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partner but did not come forward until after his death. Section 263 of the Indian Contract Act cannot override the express provisions of section 261 of the same Act. The creditor will be entitled in respect of such a debt to a decree against the surviving partner personally and against the assets of the partnership in his hands. *Bagel* v. *Miller* (1903) 2 K.B., 212, referred to.

Seshi Ammal v. *Vairavan Chettiar* ... ... (1919) I.L.R., 42 Mad., 15

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 517—*Confiscation of property found with a vagrant ordered to give security under sections* 109 (*b*) *and* 118 —*Validity of order of confiscation—'Enquiry' in section* 517, *whether, includes 'inquiry' under section* 117.] Under section 517, Criminal Procedure Code (Act V of 1898), a Court can order confiscation not only of property which has been used for the commission of an offence or regarding which an offence has been committed but also of any other property which has been produced before it. A proceeding under section 117, Criminal Procedure Code, is an 'enquiry' within section 517. *In re Govindaraja Padayachi* (1919) 31 I.C., 827 and *Jagannathan* v. *Varadaraja Mudaliar* (Criminal Revision Case No. 570 of 1915—unreported) dissented from. *Rassul Bibee* v. *Ahmed Moosajee* (1907) I.L.R., 34 Calc., 347, followed.

Pydi Ramanna, In re ... ... (1919) I.L.R., 42 Mad., 9

EVIDENCE ACT (I OF 1872), SS. 58 AND 92, PROVISO 4—*Mortgage-bond, registered —Subsequent oral agreement by mortgagee to take less than due amount, whether modifies bond—Admission by mortgagee in pleadings in suit—Proof of agreement, whether necessary under Evidence Act and Civil Procedure Code.*] A subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract, and, if it has to be proved, oral evidence is inadmissible under section 92, proviso 4 of the Indian Evidence Act. If such agreement has been admitted in the pleadings, no question of admissibility of evidence, oral or documentary, arises, as proof of the same is dispensed with in consequence of the admission under section 58 of the Evidence Act and also under the provisions of the Civil Procedure Code. *Chenbasappa* v. *Lakshmanan Ramachandar* (1894) I.L.R., 18 Bom., 369, distinguished.

Mallappa v. *Matum Nagu Chetty* ... ... (1919) I.L.R., 42 Mad., 41

GENERAL CLAUSES ACT, SS. 9 AND 10—*Applicability of principles to Provincial Insolvency Act*:—*See* PROVINCIAL INSOLVENCY ACT, SS. 45 AND 46 13

HINDU LAW—*Surrender by widow and daughter in favour of daughter's son—Deed executed by both—Stipulation for maintenance of both for their lives—Surrender, whether valid—Title of daughter's son—Title of reversioners.*] Where the widow and the only daughter of a deceased Hindu surrendered their interests in the estate of the deceased in favour of the daughter's son under a deed executed by them both, stipulating therein that he should maintain them during their lifetime, and, on the death of them all, the reversioners of the deceased sued to recover the estate from the father of the deceased daughter's son. *Held*, that the surrender was valid under the Hindu Law and operated to vest the estate in the daughter's son, and

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that the reversioners had no title to the property. *Sriramulu Naidu* v. *Andalammal* (1907) I.L.R., 30 Mad., 145, and *Challa Subbiah Sastry* v. *Paluri Pattabhiramayya* (1908) I.L.R., 31 Mad., 446, referred to.

Chinnaswami Pillai v. *Appaswami Pillai* ... ... (1919) I.L.R., 42 Mad., 25

LIMITATION ACT (IX OF 1908), SEC. 44:—*See* CONTRACT ACT, SEC. 64 36

———————, ART. 116—*Company registered under the Indian Companies Act* (*VI of* 1882)—*Suit for dividend by a shareholder, governed by art.* 116—'*Registered*' *in art.* 116, *meaning of.*] A suit by a shareholder against a company registered under the Indian Companies Act (VI of 1882) to recover dividends duly declared by the company, is governed by article 116 of the Limitation Act as the right to a dividend arises out of the contract between the shareholders contained in the registered memorandum and articles of association. 'Registered' in article 116 means 'registered' not only under the Indian Registration Act (III of 1877) but also under special Acts, such as the Indian Companies Act, which requires the memorandum and articles of association of a company to be registered. A dividend is a debt on a 'contract in writing registered' within article 116 of the Limitation Act.

Ripon Press and Sugar Mill Co., Ltd. v. *Nama Venkatarama Chetti* (1919) I.L.R., 42 Mad., 33

MADRAS CITY MUNICIPAL ACT (III OF 1904), SS. 262 AND 420—*Re-construction of pandal, whether within the section.*] The reconstruction of an old pandal with inflammable materials without the written permission of the President of the Corporation is prohibited by section 262 and is an offence punishable under section 420 of the Madras City Municipal Act (III of 1904). Section 262 of the Madras City Municipal Act (III of 1904) was intended to reproduce section 264 of the Madras City Municipal Act (I of 1884).

Corporation of Madras v. *Varadachariar* ... (1919) I.L.R., 42 Mad., 7

MORTGAGE—*Subsequent oral agreement modifying terms*:—*See* EVIDENCE ACT, SS. 58 AND 92 41

———*Suit for cancellation on ground of non-payment of consideration, maintainability of*:—*See* SPECIFIC RELIEF ACT (I OF 1877), SEC. 39 20

PARTNERSHIP—*Liability of estate of deceased partner*:—*See* CONTRACT ACT, SS. 261 AND 263 15

PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 45 AND 46—*Appeal, time for—Limitation Act, applicability of—Period of limitation, commencement of—General principles—General Clauses Act* (*X of* 1897), *sections* 9 *and* 10, *applicability of—Ninetieth day*, dies non—*Exclusion of.*] In computing the time for preferring an appeal to the High Court under section 46 of the Provincial Insolvency Act (III of 1907) though the general provisions of the Indian Limitation Act do not apply, the period of ninety days specified in section 45 of the Act should be reckoned from the date of the order appealed against; and thereupon the general principles contained in section 9 of the General Clauses Act (X of 1897) should be applied and the day on which the order appealed against is passed should be excluded. Further,

under section 10 of the General Clauses Act, the ninetieth day, if it be a *dies non*, must be excluded.

Ramaswami Pillai v. *Venkateswara Aiyar* ... (1919) I.L.R., 42 Mad.,

SPECIFIC RELIEF ACT (I OF 1877), SEC. 39—*Mortgage-deed executed and registered—Suit by mortgagor for cancellation on the sole ground of non-payment of consideration—Suit, whether maintainable—Contract and executed conveyance, distinction between—Mortgage, whether void or voidable.*] Where a mortgage-deed has been executed and registered, a suit by the mortgagor for the cancellation of the deed, on the mere ground that the consideration for the mortgage has not been paid, is not maintainable. When the matter has passed from the stage of contract to that of an executed conveyance, mere non-payment of consideration will not render the transaction void or voidable within the terms of section 39 of the Specific Relief Act *Basalingappa* v. *Virupanappa* (1903) 5 Bom. L.R., 392 and *Rashik Lal* v. *Ram Narain* (1912) I.L.R., 34 All., 278, referred to.

Abdul Kashin Sahib v. *Khadir Batcha Sahib* ...(1919) I.L.R., 42 Mad.,

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THE

INDIAN LAW REPORTS

MADRAS SERIES.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

VENKATASUBBIAH (PLAINTIFF), APPELLANT,

v.

VENKATA SESHAIYA AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

1918, April 25 and July 10.

Civil Procedure Code (Act V of 1908), Order XXXVIII—Order to attach before judgment—Attachment effected after decree—Alienation after attachment, validity of—Order XXI, rule 57, applicability of to attachment before judgment.

An attachment ordered before judgment invalidates an alienation made after the property is actually attached in pursuance of the order even though the actual attachment was made after the passing of the decree.

Order XXI, rule 57, Civil Procedure Code, has no application to attachments *before* judgment. Hence an attachment before judgment does not cease to have effect because of the dismissal of subsequent application for execution for default of prosecution.

Bavuddin Sahib v. *Arunachala Mudali* (1914) 26 M.L.J., 215 and *Kosuri Suraparaju* v. *Mandapaka Narasimham* (1914) 26 I.C., 81, followed.

A private purchaser from the judgment-debtor pending an attachment has no right of suit for damages on the ground that the decree was satisfied and became unexecutable until he is damnified by any execution of the decree.

SECOND APPEAL against the decree of J. W. HUGHES, District Judge of Cuddapah, in Appeal No. 33 of 1915, preferred against the decree of T. M. VENKATARAGHAVA ACHARIYAR, District Munsif of Cuddapah, in Original Suit No. 208 of 1913.

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* Second Appeal No. 1549 of 1917.

VENKATA-SUBBIAH v. VENKATA SESHAIYA.

The facts are stated in the first paragraph of the judgment of KUMARASWAMI SASTRI, J.

N. R. K. Tatachariyar for appellant.

K. P. Ramakrishna Ayyar and *B. Somayya* for first respondent.

B. Ramaswamayya for second respondent.

PHILLIPS, J.

PHILLIPS, J.—In this case the first defendant attached the plaint property before judgment in connexion with a suit filed against the third defendant, viz., Original Suit No. 137 of 1910. The plaintiff subsequently purchased the property. The question is whether at the time of the plaintiff's purchase the property was subject to the attachment by the first defendant. Two points are raised now: (1) that the original attachment was invalid as having been completed after the decree in the suit was passed; and (2) that even if the attachment was valid it became an attachment in execution when the decree was sought to be executed and ceased to exist under the provisions of Order XXI, rule 57, Civil Procedure Code. So far as the second contention is concerned, the matter is practically concluded by authority. Vide *Bavuddin Sahib* v. *Arunachala Mudali*(1), *Ganesh Chandra Adak* v. *Banwari Lal Roy*(2) and *Kosuri Suraparaju* v. *Mandapaka Narasimham*(3). No doubt in *Sewdut Roy* v. *Sree Canto Maity*(4), there is an observation by WOODROFFE, J., that the attachment before judgment on application to execute the decree becomes attachment in execution. Except for that one observation, I can find no other authority in support of the proposition that the nature of the attachment is altered by the filing of an execution application. I am not at all inclined to adopt this view in opposition to the authority of the cases above cited.

In support of the first proposition, reliance is placed on the language of Order XXXVIII, rule 11 of the Civil Procedure Code, which is as follows:—

"Where property is under attachment by virtue of the provision of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property."

(1) (1914) 26 M.L.J., 215.
(2) (1912) 14 I.C., 345.
(3) (1914) 26 I.C., 81.
(4) (1906) I.L.R., 33 Calc., 639.

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PHILLIPS, J.

No doubt under this rule it would appear at first sight that the attachment must have been completed before the decree was passed in order to give a party the benefit of the rule, that is to say, the benefit of not being obliged to apply for re-attachment of the property, when he wishes to execute his decree. In the present case it is not necessary to consider whether re-attachment was necessary, and we need only consider whether the property was validly attached under Order XXXVIII. Attachment was applied for and an order of attachment was passed before judgment was actually pronounced. But the attachment was not effected until a few days after the date of the decree. This being so, can it be said that there was any attachment before judgment? No doubt the order was passed under rule 6 (1) before the decree, and if the order had been carried out at once, there could have been no doubt in the matter. Can it be said that the fact that there was delay in carrying out the order of the Court has deprived the Court of its powers to make such order effectual? The scope of Order XXXVIII is unquestionably limited to attachment before judgment, and all its provisions are set forth with a view to securing the plaintiff in the suit up to the time that he obtains a decree. It would be only by applying this limited scope of the order to the present case that we would be justified in ruling that the attachment actually effected after the decree was ineffectual and void. It has been held in *Sivakolundu Pillai* v. *Ganapathi Ayyar*(1), that when an application for renewing attachment under section 46, Civil Procedure Code, has been put in before the expiry of the two months prescribed in the proviso to that section and an order of the Court has not been passed until after the two months expired, the date of the application should be deemed to be the date of the order extending time. On the other hand, the appellant's vakil relies on *Venkatachalapati Rao* v. *Kumeswaramma*(2), deciding that the written order of the Appellate Court staying execution does not take effect from its date but only from the date of its communication to the executing Court. Neither of these cases is really directly in point, and the question has to be decided on general principles. It seems to me that when a Court makes an order under Order XXXVIII,

(1) (1916) 3 L.W., 336.
(2) (1918) I.L.R., 41 Mad., 151 (F.B.).

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rule 6 of the Civil Procedure Code that order cannot be deprived of all force by the mere failure of the executive officers of the Court to carry it out before the decree is passed The attachment when effected is an attachment made in pursuance of an order to attach before judgment and must be treated as an attachment before judgment and not as a nullity merely because as a matter of fact the attachment is not completed until after judgment. To adopt the opposite view would be to allow a formal judicial order to be upset by the negligence or default of a subordinate ministerial officer. The language of Order XXXVIII, rule 11, is also in favour of my view, for it does not refer to 'an attachment made before judgment' but to an attachment 'by virtue of the provisions of this order', and an attachment made in pursuance of an order under rule 6 could be such an attachment in spite of its being completed after decree. I find therefore that the attachment in the present case was a valid attachment. The claim for damages is certainly premature.

The Second Appeal is accordingly dismissed with costs.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. The first defendant instituted a suit (Original Suit No. 137 of 1910) against the third defendant and on the same date applied for attachment before judgment. Notice was directed to the defendant and interim attachment was ordered under Order XXXVIII, rule 5 of the Civil Procedure Code, on the 17th February 1910. The attachment was actually effected on the property on the 26th February 1910. Meantime a decree was passed in the suit on the 21st February 1910. After decree the decree-holder applied for execution on the 3rd January 1912 and the 10th July 1912, but both the applications were dismissed for default of prosecution. The plaintiff herein purchased the property on the 27th April 1911 and sued for a declaration that the decree in Original Suit No. 137 of 1910 was satisfied and was unexecutable and, in the alternative, for damages. The lower Courts dismissed the plaintiff's suit on the grounds *inter alia* that the purchase of the plaintiff being subsequent to the attachment was invalid against the decree-holder and that the suit for damages was premature.

As regards the first point, it is contended by the appellant that the attachment having been actually effected after passing

VENKATA SUBBIAH v. VENKATA SESHAIYA. — KUMARASWAMI SASTRI, J.

of the decree, it is invalid and that, even if valid, the dismissal of the execution application for default put an end to the attachment under Order XXI, rule 57 of the Code of Civil Procedure. I am unable to agree with either of the contentions. There is nothing in Order XXXVIII, rules 5 to 12 (which deal with attachments before judgment), requiring that the actual attachment in pursuance of the order directing conditional attachment should be made before passing of the decree. Rule 5 empowers the Court to direct conditional attachment of the property specified in the application when at any stage of the suit it is satisfied that the defendant is about to dispose of the whole or any part of his property or is about to remove it from the local limits of the Court's jurisdiction. An order duly passed under rule 5 cannot be *ipso facto* vacated by reason of the decree supervening before actual attachment is effected in manner specified by Order XXI, rule 54, unless there is something in rules 5 to 12 to that effect. It is contended that rule 11 of Order XXXVIII refers to an attachment and subsequent decree and that by implication it negatives the validity of an attachment made subsequent to decree in pursuance of a previous order under rule 5. All that rule 11 states is that it shall not be necessary to re-attach if before decree has been passed property has been attached in pursuance of an order under rule 5. The section is only an enabling one and relieves the decree-holder from going over the same process again after decree if he has attached the property while the suit is pending. It is unnecessary to consider whether, if the attachment ordered before was made after decree, the section would apply so as to dispense with attachment after the filing of the execution application. The invalidity of the attachment order under rule 5 effected after decree is one thing and the necessity for re-attachment owing to the terms of rule 11 not having been complied with is another. The case is one of first impression and I think there is neither reason nor authority for holding that the mischief, to prevent which rule 5 was enacted, is none the less because of the passing of a decree subsequent to the order. It is argued that the party could re-attach, but a re-attachment would take some time (especially if the property is situate at some distance from the Court) and should the order under rule 5 cease to have any effect immediately on the passing

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of the decree, there is nothing to prevent alienation between the date of the decree and the date when the attachment is actually effected in manner specified by Order XXI, rule 54, as under section 64 the attachment invalidates an alienation only when the alienation is after the actual compliance with the provision of rule 54. Attachment of the property in the manner prescribed by Order XXI, rule 54, is a purely ministerial act. Any delay of the officers of Court in effecting the attachment should not prejudice the decree-holder and the validity of the order of attachment under rule 5, Order XXXVIII, should not depend on the date when it is actually effected. I am of opinion that an attachment ordered before judgment invalidates an alienation made after the property is actually attached in pursuance of the order even though the actual attachment was made after the passing of the decree.

It is argued that the dismissal of the execution application puts an end to the attachment before judgment and reliance is placed on an observation of WOODROFFE, J., in *Sewdut Roy* v. *Sree Canto Maity*(1) to the effect that on an application for execution being filed

"the attachment before judgment enures and becomes upon and by virtue of the application an attachment in execution."

The question whether rule 57 of Order XXI which expressly refers to cases where property is attached in execution of a decree, can be extended to cases of attachment before judgment merely by reason of the provision of rule 11 of Order XXXVIII dispensing with the necessity for re-attachment was considered by SADASIVA AYYAR and SPENCER, JJ., in *Bavuddin Sahib* v. *Arunachala Mudali*(2) and I agree with them in holding that rule 57 of Order XXI has no application to attachments effected under rule 5 of Order XXXVIII. A similar view was taken in *Kosuri Suraparaju* v. *Mandapaka Narasimham*(3).

As regards the claim to damages, it is premature as the decree has not been executed and plaintiff did not at the date of the suit suffer any damages. The decree may never be executed by sale of the property purchased by plaintiff and there

(1) (1906) I.L.R., 33 Calc., 639 at p. 643. (2) (1914) 26 M.L.J., 215.
(3) (1914) 26 I.C. 81.

VENKATA SUBBIAH v. VENKATA SESHAIYA. — KUMARASWAMI SASTRI, J.

is no reason why he should get the consideration paid by him, by way of damages and also keep the property. It is open to him to pay the amount due on the decree in respect of which the property is attached and recover it by proper proceedings but his case is that the decree has been satisfied.

The second appeal fails and is dismissed with costs.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1918. *July* 18.

THE CORPORATION OF MADRAS (COMPLAINANT), APPELLANTS,

v.

S. VARADACHARIAR ... ... ACCUSED.*

Madras City Municipal Act III of 1904, secs. 262 and 420—Reconstruction of pandal, whether within the section.

The reconstruction of an old pandal with inflammable materials without the written permission of the President of the Corporation is prohibited by section 262 and is an offence punishable under section 420 of the Madras City Municipal Act (III of 1904).

Section 262 of the Madras City Municipal Act (III of 1904) was intended to reproduce section 264 of the Madras City Municipal Act (I of 1884).

APPEAL against the acquittal of E. H. M. BOWER, the Fourth Presidency Magistrate, Egmore, Madras, in Calendar Case No. 17776 of 1917, under section 417 of the Code of Criminal Procedure (Act V of 1898).

The accused was the owner and occupier of a house, within the municipal limits of Madras, to which was attached a pandal constructed of inflammable materials, originally erected thirty years ago and renewed from time to time. On the 19th of July 1917 he pulled down the pandal, leaving the teak posts planted in the masonry structure of the house standing, and on the 21st of July he rebuilt the pandal partly with the old materials and partly with new of the same kind, without obtaining a licence from the President of the municipality.

* Criminal Appeal No. 285 of 1918.

CORPORATION OF MADRAS v. VARADA-CHARIAR.

He was charged with having committed an offence under section 262 read with section 420 of the Madras City Municipal Act (Madras Act III of 1904) and was acquitted by the Magistrate on the ground that the reconstruction of an old pandal, such as had been done by the accused, did not fall within the mischief of section 262 which aimed only at entirely new constructions. The Government appealed against the acquittal.

C. Sidney Smith, Ag. Crown Prosecutor, for the appellant.—The learned Magistrate has misconstrued section 262 of Madras Act III of 1904. The words 'shall be made of' is a general expression which would include a case of repairs, as well as original construction.

[NAPIER, J.—Bearing in mind the purpose for which such a provision is enacted—being to avoid danger or nuisance to the public—should we not construe the words 'shall be made of' as meaning 'shall be composed of'?]

Yes. I submit the ruling in *The Crown Prosecutor* v. *Audikasavaloo Naidoo*(1) is based upon a misapprehension. The attention of the Court was not directed to the explanation to section 420, and reliance was placed upon the second column of schedule XVI of the Act, which describes the prohibition in section 262 as 'construction of external roof . . .' The present section was intended to reproduce the provisions of section 264 of the old Act in more general terms.

K. S. Krishnaswami Ayyangar for the accused.—The question is one as to the meaning of the words 'shall be made of.' My submission is that 'made' means 'constructed.' Whenever the Legislature wanted to penalize a case of repairs without licence, they have always expressly said so. See section 264 of the old Act I of 1884 and the other Municipal Acts, where 'renewals' are prohibited in express terms. The omission of the word 'renewals' clearly shows that the Legislature did not intend to prohibit constructions other than first constructions.

[NAPIER, J.—There is nothing to show that the change in the language between the old and the new Acts legalized anything

(1) (1912) M.W.N., 84.

which was declared illegal by the old Act—see clause 2, section 262.]

This is a penal section, and it must be construed in favour of the subject. The matter is at the best left in doubt, and the judgment ought to stand.

The JUDGMENT of the Court was delivered by

SADASIVA AYYAR, J.—We are quite clear that this section 262 of the Madras City Municipal Act, 1904, read with section 420 of the Act was intended to reproduce section 264 of the old Act (The City of Madras Municipal Act, 1884) which made the new construction of an inflammable pandal or the continuance of an existing pandal, etc., of that character an offence. The pandal in question is clearly unlawful and there is no written permission of the President to legalize it. We think that the language of section 420 (of the Madras City Municipal Act, 1904) 'whoever contravenes' is wide enough to cover an owner and occupier of premises which offends against the section.

We set aside the acquittal and impose a fine on the defendant of Rs. 5 (five rupees).

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

In re PYDI RAMANNA AND 5 OTHERS (ACCUSED), PETITIONERS.* 1918, July 22.

CRIMINAL PROCEDURE CODE (*Act V of 1898*) *Sec. 517—Confiscation of property found with a vagrant ordered to give security under sections* 109 (*b*) *and* 118 *—Validity of order of confiscation—'Enquiry' in section* 517, *whether includes 'Inquiry' under section* 117.]

Under section 517, Criminal Procedure Code (Act V of 1898), a Court can order confiscation not only of property which has been used for the commission of an offence or regarding which an offence has been committed but also of any other property which has been produced before it.

A proceeding under section 117, Criminal Procedure Code, is an 'enquiry' within section 517.

In re Govindaraja Padayachi (1919) 31 I.C., 827 and *Jagannathan* v. *Varadaraja Mudaliar* (Criminal Revision Case No. 570 of 1915 unreported) dissented from. *Rassul Bibee* v. *Ahmed Moosajee* (1907) I.L.R., 34 Calc., 347, followed.

CRIMINAL REVISION Case called for by the High Court on perusal of the order of H. A. B. VERNON, District Magistrate of Vizagapatam, in Criminal Appeal No. 5 of 1917, against the

* Criminal Revision Case No. 209 of 1918.

In re PYDI RAMANNA.

judgment of S. H. SLATER, Joint Magistrate of Vizianagram, in Criminal Miscellaneous Case No. 4 of 1917.

The Public Prosecutor, for the Crown.

Facts are stated in the judgment of SADASIVA AYYAR, J.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—This is a case taken up in revision by AYLING, J., on a perusal of the calendar. These persons were put up by the police before the Joint Magistrate of Vizianagram in order that the Magistrate might take proceedings against them under section 109, Criminal Procedure Code, requiring them to execute bonds with sureties for their good behaviour. Now under section 109 security can be required either on the ground that a person is taking precautions to conceal his presence and is taking such precautions with a view to committing an offence or on the ground that a person has no ostensible means of subsistence, or cannot give a satisfactory account of himself. Then section 110 provides that certain specially qualified Magistrates may require the execution of a similar bond with sureties for good behaviour if a person is by habit a robber, housebreaker or thief or a receiver of stolen property by habit and so on. Now the Joint Magistrate has passed his order not under section 110 but under section 109 on the ground that these six persons had no ostensible means of subsistence and could not give a satisfactory account of themselves; that is under clause (*b*) of section 109. Then he further passed an order confiscating Rs. 211 found with the third accused (the word 'accused' being used in a loose sense so as to include persons called upon to furnish security), Rs. 260 found with the fourth accused and Rs. 213 found with the sixth accused besides keys, ornaments and cloths found with the fourth and fifth accused. (The Joint Magistrate does not mention the provision of law under which he passed the order of confiscation.)

As section 118 of the Criminal Procedure Code under which orders are passed in proceedings taken under sections 107 to 110 is preceded by section 117 which provides for an enquiry into the truth of the information on which an order is to be passed, I take it that the order of confiscation was passed under section 517, clause (1). That section is as follows:

"When an enquiry or 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

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regarding which any offence appears to have been committed or which has been used for the commission of any offence."

There can be no doubt that the property with reference to which the confiscation order was passed was property produced before a Criminal Court (that is the Joint Magistrate), that there was an enquiry in the said Criminal Court under section 117, Criminal Procedure Code, and that the Joint Magistrate had therefore jurisdiction to pass the order for the disposal of the property because it was produced before him though there may be no proof that any offence had been committed with reference to that property even if the word 'property' by the explanation to the same section included other property which had been converted into the property produced before the Court. In this connexion I might refer to the case in *In re Govindaraja Padayachi*(1) in which a Bench of this Court (ABDUR RAHIM AND AYLING, JJ.), held that under section 517, clause (1), the Criminal Court has power to pass confiscation orders only in respect of property regarding which an offence appears to have been committed and that the Court cannot pass such orders on the mere fact that the property had been produced before the Court in an inquiry. No doubt under the corresponding section 517 of the Act of 1882 the words 'regarding which any offence appears to have been committed' qualify the words 'produced before it.' But the words 'or in its custody' and the word 'or' again have been introduced in the later Code of 1898 before the word 'regarding' and as pointed out in *Rassul Bibee* v. *Ahmed Moosajee*(2), this alteration clearly extended the powers of the Criminal Court to make orders about the disposal of all property produced before it in enquiry even without an expression of opinion on the part of the Court that any offence appeared to have been committed regarding it. I therefore respectfully dissent from the decision in *In re Govindaraja Padayachi*(1). * * * * *

NAPIER, J.

NAPIER, J.—This case taken up by the High Court arises out of proceedings taken by the Joint Magistrate of Vizianagram under section 109, Criminal Procedure Code. He made an order under that section against certain persons to execute bonds with

(1) (1915) 31 I.C., 827. (2) (1907) I.L.R., 34 Calc., 347.

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NAPIER, J.

sureties for good behaviour and also made an order for confiscation of cash and pieces of broken jewellery and cloths found in their possession. The persons against whom the order was made appealed to the District Magistrate who upheld both the orders and they themselves have not applied to us in revision, but the propriety or correctness of the order as to confiscation was doubted by a Judge of this Court and has been put before us for disposal. The order must have been, I think, made under section 517. I had at first doubts whether proceedings under the preventive sections of the Code come within what is an enquiry or trial in the sections. But, as has been pointed out by my learned brother, such proceedings are called an enquiry in those sections and therefore the section cannot be limited to preliminary enquiries before Magistrates. I would therefore hold that orders can be made in enquiries under the preventive sections.

The next question is whether section 517 covers property which has come before the Court in the circumstances of this case. It has been held by a Bench of this Court in *Jagannathan* v. *Varadaraja Mudaliar*(1) that orders can be passed in an enquiry under the preventive sections but that the order cannot be passed unless it has been shown that the property with regard to which the order is made is such that an offence appears to have been committed with respect to it or that it has been used for the commission of an offence. With respect to the learned Judges who decided that case, I think that they had overlooked the language of the present Code. The same view was taken in a case in *Surendranath Sarma* v. *Rai Mohan Das*(2) and that case was relied on in a subsequent case in *Rassul Bibee* v. *Ahmed Moosajee*(3). The learned Judges in the latter case point out that the Bench which decided *Surendranath Sarma* v. *Rai Mohan Das*(2) had overlooked the amendment of the Code; and with great respect, this is what the learned Judges who decided the case above referred to in our Court seem to me to have done. The language of the old Code was, as pointed out by my learned brother, limited to property in respect of which an offence appears to have been committed or which has been used for the commission of an offence; whereas the language of the

(1) Crl.R.C. No. 570 of 1915 (unreported). (2) (1903) I.L.R., 30 Calc., 690.
(3) (1907) I.L.R., 34 Calc., 347.

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NAPIER, J.

present Code is quite clear and extends the mischief of the section to any property produced before the Court or in its custody. Differing therefore with the decision in *Jagannathan* v. *Varadaraja Mudaliar*(1), I am of opinion that there is power in Courts acting under the preventive sections to make an order with regard to a property which has been produced before it. * * * * *

N.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

1918 July 23.

CHAVADI RAMASWAMI PILLAI (PETITIONER), APPELLANT,

v.

E. VENKATESWARA AIYAR, AND THE OFFICIAL RECEIVER, TINNEVELLY (RESPONDENTS), RESPONDENTS.*

Provincial Insolvency Act (III of 1907), ss. 45 and 46—Appeal, time for—Limitation Act, applicability of—Period of limitation, commencement of—General principles—General Clauses Act (X of 1897), ss. 9 and 10, applicability of—Ninetieth day, dies non*—Exclusion of.*

In computing the time for preferring an appeal to the High Court under section 46 of the Provincial Insolvency Act (III of 1907) though the general provisions of the Indian Limitation Act do not apply, the period of ninety days specified in section 45 of the Act should be reckoned from the date of the order appealed against; and thereupon the general principles contained in section 9 of the General Clauses Act (X of 1897) should be applied and the day on which the order appealed against is passed should be excluded.

Further, under section 10 of the General Clauses Act, the ninetieth day, if it be a *dies non*, must be excluded.

APPEAL against the order of A. EDGINGTON, the District Judge of Tinnevelly, in Original Petition No. 627 of 1916.

The material facts appear from the judgment.

T. M. Ramaswami Ayyar for the appellant.

K. S. Sankara Ayyar for the respondent.

The JUDGMENT of the Court was delivered by

SPENCER, J.

SPENCER, J.—It is argued that these appeals are barred by limitation on the ground that as the general provisions of the Limitation Act have been held not to apply to appeals under section 46 of the Provincial Insolvency Act, the date upon which the order appealed against was made, and the Sunday upon

(1) Crl. R.C. No. 570 of 1915.

* Appeal against Order No. 197 of 1917.

RAMASWAMI PILLAI v. VENKATESWARA AIYAR.

SPENCER, J.

which the ninety days allowed by section 46 expired, cannot be excluded. Section 45, clause (4), merely declares that ninety days shall be the period of limitation for appeals to the High Court without specifying the method of computing that period. Section 9 of the General Clauses Act (X of 1897) does not directly apply to this section, in which the words 'from' and 'to' do not occur. Nevertheless we think it was intended that the computation should be done as it is usually done in appeals under other Acts, seeing that no other method is prescribed, that is, that ninety days should be reckoned from the date of the order appealed against. We must therefore apply the general principle contained in section 9 under which the day on which the act appealed against is done is to be excluded.

Further under section 10 of the General Clauses Act, the 22nd April which was a *dies non* must be excluded, and it is unnecessary to resort to section 4 of the Limitation Act for this purpose.

It was also argued that the application to the District Court itself was barred by limitation under the twenty-one days rule in section 22 of the Provincial Insolvency Act. But we observe that the application to the District Court was not an appeal against any order passed by the Official Receiver but was one to the Court to take action under section 26, clause (2).

On the merits we are of opinion that there was sufficient cause for the petitioner's vakil failing to attend on the date of hearing, if the facts stated in his affidavit which have not been controverted, are true. The petitioner could not be expected to proceed with his application, which involved certain complicated matters of law and fact, unaided and he might have been reasonably given some time to engage a fresh vakil. We think that when the facts became known on the petitioner's application to the District Court to restore his petition to file, the District Judge should have allowed his application on such terms as to costs, etc., as he thought proper.

We set aside the Judge's orders of January 22nd dismissing the appellant's petition and direct the Judge to take it again on his file and dispose of it according to law.

The appellant will bear his own costs and the respondents' costs in the District Court up to date. Costs in this Court will abide and follow the result.

K.R.

APPELLATE CIVIL.

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

SESHI AMMAL AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

1918. July 12 and 24.

v.

VAIRAVAN CHETTIAR AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Indian Contract Act (IX of 1872), ss. 261 and 263—Partners—Death of one of the partners—Debt incurred after his death by surviving partner to pay off price of goods ordered by both—Liability of estate of deceased partner.

The estate of a deceased partner is not liable to a creditor for a debt incurred by the surviving partner subsequent to the death of the former, although the debt was incurred to take up bills of lading for, and obtain delivery of, goods which had been ordered by the partners during the lifetime of the deceased partner but did not come forward until after his death.

Section 263 of the Indian Contract Act cannot override the express provisions of section 261 of the same Act.

The creditor will be entitled in respect of such a debt to a decree against the surviving partner personally and against the assets of the partnership in his hands.

Bagel v. *Miller* (1903) 2 K.B., 212, referred to.

APPEAL against the decree of V. S. KRISHNA AYYAR, the Additional Temporary Subordinate Judge of Tanjore, in Original Suit No. 29 of 1917.

The material facts appear from the judgment.

T. R. Venkatarama Sastri for the appellant.

A. Krishnaswami Ayyar for the first respondent.

M. Subbaraya Ayyar for the second respondent.

WALLIS, C.J.—The main question argued in this appeal is as to the liability of the defendants Nos. 2 and 3, the representatives of a deceased partner of the first defendant, for an advance of Rs. 2,301 made by the plaintiff to the first defendant after his partner's death to enable him to take up bills of lading for, and obtain delivery of, goods which had been ordered by the partners during the lifetime of the deceased partner but did not come forward until after his death. While section 249,

WALLIS, C.J.

* Appeal No. 419 of 1917.

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WALLIS, C.J.

Indian Contract Act, makes any partner liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership, section 261 provides that the estate of a partner who has died is not in the absence of an express agreement liable in respect of any obligation incurred by the firm after his death. The debt now sued for was an obligation incurred by the firm after his death, and is therefore covered by the section. It is true that it was incurred by the surviving partner to enable him to perform a contract entered into during the lifetime of the deceased partner, but this is not enough to take it out of the section. Section 263 no doubt provides that "after a dissolution of partnership the rights and obligations of the partners continue in all things necessary for the winding up of the business of the partnership." But these provisions cannot override the express provisions of section 261 that obligations created by the firm after the death of the deceased partner are not binding on his estate. "It may be taken as a general proposition, that the estate of a deceased partner is not liable to third parties for what may be done after his decease, by the surviving partners." Lindley on Partnership Bk. IV, chap. 3, section 2, page 708 (eighth edition). Section 9 of the Partnerships Act, 1890, makes the estate of a deceased partner liable in due course of administration for all debts and obligations of the firm incurred while he is a partner. At common law the estate of a deceased partner was not entitled to the benefit of, or liable under, partnership contracts, and equity seems only to have imposed liability in the case of contracts entered by the partnership in the lifetime of the deceased partner. It has been held, under section 9 of the Partnership Act, in *Bagel* v. *Miller*(1) that the representatives of a deceased partner could not be sued in a County Court together with the surviving partner for the price of goods ordered by the partnership during his lifetime but not delivered till after his death, on the ground that the obligation to pay was not incurred while he was a partner, though apparently the Court considered some other remedy was available against his representatives on the contract to purchase made during his lifetime, as to which see *McClean* v.

(1) (1903) 2 K.B., 212.

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WALLIS, C.J.

Kennard(1). In this case the suit debt was binding on the partnership assets, which the surviving partner had power to pledge in discharge of it, and I think as regards the amount in question the decree must be against the first defendant personally and against the partnership assets in his hands. We modify the decree accordingly, and dismiss the appeal in other respects. Parties to pay and receive proportionate costs throughout.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I agree. The short and interesting point raised by Mr. Venkatarama Sastriyar is *res integra* in this country and has very meagre authority in favour of it in England. The facts are that a firm consisting of two partners ordered goods during the lifetime of both of them. After consignment and before delivery, one of them died. The survivor borrowed money to honour the bill of lading and took possession of the goods. The lender now sues to enforce the liability on the assets of the partnership as well as on the properties of the deceased partner. The learned vakil for the legal representative of the deceased partner contends that the estate is not liable. The sections of the Indian Contract Act bearing on the point are sections 251, 261 and 273. As regards section 251, it is not denied that the honouring of the bill of lading and the acceptance of the goods are acts 'necessary for, or usually done in, carrying on the business.' Therefore, if the co-partner were alive, he and his estate would have been bound. Section 261 refers to obligations *incurred after the death of the partner* and expressly exempts the estate of the deceased from liability for such obligations. In this case the obligation to pay for and to accept the goods was incurred during the lifetime of the deceased partner. It is true that the borrowing was after; but the borrowing, in my opinion, is only the substitution of a new liability for an existing one and not the creation of a fresh liability. The implication of the section seems to be that the estate should not be answerable for fresh liabilities created solely after the death of the partner. Then comes section 263. It is difficult to construe this section as not dealing with devolution caused by the death of a partner. The expression 'partners' must mean those who constituted the partnership

(1) (1874) 9 Ch., 386 at 344.

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before it was dissolved by the death of one of them and *prima facie* in cases of dissolution by death the same liability would attach as before death, provided the obligation was incurred for winding up the business. It cannot seriously be argued that the acceptance of the goods ordered and their payment were not necessary for winding up the business. Consequently, subject to the special rule for payment of partnership debts and of separate debts mentioned in section 262, it seems fairly clear from the language of section 263 that the deceased partner's estate would be liable for obligations necessitated by the process of winding up the business. Unhampered by authority, this seems to be the plain interpretation of the sections referred to.

Mr. Venkatarama Sastriyar relied strongly on *Bagel* v. *Miller*(1) for his contention already referred to. The decision certainly supports him. The learned Chief Justice, Lord ALVERSTONE, says that "there may be an obligation, but not the obligation alleged in the present case." Section 9 of the English Partnership Act on which the decision is based provides that "after his death his estate is also severally liable in a due course of administration for such debts and obligations." The judgment may be said to have proceeded upon the unsustainability of the form of action commenced by the plaintiff and not on a denial of the liability of the estate of the deceased partner to contribute. The observation of CHANNEL, J., that "the plaintiff's remedy is not by means of an action for goods sold and delivered" supports this suggestion. But the weight of authority is against restricting the principle of the Lord Chief Justice's decision to forms of action alone. Lord LINDLEY at page 708 says:

"With respect to the direct liability of the assets of the deceased to creditors, it may be taken as a general proposition, that the estate of the deceased partner is not liable to third parties for what may be done after his decease by the surviving partners."

In 22 Halsbury, in the note to paragraph 47, the law is thus stated:—

"But, though he has authority to pledge the partnership property, this does not enable him to bind his partners personally."

The authority quoted for this proposition, namely, *Blaine* v. *Holland*(2), does not support it. Pollock in his Digest of

(1) (1903) 2 K.B., 212.

(2) (1889) 60 L.T. 285.

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the Law of Partnership puts the above statement of the law as an illustration to section 9 of the Partnership Act. Sir H. H. SHEPPARD in his commentaries on sections 261 and 262 of the Contract Act inclines to the view that the estate would not be liable. It must be stated that there is practically no difference in language between the sections of the English Partnership Act and those of the Indian Contract Act on this point.

As I felt considerable doubt on the question, with diffidence, I examined the American law on the subject. In 30 Cyclopædia of Law and Procedure, page 634, it is mentioned:—

"As a rule, however, the estate of the deceased partner cannot be made directly liable to third persons by the contracts of the survivor."

In this state of authorities, I feel compelled to hold that the contention of the learned vakil for the appellant should be accepted. The result of this view would be to restrict the operation of section 263, so as to give the surviving partner alone and not the creditor a right to proceed against the estate of the deceased partner in regard to an obligation incurred for winding up the business of the partnership. This does not, in my opinion, stand in the way of the creditor proceeding against the assets of the partnership. The surviving partner is before the Court and he represents the partnership effectually and a decree against him can be executed against the assets of the partnership in his hand. I would modify the decree by directing that for the sum of Rs. 2,300 and odd borrowed after the death of the husband of the second defendant, the assets of the partnership in the hands of the first defendant be alone liable. The latter will also be personally liable as mentioned by the learned Chief Justice. I agree in the order as to costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

1918. July 16 and 26.

ABDUL HASHIM SAHIB AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

KADIR BATCHA SAHIB AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Specific Relief Act (I of 1877), Sec. 39—Mortgage-deed executed and registered—Suit by mortgagor for cancellation on the sole ground of non-payment of consideration—Suit, whether maintainable—Contract and executed conveyance, distinction between—Mortgage, whether void or voidable.

Where a mortgage-deed has been executed and registered, a suit by the mortgagor for the cancellation of the deed, on the mere ground that the consideration for the mortgage has not been paid, is not maintainable.

When the matter has passed from the stage of contract to that of an executed conveyance, mere non-payment of consideration will not render the transaction void or voidable within the terms of section 39 of the Specific Relief Act.

Basalingappa v. *Virupanappa* (1903) 5 Bom., L.R., 392, and *Rashik Lal* v. *Ram Narain* (1912) I.L.R., 34 All., 273, referred to.

SECOND APPEAL against the decree of J. T. GILLESPIE, the District Judge of Salem, in Appeal Suit No. 105 of 1915 preferred against the decree of K. S. KOTHANPARAMA AYYAR, the Principal District Munsif of Salem, in Original Suit No. 451 of 1914.

The material facts appear from the judgment.

P. N. Marthandam Pillai for the appellants.

T. R. Venkatarama Sastri for 4th, 7th and 9th respondents.

PHILLIPS, J.

PHILLIPS, J.—In this case the plaintiffs sued for a declaration that the suit mortgage-deed is not supported by consideration and void, and for its cancellation. The plaint properties were mortgaged by the plaintiffs to the first defendant and it has been found that the consideration money was not paid. The first defendant however leased one of the items to the second defendant who is now in possession and it has been decided in another suit that the second defendant is entitled to retain possession and that his lease is valid. The second defendant's lease is based on

* Second Appeal No. 1482 of 1916.

the plaint mortgage-deed inasmuch as he is a lessee of the mortgagee and to the extent of the possession of the second defendant, the mortgage-deed must be held to be valid.

The plaintiff's suit has been dismissed on the ground that it will not lie under section 39 of the Specific Relief Act because the document is neither void nor voidable and there is no apprehension of any injury to the plaintiff's right. It has been contended before us that the mortgage-deed is a void document inasmuch as no consideration has passed. It has no doubt been held that a suit will not lie to compel a person either to lend or to borrow money, that is to say, the Court will not decree specific performance in a suit to enforce the execution of such a contract and it is contended that if plaintiff cannot sue for specific performance he must be entitled to have the contract cancelled. In this case, however, there is something more than a contract to mortgage because the mortgage-deed has been executed and registered, and possession has been given under it. It is therefore a complete conveyance of a mortgage right to the first defendant.

This case is on all fours with the case reported in *Baslingappa* v. *Virupanappa*(1). There it was held that in a case where the mortgagee had failed to pay consideration for the mortgage-deed, plaintiff was not entitled to bring a suit under section 39 of the Specific Relief Act. The other side relied on *Ramaswami Chettiar* v. *Sundara Reddiar*(2) and *Kumarappan Chettiar* v. *Narayanan Chettiar*(3). In the first case, the suit was brought by the mortgagee to enforce his mortgage when he had not paid any consideration for it and it was held that inasmuch as there was no debt due, there was nothing to be charged on the land and the mortgagee could not enforce his charge on the land before he had paid the mortgage money. In *Kumarappan Chettiar* v. *Narayanan Chettiar*(3) also the plaintiff was mortgagee without possession and sued to enforce the mortgage for which no consideration had been paid. In those two cases, SPENCER, J., held that the mortgage was a nullity and was inoperative. I think the present case can be distinguished from those cases on the ground that possession has been

(1) (1903) 5 Bom. L.R., 392. (2) (1914) 23 I.C., 805.
(3) (1916) 35 I.C., 455.

ABDUL HASHIM SAHIB v. KADIR BATCHA SAHIB.

PHILLIPS, J.

given under the mortgage, even if it can be held that a mortgage is void when it has merely been executed without consideration and nothing further has taken place. In *Rajai Tirumal Raju* v. *Pandla Muthial Naidu*(1) where only part consideration was paid, the mortgage was held to be valid, as also in *Rashik Lal* v. *Ram Narain*(2) where reference is made to *Tatia* v. *Babaji*(3) where FARREN, C.J., pointed out the distinction between a perfected conveyance and a mere contract. In *Govindammal* v. *Gopalachariar*(4) it was held that the execution of a sale-deed completed the contract and the fact that there was no consideration for it did not make it void. Under section 58 of the Transfer of Property Act "a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced," so that on execution of a registered deed in accordance with section 59, the mortgage would be complete although the mortgage money had not actually been paid to the mortgagor. It is difficult to draw a distinction between a transfer of immovable property by way of sale and a transfer by way of mortgage. If a sale is complete by the execution of the registered instrument, it appears to me that a mortgage is also complete and can be enforced. The mortgagor would not then be entitled to sue for cancellation of the instrument, but if the consideration was not paid to him, he would have his remedy in damages for breach of the contract. This view does not, I think, conflict with the principle that a suit will not lie to enforce a contract to lend or to borrow, for, in this case, the contract has been completed by the conveyance and it is not a case of suing to enforce the contract. Under section 39 of the Specific Relief Act, plaintiff cannot bring a suit because the document is not void nor is it voidable.

It is however contended that his prayer for a declaration should be granted. So far as the second defendant is concerned, it has been decided by a Court of law that he is not entitled to such a declaration. As against the first defendant a decree declaring that no consideration passed might be justifiable, but a declaration to this effect is only asked for jointly with a

(1) (1912) I.L.R., 35 Mad., 114.
(2) (1912) I.L.R., 34 All., 273.
(3) (1898) I.L.R., 22 Bom., 176.
(4) (1914) 16 M.L.T., 524.

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PHILLIPS, J.

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declaration that the deed is void and it seems to me that the declaration as to consideration should not be decreed, as both the lower Courts have found that plaintiff has no reasonable apprehension of danger and plaintiff has not asked for this particular relief alone against first defendant.

The second appeal is therefore dismissed with costs.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. He sued for a declaration that the deed of mortgage executed by him was not supported by consideration, for cancellation of the deed, and for a declaration that the lease executed by the first defendant in favour of the second defendant was not binding on plaintiff. Though there is a prayer for 'confirming the possession of item I by the plaintiff,' only the two declarations prayed for were valued and stamp duty paid thereon. The defendant executed a lease of item I in favour of the second defendant on the 7th September 1911 for a period of three years and at the date of the suit (12th June 1914) the lease had about three months to run. The second defendant filed O.S. No. 248 of 1912 on his lease alleging that plaintiff obstructed him and got a decree in his favour restraining the appellant from disturbing his possession which it is now admitted was confirmed on appeal.

Various defences were raised, but for the purpose of this second appeal it is necessary to consider only two, namely, that plaintiff's remedy was only to sue for the consideration recited in the deed, assuming that it was not paid, and that plaintiffs are not entitled under the Specific Act for the relief claimed.

Both the District Munsif and District Judge dismissed the suit on the preliminary ground that the plaintiff was not entitled to the declarations sought for, even assuming that the allegations in the plaint are true.

As regards the prayer for the cancellation of the mortgage deed, I think it must fail. A distinction has to be drawn between cases where the matter rests simply on contract and where it has passed to the stage of an executed conveyance and in the latter case mere non-payment of consideration will not render the transaction void or voidable. *See Rashik Lal* v. *Ram Narain*(1), *Basalingappa* v. *Virupanappa*(2). The question

(1) (1912) I.L.R. 34 All., 273.
(2) (1903) 5 Bom.L.R., 392.

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has also been fully discussed by WALLIS, C.J., in Appeal No. 64 of 1916. In the present case no fraud, misrepresentation or mistake is alleged and no case has been made out for cancellation.

Another ground for refusing the prayer is that the parties cannot be put in *status quo ante* as the mortgagee has executed a lease of one of the items of property which has been upheld as against the plaintiff. It is unnecessary to decide whether a mortgagee who pays no consideration can, by the simple expedient of transferring his mortgage right or leasing a portion of the property, plead the transfer in bar to a suit for cancellation or whether it is not competent to the Court as against such mortgagee to cancel the document in so far as it affects right not transferred to any *bona fide* third party, as the lease in this case has been held to be binding on the plaintiff in the suit filed by the lessee and the matter is concluded between the parties. It is well settled that when a contract is voidable the right to determine it is subject to the condition that an innocent third party will not be affected by the cancellation or even a wrong doer, in case of delay on the part of the party entitled to rescind, and that as a condition to a rescission there must be *restitutio in integrum* so that the parties may be put in *status quo* by the Court. See *Clough* v. *London and North Western Railway Co.*(1), *Addic* v. *Western Bank of Scotland*(2), *Erlanger* v. *New Sonibrero Phosphate Company*(3).

As regards the prayer for a declaration that the mortgage is not supported by consideration, it is clear that a mortgage affects the property only to the extent to which money is advanced as security—*Ramaswami Chettiar* v. *Sundara Reddiar*(4), *Kumarappa Chettiar* v. *Narayanan Chettiar*(5). If there was no consideration there would be nothing for the mortgagor to pay when a suit is filed. Though there may be cases where a Court will grant a declaration or injunction on proof of danger to the mortgagor's title to the properties, I do not think there is anything in the allegations in the plaint which would justify a court in exercising its discretion in favour of the mortgagor

(1) (1871) L.R., 7 Ex., 26 at p. 34. (2) (1867) L.R.I. H.L., 145 at p. 165.
(3) (1878) 3 A.C., 1218. (4) (1914) 23 I.C., 805.
(5) (1916) 35 I.C., 455.

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who has come to Court three years after the execution of deed of mortgage. Both the lower Courts are of opinion that plaintiffs have no reasonable apprehension of any serious injury in the future.

In the result the second appeal fails and is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1918, July 25 and 26.

CHINNASWAMI PILLAI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

APPASWAMI PILLAI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Surrender by widow and daughter in favour of daughter's son—Deed executed by both—Stipulation for maintenance of both for their lives—Surrender, whether valid—Title of daughter's son—Title of reversioners.

Where the widow and the only daughter of a deceased Hindu surrendered their interests in the estate of the deceased in favour of the daughter's son under a deed executed by them both, stipulating therein that he should maintain them during their lifetime, and, on the death of them all, the reversioners of the deceased sued to recover the estate from the father of the deceased daughter's son.

Held, that the surrender was valid under the Hindu Law and operated to vest the estate in the daughter's son, and that the reversioners had no title to the property.

Sriramulu Naidu v. *Andalammal* (1907) I.L.R., 30 Mad., 145, and *Challa Subbiah Sastry* v. *Paluri Pattabhiramayya* (1908) I.L.R., 31 Mad., 446, referred to.

SECOND APPEAL against the decree of J. G. BURN, the District Judge of Trichinopoly, in Appeal No. 376 of 1916 preferred against the decree of K. S. VENKATACHALA AYYAR, the District Munsif of Ariyalur, in Original Suit No. 542 of 1915.

The plaintiffs sue as reversioners of one Chandram Pillai who died in 1890 leaving a widow and a daughter who had a

* Second Appeal No. 2145 of 1917.

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son born to her in 1893. In 1894, the widow and the daughter xecuted a deed of surrender in favour of the daughter's son. The material terms of the document which was called a release deed were as follows:—

As the abovementioned child by name Sudharathnam Pillai is the grandson of Pichammal and son of Marudayi amongst us, as for both of us there are no other heirs excepting Sudharathnam Pillai and as after the life of both of us the said Sudharathnam Pillai alone is the person who should inherit all our properties and also the heir we give up hereby the right of enjoyment we possess till the end of our life in the immovable properties hereunder mentioned of the value of Rs. 400. From this day, on behalf of the said Sudharathnam Pillai, his guardian and father the said Appaswami Pillai should enjoy the said properties. If a brother should be born for the said Sudharathnam Pillai, he also should enjoy the said properties. Till the said Sudharathnam Pillai becomes a major, his guardian Appaswami Pillai, and after minority ceases the said Sudharathnam Pillai should only protect us. We have no right whatever in future in the said properties. The Sirkar kist also should be paid only by Sudharathnam Pillai. In future the said Sudharathnam Pillai possesses all rights and ownership in the said properties. Thus with our consent we execute and give this release deed.

(Mark of) Pichammal.
(„) Marudayi.

The minor died two years after the deed was executed; the widow died about 1900 and the daughter died in October 1914. The reversioners of Chandram Pillai brought this suit on the 9th September 1915 to recover the estate from the possession of the first defendant who claimed the property as the father and heir of the deceased daughter's son and relied on the surrender deed already mentioned. The District Munsif decreed the suit in favour of the plaintiff. On appeal by the defendants, the learned District Judge reversed the decree and dismissed the suit. The plaintiffs preferred this second appeal.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellants.

P. Nagabhushanam for the respondents.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiffs are the appellants. On the date of the suit they were the reversionary heirs of one Chandram Pillai who died in about 1890 leaving a widow as his

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next heir and a daughter as the next expectant heir after the widow. A son was born to the daughter in 1893. When he was a year old, the widow and the daughter executed the surrender deed, Exhibit I, dated 2nd April 1894, in his favour, he being represented by his father and guardian, the first defendant. That document was a complete surrender of all the rights of the two executants in the estate of the last male owner Chandram Pillai. But there is a provision in the document that the first defendant as guardian of his infant son and the infant himself after he attained majority, should protect the two executants, meaning evidently that they should be maintained. The infant died about two years afterwards, say in 1896, and the plaintiffs now sue for the recovery of the properties from the first defendant, the widow and the daughter having died. The question is whether the deed of surrender, Exhibit I, accelerated the inheritance to Chandram Pillai's estate of the first defendant's infant son and made him the full owner of the property on that date.

That a widow could surrender her limited interest in her husband's estate to the next reversioner so as at once to vest the property in the next reversioner is now settled law, provided that the whole estate is surrendered. The point argued for the appellants is that the present case is not a surrender by the widow to the next reversionary heir, but it is a surrender by the widow and the next reversionary heir who is also a female to the second reversionary heir. Even as regards this question, I think there are observations in *Mulugu Kotayya* v. *Mudigonda Chandramowli Sastri*(1). See also *Protab Chunder Roy Chowdhry* v. *Sreemutty Joy Monee Dabee Chowdhrain*(2), which establishes the rule of law that a surrender by a widow with the consent of the next female heir to the secondary male heir can be treated as a joint surrender by both, and that such a joint surrender might be treated as a surrender by the widow to the next female heir which vests the property in the next female heir for a moment and an immediate surrender of the property so vested for a moment in the next female heir by the latter to the next male heir, the result being to vest an absolute title in the secondary male heir.

(1) (1916) 31 M.L.J., 406. (2) (1864) 1 W.R., 98.

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Next, it is objected that if the widow reserves any benefit for herself when making the surrender, the surrender is not one made in good faith in consonance with the principles of Hindu Law and hence it is invalid. In the present case the widow stipulated that the male reversioner's guardian and the male reversioner after attaining majority should support herself and her daughter. Taking first the provision for her own maintenance, I do not think that a stipulation for her own maintenance by a widow can affect the legal result of the surrender. The language of the judgment in *Sriramulu Naidu* v. *Andalammal*(1) suggests that if a widow making a surrender imposes on the reversioner nothing more onerous than the obligation to maintain the widow, such a surrender would be valid and would vest the title in the reversioner. This is also in conformity with the principles of Hindu Law, a surrender being allowed by that Law, as stated by SESHAGIRI AYYAR, J., in *Nachippa Gounden* v. *Rangaswami Gounden*(2), in order to give relief to female heirs (supposed to be incapable of prudent management) in respect of the management of the property. The theory that a widow becomes civilly dead when she makes a surrender has no basis in any text of Hindu Law. The loose expressions in some judgments as to a widow being civilly dead when read with the context can mean only that the next reversioner succeeds in such a case as if the widow died at the moment of surrender. She neither actually nor civilly dies then. This is also clear from the expression about civil death being followed in one of the judgments by the illustration based upon the widow's re-marriage. A woman who surrenders is clearly not civilly dead for any other purpose than for the purpose of bringing in the next reversioner as heir at once to her husband's estate. She continues to own her Stridhanam and the obligation of all persons who take her husband's estate to maintain her, which is an absolute obligation thrown by the Hindu Law, cannot be destroyed by her surrender thereof. She does not become a Sanyasi because she surrenders her husband's estate. She is entitled to acquire properties, to retain her Stridhanam and to bring suits and she remains competent to enter into contractual and other legal obligations.

(1) (1907) I.L.R., 30 Mad., 145 at p. 148. (2) (1915) 28 M.L.J., 1 at p. 24.

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Then coming to the provision for the maintenance of the daughter, the daughter is not (like the widow) under the Hindu Law obliged even as a moral obligation to starve and stint herself because her father is dead and she inherits her father's property. The extension of the doctrine of the so-called life-estate from the widow to the other female heirs is itself an unwarranted extension of the Commentators which however being the present law could not be criticised to any useful purpose. When a daughter surrenders to the next reversioner it is arguable that even she should surrender the whole estate and should not retain any portion of the estate of the last male owner to herself in order to vest the full ownership in the next reversioner. But the principle on which it was held in *Sriramulu Naidu* v. *Andalammal*(1) that if *the widow* imposes any onerous obligations upon the surrenderee for her own benefit or for the benefit of her servants or for charity, the surrender is not valid, does not apply to the *daughter* who inherits as heir. The only condition which can be imposed on principle upon any female heir other than the widow is that the surrender should be of the whole estate. Whether, therefore, the case in *Challa Subbiah Sastri* v. *Palury Pattabhiramayya*(2), which went further than the decision in *Sriramulu Naidu* v. *Andalammal*(1), and which held that the imposing of an obligation upon a reversioner to convey back a portion of the property to the widow's brother did not invalidate the surrender can be supported or not—in parenthesis I may here state that that case and the case of *Karchi Brahmanaikudu* v. *Karchi Mahalakshmi*(3) have been followed even to that extent by a very recent case, *Gopala Krishnayya* v. *Gangayya*(4), decided by ABDUR RAHIM and SRINIVASA AYYANGAR, JJ.—I am clear that the act of a daughter who being next heir, surrenders the whole estate, vests the absolute inheritance in the next male heir even if she received consideration for her surrender of the full enjoyment of the property during her lifetime.

It follows that the second appeal fails and is dismissed with costs.

(1) (1907) I.L.R., 30 Mad., 145. (2) (1908) I.L.R., 31 Mad., 446.
(3) (1913) M.L.J., 433. (4) Appeal No. 378 of 1915.

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NAPIER, J.

NAPIER, J.—I agree that this second appeal fails. I have had considerable difficulty during the hearing of this appeal in ascertaining what are the true limits laid down in the cases to the right of surrender. I think that it is clear on the latest authorities that the surrender need not be definitely to the next heir if that next heir agrees to be passed over. That has been decided in *Mulugu Kotayya* v. *Mudigonda Chandramowli Sastri*(1) and in *Munugarra Satya Lakshmi Naruya* v. *Munugarra Jagannadham*(2), and it seems to me to be immaterial whether the next heir is a party to the deed of surrender or executes a deed of surrender for herself or simply consents to being passed over. The difficulty I have found is on the question whether an agreement for maintenance by the person who is passed over is sufficient to invalidate the transaction. Now, it is perfectly clear that, according to the school of thought which is to be found in the reasoning of Mr. Justice SANKARAN NAIR in *Challa Subbiah Sastri* v. *Palury Pattabhiramayya*(3), it is absolutely immaterial what reservations are made at the time of surrender by a widow or indeed by any person surrendering. The view taken by him is that you have to treat the document of surrender by itself, and when once the estate is vested it is immaterial whether or not by a contemporaneous agreement provision is made for returning even a greater portion of the estate to a person who may not even be in any way connected with the original holder. SANKARAN NAIR, J., treats it as being analogous to an adoption with a contemporaneous agreement to transfer. Whether that analogy is sound,—and arguments by analogy are frequently dangerous—I cannot but view with alarm the proposition which comes to this that a person holding a limited interest can enter into an arrangement with the then existing next heir who may be in impecunious circumstances and prepared to lend himself to any arrangement for the sake of some ready money, by which the greater part of the property will be diverted from the person who at the falling in of the estate would be entitled to the whole. As my learned brother has pointed out, this view has been accepted in the case reported in *Karchi Brahmanaikudu* v.

(1) (1916) 31 M.L.J., 406.
(2) (1918) 34 M.L.J., 229.
(3) (1908) I.L.R., 31 Mad., 446.

CHINNASAMI PILLAI v. APPASWAMI PILLAI.

NAPIER, J.

Karchi Mahalakshmi(1) and in *Gopalakrishnayya* v. *Gangayya*(2). Speaking for myself, if such an invasion on the whole doctrine of surrender is to receive the sanction of the Court, I should like to see it so laid down by a Full Bench of this Court. There is, however, a modified rule to be spelt out from these cases which might be that where the arrangement, although retaining a benefit for the person surrendering or even conferring a benefit on some person not entitled, is an obviously fair and just arrangement for the maintenance and benefit of the person surrendering, then the doctrine that such a surrender is not vitiated by the arrangement should be upheld. But that is not the view taken by a very eminent Hindu Judge of this Court, SUBRAHMANYA AYYAR, J., in *Sriramulu Naidu* v. *Andalammal*(3). He never considers this aspect of the case at all, and he lays down that if the surrender is coupled with onerous conditions thrown on the person whose estate is accelerated, liabilities which are not such as would naturally devolve on him, in connexion with persons to be benefited, that surrender is bad. The cases he mentions are conditions not only for the maintenance of the transferor, who was in that case a widow, but also a condition to pay a sum of money to certain dependants and to maintain a charity for all time at certain expense and on her death to make payments of different amounts aggregating to one-fourth of the estimated value of the properties. This, as far as I gather from the language used by him in his judgment in *Challa Subbiah Sastri* v. *Palury Pattabhiramayya*(4), would have been upheld by SANKARAN NAIR, J., as a good surrender. Taking, therefore, this narrower view of SUBRAHMANYA AYYAR, J., and applying it to this case as we are asked to do, do the facts fall within the mischief of the doctrine? My learned brother is of opinion that a surrender by a daughter reserving the right of maintenance would be good although there is not the direct legal liability for the support of a daughter incumbent on the estate. I hesitate to express a definite opinion on that point. But the facts of this case being that the reservation was made by both the widow and the daughter in the deed of surrender and that it was for the protection and maintenance of the mother

(1) (1913) 24 M.L.J., 533.
(2) Appeal No. 373 of 1915.
(3) (1907) I.L.R., 30 Mad., 145.
(4) (1908) I.L.R., 31 Mad., 446.

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of the infant child in whose favour the surrender was made, I am inclined to think that such a reservation is not within the mischief of the doctrine laid down by Mr. Justice SUBRAHMANYA AYYAR, and it would certainly be covered by the suggested modification of the rule laid down in *Challa Subbiah Sastri* v. *Palury Pattabhiramayya*(1).

For these reasons I concur in holding that the appeal should be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Phillips.

1918. July 26.

AMBA *alias* PADMAVATI (PETITIONER), APPELLANT,

v.

SRINIVASA KAMATHI (RESPONDENT), RESPONDENT.*

Appeal to Privy Council—Petition to High Court for leave to appeal to Privy Council in forma pauperis, *whether maintainable.*

The High Court cannot entertain applications for leave to appeal to the Privy Council *in forma pauperis.*

Jagadanand Asram v. *Rajendra Roy* (1912) 17 C.L.J., 381 and *Ramkishen Lal* v. *Manna Kumri* (1916) 3 P.L.J., 179, followed.

PETITION presented under sections 109 to 110 and Order XLV, rules 2, 3 and 8 of Act V of 1908, praying the High Court to grant a certificate to enable the petitioner to appeal to His Majesty in Council against the decree of the High Court in Appeal No. 24 of 1916 preferred against the decree of the Subordinate Judge of South Kanara in Original Suit No. 73 of 1914 and to grant leave to petitioner to prefer the said appeal *in forma pauperis.*

The facts appear from the judgment.

C. V. Anantakrishna Ayyar and *K. Sundara Rao* for the appellant.

B. Sitarama Rao and *K. P. Lakshmana Rao* for the respondent.

The JUDGMENT of the Court was delivered by

OLDFIELD, J. — OLDFIELD, J.—The petition, in so far as it is for a certificate that the case is a fit one for appeal to His Majesty in Council, is

(1) (1908) I.L.R., 31 Mad., 446.

* Civil Miscellaneous Petition No. 1588 of 1918.

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not opposed. We certify accordingly under section 110 of the Code of Civil Procedure.

The petition is further for leave to appeal *in forma pauperis.* In *Munni Rama Awasty* v. *Shoo Churn Awasty*(1) Counsel (Mr. Moore) referred generally to a practice of the Court in India granting such leave, mentioning Bengal Regulation XXVIII of 1814. But no precedent for its grant has been proved in this court and the authority of decisions in other High Courts is against it. *Jagadanand Asram* v. *Rajendra Roy*(2) and *Ramkishen Lal* v. *Manna Kumri*(3). We respectfully adopt the grounds of the latter decision and dismiss the petition so far as it relates to leave to appeal *in forma pauperis.* There will be no order as to costs.

N.R.

APPELLATE CIVIL.

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

1918, July 26 and 29.

RIPON PRESS AND SUGAR MILL COMPANY, LIMITED (DEFENDANT), APPELLANT,

v.

NAMA VENKATARAMA CHETTY (PLAINTIFF), RESPONDENT.*

Limitation Act (IX of 1908), art. 116—Company registered under the Indian Companies Act (VI of 1882)—Suit for dividend by a shareholder, governed by art. 116—'Registered' in art. 116, meaning of.

A suit by a shareholder against a company registered under the Indian Companies Act (VI of 1882) to recover dividends duly declared by the company, is governed by article 116 of the Limitation Act as the right to a dividend arises out of the contract between the shareholders contained in the registered memorandum and articles of association.

'Registered' in article 116 means 'registered' not only under the Indian Registration Act (III of 1877) but also under special Acts, such as the Indian Companies Act, which requires the memorandum and articles of association of a company to be registered.

A dividend is a debt on a 'contract in writing registered' within article 116 of the Limitation Act.

(1) (1847) 4 M.I.A., 114 at 136. (2) (1912) 17 C.L.J., 381.

(3) (1916) 3 P.L.J., 179.

* Appeal No. 371 of 1917.

RIPON PRESS AND SUGAR MILL CO., LTD. v. NAMA VENKATA-RAMA CHETTY.

APPEAL against the decree of H. R. BARDSWELL, District Judge of Bellary, in Original Suit No. 12 of 1917.

In so far as it is material for the purposes of this report, the facts of the case are as follow:—This was a suit brought on 4th April 1917 by a shareholder of a company registered under the Indian Companies Act (VI of 1882) against the company for recovery of dividend duly declared by the company on 14th March 1913. There were no special articles of association and the articles in table A to the Indian Companies Act were therefore applicable. The defence *inter alia* was that the suit was barred by limitation. The lower Court decreed the claim holding that it was not barred by limitation. The defendant company preferred this appeal.

C. Sambasiva Rao for the appellant.

H. Balakrishna Rao for the respondent.

The JUDGMENT of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—This appeal raises an interesting question on the law of limitation as to which, so far as we are aware, there is as yet no authority in India, namely as to the period of limitation for a suit by a shareholder against a registered company to recover dividends. In England it is well settled that a dividend is a speciality debt for which a period of twenty years is allowed by 3 and 4 William 4, cap. 42, section 3. This was first pointed out by Lord Justice CHRISTIAN in *Smith* v. *The Cork and Bandon Ry. Co.*(1) which has been followed in later cases and in England in *In re Artisans' Land and Mortgage Corporation*(2).

In India we have to look to the provisions of our Limitation Act. The right to receive a dividend which has been duly declared is one of the rights of every shareholder by virtue of the contract which he is deemed to have entered into with all the members of the company under section 39 of the Indian Companies Act, 1882. The terms of that contract are to be found in the memorandum of association, and in the special articles of association, if any, and if there are no special articles of association and in so far as they are not inconsistent with them, then in the table A which is appended to the Act. *Prima facie* the provisions of articles 72 to 76 in table A, which deal with the declaration and payments of dividends, are applicable

(1) (1870) Ir. Rep., 5 Eq., 65. (2) (1904) 1 Ch. D., 796.

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WALLIS, C.J.

and form the contract under which dividends are payable. Now, the memorandum of association is required by law to be registered and the articles in table A in so far as they are applicable are by section 38 of the Companies Act to be deemed to be the regulations of the company in the same manner and to the same extent as if they had been inserted in the articles of association, so that by virtue of section 38 the debt here must be deemed to have arisen from a memorandum and articles of association duly registered under the Companies Act.

Now, article 115 of the Limitation Act is 'for compensation for the breach of any contract, express or implied not in writing registered and not herein specially provided for'. There is no special article for the recovery of dividends, and therefore article 115 will apply unless article 116 is applicable. Article 116 is 'for compensation for the breach of a contract in writing registered,' and it is now settled that that means 'for breach of any contract in writing registered.' 'Registered' in the Limitation Act, must be read as defined in the General Clauses Act of 1897. Section 3, clause 45 of that Act says 'registered' used with reference to a document shall mean registered in British India under the law for the time being in force for the registration of documents. It has been contended for the appellant that the 'law for the time being in force for the registration of documents' must mean the Indian Registration Act for the time being. That, however, appears to us to be unduly restricting the meaning of that clause. The Companies Act provides for the registration of the memorandum and the articles of association, which are documents, and there may be other statutes such as the Copyright Act, which provide for the registration of other documents. There is, we think, no reason why the term 'registered' within the meaning of the General Clauses Act should not include documents registered under any special law of that kind as well as registration under the Indian Registration Act. We are, therefore, of opinion that the present suit is for compensation for the breach of a contract in writing registered and that the period of limitation therefore under article 116 is six years and the suit is not barred. The other contentions of the appellant also fail.

In the result the appeal fails and is dismissed with costs.

M.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

1916, July 18 and 31.

CHINNASWAMI REDDI (PLAINTIFF), APPELLANT,

v.

KRISHNASWAMI REDDI AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Indian Contract Act (IX of 1872), sec. 64—Benefit, meaning of—Sale by guardian of wards' lands—Sale, not for binding purposes—Purchase of other lands for wards out of sale-proceeds—Suit by vendee for possession of portion of lands—Right of wards to avoid sale—Duty of wards to convey purchased lands or their value—Suit by wards to set aside sale held barred by limitation—Competency of wards to set up plea of invalidity of sale in defence in vendee's suit—Limitation Act, art. 44—Form of decree.

Where a guardian sold lands belonging to her wards for purposes not binding on them and, with the sale-proceeds, purchased subsequently other lands for them but the purchase of the specific lands was not in the contemplation of the parties at the time of sale and did not form part of the same transaction as the sale, the lands so purchased did not constitute a *benefit* arising out of the sale under section 64 of the Indian Contract Act and the wards were not bound to convey them to the vendee before they avoided the sale.

Where the vendee from the guardian under a voidable sale, having obtained possession of a portion of the lands, sued to recover the remainder, after a suit by one of the wards who had attained majority to set aside the sale had been dismissed as barred by limitation under article 44 of the Limitation Act, it is open to the wards to set up the plea of invalidity of the sale in defence in the vendee's suit in respect of the portion of the lands in their possession.

The vendee will be entitled in such suit to a decree for the value of the lands and in default of payment to a decree for possession.

SECOND Appeal against the decree of V. VENUGOPAL CHETTI, the District Judge of Chingleput, in Appeal Suit No. 304 of 1914, preferred against the decree of P. SUBBAYYA MUDALIYAR, the District Munsif of Poonamallee, in Original Suit No. 67 of 1912.

The material facts appear from the judgment of KUMARASWAMI SASTRI, J.

The Hon. the Advocate-General (S. Srinivasa Ayyangar) and *A. C. Sampath Ayyangar* for the appellant.

G. S. Ramachandra Ayyar for the third respondent.

* Second Appeal No. 1470 of 1916.

PHILLIPS, J.—Apart from the fact that the plaintiff has by his action precluded the Court from ordering an exchange between the parties of the lands sold to plaintiff by the mother of defendants Nos. 1 and 2, and the lands purchased by her in Srīperumbudūr, I think that it follows from the finding that the purchase of the lands in Srīperumbudūr was not contemplated at the time of the sale to plaintiff, that those lands do not constitute the benefit received by defendants Nos. 1 and 2 from plaintiff within the meaning of section 64 of the Contract Act. I therefore agree in the order proposed.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. He sued for possession of the house-site specified in the plaint. The case for the plaintiff is that the mother of the first and second defendants acting as their guardian sold to him certain properties consisting *inter alia* of the site specified in the plaint for the purpose of purchasing other properties, and that the defendants have not put plaintiff in possession of the property claimed by demolishing the building on the site as agreed upon. Defendants Nos. 1 and 2 contested the suit on the ground that the sale-deed executed by their mother is invalid and inoperative and would not bind them and that plaintiff has no right to the relief claimed. The defence of the third and fourth defendants who claimed an interest in the buildings on the site is not material for the purpose of this appeal.

The District Munsif held that the sale by their mother as their guardian was not binding on the defendants Nos. 1 and 2 and dismissed the suit on this ground. He was of opinion that the purchase of the lands subsequently purchased was not settled at the time of the sale by defendants' mother and that it is probable that the plaintiff prevailed upon the defendants' maternal grandfather to enter into the transaction.

On appeal, the District Judge held that the sale was not binding on the defendants Nos. 1 and 2 as it was not necessary or beneficial, and dismissed the appeal.

The contention for the appellant is that it was not open to the first and second defendants to keep the lands purchased with the sale-proceeds of the family lands and to repudiate the sale by their mother made with the object of purchasing other lands and that under section 64 of the Contract Act, a person who seeks to avoid a voidable transaction should restore any benefit

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he has received as a condition precedent to such avoidance. It is also argued that the District Judge was wrong in thinking that the recital in the sale-deed by defendants' mother to the effect that lands in Srīperumbudūr were to be purchased was insufficient as the particular lands actually purchased were not specified.

There can be little doubt that under section 64 of the Contract Act a party seeking to avoid a voidable transaction is bound to restore any benefit he has received from the other party and the question is whether in the present case lands actually purchased in Srīperumbudūr can be said to be the benefit which the defendants Nos. 1 and 2 received in respect of the sale by their mother as their guardian.

Ordinarily, the benefit which a party receives when he sells the property is the price which the vendee pays. Any profits which the vendor might make with the moneys would be too remote in estimating what he has to return in case he is entitled to avoid the sale and elects to do so. Where however for the protection of a purchaser contracting with a guardian or a qualified owner, a particular dealing with the money was in the direct contemplation of the parties such as the purchase of other lands with the consideration and the money is so applied, the benefit which the other party obtains will be the land or other property acquired with the consideration. There must, in my opinion, be something more than a mere application of the consideration in a particular way in order to entitle the purchaser to claim restoration of the properties acquired with the consideration paid by him. Section 35 of the Transfer of Property Act makes this clear. It requires that the benefit received should be part of the same transaction and should be direct. The authorities cited by the learned Advocate-General do not support the view that the purchaser is entitled to follow up properties purchased with the consideration irrespective of whether there was any arrangement or not.

In *Rabia Bi* v. *Angappan*(1) it was held that the guardian of a Muhammadan minor is not entitled to mortgage her properties for the purpose of acquiring other properties but that if the minor disclaims liability to pay the mortgage moneys, she

(1) (1915) 2 L.W., 369.

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must give up her rights in the property so purchased. She was directed to execute a conveyance of the property to the mortgagee. It was assumed that the benefit was the purchase of other lands and there was no discussion of the question. In *Sinaya Pillai* v. *Munisami Ayyan*(1), *Tejpal* v. *Ganga*(2) and *The Eastern Mortgage and Agency Co., Ltd.*, v. *Rebati Kumar Ray*(3). it was held that any benefit received should be restored. In these cases it was the consideration paid that was to be refunded. There can be little doubt that if the purchase of the land at Srīperumbudūr was the benefit contemplated by the parties and arose in connexion with the same transaction as the sale of ancestral properties by the minors' mother, the plaintiff would be entitled to a conveyance of the properties so purchased. Otherwise all that he would be entitled to is repayment of the consideration he paid.

The difficulty in the present case is that both the lower Courts do not believe the evidence of the plaintiff and find that the purchase of the lands which were actually purchased were not in the contemplation of the parties at the time of the sale to plaintiff. The District Judge disbelieves the evidence of the plaintiff and his witnesses that there was an understanding at the time of the sale that lands in Srīperumbuūdr should be purchased with the consideration and believes the evidence of Sami Reddi, the first defence witness, that it was only subsequent to the sale that plaintiff refused to pay the consideration unless lands were purchased and that it was at his pressure and refusal to pay that lands were purchased. The plaintiff executed an unconditional on-demand promissory note for the consideration and could have been sued on the note and the fact that there is a recital in the sale-deed to plaintiff that it was intended to purchase lands would not entitle plaintiff to withhold payment of the note if the vendor changed her mind, and decided to invest the moneys in any other way. The lands were purchased at Srīperumbudūr on the 4th March 1908 while the sale to plaintiff was on the 22nd August 1907. I do not think we can say that the findings of the lower Courts were based on no evidence and on those findings it cannot be said that the purchase of the lands under Exhibit C was part of the

(1) (1899) I.L.R., 22 Mad., 289.
(2) (1903) I.L.R., 25 All., 59.
(3) (1906) 3 Calc. L.J., 260.

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same transaction as the sale of lands under Exhibit B. The plaintiff would therefore be entitled only to the return of the consideration paid by him.

It has been argued that, as the suit by the first defendant to set aside the sale-deed (Exhibit B) and to recover possession of properties other than the plaint properties covered by it was dismissed as barred, the plaintiff is entitled to possession of the suit properties as the right to avoid the contract is at an end owing to the impossibility of placing the parties in *status quo ante*. I do not think there is anything to prevent the plaintiff from giving back the properties in his possession though the suit of the first defendant was dismissed as barred. He is the plaintiff and the defendants are, in a suit by him for possession, entitled to plead the invalidity of the sale by their guardian. The fact that they cannot sue to recover an item of property wrongfully alienated by their guardian cannot affect their right to remain in possession of properties not delivered to the possession of the purchaser. There is no authority for the proposition that on the expiry of the period specified in article 44 of the Limitation Act, the purchaser from the guardian is of right entitled to possession of properties in the possession of the ward.

No doubt the right to avoid a contract depends on the power of the Court to put the parties in the same position as they would have been if the transaction had not been entered into, but the plaintiff cannot be heard to say that he will not do something which is within his competence and claim the enforcement of a voidable transaction on the ground that the parties cannot be put in *status quo ante*, because of his unwillingness to do equity.

The plaintiff is in possession of other properties conveyed to him; he values the site at Rs. 250 and the value is not disputed in the written statement or in the evidence. I am of opinion that the plaintiff is entitled to a return of Rs. 250 in case the defendants elect to keep the house-site claimed. I would set aside the decrees of the lower Courts and direct that on payment by the defendants Nos. 1 and 2 of Rs. 250 in three months the plaintiff's suit be dismissed, each party bearing his own costs and that in default a decree be passed for possession as prayed with costs throughout.

K.R.

APPELLATE CIVIL.

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

G. P. MALLAPPA (PLAINTIFF), APPELLANT,

v.

MATUM NAGU CHETTY (DEFENDANT), RESPONDENT.*

1918, July 16 and 30.

Indian Evidence Act (I of 1872), ss. 58 and 92, proviso 4—Mortgage-bond, registered—Subsequent oral agreement by mortgagee to take less than due amount, whether modifies bond—Admission by mortgagee in pleadings in suit—Proof of agreement, whether necessary under Evidence Act and Civil Procedure Code.

A subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract, and, if it has to be proved, oral evidence is inadmissible under section 92, proviso 4 of the Indian Evidence Act.

If such agreement has been admitted in the pleadings, no question of admissibility of evidence, oral or documentary, arises, as proof of the same is dispensed with in consequence of the admission under section 58 of the Evidence Act and also, under the provisions of the Civil Procedure Code.

Chenbasappa v. Lakshmanan Ramachandar (1894) I.L.R., 18 Bom., 369, distinguished.

APPEAL under clause (15) of the Letters Patent against the prevailing judgment and decree of the Honourable Mr. Justice BAKEWELL, in *G. P Mallappa* v. *Matum Nagu Chetty*(1) on the file of the High Court, preferred against the decree of the District Court of Coimbatore, in A.S. No. 215 of 1916, preferred against the decree of the Court of the District Munsif of Kollegal, in O.S. No. 88 of 1915.

The plaintiff sued to recover a sum of Rs. 2,040 due on two mortgage-bonds executed by the defendant. The defendant pleaded, *inter alia*, that by a subsequent oral agreement the plaintiff agreed to take a smaller amount than what was due, if paid within a certain time and that the amount having been paid, the plaintiff was not entitled to recover the suit amount. The plaintiff admitted in his reply statement the oral agreement set up by the defendant but contended that the payment was not made within the time agreed and that consequently the plaintiff

* Letters Patent Appeal No. 191 of 1917.

(1) Second Appeal No. 851 of 1916.

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was entitled to recover the full amount of the bonds after giving credit for the amounts paid by the defendant. The Court of first instance decreed in favour of the plaintiff; the lower Appellate Court reversed the decree; the plaintiff preferred this second appeal which was heard by SADASIVA AYYAR and BAKEWELL, JJ., who differed; the judgment of BAKEWELL, J., who confirmed the decision of the lower Appellate Court having prevailed under section 98 of the Civil Procedure Code, this Letters Patent Appeal was preferred against the judgment of BAKEWELL, J. The further facts and contentions appear from the judgments of SADASIVA AYYAR and BAKEWELL, JJ., which were as follows :—

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant. The suit was brought for sale of the property mortgaged under two documents, Exhibit A and Exhibit B, dated 1898 and 1904 securing the principal amounts of Rs. 750 and Rs. 120 with the stipulated interest at 9 per cent and 12 per cent respectively. The respective dates fixed for repayment are 31st December 1899 and 1st April 1905. At the end of March 1914, the plaintiff threatened a suit on the bonds and sent them to his vakil. Then, oral negotiations took place. (The principal and interest on the two bonds till then amounted to about Rs. 2,040.) An oral agreement was brought about by mediators to the effect that if the defendant mortgagor should pay Rs. 1,000 in one week's time and Rs. 400 in three months' time the plaintiff should accept the two payments in full satisfaction, and should refrain from filing the threatened suit. The oral agreement included a further provision that if the Rs. 400 was not paid, in three months (even though the first stipulation as to payments of Rs. 1,000 in one week was carried out), the defendant should pay an additional sum of Rs. 100 in satisfaction of the mortgage debts. Under this agreement, assuming it for the moment to be binding on both sides, the defendant ought to have paid Rs. 1,000 about the 7th April 1914 and the balance of Rs. 400 on 7th July 1914. He paid the Rs. 1,000 into the hands of the plaintiff's vakil three months after the date agreed upon, that is, on 7th July 1914 instead of on 7th April 1914 with Rs. 22-8-0 as interest for the three months. He did not pay the Rs. 400 or Rs. 500 at all to the plaintiff and so in April 1915, plaintiff brought this suit. The plaintiff in his plaint, ignored the oral agreement of March 1914 and giving credit to Rs. 1,022-8-0 paid on the 7th July 1914 brought the suit for sale on the contracts mentioned in the mortgage bonds. The defendant pleaded the oral agreement of March 1914 and contended that he was liable to pay

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only Rs. 400 or at the most Rs. 500 minus Rs. 22-8-0 or Rs. 477-8-0. In reply to the defendant's written statement, the plaintiff filed a written statement admitting the oral agreement but contending that Rs. 1,022-8-0 was received by his vakil in July 1914 without the plaintiff's preliminary consent and then in paragraphs 7 and 8 of his reply he stated as follows :—

"7. No portion of the transaction which occurred between both parties can amount to an agreement under law. The plaintiff has not obtained any consideration therefor. According to section 25 of the Indian Contract Act, it is not valid.

"8. One item of Rs. 195 paid by the defendant for the interest has by mistake not been mentioned in the plaint. It is prayed that the Court may be pleased to pass a decree for the plaint amount less Rs. 195."

(The Rs. 195 thus honestly admitted in paragraph 8 was given credit to by the lower Courts accordingly.) The District Munsif held that, as the defendant committed a breach of the oral contract of March 1914, he could not rely upon it as a satisfaction of the claim under the mortgage bonds and that the plaintiff was entitled to fall back on his rights under the mortgage bonds. The learned Munsif therefore decreed the suit for Rs. 691-8-0 and subsequent interest and costs to be recovered by sale of the mortgaged property. On appeal, the learned District Judge held that the defendant's failure to carry out his agreement did not relegate the parties to their rights and liabilities under the original contracts, that the plaintiff consented to remit a part of what was due to him in April 1914 and was bound by that act and that hence the plaintiff should have a decree only for Rs. 477-8-0 and interest thereon This Second Appeal relates to the difference between the amount decreed by the District Munsif and the amount decreed by the District Judge. In the memorandum of Second Appeal, the questions of law are thus formulated in grounds 2 to 4 :

"2. The lower Appellate Court ought to have held that since the substituted agreement was not performed, the parties were relegated to their former position and that the plaintiff is entitled to recover Rs. 691-8-0."

"3. The lower Appellate Court failed to note that the contract of substitution was only conditional."

"4. The lower Appellate Court failed to note that, since the original contract was in writing registered, it cannot be substituted by a subsequent oral contract under section 92 of the Indian Evidence Act."

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The fourth ground based on section 92 of the Indian Evidence Act was not put forward in the lower Courts, but I think that as it is a pure question of law arising on the facts found, the appellant is not disentitled from urging it. See *Sakhireddy Appalaswamy* v. *Sakhireddy Venkanna*(1).

It is clear that no sum in round figures was remitted by the plaintiff from the amounts due to him under Exhibits A and B. What was agreed upon was (*a*) if the defendant paid Rs. 1,000 within 7th April 1914, and Rs. 400 within 7th July 1914, the balance due under Exhibits A and B should be deemed to be remitted; (*b*) in the alternative, if Rs. 1,000 alone was paid within 7th April 1914, but Rs. 400 was not paid on the 7th July 1914, the balance promised to be remitted under the first alternative was to be reduced by Rs. 100 and the defendant was to be liable to pay Rs. 500 (and not Rs. 400) to get finally rid of his liability under Exhibits A and B. There was a third alternative which would arise if even the first Rs. 1,000 was not paid within 7th April 1914. As to this the panchayatdar D. W. 2 says "*We settled nothing as to what should be done if the defendant failed to pay Rs.* 1,000 in one week." It will be seen that the defendant did fail to pay even the Rs. 1,000 within one week and he paid the said sum with interest at 1 per cent for three months to the plaintiff's vakil on 7th July 1914 though Exhibit A provides for interest at only $\frac{3}{4}$ per cent. I think that on these facts it cannot be said that the plaintiff unconditionally remitted any amount and as the defendant broke the conditions agreed upon between the parties, when the plaintiff made the promise to remit whatever balance may be found after the defendant made the two payments according to the agreement, I think the parties were relegated to their original rights and liabilities under the documents Exhibits A and B on such breach of the conditions. In *Manohur Koyal* v. *Thakur Das Naskar*(2) the arrangement was that in satisfaction of Rs. 1,173 due on two bonds, the plaintiff was to accept Rs. 400 in cash and a bond for Rs. 701. The sum of Rs. 400 was not, however, paid, nor was the bond for Rs. 701 given as promised. The defendant pleaded that *the promise* to pay Rs. 400 and to give the bond for Rs. 701 constituted a novation and a satisfaction which under sections 62 and 63 of the Contract Act extinguished the debt due under the bonds. (The documents sued on were not mortgage bonds in that case.) Still it was held that unless the Rs. 400 had been actually paid and the

(1) (1914) M.W.N., 488. (2) (1888) I.L.R., 15 Calc., 819.

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bond for Rs. 701 had been actually given before the suit, the parties were relegated to their rights and liabilities under the original bonds. In *Keshab Lal* v. *Hossein-ud-din*(1) there was an oral agreement to satisfy a registered mortgage bond under which Rs. 175 was due on the date of the oral agreement; the plaintiff agreed to remit Rs. 25 and to take the balance of Rs. 150 in five yearly instalments of Rs. 30 each. Rupees 30 was paid on the date of the oral agreement and Rs. 90 in three subsequent years. The last instalment of Rs. 30 was not paid. The mortgage sought to recover on the basis of the bond after giving credit to the Rs. 120 paid. The lower Courts (as the lower Appellate Court did in this case) decreed only what was due under the oral agreement treating it as valid and admissible in evidence. The High Court of Calcutta allowed the appeal by the plaintiff giving the following reasons:—

"We think that both the lower Courts are wrong in this case for the simple reason that they have found that the defendant did not carry out the agreement he made with his creditor for defraying the mortgage debt. Such an agreement could not be enforced as a contract *before it was completed by payment of* all *the instalments*, for the plaintiff cannot exercise the option under section 63 of the Contract Act of dispensing with or remitting in part the performance of the promise made to him, nor can he accept instead of it the satisfaction *which he* thought fit to agree to *until that satisfaction has been* completely paid to him."

And then they rely upon the English case *James* v. *David*(2). I am myself loath to rely upon English precedents on this question and I think that the decision could be supported upon the ground that the oral agreement to substitute a mortgage charge for Rs. 150 on the mortgaged property payable in five instalments in supersession of the mortgage charge for Rs. 175 payable at once on the registered mortgage bonds is not admissible in evidence as it varies the terms of the written registered mortgage contract. If, however, the Rs. 150 had been paid up regularly, there would have been a complete discharge and satisfaction of the mortgage debt which could be proved in accordance with the Indian decisions though the oral agreement could not be proved. In *Kattika Bapanamma* v. *Kattika Kristnamma*(3) BENSON and WALLIS, JJ., held that a subsequent oral agreement to modify the original registered agreement of maintenance could not be received in evidence though the payments made under the subsequent oral agreement might be proved as payments made towards the sums due under the original registered agreement. This case, in my opinion, is directly

(1) (1913) 18 I.C., 847. (2) (1793) 5 T.R., 141.
(3) (1907) I.L.R., 30 Mad., 231.

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in point. In *Srinivasaswami Aiyangar* v. *Athmarama Aiyar*(1) decided by MUNRO and PINHEY, JJ., it was held that 'section 92 (4) of the Evidence Act precludes evidence of an oral agreement to rescind a registered contract.' As the oral agreement in this case is stated to be in rescission of the original agreement, this case also is in point. In *Namagiri Lakshmi Ammal* v. *Srinivasa Ayyangar*(2) SESHAGIRI AYYAR and KUMARASWAMI SASTRI, JJ., state at page 271:

"Where, however, it is sought to prove that though the parties provided in the registered mortgage for performance in a particular way, *e.g.*, by *repayment of the debt in a particular manner, an agreement whereby a lesser amount was agreed to be taken in full* discharge or a *different period was fixed* would be a variation of the terms and would fall within section 92."

Sections 62 and 63 of the Contract Act must be read as subject to the provisions of section 92 of the Evidence Act so far as regards the admissibility in evidence of the new contract mentioned in section 62 or put forward as 'satisfaction' under section 63 if it was an oral agreement which was intended to extinguish or vary the written contract. The exception to proviso 4 to section 92 of the Evidence Act absolutely prohibits evidence about such oral agreement where the contract or grant or disposition of property has been *registered*. The agreement in the present case to remit was not a separate or separable transaction from the agreement to pay the Rs. 1,000 and Rs. 400 in a particular mode and on particular dates retaining the mortgage lien, and the whole agreement seems therefore to be one altering the written registered contract and inadmissible in evidence according to the dictum in *Namagiri Lakshmi Ammal* v. *Srinivasa Ayyangar*(2) above referred to. In the result I would allow the Second Appeal, and setting aside the decree of the lower Appellate Court, restore that of the District Munsif with costs of the appellant in this and the lower Appellate Court. Time for redemption will be extended till the expiry of three months from this date.

BAKEWELL, J.

BAKEWELL, J.—The plaint recites two registered mortgage deeds and certain payments made by the defendant, including a sum of Rs. 1,022-8-0 paid on the 7th July 1914. In his written statement the defendant pleaded an agreement between the parties in March 1914 that the defendant should pay to the plaintiff in one week's time Rs. 1,000, and Rs. 400 in three months, and that in case of default Rs. 100 should be paid in addition; that defendant was unable to pay Rs. 1,000 within the period fixed and accordingly paid this sum with interest for the time that had expired. The

(1) (1909) I.L.R., 32 Mad., 281. (2) (1915) 27 I.C., 269.

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plaintiff filed a reply in which he admitted an arrangement that the defendant should pay at once to the plaintiff Rs. 1,000 and afterwards Rs. 400 in three months, and that if the debt were not paid in three months Rs. 100 should be paid in addition, and also that he had accepted the sum of Rs. 1,000 and interest through his vakil; but he alleged that he instructed his vakil to inform the defendant that since the time for payment of the balance had expired it should be paid together with Rs. 100 in ten or fifteen days and that in case of default the whole amount should be paid, and that these terms were communicated to the first defendant. He also alleged that this arrangement was without consideration. By his pleading the plaintiff, therefore, admitted the agreement set up by the defendant, with the exception of the time of payment of Rs. 1,000, and this variation is immaterial because by his admitted acceptance of this sum with interest he waived the alleged default. It is not alleged in the pleadings that the alteration of the original contract was conditional upon performance of the new terms and the only substantial issue raised was as to the validity of this agreement of March 1914.

The agreement made between the parties therefore appears upon the face of the pleadings, and the plaintiff was not bound to prove the fact of the agreement or its terms (Evidence Act, section 58), and I think that section 92 of that Act which relates to the admission of evidence by the Court, therefore, does not apply to the case. The question, therefore, is whether the agreement is binding upon the plaintiff. Section 62 of the Contract Act provides that "if the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed." In the present case the plaintiff retained his security under his two mortgage deeds, and there was merely an *alteration in the amount* and time of payment thereunder. If a new agreement be substituted for an old one, under the terms of this section it must be a contract, that is an agreement enforceable by law [section 2 (*h*)], and under sections 10 and 25 consideration is necessary; but a mere agreement, that is, an accepted proposal [section 2 (*b*) and (*e*)], for rescission or alteration is sufficient to prevent the enforcement of the original contract, and consideration is not necessary to constitute an agreement (see *Abaji Sitaram* v *Trimbak Municipality*(1). The finding in *Manohur Koyal* v. *Thakur Das Naskar*(2) was that the creditor intended to accept cash and a bond in satisfaction of his contract and not a promise to give them, and therefore the alteration of the original contract was in effect conditional upon the perform-

(1) (1904) I.L.R., 28 Bom., 66. (2) (1888) I.L.R., 15 Calc., 319.

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ance of these terms, and with all respect I am unable to accept the dictum of the learned Judges that this section does not apply after breach of the contract. The basis of the English rule upon which they rely is that there must be consideration for a modification of a contract; before breach the consideration may be the giving up by each party of his rights thereunder, but after breach the rights of the parties are determined and there must be fresh consideration for an agreement to accept satisfaction for the right of action which has accrued (see Pollock and Mullah on the Indian Contract Act, third edition, page 278). The present case falls within the express terms of section 63, because the plaintiff remitted part of the sum due to him and extended the time for payment of the balance, and for such a promise no consideration is necessary [*Davis* v. *Cundaswami Mudali*(1)]. This section appears to be intended to amplify the provisions of the section immediately preceding it and to abrogate in express terms the rule of English law as to the discharge of an executed contract.

For these reasons, I am of opinion that the defendant is not bound to perform his original contract and that this appeal should be dismissed with costs.

Under section 98 (2) of the Civil Procedure Code the Second Appeal is dismissed with costs.

C. S. Venkatachariar for the appellant.

L. S. Veeraraghava Aiyar for the respondent.

WALLIS, C.J.

WALLIS, C.J.—A subsequent agreement to take less than is due under a registered mortgage is clearly an agreement modifying the terms of a written contract; and if it has to be proved, oral evidence is inadmissible under the fourth proviso to section 92 of the Indian Evidence Act, which is designed to protect parties to registered instruments from false cases of subsequent modification of the original contract being set up and supported by oral evidence. If the subsequent agreement in this case has to be proved, oral evidence is clearly inadmissible. The contention, however, is that it has not to be proved, as it is admitted in the pleadings. Part II of the Evidence Act deals with proof, and Chapter III, which is the first Chapter of Part II, with "facts which need not be proved." Under section 58 of this chapter, among the facts which need not be proved, are facts admitted in the pleadings, such as the subsequent agreement now in question. Evidence is tendered in proof of facts in issue;

(1) (1893) I.L.R., 19 Mad., 398.

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and no question of the admissibility of evidence, oral or documentary, arises when proof is dispensed with in consequence of an admission in the pleadings, either under section 58 or under the provisions of the Code of Civil Procedure. Where as in *Chenbasappa* v. *Lakshman Ramchandar*(1) the legislature had enacted, not only that an unstamped promissory note should not be receivable in evidence, but also that it should not be 'acted on,' it was held that the Court was precluded from acting on the note by giving a decree on it, even though execution was admitted. It has not been shown that in giving effect to the subsequent agreement admitted in the pleadings in the present case we should be contravening any express statutory provision such as that contained in the Stamp Act, and I do not think that in the present case we are at liberty to restrict the operation of the plain language of section 58 or of the Code of Civil Procedure by reference to considerations of alleged public policy. Here the subsequent agreement is one by a mortgagee to take less than was due to him under the terms of the mortgage, and I do not think we should be justified in refusing to give effect to the section, merely because, if the plaintiff had not admitted the subsequent agreement but put the defendant to the proof of it, there does not appear to be any admissible evidence by which it could have been proved. Further, I do not consider that in a case of this kind there is any public policy in refusing to give effect to the subsequent written agreement, because I think that the plaintiff's admission in the pleadings gets rid of the danger which it was intended to guard against by the prohibition of oral evidence in the fourth proviso to section 92. Different considerations might arise if the admission were that more than was provided for in the mortgage bond should be due under it. I would agree with BAKEWELL, J., and dismiss the appeal with costs.

OLDFIELD, J.

OLDFIELD, J.—With all due deference I cannot follow the judgment just delivered, so far as it lays down that acceptance of a statement in an unregistered writing as evidence of the modification of a registered contract is not contrary to public policy as tending to defeat the provisions of the Registration Act. Those provisions are, as I understand them, intended to

(1) (1894) I.L.R., 18 Bom., 569.

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facilitate the investigation of titles by compelling their registration and by fixing the offices, in which they must be registered and to which therefore investigation can be restricted. This intention would be frustrated, if the investigation had to be wider; and none the less so, if it had to be extended not only beyond those registration offices, but also to pleadings in the records of Courts. This, however, does not affect the validity of the broader ground of decision, which is available, the unqualified nature of the language used in section 58 of the Indian Evidence Act, and I therefore concur in dismissing the appeal with costs.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I agree with the conclusion at which the learned Chief Justice has arrived.

The suit is on two mortgages executed by the defendant to the plaintiff. In or about March 1914, plaintiff threatened to sue on the bonds. Then certain mediators intervened. An oral agreement was come to by which the plaintiff agreed to accept in full satisfaction Rs. 1,400, in case Rs. 1,000 was paid within a week's time and the other Rs. 400 within three months thereafter. There was a further stipulation that if the Rs. 400 was not paid within three months an additional sum of Rs. 100 was to be paid by the defendant. This settlement was not reduced to writing. The question for consideration is whether this arrangement is admissible in evidence. There is a further question whether the admission contained in the counter-statement of the plaintiff is not sufficient for the disposal of the case. On the first question I feel no doubt that the admission of this oral arrangement would contravene proviso 4 to section 92 of the Evidence Act. The effect of the arrangement is to alter the terms of the two documents in question and as the original documents were in writing and registered oral evidence of the arrangement is within the mischief of the exception to proviso 4. The decision of this Court in *Karampalli Unni Kurup* v. *Thekku Vittil Muthorakutti*(1) which was followed by the learned CHIEF JUSTICE and BENSON, J., in *Kattika Bapanamma* v. *Kattika Krishnamma*(2) covers this point. Sitting with KUMARASWAMI SASTRIYAR, J., I acted on the principle enunciated in the above decisions—*Namagiri Lakshmi Ammal* v. *Srinivasa Ayyangar*(3).

(1) (1903) I.L.R., 26 Mad., 195. (2) (1907) I.L.R., 30 Mad., 231.
(3) (1915) 27 I.C., 269.

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limited—Obligation on Court to pass a final decree for sale.] Order XXXIV, rule 5, Civil Procedure Code, recognizes only one method of payment, viz., payment *into Court* of the amount fixed by a preliminary mortgage decree; hence, on default of payment *into Court* within the time fixed by the decree, the Court is bound on the application of the decree-holder to pass a final decree for sale. *Jogandra Prasad Narain Singh* v. *Gouri Shankar Prasad Sahu* (1917) 2 P.L.J., 533, followed. *Semble.*—If any payment had been made *to the decree-holder* in the interval and *certified* by Court under Order XXI, rule 2, Civil Procedure Code, credit may be given for the same at the time of passing the final decree.

Singa Raja v. *Pethu Raja* ... ... (1919) I.L.R., 42 Mad., 61

CONTRACT ACT (IX OF 1872), SEC. 108:—*See* HYPOTHECATION OF MOVABLES.

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 195, SUB-SECTION 1 (*a*) AND SUB-SECTION (7)—*Indian Arms Act (XI of 1878), ss. 25 and 28—False information to District Magistrate—Sanction by District Magistrate—Application to Sessions Court to revoke sanction, whether competent—District Magistrate granting sanction, whether a Court.*] Where a District Magistrate receives information of illicit possession of arms and issues a search warrant in consequence of the information, he acts as a Court, though the information may have been given under section 28 and the search warrant issued under section 25 of the Indian Arms Act, and an application lies to the Sessions Court under section 195 (6) of the Criminal Procedure Code to revoke a sanction given by him for the prosecution of the informant for an offence under section 182 of the Indian Penal Code. *Sankaram Aiyar* v. *Sakkarappa Mudaliar* (1903) 2 Weir, 155, dissented from; *Clarke* v. *Brajendra Kishore Chowdhury* (1912), I.L.R., 39 Calc., 953 (P.C.), referred to.

Gaddam Panchalu Reddi v. *Sura Chinna Venkata Reddi* (1919) I.L.R., 42 Mad., 94

———, SEC., 195, CLAUSES (1) (*a*), (*b*), (*c*) AND CLAUSES (6) AND (7)—*Disobedience to an order of a public servant under section 144. Criminal Procedure Code—Public servant, whether a Court—Sanction for disobedience, whether a judicial or administrative order—Appeal.*] An order under section 144 of the Criminal Procedure Code is a judicial and not an administrative order and an order of a Sub-Magistrate refusing to sanction the prosecution of a person for an offence under section 188 of the Indian Penal Code in respect of an order made by him under section 144 of the Criminal Procedure Code is the order of a Court to which the appeal provisions in section 195 (7) of the Criminal Procedure Code are applicable. *Sankaram Aiyar* v. *Sakkarappa Mudaliar* (1903), 2 Weir, 155, considered.

Arunachalm Pillai v. *Ponnusami Pillai* ... ... (1919) I.L.R., 42 Mad., 64

———, SS. 254, 347—*Commitment to Sessions by Magistrate competent to try and adequately punish, legality of.*] The terms of section 347 of the Criminal Procedure Code are general and give a Magistrate who is empowered to commit a discretion in committing cases for trial which is not limited by section 254 so as to make it obligatory on him to try every case which he can adequately punish. 'Queen-Empress v. *Kayemullah Mandal* (1897) I.L.R., 24 Calc., 429, *King-Emperor*

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v. *Dharam Singh* (1906) 1 M.L.T., 61, and *Emperor* v. *Jagmohan* (1909) 11 Crl. L.J., 54, not followed. *In the matter of Chinnamarigadu* (1876) I.L.R., 1 Mad., 289 (F.B.), applied.

The Crown Prosecutor v. *Bhagavathi* ... ... (1919) I.L.R., 42 Mad., 88

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 439—*Acquittal—Reference to High Court by Sessions Judge—Interference by High Court, principles governing—Jurisdiction of High Court.*] The High Court has jurisdiction to interfere with acquittals, in revision under section 439 of the Criminal Procedure Code, but it will not exercise that jurisdiction on a Reference by a Sessions Judge except where serious injustice has been caused by error of law.

Mogal Beg, In re ... ... (1919) I.L.R., 42 Mad., 109

DEFENCE OF INDIA ACT (IV OF 1915), SEC. 2—*Rules framed under, creating offences—Time from which acts specified in rules are offences—Special tribunals, no creation of—Trial by Magistrates as under Criminal Procedure Code, validity of—Sanction for prosecution by Acting District Magistrate, validity of—General Clauses Act (X of 1897), sec. 17, cl. 1.*] Rules framed under section 2 of the Defence of India Act must be read as part of that section and are effective from the date of their publication and are not dependent on the remainder of the Act being brought into operation. *Held* accordingly that a person in the Presidency of Madras, who, in contravention of the rules, dissuades anyone from entering into His Majesty's Military Service, is guilty of an offence though the remainder of the Act had not been brought into operation in this province. *Held* further that in the absence of a notification creating special tribunals for the trial of such offences under the Defence of India Act, such offences are triable by the ordinary Magisterial Courts of the country in the manner provided by the Criminal Procedure Code as 'offences against other laws' within schedule II of the Code. By virtue of section 17, clause (1), of the General Clauses Act (X of 1897) an Acting District Magistrate is competent to sanction a prosecution in all cases where a District Magistrate can sanction the same.

Kandasami Pillai v. *Emperor* ... ... (1919) I.L.R., 42 Mad., 69

GENERAL CLAUSES ACT (X OF 1897), SEC. 17, CL. (1).—*See* DEFENCE OF INDIA ACT (IV OF 1915), SEC. 2.

HYPOTHECATION OF MOVABLES—*Bona fide purchaser without notice, from hypothecator, whether affected by hypothecation—Indian Contract Act (IX of 1872), sec. 108—A bona fide* purchaser without notice of the encumbrance, of *goods* hypothecated but left with the hypothecator, is not affected by the encumbrance and takes them free of it.

Narasiah v. *Venkataramiah* ... ... (1919) I.L.R., 42 Mad., 59

LEGAL PRACTITIONERS ACT (XVIII OF 1879), SEC. 12—*Pleader guilty of keeping a common gaming house—Suspension of pleader—Procedure for cases under sec. 12.*] The conviction of a pleader under section 6 of the Madras Towns Nuisances Act (III of 1889) for keeping a common gaming house 'implies a defect of character which unfits him to be a pleader,' within section 12 of the Legal Practitioners Act, for which the pleader may be suspended by the

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High Court. The procedure prescribed for enquiring into charges mentioned in sections 13 and 14 of the Legal Practitioners Act need not be pursued in cases coming under section 12 of the Act.

In the matter of a Second-grade Pleader ... (1919) I.L.R., 42 Mad. (F.B.), 111

LIMITATION ACT (IX OF 1908), SEC. 19 AND ARTICLE 181 :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 2 AND 47.

MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884), SS. 207 AND 246-A—*Non-compliance with notice to provide latrines in houses—Duty of Municipality to call upon owners to provide movable receptacles or itself construct latrines before prosecution, whether any.*] It is not obligatory on a Municipality under the Madras District Municipalities Act (IV of 1884) either to call upon a house-owner to provide movable receptacles under section 217 of the Act or to construct a latrine itself, before prosecuting the house-owner under section 264-A for non-compliance with a notice to construct a latrine. An owner cannot be convicted of not providing a latrine in the backyard of his house when there is no backyard to his house.

The Public Prosecutor v. Narayana Reddi and others ... (1919) I.L.R., 42 Mad., 57

MADRAS ESTATES LAND ACT (I OF 1898), SS. 3 (5), 192 AND 205 :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXII, R. 5.

MORTGAGE—*Decree for sale at the instance of prior mortgagee—Right of puisne mortgagee to apply for sale in execution for amount ascertained to be due to him—Subsequent suit by puisne mortgagee for sale—Sec. 47, Civil Procedure Code, whether a bar to suit.*] In a suit for sale by a prior mortgagee against the mortgagor and a puisne mortgagee, the decree not only directed the sale of the mortgaged properties for the amount found due to the prior mortgagee but also ascertained the amount due to the puisne mortgagee and ordered the payment to him of this amount out of the surplus sale-proceeds. *Held*: (1) that the puisne mortgagee was not entitled to execute the decree for the amount due to him, when no sale was held for the realisation of the amount due to the prior mortgagee, (2) that the remedy of the puisne mortgagee was a suit for sale, (3) that section 47, Civil Procedure Code, was no bar to the suit and (4) that the decree in the previous suit did not operate as *res judicata*.

Vedaeyasa Ayyar v. The Madura Hindu Labha Nidhi Co., Ltd. (1919) I.L.R., 42 Mad., 90

MUNICIPALITIES :—*See* MADRAS DISTRICT MUNICIPALITIES ACT.

REGISTRATION ACT (XVI OF 1908), SEC. 41 (2)—*Enquiry before a Sub-Registrar regarding a disputed will—Deposition of witnesses, admissibility of, under section 33 of the Evidence Act.*] The depositions of witnesses (since deceased) examined at an enquiry held by a Sub-Registrar under section 41 (2) of the Indian Registration Act regarding the genuineness of a will, at which the opposing parties had opportunity of cross-examination, are admissible in evidence under section 33 of the Evidence Act in a subsequent suit raising the same question between the same parties. It is not necessary that the 'first proceeding' referred in section 33 of the Evidence Act should be a judicial proceeding.

Lanka Lakshmanna v. Lanka Vardhanamma ... (1919) I.L.R., 42 Mad., 108

The contention of the learned vakil for the respondent that the admission would not vary the document is unsupportable. The cases he drew our attention to all relate to actual payments under documents, which discharged the liability thereunder. An agreement which in future will have the effect of putting an end to the liability must be regarded as a subsequent agreement modifying the original contract. I am in entire agreement with the view enunciated by Mr. Justice BODDAM in *Gosetu Subba Row v. Varigonda Narasimham*(1). The learned Judge says referring to proviso 4 of section 92—"The words of the proviso are perfectly clear and in my opinion apply to any agreement whether executory or executed." I am unable to see any justification in principle for not applying the proviso to all cases other than those in which there has been a perfected discharge by payment. I agree with SADASIVA AYYAR, J., on this question.

On the second question I feel doubts whether section 58 and the chapter in which it appears should not be restricted to admissions in pleadings which do not contravene the express provisions as to the mode of proof contained in the other sections of the Evidence Act. At the same time, I realize the force of the learned CHIEF JUSTICE's observation that the language of the section takes the facts admitted in the pleadings out of the category of those that need be proved. The rule of law enunciated in *Slattorie v. Pooley*(2) which accepted oral admissions of every kind as proving documents has no doubt been departed from in India—see section 22 of the Evidence Act and sections 59 and 65 (*b*). It is open to argument that admissions in pleadings are in the nature of secondary evidence and that the prohibition in section 22 applies equally to pleadings as well. Otherwise parties may compel a court by statements in pleadings to pronounce judgment upon evidence which is not legally admissible. There is the further fact that, notwithstanding the admission in the pleadings, the Court may call upon the party to prove a fact. In such cases, the proof must be restricted to the modes mentioned in the Act. It is therefore with hesitation that I agree in the conclusion arrived at by the learned CHIEF JUSTICE on this point.

K.R.

(1) (1904) I.L.R., 27 Mad., 368. (2) (1840) 6 M. & W., 664.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

1918. July 30 and 31, August 6.

SUBBALAKSHMI AMMAL (FIRST DEFENDANT) APPELLANT,

v.

RAMANUJAM CHETTY AND FOUR OTHERS (PLAINTIFF 2 AND 3 DEFENDANTS 2 TO 4), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), ss. 2, 47 and 96, O. XXXIV, r. 5, cl. (2)—Suit for sale—Preliminary decree—Final decree, application for—Order of dismissal—Appeal, whether competent—Limitation Act (IX of 1908), sec. 19 and art. 181, applicability of—Acknowledgment, sufficiency of.

An order dismissing an application for a final decree in a suit for sale on a mortgage, is not an order under section 47 of the Civil Procedure Code but a decree in the suit and is appealable as a decree under section 96 of the Code.

Where a mortgagee, having obtained a preliminary decree for sale, applied for a final decree more than three years after the date fixed for payment in the former decree, but it appeared that, in a previous application by the decree-holder for sale, the mortgagor applied for adjournment of the sale stating in his petition that he had asked the decree-holder for an extension of time to pay the decree amount and that the latter had consented thereto.

Held (on objection being taken that the application was barred by limitation) that article 181 and section 19 of the Limitation Act were applicable to an application for final decree in a mortgage suit; and that there was sufficient acknowledgment within the terms of section 19 of the Act.

The right to take legal steps for enforcing a right need not be expressly acknowledged, if the right itself is acknowledged.

Sukhamoni v. *Ishan Chunder Roy* (1889) I.L.R., 25 Calc., 844 (P.C.), applied, *Venkatrav Bapu* v. *Bijesingh Vithalsingh* (1886) I.L.R., 10 Bom., 108, followed.

APPEAL against the order of T. M. FRENCH, Temporary Subordinate Judge of Vellore in Appeal Suit No. 22 of 1917 preferred against the order of RAVI VARMA RAJA, District Munsif of Tiruppattur, in I.A. No. 908 of 1914, in O.S. No. 1240 of 1910.

The respondent obtained a preliminary decree for sale on the 27th October 1910, against the appellant and some others; the decree amount was payable by the 27th April 1911. He applied for execution of the decree by sale of the mortgaged property but had not previously obtained a final decree in the

* Appeal Against Appellate Order No. 123 of 1917.

suit. The Court directed him to apply for a final decree, and he accordingly filed the present application, on the 16th September 1914, for a final decree in the suit. The appellant pleaded that the application was barred by limitation under article 181 of the Limitation Act. The respondent relied on a petition filed by the appellant (M.P. No. 178 of 1912) as furnishing a valid acknowledgment under section 19 of the Act and as saving the bar of limitation. The petition referred to was filed by the appellant in the course of the previous application in execution filed by the decree-holder, and prayed for an adjournment of the sale in Court auction in pursuance of the application for execution filed by the decree holder as above mentioned. The petition of the mortgagor was in these terms:—

"Petition put in respectfully by the first defendant.—In the said suit, date of sale in auction has been fixed for the 17th instant of this month. I have applied for the extension of time till the re-opening of the Court to pay to the plaintiff the decree amount. The plaintiff has also consented. I therefore pray that the Court may be pleased to pass orders upon this petition only directing that the auction to be held on the 17th instant may be stopped and that the sale may be adjourned till the re-opening of the Court without any further sale proclamation.

(——) Mark of Subbalakshmi Ammal, 16-4-1912."

The District Munsif dismissed the respondent's application for obtaining a final decree as barred by limitation. On appeal the Subordinate Judge held that the application was not barred by limitation and directed the passing of a final decree. The first defendant preferred this Civil Miscellaneous Second Appeal against the decree and judgment of the Subordinate Judge.

M. Patanjali Sastri for the appellant.

C. V. Anantakrishna Ayyar for the respondent.

The JUDGMENT of the Court was delivered by—

KRISHNAN, J.

KRISHNAN, J.—The two questions raised for our decision in this case are (1) whether an appeal lay to the lower Appellate Court and (2) whether M.P. No. 178 of 1912 contains a sufficient acknowledgment under section 19 of the Limitation Act to give a fresh starting point for first respondent's application.

The first plaintiff sued to recover the amount due to him under a simple mortgage bond by sale of the property mortgaged.

SUBBA-LAKSHMI AMMAL v. RAMANUJAM CHETTY.

KRISHNAN, J.

On 27th October 1910 a preliminary mortgage decree was passed in his favour giving defendants time till 27th April 1911 to pay the amount found due. Money was not so paid and the present application from which the Civil Miscellaneous Second Appeal before us arises was filed by the first respondent on 16th September 1914 under Order XXXIV, rule 5, clause (2) for a final decree for sale. The first Court dismissed the application as barred by limitation under Article 181 of the Limitation Act. On appeal the lower Appellate Court reversed that order and has passed a final decree. The first defendant has appealed to us against that decision.

On the first question raised, the appellant is right in his contention that the order cannot be treated as one under section 47, Civil Procedure Code, in execution of the preliminary decree. It is an order in the suit itself. The effect of the order is to dismiss the plaintiffs' suit so far as it prayed for the realization of the mortgage money by sale of the mortgaged property. It is a final adjudication on that part of the plaintiffs' case so far as the Munsifs' Court is concerned and therefore falls within the definition of decree under section 2, Civil Procedure Code. A formal decree was drawn up by the Munsif dismissing the petition but it did not expressly dismiss the suit for sale. This, however, seems immaterial as the effect of the order was to so dismiss. In *Suppu Nayakan* v. *Perumal Chetti*(1) this Court held that an order declaring that a suit had abated because the legal representative of the deceased defendant had not been brought on record in time was a decree and appealable as such though no formal decree dismissing the suit had been drawn up. The principle of that decision applies to the present case. If the plaintiffs' application had been allowed by the Munsif and a final decree passed, there can be no doubt that an appeal would have lain against it. It would be an anomalous position if we were to hold that an appeal does not lie where the application is refused. The ruling of the Full Bench in *Madho Ram* v. *Withal Singh*(2) shows that appeals are allowed in that province from such orders, as appeals from decrees in suits. We think that is the right view and that the appeal to the

(1) (1916) 30 M.L.J., 486. (2) (1899) I.L.R., 26 All., 21.

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KRISHNAN, J.

lower Appellate Court was a competent one under section 96 of the Civil Procedure Code.

On the question of limitation it is now settled that article 181 applies to an application under Order XXXIV, rule 5, clause (2) [see *Nimmala Mahankali* v. *Kallakuri Seetharamiah*(1)] and it is clear that section 19 of the Limitation Act also applies. The question then to be decided is whether there is a sufficient acknowledgment in the present case. M.P. No. 178 of 1912, relied on by the plaintiffs as containing the necessary acknowledgment, was put in by the mortgagor for obtaining an adjournment of the sale of the mortgaged properties in Court auction. It should be explained that at one stage of the proceedings in this suit the Court had treated the first decree as an executable decree and had ordered sale of the properties. It was during the time that this view was in force that M.P. No. 178 of 1912 was filed. Subsequently the Court ruled that a final decree should be obtained before execution and that order has now become final between the parties so that no question about the executability of the first decree itself having become *res-judicata*, arises. In M.P. No. 178 of 1912 the first defendant says "The date of sale in auction has been fixed for the 17th of this month. I have applied for extension of time till the re-opening of the Court to pay to the plaintiff the decree amount. Plaintiff has also consented. I pray that the Court may be pleased to pass orders directing that the auction to be held on the 17th instant may be stopped and the sale may be adjourned till the re-opening of the Court without issuing any further sale proclamation." There can be no doubt that the mortgagor already acknowledges by it plaintiffs' right to the decree amount and their right to realize it by sale of the suit properties. Appellant's vakil, however, urges that such an acknowledgment is not sufficient to save the present application and that the acknowledgment must expressly be of the right to apply for a final decree and he relies on *Andiappa Chetty* v. *Devarajulu Naidu*(2). Under section 19, the acknowledgment of liability must be in respect of the right in respect to which the application is made. What then is that right in the present case? Is it the right to apply for a final decree as appellant contends or the right to realize the

(1) (1917) 32 M.L.J., 455. (2) (1911) 21 M.L.J., 1024.

SUBBA-LAKSHMI AMMAL v. RAMANUJAM CHETTY.

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decree amount by sale of the mortgaged properties through Court as the respondent argues? The substantial right the plaintiff has is the latter, his application to Court is only for obtaining a final decree to enable him to enforce that right. The Privy Council has laid down in *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy*(1) that

"it is not required that an acknowledgment within the statute shall specify every legal consequence of the thing acknowledged."

Similarly the right to take legal steps for enforcing the right itself need not be expressly acknowledged if the right itself is acknowledged. The language of section 19 is clear on the point that the right itself should be acknowledged and not the right to apply. In *Venkatrav Bapu* v. *Bijesingh Vithalsingh*(2) an application for the postponement of a sale under a mortgage decree, which said the mortgagor would pay the amount of the decree, was held to contain a sufficient acknowledgment to give a fresh starting point for the plaintiff's subsequent application to execute the decree. The only difference between that case and the present one is that here the application is to get a final decree before applying for execution. This does not seem to be a material difference in this connexion. The acknowledgment of plaintiffs' right to sell the properties in Court auction involves an acknowledgment of their right to get the final decree for the purpose.

We think the Subordinate Judge is right in holding that there was a sufficient acknowledgment in this case. The respondent's vakil has not attempted to support the Subordinate Judge's view on the question of waiver and on the question of previous execution applications giving fresh starting points for limitation under article 181, which are obviously wrong. His decree is, however, right and this appeal must be dismissed with costs.

K.R.

(1) (1889) I.L.R., 25 Calc., 844 at p. 851 (P.C.). (2) (1886) I.L.R., 10 Bom., 108.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1918, August 6.

THE PUBLIC PROSECUTOR (APPELLANT),

v.

NARAYANA REDDI AND OTHERS (ACCUSED), RESPONDENTS.*

Madras District Municipalities Act (IV of 1884), ss. 207 and 264-A—Non-compliance with notice to provide latrines in houses—Duty of Municipality to call upon owners to provide movable receptacles or itself construct latrines before prosecution, whether any.

It is not obligatory on a Municipality under the Madras District Municipalities Act (IV of 1884) either to call upon a house-owner to provide movable receptacles under section 217 of the Act or to construct a latrine itself, before prosecuting the house-owner under section 264-A for non-compliance with a notice to construct a latrine.

An owner cannot be convicted of not providing a latrine in the backyard of his house when there is no backyard to his house.

APPEAL under section 417 of the Code of Criminal Procedure preferred against the acquittal of the accused by the Court of the Bench of Magistrates of Tirupati in Bench Cases Nos. 414 to 452 of 1917.

The Municipality of Tirupati gave notice under section 207 of the Madras District Municipalities Act (IV of 1884) to owners of certain houses to provide suitable latrines at the backyards of their houses. Some of them had backyards and some not. On non-compliance with the notice, the Municipality prosecuted all of them under section 264-A of the Act. The Bench of Magistrates acquitted all the accused. The Public Prosecutor preferred these appeals against the order of acquittal.

The arguments appear from the judgment.

The Public Prosecutor for the appellant.

A. Ramachandra Ayyar for the respondent.

The JUDGMENT of the Court was delivered by—

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The notices so far as they require persons having no backyards to their houses to provide latrines in

* Criminal Appeals Nos. 146 to 184 of 1918.

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SADASIVA AYYAR, J.

their non-existing backyards are clearly bad and we dismiss the appeals in which the respondents are owners of houses having no backyards. Criminal Appeal No. 176 of 1918 is also dismissed, the respondent being dead.

It appears that the respondents in the twelve appeals Nos. 158, 164 to 167, 171, 174, 175, 177, 181, 182 and 184 of 1918 do own backyards to their houses and could have complied with the notices issued under section 207 of the District Municipalities Act (IV of 1884) to provide latrines in their several backyards.

We are unable to follow the reasoning of the majority of the Bench that the municipal council ought to have called upon the accused to provide movable receptacles under section 217 of the Act before proceeding to take action under section 264-A. We are also unable to accept the argument of the respondents' learned vakil that the municipal council ought to have constructed the latrines themselves under section 264 (1) before prosecuting under section 264 (*a*) for failure to comply with the notice under section 207. We are unable to find any such duty imposed by the Act on the council as a necessary condition precedent to the institution of prosecutions under section 264 (*a*).

We, therefore, convict the respondents in these twelve appeals and impose a fine of one rupee on each of them, dismissing the other appeals.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

NARASIAH (PLAINTIFF), APPELLANT,

v.

VENKATARAMIAH (DEFENDANT No. 3), RESPONDENT.*

1918, August 13 and 14.

Hypothecation of movables—Bona fide *purchaser without notice, from hypothecator, whether affected by hypothecation—Indian Contract Act (IX of 1872), sec.* 108.

A *bona fide* purchaser without notice of the encumbrance, of *goods* hypothecated but left with the hypothecator, is not affected by the encumbrance and takes them free of it.

SECOND APPEAL against the decree of J. W. HUGHES, the District Judge of Cuddapah, in Appeal No. 71 of 1916, preferred against the decree of A. S. VIRASWAMI AYYAR, the District Munsif of Nandalur, in Original Suit No. 153 of 1915.

This was a suit to recover Rs. 126 due on a mortgage of certain immovable property and two bulls, executed by the deceased brothers of the first defendant, a minor. First defendant's guardian did not contest the suit and the third defendant contended that he was a *bona fide* purchaser of one of the bulls for value from a person to whom the first defendant's guardian had sold them, that he was not aware of the mortgage and that therefore no mortgage decree should be passed regarding the bull. Though the District Munsif found that the third defendant was a *bona fide* purchaser without notice, he gave a decree for the sale of the bull also. On appeal by the third defendant, the District Judge, upholding the contentions of the third defendant, dismissed the suit so far as the third defendant and his bull were concerned. The plaintiff preferred this second appeal.

E. Duraiswami Ayyar and *C. Bakthavatsalu Nayudu* for the appellant.

K. Koti Reddi for the respondent.

* Second Appeal No. 1437 of 1917.

NARASIAH v. VENKATA-RAMIAH.

PHILLIPS, J.

The JUDGMENT of the Court was delivered by—

PHILLIPS, J.—Plaintiff obtained a mortgage of certain properties including a bull, with which alone we are concerned here. The bull was left in the mortgagor's possession and was eventually purchased by third defendant from the mortgagor's vendee. The hypothecation of movables has been recognized in Indian Courts —vide *Shyam Soonder* v. *Cheita and another* (1) and *Shrish Chandra Roy* v. *Mungri Bema* (2) but that is not the question for consideration now. We have to determine whether a *bona fide* purchaser for value of hypothecated goods without notice of the hypothecation is bound by it. There is no direct authority on the point, nor is hypothecation of movables recognized by any statute. We are therefore thrown back upon principles of equity and justice. Under section 108 of the Indian Contract Act a person in possession of movables, although not the owner, can pass the property in the goods to an innocent purchaser. Much more then would it appear that the real owner could pass the property, which was only subject to an undisclosed hypothecation. Even if we are to apply principles of English law on this question, which is perhaps doubtful, we find that it has been held that goods included in a bill of sale and left with the original owner can be purchased in the ordinary course of business by a *bona fide* purchaser. *National Mercantile Bank* v. *Hampson*(3). When goods are left in the possession of the mortgagor, a wide door is opened for fraud, and when the equities between the innocent purchaser and the mortgagee have to be weighed, the preponderance must be given to the purchaser, for the mortgagee has by his omission to secure possession of the goods facilitated the commission of the fraud. In this view we think that a *bona fide* purchaser of hypothecated goods without notice of the encumbrance takes the goods free of it.

The second appeal is dismissed with costs.

N.R.

(1) (1871) 3 N.W.P., H.C.R., 71. (2) (1904) 9 C.W.N., 14.
(3) (1880) 5 Q.B.D., 177.

APPELLATE CIVIL.

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

SINGA RAJA AND FIVE OTHERS (DEFENDANTS NOS. 1 TO 6), APPELLANTS,

1918, August 16.

v.

PETHU RAJA AND THREE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 7 TO 9), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Preliminary mortgage decree for sale—Non-payment into Court of decree amount within the time limited—Obligation on Court to pass a final decree for sale.

Order XXXIV, rule 5, Civil Procedure Code, recognizes only one method of payment, viz., payment *into Court* of the amount fixed by a preliminary mortgage decree; hence, on default of payment *into Court* within the time fixed by the decree, the Court is bound on the application of the decree-holder to pass a final decree for sale.

Jogandra Prasad Narain Singh v. *Gouri Shankar Prasad Sahu* (1917) 2 P.L.J., 533, followed.

Semble.—If any payment had been made *to the decree-holder* in the interval and *certified* by Court under Order XXI, rule 2, Civil Procedure Code, credit may be given for the same at the time of passing the final decree.

APPEAL against the decree of T. SRINIVASA AYYANGAR, the Temporary Subordinate Judge of Rāmnād at Madura, in Original Suit No. 59 of 1916.

Plaintiff obtained on 27th September 1916 a preliminary mortgage decree for sale for Rs. 5,800, which fixed 27th March 1917 as the time for payment. Alleging non-payment of the decree amount within the time, the decree-holder applied on 25th June 1917 for a final decree for sale of the mortgaged properties. The third defendant pleaded a settlement of the decree amount at Rs. 5,100 and a payment to the plaintiff of Rs. 3,000 on 13th February 1917. Finding that neither the settlement nor the payment was reported to the Court, the Subordinate Judge disbelieved the plea and passed a final decree for sale for the entire amount of the decree. The judgment-debtors (defendants Nos. 1 to 6) preferred this appeal.

* Appeal No. 403 of 1917.

SINGA RAJA v. PETHU RAJA.

T. M. Ramaswami Ayyar for appellants.

A. S. Viswanatha Ayyar for first respondent.

The JUDGMENT of the Court was delivered by—

WALLIS, C.J.

WALLIS, C.J.—This is an appeal from the decree for sale in a mortgage suit passed by the Subordinate Judge of Rāmnād. The plaintiff obtained a preliminary decree on the 27th September 1916 and the appellant, the third defendant, complains that the Subordinate Judge at the time of passing the decree for sale refused to inquire into and recognize an alleged settlement of the decree out of Court on the 13th February 1917. The application for the decree for sale was made on the 25th June 1917 and therefore even if the procedure in Order XXI, rule 2, Civil Procedure Code, were applicable the defendant was out of time and was too late to have the adjustment recorded. However, we think that the appeal fails on a wider ground. The scheme of the Code appears to us to be that, if the amount made payable in the preliminary decree is not paid into Court within the time limited, then the decree for sale is to be made. In this respect the provisions of Order XXXIV differ from section 89 of the Transfer of Property Act, which provided for payment to the plaintiff or into Court. Order XXXIV, rule 2, clause (c) and rule 5, Civil Procedure Code, provide that "where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10" the Court is to pass a decree ordering the plaintiff to deliver up the documents and to re-transfer the mortgaged property and, if necessary, to put the defendant in possession. But sub-rule 2 says where such payment is not so made, that is to say, where such payment is not made into Court, the Court shall pass a decree ordering the sale of the mortgaged property or a sufficient part thereof. Forms of mortgage decrees are given in Appendix D and forms Nos. 7 and 8 are drawn up in the same way. Form No. 7 says that if the defendants pay into Court the sum declared due on account of principal, interest and costs, the plaintiff is to deliver up the documents, etc., and the effect of clause (3) is that, if the defendant pays the said sum as aforesaid (that is, into Court) the mortgagor may apply, etc. Therefore we are of opinion that the scheme of the Code, so far

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as mortgage decrees are concerned, is that if the amount due under the preliminary decree has not been paid before the appointed day, a decree for sale is to be made and the machinery for sale is to be set in motion. This decision is in accordance with the decision of the Calcutta High Court in *Piran Bibi* v. *Jitendriya*(1). It may be that if, between the passing of the preliminary decree and the passing of the decree for sale, the defendant obtains a certificate under the provisions of Order XXI, rule 2, he can take advantage of that to reduce the amount for which the property is to be sold and the decision will be the same as if at the time when the decree for sale was being made he came forward and paid that amount into Court. We do not think that the decision in *Jogandra Prasad Narain Singh* v. *Gouri Shankar Prasad Sahu*(2) amounts to more than this.

The provisions of the Code are imperative that if the money is not paid into Court within the time limited, then there is to be a decree for sale. These provisions were advisedly inserted in modification of the corresponding provisions of section 89 of the Transfer of Property Act, and we are bound to give effect to them. On this ground the appeal fails and must be dismissed with costs.

N.R.

(1) (1917) 25 C.L.J., 553. (2) (1917) 2 P.L.J., 533.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1918, July 29, August 5, 8 and 20.

ARUNACHALAM PILLAI (SECOND RESPONDENT), PETITIONER,

v.

PONNUSAMI PILLAI (PETITIONER), RESPONDENT.*

Criminal Procedure Code (Act V of 1898) sec. 195, clause (1) (a), (b), (c) and clauses (6) and (7)—Disobedience to an order of a public servant under section 144, Criminal Procedure Code—Public servant, whether a Court—Sanction for disobedience, whether a judicial or administrative order—Appeal.

An order under section 144 of the Criminal Procedure Code is a judicial and not an administrative order and an order of a Sub-Magistrate refusing to sanction the prosecution of a person for an offence under section 188 of the Indian Penal Code in respect of an order made by him under section 144 of the Criminal Procedure Code is the order of a Court to which the appeal provisions in section 195 (7) of the Criminal Procedure Code are applicable.

Sankaram Aiyar v. *Sakkarappa Mudaliar* (1903) 2 Weir, 155, considered.

PETITIONS under section 195, clauses (6) and (7), Criminal Procedure Code, and under section 195, clauses (6) and (7) and sections 436 and 439, Criminal Procedure Code, against the Proceedings D. Dis. No. 24 of 1918, dated the 12th day of January 1918, passed by E. S. LLOYD, the District Magistrate of Trichinopoly, against the Proceedings of R. KRISHNASWAMI, the Stationary Second-class Magistrate of Trichinopoly, dated the 17th July 1917, in Miscellaneous Case No. 10 of 1917; and against the order of J. G. BURN, the Sessions Judge of Trichinopoly, dated the 1st March 1918, in Criminal Miscellaneous Petition No. 10 of 1918, filed against the said order of the District Magistrate.

The facts are stated in the judgment of NAPIER, J.

C. Rajagopala Ayyangar for the petitioner.

R. V. Seshagiri Rao for the respondent.

E. R. Osborne, Acting Public Prosecutor and *C. Narasimha Achariar* for the Crown.

NAPIER, J.

NAPIER, J.—These are two petitions, one to revise an order of the District Magistrate of Trichinopoly of the 12th January

* Criminal Miscellaneous Petitions Nos. 83 and 399 of 1918.

1918, the other to revise the order of the Sessions Judge of Trichinopoly of the 1st March 1918. The order of the District Magistrate was made on appeal from an order of the Stationary Sub-Magistrate of Trichinopoly refusing to sanction the prosecution of the present petitioner and another for an offence under section 188, Indian Penal Code. The petitions were the result of an order of the Stationary Sub-Magistrate passed on the 8th May 1917 under section 144, Criminal Procedure Code, restraining this petitioner and others from taking the *Pidari* deity in procession through a lane claimed to be the private property of the present counter-petitioner. This order was alleged to have been violated and hence the petition for sanction.

The Stationary Sub-Magistrate declined to grant the sanction on two grounds—one, that the order should not have been passed and that therefore disobedience cannot be considered to be an offence; the other, that the petition for sanction was the outcome of previously existing spite. The present counter-petitioner appealed to the District Magistrate of Trichinopoly, who decided that the order having been passed, rightly or wrongly, disobedience to it was an offence, and granted the sanction. This is one of the orders appealed against. The petitioner appealed from that decision to the Sessions Judge who passed the following order:—

"The order appears to have been made by the District Magistrate as an administrative officer, and I think, therefore that no appeal lies to this Court. Petition is dismissed."

This is the other order appealed against. The petitioner before us first argued that the order of the District Magistrate granting sanction against him was passed by him as a public servant, that no appeal lay to the Sessions Judge and that therefore he was entitled to come to the High Court. On this petition it is, in our opinion, enough to say that if the order was passed by the District Magistrate administratively, the High Court has no appellate or revisional power. We asked the learned vakil to invite our attention to any provision either in the Government of India Act or the Letters Patent or in the Criminal Procedure Code which makes a public servant *qua* such servant and not *qua* Courts subordinate to the authority of the High Court as required by section 195,

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NAPIER, J.

sub-section 6, and he was unable to show us any. We, therefore, dismiss this petition.

On the second petition, by way of what is for convenience called an appeal from the order of the Sessions Judge, the petitioner took up the opposite position, namely, that the order was one of a Court and that therefore the Sessions Judge was in error in declining to exercise his jurisdiction. We have therefore to decide whether the (appeal) provisions in section 195, sub-section (7), Criminal Procedure Code, apply to this order. We are clear that the Stationary Sub-Magistrate in passing this order refusing sanction was acting judicially, for the original order which it was alleged was disobeyed was an order passed under section 144, Criminal Procedure Code. These orders have always been treated as judicial orders and we cannot separate the authority issuing the order from the authority granting sanction for disobedience of it.

But the more difficult question is whether on the language of section 195, Criminal Procedure Code, even though the order was passed by a Court, the 'appeal' lies to another Court. Section 195, sub-section (1), deals with three classes of offences. The first group are sections 172 to 188 of the Indian Penal Code, which are classed in Chapter X of the Code under the heading "Of contempts of the lawful authority of public servants"; the second group refers to section 193 and others which are classed in the Code under the heading "Of false evidence and offences against public justice;" and the third group contains the sections in Chapter XVIII of the Code and classed "Of offences relating to documents and to trade and property marks". With regard to the first group, section 195, Criminal Procedure Code, provides that the Court shall not take cognizance of any such offence, except with the previous sanction or on the complaint, of the public servant or of some public servant to whom he is subordinate. With regard to the second group, the provision is that no Court shall take cognizance of any such offence 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, etc. With reference to the third group, it is provided that no Court shall take cognizance of any such offence, when such offence has been committed by a party to any proceeding in any Court in respect of a document

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produced or given in evidence in such proceeding, except with the previous sanction or on the complaint of such Court, etc. With reference to the second and third groups, the section provides that the term 'Court' means Civil, Revenue or Criminal Court, but not a Registrar. The appeal in all cases is provided for by sub-section 6.

"Any sanction given or refused may be revoked or granted by any authority to which the authority giving or refusing it is subordinate.

Then sub-section 7 provides:

"For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lies".

The question is whether the word 'Court' in sub-section 7 refers to 'Court' mentioned in sub-section (1), clauses (b) and (c) only or whether it applies also to order made by a public servant as a Court under sub-section (1), clause (a). The Sessions Judge took the former view following a decision of this Court in *Sankaram Aiyar* v. *Sakkarappa Mudaliar*(1). That decision is however no authority for his view, as the High Court held that the order was not one of a Court. It is of course clear that the offences grouped in clause (a) include disobedience of orders of Courts, such as contempts of summonses issued by Courts (section 172, Indian Penal Code), refusal to produce documents before Courts (section 175), refusal to take an oath or affirmation before a Court (section 178), giving false information to Court (section 181), obstructing sale of property offered for sale by the lawful authority of the Court (section 184) and disobeying a direction to abstain from a certain act promulgated by a Court under section 188, which is the present case. There can be no doubt that the various summonses and orders referred to in those sections when issued by a Magistrate or a Judge are issued judicially, and, as pointed out above, it surely must follow from that that the sanction to prosecute for disobedience of such sammons or order must be issued by the same authority, namely, the Court.

But this still leaves the other question open, namely, whether sub-section 7 applies to such sanction. I am of opinion that

(1) (1903) 2 Weir, 155.

ARUNA-CHALAM PILLAI v. PONNUSAMI PILLAI.

NAPIER, J.

the word 'Court' in sub-section 7 is not confined to clauses (*b*) and (*c*). The legislature must have been aware that offence against the authority of the Courts were covered by Chapter X of the Indian Penal Code, and there is of course no reason why any difference should be made with regard to appeals between offences against the lawful authority of Courts and offences against public justice in relation to proceedings in Courts. The word 'public servant' was obviously used in clause (*a*), because it is used in the Penal Code throughout the provisions in Chapter X, and 'public servant' is defined in section 21 of the Code as including Judges and Magistrates. Sub-section 7 is, I think, enacted for the purpose of explaining what is subordination within the meaning of sub-section 6, where the authority giving or refusing sanction is a Court, and does not purport to confine its operation to clauses (*b*) and (*c*) of sub-section (1), nor do I think that the legislature had that intention. It seems to me that the word 'Court' was used in clauses (*b*) and (*c*), because it was intended to limit the operation of those clauses to proceedings in relation to Courts, thereby constituting a narrower class than is dealt with in clause (*a*), and I see no reason why because a narrower class of cases confined to Courts only is provided for in those two clauses, the word 'Court' in sub-section 7 should be confined to those two groups and not read as applicable to the wider group in clause (*a*) which applies to both Courts and other public servants, both of whom are clearly covered by the word 'authority' in sub-section 6.

In the result, I hold that where the sanction is given with reference to an offence against a Court, the appeal is governed by sub-section 7. The order of the Sessions Judge is set aside and he is directed to take the petition on his file and dispose of it according to law.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I agree entirely. It is not essential for the decision of this case to express an opinion on the question whether the particular order of the Sub-Magistrate mentioned in *Sankaram Aiyar* v. *Sakkarappa Mudaliar*(1) was rightly held by this Court on the facts of that case to have been passed by that public servant, not as a criminal court but as a public servant who was not a Court. It is however necessary

(1) (1903) 2 Weir, 155.

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SADASIVA AYYAR, J.

to guard myself from subscribing to the opinion suggested by a sentence in that decision, that opinion being that a Sub-Magistrate would act as a Court, only when he grants sanction for offences mentioned in section 195, clauses (*b*) and (*c*), that he could never act as a Court when he grants sanction for any of the offences mentioned in clause (*a*) and that therefore sub-section (7) could never apply to a sanction given by a Sub-Magistrate for such an offence. N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

KANDASAMI PILLAI AND ANOTHER (ACCUSED), PETITIONERS,*

v.

EMPEROR.

1918. July 17, Aug. 12 and 23.

Defence of India Act (IV of 1915), sec. 2—Rules framed under—creating offences—Time from which acts specified in rules are offences—Special tribunals, no creation of—Trial by Magistrates as under Criminal Procedure Code, validity of—Sanction for prosecution by Acting District Magistrate, validity of—General Clauses Act (X of 1897), sec. 17, Cl. 1.

Rules framed under section 2 of the Defence of India Act must be read as part of that section and are effective from the date of their publication and are not dependent on the remainder of the Act being brought into operation.

Held accordingly that a person in the Presidency of Madras, who, in contravention of the rules, dissuades any one from entering into His Majesty's Military Service, is guilty of an offence though the remainder of the Act had not been brought into operation in this province.

Held further that in the absence of a notification creating special tribunals for the trial of such offences under the Defence of India Act, such offences are triable by the ordinary Magisterial Courts of the country in the manner provided by the Criminal Procedure Code as 'offences against other laws' within schedule II of the Code.

By virtue of section 17, clause 1, of the General Clauses Act (X of 1897) an Acting District Magistrate is competent to sanction a prosecution in all cases where a District Magistrate can sanction the same.

PETITION under sections 435 and 439 of the Code of Criminal Procedure against the judgment of F. A. COLERIDGE, the

* Criminal Revision Case No. 815 of 1917 (Criminal Revision Petition No. 660 of 1917).

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Sessions Judge of Madura, dated 27th July 1917, in Criminal Appeal No. 31 of 1917, preferred against the judgment of P.C.C. PANDIYAN, the Subdivisional First-class Magistrate of Melur, dated 11th July 1917, in Calendar Case No. 41 of 1916.

The accused in this case were charged and convicted by the First-class Magistrate of Melur in the Madura District under rule 29 of the rules framed under section 2 of the Defence of India Act for having dissuaded one Ramu Pillai from entering military service. The pleas of the accused were (1) that they did not dissuade, (2) that even if they had done so it was no offence as the rules were not in force in the Madras Presidency, (3) that the First-class Magistrate of Melur had no jurisdiction to try the case as all offences under the Act were to be tried by a special tribunal composed of three persons as provided by the Act and (4) that no sanction of the District Magistrate was obtained for the institution of the proceeding. Overruling all these pleas, the Magistrate convicted the accused. The Sessions Judge in appeal confirmed the conviction but reduced the fine. The accused preferred to the High Court this revision petition.

A. Subbarama Ayyar with *K. R. Guruswami Ayyar* for the petitioners.—The conviction is illegal. As the first two sections alone of the Defence of India Act are declared to be operative from the time of the passing of the Act and 'the rest of the Act' is to be operative on notification in the official Gazette to that effect, rules framed under section 2 of the Act can only come under the terms 'the rest of the Act' and acts constituted by the rules as offences can become offences only from the time 'the rest of the Act' is notified to come into operation. As no such notification has been made for this Presidency, as regards 'the rest of the Act' the act done is no offence; see Maxwell's Interpretation of Statutes, Fourth Edition, page 76 and *Institute of Patent Agents* v. *Lockwood*(1). This decision shows that the words 'as if the rules were enacted in the Act' are generally introduced into the Act only for the purpose of making them *intra vires* and not for giving the rules a retrospective effect. Secondly, the Defence of India Act declares that offences thereunder are to be tried by special

(1) (1894) A.C., 347 at p. 360.

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tribunals composed of three persons and thus takes away the jurisdiction of ordinary criminal courts to try such offences. Hence the trial of the accused by a First-class Magistrate under the Criminal Procedure Code is illegal; see section 29 (1) of Criminal Procedure Code. Thirdly, sanction for this prosecution was given by a person who was Acting District Magistrate. Under the Defence of India Act the sanction could be given only by the District Magistrate and neither that Act nor the General Clauses Act defines 'District Magistrate.' Hence the sanction by an Acting District Magistrate is illegal. Sections 10 and 11 of the Criminal Procedure Code are not incorporated in the Defence of India Act. Lastly, no notice was given to the accused why sanction should not be given.

Mr. *S. Srinivasa Ayyangar*, the Hon'ble the Advocate-General (with him *E. R. Osborne*, Public Prosecutor) for the Crown—The conviction is legal. Notice to accused is not necessary under the Act. Rules when framed under a power given by a section become part of the section itself and cannot come under the terms 'the rest of the Act.' The rules have operation from the time they are framed and published and not from any later time when 'the rest of the Act' might be notified to come into operation; see *Institute of Patent Agents* v. *Lockwood*(1). Unless there is some irreconcilable conflict between the section and the rules, the rules are *intra vires*; see *Baker* v. *William*(2). The words 'as if enacted in the Act' are introduced to make the rules *intra vires* however they are made and to prevent the courts from scanning whether they are so or not. The Defence of India Act contemplates trials by special tribunals only from the time that such tribunals are constituted and notified as empowered to try offences under the Act. Until such constitution and notification, the ordinary criminal courts of the country are entitled to try the offences as 'offences under other laws within schedule II, clause (8) of the Criminal Procedure Code, and the class of courts that can try such offences can be ascertained by a reference to column 2 and column 3 of the second schedule of the Criminal Procedure Code. See sections 4 (*o*), 5 and 29 (2) of the Criminal Procedure Code. The sanction in the case was given by Mr. Reilly when he was

(1) (1894) A.C., 347 at p. 358. (2) (1898) 1 Q.B., 23 at p. 25.

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Acting District Magistrate of Madura. Such a sanction is valid; see section 17 (1) of the General Clauses Act and section 11 of the Criminal Procedure Code and sections 66 and 67 of the Madras Regulation II of 1803.

A. Subbarama Ayyar replied.

The JUDGMENT of the Court was delivered by—

NAPIER, J.

NAPIER, J.—In this petition we are asked to revise the judgment of the Sessions Judge of Madura upholding the conviction of the accused for an offence under rule 29 of the rules framed under the Defence of India Act (IV of 1915), for having dissuaded one Ramu Pillai from entering into military service. It was contended by Mr. A. Subbarama Ayyar in the course of his able argument, first, that there was no such offence in the Madras Presidency and secondly, that if it was an offence the Court of the Subdivisional Magistrate of Melur had no jurisdiction to try the charge in that (1) the ordinary courts of the country have no jurisdiction, (2) there was no previous consent of the District Magistrate as required by the Act. After hearing the Advocate-General in reply we had no doubt that the petition must be dismissed, but thought it advisable to give our reasons in a written judgment in view of the importance of the questions raised.

The first argument is based on the peculiar arrangement of the Act. Under section 1, sub-section (3) it is provided that sections 1 and 2 shall come into operation at once, and that as for the rest of the Act it shall only come into operation in any province on notification by the Governor-General in Council in the *Gazette of India*. Section 2 empowers the Governor-General in Council to make rules for various general purposes and in particular for certain specified purposes, one of which is to prevent any attempt to dissuade persons from entering into the military or police service of His Majesty (clause H). Sub-section (2) of the same section says that rules made under this section may provide that any contravention thereof should be punished with imprisonment up to a term of seven years or with fine, etc. Sub-section (3) provides that all rules made under this section shall be published in the *Gazette of India* and shall thereupon have effect as if enacted in this Act. The whole of these rules were admittedly published in the *Gazette of India*.

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NAPIER, J.

It is argued before us that the words 'enacted in this Act' must be read to mean that the rules become an additional section to the Act and that as only sections 1 and 2 come into operation at once, the rules being treated as the rest of the Act, can only come into operation after notification as provided in section 1, sub-section (3). This argument will of course reduce the Act to an absurdity. The scheme of the Act is to provide for the creation of rules and offences to apply at once to the whole of India and also to create in certain special conditions tribunals for the purpose of ousting the jurisdiction of the ordinary criminal courts in any province or part thereof to which the Governor-General by notification has made the remaining provisions of the Act applicable. To give effect to the contention would be to render the whole Act nugatory in spite of section 1, sub-section (3), which provides that sections 1 and 2 shall come into operation at once. It is of course our duty to construe an Act in such a manner as to give effect to its provisions if it is possible to do so, and this can be done by reading the rules, as part of the section under which they are framed and not as part of the rest of the Act. It is quite clear that where section 1, sub-section (3) was speaking of the rest of the Act coming into operation, it was referring to the subsequent sections and not to the rules which are to be framed under section 2 and to have effect as if enacted in this Act.

An argument was addressed on the construction of section 22 of the General Clauses Act (X of 1897) which provides that where by any Act which is not to come into force immediately on the passing thereof, a power is conferred to make rules, such rules shall not take effect till the commencement of the Act: and it was sought to introduce into this section words which would make it read 'where by any Act part of which is not to come into force immediately on the passing thereof, a power is conferred to make any rules, etc., such rules shall not take effect until the whole of the Act shall come into force.' It is not permissible to make any such addition to the section which would have the effect of negativing the purpose of the section which is simply to provide power to make the rules although the Act has not come into force, but to reserve their application. In addition to this there is the direct authority of the House of Lords against the contention. It is to be found in the case of

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Institute of Patent Agents v. *Lockwood*(1). In that case Lord HERSCHELL clearly laid down that where the section gives power to make rules, the rules are to be read as part of the section, his language being (page 358)

"every rule which is *intra vires* at all events . . . . is to be read into the section and have just the same effect as if it had been contained in the Act itself;"

For these reasons we are satisfied that the rules came into force directly they were published in the *Gazette* and therefore that the offence is created.

The argument that such offence can only be tried by a special tribunal fails entirely unless it is shown that sub-sections (3) to (11) have been applied to the Madras Presidency. As it has been conceded that they have not been so applied, and the whole of the first argument has been based on that assumption, there is no foundation for this contention. We prefer therefore to leave the consideration of the effect of sections 3 and 4 of the Act until such a time as these sections are so applied, or to the Courts of the provinces where they are in force. Section 4, clause (*o*) of the Criminal Procedure Code defines offence as 'any act or omission made punishable by any law for the time being in force' and section 29 provides that any offence under any other law which means any law other than the Indian Penal Code shall, when no Court is mentioned in this behalf in such law, be tried by the High Court or by any Court constituted under this Code by which such offence is shown in the eighth column, second schedule, to be triable. Sections 3 to 11 of the Special Act not being in force in this Presidency, there is no Court mentioned in this behalf. The second schedule provides under the heading 'Offences against other laws' for the trial of an offence punishable as this is by a Court of Session, Presidency Magistrate or a Magistrate of the first class. There can therefore be no doubt that the trying Court had jurisdiction, if the case was put before it in a proper manner.

The point is taken, however, that there was no previous consent by a District Magistrate as required by rule 30. It was somewhat faintly argued that as neither the Defence of India Act nor the General Clauses Act define the words 'District

(1) (1894) A.C., 347 at p. 360.

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Magistrate,' there was nothing to show what was meant by those words. We are clear however that where the procedure for the trial of an offence is that under the Criminal Procedure Code, we must look to the provisions of that Code for the meaning of the words used. District Magistrates were created by the Code of Criminal Procedure, and section 10 of the Code provides that in every district outside the Presidency town the local Government shall appoint a Magistrate of the first-class who shall be called the District Magistrate. The point really pressed on us was that Mr. Reilly who gave the consent was not the actual District Magistrate. It appears however from the *Gazette of the Government of Madras* of 25th April 1916 that he was appointed to act as District Magistrate from the 1st June 1916. Then section 17, clause (1) of the General Clauses Act provides that in any Act it shall be sufficient for the purpose of indicating the application of the law to every person for the time being executing the functions of an office to mention the official title of the officer at present executing the functions. The result of this provision is that the words of rule 20 of the Defence of India Act must be read as if they contained after the words 'District Magistrate' the words 'Acting District Magistrate or Magistrate executing the functions of a District Magistrate.' There can be no doubt therefore that Mr. Reilly was competent as Acting District Magistrate to give the consent, and this point therefore fails. In the result, the petition is dismissed.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Krishnan.

1918 August 14, 15 and 23.

PARAMASWAMY AIYANGAR (PETITIONER), PETITIONER.

v.

ALAMELU NATCHIAR AMMAL AND ANOTHER (PLAINTIFFS' LEGAL REPRESENTATIVE AND DEFENDANT), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 115 and O. XXII, r. 5—Suit for rent in a Revenue Court—Death of plaintiff—Conflicting claims to represent plaintiff by widow and father—Necessity for inquiry—Order of District Collector recognizing widow as land-holder, effect of—Order of Revenue Court recognizing widow as legal representative—Revision to High Court, competency of—Madras Estates Land Act (I of 1908), sections 3 (5), 192 and 205, construction of.

In a suit for rent instituted in a Revenue Court the plaintiff died; the widow of the deceased plaintiff claimed to be his legal representative to continue the suit, as against the father who claimed to be such representative as the legatee under an alleged will of the deceased plaintiff. Subsequent to the institution of the suit, the District Collector had passed an order, under section 3 (5) of the Madras Estates Land Act, recognizing the widow as '*Land-holder*' in succession to the deceased plaintiff. The Revenue Court held that the widow should be held to be the legal representative to continue the suit, and dismissed the claim of the father without inquiring into the genuineness and validity of the will. The latter preferred a Civil Revision Petition to the High Court under section 115 of the Civil Procedure Code. The respondent raised a preliminary objection that no revision petition lay to the High Court and also contended that the point was concluded by the order of the District Collector.

Held: (1) that the High Court was competent to revise the order of the Revenue Court under section 115 of the Civil Procedure Code, which is made applicable to proceedings in Revenue Courts by section 192 of the Madras Estates Land Act, and section 205 of the Act does not relate to interlocutory orders in rent suits, the final decrees in which are appealable under Part A of the schedule;

(2) that the Revenue Court is bound under Order XXII, rule 5 of the Civil Procedure Code to hold an inquiry into the claims of the several claimants and determine who was entitled to be brought on the record as legal representative in the place of the deceased plaintiff; and

(3) that the order of the District Collector recognizing the widow as 'Land-holder' under section 3 (5) of the Madras Estates Land Act, was not only not conclusive on the point but has no bearing on it and could not be the basis of an order of the Court under Order XXII, rule 5 of the Code, or obviate the necessity for an enquiry thereunder.

* Civil Revision Petition 256 of 1918.

PARAMASWAMY AIYANGAR *v.* ALAMELU NATCHIAR AMMAL.

PETITION under section 115 of Act V of 1908 and 107 of the Government of India Act, 1915, praying the High Court to revise the order of V. RAMASWAMI AYYAR, Deputy Collector on special duty, Madura District, in O.S. No. 702 of 1917.

The material facts appear from the judgment of the High Court.

K. Srinivasa Ayyangar, K. V. Krishnaswami Ayyar, K. V. Sesha Ayyangar and *S. Aravamudhu Ayyangar* for the petitioner.

M. Patanjali Sastri for the respondent.

AYLING, J.

AYLING J.—This is an application to revise an order of the Special Deputy Collector, Madura District, in the matter of bringing on record the legal representative of the deceased plaintiff in certain suits under section 77 of the Madras Estates Land Act pending in his Court.

The preliminary objection is taken that this Court has no power of interference in revision in such cases. Reliance is placed on section 205 of the Madras Estates Land Act. In my opinion this section relates, not to incidental orders in suits, the final decree in which is appealable, but to such proceedings as are specified in part B of the schedule to the Act, as those in which no appeal lies (Nos. 12—20). It is not, and cannot be, intended to affect the revisional powers of this Court, in suits which are made appealable to the District Court and this Court under part A of the schedule. Section 115, Civil Procedure Code, is one of the sections made applicable to suits under the Madras Estates Land Act by section 192 of the latter. No appeal lies against the Deputy Collector's order sought to be revised: and if, as is urged on plaintiff's behalf, the Deputy Collector has failed to exercise a jurisdiction vested in him by law, this would seem to be a fit case for interference in revision.

Reference was made to a recent unreported decision of Mr. Justice SESHAGIRI AYYAR in *Zamindar of Pamuru*, v. *Nagayya*(1). I have considered this, but in the view I take of section 205, I regret to find myself unable to follow it.

It has therefore to be determined whether the Deputy Collector has declined to exercise the jurisdiction vested in him by law. The dispute lay between the widow of the deceased

(1) C. R. P. No. 945 of 1916—unreported.

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plaintiff on the one hand, claiming as his natural heir, and his father and brothers claiming under wills, the validity of which was challenged by the widow. The claim of the brothers was dropped as the will they set up did not cover the present matter, so that only that of the father remains. The Deputy Collector held that, as the validity of the will was a very contentious matter, it might be left for settlement in another Court, and without taking evidence, dismissed the claim of the father and added the widow as legal representative of the deceased. The question is, whether this was a compliance with Order XXII, rule 5, which says:

"Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court".

For respondent, much reliance is placed on an order of the District Collector passed under section 3 (5), Madras Estates Land Act subsequent to the institution of the suit recognizing the widow as 'land-holder' in succession to the deceased plaintiff. This order is referred to by the Deputy Collector, but the latter makes it quite clear that he does not rely on it as the basis of his own order.

Respondent's vakil contends that it should have been treated by the Deputy Collector as conclusive of the point for determination under Order XXII, rule 5; and that, even if not, a reference to it is sufficient compliance with the provisions of the rule. I do not think either contention is sound. The Collector's order (subject to determination by a Civil Court) is conclusive as to who is entitled to take subsequent proceedings under the Act, and probably also, in a case of succession like the present one, as to proceedings instituted between the death of the last holder and the passing of the order. But we are concerned here simply with the question of who is entitled to continue proceedings which were legally instituted by the last holder; in other words, who should represent his estate for the purpose of the suit. This person will not necessarily be the same person as is entitled to succeed to his rights as land-holder after his death. As laid down by SESHAGIRI AYYAR, J. in *Sundaram Iyer* v. *Kulathu Aiyer*(1), a person can sue to recover rent which has accrued

(1) (1915) 31 I.C., 81.

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due to him as a land-holder, although his estate as such may have terminated. The right to recover arrears of rent is a part of the estate of the deceased (in the personal sense, not in the sense of the definition in section 3 of the Madras Estates Land Act) and is devisable by will: such a devise could not possibly be defeated by an order of the Collector deciding who should succeed to the possession of land-holder after his death.

The Collector's order is, therefore, not only not conclusive on the point, but has no bearing on it, and cannot be the basis of an order of the Court under Order 22, rule 5, or obviate the necessity for an enquiry thereunder.

The words of the rule are imperative 'shall be determined' and I think this presupposes an enquiry in which any claimant shall be entitled to adduce evidence to support his claim. No such enquiry has been held here. I am fully alive to the practical objections to compelling a Court to conduct a long and complicated enquiry as a preliminary to a suit which may be of little value and importance, and which will not preclude further litigation on the very same question. But that is the law, and it must be followed.

I would therefore set aside the order of the Deputy Collector and direct him to enquire and determine who is entitled to be brought on record as legal representative of the deceased plaintiff. Costs to be provided for in the final decree.

KRISHNAN, J.

KRISHNAN, J.—We have first to deal with the preliminary objection taken by the respondent's vakil that, as the order sought to be revised is that of a revenue court, no revision lies to the High Court and that, if any revision lies at all, it is to the Board of Revenue or to the District Collector under section 205 of the Estates Land Act.

It may be conceded that section 115, Civil Procedure Code, does not of its own force apply to the proceedings of a revenue court. The Civil Procedure Code is applicable only to the Courts of civil jurisdiction—see the Preamble to the Code—and section 3 which enumerates the Courts which are subordinate to the High Court and over which the High Court is empowered by section 115 to exercise revisional jurisdiction does not refer to revenue courts. Nevertheless section 192 of the Estates Land Act has made section 115

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applicable to proceedings in revenue courts. That section says: "Subject to the other provisions of this Act and subject to the following modifications and additions, the provisions of the Code of Civil Procedure shall apply to all suits, appeals and other proceedings under this Act so far as they are not inconsistent therewith." Section 622 of the old Code corresponding to section 115 of the new Code is not one of the excepted sections mentioned in the latter part of section 192. Section 115, Civil Procedure Code, would therefore seem to apply to proceedings in a revenue court under the Estates Land Act.

It is, however, argued for the first respondent that section 205 of that Act properly applies and, as that section specifically provides for the revision of orders like the present one, the jurisdiction of the High Court under section 115, Civil Procedure Code, should be held to be excluded as being inconsistent with it, or at any rate in the exercise of our discretion under that section, we should refuse to interfere. In considering this argument we have first to decide whether section 205 can be applied at all. That section speaks of 'any proceeding before a Revenue Officer from whose decision no appeal lies.' The question whether section 205 applies to orders in a rent suit depends upon the meaning we attach to the word 'proceeding' in it. To avoid the serious anomaly of a conflict of decision in the same matter that may otherwise result from the revenue authorities revising orders passed in rent suits in which the appeal lies from the final decree to the civil courts, I think we may well hold that the word 'proceeding' refers to the whole proceeding and not to a part of it, or in other words, in a rent suit to the whole suit itself and not to any interlocutory orders in it. If this is correct, as an appeal lies from the Revenue Officer's decision in the suit, section 205 will not apply to proceedings in rent suits; and section 115, Civil Procedure Code, stands unaffected.

It is argued that this is giving too restricted a meaning to the term 'proceeding' and that we should hold that it is not less extensive in scope than the word 'case' in section 115, Civil Procedure Code. The two words are not analogous and are used in different connexions, but even if we assume that what took place before the Deputy Collector in the present case can be treated as 'a proceeding' by itself, the result, so far as the

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applicability of section 115, Civil Procedure Code, is concerned, seems to be the same. It will only make section 205 also applicable, and we have then a case of concurrent jurisdiction both in the High Court under section 115, Civil Procedure Code, and in the revenue authorities under section 205 of the Madras Estates Land Act. There is nothing in section 205 which expressly excludes the applicability of section 115 and, as the latter section is expressly made applicable to the revenue courts by section 192, we cannot treat it as impliedly abrogated by section 205, when there is nothing strictly inconsistent between the two sections.

The next question is whether in the view that the revenue authorities have co-ordinate jurisdiction with the High Court in the matter, we should not, in the exercise of our discretion, leave it to them to revise the order in question. I do not think so. To avoid the anomaly pointed out above it is certainly more convenient and proper that this Court should exercise its jurisdiction in the matter. If a party has already elected his remedy by applying to the revenue authorities under section 205, it may be a question whether interference under section 115, Civil Procedure Code, should not be refused, but such a difficulty does not arise here.

The first respondent's vakil relied on the rulings in *Zamindar of Pamuru* v. *Nagayya*(1) and in *Ram Dayal* v. *Ramadhin*(2) in support of his argument. In the former case which is a ruling of a single Judge of this Court the learned Judge says: "The learned vakil for the petitioner has not been able to point to any section under which he can ask the High Court to revise the proceedings of a revenue court." His attention was not drawn to section 192 of the Estates Land Act and his ruling, therefore, loses its authority.

The case in *Ram Dayal* v. *Ramadhin*(2) arose under the North-West Provinces Rent Act XII of 1881 which, though similar in some aspects to the Act in this Presidency, differs materially on the very point we have to consider here. The ruling was given in a rent case from which there was no appeal to the civil courts under section 189 of Act XII of 1881, the

(1) C.R.P., No. 945 of 1916—unreported.
(2) (1890) I.L.R., 12 All., 198.

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amount claimed being less than Rs. 100. Furthermore, that Act has expressly excepted cases in which appeals lie to the civil courts from the decisions of the Revenue Officers under section 189, from the scope of section 199 which gives the revisional power to the Board. The ruling, therefore, cannot be treated as in point here.

I, therefore, agree with my learned brother that the preliminary objection fails. The next point is whether on the merits this is a fit case for our interference in revision. On that point also I agree with my learned brother because, when the Deputy Collector refused to consider the petitioner's claim based on his alleged will and referred him to a suit to establish its validity, he acted with material irregularity in the exercise of his jurisdiction. The order said to have been passed by the Collector in favour of the first respondent under section 3, clause (5) of the Estates Land Act, declaring her to be the land-holder in succession to the deceased plaintiff on which much reliance was placed by the first respondent before us, was not relied on by the Deputy Collector as the basis of his order. That order itself is not before us and we can, therefore, hardly decide the exact effect of it regarding the arrears of rent sued for in this rent suit, No. 702 of 1917. *Prima facie* the proper legal representative of the deceased plaintiff in the suit is the man to whom the ownership of the rent has passed on plaintiff's death, and the petitioner alleges that he is that person who has become the owner under the will. It may be that, if the right to continue the suit in the revenue court has passed to the respondent under the order of the Collector under section 3, clause (5), she will be the proper legal representative irrespective of the question of the ownership of the amount sued for; just as the holder of a succession certificate for a particular debt will be in a suit for that debt. The rights of the beneficial owner will not be defeated, as he could sue the person added as the legal representative and recover it from him. The legal representative, as defined in the Code, section 2, clause (11), means a person who in law represents the estate of a deceased person; so he need not necessarily be the beneficial owner of that estate. But even if that be so, the order of the Collector not being before us, it is not possible to say whether it refers to the arrears of rent sued

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for and confers on the respondent the exclusive right to continue the suit or not. Unless the declaration by the Collector is given retrospective effect, it can scarcely affect the arrears of rent which had already accrued and had been sued for; and there is no reason to suppose that such effect should be given to it. If the Collector's order is to take effect only from its date, petitioner will be the land-holder *qua* the rent sued for, under section 3, clause (5), if his claim to collect it under the will is established. See *Sundaram Iyer* v. *Kulathu Iyer*(1). In that case it was held that a person to whom arrears of rent were due was a landholder though his estates had terminated. If he is such a landholder, petitioner will be the proper person to continue the suit under the Estates Land Act in the revenue court. I therefore agree that the order of the Collector under section 3, clause 5, is not shown to affect the question who the proper legal representative of the deceased plaintiff is; and for the purpose of deciding it, it seems necessary that the genuineness and the validity of the petitioner's will should be enquired into. I therefore agree in the order proposed by my learned brother.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1918. August, 28.

THE CROWN PROSECUTOR (COMPLAINANT), PETITIONER,

v.

BHAGAVATHI (ACCUSED), RESPONDENT. *

Criminal Procedure Code (Act V of 1898), sections 254 and 347, commitment to Sessions by Magistrate competent to try and adequately punish, legality of.

The terms of section 347 of the Criminal Procedure Code are general and give a Magistrate who is empowered to commit a discretion in committing cases for trial which is not limited by section 254 so as to make it obligatory on him to try every case which he can adequately punish.

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(1) (1915) 31 I.C., 81.

* Criminal Miscellaneous Petition No. 403 of 1918.

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Queen-Empress v. *Kayemullah Mandal* (1897) I.L.R., 24 Calc., 429, *King-Emperor* v. *Dharam Singh* (1906) 1 M.L.T., 61 and *Emperor* v. *Jagmohan* (1909) 11 Crl. L.J., 54, not followed.

In the matter of Chinnamarigadu (1876) I.L.R., 1 Mad., 289 (F.B.), applied.

PETITION against the order of MUHAMMAD IBRAHIM, the Third Presidency Magistrate, Georgetown, dated the 26th July 1918, in Calendar Case No. 13163 of 1918.

The Third Presidency Magistrate committed a jutka driver to the Sessions of the High Court on a charge under section 304-A of the Indian Penal Code of having caused the death of a person by rash and negligent driving.

The Crown Prosecutor moved Mr. Justice SPENCER, who was presiding at the Sessions to which the accused had been committed, to quash the commitment on the ground that the offence being one which could be adequately punished by the Magistrate if the accused were found guilty, he was bound under section 254 of the Criminal Procedure Code to try the case himself. His Lordship held that the application to quash the commitment should be made on the Appellate Side of the High Court. This application was then made by the Crown Prosecutor on the Appellate Side for quashing the commitment.

C. Sidney Smith, Acting Crown Prosecutor.

Viswanatha Sastri for accused.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—This is an application by the Crown Prosecutor for quashing the commitment made by the Third Presidency Magistrate, Georgetown, Madras, to the High Court of Sessions of a case falling under section 304-A of the Indian Penal Code punishable with two years' imprisonment of either description or fine (of unlimited amount) or both and triable by a Court of Session or a Presidency Magistrate or a Magistrate of the first class. The ground on which we are asked to quash the commitment is that under section 254 of the Criminal Procedure Code a Magistrate ought to try a case himself till it ends either in a conviction or acquittal before him (see section 258) unless he thinks that the offence could not be adequately punished by him, and that in this case it was impossible for the Magistrate to entertain such an opinion because he had powers under the Code to inflict imprisonment of either description up to two years, which is the maximum punishment provided for the offence. This argument, in the first place, ignores the fact that

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the offence is also punishable with fine of unlimited extent, whereas the Presidency Magistrate's powers of fining are limited to the amount of Rs. 1,000 [see section 32, Criminal Procedure Code, clause (a)], and cases are conceivable where a rich man guilty under section 304-A could more appropriately be sentenced to a fine of five thousand rupees by a Sessions Court than by a Presidency Magistrate with imprisonment and a fine of Rs. 1,000. However this is a minor point.

The important question is whether section 254 does make it imperative on the Magistrate, if the offence could be adequately punished by him, to try the case till the end and whether it imperatively forbids him from committing the case to the Sessions. So far as the words of section 254 go, that section only directs the Magistrate to frame a charge against the accused. What the Magistrate has to do after framing the charge must depend upon the provisions contained in the succeeding sections of the Code dealing with the further proceedings in the trials of warrant cases. In Chapter XXIV containing general provisions as to enquiries and trials, we have got three sections—sections 346, 347 and 349—which we were invited in the arguments to consider in this connexion. Section 346 relates to the procedure of a Magistrate other than a Presidency Magistrate in certain contingencies. That section may therefore be ruled out. As regards section 349, it relates to the procedure of a Magistrate of a second or a third class under certain circumstances. That also has therefore no material bearing in the consideration of the question before us. Then we have got section 347 which gives very wide powers to a Magistrate. In any trial or proceeding before him and at any stage he can, even just before signing judgment, commit a case before him to a Court of Session or the High Court (provided, of course, he is empowered to commit cases to that Court), if it appears to him that the case is one which ought to be tried by a Court of Session or the High Court. It does not restrict the grounds on which he should arrive at his opinion to want of jurisdiction himself or to his inability in his own opinion to sentence the accused adequately. If he considers, for instance, that a complicated question of law arises or that some connected matter is already before the Court of Session or that the facts are such that trial with the aid of a jury or with the aid of assessors (who may be chosen from experts in

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the particular matters involved in the case) would be a more satisfactory procedure, I see nothing in section 347 to prevent a Magistrate from committing the case to a Court of Session. Section 347 does not say that the Magistrate is bound to put his reasons on record for entertaining the opinion that the case is one which ought to be tried by the Court of Session or the High Court. No doubt the decision of a Bench in *Queen-Empress* v. *Kayemullah Mandal*(1), and the decisions of single Judges of the Allahabad High Court reported in *King-Emperor* v. *Dharam Singh*(2) and *Emperor* v. *Jagmohan*(3) do support the contention of the Crown Prosecutor that unless the Magistrate thinks that he is unable to punish the accused adequately he ought not to commit the accused to the Court of Session. There are however two decisions, one in the *Empress* v. *Kudrutoolah*(4), and the other (of a Full Bench in this Court) *In the matter of Chinnamarigadu*(5), where there are observations which, in my opinion, indicate that the committal by a competent Magistrate on the ground that in the Magistrate's opinion the case is a fit one to be tried by a Court of Session, cannot be interfered with by the High Court. And I think that the Calcutta Case [*Queen-Empress* v. *Kayemullah Mandal*(1)] and the two Allahabad cases [*King-Emperor* v. *Dharam Singh*(2) and *Emperor* v. *Jagmohan*(3)] have given much wider effect to the language of section 254 than that language could properly support. That section makes it imperative on the Magistrate only to frame a charge and not to complete the trial to the conviction or acquittal. I would therefore dismiss this petition.

NAPIER, J.

NAPIER, J.—I entirely agree. We are asked to exercise our powers under section 215 of the Criminal Procedure Code and quash a commitment to the High Court made by the Presidency Magistrate. We can of course only do so on a point of law and we are therefore not concerned with the reasons given by the Magistrate for making the commitment.

But it has been argued before us by the Crown Prosecutor that the commitment is bad in law, that the Magistrate has not certified that he cannot adequately punish the accused who

(1) (1897) I.L.R., 24 Calc., 429. (2) (1906) 1 M.L.T., 61.
(3) (1909) 11 Crl. L.J., 54. (4) (1878) I.L.R., 3 Calc., 496.
(5) (1876) I.L.R., 1 Mad., 289 (F.B.).

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is put up before him for trial and that even if he had done so his reason would have been bad because he has in fact power to inflict the maximum punishment. The offence for which the accused has been committed is section 304-A, Indian Penal Code. Now, offences under this section are specifically stated in the second schedule of the code to be triable by a Court of Session, a Presidency Magistrate or a Magistrate of the first class. Therefore at the outset this suggestion of the Crown Prosecutor leads to a somewhat extraordinary position, that a Court of Session which is specifically empowered under the section, cannot try the case because it cannot be committed to it by a first class Magistrate.

It is suggested however by the Crown Prosecutor that schedule II, where it speaks of the Court of Session, had in mind that although the commitment for offences is not one of the ordinary powers of the Magistrates of second and third class, still those courts can be empowered under section 206 and therefore that the trial by a Court of Session provided for in the eighth paragraph of the second schedule would arise in cases where the accused had been committed by a second or third class Magistrate empowered in that behalf. It is a somewhat strained application of the provision. A more reasonable hypothesis seems to me to be that this allocation of this offence to the Court of Session as well as Magistrates of the first class is an indication that in some circumstances a Court of Session would be the proper tribunal to try the case.

Passing from that, we have to consider what are the powers possessed by Magistrates with regard to warrant cases. The Crown Prosecutor has suggested to us—and indeed this is the basis of the whole of his argument—that section 254 of the Criminal Procedure Code is exhaustive and that there is no power in a Magistrate to commit a case for trial where he is competent to try it and it can be adequately punished by him. This is a somewhat startling proposition because, as my learned brother has pointed out, it is frequent practice of magistrates in this country to commit cases for trial to the Court of Session for other reasons, namely, convenience, complexity of facts or other matters. The Crown Prosecutor would have us hold that the whole of this procedure is wrong. Now the whole of this argument hinges on the word 'shall' which is to be found in section 254. The Crown Prosecutor argues that the section

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requires that he shall frame in writing a charge against the accused and carried with it a further requirement that having done so, he shall proceed under the remaining sections of that chapter. I should have some difficulty in appreciating this argument were it not that it has found favour with a bench of the High Court of Calcutta in a case reported in *Queen Empress* v. *Kayemullah Mandal*(1). But with deference to the learned Judges, it seems to me that in that decision they ignore the very wide powers given by the Code to a Magistrate under sections 207 and 347. Section 207 provides the procedure on enquiry in cases which are exclusively triable by a Court of Session or the High Court, or in the opinion of the Magistrate ought to be tried by such Court. There are therefore a class of cases which are not triable exclusively by a Court of Session but which ought to be so tried. If we turn to section 347 which is in the chapter containing general provisions as to inquiries and trials, we find a wide and general power given to Magistrates with regard to cases coming before them for trial. The words are "If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall stop further proceedings and commit the accused under the provisions hereinbefore contained." If he is not empowered to commit for trial he should proceed under section 346. That section says that if it appears to the Magistrate that the case is one which should be tried or committed for trial by some other Magistrate he shall stay proceedings and submit the case with a brief report to any Magistrate to whom he is subordinate or to such other Magistrate having jurisdiction, as the District Magistrate directs. That is to say, whether the Magistrate has power to commit or not, if he thinks that the case is one which ought, in his opinion, to be tried by a Court of Session, he has absolute power to stop any further proceedings in the trial by himself. If he can commit, he may. If he cannot commit, he may send it to a Magistrate who will commit. It seems to me to be impossible to argue successfully that a specific provision like this in section 347 read together with section 207 which lays down the procedure in enquiries in

(1) (1897) I.L.R., 24 Calc., 429.

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such cases, can be limited because section 254 says that the Magistrate trying a warrant case shall frame a charge. Even if those words which are to be found in section 254 had been repeated in sections 255 and 256, I should still be of opinion that they were no bar to the exercise by a Magistrate of his power to commit a case. That section simply lays down the procedure for the trial of warrant cases where the Magistrate considers it proper and right for himself to go on with the trial, and it is in no way a limitation of the right of a Magistrate given to him under section 347 to commit a case for trial if he thinks that he should do so. The Crown Prosecutor has been unable to refer us to any section authorizing a Magistrate to commit for trial where he cannot inflict a proper sentence which according to him is the proper course, whereas there is a distinct provision for submission to a higher-class Magistrate in such cases to be found in section 349. I am at a loss therefore to comprehend why the wide words of section 347 should be curtailed by reference to section 254 when there is a specific section, namely, section 349, which deals with the circumstances referred to in section 254. My learned brother has referred to one case of this Court [(*In the matter of Chinnamarigadu*(1)] and it seems to me to be conclusive on the point, for, it lays down as axiomatic that it is competent to a Magistrate to say whether from the gravity of the matter or for any other sufficient reason the Sessions Court is the proper tribunal for the disposal of the case.

To sum up, the powers of a Magistrate, who has taken a warrant case on his file for trial, are as follows:—He may try it through himself if he has jurisdiction; he may, if he thinks he cannot inflict a proper sentence, act under section 346 or 349 and send it to a higher Magistrate; or he may, if he thinks that it is a proper case for Sessions, commit the accused under section 347, or if he has not power to commit, send it to another Magistrate to commit under section 346. This being my view of the law, I am of opinion that we have no jurisdiction to quash the committal in this case and that the trial before the Judge sitting in Sessions must go on.

N.R.

(1) (1876) I.L.R., 1 Mad., 289 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

1918 August 14, 19 and 27.

VEDAVYASA AYYAR (TWELFTH DEFENDANT), APPELLANT,

v.

THE MADURA HINDU LABHA NIDHI CO., LIMITED, AND ELEVEN OTHERS (PLAINTIFFS AND DEFENDANTS Nos. 1, 2, 5 TO 9 AND 13), RESPONDENTS.*

Mortgage—Decree for sale at the instance of prior mortgagee—Right of puisne mortgagee to apply for sale in execution for amount ascertained to be due to him—Subsequent suit by puisne mortgagee for sale—Sec. 47, Civil Procedure Code, whether a bar to suit.

In a suit for sale by a prior mortgagee against the mortgagor and a puisne mortgagee, the decree not only directed the sale of the mortgaged properties for the amount found due to the prior mortgagee but also ascertained the amount due to the puisne mortgagee and ordered the payment to him of this amount out of the surplus sale-proceeds.

Held: (1) that the puisne mortgagee was not entitled to execute the decree for the amount due to him, when no sale was held for the realization of the amount due to the prior mortgagee, (2) that the remedy of the puisne mortgagee was a suit for sale, (3) that section 47, Civil Procedure Code, was no bar to the suit and (4) that the decree in the previous suit did not operate as *res judicata*.

SECOND APPEAL against the decree of F. A. COLERIDGE, the District Judge of Madura, in Appeal Suit No. 273 of 1916, preferred against the decree of K. V. KARUNAKARA MENON, the Temporary Subordinate Judge of Madura, in Original Suit No. 14 of 1916.

The facts of the case appear from the first paragraph of the judgment of KUMARASWAMI SASTRI, J.

The twelfth defendant who bought one of the mortgaged properties from the mortgagor preferred this Second Appeal.

K. S. Jayarama Ayyar and *T. L. Venkatarama Ayyar* for the appellant.

C. V. Anantakrishna Ayyar and *P. S. Narayanaswami Ayyar* for respondents.

* Second Appeal No. 1252 of 1917.

KUMARASWAMI SASTRI, J.—The twelfth defendant is the appellant. Defendants Nos. 1 and 2 mortgaged certain items of property to one Naga Ayyar who filed Original Suit No. 61 of 1910 on the file of the Court of the Principal District Munsif of Madura to recover the sum due on his mortgage. He impleaded the puisne mortgagees, one of whom was the present plaintiff Nidhi. A decree was passed in Form 7, Appendix D, of the Code of Civil Procedure. The amounts due to the plaintiff in the suit and the puisne mortgagee defendant were declared but the sale of the mortgaged properties was ordered only in case the defendant did not pay the amount found due to the plaintiff and the only right given to the puisne mortgagees was to share in the surplus if any arising out of the sale. One of the items of property was brought to sale in execution of the decree but the plaintiff-decree-holder was satisfied as the amount due was paid under Order XXI, rule 89, of the Code of Civil Procedure and the sale set aside. The property was sold by private sale to the appellant. As he did not pay the amount found in O.S. No. 61 of 1910 to be due to the first respondent herein he sued for the recovery of the amount due to him as his mortgagor. Various defences were raised, the chief of which were (1) that the remedy of the plaintiff was by executing the decree in O.S. No. 61 of 1910 and not by separate suit and (2) that the second suit was barred the matter being *res judicata*. The Subordinate Judge overruled the objections raised and passed a decree which was confirmed by the District Judge.

I am of opinion that the decision of the lower Courts is right. No doubt the present plaintiff Nidhi was a party to O.S. No. 61 of 1910 as a puisne encumbrancer and the amount due to it was ascertained. The decree however did not direct redemption of the subsequent mortgagees and expressly authorized sale only in case the amount due to the first mortgagee was not paid within the time limited. The only right given to the puisne encumbrancers was the right to redeem the first mortgage and on sale to share in the surplus sale-proceeds in order of priority.

In *Sarat Chandra Roy Chowdhry* v. *Nahapiet*(1), the effect of a decree drawn up under Form 7, Appendix D, of the Code

(1) (1910) I.L.R., 37 Calc., 907.

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was considered and PUGH, J., was of opinion that there was no right conferred on the second mortgagee to get any relief at all if the mortgagor satisfied the first mortgagee's claim. He observed:

"In my view therefore under the Code the second mortgagee is there simply for the purpose as indicated by BRETT and MOOKERJEE, JJ., in *Mackintosh* v. *Watkins*(1) of receiving any surplus sale-proceeds or of redeeming and that he cannot take any independent action and treat the decree as in other respects in his favour."

Referring to *Kissory Mohan Roy* v. *Kally Churn Ghose*(2) the learned Judge distinguished the case on the ground that it related to a decree passed as in the Original Side of the High Court and in *Mackintosh* v. *Watkins*(1) BRETT, J., took the view that the practice and procedure followed on the Original Side was not to govern decrees passed by Courts in the mufassal which were governed by the Civil Procedure Code and the Transfer of Property Act.

In *Mackintosh* v. *Watkins*(1) it was held by BRETT and MOOKERJEE, JJ., that in a suit by a first mortgagee impleading the mortgagor and the puisne mortgagees the mortgagor cannot be called upon to redeem the subsequent mortgagee defendants and that they are not entitled to have the property sold for non-payment of the sums due to them. BRETT, J., observed that

"the object of impleading the puisne mortgagee was to enable the property to be sold free from his encumbrance, and not to enable him to practically obtain a decree against the principal defendant without bringing a suit properly framed for the purpose."

The learned Judge was also of opinion that such a procedure would be opposed to the provisions of Chapter III of the Court Fees Act. MOOKERJEE, J., was of opinion that sections 86 to 89 of the Transfer of Property Act

"do not provide that the mortgagor may be called upon by the decree *nisi* to pay to a puisne encumbrancer who has been joined as a party-defendant what may be found due to him on his mortgage; the mortgagor therefore cannot incur the liability to have his property sold by reason of non-payment of the dues of the subsequent encumbrancers."

(1) (1904) 1 C.L.J., 31 at p. 35. (2) (1895) I.L.R., 22 Calc., 100.

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He held that if the mortgagor-defendant pays to the plaintiff-mortgagee what may have been found due to him, the property was not liable to be sold under the decree in the suit at the instance of the second mortgagee. In *Sururjiqur Begum* v. *Baredakant Mitter*(1) the same learned Judge was of opinion that if the amount due to the first mortgagee was paid there can be no sale of the mortgaged properties and the puisne encumbrancers would obtain no relief in the suit.

It is contended for the appellant that in a mortgage suit when puisne encumbrancers are made parties-defendants there is a decree in favour of each of the mortgagees which can be executed by him and reliance has been placed on *Govinda Taragan* v. *Veeran*(2) and the unreported decision in *Achutha Menon* v. *Subramania Patter*(3). I do not think these decisions support the broad propositions contended for. The former case related to a suit for redemption of a mortgage and it was held that paragraph 2 of section 93 of the Transfer of Property Act did not take away the right from the plaintiff-mortgagor to apply for a sale. The learned Judges, after discussing the right of the mortgagor and mortgagee, observe that in some cases provisions for sale may be as much for the benefit of the mortgagor as for the benefit of the mortgagee and that

"where a decree is imperative there is no reason why the decree should not be regarded as passed for the benefit of all the parties to the suit."

They thought there was no reason for holding that any of the parties to the suit who would be benefited by the sale cannot apply for the enforcement of the decree. It should be observed that the suit was between mortgagor and mortgagee and no question arose as to the rights of puisne encumbrancers. The decree was for redemption and the only question was whether it was open to the plaintiff in a redemption suit to apply for sale under sections 92 and 93 of the Transfer of Property Act. In the present case there is nothing in the decree directing the mortgagor to pay off the subsequent mortgagees. The decree no doubt declared the amount due to them but this was only with the view of enabling them to share

(1) (1910) 11 C.L.J., 563 at p. 576. (2) (1913) I.L.R., 36 Mad., 32.
(3) A.A.A.O. No. 87 of 1917 (unreported).

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in the surplus, should the property be sold owing to non-payment of the sum due to the plaintiff who was the first mortgagee. The right of the subsequent mortgagees under the decree drawn up according to Form 7, Appendix D of the Code of Civil Procedure is contingent on the property being brought to sale for non-payment of the sum found due to the plaintiff-mortgagee and the decree cannot be read as a decree directing the mortgagor to redeem each of the puisne encumbrancers within the time limited for redeeming the first mortgagee and to entitle the puisne encumbrancer on default to bring the property to sale for non-payment not of the sum decreed due to the first mortgagee but to each of them. The utmost that can be said is that if the first mortgagee for some reason or other does not apply for sale in spite of the fact that he has not been paid, the other mortgagees can apply for sale in order to work out the rights to share in the surplus if any. This is quite different from their applying to sell the property to discharge the amount declared due to each of them. If the mortgagor pays off the amount for which alone a sale in default of payment was directed, it is difficult to see how under the express terms of the decree each puisne encumbrancer can come forward and ask for sale. No time is fixed in the decree for redeeming them. There is no direction in the decree directing the mortgagee to pay them any amount and the right to share which is dependent on there being a sale and a surplus after paying off the plaintiff-mortgagee cannot be enforced if for any reason the sale cannot take place at the instance of the plaintiff. Reference has been made to the English practice as set out in *Platt* v. *Mendel*(1) and Daniel's Chancery Practice, but it is unnecessary to consider whether having regard to the provisions of the Transfer of Property Act Courts in India can pass a decree directing plaintiff to redeem each of the puisne mortgagees and direct a sale at the instance of each of them in case of his failure to do so. No such decree has been passed in the present case. In *Achutha Menon* v. *Subramania Patter*(2) the sub-mortgagee applied to enforce the decree in favour of his mortgagor who was the mortgagee from the owner of the property. All that was held was that he was entitled to apply for execution and to work

(1) (1884) 27 Ch.D., 246. (2) A.A.A.O. No 87 of 1917 (unreported).

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out his rights by the sale of the property. The sale was to be for the amount directed in the decree to be paid by the original mortgagor to the mortgagee who in turn sub-mortgaged the property to the defendant. There is nothing in the judgment which suggests that puisne mortgagees should be treated as decree-holders entitled to bring property to sale in default of payment of the sum declared to be due to them, though the decree contains no direction that they should be redeemed or that property should be sold in default of payment of the sums declared to be due to the puisne mortgagees. The sub-mortgagee is an assignee of the original mortgagee and his being allowed to work out his rights by doing what his mortgagor could have done would not confer similar rights on third parties claiming on their own right.

As the first respondent was not entitled to execute the decree in O.S. No. 61 of 1910, section 47 of the Code of Civil Procedure has no application.

As regards the question of *res judicata*, the present suit is beyond the pecuniary limit of the jurisdiction of the District Munsif. O.S. No. 61 of 1910 which was on the file of the District Munsif's Court cannot render the present suit *res judicata*. Moreover, as pointed out in *Debendra Nath Sen* v. *Mirza Abdul Samed Seraji*(1), a suit by a puisne mortgagee who is a party to a prior suit by another mortgagee can only be barred if the puisne mortgagee is in a position to have his claim satisfied from the surplus sale-proceeds realized in execution of the decree on the prior suit.

The Second Appeal fails and is dismissed with costs.

PHILLIPS, J.

PHILLIPS, J.—I agree.

N.R.

(1 (1909) 10 C.L.J., 150.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1918, August 12, 13 and 30.

GADDEM PANCHALU REDDI (PETITIONER), PETITIONER,

v.

SURA CHINNA VENKATA REDDY (RESPONDENT), RESPONDENT.*

Criminal Procedure Code (Act V of 1898) sec. 195, sub-section 1 (a), and sub-section 7—Indian Arms Act (XI of 1878), secs. 25 and 28—False information to District Magistrate—Sanction by District Magistrate—Application to Sessions Court to revoke sanction, whether competent—District Magistrate granting sanction, whether a Court.

Where a District Magistrate receives information of illicit possession of arms and issues a search warrant in consequence of the information, he acts as a Court, though the information may have been given under section 28 and the search warrant issued under section 25 of the Indian Arms Act, and an application lies to the Sessions Court under section 195 (6) of the Criminal Procedure Code to revoke a sanction given by him for the prosecution of the informant for an offence under section 182 of the Indian Penal Code.

Sankaram Aiyar v. *Sakkarappa Mudaliar* (1903) 2 Weir 155, dissented from; *Clarke* v. *Brajendra Kishore Chowdhury* (1912), I.L.R., 39 Calc., 953 (P.C.), referred to.

PETITION presented under section 195 of the Code of Criminal Procedure against the order of W. L. VENKATARAMAYYA, Sessions Judge of Nellore, in Civil Miscellaneous Petition No. 2 of 1918 dismissing the petition to revoke the order of sanction granted by RAMACHANDRA RAO, District Magistrate of Nellore, for prosecuting the petitioner in No. 1269 D/Magl. of 1917.

The material facts appear from the judgment.

K. Krishnaswami Ayyangar for the petitioner.

The Public Prosecutor on behalf of the Crown.

NAPIER, J.

NAPIER, J.—This is an application for revocation of sanction to prosecute the petitioner for an offence under section 182, I.P.C., in that he gave false information to a public servant. The petitioner wrote to the District Magistrate informing him that one Sura Chinna Venkata Reddi had in his custody without licence three pieces of arms and submitted to the District Magistrate that the possession of such weapons "by such a person in our village will be dangerous to our lives and

* Criminal Miscellaneous Petition No. 219 of 1918.

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that they are without any licence." The house of Venkata Reddi was searched and no arms were discovered. Venkata Reddi then put in a petition to the District Magistrate under section 195 of the Criminal Procedure Code asking for sanction for the prosecution of the person who gave the information for an offence under section 182, Indian Penal Code. The District Magistrate granted the sanction. The petitioner then appealed to the Sessions Judge who dismissed his petition holding that the order was passed by the District Magistrate not as a Court but as an executive officer and that therefore no appeal lay to his Court. He expressly followed a decision of this Court in *Sankaram Aiyar* v. *Sakkarappa Mudaliar*(1). In that case a report had been made by a village munsif under section 45, Criminal Procedure Code, to the nearest Magistrate of the occurrence in the village of a death under suspicious circumstances or of the commission of an offence of murder. The High Court held that a report made under this section was not made to a Court and that therefore the Sessions Judge had no jurisdiction to entertain an appeal from a sanction granted by a Magistrate for the offence of giving false information to a public servant. With great deference to the learned Judges, I think that this view is incorrect, and if the information in this case had been given under that section, we might have thought it necessary to refer the matter to a Full Bench. But as I think the information is given under a special Act, I feel at liberty to dispose of it.

It is argued that the information constituted a complaint under the Code. But I do not think that it can be so treated. Under section 28 of the Indian Arms Act (XI of 1878) every person aware of the commission of an offence shall, in the absence of a reasonable excuse, give information of the same to the nearest Police officer or Magistrate. I have no doubt that the intention of the informant was to act under this section, especially in view of the language of his prayer which states that "the possession is without any licence," this being an offence punishable under section 19, clause (*f*) of the said Act. The informant did not go to the Magistrate to make the complaint, and he was not examined on oath, as he would have been if it had been a complaint. It appears that the Magistrate

(1) (1903) 2 Weir, 155.

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directed the issue of a warrant for the search of the house and the police procured the warrant from the nearest Magistrate. I am not clear whether the Magistrate in directing the issue of a warrant purported to act specifically under the Criminal Procedure Code with reference to an offence which had been brought to his notice or purported to act under section 25 of the Indian Arms Act. If he was acting under the Code of Criminal Procedure, it would be very difficult to argue that the information on which a Court issues a warrant is not information given to the Court, and it would not matter that the action was taken under section 190, sub-section (1), clause (c) of the Criminal Procedure Code and not on complaint. But if he did not think at that stage that it was necessary to take cognizance of an offence, but only acted under section 25 of the Indian Arms Act, the question is more difficult, for if such action is not by a Court, it would necessarily follow as held by the Sessions Judge that the information was given to an executive officer and not a Court. Section 25 provides that, where a Magistrate has reason to believe that any person has in his possession any arms for an unlawful purpose or that such person cannot be left in the possession of any such arms without danger to the public peace, such Magistrate, having first recorded the grounds of his belief, may cause a search to be made and may seize and detain the arms, although covered by a licence, in safe custody, for such time as he thinks necessary. The information in this case was to the effect that the possession of these arms is dangerous to the lives of the persons in the village, and it may very likely be that the Magistrate was proceeding under section 25 of the Act (Act XI of 1878) as a preliminary to any further proceedings which might be necessary for an offence under the Act. Assuming that he did so, I am still of opinion that he was acting as a Court. It is true that the section does not say he shall issue a warrant. But I know of no procedure by which the police have a power of search except under the Code and it would seem to follow that except by a warrant the Magistrate could not authorize the police to make a search. It would seem to follow therefore that the Magistrate in exercising his powers under this section must have recourse to this power under Chapter VII (B) of the Criminal Procedure Code of issuing search warrants subject of course to the special

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procedure contained in section 25 of the Indian Arms Act, and such warrants are of course under the language of the section issued by a Court.

There is another reason why I think the Magistrate is acting as a Court and that is the use of the words 'having first recorded the grounds of his belief.' If the Magistrate is not a Court when proceeding under section 25 the provision can have no value whatsoever. These words are always inserted where the Legislature intends to provide that a Court shall put on record the information on which it is acting for the benefit of any superior court having jurisdiction to review its action. I am fortified in this view by the opinion expressed by BRETT, J., in *Clarke* v. *Brajendra Kishore Roy Chowdhry*(1). In that case a District Magistrate having received information of a formidable riot in which fire-arms were used came to the spot and being informed that the fire-arms were being kept in certain houses, searched the houses. It was held by the majority of the Bench that his action was justified neither by the Criminal Procedure Code nor the Arms Act. On appeal to the Privy Council [*Clarke* v. *Brajendra Kishore Roy Chowdhury*(2)] the first view was negatived, but the latter view was upheld on the ground that he had not recorded his reasons as required by section 25 of the Arms Act. Neither the Privy Council nor the majority of the Bench expressed any opinion on the question whether action under section 25 was the action of a court, but the dissenting Judge states his opinion on that point definitely. He considers the matter on page 476 and says as follows:—

"The distinction between a judicial and an executive act in India is not very clearly drawn as many acts which are purely administrative are generally described as executive. The main distinction between the two appears to be that judicial acts are those acts done or orders passed in the exercise of the judicial discretion or power with which an officer is vested under the law, while executive acts are of a ministerial character either carrying judicial orders into effect or discharging duties not of a judicial nature. In the case of *Hope* v. *Evered*(3) to which we have been referred, it has been clearly laid down that the issue of a search warrant is a judicial act and in the case of *Mahomed Jackriah & Co.*, v.

(1) (1909) I.L.R., 36 Calc., 433. (2) (1912) I.L.R., 39 Calc., 953 (P.C.).
(3) (1886) L.R., 17 Q.B.D., 338.

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Ahmed Muhummud(1) and in the case of *In re Lakshmidas Naranji*(2) a similar view has been taken by the High Court in India."

I agree with the learned Judge that it is often difficult to say what acts of a Magistrate are administrative and what are judicial. But I think that whereas in the case of a search or issue of a search warrant the action of a Magistrate under a special Act is analagous to his action as a Court under the Code, the better view would be to hold that in this case too he was acting as a court. We have already decided in *Arunachalam Pillai* v. *Ponnusami Pillai*(3) that sanction by a Court under section 195, sub-section 1 (*a*) is appealable under sub-section 7. It follows therefore that the view of the Sessions Judge is incorrect and that he had jurisdiction to entertain the appeal. The petition is allowed and the case will be remitted to the Sessions Judge who will take it on his file and dispose of it according to law in the light of the above observations.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I agree with the order proposed by my learned brother and I further agree generally and in substance with the reasons given by him. I wish, however, to add some words of my own. The powers given by section 195 (*b*) of the Criminal Procedure Code of the superior 'authority' to revoke or grant a sanction given by a subordinate 'authority' is a specific statutory power. There is no express procedure laid down for the party to follow who wishes to move the superior authority to interfere with the proceedings of the subordinate authority. It seems to be usual to call the application to the superior authority a petition of 'appeal' though I am doubtful whether it could be called an 'appeal.' The mere fact that under clause 7 the superior authority is (where the subordinate authority is a Court) the Court to which in most cases [though not in all, see sub-clause (*c*)], appeals 'ordinarily lie' is not a complete justification for the use of the word 'appeal.' However the description of such an application as an appeal is convenient and I only wish to guard myself against the use of that term tending to mislead the mind in certain contingencies.

With the greatest respect to the decision in *Alagusamy Thevar* v. *King Emperor*(4) I feel constrained to dissent from that

(1) (1887) I.L.R., 15 Calc., 109 at 141. (2) (1903) 5 Bom. L.R., 980 at 982.
(3) (1919) I.L.R., 42 Mad., 64. (4) Crl. R.C. No. 136 of 1903—unreported.

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decision. In that case a village munsif sent a false report to the Sub-Magistrate accusing a man of murder. It is clear that he did so in order that the Sub-Magistrate might as a criminal court take cognizance of the alleged offence. The Sub-Magistrate accorded sanction to prosecute the village munsif for an offence under sections 177 and 182, Indian Penal Code. The Sub-divisional Magistrate revoked the sanction. The Sessions Judge 'restored' the Sub-Magistrate's order. According to section 195 (6) of the Criminal Procedure Code, it is not, strictly, a restoration of the Magistrate's order but the fresh granting of the sanction by the Sessions Judge himself. The Sessions Judge in that case treated himself as an appellate authority instead of an authority who was given a special statutory power and, as I have said above, was misled by the use of the term 'appeal' to indicate an application made to a higher authority under clause (6). Then on revision to the High Court the learned Judges (BENSON and BASHYAM AYYANGAR, JJ., held (*a*) that the sanction to prosecute was granted by the Sub-Magistrate of Tiraiyur in his capacity as a public servant and not in his capacity as a court, (*b*) that he would have acted in his capacity as a court only if the offence for the prosecution of which sanction was applied for was one of those mentioned in clauses (*b*) and (*c*) of section 195 (1) and not if it fell under section 195 (1) (*a*), (*c*)—that the Sub-divisional Magistrate did not act as a court but only as an executive officer and the superior authority over the Sub-Magistrate in revoking the sanction granted by the Sub-Magistrate and (*d*) that the Sessions Judge had therefore no jurisdiction to interfere under sub-sections 6 and 7 of section 195.

It seems to me that every Magistrate acting judicially is a criminal court. A Magistrate to whom as a criminal court a report is made in order that he might take action as a criminal court receives that report as a court. The presiding officer of the court is, no doubt, almost always a 'public servant'—also section 195, clause I (*a*)—and is also an 'authority'—clause (6). When he grants a sanction in respect of an offence falling under sections 177 and 182, Indian Penal Code (which are two of the offences mentioned in section 195, clause 1 (*a*) of the Criminal Procedure Code), he clearly grants the sanction as a Magistrate, that is, as a court and clause 7 in my opinion directly applies.

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In the case in *Clarke* v. *Brajendra Kishore Roy Chowdhury*(1) their Lordships of the Privy Council decided that a Magistrate making a search even in the absence of a complaint and on his own knowledge that an offence had been committed is acting as a criminal court. At page 966 they say :—

"It would seem that the Trial Judge and both the learned Judges who formed the majority of the court of appeal were misled by the use of the word 'court' in section 96. For the sake of brevity the Code uses the terms 'court' and 'Magistrate' generally if not always as convertible terms. Section 6 headed 'classes of criminal courts' enacts that 'besides the High Courts and the courts constituted under any law under this Code for the time being in force there shall be five classes of criminal courts in British India namely :—(1) courts of Sessions, (2) Presidency Magistrates, (3) Magistrates of the first class, (4) Magistrates of the second class, (5) Magistrates of the third class."

Then their Lordships say that a search made by a Magistrate is a proceeding conducted by him when 'acting in the discharge of his judicial functions.'

I think that this dictum of their Lordships of the Privy Council must be held as overruling the opinion expressed in *Alagusamy Thevar* v. *King-Emperor*(2) that a Sub-Magistrate to whom a report is made as such Magistrate and who grants sanction to prosecute is not acting as a court but as a public servant other than a court.

K.R.

(1) (1912) I.L.R., 39 Calc., 953 (P.C.).
(2) Crl. R.C. No. 136 of 1903—unreported.

APPELLATE CIVIL.

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

LANKA LAKSHMANNA AND ANOTHER (PLAINTIFFS), APPELLANTS

v.

LANKA VARDHANAMMA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1918. August 2, 5, 6, and 23 and Sep. 3.

Registration Act (XVI of 1908), sec. 41 (2)—Enquiry before a Sub-Registrar regarding a disputed will—Deposition of witnesses, admissibility of, under section 33 of the Evidence Act.

The depositions of witnesses (since deceased) examined at an enquiry held by a Sub-Registrar under section 41 (2) of the Indian Registration Act regarding the genuineness of a will, at which the opposing parties had opportunity of cross-examination, are admissible in evidence under section 33 of the Evidence Act in a subsequent suit raising the same question between the same parties.

It is not necessary that the 'first proceeding' referred in section 33 of the Evidence Act should be a judicial proceeding.

APPEAL against the decree of V. R. KUPPUSWAMI AYYAR, the Subordinate Judge of Kistna at Ellore, in Original Suit No. 32 of 1906.

Plaintiffs claiming to be the undivided co-parceners of the deceased husband of the first defendant brought this suit for a declaration that an adoption of the second defendant said to have been made by the first defendant, was in fact not made and even if made was invalid in law on the ground that a will set up by the first defendant as having been executed by her deceased husband and giving her power to adopt was not genuine. The first defendant pleaded that the will was genuine but that she did not adopt the second defendant. The second defendant pleaded that the will was genuine and that he was adopted by the first defendant.

Soon after the death of her husband the first defendant presented the will for registration which was opposed by the plaintiffs through their guardian on the ground that the will

* Appeal No. 192 of 1917.

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was not genuine. The Sub-Registrar examined certain attestors to the will and other witnesses tendered by both the parties. Vakils appeared on each side and cross-examined the witnesses of the opposite side. The Sub-Registrar eventually refused to register the will, but the same was registered on appeal by the District Registrar. In considering the question of the genuineness of the will the Subordinate Judge overruling the objection of the plaintiffs admitted in evidence under section 33 of the Evidence Act the depositions of the attestors to the will who were examined before the Sub-Registrar but who had died since then and upholding both the pleas of the second defendant, dismissed the suit. The plaintiffs preferred this appeal.

K. Srinivasa Ayyangar with *B. Narasimha Rao* and *S. Aravamudhu Ayyangar* for appellant.—The evidence is inadmissible under section 31. A Sub-Registrar or Registrar enquiring into the genuineness of a will is not a *Court* or a judicial officer and is not bound to hear witnesses. It is only discretionary with him. Section 33 of the Evidence Act will not apply to such enquiry. The requisites of section 33 are not complied with in such a case. See section 1 of the Evidence Act. There is no right of cross-examination of witnesses in such an enquiry. The words 'subsequent judicial proceeding' in section 33 imply that the previous proceeding also must be 'judicial'. There is 'no adverse party' in such enquiry. The sections of the Registration Act and the rules framed thereunder are only for effecting a departmental enquiry and for the Sub-Registrar or Registrar satisfying himself as to the genuineness or otherwise of the will. There is no right of suit in case of refusal to register. See sections 72 and 73. See section 36 which gives only a discretion to summon witnesses. Under that section the 'adverse party' is not entitled to get his witnesses summoned. Compare sections 63 and 69 (J) which show that the discretion vested in the Sub-Registrar and Registrar cannot be interfered with by the rules of the Government, as they must be 'consistent with the Act'. The rules framed by the Government on this point are *ultra vires*. Compare section 33 of the Registration Act, where there is no discretion left for the Sub-Registrar or Registrar.

G. Venkataramiah for second respondent—referred to various sections of the Registration Act which allow examination of

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witnesses. According to the Indian Evidence Act 'examination' includes cross-examination. The practice has been to allow cross-examination and in this case it was allowed. The rules framed under the Act are *intra vires*. All the conditions of section 33 of the Evidence Act have been complied with in this case. The previous proceeding referred to in section 33 need not be a 'judicial proceeding'. For the purpose of that section, it is sufficient if the person taking evidence is authorized by law to take it.

WALLIS, C.J.

WALLIS, C.J.—Objection has been taken in this case that the Subordinate Judge wrongly admitted in evidence depositions of persons dead at the date of the trial, which had been made by them at an inquiry held by the Sub-Registrar under section 41 (2) of the Indian Registration Act (XVI of 1908), when the will or authority to adopt which is in question in this suit was presented for registration. Such depositions have been frequently admitted and acted on without objection, but there is no authority on the point, and it is necessary to consider the question of their admissibility under section 33 of the Indian Evidence Act. It may be said at the outset that the Legislature clearly intended to give a wide scope to the section and to go beyond the English law, because it renders admissible not only evidence given by a witness in a judicial proceeding, but also evidence given by a witness "before any person authorized by law to take it," and also provides that a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of the section. In the earliest case (1653) Godb., 326 and 327; s.c. 78 E.R., 192, it was laid down that when a witness was dead or could not be found

"his deposition in an English Court in a cause betwixt the same parties plaintiff and defendant may be allowed to be read to the jury."

Taylor on Evidence, paragraph 464, says: "Where a witness has given evidence under oath in a judicial proceeding in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself be incapable of being called, be admitted in any subsequent suit between the same parties or those claiming under them, if such suit relate to the same subject or substantially involve the same material questions."

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WALLIS, C.J.

The Indian Evidence Act (section 1) applies to "judicial proceedings in or before any court," and accordingly section 33 deals with the admissibility of previous depositions "in a subsequent judicial proceeding," that is, in a judicial proceeding arising subsequently to the making of the deposition. But the previous deposition need not have been made itself in a judicial proceeding. According to the language of section 33, it is sufficient if it was made in a judicial proceeding or in such circumstances as to make it "evidence given by a witness before any person authorized by law to take it." Now the word 'evidence' is defined in section 3 as meaning and including "all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry," and 'court' is defined as including "all persons except arbitrators legally authorized to take evidence," and the Sub-Registrar is a person authorized to take evidence within the meaning of these definitions under the provisions of the Indian Registration Act, which are referred to below, as he is a person authorized to take statements from witnesses in relation to matters of fact under inquiry before him.

The only remaining question is whether the provisos to section 33 were satisfied (1) that the former proceeding was between the same parties or their representatives in interest, (2) that the adverse party in the first proceeding had the right and opportunity to cross-examine, and (3) that the questions in issue were substantially the same in the first as in the second proceeding.

For the purpose of answering this question, it is necessary to examine the statutory provisions regarding the proceedings of the Sub-Registrar under section 41 (2) of the Act. That section imposes on him the duty of registering the will if he is satisfied that it was executed by the testator, that the testator is dead, and that the person presenting it claims as executor or otherwise under the will. Section 68 gives the registering officer power to administer oaths at his discretion to persons examined before him and to record their statements, and section 36 provides for the summoning of witnesses at the instance of persons presenting any document for registration or claiming under any document which is capable of being so presented, and also provides for enforcing their attendance, etc., in the same

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manner as in suits before civil courts. Under section 69 (*j*) which authorizes the making of rules "generally regulating the proceedings of the Registrars and Sub-Registrars," rules have been made as to "the inquiry contemplated by section 41 (2) of the Act." Rule 69 requires the registering officer to whom the will is presented for registration to fix a day for such inquiry and to cause notice of the inquiry (*a*) to be served on persons to whom in his opinion special notice should be given and (*b*) to be published (1) in the District Gazette and (2) in the villages where the testator lived, where interested parties may reside and where the property of the deceased is situated. Rule 70 requires him to summon witnesses, not only at the desire of the persons presenting the will, as he is required to do by section 36 of the Act, but also at the desire of persons who object to registration on the ground that the will was not executed by the testator or that he is not dead, or that the persons presenting it is not entitled to present it under section 40, that is to say, that he does not claim under it as executor or otherwise. Rule 168 shows that the rules contemplate that the parties may be represented by counsel, as it prohibits any but licensed practitioners from appearing at the inquiry, and rule 72 (1) requires the registering officer to prepare and place on record a memorandum in English containing a summary of the evidence and the reasons for registration or refusal, as the case may be. There is an appeal from his order to the Registrar under section 72 (1) of the Act. In construing the provisos to section 33, it is important to remember that section 33 is applicable even where the earlier proceeding was not a judicial proceeding and therefore that the section contemplates that the provisos may be satisfied and the evidence at the earlier inquiry be admissible even where that inquiry does not satisfy all the requisites of a judicial proceeding. We should, therefore, be on our guard against construing the language of the provisos so strictly as to exclude evidence at all inquiries, which are not judicial proceedings, and we have not to consider whether the inquiry is or is not a judicial proceeding as in *Queen-Empress* v. *Tulja*(1) and *Atchayya* v. *Gangayya*(2) or whether or not the doctrine of absolute privilege applies to statements made at it, as to which

(1) (1888) I.L.R., 12 Bom., 36. (2) (1892) I.L.R., 15 Mad., 138.

In re MOGAL BEG.

acquitted the accused also of the offence under section 426, being of opinion that the planting of the stones was unauthorized and unnecessary and that their removal did not cause any loss to the complainant or any change in his field. The Sessions Judge who reviewed the calendar of the case referred the matter to the High Court under section 438 of the Criminal Procedure Code, being of opinion that the view of the Appellate Magistrate was wrong both in law and on the facts of the case.

The Public Prosecutor on behalf of the Crown.

S. Krishnaswami Ayyangar for the accused.

The JUDGMENT of the Court was delivered by—

PHILLIPS, J.

PHILLIPS, J.—It is argued for accused that this Court has no jurisdiction to entertain an application for revision in the case of an acquittal. It is, however, clear from the language of section 439 read with section 430 of the Criminal Procedure Code that this Court has jurisdiction to interfere even in such cases. It has, however, been consistently laid down by this Court that it will not interfere with cases of acquittal when Government has not appealed except in extreme cases. This has been held both when a private party has moved the Court and also when a District Magistrate has done so, but the present reference is made by a Sessions Judge, who has not the same facilities as a District Magistrate for moving Government to file an appeal. Although the rule of non-interference might be somewhat relaxed in cases referred by a Sessions Judge, yet we think it would be wrong to interfere even in such references unless we are convinced that serious injustice has been caused by error of law.

In the present case although we agree with the Sessions Judge's view of the law, we think the case is one of such a petty nature that we must refuse to interfere with an order of acquittal. Let the papers be returned to the Sessions Judge.

N.R.

APPELLATE CRIMINAL—(FULL BENCH).

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

IN THE MATTER OF A SECOND-GRADE PLEADER *

1918, September 30.

Legal Practitioners Act (XVIII of 1879), sec. 12—Pleader guilty of keeping a common gaming house—Suspension of pleader—Procedure for cases under sec. 12.

The conviction of a pleader under section 6 of the Madras Towns Nuisances Act (III of 1889) for keeping a common gaming house 'implies a defect of character which unfits him to be a pleader,' within section 12 of the Legal Practitioners Act, for which the pleader may be suspended by the High Court.

The procedure prescribed for enquiring into charges mentioned in sections 13 and 14 of the Legal Practitioners Act need not be pursued in cases coming under section 12 of the Act.

CASE stated under section 12 of Act XVIII of 1879 by B. C. SMITH, the District Judge of Ganjām.

The District Judge of Ganjām made the following report to the High Court under section 12 of the Legal Practitioners Act (XVIII of 1879):—

"Mr. . . . a Second-grade Pleader, practising in Berhampur, was convicted by the Second-class Magistrate, Ichchhāpuram, in C.C. No. 512 of 1916 of keeping a common gaming house in Berhampur town, an offence under section 6 of the Towns Nuisances Act (III of 1889), and was sentenced to a fine of Rs. 100. The conviction has been confirmed on appeal, and I have dismissed a revision petition presented to me.

In answer to a charge under section 12 Mr. . . . pleads that the conviction was wrong and that a conviction of an offence under the Towns Nuisances Act does not imply a defect of character unfitting him to practise as a pleader . . .

I enclose the records and copies of the judgments and order in the criminal case."

The Hon'ble the *Advocate-General* on behalf of Government.—The conviction must be taken as correct; see *In the matter of Rajendro Nath Mukerji*(1). A pleader guilty of keeping a common gaming house shows a great defect of character which

* Referred Case No. 6 of 1918 (F.B.).

(1) (1900) I.L.R., 22 All., 40 (F.C.).

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unfits him to continue as a pleader. Reference was made to *In re Weare*(1), *In the matter of a Solicitor*(2) (a case of a bookmaker), *In re Kali Prasanno Bosu Chaudhury*(3) (a member of an unlawful assembly). Gambling is reprehensible according to Hindu Sastras: see Manu, Chapter IX, sections 222, 224 and 225.

K. V. L. Narasimham for the pleader.—The pleader expressed regret in the lower Court and may be dealt with leniently.

K. Srinivasa Ayyangar represented the Vakils' Association.

The JUDGMENT of the Court was delivered by—

WALLIS, C.J.

WALLIS, C.J.—In this case the District Judge of Ganjām has reported to the High Court that the respondent has been convicted of keeping a common gaming house in Berhampur town, an offence under section 6 of the Towns Nuisances Act (III of 1889) and sentenced to a fine of Rs. 100. The District Judge has followed the procedure prescribed with regard to charges under sections 13 and 14 of the Legal Practitioners Act by issuing a notice, framing a charge and hearing the respondent, although, strictly speaking, that procedure is not required in cases such as this, which come under section 12 of the Act. Section 12 empowers the High Court to

"suspend or dismiss any pleader or mukhtar holding a certificate issued under section 7 who is convicted of any criminal offence implying a defect of character which unfits him to be a pleader or mukhtar, as the case may be."

The decision of the Privy Council in *In the matter of Rajendro Nath Mukerji*(4) shows that we are not now to re-try the case, but that the question before us is, whether the offence of which the respondent has been convicted implies a defect of character unfitting him to be a pleader. Now, the offence is that the respondent, who is a pleader of more than twenty years' standing and, according to his own showing, a man of considerable property, used the office which he rented for his business as a common gaming house, and was discovered there at night in company with a number of people of all ranks of society, with cards, cowries and other gambling instruments. Lord ESHER, M.R., in *In re Weare*(1), which was the case of a solicitor who had

(1) (1893) 2 Q.B., 439.
(2) (1905) 22 T.L.R., 127.
(3) (1910) 14 C.W.N., 1073.
(4) (1900) I.L.R. 22 All., 49 (P.C.).

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196 of the Criminal Procedure Code. *Per* NAPIER, J.—Section 196, Criminal Procedure Code, is a disenabling section, and should not therefore be construed with the strictness applicable to an enabling section. *Chidambaram Pillai* v. *Emperor* (1909) I.L.R., 32 Mad., 3, followed. *Queen-Empress* v. *Samavier* (1893) I.L.R., 16 Mad., 468, distinguished. *Barindra Kumar Ghose* v. *Emperor* (1910) I.L.R., 37 Calc., 467, dissented from.

Varadarajulu Naidu, P. v. *Public Prosecutor, Madura* ... (1919) I.L.R., 42 Mad., 180

HINDU LAW—*Settlement of a portion of joint family properties on foster-daughter in consideration of her marriage—Validity of settlement.*] A settlement of portion of joint family property by a Hindu in favour of his foster-daughter in pursuance of a promise made by him in consideration of her marriage with another who offered to marry her on such a condition is not a gift but is valid and binding on the alienor's son to the extent of the alienor's share as an alienation for consideration.

Nanjundaswami Chetti v. *Kanagaraju* ... ... (1919) I.L.R., 42 Mad., 154

INAM—*Grant by a Nawab in 1798 for building mosque, etc.—Public Trust—Confirmation of inam by British Government, subject to performance of duties—Resumption of inam—Levy of full assessment—Ryotwari patta issued to grantees—Title of grantees—Lands, whether freed from trust and made private property of trustees—Indian Trusts Act (II of 1882), sec. 88—Principle of section 88—Applicability of, to public trusts—Civil Procedure Code (V of 1908), sec. 92—Hereditary trustee, removal of—Misconduct of predecessor, whether a disability for trusteeship of descendant.*] An inam, granted by the Nawab of the Carnatic in 1798 for the building and upkeep of a mosque, was confirmed by the British Government in 1861 subject to the performance of the duties by the grantees, and, on account of non-performance of duties and misappropriation of the income by the grantees, was resumed by the Government, full assessment being levied on the lands and a ryotwari patta issued to the grantees in 1893. On a suit being instituted for removal of the defendants who were descendants of the grantees from trusteeship and for a scheme of management under section 92, Civil Procedure Code, the latter pleaded that there was no public trust and that the lands had become the private property of the grantees by the resumption and re-grant to them in 1893: *Held* (in the Letters Patent Appeal), that the inam was a grant of the land in trust for a mosque, and did not cease to be such by its being made resumable by Government for non-performance of duties by the trustees; that the resumption of the inam by levy of full assessment on the lands and issue of ryotwari patta to the trustees in 1893, did not free the lands from the trust and make them the private property of the trustees; and that even if the *lands* were resumed and re-granted to the trustees in their individual capacity on full assessment, they were bound to hold the lands so granted for the benefit of the trust, under the principle contained in section 88 of the Indian Trusts Act. *Held*, in the Appeal (*Per* WALLIS, C.J.), that the inam comprised both the lands and the assessment due thereon; that when Government resumes an inam by imposing

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full assessment and does nothing more and does not expressly resume the lands as well, the ownership is unaffected and if it was subject to any charitable trust, it still continues subject to it; and that it was unnecessary and improper to impose a permanent disability to fill the office of trustees on the defendants and their descendants on account of the misconduct of the defendants or their predecessors. (*Per* SPENCER, J.) *contra*, that in cases of resumption of charitable inams, when they consist of the land as well as the assessment, it is within the discretion of the Government to grant it on full assessment and issue ryotwari patta to the former trustee or to a person unconnected with the trust; in the former case as much as in the latter, the land becomes the private property of the grantee, freed from the trust; that the inam in this case must be taken to have been of the assessment only, that being the presumption raised by Government in dealing with grants more than sixty years old, and by resumption of the inam and levy of full assessment the trust was at an end; and that the suit grant was not for a public trust of the kind to which section 92, Civil Procedure Code, was applicable.

Muhammad Esuf Sahib v. *Moulvi Abdul Sathur Sahib* ... (1919) I.L.R., 42 Mad., 161

MADRAS ESTATES LAND ACT (I OF 1908), ss. 5, 77, 125, 132 AND 133—*Transfer of Property Act (IV of 1882), sec. 100—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Suit for rent in a Revenue Court—Money decree for rent—Sale in execution—Title of purchaser, whether free from encumbrances.*] A sale in execution of a decree for rent in a Revenue Court passes the property to the purchaser free of all encumbrances except those specified in section 125 of the Madras Estates Land Act. A charge for rent, created by section 5 of the Madras Estates Land Act, is not a charge within the meaning of section 100 of the Transfer of Property Act, so as to attract to it the provisions of Order XXXIV of the Civil Procedure Code. *Fotick Chunder Dey Sircar* v. *Foley* (1888) I.L.R., 15 Calc., 492, and *Roysuddi Sheik* v. *Kali Nath Mopkerjee* (1906) I.L.R., 33 Calc., 985, followed; *Tariniprosad Roy* v. *Narayan Kumari Debi* (1890) I.L.R., 17 Calc., 301, dissented from.

Suramma v. *Suriyanarayana Jagapathiraju* ... (1919) I.L.R., 42 Mad., 114

MINOR—*Money borrowed by guardian of a Hindu minor for a purpose binding on minor—Form of decree in a suit on loan—Liability of minor and his estate for loan.*] *Held* by AYLING and SESHAGIRI AYYAR, JJ.—(*a*) that on a contract entered into on behalf of a minor by his guardian under which the guardian borrowed money but no charge was created on the minor's estate, no decree can be passed against the minor on his attaining his majority or his estate, except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject, and that (*b*) a decree can be passed against the estate of a Hindu minor for a debt contracted by his guardian for the marriage of his sister. *Per* WALLIS, C.J.—A decree cannot be passed against a minor on his attaining his majority or his estate on a covenant entered into on his behalf by a guardian for his benefit.

Ramajogayya v. *Jagannadhan* ... ... (1919) I.L.R., 42 Mad. (F.B.), 165

been convicted of allowing houses belonging to him to be used as brothels, indicated the considerations which ought to guide the Court in these cases. He referred to the observation of Lord MANSFIELD in the earlier case of *In re Brownshall*(1) that it is necessary that members of all branches of the legal profession should stand free from all suspicion, and pointed out that the Court had to consider not only the solicitor's duties to his clients, but also whether his conduct was of such a personally disgraceful character that he ought not to remain a member of a strictly honourable profession, and that other members of that profession ought not to be called upon to enter into that intimate intercourse with him that is necessary between two solicitors, even though they are acting for opposite parties.

We think that the offence of which the respondent has been convicted is one which undoubtedly affects his character, and the learned Advocate-General has shown that this is certainly so according to Hindu ideas. In these circumstances, we are bound to deal with him under the Legal Practitioners Act, and we have carefully considered what the sentence should be. This is the first time that any such case has come before the Court, and it is possible that the pleader was not fully alive, as he ought to have been, to the gravity of his conduct. We think it is sufficient to direct in this case that he be suspended from practice for six months. But this is not to be regarded as a precedent in future cases which may come before the Court. The respondent must also pay the costs of the day.

N.R.

(1) (1778) 2 Cowp., 829.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

1918, July 19 and 25 and August 13.

PANANGIPALLI SURAMMA (PLAINTIFF), APPELLANT,

v.

SURIYANARAYANA JAGAPATHIRAZU AND SEVEN OTHERS (DEFENDANTS 1, 2, 7 and 3 to 6 and 8), RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 5, 77, 125, 132 and 133—Transfer of Property Act (IV of 1882), sec. 100—Civil Procedure Code (Act V of 1908). O. XXXIV, r. 14—Suit for rent in a Revenue Court—Money-decree for rent—Sale in execution—Title of purchaser, whether free from encumbrances.

A sale in execution of a decree for rent in a Revenue Court passes the property to the purchaser free of all encumbrances except those specified in section 125 of the Madras Estates Land Act.

A charge for rent, created by section 5 of the Madras Estates Land Act, is not a charge within the meaning of section 100 of the Transfer of Property Act, so as to attract to it the provisions of Order XXXIV of the Civil Procedure Code.

Fotick Chunder Dey Sircar v. *Foley* (1888) I.L.R., 15 Calc. 492, and *Royzuddi Sheik* v. *Kali Nath Mookerjee* (1906) I.L.R., 33 Calc., 985, followed; *Tariniprosad Roy* v. *Narayan Kumari Debi* (1890) I.L.R., 17 Calc., 301, dissented from.

SECOND APPEAL against the decree of A. RAGHUNATHA RAO, the Subordinate Judge of Cocanada, in Appeal Suit No. 72 of 1915 preferred against the decree of V. V. SUBBA RAO, the Additional District Munsif of Peddapur, in Original Suit No. 235 of 1914.

The first and second defendants instituted a suit for rent in a Revenue Court under section 77 of the Madras Estates Land Act and obtained a money decree for rent against the third defendant in R.S. No. 36 of 1911 on the file of the Deputy Collector of Peddapuram. In execution of the decree, the decree-holders put up the holding for sale in auction, and the seventh defendant became the purchaser and obtained a sale certificate dated 21st August 1913. Meanwhile, the plaintiff who was a mortgagee from the vendee of the third defendant under a registered mortgage deed, dated 6th May 1910, filed a claim petition which was dismissed on 6th January 1913. The plaintiff

* Second Appeal No. 1493 of 1916.

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thereupon filed the present suit in the District Munsif's Court of Peddapuram for a declaration that the auction sale did not affect his prior mortgage-right. The District Munsif decreed the suit in favour of the plaintiff; on appeal the Subordinate Judge reversed the decree and dismissed the suit. The plaintiff preferred this second appeal.

C. Rama Rao and *P. Narayanamurti* for the appellant.

P. Nagabhushanam for the first to third respondents.

PHILLIPS, J.

PHILLIPS, J.—The plaint properties were sold to seventh defendant in execution of a decree for rent due upon them and the sole question for decision is whether the purchase by seventh defendant is subject to plaintiff's mortgage on the properties or not. The two lower Courts have taken opposite views, the District Munsif holding on the strength of the ruling in *Tariniprosad Roy* v. *Narayan Kumari Debi*(1) that a sale in execution of a decree for rent did not affect a prior mortgage, while the Subordinate Judge, following the opinion of the Calcutta High Court in *Royzuddi Sheik* v. *Kali Nath Mookerjee*(2) that the statutory charge upon the land for arrears of rent was not a charge within the meaning of section 100 of the Transfer of Property Act, held that the sale transferred the property free of encumbrance.

Under section 5 of the Madras Estates Land Act, a first charge is created upon the land for rent, but the provision in section 65 of the Bengal Tenancy Act that the land can be sold in execution of a decree for rent finds no place in the Madras Act, under which a landlord may sue for his rent or distrain movable property (section 77) or sell the land through the Collector (section 111 et seq.). The question is whether, having obtained a money decree, the property can be brought to sale in execution with the same result as would follow from a sale effected by the Collector. If the charge upon the land is a charge within the meaning of section 100, Transfer of Property Act, the provisions of Order XXXIV, rule 14, of the Code of Civil Procedure clearly forbid the sale of the property except by instituting a suit for sale in enforcement of the charge. Under section 100, Transfer of Property Act, "where immovable property of one person is by act of parties or operation of

(1) (1890) I.L.R., 17 Calc., 301. (2) (1906) I.L.R., 33 Calc., 985.

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law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge upon the property and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property." If we apply this section the owner of the property, i.e., the tenant whose holding is security for the rent, is treated as being in the position of a mortgagor and has the rights of a mortgagor under sections 50 and 61 to redeem the charge, but under the Estates Land Act a tenant cannot get rid of the charge upon his holding by paying the rent, for the charge continues as security for rent to be paid hereafter. It may also be noted that where rent is payable in kind the charge for arrears of rent cannot come within the definition in section 100 which refers only to payment of money and it would be most anomalous that a charge created by statute should be a charge within the meaning of section 100 in some cases but not so in others. The Estates Land Act treats the charge as being of the same nature in all cases, and created no distinction between the charge where rent is payable in kind and the charge where rent is payable in money. Section 73, Transfer of Property Act, would also seem to indicate that a charge for rent is not of the nature contemplated in section 100. I would therefore accept the view of the Calcutta High Court expressed in *Folick Chunder Dey Sircar* v. *Foley*(1) and in *Roy-Zuddi Sheik* v. *Kali Nath Mookerjee*(2) that a charge for rent is not a charge within the meaning of section 100 of the Transfer of Property Act. In this view Order XXXIV, rule 14, is inapplicable to the present case.

There is however another aspect of the case which has to be considered. Under the decree for rent the property can be brought to sale, but if the decree were merely for money due on a debt, the sale would not have the effect of passing the property free of encumbrance and it is difficult to see how the fact that the debt is for rent can affect the case when the decree is passed by a civil Court. In the present case, however, we are not concerned with a civil Court's decree because the rent decree was obtained in a revenue Court and under section 132 of the Estates Land Act the provisions of Chapter VI relating to sales

(1) (1888) I.L.R., 15 Calc., 492. (2) (1906) I.L.R., 33 Calc., 985.

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by a Collector, for arrears of rent are made applicable to the execution of a decree of a revenue Court for arrears of rent. A sale by a Collector under Chapter VI passes the property free of all encumbrances except those specified in section 125 and consequently by virtue of section 132 a sale in execution must do the same. This view is also supported by the fact that under section 133 the Collector has certain powers given to him both in executing a decree for arrears by sale and in holding a sale for default under Chapter VI, no distinction being drawn between the two sales. Although section 65 of the Bengal Tenancy Act is not specifically re-enacted in the Madras Act, section 132 of the latter leads to the same result and I must hold that a sale in execution of a decree for rent in a revenue Court passes the property to the purchaser free of all encumbrances except those specified in section 125.

This Second Appeal is accordingly dismissed with costs.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. Defendants Nos. 1 and 2 filed a suit in the revenue Court against the third defendant for arrears of rent, got a money decree and in execution sold the holdings. The plaintiff who claimed to be a mortgagee under a registered deed of mortgage, dated 6th May 1910, sued for a declaration that the sale in execution was subject to his mortgage. The District Munsif was of opinion that inasmuch as the sale was in execution of a simple money decree the decree-holders must be presumed to have given up their lien on the holding conferred by section 5 of the Estates Land Act and passed a decree in favour of the plaintiff. On appeal, the Subordinate Judge reversed the decree and held that the charge was not affected by the form of the decree.

It is argued for the appellant that the charge created by section 5 of the Estates Land Act is a charge within the meaning of section 100 of the Transfer of Property Act so as to attract to it the provisions of Order XXXIV of the Code of Civil Procedure and that consequently the sale of the property charged in execution of a simple money decree will not bind a mortgagee or prevent him from redeeming. It is also argued on the strength of the observations of PETHERAM, C.J., in *Tariniprosad Roy* v. *Narayan Kumari Debi*(1) that the sale in

(1) (1890) I.L.R., 17 Calc., 301.

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execution of a simple money decree for rent would have no higher effect than any other sale in execution of a money decree.

As regards the first contention I do not think rent due by a tenant to his landlord which may be payable either in kind or in money can be said to be a charge within the meaning of section 100 of the Transfer of Property Act which expressly refers to the security being only for the payment of money. It is extremely unlikely that the legislature intended that landlords who receive their rent in kind should be on a different footing from those who receive the rent in money and that while the former are untrammelled by the provisions of Order XXXIV of the Code of Civil Procedure the latter are bound by them.

In *Sm. Moharanee Dasya* v. *Harendra Lal Roy*(1), it was pointed out that there was no strict analogy between a charge for rent and a mortgage. In *Fotick Chunder Dey Sircar* v. *Foley*(2), it was held that rent due by a tenant which by virtue of section 65 of the Bengal Tenancy Act was a charge on the holding was not a charge within the meaning of section 100 of the Transfer of Property Act. And a similar view was taken by MOOKERJEE, J., in *Royzuddi Sheik* v. *Kali Nath Mookerjee*(3). In *Gopinath Mahapati* v. *Kashinath Beg*(4) the purchaser in execution of a rent decree was held to have priority over a purchaser in execution of a mortgage decree; and reference was made to section 73 of the Transfer of Property Act which enacts that where property is sold for arrears of rent the mortgagee is entitled to enforce his mortgage against the surplus sale-proceeds, if any.

Reliance has been placed by the appellant's vakil on the observations in *Narayana Ayyar* v. *Venkataramana Ayyar*(5), to the effect that in construing the words 'mortgage' and 'charge' for the purposes of the Limitation Act the definition of the Transfer of Property Act should be applied in the absence of any definition in the Limitation Act. These observations do not lay down an imperative rule of construction, but only indicate that in the absence of any repugnancy, Courts will

(1) (1896) I.C.W.N., 458.
(2) (1898) I.L.R., 15 Calc., 492.
(3) (1906) I.L.R., 33 Calc., 885 at p. 895.
(4) (1909) 9 C.L.J., 234.
(5) (1902) I.L.R., 25 Mad., 220 (F.B.).

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adopt the definition in a substantive enactment, when they have to construe other acts where the same words are used. The fact that rent is not necessarily payable in money renders the definition of a charge in section 100 of the Transfer of Property Act inapplicable. I think the view taken by the Calcutta High Court is sound and see no reason to differ from the decisions above referred to.

On the second question I am of opinion that a sale in execution of a money decree for rent in a suit under section 77 of the Estates Land Act passes title free from all encumbrances except when the encumbrance falls within section 125 of the Act. Section 5 declares that the rent of ryot's land together with any interest which may be due in respect thereof shall be a first charge on the holding. Under the Act the landlord can recover rent due in these ways: (1) by distraint and sale of movable property, (2) by a sale through the Collector, (3) by a suit under section 77 of the Act in a revenue Court and sale in execution of the decree passed therein. So far as distraint and sale by the Collector are concerned there can be little doubt that the sale would confer a title on the purchaser free from all encumbrances except such as are contemplated in section 125 and there seems to be no reason why the intervention of a decree for rent should make any difference if the provisions of Order XXXIV of the Code of Civil Procedure do not apply. The following observations of Mr. AMEER ALI in his commentaries on section 65 of the Bengal Tenancy Act when dealing with *Tariniprosad Roy* v. *Narayan Kumari Debi*(1) are in point:

"There is no warrant in the provisions of the Act for holding that a difference in the form of the actions would alter the rights of the landlord relating to the enforcement of his decree for arrears of rent. If the suit is for rent and the decree is for rent the absence of a declaration in the ordering part of the decree that the decretal amount is a charge on the tenure or holding would not, it is submitted, alter the character of the decree the effect of which under the law is to make the rent a first charge on the tenure or holding in respect of which the arrears are claimed."

The observations of PETHERAM, C.J., in *Tariniprosad Roy* v. *Narayan Kumari Debi*(1) are dissented from in *Surbo Lal* v.

(1) (1890) I.L.R., 17 Calc., 301.

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J. M. Wilson(1), and in *Royzuddi Sheikh* v. *Kali Nath Mookerjee*(2), MOOKERJEE, J. (at page 995) was of opinion that the consequence which follows from the provision that rent is a first charge upon an under-tenure is that a sale held in execution of a decree for arrears of rent produces the effect described in Chapter XIV of the Bengal Tenancy Act which refers to sales for arrears under a decree and which provides for a title free from all except certain specified encumbrances to the purchaser.

It has been argued for the appellant that, as there is no section in the Estates Land Act similar to section 65 of the Bengal Tenancy Act, the decisions above referred to have no application. Section 65 provides that, where a tenant is a permanent tenure holder or ryot holding a fixed rate or an occupancy right he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon. As observed by the Privy Council in *Forbes* v. *Maharaj Bahadur Singh*(3) (at page 937) section 65 is not a happily worded section as the clause refers to "rents being a first charge" and the words "seem from their collocation to have been inserted as an after-thought without sufficient consideration of their applicability to the rest of the provisions contained in the section." The Estates Land Act contains provisions in different sections which in effect reproduce all the provisions of section 65 of the Bengal Tenancy Act. Section 5 of the Estates Land Act provides that rent due by a ryot shall be a first charge. Section 6 gives a ryot rights of permanent occupancy. Section 77 gives the landlord the right to recover arrears of rent in a revenue Court and section 132 provides that the provisions of Chapter VI shall be applicable so far as may be to the execution by a revenue Court of any decree for arrears of rent. It will thus be seen that the absence of any separate section like section 65 of the Bengal Tenancy Act makes really no difference in the scheme of the Estates Land Act and does not render the reasoning adopted by the learned Judges of the Calcutta High Court inapplicable.

Sections 111 to 131 relate to sales by the Collector on the application of the landlord to whom rent is due, and section 125

(1) (1903) I.L.R., 32 Calc., 680. (2) (1906) I.L.R., 33 Calc., 985.
(3) (1914) I.L.R., 41 Calc., 926 at 937 (P.C.).

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enacts that the purchaser will only take the holding subject to "any right or interest which the ryot has created therein with the landlord's permission in writing registered and subject to any encumbrances created before the passing of the Act." It seems to me that the combined effect of sections 125 and 152 is to give the same rights to a purchaser in execution of a decree for rent, there being nothing in the Act repugnant to such a construction.

I am therefore of opinion that the purchaser in execution of a decree for rent gets the properties free from encumbrances except such as are specially reserved by the provisions of the Estates Land Act. The Second Appeal fails and is dismissed with costs.

K.R.

APPELLATE CIVIL.

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

THE OFFICIAL ASSIGNEE OF MADRAS AND ANOTHER, APPELLANTS,

v.

THE OFFICIAL ASSIGNEE OF RANGOON BY HIS AGENT SUBRAMANIA AIYAR AND ANOTHER, RESPONDENTS.*

1918, August 19, 20 and 27.

Presidency Towns Insolvency Act (III of 1909), ss. 17, 22 and 51—Adjudication by different Courts—Later adjudication based on earlier acts of insolvency—Vesting of property under prior adjudication—Official Assignee, whether divested by later adjudication—Convenience of administration of assets by one Court—Annulment of adjudication in the other, necessity for—Order of adjudication—Specification of acts of insolvency therein, necessity for.

Where there are successive adjudications in insolvency by two Courts, all the property of the insolvent vests in the Official Assignee appointed by the Court in which the prior adjudication was made and it will not be divested from him by the subsequent adjudication of the other Court, even if the later adjudication be based on acts of insolvency committed earlier in date than those upon which the prior adjudication was made.

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Where it is found convenient that the estate should be administered by the Court in which the later adjudication was made, steps should be taken to annul the prior adjudication.

Section 51 of the Presidency Towns Insolvency Act (III of 1909) which enacts the doctrine of relation back is intended to enable the Official Assignee to recover property in the hands of third parties and has not the effect of divesting property vested in an Official Assignee under a prior adjudication.

Ex parte Geddes, In re Mowat (1824) 1 G. & J., 414, followed.

An order of adjudication should specify the precise acts of insolvency on which it is made, as the insolvency relates back to the date of the acts of insolvency which are found to have been proved.

APPEAL against the judgment and order of the Hon'ble Mr. Justice BAKEWELL, in Insolvency Petition No. 83 of 1917, dated the 23rd day of April 1918, on the file of the High Court in its Insolvency Jurisdiction.

Two of the creditors of the firm of T.A.R.A.R.M. Ramanathan Chetty presented a petition on the 17th April 1917 to the High Court of Madras in its Insolvency Jurisdiction for the adjudication of the firm composed of Ramanathan Chetty and his son and set out in their petition various acts of insolvency committed by them, none of which acts were earlier than March of the same year; the order of adjudication was passed on the 23rd April 1917. On the 10th May 1917, the same firm was again adjudicated by the Chief Court of Lower Burma in respect of acts of insolvency found to have been committed in or about the month of February of the same year. It appeared that the insolvents (who were Nattukottai Chettis) had their permanent home in the southern districts of Madras Presidency, and carried on business both in Madras and Rangoon, but that Rangoon was their principal place of business and latterly little or no business was done in Madras. It also appeared that the Official Receiver of Rangoon had, with the assistance of the creditors in Rangoon, made considerable progress with the winding up of the estate. The Official Receiver of Rangoon moved, on the 10th April 1918, before the High Court of Madras for annulment of, and stay of further proceedings under, the adjudication of the Madras High Court. BAKEWELL, J., who heard the motion, ordered stay of proceedings on the 23rd April 1918, and also directed the petitioning creditor in that Court and the opposing creditor to pay the cost of the motion. Against this

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order three appeals were preferred, one by the Official Assignee of Madras, the second by one of the creditors, and the third by the Official Assignee of Rangoon who wanted the Madras adjudication to be altogether annulled. The further facts and contentions appear from the judgments.

D. Chamier for the first appellant.

G. Krishnaswami Ayyar for the second appellant.

The Hon'ble *The Advocate-General* (*S. Srinivasa Ayyangar*) and *L. S. Viraraghava Ayyar* for the first respondent.

K. Srinivasa Ayyangar, *T. R. Ragavendra Row* and *S. Aravamudhu Ayyangar* for the second respondent.

WALLIS, C.J.

WALLIS, C.J.—These are cross appeals from an order of BAKEWELL, J., in Insolvency by which acting under section 22 of the Presidency Towns Insolvency Act, he stayed the proceedings of the Official Assignee of Madras in I. P. No. 83 of 1917. In O.S.A. No. 27 the Official Assignee of Madras challenges the order of stay and O.S.A. No. 29 is an appeal to the same effect by one of the creditors, while in O.S.A. No. 39 the Official Assignee of Rangoon asks that the Madras insolvency should not merely be stayed but annulled. No question was raised before the learned Judge as to the petition for annulment having been presented by the Official Assignee of Rangoon instead of by one of the creditors and it is unnecessary for us to consider the question, as to which we decide nothing.

On 17th April 1917 two of the creditors of the firm of T.A.R.A.R.M. Ramanathan Chetty presented a petition for the adjudication of the firm to this Court, alleging that the firm consisted of Ramanathan Chetty and his son Annamalai Chetty, and setting out various acts of insolvency. This was supported by an affidavit in nearly the same terms by Adaikappa Chetty the agent of the petitioning creditors, and on the 23rd of April an order of adjudication was made. The order, which was drawn up by filling in a printed form, recites that the insolvents had committed acts of insolvency mentioned in the petition and does not specify the precise acts of insolvency on which the order was made. This form may have been sufficient under the scheme of the old Act, in which the insolvency related back to the date of the petition, but, to enable due effect to be given to the provisions of the present Act, the acts of insolvency which are found to have been proved should be shown specifically in

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the order and not be left to be gathered from a perusal of the affidavit. Another defect of practice which has come to light is that the order on the creditors' petition was not notified forthwith as it should have been, in the *Fort St. George Gazette*.

On the 10th of May 1917 the T.A.R.A.R.M. firm was again adjudicated by the Chief Court of Lower Burma in respect of acts of insolvency found to have been committed in or about the month of February. The affidavit in support of the Madras petition on which this Court acted, did not allege with sufficient certainty any acts of insolvency prior to the month of March; and, therefore, the acts of insolvency upon which the firm was adjudicated in Madras must be taken to have been later in time than the acts on which the adjudication was made in Rangoon, though the date of the adjudication in Rangoon was subsequent to the adjudication in Madras. Now in these circumstances it is contended for the Madras creditors and the Madras Official Assignee that the property of the insolvents wherever situated in British India having vested in the Official Assignee of Madras, the subsequent adjudication in Rangoon had nothing to operate upon, and that the property of the insolvents has never vested in the Official Assignee of Rangoon and cannot vest in him until the Madras insolvency is annulled under section 22. In my opinion the whole property of the insolvents having vested in the Official Assignee of Madras by virtue of the adjudication here, there was nothing to vest under the subsequent adjudication in Rangoon. If authority be wanted for what appears to me to be an obvious proposition, it is to be found in the series of cases both at law and equity referred to in *Morgan* v. *Knight*(1) in which a later commission of bankruptcy had been held to be a nullity so long as the earlier commission was outstanding. In delivering the judgment of the Court of Common Pleas overruling these decisions, ERLE, C.J., observed that they rested on two propositions, one, that an uncertificated bankrupt could have no property, and the other, that, if there is no property, a commission is void, by reason of the fact that there cannot be any effects administered under it. He then pointed out that it was not essential to the validity of

(1) (1863) 15 C.B.N.S., 669.

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a bankruptcy that the bankrupt should be possessed of property, and, secondly, that in certain circumstances an uncertificated bankrupt might acquire property. It was not questioned in this case, or in any of the later cases in England that have followed it, that the later adjudication could not operate on the property which had once belonged to the bankrupt but had vested in the Assignee under the earlier adjudication. This was also regarded as beyond question by STRACHEY, J., and on appeal from his judgment, by FARRAN, C.J., in *Re Arunvayal Sabhapathy*(1). There are no doubt some observations of HENDERSON, J., in *In the matter of William Watson*(2), as to the Official Assignee having some sort of title to assets which under an earlier bankruptcy in England had vested in the English trustee, but they appear to have been made *obiter* and *Morgan* v. *Knight*(3), on which the later English cases proceed, was not cited to the Court.

It is said, however, that, assuming this to be so, the property vested in the Official Assignee of Rangoon by virtue of the fact that the adjudication in Rangoon was based on acts of insolvency earlier in date than those on which the order was made in Madras. None the less, when the adjudication was made in Rangoon all the property of the insolvents had already vested in the Official Assignee of Madras and there was nothing in which the Rangoon adjudication could operate. The provision in section 17 that on the making of an order of adjudication the property shall vest in the Official Assignee is express, and there is no provision in the Act divesting the property so vested in that Official Assignee and transferring it to another Official Assignee under a later adjudication. Section 51, no doubt, provides that the insolvency is to date back and to be deemed to commence at the date of the first of the acts of insolvency proved to have been committed within three months of the date of the presentation of the insolvency petition, but this is a provision intended to enable the Official Assignee to recover property in the hands of third parties, and has not the effect of divesting property which has been duly vested in an Official Assignee in accordance with law under a prior adjudication.

(1) (1897) I.L.R., 21 Bom., 297. (2) (1904) I.L.R., 31 Calc., 761.
(3) (1863) 15 C.B. (N.S.), 669.

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The point, moreover, has been expressly decided by the House of Lords in *Ex parte Geddes, In re Mowat*(1), a case of competition between an earlier Scotch sequestration and a later English bankruptcy. The English bankruptcy, which was before the statute of 6 Geo. 4, was governed by the statute of Elizabeth and the subsequent Acts under which the doctrine of relation back was applied without the restrictions which have been imposed upon the doctrine in modern statutes. It was there held by the House of Lords that the Scotch sequestration, which under the Sequestration Act operated on the bankrupt's estate in England and took effect from the date of the presentation of the petition on the 26th of January, was not superseded or annulled by an English commission of Bankruptcy granted in the month of March by relation back to the act of bankruptcy on which it was founded, which was committed on the 4th of January. As observed by Mr. Dicey citing this case, priority depends on the date of the adjudication and not on the date of the commission of the act of bankruptcy (Conflict of Laws, Note to Rule 113). In British India we have not only four insolvency jurisdictions under the Presidency Towns Insolvency Act, but also the very numerous jurisdictions under the Provincial Insolvency Act, so that cases like the present may not infrequently arise. In all such cases it should, we think, be recognized that the vesting depends on priority of adjudication, and that steps should at once be taken to annul the prior adjudication where it is convenient that the estate should be administered by another jurisdiction. Great confusion might ensue if competing assignees or receivers were to have concurrent authority to realize the insolvent's estate independently of one another, instead of the insolvency being in one jurisdiction only at a time and the other jurisdictions being required to act in aid of it, if necessary.

It follows that the estate of the insolvent is now vested in the Official Assignee of Madras and not in the Official Assignee of Rangoon. The question then arises whether we should annul the Madras insolvency and leave the estate to be administered in Rangoon. BAKEWELL, J., was of opinion that in the interests of the creditors the estate should be administered in Rangoon,

(1) (1834) 1 G. & J., 414.

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and unless we are prepared to differ from him as to this, we think we are bound to give effect to this view by annulling the insolvency in Madras and allowing the title of the Rangoon Official Assignee to operate on the assets. The insolvents are Nattukottai Chettis, who according to their custom have their permanent home in the southern districts of this Presidency where their families reside, and carry on business in India, Burma and the near East. The insolvents carried on business in this way both in Madras and Rangoon, but there can be no doubt that Rangoon was their principal place of business, and that latterly little or no business was done in Madras. While in Madras for nearly a year after the adjudication no assistance was given to the Official Assignee to enable him to get in the assets, the Official Assignee of Rangoon, who did not come to know of the prior Madras insolvency until the middle of December 1917, was enabled with the assistance of the local creditors to make considerable progress with the winding up of the estate. Properties which had been mortgaged by the insolvents were sold, and the surpluses recovered for the general body of creditors, and various suits were instituted against the debtors of the estate. The chief ground on which we have been asked not to annul the Madras insolvency but to allow it to proceed is, that with knowledge of the prior insolvency in Madras, the Official Assignee of Rangoon entered into a contract in April of this year to sell valuable properties of the insolvents in the Coimbatore district of the Presidency in one lot for five lakhs of rupees. It is alleged, and has been strongly pressed, that this sale was at a serious undervalue, and that, if the property had been sold in lots, very much higher prices would have been realized, and counter offers to purchase in one lot at an advance of half a lakh were placed before the Court. As regards the action of the Official Assignee of Rangoon in proceeding to enter into the contract of sale, it cannot be said, having regard to the observations in *In the matter of William Watson*(1), that the law was clear. Even before BAKEWELL, J., the point as to the absence of authority does not appear to have been very strongly pressed as the learned Judge does not deal with it in his order. There were, also, circumstances connected

(1) (1904) I.L.R., 31 Calc., 761.

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with the property which the Official Assignee of Rangoon may have considered to necessitate immediate action. We do not think that in these circumstances the conduct of the Official Assignee in proceeding with the administration or in entering into the contract of sale affords sufficient ground for refusing to make the order of annulment which we consider on other grounds to be desirable. Nor do we think that the terms of the contract afford such a ground. Further than this it is unnecessary for us to go, and we express no opinion whatever as to this contract, because we think it is a question for the Rangoon Court to deal with after the annulment of the Madras insolvency. In order that the creditors should have an opportunity of questioning it, if so advised, in the Rangoon Court, we have decided to make the annulment conditional on the Official Assignee of Rangoon undertaking not to execute the deed of sale for two months from this date, which will give time for an application to the Chief Court, and on his paying the costs of the Official Assignee of Madras both here and before the learned Judge as between solicitor and client out of the estate.

As regards the memorandum of objections, we set aside so much of the order of the learned Judge as makes the petitioning creditors and Tyagaraja Chetti liable for the costs of the Official Assignee of Rangoon.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I entirely agree with the judgment of the learned Chief Justice. As was pointed out by STRACHEY, J., in *In re Aranvayal Sabhapathy*(1), an adjudication of insolvency by one Court is not a bar to the jurisdiction of another Court exercising similar powers. Section 22 of the Insolvency Act by implication recognizes concurrent adjudication. It may be, as was pointed out in *In the matter of William Watson*(2), that the subsequent adjudication may give a sort of contingent or reversionary interest in the assets of the insolvent in the event of the previous order being set aside.

The further question is whether we should annul the adjudication made in Madras. The Madras adjudication was undoubtedly earlier in date. The learned Advocate-General referred to the Madras petition and the order of adjudication

(1) (1897) I.L.R., 21 Bom., 297. (2) (1904) I.L.R., 31 Calc., 761.

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thereon as showing that the title of the Madras Official Assignee was inferior to that of the Rangoon Official Assignee. He relied upon section 51 of the Act which declares that the insolvency of a debtor shall be deemed to have relation back to the time of the commission of the act of insolvency on which an order of adjudication is made. In my opinion, this section was not intended to refer to the conflicting claims of different assignees. As was contended by Mr. Chamier, its operation should be limited to questioning titles created by the insolvent in favour of third parties since the date of the act of insolvency complained of in the petition. If the other contention were upheld, the result would be that there would be a complete vesting order under one adjudication from a particular date, and an equally effective order by another adjudication from an earlier date. In my opinion, section 51 was not intended to give priority to an adjudication by one Court over the adjudication of another Court by reference to the act of insolvency adjudicated upon. The decisions in *Ex parte Learoyd, In re Foulds*(1), *In re Pollitt, Ex parte Minor*(2) and *In re Carl Herth, Ex parte the Trustee*(3) relied on by the Advocate-General and which were given under the corresponding section of the English Bankruptcy Act are only authorities for the proposition that as between the trustee in bankruptcy and a creditor of the insolvent, the title of the former relates back to the act of insolvency mentioned in the petition. Lord ESHER, Master of the Rolls, in *In re Pollitt, Ex parte Minor*(2) gave this definition of 'relating back':

"The result of the relation back is, that all the subsequent dealings with the debtor's property must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed. The debtor must be considered as having become a bankrupt the moment the deed was executed."

It is true that the decision of the House of Lords commented on by Dicey in his book under rule 113 related to acts of adjudications of bankruptcy made under different statutes. None the less, it seems to me that this principle should be

(1) (1878) 10 Ch. D., 3. (2) (1893) 1 Q.B., 455 at 457.
(3) (1899) 1 Q.B., 612.

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applied to adjudications made under the same statute. Dicey in commenting upon the rule says :—

"The rule probably holds good where the earliest of several bankruptcies, and the assignment under it, takes place in a country beyond the limits of the United Kingdom, namely, Victoria or Prussia."

As was pointed out by the learned Chief Justice, there is nothing in the Presidency Towns Insolvency Act, which says that a vesting order once made can be divested except it be by annulling the adjudication altogether. I am therefore of opinion that the Madras adjudication which was earlier in date did vest all the properties of the insolvent in the Madras Official Assignee, notwithstanding the fact that the act of insolvency complained of in the petition for adjudication is said to have been committed on a date later than the act of insolvency, with reference to which the Rangoon order of adjudication was passed.

On the question of convenience as to which of the two Courts should administer the estate, I entirely agree that the Rangoon Official Assignee should have the preference. I agree in the order proposed by the learned Chief Justice.

V. Varadaroja Mudaliyar, Attorney, for the appellant.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

1918. ember 12.

ARUNACHELAM CHETTIAR (DEFENDANT), APPELLANT,

v.

MATHU *alias* SALAKSHI AMMAL AND TWO OTHERS (LEGAL REPRESENTATIVES OF PLAINTIFF) RESPONDENTS.*

Succession Certificate Act (VII of 1889), ss. 4 (1) and 18—Assignment of a debt—Certificate obtained by assignor after assignment—Suit by assignee without a certificate in his own name—Decree, whether can be passed.

An assignee of a debt from a person to whom a succession certificate was granted subsequent to the assignment is entitled to a decree for the debt

* Second Appeal No. 1413 of 1917.

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without obtaining a succession certificate in his own name.

Raman Lalji v. *Hari Das* (1916) 14 A.L.J., 677, followed.

Allah Dad Khan v. *Sant Ram* (1913) I.L.R., 35 All., 74, dissented from.

SECOND APPEAL against the decree of E. H. WALLACE, the District Judge of Tanjore, in Appeal Suit No. 360 of 1915, preferred against the decree of B. SUBBA RAU, the District Munsif of Tiruvālūr, in Original Suit No. 443 of 1914.

The plaintiff sued on the 9th November 1914 as the endorsee of a promissory note to recover the sum due thereon from the defendant who executed the note in favour of the deceased husband of the indorser. At the time of the indorsement which was on 18th July 1914, the indorser had not obtained a succession certificate but applied for one on the 3rd September 1914 and got it on the 10th October 1914. The defendant contended *inter alia* that the plaintiff was not entitled to a decree without obtaining a succession certificate in his own name and that the certificate obtained by the indorser subsequent to the indorsement was invalid. Both the lower Courts overruled the contentions and passed a decree in favour of the plaintiff. The defendant preferred this second appeal.

T. V. Muttukrishna Ayyar and *N. Muttuswami Ayyar* for the appellant.

S. Muthiah Mudaliyar for the third respondent.

The JUDGMENT of the Court was delivered by—

PHILLIPS, J.

PHILLIPS, J.—Appellant's first contention is that plaintiff being only the assignee of the person to whom succession certificate had been granted is not entitled to a decree without obtaining a succession certificate in his own name. This contention is supported by the ruling in *Allah Dad Khan* v. *Sant Ram*(1), but that decision has been doubted in *Rang Lal* v. *Annu Lal*(2), and has been dissented from by both Judges in *Raman Lalji* v. *Hari Das*(3). One of the main grounds for the decision in *Allah Dad Khan* v. *Sant Ram*(1) is that section 16 of the Succession Certificate Act affords protection only when payment is made to the certificate holder and not to his assignee. We respectfully regret that we are unable to accept this argument, for payment to the assignee is as valid as payment to the assignor in the absence of any restriction imposed by law. Further section

(1) (1913) I.L.R., 35 All., 74. (2) (1914) I.L.R., 36 All., 21.
(3) (1916) 14 A.L.J., 677.

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4 (1) of the Act only requires the production of a certificate and not a certificate in the name of the person suing. Agreeing with *Raman Lalji* v. *Hari Das* (1), we overrule this contention.

The next contention is that plaintiff's assignor obtained the succession certificate after she had effected the transfer to plaintiff. This may or may not form a ground for revoking the certificate under section 18 but until revoked the certificate is valid and affords protection and this objection must also fail.

The Second Appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

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

1918, September 12, 13 and 26.

J. B. LESLIE ROGERS (DEFENDANT), APPELLANT,

v.

H. R. HAJEE FAKIR MAHOMED SAIT (PLAINTIFF), RESPONDENT.*

Torts—Defamation—Bona fide suspicion by defendant of poisoning—Communication by defendant to his subordinates for inquiry—Privilege, absolute or qualified—Absence of actual malice—Liability of defendant.

Where the defendant, who was the general manager of the estates of the plaintiff's firm, under a bona fide impression that he had been poisoned at the instigation of the plaintiff expressed his suspicion to two of his subordinates with a view to their making inquiries into the matter. *Held*, that the communication was privileged and, there being no proof of actual malice, the defendant was not liable for defamation in a suit for damages for defamation.

Toogood v. *Spyring* (1834) 1 C. M. & R., 181, followed.

Statements made to protect the interest of the speaker, and statements made to protect a common interest form distinct heads of privilege.

APPEAL against the decree of P. C. LOBO, the Subordinate Judge of Nilgiris, Ootacamund, in Original Suit No. 105 of 1915.

The material facts appear from the judgments.

D. Chamier for the appellant.

(1) (1916) 14 A. L.J., 677.

* Appeal No. 356 of 1917.

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The Hon'ble Mr. *T. Richmond* and *A. Ramaswami Mudaliyar* for the respondent.

WALLIS, C.J.—These are appeals from two decrees of the Subordinate Judge of Ootacamund awarding the two plaintiffs damages against the same defendant for alleged slander by falsely and maliciously publishing the following words "I have been poisoned and I suspect the Saits are at the bottom of it," meaning thereby that the Saits had instigated the alleged poisoning. The Subordinate Judge has found publication proved in three instances, that the occasion was not privileged, that, if it was, the defendant was actuated by malice, and also apparently that he was never ill at all and never believed himself poisoned. The defendant from April 1913 had been in the service of the plaintiff's firm at Ootacamund as general manager of their office and planting estates. The evidence in this case shows what is brought out more fully in the case of wrongful dismissal, that his relations with his employers towards the end of November 1914 were very bad, and that they did not wish to retain his services. The defendant appears to have suspected that, rather than dismiss him and face an action for damages as they subsequently did, they might endeavour to get rid of him by foul play whilst on one of his planting tours. He has spoken of various circumstances which excited suspicion in his mind, and while I do not think the circumstances were such as to give rise to a well-founded suspicion, it is, I think, clear that the defendant laboured under it. Before starting on his December tour he borrowed a gun to take with him, communicated with the Police, and had the names of his party taken down by the Police, and a constable in plain clothes sent round with him. Mr. Richmond for the plaintiffs argues that all these precautions, as well as the subsequent story of poisoning, were malicious inventions planned by the defendant to injure his employers. This, in my opinion, has not been proved. The defendant was clearly anxious to remain in the employment of the Saits, and could only have imperilled his prospects of doing so by getting up a case of poisoning against them. As I observed in the other case, it may be that some one in the interests of the Saits had been trying to frighten him into resigning, but his conduct before starting on tour as well as the entries in his diary show that, however unreasonably, he

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was under apprehensions as to his personal safety. This being so, if he suffered from poisoning symptoms, on the 13th and 14th, he would naturally in the circumstances of the case suspect that the Saits were, as was said, at the bottom of it. The Subordinate Judge in the present case goes so far as to refuse to believe that he suffered from the symptoms to which he speaks, but D'Sousa, the Estate Agent, speaks to his looking ill on the 15th, the day after the alleged poisoning, and on his way back to Ootacamund on the 16th he obtained a medical certificate, Exhibit J, which showed that he had symptoms of irritant poisoning. The facts that the defendant did not send for the Devarshola doctor at once, that he brought back some of the food he had eaten for examination by the Chemical Examiner instead of excreta, and that he did not call in a doctor after his return to Ootacamund are not, in my opinion, a sufficient foundation for the Subordinate Judge's conclusion that the whole thing was a malicious invention for the purpose of injuring the Saits. That is not the conduct to be expected from a gentleman in the position of Mr. Rogers, however much he might dislike and whatever grievances he might consider himself to have against his employers; and, as I have already said, such a senseless and wicked plot would have endangered his position which he was unduly anxious to retain in spite of his differences with the Saits. The Subordinate Judge appears to me to have made far too much of the entries in his private diary in which he had relieved his feelings by jotting down what he thought of his employers from day to day. It must, I think, be taken that he really did suffer on the 13th and 14th from symptoms of poisoning, which may well in this country arise from purely accidental circumstances. This being so, I think it very natural, having regard to the evidence as to what proceeded, that he should have suspected, however unjustly, the Saits, who were the only persons interested in getting rid of him, of being at the bottom of it.

The Subordinate Judge found publication to three persons proved. There is no evidence of publication to Major Ward to justify the finding, and we may confine ourselves to the publications to D'Souza, an estate superintendent, on the 15th and to the publication on the 16th on the defendant's way back to Ootacamund to Bickram Singh, another estate superintendent. In the

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evidence, which was given in July 1917, two and a half years after the event, there was a conflict between the plaintiff's witnesses and the defendant as to the details of their conversations with the defendant and as to whether it was the witness or the defendant who first spoke of the suspicion against the Saits, arising out of the defendant's illness. As to this, I am not prepared to differ from the Subordinate Judge's finding that it was the defendant who first mentioned his suspicions as this appears the more likely story.

At common law it is not actionable to say of a man that you suspect him of a crime, at any rate, in the absence of special damage or unless the observation be made with reference to his business. See *Buller's Nisi Prius* 1200, *Harrison* v. *King*(1), *Tozer* v. *Mashford*(2), *Simmons* v. *Mitchell*(3), a decision of the Privy Council on appeal from the Windward Islands. In *Parvathi* v. *Mannar*(4), Sir CHARLES TURNER, C.J. and MUTTUSWAMI AYYAR, J., held that the common law rule as to special damage being necessary to support an action for slander except in certain cases was inapplicable in India, and the case has been argued before us as one of privilege. Justification has not been pleaded. Taking it then to be defamatory to say that a person is suspected of having committed an offence, I think the person against whom the offence is alleged to have been committed must have a qualified privilege to discuss the case mentioning his suspicions with people who may be in a position to throw light on it, and that the privilege has not been exceeded in the case of the two publications of the words actually charged which are merely words of suspicion. The case appears to me to come within the well-known rule laid down by PARKE, B. in *Toogood* v. *Spyring*(5) which has been approved in so many cases and recently by the highest tribunal, and may be looked to for guidance in the absence of any decision more closely in point.

"In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of a public or private duty, whether legal or

(1) (1817) 4 Price, 46.
(2) (1880) 6 A.C., 156.
(3) (1851) 6 Ex., 539.
(4) (1885) I.L.R., 8 Mad., 175.
(5) (1834) 1 C. M. & R., 181 at p. 193.

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moral, *or in the conduct of his own affairs in matters where his interest is concerned.* In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

Here the communication was in my opinion made by the plaintiff, "in the conduct of his own affairs in matters where his interest was concerned" within the meaning of the rule, and was therefore privileged in the absence of actual malice which in my opinion has not been proved. It has been argued that the communication to the two superintendents could not be privileged because there was no common interest, that is to say, that it did not matter to them whether the defendant was poisoned or not. Happily this contention appears to be erroneous in law. Statements made to protect the interest of the speaker, and statements made to protect a common interest form distinct heads of privilege, and are so dealt with in Articles 36 and 37 of the most recent edition of Sir Hugh Fraser's Law of Libel and Slander, Fifth Edition, pages 226 and 228. In my opinion, the case comes within the former head of privilege and malice has not been proved.

The Appeals must be allowed and the suits dismissed with costs throughout.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I agree. In this case the plaintiff, who is the head of the firm in which the defendant was employed as general manager, and who is known as the senior Sait, claims damages against the defendant for defamation. The allegation in the plaint is that the defendant maliciously spoke and published the following words:—"I have been poisoned and I suspect that the Saits are at the bottom of it." These defamatory statements were said to have been made to three individuals, namely, A. W. D'Souza, P. J. Bickram Singh and Major Ward. The dates of the publication were the 15th and 17th of December 1914.

The defence is that the suggestion about poisoning came from the subordinates of the plaintiff, and that the defendant "having regard to the surrounding incidents of the particular tour on which he was engaged, thought it likely to be true."

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At the time of the issues, apparently no plea of justification was advanced. Issue 1 (*b*) raises the question of privilege. The Subordinate Judge found that the words were uttered by the defendants, that there was no privilege, and that he was actuated by malice. In the appeal Mr. Chamier mainly rested his contention upon the plea of privilege. In order to appreciate this contention a few facts have to be stated. Defendant was employed by the plaintiff and his sons as their general manager. The engagement was in May 1913. The parties were not on good terms almost from the beginning. There were frequent disputes. Ultimately the plaintiff was dismissed from service on the 17th February 1915. Ten days before the dismissal the defendant started on his tour of inspection to the estates belonging to the plaintiff in Wynaad. His case is that on the 13th evening he was unwell and that he suspected one Jamaludin, a writer at the estate, of having poisoned him. He says he got worse on the morning of the 14th and that when D'Souza, the superintendent of the estate, came to see him, the latter suggested that he must have been poisoned at the instance of the Saits, and that thereupon he informed D'Souza that he also believed that the Saits were at the bottom of the poisoning. On the 15th the defendant met Bickram Singh, the superintendent of another estate, who, according to him, also believed that the Saits must have set up somebody to poison him. On his way back to Ootacamund from the tour he met Major Ward to whom he communicated his suspicions.

The question for consideration is whether these communications to these three people were privileged; and if privileged, whether on the evidence it is proved that defendant was actuated by malice. As regards Major Ward, Mr. Richmond who appeared for the plaintiff did not seriously argue that the evidence is sufficient to establish publication. Major Ward himself does not remember having heard from the defendant the words complained of, and the other evidence is not strong enough to establish that defamatory words were published to Major Ward. The case of the other two persons stands on a different footing.

D'Souza and Bickram Singh and the defendant were co-employees under the plaintiff. Defendant says that he gave expression to the words complained of, as he was anxious that enquiries should be started regarding the truth of the rumour

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that the Saits were at the bottom of the poisoning. On the question as to whether D'Souza started the conversation or whether the statements were first made by the defendant, there is not much reliable evidence. I shall proceed to deal with the case on the footing that the defendant first communicated his suspicions to D'Souza. It was argued by the learned Counsel for the plaintiff that the defendant's evidence about his desire that enquiries should be made should not be accepted. He refers to the fact that in his deposition in the suit for damages for wrongful dismissal he did not mention this circumstance. But it must be remembered that in that case the question about poisoning arose very incidentally and consequently the omission to refer to the starting of enquiries is not a ground for holding that the defendant is not speaking the truth. It is also contended that the evidence of D'Souza and Bickram Singh is more entitled to weight than that of the defendant. These two persons did not communicate to the plaintiff their version of what happened immediately after the words were spoken and even after the dismissal of the plaintiff. The learned Counsel for the plaintiff admitted that it was after the examination of the defendant in the suit for wrongful dismissal that enquiries were started, from which it was learned that defendant spoke to those two persons the words complained of. I feel little hesitation in holding that the evidence of the defendant is entitled to greater weight than the evidence of these two persons. If we reject the evidence of these two witnesses, the defendant's evidence is practically uncontradicted. My conclusion is that defendant spoke these words to D'Souza and Bickram Singh with a view to starting enquiries regarding the truth of the suspicion that the Saits were at the bottom of the poisoning incident. On this conclusion the question is whether the statement is privileged.

In *Toogood* v. *Spyring*(1) Baron PARKE in defining the limits of privilege uses language which has since become classical. He stated at page 193:

"In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made

(1) (1834) 1 C.M. & R., p. 181.

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by a person in the discharge of some public or private duty whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice."

In *London Association for Protection of Trade* v. *Greenlands Limited*(1), and in *Adam* v. *Ward*(2) this dictum of the learned Baron was regarded as laying down the law correctly. Reference may also be made to *Hamon* v. *Falle*(3) and to *Stuart* v. *Bell*(4). The point for determination therefore is whether the words published to D'Souza come within the protection referred to in the dictum above quoted. There can be no doubt that the defendant was acting in the discharge of a private duty and that the communication related to the conduct of his affairs. He was under the employ of the Saits. He had rightly or wrongly come to the conclusion that the Saits were anxious to get rid of him. Under these circumstances, if he asked D'Souza, a subordinate of the Saits and who was also a subordinate of his, to institute enquiries regarding the truth of the suspicions was he not acting in the conduct of his own affairs and in respect of a matter in which his own interests were concerned? I am of opinion that the communication to D'Souza comes within the principle of Baron PARKE's pronouncement. Mr. Richmond contended that the person to whom the communication is made must have an equal interest with the communicator if the privilege is to be maintained. He relied on *Force* v. *Warren*(5), which to a certain extent supports him. In *Whiteley* v. *Adams*(6), ERLE, C.J., said:—

"So also is the rule as to giving information concerning private individuals when given *bona fide*, and to a person having an interest in making the enquiry."

I do not understand the learned Chief Justice to have laid down that unless the person who receives the communication is equally interested there can be no privilege. He was only referring to one class of cases. As a matter of fact, if we look

(1) (1916) 2 A.C., 15.
(2) (1917) A.C., 309.
(3) (1879) 4 A.C., 247.
(4) (1891) 2 Q.B., 341.
(5) (1864) 15 C.B. (N.S.), 806.
(6) (1863) 15 C.B. (N.S.), 392 at p. 418.

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into the earlier portion of the judgment, it is clear that the Lord Chief Justice was stating the law in terms identical with those employed by Baron PARKE. He states:

"not only, *therefore*, was the defendant in my judgment discharging a social and moral duty, but he was also acting with a just view to his own interest in writing that letter."

Mr. Justice BYLES in the same case says that the law has been well laid down in *Toogood* v. *Spyring*(1). Mr. Richmond stated that if the receiver of the communication is a friend or a police officer the privilege would exist. I fail to see why the communication made to a subordinate with a view to starting an enquiry should stand on a different footing. In *Stuart* v. *Bell*(2), communication made to a friend was considered to be within the rule enunciated by Baron PARKE. The same principle governs communications made to a subordinate. In my opinion the communication made to D'Souza was privileged.

As regards Bickram Singh, it was contended by the learned Counsel for the respondent that as already a communication was made to D'Souza and as subsequently the defendant had conveyed his suspicions to a Sub-Inspector of Police, the further communication to Bickram Singh was unjustifiable. No doubt in *Force* v. *Warren*(3), ERLE, C.J., says:

"it is no part of a man's duty to go into the confessional to every chance person who may choose to ask impertinent questions. And I see no interest that the defendant could have to justify himself in the eyes of that witness."

This decision of the Lord Chief Justice has not been commented upon or followed in any of the subsequent decisions. After all the question for consideration is whether in the circumstances in which the defendant found himself he exceeded the privilege by repeating his suspicions to another subordinate of his. He no doubt had set D'Souza on the track of an enquiry, and he apparently thought that the matter should be taken in hand by Bickram Singh also. I do not think that even on the principle stated in *Force* v. *Warren*(3), the defendant can be said to have exceeded his privilege. I therefore hold that both the communications were privileged.

(1) (1834) 1 C.M. & R., p. 181. (2) (1891) 2 Q.B., 341.
(3) (1864) 15 C.B. (N.S.), 806.

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The next question is whether the defendant was actuated by malice. The Subordinate Judge found that the defendant could have had no reasonable belief in the rumour which he had given currency to. At first sight it seems almost incredible that a person of the status and attainments of the defendant should have believed that the Saits intended to poison him. But the state of mind of the defendant has to be judged from the surrounding circumstances. He had conceived a great dislike to the plaintiff and the plaintiff made no secret of his desire to dispense with the services of the defendant. One ludicrous incident seems to have told on the nerves of the defendant. The Saits had stored in the office godown some manure. The defendant was led to think that those were ashes from the cremation ground brought in order to practise incantation. The defendant, who says that he has been attracted to the subject of black magic by what he heard during his employment in the north of India, seems apparently to have been impressed that these ashes were brought to the office with a view to practising black magic on him. Some persons in the office of the Saits seem to have played upon his credulity. In this frame of mind the defendant believed that the visit of Jaffar Sait in November 1914 to the Wynaad estates was with a view to get the defendant into trouble. He seems to have asked the Superintendent of Police at Ootacamund for the services of a detective in his tour. There can be no question that the defendant was in a morbid state of mind regarding his safety. I have no doubt that there was no reasonable ground for this belief. At the same time, I am not prepared to say that he was not *bona fide* under the impression that attempts were being made to get rid of him. He went on his inspecting tour in this nervous state. I fully believe his evidence that he was unwell on the evening of the 13th and on the morning of the 14th. The certificate of the Sub-Assistant Surgeon given on the 16th to a certain extent supports him. D'Souza's evidence given on the former occasion also corroborates his evidence. I have no doubt that he was unwell. This illness coupled with what he believed about the bringing in of human ashes so worked upon his nerves that he thought that the Saits had engaged men to poison him. What we have

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to consider is whether it was an honest belief. TINDAL, C.J., said in *Coxhead* v. *Richards*(1):—

"On the contrary, all the evidence went to prove that what he did was under the full belief that he was performing a duty, however mistaken he might have been as to the existence of such a duty, or in the mode of performing it."

In *Stuart* v. *Bell*(2), Lord Justice LINDLEY after examining a number of decisions says that the opinion of TINDAL, C.J.,

"is the most accurate and safe to take as a guide."

Lord BUCKMASTER in *London Association for Protection of Trade* v. *Greenlands, Limited*(3), states the law in similar terms. I am of opinion that the defendant must be taken to have been under a *bona fide* belief that the Saits were at the bottom of an attempt to get rid of him, and hold that no malice has been established in this case. I confess that I have come to the conclusion on the question of malice with some hesitation. But having regard to the strained relations that existed between the plaintiff and the defendant just before the incident happened and having regard to the state of mind which the defendant was in and rejecting as I do the evidence of D'Souza and Bickram Singh for the reason that their story, if true, should have been communicated to the plaintiff either at once or at least after the dismissal of the defendant from the service. I see no reason for not accepting the uncontradicted evidence of the defendant on the question of his *bona fides*. I would therefore reverse the judgment of the Subordinate Judge and dismiss the plaintiff's suit with costs throughout.

Brightwell and *Moresby*, Solicitors for the appellant.

K.R.

(1) (1846) 2 C.B., 569. (2) (1891) 2 Q.B., 341. (3) (1916) 2 A.C., 15.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Krishnan.

1918, September 19, 20 and 27.

KOTTARATHIL PUTHIYAPURAYIL POKKER (FIRST DEFENDANT), APPELLANT,

v.

BALATHIL PURKUM CHANDRANKANDI KUNHAMAD AND TWO OTHERS (PLAINTIFFS 1 AND 2 AND SECOND DEFENDANT), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 53—Transfer in fraud of creditors—Attaching decree-holder—Claim petition by transferee, allowed—Right of suit of attaching decree-holder and an ordinary creditor—Form of suit—Whether representative suit on behalf of all creditors, necessary—English and Indian Law—Statutory right of suit under Order XXI, r. 63, Civil Procedure Code—Objection to form of suit, if permissible on appeal for the first time.

An attaching decree-holder, whose attachment has been raised on the claim petition of a transferee of the attached property, is not bound to bring a representative suit on behalf of all the creditors of the judgment-debtor to set aside the transfer as fraudulent under section 53 of the Transfer of Property Act, but is competent to institute a suit to establish his right to proceed against the property under Order XXI, rule 63 of the Civil Procedure Code.

Subramania Ayyar v. *Muthia Chettiar* (1918) I.L.R., 41 Mad., 612 (F.B.), and *Palaniandi Chetty* v. *Appavu Chettiar* (1916) 30 M.L.J., 565, explained and distinguished. English and Indian cases reviewed.

Quære: Whether an ordinary creditor who seeks to set aside an alienation as fraudulent under section 53, Transfer of Property Act, is bound to sue in a representative capacity on behalf of all the creditors of the transferor?

Per KRISHNAN, J.—There is no rule either in English or Indian Law justifying the dismissal of a suit brought under section 53, Transfer of Property Act, because it is not brought in a representative capacity; and objections to the form of the suit should not be allowed to be taken for the first time in appeal.

Adopting the English rule, an *attaching decree-holder* has a personal right to sue by himself to avoid the transfer.

Further, as the defeated party in a claim-petition, the attaching creditor has a statutory right of suit given to him under Order XXI, rule 63, Civil Procedure Code, and that suit must necessarily be one brought by himself alone and is not a representative suit; such right of suit cannot be defeated by any rule of practice which has no statutory basis.

* Second Appeal No. 1558 of 1917.

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SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, the Temporary Subordinate Judge of Tellicherry, in Appeal Suit No. 715 of 1916, preferred against the decree of U. RAMAPPA, the District Munsif of Kuttuparamba, in Original Suit No. 713 of 1914.

The plaintiff obtained a decree in Original Suit No. 50 of 1913 on the file of the District Munsif's Court at Virarajapet against one Soopy now represented by the second and third defendants. In execution of that decree which was transferred to the Munsif's Court of Kuttuparamba, some immovable property was attached. The first defendant claimed the property as his under an assignment deed, dated 24th May 1912 (Exhibit V) executed by the deceased Soopy to him, and filed a claim petition under Order XXI, rule 60, Civil Procedure Code. The claim was allowed. The plaintiff thereupon instituted the present suit (Original Suit No. 713 of 1914) in the District Munsif's Court of Kuttuparamba and prayed for a decree "declaring that the schedule-mentioned paramba was liable to be sold in execution of the decree in Original Suit No. 50 of 1913, and for other appropriate reliefs." The District Munsif held that the assignment was a fraudulent transaction intended to defraud the creditors of the transferrer and decreed the suit in favour of the plaintiff; on appeal the Subordinate Judge confirmed the decree holding that Exhibit V (the assignment deed) was executed to defraud the creditors of the transferrer and also that it was only a nominal and colourable transaction. The first defendant preferred this Second Appeal.

K. Ramanatha Shenai for the appellant.

C. Madhavan Nayar and *B. Pocker* for first and second respondents.

AYLING, J.

AYLING, J.—In this case the lower Appellate Court seems to me to have erred in supposing that unless the contested sale-deed, Exhibit V, is merely a sham transaction, the present suit is not maintainable. The ruling quoted, *Palaniandi Chetty* v. *Appavu Chettiar*(1) if examined, does not support such a view; nor does the later Full Bench ruling, *Subramania Ayyar* v. *Muthia Chettiar*(2), which considered the same question, and to which I was a party.

(1) (1916) 30 M.L.J., 565. (2) (1918) I.L.R., 41 Mad., 612 (F.B.).

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What was decided in these cases was this: that, where the validity of an alienation is impugned on the ground that it offends against section 53, Transfer of Property Act, that alienation must be upheld until it is set aside in proceedings properly instituted for the purpose. The exact nature of the proceedings which should be instituted was not determined. In *Palaniandi Chetty* v. *Appavu Chettiar*(1) COUTTS TROTTER, J., expressed the opinion that a creditor suing to set aside an alienation on this ground must do so on behalf of all creditors, unless (as in the case before us) he was a judgment-creditor who had taken attachment in execution of his decree. This view was dissented from by the other learned Judge, SESHAGIRI AYYAR, J., and the Full Bench expressly left the point undecided. No other light is thrown on the nature of the proceedings by either judgment.

What we have therefore to consider is whether the present suit should be treated as one properly instituted for the purpose of setting aside the assignment deed, Exhibit V.

It was brought by plaintiff under Order XXI, rule 63, Civil Procedure Code. First defendant had preferred a claim to the property attached by plaintiff, based on Exhibit V, which had been allowed under Order XXI, rule 63. Plaintiff therefore brought this suit, as he was bound to do by Order XXI, rule 63, to establish the right which he claimed of bringing the property to sale, as that of his judgment-debtors.

Whether it was the judgment-debtor's property or not depends solely on whether Exhibit V be upheld or set aside. The suit directly raises, and actually turns upon, the validity of the assignment by Exhibit V, and in my opinion it must be regarded as one properly instituted to set aside that transaction. That the plaint only asks in terms for a declaration that the property is liable to sale in execution of the decree is immaterial. The form the suit has taken is determined by the peculiar position held by plaintiff. The law declares that an attaching decree-holder against whom the claim of a third party is allowed *must* sue within a year of the date of the order to establish his right, failing which the latter is extinguished. It puts him in a specially unfavourable position as regards limitation as compared with an ordinary creditor; but on the other hand in

(1) (1916) 30 M.L.J., 565.

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prescribing the exact nature of his remedy, it frees him from any other restrictions as to the nature of the suit to be brought which the latter may labour under. It seems to me impossible to hold that, as appellant's Counsel contends, he is bound to bring two suits, one in his individual capacity under Order XXI, rule 63, to save himself from limitation, and another as a representative of the whole body of creditors impugning the validity of the alienation.

Quite apart from the provisions of Order XXI, rule 63, the exceptional position of a judgment-creditor is generally recognized even in English law; *vide* 15 Halsbury, 89. In *Palaniandi Chetty* v. *Appavu Chettiar*(1) COUTTS TROTTER, J., points out the distinction: and although it was ignored by the learned Judges in *Hakim Lal* v. *Mooshahar Sahu*(2), this may have been because the point was not raised and the decision of the case proceeded on altogether different grounds. Our attention has been drawn to no case in which a suit by an attaching judgment-creditor was dismissed, simply because it was not brought in a representative capacity.

Whether an ordinary creditor who seeks to set aside an alienation as infringing section 53, Transfer of Property Act, must sue in a representative capacity, we are not called upon to say. I must not be understood to hold that he is under any such obligation.

The present suit is, in my opinion, certainly not liable to dismissal on account of any defect of form; and on the concurrent findings of fact arrived at by both the lower Courts, plaintiff is entitled to a decree. I can see no ground for questioning these findings or for holding that defendants should have been allowed further opportunity of adducing evidence.

I would therefore dismiss the Second Appeal with costs.

KRISHNAN, J.

KRISHNAN, J.—I agree with my learned brother that this Second Appeal fails. But as the point raised by the appellant's Advocate, Mr. Shenai, as to the necessity of bringing a representative suit under section 53 of the Transfer of Property Act is an important one and has been argued at some length before us, I shall add a few words.

(1) (1916) 30 M.L.J., 565. (2) (1907) L.R., 34 Calc., 999.

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Both the lower Courts found on the evidence in the case that Exhibit V, the sale-deed in favour of the appellant, was intended to defeat the vendor's creditors of which plaintiff was one and that the appellant was not a transferee in good faith. The Subordinate Judge went further and found that the sale was a sham or colourable transaction which was void and did not require to be avoided. This last finding has been attacked before us and it is difficult to support it on the facts of the case. But, in my view, it is an unnecessary finding and may be ignored, as the sale-deed was properly treated as unenforceable against the plaintiff on the other two findings.

It was however argued by Mr. Shenai that a creditor was not entitled to avoid a transfer under section 53 of the Transfer of Property Act, unless he had brought a representative suit on behalf of all the creditors and got a decree setting aside the deed. He contended that as this was not such a suit we must ignore the findings as to the fraudulent character of Exhibit V and treat it as in force and dismiss the plaintiff's suit. The result of his contention, if adopted, will be that we should be driven to uphold a sale-deed, which has been proved to be fraudulent and voidable at plaintiff's option and enforce it against him simply because he has not brought what is called a representative suit. Such a result seems somewhat startling, but Mr. Shenai contended that his proposition was supported by decided cases both in this country and in England; we must therefore examine the authorities relied on. It is conceded that there is no statutory rule on the point.

Mr. Shenai relied in the first instance on the English rule regarding cases under the statute of Elizabeth, 13 Elizabeth, Chap 5; the provisions of that statute are practically the same as that of section 53 of the Transfer of Property Act on this point. The English rule, as stated in Halsbury's Laws of England, Vol. XV, page 89, is as follows:—

"In an action to set aside an alienation under the statute a creditor should sue on behalf of himself and all other creditors of the grantor except where he has recovered judgment for his debt, in which case he can obtain an order declaring the alienation as void against him and containing consequential directions for the satisfaction of his debt alone, without mention of any other creditors or their debts."

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As pointed out by COUTTS TROTTER, J., in *Palaniandi Chetty* v. *Appavu Chettiar*(1) the Equity Courts used to insist that after getting a judgment in his favour the creditor should sue out a writ of *Fifa* or *elegit* before seeking their help to set aside a deed of transfer in equitable execution of his decree. If we adopt the rule in the restricted manner with the exception as above stated, the present suit will be a validly constituted one as it is by a judgment-creditor who has attached immovable property, which corresponds in a general way to suing out the writ of *elegit*. Apart from that, it has not been shown that the rule itself was ever used for the purpose of dismissing a suit by a single creditor. No authority has been cited where such a procedure was followed in England. The cases cited in support of the rule, viz., *Bott* v. *Smith*(2), *Mouat, In re*(3) *Cornish* v. *Clark* (4), *Ideal Bedding Company, Limited*, v. *Holland*(5) and *Reese River Silver Mining Co.* v. *Atwell*(6) when examined show either that the suit was brought by the plaintiff himself on behalf of all the creditors or as happened in the last case cited, the suit was allowed to be amended for the purpose in the trial Court. On the contrary, in the case of *In re Maddever, Three Towns Banking Company* v. *Maddever*(7) though the suit was by a single creditor, no objection was apparently taken as to its form but the decree gave as a matter of form a declaration that the conveyance in question was void against the plaintiff and all other, if any, creditors of the debtor. It seems to me therefore that even in cases of ordinary creditors where the rule applied and not the exception, suits were not dismissed for not being brought on behalf of all the creditors, but were allowed to be amended in the trial Court or where the transfer was to be set aside, a decree was passed setting it aside on behalf of all the creditors.

As the provisions in the statute of Elizabeth and section 53 of the Transfer of Property Act are practically the same, we may well adopt the English rule as a whole, but without giving any further scope to it either by allowing objections to the form of the suit being taken in appeal for the first time or by

(1) (1916) 30 M.L.J., 565. (2) (1856) 52 E.R., 957.
(3) (1899) 1 Ch., 831. (4) (1872) L.R., 14 Eq., 184.
(5) (1907) 2 Ch., 157. (6) (1869) L.R., 7 Eq., 347.
(7) (1884) 27 Ch.D., 523.

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dismissing the suit because it is not in a representative character. As pointed out by COUTTS TROTTER, J., in the case in *Palaniandi Chetty* v. *Appavu Chettiar*(1) already cited, the rule has already been, to some extent, adopted in India.

There are indications in the Indian law to show that a creditor may bring a suit under section 53 of the Transfer of Property Act in his individual character without joining the other creditors or suing on their behalf. The wording of section 53 itself gives the right to each individual creditor who has been defeated or delayed a right to treat as voidable at his option a transfer that falls within it. He has not got to exercise his option in conjunction with his co-creditors. He thus gets a cause of action for himself and there is nothing in the Code of Civil Procedure to prevent him from seeking relief by himself.

Again it would seem from the wording of the form of the decree under the Civil Procedure Code in a suit to set aside a transfer in fraud of creditors (see form No. 13, first schedule of Appendix D) a suit to which all the creditors are not parties either personally or otherwise is contemplated; for the form of the decree in *In re Maddever, Three Towns Banking Company* v. *Maddever*(2) above cited, is adopted. The use of the words 'if any' shows that all the creditors are not before the Court.

I am therefore of opinion that there is no rule either in the English or in the Indian law justifying the dismissal of a suit brought under section 53, Transfer of Property Act, because it is not brought in a representative capacity. To avoid the difficulty of multiplicity of suits pointed out by COUTTS TROTTER, J., in *Palaniandi Chetty* v. *Appavu Chettiar*(1), I think the trial Court may, of its own motion, and should, if moved by the transferee defendant, direct that a suit by a single creditor under section 53, Transfer of Property Act, should be amended so as to make it a suit on behalf of all the creditors as was directed to be done in *Ishvar Timappa* v. *Devar Venkappa*(3). The Court should also take care when passing a decree setting aside a transfer even in a single creditor's suit to adopt the

(1) (1916) 30 M.L.J., 565. (2) (1884) 27 Ch.D., 523.
(3) (1903) I.L.R., 27 Bom., 146.

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form No. 13 in Appendix D above referred to. But if a suit had been proceeded with, without any objection being taken to its form on the ground of its not being on behalf of all the creditors and a decree had been passed setting aside a transfer as fraudulent, it seems to me that there is no justification for allowing such an objection to be raised for the first time in appeal or for ignoring the findings arrived at by the lower Court and dismissing the suit as not being of a representative character. Such a course will make the Court really an instrument for the support of a proved fraud.

I shall now refer to the Indian cases relied on by Mr. Shenai. To start with, he relied on the Madras cases reported in *Palaniandi Chetty* v. *Appavu Chettiar*(1) and in *Subramania Ayyar* v. *Muthia Chettiar*(2). The latter case is a Full Bench decision. The point decided in both these cases was that a defendant to an action cannot plead in defence his right to avoid a transfer under section 53 of the Transfer of Property Act; and that if he wishes to exercise his option under that section he can do so only as a plaintiff and not as a defendant. If this question were *res-integra*, I should find some difficulty in adopting this view. But it is not necessary to discuss it as the question before us now is quite different. The creditor here is not seeking to set up his right as a plea in defence, but he has come to Court as a plaintiff and the question raised is whether he should do so in a representative suit only. On that question I consider that neither case is an authority. In the judgment in the Full Bench case, this question has been expressly excluded from consideration. No doubt there is an observation in it that the sale should be set aside "in proceedings properly instituted for the purpose." There is, however, no indication in the judgment what these proceedings are and, as my learned brother who made the observation considers that the present suit is such a proceeding, it cannot be relied on as an authority against the respondent.

If *Palaniandi Chetty* v. *Appavu Chettiar*(1) is examined, it will be found that SESHAGIRI AYYAR, J., definitely ruled that no representative suit was necessary. The view of COUTTS TROTTER, J., on the point is not quite clear; but it seems to be that a

(1) (1916) 30 M.L.J., 565. (2) (1918) I.L.R., 41 Mad., 612 (F.B.).

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representative suit is necessary except in the case of attaching decree-holders. The difficulty in understanding his view arises from the fact that he apparently overlooked that the case before him was that of a decree-holder who had not only attached property but had obtained an order in his favour in the claim petition. From his judgment it would appear that he would have supported the decree in the case if he had not treated it as one of a mere decree-holder. However, that may be, if the learned Judge is to be taken as holding that a creditor's suit should be dismissed in second appeal if it is not brought in a representative capacity, with all respect, I am unable to follow him. I am inclined to agree with the view of SESHAGIRI AYYAR, J., on this point though I am doubtful about his view as to the applicability of section 11, Explanation VI, of the Civil Procedure Code; for in a case which ends in favour of the transferees, it may be difficult to hold that the creditors who were no parties to the suit are also barred from disputing the validity of the transfer.

The other cases relied on by Mr. Shenai are *Burjorji Dorabji Patel* v. *Dhunbai*(1), *Ishwar Timappa* v. *Devar Venkappa*(2), *Hakim Lal* v. *Mooshahar Sahu*(3) and *Chatterput Singh* v. *Maharaj Bahadur*(4). The last one is a Privy Council ruling and the observation relied on is in page 217.

"Such an issue could be raised and such a decree could be made only in a suit properly constituted for that purpose, and this suit was not so constituted either as to parties or otherwise."

There is nothing to show that their Lordships meant by a properly constituted suit a representative suit; they do not say so. The facts of the case show that proper allegations had not been made and proper parties, viz., the transferrers, had not been joined to enable the Court to set aside Chutterpur's private purchase as fraudulent. The observation referred to is apparently connected with these circumstances. I am therefore not able to treat it as an authority on the point before us.

The observations in *Hakim Lal* v. *Mooshahar Sahu*(3) is no doubt in point in appellant's favour; but as the decision in the case was that the conveyance was a valid one and not liable to be set aside under section 53 of the Transfer of Property

(1) (1892) I.L.R., 16 Bom., 1. (2) (1903) I.L.R., 27 Bom., 146.
(3) (1907) I.L.R., 34 Calc., 999. (4) (1905) I.L.R., 32 Calc., 198 (P.C.).

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Act, they are in the nature of *obiter dicta*. It was also pointed out to us that the learned Judges had not noticed the exception recognized in the English law to the general rule in favour of the attaching decree-holder, though the case before them was one of such a decree-holder. With every respect I am unable to follow their view that a suit under section 53 of the Transfer of Property Act is liable to be dismissed if not brought in a representative capacity. They have also not expressed a definite opinion whether the objection should be allowed to be raised for the first time in appeal, though they were apparently inclined to hold that it should not. As I have already stated, I am also of the same opinion that it should not be allowed.

I have already referred to the case in *Ishwar Timappa* v. *Devar Venkappa*(1), and I am in agreement with the learned Judges there that suitable amendments may be directed by the trial Court to make a suit brought by a single creditor under section 53 of the Transfer of Property Act a representative suit. The actual decision in that case was that a creditor who has not obtained a decree in his favour is nevertheless entitled to sue under that section. In the case in *Burjorji Dorabji Patel* v. *Dhunbai*(2), the suit was not dismissed on the ground of its not being a representative suit, though no doubt the learned Judge was of opinion that the suit was liable to be dismissed on that ground. This opinion, however, was really only an *obiter dictum*, for it was found by him that plaintiffs were claiming under the transferrer himself and could not therefore impeach his transfer. It was not a case of creditors at all and was not under section 53 of the Transfer of Property Act, as the Act did not then apply to Bombay. As already pointed out, the English authorities the learned Judge follows do not show that the suit should be dismissed if not brought in a representative character. I do not therefore consider that this case which, it will be noted, is the decision of a single Judge, is an authority against the view I am taking and which I should follow.

I have thus, for the reasons above stated, come to the conclusion that even looking upon plaintiff as no more than an ordinary creditor of the vendor, the appellant's contention that we should now dismiss his suit should be overruled. In my

(1) (1903) I.L.R., 27 Bom., 146. (2) (1892) I.L.R., 16 Bom., 1.

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view the Subordinate Judge was wrong in allowing the point to be raised for the first time in appeal.

In this case, however, the decree of the lower Court can be supported on a much narrower ground as well; for the plaintiff here is not merely a creditor but an attaching decree-holder who was the defeated party in a claim-petition filed by the transferee defendant under Order XXI, rule 60, Civil Procedure Code. I have already pointed out that adopting the English rule he will have, as attaching decree-holder, a personal right to sue by himself to avoid the transfer. Again, as the defeated party in a claim-petition, he has a statutory right of suit given to him under rule 63 and that suit must necessarily be one brought by himself alone and is not a representative suit. Under that rule he can sue to establish the right which he claims to the property in dispute and that right is that it can be attached and sold for his decree. The present suit is exactly that suit and it cannot therefore be defeated by any rule of practice which has no statutory basis. As it is necessary to find whether Exhibit V is valid against him to give him the relief claimed, the Court, I think, was bound to decide that question and he could not be referred to another suit for the purpose. In fact the suggestion of the appellant's counsel that after bringing this suit plaintiff should have at once launched another suit of a representative character to set aside Exhibit V and get a stay of this suit pending that suit if he wanted to save it from dismissal does not seem to me to be at all reasonable, nor the course proposed necessary; it is perhaps even impracticable. I do not see why plaintiff should be driven to bring two suits for the same purpose To hold that plaintiff cannot get the deed set aside except in a representative suit will be a practical denial of his statutory right of suit; a suit which he has to bring, as pointed out by my learned brother, within one year, at the risk of losing his right to attach the property if he does not do so.

The only case cited to us which was a case of an attaching decree-holder defeated in a claim-petition suing is the one in *Hakim Lal* v. *Mooshahar Sahu*(1) already referred to. But in that case the learned Judges did not consider his special and peculiar right to sue in his own name under rule 63. I have

(1) (1907) I.L.R., 34 Calc., 999.

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already stated that I am unable to follow their view as to the character of the suit to be brought under section 53. It is therefore no authority against the respondent.

I agree with my learned brother that the appellant's contention that the present suit should be dismissed because it was not a representative suit on behalf of all the creditors fails and that the lower Courts were right on their findings in holding that Exhibit V was not valid against the plaintiff and in giving relief on that footing.

I agree the Second Appeal should be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

1918, October 2 and 3.

NANJUNDASWAMI CHETTI (FOURTEENTH DEFENDANT), APPELLANT,

v.

KANAGARAJU CHETTY AND THREE OTHERS (PLAINTIFF AND SECOND, THIRD AND FIFTH DEFENDANTS), RESPONDENTS.*

Hindu Law—Settlement of a portion of joint family properties on foster-daughter in consideration of her marriage—Validity of settlement.

A settlement of a portion of joint family property by a Hindu in favour of his foster-daughter in pursuance of a promise made by him in consideration of her marriage with another who offered to marry her on such a condition is not a gift but is valid and binding on the alienor's son to the extent of the alienor's share as an alienation for consideration.

APPEAL against the decree of T. SRINIVASA AYYANGAR, the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 62 of 1914.

The facts of the case, so far as they are material for this report, are as follow.

The plaintiff brought this suit as the adopted son of the first defendant for a partition of family properties belonging to them both, and prayed *inter alia* for a declaration that a

* Appeal No. 424 of 1916.

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deed of settlement of some family properties alleged to be worth more than Rs. 2,000 made by the first defendant in favour of the fourth defendant, who was the daughter of the first defendant's deceased divided brother, was not valid and binding upon him. The first defendant pleaded that the plaintiff was not his adopted son and that he was entitled to make the settlement in favour of the fourth defendant. The fourth defendant pleaded that the plaintiff was not the adopted son and that the settlement in her favour was made by the first defendant out of affection towards her, as she was the foster-daughter of the first defendant, in pursuance of a promise made with her intended husband, who agreed to marry her only on such condition and that the settlement was binding upon the plaintiff, even if he be the adopted son of the first defendant. The first and fourth defendants died during the pendency of the suit and the plaintiff amended his plaint by praying for the recovery of the entire properties by right of survivorship. The fourteenth defendant, the husband of the fourth defendant, who was added as the heir of the fourth defendant, adopted her written statement. The Subordinate Judge found in favour of the plaintiff's adoption and holding that the settlement in favour of the fourth defendant was not made in pursuance of any promise on account of the fourth defendant's marriage and that it was therefore invalid as a gift, gave a decree in favour of the plaintiff as prayed for. He also incidentally held that a sale by the fourth defendant of a portion of the settled properties in favour of the fifth defendant was invalid. The fourteenth defendant preferred this appeal.

T. Narasimha Ayyangar for appellant.

C. S. Venkata Achariyar for respondent.

The JUDGMENT of the Court was delivered by

ABDUR RAHIM, J.

ABDUR RAHIM, J.—The only question argued in the appeal is as to the third issue. That issue raised the question whether the alienation in favour of the fourth defendant was valid. The fourth defendant is the daughter of the divided brother of the first defendant, now dead. The plaintiff is the adopted son of the first defendant, and he sued for partition and accounts and for similar other reliefs. The fourteenth defendant, the appellant before us, is the husband of the fourth defendant. The fourth defendant whose heir is the fourteenth defendant, being

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her husband, died since the institution of the suit. The alienation in question was made by a document, Exhibit III, dated 19th May 1909. By it the first defendant purports to settle some of the property in dispute on the fourth defendant, and the validity of that settlement, according to the case of the appellant, would depend on whether it was made in consideration of the fourteenth defendant marrying the fourth defendant. The property would belong to the joint family, and the first defendant would not have been entitled to settle any property belonging to the family on the fourth defendant, if at the time the plaintiff had been adopted. The learned pleader for the appellant tried to show that the promise, according to the witnesses examined by him in connexion with this question, was made before the adoption of the plaintiff by the first defendant. But we do not think that the evidence at all clearly makes this out. We cannot therefore uphold this contention on the part of the appellant.

But the learned pleader next argues that even if the promise to settle the property was made after the adoption of the plaintiff by the first defendant, since the first defendant upheld the deed of transfer, Exhibit III, in his written statement filed in the suit, the settlement will be effective at least to the extent of the first defendant's half share in the properties. The evidence relating to the alleged promise in consideration of marriage consists mainly of the evidence of four defence witnesses, Nos. 1 to 4, before the Commissioner. They were examined on commission at Salem, the parties being residents of the Madura district. It appears that the Commissioner, Mr. Anantharama Ayyar, who, we understand, is a vakil of the Salem Court, sent a telegram on 17th February 1916 to Mr. P. S. Ganapathi Ayyar, a vakil of Madura who was appearing for the plaintiff, saying that he had fixed the 19th February for the examination of these witnesses. On the 19th, however, nobody appeared for the plaintiff and there was no cross-examination of the witnesses. On that date, however, the Commissioner had received a telegram sent by Mr. Ganapathi Ayyar asking for adjournment of the examination till the 21st. But he refused to adjourn the examination as he had to return the warrant on that very day. It is quite clear on these facts that the plaintiff's pleader was not given sufficient opportunity to be present at the examination of

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these witnesses before Mr. Anantharama Ayyar and that the plaintiff should therefore be given proper opportunity of cross-examining defence witnesses, Nos. 1 to 4. We must therefore ask the Subordinate Judge to send us a revised finding on the question whether there was a promise made by the first defendant to settle certain properties in consideration of the fourth defendant's marriage with the fourteenth defendant, after giving proper opportunity to the plaintiff to cross-examine the above witnesses before the Commissioner at Salem.

We allow two months for finding and ten days for objections.

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Ramnad at Madura submitted the following FINDING :—

"On a consideration, therefore, of all the above facts and circumstances, I am of opinion that no promise by the first defendant to settle any properties on the fourth defendant in consideration of her marriage with the fourteenth defendant has been made out by the fourteenth defendant. I find the point, therefore, against the fourteenth defendant and for the plaintiff."

ON THIS FINDING—

T. Narasimha Ayyangar and *N. S. Rangaswami Ayyangar* for appellant.—The evidence shows that there was a promise made in consideration of the marriage which would not have taken place otherwise. The settlement has therefore consideration ; it is not therefore a gift but a transfer for consideration. Such transfer by a member of a joint Hindu family is valid to the extent of his share and binding on the other members, *Ayyagari Venkataramayya* v. *Ayyagari Ramayya*(1). Marriage is good consideration ; see Leake on Contracts, Fifth Edition, pages 163 and 440 ; *Jordon* v. *Money*(2), *Shadwell* v. *Shadwell*(3) and definition of 'consideration' in section 2, Contract Act.

C. S. Venkata Achariyar and *N. C. Vijiaraghava Achariyar* for respondent.—The evidence shows that there was no promise. Even if there was a promise it does not bind the son ; there was no duty to settle property on a divided brother's daughter. It

(1) (1902) I.L.R., 25 Mad., 690 (F.B.).

(2) (1854) 5 H.L.C., 165 ; s.c. 10 E.R., 863.

(3) (1860) 9 C.B. (N.S.), 159.

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is really a gift and is not binding on the son—*Baba* v. *Timma*(1), *Ponnusawmi* v. *Thatha*(2), *Kosuri Ramaraju* v. *Ivalury Ramalingam*(3).

The JUDGMENT of the Court was delivered by

ABDUR RAHIM, J.—We think upon the evidence submitted to us that the Subordinate Judge's finding, that the alleged promise by the first defendant to settle property worth Rs. 2,000 on the fourth defendant at the time of her marriage is not proved, is incorrect. The evidence on the point consists of certain correspondence and the deposition of certain witnesses. [After dealing with the evidence, their Lordships proceeded as follows]—We think that a promise just before the marriage and in consideration of the marriage has been proved.

What then is the effect of Exhibit III? It is not contended by Mr. Narasimha Ayyangar that this transaction would affect the share of the plaintiff in the properties in dispute. What he wants us to hold is, that to the extent of the first defendant's own share, the transaction is a valid and binding one. The first defendant and the plaintiff were undivided co-parceners. The law is well-settled that the managing member of an undivided Hindu family or any other member cannot alienate any portion of the family property except for necessity. But a co-parcener may alienate his own share either in the whole of the family property or in any particular item of it for valuable consideration; see *Ayyagari Venkataramayya* v. *Ayyagari Ramayya*(4). It is also settled law that a co-parcener cannot make a valid gift of his share. It is contended on behalf of the respondents that the transaction evidenced by Exhibit III stands on the footing of a gift. Mr. T. Narasimha Ayyangar contends that we must treat it as an alienation for valuable consideration just like a sale or a mortgage. There is no express authority on the point and we have got to decide the question on general principles of Hindu Law as obtaining in the Presidency. In this Presidency, as already stated, alienation by a Hindu co-parcener of his share for a valuable consideration is recognized, though it is not recognized in some other provinces where the Mitakshara law prevails. The question is whether a gift made in pursuance

(1) (1884) I.L.R., 7 Mad., 357. (2) (1886) I.L.R., 9 Mad., 273.
(3) (1903) I.L.R., 26 Mad., 74. (4) (1902) I.L.R., 25 Mad., 690.

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of a promise in consideration of marriage is an alienation for valuable consideration within the rule of Hindu Law. We are of opinion that it does come within the rule. According to the Contract Act 'consideration' is defined thus:

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

If a person contracts a marriage in consideration of a promise, then it seems to us that the marriage is valuable consideration within the meaning of this definition. In this respect the law is the same in India as in England. In England, a promise made in consideration of marriage is a binding and enforceable agreement. The definition of 'consideration' as given in section 2 of the Contract Act seems to be general and wide enough to cover such cases.

That being so, the next step in the argument of Mr. T. Narasimha Ayyangar is that this agreement entered into between the first defendant and the fourteenth defendant was a valid contract, which could be enforced against the first defendant. We do not think that this proposition can be doubted. The settlement in Exhibit III was made in pursuance of this contract. It seems to us therefore that such a settlement is an alienation for valuable consideration. It might be suggested that the Courts of this Presidency in upholding alienation for consideration by a Hindu co-parcener are making an exception to the strict notion of Hindu Law, that until partition the co-parcener has no definite share in the family property. But once the validity of alienation for valuable consideration is recognized, it seems to us impossible not to include such a transaction as this within the operation of the rule. None of the cases to which we have been referred lay down that this power of a Hindu co-parcener is merely confined to sales or mortgages; but the general proposition which we deduce from the decisions in *Ayyagari Venkataramayya* v. *Ayyagari Ramayya*(1), *Baba* v. *Timma*(2), *Ponnusawmi* v. *Thatha*(3) and *Kosuri Ramaraju* v. *Ivalury Ramalingam*(4) is that an ordinary simple gift for no

(1) (1902) I.L.R., 25 Mad., 690. (2) (1884) I.L.R., 7 Mad., 357.
(3) (1886) I.L.R., 9 Mad., 273. (4) (1903) I.L.R., 26 Mad., 74.

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consideration will not be upheld as distinguished from alienations for consideration. We, 'therefore,' hold that the fourteenth defendant is entitled to a half share of items Nos. 3 to 8 in A schedule. As regards item 5, it was argued by the pleader for the respondents that as the sale to the fifth defendant of that item by the fourth defendant has been found to be not binding on the plaintiff and as the fifth defendant has not appealed specifically regarding this item, the appellant was not entitled to any share in this property. But the fifth defendant's purchase was found to be ineffective and inoperative, and the fifth defendant not having appealed, the property remains with the fourth defendant. Therefore the fourteenth defendant is entitled to a share in that property as well to the extent of the first defendant's share. The appellant and the first respondent will pay and receive proportionate costs from each other with respect to this Appeal. In the lower Court each party will bear his own costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling, Mr. Justice Kumaraswami Sastri and Mr. Justice Krishnan.

1918, September 23 and October 8.

MUHAMMAD ESUF SAHIB AND AMIR BIBI (DEFENDANTS Nos. 1 AND 2), APPELLANTS,

v.

MOULVI ABDUL SATHUR SAHIB AND AMIR KHAN SAHIB (PLAINTIFFS Nos. 1 AND 2), RESPONDENTS.*

Inam—Grant by a Nawab in 1798 *for building mosque, etc.—Public Trust—Confirmation of inam by British Government, subject to performance of duties—Resumption of inam—Levy of full assessment—Ryotwari patta issued to grantees—Title of grantees—Lands, whether freed from trust and made private property of trustees—Indian Trusts Act* (*II of* 1882), *sec.* 88—*Principle of section* 88, *applicability of, to public trusts—Civil Procedure Code* (*V of* 1908), *sec.* 92—*Hereditary trustee, removal of—Misconduct of predecessor, whether a disability for trusteeship of descendant.*

An inam, granted by the Nawab of the Carnatic in 1798 for the building and up-keep of a mosque, was confirmed by the British Government in 1861 subject to the performance of duties by the grantees, and, on account of non-performance of duties and misappropriation of the income by the grantees, was resumed by the Government, full assessment being levied on the lands and a ryotwari patta issued to the grantees in 1893. On a suit being instituted for removal of the defendants who were descendants of the grantees from trusteeship and for a scheme of management under section 92, Civil Procedure Code, the latter pleaded that there was no public trust and that the lands had become the private property of the grantees by the resumption and re-grant to them in 1893.

Held (in the Letters Patent Appeal), that the inam was a grant of the land in trust for a mosque, and did not cease to be such by its being made resumable by Government for non-performance of duties by the trustees;

that the resumption of the inam by levy of full assessment on the lands and issue of ryotwari patta to the trustees in 1893, did not free the lands from the trust and make them the private property of the trustees; and

that even if the *lands* were resumed and re-granted to the trustees in their individual capacity on full assessment, they were bound to hold the lands so granted for the benefit of the trust, under the principle contained in section 88 of the Indian Trusts Act.

Held, in the Appeal (*Per* WALLIS, C.J.), that the inam comprised both the lands and the assessment due thereon;

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* Letters Patent Appeal No. 32 of 1918.

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that when Government resumes an inam by imposing full assessment and does nothing more and does not expressly resume the lands as well, the ownership is unaffected and if it was subject to any charitable trust, it still continues subject to it; and.

that it was unnecessary and improper to impose a permanent disability to fill the office of trustees on the defendants and their descendants on account of the misconduct of the defendants or their predecessors.

(Per SPENCER, J.) *contra*, that in cases of resumption of charitable inams, when they consist of the land as well as the assessment, it is within the discretion of the Government to grant it on full assessment and issue ryotwari patta to the former trustee or to a person unconnected with the trust; in the former case as much as in the latter, the land becomes the private property of the grantee, freed from the trust;

that the inam in this case must be taken to have been of the assessment only, that being the presumption raised by Government in dealing with grants more than 60 years old, and by resumption of the inam and levy of full assessment the trust was at an end; and

that the suit grant was not for a public trust of the kind to which section 92, Civil Procedure Code, was applicable.

APPEAL under clause (15) of the Letters Patent against the judgment of the Hon'ble the Chief Justice (SPENCER, J., dissenting) in *Muhammad Esuf Sahib* v. *Moulvi Abdul Sathur Sahib*(1), preferred against the decree of S. G. ROBERTS, the District Judge of South Arcot, in Original Suit No. 3 of 1915.

The plaintiffs instituted this suit under section 92 of the Civil Procedure Code for removal of the defendants from the position of trustees of the Wallajah Masjid at Villupuram, for the recovery of the income of the institution alleged to have been misappropriated by them and for the settlement of a scheme for the future management of the charity. The suit lands, including the site on which the mosque was built, were granted as inam by the Nawab of the Carnatic in 1798, under a grant which was not produced in the suit; but it appeared from the inam register that the inam was granted for building a masjid on the spot where the coffin of Nawab Wallajah rested temporarily while it was being carried to Trichinopoly from Madras, for reading namas and fatehas every Friday, for performing or celebrating the annual ceremony and for feeding fakirs that may happen to pass by it. It appeared from the evidence that the mosque was open to the public for worship. The inam was confirmed by the Inam Commissioner in 1861 subject to the due performance of

(1) Appeal No. 221 of 1917.

MUHAMMAD ESUF SAHIB v. MOULVI ABDUL SATHUR SAHIB.

the services by the grantees. On account of the failure of the grantees in the performance of the services and misappropriation of the income of the properties by them, the Government resumed the inam, levied full assessment on the lands and issued ryotwari pattas in 1893 to the first defendant and his father, who were the descendants of the original trustee under the original grant. The defendants pleaded *inter alia* that the institution was not a public mosque, that by reason of the fact that the inam was confirmed subject to its being resumed for non-performance of the services, the inam was void as a wakf under the Muhammadan Law, and that in any event the lands had become the private property of the grantees, when the Government resumed the inam, levied full assessment on the lands and issued ryotwari pattas in the name of the first defendant and his father in 1893, and that the suit under section 92 of the Civil Procedure Code was not maintainable. The District Judge of South Arcot, who tried the suit, held that the suit mosque was a public institution and that the defendants were only trustees, and that they were guilty of misappropriating the income of the trust and that neither they nor their descendants were fit to be its trustees and directed the framing of a scheme of management in which the defendant or their descendants were held to be disqualified to be selected as trustees. The defendants appealed to the High Court. The appeal was heard by WALLIS, C.J., and SPENCER, J., who differed in opinion and delivered the following JUDGMENTS:—

WALLIS, C.J.

WALLIS, C.J.—The District Judge has found that the mosque in question is a public mosque and I see no reason to differ from his conclusion. The first defendant who should be in possession of the original parwana or grant by the last ruling Nawab of the Carnatic has not produced it, though it was produced by his predecessors before the Inam Commissioner in 1861. The inam register mentions the objects with which the lands were granted, viz., the building of a mosque and the performance of certain ceremonies in commemoration of the Nawab Wallajah whose body rested on the site of the mosque on the way from Madras to Trichinopoly. In the absence of express evidence as to whether the mosque was dedicated for public worship, the point must be determined by user, and it is clear from the evidence that the mosque has always been open to the public for worship.

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The first defendant was fined on one occasion for interfering with the public worship there, and in his cross-examination he had to admit that the public had a right to worship there. In these circumstances, it is immaterial whether it is called a Jumma Masjid or not; but the fact that the worshippers were styled Jamayatkars as spoken to by him, goes to show that it was a Jumma Masjid. It must, I think, be taken that the grant was to the original grantee in the deed which has not been produced as Mutawalli, and this is confirmed by the fact in the column in the inam register for particulars regarding present owner, three persons are entered as "enjoying together as managers of the masjid." It was, I think, clearly a grant on trust, as held in a very similar case in *Sikkandar Rowthen* v. *The Secretary of State for India*(1).

It must, I think, be taken that the mosque was founded, dedicated and endowed for public worship. The inam granted for these purposes was confirmed by the Inam Commissioner subject to the due performance of services but was resumed in 1893 for failure duly to perform them. With regard to the suggestion that the original grant was only of the assessment and not of the lands, I think it is clear that the site of the mosque was granted, and I think the presumption is that there was a grant of the other lands as well. The parwana has not been produced by the defendants, and I think it is not likely that the first Mutawalli, a grantee of the mosque, was the owner of the lands prior to the grant. Now it is quite clear that Government might have resumed both the lands and the assessment, and re-granted the lands to any one they chose at the full assessment. What it did was to require payment of the full assessment from the descendant of the person in whose name the inam had been confirmed, and the main question argued was, whether they must be taken to have resumed both the lands and the assessment and re-granted the lands as private property to the first defendant, or whether they merely resumed the assessment and did not interfere with the ownership of the lands. They were clearly in my opinion lands dedicated to charity though liable to be resumed, and the first defendant and his predecessors were merely in the

(1) (1917) 5 L.W., 402.

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position of Mutawallis or trustees. In these circumstances, I can find no reason for presuming that the Government intended to resume the lands as well as the assessment and to regrant the lands to the Mutawalli as his private property. As the resumption of the assessment was occasioned by the failure of the Mutawalli to perform his duties, it seems unlikely that the Government intended to make a fresh grant of the lands in his favour freed and discharged from the charitable trusts to which they had till then been subject. That would in effect be rewarding the defaulting Mutawalli for his breach of duty. I see no sufficient reason for imputing this intention to Government, and consider that the lands still remained subject to the charitable trust even after the assessment had been resumed. In *Punniah* v. *Kotamma*(1), it appears to have been assumed that the land itself was resumed and granted as private property freed from all charitable trust to the first defendant. The point that the land itself was not resumed but continued subject to the charitable trust was not raised before the Court or adjudicated on. What the plaintiff wanted was a half share in the land for which a patta had been issued in the name of the defendant, his co-trustee, and the interests of the charity were not represented at all. On the other hand in *Sikkander Rowthen* v. *The Secretary of State for India*(2), which was also the case of a mosque, it was held that the lands had been dedicated for the support of a public mosque and that the so-called resumption of the inam for failure of the trustees to perform their duties had not the effect of making the lands cease to be trust properties. The contest in that case was whether the lands had been dedicated for a public charitable purpose. If so, it does not appear to have been seriously questioned that a mere resumption of assessment could be taken as indicating that Government had exercised its right of resuming the lands themselves and granting them to the defaulting trustees as their private property. I think this decision is in accordance with a principle which to some extent underlies the decision in *Gunnaiyan* v. *Kamakshi Ayyar*(3) and *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya*(4) that when

(1) (1917) I.L.R., 40 Mad., 939.
(2) (1917) 5 L.W., 402.
(3) (1903) I.L.R., 26 Mad., 339.
(4) (1907) I.L.R., 30 Mad., 434.

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WALLIS, C.J.

Government resumes an inam by imposing the full assessment and does nothing more, and does not expressly resume the lands as well, the ownership of the land is unaffected and if it was subject to any charitable trust it still continues subject to it. In these circumstances, I think the decree of the District Judge should be confirmed, except as to one point. The words in the decree after "do submit schemes for the future management of the trust and its properties" must be omitted as it is unnecessary and improper to impose a permanent disability to fill the office of trustee on all the defendants and their descendants. Otherwise the Appeal is dismissed with costs.

SPENCER, J.

SPENCER, J.—This suit was brought for the removal of the defendants from the position of trustees of the Wallajah Masjid at Villupuram, for the recovery from them of the income of the institution alleged to have been misappropriated by them, and for the settlement of a scheme for the future management of the charity. Two questions have been argued at the hearing of the appeal (1) whether section 92 of the Code of Civil Procedure is applicable to the facts of this case, and (2) whether the defendants are accountable for the income of the lands after the resumption of the inam.

It appears from an extract from the inam register of the district of South Arcot (Exhibit A) that this inam was originally granted in 1799 free of tax for building a masjid on the spot where the coffin of Nawab Wallajah rested temporarily while it was being carried to Trichinopoly, for reading namas and fatehas every Friday, for performing or celebrating the annual ceremony, and for feeding fakirs that may happen to pass by it.

In 1893 the inam was resumed and fully assessed by Government on account of the failure of the grantees to perform the religious service for which it was granted.

The reasons for the resumption do not find a place in the Board's Proceedings (Exhibit VII) but they appear from the statement of the first defendant (Defence witness No. 1) and from Exhibits III and IV. The learned District Judge was of opinion that the Government was not acting strictly within its powers in entirely resuming this inam but that it should rather have ensured the due performance of the service by changing

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the Mutawalli, which he thinks the Government could have done as being a successor of the original founder.

I do not think that any question of the competence of Government to resume the grant can properly be raised in this suit to which the Government is not a party. There is no doubt that in some instances religious inams are resumed and re-assigned. Board's Standing Order No. 54, paragraph 7, subdivisions (1) and (2), provides for this course being followed where the institution still continues and the service is maintained but the lands have been alienated, or where the institution still continues but the inam has become incapable of application to its original object; but subdivision (2) prohibits re-assignment in cases when the institution has disappeared and the service has ceased and become incapable of restoration.

There is nothing on record to show what considerations influenced the officers of Government in resuming this inam but presumably they acted according to rule. We only know from Exhibit V that when the Muhammadan inhabitants of Villupuram 18 years later petitioned the Government for a re-assignment of the inam, the Collector refused to consider their request after that lapse of time. We have therefore only to consider the effect of the resumption, treating it as an accomplished fact. In *Gunnaiyan* v. *Kamakshi Ayyar*(1) BASHYAM AYYANGAR, J., observed that

"grants of land or land revenue for religious or charitable purposes in this country when made by the ruling authority should be construed not as out and out grants but as reserving a reversion in case of the trust failing."

On this principle, he stated, Government has a right to resume the inam if the grantee's family fail to fulfil the objects and conditions of the grant. He added:

"It is open to the ruling power to resume the grant and appro-riate it for other religious or charitable purposes or incorporate it ith public revenue. In the latter case Government simply imposes ll assessment without extinguishing the right of the family of the antee in the land and making a fresh grant of it."

The learned Judge then proceeds to consider the effect of ranchisement and to distinguish it from resumption. The

(1) (1903) I.L.R., 26 Mad., 339.

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two are distinct processes in their operation on the grantee's interest but we need not follow him into his discussion of their features. This is a case of resumption and resumption means a taking back of what was granted. But in cases like the present, the real question is not so much what was resumed as what was granted in the first instance. We have not the original grant to tell us this directly. But we know what is the presumption that the Government draws in such cases, because that is laid down in the Board's Standing Orders for the direction of officers of Government dealing with cases of resumption, and we are able to know what presumption the Government drew in this particular case from their conduct in simply imposing full assessment and leaving the enjoyment of the land where it was. In the case of ancient grants like this where it does not appear from the title-deed whether it was the land or the assessment that was originally granted, the Government gets over the difficulty of uncertainty as to title and avoids interfering with occupancy rights by requiring the Collector to report who is the actual occupant of the land and by *treating the inam subject to resumption as a grant of the assessment of the land* and fully assessing it in the name of the occupant. It is only in the case of grants made within 60 years of resumption proceedings, when there is *primâ facie* evidence that the grant was of the land also, that any steps are taken to resume the land and interfere with the enjoyment of the person in possession. That these are the principles governing the action of the Government is evident from Board's Standing Order No. 54, paragraphs 4 and 5. I agree with the learned Judges who decided *Punniah* v. *Kotamma*(1) that in cases of resumption of charitable inams the land that was previously the property of the trust becomes the property of the person to whom Government grants it and that it is within the discretion of Government to grant land which it has resumed to the former trustee or to any other person.

If then resumption in the words of the Privy Council quoted in *Sreevadhu Yerranna* v. *Donkiri Kannamma*(2) "consists in putting an end to the grant remitting the services and requiring them (i.e., the grantees or their heirs) to pay the full assessment", what is the effect on the rights of the

(1) (1913) I.L.R., 40 Mad., 939. (2) (1912) I.L.R., 35 Mad., 704 at p. 706.

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defendants to dispose of the land which was trust property, and its income ?. There is nothing to show that the lands were waste before the grant. The grant was more than 60 years old at the time of the resumption. The lands have now been incorporated with ayan, and an ordinary ryotwari patta has been issued to them which carries with it no obligations beyond the payment of assessment. The restriction to alienation has been removed from the properties which were before inalienable on account of the religious service for which they were intended to be a support: transfers of the pattadar's interest are recognized by the Government and the holding is hereditary in the ordinary way according to the personal law of the holder. The natural inference is that the grant must be taken to have been a grant of the assessment, that on full assessment being imposed nothing was left for the trust, that the Government which represents the grantor, released the grantees from their obligation to render service from the moment that resumption took place and that the trust is at an end. It may be that the holders of service and religious inams are by these means able to take advantage of their own default but this is a matter for consideration of the Government and not of the Civil Courts, whose function is only to declare the law as it stands. See the observations of the Judicial Committee in *Balakrishna Udayar* v. *Vasudeva Aiyar*(1). Moreover, as full assessment is now being paid, I am doubtful whether there has been any real advantage accruing to the defendants in consequence of the resumption. The second and fourth issues must therefore in my opinion be answered in the negative.

I am further of opinion that the suit must fail on the first issue also, though I admit that this question does not admit of easy solution.

Mr. Ameer Ali, in his book on Muhammadan Law, at page 561, distinguishes between public wakfs and quasi-public or private wakfs and states that a Muhammadan mosque, unless it is a *masjid-i-jamma*, is not regarded by Muhammadan Lawyers to be vested in the public. In this passage and in his commentary on the Civil Procedure Code the learned author declares that section 92 of the Code of Civil Procedure has no application to

(1) (1917) I.L.R., 40 Mad., 793 at p. 803.

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private or quasi-public trusts. In the present case we have the statement of the Kazi of Villupuram (Defence witness No. 3) who ought to know the facts that this Wallajah mosque is not called a Jumma Masjid, that is, a mosque where congregational worship is held. In Ganapathi Aiyar's *Religious Endowments* at pages CXIX to CXXV the distinction between public and quasi-public trusts made by Mr. Ameer Ali is said to be unwarranted, but the latter's authority on questions of Muhammadan Law is in my opinion so great as not to be lightly disregarded. In *Sikkandar Rowthen* v. *The Secretary of State for India*(1) the Begumpur mosque at Dindigul was decided to be a public trust although the learned judges held in that case, to which Government was a party that Government were justified in resuming the inam. That was a grant of two whole villages as inam for the upkeep of a mosque and a durga. In *Rungachariar* v. *Pranatharthiharachariar*(2), an inam granted for the support of hereditary office-holders in a Hindu temple was held to be not a religious trust of a public nature. No doubt each case must depend on its own facts and therefore other decisions do not help us much in determining this case, but looking to all the known circumstances connected with the grant and the resumption of this inam, its registration not in the name of any institution but in the name of an individual grantee, the statement of Defence witness No. 3 and other evidence, I am of opinion that this is not a public trust of the kind to which section 92 of the Code of Civil Procedure is applicable. On these two grounds, I think that the appeal should be allowed and the suit dismissed with costs here and in the District Court.

Under section 98 of the Code of Civil Procedure the Appeal is dismissed with costs.

Against the judgment of WALLIS, C.J., the defendants preferred this Letters Patent Appeal.

T. R. Ramachandra Ayyar, G. S. Venkatarama Ayyar and *S. Ranga Achariyar* for the appellants.

C. Padmanabha Ayyangar for the respondents.

AYLING, J.

AYLING, J.—The first question for consideration in this case is obviously the nature of the original grant which it is common

(1) (1917) 5 L.W., 402. (2) (1915) 18 M.L.T., 122.

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ground was made by the Nawab of Carnatic in 1798, and I have no hesitation in agreeing with my lord the Chief Justice that it was of the nature of a public trust for the benefit of a mosque founded, endowed and dedicated for public worship. In the absence of the parwana we have to look to the record in the inam register, Exhibit A, and to the evidence of user. Both are strongly in plaintiff's favour. I attach no importance to the statement of Defence witness No. 3 that the mosque is not called a Jumma Masjid in the face of the evidence that it has always been used for public worship. Exhibit A shows clearly that the inam was a religious endowment for the establishment and upkeep of a mosque and various services therein, and that the persons named in columns 16—20 as 'present holders' are so treated as managers of the masjid and not in their individual capacity.

Indeed the only ground on which the public character of the trust has been seriously attacked is the fact that it was treated by the British Government as resumable, and that under Muhammadan Law a wakf must be unconditional. No authority has been quoted which, as far as I can see, supports the contention that in the case of a grant by the ruling power the condition of power of resumption in case the trust is not carried out, impairs the public character of the trust. We have been referred to a passage at page 526 of Volume 1 of Ameer Ali's Muhammadan Law, which says :—

"If a person were to create a wakf and make a condition that the property should return to him in case of necessity, the condition would be valid and the wakf would be void the transaction taking effect as a mere hubs or settlement when the need arises the property would revert to the owner."

This has reference to a totally different state of things. A contingency of reversion to the owner, in case the latter needs the property, obviously implies only a temporary settlement, which can be annulled although all its other conditions are rigorously complied with. In *Kuttayan* v. *Mammanna Ravuthan*(1) the only case to which we were referred as being in appellants' favour, there was no question of resumability, but of the existence of outstanding private rights in the alleged wakf property. In *Sikkandar Rowthen* v. *The Secretary of State for India*(2), a very similar case to the present, SRINIVASA

(1) (1912) I.L.R., 35 Mad., 681. (2) (1917) 5 L.W., 402.

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AYYANGAR, J., and myself held that land forming the subject of a public trust was resumable by Government on failure to perform the conditions of the trust.

I would therefore reject this contention and may add that in any case it could not be applied to a grant by the British Government while there is no evidence attaching a specific condition of resumability to the original grant by the Nawab. The earliest evidence is the entry in the inam register (Exhibit A), dated 1861.

It only remains to consider the nature and effect of the proceedings of Government in 1893 by way of resumption. There appears to have been considerable argument before the Divisional Bench as to whether the original grant was of the lands themselves as held by the Chief Justice or only of the assessment thereon. Before us the learned vakil for appellants did not contest the view taken by the Chief Justice on this point, but was content to argue his case on the hypothesis that the lands themselves constituted the grant.

But if this be so, the appellants' case is hopeless, whichever view be taken of the extent of the interest resumed by Government. If, as both the learned Judges of the Divisional Bench held, Government only resumed its right to collect full assessment on the land then the remaining interest in the land remained as much the subject of the trust as ever. If on the other hand, it be held that Government took back all that it had granted (i.e., the ryot's interest as well as its own right of collecting assessment) and made a re-grant of the ryot's interest to the trustees in their individual capacity, then the principle embodied in section 88 of the Trusts Act comes into effect. There can be no question that by such a transaction the trustees would gain for themselves a very valuable proprietary interest in the property which interest previously appertained to the trust. This interest would have been acquired by the simple process of neglecting their duty as trustees, whereby Government was driven to resume the inam. In such circumstances the advantage they gained must be held by them for the benefit of the trust. It is argued that the trust had ceased to exist but this cannot be the case. Apart from the cultivable lands which formed the endowment of the mosque there is the mosque itself and the site on which it stands which latter also formed part of

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the original grant. It cannot be seriously suggested that the site of the mosque was assessed and, with the mosque upon it re-granted to the defaulting trustees for their private use. There is certainly no evidence to prove that such was the case; and as long as the mosque and the site remain unaffected, the trust cannot be said to be extinguished.

I would dismiss the Appeal with costs.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—I am of opinion that the decision of the Chief Justice ought to be affirmed. There can be little doubt from the inam title deed that the inam was granted by Nawab Azim Jah in Fasli 1208 (1798) for the purpose of erecting a masjid, for keeping a light burning every night, for reading the namas and fatehas every Friday, for performing the annual ceremony (of the Nawab whose coffin rested on the spot where the masjid was to be built on its way from Madras to Trichinopoly) and for feeding the fakirs. It does not appear that it was the intention of the grantor that the trustee should obtain any personal benefit or that he should appropriate any portion of the income of the lands. The land is classed as a religious endowment in the inam register and this is as pointed out in *Muhammad Jafar* v. *Muhammad Ibrahim*(1) strong evidence that the property was subject to a public trust. The persons in possession are described as managers of the masjid. The first defendant and his witnesses in their evidence state that the lands were manyam lands assigned to the mosque. I see no reason to hold that the mosque is not a public mosque and that the grant of the inam was to the grantees personally as a service inam. It is conceded before us that the grant was of both the melvaram and kudivaram of the land. In the absence of evidence as to what was actually granted, the recent decision of the Privy Council in *Suryanarayana* v. *Patanna*(2), is to the effect that in grants by Native Rulers there is no presumption that only the melvaram was granted.

It is also clear that a mosque was built and that the trusts were carried out till at least 1861 as the remark in column 8 of the inam register is to the effect that the conditions were all regularly fulfilled. It also appears that the trusteeship was hereditary.

(1) (1901) I.L.R., 24 Mad., 243. (2) (1918) I.L.R., 41 Mad., 1012 (P.C.).

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As to what happened between 1861 and 1893 (the date of resumption by Government) the evidence is not clear. The probabilities are that, having got the recognition of the British Government during the inam settlement proceedings, the trustees gradually neglected their duties and treated the inams as their private property.

In 1893 an enquiry was held and in consequence of it full assessment was levied on the lands. Exhibit VI shows that a total tirwa of Rs. 123-8-0 was levied on the lands which are said to consist of 2 acres 99 cents of punjah and 16 acres 70 cents of nanjah. It is argued that the levying of this assessment had the effect of putting an end to the trusts, and the grant of the lands as the private and absolute property of the grantees. I do not think this consequence follows. All that the Government did was to levy the full assessment on lands which were free from it. The kudivaram rights on the land were not affected and as the grant in inam was of both varams it is difficult to see how the levying of the assessment can put an end to the trust. At the most all that can be said is that by levying full assessment the income of the trust properties was reduced by the amount of the tirwa levied. Reference was made by the appellant's vakil to *Unide Rajaha Raje Bommaranuze Bahadur* v. *Pemmasamy Venkadry Naidoo*(1). In this case the inam was a service inam and the grant seems to have been of the melvaram in return for services. The levying of the assessment had therefore the effect of putting an end to the tenure. In the present case the grant in inam was of both the varams and I cannot, from the mere fact of the levying of full assessment and the grant of a patta to the trustees, hold that there was a resumption of both the varams by the Government which extinguished the trust and a re-grant to the trustees of an absolute estate free from all obligations. The case *Punniah* v. *Kotamma*(2) is distinguishable as the resumption was assumed to be of both the varams.

It has been argued that no valid wakf was ever created as the lands were resumable at the option of the grantor if the trusts were not performed by the grantees of the inam. Reference has been made to Ameer Ali's Muhammadan Law, Volume I,

(1) (1858) 7 M. I.A., 128. (2) (1917) I.L.R. 40 Mad., 939.

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page 526. The original grant is not produced and no satisfactory explanation has been given for its non-production. That such a document existed appears from the inam register which refers to "documents in Persian with parwana." There is therefore nothing to show that a right of resumption existed in the original grant constituting the wakf. I doubt very much if the limitations which would apply to grants by private individuals would apply to trusts created by sovereign-rulers; but assuming it is so there is nothing to show that there were any terms or conditions in the parwana issued by the Nawab of the Carnatic which are repugnant to Muhammadan Law. What the British Government did in 1861 was to confirm the grant. A clause was added that the inam would be "continued so long as the conditions of the grant are regularly fulfilled," but this clause cannot render a valid wakf already created invalid nor can the inam proceedings of 1861 be taken to amount to the creation of a new wakf. Assuming it to be so, the trust would be one created by the British Government and the law as to wakfs would not apply to trusts created by a non-Muhammadan State. I am also of opinion that section 2 of the Crown Grants Act (XV of 1895), which provides that all provisions, restrictions, conditions and limitations contained in grants by the Crown shall take effect according to their tenor notwithstanding any rule of law to the contrary, will validate the grant as the Act is retrospective.

There can be little doubt that full assessment was levied by the Government becasue the then trustees did not carry out the trust. Assuming that there was a re-grant of both the varams to such trustees, the case will fall under section 88 of the Trusts Act. Having regard to the Standing Orders of the Board of Revenue, the grant in cases where inams are resumed is, as pointed out by SPENCER, J., ordinarily to the persons in possession and the patta was issued to the trustees because they were in possession of the lands. I agree with the Chief Justice that the Government can hardly have intended to reward the defaulting trustees by conferring on them an estate free from the trust. The Government had waived its right to levy assessment on condition that certain trusts were performed and on failure by the trustees it levied full assessment. The patta was issued to the trustees because they were in possession as trustees and not

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because of any special claims they had apart from the trust. The trustees who were bound to carry out the trusts therefore gained an advantage by their breach of trust and they must hold the land for the benefit of the trust.

I would dismiss the Appeal with costs.

KRISHNAN, J.

KRISHNAN, J.—The first question for our decision in this case is whether the plaint mosque is a trust created for public purposes within the meaning of section 92, Civil Procedure Code.

The nature of a trust has to be judged primarily from the terms of the deed of endowment creating it. But in the present case the parwana by which the trust was created is not produced. The appellants pretend that they have lost it, but I am unable to believe it. I am inclined to think it is kept back as its production would work against their interests and therefore every presumption should be drawn against them on the question at issue.

In the absence of the original deed of trust, we have to fall back upon what appears in the extract from the inam register of 1861, Exhibit A, and on the usage in the institution. Exhibit A shows that the grant was made in Fasli 1208 or A.D. 1798 by the order of the then Nawab of the Carnatic for the purpose of building a masjid on the spot where the coffin of Nawab Wallajah rested on its way to Trichinopoly, for keeping a light in it, and for reading namaz and fatehas on every Friday, for performing the annual ceremony of the Nawab's death, and for feeding fakirs who pass by. No doubt the object so stated and the fact that the inam was to be continued only so long as the conditions were fulfilled are in favour of the appellants' argument that the inam is a service inam. But the inam is not described as a service inam in the deed but it is stated to be a 'religious endowment' and the lands are said to be enjoyed by the persons then in possession as 'Managers of the masjid'. These circumstances rather support the contention that the endowment is a public one. I am, however, not prepared to go as far as my learned brothers that they are conclusive of the question at issue. It seems to me that no definite inference can safely be drawn from Exhibit A by itself as to the character of the trust.

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But I consider the matter is put beyond doubt by the usage in the institution as proved by the evidence in the case. Several witnesses speak to the mosque being open to the Muhammadan public for worship. The first defendant himself had to admit that "the people had a right to worship in the mosque." He seems to have also been fined once for interfering with public worship in it, see Exhibits B and B-1. It is also proved that there is a Peish inam and Katib and a Muazzin for the mosque. Plaintiff's first witness swears that he is the holder of the first two offices and plaintiff's third witness claims to be the Muazzin. The first defendant admits the existence of these offices, though he claims to hold them himself. Plaintiff's first witness also swears that he was in the habit of preaching Katib from the 'Inimbar' or pulpit regularly to congregations of Muhammadans. In these circumstances, it seems to me idle to say that the mosque is not a public one. I therefore agree that the finding arrived at by the District Judge and supported by his Lordship the Chief Justice and by my learned brothers now, that the mosque is a public trust, should be adopted. As pointed out by the learned Chief Justice, this view is supported by the ruling in *Sikkandar Rowthen* v. *The Secretary of State for India*(1), where, under similar circumstances, a similar inference was drawn.

It was next contended by the appellants' vakil that as the grant was confirmed and continued by the British Government by Exhibit A, only subject to the conditions of the grant being fulfilled, it became an invalid wakf, as under the Muhammadan Law the grantor cannot retain any interest in a valid wakf; and reliance was placed on Ameer Ali's Muhammadan Law, volume I, page 526. This argument is clearly fallacious. In the first place, the Government was creating no new trust at all by Exhibit A. They simply confirmed the previous grant, imposing certain conditions, as they were entitled to do, as the ruling power in the land. In doing so, they did not act as the representatives of the Nawab who was the original grantor nor did they purport to make a new grant themselves. In the second place, if we take it that they did make a new grant,

(1) (1917) 5 L.W., 402.

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obviously the Muhammadan Law of wakf cannot apply to it. In any case, therefore, the objection is futile.

It was finally contended by the appellants' vakil that the resumption proceedings in 1893 put an end to the inam in question, and as the lands were granted to his client's predecessor in title on an ordinary ryotwari patta, they became his private property. On this question the learned Chief Justice and SPENCER, J., have taken different views, the former holding that it did not affect the trust and the latter that it did. I am inclined to agree with the view of his Lordship the Chief Justice.

It is admitted before us that the lands themselves formed the inam and not merely the revenue payable on it. As the note of the fact in the Inam Register, Exhibit A, states that the "whole inam has been resumed" I am not able to adopt the suggestion that the resumption was only of the melvaram right and that the kudivaram still remained as it was before. But even taking that the lands themselves were resumed, I think it really makes no difference in the result of the case.

If the Government had granted the lands to a stranger without expressly providing for the trust to attach to them, it may be they would have become the ordinary private ryotwari property of the grantee. But the grant in this case was to the Mutawallis themselves, and apparently on the ground that they were such Mutawallis. In such a case it seems to me a fair inference to draw that the Government intended that the lands should be held under the same conditions as before, subject to the one exception that full assessment was to be paid. In fact, the considerations mentioned by SPENCER, J., regarding resumption in the case of ancient grants show that where the Government merely levy full assessment they do not intend to interfere with the existing rights; and therefore where they purport to resume the land and re-grant it to the same trustee on full assessment, it is clearly right to hold that they intended by their re-grant that the lands should be held subject to the same rights as before resumption.

The case *Punniah* v. *Kotamma*(1), relied on by the appellants' vakil, does not seem to me to be in point here. In that case

(1) (1917) I.L.R., 40 Mad., 939.

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both parties were agreed that the charitable trust had come to an end by the resumption proceedings; in fact the claim was for a share on the footing that the property had become private property. In such a case the learned Judges held that the re-grant to a person, who happened to be one of the trustees, did not lead to a presumption that it was given to him because he was a trustee; or that he took it jointly for himself and the other trustees; for, if that was the intention of the Government, the grant would have been to all the trustees. Whether this view be correct or not, it is not in conflict with the view that, where the grant is not inconsistent with an intention to preserve the trust, such intention may be presumed.

I agree with the view taken in *Sikkandar Rowthen* v. *The Secretary of State for India*(1), which is followed by the learned Chief Justice in this case, that, where lands have been dedicated for the support of a public mosque, their resumption and re-grant to the trustees on full assessment, do not free them from the trust.

I am prepared to support my conclusion in this case on another ground as well. It is proved here that it was entirely due to the failure of the Mutawallis to perform their duties properly that led to the inam being resumed and the lands being re-granted on full assessment. In these circumstances, I am of opinion that, even though the resumption proceedings be taken to have resulted in freeing the lands from the trust in the hands of the Government, the trust re-attached to them when they were given back to the Mutawallis, on the principle underlying section 88 of the Indian Trusts Act, though that Act does not directly apply to public religious endowments. Otherwise, as the learned Chief Justice remarks,

"we would in effect be rewarding the defaulting Mutawallis for their breach of duty."

Section 88 embodies a principle which is of general application, that if a trustee avails himself of his character as such to gain an advantage thereby, he must hold it for the beneficiaries. It is quite clear in this case that it was by taking advantage of their p sition as Mutawallis and failing to do their duty as such, that they led the Government to resume the lands and re-grant

(1) (1917) 5 L.W., 402.

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them to them. They cannot be allowed to take advantage of their own default and to treat the lands as private property in their hands.

I, therefore, find on the first issue that the Wallajah Musjid of Villupuram is a public religious institution, to which section 92, Civil Procedure Code, applies, and on issues 2 and 4, that the lands are trust properties belonging to the Musjid and that defendants are accountable for the income. The amount decreed by the lower Court has not been seriously disputed before us.

I agree with the learned Chief Justice that the decree of the District Judge should be modified as he proposes, as it is not right to exclude the defendants and all their descendants from filling the office of trustee for ever. Adopting that modification, which has already been incorporated in the decree of this Court, I agree in dismissing the Appeal to us with costs.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Phillips and Mr. Justice Napier.

1918. October 15.

P. VARADARAJULU NAIDU (ACCUSED), PETITIONER,

v.

PUBLIC PROSECUTOR, MADURA (COMPLAINANT), RESPONDENT.*

Criminal Procedure Code (act V of 1898), sec. 196—Authority by Government for filing complaint—Telegram by Government to District Magistrate—Authority to Public Prosecutor—Discretion given to District Magistrate as to filing complaint immediately—Complaint to be submitted to Government for supplemental sanction—Authority, whether valid.

Where the Government sent a telegram to a District Magistrate expressly authorizing the Public Prosecutor to file a complaint against a person for an offence under section 124-A, Indian Penal Code, but the telegram added that the Public Prosecutor might act on this authority immediately if the District Magistrate on consultation should think it desirable and that the complaint prepared should be submitted at once to the Government for issue of supplemental sanction:

* Criminal Revision Case No. 596 of 1918.
Criminal Revision Petition No. 42 of 1918.

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Held, that the authority given by the Government was valid under section 196 of the Criminal Procedure Code.

Per NAPIER, J.—Section 196, Criminal Procedure Code, is a disenabling section, and should not therefore be construed with the strictness applicable to an enabling section.

Chidambaram Pillai v. *Emperor* (1909) I.L.R., 32 Mad., 3, followed.

Queen-Empress v. *Samavier* (1893) I.L.R., 16 Mad., 468, distinguished.

Barindra Kumar Ghose v. *Emperor* (1910) I.L.R., 37 Calc., 467, dissented from.

PETITION under sections 435 and 439, Criminal Procedure Code, and section 107 of the Government of India Act (5 and 6 Geo. V, Cap. 61) to revise the order of S. V. NARGUNAM, First-class Subdivisional Magistrate of Madura, on the Objection Petition in Calendar Case No. 53 of 1918.

A complaint was filed in the Subdivisional Magistrate's Court of Madura for an offence under section 124-A of the Indian Penal Code against one Varadarajulu Naidu in respect of speeches delivered by him on the 18th August 1918. It appeared that a telegram was sent by the Government to the District Magistrate of Madura in which the Government expressly authorized the Public Prosecutor of Madura to file the complaint. The telegram was as follows:—

"Your letter 20th instant. Under section 196, Criminal Procedure Code, Government authorizes Public Prosecutor prefer complaint under section 124-A, Indian Penal Code, against Varadarajulu Naidu in respect of speech made at Madura on 18th August. Public Prosecutor may act on this authority immediately if after consultation with him you are satisfied that this is desirable. Complaint prepared should be submitted at once to Government for issue of supplemental sanction."

The District Magistrate thereupon forwarded the telegram to the Public Prosecutor with a request that the Public Prosecutor should prefer a complaint as therein authorized before the Divisional First-class Magistrate, Madura Town. A complaint was accordingly preferred by the Public Prosecutor and filed in Court. The accused took the objection that there was no valid sanction by the Government for the complaint as required by section 196 of the Criminal Procedure Code. The Subdivisional Magistrate overruled the contention by a special order. The accused preferred this Criminal Revision Petition to the High Court against the order.

P. VARADA-RAJULU NAIDU v. PUBLIC PROSECUTOR, MADURA.

PHILLIPS, J.

K. Srinivasa Ayyangar, *A. Krishnaswami Ayyar* and *K. Balasubrahmanya Ayyar* for the petitioner.

The Public Prosecutor (*E. R. Osborne*) on behalf of the Crown.

PHILLIPS, J.—The only point argued before us among the many objections taken in the revision petition is that the complaint was filed without the authority of Government. A telegram was sent by Government to the District Magistrate (Exhibit A) and it expressly authorised the Public Prosecutor to file a complaint aginst Varadarajulu Naidu under section 124-A, Indian Penal Code. It further authorizes him to act immediately if the District Magistrate thinks it advisable after consulting him, and this consultation does not refer, as suggested by Mr. Srinivasa Ayyangar, to the actual filing of the complaint. The last sentence of the telegram enjoins the District Magistrate to submit the complaint preferred, "for issue of supplemental sanction." It is contended that these words modify the previous portion of the order and render the authority invalid. I, however, agree with the Subdivisional Magistrate that this last sentence must be read apart from the rest of the order, and does not intend to refer back to the first portion of the telegram or to limit the authority given. The words 'issue of' strengthen me in this view, for if Government intended that no action should be taken until the complaint had been sanctioned, those unnecessary words would not have been inserted in the telegram. *Chidambaram Pillai* v. *Emperor*(1) is authority for the proposition that the actual words of the complaint need not be authorized by Government. I have therefore no doubt but that the authority given by Government in Exhibit A was a perfectly valid authority. In view of the above, it is unnecessary to deal with two cases cited, i.e., *Barindra Kumar Ghose* v. *Emperor*(2) and *Queen-Empress* v. *Samavier*(3), the former of which decided a point which does not arise here and the latter a question under section 197, Criminal Procedure Code, the language of which is entirely different from section 196. I would therefore dismiss this petition.

NAPIER, J.

NAPIER, J.—I agree. I only wish to add a few words on what I conceive to be the scope of section 196 of the Criminal Procedure Code. Mr. K. Srinivasa Ayyangar invited our

(1) (1909) I.L.R., 32 Mad., 3. (2) (1910) I.L.R., 37 Cal., 467.
(3) (1893) I.L.R., 16 Mad., 468.

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attention to the language used by the learned Judges in a case reported in *Barindra Kumar Ghose* v. *Emperor*(1). It appears to me, that they treated section 196 as an enabling section. With the greatest deference I entirely differ. Section 196 is not an enabling section. It is a disenabling section. The enabling section is section 190. Section 190 provides that a Magistrate may take cognizance of any offence (*a*) upon receiving a complaint of facts which constitute such offence; (*b*) upon a police report of such facts; and (*c*) upon information received otherwise or from his own knowledge. Then there are sections 195, 196 and 197 which limit the power of a Magistrate to take cognizance in this general manner. What the Code does is to provide that any person who has knowledge of an offence being committed can set the criminal Court in motion; but that with regard to matters dealt with in section 196, the criminal Court shall not be set in motion without a complaint, this provision eliminating clauses 2 and 3 of section 190, and further provides that the complaint shall be either by order of, or under authority from, the Governor-General in Council or the Local Government. Therefore, in my opinion, the question whether this section should be read in the interest of the accused or to what extent discretion is allowed, or to what extent Government is to be guided by questions of policy, have with deference to the learned Judges, no bearing on the question at all. All that it requires is that whereas ordinarily anybody can give information of an offence and the proceedings then go on in the name of the Crown against the accused person, in this particular case only the Government can set the Court in motion. And it is, I think, in view of the generality of the language used in this section that this Court and the High Court of Bombay have given a wide interpretation to the section. This Court, in the case reported in *Chidambaram Pillai* v. *Emperor*(2) expressly approved of the language used in *Queen-Empress* v. *Bal Gangadhar Tilak*(3) and that language seems to me to indicate the true manner in which the construction of this section should be approached. It is as follows :—

"Now as to the question of jurisdiction we are all of opinion without doubt that this prosecution was instituted under the

(1) (1910) I.L.R., 37 Calc., 467. (2) (1909) I.L.R., 32 Mad., 3.
(3) (1898) I.L.R., 22 Bom., 150.

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authority of Government, and that to use the words of the present Code (Act X of 1886) this complaint was made 'by order of or under the authority of Government.' There is no special mode laid down in the Code whereby the order of sanction of Government is to be conveyed to the officer who puts the law in motion. In this case the prosecution was conducted by the Government Solicitor, it was instituted by the Oriental Translator to Government, and he produced the written order of Government to institute the complaint. Now, though the complaint must undoubtedly contain the article complained of to give information to the accused of the charge against him, there is nothing in the Code to show that the written order to make the complaint, if written order is required, must specify the exact article in respect of which the complaint is to be made."

That appears to have been the view taken in *Chidambaram Pillai* v. *Emperor*(1), because in that case we find the language of the order is,

"The Madras Government authorizes the institution of criminal proceedings against Chidambaram Pillai, Subramania Siva and Padmanabha Iyengar under sections 124-A, 153-A and 505, Indian Penal Code, in respect of speeches delivered by them at Tuticorin and Tinnevelly in the months of February and March 1908";

so, the only thing definite in the order is the persons, the sections, and the dates *within which* the speeches were made. These two cases seem to me clearly to indicate that this section must not be construed with the strictness of an enabling section but as being a disenabling section must be read simply as requiring the specified authority of Government for institution of the proceedings and nothing more.

K.R.

(1) (1909) I.L.R., 32 Mad., 3.

APPELLATE CIVIL—FULL BENCH.

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

PATCHU RAMAJOGAYYA (PLAINTIFF), PETITIONER,

v.

VAJJULA JAGANNADHAN AND ANOTHER (DEFENDANT), RESPONDENTS.*

1918, March 28, April 5, October 29, and 30, and November 14.

Minor—Money borrowed by guardian of a Hindu minor for a purpose binding on minor—Form of decree in a suit on loan—Liability of minor and his estate for loan.

Held by AYLING and SESHAGIRI AYYAR, JJ.—(a) that on a contract entered into on behalf of a minor by his guardian under which the guardian borrowed money but no charge was created on the minor's estate, no decree can be passed against the minor on his attaining his majority or his estate, except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject, and that (b) a decree can be passed against the estate of a Hindu minor for a debt contracted by his guardian for the marriage of his sister.

Per WALLIS, C.J.—A decree cannot be passed against a minor on his attaining his majority or his estate on a covenant entered into on his behalf by a guardian for his benefit.

PETITION under Rule 8 of the Agency Rules for the Gōdāvari district against the decree of H. H. BURKITT, the Agent to the Governor at Gōdāvari, in Appeal Suit No. 3 of 1917, preferred against the decree of H. R. UZULLI, Assistant Agent to the Governor at Bhadrachalam, in O.S. No. 12 of 1915.

This was a suit to recover Rs. 550 due on a mortgage executed by the second defendant the mother of the first defendant *as guardian* of the latter during the latter's minority and was brought after the latter attained his majority. The material portion of the mortgage deed was as follows:—

"For the purpose of discharging the minor debts hitherto contracted for the maintenance of our family and for the marriage of Chandramma, my second daughter, I have borrowed from you Rs. 400 (Rupees four hundred). I shall pay within a year the principal and interest thereon at one rupee per cent per mensem from this date till the amount is repaid to you, and get the payment endorsed hereon and receive back this deed. Payments not so

* Civil Miscellaneous Petition No. 2743 of 1917.

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endorsed need not be accepted. Mortgaged herefor:—Our joint right to a half share belonging to us in inferior proprietary village of Gogubaka, Bhadrachalam sub-district, having an extent of acres 1103—26 (sic) cents as per the *missel* plan has been mortgaged in respect of the debt due to you and (the land) retained in our possession. I shall discharge the said debt by means of this mortgaged property and our other properties."

The second defendant admitted the claim; but the first defendant contended (*a*) that the mortgage of the property was void as the requisite sanction of the Government for mortgaging the same was not obtained, (*b*) that his mother had other funds of his estate for the marriage of his sister and that the loan was not necessary and (*c*) that no decree could be passed either against him or his estate. The Court of first instance, viz., the Assistant Agent to the Governor, upheld the first plea, but, holding that the mother had not sufficient funds to meet the expenses of her daughter's marriage, passed a decree against the other properties of the first defendant. On appeal by the first defendant, the Agent to the Governor, though agreeing with the Court of first instance on the question of the inalienability of the property mortgaged and the necessity for raising the loan, held on the authority of the ruling in *Dipan Rai* v. *Ram Khelawan*(1), that no decree could be passed even as against the other properties and dismissed the suit. The plaintiff preferred this petition to the High Court against the decree of the Appellate Court.

P. Narayanamurti for the petitioner.

P. Somasundaram for the first respondent.

This petition coming on for hearing, the Court (SADASIVA AYYAR and NAPIER, JJ.) made the following ORDER of REFERENCE to a Full Bench:—

NAPIER, J.

NAPIER, J.—The plaintiff in this suit sues for recovery of moneys due on a mortgage deed executed in his favour by the mother of the first defendant as his guardian. The lower Appellate Court found that the greater part of the money was borrowed for the marriage of the first defendant's sister and that the amount was moderate and spent for legitimate purposes. Both Courts have held that the property could not be mortgaged without the sanction of Government. But the first Court held that the first defendant was bound to liquidate the debt by any

(1) (1910) I.L.R., 32 All., 383.

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property other than the mortgaged property, and decided that the plaintiff was entitled to a decree for Rs. 550 against the first defendant as head of the Vajjula family and manager of the family property. The decree followed the terms of the judgment.

The sole point taken before us is that this is a personal decree against the minor on an obligation created by his guardian and that no such decree can be given. Reliance is placed on the decision of the Privy Council in *Waghela Rajsanji* v. *Shekh Masludin*(1). The covenant in that case which was contained in a mortgage of a Talukdar's estate by his guardian, is found in the deed set out at pages 553 and 554. It is as follows:—"If Government should make a claim in any way . . . and if you should have to pay . . . all those moneys and the interest on those moneys we and our heirs are to pay to you . . . You are to recover your money from the said property, etc., and from our persons." The Bombay High Court gave judgment for a sum of Rs. 12,000 to be recovered from the defendant Rajsanji's property generally as well as from him personally. So far as the personal liability is concerned, the view of their Lordships is stated at page 561:

"Now it was most candidly stated by Mr. Mayne, who argued the case on behalf of the respondent, that there is not in Indian Law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English Law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English Law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward, and they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward, and that, so far as this suit is founded on the personal liability of the *Talukdar*, it must fail."

This decision was considered by this Court in *Venkitaswamy Naicker* v. *Muthuswamy Pillai*(2). In that case, the guardian of a minor executed a bond in favour of a certain mortgagee to

(1) (1887) I.L.R., 11 Bom., 551 (P.C.). (2) (1918) 34 M.L.J., 177.

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pay certain expenses which the lower Appellate Court found reasonable and with respect to which this Court was not prepared to differ from the lower Appellate Court. The High Court was of opinion that the decision in *Waghela Rajsanji* v. *Shekh Masludin*(1), went no further than this, that no decree should be made against the minor personally, but that a decree might be made against his property. It was admitted that if the property had been specifically charged, such a decree could be passed, but it was argued before the Court on the authority of *Indur Chander Singh* v. *Radha Kishore Ghose*(2), that in the absence of such a specific charge no decree could be passed against the estate of the minor. The Court pointed out that in *Indur Chander Singh* v. *Radha Kishore Ghose*(2), the Judicial Committee were dealing with a document which did not purport to have been executed by a guardian on behalf of the minor, and referred to page 513 of the report where the Board pointed out that the plaintiff was asking the minor to fulfil obligations entered into by the lessees in their own name. The judgment also points out that in several cases since the decisions of the Privy Council, this Court has held that the minor's estate could be made liable, the decisions being *Subramania Ayyar* v. *Arumuga Chetti*(3), *Duraisami Reddi* v. *Muthial Reddi*(4), *Sanka Krishnamurthi* v. *The Bank of Burma*(5), and *Krishna Chettiar* v. *Nagamani Ammal*(6). In view of this *catena* of decisions in the Presidency, the Court saw no reason why they should refer the case to the Full Bench. It has now been pressed upon us that the decision in *Venkitaswamy Naicker* v. *Muthuswamy Pillai*(7) does not give full effect to the decision of the Privy Council in *Waghela Rajsanji* v. *Shekh Masludin*(1), in that that suit was dismissed by the Privy Council and no limited form of decree given. It is further contended that although in the case in *Indur Chander Singh* v. *Radha Kishore Ghose*(2), the mortgage did not purport to be executed *qua* guardian, there are dicta at page 511 which are inconsistent with the decision in *Venkitaswamy Naicker* v. *Muthuswamy Pillai*(7). The language is as follows.

(1) (1887) I.L.R., 11 Bom., 551 (P.C.).
(2) (1892) I.L.R., 19 Calc., 507 (P.C.).
(3) (1903) I.L.R., 26 Mad., 330.
(4) (1908) I.L.R., 31 Mad., 458.
(5) (1912) I.L.R., 35 Mad., 692.
(6) (1916) I.L.R., 39 Mad., 915.
(7) (1918) 34 M.L.J., 177.

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"The contention that the mother and widow . . . had power to bind the minor by contract was abandoned in the Court below and their Lordships are of opinion that such a contention could not be sustained."

I agree that this is definite language. But it is doubtful whether it carries the case any further than the decision in *Waghela Rajsanji* v. *Shekh Masludin*(1). Reliance is also placed on the decision of a Bench of this Court in *Swaminatha Aiyar* v. *Srinivasa Aiyer*(2). But that was a case not of a guardian of a minor, but of a trustee with reference to temple property, and the question now before us only arose on the suggested analogy between such a trustee and the guardian of a minor. The last case prior to the decision in *Venkitaswamy Naicker* v. *Muthuswamy Pillai*(3) is *Ammalu Ammal* v. *Namagiri Ammal*(4). The question in that case was how far an estate can be made liable where the executor had borrowed money on a promissory note for the purpose of paying a legacy to the testator's daughter. The position then is this: that there are two cases in the Privy Council which go a long way to support the appellant's contention; and there are subsequent decisions of this Court which it is contended are inconsistent with the *ratio decidendi* in the Privy Council cases.

I think it advisable therefore to refer to the Full Bench the question whether any decree, and if so, what decree, can be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit, under which covenant no charge is made on the estate.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I agree.

ON THIS REFERENCE—

M. Patanjali Sastri for *P. Narayanamurthi* for petitioner.—A decree can be given to the creditor against the estate of the minor. Only the minor's person is free. He relied on *Sundararaja Ayyangar* v. *Pattanathusami Tevar*(5), *Sinaya Pillai* v. *Munisami Ayyan*(6), *Subramania Ayyar* v. *Arumuga Chetti*(7), *Duraisami Reddi* v. *Muthial Reddi*(8), *Krishna Chettiar*

(1) (1887) I.L.R., 11 Bom., 551 (P.C.).
(2) (1917) 32 M.L.J., 259.
(3) (1918) 34 M.L.J., 177.
(4) (1917) 33 M.L.J., 631.
(5) (1894) I.L.R., 17 Mad., 306 at p. 308.
(6) (1899) I.L.R., 22 Mad., 289.
(7) (1903) I.L.R., 26 Mad., 330.
(8) (1908) I.L.R., 31 Mad., 458.

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v. *Nagamani Ammal*(1), *Venkitaswamy Naicker* v. *Muthuswamy Pillai*(2), *Siva Narayana Ghosh* v. *Kamakya Ghose*(3) and referred to Simpson on Infants, page 289, Mayne's Hindu Law, pages 288, 289, *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*(4) and *Hari Charan Kuar* v. *Kaula Rai*(5). He distinguished *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*(6) as a case of purchase and not of sale. If an alienation can be made by a guardian for a necessity, a decree can equally be passed on the minor's estate; see *Ganesh Row* v. *Tuljaram Row*(7), *Nathurum* v. *Shoma Chhagan*(8), *Viswanadha* v. *The South Indian Bank, Ltd.*(9), *Swaminada Aiyar* v. *Srinivasa Aiyar*(10), *Srimath Daivasikamani Pandarasannadhi* v. *Noor Mahomed Rowthen*(11), *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand*(12), *Juggessur Sircar* v. *Nilambur Biswas*(13) and *Bhawal Sahu* v. *Baynath Pertab Narain Singh*(14).

P. Somasundaram for respondents.—No decree can be passed on the guardian's covenant either against the estate of the minor or his person, *Waghela Rajsanji* v. *Shekh Masludin*(15), *Indur Chander Singh* v. *Radha Kishore Ghose*(16). The case of *Annapagauda* v. *Sangadigyapa*(17) is a case of acknowledgment of a pre-existing liability and not a case of initial liability. On that principle the Madras decisions are explicable. If not I respectfully submit they are wrong. There are no special rules of Hindu Law which creates exceptions to the principle of *Waghela Rajsanji* v. *Shekh Masludin*(15) which itself was a case of Hindus. See also *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*(6), *Ammalu Ammal* v. *Namagiri Ammal*(18), *Ramaswami Mudaliar* v. *Muthuswami Ayyar*(19) and *Surendra Nath Sarkar* v. *Atul Chandra Roy*(20). Cases of trust are *Swaminatha Aiyar* v. *Srinivasa Aiyar*(21), *Dowse* v. *Gorton*(22), *Labouchere* v.

(1) (1916) I.L.R., 39 Mad., 915 at p. 916. (2) (1918) 34 M.L.J., 177 at p. 181.
(3) (1914) 23 I.C., 877 (Calc.). (4) (1907) I.L.R., 34 Calc., 163 at p. 170 (F.B.).
(5) (1917) 40 I.C., 142 Pat. (6) (1912) I.L.R., 39 Calc., 232 (P.C.).
(7) (1913) I.L.R., 36 Mad., 295 at p. 303 (P.C.). (8) (1890) I.L.R., 14 Bom., 562.
(9) (1917) 6 L.W., 712. (10) (1917) 32 M.L.J., 259.
(11) (1908) I.L.R., 31 Mad., 47. (12) (1896) I.L.R., 20 Bom., 61 at p. 70.
(13) (1865) 3 W.R., 217. (14) (1908) I.L.R., 35 Calc., 320 at p. 323.
(15) (1887) I.L.R., 11 Bom., 551 (P.C.). (16) (1892) I.L.R., 19 Calc., 507 (P.C.).
(17) (1902) I.L.R., 26 Bom., 220 at p. 232. (18) (1917) 33 M.L.J., 631 at p. 646.
(19) (1915) 30 I.C., 481 Mad. (20) (1907) I.L.R., 34 Calc., 892.
(21) (1917) 32 M.L.J. 250 at p. 260. (22) (1891) A.C., 190.

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Tupper(1), *Strickland* v. *Symons*(2), *In re Johnson Shearman* v. *Robinson*(3), *In re Evans: Evans* v. *Evans*(4), *Farhall* v. *Farhall*(5) and *In re Gorton: Dowse* v. *Gorton*(6). The case of *Muir* v. *City of Glasgow Bank and Liquidators*(7) was distinguished.

WALLIS, C.J.

WALLIS, C.J.—The decision of the Privy Council in *Waghela Rajsanji* v. *Shekh Masludin*(8) with reference to a personal covenant made on behalf of a Hindu minor by his guardian, that a guardian cannot be allowed to make covenants in the name of the ward so as to impose personal liability upon him, precludes us in my opinion from holding that a guardian has any such power in India. It was, however, pointed out in *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand*(9), that this ruling does not affect the liability of the minor's estate under section 68 of the Indian Contract Act to persons who have supplied him during minority with necessaries suited to his condition in life. What are necessaries must depend on the facts of each case, and in the case of a Hindu, money advanced for the expenses of a marriage which the minor has to perform or to pay off a debt binding upon him, may be recoverable under this head from his estate. It was held in that case that a guardian has no power to acknowledge debts on behalf of the minor, but this part of the decision was overruled by a Full Bench in *Annapagauda* v. *Sangadigyapa*(10) where Sir LAWRENCE JENKINS, C.J., pointed out that the fact that a guardian cannot impose a personal liability on his ward by contract does not prevent him from binding the ward by acknowledgments under section 19 of the Limitation Act:

"For an acknowledgment under the Act is fundamentally different from a fresh contract, though it may in some respects have similar results."

Further, where a guardian himself borrows money for the necessities of the minor in such circumstances as to give him a right to reimbursement from the minor's estate, his creditor

(1) (1857) 11 Moo., P.C. 198. (2) (1884) 26 Ch. D., 245.
(3) (1880) 15 Ch. D., 548. (4) (1887) 34 Ch. D., 597.
(5) (1871) 7 Ch. App., 123. (6) (1889) 40 Ch. D., 533.
(7) (1879) 4 A.C., 337. (8) (1887) I.L.R., 11 Bom., 551 (P.C.).
(9) (1896) I.L.R., 20 Bom., 61 at p. 70.
(10) (1902) I.L.R., 26 Bom., 221 at p. 232 (F.B.).

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may in a proper case be subrogated to his rights as held in *Sanka Krishnamurthi* v. *The Bank of Burma*(1). In practically all the cases in this Court which are referred to in the Order of Reference or were cited before us, it will be found that the minor's estate could have been made liable under one of the first two heads independently of any contract by the guardian on his behalf. No practical inconvenience, therefore, would result from giving full effect to their Lordship's express decision; but, even if it were otherwise, we should be bound to follow it. That this rule is well settled appears to me to be assumed by the Privy Council in *Indur Chunder Singh* v. *Radha Kishore Ghose*(2). I do not read the recent judgment in *Imambandi* v. *Mutsaddi*(3) as holding that a Muhammadan guardian can bind a minor's estate by contract except in the sense that the minor's estate will be liable for necessaries supplied by his agency, and that he can sell the minor's property in proper cases. The question under consideration in that case was the right of a *de facto* guardian to alienate the minor's property.

It was also argued that the decision in *Waghela Rajsanji* v. *Shekh Masludin*(4) only established the illegality of covenants imposing personal liability on the ward in the sense of making him liable to arrest after attaining majority in execution of a decree obtained against him on such covenants. This contention is clearly untenable. The High Court had passed a decree against the appellant, who was sued after attaining majority on a covenant made during his minority by his guardian, for Rs. 12,000 with interest to be recovered from the defendant's property generally as well as from him personally. The contention raised on appeal was that the covenant was not binding on him at all, and their Lordships upheld this contention and dismissed the suit altogether. Further the term 'personally liable' is well understood in English law, and has reference to the old classification of actions into personal, real and mixed.

"Actions may be personal, as contra-distinguished from real and mixed; the first being actions against the person only for damages, the second for recovery of real estate, the third for both." *A. G.* v *Churchill*(5).

(1) (1912) I.L.R., 35 Mad., 692.
(2) (1896) I.L.R., 19 Calc., 507.
(3) (1918) I.L.R., 45 Calc., 878 (P.C.).
(4) (1887) I.L.R., 11 Bom., 551 (P.C.).
(5) (1841) 8 M. and W. 171, 192.

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A man who was liable in the old personal actions of debt, covenant, trespass, etc., was said to be personally liable, and is still so described after the abolition of these old forms of action and of the liability to arrest in execution. I think the answer should be that a decree cannot be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit.

AYLING, J.

AYLING, J.—I would prefer to frame our answer as suggested by my learned brother SESHAGIRI AYYAR, J., in his judgment about to be delivered.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—It was tacitly agreed that the decision in *Indur Chunder Singh* v. *Radha Kishore Ghose*(1), to which reference is made in the order of the Division Bench has no bearing on the question we have to decide. That was a case of a personal and onerous executory contract by the widows in management which was held not to bind the minor heir. The question before us is what is the principle laid down in *Waghela Rajsanji* v. *Shekh Masludin*(2) and what are its limits. There are some accepted propositions: (*a*) A guardian can for a proper purpose by apt words create a charge over the property under his management so as to bind the minor. See *Dowse* v. *Gorton*(3); (*b*) If the guardian acts for the benefit of the minor and borrows and if the creditor obtains a decree for the loan against the guardian, the latter can sue the minor for reimbursement: this is based on the principle of subrogation and may shortly be styled the theory of indirect recourse. *Strickland* v. *Symons*(4), *In re Johnson*: *Shearman* v. *Robinson*(5), *Farhall* v. *Farhall*(6) and *Sanka Krishnamurthi* v. *The Bank of Burma*(7); (*c*) For necessaries, the debts contracted by the minor himself or by his guardian would bind the estate: Section 68 of the Contract Act and *Maharana Shri Ranmalsinggi* v. *Vadilal Vakhatchand*(8); (*d*) If the guardian in management gives a bond in renewal of a debt binding on the minor, the estate could be proceeded against, as the act of the guardian may be regarded as keeping alive by acknowledgment a

(1) (1892) I.L.R., 19 Calc., 507.
(2) (1887) I.L.R., 11 Bom., 551 (P.C.).
(3) (1891) A.C., 190.
(4) (1881) 26 Ch. D., 246.
(5) (1880) 15 Ch. D., 548.
(6) (1871) 7 Ch., App., 123.
(7) (1912) I.L.R., 35 Mad., 692.
(8) (1896) I.L.R., 20 Bom., 61.

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pre-existing liability: per JENKINS, C.J., in *Annapagauda* v. *Sangadigyapa*(1).

It is possible that the cases which are said in the Order of Reference to conflict with *Waghela Rajsanji* v. *Shekh Masludin*(2) may be brought under one or the other of the above categories. That is the view taken by my Lord and that is certainly one way of reconciling the Privy Council decision with the mass of cases which have been decided since that ruling.

However, I shall shortly point out that the decisions in Madras and in the other Presidencies can be based on a broader ground. I do not wish to take a narrow view of *Waghela Rajsanji* v. *Shekh Masludin*(2). Mr. Justice WOODROFFE in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*(3), states that what the Judicial Committee intended to lay down was that an onerous covenant cannot be imposed by the guardian upon the person or property of the minor. That is also my view. Although this decision was overruled by the Judicial Committee in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*(4), on another point, I do not think this view of the law was taken exception to in the argument before or in the judgment of the Privy Council. The various English decisions dealing with trustees and executors to which our attention was drawn in the course of the argument lay down that a trustee or executor has no power to bind the beneficiary by personal contracts *In re Johnson : Shearman* v. *Robinson*(5), and *In re Evans : Evans* v. *Evans*(6). I do not think the *bona fides* of the guardian is an element for consideration. But where an infant's estate would be liable but for the interposition of the guardian, I fail to see why the latter undertaking that liability should not bind the estate. After examining *Waghela Rajsanji* v. *Shekh Masludin*(2), once again, I do not think their Lordships intended to lay down that under no circumstances can a minor be held liable for the acts of his guardian. Almost all the High Courts have, since *Waghela*

(1) (1902) I.L.R., 26 Bom., 221 at p. 232.
(2) (1887) I.L.R., 11 Bom., 551 (P.C.)
(3) (1907) I.L.R., 34 Calc., 163.
(4) (1912) I.L.R., 39 Calc., 232 (P.C.)
(5) (1880) 15 Ch. D., 548.
(6) (1887) 34 Ch. D., 597.

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Rajsanji v. *Shekh Masludin*(1), held that the liability of the minor under the Hindu Law is not affected by the fact that the guardian has incurred that obligation. *Nathuram* v. *Shoma Chhagan*(2), *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand*(3), *Siva Narayan Ghosh* v. *Kamakya Ghose*(4), *Sundararaja Ayyangar* v. *Pattanathusami Tevar*(5), *Sinaya Pillai* v. *Munisami Ayyan*(6), *Subramania Ayyar* v. *Arumuga Chetti*(7), *Srimath Daivasikamani Pandarasannidhi* v. *Noor Mahomed Routhan*(8), *Duraisami Reddi* v. *Muthial Reddi*(9), *Krishna Chettiar* v. *Nagamani Ammal*(10), and *Venkitaswamy Naicker* v. *Muthuswamy Pillai*(11), have all taken this view. SARJEANT, C.J., TELANG, J., MOOKERJEE, J., and MUTHUSWAMI AYYAR, J are among the Judges who have enunciated this view.

If we examine some of the Privy Council decisions before, contemporaneous with, and after, *Waghela Rajsanji* v. *Shekh Masludin*(1), it will be seen that the Judicial Committee did not intend to lay down that under no circumstances can the guardian bind the estate of the ward, except it be by creating a charge. In *Hunooman Prasad* v. *Mussumat Babooee Manraj Koonweree*(12), their Lordships speak of a guardian borrowing on behalf of a minor and charging his estate in the same sentence. In *Watson and Company* v. *Sham Lal Mitter*(13), which is contemporaneous with *Waghela Rajsanji* v. *Shekh Masludin*(1), an agreement by a guardian to pay enhanced rent was held binding on the minor. In *Imambandi* v. *Mutsaddi*(14), the Right Honourable Mr. AMEER ALI lays down that a Muhammadan guardian can bind a minor's estate by contracts entered into for the latter's benefit So the rule of law in *Waghela Rajsanji* v. *Shekh Masludin*(1), is subject to exceptions. Strong reliance was placed on the observation of Lord HOBHOUSE at page 561 :

"Now it was most candidly stated by Mr. Mayne, who argued the case on behalf of the respondent, that there is not in Indian Law

(1) (1887) I.L.R., 11 Bom., 551.
(2) (1880) I.L.R., 14 Bom., 562.
(3) (1896) I.L.R., 20 Bom., 61.
(4) (1914) 23 I.C., 877 (Calc.)
(5) (1894) I.L.R., 17 Mad., 306.
(6) (1899) I.L.R., 22 Mad., 289.
(7) (1903) I.L.R., 26 Mad., 330.
(8) (1908) I.L.R., 31 Mad., 47.
(9) (1908) I.L.R., 31 Mad., 448.
(10) (1916) I.L.R., 39 Mad., 915.
(11) (1919) 34 M.L.J., 177.
(12) (1856) 6 M.I.A., 393.
(13) (1888) I.L.R., 15 Calc., 8.
(14) (1918) I.L.R., 45 Calc., 878 (P.C.).

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any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English Law."

I do not think that it was intended to lay down by this statement that no rule to the contrary under the Hindu Law would be countenanced. The term *Indian Law* was meant to apply to the statute law of the land and not to Hindu or Muhammadan Law. I am therefore of opinion that the rule laid down in *Waghela Rajsanji* v. *Shekh Masludin*(1) was not intended to affect the Hindu Law liability of the minor. In this view, the decisions which are mentioned in the order of reference are not inconsistent with *Waghela Rajsanji* v. *Shekh Masludin*(1).

I would therefore answer the question under reference by saying that no decree should be passed against the minor or his estate on a contract entered into on his behalf by a guardian, under which covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. Although the answer given by the learned Chief Justice read with his opinion would cover my opinion also, I respectfully think that in order that doubts may not be entertained as to our meaning, the answer should be in the form I have sug ested.

N.R.

(1) (1887) I.L.R., 11 Bom., 551 (P.C.).

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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 (Alluvian), as modified up to 15th February 1908. Pies 6. (Anna 1.)
Act I of 1859 (Indian Merchant Shipping), as modified up to 30th June 1905. As. 13. (As. 2.)
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 III of 1864 (Foreigners), as modified up to 1st April 1915. As. 3 p. 6. (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.)

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

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 V of 1871 (Prisoners), as modified up to 1st May 1894. As. 5 p. 6. (Anna 1.)
Act XXI of 1871 (Dehra Dun), as modified up to 1st October 1913. Anna 1 p. 3. (Anna 1.)
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.)
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.)

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

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.)
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. 2 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 1908. 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 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.)
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 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 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.)

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. 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 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. 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.)
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. 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 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.)
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.)
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effect of.] A river which, after rising in certain Government hills, flows through ryotwari tracts and then through a zamindari and lastly through a Government village, is not a 'river belonging to Government' within section 2 of Madras Act VII of 1865 at the place where it passes through the zamindari wherein both the banks and the bed of the river belong to the zamindar; and a ryot of the zamindar taking water from the river within the limits of the zamindari for irrigation is not liable to pay water-cess to Government under the Act. Madras Act III of 1905 has not taken away pre-existing natural and easement rights of private proprietors in flowing waters of natural streams.

Chinnappan Chetty v. *The Secretary of State for India* ... (1919) I.L.R., 42 Mad. (F.B.), 289

LAND ACQUISITION ACT (I OF 1894), SS. 3 (*b*) AND 18—*Award of compensation by Revenue Divisional Officer—Application for reference to Court—Person claiming interest—Power of Collector to refuse to refer—Order refusing reference—Judicial or administrative order—Revision petition to High Court—Power of High Court to revise—Civil Procedure Code (Act V of 1908), sec. 115—Government of India Act (5 and 6 Geo. V, Cap. 61), sec. 107.*] An order, passed by a Revenue Divisional Officer dismissing an application under section 18 of the Land Acquisition Act (I of 1894) for a reference to the Court regarding his award of compensation for certain lands, is a judicial order and is subject to revision by the High Court. *The Administrator-General of Bengal* v. *The Land Acquisition Collector* (1907) 12 C.W.N., 241, followed; *Best & Co.* v. *Deputy Collector of Madras* (1916) 20 M.L.T., 388, dissented from. Section 18 read with section 8 (*b*) of the Act enables any person, claiming an interest in the compensation who has not accepted the award, to require a reference to the Court: it is no part of the Collector's duty to decide whether the claim is well founded and he is not authorized to refuse to make the reference merely because he may think the claim is not well founded.

Parameswara Aiyar v. *Land Acquisition Collector, Palghat* ...(1919) I.L.R., 42 Mad., 231

LANDLORD AND TENANT—*Cesses, inclusion of, in patta—Payment of cesses for a long time—Effect on legality and enforceability of—Rules for determining whether cesses are legal and enforceable—Madras Estates Land Act (I of 1908), sec. 143—Usage—Contract—Cesses called kanganam, kulavettu, tiruppani, etc., nature and legality of.*] Cesses paid for a long time by the tenant without objection are not *necessarily* legal and recoverable by the landlord. Such of them as have a direct or proximate bearing on the purposes for which the land was let are *prima facie legal*, while those having no such bearing are only recoverable under a contract supported by consideration or under a usage proved or presumed from the nature of the case and long course of payments. *Held*, accordingly on the facts of the case and the nature of the cesses in question, that the cases, called *kanganam, kulavettu, melvaram urai, kudiaram urai* and *swatantram*, which were paid for a long series of years out of the gross produce before division thereof between the landlord and the tenant, were legal and recoverable by the landlord; that

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the cesses, called *kangovi* and *tiruppani*, paid out of the kudivaram for a long time, were not legally recoverable, and that the cess for the use of the thrashing-floor was recoverable unless the tenant had a thrashing-floor, in which case the cess ought not to be levied. Rules for determining whether cesses paid for a series of years are legallund enforceable, pointed out.

Vadamalai Thiruvanatha Sevuga Pandia Thevar v. *Sankaramoorthi Naidu* (1919) I.L.R., 42 Mad., 197

LESSOR AND LESSEE—*Lessee agreeing in the lease-deed to pay a debt of lessor—Non-payment by lessee—Suit by lessee to recover possession of lands demised—Subsequent usufructuary mortgage by lessor for discharge of debt—Right of lessee to possession under lease—Transfer and executory contract, distinction between—Indian Contract Act (IX of 1872), sec. 39, applicability of, to leases—Specific Relief Act (I of 1887), sec. 35, whether applicable to default after lease.*] Where a lessee having agreed in the lease-deed to discharge a debt of the lessor secured on the demised lands, failed to pay the debt, and the lessor being sued by the mortgagee executed a usufructuary mortgage to other persons and with the proceeds thereof paid off the debt, and thereupon the lessee sued to recover possession of the demised lands from the lessor and the usufructuary mortgagees who pleaded that the former was not entitled to recover possession under his lease on account of his default in not discharging the debt as agreed to in the lease-deed. *Held*, that the lessee was entitled to recover possession of the lands under his lease, though he had not paid the debt as agreed to in the lease-deed. A lease is an executed contract; it is a transfer of property or of an interest in property and all the considerations which apply to the enforcement of mere contracts do not necessarily apply to a transfer; consequently the doctrine regarding mutual promises contained in section 39 of the Indian Contract Act has no application to a lease. Section 35 of the Specific Relief Act did not apply to the case, as the plea did not relate to any facts which vitiated the contract culminating in the lease but to something which happened after the grant of the lease, namely, non-payment of the debt mentioned in the lease-deed. *Chhotku Rai* v. *Baldeo Shukul* (1912) I.L.R., 34 All., 659, dissented from. *Subba Rau* v. *Devu Shetti* (1895) I.L.R., 18 Mad., 126, distinguished.

Kandasami Pillai v. *Ramasami Mannadi*... ... (1919) I.L.R., 42 Mad., 203

PRACTICE—*Order of Judge on Original Side of the High Court—Jurisdiction to modify order before formally drawing up the order.*] A Judge on the Original Side of the High Court has jurisdiction to modify the minutes of an order before the formal order is drawn up.

Mahboob Bi v. *Sherifa Bi* ... ... (1919) I.L.R., 42 Mad., 269

SPECIFIC RELIEF ACT (I OF 1877), SEC. 35—*See* LESSOR AND LESSEE 243

———————————, SEC. 42—*Suit by a reversioner of Hindu for a declaration that another is not reversioner, maintainability of—Order striking out a defendant as party under Order I, rule 10 (2), Civil Procedure Code, and dismissing suit—Appeal from order, maintainability of.*] Though under section 42 of the Specific Relief Act a Court can, in its discretion, grant relief

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by way of declaration, it is a settled rule of practice not to grant such relief where the only question for decision is which of two persons (plaintiff or defendant) is the nearest reversioner or whether the defendant is a reversioner at all to the estate of a deceased Hindu. *Saudagar Singh* v. *Pardip Narayan Singh* (1918) I.L.R., 45 Calc., 510 (P.C.), referred to. An order in a suit striking out from the array of parties a defendant as an unnecessary party and dismissing the suit against him is in effect a decree and is appealable as such.

Rama Rao v. *The Raja of Pittapur*... ... ... (1919) I.L.R., 42 Mad., 219

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

1918, September 13 and 24.

VADAMALAI THIRUVANATHA SEVUGA PANDIA THEVAR (DEFENDANT), APPELLANT,

v.

SANKARAMOORTHI NAIDU (PLAINTIFF), RESPONDENT.*

Landlord and Tenant—Cesses, inclusion of, in patta—Payment of cesses for a long time—Effect on legality and enforceability of—Rules for determining whether cesses are legal and enforceable—Madras Estates Land Act (I of 1908), sec. 148—Usage—Contract—Cesses called kanganam, kulavettu, tiruppani, etc., nature and legality of.

Cesses paid for a long time by the tenant without objection are not *necessarily* legal and recoverable by the landlord. Such of them as have a direct or proximate bearing on the purposes for which the land was let are *primâ facie legal*, while those having no such bearing are only recoverable under a contract supported by consideration or under a usage proved or presumed from the nature of the case and long course of payments.

Held, accordingly on the facts of the case and the nature of the cesses in question, that the cesses, called *kanganam*, *kulavettu*, *melvaram urai*, *kudivaram urai* and *swatantram*, which were paid for a long series of years out of the gross produce before division thereof between the landlord and the tenant, were legal and recoverable by the landlord; that the cesses, called *kangovi* and *tiruppani*, paid out of the kudivaram for a long time, were not legally recoverable, and that the cess for the use of the thrashing-floor was recoverable unless the tenant had a thrashing-floor, in which case the cess ought not to be levied.

Rules for determining whether cesses paid for a series of years are lega and enforceable, pointed out.

SECOND APPEAL against the decree of L. G. MOORE, the District Judge of Madura, in Appeal Suit No. 503 of 1916 preferred against the decree of F. H. SENNECK, the Revenue Divisional Officer of Sivakasi Division, in Summary Suit No. 240 of 1915.

The plaintiff, who is a ryot in a zamindari, brought this suit in the Revenue Divisional Officer's Court, Sivakasi Division, against the zamindar under section 55 of the Madras Estates Land Act for a decree directing him to tender a proper patta.

* Second Appeal No. 2193 of 1917.

VADAMALAI THIRUVANATHA SEVUGA PANDIA THEVAR v. SANKARAMOORTHI NAIDU.

The plaintiff filed along with the plaint a sample copy of the patta which he demanded, which did not include certain cesses claimed by the zamindar as payable to him and paid by the tenant for a long series of years (about thirty years and more) without objection. The latter filed a patta which was granted to the plaintiff's predecessor in title in a previous fasli, and which contained the following cesses, namely, (1) ayyanar, (2) kulavettu, (3) kattalavuvasi, (4) kanganam, (5) melvaram kottai urai, (6) kudivaram kottai urai, (7) swatantram. These were called podu-silavu and were to go to the zamindar after the same were deducted out of the gross produce, the remainder being divided between the landlord and the tenant. The zamindar also claimed that, after the kudivaram was taken on division, the tenant was further to pay out of it to the landlord (1) kangovi, (2) thrashing-ground rent and (3) tiruppani. The Revenue Divisional Officer held that the cesses claimed were legal and recoverable and directed a patta to be tendered accordingly. On appeal by the plaintiff, the learned District Judge held that the cesses were illegal under section 143 of the Madras Estates Land Act, and directed the defendant to tender a patta as claimed by the plaintiff. The defendant preferred this Second Appeal.

A. Swaminatha Ayyar for the appellant.

K. V. Sesha Ayyangar for the respondent.

The judgment of the Court was delivered by—

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—The defendant zamindar is the appellant. Plaintiff who is a ryot in the zamindari sued under section 55 of the Estates Land Act for a decree directing the defendant to tender to him a proper patta. He put in a patta which did not contain any provision for cesses that had been usually levied and objection was taken by the zamindar to the form of the patta which he wanted to get. The zamindar put in the patta (Exhibit 1) which was granted to the plaintiff's predecessor in title which contained the following cesses which were described as podu-silavu or common expenses which were to go to the zamindar (1) ayyanar, (2) kulavettu, (3) kattalavuvasi, (4) kanganam, (5) melvaram kottai urai, (6) kudivaram kottai urai, (7) swatantram. It provided for two items to go to the tenant as common expenses and stipulated that after deducting

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the above items of common expenses one half of the paddy was to be taken by the landlord and the other half by the tenant. Out of the kudivaram thus taken by the ryot, he was further to give to landlord (1) kangovi, (2) thrashing-ground rent and (3) tiruppani.

It is not disputed that the land to which the patta claimed related is nanja and that varam rents are payable. The plaintiff in his evidence admits he has been paying the cesses to the zamindar for the past thirty years and that his father was paying the cesses when he was alive and that all the tenants have been paying the cesses without complaint.

The Revenue Divisional Officer held that the cesses claimed by the zamindar were payable "according to usage having the force of law" and that they must be included in the patta. On appeal the District Judge disallowed the cesses as illegal under section 143 of the Estates Land Act and held that plaintiff was entitled to the patta without any of the cesses being included.

The question for decision in this Second Appeal is as to the legality of all or any of the cesses claimed. As regards kangovi, kattalavuvasi and ayyanar, it is not clear what they are payable for or on what ground payment is based. The zamin karnam who was examined as defendant's first witness states he does not know why kangovi was collected. He says nothing about ayyanar and kattalavuvasi and the appellant's vakil is unable to throw any light on these cesses. These three cesses are not shown to have any connexion with the holding or the rent payable.

The other cesses claimed stand on a different footing. Kanganam is the fee for watching the harvest. Kulavettu relates to the expenses for keeping tanks in proper repair. Kudivaram urai and melvaram urai are in respect of measuring the kudivaram and melvaram paddy. Swatantram is in respect of payment to village artisans. Tiruppani is the cess for repairing the village temple.

Rent is defined in section 3, clause 11 (*a*) of the Estates Land Act as including any local tax, cess, fee or sums payable by a ryot as such in addition to the rent due in respect of land according to law or usage having the force of law. Section 143 prohibits land-holders from exacting from their ryots anything

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in addition to the rent lawfully payable by them rendering all stipulations and reservations for such additional rent void.

In considering whether any particular cess claimed, which has been paid for a series of years, is enforceable or not, the first thing to be considered is whether the cess claimed has any direct or proximate bearing on the purpose for which the land is let. If the cess is payable in respect of such purposes, it will *primâ facie* be one which is binding on the parties and the onus will be on the tenant to show that owing to some special circumstances it is not binding on him. Where the cesses are in their nature unconnected with the object for which land is let, they can only be claimed by the landlord under a contract between him and the ryots supported by consideration or under a usage for which a legal origin is either proved or presumed from the nature of the case and long course of payments. While on the one hand mere length of payment would not, as pointed out in *Sundaram Iyer* v. *Theetharappa Mudaliar*(1), make a cess which is purely voluntary or which is on its face illegal acquire a binding character, payment during a long series of years will be presumptive evidence that the payment of a cess had a legal origin if the cess is of such a nature that a contract to pay it may be reasonably inferred.

Another distinction is whether the particular cess is paid out of the tenant's share of the varam or whether it is deducted out of the whole gross produce before the division of the varam is made. There is nothing to prevent both the sharers in the varam from agreeing that certain expenses which they think beneficial to both of them shall be met by them in common and the rent of the produce divided. So long as it is not a device by the landlord to give himself a purely personal advantages the purpose for which the item is appropriated is immaterial. It will of course be open to the tenant to show that the purpose for which the cess was levied had failed or that the landlord has not been appropriating the sum to the purpose for which he levied it, but otherwise there is no reason for releasing the tenant from his agreement. Where the cess has no direct bearing on the purpose for which the land is let and is payable out of the tenant's share of the rent, we think that the onus ought to be on

(1) (1917) 40 I.C., 159.

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is purely for the benefit of the landlord. In *Sree Sankarachari*- the landlord to show that it was either part of the consideration for which the land was originally leased or that it is supported by consideration subsequently.

We do not think that because a cess has been held to be not binding on one estate it follows that it is not binding on other estates or vice versa. Each case must depend on the facts and reported decisions are only useful in so far as they lay down general principles which guide Courts in coming to conclusions as to the validity or otherwise of any particular cess.

In the present case kanganam, kulavettu, melvaram urai, kudivaram urai and swatantram are set apart before division of the produce between the landlord and tenant. Kanganam as pointed out in *Arunachallam Chettiar* v. *Mangalam*(1) is clearly a cess which the landlord is entitled to levy as in cases of varam tenure he is interested in seeing that he gets his due share of the harvest. Kulavettu which is a cess for keeping the tanks in proper repair is for a purpose beneficial to the landlord and tenant and there is no reason why the cess should be disallowed. Reference was made by the respondent's vakil to *Sri Rajah Bommadevara Venkata Narasimha Naidu* v. *Ramamma*(2), but the case has no application to the facts of the present case as in that case the finding was that the tank fell into disrepair several years ago when the anicut system was introduced by the Government in the Kistna district. The zamindar did not repair the tank and the ryots derived no benefit in consideration of which the cess could be claimed. In the present case there is no allegation that tank water is not used by the respondent. Kudivaram urai and melvaram urai are in respect of the measurement of the melvaram and kudivaram respectively. It is not denied that measurement of the paddy is necessary to determine the landlord's and tenant's share.

As regards swatantram the cess is collected for payment to village artisans and servants and it is not shown that the tenants who have been paying this cess without any objection for several years receive no benefit. The cess was taken out of the gross produce before division and there is nothing either in the plaint or in the evidence adduced by the plaintiff to show that this cess

(1) (1917) I.L.R., 40 Mad., 640. (2) (1913) M.W.N., 551.

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swamiar v. *Varada Pillai*(1), it has been held that a cess for payment to village artisans is lawful.

Turning to the cesses (kangovi, thrashing-ground rent and tiruppani) which in the patta granted to plaintiffs vendors are payable after division of the produce we have already disallowed kangovi. Tiruppani is cess collected for repairing temples. This cess has been held to be purely voluntary in *Siriparapu Ramanna* v. *Mallikarjuna Prasada Nayudu*(2), where the learned Judges (MUTTUSWAMI AYYAR and BEST, JJ.) observed:

"A duty to contribute to the expenses of a temple is not an ordinary incident of the relation of landlord and tenant nor has it any connexion with the jirayati tenure on which the ryot holds his land. *Primâ facie* the contribution is voluntary and unless the fee is shown to be a charge on the land it cannot be treated as a payment which the zamindar can legally compel the ryot to make."

A similar view was taken by BENSON and BHASHYAM AYYANGAR, JJ., in *Ramalingam Chettiar* v. *Ramasami Aiyar*(3).

As regards thrashing-ground rent, it is difficult to see why the cess should not be paid in cases where owing to the want of thrashing-floor belonging to the tenant the parties have to pay for using another's. Where however the tenant has a thrashing-floor the cess ought not to be levied.

We would modify the decree of the District Judge by allowing kanganam, kulavettu, melvaram urai, kudivaram urai, swatantram and thrashing-ground rent in cases where the tenant has no thrashing-floor. As regards the items which under the patta, Exhibit I, go to the ryot, the landlord does not dispute that the tenant is entitled to them. These items will also be included in the patta so far as wet land paying varam are concerned. The patta will issue in terms of Exhibit I with the above modifications so far as varam paying wet land are concerned. The decree of the District Judge disallowing cesses will stand as regards punjai land.

As the appellant has succeeded substantially and as the respondent came to Court alleging that no cesses were due, we direct the respondent to pay the appellant's costs in this and the lower Appellate Court.

K.R.

(1) (1904) I.L.R., 27 Mad., 332.
(2) (1894) I.L.R., 17 Mad., 43. (3) (1903) 13 M.L.J., 379.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

1918, September 30

KANDASAMI PILLAI AND THREE OTHERS (PLAINTIFFS Nos. 1, 3 AND 4 AND SECOND PLAINTIFF'S L.R.), APPELLANTS,

v.

RAMASAMI MANNADI AND SIX OTHERS (DEFENDANTS), RESPONDENTS.*

Lessor and Lessee—Lessee agreeing in the lease-deed to pay a debt of lessor—Non-payment by lessee—Suit by lessee to recover possession of lands demised—Subsequent usufructuary mortgage by lessor for discharge of debt—Right of lessee to possession under lease—Transfer and executory contract, distinction between—Indian Contract Act (IX of 1872) sec. 39, applicability of, to leases—Specific Relief Act (I of 1877) sec. 35, whether applicable to default after lease.

Where a lessee having agreed in the lease-deed to discharge a debt of the lessor secured on the demised lands, failed to pay the debt and the lessor being sued by the mortgagee executed a usufructuary mortgage to other persons and with the proceeds thereof paid off the debt, and thereupon the lessee sued to recover possession of the demised lands from the lessor and the usufructuary mortgagees who pleaded that the former was not entitled to recover possession under his lease on account of his default in not discharging the debt as agreed to in the lease-deed.

Held, that the lessee was entitled to recover possession of the lands under his lease, though he had not paid the debt as agreed to in the lease-deed.

A lease is an executed contract; it is a transfer of property or of an interest in property and all the considerations which apply to the enforcement of mere contracts do not necessarily apply to a transfer; consequently the doctrine regarding mutual promises contained in section 39 of the Indian Contract Act has no application to a lease.

Section 35 of the Specific Relief Act did not apply to the case, as the plea did not relate to any facts which vitiated the contract culminating in the lease but to something which happened after the grant of the lease, namely, non-payment of the debt mentioned in the lease-deed.

Chhotku Rai v. *Baldeo Shukul* (1912) I.L.R., 34 All., 659, dissented from.

Subba Rau v. *Devu Shetti* (1895) I.L.R., 18 Mad., 126, distinguished.

APPEAL under clause 15 of the Letters Patent against the judgment of KUMARASWAMI SASTRI, J., in Appeal No. 64 of 1916 against the decree of K. V. KARUNAKARA MENON, the Temporary Subordinate Judge of Madura, in Original Suit No. 10 of 1914.

* Letters Patent Appeal No. 186 of 1917.

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The plaintiffs obtained a lease of the suit lands for seventeen years from the first defendant. The document provided that the lessees were to discharge a certain mortgage debt secured on the demised lands by the lessor. The lessees failed to discharge the debt as agreed by them; the mortgagee sued on the mortgage impleading the lessor (mortgagor) and the lessees as parties to the suit and obtained a decree; while that suit was pending, the lessor executed a usufructuary mortgage-deed in favour of the present third to seventh defendants and, with the proceeds of the mortgage, paid off the decree-debt of the prior mortgagee. The lessees subsequently brought the present suit to recover possession of the lands on the footing of their lease and joined the lessor as the first defendant, and the usufructuary mortgagees as the third to the seventh defendants. The latter pleaded, *inter alia*, that the document was not a lease but a contract with respect to the future produce of certain trees, that the plaintiffs (lessees) having defaulted in paying the mortgage debt as agreed to in the lease-deed, could not in law and in equity claim to recover possession from the usufructuary mortgagees who had paid off the mortgage debt which the lessees had agreed but wrongfully failed to pay, and that in any event they were entitled to remain in possession until the plaintiffs paid them the debt discharged by them. The Subordinate Judge upheld the contentions of the defendants and dismissed the suit. On appeal to the High Court, the case was heard by WALLIS, C.J. and KUMARASWAMI SASTRI, J., who differed in their opinion and delivered the following JUDGMENTS :—

WALLIS, C.J.

WALLIS, C.J.—The Subordinate Judge has found that the defendant has not proved that the lease, Exhibit L, executed by him in the plaintiff's favour on the 1st January 1912 was not to take effect unless the mortgage was paid off and possession recovered from him, and after very carefully examining the evidence I cannot find any sufficient ground for differing from that finding. The plea that the lease was fraudulently obtained is too general, and even when read with the first issue does not raise any case for the plaintiffs to meet. In these circumstances, the case must be dealt with on the footing that the lease was good, but that the plaintiffs failed to discharge their obligation under it to pay the premium stipulated for forthwith and discharge the mortgage on the property. The mortgagees were consequently left to sue the defendant on the mortgage, and even then the plaintiffs who were made parties did not redeem

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the mortgage within the time allowed by the decree and in order to avoid a sale under the decree the first, second and third defendants executed a fresh mortgage, Exhibit XIII, on the 10th January 1913 in favour of defendants Nos. 4 to 7 in the suit just before the institution of the present suit by the plaintiffs to enforce their lease. In these circumstances, the Subordinate Judge has held that the plaintiffs have failed to pay the consideration stipulated in the lease and were not entitled to enforce it, citing *Chhotku Rai* v. *Baldeo Shukul*(1). The lease, Exhibit L, it should be explained, is for seventeen years and merely stipulates for a premium of Rs. 3,500 payable at once, of which Rs. 2,805 being the amount due on the mortgage at the date of the lease was to be paid to the mortgagee, Rs. 354 was to be paid by the lessee in discharge of a promissory note and Rs. 341 was said to have been advanced at the time. Of these sums, according to the finding of the Subordinate Judge, the first defendant only recovered Rs. 341. In these circumstances, it has been contended before us on the authority of *Subba Rau* v. *Devu Shetti*(2) that the judgment of the lower Court may be supported on the ground that the first defendant was entitled under section 39 of the Indian Contract Act to put an end to the contract owing to the plaintiffs' failure to perform part of the contract notwithstanding the fact of the execution of the lease in the plaintiffs' favour, Exhibit L. The Calcutta and Allahabad High Courts have refused to accept *Subba Rau* v. *Devu Shetti*(2) as authority for this proposition, *Munshi Bajrangi Sahai* v. *Udit Narain Singh*(3) and *Rashik Lal* v. *Ram Narain*(4) where it is explained as possibly proceeding upon an express power of cancellation which may have been reserved by the deed in that case. On any other view it ignores what FARRAN, C.J., in *Tatia* v. *Babaji*(5) calls the 'radical distinction between a perfected conveyance and a contract.' By the lease, Exhibit L, the first defendant executed a transfer of his interest in the plaintiffs' favour and performed his part of the contract, and section 39 of Indian Contract Act does not authorize a party to a contract who has completely performed his part of the contract, to cancel it for failure of performance on the other side. This is the view taken in this Court in *Govindammal* v. *Gopalachariar*(6) citing *Tatia* v. *Babaji*(5) and by the Calcutta and Allahabad Courts in the cases already cited. In *Chhotku Rai* v. *Baldeo Shukul*(1), the case relied on by the Subordinate Judge, the learned Judges did not dissent from *Rashik Lal* v. *Ram Narain*(4)

(1) (1912) I.L.R., 34 All., 659.
(2) (1895) I.L.R., 18 Mad., 126.
(3) (1906) 10 C.W.N., 932.
(4) (1912) I.L.R., 34 All., 273.
(5) (1898) I.L.R., 22 Bom., 176 at p. 183.
(6) (1906) 16 M.L.J., 524.

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which was cited before them but declined to enforce a provision against redemption before a fixed date in favour of a mortgagee who had failed to pay the greater part of the consideration. On the whole I am of opinion that the defendants who have performed the contract cannot cancel the conveyance. They are however entitled in equity as unpaid vendors to non-possessory lien over the interests of their transferee (Fisher on Mortgages), and might have counter-claimed for the enforcement of the lien in answer to the present suit as explained in *Velayutha Chetty* v. *Govindasawmi Naiken*(1) in which case the plaintiffs' interest under the lease might have been sold in execution of their claim for unpaid purchase money. As regards the defendants Nos. 4 to 7, the subsequent mortgagees from the defendants who have discharged the mortgage which was prior to the plaintiffs' lease, they are entitled to be subrogated to the rights of the prior mortgagees whom they have paid off and to retain possession until they have been repaid what, but for their intervention, would have become payable to the original mortgagees. We have not been referred to any authority for the view taken by my learned brother that the first defendant is entitled to create a mortgage subsequent to the lease sued on ranking before the lease. I would allow the appeal, reverse the decree of the lower Court and give to plaintiffs a decree on the lines already indicated and make no order as to costs.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—I regret I have to differ on the question of the reliefs to which the plaintiffs are entitled as against defendants Nos. 4 to 7. There can be little doubt that the conduct of the first and second plaintiffs (the lessees) has throughout not been *bona fide*. The first defendant who is an ignorant cultivator was in pecuniary difficulties and his attempts to extricate himself had failed. The first and second plaintiffs who were men of little means and who had not money with them to redeem the prior mortgage represented to the first defendant that they had money with them to redeem and got the lease for seventeen years on very favourable terms. According to the lease-deed, Exhibit L, first and second plaintiffs (the original lessees) had to pay Rs. 2,805 to the mortgagee. The Subordinate Judge found that out of the sum of Rs. 3,500, consideration for the lease, first and second plaintiffs only paid Rs. 341 and I have no hesitation in agreeing with him. As the first and second plaintiffs did not pay the mortgagee, his transferee filed Original Suit No. 82 of 1912 and got a decree. The lessees though impleaded did not even then pay the amount due on the mortgage. The Subordinate

(1) (1911) I.L.R., 34 Mad., 543.

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Judge rightly found that first and second plaintiffs (the original lessees) were not at any time in a position to pay the whole decree debt. Exhibit N shows that even as late as the 14th June 1913 the first and second plaintiffs had to assign a share in the lease to scrape out money to pay the mortgage. The decree in Original Suit No. 87 of 1912 was passed on the 30th November 1912. It no doubt gave six months' time to redeem, but having regard to the fact that the first and second plaintiffs did not pay the mortgage-debt though they were bound to do so on the 1st January 1912 and that they had not the means to pay, the first defendant was not bound to wait for six months and run the risk of the properties being sold by auction. So far as the plaintiffs were concerned, they put in an application Exhibit P to the Court on the 30th June 1913 to receive the decree amount. This was after the first defendant paid the decree amount, with the sum raised on the mortgage to defendants Nos. 3 and 4. I agree with the Subordinate Judge in thinking that this application was a mere pretence as the plaintiffs knew that the decree had been discharged. The first defendant raised money on the mortgage Exhibit XIII on the 10th January 1913 and had satisfaction entered up on the 14th March 1913, as appears from Exhibit XII (*c*) and I find it difficult to believe that plaintiffs were ignorant of this fact. Till then they did not tender the decree amount and the recitals in Exhibit N show that they were not able to pay even in June 1913. Having regard to all these facts, the question is whether the third and fourth defendants who lent moneys *inter alia* for the purpose of discharging the very mortgage which plaintiffs were bound to redeem and which they wilfully failed to do, are entitled to the rights conferred on them by the deed of mortgage Exhibit XIII at least to the extent to which the mortgage was for discharging the amount of the decree in Original Suit No. 87 of 1912. I am of opinion that they are. On the date of the lease to plaintiffs there was a mortgage outstanding which the plaintiffs undertook and were bound to discharge. They failed to do so, with the result that there was danger of the properties being sold under a title paramount to the lease. The third and fourth defendants lent moneys *bona fide* for the purpose of discharging the mortgage. It is not shown that the first defendant could have got money on more favourable terms and the necessity for raising money from third and fourth defendants arose from the wilful default of the plaintiff. Under these circumstances, I do not see what equity the plaintiffs have to require that on doing now what they ought to have done

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months ago they should in the events that have happened be treated as if they had committed no default and be allowed possession as against *bona fide* mortgagees. A prior mortgagee or lessee can be postponed to a subsequent one as much by wilful default as by neglect or omission. I have been referred to no authority which compels me to hold that the mortgage of third and fourth defendants is invalid as against the plaintiffs and that the third and fourth defendants are only entitled to be subrogated to the rights of the decree-holder in Original Suit No. 87 of 1912, *Chhotku Rai* v. *Baldeo Shukul*(1), is authority against any equity the plaintiffs may claim as against third to seventh defendants. On plaintiffs' default, I think it was open to the lessors to go elsewhere in order to satisfy a claim paramount to that of the lessees especially as the property was in danger of being sold. I think that the mortgage executed by the first defendant in favour of the third and fourth defendants is valid and binding on the plaintiffs to the extent of Rs. 3,360 the amount specified in Exhibit XIII as having gone to discharge the decree in Original Suit No. 87 of 1912 and that the plaintiffs will be entitled to possession only on the expiry of the term fixed in Exhibit XIII on payment of Rs. 3,360 to the third and fourth defendants. In this view, the suit for possession is premature. I would dismiss the Appeal.

BY THE COURT.—Under section 98, Civil Procedure Code, the decree of the lower Court is confirmed.

Against the judgment of KUMARASWAMI SASTRI, J., the plaintiffs preferred this Letters Patent Appeal.

S. Parthasarathi Ayyar for the appellants.—The lessee, on getting a registered document, is entitled to possession on the basis of his lease; the lessor cannot resist the claim by pleading that the lessee had not acted up to the terms of the lease. There is here no condition precedent under the lease to be fulfilled by the lessee before he could recover possession on his title as lessee. *Subba Rau* v. *Devu Shetti*(2) is either distinguishable on the facts or wrongly decided.

[ABDUR RAHIM, J.—If the consideration is a promise to pay, the lessee can recover possession though he has not paid the consideration, but he cannot recover if payment is a condition precedent to his taking possession under the lease.]

(1) (1912) I.L.R., 34 All., 659. (2) (1895) I.L.R., 18 Mad., 126.

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In this case there is a finding that the payment of the mortgage was not a condition precedent. Agreement to lease may be a contract, but a lease is a transfer of property or an interest in property and is a present demise. The law of contract does not apply to a lease which is a conveyance under the Transfer of Property Act. A vendee is entitled to possession, though he has not paid the consideration he was liable to pay, see *Velayutha Chetty* v. *Govindasawmi Naiken*(1), *Arunachella Chettiar* v. *Ramiah Naidu*(2), *Ponnayya Goundan* v. *Muthu Goundan*(3). The lease has not been rescinded at all in this case as in *Rashik Lal* v. *Ram Narain*(4). There is a fundamental difference between contract and conveyance; see *Raijnath Singh* v. *Paltu*(5), *Shib Lal* v. *Bhagwan Das*(6), *Makhan Lal Marwari* v. *Hanuman Bux*(7), *The Zamindar of Vizianagram* v. *Behara Suryanarayana Patrulu*(8). Section 39 of the Indian Contract Act does not apply to conveyances but only to executory contracts; a vendor cannot rescind the contract, as it has culminated in a conveyance. Section 108, clause (*b*) of the Transfer of Property Act gives an absolute right to the lessee to be put in possession of the demised property.

K. Raja Ayyar for respondents.—The document sued on is a lease of produce of certain trees and not a lease of land. The lease in question is in the nature of a mortgage. A mortgagee under a usufructuary mortgage is not entitled to possession before payment of the consideration. The possession, according to the plaint itself, is to be given to the so-called lessees only one year after the date of the deed. Even if the transaction is a lease, the Transfer of Property Act does not apply to this case as it is an agricultural lease. It is in any event a reciprocal obligation to give possession, if the lessee was able and willing to pay the consideration agreed to be paid in the lease deed. He failed to do so, and he cannot therefore get possession. The principles to be applied are to be found in sections 39 and 64 of the Indian Contract Act. Section 4 of the Transfer of Property Act expressly says that the provisions of the latter Act are supplemental to the

(1) (1911) I.L.R., 34 Mad., 543. (2) (1906) 16 M.L.J., 533.
(3) (1894) I.L.R., 17 Mad., 146. (4) (1912) I.L.R., 34 All., 273.
(5) (1908) I.L.R., 30 All., 125. (6) (1889) 11 A., 244 (248).
(7) (1917) 2 P.L.J., 168. (8) (1902) I.L.R., 25 Mad., 587.

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provisions of the Indian Contract Act. A lease is also an executory contract. The plaint document is not a lease of land, but is only a lease of future produce which is valid in equity, and so where it is inequitable, the right arising therefrom cannot be enforced. This lease is only an executory contract. Though a lease be a present demise, still it is an executory contract; consequently sections 39 and 64 of the Indian Contract Act apply to the case. In *The Zamindar of Vizianagram* v. *Behara Suryanarayana Patrulu*(1), this Court held that though a lease is a conveyance, still it is an executory contract as regards some of its terms. I rely on *Chhotku Rai* v. *Baldeo Shukul*(2), as in my favour.

[ABDUR RAHIM, J.—Section 108, Transfer of Property Act, shows that those provisions are incidents of a transfer of property.]

Assuming section 108, Transfer of Property Act, to be applicable to agricultural leases, even though some interest is transferred and some portion of the contract is executed, yet other terms are executory and the lease is in part an executory contract. A usufructuary mortgagee cannot sue for possession without paying the consideration agreed to be advanced; *Husaini* v. *Ram Charan*(3). The plaint lease is very much like a usufructuary mortgage. Until possession is given to the lessee, he has only an *interesse termini*, though he can sue in ejectment; see Woodfall's Landlord and Tenant, page 232. He can maintain a suit in ejectment, but has no more right; the matter is still in contract and can be rescinded; see *Wallis* v. *Hands*(4). Lease itself is defined as lying in contract; see Bacon's Abridgment, Volume V, page 632; Woodfall's Landlord and Tenant, page 146; Pollock on Contracts, page 389. The right to possession and the right to consideration are reciprocal rights. The circumstances in which the lease was made, and the allegations in the plaint itself show the reciprocal character of the obligation, and his omission to pay the debt even after he (plaintiff) was impleaded in the suit shows the default and refusal in performing his part of the contract. Reference was made to Dr. Gour's Transfer of Property Act, Volume III, page 1759, and to *Bansidhar* v.

(1) (1902) I.L.R., 25 Mad., 587 at p. 597. (2) (1912) I.L.R., 34 All., 659.
(3) (1916) 32 I.C., 341. (4) (1893) 2 Ch., 75.

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Sant Lal(1). *Mammikkutti* v. *Puzhakkal Edom*(2). Section 35 of the Specific Relief Act, illustration (*a*) shows that a sale can be rescinded. A lease can be rescinded; see *Indra Nath Banerjee* v. *Rooke*(3). Defendants Nos. 4 to 7 are entitled to priority over plaintiffs' lease as the former paid the prior mortgage debt, and but for their payment, the lease would have been extinguished by the execution sale.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—I entirely agree with the judgment of the learned Chief Justice and will only shortly give my reasons for the conclusion I have arrived at. The plaintiffs obtained a lease for seventeen years of a certain garden, from the owner of the property, the first defendant in the suit. The document provides that the plaintiffs are to discharge a prior encumbrance to the extent of Rs. 2,805, besides making two other small payments. They failed to discharge the encumbrance and the mortgagee whose debt they had bound themselves to discharge brought a suit to enforce the mortgage and obtained a decree. In the meantime while the suit was pending, the first defendant granted a usufructuary mortgage to defendants Nos. 4 to 7 and with the money so realized the mortgage decree was paid off. The Subordinate Judge in the Court of trial held that since the plaintiffs failed to pay the amount stipulated for in the document, they were not entitled to possession of the properties, which was their chief prayer in the plaint. On appeal to this Court, the learned Chief Justice was of opinion that the fact that the plaintiffs had not paid the amount mentioned in the lease, was no answer to their suit for possession; while KUMARASWAMI SASTRI, J., the other learned Judge who heard the appeal, disagreed and confirmed the decree of the Subordinate Judge.

On behalf of the respondents, Mr. K. Raja Ayyar sought first of all to argue that the document in question (Exhibit L) was not a lease at all, but a mere contract with respect to the future produce of certain trees. In the first place, this was not their case up till now, and the written statement itself proceeds on the assumption that Exhibit L is a lease. No doubt it is called a contract relating to coffee and plantain produce. But that description is not *ipso facto* conclusive. We find that the

(1) (1888) I.L.R., 10 All., 133. (2) (1906) I.L.R., 29 Mad., 353.
(3) (1910) I.L.R., 37 Calc., 81.

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document goes on to state: "I have granted to you on lease the coffee, plantain, and jack produce belonging to me." Further it says: "You shall enjoy according to your choice the coffee, plantain and jack produce . . . for seventeen years from this date, and on the expiry of the term surrender the lands to me without any objection whatsoever. The assessment due for this land shall be paid by me." Then it gives the boundaries of the land. There can be no doubt whatever that what the parties contemplated was a lease. We have got all the apt words of a conveyance by way of a lease. There would be no sense in talking about surrendering the lands, if it was only the future produce of certain trees apart from any interest in the land that was meant to be granted. Proceeding on that basis, there cannot be any doubt to my mind upon the authorities that the lessee is entitled to possession of the land demised to him, even though he has not paid the premium he bound himself to pay. This is an agricultural lease and therefore the Transfer of Property Act in its terms does not apply. But the Transfer of Property Act, when it defines a lease of immovable property by section 105, gives a definition which is undoubtedly applicable to agricultural leases as well in this country. Mr. Raja Ayyar did not attempt to argue that the definition of a lease as contained in section 105 is not applicable to agricultural leases. Section 105 says:

"A lease of immovable property is a transfer of a right to enjoy such property, etc."

Now section 108 lays down the rights and liabilities of the lessor and the lessee. Clause (*b*) of that section provides that the lessor is bound on the lessee's request to put him in possession of the property, and clause (*e*) says that

"the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf".

And it is argued that this is a case of reciprocal contracts, and that the lessor is only bound to put the lessee in possession after the lessee has paid or is prepared to pay the premium that is agreed upon. This, to my mind, proceeds entirely on a misconception of the true nature of a lease and of the rights of the parties arising from such a transaction. It is not a mere contract, it is a transfer of a right to enjoy the property. That

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means it is a transfer of an interest in immovable property, and section 108 assumes it is a transfer of such an interest. The right of the lessee to be put in possession arises from the words of the demise which imply that the right to possession is granted to the lessee, and the lessor is not entitled to refuse to give possession to the lessee unless the document provides that the latter is not to have possession until the fulfilment of a certain condition. It is found by both the Courts that no such condition exists in this case. No doubt there are also other rights and liabilities both of the lessor and the lessee, which are set out in section 108, Transfer of Property Act, and which arise out of the general law governing the relations of landlord and tenant. The liability of the lessor to put the lessee in possession may be said to arise out of the implied covenant applying to leases, as put by my learned brother COUTTS TROTTER, J., in *The Secretary of State for India in Council* v. *Venkayya*(1). The distinction between executory and executed contracts is well known as pointed out in *Wolverhampton and Welsall Railway Co.* v. *London and North-Western Railway Co.*(2). A lease is an executed contract, it is a transfer of property or of an interest in property; and all the considerations which apply to the enforcement of mere contracts do not necessarily apply to a transfer.

We have been referred to a number of cases both of this Court and other Courts in which it is laid down that a vendee of immovable property is entitled to possession of the property even though he has not paid the consideration mentioned in the deed of sale, see for instance *Velayutha Chetty* v. *Govindasawmi Naiken*(3), *Velayutha Chetty* v. *Govindasawmi Naiken*(4) and *Govindammal* v. *Gopalachariar*(5) and this proposition Mr. Raja Ayyar has not contested before us. But he says there is a distinction between a sale and a lease. His argument is that a lease for a term stands on no higher footing than a mere contract, and he has referred us for this position to the English law. In English law no doubt lease for a term is a mere chattel interest and has been treated as such in some of the cases, for instance, by Justice CHITTY in *Wallis* v. *Hands*(6). But he has not been able to cite any Indian cases to show that these technical

(1) (1917) I.L.R., 40 Mad., 910.
(2) (1873) L.R., 16 Eq. C., 433.
(3) (1911) I.L.R., 34 Mad., 543.
(4) (1907) I.L.R., 30 Mad., 524.
(5) (1906) 16 M.L.J., 524.
(6) (1893) 2 Ch., 75.

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distinctions of English law between real and chattel interest in land obtained in India. Speaking for myself, I am not aware that the peculiarities of English law as regards leases for a term have ever been adopted in this country. The law regarding real property in India is in many respects very different from that of England, and it is especially so regarding leases; for instance Indian law recognizes leases in perpetuity which are unknown to the English law, though it recognizes leases for such terms as 99 years or 999 years. And I do not think I should be justified in importing the technicalities of English law relating to leases for terms into this country.

Mr. Raja Ayyar's main argument has been that there is some sort of equity in his client's favour, and therefore we ought to deny the plaintiffs the remedy which they seek, viz., recovery of possession. What the plaintiffs seek is a remedy in law, and their right to possession cannot be defeated by pleading laches or any other considerations of that kind, which might be effective if the suit was one for some relief in equity. Reliance was placed on section 39 of the Indian Contract Act (IX of 1872). But this is not a case for enforcement of a contract. The plaintiffs' right to possession arises out of the interest which they have acquired in the land and the doctrine regarding mutual promises has therefore no application. Then we have also been referred to section 35, Specific Relief Act, which deals with rescission of contracts on grounds of misrepresentation, fraud and the like. Our attention was specially drawn to the illustrations which speak of rescission of sale and other transfers, on the grounds mentioned in the section. But the section deals with cases in which the contract is vitiated by reason of misrepresentation or fraud, and, if the contract which led to the ransfer is voidable, that is, liable to be set aside, the transfer based upon it necessarily fails. But the plea of the respondents in this case is based not upon anything which would make the contract relating to the lease liable to be set aside, but on something which happened after the grant of the lease, viz., non-payment of a certain sum of money mentioned in the lease. Section 35, Specific Relief Act, has no application.

Reliance has been placed on decisions, one of the Allahabad High Court *Chhotku Rai* v. *Baldeo Shukul*(1) and another of

(1) (1912) I.L.R., 34 All., 659.

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this Court *Subba Rao* v. *Devu Shetti*(1); the former is referred to by KUMARASWAMI SASTRI, J., in his judgment. In the Allahabad case, certain property was mortgaged, and only a portion of the mortgage amount was paid. The mortgagor sold the mortgaged property and his assignees sued for redemption of the mortgage before the expiry of the term of the mortgage; and it was held on equitable grounds that the plaintiffs should be allowed to redeem before the expiry of the specified term. The learned Judges do not, however, lay down any general principles of law which I should feel justified in adopting and applying to this case. All that they say is, that

"the defendants not having performed what we deem to be a most essential part of the contract so far as they are concerned, the plaintiffs ought to be allowed to redeem the property before the expiration of ten years".

They cite no authority and do not enunciate any general and well recognized principle of equity by which the case could be said to be governed. With all respect to the learned Judges, it is not open to us to proceed on some sort of vague equitable grounds, especially in a case like this, where the plaintiffs are seeking a remedy in law. As regards *Subba Rao* v. *Devu Shetti*(1) one of the learned Judges, MUTTUSWAMI AYYAR, J., says in his judgment:

"Upon the facts found the Subordinate Judge obviously considered the original mortgage as lawfully cancelled."

The facts of that case are not to be found in the report and it is not clear how the instrument came to be cancelled. I do not think that the judgment can be said to lay down any general proposition that can be applied to the present case.

I am of opinion that the judgment of the learned Chief Justice is right. It was noticed during the course of the argument that the learned Chief Justice gave a decree to the plaintiffs on condition of their paying the prior mortgage and that respondents Nos. 4 to 7 were entitled to retain possession until they have been repaid. But the form of the decree has not been challenged before us by the learned pleader for the appellants.

The result therefore will be that the judgment of KUMARASWAMI SASTRI, J., is set aside and there will be a decree in favour

(1) (1895) I.L.R., 18 Mad., 126.

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of the plaintiffs to the effect that they will be entitled to possession of the property on paying the money due under the mortgage decree in O.S. No. 87 of 1912, and until then respondents Nos. 4 to 7 will remain in possession. The appellants are entitled to their costs throughout.

OLDFIELD, J.—I agree.

COUTTS TROTTER, J.—I agree and wish to add only a few words. The appellants (plaintiffs) were lessees under a deed of lease, and I have no doubt that the deed of lease was a present demise and nothing else. As long ago as the case of *Holder* v. *Taylor*(1) which was decided in the beginning of the seventeenth century, it was laid down that the word 'demise' in a lease involves by necessary implication a covenant or contract or call it what you will on behalf of the lessor to give instantaneous and complete possession to the lessee. In this case, the lessor was under an obligation to give possession to the lessees. Certain other obligations were cast on the lessees by the instrument of lease, and among them was an obligation to discharge an existing encumbrancer by the payment of certain sums of money. The plaintiffs failed to do that. They broke their obligation to pay off this encumbrancer and the result was that respondents 4 to 7 in this case stepped into the breach, paid off the old encumbrancer, and took from the owners of the land a usufructuary mortgage. The mortgage paid off was not a usufructuary mortgage, but a simple hypothecation without rights of possession. The question is whether the respondents 4 to 7 can be allowed to plead their usufructuary mortgage in derogation of the right claimed by the plaintiffs.

Now, as I understand it, you can defeat the right to possession under a lease in various ways. If it is only an agreement for a lease all sorts of equitable pleas are open by way of reply to an action for specific performance, and any breach of contract by the person seeking to enforce the contract and any breach by him of any of the provisions of the contract, might be a very excellent answer to his suit for specific performance. If it is a demise, you can show that there was a condition precedent to its taking effect as such. That is just what was attempted to be done in this case. That defence

(1) (1614) 12 Hob. 24.

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broke down and it was held that the obligations of the lessees were not conditions precedent, but were merely mutual concurrent contracts or covenants between lessor and lessee. Or you can show that the whole thing is void, because the making of the contract was vitiated by fraud, coercion or misapprehension. That is not this case, and no such ground is suggested. What is the result? The result is that the respondents are seeking to destroy the right to possession given by the instrument by setting up a breach of contract which arose subsequent to the obligation to give possession. That seems to be an obviously impossible defence. It is for the safe-guarding of those rights of a lessor that covenants of re-entry are inserted in leases, whereby a breach of contract by the lessee subsequent to the lease may entitle the lessor to re-enter and get back possession of the land. But in my opinion that must be under a specific covenant of re-entry in the lease. If there is no such clause, there can be no right to get back possession of the land. If section 39 of the Contract Act applies, this document is not a transfer of property or of any interest in the land, but is a mere bundle of mutual obligations under a contract. I think much confusion has arisen from the fact that the English law of real property makes a very sharp distinction between those rights over property which are termed 'real' rights and 'chattel' interests in property which are mere personal rights. I think that is a peculiar incident of the English law of property with its very curious history, and it seems to me that it is not necessary to complicate Indian law by seeking to import such technicalities of English law into India. In the case reported in *The Secretary of State for India in Council* v. *Venkayya*(1) I took very great care, in deciding the question of leasehold interest which there came up, not to base my judgment on technicalities peculiar to English real property law but on general principles which seemed to me to apply. I think that the introduction of the English conception of chattel interests in land might lead to the conclusion that nothing had passed by way of transfer, that there was a mere bundle of rights and that section 39 of the Contract Act applied. To my mind that could be arrived at only by importing the English doctrine

(1) (1917) I L.R., 40 Mad., 910.

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and speaking for myself, I must decline to adopt that course. That being so, I regard this instrument not as a mere executory contract but as a transfer of an estate. Section 39 of the Contract Act, in my opinion, applies only to a state of things where there is a series of executory promises on both sides, and so soon as one part of the obligation has been performed by a complete transfer of the property in question, that section ceases to have any application.

As regards the decision reported in *Chhotku Rai* v. *Baldeo Shukul*(1) all I can say is that I do not understand it as reported, nor do I gather upon what principle the learned Judges proceeded. With regard to the case in *Subba Rau* v. *Devu Shetti*(2) I have no hesitation in saying that unless it can be explained by an omission in the report as to the existence of an express power of cancellation, it must be regarded as contrary to the trend of authority.

I think that the order of the learned Chief Justice is right. It may be that the appellants might have got further relief. But they have contented themselves with the Chief Justice's judgment.

K.R.

(1) (1912) I.L.R., 34 All., 659. (2) (1895) I.L.R., 18 Mad., 126.

APPELLATE CIVIL.

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

1918 September 19, 20, and October 2.

RAMA RAO AND ANOTHER (PLAINTIFFS Nos. 1 AND 2), APPELLANTS,

v.

THE RAJA OF PITTAPUR AND TWO OTHERS (FIRST, SECOND AND FOURTH DEFENDANTS), RESPONDENTS.*

Specific Relief Act (I of 1877), sec. 42—Suit by a reversioner of Hindu for a declaration that another is not reversioner, maintainability of—Order striking out a defendant as party under Order I, rule 10 (2), Civil Procedure Code, and dismissing suit—Appeal from order, maintainability of.

Though under section 42 of the Specific Relief Act, a Court can in its discretion grant relief by way of declaration, it is a settled rule of practice not to grant such relief where the only question for decision is which of two persons (plaintiff or defendant) is the nearer reversioner or whether the defendant is a reversioner at all to the estate of a deceased Hindu.

Saudagar Singh v. *Pardip Narayan Singh* (1918) I.L.R., 45 Calc., 510 (P.C.) referred to.

An order in a suit striking out from the array of parties a defendant as an unnecessary party and dismissing the suit against him is in effect a decree and is appealable as such.

APPEAL against the order of T. S. TYAGARAJA AYYAR, the Subordinate Judge of Cocanada, in Interlocutory Application No. 474 of 1917 in Original Suit No. 44 of 1916.

One Raja Venkata Rao Bahadur died in 1871 leaving only his widow, the fourth defendant in the present suit, to inherit his estate. She adopted the second defendant in this suit (Krishnasuri Rao) in 1914. The first defendant in this suit, viz., the Raja of Pittapur, claiming to be the nearest reversioner of the fourth defendant's deceased husband, brought Original Suit No. 55 of 1915 for a declaration that he was the nearest reversioner to the deceased and that the adoption of the second defendant was invalid. The plaintiffs in the present suit intervened in that suit and wanted to be made parties stating that they were the nearest reversioners and that the Raja of Pittapur was not a reversioner at all. Their application to be made

* Appeal No. 360 of 1917.

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parties was dismissed and the High Court refused in revision to interfere with that order. The said suit is still pending. Thereupon the present plaintiffs brought this suit and prayed as follows:—

"(i) for a declaration that the first defendant (Raja of Pittapur) is not entitled to claim that he is the nearest reversioner under the Hindu Law or that he is a reversioner at all under the Hindu Law to the estate of the late Raja Venkata Rao Bahadur or to claim any right to the mitta of Gollaprole, and that he is not entitled to conduct any proceedings (Original Suit No. 55 of 1915) in respect of the said estate or the said mitta in the capacity of a reversioner under the Hindu Law;

"(ii) for setting aside the adoption of the second defendant made by the fourth defendant to her deceased husband Raja Venkata Rao Bahadur by a declaration that the same is invalid."

The defence of the first defendant, *inter alia*, was that the plaintiffs were not the nearest reversioners, that the adoption was illegal and invalid, that the plaintiffs were not entitled in law to ask for a declaration that another person (first defendant) was not the next reversioner, that even on the allegations in the plaint he was an unnecessary party and the suit as against him should be dismissed. On the above grounds the first defendant made an application in the course of the suit, that the suit should be dismissed against him, and the Subordinate Judge passed the following order:—

"I therefore order under Order I, rule 10 (2) of Civil Procedure Code that the name of the first defendant be struck out and removed from the record and under Order VI, rule 16, that the first prayer in the plaint be deleted as unnecessary. The result will be that the suit will proceed only against the other defendants and confined to the question of the adoption."

The plaintiffs preferred this appeal against the said order.

The Honourable the Advocate-General (*S. Srinivasa Ayyangar*) with *K. N. Aiya Ayyar*, for respondent took a preliminary objection that no appeal lay as the order was only striking out the name of a defendant. No appeal is provided for by the Civil Procedure Code against such order and there is no adjudication on any legal rights of the parties.

C. P. Ramaswami Ayyar and *A. Suryanarayanayya* for appellant.—There is an appeal against the order. The order practically dismisses the suit as against the first defendant. If

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after the removal of this defendant the suit can proceed with all the reliefs prayed for, it may be a different matter. But the order is to proceed with the suit only as regards other reliefs; *Vaithilingam* v. *Ramalingam Pillai*(1) and *Ankala Venkata Reddy* v. *Manchala Venkata Reddy*(2).

ON THE MERITS.—A person who is the nearest reversioner has a right to sue for a declaration that another who claims to be the nearest reversioner is not so. In *Janaki Ammal* v. *Narayanasami Aiyer*(3) there was no competing reversioner. That case is explained in *Saudagar Singh* v. *Pardip Narayan Singh*(4). Otherwise there would be prejudice to the plaintiff; *Naganna* v. *Sivanappa*(5). There is a cloud on my title to remove which I have a right to sue; see also *Bobba Padmanabhudu* v. *Bobba Buchamma*(6). A suit for a mere declaration that the plaintiff is the nearest reversioner may not lie; but this is not that suit; see *Vijiasamy Tevar* v. *Sasivarma Tevar*(7). In order to entitle one to sue it is not necessary that the denial of plaintiff's title should have been made by the defendant; *Sheoraji* v. *Ramjas Pande*(8) and *Puttanna* alias *Keshava Batta* v. *Ramakrishna Sastri*(9).

The *Honourable the Advocate-General* for respondent in reply—Under section 42, Specific Relief Act, it is not the mere reversioner's personal right but his contingent right to property that gives the right to sue. 'Legal character' in section 42 means an existing or present legal character. *Janaki Ammal* v. *Narayanaswami Aiyer*(10) is decisive of this question, though there was no other reversioner competing with the plaintiff in that case. Though anyone particular reversioner has no present right, yet all the reversioners as a body have a present right. The law on this question does not rest merely as a matter of flexible discretion; it has become a rule by reason of long-standing decisions of the Privy Council. There cannot be an adjudication as to who is the nearer reversioner of the two; *Navaneetha Krishna Thevar* v. *Ramaswami Pandia*

(1) (1917) M.W.N., 550.
(2) (1915) 29 I.C., 393.
(3) (1916) I.L.R., 39 Mad., 634 (P.C.).
(4) (1918) I.L.R., 45 Calc., 510 (P.C.).
(5) (1915) I.L.R., 38 Mad., 1162.
(6) (1918) 35 M.L.J., 144.
(7) (1906) I.L.R., 29 Mad., 48.
(8) (1911) I.L.R., 33 All., 430.
(9) (1907) I.L.R., 30 Mad., 195.
(10) (1916) I.L.R., 39 Mad., 634 at p. 638 (P.C.).

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Thalavar(1) unless that is incidental to the decision of some other question. *Saudagar Singh* v. *Pardip Narayan Singh*(2) affirms *Janaki Ammal* v. *Narayanaswami Aiyer*(3). The case of *Kathama Natchiar* v. *Dorasingha Tevar*(4), though one decided before the Specific Relief Act, clearly holds that competing claims cannot be adjudicated. The widow has in this case put in a written statement conceding the respondent's right as reversioner. Hence the real object of this plaintiff is to try the question that he is the next reversioner. Such a suit cannot lie under section 42, Specific Relief Act; *Baijnath Goenka* v. *Rani Sashirama Kumari*(5).

WALLIS, C.J.

WALLIS, C.J.—This is an appeal from an order striking out the name of the first defendant on a petition under Order I, rule 10, for the amendment of the plaint. No separate appeal is provided under the Code from orders passed under this rule, but in this case the Subordinate Judge decided to strike out the first defendant's name on the ground that the plaint disclosed no cause of action against him and ordered the suit to be dismissed as against him. In these circumstances I think the order comes within the definition of a 'decree' and is appealable as such. The facts are these. The fourth defendant is the widow of a junior member of the Pittapur family and the Raja of Pittapur, the first defendant, has recently brought a suit as next reversioner of the property in her enjoyment for a declaration that an adoption made by her is invalid. The widow, as one of her defences, contested the Raja's claim to be the next reversioner and denied that he was related to her deceased husband. The present plaintiffs, who also deny the Raja's relationship and claim to be themselves the next reversioners to the estate in the hands of the widow, sought unsuccessfully to be made parties to that suit for the purpose of establishing as against the Raja that they are the next reversioners. Having failed in that attempt they then instituted the present suit against the Raja and the widow for a declaration that the Raja, the first defendant, is not the nearest reversioner or a reversioner at all of the husband of the fourth defendant and

(1) (1917) I.L.R., 40 Mad., 871. (2) (1918) I.L.R., 45 Calc., 510 (P.C.).
(3) (1916) I.L.R., 39 Mad., 634 at p. 637 (P.C.).
(4) (1875) L.R., 2 I.A., 169 at p. 181. (5) (1910) 12 C.L.J., 183.

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for a further declaration that the adoption of the second defendant by the fourth defendant was invalid. The second and fourth defendants in their written statement have not challenged the plaintiffs' claim to be the next reversioners, and indeed it is their case in the suit brought against them by the Raja that the plaintiffs and not the Raja are entitled to that character. In these circumstances it is clear that the Raja is not a necessary party to the suit as between the plaintiffs and the widow and the adopted boy, and that the suit against him cannot be supported, unless it be held, as argued, that the plaintiffs are entitled to maintain a separate suit against the Raja for a declaration that the plaintiffs and not the Raja are the next reversioners of the deceased and that the latter is not entitled to usurp the character of next reversioner. Mr. C. P. Ramaswami Ayyar argued that the plaintiffs are persons entitled to the lawful character of next reversioners within the meaning of section 42 of the Specific Relief Act, and that they are entitled under that section to bring a declaratory suit against the first defendant who questions it. The granting of the relief under that section is discretionary with the Court, and it appears to me that there is a settled rule of practice against the grant of such relief when the only question for decision is which of two persons is entitled to the character of next reversioner at the date of the institution of the suit, a decision which may serve no useful purpose as both the claimants may be dead and a different person entitled to succeed when the succession actually opens. In the most recent case, *Saudagar Singh* v. *Pardip Narayan Singh*(1), Lord PARKER of Waddington delivering the judgment of the Judicial Committee stated that the point was simply whether under the practice prevalent in India such a declaration, that is, a declaration under section 42, ought to have been made. In the present case, I think the Subordinate Judge was right in holding that it ought not. Mr. Ramaswami Ayyar argued that the fact that the Raja had brought a suit in the character of next reversioner made a difference, but his client has refrained no doubt advisedly from praying by way of consequential relief for an injunction restraining the Raja from prosecuting the other suit. Whatever grounds the plaintiffs may have had for

(1) (1918) I.L.R., 45 Calc., 510 (P.C.).

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asking to be made parties defendants in the other suit, a matter not now before us, they ought not, in my opinion, to be allowed either by reason of that failure or on any other grounds to maintain the present suit against the Raja and the Subordinate Judge was right in dismissing it. The Appeal fails and must be dismissed with costs.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I am of the same opinion. This appeal raises some interesting questions. The plaintiffs who are the appellants sued for a declaration that the first defendant is not the nearest reversioner to the estate of one Raja Venkata Rao and that he is not entitled to conduct any proceedings in respect of the said estate and for a further declaration that the adoption of second defendant made by the fourth defendant to her husband, the said Venkata Rao is not valid. The late Raja of Pittapur had a brother named Raja Venkata Rao. The latter, before his death, it is alleged, gave his wife, the fourth defendant, authority to adopt a son. She adopted the brother of the plaintiffs. The first defendant is the present owner of the Pittapur zamindari. On the death of the last zamindar his status as Aurasa son of the zamindar was challenged. The High Court and the Judicial Committee, without expressing any opinion on this question, held that under the will of the previous zamindar the first defendant was entitled to the estate as *persona designata*. This was in 1899.* In O.S. No. 55 of 1915 the present first defendant brought a suit for a declaration that the present fourth defendant was not entitled to adopt a boy to her husband. The present plaintiffs intervened and wanted to be made parties to that suit. Their application was dismissed. In revision the High Court refused to interfere. That suit is now being tried. In substance the present plaintiffs' contention is that as the first defendant is not the Aurasa son of the late zamindar, he is not the nearest reversioner to the estate of Raja Venkata Rao and that consequently he has no right to bring a suit to declare that the adoption by Raja Venkata Rao's widow is invalid. The Subordinate Judge in a carefully written judgment came to the conclusion that the first defendant's name should be struck out and that the prayer against him should be deleted. Against that order this appeal has been preferred.

* [The Privy Council decision is reported in (1899) I.L.R., 22 Mad., 383 (P.C.)--Ed.]

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A preliminary objection was taken by the learned Advocate-General against the maintainability of the appeal. His contention is that the order of the Subordinate Judge comes under Order I, rule 10, clause (2) of the Civil Procedure Code and that no appeal is provided against it under Order XLIII. In a way the conclusion of the Subordinate Judge may be said to come within Order I, rule 10. But what we have to see is the substance of the order and not the form of it. In his order the Subordinate Judge examines the right of the plaintiffs to bring a suit like the present one and concludes, having regard to certain authorities which he has quoted, that such a suit would not lie. In my opinion this is an adjudication determining the rights of the plaintiffs to bring a suit of this nature; and his order is a 'decree' as defined in section 2, clause 2 of the Civil Procedure Code. There is one other answer to this preliminary objection. I am disposed to agree with Mr. C. P. Ramaswami Ayyar who appeared for the appellants that unless the removal of the plaintiff or defendants leaves the suit intact Order I, rule 10, clause (2), cannot apply. In this clause the words are:

"The Court may order that the name of any party improperly joined whether as plaintiff or defendant be struck out."

That is to say, the impropriety is in introducing a party who has no connexion with the reliefs claimed in the plaint. Moreover Order I, rule 10, clause (2), does not relate to the deletion of reliefs but only to the striking out of parties. Consequently where a substantial right has been adjudicated upon and where the party's name has been struck out not on the ground that a suit against him would not lie and where a substantial relief claimed in the suit has been ordered to be deleted, I am of opinion that the Court has "conclusively adjudicated the rights of the parties with regard to a matter in controversy" and that therefore the order of the Subordinate Judge is a decree. The preliminary objection must therefore be overruled.

On the merits, very elaborate arguments were addressed to us on both sides. It is now settled that a reversioner has no personal right of action. If he happens to be the next reversioner or if he is able to prove that the next reversioner has neglected his rights, he is given a right of action as representing the entire body of the reversioners. In other words, he has no individual rights or, in the language of section

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42 of the Specific Relief Act, "is not entitled to any legal character in his own right." Therefore the first of the ingredients necessary to enable him to sue under section 42 of the Specific Relief Act is wanting.

Mr. Ramaswami Ayyar referred to some decisions of this Court as supporting his contention. In *Bobba Padmanabhudu* v. *Bobba Buchamma*(1) I pointed out that a suit by a reversioner for a declaration that his divided brother did not give authority to adopt as alleged by his widow is maintainable. My conclusion was in accordance with the judgment of the Judicial Committee which I quoted. I do not think that any observation of mine in that judgment lends support to the maintainability of the present suit. Reference was also made to *Naganna* v. *Sivanappa*(2) wherein I traced the history of actions under section 42. Mr. Ramaswami Ayyar referred to the head-note which makes it appear as if the suit was brought by a reversioner and contended that if a reversioner was allowed to sue for a declaration that a decree obtained by a third party against property in the hands of the widow is not binding on him, the present suit is equally maintainable. In my judgment I pointed out that the suit was not really one by a reversioner but by a person who had succeeded to the property on the death of the widow. In my judgment the expression 'reversioner' appears in one or two places. But the expression has not been employed as referring to the rights of persons before succession opens to them but only as describing what their status was before the widow died. That decision therefore does not help the appellants. On the other hand there is the decision of the Judicial Committee in *Janaki Ammal* v. *Narayanaswami Aiyer*(3) which seems to be conclusive on the question now in dispute. In that case the suit was brought by a reversioner for a declaration that the widow was wrongfully wasting and alienating the property. In the first Court the allegations of waste and alienations were found against. But as there was an issue whether the plaintiff was a reversioner, the first Court gave a decree embodying such a declaration. On appeal to the High Court this Court agreed with the lower Court that no acts of waste were proved and held that the declaration

(1) (1918) 35 M.L.J., 144. (2) (1915) I.L.R., 38 Mad., 1162.
(3) (1916) I.L.R., 39 Mad., 634 (P.C.).

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should remain. Before the Judicial Committee it was contended for the respondents that "as next reversioner he was the proper person to sue for the protection of the estate and therefore he had a 'legal right as to property' within the meaning of section 42 of the Specific Relief Act." It is with reference to this contention that their Lordships say in page 639:

"And in their Lordships' opinion the case must accordingly be treated as if the suit had been directed *simpliciter* to a declaration of the plaintiff's individual right. In the view of the Board it is not legitimate to give a plaintiff under cover of a request for 'further relief' after all the substantial heads of a claim have failed greater right to obtain a declaration than he would have had if such a declaration had been asked directly and unaccompanied by other and unfounded claims."

These observations are exactly in point. If the suit against the first defendant is to be regarded simply as one for a declaration that the plaintiffs are the reversioners and not the first defendant, the observations of the Judicial Committee leaves no room for doubt that such a suit would not be maintainable. Mr. Ramaswami Ayyar sought to distinguish this case by arguing that this was not a case in which there were rival claimants to the nearest reversionership. I do not think that this matters. In *Janaki Ammal* v. *Narayanaswami Aiyer*(1) there was an issue whether the plaintiff was the nearest reversioner. The fact that the nearest reversionership was denied by the widow and not by another reversioner is not a ground for distinction. I have already pointed out each reversioner has not an individual legal character. Mr. Ramaswami Ayyar referred to the decision in *Saudagar Singh* v. *Pardip Singh*(2) where a declaration as to the status of the nearest reversioner was embodied in the decree. Lord PARKER distinguishes the case in *Janaki Ammal* v. *Narayanaswami Aiyer*(1) on the ground that the declaration in the case before the Board was only incidental to the main relief given in the case. It is stated in the judgment:

"It is quite true that it involves a finding that the plaintiffs in this case are reversionary heirs but that must always be the case where a declaration is made following the illustration (*e*) of the section, because it is only in virtue of the persons claiming the

(1) (1916) I.L.R., 39 Mad, 634 (P.C.). (2) (1918) I.L.R., 45 Calc., 510 (P.C.).

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declaration being reversionary heirs, and therefore presumptively entitled that the declaration is made."

In that case the substantial declaration was as to the validity of the document, and the declaration as to reversionership was really a part of the main relief given in the case. I do not think this decision is any authority for the proposition that a bare declaration of the status as a reversioner lies under section 42 of the Specific Relief Act. I do not think it necessary to examine the other cases quoted at the bar. I think the decision of the Subordinate Judge is right and this Appeal should be dismissed with costs.

N.R.

APPELLATE CIVIL.

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

1918, October 22.

VAITHILINGA MUDALIAR AND TWO OTHERS (PLAINTIFFS), RESPONDENTS Nos. 1 TO 3 IN APPEALS Nos. 206 AND 207 OF 1908), PETITIONERS,

v.

T. SOMASUNDARAM CHETTIAR AND TWENTY-TWO OTHERS (DEFENDANTS), APPELLANTS, AND RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 110—Leave to appeal to Privy Council—Suit by reversioner to recover several items of land—Joinder of several alienees from widow, and others claiming on independent title as defendants—Separate appeals by defendants to High Court—Single decree by High Court—Petition in each appeal for leave to appeal to Privy Council—Value of subject-matter of some appeals, less than ten thousand rupees—Leave to appeal, whether can be granted in such appeals—Rule 105 of the Civil Rules of Practice, 1905, effect of.

Where the plaintiffs sued, as the nearest reversioners under the Hindu Law on the death of the widow of the last male holder, to recover his estate and joined various defendants, who were in possession of separate items either as alienees from the widow or as owners claiming by independent title and, on a decree being passed in the Original Court in favour of the plaintiffs, the defendants preferred separate appeals to the High Court which were disposed of by one decree drawn up under rule 105 of the Civil

* Civil Miscellaneous Petitions Nos. 2389, etc., of 1917.

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Rules of Practice, and where several petitions were filed in the several appeals for leave to appeal to His Majesty in Council and the respondents to some of the petitions objected that leave could not be granted in their appeals as the value of their subject-matter was less than ten thousand rupees.

Held, that the claims against the several alienees were based on really different causes of action against the several defendants, though they were allowed, according to a well-established practice, to be joined in the same suit;

that the fact that only one appellate decree was drawn up in all the appeals under rule 105 of the Civil Rules of Practice, could not affect the requirements of section 110 of the Civil Procedure Code as to granting leave in each of the appeals;

and that, consequently, in such of the appeals in which the value of the subject-matter was below ten thousand rupees, the High Court could not grant leave to appeal to His Majesty in Council.

PETITION presented by the plaintiffs under Order XLV, rule 3, Civil Procedure Code, praying for the grant of a certificate to entitle the petitioners to appeal to His Majesty in Council against the decree of the High Court, in Appeals Nos. 206 and 207 of 1908 and Nos. 11, 12 and 14 of 1909, preferred against so much of the decree of V. K. DESIKA ACHARIYAR, Subordinate Judge of Negapatam, in Original Suit No. 26 of 1905, as is against the several defendants concerned therein.

The material facts appear from the judgment.

The Hon'ble Mr. *T. Ranga Achariyar* for the petitioners.

T. V. Gopalaswami Mudaliyar for the first respondent.

A. Krishnaswami Ayyar for the respondents Nos. 3, 4 and 19 to 21.

The JUDGMENT of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—In this case, the plaintiffs sued as next reversioners on the death of the widow of the alleged last male holder and joined various defendants who were in possession of properties which, they alleged, formed part of the estate of the last male owner. These were really different causes of action against the defendants, but they were allowed, according to a well-established practice, to be joined in the same suit The Subordinate Judge passed a decree in favour of the plaintiffs against the alienees of the several items of property. These alienees and the other defendants filed separate appeals in the High Court, and the appeals of some of the defendant alienees were allowed on the ground that the items in question were not shown to have formed part of the estate of the last male owner. Although

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several separate appeals were filed, in accordance with rule 105 of the Civil Rules of Practice, only one appellate decree was drawn up. Some of the appeals of the defendant's alienees which were allowed by us relate to items of property which are said to be of less value than Rs. 10,000, and it is objected by these defendants as respondents to the petitions that, in these circumstances, the petitioners are not entitled to a certificate under section 110 of the Civil Procedure Code. We think that the fact that only one appellate decree was drawn up in all these appeals cannot affect the rights either of the appellants or the respondents in those appeals with reference to a further appeal to His Majesty in Council and that the applications must be considered as if a separate decree had been passed in each appeal. Otherwise, the effect of the Civil Rules of Practice would be to interfere with the right of appeal or the right to retain the judgment of this Court without appeal, both very valuable substantive rights, as has often been pointed out. This is a matter with which we have no power to interfere by means of the Civil Rules of Practice.

Their Lordships then considered the evidence relating to the value of the subject-matter of each appeal and disposed of the petitions filed for leave to appeal to His Majesty in Council.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Krishnan.

T. K. PARAMESWARA AIYAR AND FOURTEEN OTHERS (PETITIONERS NOS. 1 TO 10, 12, 13, 16, 17 AND 18), PETITIONERS,

1918, October 17, 18 and 22.

v.

LAND ACQUISITION COLLECTOR, PALGHAT, AND EIGHT OTHERS (LAND ACQUISITION OFFICER AND PETITIONERS NOS. 11, 14, 15, 18, 20, 21, 22 AND 23), RESPONDENTS.*

Land Acquisition Act (I of 1894), secs. 3 (b) and 18—Award of compensation by Revenue Divisional Officer—Application for reference to Court—Person claiming interest—Power of Collector to refuse to refer—Order refusing reference—Judicial or administrative order—Revision petition to High Court—Power of High Court to revise—Civil Procedure Code (Act V of 1908), sec. 115—Government of India Act (5 and 6 Geo. V, Cap. 61), sec. 107.

An order, passed by a Revenue Divisional Officer dismissing an application under section 18 of the Land Acquisition Act (I of 1894) for a reference to the Court regarding his award of compensation for certain lands, is a judicial order and is subject to revision by the High Court.

The Administrator-General of Bengal v. *The Land Acquisition Collector* (1907) 12 C.W.N., 241, followed; *Best & Co.* v. *Deputy Collector of Madras* (1916) 20 M.L.T., 388, dissented from.

Section 18 read with section 3 (b) of the Act enables any person, claiming an interest in the compensation who has not accepted the award, to require a reference to the Court: it is no part of the Collector's duty to decide whether the claim is well founded and he is not authorized to refuse to make the reference merely because he may think the claim is not well founded.

PETITION under section 1915 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of P. MACQUEEN, the Revenue Divisional Officer of Palghat, and Land Acquisition Collector, in Land Acquisition Case No. 1 of 1917.

The material facts appear from the judgment.

C. V. Anantakrishna Ayyar and *P. S. Narayanaswami Ayyar* for the petitioners.

The Government Pleader (*V. Ramesam*) for the first respondent.

* Civil Revision Petition No. 853 of 1917.

PARAMESWARA AIYAR v. LAND ACQUISITION COLLECTOR, PALGHAT.

AYLING, J.

AYLING, J.—In this case we are asked to revise an order of the Revenue Divisional Officer of Palghat dismissing petitioners' application under section 18 of the Land Acquisition Act (I of 1894) for a reference to the Court regarding his award of compensation for certain lands of a devaswom acquired under the Act. The order is very brief and runs thus:

"These persons do not appear to be the accredited representatives of the devaswom. The petition is therefore rejected."

That the order is illegal hardly admits of doubt. Section 18 enables 'any person interested, who has not accepted the award' to 'require' a reference: and section 3 (*b*) defines 'persons interested' as including all persons *claiming* an interest in the compensation. As long as the application sets out a claim to an interest in the compensation, it is no part of the Collector's duty to decide whether the claim is well founded: and he is not authorized to refuse to make the reference merely because he may think it is not. Petitioners in their application in the present case undoubtedly claim an interest in the compensation as trustees and managers of the devaswom to which the acquired property belongs: and they have not accepted the award.

It is, however, contended by the Government Pleader that however illegal the Revenue Divisional Officer's order may be, it is not one with which we can interfere either under section 115 of the Code of Civil Procedure, or section 107 of the Government of India Act, because it is not the order of a 'Court' subordinate to this Court. He relies mainly on a recent decision of this Court in *Best & Co.* v. *Deputy Collector of Madras*(1), which undoubtedly supports him, although after careful and respectful consideration I am unable to agree with the view of the learned Judges. The latter is not based on independent reasoning so far as the judgment discloses, but on two earlier cases, which do not appear to bear the interpretation put upon them: and it is certainly opposed to the weight of authority in other Courts. The cases referred to are *Ezra* v. *Secretary of State for India*(2) and *British India Steam Navigation Co.* v. *Secretary of State for India*(3). An examination of them shows that both dealt with the power to revise the award of a Collector under section 11 of the Act, and with the nature of the proceedings, which led up to, and

(1) (1916) 20 M.L.T., 388.
(2) (1905) I.L.R., 32 Calc., 605 (P.C.).
(3) (1911) I.L.R., 38 Calc., 230.

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terminated in, such an award. Their Lordships of the Privy Council in the first case say that the proceedings resulting in this award are administrative and not judicial; and the learned Judges of the Calcutta High Court in the second case take the matter practically no further. They in fact specifically reserve the question before us of whether the order of a Collector refusing to make a reference under section 18 is subject to revision by the High Court: while at the same time, they refer to a case, *The Administrator-General of Bengal* v. *The Land Acquisition Collector*(1) in which it was held to be revisible. Neither case is therefore an authority for the proposition that it is not revisible.

On the other hand the case last quoted is clear authority for holding that there is a distinction between Part II and Part III of the Act, and that in rejecting an application under section 18 a Collector acts judicially and his order is subject to revision by the High Court. Although MOOKERJEE and SHARFUDDIN, JJ., in *British India Steam Navigation Co.* v. *Secretary of State for India*(2) left this point open, as not necessary for the decision of the case before them, the decision in *The Administrator-General of Bengal* v. *The Land Acquisition Collector*(1) was followed by another Bench of that Court in *Krishna Das* v. *Collector of Pabna*(3), as well as by a Bench of the Patna High Court in *Saraswati Pattack* v. *The Land Acquisition Deputy Collector of Champaran*(4).

I am moreover inclined to take the same view. The proceedings under Part III of the Land Acquisition Act are undoubtedly judicial in character, and although the part played in them by the Collector is small, he is far from being a mere post office or channel for transmission of the representations of the persons interested. He has to determine whether the application satisfies the conditions of the proviso to section 18, and in making the reference he has to set out the grounds of his own award, and his opinion as to what persons are really interested in the land acquired. I think he may be considered to be acting as a 'Court'.

I may add that unless such an order is open to revision it is not clear what remedy a person aggrieved by it possesses. In

(1) (1907) 12 C.W.N., 241.
(2) (1911) I.L.R., 38 Calc., 230.
(3) (1912) 16 C.L.J., 165.
(4) (1917) 2 P.L.J., 204.

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Best & Co. v. *Deputy Collector of Madras*(1) the learned Judges were dealing with an application for a mandamus under section 45 of the Specific Relief Act. The effect of proviso (*d*) to that section is to exclude cases where the applicant has any other specific and adequate legal remedy: and it was in order to determine whether this proviso applied that the question of the admissibility of a revision petition had to be considered. It was even argued before us that for this reason the ruling was an *obiter dictum*; but while this argument is unsound, the circumstances under which the point arose may perhaps be looked to. However that may be, the remedy by way of 'Mandamus' is only available within the original civil jurisdiction of this Court; and I feel very doubtful how far the alternative reliefs suggested by the Government Pleader (a suit for damages and a suit under section 55 of the Specific Relief Act) are available to parties in the plight of the present petitioners. That some remedy should be at the disposal of parties aggrieved by an arbitrary order like the one before us is incontrovertible.

I am of opinion that the order is open to revision, and if so, it is certainly one which we should set aside. I would set aside the order of the Revenue Divisional Officer and direct him to make a reference to the District Court, as provided by law. Costs of this petition will be provided for in the District Judge's award.

KRISHNAN, J.

KRISHNAN, J.—The main argument before us in this case has been on the question whether we have power under section 115 of the Code of Civil Procedure or under section 107 of the Government of India Act to revise the order of the Revenue Divisional Officer as the Land Acquisition Collector, refusing to refer to the Court under sections 18 and 19 of Act I of 1894, the application filed by the petitioners under section 18.

The learned Government Pleader contended that in making his order the Divisional Officer was acting in his administrative capacity only and not as a Court subordinate to the High Court and therefore his order, however illegal it might be, was not open to be revised by us under our revisional powers. He has relied on the ruling in *Best & Co.* v. *Deputy Collector of Madras*(1), in his favour. On the other hand the learned vakil

(1) (1916) 20 M.L.T., 388.

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for the petitioners has drawn our attention to the rulings in *The Administrator-General of Bengal* v. *The Land Acquisition Collector*(1) and *Saraswati Pattack* v. *The Land Acquisition Deputy Collector of Champaran*(2), where under similar circumstances the High Courts of Calcutta and of Patna held that they had power to interfere in revision and did so.

Though the question is not free from difficulty, I am inclined to think that, as between the two views above stated, we should adopt the latter because it is consistent with the language and scheme of the act and because if we do not do so, there will be no proper and adequate remedy to prevent a misuse of power by the Land Acquisition Collector who, by adopting the simple expedient of refusing to refer, may prevent an enquiry by Court into the correctness of his own award, at any rate in all cases arising outside the Presidency towns. The remedy by 'Mandamus' under section 45 of the Specific Relief Act which was adopted in *Best & Co.* v. *Deputy Collector of Madras*(3) is available only within the ordinary original civil jurisdiction of the High Courts and not outside it. The learned Government Pleader suggested that on the principles laid down in *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*(4), *Gaekwar Sarkar of Baroda* v. *Gandhi Kachrabhai*(5) and *Rameswar Singh* v. *Secretary of State for India*(6) the petitioners had a right to sue for damages; but even if this is so, about which I express no opinion, it is not an adequate or satisfactory remedy. It was also suggested by him that an action might lie under section 55 of the Specific Relief Act to direct the Collector by a mandatory injunction to make the reference he refused to make. No authorities have been cited in support of this suggestion and it seems to be of doubtful validity. But whether the petitioners have another remedy or not, I think we should interfere if we have the power to do so.

It seems to me that a careful consideration of the scheme and language of Part III of the Act leads to the conclusion that the act of the Collector in refusing to make a reference under section 19 is a judicial act. Now it cannot be denied that the

(1) (1907) 12 C.W.N., 241.
(2) (1917) 2 P.L.J., 204.
(3) (1916) 20 M.L.T., 388.
(4) (1894) I.L.R., 18 Calc., 99.
(5) (1903) I.L.R., 27 Bom., 344.
(6) (1907) I.L.R., 34 Calc., 470.

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proceedings under Part III which result in an award of the Court are judicial proceedings and by virtue of section 54 the Court is subordinate to the High Court. Sections 18 and 19 provide for the procedure to be adopted to initiate those proceedings. Ordinarily a proceeding is commenced in a court of law by the presentation of a plaint or a petition to it; but the Land Acquisition Act has adopted a somewhat different method, *viz.*, the presentation of the application to the Collector. If the requirements of section 18 are complied with, the Collector has no option but to make the reference, and in doing so, in addition to the statement to be sent by him under section 19, clause (1), he has to attach a schedule of the particulars of the notices served and of the statements made by the parties. The objection petition itself is forwarded to the Court. The limitation fixed under section 18 has also reference to the filing of the objection petition. It seems clear therefore that the proceedings which culminate in the Court's award commences with the filing of the application under section 18. As soon as it is filed the matter of the amount of proper compensation assumes a litigious form and becomes a contentious proceeding between the owner and the Collector. It was held by CHANDAVARKAR, J., in *In Re Land Acquisition Act—in Re Rustomji Jijibhai*(1) that the application under section 18 is in the nature of a plaint in a suit. But whether it be a plaint or a petition I consider it to be the first step in the judicial proceedings and to be an integral part of it. It follows therefore that if the Collector decides to reject it or passes any orders regarding it, he does so judicially and not administratively; for a judicial proceeding once commenced cannot be effected by administrative action. The questions that the Collector may have to decide under section 18, *viz.*, whether the applicant is a person interested within the meaning of the Act, whether the application is in proper form and whether it is in time are all questions that have to be decided judicially. If therefore the Collector takes upon himself to pass an order which has the effect of rejecting the petitioner's application and of preventing his claim being tried by the Court, I see no difficulty in holding that it should be treated as a judicial order subject to our revisional jurisdiction.

(1) (1906) I.L.R., 30 Bom., 341.

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The ruling in *Best & Co.* v. *Deputy Collector of Madras*(1) has no doubt taken the contrary view; but with every respect to the learned Judges, I regret I am unable to adopt it. The ruling in it on the point before us seems, as pointed out by my learned brother, to be based entirely on what appears to be a wrong impression of the scope of the rulings in *Ezra* v. *Secretary of State for India*(2) and *British India Steam Navigation Co.* v. *Secretary of State for India*(3) which the learned Judges purport to follow. Neither case dealt with a question such as the present one arising under Part III of the Act. The observation of the Privy Council is not, as stated in *Best & Co.* v. *Deputy Collector of Madras*(1) that the proceedings of the Collector are administrative "until the matter comes before the Land Acquisition Judge," but only that they are administrative "till they result in his award." See *Ezra* v. *Secretary of State for India*(2) at page 629.

In the second case above cited the question arose with reference to an application by the Secretary of State to direct the Collector to pass a fresh award under section 11. It was with reference to that, that the learned Judges held, following Ezra's case, in *Best & Co.* v. *Deputy Collector of Madras*(1) that they could not interfere in revision. When the case in *The Administrator-General of Bengal* v. *The Land Acquisition Collector*(4) was cited to them they distinguished it on the ground that their case referred to a proceeding relating to the Collector's award. They did not dissent from that ruling; and it has since been followed by the same High Court in *Krishna Das Roy* v. *The Land Acquisition Collector of Pabna*(5) and as already stated the Patna High Court has adopted the same view.

It would also appear that the attention of the learned Judges in *Best & Co.* v. *Deputy Collector of Madras*(1) was not drawn to the distinction between the position of the Collector under Part II of the Act and his position under Part III. In the former he acts practically as an agent of the Government in fixing the price to be paid and in taking possession of the land which is acquired. His award is not binding on the owner as he

(1) (1916) 20 M.L.T., 388. (2) (1905) I.L.R., 32 Calc., 605 (P.C.).
(3) (1911) I.L.R., 38 Calc., 230. (4) (1907) 12 C.W.N., 241
(5) (1911) 16 C.W.N., 327.

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can ask for a reference under section 18 ; nor is the Government bound till possession is taken as it can under section 48 withdraw from the acquisition till then. It was with reference to these circumstances that his action was held to be an administrative one by the Privy Council. That ruling however is not decisive of the Collector's position under Part III where, as explained above he seems to act in a judicial capacity as part of the Court and receives the objection petition and deals with it.

I therefore agree with my learned brother that we should follow the view in *The Administrator-General of Bengal* v. *The Land Acquisition Collector*(1) in preference to that in *Best & Co.* v. *Deputy Collector of Madras*(2) and hold that we have power to interfere in revision with the order of the Sub-divisional Officer.

On the merits there can be no question that his order is wrong. In fact if the Sub-divisional Officer had looked at the definition of "person interested" in section 3, clause (*b*) of the Act, I think he would not have passed the order he passed. In rejecting the application on the ground stated by him, when he had no power to do so, he must be taken to have acted illegally in the exercise of his jurisdiction and we should therefore interfere under section 115 of the Code of Civil Procedure. I agree to the order proposed by my learned brother.

K.R.

(1) (1907) 12 C.W.N., 241. (2) (1916) 20 M.L.T., 388.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Abdur Rahim, Mr. Justice Ayling, Mr. Justice Oldfield, Mr. Justice Sadasiva Ayyar and Mr. Justice Coutts Trotter.

1917, August 3, October 2, November 14, 1918, August 26, 27 and 28, November 7.

CHINNAPPAN CHETTY (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE COLLECTOR OF MADURA (DEFENDANT), RESPONDENT.*

Madras Irrigation Cess Act (VII of 1865), sec. 2—'River belonging to Government,' meaning of—Madras Land Encroachment Act (III of 1905), effect of.

A river which, after rising in certain Government hills, flows through ryotwari tracts and then through a zamindari and lastly through a Government village, is not a 'river belonging to Government' within section 2 of Madras Act VII of 1865 at the place where it passes through the zamindari wherein both the banks and the bed of the river belong to the zamindar ; and a ryot of the zamindar taking water from the river within the limits of the zamindari for irrigation is not liable to pay water-cess to Government under the Act.

Madras Act III of 1905 has not taken away pre-existing natural and easement rights of private proprietors in flowing waters of natural streams.

SECOND APPEAL against the decree of K. V. KARUNAKARA MENON, the Temporary Subordinate Judge of Madura, in Appeal Suit No. 11 of 1915, preferred against the decree of V. K. KRISHNAN NAMBIYAR, the Acting District Munsif of Dindigul, in Original Suit No. 97 of 1912.

This was a suit by a ryot in the zamindari of Kannivadi in the Madura district (*a*) for a declaration that he was entitled to irrigate his lands free of any water-cess, with the water of a river called Maruda which after rising in certain Government hills passed through a ryotwari tract and then through the zamin and afterwards through a Government village, (*b*) for an injunction to restrain the defendant, viz., the Secretary of State, from causing any obstruction to the plaintiff's right to so irrigate, and (*c*) for recovery of Rs. 35, the amount of penal assessment that was levied from him in fasli 1318 and which he paid under protest on 26th June 1909. The plaintiff based his

* Second Appeal No. 252 of 1916.

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claim for irrigation upon immemorial user and upon easement. The defendant pleaded *inter alia* that the river belonged to Government, that the plaintiff was not entitled to the declaration and injunction, that the cess was properly levied under Madras Act VII of 1865 and that the claim for refund was barred by limitation prescribed by section 14 of Madras Act III of 1905, having been brought more than six months after the date of levy of penal assessment. The Court of first instance held that the plaintiff had not established any right of easement, that the defendant was not entitled to levy any water-cess for water taken from a river flowing through a zamindari and that the plaintiff was not entitled to get a refund of the penal assessment on account of limitation. A decree was accordingly given for a declaration and an injunction. The Court relied on *The Secretary of State for India* v. *Janakiramayya*(1). On appeal by the defendant the Subordinate Judge held that the plaintiff was liable to pay water-cess in accordance with the decision of the Full Bench in *The Secretary of State for India* v. *Janakiramayya*(2) and accordingly dismissed the suit. The plaintiff preferred this Second Appeal.

This Second Appeal coming on for hearing, the Court (the Hon'ble Sir JOHN WALLIS, C.J. and OLDFIELD, J.), made the following

ORDER OF REFERENCE TO A FULL BENCH.

WALLIS, C.J.—The meaning of the words 'river or stream belonging to the Government' in Madras Act VII of 1865 has given rise to much diversity of opinion in recent cases in this Court:—*Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(3), *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(4), *The Secretary of State for India* v. *Janakiramayya*(1), *Zamindar of Kapileswarapuram* v. *Secretary of State* 5), *Rajagopalacharyulu* v. *Secretary of State*(6), *Sri Rajah Simhadri Raju* v. *Secretary of State*(7), *The Secretary of State for India* v. *Janakiramayya*(2), *Secretary of State for*

(1) (1914) I.L.R., 37 Mad., 322.
(2) (1915) 29 M.L.J., 389 (F.B.).
(3) (1911) I.L.R., 34 Mad., 295.
(4) (1911) I.L.R., 34 Mad., 366.
(5) (1914) I.L.R., 37 Mad., 355.
(6) (1915) I.L.R., 38 Mad., 997.
(7) (1916) I.L.R., 37 Mad., 67.

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India v. *Maharaja of Bobbili*(1), *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(2). In the still more recent case in *Prasad Row* v. *Secretary of State for India*(3) Lord PARKER delivering the judgment of the Judicial Committee considered it unnecessary to decide the point, as in their Lordships' opinion the appellants were entitled to succeed on either view. The case was accordingly dealt with at page 902 on the assumption that the river in question belonged to Government and at page 904 on the assumption that it did not. There is, however, some discussion in an earlier passage of the judgment at page 894:—

"In the next place, it is by no means easy to say what is meant by a river or stream 'belonging to the Government.' The same expression in an Act of the United Kingdom would probably connote a Government ownership of the bed or the banks of the river; but it is quite possible that the law of the Madras Presidency recognizes some proprietary right on the part of Government in the water flowing in rivers and streams. The law of the Madras Presidency as to rivers and streams certainly differs in some respects from English Law—*Fischer* v. *The Secretary of State for India*(4). Further the Madras Act No. III of 1905 appears to enact that (*inter alia*) all standing and flowing water not the property of private individuals is the property of Government, but subject to the natural and easement rights of other land-holders. If this section be relied on, it is a nice problem whether a riparian owner, who is exercising his natural or prescriptive right of taking water from a natural stream for purposes of irrigation, is taking water from a stream belonging to the Government within the meaning of the Cess Act. If he is, the natural and prescriptive rights of riparian owners are seriously diminished by the Act and, where the Government have not expended money in improving the natural stream, apparently without any sort of *quid pro quo*."

In view of the great diversity of views expressed in this Court and in the light of the above observations, it appears desirable that there should be a binding decision of this Court as to the question which has again arisen in the present case. What we have to see is which of these meanings is more in conformity with the intention of the Legislature which passed the Act of 1865, and this intention is to be gathered from a carefu

(1) (1915) 30 M.L.J., 163.
(2) (1917) M.W.N., 729; s.c., 33 M.L.J., 415.
(3) (1917) I.L.R., 40 Mad., 886 (P.C.).
(4) (1909) I.L.R., 32 Mad., 141.

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consideration of the provisions of the Act and of the preamble. As has often been said, the preamble is as it were a key to the understanding of the Act and at the same time

"may legitimately be consulted for the purpose of solving any ambiguity, or of fixing the meaning of words which may have more than one, or of keeping of the effect of the Act within its real scope, whenever the enacting part of it is in any of these respects open to doubt."—Maxwell, Fifth Edition, page 69.

"The preamble cannot restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt. It is not unusual to find that the enacting part is not exactly co-extensive with the preamble. In many Acts of Parliament, although a particular mischief is recited, the legislative provisions extend beyond it."—Maxwell at page 74.

In Act VII of 1865 the enactment goes beyond the preamble, as has often been observed, most recently in Lord PARKER's judgment. If now the reason for this can be ascertained, it will help to define more clearly the scope and purport of the Act and so throw light on the present question. The explanation is, I think, to be found in the fact of revenue history which is referred to in the judgments of SANKARAN NAIR, J., especially in *Zamindar of Kapileswarapuram* v. *Secretary of State*(1) that, at the time the Act was passed and for reasons which do not concern us, the Secretary of State was pressing on the Madras Government the policy of showing the water-rate on irrigated land separately from, and as additional to, the assessment fixed on the land as dry.

If now we read the Act as originally passed, in the light of this knowledge, it is apparent that it was drafted in deference to this policy so as to give effect or enable effect to be given to it, and that this is the explanation of the fact that the body of the enactment goes beyond the preamble and enables the statutory rate to be imposed irrespectively of the question whether or not the water is from a source on which public expenditure has been incurred and also irrespectively of the question whether the irrigation is old or new. Though this object is not mentioned in the preamble it is brought out in the title, which is—

"An Act to enable the Government to levy a separate cess for the use of water supplied for irrigation in certain cases."

(1) (1914) I.L.R., 37 Mad., 355, 356.

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Section 1 which is applicable to ryotwari holdings, enabled Government—

"to levy at pleasure, on the land so irrigated, a separate cess for the use of the water which cess shall be additional to any land assessments that may be leviable on the said land as unirrigated or punja"

in accordance with the policy then favoured by the Secretary of State, and declared that these provisions should extend to permanently-settled estates to the extent to which they were not entitled by virtue of engagements with Government to irrigation free of separate charge. It is now settled by their Lordships' decision after much divergence of opinion in this Court that the owners of these estates are entitled to make the fullest use of the facilities for irrigation which existed at the date of their grants without incurring liability to pay water-cess under the Act.

We have thus what appears to me to be an adequate explanation of the fact that the Act goes beyond the preamble by providing for the imposition of the statutory separate cess, not only where expenditure from Government funds has been incurred in the construction and improvement of works of irrigation and drainage, the case contemplated in the preamble, but also in the terms of

"whenever water is supplied or used for the purposes of irrigation from any river, stream . . . belonging to Government."

It may be said, and truly, that in ryotwari tracts the system of charging separately a dry rate of assessment and a water-rate might have been introduced by Government without any fresh legislation, and that in the case of permanently-settled estates it has only been introduced by the Act in the very limited class of cases in which the statutory cess is payable in such estates. Whether for the purpose of complying with the policy of the Secretary of State or for whatever other reason the legislature proceeded in this manner, and we are only concerned with it in so far as it throws light on the meaning with which the words 'belonging to Government' were used in the Act. As already pointed out, this much seems clear that they were inserted to make it plain that the cess was to be imposed in cases not coming within the preamble.

In an Act of the United Kingdom Lord PARKER says they would probably connote a Government ownership of the bed or

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the banks of the river, that is to say, that is the meaning they would have *primâ facie* in an Act drafted by an English lawyer and it must be remembered that this Act, as appears from the papers referred to in some of the earlier cases, was drafted by the Government Pleader who was then an English Barrister. Now if for a moment we apply that meaning to the Act, we find that in ryotwari tracts it empowers Government to levy the separate water-cess in all cases where the banks and bed or at any rate one bank and half the bed of the river or stream are owned by Government. This comprises nearly the whole irrigated area in ryotwari tracts. There must, of course, be some cases in which ryotwari tracts are irrigated under easement rights from rivers of which Government has not the ownership of the bed and banks, but such cases must be comparatively rare, and, as already pointed out, the desired separation into dry rate and water-rate could be effected as regards them if so desired without legislative authority. As regards permanently-settled estates also this meaning appears adequate, because water taken pursuant to natural or easement rights existing at the date of the grant from rivers and streams the banks and beds of which are in permanently-settled estates is not chargeable under the Act, unless the supply has been improved at the public expense—a case expressly provided for in the Act; and cases of water being taken in excess of such rights are too rare to require legislation of this character and could be dealt with under the ordinary law by restraining the user. Not only then is the sense that in which the words would *primâ facie* be used by an English lawyer, but it is found to correspond with the scope of the Act, and it has also the great advantage over the rival meaning of giving some effect to the words 'belonging to' which must have been intended by the framers of the Act to have some effect and not to be purely otiose or even misleading as applied to rivers and streams. If all streams and rivers in the Presidency belong to Government, the words 'belonging to' would not have been made applicable to rivers and streams and the section would have read,

"whenever water is supplied or used for purposes of irrigation from any river or stream, or from any channel, tank, or work belonging to, or constructed by Government."

This goes to show that these words were applied to rivers

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and streams because the framers of the Act proceeded on the view which English Lawyers might be presumed to take, that the ownership of the river at any point depended on the ownership of the banks and bed.

On the whole, as a result of the further consideration which I have now given to the subject, I am inclined to think that for the purposes of Act VII of 1865 the ownership of the river or stream was intended to depend on the ownership of the bed and banks. It is, as I have said, desirable that there should be a binding decision on this question, and also supposing this to be so, on the further question as to the effect if any of Act III of 1905.

The somewhat exceptional circumstances of the present second appeal are that there is a finding that water has been taken for irrigation in excess of natural and easement rights from a river at a place where the banks and bed belong to the zamindar. The river is one which rises in hills belonging to Government and passes through ryotwari tracts before entering the zamindari. I would therefore refer to a Full Bench the question :—

"*Is the river in question a river belonging to Government within the meaning of Act VII of* 1865."

OLDFIELD, J.

OLDFIELD, J.—I agree to the reference proposed. But I desire to say that in doing so I commit myself to no opinion as to the legitimacy of resort to the matter referred to in the judgments in *Zamindar of Kapileswarapuram* v. *Secretary of State for India*(1), as a ground of decision or as to its comprehensive character or its effect.

ON THIS REFERENCE—

T. R. Venkatarama Sastri with *K. S. Ramabhadra Ayyar* for appellant.—The question is: what is the meaning of the words 'river belonging to Government' in Act VII of 1865. A river running through a zamindari is not such a river as the zamindar owns both the banks and the bed of the river within the limits of the zamin. Reference was made to the preamble and the sections of Act VII of 1865 to show that the enacting portion of the Act went beyond the preamble—the recent decision of the Privy Council in *Prasad Row* v. *The Secretary of State for India*(2). The preamble cannot

(1) (1914) I.L.R., 37 Mad., 355. (2) (1917) I.L.R., 40 Mad., 886 (P.C.)

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be looked to interpret the clear and unambiguous words of the sections. According to English law, the bed of tidal and navigable rivers belongs to Government. The bed of non-tidal and non-navigable rivers belongs to proprietors on either side *ad medium filum*. But where the water is entirely within one person's lands, the river belongs to him absolutely: Halsbury's Laws of England, Volume 28, page 358. Flowing water is not generally the subject of property. Therefore when a statute uses in respect of flowing water passing through the lands of many, the words 'owner of water,' it means only a riparian proprietor as held in *Bush* v. *Trowbridge Water Works Co.*(1). The words are used in a non-natural sense: *Stone* v. *Corporation of Yeovil*(2). The words 'river belonging to Government' in the Act are not in accordance with the language of the text-writers or of English decisions. Though those words do not mean only rivers going through Government lands from beginning to end, they mean only such portion of the river as lies within the limits of ryotwari tracts. He referred to section 6 of the Water Works Clauses Act of 1847 (10 & 11 Vict., Cap. 17). The view stated in Blackstone's Commentaries, pages 14 and 18, is quoted with approval in *Mason* v. *Hill*(3) by DENMAN, C.J. Madras Act III of 1905, section 2, clause(2) and Madras Act VII of 1865 save private ownership in rivers; see *Prasad Row* v. *The Secretary of State for India*(4) which overruled *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(5) and *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(6). Act III of 1905 deals only with land. *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(7). The wording of this Act is taken bodily from section 37 of the Bombay Act V of 1879, in which there is a comma before 'and all lands', so that the word 'bed' applies only up to 'water courses.' The immediate reason for the passing of Act III of 1905 is the decision in the case relating to land encroachment in *Madathapu Ramayya* v. *The Secretary of State for India*(8). A comma wrongly placed ought not make one wrongly interpret an Act.

(1) (1875) L.R., 10 Ch. App., 459. (2) (1876) 2 C.P., 99.
(3) (1833) 5 B. & Ad., 1 at p. 22.
(4) (1917) I.L.R., 40 Mad., 886 at p. 895 (P.C.)
(5) (1911) I.L.R., 34 Mad., 295. (6) (1911) I.L.R., 34 Mad., 366, at p. 369.
(7) (1917) M.W.N. 729; s.c. 33 M.L.J., 415 at p. 419.
(8) (1904) I.L.R., 27 Mad., 386.

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A comma is not part of a statute: Maxwell's Interpretation of Statutes, 5th Edition, pages 67 and 68. Act III of 1905 does not vest in the Government any new ownership in a river which it could not have otherwise owned. It has been said that the Act III of 1905 creates a presumption and that the onus is shifted. The exclusion of private ownership of a river does not lead to Government ownership. Section 2 speaks of ownership of Government and ownership of private proprietors. The same tests which will connote ownership in a private person must also be the tests to arrive at a conclusion as to whether Government owns a particular river. Where both banks of a river belong to a proprietor at a particular place that portion of the river belongs to him [(see *Secretary of State for India* v. *Maharaja of Bobbili*(1)] and the Government cannot trespass even for regulating water; *Secretary of State* v. *Ambalavana Pandara Sannadhi*(2). If one bank belongs to the proprietor and the other to the Government, it has been held by the majority of the Court in *Secretary of State for India* v. *Janakiramayya*(3), that the river belonged to the Government. In the case of a grant of land by Government as bounded by a river, *Venkata Lakshminarasimha* v. *The Secretary of State*(4), has held that the grantor is proprietor of the river bed *ad medium filum aquæ*. Reference was made to *Secretary of State* v. *Janakiramayya*(5). 'River' may mean either the body of water between two banks or flowing water together with the bed. Mere water alone is not a river; see also *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State*(6), and *M'Nab* v. *Robertson*(7), at page 134 per Lord WATSON and per Lord HALSBURY at pages 142 and 143. See page 77 in Coulson and Forbes on Waters.

Even if Act III of 1905 vests the ownership of the water in the Government, yet for the purposes of Act VII of 1895, it must be found that the *river belongs to Government*. That finding can be arrived at only if the *banks* and *bed* are found to belong to Government. Act VII of 1865 cannot be construed to have

(1) (1915) 30 M.L.J., 163 at pp. 175, 176, 179.
(2) (1917) M.W.N., 729; s.c., 33 M.L.J., 415.
(3) (1915) 29 M.L.J., 389 at pp. 396, 397, 399, 411, 427, 430 and 432.
(4) (1918) I.L.R., 41 Mad., 840 (F.B.).
(5) (1914) I.L.R., 37 Mad., 322 at 351 to 354.
(6) (1911) I.L.R., 34 Mad., 295. (7) (1897) A.C., 129.

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been indirectly altered by Act III of 1905; see as to rule of construction, *Nairn* v. *The University of St. Andrews*(1); see as to the meaning of the words 'river belonging to Government' *Venkataratnamma* v. *Secretary of State*(2); *Secretary of State* v. *Janakiramayya*(3). The case in Bombay is *Secretary of State* v. *Balvant Ganesh*(4). On the construction of Act III of 1905, see *Sri Rajah Simhadri Raju* v. *Secretary of State*(5), and *Prasada Rao* v. *The Secretary of State for India*(6).

The Government Pleader (*V. Ramesam*) for the respondent:—The river is one 'belonging to Government' within Act VII of 1865. River primarily means 'a body of flowing water'; *Kandukuri Mahalakshmamma Garu* v. *Secretary of State*(7), *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(8), and *Secretary of State for India* v. *Janakiramayya*(9). As against these we have the meaning 'bed and banks also'; see *The Secretary of State for India* v. *Janakiramayya*(10); and *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(11). But at page 74 of Coulson and Forbes on Waters, a 'river' is defined as a 'body of waters'; see Woolwich on Waters, page 40, Callis, pages 71, 77 American Cyclopædia, Volume 34, page 1792, quoting from The Century Dictionary, Webster's Dictionary, Ogilvie's Dictionary, Bouvier 933, and Stormonth, Strond's Judicial Dictionary under heading 'Stream.' The word 'river' may include bed or banks according to the context. But Act VII of 1865 concerns itself with only *flowing water* (and not the banks or bed) and with imposing a cess for the *water*. If there is any ambiguity, that is cleared by the purpose for which the Act was passed. It is not permissible to refer to official correspondence prior to Act VII of 1865 to know its meaning as has been done in *The Secretary of State for India* v. *Janakiramayya*(10); see *Rajagopalaacharyulu* v. *Secretary of State*(12) on the meaning of Act III of 1905. Not only is there the comma before tanks, but the word 'of' is not repeated

(1) (1909) A.C., 147 at p. 161. (2) (1914) I.L.R., 37 Mad., 364.
(3) (1915) 29 M.L.J., 389 at pp. 393, 597, 399, 411, 414 and 427.
(4) (1901) I.L.R., 28 Bom., 105, 106. (5) (1916) I.L.R., 39 Mad., 67 at 73
(6) (1917) I.L.R., 40 Mad., 886 at 894, 903, 904 and 895 (P.C.)
(7) (1911) I.L.R., 34 Mad., 295 (8) (1911) I.L.R., 34 Mad., 366.
(9) (1915) 29 M.L.J., 389 at p. 419. (10) (1914) I.L.R., 39 Mad., 322 at p. 339.
(11) (1917) M.W.N. 729; s.c. 33 M.L.J. 415.
(12) (1915) I.L.R., 38 Mad., 997 at 1003.

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in section 2, clause (1), before the words 'and all canals'. If we add the word 'of' to 'land' it will make the section absurd; see judgment of WALLIS, C.J., as to the object of the Act in *Secretary of State for India* v. *Maharaja of Bobbili*(1), where at page 176 the learned Chief Justice holds that even the Bombay Act, in section 55, where there is a comma, imposes a tax for taking water belonging to Government. Act III of 1905 can be used to interpret Act VII of 1865. See the unanimous opinion of the Judges in *The Secretary of State for India* v. *Janakiramayya*(2). Section 2 of Act III of 1905 vests the ownership of running water in the Government unless it is proved to belong to another. But if running water is collected it is private water. The words 'subject to rights' mean only easement or riparian rights as no ownership can exist in flowing waters. The object of the Act is to protect all individual and all communal rights against trespassers. All *residual* rights are vested in the Government. The section does shift the onus of proof, but does not do away with the Evidence Act. There are several exceptions known to the rule that flowing water cannot be owned; one may be owner of flowing water without being owner of the bed; Halsbury's Laws of England, Volume 28, page 358 (eg.); see *The Midway Navigation Company* v. *The Earl of Romney*(3). A riparian owner is entitled to take water not because he is the owner of the bed, but because he is the owner of the bank; see Coulson, pages 78, 79, Easements Act, section 7, and *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(4). But the right to the water is in the Government. Act III of 1905 is certainly declaratory of the rights of the Government and it makes clear the once doubtful ownership of Government. By means of this declaration it vests the ownership in the Government. A declaratory Act may make clear pre-existing rights which were doubtful. If it creates new rights it may not properly be called declaratory; Maxwell, page 361. The cases in order of time on Act VII of 1865 and Act III of 1905 are *Secretary of State for India* v. *Swami Naratheeswarar*(5) (which holds that to tax for water

(1) (1915) 30 M.L.J., 163 at pp. 176, 177. (2) (1915) 29 M.L.J., 389 at p. 396.
(3) (1861) 9 C.B. (N.S.), 575; s.c. 30 L.J.C.P., 236.
(4) (1917) M.W.N., 729 at p. 738; s.c. 33 M.L.J., 415.
(5) (1911) I.L.R., 34 Mad., 21 at p. 22.

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it is not necessary for the Government to own the bed of the river), *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State* (1) (as to Act III of 1905 being only declaratory and as to 'river' meaning only flowing and continuing water). The High Court says there was no grant in that case to the zamindar of the water or of an easement to use the water, while the Privy Council reversing the decision say there was an easement: see *Prasad Row* v. *Secretary of State for India*(2). *Venkataratnamma* v. *Secretary of State*(3), does not support the other side as will be seen from the fuller report of the finding in that case in *Venkataratnamma* v. *Secretary of State*(4) (which shows that the stream is a natural stream issuing from jungle hills and that there was a *grant of the channel* to the inamdar). The reasoning even in *The Secretary of State for India* v. *Janakiramayya*(5) is in my favour. If it is conceded, that in ryotwari tracts the Government owns the river, in zamindari tracts also the Government must be the owner. Customary rights mentioned and excepted in the section do not affect the present question referred to the Court. See *The Secretary of State for India* v. *Janakiramayya*(6), which lays down that the water in a flowing river is *owned* by and is under the control of the Government after the demands of zamindars, etc., are satisfied. This residuary right remaining after riparian and easement rights is independent of the ownership of the bed of the river. Riparian owners in tidal navigable rivers have right to use water for irrigation even without ownership of the bed. The reasons given for the conclusion in *The Secretary of State for India* v. *Maharaja of Bobbili*(7) are not consistent; see *Prasad Row* v. *The Secretary of State for India*(8). Reference was made to *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(9) and *Crawford Company* v. *Hill*(10).

T. R. Venkatarama Sastri in reply—The word 'constructed' in section 1 of Act VII of 1865 cannot refer to 'body of water'

(1) (1911) I.L.R., 34 Mad., 295 at p. 305.
(2) (1917) I.L.R., 40 Mad., 886 (P.C.).
(3) (1914) I.L.R., 37 Mad., 364.
(4) (1912) 15 I.C., 594.
(5) (1914) I.L.R., 37 Mad., 322.
(6) (1915) 29 M.L.J., 389 at p. 411.
(7) (1915) 30 M.L.J., 168.
(8) (1917) I.L.R., 40 Mad., 886 at pp. 894, 895 (P.C.).
(9) (1917) M.W.N., 725; s.c. 33 M.L.J., 415.
(10) (1903) 60 L.R. Anno., 889.

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but can refer only to physical locality in which the water flowing or standing exists. The words '*other landowners*' at the end of the section indicate that the ownership of water arises from ownership of lands. If flowing water alone is meant by 'river' and if flowing water cannot be owned except by Act III of 1905, then '*river belonging to Government*' in Act VII of 1865 would be meaningless. There has been no case which has decided the ownership of water apart from ownership of land.

OPINION.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—The question referred to us is whether a river called Marudarnathi which rising in hills belonging to the Government flows through ryotwari tracts, then through the Kannivadi zamindari and again through a Government village, can be said to be a river belonging to the Government within the meaning of section 1 of the Madras Irrigation Cess Act (VII of 1865) as amended by Act V of 1900. The question arose in connexion with the right claimed by a pattadar of the Kannivadi zamindari to take water from this river at a place within the limits of the zamindari for irrigating zamindari lands, without being liable to a separate cess levied under the above-mentioned Act. This Act enables the Government to levy a separate cess for "water supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to or constructed by Government," subject to certain provisos with which we are not concerned in this reference. It does not however purport to indicate the class of rivers or streams which were within the contemplation of the Legislature, but there is another Act of the Madras Legislature, the Madras Land Encroachment Act (Act III of 1905) on which considerable reliance has been placed in support of the contentions on behalf of the Secretary of State. It is enacted by its section 2 (1):—

"All public roads, streets, lanes and paths, the bridges, ditches, dikes and fences, on or beside the same, the bed of the sea and of harbours and creeks below high water mark, and of rivers, streams, nalas, lakes and tanks, and all canals and water courses, and all standing and flowing water, and all lands, wherever situated, save in so far as the same are the property—

(*a*) of any zamindar, poligar, mittadar, jagirdar, shrotriyamdar or inamdar or any person claiming through or holding under any of them, or

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(b) of any person paying shist, kattubadi, jodi, poruppu or quit-rent to any of the aforesaid persons, or

(c) of any person holding under ryotwari tenure, including that of a jenmi in Malabar, or of a wargdar in South Kanara, or in any way subject to the payment of land revenue direct to Government, or

(d) of any other registered holder of land in proprietary right, or

(e) of any other person holding land under grant from Government otherwise than by way of licence,

and, as to lands, save also in so far as they are temple site or owned as house-site or backyard,

are and are hereby declared to be the property of Government except as may be otherwise provided by any law for the time being in force, subject always to all rights of way and other public rights and to the natural and easement rights of other landowners, and to all customary rights legally subsisting."

Within the last eight years these enactments have been the subject of discussion in a number of cases, but the decisions are conflicting and do not supply a clear preponderance of opinion in support of one view of the law rather than another. In the first Urlam case, *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(1), MILLER and MUNRO, JJ., ruled on the strength mainly of section 2 of Act III of 1905 that the water of a stream or river belongs to the Government even though its bed or banks may belong to the zamindar and that the zamindar irrigating his land with such water is chargeable with a separate cess. Generally speaking this interpretation has been upheld by OLDFIELD, J., in *The Secretary of State for India* v. *Janakiramayya*(2) and was accepted apparently without further discussion by ARNOLD WHITE, C.J., and AYLING, J., in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(3). On the other hand SANKARAN NAYAR, J., in *The Secretary of State for India* v. *Janakiramayya*(4) SADASIVA AYYAR and BAKEWELL, JJ., in *The Secretary of State for India* v. *Janakiramayya*(2) the learned Chief Justice and SESHAGIRI AYYAR, J., in *The Secretary of State for India* v. *Maharaja of Bobbili*(5) and myself in *The Secretary*

(1) (1911) I.L.R., 34 Mad., 295.
(2) (1915) 29 M.L.J., 389.
(3) (1911) I.L.R., 34 Mad., 366.
(4) (1914) I.L.R., 37 Mad., 322.
(5) (1915) 30 M.L.J., 163.

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of State for India v. *Ambalavana Pandara Sannadhi*(1), have expressed a contrary opinion. The judgment of MILLER and MUNRO, JJ., in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State*(2) has since been reversed by the Judicial Committee of the Privy Council (see *Prasad Row* v. *The Secretary of State for India*(3) their Lordships holding that the Urlam Zamindar concerned in that case was protected by an engagement within the meaning of the proviso to section 1 of Act VII of 1865. But Lord PARKER, who delivered the Board's judgment while indicating in the passage cited in the Order of Reference the problems that might arise upon the construction of the two statutes as to the rights of the Government in the rivers and streams of this Presidency, refrained from expressing any opinion on the subject.

In construing the words 'river or stream belonging to Government' in Act VII of 1865 it would be quite legitimate to take into consideration the state of the law in this connexion as it existed at the time of the passing of the Act and we are also bound to give effect to any later statutory enactment by which the Legislature may have defined the 'river or stream which belongs to Government.'

As regards the first, the learned Government Pleader at one part of his argument contended that section 2 of Act III of 1905 was intended to clear away any doubt that might have been entertained as to the rights of the Government in the properties mentioned therein, but he did not make any attempt to prove that the common law of the Presidency was in accordance with the interpretation which he sought to place on the enactment. In fact the materials available for forming a definite conclusion on the point are meagre and insufficient. In *Fischer* v. *The Secretary of State for India*(4), it was laid down that the Government has power by the customary law in India to regulate in the public interests the collection and distribution of water of rivers and streams flowing in natural channels provided they do not thereby inflict sensible injury on other riparian owners and diminish the supply they have hitherto utilised. This paramount right of the Government is held to be

(1) (1917) M.W.N., 729; s.c. 33 M.L.J., 415.
(2) (1911) I.L.R., 34 Mad., 295.
(3) (1917) I.L.R., 40 Mad., 886 (P.C.).
(4) (1909) I.L.R., 32 Mad., 141.

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independent of the ownership of the bed of a river, but for the purpose of exercising its control the Government would not be warranted in committing an act of trespass. It is not necessary for us to examine how far these propositions, beyond which it may be mentioned, the learned Government Pleader was apparently not in a position to carry the rights of the Government in so far as they were established by the rulings of this Court apart from any legislative enactment, are well founded. For it is obvious that the ruling in *Fischer* v. *The Secretary of State for India*(1), which is referred to by the Judicial Committee in *Prasad Row* v. *The Secretary of State for India*(2), as showing that the law of the Madras Presidency as to rivers and streams is different in some respects from the English law, does not affect the question before us. It cannot be said that a river or stream belongs to Government because it has the power in the public interests to regulate the distribution of its water, since it is clearly recognized that this right of the Government is not in any way in supersession of the rights of the riparian proprietors.

As to section I of Act VII of 1865 a Full Bench of this Court in *The Secretary of State for India* v. *Mahadeva Sastrigal*(3), pointed out that it goes further than the preamble, enabling the Government to levy water-cess for use of waters derived from a natural stream belonging to the Government even though the Government might not have incurred any expenditure in connexion therewith. This is now placed beyond any doubt by the judgment of the Privy Council in *Prasad Row* v. *The Secretary of State for India*(2). Therefore even if Mr. Venkatarama Sastri is right in his contention that the word 'constructed' might be applied to 'river or stream' as well as to 'channel, tank or work' the power of the Government to levy cess clearly extends to natural streams belonging to the Government.

There has been much discussion as to what the words 'river or stream' in Act VII of 1865 were intended to import, whether merely bodies of flowing water or whether also the bed and the banks as forming part of a river. JESSEL, M. R., in *Taylor* v.

(1) (1909) I.L.R., 32 Mad., 141. (2) (1917) I.L.R., 40 Mad., 886.
(3) (1917) I.L.R., 40 Mad., 58 (F.B.).

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Corporation of St. Helens(1), defines a stream of water as 'water which runs in a defined course so as to be capable of division' and 'a water course' has been defined by Lord TENDERDON, C.J., in *Rex* v. *The Inhabitants of Oxfordshire*(2), as 'water flowing in a channel between banks more or less defined.' Lord WATSON in *M'Nab* v. *Robertson*(3), says:

"the word 'stream' in its primary sense denotes a body of water having as such body a continuous flow in one direction."

Lord WENSLEYDALE's definition of a river is 'a running stream pent in on either side with walls and banks.' But these definitions do not necessarily imply that the bed and the banks do not form part of a water course. (See Angell on Water Courses, 30.) Whether by a river or stream only the flowing water is intended or also the banks and the bed must depend on the context and the question therefore is, in what sense did the Legislature intend that a river or stream should be understood as 'belonging to the Government' in section 1 of Act VII of 1865.

In the absence of any indication to the contrary, we must give to the expression a meaning and significance known to the law. When a river or stream rises and terminates entirely within the limits of any person's land that person is its owner in the fullest sense, just as much as he is the owner of the soil of his domain and of the trees growing thereon. If therefore any river runs in its entire course within Government land that river is undoubtedly within scope of the section.

But there is a qualified sense in which in law a natural stream flowing through the lands of a number of persons, each one of whom is entitled to use the water of the stream as it passes through his land as a natural advantage belonging to the land and as incidental to his right to the soil itself may be said to be the property of such persons collectively or individually. Lord WENSLEYDALE in the following well-known passage in *Chasemore* v. *Richards*(4) observes:

"It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturae*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as

(1) (1877) 6 Ch. D., 264 (C.A.). (2) (1830) 1 B. and Ad., 301.
(3) (1897) A.C., 129. (4) (1859) 7 H.L.C., 349 at p. 382.

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he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state."

The same learned Judge as Baron PARKE had laid down in *Embrey* v. *Owen*(1):—

"The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property through which it passes; but flowing water is *publici juris*, not in the sense, that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only; see *Mason* v. *Hill*(2). But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

Lord SELBORNE in *Lyon* v. *Fishmongers' Company*(3) after reviewing the above and other authorities points out that it is by reason of his ownership of the adjoining land that a riparian proprietor acquires the right to the usufruct of the water, for it is that which enables him to have access to the stream and to exclude others from it. The owner of land on the bank of a river is also presumed in law to be the owner of the bed opposite to his land *ad medium filum aquae*. We find therefore that learned Judges, having in view the nature of the rights of a riparian proprietor in the water of a stream adjoining his land, have spoken of him as owner of the stream, such as, JAMES, L.J., in *Bush* v. *Trowbridge Waterworks Company*(4), COCKBURN, C.J., in *Stone* v. *Corporation of Yeovil*(5). Except in the above sense ownershi pcannot be predicated of a river any more in India than in England.

It is not the contention of the Government that riparian rights are not recognized by the law of the Presidency, or are substantially different here from those established in England

(1) (1851) 6 Ex., 353 at p. 369.
(2) (1833) 5 B. & Ad. 1 at p. 24.
(3) (1876) 1 A.C., 662
(4) (1875) L.R., 10 Ch. App. 459 at p. 462.
(5) (1876) 2 C.P. 99 at p. 107.

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except perhaps to the extent indicated in *Fischer* v. *The Secretary of State for India*(1). That very judgment takes the right of the riparian owners to be well recognized in this Presidency. The Legislature has also assumed the prevalence of such rights. (See section 7, illustration (*h*) of Easements Act V of 1882 and section 2 of Act III of 1905 itself on which reliance is placed by the Government) not as taking away riparian rights but as conferring on the Government the power to levy cess for the use of waters of rivers and streams belonging to the Government, irrespective of such rights. Riparian rights are not unoften asserted and exercised by the Government itself in connexion with ryotwari lands in which they claim proprietary rights analogous to those of a landlord.

Apart from such ownership as the possession of the banks of a river gives to a riparian proprietor I do not find that before the Urlam case the Government had ever claimed any other form of proprietorship with respect to it or its waters. So far, therefore, it would seem that by 'a river or stream belonging to the Government' the Legislature *prima facie* intended in section 1 of Act VII of 1865 to connote a Government ownership of the banks and the bed.

Has section 2 of Act III of 1905 then conferred on the Madras Government a right of property in the water of a natural stream higher than, and different in its nature from, what the law recognizes as incidental to riparian proprietorship? The history of the Act is well known. It was passed in consequence of a decision of this Court in *Madathapu Ramayya* v. *The Secretary of State for India*(2) to legalize the practice of imposing what was known as penal assessment on lands claimed by the Government and which are encroached upon by a private individual. For that purpose section 2 declares what shall be deemed to be the property of the Government and the rest of the Act lays down the mode of levying assessment or ejecting trespassers from Government lands. To define the incidence of water-cess is clearly not within the professed objects of the Act. At the same time if by section 2 it has designated a class of rivers or streams as belonging to the Government, the Government will be entitled to levy cess for the use of such waters

(1) (1909) I.L.R., 32 Mad., 141.
(2) (1904) I.L.R., 27 Mad., 386.

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under the Irrigation Cess Act. Section 2 of the Act, the language of which appears to have been borrowed from the Bombay Act V of 1879, cannot be said to be very happily worded. It is undoubtedly a wide and sweeping enactment, for there can be no question that so far as lands are concerned including those covered with water, it declares such of them as are not the property of any of the various classes of land-owners in the Presidency to be the property of the Government. At the same time every endeavour is made to make it clear that the Legislature did not by this enactment mean to deprive any private individual of his property or of any rights connected with immovable property.

The contention on behalf of the Government based on this Act may perhaps be best expressed in the language of MILLER, J., in the following passage in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(1).

"So far as this case is concerned the provisions of section amount to a declaration, that subject to easement and natural rights of other land-holders, all standing and flowing waters which are not the property of any one else are the property of the Government. Now clearly the waters of the Vamsadhara river do not belong to any one else; the owners of land on the bank of the river do not own the water: their natural right as defined by the Easements Act is saved by Act III of 1905, but it is not contended that the water is their 'property'. It follows that it is the property of the Government.

"And if the body of the water forming the river is the property of the Government, the river, it seems to me, belongs to the Government within the meaning of Act VII of 1865, even though the bed may be vested in the owners of land along the banks, so as to give them the right to accretions or 'lankas' forming therein. The Vamsadhara river is undoubtedly a natural stream, and the definition of a natural stream given in the explanation to section 7 of the Easements Act indicates that in the eye of the law the stream is the flowing body of water—and a stream was defined by Lord WATSON in *M'Nab* v. *Robertson*(2) as 'a body of water having as such body a continuous flow in one direction.'"

If this interpretation be correct we must give effect to it even though the natural or prescriptive rights of riparian owners

(1) (1911) I.L.R., 34 Mad., 295 at p. 333. (2) (1897) A.C., 129.

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would, as stated by Lord PARKER, be seriously diminished by the Act and where the Government have not expended money in improving the natural stream, apparently without any sort of *quid pro quo*.

In the first place it must be pointed out, though it hardly affects the question under consideration, that section 2 cannot properly be said, as has sometimes been assumed, to have made any change in the ordinary rules regarding burden of proof, for I find nothing in it which necessarily implies that whenever the Government lays claim to any land or water it lies upon the party against whom the claim is made to show that the property belongs to him quite apart from other considerations regulating the onus of proof as dealt with in the Evidence Act. Then, whether a body of flowing water can be said to be the property of the owner of the land by which the stream flows depends on the meaning to be attached to the word 'property' as used in this section. According to the Common Law of England, running water, strictly speaking, cannot be the property of any one except by statutory enactment. But a riparian proprietor, as I have stated, is in a qualified sense the owner of the stream adjoining his land. Section 2 itself proceeds on that assumption; otherwise there would have been no need to enumerate the land-owners whose property in a water course and in flowing water among other things is left intact. Now it would be a violation of the ordinary rules of interpretation to hold that when 'flowing water' is declared by section 2 to be the property of the Government save in so far as it is not the property of a zamindar or other land-owner that the proprietorship in contemplation in the two cases was intended to be of a different character. That the rights of the Government in water, declared by this section, are in connexion with its position as a land-owner may also well be deduced from the use of the words 'other land-owners' in the saving clause. Rights in water are incidental to the ownership of the land by which it flows or on which it stands so that by the conveyance of a parcel of land the rights in the water covering any portion of it will pass. This is the law not only in England but, so far as I am aware, in India as well. If it was the intention of the Madras Legislature to confer on the Government new rights in flowing water of a nature hitherto

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unknown to the general law either of India or England and which would materially diminish, if not practically destroy, extensive and valuable vested rights of riparian proprietors in this Presidency, one would have expected them to carry out such intention by a more direct and lucid process than by the introduction of certain general words capable of more than one construction in a Statute dealing with a wholly different subject. In my opinion when the Legislature says that all 'flowing water' in the Madras Presidency is the property of the Government save in so far as it is the property of a zamindar or any other land-owner it means only to declare with respect to flowing water passing through the lands of Government as well as of a zamindar, that the Government has in them rights of the same kind as the zamindar himself as a riparian owner enjoys under the ordinary law and not rights of a higher character materially impairing it not altogether superseding the land-owner's rights.

The conclusion that I come to is, that where, as in the case in which the question under reference has arisen, both the banks and the bed of a river at the place at which water is taken by the zamindar do not belong to the Government, the river cannot be said to belong to the Government for purposes of section 1 of Act VII of 1865. The answer to the question referred will therefore be given in the negative.

AYLING, J.

AYLING, J.—I agree that the answer must be in the negative.

The main authority in support of the position contended for by the learned Government Pleader is the judgment of MILLER, J. (concurred in by MUNRO, J.), in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(1). This ruling was quoted without comment or discussion by the late Chief Justice and myself in a case which came up for disposal very shortly afterwards [*The Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(2)] and relied on as one of two alternative grounds for our decision therein. We must, no doubt, be taken to have followed it: though the report of the case does not show, and my memory does not enable me to say, whether any attempt was made to question the correctness of

(1) (1911) I.L.R., 34 Mad., 295. (2) (1911) I.L.R., 34 Mad., 366.

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the ruling. However that may be, sitting as a member of a Full Bench, on which the ruling is not binding, and after hearing a full argument on the point, I can only come to the conclusion that the learned Judge's application of section 2 of Act III of 1905 is one from which I should respectfully dissent.

There was considerable discussion before us as to the meaning to be attached to the word 'river' in section 1 of Madras Act VII of 1865, whether as including the bed, banks and water, or only the water flowing down the river bed. I do not think it makes any practical difference in the present connexion, and the choice of meaning must always depend mainly on the context. In construing section 1, I should be inclined to interpret the word 'river' as including both the bed and banks as well as the water: and I think the close juxtaposition of the term 'work' in the same clause tends strongly to support this view. But whichever meaning be given seems to me to make little difference. The bed and banks are found as a fact to belong to the zamindar: and I agree with the opinion expressed by the learned Chief Justice in his Order of Reference that for the purpose of construing Act VII of 1865, the ownership of the water of a river must follow the ownership of the bed and banks. In fact, no authority has been cited, nor so far as I can see, no argument has been seriously addressed to us for the proposition that, apart from the effect of Madras Act III of 1905, the water of the river while flowing through zamindari limits was the property of Government. Some reference was made to *Fischer* v. *The Secretary of State for India*(1), but this contains nothing to support it. What has been contended is that it was the property of no one, relying on the doctrine of English Law expressed in Halsbury's Laws of England, Volume 28, paragraph 649, that flowing water cannot be the subject of property. Construing the term 'property' in the most complete and absolute sense, this, of course, commands assent. It is not suggested in the present case for instance that the zamindar could pursue the drops of water after they had flowed out of the territorial limits of his zamindari and claim them as his own. But as long as they are flowing within his zamindari, they may be his and, I think, are his, in a very real and valuable sense whether we

(1) (1909) I.L.R., 32 Mad., 141.

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call his property usufructuary or use any other word. And this kind of ownership of flowing water is recognized in the clearest manner in the judgments of English Courts. *Vide* JAMES, L.J., in *Bush* v. *Trowbridge Waterworks Company*(1), to which may be added *Stone* v. *Corporation of Yeovil*(2). This seems to me sufficient legal authority for what I should be inclined to hold on grounds of common sense and equity that the owner of the bed and banks of a river is also the owner (though in a special and qualified sense) of the flowing water, so long as it passes between those banks and over that bed: and that the term 'property' may not be inaptly applied to such ownership.

Now Act III of 1905 declares that flowing water (*inter alia*) is the property of Government "save in so far as it is the property" (so far as we are here concerned) "of the zamindar". If at the time of passing of the Act, it was already the property of the zamindar the Act makes no difference: and the contention put forward for Government and accepted in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(3), is simply that because the zamindar's property in the flowing water is not absolute, it should be treated as a nullity, and the saving clause held inapplicable. I cannot accept this. It is not seriously suggested that this Act operated to confiscate existing private rights, and, in my opinion, it was not intended to. In so far as the river, whether in the broader or narrower sense, was the property of the zamindar before the passing of the Act it remained his property afterwards: and before the Act, his rights to use flowing water and prevent others from using it were certainly such as to make it impossible to call it the property of Government.

In my view therefore the enactment of Act III of 1905 does not affect the present case, and apart from its operation, the decision can only be against the ownership of the river by the Government.'

OLDFIELD, J.

OLDFIELD, J.—The question whether section 2 of Act III of 1905 involves any declaration regarding the burden of proof of the right to water or of its ownership does not arise directly in this case and I therefore think it unnecessary to express any opinion regarding the portion of the judgment of Abdur Rahim,

(1) (1875) L.R., 10 Ch. App., 459. (2) (1876) 2 C.P.D., 99.
(3) (1911) I.L.R., 34 Mad., 295.

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J., in which it is considered. With this reservation I concur in the judgments just delivered and in a negative answer to the question referred.

SADASIVA AYYAR, J.—In the course of my judgment in the case in *The Secretary of State for India* v. *Janakiramayya*(1) the following remarks occur at page 419:—

"There were some arguments advanced at the Bar on the question whether words 'river, stream, channel and tank,' found in section 1 (*a*) of the Madras Act VII of 1865 meant (1) the beds, banks and the volume of waters (all taken together) of and in the river, stream, channel or tank, (2) or whether it meant the bed alone or bed and banks alone of the river, stream channel or tank or (3) whether it meant only the collection of the waters in the river, stream, channel or tank. I think clause (*b*) of section (1) of that Act which speaks of 'water *from* any such river, stream, channel or tank' clearly indicates that the words 'river, stream, etc.' are used in the sense of the collective body of waters which are called river, stream, channel or tank according to the respective configurations of the receptacles."

After the full arguments I have heard in the case, I feel confirmed in my view that the primary meanings of the words 'river and stream' connote the collection of waters and exclude the bed and banks. I do not deny that by a justifiable use of words (called Jahath Latchana Vritti in Sanskrit), the words may be made to mean the bed alone or one bank alone or both banks to the exclusion of the body of water (as when we say, a village on the Ganges). But the ordinary and primary meaning is clearly the collection of waters (instance—the usual expressions 'water of or from a stream or river, bed of a river, banks of a river, bathing in the river, the river is muddy' and so on). Especially the word 'stream' from its very root meaning primarily connotes the body of water flowing in a current and in Sanskrit also, the primary meaning of a river is the "Jala Pravaham." In Murray's Dictionary, the primary meaning of the word 'river' is given as 'a copious stream of water, etc.'

At page 423 of the same judgment, I said with reference to the Madras Act III of 1905—

"There can be no doubt that the Government starts with a strong presumption in their favour under Madras Act III of 1905,

(1) (1915) 29 M.L.J., 389.

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that all standing and flowing waters belong to them, but it is a rebuttable presumption."

Section 2 of the Act says that

"All standing and flowing waters" (save in so far as the same are the property of others) "are hereby *declared* to be the property of Government."

On this language I am still of opinion that the Legislature intended that when a dispute arises between Government and a private person, the burden should rest on the latter of proving that a particular 'water' belongs to him, though of course proof by him (or admission by Government) of present use and possession will easily shift the burden on to Government. I do not think it necessary to consider at length the argument that the language of section 2 grammatically considered does not make all standing and flowing water itself the property of Government but only the bed of all standing and flowing water. In my opinion the language could not bear such construction and the matter seems to be concluded by the following sentence in the judgment of their Lordships of the Privy Council in *Prasad Row* v. *The Secretary of State for India*(1).

"Further the Madras Act III of 1905 appears to enact that (*inter alia*) all standing and flowing water not the property of private individuals is the property of Government but subject to the natural and easement rights of other land-holders."

In *The Secretary of State for India* v. *Janakiramayya*(2) at pages 424 and 425 I said:

"In this connexion, I wish to point out that not only all 'standing and flowing water' wherever situate are and are declared to be the property of Government, but the words just coming after the words 'all flowing and standing water' in section 2 (1) of Act III of 1905 are '*all lands wherever situated*.' Thus as regards all lands also wherever situate, the presumption is created by that section that they belong to Government unless proved to belong to zamindars, inamdars, etc. As regards standing water in tanks, can it be reasonably argued that the ownership of the tank bed has nothing to do with the ownership of the water standing on it? Can it be said that, even though the rain water fills the tank, the standing water in it is the property of Government? . . . The section again assumes that zamindars,

(1) (1917) I.L.R., 40 Mad., 886 at p. 895 (P.C.). (2) (1915) 29 M.L.J., 389.

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Poligars, Inamdars, etc., can have the same kind of 'property' or ownership in standing and flowing waters as Government is declared to possess. . . . That flowing water *by its very nature* can never be the absolute property of the Government or anybody else (though the ownership in a very real sense can be predicated of it as vesting in a person so long as the water continues to be situated vertically over land belonging to that person) is clear to my mind; and when section 2 (1) says that all standing and flowing water are hereby declared to be the property of Government (except as may be otherwise provided for by any law for the time being in force, subject always to all public rights and natural and easement rights of other land-owners and to all customary rights) it seems to me that the Legislature did not intend to give to the Government greater rights of ownership in flowing water than the principles of general jurisprudence would allow. . . . When water flows in a river over the bed portion belonging to one owner, that water is temporarily and usufructuarily his property (subject to well-known natural rights of others). As soon as it leaves that portion of the bed and begins to flow over another bed-portion belonging to another owner, the water becomes the property of the owner of that bed-portion, subject again to the same rights. . . . I can find nothing in section 2 of the Madras Act III of 1905 which was intended to give the Government greater rights over standing or flowing water vertically over their land than any other proprietor of land (like a zamindar or inamdar) has over water standing or flowing over his."

At pages 427 and 428 I said:

"There are two well-known legal maxims which usually come to mind in such cases. One is *Aqua currit et deb et currere ut currere solebat* which signifies that water flows and ought to flow as it used to flow. Grounding on this maxim, it is usually stated that there is no property in running water, but merely a right to use it, and this right may only be exercised so as not to interfere with the use of the water by other persons similarly entitled. But the right to use it can itself be called 'property' in running water, and (as I have said already) it is not wise to confuse ourselves by juggling with the word 'property', or the word 'owner'?.

"The other maxim is *cujus est solum, etc.*, meaning that whoever is the owner of the soil, it is his even to the firmament and to the middle of the earth. This maxim is the basis of the rule that waters in ponds, tanks, and wells situated on land owned by a person belong to him in a very real sense, and that in the flowing water also running over his land, he has got a real right of property though of

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a qualified kind. . . . How else is a Zamindar or Inamdar to prove his 'property' in 'standing or flowing water' except by proving his 'property' in the land situated under such water, it being clear from section 2 (1) (*a*) itself that such 'property' can exist in him? *Narasimha Sastrial* v. *The Secretary of State for India*(1).

"There is, no doubt, a distinction in the extent of the proprietary or ownership rights of a man in water over his soil, according as the water is standing water (as in a tank) or water naturally flowing as a river (though the waters cannot be said to belong to anybody else so long as the waters are still vertically over his soil)".

(The existence in a man of a very real proprietary right over even flowing water within the limits of that portion of the river bed which belongs to him is well brought out by his power to prevent other persons fishing in that portion of the current or floating over or doing any acts in that portion of the flowing water and he can effectually exercise that power by driving stakes in the river bed from bank to bank or drawing nets across, without interfering of course with the flow of the water down the river).

I am confirmed in the opinions quoted above by the referring judgment of my Lord the Chief Justice in this case, and by the opinion of AYLING, J., just delivered. In *Prasad Row* v. *The Secretary of State for India*(2), their Lordships of the Privy Council state that if section 2 of the Madras Act III of 1905 be relied on for the contention that the water of a stream belong to Government even when the property in the bed belongs to a riparian owner,

"the natural and prescriptive rights of riparian owners are seriously diminished by the Act and where the Government have not expended money in improving the natural stream, apparently without any sort of *quid pro quo*."

I think from this sentence a clear indication is given as to the inclination of the minds of their Lordships of the Privy Council. Their Lordships (it seems to me) suggest that the words 'property of Government' in the Madras Act III of 1905 should not be given as wide a meaning as is connoted by the words 'belonging to Government' in the Madras Act VII of

(1) (1891) 1 M.L.J., 167. (2) (1917) I.L.R., 40 Mad., 886 at p. 895 (P.C.).

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1865, as such a construction would lead to startling and inequitable results.

For the above reasons I agree in answering the question referred to us in the negative.

COUTTS TROTTER, J.—The short contention for Government is that the Act of 1905 created a property in Government in all flowing water in this Presidency, without reference to any question of ownership of the banks or bed of the river.

English lawyers do not ordinarily regard flowing water as the subject of property. The owners of land on the banks of the river are owners of the soil of the river bed *usque ad medium filum aquæ*; and by virtue of the ownership of that land, they acquire certain rights over the water flowing past the banks which they own. Those rights are known both to English and Indian law as riparian rights; and they arise as an incident of the land through which the water passes. When judges are using scrupulously accurate language, they are careful to point out that neither riparian owners nor others have any property in the water, e.g., *Embrey* v. *Owen*(1). But the rights of riparian owner are extensive, and it is very natural that they should often be described as rights of property or ownership, the necessary qualification that the 'property' is only usufructuary being left unexpressed, see, e.g., JAMES, L.J., in *Bush* v. *Trowbridge Waterworks Co.*(2). Statutes sometimes use similar language, e.g., section 6 of the Water-Works Clauses Act, 1847. It is especially natural when the ownership of both banks is vested in the same person to speak of him generally as the owner of the river.

The material portion of Act III of 1905 in effect declares that all flowing water save and in so far as it is the property of any one also is henceforth to be the property of Government. What the judges did in the Urlam case [*Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(3)] was to apply the English Common Law conception to the saving clause with the result that they held that no one had any property in flowing water, except perhaps in the abnormal case of a river which from source to mouth runs through one man's land. The

(1) (1851) 6 Ex., 353. (2) (1875) L.R., 10 Ch. App., 459 at p. 462. (3) (1911) I.L.R., 34 Mad., 295.

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result was that all flowing water would become automatically the property of Government. That is in itself a startling conclusion; but it involves a still more startling process. We are to suppose that the draftsman and the enactors of this short local Act designed, not directly but by mere intendment, to introduce a wholly new juridical conception, viz., that of property in flowing water without reference to any question of ownership of the banks or bed of the river in which it flows. That seems to me obnoxious to all the evils pointed out by the House of Lords in *Nairn* v. *The University of St. Andrews*(1). In my opinion *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State*(2) was wrongly decided, and I think the Act of 1905 when it spoke of water 'belonging' to any one, only used the term in the lax but commonly understood sense of water over which rights were exercised by virtue of ownership of bed or banks. This construction necessitates no new legal conception of property in water; for flowing water will only go to Government as a *bonum vacans*, when the bank or banks are *bona vacantia*, and it will become their property only in the sense with which every one is familiar and which is correlated to their property in the banks or bed.

Some attempt was made during the argument to draw conclusions from the linguistic implications of the word 'river'. I do not think such considerations go far much, but they certainly do not help the case of Government. 'River' is not derived from the Latin '*rivus*', as most people would suppose off-hand, but through the French *riviere* from 'riparia', i.e., the thing with banks (ripa). Nor would the case be better if the derivation was from *rivus*, for I find this in the Digest (43—21): *rivus est locus per longitudinem depressus, quo aqua decurrat.*

1918, December 19.

The Second Appeal coming again for hearing before the Division Bench (WALLIS, C.J., and Mr. JUSTICE OLDFIELD), the Court delivered the following JUDGMENT:—

As a result of the answers of the Full Bench we reverse the decree of the lower Appellate Court and give the plaintiff a declaration that the Government is not entitled to levy water-cess on the plaintiff in respect of the suit lands under Act VII of 1865 as amended, seeing that the river Marudarnathi where it flows past the suit lands is not a river belonging to the

(1) (1909) A.C., 147. (2) (1911) I.L.R., 34 Mad., 295.

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Government within the meaning of that Act read with Act III of 1905.

The question of the plaintiff's alleged excessive use of the river water for his own irrigation cannot be disposed of in this suit in which he is arrayed as a plaintiff.

We reverse the decree of the lower Appellate Court and grant the plaintiff the declaration abovementioned with costs throughout.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Napier.

1918, November 8.

MAHBOOT BI (PLAINTIFF), APPELLANT,

v.

SHERIFA BI AND FOUR OTHERS (DEFENDANTS), RESPONDENTS. *

Practice—Order of Judge on Original Side of the High Court—Jurisdiction to modify order before formally drawing up the order.

A Judge on the Original Side of the High Court has jurisdiction to modify the minutes of an order before the formal order is drawn up.

APPEAL against the order of KUMARASWAMI SASTRI, J., made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court of Madras in Civil Suit No. 193 of 1915.

This was a suit brought on the Original Side of the High Court by one of several heirs of a deceased Muhammadan for partition of the estate left by the deceased, for an account of the administration of the estate and for the appointment of a receiver pending the suit. Mr. Justice KUMARASWAMI SASTRI passed a preliminary decree on 25th July 1916 declaring *inter alia* the shares to which the plaintiff and the defendants were entitled and ordering the Official Referee (*a*) to take an account of the property, credits and effects of the estate and of the debts and liabilities of the estate then outstanding, and (*b*) to report to the Court a scheme for the distribution of the said estate among the parties. A receiver also was appointed in the case to take charge of the properties and to manage them. The

* Original Side Appeal No. 44 of 1917.

MAHBOOT BI v. SHERIFA BI.

Official Referee not only took an account of all the property belonging to the estate but he also sold by auction between the parties the various properties, setting off the value of each item sold against the share due to the purchaser, and he made a report to the above effect to the Court on 17th August 1916. No objection to the report having been filed, the Court on 4th September 1916, confirmed the sales and passed the following order:—"Receiver to sub-divide the Government Promissory Notes in such manner as to be capable of being allotted to the various shares. Final decree to stay over till receiver's accounts are passed." No formal order embodying the above was drawn up by the Court. Upon a motion made by the fourth defendant, a minor, to vacate the above order of 4th September 1916, the Judge vacated it on 30th April 1917 on the grounds (*a*) that the Official Referee was only asked to submit a scheme for distribution and was not empowered by the Court to sell the properties between the parties, (*b*) that the sales had prejudiced the interests of the minor fourth defendant and (*c*) that no final order embodying the report of the Official Referee was drawn up.

From the above order of the 30th April 1917, the plaintiff preferred this appeal.

V. V. Srinivasa Ayyangar for second and third appellants.

K. C. Desika Achariyar for fourth respondent.

V. Ramaswami Ayyangar for second respondent.

A. Narasimha Achariyar for third respondent.

T. A. Vijayaraghava Achariyar for fifth respondent.

T. Ananda Rao for first respondent.

The judgment of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—At the time Mr. Justice KUMARASWAMI SASTRI passed his present order, no formal order had been drawn up on the minutes of his previous order, and we think that, as a Judge sitting on the Original Side of the Court, he had jurisdiction to modify the minutes before the formal order was drawn up. *See In Re Suffield and Watts: Ex parte Brown*(1), and *Preston Banking Company* v. *William Allsup and Sons*(2).

The appeal is dismissed.

N.R.

(1) (1888) 20 Q.B.D., 693. (2) (1895) 1 Ch., 141.

APPELLATE CIVIL—FULL BENCH.

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

1918. October 30, 31 and November 14.

VELAN PAKKIRI TARAGAN AND THREE OTHERS (DEFENDANTS Nos. 1 TO 3 AND 6), APPELLANTS,

v.

SUBBAYAN SAMBAN AND NINETEEN OTHERS (PLAINTIFFS Nos. 1 TO 7, DEFENDANTS Nos. 5, 7 TO 10, 13, 14 AND 16 AND L.R. OF PLAINTIFFS Nos. 8 AND 9), RESPONDENTS.*

Highway—Right of a person or body of persons to go in procession along a highway—Order of Magistrate under Criminal Procedure Code (Act V of 1898) prohibiting a body of persons from going in procession—Right of suit of prohibited persons—Special damage, whether should be alleged and proved—Trespass and public nuisance—Declaratory suit—Cause of action—English and Indian law.

An order passed by a Magistrate under the Criminal Procedure Code forbidding a person or body of persons from using a highway for the purpose of processions invests the person or persons interdicted with a cause of action, if they allege it to be an infringement of their legal rights, though such order be in itself *intra vires* and no special damage be alleged or proved.

A person or body of persons who claim a right to go in procession along a public highway, can bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage.

Mannada Mudali v. *Nallay Goundan*, (1909) I.L.R., 32 Mad., 527 and *Basalingappa Parappa* v. *Dharmappa Basappa*, (1910) I.L.R., 34 Bom., 571 followed; *Kalmatappa* v. *Joish Narayana Bhat*, (1917) 42 I.C., 337, *Muthialu Chetty* v. *Bapun Sahib*, (1880) I.L.R., 2 Mad., 140 and *Kandaswami Mudali* v. *Subbaroya Mudali*, (1909) I.L.R., 32 Mad., 478, overruled.

Per WALLIS, C.J.—If defendants assembled to prevent the plaintiffs from exercising their lawful right to pass along the highway in a particular manner, that would not be a case of public nuisance but of trespass or threatened trespass to plaintiffs, and in trespass an action lies without proof of special damage.

SECOND APPEAL against the decree of T. MAHADEVA SASTRI, Acting District Judge of Tinnevelly, in Appeal Suit No. 390 of 1915, preferred against the decree of R. NARASIMHA AYYANGAR, District Munsif of Tinnevelly, in Original Suit No. 280 of 1912.

The plaintiffs, who were the representatives of the Pariahs of Kottikulam locally known as Sambanmars, brought the present

* Second Appeal No. 370 of 1917.

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suit against the defendants, who are representatives of the Muhammadans of the same place, for a declaration that they are entitled to conduct their marriage processions along the plaint road, which was alleged and found to be a public high-road. In March 1911 an application was made to the Second-class Magistrate of Palamcottah on behalf of the Pariahs for an order under section 144 of the Criminal Procedure Code to restrain the Muhammadans from interfering with their procession. The Sub-Magistrate passed an order prohibiting the petitioners (the Pariahs) from going in procession along the road in question, but allowing the procession only in a different route; the order dated 21st March 1911, *warned* the petitioners under section 144, Criminal Procedure Code, from taking the procession through any other street but the aforesaid ones, and the counter petitioners from molesting the procession taken along the aforesaid route. The Pariahs filed a similar petition on the 6th July 1911 before the Sub-divisional Magistrate of Tinnevelly, who made an order, the material portion of which was as follows:—

"As the cause of imminent breach of the peace does not now exist, no orders either under section 144 or 147, Criminal Procedure Code, are now necessary. . . . If the Pariahs feel aggrieved by the Muhammadans objecting to their right of taking processions through a public street wherever Muhammadans live, they should resort to a proper civil court for redress."

The Sub-divisional Magistrate dismissed the petition on 11th November 1911. The Pariahs thereupon instituted the present suit (Original Suit No. 280 of 1912) in the District Munsif's Court of Tinnevelly for a declartion of their right to conduct their processions along the suit public roads and for a permanent injunction restraining the defendants from interfering with the exercise of their right. The plaintiffs recited in their plaint the previous orders of the two Magistrates already referred to, but did not allege and prove any special damage and based their cause of action on the dates of the several orders passed by the Magistrates. The District Munsif passed a decree in favour of the plaintiffs, holding that a suit to declare the right to conduct processions along the public road was maintainable without proof of special damage, the cause of action being the improper order of the Magistrates. The decree was confirmed, on appeal, by

the Acting District Judge. The defendants preferred this Second Appeal.

T. R. Ramachandra Ayyar, T. R. Krishnaswami Ayyar and *N. A. Krishna Ayyar* for the appellants.

M. D. Devadoss for the respondents.

This SECOND APPEAL coming on for hearing in the first instance before AYLING and COUTS TROTTER, JJ., their Lordships passed the following ORDER OF REFERENCE to a FULL BENCH:—

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COUTTS TROTTER, J.—This is a suit by the representatives of the Pariahs of Kottikulam locally known as Sambanmars, against the defendants who are representative Muhammadans of the same place, for a declaration that they are entitled to conduct processions along a certain public road in Kottikulam. As is usual in such cases, the existence of these processions has given rise to high feeling and is likely to lead to rioting and bloodshed unless the rights of the parties are settled by the civil court. In March 1911 an application was made to the Second-class Magistrate of Palamcottah on behalf of the Pariahs for an order under section 144 of the Criminal Procedure Code to restrain the Muhammadans from interfering with their procession. On that application the Sub-Magistrate made an order restraining the petitioners from going in procession along the path in question in this suit. It is true that he called it a warning, but we think it is clear that he meant to give a definite order and are prepared to treat Exhibit A as amounting to such. In November 1911 a further application was made to the Sub-divisional Magistrate of Tinnevelly for a fresh order. He came to the conclusion that a breach of the peace was not imminent and therefore refused to pass orders either under section 144 or section 147, and he concluded by saying this: "If the Pariahs feel aggrieved by the Muhammadans objecting to their right of taking processions through a public street wherever Muhammadans live, they should resort to a proper civil court for redress". Thereupon he dismissed the petition. No doubt in consequence of this the present suit was instituted in July 1912.

The objection taken by the defendants is that in the absence of proof of special damage no action will lie to enforce rights relating to a public highway. The case-law on the subject is complicated and difficult, and we think that an effort should be

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made to establish definitely for this Court at least what the legal position really is.

The leading case in India in which the doctrine of English law was applied to this country was *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga*(1) where the Chief Justice Sir MICHAEL WESTROPP in a very learned judgment applied the rule of English law in its entirety to India, the rule being that a private person cannot bring a suit for interference with a right which he enjoys merely as a member of the public unless he has individually suffered damage, which means in this connection pecuniary damage. The reason for the rule in England was that the true remedy was one by indictment, and we are unaware of any corresponding remedy under the Indian law. Notwithstanding this, the Courts of India have adopted this view, as for instance in *Baroda Prasad Mostafi* v. *Gora Chand Mostafi*(2), *Raj Luckhee Debia* v. *Chunder Kant Chowdhry*(3), and the doctrine was explicitly recognized in this Court in *Hussain Sahib* v. *Narasimhappa*(4). At the same time another doctrine gradually evolved itself in the Courts, at any rate of this Presidency, which amounts in general terms to this: that in certain circumstances an order of a Magistrate prohibiting a procession under the provisions of the Criminal Procedure Code of itself gives a cause of action to the interdicted party. In our opinion the cases as to what those circumstances are, are neither clear nor consistent. In *Muthialu Chetti* v. *Bapun Saib*(5) the order of the Magistrate was held to be *ultra vires* and to create a cause of action in those against whom it was directed against those who had procured it. In *Muthayya* v. *Sudalaimuthu*(6) the magisterial order was held to constitute a cause of action, but it is not clear whether the learned Judges regarded the order as *ultra vires* or not. In *Kandasami Mudali* v. *Subroya Mudali*(7) the head-note is to the effect that where an "*illegal*" order of the Magistrate has been procured restraining a procession, a suit to declare the right to carry such procession is sustainable without proof of special damage. It does not appear from the report in that case that the order of the Magistrate was illegal

(1) (1878) I.L.R., 2 Bom., 457.
(2) (1870) 3 B. L.R., 295.
(3) (1870) 14 W.R., 173.
(4) (1912) 23 M.L.J., 539.
(5) (1880) I.L.R., 2 Mad., 140.
(6) (1910) 20 M.L.J., 119.
(7) (1909) I.L.R., 32 Mad., 478.

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in the sense of being one that he had not jurisdiction to make. It must be remembered that in making orders of this nature under the Criminal Procedure Code the Magistrate is expressly debarred from determining the civil rights of the parties, and is as expressly empowered in the interests of public order to restrain members of the public from exercising rights which they may indubitably possess. But it is quite true that in the judgment the following sentence occurs: "The real distinction appears to be, as pointed out in *Kazi Sujaudin* v. *Madhavdas*(1), that in the one case the cause of action is the alleged obstruction and in the other the improper order issued by a Magistrate at the instance of the defendants." The term 'improper' is obviously taken bodily from the judgment of FULTON, J., in *Kazi Sujaudin* v. *Madhavdas*(1). It is capable of two constructions. It may mean an order which the Magistrate had no power to make, or it may mean an order which though within the jurisdiction of the Magistrate was in fact a derogation from the legal rights of the person or persons against whom it was made. In *Andi Moopan* v. *Muthuveera Reddy*(2) a Bench of this Court appears clearly to have taken the view, though it was perhaps not necessary to the actual decision, that an order of itself *intra vires* on the part of the Magistrate would give rise to an action if in fact it fetterred the plaintiffs in the action in the exercise of their legal rights. On the other hand, another Bench of this Court in *W. Kalmatappa* v. *Joish Narayana Bhat*(3) unreservedly adopted the view that the order of the Magistrate to give rise of itself to a cause of action must be an order outside his competence and illegal. It is obvious that to restrict the cause of action to cases where the Magistrate's order is illegal will necessarily lead to an 'impasse' in which the claim of the parties will tend to be settled not by the determination of a Court of law but by violence and bloodshed. We therefore think that the whole question had better be referred to a Full Bench.

An entirely different set of considerations is evoked by the decision in *Baslingappa Parappa* v. *Dharmappa Basappa*(4). The report is meagre and the grounds of decision are not very clear; but the result is indubitably this: that the Bombay High

(1) (1894) I.L.R., 8 Bom., 693
(2) (1915) 29 M.L.J., 91.
(3) (1917) 42 I.C., 337.
(4) (1910) I.L.R., 34 Bom., 571.

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Court held in that case that though an action for the abatement of a public nuisance would not lie without proof of special damage, a suit for a declaration of the right to pass in procession along a public highway would. We regard this decision as salutary and convenient, but we doubt whether considering the trend of authority in the Courts of India, and above all in this Court, we are at liberty to follow it. We think it best to refer this matter also to the decision of a Full Bench.

The questions we refer are therefore as follows:—

(1) *When a Magistrate has made an order under the Criminal Procedure Code forbidding a person or body of persons from using a highway for the purpose of processions, does such an order invest the person or persons interdicted with a cause of action if they allege it to be an infringement of their legal rights, though such order be in itself* intra vires *and no special damage be alleged or proved?*

(2) *Can a person or body of persons who claim a right to go in procession along a public highway bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage?*

On this REFERENCE—

T. R. Ramachandra Ayyar (with him *T. R. Krishnaswami Ayyar* and *N. A. Krishna Ayyar*) for the appellants.—The party against whom an order has been passed by a Magistrate under section 144 of the Criminal Procedure Code has no cause of action against the successful party, without proof of special damage. There will be a cause of action without proof of special damage, only when the order of the Magistrate is *ultra vires*, not when it is *intra vires*. Section 42 of the Specific Relief Act applies only to a private right of property, and not to the right in question, which is only a privilege of using a public road. If every member of the public has a right of suit, it will be intolerable, and law consequently limits it to persons who have sustained special damage by reason of the obstruction. See also section 91 of the Civil Procedure Code. The Magistrate's order gives a cause of action only when the Magistrate has gone wrong and his order is *ultra vires*. See *Muthialu Chetti* v. *Bapun Saib*(1) and *Satku Valad Kadir Sansare* v. *Ibrahim Aga Valad Mirza*

(1) (1880) I.L.R., 2 Mad., 140.

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Aga(1) which holds that special damage must be proved, though there was an order of a Magistrate under the Criminal Procedure Code.

[AYLING, J.—It was not suggested in *Muthialu Chetti* v. *Bapun Saib*(2) and *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga*(1) that the Magistrate's order itself was an injury or special damage to the party against whom the order was made.]

The proper view, as regards the magisterial order, will be to hold 'that the order, whether legal or illegal, *ultra vires* or *intra vires*, does not give rise to a cause of action.'

[AYLING, J.—*Sadagopa Chariar* v. *Krishnamurthy Row*(3) shows that there is a right of action, though there was an order which was legal under section 147, Criminal Procedure Code.]

There was no order under section 147, Criminal Procedure Code, in this case; there was only an order under section 144 of the same code.

[WALLIS, C.J.—In the case in *Muthialu Chetti* v. *Bapun Saib*(2) and in the cases relied on in that case, there was actual obstruction and special damage was held to be necessary. A Magistrate's order is more than mere obstruction, it is prohibition of the exercise of the right.]

Even where the police prohibit a person and a suit is recognised by the statute, it has been held that special damage must be proved; see 11 Bom. L.R., 372.

[WALLIS, C.J.—I differ from that view; the statute gives a cause of action by the order.]

In *Dundappa Mullappa Sigandhi* v. *Secretary of State*(4) it was held that the order of Government was illegal and hence that there was a cause of action without special damage. The following cases were relied on or distinguished:—

Kandasami Mudali v. *Subroya Mudali*(5), *Mannada Mudali* v. *Nallaya Goundan*(6), *Kazi Sujandin* v. *Madhavdas*(7), *Sadagopa Chariar* v. *Krishnamoorthy Rao*(8), *Andi Moopan* v. *Muthuveera*

(1) (1878) I.L.R., 2 Bom., 457.
(2) (1880) I.L.R., 2 Mad., 140.
(3) (1907) I.L.R., 30 Mad., 185 (P.C.)
(4) (1917) 37 I.C., 360.
(5) (1909) I.L.R., 32 Mad., 478.
(6) (1909) I.L.R., 32 Mad., 527.
(7) (1894) I.L.R., 18 Bom., 693.
(8) (1907) I.L.R., 30 Mad., 185 (P.C.).

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Reddy(1), *Kalmatappa* v. *Joish Narayana Bhat*(2), *Subbaya Nadan* v. *Aiyavoo Reddi*(3), *Adamson* v. *Arumugam*(4), *Siddeswara* v. *Krishna*(5), and *Hussain Sahib* v. *Narasimhappa*(6).

M. D. Devadoss for respondent.—There is special damage because the plaintiffs have been prevented on the ground that they belong to a particular community. On the second point in the Reference, reference was made to *Boyce* v. *Paddington Borough Council*(7), and to *Baslingappa Parappa* v. *Dharmappa Basappa*(8).

WALLIS, C.J.

WALLIS, C.J.—In *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga*(9) the facts are not set out in the report, and all that appears is that the plaint averred obstruction of the plaintiffs in their use of the highway by the defendants, and also an order of the Magistrate under section 518 (now 144) of the Code of Criminal Procedure prohibiting the plaintiffs from using the highway in the particular way to which the defendants took objection. Sir MICHAEL WESTROPP, C.J., after reviewing the English decisions as to the right of an individual member of the public to maintain an action for the obstruction of a public thoroughfare and showing that no such action would lie without proof of special damage, dismissed the plaintiffs' suit on that ground. The obstruction in the English cases cited consisted of interference with the surface of the highway which interfered with the right of the public to pass and repass freely. The same principle would, no doubt, apply if the defendants obstructed the public by assembling on the highway for their own purposes, as for the purpose of holding a market. That also would be a public nuisance and the rule as to special damage would apply. If, however, the defendants assembled to prevent the plaintiffs from exercising their lawful right to pass along the highway in a particular manner, that would appear not to be a case of public nuisance but of trespass or threatened trespass to the plaintiffs, and in trespass an action lies without proof of special damage. That, indeed, is the general rule, the

(1) (1915) 29 M.L.J., 91.
(2) (1917) 42 I.C., 337.
(3) (1917) M.W.N., 70.
(4) (1886) I.L.R., 9 Mad., 463
(5) (1891) I.L.R., 14 Mad., 177.
(6) (1912) 23 M.L.J., 539.
(7) (1903) 1 Ch., 109.
(8) (1910) I.L.R., 34 Bom., 571.
(9) (1878) I.L.R., 2 Bom., 457.

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rule as to special damage in cases of public nuisance being the exception. The Bombay High Court has recently taken this view in *Baslingappa Parappa* v. *Dharmappa Basappa*(1) and has refused to apply the decision in *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga*(2) to a case like this. In that case the plaintiffs sued to establish their right to go in procession with a temple car along a particular road which was denied by the defendants. The lower Appellate Court thought that the plaintiffs had the right they claimed, but dismissed their suit as no special damage was shown, following *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga*(2). The High Court reversed the decrees of the lower Courts and gave the plaintiffs a declaration and an injunction, observing, in the course of their judgment, that the suit was not for the removal of a public nuisance, but for a declaration of the right of an individual community to use the public road, a suit which they held to lie without proof of special damage. This case in my opinion was rightly decided and should be followed.

The case is stronger both on principle and authority where, in addition to the plaintiffs' right to use the road in a particular manner being challenged by the defendants, the plaintiffs have been prohibited from exercising it under section 144, Criminal Procedure Code. In deciding in a case like this how to exercise the power given him by the section to direct any person to abstain from a certain act "if he considers that such direction is likely to prevent or tends to prevent obstruction, annoyance or injury or risk of obstruction, annoyance or injury or a disturbance of the public tranquillity or a riot or an affray" the Magistrate must be governed largely, though not exclusively, by the opinion he forms as to the legal rights of the contending parties. He is not the proper judge of these rights, and all that he can do is, summarily and on materials which are necessarily imperfect, to form an opinion that one side or the other has made out a *prima facie* case of right and to give due weight to that opinion in deciding what order to pass. The effect, however, of the order which the Magistrate is empowered to pass by the section in the general interest is that for two months it becomes a punishable offence for the party to do an act which

(1) (1910) I.L.R., 34 Bom., 571.
(2) (1878) I.L.R., 2 Bom., 457.

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he may be in a position to establish his right to do before a competent tribunal. Further, the order may be extended by the Government, and, even if not extended, must necessarily form a precedent for the passing of a similar order whenever the circumstances recur.

In these circumstances, even if there were any rule of law prohibiting persons from establishing by suit their rights to use the road in a particular manner against those who challenge it unless they could show special damage, and in my opinion there is no such rule, I should still hold that the statutory interference under the order with the legal rights of the party without any adjudication upon them would of itself give him a cause of action in a civil court for the establishment of his right so as to prevent the order being continued by Government or renewed on a future occasion owing to a misapprehension of his rights if not so established. This would appear to be the result arrived in the recent decisions of the Court which are referred to in the Order of Reference, except in *W. Kalmatappa* v. *Joish Narayana Bhat*(1), which should be overruled, and also in *Mannada Mudali* v. *Nallaya Goundan*(2). In the earlier cases which are referred to in the order, the Court seems to have been hampered by the decision in *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga*(3), and to have avoided the difficulty by holding that in the particular case the illegal or improper order of the Magistrate constituted the cause of action. In some of the cases it is not easy to see wherein the illegality or impropriety consisted, and this consideration has been rightly discarded in later cases such as in *Mannada Mudali* v. *Nallaya Goundan*(2), which should, I think, be followed.

I would answer both questions in the affirmative.

AYLING, J.

AYLING, J.—I agree that both questions should be answered in the affirmative.

As stated in the order of reference, I regard the decision in *Baslingappa Parappa* v. *Dharmappa Basappa*(4), as salutary and convenient, and was only deterred from following it by the rulings of Divisional Benches of this Court (*e.g.*, in *Kandasami Mudali* v. *Subroya Mudali*(5), in which the decision in *Satku*

(1) (1917) 42 I.C., 337.
(2) (1909) I.L.R., 32 Mad., 527.
(3) (1878) I.L.R., 2 Bom., 457.
(4) (1910) I.L.R., 34 Bom., 571.
(5) (1909) I.L.R., 32 Mad., 478.

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Valad Kadir Sausare v. *Ibrahim Aga Valad Mirza Aga*(1), had been treated as barring suits to declare a right of way where no special damage or special cause of action was proved. Now that the matter has been referred to a Full Bench, I have no hesitation in adhering to the view taken in the later Bombay case.

The first question is really unnecessary if the second be answered as above; but I would only add that I fail to see why when a magisterial order purporting to be passed under section 144, Criminal Procedure Code, is alleged as the cause of action, it should make any difference whether the said order is *intra vires* or *ultra vires* of the Magistrate, who passed it. Its legality as distinguished from its expediency will ordinarily depend on considerations entirely dissociated from the civil rights of the parties affected. If it is held that an illegal order which may be disobeyed with impunity gives a right of action, all the more should a legal order, which cannot be contravened without a breach of the criminal law. If a legal order gives no cause of action, then the person injuriously affected will, in most cases, be without a legal remedy; for he could only secure special damage by disobeying the order and committing a criminal offence.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I am of the same opinion. I am satisfied after listening to the very full arguments of Mr. Ramachandra Ayyar that there should be no distinction between orders *intra vires* and *ultra vires* of the Magistrate with reference to a right of suit. It is practically offering a premium to break the law, if it is held that a party is not entitled to have recourse to a civil suit to establish his right after an adverse order against him by the Magistrate. I fail to see why the mistake of a Magistrate in clutching at jurisdiction or in passing an order which the law does not permit him to pass should place the party against whom it is made in a more advantageous position as regards civil remedy than the party against whom a Magistrate has acted within his powers, and has exercised his functions within the limits of law. In either case the party seeks the assistance of the Court on the ground that the order is wrong and deprives him of his rights; consequently, there can be no justification for the artificial distinction between illegal and legal orders.

The earlier cases which laid down that for an injury which is common to himself and to the rest of the public, the complaining

(1) (1878) I.L.R., 2 Bom., 45.

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plaintiff should allege special damage, proceeded on the ground that otherwise there would be multiplicity of suits. That seems to have been the basis of the English decisions on the point. But in England, there is apparently no procedure by which the Magistracy can prohibit particular classes, communities or bodies of persons from exercising civil rights. In my opinion, magisterial orders cause special injury to the persons prevented. Therefore the rule of English law is not strictly applicable in India. If I am right in this view, it would lead to no good to classify such orders into proper and improper ones and to invest the latter alone with the attributes of special injury. In both cases, the party is equally affected. In both cases, it is desirable that the party should have an opportunity of proving that his rights have been interfered with.

I am of opinion that *Mannada Mudali* v. *Nallaya Goundan*(1), *Muthayya* v. *Sadalaimuthu*(2), *Andi Moopan* v. *Muthuveera Reddy*(3), lay down the law correctly. In the Bombay High Court there are a number of cases which hold that an order issued by the Police would not furnish a cause of action, but that special damage should be proved. *Virupaxappa* v. *Sheriff Sab Mulla*(4), and *Dundappa Mullappa Sigandhi* v. *Secretary of State*(5), are inconsistent with *Baslingappa Parappa* v. *Dharmappa Basappa*(6). Although this latter decision is based on an alleged dictum in *Sadagopa Achariar* v. *Rama Row*(7), which is not to be found in it, the conclusion is that special injury need not be proved when a portion of the public sues to establish a right of possession over a public highway. In my opinion this view is right. The dicta in *Muthialu Chetti* v. *Bapun Saib*(8), *Kandasami Mudali* v. *Subroya Mudali*(9), and *Kalmatappa* v. *Joish Narayana Bhat*(10), that unless the order of the Magistrate is *ultra vires*, special damage should be proved, must be overruled.

My answer to both the questions is in the affirmative.

K.R.

(1) (1909) I.L.R., 32 Mad., 527.
(2) (1910) 20 M.L.J., 119.
(3) (1915) 29 M.L.J., 91.
(4) (1909) 11 Bom. L.R., 372.
(5) (1917) 37 I.C., 363.
(6) (1910) I.L.R., 34 Bom., 571.
(7) (1903) I.L.R., 26 Mad., 376.
(8) (1880) I.L.R., 2 Mad., 140.
(9) (1909) I.L.R., 32 Mad., 478.
(10) (1917) 42 I.C., 337.

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the landlord to show that it was either part of the consideration for which the land was originally leased or that it is supported by consideration subsequently.

We do not think that because a cess has been held to be not binding on one estate it follows that it is not binding on other estates or vice versa. Each case must depend on the facts and reported decisions are only useful in so far as they lay down general principles which guide Courts in coming to conclusions as to the validity or otherwise of any particular cess.

In the present case kanganam, kulavettu, melvaram urai, kudivaram urai and swatantram are set apart before division of the produce between the landlord and tenant. Kanganam as pointed out in *Arunachallam Chettiar* v. *Mangalam*(1) is clearly a cess which the landlord is entitled to levy as in cases of varam tenure he is interested in seeing that he gets his due share of the harvest. Kulavettu which is a cess for keeping the tanks in proper repair is for a purpose beneficial to the landlord and tenant and there is no reason why the cess should be disallowed. Reference was made by the respondent's vakil to *Sri Rajah Bommadevara Venkata Narasimha Naidu* v. *Ramamma*(2), but the case has no application to the facts of the present case as in that case the finding was that the tank fell into disrepair several years ago when the anicut system was introduced by the Government in the Kistna district. The zamindar did not repair the tank and the ryots derived no benefit in consideration of which the cess could be claimed. In the present case there is no allegation that tank water is not used by the respondent. Kudivaram urai and melvaram urai are in respect of the measurement of the melvaram and kudivaram respectively. It is not denied that measurement of the paddy is necessary to determine the landlord's and tenant's share.

As regards swatantram the cess is collected for payment to village artisans and servants and it is not shown that the tenants who have been paying this cess without any objection for several years receive no benefit. The cess was taken out of the gross produce before division and there is nothing either in the plaint or in the evidence adduced by the plaintiff to show that this cess is purely for the benefit of the landlord. In *Sree Sankarachari-*

(1) (1917) I.L.R., 40 Mad., 640.
(2) (1913) M.W.N., 551.

VADAMALAI THIRUVANATHA SEVUGA PANDIA THEVAR v. SANKARAMOORTHI NAIDU.

KUMARASWAMI SASTRI, J.

swamiar v. *Varada Pillai*(1), it has been held that a cess for payment to village artisans is lawful.

Turning to the cesses (kangovi, thrashing-ground rent and tiruppani) which in the patta granted to plaintiffs vendors are payable after division of the produce we have already disallowed kangovi. Tiruppani is cess collected for repairing temples. This cess has been held to be purely voluntary in *Siriparapu Ramanna* v. *Mallikarjuna Prasada Nayudu*(2), where the learned Judges (MUTTUSWAMI AYYAR and BEST, JJ.) observed:

"A duty to contribute to the expenses of a temple is not an ordinary incident of the relation of landlord and tenant nor has it any connexion with the jirayati tenure on which the ryot holds his land. *Primâ facie* the contribution is voluntary and unless the fee is shown to be a charge on the land it cannot be treated as a payment which the zamindar can legally compel the ryot to make."

A similar view was taken by BENSON and BHASHYAM AYYANGAR, JJ., in *Ramalingam Chettiar* v. *Ramasami Aiyar*(3).

As regards thrashing-ground rent, it is difficult to see why the cess should not be paid in cases where owing to the want of thrashing-floor belonging to the tenant the parties have to pay for using another's. Where however the tenant has a thrashing-floor the cess ought not to be levied.

We would modify the decree of the District Judge by allowing kanganam, kulavettu, melvaram urai, kudivaram urai, swatantram and thrashing-ground rent in cases where the tenant has no thrashing-floor. As regards the items which under the patta, Exhibit I, go to the ryot, the landlord does not dispute that the tenant is entitled to them. These items will also be included in the patta so far as wet land paying varam are concerned. The patta will issue in terms of Exhibit I with the above modifications so far as varam paying wet land are concerned. The decree of the District Judge disallowing cesses will stand as regards punjai land.

As the appellant has succeeded substantially and as the respondent came to Court alleging that no cesses were due, we direct the respondent to pay the appellant's costs in this and the lower Appellate Court.

K.R.

(1) (1904) I.L.R., 27 Mad., 332.
(2) (1894) I.L.R., 17 Mad., 43. (3) (1903) 13 M.L.J., 379.

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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.)

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

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.)
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Act XII of 1850 (Public Accountants' Default), with footnotes. Anna 1 p. 6. (Anna 1.)
Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. Anna 1 p. 9. (Anna 1.)
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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.)
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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.)
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Act XX of 1856 (Bengal Chaukidari), 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.)

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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. Pies 6. (Anna 1.)
Act I of 1859 (Indian Merchant Shipping), as modified up to 30th June 1905. As. 13. (As. 2.)
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.)
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Act III of 1864 (Foreigners), as modified up to 1st April 1915. As. 3 p. 6. (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.)
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Act III of 1867 (Public Gambling), as modified up to 1st January 1905. As. 4. (Anna 1.)
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III.—REPRINTS OF ACTS AND REGULATIONS, ETC.—*cont.*

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.)
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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.)
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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.)

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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. 2 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.)
Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. As. 8. (Anna 1.)

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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.)
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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.)
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Act XII of 1896 (Excise), as modified up to 1st March 1907. As. 8. (As. 2.)
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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.)
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Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. As. 2 p. 9. (Anna 1.)

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Act XVI of 1899 (Northern India Canal and Drainage), with footnotes. Anna 1. (Anna 1.)
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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.)
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Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st March 1909. As. 6 p. 6. (Anna 1.)
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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.)

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Act XXX of 1852 (Naturalization), as modified up to 1st December 1902. In Urdu. Pies 6. (Anna 1.)
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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 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.)

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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. 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 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. 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.)
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 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 1916. In Nagri. As 2 p. 6. (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.)

V.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—cont.

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.)
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.)

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

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 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.)

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

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.)
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.)

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 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.)
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.)
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APPEAL, RIGHT OF—*Letters Patent, clause* (15)—*Judgment—Order as to costs only, passed by a Judge of the High Court on its Original Side, whether a judgment—Judgment, interpretation of.*] An order as to costs, passed by a Judge of the High Court in the exercise of its original jurisdiction, is not the less a judgment within the meaning of clause (15) of the Letters Patent because it relates to costs only. *Tuljaram Row* v. *Alagappa Chettiar* (1912) I.L.R., 35 Mad., 1 (F.B.), followed.

Kulasekara Naicker v. *Jagadambal Ammal* (1919) I.L.R., 42 Mad. (F.B.), 352

BENAMIDAR, *suit on mortgage by, maintainability of—Real owner, whether a necessary party to.*] *Held* by the Full Bench, that a person who is not the real mortgagee but only a benamidar for him can institute a suit to enforce the mortgage and that the real mortgagee need not be a party. *Choudhri Gur Narayan* v. *Sheo Lal Singh* (1919) 36 M.L.J., 68 (P.C.); s.c. 46 I.A., 1, followed.

Vaitheswara Aiyer v. *Srinivasa Raghava Iyengar* (1919) I.L.R., 42 Mad., (F.B.) 348

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——SEC 115:—SEE ESTATES LAND ACT. 310
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ESTATES LAND ACT (MADRAS ACT I OF 1908), SECS. 131, 192 AND 205—*Civil Procedure Code (Act V of 1908), sec. 115—Application to Deputy Collector to set aside rent sale on the thirtieth day—Deputy Collector, absent on leave—Deposit made two days later—Sale set aside by Deputy Collector without notice to purchaser—Revision petitions to District Collector and Board of Revenue, dismissed—Revision petition to High Court, competency of—Discretion in exercise of revisional powers—Absence of notice before setting aside sale, effect of—General Clauses Act (X of 1897), sec. 10.*] An application to set aside a sale held for arrears of rent was made to the Deputy Collector under section 131 of the Madras Estates Land Act and the deposit therein required tendered on the last day allowed by that section; the Deputy Collector being absent on leave, the petitioner was asked by the clerk to come two days later, on which day the Deputy Collector received the deposit and set aside the sale without giving notice to the purchaser. The latter presented petitions to the District Collector and the Board of Revenue respectively to revise the order under section 205 of the Act; the petitions being dismissed, the purchaser filed a revision petition to the High Court. The respondent objected that no revision lay to the High Court, and that as the sale was properly set aside the High Court should not interfere in revision. *Held*, that the revision petition to the High Court was competent, because section 192 of the Madras Estates Land Act renders section 115 of the Civil Procedure Code applicable to all suits, appeals and other proceedings under the Act, even though section 205 thereof gave a power of revision to the Board of Revenue and the District Collector; but where the petitioner had previously applied to the revenue authorities and failed, the High Court would decline to exercise its discretionary power in revision, unless it was imperatively called upon to do so to prevent miscarriage of

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justice; that, as the deposit was not made within time owing to the absence of the Deputy Collector and not the default of the petitioner, it was competent to the former to receive the deposit on the next open day under general principles of law embodied in section 10 of the General Clauses Act, and set aside the sale; *Shooshee Bhushan Rudro* v. *Govind Chunder Roy* (1891) I.L.R., 18 Calc., 231, followed; that assuming that the failure to give notice to the purchaser vitiated the whole proceedings, the High Court will not exercise its revisional powers on that ground alone; and that the order setting aside the sale was proper as no valid objection was or could be raised by the petitioner even when opportunity was given to him.

Ramasami Goundan v. *Kali Goundan* ... ... (1919) I.L.R., 42 Mad., 310

ESTATES LAND ACT (MADRAS ACT I OF 1908), SECS. 153 AND 157—*Suit in Revenue Court to eject non-occupancy ryot of 'old waste' on expiry of registered lease for more than five years granted before the Estates Land Act—Jurisdiction—Mesne profits, jurisdiction of Revenue Court to grant.*] A suit is maintainable in a Revenue Court under sections 153 and 157 of Madras Estates Land Act to eject a non-occupancy ryot of 'old waste' on the expiry of the term of a registered lease for more than five years though granted before the commencement of the Estates Land Act; *Atchutaraju* v. *Rajah V. G. Krishnayachandralu Varu* (1915) I.L.R., 38 Mad, 193, not followed. A Revenue Court can award mesne profits against persons in unlawful possession of lands holding over beyond the period of their lease.

Jampana Somadu v. *Zamindar of Mirsapuram* ... (1919) I.L.R., 42 Mad., 315

EXECUTION—*Civil Procedure Code (Act V of 1908), sec. 49 and Order XXI, rule 2—Satisfaction of decree, not certified—Second execution of decree by assignee of decree-holder—Suit by judgment-debtor for damages against decree-holder and assignee, maintainability of.*] Even a decree which has once been satisfied can be executed so long as the satisfaction is not reported to and certified by the Court. A judgment-debtor who is obliged to satisfy such a decree a second time at the instance of an assignee of the decree-holder, has a cause of action for damages only as against the decree-holder but none against the assignee even though the assignee got the assignment with knowledge of satisfaction. *Viraraghava Reddi* v. *Subbakka* (1882) I.L.R., 5 Mad., 397, referred to. *Manmohan Karmokar* v. *Dwarak Nath Karmokar* (1911) 12 C.L.J., 312 and *Goono Monee Dossia* v. *Pran Kishore Dossee* (1870) 13 W.R., 69 (F.B.), distinguished.

Krishna Aiyar v. *Savurimuthu Pillai* ... ... (1919) I.L.R., 42 Mad., 338

GENERAL CLAUSES ACT (X OF 1897), SEC. 10:—*See* ESTATES LAND ACT 310

GUARDIANS AND WARDS ACT (VII of 1890), SECS. 34 AND 35—*Bonds given to Court by guardian and sureties—Court obligee under the bonds—Persons entitled to sue on the bonds—Breach of conditions of bond, when.*] Under section 34 of the Guardians and Wards Act (VII of 1890) it is the Court that is the obligee under the bonds given by the guardian and his sureties in respect of the management of a ward's estate and except under an assignment from Court under section 35 of the Act nobody else can sue on the bonds. The conditions of bonds given under section 34(*c*) and (*d*) of the Guardians and

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Wards Act and under Form No. 93 of Civil Rules of Practice, being to exhibit such accounts as may be directed by Court or pay such balance of the minor's moneys in the guardian's hands as the Court may direct, there is no right of suit as for a breach of the conditions of the bonds unless there is a preliminary order of the Court either to exhibit accounts or to pay any specified balance and a breach thereof. An assignment of the bonds by the Court without any such preliminary order, on the ground that there was a *prima facie* case of maladministration is invalid and does not give a right of suit on the bonds. *Obiter*.—The loss of the bond is no impediment to its assignment.

Krishna Chettiar v. *Venkatachellapathi Chettiar* ... (1919) I.L.R., 42 Mad., 302

HINDU LAW—*Will—Bequest to widow—Construction.*] Unless a grant expressly gives only a limited estate or unless there is any uncertainty or ambiguity in the grant as to the extent of interest conveyed, a grant to a Hindu female conveys an absolute estate and there is no presumption of law to the contrary, at least in this Presidency. On the occasion of adopting a son, a Mahratta Brahman of Tanjore executed a will in 1858 by which, after making some small gifts in favour of strangers, he made a grant "in inam" as follows:—"Out of the remaining property my adopted son shall be entitled to enjoy one half of the property. Out of the remaining half my two wives shall take half and half." *Held* that the wives took an absolute estate under the bequest. *Surajmani* v. *Rabi Nath Ojha* (1908) I.L.R., 30 All., 84 (P.C.), applied. *Moulvie Mahomed Shumsool Hooda* v. *Shewakaram* (1874) 2 I.A. 7, explained.

Ramachandra Rao v. *Ramachandra Rao* ... ... (1919) I.L.R., 42 Mad., 283

LETTERS PATENT, CLAUSE 15:—*See* APPEAL 352

LIMITATION ACT (IX OF 1908), SEC. 15—*Suits against insolvent—Effect of adjudication—Subsequent annulment—Saving of limitation for suits—Adjudication, whether absolute stay of suits—Obtaining of leave to sue from Court—Condition precedent to sue, if sufficient to save limitation—Provincial Insolvency Act (III of 1907), sec. 16, cl. 2.*] In computing the period of limitation for suits instituted against a person after an order adjudicating him an insolvent was annulled, section 15 of the Limitation Act does not permit the deduction of time during which the order was in force, as, under section 16, clause 2, of the Provincial Insolvency Act, an order of adjudication does not effect an absolute stay of suits against the insolvent, but only makes it necessary that leave to sue should be obtained from Court before a suit could be filed against him while the adjudication was in force. *Soni Ram* v. *Kanhaiya Lal* (1913) I.L.R., 35 All., 227 (P.C.), and *Doraisami Padayachi* v. *Vaidyalinga Padayachi* (1917) 33 M.L.J., 46, referred to. *Shunmugam* v. *Moideen* (1885) I.L.R., 8 Mad., 229, distinguished.

Ramaswami Pillai v. *Govindasami Naicker* ... (1919) I.L.R., 42 Mad., 319

LOCAL BOARDS ACT (V OF 1884), SEC. 95—*Taluk Board—Planting of trees along a road—Statutory duty—Branches of trees overhanging plaintiff's land—Omission to remove, if actionable—Non-feasance—Absence of negligence—Cause of action—English and Indian Law.*] Where a Taluk Board, acting under section 95 of the Local Boards Act (V of 1884), planted, on the sides of a

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road certain trees, whose branches spread over the land of the plaintiff, who thereupon sued for an injunction directing the Board to lop off the branches. *Held*, that the suit was not sustainable, as (1) the Taluk Board in the discharge of its statutory duties had not acted carelessly or negligently, and (2) the omission to remove the branches, even if it ought to have been done, is only a *non-feasance* for which no action at the instance of a private individual would lie. English and Indian Cases on the subject, reviewed.

Krishnamoorthi Aiyar v. *The Taluk Board of Mayavaram* ... (1919) I.L.R., 42 Mad., 331

MALABAR LAW—*Partition—Tarwad—Division by tavazhis—Right of minor members to upset partition—Division* per stirpes *and not* per capita, *whether sufficient ground—Authority in favour of division* per stirpes *or* per capita, *preponderance of.*] Members of a Malabar tarwad, who were minors when a partition was made with the consent of all the adult members at the time, cannot upset the partition on the ground that the division was *per stirpes*, i.e., by tavazhis, and not *per capita*. *Sulaiman* v. *Biyaththumma* (1917) 32 M.L.J., 187 (P.C.), and *Veluthakkal Chirudevi* v. *Veluthakkal Tarwad Karnavan* (1916) 31 M.L.J., 879, referred to.

Narainikutti v. *Achuthankutti Nair* ... ... (1919) I.L.R., 42 Mad., 292

MESNE PROFITS :—*See* ESTATES LAND ACT 315

MULGENI LEASE—*Death of mulgeni tenant without heirs—No escheat of tenant's rights to Government—Lapse of tenant's rights to lessor.*] The rights of a *mulgenidar* do not escheat to Government on the death of the last owner dying without heirs, but revert to *mulgar* from whom the *mulgeni* was acquired. A *mulgeni* tenure differs in its incidents from an ordinary permanent lease. *Sonet Kooer* v. *Himmut Bahadoor* (1876) I.L.R., 1 Calc., 391 (P.C.), distinguished.

Secretary of State for India v. *Shitaramappa* ... (1919) I.L.R., 42 Mad., 327

PARTITION, SUIT FOR—*Preliminary decree—Mesne profits—Omission to direct inquiry as to—Final decree, whether can award or direct inquiry—Civil Procedure Code (Act V of 1908), O. XX, rr. 12 and 20.*] Where a preliminary decree in a partition suit has either intentionally or inadvertently omitted to direct an inquiry into mesne profits, the final decree cannot award mesne profits or direct an inquiry regarding the same. Rules 12 and 18 of Order XX of the Civil Procedure Code, compared. *Venkamamidi Mahalakshmamma* v. *Venkamamidi Rajamma* (1918) 43 I.C., 458, and *Maimod Rowther* v. *Duraisami Naicker* (A.A.O. 277 of 1917—unreported), dissented from. *Duraisami* v. *Subramania* (1918) 41 Mad., 188 (F.B.), referred to.

Ghulusam Bivi v. *Ahamadsa Rowther* ... ... (1919) I.L.R., 42 Mad., 296

PARTITION :—*See* MALABAR LAW 292

PROVINCIAL INSOLVENCY ACT (III OF 1907), SEC. 36—*'Void' in, meaning of—Exclusive jurisdiction of Insolvency Court to avoid transfers falling under the section.*] A transfer of property falling under section 36 of the Provincial Insolvency Act remains valid unless and until set aside at the instance of the Official Receiver. The word 'void' in that section means only 'voidable'. It is only the Official Receiver and not anybody else, e.g., a purchaser from him, that can get such a transfer set aside. After an adjudication in insolvency the only Court that has jurisdiction to annul a transfer voidable under the Law of Insolvency is the Court of Insolvency and no other Court can adjudicate upon the voidable character of such a transfer in any other proceeding, e.g., a suit, either at the instance of a plaintiff or of a defendant.

Mariappa Pillai v. *Raman Chettiyar* ... ... (1919) I.L.R., 42 Mad., 322

PROVINCIAL INSOLVENCY ACT (III OF 1907), SEC. 16, CL. 2 :—*See* LIMITATION ACT 319

PUBLIC TRUST—*Co-trustees—Act of one of two trustees without consent of the other—Grant of mortgage—Transaction, whether valid—Rule of act of majority of trustees, applicability of, to cases of two co-trustees.*] One of two trustees of a public trust cannot grant a mortgage or effect any similar transaction in respect of the trust properties so as to bind the trust, without the consent of the other trustee even though the latter, on consultation, wrongly refuses his consent. The rule that the act of a majority of the trustees is valid, provided they gave proper opportunity to the others to consider the advisability of the act in question, does not apply to cases where there are only two trustees, as one of them alone cannot constitute a majority. *Savitri Antarjanam* v. *Raman Nambudri* (1901) I.L.R., 24 Mad., 296 and *Wilkinson* v. *Malin* (1832) 2 C. & J., 636, followed.

Cheeru v. *Narayanan Nambudiri* ... ... (1919) I.L.R., 42 Mad., 335

TRUSTS—*Acts of one of two co-trustees, validity of* :—*See* PUBLIC TRUST 335

APPELLATE CIVIL.

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

1918, October 8.

RAMACHANDRA RAO (FIRST DEFENDANT), APPELLANT,

v.

RAMACHANDRA RAO AND FIVE OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 5), RESPONDENTS.*

Hindu Law—Will—Bequest to a widow—Construction.

Unless a grant expressly gives only a limited estate or unless there is any uncertainty or ambiguity in the grant as to the extent of interest conveyed, a grant to a Hindu female conveys an absolute estate and there is no presumption of law to the contrary, at least in this Presidency.

On the occasion of adopting a son, a Mahratta Brahman of Tanjore executed a will in 1858 by which, after making some small gifts in favour of strangers, he made a grant "in inam" as follows:—"Out of the remaining property my adopted son shall be entitled to enjoy one half of the property. Out of the remaining half, my two wives shall take half and half."

Held that the wives took an absolute estate under the bequest.

Surajmani v. *Rabi Nath Ojha* (1908) I.L.R., 30 All., 84 (P.C.), applied.

Moulvie Mahomed Shumsool Hooda v. *Shewakaram* (1874) 2 I.A. 7, explained.

APPEAL against the decree of V. S. KRISHNA AYYAR, the Additional Temporary Subordinate Judge of Tanjore, in Original Suit No. 23 of 1917.

The plaintiffs in this suit sued to recover certain immovable properties from the defendants under the following circumstances:—One Ramojee Bavajee, who was the owner of all the suit properties, died in 1858 and some time before his death he adopted the father of the plaintiffs. Contemporaneously with the said adoption he executed a deed of settlement (will), by which after granting certain legacies in inam, to strangers, he granted '*in inam*' his remaining properties in the following words:—

"Out of the remaining property after deducting the above, my adopted son, to whom I have given the name of Bavajee Pandit, shall be entitled to, and enjoy one half of, the property. Out of the remaining half of the property these two persons, namely, my senior

* Appeal No. 1 of 1918.

RAMA-CHANDRA RAO v. RAMA-CHANDRA RAO.

wife Sowbhagiavathi Kamakshi and junior wife Sowbhagiavathi Thulja Boyee shall take half and half. In this manner have I made this deed of arrangement with the knowledge of many people. Matters shall therefore be conducted as aforesaid. Until the aforesaid adopted son attains proper age, he shall be under the protection of my senior wife."

The said Thulja Boyee died in 1916; the plaintiffs alleged that the properties given to her by the will were only for her maintenance and that she had no power to bequeath those properties as she had done in favour of the first defendant. The plaintiffs further alleged that when about two acres of the land held by the said Thulja Boyee were acquired by Government under the Land Acquisition Act in the year 1895, the High Court, in Appeal No. 74 of 1896 filed by the plaintiffs' father, held (see Exhibit A) that Thulja Boyee had only a life-estate in the lands and that she could be given only the usufruct of the compensation awarded and that that decision was *res judicata*. The first defendant and other defendants who held properties under him pleaded *inter alia* that the settlement of 1858 conferred on Thulja Boyee an absolute estate and that the decision in the Land Acquisition proceedings in respect of a small portion of land was not *res judicata*, as regards the suit lands. The Subordinate Judge held that the previous decision of the High Court was not *res judicata* except with regard to the two acres of land but that the settlement of 1858 conferred only a life-estate on Thulja Boyee. He accordingly allowed the suit. The first defendant preferred this Appeal.

T. R. Ramachandra Ayyar, (with *T. S. Narayana Ayyar*) for appellant.—The settlement of 1858 gives an absolute estate to Thulja Boyee. Even a female donee can take an absolute estate unless there is indication in the grant that the estate given is a limited one. That is the modern view and there is no presumption that she takes only a limited estate. *Namasivayam Pillai* v. *Kuthalingam Pillai*(1), *Sambasiva Ayyar* v. *Venkateswara Ayyar*(2), *Surajmani* v. *Rabi Nath Ojha*(3), and *Kollany Kooer* v. *Luchmee Pershad*(4). The words used in this deed are "I give as *inam*." 'Inam' means an absolute gift. He

(1) (1917) M.W.N., 78 at p. 87.
(2) (1908) I.L.R., 31 Mad., 179.
(3) (1908) I.L.R., 30 All., 84 at 88 (P.C.).
(4) (1875) 24 W.R., 395.

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distinguished *Radha Prasad Mullick* v. *Ranee Mani Dassee*(1), and referred to *Ratna Chetti* v. *Narayanaswami Chettiar*(2), *Ramanuja Aiyangar* v. *Satagopachariar*(3) and *Muthukaruppa Pillai* v. *Sellathammal* (4).

The Hon'ble *the Advocate-General* (*S. Srinivasa Ayyangar*) (with *T. R. Venkatarama Sastri* and *K. Rajah Ayyar*) for first and second respondents.—In these matters the personal law governing a Hindu widow or a Hindu woman ordinarily governs. That law gives them only a life-estate. Unless there are words conferring an absolute estate, the presumption is that only a life-estate is given. If the modern tendency is to give an absolute estate, it is all the more reasonable to see whether in the case of an old settlement like this there are words giving an absolute estate. The intention of the testator of those days must be considered; *Moulvie Mahomed Shumsool Hooda* v. *Shewakaram*(5). The rule generally is that gifts to females who remain in the family are to be construed only as giving life-estate, while gifts to females who go out of the family or who are strangers can be construed as conferring absolute estates in the absence of words to the contrary. This principle will explain all the cases quoted. Reference was made to *Manicka Mudali* v. *Muthachi Kavandan*(6), *Ratna Chetti* v. *Narayanaswami Chettiar*(2) and *Dhanapala Chetti* v. *Anantha Chetti*(7). The leading case in this High Court, viz., *Bhujanga* v. *Ramayamma*(8) which was followed by *Nunnu Meah* v. *Krishnaswami*(9) has never been dissented from. These two cases also hold that the donees (females) cannot dispose of the properties by will to others. He referred to *Radha Prasad Mullick* v. *Ranee Mani Dassee*(1). He distinguished *Surajmani* v. *Rabi Nath Ojha*(10) and *Lalit Mohun Singh Roy* v. *Chukkum Lal Roy*(11) as cases turning upon the use of the technical word 'malik' (owner). 'Inam' does not mean gift in perpetuity. We must see whether the operative portion of the will uses words of inheritance; *Brij Lal* v. *Suraj*

(1) (1908) I.L.R., 35 Calc., 896 (P.C.)
(2) (1914) 26 M.L.J., 616.
(3) (1914) 27 M.L.J., 329.
(4) (1916) I.L.R., 39 Mad., 298.
(5) (1874) 2 I.A., 7 at p. 14.
(6) (1915) 18 M.L.T., 346.
(7) (1913) 24 M.L.J., 418.
(8) (1884) I.L.R., 7 Mad., 387.
(9) (1891) I.L.R., 14 Mad., 274.
(10) (1908) I.L.R., 30 All., 84 (P.C.).
(11) (1897) I.L.R., 24 Calc., 834 (P.C.).

RAMA-CHANDRA RAO v. RAMA-CHANDRA RAO.

Bikram Singh(1), *S. Soorjeemoney Dossee* v. *D. Mullick and others*(2) and *Radha Prasad Mullick* v. *Ranee Mani Dassee*(3).

All the Bengal cases are cases under the Indian Succession Act which gives an absolute estate. In *Hirabai* v. *Lakshmibai*(4) which was a case, exactly like this in its facts, of a testator making an adoption and bequeathing his property between the adopted son and his widow, it was held that the widow took only a life-estate. Reference was made to *Koonjbehari Dhur* v. *Premchand Dutt*(5), *Jamna Das* v. *Ramautar Pande*(6), *Atul Krishna Sircar* v. *Sanyasi Churn Sircar*(7) and *Fateh Chand* v. *Rup Chand*(8).

T. R. Ramachandra Ayyar in reply.—*Moulvie Mahomed Shumsool Hooda* v. *Shewakaram*(9) was prior to and is referred to in *Kollany Kooer* v. *Luchmee Pershad*(10), which is approved in *Surajmani* v. *Rabi Nath Ojha*(11) and hence *Surajmani* v. *Rabi Nath Ojha*(11) must be the governing decision.

WALLIS, C.J.

WALLIS, C.J.—Construing this very deed in Appeal No. 74 of 1896, COLLINS, C.J., and SHEPHERD, J., observed:

"There being no indication of intention to give a larger estate, we must assume that the husband intended that a widow's estate only should pass."

The trend of the later decisions in this Court beginning with *Sambasiva Ayyar* v. *Venkateswara Ayyar*(12) is against making any such assumption, and they appear to be supported by the judgment of the Judicial Committee in *Surajmani* v. *Rabi Nath Ojha*(11), which cites with approval a ruling of MITTER, J., in *Kollany Kooer* v. *Luchmee Pershad*(10) that there is no presumption that a gift to a widow means a limited gift.

We must, I think, take it to be now settled, at any rate so far as this Court is concerned, and until the decisions to which I have referred are overruled by higher authority, that the rule laid down by the Judicial Committee in *Moulvie Mahomed*

(1) (1912) I.L.R., 34 All., 405 (P.C.).
(2) (1857) 6 M.I.A., 526. (3) (1906) I.L.R., 33 Calc., 947 (F.B.).
(4) (1886) I.L.R., 11 Bom., 573 at p. 578
(5) (1880) I.L.R., 5 Calc., 684. (6) (1905) I.L.R., 27 All., 364.
(7) (1905) I.L.R., 32 Calc., 1051. (8) (1916) I.L.R., 38 All., 446 (P.C.).
(9) (1874) 2 I.A., 7. (10) (1875) 24 W.R., 395.
(11) (1908) I.L.R., 30 All., 84 at p. 88 (P.C.)
(12) (1908) I.L.R., 31 Mad., 179

RAMA-CHANDRA RAO v. RAMA-CHANDRA RAO

WALLIS, C.J.

Shumsool Hooda v. *Shewakaram*(1) is a rule of construction to be applied only when there is some uncertainty or ambiguity in the language of the instrument before the Court.

The question then is, is there anything in the terms of Exhibit III which warrants the application of the rule. The opening recital is to the effect that the settlor made "the following gifts (inams)" of the properties belonging to him on the occasion of his adopting as his son a boy of ten years of age. There is first a gift of chattels and money to the maternal nephew, then directions that certain allowances of paddy should continue to be paid to two descendants of his maternal uncles, that six Brahmans should be fed daily from the income of certain lands, and that a saffron allowance of Rs. 25 should continue to be paid to his sister. Then comes the disposition in favour of the widows. Of the remaining property the adopted boy

"is to be entitled to and enjoy one half. Of the remaining half, these two persons, my senior wife Sowbhaghiavati Kamakshi and my junior wife Sowbhaghiavati Thulja, shall each take a half."

On the language of this instrument, I have come to the conclusion that there is no sufficient reason for cutting down the disposition in favour of the widows. *Hirabi* v. *Lakshmibai*(2) was decided on the view that there is a general presumption that a gift to a woman is only of a woman's estate, though on the language of that document, which was different from the language here, the rule of construction laid down in *Moulvie Mahomed Shumsool Hooda* v. *Shewakaram*(1) may have been applicable as was held, though with a different result, in *Seshayya* v. *Narasamma*(3). Sir CHARLES SARGENT, however, in the course of his judgment spoke of

"the extreme improbability that having adopted a son, the testator should have intended to give more than a life-estate, or, at the utmost, a widow's estate to his wife."

As I stated at the hearing, my very general impression derived from the cases which have come before me is that there is no such extreme improbability in this Presidency and my learned brother, whose opinion on such a point is entitled to

(1) (1874) 2 I.A., 7. (2) (1886) I.L.R., 11 Bom., 573.
(3) (1899) I.L.R., 22 Mad., 357.

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much greater weight, is of the same opinion. I concur in the order proposed.

SESHAGIRI AYYAR, J.—I entirely agree. The suit is to recover possession of properties which were last in the enjoyment of one Thulja Boyee. Thulja Boyee's husband, Bamojee Bavajee, adopted plaintiff's father Bavajee. He executed Exhibit III on the 6th of August 1858 by which he settled one-half of his properties upon his adopted son and gave the other half to his two wives. Thulja Boyee, the junior wife, took possession of a fourth share under that settlement. The defendant claims under her will.

The points for consideration are whether Thulja Boyee took an absolute estate under Exhibit III and whether she was competent to dispose of the property by a will.

I shall first deal with a few decisions of the Judicial Committee which were quoted as indicating the principles on which an instrument like the present should be construed. The learned Advocate-General relied upon *Moulvie Mahomed Shumsool Hooda* v. *Shewakaram*(1) and *Radha Prasad Mullick* v. *Ranee Mani Dassee*(2). Mr. Ramachandra Ayyar quoted *Surajmani* v. *Rabi Nath Ojha*(3). In the first two cases the facts were almost identical. In both of them the father gave properties to his daughter or daughters and their children. In both, the Judicial Committee held that the daughter or daughters took only a limited estate, and pointed out that in construing wills of Hindus, their ordinary notions as to the devolution of property may be taken into account. In these cases it was clear that the daughters and their children could not have been regarded as tenants-in-common, because the children were not mentioned by name and it was as a class that they were referred to. The question therefore was whether the words 'and their children' should be regarded as mere surplusage or whether they should be referred to to ascertain the intention of the donor. Their Lordships held that ordinarily a Hindu would desire that his properties should remain in the possession of his descendants, and that consequently the donor could not have intended to give

(1) (1874) 2 I.A., 7 at p. 14. (2) (1908) I.L.R., 35 Calc., 896 (P.C.)
(3) (1908) I.L.R., 30 All., 84 (P.C.).

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absolute powers of disposition to the daughters. I do not think that these two judgments are authorities for the proposition that in all cases where gifts are made to females, a Hindu must be deemd to have given them only an estate for life. On the other hand, the decision in *Surajmani* v. *Rabi Nath Ojha* (1) relied on for the appellant shows that, in the opinion of their Lordships, no difference should be made between a male and a female, provided the words of gift are sufficiently clear to convey property. They quoted with approval the dictum of MITTER, J., in *Kollany Kooer* v. *Luchmee Pershad*(2) wherein the learned Judge stated:

"We must hold that the gift in question was an absolute gift, unless it can be shown that by the Hindu Law a gift to a female means a limited gift or carries with it the effect of creating an estate similar to the 'widow's estate' under the law of inheritance. I am not aware of any such provision in the Hindu Law nor have we been referred to any authority in support of it."

There can be no doubt that the Hindu Law does not enunciate that women as donees can only take an estate for life. The Judicial Committee say at the end of page 89:

"Nothing has been found in the context here or the surrounding circumstances or is relied upon by the respondents but the fact that the donee is a woman and a widow, which was expressly decided in the last mentioned case not to suffice."

The case referred to is *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*(3). If we remember that Mr. Justice MITTER's decision in *Kollany Kooer* v. *Luchmee Persad*(2) was given after examining at some length the dictum of the Judicial Committee in *Moulvie Mahomed Shumsool Hooda* v. *Shewakaram*(4), it is clear that their Lordships advisedly approved the principle enunciated by MITTER, J. In recent years there has been practical unanimity in Madras as to the construction to be placed upon similar documents. The first decision was in *Sambasiva Ayyar* v. *Venkateswara Ayyar*(5), which was contemporaneous with *Surajmani* v. *Rabi Nath Ojha*(1); *Venkatarazu* v. *Kotayya*(6), *Bodi Muthayya* v. *Kavari Kothandaramayya*(7), *Ratna Chetty* v. *Narayanaswami Chettiar*(8), *Ramanuja Aiyangar* v.

(1) (1908) I.L.R., 30 All., 84 (P.C.). (2) (1875) 24 W.R., 395.
(3) (1897) I.L.R., 24 Calc., 834 (P.C.). (4) (1874) 2 I.A., 7.
(5) (1908) I.L.R., 31 Mad., 179. (6) (1913) 23 M.L.J., 223.
(7) (1914) M.W.N., 387. (8) (1914) 26 M.L.J., 616.

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Sadagopachariar(1) and *Namasivayam Pillai* v. *Kuthalingam Pillai*(2) have decided that the sex of the donee is not a ground for cutting down an otherwise full estate.

The learned Advocate-General relied upon some decisions of the other High Courts. Most of them were earlier than *Surajmani* v. *Rabi Nath Ojha*(3), and I do not think it necessary to examine them at any length. I would only say with reference to the observations of Sir CHARLES SARGENT, in *Hirabai* v. *Lakshmibai*(4), that at any rate, so far as the Southern Presidency is concerned, there is nothing improbable in a Hindu giving an absolute estate to his wife when he directs an adoption to be made to him. Cases have not infrequently come before the Courts in which, in order to avoid possible conflicts between an adopted son and his widow, a Hindu has been found to give a portion of his property absolutely to his widow and the other portion to his adopted son.

In deducing a rule of construction, a few considerations should be borne in mind. Section 8 of the Transfer of Property Act lays down :—

"Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferror is capable of passing in the property or in the legal incidents thereof."

Therefore, unless there is an expressed or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted. The Judicial Committee in *Tagore* v. *Tagore*(5) recognized this principle. Consequently, if the words employed are clear and unambiguous, no matter who the donee is, whether a male or a female, the language of the gift must be given effect to. This is what was laid down in *Surajmani* v. *Rabi Nath Ojha*(3). But there may be cases in which it may be necessary, owing to the language employed not being clear and precise or being superfluous, to find out the intention of the donor. In such cases as the learned Advocate-General contended, the personal law of the donee may be taken into account. That is to say, the ordinary rule of inheritance applicable to him or her may be called

(1) (1914) 27 M.L.J., 329. (2) (1917) M.W.N., 78.
(3) (1908) I.L.R., 30 All., 84 (P.C.). (4) (1886) I.L.R., 11 Bom., 573.
(5) (1872) L.R., I.A., Sup. Vol., 47; s.c., 9 B.L.R., 377.

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in aid. This is not a rule of presumption so much as it is one for gathering the intention of the donor. Broadly speaking, it may be said that if the language of the instrument is capable of conferring an estate of inheritance, considerations regarding the sex of the donee should be discarded. Where the language is ambiguous, then recourse can be had to the ordinary notions of Hindus as a rule of construction in finding out what the intention of the donor was.

Now I shall turn to Exhibit III and see whether, in the light of the above discussion, the document confers only a life-estate upon Thulja Boyee. It was not seriously argued that there is any material difference between the words employed in the case of the adopted son and the words employed in the case of the two wives. Nor was it argued that the words employed in the case of the adopted son were not capable of conveying to him absolute rights in the property. I therefore fail to see why a distinction should be made between the two classes of donations. Further the preamble of the deed says: "I am giving these properties as *Inam*." The donor was a Mahratta Brahman, who lived in Tanjore and the document was written in Mahratti. Wilson in his Glossary says about the word *Inam*—

"In India and especially in the South and amongst the Mahrattas, the term was especially applied to grants of land rent free, and in hereditary and perpetual occupation."

In another dictionary by a Mahratta scholar the word *Inam* is defined as meaning "a grant in perpetuity without conditions". These definitions support the conclusions at which I have arrived. In my opinion the gift to Thula Boyee was an absolute one. There are certain legacies which have been directed to be paid out of the estate. As they are in terms only for life, the main dispositions are not affected by these life grants.

It was next argued by the learned Advocate-General that even supposing that it was an absolute grant to Thulja Boyee, she was not competent to dispose of the property by will. He relied upon *Bhujanga* v *Ramayamma*(1), and *Nannu Meah* v. *Krishnaswami*(2). At the same time, he frankly admitted that the two decisions are inconsistent with the conclusions of the

(1) (1884) I.L.R., 7 Mad., 387. (2) (1891) I.L.R., 14 Mad., 274.

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Judicial Committee in *Surajmani* v. *Rabi Nath Ojha*(1), where one of the widows, who had acquired her property under a deed of gift from her husband, disposed of it by a testamentary instrument. Their Lordships upheld the will of the Hindu widow. Reference may also be made to *Fateh Chand* v. *Rup Chand*(2), where it was held that a widow could dispose of by will property which had come to her under a deed of gift. I am unable to find any valid reason for the view that properties in which a Hindu widow has an absolute estate cannot be disposed of by her by a testamentary instrument. These two Madras decisions must be deemed to have been overruled by *Surajmani* v. *Rabi Nath Ojha*(1), and *Fateh Chand* v. *Rup Chand*(2). A portion of the property in suit is governed by the decision of this Court (*vide* Exhibit A). To that extent, the defendants' claim is barred by *res judicata*. The decree of the Subordinate Judge must be reversed and the suit should be dismissed with costs except in respect of the property which was the subject matter of the suit under Exhibit A. The Memorandum of Objections is also dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Spencer.

1918, October 9.

NANIKUTTI *alias* NARAINIKUTTI AMMA AND THREE OTHERS (PLAINTIFFS), APPELLANTS,

v.

ACHUTHANKUTTI NAIR AND EIGHTEEN OTHERS (DEFENDANTS), RESPONDENTS.*

Malabar Law—Partition—Tarwad—Division by tavazhis—Right of minor members to upset partition—Division per stirpes *and not per* capita, *whether sufficient ground—Authority in favour of division per* stirpes *or per* capita, *preponderance of.*

Members of a Malabar tarwad, who were minors when a partition was made with the consent of all the adult members at the time, cannot upset the

(1) (1908) I.L.R., 30 All., 84 (P.C.). (2) (1916) I.L.R., 38 All., 446 (P.C.).

* Second Appeal No. 1266 of 1917.

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partition on the ground that the division was *per stirpes*, i.e., by tavazhis, and not *per capita*.

Sulaiman v. *Biyaththumma* (1917) 32 M.L.J., 137 (P.C.), and *Veluthakkal Chirudevi* v. *Veluthakkal Tarwad Karnavan* (1916) 31 M.L.J., 879, referred to.

SECOND APPEAL against the decree of A. NARAYANA NAMBIYAR, the Subordinate Judge of Palghat at Calicut, in Appeal Suit No. 784 of 1914 preferred against the decree of the District Munsif of Alattur, in Original Suit No. 45 of 1913.

This suit was brought by certain members of a Malabar tarwad to set aside two partition deeds (Exhibits B and C) executed by the then adult members of the tarwad in respect of different sets of properties. It was alleged that the plaintiffs were minors at the time of the partition deeds and that the deeds were invalid on account of mistake, fraud and illegality and the plaintiffs prayed that a re-partition should be made of all the properties belonging to the family. The material defences were that the suit was bad for misjoinder of causes of action in respect of the two partition deeds, and that there was no mistake, fraud or illegality in the partition deeds. The District Munsif who tried the suit modified the partition deeds in some respects and allowed them to stand in other respects. Both sides appealed to the Subordinate Judge, who dismissed the whole suit holding that the suit was bad for misjoinder of causes of action and also that there was no legal consent to partition apart from allotment of shares and that therefore the suit for partition would not lie; he further held that Exhibit B was a valid document, that the objections urged against Exhibit C were unfounded and were not urged before him, and that the partitions were valid and that the suit should be dismissed. Against the decree of the Subordinate Judge the plaintiffs preferred this Second Appeal.

C. Madhavan Nayar for the appellants.

C. V. Anantakrishna Ayyar for the eighteenth and nineteenth respondents.

T. Eroman Unni for the respondents.

The JUDGMENT of the Court was delivered by

SPENCER, J.

SPENCER, J.—In view of the findings of the lower Appellate Court in these cases, Mr. C. Madhavan Nayar, who appears for the appellants, has only questioned the decision as regards the partition deed, Exhibit C. This raises a question of Malabar

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Law of some importance on which we have derived much assistance from his argument, and those of Mr. K. P. M. Menon and Mr. C. V. Anantakrishna Ayyar for various respondents. The division under Exhibit C is a division of the tarwad properties *per stirpes*, that is to say, allotting an equal share to each *stirps* or tavazhi. It is of course well settled in Malabar that there can be no partition at all except by the consent of all the adult members. As regards the minor members of the tarwad, it was observed by SANKARAN NAYAR, J., in *Veluthakkal Chirudevi* v. *Veluthakkal Tarwad Karnavan*(1):

"Such a partition would ordinarily be binding on the minors, but if on attaining majority they are able to show that they have been prejudiced, that partition could be reopened so far as they are concerned, and they would be awarded the share which should have been set apart for them; but subject to this the partition is final as between those who were parties to it."

This appears to be an application of the similar principle which has been applied with regard to partitions on the East Coast. As to such partitions Mr. Anantakrishna Ayyar has referred us to the decision of SRINIVASA AYYANGAR, J., in *Yechuri Ramamurthi* v. *Yechuri Ramamma*(2) where it was pointed out that partitions effected by the adult members of the family are binding on the minor members, in the absence of negligence or fraud.

The only question then is whether this partition which is by consent can be upset at the instance of certain members of the tarwad who were minors on the ground that the division was *per stirpes* and not *per capita*. Now the authorities to which Mr. Anantakrishna Ayyar has called our attention show conclusively that partition *per stirpes*, or, what comes to the same thing, partition *by tavazhis*, has, to say the least, a greater body of authority in its favour than partition *per capita*. He has referred us to Strange's Manual of Hindu Law, section 389, where it is said that where such divisions are made, they would naturally be by tavazhis. Mr. Ormsby, who was Chief Justice of Travancore, in his book on Marumakkattayam Law, says at page 2, paragraph 4:

"Where division takes place it will usually be according to the Taivaries, or number of daughters of the original ancestress. Each

(1) (1916) 31 M.L.J., 879 at 881. (2) (1916) 30 M.L.J., 308.

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Taivari may similarly be subdivided, should the members consent thereto, and so on until individual proprietorship is arrived at. I am not aware that this rule has ever been questioned."

The fullest discussion of the question is to be found in Dr. Pandalai's Marumakkattayam Law, 1914, page 146 (which was not referred to before us) where the same result is arrived at, and several decisions of the Travancore High Court are referred to. In a recent case which came before the Privy Council, *Sulaiman* v. *Biyaththumma*(1), their Lordships alluded at page 141 to this method of division *by tavazhis* as the proper mode of division. They say that this division

"was merely an application of the rule that division for the purpose of partition is *stirpital*, though as between the members of any one class it is *capital*."

Mr. Madhavan Nayar explained this by saying that it only meant that divisions should be by tavazhis, but did not lay down that each tavazhi should have an equal share. But a division *per stirpes* which gave each stirps an unequal share depending on the number of members in it would be very like a division *per capita* and was not, we think, what their Lordships intended. This division by Exhibit C has been made in what appears upon authority to be the more approved form, and therefore we think that the plaintiffs can have no right to question a partition effected in this manner.

Further we have to bear in mind that a partition in Malabar depends upon the consent of all parties and if we were to uphold the plaintiffs' contention, the only result would be to set this partition aside and to restore the original state of unity, because division *per capita* would in this case be without the consent of all the adult members. It appears that with regard to some of the property of this family, it was divided *per capita* by Exhibit B. That division is not attacked in the present case and we have not to consider it. What is contended is that the partition under Exhibit C should also have been *per capita* and should be upset because it is *per stirpes*. We are clearly of opinion that there is no ground for this contention.

Therefore the Appeal fails and must be dismissed with costs.

K.R.

(1) (1917) 32 M.L.J., 137 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Krishnan.

1918, October 17.

GHULUSAM BIVI (TENTH DEFENDANT), APPELLANT,

v.

AHAMADSA ROWTHER AND ELEVEN OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 4, 5 TO 7, 9 AND LEGAL REPRESENTATIVE OF EIGHTH DEFENDANT), RESPONDENTS.*

Partition, suit for—Preliminary decree—Mesne profits—Omission to direct inquiry as to—Final decree, whether can award or direct inquiry—Civil Procedure Code (Act V of 1908), O. XX, rr. 12 and 20.

Where a preliminary decree in a partition suit has either intentionally or inadvertently omitted to direct an inquiry into mesne profits, the final decree cannot award mesne profits or direct an inquiry regarding the same.

Rules 12 and 18 of Order XX of the Civil Procedure Code, compared.

Venkamamidi Mahalakshmamma v. *Venkamamidi Rajamma* (1918) 43 I.C. 458, and *Maimod Rowther* v. *Duraisami Naicker* (A.A.O. No. 277 of 1917—unreported), dissented from.

Doraisami v. *Subramania* (1918) 41 Mad., 188 (F.B.), referred to.

SECOND APPEAL against the decree of E. H. WALLACE, the District Judge of Tanjore, in Appeal Suit No. 16 of 1916, preferred against the decree of C. V. VISWANATHA SASTRI, the Subordinate Judge of Kumbakōnam, in Original Suit No. 51 of 1907.

This was a suit for partition, in which the tenth defendant, who is the appellant in the Second Appeal, also obtained a decree for recovery of his share in the suit property in the Court of first instance. On appeal by the tenth defendant to the lower Appellate Court against the preliminary decree claiming *inter alia* future mesne profits in respect of her share of the lands, the appeal was dismissed, but the Court did not deal with the question of mesne profits; and in the Second Appeal to the High Court, the appellant dropped the matter of future mesne profits. The tenth defendant again appealed to the District Court against the final decree and therein claimed future mesne profits once again. The District Judge refused to award the same on the ground that the appellant's claim had

* Second Appeal No. 588 of 1917.

been "definitely though not explicitly decided against her" in the prior proceedings. Against the latter decree, the tenth defendant preferred this Second Appeal.

T. Narasimha Ayyangar and *K. R. Rangaswami Ayyangar* for the appellant.

C. V. Ananthakrishna Ayyar for third to ninth and thirteenth to fifteenth respondents.

C. R. Subrahmanya Ayyar for first respondent.

AYLING, J.—This appeal relates to appellant's claim to future mesne profits on the property awarded to her by the decree in a partition suit in which she was tenth defendant. The preliminary decree in the suit is silent on the subject of future mesne profits on appellant's share and the question is whether she is entitled to ask that they should be determined and included in the final decree.

In my opinion she is not. We are not now concerned with the decision of the Full Bench in *Doraisami* v. *Subramania*(1) that where the decree in a suit for possession leaves a claim to mesne profits undecided, a fresh suit for the mesne profits will lie. What we have to determine is the extent to which the final decree in a partition suit can provide for matters which are not settled or directed to be inquired into by the preliminary decree. The relevant provisions of law are rules 12 and 18 of Order XX, which have to be read together, and in my opinion their effect is against appellant. A simple suit for possession of specific immovable property, uncomplicated by any question of partition, is governed specifically by rule 12 and it seems clear to me that in such a suit the final decree could only provide for mesne profits past or future where an inquiry into the same had been directed by the preliminary decree. If, either intentionally or inadvertently, the Court had omitted to direct such an inquiry, the aggrieved party must get the preliminary decree amended; no application for mesne profits not provided for in the preliminary decree would be entertained in framing the final decree. This was not, in fact, contested by the learned vakil for appellant.

I fail to see why the same principle should not be applied to preliminary and final decrees in partition suits. Rule 18 (2) says:

(1) (1918) I.L.R., 41 Mad., 188 (F.B.).

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AYLING, J.

"The Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property, *and giving such further directions as may be required.*"

As to what follows the rule is silent; but the law obviously intends that a final decree should be passed as in the cases specifically dealt with by rule 12: and I think the 'further directions' must be understood as relating to the 'further inquiry' which is found necessary and that the final decree, contemplated, though not specifically referred to, by rule 18, should be restricted in exactly the same way as the final decree referred to in rule 12. With all respect, I am unable to agree with the view expressed by OLDFIELD, J., in *Venkamamidi Mahalakshmamma* v. *Venkamamidi Rajamma*(1) that a direction for inquiry regarding future mesne profits should be made in the final decree and they should be the subject of a separate final decree after its conclusion. This involves three distinct stages of decree; whereas, as it seems to me, the law expressed in the rules above quoted contemplates only two. See *Bharat Indu* v. *Yakub Hasan*(2) and *Kamini Debi* v. *Promotho Nath*(3). I respectfully agree in this connexion with my Lord the Chief Justice who says in *Doraisami* v. *Subramania*(4):

"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."

We are referred to an unreported case (*Maimod Rowther* v. *Duraisami Naicker*(5)), in which the learned Judges remarked that unless there was an adjudication on plaintiff's rights to profits before the preliminary decree was passed, there was no reason why the Court should not provide in its final partition decree for an inquiry regarding it. Neither this decision nor that of the single Judge in *Venkamamidi Mahalakshmamma* v. *Venkamamidi Rajamma*(1) is, of course, binding on us, but I may remark that

(1) (1918) 43 I.C., 458.
(2) (1913) I.L.R., 35 All., 159. (3) (1914) 20 Calc. L.J., 476.
(4) (1918) I.L.R., 41 Mad., 188 (F.B.).
(5) A.A.O. No. 277 of 1917 (unreported).

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the circumstances of the unreported case were quite different. In that case a party was endeavouring to attack in execution the terms of a final decree which had already been passed, and had conclusively determined the right to the mesne profits in question. Even if the judgment had been directed to be reported, the remarks above quoted would be of an *obiter* nature in so far as they went beyond the facts of the case.

I would dismiss the Appeal with costs of (defendants) respondents.

KRISHNAN, J.

KRISHNAN, J.—I agree with my learned brother that this Second Appeal fails.

The tenth defendant who is the appellant before us claimed past and future profits along with her share in the property in her written statement. But the preliminary decree which was passed so long ago as 1909 said nothing about future profits while refusing the past profits, though it recognized her claim to a share in the property. She appealed against that decree and again claimed future profits, but the Appellate Court also did not deal with them or grant them. Though she filed a second appeal, she did not again renew her claim for such profits.

The final decree was passed in 1915 in which the tenth defendant was given her share in the property. She again appealed to the District Court and there claimed future mesne profits once again. Apparently she did not claim them in the first Court when it was passing its final decree as there is no reference to them in its judgment. The District Judge refused to allow the matter to be reopened before him and I think he was right in doing so in the circumstances of this case.

The learned Judge may be wrong in saying that the appellant's claim to future profits has been "definitely, though not explicitly, decided against her" and it may be that it is still open to her to sue for them if so advised under the ruling of the Full Bench in *Doraisami* v. *Subramania*(1). I do not, however, think that this is any reason why the final decree should be any longer delayed by directing a fresh inquiry into mesne profits even if it is competent to the Court to do so now. Admittedly the claim for future mesne profits in a suit for

(1) (1918) I.L.R., 41 Mad., 188 (F.B.).

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possession of immovable property is not one which a party can, as a matter of right, insist upon being adjudicated upon in the suit. I think, therefore, the Judge was right in refusing to consider the question of future profits in the appeal before him.

As the question when exactly the order directing an inquiry into mesne profits should be made in a partition suit has been argued at some length before us, I think it proper to state my view regarding it. I agree with my learned brother that the order should be passed at the time of the preliminary decree itself.

It is rule 18, clause 2, of Order XX of the first schedule of the Code of Civil Procedure that provides for the passing of the preliminary decree in a partition suit. That rule gives power to the Court when passing such a decree to

"give such further directions as may be required".

These words, I think, are wide enough to include a direction for an inquiry into mesne profits; but under the rule the direction should be in the preliminary decree. It is not necessary to bring in aid rule 12.

The wording of rule 12 of Order XX is not such as would properly apply to a partition suit, for it contemplates a suit for possession in which a decree for possession can be passed at the very first stage; whereas in a suit for partition, though finally a decree for possession of specific immovable property may be passed, it is not always convenient to do so without a preliminary decree and a further inquiry; and it may also happen that in such a suit directions as to several other matters such as payment of debts and collection of outstandings may become necessary. The rule does not therefore in my opinion properly apply, by its own force, to a partition suit. No doubt, in making an inquiry into profits ordered under rule 18, the provisions of rule 12 (1), clauses (*b*) and (*c*) and clause (2) will be kept in view as guiding the Court in such an inquiry.

But even if we assume that that we should read rule 18, clause (2), with rule 12 (1), clauses (*b*) and (*c*) and clause (2), to grant mesne profits in partition suits, I am of opinion that the preliminary decree which each rule contemplates is one and the same and it is not necessary to have two different preliminary decrees and two different final decrees at different stages. Neither rule contemplates more than one preliminary

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decree and one final decree in one suit. In fact the Code nowhere contemplates more than one preliminary decree and one final decree in one suit. To have two final decrees and to call the first one a 'final' decree will be really a misnomer as it will not be final. To hold the view taken in *Venkamamidi Mahalakshmamma* v. *Venkamamidi Rajamma*(1) and in *Maimod Rowther* v. *Duraisami Naicker*(2) is, it seems to me, with all respect to the learned Judges, to unnecessarily lengthen out proceedings with a possibility of Appeals and Second Appeals from at least three different decrees in the same suit. Assuming rule 12 should be read with rule 18 to give mesne profits in a partition suit, is there anything in the former rule that compels the Court to wait till the passing of the final decree in partition, before it can order an inquiry into mesne profits? It is said that there is, because the rule speaks of passing a decree for possession in clause (*a*) when directing inquiry into profits under the following clauses and it is argued that in a partition suit the decree for possession is the final decree. In considering the wording of rule 12, as already pointed out, it must be borne in mind that it contemplates a suit where a decree for possession can be passed at the very first stage. In applying that rule to a case where such a decree cannot be passed as in a partition suit, we are, I think, not justified in reading it too strictly, but we should make the necessary allowance to avoid unnecessary multiplicity of proceedings especially when clause(*a*) does not properly apply to such a suit. I can see no difficulty in holding that an inquiry into mesne profits should, if the Court thinks fit to order it, be directed in the preliminary decree itself and that, I believe, is in accordance with the prevailing practice of the Courts. I therefore consider that when the tenth defendant applied for mesne profits before the preliminary decree was passed, she acted properly, but when they were not granted to her, her remedy, if any, was by a separate suit. It was too late for her to ask for them in the present appeal.

I agree the Second Appeal should be dismissed with costs.

K.R.

(1) (1918) 43 I.C., 458. (2) A.A.O. 277 of 1917 (unreported).

APPELLATE CIVIL.

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

1918, September 20, 23 and October 22.

KRISHNA CHETTIAR (PLAINTIFF), APPELLANT,

v.

VENKATACHELLAPATHI CHETTIAR AND FIFTEEN OTHERS (DEFENDANTS), RESPONDENTS.*

Guardians and Wards Act (VII of 1890), ss. 34 and 35—Bonds given to Court by guardian and sureties—Court obligee under the bonds—Persons entitled to sue on the bonds—Breach of conditions of bond, when.

Under section 34 of the Guardians and Wards Act (VII of 1890) it is the Court that is the obligee under the bonds given by the guardian and his sureties in respect of the management of a ward's estate and except under an assignment from Court under section 35 of the Act nobody else can sue on the bonds. The conditions of bonds given under section 34 (c) and (d) of the Guardians and Wards Act and under Form No. 93 of Civil Rules of Practice, being to exhibit such accounts as may be directed by Court or pay such balance of the minor's moneys in the guardian's hands as the Court may direct, there is no right of suit as for a breach of the conditions of the bonds unless there is a preliminary order of the Court either to exhibit accounts or to pay any specified balance and a breach thereof. An assignment of the bonds by the Court without any such preliminary order, on the ground that there was a *prima facie* case of maladministration is invalid and does not give a right of suit on the bonds.

Obiter.—The loss of the bond is no impediment to its assignment.

APPEAL against the decree of C. V. VISWANATHA SASTRI, the Subordinate Judge of Kumbakōnam, in Original Suit No. 63 of 1915.

This was a suit to recover about Rs. 20,000 from the first defendant personally and by the sale of immovable properties mentioned in the plaint, under the following circumstances:—Plaintiff's father died when plaintiff was a minor, and the first defendant was appointed as the guardian of the person and properties of the plaintiff by the District Court of Tanjore. The first defendant, the deceased father of the second defendant, and a third person executed on 21st April 1896 a security bond to the District Court under which they gave, as security

* Appeal No. 133 of 1917.

for the due fulfilment by first defendant of the terms of the administration bond executed by him to the District Court, the immovable properties detailed in the schedule attached to the plaint. The first defendant acted as guardian for about three years and was then removed by the District Court on 13th February 1900 and plaintiff's mother was appointed in his stead. Plaintiff alleged that during the period when the first defendant acted as guardian he was guilty of various acts of misconduct and that in consequence he incurred a loss of about Rs. 20,000. Plaintiff attained majority on 13th February 1913 and filed this suit on 20th September 1915.

The original administration bond given to the District Court by the first defendant as guardian of the plaintiff was lost and on the application of the plaintiff the District Judge passed an order on 1st December 1914, directing that the security bond be assigned over to the plaintiff to enable him to file a suit. On 29th September 1916 an assignment in pursuance of this order was endorsed on the security bond by the District Judge and it was only on 27th November 1916 that a regular assignment deed was executed and registered. The other defendants were alienees from the first and second defendants of the immovable properties mentioned in the plaint. The first and fifth defendants were *ex parte*. The pleas of the other defendants, as far as they are material for the present report, were (1) that in absence of the original administration bond and in the absence of an assignment thereof, the plaintiff had no cause of action, (2) that as there was no assignment to the plaintiff of the security bond before the date of the suit, plaintiff had no right to sue, (3) that there was no proof of any breach of the conditions of the administration bond and of the security bond and (4) that the defendants were alienees for value without notice of the charge created by the security bond and that therefore they and the properties purchased by them were not liable. The Subordinate Judge gave a decree for Rs. 5,821 personally against the first defendant and upholding the other defences dismissed the suit as against the other defendants with costs. Plaintiff preferred this Appeal.

A. Krishnaswami Ayyar with *G. Gopalakrishna Ayyangar* for the appellant.—Though there was no formal assignment of the surety bond to my client before suit, there was an order to assign

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it to me and there was an actual assignment after the filing of the suit, i.e., after the issues were framed. After the order to assign the bond there was no further act to be done by the District Judge, but a ministerial act. Section 35 of the Guardian and Wards Act is the only provision in the Act in respect of assignment. Even there the provision is 'may assign.' No assignment is necessary. If an assignment were necessary, the order to assign itself operates as an assignment. There need not be a written assignment; see section 9 of the Transfer of Property Act and *Surat Chandra Roy Chowdhury* v. *Rajoni Mohan Roy*(1). A beneficiary such as the plaintiff can maintain a suit on the bond executed to the trustee even without an assignment. Security bonds for administration of an estate to which several persons may be entitled stand on a different footing from a security bond given for the protection of the estate of a single minor. Reference was made to section 257 of the Indian Succession Act. Without any assignment the beneficiary or legatee can sue. *Ramanadhan Chetty* v. *Katha Velan*(2), *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*(3) and *In re Culverhouse Cook* v. *Culverhouse*(4). In England personal estates will pass without formal assignment. No formal conveyance from a trustee to the beneficiary is necessary; *Rajah of Karvetnagar* v. *Saravana Pillai*(5). See section 56 of the Trusts Act. The District Judge is only a bare trustee. Acquisition of title by the plaintiff during the course of the suit perfects his title, the plaintiff already having the beneficial title; see *Doraisawmi Pillai* v. *Chinnia Goundan*(6), *Subbaraya Chetty* v. *Nachiar Ammal*(7). The fact that the bond given by the guardian has been destroyed does not disentitle my client to enforce the bond given by the surety. Moreover, the surety's bond recites the terms of the guardian's bond. When a guardian gives a bond for due administration of the ward's estate, the ward need not prove, in order to entitle him to recover damages, that the guardian acted fraudulently. The security bond being registered, subsequent purchasers for value are presumed to have notice of the terms of the bond.

(1) (1908) 12 C.W.N., 481. (2) (1918) I.L.R., 41 Mad., 353.
(3) (1908) I.L.R., 31 Mad., 534. (4) (1896) 2 Ch., 251.
(5) (1916) 4 L.W., 200 at pp. 203 and 207. (6) (1918) 34 M.L.J., 258.
(7) (1918) M.W.N., 199.

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THE HON'BLE *the Advocate-General*, *S. Srinivasa Ayyangar* (with *S. T. Srinivasagopalachari* and *K. Bhashyam Ayyangar* and *K. Narasimha Ayyangar*) for respondents.—The question is whether there is a right of suit. The security bond gives only a charge on certain lands. There is no mortgage given on the lands. If so *Ramachariar* v. *Dorasami Pillai*(1), *Rangappa* v. *Thamayappa*(2), *Balasubramanya Nadar* v. *Sivaguru Asari*(3) hold that want of notice protects *bona fide* purchasers for value; see section 100, Transfer of Property Act. In the absence of an actual assignment before suit there is no right of suit. This is an actionable claim. A writing is required by section 130 of that Act in order to assign the same. Section 35 of the Guardians and Wards Act is borrowed from section 83 of the English Probate Act of 1857 which shows that the Court should ask the Registrar to assign to the party and the Registrar must assign; but the order to assign is not equivalent to assignment by the Registrar. Subsequent production of assignment deed will not do, as the section is not analogous to section 4 of the Succession Certificate Act. *Cope* v. *Bennett*(4), Tristam and Cootes' Probate Practice, page 345; see Seton, pages 822, and 823 for the forms of assignment of bonds by executors and administrators and also by guardians. In this case there has been no breach of the conditions of the bond. The suit is barred by limitation. Article 68 applies to the case of an administration bond given by a guardian for the due administration of the estate. The guardian was removed on 13th February 1900 and the suit was instituted on 20th September 1915. A suit on the bond must be commenced within three years from the date of the breach and time began to run from the time the guardian was removed. The security bond creates only a *charge* on the lands. Article 132 governs suits to enforce a charge; and this suit to enforce the charge is barred by limitation under article 132, as more than twelve years have elapsed from the date of the removal of the guardian. [Cases quoted to support the point of limitation are not noted here as the decision of the Court turned on other points.]

(1) (1915) 29 I.C., 605 (Mad.). (2) (1914) 26 M.L.J., 514.
(3) (1911) 21 M.L.J., 562. (4) (1911) 2 Ch., 488.

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A. Krishnaswami Ayyar in reply.—Under section 34 of the Guardians and Wards Act the Court must be satisfied first that the engagement of the bond has not been kept. In this case the Court came to the conclusion that the conditions of the bond were broken when the plaintiff applied to the Court for assignment of the security bond for the purpose of recovering the losses from the properties given as security, and time commenced to run both as against the guardian and the sureties only from the date of the order, viz., 1st December 1914, when on being satisfied that the guardian committed acts of misappropriation the Court ordered the assignment of the bond. The guardian is liable to render accounts for the period of his administration till his death though he might have been removed previously; see *Kanti Chandra Mukerji* v. *Ali-i-Nabi*(1). The security bond, Exhibit A, charges not only immovable properties, but it also contains a covenant to pay and hence it is a mortgage, and subsequent *bona fide* purchaser for value will be affected by notice of its terms, especially as it is registered.

WALLIS, C.J.

WALLIS, C.J.—This is an appeal from the decree of the Subordinate Judge of Kumbakonam in so far as it dismissed the suit brought by the plaintiff as assignee of a surety bond, Exhibit A, dated 21st April 1896, charging the immovables therein mentioned for the due performance by the first defendant of his obligations under the bond given by him to the District Court under section 34 (*a*) of the Guardians and Wards Act as guardian of the plaintiff who was then a minor. The immovable properties of the other sureties being insufficient, the first defendant added certain properties of his own and became a party to the surety bond, Exhibit A, as well as to the principal bond which is now missing. The Subordinate Judge passed a personal decree against the guardian, the first defendant, who did not contest the suit, and otherwise dismissed it on the ground that the plaintiff had no right to sue on the bond, Exhibit A, at the date of the suit, as the principal bond had not been assigned to him and there had been no regular assignment to him of the surety bond, Exhibit A, but only an order by the District Court that it should be assigned. He also dismissed the suit on the ground that the

(1) (1911) I.L.R., 33 All., 414.

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plaintiff had failed to prove what were the terms of the principal bond which was missing, and held that the defendants, who are alienees from the sureties under Exhibit A, took without notice and are exempt from liability.

As regards the first point, I am of opinion that the plaintiff had no title to sue on Exhibit A without an assignment to him by the Court both of the principal bond and of the surety bond, Exhibit A; but I do not think the case can be satisfactorily disposed of on this ground. The District Judge has since assigned Exhibit A by a registered instrument, and though the principal bond has not yet been assigned, we might, I think, accept the assignment even at this late stage if this was the only difficulty in the plaintiff's way. The fact that the principal bond is lost would not prevent its being duly assigned. The Ecclesiastical Courts were required by a statute of Henry VIII to take bonds with sureties from persons to whom they granted administration of the estates of deceased persons, and a statute of Charles II settled the terms of the bond to be so taken. There was a right of action on these bonds in the Common Law Courts, but the Ecclesiastical Judge to whom the bond had been given did not sue himself, but, as stated in *Bolton* v. *Powell*(1) the Ecclesiastical Court made an order in favour generally of one of the next of kin that the bond be 'attended with' and the party in whose favour the order was made was allowed to sue in the name of the Ecclesiastical Judge to whom the bond had been given. Whether under any circumstances the sureties could be proceeded against in equity without such an order of the Ecclesiastical Court was discussed in the case just mentioned. The Probate Act of 1857 first made these bonds assignable, and its provisions in this respect have been reproduced in the Indian Succession Act, the Probate and Administration Act, 1881, and lastly in sections 34 and 35 of the Guardians and Wards Act, 1890. The Court now being the obligee under the bond is alone entitled to sue on it in the absence of an assignment in due form of law.

In the present case I feel constrained to hold in the present state of the evidence that the suit fails on the broad ground that no breach of the conditions of the bond (Exhibit A) has been proved. Section 34 (*a*) of the Guardians and Wards Act

(1) (1852) 2 De G.M. & G., 1 at p. 21.

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obliges the guardian, if so required, to give a bond to the Judge of the Court

"engaging duly to account for what he may receive in respect of the property of the Ward."

By section 34 (*b*) he is to deliver an inventory within six months, and by section 34 (*c*) he is to

"exhibit his accounts in the Court at such times and in such form as the Court from time to time directs."

And by section 34 (*d*) he is

"to pay into the Court the balance due from him on those accounts, or so much thereof as the Court directs."

The form of bond prescribed in Form 93 of the Civil Rules of Practice, 1902, clearly follows the provisions of section 34 (*c*) and (*d*) just set out, the condition of the bond being that the guardian shall duly account

"at such periods as the Judge shall appoint and shall duly pay or dispose of the balances which shall from time to time be found to be due from him as the said Court or Judge has directed or shall hereafter direct."

No doubt, this form was not in force in 1896 when the first defendant as guardian executed the principal bond which is now missing, but there is no reason to assume that the bond then executed by the first defendant was of a more onerous character than the form now prescribed. Now to constitute a breach of this bond there must be a failure either duly to account at a period directed by the Court, or a failure to pay as ordered by the Court a balance found due from him: and where there is no evidence of any order to account within a fixed time, or to pay any balance within a fixed period, there is no breach of the obligation of the bond. This follows from the language of the bond, and has been expressly ruled in the case of a similar provision in the old statutory form of administration bond; *Archbishop of Canterbury* v. *Tappen*(1) and *Archbishop of Canterbury* v. *Robertson*(2). The latter case also deals with the question of what amounts to a breach of the condition well and truly to administer the estate in the old form of administration bond. To establish a breach of that condition it was not necessary to show a failure to obey a specific order of the Court. Similarly

(1) (1828) 8 B. & C., 151. (2) (1833) 1 Cr. & M., 690.

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under section 81 of the Probate Act, 1857, the bond is to be conditioned for duly collecting, getting in and administering the estate of the deceased, language followed in section 256 of the Indian Succession Act and section 78 of the Probate and Administration Act; and therefore in the case of these bonds it is enough to show a failure to administer or collect and it is not necessary to show a failure to obey a specific order of the Court. Where, however, as we must assume in the present case, the only conditions in the bond were to exhibit accounts when ordered by the Court and to pay or apply the balance found due as directed by the Court, if there is no order, there is no breach and the suit on the bond necessarily fails. There is no evidence of any order to account or of any order to pay in the present case. All the District Judge did was to direct the assignment of the bond on the ground that there was a *prima facie* case of maladministration against the first defendant. In the case of bonds under the Guardians and Wards Act the proper course appears to be to get an order to pay against the guardian under section 34 (*d*) or a decree against him, and, if he fails to satisfy the order or decree, then to sue the sureties in respect of this breach as to which there will be no defence and the article of limitation will be article 68 unless, as in the present case, the bond charges immovable property, when that article may be inapplicable. It is unnecessary to consider this point, or the other question raised in argument before us as to when time begins to run when the condition in the bond is duly to administer. In my opinion the appeal fails and must be dismissed with costs against defendants Nos. 3 to 9 the alienees. As those grounds apply also to the decree against the first defendant, we set aside that decree also, but without costs in the exercise of our powers under Order XLI, rule 33.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I agree.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Krishnan.

1918, October, 22, 23 and 31.

RAMASAMI GOUNDAN (PETITIONER), PETITIONER,

v.

KALI GOUNDAN (COUNTER-PETITIONER), RESPONDENT.*

Madras Estates Land Act (I of 1908), ss. 131, 192 and 205—Civil Procedure Code (Act V of 1908), sec. 115—Application to Deputy Collector to set aside rent sale on the thirtieth day—Deputy Collector, absent on leave—Deposit made two days later—Sale set aside by Deputy Collector without notice to purchaser—Revision petitions to District Collector and Board of Revenue, dismissed—Revision petition to High Court, competency of—Discretion in exercise of revisional powers—Absence of notice before setting aside sale, effect of—General Clauses Act (X of 1897), sec. 10.

An application to set aside a sale held for arrears of rent was made to the Deputy Collector under section 131 of the Madras Estates Land Act and the deposit therein required tendered on the last day allowed by that section; the Deputy Collector being absent on leave, the petitioner was asked by the clerk to come two days later on, which day the Deputy Collector received the deposit and set aside the sale *without giving notice to the purchaser.* The latter presented petitions to the District Collector and the Board of Revenue respectively to revise the order under section 205 of the Act; the petitions being dismissed, the purchaser filed a revision petition to the High Court. The respondent objected that no revision lay to the High Court and that as the sale was properly set aside, the High Court should not interfere in revision.

Held, that the revision petition to the High Court was competent, because section 192 of the Madras Estates Land Act renders section 115 of the Civil Procedure Code applicable to all suits, appeals and other proceedings under the Act, even though section 205 thereof gave a power of revision to the Board of Revenue and the District Collector; but where the petitioner had previously applied to the revenue authorities and failed, the High Court would decline to exercise its discretionary power in revision, unless it was imperatively called upon to do so to prevent miscarriage of justice;

that, as the deposit was not made on the last day owing to the absence of the Deputy Collector and not the default of the petitioner, it was competent to the former to receive the deposit on the next open day under general principles of law embodied in section 10 of the General Clauses Act, and set aside the sale; *Shooshee Bhushan Rudro v. Govind Chunder Roy* (1891) I.L.R., 18 Calc., 231 followed;

that, assuming that the failure to give notice to the purchaser vitiated the whole proceedings, the High Court will not exercise its revisional powers on that ground alone;

* Civil Revision Petition No. 111 of 1918.

and that the order setting aside the sale was proper as no valid objection was or could be raised by the petitioner even when opportunity was given to him.

PETITION under section 107 of the Government of India Act to revise the order of E. S. LLOYD, the District Collector of Trichinopoly, in D. Dis. No. 2403, Revenue, of 1917, against the order of D. DIRAVIYA NADAR, the Deputy Collector of Nāmakkal, in Miscellaneous Petition No. 95, etc., of 1917.

A sale was held under the Madras Estates Land Act for arrears of rent on the 24th April 1917 The tenant applied to the Deputy Collector of Namakkal on the 24th May 1917 under section 131 of the Act to set aside the sale on payment of the arrears for which the sale was held and the other amounts payable to the purchaser under the section. The Deputy Collector was absent on casual leave on that and the next day and the clerk of the Deputy Collector's office asked the petitioner to go over to the office on the 26th May 1917 to make the requisite deposit; on the latter date the petitioner made the deposit of the amount due from him before the Deputy Collector who received the amount and set aside the sale without giving notice to the purchaser. The latter filed a revision petition to the District Collector, as well as another to the Board of Revenue (*vide* judgment of the High Court); the petitions were dismissed. The order of the District Collector was as follows:—

"On the 24th May the last day open to him, the counter-petitioner appeared with the deposit and applied to have the sale set aside. The Divisional Officer was absent on casual leave, the clerk therefore told him to come on the 26th, which he did. In the circumstances, I cannot say that the sale was improperly cancelled even though no notice was given as it ought to have been to the purchaser. I decline to interfere on revision, and dismiss the petition."

Against this order the petitioner (purchaser) preferred this Civil Revision Petition to the High Court.

K. V. Sesha Ayyangar for the petitioner.

L. S. Veeraraghava Ayyar for the respondent.

AYLING, J.—This petition arises out of an order of the Deputy Collector of Namakkal under section 131, Madras Estates Land Act, setting aside a sale for arrears of rent.

AYLING, J.

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The preliminary objection is taken that this Court has no power to revise such an order. I do not think this objection can be upheld. It is true that section 205 of the Act (read with the Schedule, part B, No. 19) gives a power of revision to the Board of Revenue or the District Collector in the case of such an order; and in the present case, petitioner has invoked the interference of both the authorities named without success. But section 192 renders section 115 of the present Code of Civil Procedure (old section 622) applicable to all suits, appeals and other proceedings under the Madras Estates Land Act. It may seem undesirable that the power of revising the same order should vest in two authorities so different in their constitution and ordinary procedure as this Court and the Board of Revenue; and one may wonder whether such a result was deliberately intended by the Legislature or arrived at by inadvertence. Nevertheless we have to interpret the Act as it stands. It is impossible to say that the grant of the power of revision to this Court is inconsistent with the grant of similar power to the Collector and Board of Revenue; and I think it must be held that section 192 vests this Court with the power of revision, which petitioner invokes.

Its exercise is, of course, always discretionary; and where, as in the present case, the petitioner has previously applied to the revenue authorities under section 205 without success, I think this Court might reasonably decline to exercise it unless imperatively called upon to do so to prevent a miscarriage of justice.

The facts of the case are clearly set forth in the order of the District Collector, declining to interfere, which runs thus:

"On the 24th May, the last day open to him, the counter-petitioner appeared with the deposit and applied to have the sale set aside. The Divisional Officer was absent on casual leave. The clerk therefore told him to come on the 26th, which he did. In the circumstances, I cannot say that the sale was improperly cancelled even though no notice was given as it ought to have been to the purchaser. I decline to interfere on revision, and dismiss the petition."

Petitioner's main contention is that the deposit of the amount by the defaulting ryot, within the period of 30 days from the sale, is a condition precedent to the passing of an order setting

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aside the sale; and that unless it is strictly complied with, no matter what the circumstances may be, an order setting aside the sale is *ultra vires* and illegal. The admitted failure to give notice to the auction purchaser before passing the order is also said to be an infringement of Order XXI, rule 92, and to equally invalidate the order.

As regards the first objection, however strict the wording of section 131 may seem to be, and although section 5, Indian Limitation Act, is not in terms applicable, authority is not wanting for a more reasonable and liberal interpretation of the section. *Shooshee Bhushan Rudro* v. *Govind Chunder Roy*(1) was a precisely similar case to the present one under the Bengal Tenancy Act; the learned Judges held that, on general principles, when a fixed period is given to do a certain act, and the person bound to perform it is, from no act of his own, but from some act or order of the Court, prevented from carrying it out, he gets the advantage of the next open day. This ruling was followed and the same principle applied in other cases in the same Court (vide *Peary Mohun Aich* v. *Ananda Charan Biswas*(2), and by a Bench of this in *Sambasiva Chari* v. *Ramasami Reddi*(3) to a case under the Rent Recovery Act. It has been embodied as a salutary rule in section 10 of the General Clauses Act as regards cases where the Court or office is actually closed. In the present case it may be said that the office or Court of the Deputy Collector was not closed on the last day of performance, but only the presiding officer, the Deputy Collector himself, was absent on leave. This makes no difference. In consequence of his absence, respondent found it just as impossible to get his deposit received, as if the office or Court had been shut up, and his failure to perform the act required of him within the time specified was equally occasioned by the act of the Court and by no act of his own.

I find nothing inconsistent with this in *Chundi Charan Mandal* v. *Banke Behary Lal Mandal*(4). In that case it was not shown that the judgment-debtor's failure to deposit the full amount within the prescribed period was due to any act or mistake of the Court; and the learned Judges are at pains to make it clear

(1) (1891) I.L.R., 18 Calc., 231.
(2) (1891) I.L.R., 18 Calc., 631.
(3) (1899) I.L.R., 22 Mad., 179.
(4) (1899) I.L.R., 26 Calc., 449 (F.B.).

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that, if it had been, their decision might (not to say, would) have been different. In another case quoted, *Bibi Sharifan* v. *Mahomed Habibuddin*(1), there is nothing to indicate that the failure to deposit within the prescribed time was due to any act of the Court, and the learned Judge whose judgment is relied on (MOOKERJEE, J.), had subscribed to the general principle laiddown in *Shooshee Bhushan Rudro* v. *Govind Chunder Roy*(2)—*Vide* his judgment in *Mahomed Akbar Zaman Khan* v. *Sukhdeo Pande* (3).

Appellant's vakil drew our attention to Government Notification No. 145, Revenue, dated 27th March 1912, under which a deposit under section 131 is allowed to be paid into any sub-treasury; and suggested that, as this alternative course was open to him, respondent should not be allowed the benefit of the general principle. The course prescribed by the Act is payment to the Collector; and we are in no position to say that when respondent found the latter's office closed against him, he was in a position to avail himself of the alternative course.

In my opinion it was competent to the Deputy Collector to set aside the sale in the circumstances, although the deposit was not made within the prescribed time.

Coming to the second point, whether failure to give notice is a mere irregularity, or vitiates the whole proceedings is open to argument. But taking the view most favourable to appellant, I should not be prepared to exercise our revisionary powers in this case on that ground alone. If the objection were allowed, our only course would be to set aside the Deputy Collector's order, and remand the application for disposal after due notice to appellant. But we have now had the advantage of hearing the case fully argued in all its aspects; and it is clear that appellant could bring forward no tenable objection to the setting aside of the sale, and that the Deputy Collector's order was a perfectly just, reasonable and proper one (apart from the omission to give prior notice). To remand the case in such circumstances would be futile.

I would dismiss the petition with costs.

KRISHNAN, J.

KRISHNAN, J.—I agree and have nothing further to add except that I have already dealt with the revisional power of

(1) (1911) 13 C.L.J., 535. (2) (1891) I.L.R., 18 Calc., 231.
(3) (1911) 13 C.L.J., 467.

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KRISHNAN, J.

the High Court in my judgment in *Paramaswamy Aiyangar* v. *Alamelu Natchiar Ammal*(1), which may be referred to.

K.R.

APPELLATE CIVIL.

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

JAMPANA SOMADU (FIRST DEFENDANT), APPELLANT,

v.

ZAMINDAR OF MIRZAPURAM AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1918, October 24 28 and 31.

Madras Estates Land Act (I of 1908), ss. 153 and 157—Suit in Revenue Court to eject non-occupancy ryot of 'old waste' on expiry of registered lease for more than five years granted before the Estates Land Act—Jurisdiction—Mesne profits, jurisdiction of Revenue Court to grant.

A suit is maintainable in a Revenue Court under sections 153 and 157 of Madras Estates Land Act to eject a non-occupancy ryot of 'old waste' on the expiry of the term of a registered lease for more than five years though granted before the commencement of the Estates Land Act.

Atchutaraju v. *Rajah V. G. Krishnayachandralu Varu* (1915) I.L.R., 38 Mad., 193, not followed.

A Revenue Court can award mesne profits against persons in unlawful possession of lands holding over beyond the period of their lease.

SECOND APPEAL against the decree of E. PAKENHAM-WALSH, the Acting District Judge of Kistna, in Appeal No. 134 of 1915, preferred against the decree of M. VENKANNA NAYUDU, Suits Deputy Collector, Kistna, in Suit No. 1158 of 1914.

This was a suit by a landholder under section 153, clause (*e*) of the Estates Land Act to eject the defendants from certain 'old waste' lands which were leased to them for a term of ten years (1903 to 1912) under a registered deed, but which they failed to vacate on the expiry of the term of the lease. Plaintiff also prayed for recovery of arrears of rent for fasli 1322 (1912) and mesne profits for fasli 1323 (1913) onwards. Defendants contended

(1) (1919) I.L.R., 42 Mad., 76.
* Second Appeal No. 1569 of 1917.

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that the expiry of the lease granted before the passing of the Act cannot be a valid ground for ejectment in a Revenue Court and that a Revenue Court has no jurisdiction to award any mesne profits. Rejecting these pleas the lower Courts gave a decree in favour of the plaintiff as prayed for. The first defendant appealed..

P. Nagabhushanam for appellant.

T. Ramachandra Rao for respondent.

SPENCER, J.

SPENCER, J.—This suit was brought by the Court of Wards' manager of the estate of Mirzapuram on behalf of the minor zamindar, who is a landholder under the Madras Estates Land Act (I of 1908), to evict the defendants on the expiry of their lease in fasli 1322. In Second Appeal three questions were argued; *first* whether the land in suit is 'old waste,' *secondly*, whether the tenants of 'old waste' can be ejected, and *thirdly*, whether mesne profits can be decreed by a Revenue Court.

It was asserted in paragraph 3 of the plaint that the lands in the schedule of the plaint were 'old waste,' and in the written statement there is no specific denial of this fact. Therefore applying rules 3 and 5 of the Order VIII of the Code of Civil Procedure (Act V of 1908) the defendants must be taken to have admitted the fact that the land in suit was 'old waste,' and it is not open to them now to set up a contention to the contrary.

The defendants held on a lease for ten years from fasli 1313 to 1322 under a registered muchilka, dated 24th April 1903. Section 153, clause (*e*), of the Madras Estates Land Act provides for the ejectment by suit of a non-occupancy ryot on the ground that the term of his lease has expired in cases where he has been admitted to occupation under a registered lease for a term exceeding five years. To this section a proviso was added by section 8 of Madras Act IV of 1909 (Madras Estates Land Act Amendment Act) which runs thus:

"Nothing in this section shall affect the liability of any person who is a non-occupancy ryot according to the provisions of this Act to be ejected on the ground of expiry of the term of a lease granted before the commencement of this Act."

It has been held that this addition to Act I of 1908, not being worded as a proviso, furnishes an additional ground of ejectment (see the notes at page 197 of Mr. Krishnama Achariyar's Madras Estates Land Act). Whether this view is

JAMPANA SOMADU v. ZAMINDAR OF MIRZAPURAM.

SPENCER, J.

correct or whether the words thus added were intended merely to amplify and explain the preceding section, it is clear that the section as it now stands gives ample power to a landholder to sue in a Revenue Court to evict a non-occupancy ryot occupying land in his estate under a lease for more than five years granted before the commencement of the Act and holding over after the term has expired. Where the words of the section are so plain, it is impossible for the defendants to contend that the Act does not provide for their being ejected after the term of their lease has expired. The only authority in their favour is that of *Atchaparaju* v. *Rajah V. G. Krishnayachendrula Varu*(1) where it was held that a ryot of 'old waste' could not be ejected on the ground of expiry of a term of lease contained in a contract entered into before the Act came into force. But this decision overlooked clause (*e*) of section 153 in so far as it contained an observation in two places that section 153 did not make the expiry of the lease a ground for ejectment. This was pointed out by me in *Ponnusami Padayachi* v. *Karuppudayan*(2) where the correctness of that decision was doubted; and *Ponnusami Padayachi* v. *Karuppudayan*(2) has since been followed by OLDFIELD, J., in *President, District Board, Tanjore* v. *Kannuswami Thondaman*(3).

It is suggested that the defendants who are ryots of 'old waste' are not necessarily non-occupancy ryots within the meaning of the proviso to section 153. But this contention is inconsistent with section 6, clause (3) of the Act, and in Mr. Ramadoss's Commentary on the "Estates Land Act" at page 266 and in Mr. M. Krishnama Achariyar's book at page 195, a category of non-occupancy ryots is given which includes ryots of 'old waste.' From the definition in section 3, clauses (7) and (12) it is clear that a 'ryot' is the term used in the Act for a tenant of 'ryoti' land and that land may be 'old waste' and yet be 'ryoti land', the term 'old waste' merely denoting that it has not been occupied for ten years by any one with a right of occupancy.

The last question is whether mesne profits can be decreed by a Revenue Court. On this point, I think that section 45

(1) (1915) I.L.R., 38 Mad., 163. (2) (1915) I.L.R., 38 Mad., 843.
(3) (1916) 35 I.C., 121.

JAMPANA SOMADU v. ZAMINDAR OF MIRZAPURAM.

SPENCER, J.

authorizes a Revenue Court to award this form of rent. In *Kamalummal Avargal* v. *Athikari Sangali Subba Pillai*(1) it was held that a Revenue Court had this power against any persons, even trespassers, in unlawful possession of ryoti land.

Another question that was referred to in the District Court but not taken in second appeal, is that of the jurisdiction of the Revenue Courts to try a suit of this nature. Such a contention could not be raised with any chance of success, in view of section 153, read with article 19 of part A of the Schedule to the Act, and in view of the recent decision in *Yelikapalli Venkaya* v. *Venkatramayya Appa Row*(2). It is not necessary to do more than to point out for the District Judge's information that he was mistaken in supposing that *Ponnusami Padayachi* v. *Karuppudayan*(3) would support an objection on the score of jurisdiction of the Revenue Court in this case, seeing that the lease on which the defendants occupied the plaint land and held over on its expiry was one for a term exceeding five years, for which clause (*e*) of section 153 expressly provides, and that *Ponnusami Padayachi* v. *Karuppudayan*(3) dealt only with leases for a period of less than five years which terminated before the Act came into force for which there is no express provision in section 153 and thus no jurisdiction conferred upon the Collector by article 19 of part A to the Schedule which applies to suits for eviction under this section only (see column 2 of the schedule, and the words 'before the Collector' in section 153).

As the contentions raised by the appellant's vakil have failed, the Second Appeal must be dismissed with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I wish to add only a few words on the additional provision enacted in 1909 and added to section 153 of the Estates Land Act. The body of the section enacts that a non-occupancy ryot (including a non-occupancy ryot in possession of old waste) shall be liable to ejectment on one or more of the grounds (*a*) to (*e*) mentioned therein "*and not otherwise*." Then this addition of 1909 by the Legislature enacted that

"nothing in this section shall affect the liability of any person who is a non-occupancy ryot according to the provisions of this Act

(1) (1918) 35 M.L.J., 11.
(2) (1917) 33 M.L.J., 757.
(3) (1915) I L.R., 38 Mad., 818.

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SADASIVA AYYAR, J.

to be ejected on the ground of expiry of the term of a lease granted before the commencement of this Act."

I find it impossible to hold that this addition was not intended to add one more *independent* ground to the grounds (*a*) to (*e*) on which the tenant was liable under the unamended section to be ejected at the suit of the landlord. The ingenious argument of Mr. Nagabhushanam that this addition cut down the meaning of the plain language of clause (*e*) so as to confine the expression 'a registered lease' found in that clause to a lease executed after the Act came into force and so as to exclude a registered lease deed executed before the Act came into force did not impress me at all as valid. It is difficult to believe that the Legislature, while granting the right to the landlord to eject on the expiry of the lease term, a tenant of old waste to whom a registered lease deed for a term exceeding five years was granted after the Act came into force, intended to refuse the same right to eject, to the landlord if the lease deed whose term has expired had been granted before the Act.

As regards the other points dealt with in the judgment of my learned brother, I express my concurrence and have nothing to add.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

1918, November 4.

RAMASWAMI PILLAI (FIRST DEFENDANT), APPELLANT,

v.

GOVINDASAMI NAICKER (PLAINTIFF), RESPONDENT.*

Limitation Act (IX of 1908), sec. 15—Suits against insolvent—Effect of adjudication—Subsequent annulment—Saving of limitation for suits—Adjudication, whether absolute stay of suits—Obtaining of leave to sue from Court—Condition precedent to sue, if sufficient to save limitation—Provincial Insolvency Act (III of 1907), sec. 16, cl. 2.

In computing the period of limitation for suits instituted against a person after an order adjudicating him an insolvent was annulled, section 15 of the Limitation Act does not permit the deduction of time during which the order was in

* Second Appeal No. 2225 of 1917.

RAMASWAMI PILLAI v. GOVINDASAMI NAICKER.

force, as, under section 16, clause 2, of the Provincial Insolvency Act, an order of adjudication does not effect an absolute stay of suits against the insolvent, but only makes it necessary that leave to sue should be obtained from Court before a suit could be filed against him while the adjudication was in force.

Soni Ram v. *Kanhaiya Lal* (1913) I.L.R., 35 All., 227 (P.C.), and *Doraisami Padayachi* v. *Vaidyalinga Padayachi* (1917) 33 M.L.J., 46, referred to. *Shunmugam* v. *Moideen* (1885) I.L.R., 8 Mad., 229, distinguished.

SECOND APPEAL against the decree of E. H. WALLACE, the District Judge of Tanjore, in Appeal Suit No. 19 of 1917, preferred against the decree of K. K. SRINIVASA ACHARIYAR, the Additional District Munsif of Kumbakōnam, in Original Suit No. 160 of 1916.

The material facts appear from the judgment.

K. Krishnaswami Ayyangar for the appellant.

K. Bhashyam Ayyangar for the respondent.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—This Second Appeal can be disposed of on the short point of limitation. The bond and the pro-note sued on were executed in February and April 1910. The suit was brought in July 1915. In October 1910, the first defendant applied to be adjudged an insolvent and was so adjudged in December 1911. In July 1914 that adjudication was annulled, because there was a composition with the creditors. Apparently the present plaintiff received no dividends under the composition. He is the assignee of the bond and the pro-note. The question is whether his present claim is barred by limitation. Mr. Bhashyam Ayyangar, for the respondent, contended that section 15 of the Limitation Act saved the bar. His argument was that the order of adjudication was tantamount to an order to stay all further proceedings in the matter. As we read section 16, clause (2) of the Provincial Insolvency Act, what the order of adjudication effects is not an absolute stay, but a direction that before a suit is brought, a condition precedent should be complied with, namely, the obtaining of leave to sue from the Court. In our opinion, section 15 of the Limitation Act does not operate to save limitation in cases where the suit could have been instituted on complying with a preliminary requisite in that behalf. The learned vakil relied on *Shunmugam* v. *Moideen*(1)

(1) (1885) I.L.R., 8 Mad., 229.

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SESHAGIRI AYYAR, J.

That case proceeded on the construction of the particular order before the Court. Moreover the authority of that decision is much shaken by the decision of the Judicial Committee in *Beti Maharani* v. *The Collector of Etawah*(1). As regards *In re General Rolling Stock Company (Joint Stock Discount Company's Claims)*(2) it is clear that what the Court of Appeal lay down is that so long as the matter is pending before the Bankruptcy Court, the liquidator can admit a claim to proof and the fact that leave to prove the debt is given or refused does not affect the question. In *Unni Koya* v. *A. P. Umma*(3), this Court held on a construction of section 273 of the Code of Civil Procedure that there was a total prohibition against persons other than the decree-holder from executing the decree. In that view, section 15 clearly applied.

Having regard to section 9 of the Limitation Act and to the observation of the Judicial Committee of the Privy Council in *Soni Ram* v. *Kanhaiya Lal*(4), we are unable to agree with the District Judge that section 15 of the Limitation Act is applicable to this case. *Vide* also *Doraisami Padayachi* v. *Vaidyalinga Padayachi*(5). For these reasons, we think that the suit was barred by limitation. We must, therefore, reverse the decree of the District Judge and restore that of the District Munsif with costs here and in the Court below.

K.R.

(1) (1895) I.L.R., 17 All., 198 (P.C.).
(2) (1872) 7 Ch. App., 646.
(3) (1912) I.L.R., 35 Mad., 622.
(4) (1913) I.L.R., 35 All., 227 (P.C.).
(5) (1917) 33 M.L.J., 46.

APPELLATE CIVIL.

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

1918, October 31 and November 6.

MARIAPPA PILLAI (THIRD DEFENDANT), APPELLANT,

v.

RAMAN CHETTIYAR AND THREE OTHERS (PLAINTIFF AND DEFENDANTS 1 AND 2), RESPONDENTS.*

Provincial Insolvency Act (III of 1907), sec. 36—'Void' in, meaning of—Exclusive jurisdiction of Insolvency Court to avoid transfers falling under the section.

A transfer of property falling under section 36 of the Provincial Insolvency Act remains valid unless and until set aside at the instance of the Official Receiver. The word 'void' in that section means only 'voidable'. It is only the Official Receiver and not anybody else, e.g., a purchaser from him, that can get such a transfer set aside.

After an adjudication in insolvency the only Court that has jurisdiction to annul a transfer voidable under the Law of Insolvency is the Court of Insolvency and no other Court can adjudicate upon the voidable character of such a transfer in any other proceeding, e.g., a suit, either at the instance of a plaintiff or of a defendant.

SECOND APPEAL against the decree of A. EDGINGTON, the District Judge of Tinnevelly, in Appeal No. 514 of 1916, preferred against the decree of T. N. KRISHNAMURTI VAJAPIER, the Additional District Munsif of Tinnevelly, in Original Suit No. 80 of 1914.

The facts are given in the judgment of SPENCER, J. The third defendant preferred this Second Appeal.

T. M. Krishnaswami Ayyar and *E. Vinayaga Rao* for the appellant.

T. R. Venkatarama Sastri and *G. R. Sivaramakrishna Ayyar* for the second respondent.

SPENCER, J.

SPENCER, J.—The plaintiff is the wife of the second defendant. She purchased the suit property from him on 5th August 1912, the consideration for the sale being the debt to her which he had incurred for meeting the expenses of a certain litigation between himself and his father for which he had pledged his wife's jewels. The first defendant was a creditor of the second defendant and brought Original Suit No. 324 of 1913 in the Court of the District Munsif of Tinnevelly against him and got

* Second Appeal No. 1941 of 1917.

the suit property attached before judgment. The plaintiff put in a claim petition but it was dismissed on 2nd December 1913. On a debtor's petition presented in the District Court on 15th September 1913, the second defendant was on 12th December 1913 declared insolvent. The Official Receiver sold the suit property by auction on 31st July 1914 and the third defendant purchased it.

The plaintiff brought this suit to establish her title and has been successful in the lower Courts in obtaining a declaration of her title, both the Additional District Munsif and the District Judge finding that the sale by plaintiff's husband in her favour was a genuine one for good consideration. They also held that the sale by the Official Receiver was a nullity for want of a vesting order, citing the opinion of MOORE, J., in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar*(1). The proceedings in which the second defendant was adjudicated insolvent are not in the records of this Second Appeal. Assuming that those proceedings were regular and that under section 16 (2) (*a*) of the Provincial Insolvency Act the insolvent's property by the order of adjudication *ipso facto* became vested in the Official Receiver, there are other obstacles in the way of the third defendant, who purchased the property from the Official Receiver and is the appellant in this Second Appeal. The defect in his title consists in the admitted fact that the transfer of the suit property by the insolvent to the plaintiff has not been annulled by the Court of Insolvency either under section 36 or section 37 of the Provincial Insolvency Act. 'The Court' in sections 36 and 37 signifies the Court exercising jurisdiction under that Act (see the definition in section 2 (*g*) of the Provincial Insolvency Act) which in the present case was the District Court. I am of opinion that no Court has the jurisdiction to annul, as such, a transfer amounting to a fraudulent preference or a voluntary transfer made within two years of the adjudication, except a Court exercising insolvency jurisdiction in proceedings which have been instituted to declare the debtor, who made the transfer, insolvent by a petition duly presented under the Act. In *Gandla Veeramma* v. *Ramaswamiah Garu*(2) it was held by PHILLIPS and KRISHNAN, JJ., that a Receiver appointed by a Court of Insolvency

(1) (1916) 30 M.L.J., 415. (2) Second Appeal No. 360 of 1916 (unreported).

MARIAPPA PILLAI v. RAMAN CHETTIYAR.

SPENCER, J.

could bring a regular suit in another Court to set aside a transaction under section 36 of the Provincial Insolvency Act, but with due respect, I feel doubt whether that decision was right. I do not think that a special statutory provision whereby District Courts and certain other Courts are invested by notification of the Local Government under section 3 (1) with the power among other powers of invalidating certain defined transactions of insolvents should be extended to all Courts of original jurisdiction whether notified under this Act or not. Otherwise conflicts might arise between the decision of a Court sitting in Insolvency and the judgment of another Court exercising ordinary original jurisdiction. Transfers of this kind, if they do not fall under section 53 of the Transfer of Property Act, would, in the absence of any provision to the contrary, be valid transfers.

I further agree with the view taken in *Hemraj Champa Lall* v. *Ramakrishnan Ram*(1) and in *Kauleshar Ram* v. *Bhawan Prasad*(2) that it is the Official Receiver who must set the Court in motion to annul a transfer under section 36 or 37. These sections speak of such transfers as being 'void against the Receiver', not void against all the world.

On the analogy of the English Bankruptcy Act, it has been laid down in three decisions of this Court that 'void' in section 36 of the Provincial Insolvency Act and in the corresponding section 55 of the Presidency Town Insolvency Act means 'voidable' (see *Khan Sahib Banji Abdul Khadar Sahib* v. *The Official Assignee of Madras*(3), *Sankaranarayana Aiyar* v. *Alagiri Aiyar*(4) and *Official Receiver of Trichinopoly* v. *Somasundaram Chettiyar*(5).

An additional reason was given by my learned brother in the latter case, viz., that the Act makes the intervention of the Court necessary, which would not be so if such a transfer were void *ab initio*. It has been held by another Bench of this Court in *Ussum Kassim Sait* v. *Palat Muhammad Koya*(6), that even the word 'void' in section 37 of the Provincial Insolvency Act only means 'voidable' although that section leaves the Court no discretion in the matter, by declaring that every transfer of

(1) (1917) 38 I.C., 369 (Patna).
(2) (1917) 42 I.C., 845 (All.).
(3) (1914) M.W.N., 247.
(4) (1918) 8 L.W., 281.
(5) (1916) 30 M.L.J., 415.
(6) (1917) 38 I.C., 321 (Mad.).

MARIAPPA PILLAI v. RAMAN CHETTIYAR.

SPENCER, J.

property which amounts to a fraudulent preference 'shall be annulled by the Court,' the words in section 36 being 'may be annulled.' It is enough for this appeal that 'void' in section 36 means 'voidable.' The appellant's pleader citing the Full Bench case of *Lakshmi Doss* v. *Roop Laul*(1) argues that he should be allowed to raise the voidability of the transaction in plaintiff's favour as an equitable defence in this suit, and further contends that the Official Receiver when he sold the insolvent's property by auction sufficiently indicated his intention of exercising his discretion towards the avoidance of the sale to the plaintiff.

But that is not enough. The transfer has not been annulled by the Insolvency Court. The appellant cannot be allowed for the purposes of this suit to stand in the shoes of the Official Receiver, an officer of Court, who has not been made a party, and to raise a defence involving the decision of a point which it is only within the jurisdiction of a Court dealing with the estate in insolvency to decide.

Moreover the transfer to the plaintiff, looked at from the point of view of section 36, is not a voluntary transfer, as both Courts have found that there was consideration for it. For the application of section 37, it was not made within three months of the presentation of the petition on which the adjudication was made. Even regarded as a transfer in fraud of creditors, it could, under the authority of *Palaniandi Chetty* v. *Appavu Chettiyar*(2) and *Subrahmania Ayyar* v. *Muthia Chettiar*(3), only be avoided by a suit instituted for the purpose of having it set aside.

The Appeal therefore fails from every point of view and is dismissed with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The Full Bench decision in *Lakshmi Doss* v. *Roop Laul*(1) (which is binding on me sitting in a Division Bench) should not, in my opinion, be extended so as to enable a defendant to raise an equitable defence if the Court before whom it is raised would not have jurisdiction to entertain a suit if brought by the defendant to obtain the relief of cancellation based on the right put forward as the basis of the equitable defence.

(1) (1907) I.L.R., 30 Mad., 169 (F.B.).
(2) (1916) 30 M.L.J., 565.
(3) (1918) I.L.R., 41 Mad., 612 (F.B.).

MARIAPPA PILLAI v. RAMAN CHETTIYAR. — SADASIVA AYYAR, J.

Such an equitable defence may be successfully pleaded in some cases even though a suit to obtain the relief based on the facts on which the defence is based may be barred by limitation, but I do not think that where the right to grant such a relief is, by statute law, vested in a special tribunal, the defence could be pleaded before another tribunal not vested with such power. I therefore agree with my learned brother that a transfer falling under section 36 of the Provincial Insolvency Act remains valid till set aside by the Insolvent Court at the instance of the Receiver and that the voidability of the transfer could not be pleaded as a defence in any Court till it is so set aside. I might further add that in this case there is nothing to show that the Receiver Gopala Ayyar knew of the transfer and elected to avoid it. It is the Receiver alone that could so elect and not a purchaser from him. Hence assuming that an order of annulment by the Court at the Receiver's instance is unnecessary and that the Receiver's unilateral declaration of intention to avoid will suffice, there is nothing to indicate that even such a declaration of intention existed in this case. The Receiver's act of selling the property to the third defendant is no proof of such intention in the absence of evidence that the Receiver had even knowledge of the alienation to the plaintiff. A man cannot intend to destroy a thing of whose existence he is unaware.

I do not wish to enter upon a consideration of the difficult question whether the Full Bench decision in *Lakshmi Doss* v. *Roop Laul*(1) can be reconciled with the principle of the recent Full Bench decision in *Subrahmania Ayyar* v. *Muthia Chettiar*(2) in which it was held that a defendant cannot set up the voidability under section 53, Transfer of Property Act, of an alienation made in the plaintiff's favour in fraud of creditors till such alienation is set aside actually by a decree passed in a regular suit, especially in view of even more recent decisions which held that even a single creditor could maintain such a suit brought in his own individual interest and not necessarily on behalf of all the creditors.

N.R.

(1) (1907) I.L.R., 30 Mad., 169 (F.B.).
(2) (1918) I.L.R., 41 Mad., 612 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

SECRETARY OF STATE FOR INDIA (PLAINTIFF), APPELLANT,

1918, November 7 and 14.

v.

SHITARAMAPPA AND 35 OTHERS (DEFENDANTS), RESPONDENTS.*

Mulgeni Lease—Death of mulgeni tenant without heirs—No escheat of tenant's rights to Government—Lapse of tenant's rights to lessor.

The rights of a *mulgenidar* do not escheat to Government on the death of the last owner dying without heirs, but revert to *mulgar* from whom the *mulgeni* was acquired.

A *mulgeni* tenure differs in its incidents from an ordinary permanent lease. *Sonet Kooer* v. *Himmut Bahadoor* (1876) I.L.R., 1 Calc., 391 (P.C.), distinguished.

SECOND APPEAL against the decree of A. J. CURGENVEN, the District Judge of South Kanara, in Appeal No. 126 of 1915, preferred against the decree of T. SAMA RAO, the District Munsif of Coondapoor, in Original Suit No. 535 of 1913.

This was a suit by the Government to recover by right of escheat certain properties said to have been once held on *mulgeni* lease by one Surappa Setti, who was alleged to have died in 1907 without leaving any heirs. The defendants who belong to the family of *mulgars* contended *inter alia*, (1) that Surappa Setti was only a *chalgeni* and not a *mulgeni* tenant, (2) that he left certain *dayadis* as heirs and, (3) that even if the tenure was *mulgeni*, it reverts on the death of the holder without any heirs, to the *mulgar* and it does not escheat to the Government. The District Munsif held that Surappa Setti died without leaving any heirs, that the tenure was *chalgeni* and that therefore it lapsed to the *mulgar* on the death of the *chalgenidar*, and he accordingly dismissed the suit. On appeal by the plaintiff, the District Judge held on the only two points argued before him that the tenure was *mulgeni* and not *chalgeni*, but that under the law it did not escheat to Government on failure of heirs but lapsed only to *mulgar*. Hence he concurred in the dismissal of

* Second Appeal No. 57 of 1917.

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the suit. The plaintiff (the Government) preferred this Second Appeal.

The Govenment Pleader (*V. Ramesam*) for appellant submitted that even a *mulgeni* lease can escheat to Government. A tenure can escheat if it is permanent and alienable; [see *Sonet Kooer* v. *Himmut Bahadoor*(1)], and both these conditions are fulfilled in a mulgeni tenure. The decisions in *Vyankatraya* v. *Shivarambhat*(2) and *Tamaya* v. *Timapa Ganpaya*(3) do not lay down generally that *mulgeni* lands are inalienable. All that they decide is that where there is a clause restraining alienation such restraint is not invalid. But this is not inconsistent with this position, viz., where there is no such clause in a *m lgeni* lease, as here, the tenure is alienable. Therefore the tests for escheat mentioned above are satisfied. Reference was made to *Nil Madhab Sikdar* v. *Narattam Sikdar*(4) and *Ram Dihal Rao* v. *The Maharaja of Vizianagram*(5).

B. Sitaram Rao (with *K. Y. Adiga* and *K. Sundara Rao*) for respondents.—The question whether *mulgeni* tenure escheats does not depend upon alienability. Whether alienable or not, the nature of the tenure is such that it reverts to the lessor on failure of heirs; see Fifth Report, Volume II, page 78, *Timmarsa Puranik* v. *Badiya*(6), *Vidyapurna Thirthaswami* v. *Uggannu*(7), Government Order No. 2154, dated 18th July 1912, *Parameshri* v. *Vittappa Shanbaga*(8), *Vaynkatraya* v. *Shivarambhat*(2) and *Tamaya* v. *Timapa Ganpaya*(3).

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The question in this case is whether the right of a *mulgenidar* escheats to the Government on the death of the last owner dying without issue or whether it reverts back to the *mulgar* from whom the *mulgeni* was acquired. This question is not covered by any direct authority. If a *mulgeni* tenure is of the same character as a permanent lease on the authority of the Judicial Committee in *Sonet Kooer* v. *Himmut Bahadoor*(1), the right would escheat to the Government and would not revert to the landlord. Therefore the question is what are the characteristics of a *mulgeni* tenure. In the Fifth Report, Volume

(1) (1876) I.L.R., 1 Calc., 391 (P.C.). (2) (1883) I.L.R., 7 Bom., 256.
(3) (1883) I.L.R., 7 Bom., 262. (4) (1890) I.L.R., 17 Calc., 826.
(5) (1908) I.L.R., 30 All., 488. (6) (1865) 2 Bom. H.C.R., 66.
(7) (1911) I.L.R., 34 Mad., 231 at p. 238. (8) (1903) I.L.R., 26 Mad., 157.

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II, page 78, it is pointed out that on the death of the *mulgenidar* the right would revert to the *mulgar* just as the mulgar's property would escheat to the Government in case he died issueless. Similar observations are to be found in the Report of the Collector in the same report at page 481. The learned Government Pleader suggested that this is not a statement of fact but an inference from ideas relating to feudal tenure. We are unable to agree with this contention. The Fifth Report was a collection of facts and statements laid before the House of Commons and there is no reason to suppose that the Collector and the other officers were influenced by feudal notions in making the above statements. In the minutes of Sir Thomas Munro at pages 71 and 79 a similar statement occurs. In *Timmarsa Puranik* v. *Badiya*(1) an extract is made from the report of Mr. Chamier speaking on behalf of the Board of Revenue which also shows that the tenure would revert to the *mulgar*. Then there is an observation by Mr. Justice BENSON in *Vidyapurna Thirthaswami* v. *Uggannu*(2), wherein the learned Judge accepts the view contained in the earlier reports. That was a case in which the question was whether a *mulgar* or *mulgenidar* should pay the increased assessment levied by the Government. After the decision of the Full Bench, the Government of Madras collected opinions on the advisability of legislating on the question of increased assessment. In their final order which is G.O. No. 2154, dated 18th July 1912, the Government say with reference to mulgeni leases:

"*As long as the rent is paid, the tenant cannot be evicted and even when it is unpaid the landlord on evicting the tenant is liable for the improvements which the tenant has made. On failure of heirs, the tenant's interest ordinarily lapses to the landlord.*"

Thus we have the opinion of a Collector, of the Board of Revenue, of that experienced administrator Sir Thomas Munro, of the Government and of the High Court in favour of the contention that an essential incident of *mulgeni* tenure is that on failure of heirs it lapses to the *mulgar*. In these circumstances the decision in *Sonet Kooer* v. *Himmut Bahadoor*(3), is not applicable to the present case. As pointed out by Mr. Sitarama

(1) (1865) 2 Bom. H.C.R., 66. (2) (1911) I.L.R., 34 Mad., 231 at p. 238.
(3) (1876) I.L.R., 1 Calc. 391 (P.C.).

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Rao the view taken by Sir CHARLES SERGEANT in *Vyankatraya* v. *Shivarambhat*(1) and *Tamaya* v. *Timapa Ganpaya*(2) is also in favour of this view. It is true in those cases there was a condition restraining alienation. But it was held that such conditions were not void. If it were a permanent heritable tenure to which the landlord has no manner of right, such a condition would be void under the general law as well as under section 10 of the Transfer of Property Act. The fact that that *condition* was held not repugnant to the grant is another ground for holding that a *mulgeni* tenure should not be regarded as of the same character as a permanent lease. In *Parameshri* v. *Vittappa Shanbaga*(3), the view taken in *Vyankatraya* v. *Shivarambhat*(1), and *Tamayya* v. *Timapa Ganpaya*(2), was accepted by Justice BASHYAM AYYANGAR. *Nil Madhab Sikdar* v. *Narattam Sikdar*(4) and *Ram Dihal Rao* v. *The Maharaja of Vizianagram*(5), relied on by the Government Pleader do not take the case further than *Sonet Kooer* v. *Himmut Bahadoor*(6). For these reasons we are of opinion that the decision of the District Judge is right and that this Appeal should be dismissed with costs to be paid in three months.

N.R.

(1) (1883) I.L.R., 7 Bom., 256.
(2) (1883) I.L.R., 7 Bom., 262.
(3) (1903) I.L.R., 26 Mad., 157.
(4) (1890) I.L.R., 17 Calc., 826.
(5) (1908) I.L.R., 30 All., 488.
(6) (1876) I.L.R., Calc., 391 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

KRISHNAMOORTHI AIYAR (PLAINTIFF), APPELLANT,

v.

THE TALUK BOARD OF MAYAVARAM REPRESENTED BY ITS PRESIDENT IN COUNCIL (DEFENDANT), RESPONDENT.*

1918, December 4 and 12.

Local Boards Act (V of 1884), sec. 95—Taluk Board—Planting of trees along a road—Statutory duty—Branches of trees overhanging plaintiff's land—Omission to remove, if actionable—Non-feasance—Absence of negligence—Cause of action—English and Indian Law.

Where a Taluk Board, acting under section 95 of the Local Boards Act (V of 1884), planted, on the sides of a road, certain trees, whose branches spread over the land of the plaintiff, who thereupon sued for an injunction directing the Board to lop off the branches:

Held, that the suit was not sustainable, as (1) the Taluk Board in the discharge of its statutory duties had not acted carelessly or negligently, and (2) the omission to remove the branches, even if it ought to have been done, is only a *non-feasance* for which no action at the instance of a private individual would lie.

English and Indian Cases on the subject, reviewed.

SECOND APPEAL against the decree of ANANTA NARAYANA AYYANGAR, the Temporary Subordinate Judge of Tanjore, in Appeal Suit No. 138 of 1917, preferred against the decree of B. GURURAJA RAO, the District Munsif of Mayavaram, in Original Suit No. 272 of 1916.

The material facts appear from the judgment.

S. Ranga Achariyar for the appellant.

The Hon. The Advocate-General, T. S. Rajagopala Ayyar and *A. C. Sampath Ayyangar* for the respondent.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—This is a suit for an injunction against the Taluk Board of Mayavaram directing it to lop off all the branches of certain trees which have spread over the land of the plaintiff. Both the Courts below have dismissed the suit holding that such a suit is not maintainable. Before us, it was argued by the learned vakil for the appellant that the burden of proving due care and caution in the exercise of public duties is

* Second Appeal No. 52 of 1918.

KRISHNA-MOORTHI AIYAR v. THE TALUK BOARD OF MAYAVARAM.

SESHAGIRI AYYAR, J.

on the defendant and that the Board should so exercise its powers as not to interfere with private rights. Section 95 of the Local Boards Act (V of 1884) directs the Taluk Board to plant trees on the sides of roads and to preserve them. It is not disputed that the trees complained of were planted on the sides of the road. There is no allegation that there was any negligence in the doing of this act. The main argument for the appellant was that although the original act was done properly, the Taluk Board is under a liability to see that the results of that act do not injuriously affect private rights. *Gaekwar Sarkar of Baroda* v. *Gandhi Kachrabhai*(1), which was relied on only lays down that in exercising a duty a public body should see that as little damage as possible is done to private individuals. In *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*(2) it was held that the duty was not obligatory on the Government to provide a bye-wash, and that therefore in performing this self-imposed task the Government was bound to have respected private rights. It is not necessary to say whether this view of the functions of the Government is right or not. In our opinion these dicisions are not applicable to the present case. As the learned Advocate-General contended, before fastening responsibility upon a public body for acts done by it, the first thing is to ascertain whether the act complained of was done in discharge of a permissive right or of a compulsory duty. If Corporations have been authorized to perform certain functions not solely in the interests of the public, their liability may not differ much from the liability of private individuals. But where the Legislature imposes a statutory obligation on a public body, the duty *prima facie* is imposed in the interests of the public and private individuals are expected to submit themselves to some inconvenience in order that the general convenience of the public may be furthered. For these reasons it has been held that unless it can be shown that they have discharged their duties negligently and carelessly, public bodies are not liable in damages to private individuals. In *East Fremantle Corporation* v. *Annois*(3) Lord

(1) (1903) I.L.R., 27 Bom., 344. (2) (1905) I.L.R., 28 Mad., 73.
(3) (1902) 2 A.C., 213 (P.C.).

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MACNAGHTEN in delivering the judgment of the Judicial Committee stated:

"The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual cannot maintain an action. He is without a remedy unless a remedy is provided by the statute."

In the present case there is no provision, so far as we are aware, in the Local Boards Act giving a remedy to an injured individual in cases like the present. In another case *Canadian Pacific Railway* v. *Roy*(1) in the same volume the LORD CHANCELLOR stated:

"The ground upon which the immunity of a Railway Company for injury caused by the normal use of their line is based is that the Legislature which is supreme, has authorized the particular thing so done in the place and by the means contemplated by the Legislature, and that cannot constitute an actionable wrong in England any more than it can constitute a fault by the Quebec Code."

These observations apply with equal force to the acts directed to be done by the Local Boards. In *Geddis* v. *Proprietors of Bann Reservoir*(2), which was quoted for the appellant, Lord HATHERLY stated:

"If a company, in the position of the defendants there, has done nothing but that which the Act authorized—nay, may in a sense be said to have directed—and if the damage which arises therefrom, is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done, must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation."

In *Hammersmith Railway Company* v. *Brand*(3) Lord CAIRNS stated:

"It would be a repugnant and absurd piece of legislation to authorize by statute a thing to be done, and at the same time leave it to be restrained by injunction from doing the very thing which the Legislature has expressly permitted to be done."

(1) (1902) 2 A.C., 220.
(2) (1878) 3 A.C., 430 at p. 438. (3) (1863) L.R., 4 H.L., 171 at p. 215.

KRISHNA-MOORTHI AIYAR v. THE TALUK BOARD OF MAYAVARAM.

SESHAGIRI AYYAR, J.

The principle of these decisions was followed in *Aiyasami Aiyar* v. *The District Board, Tanjore*(1) where a distinction between permissive and obligatory duties was pointed out. No doubt, as was said in *Canadian Pacific Railway* v. *Parke*(2), even in the case of Corporations, if the acts are only permissive, the private rights of parties must be respected. Reference may also be made to *Municipality of Picton* v. *Geldert*(3), in which all the authorities on the subject are collected. Probably the nearest case in point is that reported in *Tregellas* v. *The London County Council*(4). That was an action against the London County Council and the complaint was that by the neglect of the Council to lop off the branches of trees plaintiff suffered injury. In that case there was no duty cast upon the Council to plant and preserve trees. Still Lord RUSSEL of Killowen, C.J., held that because the failure to lop off the branches was only non-feasance, no action lay against the County Council. It must be taken now as well-established that for mere non-feasance no action for damages will lie against a public body. See *Municipal Council of Sydney* v. *Bourke*(5), *Earl of Harrington* v. *Derby Corporation*(6). It was argued that although the planting of the trees was done properly, a misfeasance was committed by the failure to prevent damage to plaintiff. In our opinion it would not be consistent with the duty to preserve the trees that the Local Board should cut off all its branches. The very recent case, a summary of which is reported, (*Mul* v. *Croydon Corporation*(7), gives a complete answer to this contention. In that case, the Corporation was charged with the duty of wood-paving roads. After seventeen years, the wood blocks swelled and bulged and owing to the obstructions caused by such bulging an accident happened. AVORY and LUSH, JJ., held that it was not a case of misfeasance; but only one of non-feasance, namely, neglect to repair the highway, and held that the Corporation was not liable. The learned Judges are reported to have distinguished *McClelland* v. *Manchester Corporation*(8) on this ground.

(1) (1908) I.L.R., 31 Mad., 117.
(2) (1889) A.C., 535.
(3) (1893) A.C., 524.
(4) (1897) 14 T.L.R., 55.
(5) (1895) A.C., 433.
(6) (1905) 1 Ch., 205.
(7) (1918) 53 L.J., 227.
(8) (1912) 1 K.B., 118.

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SESHAGIRI AYYAR, J.

In the present case, the Taluk Board on which an obligatory duty to plant and preserve trees has been imposed, are exempt from liability on both the grounds, namely (*a*) that in the discharge of its duties it has not acted carelessly or negligently and (*b*) that the omission to remove the branches, even if it ought to have been done, is only non-feasance for which no action at the instance of a private individual lies. We therefore agree with the Courts below that the suit was rightly dismissed. The Second Appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Napier.

1918, December 16.

CHEERU AND SIX OTHERS (PLAINTIFFS), APPELLANTS,

v.

NARAYANAN NAMBUDIRI AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

Public Trust—Co-trustees—Act of one of two trustees without consent of the other—Grant of mortgage—Transaction, whether valid—Rule of act of majority of trustees, applicability of, to cases of two co-trustees.

One of two trustees of a public trust cannot grant a mortgage or effect any similar transaction in respect of the trust properties so as to bind the trust, without the consent of the other trustee even though the latter, on consultation, wrongly refuses his consent.

The rule that the act of a majority of the trustees is valid, provided they gave proper opportunity to the others to consider the advisability of the act in question, does not apply to cases where there are only two trustees, as one of them alone cannot constitute a majority.

Savitri Antarjanam v. *Raman Nambudri* (1901) I.L.R., 24 Mad., 296 and *Wilkinson* v. *Malin* (1832) 2 C. & J., 636, followed

SECOND APPEAL against the decree of H. D. C. REILLY, the District Judge of North Malabar, in Appeal Suits Nos. 587 and 590 of 1915, preferred against the decree of U. RAMAPPA, the District Munsif of Kuttuparamba, in Original Suit No. 232 of 1914.

* Second Appeals Nos. 46 and 47 of 1917.

CHEERU v. NARAYANAN NAMBUDIRI.

The first defendant, who is one of two Uralars of a devaswam to which the suit lands belong in jenm, granted a kanom over them to the fourth defendant who assigned his interest to the plaintiffs. The latter brought this suit to recover possession of the lands with arrears of rent from the third defendant who had purchased the lands on 10th March 1913 in Court auction in execution of a decree against the devaswam and had subsequently taken a lease of the same from both the first and the second defendants who were co-trustees of the devaswam. The second and third defendants contended, *inter alia*, that the kanom was not valid and binding on the trust as it was granted by the first defendant alone without the consent of the other co-Uralan, namely, the second defendant. It was found that the kanom deed was executed by the first defendant alone on the 5th April 1913 and the money raised thereby was used to get the auction sale to the third defendant set aside and to save the property for the devaswam. The District Munsif decreed the suit in favour of the plaintiffs. On appeals being preferred by the second and third defendants, the learned Acting District Judge reversed the decree and dismissed the suit, holding that the grant on kanom by only one of two Uralars without the consent of the other was invalid in law. The plaintiff preferred a Second Appeal which came on for hearing originally before ABDUR RAHIM and NAPIER, JJ., who called for a finding on the following issue :—

"*Whether the second defendant consented to the kanom being granted to the appellants although he did not join in its execution?*"

The learned Acting District Judge submitted a finding in the following terms :—

"My finding is that the second defendant never consented to the particular kanom in question being granted to appellants' assignor and at the time when the kanom deed was executed was not consenting to any kanom being granted to appellants' assignor."

On receipt of the above finding, the Second Appeal was posted for final hearing before ABDUR RAHIM and NAPIER, JJ.

K. P. M. Menon and *E. Ramaswami Ayyar* for the appellants.

C. Madhavan Nayar for the first, third and fifth respondents.

CHEERU v. NARAYANAN NAMBUDIRI.

ABDUR RAHIM, J.

The JUDGMENT of the Court was delivered by

ABDUR RAHIM, J.—The learned District Judge has found that one of the co-Uralars did not give his consent to the grant of the kanom in question. But it is argued that, nevertheless the act of one trustee, if he has consulted the other trustee as to the grant of a mortgage or any similar transaction and that trustee wrongfully refused to join in the act, was valid. There is no express authority dealing with the case of two trustees, though there are a number of cases in which it has been held that where there are a number of trustees the act of the majority will be binding and valid if they had given a proper opportunity to the other trustees to consider the advisability of the act in question. But those decisions are based on the principle that unless the act of the majority was upheld in many cases the trust estate would suffer. In the case of two trustees, however, this principle will not apply because there is no majority. That is what is practically indicated in *Savitri Antarjanam* v. *Raman Nambudri*(1). The decision in *Wilkinson* v. *Malin*(2) which is the leading case on the subject bases it on the principle that the majority should have approved of the act. We do not think that we should be warranted in extending the principle to a case like the present where only one out of two trustees has exercised an act which ought to be done by both the trustees jointly.

But it is pointed out that the suit ought not to have been dismissed altogether and that the plaintiffs should have a charge for the amount actually advanced by him as it went to discharge a liability on some of the trust properties including the property in the suit. We think there is force in this contention and we, therefore, modify the decree of the lower Court by declaring a charge on the property in suit for the amount of Rs. 418-14-0. The appellants will bear the costs of this appeal.

K.R.

(1) (1901) I.L.R., 24 Mad., 296. (2) (1832) 2 C. & J., 636.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1918, March 18 and December 20.

KRISHNA AIYAR (SECOND DEFENDANT), APPELLANT,

v.

SAVURIMUTHU PILLAI (PLAINTIFF), RESPONDENT.*

Execution—Civil Procedure Code (Act V of 1908), sec. 49 and O. XXI, r. 2—Satisfaction of decree, not certified—Second execution of decree by assignee of decree-holder—Suit by judgment-debtor for damages against decree-holder and assignee, maintainability of.

Even a decree which has once been satisfied can be executed so long as the satisfaction is not reported to and certified by the Court.

A judgment-debtor who is obliged to satisfy such a decree a second time at the instance of an assignee of the decree-holder, has a cause of action for damages only as against the decree-holder but none against the assignee even though the assignee got the assignment with knowledge of satisfaction.

Viraraghava Reddi v. *Subbakka* (1882) I.L.R., 5 Mad., 397, referred to.

Manmohan Karmokar v. *Dwarak Nath Karmokar* (1911) 12 C.L.J., 312 and *Goono Monee Dossia* v. *Pran Kishore Dossee* (1870) 13 W.R., 69 (F.B.), distinguished.

APPEAL under clause (15) of the Letters Patent against the judgment of PHILLIPS, J., who differed from SADASIVA AYYAR, J., in *Krishna Aiyar* v. *Savurimuthu Pillai*(1).

The facts are fully given in the judgment of SESHAGIRI AYYAR, J.

This Letters Patent Appeal coming on for hearing in the first instance, the Court made the following

ORDER.

Before disposing of this appeal it is desirable that we should have a finding whether the second defendant, when he obtained assignment of the decree in question, knew that that decree had been satisfied. The finding will be submitted on the

* Letters Patent Appeal No. 131 of 1917.

(1) Second Appeal No. 389 of 1916 against the decree of F. A. COLERIDGE, the District Judge of Madura, in Appeal No. 494 of 1914, preferred against the decree of V. BHASHYAM AYYANGAR, the District Munsif of Tirumangalam, in Original Suit No. 366 of 1912.

evidence on record within the first week after recess of the High Court, and the parties will be allowed to file objections to the said finding within ten days after notice of the return of the same shall have been posted up in this Court.

In compliance with the above order, the District Judge of Madura submitted the following

FINDING.

* * * *

"My finding is that second defendant knew the decree had been satisfied."

T. R. Venkatarama Sastri for the appellant.—There is no cause of action against the second defendant, the assignee. Though it is found by both the lower Courts that he knew that the decree was satisfied, yet as there is a prior order of the Court that the decree was not satisfied, he is entitled to execute. Section 49 of the Civil Procedure Code does not affect the question. The assignee was not a party to the judgment-debtor's contract with the assignor, the decree-holder. It has been held that section 244, Civil Procedure Code, bars a suit for a refund or for an injunction against executing the decree [*Bairagulu* v. *Bapanna*(1)]. A second execution is therefore maintainable. The cause of action arises not on the date of the second execution but on the date on which the original decree-holder failed to enter satisfaction. The only equities affecting a transferee are stated in section 49, Civil Procedure Code, and Order XXI, rule 16, Civil Procedure Code. That section relates to equities in the course of *execution*. Moreover, as the Court cannot take notice of an uncertified payment, such payment is not one of the equities that can be set up in bar of execution under section 49 or Order XXI, rule 16, Civil Procedure Code [*Sinnu Pandaram* v. *Santhoji Row*(2)]. A suit to annul the effect of a second execution cannot lie but a suit for damages against the decree-holder will lie, for breach of contract to certify [*Jaikaran Bharti* v. *Raghunath Singh*(3)]. Moreover, the suit is barred by limitation. The original satisfaction was in March 1906. The date of recognition of assignment was February 1908. The recovery of decree amount was in July

(1) (1892) I.L.R., 15 Mad., 302. (2) (1903) I.L.R., 26 Mad., 428.
(3) (1898) I.L.R., 20 All., 254.

KRISHNA AIYAR v. SAVURI-MUTHU PILLAI.

1909. This suit was filed in October 1910. The suit, not having been filed within three years of the first payment, is barred by limitation. *Dorasinga Tevar* v. *Arunachalam Chetti*(1), *Gopala Aiyar* v. *Ramaswamy Sastrigal*(2) and *Marappa Chetti* v. *Shanmugappa Chetti*(3).

K. Jagannatha Ayyar for respondent—[*Court* :—We do not want to hear you on the question of limitation.] I have a right of suit against the second defendant also. My cause of action is the actual recovery of money in execution a second time. The decree-holder may put in several applications for execution but he may not actually execute or recover. There is no period of limitation for the decree-holder reporting the satisfaction. The transferee who is the representative of the decree-holder is liable if he executes after satisfaction; *Goono Monee Dossia* v. *Pran Kishore Dossee*(4) and section 49, Civil Procedure Code. Reference was made to *Monmohan Karmokar* v. *Dwarak Nath Karmokar*(5). The equities affecting the decree-holder affect also his assignee.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—I have come to the conclusion that the plaintiff-respondent had no cause of action against the second defendant in the suit. The first defendant obtained a decree against one Antonia Pillai whose executor is the present plaintiff.

The decree amount was paid out of Court by the judgment-debtor. The payment however was not certified as required by the law by the decree-holder whose duty it was to do so in the first instance, nor did the judgment-debtor inform the Court of the satisfaction as he was entitled to do in default by the decree-holder. The decree was afterwards assigned to the second defendant. A question was raised in the execution of the decree as to whether it had been adjusted, and, if so, whether the adjustment could be recognized. The executing Court held that in the absence of a certificate or record of satisfaction as required by Order XXI, rule 2, it remained an executable decree and it also found that adjustment had not been proved. The second defendant then proceeded to realize the decree amount by execution. The plaintiff, as executor of the judgment-debtor, thereafter instituted this suit claiming damages against the first

(1) (1900) I.L.R., 23 Mad., 441. (2) (1912) 22 M.L.J., 207.
(3) (1911) 21 M.L.J., 518. (4) (1870) 13 W.R., 69 (F.B.).
(5) (1911) 12 C.L.J., 312.

KRISHNA AIYAR v. SAVURI-MUTHU PILLAI.

ABDUR RAHIM, J.

and second defendants to the extent of the amount, which the second defendant had realized in execution. It has been well settled, and it can hardly be disputed, that so far as the first defendant, the original decree-holder, was concerned, the plaintiff had a good cause of action. This was so laid down as far back as *Viraraghava Reddi* v. *Subbakka*(1) by a Full Bench of this Court and that is also the view of the other High Courts. In that case, it was held that such a suit would lie as for breach of a promise on the part of the decree-holder either not to execute the decree or to enter satisfaction. It was also held that the judgment-debtor could frame his claim against the decree-holder thus in default for damages on the basis of fraud or negligence in not certifying adjustment.

But the question whether there is a cause of action against the assignee of a decree which had been adjusted but the adjustment of which was not certified to the Court, is bare of authority. It cannot be said that there was any sort of contractual relation between the second defendant, the assignee in the case, and the plaintiff and the mere fact that the second defendant, as found, knew that the decree had been satisfied will not make him guilty in law, either of fraud or of negligence inasmuch as he was under no obligation to certify adjustment, the decree amount having been received by the original decree-holder before assignment. The executing Court was right in holding that it was bound to treat the decree as still subsisting and to allow it to be executed, by virtue of Order XXI, rule 2, clause (3) which enacts that "a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree." The decree, therefore, on the date of its assignment being one which, according to law, the second defendant could enforce, the only way in which the case of the plaintiff could be put is to base it on section 49, which enacts that "every transferee of a decree shall hold the same subject to the equities, if any, which the judgment-debtor might have enforced against the original decree-holder." It is argued that we must hold that the decree was in this case subject to an equity which bound the assignee who had knowledge of the adjustment before he obtained the assignment. In the first place

(1) (1882) I.L.R., 5 Mad., 397 (F.B.).

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section 49 relates to the stage of execution, that is to say, under it, it is the Court executing the decree that has to consider whether it was held subject to any equities which the judgment-debtor could enforce against the original decree-holder. Now the cause of action in a case like this as laid down in *Viraraghava Reddi* v. *Subbakka*(1) is breach of a promise or contract and I am not aware of any general principles according to which the existence of such a contract or promise would create an equity which would be enforceable against the transferee. In the case of sales of immovable property, no doubt, it is well established that the transferee is bound by a contract to convey the property in favour of another person of which he had knowledge. But that rule, so far as I am aware, has not been extended either to the disposition of movable properties or of money decrees. We have been referred to a Full Bench decision of the Calcutta High Court reported in *Goono Monee Dossia* v. *Pran Kishore Dossee*(2) where the cause of action against the original decree-holder who executed the decree in spite of adjustment out of Court is put on the ground that after such adjustment he held the decree in trust for the judgment-debtor. But I do not think that section 49 of the Code of Civil Procedure or the corresponding provision of the old Code ever contemplated such an inferential trust. The Full Bench of this Court in *Viraraghava Reddi* v. *Subbakka*(1) does not base it on any such ground, and if I may say so with respect, the right way to regard the cause of action as laid down in that case is either breach of a promise or of a statutory duty to certify adjustment to Court. The second defendant, as I have pointed out, could not be said to have committed any breach of promise or having been guilty of violating any statutory duty. We have been also referred to another decision of the Calcutta High Court in *Monmohan Karmokar* v. *Dwarak Nath Karmokar*(3). But I do not think that the point decided there throws much light on the principles applicable to this case. There the question arose in execution between the assignee of a decree who held it as benamidar of the judgment-debtor and other creditors of the judgment-debtor, and having regard to the conclusion of the learned Judges that in

(1) (1882) I.L.R., 5 Mad., 397 (F.B.). (2) (1870) 13 W.R., 69 (F.B.).
(3) (1911) 12 C.L.J., 312.

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those circumstances there was no executable decree, any observations regarding the liability of assignees of decree generally cannot in my opinion be of much help in the present case. Here there was undoubtedly an executable and subsisting decree and that decree was executed according to law. I hold therefore that there was no cause of action against the second defendant. I may mention that we had called for a finding as to whether the second defendant, at the time he obtained the assignment, had knowledge of the adjustment out of Court. The finding is that he had such knowledge, but as I have already stated, that fact cannot make any difference as to his liability in the present suit.

The result is that the Appeal must be allowed and the suit as against the second defendant dismissed with costs throughout.

OLDFIELD, J.

OLDFIELD, J.—I am not prepared to accept all the considerations adduced by my learned brethren. But I can give my reasons shortly for agreeing with the conclusion that there is no cause of action against the second defendant; and that is sufficient to justify concurrence in the decision that the suit must be dismissed.

The main question is whether the plaintiff is entitled to recover, not only from the first defendant who has once recovered the decree amount, that is not disputed, but also from the second defendant who has recovered it again by execution. I agree with my learned brethren for the reasons given by them that the claim must be regarded as for damages for injury caused by first defendant's failure to certify satisfaction, as he ought to have done after recovering the decree amount. Then the only ground, on which second defendant can be held liable, is that he in some way subjected himself to first defendant's liability by taking an assignment from him. There is only one basis put forward for this contention, namely, the terms of section 49 of the Civil Procedure Code. But no authority has been cited to show that the section is intended to cover such cases as the present. Whether the fact that it occurs in the chapter relating to execution is a reason against the construction of it, I do not wish to decide. It is at all events not necessary in the present connexion to hold that it is final; for there is another clear reason for the same conclusion.

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The section provides that the transferee of a decree shall hold the same subject to the equities, which the judgment-debtor might have enforced against the original decree-holder. It seems to me that the section is not intended to mean any more than it says explicitly. It is only intended to make provision regarding the terms on which the decree is to be held; and it is not the contention of the plaintiff in this case, and could not be, that the second defendant's holding of the decree in any way arose from or is connected with the first defendant's wrongful conduct or was ever conditional on his paying compensation for it. In fact, the claim against the second defendant is entirely independent of his holding the decree in that way. In these circumstances, I agree with the order proposed by Mr. Justice ABDUR RAHIM.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I agree with the judgment of ABDUR RAHIM, J., just pronounced.

In O.S. No. 316 of 1905 the first defendant obtained a decree against the plaintiff. Subsequent to the decree, it was arranged that the plaintiff should pay off the debts due from the first defendant to third parties and that he should enter up satisfaction of the decree obtained by him against the plaintiff. The plaintiff's case is that he did perform the agreement, but that the first defendant fraudulently failed to enter up satisfaction. An application was made for execution by the first defendant which was opposed by the plaintiff. But it was allowed on two grounds: (1) that as no satisfaction was entered, the decree can be executed and (2) that the arrangement between the parties was not carried out by the plaintiff. After this order permitting execution, the first defendant transferred the decree to the second defendant. He executed it and recovered the money from the plaintiff. This was on the 7th September 1908. Thereupon the present suit was instituted by the plaintiff for damages for wrongfully executing the decree in contravention of the original arrangement. The Courts below have found that the plaintiff did perform his part of the contract and gave a decree for damages against both the defendants. The second defendant appealed to this Court in Second Appeal No. 389 of 1916. The two learned Judges who heard the appeal differed in opinion. SADASIVA AYYAR, J., was for reversing the decree as against the

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second defendant, but PHILLIPS, J., was for confirming the decree against him. Hence this Letters Patent Appeal.

Although I did not dissent from the opinion of my learned colleagues that a finding should be called for on the question whether the second defendant was aware that, at the time the decree was transferred to him, the plaintiff had performed his part of the contract, in my opinion, there is no cause of action at all against the second defendant. There is no privity of contract between the plaintiff and the second defendant. The suit for damages is for the breach of the contract. That is well settled. See *Viraraghava Reddi* v. *Subbakka*(1) and *In the matter of Medai Kaliani Anni*(2). What gives the aggrieved party a right of action is the failure to carry out the terms of the contract to enter up satisfaction. It is true that the measure of damages in such a suit is ordinarily the amount recovered by the wrongdoer. But that is not because the plaintiff is entitled to follow the amount recovered in whosoever's hands it may be found, but because the Courts for the sake of convenience have enunciated the rule that the injury must be estimated as the actual loss sustained by the aggrieved party. In all the four High Courts in this country it has been held that where there is a wrongful sale of property in violation of the agreement to enter up satisfaction, the property purchased at the execution sale cannot be recovered by the injured party but that he is only entitled to damages. *Yellappa* v. *Ramachandra*(3), *Rewa Mahton* v. *Ram Kishen Singh*(4), *Jaikaran Bharti* v. *Ragunath Singh*(5) and *Krishnaswami Ayyangar* v. *Ranga Ayyangar*(6), all enunciate this principle. Now the ground on which these decisions proceed is that the execution proceedings are not invalid by themselves, although they had been taken in violation of the agreement, because under the Civil Procedure Code, so long as the decree is allowed to be outstanding without satisfaction having been entered in respect of it, it is an enforceable decree. Parties deriving benefit thereunder should not be deprived of their right because of a pre-existing arrangement between the judgment-debtor and the decree-holder. That being the

(1) (1882) I.L.R., 5 Mad., 397 (F.B.).
(2) (1907) I.L.R., 30 Mad., 545.
(3) (1897) I.L.R., 21 Bom., 463.
(4) (1887) I.L.R., 14 Calc., 18.
(5) (1898) I.L.R., 20 All., 254.
(6) (1897) I.L.R., 20 Mad., 369.

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provision of law, all the four High Courts have held that the right of the judgment-debtor who has been deprived of property is to sue the decree-holder for damages caused by the deprivation, and not the purchaser for the restoration of the property taken from him. I think the principle of these decisions is applicable to the present case. The second defendant obtained execution in a proceeding, which was held to be subsistent and enforceable. The fact that it is not land but money that he recovered ought to make no difference in the application of the rule of law. Therefore I am unable to hold that the second defendant is bound to return the money which he recovered in execution against the plaintiff.

But it was suggested that the knowledge of the second defendant that, at the time he obtained a transfer of the decree, the plaintiff had performed his part of the contract entered into with the first defendant would make a difference in the case. Now there are some recognized principles on this subject. For example, we have section 27 of the Specific Relief Act which enables a party with whom a contract of sale has been entered into to sue for specific performance not only against the person who agreed to sell the property to him but also against the person who has purchased that property with knowledge of the agreement to sell. The principle of this section is borrowed from the well-known rule in equity that "equity regards that as done which ought to have been done." From this maxim, the rule has been deduced "that from the time of the contract for the sale of the land, the vendor, as to the land, becomes a trustee for the vendee; and the vendee, as to the purchase money a trustee for the vendor who has a lien upon the land therefor. And every one coming in by subsequent and representative title, and every subsequent purchaser from either with notice, becomes subject to the same equities as the party would be to whom he succeeds, or from whom he purchased." It is doubtful whether this principle is applicable to contracts relating to money or movable property. For the sake of argument, I shall assume that it covers such cases also. What follows? The person with whom the contract not to execute the decree has been entered into can proceed to recover the amount wrongfully levied from him not only from the promisor, but also from the party who has benefited by the breach. This assumes that the proceeding is

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wrongful and void *ab initio*. But where legally the decree is executable, it is not open to argument that the party who recovered under such a decree is compellable to refund what he has recovered. Moreover, the four cases from the four High Courts to which I drew attention already show that the principle underlying section 27 of the Specific Relief Act has no application to such cases. In my opinion when once it is conceded that the aggrieved party is not entitled to recover land or other property sold in execution contrary to the terms agreed upon between the judgment-debtor and the decree-holder, it is impossible to suggest any ground of liability on the part of a third party deriving benefit under the decree. This conclusion derives further support from decisions like *Bairagulu* v. *Bapanna*(1) where it was held that no injunction will lie to prevent a party from executing a decree. The obvious reason is that the decree is legal and enforceable and the right of action to the aggrieved party arises on the breach of the agreement and not upon the fact that the decree has been executed. The decision in *Monmohan Karmokar* v. *Dwarak Nath Karmokar*(2) has been very much misunderstood. It is a case of a judgment-debtor obtaining an assignment of decree nominally after it had been satisfied. The question related to the equities enforceable in execution against the assignee. The observations about similar equities being available in suits are pure *obiter*. They really have no bearing on the present case. However, if that judgment lays down the proposition contended for by the respondent's vakil, I am unable to agree with it. As regards *Goono Monee Dossia* v. *Pran Kishore Dossee*(3), the question was between the original parties to the decree and no question of assignment was considered. With all respect I am unable to accept the proposition that the decree-holder is a trustee for the judgment-debtor. As regards section 49 of the Civil Procedure Code on which reliance was placed, it is enough to point out that that section deals only with equities in the course of execution: for example, there may be cross-decrees or a question of set off in respect of costs. In such matters, the transferee decree-holder is bound by the equities subsisting

(1) (1892) I.L.R., 15 Mad., 302. (2) (1911) 12 C.L.J., 312.
(3) (1870), 13 W.R., 69 (F B.).

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between his assignor and the judgment-debtor. Vide *Sinnu Pandaram* v. *Santhoji Row*(1). That has no application to the cases of suits for damages. I therefore agree with SADASIVA AYYAR, J., that there is no cause of action against the second defendant. This being my view it is unnecessary to consider the question of limitation.

As I have held that there is no cause of action against the second defendant, I would reverse the decrees of the Courts below, and dismiss the suit against the second defendant with costs throughout.

N.R.

APPELLATE CIVIL—FULL BENCH.

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

1918, October 25, 31, 1919, February 4.

VAITHESWARA AIYER (PLAINTIFF), APPELLANT,

v.

SRINIVASA RAGHAVA IYENGAR AND FIVE OTHERS (DEFENDANTS Nos. 1 to 5 AND SIXTH RESPONDENT IN DISTRICT COURT), RESPONDENTS.*

Benamidar, suit on mortgage by, maintainability of—Real owner, whether a necessary party.

Held by the Full Bench that a person who is not the real mortgagee but only a benamidar for him can institute a suit to enforce the mortgage and that the real mortgagee need not be a party. *Choudhri Gur Narayan* v. *Sheo Lal Singh* (1919) 36 M.L.J., 68 (P.C.); s.c., 46 I.A., 1, followed.

SECOND APPEAL against the decree of J. G. BURN, the District Judge of Trichinopoly, in Appeal No. 168 of 1916, preferred against the decree of A. S. BALASUBRAHMANI AYYAR, the Subordinate Judge of Trichinopoly, in Original Suit No. 113 of 1914.

This was a suit upon a hypothecation bond executed by the first defendant and another in favour of the defendants' second witness, who assigned his right to the plaintiff. The defendants pleaded *inter alia* that the plaintiff was only a benamidar for defendants' first witness, who was the real assignee, that the defendants' first witness ought to have been made a party and that

(1) (1903) I.L.R., 26 Mad., 428.

* Second Appeal No. 1815 of 1917.

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the suit was therefore not maintainable. Both the lower Courts upheld the above pleas and dismissed the suit. Plaintiff preferred this Second Appeal.

The Second Appeal came on for hearing in the first instance before PHILLIPS and NAPIER, JJ., and the following

ORDER OF REFERENCE TO A FULL BENCH was made by

NAPIER, J.

NAPIER, J.—This is a suit on a mortgage by an assignee mortgagee. The lower Appellate Court has found that the plaintiff was a benamidar for defence first witness and has dismissed the suit obviously on the ground that a benamidar cannot sue on title. Before us it is urged on the authority of *Singa Pillai* v. *Govinda Reddi*(1) that such a benamidar can sue. The case relied on is a direct authority for that contention. We are however unable to accept it as conclusive. In this Court ever since the decision in *Kuthaperumal Rajali* v. *The Secretary of State for India*(2) it has, we think, been consistently held that a benamidar must show some right to sue under the general law apart from the fact that he lent his name for the purchase. At least we are aware of no decision to the contrary and no such case has been relied on by the learned Judges who decided *Singa Pillai* v. *Govinda Reddi*(1). With deference to the learned Judges, we should be prepared to consider the matter concluded by the doctrine of *stare decisis* but for the fact that the later decision is published in the authorized Law Reports. But that being the case, we think that the question must be referred to a Full Bench. We do not think it necessary ourselves to examine the cases in other Courts as was done in *Kuthaperumal Rajali* v. *The Secretary of State for India*(2) and has been done in *Singa Pillai* v. *Govinda Reddi*(1) but we would offer a few observations on the latter case. With deference to SPENCER, J., we do not think that the unreported case, *Chidambara Mandaroyan* v. *Singaram*(3) was quoted with approval in *Kuthaperumal Rajali* v. *The Secretary of State for India*(2). On the language of the learned Judges we gather that they did not approve of it and sought to distinguish it on the ground that the plaintiff in that case may have been appointed an agent. In the present case such a contention could not be raised as both the plaintiff and the defence first witness have

(1) (1918) I.L.R., 41 Mad., 435. (2) (1907) I.L.R., 30 Mad., 245.

(3) S.A. No. 186 of 1903 (unreported).

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sought to make out that plaintiff was the real purchaser and the plaintiff was admittedly not an agent. SESHAGIRI AYYAR, J., relies on *Sri Raja Datla Venkata Surya Narayana Jagapathi Raju* v. *Goluguri Bapiraju*(1) as an inroad on the rights of the real owner. With deference we do not think that it is. The plaintiff in that case was a successful bidder at a Court auction of certain property and a sale certificate was issued to him. He subsequently sued to have the sale cancelled on the ground of a fraudulent suppression of facts at the auction. The plaintiff was found to be a benamidar. The learned Judges following *Kuthaperumal Rajali* v. *The Secretary of State for India*(2) among other cases enunciated the proposition on page 148 that a *benami* transaction does not vest any title to an immovable property, but they continue and say that that does not prevent a person who has been found to be an agent for an undisclosed principal in a contract for purchase of land from suing for any relief *in respect of the contract* even though the land has subsequently been conveyed to him. In our opinion this decision does not even go so far as the reservation in *Kuthaperumal Rajali* v. *The Secretary of State for India*(2) for in the latter case the right of an agent for an undisclosed principal to bring any suit appears to be conceded. We think that the decision in *Singa Pillai* v. *Govinda Reddi*(3) does distinctly negative the principle laid down in *Kuthaperumal Rajali* v. *The Secretary of State for India*(2) and accepted in *Sri Raja Datla Venkata Surya Narayana Jagapathi Raju* v. *Goluguri Bapiraju*(1). It is necessary therefore to refer to a Full Bench the following question :

"*When on the evidence it is found that an assignee mortgagee is a mere benamidar, can he sue on the mortgage?*"

ON THIS REFERENCE.—

A. Krishnaswami Ayyar (with *S. Subrahmanya Ayyar*) for appellant.—The recent Privy Council decision in *Choudhri Gur Narayan* v. *Sheo Lal Singh*(4) holds that a benamidar can sue.

K. V. Venkatasubrahmanya Ayyar for *S. T. Srinivasagopala Achariyar* for fourth respondent (with *N. Rajagopalachariar* and *R. Srinivasa Ayyangar*).—The Privy Council case quoted in

(1) (1911) I.L.R., 34 Mad., 143. (2) (1907) I.L.R., 30 Mad., 245.
(3) (1918) I.L.R., 41 Mad., 435.
(4) (1919) 36 M.L.J., 68 (P.C.); s.c., 46 I.A., 1.

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favour of the appellant does not lay down that any and every benamidar can sue. It only lays down that if a benamidar sues and recovers property, he must hold it as trustee. Where the benamidar arranges a sale or mortgage in his own name and *is thus a party to the contract*, he can always sue. But where the real owner arranges a sale or mortgage but chooses to take the sale deed or mortgage deed in the name of another without that other being in any way a contracting party, then that other cannot sue. The finding in this case is that plaintiff knew nothing about the assignment. The respondent was not represented before the Privy Council in *Choudhri Gur Narayan* v. *Sheo Lal Singh*(1). It cannot be said that it intended to overrule the Madras decisions, which were the other way.

The OPINION of the Court was expressed by

WALLIS, C.J.

WALLIS, C.J.—We think that this question must be considered to have been settled by the recent pronouncement of the Privy Council in *Choudhri Gur Narayan* v. *Sheo Lal Singh*(1). The respondents were not represented, but the report of the argument shows that the divergent decisions of the Courts in India were placed before their Lordships by Mr. DeGruyther who appeared for the appellants. Mr. Amir Ali dealt with the point in the following very general terms :—

"As already observed, the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and, so far as their relative legal position is concerned, he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the benamidar in respect of the property although the beneficial owner is no party to it."

These very general observations appear to us to be conclusive of the question referred to us, and we accordingly answer it in the affirmative.

N.R.

(1) (1919) 36 M.L.J., 68 (P.C.); s.c., 46 I.A., 1.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Chief Justice, Mr. Justice Ayling and Mr. Justice Kumaraswami Sastri.

1919, February 18.

KULASEKARA NAICKER AND THREE OTHERS (PLAINTIFFS Nos. 2 TO 5), APPELLANTS,

v.

JAGADAMBAL AMMAL AND FIVE OTHERS (DEFENDANTS Nos. 1, 2, 4, 5, 6 AND FIRST PLAINTIFF), RESPONDENTS.*

Appeal, right of—Letters Patent, cl. (15)—Judgment—Order as to costs only passed by a Judge of the High Court on its Original Side, whether a Judgment—Judgment, interpretation of —.

An order as to costs, passed by a Judge of the High Court in the exercise of its original jurisdiction, is not the less a judgment within the meaning of clause (15) of the Letters Patent because it relates to costs only.

Tuljaram Row v. *Alagappa Chettiar* (1912) I.L.R., 35 Mad., 1 (F.B.), followed.

APPEAL against the judgment and decree of COUTTS TROTTER, J., in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 308 of 1916.

The plaintiffs brought this suit in the Original Side of the High Court to set aside the adoption of the second defendant by the first defendant and to recover possession of the suit lands in the possession of the respective defendants, and for other reliefs. After issues were settled, the suit was withdrawn by the plaintiffs on condition of their paying the costs of the defendants, which was embodied in the order of Court, two sets of costs being allowed. The entire lands forming the subject-matter of the suit was valued at Rs. 59,000. Costs were taxed by the taxing officer at 5 per cent on the full value of the lands, viz., Rs. 59,000, in favour of defendants Nos. 1 and 2. The plaintiffs took out a summons for review of taxation before COUTTS TROTTER, J., sitting in the Original Side of the High Court under rules 37 and 38 of the Original Side Fees Rules, and contended that the vakil's fees should be assessed on the value of only such of the lands as were sought to be recovered from the possession of the first and second defendants and that only 1¼ per cent should be allowed as fees, as the case was withdrawn before trial, and they relied on the provisions of rule 32 of the Pleaders' Fees Rules. The

* Original Side Appeal No. 69 of 1917.

learned Judge dismissed the application. Against the order of dismissal, the plaintiffs preferred this Letters Patent Appeal, which came on for hearing before WALLIS, C.J., and NAPIER, J., and the following

ORDER OF REFERENCE TO A FULL BENCH was made by

WALLIS, C.J.

WALLIS, C.J.—This is an appeal from an order of COUTTS TROTTER, J., passed on review of taxation by the taxing officer under rules 37 and 38 of the Original Side Fees Rules. We find some difficulty in reconciling in *Saravana Mudaliar* v. *Rajagopala Chetty*(1), which decides that there is no appeal with the principles laid down in the Full Bench case in *Tuljaram Row* v. *Alagappa Chettiar*(2). We accordingly refer to a Full Bench the question whether in the present case an appeal lies as from a judgment under clause (15) of the Letters Patent.

ON THIS REFERENCE.—

R. Subrahmanya Ayyar for appellants.—The order as to costs is a judgment under clause (15) of the Letters Patent. The word 'judgment' has been interpreted recently by a Full Bench of this Court in *Tuljaram Row* v. *Alagappa Chettiar*(2). The appeal is perfectly competent. The order as to costs has been further embodied in the decree of the Court. The order is clearly a judgment within the meaning of clause(15) of the Letters Patent.

A. Narasimha Achariar for respondents Nos. 1 and 2.—An order for costs is not a judgment within clause (15) of the Letters Patent. It is not a matter dealing with the rights of the parties to the suit. It is incidental to the suit but it is not the subject-matter of the suit. The word 'judgment' has been interpreted in *Tuljaram Row* v. *Alagappa Chettiar*(2).

[WALLIS, C.J.—The taxing officer is very much like a Commissioner and his order is subject to a review. The Court then decides it. Why is it not a judgment?]

[KUMARASWAMI SASTRI, J.—The prayer in the plaint also contains a prayer for costs. It is as much a right in the suit as any other right.]

Saravana Mudaliar v. *Rajagopala Chetty*(1) decides that an order for cost is not a judgment. See judgment therein of BENSON, J.

(1) (1907) 17 M.L.J., 569. (2) (1912) I.L.R., 35 Mad., 1 (F.B.).

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[WALLIS, C.J.—No reasons are given for that view.]

Judgment is distinct from order. The suit has been disposed of already : an order for cost is not in the suit.

[KUMARASWAMI SASTRI, J.—No ; the suit is not disposed of till the costs are taxed and incorporated in the decree.]

There is a distinction between an order as to costs as incidental to a decree and an order as to costs standing alone. See *Numberumal Chettiar* v. *Krishnaiee*(1).

Here the order is further a consent order.

[WALLIS, C.J.—If the costs have been decided on wrong principles, will there not be an appeal ?]

No ; there will not be an appeal unless the original order is itself an appealable order. Suppose an adjournment is granted conditional on payment of costs, it is not appealable.

[KUMARASWAMI SASTRI, J.—The taxation is a judicial order delegated to an officer. It must be taken as an order of the Judge. It is final. Why is it not a judgment ?]

There is a distinction between order and judgment, recognized by KRISHNASWAMI AYYAR, J., in *Tuljaram Row* v. *Alagappa Chettiar*(2). The present order does not dispose of the suit ; it is merely a direction to the taxing officer to fix a certain amount as costs.

The OPINION of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—Accepting the interpretation put upon the word 'judgment' in clause (15) of the Letters Patent in *Tuljaram Row* v. *Alagappa Chettiar*(2), the most recent decision on the subject of a Full Bench of this Court, we think that an order as to costs is not the less a judgment within the meaning of clause (15) of the Letters Patent because it relates to costs only. We do not think that the observations of WHITE, C.J., in the later case, *Numberumal Chettiar* v. *Krishnajee*(1), are opposed to this view. The earlier decision of the Full Bench in *Saravana Mudaliar* v. *Rajagopala Chetty*(3) was binding on the Bench in that case and the learned Chief Justice merely distinguished it by showing that it was inapplicable to the facts of that case. We answer the question in the affirmative.

K.R.

(1) (1914) 26 M.L.J., 356.
(2) (1912) I.L.R., 35 Mad., 1 (F.B.). (3) (1907) 17 M.L.J., 569.

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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 92—*Hindu temple—Worshipper—Right of suit of—Interest, meaning of—Mere right to worship, whether sufficient interest to maintain suit under sec. 92—Religious Endowments Act (XX of 1863), secs. 14 and 15—Definition of interest therein, whether applicable to sec. 92—Lord Romilly's Act—English decisions thereon, whether proper guidance in construction of sec. 92—Interest, nature of, to maintain suit—Policy of Act and Code—Act and Code, whether in* pari materia.] Where a Hindu residing in Madras and another residing in Tellicherry instituted a suit in the District Court of North Malabar under section 92 of the Civil Procedure Code, in respect of a Hindu temple situated in Tellicherry in North Malabar, after obtaining sanction under the section, and it appeared that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry and he relied on his right as a Hindu to worship in the temple as entitling him to institute the suit: *Held*, by OLDFIELD and COUTTS TROTTER, JJ. (ABDUR RAHIM, J., dissenting that, though as a Hindu he might have the right to worship in the temple, he had not, on that ground alone, the interest required by section 92 of the Code to maintain

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the suit. 'Interest' under section 92 of the Code denotes an interest which is substantial and not sentimental or remote: it must be a present and substantial and not a remote and fictitious or purely illusory interest. The definition of 'interest' in section 15 of the Religious Endowments Act (XX of 1863) cannot be used as a guide in interpreting the word as used in section 92 of the Code. The English decisions under Lord Romilly's Act, which lay down that the petitioners under the Act must have an interest which is clear or direct, should be a guidance in interpreting the provisions of section 92 of the Civil Procedure Code. Per ABDUR RAHIM, J.—In the case of a temple or a mosque, persons entitled to attend there for purposes of worship are beneficiaries and must as such be held to possess a sufficient interest to support a suit under section 92 of the Civil Procedure Code. English and Indian decisions on the subject reviewed.

T. R. Ramachandra Aiyar v. *Parameswaran Unni* ... (1919) I.L.R., 42 Mad., 360

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 476—*Close of judicial proceedings—Knowledge of commission of offence after—Order under sec. 476 of Criminal Procedure Code, validity of.* [*Held* by the Full Bench—Even where the facts of a judicial proceeding are fresh in the mind of a Judge, he cannot take action under section 476 of Criminal Procedure Code if the commission of an offence during the course of that proceeding is discovered by him only after the close of the proceeding. Per KUMARASWAMI SASTRI, J.—In such cases it is open to the Court to act under section 195, Criminal Procedure Code, and direct an officer to file a complaint. *Aiyakannu Pillai* v. *Emperor* (1909) I.L.R., 32 Mad., 49 (F.B.), applied.

In re *Padmanabha Hebbara* ... ... (1919) I.L.R., 42 Mad. (F.B.), 422

ESTATES LAND ACT (MADRAS ACT I OF 1908), SS. 3 AND 6, *sub-section* (1) *and explanation added by amending Act* (*Madras Act IV of* 1909), *sec.* 3, *and sec.* 185, *proviso—Conversion of ryoti into private land—Holder in unauthorised possession.*] The respondents held certain lands under a muchilika, dated 28th July 1907, given by them to the appellant by which they agreed to hold the lands, described as Kumatam or private lands until 30th April 1908 for the purpose of cultivation, the document expressly providing that it should itself operate as a surrender of the lands at the end of that term. The respondents however held over after the expiration of the lease, not only without the consent of the appellant, but contrary to his wishes and intention, and contrary also to the terms of the muchilika, and were so holding the lands on and after 1st July 1908 when the Madras Estates Land Act (Madras Act I of 1908), came into force. In a suit by the appellant to eject the respondents and recover possession of the lands which he claimed as his private lands within the meaning of Madras Act I of 1908, the defence was that they were ryoti lands in which the respondents had occupancy rights under section 6, sub-section (1) of the Act and explanation thereto added by the amending Act (Madras Act IV of 1909). There were concurrent findings of fact by the Courts below that the lands were ryoti, and that the appellant had not proved that they were his private lands within the proviso of section 185 of the Act of 1908. *Held* that, assuming that the respondents

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had not any permanent rights of occupancy in the lands in suit before the coming into force of Madras Act I of 1908, they obtained such permanent rights of occupancy by the operation of section 6, sub-section (1) as amended by section 3 of Madras Act IV of 1919, and the suit was rightly dismissed by the Courts in India. *Govinda Parama Guruvu* v. *Bothasi Dandasi Padhi* (1910) 20 M.L.J., 528 approved. *Kanakayya* v. *Janardhana Vadhi* (1913) I.L.R., 36 Mad., 439, referred to.

Yerlagadda Mallikarjuna Prasad Nayudu v. *Somayya* ... (1919) I.L.R., 42 Mad. (P.C.). 400

ESTATES LAND ACT (MADRAS ACT I OF 1908), *sec.* 6, *sub-section* (6)—*Release of revenue on lands under ryotwari tenure purchased by zamindar—Zamindari lands acquired by Government under Land Acquisition Act* (*I of* 1894)—*Compensation—Substitution of ryotwari lands as zamindari lands—Suit for ejectment—Acquisition by land-holder of occupancy rights—Acquisition by tenant of rights of land-holder.*] The respondent was zamindar of a settled estate, parts of which were taken by the Government under the Land Acquisition Act, 1894, for making drainage canals. The compensation to which the land-holder was entitled could have been paid in money, or, with the land-holder's consent by a reduction of the revenue on the estate; but the land-holder asked that he might have instead some Government lands in another district of which lands he had already acquired the ryoti rights, and this was agreed to, and the new lands were transferred to the land-holder and entered in the Collector's registers as zamindari lands instead of, as formerly, Government lands. These lands were let in 1901 to the appellant for five years, and the lease was prolonged for a further period of three years, on the expiration of which the land-holder was desirous of resuming possession, but the appellant refused to quit on the ground that he had acquired a permanent right of occupancy in virtue of the provisions of section 6 of the Madras Estates Land Act (I of 1908) which had come into force on 1st July of that year. In a suit in the Civil Court by the respondent to eject the appellant:—*Held* that for the appellant to succeed it was essential that the lands let to him should be a "permanently settled estate" or part of such an estate within the provisions of Madras Act I of 1908. But there was no formal settlement, and no recorded evidence of any settlement. Admittedly there was no sanad dealing with the lands in terms of Madras Regulation XXV of 1802, nor anything to which the appellant could point as a making a settlement, and the uncertainty of the mode of settlement, if any, was fatal to any idea of a settlement having been made, and the defence therefore failed.

Parthasaradhi Appa Rao v. *Bommadeva Satyanarayana* ... (1919) I.L.R., 42 Mad. (P.C.). 355

SURVEY AND BOUNDARIES ACT (MADRAS ACT IV OF 1897), SEC. 11—*Decision of Survey Officer, on dispute as to boundary, not set aside on appeal or by suit within one year, effect of—Continued possession of unsuccessful party, effect of.*] A decision of a Survey Officer passed under section 11 of the Madras Survey and Boundaries Act (IV of 1897) on a dispute arising between two

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parties as to the boundary of a certain property, is final and conclusive as to the rights of the parties if not set aside either on appeal or by a suit brought within one year and it is none the less so, because the unsuccessful party who was in possession on the date of the order was not subsequently ousted from possession. *Krishnamma* v. *Achayya* (1880) I.L.R., 2 Mad., 306, distinguished.

Muthirulandi Poosari v. *Sethuram Aiyar* (1919) I.L.R., 42 Mad. (F.B.). 425

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 58—*Mortgage by conditional sale—Sale and agreement to re-sell, same transaction, whether a sale or a mortgage—Construction—Intention of parties—Surrounding circumstances, terms of instrument or oral evidence of intention, whether can be considered—Decisions of Privy Council on transactions before Transfer of Property Act—Applicability of, to those after the Act.*] Where in one and the same transaction land is sold absolutely but with a right of re-purchase to be exercised before a certain date, the transaction does not necessarily become by virtue of section 58 of the Transfer of Property Act a mortgage by conditional sale, whatever the intention of the parties might have been. The Privy Council have laid down that, in transactions before the transfer of Property Act, not governed by Bengal Regulation XVI of 1806, instruments of the above kind are to take effect according to their tenor, unless it appears from the terms of the instrument or the surrounding circumstances, excluding oral evidence of intention as inadmissible, that the intention was to effect a mortgage. Though such decision dealt with transactions before the Act, they still govern transactions after the Act which has not effected any change in the pre-existing law on this subject. *Pattabhiramier* v. *Venkatarow Naiken* (1870) 13 M.I.A., 560; *Thumbusawmy Moodelly* v. *Hossain Rowther* (1875) I.L.R., 1 Mad., 1 (P.C.); *Situl Purshad* v. *Luchmi Purshad* (1884) I.L.R., 10 Calc., 30 (P.C.); *Bhagwan Sahai* v. *Bhagwan Din* (1890) I.L.R., 12 All., 387 (P.C.); *Balkishen Das* v. *W. F. Legge* (1900) I.L.R., 22 All., 149 (P.C.), and *Jhanda Singh* v. *Wahid-ud-din* (1916) I.L.R., 38 All., 570 (P.C.), relied on. *Palaniappan* v. *Subbaraya Goundan* (1914) 1 L.W., 80 overruled.

Muthuvelu Mudaliar v. *Vythilinga Mudaliar* (1919) I.L.R., 42 Mad. (F.B.). 407

PRIVY COUNCIL.*

PARTHASARADHI APPA RAO (DEFENDANT),

v.

BOMMADEVARA SATYANARAYANA (PLAINTIFF).

1918, October 22 and November 1.

[On Appeal from the High Court of Judicature at Madras.]

Estates Land Act (Madras Act I of 1908), sec. 6, sub-sec. (6)—Release of revenue on lands under ryotwari tenure purchased by zamindar—Zamindari lands acquired by Government under Land Acquisition Act (I of 1894)—Compensation—Substitution of ryotwari lands as zamindari lands—Suit for ejectment—Acquisition by land-holder of occupancy rights—Acquisition by tenant of rights of land-holder.

The respondent was zamindar of a settled estate, parts of which were taken by the Government under the Land Acquisition Act, 1894, for making drainage canals. The compensation to which the land-holder was entitled could have been paid in money, or, with the land-holder's consent, by a reduction of the revenue on the estate; but the land-holder asked that he might have instead some Government lands in another district, of which lands he had already acquired the ryoti rights, and this was agreed to, and the new lands were transferred to the land-holder and entered in the Collector's registers as zamindari lands instead of, as formerly, Government lands. These lands were let in 1901 to the appellant for five years, and the lease was prolonged for a further period of three years, on the expiration of which the land-holder was desirous of resuming possession, but the appellant refused to quit on the ground that he had acquired a permanent right of occupancy in virtue of the provisions of section 6 of the Madras Estates Land Act (I of 1908) which had come into force on 1st July of that year. In a suit in the Civil Court by the respondent to eject the appellant:

Held that for the appellant to succeed it was essential that the lands let to him should be a "permanently settled estate" or part of such an estate within the provisions of Madras Act I of 1908. But there was no formal settlement, and no recorded evidence of any settlement. Admittedly there was no sanad dealing with the lands in terms of Madras Regulation XXV of 1802, nor anything to which the appellant could point as making a settlement, and the uncertainty of the mode of settlement, if any, was fatal to any idea of a settlement having been made, and the defence therefore failed.

APPEAL No. 89 of 1917 from a decree (2nd November 1915) of the High Court at Madras, which affirmed a decree of the District Judge of Kistna.

* *Present:*—Lord BUCKMASTER, Lord DUNNEDIN, Sir JOHN EDGE, and Sir LAWRENCE JENKINS.

PARTHA-SARADHI APPA RAO v. BOMMA-DEVARA SATYA-NARAYANA.

The facts of this case will be found sufficiently stated in the report of the appeal to the High Court (Sir JOHN WALLIS, C.J. and SESHAGIRI AYYAR, J.) in *Zamindar of Sanivarappet* v. *Zamindar of South Vallur*(1).

De Gruyther, K.C., and *J. M. Parikh* for the appellants contended that the land in dispute was a permanently settled estate, and therefore land to which the Madras Estates Land Act (Madras Act I of 1908) was applicable. The effect of the transaction of transferring the land to the respondent was that it was assessed at Rs. 777 and so became land permanently settled which may exist apart from Madras Regulation XXV of 1802. It is not essential that the land should be described in the sanad, the purpose of which is merely to settle the revenue. Reference was made to *Collector of Trichinopoly* v. *Lekamani*(2). The lands are held precisely on the same basis as the portion of the permanently settled estate for which they were exchanged; see *Rajindra Bahadur Singh* v. *Raghubans Kunwar*(3). Upon the transfer in 1893 the interest of the respondent as ryot became united with his interest as a land-holder, and his ryoti interest thereupon ceased by virtue of section 8, sub-section (1) of Madras Act I of 1908, and the presumption is that the appellants who were in possession when that Act came into operation, thereupon obtained the occupancy rights given by section 6, sub-section (1).

Sir *H. Erle Richards*, K.C., and *Kenworthy Brown* for the respondent contended that the land in dispute was neither a permanently settled estate, nor was it part of such an estate. After its transfer to the respondent he held it as a ryot with rights of occupancy, and the appellants were merely ijaradars, but the transfer did not result in depriving the respondent of his occupancy rights. The term 'permanently settled estate' in section 3 of the Act of 1908 was only intended to include land which is formally settled in perpetuity. Land which is ryoti cannot be converted into land permanently settled unless the consent of the Governor in Council has been obtained, and the consent of the ryot is also essential. The land now in dispute was obtained from the Government who was not a land-holder

(1) (1916) I.L.R., 39 Mad., 941.
(2) (1874) 14 B.L.R., 115 : L.R., 1 I.A., 282.
(3) (1918) I.L.R., 40 All., 470.

PARTHA-SARADHI APPA RAO v. BOMMA-DEVARA SATYA-NARAYANA.

within the meaning of section 3, clause (5), and therefore section 8, sub-section (1), was not applicable. The union of interests referred to in section 8, sub-section (1), did not mean the union of the right of occupancy under Government with a right as land-holder, but the union of the kudivaram and melvaram referred to in section 3. If section 8, sub-section (1), did apply, the present case is within the explanation to section 6, sub-section (6) which should be read with it. Reference was made to *Tallapragada Subba Row* v. *Gopisetti Narayanaswami Naidu*(1). Even if the land is an 'estate' within Madras Act I of 1908, the question whether it is '*Kamatam*' had still to be decided; if it was, the Civil Court had jurisdiction. *Atchaparaju* v. *Rajah V. G. Krishnayachendrulavaru*(2).

De Gruyther, K.C., replied referring to the Standing Order of the Revenue Board No. 1157.

The JUDGMENT of their Lordships was delivered by

LORD DUNEDIN.

Lord DUNEDIN.—The respondent is zamindar of certain lands in the village of Satrampadu. The lands were let on 11th August 1903 on a five years' lease to the appellants. At the expiry of the term the lease was prolonged for a further period of three years. At the expiry of the three years the respondent wished to resume possession, but was met by the assertion that the appellants had a permanent right of occupancy in virtue of the provisions of the Madras Estates Land Act which was passed in June 1908 and came into force on 1st July of the same year. This suit was then raised to recover possession and to get mesne profits.

The provision of the Act on which the appellants rely is the sixth section which says that every ryot now in possession or who shall hereafter be admitted by a land-holder to possession of ryoti land not being old waste, situate in the estate of such land-holder, shall have a permanent right of occupancy in his holding. 'Estate' is defined as meaning (in addition to certain definitions which would not apply in the present question): "any permanently settled estate or temporarily settled zamindari." The respondent says that his estate does not fall within this definition.

(1) (1916) 31 M.L.J., 339.
(2) (1915) I.L.R., 38 Mad., 163.

PARTHA-SARADHI APPA RAO v. BOMMA-DEVARA SATYA-NARAYANA.

Lord DUNEDIN.

The facts as to the estate are as follows :—The respondent's predecessor was zamindar of a settled estate situate in another district. Parts of this estate were taken by the Government under the Land Acquisition Act for the purpose of making drainage canals, etc. In terms of the Act the land-holder was entitled to be compensated. This compensation might have been made by payment of a sum of cash down, or, if the land-holder consented, by a reduction of the *peshkash* settled on the estate. The value of the lands taken was investigated; it was brought out that compensation would be fairly settled by a remission of Rs. 777 out of a total *peshkash* of Rs. 35,588. The land-holder then presented a petition to the Government praying that instead of the *peshkash* being *pro tanto* remitted, he might be given some Government lands in another district, of which lands he had already acquired the ryoti rights. This was acceded to, and accordingly no remission was made of the *peshkash*, which continued to be exacted as formerly, but by order of the Collector the new lands were transferred to the land-holder, and were entered in the register as zamindari lands instead of Government lands as formerly. These are the lands which were let to the appellants. The question therefore is, are these lands part of a permanently or temporarily settled estate? It is obvious that when in the hands of the Government they were not so. What then has made them acquire the character of a settled estate? The appellant's Counsel argued that the effect of the transaction detailed above was to make the lands an estate settled at a *peshkash* of Rs. 777. But a settlement must be effected formally and there should be some recorded evidence of it. It seems impossible here to point to anything which has that effect. There is admittedly no sanad dealing with the lands in terms of the article of the regulations. That in the opinion of the learned District Judge was *per se* conclusive. It is, however, enough to say that there is nothing to which the appellants can point as making a settlement. There being no document and the matter being left to inference to be drawn from the facts, it would be possible to suggest more than one mode of settlement. There is the view as just stated, which was pressed by the appellant's Counsel, which would amount to a separate settlement of the new lands at a *peshkash* of Rs. 777 and a reduced *peshkash* of Rs. 34,811 on the old lands. But it

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would be equally easily suggested that the new lands became an integral part of the old lands at a total *peshkash* of Rs. 35,588; or again that the new lands were settled at *nil*, leaving the original *peshkash* as it stood. There is no reason to prefer any one of these theories to the others. Yet the question of what lands could be sold to discharge the debt of an unpaid portion of the *peshkash* of Rs. 35,588 would necessarily depend on which was the true view. This uncertainty is fatal to the idea of a settlement having been made.

This disposes of the case, and is substantially the ground on which the learned District Judge decided it. The High Court went upon different reasons, with which their Lordships are not prepared to agree, but as the result at which they arrived was the same, no alteration need be made, and their Lordships will humbly advise His Majesty to dismiss the Appeal with costs.

Appeal dismissed.

Solicitor for the appellants: *E. Dalgado.*

Solicitor for the respondent: ***The Solicitor, India Office.***

J.V.W.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

1918, October 1, 2 and November 21.

T. R. RAMACHANDRA AIYAR AND ANOTHER (PLAINTIFFS 1 AND 3), APPELLANTS,

v.

PARAMESWARAN UNNI AND FIVE OTHERS (DEFENDANTS 1 TO 3, 6, 7 AND FIFTH DEFENDANT'S LEGAL REPRESENTATIVE), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 92—Hindu temple—Worshipper—Right of suit of—Interest, meaning of—Mere right to worship, whether sufficient interest to maintain suit under sec. 92—Religious Endowments Act (XX of 1863), ss. 14 and 15—Definition of interest therein, whether applicable to Sec. 92—Lord Romilly's Act—English decisions thereon, whether proper guidance in construction of sec. 92—Interest, nature of, to maintain suit—Policy of Act and Code—Act and Code, whether in pari materia.

Where a Hindu residing in Madras and another residing in Tellicherry instituted a suit in the District Court of North Malabar, under section 92 of the Civil Procedure Code, in respect of a Hindu temple situated in Tellicherry in North Malabar, after obtaining sanction under the section, and it appeared that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry and he relied on his right as a Hindu to worship in the temple as entitling him to institute the suit:

Held, by OLDFIELD and COUTTS TROTTER, JJ. (ABDUR RAHIM, J., dissenting), that, though as a Hindu he might have the right to worship in the temple, he had not, on that ground alone, the interest required by section 92 of the Code to maintain the suit.

'Interest' under section 92 of the Code denotes an interest which is substantial and not sentimental or remote: it must be a present and substantial and not a remote and fictitious or purely illusory interest.

The definition of 'interest' in section 15 of the Religious Endowments Act (XX of 1863) cannot be used as a guide in interpreting the word as used in section 92 of the Code.

The English decisions under Lord Romilly's Act, which lay down that the petitioners under the Act must have an interest which is clear or direct, should be a guidance in interpreting the provisions of section 92 of the Civil Procedure Code.

Per ABDUR RAHIM, J.—In the case of a temple or a mosque, persons entitled to attend there for purposes of worship are beneficiaries and must as such be

* Letters Patent Appeal No. 4 of 1918.

held to possess a sufficient interest to support a suit under section 92 of the Civil Procedure Code.

English and Indian decisions on the subject reviewed.

APPEAL under clause 15 of the Letters Patent against the judgment of the Hon'ble Sir JOHN WALLIS, *Kt.*, Chief Justice, (Mr. Justice KUMARASWAMI SASTRI, dissenting) in *T. R. Ramachandra Aiyar and another* v. *Ponniah Akathuchu Parameswaran Munbu and six others*(1) preferred against the decree of H. D. C. REILLY, the District Judge of North Malabar, in Original Suit No. 21 of 1914.

The present suit was instituted in the District Court of North Malabar under section 92 of the Civil Procedure Code against the trustees of a certain temple situate at Tellicherry in North Malabar district for the removal of the trustees and for a scheme of management of the temple and its properties. The suit was brought by two persons who had previously obtained the sanction of the Advocate-General as required by section 92; one of the plaintiffs was a Nambudri Brahman residing in Tellicherry (as to whom there was no question) and the other was Mr. T. R. Ramachandra Aiyar who was a well-known vakil of the High Court practising in Madras and permanently residing in Madras. He was also the vice-president of the Dharma Rakshana Sabha, being so described in the plaint, which interests itself in the conduct and management of temples in Southern India. It appeared that he was a native of Cochin and that he lived in Madras, and the utmost that can be said was that, on two or three occasions, the last of which was some eight or ten years ago, while visiting Tellicherry on his professional business, he took the occasion to worship in the temple. This plaintiff relied on his right as a Hindu to worship in every Hindu temple to entitle him to institute this suit as a person interested in the trust along with the other person under section 92 of the Code. The defendants pleaded, *inter alia*, that the plaintiff (Mr. T. R. Ramachandra Aiyar) was not interested within the meaning of section 92 of the Code to maintain this suit. The District Judge dismissed the suit; the plaintiffs preferred an appeal to the High Court which was heard by WALLIS, C.J., and KUMARASWAMI SASTRI, J., who delivered the following dissenting JUDGMENTS.

(1) Appeal No. 116 of 1916.

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WALLIS, C.J.—This is an appeal from the decree of the District Judge of North Malabar dismissing a suit filed against the trustees of a temple at Tellicherry on the West Coast under section 92, Civil Procedure Code, with the requisite authority, on the ground that one of the plaintiffs had not an interest in the trust within the meaning of the section. The plaintiff in question, Mr. T. R. Ramachandra Aiyar, one of the senior and leading practitioners of this Court, resides in Madras and is vice-president of a sabha or association which specially concerns itself with temple affairs in Southern India. It has not been contended before us that this circumstance gives him the requisite interest, nor has it been seriously argued that the fact that in the practice of his profession he has on two or three occasions visited Tellicherry and has then worshipped at the suit temple, and may possibly do so again, is enough to distinguish his position in this respect from that of the rest of the Hindu community throughout the length and breadth of India. The broad proposition contended for by Mr. Ganapati Ayyar for the appellants is that every Hindu temple must be presumed, according to the decision in *Gopala Muppanar* v. *Subramania Aiyar*(1), to be dedicated for the use of all Hindus, of whom there were 270½ millions in British India at the last census, to say nothing of the additional millions in Native States, and that each of these individuals has, therefore, an interest in the trusts of every Hindu temple in India within the meaning of section 92, Civil Procedure Code. Incidentally he argued that the position of Muhammadans as regards the mosques is the same, as the ownership of the mosque is regarded as vested in the deity and every Muhammadan has a right to worship at every mosque. *Gopala Muppanar* v. *Subramania Aiyar*(1) merely decides that every Hindu resorting to a Hindu temple has presumably the right to worship there. This does not seem to me to warrant an inference that the temple must be considered as dedicated to the use of all Hindus whether they resort to it or not.

In support of this contention, Mr. Ganapati Ayyar craved in aid the definition in section 15 of the Religious Endowments Act, 1863, of the interest entitling people under section 14 of

(1) (1914) 27 M.L.J., 253.

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that Act to sue trustees in respect of any misfeasance, breach of trust or neglect of duty, for specific performance of the duty, damages or removal. The section says that the interest need not be a pecuniary or a direct or immediate interest, and goes on to provide expressly that "any person having a right of attendance, or having been in the habit of attending, at the performance of the worship or service or of partaking of any distribution of alms" shall be deemed to be a person interested within the meaning of section 14 of the Act. This definition has not been applied to section 92 (formerly 539) of the Code which has quite a different history, and to take a definition from one statute and apply it to another easily leads to error, as when the definition of the word 'attest' in the Indian Succession Act was used in interpreting the same word in the Transfer of Property Act, and when an earlier decision under section 539 based on a consideration of this very definition necessitated the intervention of the Legislature. Secondly, the definition in section 15 was expressly excluded because section 539, as originally enacted, expressly required that there should be a direct interest, and the subsequent omission of the word, which will be referred to later, has not had the effect of rendering the definition applicable. Lastly, it seems clear that, even under section 15, the Legislature intended the plaintiff to have some special interest in the endowment whether based on the right to worship or on habitual attendance, and this intention will be frustrated if it be held that every Hindu and every Muhammadan in India or beyond has an interest within the meaning of section 15, because it must be presumed that every temple and every mosque has been dedicated for the use of every Hindu and every Muhammadan who may resort to it. The language of the section does not suggest that the Legislature was aware that all Hindus must be regarded as having a right to worship in every temple. Otherwise they would not have thought it necessary to provide that mere habitual attendance should confer the right to sue. We were not referred to any case in which a plaintiff has sued without having some interest of his own as distinct from the rest of the community either under section 14 or under the general law, as in *Panchcowrie Mull* v. *Chumrodall*(1), *Jawahra*

(1) (1878) I.L.R., 3 Calc., 563.

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v. *Akbar Husain*(1), *Srinivasa Chariar* v. *Raghava Chariar*(2), *Monmotho Nath Das* v. *Hirsh Chandra Das*(3).

I do not pursue this subject, because what we have to construe is not section 15 of the Religious Endowments Act, 1863, or the general law, but section 92 of the Civil Procedure Code, and I am clearly of opinion that to entitle him to sue under that section it is not enough that the plaintiff is a Hindu by religion, but he must have a clear interest in the particular trust over and above that which millions of his countrymen may be said to have by virtue of their religion. Section 92 was first enacted as section 539 of the Code of 1877 and was modelled as regards the right of suit, as in some other respects, on the provisions of Sir Samuel Romilly's Act as interpreted by the Court of Chancery (see the observation of SHEPHARD, J., in *Rangasami Naickan* v. *Varadappa Naickan*(4). Before that Act, the Attorney-General representing the Crown as *Parens patriae* was alone entitled to proceed by way of information, ordinarily in the Court of Chancery, for the enforcement of charitable trusts. Usually he did so only on the relation of private persons who gave security for the costs, and as he had a clear right to proceed by way of information if so advised, the Court was not concerned to inquire whether the relators had any interest of their own; *Attorney-General* v. *Vivian*(5), *Attorney-General* v. *Bucknall*(6). When, however, Romilly's Act authorized 'any two or more persons' to proceed by petition under that Act with the authority of the Attorney-General, Lord ELDON ruled in one of the earliest cases under the Act, *In re Bedford Charity*(7), that no person could petition who had not 'a direct interest' in the charity, and held that those petitioners in that case who described themselves as elders of the congregation of Dutch and German Jews assembling at certain synagogues in London had no right to petition the Court with reference to the alleged right of Jewish children residing at Bedford to participate in the benefits of the Bedford Charity, the revenues of which by Act of Parliament were to be applied partly in providing dowers for poor maids resident in Bedford and partly in providing

(1) (1885) I.L.R., 7 All., 178. (2) (1900) I.L.R., 23 Mad., 28.
(3) (1906) I.L.R., 33 Calc., 905. (4) (1894) I.L.R., 17 Mad., 462 (F.B.), at p. 467.
(5) (1826) 1 Russ., 226. (6) (1741) 2 Atk., 328.
(7) (1819) 2 Swans., 470.

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a free school for poor boys born and resident within the town of Bedford. The same view was approved by the House of Lords in *Corporation of Ludlow* v. *Greenhouse*(1), where Lord ELDON observed that the Court was bound to take care

"that the petitioners have a clear interest in the subject and that they prove themselves to have that interest in the subject which they state upon their petition."

The Indian Legislature clearly intended to legislate in this sense when they provided in section 539 of the Code of 1877 that the persons authorized to sue under that section must have a 'direct interest in the trust.' WESTROPP, C.J., and KEMBALL, J., having raised the question in *Radhabai* v. *Chimnaji Bin Ramji Sali*(2), without expressing any opinion whether the words 'public charitable purposes' could be held applicable to the devasthan of an idol or temple dedicated merely to the purposes of such idol or temple, the Legislature altered the language to public charitable or religious purposes. In *Karuppa* v. *Arumuga*(3), INNES, Offg. C.J., and MUTTUSWAMI AYYAR, J., held that the section as originally drafted did not apply to the case of an endowment for purposes religious as well as charitable, and declined to consider the fact that the opposite view was expressed in the statement of objects and reasons assigned for the alteration of the section in 1882. I do not think they would have come to that conclusion, if their attention had been called to the fact that ever since the Statute of Elizabeth religious uses have formed one of the most important branches of charitable uses in English Law, so that the English lawyer who drafted the Code of Civil Procedure must necessarily be taken to have included religious in charitable purposes unless they were expressly excluded. I have no doubt that the Legislature intended to include charitable uses in the section 539 as passed in 1877 and that the alteration in 1882 was only intended to remove doubts. The intervention of the Legislature was again necessitated in 1887 in consequence of the decision in *Jan Ali* v. *Ram Nath Mundul*(4) that Muhammadans residing in the village of Gopalpur and in the habit of attending prayers at the mosque there had not a direct interest in the endowment of the mosque within the meaning of the section. The attention of the

(1) (1827) 1 Bligh N.S., 17. (2) (1876) I.L.R., 3 Bom., 27.
(3) (1882) I.L.R., 5 Mad., 368. (4) (1882) I.L.R., 8 Calc., 82.

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learned Judges was not called to the fact that these provisions were taken from Romilly's Act as interpreted by the English Courts and that the plaintiffs were clearly persons having a direct interest within the meaning of those decisions, and they founded their conclusion upon an inference drawn from the language of section 15 of the Religious Endowments Act, which, as I have pointed out, is not applicable and, as it seems to me, would scarcely warrant their inference if it were. If the actual worshippers had not a direct interest, it is difficult, as observed by MAHMOOD, J., in a later case, to say who had. The effect of the decision would have been very largely to make the section a dead letter as regards temples and mosques, and the legislature thought fit to indicate the necessity for a more liberal construction than had been taken in this and some other cases in 1888 by taking the word 'direct' out of the section. I am however clearly of opinion that 'the interest in the trust' must still, in Lord ELDON's words, be a 'clear interest,' that is to say, a present and substantial, and not a remote and fictitious or purely illusory interest, and that, whilst indicating the necessity of taking a more liberal view than had been taken by our Courts in some cases, the Legislature did not intend that we should go to the other extreme and allow any member of the Hindu and Muhammadan public to sue with the requisite consent in regard to every temple or mosque in British India. It is, I think, quite clear both under Lord Romilly's Act and the section that the Court must be satisfied not only that the requisite authority has been given, but also that those to whom it has been given have a clear interest in the trust. That interest, it seems to me, if the provision is not to be altogether illusory, must arise from some special relation in which the plaintiff stands to the endowment in question as compared with the whole body of religious community throughout India; in other words, he must be in a position to derive some benefit from the trust in respect of which the suit is filed. I do not think it necessary or safe to go further than this on the present occasion. In all the cases cited which have arisen since the omission of the word 'direct' in 1887, the plaintiffs have clearly had an interest which would entitle them to proceed under Romilly's Act in England, *Chintaman Bajoji Dev* v. *Dhonde Ganesh Dev*(1), *Saiyedur Raja* v. *Baidyanath Deb*(2),

(1) (1891) I.L.R., 15 Bom., 612. (2) (1891) I.L.R., 20 Calc., 897.

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Sajedur Raja Chowdhuri v. *Gour Mohun Das Baishnav*(1), *Ganapati Ayyan* v. *Savithri Ammal*(2). In *Mohiuddin* v. *Sayiduddin*(3), it was expressly ruled that the requisite interest under the section must be existing and not contingent—a ruling which appears to me to apply to the present case. In *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*(1), it is clear from the statement in the judgment at page 427 that the plaintiffs were not only habitual worshippers at the particular temple but also took part in the management and worship. That case is therefore no authority for the proposition that any lesser degree of interest is required under section 92 than under Romilly's Act, and with reference to the observation as to sections 14 and 15 of the Religious Endowments Act there is no reason for supposing that the learned Judges considered that the Hindu and Muhammadan public generally were entitled to sue under that section in respect of any temple or mosque. That question was not raised before them. As regards *Jawahra* v. *Akbar Hussain*(4), MAHMOOD, J., observed at page 184:

"I hold that it is an undoubted principle of Muhammadan Law that the persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it."

And the case in no way supports the proposition that a Muhammadan unconnected with a particular mosque would have an interest entitling him to sue with regard to it under section 539, now section 92, of the Code.

Coming back to the facts of the present case, I think that Mr. Ramachandra Aiyar is rather in the position of the members of the Jewish synagogue who presented a petition under Romilly's Act in the interest of their co-religionists at Bedford in the Bedford Charity case and were held not to be entitled to proceed under that Act because they had no interest of their own in the charity. It was not suggested that the possibility that they might some day lose their fortunes and settle at Bedford with a view to their families benefiting under the charity gave them a sufficient interest under the Act. Such a contention would, I cannot help thinking, have been regarded as extravagant.

(1) (1897) I.L.R., 24 Calc., 418. (2) (1898) I.L.R., 21 Mad., 10.
(3) (1893) I.L.R., 20 Calc., 810, at 817. (4) (1885) I.L.R., 7 All., 178 (F.B.).

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So too, I think, Mr. Ramachandra Aiyar has no sufficient interest of his own to entitle him to sue under section 539 as regards this temple.

I have since had the advantage of reading the judgment prepared by my learned brother and will only add that I have proceeded on the assumption that Hindu temples are *prima facie* to be taken to be dedicated for the use of all Hindus resorting to them. There are however three hundred million Hindus and I know not how many thousand temples in India, and to say that the bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him an interest in the trust appears to me to defeat the object with which the Legislature inserted these words in the section. That object was to prevent people interfering by virtue of the section in the administration of charitable trusts merely in the interest of others and without any real interest of their own.

Under Romilly's Act, although there was no express restriction, the Courts from the very first held that sanction could only be given to a person having an interest of his own and section 92 expressly requires it. I would dismiss the appeal with costs.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—The question raised in this appeal is whether the 'interest' required by section 92 of the Civil Procedure Code must be something more than a *mere right to worship* in the temple in respect of which the suit is brought. So far as the application of section 92 to Hindu temples is concerned, I think the answer must depend on a consideration of the peculiar nature of Hindu temples and the rights of Hindus therein. There is, so far as I am aware, no such thing as a purely parochial temple, access to which is prohibited or refused to persons outside a particular locality. If any such exist, persons outside the locality have no interest whatever and no question will arise as to the power of persons outside the benefits of the trusts to sue under section 92.

All important Hindu temples are built in honour of one of the principal deities, generally Siva or Vishnu under their various names, and the God is supposed to grace the temple with his presence. Along with the presiding deity is worshipped his sakti (or consort) and minor deities are often installed in the larger temples. The dedication of the temple is to all Hindu devotees of the deity residing in India. Hindu religion enjoins

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pilgrimages to temples as one of the sacred duties to be performed and various *Stala Puranas* describe the special virtues of the larger and more important temples. The right of Hindus to worship in temples viewed in the light of the *Puranas* and *Agamas* has been discussed by SADASIVA AYYAR, J., in *Gopala Muppanar* v. *Subramania Aiyar*(1), and I entirely agree with his conclusions. The dedication of the temple being to all Hindu devotees of the presiding deity, it seems to me that they are persons for whose spiritual benefit the trust was created. Every Hindu has therefore a legal right to worship in a temple, unless by the terms of the dedication or the usage of the particular temple he is denied right of access. It is no doubt true that he can only worship in the temple if he gets there and that possibly distance or other considerations may prevent him from availing himself of the benefit, but it can hardly be said that his interest is only contingent or is a mere possibility on that account. It is a vested right which can be exercised at any time and irrespective of the place where the person resides. As regards mosques, it has been held by a Full Bench of the Allahabad High Court in *Jawahra* v. *Akbar Husain*(2) that all the members of the Muhammadan community are entitled to use a mosque.

It is probably the peculiar nature of Hindu and Muhammadan religious endowments which induced the Legislature to give so wide a meaning to the word 'interest' in section 15 of the Religious Endowments Act of 1863 which enacts that the interest required by section 14 to enable a person to sue need not be pecuniary, direct or immediate, and that a right of attendance is sufficient.

The right of suit to two or more persons who have obtained the necessary sanction was first conferred by section 539 of the Civil Procedure Code of 1877. As has been pointed out in *Rangasami Naickan* v. *Varadappa Naickan*(3) the section was framed on the lines of Lord Romilly's Act (52 Geo. III, cap. 101) in the light of the decisions of the English Courts as to its scope and effect. There are, however, material points of difference which have been pointed out by BEST and WEIR, JJ., in *Subbayya* v. *Krishna*(4). Section 539 of the Code of 1887 required a *direct*

(1) (1914) 27 M.L.J., 253.
(2) (1885) I.L.R., 7 All., 178 (F.B.).
(3) (1894) I.L.R., 17 Mad. 462 (F.B.).
(4) (1891) I.L.R., 14 Mad., 186.

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interest, and the word 'direct' was used in order to give effect to the decisions in *In re Bedford Charity*(1) that no person could petition under Lord Romilly's Act who had not a direct interest in the charity and in the *Corporation of Ludlow* v. *Greenhouse*(2), where a 'clear interest' was required. The result, however, was not very happy. In *Jan Ali* v. *Ram Nath Mundul*(3) it was held that two of the worshippers of a mosque who lived in the village where the mosque was situate had no 'direct interest' in the mosque so as to enable them to sue under section 539. A similar restricted view was taken in *Lutifunnissa Bibi* v. *Nazirun Bibi*(4). The decision in *Jan Ali* v. *Ram Nath Mundul*(3) was followed by the Madras High Court in *Narasimha* v. *Ayyan*(5), where KERNAN and WILKINSON, JJ., went to the extent of holding that even the right of management and of partaking in the food offerings did not give persons a direct interest within the meaning of section 539. In *Jawahra* v. *Akbar Husain*(6), MAHMOOD, J., dissented from the decision in *Jan Ali* v. *Ram Nath Mundul*(3) and was of opinion that

"it was an undoubted principle of Muhammadan Law that the persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it."

In *Manohar Ganesh Tambekar* v. *Lakmiram Govindram*(7) [which was confirmed by the Privy Council—see *Chotalal* v. *Manohar Ganesh Tempekar*(8)] WEST and BIRDWOOD, JJ., held that priests who took part in the worship of the temple had a direct interest within the meaning of section 539 of the Act of 1877.

In 1888 the Legislature thought it fit to intervene, and by section 44 of the Amendment Act VII of 1888 the word 'direct' in section 539 was omitted. All that the section now requires is that the plaintiff should have an interest in the trust. As pointed out by BANERJEE and RAMPINI, JJ., in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*(9), the inference is that the legislature intended to allow persons having the same sort of interest that is sufficient under section 14 of Act XX of 1863 to maintain a

(1) (1819) 2 Swans. 570.
(2) (1827) 1 Bligh N.S. 17.
(3) (1882) I.L.R., 8 Calc., 32.
(4) (1885) I.L.R., 11 Calc., 33.
(5) (1889) I.L.R., 12 Mad., 157.
(6) (1885) I.L.R., 7 All., 178 (F.B.).
(7) (1888) I.L.R., 12 Bom., 247.
(8) (1900) I.L.R., 24 Bom., 50.
(9) (1897) I.L.R., 24 Calc., 418.

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suit under section 539. Effect has to be given to the deliberate omission of the word 'direct' and it has to be borne in mind that the Legislature had Act XX of 1863 before it when the amending Act VII of 1888 was passed. There is no special reason why, so far as temples and mosques are concerned, the word 'interest' in section 92 of the Civil Procedure Code, which by clause 2 takes away the right of suit which worshippers had apart from section 539, should bear a more restricted interpretation than in section 14 of the Religious Endowments Act, which empowers any person or persons interested in any mosque, temple or religious endowment to file a suit against trustees, managers and superintendents for any misfeasance, breach of trust or neglect of duty and gives wide powers to the Court to enforce performance of their duties and to make good the loss occasioned to the temple. It is true that no explanation corresponding to section 15 of the Religious Endowments Act has been added to section 92, but this is due to the fact that section 92 is not confined to Hindu and Muhammadan religious and charitable trusts. So far as such trusts are concerned, it cannot be said that the two enactments are so different in scope as to render it unsafe to accept the meaning given to the word 'interest' in Act XX of 1863, when similar questions arise under section 92 of the Civil Procedure Code especially when the legislature deliberately omitted the word 'direct' before the word 'interest' by the amending Act of 1888.

I am not unmindful of the inconvenience pointed out by the Chief Justice in holding that every Hindu, wherever he may live, has an interest in a temple which he may never visit or worship in, but the necessity of obtaining sanction of the Advocate-General or the Collector or other officer as the local Government may appoint coupled with the fact that a suit once filed would be conclusive and bind every worshipper would, I think, minimise any possible abuse. On the other hand, it would lead to great difficulties if it were attempted to lay down what the quantum of the interest required is to be which would be necessary to enable a person to file a suit under section 92, if anything more than the right to worship is required.

I am of opinion that the right to worship in a particular temple is a sufficient interest to entitle a person to join in a suit

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under section 92. In this view, Mr. T. R. Ramachandra Aiyar, the first plaintiff, as a person whose right to worship in the suit temple is beyond doubt, has a sufficient interest and the District Judge erred in dismissing the suit on the ground of his want of interest.

The appeal was dismissed with costs.

The plaintiffs preferred this LETTERS PATENT APPEAL:

P. R. Ganapati Ayyar for appellants.—The first plaintiff is a worshipper and is entitled to institute the present suit, though he may not *frequently* go to the temple for purposes of worship. The first plaintiff is competent to sue under section 92 of the Civil Procedure Code (Act V of 1908). He is interested in the trust within the meaning of the expression used in section 92. The expression 'direct interest' which was contained in section 539 of the old Code (Act XIV of 1882) was omitted from section 539 by Act VII of 1888. It was in the original Code of 1882 and in the Code of 1877 before it was deleted by Act VII of 1888, section 44, and the words 'having interest' were substituted for 'direct interest.' Even when 'direct interest' existed in the section, some of the High Courts held that worshippers as such could sue under the section: see *Manohar Ganesh Tambekar* v. *Lakmiram Govindram*(1); *Chintaman Bajoji Dev.* v. *Dhonde Ganesh Dev*(2); *Jawahra* v. *Akbar Hussain*(3); which dissented from *Jan Ali* v. *Ram Nath Mundul*(4). The alteration of language by omission of the word 'direct' is to bring the language of the Code into conformity with that of Act XX of 1863, sections 14 and 15. That Act (XX of 1863) is in *pari materia* and decisions on the sections 14 and 15 of that Act are useful as guidance in the construction of section 539 of the old and section 92 of the present Code. If a person has a right, his not using it will not matter: see *Venkataramana Ayyangar* v. *Kasturiranga Ayyangar* (5); *Subbayya* v. *Krishna* (6); *Rangasami Naickan* v. *Varadappa Naickan*(7).

(1) (1888) I.L.R., 12 Bom., 247. (2) (1891) I.L.R., 15 Bom., 612.
(3) (1885) I.L.R., 7 All., 178 (F.B.). (4) (1882) I.L.R., 8 Calc., 32
(5) (1917) I.L.R., 40 Mad., 212 (F.B.), at p. 225.
(6) (1891) I.L.R., 14 Mad., 186.
(7) (1894) I.L.R., 17 Mad., 462 (F.B.), at pp. 466 and 467.

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[COUTTS TROTTER, J.—In *Venkataramana Ayyangar* v. *Kasturiranga Ayyangar*(1) the plaintiffs were not mere potential worshippers but actual worshippers who were in the habit of worshipping in the temple.]

No, their Lordships lay down the wider rule and say also that the plaintiffs were further, more than mere worshippers.

A Hindu need not be an actual or habitual worshipper in a temple to be interested in the temple within section 92 of the Code. The law considers only the legal interest, not the contingency of his actually going there and worshipping there frequently. Take a temple of great celebrity like the one in Tirupati, Benares, Gaya or Rameswaram, any Hindu can worship in these places and so is interested as a worshipper in each of them, though he rarely goes there or not at all but only sends offerings to the temple.

[ABDUR RAHIM, J.—Hindu devotees can and do send offerings to distant temples in performance of their vows: they are worshippers.]

Sajedur Raja Chowdhuri v. *Gour Mohun Das Baishnav*(2); *Guduru Kristnayya Naidu* v. *Maradugula Venkataratnam*(3) and *Gopala Muppanar* v. *Subramania Aiyar*(4) show the nature of the right of a Hindu as a worshipper in a Hindu temple.

[ABDUR RAHIM, J.—Suppose the plaintiff is entitled to worship at the suit temple, does it give him 'interest' to sue under section 92, Civil Procedure Code?]

Yes, persons for whose spiritual benefit temples are founded are its beneficiaries.

The English Charitable Endowments Act is differently worded from section 92, Civil Procedure Code, or Act XX of 1863, sections 14 and 15. Residence is required in the English Law and not by the Indian Acts. The rights of parishioners are stated in Burn's Ecclesiastical Law, Vol. III, pages 404 to 408.

No rights are vested by the fact of residence. The right of a parishioner is a special right and is determined when he ceases to be a parishioner: see *Clifford* v. *Wicks*(5).

(1) (1917) I.L.R., 40 Mad., 212 (F.B.).
(2) (1897) I.L.R., 24 Calc., 418.
(3) (1907) I.L.R., 30 Mad., 293. (4) (1914) 27 M.L.J., 253.
(5) (1881) 106 E.R., 183.

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In Lord Romilly's Act (52 Geo. III, cap. 101), there is no expression corresponding to 'interest' or 'direct interest'; the statute merely refers to two or more persons as entitled to be petitioners, etc.; though decisions have held that they must have a direct or clear interest: see *In re Bedford Charity*(1). The case ultimately proceeded under the Bedford Charity Act, not under Lord Romilly's Act. There the objects of the Charity were the residents of Bedford, being Jews. See also *Corporation of Ludlow* v. *Greenhouse*(2). *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*(3) was followed in *Budh Singh Dudhuria* v. *Niradbaran Roy*(4) and in *Lukshmi Kunwar* v. *Murari Kunwar*(5).

[ABDUR RAHIM, J.—Is it your case that the interest in section 92, Civil Procedure Code, means 'legal' right to worship?]

Yes, so far as a Hindu temple is concerned, interest is identical with right, but interest will vary with the charity, such as a hospital, library, etc.

Section 92, Civil Procedure Code, covers religious and charitable trusts, and refers in terms to Act XX of 1863. So the scope of section 92 as to religious trusts should be coterminous with the scope of section 14 of Act XX of 1863; and there is nothing to show that the Legislature meant to limit the scope differently in section 92 from that of the Act. The Act is in *pari materia* with section 92, Civil Procedure Code, and we are entitled to look into it to know what 'interest' means in either of the enactments.

The position of the two plaintiffs under section 92 is the same as the Advocate-General who can intervene at any moment in the suit, unlike that of the petitioners under Lord Romilly's Act. The Code applies also to constructive trustees unlike the English Act. In *Panchcowrie Mull* v. *Chumroolall*(6) a resident of a village in Russia was allowed to sue in respect of a Charity in India.

K. P. M. Menon for respondents.—Section 92 of the present Code (corresponding to section 539 of the old Code) is taken from Lord Romilly's Act, as laid down in a long list of cases.

(1) (1819) 2 Swans., 470.
(2) (1827) 1 Bligh N.S., 17.
(3) (1897) I.L.R., 24 Calc., 418.
(4) (1905) 2 C.L.J., 431.
(5) (1918) 45 I.C., 213.
(6) (1878) I.L.R., 3 Calc., 563, at p. 571.

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Lord ELDON construed Lord Romilly's Act as limiting the right to persons having a "clear or direct interest." The Indian Legislature adopted Lord Romilly's Act as judicially construed. See *Corporation of Ludlow* v. *Greenhouse*(1).

[COUTTS TROTTER, J.—Interest or no interest is a question of fact in each case.]

Yes. T. R. Ramachandra Aiyar (the first plaintiff) is a foreigner (native of Cochin State), permanently residing in Madras. He is not interested in any tangible sense in the plaint temple situate in Tellicherry.

The English statute was meant to protect trustees as well as beneficiaries. The Lord Chancellor held that there must be "clear interest" or "direct interest," though no such words existed in the statute. So also the Indian Act should be construed so as to protect trustees as well as beneficiaries from improper suits.

[ABDUR RAHIM, J.—What is your test for interest?]

Anybody who will be prejudiced by the breach of trust is interested. It is impossible to define interest where a question of remoteness or otherwise comes in. If a man never goes to a temple, he has no interest in the temple; he is not prejudiced certainly by breach of trust therein. The learned Chief Justice puts it succintly by saying "he must derive some benefit". It is not possible to define interest. It is enough to say that Mr. T. R. Ramachandra Aiyar, plaintiff in this suit, has no interest in the suit temple to enable him to maintain the suit.

In *Jan Ali* v. *Ram Nath Mundul*(2) the Court went too far in construing 'direct interest', contained in the Codes of 1877 and 1888, by excluding cases which were not really meant to be so excluded and would not have been under the English Act; so the Legislature omitted the word 'direct' so as to include the cases wrongly omitted, and not to extend the scope of section 539 of the old Code further than Lord Romilly's Act. Reference was made to *Mohiuddin* v. *Sayiduddin*(3) which lays down that interest must be an existing one and not merely contingent.

[ABDUR RAHIM, J.—*Mohiuddin* v. *Sayiduddin* is not a case of a mosque?]

(1) (1827) 1 Bligh N.S., 17.
(2) (1882) I.L.R., 8 Calc., 32.
(3) (1893) I.L.R., 20 Calc., 810.

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It is a case of a religious foundation. The beneficial interest, if any, in the plaintiff in this case, is not tangible or proximate enough to sustain a suit. The sufficiency of interest can be decided only on the facts of each case. Take the instance of a hospital or free library in Madras, a Punjabee who comes here cannot have an interest to sue under section 92, Civil Procedure Code. The cases decided in India show that there must be a habit of going to worship,—"accustomed to worship" as observed in *Jawahra* v. *Akbar Hussain*(1). Reference was also made to *Narasimha* v. *Ayyan*(2), *Ambu* v. *Kethlamma*(3), *Venkatachalapati* v. *Subbarayadu*(4), *Gopala Muppanar* v. *Subramania Ayyar*(5).

P. R. Ganapati Ayyar in reply.—Under section 92 we are to look for a subsisting interest; as regards a Hindu temple we have to see if a plaintiff is a Hindu and entitled as such to worship. When the Indian Legislature removed 'direct' from the section 539, it departed from the English law.

[OLDFIELD, J.—When the word 'direct' existed, was the policy of the Code not the same as that of Act XX of 1863?]

Yes, it was the same. After the amendment in section 539 of the Code was made in 1888, the inference is strongly suggested that the policy of the Act and of the Code was identical and they were in *pari materia*. Reference was made to *Ganapati Ayyan* v. *Savithri Ammal*(6) and *Budh Singh Dudhuria* v. *Niradbaran Roy*(7).

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ABDUR RAHIM, J.—The sole question for determination in this Letters Patent Appeal is whether the suit in which it has arisen and which was instituted under section 92 of the Code of Civil Procedure with respect to a temple in North Malabar is maintainable, the point being whether Mr. T. R. Ramachandra Aiyar, one of the plaintiffs, has an interest within the meaning of that section in the temple concerned. Mr. T. R. Ramachandra Aiyar, who is a leading practitioner of this Court and a Brahman, resides in Madras while the temple is situate in Tellicherry. It is an ancient temple of some celebrity and is dedicated to the deity

(1) (1885) I.L.R., 7 All., 178 (F.B.).
(2) (1889) I.L.R., 12 Mad., 157.
(3) (1891) I.L.R., 14 Mad., 23.
(4) (1890) I.L.R., 13 Mad., 293.
(5) (1914) 27 M.L.J., 253.
(6) (1898) I.L.R., 21 Mad., 10.
(7) (1905) 2 C.L.J., 431.

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Sri Rama. Mr. T. R. Ramachandra Aiyar is a member of the Dharma Rakshana Sabha among whose objects is included the institution of suits for the protection and due application of Hindu religious endowments. It also appears that when, on one or two occasions in the exercise of his profession he went to Tellicherry, he attended this temple and worshipped there, and it was further stated that he was likely to do so if he again went to Tellicherry. But the interest of Mr. T. R. Ramachandra Aiyar in this temple within the meaning of the Code is not supported on any of these facts but on his right as a Hindu to perform worship therein.

The question is one of considerable importance, and having given my best consideration to it I have come to the conclusion that the view of the law expressed in the judgment of KUMARASWAMI SASTRI, J., is right. I think that the history of legislation on the subject makes it sufficiently clear that the legislature intended by the words "having an interest in the trust" to include in the case of a temple or a mosque all persons having a right to perform worship or to say their prayers therein. It is not necessary to go back further than Act XX of 1863, an Act which is expressly referred to in section 92 of the Code of Civil Procedure itself and is still in force. That Act, as is well known, was passed primarily to enable the Government to divest itself of the direct management of Hindu and Muhammadan religious endowments which they had assumed under certain regulations. It also contains provisions for suits to secure the due administration of religious trusts by the trustees, managers or members of committees. By section 14 such right of suit is conferred on persons 'interested' in any mosque, temple or religious establishment. Section 15 then explains that the interest required in order to entitle a person to sue under the last preceding section *need not be a pecuniary or a direct or immediate* interest or such an interest as would entitle the person suing to take any part in the management or superintendence of trusts. *Any person having a right of attendance*, or having been in the habit of attending at the performance of the worship or service of any mosque, temple or religious establishment, or of partaking in the benefit of any distribution of arms shall be deemed to be a person interested within the meaning of the last preceding section. It is probable that this elaborate explanation of what would be

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deemed to be sufficient interest to maintain a suit under Act XX of 1863 was considered necessary on account of the decisions under the Romilly's Act, such as in *In re Bedford Charity*(1). Also it is clear that the Indian Legislature in 1863 did not think it would lead to undue harassment of trustees of religious foundations or to the institution of frivolous and vexatious suits, if persons entitled to worship in a temple or to say prayers in a mosque were vested with the right to institute suits to secure their proper management. Act XX of 1863 however applied only to religious foundations and the Legislature deemed it advisable in the Civil Procedure Code of 1877 for the first time to make a specific provision for suits instituted for the purpose of remedying abuses relating to the administration of public charities generally. But by section 539 of that Code only two or more persons having a 'direct' interest in the trust were given the right to sue provided they obtained sanction of the Advocate-General or the Collector for the purpose. The words 'direct interest' were repeated in the Code of 1882, Act XIV of 1882. This probably indicates that the Legislature in 1877 and 1882 in providing for suits relating to public trusts intended to assimilate the law to that of England as expounded by Lord Chancellor ELDON in *In re Bedford Charity*(1) and in *Corporation of Ludlow* v. *Greenhouse*(2) though it does not follow that it intended any difference in the nature of the interest required to sustain an action with respect to the administration of religious foundations deemed to be sufficient under Act XX of 1863. Sir Samuel Romilly's Act, 52 Geo. III, cap. 101, which provided a summary remedy in cases of breaches of trust created for charitable purposes and for their proper administration gave to "any two or more persons" the right to present a petition for the purpose. But it was nevertheless ruled by the Lord Chancellor that only persons having a direct or clear interest in the trust were competent to present a petition under the Act. In *In re Bedford Charity*(1), certain Jews who were attending a synagogue in London were held not to be persons who could present such a petition with respect to the Bedford Charities, merely because being Jews they were interested on that account in obtaining a decision as to whether the poor Jews of Bedford

(1) (1819) 2 Swans., 471. (2) (1827) 1 Bligh N.S., 17.

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were entitled to the benefit of the charities which were founded for the education and relief of the poor inhabitants of Bedford. I do not find that any proposition can be deduced from the decision or observation of the Lord Chancellor in the above case or in the case of *Corporation of Ludlow* v. *Greenhouse*(1), from which it can be properly inferred that persons having a right to attend a religious foundation for purposes of divine worship have not a sufficient interest to maintain an action for its proper administration.

The interpretation of the phrase 'direct interest' however led to a considerable conflict of decisions in the High Courts of the country. It is not necessary to go through them all. For our present purpose they are divisible into two groups, some supported the view that worshippers at a temple or a mosque were not persons having a direct interest, while others held that they had such interest within the meaning of the Code. The case of *Jan Ali* v. *Ram Nath Mundul*(2) was a leading decision of the former class. It ruled that worshippers or persons accustomed to say their prayers in a mosque were not within the purview of section 539 as persons having a direct interest in the foundation. This ruling was followed by this High Court in *Narasimha* v. *Ayyan*(3). The learned Judges here, in fact, went further holding that even the fact of plaintiffs being managers of the temple in suit did not bring them within the provision of section 539. The Allahabad High Court in the case of *Jawahra* v. *Akbar Hussain*(4) dissented from *Jan Ali* v. *Ram Nath Mundul*(2), holding that every Muhammadan having right to use a mosque for purposes of devotion was entitled to remedy if the exercise of such right was interfered with and that it was not even necessary for him to come under the provision of section 30 of the Code of Civil Procedure, which deals with the right of suit by persons interested in obtaining relief or under section 539 of the Code of Civil Procedure. MAHMOOD, J., added that even if section 539 applied, Muhammadan worshippers who were entitled and accustomed to use it had the most direct interest in the foundation and were thus comprised within the purview

(1) (1827) 1 Bligh N.S., 17. (2) (1882) I.L.R., 8 Calc., 32.
(3) (1889) I.L.R., 12 Mad., 157. (4) (1885) I.L.R., 7 All., 178 (F.B.).

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of section 539. It has been pointed out on behalf of the respondent that MAHMOOD, J., was speaking of worshippers that were accustomed to use the mosque. But PETHERAM, C.J., who delivered the judgment of the Full Court, relied entirely on a Muhammadan's right to attend a mosque in supporting the plaintiff's *locus standi* in that case, and I feel sure that MAHMOOD, J., did not want to add any qualification to PETHERAM, C.J.'s statement of the law. It is also suggested in the judgment of the learned Chief Justice in this case that the decision in *Jawahra* v. *Akbar Hussain*(1) proceeded on the provisions of Muhammadan law. But with all respect, in order to ascertain whether a Muhammadan or a Hindu has an interest in a religious foundation, it is the Muhammadan or the Hindu law that must be primarily looked into, and I have not heard any suggestion at the bar that under the provisions of Hindu law a Hindu having a right of attendance and worship at a temple has not an interest in that temple similar to what a Muhammadan has in a mosque. In the Bombay High Court, SERGEANT, C.J., and NANABHAI HARIDAS, J., in *Chintaman Bajoji Dev* v. *Dhonde Ganesh Dev*(2), expressed their dissent from *Jan Ali* v. *Ram Nath Mundul*(3) and held that the Legislature did not intend by the expression 'direct interest' an interest of a different nature from that which the worshippers and the devotees of a deity naturally have in the proper management of the temple. That was also the trend of view of WEST and BIRDWOOD, JJ., in *Manohar Ganesh Tambekar* v. *Lakmiram Govindram*(4).

At this stage the legislature intervened to settle the controversy by removing the word 'direct' by the amending Act, Act VII of 1888, section 44. The effect of this amendment was fully considered by the Calcutta High Court in 1897 in the well-known case of *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*(5), where it was laid down:

"The inference, therefore, is that the legislature intended to allow persons having the same sort of interest that is sufficient under section 14 of Act XX of 1863 to maintain a suit under section 539; and this change in the law is, in our opinion, sufficient to

(1) (1885) I.L.R., 7 All., 178 (F.B.).
(2) (1891) I.L.R., 15 Bom., 612, at p. 623.
(3) (1882) I.L.R., 8 Calc., 32.
(4) (1888) I.L.R., 12 Bom., 247.
(5) (1897) I.L.R., 24 Calc., 418.

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distinguish the present case from that of *Jan Ali* v. *Ram Nath Mundul*(1), which was decided before section 539 had been amended by the omission of the word 'direct'."

This was a clear and explicit ruling that a person having a right of attendance and worship at a temple or a mosque had thereby an interest within the meaning of section 539 in the Code of 1882 as amended by Act VII of 1888. The significance of that ruling cannot be whittled away by pointing out that the plaintiffs in that case had not only a right to worship at the temple concerned but were as a matter of fact also in the habit of performing worship there. I may also refer to a decision of this Court in *Ganapati Ayyar* v. *Savithri Ammal*(2). There it was held that two Brahman residents of the neighbourhood who had obtained leave under section 30 of the Code were entitled to maintain a suit, as representing the Brahman community at large, for the removal of the trustee for the time being of a choultry founded for the benefit of the Brahmans. In his judgment, SHEPHARD, J., observed:

"It has been repeatedly held in this country that such a suit as the present may be instituted by any member of the class intended to be benefited by the charity for the support and preservation of which the aid of the Court is invoked. According to the document which evidences the institution of the charity, the class for which it was intended comprised Brahmans generally."

It cannot be said that the interest of a person as member of a large and indefinite class entitled to the benefit of a charity if sufficient for the purpose of a suit under the provision of section 30 will not be equally competent for a suit under section 539.

We have not been referred to any decision in which the ruling in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*(3) was dissented from or doubted and, so far as I am aware, it has always been understood to contain a correct exposition of the law. When therefore the Civil Procedure Code was re-drafted in 1908, the legislature must be taken to have been aware of the interpretation that had been put on the words 'having an interest in the trust.' If that interpretation did not

(1) (1882) I.L.R., 8 Calc., 32.
(2) (1898) I.L.R., 21 Mad., 10.
(3) (1897) I.L.R., 24 Calc., 418.

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commend itself to the legislature and if it intended to narrow the class of persons that could institute suits with respect to religious foundations, it would have given some indication of its intention. On the other hand, it is in my opinion a fair and clear inference that the legislature in retaining the same expression intended to confirm the view expressed in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (1) that the interest required need not be pecuniary, direct or immediate, or in any way different from that required by sections 14 and 15 of the Religious Endowments Act for purposes of suits relating to Hindu temples and Muhammadan mosques.

Considerable stress has been laid in support of the respondent's position on considerations of convenience, and such arguments were sought to be reinforced by a general reference to the law relating to the English Church, though no authority at all supporting the respondent's position was cited. In my opinion, considerations of convenience are a very unsafe guide to the interpretation of a statute, especially so in the case of an enactment like the one we are dealing with. At all events, regard must in this connexion be had to the provisions of Hindu law and to customs and usages relating to Hindu temples, the nature of these foundations and the character of the worship and the services carried on there, the class of persons that resort to them, what special interests, if any, do the residents of the place in which the temples are situated have and to what extent persons residing in other parts of the Presidency or India generally are interested in their maintenance. What I mean will be made clear by briefly contrasting the constitution and the laws relating to the Church of England with those relating to religious foundations of Hindus and Muhammadans. The English Church has a regular and highly elaborate constitution. It is connected with the State and its administration is secured by an organization of a fixed and permanent character, governed by well-defined rules and usages, enforcible in Courts specially constituted for the purpose. There is one peculiarity of English Ecclesiastical law which alone would forbid the application of English notions in the determination of questions relating to a temple or a mosque. A Protestant church is a parish

(1) (1897) I.L.R., 24 Calc., 418.

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church. It is intended primarily for the spiritual benefit of the parishioners. The parish is a well-defined ecclesiastical area and the parishioners have distinct rights and duties with respect to the parish church. They have a preferential right to accommodation during divine service and, generally speaking, they alone are entitled to the services of the incumbent for the administration of Holy Communion, for solemnization of marriages, to burial in the churchyard and for the baptism of their children. The church wardens and the members of the vestry are selected from the parishioners. The parishioners are bound to pay tithes or rather the rent charges into which they have been commuted. They contribute to the church rates and are bound to pay fees for marriages, churchings and burials and to contribute offerings during Easter. They are looked to for repair of the church building and its fittings and under the Ecclesiastical law they are even bound to attend divine worship on holy days. The rector is the incumbent of the parish. His remuneration consists of income derived from his benefice, ordinarily consisting of the tithes, glebe land, parsonage house, Easter offerings and fees. The whole system in fact is parochial. Even most cathedral or collegiate churches belong in the Ecclesiastical law to a parish.

On the other hand, the Indian Government as such has no duties or obligations in connexion with the maintenance of Hindu temples and Muhammadan mosques. There is no ecclesiastical constitution or organization for the administration of Hindu and Muhammadan religious establishments in any way analogous to that of the English Church. A Hindu temple or a Muhammadan mosque is not ordinarily intended, if ever, for the use of the residents of a particular village or town. The idea of anything like a parish or parishioners is entirely alien to and has no meaning in connexion with these places of worship. A temple or a mosque is founded in order to enable Hindus or Muhammadans generally or of a particular sect or persuasion to carry on worship or to say their prayers therein. They are maintained out of the income of the endowments, if any, and from free offerings and gifts or presents made by followers of the Hindu or Muhammadan religion not confined to any particular locality. No religious ordinance enjoining the attendance of Hindus or Muhammadans at their respective places of worship could be

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enforced by any recognized authority. I am not aware, and it has not been suggested, that Hindus or Muhammadans residing in the vicinity of a temple or a mosque have any higher rights or any special duties connected with it different from those of their fellow Hindus and Muhammadans or members of the same sect residing in any parts of the Presidency or elsewhere. In the case of at least the larger temples in this Presidency, offerings, sometimes of a very valuable nature, are sent from all parts of the Presidency as well as from outside. The making of offerings is an important mode of worship in all Hindu temples and such offerings often are made by persons living at a distance. As regards a mosque, as its use consists in the saying of prayers therein, it can only be used by persons in a position to attend the mosque in person. But there are shrines in connexion with tombs of Muhammadan saints, which in this connexion bear analogy to Hindu temples. To these shrines offerings are sent by persons from all parts of India and the temples and shrines which receive offerings from distant places are not a few but numerous. The famous temples at Tirupati, Rameswaram, Srirangam and Madura in this Presidency and the temples at Benares and other sacred places of the Hindus attract pilgrims in large numbers from the most distant places at stated festivals in the year. The well-known Muhammadan shrines, such as at Ajmeer, Agra, Delhi and at Nagore in this Presidency, are similarly resorted to by numerous Muhammadan pilgrims from all parts of the country. It is, to my mind, palpably repugnant to Hindu and Muhammadan religious consciousness that residents of the locality should alone be considered to have an interest sufficient to sustain a suit for the proper management of a temple or a mosque and none else, and the utter untenability of such a notion becomes still more vivid to one's mind in the case of the more important institutions. I think the Legislature of the country must have been persuaded of this fact when it gave the right to institute actions to secure proper administration of temples and mosques and their endowments by Act XX of 1863 to all persons who have a right of attendance and worship at these religious foundations and I cannot conceive that it intended by section 539 of the old Code or section 92 of the present Code to circumscribe within narrower limits the class of persons authorized to institute such suits. The provisions of the Code

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of Civil Procedure are not confined to purely religious institutions but cover all cases of religious and charitable trusts and it was urged that if we construed them in the way contended for on behalf of the plaintiffs, the results would be startling. For instance, if there is a dispensary in a village in this Presidency for the relief of sick persons generally, we should be compelled to hold that any two persons resident at Peshawar would be entitled to sue for administration of that charity under section 92. That no doubt is a possibility, but they would have to obtain the sanction of the Advocate-General and that officer might be relied on not to grant leave except in a proper case. On the other hand, from the history of the legislation in this connexion, it seems to me clear that the Legislature must have thought that as in India no authoritative organization or machinery existed for enforcing a due and proper administration of public trusts, the withholding of the right of suit from persons having an interest in the trust in the wide sense as defined in Act XX of 1863 with respect to religious foundations would be detrimental to numerous religious foundations and charities of the country. It was pointed out by way of answer that the Advocate-General can institute suits in cases where people of the locality are apathetic and indifferent. But it is common knowledge that most of such suits are in fact instituted by private persons and those instituted by the Advocate-General are rare and must necessarily be so in the present condition of things. On the other hand, the trustees are in my opinion sufficiently protected from vexatious suits by the safeguards provided by the section.

Whether the interests of the plaintiffs in a particular foundation or public trust is sufficient to support an action under section 92 may to some extent depend upon the facts of each case. But it must in my opinion be conceded as a sound general proposition that persons belonging to that section of the public for whose benefit a public trust has been created are in the position of beneficiaries and must as such be held to possess a sufficient interest to support a suit under the Code. In the case of a temple or a mosque persons entitled to attend there for purposes of worship and devotion are presumably the beneficiaries intended by the founder [See SADASIVA AYYAR, J., in *Gopala Muppanar* v. *Subrahmanya Aiyar*(1)], and if such persons

(1) (1914) 27 M.L.J., 253, at p. 258.

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have not an interest in the institution within the meaning of law, it is difficult to conceive who has. It is argued however that the interest contemplated by section 92 must not be merely contingent or only a possibility as laid down in *Mohiuddin* v. *Sayiduddin*(1). But in that case the learned Judges were considering the position of a person who had only a chance of succession to the office of the spiritual head of an institution, while in this case Mr. T. R. Ramachandra Aiyar in maintaining the suit relies on the right of attendance and worship already vested in him. The possibility that he may not often or ever actually worship at the temple in question cannot in my opinion make any difference. On the other hand, if a person is not entitled to worship at a particular temple, he cannot by the mere fact of having actually worshipped there in the past on several or many occasions acquire a *locus standi* under section 92. If the right of attendance and worship be not sufficient in itself, the Courts would be called upon to enquire into questions as to extent and mode in which a Hindu or Muhammadan suing under section 92 of the Code of Civil Procedure observes his religious duties, how far he is in a position to resort to the temple or mosque in question and how often he actually goes there for worship or to investigate the nature and value of the offering, gift or presents made by a devotee and of other similar acts of devotion. In my opinion the Indian Legislature would ill-like the Courts to embark upon such enquiries and that was probably why they took pains in Act XX of 1863 to explain the nature of the interest required and afterwards to omit the word 'direct' from the Code of Civil Procedure after the decision in *Jan Ali* v. *Ram Nath Mundul*(2). Further, if the respondents' arguments were sound, in cases where through a long course of misconduct or neglect on the part of persons in charge of a temple or mosque, it has ceased to be frequented for worship either owing to disrepair of the building or the trustees' default in maintaining the necessary establishment for due performance of the services or other similar causes—and such cases are not infrequent—there would be no one who would have a sufficient interest for purposes of a suit under section 92.

(1) (1893) I.L.R., 20 Calc., 810. (2) (1882) I.L.R., 8 Calc., 82.

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As a mosque is dedicated to God in order that Muhammadans may say their prayers therein, so also a temple is dedicated to a particular deity in order that the worshippers of that deity may worship there. It follows that in the case of a mosque leaving out those rare cases, if any such exist, where the dedication is expressly limited, the followers of Muhammadan religion and in the case of a temple the Hindu devotees of the particular deity for whose worship a temple is founded are the beneficiaries intended by the founders. Suppose, there had been a deed of dedication with respect to the temple in suit, and that deed stated in so many words that Mr. T. R. Ramachandra Aiyar and all other worshippers of Sri Rama would be entitled to worship there, it could hardly be contended then that Mr. T. R. Ramachandra Aiyar would not be a beneficiary of the trust and as such entitled to maintain the suit. It cannot in my opinion make any difference in this respect that there is no such deed of dedication available in this case, if, as is admitted, the temple in question was in fact intended for the use of worshippers of Sri Rama and Mr. T. R. Ramachandra Aiyar is a devotee of Sri Rama and as such entitled to worship in this temple.

I would therefore allow the appeal and remand the suit to the District Judge of North Malabar district for trial on the merits.

OLDFIELD, J.

OLDFIELD, J.—Appellants are plaintiffs in a suit filed with the consent of the Advocate-General against the trustees of a temple in Malabar under section 92, Code of Civil Procedure; and the question is whether one of them, to whom alone I shall refer as the appellant, has the interest in the trust, which is required of a plaintiff by that provision. It is alleged that he has not, because he comes before us on the footing that he is a practitioner in this Court, who has worshipped in the suit temple only on two or three occasions, when he was in its neighbourhood on professional business, and has no particular expectation of ever doing so again. His right to worship there is disputed by respondents, but may be assumed for the present purpose, as (it is admitted) it might similarly be assumed in favour of every other Hindu of the higher castes; and it is the sole qualification he alleges. The question is whether it involves his possession of the interest which section 92 requires.

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Argument in his favour has been based largely on the assumption that section 92 should be construed with reference to Act XX of 1863 and by importation into it of the definition of an 'interest,' which section 15 of that Act contains; and, if the interest required is, in the words of the latter provision, to be 'not necessarily direct or immediate' and may be claimed by 'any person having a right of attendance . . . at the performance of the worship' of the institution, then no doubt plaintiff has an interest. But although this construction was adopted in *Sajedur Raja Chowdhuri* v. *Gour Mohan Das Baishnav*(1), there is little in the details and history of the two provisions to commend it. True, both deal with religious trusts and provide remedies for their mismanagement. But there the likeness between them ends; and until 1908 even that statement required material qualification. The Act applies to a particular class of religious institutions, those which were or could have been under the management of Government under Regulation VII of 1817; the Code did not originally apply in terms to religious trusts, and, whatever the original intention, it was only in 1882 that a reference to them as well as to charitable trusts was inserted. The Act remained unaltered since it was passed in 1863 and, although the Code was passed in 1877 and amended in 1882, 1888 and 1908, no exhaustive attempt was made to create or maintain similarity between the differing provisions of the one and of the other on any of these occasions. It was only in 1908 that the jurisdiction of Courts other than the District Court over suits under the Code was made possible, although they had exercised it under the Act from the beginning; that the section of the Code was expressed as mandatory and that the right of suit under the Act was saved; and that one relief, the removal of a trustee, obtainable under the Act from the beginning, but not, if the Full Bench of the Court decided rightly in *Rangasami Naickan* v. *Varadappa Naickan*(2), under the Code, was expressly provided for. Last and for the present purpose most important, the Act from the beginning contained the wide description of the interest entitling to sue, on which appellant relies; but the Code recognized only a direct interest, whatever that expression comprehends, until 1888, when the

(1) (1897) I.L.R., 24 Calc., 418. (2) (1894) I.L.R., 17 Mad., 462.

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word 'direct' was omitted. These amendments no doubt did in fact assimilate the Code to the Act on various points in succession; and some of them may have been made in consequence of decisions, in which the latter was referred to, in particular the last mentioned with reference to *Jan Ali* v. *Ram Nath Mundul*(1). But this spasmodic course of legislation does not indicate what in my opinion the material differences between two statutes as they were enacted negative, a consciousness that the two were in *pari materia* or an intention that the one should be used as an aid to the interpretation of the other.

This conclusion is confirmed by reference to the character of the reliefs obtainable under the two statutes. In 1888, the crucial date for appellant's contention, because in it the interest required by the Code ceased to be qualified as direct, they differed essentially, the reliefs granted by it comprising only safeguards against future mismanagement; those granted by the Act only remedies for misfeasance in the past against trustees and managers, not alienees or other strangers to the trust; and naturally so, because the provisions in the former for appointment of new trustees and for a scheme were irreconcilable with those in the latter for control and for appointment of trustees by elective committees. Whilst this distinction between the reliefs, which could be granted, was retained, there is no reason for supposing, what the Code did not state explicitly, that the persons, who could claim them, were regarded as identical; and, if it cannot be shown that those persons were the same in 1888, there is none for supposing what again was not expressed, that they were intended to be the same in 1908, when provisions, explicable as natural improvements in this branch of the law and without reference to the Act, were introduced and the reliefs allowed by it were first made obtainable under the Code. I would respectfully associate myself with the suspicion, with which the learned Chief Justice regards the method of construction of one statute by reference to another, and would hold that in this case its employment is without justification.

The description in the Code until 1888 of the qualifying interest as direct is in fact the immediate basis of the majority of the decisions, to which we have been referred. For until that year, the question was always whether the plaintiff,

(1) (1882) I.L.R., 8 Calc., 32.

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who had some interest, had a direct one. Thus to give two instances, *Jan Ali* v. *Ram Nath Mundul*(1), already referred to, plaintiffs were habitual worshippers in the mosque which was in question, and the Court, finding in Act XX of 1863 a distinction drawn between persons possessing a direct and immediate interest, and those who were merely in the habit of attending the worship, held that they had not the direct interest required; and in *Jawahra* v. *Akbar Hussain*(2), the existence of a direct interest in persons so situated was sustained, MAHMOOD, J., dissenting expressly from the Calcutta decision. To turn to the more important cases, those enumerated in the judgment of the learned Chief Justice as decided after the omission of the word 'direct,' it is sufficient that, as he observes, the plaintiffs, who were allowed to sue, had in each an interest, which would have enabled them to proceed under Romilly's Act in England and had more than a mere right to worship. Closer reference is necessary only to two, which have been particularly relied on. In *Mohiuddin* v. *Sayiduddin*(3), the dictum that the interest must be an existing one and not a mere contingency at first sight is against appellant's contention. But the only contingency in question was the mere possibility of the plaintiffs' succession to the management of the institution, which depended on circumstances beyond their control and in no way resembled the existing right of a potential worshipper, on which appellant relies. On the other hand, in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*(4), although the issue was stated as it has been in this appeal and the argument that the interest required must be different from a mere right to worship was rejected, the Court proceeded, firstly on the adoption of the definition of 'interest' in Act XX of 1863, from which I have dissented, secondly with reference to the decision in *Manohar Ganesh Tambekar* v. *Lakshmiram Govindram*(5), which in fact recognizes the right to sue, not of mere worshippers, but of the manager of a temple and of priests who supervised the worship there of pilgrims, and thirdly on the finding that the plaintiffs had 'a somewhat larger interest than that of mere worshippers'; and in these circumstances I do not feel bound by the conclusion.

(1) (1882) I.L.R., 8 Calc., 32.
(2) (1885) I.L.R., 7 All., 178 (F.B.).
(3) (1893) I.L.R., 20 Calc., 810.
(4) (1897) I.L.R., 24 Calc., 418.
(5) (1888) I.L.R., 12 Bom., 247.

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But, although the direct result of the authorities, even after 1883, is negative, indirectly they are strongly against appellant. For the fact that the wide construction he proposes has never been suggested during the last thirty years, although in every case it would have afforded a short ground of decision in the plaintiffs' favour, is clear reason for doubting its correctness.

Apart from authority appellant relied mainly on the enumeration of alleged crucial instances, as admitting only of a decision consistent with his claim. But he did not show how any principle could be deduced from them; and, so far as they could be tested with reference to convenience, the result was against him, since, apart from considerations of *bona fides*, the possession of a mere right to worship affords no security for the plaintiffs' ability to propose a suitable scheme or later to see to its working. On the subject matter and language of the section it was suggested that the interest entitling to sue should be defined liberally to include such cases as appellant's, because the necessity for the consent of the Advocate-General or Collector will afford a corrective, where one is required. But that consent is merely a condition precedent to the institution of the suit and cannot affect the responsibility of the Court for the decision as to the plaintiffs' qualification. On the other hand, no good reason has been shown against the interpretation of the word 'interest' in the section in the manner in which it is ordinarily interpreted in other legal connexions and in which I shall interpret it, as an interest, which is substantial and not sentimental or remote. This conclusion is consistent with the only cases cited, in which a merely potential right to claim the benefits of the trust was directly in question, *Corporation of Ludlow* v. *Greenhouse*(1) and *In re Bedford Charity*(2), the former insisting on proof of a 'clear' interest, whilst the latter negatived the interest in a charity for the poor of one place alleged by persons who were wealthy and lived in another.

The foregoing, of course, affords no immediate or explicit answer to the question as it was originally stated, whether a right to enjoy the benefits of a trust involves possession of the interest referred to in section 92; and the assumption that such an answer must be possible underlay most of the argument in

(1) (1827) 1 Bligh N.S., 17.
(2) (1819) 2 Swans., 470.

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favour of the comprehensive qualification, for which appellant contended. But there is no reason for assuming that an answer to this or any other question of interpretation, which excludes considerations of degree or the necessity for enquiry into the facts of each case, can be found or should be looked for at the expense of established principle. And in practice such enquiry will present no difficulty. Proof of residence in the neighbourhood of the institution will no doubt be one way of establishing possession of an interest, not by any analogy with the rights of parishioners in England, but on the simpler ground that those who live near to the institution will be most likely to take advantage of its benefits. Other ways, however, will not be excluded; and therefore I am not troubled by the suggested cases of devotees, who may conceivably visit a shrine in the future, although there is no reason for expecting and no probability that they will ever do so; or of institutions, which have ceased to be frequented, because their services have been discontinued. In the first class of cases the grievance may fairly be described as sentimental; in the second the answer is that any two persons who can show at any time that they are prejudiced or have any well-founded expectation that they will be prejudiced by the discontinuance will be entitled to sue; and in both classes it is possible that, if exceptional circumstances rendering a private suit impossible are established, the Advocate-General may be justified in the independent exercise of his powers. Such cases, however, will be rare and usually it should be easy to ascertain whether even occasional visitors or pilgrims, actual or prospective, have a substantial interest if the character and sphere of reputation of the institution, the area from which votaries come to it and the purposes for which they ordinarily come are considered. And in the present case it is unnecessary to pursue such considerations further. For they do not arise on the statement of appellant's position, which has been made. It involves that his interest is based on a mere possibility and is too remote to be substantial: and therefore, however laudable his motives or those of the society in which he holds office, his right to sue has not been established.

I would dismiss the Letters Patent Appeal with costs.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—This Letters Patent Appeal comes before us on a difference of opinion between my Lord the CHIEF

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JUSTICE and my brother KUMARASWAMI SASTRI in an appeal from the District Judge of North Malabar. The suit was one under section 92 of the Civil Procedure Code asking for the removal of the trustees of a temple at Tellicherry and other kindred reliefs. The plaintiffs were a Nambudri Brahman of North Malabar, as to whom no question arises, and Mr. T. R. Ramachandra Aiyar, a well-known vakil practising in these Courts. The learned District Judge dismissed the suit on the ground that Mr. Ramachandra Aiyar had no interest in the trust relating to the temple within the meaning of section 92 of the Code of Civil Procedure. The learned Chief Justice agreed with his view and KUMARASWAMI SASTRI, J., dissented from it. I find myself in entire agreement with the views of the former and only express my opinion in words of my own out of respect for the opinion of KUMARASWAMI SASTRI and ABDUR RAHIM, JJ.

It is desirable to state the exact position of Mr. Ramachandra Aiyar in relation to this suit, and the facts are to be gathered from the learned District Judge's judgment. He is the vice-president of the Dharma Rakshana Sabha and is so described in the plaint. That is a body which interests itself in the conduct and management of temples in Southern India, but it is not contended that that fact would, of itself, give Mr. Ramachandra Aiyar any *locus standi* in this suit. His personal connexion with the temple is so slight as to be negligible. He is a native of Cochin, he lives in Madras, and the utmost that can be said is that on two or three occasions, the last of which was some eight or ten years ago, while visiting Tellicherry in his professional capacity, he took the occasion to worship in this temple. No one has seriously urged that so slender a connexion could be relied upon as creating any real interest in the temple, in the popular sense of that term. The proposition put forward is a much wider one, namely, that every Hindu has an interest, within the meaning of the section, in every Hindu temple throughout the length and breadth of India. The arguments that have been addressed to us appear to me to fall under three heads; first, the argument from the Indian decisions, secondly, the suggested analogy of Romilly's Act, 52 Geo. III, cap. 101, and the decisions under it, and thirdly, the suggested analogy of section 15 of the Religious Endowments Act of 1863.

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In considering the decided cases it is no doubt important to remember and keep in mind the fact that section 539 of the old Code stipulated that the relators should have not merely an interest but a 'direct' interest in the trust. By section 44 of the amending Act of 1888, the word 'direct' was omitted from section 539 and it has not reappeared in section 92 of the present Code. Accordingly, the cases decided before 1888 were applying a more stringent rule than can be applied at the present day in testing the *locus standi* of the relator. The Bombay cases, *Manohar Ganesh Tambekar* v. *Lakmiram Govindram*(1) and *Chintaman Bajoji Dev* v. *Dhonde Ganesh Dev*(2) do not help us much, because the interest there was so manifest as to be held by the Court, without difficulty, to be not merely an interest but a 'direct' interest, within the meaning of the old section. *Jawahra* v. *Akbar Hussain*(3), which was relied upon by Mr. Ganapathi Ayyar, does not appear to me necessarily to support the position for which he contends, because the plaintiffs in that case lived in the village where the mosque in question was situated, habitually worshipped in the mosque and, moreover, had actually been obstructed in the attempt to perform their devotions in it. MAHMOOD, J., whose judgment has been relied upon by the appellants, describes the plaintiffs in that case as "personally entitled and accustomed to worship there." Of the Calcutta cases, in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*(4), the learned Judges, no doubt, express themselves as of the opinion that the 'right to worship' is sufficient to constitute an interest under the present section. I think that must be qualified by two considerations: the first is that the learned Judges, in my opinion, at page 427 completely distort the effect and scope of the decision in *Manohar Ganesh Tambekar* v. *Lakmiram Govindram*(1); the other is that, in stating the position of the plaintiffs, they say this:

"We may add that the two plaintiffs in the present case have a somewhat larger interest than that of more worshippers, the plaintiff No. 1 alleging that he has for some time been performing some of the duties of the *Mohunt*, and plaintiff No. 2 that he has been performing the *poojah* in the temple. These allegations have been supported by some evidence which is not contradicted."

(1) (1888) I.L.R., 12 Bom., 247.
(2) (1891) I.L.R., 15 Bom., 612.
(3) (1885) I.L.R., 7 All., 178 (F.B.).
(4) (1897) I.L.R., 24 Calc., 418.

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No one would contend that the discharge of the duties of *Mohunt* and the performance of *poojah* did not constitute an interest, but, apart from those special facts, the use of the term 'mere worshippers' by the learned Judges suggests, to my mind, that their view was not focussed on any distinction between *de facto* worship and the abstract and even unexercised right of worship —a distinction, which for the purposes of this case, goes to the root of the matter. *Mohiuddin* v. *Sayiduddin*(1) is an express decision that the interest required under the section must be an 'existing one and not a mere contingency.' *Jan Ali* v. *Ram Nath Mundul*(2) is an important case, because it is common knowledge that it was in consequence of that decision that the change in the law was made to omit the word 'direct.' The plaintiffs in that case lived in the village where the mosque was situated and were in the habit of worshipping regularly at that mosque. The Court, nevertheless, decided that they had not a direct interest in the mosque. I do not think that any of the Madras decisions have any direct bearing on the point we have to decide. *Gopala Muppanar* v. *Subramania Aiyar*(3) is no doubt an authority for the proposition that every Hindu, with perhaps certain possible restrictions which I need not consider here, has a right to worship in every Hindu temple throughout India. I am not concerned, for the purposes of this case, with questioning that doctrine or the corresponding doctrine that every Muhammadan has a right to worship in every mosque in India, and perhaps in the whole world. I am not prepared to treat the observations of the learned Judges in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*(4) as compelling me to hold that the right to worship in a temple is equivalent to an interest within the meaning of section 92 of the Civil Procedure Code.

I now pass to the argument put forward by the respondent based on the analogy of Romilly's Act and the two decisions *In re Bedford Charity*(5) and *Corporation of Ludlow* v. *Greenhouse*(6). Romilly's Act authorized any two or more persons to take proceedings under the Act in regard to the trust to

(1) (1893) I.L.R., 20 Calc., 810.
(2) (1882) I.L.R., 8 Calc., 32.
(3) (1914) 27 M.L.J., 253.
(4) (1897) I.L.R., 24 Calc., 418.
(5) (1819) 2 Swans., 470.
(6) (1827) 1 Bligh N.S., 17.

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which the Act referred, on obtaining the sanction of the Attorney-General, and the Act contains not a word to prescribe that they should have an interest, direct or otherwise. Nevertheless, Lord ELDON in those two cases expressed an emphatic opinion that the Court would not listen to a relator who had not an interest which he describes in one place as 'clear,' and in another as 'direct.' As the section of the Civil Procedure Code is known, as a matter of history, to be based on Romilly's Act, I do not think this argument from analogy is one that can be overlooked.

Mr. Ganapati Ayyar relied strongly on the definition of 'interest' contained in section 15 of the Religious Endowments Act of 1863. Section 14 of that Act gives a right of suit, in certain matters, to "any person or persons interested in any mosque, temple or religious establishment, or in the performance of the worship or of the service thereof, or the trusts relating thereto." Section 15 proceeds to define the requisite interest in two classes, the first of which is negative and the second positive. The clauses are as follow :—

"The interest required in order to entitle a person to sue under the last preceding section need not be a pecuniary, or a direct or immediate, interest or such an interest as would entitle the person suing to take any part in the management or superintendence of the trusts."

"Any person having a right of attendance, or having been in the habit of attending, at the performance of the worship or service of any mosque, temple or religious establishment, or of partaking in the benefit of any distribution of alms, shall be deemed to be a person interested within the meaning of the last preceding section."

The important words are those in the second clause. If it be conceded that every Hindu has a right to worship in every temple, and the definition of section 15 can be applied, as it stands, to the expression 'interest' in section 92 of the Code of Civil Procedure, the appellant's chain of reasoning seems to me to be complete. I respectfully agree, in general, with the learned Chief Justice's observations as to the danger of taking a definition of an expression in one statute and applying it to the same expression in another. But I am constrained to admit that very special considerations apply to the case of these two particular statutes. In the first place they are in *pari materia*

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dealing with practically the same subject matter. The argument goes even further than that and invites us to infer that the deliberate intention of the legislature must be taken to have been to assimilate the interest stipulated for in section 92 of the Code of Civil Procedure to the interest defined in section 15 of the Religious Endowments Act. The argument, as I follow it, is this: before the amending section of the Act of 1888, section 539 of the old Code required a direct interest in the relator. Then came the decision in 1882 in *Jan Ali* v. *Ram Nath Mundul*(1). That case decided, as I have already pointed out, that the fact that the plaintiffs were residents of the village in which the suit mosque was situated and were regular worshippers at it did not give them a direct interest in the trusts of the mosque. But it now becomes important to observe further that the learned Judges went on to express the opinion that the suit should have been instituted under section 14 of the Religious Endowments Act of 1863—doubtless a clear intimation that, in the opinion of the learned Judges, the relators had an interest within the meaning of that section, though not a direct interest. The draftsman of the amending section of the Act of 1888, we are to suppose, set himself to the task of so amending the law that persons in the position of the plaintiffs in *Jan Ali* v. *Ram Nath Mundul*(1) should be enabled in future to sue under the section of the Civil Procedure Code. He had before him the section of the Religious Endowments Act and the opinion of the learned Judges in Calcutta that the plaintiffs had an interest within the meaning of the section of the Religious Endowments Act. When he omitted the word 'direct,' is it not most natural to suppose that he intimated that the expression 'interest', in the amended Code, should have the same meaning as in the Religious Endowments Act? I think this is a most cogent argument and would yield to it but for one reason. Assuming that the words of the Religious Endowments Act, if it applied, would cover the case of the present plaintiffs, I have no manner of doubt that such a result was not in the least in the contemplation of the draftsman of the Religious Endowments Act and that such a result, from the wording of the definition, would have been regarded as startling by everybody at the time. I think

(1) (1882) I.L.R., 8 Calc., 32.

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that is sufficient warrant for refusing to import the definition contained in the one Act into the other. However close the historical connexion between the two sections may be, the very fact that the words used in one may lead to an inconvenient and unforeseen conclusion is, it seems to me, good reason for refusing to import those words and producing the same conclusion in the other.

Numerous illustrations were put during the course of the argument to show the difficulties involved on one side or the other. The inconvenience and, to my mind, the absurdity of the proposition that any two Hindus, residing, say in Peshwar, can be said to have an interest in a temple in Malabar, by virtue of merely being Hindus, with the right to worship in that temple if they should ever find themselves in its vicinity, is apparent from its mere statement. On the other side, it was pressed upon us that, if that proposition in its extreme width be rejected, it is impossible to draw a line of demarcation. Hindu and Muhammadan laws know nothing of territorial boundaries of temples or their priests or of anything corresponding to the idea of a parish with special local rights in its parishioners, which would easily solve the difficulty in the case of an English Established Church. In so far as the decided cases suggest a limitation, the limitation suggested is that of living in the neighbourhood of the institution in question and habitually resorting thereto for purposes of worship. On that, one can be asked, what is your definition of neighbourhood? What is your definition of habitual resorting? On that I am prepared at once to admit that I can find no words that would solve those difficulties by a universally applicable formula. But I do not think that concludes the matter. I am content to say that the task is impossible, that the most that can be done, or attempted to be done, is to say that the interest required by the statute to reside in the relator must be, in the words of Lord ELDON, 'clear' or, in the words of the learned Chief Justice in this case, 'a present and substantial, and not a remote and fictitious, or purely illusory interest', or, in the words of the learned Judges in *Mohiuddin* v. *Sayiduddin*(1), 'an existing interest and not a mere contingency.' Beyond that, it seems to me that the

(1) (1893) I.L.R., 20 Calc., 810 at p. 817.

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question as to whether any given person has or has not an interest, as so defined, is a pure question of fact and must be left to the Court, before whom he appears, to decide in the light of these general principles on a consideration of the particular circumstances of each case. I see nothing to regret in such a conclusion and do not feel perturbed at my own or any one else's inability to construct a logical bed of Procrustes to fit each and every imaginable case. No doubt, there are cases of special difficulty, such as the great pilgrimage temples at Benares and other sacred places, where the majority of the worshippers come from all over India. The extreme case perhaps is the temple of Rameswaram in this Presidency, which is situated on an island, and no one lives near it except those connected with the carrying out of the religious worship in the temple, and the worshippers are exclusively pilgrims. It is urged that, if you are to put a construction on the section which in any way confines the right of suit to local or habitual worshippers, not one of the thousands who attend the temple would fulfil the requirement. If it be so, I do not shrink from the conclusion. Section 92 of the Code does not confine the right of suit to relators but gives a right of suit to the Advocate-General himself directly. As guardian of the religious interests of the community as a whole, he could doubtless be relied upon to take proper steps for the due administration of those religious establishments which are more the resort of the public at large than of the residents in their immediate neighbourhood. I am, therefore, of opinion that there is nothing which compels me to adopt the wide proposition contended for by the appellants with its results so directly opposed, as I think, to convenience as to make the position of temple trustees an intolerable one.

I, therefore, agree with my lord the Chief Justice and my brother OLDFIELD in dismissing this Appeal with costs.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—The result is the appeal will be dismissed with costs of respondents Nos. 1 and 3 in accordance with the opinion of my learned brothers.

K.R.

PRIVY COUNCIL.

1918. October 29, December 3.

YERLAGADDA MALLIKARJUNA PRASAD NAYUDU, (PLAINTIFF)*

v.

SOMAYA AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Madras.]

Estates Land Act (Madras Act I of 1908), ss. 3 and 6, sub-section (1), and explanation added by amending Act (Madras Act IV of 1909), sec. 3, and sec. 185, proviso—Conversion of ryoti into private land—Holder in unauthorized possession.

The respondents held certain lands under a muchilika, dated 28th July 1907, given by them to the appellant by which they agreed to hold the lands, described as Kamatam or private lands, until 30th April 1908 for the purpose of cultivation, the document expressly providing that it should itself operate as a surrender of the lands at the end of that term. The respondents however held over after the expiration of the lease, not only without the consent of the appellant, but contrary to his wishes and intention, and contrary also to the terms of the muchilika, and were so holding the lands on and after 1st July 1908 when the Madras Estates Land Act (Madras Act I of 1908) came into force. In a suit by the appellant to eject the respondents and recover possession of the lands which he claimed as his private lands within the meaning of Madras Act I of 1908, the defence was that they were ryoti lands in which the respondents had occupancy rights under section 6, sub-section (1), of the Act and the explanation thereto added by the amending Act (Madras Act IV of 1909). There were concurrent findings of fact by the Courts below that the lands were ryoti, and that the appellant had not proved that they were his private lands within the proviso of section 185 of the Act of 1908.

Held that, assuming that the respondents had not any permanent rights of occupancy in the lands in suit before the coming into force of Madras Act I of 1908, they obtained such permanent rights of occupancy by the operation of section 6, sub-section (1), as amended by section 3 of Madras Act IV of 1909, and the suit was rightly dismissed by the Courts in India.

Govinda Parama Guruvu v. *Bothasi Dandasi Padhi*, (1910) 20 M.L.J., 528, approved.

Kanakayya v. *Janardhana Padhi*, (1913) I.L.R., 36 Mad., 439, referred to.

APPEAL No. 104 of 1916 from a judgment and decree (26th November 1914) of the High Court at Madras, which affirmed

* *Present*:—Lord BUCKMASTER, Lord DUNEDIN, Sir JOHN EDGE and Sir LAWRENCE JENKINS.

on appeal a judgment and decree (22nd November 1912) of the Subordinate Judge of Masulipatam.

The question for determination in this appeal is whether the lands in suit are 'Kamatam' or private lands of the appellant, the zamindar, or are 'seri' or 'ryoti' lands in which the respondents have permanent occupancy rights.

The lands in question, in area 22 or 23 acres, are situate in village Ayyanki in the Kistna district within the appellant's zamindari. The case of the appellant is that they have always been 'private' lands and that in any case they have been treated and specifically leased as such for many years past.

By a muchilka or counterpart of a lease, dated 8th July 1907, the lands in suit, described as 'Kamatam' or private lands, were let by the appellant to the respondents Nos. 1 and 2 for cultivation purposes to the end of April 1908, the document expressly providing that it should itself operate as a surrender of the lands at the end of the term. The respondents gave up possession to the appellant at the end of April 1908, but in August following they trespassed on the lands, and began cultivating them again and continued to do so until April 1909, when the appellant again obtained possession, and cultivated the lands by his own servants and hired labour. The respondents thereupon took criminal proceedings against the appellant which resulted in the attachment by the magistrate of the lands under section 145 of the Criminal Procedure Code, whereupon the appellant, on 30th April 1910, instituted the present suit against the respondents.

The facts are sufficiently stated in the judgment of the Judicial Committee; and the judgments of the High Court (Sir JOHN WALLIS, C.J., and SESHAGIRI AYYAR, J.) will be found reported in I.L.R., 39 Mad., 341.

On this appeal, which was heard *ex parte*, *DeGruyther*, K. C., and *Kenworthy Brown* for the appellant contended that on the documentary evidence in the case it should have been held that the lands in suit had always been private lands and were never held as ryoti lands, and that if the respondents were in possession of them at all on 1st July 1908 it was either as trespassers, or as tenants of private land; they never obtained occupancy rights under section 6, sub-section (1), of the Madras

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Act I of 1908, and the explanation thereto, which only refer to persons in authorized possession, and therefore not to the respondents who were holding over contrary to the expressed wishes of the appellant, and the terms of their lease. In sections 45 and 163 of the Act where unauthorized possession is intended to be referred to, the word used is 'occupation.' A trespasser cannot be described as being in occupation of the land as 'his holding'; and it could not have been the intention of the legislature to give permanent occupancy rights to persons who were not legally in occupation. In the case of *Kanakayya* v. *Janardhana Padhi*(1), decided by a Full Bench of the High Court, the person in possession was held to be in possession of ryoti land, and had therefore no previous right of occupancy; so the question for decision here did not arise and was not decided in that case. Reference was also made to *Govinda Parama Guruvu* v. *Bothasi Dandasi Padhi*(2) and *Sivapada Mudali* v. *Pitty Thyagaraja Chetty*(3). But in the present case the evidence showed that the land had been from 1884, if not earlier, decribed as 'Kamatam' and let so described, which is made a test of the character of the land by section 185 of the Act. The proviso to that section must be construed as such and not as an exception to the substantive enactment—*Maha Prasad* v. *Ramani Mohan Singh*(4).

The JUDGMENT of their Lordships was delivered by

Sir JOHN EDGE, J.

Sir JOHN EDGE.—This is an appeal from a decree, dated the 26th November 1914, of the High Court at Madras, which affirmed a decree, dated the 22nd November 1912, of the Subordinate Judge of Masulipatam, by which the suit had been dismissed.

The plaintiff is a zamindar, and he brought his suit on the 3rd of April 1910, for a declaration that certain lands within his zamindari in the village of Ayyanki, in the Kistna district, of which the defendants were in possession, were his private lands within the meaning of the Madras Estates Land Act, 1908 (Madras Act I of 1908), in which the defendants had no right of occupancy, for the ejectment of the defendants from those lands, and for mesne profits. The defendants resisted the suit

(1) (1913) I.L.R., 36 Mad., 439. (2) (1910) 20 M.L.J., 528.
(3) (1914) 27 M.L.J., 165.
(4) (1914) I.L.R., 42 Calc., 116; L.R., 41 I.A., 197 (206).

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on the ground that the lands in question were ryoti lands within the meaning of the Act, and that they had in them rights of occupancy and were not liable to be ejected by the Civil Court.

As defined by Madras Act I of 1908, private land means:

"The domain or home-farm land of a land-holder by whatever designation known such as *kambuttam*, *khas*, *sir or pannai*."

Ryot as defined by that Act means:

"A person who holds for the purpose of agriculture ryoti land in an estate on condition of paying the land-holder the rent which is legally due upon it."

Ryoti land as defined by that Act means:

"Cultivable land in an estate other than private land, but does not include (*a*) tank-beds, (*b*) thrashing floors, cattle-stands, village sites, and other lands situated in any village which are set apart for the common use of the villagers, (*c*) lands granted on service tenure either free of rent or on favourable rates of rent if granted before the passing of this Act or free of rent if granted after that date, so long as the service tenure subsists."

The lands in question do not satisfy the conditions mentioned in (*a*), (*b*) or (*c*), and are therefore not excluded from the statutory definition of *ryoti* land. They were cultivable lands in the estate of the plaintiff, and had been held by the defendants for the purpose of agriculture under a *muchilka*, which will be presently referred to, and were not old waste lands.

It was enacted by Madras Act I of 1908 as follows:—

"6. (1) Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a land-holder to possession of ryoti land not being old waste situated in the estate of such land-holder shall have a permanent right of occupancy in his holding; but nothing contained in this sub-section shall affect any permanent right of occupancy that may have been acquired in land which was old waste before the commencement of this Act. . . ."

To sub-section (i) of section 6 was added by Madras Act IV of 1909 the following explanation:—

"*Explanation.*—For the purpose of this sub-section, the expression 'every ryot now in possession' shall include every person who, having held land as a ryot, continues in possession of such land at the commencement of this Act."

Section 185 of Madras Act I of 1908 is as follows:—

"185. When in any suit or proceeding it becomes necessary to determine whether any land is the land-holder's private land, regard shall be had to local custom and to the question whether the land

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was before the first day of July 1898 specifically let as private land to any other evidence that may be produced, but the land shall be presumed not to be private land until the contrary is shown. Provided that all land which is proved to have been cultivated as private land by the land-holder himself, by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act shall be deemed to be the land-holder's private land."

Madras Act I of 1908 received the assent of the Governor of Madras on the 25th March 1908, and the assent of the Governor-General on the 28th June 1908.

The plaintiff endeavoured to prove that by custom the lands in question were his private lands. He failed to prove any such custom. In a *muchilka* of the 28th July 1907, which the defendants or some of them gave to the plaintiff, and under which they agreed to hold the lands as his tenants until the 30th April 1908, the lands were described as "your *Diwanam Kamatam* (private) lands." Clause 8 of that *muchilka* is as follows:—

"8. As we have no manner of right and title to the said lands, neither we nor our heirs shall raise any objection to your leasing out the lands according to your pleasure at the expiration of the term, that is, after 30th April 1908, without the need for a fresh relinquishment from us or any notice from your Sircar at the close of the period of this *khat* (*muchilka*), considering this itself as a relinquishment and as a notice."

At the trial of the suit there was a conflict of evidence as to whether the lands were the private lands of the plaintiff or were ryoti lands, and the evidence which was produced was fully and carefully considered by the trial Judge, who found that the plaintiff had failed to prove that the lands had been cultivated and dealt with as private lands by the plaintiff and his predecessors in title. The trial Judge found that the lands were ryoti lands, and by his decree dismissed the suit.

From that decree dismissing the suit, the plaintiff appealed to the High Court at Madras. The appeal was heard by the Chief Justice and Mr. Justice SESHAGIRI AYYAR, who agreed with the finding on the evidence of the trial Judge. The learned Chief Justice in his judgment said:

"The Subordinate Judge has found, and I agree with him, that the suit lands were never cultivated by the zamindar as part of his

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home-farm lands, and it seems to me that his treatment of them as kambattam was merely colourable for the purpose of defeating the occupancy rights of the tenants. In some parts of India lands of this kind are known as *sir* lands, and this is one of the terms mentioned in the definition. In *Budley* v. *Bukhtoo*(1) it was held that *sir* land is land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season. I think that this test may well be applied here, and that, as the plaintiff has failed to satisfy it, the appeal fails and must be dismissed with costs."

That test is obviously suggested by section 185 of the Act, and was rightly applied by the Chief Justice. Mr. Justice SESHAGIRI AYYAR in his judgment stated that

"I see no reason to differ from the conclusion at which the lower Court has arrived."

The High Court by its decree affirmed the decree of the Subordinate Judge and dismissed the appeal. From that decree of the High Court the plaintiff has brought this appeal.

The concurrent findings of fact as to the lands being ryoti lands must be accepted as binding on the appellant. But it is contended that, after the 30th April 1908 when their term expired, the defendants were trespassers on the lands, and continued to be and were trespassers when Madras Act I of 1908 was passed and came into force, and that the explanation to sub-section (i) of section 6 of Madras Act I of 1908, which was added by Madras Act IV of 1909, does not apply to a person whose continued possession of ryoti land is that of a trespasser, and applies only when the person continuing in possession does so with the consent of the land-holder, which as a fact was not the case here. As a fact, the defendants continued in possession of the *ryoti* lands in suit after the 30th April 1908 not only without the consent of the plaintiff, but contrary to his wishes and expressed intentions, and contrary to the terms of clause 8 of the *muchilka* of the 28th July 1907. The appellant's contention as to the effect of the explanation to sub-section (i) of section 6 is, in the opinion of their Lordships, unsound and untenable. The defendants had held the lands from the 28th July 1907 until the 30th April 1908 for the purpose of agriculture on condition of paying to the plaintiff, the land-holder, the rent legally

(1) (1869) 3 N.W.P., 203.

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due upon the lands. The lands were *ryoti* lands, as has been found by each Court below, and the defendants were, in fact, continuing in possession of the land at the commencement of Madras Act I of 1908, although such continuing in possession was without the consent and was contrary to the wishes of the plaintiff. The construction of sub-section (i) of section 6 of Madras Act I of 1908 as amended by section 3 of Madras Act IV of 1909 is too plain for argument. Assuming that the defendants had not any permanent right of occupancy in the lands in question before the commencement of Madras Act I of 1908, they obtained a permanent right of occupancy in the holding by the operation of section 6, sub-section (i), as amended by section 3 of Madras Act IV of 1909, and the suit was rightly dismissed by the Civil Court.

The effect of section 6, sub-section (i), of Madras Act I of 1908, as amended by section 3 of Madras Act IV of 1909, came before the High Court of Madras in *Govinda Parama Guruvu* v. *Bothasi Dandasi Padhi*(1) in 1910. In that case the landlord had before the 1st July 1908 obtained a decree for possession of ryoti land against the occupiers who were in possession on the 1st July 1908, and BENSON and SANKARAN NAIR, JJ., rightly held that

"It is immaterial that a decree for possession had been already passed. We must, therefore, hold that the defendants are ryots with a permanent right of occupancy."

See also *Kanakayya* v. *Janardhana Padhi*(2).

This appeal fails. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the respondents have not appeared there will be no order as to the costs of this appeal.

Appeal dismissed.

Solicitor for the appellant: *Douglas Grant.*

J.V.W.

(1) (1910) 20 M.L.J., 528. (2) (1913) I.L.R., 36 Mad., 439.

APPELLATE CIVIL—FULL BENCH.

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

MUTHUVELU MUDALIAR (PLAINTIFF), APPELLANT,

v.

VYTHILINGA MUDALIAR AND TWO OTHERS (DEFENDANTS Nos. 1, 2 AND 4), RESPONDENTS.*

1919, February 3, 4 and 13.

Transfer of Property Act (IV of 1882), sec. 58—Mortgage by conditional sale—Sale and agreement to re-sell, same transaction, whether a sale or a mortgage—Construction—Intention of parties—Surrounding circumstances, terms of instrument or oral evidence of intention, whether can be considered—Decisions of Privy Council on transactions before Transfer of Property Act—Applicability of, to those after the Act.

Where in one and the same transaction land is sold absolutely but with a right of re-purchase to be exercised before a certain date, the transaction does not *necessarily* become by virtue of section 58 of the Transfer of Property Act a mortgage by conditional sale, whatever the intention of the parties might have been.

The Privy Council have laid down that, in transactions before the Transfer of Property Act, not governed by Bengal Regulation XVI of 1806, instruments of the above kind are to take effect according to their tenor, unless it appears from the terms of the instrument or the surrounding circumstances, excluding oral evidence of intention as inadmissible, that the intention was to effect a mortgage.

Though such decisions dealt with transactions before the Act, they still govern transactions after the Act which has not effected any change in the pre-existing law on this subject.

Pattabhiramier v. *Venkatarow Naiken*, (1870) 13 M.I.A., 560; *Thumbusawmy Moodelly* v. *Hossain Rowther*, (1875) I.L.R., 1 Mad., 1 (P.C.); *Situl Purshad* v. *Luchmi Purshad*, (1884) I.L.R., 10 Calc., 30 (P.C.); *Bhagwan Sahai* v. *Bhagwan Din*, (1890) I.L.R., 12 All., 387 (P.C.); *Balakishen Das* v. *W. E. Legge* (1900), I.L.R., 22 All., 149 (P.C.), and *Jhanda Singh* v. *Wahid-ud-din*, (1916) I.L.R., 38 All., 570 (P.C.), relied on.

Palaniappan v. *Subbaraya Goundan*, (1914) I.L.W., 80, overruled.

SECOND APPEAL against the decree of V. S. KRISHNA AYYAR, the Additional Temporary Subordinate Judge of Tanjore, in Appeal Suit No. 45 of 1917 preferred against the decree of C. VAIDYANATHA RAO, the District Munsif of Tiruvālūr, in Original Suit No. 256 of 1915.

* Second Appeal No. 881 of 1917.

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The plaintiff brought this suit to redeem the suit lands from the first defendant on payment of Rs. 455 on the footing that the lands were mortgaged by his father to the first defendant on the 4th October 1883 and put in his possession under the mortgage. The plaintiff's father executed a registered sale-deed, dated 4th October 1883, in favour of the first defendant, of the suit lands and put him in possession of the same; on the same day the vendee (first defendant) executed an agreement in favour of the vendor, which was also registered, by which he agreed to receive the sum of Rs. 455, if paid, in Ani season of any year within three years and to deliver possession of the lands and give back the sale-deed and execute a deed of release to the vendor. The vendor failed to pay within the time limited and patta was transferred to the vendee and he continued to enjoy the property. The plaintiff brought this suit on 29th June 1915 to redeem, alleging the transaction to be a mortgage. The defendants pleaded that it was not a mortgage but an absolute sale with a condition to re-purchase within three years, and the vendor, having defaulted to pay within the limited time, had no right to recover the property. The District Munsif, who tried the suit, dismissed it holding that the transaction was a sale and not a mortgage. The Subordinate Judge on appeal confirmed the decree. The sale-deed referred to the agreement which in its turn referred to the former. The material portions of the sale-deed ran as follows :—

"Deducting this sum, the balance due by me to you is Rs. 455. As I have received this for the sale money of this deed as the said lands have been left in your enjoyment from the 1st Ani of Chithrabhanu (13th June 1882) last, as the sale has thus been settled, and since then you have been enjoying the said lands and paying to me the Government kist, you will keep and enjoy the said lands from this day, with the eight kinds of enjoyment water, trees, treasure, hidden treasure, etc., and ten kinds of rights, with rights of gift, etc., exchange and sale, so long as the sun and moon last, from generation to generation. You yourself will pay the Government kist from this fasli. There is no usufructuary mortgage, hypothecation, surety or any other kind of right on the said lands, contrary to this sale-deed, excepting the right I have in accordance with the agreement you have executed and given to me this day. After the lapse of the term of three years mentioned in the agreement with limited time executed in respect of the lands of this sale-deed, I shall get the miras entered in your name."

MUTHUVELU MUDALIAR v. VYTHILINGA MUDALIAR.

The material portion of the agreement deed was as follows :—

"These seven mahs thirty and three-fourths plus one-eighth kulis of land I have purchased from you through sale-deed, and the same has come within my enjoyment according to the sale-deed. As you have also been paid the money, if you pay me in cash the above-mentioned four hundred and fifty-five rupees in the Ani season of any year within the 1st Ani of Vyaya year (13th June 1886) the third year from this day, I shall receive it and deliver possession of the said land to you on that date and give away to you the sale-deed you have executed and given to me regarding that land. Besides, I shall execute and give you a release-deed in respect of that land on the stamp you will give me. If you delay to pay money and receive the sale-deed and the release-deed from me as stated above till 1st Ani of Vyaya year (13th June 1886), above mentioned, this agreement shall stand cancelled after the period above mentioned. Thus I, Vythilinga Mudaliar, execute and give to Kumarasami Mudaliar, this time-limit agreement for redemption in respect of the nanja, punja and other lands."

The plaintiff preferred this Second Appeal which came on for hearing before SADASIVA AYYAR and NAPIER, JJ., who made the following

ORDERS OF REFERENCE TO A FULL BENCH :—

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The transaction in question in this case was effected after the Transfer of Property Act came into force and the two documents making up the transaction not only came into existence on the same day but each refers to the other. There can be no question therefore in this case that they form the same and a single transaction. [See *Palaniappan* v. *Subbaraya Goundan*(1), and *Subramania Pathen* v. *Jayalakshmi Ammal*(2), where I have tried to collect the Indian cases bearing on the question, under what circumstances two documents formed a single transaction and when they must be deemed to indicate two separate transactions.] In this case, therefore, we have not got the difficulties which arise from (*a*) the dates of the two documents being different or, (*b*) from the second document reciting that out of pure grace and favour, etc. [see *Jhanda Singh* v. *Wahid-ud-din*(3)] the transferee of the first document

(1) (1914) 1 L.W., 80. (2) S.A. No. 540 of 1916—(unreported).
(3) (1916) I.L.R., 38 All., 570 (P.C.).

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agrees to re-convey, or (c) from the document or documents being dated before *Thumbusawmy Moodelly* v. *Hossain Rowther*(1) or *Pattabhiramier* v. *Venkatarow Naiken*(2) or before the Transfer of Property Act came into force. In *Palaniappan V. Subbaraya Goundan*(3), where the execution of the two documents was divided by an interval of two days (the registration having been, however, on the same day) and where the second deed styled itself expressly as the counterpart of the first deed, I held that the two documents constituted a single transaction of mortgage by conditional sale. In *Jhanda Singh* v. *Wahid-ud-din*(4), RICHARDS, J., says at pages 599 to 600:

"It seems to me that if we held that at the time of the execution of the first deed the parties intended that the second deed also should be executed, we ought to hold that the two deeds constituted a mortgage by conditional sale and that the plaintiff has a right to redeem. On the other hand, if, at the time of the execution of the sale-deed, there was no intention of executing the second deed, the defendants are entitled to have the latter construed strictly and quite independent of the provisions of the Transfer of Property Act and the Law of Mortgages."

(In that case the documents were of the years 1852 and 1853 respectively.)

"There can be no doubt in my opinion that if the two deeds were of even date, an almost irresistible presumption would arise in favour of the transaction being a mortgage."

In that case, no doubt on the particular facts (including the fact that the documents were separated by the interval of a year from each other) it was held that they did not constitute a single transaction of mortgage by conditional sale.

As regards the contention that there must be the previous existence of the relation of creditor and debtor in order to constitute a transaction which is an ostensible sale (with a covenant for re-purchase or covenant of recission of the sale on repayment of a certain amount) a mortgage by conditional sale, I see no sufficient reason to change the view expressed in *Palaniappan* v. *Subbaraya Goundan*(3) that such considerations cannot be imported into India where we have got the plain

(1) (1875) I.L.R., 1 Mad., 1 (P.C.). (2) (1870) 13 M.I.A., 560.
(3) (1914) 1 L.W., 80. (4) (1916) I.L.R., 38 All., 570 (P.C.).

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SADASIVA AYYAR, J.

words of section 58 of the Transfer of Property Act to guide us as to what the nature of a transaction is which should be regarded as a mortgage by conditional sale.

Coming to section 58 of the Transfer of Property Act itself, I need not say that I have given respectful and anxious consideration to the views of my learned brother (as reported in the case in *Maruthai Goundan* v. *Dasappa Goundan*(1) as also in the judgment to be just now pronounced by him) as to the intention of the Legislature in using the words 'mortgagor', 'mortgage money' and 'mortgagee' in the definition of mortgage by conditional sale in clause (c) of section 58 of the Transfer of Property Act. I regret that I am still of opinion that the Legislature used those short words merely to avoid involved pharseology. No doubt, it would have been meticulously accurate if the language of the clause were as follows:—

"Where the transferror in a *transfer-transaction* ostensibly sells the property, the *subject of transfer*, on condition that on default of payment of the *consideration money for the transfer* on a certain date, the sale shall become absolute, etc."

A mortgage by conditional sale is ostensibly a sale—

"Mortgages going under various names all over the country assume this form; in fact it is exceedingly doubtful if there are many genuine cases of sales with conditions of re-purchase at all" where the documents are of the same date or where there is only a single document of sale and agreement to re-convey. The Legislature evidently knew this and therefore in the Transfer of Property Act they introduced the provision that such transactions must be *prima facie* regarded as mortgages and

"as more likely to effectuate the intention of the parties than the rule to the contrary."

In *Madhavrao Keshavrao* v. *Sahebrao Ganpatrao*(2), the facts were exactly similar to those of the present case, there being a simultaneous execution of a sale-deed and an agreement to re-convey. BEAMAN, J., says at page 123:

"I have no doubt but that the contemporaneous documents of 1892 do constitute what is known in this country as a mortgage by conditional sale. Neither have I the least doubt that that was the intention of the parties executing them. Such mortgages are legislatively recognized, and I have only to observe that in no true

(1) (1916) 31 M.L.J., 375. (2) (1915) I.L.R., 39 Bom., 119.

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mortgage of this class *will any debt be apparent*. It is idle therefore to criticise mortgages by conditional sale by reference to the essential conditions of a mortgage in the English sense of that word. It only needs to peruse the judgments of the Courts relating to these mortgages to observe how necessary it is to bear this in mind when the question is whether upon an interpretation of documents alone, the result is a mortgage by conditional sale or an out and out sale."

I am aware that in *Narayan Ramkrishna* v. *Vighneshwar*(1) a document of conveyance containing an agreement to re-convey was construed differently by BATCHELOR and SHAH, JJ., though BATCHELOR, J., was a party to *Kasturchand Lakhmaji* v. *Jakhia Padia Patil*(2) in the same volume in which a sale-deed and a contemporaneous deed of agreement to re-convey were treated as a mortgage by conditional sale. Doubtless there were certain other circumstances relied on in *Narayan Ramkrishna* v. *Vighneshwar*(1), but in my opinion whenever there is a single transaction (whether contained in one or more documents) and where that transaction is an ostensible sale with a covenant to re-convey in case the consideration money for the transfer is repaid, it directly comes within the definition of mortgage by conditional sale in section 58 (c) of the Transfer of Property Act; and in such cases it is wholly unnecessary and even irrelevant to consider other circumstances for arriving at a decision on the legal nature of the transaction. (I might add that the case in *Narayan Ramkrishna* v. *Vighneshwar*(1) does not refer to the earlier decision in *Madhavrao Keshavrao* v. *Sahebrao Ganpatrao*(3)). In *Subramania Pathen* v. *Jayalakshmi Ammal*(4) PHILLIPS, J., and myself had to decide the question arising on the following facts:—There were two documents (Exhibit A and Exhibit I) of the same date (27th October 1883), one being a sale-deed and the other an agreement by the vendee that he would enjoy the lands for a fixed period of ten years and that after that period the vendor could get back the lands by repayment of the purchase money before the commencement of the cultivation season in any year. We held that the two documents ought to be read together and that they were intended to be a mortgage by conditional sale. In that case the lower Courts had taken into consideration several facts which

(1) (1916) I.L.R., 40 Bom., 378. (2) (1916) I.L.R., 40 Bom., 74.
(3) (1915) I.L.R., 39 Bom., 119. (4) S.A. No. 540 of 1916—unreported.

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happened both at the time and after the execution of the documents in arriving at the intention of the parties and decided as a question of fact that the parties intended a mortgage by conditional sale. Hence it was thought unnecessary to decide the neat and simple question whether solely on the definition of 'mortgage by conditional sale' found in the Transfer of Property Act, the documents constituted in the eye of the law a mortgage transaction. I therefore said at the end of my judgment in *Subramania Pathen* v. *Jayalakshmi Ammal*(1):

"I do not wish to enter into the question whether particular form of expression used in a document (or set of documents to be read together) necessarily imply and have the legal effect of creating a mortgage by conditional sale or of only creating an absolute right in the transferee with an obligation on his part to re-convey. On that question again there is a conflict of authority both in this Court and in the Bombay High Court and it is not absolutely necessary to decide that point for disposing of this Second Appeal;"

and then, I said that the question might have to be referred to a Full Bench when it directly arises.

As regards the decision in *Munisami Naicker* v. *Venkatapathi Naidu*(2) there were indications in the documents themselves in that case that the agreement to re-sell was merely an act of generosity on the vendee's part and that the option to re-purchase was a personal favour granted to the vendor alone and was not intended to extend to strangers deriving title from him.

In the result, I agree in making the order of reference to a Full Bench as proposed by my learned brother.

NAPIER, J.

NAPIER, J.—This Second Appeal raises the question whether certain documents constitute a mortgage by conditional sale or a sale with a right of re-purchase. The sale-deed (Exhibit B) was executed on the 4th October 1883. The consideration recited is Rs. 455 which is arrived at by taking the amounts due on three hypothecation bonds of earlier dates amounting to Rs. 510 and a small amount of Rs. 20 due on a Small Cause Court decree making a total of Rs. 530. Of this amount Rs. 75 is to be received from a third party leaving a balance of Rs. 455. The deed contains the usual words for an absolute sale, but it is to be subject to an agreement executed and given to the

(1) S.A. No. 540 of 1916—unreported. (2) S.A. No. 2180 of 1915—unreported.

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vendor on the same day. It continues: "After the lapse of the term of three years mentioned in the agreement in respect of the lands of this sale-deed, I shall get the miras entered in your name." Exhibit A, the agreement, is of the same date. It recites the purchase of the land and provides that "if you pay me in cash the sum of Rs. 455 in the Ani season of any year within the third year from this day, I shall receive and deliver possession of the said land to you on that date . . . Besides I shall execute and give you a release deed in respect of that land on the stamp you will give me. If you delay to pay money and receive the sale-deed and the release deed till after the date above mentioned, this agreement shall stand cancelled." It is contended before us that the sale and the re-purchase are obviously part of the same transaction, and I agree that this is so.

It is then contended that where the transaction is all one, it amounts to a mortgage, whatever was the intention of the parties ascertainable from evidence properly admissible. This is a proposition I am unable to accept. If the Transfer of Property Act makes such a document a mortgage, then certainly the intention of the parties is immaterial. I have discussed this point in the case reported in *Maruthai Goundan* v. *Dasappa Goundan*(1) and have there expressed the view which had BAKEWELL, J.'s concurrence that the Legislature in section 58 of the Transfer of Property Act did not intend to make transactions mortgages against the will of the parties, but only to provide that where the parties intended to make a mortgage the transaction was none the less a mortgage because it was put in the form of an outright sale and an agreement for re-purchase. The opposite contention would necessarily go as far as this, that even if the agreement recited a refusal to grant a further loan the transaction would still be a mortgage. As I have pointed out, this view requires the substitution of the words—'transferror' for 'mortgagor,' 'transferee' for 'mortgagee' and 'consideration' for 'mortgage money' in clause (c) of section 58. I am aware that my learned brother takes a diametrically opposite view and that there is other authority to which he has referred which supports his contention, but, with deference to his opinion,

(1) (1916) 31 M.L.J. 875.

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I do not think the language of the section supports this view. I quite agree that the Act in several places uses the word 'vendor' in relation to contracts prior to sale. But I do not think that this affects the question. To my mind the word 'mortgagor' means a person intending to create a mortgage by the transaction just as 'vendor' sometimes means a person who has made a contract intended to be followed by a sale. I know of no provision in the Act under which a person is called 'vendor' who did not intend eventually to make a sale. If the object of the legislature had been to make such a drastic alteration in the existing law as to make documents *inter parties* operate both against their form and against the intention of the parties so that all such transactions become mortgages, it seems to me that it could have found words more apt for the purpose than those which we have here. And further, I can see no reason why we should attribute to the legislature an intention to do something with regard to conditional mortgages which it is not doing to other forms of mortgages, namely, to create a mortgage against the will of the parties. Section 58 begins by defining a mortgage and says that (in the circumstances set out) the transferror is called a mortgagor and the transferee a mortgagee and the money of which *payment is secured* the mortgage money. It then proceeds to enumerate four forms which a mortgage can take, namely, simple mortgage, mortgage by conditional sale, usufructuary mortgage and English mortgage; and I do not think that it intended to do anything more than enumerate. This is my view on the language of the section, but if it is permissible to go to the law prior to the Act, as I must assume that it is in view of the fact that Courts have differed on the construction of the Act, there can be little doubt what the law was. In a recent case decided by the Privy Council reported in *Jhanda Singh* v. *Wahid-ud-din*(1) where the sale and agreement to re-purchase were prior to the Transfer of Property Act their Lordships expressly state that it was not disputed that the test in such cases was the intention of the parties to the instruments. But that intention must be gathered from the language of the documents themselves viewed in the light of the surrounding

(1) (1916) I.L.R., 38 All., 570 (P.C.).

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circumstances. Their Lordships refer with approval to the judgment of Lord CRANWORTH in *Alderson* v. *White*(1) which is as follows:—

That *primâ facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage, merely because the vendor stipulates that he shall have a right to a re-purchase.

In the *Manchester, Sheffield, and Lincolnshire Railway Company* v. *The North Central Wagon Company*(2) Lord MACNAGHTEN says on page 568:

"In all these cases the question is what was the real intention of the parties;"

and quotes with approval the decision in *Alderson* v. *White*(1). For the present I do not think it necessary to decide what the intention of the parties was, as I think we should get a ruling from the Full Bench on the broad question on which my learned brother and I differ. I would therefore refer to a Full Bench the question—

Whether where in one and the same transaction land is sold absolutely but with a right of re-purchase to be exercised before a certain date, the transaction necessarily becomes, by virtue of section 58 of the Transfer of Property Act, a mortgage by conditional sale, whatever the intention of the parties might have been?

ON THIS REFERENCE—

S. Muttayya Mudaliar for appellant.—The suit transaction is a mortgage by conditional sale. The sale and agreement have been held by the learned Judges in the order of reference to be one single transaction. Then as a matter of law under section 58 of the Transfer of Property Act the transaction is a mortgage. It may be otherwise if they are two different transactions. The agreement may be in the same or different documents or on different dates, but if they both constitute one transaction, it is only a mortgage by conditional sale falling within the definition of section 58 of Transfer of Property Act. NAPIER, J., thinks that even if they are one single transaction, still the document must indicate a debt or security. That is not possible if section 58 of the Transfer of Property Act is to apply to any case; that there can never be a mortgage by conditional sale, for there will be

(1) (1858) De G. & J., 87. (2) (1888) 13 A.C., 554.

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no ostensible sale under section 58 if the document should indicate a security or debt. *Madhavrao Keshavrao* v. *Sahebrao Ganpatrao*(1) shows that a debt will not be apparent in a mortgage by conditional sale. See also *Kastur Chand Lakhmaji* v. *Jakhia Padia Patil*(2) and *Narayan Ramkrishna* v. *Vighneshwar*(3). In *Palaniappan* v. *Subbaraya Goundan*(4) SADASIVA AYYAR, J., says it is necessarily a mortgage in such cases under section 58 of the Transfer of Property Act; *Ramayya* v. *Krishnamma*(5), *Wajid Ali Khan* v. *Shafirkat Hussain*(6). See also *Muthukaruppu Pillai* v. *Marudachalam Chetti*(7). The evidence can be gone into to find out if it is one transaction; if it is so found it is necessarily a mortgage. The effect of section 58 of the Transfer of Property Act is similar to the effect of Bengal Regulation XVI of 1806. In *Balakishen Das* v. *W. E. Legge*(8) and in *Jhanda Singh* v. *Wahid-ud-din*(9) the Privy Council do not decide as to the effect of the Bengal Regulation XVI of 1806 or section 58 of the Transfer of Property Act. The cases arose in respect of transactions not governed by the Regulation or the latter Act. Even if it was held to be a sale before the Transfer of Property Act, it should be held to be a mortgage after the Act.

A. Krishnaswami Ayyar for respondent.—The Transfer of Property Act did not alter the law as to the determination if a transaction is a sale or mortgage. The criteria laid down in the Privy Council decisions still govern transactions after the Transfer of Property Act. Reference was made to the following Privy Council cases:—*Pattabhiramier* v. *Venkatarow Naiken*(10), *Thumbusawmy Moodelly* v. *Hossain Rowther*(11), *Situl Purshad* v. *Luchmi Purshad*(12), *Bhagwan Sahai* v. *Bhagwan Din*(13), *Balakishen Das* v. *W. E. Legge*(8) and, *Jhanda Singh* v. *Wahid-ud-din*(9).

WALLIS, C.J.

WALLIS, C.J.—It is in my opinion not open to us to answer the question referred to us in the affirmative consistently with the decisions of the Privy Council in *Pattabhiramier* v. *Venkatarow*

(1) (1915) I.L.R., 39 Bom., 119.
(2) (1916) I.L.R., 40 Bom., 74.
(3) (1916) I.L.R., 40 Bom., 378.
(4) (1914) 1 L.W., 80 at p. 86.
(5) (1900) I.L.R., 23 Mad., 114.
(6) (1911) I.L.R., 33 All., 122.
(7) (1915) 27 I.C., 436.
(8) (1900) I.L.R., 22 All., 149 (P.C.).
(9) (1916) 38 All., 570 at p. 579.
(10) (1870) 13 M.I.A., 560.
(11) (1875) I.L.R., 1 Mad., 1 (P.C.).
(12) (1884) I.L.R., 10 Calc., 30 (P.C.).
(13) (1890) I.L.R., 12 All., 387 (P.C.).

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Naiken(1), *Thumbusawmy Moodelly* v. *Hossain Rowther*(2), *Situl Purshad* v. *Luchmi Purshad*(3), *Bhagwan Sahai* v. *Bhagwan Din*(4), *Balakishen Das* v. *W. E. Legge*(5) and *Jhanda Singh* v. *Wahid-ud-din*(6). All these decisions lay down that in cases in India not governed by Bengal Regulation XVI of 1806 instruments of this kind are to take effect according to their tenor, unless it appears from the terms of the instrument or the surrounding circumstances, excluding oral evidence of intention as inadmissible, that the intention was to effect a mortgage. In *Thumbusawmy Moodelly* v. *Hossain Rowther*(2), the Privy Council refused to disturb a decision of this Court which took a different view, because it considered that the parties might have been misled by a course of decisions in this Court which their Lordships held to be erroneous, but they also indicated with sufficient clearness that there was no room for any such misconception in future.

In *Balakishen Das* v. *W. E. Legge*(5) there were held to be sufficient indications that the transaction was intended to be a mortgage, and this decision was explained as proceeding on this ground in the subsequent decision in *Jhanda Singh* v. *Wahid-ud-din*(6).

It is true that all these cases dealt with transactions before the passing of the Transfer of Property Act, but I do not think that Act made any difference in the law on this subject in this part of India. In *Balakishen Das* v. *W. E. Legge*(5) their Lordships observed that it might be assumed that the framers of the Transfer of Property Act intended in section 58 to state the existing law and practice in India. The section begins with a definition of the terms 'mortgage,' 'mortgagor' and 'mortgagee' and proceeds, as pointed out by NAPIER, J., to describe or define the different sorts of mortgages which are met with in India. Sub-section (*c*) deals with mortgages by conditional sale, in which the transaction is ostensibly a sale or transfer of ownership in exchange for a price (section 54), but is really intended to be a mortgage or transfer of an interest in specific immovable property for the purpose of securing the payment of money [section 55 (*a*)]. As the transaction is really a mortgage and only

(1) (1870) 13 M.I.A., 560.
(2) (1875) I.L.R., 1 Mad., 1 (P.C.).
(3) (1884) I.L.R., 10 Calc., 30 (P.C.).
(4) (1890) I.L.R., 12 All., 387 (P.C.).
(5) (1900) I.L.R., 22 All., 149 (P.C.).
(6) (1916) I.L.R., 38 All., 570 (P.C.).

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ostensibly a sale, sub-section (*c*) refers to the transferror as the mortgagor, and speaks of the ostensible sale of the mortgaged property subject to certain conditions as to the payment of the mortgage money. Whether a particular transaction is really a sale, or ostensibly a sale and really a mortgage, must still be decided in accordance with the decisions of the Privy Council in the cases already cited. There is, in my opinion, nothing in the definition in section 58 (*c*) which favours the view that, wherever the sale-deed and the agreement to reconvey from one transaction, it must necessarily be a mortgage and not a sale. On the other hand, both in *Situl Purshad* v. *Luchmi Purshad*(1) and *Bhagwan Sahai* v. *Bhagwan Din*(2) there was clearly only one transaction, and it was none the less held by the Privy Council to be a sale and not a mortgage. For these reasons, I am of opinion that the decision in *Palaniappan* v. *Subbaraya Goundan*(3) should be overruled and the question answered in the negative.

OLDFIELD, J.

OLDFIELD, J.—I agree.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I entirely agree with the learned Chief Justice. But out of deference to the opinion of Mr. Justice SADASIVA AYYAR from whom we are differing, I wish to say a few words. In *Pattabhiramier* v. *Venkatarow Naicken*(4) the Judicial Committee laid down that a contract between the parties should be interpreted according to its tenor and that the practice of reading into it preconceived legal principles should be discouraged. All the subsequent judgments of the Privy Council seem to me to emphasise this cardinal principle. In *Thumbusawmy Moodelly* v. *Hossain Rowther*(5) the Judicial Committee construed the document in that case as a mortgage because they held that the parties to the contract must be deemed to have contracted with reference to the wrong view of law enunciated by the Sudder Court at Madras before *Pattabhiramier* v. *Venkatarow Naicken*(4) was decided. They further said that the Legislature should intervene to correct the impression which the decisions of the Sudder Court had left in the minds of the litigant public. In *Situl Purshad* v. *Luchmi Purshad*(1) which related to a contract before the passing of the

(1) (1884) I.L.R., 10 Calc., 30 (P.C.).
(2) (1890) I.L.R., 12 All., 387 (P.C.).
(3) (1914) 1 L.W., 80.
(4) (1870) 13 M.I.A., 560.
(5) (1875) I.L.R., 1 Mad., 1 (P.C.).

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Transfer of Property Act, although the documents were of the same date, the Privy Council held that the transaction was a sale and not a mortgage. They stated that evidence can be looked into to ascertain the intention of the parties. In *Bhagwan Sahai* v. *Bhagwan Din*(1), where also the documents were of the same date, the transaction was construed as a sale. In *Balakishen Das* v. *W. E. Legge*(2) it was held that the transaction amounted to a mortgage. But it was pointed out that in the documents themselves there were "indications that the parties intended to effect a mortgage by conditional sale." It was further said that the Transfer of Property Act was framed in accordance with the existing law and practice regarding mortgages. The next case before the Board was *Jhanda Singh* v. *Wahid-ud-din*(3). Here again their Lordships held that the transaction was an out and out sale. Their Lordships said that the intention of the parties which was the test in such cases must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. This is a distinct direction to Courts in India that in such matters the intention of the parties and the surrounding circumstances are the proper guide and not the fact that the documents were of the same date or that they were expressed in any particular form. After this statement of the law it is not open to Courts in India to lay down any inflexible rule from the bare fact that the documents were of even date or were interdependent upon a single settlement. Mr. Muthayya Mudaliyar referred, in support of the view taken by Mr. Justice SADASIVA AYYAR, to the use of the expression 'one transaction' in page 575 of the Privy Council judgment. Their Lordships said:

"If no such agreement was made before the deed of sale was executed and the latter deed was an after-thought, only suggesting itself after the sale-deed had been executed and delivered, it would not suffice. The execution of the deed of sale and of the contract of re-purchase would then form two separate and independent transactions, not two connected and interdependent parts of one and the same transaction."

I do not understand their Lordships to lay down that if there was a single settlement and the two documents are

(1) (1890) I.L.R., 12 All., 387 (P.C.). (2) (1900) I.L.R., 22 All., 149 (P.C.).
(3) (1916) I.L.R., 38 All., 570 (P.C.).

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connected and are interdependent, it must necessarily lead to the inference that there was a mortgage and not a sale. All that was said was that an essential requisite for construing such documents as a mortgage is that they should be dependent upon a single arrangement, and not that such a test is a conclusive criterion of the transaction being a mortgage. I do not propose to consider the decisions of the various High Courts. In Madras, after *Thumbusawmy Moodelly* v. *Hossain Rowther*(1), there have been some cases which are not quite reconcilable with each other. But these cases do not help us much. It is in *Palaniappan* v. *Subbaraya Goundan*(2) that Mr. Justice SADASIVA AYYAR enunciated the proposition which has led to this reference. If I may say so with respect, the learned Judge does not attach sufficient importance to the language of section 58, clause (*c*) of the Transfer of Property Act. I agree with Mr. Justice NAPIER that the use of the word mortgage is not *per incuriam*. Clause (*c*) speaks of a 'mortgagor ostensibly selling the mortgaged property.' That language implies that there must be in reality a mortgage and that the sale must be merely a cloak. A party who wishes the document to be understood as being different from what the words suggest should show that the form in which the language is clothed does not express the real intention of the parties and that in substance the parties intended that there should be a transaction different from what the language imports. In other words there must be evidence to show that the parties intended a mortgage although they used expressions which *primâ facie* connote a sale. I am, therefore, of opinion that the question referred to us must be answered in the negative.

K.R.

(1) (1875) I.L.R., 1 Mad., 1 (P.C.). (2) (1914) 1 L.W., 80.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Kumaraswami Sastri.

1918, September 23, October 1, and 1919, February 17.

In re PADMANABHA HEBBARA (THIRD ACCUSED—TRANSFEREE PLAINTIFF), PETITIONER.*

Criminal Procedure Code (V of 1898), sec. 476—Close of judicial proceedings—Knowledge of commission of offence after—Order under sec. 476 of Criminal Procedure Code, validity of.

Held by the Full Bench: Even where the facts of a judicial proceeding are fresh in the mind of a Judge, he cannot take action under section 476 of Criminal Procedure Code if the commission of an offence during the course of that proceeding is discovered by him only after the close of the proceeding.

Per *Kumaraswami Sastri, J.*—In such cases it is open to the Court to act under section 195, Criminal Procedure Code, and direct an officer to file a complaint.

Aiyakannu Pillai v. *Emperor*, (1909) I.L.R., 32 Mad., 49 (F.B.), applied.

PETITION under section 476 of the Criminal Procedure Code and section 115 of the Civil Procedure Code to revise the order of BALAJI RAO, the District Munsif of Koondapoor, in Disposal No. 2294 of 1917 in Small Cause Execution Petition No. 714 of 1917.

This petition coming on for hearing, the following

ORDER OF REFERENCE TO A FULL BENCH was made by

PHILLIPS, J.

PHILLIPS, J.—This is a petition to revise the order of the District Munsif of Coondapoor directing the prosecution of the petitioner for offences under sections 193, 463, 466, 468 and 471 of the Indian Penal Code. The order was made under section 476 of the Criminal Procedure Code. The offences are alleged to have been committed with reference to a decree used as genuine in Small Cause Execution Petition No. 714 of 1917 before the District Munsif which decree is found by the District Munsif in this order to be a forgery. Those proceedings had terminated on 11th September 1917 in an order on the footing that the decree was genuine. The District Munsif states in the order under review that "within a few days of the closing of the above execution proceedings" the fact of the forgery of the

* Civil Revision Petition No. 150 of 1918.

decree was discovered and the present proceedings were instituted by him to ascertain if there was a *prima facie* case against the persons concerned. In the result he passed this order. It is argued before us that the proceedings having terminated he had no jurisdiction to pass the order. It has been finally decided by a Full Bench of this Court in *Aiyakannu Pillai* v. *Emperor*(1) that these orders must be passed in the course of the judicial proceeding or so shortly thereafter as to make it the continuation of the same proceeding, and if this proposition was intended by the Full Bench to be of universal application the petitioner's contention must succeed. But we have doubts whether this view is correct. The reference to the Full Bench in *Aiyakannu Pillai* v. *Emperor*(1) was whether, 'on the facts stated before us, the order was made without jurisdiction.' The facts were (*vide* page 50 of the report) that judgment was delivered on October 8 that the District Judge acting *suo moto* issued notice on October 29 and that the record gave no reason for his not taking action between October 8 and October 29. The offence came to his notice during the proceedings terminating on October 8. In the present case no offence was brought to the notice of the District Munsif until after the proceedings terminated and the reason for not taking action before is therefore apparent. This state of facts was not therefore before the Full Bench and the actual ruling does not in terms apply, though the dicta of the learned Judges are wide enough to cover this case. The possibility of a case of necessary delay seems to have been suggested by the (present) learned Chief Justice in *Rahimadulla Sahib* v. *Emperor*(2), but he is there dealing with English practice, and the actual facts of this case were imagined by MILLER, J., in *Aiyakannu Pillai* v. *Emperor*(3), and he was of opinion that an order might be passed but as he was the dissentient Judge his opinion cannot be treated as authoritative. The principle underlying the Full Bench decision not applying we see no reason why an order under section 476 of the Criminal Procedure Code should not be passed in these circumstances, but in view of the language of some of

(1) (1909) I.L.R., 32 Mad., 49 (F.B.). (2) (1908) I.L.R., 31 Mad., 140, at p. 146. (3) (1909) I.L.R., 32 Mad., 49, at p. 54 (F.B.).

In re PADMANABHA HEBBARA.

PHILLIPS, J.

the Judges on the scope of the section we decide to refer to a Full Bench the following question :—

Where the commission of an offence has been discovered by a Court after the judicial proceedings have terminated but at a time when the facts were fresh in the mind of the Judge, can he pass an order under section 476 of the Criminal Procedure Code?

ON THIS REFERENCE—

K. Annaji Rao for the petitioner relied on *Aiyakannu Pillai* v. *Emperor*(1), and contended that the order was illegal as the order sought to be revised was passed long after the close of the previous judicial proceedings.

E. R. Osborne, Public Prosecutor.—Though the ruling in *Aiyakannu Pillai* v. *Emperor*(1) does not in terms apply, action can be taken under section 476 of the Criminal Procedure Code if two conditions are satisfied: (1) if the offence is committed during the course of the judicial proceedings and (2) if under the circumstances of the case the subsequent proceedings can be considered as part of the original proceedings. In this case a forged decree was used as genuine by the assignee of the decree when he applied for execution. About a week after the close of the execution, it was discovered that the decree was a forged one. Acquisition of knowledge of the offence committed during the judicial proceedings, very soon thereafter will make the subsequent proceedings part of the previous proceedings.

WALLIS, C.J.

WALLIS, C.J.—In this case the facts first came to the notice of the Court after the judicial proceedings before it had terminated, but that I think is not enough to take the case out of the authority of the Full Bench decision of five Judges in *Aiyakannu Pillai* v. *Emperor*(1), confirming the earlier ruling in *Rahimadulla Sahib* v. *Emperor*(2). I would answer the question in the negative.

AYLING, J.

AYLING, J.—If the matter were *res integra* I should concur in the view expressed by MILLER, J., in *Rahimadulla Sahib* v. *Emperor*(2), and *Aiyakannu Pillai* v. *Emperor*(1). But, sitting as

(1) (1909) I.L.R., 32 Mad., 49 (F.B.).
(2) (1908) I.L.R., 31 Mad., 110, at p. 146.

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a member of the present Bench, I feel bound by the opinion of the Full Bench of five Judges in the last-named case. I do not think the order in the present case can be treated as a valid one within the spirit of these rulings.

I therefore agree to the answer proposed.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—I agree with my Lord and would add that in cases like the present it is open to the Court to act under section 195 of the Criminal Procedure Code and direct an officer to file a complaint.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Kumaraswami Sastri.

1918, November 15 and 20, 1919, February 17 and 18.

MUTHIRULANDI POOSARI AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

SETHURAM AIYAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Survey and Boundaries Act (Madras Act IV of 1897), sec. 11—Decision of Survey officer, on dispute as to boundary, not set aside on appeal or by suit within one year, effect of—Continued possession of unsuccessful party, effect of.

A decision of a Survey officer passed under section 11 of the Madras Survey and Boundaries Act (IV of 1897) on a dispute arising between two parties as to the boundary of a certain property is final and conclusive as to the rights of the parties if not set aside either on appeal or by a suit brought within one year and it is none the less so, because the unsuccessful party who was in possession on the date of the order was not subsequently ousted from possession.

Krishnamma v. *Achayya*, (1880) I.L.R., 2 Mad., 306, distinguished.

SECOND APPEAL against the decree of F. A. COLEBIDGE, the District Judge of Madura, in Appeal No. 274 of 1916, preferred against the decree of K. W. RAMA RAO, the Additional District Munsif of Madura, in Original Suit No. 312 of 1913.

This was a suit for a permanent injunction to restrain the defendants from interfering with a lane situated between the houses of the plaintiffs and the defendants. Plaintiffs alleged that, in Original Suit No. 802 of 1900 brought against them by

* Second Appeal No. 1822 of 1917

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the defendants' father, this lane was decreed to be their (present plaintiffs') property and that they (present plaintiffs) have been in undisturbed possession of the lane from even before that decision. The defendants contended *inter alia* that at the time of the previous suit they and their father were divided, that the decision in the previous suit brought by their father was not binding upon them as he did not and could not represent them, that even after the decree, at the time of the re-survey of Madura town in which this lane is situated each party claimed the lane as his before the Survey officer, that as a result of this dispute there was a decision of the Survey officer in their (present defendants') favour between the years 1904—1906, according to which the officer demarcated the property by planting survey stones so as to show that the lane belonged to the defendants and that this decision of the Survey officer not having been set aside either in appeal or by a suit within one year, the plaintiffs were barred by *res judicata* from instituting the present suit. On these pleadings the District Munsif dismissed the suit, but on appeal by the plaintiffs the District Judge held that the decision in Original Suit No. 802 of 1900 declared the present plaintiffs, owners of the lane, that there was then no division between the defendants and their father, that the then decree against the defendants' father was binding upon the defendants, that the mere planting of survey stones by the Survey officer did not in any way interfere with the plaintiffs' continued enjoyment from even before that date and that on the strength of *Krishnamma* v. *Achayya*(1) plaintiffs were entitled to a decree for injunction. The defendants preferred this appeal.

C. S. Venkata Achariyar for appellants.

A. Venkatarayalayya and *L. Venkatanarasayya* for respondents.

The Second Appeal came on for hearing in the first instance before SESHAGIRI AYYAR AND PHILLIPS, JJ., who made the following

ORDERS OF REFERENCE TO A FULL BENCH—

PHILLIPS, J.

PHILLIPS, J.—The question at issue in this appeal is whether the suit site belongs to plaintiffs or defendants. The District Judge, differing from the District Munsif, has found that in a

(1) (1880) I.L.R., 2 Mad., 306.

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PHILLIPS, J.

litigation between the predecessors of the parties in 1900 the suit lane was found to belong to plaintiffs. In 1904—1906 the Madura Town Survey took place and the site was demarcated by the survey authorities as belonging to defendants. In the written statement it was pleaded that this demarcation took place after the settlement of a dispute between the parties and we must take it that this was so, although respondents now set up a contention, which was apparently never set up before, that there was no dispute about the site. In this view the decision of the Survey Officer was not *ultra vires*, whatever view be taken of the litigation of 1900 and 1902, for the parties referred their dispute to him and he had jurisdiction to determine it. The decision of the Survey Officer was not appealed against, nor did plaintiffs file a suit within one year of the order. The District Judge, however, relying on the decision in *Kishnamma* v. *Achayya*(1), has held that in this suit for possession the decision of the Survey Officer does not estop plaintiffs from asserting their rights, and has found that plaintiffs were in possession in 1900 and 1902, and that the present suit is not barred by limitation by virtue of section 13 of Act IV of 1897. The decision in *Krishnamma* v. *Achayya*(1), does not appear to have been overruled, but in *Kamaraju* v. *The Secretary of State for India*(2) it was held that decision of a Survey Officer under the Boundary Act (XXVIII of 1860) was *res judicata*, and this was the view of another Full Bench in *Muthammal* v. *The Secretary of State for India*(3). Similarly in *B. Krishna Rau* v. *Lakshmana Shanbhogue*(4), *Velayuthan* v. *Laksmana*(5) and *Peela Yarakayya* v. *Venkata Krishnamraju*(6) it was held that an adverse order on a claim petition, when no suit was afterwards filed to set it aside, was a bar to the same plea in subsequent proceedings. In *Raj Bahadoor Singh* v. *Achumbit Lal*(7), which is quoted as authority in *Krishnamma* v. *Achayya*(1), it was held that it was unnecessary to set aside an adoption, which was wholly invalid, before bringing a suit for possession, and undoubtedly when the order to be set aside is *ultra vires* a suit need not be brought to set it

(1) (1880) I.L.R., 2 Mad., 306.
(2) (1888) I.L.R., 11 Mad., 309 (F.B.).
(3) (1916) I.L.R., 39 Mad., 1202 (F.B.).
(4) (1882) I.L.R., 4 Mad., 302.
(5) (1885) I.L.R., 8 Mad., 506.
(6) (1917) 6 L.W., 281.
(7) (1880) 6 I.A., 110.

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aside before suing for an independent relief [vide *Shivaji Yesji Chawan* v. *The Collector of Ratnagiri*(1)]. In *Jagadamba Chadhrani* v. *Dakhina Mohun Roy Chaodhri*(2) the decision in *Raj Bahadoor Singh* v. *Achumbit Lal*(3) was explained as being based upon this ground, and the Judges in *Nagu* v. *Salu*(4) referred to this and consequently doubted the authority of *Krishnamma* v. *Achayya*(5).

We cannot accept respondents' contention by which it is sought to uphold the decree appealed against, that plaintiffs had held adverse possession for over twelve years, for such possession must have been interrupted when the Survey Officer gave his decision and fixed the demarcation stones. It might be possible to distinguish *Krishnamma* v. *Achayya*(5) on the ground that in that case it was not shown that the demarcation interfered with plaintiffs' possession so as to give rise to a cause of action, but as the facts appear to be very similar to those of the present case I think it advisable to refer to a Full Bench the following question :—

"*When a plaintiff's claim has been disallowed under the Surveys and Boundaries Act IV of* 1897, *but he has been in possession of the property, does the decision of the Survey Officer operate as* res judicata *in a subsequent suit for possession?*"

SESHAGIRI AYYAR J.

SESHAGIRI AYYAR, J.—I agree that the question should be referred to a Full Bench. I take the facts found to be these :— There was a decision in favour of the plaintiff in Original Suit No. 802 of 1900 about a plot of ground. Subsequent to the decision the parties disputed whether that decision included the property in suit. Even in this suit, the Courts below are not agreed whether the plot in dispute was included in the previous decree, the Court of First Instance holding one way and the lower Appellate Court the other way. In 1904 there was a survey of the town of Madura. From the judgment of the District Judge I take it that the plaintiff and the defendant asked the Survey Officer to determine to which of them the site now in dispute belonged. I am also of opinion that it must have been with reference to the question whether the decree included

(1) (1887) I.L.R., 11 Bom., 429. (2) (1896) I.L.R., 13 Calc., 308.
(3) (1880) 6 I.A., 110. (4) (1891) I.L.R., 15 Bom., 424.
(5) (1880) I.L.R., 2 Mad., 306.

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SESHAGIRI AIYAR, J.

this site or not. I am sure that the decree was before the Survey Officer. He gave his decision in favour of the defendant. Plaintiff did not bring a suit to contest it. Mr. Venkatarayalayya contended that so long as a person against whom a Survey Officer has given his decision is in possession of the property he is not bound to set aside the order; and he is supported by *Krishnamma* v. *Achayya*(1). I regard the decision of the Survey Officer as in the nature of an award assigning the property in dispute to the defendant. In that view the defendant acquired a title to the property on the date of the Survey Officer's demarcation. The authorities to which my learned brother referred show that in similar circumstances where the Legislature has enacted that a decision would be final unless set aside within a prescribed period by the Civil Court, the party against whom the order was passed would be barred by *res judicata* even though he was in possession. *Krishnamma* v. *Achayya*(1) is not reconcilable with these decisions. I therefore agree that the question propounded by my learned brother should be submitted to the decision of a Full Bench.

ON THIS REFERENCE—

M. S. Ramamuja Ayyangar for *C. S. Venkatachariyar* for appellants.—The decision of the Survey Officer was passed under section 11 (2) of the Act on a dispute that arose between the parties as to the possession and ownership of the lane and the boundary was then fixed by the Survey Officer as a result of his decision in favour of the present appellants. There was no appeal from that decision nor any suit filed within one year to question that decision as provided by sections 12 and 13 of the Act. Hence that order is final and conclusive both as to title and possession and bars the institution of the present suit. In *Krishnamma* v. *Achayya*(1) which is relied on by the District Judge it does not appear that there was any dispute and that any decision of the Survey Officer was passed after dispute. Hence that decision is not applicable.

A. Venkatarayalayya and *L. Venkatanarasayya* for respondents relied on *Krishnamma* v. *Achayya*(1) as a case on all fours and contended that, as his client had been in undisturbed

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possession for more than the statutory period even from before the date of the Survey Officer's decision that decision had no effect and that the jurisdiction of the Survey Officer was only to decide the question of possession and not of title which is the subject matter of the present suit.

The OPINION of the Court was expressed by

WALLIS, C.J.

WALLIS, C.J.—Assuming that in this case the boundary was disputed and the dispute was the subject of an order by the Survey Officer under section 11 of Madras Act IV of 1897, we think that order, if not reviewed by the appellate authority or questioned by suit as provided in the section, was conclusive as to the rights of the parties, and none the less so because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession. In *Krishnamma* v. *Achayya*(1) there does not appear to have been any order under section 25 of the Boundaries Act of 1860, which corresponds to sections 11 and 12 of the present Act. The suit had been treated in the District Court as a suit governed by Article 16 to Schedule II of the Limitation Act of 1871 "to set aside any act of an officer of Government in his official capacity, not herein otherwise expressly provided for". The official act appears to have been the actual demarcation of the land by fixing the boundary stones. If there was an order in that case under section 25 of the Act of 1860, we think the decision was wrong.

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(1) (1880) I.L.R., 2 Mad., 306.

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Civil Procedure Code (Act V of 1908), ss. 37, 38 and 39—*Court which passed the decree, meaning of—Mortgage decree passed by one Court—Territorial jurisdiction in another Court—Transfer of territorial jurisdiction to a third Court—No transfer of decree for execution to the last Court—Application*

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for execution to such Court, whether competent—Power of District Court on appeal to transfer decree for execution, when properly exercisable.] A mortgage suit instituted in the District Munsif's Court of Srivilliputtur was transferred for trial to the Additional District Munsif's Court of Tinnevelly which had no territorial jurisdiction in respect of the hypotheca in the suit, and a decree for sale was passed by the latter Court; subsequently a part of the territorial jurisdiction of the Court of Srivilliputtur including that in respect of the hypotheca was transferred to the District Munsif's Court of Kovilpatti. The decree-holder applied to the Court of Kovilpatti for execution of the decree by sale of the property. On objection being taken to the jurisdiction of the Court of Kovilpatti to execute the decree: *Held*, that the District Munsif's Court of Kovilpatti had no jurisdiction to execute the decree, as it was not a Court which passed the decree under the terms of section 37 of the Civil Procedure Code, and the decree was not sent for execution by the Court of Tinnevelly to the former Court under sections 38 and 39 of the Code. *Held further*, that the District Judge, by his order on appeal allowing the execution petition, ought not to have made it to operate as a transfer of the decree to the Court of Kovilpatti, as no transfer should be made so as to evade the provisions of the Limitation Act or to validate an invalid application.

Venkatasami Naik v. *Sivanu Mudali* (1919) I.L.R., 42 Mad., 461

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—*Application by judgment-debtor to set aside sale in execution of a decree—Execution of sale-deed by judgment-debtor, not registered—Subsequent application, whether competent—Fresh sale-deed executed by him after application and registered before final order—Sustainability of application—Rights of parties to suit or application, whether affected by subsequent events.* Where a judgment-debtor applied under Order XXI, rule 89, of the Civil Procedure Code, to set aside a sale of certain lands held in execution of a decree, and it appeared that he had previous to his application executed a sale-deed therefor which was not however registered, and that he had subsequent to his application executed a fresh sale-deed in respect of the same lands to the same vendee which was registered before final order was passed on the application, and the auction purchaser objected to the competency of the judgment-debtor to make or sustain the application: *Held*, that the judgment-debtor had *locus standi* to make the application, as he had not ceased to be owner of the lands at the time of his making the application; and that he did not lose the right to sustain the application by the subsequent execution and registration of a sale-deed, as it is a well-recognized rule of law that the rights of the parties should be adjudicated as on the date of suit or application and not with reference to what transpires subsequently. *Kurri Veerreddi* v. *Kurri Bapireddi* (1906) I.L.R., 29 Mad., 336, and *Ramanathan* v. *Ranganathan* (1917) I.L.R., 40 Mad., 1134, referred to; *Subbarayadu* v. *Lakshminarasamma* (1915) I.L.R., 38 Mad., 775, distinguished and *Karalia Manuhai* v. *Mansukhram* (1900) I.L.R., 24 Bom., 400, dissented from.

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CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIV, RR. 2 AND 4, AND APPENDIX D, FORMS 4, 7, 8 AND 9—*Mortgage suit—Decree for sale—Default of payment—Subsequent interest after date fixed in decree—Right of mortgagee—Subsequent interest, whether payable on aggregate sum of principal, interest and costs—Rate of interest—Discretion of Court—Mortgage bond—Stipulation for enhanced interest after default at twelve per cent, whether penal.*] In a decree for sale on a mortgage, the decree-holder is, on default of payment by the mortgagor on the date fixed in the decree, entitled to subsequent interest on the aggregate amount of principal, interest and cost declared or found to be payable on that date; and such further interest should ordinarily be at the rate of six per cent per annum, but the Court has a discretion in the matter. *Sunder Koer* v. *Rai Sham Krishen* (1907) I.L.R., 34 Calc., 150 (P.C.), and *Subbaraya Ravuthaminda Nainan* v. *Ponnusami Nadar* (1898) I.L.R., 21 Mad., 364, referred to. Where in a mortgage-bond there was a stipulation to pay enhanced interest at twelve per cent on principal and interest on default of payment of the principal with interest at nine per cent on a day fixed therein, and where it appeared that the debts to discharge which the mortgage was executed carried interest at twelve per cent and more: *Held*, that the stipulation for such enhanced interest was not penal and could be enforced.

Venkatachelapathy Ayyar v. *Thavasi Servai* ... (1919) I.L.R., 42 Mad., 465

CRIMINAL PROCEDURE CODE (ACT V OF 1898), *sec. 4 (p)—Officer in charge of a police station, meaning of—Search of a house by an authorised officer—Assistance by an unauthorised person, whether unlawful.*] Where an officer in charge of a police station has gone on duty to a place outside his local jurisdiction the police officer next in rank deputed to act for him even though he is absent from the station, so long as he is within the jurisdiction, is an officer in charge of a police station. If a police officer entitled to conduct a search enters a building for such a purpose, the association with him of another having no local jurisdiction does not make the other's entry an unlawful trespass. *Morris* v. *Wise* (1860) 2 F. & F., 51, and *Sadagopa Charlu* v. *Satrughna Behara* (1912) 23 M.L.J., 445, followed.

Assan Allisr Maraikayar v. *Masilamani Nadar* ... (1919) I.L.R., 42 Mad., 446

DISTRICT MUNICIPALITIES ACT (MADRAS ACT IV OF 1884), SEC. 53—*Shipping Company—Ships, calling at ports to load and unload goods—Calling at Cocanada for loading goods—Agent at Madras—Sub-agent at Cocanada—Contracts with shippers entered into only by agent at Madras—Company, whether trading or carrying on business at Cocanada—Company, whether liable to be taxed in Cocanada.*] Where a shipping company, which earned profits by carriage of goods by sea and in the course of its business called at several ports in various parts of the world, was in the habit of loading and unloading goods at Cocanada, and it appeared that the Company had its principal Agent at Madras who employed a Sub-Agent at Cocanada but that all contracts with shippers could be and were entered into only by the Agent at Madras, and the Company was assessed by the Municipality of Cocanada to pay tax under section 53 of the District Municipalities Act (IV of 1884)

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for exercising its trade and carrying on business in Cocanada: *Held*, that the Company was not exercising any trade or carrying on business in Cocanada so as to be liable to be taxed under section 53 of the Madras District Municipalities Act, because the freight-earning contracts with the shippers were not entered into at the port of Cocanada. *Grainger* v. *Gough* (1896) A.C., 325, and *Lovell and Christmas, Limited* v. *Commissioner of Taxes* (1908) A.C., 46 (P.C.), followed.

Municipal Council of Cocanada v. *The 'Clan' Line Steamers, Limited* (1919) I.L.R., 42 Mad., 455

GIFT *of lands to an idol by a Hindu for 'pious purposes' without a deed, validity of—Binding nature of the gift on members of a joint Hindu family.*] A dedication of a small portion of the joint Hindu family lands to an idol of a temple by the father or manager of the family on the occasion of the funeral of a deceased member, is not by the law of India required to be in writing and is valid and binding on the other members of the family as a gift ordained 'for pious purposes.'

Ramalinga Chetty v. *Sivachidambara Chetty* ... (1919) I.L.R., 42 Mad., 440

HINDU LAW—*Division in status of members of a family—Enjoyment by each of some portion of family properties, whether exclusion in law as to other portions.*] Where a member of a Hindu family who is divided in status from others is in enjoyment of some portion of the family properties, while others enjoy other portions, he is not in law excluded or ousted from those other portions, so as to disentitle him to his share of those portions, however long their enjoyment by others. *Vishnu Ramachandra* v. *Ganesh* (1897) I.L.R., 21 Bom., 325, not followed; *Lakshman Dada Naik* v. *Ramachandra Dada Naik* (1881) I.L.R., 5 Bom., 48 (P.C.), followed.

Kumarappa Chettiar v. *Saminatha Chettiar* ... (1919) I.L.R., 42 Mad., 431

LAND ENCROACHMENT ACT (MADRAS ACT III OF 1905), SS. 6, 7 AND 14—*'Levied' in section 14, meaning of—Levy of penal assessment—Suit for refund of penal assessment, declaration of title to property and injunction—Limitation.*] In a suit under section 14 of Madras Land Encroachment Act (III of 1905) for (*a*) refund of penal assessment levied from the plaintiff, (*b*) declaration of the plaintiff's title to the property in respect of which penal assessment was levied and (*c*) an injunction restraining Government from interfering with the plaintiff's possession, the cause of action for the refund arises not from the date of *imposition* of the penal assessment but from the date on which it was actually *collected*; and the cause of action for the declaration and injunction arises not from the date when the Collector issues his order for the eviction but from the date on which some steps are taken under section 6 of the Act to evict the plaintiff. 'Levied' in section 14 means 'collected' and not merely imposed. *The Secretary of State for India* v. *Assan* (1916) I.L.R., 39 Mad., 727, explained and distinguished.

Kesava Chetty v. *The Secretary of State for India* ... (1919) I.L.R., 42 Mad., 451

LANDLORD AND TENANT—*Letting for cultivation of dry land at fixed rate—Improved cultivation thereafter effected solely at tenant's expense—Payment of higher rate of rent for a series of years—Presumption of consideration for and contract for payment of higher rate from such payment.*] Where a tenant to whom

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dry lands were let for cultivation at a fixed rate and who cultivated them for a certain time, dug wells on the land at his own expense and thereafter raised garden crops for which he paid for a long number of years at rates higher than the dry rate: *Held* by the full Bench (AYLING and SESHAGIRI AYYAR, JJ., dissenting) that a Court can presume a contract to pay the higher rate and a legal origin and consideration therefor from such long continued payment of higher rate, if that be the only evidence in the case to prove the rate payable, but that if there be other evidence, a Court cannot make any such presumption from such payment alone. Per AYLING and SESHAGIRI AYYAR, JJ.—Where, as in this case, the reason and origin of the payment of higher rate are known to be due to the raising of better crops by the aid of tenants' wells to which the landlord contributed nothing, there is no consideration moving from the landlord and no scope for raising any presumption of a legal origin for the contract from the mere fact of a long course of payment of the higher rate.

Periakaruppa Mukkandan v. *Raja Rajeswara Sethupathi* (1919) I.L.R., 42 Mad. (F.B.), 475

LIMITATION ACT (IX OF 1908), ART. 97—*Failure of consideration suits on—Sale by a member of joint Hindu family—Mitakshara law—Suit by vendee for possession—Previous sale by manager—Suit dismissed finally by High Court on Second Appeal—Subsequent suit for refund of price and costs of litigation—Suit within three years of decree of High Court, whether barred—Failure of consideration when—Costs of litigation, whether recoverable—Costs of review in High Court, whether recoverable.*] Where a purchaser of the share in certain lands of a member of a joint Hindu family governed by the Mitakshara law, sued to recover possession of the same from another who had previously purchased the entire lands from the managing member of the family, succeeded in the Original Court but failed in the lower Appellate Court on appeal and in the High Court on Second Appeal and in the review therein, and where he brought another suit within three years of the decree in the High Court for refund of the price paid by him and for the cost of the litigation against his vendor who pleaded the bar of limitation: *Held*, that the suit was not barred by limitation under article 97 of the Limitation Act, as the consideration failed only when it was finally determined by the High Court in Second Appeal that the sale by the plaintiff's vendor could not take effect against the prior sale by the manager; and that the costs of litigation were legally recoverable, except the costs of review which was a luxury indulged in by the plaintiff. *Hanuman Kamut* v. *Hanuman Mandur* (1892) I.L.R., 19 Calc., 129 (P.C.), distinguished; *Subaroya* v. *Rajagopala* (1915) I.L.R., 38 Mad., 887, and *Venkataramayya* v. *Lanka Ram Brahmam* (1918) 35 M.L.J., 124, followed.

Sarvothama Rao v. *Chinnasami Pillai* ... ... (1919) I.L.R., 42 Mad., 507

MORTGAGE—Stipulation for enhanced interest on default of payment of principal and interest, whether penal. *See* CIVIL PROCEDURE CODE (ACT V, OF 1908), O. XXXIV, RR. 2 AND 4 465

PAPER CURRENCY ACT, INDIAN (II OF 1910), SEC. 26 (PROVISO)—*Hundi payable to bearer, validity of—Bona fide customer drawing hundi on a bank without money to his credit, effect of.*] Where a hundi though drawn in favour of a specified person is made payable to bearer, it is void as being obnoxious to section 26 of the Indian Paper Currency Act (II of 1910) unless the hundi comes within the proviso to the section. The object of the proviso being to enable *bona fide* customers to operate on actual or intended deposits, the fact that the drawer of the hundi had actually no money in the bank does not take the hundi out of the proviso, if as a fact he intended to deposit money before presentment.

Arunachalam Chettiar v. *Narayanan Chettiar* ... (1919) I.L.R., 42 Mad., 470

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SS. 55 AND 56—*Transfer of property by debtor to a creditor—Fraudulent preference—'With a view of giving preference,' meaning of—English Bankruptcy Act, 1883, sec. 48—Construction adopted in English cases, applicability of, to the Indian Act.*] A trader, being in very embarrassed circumstances and unable to meet his obligations as they fell due, sold to one of his creditors, for what was found to be a fair price, a large quantity of diamonds pledged by him with certain other creditors and thereby paid off the debts due to the latter and the purchasing creditor; the balance was paid to the debtor who kept his business going by paying off other pressing creditors with that amount. The debtor was adjudged an insolvent on a petition presented within three months of this transaction. On an application by the Official Assignee filed before a Judge of the High Court in Insolvency to declare the transfer void under sections 55 and 56 of the Presidency Towns Insolvency Act: *Held*, that the transaction was not void as a fraudulent preference under section 56 of the Presidency Towns Insolvency Act; nor was it void under section 55 of the Act as it was made in good faith and for valuable consideration.

Per curiam.—To bring a transaction within the scope of section 56 of the Act, it must have been entered into with the *dominant view* of preferring a particular creditor. The construction adopted in several English decisions and approved by the House of Lords in *Sharp* v. *Jackson* (1899) A.C., 419, on the corresponding provision in section 48 of the English Bankruptcy Act, 1883, should be followed in construing similar language used in section 56 of the Presidency Towns Insolvency Act (III of 1909). *Sharp* v. *Jackson* (1899) A.C., 419; *Ex parte Griffith* In re *Wilcoxon* (1889) L.R., 23 Ch.D., 69; *Ex parte Hill* In re *Bird* (1889) 23 Ch.D., 695, followed; *Nalam Viswanathan* v. *Official Assignee of Madras* (1915) 32 I.C., 795, dissented from.

The Official Assignee, Madras v. *T. B. Methia & Sons* (1919) I.L.R., 42 Mad. 510

APPELLATE CIVIL.

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

KUMARAPPA CHETTIAR AND EIGHT OTHERS (DEFENDANTS NOS. 3 TO 7 AND 9 TO 12), APPELLANTS,

v.

SAMINATHA CHETTIAR AND THREE OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

1918, September, 4, 26, and October, 15.

Hindu Law—Division in status of members of a family—Enjoyment by each of some portion of family properties, whether exclusion in law as to other portions.

Where a member of a Hindu family who is divided in status from others is in enjoyment of some portion of the family properties, while others enjoy other portions, he is not in law excluded or ousted from those other portions, so as to disentitle him to his share of those portions, however long their enjoyment by others.

Vishnu Ramachandra v. *Ganesh*, (1897) I.L.R., 21 Bom., 325, not followed.

Lakshman Dada Naik v. *Ramachandra Dada Naik* (1881) I.L.R., 5 Bom., 48 (P.C.), followed.

APPEAL against the decree of C. V. VISWANATHA SASTRI, the Subordinate Judge of Kumbakōnam, in Original Suit No. 60 of 1916.

The plaintiff in this case purchased for Rs. 12,500 on 26th March 1912 from defendants 1 and 2 properties described in schedule A of the plaint and also got from them a security bond by way of assurance of title, on the same day, affecting the properties described in schedule B attached to the plaint. The plaintiff sued for possession of the properties sold to him. Plaintiff and defendants 1 and 2 contended that defendants 1 and 2 were divided in status from defendants 3 to 7, the other members of the family, and that defendants 1 and 2 were also in exclusive and adverse possession of A and B schedule properties for more than the statutory period. Defendants 3 to 7 and defendants 9 to 12, who were alienees from them, contended *inter alia* that there was no division in the family, that A and B schedule properties and

* Appeal No. 358 of 1917.

KUMARAPPA CHETTIAR v. SAMINATHA CHETTIAR.

several other properties belonging to the family were joint family properties, that they were being enjoyed by all in common, that defendants 1 and 2 were only entitled to a fifth share in the properties sold by them, that there was no adverse possession and that plaintiff, as purchaser from defendants 1 and 2, was not entitled to more than two-fifths share in the A schedule properties. Upholding the plaintiff's contention, the Subordinate Judge gave a decree to the plaintiff as prayed for. At the same time the Subordinate Judge gave a finding that, in case the plaintiff was not entitled to the whole of A schedule properties but only to two-fifths of the same, he was entitled to get Rs. 7,500 as damages to be realized by sale of the rights of defendants 1 and 2 in B schedule properties given as security. Defendants 3 to 7 and 9 to 12 appealed.

T. R. Venkatarama Sastri (with *K. R. Rangaswami Ayyangar*) for appellants.—There was no division of the family. There was no adverse possession at any time. Even if there were, it was not for the statutory period. Assuming that the members were divided in status, possession of a portion only of family properties by some did not amount to ouster of others, as the latter were in possession of other properties. This has always been the law in India. Reference was made to section 1, clause (13) of Act XIV of 1859, article 127 of Limitation Acts of 1871, 1877 and 1908—*Ranjeet Singh* v. *Kooer Gujraj Singh*(1), *Lakshman Dada Naik* v. *Ramachandra Dada Naik*(2), *Govindan Pillai* v. *Chidambaran Pillai*(3), *Jaganatha* v. *Ramabhadra*(4), *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatraju Bahadur Garu*(5), *The Udayarpalaiyam Case*(6), *Sakho Narayan Khandalkar* v. *Narayan Bikkaji Khandekkar*(7), *Corea* v. *Appuhamy* 8), *Kumar Saradindu Roy* v. *The Collector of Rungpur*(9). In England the law as to ouster by joint tenants before the passing of 3 & 4 Will. IV, cap. 27, was like the law of India. *Vishnu Ramachandra* v. *Ganesh*(10) is wrong.

N. S. Rangaswami Ayyangar for *T. Narasimha Ayyangar* (with *M. S. Ramanuja Ayyangar*) for respondents.—Exclusive

(1) (1873) 1 I.A., 9.
(2) (1881) I.L.R., 5 Bom., 48 (P.C.).
(3) (1866) 3 M.H C.R., 99.
(4) (1888) I.L.R., 11 Mad., 380, at p. 393.
(5) (1897) I.L.R., 20 Mad., 256 (P.C.).
(6) (1901) I.L.R., 24 Mad., 562.
(7) (1869) 6 Bom. H.C.R., 238
(8) (1912) A.C., 230.
(9) (1907) 11 C.W.N., 1143.
(10) (1897) I.L.R., 21 Bom., 325.

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possession by one member of even a portion of the family properties extinguishes the right of other members in that portion—*Vishnu Ramachandra* v. *Ganesh*(1). The cases quoted by the other side referred to *joint family* property. Article 127 will not apply as it refers to division of '*joint family* property' and not to property owned as here by several people as tenants-in-common. Further in the cases quoted there was perception of profits by the member alleged to have been excluded, either as for maintenance or by virtue of some arrangement made for convenient enjoyment. But here this portion of the family property was enjoyed by first and second defendants hostilely to others and in assertion of a right of exclusive ownership and hence possession by others of other portions does not avail them to save the bar of limitation.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—This is a suit for partition; defendants 1 and 2 represent one branch; defendants 3, 4 and 5 the second branch; the sixth defendant the third branch; and the seventh defendant the fourth branch. The fifth branch is not represented in this litigation. Defendants 8 to 12 are alienees from defendants 3 to 7. The plaintiffs purchased the suit properties from defendants 1 and 2. The plaintiffs' case is that the family was divided and that, as purchasers from defendants 1 and 2, they are entitled to the sole possession of the properties in the suit. They also set up the alternate plea that defendants 1 and 2 had acquired title by prescription to the properties.

The defence is that the members of the family are undivided and that the plaintiffs are not entitled to more than a fifth share in the properties conveyed to them. The Subordinate Judge held that, as the plaintiffs' vendors were in exclusive and hostile possession of the suit properties for more than 12 years, they were competent to convey them to the plaintiffs. He also expressed the opinion that the five branches had become divided in status, though the properties were not divided by metes and bounds. The appeal was argued on the supposition that the finding as to division by status was correct without deciding the point.

The point for decision is whether the possession of defendants Nos. 1 and 2 of a portion of the family properties was adverse

(1) (1897) I.L.R., 21 Bom., 325.

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to the other members of the family. In my opinion, the decision of the Subordinate Judge is wrong. I shall shortly trace the history of the legislation regarding adverse possession by co-tenants in England and in India before dealing with the decided cases. In England before the enactment of 3 & 4 Will. IV, cap. 27, the law as to possession by co-tenants was this (vide the First Report of the Common Law Commissioners made in the year 1851 as to forms of action relating to ejectment)—

"In cases where by reason of the rule plaintiff and defendant being tenants in common, joint tenants or co-partners an actual ouster must be established in order to found an action of trespass, the rule is modified by requiring the substituted defendant to admit fictitious ouster only in case an actual ouster of the lessor of the plaintiff is proved."

Then came the Statute of 3 & 4 Willi. IV, cap. 27. Section 12 which ran thus:

"That when any one or more of several persons entitled to any land or rent as co-partners, joint tenants or tenants in common, shall have been in possession or receipt of the entirety or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

This section was apparently enacted to negative the presumption that possession by one co-tenant is possession on behalf of all of them. As was pointed out in *Holmes* v. *Newlands*(1) and *Culley* v. *Doe*(2), before the statute of William IV, there was no adverse possession in such cases. The bare receipt of all rents and profits by a tenant in common was not adverse to his co-tenants—*Reading* v. *Rawsterne*(3) and *Farclaim* v. *Shackleton*(4). In *Peaceable v. Read and others*(5), it was held that where one tenant in common levied a fine and received all the rents for more than five years afterwards without any entry or claim made to avoid the fine no actual

(1) (1839) 11 Ad. and E., 44. (2) (1840) 11 Ad. and E., 1008.
(3) (1790) 2 Raym. Ld., 829. (4) (1770) 5 Burr., 2604.
(5) (1800) I East, 568.

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ouster of his co-tenant could be presumed. After the passing of the statute, as has been pointed out in Halsbury's Laws of England, volume 19, paragraph 247—

"The possession of the joint tenants, tenants-in-common and co-partners is separate and is not the possession of the other joint tenants."

It was held in *Thornton* v. *Sranee*(1) that, if a person entitled to an undivided share in the land, is in exclusive possession of the whole land or any part of it, the title of his co-owner to his undivided share would be extinguished by such possession. In *Glyn* v. *Howell*(2), EVE, J., says:

"Mr. Upjohn is right when he says the decisions have proceeded upon two lines, the one being those cases where the possession of the part has been treated as possession of the whole, because the Court has found, either by contract or according to conscience, that possession of the whole is what the person possessed of the part was intended to have, and the other being those cases in which the Court finding no just reason for inferring, in favour of a person relying solely on possession of a part, a constructive possession of the whole, has refused to make such inference."

This is the state of law under 3 & 4 Will. IV. Now we have to see how the law stands in India. Under Act XIV of 1859, section 1, clause (13), enacted the general rule that suits to enforce the right to share in any property, movable or immovable, on the ground that it is the joint family property, must be brought within twelve years from the death of the person from whom the property alleged to be joint is said to have descended, or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share. The Limitation Acts of 1871 and of 1877, although they fixed the starting point of limitation from demand and refusal in the one case and from exclusion in the other, introduced no substantial changes in the first column of the schedule. Two things are clear from the history of the Indian Limitation Acts. One is that no distinction is made between movable and immovable property as in the case of 3 & 4 William IV. Secondly, there is no special provision regarding

(1) (1897) 2 Q.B., 143. (2) (1909) 1 Ch., 66.

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the hostile possession of tenants in common. The reason is not far to seek. In India co-parcenary and joint enjoyment are normal, whereas in England they are exceptions. The Legislature apparently considered that it would be dangerous to introduce the principle enunciated in 3 & 4 Will. IV into this country, where managers and other members of the family are ordinarily in enjoyment of either the whole or portions of the property exclusively to avoid the disruption of the family ties and the partition of family properties.

I am of opinion that the decisions passed under section 1, clause (13) of the Act XIV of 1859, govern article 127 in the later Acts. Under the Act of 1859 it was held in *Ranjeet Singh* v. *Kooer Gujraj Singh*(1) that if one of the members of the family was in possession of only a portion of the property to the exclusion of the others, the presumption will be that the possession was for and on behalf of the other members of the family. This is what their Lordships say:

"Their Lordships entertaining the view which they have expressed, there was no partition, but that the plaintiffs took the seer land as equivalent to a payment in respect of their shares by the defendant, are of opinion that the proceeds of those seer lands have been substantially payments by the defendant within the meaning of that section, payments which have continued to the time of action brought, and that, therefore, the Statute of Limitation does not apply."

In *Sakho Narayan Khandalkar* v. *Narayan Bhikkaji Khandekkar*(2), the learned Judges say at page 241:

"but in the class of cases similar to the one before us, where both parties are in possession of portions, we should require a definite finding as to whether there had or had not been partition between the parties. In this particular case we have a clear finding that no partition was made and that each party is in possession of a portion of the entire estate, either by mutual agreement or accidental circumstances. In this view of the matter we consider the suit not barred."

In the *Udayarpalaiyam Case*(3), it was pointed out:

"That although one member of the family was in sole possession of the estate the receipt of maintenance by the other member and

(1) (1873) 1 I.A., 9. (2) (1869) 6 Bom. H.C.R., 238.
(3) (1901) I.L.R., 24 Mad., 562.

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his enjoyment of portions of property allotted to him for maintenance would be regarded as participation in the family income."

In *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatraju Bahadur garu*(1), which related to the Belgaum Zamindari, one member of the family believing the estate to be impartible was in sole possession of the major portion of the zamindari. The others were given a few villages for their maintenance. After the death of the last zamindar the question arose whether the other members who were enjoying the villages for maintenance were not barred by limitation. On behalf of the widow the plea of limitation was raised on the ground that the other members, notwithstanding their possession of portions of property, were excluded from the zamindari. Both the High Court and the Judicial Committee overruled this contention. They held that, so long as there was no total exclusion of the claimants, there can be no adverse possession in favour of persons holding portions of the property. As against these decisions we were referred to *Vishnu Ramachandra* v. *Ganesh*(2), in which it was held that the possession of a part of the property exclusively by a member of the joint family would be hostile to the other members of the family. I am unable to agree with this decision. It is inconsistent with the decisions I have quoted and with the judgment of Lord MACNAGHTEN in *Corea* v. *Appuhamy*(3), where it was pointed out that:

"Before the Act 3 & 4 Will. IV was passed it was a settled rule of law that the possession of any one of such persons was the possession of the other or others of the co-proprietors. It was not disputed at the Bar that such is now the law in Ceylon."

I may add that this is the law in India as well. Having regard to the decisions I have referred to and to the observations of Lord MACNAGHTEN it seems to me that the decision in *Vishnu Ramachandra* v. *Ganesh*(2) is not right. There is only one other decision to which I shall refer and that is the decision in *Lakshman Dada Naik* v. *Ramachandra Dada Naik*(4). That was a case in which the co-parcener wanted to establish his right to his own share as well as to a moiety of his father's interest to

(1) (1897) I.L.R., 20 Mad., 256 (P.C.). (2) (1897) I.L.R., 21 Bom., 325.
(3) (1912) A.C., 230. (4) (1881) I.L.R., 5 Bom., 48 (P.C).

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which he became entitled on the death of his father. It was held that section 1, clause (13) of the Act of 1859 applied to such a case. As regards the plea of limitation, the Judicial Committee says at page 59 :

"Now, as far as the immovable property of the family is concerned, there seems to be no ground for the application of the statute. Not only has the respondent all along been in the enjoyment of part of that property, viz., the house at Shahapur, but is also entitled to exclude from the computation the period of limitation during which he had prosecuted the suit."

This decision is authority for the proposition that possession of part of the property would save limitation as regards the rest of the property. In the present case it is not denied that defendants Nos. 3 to 12 have been in possession of portions of the joint family property.

It was contended for the respondent that the expression 'joint family property' in article 127 does not apply to the case of persons who have become divided in status. Granting this contention is well-founded, as to which I express no opinion, the cases referred to by me establish that, even if article 144 applied to the case, the possession of the plaintiff's vendor would not be adverse to the other defendants. In any view therefore the decision of the Court below is wrong and its decree must be reversed.

The plaintiffs as purchaser of the share of defendants 1 and 2 are entitled to two-fifths share in the suit properties by partition and to the mesne profits on that share from the date mentioned in the judgment of the Subordinate Judge: plaintiffs are entitled to the damages awarded by the Lower Court on the security of the B schedule properties as provided in the judgment of the lower Court. Plaintiffs are entitled to the costs from defendants 1 and 2 who in their turn will get all their costs from defendants 3 to 7 and 9 to 12 and personally and from the security of the B schedule properties and must pay defendants 3 to 7 and 9 to 12 their costs in both the Courts; plaintiffs are also entitled to interest on Rs. 7,500 from 26th March 1912 up to date of payment.

WALLIS, C.J.

WALLIS, C.J.—I have had the advantage of reading the judgment prepared by SESHAGIRI AYYAR, J., and will state my conclusions very briefly. If the property was undivided and

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article 127 is applicable, I entirely agree with him that to bar the plaintiff there must be exclusion from the whole of the joint family property and that exclusion from the suit property only will not do. The decision in *Vishnu Ramachandra* v *Ganesh*(1) appears to me to be opposed to the decree of the Privy Council in the Belgaum case [*Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatraju Bahadur Garu*(2)] and to the other cases cited by my learned brother as well as to the language of the article and I am unable to follow it. Assuming however that a division must be presumed to have taken place, it is said that article 127 does not apply, because the plaintiff is not a person excluded from joint family property within the meaning of the article but only a tenant in common excluded from the common property. The words 'joint family property' are used in the corresponding section 1, clause 13 of the Act of 1859, and I think the scope of the two enactments is the same though the starting points of limitation are different. It is in my opinion unnecessary to review the decisions on the question whether the words 'joint family property' in the article apply where there has been a division in status but no division of immovable properties by metes and bounds. In such a case, if article 127 does not apply, article 144 must apply. Under that article the suit would not be barred, as the possession of one tenant in common is the possession of all and is not adverse to his co-tenants in the absence of clear evidence of ouster—*Corea* v. *Appuhamy*(3). The Subordinate Judge has not found that there was anything amounting to ouster in this case, and there is no sufficient evidence of it. I agree with the order proposed by my learned brother.

N.R.

(1) (1897) I.L.R., 21 Bom., 325. (2) (1897) I.L.R., 20 Mad., 256. (P.C.).
(3) (1912) A.C., 230.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips

1918, November, 5 and 15

RAMALINGA CHETTI AND TWO OTHERS (DEFENDANTS Nos. 1 TO 3), APPELLANT,

v.

SIVACHIDAMBARA CHETTY AND FOURTEEN OTHERS (PLAINTIFFS Nos. 1 TO 7 AND DEFENDANTS Nos. 4 TO 11), RESPONDENTS.*

Gift of lands to an idol by a Hindu for 'pious purposes' without a deed, validity of—Binding nature of the gift on members of a joint Hindu family.

A dedication of a small portion of the joint Hindu family lands to an idol of a temple by the father or manager of the family on the occasion of the funeral of a deceased member is not by the law of India required to be in writing and is valid and binding on the other members of the family as a gift ordained 'for pious purposes.'

SECOND APPEAL against the decree of R. ANNASWAMI AYYAR, the Temporary Subordinate Judge of Cuddalore, in Appeal No. 83 of 1916, preferred against the decree of T. MUNRO FRENCH, the District Munsif of Panruti, in Original Suit No. 616 of 1912.

The plaintiffs as trustees of a certain temple brought this suit in 1912 for recovery of a small piece of land from defendants Nos. 1 to 3 and their lessee, the eleventh defendant, and for mesne profits, past and future, alleging that the said land was endowed to the temple by Sabapathi Chetti, the deceased father of defendants Nos. 1 to 3, as a gift at the time of the funeral of his father, Vyapuri Chetti, in November-December 1903, and that the said Sabapathi Chetti, who was himself one of the trustees of the temple, was holding it as the lessee of the temple and was paying rent to the temple as long as he was alive. The defendants Nos. 4 to 10 were joined as they were the other trustees of the temple. The defendants Nos. 1 to 3 pleaded *inter alia* that the gift was invalid as it was only oral and was not by a registered instrument and that the gift was not binding on the defendants, the sons of the donor. The lower Courts

* Second Appeal No. 2258 of 1917.

disallowed the above pleas and gave the plaintiffs a decree as prayed for. The defendants Nos. 1 to 3 preferred this Second Appeal.

C. V. Anantakrishna Ayyar, A. V. Viswanatha Sastri and *S. Rangachari* for appellants.

T. R. Venkatarama Sastri for first and second respondents.

SESHAGIRI AYYAR, J.—This is a suit to recover property. The father of defendants Nos. 1 to 3 gave about 40 cents of land to a temple in 1903 on the Sapandikarnam day of his father's death. There was no writing to evidence it. The donor was himself a trustee of the temple. During his lifetime he regarded himself as a lessee of the temple and gave it the income from the land. After his death, the defendants refused either to give the income or to deliver possession of the land.

There were two main defences. One is, that as the gift was not in writing and registered, no title passed to the temple. The other is that it was not competent to the donor who was a member of a joint Hindu family at the time of the gift to dispose of ancestral property in the way he did. The Courts below rejected these contentions.

In Second Appeal Mr. Anantakrishna Ayyar relied strongly upon *Mannu Lal* v. *Radhakrishenji*(1) for the first contention. The learned Judges of the Allahabad High Court do not discuss the question, nor do they refer to the decisions of the other High Courts bearing on it. It is true that the exact point now raised was not decided before, but there are observations in the judgments of this Court and of the Calcutta High Court which are not consistent with the view taken in Allahabad. Before examining the cases, we shall consider the nature of a dedication as understood by Hindus and a few texts of Hindu law bearing on it. A dedication, offering, or oblation as it is called, is generally made on occasions of death or marriage in a Hindu family. The usual form is to take a leaf of the *tulasi* plant in hand and with water offer the property in the presence of the persons assembled. It is not usually done before the temple, or in the presence of the trustees. The occasion is such that no writing will be thought of. We are not sure that a writing will not be regarded as detracting from

(1) (1917) 36 I.C., 989.

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the sanctity of the proceeding. The question is whether such a process is ineffectual to pass property. In the Chandogya Upanishad, this is what is stated regarding the persons who benefit by a religious offering :

"अथ यक्तदेवं विद्वान् अग्निहोत्रं जुह्वेति तस्य सर्वेषु लोकेषु भूतेषु सर्वेषु आत्मसु हुतं भवति यथेह क्षुधिता बाला मातरं पर्युपासत एवं सर्वाणि भूताध्यग्नीहोत्रमुपासत इत्यग्नीहोत्रमुपासत इति ॥"

"He who presents an oblation, has made an offering in all worlds in all beings, in all souls . . . As in the world hungry infants press round their mother, so do all beings await the holy oblations. They await the holy oblations."

The usual religious formula pronounced by every Hindu male or female, on the occasion of any offering or feeding is that it is made to God ;

"सर्वान्तर्यामी भगवान् श्रीहरिः जनार्दनः प्रीयताम्" ॥

'He is watching within all beings'

Consequently a dedication of the kind we have referred to is intended to benefit the public in whom the spirit of God is said to reside. It is to the universal soul which pervades all beings. These offerings are not to any specific person, real or artificial. The learned vakil for the appellant referred to the observations in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*(1), where an idol was spoken of as a juridical person. It was pointed out in *Manohar Ganesh Tambekar* v. *Lakshmiram Govindram*(2) and *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*(3) that, in an ideal sense, an idol is a person capable of owning property. A person can make a gift to the trustees on behalf of an idol or he can make offerings in the temple to the idol. In these cases, the idol can and does own the property. But it does not follow from it that a dedication must be in the form prescribed by section 123 of the Transfer of Property Act. There are various modes of giving property to a temple. One is by giving it to the trustees. In that case the provisions of the Transfer of Property Act must be complied with. Another is by dedication to the idol itself. If this is in writing, it is open to argument that by virtue of the Registration Act no title would pass

(1) (1905) I.L.R., 32 Calc., 129. (2) (1888) I.L.R., 12 Bom., 247.
(3) (1910) I.L.R., 37 Calc., 128, at p. 140.

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unless the document is registered. The third mode is the one with which we are concerned and which is observed on occasions of marriage or death. Although the donor may intend that the embodiment of the universal soul worshipped in a particular place should have the benefit of the dedication, the words employed by him and the object aimed at by him are what has been indicated in the Chandogya Upanishad and in the formula we have referred to. In these cases, the gift is not to any sentient being, real or artificial, so as to attract section 5 of the Transfer of Property Act.

The property thus dedicated ceases to belong to the donor. That undoubtedly is the Hindu idea. After an elaborate review of the Hindu texts, Mr. Justice MOOKERJEE says in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*(1) :

"It is conclusively established from these authorities that according to strict Hindu juridical notions there can be no gift in favour of the gods. We are not concerned now with the philosophical reason for this position, and it is needless to inquire whether it is due to the fact that in the earliest time physical objects were deified, and could not, therefore, be very well supposed to be capable of acceptance of a gift, or to the fact that the deity was conceived as a being to whom a mortal could not aspire to make a gift, but could only content himself with a dedication of things for acceptance."

In one of the early texts (Vyavahara Mayukka, chapter IV, section 7, placitum 23), it is said, quoting Katyayana, that wealth which has been assigned for religious purposes is *extra commercium*. In the Calcutta case already referred to, the same learned Judge deals with this matter in these terms :

"If, therefore, a dedication is made in favour of the deity, what is the position ? The owner is divested of his rights. The deity cannot accept. In whom does the property vest ? The answer is that the king is the custodian of all such property. Vijnaneswara in the Mitakshara (Vyavahara Adhyaya, verse 186) lays it down that one of the duties of the king is the protection of the Devagriha: and Aparaditya and Mitramisra in their commentaries on the same subject lay down the rule in the same manner. In the Sukraniti, chapter IV, verse 19, stress is laid upon this as one of the primary duties of kings. The true Hindu conception of dedication for the

(1) (1910) I.L.R., 37 Calc., 128, at p. 153.

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establishment of the image of the deity and for the maintenance thereof is that the owner divests himself of all rights in the property: the King, as the ultimate protector of the State, undertakes the supervision of all endowments. There is no acceptance on the part of the deity, but, from the dedication, religious merit and spiritual benefit accrue to the founder and material benefit accrues to the person in charge of the worship and to the creatures of God."

See also WEST, J., in *Manohar Ganesh Tambekar* v. *Lakshmiram Govindram*(1). This conception of the effect of dedication is common to many systems of jurisprudence. In the Roman law property dedicated to religious purposes was *extra commercium*. See Ulpian's Frag XXII, section 6. In Muhammadan law dedications of this kind are not uncommon. It seems to us, therefore, that to hold that, unless a donation for religious purposes conforms to the requirements of the Transfer of Property Act, it would be invalid would be to introduce an idea foreign at least to Hindu notions of religious donation. Of course, if the statute law imposes such a restriction, it must be obeyed. But the Transfer of Property Act is not exhaustive of all modes of transfer, and, as we pointed out, if the true intent of a dedication is not to give property to a sentient being, the chapter relating to gifts can have no application to gifts by dedication. This is substantially the idea that underlies the decision in *Pallayya* v. *Ramavadhanulu*(2). For these reasons we are of opinion that the dedication on the Sapandikarnam day divested the donor of his rights and conferred them on the temple.

On the second question reliance was placed by the learned vakil for the appellant on *Muthusami Pillai* v. *Dorasami Pillai* (3). The occasion of the gifts is not mentioned in the judgment. The learned Judges quote without disapproval *Raghunath Prasad* v. *Gobind Prasad*(4). That judgment refers to *Gopal Chand Pande* v. *Babu Kunwar Singh*(5) as authority. On turning to this latter decision, it is seen that the Vyvastha of the pandit on which the conclusion was based refers to Hindu texts and Puranic slokas for the broad proposition that a gift to Vishnu and other deities by the manager of the family is within his

(1) (1888) I.L.R., 12 Bom., 247, at p. 264.
(2) (1903) 13 M.L.J., 364.
(3) (1901) 11 M.L.J., 310.
(4) (1886) I.L.R., 8 All., 76.
(5) (1843) S.D., A.P., Vol. V, 24.

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competence. In Mitakshara, chapter I, section 1, placitum 28, it is stated:

"Even a single individual may conclude a donation, mortgage, or sale, of immovable property, during a season of distress for the sake of the family, and especially for pious purposes."

In *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(1) this proposition is quoted with approval. In placitum 29 the expression 'pious purposes' is explained thus: 'such as the obsequies of the father, etc.' That explanation would undoubtedly cover the present case. It was pointed out by a Full Bench of this Court in *Baba* v. *Timma*(2) that if there is a special text of Hindu law in favour of a disposition by a manager, Courts are bound to give effect to it. In *Hanumantapa* v. *Jurubai*(3) the same principle was enunciated. Having regard to these authorities and to the text of Mitakshara, it seems clear that at any rate in the performance of religious obsequies the manager of a Hindu family is competent to give property to a temple. In *Rathnam* v. *Sivasubramania*(4) a silver vehicle was presented to the temple not on any occasion of death or marriage but as a present on an ordinary occasion. It is doubtful whether such an offering can be said to be one for religious purposes, and whether it would be covered by placitums 28 and 29 of chapter I, section 1, of Mitakshara. The present case is clearly within the rule enunciated in those texts. Other texts may be quoted in support of this view. But it is not necessary to multiply citations. We hold that it is not beyond the competence of a Hindu manager to make a gift of the kind we are dealing with. For these reasons, the Second Appeal fails and must be dismissed with costs.

N.R.

(1) (1856) 6 M.I.A., 407.
(2) (1884) I.L.R., 7 Mad., 357.
(3) (1900) I.L.R., 24 Bom., 547.
(4) (1893) I.L.R., 16 Mad., 353.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

1918, November, 11 and 18.

ASSAN ALLIAR MARAIKAYAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

MASILAMANI NADAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), sec. 4 (p)—Officer in charge of a police station, meaning of—Search of a house by an authorized officer—Assistance by an unauthorized person, whether unlawful.

Where an officer in charge of a police station has gone on duty to a place outside his local jurisdiction, the police officer next in rank deputed to act for him even though he is absent from the station, so long as he is within the jurisdiction is an officer in charge of a police station.

If a police officer entitled to conduct a search enters a building for such a purpose, the association with him of another having no local jurisdiction does not make the other's entry an unlawful trespass.

Morris v. *Wise* (1860) 2 F.&F., 51, and *Sadagopa Charlu* v. *Satrughna Behara* (1912) 23 M.L.J., 445, followed.

SECOND APPEAL against the decree of A. EDGINGTON, the District Judge of Tinnevelly, in Appeal No. 500 of 1916, preferred against the decree of T. N. KRISHNAMURTHI VAJAPAYAR, the Additional District Munsif of Tinnevelly, in Original Suit No. 211 of 1915.

The facts are stated in the judgment of SESHAGIRI AYYAR, J. Plaintiffs preferred this Second Appeal.

K. R. Guruswami Ayyar (with *A. Subbarama Ayyar*) for appellants.

C. Narasimha Achariyar (with *S. Anantarama Ayyar*) for respondents.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—This is a suit against two policemen for damages for illegal search of the plaintiffs' house. On the 29th January 1915, the two defendants undoubtedly conducted the search. The District Munsif held that the search was illegal and awarded Rs. 100 as damages against each of the defendants. In appeal the District Judge exonerated the second defendant altogether and gave a rupee as damages against the first

* Second Appeal No. 2158 of 1917.

defendant. The plaintiffs have preferred this Second Appeal and the first defendant has filed a Memorandum of Objections.

On the question whether the second defendant should be held liable, I have come to the conclusion that the District Judge is right. The main argument addressed to us by the learned vakil for the appellant was that the second defendant was not an officer in charge of a police station and that consequently he had no power to make the search. Under section 4, clause (*p*) of the Code of Criminal Procedure an officer in charge of a police station includes, when a permanent incumbent is absent or unable to perform his duties, 'the police officer present at the station-house who is next in rank to such officer and is above the rank of a constable.' In the present case, the Sub-Inspector, as he is called, who is the officer in charge of the police station of Valliyur, left his jurisdiction for the purpose of pursuing a gang of thieves. This was on the 26th January 1915. The only evidence we have in the case as to what happened when he left the station is the deposition of the second defendant in which he says: 'I am the general charge officer and I look after the station work during the Sub-Inspector's absence as senior officer of the station.' Relying upon this evidence the District Judge has come to the conclusion that the second defendant was put in charge of the station when the permanent incumbent went out of the jurisdiction. I see no reason to differ from this finding of fact.

It is in evidence, however, that the second defendant left the headquarters of the station on the 26th to inspect some of the outlying villages within his jurisdiction. There is some doubt whether he returned on the 29th or not. I am of opinion, having regard to what he states in the earlier portion of his deposition, that he was not in the station-house on the 29th. But that does not matter. If he was deputed to be in charge of the station, the fact that he was doing duty elsewhere does not deprive him of his capacity of station-house officer. If Mr. Guruswami Ayyar's contention were upheld, every moment that the officer in charge of a police station leaves the station-house a new station-house officer must be installed there. Take for example a case in which the permanent incumbent who left the jurisdiction returns to the jurisdiction under his charge but not to the station-house; if the contention for the appellants were

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upheld, he cannot exercise the functions of an officer in charge of the police station until he takes charge of the station-house I am unable to agree with this contention. The object of the definition is to permit of the discharge of duties which can only be done by an officer in charge of a police station by some person who is deputed to look after that work. The aim is to bring in more men so that the duties of the office may be performed without delay, and not to exclude persons who were either permanent incumbents or who have been appointed to act for the permanent incumbent. My opinion, therefore, is that as the second defendant was within the jurisdiction of the police station and as he was appointed to act for his superior when the latter went outside the jurisdiction, he was an officer in charge of a police station. It may be that Arunachalam Pillai, the station writer as he is called, was also an officer in charge of a police station, but it is not necessary to consider that matter. I am clear that the second defendant was an officer in charge of the police station of Valliyur. I do not think that the words 'present at the station-house' would necessarily have the effect of depriving an officer of his functions if he happens to go out of the station-house. That clause, as I said before, is intended to empower more men to discharge these duties and not to deprive others of their functions. In this view, I am of opinion that the second defendant, in conducting the search, acted within his powers. There is the finding by the District Judge that in exercising those powers he did not act harshly or oppressively. I am of opinion that the exoneration of the second defendant was right. Therefore the appeal so far as he is concerned must be dismissed with costs.

The question of the liability of the first defendant is somewhat different. He is not attached to the Valliyur station. He is the head of another station. Therefore, *primâ facie* he acted without jurisdiction in making the search. Under section 166 of the Code of Criminal Procedure, if a theft is committed within the limits of a police station, and if the property is concealed within the limits of another station, the officer in charge of the station where the theft was committed can requisition the aid of the officer in charge of the station where the thief has secreted the property to cause a search to be made. That is not this case. The plaintiffs, against whom the suspicion of having

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SESHAGIRI AYYAR, J.

received stolen property was entertained, had their house within the limits of Valliyur station. Therefore the first defendant had absolutely no right to make any search. I find no provision of law which would enable a police officer who did not belong to the constabulary of a particular police station to come within its limits and to help in the search of property. I must therefore hold that the first defendant acted without jurisdiction.

It was suggested in the course of the hearing that, as the second defendant was acting within his powers in making the search, the association of the first defendant did not matter. In *Morris* v. *Wise*(1) it was held that a person assisting a constable or other officer engaged in carrying out a lawful process of law would be justified as it would not be unlawful to take part in a lawful act. Having regard to the rank of the first defendant, it is doubtful whether he can be said to have simply assisted the second defendant. But the second defendant had jurisdiction to conduct the search and was doing a lawful act. Consequently, if the entry into the plaintiffs' house for the purpose of a search was lawful, can it be said that the association of another in this act was an actionable wrong? After consideration I am inclined to agree with my learned brother that he too was not liable. It is unnecessary to consider the other questions argued before us. I agree therefore that the Memorandum of Objections should be allowed with costs.

PHILLIPS, J.

PHILLIPS, J.—Plaintiffs' suit is for damages for wrongful trespass committed by defendants in searching their house. The District Judge has found that second defendant was the officer in charge of the Valliyur police station within the limits of which the search was conducted. The evidence of defendants Nos. 1 and 2 supports this finding and I think it may be accepted. The contention put forward by Mr. Guruswami Ayyar that the Sub-Inspector, who had been put in charge of the station, could be the only officer in charge of the station, subject to the proviso in section 4 (*p*) of the Criminal Procedure Code, does not appear to be correct. The Sub-Inspector was absent from the station on special duty and during his absence it would be

(1) (1860) 2 F. & F., 51.

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necessary to have some other officer in charge, and the evidence is that second defendant was that other officer. Section 4 (*p*) of the Criminal Procedure Code only provides that in the temporary absence of the officer in charge the next senior officer above the rank of constable shall also be deemed to be officer in charge of the station. This does not take away the power of acting as such from the officer who is really in charge of the station, for it is only necessary to state the proposition to see its absurdity. It would mean that as soon as such officer left the station-house, the next senior officer would be the only officer in charge and no search outside the station-house could be conducted by the officer in charge. Accepting this finding, the suit was rightly dismissed as against second defendant.

The District Judge has, however, found that first defendant acted without jurisdiction in that he took part in a search which he had no jurisdiction to make. The search being conducted by second defendant was made with jurisdiction and the fact that a person not authorized by the code to conduct the search took part in it does not invalidate the search. It is not necessary that a person who conducts a search should do all the acts connected with the search with his own hand, but it is sufficient if he is present and personally supervises the proceedings [vide *Sadagopa Charlu* v. *Satrughna Behari*(1)]. In most searches one or more constables assist the officer conducting the search, and sometimes a cooly is employed to do manual labour, such as digging up the floor, etc., to facilitate the search. I do not for a moment think that such assistants could be held to be liable in damages for rendering such assistance. In the present case the first defendant being second defendant's superior officer, no doubt took a considerable part in effecting the search, but that is no reason for saying that he conducted the search, for he had been careful enough to send for second defendant to conduct the search, knowing that he had no jurisdiction to conduct it himself. In doing what he did, he cannot be said to have exceeded his jurisdiction, and he is not liable in damages to plaintiffs. In this view the Second

(1) (1912) 23 M.L.J., 445.

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Appeal must be dismissed with costs, and in allowance of the Memorandum of Objections plaintiffs' suit must be dismissed with costs throughout.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami Sastri.

KESAVA CHETTY (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT.*

1918, October, 24, and November, 21

Land Encroachment Act (Madras Act III of 1905), ss. 6, 7 and 14—'Levied' in sec. 14, meaning of—Levy of penal assessment—Suit for refund of penal assessment, declaration of title to property and injunction—Limitation.

In a suit under section 14 of Madras Land Encroachment Act (III of 1905) for (*a*) refund of penal assessment levied from the plaintiff, (*b*) declaration of the plaintiff's title to the property in respect of which penal assessment was levied and (*c*) an injunction restraining Government from interfering with the plaintiff's possession, the cause of action for the refund arises not from the date of *imposition* of the penal assessment but from the date on which it was actually *collected*; and the cause of action for the declaration and injunction arises not from the date when the Collector issues his order for the eviction but from the date on which some steps are taken under section 6 of the Act to evict the plaintiff.

'Levied' in section 14 means 'collected' and not merely imposed.

The Secretary of State for India v. *Assan*, (1916) I.L.R., 39 Mad., 727, explained and distinguished.

SECOND APPEAL against the decree of T. M. FRENCH, the Temporary Subordinate Judge of Vellore, in Appeal Suit No. 36 of 1917, preferred against the decree of A. P. P. SALDANHA, the Principal District Munsif of Vellore, in Original Suit No. 51 of 1915.

The facts are stated in the judgment of KUMARASWAMI SASTRI, J.

* Second Appeal No. 2101 of 1917.

KESAVA CHETTY v. THE SECRETARY OF STATE FOR INDIA. — KUMARASWAMI SASTRI, J.

C. Madhavan Nayar and *K. Kuttikrishna Menon* for the appellant.

T. S. Narayana Ayyar for the respondent.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. He sued the Secretary of State for India in Council (respondent) for a declaration that the property specified in the plaint belongs to him and is not liable to penal assessment, for an injunction restraining the defendant from interfering with the property and for refund of the penal assessment levied. The case for the plaintiff is that the property belongs to him absolutely and was never the property of Government, that he was served with a notice from the Revenue Divisional officer, dated 15th July 1914, purporting to be issued under Madras Act III of 1905 levying a penal assessment of Rs. 10 and that the amount was wrongly collected from him on the 21st July 1914. The defence is that the property was nattam poramboke which the plaintiff trespassed upon, that the Government is entitled to levy the assessment claimed and that the suit is barred by limitation.

Both the District Munsif and, on appeal, the Subordinate Judge held that the suit was barred by limitation as it was brought more than six months after the 15th July 1914, the date of the notice by the Divisional officer informing the plaintiff that an assessment of Rs. 10 was levied owing to his having encroached on Government property. The question raised in this Second Appeal is whether the period of six months specified in section 14 of the Madras Land Encroachment Act III of 1905 is to be computed from the date of the imposition of the assessment or the date when it is actually collected from him.

Section 14 of the Act provides that Civil Courts shall not take cognizance of any suit instituted by persons aggrieved by any proceedings under that Act unless the suit is instituted within six months from the date of the cause of action. The explanation to the section states that the cause of action in respect of any assessment or penalty shall be deemed to arise 'on the date on which such assessment or penalty was levied'. As regards eviction or forfeiture the cause of action is said to arise on the date of eviction or forfeiture.

Both the lower Courts erred in construing section 14 with reference to the marginal notes to sections 3, 5 and 7 of the

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Act. It is now well settled that marginal notes to sections of an Act of the Indian Legislature cannot be referred to for the purpose of construing the Act. The view taken in *Punardeo Narain Singh* v. *Ram Sarup Roy*(1) and *Emperor* v. *Alloomiya Husan*(2) has been affirmed by their Lordships of the Privy Council in *Balraj Kunwar* v. *Jagatpal Singh*(3), where Lord MACNAGHTEN observed as follows :—

'It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and was exploded long ago. There seems to be no reason for giving to the marginal notes of an Indian Statute any greater authority than the marginal notes in an English Act of Parliament.'

The marginal notes do not throw much light on the question. It is significant that, while the marginal note to sections 3 and 9 would suggest that 'levy' was used in the sense of 'imposition,' the marginal note to section 15 uses the word in the sense of 'collection.' In the body of the Act the word 'levy' is only used in section 13 and obviously means 'collected' as the clause provides that if any penalty has been levied from any person under section 5 no similar penalty shall be levied under any other law.

I am of opinion that the word 'levied' in section 14 means 'collected' and that the period of limitation in section 14 runs from the date when the assessment or penalty is actually collected and not when it is merely imposed. The decision of the Revenue officer under section 3 of the Act to impose assessment need not be on notice to the party as section 7 of the Act requires notice to be given only when it is decided to impose a penalty or eviction or forfeiture of crops. As the explanation to section 14 refers to both assessment and penalty it is difficult to see how a mere decision of the Revenue officer to levy assessment can cause time to run against the person aggrieved. If 'levy' simply means 'imposition' time will begin to run before the person on whom it is imposed has any notice of the demand, and if the fact that assessment has been imposed comes to his knowledge six months afterwards he would be without any remedy.

(1) (1898) I.L.R., 25 Calc., 858.
(2) (1904) I.L.R., 28 Bom., 120, at p. 142.
(3) (1904) I.L.R., 26 All., 393 (P.C.), at p. 406.

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As regards the recovery of the sum actually paid, plaintiff's cause of action can only arise after he has paid it and there is no reason why he should go to Court before he is actually damnified by the amount being recovered from him. Nor is he bound to file a suit to declare his title to the property or for an injunction until the Government take some steps to eject him and the mere imposition of assessment or fine, if unaccompanied by any steps taken to evict him under the powers conferred by section 6 of the Act, would not affect his possession. Under clause (*b*) of the explanation to section 14 a person's cause of action arises in respect of eviction or forfeiture from the date of the eviction or forfeiture and not when the Collector issues the order directing his eviction, and there seems to me no reason why in the case of assessment or penalty his cause of action should be deemed to have arisen on the mere imposition of the assessment or penalty and not on payment.

Reference has been made to *The Secretary of State for India* v. *Assan*(1), where it was held that a notice under section 7 of the Act gives rise to no cause of action. It appears from the facts of that case that the assessment was actually collected six months before the suit and all that was decided was that the suit for declaration of title would be barred if the remedy to recover the assessment paid was barred under section 14, clause (*a*) of the Act. It is no authority for the view that the starting point of limitation is the imposition and not the actual collection of the assessment or penalty. On the contrary, the fact that the right to ask for a declaration of title would be barred if his remedy in respect of the assessment or penalty is barred is in my opinion a good reason for holding that payment and not mere demand gives rise to the cause of action.

As the penal assessment was paid on the 21st July 1914, the suit is in time, having been filed within six months from that date.

I would reverse the decrees of both Courts and remand the suit for disposal to the District Munsif for trial on the other issues. Appellant will be entitled to a refund of court fees. Costs will abide and follow the result.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—I agree and have nothing to add.

N.R.

(1) (1916) I.L.R., 39 Mad., 727.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Napier.

THE MUNICIPAL COUNCIL OF COCANADA (DEFENDANT), APPELLANT,

1918, Nov. 11, 14 and 26.

v.

THE 'CLAN' LINE STEAMERS, LIMITED (PLAINTIFF), RESPONDENT.*

District Municipalities Act (Madras Act IV of 1884), sec. 53—Shipping Company—Ships calling at ports to load and unload goods—Calling at Cocanada for loading goods—Agent at Madras—Sub-agent at Cocanada—Contracts with shippers entered into only by agent at Madras—Company, whether trading or carrying on business at Cocanada—Company, whether liable to be taxed in Cocanada.

Where a shipping company, which earned profits by carriage of goods by sea and in the course of its business called at several ports in various parts of the world, was in the habit of loading and unloading goods at Cocanada, and it appeared that the Company had its principal Agent at Madras who employed a Sub-Agent at Cocanada but that all contracts with shippers could be and were entered into only by the Agent at Madras, and the Company was assessed by the Municipality of Cocanada to pay tax under section 53 of the District Municipalities Act (IV of 1884) for exercising its trade and carrying on business in Cocanada:

Held, that the Company was not exercising any trade or carrying on business in Cocanada so as to be liable to be taxed under section 53 of the Madras District Municipalities Act, because the freight-earning contracts with the shippers were not entered into at the port of Cocanada.

Grainger & Son v. *Gough*, (1896) A.C., 325, and *Lovell and Christmas, Limited* v. *Commissioner of Taxes*, (1908) A.C., 46 (P.C.), followed.

APPEAL against the judgment and decree of COUTTS TROTTER, J., in the exercise of the Ordinary Original Civil Jurisdiction in O.S. No. 219 of 1917.

The material facts appear from the judgment.

Venkatasubba Rao and *Radhakrishnayya* for appellant.

D. Chamier and *Dr. Pandalai* for respondent.

WALLIS, C.J.

WALLIS, C.J.—The question in this appeal is whether the Clan Line of Steamers, who have their registered office in Glasgow, are liable under section 53 of the Madras District

* Original Side Appeal No. 2 of 1918.

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Municipalities Act, 1884, to pay profession tax in Cocanada on the ground that they are persons exercising within that municipality one of the professions, trades or callings specified in the schedule, which includes persons 'carrying on business as a company,' and also 'ship-owners.' The Clan Line steamers call at Cocanada to take in cargo for Europe, and also unload there any cargo consigned to Cocanada of which there is very little. They are represented in various matters by Messrs. Ripley & Co., Sub-Agents engaged by Messrs. Gordon Woodroffe & Co., the Clan Line's Agents at Madras. Messrs. Ripley have no authority to contract with shippers for the allotment of cargo space under letters of engagement such as are now common. Shippers apply direct to Gordon Woodroffe & Co.; if they apply to Messrs. Ripley, the latter forward the application to be dealt with by Gordon Woodroffe & Co., or take their instructions by telegraph if the time is short. They issue shipping orders to shippers who have secured space, sign the bills of lading for cargo shipped, and receive the freight where it is payable in advance, as it is in all cases where the goods are consigned to London for transhipment to America. They also settle the bills of the dubash who is employed by Gordon, Woodroffe & Co. to supply the ships with necessaries and pay the doctor who is similarly employed. They apparently collect any freight that may be payable on the small quantity of cargo landed.

Having regard to these facts, it may be said that in one sense the Clan Line carry on business at Cocanada through Messrs. Ripley, but what we have to see is whether it is such an exercise of their trade or carrying on business within the municipality as to bring the case within the language of the statute, which is indistinguishable from that of similar taxing Acts both in England and the Colonies. Those cases have been reviewed by the learned Judge and have again been considered by us, but it is unnecessary to go behind the decision of the House of Lords in *Grainger & Son* v. *Gough*(1) and the more recent decision of the Privy Council in *Lovell and Christmas, Limited* v. *Commissioner of Taxes*(2). In *Grainger & Son* v.

(1) (1896) A.C., 325. (2) (1908) A.C., 46 (P.C.).

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Gough(1) the fact that Louis Roederer, who carried on business at Reims in France, employed an agent and a large number of sub-agents in England to canvass for orders for his champagne, which were sent to Reims for acceptance, was held not to make him a person exercising a trade within the United Kingdom, even when coupled with the further facts that the agents in England sometimes received the price of the goods sold for transmission to their principal, and that the principal's name appeared in the "London Directory" as carrying on business at 21 Mincing Lane, London. Lord HERSCHELL, L.C., pointed out that in previous cases of this nature where liability was established the contracts of sale had been habitually made in the United Kingdom, and observed that there was a broad distinction between trading with a country and carrying on a trade within a country, and that it was impossible to say that merchants and manufacturers who export their goods to all parts of the world exercise or carry on their trade in every country in which their goods find purchasers. A wine merchant, he said, exercised his trade by making or buying wine and selling it again with a view to profit, and, if all he did was to solicit orders in England, he could not be said to exercise his trade there.

Lord WATSON reviewed the earlier decisions and observed:

"There may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected with his business abroad that without them it could not be successfully carried on, which are nevertheless insufficient to constitute an exercise of his trade here within the meaning of schedule D."

He referred in this connexion, as did Lord DAVEY, to *Sully* v. *Attorney-General*(2), where it was held that the purchase of goods in England, by a branch of an American firm established there, of goods which it is intended to re-sell at a profit in New York, 'does not, of itself, constitute an exercise of the trade in the United Kingdom when that department of the business from which profits or gains are directly realized is carried on in another country.' These two cases were followed and applied by the Judicial Committee in *Lovell & Christmas, Limited* v. *Commissioner of Taxes*(3). In that case the question

(1) (1896) A.C., 325. (2) (1860) 5 H. & N., 711.
(3) (1908) A.C., 46 (P.C.).

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was whether any of the profits of the appellant's business, which consisted of the sale of provisions on commission in London, were 'derived from New Zealand' within the meaning of the New Zealand Statute, because the appellants had agents in New Zealand who contracted with shippers there that they should consign their goods to the appellants in London for sale on commission in consideration of advances made to them against the bills of lading. The New Zealand Court held the appellants liable on the ground that these contracts from which profits resulted were made in New Zealand, but the Judicial Committee reversed the decision. Their Lordships, after referring to *Grainger & Son* v. *Gough*(1) and distinguishing *Erichsen* v. *Last*(2) and citing *Sully* v. *Attorney-General*(3) with approval, observed that the decisions did not furnish authority for going further back, for the purpose of taxation, than the business from which profits are directly derived and the contracts which form the essence of that business. In the case before them they were of opinion that the business which yielded profit was the business of selling goods on commission in London, and that the earlier arrangements entered into in New Zealand were merely transactions the object and effect of which was to bring goods from New Zealand within the net of the business which was to yield a profit.

Looking at the facts of the present case in the light of these decisions, I think there is no ground for holding that the Clan Line exercises a trade at Cocanada. It is a shipping company which earns profits by the carriage of goods by sea, and in the course of its business trades, in Lord HERSCHELL's language, with, but not necessarily within, port towns in various parts of the world. It has not been contended before us that a ship-owner exercises his trade at all the ports at which his steamers habitually call to discharge or load cargo, which latter operation may involve entering there and then into contracts with shippers. In the absence of other arrangements the ship-owner is represented by ship's master in all the business incidental to loading and unloading, and it is open to question whether the fact that this business is done by a resident agent himself carrying on a

(1) (1896) A.C., 325. (2) (1881) 8 Q.B.D., 414.
(3) (1860) 5 H. & N., 711.

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business there and not by the master makes any difference. It is unnecessary to pursue this question, because it is, I think, clear upon the authorities that, where, as in the present case, the freight-earning contracts with shippers which enable profits to be earned by sea carriage are not entered into at the port in question by the ship's master or the local agent of the ship-owner, but elsewhere, the ship-owner cannot be held to exercise his trade at the port, merely because he employs a shipping agent there to attend to other matters, such as issuing shipping orders and signing bills of lading pursuant to contracts already made and receiving payment of advance freight.

It was, however, argued that such contracts were made in Cocanada in some instances, because Messrs. Ripley & Co. delivered to shippers there letters of engagement sent by Gordon, Woodroffe & Co. from Madras. I agree with COUTTS TROTTER, J., that this is not shown to have happened, and that, even if it did happen in a few instances, what we have to see is where in substance the business of making contracts was carried on and controlled, and that this was not at Cocanada. The Appeal fails and must be dismissed with costs.

NAPIER, J.

NAPIER, J.—I entirely agree with the judgment just delivered by the learned Chief Justice, but as the case is one of great importance I would like to add a few words with regard to the contentions of the appellant. We were asked to examine a certain number of old cases in which the carrying on of business has been found, to ascertain what facts were there proved and if we found some of those facts to exist in this case to hold that carrying on business is established. I agree with the learned Chief Justice that it is not open to us to do so in a case of this class. It may be that some of the learned Judges in *Tiechler, etc.*, v. *Anthorpe*(1), *Pommery* v. *Apthoro*(2), *Erichsen* v. *Last*(3), *and Werle & Co.* v. *Colquhoun*(4) have used language indicating their application of tests other than those applied in *Grainger & Son* v. *Gough*(5); but the House of Lords in this last case have distinctly ignored those tests and treated those cases as decisions turning on the question where was the contract made. In two of those cases BRETT, L.J., has used this as the test, and, as pointed

(1) (1885) 52 L.T. (N.S.), 814. (2) (1886) 56 L.J. (Q.B.), 155.
(3) (1881) 8 Q.B.D., 414. (4) (1888) 20 Q.B.D., 753.
(5) (1896) A.C., 325.

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out by the learned Chief Justice, both Lord HERSCHELL and Lord WATSON in the House of Lords case accept this test and the Privy Council in *Lovell and Christmas Limited* v. *Commissioner of Taxes*(1) have followed this case. Whatever therefore may have been the view of JESSEL, M.R., or FRY, L.J., in two of those earlier cases we must accept this proposition as established by the House of Lords and the Privy Council, that in this class of cases, if the contract out of which the profit arises is not made in the place where the tax is sought to be imposed, the liability does not arise. I do not mean that if any contract is shown to have been made in the course of a business from which profits are eventually earned, that it is sufficient to impose the liability, for the decisions in *Sully* v. *Attorney-General*(2) by the Exchequer Chamber and in *Lovell and Christmas, Limited* v. *Commissioner of Taxes*(1) show that this test cannot be broadly applied. I may add too that in a case of production or manufacture in the country by a person sought to be assessed the question where the contracts for sale of the proceeds are made may be immaterial. But in this class after the above rulings I do not think it is open to us to consider any other aspect and I therefore agree with COUTTS TROTTER, J., that the plaintiffs are entitled to recover the amount paid.

Messrs. King & Partridge, Solicitors for respondent.

K.R.

(1) (1908) A.C., 46 (P.C.).

(2) (1860) 5 H. & N., 711.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Krishnan.

1918, October, 24, and November, 8, 15 and 27.

VENKATASAMI NAIK AND ANOTHER (DEFENDANTS NOS. 1 AND 3), APPELLANTS,

v.

SIVANU MUDALI AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), ss. 37, 38 and 39—Court which passed the decree, meaning of—Mortgage decree passed by one Court—Territorial jurisdiction in another Court—Transfer of territorial jurisdiction to a third Court—No transfer of decree for execution to the last Court—Application for execution to such Court, whether competent—Power of District Court on appeal to transfer decree for execution, when properly exercisable.

A mortgage suit instituted in the District Munsif's Court of Srivilliputtur was transferred for trial to the Additional District Munsif's Court of Tinnevelly which had no territorial jurisdiction in respect of the hypotheca in the suit, and a decree for sale was passed by the latter Court; subsequently a part of the territorial jurisdiction of the Court of Srivilliputtur including that in respect of the hypotheca was transferred to the District Munsif's Court of Kovilpatti. The decree-holder applied to the Court of Kovilpatti for execution of the decree by sale of the property. On objection being taken to the jurisdiction of the Court of Kovilpatti to execute the decree:

Held, that the District Munsif's Court of Kovilpatti had no jurisdiction to execute the decree, as it was not a Court which passed the decree under the terms of section 37 of the Civil Procedure Code, and the decree was not sent for execution by the Court of Tinnevelly to the former Court under sections 38 and 39 of the Code.

Held further, that the District Judge, by his order on appeal allowing the execution petition, ought not to have made it to operate as a transfer of the decree to the Court of Kovilpatti, as no transfer should be made so as to evade the provisions of the Limitation Act or to validate an invalid application.

APPEAL against the order of A. EDGINGTON, the District Judge of Tinnevelly, in Appeal No. 86 of 1917, preferred against the Order of S. RAJAGOPALA AYYANGAR, the District Munsif of Kovilpatti, in Execution Petition No. 190 of 1916, in Original Suit No. 280 of 1906 on the file of the Court of the Additional District Munsif of Tinnevelly.

The plaintiff obtained a mortgage decree in Original Suit No. 280 of 1906 on the file of the Additional District Munsif's

* Civil Miscellaneous Appeal No. 174 of 1918.

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Court of Tinnevelly. The suit was originally instituted in the District Munsif's Court of Srivilliputtur and was transferred to the former Court for trial and disposal and the decree was passed by that Court on 14th September 1907. The mortgaged property was then within the jurisdiction of the District Munsif's Court of Srivilliputtur. Then in the re-distribution of local jurisdiction, the Court of the District Munsif of Kovilpatti obtained jurisdiction over the hypotheca in 1910. The decree-holder filed an application for execution in the Kovilpatti Court on the 23rd December 1910. It was dismissed as batta was not paid; he then presented another petition in the same Court in December 1913, which was returned to, and not re-presented by, the decree-holder. The latter thereupon filed the present petition for execution in the same Court on the 6th April 1916. The judgment-debtors contended that the Kovilpatti Court had no jurisdiction to execute the decree, on the ground that it was not the Court which passed the decree even within the extended definition contained in section 37 of the Civil Procedure Code, as the Additional Munsif's Court of Tinnevelly was still in existence and had not lost jurisdiction to execute the decree, and there was no transfer of the decree by that Court to the Kovilpatti Court for execution as required by section 38 of the Code. The judgment-debtors further contended that the execution petition was barred by limitation. The District Munsif of Kovilpatti rejected the application for execution, holding that his Court had no jurisdiction to entertain it; on appeal the learned District Judge held that the Kovilpatti Court had acquired territorial jurisdiction in the case and could entertain the application for execution of the decree; that even otherwise the District Munsif of Kovilpatti ought not to have dismissed the petition but should have referred the petitioner to the Additional Munsif's Court of Tinnevelly. He therefore allowed the appeal and directed the District Munsif of Kovilpatti to deal with the petition for execution, and observed that 'this direction will operate as a transfer to his file even assuming that he has no jurisdiction.' Against this order, the judgment-debtors preferred this Civil Miscellaneous Second Appeal.

L. A. Govindaraghava Ayyar for appellants.—The Kovilpatti Court had no jurisdiction to execute this decree; nor

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had the Srivilliputtur Court from whose file the original suit had been transferred to the Additional District Munsif's Court of Tinnevelly. The latter Court has not ceased to exist, nor has its business been transferred to the Kovilpatti Court. The Kovilpatti Court will have no jurisdiction to execute the decree unless the conditions laid down in section 37 or 38 of the Civil Procedure Code are satisfied. They are not satisfied in this case. The Additional Munsif's Court of Tinnevelly, which, as a fact, passed the decree, has not ceased to exist, nor has it 'ceased to have jurisdiction to execute it'; and unless the decree was transferred to the Kovilpatti Court by the former Court the latter cannot acquire jurisdiction under section 38 of the Code. The Tinnevelly Court neither ceased to exist nor *ceased* to have jurisdiction because it had at no time territorial jurisdiction to execute the decree by sale of hypotheca, i.e., it had no jurisdiction which was taken away from it, and whatever jurisdiction it had when it passed the decree it still continued to possess at the time of the present application. Reference was made to *Venkatachellam* v. *Sithayamma*(1), *Subbiah Naicker* v. *Ramanathan Chettiar*(2), and *Panduranga Mudaliar* v. *Vythilinga Reddi*(3). An application to a Court without jurisdiction is not in accordance with law: see *Maharaja of Bobbili* v. *Narasaraju Bahadur* (4), *Maharaja of Bobbili* v. *Sree Raja Narasaraju Peda Baliar Simhulu Bahadur*(5), and *Penugonda Rattam* v. *Korasika Thatha*(6).

M. D. Devadoss for the respondents.—When a case is transferred to another Court for disposal, the latter is only a longer arm of the original Court. The Additional Munsif is an Additional Judge of each of the Munsif's Courts in the district from whose file cases are sent to him for disposal. He is not an independent Court. Hence the original transferring Court of Srivilliputtur still retained jurisdiction to execute and its business was transferred to the Kovilpatti Court. No re-transfer to the original Court is necessary. The expression 'ceased to have jurisdiction' in section 37 of the Code is wide enough to include cases where a Court never

(1) (1916) 31 M.L.J., 22.
(2) (1914) I.L.R., 37 Mad., 462.
(3) (1907) I.L.R., 30 Mad., 537.
(4) (1916) I.L.R., 39 Mad., 640 (P.C.).
(5) (1914) I.L.R., 37 Mad., 231.
(6) (1916) 31 M.L.J., 90.

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had jurisdiction. Further, the Additional Munsif's Court cannot transfer unless it can entertain an application for execution under the Code and the Civil Rules of Practice. Reference was made to *Perm Chand Dey* v. *Mukhoda Debi*(1).

The judgment of the Court was delivered by

AYLING, J.

AYLING, J.—This appeal turns solely on the question of whether the District Munsif of Kovilpatti had jurisdiction to entertain a petition (Execution Petition No. 190 of 1916) presented to him for execution of a mortgage decree passed by the Additional District Munsif of Tinnevelly in Original Suit No. 280 of 1906 on his file. Territorial jurisdiction over the hypotheca sought to be brought to sale in execution of the mortgage decree admittedly lay with the Kovilpatti Court while the Tinnevelly Court had no local jurisdiction at all, but was established simply to aid the other Courts of the district by disposing of suits transferred from their file. There had been a transfer of territorial jurisdiction to the Kovilpatti Court from that of Srivilliputtur in which the suit had originally been filed: but it is agreed that this circumstance makes no difference to the question for disposal and we may consider the latter as if territorial jurisdiction had always been with the Kovilpatti Court. No order had been passed transferring the decree under section 24 or 39 of the Civil Procedure Code; and the question is whether in these circumstances the Kovilpatti Court had jurisdiction to execute it under section 38 of the Civil Procedure Code as the Court which passed it.

In our opinion the answer must be in the negative. Section 37 of the Code of Civil Procedure gives an extended significance to the term 'Court which passed a decree' but contains nothing applicable to the present case. The Tinnevelly Court has certainly not ceased to exist; and it cannot be said to have ceased to have jurisdiction to execute its own decree. Whatever jurisdiction as regards execution it possessed at the time of passing the decree, it still possesses. In fact this portion of section 37 of the Civil Procedure Code clearly has reference to transfers of territorial jurisdiction from one Court to another.

We must therefore hold that the Kovilpatti Court had no jurisdiction to execute the decree unless and until the decree-

(1) (1890) I.L.R., 17 Calc., 699 (F.B.).

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holder got the decree transferred to it for execution. The order of the Kovilpatti District Munsif rejecting the execution petition was therefore right.

In the concluding portion of his judgment the District Judge directs that his order allowing execution should operate as a transfer of the decree to the Kovilpatti Court's file: but in so doing he appears to have overlooked the fact that at the date of his order an application for execution would apparently have been time-barred unless petitioner could claim the benefit of section 14 of the Indian Limitation Act—a point which has not been considered. No transfer order should be made so as to evade the provisions of the Limitation Act or to validate an invalid application.

The District Judge's order must be set aside and that of the District Munsif restored with costs to the appellant throughout.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

VENKATACHALAPATHY AYYAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

1918, November, 19, 20 and 27.

v.

THAVASI SERVAI AND TWO OTHERS (DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 2 and 4, and appendix D, forms 4, 7, 8 and 9—Mortgage suit—Decree for sale—Default of payment—Subsequent interest after date fixed in decree—Right of mortgagee—Subsequent interest, whether payable on aggregate sum of principal, interest and costs—Rate of interest—Discretion of Court—Mortgage bond—Stipulation for enhanced interest after default at twelve per cent, whether penal.

In a decree for sale on a mortgage, the decree-holder is, on default of payment by the mortgagor on the date fixed in the decree, entitled to subsequent interest on the aggregate amount of principal, interest and costs declared or found to be payable on that date; and such further interest should ordinarily be at the rate of six per cent per annum, but the Court has a discretion in the matter.

* Appeal No. 409 of 1917.

VENKATA-CHALAPATHY AYYAR v. THAVASI SERVAI.

Sunder Koer v. Rai Sham Krishen, (1907) I.L.R., 34 Calc., 150 (P.C.), and *Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar*, (1898) I.L.R., 21 Mad., 364, referred to.

Where in a mortgage-bond there was a stipulation to pay enhanced interest at twelve per cent on principal and interest in default of payment of the principal with interest at nine per cent on a day fixed therein, and where it appeared that the debts to discharge which the mortgage was executed carried interest at twelve per cent and more:

Held, that the stipulation for such enhanced interest was not penal and could be enforced.

APPEAL against the decree of V. DHANDAPANI PILLAI, the Subordinate Judge of Madura, in Original Suit No. 11 of 1917.

The plaintiff sued on a mortgage-bond, dated 24th March 1910, executed by the first defendant to recover the amount due thereon and obtained a preliminary decree for sale. The mortgage bond provided for payment of the principal amount together with interest thereon at nine per cent per annum within a year from the date of the bond, and further provided as follows:

"In default to pay in the stipulated time as mentioned herein you shall add the interest accrued up to the date of default to the principal and you shall charge for the total amount interest at one rupee per cent per mensem and realize the principal and interest whenever you require, etc."

The Subordinate Judge, who tried the suit, passed a preliminary decree for sale, directing payment of the decree amount within six months from the date of the decree and declaring that the mortgagors should pay the principal amount of the bond, the interest due thereon at 9 per cent on the principal for one year and further interest at 10½ per cent from the end of the first year of the bond till the date fixed in the decree for payment on the principal amount and on the interest for the first year of the bond, and also awarding costs and subsequent interest at 6 per cent on principal and costs only but not on interest which had accrued due from the date of default till date fixed in the decree for payment and which had been included in the aggregate sum directed to be paid on the date fixed in the decree. The lower Court also reduced the rate of interest after date of default in the bond from 12 per cent to 10½ per cent per annum. The mortgagees preferred an appeal to the High Court claiming, *inter alia*, that they are entitled to subsequent interest

on the full aggregate amount of principal, *interest* and costs which was declared to be payable by the decree on the date fixed for payment, and also that they were entitled to the full rate of interest at 12 per cent per annum on the principal and interest after the time fixed in the bond and not at the reduced rate of 10½ per cent. The defendants pleaded that the mortgagees were not entitled to subsequent interest on any but the principal amount, and also that the enhanced rate of interest at 12 per cent was penal and unenforceable.

K. S. Jayarama Ayyar for appellants.

M. O. Parthasarathi Ayyangar and *M. O. Thirumala Achariyar* for respondents.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—I do not think the Subordinate Judge was right in treating the provision for payment of interest at 12 per cent, in default of payment on the date fixed in the mortgage bond, as penal. The original rate fixed no doubt is 9 per cent. But it is to be borne in mind that the debts to discharge which this mortgage was executed carried interest at 12 per cent and more. It could not therefore be said that the mortgagees were not justified in stipulating for payment of a higher rate if the money was not paid as promised.

The second question raised by the appeal is one of some importance. It is whether in a mortgage decree for sale interest should be computed on the aggregate amount found to be payable on the date fixed for redemption, that is, consisting of principal, interest and costs, or only on the principal if the ascertained amount is not paid and property has to be sold in consequence. The matter is now governed by Order XXXIV, rule 4, Civil Procedure Code, which, read along with rule 2, provides that in case of default the sale proceeds of the property sold shall be applied in payment of what is declared due to the plaintiff for principal and interest on the mortgage and for costs of the suit until the date fixed for payment together with subsequent interest and subsequent costs. This *primâ facie* suggests that the subsequent interest is payable on the aggregate amount and not on the principal alone. The form appended to this rule, form No. 4 of appendix D to the first schedule of the Code, clearly proceeds upon this above interpretation. But in forms Nos. 7, 8 and 9, which are forms of decrees for sale in cases where there are more than one mortgage on the property,

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provision is made for payment of such subsequent interest and costs as may be allowed by the Court. These forms certainly suggest that the rate of such subsequent interest is left to the discretion of the Court, and probably also that the Court may in a proper case refuse to allow any further interest.

Before the present Civil Procedure Code, the subject was dealt with in the Transfer of Property Act, and the question arose as to whether the Court had the power to allow interest at all for any period subsequent to the date fixed for payment, and as to the proper rate. The Privy Council held in *Sunder Koer* v. *Rai Sham Krishen*(1) that the Calcutta practice of allowing such interest at the Court rate, also adopted in this Court in *Subbaraya Ravuthaminda Nainar* v. *Ponnusami Nadar*(2), was right, contrary to the view of the Allahabad High Court in *Amolak Ram* v. *Lachmi Narain*(3). Their Lordships at page 161 also observed:

"They think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree. It will be observed that according to the practice explained by the Registrar (that is, of the Calcutta High Court), which has been followed in this case, the interest is allowed on the aggregate sum, and not merely on the principal money, and this is right, if the mortgagee is treated as a decree-holder or judgment-creditor, but would be wrong if the right to the interest depended on the terms of the mortgage bond."

No doubt this reasoning was intended to prove that the contract rate was not to be given, but it contains all the same a clear dictum that the practice in Calcutta of allowing interest on the aggregate sum was right.

I have tried to ascertain the practice in the Courts of this Presidency with reference to this matter. It would seem that in the mufassal Courts the practice cannot be said to be consistent

(1) (1907) I.L.R., 34 Calc., 150 (P.C.). (2) (1898) I.L.R., 21 Mad., 364.
(3) (1897) I.L.R., 19 All., 174.

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or uniform. When the High Court in its appellate jurisdiction passes a mortgage decree for sale, the practice seems to be to allow interest at the Court rate of 6 per cent on the aggregate amount. On the original side, the practice is to provide in the final order for sale for such subsequent interest and costs as may be allowed by the Court, and I understand that an application for the determination of such interest is generally made at the time of confirmation of the sale. The conclusion that I am led to is that, in default of redemption by payment on the date fixed, subsequent interest is to be calculated both on the principal and interest declared or found to be payable on that date, and such further interest is ordinarily to be calculated at 6 per cent, but the Court has a discretion in the matter.

The English law was also discussed at the bar, and, so far as I can gather, the practice of the English Courts in a foreclosure action is to compute subsequent interest on the aggregate amount, but in other actions such as by way of administration subsequent interest is allowed only on the principal amount apparently out of consideration for other creditors of the mortgagor. This is what is to be deduced from *Harris* v. *Harris*(1), *Whatton* v. *Craddok*(2), *Brewin* v. *Austin*(3), and *Elton* v. *Curteis*(4). But in my opinion a question like this has to be determined with reference to the provisions of the Civil Procedure Code and the practice of the Courts in this Presidency, if there is a uniform and well established practice.

There seems to be no special reasons in this case why interest should not have been allowed on the amount found to be due on the date fixed and I think that such interest should be allowed at the rate of 6 per cent.

The decree of the Subordinate Judge will therefore be modified by allowing interest from the date of default at 12 per cent instead of 14 annas per mensem decreed by the Subordinate Judge, and also by calculating interest at the rate of 6 per cent, on the aggregate amount, that is, principal and interest calculated as indicated above and on costs, and not merely on the amount of principal as decreed by the Subordinate Judge, from

(1) (1750) 3 Atk., 721.
(2) (1836) 1 Ke., 267; s.c., (1836) 48 E.R., 409.
(3) (1838) 2 Ke., 211. (4) (1881) 19 Ch.D., 49.

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the date fixed for payment, that is 28th February 1918, until realization. The respondents will pay the appellants the costs of this appeal.

OLDFIELD, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

1918, November, 20 and 27.

ARUNACHALAM CHETTIAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

NARAYANAN CHETTIAR AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

*Paper Currency Act, Indian (II of 1910), sec. 26 (proviso)—Hundi payable to bearer, validity of—*Bona fide *customer drawing hundi on a bank without money to his credit, effect of.*

Where a hundi though drawn in favour of a specified person is made payable to bearer, it is void as being obnoxious to section 26 of the Indian Paper Currency Act (II of 1910) unless the hundi comes within the proviso to the section.

The object of the proviso being to enable *bona fide* customers to operate on actual or intended deposits, the fact that the drawer of the hundi had actually no money in the bank does not take the hundi out of the proviso if as a fact he intended to deposit money before presentment.

SECOND APPEAL against the decree of L. G. MOORE, the District Judge of Madura, in Appeal No. 404 of 1916, preferred against the decree of R. GOPALA RAO, the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 16 of 1915.

The facts are stated in the judgment of SESHAGIRI AYYAR, J. Plaintiffs preferred this Second Appeal.

C. S. Venkata Achariyar for appellants.

M. Patanjali Sastri (with *A. Krishnaswami Ayyar*) for respondents.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—This is a suit by an endorsee of a hundi. On the 9th of April 1914 the first defendant drew the

* Second Appeal No. 1849 of 1917.

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hundi (exhibit A) on a Rangoon firm. At the top of the hundi, the third defendant is described as the creditor and the first defendant as the debtor. The exact rendering of the hundi omitting unnecessary portions is: 'The money with Rangoon current rate of interest should be paid on demand to the person who brings this by the Rangoon firm.' This was signed by the first defendant. Subsequently the third defendant put his signature by way of endorsement. Plaintiffs lent to the first defendant on the strength of the endorsement. Hence the suit. The defence was that the debt was discharged, and that as the hundi offended against the provisions of the Paper Currency Act the suit is not maintainable. The Courts below held that the hundi was not discharged. They came to the conclusion, relying upon *Chidambaram Chettiar* v. *Ayyasami Thevan*(1), that the suit should be dismissed.

Mr. Venkata Achariyar in the Second Appeal tried to distinguish *Chidambaram Chettiar* v. *Ayyasami Thevan*(1) from the present case on the ground that the hundi must be regarded as not being made payable to the payee or bearer. I am unable to agree with him. The fact that the name of the payee is entered at the top of the hundi does not matter. In effect the hundi is drawn in favour of the third defendant and is made payable to bearer. I think that even without the endorsement of the third defendant the hundi could have been presented for payment. Consequently it is obnoxious to section 26 of the Paper Currency Act.

This case, however, is distinguishable from *Chidambaram Chettiar* v. *Ayyasami Thevan*(1) on another ground. In the first place, I think that the document in question is covered by the proviso to that section. Under it, a draft can be made payable

"to bearer on demand in respect of deposits of money in the hands of bankers and held at the credit and disposal of persons drawing such drafts."

Mr. Patanjali Sastri contended that in the present instance the hundi should not be regarded as being drawn against a deposit of money because on the date of the hundi there was no money in the Rangoon firm due to the first defendant. If we turn to the admissions of the first defendant contained in his

(1) (1917) I.L.R., 40 Mad., 585.

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deposition, it is clear that this contention must be overruled. He says:

'When the hundi was drawn on it I had no money in that firm, but I had written to Saigon where I had money to send it on to the said Rangoon firm, and so I drew the hundi on it.'

* * * *

"My account with that firm as regards that money is not yet closed. No money is due to me from that firm. The money I wanted to be sent to the Rangoon firm from Saigon was not sent. After the suit hundi my money has gone to that firm and I have drawn it."

Notwithstanding the evident intention of the first defendant to tell as many lies as would save him from liability, the net import of this evidence is that he drew the hundi on money which he directed to be sent to the Rangoon firm and that after drawing the hundi and before presentation for payment at Rangoon he drew that money out. It is clear from this statement that the case comes within the proviso, because the draft was drawn in respect of an intended deposit of money which was expected to be held by the bankers at the credit and disposal of the first defendant. The money that apparently reached Rangoon firm would, but for the dishonest conduct of the first defendant, have been available to the plaintiffs. To hold otherwise would be to decide that when a customer draws a cheque or hundi on a bank to which he had directed a payment to be made which would cover the draft is guilty of an offence. The object of the proviso is to enable *bona fide* customers to operate on actual or intended deposits. There is nothing against public policy in so doing and I am of opinion that the hundi was validly drawn on the bank. The subsequent misconduct of the first defendant in drawing out the money would not invalidate it.

There is another possible ground. It was not disputed that the plaintiff was a holder in due course. He had paid consideration for the hundi before it had become payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. *Primâ facie* therefore the third defendant is estopped from saying that the hundi which he endorsed is not a valid document. Under the English Bills of Exchange Act the position of the plaintiffs would have been unassailable. Section 55, clause (2) (c), runs thus:

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SESHAGIRI AYYAR, J.

"The endorser of a bill by endorsing it is precluded from denying to his immediate or subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill and that he had then a good title thereto."

This rule is an illustration of the principle of estoppel contended in section 115 of the Indian Evidence Act. The Indian enactment, though passed a year previous to the passing of the English Bill of Exchange Act, was apparently modelled on its provisions. In the chapter headed 'Special Rules of Evidence,' sections 120 and 122 refer respectively to estoppel against makers and endorsers. Section 120 says that

"the maker or drawer of a bill of exchange shall not be permitted in a suit thereon by a holder in due course to deny the validity of the instrument as originally made or drawn."

As regards the endorser, section 122 says:

"No endorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument."

There are two noticeable differences between the two sections. One is that under the latter section the liability is incurred not only to the holder in due course but to any holder. In the second place, the estoppel is only against denying the signature or capacity of the third party, and not against the validity of the instrument as originally made or drawn. There is no reason why there should be this distinction between the position of a drawer of a bill of exchange or the maker of a promissory note and the endorser. The English law does not recognize such a distinction and I am inclined to think that it is a case of inadvertent omission rather than of deliberate departure from the English rule. If we turn to section 36 of the Act we find that every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied. Section 38 says:

"Each prior party is, in the absence of a contract to the contrary, liable thereon as a principal debtor in respect of each subsequent party."

The illustration to the section shows that the drawer will be the principal debtor and the endorser will be the surety. Ordinarily an estoppel which would apply against the principal party would also be available against the surety unless there are

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circumstances such as those mentioned in section 40, etc. Byles in his book on Bills of Exchange (16th edition) says at page 180:

"The endorser makes a similar contract, and promises in the same way to compensate the holder or any subsequent endorser; he is estopped from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature of all previous endorsements; is estopped from denying to his immediate and any subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill and that he had a good title thereto."

I fail to see why this salutary principle of estoppel should not be applied in India. However, having regard to the language of section 122, I shall not base my decision on the rule of estoppel enunciated in section 55 (2) (c) of the English Act. The legislature should make this point clear. As I have held that the hundi is covered by the proviso to section 26 of the Paper Currency act, this appeal should be allowed and the decrees of the Courts below reversed. Plaintiff is entitled to a decree as prayed for and to costs in all the Courts.

PHILLIPS, J.

PHILLIPS, J.—I agree that the suit document comes within the proviso to section 26 of the Paper Currency Act. The finding that the first defendant had no money with his bankers at the time he signed the hundi is not by itself sufficient to show that he was not operating on money deposited by him with his bankers. In fact he admits that he was so operating and had given instructions for a remittance to be made to his bankers to meet the suit hundi. The Subordinate Judge's conclusion from the mere fact that no money was actually in the bankers' hands when the hundi was signed is not warranted, for it would involve the proposition that a cheque drawn payable to bearer at a time when, as a matter of fact, the drawer had no balance at the bank is an offence against the Paper Currency Act although the drawer believed he had sufficient funds in the bank or intended to put the bank in funds before the cheque could be presented. The words of the proviso to section 26 'in respect of deposits of money in the hands of the bankers' do not seem to me to warrant such a broad proposition. I therefore agree in the order proposed, and think it unnecessary to discuss the further question of estoppel.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling, Mr. Justice Coutts Trotter, Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastri.

1918, August, 19 20 and 28 October, 28, 29, December,

PERIAKARUPPA MUKKANDAN AND OTHERS (DEFENDANTS), APPELLANTS,

v.

RAJA RAJESWARA SETHUPATHI (PLAINTIFF), RESPONDENT.*

Landlord and tenant—Letting for cultivation of dry land at fixed rate—Improved cultivation thereafter effected solely at tenant's expense—Payment of higher rate of rent for a series of years—Presumption of consideration for and contract for payment of higher rate from such payment.

Where a tenant to whom dry lands were let for cultivation at a fixed rate and who cultivated them for a certain time, dug wells on the land at his own expense and thereafter raised garden crops for which he paid for a long number of years at rates higher than the dry rate:

Held by the Full Bench (AYLING and SESHAGIRI AYYAR, JJ., dissenting) that a Court can presume a contract to pay the higher rate and a legal origin and consideration therefor from such long continued payment of higher rate, if that be the only evidence in the case to prove the rate payable, but that if there be other evidence a Court cannot make any such presumption from such payment alone.

Per AYLING and SESHAGIRI AYYAR, JJ.—Where, as in this case, the reason and origin of the payment of higher rate are known to be due to the raising of better crops by the aid of tenants' wells to which the landlord contributed nothing, there is no consideration moving from the landlord and no scope for raising any presumption of a legal origin for the contract from the mere fact of a long course of payment of the higher rate.

SECOND APPEALS against the decrees of L. G. MOORE, the District Judge of Madura, in Appeals Nos. 272 to 298, 315 and 316 of 1916, preferred against the decrees of P. DURAISWAMI AYYANGAR, Special Deputy Collector of Rāmnād, in Summary Suits Nos. 1821, 1828, 1833 to 1836, 1841 to 1843, 1845, 1847, 1849, 1853, 1855, 1856, 1874, 1866, 1867, 1869, 1870, and 1824 to 1826 of 1915.

These are suits by the Raja of Rāmnād against certain ryots in one of his villages (Nochiurani) for arrears of rent for faslis 1321 to 1323 (1911 to 1913). The defendants contended, *inter alia,*

* Second Appeal Nos. 1449 to 1472 of 1917.

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(1) that no rent was to be charged for lands left waste, (2) that the lands were originally let to the tenants only as dry lands for cultivation at certain rates, (3) that they constructed wells on the lands at their own expense in various years after the year 1828 and thereby raised garden crops for which they were paying higher rates (called garden rates) than the original dry rates, but that they were not bound to pay the same as now demanded by the landlord as there was no consideration for the same moving from the landlord and (4) that they were therefore bound to pay only the lower rate. Two issues were raised: (1) whether any rent was payable for lands left waste and (2) whether garden rates were payable for dry lands cultivated with water of the ryots' own wells. The first Court allowed the suits as prayed for. On appeal by the defendants, the lower Appellate Court held on the first issue that, though from time immemorial only cultivated lands were charged and no rent was being paid in respect of waste lands and though such lands were only occasionally cultivated, they were chargeable with rent for use and occupation as the tenants were growing trees thereon and were felling them for their profit. On the second issue the lower Appellate Court found that the lands were originally let to the tenants only as dry lands at fixed rates but that the tenants later on dug wells on the lands at their own expense and paid garden (higher) rates for garden crops raised thereon for the last forty years and that such higher rate was therefore payable. Hence the lower Appellate Court confirmed the decrees in favour of the plaintiff. The defendants preferred these Second Appeals.

K. S. Ramabhadra Ayyar for appellants.

R. Krishnama Achariyar for respondent.

These Second Appeals came on for hearing in the first instance before AYLING and KRISHNAN, JJ., who made the following

ORDERS OF REFERENCE TO A FULL BENCH:

AYLING, J.

AYLING, J.—These Second Appeals arise out of suits for rent for faslis 1321—1323 brought by the Raja of Rāmnād against certain ryots of Nochiurani village, and the two points for our determination relate to the liability of the tenants to pay (1) rent on dry waste, (2) garden rates (kuli teerva) on vanpayir crops raised with the aid of their own wells.

As regards the first, the District Judge finds that 'from time immemorial only cultivated lands were charged and no rent

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was payable in respect of waste lands. The landlord has consequently a right to claim rent only in respect of cultivated lands by virtue of section 4 of the Act read with sections 27 and 28—vide *Arunachalam Chettiar* v. *Mangalam*(1), a case which relates to the Rāmnād Zamindari.' He proceeds however to state that although the lands were only occasionally cultivated, they contained a large number of trees which are a source of profit to the ryots, and concludes that there is nothing unreasonable in the defendants being required to pay rent for use and occupation of the land. He therefore decided the points in favour of the landlord.

In my opinion this reasoning is admissible. The custom of the estate has been found and whatever may be thought of its reasonableness, if the terms of tenancy had to be fixed for the first time, it is certainly not one which the law would refuse to recognize. It has, in fact, been recognized and enforced in this very estate in the case above referred to and must be followed now, unless the landlord can show an enforceable contract to the contrary. The law on the subject is clearly expounded in the case in question which I have no hesitation in following.

The vakil for respondent has argued that the decree of the lower Courts can nevertheless be supported on the basis of a contract to pay contained in the muchilikas (exhibits B and E series). This is one basis of the Deputy Collector's finding though it is not relied on by the District Judge. It is a fact that for the suit faslis most of the defendants executed muchilikas undertaking to pay the rents now claimed on their holdings 'inclusive of tarisu.' Whether this condition, inserted for the first time, was understood by the ryots may be doubted; but in any case the agreement to pay can only be enforced against them if it was supported by consideration. No consideration is found or appears on the evidence; and the only consideration that the respondent's vakil can suggest is that plaintiff newly admitted defendants to tenancy of the lands regarding which the dispute arises. But no such suggestion has ever been made in the lower Courts; and it is perfectly clear from the judgments of both Courts as well as the pleadings that the suits have been tried on the understanding that the defendants have held the

(1) (1916) 31 M.L.J., 168.

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disputed waste lands in previous faslis, although rent was only levied on them when they were actually cultivated with crops. This suggestion of possible consideration (it is no more) cannot therefore be seriously entertained. It follows that the contract to pay contained in the muchilikas is unenforceable. In my opinion the suits, as far as they relate to the charge for dry waste, must therefore be dismissed.

I now pass to the second point. The suits have been tried on the footing that the vanpayir crops were raised with the water of the ryots' own wells (*vide* issue 2), and we must take this to be the case. It is further admitted that garden rates have always been paid on the lands so cultivated except during the period of twelve years from 1878 to 1890, during which the zamindari was under the Court of Wards. During this period the lower dry rate (kurukkam teerva) only was collected, but when the estate was handed over to the Raja the previous practice was reverted to and remained in force till the suit faslis. Appellants' vakil argues, relying on *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*(1), and the cases which follow it, that this long continued course of payment is of no avail to plaintiff's case; that a *custom* to pay enhanced rent in consequence of the tenant's own improvements is unenforceable, and that a *contract* to do so is only enforceable on proof of consideration, which cannot be inferred merely from the long continuance of payment. That the claim of the landlord cannot be based on *custom* is not disputed before us; but it is argued by respondents' vakil that it has been held in more recent cases that a long continued payment of higher rent may be legitimate basis for the inference that there was consideration for the tenant's agreement to pay, and that in this case there is actual evidence of consideration. As regards the first point there seems to me to be an irreconcilable difference between the view in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*(1), *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa*(2) and *Arunachalam Chetti* v. *Syed Ahamed Ambalam*(3), on the one hand, and *Sri Mahant Prayaga Doss Jee* v. *Venkata Naidu*(4) and a recent unreported case, *Rama chandra*

(1) (1905) I.L.R., 28 Mad., 444.
(2) (1912) I.L.R., 35 Mad., 134.
(3) (1915) 2 L.W., 1117.
(4) (1918) 7 L.W., 4[illegible]7.

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Thevan v. *Velayutha Nadan*(1) on the other. I think our proper course is to refer the question to a Full Bench, provided that its decision is essential to the determination of the case.

This brings us to the question of the other evidence. The only evidence to which we are referred by respondent is the statement of P.W. 1: 'Originally all the lands, wet and dry, were on a varam basis; afterwards dry lands cultivated with ragi, varagu, etc., were charged 5¼ fanams per kurukkam and crop-war rates were charged for dry vanpayir crops.' We are asked to interpret this as meaning that the consideration for the tenants paying the garden rates (5¼ fanams a kurukkam) was the landlord's abandonment of his right to insist on, or revert to, the varam system. I cannot read anything of the kind into it; and neither of the lower Courts appears to have taken it as raising such a plea. Both have based their decision solely on the long course of payment; and I think we are justified in proceeding on the footing that the only evidence of consideration is that deducible from the long course of payment.

It is suggested on the other side that the interruptions from 1878 to 1890 stand in the way of the desired inference being drawn. I do not think this contention can be admitted. If it is open to a Court to draw the inference of consideration from a long course of payment, it will be for that Court to consider the weight to be attached to an interruption. In the present instance I should be inclined to attach very little. The Court of Wards was probably desirous of bringing the practice into conformity with the system prevailing in ryotwari tracts, where Government on grounds of public policy as well as equity was careful to encourage all ryots to improve their lands by the certainty of reaping the full benefit of such improvement. The fact that as soon as the estate was handed back to the proprietor the old system was reverted to, apparently without opposition, would weigh more with me than the fact of interruption.

It seems to me therefore that the decision of this part of the case depends solely on the legitimacy of the inference drawn by the lower Courts from the long course of payments, and I would refer the following question for determination by a Full Bench:—

(1) S.A. Nos. 1639 to 1644 of 1916 (unreported).

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"Where it is sought to base liability to pay enhanced rent on an alleged contract to pay, can a Court infer consideration for such a contract solely from a long continued course of payment of the enhanced rent?"

KRISHNAN, J.—The first point that arises for consideration is whether the ryots are bound to pay rent on waste land left uncultivated in their holdings during the suit faslis. The District Judge has found that from time immemorial no rent has been charged in respect of waste lands in this zamindari till 1910; nevertheless he held that as the odai and palmyra trees on such lands were a source of profit to the ryots they should pay rent for them also. These lands are said to be of sandy soil cultivable only once in 5 or 10 years; and their non-cultivation during the suit faslis is not shown to be due to any neglect on the part of the ryots; admittedly till fasli 1320 no rent was charged for them when uncultivated even though the ryots were in the habit of enjoying the odai and other trees on them. The custom relied on by the ryots must be held to be not unreasonable so far as it is not applied to lands left uncultivated through the neglect of the tenants, on the authority of the ruling in *Arunachalam Chettiar* v. *Mangalam*(1), where the question was considered at some length. That being so, the attempt of the Raja now to compel the tenants to pay rent on them by getting muchilikas from them cannot be supported as it would virtually amount to an enhancement of the rent of the holding and offend against section 24 of the Estates Land Act; see *Segu Rowthen* v. *Alagappa Chetty*(2) per TYABJI, J. I therefore agree with my learned brother that the charge for dry waste must be disallowed.

The second point has reference to the charge of kuli teerva for vanpayir or garden crops cultivated with water from the tenants' own wells. The lower Courts have allowed this charge to the landlord on the basis of an implied contract which they have rightly inferred from a long continued course of payment extending at least to 40 years. It was argued that section 13, clause (3) of the Estates Land Act, rendered such contracts invalid after the passing of the Act. The question whether the

(1) (1910) 31 M.L.J., 168. (2) (1914) 26 M.L.J., 269.

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clause applies to contracts before the Act was considered and decided against the appellants' contention by two of the learned Judges in *Venkata Perumal Raja* v. *Ramudu*(1) and I am prepared to follow their view.

The only other point argued was that the Court could not imply a contract from long continued payment without independent proof of consideration for it as it was said that consideration could not be presumed from such payment however long it might have continued. The point is a small one, but as shown by my learned brother there is a definite difference of opinion on it in our Court. The proposition was supported in *Arunachalam Chetti* v. *Syed Ahamed Ambalam*(2), but that ruling was dissented from in *Sri Mahant Prayaga Doss Jee* v. *Venkata Naidu*(3), which was followed in *Ramachandra Thevan* v. *Velayutha Nadan*(4), to which ruling I was a party. The same view was taken in *Venkata Perumal Raja* v. *Ramudu*(1) by both the learned Judges who originally heard the case. The question also arose in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*(5), and *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa*(6). In the former the period was too short for any inference, being only 18 years. In the latter, the judgment says;

'Consideration may be of the same *implied* nature as the covenant to pay.'

As my learned brother proposes that the question should be settled by a reference to the Full Bench, I think I must consent to that course.

The question to my mind is not really one of implying consideration as distinguished from implying an agreement but of attributing a legal origin to a long continued course of payments. If we are justified in applying the doctrine of legal origin to the case, as I think we are, the result is a valid implied contract, and as all valid contracts must be supported by consideration there will be a presumption of consideration also. If there is evidence to rebut such inference it will not of course be drawn. But if there is not, I do not see any difficulty

(1) (1916) I.L.R., 39 Mad., 84.
(2) (1915) 2 L.W., 1117. (3) (1918) 7 L.W., 477.
(4) S.A. Nos. 1639 to 1644 of 1916 (unreported).
(5) (1905) I.L.R., 28 Mad., 444. (6) (1912) I.L.R., 35 Mad., 134.

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in implying consideration from the same long course of payments from which the agreement to pay is inferred without any independent evidence for it.

As however there is a difference of opinion on the point, it may be settled by the Full Bench.

ON THIS REFERENCE—

K. S. Ramabhadra Ayyar for appellants.—The question must be answered in the negative. I rely on the recent Privy Council case of *Raja Jagaveera Rama Venkateswara Ettappa* v. *Alawarasa Asari*(1), which shows that from mere long payment consideration cannot be inferred. Under the Rent Recovery Act, section 11, the tenant had the right to make improvements without the consent of the landlord. The consideration that was attempted to be proved in the present case in the course of the argument in the lower Courts, viz., of the landlord's right to revert to the varam system was not allowed by any of the lower Courts to be proved as the point was not specifically raised in the pleadings. There was no other consideration proved. Reference was made to *Parthasarathi Appa Rao* v. *Chevandra Venkata Narasayya*(2) on appeal from *Parthasarathi Appa Rao* v. *Chevandra China Sundara Ramayya*(3). The land was let only as dry land; it does not matter which crop the tenant raises with his water.

K. Srinivasa Ayyangar (with *R. Krishnama Achariyar*) for respondents.—The question must be answered in the affirmative. In the absence of any original written contract showing the amount or rate of rent, the rent has to be determined upon proof or presumption. If a certain payment has been made for a series of years, we can infer a legal origin for it and presume that that was the term of an original lost grant or patta. This appears clear from the recent Privy Council decision in *Raja Jagaveera Rama Venkateswara Ettappa* v. *Alwarasa Asari*(1). I do not say that there was an original contract to pay a certain rate and that there was a subsequent contract altering it. My case is that the original contract itself was a contract to pay

(1) (1918) M.W.N., 732; s.c., 36 M.L.J., 49 (P.C.); s.c., 45 I.A., 195.
(2) (1910) I.L.R., 33 Mad., 177, at p. 186 (P.C.).
(3) (1904) I.L.R., 27 Mad., 543.

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varying rent according to the crop raised irrespective of the fact at whose expense the improvement was effected. Reference was made to *Venkata Perumal Raja* v. *Ramudu*(1). The payment need not be by any particular tenant in the suit. The question is what is the rate of rent in the estate in certain contingencies. If no money rent was fixed but only a sharing system prevailed, the landlord's particular share must be paid even if the improvement was by the tenant. 'Enhanced rent' in the Order of Reference means 'larger rent than the dry rent' according to the nature of the crop raised by means of the improvement, not enhanced rate for the same kind of crop raised as before. A contract before the Rent Recovery Act to pay a higher rate even when the improvement had been made by the tenant has been held to be valid; see *Venkatagiri Raja* v. *Pichana*(2). From a long payment we can presume a legal origin for it—*Goodman* v. *Mayor of Saltash*(3)—and *Foley's Charity Trustees* v. *Dudley Corporation*(4). The existence of consideration also can be presumed from long payment—*Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*(5), *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa*(6), *Sri Mahant Prayaga Doss Jee* v. *Venkata Naidu*(7), *Lodd Govindoss* v. *Chennappa Naidu*(8), *Ramachandra Thevan* v. *Velayudha Nadan*(9), *Velayudha Reddi* v. *Bandy Papi Reddi*(10). As against this there is only the *obiter dictum* in *Davaru* v. *Raghunatha Rao*(11) and it is a case dealing with illegal cesses. It is for the lower Court to find or not as to whether there was an implied contract as contended for by me. The lower Court must be asked to submit a finding.

K. S. Ramabhadra Ayyar in reply.—Merely from long payment at a certain rate we cannot presume consideration or a contract to pay at that rate—*Gonn* v. *Free Fisheries of Whitstable*(12), *Krishna* v. *Venkataswami*(13), *Fischer* v. *Kamakshi*

(1) (1916) I.L.R., 39 Mad., 84, at pp. 85, 86.
(2) (1886) I.L.R., 9 Mad., 27, at p. 29.
(3) (1882) 7 A.C., 633, at pp. 639, 653.
(4) 1910) 1 K.B., 317, at p. 323.
(5) (1905) I.L.R., 28 Mad., 444, at p. 450
(6) (1912) I.L.R., 35 Mad., 134, at p. 136.
(7) (1918) 7 L.W., 477.
(8) (1915) 28 M.L.J., 136.
(9) S.A. Nos. 1639 to 1644 of 1916 (unreported).
(10) S.A. Nos. 2525 to 2545 of 1913 (unreported).
(11) (1913) M.W.N., 886, at pp. 890, 891 and 892.
(12) (1864-65) 11 H.L.C., 192.
(13) (1885) I.L.R., 8 Mad., 164.

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Pillai(1). Reference was made to *Suppa Pillai* v. *Nagayasam Thumbichi Naicker*(2), Fifth Report, Volume III, page 550, and *Venkatagopal* v. *Rangappa*(3) to show that tenant's improvements should not be charged. The finding in this case is that increased charge was made after well cultivation began in 1828; that means that the rate prior to that date was lower. Where, as in this case, the origin of increased payment is known, there is no room for the application of the presumption of a legal origin. There being no consideration moving from the landlord for the enhanced rate, there is no contract to pay at that rate—*Nagu Chetty* v. *Bhaskara Sethupathi*(4). There is no necessity for calling for a further finding. No contract and no consideration from mere long payment can be inferred when the improvement is by the tenant—*Raja Venkata Narasimha* v. *Venkayya*(5), *Kasidoss Subraya* v. *Narayana Reddi*(6), *Seetaram Raju Singaram Raju* v. *Raja Venkatagiri Appa Row*(7), *Arunachalam Chetti* v. *Syed Ahamed Ambalam*(8).

K. Srinivasa Ayyangar in reply explained *Nagu Chetty* v. *Bhaskara Sethupathi*(4) and other cases quoted by the appellant and quoted *Suppa Pillai* v. *Nagayasami Thumbichi Naicker*(2).

WALLIS, C.J.

WALLIS, C.J.—There has been some discussion as to the meaning of the words 'liability to pay enhanced rent on an alleged contract to pay' in the question referred to us. Whether or not these words are wide enough to cover not only a fresh contract enhancing the rent already payable under a binding contract, but also an increased demand under an original contract to pay rent at rates varying with the crops, a well known kind of tenancy recognized in section 29 of the Madras Estates Land Act, 1908, which may well have become payable under a contract to substitute money rents for the old sharing system of the country, the possibility of there having been a contract of either kind ought in my opinion to be taken into consideration in deciding whether or not to presume a contract supported by consideration. That an implied contract within the meaning of section 11 of the Rent Recovery Act,

(1) (1898) I.L.R., 21 Mad., 136.
(2) (1908) I.L.R., 31 Mad., 19.
(3) (1884) I.L.R., 7 Mad., 365 (F.B).
(4) (1911) 1 M.W.N., 6.
(5) (1914) 1 L.W., 576, at p. 592.
(6) (1915) M.W.N., 209.
(7) (1913) M.W.N., 645.
(8) (1915 2 L.W., 1117.

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1865, to pay rent at a certain rate may be inferred from payments for a long series of years was decided in *Venkatagopal* v. *Rangappa*(1), which is referred to with approval at the outset of Lord SUMNER's judgment in the recent case *Raja Jagaveera Rama Venkateswara Ettappa* v. *Alawarasa Asari*(2), and in the case of ryots admitted before the passing of the Madras Estates Land Act, 1908, such contracts remain in force in the absence of any provisions in the Act interfering with them.

In *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa*(3), at an earlier stage of the case last mentioned, SUBRAHMANYA AYYAR, J., after pointing out that to presume a contract you must presume consideration as well as agreement, a ruling which is now confirmed by their Lordships' judgment, went on to observe:

"If in cases like the present, payments at the higher rate had continued to be made for a great many years so as to make it unfair to the land-holder, on account of such lapse of time, to be compelled to prove the existence of some consideration when the payment commenced, it may be a question whether the Courts should not presume a lawful origin for the payment, on the analogy of the lost grant principle availed of to support long possession and enjoyment."

In *Venkata Perumal Raja* v. *Ramudu*(4), the learned Judges cited this sentence and answered the question in the affirmative, in my opinion rightly, and the District Judge purported to follow their decision in the case which gave rise to this reference. This ruling, in my opinion, is not affected by the recent decision in *Raja Jagaveera Rama Venkateswara Ettappa* v. *Alawarasa Asari*(2). There are also other decisions to the same effect referred to in the opinion of KUMARASWAMI SASTRI, J., which I have had the advantage of reading. In that case, as observed by Lord SUMNER, this Court in the judgment under appeal had ruled that the question was:

'Whether a presumption of the fact of an implied contract arose in any particular case on the facts of that case.'

Their Lordships accepted this position and also the ruling of this Court that there was not sufficient reason to differ from the District Judge's finding that an agreement might be

(1) (1884) I.L.R., 7 Mad., 365 (F.B.).
(2) (1918) M.W.N., 732; s.c., 36 M.L.J., 48 (P.C.); s.c., 45 I.A., 195.
(3) (1905) I.L.R., 28 Mad., 434.
(4) (1916) I.L.R., 39 Mad., 84.

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presumed although in the particular case of Arumugam Chetty, which was treated as typical of the ninety suits, the enhanced rate had only been paid in the year before suit. As Lord SUMNER observed :

'The question then came to be that of consideration for the subsequent agreement at garden rate thus implied.'

As regards this question, as was repeatedly pointed out, the zamindar's case throughout

'was that of a new promise to pay at the rate of 8 fanams for land, which was already held on a binding contract of tenancy at the rate of 4 fanams per kuli, and not an original contract to pay rent at rates varying with the crops.'

For such a new contract Lord SUMNER agreed with the High Court that there was no consideration in that case, but he went on to say :

"If the cases had been examined separately, if distinctions had been drawn between cases where the higher rate was paid for forty years and cases where it was only paid once or twice, if the possibility of presuming a lost patta at 8 fanams or lost proof of consideration had been mooted, if the origin of these tenancies had been investigated and the terms of the original contracts fully discussed other questions might possibly have arisen."

All these questions were ruled out owing to the course the case had taken, but the judgment in my opinion sufficiently indicates that they are all matters which ordinarily may and ought to be considered. The question referred to us is, whether a Court can infer consideration for a contract to pay rent at an enhanced rate 'solely from a long continued course of payment of the enhanced rate.' My answer is that it may if that is the sole fact it has to go upon ; but that, in dealing with the question of presuming the agreement and the consideration therefor that together make up a contract, the Court should not be governed by that fact alone but should come to a conclusion on all the circumstances of the case.

AYLING, J.

AYLING, J.—As a member of the referring Bench I must endeavour to make two points clear, concerning both of which there has been a certain amount of misapprehension.

The first is this. The case was argued before us, and our reference was made on the following basis of facts :—That in each case the payment of the rate of rent now demanded commenced from the digging of the well and the consequent raising

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of a more valuable crop by its aid by the tenant, that the well was dug by the tenant at his sole expense, and that prior to the digging of the well rent was being paid at a lower rate than the rate paid thereafter.

It would perhaps have been better if the above facts had been set forth specifically instead of being to some extent implied in my order proposing a reference : but the latter was framed in the light of the arguments addressed to us, and I venture to think it leaves no room for doubt if carefully perused. That the vanpayir crops were raised with the water of the ryots' own wells is distinctly stated : and I think the use of the term 'enhanced rent' in the question is sufficient to imply the existence of a prior state of affairs, in which rent was paid at a lower rate. *Fischer* v. *Kamakshi Pillai*(1) is sufficient authority for holding that the imposition of garden assessment where rent had previously been paid at dry rates is an enhancement of rent. The second point relates to the theory of an original contract of tenancy at the time of the commencement of the latter to pay rents varying with the crop raised. This theory in connexion with the cases before us appears to have been first brought forward by Mr. K. Srinivasa Ayyangar a the present hearing. It was never set up in the argument before Mr. Justice KRISHNAN and myself : and I do not find a single word in the judgments of the lower Courts to suggest that it was raised before them. The contract which we were asked to imply was a fresh contract contemporaneous with the digging of the well in each case, whereby the rate of rent previously paid was to be enhanced. This is the kind of contract contemplated in the order of reference—precisely similar to that which was considered by the Privy Council in the recent case—*Raja Jagaveera Venkateswara Ettappa* v. *Alawarasa Asari*(2).

If the question be considered in the light of the above explanation, I think it should be answered in the negative. If we understand 'consideration' for a contract to imply something moving from the promisee, I fail to see why a continued course of payment of rent at a particular rate however far it may go back, should imply consideration, always provided that

(1) (1898) I.L.R., 21 Mad., 136.
(2) (1918) M.W.N., 732 ; s.c., 36 M.L.J., 49 (P.C.) ; s.c., 45 I.A., 195.

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a previous state of affairs is proved in which a different and lower rate was paid. A long course of payment no doubt indicates that the tenant agreed to pay. But it throws no light on why he agreed to pay at the higher rate. He may have agreed (1) for some consideration moving from the landlord; but he may have agreed (2) because he was afraid to resist his landlord's demand or (3) simply because he looked around and saw other tenants in similar circumstances paying rent at the higher rate—in other words, because it was customary. Such a custom (of charging extra rent for a tenant's own improvements) is, I need hardly say, unenforceable at law both before and after the enactment of the Estates Land Act—*vide* section 13 of the Madras Estates Land Act, section 11, Rent Recovery Act, in *Fischer* v. *Kamakshi Pillai*(1) and in *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa*(2). It is at the same time extremely widespread a fact which, I think, no one will deny.

There may be other explanations besides the three I have indicated above: but simply dealing with these three I fail to see why No. (1) should be taken to be the most probable. No. (2) is, to my mind at least, as likely in view of the conditions which formerly prevailed, and prevail even now to some extent, in zamindari tracts. But No. (3) seems to me the most probable of all. It is difficult to exaggerate the extent to which custom or mamul governs the action of the tenantry. It is prominently referred to, for example, even in the muchilikas filed in these suits (exhibits B and E series) in which the tenant undertakes

'I shall in accordance with the custom of the zamindari pay,' etc.

It may be argued (and I am fully alive to the force of the argument) that, where a known result may be due to more than one cause, the determination of which is the true cause is a question of fact. But an implied contract may be a question of law—vide SANKARAN NAYAR, J., in *Nagu Chetty* v. *Bhaskara Sethupathi*(3). Where the data are limited and ascertained it may not be impossible to lay down a rule of law that such data in themselves are not sufficient to justify a particular inference: and

(1) (1898) I.L.R., 21 Mad., 136. (2) (1905) I.L.R., 28 Mad., 444. (3) (1911) M.W.N., 6.

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where (as here) the cause sought to be inferred is, on the data available, the least probable of three possible causes, I think it may be laid down as a rule of law that such an inference is not to be drawn in the absence of other evidence to support it. As a somewhat analogous case, I may mention *Parthasarathi Appa Rao* v. *Chevandra China Sundara Ramayya*(1), in which this Court laid it down that it was not open to Courts to infer from the mere circumstance that rent has been paid in money for a series of years but at varying rates an agreement to pay money rent: and this dictum was approved by the Privy Council in *Parthasarathi Appa Rao* v. *Chevandra Venkata Narasayya*(2). I fail to see why the legitimacy of the inference in question in the present case is not equally a question of law.

It has been suggested by my learned brother KRISHNAN, J., in consenting to the order of reference that the question is not really one of implying consideration, but of attributing a legal origin to a long continued course of payment. It is argued that this may be done by the application by analogy of the principle of presumption of a lost grant where long continued possession and enjoyment of property are proved. The same aspect of the case was suggested by SUBRAHMANYA AYYAR, J., in *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa*(3) though the learned Judge did not examine it. With all respect, I do not think this is the class of cases to which the doctrine of legal origin can be safely applied, if only because we know too much of the antecedent circumstances before the payment originated. The doctrine of legal origin appears to be this: that where all we know of the origin of a certain disputed right is that it has been enjoyed without interference or interruption from time immemorial, it should be presumed to have had a legal origin, if a legal origin was reasonably possible—*vide* the Lord Chancellor in *Goodman* v. *Mayor of Saltash*(4). Here there is no immemorial enjoyment. We know that the payment of enhanced rent originated with a certain event, the digging of a well at a date which will in most cases be approximately ascertainable and that before that time a lower rate of rent was paid. There is neither room nor occasion for the application of the

(1) (1904) I.L.R., 27 Mad., 543. (2) (1910) I.L.R., 33 Mad., 177 (P.C.). (3) (1905) I.L.R., 28 Mad., 444. (4) (1882) 7 A.C., 633.

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doctrine. One party sets up a particular explanation and the question is whether the balance of probability is so much in its favour that it should be presumed to be correct.

How carefully the doctrine of legal origin should be applied even in appropriate cases may be guaged from the judgment of the House of Lords in another case—*Gonn* v. *Free Fisheries of Whitstable*(1). Their Lordships were ready to presume from a long course of payment of the anchorage fees charged that this payment had been going on from time immemorial. But they declined to infer in the absence of evidence the existence of the facts which alone would make a grant by the Crown legal. The Lord Chancellor said :

"If the payment be claimed as an ancient anchorage due, some facts must be shown which either prove or from which it can be inferred that the soil claimed by the respondents was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered to the public in respect of which the alleged grant was made; but nothing of the kind appears, and no such case can be presumed or inferred from the mere fact of an immemorial payment."

Lord WENSLEYDALE expressed the same view :

"I perfectly agree that from long enjoyment of a privilege in this case of demanding the payment of anchorage, as for a period of ninety years from 1775 to 1864, every reasonable presumption may be made that it has continued from time immemorial; but where the privilege requires more than immemorial enjoyment, in order to be legal and valid, some other facts must exist, and there must be some proof of these facts."

For the above reasons, I would answer the question referred to us in the negative.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—If the word 'enhanced' be excised from the question referred to us, the answer presents no difficulty and could at once be given in the affirmative. A Court with nothing before it but the fact of a long continued payment by a tenant would be amply justified in presuming a legal origin for that payment. But the word 'enhanced' clearly carries an implication of a further fact, viz., that the tenant had previously paid a lower rent than that sought to be enforced. And when the referring judgments are looked into, other facts emerge:

(1) (1864-5) 11. H.L.C., 193.

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that the rent in each case was enhanced when the tenant, by means of water supplies provided by himself at his own expense, changed the mode of cultivation, and that the date of enhancement of rent for this cause differs in each instance, and has not been specifically ascertained with regard to the case of any one of the appellants. In these circumstances the question appears to me to be one entirely of fact, to be determined on the balance of probabilities. For a Court to infer consideration from a long continued course of payment is a totally different thing when that is the sole fact before it, and when it is complicated by other considerations as in this case. In the latter event it comes in effect to a balancing of probabilities; and no Court should, in my opinion, presume consideration passing from the landlord, unless it thinks it inherently probable that such consideration could and did exist in fact. It is obvious that the tenants may have paid the enhanced rent merely because they were not strong enough to resist the landlord's demands, or because it had been the custom to pay it without demur and it is not contested here that custom will not do, but that a contract supported by consideration moving from the landlord is required. I am conscious that the only answer I am able to give to the question propounded is not likely to be very helpful to the referring Bench: the reason in my opinion is that the question, though apparently one of law, is, when analysed, one of fact. The Court which has to decide the issue involved in this case should obviously pay the greatest attention to the fact of the long continued payments of the enhanced rents by the tenants: it is no light matter to overset a state of things which has existed without question for a long period of time. But it must not assume that it is in possession of a single fact, when in truth it is in possession of many, and proceed to a finding on that erroneous assumption. I think that that is what happened in this case, and that the error has repeated itself in the terms of the reference.

I do not therefore feel able to say more than this: that if the continued payment of a rent were the sole fact before the Court, it would be entitled to presume consideration from it: but that if, as in the present case, there are other facts before the Court, it must refuse to treat the payment as raising a

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presumption, and, while giving it such weight as it thinks fit, perhaps a determining weight, treat it merely as a portion of the evidence in the case, subject to be weighed against and perhaps overtopped by the evidence on the other side.

SESHAGIRI AYYAR, J.—It was stated by Mr. Justice AYLING in the course of the hearing of the Full Bench Reference that it was not suggested before the Division Bench that there was or might have been an original contract between the landlord and the tenant to the effect that, in case the tenant cultivated garden crops on dry lands from whatever irrigation source it might be, he should pay a different rate of rent different from what he was bound to pay for raising dry crops. It may be open to the Division Bench when the case goes back to permit the landlord to prove such an agreement. They would be guided by the nature of the pleadings, the issues and the opportunities which the parties had to present their case. But apparently until Mr. K. Srinivasa Ayyangar opened the case in this Court, the suggestion was not put forward. The learned vakil has apparently based his contention upon the statement of Lord SUMNER in *Raja Jagaveera Rama Venkateswara Ettappa* v. *Alawarasa Asari* (1), to the following effect (at page 736):

"It never appears to have been suggested that what was meant was a custom of the country, with reference to which the ryots or their predecessors must be deemed to have contracted when they began to occupy the land in the first instance, or that the zamindar's claim was merely to have the original contract applied to new circumstances according to its terms, and was not a claim to alter those terms, to imply a new contract for that purpose."

No doubt, if that was the contention and if the question referred to us is to be regarded as relating to that argument, I would be prepared to answer the question by saying that the trial Court or the lower Appellate Court would not be acting contrary to law or to any usage having the force of law 'in inferring consideration from a long continued course of payment.'

I do not think that *Goodman* v. *Mayor of Saltash* (2) relied on by Mr. K. Srinivasa Ayyangar would compel us or the Division

(1) (1918) M.W.N., 732; s.c., 36 M.L.J., 49 (P.C.); s.c., 45 I.A., 195.
(2) (1882) 7 A.C., 633.

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Bench to draw such an inference otherwise. Lord SELBOURNE, at the bottom of page 739 says:

"But an open and uninterrupted enjoyment from time immemorial under a claim of right seems to me to be all that is necessary for a presumption that it had such an origin as would establish the right *if a lawful origin was reasonably possible in law.*"

I understand the Lord Chancellor to have held that the continuance of an arrangement for however long a period is not evidence that the contract is lawful or supported by consideration. It would only enable the Court to infer that the parties had come to such an arrangement. The Indian Contract Act speaks of agreements or contracts which are void for 'want of consideration.' Therefore, the element of consideration is not an implication which is involved in the inference which attributes a lawful origin for the prevalent practice. Courts in this country are familiar with cases where, notwithstanding long payment, the landlord has not been permitted to enforce these payments. In *Ramasami* v. *Appavu* (1) it was found that the inhabitants of a village contributed to a temple a quantity of grain proportionate to the holding of each ryot. It was held that this was a voluntary one and had no consideration to make it legally enforceable. I can quote a large number of similar instances in Madras and Calcutta. I refer to them to show that a long course of payments standing by itself, although it may refer the payment to a voluntary agreement between the parties, would not suffice to indicate that the agreement was either lawful, reasonable, or had consideration. I am willing to agree that the payment for a long period standing by itself is an element to be taken into account in deciding whether there was consideration for it or not.

But that is not what we are asked to give our opinion upon. It was explained by Mr. Justice AYLING that he and Mr. Justice KRISHNAN used the word *enhancement* in the question under reference as it was not disputed before them that there was a prior rate of rent which was enhanced after improvements were effected by the tenant. In this view, I am unable to hold that a course of payment would lead to the presumption that there was consideration for the increased payment. Given these facts,

(1) (1889) I.L.R., 12 Mad., 9.

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namely, (a) an existing contract to pay at a particular rate, (b) the ryot solely and at his expense effected improvements on the land by digging a well in it, (c) and the increased payment commenced after these operations by the ryot, I can find no circumstances for the operation of any presumption. *Consideration*, which has an extended significance in the Indian law, presupposes that something moves from the promisee. But when we know that he has not moved his little finger except it be to extend it to receive the additional payment, there is no room for making a presumption. If I understand the judgment of Lord SUMNER rightly, that is what the learned Lord has laid down. His Lordship says at page 737 of the judgment quoted above:

"What is this consideration to be? The mere letting of the land by the landlord will not do, for it was let at the dry rate already, and the ryot was entitled to continue in occupation at that rate, and no fresh consideration therefore moved from the landlord for the ryot's assumed promise to pay at the 8 fanam rate. The District Judge appears to have found consideration in the landlord's abstention from exercising his right to resort to the 'varam' system, if the ryot refused to consent to pay at the rate of 8 fanams, but, under the Act, if there was an implied contract for the 4 fanam rate, that contract had to be enforced, and there was no question of resorting to the 'varam' system. By the admission, such an implied contract did exist."

If the letting was previous and if there can be no question of going back to varam payment, because that can only be done if there was no express or implied contract, if there was a specified rate before the improvements, and if the ryot did not cultivate the new crop with the aid of water from the landlord's sources of irrigation, there can be but one answer to the question whether the new rate had consideration. It was faintly suggested, and I find that in some of the cases this is accepted, that the landlord might have given up his claim for rent upon that portion of the holding on which the well was dug, and that forbearance might have been the consideration for the extra payment. In the first place, this is a fact to be proved and not a matter depending upon the course of payments. In the second place, it is not ordinarily the case that the landlord excludes this portion from the payment of the rent. In the third place, even if the landlord consented to the exclusion, it

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very often will be because, instead of a precarious payment from the tenant dependent upon rain-supply for the crops, he would have calculated that a good irrigation source would ensure a regular payment of the original rent; because it has been held that, if the tenant is unable to cultivate owing to want of water, he is not ordinarily chargeable with rent, unless there is a contract to the contrary. Moreover, I very respectfully adopt the observation of Lord SUMNER that it would not be easy

"to say the least of it to suppose that any ryot voluntarily agreed to have his rent enhanced whenever his own outlay should have rendered an improved mode of cultivation."

From my experience of the country, what happens is the tenant when in a prosperous condition owing to his own exertions does not grudge to pay the landlord a share of the benefits which he is reaping. This is not the only country in which landlords lay claim to unearned increments, but I am unable to hold from the naked circumstance of payment alone that there must have been consideration from the start.

As regards cases, my view is supported by *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa*(1), *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa*(2) and the recent Privy Council decision—*Raja Jagaveera Rama Venkat-swara Ettappa* v. *Alawarasa Asari*(3). Two earlier decisions of this Court which Lord SUMNER quotes without disapproval in *Venkatagiri Raja* v. *Pichana*(4) and in *Fischer* v. *Kamakshi Pillai*(5), though they were based on custom, lay down the law in the same way. In *Gopalasami Chettiar* v. *Fischer*(6) there is some doubt thrown on *Fischer* v. *Kamakshi Pillai*(5), but having regard to its quotation by the Judicial Committee do not attach much importance to the doubt. In *Suppa Pillai* v. *Nagayasami Thumbichi Naiker*(7), to which the present Chief Justice was a party, it was found that the commutation of varam into money was a sufficient consideration for the new payment. The price of paddy is dependent current prices and when a fixed payment is agreed to,

(1) (1895) I.L.R., 28 Mad., 444.
(2) (1912) I.L.R., 35 Mad., 134.
(3) (1918) M.W.N., 732; s.c., 36 M.L.J., 49 (P.C.); s.c., 45 I.A., 195.
(4) (1886) I.L.R., 9 Mad., 27.
(5) (1898) I.L.R., 21 Mad., 136.
(6) (1905) I.L.R., 28 Mad., 328.
(7) (1903) I.L.R., 31 Mad., 19.

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there is sufficient consideration for what may, at first sight, appear to be excess rate. I do not think that *Parthasarathi Appa Rao* v. *Chevandra Venkata Narasayya*(1) has any bearing on the present question. In the other cases cited, including the one to which I was a party, it was held without discussion that payments during a particular period would, or would not be evidence of consideration. These decisions ought not to be regarded as authoritative pronouncements on matters which were not discussed and decided upon.

For all these reasons, my answer is that a course of payment, if nothing else appears, may be an element to be considered in arriving at the conclusion whether there was consideration for it or not; but if there was a fixed payment before and the rate was enhanced solely because the tenant has cultivated new crops by his own exertions, my answer is that there is no room for presuming consideration under such circumstances.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—The question referred to the Full Bench is whether the Court can infer consideration solely from a long continued course of payment of enhanced rent in cases where it is sought to base liability to pay enhanced rent on an alleged contract to pay it. The facts of the case and the findings of both the lower Courts have been set out in the order of reference and it is not necessary for me to repeat them here.

I am of opinion that it is open to the Court from a long and uniform course of payment to presume that there was an agreement to pay which had a lawful origin and was supported by consideration where it is satisfied that it would be unreasonable from lapse of time or other circumstances to call upon the landlord to give direct evidence as to the terms and circumstances that gave rise to the payment and when circumstances exist which would render the drawing of the presumption reasonable in law and probable in fact. If all that appears is a long course of payment, I do not see why the presumption should not be drawn.

It seems to me that the drawing of the presumption is only an application of the principle that a legal origin should be presumed where there has been a long continued assertion of a

(1) (1910) I.L.R., 33 Mad., 177 (P.C.).

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right if such a legal origin were possible and that in such cases Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title; see the judgment of Lord HERSCHELL in *Phillips* v. *Halliday*(1). The presumption of a lost grant in cases of long continued exercise of rights has been recognized in the leading case of *Goodman* v. *Mayor of Saltash*(2) and the principles governing such cases have been laid down in a series of English decisions. As pointed out by FARWELL, J., in *Mercer* v. *Dennie*(3) not only would Courts be slow to draw an inference of fact which would defeat a right which has been exercised for a very long period unless such an inference is irresistible but will presume everything that is reasonably possible to presume in favour of such a right. In *Foley's Charity Trustees* v. *Dudley Corporation*(4), where a free farm rent had been paid to certain charity trustees for over 100 years in respect of a piece of land acquired for the widening of a road, it was held that the Court ought to presume that land had been granted to the turnpike trustees as land subject to a perpetual rent charge even though no conveyance to the trustees was forthcoming. The Master of the Rolls observed that he did not think it necessary to enlarge upon the duty of the Court to make every presumption in a case like that which can be made to support such a long continued possession.

There seems to me to be nothing in the relations between landlords and tenants in this country to render it necessary or equitable to exclude the principle so clearly enunciated in the English cases though the presumption has to be applied with great care and discrimination in cases of ryots in zamindaris and a great many circumstances have to be noted and their probability excluded before the Court can proceed to draw the inference that what was being done had its origin in an agreement supported by consideration. For example, Courts have to take into careful consideration the fact that very often a tenant pays enhanced rent demanded not because there are any valid grounds for doing so but because he sees his neighbours paying it without demur. The ignorance of ryots of their legal rights and the position and influence of the zamindar have to be taken

(1) (1891) A.C., 228.
(2) (1882) 7 A.C., 633.
(3) (1904) 2 Ch., 534, at p. 556.
(4) (1910) 1 K.B., 317.

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into account. The difficulties often experienced and the caution required in dealing with cases of claims based on an enhancement of rent are however no ground for not applying a principle which had so much reason and authority to support it.

Enhancement of rent may have been due to various causes and the enhanced rent may have been paid for so long a series of years that it would be unreasonable to expect the landlord to prove the grounds which led to the enhancement and the consideration therefor. When no circumstances exist which would raise a fair inference that rent was enhanced without any consideration moving from the landlord, the ordinary presumption that a person and his predecessor-in-title would not have paid for a series of years, more than what was payable, voluntarily and without any legal or binding obligation to do so, might well be raised.

The balance of authority is in favour of the view that a legal origin may be presumed. In *Venkatagopal* v. *Rangappa*(1), TURNER, C.J., observed:

"Payment of rent in a particular form or at a certain rate for a number of years is not only presumptive evidence of the existence of a contract to pay a rent in that form or at that rate for those years but is also presumptive evidence that the parties have agreed that it is obligatory on the one party to pay and the other to receive rent in that form or at that rate so long as the relations of landlord and tenant may continue. Either party is of course at liberty to rebut the presumption."

In *Krishna* v. *Venkataswami*(2) it was held, following the above decision, that an implied contract to pay rent at varam rates within the meaning of section 11 of the Rent Recovery Act may be inferred where a landlord accepted rent at varam rates for a number of years.

In *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa*(3), SUBRAHMANYA AYYAR, J., in dealing with presumptions to be raised for a long course of payment observed:

"If in cases like the present payment at the higher rate had continued to be made for a great many years so as to make it unfair to the landholder on account of such lapse of time to be compelled to prove the existence of some consideration when the payment

(1) (1884) I.L.R., 7 Mad., 365 (F B.). (2) (1885) I.L.R., 8 Mad., 164.
(3) (1905) I.L.R., 28 Mad., 444 at 451.

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commenced, it may be a question whether the Courts should not presume a lawful origin for the payment on the analogy of the lost grant principle availed of to support long possession and enjoyment. That even in the case of immemorial usage the doctrine of *quid pro quo* is not altogether to be ignored will be seen from the observations of Lord CHELMSFORD in *Gonn* v. *Free Fisheries of Whitstable*(1)."

He did not pursue the argument further as he was of opinion that the facts proved in the case he was dealing with gave no room for any such inference.

In *Venkata Perumal Raja* v. *Ramudu*(2), SADASIVA AYYAR and NAPIER, JJ., held that the Court can presume a lawful origin for a contract to pay enhanced rent where it has been paid for a long time though they differed as to whether the provisions of section 13 of the Estates Land Act were retrospective. In *Sri Mahant Prayaga Doss Jee* v. *Venkata Naidu*(3), SADASIVA AYYAR and BAKEWELL, JJ., held that an implied contract to pay an enhanced rent may be presumed from continued payment for a number of years. In *Lodd Govindoss* v. *Chennappa Naidu*(4), SADASIVA AYYAR and NAPIER, JJ., followed their decisions in *Venkata Perumal Raja* v. *Ramudu*(2) as to the power of the Court to presume a valid contract to pay enhanced rates.

In *Davaru* v. *Raghunatha Rao*(5), SUNDARA AYYAR and SADASIVA AYYAR, JJ., were inclined to the view that Courts may presume that there was some reason which made it obligatory on the payee to make the payment when periodical payments were made for a long time though they pointed out that much caution was required in the application of this principle when cesses were concerned.

In *Ramachandra Thevan* v. *Velayutha Nadan*(6), SPENCER and KRISHNAN, JJ., were of opinion that payments for a sufficiently long period would entitle the Court to raise a presumption

"that they are based on an agreement between the parties and that there must have been some consideration for that agreement."

(1) (1864-65) 11 H.L.C., 192, at p. 193. (2) (1916) I.L.R., 39 Mad., 84.
(3) (1918) 7 L.W., 477. (4) (1915) 28 M.L.J., 136.
(5) (1913) M.W.N., 886.
(6) Second Appeals Nos. 1639 to 1644 of 1916 (unreported).

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A contrary view was taken in *Arunachalam Chetti* v. *Syed Ahamed Ambalam*(1), where AYLING and PHILLIPS, JJ., were of opinion that though an agreement to pay enhanced rent may be inferred from payment for a long series of years, yet independent proof of consideration was necessary to render it a binding contract. With all respect I fail to see why, if circumstances exist for drawing the presumption that there was an agreement, they should not equally be used to draw a presumption that there was consideration. As observed by AYLING, J., in *Arnmugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa*(2), consideration may be of the same implied nature as the contract to pay. In *Sri Mahant Prayaga Doss Jee* v. *Venkata Naidu*(3), SADASIVA AYYAR and BAKEWELL, JJ., dissented from the decision in *Arunachalam Chetti* v. *Syed Ahamed Ambalam*(1), and I entirely agree with the reasons given by them.

In *Narasimmulu Nayudu* v. *Ramesam*(4), *Parthasarathi Appa Rao* v. *Chevandra China Sundara Ramayya*(5), it was assumed that it was open to the Courts to draw the inference that there was a valid and enforceable agreement from long course of payment though on the facts of those cases it was held that period was not long enough.

It was argued by the vakil for the appellant that in case of permanent tenancy there is an express contract at the time of letting and that there consequently arises no room for presuming any implied contract with a fresh consideration, and great reliance has been placed on the decision of their Lordships of the Privy Council in *Raja Jagaveera Rama Venkateswara Ettappa* v. *Alawarasu Asari*(6). I do not think the decision is authority for this proposition. All that was decided was that the expression implied 'contract' was an English term of art 'involving the legal incident of some consideration moving from the landlord as that incident is understood in English Law.' On the facts found in the cases before their Lordships (namely; that enhanced rent was claimed solely because tenants dug wells at their own expense) it was held that there was no room for presuming any implied contract. The question as to

(1) (1915) 2 L.W., 1117. (2) (1912) I.L.R., 35 Mad., 134.
(3) (1918) 7 L.W., 477. (4) (1891) I.L.R., 14 Mad., 44.
(5) (1904) I.L.R., 27 Mad., 543.
(6) (1918) M.W.N., 732; s.c., 36 M.L.J., 49 (P.C.); s.c., 45 I.A., 195.

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the presumption of a lost patta or lost proof of consideration was considered and the observations of Lord SUMNER at the end of the judgment leave the question open.

I am unable to see why a legal origin should not be presumed in cases where rent has at some remote period been enhanced. Enhancement of rents in the case of wet or garden crops raised on dry land may be due to various causes, some of which would not necessarily negative the idea of fresh consideration and some of which would *ex-hypothesi* do so. Where it is possible to infer a legal origin from a long course of payment I do not see why the necessary presumption should not be made. Like all presumptions their strength or weakness will depend upon the facts of the case to which they are to be applied.

There may be, as pointed out in *Venkatagiri Raja* v. *Pichana*(1), cases where the land has not been classified as wet or dry or garden but the rent varied with the crops and where the fiscal accounts were prepared on this principle. In such cases the landlord will be entitled to enhance the rent if garden crops are raised irrespective of whether the crops are raised with water from wells dug by the tenant or not. There may be cases where the tenant dug wells or tanks with the help of the landlord and where the landlord gave poramboke lands for the purpose. In such cases there is nothing to prevent the parties from agreeing to pay enhanced rent. See *Lold Govindloss* v. *Chennappa Naidu*(2). There may be cases where rent at a certain rate appears to have been paid at some remote period and enhanced subsequently, the reason not being apparent on the evidence. In such cases there is nothing to militate against the presumption of lawful origin for the enhancement being drawn. On the other hand, where there is nothing to show that there was any agreement that the rates should vary with the crops and where all the facts point to a fixed rent having been agreed upon at the time of the letting, it is clear that an enhancement cannot be claimed *merely because* the tenant raised garden crops with the aid of water from wells dug at his expense or water which was not the landlord's. There is obviously no consideration in such cases and no room for the drawing of any presumption because of certain known facts

(1) (1886) I.L.R., 9 Mad., 27. (2) (1915) 28 M.L.J., 136.

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which exclude the possibility of any consideration. See *Venkatagiri Raja* v. *Pichana*(1), *Raja Venkata Narasimha* v. *Venkayya*(2), *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa*(3), *Seetaram Raju Singaram Raju* v. *Raja Venkatagiri Appa Row*(4), *Kasidoss Subraya* v. *Narayana Reddi*(5), *Srimalu Raja Mallikarjuna Prasad Naidu* v. *Subbayya*(6).

The cases above referred to which decide that no consideration can be inferred merely by payment for a series of years where the only ground shown is the improvements of the land *at the tenant's sole expense* do not militate against the general proposition that the Court can infer a lawful origin where a long course of conduct is proved. They only illustrate the limitation that such an inference cannot be drawn where the facts proved show that there cannot be any consideration for the enhanced payment. The rule as to the presumption of a legal origin from long course of conduct is always subject to the inference being *legally possible*. As the reference to us is general and is not limited to enhancement of rent owing to any particular reason, I would answer the reference as proposed by me in the opening of my judgment.

N.R.

(1) (1886) I.L.R., 9 Mad., 27.
(2) (1914) 1 L.W., 576.
(3) (1912) I.L.R., 35 Mad., 134.
(4) (1913) M.W.N., 645.
(5) (1915) M.W.N., 209.
(6) (1913) I.L.R., 36 Mad., 4.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

1918, December, 5 and 6.

SETHURAMASAMI NAYANI VARU (PETITIONER), APPELLANT,

v.

SYED MIR HUSSAIN SAHIB AND ANOTHER (DECREE-HOLDER AND AUCTION-PURCHASER), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Application by judgment-debtor to set aside sale in execution of a decree—Execution of sale-deed by judgment-debtor, not registered—Subsequent application, whether competent—Fresh sale-deed executed by him after application and registered before final order—Sustainability of application—Rights of parties to suit or application, whether affected by subsequent events.

Where a judgment-debtor applied under Order XXI, rule 89 of the Civil Procedure Code, to set aside a sale of certain lands held in execution of a decree, and it appeared that he had previous to his application executed a sale-deed therefor which was not however registered, and that he had subsequent to his application executed a fresh sale-deed in respect of the same lands to the same vendee which was registered before a final order was passed on the application, and the auction-purchaser objected to the competency of the judgment-debtor to make or sustain the application:

Held, that the judgment-debtor had *locus standi* to make the application, as he had not ceased to be owner of the lands at the time of his making the application; and that he did not lose the right to sustain the application by the subsequent execution and registration of a sale-deed, as it is a well-recognized rule of law that the rights of the parties should be adjudicated as on the date of suit or application and not with reference to what transpires subsequently. *Kurri Veerareddi* v. *Kurri Bapireddi*, (1906) I.L.R., 29 Mad., 336, and *Ramanathan* v. *Ranganathan*, (1917) I.L.R., 40 Mad., 1134, referred to; *Subbarayadu* v. *Lakshminarasimma*, (1915) I.L.R., 38 Mad., 775, distinguished; and *Karalia Nannubhai* v. *Mansukhram*, (1900) I.L.R., 24 Bom., 400, dissented from.

APPEAL against the order of P. N. SATAGOPA NAYUDU, the Temporary Subordinate Judge of North Arcot, in Civil Miscellaneous Petition No. 293 of 1917 in Original Suit No. 29 of 1912.

In execution of a decree for money in O.S. No. 29 of 1912 on the file of the Subordinate Judge's Court of Chittoor, certain lands were sold in Court auction on the 16th April 1917 and purchased by one Tirupurasundarammal. The judgment-debtor filed an application in the Court under Order XXI, rule 89,

* Civil Miscellaneous Appeal No. 55 of 1918.

SETHU-RAMASAMI NAYANI VARU v. SYED MIR HUSSAIN SAHIB.

of the Civil Procedure Code, to set aside the sale on payment of the full amount specified in that rule. The application was made on the 25th June 1917, which was the day on which the Court re-opened after the summer vacation, the thirty days' time allowed by the rule having expired during the time the Court was closed. It appeared that the judgment-debtor had executed a sale-deed for the lands in favour of a third party on the 22nd June 1917, but it was not registered at any time; the judgment-debtor however executed another sale-deed for the same lands to the same vendee on the 20th August 1917 and the same was registered on the next day. The application to set aside the sale came on for final disposal on the 11th January 1918. The auction-purchaser, who was joined as a party to the application, contended that the judgment-debtor had no *locus standi* to make the application by reason of the execution of the first sale-deed, and, even if he could have filed such a petition, he had lost the right to maintain the application at the time of its final disposal as he had lost his title to the property by the execution and registration of the second sale-deed before final order was passed on the application; he also contended that the abandonment of the first sale-deed and the execution of the second were brought about by the fraud and collusion of the judgment-debtor and his vendee with a view to enable the former to make the application. The Subordinate Judge agreed with the contentions of the auction-purchaser and dismissed the application. The judgment-debtor preferred this Civil Miscellaneous Appeal to the High Court.

T. Narasimha Ayyangar and *N. S. Rangaswami Ayyangar* for the appellant.

T. R. Venkatarama Sastri and *B. C. Seshachala Ayyar* for the respondents.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—This is an appeal against the order of the Subordinate Judge of Chittoor rejecting an application by the judgment-debtor under Order XXI, rule 89, of the Code of Civil Procedure (Act V of 1908). The facts are these:—The properties of the judgment-debtor were sold in Court auction on the 16th of April 1917. On the 22nd of June 1917 the judgment-debtor executed a sale-deed to a third party. On the 25th of June he applied to the Court to set aside the sale and deposited

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the requisite amount. The conveyance of the 22nd of June was not registered. A fresh sale-deed was executed to the third party on the 20th of August 1917. The Subordinate Judge disposed of the application on the 11th of January 1918. He held that as the conveyance of the 22nd of June was capable of being registered and as when registered it would confer title as on the date of the sale the judgment-debtor had no *locus standi* on the 25th of June to present the application. He has relied upon *Subbarayadu* v. *Lakshminarasamma*(1) and *Ishar Das* v. *Asaf Ali Khan*(2). In those cases there was a completed registered conveyance and it was held that by virtue of those conveyances the judgment-debtor was divested of his right to present an application under Order XXI, rule 89, of the Code of Civil Procedure (Act V of 1908). Other High Courts have taken a different view. They have held that the judgment-debtor would always have the right of getting the sale set aside and that the execution of a conveyance to a third party would not interfere with his right. It is not necessary in the view we are taking of the case to express any opinion on this vexed question. In our opinion the judgment-debtor was a person 'owning the property' on the date of his application. The fact that the sale could have been perfected and was capable of passing a complete title should not affect his *locus standi*. It was held in this Court by a Full Bench in *Kurri Veerareddi* v. *Kurri Bapireddi*(3) that, notwithstanding the execution of an unregistered conveyance and the passing of possession thereunder, the vendor of the property was entitled to sue for possession against the vendee. That view has been confirmed in *Ramanathan* v. *Ranganathan*(4). Consequently the mere execution of a conveyance does not deprive the owner of his rights in the property until registration. The rule of law which dates back the title when registered to the date of the conveyance does not affect this principle. The right is in the vendor, although it can be divested by the registration of the conveyance.

The decisions to which the learned vakil for the respondent drew our attention, namely, *Savithri Ammal* v. *Ramasami*(5)

(1) (1915) I.L.R., 38 Mad., 775. (2) (1912) I.L.R., 34 All., 186.
(3) (1913) I.L.R., 29 Mad., 333 (F.B.) (4) (1917) I.L.R., 40 Mad., 1134.
(5) (1898) 8 M.L.J., 266.

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and *Venkata Reddi* v. *Yellappa Chetty*(1) do not affect the present case. The Subordinate Judge says that the conduct of the judgment-debtor and of his vendee was fraudulent. We fail to understand this. On the facts the utmost that can be said is that the vendor and the vendee, realizing that if the document of the 22nd of June was registered it might affect the application of the judgment-debtor, agreed not to get it registered and made up their mind that a new sale-deed should be executed. There is nothing illegal or wrong in such a procedure. The judgment-debtor had the right under Order XXI, rule 89, to enforce his rights. His vendee who was anxious to get a valid sale agreed, in his own interest, not to press for the registration of the earlier document. Such an attitude is quite reasonable and has no element of fraud in it. We are therefore of opinion that the judgment-debtor has a right to make the application on the date he made it. It was next argued relying mainly upon *Karalia Nannubhai* v. *Mansukhram*(2) that as a new sale-deed was executed before the final order was passed the judgment-debtor had lost his right. We are unable to accept this contention. The new conveyance was executed *pendente lite* and the vendee would be affected by all the equities enforceable against his vendor. It is a well-recognized rule of law that the rights of the parties should be considered as on the date of suit or application and not with reference to what transpires subsequently. It is true that Courts have power under certain circumstances to grant relief to the plaintiff with reference to what has happened since the institution of the suit or application. But that is an indulgence which the Court may or may not grant. The ordinary right of the party is that his claim should be adjudicated with reference to the matters that existed on the date of his suit or application. If *Karalia Nanbai* v. *Mansukhram*(2) is inconsistent with this view, we are respectfully unable to accept it as good law. We must therefore reverse the order of the Subordinate Judge and set aside the Court sale made on the 16th April 1917.

K. R.

(1) (1917) 5 L.W., 234. (2) (1900) I.L.R., 24 Bom., 400.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

SARVOTHAMA RAO (DEFENDANT), APPELLANT,

v.

CHINNASAMI PILLAI AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

1918, December, 9.

Limitation Act (IX of 1908), article 97—Failure of consideration, suit on—Sale by a member of joint Hindu family—Mitakshara law—Suit by vendee for possession—Previous sale by manager—Suit dismissed finally by High Court on Second Appeal—Subsequent suit for refund of price and costs of litigation—Suit within three years of decree of High Court, whether barred—Failure of consideration, when—Costs of litigation, whether recoverable—Costs of review in High Court, whether recoverable.

Where a purchaser of the share in certain lands of a member of a joint Hindu family governed by the Mitakshara law sued to recover possession of the same from another, who had previously purchased the entire lands from the managing member of the family, succeeded in the Original Court but failed in the lower Appellate Court on appeal and in the High Court on second appeal and in the review therein, and where he brought another suit within three years of the decree in the High Court for refund of the price paid by him and for the costs of the litigation against his vendor who pleaded the bar of limitation :

Held, that the suit was not barred by limitation under article 97 of the Limitation Act, as the consideration failed only when it was finally determined by the High Court in Second Appeal that the sale by the plaintiff's vendor could not take effect against the prior sale by the manager ; and that the costs of litigation were legally recoverable, except the costs of review which was a luxury indulged in by the plaintiff.

Hanuman Kamet v. *Hanuman Mandur*, (1892) I.L.R., 19 Calc., 129 (P.C.), distinguished ; *Subbaraya* v. *Rajagopala*, (1915) I.L.R., 38 Mad., 887, and *Venkataramayya* v. *Lanka Ram Brahmam*, (1918) 35 M.L.J., 124, followed.

SECOND APPEAL against the decree of S. RANGANATHA MUDALIYAR, the Subordinate Judge of Tanjore, in Appeal No. 28 of 1917 preferred against the decree of K. S GOPALARATHNAM AYYAR, the District Munsif of Tiruvadi, in Original Suit No. 426 of 1915.

The material facts appear from the judgment.

P. S. Vaidyanatha Ayyar for the appellant.

K. Raja Ayyar for the first respondent.

* Second Appeal No. 80 of 1918.

SARVOTHAMA RAO v. CHINNASAMI PILLAI. — SESHAGIRI AYYAR, J.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.—The managing member of a joint Hindu family consisting of himself and his brother sold the suit properties to a stranger on 22nd December 1908. The younger brother sold his share alone to the plaintiff on 12th January 19 9. There was also a mortgage outstanding on the property. When the plaintiff attempted to take possession, he was resisted by the purchaser from the manager. Thereupon he sued for possession of the half share to him. He succeeded in the first Court. The lower Appellate Court held that the sale by the manager was binding on the plaintiffs' vendor and dismissed the suit. In Second Appeal this decree was confirmed; an application to review the judgment also failed. The decision of the High Court in the Second Appeal was given on the 18th February 1915. This suit for refund of the sale price and for the expenses of the costs incurred in the unsuccessful litigation was instituted within three years of the judgment of the High Court. The Courts below have held that the suit was not barred by limitation.

Before us the learned vakil for the appellant relied on *Hanuman Kamet* v. *Hanuman Mandur*(1) for the proposition that the cause of action for the refund of the money arose when the plaintiff was refused possession. In the case before the Privy Council, the managing member of a Mithila family who was only entitled to dispose of the shares of his brothers with their consent and not, as under the Mitakshara law, to alienate family property for justifiable purposes alienated the family property. When the vendee sought to take possession, the other brothers resisted. The Judicial Committee pointed out that, as the alienation depended on consent and as that consent was certainly refused when the brother refused to give possession, the cause of action arose on that date. In the present case the plaintiff's vendor was competent to dispose of his share and the manager had a right *primâ facie* without consulting his brother to deal with the property for family purposes. It was only when it was finally determined that the sale by the plaintiff's vendor could not take effect against the sale by the manager that the former sale became infructuous; consequently it was only then that the

(1) (1892) I.L.R., 19 Calc., 123 (P.C.).

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consideration failed. This case is practically the second of the class of cases referred to in *Subbaraya* v. *Rajagopala*(1). The decision in *Venkataramayya* v. *Lanka Ram Brahmam*(2) also supports this view. We think the suit is not barred by limitation.

It was next contended that the costs of the litigation should not be given to the plaintiff. He was bound to have sought the aid of the Court to vindicate the title of his vendor and the litigation expenses must be regarded as having been legitimately incurred. The damages are not too remote as laid down in *Krishnan Nambiar* v. *Kannan*(3) and in *Digambar Das* v. *Nishibala Debi*(4).

We are, however, of opinion that the plaintiff is not entitled to recover the costs of this unsuccessful attempt to have the decision of this Court reviewed. It is a luxury he indulged in, for which the defendant should not be held liable. The sum of Rs. 55-9-9 allowed under this head should be deducted from the decree. In other respects we confirm the decree of the lower Appellate Court.

K.R.

(1) (1915) I.L.R., 38 Mad., 887.
(2) (1918) 35 M.L.J., 124.
(3) (1898) I.L.R., 21 Mad., 8.
(4) (1910) 8 I.C., 91.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Napier.

1918, November, 20, 21, 22, and 26, December, 4.

THE OFFICIAL ASSIGNEE OF MADRAS (PETITIONER), APPELLANT,

v.

T. B. MEHTA & SONS (GARNISHEES), RESPONDENTS.*

Presidency Towns Insolvency Act (III of 1909), *secs.* 55 *and* 56—*Transfer of property by debtor to a creditor—Fraudulent preference—'With a view of giving preference,' meaning of—English Bankruptcy Act,* 1883, *sec.* 48—*Construction adopted in English cases, applicability of, to the Indian Act.*

A trader, being in very embarrassed circumstances and unable to meet his obligations as they fell due, sold to one of his creditors, for what was found to be a fair price, a large quantity of diamonds pledged by him with certain other creditors and thereby paid off the debts due to the latter and the purchasing creditor; the balance was paid to the debtor who kept his business going by paying off other pressing creditors with that amount. The debtor was adjudged an insolvent on a petition presented within three months of this transaction. On an application by the Official Assignee filed before a Judge of the High Court in Insolvency to declare the transfer void under sections 55 and 56 of the Presidency Towns Insolvency Act:

Held, that the transaction was not void as a fraudulent preference under section 56 of the Presidency Towns Insolvency Act; nor was it void under section 55 of the Act as it was made in good faith and for valuable consideration.

Per curiam.—To bring a transaction within the scope of section 56 of the Act, it must have been entered into with the dominant view of preferring particular creditor.

The construction, adopted in several English decisions and approved by the House of Lords in *Sharp* v. *Jackson*, (1899) A.C., 419, on the corresponding provision in section 48 of the English Bankruptcy Act, 1883, should be followed in construing similar language used in section 56 of the Presidency Towns Insolvency Act (III of 1909).

Sharp v. *Jackson*, (1899) A.C., 419; *Ex parte Griffith, In re Wilcoxon* (1889) L.R., 23 Ch.D., 69; and *Ex parte Hill, In re Bird*, (1889) 23 Ch.D., 695, followed; *Nalam Viswanathan.* v. The *Official Assignee of Madras*, (1915) 32 I.C., 795 dissented from.

APPEAL against the order and judgment of COUTTS TROTTER, J., dated the 13th December 1917, passed in the exercise of the insolvency jurisdiction of the High Court in I.P. No. 115 of 1917.

* Original Side Appeal No. 4 of 1918.

One Muthia Chetty, who was a diamond merchant in a large way of business, was in the middle of May 1917 in very embarrassed circumstances and was unable to meet his obligations as they fell due. He had large dealings with several merchants, among others with a firm of diamond merchants in Madras, known as T. B. Mehta & Sons, to the extent of Rs. 36,000 and odd about that time against which he had given eight hundis which were outstanding and also another sum of Rs. 3,000 on general account. Two hundis which fell due on the 19th May were not presented for payment at his request; but a third hundi which also fell due about the same time was not met and the firm began to press him. The debtor had pledged large quantity of diamonds with Nattukottai Chettis who were his creditors for a large amount of loans advanced by them to him, and he proposed to Mehta & Sons that they should purchase the diamonds under pledge, and, after paying the amount due to the pledgees, pay themselves their own debts. The firm of Mehta & Sons accepted the proposal; and the sales were accordingly effected in the course of five transactions between 25th May and 12th June 1917 for a total price of Rs. 2,87,000; the pledgees being paid their dues, the debts of the vendee firm were discharged out of the balance, and the remainder of the price, which was left in the hands of the pledgees to the credit of the debtor, amounting to about Rs. 41,000, was paid over to the debtor, who used that amount and other amounts in paying off his other pressing creditors in Bombay and thus kept his business going. It was found that the firm of Mehta & Sons had paid a fair price for the diamonds; that though the sales included diamonds not under pledge, the vendee had no knowledge of this fact; it appeared that the debtor had, between the date of the first of these sales in May 1917 to the end of June 1917, made payments to his other pressing creditors to the extent of Rs. 71,000, and had put off other creditors and had kept his business going for some time. The debtor was adjudicated an insolvent on an application filed within three months of the above sales. The Official Assignee applied, on notice of motion, before COUTTS TROTTER, J., sitting in Insolvency, for a declaration that the transactions were void as fraudulent preference under section 56 of the Presidency Towns Insolvency Act (III of 1909), or in the alternative as void under section 55 of the Act, on the

THE OFFICIAL ASSIGNEE, MADRAS v. T. B. MEHTA & SONS.

ground that the sales were not in good faith and for valuable consideration. The learned Judge held that the sales were not void either under section 56 as fraudulent preference or under section 55 of the Act, and dismissed the application. The Official Assignee preferred this Letters Patent Appeal against the judgment.

M. D. Devadoss for the appellant.—The sales are void under sections 56 and 55 of the Presidency Towns Insolvency Act (III of 1909). When a debtor was in a state of insolvency and he paid one creditor and not others who were pressing him for payment, it is fraudulent preference under section 56. The onus is no doubt on the Official Assignee. But he has shown by the evidence let in in this case that there was a fraudulent preference. There was no pressure by Mehta. Some hundis were paid before they became due.

[CHIEF JUSTICE.—You must show that the transfer was with a view to prefer: suppose the insolvent did it to keep the business going or even in his own interest, it will not be a fraudulent preference.]

No, the mere fact that the insolvent imagines he can float his trade is not enough. When a debtor in insolvent circumstances pays one creditor *X* and not another *Y*, when not able to pay both, it is fraudulent preference, unless there is pressure or other cause for the transfer. In *Sharp* v. *Jackson*(1) the debtor paid a *cestui que* trust. Pressure negatives 'with a view.'

[NAPIER, J.—Motive, view and intention are three stages. It is the middle stage that is taken by the statute.]

[CHIEF JUSTICE.—BOWEN, L.J., says that there are three meanings that can be attached to 'a view' in the section 48 of the English Act, viz., '*a view*,' '*main view*,' '*the sole view*,' and takes the 'main view' as the rule to be followed.]

When no personal interest, pressure or other motive is proved, it is fraudulent preference. [See *Ex parte Viney: In re Eaton & Co.*(2).] The evidence shows that the proposal came from the insolvent. It was voluntary under the older law. The learned Judge has found that there was no pressure by Mehta. On both grounds, it is voluntary. He wanted to prefer the local Madras merchant (Mehta & Sons) to the Bombay creditors.

(1) (1899) A.C., 419. (2) (1897) 2 Q.B., 16.

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Secondly, the transaction was void under section 55 of the Act, as it was not in good faith and for proper consideration as required by section 55. The sale to Mehta is an act of bankruptcy and is in bad faith. [See *The Mercantile Bank of India, Limited, Madras* v. *The Official Assignee, Madras*(1).] Mehta knew that the insolvent could not pay in the ordinary way and that he was selling property which was pledged. Sections 9 and 55 of the Act will make it an act of bankruptcy and hence not one in good faith. Mehta admits that he knew that all the goods were sold.

[CHIEF JUSTICE.—There was no transfer of all his property by the insolvent.]

There must be consideration and good faith. There is no good faith in this case. Mehta says in his evidence that he made no inquiries as to the state of the insolvent's affairs.

Reference was made to the following cases:—*Abdul Kadir* v. *Official Receiver*(2); *Ex parte Russel: In re Butterworth*(3); *In re Sharp*(4); *Shears* v. *Goddard*(5); *Ex parte Chaplin: In re Sinclair*(6); *Ex parte Johnson: In re Chapman*(7); *Ex parte Pearson: In re Mortimer*(8).

The onus in this respect is on the transferee.

It is submitted that the whole transaction was a fraud.

Reference was made on the first point to the following cases:—*Sharp* v. *Jackson*(9); *Ex parte Griffith: In re Wilcoxon* (10); *Ex parte Hill: In re Bird* (11); *Morpeth Rival Council* v. *Bullocks Hall Colliery Company, Limited*(12); *Ex parte Viney: In re Eaton & Co.* (13); *Official Receiver Ex parte: In re Bell*(14); *In re Arnott*(15); *In re Jukes: Ex parte Official Receiver*(16).

Nugent Grant, (*D. Chamier* with him) for respondent.—The insolvent sent the sale-proceeds obtained under the transaction with Mehta to the Bombay creditors and carried on his business by keeping it floating. His dominant view was to keep his business floating and it was with that view and not with the

(1) (1916) I.L.R., 39 Mad., 250. (2) (1913) 20 I.C., 482.
(3) (1882) 19 Ch.D., 588. (4) (1912) 83 L.T., 416.
(5) (1896) 1 Q.B., 406. (6) (1884) 26 Ch.D., 319.
(7) (1884) 26 Ch.D., 338. (8) (1873) L.R., 8 Ch., 668.
(9) (1899) A.C., 419. (10) (1883) 23 Ch.D., 69.
(11) (1883) 23 Ch.D., 695. (12) (1913) 2 K.B., 8.
(13) (1897) 2 Q.B., 16. (14) (1892) 10 Mor., 715.
(15) (1889) 6 Mor., 215. (16) (1902) 2 K.B., 58.

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view of preferring Mehta that he sold diamonds to him. He carried on trade after the date of sales to Mehta. It is not a fraudulent preference. Secondly, it is not void under sections 55 and 9 of the Act. It is not a fraud on the bankruptcy law.

Reference was made to *Shears* v. *Goddard*(1), *Ex parte Blackburn : In re Cheeseborough*(2); *In re Clay*(3).

M. D. Devadoss in reply.—Mehta was a local man and so the insolvent preferred him. Every transaction by which a creditor is given a preference as a fact to others is presumably fraudulent; there are only three exceptions recognized in English decisions in which transfers will be sustained, viz., (1) to recoup a breach of trust by the insolvent, (2) under threats of legal proceedings, (3) where the insolvent *bona fide* believed he could thereby avoid bankruptcy. *Sharp* v. *Jackson*(4) was one of these cases. The decision in *Tomkins* v. *Saffery*(5) is another exception to the rule in *Sharp* v. *Jackson*(4).

WALLIS, C.J.

WALLIS, C.J.—This is an appeal from an order of COUTTS TROTTER, J., dismissing the Official Assignee's application by notice of motion for a declaration that the sale of diamonds by the insolvent on and after the 19th May 1917 to the garnishees T. B. Mehta & Sons was void as a fraudulent preference under section 56 of the Presidency Towns Insolvency Act or in the alternative under section 55 as the sale was not *bona fide* and for valuable consideration. In my opinion the decision of the learned Judge was right on both points. We are not now concerned with the propriety or morality of the insolvent's conduct in obtaining large quantities of diamonds on credit from various firms and pledging them for advances to Nattukottai Chettis and in persisting in this course when he was clearly in insolvent circumstances and had no prospect of paying for them. These are matters to be taken into consideration at another stage. In the middle of May 1917 the insolvent was in very embarrassed circumstances and was unable to meet his obligations as they fell due. He was indebted to the garnishees Messrs. Mehta & Sons, a Madras firm, with whom he had had large transactions, in Rs. 36,062 against which eight hundis were outstanding and also in Rs. 3,000 on general account. Two

(1) (1896) 1 Q.B., 406. (2) (1871) 12 Eq., 358.
(3) (1896) 3 Mans., 31. (4) (1899) A.C., 419.
(5) (1878) 3 A.C., 213.

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WALLIS, C.J.

hundis which fell due on the 19th were not presented at his request (exhibit 10, dated 14th May 1917), but a third hundi which fell due on the same day was not met and they began to press him. The insolvent then proposed that the garnishees who were diamond merchants should purchase from him diamonds which were under pledge to various Nattukottai Chettis and apply the surplus after discharging the pledges in satisfaction of the hundis. The diamond market was then rising and Mehta accepted the offer and in the course of five transactions between the 25th May and 12th June purchased diamonds to the extent of Rs. 2,87,000, and in this way obtained payment of the hundis. It is not now disputed that he paid a fair price for the diamonds. An examination of the pledgees' accounts in the course of the case revealed the fact that the purchases by the garnishees from pledgees were larger than was necessary to pay them off out of the surpluses and that the insolvent was paid over Rs. 41,000 by the pledgees as a result of the transactions. The evidence is that this result was obtained by including in the sales, apparently without the garnishees' knowledge, other diamonds which were not under pledge. Any adverse inference that might arise from this fact is negatived by the evidence that between the 25th May, the date of the first of these sales, and his arrest at the end of June, he made payments to the other creditors amounting to more than Rs. 71,000 to meet his more pressing obligations and at the same time put off other creditors. All this shows that he went on trading when in hopelessly insolvent circumstances, not that he entered into the transactions now impugned with a view to prefer these particular creditors. The learned Judge has rightly held that to bring a transaction within the scope of section 56 it must have been entered into with the dominant view of preferring the particular cerditor. That construction has recently been criticized in an unreported case—*Nalam Viswanathan* v. *The Official Assignee of Madras*(1) in this Court—as proceeding upon a consideration of cases decided before the section was enacted. Lord Justice BOWEN deprecated this mode of construction in *Ex parte Griffith : In re Wilcoxon*(2) and *Ex parte Hill : In re Bird*(3) and in the latter case expressed the opinion on a careful consideration of the various ways

(1) (1915) 32 I.C., 795. (2) (1883) 23 Ch. D., 69.
(3) (1883) 23 Ch. D. 695.

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in which the language of the section could be construed that the words 'with a view of giving a creditor preference over other creditors' must be read as equivalent to 'with the view,' the real effectual substantial view of giving a preference to the creditor, the word *a* being equivalent to *the*. That construction was accepted and was approved by the House of Lords in *Sharp* v. *Jackson*(1) several years before that section was re-enacted in India in 1907 and again in 1909 and the Indian Legislature must in my opinion have contemplated that that construction would be followed here. In the present case the evidence in my opinion does not show that the insolvent entered into these transactions with the dominant view of 'preferring the garnishees' because, as is suggested, they were Madras creditors, whereas most of the other creditors were in Bombay. The evidence rather shows that he was acting throughout exclusively in his own interests and with a view to keep his business going which he could not do without satisfying the garnishees, creditors on the spot who were pressing him to meet his obligations and were not to be put off with excuses. As regards section 55, the sales now in question were for full consideration and did not amount to an act of insolvency by reason of an intent to defeat or delay creditors or otherwise, and the purchaser had no notice of an act of insolvency. In these circumstances they must be held to have been made in good faith and for valuable consideration and not to be avoided under section 55. The Appeal fails and is dismissed with costs.

NAPIER, J.

NAPIER, J.—This is an appeal from the judgment of COUTTS TROTTER, J., on a motion on behalf of the Official Assignee for a declaration that certain sales of jewels by the insolvent Muthiah Chetty to the firm of T. B. Mehta & Sons are void as not being *bona fide* transactions and further as constituting a fraudulent preference of that firm in that the proceeds were largely utilized for discharging certain promissory notes given by the insolvent to the firm. The insolvent was a diamond merchant in a large way of business in Madras, purchasing diamonds here to a certain extent and to a much larger extent in Bombay. At the time of the sales he was in fact hopelessly insolvent. The sales covered a period between 25th May and 12th June 1917 and were completed in five transactions, on 25th May, 2nd June, 7th June, 8th June and 12th June. Nearly all

(1) (1899) A.C. 419.

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the diamonds sold were under pledge to various lenders and the sales purported to be, according to the evidence of the garnishee, of those diamonds only, the garnishee buying the diamonds at an agreed price, paying the amount due on the pledge and crediting the balance as against promissory notes, with the result that the whole of the promissory notes and an amount due on general account to the garnishee were discharged, while much heavier debts on promissory notes to other creditors were left undischarged. The learned Judge has found that the sales are not void for fraudulent preference.

Mr. Devadoss has attacked these findings as being based on an erroneous view of the law and also contends that on the true view of the facts they cannot be upheld. His contention on the law was as follows : that every transaction by which a creditor is given a preference is presumably fraudulent and that there are only three conditions under which such transactions will be sustained, namely, where the transaction is to recoup a breach of trust, where the transaction is compelled by threats of legal proceedings and where the insolvent *bona fide* believed he could avoid bankruptcy and entered into the transaction for that purpose. In my opinion, there is no warrant for this contention. All that Mr. Devadoss has been able to do is to invite our attention to cases in which these conditions have been held sufficient to establish that there was no fraudulent preference in the particular case. I entirely agree with what fell from the learned Chief Justice at the beginning of the argument that what we have to do is to construe the act with the assistance of decisions of eminent Judges in England on similar words in the English statute The learned trial Judge, although he does not refer to the language of the section, starts with this proposition that he has to consider what was the dominant motive of the insolvent in carrying through this transaction. I agree that this is the real consideration in the case, but I think it advisable to state how this proposition is arrived at.

The Act to be construed is the Presidency Towns Insolvency Act (III of 1909) and the important sections are section 9, which defines an Act of Insolvency, section 55, which avoids certain transactions made within two years of insolvency, section 56 which declares certain transactions within three months of the insolvency fraudulent and void, and section 57 which

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protects certain transactions. The corresponding English Act is the Bankruptcy Act of 1883, and the corresponding sections are sections 4, 47, 48 and 49. Dealing first with fraudulent preference, the words of section 56 with which we are concerned are :—

"Every transfer of property, every payment made, by the person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over other creditors, shall, if such person is adjudged insolvent, on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Official Assignee."

The language of section 48 of the English Act is *mutatis mutandis* identical. The first thing to be noted about this section is that it does not say that every transfer of property or payment by such a person with the effect of giving the creditor preference is fraudulent and there can be no doubt that, if the legislature had intended to avoid all transfers and payments in favour of a particular creditor without considering the motive or the object of the insolvent, it would have used some such words as the above or omitted the words 'with a view, etc.' We have therefore to construe the words 'with a view of giving that creditor a preference' as an essential requirement for a fraudulent preference. The learned Judge in the course of his judgment has referred with disapproval to an *obiter dictum* of a Judge of this Court in a case not reported in the authorized reports—*Nalam Viswanathan* v. *The Official Assignee of Madras*(1). I do not think that COUTTS TROTTER J.'s criticisms are quite justified on the language of my learned brother, though I am not prepared to agree with some of the observations to be found in that language. I must say also that I think the learned Judge's language is useful as drawing the attention to the fact that we have to construe a particular statute and not to apply principles founded on words which are not in the particular statute. The true rule of construction was laid down in 1891 by the House of Lords in the well-known case of the *Bank of England* v. *Vagliano Brothers*(2) and approved of by the Privy Council in *Narendranath Sircar* v. *Kamal Basini Dasi*(3). I am not certain that this rule has always been borne in mind

(1) (1915) 32 I.C., 795. (2) (1891) A.C., 107.
(3) (1896) I.L.R. 23, Calc., 563.

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in decisions on questions of fraudulent preference in cases in England, and I specially refer to a decision which was pressed on us by Mr. Grant, *Ex parte Blackburn: In re Cheeseborough*(1) from which, so far as the process of reasoning is concerned, I must respectfully dissent. We have however the guidance of very eminent Judges in England in cases where the language of the English statute was critically analysed, and I propose to refer to a few of them.

The first case which is very much in point is in *Ex parte Griffith : In re Wilcoxon*(2) and especially the language of BOWEN, L.J., at page 74. He there refers to the fact that in judicial decisions since the Bankruptcy Act there has been a tendency among Courts to discuss the question whether the Act had altered the old law and introduced an entirely new law with the result that the Court has been drawn into questions of pressure and volition and into motive of a motive, whatever that may mean, and he lays down that the true method is to go back to the words of the statute and be guided by them. Here we have a very eminent Judge applying the principle which was subsequently laid down in the *Bank of England* v. *Vagliano Brothers*(3). The next is *Ex parte Hill : In re Bird*(4). In that case the same learned judge speaking of section 92, the corresponding section of the Bankruptcy Act of 1869, says as follows :—

"Whether that section has or has not altered the old law is not a matter that need be decided, though there was considerable authority for saying that it has not. But however that may be, we have to look to the words of section 92, and they are 'with a view of giving such creditor a preference over other creditors'."

He then considers the meaning of the words 'a view' and says:

"I should prefer keeping to the word 'view' instead of 'motive,' though in nine cases out of ten the two words may come to the same thing."

He declines to accept the suggestion that the words 'a view' mean 'sole view' on the ground that if the legislature had so intended it would have used the word 'sole'. He is of opinion that the word 'a' is equivalent to 'the' and considers that 'the view' means the dominant and substantial view.

(1) (1871) 12 Eq., 358. (2) (1883) 23 Ch.D., 69.
(3) (1891) A.C., 107. (4) (1883) 23 Ch.D., 695.

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These two cases were followed and applied by a divisional Court in *Ex parte Official Receiver : In re Bell*(1). That was a case where pressure was relied on as taking the case out of the statute and WRIGHT, J., laid down that in such a case it must be found that pressure was the substantial ground of the payment being made, which is of course equivalent to saying that the intention to prefer would not be the substantial ground. VAUGHAN WILLIAM, J., says :

"The law is well established now that one has to ascertain in each case what was the dominant motive which operated on the bankrupt's mind ;"

and in another part of the judgment :

"Was the substantial, effectual, or dominant view with which the debtor made the payment a preference of that creditor ?"

The next case is the decision relied on by the learned Judge is *Sharp* v. *Jackson*(2). There the learned Lord Chancellor endorses the view of Lord ESHER in the Court of Appeal in the same case that the question depends not on the mere fact that there has been a preference but also on the state of mind of the person who made it, and that it is not sufficient to say that, the natural consequence of the act being to prefer, the intention to prefer follows. This decision is specially important, as it has been treated in subsequent cases as endorsing the correctness of the decision in the Court of Appeal in the same case. That is sub-nom, *In re The Trustee of the Property of New, Prance and Garrard* v. *Hunting and others*(3). I have already referred to one extract from Lord ESHER's judgment. Other passages are as follow :

"What had he obviously in view when he executed this deed ? It seems to me clear that he made this conveyance, not with the 'intention', or 'view' or 'object' or whatever it may be called, of preferring these persons, but for the sole purpose of shielding himself. Under these circumstances what he did is not a fraudulent preference within the Act."

A.L. SMITH, L.J., says :

"I have always understood that, to ascertain whether there has been a fraudulent preference, it is necessary to consider what the dominant or real motive of the person making the preference was ; whether it was to defraud some credtiors by preferring others, or some other motive."

(1) (1892) 10 Mor., 715. (2) (1899) A.C., 419.
(3) (1897) 2 Q.B., 19.

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CHITTY, L.J., says :

"I ask myself what was really the view which Prance had in making this conveyance. Was it to prefer these particular trust estates to other creditors ? No, it was to protect himself against the charges hanging over him."

There can be no doubt that the Court of Appeal in this case were applying the tests laid down in *Ex parte Griffith : In re Wilcoxon*(1) and *Ex parte Hill : In re Bird*(2) and in consequence of this unanimity of the Court of Appeal and its endorsement by the House of Lords, WRIGHT, J., in *In re Blackburn, Buckley's Case*(3) said as follows :

"Ever since the decision in *New, Prance and Garrard's Trustees* v. *Hunting*(4), which has since been affirmed by the House of Lords, sub-nom *Sharp* v. *Jackson*(5) so little difficulty has been felt by gentlemen who practise in bankruptcy matters that questions of fraudulent preference comparatively seldom now arise."

It is clear on the authority of these cases that no hard and fast rule can be laid down as to what facts will take a particular case out of the statute and it is not open to us to hold, as Mr. Devadoss would wish us to do, that certain circumstances only have been accepted by the Courts for this purpose and no other circumstances will suffice. Mr. Devadoss relied on a decision in *In Re Lake*(6), a breach of trust case. But this case is really against him, for there WRIGHT, J., finding that there had been several breaches of trust of which only one was made good, held that there was a fraudulent preference. The Court of Appeal, it is true, found on the facts that it was not. But the learned Judges did not lay down, and I venture to think, could not lay down, a definite rule that where there are breaches of trust and one is made good, there cannot be a fraudulent preference. Indeed, on those facts, I would myself prefer the finding of WRIGHT, J.

[His Lordship then dealt with the facts and found that the insolvent was endeavouring to keep his business going as long as possible.]

The learned trial Judge has relied on *In re Arnott*(7), and our attention has also been invited to *Lomax* v. *Buxton*(8). In

(1) (1883) 23 Ch D. 69. (2) (1883) 23 Ch. D. 695.
(3) (1899) 2 Ch. 725 at p. 728. (4) (1897) 2 Q.B., 19.
(5) (1899) A.C, 419. (6) (1901) 1 K.B., 710.
(7) (1889) 6 Mor., 215. (8) (1871) 6 C.P., 107.

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both these cases the insolvent had procured money for the purpose of carrying on business and the transaction was upheld. I do not myself think that we require any authority because, as indicated above, each case should be decided on its own facts, the sole question being 'what was the object which the insolvent had in view?' I can come to no other conclusion but that these transactions with Mehta were put through in the hope of being able to continue business and for the purpose of raising money with which to satisfy Meenasche and get further consignments of diamonds from him. I therefore agree with COUTTS TROTTER, J., that these transactions did not amount to a fraudulent preference.

The remaining question can be shortly disposed of. It follows from the above finding that the transfer was not an act of bankruptcy under section 9, clause(*b*). With regard to section 55 which invalidates transfers not made in good faith and for valuable consideration within two years of insolvency, it has been established by the evidence of an expert witness that the price paid by the garnishee for the jewels was only 4 per cent less than the valuation he would put on them. It is hardly necessary to say that such a variation cannot indicate anything more than a difference of opinion. There is no evidence that the garnishee knew that the insolvent was carrying through this transaction for any other purpose than that which he (the garnishee) thought, namely, discharging the liability to him, or that he was getting more money than was required for discharge of the pledge. Indeed Mr. Devadoss conceded this. There was therefore no want of good faith within the ordinary meaning of the term. It is true that the words 'in good faith' have been held both in England and in this Court to require that the transaction should not be in fraud of the bankruptcy laws. But as there has been no fraudulent preference, it follows that there has been no fraud of the bankruptcy laws. In these circumstances, I do not think it necessary to consider the case of *Shears* v. *Goddard*(1), and other English cases on the point. I therefore agree with the learned Chief Justice in dismissing the Appeal with costs.

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(1) (1896) 1 Q.B., 408.

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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 64 AND O. XXI, R. 54—*Attachment when effective against alienation.*] An attachment of land which is only ordered but not communicated to the judgment-debtor by the issue of a prohibitory order under Order XXI, rule 54, Civil Procedure Code, does not affect an alienation made before the judgment-debtor has knowledge of the prohibitory order.

Ramanayakudu v. *Boya Pedda Basappa* ... ... (1919) I.L.R., 42 Mad., 565

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Ramaraya Shanbogue v. *Sherbott Venkataramanayya* (1919) I.L.R., 42 Mad., 576

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Chenchiah v. *King-Emperor* ... ... (1919) I.L.R., 42 Mad., 561

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 476—*"Offence referred to in section* 195," *meaning of—Jurisdiction of Court to take action under section* 476 *whether restricted to limitations imposed by section* 195, *Criminal Procedure Code.*] *Held* by the Full Bench.—The words in section 476, Criminal Procedure Code, "any offence referred to in section 195" incorporate the conditions laid down by section 195, and a Court can take action under section 476 only under such conditions. Hence proceedings under section 476 of the Criminal Procedure Code cannot be taken against a person who is neither a party to nor a witness in a suit in respect of abetment of forgery of a document exhibited in the suit.

Govinda Iyer v. *Ros* ... ... (1919) I.L.R., 42 Mad. (F.B.), 540

EASEMENTS ACT, INDIAN (ACT V OF 1882), ss. 15, 16 AND 19—*Easement of light and air—Acquisition by prescription—Easement for a limited period, whether can be acquired by prescription under the Act—English Common Law and English Prescription Act* (2 *and* 3, *Will.* 4, *c.* 71)—*Grant of land for maintenance to a tavazhi, whether an interest for life—Demise on kanom—No resistance to easement within three years after expiry of kanom, effect of—Acquisition by prescription of absolute right against owner—Prescription for an easement for a limited period aginst a tenant, whether possible in law.*] Where a tarwad, which was the absolute owner of the suit land, granted it for maintenance to a tavazhi in 1877, and the latter demised it on kanom in 1887 to the defendants who held over possession after its expiry in 1899 and subsequently obtained from the tavazhi a fresh lease for twelve years commencing from 1905, and where the plaintiffs, the owners and occupiers of adjacent lands claimed to have acquired a right of easement of light and air over the suit land by prescriptive enjoyment since 1877 till a few months before they

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instituted the present suit in 1913 for an injunction restraining the defendants from interfering with their right of easement. *Held*, that the plaintiffs had acquired in law *an absolute* right of easement of light and air by *prescription* for over the statutory period, as under section 16 of the Indian Easements Act, the plaintiffs' enjoyment of the easement from 1877 was not resisted by the tarward or the tavazhi within three years after the expiry of the kanom in 1899, and the grant for maintenance to a tavazhi was not in law a grant of an interest for life; and that consequently the plaintiffs were entitled to an injunction against the defendants. *Per* ABDUR RAHIM, J.—There cannot be an acquisition by *prescription* of a right of easement for a *limited* period under the Indian Easements Act which follows the English Common Law and the English Prescription Act (2 & 3 Will. IV, cap. 71), in this respect. *Wheaton* v. *Maples & Co.* (1893) 3 Ch., 48, referred to. *Per* PHILLIPS, J., *contra*. There can be an acquisition by *prescription* of an easement for a *limited* period under the Indian Easements Act, and that consequently the plaintiffs in this case were in any event entitled to a right of easement as against the defendants during the period of the latter's interest in the property.

Koyyammu v. *Kuttiammoo* ... ... (1919) I.L.R., 42 Mad., 567

EVIDENCE ACT (I OF 1872), S. 91: *See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 239, 435, 436, 439 561

HINDU LAW—*Alienation—Alienation by widow—Power to alienate husband's estate—Surrender or relinquishment by widow—Consent of reversioners—Whether alienation is binding on a mortgagee from transferee—Estoppel.*] As to the power of a Hindu widow to deal with the property of her husband to which she has succeeded for a life-estate on his death, there is a distinction between the power of surrender or renunciation which is the first head of the subject, and the power of alienation for certain specific purposes, as necessity, which is the second. The result of the consideration of the decided cases may be summarized as follows:—(1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, and not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved aliunde, and the alienee does not prove enquiry on his part, and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction, will be held to afford a presumptive proof which if not rebutted by contrary proof will validate the transaction as a right and proper one. Where property was transferred by the widow to an alienee from whom a prospective reversioner takes a mortgage of a portion of it, he is not estopped on the death of the widow, from disputing the validity of the alienation.

Rangasami Gounden v. *Nachiappa Gounden* ... (1919) I.L.R., 42 Mad. (P.C.), 523

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PENAL CODE, INDIAN (ACT XLV OF 1860), SS. 299 AND 300—*Grievous hurt causing unconsciousness—Hanging an unconscious person believing him to be dead to screen an offence—Death in consequence, whether culpable homicide.*] Where an accused struck his wife a blow on her head with a ploughshare which, though not shown to be a blow likely to cause death, did in fact render her unconscious and, believing her to be dead, in order to lay the foundation of a false defence of suicide by hanging, the accused hanged her on a beam by a rope and thereby caused her death by strangulation. *Held* by the Full Bench that the accused was not guilty either of murder or culpable homicide not amounting to murder. *The Emperor* v. *Dalu Sardar* (1914) 18, C.W.N., 1279, followed.

Palani Goundan v. *Emperor* ... ... (1919) I.L.R., 42 Mad. (F.B.), 547

——————— SEC. 464—*Forgery—Document made to screen a previous offence, whether made fraudulently.*] An attakshi made by a process-server with false signatures in order to defraud a District Munsif into excusing his delay in returning processes and his absence from duty is made fraudulently and is a forged document within section 464 of the Indian Penal Code. *Empress* v. *Sabapathi* (1888) I.L.R., 11 Mad., 411, *Emperor* v. *Rash Behari Das* (1908) I.L.R., 35 Calc., 450, and *Kotamraju Venkatarayulu* v. *Emperor* (1905) I.L.R., 28 Mad., 90 (F.B.), followed. *Empress of India* v. *Jiwanand* (1883) I.L.R., 5 All., 221 and *Queen-Empress* v. *Girthari Lal* (1886) I.L.R., 8 All., 653, doubted.

Kamatchinatha Pillai v. *Emperor* ... ... (1919) I.L.R., 42 Mad., 553

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 68—*Usufructuary mortgage invalid for want of attestation—Deprivation of possession not by mortgage or but by title paramount—Suit for mortgage money, whether maintainable.*] Section 68 of the Transfer of Property Act does not entitle a person who takes a usufructuary mortgage which is invalid for want of attestation and who is deprived of his possession by title paramount and not by any act of his mortgagor, to sue for the mortgage money. The default referred to in section 68 (*b*) as entitling the mortgagee to sue for the mortgage money is one anterior to the deprivation of possession, and failure of the mortgagor to establish the possession when called upon as against the strangers dispossessing the mortgagee is no default within section 68(*b*). *Ram Narayan Singh* v. *Abhindra Nath Mukkerji* (1918) I.L.R., 44 Calc., 388 (P.C.), distinguished.

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instituted the present suit in 1918 for an injunction restraining the defendants from interfering with their right of easement. *Held*, that the plaintiffs had acquired in law *an absolute* right of easement of light and air by *prescription* for over the statutory period, as under section 16 of the Indian Easements Act, the plaintiffs' enjoyment of the easement from 1877 was not resisted by the tarward or the tavazhi within three years after the expiry of the kanom in 1899, and the grant for maintenance to a tavazhi was not in law a grant of an interest for life; and that consequently the plaintiffs were entitled to an injunction against the defendants. *Per* ABDUR RAHIM, J.—There cannot be an acquisition by *prescription* of a right of easement for a *limited* period under the Indian Easements Act which follows the English Common Law and the English Prescription Act (2 & 3 Will. IV, cap. 71), in this respect. *Wheaton* v. *Maples & Co.* (1893) 3 Ch., 48, referred to. *Per* PHILLIPS, J., *contra*. There can be an acquisition by *prescription* of an easement for a *limited* period under the Indian Easements Act, and that consequently the plaintiffs in this case were in any event entitled to a right of easement as against the defendants during the period of the latter's interest in the property.

Koyyammu v. *Kuttiammoo* ... ... (1919) I.L.R., 42 Mad., 567

EVIDENCE ACT (I OF 1872), S. 91: *See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 239, 435, 436, 439 561

HINDU LAW—*Alienation—Alienation by widow—Power to alienate husband's estate—Surrender or relinquishment by widow—Consent of reversioners—Whether alienation is binding on a mortgagee from transferee—Estoppel.*] As to the power of a Hindu widow to deal with the property of her husband to which she has succeeded for a life-estate on his death, there is a distinction between the power of surrender or renunciation which is the first head of the subject, and the power of alienation for certain specific purposes, as necessity, which is the second. The result of the consideration of the decided cases may be summarised as follows:—(1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, and not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved aliunde, and the alienee does not prove enquiry on his part, and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction, will be held to afford a presumptive proof which if not rebutted by contrary proof will validate the transaction as a right and proper one. Where property was transferred by the widow to an alienee from whom a prospective reversioner takes a mortgage of a portion of it, he is not estopped on the death of the widow, from disputing the validity of the alienation.

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PENAL CODE, INDIAN (ACT XLV OF 1860), ss. 299 AND 300—*Grievous hurt causing unconsciousness—Hanging an unconscious person believing him to be dead to screen an offence—Death in consequence, whether culpable homicide.*] Where an accused struck his wife a blow on her head with a ploughshare which, though not shown to be a blow likely to cause death, did in fact render her unconscious and, believing her to be dead, in order to lay the foundation of a false defence of suicide by hanging, the accused hanged her on a beam by a rope and thereby caused her death by strangulation. *Held* by the Full Bench that the accused was not guilty either of murder or culpable homicide not amounting to murder. *The Emperor* v. *Dalu Sardar* (1914) 18, C.W.N., 1279, followed.

Palani Goundan v. *Emperor* ... ... (1919) I.L.R., 42 Mad. (F.B.), 547

——————— SEC. 464—*Forgery—Document made to screen a previous offence, whether made fraudulently.*] An attakshi made by a process-server with false signatures in order to defraud a District Munsif into excusing his delay in returning processes and his absence from duty is made fraudulently and is a forged document within section 464 of the Indian Penal Code. *Empress* v. *Sabapathi* (1888) I.L.R., 11 Mad., 411, *Emperor* v. *Rash Behari Das* (1908) I.L.R., 35 Calc., 450, and *Kotamraju Venkatarayulu* v. *Emperor* (1905) I.L.R., 28 Mad., 90 (F.B.), followed. *Empress of India* v. *Jiwanand* (1883) I.L.R., 5 All., 221 and *Queen-Empress* v. *Girthari Lal* (1886) I.L.R., 8 All., 653, doubted.

Kamatchinatha Pillai v. *Emperor* ... ... (1919) I.L.R., 42 Mad., 553

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 68—*Usufructuary mortgage invalid for want of attestation—Deprivation of possession not by mortgage or but by title paramount—Suit for mortgage money, whether maintainable.*] Section 68 of the Transfer of Property Act does not entitle a person who takes a usufructuary mortgage which is invalid for want of attestation and who is deprived of his possession by title paramount and not by any act of his mortgagor, to sue for the mortgage money. The default referred to in section 68 (*b*) as entitling the mortgagee to sue for the mortgage money is one anterior to the deprivation of possession, and failure of the mortgagor to establish the possession when called upon as against the strangers dispossessing the mortgagee is no default within section 68(*b*). *Ram Narayan Singh* v. *Abhindra Nath Mukkerji* (1918) I.L.R., 44 Calc., 388 (P.C.), distinguished.

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PRIVY COUNCIL.*

RANGASAMI GOUNDEN (PLAINTIFF)

v.

NACHIAPPA GOUNDEN (DEFENDANT No. 2).

1918, October 31, and December, 16.

[On appeal from the High Court of Judicature at Madras.]

Hindu Law—Alienation—Alienation by widow—Power to alienate husband's estate—Surrender or relinquishment by widow—Consent of reversioners—Whether alienation is binding on a mortgagee from transferee—Estoppel.

As to the power of a Hindu widow to deal with the property of her husband to which she has succeeded for a life-estate on his death, there is a distinction between the power of surrender or renunciation, which is the first head of the subject, and the power of alienation for certain specific purposes, as necessity, which is the second.

The result of the consideration of the decided cases may be summarized as follows:—

(1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, and not a device to divide the estate with the reversioner.

(2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved *aliunde*, and the alienee does not prove inquiry on his part, and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction, will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one.

Where property was transferred by the widow to an alienee from whom a prospective reversioner takes a mortgage of a portion of it, is not estopped on the death of the widow, from disputing the validity of the alienation.

APPEAL No. 32 of 1917 from a judgment and decree (20th November 1914) of the High Court at Madras in an appeal under clause 15 of the Letters Patent, which varied a judgment and

* *Present*:—Lord BUCKMASTER, Lord DUNEDIN, Sir JOHN EDGE and Sir LAWRENCE JENKINS.

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decree (3rd March 1913) of the same Court in its Appellate Civil jurisdiction, which affirmed a judgment and decree (4th October 1909) of the District Judge of Salem.

The suit which gave rise to this appeal was brought for a declaration of the appellant's title to, and for possession of, a half-share of certain lands which had formed the estate of one Ramasami Gounden deceased; the most valuable portion of the estate consisted of certain mitta lands of Kanganapuram. The relationship of the parties appears from a pedigree which is set out in the judgment of the Judicial Committee. Ramasami died childless in 1890, and his mother Marakammal then succeeded to his property for a woman's estate. On 24th November 1893 she executed a deed of transfer to another Ramasami Gounden, a nephew of her late husband, who was then the nearest reversionary heir to her son and entitled to succeed on her death. The material parts of the deed are set out in the judgment of the Judicial Committee.

The transferee enjoyed the properties under the deed, which was duly registered, till his death, when they passed to his nephew, the first defendant, and his brother since deceased. It appears from the pedigree that these persons and the appellant became on his death the nearest male relatives of Marakammal's son, and that they stood in the same degree of relationship to him. The third defendant was of the same grade but of the half-blood.

The plaintiff, on 7th December 1896, purchased from the first defendant and his brother for Rs. 1,700 two items held by them under the deed of 1893 which is referred in the conveyance, and on the same day advanced them Rs. 8,000 on a mortgage of the mitta lands: that mortgage was paid off with money borrowed on the same security by the mortgagors from the third defendant, and the mortgage property was sold to him in 1907.

On 5th August 1907 Marakammal died, and the appellant for the first time impeached the validity of her deed of transfer, and the title of his own vendors and mortgagors which depended thereon, asserting his claim to half the estate as reversioner. Other portions of the estate having been sold or leased by the transferee under the deed of 1893 the appellant

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instituted the present suit on 6th April 1908 as above mentioned.

Defendants Nos. 1 and 2 put in statements of defence (1) that the deed of transfer of 1893 was valid, and (2) that in any event under the circumstances of the case the appellant was not entitled to call its validity in question, and paragraph 5 of the statement was as follows :—

"Moreover, as the plaintiff (appellant) and third defendant's party who were well aware of the fact that the said Ramasami Gounden and the members of his undivided family having acquired and enjoyed the said properties under the said deed of gift acknowledged the said alienation, and the enjoyment obtained in pursuance thereof, conducted many transactions and got some of the properties by sale and mortgage under registered deeds and have been enjoying the same, they are precluded by the said acts of theirs from contending that the said gift was not valid after the death of Marakammal or that it is not binding on them and from bringing the suit. So the plaintiff's suit is not sustainable."

Issues were framed, of which the following are material :—

(1) Does the gift in favour of Ramasami Gounden operate in law as a surrender of the widow's estate to the next reversioner, and as such is the transaction binding on the plaintiff (appellant) and the other reversioners even after Marakammal's lifetime as alleged by first defendant?

(2) Was the transaction effected for good consideration, and was it consented to and acquiesced in by the plaintiff, and by the third defendant as alleged by the first defendant, and, if so, is it valid and binding on the plaintiff?

(3) Are the plaintiff and third defendant precluded from repudiating or otherwise questioning the validity and binding character of the said transaction for the reasons alleged by the first defendant in paragraph 5 of his written statement?

(4) Is the third defendant excluded from the reversion by reason of his half-blood as alleged in the plaint, or is he entitled to a third in the reversion as contended by him?

The District Judge held on the first issue that the deed of 1893 was inoperative against the reversioners living at the widow's death, because it did not include the whole of the property. On the second and third issues he held that the plaintiff was not precluded by any consent, acquiescence

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estoppel or otherwise from advancing his present claim, and he found that the third defendant was excluded from the reversion on account of his half-blood.

The first and third defendants appealed to the High Court (MILLER and SADASIVA AYYAR, JJ.), the former of whom agreed with the District Judge, and the latter came to a contrary conclusion that, even assuming the deed of 1893 was a transfer of only part of the estate of Ramasami, the judgment should be reversed "on the short ground that a partial alienation by a widow to the nearest reversioner is valid in law when he is a male, and gives him full ownership in the alienated property." In support of his opinion he cited the case of *Bajrangji Singh* v. *Manokarnika Baksh Singh*(1).

The Judges of the High Court having differed a further appeal under section 15 of the Letters Patent of the High Court was preferred and came before WALLIS, O.C.J., and SESHAGIRI AYYAR and KUMARASWAMI SASTRI, JJ., who all agreed with MILLER, J., and the District Judge that the plaintiff was entitled to avoid the deed of 1893 under the Hindu Law, and as to that they dismissed the appeal: but they further held that the plaintiff was by his conduct estopped from recovering the mitta lands, and on that point they allowed the appeal.

ON THIS APPEAL

A. M. Dunne, K.C., and *B. Dubé* for the appellant contended that he was not precluded from recovering the mitta lands as held by the High Court in the Letters Patent Appeal, on the ground of estoppel, consent, or ratification, by acquiescence, or for any other cause: his having become a mortgagee of them could have no such effect as to make the deed of transfer binding on him so as to bar his rights as a reversioner on Marakammal's death. That deed, it was submitted, was a deed of gift, and not an alienation for consideration, and the gift by the widow was only for the term of her life. The deed moreover only dealt with part of the estate, and was therefore invalid. Reference was made to *Behari Lal* v. *Madho Lal Ahir Gyawal*(2), *Marudamuthu Nadan* v. *Srinivasa Pillai*(3) *Debi Prosad Chowdhry* v. *Golap Bhagat*(4). This not being a deed for consideration, the

(1) (1907) I.L.R., 30 All., 1: L.R., 35 I.A., 1.
(2) (1891) I.L.R., 19 Calc., 236: L.R., 19 I.A., 30.
(3) (1898) I.L.R., 21 Mad., 128. (4) (1913) I.L.R., 40 Calc., 721.

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principles on which the case of *Bajrangji Singh* v. *Manokarnika Baksh Singh*(1) was decided are not applicable: reference was made to *Bakhtawar* v. *Bhagwana*(2), *Abdulla* v. *Ramlal*(3), and *Pilu* v. *Babaji*(4). Here the appellant never consented to the alienation—*Jiwan Singh* v. *Misri Lal*(5) and *Hari Kishen Bhagat* v. *Kastu Pershad Singh*(6)—and his having become a mortgagee of part of the property alienated did not, it was submitted, interfere in any way with the assertion of his right as soon as it ceased to be a mere *spes successionis*.

DeGruyther, K.C., and *Kenworthy Brown*, for the respondent, contended that it had been rightly held as to the mitta lands that the appellant was not entitled to assert that the deed of 1893 was inoperative as against him: by taking a mortgage of it he recognized the validity of the alienation. The deed of 1893 was not a deed of gift, but was supported by consideration, and the whole estate of the deceased Ramasami Gounden was dealt with thereby. It was therefore not a case to which the decision in *Behari Lal* v. *Madho Lal Ahir Gyawal*(7) was applicable. An alienation by a Hindu widow is not void but only voidable—*Modhu Sudan Singh* v. *Rooka*(8). But even if it were a gift it was valid, and the rule of Hindu law that a partial alienation "by a widow to the nearest reversioner is valid when he is a male, and gives him full ownership right in the alienated property," stated by SADASIVA AYYAR, J., in his judgment made it a deed operative for all purposes whether it was a gift or a transfer for consideration. Reference was made to *Bajrangji Singh* v. *Manokarnika Baksh Singh*(1) as being authority for that rule of law. If a reversioner has assented to a deed aliening part of an estate, he is bound by the deed. Reference was made to *Rangappa Naik* v. *Kampti Naik*(9), *Muthuveeru Mudaliar* v. *Vithilinga Mudaliar*(10),

(1) (1907) I.L.R., 30 All., 1: L.R. 35, I.A., 1.
(2) (1910) I.L.R., 32 All., 176. (3) (1911) I.L.R., 34 All., 129.
(4) (1909) I.L.R., 35 Bom., 165.
(5) (1895) I.L.R., 18 All., 146: L.R. 23 I.A., 1.
(6) (1914) I.L.R., 42 Calc., 876: L.R., 42 I.A., 64.
(7) (1891) I.L.R., 19 Calc., 236: L.R., 19 I.A., 30.
(8) (1897) I.L.R., 25 Calc., 1: L.R., 24 I.A., 164.
(9) (1908) I.L.R., 31 Mad., 366.
(10) (1908) I.L.R., 32 Mad., 206.

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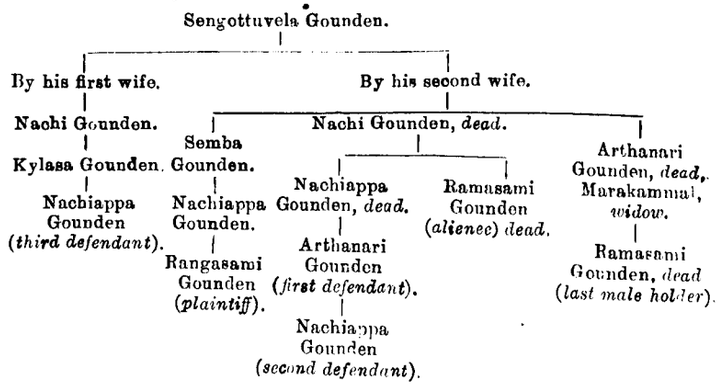
Narayana v. *Ramu*(1), *Mallik Sahieb* v. *Mallik Arjunappa*(2), *Pulin Chandra Mandal* v. *Bholai Mandal*(3) and *Bajrangji Singh* v. *Manokarnika Baksh Singh*(4) which shows that an assent given even after the alienation is binding. *Debi Prosad Chowdhry* v. *Golap Bhagat*(5) was wrongly decided so far as what it decides is contrary to this contention.

Dunne, K.C., in reply.—The deed of 1893 was held to be a gift by all the Courts: the evidence showed that it did not transfer the whole estate vested in the widow.

The JUDGMENT of their Lordships was delivered by

Lord DUNEDIN.

Lord DUNEDIN.—The subjoined pedigree will explain the position of the persons to be mentioned :—



This suit is brought by the plaintiff as one of the reversionary heirs entitled to one-half of the property last held by Marakammal, the widow of Arthanari Gounden, who had succeeded thereto as upon the death of her childless son, Ramasami Gounden. It was directed against thirty-two persons who were in possession of different pieces of the property. The suit was only contested by three defendants. The third defendant, who was only of the half-blood, as the pedigree will show, was held on that account to have no claim as a reversionary heir, and that finding is acquiesced in. He may be therefore dismissed from further notice. The first and second defendants were reversionary heirs, and as such entitled to the other half; but

(1) (1913) I.L.R., 38 Mad., 396 (402).
(2) (1913) I.L.R., 38 Bom., 224. (3) (1908) I.L.R., 35 Calc., 939.
(4) (1907) I.L.R., 30 All., 1: L.R., 35 I.A., 1.
(5) (1913) I.L.R., 40 Calc., 721.

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they were also in possession of two-fifteenths of an estate called Kongapuram mitta, one-fifteenth of which was claimed by the plaintiff, and they resisted this claim. The first defendant is now dead, and the second defendant is in his right and is the sole respondent before the Board.

The grounds on which the claim was resisted arise out of the following facts. After the death of her husband, Marakammal entered into possession of that estate. At the time Ramasami Gounden (designated in the pedigree as the 'alienee') was the nearest reversionary heir. Marakammal executed in 1893 in his favour a conveyance of parts of the estate including the disputed part of the Kongapuram mitta. The deed so far as material to the present questions ran as follows :—

"As you have performed the funeral rites to my husband the deceased Arthanari Gounden and my son the deceased Ramasami Gounden, as you have the right to inherit as surviving heir all my properties after my death, as you have spent on my behalf and on behalf of my son your own (moneys) and after borrowing moneys required for conducting O.S. No. 5 of 1883 on the file of the District Court of Salem conducted by my son deceased Ramasami Gounden as plaintiff and all other civil and criminal proceedings in connexion therewith in other Courts, as I am advanced in age and unable to supervise and manage the mitta and other lands and to collect the amounts due on the hypothecation debt bonds, and as you have consented to my possession and enjoyment with all rights and interests of all the properties other than those mentioned below which belong to me under the razinama decree in O.S. No. 5 of 1883 on the file of the District Court of Salem and which I am enjoying and of which I make a gift to you, and as you have promised to support me during my lifetime at your expense and to have the marriage of my unmarried (daughter) performed according to our custom and to perform also *seeru* and *sirappu* for this and to another daughter who has been married, I have made a gift of the undermentioned properties valued at about Rs. 10,000 to you who are the elder brother's son of my (husband) deceased, Arthanari Gounden and delivered possession to you. Therefore, you shall in comfort possess and enjoy the undermentioned properties from generation to generation and with powers to give away by gift, sale, etc. I have no manner of right or interest over the said gift properties."

Ramasami Gounden entered into possession but died prior to 1896, and was succeeded by his two nephews, the sons of his

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undivided brother. The nephews were Sundara, now deceased, and Arthanari, the first defendant.

In 1896 the nephews conveyed to the plaintiff by deed of sale two small properties which had been included in Marakammal's deed, and in the same year they borrowed from the plaintiff a sum of money, and in security therefor mortgaged four-fifteenths of Kongapuram mitta on the recital that they held two-fifteenths in respect of their own succession and two-fifteenths in respect of Marakammal's deed.

The learned District Judge gave judgment in favour of the plaintiff. The judgment being for one-half of all the property held by Marakammal included inter alia one-fifteenth of Kongapuram mitta. This judgment was acquiesced in by all concerned except the present respondent and his father, who, as before stated, subsequently died, so that the present respondent alone further proceeded with the litigation.

The grounds on which the suit was resisted were: (1) that the deed by Marakammal was valid and carried the property in question; (2) that even if it did not, the plaintiff had either ratified the deed by reason of his taking the conveyances and mortgage above set forth, or was at least estopped from saying that the deed was bad.

Appeal being taken to the High Court, the case was heard by MILLER, J., and SADASIVA AYYAR, J. MILLER, J., agreed *in omnibus* with the District Judge. SADASIVA AYYAR, J., dissented from this view and considered that the deed by Marakammal was good, it being in his view a correct proposition that

"a partial alienation by a widow to the nearest reversioner is valid in law when he is a male, and gives him full ownership right in the alienated property."

The Judges thus differing in opinion, the appeal was dismissed. It was then again appealed under the Letters Patent to a Full Bench, and was heard by WALLIS, C.J., and SESHAGIRI AYYAR and KUMARASWAMI SASTRI, JJ. The learned Judges all agreed with MILLER, J., and the District Judge as to the law applicable to the deed, but they held that the plaintiff was estopped from denying its validity in respect of the mortgage transaction. The suit was therefore dismissed as against the present respondent. Appeal was then taken to this Board.

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The first matter to be considered is the dictum of SADASIVA AYYAR, J., that a partial alienation by a widow to the nearest reversioner is valid in law when he is a male, and gives him full ownership right in the alienated property. It is true that this did not find acceptance with any of the learned Judges of the Court of Appeal, but it is founded in the opinion of the learned Judge on the most recent judgment of the Privy Council, viz., *Bajrangji Singh* v. *Manokarnika Baksh Singh*(1), and it is obvious that if it is sound it disposes at once of the case in favour of the respondent.

This raises the consideration of the whole subject of the power of a Hindu widow over estate which belonged to her husband to which she has succeeded, either immediately on the death of her husband, or as here on the death of her own childless son, her husband being already dead. This subject has been dealt with in many cases which are too numerous to cite individually; it has given rise to different currents of judicial opinion, and, as in this case and some others, to actual difference in judicial determination. The most recent examination of the subject in full in the Courts of India will be found in the case of *Debi Prosad Chowdhry* v. *Golap Bhagat*(2), and their Lordships wish to acknowledge how much they have been assisted by the lucid and able judgments of JENKINS, C.J., and MOOKERJEE, J., in that case, which though expressed in terms which are not identical, are in substance the same.

It has often been noticed before, but it is worth while to repeat, that the rights of a Hindu widow in her late husband's estate are not aptly represented by any of the terms of English Law applicable to what might seem analogous circumstances. Phrased in English law terms, her estate is neither a fee nor an estate for life, nor an estate tail. Accordingly one must not, in judging of the question, become entangled in Western notions of what a holder of one or other of these estates might do. On the other hand, what a Hindu widow may do has often been authoritatively settled. Here arises that distinction which, as SESHAGIRI AYYAR, J., most justly observed in the present case, will, if not kept clearly in view, inevitably lead to confusion—the distinction

(1) (1907) I.L.R., 30 All., 1: L.R., 35 I.A., 1.
(2) (1913) I.L.R., 40 Calc., 721.

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between the power of surrender or renunciation, which is the first head of the subject, and the power of alienation for certain specific purposes, which is the second.

To consider first the power of surrender. The foundation of the doctrine has been sought in certain texts of the Smritis. It is unnecessary to quote them. They will be found in the opinions of the learned Judges in some of the cases to be cited. But in any case it is settled by long practice and confirmed by decision that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all the reversioners nearest in degree if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death. The landmark of decision as to this may be taken as the case of *Behari Lal* v. *Madho Lal Ahir Gyawal*(1), where, in delivering the judgment of the Board, Lord MORRIS said :—

"It may be accepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee."

That this was no new doctrine but was only the final sanction of a long series of decisions may be taken from the opinions of GARTH, C.J., and MITTER, J., in the case of *Nobokishore* v. *Hari Nath Sarma Roy*(2), which had been decided six years before *Behari Lal's* case.

It has been suggested that the expressions in *Behari Lal's* case only meant that the widow should retain no interest in what was surrendered, and that therefore a partial surrender provided that the surrender was absolute as to that part was valid. This however is quite against the principle on which the whole transaction rests. As already pointed out it is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date. Now there cannot be a widow who is partly effaced and partly not so, and consequently the suggestion was in their Lordships' view rightly rejected by the Calcutta Full Bench in the case of *Debi Prosad* already cited and by the Full Bench in Madras

(1) (1891) I.L.R., 19 Calc., 236: L.R., 19 I.A., 30.
(2) (1884) I.L.R., 10 Calc., 30.

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in *Marudamuthu Nadan* v. *Srinivasa Pillai*(1) and by all the learned Judges in this case.

The surrender once exercised in favour of the nearest reversioner or reversioners the estate became his or theirs, and it was an obvious extension of the doctrine to hold that, inasmuch as he of they were in title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent. This was decided to be possible by the case of *Nobokishore* already cited. The judgment went upon the principle of surrender, and it might do so for the surrender there was of the whole estate, but it is worthy of notice that the order of reference showed that the alienation was ostensibly on the ground of necessity, so that it might have been supported on the grounds to be mentioned under the second head above set forth.

Turning now to the second head, viz., the power of alienation, which may be alienation to any one whether an heir or not, there is again authority of long standing. As a leading case may be taken *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(2) in a passage which need not be quoted at length. The purposes for which alienation is legitimate may be summarized as religious or charitable purposes, and those which are supposed to conduce to the spiritual welfare of the husband or necessity. Now necessity must be proved, and the mere recital in the deed of alienation is not sufficient proof—*Banga Chandra Dhur Biswas* v. *Jagat Kishore Chowdhuri*(3). An equitable modification has also been admitted in the case where the alienee has in good faith made proper inquiry and been led to believe that there was a case of true necessity.

Thus far if the alienation stands alone. But it may be fortified by the consent of reversionary heirs. The remaining question is what is the effect of such consent. If the alienation be total and the reversionary heirs be the nearest it falls within the first division. But what if it be partial?

The matter is mooted in the case of *The Collector of Masulipatam* just mentioned. Their Lordships there say :—

"On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may

(1) (1898) I.L.R., 21 Mad., 128. (2) (1861) 8 Moore's I.A., 500 (529).
(3) (1916) I.L.R., 44 Calc., 186: L.R., 43 I.A., 249.

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become so if made with the consent of the husband's kindred. The exception in favour of alienation with consent may be due to a presumption of law that, when that consent is given, the purpose for which the alienation is made must be proper."

The opinion which is here only tentatively expressed, viz., that consent does not give force *per se*, but is of evidential value, is corroborated by much subsequent authority. In the case of *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhury*(1), Sir JAMES COLVILE says:—"There should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law." Lord DAVEY uses the same form of expression in *Sham Sunder Lal* v. *Achhan Kunwar*(2). It was deliberately accepted in the case of *Debi Prosad* and was again affirmed by the Privy Council in *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji*(3), where it is said that the consent of reversioners was looked on

"as affording evidence that the alienation was under circumstances which rendered it lawful and valid."

But further if the matter be considered on principle, it seems clear that this must be the true view. For first if mere consent as such of the reversioner could validate alienation, then the rule as to total surrender would be an idle rule. And secondly mere consent could only validate on the theory that the reversioner together with the widow represented the whole estate. But that is impossible unless the reversioner has a vested interest, whereas it is settled that he has only a *spes successionis*.

The view that consent operates *proprio vigore* is, apart from casual expressions, really based on the authority of *Bajranji Singh's* case. It is therefore expedient to examine what was really there decided. The only real point at issue (apart from the question as to a particular custom of succession which is *nihil ad rem*) was whether the strict rule which had been laid down by the Allahabad High Court should be followed, or whether the extension permitted by the High Court of Calcutta was allowable. The Allahabad Court had laid down that where necessity was not proved *aliunde* then the consent of any number of reversioners would not bind a reversioner who possessed that character at

(1) (1869) 13 Moore's I.A., 209: 3 B.L.R. (P.C.), 57.
(2) (1898) I.L.R., 21 All., 71: L.R., 25 I.A., 183.
(3) (1914) I.L.R., 41 Calc., 793.

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the death of the widow and who had not himself been one of the consenters. The Calcutta Court had decided that if the consent of the reversioners at the time being was of an adequate character then the eventual reversioner could not challenge the transaction.

The Judicial Committee examined the various cases which had been decided from the beginning. They set forth the cases of surrender and those of partial alienation without discriminating for the purposes of the case before them between the two principles. They did not in any way throw doubt on the former judgment in *Behari Lal's* case which settled that a surrender must be total. Having set out the cases the judgment after quoting the opinion of RANADE, J., in *Vinayak* v. *Govind*(1):

"The consent of the reversioners must be of such kindred, the absence of whose opposition raises a presumption that the alienation was a fair and proper one,"

continues:

"The principle being thus admitted by the High Courts in India the question of the *quantum* of consent necessary only remains."

And then as the consent in that case had been given by the whole of the reversioners then in existence it decided that the Allahabad rule was too strict, and that the transaction must stand in a question with two reversioners who had not been parties to the transaction but were sons of those who had. The judgment affirmed the Calcutta as against the Allahabad rule, but it did not particularize on what exact ground the alienation was supported.

Now it is to be observed that in the particular case it might possibly have been supported on either ground. Although there were three successive alienations they *in cumulo* amounted to an alienation of the whole immovable property, and it is just possible that the fact was overlooked which was noticed by the learned Chief Justice in this case, that the widow was also possessed of movable property. But apart from that the alienations were all made for purposes of ostensible necessity. Their Lordships have examined the record and find that two of the alienations were to meet money spent in litigation presumably connected with the estate, and the third to pay Government duty. This would protect the alienation on the principles already stated. It is true that the concluding words of the judgment as

(1) (1900) I.L.R., 25 Bom., 129.

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to the sons being bound by the consent of the fathers 'through whom they claim' could be read as indeed they have been read as indicating that consent operated *proprio vigore*. But two remarks fall to be made. First the idea of an eventual reversioner claiming through any one who went before him is opposed both to principle and authority. It is opposed to principle because, as already stated, there is no vested right till the death. It is opposed to authority—*Bahadur Singh* v. *Mohar Singh*(1). Secondly, there is no hint in the judgment that their Lordships proposed to lay down a new doctrine which would render quite immaterial most of the cases quoted. It seems therefore much safer to conclude that the judgment was only meant to settle the point at issue, viz., the comparative merits of the Allahabad and the Calcutta rules, leaving the operation of consent to stand on the perfectly logical grounds of the authorities quoted, than to hold that a new and illogical extension of the law was introduced, and to find consolation in the fact as stated by SADASIVA AYYAR, J., that Lord HALSBURY once said that law was not a logical science.

The result of the consideration of the decided cases may be summarized thus: (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. These propositions are substantially the same as those laid down by JENKINS, C.J., and MOOKERJEE, J., in the case of *Debi Prosad*.

(1) (1901) I.L.R., 24 All., 94: L.R., 29 I.A., 1.

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It follows that their Lordships cannot agree with a good deal of what was said in the case of *Rangappa Naik* v. *Kampti Naik*(1).

It now becomes necessary to fix what was the character of the deed executed by Marakammal in favour of Ramasami Gounden. All the Judges in the Courts below concurred in holding that it was not a total conveyance of Marakammal's property, and that was scarcely contested by learned counsel before this Board. This prevents it receiving effect as a surrender. Counsel however strenuously argued that it was a deed for consideration and not a deed of gift. As to this all the Judges have decided that it was a deed of gift except KUMARASWAMI SASTRI, J., who says that in his view it is unnecessary to decide, but, that if he had to do so he would hold it a deed for consideration. Their Lordships see no ground for disagreeing with the result arrived at by the large majority of the learned Judges below. It calls itself a deed of gift, and it is apparent from the opinion of the Chief Justice that this point was abandoned at the trial and is not mentioned in the reasons for appeal to the Appeal Court.

Being a deed of gift it cannot possibly be held to be evidence of alienation for value for purposes of necessity. It follows, therefore, that the deed taken by itself cannot stand.

So far the result at which their Lordships have arrived is in consonance with the views of all the learned Judges in the Courts below except SADASIVA AYYAR, J. But the Court of Appeal differing from the District Judge and from MILLER, J., have held that the appellant cannot be allowed to challenge the deed on the ground of estoppel or ratification in respect of his conduct in taking the mortgage as above set forth. Their Lordships are unable to agree in this view. They think, with MILLER, J., that there is here no room for the doctrine of estoppel. Of estoppel by record or by deed obviously there is none. The definition of estoppel in the Indian Evidence Act—a definition which covers both estoppel by deed and *in pais*—is section 115:

"When a person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act on such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representatives to deny the truth of that thing."

(1) (1908) I.L.R., 31 Mad., 366.

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How can it be said that the plaintiff, by any act of his, led the respondents to think that something was true and then to act on that belief? The learned Judges of the Appeal Court rest their opinion on the case of *Bajrangji Singh*. Their Lordships have already examined that case, and stated what in their view is the true import of the judgment. But apart from that, if *Bajrangji Singh's* case had been decided on the ground of estoppel, it affords no parallel to the present case. In that case all the reversioners in being had consented to the alienations. They were bound by their own consent and the *post nati* were held to claim through those that were bound. Here the plaintiff never consented to the deed, nor is his claim traced through Ramasami even in the matter of descent.

No doubt there is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hypercriticism to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract, it is only voidable—*Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*(1). Now in all cases of voidable contracts there is a general equitable doctrine common to all systems that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If, therefore, a reversioner, after he became *in titulo* to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good he would lose his right of complaint. This may be spoken of, though scarcely accurately, as ratification. In some cases it has been expressed as an election to hold the deed good—*Modhu Sudan Singh* v. *Rooka*(2).

But it is well settled that though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception, he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character which up to that date might be defeated by birth or by adoption. The present plaintiff raised these proceedings immediately after his title was confirmed.

(1) (1907) I.L.R., 34 Calc., 329: L.R., 34 I.A., 87.
(2) (1897) I.L.R., 25 Calc., 1: L.R., 24 I.A., 164.

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Of course something might be done even before that time which amounted to an actual election to hold the deed good. In that view what was done here? The learned Appeal Judges dismiss as inadequate the fact of the purchase of the two small pieces of ground. But they attach great weight to the taking of the mortgage. Here they have made a slip as to the facts. The mortgage did not consist, as they think, of only the share of the mitta which had come through the deed of gift. It consisted also of two-fourteenths of the mitta which had come to the mortgagors in right of their own succession. The value of this share was more than the sum secured by it. Now at the time of the mortgage the plaintiff did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift. Why should he not take all that the mortgagors could give or propose to give? To hold that by so doing he barred himself from asserting his own title to part of what was mortgaged seems to their Lordships a quite unwarrantable proposition.

Their Lordships will therefore humbly advise His Majesty to allow the appeal and to restore the decree of the District Judge; the appellant to have his costs in the Courts below and before this Board.

Appeal allowed.

Solicitors for the appellant—*Barrow, Rogers* and *Nevill.*

Solicitor for the respondent—*Douglas Grant.*

J.V.W.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Kumaraswami Sastri.

1918, October, 18, and November, 15, and 1919, February, 26.

GOVINDA IYER (THIRD RESPONDENT), PETITIONER,

v.

REX (PETITIONER), RESPONDENT.*

Criminal Procedure Code (V of 1898), sec. 476—"Offence referred to in section 195," meaning of—Jurisdiction of Court to take action under section 476 whether restricted to limitations imposed by section 195, Criminal Procedure Code.

Held by the Full Bench.—The words in section 476, Criminal Procedure Code, "any offence referred to in section 195" incorporate the conditions laid down by section 195, and a Court can take action under section 476 only under such conditions.

Hence proceedings under section 476 of the Criminal Procedure Code cannot be taken against a person who is neither a party nor a witness in a suit in respect of abetment of forgery of a document exhibited in the suit.

PETITION under section 115 of Civil Procedure Code and under section 107 of the Government of India Act, 1915 (5 & 6 Geo. 5, c. 61) to revise the order, dated 12th February 1918, of P. VENKATARAMA AYYAR, the District Munsif of Karur, in Original Petition No. 23 of 1917 (in Original Suit No. 456 of 1916).

This was a petition under section 115 of Civil Procedure Code and under section 107 of the Government of India Act, 1915 (5 & 6 Geo. 5, c. 61) by one Govinda Iyer for revision of an order made against him by the District Munsif of Karur under section 476, Criminal Procedure Code, by which he was ordered to be prosecuted for forgery and for using as genuine a forged document filed in Original Suit No. 456 of 1916 before the District Munsif. The circumstances under which the order was made were as follow: The petitioner before the High Court was a clerk under a Nattukottai Chetti in whose favour the petitioner's brother had executed a mortgage on his house on 10th December 1914 for Rs. 1,150. No money having been paid, the mortgagee filed a suit in May 1916 for the full amount due on the mortgage. All the proceedings connected with filing of the plaint were conducted by the petitioner who was the clerk of the plaintiff. The first defendant who was the

* Civil Revision Petition No. 130 of 1918.

mortgagor and the fourth defendant who took a mortgage of the same house on the same day (viz., 10th December 1914) for Rs. 1,700 contended that the mortgagor paid Rs. 1,230 on 4th December 1915 to the mortgagee's agent and that the mortgagor got the payment endorsed on the mortgage-deed and that credit was not given in the plaint for such payment. The fourth defendant attested the endorsement. In answer to this the plaintiff pleaded that the payment was false and the endorsement was fraudulent. The petitioner disappeared from the locality some time after the filing of the written statements. After the termination of the suit, the Court took action under section 476, Criminal Procedure Code, calling on the first and fourth defendants to show cause why action should not be taken against them under sections 467 and 471, Indian Penal Code, in respect of the endorsement and calling on the petitioner who was alleged to be the writer of the mortgage-deed to show cause why he should not be prosecuted for abetment of the said offences. The petitioner not having appeared to show cause, the District Munsif made an order under section 476, Criminal Procedure Code, to the effect stated above.

The revision petition came on for hearing in the first instance before PHILLIPS and NAPIER, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

PHILLIPS, J.—The prosecution of petitioner for abetment of offences under sections 467 and 471 of the Indian Penal Code has been ordered by the District Munsif of Karur, and objection is now taken that the District Munsif acted without jurisdiction inasmuch as petitioner was not a party to the proceedings in which the forged document was produced, the argument being that the words in section 476 of the Criminal Procedure Code "offence referred to in section 195" must be restricted to an offence committed in the manner laid down in section 195. Under section 195 (1) (c) the offence must have been committed by a 'party.' If therefore the offence has been committed by a person not a party, section 195 (1) (c) is inapplicable, and it is contended that section 476 is also inapplicable. This view has been approved in *In re Ramalingam*(1) by a bench of this Court following *Abdul Khadar* v. *Meera Saheb*(2), but a different view has been held in

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(1) (1917) I.L.R., 40 Mad., 100. (2) (1892) I.L.R., 15 Mad., 224.

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the Bombay High Court [*In re Devaji-valad Bhavani*(1)] and *In re Keshav Narayan*(2) and in the Calcutta High Court [*Akhil Chandra De* v. *Queen-Empress*(3)]. This last case was considered in *Jadu Nandan Singh* v. *Emperor*(4) and distinguished on the ground that the former referred to an offence under section 195 (1) (*c*), and the latter to an offence under clause (*b*) of the same section, but was not dissented from. In this Court there is a dictum of SANKARAN NAIR, J., in *Aiyakannu Pillai* v. *Emperor*(5) that offences in clause (*c*) of section 195 must be committed by a party, while the scope of section 476 is not so restricted, in which he expressly follows *In re Devjai-valad Bhavani*(1), and with this view we respectfully concur, as apparently did the learned Judge who admitted this petition, and consequently we feel constrained to refer the question to a Full Bench.

The fact that some of the decisions quoted relate to section 478 and not to section 476 is not of importance, because section 478 refers to "any such offence," i.e., "any offence referred to in section 195" as mentioned in the two preceding sections. In both sections therefore the sole question to be determined is the meaning of the words, "offence referred to in section 195." The word 'offence' is defined in the Code in section 4, clause (*o*):—'Offence' means any act or omission made punishable by any law for the time being in force'. So there can be no doubt as to the meaning of that. There remain only the words "referred to in section 195." It is certainly the usual method employed in the drafting of the Code to use the words

"made punishable by sections . . . (enumerating the sections,"

and this form would undoubtedly have been used in section 476 if it had been the first section in which these offences were grouped together, but it is not, for we have the words in section 195 itself in clauses (*a*) and (*b*) which run as

"any offence punishable under sections 172 to 188" and "any offence punishable under sections 193, 194, etc."

The use of different language in this section seems to be thus sufficiently explained by the fact that section 476 was referring to section 195, and it is difficult to see what language would be more appropriate if the legislature did not wish to repeat

(1) (1894) I.L.R., 18 Bom., 581. (2) (1912) 14 Bom. L.R., 968.
(3) (1895) I.L.R., 22 Calc., 1004. (4) (1910) I.L.R., 37 Calc., 250.
(5) (1909) I.L.R., 32 Mad., 49 at p. 57.

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the long list of sections given in section 195. Legislation by reference is stated to be due to considerations of brevity, and the same reason will explain the non-recapitulation of this long list of sections. We see no reason why any other explanation is required. To read those words as incorporating the conditions contained in section 195 for the taking of cognizance is, in our opinion, undoubtedly an extension of the natural meaning of the words "referred to in section 195." It would be easy to find words appropriate for importing those conditions if that had been intended, but they are not used. If section 476 had contained only the sentence,

"when any . . . Court is of opinion that there is ground for inquiring into any offence referred to in section 195, such Court after making, etc.,"

we should have been of opinion that the words "referred to" were nothing more than a substitute for enumeration. But there is the still further difficulty in the way of the construction put on these words by ABDUR RAHIM, J., *In re Ramalingam*(1) which is this, that the incorporation of the conditions to be found in section 195 introduces conditions into section 476, which partly cover the same ground as the conditions to be found in that section. It cannot be denied that the conditions in section 195 and those specifically referred to in section 476 are in *pari materia*. The language in section 476 is,

"and committed before it or brought under its notice in the course of a judicial proceeding."

This is analogous to the provision in section 195 (1) (*b*) where the words are,

"when such offence is committed in or in relation to any proceeding in any Court,"

and the words in clause (*c*),

"when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding."

It would be strange if the legislature intended to introduce the narrower requirements of clauses (*b*) and (*c*) of section 195, and yet incorporate into the section the wider language we have in section 476. Further than that, the suggested construction of the section requires the clause to be read as follows.

(1) (1917) I.L.R., 40 Mad., 100.

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"When any Court is of opinion that there is ground for inquiring into any offence punishable under sections 193, etc., when such offence is committed in or in relation to any proceeding in any Court and when committed before it or brought under its notice in the course of a judicial proceeding, etc."

That is with reference to offences in clause (*b*). With reference to the offences in clause (*c*) the result is still more extraordinary. It would read . . .

"into any offence described in section 463 or punishable under sections 471, 475 or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, when it is committed before it or brought under its notice in the course of a judicial proceeding, etc."

It seems to us, with due deference to the view taken in *In re Ramalingam*(1) that to read section 476 like that is to commit the legislature to inconsistency in some respects and tautology in others. We are therefore thrown back on what we consider to be the natural meaning of the words "referred to," and are of opinion that they are only words of description.

We therefore refer for the consideration of the Full Bench the following question :—

Do the words in section 476 *of the Code of Criminal Procedure, "any offence referred to in section* 195, *incorporate the conditions laid down in section* 195 *for taking cognizance of the offence by a Court?*

ON THIS REFERENCE

Dr. Swaminathan for petitioner.—As the petitioner was neither a party nor a witness in the judicial proceedings, no order can be made against him under section 476, Criminal Procedure Code; see *In re Ramalingam*(1) and *Abdul Khadar* v. *Meera Saheb*(2). Reference was made to *In re Devaji-valad Bhavani*(3). The words in section 476, "offence referred to in section 195, Criminal Procedure Code," import all the limitations that are contained in section 195, Criminal Procedure Code. If the Court cannot give sanction under section 195, it cannot also take action under section 476. The heading of the chapter in which section 476 occurs is "Administration of

(1) (1917) I.L.R., 40 Mad., 100. (2) (1892) I.L.R., 15 Mad., 224.
(3) (1894) I.L.R., 18 Bom., 581.

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Justice." In the old Code of 1861, sections 476 and 195 were all dealt with together and now owing to the fact of section 476 appearing at a long interval after section 195, the words "referred to in section 195" are used.

E. R. Osborne, Public Prosecutor.—When section 476 gives a right to the Court to institute a prosecution, it is not limited by the qualifications mentioned in section 195 which will apply to a complaint by a *private party*.

The OPINION of the Full Bench was delivered by

WALLIS, C.J.

WALLIS, C.J.—I am of opinion on the construction of the section that the words "any offence referred to in section 195" refer to offences within the scope of section 195, and not to all offences against sections of the Indian Penal Code enumerated in section 195 whether or not they are within the scope of that section. The preponderance of authority is in favour of this view, beginning with *Abdul Khadar* v. *Meera Saheb*(1). PARKER and SHEPHARD, JJ., gave no reasons for their decision in that case, but they were no doubt familiar with the history of the section, and knew that the words

"committed before or brought under its notice in the course of a judicial proceeding"

were first introduced into the section in the Code of 1882 as a further limitation on its operation, and that the corresponding sections of the Codes of 1861 and 1872 were clearly limited to cases coming within the operation of the sections corresponding to section 195 of the present Code. In the Code of 1872 section 471 (now 476) was immediately preceded by sections 467, 468 and 469, which in 1882 were consolidated and transferred as section 195 to an earlier part of the Code. Section 471 began thus :—

"When any Court, Civil or Criminal, is of opinion that there is sufficient ground for inquiry into any charge mentioned in sections 467, 468 and 469, the Court, after making such preliminary inquiry, etc."

The marginal note

"Procedure in cases mentioned in sections 467, 468 and 469," meaning, of course, procedure in cases mentioned in those sections where such proceedings were taken by a Civil or

(1) (1892) I.L.R., 15 Mad., 224.

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Criminal Court, in my opinion, correctly represents the effect of the section. There appears to me to be no sufficient reason for holding that section 471 of the Code of 1872 or the corresponding section of the Code of 1861, intended to give all Courts, Civil or Criminal, an unlimited power of originating prosecutions under all the sections of the Indian Penal Code mentioned in the sections referred to, or that the substitution of the words "any offence referred to in section 195" for "any charge mentioned in sections 467, 468 and 469" had that effect. On the contrary the power conferred on the Court by section 471 of the Code of 1872, even as restricted with reference to the preceding sections, was apparently considered too wide, and was further limited in 1882 by imposing the restriction that the offence must have been

"committed before it or brought under its notice in the course of a judicial proceeding."

The attention of the learned Judges, who decided *Akhil Chandra De* v. *Queen-Empress*(1), and of the referring Judges in this case was not called to the fact that sections 195 and 476 of the present Code were not enacted for the first time in their present form, in which case they might have been expressed differently and other cases, such as the present, included, or to the fact that the awkwardness or tautology to which they refer was the result of introducing a further limitation into the section by the words added in 1882. In some cases covered by section 195, the new restriction was no doubt unnecessary, as pointed out by the referring Judges, but as a matter of drafting it was the easiest course to make the new restriction in general terms even at some risk of tautology. I may add that, where sections are repealed and re-enacted in slightly different form, there is a presumption against implied as contrasted with express alterations in the scope of the section. I would answer the question in the affirmative.

AYLING, J.

KUMARASWAMI SASTRI, J

AYLING, J.—I agree.

KUMARASWAMI SASTRI, J.—I agree.

N.R.

(1) (1895) I.L.R., 22 Calc., 1004.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Coutts Trotter.

PALANI GOUNDAN (APPELLANT),

v.

EMPEROR (RESPONDENT).*

1919, February, 24 and 26, March, 17, and April, 7.

Penal Code, Indian (Act XLV of 1860), ss. 299 and 300—Grievous hurt causing unconsciousness—Hanging an unconscious person believing him to be dead to screen an offence of grievous hurt—Death in consequence, whether culpable homicide.

Where an accused struck his wife a blow on her head with a ploughshare which, though not shown to be a blow likely to cause death, did in fact render her unconscious and, believing her to be dead, in order to lay the foundation of a false defence of suicide by hanging, the accused hanged her on a beam by a rope and thereby caused her death by strangulation;

Held by the Full Bench, that the accused was not guilty of either murder or culpable homicide not amounting to murder.

The Emperor v. *Dalu Sardar* (1914) 18 C.W.N., 1279, followed.

CRIMINAL APPEAL by the prisoner and Trial referred to the High Court for confirmation of the conviction and sentence of death passed on the accused by the Sessions Court of Coimbatore in Case No. 99 of 1918.

The facts are given in the first paragraph of the Opinion of the Full Bench.

The Criminal 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.

NAPIER, J.

NAPIER, J.—The accused has been convicted of the murder of his wife. The evidence shows that on Wednesday, the 23rd of October 1918, at about four or five naligais before sunset she was seen by prosecution witness No. 6 weeping and she said that her husband had beaten her. The witness told her go home, promised to send for her father and then went to the father himself who lived in another hamlet of the same village, a mile away, a little before sunset and told him of the occurrence. After sunset the father, prosecution witness No. 2, sent his son, prosecution witness No. 3, and his son-in-law, prosecution witness

* Criminal Appeal No. 33 of 1919 and Referred Trial No. 2 of 1919.

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No. 4, to the house where his daughter was living. Their evidence is that they arrived at the house at four or five naligais after sunset and that just outside the door they found the mother and the brother of the accused in the vasal and that the mother was remonstrating with her son inside saying "do not beat a woman." According to their evidence they did not hear any cries inside the house at that time. After they waited a few minutes the accused opened the door and came out. They say they went inside and found Ramayee lying dead on the floor with a ploughshare lying near her. They say they at once went and told Rasa Goundan, who lives two doors off from the accused's house to go and call their father, prosecution witness No. 2. Rasa Goundan, prosecution witness No. 5, says that he went and informed prosecution witness No. 2 who at once came and found his daughter lying dead at about 10 or 11 o'clock in the night. Prosecution witness No. 2 says that he taxed the accused with the murder of his daughter and the accused said she hanged herself. Prosecution witness No. 2 further says that he went to the monigar and reported, but the monigar was busy with a procession and only promised to report. He thought that the monigar was endeavouring to hush the matter up, so he went to report the matter to the police himself at Kodumudi, three or four miles away, and laid a complaint. This complaint was recorded at 9-15 a.m. the next morning. That the monigar was endeavouring to hush the matter up, there can be no doubt, for it is clear that he sent no report to the police whatsoever as was his duty to do. The accused told a story to the effect that he came back early in the evening to get his meals and found his wife hanging with a rope tied to the roof and he calls two witnesses who say that the accused came and told them that his wife would not let him in and they went in with him and found his wife hanging from a beam. I do not think there can be any doubt that the deceased was hanged, but the evidence of the two defence witnesses is so discrepant that it is impossible to believe their version of the occurrence. The medical evidence shows that the woman had received a severe blow on the side of her head which would probably have rendered her unconscious, and it also shows that she died of strangulation which may have been the effect of hanging. That she hanged herself is impossible because, as pointed out by the

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Medical Officer, the blow on the head must have produced unconsciousness and therefore she could not hang herself. I am satisfied on the evidence of the following facts: that the accused struck his wife a violent blow on the head with the ploughshare which rendered her unconscious, that it is not shown that the blow was likely to cause death and I am also satisfied that the accused hanged his wife very soon afterwards under the impression that she was already dead intending to create false evidence as to the cause of the death and to conceal his own crime. The question is whether this is murder.

Section 299 of the Indian Penal Code provides

"Whoever causes death by doing an act with the intention of causing . . . such bodily injury as is likely to cause death . . . commits the offence of culpable homicide";

and section 300, clause (3), provides that

"if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death,"

then in such cases culpable homicide is murder. Now, the hanging of a woman who dies from the effect of the hanging is on the face of it causing bodily injury which is sufficient in the ordinary course of nature to cause death and the section only requires that there should be homicide, namely the causing of death, to make this murder. It cannot, I think, be disputed that the accused intended to cause bodily injury for he intended to hang and did hang whether the body was alive or dead. If he had stabbed her or shot her intending it to be believed that she had stabbed or shot herself I cannot see that he would have done otherwise than intended to cause the wounds which he did cause. In this case the bodily injury was strangulation by hanging. It is, however, suggested that there is a necessary limitation, namely, that the person on whom the bodily injury is inflicted must be a person who is to *the knowledge of the accused* capable of being killed and that therefore if the accused thinks that the person is dead already he cannot be convicted of culpable homicide. One objection to this theory is that it is not necessary that the person who is killed should be a person to whom the offender intends to cause the bodily injury and that therefore his knowledge of the condition of the person killed is not a necessary element for conviction for murder. If *A* shoots

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at *B* with intent to kill *B* but misses *B* and kills *C*, then he has committed the murder of *C* although he did not even know that *C* was there. This point has been the subject of an express decision of this Court in a case (*The Public Prosecutor* v. *Mushunooru Suryanarayanamoorti*)(1), where the accused attempted to poison one person and the poison was taken by another. There is no doubt that such is the law and it seems to me to follow that the opinion of the person who inflicts the injury as to the condition of the person who actually suffers the injury is immaterial. There is a general exception in the Penal Code which saves persons acting innocently, viz., section 79. So the burying of a person wrongly believed to be dead would be protected from the scope of section 299.

The Public Prosecutor, therefore, suggested that the proper limitation will be found by introducing the word 'unlawfully'. That would perhaps leave one class of persons unprotected as in the following instance. Suppose that in this case the accused, having struck his wife a blow on the head that made her unconscious and believing her to be dead, had gone to his relatives and told them of the occurrence and they having sent him away themselves hanged the body of the woman believing her to be dead for the purpose of concealing his crime. They would be undoubtedly acting unlawfully, for they would be guilty of an offence under section 201, namely, causing evidence of the commission of an offence to disappear with the intention of screening the offender from legal punishment, and yet it seems a strong proposition to say that they have committed murder. Of course the position of the accused in this case is far worse, for he has committed the offence of grievous hurt; and speaking for myself I see no reason why he should not have to bear the consequences of his subsequent act in killing the woman. Still it does appear that there should be some limitation of the strict words of the section and the difficulty is to say what that limitation is to be.

The protection would seem to be found in English Law by the application of the doctrine of *mens rea* though this might again be affected by the doctrine of malice in law which makes the killing in the course of a felony homicide. This doctrine of

(1) (1912) 11 M.L.T., 127.

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mens rea, though extremely difficult of definition, operates to protect persons who have no wrongful intention or other blameworthy condition of mind. To what extent it would operate to protect persons who knew that they were committing a criminal offence, namely concealment of murder, is a question which I do not propose to consider though the decision in *The Queen* v. *Prince*(1) referred to by the Public Prosecutor would seem to apply the *mens rea* to a person who intended to do an unlawful act but not the unlawful act which he in fact did. This is in fact the argument of the Public Prosecutor who asks us to apply this doctrine. I do not think, however, that it arises for consideration.

Mr. Mayne is quite clear that under the Penal Code the maxim is wholly out of place. He says that every offence is defined and the definition states not only what the accused must have done but his state of mind in regard to his act when he was doing it. The whole of his discussion in sections 8, 9 and 10 on *mens rea* and knowledge is worthy of very close consideration and he seems to be quite clear that all the protections found in the English Criminal Law are reproduced in the Chapter of General Exceptions in the Penal Code. Sections 79, 80 and 81 would seem to cover all cases where a person is not acting with a criminal intent. Now, it seems to me that the particular clauses in sections 299 and 300 which we have to interpret do create what I am tempted to call constructive murder. The first clause of section 299 requires the intention of causing death; the third clause requires a knowledge that he is likely by such act to cause death. In the same way the first clause of section 300 requires an intention to cause death; the second clause requires an intention to cause such bodily injury as the offender knows to be likely to cause death; and the fourth clause requires the knowledge that the act is so imminently dangerous that it must, in all probability, cause death or is likely to cause death and the act is committed without any excuse for incurring the risk. In all these we have intention, knowledge and recklessness directed towards the causing of death. On the other hand, in the second clause to section 299 the intention is directed towards the bodily injury and in the third clause to section 300 the

(1) (1875) L.R., 2, Crown Cases Reserved, 154.

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intention is the same. What makes the offence murder is that the bodily injury should *in fact* be likely to cause death entirely apart from intention or knowledge. The legislature has thought fit to make the offence murder without proof of intention or knowledge directed towards death on the principle, of course, that a person must be deemed to intend the natural result of the injury which he inflicts; that is to say, if he inflicts an injury which is likely to cause death and that person dies, he must take the consequences of his action. But the intention provided for is confined to the bodily injury and not to the death. That is the law which we have to apply, and unless a person can be protected by one of the general exceptions, I cannot see for myself how he is to escape from the language of the section. Apart from the actual offence of concealing a murder, it is the grossest violation of natural rights to stab, shoot or hang a person without absolute knowledge that that person is dead unless of course it is done innocently, and I see no reason why the offender should not suffer the consequences of his act.

I shall now refer to the cases. The first is *Gour Gobindo Thakoor and another*(1). The facts are very similar. There one Gour Gobindo struck the deceased, Dil Muhammad, a blow which knocked him down and then he and others without inquiry as to whether he was dead or not, in haste hung him up to a tree so as to make it appear that he committed suicide. The accused were all convicted of hurt, but the High Court quashed the proceedings and directed the accused to be re-tried on charges of murder, culpable homicide not amounting to murder and hurt. Mr. Justice SETON-KARR says:

"If however, the deceased was not actually killed by the blow, but was killed by the suspension, then Gour Gobindo himself, and also all the other Thakoors who took part in hanging him up to the tree, would be clearly liable to a charge of culpable homicide amounting to murder; for, without having ascertained that he was actually dead, and under the impression that he was only stunned, they must have done the act with the intention of causing death, or bodily injury likely to cause death, and without the exceptions provided by the law, or they might have been committed for culpable homicide *not* amounting to murder."

(1) (1866) 6 W.R. (Cr. R.) 55.

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Mr. Justice NORMAN says:

"Suppose, secondly, that the Thakoors had no intention of killing the deceased, but, finding him insensible, without enquiry whether he was dead or alive, or giving him time to recover, under an impression that he was dead, hung him to the tree, and thereby killed him. It appears to me that they might all have been put on their trial, under section 304, for culpable homicide not amounting to murder. I think a jury might fairly presume against them that they must have known that they were *likely by that act to cause death*."

The difficulty in this case is that the learned Judges did not wish to decide the case, and therefore their language is hypothetical. Mr. Justice NORMAN says that a jury might fairly presume knowledge that they were likely to cause death, hereby introducing a limitation which is not to be found in the clauses we have under consideration. Certainly SETON-KARR, J., thinks the offence to be culpable homicide.

The next case is *Queen-Empress* v. *Khandu*(1). In that case it was found that the accused struck the deceased three blows on the head with a stick with the intention of killing him. The accused, believing him to be dead, set fire to the hut in which he was lying with a view to remove all evidence of the crime. The medical evidence showed that the blows were not likely to cause death and did not cause death and that death was really caused by injuries from burning. Mr. Justice BIRDWOOD states the provisions of section 299 and says:

"it is not as if the accused had intended, by setting fire to the shed, to make the deceased's death certain,"

and therefore acquits him of murder though he convicts him of an attempt to commit murder because of the accused's own admission that he intended by the blow to kill. With great deference the learned Judge gives no reason for the view he takes. Mr. Justice PARSONS took the view that the whole transaction, the blow and the burning, must be treated as one and that therefore the original intention to cause death applied to the act of burning which did cause death. The Chief Justice disagreed with Mr. Justice PARSONS as to the transaction being one and without giving any other reason acquitted. With the greatest deference to the learned Judges I do not find any

(1) (1891) I.L.R., 15 Bom., 194.

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assistance from the manner in which they disposed of the case. Mr. Mayne deals with this case in section 414 of his notes and is inclined to agree with the dissenting Judge that the intention should be treated as continuing up to the burning.

The last case is *The Emperor* v. *Dalu Sardar*(1). In that case, the accused assaulted his wife by kicking her below the navel. She fell down and became unconscious. In order to create an appearance that the woman had committed suicide, he took up the unconscious body and, thinking it to be a dead body, hung it by a rope. The post-mortem examination showed that death was due to hanging. The Court, I think, assumed that at the time he struck her he was not intending to cause death, and, I think, we may also take it that the injury was not in fact likely to cause death. The learned Judges say that as he thought it to be a dead body he could not have intended to kill her if he thought that the woman was dead and seem to assume that the intention to cause death is a necessary element in the offence of murder. With very great deference to the learned Judges they seem to have ignored the language of sections 299 and 300 and accordingly I can find no assistance from this case. That being the state of the authorities, it seems to me to be advisable to get a definite pronouncement from this Court and I would therefore refer to a Full Bench the question whether on the facts found by us in this case the offence of murder has been committed.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I agree in referring the question to a Full Bench as proposed by my learned brother. I shall however give my own opinion shortly on the matter referred. I do not think that the case of *The Queen* v. *Prince*(2) relied on strongly by Mr. Osborne has much relevancy in the consideration of the question before us. In that case the decision mainly depended upon the wording of the Statute 24 & 25 Vict., c. 100, s. 55, which made the taking unlawfully of an unmarried girl, being under the age of 16 years, out of the possession of the father a misdemeanour. The majority held in that case that there was no lawful excuse for taking her away, and the accused's ignorance of her age did not make it not unlawful.

(1) (1914) 18 C.W.N., 1279.
(2) (1875) L.R., 2, Crown Cases Reserved, 154.

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We have simply to construe the definition of culpable homicide in section 299. The intention "to cause such bodily injury as is likely to cause death" cannot, in my opinion, mean anything except "bodily injury" to a *living human body*. If this is not so, then, according to the strict letter of the definition, the relatives who burn the body of a man believing it to be dead would be guilty of culpable homicide; I may even say that it is remarkable that the words "of a human being" are not added in the body of the definition after 'death' and, as the definition stands, the causing of the death of anything with intention will be culpable homicide, which of course is a contradiction in terms. I think after the words "bodily injury" the following words must be understood, namely, "to some living human body or other" [it need not be a particular person's body according to illustration (*a*) and it may even be the body of another living person than the one intended actually that received the injury]. The case of *The Emperor* v. *Dalu Sardar*(1) is almost exactly a similar case to the present. Though (as my learned brother points out) the Judges refer only to the intention to kill and not the intention to cause bodily injury likely to cause death, the two stand clearly on the same footing.

As regards Mr. Osborne's argument that a person who does an unlawful act, such as trying to conceal a murder, should take the consequences of the same if the act done in furtherance of that unlawful intention results unintentionally in homicide, I need refer only to illustration (*c*) to section 299 which indicates that the Indian legislature did not wish to import the artificial rules of the English Law of felony into the Indian Criminal Law.

A similar case in *Queen-Empress* v. *Khandu*(2) contains observations by SARGEANT, C.J., and BIRDWOOD, J., that "what occurred from first to last cannot be regarded as one continuous act done with the intention of killing the deceased" and I agree with them respectfully. As regards the case, *Gour Gobindo Thakoor*(3), no final opinion was expressed, and the fact that the accused hastily and recklessly came to the conclusion that the woman was dead might make him liable for punishment under

(1) (1914) 18 C., W.N., 1279.
(2) (1891) I.L.R., 15 Bom., 194.
(3) (1866) 6 W.R. (Cr.R.), 55.

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section 304-A (causing death by doing rash or negligent act) but not under culpable homicide, sections 300 and 304 having the same relation to each other as section 325 and section 338 relating to grievous hurt.

ON THIS REFERENCE:

Public Prosecutor (*E. R Osborne*) for the Crown.—On the facts as now found by the learned Judges who have referred the case to the Full Bench, the acts of the accused do not amount either to culpable homicide or murder. Reference was made to sections 299 and 300, Indian Penal Code, and to *The Emperor* v. *Dalu Sardar*(1), *Queen-Empress* v. *Khandu*(2) and *Gour Gobindo Thakoor and another* v. *Emperor*(3).

V. R. Ponnusamy Ayyangar for the accused was not called upon.

The OPINION of the Full Bench was delivered by

WALLIS, C.J.

WALLIS, C.J.—The accused was convicted of murder by the Sessions Judge of Coimbatore. He appealed to this Court, which took a different view of the facts from that taken by the learned Sessions Judge and has referred to us the question whether, on the facts as found by the learned Judges who composed it, the accused has in law committed the offence of murder. NAPIER, J., inclined to the view that he had: SADASIVA AYYAR, J., thought he had not. The facts as found are these: the accused struck his wife a blow on the head with a ploughshare, which knocked her senseless. He believed her to be dead and in order to lay the foundation for a false defence of suicide by hanging, which he afterwards set up, proceeded to hang her on a beam by a rope. In fact the first blow was not a fatal one and the cause of death was asphyxiation by hanging which was the act of the accused.

When the case came before us, Mr. Osborne, the Public Prosecutor, at once intimated that he did not propose to contend that the facts as found by the learned referring Judges constituted the crime of murder or even culpable homicide. We think that he was right in doing so: but as doubts have been entertained on the subject, we think it proper to state shortly the grounds for our opinion. By English Law this would

(1) (1914) 18 C.W.N., 1279. (2) (1891) I.L.R., 15 Bom., 194.
(3) (1866) 6 W.R., (Cri R.), 55.

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clearly not be murder but man-slaughter on the general principles of the Common Law. In India every offence is defined both as to what must be done and with what intention it must be done by the section of the Penal Code which creates it a crime. There are certain general exceptions laid down in chapter IV, but none of them fits the present case. We must therefore turn to the defining section 299. Section 299 defines culpable homicide as the act of causing death with one of three intentions:

(*a*) of causing death,

(*b*) of causing such bodily injury as is likely to cause death,

(*c*) of doing something which the accused knows to be likely to cause death.

It is not necessary that any intention should exist with regard to the particular person whose death is caused, as in the familiar example of a shot aimed at one person killing another, or poison intended for one being taken by another. "Causing death" may be paraphrased as putting an end to human life: and thus all three intentions must be directed either deliberately to putting an end to a human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life. The knowledge must have reference to the particular circumstances in which the accused is placed. No doubt if a man cuts the head off from a human body, he does an act which he knows will put an end to life, *if it exists*. But we think that the intention demanded by the section must stand in some relation to a person who either is alive, or who is believed by the accused to be alive. If a man kills another by shooting at what he believes to be a third person whom he intends to kill, but which is in fact the stump of a tree, it is clear that he would be guilty of culpable homicide. This is because though he had no criminal intention towards any human being actually in existence, he had such an intention towards what he believed to be a living human being. The conclusion is irresistible that the intention of the accused must be judged not in the light of the actual circumstances, but in the light of what he supposed to be the circumstances. It follows that a man is not guilty of culpable homicide if his intention was

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directed only to what he believed to be a lifeless body. Complications may arise when it is arguable that the two acts of the accused should be treated as being really one transaction as in *Queen-Empress* v. *Khandu*(1) or when the facts suggest a doubt whether there may not be imputed to the accused a reckless indifference and ignorance as to whether the body he handled was alive or dead, as in *Gour Gobindo's case*(2). The facts as found here eliminate both these possibilities, and are practically the same as those found in *The Emperor* v. *Dalu Sardar*(3). We agree with the decision of the learned Judges in that case and with clear intimation of opinion by SERGEANT, C.J., in *Queen-Empress* v. *Khandu*(1).

Though in our opinion, on the facts as found, the accused cannot be convicted either of murder or culpable homicide, he can of course be punished both for his original assault on his wife and for his attempt to create false evidence by hanging her. These, however, are matters for the consideration and determination of the referring Bench.

[When the case came on again for hearing before the Division Bench, their Lordships convicted the accused of grievous hurt under section 326, Indian Penal Code.—Ed.]

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1918, November 11, and 1919, January, 7.

KAMATCHINATHA PILLAI (ACCUSED), APPELLANT,

v.

EMPEROR.*

Penal Code, Indian (Act XLV of 1860)—Forgery, sec. 464—Document made to screen a previous offence, whether made fraudulently.

An attakshi made by a process-server with false signatures in order to defraud a District Munsif into excusing his delay in returning processes and his absence from duty is made fraudulently and is a forged document within section 464 of the Indian Penal Code.

(1) (1891) I.L.R., 5 Bom., 194. (2) (1866) 6 W.R. (Cr.R.), 55.
(3) (1914) 18 C.W.N., 1279.
* Criminal Appeal No. 707 of 1918.

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Empress v. *Subapathi* (1888) I.L.R., 11 Mad., 411, *Emperor* v. *Rash Behari Das* (1908) I.L.R., 35 Calc., 450, and *Kotamraju Venkatarayulu* v. *Emperor* (1905) I.L.R., 28 Mad., 90 (F.B.), followed.

Empress of India v. *Jiwanand* (1883) I.L.R., 5 All., 221, and *Queen-Empress* v. *Girthari Lal* (1886) I.L.R., 8 All., 653, doubted.

CRIMINAL APPEAL against the conviction of the appellant by the Sessions Judge of Rāmnād in Sessions Case No. 28 of 1918 of the Rāmnād division.

The facts are given in the judgment.

Accused was not represented.

Public Prosecutor (*E. R. Osborne*) for the Crown.

The JUDGMENT of the Court was delivered by

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—This is an appeal by a process-server of the Court of the District Munsif of Dindigul who was convicted of forgery for the purpose of cheating and using as genuine a forged document and sentenced to six months' rigorous imprisonment under sections 468 and 471 of the Indian Penal Code.

The document in question is the attakshi, exhibit H, purporting to have been signed by the two karnams Sivagurunatha Pillai (prosecution fifth witness) and Athinarayana Mudali (prosecution sixth witness), certifying that the appellant was ill of fever and cholera in prosecution fifth witness' village and was between 23rd and 30th November 1917 and that the two karnams had him treated with medicines. The body of attakshi is in the appellant's writing. The evidence (including the depositions of prosecution fifth and sixth witnesses) clearly establishes that prosecution fifth and sixth witnesses did not sign the attakshi (exhibit H) that the peon was not in prosecution fifth witness's village between the 23rd and 30th November 1917 and that he was not treated with medicines by prosecution fifth and sixth witnesses in that village. Seeing that the appellant has not adduced any evidence (except the worthless testimony of defence second witness, a 'resigned' head constable, who says appellant told him one day ten months before the witness gave evidence that appellant was suffering from fever) to establish that he suffered from cholera and fever between 23rd and 30th November 1917, it is a very fair inference that the whole story of his opportune illness for just the one week's time that he overstayed the period allowed to him to return his process is all a myth. There can be no question that the attakshi (exhibit H) was prepared by the appellant with the false signatures

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SADASIVA AYYAR, J.

of prosecution fifth and sixth witnesses in order to defraud the District Munsif into excusing his delay in returning processes and the absence of the appellant from duty between the 24th and 30th November 1917. The decisions in *Empress of India* v. *Jiwanand*(1) and *Queen-Empress* v. *Girthari Lal*(2) and other similar cases where false entries made to screen the accused from punishment for an offence already committed were held not to be offences are distinguishable and the soundness of those decisions is also doubtful, there being other decisions tending to support a contrary conclusion; see *Queen-Empress* v. *Sabapathi* (3) and *Emperor* v. *Rash Behari Das*(4).

The question whether the false signatures were placed in exhibit H also 'dishonestly' need not be considered as they were clearly placed in exhibit H 'fraudulently' according to the rule laid down by the majority of the Full Bench of this Court in *Kotam Razu Venktarayulu* v. *Emperor*(5) and hence exhibit H was a forgery intended to cheat the District Munsif and was used by the appellant as a genuine document.

We affirm the conviction and sentence and dismiss the appeal.

N.R.

(1) (1883) I.L.R., 5 All., 221. (2) (1886) I.L.R., 8 All., 653.
(3) (1888) I.L.R., 11 Mad., 411. (4) (1908) I.L.R., 35 Cal., 450.
(5) (1905) I.L.R., 28 Mad., 90.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

NALLURI CHENCHIAH AND THREE OTHERS (ACCUSED), PETITIONERS,

1919, January, 16.

v.

KING-EMPEROR.*

Criminal Procedure Code (V of 1898), ss. 239, 435, 436, 439—Evidence Act (I of 1872) sec. 91—Civil Procedure Code (V of 1908), O. XVIII, rr. 5 and 6—Prosecution for perjury—Deposition of a witness not read over and interpreted to him before his signing it—Record, whether admissible in proof—Irregularity or illegality—Public policy—Joinder of persons in preliminary inquiry, whether prohibited—Discharge of accused by Sub-Magistrate—Power of Sessions Judge to direct committal for offences under ss. 471 and 193, Indian Penal Code.

Where a deposition of a witness is not read over and interpreted to him before it is signed by him, he cannot be prosecuted for perjury on such deposition under section 193 of the Indian Penal Code.

Omission to interpret and read over the deposition to the witness is not a mere irregularity but renders the record inadmissible in proof of the deposition under section 91 of the Evidence Act, as the guarantee provided by the law for its accuracy has been substantially ignored and it is dangerous and against public policy to make a witness liable on such a wholly unsafe record.

Bogra v. *Emperor* (1912) I.L.R., 34 Mad., 141, distinguished; *Meango* v. *Baviah* (1918) 45 I.C., 507, dissented from.

A Sessions Judge, acting under sections 435 and 436 of the Criminal Procedure Code, cannot direct committal to the Sessions Court of an accused who has been discharged by a Sub-Magistrate in a preliminary inquiry into offences under sections 193 and 471 of the Indian Penal Code for forgery of a promissory note not being a Government of India promissory note, as such offences are not exclusively triable by a Court of Sessions.

Section 239 of the Criminal Procedure Code prohibits only a joint trial and not a joint preliminary inquiry into a case against several persons for the purpose of committal to the sessions.

PETITION under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of K. SRINIVASA RAO, Sessions Judge of Guntūr division, in Criminal Revision Petition No. 10 of 1918, preferred against the order of discharge by A. RAMAYYA, the Stationary Second-class Magistrate of Ongole, in Preliminary Register Case No. 4 of 1918.

* Criminal Revision Case No. 583 of 1918.

CHENCHIAH v. KING-EMPEROR.

SADASIVA AYYAR, J.

The material facts appear from the judgment.

P. Chenchayya, Counsel for the petitioner.

The Public Prosecutor (*E. R. Osborne*) on behalf of the Crown.

SADASIVA AYYAR, J.—The petitioners in revision are the four accused in Preliminary Register Case No. 4 of 1918 on the file of the Stationary Second-class Magistrate, Ongole. An inquiry for the purpose of commitment or discharge, as the case may be, was made in this case by the said Stationary Second-class Magistrate, the complaint against the first accused being under two sections 471 and 193, Indian Penal Code, and against the other accused under section 193, Indian Penal Code, alone. The charge under section 193 relates to the depositions, exhibits K, L, M and N given by the four accused before the District Munsif of Ongole in Original Suit No. 47 of 1912 were to the effect that the complainant executed a promissory note for Rs. 500 in favour of the first accused's father. The Stationary Sub-Magistrate discharged all the accused under section 209, Criminal Procedure Code. He considered that exhibits K, L, M and N were not admissible in evidence as the legally correct record of the statements given by the accused in the Ongole District Munsif's Court's suit, because it appeared from the evidence of the trial clerk of the District Munsif's Court, prosecution witness 3, that the depositions after they were completed were not interpreted and read over to the witnesses as required by order XVIII, rules 5 and 6, of the Civil Procedure Code. He also held that the statements could not be proved by any other evidence except these records (exhibits K, L, M and N), under section 91 of the Indian Evidence Act. This is the ground on which the Stationary Sub-Magistrate based the discharge of the accused so far as the offence under section 193, Indian Penal Code, was concerned. As regards the offence under section 471, Indian Penal Code, against the first accused alone, the Magistrate's reasons are not quite clear except that the depositions (exhibits K, L, M and N) cannot be used to connect the first accused with the forged document (exhibit A).

Against the order of discharge, a petition under sections 435 and 437 of the Code of Criminal Procedure seems to have been presented to the Sessions Judge and the learned Judge set aside the order of discharge and passed an order containing two directions, the first being that the case against the first accused

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should be committed to the Sessions Court by the Sub-Magistrate in order that the first accused may be tried for the offences under sections 471 and 193, Indian Penal Code, and the second direction being that, as regards the accused Nos. 2, 3 and 4, the District Magistrate of Guntūr should direct either the Joint Magistrate of Ongole or any other Magistrate he thinks fit to make a further inquiry into the complaints against these persons and try them as separate cases and dispose of them according to law. I must say that the learned Sessions Judge's first direction out of the two directions found in his order is not warranted by the powers exercisable by him under the provisions of section 435 or section 436 of the Criminal Procedure Code. The offence under section 193, Indian Penal Code, is not exclusively triable by the Court of Sessions. The offence under section 471, Indian Penal Code, is also not exclusively triable by the Court of Sessions unless the forged document is a promissory note of the Government of India. The Criminal Procedure Code (section 435) gives the Sessions Judge power only to call for and examine records. Section 436 gives him power to order commitment only when the offence is exclusively triable by the Sessions Court. The Sessions Judge's order therefore directing the first accused to be committed to his Court is illegal and must be set aside. As regards the charge under section 193, Indian Penal Code, against all the accused, there is a case not officially reported but mentioned in *Meango* v. *Baviah*(1) which goes to the length of holding that even serious irregularities in making the record of the depositions of witnesses do not render that record inadmissible in evidence to prove the statement so recorded and only go in mitigation of the weight to be attached to that record as accurate. I am not prepared to agree to that extent. Where a deposition after it has been completed has been interpreted and read over to a witness and acknowledged by him to be correct, any irregularity due to the omission of the observances of further formalities, such as the presence of the Judge and his listening to the reading during the time when the deposition is interpreted and read over to the witness, may not affect the admissibility of the record as evidence of the witness's statement [see *Bogra* v. *Emperor*(2)]; but the omission to interpret

(1) (1918) 45 I.C., 507. (2) (1912) I.L.R., 34 Mad., 141.

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and read over the deposition to the witness after the deposition is completed cannot in my opinion be put on the same footing, because the guarantee provided by the law for the accuracy of the deposition has been substantially ignored, and it is dangerous and against public policy to make a witness liable on such a wholly unsafe record. I would therefore set aside the Sessions Judge's order so far as it directs the District Magistrate to make further inquiry in respect of the charge under section 193, Indian Penal Code.

I may add that the Sessions Judge fell into another error in holding that the Sub-Magistrate contravened the provisions of section 239 of the Criminal Procedure Code in inquiring into the cases of these four accused jointly, section 239 prohibiting only a joint trial and not a joint preliminary inquiry into a case for the purpose of commitment to the sessions. Though the Sessions Judge's order as against the first accused must be set aside as illegal, I think that this is a case in which the powers of this Court under section 439, Criminal Procedure Code, might properly be utilized in passing the necessary order in connexion with the alleged forgery of the promissory note for Rs. 500 in the interests of justice. There was some evidence before the Sub-Magistrate that the first accused did use the document as genuine in a Court of Justice and that the document is a forgery. The proper course for the Sub-Magistrate under those circumstances was to have committed the first accused to the Sessions Court as regards the offence under section 471. I would therefore direct him to do so.

NAPIER, J.

NAPIER, J.—I agree. I would add that I am strongly influenced in the view I take as to the admissibility of the exhibits K, L, M and N, which have clearly been recorded in an irregular manner, by the provisions of section 91 of the Evidence Act which seem to lay down that the deposition is the only evidence admissible of the statements alleged to have been made by the witness. The words are

"In all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of such matter except the document itself or secondary evidence of it."

It seems to me that where the legislature has imposed such narrow limits on methods of proof, we should be careful to see

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that this sole proof is forthcoming in a form which is free from suspicion, and I entirely agree with my learned brother that where the ground of the attack goes to the knowledge of the witness as to what has been recorded as his statement, we have not got that certainty of accuracy which the law must require under section 91 of the Evidence Act. I agree with the order proposed by my learned brother.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Krishnan.

1919, January, 17.

RAMANAYAKUDU AND THREE OTHERS (DEFENDANTS NOS. 5 TO 8), APPELLANTS,

v.

BOYA PEDDA BASAPPA AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Civil Procedure Code (V of 1908), sec. 64 and O. 21, r. 54—Attachment when effective against alienation.

An attachment of land which is only ordered but not communicated to the judgment-debtor by the issue of a prohibitory order under Order 21, rule 54, Civil Procedure Code, does not affect an alienation made before the judgment-debtor has knowledge of the prohibitory order.

SECOND APPEAL against the decree of A. FOTHERINGHAM, District Judge of Kurnool, in Appeal Suit No. 3 of 1917, against the decree of A. NARAYANA PANTULU, District Munsif of Kurnool, in Original Suit No. 566 of 1915.

In 1914 the fourth defendant was sinking into insolvency. On 1st February 1915 he borrowed Rs. 500 from plaintiff's second witness, but the latter required a surety and plaintiff stood surety. On 21st March 1915 the plaintiff paid off plaintiff's second witness's loan and on 29th April 1915 fourth defendant executed a lease to him of the suit land for five years in discharge of the Rs. 400 due on this account. But meantime on 23rd April 1915 first and second defendants (decree-holders against fourth defendant) had obtained an attachment order on this same land though it had not been executed by 29th April 1915. Eventually the land was sold in court auction and the third defendant bought it and had plaintiff evicted. Plaintiff accordingly sued for possession as lessee. While the suit was pending third defendant

* Second Appeal No. 511 of 1918.

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died and appellants were added as his representatives. Both the lower Courts gave a decree for the plaintiff. The representatives of the third defendant (viz., defendants Nos. 5 to 8) preferred this appeal.

K. S. Ganesa Ayyar for appellants.

E. S. Chidambaram Pillai for first respondent.

The JUDGMENT of the Court was delivered by

PHILLIPS, J.

PHILLIPS, J.—Section 64 of the Code of Civil Procedure says that

"Where an attachment has been made any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment shall be void as against all claims enforceable under the attachment."

The only question for decision in this case is whether on the date of plaintiff's lease the attachment had been made. No doubt an order had been passed a few days before the lease ordering attachment, but Order 21, rule 54, of the Code of Civil Procedure, lays down the manner in which an attachment of an immovable property has to be made and those provisions were not complied with until long after the lease was executed. It is contended that the mere writing of an order to attach is sufficient to constitute attachment, but the rule says that the order must be one 'prohibiting' the judgment-debtor, and we think that, in order to make an order prohibitive, the person prohibited must have the opportunity afforded by the application mentioned in clause 2 of rule 54 of knowing that he is so prohibited and the mere writing of such an order behind the judgment-debtor's back and keeping it in the Court records would not amount to an order prohibiting within the meaning of rule 54. A perusal of rules 43, 44, 46, 47, 48 and 51 to 53 of Order 21 shows that the principle underlying the procedure in each case is to make the attachment known to the person affected by the order. In this view no attachment of the property had been made in this case and the lower Court's decree is right. Under section 64 of the Code of Civil Procedure no question of the bona fides of the alienee arises; so this aspect of the case need not be considered.

The Second Appeal is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Phillips.

1918, December, 19, 1919, January, 21.

PONMANICHINTUGATH KOYYAMMU AND TWO OTHERS (DEFENDANTS NOS. 1 TO 3), APPELLANTS,

v.

KUTTIAMMOO AND ANOTHER (PLAINTIFFS NOS. 1 AND 2), RESPONDENTS.*

Easements Act, Indian (V of 1882), ss. 15, 16 and 19—Easement of light and air—Acquisition by prescription—Easement for a limited period, whether can be acquired by prescription under the Act—English Common Law and English Prescription Act (2 & 3 Will. 4, c. 71)—Grant of land for maintenance to a tavazhi, whether an interest for life—Demise on kanom—No resistance to easement within three years after expiry of kanom, effect of—Acquisition by prescription of absolute right against owner—Prescription for an easement for a limited period against a tenant, whether possible in law.

Where a tarwad, which was the absolute owner of the suit land, granted it for maintenance to a tavazhi in 1877, and the latter demised it on kanom in 1887 to the defendants who held over possession after its expiry in 1899 and subsequently obtained from the tavazhi a fresh lease for twelve years commencing from 1905, and where the plaintiffs, the owners and occupiers of adjacent lands, claimed to have acquired a right of easement of light and air over the suit land by prescriptive enjoyment since 1877 till a few months before they instituted the present suit in 1913 for an injunction restraining the defendants from interfering with their right of easement:

Held, that the plaintiffs had acquired in law *an absolute* right of easement of light and air *by prescription* for over the statutory period, as, under section 16 of the Indian Easements Act, the plaintiffs' enjoyment of the easement from 1877 was not resisted by the tarwad or the tavazhi within three years after the expiry of the kanom in 1899, and the grant for maintenance to a tavazhi was not in law a grant of an interest for life, and that consequently the plaintiffs were entitled to an injunction against the defendants.

Per ABDUR RAHIM, J.—There cannot be an acquisition by *prescription* of a right of easement for a *limited* period under the Indian Easements Act which follows the English Common Law and the English Prescription Act (2 & 3 Will. 4, c. 71) in this respect.

Wheaton v. *Maples & Co*, (1893) 3 Ch., 48, referred to.

Per PHILLIPS, J., *contra*.—There can be an acquisition by *prescription* of an easement for a *limited* period under the Indian Easements Act, and that consequently the plaintiffs in this case were in any event entitled to a right of easement as against the defendants during the period of the latter's interest in the property.

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* Second Appeal No. 368 of 1918.

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SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, the Temporary Subordinate Judge of Tellicherry, in Appeal Suit No. 2 of 1917, preferred against the decree of T. G. RAMASWAMI AYYAR, the Principal District Munsif of Tellicherry, in Original Suit No. 779 of 1913.

The plaintiffs, who were the owners and occupiers of a warehouse adjacent to the suit land in the possession of the defendants, sued in 1913 for an injunction restraining the latter from erecting a storeyed building on their land and thereby obstructing the access of light and air to certain windows in their warehouse. The suit land was the absolute property of a tarwad which granted it for maintenance to one of its tavazhis in 1877; the latter, after remaining in possession till 1887, demised it on kanom to the defendants who continued in possession without any lease after the expiry of the kanom in 1899 till 1905, when the defendants obtained a lease-deed for twelve years from 1905 from the same tavazhi and continued in possession thereunder until some months before the date of this suit in 1913. It appeared that the plaintiffs had enjoyed the right to light and air ever since 1877 as against the tavazhi until 1887 and against the defendants until a few months before the present suit instituted on the 3rd December 1913. Within three years after the expiry of the kanom of 1887 in 1899, neither the tarwad which was the absolute owner, nor the tavazhi (the grantee for maintenance), nor the defendants who were holding over after the kanom period, offered any resistance to the enjoyment of the easement by the plaintiffs. In August 1913, the defendants made arrangements to build a storeyed house on their own land which would obstruct the access of light and air enjoyed by the plaintiffs, who thereupon brought this suit for injunction against the defendants Nos. 1 to 3, who were in possession as tenants under the lease of 1905, and the fourth defendant who was their sub-tenant, neither the tarwad nor the tavazhi was made a party to this suit. The defendants pleaded that the plaintiffs could not acquire an easement by prescription as the land was subject to an interest for life by reason of the grant in 1877 to the tavazhi for maintenance, which continued to subsist, that no easement could be acquired by prescription for a limited period of the tenancy under the Indian Easements Act, and that the plaintiffs did not acquire any easement by valid prescription for the full statutory period. The

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lower Courts passed a decree in favour of the plaintiffs; the defendants preferred this Second Appeal.

K. P. M. Menon and *B. Pocker* for the appellants.

C. Kunhiraman for the respondents.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—The plaintiffs in this suit claimed an easement of light and air acquired by prescription over the premises in occupation of the defendants. The dominant tenement is a warehouse and the lower Appellate Court has found that with respect to the windows Nos. 11 to 16 in the plan (Exhibit B) the plaintiffs who are in the occupation of the warehouse had been in unobstructed enjoyment of light and air since the year 1877 until the defendants threatened to obstruct the access of such light and air by building a two-storeyed warehouse on their land shortly before the institution of this suit in 1913. From 1877 to 1887 the land was in the possession of a tavazhi to whom the Orakatteri tarwad had made a grant of it for maintenance. In 1887 the defendants obtained the land from the tavazhi on a kanom of twelve years. On its expiry in 1899 they continued in possession without any lease until 1905 when they obtained a fresh kanom for another term of twelve years. Neither the tavazhi, the lessor of the defendants, nor the superior proprietor, the tarwad, has taken any steps to resist the plaintiffs' claim and the question is whether the defendants' possession since 1887 as tenants of the servient heritage is a bar to the maturing of the plaintiffs' prescriptive rights.

On the question whether a prescriptive right to access of light and air can be acquired in the nature of an easement for a limited period, for instance, during the time the servient tenement is in the occupation of a lessee for years, I am of opinion that it cannot. Section 15 of the Easements Act, V of 1882, lays down that

"where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years . . . the right to such access and use of light or air . . . shall be absolute,"

and section 19 says

"provided that, when any land upon, over or from which any easement has been enjoyed . . . has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement

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during the continuance of such interest or term shall be excluded in the computation of the said last mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land."

These sections imply that by reason of a prescriptive easement the rights of the owner of the servient tenement are modified or restricted to that extent and not merely those of the lessee for the term of his lease. No doubt an easement may be permanent or for a limited period as stated in section 6. But the question is whether an easement for a limited period can be acquired by prescription. In Chapter II the imposition, acquisition and transfer of an easement are dealt with. Wherever an easement is spoken of as 'imposed' the phrase is used to mean the creation of an easement by a voluntary act of the owner or lessee or of any other person having power to transfer an interest in the servient tenement. This will be apparent from sections 8, 9, 10, 11, 20, 28, 37, 40 and the illustrations appended thereto, especially those to section 9. They show that the imposition of an easement as contemplated is to be by such an act as a grant or a bequest of the owner or occupier of the servient heritage. That a lessee can create or impose an easement by a grant for the period of his term cannot be doubted; see section 11. In contradistinction to such 'imposition' of an easement by the owner or lessee of the servient tenement, the legislature speaks of *acquisition* of an easement by the owner of the dominant heritage by prescription or custom in sections 15, 16, 17, 18 and elsewhere. There are no express words in the Act providing for the acquisition of an easement for a limited time by prescription by the owner or occupier of the dominant heritage, though the Act in various places deals with the *imposition* of an easement by the owner or lessee of the servient tenement. And, in my opinion, without the intention of the legislature being in this connexion expressed in so many words or capable of being inferred from any plain indications in the Act, we should not be justified in recognizing a prescriptive right to light and air by way of easement for a limited period, such as during the occupation of the servient heritage by a lessee, when it is clear that no such right has ever been recognized by the English Law.

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The English Law on the subject is clearly stated in *Wheaton* v. *Maple & Co.*(1) by LINDLEY, L.J., in the Court of Appeal:

"The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years,"

and further on, after quoting the words of the English Prescription Act, 2 & 3 Will. 4, c. 71:

"The expression 'absolute and indefeasible' as applied to easements of all kinds . . . shows that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden for ever on the servient tenement. This view of the statute was clearly expressed soon after it was passed in *Bright* v. *Walker*(2), and although some passage in Baron PARKE's judgment in that case have been criticized, and even dissented from, the broad view which underlies the judgment has never been disapproved. That view, as I understand it, is that the Act has not created a class of easements which could not be gained by prescription at common law, or, in other words, has not created an easement for a limited time only, or available only against particular owners or occupiers of the servient tenement. Such easements can only be created since the Act as before the Act, viz., by grant or by an agreement enforceable in equity, which, for most purposes, is as efficacious as a deed under seal. Such a grant or agreement must, moreover, be proved as a fact and not be purely fictitious."

It will appear from Gale on Easements, Ninth Edition (pages 210, 211, etc.), that this exposition of the law has been accepted without question or doubt in England. If the Indian Legislature, which must be presumed to have been familiar with the English Law on the subject, intended to alter it on this point, it would have plainly expressed or indicated such intention.

But the plaintiffs have in my opinion nevertheless acquired an absolute title to light and air by prescription as claimed by them by reason of the fact that their claim was not resisted by the owner of the premises within three years of the termination of the period of the defendants' lease in 1899. The clear effect of section 16 is that the time during which the servient premises

(1) (1893) 3 Ch., 48, at p. 63. (2) (1834) 40 R.R., 536.

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have been in occupation for any term of years is to be deducted in computing the period of enjoyment of the easement claimed, only if that claim is resisted within three years next after the termination of the term by the owner of the land. The owner did not resist the plaintiffs' claim for three years and more after 1899 and it follows that the plaintiffs' right acquired by enjoyment for twenty years became absolute within the meaning of section 15 of the Easements Act. The fact that the defendants continued in possession as tenants by holding over after the expiry of the lease for years cannot make any difference.

It was also argued on behalf of the appellant that the tavazhi, whose tenants the defendants were, held the servient premises for life within the meaning of section 16. I have no doubt that the grant for maintenance of the tavazhi can never be called an interest for life as contemplated by the Act unless it can be shown that it was intended for certain definite lives. We have no document to show what the terms of the grant were, supposing there was a grant, and, as the Subordinate Judge finds, the arrangement, such as it was, was capable of being revoked at any time by the tarwad to whom the property belonged. The Appeal therefore fails on all the points argued before us and must be dismissed with costs.

PHILLIPS, J.

PHILLIPS, J.—This suit is brought by the plaintiffs for an injunction restraining the defendants from obstructing the access of light and air to the plaintiffs' warehouse. The warehouse was built in 1877 and the land now in the possession of the defendants was in the possession of its owner from 1877 to 1887. In 1887 the land was demised on kanom for twelve years and was held over until 1905 when there was a fresh renewal for twelve years. The defendants' land belongs to the Orakatteri tarwad and was allotted to a tavazhi for maintenance. The kanom demises were granted by the tavazhi.

Two questions arise for consideration in this appeal: (1) whether an easement right can be acquired by prescription against a tenant for the term of his tenancy, and (2) whether by virtue of section 16 of the Easements Act the owner of the land is prevented from disputing the easement claimed, because he did not resist the easement within three years of the determination of the tenancy from 1887 to 1899.

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So far as the second question is concerned, it appears that the plaintiffs enjoyed this easement right from 1877 until the date of suit in 1913, which is a great deal longer than the statutory period of twenty years prescribed for the acquisition of an easement by prescription. For part of this period, namely, from 1887 to 1899, the land was in the possession of the defendants and their predecessors as tenants under the kanom granted to them for twelve years. This kanom expired in 1899 and it would therefore appear that, unless the owner intervened within three years from 1899, the easement would become absolute.

It is contended for the defendants that the term had not been determined by the landlord and therefore section 16 would not apply. Section 16 is however clear. It says:

"When any land . . . has been held . . . for any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such . . . term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such . . . term, resisted by the person entitled, on such termination, to the said land."

The contention is that the determination of such term means the determination of the tenant's right, and it is argued that inasmuch as the tenants were allowed to hold over for six years and were then confirmed in their right by a renewal deed, there has been no determination of their right. The language of the section is however clear. In the words "determination of such term," "such term" means "any term of years exceeding three years from the granting thereof." In this case a term of twelve years was granted and, when that term expired, it must be held to be a determination of such term. The landlord did not take advantage of his right to intervene within three years of that date and therefore the period of tenancy is not excluded in the computation of the period of twenty years.

A further argument is put forward, namely, that the kanom was not granted by the owner but by the tavazhi, which itself had only a life interest in the land. No evidence has been adduced as to the exact terms on which the tavazhi was in possession of the land, but the kanom deed (exhibit III) merely

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recites that the land has been set apart towards the expenses of Orakatteri house. Even if there had been a grant to the tavazhi, it would not be a grant of a life interest, for there is no one life during which such interest could subsist and the interest would continue so long as the tavazhi existed. It is not however proved that there was any grant to the tavazhi, and I think it must be held that the tavazhi was allowed to enjoy this land under the tarwad and that its possession was nothing more than the possession of the tarwad. In that view, the landlord was really the tarwad acting through its agent, the karnavan of the tavazhi, and section 16 would be applicable. In this case I think that the plaintiffs have made their right absolute by more than twenty years' enjoyment and are entitled to a decree.

The first question is one of greater difficulty, the contention for the appellants being that no easement right can be acquired by prescription against a tenant and this appears to be the principle recognized by the Common Law of England—vide *Wheaton* v. *Maple & Co.*(1) and *Kilgour* v. *Geddes*(2). In an earlier case apparently a contrary view was suggested, *Daniel* v. *Anderson*(3), and in two Irish cases this contrary view was adopted—*Beggan* v. *M'Donald*(4) and *Fahey* v. *Dwyer*(5). The question is whether the Common Law principle has been embodied in the Indian statute, the Easements Act. It is not disputed that a tenant could grant an easement for the period of his tenancy even under English Law. But the possibility of its acquisition by prescription is not recognized on the theory that there can be no presumed grant except from the owner. In the Easements Act, we find in section 6 that an easement may be for a term of years or for other limited period. In section 4 it is defined as a right which the owner or occupier of certain land possesses as such. Again in section 8:

"An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed."

Again in section 11:

"No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take

(1) (1893) 3 Ch., 48.
(2) (1904) 1 K.B., 457.
(3) (1862) 31 L.J. Ch., 610.
(4) (1878) 2 L.R. Ir., 560.
(5) (1874) 4 L.R. Ir., 271.

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effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor."

I do not think the word 'impose' in these sections must necessarily mean impose by some act, such as a grant, but it will include "impose by omission to take steps to prevent acquisition by prescription." Similarly in Explanation I to section 15:

"Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease."

Section 37 says:

"When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished."

All these provisions seem to imply the possibility of an easement being acquired against a lessee or other person having a derivative interest in the property, and the only section which throws some doubt is section 7 which says:

"Easements are restrictions of one or other of the following rights (namely):—

(*a*) The exclusive right of every owner of immovable property . . . to enjoy and dispose of the same . . . (*b*) The right of every owner of immovable property . . . to enjoy without disturbance by another the natural advantages arising from its situation."

This section seems to imply that easements can only be acquired against an owner of property. It does not say that the owner must be the absolute owner, and the following section (section 8) is inconsistent with such interpretation of the word, for it says that an easement can be imposed to the extent to which any one may transfer his interest in the heritage, which obviously contemplates the existence of a lesser interest than absolute ownership. I think therefore that the word 'owner' in section 7 cannot be interpreted as meaning necessarily absolute owner. The whole scheme of the Act seems to imply that easements can be acquired even against limited owners. The Act undoubtedly goes further than the

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English Law on the subject of prescription, for section 8 of the English Act (2 & 3 Will. 4, c. 71) which corresponds to section 16 of the Easements Act is restricted to rights of way and water, whereas section 16 of the Indian Act is applicable to all kinds of easements. This is one instance wherein English Law has not directly applied in India, and there being this one instance, it is not so difficult to hold that in other respects also the legislature did not wish to adopt all the provisions of the English Common Law. If that be so, there is no serious objection to reading the sections I have enumerated above in a natural meaning, and understanding them as referring to the acquisition of easements against owners who are not absolute. If that is so, the easement has at any rate been acquired by the plaintiffs against the defendants and for the purpose of this suit to which the owners of the land were not parties the plaintiffs would be entitled to an injunction.

I agree therefore that the Appeal must be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919, January 23.

RAMARAYA SHANBOGUE (PETITIONER), APPELLANT,

v.

SHERBOTT VENKATARAMANAYYA (RESPONDENT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 1—Payment of decree amount into Court—Notice to decree-holder—Cessation of interest, whether from date of deposit or date of service of notice.

Interest does not cease to run in respect of a decree-debt deposited in Court until the decree-holder gets notice of the deposit.

CIVIL MISCELLANEOUS SECOND APPEAL against the decree of L. G. MOORE, the District Judge of South Kanara, in Appeal No. 359 of 1917, preferred against the order of JAGANNATHA RAO S. TAGOT, the District Munsif of Mangalore, in Regular Execution Petition No. 220 of 1917 (in Original Suit No. 502 of 1914).

* Appeal against Appellate Order No. 48 of 1918.

RAMARAYA SHANBOGUE v. SHERBOTT VENKATA-RAMANAYYA.

In this case the judgment-debtor against whom there was a money decree for nearly a thousand rupees with subsequent interest at six per cent deposited in Court the whole amount of the decree together with interest calculated up to the date of deposit, and prayed for issue of notice to the decree-holder and for entry of satisfaction of the judgment-debt. On notice being served on the decree-holder he claimed interest up to the date on which he was served with notice and was in a position to draw the money out of Court. The judgment-debtor contended that interest ceased from the date of deposit. Both the lower Courts allowed interest up to the date of service of notice. The judgment-debtor appealed.

K. P. Lakshmana Rao for the appellant.

K. Yegnanarayana Adiga for the respondent.

OLDFIELD, J.

OLDFIELD, J.—The only question for decision is whether interest ceases to run on money paid into Court for a decree-holder under Order XXI, rule 1, on the date of that payment or on the date when the decree-holder receives notice thereof.

The Code is not explicit on the point and the authority relied on by the lower Appellate Court—*Krishnaswami Chettiar* v. *Ramaswami Chettiar*(1)—deals with a payment under the special provisions of the Transfer of Property Act. Looking, however, to the terms of Order XXI, rule 1, Code of Civil Procedure, I observe that there would be nothing to compel compliance by the judgment-debtor with clause 2, which enjoins the giving of notice of the payment to the decree-holder, if the running of interest stopped before and independently of it. There is further no reason why the decree-holder should be deprived of compensation for being kept out of his money, because the judgment-debtor chooses a particular method of paying it to him. On these grounds I would dismiss the appeal against Appellate Order with costs.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I agree. Mr. Lakshmana Rao has raised an interesting question of law which is *res integra*. Afte decree, the judgment-debtor paid the decree amount into Court with interest up to the date of the deposit. Notice as provided by Order XXI (1) (2) was given. The Court below has held that it is only from that date that the decree amount ceased to carry

(1) (1912) I.L.R., 35 Mad., 44.

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further interest. I think this conclusion is right. No doubt, as pointed out by the learned vakil for the appellant, the analogy of the Transfer of Property Act is not very helpful as the legislature has provided specially for the cessation of interest only after the service of notice. I think there is a closer analogy in Order XXIV of the Code of Civil Procedure. Rule 3 says that interest on the deposit would cease to run from the date of the notice to the defendant. That is to say, the deposit being taken to have been made up correctly to the date of the deposit, the liability for interest on the sum which by the fact of the payment the defendant acknowledges to be due to the plaintiff ceases when the latter has notice of it and is put in the way of receiving the money from Court. True, that the order in question in terms only governs payment in the course of the hearing of a suit. I do not see why the same principle should not be applied to payments in the course of execution proceedings, especially as Order XXI, rule (1) (*a*), does not say that by the payment satisfaction of the claim of the decree-holder is *ipso facto* to be entered. The provision for notice rather indicates that the decree-holder's rights should be affected only after he is informed that the decree amount is available for him and that he can draw it out of Court. For these reasons I agree that the appeal should be dismissed.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919, January, 31.

KUPPIER (PLAINTIFF), APPELLANT,

v.

PERIAKARUPPA KAVUNDAN (FIRST DEFENDANT), RESPONDENT.*

Transfer of Property Act (IV of 1882), Sec. 68—Usufructuary mortgage, invalid for want of attestation—Deprivation of possession not by mortgagor but by title paramount—Suit for mortgage money, whether maintainable.

Section 68 of the Transfer of Property Act does not entitle a person, who takes a usufructuary mortgage which is invalid for want of attestation and who is deprived of his possession by title paramount and not by any act of his mortgagor, to sue for the mortgage money. The default referred to

* Second Appeal No. 1270 of 1918.

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in section 68 (*b*) as entitling the mortgagee to sue for the mortgage money is one anterior to the deprivation of possession, and failure of the mortgagor to establish the possession when called upon as against the strangers dispossessing the mortgagee is no default within section 68 (*b*).

Ram Narayan Singh v. *Abhindra Nath Mukkerji*, (1918) I.L.R., 44 Calc., 388, (P.C.), distinguished.

SECOND APPEAL against the decree of A. FOTHERINGHAM, District Judge of Madura, in Appeal Suit No. 226 of 1917, against the decree of K. W. RAMA RAO, District Munsif of Madura, in Original Suit No. 26 of 1917.

The plaintiff in this suit lent to the first defendant Rupees 450 and obtained from him a usufructuary mortgage of certain lands for a period of five years ending June 1917. He was put in possession and was enjoying the land till 1915 when he was dispossessed by defendants Nos. 2 to 4 who claimed paramount title. Plaintiff brought this suit in 1916 for possession against all the defendants and in the alternative for Rs. 450 and damages against the first defendant. All the defendants contended inter alia that the mortgage deed was invalid for want of a second attestor and the first defendant contended in addition that the suit for money brought before the expiry of the mortgage period was premature, that he was in no way liable for the dispossession of the plaintiff and that he was not therefore liable to repay the mortgage money. Finding that the mortgage was invalid for want of a second attestor, the plaintiff, in the course of hearing in the first Court, confined his prayer to the recovery of Rs. 450 and damages as against the first defendant only. Upholding the pleas of the first defendant on this point, both the lower courts dismissed the suit. The plaintiff preferred this appeal.

C. S. Venkata Achariyar for appellant.

The respondent did not appear.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The undisputed facts are that the first defendant executed a deed of mortgage to the plaintiff which was not in proper form owing to want of attestation. After the mortgage, the plaintiff was in possession for some time and then he was dispossessed by defendants Nos. 2 to 4 who claimed the property by title paramount. There is no allegation that the first defendant aided or abetted these other defendants in depriving the plaintiff of his possession. Under these circumstances plaintiff would not be entitled to sue for the mortgage money as

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such even if the mortgage was in proper form. Reliance was placed upon *Ram Narayan Singh* v. *Abhindra Nath Mukkerji*(1) for the proposition that even though plaintiff may not be able assert his claim as mortgagee, he can claim the money advanced by him on the footing that the mortgagor should refund it. In the case before the Judicial Committee the mortgagor had taken active steps to deprive the mortgagee of his possession. To such a state of circumstances clause (*b*) of section 68 of the Transfer of Property Act would in terms apply, provided the mortgage was otherwise enforceable; but the Judicial Committee held that even though the mortgage *qua* mortgage was not valid, the mortgage money was recoverable. We are not prepared to extend the reasoning of that decision to a case where the mortgagor has done no act to deprive the mortgagee of possession.

Then it was contended that the case fell under clause (*e*) of section 68, inasmuch as the mortgagee was deprived of his security by a stranger. If that is taken to be the finding, then, before suing the mortgagor for the money, the mortgagee ought to have called upon the mortgagor to furnish some other security equivalent to the one which he was dispossessed of.

The last argument related to clause (*b*) and it was contended that as the mortgagor did not when called upon defend his title against defendants Nos. 2 to 4, he must be deemed to have been guilty of default which resulted in depriving the mortgagee of his possession. But the default referred to in clause (*b*) must be anterior to the deprivation. The failure to get back lost possession is not within the clause. In *Bhola Nath* v. *Hara Mohan*(2), the default was at the date of the mortgage. We are not however to be understood as deciding that the failure to observe the conditions mentioned in section 68 would amount to default on the part of the mortgagor.

We, therefore, agree with the lower Courts' conclusion, though not with the reasons given by either of them. In the circumstances of the case, we permit the plaintiff to withdraw the suit with liberty to bring a fresh suit for the money, if he is otherwise entitled to it, on his paying all the costs of the first defendant incurred up to date within two months from now.

N.R.

(1) (1918) I.L.R., 44 Calc., 888. (2) (1910) 7 I.C., 251.

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in his name in Court auction and that one-half of it should be conve ed by him to the plaintiff after the sale-certificate was obtained, and under an agreement subsequent to the purchase the defendant agreed io execute a registered conveyence. *Held*, by the Full Bench, on a suit being brought for specific performance of the latter agreement, that the suit was not barred under section 66 of the Civil Procedure Code.

Venkatappa v. *Jalayya* ... ... (1919) I.L.R., 42 Mad. (F.B.), 615

CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER XXXIII :—*See* CIVIL PROCEDURE CODE, SCHEDULE II.

——————————SECOND SCHEDULE—*Reference of suit to arbitration by judge and two others as arbitrators—Award—Decree in accordance therewith—Finality of decree—Reference whether under second schedule—Proceedings, extra* cursum curiæ*—Adjustment of suit under O. XXIII, Civil Procedure Code—Consent decree.* A reference of a pending suit to arbitration by the presiding Judge along with others as arbitrators is not a reference under the second schedule to the Civil Procedure Code but is a proceeding extra *cursum curiæ*, and a decree passed in accordance with their decision should be regarded as a consent decree not subject to the provisions of the second schedule, and is therefore final. *Nanjappa* v. *Nanjappa* (1912) 23 M.L.J., 290; and *Praydas* v. *Girdhardas* (1902) I.L.R., 26 Bom., 76, followed. It is undersirable that a judge before whom a case is pending should associate himself with other persons as an arbitrator.

Chinna Venkatasami Naicken v. *Vankatasami Naicken* (1919) I.L.R., 42 Mad., 625

——————————SCH. II, R. 1—*Reference to arbitration by some only of the parties to the suit—Ex parte defendant, not a party to the reference—Reference, whether valid, Award—Decree, validity of—Jurisdiction of Court to make a reference'—Party interested, meaning of.* Where a suit was referred to arbitration at the instance of some of the parties thereto but a defendant against whom relief was claimed in the plaint who was ex parte in the suit, did not join in the reference though he had an interest in the subject-matter of the referenee, and a decree was passed in accordance with the award of the arbitrators. *Held*, that the Court had no jurisdiction to make the order of reference under schedule II, rule 1, of the Civil Procedure Code, that the decree was invalid and should be set aside, and that the suit should be proceeded with on the merits. If a person is ex parte in a suit, he does not thereby cease to be a party interested in the reference. *Ishar Das* v. *Keshab Deo* (1910) I.L.R., 19 All., 657, and *Vaithianatha Iyer* v. *Vaithialinga Mudaliar* (1915) 18 M.L.T., 374, dissented from; *Girija* v. *Karai* (1918) 27 C.L.J., 939 followed.

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COMPROMISE, *construction of—Whether benefit of annuity under it was confined to lineal heirs of grantee—No illegal perpetuity where annuity was a charge on the zamindari as long as heirs of grantee existed—Right to arrears of annuity by assignee of a reversioner—Objection not taken in early stage of case and no issue on it settled, not allowed to be raised in appeal to Privy Council.* In a suit between an ancestor of the appellant (third defendant) and an ancestor of the respondent (third plaintiff) for an impartible zamindari, a compromise

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was come to in 1861 by the parties, by which the ancestor of the appellant retained the zamindari subject to his giving up one village and paying an annual sum of Rs. 700 a month in perpetuity to the ancestor of the respondent. The terms of the compromise were contained in two petitions, dated 8th January 1861, one being in Tamil and the other in English, the only difference between them being that in the former the annuity was to be paid to the grantee "and his descendants from generation to generation," and in the latter to the grantee, "and his heirs." In a suit for the annuity by a collateral descendant of the respondent's ancestor. *Held*, on the construction of the compromise that the right to it was not confined to lineal heirs. *Held* also that the agreement lay not in covenant, but in charge, and that the annuity being a charge on the estate, it was not illegal as there was no difficulty in making it perpetual as long as there were lineal or collateral heirs of the grantee. Where an objection which might and ought to have been but was not, taken by the appellant at a stage of the case when an issue could have been raised on it, and the matter was subsequently decided by the High Court against the appellant, the objection by him was not allowed to be raised on an appeal to the Privy Council.

Rajah of Rámnád v. *Sundara Pandiyasami Tevar.* (1919) I.L.R., 42 Mad. (P.C.), 581

HINDU LAW—*Hindu Joint trading family—Loan borrowed by manager—Onus as to binding nature of loan—Account books not produced—Presumption against party—Onus of proof in cases of joint family business.*] Where the members of a devastanam committee sued the members of a Hindu joint trading family to recover a debt borrowed from the plaintiffs by the managing member of the family, and the defendants failed to produce their account books though summoned by the plaintiffs. *Held*, that, assuming that the onus of proving the binding nature of the debt lay on the plaintiffs even in the case of a trade carried on as joint family business it was shifted to the defendants on account of the presumption arising against them by their omission to produce their accounts called for by the plaintiffs, a presumption which arises against them whether the plaintiffs have any evidence or not. *Murugesam Pillai* v. *Manickavasaka Desika Gnána Sambanda Pandara Sannadhi* (1917) I.L.R., 40 Mad. 402 (P.C.), applied. *Quære.*—Whether, in a joint trading family, the onus of proof as to the nature of the debt is not on the family. *Raghunathji Tarachand* v. *The Bank of Bombay* (1910) I.L.R., 34 Bom., 72, referred to.

Guruswami Nadar v. *Gopalasami Odayar* ... ... (1919) I.L.R, 42 Mad, 629

LAND ACQUISITION ACT (I OF 1894)—*Acquisition of lands for building purposes—Wet lands in a zamindari—Occupancy rights of tenants included—Valuation of lands, mode of—Interests of zamindar and tenant, how valued—Apportionment of compensation—Land, whether to be valued merely as wet lands or as house-site.*] Where wet lands in a zamindari are acquired by the Government under the Land Acquisition Act for extension of the village-site, the lands have to be valued in the first instance including all interests in it, and the amount so ascertained has then to be apportioned among the parties interested, according to their interests The proper way of valuing lands

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TRUSTEES OF TEMPLE—*Suspension from office of an hereditary archaka—Order passed without notice to archaka or previous inquiry, whether valid—Order, ad interim, continued for an unreasonably long time, whether legal—Punitive order of suspension, whether valid without notice.*] Where the trustees of a temple suspended an hereditary archaka of the temple from his office on account of certain imputations of misconduct made against him, without giving him notice or making any inquiry previous to passing such order, and no subsequent inquiry was made by them for fourteen months after the date of the order, whereupon the latter brought a suit to recover his office and damages for wrongful suspension. *Held*, that the order of suspension pending inquiry into alleged misconduct should not have been continued in force for a longer period than was reasonably necessary; that, in this case, the delay of fourteen months between the date of the order and the institution of the suit being unreasonable, the order as an ad interim order, ceased to be valid before the date of the suit; and that the order, viewed as a punitive order, was invalid as having been passed without notice and inquiry, whatever the merits of the case might be. *Thiruvambala Desikar* v. *Manikkavachaka Desikar* (1917) I.L.R., 40 Mad., 177; and *Venkatanarayana Pillai* v. *Ponnuswami Nadar* (1918) I.L.R., 41 Mad., 357, followed; *Willis* v. *Sir G. Gipps* (1846) 5 Moore, 379 (P.C.), applied; *Seshadri Iyengar* v. *Ranga Bhattar* (1912) I.L.R., 35 Mad., 631, distinguished. *Held* further, that out of the temple funds the plaintiff was entitled to recover damages due to him, as the trustees in passing the order of suspension and continuing it, acted in their capacity as trustees and in what they conceived to be the proper discharge of their duties on behalf of the temple.

Jagannatha Achariar v. *Seenu Bhattachariar* ... (1919) I.L.R., 42 Mad., 618

PRIVY COUNCIL*.

RAJAH OF RAMNAD (DEFENDANT No. 2)

v.

SUNDARA PANDIYASAMI TEVAR (PLAINTIFF No. 3).

1918, November 7.

[On appeal from the High Court of Judicature at Madras.]

Compromise, construction of—Whether benefit of annuity under it was confined to lineal heirs of grantee—No illegal perpetuity where annuity was a charge on the zamindari as long as heirs of grantee existed—Right to arrears of annuity by assignee of a reversioner—Objection not taken in early stage of case and no issue on it settled, not allowed to be raised in appeal to Privy Council.

In a suit between an ancestor of the appellant (third defendant) and an ancestor of the respondent (third plaintiff) for an impartible zamindari, a compromise was come to in 1861 by the parties, by which the ancestor of the appellant retained the zamindari subject to his giving up one village and paying an annual sum of Rs. 700 a month in perpetuity to the ancestor of the respondent. The terms of the compromise were contained in two petitions, dated 8th January 1861, one being in Tamil and the other in English, the only difference between them being that in the former the annuity was to be paid to the grantee "and his discendants from generation to generation," and in the latter to the grantee "and his heirs." In a suit for the annuity by a collateral descendant of the respondent's ancestor

Held, on the construction of the compromise that the right to it was not confined to lineal heirs;

Held also that the agreement lay not in covenant, but in charge, and that the annuity being a charge on the estate, it was not illegal as there was no difficulty in making it perpetual as long as there were lineal or collateral heirs of the grantee.

Where an objection which might and ought to have been but was not, taken by the appellant at a stage of the case when an issue could have been raised on it, and the matter was subsequently decided by the High Court against the appellant, the objection by him was not allowed to be raised on an appeal to the Privy Council.

APPEAL No. 13 of 1917 from a judgment and decree (28th October 1914) of the High Court at Madras, which affirmed a judgment and decree (28th March 1911) of the Court of the District Judge of Madura.

The main question for decision in this appeal is whether the appellant is liable to pay to the respondent and his heirs and

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assignees in perpetuity a sum of Rs. 700 a month as being a charge on the Rāmnād estate.

The facts were that in 1853, one Rani Parvatavardani Nachiar was the Zamindar of Rāmnād, against whom a suit was brought in the Civil Court of Madura by one Sivaswami Tevar to recover possession of the estate. Sivaswami claimed to succeed to it as the surviving member of a joint family in preference to the widow of the zamindar. The Judge dismissed the suit on 4th April 1857, and on 14th January 1858 the Court of Sadr Adalat on appeal by Sivaswami affirmed that decree though for different reasons from those on which the first Court's judgment was based.

Pending an appeal to the Privy Council the parties came to a compromise, the terms of which were recorded in petitions, dated 8th January 1861, one in Tamil and one in English, filed in the Court of Sadr Adalat. The material portion of each so far as this appeal is concerned were as follows:—The translation of the Tamil petition was:

"As consideration for the plaintiff having lost wholly his future claim and all other rights, the defendant and her heirs who are in enjoyment of the zamindari should pay to the plaintiff and his descendants, from generation to generation, an allowance at the rate of Rs. 700 a month from the 1st November 1860."

The English petition stated:

"The plaintiff having thus completely relinquished all right and claim the defendant and her heirs holding the zamindari shall, from 1st November 1860, pay to the plaintiff and his heirs a monthly allowance of Rs. 700."

Sivaswami Tevar died on 1st July 1861, leaving two widows Kulanthai Nachiar and Ramamani Ammal and a son by the latter named Muthudoraswami Tevar. Kulanthai Nachiar denied that Ramamani had ever been married to the deceased, and as sole heir of her deceased husband she sued the then zamindar Rani Parvatavardani Nachiar and her adopted son Muttu Ramalinga Setupati for the allowance payable under the compromise. On 25th January 1869, the Civil Judge of Madura decreed her claim against the adopted son, who by virtue of his adoption had succeeded to the estate and on 5th April 1870 this decree was affirmed by the High Court at Madras.

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Meanwhile Muthudoraswami Tevar had brought a suit against Kulanthai Nachiar to establish his legitimacy in which he obtained, on 21st November 1871, a final decree of the Privy Council in *Ramamani Ammal* v. *Kulanthai Nachiar*(1). He then sued the Rajah of Rāmnād to recover the monthly allowance for himself, and on 4th February 1884, he obtained a final decree in his favour from the High Court at Madras. He continued to receive the allowance until he died on 16th November 1905.

The Rajah of Rāmnād on 12th July 1895 executed a deed of trust by which he assigned the whole estate to trustees for the benefit of his eldest son, the present appellant, and, *inter alia*, provided for the payment to Muthudoraswami Tevar and his heirs of the monthly sum of Rs. 700 payable under the decree in Original Suit No. 16 of 1881 on the file of the District Court of Trichinopoly," which was the suit brought by Muthudoraswami Tevar against the Rajah of Rāmnād in that year.

The suit giving rise to the present appeal was brought by Ramamani Ammal as heir to her son to recover arrears of the allowance. The plaintiff based her claim to recover the allowance and have it charged on the Rāmnād estate on the compromise of 1861 and the deed of trust of 1895. The nature of the defence appears from the following issues which are those now material:—

"(2) Whether on a construction of the razinama, dated 8th January 1861, and the deed of trust, dated 12th July 1895, in favour of the first defendant's predecessor, the right to the allowance would descend only to the lineal heirs? If so, has the second plaintiff any cause of action? (4) Are the defendants Nos. 1 and 2 estopped from raising the contention covered by issue (2) in consequence of the decisions in Original Suit 10 of 1867 on the file of the District Court of Madura and in Original Suit 16 of 1881 on the file of the Trichinopoly District Court, and by the provisions of the trust deed, dated 12th July 1895? (7) Whether by virtue of the razinama or of the trust deed, of 12th July 1895, the plaintiffs are entitled to a charge on the Rāmnād zamindari? (8) If issue (7) is found in the negative, whether the plaintiffs are now entitled to a declaration of such a charge?"

(1) (1871) 14 M.I.A., 346.

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Ramamani Ammal died on 14th March 1910 after all the evidence had been recorded. Poolar Tevar, the next reversioner to Muthudoraswami's estate, executed on 8th April 1910 a document in favour of the respondent purporting to be a deed of release, but which the respondent contends is an assignment to him of all rights in the allowance claimed. On 21st July 1910 the respondent applied to be substituted on the record as representative of Ramamani, and on 18th March 1911 the District Judge directed that to be done.

The District Judge held that there was no estoppel. On issue (2) he decided that the respondent was entitled to recover from the appellant the allowance claimed, and on issue (7) that the allowance had been charged on the estate.

An appeal by the appellant to the High Court was heard by WALLIS, C.J., and SESHAGIRI AYYAR, J., who made a decree affirming that of the District Judge so far as it decided that the appellant was liable to pay the respondent the allowance claimed but varying the decree by directing that it should be a charge on a part of the zamindari to be determined by the District Judge.

ON THIS APPEAL

D. Gruyther, K.C., and *E. B. Raikes* for the appellant contended that, on the true construction of the deed of compromise, no right to the allowance had been established in Ramamani, the original plaintiff. If the true construction was as alleged by her it was void and not enforceable both under the law of India and the Hindu Law. Even if she had any such right the respondent did not by virtue of the document executed by Poolar Tevar obtain an assignment of his rights, an assignee being unable to acquire any right to an allowance which by the plain terms of the deed could be payable only to heirs. No charge on the estate was created by its terms; and the Zamindar Rani could not bind her successors, so that the deed was not enforceable against them. Reference was made to the case of *Mahomed Hussain Khan* v. *Mahomed Nahaluddin Khan*(1) relied on by the High Court which was distinguished as the grant there expressly created a charge; and to *Lakshmi Narayan Ananga* v. *Duga Madhawa Deo*(2), where the finding

(1) (1883) 13 C.L.R., 330, 333.
(2) (1892) I.L.R., 16 Mad., 268; L.R., 20 I.A., 9.

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that the grant created a charge though made was not necessary for the decision of the case. Reference was also made to *Balvankav* v. *Purshotam Sideshar Bapaji*(1) which it was contended was not applicable. On the terms of the compromise in the translation from the Tamil document, it was submitted that the right to the allowance was limited to lineal heirs, and did not extend to collaterals; and reference was made to *Ekradheswar Singh* v. *Janeshwari Babuasin*(2). As to the arrears of the allowance they belonged to the widow, and unless it was shown that she had made them part of her husband's estate the presumption was that she had not done so; see *Akkanna* v. *Vendayya*(3). At any rate the respondent had no right to them, as he was not her legal representative: as to the arrears the suit should be held to have abated; the respondent had no title to revive the suit on the death of the original plaintiff, and should not have been permitted to do so. Reference was also made to Mayne's Hindu Law, 8th edition, paragraph 627, to *Babaji* v. *Ganesh*(4), and to the Civil Procedure Code, 1908, Order XXII, rules 1, 3, 5 and 10.

Sir *H. Erle Richards*, K.C., and *Kenworthy Brown* for the respondent were not called upon.

The JUDGMENT of their Lordships was delivered by

Lord PHILLIMORE.

Lord PHILLIMORE.—This is an appeal from the decree of the High Court of Judicature at Madras, affirming, with a modification, the decree of the District Judge of Madura, who ordered that the second defendant, that is the present appellant, should pay out of the income of the Rāmnād zamindari to the third plaintiff, the present respondent, the sum of Rs. 24,126-10-8 with interest, and should also pay future instalments from the date of the plaint at the rate of Rs. 700 a month, and gave the plaintiff the costs of the suit.

The first question which the Board has to decide is upon the construction of a deed of compromise, which is the root of the title of the third plaintiff. That compromise passed between the ancestor of the appellant and the ancestor, though not the lineal ancestor, of the respondent, and by that compromise

(1) (1872) 9 Bom., H.C.A.C., 99.
(2) (1914) I.L.R., 42 Calc., 582, 592; L.R., 41 I.A., 275, 285.
(3) (1901) I.L.R., 25 Mad., 351.
(4) (1902) I.L.R., 27 Bom., 162.

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between two parties claiming the impartible zamindari, the ancestor of the present appellant retained the zamindari subject to his giving up one village and paying an annual sum of Rs. 700 per month to the ancestor of the present respondent. It has been contended that the effect of that compromise was to limit the payment of the Rs. 700 to the lineal heirs of the grantee and that, as the present respondent is only a collateral heir and only represents, by virtue of the assignment under which he claimed, a nearer collateral heir of the grantee, he is not within the terms of the deed. Both Courts below have taken the opposite view and their Lordships see no reason to differ from that view. The ground may be put quite shortly: it was a compromise dividing the estate—not dividing the estate equally by any means, but giving a share to the grantee of this annuity, and a larger share to the other party. The less successful party got a village and an annuity, the more successful party got all the rest of the property. There is every reason to suppose that the intention of the parties was that, just as one side was to keep the majority of the property for himself and his heirs, lineal or collateral as the case might be, so the other side was to have the village, and, in the same way, the annuity, for himself and his heirs lineal or collateral as the case might be. If the question of construction be determined with reference to the village, the sense of this view is even more marked. Therefore one of the grounds for the appeal fails.

A second contention was that this was a creation of a kind of perpetuity, which the law did not allow, or an attempt to create a permanent relation which was impossible of creation. Whatever might be said about that, if this agreement lay in covenant, seeing that it lies in charge, there is no difficulty in making it perpetual as long as there are lineal or collateral heirs of the grantee, and in our view the District Judge and Mr. Justice SESHAGIRI AYYAR, in the High Court, were right in holding that this is a charge. In that respect, and in that respect only, we differ from the view taken by the learned Officiating Chief Justice. If it is a charge, the modification which the High Court made in the decree of the District Judge is, by the allowance of counsel for the appellant, not injurious to his client. The decree of the District Judge may well be read as making

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the annuity a charge on the whole raj, and it is very much more convenient, and indeed in the interest of the appellant, that it should be limited in the way proposed by the decree of the High Court, that is to say, that it is to be referred back to the District Judge so that he shall settle on what part of the Rāmnād zamindari the charge shall be allowed. That being so, there is no objection to the decree so far.

A point was taken that the third plaintiff, claiming under an assignment from a nearer reversioner, had not made out his title to the assignment; that it was void for want of consideration; that it was obtained by fraud, or some similar objection. It is enough to say that their Lordships agree with the Courts below in saying that there is nothing in any of these points.

The one matter which requires a little more consideration is as to the title of the third plaintiff to maintain his decree for the arrears of the annuity. Now the suit in the first instance was brought by the first plaintiff, who claimed to be the adopted son of the previous grantee, and the widow of the previous grantee as second plaintiff, and she sued for herself and for her heirs: "Plaintiffs therefore pray"—that is the adopted son and the widow—

"For a decree in favour of the first plaintiff and his heirs, or the second plaintiff and heirs as may be found entitled."

No doubt the prayer goes on to pray that the declaration may be in favour of the first plaintiff and his heirs or the second plaintiff and reversioners, and that the arrears may be paid to the first plaintiff or the second plaintiff as the case may be. The first plaintiff sued as an adopted son, and his claim was found to be unfounded, and he was dismissed and has not appealed. The second plaintiff, the widow, died in March 1910, and shortly afterwards the next reversioner sold his rights to the third plaintiff for a small consideration and in order to effect a family settlement. Among the rights which he professed to pass were the widow's claim to the allowances. Thereupon the present third plaintiff petitioned to be substituted in the suit in place of the second plaintiff, so that he might carry it on, and he set out by reference the deed of assignment as part of his title and prayed that he might be

"brought on record as legal representative in place of the deceased

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The present appellant resisted this application on the ground that the assignment was fraudulent, and perhaps for other reasons; but he took no objection based on the fact that the third plaintiff was claiming to be brought on the record as the legal representative of the deceased second plaintiff; he did not say that, while he might go on the record as the assignee of the next reversioner, and to that extent fulfil part of the position of the deceased second plaintiff, he was not the legal representative of the deceased second plaintiff, and could not exhaust the whole claim by being substituted for her; and, he not taking that point, the learned Judge made an order which declared the third plaintiff to be the legal representative of the deceased second plaintiff, and that the suit do proceed. It may be observed in passing that if the third plaintiff was only a partial legal representative of the second plaintiff the suit which was proceeding as to the arrears would have been defective. It is now said, and very elaborately argued on behalf of the appellant, that the present respondent is not and cannot be the legal representative of the widow so as to be in a position to claim for or give a good discharge for the arrears, which were very considerable, of the annuity, and that therefore the suit fails as regards all that claim, and must be limited to a declaration *de futuro*. Their Lordships think the answer to this is that a widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It may be that the presumption is the other way. A case has been cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property. The third plaintiff when he petitioned to be substituted in her place relied upon a title which purported to assign to him the widow's arrears of the annuity as well as the right to the annuity *de futuro*, and if there was an accretion to the estate that title would be a good one, the next reversioner could pass it to him and he properly represents the estate in respect of the whole. As no objection was taken, as no issue was raised, as the matter was not even raised on appeal from the District Judge (because we cannot take a general allegation in the memorandum of appeal as pointing to this question), it was too late to raise it after the High Court had decided the matter, and it is therefore

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not open to their Lordships to consider whether or not a good case could have been made requiring the addition of some other representative of the widow.

Upon the whole, the case for the appellant fails, and their Lordships will humbly advise His Majesty that the decree of the Court below should be affirmed, and 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.

PRIVY COUNCIL.*

MAHARAJA OF JEYPORE (PLAINTIFF)

v

RUKMINI PATTAMAHDEVI GARU (DEFENDANT).

APPEAL AND CROSS APPEAL.

1918, November, 4, 5, and 1919 January, 20.

[On appeal from the High Court of Judicature at Madras.]

Landlord and tenant—Contract for payment of rent, also with conditions for rendering services when called upon—Denial of title and refusal to render services—Services, a subsidiary consideration and of a ceremonial nature—Forfeiture and resumption, right to.

The suit which gave rise to this appeal was brought in 1906 by the appellant, the Maharaja of Jeypore, against the husband of the respondent (now deceased and represented by his widow) for the possession and arrears of rent of a pargana called Bissamcuttak, on the allegation that it was part of the appellant's zamindari, and had been held by the predecessors in title of the defendant under grants or leases on conditions of payment of kattubadi or rent and of rendering services to the Maharaja. The latest was a patta, dated 1st August 1877, under which the possession of the defendant's father had been

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renewed by the then Maharaja on payment of an annual kattubadi of Rs. 15,000 and the rendering of services stated in the plaint as "just as your father used to attend at Dasara for service, so now you should also present yourself with 500 paiks for service whenever directed to do so." In 1903 when directed to render such services, the defendant had not so attended the Dasara darbar, nor had he paid the proper amount of rent for that year or for 1904, but had asserted that the pargana was not held as a service tenure, and had set up a title in himself to the pargana as an independent zamindari, and subject only to a payment of Rs. 2,200 to the Maharaja which sum he then paid as rent, but denied his liability as a tenure-holder under the appellant. He wrote a letter to the appellant, dated 26th November 1901, which was alleged to be a contumacious refusal to render services, and to amount to a denial of the appellant's title causing forfeiture of his tenant's holding which the appellant claimed to be entitled to resume.

Held that denial of title in the suit would not work a forfeiture of which advantage could be taken in that suit, because the forfeiture must have accrued before the suit was instituted, and there was no denial by matter of record previous to the institution of the suit.

Nizamuddin v. *Mamtozuddin* (1900) I.L.R., 28 Calc., 135, and *Prannatha Shaha* v. *Madhu Khatu* (1876) I.L.R., 13 Calc., 36, referred to.

Held also that here there was no such renunciation by the tenant of his character as such, as to work a forfeiture.

Held further that in this case the rent received was the principal matter, and the rest was subsidiary, and that, under the circumstances, the refusal to render the services contracted for did not operate to create a forfeiture or give occasion for resumption.

CONSOLIDATED APPEAL No. 125 and Cross Appeal No. 126 of 1916 from a decree (18th February 1915) of the High Court at Madras, which varied a decree (21st October 1910) of the Court of the Agent to the Governor of Madras at Vizagapatam in Original Suit No. 2 of 1909.

The suit, out of which these appeals arose, was brought by the present appellant, the Maharaja of Jeypore, against Narendra, the late holder of the pargana of Bissamcuttak, for possession of that pargana, and for arrears of rent or kattubadi due thereon for three years at the rate of Rs. 15,000 per annum, for subsequent mesne profits and for other relief.

In his defence, the defendant set up an independent proprietary and permanent hereditary freehold right to the estate of Bissamcuttak, pleading that that estate was "excluded at the permanent settlement from the assets belonging to the Jeypore zamindari in proprietary right, and only his right to the jamabandi (Rs. 2,200) was taken into account when fixing the peshkash payable to him"; and he denied that his

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ancestors had rendered any services as That raj or master of the paiks since 1689, and contended that the agreements and pattas made and accepted by his father and grandfather were not binding on him, and that the Maharaja had no right to eject him and resume the estate, or to recover rent at any higher rate than Rs. 2,200. He also set up a copper-plate patta, and one of the questions in the case was whether it was genuine, and whether under it the grantee had a permanent hereditary freehold right to Bissamcuttak.

Narendra died on 10th August 1910 without male issue and his widow, the respondent in appeal No. 125 and appellant in the cross appeal No. 126, was brought on the record as his legal representative.

The facts of the case and the circumstances leading to the litigation are sufficiently stated in the judgment of the Judicial Committee.

The Court of the Agent to the Governor of Madras made a decree in favour of the plaintiff in respect of kattubadi for the three years as claimed, and subsequently at the rate of Rs. 2,200 per annum but otherwise dismissed the suit.

On appeal the High Court (SANKARAN NAIR and OLDFIELD, JJ.) varied that decree by awarding kattubadi at the rate of Rs. 15,000 per annum.

ON THIS APPEAL

Upjohn, K.C., *DeGruyther*, K.C., and *Kenworthy Brown* for the Maharaja of Jeypore, the appellant in appeal No. 125, contended that Bissamcuttak formed part of his zamindari held under the sanad of 1803. The respondent held the pargana from the Maharaja under the patta of 1877 granted to his father, and it had been rightly decided by the High Court that its terms were enforceable against him. The Court of First Instance was right in holding that, according to the terms of the patta of 1877, the respondent held subject to perform services as therein described, and his tenancy was therefore conditional on the performance of them; and consequently when he refused to pay the rents or to render the services to the appellant, and set up an independent title to the land, the appellant, on giving due notice of his intention to resume possession, was entitled to a decree for ejectment. Having held under the above pattas the respondent

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could not now dispute their validity. He was also precluded from setting up any permanent and hereditary right in his ancestors and himself to the estate by reason of the dismissal of his grandfather's suits in 1845; and also by the law of limitation from setting up his present case, and moreover as to that the High Court had rightly held that the alleged copper-plate grant of 1689 had not been established. As to the right of the appellant to resume the pargana on the respondent's refusal to perform the services the case of *Forbes* v. *Meer Mohamed Tuquee*(1) was cited; and as to the effect of his denying the appellant's title and setting up an independent title in himself reference was made to *Doe* v. *Stanion*(2), *Vivian* v. *Moat*(3), *Padmanabhaya* v. *Ranga*(4), and the Transfer of Property Act (IV of 1882), section 111 (*g*).

A. M. Dunne, K.C., and *B. Dube* for the respondent, the Rani of Bissamcuttak contended that the copper-plate patta of 1689 was proved, and the respondent's predecessors in title held the estate of Bissamcuttak in permanent hereditary right prior to the British rule. In assessing the revenue on the Jeypore zamindari the British Government took into consideration only the small quit-rent of Rs. 2,200 which the That raj of Bissamcuttak paid to the Maharaja of Jeypore, and the High Court had wrongly decided in coming to a contrary conclusion. The appellant was not entitled to recover more than that sum annually from the respondent, and all agreements to the contrary were unlawful and void. The Transfer of Property Act was not applicable, see section 2, and even if section 111 (*g*) applied there would be no forfeiture. The case was governed by the rule of justice, equity and good conscience. Reference was made to *Satayabhama Dassee* v. *Krishna Chundee Chatterjee*(5), *Debiruddi* v. *Abdur Rahim*(6), *Kally Doss Ahisi* v. *Monmohinee Dassee*(7), *Nizamuddin* v. *Mamtozuddin*(8), and *Waghela Rajsangji* v. *Masludin*(9). The general rule of English Law is that a denial of the landlord's title only effects forfeiture if made by matter of record before the suit, see Cruise's Digest Title III,

(1) (1870) 13 M.I.A., 438.
(2) (1836) 1 M. & W., 695.
(3) (1881) 16 Ch. D., 730.
(4) (1910) I.L.R., 34 Mad., 161.
(5) (1883) I.L.R., 6 Calc., 85.
(6) (1888) I.L.R., 17 Calc., 196.
(7) (1897) I.L.R., 24 Calc., 440.
(8) (1900) I.L.R., 28 Calc., 135.
(9) (1887) I.L.R., 11 Bom., 551 (558); L.R., 14 I.A., 89 (93).

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Ch. I, section 58; Woodfall's "Landlord and Tenant," Ch. VIII, section 5 (19th ed., page 363). [Sir L. JENKINS referred to Platt on Leases, Part VII, Ch. I, section 2, and *Sheik Miadhar* v. *Rajani Kanta Roy*(1).] The principles on which *Doe* v. *Stanion*(2) and *Vivian* v. *Moat*(3) were decided do not apply to India; see *Kali Kishen Tagore* v. *Golam Ali*(4). But in the present case liability to pay rent was admitted, so there was no denial of title. The nature of the services were not such as that the non-performance of them would effect a forfeiture, they were subsidiary conditions of the tenancy and were merely formal and ceremonial; see *Forbes* v. *Meer Mohamed Tuquee*(5). The appellant had therefore no right to resume the pargana. [The arguments on the cross appeal were only on facts.]

De Gruyther, K.C., replied.

The JUDGMENT of their Lordships was delivered by

Lord PHILLIMORE.

Lord PHILLIMORE.—This is an appeal from a decision of the High Court of Judicature at Madras which varied a decree of the Court of the Agent to the Governor of Madras.

The suit was brought by the present appellant against the husband of the present respondent for possession of the pargana of Bissamcuttak, and for arrears of rent and mesne profits.

The case made in the plaint filed on 17th September 1906 was that Bissamcuttak was in the plaintiff's zamindari, that under various grants or leases it had been held by the ancestors of the defendant paying rent and rendering services to the ancestors of the plaintiff, and that at the present time the governing instrument was a patta of the 1st August, 1877, under which the then Maharaja continued the father of the defendant in possession of the pargana on his payment of an annual kattubadi of Rs. 15,000. The further contents of the patta were stated as follows:—

"Just as your father used to attend in Dasara for service, so now you should also present yourself with 500 paiks for service whenever directed to do so. These directions are given imperatively."

The plaint proceeded to aver that the defendant had been directed in 1903 to render services by attending the ensuing Dasara darbar, at Jeypore, that he did not attend the Dasara,

(1) (1900) 14 C.W.N., 319.
(2) (1836) 1 M. & W., 695.
(3) (1881) 16 Ch.D., 730.
(4) (1886) I.L.R., 13 Calc., 3, 248.
(5) (1870) 13 M.I.A., 438.

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or remit the kattubadi that year or in 1904, but had replied to the effect that Bissamcuttak pargana was not held on service tenure, but that it was an independent zamindari, which had only to pay to the Zamindar of Jeypore a fixed, unchanging and unchangeable kattubadi of Rs. 2,200 as per permanent settlement records, and had remitted therewith Rs. 3,300 only; that he had been warned of the consequences of his conduct and given an opportunity for withdrawing his repudiation, but that he persisted in repudiating the plaintiff's title to the pargana and in denying his liability as service holder under the plaintiff, and also in setting up a title in himself to the pargana as an independent zamindar subject only to the payment to the plaintiff of a fixed, unchanging and unchangeable kattubadi of Rs. 2,200 annually.

The plaintiff thereupon contended that the pargana was held either on service tenure by the defendant merely as a remuneration for discharging the services annexed to the said office, or on a tenure subject to the condition and burden of rendering such service to the zamindar, that in the former case it was competent to the plaintiff to dispense with such services and to resume the pargana at pleasure, and that in either case the defendant was liable to forfeit the pargana by reason of his repudiating the plaintiff's title and his (defendant's) liability to render such services and to pay the kattubadi of Rs. 15,000 and of his refusing to perform such services.

The defendant by his written statement said that the estate of Bissamcuttak was an independent estate at first, but became subordinate to the Jeypore zamindari, that the owner of Bissamcuttak, whom he styled zamindar, did not hold his estate on condition of rendering any service to the Maharaja, and that at any rate, some time before 1689, he agreed to pay a fixed rent to the Maharaja and thereupon any duty to render service ceased. And he set up a patta supposed to be engraved on a copper-plate whereby the Maharaja acknowledged the permanent and hereditary freehold right of the Bissamcuttak Zamindar, fixing the jamabandi or rent at Rs. 2,200. He further said that the Bissamcuttak estate had no connexion with Jeypore, nor was it subordinate to it, except in the manner mentioned above. He admitted that he had repudiated the claims made by the

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raja in his letters of summons as to the tenure on which his estate was held, and he denied the various allegations made in the plaint, both in respect of the nature of his tenure and of the plaintiff's right to resume. He gave reasons why even if the obligation to render services was not put an end to by the fixing of a jamabandi in lieu in 1689, the liability to render them had at any rate now ceased. And finally he submitted that, in the circumstances of the case, he had made no disclaimer, or denial in law, of the plaintiff's title such as to work a forfeiture of the estate.

The first question, therefore, to be determined was that of the tenure by which the defendant held his estate. His father had unquestionably accepted the patta of 1877; but if the defendant could establish the copper-plate of 1689, he might then be able to free himself from the effect of the patta of 1877. There would still be a good many difficulties in his way, but in their Lordships' opinion it is unnecessary to discuss them. At the root of the defendant's case lays the question of the genuineness of the copper-plate.

The Agent in the Court of First Instance accepted it as genuine; the High Court took the opposite view.

After hearing all that could be said upon the subject by counsel for the respondent, who was in this respect a cross appellant attacking the decree of the High Court, their Lordships think that the decision of that Court was right, and they concur in the reasons given by OLDFIELD, J.

The ancestors of the defendant were no doubt from time to time, as far back as it can be traced, in occupation of Bissamcuttak. They were excluded by the then Maharaja from possession about 1816 and remained out of possession till somewhere about the year 1850 or it may be 1853, when a lease was granted at the rent (said to be a reduced rent) of Rs. 1,500.

In October, 1853, occurs the first mention of the alleged copper-plate, but it was probably not produced to any one in authority. At that time and since the rent supposed to be reserved according to the copper-plate was stated to be Rs. 2,200, but in 1902 to be Rs. 2,500.

The story told on behalf of the defendant was that some representative of the then owner took it to the Government Agent in 1853 or 1854, and then instead of bringing it back to

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his master kept it, because he had a quarrel with his master; that it remained in his house for many years till there was a threat that some Government official was going to search the house in connexion with some charge of malversation, whereupon the defaulting servant took the copper-plate to the brother of the widow of the last owner, who gave it to the widow, who gave it to a Government Agent in the year 1891. The document, therefore, according to this story, was out of proper custody from 1854 to 1891.

No doubt, in 1891, the copper-plate which was produced at the trial, and which was relied upon by the defendant, was produced and handed to the Government Agent, since when its possession is accounted for.

But the whole story is a most improbable one, and against it are the unquestioned facts that in 1845 and 1846, during the time when the defendant's ancestors were out of possession, two suits were brought against the Maharaja to recover possession and discontinued; that when the defendant's ancestor was restored to possession it was on a reduced rent of Rs. 1,500, but with the condition of rendering service; that in 1854 a new lease at Rs. 2,500, and in 1864 a further lease at the increased rent of Rs. 5,000, always with the condition of service, and finally in 1877 the patta or lease already referred to were given and accepted; a state of things entirely inconsistent with the supposed existence of a permanent tenure at a fixed rent of Rs. 2,200 without any duty to render service.

In their Lordships' opinion the genuineness of the copper-plate of 1689 was not proved, and there is no reason for saying that the patta of 1877 was invalid; and the relations between the parties must be held to be governed by the terms of this patta.

The cross appeal of the respondent, therefore, fails.

Their Lordships have now to deal with the principal appeal.

The High Court, while reversing the decision of the Agent and making a decree in favour of the appellant, has granted him relief to a limited extent only. It ordered and decreed that the respondent, who had by that time succeeded to the estate of the deceased defendant, should pay with interest the arrears of rent at the rate prescribed by the patta, but it did not give to the

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appellant possession of the property, holding that no forfeiture had been established.

In their Lordships' opinion it is a consequence of the decision of the High Court that the respondent holds a tenure derived from the zamindari of the Maharaja, and there is an obligation upon the tenant for the time being to pay the rent, and, so far as modern conditions of society and law permit, to render the service prescribed by the patta.

So far they accede to the contentions of the appellant. They have now to inquire whether in these circumstances the acts and omissions of the deceased defendant were such as to create a forfeiture of his estate.

The case for the appellant is put in paragraph 31 of his plaint:—

"Whether the pargana was held on service tenure by the defendant merely as remuneration for discharging the service annexed to the said office or on a tenure subject to the condition and burden of rendering such service to the zamindar, it is competent to the plaintiff in the former case to dispense with such services and to resume the pargana at pleasure, and in either case the defendant is liable to forfeit the pargana by repudiating the plaintiff's title and his (defendant's) liability to render such services and to pay the kattubadi of Rs. 15,000 and by refusing to perform such services, and it is competent to the plaintiff to enforce such forfeiture as he has done by his notice, dated 24th April 1906, and resume the possession and management of the pargana."

He thus raises two grounds of forfeiture; the second, which their Lordships propose to take first, being that the tenant has repudiated his landlord's title; and it must be accepted that it is the law of India that there are circumstances in which such a repudiation will work a forfeiture. This law is not ancient Indian law, but has been adopted by the Courts from the law of England, and is now embodied in a statute.

By the Transfer of Property Act, 1882—

"Section III (a), lease of immovable property, determines—

* * * *

"(g) By forfeiture, that is to say (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; and in either case the

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lessor or his transferee does some act showing his intention to determine the lease."

This statutory provision not being retrospective (see section 2) does not govern the present case. But it is in substance the placing in a statutory form of the rule of law which had been already adopted by the Courts in India; see *Kally Dass Ahisi* v. *Monmohinee Dassee*(1).

They are directed by the several charters to proceed where the law is silent, in accordance with justice, equity, and good conscience, and the rules of English law as to forfeiture of tenancy may be held and have been held to be consonant with these principles and to be applicable to India; see *Nizamuddin* v. *Mamtozuddin*(2).

Now the rule of English Law is that a tenant will forfeit his holding if he denies his landlord's title in clear, unmistakable terms, whether by matter of record, or by certain matters *in pais*.

The qualification that the denial must be in clear and unmistakable terms has not unfrequently been applied by the Courts in India, which have held that where a tenant admits that he does hold as a tenant of the person who claims to be his landlord, but disputes the terms of the tenancy, and sets up terms more favourable to himself, he does not, though he fails in establishing a more favourable tenancy, so far deny the landlord's title as to work a forfeiture; see *Vithu* v. *Dhondi*(3), *Venkaji Khrishna Nadkarn* v. *Lakshman Devji Kandar*(4), *Unhamma Devi* v. *Vaikunta Hedge*(5), *Chinna Narayudu* v. *Harischendana Deo*(6).

Counsel for the respondent contended that she was entitled to the benefit of these rulings, and that in this case there was no such clear and unmistakable denial.

Whether this be so or not, their Lordships do not find it necessary to decide for the following reasons:—

(1) There is here no denial by matter of record before the present suit was instituted. Denial in the suit will not work a forfeiture of which advantage can be taken in that suit, because the forfeiture must have accrued before the suit was instituted;

(1) (1897) I.L.R., 24 Calc., 440.
(2) (1900) I.L.R., 28 Calc., 135.
(3) (1890) I.L.R., 15 Bom., 407.
(4) (1895) I.L.R., 20 Bom., 356.
(5) (1893) I.L.R., 17 Mad., 218.
(6) (1903) I.L.R., 27 Mad., 23.

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see *Nizamuddin* v. *Mamtozuddin*(1), already referred to, and the previous case of *Prannath Shaha* v. *Madhu Khulu*(2) there cited.

(2) As to forfeiture by matter *in pais*, this, according to English Law, occurred when the tenant purported to make a tortious conveyance such as a feoffment with livery of seisin, the result of which was to purport to give to the feoffee a greater estate than he himself had in the land; in such case the estate thus given, though forfeitable immediately to the person claiming by a prior title, was good against everyone else. The feoffment was then said to operate by tort.

When by the Real Property Act (8 & 9 Vict., c. 106, s. 4), it was provided that no feoffment should have in future any tortious operation, the reason for imposing a forfeiture ceased.

It never was applicable in India, and their Lordships can find no authority for saying that an 'innocent conveyance' ever operated in England as a cause of forfeiture, or that it has ever been held so to operate in India.

The English Law on this subject is conveniently to be found in Bacon's Abridgment, 'Leases,' T2, and Platt on Leases, Part 7, ch. I, section 2.

Some confusion has arisen from a misunderstanding of the reason why a tenant from year to year may, when he has denied his landlord's title, be ejected without notice—*Doe* v. *Stanion*(3) and *Vivian* v. *Moat*(4).

The reason is explained in *Doe d. Graves* v. *Wells*(5) and in Platt on Leases.

It is not because the denial or disclaimer works a forfeiture. Platt expresses it thus:—

"The holding being from year to year subject to the mutual will of landlord and tenant to determine it on giving the usual 6 months' notice, evidence of a disclaimer . . . is evidence of an election to put an end to the tenancy and supersede the necessity for such notice . . . Hence verbal or written denials of a tenancy have rendered a notice to quit unnecessary, but it does not appear that they have effected a forfeiture of the term."

(1) (1900) I.L.R., 28 Calc., 135.
(2) (1886) I.L.R., 13 Calc., 96.
(3) (1836) 1 M. & W., 695.
(4) (1881) 16 Ch.D., 730.
(5) (1839) 10 A. & E., 427.

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That a tenant who disputes his character as tenant does not thereby forfeit a lease for a term certain is shown by *Doe d. Graves* v. *Welis*(1).

The doctrine of *Vivian* v. *Moat*(2) does not apply to Indian tenures such as the present; see *Kali Kishen Tagore* v. *Golam Ali*(3) and *Vithu* v. *Dhondi*(4) already cited.

This being so there was in the present case no such renunciation by the tenant of his character as such as to work a forfeiture.

Their Lordships have gone at some length into this point, because it was argued with much learning and insistence at their Lordships' Bar, but it is difficult to find any trace in the judgment of the High Court of its having been made a serious matter of discussion there.

It was no doubt raised slightly but sufficiently in paragraphs 62, 63, 64 and 73 of the Memorandum of Appeal to the High Court; but the written judgment of the learned Judges seems to deal with the other ground of forfeiture only.

This their Lordships must now approach. It has been described at their Lordships' Bar as the contumacious refusal of the defendant to render the services prescribed by the patta.

After two or more formal demands requiring the defendant's attendance at the darbar and his payment of the rent due, the agent and mukhtiar of the defendant wrote to the Maharaja on the 26th November, 1904, the following letter:—

"MAHARAJAH,—

"I am in due receipt of your so-called hukums Nos. 818 and 683 of the 4th October 1904, calling on me to attend your Dasara darbar of this year with 500 paiks and Rs. 15,000 (fifteen thousand) on account of what you call Talapu Dewani Kattubadi of fasli 1313 and Rs. 7,500 (seven thousand five hundred) for the first half-year of fasli 1314.

"2. The Bissamcuttak estate is not held on service tenure as you seem to imply. It is an independent zamindari which has only to pay the Jeypore zamindari a fixed, unchanging and unchangeable kattubadi of Rs. 2,200 (two thousand two hundred) as per Permanent Settlement Records.

"3. I have, therefore, remitted Rs. 2,200 (two thousand two hundred) on account of kattubadi for fasli 1313 and Rs. 1,100 (one

(1) (1839) 10 A. & E., 427.
(2) (1881) 16 Ch.D., 730.
(3) (1886) I.L.R., 13 Calc., 3, 248.
(4) (1890) I.L.R., 15 Bom., 407.

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thousand one hundred) for the first and second instalments of the present fasli 1314, which, I request, you will be pleased to accept and formally acknowledge."

Thereafter, though warned of the consequences of his refusal, the defendant persisted in his non-compliance.

The Judges of the High Court came to the conclusion that the second condition of attendance, when on Sirkar business, was so indefinite as to be unenforceable, and that the first condition, now that there was no longer any question of military service, was merely one of an attendance on ceremonial occasions, which was not service but complimentary only, or a mark of respect which every person, even an official, is expected to pay to his superiors. And they said that there was no authority for holding that failure in this respect would lead to forfeiture, or to a liability to resumption.

At their Lordships' Bar the point was made that there was no proviso for re-entry upon breach contained in the patta, and reliance was placed upon *Forbes* v. *Meer Mohamed Tuquee*(1). This case, however, was not one of contumacious refusal to render a possible service; it was a case where, owing to altered conditions of society, the prescribed services could no longer be rendered, and where the superior landlord sought thereupon to resume the tenancy, and in the opinion of their Lordships failed.

There are, however, expressions in their Lordships' judgment in that case which are of some assistance to the respondent, and no authority of weight was produced for rendering the breach of such a ceremonial observance a cause of forfeiture or resumption, at any rate where the superior landlord was a subject, and not the Government.

It may be said that in this case the rent reserved is the principal matter, and that the rest is only subsidiary.

It may also be observed that under modern conditions it is doubtful whether a strict compliance *modo et forma*, with the provisions of the patta, would not be of public inconvenience and perhaps forbidden by superior authority. Modern conditions also make the service suggested highly burdensome and without any corresponding benefit to the superior.

(1) (1870) 13 M.I.A., 433.

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Having all these considerations in mind their Lordships agree with the judgment of the High Court that the refusal to render these services did not operate to create a forfeiture or give occasion for resumption.

At the same time their Lordships must not be held to approve of the total failure to render ceremonial respect to the Maharaja, still less of the language in which the refusal was couched, and they must not be taken as deciding that there is no method by which an absolute and blank refusal might not incur some appropriate penalty, and they hope that these observations will lead the parties to make some sensible arrangement in future.

When both landlord and tenant were minors, a sum of money appears to have been publicly paid at the darbar in lieu of service. Whether this course should be taken, or the attendance of the tenant with a small retinue at the darbar should be deemed appropriate and sufficient, must be left for the present to the good sense of the parties.

Their Lordships, however, think that the appellant is entitled to have his position as superior put in a clearer light than it was put in the formal decree of the High Court, and that the order and decree that the respondent should pay should be prefaced by the words:

"This Court being of opinion that the defendant held, and the respondent holds, a tenure under the appellant."

Subject to this variation the appeal fails. But seeing that there has been this slight success, and that the cross appeal has failed, their Lordships think that justice will be met by leaving the decision of the High Court as to costs as it stands, and by giving no costs of this appeal.

Their Lordships will, therefore, humbly recommend to His Majesty that the decree of the High Court be subject to the variation above mentioned, affirmed; and that the cross appeal be dismissed, and that the parties should respectively pay their own costs of the appeals to His Majesty in Council.

Decree varied and otherwise affirmed.

Solicitors for the Maharaja of Jeypore: *T. L. Wilson & Co.*

Solicitor for Sri Rukhmini Pattamahdevi Garu: *Douglas Grant.*

J.V.W.

APPELLATE CIVIL—FULL BENCH.

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

1918, July 19, 1919, March, 26.

PUTHIAPURAYIL KANNYAN BADUVAN AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

CHENNYANTEAKATH PUTHIAPURAYIL ALIKUTTI AND TWO OTHERS (PLAINTIFF, FIRST DEFENDANT AND L.R. OF FIRST DEFENDANT), RESPONDENTS.*

Lessor and lessee—Suit in ejectment from part of a holding, maintainability of—Right of suit of lessor, or of assignee of part of the reversion—Payment of compensation for tenant's improvements—Payment for improvements, whether on the whole or part of the holding necessary—Malabar compensation for Tenants Improvements Act (I of 1900), ss. 5 and 6—'Holding,' construction of—.

Held, by the Full Bench (SESHAGIRI AYYAR, J., dissenting), that a lessor is not entitled to eject a tenant from a part only of the holding, but the assignee of the reversion in part of the demised premises is entitled to eject a tenant for due cause from such part on payment of the value of the improvements to that part, and that this rule applies to tenancies in Malabar.

Per SESHAGIRI AYYAR, J.—Neither the lessor nor the assignee of a part of the premises can evict a tenant from a part of the premises during the continuance of tenancy; in the case of a terminated tenancy, the Malabar Compensation for Tenants Improvements Act does not contemplate the possibility of a partial eviction on payment of the value of improvements on a part of the holding.

SECOND APPEAL against the decree of M. G. KRISHNA RAO, the Temporary Subordinate Judge of Tellicherry, in Appeal Suit No. 476 of 1916, preferred against the decree of M. NARASINGA RAO, the District Munsif of Cannanore, in Original Suit No. 186 of 1914.

The material facts and contentions appear from the Order of Reference to the Full Bench.

The second appeal came on for hearing in the first instance before PHILLIPS and KUMARASWAMI SASTRI, JJ., who made the following

* Second Appeal No. 94 of 1917 (F.B.).

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ORDER OF REFERENCE TO A FULL BENCH.

PHILLIPS, J.—In this case a lease was granted to the second defendant for a period of eight years. This lease comprised 11 items of property, and the period of eight years had expired at the time of suit. The plaintiff is a melcharthdar from the jenmi, and his melcharth refers to only one item of the second defendant's lands.

Two minor points have been raised in this Second Appeal, firstly, that the melcharth which was obtained by one Ussan Parikutti and assigned to the second defendant was invalid, and secondly, that notice to quit had been waived by subsequent receipt of rent. These two points were found against the second defendant by the District Munsif, and were not argued before the Subordinate Judge, and we agree with the District Munsif that they must be found against the appellant for the reasons given by him. The fact that the appellant now urges, i.e., that the properties were devaswom properties and not ordinary tarwad properties, is a question of fact which cannot be decided without evidence, and it is very doubtful if it can affect the merits of the case.

The main point for consideration is whether the plaintiff is entitled to evict the second defendant from one item of his leasehold lands without paying compensation to him for improvements in the other items. The Subordinate Judge has found that he can do so, and the reasons he gives are that the rent of each of the items is stated separately in the lease deed, Exhibit X, and that the term of each is to expire after eight years, and there is no agreement forbidding the lessor to recover each item separately. As a matter of fact the rent of the plaint item is not stated separately in the lease, but its rent is lumped up with that of the only other *nilam* contained in the lease, the other nine items all being *parambas*.

It has no doubt been held that, when there is a severance of the interest of the landlord, the owner of the served interest can sue to recover the portion of the property which has fallen to him, vide *Korapalu* v. *Narayana*(1) and *Syed Ahmad* v. *Magnesite Syndicate, Ltd.*(2) But these decisions are not decisions from

(1) (1915) I.L.R., 38 Mad., 445. (2) (1916) I.L.R., 39 Mad., 1049.

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Malabar, and hardly seem to bear on the question of the tenants' rights under the Improvements Act. In this case plaintiff is not the original landlord but a melcharthdar, a lessee under the landlord, but there seems to be no reason why if a landlord cannot eject from one item only, the assignee from the landlord should be allowed to do so. Under the Malabar compensation for Tenants' Improvements Act, a tenant is entitled to resist eviction until he has been paid compensation for his improvements, but it has been held in an unreported case of *Krishnan* v. *Govindan*(1) that, when the lease is divisible and when no hardship is caused to the tenant by ejecting him from one item of land without paying for his improvements in the other items, he can be evicted from a portion only of the leased property without compensation for improvements on other items. The judgment does not decide definitely what the tenant's rights are under section 5 of the Malabar Improvements Act. It appears to consider that his rights are dependent on facts, such as, whether the lease can be divided up into parts, and on the hardship that the tenant might suffer through the division of the property and ejectment from one portion of it. The object of section 5 of the Act appears to be to give the tenant some security that he will receive the value of the improvements made upon the land, and the question that has to be decided is whether the whole of the land held on lease is the security for such payment, or whether only the items of land on which those improvements stand form the security. Section 5 is in very general terms and merely says that the tenant shall on ejectment be entitled to compensation for improvements, and is entitled to remain in possession until ejectment in execution of a decree or order of Court. The language of the section would seem to imply that a tenant can resist eviction from any portion of his holding until he gets compensation, and there is no section of the Act which specially authorizes eviction from a part of the holding without paying compensation. In section 3, clause (3), 'Improvement' is defined as any work or product of a work which adds to the value of 'the holding,' is suitable to it and consistent with the purpose for which the holding was let, mortgaged or occupied; and again section 9 relates to improvements which enhance the

(1) S.A. No. 2180 of 1914 (unreported).

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value and annual produce of 'the holding.' The use of the word 'holding' seems to imply that the whole of the land demised under the lease has to be considered when there is a question of compensation for improvements; and we see in section 6, clause (2), that if a tenant is found to be in arrears with his rent, the Court is directed to set off such sum against the amount found due for improvements. If therefore a landlord is entitled to evict a tenant from a portion of his holding on which no improvements have been made, he might obtain a decree for ejectment and for arrears of rent, and the tenant would not be able to set off against arrears of rent the amount due for improvements, and he would thus lose the benefit of section 6 (2). We think that this is a very important question which in many cases is likely to arise in Malabar, and consider it advisable to refer it to the decision of a Full Bench of this Court, more especially in view of the decision in *Krishnan* v. *Govindan*(1) which does not seem to have held that there is any definite principle underlying the provisions of the Act as regards the security which the tenant has for the payment of his improvements. We, therefore, refer for the orders of the Full Bench the following question:—

When several items of property are comprised in a lease, is the landlord entitled to evict the tenant from one of those items only, without paying him compensation for the improvements on other items?

ON THIS REFERENCE—

N. P. Narasimha Ayyar for *E. Ramaswami Ayyar* for appellant.—Partial eviction is not allowed in law. Sections 5 to 18 of the Malabar Compensation for Tenants Improvements Act do not contemplate partial eviction. Sections 7 and 8 refer to 'holding' and not a part of the holding. The Act (I of 1900) only consolidates the Customary Law of Malabar. There was a common law right in the tenant to be paid the improvements before eviction from the holding. It is not affected by the Act. Section 3 defines holding; section 4 enumerates the holdings. Until the tenancy ceases, the tenant can remain in possession of the holding. All claims between lessor and lessee should be completely adjusted before possession is taken by lessor; see

(1) S.A. No. 2180 of 1914 (unreported).

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Abdulla Koya v. *Kullumpurath Kunaram*(1). The ruling in *Vasudevan Nambudripad* v. *Valia Chathu Achan*(2) shows that the position of a tenant in Malabar is higher than that of an ordinary lessee. Moore's Malabar Law at page 237 shows that there is no difference between kanom amount and improvements. There is no splitting of the holding contemplated in the Act. The tenant is not given a right of suit for compensation for the improvements, but only a right to retain possession before eviction. Reference was made to *Sri Raja Simhadri Appa Rao* v. *Prattipatti Ramayya*(3), *Syed Ahmad* v. *Magnesite Syndicate Ltd.*(4), and distinguished.

Eroman Unni for respondent:—The question is "what is the general law as to partial eviction apart from the Malabar Compensation for Tenants Improvements Act," and "does the Act alter the general law"? The general law is that after the termination of the term of the tenancy, there can be partial eviction; see *Ishwar Chunder Dutt* v. *Ram Krishna Dass*(5), Cole on Ejectment, page 44; *ibid.*, Appendix, page 697; *Cutting* v. *Derby*(6). A tenant in common can give notice to quit for his own share; on the expiry of the term of the tenancy, the landlord can recover his share of the rent. The tenant has no charge for the value of the improvements; he has only a possessory lien; see *Achuta* v. *Kali*(7). Right to improvements is not a charge on the holding and cannot be attached in execution of a decree, see *Anantha Bhattu* v. *Anantha Bhatta*(8). Section 9 of the Act shows how improvements are to be valued; if the suit is to eject a tenant from a holding in which a tank has been dug, it may be that the tenant will get compensation for value of the increased productivity of other lands. The improvements to be paid for under sections 5 and 6 are those on the land or portion of the holding sued on for eviction. The Act does not say that the suit for ejectment must be in respect of the whole holding and on payment of compensation for improvements on the entire holding.

[SADASIVA AYYAR, J.—Suppose *A* and *B* demised *X* and *Y* to *C* while they were joint 40 years ago, and then they divide, *A*

(1) (1917) 33 M.L.J., 463, at p. 465.
(2) (1901) I.L.R., 24 Mad., 47 (F.B.).
(3) (1906) I.L.R., 29 Mad., 29.
(4) (1916) I.L.R., 39 Mad., 1049.
(5) (1880) I.L.R., 5 Calc., 902.
(6) (1776) 2 W. Black., 1075.
(7) (1884) I.L.R., 7 Mad., 545.
(8) (1919) 36 M.L.J., 92.

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getting *X* and *B* getting *Y*, and *B* wants to eject *C* from *Y*, why should not *B* do so without paying compensation on *X* also?] Yes, I submit *B* can do so: the Act does not prohibit it. The Act says only that on eviction from certain lands, certain things should be done as to improvements thereon and does not refer to other lands. Once the tenancy is at an end, assignee of a part can sue in ejectment of his portion on payment of compensation thereon. The tenancy is severable and each part owner of the reversion can recover, after the expiry of the term, his share of the holding. Second Appeal No. 2180 of 1914 is a considered judgment of this Court and is in my favour. Reference was made to *Mayankutti* v. *Kunhammad*(1), *Thema* v. *Kunhi Pathumma*(2), *Tripura Sundari* v. *Durga Chursa Pal*(3) and *Harendra Narain Singh Chowdry* v. *Moran*(4).

N. P. Narasimha Ayyar in reply.—The decision of the Privy Council in *Harihar Banerji* v. *Ramsashi Roy*(5) shows that notice to quit as to part of the holding is bad in law.

[SESHAGIRI AYYAR, J.—That assumes that there is a tenancy at the time of the notice to quit, but there is no tenancy in the present case after the expiry of the term.]

No, the Act (Malabar Compensation for Tenants Improvements Act) says that he is a tenant, even after the tenancy is determined, until compensation is paid; see Moore's Malabar Law, page 274.

OPINION.

WALLIS, C.J.

WALLIS, C.J.—The Malabar Compensation for Tenants Improvements Act, 1900, entitles a tenant who is sued in ejectment to compensation for improvements to the land from which it is sought to eject him, and authorizes him, notwithstanding the determination of the tenancy, to remain in possession until ejectment in execution of a decree, or of an order of Court varying that decree as provided in section 6 (3). Section 6 (1) provides that the decree is to direct that on payment by the plaintiff into Court of the amount found due for improvements the defendant is "to put the plaintiff into possession of the land with the improvements thereon". As under section 5 (2) the tenant

(1) (1918) I.L.R., 41 Mad., 641. (2) (1918) I.L.R., 41 Mad., 118.
(3) (1885) I.L.R., 11 Calc., 74. (4) (1888) I.L.R., 15 Calc., 40.
(5) (1918) 35 M.L.J., 707, at p. 714 (P.C.).

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after decree is to continue in possesssion as a tenant, section 6 (3) provides for a re-valuation of the improvements when the plaintiff seeks to execute the decree with reference to the state of things then existing, and for an order of Court varying the decree accordingly. The only improvements for which compensation is payable under these sections are improvements to the land from which it is sought to eject the tenant, and they neither impose nor recognize any obligation on the plaintiff to pay for improvements to land from which the plaintiff does not seek and is not entitled to eject the tenant. We have therefore to consider the question referred to us apart from the provisions of the Act. A lessor cannot give a tenant notice to quit a part of the holding only and then sue to eject him from such part only, as pointed out quite recently by the Privy Council in *Harihar Bannerjee* v. *Ramasashi Roy*(1). Consequently, if the suit is brought by the original lessor the answer to the question referred to us must be in the negative because such a suit does not lie at all. Other considerations, however, arise, where, as in the present case, the original lessor has parted in whole or in part with the reversion in part of the demised premises. Under the general law such an assignment effects a severance, and entitles the assignee on the expiry of the term to eject the tenant from the land covered by the assignment. There never was any question about this, but it was held in England that, while the assignee of the reversion in part was entitled to the benefit of the covenants in the lease as regards such part, the result of the severance effected by the assignment was to destroy altogether the conditions in the lease, as for re-entry for non-payment of rent—Coke on Littleton, 215*a*. The law was altered as regards the case last mentioned by 22 & 23 Vict., cap. 35, s. 3, and generally, as regards leases made after the passing of the Act, by section 12 of the Conveyancing Act, 1881; see *Piggott* v. *Middlesex County Council*(2). Section 109 of the Transfer of Property Act gets over the difficulty by providing that "the transferee shall possess all the rights of the transferor in the part transferred" words which are large enough to cover both covenants and conditions. There is no question of a condition here, as the suit was to recover possession on the expiry of the

(1) (1918) 35 M.L.J., 707 (P.C.). (2) (1909) 1 Ch., 134, at p. 141.

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term. Under the general law the assignee of the reversion in part of the demised premises is entitled to bring such a suit, and there does not appear to be any ground for suggesting that the general law in this respect is inapplicable in Malabar. The learned Judges in their Order of Reference have referred to the provision in section 6(2) that "the money due by the plaintiff to the defendant for rent or otherwise in respect of the tenancy" is to be set off against the amount found due for improvements. The only rent due to a plaintiff suing as assignee of the reversion in part of the demised premises would be the apportioned rent in respect of the part assigned to him. There would be therefore no difficulty in applying the provision in question to such a case. Moreover, it is a provision in favour of the landlord, and cannot be regarded as enlarging the tenant's rights. The view I have taken is in accordance, as to the construction of the Act, with the decision of SADASIVA AYYAR and MOORE, JJ., in *Krishnan* v. *Govindan*(1) and, as to the question of severance, with the decision of SUNDARA AYYAR and SADASIVA AYYAR, JJ., in *Pullambil Krishnan* v. *Sankaran*(2) at an earlier stage of the same case. It was not suggested that there was any hardship to the tenant in that case or in this. If, however, it be apprehended that jenmis may be so unwise as to attempt to use the power of severance in a manner oppressive to their tenants, the proper course, it seems to me, is to move for an amendment of the Act.

I would answer that the lessor is not entitled to eject from a part only of the holding, but that the assignee of the reversion in part of the demised premises is entitled to eject for due cause from such part on payment of the value of the improvements to that part, and that this answer applies to tenancies in Malabar.

OLDFIELD, J.

OLDFIELD, J.—I agree with the answer just proposed to the reference and accept the reasoning, by which it is supported, unreservedly, so far as it relates to the effect of severance on a tenancy. I agree also that its effect is undiminished when, as in the case before us, the tenant is holding over and there has been no acceptance of rent, involving that the lease has been renewed.

I have, however, felt some hesitation regarding the application of Act I of 1900 as between the tenant and the transferee of a part of the leased property, because it has been argued that

(1) Second Appeal No. 2180 of 1914 (unreported).
(2) Appeal Against Order No. 85 of 1911 (unreported).

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the Act is worded with reference to improvements to the holding and compensation is payable only for improvements on the holding, that is the whole property covered by the original lease, not for those standing on or affecting the transferred portion. And no doubt in section 3 (3) an improvement is defined with reference to the value of the holding and the purpose for which it is let; and in sections 4, 7, and 9 (1) improvements which increase the value of the holding are referred to directly. But there are also provisions, in which the reference is not to the holding, but to the tenancy, such reference being direct in sections 6 (2) and (3) and indirect in section 6 (1), where the reference to 'the land' may be read as to the land referred to in the definition of 'tenant' in section 3 (1). The question is then whether the use of the term "holding" was intended by the legislature to be distinctive and to mean the property originally leased, not the portion of it, from which in consequence of a subsequent transfer the tenant would be separately ejected. The result of so regarding it will be the exclusion of claims to compensation after severance from the purview of the Act, and we have been shown no reason for thinking that this was contemplated. The Act contains no definition of the term "holding"; and in the circumstances I am of opinion that a liberal interpretation of it is legitimate and I therefore concur in the conclusion reached by the learned Chief Justice.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I agree with the judgment of my Lord and have nothing to add.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—I agree with my Lord. The legislature might have created a substantive right in the tenant to compensation for his improvements enforced by a lien on his holding in its entirety. What in fact it has done is to make the right to compensation merely an adjunct to a suit in ejectment or for redemption. So far as I can see, the right itself does not even arise till such a suit is brought. That being so, the right must, it appears to me, be limited to the land which is the subject matter of the suit, i.e., the lands from which it is actually sought to eject the tenant.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The scope of the reference was considerably limited during the second argument before a Fuller Bench. The objection which I had raised to the suggestion that there can be no eviction from part of the premises during the

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continuance of the tenancy was not attempted to be answered by Mr. Eroman Unni on the second occasion. I feel no hesitation in saying that neither under section 109 of the Transfer of Property Act nor under the general law of the land is it competent to an assignee of a part of the demised premises to eject the tenant from that portion compulsorily during the period of the tenancy. Even if section 109 is capable of a different construction, I would hold that its operation should not be extended to agricultural tenancies in this country, because the rule of equity, justice and good conscience would be defeated rather than advanced by the extension of the doctrine of partial eviction to agricultural leases. As to the rule of English Law, I had formed an opinion at the first hearing that partial eviction before the expiry of the term of the tenancy is equally unavailing in England and I see no reason to change that view. But I do not think it necessary to discuss the point now. Therefore my answer to the question would be in the negative, if it is understood to refer to eviction before the expiry of the period of the lease.

But what we have to consider is a case of a terminated tenancy which by virtue of the Malabar Compensation for Tenants Improvements Act has not wholly ceased to be operative. There can be no doubt that the Act does not attempt to legislate as to whether there can be partial eviction or not. The legislature has only provided for events happening on the filing of a suit for ejectment. At the same time, to my mind it seems clear that it did not contemplate the possibility of a partial eviction. It, by the terms of sections 5, 6, 7 and 9, seems to have assumed that the lease under which the tenant came in would continue intact. In clause (1), section 5, the expression used is "notwithstanding the determination of the tenancy." This must have reference to the one which was created on the first entry and not to the split-up parts by the process of sale or assignment. Strictly speaking, unless the tenant attorns or otherwise acknowledges the fractional landlord, there would be no tenancy to determine. Again in section 6, clause (1), the word 'tenant' is used; in clauses (2) and (3) the word 'tenancy.' These words are not appropriate to the relationship which comes into existence by reason of the division of the demised premises, either by conveyance or assignment.

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SESHAGIRI AYYAR, J.

In sections 7 and 9, as if by way of variety, the language employed is 'holding.' Where can we have a 'holding' between the assignee of one of the demised premises and the quondam tenant of all the premises, unless a new tenancy is created in respect of it? If such a one is by act of parties brought into existence, the present question is easily answered. Otherwise I find it difficult to hold that on the expiry of the term of the lease, there is any 'holding' belonging to the assignee of a portion or "a tenant" in respect of it. It seems to me that the legislature in providing for compensation on eviction understood that the parties were in *status quo ante* and that there has been no break up of the lease interest.

It is no answer to this difficulty to say that under the ordinary law a tenant, that was, can be evicted from each and every portion of the leased property. If that can be done, except in cases of holding over, it would be by regarding him as a trespasser who had no right to remain on the soil after the efflux of time limited by his lease. I am prepared to concede that the Act we are construing does not in terms prohibit partial eviction. But that is only the negative side of the enactment. Has it not by implication asked the Courts to pass a decree in ejectment preparatory to the award of compensation on the basis of an existing tenancy? That is my reading of the Act, and I therefore regret I am unable to agree with the conclusion to which the learned Chief Justice and my learned brothers have come.

I have been reading a great deal about the genesis of the Act. The report of the Malabar Land Tenures Committee shows that the present law is a compromise between the creation of occupancy rights in the soil in favour of all tenants in the same way that the Estates Land Act has done and the endeavour to purchase the landlord out altogether. I do not propose to quote any extracts from the report; but I cannot help remarking that it is a sad commentary on their labours that the law which they recommended should have been so inaptly worded as to enable the landlord to evict the tenant piecemeal. The danger which threatens the tenant is not an imaginary one. I suggested some cases in the course of the hearing. A tenant erecting a house in a portion of the paramba or digging a tank in one of

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the demised premises to irrigate the lands demised are instances in which partial eviction would place the tenant very badly at the mercy of the landlord. When we remember the practice of granting melcharths which prevails in Malabar, it would occur at once that a karnavan can by threatening to evict the tenant from a portion of the holding exact unconscionable terms prior to renewal. In the case of ordinary owners of property such a procedure would not be frequently adopted. But the Malabar janmi of to-day is in a transition stage. Education and notions of independence have destroyed his benevolent despotism. He is a watched man and he therefore does not hesitate to make the most of his opportunities. Melcharths and the demand of a heavy renewal fee for which he is seldom held accountable to the flock under him are his resorts to enrich his wife and children. There may be still a few old-fashioned janmis who wish well by the tarwad and its property; but their numbers are diminishing. The tie of natural kinship rebels against the enforcible claims of the corporate body; and the result is that, in the majority of cases, the karnavan is trying to exact as much as possible from the tenants. Our decision would place a new weapon in his hands and the lot of the tenant would become more difficult than ever.

I hope I may be excused this digression into the question of the relationship between the tarwad and its members because I am anxious to impress on the legislature the necessity of so amending the law as to make the lot of the Malabar tenant more tolerable than it would be under our decision. I feel compelled to differ from the majority of the Court, and to hold that until the payment of compensation in respect of the holding as a whole there can be no partial eviction.

K.R.

APPELLATE CIVIL—FULL BENCH.

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

1918, December 2, 1919, April 7.

AMRUTAM VENKATAPPA AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

VAVILALA JALAYYA (DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 66—Auction sale in the name of defendant—Agreement to sell half-share to plaintiff after sale-certificate is obtained—Sale, whether benami—Agreement subsequent to sale to convey—Suit for specific performance of latter agreement, whether barred.

Where the defendant agreed that certain immoveable property should be purchased in his name in Court auction and that one-half of it should be conveyed by him to the plaintiff after the sale-certificate was obtained, and under an agreement subsequent to the purchase the defendant agreed to execute a registered conveyance:

Held, by the Full Bench, on a suit being brought for specific performance of the latter agreement, that the suit was not barred under section 66 of the Civil Procedure Code.

SECOND APPEAL against the decree of K. SRINIVASA RAO, the District Judge of Guntūr, in Appeal Suit No. 396 of 1916, preferred against the decree of K. KALYANASWAMI, the District Munsif of Ongole, in Original Suit No. 337 of 1915.

The material facts appear from the following ORDER OF REFERENCE TO THE FULL BENCH, passed by SESHAGIRI AYYAR and PHILLIPS, JJ.:—

ORDER OF REFERENCE TO A FULL BENCH.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The facts found are: Plaintiff and the defendant agreed that at the Court auction the property in suit should be purchased in the name of the defendant and that one-half of it should be conveyed to the plaintiff after obtaining the certificate of sale: some money was paid before the Court auction, and apparently plaintiff was put in possession of the half-share. In September 1907, a promissory note for the balance of the purchase money due from plaintiff was executed. Nearly 5 years afterwards, the promissory note was discharged,

* Second Appeal No. 54 of 1918.

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and Exhibit A was executed to the plaintiff in which it was provided that the defendant should execute a conveyance for the half-share whenever plaintiff demanded it. This suit is to enforce that agreement. In the plaint it is stated that the half share intended to be conveyed was purchased in the name of the defendant benami for the plaintiff. The question for consideration is whether the suit is within the mischief of section 66 of the Code of Civil Procedure.

There is some difference between the language of section 317 of the old Code and that of section 66 of the new Code: but we do not think there is any material alteration in the principle of the section. In this Court, the decisions have not been uniform on the question; in *Kumara* v. *Srinivasa*(1), *Sankunni Nayar* v. *Narayanan Nambudri*(2), and *Kumbalinga Pillai* v. *Ariaputra Padiachi*(3), suits under similar circumstances were held not barred by section 317. On the other hand, in *M. Subramaniam Pillai* v. *Gopalarama Subramania Ayyar*(4), the decision was the other way. Recently, COUTTS TROTTER and SRINIVASA AYYANGAR, JJ., had to consider the question in A.S. Nos. 167 and 215 of 1914. Apparently, in the view taken by COUTTS TROTTER, J., such a suit would not be affected by section 66 of the Code. There is also the dictum of the Judicial Committee in *Ganga Sahai* v. *Kesari*(5), that the object of the section is to prevent judgment-debtors from getting property purchased in the names of third parties benami for themselves. The language of the section seems to be wider. However, as the question is one of some importance, we have resolved to ask the opinion of a Full Bench on the following question:—

When the plaintiff alleges that the auction-purchaser is a *benamidar* for him and sues to enforce specifically a subsequent agreement executed by the certified purchaser to convey the property, is section 66 a bar to such a suit?

ON THIS REFERENCE

P. Chenchiah for the appellants.—The case is referred to the Full Bench on account of some conflict of rulings of this High Court. The decisions on section 317 of the old

(1) (1888) I.L.R., 11 Mad., 213. (2) (1894) I.L.R., 17 Mad., 282.
(3) (1895) I.L.R., 18 Mad., 436. (4) (1915) 29 I.C., 138.
(5) (1915) I.L.R., 37 All., 545.

Code of 1882 hold that a suit such as the present is not prohibited by section 317 of the Code; see *Kumara* v. *Srinivasa*(1), *Sankunni Nayar* v. *Narayanan Nambudri*(2) and *Kumbalinga Pillai* v. *Ariaputra Padiachi*(3). But the ruling in *M. Subramaniam Pillai* v. *Gopalarama Subramania Ayyar*(4) was the other way. The last case is distinguishable from the present on the ground that here possession has been given to the plaintiff and he wants only a conveyance to be executed. This case is not really a case of a real owner suing as such to recover property from a benamidar. There was really no benami transaction. There was an agreement with the real purchaser, namely, the defendant, that the plaintiff should pay a part of the consideration and that the defendant should purchase the property in auction and convey one-half of it to the plaintiff, after the defendant obtained the sale certificate. The plaintiff also paid some money before the auction and got possession of his half share. Subsequently a promissory note for the balance was executed and discharged. Thereupon the defendant executed an agreement, Exhibit A, to execute a conveyance whenever plaintiff demanded. The suit is to enforce this agreement. The suit is not prohibited by section 66 of the new Code (Act V of 1908).

[THE COURT.—The plaint refers to the transaction as a benami one, and that is the cause of the trouble?]

We relied on the subsequent agreement, and the District Munsif notes it.

[SADASIVA AYYAR, J.—Why did you not amend the plaint?]

I might have done so; I shall do so even now, with your Lordship's permission.

H. Suryanarayana for respondent.—There is a reference to benami in the plaint. The plaintiff relies in the plaint on the benami character of the purchase made by the defendant. Even the new agreement is not independent of the original benami agreement. There is no new agreement to be enforced apart from the original transaction. Section 66 clearly applies to the case. Reference was made to *M. Subramaniam Pillai* v. *Gopalarama Subramania Ayyar*(4), and *Ganga Sahai* v. *Kesari*(5).

(1) (1888) I.L.R., 11 Mad., 213. (2) (1894) I.L.R., 17 Mad., 282.
(3) (1895) I.L.R., 18 Mad., 436. (4) (1915) 29 I.C., 138.
(5) (1915) I.L.R., 37 All., 545.

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WALLIS, C.J.

The OPINION of the Court was delivered by

WALLIS, C.J.—We do not think that this is a suit against the auction-purchaser on the ground that the purchase was made on behalf of the plaintiff within the meaning of section 66, Civil Procedure Code. The finding is that the defendant agreed that the property should be purchased in the name of the defendant and that one-half of it should be conveyed by the defendant to the plaintiff after the sale certificate had been obtained. This in our opinion is not a benami transaction at all. The mere fact that the plaintiff alleges in the plaint that the auction-purchaser was the benamidar for him has not in our opinion the effect of debarring the plaintiff under section 66, Civil Procedure Code, from maintaining his suit for specific performance of an agreement by the auction-purchaser subsequent to the purchase to convey the property to the plaintiff. Such an agreement is not inconsistent with auction-purchaser's own title, but rather the reverse. We answer the question in the negative.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Krishnan.

1919, January 7, 8 and 10.

JAGANNATHA ACHARIAR AND ANOTHER (SECOND RESPONDENT IN THE LOWER APPELLATE COURT), APPELLANTS,

v.

SEENU BHATTACHARIAR AND EIGHT OTHERS (PLAINTIFF AND DEFENDANTS NOS. 5, 7, 8, 9, 12 TO 14), RESPONDENTS.*

Trustees of a temple—Suspension from office of an hereditary archaka—Order passed without notice to archaka or previous inquiry, whether valid—Order, ad interim, continued for an unreasonably long time, whether legal—Punitive order of suspension, whether valid without notice.

Where the trustees of a temple suspended an hereditary archaka of the temple from his office on account of certain imputations of misconduct made against him, without giving him notice or making any inquiry previous to

* Second Appeal No. 2171 of 1917.

JAGANNATHA ACHARIAR v. SEENU BHATTACHARIAR.

passing such order, and no subsequent inquiry was made by them for fourteen months after the date of the order, whereupon the latter brought a suit to recover his office and damages for wrongful suspension.

Held, that the order of suspension pending inquiry into alleged misconduct should not have been continued in force for a longer period than was reasonably necessary; that, in this case, the delay of fourteen months between the date of the order and the institution of the suit being unreasonable, the order as an ad interim order ceased to be valid before the date of the suit;

and that the order, viewed as a punitive order, was invalid as having been passed without notice and inquiry, whatever the merits of the case might be.

Thiruvambala Desikar v. *Manikkavachaka Desikar* (1917) I.L.R., 40 Mad., 177; and *Venkatanarayana Pillai* v. *Ponnuswami Nadar* (1918), I.L.R., 41 Mad., 357, followed; *Willis* v. *Sir G. Gipps* (1846) 5 Moore 379 (P.C.), applied; *Seshadri Iyengar* v. *Ranga Bhattar* (1912) I.L.R., 35 Mad., 631, distinguished.

Held further, that out of the temple funds the plaintiff was entitled to recover damages due to him, as the trustees in passing the order of suspension and continuing it, acted in their capacity as trustees and in what they conceived to be the proper discharge of their duties on behalf of the temple.

SECOND Appeal against the decree of E. H. WALLACE, the District Judge of Tanjore, in Appeal Suit No. 187 of 1915 preferred against the decree of K. S. RAMASWAMI SASTRI, the District Munsif of Tirutturaippundi, in Original Suit No. 317 of 1912.

The material facts appear from the judgment of KRISHNAN, J.

T. Narashimha Ayengar for first appellant.

S. Panchapagesa Sastri for appellants.

S. T. Srinivasagopala Achariyar and *T. R. Venkatarama Sastri* for first respondent.

N. Kunchitkapatham Ayyar for second respondent.

KRISHNAN, J.

KRISHNAN, J.—In the suit from which this Second Appeal has arisen the plaintiff sued to recover the office of hereditary archaka in the temple of Sri Sarangapani in Kumbakonam which he alleged he was entitled to and to restrain the defendants from obstructing him in the discharge of his duties and in the enjoyment of the emoluments appertaining to his office and to obtain damages for his wrongful suspension from it by the trustees which resulted in loss of emoluments to him. Defendants Nos. 1 to 5 were the trustees and the remaining defendants were the plaintiff's co-archakas. The trustees denied the plaintiff's claim to his archakaship being hereditary, but the Lower Courts have found as a fact that he is a hereditary archaka and we must accept the finding in Second Appeal.

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KRISHNAN, J.

The suspension complained of was by an order of the trustees, Exhibit O, made in September 1910, and served on the plaintiff which stated:

"On account of the imputations made in the petition concerning you received from the committee office as also in the *Yatharthavachini* newspaper and allegations made against you by various respectable persons the trustees are greatly dissatisfied with you. Pending searching inquiry into a final disposal of the same you are suspended from your office. You shall therefore take notice that even during the murai of any other archaka you should not act as a substitute."

Subsequently in April 1911, when the second respondent before us became a trustee newly he confirmed the order of suspension. No notice was given to and no explanation was taken from the plaintiff before the order was passed. The suit was filed in November 1911; it was admitted that no inquiry was held into the plaintiff's conduct and it is found that no real attempt to hold such an inquiry was ever made by the trustees. Though the order in its inception was one of temporary suspension pending inquiry the trustees seem to have subsequently treated it as a final order of suspension till the plaintiff cleared his character in a Court of law against the newspaper; they say so in Exhibit II. The charge against the plaintiff was that he was leading an immoral life by frequenting a dancing giri's house and he was therefore unfit to perform the duties of an archaka. The District Munsif, while holding that the allegations of actual immorality against the plaintiff had not been proved, found that he was seen in her company and that he had compromised his good name for purity by his conduct and that there was a widespread public opinion about his immorality. He therefore held that the order of suspension was a valid one and dismissed the plaintiff's suit.

The District Judge, on appeal, refused to go into the question of plaintiff's alleged immorality and held that as the trustees had failed to make the intended inquiry within a reasonable time after the order of suspension was passed, their action in keeping plaintiff indefinitely out of office without a definite finding, after notice to him and proper inquiry, that he was unfit to do the duties of that office, was wrongful and that they were therefore liable in damages. He gave a decree declaring that the plaintiff

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was a hereditary archaka and that the order of suspension had ceased to be in force from the date of suit and directed that the plaintiff be restored to his office and awarded damages to him at Rs. 250 a year from the date of plaint to the date of reinstatement. He directed defendants Nos. 1 and 5 who were parties to the order of suspension to pay each one-fifth of the damages and costs personally and, as the other trustee-defendants were new trustees, he ordered the balance to be recovered from trust funds.

The second appeal to us has been filed only against that portion of the decree which is against the temple; the trustees against whom personal decrees were passed not appealing. The main question argued before us was that the learned Judge should have given a finding on the question of plaintiff's immorality because it was contended that, if immorality alleged was established, the order of suspension should be held to be valid and in force at the date of suit, whether viewed as one pending inquiry or as one passed by way of punishment for misconduct, any want of notice or of proper inquiry being immaterial. Reliance was placed for this contention on *Seshadri Iyengar* v. *Ranga Bhattar*(1).

Before however considering this argument it may be mentioned that it has not been contended before us that the alleged immorality, if proved, would not amount to misconduct justifying the suspension of an hereditary archaka by the trustees. Though an hereditary archaka does not hold office at the will and pleasure of the trustees it was conceded that he might be removed or suspended from office by them for proved misconduct. We need not therefore consider these questions for the disposal of this second appeal.

The case in *Seshadri Iyengar* v. *Ranga Bhattar*(1) was no doubt one where an archaka had been suspended by the trustees pending inquiry into his conduct without previous notice; but before suit the intended inquiry had been held and the offence charged had been found to be proved and apparently the *ad interim* suspension order pending inquiry had been terminated and replaced by an order after inquiry. That ruling is no doubt an authority for the contention that previous notice

(1) (1912) I.L.R., 35 Mad., 631.

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and inquiry are not essential to validate an order of suspension pending inquiry if it is subsequently found that the charge alleged was well-founded. It is not necessary to consider whether this ruling should be followed though it may be remarked that some of the observations in it do not seem to be quite in consonance with the views expressed by the learned Chief Justice in *Thiruvambala Desikar* v. *Manikkavachaka Desikar*(1) and in *Venkata Narayana Pillai* v. *Ponnuswami Nadar*(2). The objection raised in the present case to the validity of the suspension order has reference not so much to its inception as to its continuance beyond a reasonable time without a proper inquiry. Even if the trustees be held to have the power to pass an *ad interim* order of suspension without notice it seems to me that such power should not be exercised except in cases of urgency where from the nature of the misconduct alleged and other circumstances, immediate suspension from office becomes a necessity to safeguard the interests of the institution. There was hardly any such urgency in the present case. But even if the order was a good one when it was first passed I am fully in agreement with the District Judge in thinking that it should not have been continued in force for a longer period than was reasonably necessary. There can be no doubt in the present case that the period which elapsed after the date of the order and before the date of the suit, viz., about 14 months, was an unduly long period and I accept the Judge's view that there was unreasonable delay and that the order as an interim order ceased to be valid before the date of suit.

This position was hardly denied by the first appellant's vakil, but he argued that the order should be looked upon as a punitive one which was justified by the plaintiff's misconduct. It is doubtful whether the order can be looked upon as a punitive one at all, because whatever the intention of the trustees might have been, plaintiff was never informed that it had that character. But assuming that it could be done, I am of opinion that the order as a punitive one should be held to be invalid as having been passed without notice and without inquiry, whatever the merits of the case may be. It is a fundamental principle of

(1) (1917) I.L.R., 40 Mad., 177. (2) (1918) I.L.R., 41 Mad., 357.

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natural justice that a person charged with an offence or with a misconduct must be given notice of it and heard in his defence if he wishes to defend before he is condemned. That principle must be recognized and anything done contrary to it cannot be upheld. As the learned Chief Justice quotes in *Thiruvambala Desikar* v. *Manikkavachaka Desikar*(1), "the laws of God and man both give the party an opportunity to make his defence, if he has any." The interim order of suspension pending inquiry without notice does not offend against this principle, as it is only a disciplinary and not a punitive one; and the ruling in *Seshadri Iyengar* v. *Ranga Bhattar*(2) is confined to such disciplinary orders. The observations of the Chief Justice in *Venkata Narayana Pillai* v. *Ponnuswami Nadar*(3) may also be referred to in this connexion. As pointed out by his Lordship there, the Privy Council in *Willis* v. *Sir G. Gipps*(4) recommended that an order of a motion without due notice should be set aside although on the merits there were sufficient grounds for making it. It is no answer to the invalidity of the order in the present case viewed as a punitive one to say that the trustees are prepared to prove facts which would justify it in the opinion of the Court. Plaintiff was entitled to have an order by the trustees after notice to him and proper inquiry before he was punished; the Court's order is not an adequate substitute for it. To hold otherwise will be to compel the person punished to submit to punishment without knowing the grounds for it or to resort to a Court of law before he can find out the grounds on which he had been punished. I am therefore of opinion that the order of suspension, the moment it was treated as a punitive order by the trustees, became illegal and invalid.

In any view therefore the order was invalid at the date of suit. It is not necessary to ascertain when exactly before suit the order became invalid as the District Judge has not given to plaintiff any damages before the date of suit and plaintiff has not appealed against the disallowance of damages prior to suit claimed by him. In awarding plaintiff possession of his office I think it was open to the District Judge to grant a decree for its emoluments by way of damages, as he has done, from the date of

(1) (1917) I.L.R., 40 Mad., 177. (2) (1912) I.L.R., 35 Mad., 631.
(3) (1918) I.L.R., 41 Mad., 357. (4) (1843) 5 Moore, 379 (P.C.).

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suit to date of reinstatement. No argument has been addressed to us about the quantum of damages.

It was finally argued that the temple funds should not be made to bear any portion of the damages, but that the trustees who were the tort-feasors should pay them personally. There can be no doubt in this case that the trustees in passing the order of suspension and continuing it, acted in their capacity as trustees and in what they conceived to be the proper discharge of their duties as such and on behalf of the temple. In these circumstances I am of opinion that temple funds are liable and plaintiff is entitled to have recourse to them for damages. Whether the trustees are liable to make good the loss caused to the temple by their action need not be decided in this case.

I would therefore dismiss the second appeal with costs of the first respondent.

PHILLIPS, J.

PHILLIPS, J.—I agree. If the suspension order is treated as an interim order pending inquiry, I think the District Judge is right in holding that the trustees were guilty of unreasonable delay in deferring the inquiry for over a year, for this conduct of theirs practically converted the interim suspension into a punitive suspension. Treated as a punitive order, it cannot be justified because it was passed without giving plaintiff an opportunity of defending himself. It may seem anomalous that the trustees should be mulcted in damages for passing an order which, the District Munsif has found was in the circumstances a justifiable order, but the trustees should not have left it to the Court to decide after inquiry whether such an order was justifiable and should have exercised the discretion vested in them to pass such an order after due inquiry. It may be open to them to treat the inquiry that has now been held as adequate and to pass such orders as they think fit hereafter, and on this point I express no opinion, but they are liable in damages for causing loss to plaintiff without giving him an opportunity of being heard in self-defence. I agree that the second appeal should be dismissed with costs.

K.R.

APPELLATE CIVIL.

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

CHINNA VENKATASAMI NAICKEN (PETITIONER), APPELLANT,

v.

VENKATASAMI NAICKEN AND ANOTHER (RESPONDENTS NOS. 1 AND 3), RESPONDENTS.*

1919, January, 7 and 20.

Civil Procedure Code (V of 1908), Second Schedule—Reference of suit to arbitration to Judge and two others as arbitrators—Award—Decree in accordance therewith—Finality of decree—Reference whether under second schedule Proceedings extra cursum curiæ—Adjustment of suit under O. XXIII, Civil Procedure Code—Consent decree.

A reference of a pending suit to arbitration to the presiding Judge along with others as arbitrators is not a reference under the second schedule to the Civil Procedure Code but is a proceeding *extra cursum curiæ*, and a decree passed in accordance with their decision should be regarded as a consent decree not subject to the provisions of the second schedule, and is therefore final.

Nanjappa v. *Nanjappa Rao* (1912) 23 M.L.J., 290; and *Praydas* v. *Girdhardass* (1902) I.L.R., 26 Bom., 76, followed.

It is undesirable that a Judge before whom a case is pending should associate himself with other persons as an arbitrator.

APPEAL under clause 15 of the Letters Patent against the decision of AYLING, J., in *Chinna Venkatasami Naicken* v. *Venkatasami Naicken*(1).

The plaintiff sued in the Sub-Court of Coimbatore to recover a sum of money due on a mortgage bond. After the examination of some witnesses, the parties agreed to refer the questions of law and fact arising in the case to the decision by arbitration of the presiding Subordinate Judge who tried the suit and two others as arbitrators. An award was made by the majority. The defendants preferred a petition in the Sub-Court to set aside the award on various grounds. The Sub-Judge overruled the objections and passed a decree in accordance with the award. The third defendant preferred a Civil Revision Petition to the High Court against the decree of the Subordinate Judge, which was heard by AYLING, J., who

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* Letters Patent Appeal No. 70 of 1918.

(1) Civil Revision Petition No. 474 of 1917 preferred against the decree of the Subordinate Judge of Coimbatore in Original Suit No. 50 of 1916.

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dismissed the petition. Against the judgment of the learned Judge, the petitioner preferred this Letters Patent Appeal.

T. R. Ramachandra Ayyar and *G. Ramakrishna Ayyar* for *L. S. Viraraghava Ayyar* for appellant.

K. R. Guruswami Ayyar for *L. A. Govindaraghava Ayyar* for respondents.

SESHAGIRI AYYAR, J.—The suit was for money due upon a mortgage bond. After the examination of some witnesses the parties agreed to refer the questions of fact and of law arising in the case to the decision of three persons, namely, the Subordinate Judge and two friends of the parties. An award was made by the majority. Thereupon an application was presented by the defendant to set aside the award on various grounds. The Subordinate Judge overruled the objections and passed a decree. On this a Civil Revision Petition was filed in the High Court, mainly on the ground that the reference to the Subordinate Judge as one of the arbitrators was illegal and that the whole award was vitiated thereby. Mr. Justice AYLING rejected this contention and dismissed the petition. This Letters Patent Appeal is against the learned Judge's judgment.

In my opinion the conclusion of the learned Judge is right. I may at the outset say that it is undesirable that a Judge before whom a case is pending should associate himself with other persons as an arbitrator in the cause. The Subordinate Judge thought that the second schedule to the Civil Procedure Code applied to the reference. If he was right in this view, when the award is submitted to the Court, it would be open to the parties to impeach the character and conduct of the Subordinate Judge as an arbitrator. It is not desirable that a Judge should lay himself open to such a possible impeachment. But I do not think that the second schedule has any application to the case. Mr. Ramachandra Ayyar for the petitioner referred to the Order of the Reference, and contended that as the reference was in terms made under the second schedule the entire proceedings were void. The form of the reference is not conclusive of the matter. It is the intention of the parties that has to be looked to. There can be no doubt that the parties desired that the controversy between them should be put an end to by the decision of the three gentlemen to whom they referred

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the matter. In my opinion, the whole frame of the second schedule shows that references like the present one are not within its purview. Applications may be made for extension of time, for remitting the award, for correcting the award, and for impeaching the partiality of the arbitrators. If a Judge is one of the arbitrators, he cannot in another capacity extend the time, correct his own judgment, and scrutinize his own character. Section 17 of the Civil Courts Act, though not in terms applicable to the present case, indicates that what has been done by a Judge in one character or capacity should not be revised by the same officer in another capacity. It may be as pointed out by Lord HALSBURY in *Burges* v. *Morton*(1), where a reference is made to a presiding officer the proceedings may be taken to be extra *cursum curiæ*. But it does not follow that the rules which govern awards by private persons would be strictly applicable to decisions in which the Judge of the Court takes part as referee. The Lord Chancellor said :—

"My Lords, it has been held in this house that, where with the acquiescence of both parties a Judge departs from the ordinary course of procedure and decides upon a question of fact, it is incompetent for the parties afterwards to assume that they have an alternative mode of proceeding and to treat the matter as if it had been heard in due course."

With slight modifications, the same language may be applied to what has been done in the present case. Where parties have chosen to entrust their case to a Judge and two others, they must be deemed to have agreed to accept the decision of that body as final and as not being open to the attacks to which otherwise a judgment is liable. An argument was addressed to us based upon section 89 of the Civil Procedure Code. Clause 1 runs thus :—

"Save in so far as is otherwise provided by the Indian Arbitration Act 1899, or by any other law for the time being in force all references to arbitration whether by an order in a suit or otherwise and all proceedings thereunder shall be governed by the provisions contained in the second schedule."

No doubt if there is no law which could give validity to the decision of the Judge and of his two colleagues, the

(1) (1896) A.C., 136.

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proceedings must be taken to have been under the Second Schedule to the Code of Civil Procedure. In this case I am of opinion that by virtue of Order XXIII of the Civil Procedure Code the present reference can be regarded as being outside the second schedule. The parties have chosen a particular tribunal consisting of the Judge and of two other persons to deal with their contentions. They must be deemed to have agreed to accept their conclusions unreservedly. In other words, it must be regarded that they agree to adjust the suit by the result of the decision of the three persons. This adjustment must be taken to have been reported to the Court before which the suit was pending; and the Court by virtue of its inherent powers to finally dispose of any matter which is pending before it must be deemed to have passed a decree in terms of the decision reported to it by the three persons. This was practically the view taken in *Nanjappa* v. *Nanjappa Rao*(1) and *Praydas* v. *Girdhardas* (2). Giving such a finality to decisions is not unknown to the Civil Procedure Code. For example, Order XXXVI provides for cases in which a party may state a special case before a Judge who hears the suit. In such cases it has been held that there will be no appeal—vide *Nidamarthi Mukkanti* v. *Thammana Ramayya* (3). If the conclusions come to by a Judge before whom a special case is stated can be regarded as final, there is nothing incongruous in giving the same finality to the conclusion come to by a Judge who is assisted by two other persons. In my opinion, therefore, although the procedure adopted by the Subordinate Judge in dealing with the matter as if it was a reference under the second schedule and as if the provisions of the Code applied was wrong, inasmuch as a decree was passed in terms of the award, the defendant as a party to the reference is not entitled to contest its finality and to request that the case should be heard again. On this ground I am of opinion that the decree of the Subordinate Judge was rightly passed, and that the petition to this Court was rightly dismissed. The Letters Patent Appeal must be dismissed with costs.

(1) (1912) 23 M.L.J., 2[illegible]. (2) (1902) I.L.R., 26 Bom., 76.
(3) (1903) I.L.R., 26 Mad., 76.

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WALLIS, C.J.

WALLIS, C.J.—I agree with the conclusion. I think a reference of the suit to the presiding judge must be held to be altogether extra *cursum curiæ* and not the less so when two others are joined with him, and that the decree passed in accordance with their decision must be regarded as a consent decree, and as not subject to the provisions of the second schedule.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Ayling.

1919, January, 6 and 22.

GURUSWAMI NADAR AND SEVEN OTHERS (DEFENDANTS Nos. 1 AND 2 AND 4 TO 10), APPELLANTS,

v.

T. S. GOPALASAMI ODAYAR AND SIX OTHERS (PLAINTIFFS Nos. 1 TO 3 AND 5 TO 8 AND ELEVENTH DEFENDANT), RESPONDENTS.*

Hindu Law—Joint Hindu trading family—Money borrowed by manager—Onus as to binding nature of loan—Account books not produced—Presumption against party—Onus of proof in cases of joint family business.

Where the members of a devastanam committee sued the members of a joint Hindu trading family to recover money borrowed from the plaintiffs by the managing member of the family, and the defendants failed to produce their account books though summoned by the plaintiffs,

Held, that, assuming that the onus of proving the binding nature of the debt lay on the plaintiffs even in the case of a trade carried on as joint family business it was shifted to the defendants on account of the presumption arising against them by their omission to produce their accounts called for by the plaintiffs, a presumption which arises against them whether the plaintiffs have any evidence or not.

Murugesam Pillai v. *Manickavasaka Desika Gnana Sambanda Pandara Sannadhi* (1917) I.L.R., 40 Mad., 402 (P.C.), applied.

Quære.—Whether, in a joint trading family, the onus of proof as to the nature of the debt is not on the family. *Raghunathji Tarachand* v. *The Bank of Bombay* (1910) I.L.R., 34 Bom., 72, referred to.

APPEALS against the decree of C. V. VISWANATHA SASTRI, the Subordinate Judge of Kumbakōnam, in Original Suit Nos. 58 of 1914 and 61 of 1914 (Appeal Suit No. 462 of 1916) of the District Court, Tanjore, respectively.

* Appeal No. 207 of 1916 and Appeal No. 178 of 1917.

GURUSWAMI NADAR v. GOPALASAMI ODAYAR.

The Hon. the *Advocate-General* (*S. Srinivasa Ayyangar*) *K. Raja Ayyar* and *S. Desika Achariyar* for appellants.

The Hon. *T. Ranga Achariyar* for first to seventh respondents.

A. Sriranga Achariyar for first and third to sixth respondents.

The material facts appear from the JUDGMENT.

WALLIS, C.J.

WALLIS, C.J.—This is a suit by the members of a temple committee to recover temple funds which were originally lent on two promissory-notes—Exhibits E and J—dated 10th January 1893, executed by the late Rathnaswamy Nadar, brother of the first defendant, father of defendants Nos. 2 to 4, and uncle of defendants Nos. 5 to 10. Several promissory notes were executed in renewal of Exhibits E and J by Rathnaswamy Nadar, the first of which were Exhibits A and A-1. The only question is whether there is sufficient evidence to support the Subordinate Judge's finding that these debts are binding on the joint family of the defendants, of which the deceased Rathnaswamy Nadar was the managing member. In 1893, when the loan was contracted his brothers were minors and there is evidence that he was carrying on the business of an abkāri contractor and that the business was a joint family business. The family have been engaged in the business for a great many years, and indeed for a long time were the best known abkāri contractors in Southern India. It is contended for the appellant that the plaintiffs have not shown that the debt was contracted by the late Rathnaswamy Nadar for purposes binding on the family. The members of the temple committee who advanced the loan are dead, the clerk whom they called (P.W. 8) was unable to speak from personal knowledge, and the witnesses connected with the defendants whom the plaintiffs put into the box were not anxious to help them, so that there is a dearth of direct evidence. The books of the defendants' firm if produced would show whether the money advanced was utilized in the business and the debt was treated as a family debt. The plaintiffs summoned the defendants to produce their books, but the defendants failed to produce them or to explain their failure, and also abstained from going into the box relying on the weaknesses of the direct evidence for the plaintiffs. The defendants were under a duty to produce their books when summoned or to account for their failure to do so; and, as they have done neither, a presumption arises under section 114 (*g*) of

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the Indian Evidence Act that the books if produced would have been unfavourable to their case and would have shown that the money was borrowed for the purposes of the business, which is in accordance with the general probabilities of the case. The Privy Council have recently ruled in *Murugesam Pillai* v. *Manickavasaka Desika Gnana Sambanda Pandara Sannadhi*(1) that defendants are not entitled to lie by trusting to the abstract doctrine of onus of proof and refuse to furnish the Court with the best material for its decision, and that if they do so, the Court is free to conclude that the evidence if produced would not have supported the defendants' case. There was no doubt other evidence for the plaintiffs in that case, but the presumption against the defendants arises whether the plaintiffs have any evidence or not, and in my opinion it is clearly enough to shift the burden in this case assuming it to be on the plaintiffs and to throw on the defendants the onus of proving that the debts in question were not incurred for joint family purposes.

I have assumed that onus of showing that the debt is binding on the joint family is on the plaintiffs in the first instance as is generally the case with regard to monies borrowed by the managing member. In *Nagendra Chandra De* v. *Amarachandra Kundu*(2) and *Ganpat Rai* v. *Munni Lal*(3), this presumption has been held to apply even where the manager is carrying on a joint family business but as pointed out by CHANDRAVARKAR, J., in *Raghunathji Tarachand* v. *The Bank of Bombay*(4) which was not cited in the case last mentioned, the case of a joint trading family is in many ways exceptional and, it appears open to question whether in such a family the presumption should not be the other way. The appeals should be dismissed with costs.

AYLING, J.

AYLING, J.—I agree.

K.R.

(1) (1917) I.L.R., 40 Mad., 402 (P.C.).
(2) (1902) 7 C.W.N., 725.
(3) (1912) I.L.R., 34 All., 135.
(4) (1910) I.L.R., 34 Bom., 72.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919, January 16 and 23.

POTITA PAVANA PANDA AND FIVE OTHERS (DEFENDANTS Nos. 2, 3, 4, 6, 7 AND 11), PETITIONERS,

v.

NARASINGA PANDA AND FOUR OTHERS (PLAINTIFFS Nos. 1 AND 2 AND DEFENDANTS Nos. 5, 8 AND 10), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sch. II, r. 1—Reference to arbitration by some only of the parties to the suit—Ex parte defendant, not a party to the reference—Reference, whether valid—Award—Decree, validity of—Jurisdiction of Court to make a reference—Party interested, meaning of.

Where a suit was referred to arbitration at the instance of some of the parties thereto, but a defendant against whom relief was claimed in the plaint who was ex parte in the suit did not join in the reference though he had an interest in the subject matter of the reference, and a decree was passed in accordance with the award of the arbitrators,

Held, that the Court had no jurisdiction to make the order of reference under Schedule II, rule 1, of the Civil Procedure Code, that the decree was invalid and should be set aside, and that the suit should be proceeded with on the merits.

If a person is ex parte in a suit, he does not thereby cease to be a party interested in the reference.

Ishar Das v. *Keshab Deo* (1910) I.L.R., 19 All., 657 and *Vaithianatha Iyer* v. *Vaithialinga Mudaliar* (1915) 18 M.L.T., 374, dissented from; *Girija* v. *Karai*. (1918) 27 C.L.J., 939, followed.

PETITION under section 115 of the Civil Procedure Code to revise the order of T. KRISHNASWAMI NAYUDU, the Temporary Subordinate Judge of Ganjām at Berhampur, in Original Suit No. 22 of 1915.

The material facts appear from the Judgment of SESHAGIRI AYYAR, J.

The Hon. the *Advocate-General* (*S. Srinivasa Ayyangar*) and *C. S. Venkata Achariyar* for the appellants.

C. Sambasiva Rao, C. Narayanamurti and *N. C. Vijayaraghava Acharya* for the respondents.

OLDFIELD, J.

OLDFIELD, J.—I have had the advantage of reading the judgment to be delivered by my learned brother and, as I agree

* Civil Revision Petition No. 112 of 1918.

with it, I propose to deal only with one aspect of defendants' case.

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OLDFIELD, J.

Stated at its strongest, their case was that their dispute with plaintiff and twenty-third defendant involved adjudication on two distinct matters, firstly their right and plaintiffs' to recover the property in twenty-third defendant's possession from him, secondly their rights against plaintiffs to a particular share in it, if it in fact was recoverable. On the first point, for the reasons given by my learned brother, there could be no valid submission to arbitration without twenty-third defendant's concurrence and, although the record does not indicate what method of decision, if any, was really in the parties' minds, the wording of paragraph 2, Exhibit 1, is in fact inconsistent with any intention on their part to submit this part of the case. But, it is argued, the absence of any valid submission on this point does not affect the validity of the submission on the other above referred to, in which twenty-third defendant had and could have no interest, since, if he was to surrender the property, the shares in which it was afterwards to be divided would not be his concern. It is possible that there is nothing in paragraph 1, schedule II, of the Code of Civil Procedure irreconcilable with this statement of defendants' case and that the interest of the parties contemplated therein is in the question referred, not in the case as a whole. But it is unnecessary at present to decide whether that is so, because the assumption in defendants' argument, as stated above, that twenty-third defendant had no interest in the result of the submission to arbitration is incorrect in two respects. For firstly the submission included the question of the validity of an adoption, on which plaintiffs' right to sue at all depended; and secondly twenty-third defendant, if he purchased in good faith, may be entitled to have his items assigned, to his alienor in order that his transfer might, so far as possible, remain effective. In these circumstances the submission cannot be accepted as valid, and I therefore concur in the decree proposed by my learned brother.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—Plaintiffs and defendants Nos. 1 to 10 claim to be the nearest heirs of the deceased owner of the plaint properties. The suit was brought for a division of the properties and for setting aside certain alienations in favour of the other defendants. There was a dispute among the heirs as to

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whether adoptions set up by the defendants Nos. 1 to 7 were true and valid. After the settlement of the issues, on the 25th September 1916, plaintiffs and defendants Nos. 1 to 11 agreed that the matter in dispute should be referred to the decision of three arbitrators. Paragraph 3 of the agreement says:

"They have further agreed that the rest of the defendants except the twenty-third defendant who was declared ex parte be exonerated from the suit with the respective properties in their possession as per schedule attached hereto."

That is to say, these heirs agreed that the alienations in favour of defendants other than the twenty-third should not be contested. Apparently as the twenty-third defendant was ex parte, they did not exonerate his property from the suit. It was suggested by Mr. Narayanamurti that, in fact, the claim against the twenty-third defendant was withdrawn. There is nothing on record to justify such an assumption. On the other hand the express language of the agreement to refer shows that the alienation in favour of the twenty-third defendant was not accepted as binding. Subsequent to the agreement, on the 17th of April 1917, the plaintiffs and the defendants Nos. 1 to 7 settled the shares to which they were entitled and asked the arbitrators to determine, after examining the parties themselves, the following issues:—

"First part of the 2nd issue, 8th issue, 9th issue, 10th issue, 11th issue, 12th issue and 18th issue."

The arbitrators by a majority decreed the claim in a particular manner. There was a minority decision also. The Court accepted the award of the majority and passed a decree in accordance therewith. Against that decree the present petition has been presented.

The main objection argued by Mr. Anantakrishna Ayyar related to a point not specifically put forward in the Court below, but, as that relates to jurisdiction, I fail to see how we can refuse to adjudicate upon it. The short point is this: the twenty-third defendant was a party against whom relief was claimed in the original plaint. He was ex parte. In the agreement to refer the parties to the reference did not exonerate him from liability. In these circumstances, is the reference a valid one and had the Court jurisdiction to accept the reference and to act on it? I am constrained to hold that the Court had no jurisdiction to refer

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the dispute to arbitration. It is to be regretted that the legal advisers should not have taken steps either to include the twenty-third defendant in the reference or to exonerate him in terms from liability.

The question turns upon the interpretation to be placed upon the words parties 'interested' in section 1 of the second schedule to the Civil Procedure Code. In the old Code of 1882 section 506 provided 'if all the parties to a suit desire' and so on. In the place of those words we have in the present section these words: "Where in any suit where the parties interested agree." It was strenuously argued by Mr. Narayanamurti that if a person is ex parte he is not an interested party. He is supported by some authorities which with all deference I am unable to follow. It has been consistently held in Allahabad that if a person is ex parte he is not a party interested. *Ishar Das* v. *Keshab Deo*(1) and the earlier cases have taken this view. Reference may also be made to *Adjudia Prasad* v. *Badar-ul-Hussain*(2). In *Vaithianatha Iyer* v. *Vaithialinga Mudaliar*(3), a Bench of this Court took the same view. PHILLIPS, J., says:

"Further in the present case the appellant has no equitable claim to set aside the decree, for by remaining ex parte he left the conduct of the suit in the hands of the Court, and it is really immaterial to him whether the suit was decreed upon examination of witnesses in Court or upon an award made by arbitrators. By not contesting the suit he submitted to whatever decree might be passed, provided that it was not in excess of the relief claimed."

With all deference I am unable to accept this conclusion. A person may remain ex parte for various reasons. He may be too poor to defend the suit. He may think that his co-defendants would fight his case and that it is not necessary for him to put in a separate defence. He may trust to some obvious defect in the case of the plaintiff which should attract the attention of the Judge. He might also have kept away from the Court because he had confidence in the judicial capacity of the presiding officer. These considerations do not apply to a reference to arbitrators. The ex parte defendant knows nothing about their capacity, character or antecedents.

(1) (1910) I.L.R., 19 All., 657.
(2) (1917) I.L.R., 39 All., 489.
(3) (1915) 18 M.L.T., 374.

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Simply because a defendant is ex parte it does not follow that he consented to his case being decided by arbitrators. Further if a person is ex parte he has got a right of appeal if the decision goes against him. He may satisfy the Appellate Court that on the materials placed before the Judge, his conclusion was wrong, or that the Judge had taken a wrong view of the law, or that the procedure had been irregular. In the case of an award all these rights could not be exercised. Therefore by remaining ex parte a defendant cannot be said to have consented to the arbitrators disposing of his case and to giving up the right of appeal against the decision that may be passed against him. After giving my best consideration to the cases which have been cited, I am unable to accept the view taken in them that a defendant who is ex parte is not interested in the dispute. As regards *Sivalinga Pillai* v. *Marutha Pillai*(1) it is enough to say that in that case it was held that the ex parte defendant had no interest in the suit. On the other hand, in *Girija* v. *Karai*(2) and the earlier case in *Seth Dooly Chand* v. *Mamuji Musaji*(3), it was held that the ex parte defendant does not cease to be an interested party.

The next argument was that there is nothing to prevent a few among the parties to the suit adjusting their differences by submitting them to the decision of arbitrators. Granting for a moment without deciding that a partial reference is possible because a partial compromise is allowed by law and also a partial adjustment, it is not clear whether a partial award is within the rights of parties. I am, however, not prepared to hold that in this case the twenty-third defendant was not interested in the decision of the questions which plaintiffs and defendants 1 to 11 submitted for the consideration of the arbitrators. For example the extent of the impeachability of the alienation in his favour will depend upon whether the adoption in dispute was really made or not and some of the other questions covered by the issues which the arbitrators were called upon to try also relate to matters in which the twenty-third defendant was to some extent interested. Therefore this is not a case in which the subject-matter of the reference was one in which the twenty-third defendant

(1) (1912) 14 I.C., 562. (2) (1918) 27 C.L.J., 939.
(3) (1917) 25 C.L.J., 389.

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had no interest. It follows that the twenty-third defendant was a person interested in the whole suit as well as in the particular subject matter of the reference and that, as he was not a party to the reference, the order referring the matter to the arbitrators was *ultra vires* and without jurisdiction. In this view all subsequent proceedings must be regarded as infructuous and must be set aside. The decree of the lower Court must be reversed and the Subordinate Judge must be directed to deal with the suit on the merits. Costs will abide the result.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

RANGASWAMI CHETTI (PLAINTIFF), APPELLANT,

v.

THANGAVELU CHETTI (DEFENDANT), RESPONDENT.*

1919, January 29, 30 and February 10.

Indian Limitation Act (IX of 1908), ss. 6, 14, 15 and 19—Assignee of a debt due to a minor—Suit by assignee—Limitation for such suit, whether saved in right of minor assignor—Attachment of debt prior to sale—Time till sale, whether can be deducted in computation—Causes of action for attachment and suit, whether same—Acknowledgment in a deposition—Denial of a subsisting debt—Sufficiency of acknowledgment.

Where a decree-holder, having attached in 1913 a book-debt due in 1911 to a minor judgment-debtor, sold it in auction and purchased it himself in February 1915, sued in March 1915 to recover it from the defendant who pleaded the bar of limitation:

Held, (1) that the assignee of a debt due to a minor could not avail himself of the privilege of the extension of limitation given by section 6 of the Limitation Act;

Rudra Kant Surma Sircar v. *Nobo Kishore Surma Biswas* (1883) I.L.R., 9 Calc., 663, followed;

(2) that section 15 of the Act did not operate to save limitation during the time the attachment was in force;

Shib Singh v. *Sita Ram* (1891) I.L.R., 13 All., 76, followed and *Beti Maharani* v. *The Collector of Etawah* (1895) I.L.R., 17 All., 198 (P.C.), referred to.

(3) that section 14 of the same Act was also inapplicable as the attachment proceedings were not based on the same cause of action as the suit to recover the debt;

* Second Appeal No. 1116 of 1918.

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(4) that, on its appearing that the defendant stated in a deposition that there was once a debt but that he had discharged it, the statement did not amount to an acknowledgment within section 19, explanation 1 of the Act; *Bollaprogada Ramamurty* v. *Thamana Gopayya* (1916), 31 M.L.J., 21, followed; and (5) that the suit was consequently barred by limitation.

SECOND APPEAL against the decree of R. ANNASWAMI AYYAR, the Temporary Subordinate Judge of Cuddalore, in Appeal Suit No. 153 of 1916, preferred against the decree of K. SOURIRAJULU NAYUDU Garu, the District Munsif of Tirukkōyilūr, in Original Suit No. 148 of 1915.

The plaintiff was the assignee of a decree for money from one *D* who obtained the decree in Original Suit No. 138 of 1912 against two persons, one of whom was a minor. As the assignee of the decree, the plaintiff applied in execution to attach a book-debt due to the minor judgment-debtor; and the attachment was made in 1913, the debt being due in 1911; he subsequently brought it to sale and purchased it in Court auction and obtained a sale-certificate in February 1915. As the purchaser of the debt, he sued in March 1915 to recover it from the defendant who was the debtor. The plaintiff pleaded in bar of limitation that he was entitled to extension of time under section 6 of the Limitation Act; he also contended that the time during which the debt remained under attachment from 1913 to 1915 should be deducted in computing limitation for the suit on the debt under section 15 of the Act, and also relied on section 14 of the same Act as entitling him to exclude the time taken up by the attachment proceedings and objections thereto; he further relied on an acknowledgment said to be furnished by the statement contained in a deposition of the defendant, dated 3rd February 1914, which was in these terms:

"About one month after his (minor's father's) death, the stock that was in his shop was sold to me by his widow Soubhagyam Ammal for Rs. 180 and odd. There was a notebook kept by me. It was in the nature of a day book. It is missing. I have discharged the debt . . . "

The lower Courts dismissed the suit as barred by limitation. The plaintiff preferred this Second Appeal.

S. Subrahmanya Ayyar for the appellant.

Thangavelu Chetti for the respondent.

OLDFIELD, J.

OLDFIELD, J.—I have had the advantage of reading the judgment, which my learned brother is about to deliver, and

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as I agree with his conclusion, I deal only with the one important question we have to decide, whether the appellant is entitled to the extension of time he claims as transferee from a minor. It does not appear material that his transfer was not voluntary, but was effected by attachment followed by a sale of the debt and an order vesting it in him as purchaser; and I assume that time did not begin to run before the minor's acquisition of the cause of action. Appellant's contention is that he is entitled to the full extension of time, which the minor would have had, if the cause of action had remained his property or, in the alternative, to three years from the date, when his own ownership began.

This alternative contention can be dealt with shortly. It cannot be justified by any provision of the Limitation Act; for section 6 (3) is, as will be shown, the only one extending time for a person other than the one disabled and it is inapplicable to appellant, a transferee during the latter's lifetime. In fact, the argument in this form must rest solely on the tentative reasoning of WILSON, J., in *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas*(1) that an alienation of the cause of action terminates the existing disability and on general principles carries with it the right to sue thereon, which the alienor on such termination would acquire. But, with all due deference, although on general principles the transferor's right to sue may pass with the cause of action, that goes no way towards answering the question whether it does so, when the operation of those principles has been interrupted by the special law, with which we are dealing, and special considerations have been introduced; and it is still necessary to meet the argument of the majority of the Court that the disabled person's right to an extension is personal and does not necessarily remain alive after an alienation by him.

Turning to appellant's argument in its wider form, I need not repeat my learned brother's references to the cases. For, although the actual current of authority, whatever its tendency here and in Bombay, is in respondent's favour, it is not strong enough to conclude the question. To turn then to the relevant

(1) (1883) I.L.R., 9 Calc., 663.

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provisions of the Limitation Act, their wording does not authorize appellant's contention and their intention, so far as it can be deduced, is against it.

Firstly as to the wording, section 6 (1) throughout refers to one person only, the person entitled to sue or apply for execution, and does not admit of the violent construction proposed by appellant, that, one person being referred to as disabled, that person or in the alternative his transferee, are referred to later in the clause as eligible for indulgence; and in my opinion the possibility of such construction is further negatived by the specification in clause (3) of one person, for whose benefit the right to indulgence inheres in a qualified form, the legal representative, to the exclusion of the transferees from the disabled person during his lifetime. Next section 8 can, it is argued, be regarded as extending time in favour not only of the minor or idiot concerned, but also of the person indirectly disabled from suing the transferee. But this interpretation of the reference to the person "affected by the disability" is inconsistent with the meaning of disability in sections 6 and 7, which are explicitly referred to and in which "disability" is used of the particular disabilities mentioned in the former, not of the disability to sue; and in any case section 8 is statedly ancillary to and restrictive of the concession granted in those sections and does not confer any substantive privilege. It has been suggested that the definition of 'plaintiff' in section 2, as including a person from or through whom the right to sue is derived, is relevant to the discussion. But it plainly is not so, since this part of the Act is throughout expressed, no doubt advisedly, with reference to the person entitled to sue.

We are on even firmer ground, when the intention of these provisions is considered. I respectfully concur in the opinion of the majority of the Court in *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas*(1) that the privilege is personal and cannot be transferred with property or a right of action. I add only that, if the contrary were the case, section 6 (3) would be superfluous and section 7 an exception to the principle, for which no reason has been shown, since, if the privilege of one of the

(1) (1883) I.L.R., 9 Calc., 663.

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persons jointly interested attaches to the cause of action, it must attach to it as a whole and the ability of one of such persons to give a discharge will be immaterial.

In fact however the appellant's contention has been supported here, as it commended itself to WILSON, J., and might perhaps have commended itself in *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai*(1) if a decision had been necessary on grounds of convenience or in order to avoid anomaly. It is a sufficient answer that inconvenience and anomaly are almost inevitable, where the general law is overridden by personal privilege and natural expectations founded on the former are disappointed. It may be added that, where, as in England, the law is as appellant contends that it should be construed here, anomaly and inconvenience are none the less to be apprehended. Darby and Bosanquet, Statutes of Limitation, Second Edition, page 399.

The Appeal fails and is dismissed.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—Plaintiff's assignor obtained a decree against two persons. It was assigned to the plaintiff. In execution of the decree, he attached a book debt due to his judgment-debtors from the present defendant. That debt became due in August 1911. The attachment was made in November 1913. Plaintiff himself became the purchaser of the debt and a certificate was issued to him on the 22nd February 1915. The present suit was brought on the 15th of March 1915. The question is whether the suit is in time.

The first contention raised by the learned vakil for the appellant before us was that section 15 of the Limitation Act saved the bar because the attachment was pending between November 1913 and February 1915. This contention must be overruled. There is the direct decision of the Allahabad High Court in *Shib Singh* v. *Sita Ram*(2) to the effect that an attachment is not covered by the expression 'an injunction or order' in section 15 of the Limitation Act. The Judicial Committee in *Beti Maharani* v. *The Collector of Etawah*(3) held that in the case of an attachment before judgment section 15 will not save the bar. In that decision they expressly approve of

(1) (1894) I.L.R., 17 Mad., 316.
(2) (1891) I.L.R., 13 All., 76. (3) (1895) I.L.R., 17 All., 198 (P.C.).

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the principle enunciated in *Shib Singh* v. *Sita Ram*(1). In *Shunmugam* v. *Moidin*(2) it seems to have been suggested that the prohibitory order issued during the attachment would come within the meaning of section 15. That dictum cannot be regarded as good law in the face of *Beti Maharani* v. *The Collector of Etawah*(3). Therefore the first contention fails.

As regards the applicability of section 14, it is enough to say that the attachment proceedings are not based on the same cause of action as the suit to recover money on the book debt.

Another contention was that there was an acknowledgment which saved the limitation. Exhibit B which is relied on as containing the acknowledgment does not acknowledge a subsisting liability. The deponent distinctly says: "I have discharged the debt." This is not covered by explanation 1 to section 19. Following *Bollaparagada Ramamurthy* v. *Tammana Gopayya*(4), I hold that there is no acknowledgment of any subsisting liability.

The more difficult question relates to the applicability of section 6 of the Limitation Act. It would have been better if the Subordinate Judge had given a decision on the facts as to whether the original creditor of the defendant was a major at the time of the suit. That would have saved the discussion of the question of limitation which was very elaborately argued by the learned vakil for the appellant. But as he has not done so, it is necessary to deal with the abstract question of law. The point is whether the assignee of a minor can avail himself of the privilege of the extension of the period of limitation given by section 6 of the Limitation Act. In *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas*(5) the matter was considered very fully by a Bench of five Judges. GARTH, C.J., said:

"It seems to me that the provisions in the Limitation Acts, which relieve minors and others under disability . . . are purely personal exemptions".

MITTER, J., MCDONELL, J., and PRINSEP, J., were all of the same opinion. In the referring judgment no doubt, WILSON and FIELD, JJ., seemed inclined to take the opposite view. This Full Bench decision has been followed in Calcutta in a number of cases.

(1) (1891) I.L.R., 13 All., 76. (2) (1885) I.L.R., 8 Mad., 229.
(3) (1895) I.L.R., 17 All., 198 (P.C.). (4) (1916) 31 M.L.J., 231.
(5) (1883) I.L.R., 9 Calc., 663.

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In Bombay in the earlier cases ending with *Mahadev* v. *Babi*(1), the same view was taken. But in *Arjun Ramji* v. *Ramabai*(2), the learned Chief Justice and Justice HEATON were apparently inclined to reconsider the question. In the case before them it was the personal representative, not an assignee, that brought the suit. There is no direct decision in Madras. In *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai*(3) doubt seems to have been thrown upon *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas*(4). But there is no decision of the question. In *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*(5) it was held that where for a debt due to a minor a bond was executed *benami* to the mother, the mother cannot avail herself of the extended period of limitation on the ground that the real owner was an infant. In this state of authorities it is desirable to consider closely the history and the language of section 6. In 3 & 4 Will. IV, cap. 27, the disability section is section 16. This was amended by 37 and 38 Vict., cap. 57, s. 3, and the amended section 16 provides:

"If such person shall have been under any of the disabilities hereinafter mentioned (that is to say) infancy, coverture, idiotcy, lunacy or unsoundness of mind, then such person or *the person claiming through him, etc.*"

It must also be remembered that in both 3 & 4 Will. IV, cap. 27, and 37 & 38 Vict., cap. 57, there was a definition of the term '*person through whom another claimed*' and it clearly included the assignee. With those statutes before them the Indian Legislature advisedly omitted the words "or persons claiming through or under them." It may be mentioned that even under the English section it is considered doubtful whether the assignee can get the benefit of the extended period. See page 399 of Darby and Bosanquet. But apart from that, if we come to the Indian Act, we find in section 6, clause (1), it is only the minor, the insane or the idiot who are mentioned as entitled to the benefit. Clause (2) speaks of successive disabilities to such persons. Clause (3) says that, where the disability continues up to the death of such a person, his

(1) (1902) I.L.R., 26 Bom., 730. (2) (1916) I.L.R., 40 Bom., 564.
(3) (1894) I.L.R., 17 Mad., 316 at p. 342. (4) (1883) I.L.R., 9 Calc., 663.
(5) (1905) I.L.R., 28 Mad., 205.

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legal representative may institute the suit. The special provision in favour of legal representatives, and the provision that such a representative can institute the suit after the death of the person who was under disability, make it clear that an assignee was not within the contemplation of the legislature and that the suits by such assignees during the lifetime of the disabled person should not have the benefit of the extended period. Clause (4) makes a similar provision in favour of the legal representative when there have been successive disabilities. It seems to me that on the principle *expressio unis personæ vel rei, est exclusio alterius*, section 6 should be regarded as not applicable to assignees from a minor. These considerations show that the legislature regarded that exemptions granted to minors were in the nature of personal privileges, which should not enure for the benefit of a bare transferee. In my opinion, therefore, the Appeal fails and must be dismissed. I agree with the order of my learned brother.

K.R.

APPELLATE CIVIL.

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

1919, February, 12.

THE RAJA OF PITTAPURAM (EIGHTH CLAIMANT), APPELLANT,*

v.

THE REVENUE DIVISIONAL OFFICER, COCANADA (REFERRING OFFICER), RESPONDENT.

Land Acquisition Act (I of 1894)—Acquisition of lands for building purposes—Wet lands in a zamindari—Occupancy rights of tenants, included—Valuation of lands, mode of—Interests of zamindar and tenant, how valued—Apportionment of compensation—Land, whether to be valued merely as wet lands or as house-site.

Where wet lands in a zamindari are acquired by the Government under the Land Acquisition Act for extension of the village-site, the lands have to be valued in the first instance including all interests in it, and the amount so

* Appeal No. 171 of 1918.

THE RAJA OF PITTAPURAM v. THE REVENUE DIVISIONAL OFFICER, COCANADA.

ascertained has then to be apportioned among the parties interested, according to their interests.

The proper way of valuing lands with *occupancy* rights is to ascertain what would be their market value if they were put to the most lucrative use, having regard to their condition, and when they are acquired for building purposes they ought to be valued as building-sites and not merely as wet lands; the fact that neither the landlord nor the tenant can utilize the lands for building purposes without the concurrence of the other, does not make any difference.

Collector of Belgaum v. *Bhima Rao* (1908) 10 Bom. L.R., 657; and *Collector of Dacca* v. *Hari Das Bysak* (1912) 14 I.C., 163, followed.

Raja of Pithapur v. *The Revenue Divisional Officer, Cocanada*, Appeals Nos. 371 and 372 of 1916 (unreported), dissented from.

APPEAL against the award of J. C. FERNANDEZ, the District Judge of Gōdāvari at Rajahmundry, in Original Petition No. 161 of 1916.

Certain zamindari lands in which the tenants had occupancy rights were acquired by the Government under the Land Acquisition Act for purposes of extension of the village-site. The Revenue Divisional Officer awarded compensation in favour of the zamindar and the tenants respectively; but in doing so, he valued the zamindar's interest on the basis of twenty years' purchase of the rent less proportionate peshkash, and further he valued the lands for purposes of compensation merely as wet lands not as lands fit for building sites. In this respect he purported to follow the rulings of the Madras High Court in *Raja of Pithapur* v. *The Revenue Divisional Officer, Cocanada*(1) and that of the Allahabad High Court in the case of *Secretary of State for India in Council* v. *Abdul Salam Khan*(2). The Zamindar and the tenants objected to the valuation of the lands. They applied to the Revenue Divisional officer that the award should be referred to the District Judge for adjudication by him. On the reference, the District Judge enhanced the compensation in favour of some of the tenants, and dismissed the petition of the zamindar holding against him as regards the points raised by him as to the mode of valuation. The zamindar preferred this appeal to the High Court against the decision of the District Judge.

A. Krishnaswami Ayyar for appellants.

The Government Pleader (*V. Ramesam*) for respondents.

(1) Appeals Nos. 371 and 372 of 1916 (unreported).

(2) (1915) 37 All., 347.

THE RAJA OF PITTAPURAM v. THE REVENUE DIVISIONAL OFFICER, COCANADA.

WALLIS, C.J.

The Court delivered the following JUDGMENT:—

WALLIS, C.J.—We think the correct rule in cases like this has been laid down by Sir LAWRENCE JENKINS in *Collector of Belgaum* v. *Bhima Rao* (1), viz., the land to be acquired has to be valued in the first instance including all interests in it, and that the amount so ascertained has then to be apportioned among the parties interested according to their interests. This was followed by BATCHELOR, J., in *Bombay Improvement Trust* v. *Jalbhoy* (2): Similarly it was held in Calcutta in *Collector of Dacca* v. *Hari Das Bysak* (3) that the proper way of dealing with lands like this is in the first instance to leave out of consideration the value of the occupancy rights, and to ascertain what would be the market value of the land if it were put to the most lucrative use, having regard to its condition, etc., the value of the occupancy-rights of the tenants settled on the land being left to be ascertained afterwards. The fact that neither the landlord nor the tenant can utilize the land for building purposes without the concurrence of the other makes no difference. The difference between the market value and the value of the tenant's interest represents the landlord's interest. These authorities are not referred to in the judgment in *Raja of Pithapur* v. *The Revenue Divisional Officer, Cocanada* (4) to which the District Judge has referred. We must set aside the award in so far as it relates to the appellant and remand the case for disposal according to law. Costs will abide the result.

K.R.

(1) (1908) 10 Bom. L.R., 657. (2) (1909) I.L.R., 33 Bom., 483.
(3) (1912) 14 I.C., 163.
(4) Appeals Nos. 371 and 372 of 1916 (unreported).

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The United Provinces Code.

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I.—THE INDIAN STATUTE-BOOK.

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Chronological Tables of the Indian Statutes, Vol. I, 1917. Royal 8vo, cloth. Rs. 4. (As. 7.)

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The Central Provinces Code, 4th Edn., 1918. Royal 8vo, cloth. Rs. 4 as. 8. (As. 8.)

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

Acts (Unrepealed) of the Governor-General of India in Council from 1917 up to date.
Regulations made under the Statute 33 Vict., Cap. 3, from 1917 up to date.
Ordinances of the Governor-General of India from 1917 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 VIII of 1873 (Northern India Canal and Drainage), as modified up to 1st December 1917. As. 9 (Anna 1.)
Act VIII of 1878 (Sea Customs), as modified up to 1st August 1918. Royal 8vo; stitched. Re. 1 as. 6 (As. 2 p. 6.)
Act VIII of 1911 (Indian Army), as modified up to 1st August 1918. As. 14 (As. 2.)

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

Act I of 1917 (Inland Steam Vessels). In Urdu. Anna 1 Pies 6. (Anna 1.)
Act I of 1917 (Inland Steam Vessels). In Nagri. Anna 1 Pies 6. (Anna 1.)
Act II of 1917 (Motor Spirit Duties). In Urdu. Pies 3. (Anna 1.)
Act II of 1917 (Motor Spirit Duties). In Nagri. Pies 3. (Anna 1.)
Act III of 1917 (Indian Defence Force). In Urdu. Pies 6. (Anna 1.)
Act III of 1917 (Indian Defence Force). In Nagri. Pies 6. (Anna 1.)
Act IV of 1917 (Indian Army Suspension of Sentences). In Urdu. Pies 3. (Anna 1.)
Act IV of 1917 (Indian Army Suspension of Sentences). In Nagri. Pies 3. (Anna 1.)
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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 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.)

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. 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 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. 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.)
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 [illegible]. (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 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 1916. In Nagri. As. 2 p. 6. (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.)

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

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.)
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.)

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

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 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.)
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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.)
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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.)
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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.)

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Act X of 1901 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
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Act II of 1902 [Cantonments (House-accommodation)]. In Nagri. Anna 1. (Anna 1.)
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Act VII of 1903 (Indian Works of Defence). In Urdu. Anna 1 p. 3. (Anna 1.)
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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.)
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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.)
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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.)

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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.)
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Act I of 1908 [Legal Practitioners (Amendment)]. In Urdu. Pies 3. (Anna 1.)
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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.)
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Act XIV of 1908 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
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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.)

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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.)
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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.)
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Act I of 1910 (Indian Press). In Urdu. Pies 6. (Anna 1.)
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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.)
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Act XIII of 1910 [Prisons (Amendment)]. In Urdu. Pies 3. (Anna 1.)
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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.)
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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.)
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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.)

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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.)
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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.)
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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.)
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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.)

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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.)
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Act VIII of 1914 (Indian Motor Vehicles). In Urdu. Pies 6. (Anna 1.)
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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.)
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Act XIV of 1914 [Post Office and Telegraphs (Amendment)]. In Urdu. Pies 3. (Anna 1.)
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Act XVI of 1914 [Indian Aircraft (Amendment)]. In Urdu. Pies 3. (Anna 1.)
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Act I of 1915 (Emergency Legislation Continuance). In Urdu. Pies 3. (Anna 1.)
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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 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.)

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Act II of 1916 (Defence of India Amendment). In Urdu. Pies 3. (Anna 1.)
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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.)
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Act X of 1916 (Enemy Trading). In Nagri. Pies 6 (Anna 1.)
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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 No. VIII of 1916 (Indian Legislative Councils Elections Inquiries). In Urdu. Pies 3. (Anna 1.)
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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.)

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Ordinance III of 1914 (Foreigners). In Nagri. Pies 3. (Anna 1.)
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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.)
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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.)

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their suits subsequently—Right of latter to rateable distribution against former —Priority.] Where a decree-holder having attached in execution of his decree a fund in Court belonging to his judgment-debtor, applied for payment of the amount before other decree-holders of the same judgment-debtor had obtained decrees in their suits, but the latter claimed rateable distribution of the fund along with the former. *Held*, that the attaching decree-holder was in law entitled to be paid the amount attached by him in priority to the others. *Katum Sahiba* v. *Hajee Batcha Sahib*, (1915) I.L.R., 38 Mad., 221, dissented from; *K. Tiruvengadial* v. *Tiruvenkadiah* (1903) 26 M.L.J., 364, followed.

Umma Venkataratnam & Co. v. *Adamji Usman & Co.* (1919) I.L.R., 42 Mad. 692

CIVIL PROCEDURE CODE (ACT V OF 1908), *sec.* 92—*Religious Endowments Act* (XX *of* 1863), *sec.* 14—*Sanction for suit—Trustees of a temple—Appointment of a trustee by a Devastanam Committee in bad faith—Suit, without sanction, by two trustees for declaration as to invalidity of appointment and for injunction—Maintainability of the suit—Jurisdiction of Civil Courts to question appointment.*] Two out of three trustees of a temple instituted a suit in a Subordinate Judge's Court for a declaration that the appointment by the Devastanam Committee of one of the defendants as a trustee in the place of a deceased trustee was invalid, and for an injunction to restrain him from interfering with the affairs and the property of the temple. The plaintiffs' trustees did not obtain sanction either under section 92, Civil Procedure Code, or section 14 of the Religious Endowments Act (XX of 1863). The defendants pleaded, inter alia, that the suit was not maintainable for want of sanction and that the Civil Courts could not question the appointment made by the committee. *Held*, that the suit was not maintainable for want of a sanction under section 92, Civil Procedure Code, and that a Civil Court can question an appointment of a trustee by a Devastanam Committee if it is not made reasonably or in good faith. *Per* ABDUR RAHIM, J., section 14 of the Religious Endowments Act (XX of 1863) did not apply to the present suit, as it was not a case of misfeasance, breach of trust or neglect of duty by a trustee.

Subramania Pillai v. *Krishnaswamy Somayajiar.* (1919) I.L.R., 42 Mad. 668

CONTRACT ACT (IX OF 1882), SEC. 74:—*See* Landlord and Tenant 654

ESTATES LAND ACT (I OF 1908), SEC. 3 (11):—*See* Landlord and Tenant 702

GUARDIANS AND WARDS ACT (VIII OF 1890)—*Petition under, whether only remedy for a father seeking custody of his child—Suit by father for custody of his minor child in ordinary Civil Courts of the mufassal, maintainability of.*] No mufassal Court has jurisdiction to entertain a suit by a father for the custody of his child. *Besant* v. *Narayaniah*, (1915) I.L.R., 38 Mad., 807, at p. 820 (P.C.), relied on. *Achratlal Jekisandas* v. *Chimanlal Parbhudas* (1916) I.L.R., 40 Bom., 600, not followed.

Sathi v. *Ramandi Pandaram* ... ... (1919) I.L.R., 42 Mad. (F.B.) 647

HINDU LAW:—*See* SPECIFIC RELIEF ACT (I OF 1877), SEC. 42.

INAM—*Resumption of,—Grant by Nabob for a mosque, services therein and feeding the poor—Confirmation by British Government—Misappropriation by trustees—Alienation by trustee on mortgage and on long lease—Performance of services on lower scale—Mosque kept in good repair—Power of Government to resume inam—Terms of confirmation, construction of—Suit by trustee against Secretary of State—Suit for declaration and possession—Limitation Act (IX of 1908), art. 14 or 144, applicability of.*] An inam, granted by the Nawab of the Carnatic in 1775 for the upkeep of a mosque, the performance of services and ceremonies therein and the feeding of travellers and the poor, was 'confirmed,' by the British Government, 'permanently so long as the service was performed.' Owing to persistent misappropriation of the income by the grantee's successors and alienations by some of them of two of the villages, included in the inam, one on a usufructuary mortgage in 1883 for thirty years and the other on a long lease of twelve years in 1894 for purposes not binding on the charity, the Government resumed the inam in 1903 and credited the assessment to its general revenues. It appeared however that the mosque was maintained in good repair, services and ceremonies were regularly performed there though on a smaller scale. The present trustee, disputing the power of the Government to resume the inam, sued in 1913 the Secretary of State for India in Council for a declaration that the resumption was invalid and for recovery of possession of the inam villages; the latter contended that the resumption was valid and that the suit was in any event barred by limitation under article 14 of the Limitation Act. *Held*, (1) that, as the charity did not fail altogether, the performance of the charity was not wholly discontinued and the alienations (mortgage and lease) did not *permanently* deprive the charity of the use of the property, the Government was not authorised, under the terms of the grant, to resume the inam in the circumstances of this case; and (2) that the resumption being a nullity and the suit being one for possession, it was not barred by limitation, as article 144 and not article 14 of the Limitation Act applied to the case. On a reasonable construction of the words of the grant, any default in the performance of services of however minor a character would not entitle the Government to resume the grant, but what was contemplated was that if the charity failed altogether or substantially as through the disappearance of the mosque or of persons who would resort to the institution for prayers, etc., or if the charity was entirely discontinued, then the Government would be entitled to resume the grant.

The Secretary of State for India in Council v. *Gulam Mahaboob Khan Sahib* (1919) I.L.R., 42 Mad. 673

INTEREST ACT (XXXII OF 1839)—*Award of interest, as damages, apart from the Act.*] The Interest Act (XXXII of 1839) is not exhaustive of all cases where interest is allowable. The Act while specifically allowing interest in all cases of "debts or sums certain payable at a certain time or otherwise" saves by its proviso other cases in which it is legally allowable. Where the suit was for a sum of money which would be payable to the plaintiff (a Muhammadan lady) as for her share on taking accounts of the business which was carried on by her father while he was alive and which was continued by her brothers, the defendants, after his death, wherein the

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amount due to the plaintiff was utilised by her brothers. *Held*, (1) that the proviso in the Interest Act applied to the case and (2) that 6 per cent interest was payable as damages on the amount due to the plaintiff. *Miller* v. *Barlow* (1871) L.R., 3 P.C.C., 783, and *Hurro Persaud Roy* v. *Shan Persaud Roy*, (1878) I.L.R., Calc., 654 (P.C.), followed; *Kamalammal* v. *Peerumeera Levvai Rowthen*, (1897) I.L.R., 20 Mad., 481, *Subramania Aiyar* v. *Subramania Aiyar and others*, (1908) I.L.R., 31 Mad., 250 and *Kalyan Das* v. *Maqbul Ahmad*, (1918) I.L.R., 40 All., 497 (P.C.), distinguished.

Abdul Safur Rowthen v. *Hamida Bivi Ammal* .. (1919) I.L.R., 42 Mad. 661

LANDLORD AND TENANT—*Cesses, legal and illegal—Charge for taking landlord's water 'rent' within sec. 3 (11), Estates Land Act (I of 1908)—Res judicata—'Competent to try such subsequent suit' in sec. 11, Civil Procedure Code (V of 1908), meaning of.*] The words "competent to try such subsequent suit" in section 11, Civil Procedure Code, refer to the competency of the Court which tried the previous suit to entertain the later suit *at the time of the institution of the previous suit*; and the fact that it was deprived of jurisdiction to try suits of the nature of the later suit after the institution but some time before pronouncing judgment in the previous suit does not make its decision any the less *res judicata*. Hence the decison of a Munsif's Court in a prior suit for rent operates *res judicata* in respect of a later suit for rent though, by reason of the Estates Land Act, the Munsif's Court was deprived of jurisdiction to try such suits after the institution but some time before pronouncement of judgment in the prior suit. *Kunji Amma* v. *Raman Menon*, (1892) I.L.R., 15 Mad., 494, explained; *Gopi Nath Chobey* v. *Bhagwat Pershad*, (1884) I.L.R., 10 Calc., 697, and *Raghunath Panjah* v. *Issur Chunder Chowdhry*, (1885) I.L.R., 11 Calc., 153, followed. A judgment does not cease to have the force of *res judicata*, simply because in other suits between the same parties the decision on the same point was different. A charge for taking water belonging to the landlord is 'rent' within section 3 (11), Estates Land Act, and it is not an enhancement of rent even if not consolidated with the rent proper. *Thayammal* v. *Muttia* (1887) I.L.R., 10 Mad., 282, followed. Where such water is taken with the permission of the landlord only a suit for rent therefor can be brought and no suit for compensation for taking it will lie. Where for water so taken even for dry crops the landlord was for long time levying and the tenant was paying the same rent as for water taken for paddy cultivation (*sarasari*) it is reasonable to charge rent at that rate whenever water is taken for dry crops. A landlord is entitled to levy only such cesses as have a direct or proximate bearing on the purposes for which a land is let and mere length of payment will not give a cess which is purely voluntary or illegal a binding character, e.g., *Mahimai*, a cess for payment to a village temple; *Sriparapu Ramanna* v. *Mallikarjuna Prusada Nayudu*, (1894) I.L.R., 17 Mad., 43, and *Vadamalai Thiruvanatha Sevuga Pandia Thevar* v. *Sankaramoorthi Naidu*, (1919) I.L.R., 42 Mad., 197, followed. Cesses for purposes which are beneficial to both the landlord and tenant can be deducted out of the gross produce, such as *kulavettu* (a cess for repair of irrigation sources) and *Palaswatantram* (a

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cess for payment to village artisans and servants). No cess for superintending a harvest (*Kanganam*) can be claimed where the landholder is entitled to get a fixed rent irrespective of the produce.

Venkatachalam Chetty v. *Aiyanperumal Tevan* ... (1919) I.L.R., 42 Mad., 702

LANDLORD AND TENANT—*Stipulation in lease deed for notice prior to exercise of right of pre-emption of leasehold right—Clause of forfeiture of lease and right to re-enter on breach of covenant—Contract Act (IX of 1872), sec. 74, applicability of—Transfer of Property Act (IV of 1882), ss. 111 (g) and 117, applicability of—Relief against forfeiture, whether grantable.*] Where a *mulgani* lease provided for previous notice to the lessor in case of any intended sale or mortgage of the leasehold interest by the lessee and for forfeiture of lease and re-entry on breach of the covenant. *Held*, that section 74 of the Indian Contract Act did not apply, that Courts had no power to relieve against the forfeiture and that the lessor was entitled to possession on breach of the covenant; *Held* further that by reason of the prohibition in section 117 of the Transfer of Property Act, section 111 (g) of the Act did not in terms apply but that the principles of the Courts of Equity embodied in section 111 (g) applied to the case.

Krishna Shetti v. *Gilbert Pinto* ... ... (1919) I.L.R., 42 Mad. 654

LIMITATION ACT (IX OF 1908), ART. 12 OR 144—*See* INAM 675

——————————ARTS. *113 AND 143—Deed of exchange—Express covenant—Transfer of Property Act (IV of 1882), sec. 119—Implied covenant—Breach of covenant—Dispossession of plaintiff—Suit for recovery of possession of plaintiff's lands—Suit filed more than three years after but within twelve years of dispossession, whether barred.*] Where a deed of exchange executed in 1908 between the plaintiff's father and some of the defendants contained a covenant, which only limited the option provided by section 119 of the Transfer of Property Act and was otherwise of the same nature as one that would be implied under that section, and the plaintiff, being dispossessed in 1908 of the lands given by the defendants, sued in 1916 to recover the lands given by his father under the exchange, and the defendants pleaded the bar of limitation. *Held*, that article 143 and not article 113 of the Limitation Act applied to the case, and that the suit was in time.

Sreenivasa Ayyangar v. *Johnsa Rowther* ... (1919) I.L.R., 42 Mad. 690

MALABAR LAW—*Tarwad—Separate maintenance—Male member, leaving tarwad house to live with his wife—Right of such member to separate maintenance—Menchilavu, claim for, whether on a higher footing than one for maintenance.*] A male member of a Malabar tarwad, leaving the tarwad house for the purpose of living with his wife, is entitled to separate maintenance from the tarwad. A claim to *menchilavu* is on the same footing as a claim to maintenance.

Govindan Nair v. *Kunju Nair* .. .. (1919) I.L.R., 42 Mad. 686

PROVINCIAL INSOLVENCY ACT (III OF 1907), SEC. 16 (2) (b)—*Effect of order of adjudication on institution of suits by creditors to set aside fraudulent alienations by insolvent.*] The effect of an order adjudicating a person an insolvent under

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section 16 (1) of the Provincial Insolvency Act is to vest the administration of his estate including the realization of his assets under the control of the Court. Hence after such an order a creditor (whether decree-holder or otherwise) is by section 16 (2) (b) of the Act prevented from instituting, without the leave of the Court of Insolvency, a suit to set aside a transfer made by the insolvent as being in fraud of creditors.

Vasudeva Kamath v. *Lakshminarayana Rao* ... (1919) I.L.R., 42 Mad. 684

RELIGIOUS ENDOWMENTS ACT (XX OF 1863):—*See* CIVIL PROCEDURE CODE, ACT V OF 1908, SS. 92 AND 14 668

RES JUDICATA:—*See* LANDLORD AND TENANT 702

SPECIFIC RELIEF ACT (I OF 1877), SEC. 42—*Hindu Law—Suit by a Hindu for a declaration that a will alleged to have been executed by another member of the family giving his widow power to adopt is forged—Maintainability of.*] A member of a Hindu family can maintain a suit under section 42 of the Specific Relief Act for a declaration that a will alleged to have been executed by another member of the family giving his widow power to adopt is a forgery. *Bobba Padmanabhudu* v. *Bobba Buchamma*, (1918) 35 M.L.J., 144, followed; *Sreepadam Venkataramanna* v. *Sreepadam Ramalakshmamma*, (1912) I L.R., 35 Mad., 592, not followed.

Surayya v. *Annapurnamma* ... ... (1919) I.L.R., 42 Mad. 699

TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 111 (g) AND 117:—*See* LANDLORD AND TENANT 654

——— s. 119:—*See* LIMITATION ACT (IX OF 1908), ARTS. 113 AND 143 690

APPELLATE CIVIL—FULL BENCH.

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

SATHI AND TWO OTHERS (DEFENDANTS NOS. 1 TO 3), APPELLANTS,

v.

RAMANDI PANDARAM (PLAINTIFF), RESPONDENT.*

1919, February, 3 and 18 and April, 22.

Guardians and Wards Act (VIII of 1890), petition under, whether only remedy for a father seeking custody of his child—Suit by father for custody of his minor child in ordinary Civil Courts of the mufassal, maintainability of.

No Mufassal Court has jurisdiction to entertain a suit by a father for the custody of his child.

Besant v. *Narayaniah*, (1915) I.L.R., 38 Mad., 807, at p. 820 (P.C.), relied on. *Achratlal Jekisandas* v. *Chimanlal Parbhudas* (1916) I.L.R., 40 Bom., 600, not followed.

SECOND APPEAL against the decree of M. G. KRISHNA RAO, Subordinate Judge of South Malabar at Calicut, in Appeal No. 22 of 1918, against the decree of B. VENKATA RAO, District Munsif of Alathur, in Original Suit No. 273 of 1916.

This was a suit by the plaintiff for the custody of his minor son, the third defendant, aged 3 years, against his wife, the first defendant, and her father, the second defendant, on the ground that the first defendant in collusion with the second defendant took away the third defendant from his custody and was permanently living in the second defendant's house. The defendants pleaded *inter alia* that the plaintiff ill-treated the first defendant, and had married a second wife, that it was not to the interests of the minor son to live with the plaintiff and that there was no collusion. The District Munsif dismissed the suit holding that it would be to the advantage of the minor to leave him in the custody of the mother. On appeal, the Subordinate Judge, holding that the minor's interests would be better served if he lived with his father, allowed the suit. The defendants preferred this appeal.

This Second Appeal coming on for hearing in the first instance before BAKEWELL and PHILLIPS, JJ., the Court made the following

* Second Appeal No. 905 of 1918.

SATHI v. RAMANDI PANDARAM.

ORDER OF REFERENCE TO A FULL BENCH.

The only question for determination is whether a suit by a father to recover possession of his minor child is maintainable in a Civil Court, or whether the sole remedy is by proceedings under the Guardians and Wards Act (VIII of 1890). In the latter case the procedure would be by application to the District Court under section 25 of the Act, and it has been held in *Dayabhai Raghunathdas* v. *Bai Parvati*(1) that this section is applicable to all guardians, and not only to guardians appointed by Court, but the Provincial Small Cause Courts Act distinctly recognizes a right of suit, for suits for the custody of a minor are not cognizable by a Court of Small Causes (article 37). It has been held that such a suit is maintainable both in this Court in *Krishna* v. *Reade*(2) and in Bombay in *Sharifa* v. *Munekhan*(3), but a contrary view has been taken in Allahabad; *Sham Lal* v. *Binda*(4). It is now argued that the decision of the Privy Council in *Besant* v. *Narayaniah*(5) has overruled the Madras and Bombay decisions, but this proposition has been distinctly negatived in *Achratlal Jekisandas* v. *Chimanlal Parbhudas*(6). The argument is based on the statement of the Privy Council in *Besant* v. *Narayaniah*(5) that the District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. The previous passage, which we quote below, also supports the contention:—

"The real question was whether he was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education. Again, it was not and could not be disputed that the letter of 6th March 1910 was in the nature of a revocable authority. The real question was whether in the events which had happened the plaintiff was at liberty to revoke it. Both questions fell to be determined having regard to the interests and welfare of the infants, bearing in mind, of course, their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants, and in their presence."

(1) (1915) I.L.R., 39 Bom., 438. (2) (1886) I.L.R., 9 Mad., 31.
(3) (1901) I.L.R., 25 Bom., 574. (4) (1904) I.L.R., 26 All., 594.
(5) (1915) I.L.R., 38 Mad., 807, 820 (P.C.). (6) (1916) I.L.R., 40 Bom., 600.

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From this it would appear that in the opinion of their Lordships, the District Court had only jurisdiction under Act VIII of 1890 so far as the case under reference was concerned, but they do not appear to have specifically decided the question of whether any suit like the present one is maintainable in a Civil Court.

We may point out that the decision in *Krishna* v. *Reade*(1) was under Act IX of 1861, which was held to be an enabling Act only, and that Act VIII of 1890 is a consolidating and amending Act although in other respects the provisions appear to be the same; also that the actual decision in *Achratlal Jekisandas* v. *Chimanlal Parbhudas*(2) was based on the fact that the father never had custody of the child, but it has been held by this Court in *Ibrahim Nachi* v. *Ibrahim Sahib*(3) that this fact does not prevent the application of section 25 of the Act of 1890. Section 25 does not expressly state whether the procedure thereunder should be by plaint or petition when no application has been made for the appointment or declaration of a guardian by the Court.

In view of the apparent conflict between the decision in *Krishna* v. *Reade*(1), and the recent *dictum* of the Privy Council, we think it advisable to refer to a Full Bench the question—

"Whether a Mufassal Court other than a District Court has jurisdiction to entertain a suit by a father for the custody of his child."

ON THIS REFERENCE

P. G. Krishna Ayyar for the appellants.—A *suit* by a father in ordinary Civil Courts for the custody of his minor child does not lie; the only remedy is a petition to the District Court under the Guardians and Wards Act—*Besant* v. *Narayaniah*(4). No such suit lay under the previous Act IX of 1861—*Mussamat Harasundari Baistabi* v. *Jayadurga Baistabi*(5). The decision in *Krishna* v. *Reade*(1), which is against this view, is based upon section 11 of the Civil Procedure Code of 1877, whereas section 9 of the Guardians and Wards Act of 1890 impliedly vests such jurisdiction only in District Courts. This

(1) (1886) I.L.R., 9 Mad., 31. (2) (1916) I.L.R., 40 Bom., 600.
(3) (1916) I.L.R., 39 Mad., 603. (4) (1915) I.L.R., 38 Mad., 807 at p. 820 (P.C.).
(5) (1870) 4 B.L.R., Ap. 36.

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Act of 1890 is a consolidating and complete code. Referen was made to *Ibrahim Nachi* v. *Ibrahim Sahib*(1), *Sham Lal* v. *Bindo*(2), and *Utma Kuar* v. *Bhagwant Kuar*(3).

C. V. Anantakrishna Ayyar for the respondent.—Prior to Act IX of 1861 Civil Courts entertained such suits—*Annie Besant* v. *Narayaniah*(4). The right by way of petition under the Guardians and Wards Act is not an exclusive right. The case of *Besant* v. *Narayaniah*(5) is distinguishable owing to its special facts; viewed as a suit the suit was wrongly brought in a higher Court, viz., the District Court; viewed as a petition under the Guardians and Wards Act, the petition to the District Court was incompetent as the minors were not then living under its jurisdiction but were living in England; and nowhere in that judgment does the Privy Council hold that such a suit in ordinary Civil Courts in the mufassal will not lie. The existence of concurrent jurisdictions will not result in any clash of jurisdictions, as when once an order of guardianship under the Act is made by the District Court, it vacates the guardianship of everybody else; see section 7 (2) and (3). A consolidating Act only collects various existing Acts and does not put an end to any existing right outside the Acts; whereas a codifying Act does; see Wharton's Law Lexicon, page 184. The Act of 1890 is only a consolidating Act; that a right of suit exists is clear from clause 37 of the second schedule of the Provincial Small Cause Courts Act; see also Trevelyan on Minors, page 189. Section 25 of the Guardians and Wards Act does not apply to a father; and even if it does, it does not take away the right of suit or the right to apply for *Habeas Corpus*. In England the common law right of suit for detinue in such cases has not been taken away though the summary remedy by way of petition being cheaper is usually resorted to—*The Queen* v. *Maria Clarke*(6), *Rex* v. *Smike*(7), Simpson on Infants, page 363, *Achratlal Jekisandas* v. *Chimanlal Parbhudas*(8). Section 52 of

(1) (1916) I.L.R., 39 Mad., 608, at pp. 610, 611.
(2) (1904) I.L.R., 26 All., 594. (3) (1915) I.L.R., 37 All., 515.
(4) (1913) 25 M.L.J., 661, at p. 682.
(5) (1915) I.L.R., 38 Mad., 807, at pp. 814 and 816 (P.C.).
(6) (1857) 7 E. & B., 186; s.c. 119, E.R., 1217.
(7) (1857) 2 Strange, 982-93; s.c. E.R., 983.
(8) (1916) I.L.R., 40 Bom., 600, at p. 604.

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the Guardians and Wards Act recognizes the right of other Courts to appoint. The present relief, viz., custody of a child of 3 years cannot be obtained by a petition under section 25 of the Act; see section 19. But even if the father is a guardian for the purpose of section 25 and can get relief he is not bound to adopt that summary remedy giving up his right of suit; see *Kanhyal Lal* v. *National Bank of India, Ltd.*(1).

P. G. Krishna Ayyar in reply.—'Any Court of Justice' in section 25 means one having jurisdiction. The word 'Guardian' in the Act includes also uncertificated guardian—*Sitha Boi* v. *Radha Boi*(2). A father is a guardian within section 25. While several other rights are saved a right of suit is not saved by section 3. The reliefs prayed for in this suit are exactly similar to those prayed for in *Besant* v. *Narayaniah*(3).

The Court expressed the following

OPINION.

WALLIS, C.J.

WALLIS, C.J.—British Courts in India appear from the outset to have considered the right of the father or other persons entitled to the custody of a minor to be a civil right and enforceable as such by suit in a Civil Court. That this was a well-known kind of suit appears from the Guardians and Wards Act IX of 1861, which recited that it was expedient to amend the law for hearing suits relative to the custody and guardianship of minors, and provided that applications might be made by petitions to the principal Civil Court of Original Jurisdiction in the district by which such application if preferred in the form of a regular suit would be cognizable.

It was first held in Calcutta that the right of civil suit was taken away by this Act—*Mussamat Harasundari Baistabi* v. *Mussamat Jayadurga Baitabi*(4). No reasons were given for the decision, and the case was not followed in *Brahmomoyee* v. *Kashi Chundersen*(5). In *Krishna* v. *Reade*(6), this Court also held that the right of suit was not taken away by the Act of 1861, and this view is supported to some extent by the

(1) (1913) I.L.R., 40 Calc., 598, at p. 610 (P.C.).
(2) (1918) 36 M.L.J., 189.
(3) (1915) I.L.R., 38 Mad., 807 (P.C.).
(4) (1870) 4 B.L.R., Ap. 36. (5) (1882) I.L.R., 8 Calc., 266.
(6) (1886) I.L.R., 9 Mad., 31.

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Provincial Small Cause Courts Acts, 1887, which included in the schedule of suits excluded from the jurisdiction of the Small Cause Court—

"*Article* 37.—A suit for the restitution of conjugal rights, for the recovery of a wife, for the custody of a minor or for a divorce."

Act IX of 1861 and a large number of enactments relating to the guardianship of minor's property were repealed and re-enacted with modifications by the Guardians and Wards Act, 1890. It did not purport to be a codifying but a *consolidating* Act, which is a very different thing, and did not, as far as I can see, make any very material alterations in the provisions of Act IX of 1861 as to the guardianship of the person. It was held however in *Sham Lal* v. *Bindo*(1) to have been a codifying Act and to have taken away the right of proceeding by regular suit in Civil Courts to recover the custody of minors. A different view was taken in *Sharifa* v. *Munekhan*(2), where however the point was not considered to be free from doubt. Then came the decision of the Privy Council in *Besant* v. *Narayaniah*(3). The plaintiff in that case had filed a suit in the District Court of Chingleput against the defendant, Mrs. Besant, who resided within that jurisdiction, for declarations that he was entitled to the guardianship and custody of his two minor sons, and that the defendant was not entitled and was in any case unfit to have the charge and guardianship of the minors, and for a direction to the defendant to hand them over to him or to such person as the Court might think fit. The minors, one of whom was nearly eighteen, were residing and being educated in England at the date of the suit.

The Privy Council held that the suit, which was a suit to recover the custody of the infants, did not lie in the District Court, and observed:

"The District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890."

The question for decision was whether a civil suit not under the Guardians and Wards Act would lie in the Civil Court. The Privy Council held that it would not, and assigned as the sole

(1) (1904) I.L.R., 26 All., 594. (2) (1901) I.L.R., 25 Bom., 574.
(3) (1915) I.L.R., 38 Mad., 807 (P.C.).

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but sufficient reason for so holding the fact that the District Court had no jurisdiction in the case except under the Guardians and Wards Act. This I feel bound to construe as a ruling that the jurisdiction conferred by the Guardians and Wards Act was exclusive, and that the right of proceeding independently by civil suit no longer existed. The suit having been held incompetent, their Lordships proceeded to consider whether the proceedings could be supported if treated as proceedings under the Guardians and Wards Act, and held they could not because the minors were not resident in the district where the proceedings were instituted. If the jurisdiction of the District Court to entertain suits of this character not governed by the Guardians and Wards Act had been recognized as still existing to any extent, it would have been necessary to assign reasons for holding that it was inapplicable in the circumstances of the case. The judgment did not do so, but dismissed the suit simply on the ground that the Court had now no jurisdiction except under the Act. If this is the position of the District Court, the position of the District Munsif's Court must be the same. In *Achratlal Jekisandas* v. *Chimanlal Parbhudas*(1) it was no doubt held that the judgment of the Privy Council has not this effect, but no reasons were given for that decision, and I have been unable to find any which are satisfactory to my mind. I would answer the question in the negative.

AYLING, J.

AYLING, J.—I agree. The judgment of the Privy Council in *Besant* v. *Narayaniah*(2) appears to me to be open to no other construction.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I agree and for the same reasons.

N.R.

(1) (1916) I.L.R., 40 Bom., 600. (2) (1915) I.L.R., 38 Mad., 807.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Napier and Mr. Justice Kumaraswami Sastri.

1918, December, 1919, January, 6.

KRISHNA SHETTI (APPELLANT), PLAINTIFF,

v.

GILBERT PINTO AND OTHERS (DEFENDANTS Nos. 2 TO 7), RESPONDENTS.*

Landlord and tenant—Stipulation in lease deed for notice prior to exercise of right of pre-emption of leasehold right—Clause of forfeiture of lease and right to re-enter on breach of covenant—Contract Act (IX of 1872), sec. 74, applicability of—Transfer of Property Act (IV of 1882), ss. 111 (g) and 117, applicability of—Relief against forfeiture, whether grantable.

Where a *mulgeni* lease provided for previous notice to the lessor in case of any intended sale or mortgage of the lease hold interest by the lessee and for forfeiture of lease and re-entry on breach of the covenant,

Held that section 74 of the Indian Contract Act did not apply, that Courts had no power to relieve against the forfeiture and that the lessor was entitled to possession on breach of the covenant;

Held further that by reason of the prohibition in section 117 of the Transfer of Property Act, section 111 (g) of the Act did not in terms apply but that the principles of the Courts of Equity embodied in section 111 (g) applied to the case.

APPEAL under clause 15 of the Letters Patent against the judgment of SADASIVA AYYAR, J. (BAKEWELL, J., dissenting), in Second Appeal No. 92 of 1916 against the decree of B. C. SMITH, the acting District Judge of South Kanara, in Appeal Nos. 64 and 67 of 1915, preferred against the decree of S. VENKATASUBBA RAO, the District Munsif of Mangalore, in Original Suit No. 410 of 1913.

This was a suit by a lessor of a *mulgeni* (permanent) lease against the lessee and alienees from him for recovery of the leased land and for arrears of rent under the following circumstances: the lessor (the plaintiff) who was himself a *mulgeni* lessee let the land on *mulgeni* lease in April 1909 to one Ramappa Achari at an annual rent of Rs. 22-8-0. There was a small tiled building on the agricultural holding and it was sold by the plaintiff to the lessee, Ramappa Achari, for Rs. 81-4-0

* Letters Patent Appeal No. 103 of 1917.

which the plaintiff received. There was a forfeiture clause in the lease deed in the following terms:—

In case I (the lessee) or my representatives are obliged to mortgage or sell my *mulgeni* right in respect of the said land as well as the existing house belonging to me and also the improvements effected hereafter, we shall first inform you (the lessor) and your daughters after you, giving a written notice. If you fail to act in accordance with the said notice or if a reply is not given thereto, we will effect the alienation through mortgages, etc., to others as we like. The alienations which I or my representatives may effect in contravention hereto shall immediately be void and neither I nor my representatives shall raise any right or objection to your or to your daughters taking possession of and enjoying the said land inclusive of improvements.

The widow and heir of Ramappa Achari sold her *mulgeni* right to the first defendant on 30th November 1911, the plaintiff having consented to such transfer and having attested the transfer deed. Then the first defendant transferred his rights to the second defendant in March 1912 and the second defendant sold his rights in September 1913 to the third defendant. Prior notice was not given of either of these later transfers to the plaintiff. The second defendant built a rice factory worth about Rs. 2,000 on the site. Under these circumstances the plaintiff sued to recover the site and arrears of rent with the rice factory building on it without paying any compensation. The defendants pleaded *inter alia* that the plaintiff was under the terms of the lease deed only entitled to rent, that he was not entitled to eject the defendants for want of notice of sales effected, that the forfeiture ought to be relieved against by payment of compensation and that if the defendants ought to be ejected they must be given the value of the rice factory or be allowed to remove the superstructure. The District Munsif gave a decree for the plaintiff for possession and arrears of rent. On appeal the District Judge holding that the plaintiff was not entitled to forfeit the lease and recover possession of the property, gave a decree only for arrears of rent and damages. On appeal by the plaintiff to the High Court, SADASIVA AYYAR, J., confirmed the District Court's decree, while BAKEWELL, J., confirmed the Munsif's decree. The plaintiff filed this appeal under clause (15) of the Letters Patent.

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B. Sitarama Rao for the appellant.—Under the terms of the lease, the plaintiff was entitled to put an end to the lease as forfeited on breach of the covenant and became entitled to possession. Courts cannot relieve against any forfeiture incurred in a lease except that for non-payment of rent. That was the law always in England. Even when the Conveyancing Act, 44 and 45 Vict., c. 41, of 1881, introduced reliefs against forfeiture in various instances, a forfeiture of this kind was exempted; see *Peachy* v. *Duke of Somerset*(1), *Hill* v. *Barclay*(2), *Barrow* v. *Isaacs and Son*(3), *Eastern Telegraph Company* v. *Dent*(4), though all forfeitures can be relieved against, if there be fraud, accident, surprise or mistake. Even in India it was only forfeiture for non-payment of rent that was relieved against, see *Kothal Uppi* v. *Edavalath Thathan Nambudri*(5) *and Appayya Shetty* v. *Mahammed Beari*(6), and no relief was afforded in cases of forfeiture by alienation when the lease contained a clause for re-entry; see *Subbaraya* v. *Krishna*(7). *Parameshri* v. *Vittappa Shambaga*(8), *Vyankatraya* v. *Shivrambhat*(9) and *Tamaya* v. *Timapa Ganapaya*(10). Even a permanent lease can be forfeited for failure to observe conditions other than payment of rent; see *Abhiram Goswami* v. *Shyama Charan Nandi*(11). Forfeiture was enforced in several cases before; see *e.g. Pattabhiramier* v. *Venkatarow*(12). Section 74 of the Contract Act does not apply. Though section 117 of the Transfer of Property prohibits the application of sections 106 to 116, yet those sections embody the principles laid down by Courts of Equity in the abovementioned cases and hence the principle of forfeiture embodied in section 111 (*g*) of the Transfer of Property Act should be applied.

K. P. Lakshmana Rao for the respondent.—Under the early English law forfeiture in any case was relieved against; see *Saunders* v. *Pope*(13). Section 117 of the Transfer of Property

(1) (1724) 2 White and Tudor, 255.
(2) (1811) 18 Ves., 56.
(3) (1891) 1 Q.B., 417, 425.
(4) (1899) 1 K.B., 835.
(5) (1871) 6 M.H.C.R., 258.
(6) (1916) I.L.R., 39 Mad., 834.
(7) (1883) I.L.R., 6 Mad., 159, at p. 161.
(8) (1903) I.L.R., 26 Mad., 157, at pp. 161, 162.
(9) (1883) I.L.R., 7 Bom., 256.
(10) (1883) I.L.R., 7 Bom., 262.
(11) (1909) I.L.R., 36 Calc., 1003, at p. 1015.
(12) (1870) 13 M.I.A., 53.
(13) (1803) 12 Ves., 282.

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Act prohibits the application of sections 106 to 116 to agricultural leases; hence neither section 111 (*g*) nor its principle should be applied. Section 74 of the Indian Contract should be applied. The word 'penalty' in that section is not confined to 'money'; see *Raja of Ramanad* v. *Selachami Tevar*(1), *Muthukrishna Iyer* v. *Sankaralingam Pillay*(2). In cases of breaches of conditions of lease return of the leased property alone may not be a penalty but if something more, such as improvements, etc., is to be lost, then the condition will be a penalty; see *Subbaraya* v. *Krishna*(3), *Kilmer* v. *British Columbia Orchards Lands, Ltd.* (4).

WALLIS, C.J.

WALLIS, C.J.—This is a letters patent appeal from the decision of SADASIVA AYYAR, J., who held (BAKEWELL, J., dissenting) that the Court has power to relieve against a provision in a mulgeni or permanent lease, a form of agricultural lease in use in South Kanara, for re-entry by the landlord on breach of a covenant or condition against any alienation by the lessee of his mulgeni right except in the manner therein provided. The lease, which is inartistically drawn, provides in substance that, if the lessee or his representatives have to sell or mortgage their mulgeni right, they are first to give a written notice to the lessor or his heirs, and, if they fail to act on it or to reply thereto, the lessee is to be free to make the alienation, but that alienations in contravention of these provisions are to be void, and the lessor is to be at liberty to re-enter and enjoy the land inclusive of improvements. This we read as meaning that the lessee is to give notice to the lessor of the terms of any transaction which he proposes to effect by way of sale or mortgage of his mulgeni right, and that the lessor is then entitled to become himself the purchaser or mortgagee on those terms, and as in fact conferring a right of pre-emption.

Two questions arise in the case, whether the Court has any general jurisdiction to relieve in a case of this kind, and if not, whether such jurisdiction has been conferred upon it by the amendment to section 74 of the Indian Contract Act.

As regards the first question, it is well settled that a Court of Equity could not relieve against the right of re-entry or

(1) (1916) 2 M.W.N., 247.
(2) (1913) I.L.R., 36 Mad., 229 (F.B.).
(3) (1883) I.L.R., 6 Mad., 159.
(4) (1913) A.C., 319.

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forfeiture under any provision or stipulation in a lease for a breach of any covenant in the lease except the covenant for payment of rent. The history of this question is most lucidly explained by KAY, L.J., in *Barrow* v. *Isaacs and Son*(1) :

"Courts of Equity," he says, "assumed jurisdiction to relieve against forfeitures and penalties where the only object was to secure payment of a definite sum of money, even though there was no fraud, accident, surprise or mistake. On this principle it relieved against the payment of the whole penalty on a money bond before the Statutes of 4 & 5 Anne, chapter XVI, sections 12 and 13 and 8 and 9 Wm. 3, chapter II, which enabled the Courts of Law to give the same relief. Also against forfeiture for non-payment of rent, and by statute 4 Geo. 2, c. 28, its powers in this respect were somewhat restricted by limiting the time for their exercise to six months after execution in ejectment. At first there seems to have been some hesitation whether this relief might not be extended to other cases of forfeiture for breaches of covenants such as to repair, to insure, and the like where compensation could be made, but it was soon recognized that there would be great difficulty in estimating the proper amount of compensation and since the decision of Lord ELDON in *Hill* v. *Barclay*(2) it has always been held that equity would not relieve, merely on the ground that it could give compensation upon breach of any covenant in a lease except the covenant for payment of rent. But of course this left unaffected the undoubted jurisdiction to relieve in case of breach occasioned by fraud, accident, surprise or mistake."

The law, as here laid down, has been reproduced in the Transfer of Property Act which provides expressly in section 111 that a lease of immovable property determines "(*g*) by forfeiture, that is to say (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter, or the lease shall become void" and only gives power to relieve against such determination by forfeiture for non-payment of rent (section 114). It is noteworthy that the Indian Legislature preferred to adhere to the old law in this respect, and did not adopt the provisions of section 14 of the Conveyancing Act of 1881 which was followed in several other sections. Section 14 of that Act imposes restrictions on and confers powers of relief against forfeitures of leases generally and not merely as regards

(1) (1891) 1 Q.B., 417, at p. 425. (2) (1811) 18 Ves., 56, at p. 64.

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forfeitures for non-payment of rent, but it leaves the law as it was before with regard to cases such as the present, because it provides in sub-section (6) that the section does not extend

"to a covenant or condition against the assigning, underletting, parting with the possession or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest."

This section gives the English Courts power to relieve against stipulations which were not regarded by Courts of Equity as stipulations by way of penalty because they were not intended to secure the repayment of money; but it did not interfere with provisions such as the present, designed to prevent transfer of the land to third parties against the landlord's will. As observed by Lord ELDON in *Hill* v. *Barclay*(1) as regards a covenant of this kind :

"It is sufficient that the lessor insists upon his covenant; and no one has a right to put him in a different situation,"

a view to which the legislature has adhered in sub-section 6 of section 14 of the Conveyancing Act.

Such a covenant in my opinion cannot properly be regarded as a stipulation by way of penalty, and it is therefore unnecessary to decide whether provisions in leases for re-entry for breaches of other covenants in the lease can be regarded as coming within section 74, Indian Contract Act, as amended. Section 74 in its present form provides that—

"when a contract has been broken if a sum is named in the contract as the amount to be paid in case of such breach or if the contract contains any other stipulations by way of penalty the party complaining of the breach is entitled, whether or not actual damages or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or as the case may be, the penalty stipulated for."

This amendment and the decisions which gave rise to it have been very fully discussed in *Natesa Iyer* v. *Appavu Padayachi*(2) where it is pointed out that the word 'penalty' was first inserted in the Contract Act in 1899 by this amendment and is not defined in the Act. Equity as we have seen, only considered stipulations in contracts penal which were intended to secure

(1) (1811) 18 Ves., 56, at p. 64. (2) (1910) I.L.R., 33 Mad., 375.

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the payment of money, and it may be questioned whether the term has a more extended meaning in this section, which was designed to abolish, so far as India is concerned, the distinction between stipulations for liquidated damages and stipulations for pecuniary payments by way of penalty, and which speaks of the party complaining of the breach receiving reasonable compensation not exceeding the amount named or the penalty stipulated for, and whether it can be construed as affecting the express provisions of section 111 of the Transfer of Property Act which makes leases determinable by virtue of provisions for re-entry on breach of covenant.

The fact that agricultural leases such as this one are excepted from the operation of sections 105 to 116 of the Transfer of Property Act does not in my opinion affect the present question. The Act was framed by eminent English lawyers to reproduce the rules of English Law, in so far as they are of general application and rest on principle as well as authority and its provisions are in my opinion binding on us as rules of justice, equity and good conscience when we have to deal with agricultural leases in the absence of any special reason for not applying them. The legislature wisely in my opinion, if I may say so, has refrained from making these sections applicable *proprio vigore* to agricultural leases for fear of unnecessarily interfering with settled usages which it is undesirable to disturb. But in the absence of special reasons there is no ground for applying a different rule in the cases of agricultural leases and there are many decisions to that effect. For these reasons, I would allow the appeal and modify the decree of the District Judge by giving the plaintiff possession in addition to the reliefs already granted with costs throughout. Four months for removal of superstructure, etc.

NAPIER, J.

NAPIER, J.—I agree with the learned Chief Justice that section 74 of the Contract Act does not apply to the terms of the contract in this case. I cannot agree with SADASIVA AYYAR, J., that we can apply the principle on which the amendment to that section is based, as I think that we should be very careful in applying statutory provisions that are not in *pari materia*. For the same reason I would not seek the assistance of the Transfer of Property Act as a guide when we are applying

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equitable reliefs especially as in this case we are dealing with material that has been excluded from the purview of the Act by express words: vide section 117. The provisions as to forfeiture in the Transfer of Property Act do not coincide with those enacted in the Conveyancing Act which does apply to agricultural leases. There is, however, no statutory bar to our seeking guidance from English Law and I entirely agree with the learned Chief Justice that Courts of Equity would not grant relief in the present case. For these reasons I agree that the appeal should be allowed.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—I agree with the judgment of my Lord and have nothing to add.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1919, January, 9 and 16.

MUHAMMADEN ABDUL SAFFUR ROWTHER AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

HAMIDA BIVI AMMAL AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 3 AND 4), RESPONDENTS.*

Interest Act (XXXII of 1839)—Award of interest, as damages, apart from the Act.

The Interest Act (XXXII of 1839) is not exhaustive of all cases where interest is allowable. The Act while specifically allowing interest in all cases of "debts or sums certain payable at a certain time or otherwise" saves by its proviso other cases in which it is legally allowable.

Where the suit was for a sum of money which would be payable to the plaintiff (a Muhammadan lady) as for her share on taking accounts of the business which was carried on by her father while he was alive and which was continued by her brothers, the defendants, after his death, wherein the amount due to the plaintiff was utilized by her brothers,

Held, (1) that the proviso in the Interest Act applied to the case and (2) that 6 per cent interest was payable as damages on the amount due to the plaintiff.

Miller v. Barlow, (1871) L.R., 3 P.C.C., 733, and *Hurro Persaud Roy v. Sham Persaud Roy*, (1878) I.L.R., 3 Calc., 654 (P.C.), followed; *Kamalamma v. Peerumeera Levvai Rowthen*, (1897) I.L.R., 20 Mad., 481, *Subramania Aiyar v. Subramania Aiyar*, (1908) I.L.R., 31 Mad., 250, and *Kalyan Das v. Maqbul Ahmad*, (1918) I.L.R., 40 All., 497, distinguished.

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* Appeal No. 390 of 1917.

ABDUL SAFFUR ROWTHER v. HAMIDA BIVI AMMAL.

APPEAL against the preliminary decree of K. S KODANDARAMA AYYAR, Subordinate Judge of Tuticorin, in Original Suit No. 70 of 1916.

This was a suit for partition and accounts brought by a Muhammadan lady against her brothers and sisters, who were co-heirs to her deceased father who was carrying on a cloth trade and who died in 1911, leaving behind him valuable movable and immovable properties, the subject-matter of the suit. The plaintiff alleged that the share due to her was, in spite of her demand, not given to her, but was utilized by her brothers, defendants Nos. 1 and 2, in the trade which they continued to carry on after the father's death. The defendants Nos. 3 and 4 were the sisters of the plaintiff. The defendants, while admitting that the plaintiff's share was utilized in the trade, pleaded, *inter alia*, that the deceased never received any interest from his debtors, that the defendants Nos. 1 and 2 neither received nor paid any interest in their dealings with others and that the plaintiff was therefore not entitled to interest. The Subordinate Judge found that, though the deceased father did not receive any interest, the defendants were receiving and paying interest in their dealings and gave the plaintiff a decree for partition allowing 9 per cent interest on the amount that might be found due to her on taking accounts. Defendants Nos. 1 and 2 preferred this appeal.

The Hon. *T. Ranga Achariyar* (with *C. R. Subrahmanya Ayyar*) for the appellants.—Interest on the plaintiff's share of her father's assets cannot be given. The share is not a 'debt or sum certain' within the Interest Act; see *Kamalammal* v. *Peerumeera Levvai Rowthen*(1), *Subramania Aiyar* v. *Subramania Aiyar and others*(2), *Kalyan Das* v. *Maqbul Ahmad*(3), *Marian Beeviammal* v. *Kadiri Meera Sahib Taragan*(4), *London Chatham and Dover Railway Company* v. *South Eastern Railway Company*(5), *Gowri* v. *Naraina Muchinthaya*(6), *Ganesh Baksh* v. *Harihar Baksh*(7).

The Hon. *Advocate-General* (*S. Srinivasa Ayyangar* with *K. Raja Ayyar*) for the plaintiff, first respondent.—The section of the Interest Act does not apply, but its proviso applies

(1) (1897) I.L.R., 20 Mad., 481.
(2) (1908) I.L.R., 31 Mad., 250
(3) (1918) 40 All., 497, at p. 504 (P.C.)
(4) (1915) 29 I.C., 275
(5) (1893) A.C., 429, at p. 436.
(6) (1917) 45 I.C., 664.
(7) (1904) I.L.R., 26 All., 299 (P.C.).

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and interest can be awarded as damages in cases of unascertained sums by a Court of Equity and Indian Courts are Courts of Law and *Equity*; see also section 73 of the Contract Act. Even in *London Chatham and Dover Railway Company* v. *South Eastern Railway Company*(1), regret is expressed that interest is not allowed in England owing to a settled practice. There is no such settled practice in India—see Madras Civil Courts Act, section 16, *Miller* v. *Barlow*(2), *Hurro Persaud Roy* v. *Sham Persaud Roy*(3), *Lakshmi Narasimha* v. *Lakshmamma*(4), *Alagappa Chettiar* v. *Muthukumara Chettiar*(5), *Khetra Mohan Poddar* v. *Nishi Kumara Saha*(6), *Mohamaya* v. *Ram Khelawan*(7), *Ahmed Misaji Saleji* v. *Hashim Ebrahim Saleji*(8), *Chajmal Das* v. *Brij Bhukan Lal*(9), *Hamira Bibi* v. *Zubaida Bibi*(10), *The Collector of Ahmedabad* v. *Lavji Mulji*(11), *Fakir Mahammad* v. *Rangiah Goundan*(12), *Rudger* v. *The Comptor D'Es Compte De Paris*(13). Interest is payable also for another reason. My client was a minor at her father's death. The defendants Nos. 1 and 2 stand in fiduciary relation to the plaintiff whose money they have utilized. Section 88 of the Trusts Act applies—see its illustrations and sections 23 and 95; *Dolker* v. *Somers*(14); Lindley on Partnership, pages 631 and 632; Halsbury's Laws of England, volume 21, pages 37 to 40.

The Hon. *T. Ranga Achariyar* in reply.—Section 88 of the Trusts Act applies only if any advantage is gained. Section 23 of that Act will apply only if a trust is alleged and proved. One co-sharer is not bound to account to another; *Sivanarasa Reddi* v. *Duraiswami Reddi*(15). This case will not come under the proviso to the Interest Act; see *Caledonian Railway Company* v. *Carmichael*(16). The cases quoted by the other side were cases of fraud and wrongful detention which is not the case

(1) (1893) A.C., 429, at p. 436.
(2) (1871) L.R., 3 P.C.C., 733, at p. 750.
(3) (1878) I.L.R., 3 Calc., 654, at p. 660 (P.C.).
(4) (1913) 25 M.L.J., 531, at p. 534.
(5) (1918) I.L.R., 41 Mad., 316.
(6) (1915) 22 C.W.N., 488, at p. 490.
(7) (1911) 15 C.L.J., 685.
(8) (1915) I.L.R., 42 Calc., 914 (P.C.).
(9) (1895) I.L.R., 17 All., 511 (P.C.).
(10) (1916) I.L.R., 38 All., 581, at p. 588 (P.C.).
(11) (1911) I.L.R., 35 Bom., 255.
(12) (1913) 1 L.W., 181.
(13) (1871) L.R., 3 P.C., 465, at p. 476.
(14) (1834) 3 L.J. Ch. (N.S.), 200; s.c., 39 E.R., 1095.
(15) (1918) I.L.R., 41 Mad., 861, at p. 869.
(16) (1870) 2 Scotch Appeals, H.L., 56, at p. 66.

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here. Interest at 9 per cent is too much; 6 per cent is the usual rate.

E. S. Chidambaram Pillai and *P. N. Marthandam Pillai* for second and third respondents.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—This is a suit by a Muhammadan co-sharer for recovery of her share of her father's property from her brothers and sisters. The right of the plaintiff who was a minor to sue was denied in the Court below but has not been pressed before us. The only two points which Mr. T. Ranga Achariyar argued were: (1) whether the plaintiff is entitled to mesne profits upon the immoveable property and (2) whether she is entitled to interest upon her share of the assets of the partnership carried on by her father. On the first question it was pointed out to us that in the Court below there was no allegation that mesne profits were not payable. There is no issue upon the point, and there is no discussion in the judgment of the Court below about it. Issue 6 assumes that the plaintiff was entitled to mesne profits, and only raises the question of the deductions claimed by the defendants in their written statement. Under these circumstances we refused to allow the learned vakil to argue that point before us.

The second question has been argued elaborately by Mr. Ranga Achariyar for the appellant and by the learned Advocate-General for the respondent. We have come to the conclusion that the decree of the Court below is right though not for the reasons given by it. It is clear from the admissions in the written statement and from the evidence in the case that the share of the plaintiff in the firm's assets was utilized by the first and second defendants in the trade carried on by them and that profits were derived from that trade. The amount of profits alone had not been ascertained. The learned vakil for the appellant relied upon *Kamalammal* v. *Peerumeera Levvai Rowthen*(1), *Subramania Aiyar* v. *Subramania Aiyar and others*(2), *Kalyan Das* v. *Maqbul Ahmad*(3) and the earlier Madras cases and contended that as no notice of demand was made, no interest was allowable under Act XXXII of 1839. All of them were cases under the Act. In the first place it must be pointed out that the Interest Act is not

(1) (1897) I.L.R., 20 Mad., 481. (2) (1908) I.L.R., 31 Mad., 250.
(3) (1918) I.L.R., 40 All., 497 (P.C.).

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comprehensive of all claims to interest. Without going into details, it may be mentioned that the object of 3 & 4 Will., 42, s. 28, which was extended to India by Act XXXII of 1839 was to repeal the Usury laws relating to interest. Prior to the enactment of 3 & 4 Will. there was a law in the reign of Edward the Confessor which absolutely prohibited Courts from awarding interest in suits upon moneys lent. Attempts were made in the reign of Henry VIII to mitigate the rigour of this prohibition. 3 & 4 Will., c. 42, was enacted with a view to meet such a demand. It is clear from the language of the Act that the provisions dealt with only a particular class of cases, and enabled the Courts to give interest at the current rate under certain conditions. The framers were anxious that the right of interest, if any, otherwise possessed should not be interfered with by this enactment, and inserted the proviso to the effect that interest shall be payable "in all cases in which it is now payable by law." In India also ancient texts can be quoted to show that there was a prohibition against the taking of interest on moneys lent. One text of Manu exemplifies the abhorrence felt by the ancient sages on this question. Manu stated:

"Neither a Brahmin nor a Kshatria, though distressed, must receive interest on loans; but each of them, if he please, may pay a small interest permitted by law, on borrowing for some pious use, to the sinful man who demands it";

see Colbrooke's Digest, page 28. It looks as if when 3 & 4 Will. was extended to India, these provisions contained in the Hindu Law were kept in mind. It is therefore clear that the Interest Act is not exhaustive of the subject.

There is another difficulty in the way of applying the Interest Act to the present case. To attract its provisions the amount in dispute must be a debt or a certain sum payable at a certain time or otherwise. What is claimed now is a sum of money which on taking accounts would be payable to the plaintiff as her share. It was held in *Omrita Nath Mitter* v. *Administrator-General of Bengal*(1) that unless the amount is settled the Act is not applicable. In *London Chatham and Dover Railway Company* v. *South*

(1) (1898) I.L.R., 25 Calc., 54.

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Eastern Railway Company(1) a claim to payment under a building contract to be paid monthly on the certificate of the Engineer was held not to be a debt or sum certain if the amount was disputed; see also *Hill* v. *South Staffordshire Railway Company*(2). In *Ward* v. *Eyre*(3) it was held that a balance of account is not a sum certain within 3 & 4 Will., c. 42. The Calcutta High Court in *Rutnessur Biswas* v. *Hurishchunder Bose*(4) acted on the same principle. Therefore the Interest Act has no application to the case before us, and consequently the decisions relied on by the learned vakil for the appellant have no bearing on the matter we have to decide. On the other hand the cases to which the learned Advocate-General drew our attention establish that the Act was not intended to affect payments of interest or compensation in matters not coming strictly within the letter of the law. In *Miller* v. *Barlow*(5) the Judicial Committee point out that Indian Courts are Courts of both of law and of equity and that they can award as damages interest not covered by the Act. In *Hurro Persaud Roy* v. *Sham Persaud Roy*(6) a similar principle was enunciated by the Judicial Committee. In *Hamira Bibi* v. *Zubaida Bibi*(7) which was a case of dower, the Judicial Committee after saying that the Interest Act was not applicable allowed interest as damages. See also *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*(8) another decision of the Judicial Committee. There are decisions of the High Courts in which interest was allowed apart from the Act—*Alagappa Chettiar* v. *Muthukumara Chettiar*(9), *Fakir Muhammad* v. *Rangiah Goundan*(10), *Khetra Mohan Poddar* v. *Nishi Kumara Saha*(11), *Mohamaya* v. *Ram Khelawan*(12), *Chajmal Das* v. *Brij Bhukan Lal*(13) and *The Collector of Ahmadabad* v. *Lavji Mulji*(14). Mr. Ranga Achariyar contended that the above cases proceeded upon the principle that there was an established practice as to interest regarding the matter dealt with in them, and that the principle should not be extended to the case of Muhammadan lady claiming interest on an unascertained sum of money due to her as her share of the trade. We fail to see any difference in principle between

(1) (1892) 1 Ch., 120; s.c. (1893) A. C., 429.
(2) (1874) L. R., 18 Equity Cases, 154.
(3) (1880) 15 Ch. D., 130.
(4) (1885) I.L.R., 11 Calc., 221.
(5) (1871) L.R., 3 P.C.C., 733.
(6) (1878) I.L.R., 3 Calc., 654.
(7) (1916) I.L.R., 38 All., 581 (P.C.)
(8) (1915) 42 Calc., 914 (P.C.).
(9) (1918) I.L.R., 41 Mad., 316.
(10) (1913) 1 L.W.N., 181.
(11) (1915) 22 C.W.N., 488.
(12) (1915) 15 C.L.J., 684.
(13) (1895) I.L.R., 17 All., 511 (P.C.).
(14) (1911) I.L.R., 35 Bom., 255.

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the cases to which we have referred and the case now before us. The only decision which supports Mr. Ranga Achariyar is *Marian Beeviammal* v. *Kadir Meera Sahib Taragam*(1). In that case there has been no discussion on the question and the reference to the earnings of interest shows that the decision should be confined to the facts of the case. The learned vakil for the appellant relied very strongly upon the observations of the noble and learned Lords in *London Chatham and Dover Railway Company* v. *South Eastern Railway Company*(2) for the proposition that in matters outside the Interest Act no interest is payable. The noble Lords who took part in the discussion, especially Lord HERSCHELL, point out that there has been a course of decisions in England which tied the hands of Courts from awarding interest on equitable grounds; and they regretted that they were obliged on the principle of *stare decisis* to decline to reopen the question. There is no such course of decisions in this country. On the other hand the Privy Council held very early that on principles of equity, justice and good conscience which are specially referred to in the Civil Courts Act, the Courts in India are at liberty to award interest in cases not coming within the purview of the Interest Act. The Indian Courts have followed this rule for a long time. The Courts in this country therefore are not hampered in the exercise of their equity jurisdiction in the same way that English Courts have been.

It is not necessary therefore to refer to another argument of the learned Advocate-General which rested the claim to interest upon the existence of a quasi-fiduciary relationship between the plaintiff and her brothers. We think the Subordinate Judge is right in allowing interest. But in our opinion he ought not to have allowed more than 6 per cent. The current rate of interest in this country is ordinarily that, and no special reason has been shown why it should be raised to 9 per cent. The analogy of the Trusts Act, section 23, to which the learned Advocate-General referred us, has no bearing on the present question and we are not prepared to allow compound interest as 6 per cent. The interest allowed will be reduced to 6 per cent throughout. Subject to this modification we dismiss the appeal with costs.

N.R.

(1) (1915) 29 I.C., 275.
(2) (1893) A.C., 429

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Spencer.

1919, February 4.

SUBRAMANIA PILLAI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KRISHNASWAMY SOMAYAJIAR AND SEVEN OTHERS (DEFENDANTS NOS. 1 TO 6, 8 AND 9), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 92—Religious Endowments Act (XX of 1863), sec. 14—Sanction for suit—Trustees of a temple—Appointment of a trustee by a Devastanam Committee in bad faith—Suit, without sanction, by two trustees for declaration of invalidity of appointment and for injunction—Maintainability of the suit—Jurisdiction of Civil Courts to question appointment.

Two out of three trustees of a temple instituted a suit, in a Subordinate Judge's Court, for a declaration that the appointment by the Devastanam Committee of one of the defendants as a trustee in the place of a deceased trustee was invalid, and for an injunction to restrain him from interfering with the affairs and the property of the temple. The plaintiffs' trustees did not obtain sanction either under section 92, Civil Procedure Code, or section 14 of the Religious Endowments Act (XX of 1863). The defendants pleaded, inter alia, that the suit was not maintainable for want of sanction and that the Civil Courts could not question the appointment made by the committee.

Held, that the suit was not maintainable for want of a sanction under section 92, Civil Procedure Code, and that a Civil Court can question an appointment of a trustee by a Devastanam Committee if it is not made reasonably or in good faith.

Per ABDUR RAHIM, J.—Section 14 of the Religious Endowments Act (XX of 1863) did not apply to the present suit, as it was not a case of misfeasance, breach of trust or neglect of duty by a trustee.

APPEAL against the decree of MUHAMMAD FAZL-UD-DIN SAHIB the Subordinate Judge of Tinnevelly, in Original Suit No. 1 of 1917.

The material facts appear from the Judgment of ABDUR RAHIM, J.

The Hon. *T. Rangachariyar* and *E. S. Chidambaram Pillai* for the appellant.

M. D. Devadoss for the first to sixth and eighth respondents.

T. R. Ramachandra Ayyar and *A. Ramaswami Mudaliyar* for the seventh respondent.

* Appeal No. 159 of 1918.

ABDUR RAHIM, J.—I am not disposed to agree with the learned Subordinate Judge that he had no jurisdiction to entertain the suit. The suit is instituted by two out of three trustees of a temple for a declaration that the appointment of the eighth defendant, which is practically in the vacancy created by the death of the third trustee, by the Devastanam Committee, is invalid and for an injunction restraining him from interfering with the affairs and the property of the temple. It is alleged in the plaint that this is not a proper appointment inasmuch as there was improper understanding between some of the members of the committee and the eighth defendant as regards the former obtaining lease of certain buildings belonging to the temple at less than the proper rent. It is further alleged that the eighth defendant had agreed in consideration of his appointment to grant certain sites to some of the members of the committee in the name of third persons. If those allegations are well-founded in fact, and that is a matter which could only be investigated at the trial, the appointment of the eighth defendant could not be said to be either reasonable or made in good faith. There are a number of rulings of this Court which lay down the principle that a Civil Court can question an appointment of a trustee by a Devastanam Committee, if it is not made reasonably or in good faith, vide *Thiruvengadath Iyengar* v. *Ponnappiengar*(1), *Thirumalaiyappa Pillai* v. *Vengu Aiyar*(2), *Ganapathi Ayyar* v. *Vedavyasa Alasinga Bhattar*(3), *Seshadri Ayyangar* v. *Nataraja Ayyar*(4) and also the general observations of the learned Chief Justice and SESHAGIRI AYYAR, J., in *Sitharama Chetty* v. *Sir S. Subramania Ayyar*(5). In *Thiruvengadath Iyengar* v. *Ponnappiengar*(1) the appointment under consideration was that of additional trustees. In *Ganapathi Ayyar* v. *Vedavyasa Alasinga Bhattar*(3) the question was as regards the power of the Board of Revenue altering the scheme of management, and in *Seshadri Ayyangar* v. *Nataraja Ayyar*(4), the question which the Civil Court was asked to decide was the propriety of the suspension of a trustee by the committee. But the principle applied in those cases would apply equally to the case of an

(1) (1915) I.L.R., 38 Mad., 1176. (2) (1915) M.W.N., 280
(3) (1906) I.L.R., 29 Mad., 534, at p. 537. (4) (1898) I.L.R., 21 Mad., 179.
(5) (1916) I.L.R., 39 Mad., 700.

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improper appointment of a new trustee in the vacancy caused by the death of a trustee.

But then the learned pleaders for the respondents have argued that the suit would not lie because no sanction was obtained under section 14 of Act XX of 1863 or under section 92, Civil Procedure Code. As regards the first I do not think the present suit comes within the scope of that Act. It is not a case of misfeasance, breach of trust or neglect of duty committed by a trustee. But I am of opinion that section 92, Civil Procedure Code, does apply. This is a case which may properly be described as one in which the direction of the Court is necessary for the administration of the public trust within the meaning of that section as held in *Neti Rama Jogiah* v. *Venkatacharlu*(1) and in *Kaliswara Gurukkal* v. *Nataraja Thambiran*(2). The mere fact that the eighth defendant had not yet taken charge of his office or taken possession of the properties as a co-trustee of the plaintiffs cannot make any difference because the object of the suit is to obtain the direction of the Court as to whether the plaintiffs alone are to act in the matter of the trust or they must so act in conjunction with the eighth defendant. That view is supported by an observation of the Privy Council in *Bishen Chand Basawat* v. *Nadir Hossein*(3) as pointed out in *Kaliswara Gurukkal* v. *Nataraja Thambiran*(2).

Mr. T. Ranga Achariyar, the learned vakil for the appellants, however, argued that this is not a case for the removal of any trustee or for any other relief enumerated under section 92, Civil Procedure Code; ordinarily removal of a trustee would mean the removal of a trustee from office by reason of some act or omission in connexion with his office of trustee, and here the eighth defendant has not, as already stated, entered upon the duties of trustee at all. But he has been undoubtedly appointed by the Devastanam Committee by proceedings held according to the rules. Therefore, the Devastanam Committee, so far as they are concerned, having the power to appoint a trustee, have done what they could in order to clothe the eighth defendant with the status and powers of a trustee.

(1) (1903) I.L.R., 26 Mad., 450. (2) (1907) 19 M.L.J., 772.
(3) (1888) I.L.R., 15 Calc., 829, at p. 341.

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At the same time I am rather doubtful whether the prayer in the plaint comes within the words "removing any trustee." Even if they do not, I have no doubt that the relief is one which is contemplated by the residuary relief (*h*) under section 92, sub-section (1) of the Civil Procedure Code; clause (*h*) says "granting such further or other relief as the nature of the case may require." The object of this suit is to have it declared that the eighth defendant is not a trustee properly appointed and also to prevent him from acting in the capacity of a trustee. I should say that that is a relief cognate to removing a trustee.

It was also argued by Mr. Ranga Achariyar that suits by trustees do not come within section 92, Civil Procedure Code. But I do not think that that contention is at all sound, and no authority has been cited in support of that proposition. If the terms of section 92, Civil Procedure Code, apply to a suit by trustees there is no apparent reason why such a suit should be held to be exempted from its restrictive provision. The plaintiffs not having obtained any sanction under section 92 of the Code the suit is not maintainable. In the result the appeal must be dismissed with costs.

SPENCER, J.

SPENCER, J.—I am of opinion that section 92, Civil Procedure Code, is a bar to the maintenance of the present suit. The decisions in *Jeyangarulavaru* v. *Sri Hati Durma Dossaji*(1), *Ponnambala Mudaliar* v. *Varaguna Rama Pandia Chennathambiar*(2) and *Singarachariar* v. *Krishnaswami Iyengar*(3) which were cited in the arguments, being all prior to the enactment of the Civil Procedure Code of 1908 in which clause (*a*) of sub-section (1) of section 92 and sub-section 2 appeared for the first time, must be read in the light of the law as it then was. In effect, this is a suit for the removal of a trustee from the office. No doubt the relief asked for in the plaint is for a declaration that the appointment of the eighth defendant is invalid and for a permanent injunction restraining him from interfering with the affairs of the temple. But it cannot be denied that the eighth defendant has been appointed a trustee by a statutory body competent to make the appointment and therefore he is a trustee until he is removed from his office by a

(1) (1868) 4 M.H.C.R., p. 2. (2) (1872) 7 M.H.C.R., 117.
(3) (1909) 19 M.L.J., 513.

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competent authority. There was at the time of appointment an existing vacancy, and under Act XX of 1863 the Devastanam Committee have an inherent right to make appointments of trustees whenever vacancies occur. It is immaterial for the purpose of this suit what motives the members of the committee had for making this particular appointment. They have as much power to appoint a bad man as trustee as to appoint a good man in the exercise of their discretion. This is in fact an appointment of a man who, the plaintiffs say, ought not to be appointed; and the only means of getting rid of him is to bring a suit for his removal from office. The language of section 92, sub-section (2), Civil Procedure Code, is very clear. It declares that no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is referred to in the section except in conformity with the provisions of sub-section (1). One of the reliefs is that of removing a trustee. The only exception to this is the case where a trustee is sought to be removed under section 14 of Act XX of 1863 for misfeasance or neglect of duty. In either case sanction is required, either the sanction of the Advocate-General or the sanction of the District Court, and as the present suit has been instituted without sanction, it is not sustainable. I therefore agree with my learned brother that the appeal must be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Spencer.

1913, February, 5 and 7.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), APPELLANT,

v.

GULAM MAHABOOB KHAN SAHIB (THIRD PLAINTIFF), RESPONDENT.*

Inam—Resumption of—Grant by Nawab for a mosque, services therein and feeding the poor—Confirmation by British Government—Misappropriation by trustees—Alienation by trustee on mortgage and on long lease—Performance of services on lower scale—Mosque kept in good repair—Power of Government to resume inam—Terms of confirmation, construction of—Suit by trustee against Secretary of State—Suit for declaration and possession—Limitation Act (IX of 1908), art. 14 or 144, applicability of.

An inam, granted by the Nawab of the Carnatic in 1775 for the upkeep of a mosque, the performance of services and ceremonies therein and the feeding of travellers and the poor, was 'confirmed' by the British Government, 'permanently so long as the service was performed.' Owing to persistent misappropriation of the income by the grantees' successors and alienations by some of them of two of the villages included in the inam, one on a usufructuary mortgage in 1883 for thirty years and the other on a long lease of twelve years in 1894 for purposes not binding on the charity, the Government resumed the inam in 1903 and credited the assessment to its general revenues. It appeared, however, that the mosque was maintained in good repair, services and ceremonies were regularly performed there though on a smaller scale. The present trustee, disputing the power of the Government to resume the inam, sued in 1913 the Secretary of State for India in Council for a declaration that the resumption was invalid and for recovery of possession of the inam villages; the latter contended that the resumption was valid and that the suit was in any event barred by limitation under article 14 of the Limitation Act.

Held, (1) that, as the charity did not fail altogether, the performance of the charity was not wholly discontinued and the alienations (mortgage and lease) did not *permanently* deprive the charity of the use of the property, the Government was not authorised, under the terms of the grant, to resume the inam in the circumstances of this case; and

(2) that, the resumption being a nullity the suit for possession was not barred by limitation, as article 144 and not article 14 of the Limitation Act applied to the case.

On a reasonable construction of the words of the grant, any default in the performance of services of however minor a character would not entitle the Government to resume the grant, but what was contemplated was that if the

* Appeal No. 32 of 1918.

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charity failed altogether or substantially as through the disappearance of the mosque or of persons who would resort to the institution for prayers, etc., or if the charity was entirely discontinued, then the Government would be entitled to resume the grant.

APPEAL against the decree of K. SUNDARAM CHETTIYAR, the temporary Subordinate Judge of Nellore, in Original Suit No. 14 of 1916.

The suit was instituted by the present trustees of a mosque and tomb at Anamasamudrampeta against the Secretary of State for India in Council for a declaration that the defendant had no right to resume the two suit villages in 1903 and for recovery of possession of the villages together with mesne profits for faslis 1321 to 1324. The suit villages together with some other villages were granted as inam by the Nawab of the Carnatic in 1775 for the upkeep of a mosque and a tomb, etc., in good repair, for celebrating certain annual and monthly ceremonies therein, for distributing food to travellers and fakirs and others, and for payment of salaries to servants and maintenance allowance to the members of the family of Hazarath who was the original founder and trustee of the charities. The inam was confirmed by the British Government permanently so long as the services were performed. The successors in the office of Sajjada misappropriated the income and alienated the trust properties for purposes not binding on the trust, and frequent complaints were made to the Collector. Among these alienations, one was a usufructuary mortgage in 1883 of one of the suit villages for a period of thirty years after which period the property was to be restored to the trustee without payment, and another was a lease in 1894 of the other village for a long period of twelve years; the Collector ordered that the Sajjada should redeem the mortgage and cancel the lease within one year, and that, on his failure to do so, the two villages would be attached and taken possession of by the Government. As the trustee failed fully to obey the order, the villages were resumed and actual possession was taken by Government, as found by the Subordinate Judge, only after the 10th September 1903. Subsequently a suit was brought by two worshippers, Original Suit No. 21 of 1906 in the District Court of Nellore, to remove the then trustee, and it was decreed and a Receiver was appointed to manage the properties of the charity. Later on, another suit was filed for a scheme (Original Suit No. 36 of 1912)

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and two new trustees, namely, the present first and second plaintiffs, were appointed and a scheme was drawn up. These latter applied to the Collector to return the resumed villages to the trust in respect of which a proper scheme of management had been made, but the Government refused to give back the villages. The trustees thereupon filed the present suit against the Secretary of State for a declaration that the resumption was invalid and that the defendant should deliver possession of the two villages on behalf of the trust together with past mesne profits. It was found by the Subordinate Judge, who tried the suit, that the mosque and tomb were kept up in good repair, that the services and ceremonies and the feeding of travellers, etc., were performed though on a smaller scale at the time of the resumption of the inam by the Government in 1903. The Subordinate Judge held that the resumption of the villages was not justified by the terms of the grant and that the suit for recovery of possession was not barred by limitation, and he accordingly decreed delivery of possession of the two villages to the plaintiff together with mesne profits for four faslis. The Secretary of State preferred this appeal to the High Court.

The *Acting Government Pleader* (*V. Ramesam*) for the appellant.

T. V. Venkatarama Ayyar for the respondent.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—The appellant, the Secretary of State for India, was sued by the respondents for recovery of two villages of Ganduvaripalle and Akbarabad in the district of Nellore. The Government purported to resume these villages which are described as dharmadayam inams by an order passed some time in 1903. These two and eight other villages were made wakf for the maintenance of a mosque, and for feeding the poor and similar purposes in the days of the Carnatic Nawab, Wallajah. The history of the grant is set out in the enclosure to the Inam Register, Exhibit I. There was a man called Rahimtulla Sahib Pirzada, otherwise described as the Hazarath, who was regarded as a holy man and it was to him that the Foujdar of Nawab, Wallajah, at first made a grant of two villages,—not those with which we are concerned,—so that he might feed Saiyid Muhammadans and other poor men and "ascribe its virtue to Prophet Muhammad." Then it appears eight other villages including the two in question were purchased by the Hazarath

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at a nominal price from the then Jaghirdar of Udayagiri and he made a gift of them for charitable purposes. He was in possession and enjoyment of the properties in his lifetime and was succeeded after his death, he having died without any issue, by a relation of his wife. The dedication to charity was made some time in the year 1775. After the death of the original founder the properties were held by his successor and the latter's descendants. In a previous suit instituted under section 92 of the Civil Procedure Code, the whole history of the institution has been reviewed and it was found that the then incumbent of the office of trustee or 'Sajjada' as he was called, one Muhammad Yusuf Sahib, was not fit to hold the office having been guilty of gross mismanagement, misappropriation, and misapplication of trust funds. Even before his time, there had been persistent mismanagement of the trust properties. Some of the previous trustees and he himself made alienations of some villages either by mortgaging them or by granting long leases. The two villages in question, Ganduvaripalle and Akbarabad, were also similarly alienated by the predecessor of the trustee who was the main defendant in the suit under section 92 of the Civil Procedure Code above referred to. Ganduvaripalle was leased for twelve years in 1894 and Akbarabad was usufructuarily mortgaged for thirty years in April 1883. The question for decision is whether these two alienations amount to a violation of the conditions in the inam patta so as to entitle the Government to resume the villages. As regards Ganduvaripalle, the lease practically expired some time in 1906, and the usufructuary mortgage of Akbarabad had still about ten years to run at the date of the resumption if the mortgage debt was not paid in the meantime. The inam title-deed itself is not forthcoming, but we have the inam register and there, in column 21, the entry over the signature of Mr. Chentsal Rao is:

"I recommend the villages to be confirmed permanently so long as the service is performed."

And looking at column 8, the service there meant is:

"for feeding the travellers and poor men and for maintaining an efficient establishment for the services in the mosque at Anamasamudrampeta and for performing the usual festivals, service performed."

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The order of the Inam Commissioner, Mr. Taylor, is as follows:—

"Although there is no sanad or entry in the old accounts in support of 8 of these villages the undoubted and uninterrupted possession of them all as inams for nearly a century must be respected.

"The ten villages are confirmed in one deed and continued to the parties in column 16 for the maintenance of the religious objects for which they were granted."

Admittedly this is not what is called a personal inam; nor is it an inam in which the grant is made to a person on condition of his performing certain services of a religious character. The learned Government Pleader conceded that it was a charitable inam or dharmadayam, that is to say, that it was an inam for the maintenance and support of certain charitable and religious objects. What is granted here, so far as the Government is concerned, is the Government assessment; that is to say, the British Government confirmed the grant and exempted the villages from payment of the Government revenue. I might mention that Mr. Venkatarama Ayyar appearing for the respondents argued that this was not an inam which the Government was entitled under any circumstance to resume, because it comes within the description of the inams specified in section 2 of the Regulation 31 of 1802. Under that section the inams which are declared to be non-resumable are certain grants for holding lands exempt from the payment of public revenue. But the question whether the present grant is one of that category, having been exempt from payment of public revenue at the date mentioned therein, was not raised before the Court of trial, and as pointed in *Sikkandar Rowthen* v. *The Secretary of State for India*(1) this is a question which should not be entertained for the first time in this Court if it was not properly raised in the Court of trial. I shall proceed on the assumption that the case is not covered by section 2 of Regulation 31 of 1802, but that the villages were liable to be resumed if the condition on which the villages were held had been violated. I will also assume that the recommendation of Mr. Chentsal Rao forms part of the order of the Inam Commissioner, the effect of which would be that the grant was to continue so long as the services mentioned are performed. It

(1) (1917) 5 L.W., 402.

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will be noticed that some of the charitable objects are of an interminable character, such as feeding the travellers and poor men. One of the main objects of the grant is the maintenance of the mosque. It appears that on the death of the founder of these charities his tomb became an object of considerable veneration in the locality and by a long course of usage the proper maintenance of that tomb, the celebration of 'urs' and other ceremonies in commemoration of that holy personage became incorporated with the objects of the wakf.

The learned Subordinate Judge has gone into the evidence and come to the conclusion that the mosque is maintained in good repair and the services are regularly performed there and similarly the Hazarath's tomb is properly maintained and the services in connexion with the tomb are observed. But there has undoubtedly been considerable mismanagement for a long time and it may be taken that the religious and charitable observances have not been uniformly performed either on the scale or in the manner in which they should have been. At the same time there can be no doubt whatever upon the evidence that there has been a substantial performance of the charitable and religious objects of the foundation in spite of misapplication and misappropriation of trust moneys from time to time by the trustees for the time being. In this connexion it may be pointed out that in addition to the income of the ten villages some income is derived also from presents made at the tomb of the Hazarath. Further it has already been held in the suit under section 92 of the Civil Procedure Code that the maintenance of the descendants of the second Muttawalli or sajjadanishin is also one of the objects of this charitable foundation. Alienation of these two villages and misapplication of the trust funds such as there have been would not in my opinion strictly be a breach of the condition of the inam grant, "so long as the service is performed." As found by the Subordinate Judge the services are performed though not to the full extent of the income actually derived or which could be derived from the properties. It is, however, argued by the learned Government Pleader that the alienation of the two villages, although not of a permanent character, is a diversion of the inam villages to purposes alien to the grant and therefore the villages have become resumable. No doubt in a case where inam villages are

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alienated in a manner so that they are lost to the charity and the charity cannot be maintained without their income the forfeiture clause would in my opinion come into operation. But I am not prepared to go so far as to hold that a temporary alienation, although for a number of years and as such beyond the power of the trustee for the time being, necessarily amounts to a violation of the condition of the grant. The fact cannot be overlooked that this is not a personal grant.

The grant is to a charity of a permanent character. It is inconceivable that it should have been intended that any act of mismanagement or malfeasance on the part of a trustee of a charity like this should result in the resumption of the grant. If that was the intention one would have expected that the condition would have been to the effect that an attempt of any character at alienation by the trustee would make the inam liable to resumption. In the case already mentioned in *Sikkandar Rowthen* v. *The Secretary of State for India*(1) it has been suggested that

"a mere alienation of the trust property may not entail a forfeiture if the trustees kept the mosque clean and in good repair, put up the lights and kept it as a place fit for worship in the usual manner."

It is not necessary for us to lay down any such general proposition, for here the alienation was not such as to deprive the charity of the use of the properties. It was further pointed out by Mr. Venkatrama Ayyar, the learned vakil for the trustee-respondent, that the lease and the mortgage of the villages in question were not binding on the charity and that the trustee Muhammad Yusuf Mia Pirzada in fact took steps to get back the villages from the lessee and the mortgagee. The evidence on that point is to the effect that he managed to obtain possession of the villages by getting the tenants to attorn to him by executing muchilkas. It is, however, found that the mortgage amount due on Akbarabad was not paid, but the trustee or sajjadanishin contends that the charity was not bound to pay inasmuch as the debt was not incurred for the benefit of the charity. It seems to me that we must put a reasonable construction upon the language of this grant which is of an extremely laconic character. All that is said is

"the villages to be confirmed permanently so long as the service is performed."

(1) (1917) 5 L.W., 402.

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It cannot possibly mean that any default in the performance of the service of however minor a character would come within these words. Putting a reasonable construction on these words what is contemplated is that if the charity fails altogether, or substantially for instance, through the disappearance of the mosque or of persons who would resort to the institution for prayer, etc., or if the charity is entirely discontinued then the Government would be entitled to resume the grant. And that seems to be the interpretation placed on such grants by the Board of Revenue which is the highest revenue authority in the Presidency as noticed in the Standing Orders placed before us. See Standing Order No. 54 of the old Order, pages 120 to 122, paragraphs 2 and 3. Paragraph 2 says:

"Religious and charitable inams may be resumed on the ground that the land in respect of which the title-deed was issued has been alienated or otherwise lost to the institution or service to which it once belonged or that the terms of the grant are not observed."

Then it says in paragraph 3:

"In cases of abandonment or discontinuance of service, all reasonable endeavours should be made to secure a continuance or revival of religious and charitable institutions and services before proceeding to the resumption of inams attached to them"

That implies that the resumption is to be made only in cases of abandonment or discontinuance of service. Similarly in paragraph 4 it is said:

"Proposals for the resumption of religious and charitable nams should be submitted to the Board of Revenue except in cases of inams or money allowances attached to temples, mosques, etc., which have been abandoned or in ruins for twelve years or more."

We are not bound by any interpretation of the Board of Revenue. But I allude to it as showing that that is the customary interpretation which the Board of Revenue has placed on these and similar words of grant and which in my opinion accords with the proper interpretation of the grant in question in this case. I might here mention that what the Government has done in this case is not to order the revenue to be assessed upon resumption to be paid to the charity but has directed the assessment to be credited to the general revenues. The Government might be entitled to do that if they had a right to

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resume the grant, but I might here refer to paragraph 7 of the Standing Order already referred to.

"When the land has been alienated but the institution or service is still maintained, the inam will be resumed, converted into a beriz deduction and reassigned to the working incumbent or trustee."

The assessment is to be credited to the general revenues only in the case of a service inam, originally granted for the benefit of an institution or service if it has been resumed on account of the disappearance of the institution or cessation of the service which it is found cannot be restored. Here it is found that the services are still maintained though they are not as efficiently as they ought to be and some of the objects at least are of an unfailing character. Our attention has been drawn to a well-known decision of this Court in *Gunnaiyan* v. *Kamakshi Ayyar*(1) where there is a dictum of BHASHYAM AYYANGAR, J., to the effect that in cases of dharmadayam or devadayam there is no room for the application of the doctrine of cy près execution. It is unnecessary for us to consider here such a general question. In this case there are certain objects such as feeding the poor and the travellers which it is not alleged have come to an end, or could become extinct. And I am not at present prepared to say that where there is a general charitable object mentioned in the grant, the doctrine of cy près execution can have no application to charitable inams. And it seems that all that the learned Judge meant to lay down by that general dictum was that if the charity be of a specific character and it disappears, then the Government would be justified in resuming the grant altogether and crediting the assessment to public revenue. The learned Government Pleader also relied upon an unreported decision of a Bench of this Court in *Mohanadas Bavajee* v. *Secretary of State for India*(2) where it was held that a partial diversion may justify resumption. But in this case the alienation was not such as to render the villages unavailable to the charity. On that ground alone I think the present case may be distinguished from the unreported decision. I am of opinion that the conclusion of the Subordinate Judge on this point is correct.

The next question argued is as to limitation. It is contended on behalf of the Secretary of State that article 14 of

(1) (1903) I.L.R., 26 Mad., 339. (2) Appeal No. 342 of 1915 (unreported).

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the Limitation Act applies and that therefore the suit not having been instituted within one year of the order passed by the Board of Revenue it was barred. Article 14 says that for suits to set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for, the period of limitation is one year from the date of the act or order. I think that the Subordinate Judge is right in saying that whatever may be the form of the prayer, the object of the suit is to recover possession of the villages from the Government and that the order of resumption must be treated as a nullity, as the contingency on which alone the Government was entitled to make the resumption did not arise. If the plaintiff did not seek to recover possession of the villages but only wanted the order of the Board of Revenue to be set aside and to obtain any relief in consequence of that order, as in the case of *Subbanna* v. *The Secretary of State for India*(1), the suit would come within the article 14. I think the proper article applicable in a case of this nature is article 144, and it is not disputed that the suit was brought within twelve years of the Government taking up the villages. I would therefore dismiss the appeal with costs.

SPENCER, J.

SPENCER, J.—I too am of opinion that the Government Order of the 18th March 1903 resuming the grant in this case cannot be justified on the facts which are before us. The terms of the grant as they appear from the Inam Register, Exhibit I, are that the inam was to continue so long as the services which consisted of (1) feeding travellers and the poor, (2) maintaining an efficient establishment for the services in the mosque at Anamasamudrampeta and (3) performing the usual festivals continued to be rendered. The Subordinate Judge has found that there has been no cessation or discontinuance of the services specified in the Inam Register. He says that the 'urs' and other usual festivals have been performed without break, though on a less grand scale than before, and there is no reason to question the correctness of this finding. In fact, shortly before the passing of the Government order, the Collector, Mr. Butterworth, reported that religious worship was kept up, although the expenditure in recent years had been considerably curtailed,

(1) (1915) M.W.N., 915.

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and that the mosque and appurtenant buildings were then maintained in good repair. He did not recommend the resumption of the inam. But he considered that the directions of a Court for framing a scheme of administration was necessary and he asked for orders whether he should himself take action in this direction. The Board of Revenue left the matter in the hands of the Government, and the Government decided that those portions which had been mortgaged, leased or otherwise alienated and not redeemed within one year should be resumed. In no sense can it be said that there has been an entire failure of the trust in respect of this inam, but it appears that the Government resolved to resume the two villages which formed a part of the endowment of the trust on account of the act of one of the former trustees in temporarily alienating them and thus diverting the income from the purposes of the trust. A list of the villages alienated is attached to the Collector's report, dated February 1st, 1901; and from his subsequent report of the 18th May 1903, it appears that all these villages except two were redeemed and freed from encumbrances by the trustee. The two exceptions are the villages of Akbarabad and Ganduvaripalle. The village of Akbarabad was mortgaged with possession for thirty years from 1893 with the condition that at the close of the mortgage period the mortgagee was to give up the property unconditionally and free of debts. The village of Ganduvaripalle was mortgaged with possession and then the mortgage was converted into a lease for twelve years from fasli 1303. The terms for which these villages were alienated expired long before the suit. There was no permanent dissipation of the endowed property of the trust.

Now that a scheme has been prepared by this Court in Appeals Nos. 191 and 236 of 1914 and in No. 200 of 1917, it is unlikely that any further abuses of the trust and acts of mismanagement by the trustee will occur. It would not be doing justice to the intention of the founder to allow the institution to suffer for the fault of the office-holder for the time being. Moreover the resumption that was ordered in 1903 would be contrary to the spirit of the Board's Standing Orders as amended and brought up to date in 1913, which lay down directions for dealing with cases of religious and charitable inams held on title-deeds. This is neither a case of a mosque abandoned or in

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ruins; nor is it one of a permanent loss of title to the land forming the endowment of the institution in which cases the rules provide for the permanent resumption of the inam. I, therefore, agree with my learned brother that the judgment of the lower Court must be supported on this point. I also agree with him that the respondent is entitled to the mesne profits awarded to him in the lower Court's decree, that article 14 of the Limitation Act has no application to the facts of this case, and that the appeal should be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Ayling.

1918, December, 5 and 6.

VASUDEVA KAMATH AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

LAKSHMINARAYANA RAO AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

Provincial Insolvency Act (III of 1907), sec. 16 (2) (b)—Effect of order of adjudication on institution of suits by creditors to set aside fraudulent alienations by insolvent.

The effect of an order adjudicating a person an insolvent under section 16 (1) of the Provincial Insolvency Act is to vest the administration of his estate including the realization of his assets under the control of the Court. Hence after such an order a creditor (whether decree-holder or otherwise) is by section 16 (2) (b) of the Act prevented from instituting, without the leave of the Court of Insolvency, a suit to set aside a transfer made by the insolvent as being in fraud of creditors.

APPEAL against the decree of L. G. MOORE, the District Judge of South Kanara, in Original Suit No. 4 of 1917.

Plaintiffs Nos. 1 to 3 filed this suit against defendants Nos. 1 to 4 who were members of an undivided Hindu family and the fifth defendant who was the Official Receiver of South Kanara to set aside, under the following circumstances, a sale made in 1913 by the first defendant of his share of the family properties in favour of the family idol managed by the defendants Nos. 1 to 4. Plaintiffs Nos. 1 to 3 were some of the

* Appeal No. 82 of 1918.

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decree-holders against the first defendant who was adjudged an insolvent in July 1915 by the District Munsif of Puttur. The second defendant was the manager of the family. Plaintiffs alleged that the sale was without any consideration and in fraud of creditors. The defendants contended inter alia that the suit was not maintainable as no leave of the Court of Insolvency was obtained for its institution as contemplated by section 16 (2) (b) of the Provincial Insolvency Act. Finding that the plaintiffs had not obtained any such leave the District Judge dismissed the suit. Plaintiffs preferred this appeal.

K. P. Lakshmana Rao for appellant.

K. Sundara Rao for respondent.

The JUDGMENT of the Court was delivered by

WALLIS, C. J.

WALLIS, C. J.—The question in this appeal is whether, after the making of an order of adjudication under section 16 of the Provincial Insolvency Act, 1907, a creditor of the insolvent is prevented by the provisions of sub-section (2) (b) of that section from suing under section 53 of the Transfer of Property Act to set aside a transfer made by the insolvent without first obtaining the leave of the Court. There appears to be a curious absence of authority as to the effect of the corresponding provision in the English Bankruptcy Acts with respect to actions by creditors under the Statute of Elizabeth which corresponds with section 53 of the Transfer of Property Act. The nature of the suit under the English and Indian Acts has recently been discussed in this Court in *Palaniandi Chetti* v. *Appavu Chettiar*(1), *Subramania Iyer* v. *Muthia Chettiar*(2) and *Pokker* v. *Kunhamad*(3). It appears that in England, while such a suit should ordinarily be on behalf of all the creditors and the decree should declare the transfer void against all of them, a judgment-creditor may sue in respect of his own debt alone and obtain satisfaction for it. The sub-section of this Act provides that

"except as provided by the Act no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the person or property of the insolvent in respect of the debt or commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose."

(1) (1916) 30 M.L.J., 565. (2) (1918) I.L.R., 41 Mad., 612.
(3) (1918) 9 L.W., 138.

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WALLIS, C.J.

A suit by a judgment-creditor such as I have mentioned without the leave of the Court would, I think, be in contravention of this section, and would enable the judgment-creditor to obtain satisfaction of his decree out of the property declared in the suit to be the property of the insolvent. Even as regards a suit by a creditor who was not a judgment-creditor to declare a transfer void against creditors generally, I think the words of the sub-section

"or commence any suit or other legal proceedings"

are sufficiently wide to cover a suit to make property available as the property of the judgment-debtor and to forbid the institution of such a suit as this without the leave of the Court. The policy of the law, as disclosed in the section, is to place the administration of the estate including the realization of assets under the control of the Court, and it would be opposed to this policy to allow a creditor to proceed with a suit of this kind except with the leave of the Court and on such terms as it might impose. We agree with the District Judge and dismiss the appeal with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919, February, 13 and 14.

GOVINDAN NAIR (PLAINTIFF), APPELLANT,

v.

KUNJU NAIR AND THIRTY-THREE OTHERS (DEFENDANTS NOS. 1, 17 TO 34 AND NOS. 2 TO 16), RESPONDENTS.*

Malabar Law—Tarwad—Separate maintenance—Male member, leaving tarwad house to live with his wife—Right of such member to separate maintenance—Menchilavu, claim for, whether on a higher footing than one for maintenance.

A male member of a Malabar tarwad, leaving the tarwad house for the purpose of living with his wife, is entitled to separate maintenance from the tarwad.

A claim to *menchilavu* is on the same footing as a claim to maintenance.

SECOND APPEAL against the decree of G. H. B. JACKSON, the District Judge of South Malabar, in Appeal No. 154 of 1917 preferred against the decree of M. NARASINGA RAO, the District

* Second Appeal No. 1036 of 1918.

GOVINDAN NAIR v. KUNJU NAIR.

Munsif of Parapanangadi, in Original Suit No. 191 of 1915 [Original Suit No. 637 of 1913 (Original Suit No. 73 of 1915) on the file of the Additional District Munsif of Tirur].

The material facts appear from the Judgment of SESHAGIRI AYYAR, J.

C. Madhavan Nayar and *K. Kutti Krishna Menon* for the appellants.

C. V. Anantakrishna Ayyar for the first to nineteenth respondents.

OLDFIELD, J.

OLDFIELD, J.—I agree unreservedly with the conclusion of my learned brother in the judgment which he is about to deliver that a person claiming like the plaintiff, the appellant, separate maintenance must show some good cause for doing so and that a claim to *menchilavu* is on the same footing as a claim to maintenance.

The more difficult question is whether the plaintiff's desire to live with his wife (for that is all the real justification which he can allege for his claim) is such good cause; and I have felt great doubt whether the reasoning by which corresponding claims by female members have been countenanced in *Maradevi* v. *Pammakka*(1), *Kunchi* v. *Ammu*(2) and *Muthu Amma* v. *Gopalan*(3) should be extended. For those decisions involve with all due deference a radical departure from the view taken by earlier authorities. They have, however, been acquiesced in so far as we have been shown, for over five years; they proceeded from learned Judges, whose competence in West Coast law commands respect and whose departure from or extension of recognized principle was deliberate. In these circumstances it seems to me that the principle as regards females must be treated as established; and if it is so, there is no reason against applying it for the benefit also of male members, since it has not been shown how any special considerations such as the right of the tarwad to any services at their hands or otherwise to their presence in it, as a condition of their right to maintenance, can be sustained against them.

I concur in allowing the appeal reversing the decree of the District Judge and restoring that of the District Munsif. Each party will bear their own costs throughout.

(1) (1913) I.L.R., 36 Mad., 203. (2) (1913) I.L.R., 36 Mad., 591. (3) (1913) I.L.R., 36 Mad., 593.

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SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—This is a suit by a male member of a Malabar tarwad for arrears of *menchilavu* from the tarwad. The case as it finally developed itself in the Courts below is that the plaintiff left the tarwad house to help his wife to manage her tarwad affairs and also because he did not find it convenient to live in the tarwad house. I do not think the fact that the plaintiff wanted to assist his wife to manage her affairs is a good ground for leaving the tarwad house, nor the allegation that the plaintiff found it more comfortable to live in his wife's house a sufficient ground for claiming separate maintenance. The cases discussed in *Maradevi* v. *Pammakka*(1), *Kunchi* v. *Ammu*(2) and *Muthu Amma* v. *Gopalan*(3) support the above proposition. I may say at once that I do not agree with SADASIVA AYYAR, J., in *Kunhikrishna Menon Kernavan* v. *Kunhikavamma*(4), that the burden of proving proper cause or the want of it is on the karnavan. The customary law of Malabar as enunciated in the decisions of this Court is that ordinarily every member of a tarwad house should be maintained there by the karnavan. He may go out of the house for good and proper cause. The onus of proving that his departure is for such a cause is on the member leaving the house. This was laid down in *Kunchi* v. *Ammu*(2), to which SADASIVA AYYAR, J., was a party. *Maradevi* v. *Pammakka* in(1) is also to the same effect. In *Muthu Amma* v. *Gopalan*(3), SADASIVA AYYAR, J., did not start his present theory of burden of proof. I am, therefore, unable to agree with the learned Judge that everything would be regarded as a proper cause which the karnavan cannot show to be improper.

Now comes the important question whether a male member of a tarwad leaving the tarwad house solely for the purpose of living with his wife is entitled to separate maintenance. Mr. Anantakrishna Ayyar did not question the correctness of the rulings which have laid down that a female member leaving the tarwad house for the purpose of living with her husband would be entitled to separate maintenance—see the three cases reported in 36 Madras series—nor did he take exception to the principle that maintenance is given to a member of a Malabar tarwad by

(1) (1913) I.L.R., 36 Mad., 203. (2) (1913) I.L.R., 36 Mad., 591.
(3) (1913) I.L.R., 36 Mad., 598. (4) (1918) 25 M.L.J., [illegible]

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reason of the proprietary interest possessed by a member in the tarwad property; see *Ammani Amma* v. *Padmanabha Menon*(1).

It is not denied that a male member of a tarwad has a proprietary interest in the tarwad property. Further in the case of a female member the customary law is that she should ordinarily reside in the tarwad house and that the husband should visit her there. That being the normal state of affairs in a tarwad the permanent residence of a husband in the wife's tarwad cannot be regarded as an improper act on his part. The law as we have construed has made an inroad upon custom to this effect, namely, that a female member leaving the tarwad house solely for the purpose of living with her husband in his tarwad is entitled to separate maintenance. I fail to see why the same reasoning is not applicable to the converse case. I am almost inclined to regard the latter as an *a fortiori* case. But it is not necessary to go that length. There are expressions in the judgments of this Court which deduce the propriety of the cause from the ground that it is conducive to morality that the wife should be encouraged to live with her husband. It would serve the cause of morality no less that the husband should be encouraged to make his permanent home with his wife in her tarwad. Therefore I am of opinion that the present case is within the rule relating to the right of a female member making her home in her husband's tarwad.

Mr. Anantakrishna Ayyar's complaint that we shall be disrupting the tarwad, if the plaintiff succeed, comes too late in the day; disintegration commenced long ago.

On one point I agree with him. *Melchilavu* is part of the maintenance. I do not think that there is any reason as suggested by Mr. Madhavan Nayar, for placing it on a higher footing. I agree with the reasoning in *Valia Konikkal Edam Kelu* v. *Lakshmi Nettyar Amma*(2) on the point.

I would, therefore, reverse the decree of the District Judge and restore that of the District Munsif and I agree with the order as to costs made by my learned brother.

K.R.

(1) (1918) I.L.R., 41 Mad., 1075. (2) (1913) M.W.N., 379.

APPELLATE CIVIL.

Before Mr. Justice Bakewell and Mr. Justice Phillips.

1919, February, 18 and 19.

R. V. SREENIVASA AIYANGAR (PLAINTIFF), APPELLANT,

v.

JOHNSA ROWTHER (TWELFTH DEFENDANT), RESPONDENT.*

Limitation Act (IX of 1908), arts. 113 and 143—Deed of exchange—Express covenant—Transfer of Property Act (IV of 1882), sec. 119—Implied covenant—Breach of covenant—Dispossession of plaintiff—Suit for recovery of possession of plaintiff's lands—Suit filed more than three years after but within twelve years of dispossession, whether barred.

Where a deed of exchange executed in 1903 between the plaintiff's father and some of the defendants contained a covenant, which only limited the option provided by section 119 of the Transfer of Property Act and was otherwise of the same nature as one that would be implied under that section, and the plaintiff, being dispossessed in 1908 of the lands given by the defendants, sued in 1916 to recover the lands given by his father under the exchange, and the defendants pleaded the bar of limitation.

Held, that article 143 and not article 113 of the Limitation Act applied to the case, and that the suit was in time.

SECOND APPEAL against the decree of C. V. VISWANATHA SASTRIYAR, the Subordinate Judge of Kumbakōnam, in Appeal Suit No. 137 of 1917, preferred against the decree of K. GOPALAN NAYAR, the District Munsif of Valangiman, in Original Suit No. 173 of 1916.

The plaintiff sued in 1916 to recover possession of certain lands from the defendants which had been given to the latter in exchange for certain other lands given to the plaintiff's father under a deed of exchange executed between the plaintiff's father and the principal defendants in 1903. The deed of exchange provided that, "should there arise any dispute in the matter of enjoyment of the property specified in the deed of exchange, each shall enjoy as before their respective lands." In execution of a decree obtained by a third party against the defendants, some of the lands obtained in exchange by the plaintiff's father were sold and the plaintiff who was then a minor lost possession of the same in 1908; and some of the other lands in plaintiff's possession were subsequently taken away in sales in execution of other decrees against the defendants in

* Second Appeal No. 1342 of 1918.

1913. The plaintiff, having attained majority on 10th June 1913, instituted the present suit on 11th March 1916 to recover possession of the lands given by the plaintiff's father to the defendants. But the twelfth defendant who had purchased one of the suit items was joined as a party to the suit only on 12th December 1916, more than three years after plaintiff attained majority. The latter pleaded that the suit was barred by limitation under article 113 of the Limitation Act, as more than three years had elapsed since the plaintiff attained majority and the cause of action arose on the date of the plaintiff's dispossession of the lands obtained by them in exchange, viz., in 1908. The District Munsif, who tried the suit, overruled the plea of limitation and decreed in favour of the plaintiff. The twelfth defendant appealed to the lower Appellate Court; the Subordinate Judge held that the suit as against the twelfth defendant was barred under article 113 of the Limitation Act. The plaintiff preferred this Second Appeal.

C. S. Venkata Achariyar for the appellant.

K. Narasimha Ayyangar for the respondent.

The JUDGMENT of the Court was delivered by

PHILLIPS, J.—It is not disputed that if the covenant or condition which gives plaintiff a cause of action were a covenant to be implied under section 119 of the Transfer of Property Act the article of limitation applicable would be 143. Even if the covenant in the present case amounts to a contract to the contrary within the meaning of section 119 as was held of a similar covenant in *Abdul Rajak* v. *Saminatha Pillai*(1) the period of limitation would appear to be the same for the contract to the contrary in this case merely limits the option provided by section 119 and is in effect a specific contract of the same nature as one of the contracts implied in section 119. We do not think this question was considered in *Abdul Rajak* v. *Saminatha Pillai*(1) to which one of us was a party, for it appears to have been assumed in that case that, if there was a specific contract of any kind, article 113 would apply. The covenant in this case is in the nature of a condition subsequent and the action is based on a breach of that condition and therefore article 143 is applicable and the suit is within time.

PHILLIPS, J.

(1) Second Appeal No. 1663 of 1916 (unreported).

SREENIVASA AYYANGAR v. JOHNSA ROWTHER.

PHILLIPS, J.

The further contention for the respondent that he cannot be bound as he is a bona fide purchaser for value without notice can be met by the fact that the transferee can obtain no larger estate than his transferor.

The Second Appeal is accordingly allowed with costs both here and in the lower Appellate Court and the District Munsif's decree restored.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919, February, 19.

UMMA VENKATARATNAM & Co. (PETITIONER)—PETITIONER,

v.

ADAMJI USMAN & Co. AND 17 OTHERS (JUDGMENT-DEBTORS AND COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 73—Rateable distribution—Conditions to be satisfied—Fund in Court—Attachment by a decree-holder in execution—Application by him for payment—Other decree-holders, obtaining decrees in their suits subsequently—Right of latter to rateable distribution against former—Priority.

Where a decree-holder having attached in execution of his decree a fund in Court belonging to his judgment-debtor, applied for payment of the amount before other decree-holders of the same judgment-debtor had obtained decrees in their suits, but the latter claimed rateable distribution of the fund along with the former,

Held, that the attaching decree-holder was in law entitled to be paid the amount attached by him in priority to the others.

Katum Sahiba v. *Hajee Batcha Sahib* (1915) I.L.R., 38 Mad., 221, dissented from; *K. Tiruvengadial* v. *Tiruvenkadiah* (1903) 26 M.L.J., 364, followed.

PETITION under section 115 of Act V of 1918 to revise the order of R. V. KRISHNA AYYAR, District Munsif of Ellore, in Execution Petition No. 879 of 1916 in Original Suit No. 89 of 1916 on the file of the Subordinate Judge's Court, Ellore.

The petitioner was a decree-holder who attached a certain fund belonging to his judgment-debtor which had been deposited in the Court of the District Munsif of Ellore. The petitioner had instituted his suit in the Sub-Court of Ellore

* Civil Revision Petition No. 829 of 1917.

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on the 24th November 1916, obtained a decree on the 2nd December 1916, attached the fund in question on the 4th December 1916, got his decree transferred to the District Munsif's Court of Ellore and applied in the latter Court on the 6th December 1916 for payment of the fund. The fund had been deposited in that Court by a receiver who was appointed to sell certain properties belonging to the judgment-debtor after they were attached before judgment in another suit on the file of the same Court at the instance of another creditor who was the plaintiff in that suit. There were several other suits pending in the same and other Courts against the same debtor, but decrees had not been passed in those suits before the attachment of the fund was effected by the petitioner and the application for payment out was made by the petitioner. Before the District Munsif passed any order on the petition for payment of the fund, the other persons, who had subsequently obtained decrees in their suits, claimed rateable distribution out of the fund under section 73, Civil Procedure Code. The District Munsif passed an order for rateable distribution in favour of all the decree-holders. The attaching decree-holder, who was the petitioner applying for payment of the entire amount attached by him, preferred this Civil Revision Petition to the High Court under section 115 of the Civil Procedure Code.

T. Prakasam for the petitioner.

P. Narayanamurthi for the respondents.

OLDFIELD, J.

OLDFIELD, J.—The fund in dispute in this case represents property originally attached by one of the present respondents before judgment. But we have not been shown that this fact in any way improves his claim or that of the others. None of them had even obtained decrees when appellant secured his attachment. They applied in execution only after he did so; and the question is whether his application for payment out being (for whatever reason) still pending, when their applications were made, the whole fund should be distributed rateably.

The lower Court quite properly followed *Katum Sahiba* v. *Hajee Badsha Sahib*(1), and passed an order in respondents' favour. But that case was decided by a single Judge and we are therefore not concluded by it. I deal with it and not with

(1) (1915) I.L.R., 38 Mad., 221.

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the decisions in *Bisheshar Das* v. *Ambika Prasad*(1) and *Thakurdas* v. *Joseph*(2), because in them the discussion proceeded either with reference to the incidents of an attachment before judgment, which are not relied on before us, or on very general grounds.

With all due deference, I cannot follow BAKEWELL, J., in *Katum Sahiba* v. *Hajee Badsha Sahib*(3), where he lays down that an attachment under Order XXI, rule 52 of the Code of Civil Procedure, in no circumstances confers priority. In *Frederick Peacock* v. *Madan Gopal*(4), the first case relied on by him, the competition being between an attaching creditor and the Official Assignee special consideration arose; and in it and in the other case cited, *Sankaralinga Reddi* v. *Kandasami Tevan*(5), the attachment was of property, which, as the language used in the former suggests and the latter states explicitly, was not a fund in Court, but had to be sold before its value could be realized. This affords a clear ground of distinction from the facts before us and, it must be added, those in question before BAKEWELL, J. For section 295 of the former Code referred to assets realized in execution and applications made prior to their realization, as section 73 of the Code now in force refers to applications for execution made prior to the Court's receipt of the assets; and accordingly in both the cases relied on by the learned Judge the provision, which justified rateable distribution, was directly applicable, whilst in the case before him, as in the case before us, it is not. A similarly general statement by the Judicial Committee in *Moti Lal* v. *Karrabuldin*(6) that attachment only prevents alienation and confers no title, is no doubt relied on in the Calcutta case above referred to; and it no doubt was made without reference to any provision of the Code corresponding with the present section 73. But the question arose with reference to the effect of an attachment, which apparently was made in execution of a mortgage decree and which clearly differed from that in question here and before BAKEWELL, J., because a sale, which was to transfer ownership, was to follow. It is with all respect unsafe to rely on these authorities as decisive, when the question is of circumstances, with which they were not concerned.

(1) (1905) I.L.R., 37 All., 575.
(2) (1917) 25 C.L.J., 595 at p. 598.
(3) (1915) I.L.R., 38 Mad., 221.
(4) (1902) I.L.R., 29 Calc., 428 (F.B.).
(5) (1907) I.L.R., 30 Mad., 413.
(6) (1898) I.L.R., 25 Calc., 179 (P.C.).

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OLDFIELD, J.

It is in fact hardly disputed that the one provision of the Code authorizing rateable distribution, section 73, is inapplicable in terms to the present case, if only because the attached fund, the assets in question, were received by the Court, before respondents' applications were or could have been made. That provision attained its present scope by stages at successive revisions of the Code; and, as it is to be supposed that it was enacted advisedly, there is no reason for a liberal construction. It is true that section 270 of the Code of 1859, by which the attaching creditor was entitled to be paid first out of the proceeds of property sold under his attachment, was not re-enacted in 1882 or 1908. But that provision did not in terms affect the attachment of a fund and there is no reason for assuming that its disappearance, whatever its effect in cases to which it was applicable, affected the application of the English rule conferring a priority to which BAKEWELL, J., has referred. The material point is that a fund, attached under Order XXI, rule 52, requires no further realization and that in the absence of creditors entitled to apply under section 73, there can, from the moment that the attachment is laid on it, be no obstacle to its payment to the attaching creditor. This is recognized by the procedure authorized by the Civil Rules of Practice, Nos. 179 and 180, under which, after (if necessary) his decree has been transferred to the Court where the fund is, the attaching creditor is entitled to be paid as if he were an assignee of the judgment-debtor. In the present case, as the diary shows, the appellant had applied for and was ready to receive payment, when the lower Court's proceedings were suspended by a prohibitory order from the Subordinate Court, of what nature and passed at whose instance does not appear. No reliance has been placed on that order before us; and the conclusion must be that appellant should not have been frustrated in his effort to obtain money, to which he had established a subsisting right, by respondents, who had none, and the lower Court in allowing rateable distribution acted without jurisdiction.

The lower Court's order must be set aside, the petitions being remanded to it in order that it may deal with them according to law in the light of the foregoing, dismissing the petitions of respondents and ordering payment on that of appellant. Costs to date will follow the result and be provided for in the order to be passed.

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SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I agree. The question for consideration relates to priority among the various decree-holders of a common judgment-debtor. The undisputed facts are that the petitioner obtained a decree against the common judgment-debtor on the 2nd December 1916; on the 4th December he applied for attachment of a fund in Court belonging to the judgment-debtor and on the 6th December he applied for the payment out to him of the money in Court. The other judgment-creditors of the common judgment-debtor had not obtained their decrees on this date. The District Munsif, instead of directing the payment to the petitioner, held his hand as there were other claims, though they had not matured into decrees on the date of the application by the petitioner, and were still pending decision in various Courts. The conclusion of the District Munsif was that the petitioner was not entitled to priority, and that the money in Court should be distributed proportionately to all persons who may obtain decrees against the judgment-debtor. This civil revision petition has been filed against that order. There was no contention before us that the application to this Court is not within section 115, Civil Procedure Code. It may safely be said of this petition that there was irregularity in the exercise of jurisdiction. The real question is whether the procedure adopted by the District Munsif is one allowed by law. He is undoubtedly supported by *Katum Sahiba* v. *Hajee Badsha Sahib*(1) and by the observations of MUKERJEE, J., in *Thakurdas Motilal* v. *Joseph Iskender*(2). As against these decisions, there is *K. Tiruvengadial* v. *K. Tiruvengadiah*(3), in which the present Chief Justice took a different view. Although the learned Chief Justice refers to the decision of a Bench of this Court as supporting him, it is clear, on examining the reference, that the point now in question was not decided by the late Chief Justice and SANKARAN NAYAR, J., in the appeal referred to in *K. Tiruvengadial* v. *K. Tiruvengadiah*(3). The question has now to be examined on principle. BAKEWELL, J., is apparently of opinion that there is a general principle in the Indian Legislature that all creditors of the same debtor should have equal rights in the latter's property. I am not satisfied that there is any such principle in our

(1) (1915) I.L.R., 38 Mad., 221. (2) (1917) I.L.R., 44 Calc., 1072.
(3) (1914) 26 M.L.J., 364.

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Code. The first enunciation of the rule on this subject is to be found in sections 270 and 271 of Act VIII of 1859. Section 270 distinctly declares that a person who first takes out execution of his decree is entitled to be first paid out of the proceeds of the sale. Section 271 introduced the principle of rateable distribution with regard to the surplus proceeds that may be left after the first attaching creditor had satisfied himself. Apparently under this Code the person who attached the property and brought it to sale was regarded as having claim to priority over other creditors. In the next two Codes of Civil Procedure, namely, those of 1877 and 1882, a further change was introduced in favour of rateable distribution. The priority of the attaching creditor was abolished and the rule was stated to be that where assets are realized by sale or otherwise in execution of a decree and where more persons than one *had, prior to the realization, applied to the Court by which such assets are held*, the assets shall be divided rateably amongst all such applicants. In the Act of 1908 another change in favour of rateable distribution was introduced by omitting the words 'realized by sale or otherwise' and substituting for them the words 'are held by the Court.' But the essential condition was retained, namely, that persons applying for distribution *pari passu* must have made applications to the Court for execution of decrees before the receipt of assets. It is thus clear from an examination of these provisions that there is a progressive tendency in favour of rateable distribution. I may even say that there is a tendency to restrict the rights of the first applicant. But certain conditions have still to be complied with if the benefit of such a provision is to be availed of. BAKEWELL, J.'s judgment would lead one to suppose that wherever there are a number of decrees against a common judgment-debtor, the principle of rateable distribution should be enforced whether there have been applications for execution prior to the realization of the assets or not. If that were the object of the legislature it could have then easily declared that no person having a decree against a judgment-debtor shall be entitled to priority by virtue of the fact that he had applied for execution before others. The Indian Law has provided for rateable distribution to all creditors in administrative actions and in insolvency matters. Under Order XX, rule 13, if there is an administrative action and the assets are in the hands of the Court, its distribution

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is governed by the same principles as obtain with regard to distribution of assets of an insolvent judgment-debtor. No question of applying prior to the realization of assets and no question of execution application arise under this rule. Section 73, Civil Procedure Code, is therefore restricted in its operation to other than administrative actions. If we turn to Order XXI, rule 52, it seems clear that priority is within the contemplation of the legislature because it says :

"Any question of title or priority arising between the decree-holder and any other person shall be determined by the Court."

In my opinion the general principle is this, that a person who is diligent enough to invoke the aid of the Court in satisfaction of his decree should not be kept out of his rights because others have not been equally diligent in seeking their redress. The only restriction upon his rights is that, if before he sets the process of the Court in motion to realize the assets others have applied for execution, he should share the realized assets with these other applicants. There is no warrant for holding that a person who had applied for payment should be put off on the chance of some others having claims on the property coming in at some time to have the property distributed rateably. It is not easy to see how long this process of waiting should be enforced. Is it to be only, as in the present case, in favour of persons who have filed suits or is the Court to embark on an inquiry whether there are other creditors who may at some future time file suits to obtain decrees? In my opinion, as pointed out by the Judicial Committee in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1), section 73 should be construed as applying only to persons who come within the strict letter of the law. I am unable to agree with BAKEWELL, J., that there is an underlying principle in our jurisprudence and in our Procedure Code that every creditor should have equal chance of payment from out of the assets of the judgment-debtor whether he is diligent or not and whether he takes prompt steps to enforce his rights or not. I agree with the conclusion come to by the present Chief Justice in *Tiruvengadial* v. *Tiruvengadiah*(2). As regards *Thakurdas Motilal* v. *Joseph Iskender*(1) on the facts of that case the present question did not arise for decision. There

(1) (1917) I.L.R., 44 Calc., 662. (2) (1914) 26 M.L.J., 364.

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are some observations by way of obiter in the judgment of MUKERJEE, J., who invokes the aid of justice, equity and good conscience in favour of equal apportionment to all decree-holders. It has been laid down by the Judicial Committee that under section 53 of the Transfer of Property Act if one creditor is preferred by a debtor honestly that would not be a preference which would avoid the transaction. I am referring to this for the purpose of showing that a person who is diligent enough to get from his debtor his rights is not to be asked to give them up because there are others who have similar rights but who have not taken steps to enforce them. If there is any one principle which guides our Courts, it is the principle of enabling persons who are diligent enough to secure their rights to get full satisfaction of their claims without compelling them to share the property of the judgment-debtor along with others who did not move promptly in the matter.

I would, therefore, allow the petition and set aside the order of the District Munsif and direct him to proceed with the matter in the light of the above observations.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Ayling.

1919, February, 26.

SURAYYA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

ANNAPURNAMMA (DEFENDANT), RESPONDENT.*

Specific Relief Act (I of 1877), sec. 42—Hindu Law—Suit by a Hindu for a declaration that a will alleged to have been executed by another member of the family giving his widow power to adopt is forged—Maintainability of.

A member of a Hindu family can maintain a suit under section 42 of the Specific Relief Act for a declaration that a will alleged to have been executed by another member of the family giving his widow power to adopt is a forgery.

(1) (1917) I.L.R., 44 Calc., 1072.

* Appeal No. 122 of 1918.

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Bobba Padmanabhudu v. *Bobba Buchamma* (1918) 35 M.L.J., 144, followed; *Sreepadam Venkataramanna* v. *Sreepadam Ramalakshmamma* (1912) I.L.R., 35 Mad., 592, not followed.

APPEAL against the decree of V. R. KUPPUSWAMI AYYAR, Subordinate Judge of Kistna at Ellore, in Orginal Suit No. 50 of 1917.

One Mallampalli Patteyya alias Pattisachelam died about the end of August 1914, leaving his widow, the defendant, who alleged that he had left a will giving her power to adopt a son. As she was a minor, her father presented the will before the Sub-Registrar for registration, who registered it as genuine in spite of the opposition of the plaintiffs. The plaintiffs then brought this suit against the widow for a declaration that the will was a forgery, alleging that the deceased was a minor and an undivided co-parcener with the plaintiffs and that the will was a fabrication by the father of the defendant. The defendant pleaded that the will was genuine, that the mere execution of the will did not give the plaintiffs a cause of action, that her husband was divided in status from the plaintiffs and that though he was a minor at the time of making the will, the same was valid in law as it did not dispose of any property but only gave her power to adopt. Two issues were framed :—(1) whether the alleged will giving power to adopt having been executed admittedly by a minor is not valid, and (2) whether the plaintiffs' suit is maintainable. Relying on the authority of *Sreepadam Venkataramanna* v. *Sreepadam Ramalakshmamma*(1), the Subordinate Judge dismissed the suit on the second issue.

The plaintiffs preferred this appeal.

V. Suryanarayana for the appellants.—The plaintiffs have a cause of action and the suit is maintainable. I rely on *Bobba Padmanabhudu* v. *Bobba Buchamma*(2) as enunciating the sounder view which dissents from that in *Sreepadam Venkataramanna* v. *Sreepadam Ramalakshmamma*(1).

V. Ramadoss for the respondent.—The suit does not lie. Mere execution of the will containing only a power to adopt without an actual adoption does not give a cause of action ; see *Sreepadam Venkataramanna* v. *Sreepadam Ramalakshmamma*(1), *Rama Row* v. *The Raja of Pittapur*(3), *Saudagar Singh* v.

(1) (1912) I.L.R., 35 Mad., 592. (2) (1918) 35 M.L.J., 144.
(3) (1919) I.L.R., 41 Mad., 219.

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Pardip Narayan Singh(1), *Janaki Ammal* v. *Narayanasami Aiyer*(2), *Jaipal Kunwar* v. *Indar Bahadur Singh*(3). No suit will lie to set aside an oral consent of a reversioner to adopt. When there is a difference of opinion in same Court the proper procedure is to refer the matter to a Full Bench : see *Buddha Singh* v. *Laltu Singh*(4).

WALLIS, C.J.

WALLIS, C.J.—The Subordinate Judge has proceeded upon the authority of the decision in *Sreepadam Vekataramanna* v. *Sreepadam Ramalakshmamma*(5), but this case has been dissented from in *Bobba Padmanabhudu* v. *Bobba Buchamma*(6), which I prefer to follow. I am unable to agree with the observation in the former case that section 42 of the Specific Relief Act does not authorize such a suit as this. The effect of the widow setting up a will giving her power to adopt is in my opinion to challenge the absolute right of the plaintiff to succeed on her death if he survives her and to convert him in the language of English Law from an heir apparent into an heir presumptive. The rule that Courts in India will not entertain a suit by the plaintiff for the declaration that he is a nearer reversioner than the defendant is not in my opinion based on the view that such a suit does not come within the terms of section 42 but on the settled practice of the Court in the exercise of its discretion under the section and has been so treated by Lord PARKER of Waddington in *Saudagar Singh* v. *Pardip Narayan Singh*(1). Where a will giving authority to adopt is being set up by a widow it is expedient that the question should be settled at once and not left open until the best evidence has disappeared, and a suit such as this may therefore be regarded as in the nature of a suit *quia timet*. I would allow the appeal, reverse the decree, and remand the suit for disposal according to law.

Costs will abide the result.

AYLING, J.

AYLING, J.—I agree in the order proposed and adhere to my opinion expressed in *Bobba Padmanabhudu* v. *Bobba Buchamma*(6).

N.R.

(1) (1918) I.L.R., 45 Calc., 510 (P.C.)
(2) (1916) I.L.R., 39 Mad., 634, at p. 638 (P.C.).
(3) (1904) I.L.R., 26 All., 238, at p. 243 (P.C.).
(4) (1915) I.L.R., 37 All., 604, at pp. 622, 623 (P.C.).
(5) (1912) I.L.R., 35 Mad., 592. (6) (1918) 35 M.L.J., 144.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

1919. February 26.

VENKATACHALAM CHETTY (APPELLANT), PLAINTIFF,

v.

AIYAMPERUMAL TEVAN (RESPONDENT), DEFENDANT.*

Landlord and tenant—Cesses, legal and illegal—Charge for taking landlord's water; 'Rent' within sec. 3 (11), Estates Land Act (I of 1908)—Res judicata—"Competent to try such subsequent suit" in sec. 11, Civil Procedure Code (V of 1908), meaning of.

The words "competent to try such subsequent suit" in section 11, Civil Procedure Code, refer to the competency of the Court which tried the previous suit to entertain the later suit *at the time of the institution of the previous suit*; and the fact that it was deprived of jurisdiction to try suits of the nature of the later suit after the institution but some time before pronouncing judgment in the previous suit does not make its decision any the less *res judicata*. Hence the decision of a Munsif's Court in a prior suit for rent operates as *res judicata* in respect of a later suit for rent though, by reason of the Estates Land Act, the Munsif's Court was deprived of jurisdiction to try such suits after the institution but some time before pronouncement of judgment in the prior suit. *Kunhiamma* v. *Raman Menon*, (1892) I.L.R., 15 Mad., 494, explained; *Gopi Nath Chobey* v. *Bhagwut Pershad*, (1884) I.L.R., 10 Calc., 697, and *Raghunath Panjah* v. *Issur Chunder Chowdhry*, (1885) I.L.R., 11 Calc., 153, followed.

A judgment does not cease to have the force of *res judicata*, simply because in other suits between the same parties the decision on the same point was different.

A charge for taking water belonging to the landlord is 'rent' within section 3 (11), Estates Land Act, and it is not an enhancement of rent even if not consolidated with the rent proper. *Thyammal* v. *Muttia*, (1887) I.L.R., 10 Mad., 282, followed.

Where such water is taken with the permission of the landlord only a suit for rent therefor can be brought and no suit for compensation for taking it will lie.

Where for water so taken even for dry crops the landlord was for long time levying and the tenant was paying the same rent as for water taken for paddy cultivation (*sarasari*) it is reasonable to charge rent at that rate whenever water is taken for dry crops.

A landlord is entitled to levy only such cesses as have a direct or proximate bearing on the purposes for which a land is let and mere length of payment will not give a cess which is purely voluntary or illegal a binding

* Second Appeal No. 1956, etc., of 1916 and Second Appeal No. 1327, etc., of 1917.

character, e.g., *mahimai*, a cess for payment to a village temple; *Sriparupu Ramanna* v. *Mallikarjuna Prasada Nayudu*, (1894) I.L.R., 17 Mad., 43, and *Vadamalai Thiruvanatha Sevuga Pandia Thevar* v. *Sankaramoorthi Naidu*, (1919) I.L.R., 42 Mad., 197, followed.

Cesses for purposes which are beneficial to both the landlord and tenant can be deducted out of the gross produce, such as *kulavettu* (a cess for repair of irrigation sources) and *palaswatantram* (a cess for payment to village artisans and servants).

No cess for superintending a harvest (*kanganam*) can be claimed where the landholder is entitled to get a fixed rent irrespective of the produce.

SECOND APPEALS against the decrees of the District Court of Rāmnād in Appeal No. 363 of 1915, etc., filed against the decree of the Special Deputy Collector of Rāmnād at Manamadura in Summary Suit No. 4861 of 1914, etc., and in Appeal No. 464 of 1915, etc., preferred against the decree of the Deputy Collector of Devakottai Division in Summary Suit No. 885 of 1913, etc.

These are two batches of suits for rent under section 77 of the Madras Estates Land Act by a landholder against his tenants. The principal pleas of the defendants, so far as they are material for the purpose of this report, are:—(1) that the landholder was not entitled to include under rent several cesses which he had included, (2) that all the cesses claimed were illegal, (3) that the claim for the cesses was *res judicata*, and (4) that the landholder was not entitled to charge for water taken for dry crops at the same rate (*sarasari*) as for water for paddy crop. The landholder sought to meet these pleas by stating that all the cesses and the charge of *sarasari* were legal, that they were being paid from time immemorial, that the previous decision of the District Munsif was not *res judicata* as the Munsifs' Courts were deprived of jurisdiction to try suits for rent by the Estates Land Act from 1st July 1908, i.e., after the institution of the prior suit but three months before the Munsif pronounced his judgment, and that in several of the cesses the matter was not *res judicata* as there were no previous decisions.

These two batches of suits were tried by two Deputy Collectors and two batches of appeals were filed before the District Court of Rāmnād, one of which was disposed of by Mr. MOORE and the other of which was disposed of by Mr. W. VENKATARAMAYYA. Both the District Judges held that the landholder was not entitled to levy *sarasari* rate for the water and that there was no bar of *res judicata*; but Mr. MOORE allowed all the cesses claimed in respect of two classes of lands, viz., *varapattu*

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lands (wet lands subject to division of actual produce between landlord and tenant) and *varisaipattu* lands (wet lands paying a fixed paddy rent), while Mr. VENKATARAMAYYA disallowed the cesses in the case of *varisaipattu* lands and allowed all the cesses except three (viz., *amanji*, *pakkilai* and *tayirmutti*) in the case of *varapattu* lands. The landholder filed these second appeals and the tenants filed memoranda of objections.

The charges and cesses claimed in the suit may be explained as follows :—

Sarasari is the claim by the landholder to charge the same rate of rent for water of the landholder taken by tenant for cultivation of dry crops as that which would be charged for water taken for paddy crop. *Kanganam* is a cess for the landholder's trouble in superintending the harvest. *Kulavettu* is a cess for the repair of irrigation tanks. *Palaswatantram* is a cess for payment to village artisans and servants. *Mahimai* or *Eswaran Koil Mahimai* is for contribution towards the expenses of the local temple. *Tayirmutti* is a claim for a pot of curd. *Pakkilai* is a claim for betel leaves and arecanut. *Amanji* is a cess levied in lieu of compulsory labour due to the landlord.

K. Srinivasa Ayyangar and *K. V. Krishnaswami Ayyar* for appellants.

B. Sitarama Rao and *S. R. Muttuswami Ayyar* for respondent.

The JUDGMENT of the Court was delivered by

PHILLIPS, J.

PHILLIPS, J.—These second appeals are filed against two batches of appeals of the Rāmnād District Court which were decided by two District Judges who have not taken altogether identical views on all points. In Second Appeal there are two main points for consideration :—

(1) Whether the plaintiff is entitled to charge *sarasari* or average paddy varam for dry lands irrigated by plaintiff's water, (2) what cesses the plaintiff is entitled to charge.

On both these points, there have in the past been a number of suits between some of the same parties—one batch of suits in the Manamadura Munsif's Court, a second batch before the Special Deputy Collector of Rāmnād and the third before the Deputy Collector of Devakottai. It is contended for the appellants that the decisions in all these suits constitute *res judicata* so far as the parties and property concerned are the

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same. In the Manamadura suits there was no appeal beyond the District Court except in two cases which came to the High Court, and in those two cases the High Court reversed the decision of the lower Courts. Mr. MOORE accordingly holds that the question is not *res judicata* as regards the defendants in the Manamadura suits who did not appeal, because to hold otherwise would lead to certain startling results and Mr. Venkataramayya also appears not to consider the decision as *res judicata* and regards them as of small evidentiary value in view of the contrary opinion of the High Court. It is difficult to see why questions that have once been settled between the parties should not be deemed to be *res judicata* merely on the ground that similar questions between the same parties have been decided otherwise in other litigation, and the learned vakil for the respondent does not support the finding of the District Judges on the grounds given by them, but so far as the cases decided by the Manamadura Munsif are concerned he relies on the language of section 11 of the Civil Procedure Code for holding that they are not *res judicata*. His contention is that, under section 11, the Court which decided the first suit must have been competent at the time of such decision to try the subsequent suit and relies on a ruling in *Kunhiamma* v. *Raman Menon*(1). We do not think that this case really supports his plea. No doubt the Judges said that they were of opinion that the only reasonable construction to be put upon the words

"Court of jurisdiction competent to try such subsequent suits" must be held to refer to the jurisdiction of the Court at the time when the suit was heard and determined but that the Judges did not really mean to decide that the Court must be competent on the date of judgment and not on the date of the institution of the suit appears to be clear from the fact that they approved the view of the Calcutta High Court in *Gopi Nath Chobey* v. *Bhugwat Pershad*(2) and *Raghunath Panjah* v. *Issur Chunder Chowdhry*(3). In the former of these cases it was clearly held at page 707 as follows :

"the reasonable construction of the words 'in a Court of jurisdiction competent to try such subsequent suit' seems to us to be that it must refer to the jurisdiction of the Court at the

(1) (1892) I.L.R., 15 Mad., 494. (2) (1884) I.L.R., 10 Calc., 697.
(3) (1885) I.L.R., 11 Calc., 153.

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time when the first suit was brought, that is to say, if the Court which tried the first suit was competent to try the subsequent suit if then brought, the decision of such Court would be conclusive under section 13, although on a subsequent date, by a rise in the value of such property or from any other cause, the said Court ceased to be the proper Court, so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property."

This view is followed in *Raghunath Panjah* v. *Issur Chunder Chowdhry*(1) and also *Rai Churu Ghosh* v. *Kumud Mohan Dutt Chowdhary*(2). At the date of institution of the first suit in the Manamadura Court, that Court had jurisdiction to try the subsequent suit and the fact that jurisdiction was taken away by the passing of the Estates Land Act shortly before the judgment was pronounced would not make it a Court not competent to try the subsequent suit within the meaning of section 11. We, therefore, think that the decision of the Manamadura Munsif which was not appealed against constituted *res judicata* as well as the two decisions of this Court. So far as the cases decided by the Special Deputy Collector are concerned, there was no appeal and his decision is undoubtedly *res judicata* In the third class of cases before the Deputy Collector of Devakottai no appeal was preferred in some of the suits and his decision would therefore be final in those cases. So far therefore as the previous litigations related to the same land or between the same parties, we think that the questions therein raised and decided must be held to be *res judicata*. There are, however, other cases before us to which the principle of *res judicata* will not apply and these will have to be decided on the merits. The contention of the respondent on the first of the two questions before us which was upheld by the District Judges is that the charge of *sarasari* is illegal, because it is an enhancement of rent. Rent was originally charged for dry crops on the suit dry lands and the right to levy *sarasari* now claimed is claimed on the ground that those lands have been irrigated by water taken from the landlord's tank and for this water he is entitled to a reasonable compensation. It has been held in *Thyammal* v. *Muttia*(3), *Venkoba Rao* v. *Vaithilinga Udayan*(4) and *Battina Appanna* v. *Raja Yarlagadda*(5) that a

(1) (1885) I.L.R., 11 Calc., 153.
(2) (1898) 2 C.W.N., 297.
(3) (1887) I.L.R., 10 Mad., 282.
(4) (1901) 12 M.L.J., 22.
(5) (1917) 33 M.L.J., 355.

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charge for water taken by the tenant is not enhancement of rent. No doubt under section 3 (11) of the Estates Land Act, such charge, even if not consolidated with the rent, will come within the definition of 'rent'. But for that reason alone, it is not necessary to hold that the charge for water in excess of the prior dry rent is an enhancement of rent.

It is suggested that the landlord's remedy would be to sue for compensation for the use of water taken, but that, within the meaning of the Estates Land Act, would be in effect a suit for rent and would be governed by the provisions of that Act. Nor can he sue for damages for loss of water taken, when, as a matter of fact, he has consented to the tenant taking that water. It is not disputed that any water taken was taken with the permission of the landlord, and we think it is only reasonable to infer from such taking by consent a contract between the parties that the landlord shall be entitled to a reasonable compensation for the water. The question, therefore, would be whether the charge of *sarasari*, which is the average varam collected on paddy lands in the village, is a reasonable charge. It is very difficult to fix exactly the proper charge for the water, for the quantity of water taken must vary according to the season of the year and also the nature of the crop raised on the land. So far as the landlord is concerned, the most profitable use of the water would be to facilitate the cultivation of a paddy crop, as it would result in his obtaining his share of the produce in paddy and the landlord might well say that all the water taken from his tank should be utilized for such purpose. If the tenant utilized it for less remunerative crops, such as chillies and cotton as in the present case, can he be heard to say that he should pay less? It is a somewhat difficult question, but we find that *sarasari* has been levied in the past. *Sarasari* being a curious method of levying compensation, which would hardly suggest itself to a landlord in modern days, it is evident that it must be levied according to old existing custom, and this would also appear from the technical meaning which is attached to the word itself. By its levy the landlord gets no more for his water than he would get by supplying water to wet lands, and there seems to be no ground for depriving him of what he can ordinarily expect to get for his water. The tenant is not bound to take water to dry lands, and consequently

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he suffers a hardship by being asked to pay the full price for water taken by him. He has his remedy in his own hands, i.e., he can cease to take water. The landlord on the other hand has not a similar remedy, for the application of the water to paddy crops or to *vanpayir* crops lies in the tenants' hands. In these circumstances it seems to us that the levy of *sarusari* by the landlord is only a reasonable and equitable compensation for water supplied by him, and must be allowed. As there is no finding as to whether water was taken for the suit years, appellants' vakil says he will be satisfied with a mere declaration. The decree will therefore be modified accordingly.

As regards the cesses claimed Mr. MOORE allowed all the cases in respect of *varapattu* and *varisaipattu* lands. Mr. Venkataramayya disallowed the cesses in the case of *varisaipattu* lands and as regards *varapattu* lands disallowed *amanji*, *pakkilai* and *tayirmutti*. The appellant's vakil stated that he does not press *pakkilai* and *tayirmutti*.

Varapattu lands are the ordinary wet lands in respect of which the landlord and tenant divide the actual produce, while *varisaipattu* lands are lands paying a fixed paddy rent.

The Special Deputy Collector disallowed *pakkilai*, *tayirmutti* and *amanji* and allowed the other cesses claimed on the ground that "these cesses have been customarily paid by the ryots and collected by the landlord in kind as part of their rent." There can be little doubt that the cesses have been paid for a long series of years by the tenants without objection.

The karnam (plaintiff witness No. 1) deposes that on *varapattu* lands *kanganam*, *Iswaran kovil mahimai*, *kulavettu*, *kadiraruppu* (*cooly*), *karnam swatantram*, *kudivaram*, *kaipichai*, are deducted as common charges and the balance divided between the landlord and tenant. Out of these common charges some go to the landlord and some to the ryot. He states that out of the *kadiraruppu* three measures are taken out of every fourteen markals and added to the landlord's share as *amanji*. As regards *varisaipattu* lands he states that *kanganam*, *kulavettu*, *tayirmutti*, *amanji*, *Iswaran kovil mahimai*, *pakkilai*, *swatantram*, *vamadai*, *vaikkalkattu* are the cesses levied.

The plaintiff appeals against the decision of Mr. VENKATARAMAYYA disallowing the cesses claimed and the defendants have

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filed a memorandum of objections against the decision of Mr. MOORE as regards the cesses allowed.

In our judgment in *Vadamalai Thiruvanantha Sevuga Pandia Thevar* v. *Sankaramoorthi Naidu*(1) we have given what in our opinion are the tests to be applied and the considerations which should weigh with the Court in allowing or disallowing cesses which have been paid for a long time without dispute and to the difference between cesses which are deducted out of the gross produce and those deducted out of the tenant's share. We observed as follows :—

"IN considering whether any particular cess claimed and which has been paid for a series of years is enforceable or not the first thing to be considered is whether the cess claimed has any direct or proximate bearing on the purpose for which the land is let. If the cess is payable in respect of such purpose it will *prima facie* be one which is binding on the parties and the onus will be on the tenant to show that owing to some special circumstance it is not binding on him. When the cesses are in their nature unconnected with the object for which the land is let, they can only be claimed by the landlord under contract between him and the ryot, supported by consideration or usage for which a legal origin is either proved or presumed from the nature of the cess and long course of payment."

While on the one hand mere length of payment will not, as pointed out in *Sundaram Iyer* v. *Theetharappa Mudaliar*(2), give to a cess, which is purely voluntary, or which is on its face illegal, acquire a binding character, payment during a long course of years will be presumptive evidence that the payment of a cess had a legal origin, if the case is of such a nature that a contract to pay it may be reasonably inferred.

As regards cesses deducted out of the gross produce before division of the varam, there is nothing to prevent the parties from agreeing that certain expenses, which they consider to be beneficial to both of them, should be met by them in common, and in such cases so long as the levying of the cess is not a device by the landlord to give himself a purely personal benefit the purpose for which the cess is levied is immaterial. It will of course be open to the tenant to show that the purpose for which the cess is levied has failed or that the landlord has not been appropriating the cess to the purpose for which it is claimed and levied.

(1) (1919) I.L.R., 42 Mad., 197. (2) (1916) 40 I.C., 159.

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So far as cesses in connexion with temples are concerned, they have been held to be purely voluntary in *Siriparupu Ramanna* v. *Mallikarjuna Prasada Nayudu*(1), *Ramalingam Chettiar* v. *Ramaswami Aiyar*(2) and *Devanai* v. *Raghunatha Rao*(3). *Iswaran kovil mahimai* will therefore be disallowed.

As regards *varisaipattu* land, there is obviously no necessity for *kanganam*, which is a cess for superintending harvest; for the landlord gets a fixed paddy rent irrespective of the produce and no supervision is necessary. *Tayirmutti* and *pakkilai* have been given up. *Iswaran kovil mahimai* is for the reasons above given not enforceable. The Deputy Collector has disallowed *amanji*, and it has not been shown that the cess is one that can be enforced.

We do not see sufficient grounds to disallow the other cesses. They have been paid for several years without objections and have been found by the Deputy Collector to have been paid for a long series of years as part of the rent. The decrees of the lower Courts as regards cesses will be modified accordingly.

Appellants will get costs in second appeals Nos. 1327—1353 and 1356—1361 and will pay costs in Nos. 1956—1973 and in the memorandum of objections. Each party will bear his own costs as also in second appeals Nos. 1354–1355.

N.R.

(1) (1894) I.L.R., 17 Mad., 43. (2) (1902) 13 M.L.J., 379.
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and on his refusal proceeded to put up the property to resale, holding the bidder to be a defaulter liable for any deficiency that might be caused by the resale, and the latter preferred a Civil Revision Petition as well as a Miscellaneous Appeal to the High Court against the order directing the resale. *Held*, that the lower Court acted illegally and with material irregularity in the exercise of jurisdiction in accepting the preceding bid and making the order for resale, and that the High Court was competent to interfere in revision, but that no appeal lay against the order.

Raja of Bobbili v. *Suryanarayana Rao* ... ... (1919) I.L.R., 42 Mad., 776

CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLI, R. 27—*Additional evidence—Refusal by the lower Appellate Court to admit—Second Appeal—Power of High Court to interfere and direct admission—Jurisdiction—Exercise of discretion, whether revisable.*] *Held* (*by* WALLIS, C.J., *and* AYLING, J., SADASIVA AYYAR, J., *dissenting*) that, where a lower Appellate Court refuses to admit a certain material document as additional evidence in the appeal under Order XLI, rule 27, Civil Procedure Code, the High Court cannot interfere in second appeal and hold that such additional evidence ought to have been admitted by the lower Appellate Court. *Per* WALLIS, C.J.—It has long been the practice of all the High Courts not to entertain second appeals from refusals of the the lower Appellate Court to admit fresh evidence under Order XLI, rule 27, Civil Procedure Code, and such practice should not be departed from. *Per* SADASIVA AYYAR, J., *contra*.—The High Court has power in second appeal to consider the propriety of the exercise of discretion by the lower Appellate Court as regards the admission of additional evidence.

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CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 177 TO 187, 526 AND 531—*Murder committed outside Madras—Inquiry by Chief Presidency Magistrate and commitment to High Court Sessions—Jurisdiction of Magistrate, Original Criminal Jurisdiction of High Court—Letters Patent, cl. 24—Jurisdiction, whether conferrable under section 526, Criminal Procedure Code.*] The petitioners were charged before the Chief Presidency Magistrate of Madras with having kidnapped a child from his guardian in Madras, with having stolen his jewels from him in Madras and with having taken him out of the city to a place within the jurisdiction of the Sessions Judge of Chingleput and there murdered him. The Chief Presidency Magistrate, after inquiry, committed the petitioners to the High Court Sessions on the abovesaid charges. On an application to the High Court on its appellate side to set aside the commitment so far as the charge of murder was concerned on the grounds that (*a*) the Magistrate had no local jurisdiction to inquire into the case, and (*b*) the High Court had no local jurisdiction to try the charge of murder: *Held* (i) that the irregularity or illegality, if any, in the Magistrate's proceedings was cured by section 531, Criminal Procedure Code, (ii) that even if the High Court had no jurisdiction on its Original Side to try the case, an order could be made under section 526, Criminal

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Procedure Code, directing the trial at the High Court Sessions. Ordered accordingly. *Semble*.—The High Court has power under clause 24 of the Letters Patent in the exercise of its original criminal jurisdiction to try persons for offences committed outside the City of Madras. *Queen-Empress* v. *James Ingle*, (1892) I.L.R., 16 Bom., 200, and *Queen-Empress* v. *Ram Dei*, (1896) I.L.R., 18 All., 387, referred to; *Assistant Sessions Judge of North Arcot* v. *Ramammal*, (1913) I.L.R., 36 Mad., 387, distinguished.

Ganapathy Chetty v. *Rex* ... ... (1919) I.L.R., 42 Mad., 791

DISTRICT MUNICIPALITIES ACT (MADRAS ACT IV OF 1884), SS. 207, 264 (*a*) AND 278—*Erection of a latrine by a house-owner—Nuisance to neighbours—Nuisance avoidable—Injunction—Damages whether sole remedy.*] The fact that a municipality, governed by the Madras District Municipalities Act, which is empowered to see that house-owners provide latrines in their houses, ordered the erection of a latrine in a certain house does not enable the house-owner to erect a latrine at a place where it would be a nuisance to his neighbour. If he could erect it at any other place where it would not be a nuisance he can be restrained by an injunction to abate the nuisance. Award of damages as provided for by section 278 of the Act is not the only remedy.

Rama Row v. *Martha Sequeira* ... ... (1919) I.L.R., 42 Mad., 796

HINDU LAW—*Prior mortgage by father of joint family estate, whether an antecedent debt to support a subsequent mortgage so as to charge sons' shares also.*] An independent debt, neither illegal nor immoral, contracted by a Hindu father on the security of the joint family estate, antecedent to a mortgage sued on, is an 'antecedent debt' so as to support a charge on the sons' shares also to the extent of the sums secured on the prior mortgage. *Sahu Ram Chandra* v. *Bhup Singh*, (1917) I.L.R., 39 All., 437 (P.C.), explained. *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu*, (1918) 35 M.L.J., 382, overruled.

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LETTERS PATENT, CL. 24:—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 177 TO 187, 526 AND 531 791

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Vachali Rohini v. *Kombi Aliassan* ... ... (1919) I.L.R., 42 Mad. (F.B.), 753

LOCAL BOARDS ACT, MADRAS (V OF 1884), SS. 33, 98 (1) AND (2)—*Delegation of duty to give notice of removal of obstruction to a public road by the president of a taluk board to a chairman of a union, validity of—"Other person duly*

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authorised by him as aforesaid" in sec. 98 (2), meaning of.] Section 33 of the Madras Local Boards Act (V of 1884) does not restrict the specific delegations of duty allowed to the president of a taluk board by other sections of the Act. The words "other person duly authorised by him as aforesaid" in section 98, clause (2), mean "*any* person duly authorised by *him* in that behalf," viz., the one mentioned in section 98, clause (1), and do not mean only the vice-president of the taluk board. Hence a notice to remove an obstruction to a public road given by the chairman of a union to whom the president of the taluk board within which the union was situated delegated the power to give such notice is a legally valid notice; and disobedience to the notice is an offence under the Act.

Public Prosecutor v. *Sankaralinga Moopan* ... (1919) I.L.R., 42 Mad., 787

MALABAR LAW—*Claim by an anandravan for arrears of* menchilavu *for himself and his wife; maintainability of.*] An anandravan of a Malabar tarwad is not entitled to claim maintenance from his tarwad for his wife, who belongs to another tarwad, and much less is he entitled to claim for her any *menchilavu* (pocket money for meeting expenses other than maintenance). *Parvathi* v. *Kamaran*, (1883) I.L.R., 6 Mad., 341, referred to and explained. An anandravan is entitled to a decree from his tarwad for arrears of his *menchilavu*, which in law stands on the same footing as arrears of maintenance. *Kunhammath* v. *Kunhi Kutti Ali*, (1884) I.L.R., 7 Mad., 233, *Valiya Konikel Edom Kalu* v. *Lakshmi Nattiyar Ammal*, (1918) 1 M.W.N., 379, and *Govindan Nair* v. *Kunju Nair* (1919) 36 M.L.J., 565, followed.

Ravanni Achan v. *Thankunni* ... ... (1919) I.L.R., 42 Mad., 789

——— *Trade carried on by karnavan of a Mappilla tarwad—Debts incurred by the karnavan in the trade, whether binding on other members.*] Trade is not one of the ordinary pursuits of a Malabar tarwad and carrying on trade is not within the ordinary scope of authority of a Malabar karnavan; hence in the absence of evidence that a trade carried on by a karnavan has been the trade of the tarwad as a whole or that the members of the tarwad or at least the adult members thereof consented to the trade being carried on by the karnavan, the other members of the tarwad are not bound by the liabilities incurred by the karnavan in connection with the trade. This rule applies even in the case of a Mappilla tarwad where all the male members habitually follow trade as their ordinary avocation.

Abdurrahman Kutti Haji v. *Hussain Kunhi Haji* ... (1919) I.L.R., 42 Mad., 761

SALE OF LAND—*Contract of re-sale—Time, essence of the contract—Doctrine applicable to contracts of sale, whether applicable to contracts of re-sale—Rule of English law, applicability of, to India.*] The doctrine, that time may not be of the essence of the contract which arises on the construction of contracts of sale of immoveable property, is not applicable to contracts of *re-sale* of property conveyed. If the transaction is not a mortgage, the right to re-purchase being an option must be exercised according to the strict terms of the power. Rule of English law followed—*Joy* v. *Birch*, (1836) 7 E.R., 22. *Ranelagh* v. *Melton*, (1864) 62 E.R., 627, and *Dibbins* v. *Dibbins*, (1896) 2 Ch., 348, referred to.

Samarapuri Chettiar v. *Sudarsanachariar* ... (1919) I.L.R., 42 Mad., 802

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Chief Justice, Mr. Justice Oldfield, Mr. Justice Sadasiva Ayyar, Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Ayyar.

ARMUGHAM CHETTY, APPELLANT (PLAINTIFF),

v.

MUTHU KOUNDAN AND TWO OTHERS, RESPONDENTS (DEFENDANTS Nos. 1, 2 AND 3).*

1919, February 5, March 2, and April 10.

Hindu Law—Prior mortgage by father of joint family estate, whether an antecedent debt to support a subsequent mortgage so as to charge sons' shares also.

An independent debt, neither illegal nor immoral, contracted by a Hindu father on the security of the joint family estate, antecedent to a mortgage sued on, is an 'antecedent debt' so as to support a charge on the sons' shares also to the extent of the sums secured on the prior mortgage.

Sahu Ramchandra v. *Bhup Singh*, (1917) I.L.R., 39 All., 437 (P.C.), explained. *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu*, (1918) 35 M.L.J., 382, overruled

SECOND APPEAL against the decree of J. T. GILLESPIE, the District Judge of Salem, in Appeal No. 102 of 1916, preferred against the decree of K. S. KOTHANDARAMA AYYAR, the Principal District Munisif of Salem, in Original Suit No. 297 of 1915.

The facts of the case are fully stated in the Order of Reference of SADASIVA AYYAR, J. The plaintiff preferred this Second Appeal.

T. Narasimha Ayyangar for appellant.

B. Sitarama Rao for respondent.

The Second 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. The suit was brought to obtain a mortgage decree for sale on the mortgage document, exhibit H, dated 11th May 1903, executed by the first defendant to the plaintiff for Rs. 1,150. The defendants Nos. 2 and 3 are the undivided sons of the first defendant. The

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* Second Appeal No. 845 of 1918.

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third defendant is still a minor, while the second defendant was a minor on the date of the mortgage bond, exhibit H.

According to the recital in exhibit H the sum of Rs. 1,150 mentioned in it as consideration is made up as follows: (*a*) Rs. 833-8-0 being the sum due on the registered mortgage bond, exhibit G of 1899; (*b*) Rs. 130-1-0 due on the simple debt bond of 1902, exhibit K; (*c*) Rs. 43 received by the first defendant for excavating a well in the family garden; (*d*) Rs. 100 for discharging the debt of Nattukkottai Karuppan Chettiyar; (*e*) Rs. 43-7-0 received for excavating the well already mentioned and for family expenses; total Rs. 1,150.

The first defendant (the father) as usual remained ex parte. His sons (the defendants Nos. 2 and 3) contended that their two-thirds share in the mortgaged properties cannot be affected by the mortgage because

"the suit debt was not contracted either for family benefit or for any necessity binding on the family" [fourth paragraph of the written statement].

It will be seen from the written statement that the defendants Nos. 2 and 3 did not question the genuineness of the mortgage deed, exhibit H, or the existence of the debts, that is, the passing of consideration for exhibit H, nor did they plead that the document was legally invalid as a mortgage for any reason. Their defence was confined to the contention that the mortgage debt was not binding on their shares of the mortgage property.

As the first defendant remained ex parte, the District Munsif had to raise the point for determination as to his execution of the document in order to give a decision against him. On 11th June 1915 a single consolidated issue was raised by the District Munsif as follows:—

"Whether the suit document is genuine and supported by consideration and binding on the second and third defendants' shares."

In the judgment of the District Munsif the issue has been split up into two as follows: (1) whether the suit document is genuine and supported by consideration and (2) whether the suit document is binding on the second and third defendants' shares. The Munsif notes in paragraph 6 of his judgment that issue (2) was the only one really contested by the contesting defendants Nos. 2 and 3 whose vakil noted on exhibit H that he admitted genuineness. The vakil also noted on the documents,

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exhibits A to G, that he admitted their genuineness. The plaintiff who was not even cross-examined proved the genuineness of exhibits J and K. Clearly Mr. R. Srinivasa Rao, B.A., B.L., who appeared as vakil for the defendants Nos. 2 and 3 before the District Munsif, did not deny the genuineness or validity as a mortgage document of the deed, exhibit H, sued on or of the other documents, exhibits A to G. The Munsif found on the first issue (which was not contested by the contesting defendants) in the plaintiff's favour and he found on the second issue that the suit document is binding on the shares of the defendants Nos. 2 and 3 to the extent of Rs. 1,106-9-0 out of the principal sum of Rs. 1,150 mentioned in exhibit H, the sum of Rs. 43-7-0 received in cash on the date of exhibit H not having been proved to have been borrowed for family necessity. The District Munsif held that the remaining Rs. 1,106-9-0 constituted antecedent debts and hence the mortgage was binding to that extent on the shares of defendants Nos. 2 and 3 also. He gave a mortgage decree accordingly for that sum and interest.

On appeal, the same vakil who had appeared for the defendants in the District Munsif's Court was allowed to contend that exhibit H was not proved to be valid as a mortgage because it had not been proved by the evidence of an attesting witness under section 68 of the Evidence Act and the other mortgage documents, exhibits B, C, E, F and G, had also not been so proved by the evidence of an attesting witness for each of the documents or by proof that the attestation of one attesting witness was in his handwriting under section 69 of the Evidence Act. I might add that, in the grounds of appeal to the lower Appellate Court, no express reference is made to the necessity of the proof of any of these documents by an attesting witness or to the necessity of the proof of an attesting witness's handwriting.

The District Judge accepted this contention and held that exhibits B, C and E to H were inadmissible in evidence as not properly proved. Yet, he upheld, rather inconsistently, the decree of the District Munsif so far as it directed the sale of the first defendant's share in the mortgaged properties, that is, just as if exhibit H had been properly proved as a mortgage document, so far as the first defendant's share was concerned.

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I am clear that the contesting defendants Nos. 2 and 3 did not dispute either the genuineness or the legal validity as mortgage documents of the deeds, exhibits B, C and E to H, before the District Munsif. So far as the suit document, exhibit H, is concerned, I think that Order VIII, rules 3 to 5 (introduced into the new Civil Procedure Code), casting, as they do, the obligation on contesting defendants to make specific denials of facts alleged in the plaint and providing, as they do, that evasive denials are insufficient, precluded the defendants Nos. 2 and 3 from raising the question that exhibit H did not create a valid mortgage or was not properly proved. Under section 58 of the Evidence Act, no fact need be proved which the parties have agreed to admit or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings, though the Court may in its discretion require the facts admitted to be proved otherwise than by such admissions. The District Court is, no doubt, given a discretion under this section to require proof of these documents B, C and E to H, but in my opinion it would not have exercised its discretion properly if it called for such proof, notwithstanding what took place before the District Munsif. Assuming however that its discretion to call for proof would have been properly exercised, it did not call for such proof but decided at once that the documents had not been proved. The affidavits of three witnesses filed in this Court on behalf of the plaintiff establish that the District Munsif dispensed with the evidence as the contesting defendant's vakil did not require formal proof of the documents, exhibits B, C and E to H. I would therefore set aside the finding of the District Judge on the first issue and hold that the suit document, exhibit H, is genuine and supported by consideration.

I now come to the second issue, namely, whether the debt is binding on the second and third defendants assuming that the documents B, C and E to H are valid mortgage documents supported by consideration.

The first document, exhibit B, was executed by the first defendant to S. Koundan for Rs. 75 in 1891. Before the personal remedy under that document was barred, the first defendant executed exhibit C (which superseded B) in 1895 for Rs. 115 to the same S. Koundan. Then exhibit E is a mortgage deed by

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the first defendant to Chinnu Mudali in 1896 for Rs. 50. Exhibit F is a mortgage deed executed in the year 1897 by the first defendant to Palaniandi Chettiar for Rs. 400 to discharge exhibits C and E and for further sums borrowed. Exhibit G is dated 1899 for Rs. 700 to discharge exhibit F and for monies borrowed in cash and it was executed to the plaintiff Arumugam Chetty. Exhibits J and K are simple debt bonds for Rs. 50 and Rs. 120, respectively, dated 1900 and 1902, exhibit K superseding exhibit J. The plaint document, exhibit H, was executed for Rs. 1,150 due to the plaintiff, partly under exhibit G (Rs. 833-8-0) (within six years of exhibit G), and partly under exhibit K (Rs. 130-1-0) (within three years of exhibit K) and partly under oral loans (Rs. 143) (total Rs. 1,106-9-0), the remaining Rs. 43-7-0 borrowed in cash on date of exhibit H being disallowed by the District Munsif.

The District Judge has disallowed the plaintiff's claim against the shares of the defendants Nos. 2 and 3 in respect of almost the whole of this entire amount of Rs. 1,106-9-0. He has allowed only the amount of Rs. 130-1-0 (due under the simple debt bond, exhibit K) out of the above sum of Rs. 1,106-9-0. The District Judge's reason is that the term 'antecedent debt' as explained in the Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh*(1) does not cover the debt due under exhibit G (Rs. 833-8-0) and that the antecedent oral debts amounting to Rs. 143-1-0 are not proved. I have already held that the defendants Nos. 2 and 3 did not deny and must be deemed to have admitted the existence of all the debts which made up the Rs. 1,106-9-0.

The learned District Judge does not explain why, according to the Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh*(1), the money due under the mortgage document, exhibit G, would not constitute an antecedent debt. Mr. Sitarama Rao who appeared for the respondents Nos. 1 and 2 has however ably argued before us that, according to that decision, no debt secured by a mortgage of the ancestral family property would constitute 'antecedent debt' of the father and that such a debt could not therefore support an alienation by the father so as to bind his sons' interests. It seems to be rather a startling

(1) (1917) I.L.R., 39 All., 437 (P.C.).

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proposition that while an antecedent debt of a simple character whether contracted orally or under a simple debt bond can support a subsequent mortgage or sale of the sons' share also in the ancestral property, the fact that the antecedent creditor got the additional security of a mortgage deprives the subsequent alienee of the right given by the Hindu law to rely upon the antecedent character of the debt discharged by the consideration paid for his alienation. The point directly decided in *Sahu Ram Chandra* v. *Bhup Singh*(1) is that a loan, *contemporaneous with or just previous* to the date of a mortgage transaction, could not be treated as an antecedent debt as was erroneously held by BODDAM and BHASHYAM AYYANGAR, JJ., in *Chidambara Mudaliar* v. *Koothaperumal*(2), a view which had already been overruled by this Court in *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu*(3). Mr. Sitarama Rao relies however on the following passages found in their Lordships' judgment :—

"The law was thus stated by Lord HOBHOUSE in *Nanomi Babuasin* v. *Modhun Mohun*(4) : 'Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have, for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt . . . if not tainted with immorality.' In their Lordships' opinion, these expressions do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, 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.*"

I think that having regard to the context, their Lordships only meant that if the so-called antecedent debt is so shortly before the execution of the mortgage, say two hours or two days as to establish that *it was incurred on the credit, or security available by the joint family immoveable assets,* such a debt is not an antecedent debt and the mortgage deed executed for such a so-called antecedent debt would not affect the sons' shares. In the same page 447 their Lordships say :

(1) (1917) I.L.R., 39 All., 437 (P.C.). (2) (1904) I.L.R., 27 Mad., 326. (3) (1906) I.L.R., 29 Mad., 200. (4) (1886) I.L.R., 13 Calc., 21 at p. 35 (P.C.).

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"to call a borrowing made on the occasion of the grant of a mortgage an antecedent debt is to extend unduly and improperly the whole scope of the exception on that topic."

At page 448, their Lordships say :

"It is said that the transaction substantially is that the father got the Rs. 200 into his hands and that when he granted the mortgage he was accordingly an 'antecedent debtor.' Their Lordships are of opinion that this contention cannot be upheld."

Thus, their Lordships were only considering the question whether the debt incurred on the security of the mortgage was itself an antecedent debt so as to support *that* mortgage and not whether a debt previously incurred which is really and substantially (and not in mere name and technically) a debt antecedent to the mortgage sued on could not be called an antecedent debt, when considering the validity of a *later* security deed. The antecedent mortgage debt may not be able to support itself as a mortgage security as regards the sons' shares secured under it, but that it ceases to be an antecedent debt so as to support the later alienation by mortgage is, as I said before, not only a startling proposition but seems to be devoid of any support from the language of their Lordships.

In *Peda Venkanna* v. *Sreenivasa Deekshatulu*(1), my Lord the Chief Justice considered the above Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh*(2) and remarked as follows in answer to the argument that no suit could be brought during the lifetime of the father against the sons on a debt incurred by the father and which was neither illegal nor immoral—

"As to this, Lord HALSBURY's well-known observations in *Quinn* v. *Leathem*(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, appear to me to apply with special force. That the Indian Courts have interpreted the earlier decisions ending with *Nanomi Babuasin* v. *Modhun Mohun*(4), in which last case it is stated that the sons cannot set up their rights against his creditor's remedies for their debts if not tainted with immorality, as au horizing suits for such debts against the son as well as the father may be seen, as regards Calcutta, from the Full Bench decision in *Luchmun Dass* v. *Giridhur Chowdhry*(5)."

(1) (1918) I.L.R., 41 Mad., 136. (2) (1917) I.L.R., 39 All., 437 (P.C.). (3) (1901) A.C., 495, at p. 506. (4) (1886) I.L.R., 13 Calc., 21 at p. 35 (P.C.). (5) (1880) I.L.R., 5 Calc., 855.

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And then my Lord proceeds to refer to other cases and finally holds that the Privy Council could not have meant to overrule all those decisions. Though the case in *Peda Venkanna* v. *Sreenivasa Deekshatulu*(1) did not raise the particular point now in question, I have referred to it to show that the language of their Lordships relied on by Mr. Sitarama Rao before us, namely, "an obligation incurred wholly apart from the security afforded by the joint estate," refers to the obligation under the suit-bond on which a particular suit is brought and which is sought to be treated as an antecedent debt and not a prior antecedent obligation of the father, though that prior obligation was accompanied by a charge on the joint estate. I might further add that as the father's personal liability under the prior obligation under exhibit G had not been barred on the date of the suit document, exhibit H, there was in this case an obligation wholly apart from the security afforded by the joint estate which could form an antecedent debt and could be used as the foundation to support exhibit H to that extent, against the shares of the sons, even if their Lordships of the Privy Council intended by their language that a secured debt *as such* could never constitute an antecedent debt. While, on principle, the fact of the debt being barred on the personal covenant should make no difference, I have raised this point for consideration because, even if one is ultimately constrained by the language of their Lordships of the Privy Council to treat a debt which is altogether a mortgage debt as not being an antecedent debt, that doctrine (which, as I said before, is to my mind a startling doctrine) may not be extended an inch beyond what is absolutely necessitated by their Lordships' language.

Mr. B. Sitarama Rao however relied upon the decision of SPENCER and KRISHNAN, JJ., in *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu*(2), where the learned Judges state that an antecedent debt which was also a mortgage debt could not be relied on as an antecedent debt to support the subsequent mortgage. I feel grave doubts as to whether the language of their Lordships of the Privy Council when interpreted with reference to the facts of the Privy Council case was intended to lay down such a proposition and, as I have above tried to show,

(1) (1918) I.L.R., 41 Mad., 136. (2) (1918) 35 M.L.J., 382.

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their Lordships were only dealing with the question whether a particular loan incurred on security of the joint estate and therefore not incurred wholly apart from the security afforded by the said joint estate would affect the sons' shares in the joint estate. Their Lordships were not considering at all the question whether if a really antecedent debt had also been accompanied by a mortgage security, it would or would not constitute an antecedent debt capable of supporting a subsequent alienation of the sons' shares by a mortgage bond executed for the discharge of that antecedent debt (and for fresh loans) so far as that antecedent debt was concerned.

As however the question is an important one which must frequently occur and as my view is opposed to the decision of the Division Bench in *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu*(1) I would refer the following questions for the decision of a Full Bench:—

(1) Whether an independent debt, not immoral or illegal, contracted by the father on the security of the joint estate antecedent to the mortgage sued on can be treated as an antecedent debt so as to support the charge on the sons' shares also to the extent of the sums secured on the prior mortgage?

(2) In such a case, can the former debt be treated as an antecedent debt for the purpose referred to, if the personal liability of the father under the earlier mortgage is not barred on the date of the suit document?

NAPIER, J. — NAPIER, J.—I entirely agree with my learned brother that it was not open to defendants Nos. 2 and 3 to take the point before the Appellate Court that the mortgages A to H had not been proved. Their vakil did not deny the accuracy of the District Munsif's endorsement and his note as to the effect of the vakil's admission, and I am quite unable to understand why the District Judge did not give full effect to that admission. I must express my disapproval of the conduct of the vakil concerned in putting forward such a contention in the Appellate Court after having invited the plaintiff not to prove the documents by the witnesses whom he had in attendance.

(1) (1918) 35 M.L.J., 382.

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On the question of law raised by Mr. Sitarama Rao, I agree with my learned brother that it should be referred to a Full Bench. We have been much pressed with the language used by their Lordships of the Privy Council in the case reported in *Sahu Ram Chandra* v. *Bhup Singh*(1) and we have felt the same difficulty as was felt by the learned Chief Justice in *Peda Venkanna* v. *Sreenivasa Deekshatulu*(2). In that case the learned Chief Justice, applying the observation of Lord HALSBURY in *Quinn* v. *Leathem*(3), declined to apply their Lordships' judgment to any proposition beyond that which arose in the case. The point actually decided was that a mortgage transaction by a father would bind his sons' shares during his lifetime only when the debt forming the consideration for the document was antecedent. No question is raised in this case before us which is at variance with that ruling.

We are asked however to apply the words on page 447:

"the exception being allowed, it appears to their Lordships to apply, and to apply to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets that are joint family property"

and to say that each prior mortgage in this case is wholly invalid as consideration for the later mortgage because its security depended on the joint family property. This proposition seems to me to entail a contradiction between their Lordships' decision and the supposed result of the dictum. Their Lordships clearly say that an existing antecedent debt not secured on a family property is good consideration for a mortgage of the family property. Clearly, therefore, if no further transaction was entered into, the mortgage would be binding on the family. It seems to me to be impossible to argue that, if subsequently the father finds it necessary to borrow another sum of money without security and then some time later creates a mortgage on the family property both for the old mortgage debt and the unsecured loan, that mortgage debt is not good consideration as against the sons on the ground that it was not incurred wholly apart from the ownership of the joint estate. I cannot understand how a debt that was once binding ceases to be binding by renewal.

(1) (1917) I.L.R., 39 All., 437 (P.C.). (2) (1918) I.L.R., 41 Mad., 136.
(3) (1901) A.C., 495, at p. 586.

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My learned brother has raised the point that, apart from the security, there is a personal liability in every mortgage and that therefore even though as a mortgage the antecedent debt might be bad, still as long as the personal remedy was not barred the debt is a good antecedent debt apart from the mortgage security and can thus form consideration for the new mortgage binding on the sons. Speaking for myself, this distinction seems to me to be too artificial, but it has, if I may so, the merit of meeting the difficulty raised on an extreme construction of their Lordships' language. I therefore agree with my learned brother that this does form part of our reference.

ON THIS REFERENCE

T. Narasimha Ayyangar for the appellant.—The first question referred must be answered in the affirmative. The Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh*(1) does not lay down that a previous independent mortgage is not an 'antecedent debt' in respect of a subsequent mortgage. That decision and the *dicta* therein must be understood with reference to the facts of that case. There the mortgage sued on was executed on the same day as the loan was contracted and there was no prior simple or mortgage debt. All the previous decisions of the Privy Council and of the Indian High Courts have upheld a mortgage of the sons' shares also where it was to discharge a previous mortgage and the only restriction imposed was that the previous mortgage should neither be illegal nor immoral. No restrictions to the effect either that the property should have passed out of the family by sale or that the previous debt must have been a simple debt were imposed by the decisions when the creditors sought to bind the sons' shares also. Nowhere in that judgment has the Privy Council attempted to overrule the now settled course of decisions in India as regards 'antecedent debt.' If there are any *dicta* therein which seem to impose any such restrictions they are *obiter* and cannot be followed especially as titles would

(1) (1917) I.L.R., 39 All., 437 (P.C.).

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be upset by following such a course. To impose a new restriction that the previous debt should not have been a mortgage debt would impose an additional unbearable burden on the creditors to inquire into the nature of all the previous transactions. Reference was made to *Hunoomanpersaud Panday* v. *Mussamat Babooee Munraj Koonweree*(1), *Suraj Bunsi Koer* v. *Sheo Pershad Singh*(2), *Nanomi Babuasin* v. *Modhun Mohun*(3). The Privy Council decision only settled the conflict of decisions between *Chidambara Mudaliar* v. *Koothaperumal*(4), *Chandradeo Singh* v. *Mata Prasad*(5), where facts were similar to those of the case dealt with by the Privy Council; see also *Badri Prasad* v. *Madan Lal*(6). The decisions in *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu*(7) and *Brij Narain Singh* v. *Mangala Prasad*(8) understanding the Privy Council decision the other way are wrong. If my view is accepted it is unnecessary to consider the second question referred.

B. Sitarama Rao for the respondent.—Two restrictions are clearly laid down by the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh*(9) to the effect that a creditor can effectively bind the sons' interests only in cases where there has been a sale or where the mortgage sued on has been for a previous simple debt. Even if these observations be considered *obiter* they are binding as being distinct and definite pronouncements; see *Muttayan Chetti* v. *Sangili Vira Pandia*(10). The observation in page 446 quoted from *Girdharee Lall* v. *Kantoo Lall*(11) accords with the view now expressed by the Privy Council. *Virabhadra* v. *Guruvenkata*(12) is in my favour. There is no express decision of the Privy Council favouring the view that the prior debt may be a mortgage debt. To hold that it may be a mortgage debt would be to countenance a breach of trust, which is the very thing which the Privy Council have denounced. In this case the second mortgage being in favour of the same person as the first mortgagee, it is

(1) (1853) 6 M.I.A., 393, at p. 421. (2) (1880) I.L.R., 5 Calc., 148 (P.C.).
(3) (1886) I.L.R., 13 Calc., 21 (P.C.). (4) (1904) I.L.R., 27 Mad., 326.
(5) (1909) I.L.R., 31 All., 176, at p. 203.
(6) (1893) I.L.R., 15 All., 75 (F.B.), at p. 81.
(7) (1918) 35 M.L.J., 382. (8) (1919) I.L.R., 41 All., 235.
(9) (1917) I.L.R., 39 All. 437 at pp. 446, 447 and 449 (P.C.).
(10) (1883) I.L.R., 6 Mad., 1, at pp. 16, 17 (P.C.).
(11) (1874) L.R., 1 I.A., 321, at p. 322. (12) (1889) I.L.R., 22 Mad., 312.

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invalid according to the spirit of the recent Privy Council decision. If the personal remedy against the father is barred, then there will only be a mortgage on which that decision holds that a decree cannot be given against the sons' shares also.

OPINION.

WALLIS, C.J.

WALLIS, C.J.—This reference raises the question whether the rule as to the validity of father's alienation for antecedent debt is inapplicable where the antecedent debt itself has been contracted on the security of the family property, as held in *Badgala Jogi Naidu* v. *Bendalam Papiah Naidu*(1), on the authority of certain observations of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh*(2). The question is of great importance owing to the far reaching consequences of our decision, and has received our anxious consideration.

The appeal to the Privy Council was filed to challenge the decision of the majority of the Allahabad High Court in *Chandradeo Singh* v. *Mata Prasad*(3), dissenting from the view taken in *Khalil-ul-Rahman* v. *Govind Pershad*(4) and in *Chidambara Mudaliar* v. *Koothaperumal*(5), and agreeing with the later Madras decision in *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu*(6), that there must be an antecedent debt to support the father's alienation. In their judgment disposing of this most controverted question their Lordships frequently referred with approval to the exhaustive judgment of Sir JOHN STANLEY, C.J., in the case first mentioned, and even, as will be shown, adopted his enunciation of the true rule as to antecedency in terms which, it is to be noted, do not contain the further restriction now contended for.

We have next to consider the observations relied on in the judgment and the context in which they occur. Their Lordships in the course of their judgment had pointed out that the rule validating an alienation by the father for an antecedent debt of his own which was neither illegal nor immoral was an exception to the general rule of the Mitakshara which should not be

(1) (1918) 35 M.L.J., 382. (2) (1917) I.L.R., 39 All., 437 (P.C.).
(3) (1909) I.L.R., 31 All., 176. (4) (1893) I.L.R., 20 Calc., 328.
(5) (1904) I.L.R., 27 Mad., 326. (6) (1906) I.L.R., 29 Mad., 200.

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extended, and, after referring to their earlier decisions and setting out the well known passage in *Nanomi Babuasin* v. *Modhun Mohun*(1), in which it is laid down that the sons cannot set up their rights against the father's alienation for an antecedent debt, they proceeded to observe:

"In their Lordships' opinion these expressions, which have been the subject of much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, 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. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply only, to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, namely, that no manager, guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. In short, it may be said that the rule of this part of the Mitakshara law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might be, deliberate breach of trust. The Mitakshara law does not warrant or legalise any such transaction.

"The limits of the principle of the exception have been thus set forth, because in their Lordships' opinion they form a guide to the settlement of the conflict of authority in India on the subject of antecedent debt."

It is very important to observe that their Lordships expressly say that they are only laying down the true principle for their guidance in the decision of the point before them, and this, I think, goes to show that they did not intend to decide anything else, as for instance, the application of that principle to cases,

(1) (1886) I.L.R., 13 Calc., 21 (P.C.).

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which were not before them. If they intended to go further their observations were made *obiter* and are not binding on us as authority. In the rest of their judgment they strictly confined themsethe lves to decision of the question before them, the necessity that the debt should be antecedent, and in answering they adopted the language of Sir JOHN STANLEY in *Chandradeo Singh* v. *Mata Prasad*(1):—

"The true rule is that a son cannot impeach an alienation of ancestral joint family property made by the father, for which the consideration is an antecedent debt of the father not tainted with immorality or the object of which is to pay such a debt; . . . the doctrine has no application to a case in which no antecedent debt of the father, that is, a debt antecedent to the alienation in question, is concerned as the consideration or object of the alienation."

As already observed, there is no mention in this rule of the further restriction now contended for. Their Lordships went on to deal with the argument that the antecedency might be only of an hour or a day or a year, and observed that there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact, and that the Courts would not be slow to deny effect to the mortgage where the antecedency was found to be unreal and to be merely a cover for what was essentially a breach of trust. These observations were strictly germane to the question as to the necessity of a real antecedency in fact, but they do not cover the further proposition that the antecedent debt must be one which was not incurred on the security of the joint family property.

In the passage already cited their Lordships did not, in my opinion, lay down that in principle there should be such a further restriction, and they proceeded to decide the only question before them in accordance with the principle so laid down. They do not refer to any earlier case in which this further restriction had been laid down or even suggested, and possibly they were led to state the principle in these terms for the purpose in hand with reference to the considerations urged by Sir JOHN STANLEY in contesting the opinion expressed by BODDAM and BASHYAM AYYANGAR, JJ., in *Chidambara Mudaliar* v. *Koothaperumal*(2), that 'to insist on the debt being antecedent would not really afford any protection to the son.

(1) (1909) I.L.R., 31 All., 176. (2) (1904) I.L.R., 27 Mad., 326.

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Those learned Judges observed in *Chidambara Mudaliar* v. *Koothaperumal*(1)—

"On principle it is difficult to make any distinction between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son, and the enforcement of the security exonerates the son from the burden of the father's debt. Such a distinction does not really afford any protection to the son, for his share in the mortgage property can, as a general rule, be seized and brought to sale, even in the latter case, for the recovery of the debt as a personal debt due by the father (though also secured by a mortgage), unless such share has been validly alienated in favour of a third party since the date of the mortgage but prior to its attachment."

The learned Judges who overruled this decision in *Venkatramanaya Pantulu* v. *Venkataramana Doss Pantulu*(2) did not apparently differ in principle from this statement but considered themselves bound by authority to hold that the debt must in fact be antecedent. It was however contested by Sir JOHN STANLEY in *Chandradeo Singh* v. *Mata Prasad*(3), in the judgment already mentioned, at page 202—

"This observation is plausible, but it is capable, I think, of ready refutation. The remedy of the creditor on the basis of the son's pious duty is not co-extensive with his remedy on foot of a binding security. In principle the statement is opposed to the rule of the Mitakshara. In practice it would not be correct inasmuch as the observance of the rule of the Mitakshara does afford some protection to the interests of sons. The greed which exists for the acquisition of landed property in this province is well-known. Money-lenders are ever ready to advance money to thriftless or extravagant landowners on the security of their landed property with a view to the ultimate acquisition of the property. Interest is allowed to accumulate until the mortgage debt has reached such dimensions that it is unlikely that the owner can redeem. Then a suit for sale is instituted on foot of the security, the mortgagee gets leave to bid and buys and the family loses its ancestral property. *Money-lenders are chary of making large advances to landowners on personal security.* Now if in negotiations for a loan on a mortgage lenders are obliged to make inquiry and satisfy themselves that the loan is required to meet a legal necessity this will

(1) (1904) I.L.R., 27 Mad., 326. (2) (1906) I.L.R., 29 Mad., 200.
(3) (1909) I.L.R., 31 All., 176.

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afford some protection to the other members of the co-parcenary body. If a father in a joint Mitakshara family can borrow money on the security of the joint ancestral estate to satisfy any extravagant whim or fancy he may form, it is obvious that the rule of the Mitakshara is a dead letter and that the other members of the family are robbed of all protection."

Their Lordships, I cannot help thinking, were influenced by these forcible observations in laying down the principle in the way they did. It is however clear, I think, that Sir JOHN STANLEY did not intend to lay down that there was any necessity to show that the debt was not only antecedent but also not incurred on the security of the family property, because he does not lay down any such restriction in formulating the rule, and because he refers with approval to the decision of the Full Court in *Badri Prasad* v. *Madan Lal*(1). In that case the mortgage in question was executed in satisfaction of a prior mortgage debt incurred by the father to the same mortgagee. It was contended that the alienation was bad because the mortgage was effected in discharge of the mortgagee's own prior debt and was therefore not an antecedent debt within the meaning of the rule. Sir JOHN EDGE, C.J., with whom the other Judges concurred, rejected this contention, and, after citing a Calcutta ruling that the purchase money itself which was the consideration for a conveyance could not be said to be an antecedent debt—the point now decided by their Lordships—added—

"I know of no other restriction of the term antecedent debt."

This statement is equally true of the other Courts and of the legal profession and the public in India. The doctrine of the father's power of alienation for his own debt having been repeatedly enunciated for over sixty years, ever since its recognition by the Privy Council in *Hunoomanpersaud Panday* v. *Mussamat Babooee Munraj Koonweree*(2), without any such restriction having been suggested, it has been assumed not to exist. The only question was whether it was necessary that there should be any antecedent debt at all, and numberless transactions have taken place on that footing which, as has been represented to us, it would involve great hardship to disturb. Observations in judgments must be read with reference to the context and to the

(1) (1893) I.L.R., 15 All., 75. (F.B.) (2) (1856) 6 M.I.A., 393.

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pre-existing law, and the very recent decision in *Nachiyappa Goundan* v. *Rangasami Goundan*(1) contains an express warning against deducing from particular expressions in their Lordships' judgments novel propositions unsupported either by principle or authority, and against construing decisions putting an end to a conflict of authority on a particular question as unsettling what till then had been treated as settled. However sound in principle, and however applicable to this Presidency with reference to the son's shares, if not to the father's, the suggested restriction might be if the matter were *res integra*, it would certainly be a novel proposition unsupported by any previous authority to lay down at the present time that an alienation for an antecedent debt not otherwise open to objection was invalid because the antecedent debt was incurred on the security of the joint family property. Having regard to their Lordships' express statement that the enunciation of the principle in these terms was intended as a guide to the decision of the controverted question before them, I do not think we should be warranted in extending its application to a case which was not before them and involves considerations which are not referred to in their judgment, especially when such an application of the principle would have the effect of disturbing what has long been regarded as settled law and would give rise to great uncertainty as to existing titles.

I would answer the first question in the affirmative. It is unnecessary to answer the second question.

OLDFIELD, J.

OLDFIELD, J.—I entirely agree.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—In the reference to the Full Bench I said that their Lordships of the Privy Council in some passages of their judgment in *Sahu Ram Chandra* v. *Bhup Singh*(2) used language which, if widely interpreted, would make a mortgage debt which was *genuinely* antecedent to the alienation in suit not an antecedent debt capable of supporting such an alienation by the father as against the son's share. Having regard however (*a*) to the context, (*b*) to the particular question which their Lordships had and intended to decide and (*c*) the language used by them in several passages both before and after the widely-worded passages, I was inclined to hold that their Lordships

(1) (1919) I.L.R., 42 Mad., 523 (P.C.). (2) (1917) I.L.R., 39 All., 437(P.C.).

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were considering even in these passages only the case where the so-called antecedent debt was really and substantially the mortgage debt *sued on*. For instance, in the passage

"The exception . . . appears to their Lordships to apply only to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which are joint family property"

their Lordships were approving of the exception which allows a decree for sale to be passed in the suit brought for a mortgage debt of the father if incurred for discharging the father's antecedent debts and they disapproved its extension to a case where the mortgage deed *sued on* was executed for a so-called antecedent personal debt which was really incurred on the "credit obtainable" from the family lands and which antecedent debt was *therefore* at once or soon afterwards merged in the mortgage alienation sued upon. The question whether genuinely antecedent debts might be or might not be themselves mortgage debts and whether they ought to be only simple debts was not in my opinion decided or intended to be decided by their Lordships. I did not and do not think that their Lordships intended to adopt all the reasoning given in Chief Justice Sir JOHN STANLEY's judgment in *Chandradeo Singh* v. *Mata Prasad*(1). They, no doubt, fully approved of the dicta of the learned Chief Justice quoted at pages 446 and 449 but those dicta do not deal with the question whether a *really antecedent* mortgage debt was one which could support a later alienation against the sons.

Having heard full arguments again sitting in the Full Bench and having had the advantage of studying the judgment of my Lord the Chief Justice just now pronounced and concurred in by OLDFIELD, J., I must frankly admit that I have felt much diffidence as to the soundness of my view as to the real meaning of their Lordships' language in the disputed passages. While I had to respectfully differ in my referring order from the opinions of two learned Judges of this Court (SPENCER and KRISHNAN, JJ.), in *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu*(2) as to the interpretation of those passages, I now find that my opinion is also opposed to the opinions of my Lord and OLDFIELD, J., besides the opinions of two learned Judges of

(1) (1909) I.L.R., 31 All., 176. (2) (1918) 35 M.L.J., 382.

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the Allahabad High Court (TUDBALL and RAFIQ, JJ.) in *Brij Narain Singh* v. *Mangla Prasad*(1). However, after the best consideration I have been able to give to the question, I shall adhere to the view I have already expressed. I have fortified my mind to arrive at this conclusion by the following further considerations: (*a*) The opinion of Sir JOHN EDGE, C.J. (who took part in the Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh*(2) as found in the judgment in *Badri Prasad* v. *Madan Lal*(3) referred to in my Lord's judgment supports my view of the law: (*b*) since *Hunoomanpersaud Panday* v. *Mussamat Babooee Munraj Koonweree*(4), the uniform course of decisions, so far as I know in all the High Courts, has been to treat a *really antecedent* mortgage debt on the same level with a really antecedent simple debt for the purpose of supporting a subsequent alienation against the son's share: (*c*) their Lordships have omitted in *Sahu Ram Chandra* v. *Bhup Singh*(2) to expressly refer to and overrule this settled law: (*d*) the unsettlement of numerous titles to large estates and the great uncertainty in the law which would result if we decide the question (1) referred to the Full Bench in the negative is also a matter for serious thought: (*e*) the old Hindu Law enacted (see Yagnavalkya, II, 50, and Colebrook's Digest, Volume I, page 190, which quotes Catyayana's text) that it was the pious duty of the sons to pay their father's debt (*e*-1) even with interest (but the interest amount should not exceed the principal amount) (*e*-2) even if it was barred by limitation according to modern statutes (*e*-3) and even if no ancestral assets were inherited by the sons provided the sons were capable of bearing the burden: the obligation was restricted afterwards as regards (*e*-2) and (*e*-3) by statutory enactment and judicial decisions, but judicial decisions have explained and expanded the nature and legal results of the obligation as regards (*e*-1) (1) by not restricting the amount of interest allowable to the creditor to the amount of the principal, (2) by making the future pious duty a present legal liability and (3) by making a voluntary alienation by the father for such antecedent debt binding on the son's shares under the Mitakshara law (under the older Hindu Law of Manu the sons had no interests or

(1) (1919) I.L.R., 41 All., 235. (2) (1917) I.L.R., 39 All., 437 (P.C.).
(3) (1893) I.L.R., 15 All., 75 (F.B.). (4) (1856) 6 M.I.A., 393.

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shares at all during their father's lifetime) and (4) by making involuntary alienations by Court sales in execution of a decree against the father alone to affect the son's shares also: and (*f*) in the old Hindu Law texts relating to the son's pious obligation which form the foundation on which the present law has been broadened from precedent to precedent, *there is no distinction made between a mortgage debt and a personal debt of the father.*

In the result I concur in answering the first question referred to this Full Bench in the affirmative.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—I have had the advantage of perusing the opinion just pronounced by my Lord, and I entirely concur in it.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—My answer to the first question is in the affirmative. No cases have been quoted before us in which it has been directly held that a debt secured by a mortgage could not constitute an antecedent debt. Mr. Sitarama Rao naturally relied upon the observations of Lord SHAW at page 447 in *Sahu Ram Chandra* v. *Bhup Singh*(1) which is as follows:

> "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."

With reference to this sentence, it was contended that there was a distinct pronouncement that if a debt was advanced on the security of the property in the possession or control of the manager of a Hindu family, such a debt would have been incurred in breach of trust and that consequently it cannot constitute an antecedent debt. It was further argued that there was an essential difference between a simple loan and a loan charging the family property. The sentence in the judgment

> "under his management he can neither obtain money for his own purposes *for it*, nor can he obtain money for his own purposes *upon it*"

was relied on for this argument. I cannot say that these contentions are entirely unfounded.

Before dealing with these sentences, I think it expedient to consider the judgment as a whole. The case before the Board was one in which a suit was brought upon a mortgage document. This deed was not a renewal of an old document. The question

(1) (1917) I.L.R., 39 All., 437.

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for consideration before the Board was whether the loan advanced was contemporaneous with or was antecedent to the mortgage sued on. In considering this question their Lordships of the Judicial Committee had before them the rulings of the various High Courts in which they point out

"there was a conflict which occurs, not merely between the Courts of one district in India and another, but also between decisions pronounced in Calcutta itself, in Allahabad itself, and in Madras itself."

This conflict they wanted to put an end to. If we examine the cases which were cited before them as typical of the conflict, it would be seen that in not one of them was the question whether a subsequent mortgage superseding an earlier mortgage could constitute 'an antecedent' debt was ever raised or decided. The point at issue in them was whether there should not be a debt really antecedent to the one on which the suit was brought, or whether it was enough if a short time had elapsed between the execution of the document and the granting of the loan. Nor do I find any reference in the argument of the learned counsel before the Judicial Committee to his point. Under these circumstances I do not think that the language relied on should be regarded as a considered pronouncement upon the matter we have to decide.

Further, if we analyse the judgment of Lord SHAW it is clear that the proposition contended for by the learned vakil would be to some extent inconsistent with the general principles enunciated by the noble Lord. The judgment first traces the rights of interdiction of the subordinate members of a Hindu family to the well-known text of Mitakshara (Chapter I, Section I, Pl. 27). Then it proceeds to point out that the Mitakshara has enunciated a rule in favour of the managing co-parceners. The reason of the rule is stated to be that wherever there is a family necessity it is

"one binding upon the co-parceners as a whole and that consequently the consent of all of them can be implied even though they may not be consulted individually."

The judgment then considers the exception to the general rule which is stated to have

"arisen from the necessity of protecting the right of third persons, say, the purchasers of the property who have taken their title for onerous consideration and in good faith."

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Although in the previous sentence it was stated that

"the exception should be very carefully guarded and should not be extended,"

it is clear that the aim of the exception, in the opinion of the Board, was to safeguard the rights of *bona fide* lenders, and not of the subordinate members of the Hindu family. Then we have a discussion as to how this exception should be worked. The observations of Lord Justice KNIGHT BRUCE in *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(1) are quoted as showing that if

"the fact of the advance is proved, the presumption of law is *prima facie* to support the charge and the onus of disproving it rests on the heir."

Up to this point there is no discussion as to whether the debt should be a simple debt or a debt secured upon the charge on property. After this, the particular facts of the case are examined, and the rule deduced by Sir JAMES COLVILE in *Suraj Bunsi Koer* v. *Sheo Pershad Singh*(2) and in *Girdhari Lall* v. *Kantoo Lall*(3) are stated. Then follows an approval of the comment by Sir JOHN STANLEY in *Chandradeo Singh* v. *Mata Prasad*(4) on the above two decisions. If we turn to the judgment of the learned Chief Justice of the Allahabad High Court which has secured the approval of the Judicial Committee, it would be clear that there was no intention in that case to differentiate between simple debts and mortgage debts. On the other hand the sentence at the bottom of page 207 is in favour of holding that a mortgage is as much within the competency of the manager as a simple debt. Then the judgment of the Judicial Committee proceeds to define what an antecedent debt is. It is in this part of the judgment that the observation relied on by Mr. Sitarama Rao occurs. But the quotation from Lord HOBHOUSE's judgment in *Nanomi Babuasin* v. *Modhun Mohun*(5), on which the rule is based, does not make any distinction between mortgage debts and money debts; and the final deduction of the Board does not warrant any such distinction

(1) (1856) 6 M.I.A., 393.
(2) (1880) I.L.R., 5 Calc., 148 (P.C.).
(3) (1874) L.R., 1 I.A., 321.
(4) (1900) I.L.R., 31 All., 176.
(5) (1886) I.L.R., 13 Calc., 21.

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being drawn between the two classes of debts. The sentences relied on, namely,

"In short, it may be said that the rule of this part of the Mitakshara law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve,"

should be read as referring to the creation of the first obligation and not to the merger of the first debt in a subsequent mortgage debt. That was the only matter which was directly discussed and this and the other observations must be taken to have been made with reference to the enforcibility of a debt which starts with a mortgage and is not subsequently absorbed in any other transaction of a similar or a different kind. The rule finally laid down, namely, that "there must be antecedency in time" and "real dissociation in fact" would equally apply to a simple and to a mortgage debt. I have very closely read the judgment of the Board, and in my opinion the particular passage on which so much stress was laid should not be construed in the way in which the learned vakil asked us to construe. In this connexion I may be permitted to draw attention to what Lord HALDANE said in *Cornelius* v. *Phillips*(1):

"Dicta by judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless these dicta really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding."

Mr. Sitarama Rao contended that the Judicial Committee had set to themselves the task of laying down the law and it is not open to us to minimize its effect by saying that the sentences relied on are mere *obiter dicta*. The answer is that their Lordships had not before them this aspect of the case at all. Ever since *Hanoomanpersaud Panday* v. *Mussumat Babooee Munroj Koonweree*(2) in which the rule as to antecedent debt was outlined, numerous cases have been decided in this Presidency and elsewhere where it was assumed as unquestionable that there is no distinction between a simple and a mortgage debt. It

(1) (1918) A.C., 199, at p. 211. (2) (1856) 6 M.I.A., 393.

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would unsettle vested rights and throw open the flood gate of litigation if their Lordships are to be understood as laying down the law as contended for by the learned vakil. There must be some semblance of discussion in the judgment appealed against, in the argument of counsel or in the cases quoted at the Bar to warrant us in imputing such an unexpected departure from accepted notions on the subject to their Lordships. The Judicial Committee are in the habit of cautioning Courts in India to apply the old decisions to transactions founded on an exploded view of law and to suggesting that as and from a particular date the new pronouncement should be accepted as regulating similar transactions. In *Pattabiramier* v. *Venkatarow*(1) and *Thumbusamy Moodelly* v. *Hoosain Rowthen*(2) relating to the construction of mortgages by conditional sale, this hint was given. Again in dealing with rights of alienation which a co-parcener has in respect of his own share, the Board while saying that the Madras view was not right refused to interfere with it on the principle of *stare decisis*. There is no indication of such an attitude in the present case. The truth is that their Lordships did not intend to overrule the principle which had gained uncontested currency all these years. I cannot therefore but regard the view taken in *Brij Narain Singh* v. *Mangala Prasad*(3) and by SPENCER and KRISHNAN, JJ., in this Court as attempts to be meticulously literal at the expense of the spirit of the pronouncement.

I may draw attention to the fact that the Judicial Committee have held in *Girdharee Lall* v. *Kantoo Lall*(4) that where family property has been sold away under a mortgage decree, the son can recover it back only on showing that the debt was illegal or immoral. The same conclusion has been stated in cases where the property passed out of the family by sale under a money decree. No distinction is drawn regarding the rights of the sons in these two classes of cases. If it was breach of trust on the part of the manager to have mortgaged the property, why should the suing co-parcener show that there was immorality or illegality? If the property passed out of the family in violation of a

(1) (1870) 13 M.I.A., 560. (2) (1875) I.L.R., 1 Mad., 1 (P.C.).
(3) (1919) I.L.R., 41 All., 235. (4) (1874) L.R., 1 I.A., 321.

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trust, the son should, on pleading, without more, that the decree under which the sale was held was founded on a mortgage, be decreed possession of at least his share. There is a consideration which is specially applicable to Madras and which would also lead to the same result. In the judgment under consideration the Board had to consider the rule of Mitakshara as administered in Allahabad. They had not before them the doctrine which has been uniformly accepted in this Presidency that for a debt of the father which is neither illegal nor immoral his share in the family property would be liable. This view has obtained the sanction of the Judicial Committee on the principle of *stare decisis*. It would follow from this that if a father mortgages property for a debt which is not tainted with illegality or immorality, although not binding on the sons as not being for family benefit or necessity, it would be enforcible against the sons on the doctrine of their pious obligation to discharge their father's debt. This would furnish an additional ground for holding that a mortgage debt instead of being in a worse position than a simple debt is in some respects in a more favourable position.

There is one observation in the judgment which I have so largely quoted from, which lends support to my view. Almost the last sentence in the judgment is

"Wherever such antecedency is found to be unreal and is merely a cover for what is essentially a breach of trust the Courts will not be slow to deny effect to a mortgage so brought into existence."

There is no qualification here that the illusory character would only affect a simple debt. What the Courts in India are asked to do is to find out whether the previous loan was real or illusory and not whether it is a simple debt or a mortgage debt. For all these reasons I am of opinion that *Budayala Jogi Naidu* v. *Bendalam Papiah Naidu*(1) was wrongly decided. It is not necessary to express any opinion upon the second question referred to us.

N.R.

(1) (1918) 35 M.L.J., 382.

APPELLATE CIVIL—FULL BENCH.

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

1919, April, 8, 9 and 24.

VAITHINATHA PILLAI (FIRST PLAINTIFF), APPELLANT,

v.

KUPPU THEVAR AND FOUR OTHERS (DEFENDANTS Nos. 1, 3, 4, 5 AND 6), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Additional evidence—Refusal by the lower Appellate Court to admit—Second Appeal—Power of High Court to interfere and direct admission—Jurisdiction—Exercise of discretion, whether revisable.

Held (*by* WALLIS, C.J., *and* AYLING, J., SADASIVA AYYAR, J., *dissenting*) that where a lower Appellate Court refuses to admit a certain material document as additional evidence in the appeal under Order XLI, rule 27, Civil Procedure Code, the High Court cannot interfere in Second Appeal and hold that such additional evidence ought to have been admitted by the lower Appellate Court.

Per WALLIS, C.J.—It has long been the practice of all the High Courts not to entertain second appeals from refusals of the lower Appellate Court to admit fresh evidence under Order XLI, rule 27, Civil Procedure Code, and such practice should not be departed from.

Per SADASIVA AYYAR, J., *contra.*—The High Court has power in Second Appeal to consider the propriety of the exercise of discretion by the lower Appellate Court as regards the admission of additional evidence.

SECOND APPEAL against the decree of L. G. MOORE, the District Judge of Tanjore, in Appeal No. 557 of 1914, preferred against the decree of G. KOTHANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Negapatam, in Original Suit No. 10 of 1913.

The material facts and contentions appear from the order of reference to the Full Bench.

This Second Appeal came on for hearing in the first instance before ABDUR RAHIM and KUMARASWAMI SASTRI, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—In this case the point on which I felt considerable doubt was whether we could say that the decree of

* Second Appeal No. 173 of 1913.

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the District Judge was wrong on the ground that he refused to admit in evidence the decree in Original Suit No. 26 of 1879. That document had undoubtedly a material bearing on the question whether the property in dispute was validly dedicated to charity as found by the District Judge. The decree was not produced in the Court of first instance, but the appellant's affidavit shows that the appellant who is the purchaser of the property was not aware of the existence of this decree. He discovered it after the Court of first instance had pronounced judgment and an appeal had been preferred to the District Judge. An application was made to the lower Appellate Court for admission of this decree, but it was rejected on the ground that, if such an application was granted, there would be no end to litigation.

Can we in Second Appeal admit that document on the ground that the lower Appellate Court's refusal to exercise the power it had under Order XLI, rule 27, of the Code of Civil Procedure—supposing the application came within the scope of the rule—was wrong? The well-known ruling of the Privy Council in *Kessowji Issur* v. *Great Indian Peninsula Railway Company*(1) on the subject has been considered in a number of recent rulings of this Court. It may now be taken to be well established so far at least as this Court is concerned that the words "but if an Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause" entitle an Appellate Court to admit fresh evidence if it finds it necessary to do so to enable it to pronounce judgment to its own satisfaction. The words "any other substantial cause" should not be read in an *ejusdem generis* sense so as to confine the application of the rules to cases of *lacuna* [See *Andiappa Pillai* v. *Muthukumara Thevan*(2), *Ambuj Ammal* v. *Appadurai Mudali*(3), *Subba Naidu* v. *Ethirajammal*(4), *Kameswaramma* v. *Chelapathi*(5), and *Venkatachella Pillai* v. *Ranga Pillai*(6).]

It has been further held in *Andiappa Pillai* v. *Muthukumara Thevan*(2) and *Venkatachella Pillai* v. *Ranga Pillai*(6) that the

(1) (1901) I.L.R., 31 Bom., 381 (P.C.).
(2) (1913) I.L.R., 36 Mad., 477.
(3) (1915) I.L.R., 38 Mad., 414.
(4) (1912) 22 M.L.J., 14.
(5) (1914) M.W.N., 864.
(6) (1915) 28 M.L.J., 334.

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Appellate Court acting under rule 27 of Order XLI, clause (*b*) may admit fresh evidence on the same grounds as would justify the Court of first instance to admit a review. In all these cases, the Appellate Court had in fact admitted fresh evidence and the question discussed before the High Court was whether it had the power to do so.

In the present case the lower Appellate Court refused to admit the evidence produced by the appellant. Supposing it went wrong in this, as I am inclined to think it did, are we entitled to say that it ought to have

"required the document to be produced to enable it to pronounce judgment or for any other substantial cause"?

The very statement of the proposition shows to my mind that it is untenable. It cannot come within the scope of the rule even interpreting it and the ruling of the Privy Council as liberally as any of the decisions mentioned above have done. As pointed out in *Subbarayulu Naidu* v. *Ethirajammal*(1) the test laid down by the legislature has reference to the state of mind of the Judge hearing the appeal when he has heard the arguments with a view to pronouncing judgment in the case. Here the order refusing to admit further evidence was passed on an especial application made by the appellant before the hearing of the appeal and the lower Appellate Court apparently found no difficulty in pronouncing judgment without that evidence. I am of opinion, therefore, that the judgment of the District Judge cannot be assailed on this ground. But as my learned brother takes a different view and the question is one of general importance I would refer it to the Full Bench for its opinion, in these terms:—

"Whether the High Court can interfere in Second Appeal with an order of the lower Appellate Court rejecting an application made to it by a party to the appeal before the hearing of the appeal to admit certain material evidence discovered since the date of the decree appealed against and which was not available to the said party with the exercise of due diligence during the trial of the suit"?

I may mention that on the other questions raised before us, namely, as to the identity of the lands specified in exhibit IX

(1) (1912) 22 M.L.J., 14.

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and mesne profits subsequent to the institution of the suit I agree with my learned brother and to this extent there should be a further inquiry and finding.

KUMARASWAMI SASTRI, J.—The first plaintiff is the appellant. He sued in the Subordinate Judge's Court at Negapatam to recover possession of certain properties sold to him by the first and second defendants for Rs. 18,000. The third and fourth defendants are the sons of the first defendant and the fifth and sixth defendants are persons claiming under an agreement to sell prior to the date of the sale to plaintiff. Several defences were raised by the defendants, but the only question material to the Second Appeal is as to the dedication of certain items of property conveyed to the plaintiff to a charity. This defence was raised by the third and fourth defendants. In paragraph 3 of their written statement they made the bold allegation that 36 acres of the said lands have been set apart by the family for charities, when or how is not stated. Issues were settled on the 24th February 1912 but no issue was asked for or raised as to this alleged dedication though as many as eleven issues were raised with respect to the allegations in the written statments. On the 3rd March 1913 two additional issues were raised but even then no issue was raised as to the dedication. After the commencement of the trial and the examination of the plaintiff's witnesses and on the 25th February 1914 the following additional issue was raised on a petition of the third and fourth defendants:—

"Whether the items noted in the petition of the third and fourth defendants, dated 25th February 1914, are properties burdened with charity and are not liable to be alienated by the first defendant?"

The trial went on on that date and on the 27th February; the case was adjourned to the 2nd March and was closed on the 18th March 1913. Judgment was delivered on the 23rd March. The Subordinate Judge held that the sale of the items referred to in paragraph 61 of his judgment making 31 acres and 15 cents was invalid

"as they relate to an endowment for maintaining a choultry at Tagattur"

and gave a decree in favour of the plaintiff for the remaining items claimed. The defendants beyond filing exhibit IX, an

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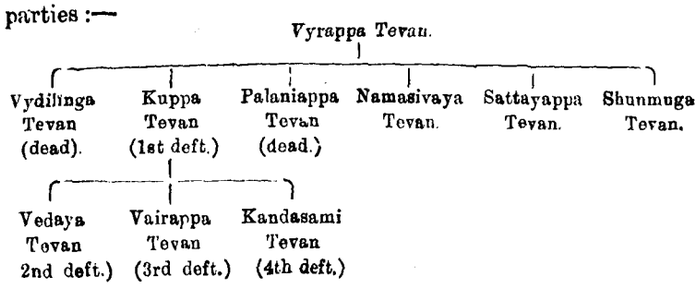
agreement of partition, dated 29th August 1870, adduced no evidence on the point. The plaintiff filed documents showing that the property had been dealt with by the first defendant as his own property from 1882.

Plaintiff appealed against the decree of the Subordinate Judge in so far as it dismissed his suit and during the pendency of the appeal applied for the admission of a decree of the Subordinate Court of Negapatam in Original Suit No. 26 of 1879 which according to him showed that there was no dedication of lands in Ekkur village as alleged by the third and fourth defendants but that on the contrary the lands fell to the share of the first defendant. He alleged he was not aware of the decree before the suit was disposed of by the Subordinate Judge. The District Judge dismissed his application not on the ground that he was aware of the existence of the suit or the decree or could have known it if he had exercised reasonable diligence but that the admission of the document would necessitate a remand and that

"there would be no end to litigation if parties were allowed to call further evidence in this way."

I have already pointed out how the issue as to dedication was raised during the trial of the suit and what little time the plaintiff who is found to be a *bona fide* purchaser who paid the large sum of 18,000 rupees had to adduce evidence on the point. He was a stranger and it is not suggested what means he had of knowing of a partition suit between the members of the family of the vendor about 32 years before his purchase. He did his best and the District Judge does not find that the non-production of the decree was due to any neglect or default of the plaintiff and the reasons he has given for refusing to admit it are unsound. There can be little doubt that the decree sought to be filed was a very material document.

The following table sets out the relationship between the parties:—



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The agreement of partition, exhibit IX, relied on by the third and fourth defendants as evidencing the dedication to charity was executed by Vairappa Tevan, Kuppa Tevan, Palaniappa Tevan, Namasivaya Tevan and Vairappa Tevan and purports to set apart over 30 acres of land in Ekkur village for the upkeep of the choultry besides other lands in other villages. Sattayappa Tevan and Shunmuga Tevan, the sons of Vairappa Tevan, who were alive at the date of exhibit IX were not parties to the deed of partition and they filed Original Suit No. 26 of 1879 for a partition of all the family properties. The plea raised was that there had been a prior partition effected by Vairappa Tevan evidently under exhibit IX. The parties entered into a razinama and a decree was passed in terms of the razinama. This is the decree sought to be put in. It appears from the decree that the lands in dispute in this appeal were not dedicated to charity but fell to the share of the first defendant. It is contended that the agreement of partition, exhibit IX, would not bind sons of Vairappa not parties to it as it purported to alienate a considerable extent of lands (about 120 acres) for the upkeep of the choultry and that the power of a Hindu father to effect a division is only validly exercised when it is a fair and equitable partition, he having no power to give properties to strangers. The decision of the Privy Council in *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal*(1) is relied on.

It is also contended that when the sons not parties questioned the partition, exhibit IX, and there was a razinama decree between the parties whereby other lands were given for the charity it was *prima facie* the only valid source of title for all parties including the charity.

It may be that defendants have a good answer but unless they show that exhibit IX continued in force in spite of the decree in Original Suit No. 26 of 1879 or was not affected by it the decree will *prima facie* support the contention of the first plaintiff.

As the document was very material and as the allegations in the first plaintiff's affidavit (printed at page 68 of the documents) have neither been traversed by the other side nor found to be false by the District Judge, I think that, having regard to the

(1) (1913) I.L.R., 40 Calc., 966.

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fact that the issue as to dedication was raised only during the course of the final hearing, the decree in Original Suit No. 26 of 1879 (as to the genuineness of which there is no dispute) should have been admitted in evidence by the District Judge.

I am of opinion that the District Judge had power under the circumstances to admit the document in appeal. In *Andiappa Pillai* v. *Muthukumara Thevan*(1) it was held that the words "or for any other substantial cause" in section 568 of the Code of Civil Procedure of 1882 (which corresponds to Order XLI, rule 27, of the present Code) need not be *ejusdem generis* with the causes stated in the previous part of the section. In *Ambuja Ammal* v. *Appadurai Mudali*(2) a similar view was adopted and it was held that the words confer a wide discretion on the Appellate Court to admit additional evidence when the ends of justice require it. The learned Judges were of opinion that section 107 of the Code of Civil Procedure conferred on the Appellate Court all the powers of the Court of first instance and were not inclined to follow the view taken by ABDUR RAHIM, J. (differing from PHILLIPS, J.) in *Subba Naidu* v. *Ethirajammal*(3) that the expression "any other substantial cause" in Order XLI, rule 27, is not to be understood in a wide and unrestricted sense but should be construed *ejusdem generis* with the causes in the other parts of the rule. The decision of PHILLIPS, J., was confirmed in Letters Patent Appeal. See *Vellayappa Chetty* v. *Nellaya Pillay*(4). In *Venkatachella Pillai* v. *Ranga Pillai*(5) it was held that the expression "for any other substantial cause" gave power to the Appellate Court to admit fresh evidence on the same grounds that would justify the Court of first instance in granting a review and that the discovery of fresh and material evidence after disposal of the suit the decree in which is appealed against would be a substantial cause within the meaning of Order XLI, rule 27. In *Kameswaramma* v. *Chelapathi*(6) the decision in *Andiappa Pillai* v. *Muthukumara Thevan*(1) was followed. *Arasappa Pillai* v. *Manika Mudaliyar*(7) is distinguishable on the ground that the party had declared in the first Court that he

(1) (1913) I.L.R., 36 Mad., 477.
(2) (1915) I.L.R., 38 Mad., 414.
(3) (1912) 22 M.L.J., 14.
(4) (1911) 9 M.L.T., 317.
(5) (1915) 28 M.L.J., 334.
(6) (1914) M.W.N., 864.
(7) (1914) 16 M.L.T., 301.

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had no evidence and the District Judge *suo moto* remanded the case for fresh evidence to be taken. The learned Judges, while referring to *Andiappa Pillai* v. *Muthukumara Thevan*(1), were not prepared to extend the rule to such cases. In *Marimuthu Pillai* v. *Velu Pillai*(2) no grounds were shown why the evidence was not adduced in the lower Court and the District Judge acted *suo moto* and remanded the case.

It is argued that where fresh evidence is discovered after judgment which would justify the original Court in granting a review the party should withdraw the appeal and apply for a review. This would obviously work hardship where the fresh document or evidence would only cover one or more of the issues and would not affect the decision of other matters decided by the lower Court which are included in the grounds of appeal. Besides if Order XLI, rule 27, empowers the Appellate Court to admit the evidence so discovered there is no reason why a party who has paid Court fees for the appeal should be again compelled to pay Court fee for a review of judgment especially as he will have to pay the full Court fee if the review is presented after ninety days and one half of it is paid before.

As the District Judge had power to admit the document, there can be little doubt that he failed to exercise his discretion judicially. The only ground given by him for not admitting the document is that there would be no end to litigation if parties were allowed to produce further evidence in appeal. His duty was to see if the applicant's allegations were proved and the document sought to be filed was material and was discovered after the judgment in the lower Court was passed. If he had thought that the document was not material or that even if it was admitted it would not have influenced him in coming to a decision as to the correctness of the lower Court's judgment, it would be another matter. But he did not apply his mind to any such question but dismissed the petition on a ground that is in my opinion irrelevant to the question in issue.

It is argued that the District Judge had a discretion under Order XLI, rule 27, and that the High Court cannot in Second Appeal interfere even if he did not exercise his discretion

(1) (1913) I.L.R., 36 Mad., 477. (2) (1916) 32 I.C., 908.

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properly. It is well settled that an Appellate Court has power to interfere even if the matter is one relating to the exercise of discretion if the lower Court has exercised the discretion on wrong principles or has disregarded any principle of law—in re *Oriental Bank Corporation*(1); *Berdan* v. *Greenwood*(2); in re *Terrell*(3). As pointed out by LINDLEY, L.J., in *Young* v. *Thomas*(4) the Appellate Court will interfere if the judgment of the lower Court proceeded on an erroneous principle and had not really exercised any discretion at all. In *Sanderson* v. *Blyth Theatre Company*(5) STERLING, L.J., was of opinion that to enable the Appellate Court to interfere there must be either a disregard of principle or a misapprehension of facts.

Section 100, clause (*c*), of the Civil Procedure Code, gives a right of second appeal when there has been a substantial error or defect in the procedure provided by the Code which may possibly have produced error or defect in the decision of the case upon the merits. This applies obviously to error or defect of procedure of the lower Appellate Court as well as the original Court.

I fail to see why the refusal of the lower Appellate Court to exercise its discretion under Order XLI, rule 27, when such refusal is based on a misapprehension of the law or the nature and extent of the powers of an Appellate Court under rule 27 cannot be said to be an error or defect in the procedure adopted by it in hearing the appeal within the meaning of section 100, Civil Procedure Code. The evidence tendered may be such as to show that the decision appealed against cannot be supported and the party may have been perfectly bona fide. To hold that in such cases an Appellate Court may on a totally erroneous view of its powers under Order XLI, rule 27, reject the evidence tendered and that the High Court in Second Appeal though convinced of the error cannot interfere would lead to obvious hardship. There is nothing in the provisions of section 100 which compel the Court to place such a restriction on its powers. In *Moni Lal Bandopadhya* v. *Kheroda Dasi*(6) which was a case where the District Munsif refused to grant an adjournment asked

(1) (1887) 56 L.T., 868.
(2) (1882) 20 Ch.D., at 767.
(3) (1883) 22 Ch.D., 473.
(4) (1892) 2 Ch., 134.
(5) (1903) 2 K.B., 533.
(6) (1893) I.L.R. 20 Calc., 740.

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for to produce certain witnesses it was held that this was a substantial error in procedure which would justify the High Court in interfering in Second Appeal. The report also contains a judgment by three learned Judges of the High Court where they held that it was open to the High Court in Second Appeal to examine the proceedings to see whether the Court below exercised a sound discretion or not. In *Hafiz Abdul Kurrin* v. *Sri Kissen Rai*(1) it was held that improper admission of evidence by the Appellate Court in the exercise of its discretion may be set aside in Second Appeal and in *Arasappa Pillai* v. *Manika Mudaliar*(2) and *Marimuthu Pillai* v. *Velu Pillai*(3) already referred to by me the High Court in Second Appeal set aside the Appellate Court's decree on the ground that evidence was wrongly admitted. If a discretion wrongly exercised in admitting evidence under Order XLI, rule 27, can be set aside, I fail to see why a wrong exercise of discretion in refusing to admit material evidence should be allowed to stand.

Two other questions remain for determination. There is nothing to show that the lands specified in exhibit IX are included in the sale-deed to the plaintiff and form part of the plaint mentioned items. The lands in exhibit IX are described by paimash numbers and there is nothing to show what the corresponding survey numbers are. I find no admission appearing anywhere to show that the items excluded by the decree of the Subordinate Judge as charity properties are the items in exhibit IX. The allegations by the vakil for the appellant that certain items specified in the third defendant's petition to raise additional issues (printed at page 84 of the printed papers) are not in the decree and certain items not in the petition find their place in the decree are not shown to be incorrect. There should be a clear finding as to which of the items claimed in the plaint and covered by the sale-deed to plaintiff were included in exhibit IX and dedicated to charity.

As regards mesne profits no reason has been assigned for not granting the prayer of the plaintiff for future mesne profits in respect of the lands which have been decreed to him. Order XX, rule 12, empowers the Court to assess future mesne profits and there is no reason to drive plaintiff to another suit.

(1) (1885) I.L.R., 11 Calc., 139. (2) (1914) 16 M.L.T., 301.
(3) (1916) 32 I.C., 908.

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I would reverse the decree of the Subordinate Judge in so far as it dismisses the plaintiff's suit and direct the District Judge to dispose of the appeal after admitting the document sought to be filed in the light of the above observations. It will be open to the District Judge to raise further issues. Costs will abide and follow the result.

As my learned brother takes a different view as to the powers of the High Court to interfere in Second Appeal, I agree to the order of reference to the Full Bench proposed by him.

ON THIS REFERENCE

K. Bhashyam Ayyangar (with him *S. Panchapagesa Sastri*) for appellants.—The additional evidence is admissible under the latter portion of clause (*b*) in Order XLI, rule 27, Civil Procedure Code, which mentions "other substantial cause" as a ground for admitting evidence. This portion is not controlled by the words that the Court "requires to be produce, etc." The learned Judges in the Order of Reference agree that additional evidence can be admitted under the latter portion of clause (*b*) of rule 27, Order XLI. It is at best a question of discretion for the lower Court. But an appeal lies even in a case of discretion, if the lower Court has not exercised a discretion at all or exercised it on wrong principles. In such cases the High Court can interfere in second appeal. The only ground given by the District Judge for refusing to admit evidence is that there would be no end to litigation if parties were allowed to produce further evidence on appeal. There has been here no exercise of discretion at all, or, even if there were, there is no exercise on sound principles. There is a discretion to be exercised by the Court even in cases falling on clause (*a*); under clause (*b*) also, the discretion exercised can be revised by the High Court on similar grounds. The same considerations apply for admitting additional evidence in appeal as on review. See *Venkatachella Pillai* v. *Ranga Pillai*(1). If a document was admitted as additional evidence for sufficient cause, it has been held that the High Court can interfere in Second Appeal, and hold that such evidence was not properly admitted. See *Kamesuraramma* v. *Chelapathi*(2) The High Court can go into

(1) (1915) 28 M.L.J., 334. (2) (1914) M.W.N., 864.

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the substantiality of the cause for admitting evidence, though not into the merits of the case, and either reject or admit the evidence. See *Arasappa Pillai* v. *Manika Mudaliar*(1), *Marimuthu Pillai* v. *Velu Pillai*(2), *Ram Piari* v. *Kallu*(3), *Durga Prasad* v. *Jai Narain*(4) and *Gauri Rai* v. *Bhaggina*(5). There is a discretion to be exercised in the awarding of costs under section 35, Civil Procedure Code. The language used is similar to that used in Order 41, rule 27. It has been held that an Appellate Court can interfere if costs were awarded on wrong principles. In this case the issue, for which the additional evidence was sought to be admitted, was framed as an additional issue at a very late stage of the case and depended on facts which were not within the knowledge of the plantiff who was an outsider (purchaser) and related to a compromise decree which nullified an alleged partition now set up contrary to the compromise decree. The refusal to admit the evidence was an irregular and improper exercise of discretion by the lower Court. Though a matter may be discretionary with the lower Court, an Appellate Court can interfere on appeal; e.g., in cases of adjournment, though discretionary, the High Court has interfered in Second Appeal. See *Moni Lal Bandopadhya* v. *Khiroda Dasi*(6), *Talewa Singh* v. *Bhagwan Das*(7), *Queen* v. *Adamson*(8), *Bhawani Kunwar* v. *Himmat Bahadur*(9), *Sanderson* v. *Blyth Theatre Company*(10), *In re Terrell*(11), *Young* v. *Thomas*(12), *Brij Indar Singh* v. *Kanshi Ram*(13) and *Sharp* v. *Wakefield*(14). Reference was made to "Yearly Practice," page 965, as to appeal in discretionary matters.

T. M. Krishnaswami Ayyar for respondents.—Order XLI, rule 27, negatives the *right* of the party to adduce additional evidence. Section 107, Civil Procedure Code, should be read subject to rules prescribed, i.e., under Order XLI, rule 27. It is not the right of the party but the option or discretion of the Court. The party cannot '*require*' the Court to do a thing.

(1) (1914) 16 M.L.T., 301.
(2) (1916) 32 I.C., 908.
(3) (1901) I.L.R., 23 All., 121.
(4) (1911) I.L.R., 33 All., 379.
(5) (1915) 31 I.C., 873.
(6) (1893) I.L.R., 20 Calc., 740.
(7) (1907) 12 C.W.N., 312.
(8) (1875) 1 Q.B.D., 201.
(9) (1911) 21 M.L.J., 641 (P.C.).
(10) (1903) 2 K.B., 533 (544).
(11) (1883) 22 Ch.D., 477.
(12) (1892) 2 Ch., 134.
(13) (1918) I.L.R., 45 Calc., 94(106) (P.C.).
(14) (1891) 14 A.C., 173.

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If the Appellate Court does not require a document, the party cannot compel the Court to receive it. Under Order 41, rule 27, the Judge must feel a need for additional evidence and then alone jurisdiction arises for the Judge to exercise a discretion. In the old Code of 1859 also, the language used is "if the Court require" same as in the present Code; the Calcutta High Court has uniformly held that the discretion cannot be interfered with by the High Court—*Beckwith* v. *Kishto Jeebun Buckshee*(1), *Golam Mukdoom* v. *Mussamut Hafeenoonissa*(2), *Kulpo Singh* v. *Thakoor Singh*(3), *In the goods of Premchand Moonshee Upendra Mohan Ghose* v. *Gopal Chandra Ghose*(4), *Ram Piari* v. *Kallu*(5), and *Durga Prasad* v. *Jai Narain*(6). If the Appellate Court does not require further evidence, there is no scope for exercise of jurisdiction, and the High Court has no scope to interfere in the matter. The Privy Council has held in *Kessowji Issur* v. *Great Indian Peninsula Railway Company*(7), that 'requires' means 'needs' or 'finds needful' There is no case in Bombay or Madras or anywhere in which additional evidence refused to be admitted by the lower Appellate Court has been admitted by the High Court. Reference was made to *Ambuja Ammal* v. *Appadurai Mudali*(8), *Garden Reach Spinning and Manufacturing Company* v. *Secretary of State for India*(9). In this case the petition and the appeal were heard together and the lower Appellate Court did not require the document to enable it to pronounce judgment, and there is an end of the matter.

K. Bashyam Ayyangar in reply.—There are practically three clauses in Order XLI, rule 27. This question is under clause 3, i.e., latter portion of clause (*b*). The Court may allow the evidence for other sufficient cause, and need not '*require*' it as under the first portion. The three categories should be kept separate. See *Andiappa Pillai* v. *Muthukumara Thevan*(10), *Venkatanarayana Pillai* v. *Subbammal*(11), *Satis* v. *Takurdas*(12) and *Kaniz Mustafa* v. *Musi Imram*(13). In the Code of 1859,

(1) (1863) Marshall's Reports, 278.
(2) (1868) 7 W.R., 489.
(3) (1871) 15 W.R., 429.
(4) (1894) I.L.R., 21 Calc., 484.
(5) (1901) I.L.R., 23 All., 121.
(6) (1911) I.L.R., 33 All., 379.
(7) (1907) 31 Bom. 381 (P.C.)
(8) (1915) I.L.R., 38 Mad., 414.
(9) (1915) I.L.R., 42 Calc., 675.
(10) (1913) I.L.R., 36 Mad., 477.
(11) (1915) I.L.R., 38 Mad., 407 (P.C.)
(12) (1917) 25 C.L.J., 473.
(13) (1917) 15 A.L.J., 21.

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there was no splitting up of the clauses; in the Codes of 1877, 1882 and 1908, the clauses were split up; in the Code of 1882, there was a semicolon after the first portion of clause (*b*) in section 568. In the old Calcutta cases, a discretion had been judicially exercised, and they do not touch the present point. Where the lower Appellate Court has declined to exercise it or exercised it on wrong principles, the High Court can and will interfere with the order of the lower Court.

OPINION.

WALLIS, C. J.

WALLIS, C.J.—The attention of the learned Judges who made the reference does not appear to have been called to the long catena of decisions in Calcutta and to the decisions to the same effect in Allahabad. Shortly after the coming into force of the Code of 1859 it was decided by Sir BARNES PEACOCK and JACKSON, JJ.—*Beckwith* v. *Kishto Jeebun Buckshee*(1)—that no special or Second Appeal lay from a refusal by the lower Appellate Court to admit fresh evidence under section 355 of that Code which reappears as Order XLI, rule 27, of the present Code. The decisions in *Mohesh Chunder Sheet* v. *Shoshee Mookhee Debia*(2), *Golam Mukdoom* v. *Mussamut Hafee Noonissa*(3), *Kulpo Singh* v. *Thakoor Singh*(4), and *In the goods of Prem Chand Moonshee Upendra Mohan Ghose* v. *Gopal Chandra Ghose*(5), are to the same effect, as are the decisions of the Allahabad Court in *Ram Piari* v. *Kallu*(6) and *Durga Prasad* v. *Jai Narain*(7). There are no reported decisions in Madras and Bombay, as there must have been, if this long line of authorities had ever been questioned in these Courts. It has, I think, long been the pactice of all the High Courts not to entertain second appeals from refusals of the lower Appellate Court to admit fresh evidence under this rule. I am not prepared to depart from this practice and would answer the question in the negative.

AYLING, J.

AYLING, J.—In my opinion the answer to the reference must be in the negative. The effect of Order XLI, rule 27, clause(*b*), is to empower an Appellate Court to admit additional evidence

(1) (1863) Marshall's Reports, 278. (2) (1866) 6 W.R., 196.
(3) (1867) 7 W.R., 489. (4) (1871) 15 W.R., 429.
(5) (1894) I.L.R., 21 Calc., 484. (6) (1901) I.L.R., 23 All., 121.
(7) (1911) I.L.R., 33 All., 379.

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provided it requires the evidence to enable it to pronounce judgment or for any other substantial cause. Whether it requires the additional evidence or not is for the Appellate Court itself to say, and it is not for a superior Court to control its discretion, or to say that it ought to have required it, where, as a fact, it did not. I would respectfully adopt the reasoning of SALE, J., in *In the goods of Prem Chand Moonshee Upendra Mohan Ghose* v. *Gopal Chandra Ghose*(1), which is in accordance with a long catena of early Calcutta decisions beginning with a judgment of PEACOCK, C.J., and JACKSON, J., reported in Marshall's Reports, page 278. That the word 'requires' in the corresponding section 568 of the old Code means nothing more than 'needs' or 'finds needful' has been expressly decided by the Privy Council in *Kessowji Issur* v. *Great Indian Peninsula Railway Company*(2), and this pronouncement, as it seems to me, concludes the matter if authority were needed.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I regret that I have the misfortune to differ from my Lord and AYLING, J., on this reference. It having been now settled in this Court that good grounds for review are also good grounds for the Appellate Court to allow further evidence to be adduced, the question whether the Appellate Court exercised its discretion properly in refusing to admit such evidence seems to be clearly a question of law which we are entitled to consider in Second Appeal.

As regards clause (*b*) of Order XLI, rule 27, I am clear that "or for any other substantial cause" is not governed by the expression "the Appellate Court requires." The 355th section in the old Civil Procedure Code (Act VIII of 1859) from which this Order XLI, rule 27, has come down clearly shows that 'or for any other substantial cause' is an independent ground and is not governed by the words in the first portion of clause(*b*), there being no division into clauses in the old Act of 1859, section 355. It cannot be argued for a moment that if the Appellate Court notwithstanding that the condition in clause (*a*) has been fulfilled (namely, the Court from whose decree the appeal is preferred having refused to admit evidence which ought to have been admitted) refuses in appeal to admit such evidence, the second Appellate Court cannot interfere with that

(1) (1894) I.L.R., 21 Calc., 484. (2) (1907) I.L.R., 31 Bom., 381 (P.C.).

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discretion so improperly exercised by the first Appellate Court. I do not see why when the condition in what I call the third clause, namely, the existence of any other substantial cause, is fulfilled and yet the discretion to admit additional evidence in such a case is wrongly exercised by the first Appellate Court, the second Appellate Court should be prevented from interfering. As regards the Allahabad and Calcutta cases, if they meant more than that the discretion given in cases falling under clause (*b*) to the first Appellate Court should not be lightly interfered with by the second Appellate Court, I respectfully differ from those decisions. Let me put the following illustration: The trial Court in a clear case where it ought to have granted a review on the ground of conclusive evidence which was not in the power of a party to produce having been afterwards discovered rejects the application for review—such rejection is not appealable. But this Court has power under its general revisional powers to direct the trial Court to accept the application for review. If so, why should the Court be powerless because a Second Appeal has been preferred from the decision of an Appellate Court which, in a similarly clear case, refused to exercise its discretion to admit additional evidence, such a case being (as I said) fully analogous to an application for review? Further section 105, clause (1), shows that even where an appeal might not lie from an order made by the Appellate Court (such as an order refusing to admit additional evidence) where the decree of the Appellate Court itself is appealed against in Second Appeal, the error in the interlocutory order refusing to admit additional evidence may be set forth as a ground of objection in the memorandum of Second Appeal.

Again suppose that treating the order of a District Court refusing to admit additional evidence as an independent order, a revision petition had been filed to this Court against that order, I see nothing to prevent us in a clear case from setting aside that order in revision. Why should such a prayer for revision of that order be not embodied as a ground in the memorandum of Second Appeal?

In the result, I agree with KUMARASWAMI SASTRI, J., in saying that this Court has power in Second Appeal to consider the propriety of the exercise of the discretion of the District Judge

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as regards the admission of additional evidence though, of course, that discretion would not be interfered with lightly any more than the discretion of a Court rejecting a review petition would be lightly interfered with in revision. I think that the power to consider and decide on the question should be affirmed as existing in this Court in Second Appeal.

K.R.

APPELLATE CIVIL (FULL BENCH).

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

1919, April, 7 and 25.

VACHALI ROHINI (SECOND COUNTER-PETITIONER), APPELLANT,

v.

PATHALATHUM KANDI KOMBI ALIASSAN AND OTHERS (PETITIONERS NOS. 1 TO 8 AND LEGAL REPRESENTATIVE OF SEVENTH RESPONDENT), RESPONDENTS.*

Limitation Act (IX of 1908), Sch. I, arts. 165 and 181—Execution of decree for possession of immoveable property—Delivery to decree-holder of lands in excess of the decree—Application by judgment-debtor for restoration of excess lands—Limitation for such applications—Applicability of arts. 165 or 181 of the Limitation Act.

Article 181, and not article 165, of Schedule I of the Limitation Act (IX of 1908) governs an application made by a judgment-debtor for restoration of immoveable property delivered to the decree-holder in execution proceedings in excess of what had been decreed.

Ratnam Ayyar v. *Krishna Doss Vital Doss*, (1898) I.L.R., 21 Mad., 494, overruled; *Abdul Karim* v. *Islamunnisa Bibi* (1916) I.L.R. 38 All., 339, followed.

APPEAL against the order of V. S. NARAYANA AYYAR, Temporary Subordinate Judge of Tellicherry, in Appeal Suit No. 596 of 1916, preferred against the order of T. KRISHNA NAYAR, the District Munsif of Nadapuram, in Revision Execution Petition No. 516 of 1914 in Original Suit No. 392 of 1913.

The material facts and contentions appear from the Order of Reference to the Full Bench.

C. Madhavan Nayar for the appellant.

* Appeal against Appellate Order No. 106 of 1917.

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K. P. M. Menon for the respondent.

This appeal came on for hearing in the first instance before AYLING and KRISHNAN, JJ., who made the following

ORDER OF REFERENCE TO THE FULL BENCH

AYLING, J.

AYLING, J.—This is of the nature of a Second Appeal against an order of the District Munsif of Nadapuram directing restoration to respondents Nos. 1 to 8 of certain property which he held to have been wrongly delivered to appellant under a decree of his Court.

The sole question before us now is whether respondents' application was time-barred; and this turns on whether article 165 of Schedule I, Limitation Act, is applicable to the case.

Respondents were defendants in the original suit and judgment-debtors under the decree; and we are asked by their counsel to hold that article 165 only applies to applications by other persons under Order XXI, rule 100, and not to petitions by judgment-debtors under section 47, Civil Procedure Code.

On this point there is a conflict of rulings. In *Abdul Karim* v. *Islamunnissa Bibi*(1) the learned Judges held in a carefully considered judgment that applications of this kind by judgment-debtors were governed by article 181, and not article 165. In this view I fully concur, as also in the reasoning which supports it. On the other hand a Bench of this Court has held in *Ratnam Ayyar* v. *Krishna Doss Vital Doss*(2) that article 165 applies; the judgment is in this respect of the briefest and assigns no reasons.

With all respect I think this view is wrong; but as it has never been overruled and is reported in the regular series, I do not feel justified in refusing to follow it without a reference to a Full Bench.

I would therefore refer to a Full Bench the question of whether article 165 of schedule I, Limitation Act, is applicable to applications by a judgment-debtor for restoration of immoveable property in excess of what has been decreed.

KRISHNAN, J.

KRISHNAN, J.—This appeal against appellate order arises from an application by respondents Nos. 1 to 8 against the appellant under section 47 of the Code of Civil Procedure for recovering,

(1) (1916) I.L.R., 38 All., 339. (2) (1898) I.L.R., 21 Mad., 494.

VACHALI ROHINI v. KOMBI ALIASSAN.

KRISHNAN, J.

with mesne profits, possession of certain properties alleged to have been wrongfully taken possession of by him in execution of the decree in Original Suit No. 762 of 1909 from their lessee, the ninth respondent, who was the fifteenth defendant in the case. Respondents Nos. 1 to 8 are the legal representatives of one Ahmed Kutti who was the tenth defendant in the suit. They had first put forward their present claim as a suit, Original Suit No. 392 of 1913, but on objection being taken by the appellant it was converted into an application under section 47 as they are the representatives of the tenth defendant in Original Suit No. 762 of 1909.

Both the lower Courts have held that they are entitled to the reliefs claimed by them, as the decree in Original Suit No. 762 of 1909 did not include the properties in question, and have directed the properties to be re-delivered to them with mesne profits at Rs. 20 a year. Appellants' plea that the respondents' application was time-barred under article 165 of the Limitation Act, having been made nearly 2 years and 11 months after possession was taken by him, was overruled; the lower Courts holding that the three years' rule of limitation applied, apparently under article 181, though they do not say so expressly.

The appellant has again raised before us the same question of limitation. His learned counsel contends that article 165 applies and relies upon the observation in the case of *Ratnam Ayyar* v. *Krishna Doss Vital Doss*(1) where the learned Judges say

"There can be no doubt as held by the lower Appellate Court that article 165, Schedule II, Indian Limitation Act, is applicable to a case where the applicant is a party bound by the decree as well as where he is a stranger (see *Vaithilinga Muppanar* v. *Seethalakshmi Ammal*(2)."

That observation is no doubt directly in the appellants' favour, but the question was recently considered by the Allahabad High Court in *Abdul Karim* v. *Islamunnissa Bibi*(3), where the learned judges held, dissenting from the view taken in the Madras case, that article 165 did not apply to an application by a judgment-debtor for restoration of immoveable property seized by the decree-holder in excess of what had been decreed, but article 181 applied.

(1) (1898) I.L.R., 21 Mad., 494. (2) (1891) 1 M.L.J., 42.
(3) (1916) I.L.R., 38 All., 339.

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With all respect to the learned Judges in the Madras cases I am inclined to think that the view expressed in the Allahabad case is correct and should be adopted. I fully agree with the reasons given by the learned Judges in that case and I need not repeat them. I would, however, add that if article 165 should be read as applicable to an application like the present one under section 47, it would be equally justifiable to apply it to a defendant who claims to recover by way of restitution proceedings immoveable property taken by the decree-holder from him; for he would also be a person dispossessed of immoveable property applying under the Code of Civil Procedure, and disputing the right of the decree-holder to be put into possession. It has, however, always been held that article 181 is applicable to such a case. Furthermore as article 165 cannot by its terms apply to the recovery of moveable property or of money taken by the decree-holder in excess of what he is entitled to under the decree, the application of article 165 to the recovery of immoveable property, so taken, will lead to the extraordinary position that in the case of the latter the judgment-debtor will only have 30 days whereas in the case of the former he will have 3 years, a result that the legislature can hardly have intended.

The wording of article 165 and its position in conjunction with articles 166 and 167 would seem to indicate that it is properly applicable only to applications under Order XXI, rule 100, of the Code of Civil Procedure. I may also observe that when, as in the present case, a person dispossesses another of property not included in the decree, it seems doubtful if the latter can be considered to be "a decree-holder" *qua* that property within the meaning of the article.

In *Ratnam Ayyar* v. *Krishna Doss Vital Doss*(1) there is no discussion of the question before us as the learned Judges merely follow the unreported case. It would also seem, as pointed out in *Abdul Karim* v. *Islamunnissa Bibi*(2), that the observation in it is in reality an obiter dictum as the Judges were dealing with the case of a minor, to whom they held no limitation applied. On examining the unreported case of *Vaithilinga Muppanar* v. *Seethalakshmi Ammal*(3), I find

(1) (1898) I.L.R., 21 Mad., 494. (2) (1916) I.L.R., 38 All., 339.
(3) (1891) 1 M.L.J., 42.

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it is no doubt a decision in point. But the judgment in it is based entirely on the absence of the words "other than a judgment-debtor" in the article. This is, no doubt, at first sight an important point, but I am inclined to think that it does not affect the considerations in favour of the opposite view. It is only if the article can be applied to the case of a judgment-debtor that the omission will be material. But, if as I think, the article applies only to applications under rule 100 it was unnecessary and even incorrect to introduce an exception in favour of judgment-debtors into it when the rule is sufficient to exclude them as it does. The form of the article is thus quite consistent with my view.

ON THIS REFERENCE

C. Madhavan Nayar for appellants.—The question is whether article 165 or article 181 of the Limitation Act (IX of 1908) governs an application made by a judgment-debtor for restoration of possession of lands delivered to the decree-holder in excess of the decree. The language of article 165 is clear and includes all persons, judgment-debtors as well as strangers, who may make such an application. The article does not exclude judgment-debtors who may complain of dispossession. This point was decided under the previous Act (XV of 1877), article 165; the language of that article is the same as that of article 165 of the present Act (IX of 1908). The legislature had the decision in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (1) before it while it enacted the later Act of 1908, and must be deemed to have followed the view expressed in that decision, as it has retained the same language in the new Act. Article 167 of Act XV of 1877 has been modified in the corresponding article in the Act IX of 1908 by omitting the words in the latter portion of article 167 of the former Act of 1877 from article 167 of the present Act. The omitted words were held to be tautological, as the cases therein provided were covered under article 165 of the same Act. The Allahabad High Court followed the case in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (1); see *Hardin Singh* v. *Lachmana Singh*(2). Where the legislature means to exclude the judgment-debtor from a general provision, it says

(1) (1898) I.L.R., 21 Mad., 494. (2) (1903) I.L.R., 25 All., 343.

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so in express terms, as under Order XXI, rule 100, of the Civil Procedure Code. Article 165 refers to all applications under the Civil Procedure Code and not merely to applications under Order XXI, rule 100, only. Reference was made to *Muthiah Chettiar* v. *Bava Sahib*(1), *Payidanna* v. *Lakshminarasimma*(2) and *Mahomed Hossein* v. *Kokil Singh*(3).

The case in *Abdul Karim* v. *Islamunnissa Bibi*(4) only points out a hardship in applying article 165 to judgment-debtors. It is only for the legislature to remedy the hardship, if any.

K. P. M. Menon for respondent.—Section 47, Civil Procedure Code, does not refer to the making of any application; when the Limitation Act refers to applications, it cannot refer to section 47, Civil Procedure Code. Various sections in the Code do refer to applications but section 47 does not; so that when the Limitation Act refers to applications, it must refer to sections other than section 47, Civil Procedure Code.

Articles 165, 166 and 167 of the Limitation Act were each of them enacted as a proviso to certain sections of the old Civil Procedure Code of 1859. From the Code of 1859 the provisos were taken out and made into articles of the Limitation Act of 1871. The summary procedure sections in the Code of 1859 contained rules of limitation as provisos. There was supposed to be a tautology in article 165 and the latter portion of article 167 of the Act XV of 1877. Article 165 was held not applicable to judgment-debtors the latter portion of article 167 being held applicable to them to avoid repetition; and the latter portion of article 167 of Act XV of 1877 has been omitted in the new Act of 1908. It is therefore clear that the legislature has accepted the omission of the judgment-debtor in article 165 and has omitted the judgment-debtors from article 167 of the new Act (1908). Article 165 has stood as it was in 1859, only it was taken out of the Civil Procedure Code and put into the Limitation Acts of 1871, 1877 and 1908. Article 165 should be considered as a proviso to Order XXI, rule 100, which corresponds to section 230 of the old Code, Act VIII of 1859.

(1) (1914) 27 M.L.J., 605, at p. 607. (2) (1915) I.L.R., 38 Mad., 1076 (1085).
(3) (1881) I.L.R., 7 Calc., 91, at p. 96. (4) (1916) 38 All., 339.

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In *Ratnam Ayyar* v. *Krishna Doss Vital Doss*(1) the decision on this question was only obiter; the point was conceded, and minority was relied on as saving limitation. Reference was also made to *Abdul Karim* v. *Islamunnissa Bibi*(2) *and Kaunsilla* v. *Chandra Sen* (3).

Mr. C. Madhavan Nayar in reply.—As regards the historical argument, it has been set aside by the legislature which has adopted the view in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (1) in enacting the new Act. The language of the present Act (IX of 1908), article 165, is clear.

OPINION.

WALLIS, C.J.

WALLIS, C.J.—The period of limitation prescribed by articles 165 and 168 may be traced back to sections 230 and 269 of the Code of Civil Procedure, 1859, which dealt only with obstructions by and, dispossessions of, persons other than the defendant. The provision in section 230 was re-enacted as article 158 (now 165) of the Limitation Act of 1871 as follows:

"Under the Code of Civil Procedure by a person dispossessed of immoveable property and disputing the right of the decree-holder to be put into possession."

This, in my opinion, must be read as meaning

"disputing the right of the decree-holder to be put into possession under the decree."

That question had been decided against the defendant in the suit itself, and it was not open to him to raise it again in execution. This shows that article 158 was intended to apply only to a case covered by section 230 of the Code where a person other than the defendant had been dispossessed, and that is in accordance with ordinary presumption that no substantial alteration is intended when a particular provision is transferred from one statute to another. Article 158 of the Act of 1871 did not provide for applications by a decree-holder who had been resisted by third persons in taking possession under the decree, whereas article 160 (now 167) dealt with complaints in the case of Court sales both by the purchaser and by persons dispossessed by him (section 269 of the Code of 1859). In the Act of 1877 article 158 was reproduced as article 165 and amended by inserting after

(1) (1898) I.L.R., 21 Mad., 494. (2) (1916) 38 All., 339.
(3) (1900) I.L.R., 22 All., 376.

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"decree-holder" the words "or purchaser at a sale in execution of a decree," and article 167 was amended by extending it to complaints of obstruction by decree-holders as well as by purchasers (a case not dealt with by the Act of 1871), and by making it applicable to applications complaining of dispossession, not only by auction-purchasers, but also by decree-holders. Both these cases were, however, covered by article 165 as amended, and the latter portion of this article was therefore not reproduced in article 167 of the Act of 1908. In *Vaithilinga Muppanar* v. *Seethalakshmi Ammal*(1) which was followed in *Ratnam Ayyar* v. *Krishna Doss Vital Doss*(2) the learned Judges relied on the fact that articles 165 and 167 do not in terms exclude the judgment-debtor, but their attention was not called to the fact that the articles were transferred from the Code of 1859 where the restriction was to be found. They further observed that

"unless the articles referred severally to judgment-debtors as well as to third parties there would be tautology."

There was however tautology in the Act of 1877 in either view, and in the Act of 1908 article 167 was amended so as to remove it. There is in my opinion nothing in these changes to show any intention of widening the scope of the article so as to make it applicable to defendants.

The decision in *Ratnam Ayyar* v. *Krishna Doss Vital Doss*(2) having stood so long unquestioned in this Court and elsewhere I have felt great doubt as to whether we should not continue to follow it, having regard to the nature of the points decided on the principle of *stare decisis*. The legislature has, however, itself restricted the scope of article 165 by restricting in the Code of 1908 applications by third parties under Order XXI, rule 100, to applications with reference to property covered by the decree or sale in pursuance thereof, and the fact that this procedure is not now applicable to complaints by third parties of dispossession of property not covered by such decree or sale appears to me to afford additional reason for excluding from the scope of the article similar complaints by defendants who, as I am satisfied, were never intended to be covered by it. I think, moreover, that the rights of defendants are sufficiently restricted by their being required to apply

(1) (1891) M.L.J., 42. (2) (1898) I.L.R., 21 Mad., 494.

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under section 47 within the period limited by article 181. Agreeing with the decision in *Abdul Karim* v. *Islamunnissa Bibi*(1) I would overrule *Ratnam Ayyar* v. *Krishna Doss Vital Doss*(2) and answer the question in the negative.

AYLING, J.—I agree.

SADASIVA AYYAR, J.—In this case, I shared with my Lord (if I may respectfully say so) the hesitation he felt in overruling the old decision in *Ratnam Ayyar* v. *Krishna Doss Vital Doss*(2). But I am convinced after reading his opinion that that decision is erroneous. As cases of wrong delivery of judgment-debtors' property in excess of that decreed are rare and as it is very unlikely that many titles could have been created arising from alienations of such property by decree-holders to purchasers who believed the title to have been perfected by the default of judgment-debtors to file their applications within the shorter period of limitation till now prevailing, and as most of even those titles would have been perfected by the lapse of three years since the dates of such alienations, I agree in the answer proposed by my Lord.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Spencer.

ABDUREHEMAN KUTTI HAJI (APPELLANT), PLAINTIFF

v.

KOCHIPALLI HUSSAIN KUNHI HAJI AND TWENTY-TWO OTHERS (RESPONDENTS), DEFENDANTS.*

1919, January, 20, 21, 22 and 23, February 19.

Malabar Law—Trade carried on by karnavan of a Mappilla tarwad—Debts incurred by the karnavan in the trade, whether binding on other members.

Trade is not one of the ordinary pursuits of a Malabar tarwad and carrying on trade is not within the ordinary scope of authority of a Malabar karnavan; hence in the absence of evidence that a trade carried on by a karnavan has been the trade of the tarwad as a whole or that the members of the tarwad or at least the adult members thereof consented to the trade being carried on

(1) (1916) I.L.R., 38 All., 339. (2) (1898) I.L.R., 21 Mad., 494.

* Appeal No. 254 of 1917.

ABDU-REHEMAN KUTTI HAJI v. HUSSAIN KUNHI HAJI.

by the karnavan, the other members of the tarwad are not bound by the liabilities incurred by the karnavan in connexion with the trade. This rule applies even in the case of a Mappilla tarwad where all the male members habitually follow trade as their ordinary avocation.

APPEAL against the decree of V. S. NARAYANA AYYAR, Temporary Subordinate Judge of Tellicherry, in Original Suit No. 29 of 1916.

This was a suit brought to recover Rs. 13,000 from defendants Nos. 1 and 2 personally and from defendants Nos. 3 to 23, who constituted the junior members of the first defendant's tarwad called the Kochipalli tarwad, and from the tavazhi tarwad properties of the second defendant. The plaintiff alleged that defendants Nos. 1 and 2 were partners in a cloth trade, that they had dealings with the plaintiff, that the trade carried on by the two defendants belonged to the respective tarwads of the two defendants from a long time past, viz., from about 1870, that in connexion with that trade, the second defendant, as representing the firm, had executed seven hundis amounting to Rs. 7,000 on 15th August 1913, and that about Rs. 2,800 had been due on accounts, and that interest was also due thereon. The first defendant was *ex parte*. The second defendant pleaded that he was not the karnavan of his tavazhi tarwad but that his elder brother who was not a party to the suit was the karnavan and the real partner in the firm with the first defendant, that he drew the hundis only as the agent of his elder brother, that there was no tavazhi in this tarwad and that he and his tavazhi properties were not liable. The other defendants who belonged to the tarwad of the first defendant pleaded that the trade carried on by the first defendant was his separate trade and not that of the tarwad and that the first and second defendants had no power to bind them by any transactions of their trade. The Subordinate Judge found that the trade carried on by defendants Nos. 1 and 2 was their separate trade and that their tarwads had no sort of concern with the trade and gave a decree for the amounts sued for against the first and second defendants personally. The plaintiff preferred this appeal.

In the course of his judgment, the Subordinate Judge found as a fact the history of the trade to be as follows, a history which was eventually confirmed by the High Court.

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That the trade which gave rise to the liabilities concerned in the suit was the separate trade of one Bachikutti, who was the karnavan of the Kochipalli tarwad previous to the first defendant, that Bachikutti commenced his trade even before he became a karnavan, that, after the death of Bachikutti, the first defendant who succeeded him as karnavan continued the trade along with Bachikutti's son, the second defendant, who belonged to a different tarwad, that the trade was at no time carried on with the assets of either of the tarwads, or with the consent of the junior members thereof, that a previous cloth trade carried on even from before 1873 by a previous karnavan of the first defendant's tarwad, viz., Kunyi Kutti Ali Haji, firstly with a stranger (Mammikutti) and afterwards with his own brother, Asan Kunyi, was his separate trade, and not that of the Kochipalli tarwad, that almost all the properties which the first defendant's tarwad eventually became possessed of were the properties which were acquired in the trade by Kunyi Kutti Ali Haji and which lapsed to the tarwad on his death, that Asan Kunyi, the surviving partner of Kunyi Kutti Ali Haji, became heavily involved in debts, that that trade collapsed in 1901, that it had no connexion with the trade separately carried on by Bachikutti and that the latter was not a continuation of the former.

C. V. Anantakrishna Ayyar and *T. S. Narayana Ayyar* for appellant.

K. P. M. Menon, *B. Pocker* and *K. Kuttikrishna Menon* for respondents.

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ABDUR RAHIM, J.—The main question in these appeals is as to the liability of the Kochipalli tarwad, of which the first defendant, Kochipalli Hussain Kunyi Haji, is the karnavan, for debts incurred on hundis drawn in the course of a trade which he carried on along with Kotti Kollone Muhammad Kunhi alias Mamu Haji, the second defendant, in Original Suit No. 5 of 1914 (Appeal No. 417 of 1917) now deceased and represented in the suits subsequently filed by the present karnavan of the Kotti Kollone tarwad, Kotti Kollone Pallikunyi. The claim against the latter tarwad has not been pressed.

The business was conducted in the firm name of 'Kochipalli Hussain Kunyi Haji Muhammad Kunhi,' the names of the two defendants above mentioned, and the hundis were signed in the

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name of the firm. As found by the Subordinate Judge, trade is the chief occupation of the male members of this tarwad, as it is, I may observe, of many Mappillas, and the properties belonging to it were acquired by Kunyi Kutti Ali Haji, who was karnavan until 1886 and by Bachikutti who succeeded him in karnavanship and held the position till his death in 1908 when he was succeeded by the first defendant. Kunyi Kutti Ali Haji carried on his business in partnership at first with a stranger and then he and his younger brother Hussain Kunyi bought up that partner's share and Hussain Kunyi became a partner with Kunyi Kutti Ali Haji, and continued to be so until their business collapsed in 1901. Hussain Kunyi was not at the time the next in succession to Kunyi Kutti Ali Haji but was only a junior anandravan, the senior anandravan being Bachikutti. That the business of Kunyi Kutti Ali Haji and Hussain Kunyi did not belong to the tarwad but belonged to them personally cannot be doubted and has not been seriously disputed before us. It is sufficient in this connexion to refer to the proceedings in Original Suit No. 485 of 1903 which was a suit instituted by Bachikutti claiming the shop in which the trade was conducted as belonging solely to Kunyi Kutti Ali and that on his death it lapsed to the tarwad. It was never contended that the shop belonged to the Kochipalli tarwad. The other evidence in the case also amply bears out that the business which Kutti Ali Haji carried on did not belong to the tarwad. It is settled law that the self-acquisitions of a member of a tarwad fall at his death to be inherited by the tarwad or, otherwise expressed, lapses to it. [See the Full Bench decision in *Govindan Nair* v. *Sankaran Nair*(1).]

Bachikutti during the lifetime of the then karnavan, Kunyi Kutti Ali, had a separate business of his own and apparently in his own name since 1878. It is not seriously contended before us that that business belonged to the tarwad and it could hardly have been so contended, considering that Bachikutti, being an anandravan, he would not have the authority to carry on any trade on behalf of the tarwad. When he died all his properties including the assets of the business were inherited by the Kochipalli tarwad of which he was a member. It may be taken

(1) (1909) I.L.R., 32 Mad., 351.

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to be proved that the first defendant who became the karnavan on Bachikutti's death continued Bachikutti's trade along with Bachikutti's son, the second defendant, who, as already stated, is a member of a different family. This is the finding of the Subordinate Judge and it is amply supported by the evidence and the facts of the case. The first and second defendants purported to have acquired Bachikutti's business under an oral bequest from Bachikutti and these two persons obtained a succession certificate to collect the debts due to Bachikutti. In that petition, exhibit U, they alleged that

"the deceased made a verbal will on the 22nd of April 1908 (i.e., shortly before his death) that the outstandings due to him should be collected by the first petitioner, the direct anandravan of the deceased and the present karnavan of the tarwad (meaning the first defendant), and the second petitioner, the son of the deceased and that the business of the deceased should be conducted jointly by the two petitioners together."

It does not appear that there was any opposition on behalf of any of the members of the Kochipalli tarwad to the petition; and on the strength of the alleged will and the certificate so obtained the first and second defendants, members of the two different tarwads, continued to carry on Bachikutti's trade. The debts now in question were incurred in the course of that business by the first two defendants for it is proved that, when Bachikutti died, he left no debts.

In the absence of a valid bequest the trade assets including the outstandings and the goodwill, if any, would be inherited by the tarwad and there can be little doubt that the alleged oral will of Bachikutti, if true, is not valid. The provisions of the Malabar Wills Act V of 1898 are, to my mind, clear on the point. Section 9 of that Act says:

"All wills and codicils made on or after the date of the commencement of this Act within the Presidency of Madras, and all such wills and codicils made outside the said Presidency, so far as relate to immoveable property situated within the said Presidency, must be executed according to the rules laid down therein."

And those rules contemplate that the will must be in writing and signed by the testator and attested by two or more witnesses. The contention on behalf of the respondent that only wills relating to immoveable property are required to be

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in writing is mainfestly untenable, because that section and other sections of the Act undoubtedly imply that all wills made within the Presidency, whether relating to immoveable property or other properties, must be made in writing. And it may be taken that so far as the first defendant, the karnavan of the Kochipalli tarwad, is concerned the tarwad having inherited the assets of the business in the absence of a valid bequest he as karnavan could not acquire any right to it by adverse possession against his tarwad. That would not apply to the second defendant who is a stranger to the tarwad. The question, however, now is not as to the right of the tarwad to the assets of Bachikutti's trade but as to their liability for debts incurred in the course of the trade by the first defendant and the second defendant. The properties of the tarwad which are sought to be made liable for these debts were not acquired by the first defendant or by him and the second defendant with the profits of the business but had been acquired mainly, as already stated, by the two preceding karnavans, Kunyi Kutti Ali Haji and Bachikutti with the income of their private and separate business.

The question, therefore, that has to be determined is whether the karnavan of a Malabar tarwad is entitled to carry on a trade on behalf of the tarwad and thus saddle the tarwad with liabilities arising in the course of that business. It is a significant fact that neither the learned pleader for the appellant nor the learned counsel for the respondents has been able to bring to our notice a single instance of a Malabar tarwad carrying on trade in its corporate capacity. On the other hand, there are numerous instances in this Presidency of trading families governed by the ordinary Hindu Law, in fact, there are trading castes like Nattukottai Chettis in which most families carry on trade as the concern of the entire family. In such cases all properties of the family which may and often do consist of minors are liable for trade debts. The nature of the liability of a member of a joint Hindu family for debts incurred in the course of an ancestral trade was fully discussed by Chief Justice SAUSSE of the Bombay High Court in the oft-cited case of *Ramlal* v. *Lashmichand*(1), and the law laid down there may be taken

(1) (1861) 1 B.H.C.R., Appendix LI.

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to be the accepted law in all the Presidencies. It is stated at page lxxi:

"The case of *Petum Doss* v. *Ramdhone Doss*(1) before Sir L. PEEL is an authority that an ancestral trade, like other Hindu property, will descend upon the members of a Hindu undivided family; and we think that such a family can, by its manager or its adult members acting as managers, enter into co-partnership with a stranger. In carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager, or the adult members acting as managers, which are necessarily incident to and flowing out of the *carrying on* of that trade, whether it be singly or with a co-partner. The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade."

In that case the trade was carried on by a Hindu widow, who had succeeded to it as the heiress of her deceased husband. To the same effect are the rulings of this Court; see *South Indian Export Company* v. *Subbier*(2) and *Malaipermal Chettiar* v. *Arunachala Chettiar*(3); see also *Joykisto Cowar* v. *Nittyanund Nundy*(4). In *Raghunathji Tarachand* v. *The Bank of Bombay*(5) CHANDAVARKAR, J., traces the law on the subject to ancient authorities. He observes at page 76:

"According to Hindu law-givers from Manu downwards, traders formed a part of the Hindu polity, and the profession of trade was meant for the third and last of the twice-born castes, namely, Vaishyas. The Brahmans and the Kshatriyas were allowed to trade only in case of necessity and in times of distress. There are special rules laid down for traders. Where a caste or a joint family takes to trading and that is handed down from one generation to the next and so on, it is called a trading caste or a trading family and trade becomes its duty or practice. In that case the duty or practice is called *Kulachara*."

Later on at page 81

"Where a minor is a co-parcener in a joint family, his *share* in the family property is liable for debts contracted by his managing co parcener for any *family purpose* or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the term *family purpose* or *purposes incidental to it* must here give way to the expression *trading purpose* or *purposes*

(1) (1847) Taylor Rep., 279.
(2) (1915) M.W.N., 499.
(3) (1917) 6 L.W., 417.
(4) (1878) I.L.R., 3 Calc., 738, at p. 740.
(5) (1910) I.L.R., 34 Bom., 72.

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incidental to it, having regard to the nature and objects of the family business."

On the other hand the manager of a joint family is not entitled to embark on a new business, that is, which is not a family or ancestral business and bind the members of the family with liabilities incurred in the course of it; see *D. McLaren Morrison* v. *S. Verschoyle*(1).

Here what the family of the Kochipalli tarwad inherited was not a business carried on by Bachikutti as karnavan of the tarwad but only a private and separate concern of his own. Therefore, it could not be said that the present case falls within the principle of the rulings above mentioned. Even supposing that principle could be applied to a Malabar Tarwad, it cannot be said that trade is the chief occupation or *Kulachara* of the Nayars who mainly form the community in which the legal conception of a tarwad is the peculiar feature of the family system. One of the earliest cases in regard to the competence of a karnavan to engage in commercial pursuits on behalf of the family was raised in O.S. No. 14 of 1874 on the file of the Subordinate Judge of North Malabar—Mr. K. KUNJAN MENON. That learned Judge held—

"It is clear that as a rule the coffee or cardamom trade is not within the ordinary scope of a karnavan's authority. It was simply a private concern which he chose to carry on. A karnavan is simply a manager of the common property of the members of the tarwad who are all joint tenants with him. This position entitles him to pledge their credit for all purposes requisite for the performance of the said duty and no further. The carrying on of a trade like this was clearly without the ordinary duty of a karnavan and any liability he has incurred in the carrying on of it must be presumed to be an individual one."

The judgment of the High Court in the appeal against the Subordinate Judge's decree is not available but the above propositions were apparently confirmed as the decree would show.

A similar question arose in another case, Suit No. 145 of 1885, which came up on Second Appeal to the High Court. This Court directed the Subordinate Judge who had heard the first appeal to try two issues—

"whether the trade carried on by the karnavan was carried on with the knowledge and consent of the tarwad and

(1) (1901) 6 C.W.N., 429 at p. 458.

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whether the amount secured by the bond sued on was borrowed by the karnavan for the purposes of that trade."

Mr. K. Kunjan Menon in his finding on the issues remitted to him observed in that case—

"His evidence, read as a whole, would clearly lead to the conclusion that the trade he carried on was his own private trade, and mercantile pursuits do not usually fall within the scope of the ordinary duties of a Malabar karnavan . . . He does not say that any part of the plaintiff's money was utilized by him for his own trade, and there is nothing to show that the trade he carried on was a family trade or that the other members assented to his carrying on such trade . . . Even granting that this explanation is false, the mere fact that the anandravans of a tarwad had agreed to pay off a portion of a trade-debt contracted by their karnavan cannot, in itself, render the tarwad liable for all his debts contracted in such trade, unless there is clear evidence that the trade was a family trade or that the other members were assenting parties to such trade, and, as the evidence now stands, I have no alternative but to return a finding in the negative on both the issues remitted to me for trial."

That finding was accepted by the High Court and a decree was passed accordingly. The fact that the male members of a particular Malabar tarwad habitually pursue trade as their occupation would not in itself make the trade which an individual member carried on on his own account and which on his death is inherited by the tarwad a family concern unless the tarwad inheriting the assets of the deceased member's trade can be held to have continued it as the business of the tarwad through its karnavan. Can, then, the karnavan at his option and without any special authority or consent of his tarwad carry on such a trade on behalf of the family and not merely for the purpose of winding it up? That again depends on the more general question whether the carrying on of trade is within the scope of his ordinary authority as karnavan.

The legal incidents of a Malabar tarwad differ in some important respects from those of an ordinary joint Hindu family. In the case of the latter, each member of the family has a share in the family properties which he can enforce by partition and which he can alienate at least according to the law in this Presidency. The member of a Malabar tarwad is not entitled to any

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share and he cannot sue for partition. All that he is entitled to is maintenance from the family properties. But neither the manager of an ordinary joint Hindu family nor the karnavan of a tarwad can alienate the family property without necessity. It may be said generally that, as regards the disposal of the income, the karnavan of a tarwad has a much larger discretion than the manager of a joint family. The ordinary function of a karnavan, however, is to manage the family property to its best advantage and maintain the members of the tarwad in a manner befitting the position of the tarwad. The law is well summarised in one of the older decisions of this Court in these words:

"In cases where the Marumakkattayam rule of inheritance prevails the property is considered indivisible, the management thereof and the collection of the rents and income being invariably vested in the senior male, on whom devolves the duty of providing for the support and maintenance, as far as the funds will admit of the other branches of the family, especially of the women and children."

See Moore's Malabar Law, p. 95. Then at page 99 the learned author cites another judgment of the High Court (KERNAN and KINDERSLEY, JJ.) in which the position of a karnavan is thus described:

"In him (i.e., the karnavan) is vested actually (though in theory in the females) all the property, moveable and immoveable, belonging to the tarwad. It is his right and duty to manage alone the property of the tarwad, to take care of it, to invest it in his own name (if it be moveable) either on loans on kanom or other security, or by purchasing in his own name lands, and to receive the rent of the lands . . . His management may not be as prudent or beneficial as that of another manager would be, but, unless he acts *mala fide* or with recklessness or incompetency, he cannot be removed from such management. Almost the only restraint on him in such management is that he cannot alienate the lands of the tarwad."

In *P. P. Kunhamod Haji* v. *P. P. Kuttiath Haji*(1) this is how the law is stated by TURNER, C.J., and MUTTUSWAMI AYYAR, J., at p. 175:

"The respect for elders, which is a marked feature of all Hinduism, is nowhere stronger than in Malabar, and, consequently, although the individual interest of the manager of a tarwad in

(1) (1881) I.L.R., 3 Mad., 169.

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tarwad property is considerably less than that of a manager of a Hindu family, he has, in the management of the tarwad property, somewhat larger powers than are accorded to a Hindu manager. While, equally with the manager of a joint Hindu family, he is incompetent to alienate the estate without the consent of the other members of the tarwad, except to supply the necessities of the tarwad or to discharge its obligations, he can not only make leases at rack-rents ordinarily for the term of five years for cultivation, but also leases with fines repayable on the expiry of the terms, in the nature of mortgages (kanoms and ottis) in which little more than a right to redeem may be left to the family."

I am unable to find that the pursuit of trade comes within the ordinary powers of a Malabar karnavan within the rule enunciated in the passages I have cited. I take it, therefore, that the unreported cases referred to above correctly indicate the circumstances in which the members of a tarwad can be held to be bound by debts contracted by a karnavan in the course of a trade carried on by him; that is to say, it must be shown that the business was a family business as explained above or that the members of the tarwad consented to the trade being carried on on behalf of and for the family. As regards such consent, the presence of minors in the family would give rise to difficulties. But assuming that the consent of the adult members would be sufficient—and, as at present advised, I am rather inclined to think it would—I have to see whether the evidence in this case makes out such a consent. There is no evidence to show that any of the anandravans took part in the business or helped the first defendant in the conduct of it. . . .

[After discussing the evidence his Lordship concluded as follows]:—Upon these facts, though the matter is not free from doubt, I am not prepared to differ from the conclusion of the learned Subordinate Judge that it was not proved either that the trade which gave rise to these liabilities was a family business or that it was carried on by the first defendant with the consent of the members of the tarwad.

I, therefore, concur in the conclusion of my learned brother, whose judgment I have had the advantage of reading, that the appeals should be dismissed with costs.

The memoranda of objections are not pressed and are also dismissed with costs.

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SPENCER, J.—The outstanding question in all these appeals is whether the trade conducted by the first and second defendants, who are the karnavans of Kochipalli and Kottikollon tarwad respectively, was the trade of the tarwads or whether it was their individual trade. Upon the answer to this question depends the liability of all the junior members of the tarwads. As the plaintiff did not press his case against the second defendant's tarwad we have only to consider the liability of the defendants in respect of the Kochipalli tarwad. Decrees have been given against the first and second defendants personally and the suits were dismissed as against the tarwads of the defendants

The history of the Kochipalli tarwad is given in paragraph 5 of the lower Court's judgment. It appears from this that the trade was started by Kunyi Kutti Ali Haji and that up to 1873 he was trading as a partner with a stranger named Mammikutti. Under exhibit LL he bought out this partner in 1873 and thereafter traded with his own brother Asan Kunyi. Bachikutti joined this partnership. Kunyi Kutti Ali Haji and Asan Kunyi were his cousins, that is to say, his mother's sister's sons. At that time Bachikutti was not the karnavan of his tarwad but he became so afterwards. Kunhi Kutti Ali Haji died in 1886, Asan Kunyi in 1907 and Bachikutti in 1908. After Kunyi Kutti Ali Haji's death Asan Kunyi became involved in debts and his trade collapsed in 1901. Defendants Nos. 1 and 2 continued the trade of Bachikutti after his death and in the course of that trade they executed the hundies, exhibits BB and CC series, which are the subject matter of these suits.

The plaintiff has to prove that the defendants are liable upon these hundies. If this were a family with an ancestral trade it might be presumed that all the members of the family were liable for the trade debts. But we have not been referred to any case of a trading tarwad with an ancestral trade like the trade of a family of Nattukottai Chetties or Marwadis in whose case a presumption would generally arise that the entire family credit and the joint family properties were devoted to the business of the family. See *Malaiperumal Chettiar* v. *Arunachala Chettiar*(1) in which such a presumption was raised in the case of a Nattukottai Chetti family. There are other cases of

(1) (1917) 6 L.W., 417.

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Nattukottai Chetti families in which similar presumptions have been raised. The Subordinate Judge has found that in this case all the male members of this tarwad have taken trade as their occupation. But he observes that

"in the case of Marumakkattayam tarwads it should be admitted that tarwad trade is very rare."

The defendants are Mappillas following Marumakkattayam law. The junior members of a tarwad cannot compel the karnavan to partition the family property nor can they ask him for accounts of the manner in which he spends the family assets. Even in the case of a Hindu family it has been held in *Vadilal* v. *Shah Khushal*(1) that there is no presumption that all the co-parceners are partners in the business because one of the persons carrying on business is a co-parcener in a joint family, and that partnership has to be proved by evidence of an agreement to combine property, labour and skill in the business and to share the profits and losses thereof. In the case of a co-parcenary it must be shown that at least the family funds were utilized in order to start the business. There is no evidence here that the tarwad properties were made use of in the first instance. It is only proved that the properties of the tarwad were acquired by the trade of the male members. There is no presumption of law that properties acquired by one member of the tarwad in his own name belong to the tarwad, and that is a matter which must be proved like any other question of fact; see *Govinda Panikker* v. *Nani*(2). In the case of families governed by the ordinary Hindu Law there are certain trading castes among whom trade becomes the duty or habit of a particular caste and it is handed down from one generation to the next, and in such a case the trade becomes one of the *Kulacharas* of the family, and that fact attracts to itself all the necessary incidents of trade. Such is the explanation given by CHANDAVARKAR, J., in *Raghunathji Tarachand* v. *The Bank of Bombay*(3) of the origin of trading families It is difficult to conceive of existence of a *Kulachara* among Mappillas who are Mussalmans by religion and follow either the Muhammadan or the Marumakkattayam Law of Succession.

(1) (1903) I.L.R., 27 Bom., 157. (2) (1913) I.L.R., 36 Mad., 304
(3) (1910) I.L.R., 34 Bom., 72.

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In Appeals Nos. 6, 12, 20 and 21 of 1875 this High Court confirmed a decision of the Subordinate Judge's Court of North Malabar in which the learned Subordinate Judge made several interesting observations on the powers of karnavans to bind their tarwads by trade transactions. He said that a karnavan was certainly not authorized to embark on any hazardous enterprise by the usage obtaining in Malabar families. He observed that any Judge who had any experience in Malabar and who had any idea of the constitution of Malabar tarwads could not for a moment doubt that the entering into any speculation connected with trade would be not a duty of a karnavan's office, but an individual act of a person of an enterprising character and therefore it was an exception to the general rule to find karnavans conducting trading operations on behalf of the tarwad. On the evidence he found that there was no hereditary trade made out in the case of the family in that suit. But he pointed out that the members of the tarwad had no power to restrain the karnavan from carrying on an individual business of his own so long as he committed no misconduct and the law would not make them liable for his private debts. In Second Appeal No. 223 of 1887 the Subordinate Judge's Court of North Malabar returned a finding in a case where the question was raised

"whether the trade carried on by the karnavan was carried on with the knowledge and consent of the tarwad,"

that the trade carried on in that case was the karnavan's private trade; and the learned Subordinate Judge observed that

"mercantile pursuits do not usually fall within the scope of the ordinary duties of a Malabar karnavan,"

and that

"the mere fact that the anandravans of a tarwad had agreed to pay off a portion of a trade-debt contracted by their karnavan cannot, in itself, render the tarwad liable for all his debts contracted in such trade unless there is clear evidence that the trade was a family trade, or that the other members were assenting parties to such trade."

In a case reported in *Sircar* v. *Unniravi Kunjen*(1), where the karnavan of a tarwad rented an abkari farm jointly with a

(1) 8 Travancore L.R., 73.

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stranger, it was held that the presumption was that it was not the concern of the tarwad, but the learned Judges declined to express any opinion upon the general question whether the karnavan of a tarwad was competent to bind the family by trade speculations. In the present case the onus clearly lies heavily upon the plaintiff to prove that the trade conducted by the first and second defendants who happened to be the karnavans of their tarwads was in fact the trade of their tarwads.

* * * *

[His Lordship dealt with the evidence on this point and continued as follows.]

Then there is exhibit U, an application for a succession certificate, which was granted to the first and second defendants on the strength of an oral will made by the deceased Bachikutti to enable them to collect the debts left by Bachikutti. In it Bachikutti is described as the first petitioner's karnavan and the father of the second petitioner. The certificate was granted without any opposition on the part of the junior members of Bachikutti's tarwad. It is argued that an oral will made in Malabar would be invalid under the Malabar Wills Act, V of 1898. This Act applies to wills of all persons governed by the Marumakkattayam or Aliyasantana Law whether they are domiciled in the Madras Presidency or not. It lays down that wills executed by such persons within the Madras Presidency, and even outside the Presidency if they purport to dispose of immoveable property within it, must be executed in a certain manner, namely, the testator must sign or affix his mark to the will and the attestors, of whom there must be two, must sign in his presence and by his direction. It is not distinctly declared in the Act that oral wills are not valid. But assuming that that is implied by the language of section 9, the inference of fact to be drawn in this case from the act of the parties would be the same. Bachikutti leaves his trade to be conducted after his death by the first defendant who happens to be the karnavan of his tarwad and by the second defendant who is a total stranger and belongs to another tarwad. This is an indication that the trade was not considered by Bachikutti to be a tarwad trade.

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[His Lordship dealt with the remaining evidence on this point and concluded as follows.]

On the whole I am of opinion that the conclusion formed by the Subordinate Judge that the plaintiff had failed to prove that the trade was that of the tarwad of Kochipalli was correct. So far as the custom of Malabar tarwads is known it would appear to be an exception to the general rule to find a karnavan conducting a trade on behalf of the tarwad, though of course any profit that might be made by any individual by trading would on his death become part of the tarwad assets. I must confirm the judgment of the lower Court and dismiss these appeals with costs.

The memoranda of objections have not been pressed and are dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919, February, 26 and 27, March, 6.

THE RAJA OF BOBBILI (PETITIONER), PETITIONER,

v.

A. SURYANARAYANA RAO GARU AND FOUR OTHERS (RESPONDENTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), ss. 47 and 115—Decree—Execution—Auction sale—Bids, nature of—Proposal—Revocation by death of bidder—Indian Contract Act (IX of 1872), sec. 6—Death of highest bidder before acceptance by Court—Preceding bid accepted by Court—Order for resale, holding previous bidder liable for deficiency, whether valid—Civil revision petition and appeal to High Court, competency of—Jurisdiction—Interlocutory order, revisability of.

Bids in an auction sale held in execution of a decree are merely proposals which are revoked by the death of the bidder before acceptance by the Court.

A bid lapses on the making of a subsequent higher bid or on the expiry of a reasonable time after the making of the bid without acceptance by the Court.

Where a Court adjourned an auction sale after certain bids had been made but the highest bidder died before the adjourned date, and the Court took up the

* Civil Revision Petition No. 1225 of 1918 and A.A.O. No. 295 of 1918.

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preceding bid and accepting it called upon such bidder to pay the price, and on his refusal proceeded to put up the property to resale, holding the bidder to be a defaulter liable for any deficiency that might be caused by the resale, and the latter preferred a Civil Revision Petition as well as a Miscellaneous Appeal to the High Court against the order directing the resale:

Held, that the lower Court acted illegally and with material irregularity in the exercise of jurisdiction in accepting the preceding bid and making the order for resale, and that the High Court was competent to interfere in revision, but that no appeal lay against the order.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of T. A. NARASIMHA ACHARIYAR, the Temporary Subordinate Judge of Vizagapatam, dated the 20th day of November 1918, in Execution Petition No. 3 of 1918 in Original Suit No. 5 of 1913 and appeal against the said order of the said Court in the said Execution Petition No. 3 of 1918 in Original Suit No. 5 of 1913.

The material facts appear from the judgment of the High Court.

K. Srinivasa Ayyangar, V. Ramesam and *C. V. Rajagopala Achariyar* for the petitioner.

P. Narayanamurti for the respondent.

OLDFIELD, J.

OLDFIELD, J.—This petition and appeal relate to the circumstances in which a Court sale was concluded by the Temporary Subordinate Judge of Vizagapatam. The decree under execution was for over Rs. 2,50,000 and eight villages of a zamindari belonging to the judgment-debtors, here respondents, were put up for sale in one lot on 27th September 1918. The sale was continued from that date until 22nd October 1918 when other bidders having dropped out competition was confined to the Raja of Bobbili, the petitioner and appellant here, and one Peria Ramamurthi Chetti. On that date the former by his mukhtiar or agent bid Rs. 3,25,000. On 28th October 1918, however, the Chetti bid Rs. 3,26,000. The sale was then continued until 5th November 1918, although no further bids were received, apparently in compliance with the requests of the Raja and the Chetti contained in two of the telegrams marked as exhibit III. Meanwhile news was received of the Chetti's death and on the date last mentioned an adjournment to the next day was granted to enable his widow to bid; and there were further adjournments until 18th November 1918 when the

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Subordinate Judge held quite correctly that the Chetti's bid was revoked by his death. He, however, decided to go on with the sale from the bid of the Raja as the highest before him. No other bid being made, he at once knocked down the property in the Raja's favour on his last bid of Rs. 3,25,000 granting him time until the next evening to pay the necessary deposit. As it was not paid by 20th November 1918 he held that a default was established and directed the resale of the property forthwith at the Raja's risk. The resale went on until 27th November 1918 when the present proceedings had been initiated and a stay order was passed by this Court. The appeal and the petition before us are against the order of 20th November 1918 directing a resale.

The foregoing appears from the original sale list more clearly than from the print because the orders of the Subordinate Judge have been recorded with an informality which the importance of the proceedings should have led him to avoid, and it may be added in slipshod language unbecoming an officer of his standing. There are, moreover, portions of his orders of which it is necessary to express disapproval on other grounds. On 22nd October 1918 he said in adjourning the sale

"Let the competitors think over and stop."

On 31st October 1918 he expressed the opinion in his order on one telegram included in exhibit III that the price was already too much. On 18th November 1918 he stated that he had already granted adjournments for the benefit not only of the Chetti's widow and the Raja but also to enable other bidders such as the Maharaja of Jeypore to come forward and he referred to the possibility of the Court of Wards which had taken over the Chetti's estate wishing to purchase although there was no application of any sort from the Maharaja and nothing formal from the Court of Wards before him. The only duty of the Subordinate Judge was to hold a fair sale giving reasonable opportunity to purchasers to come forward; and these public references to his own opinion as to the price and as to possible competitors were out of place and should not have been made.

We are not, however, concerned directly with them or their effect but with the Subordinate Judge's action in knocking down the property on the last bid of the Raja, when the Chetti's higher bid had been revoked, the former's contentions being

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that this procedure was irregular because either his own bid had been in fact retracted on 5th November 1918 or it had been discharged by (1) the suspension of the sale on its adjournment at the close of the day or (2) the higher bid of the Chetti. As regards first, the alleged retraction, the plea rests on the affidavit of the Raja's mukhtiar, dated 25th November 1918. The facts are denied in the respondent's affidavit of 24th December 1918. In these circumstances it is impossible to reach any conclusion regarding them without taking oral evidence and calling on the Subordinate Judge for a report and as one of the other contentions advanced affords ground for an immediate decision I turn to it at once.

The contention that the Raja's bid was discharged at the end of the day on which it was made by the adjournment of the sale is supported by the reasons given in the arguments in *Jones* v. *Nanney*(1) and the qualified acceptance of them in two of the judgments in that case. But it was not the ground of decision, and I hesitate to adopt it here. For a bid is merely an offer or in the language of the Indian Contract Act a proposal—vide *Payne* v. *Cave*(2) and *Agra Bank* v. *Hamlin*(3)—and although it may be that in particular cases the facts such as a change in the circumstances during the suspension of the sale or the possibility that the bidder has exhausted his resources in the purchase of other lots, those being the contingencies referred to in *Jones* v. *Nanney*(1) may justify a presumption in favour of retractation, there is nothing of that sort alleged in the present case; and in the absence of any plea of a special custom relating to auctions in India we must in my opinion decide in accordance with section 6, Indian Contract Act. Under that provision the lapse of time before acceptance of a proposal whether arising from the adjournment of auction proceedings or otherwise is ground for presuming revocation only when it is unreasonably long; and here the adjournments were authorized by the sale proclamation and Order XXI, rule 69, of the Code of Civil Procedure, and are not said to have been excessive. If the Raja's bid is to be held to have been discharged it must be on the other ground above referred to that it was impliedly refused when the

(1) (1824) 13 Price, 76. (2) (1789) 3 T.R., 148.
(3) (1891) I.L.R., 14 Mad., 235.

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Subordinate Judge continued the sale and received the bid of the Chetti.

No doubt no authority has been adduced to show that acceptance of a higher bid involves rejection of the preceding lower one. But that is perhaps because it is so clear that it would be impossible to rest an auction sale on any principle if the contrary were the case. Condition No. 3 of the sale proclamation in the present case provides that the highest bidder must be the purchaser; and when a higher bid has been received as no possibility of a lower bid succeeding can remain the latter must be taken to have been finally refused. It is argued for the respondents that an auction should be viewed as the successive submission of a number of offers to the auctioneer of which he is bound to select the highest made by a competent bidder and that the one to be selected is ascertainable by him only at the conclusion of the sale when the hammer falls, all remaining effective until such ascertainment and it being open to him, in case the apparently highest offer turns out to be that of a disqualified person such as a lunatic or minor, to accept the next highest forthwith. But it would, I think, be extremely inconvenient in practice to regard the proceedings in this way and in the absence of authority I am not prepared to do so. In *Roberts* v. *Bozan*(1) such a construction was adopted only because it was specially authorized by the conditions of the sale. The case of a bid being ultimately refused as made by an incapacitated person supports no argument, since in it the proper course consistently with the foregoing would not be to proceed from the next highest or any other bid, but to re-start the sale from the beginning; and there would be no inconvenience in doing so and no prejudice to other bidders. My conclusion is that the Subordinate Judge fell into a fundamental error in not taking that course in the present case and in not treating the Raja's bid as discharged.

This being the conclusion as to the legality of the Subordinate Judge's action the question remains whether his order can be displaced either by an appeal or in revision. It is conceded that an appeal can lie against it, only if the question between the Raja and the respondent, judgment-debtor, is one arising

(1) (1825) 3 L.J. (O.S.) Ch., 118.

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between the parties to the decree and necessary to its execution and it is not disputed that it fulfils the latter requirements. As regards the former the Raja can be treated as the representative of a party only if his character as a purchaser is admitted. But that character and the Subordinate Judge's attribution of it to him are exactly what he is seeking to disclaim by those proceedings. True the respondent, judgment-debtor, does not dispute and in fact is here to support that attribution. But I can find no case under section 47 of the present Code of Civil Procedure or the section previously corresponding with it, in which a representative character was allowed to be pleaded in order to give the Court jurisdiction to negative its existence; and it is impossible to understand how any logical course of pleading could permit it. No doubt again in Order XXI, rule 71, the reference is to the defaulting purchaser although a resale consistent only with the cancellation of his purchase is in question. But this is inconclusive since the rule is concerned only with the legal relation created by the purchase assumed to be regularly made not with the consequence of its repudiation by the bidder. In these circumstances the application of section 47 has not in my opinion been justified and the appeal is therefore unsustainable.

As regards the revision petition this Court can of course only use its powers in case the Subordinate Judge committed not merely an error in law, but also a material irregularity in the exercise of his jurisdiction. The distinction between such an error and such an irregularity must inevitably be difficult. But the latter is, I think, in question here. For the Subordinate Judge's mistake arose not incidentally or from any wrong application of or deduction from legal principles, but from a fundamental misconception of the nature of the transaction he was engaged in and his powers. It is urged also for the respondents that the Raja can await the result of the re-sale he objects to and sue when the extent of his grievance has been ascertained; and no doubt this Court does not ordinarily use its revisional powers when another remedy is available. But the rule is not absolute; and in the present case where the efficacy of that remedy is doubtful and a re-sale will only complicate the relations between those concerned, there is sufficient reason for

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immediate interference with the irregular course taken by the proceedings.

The result is that Civil Revision Petition is allowed, the Subordinate Judge's order of 20th November 1918 being set aside, with a direction for the re-sale of the property. The judgment-debtors (Nos. 3—5), respondents, will pay the costs of the petitioner. The decree-holders (Nos. 1—2), respondents, will bear their own costs.

We consider it advisable that the proceeding should not be continued from this point before the Subordinate Judge referred to in this order. The execution application is transferred to the District Court for disposal according to law.

Under rule 41 of the Rules framed under the Legal Practitioners Act we fix Rs. 500 as the appellants' vakil's fee.

The Civil Miscellaneous Appeal No. 295 of 1918 is dismissed. No order as to costs.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I agree. The facts set out by my learned brother show that there has been material irregularity and illegality of a pronounced type in the procedure of the Subordinate Judge. I wish to say a few words on the question of law argued in the case. Apart from authority the ordinary understanding in an auction sale is this. In the presence of the auctioneer who may be regarded as the acceptor successive proposals are made for the purchase of the property. *A* makes the first offer and when that is succeeded by the offer of *B* if *A* wants to purchase the property he must make a higher offer. Otherwise he walks out of the bargain. There may be *C*, *D* and *E* and so on who may bid higher than their immediate preceding bidders. It is the highest bidder that is regarded as having made the final proposal which may or may not be accepted by the auctioneer. If it is accepted the bargain is concluded. If it is not accepted there is no contract. The procedure at a Court sale exactly corresponds to what I have stated above. It is not different in any main particulars from any private proposals for the sale of property. According to the Subordinate Judge every offer that was made remained in abeyance pending acceptance by the auctioneer. If this is carried to its logical extent the first or the lowest offerer may still be regarded as keeping alive his offer on the possibility of the auctioneer accepting his proposal. In the

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first place this view of the Subordinate Judge is opposed, as pointed out by my learned brother, to the conditions of the sale because the third condition is:

"The highest bidder shall be declared to be the purchaser of any lot, provided he is legally qualified and provided it shall be in the discretion of the Court to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so."

In the present case in the auction list even when the bid had not reached the present figure the Subordinate Judge made a note that the price already offered was too high. Therefore according to condition 3 when Ramamurthi Chetti offered Rs. 3,26,000 one would have expected the Subordinate Judge to have accepted the offer. But for some reason notwithstanding his view that the price offered was unduly high he adjourned the sale to a future date. Before the adjourned date, as is pointed out by my learned brother, the highest bidder had died and the bid became a nullity. For this result the Subordinate Judge is mainly responsible. Instead of directing a fresh auction on the death of the highest bidder because under section 6 of the Contract Act, clause 4, the death of the proposer revokes the proposal, he has declared the next highest bidder as the auction purchaser. This conclusion of the Subordinate Judge seems to me to be utterly unwarranted by the conditions of the sale and by the recognized rules of auction sales. I would have been content to overrule the Subordinate Judge on what seems to me elementary rules relating to Court sales. Naturally enough Mr. K. Srinivasa Ayyangar, who appeared for the next highest bidder, who has been declared the purchaser had great difficulty in finding authority for his contention. Fortunately however there are some decisions which he has been able to bring to our notice which support one's *a priori* notions on such matters. In *Payne* v. *Cave*(1) it was stated:

"The auctioneer is the agent of the vendor and the assent of both parties is necessary to make the contract binding, that is signified by the seller knocking down the hammer, which was not done here till the defendant had retracted."

(1) (1789) 3 T.R., 149.

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. . . "Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to."

The only addition which need be made to this statement of law is "or till a person makes a higher bid." In *Jones* v. *Nanney*(1), a case which is also reported in Macleland Common Law Reports, p. 25, the facts were these: There were three plots for sale. The first plot was put up to auction. After there was a bid for £4,000 for it the auctioneer thought that higher price should be secured for it, and informed the bidders that he would proceed to sell plots 2 and 3 and then come back to plot 1. He then disposed of the next two plots and found that there was no higher offer than £4,000 for plot 1. Thereupon he declared the person who offered £4,000 to be the purchaser. This latter person refused to accept the sale. The question was whether there was a concluded bargain. The learned Barons who took part in the case held that by not knocking down the plot to the person who offered £4,000 and by proceeding to sell the other two plots the auctioneer must be taken not to have accepted the offer and that it was not competent for him subsequently to regard the offer as still open so as to enable him to accept it. This principle applies with great force to the present case. Here the Subordinate Judge accepted neither the offer of the appellant nor of Ramamurthi but adjourned the sale to some other date because in his opinion there were two other persons who were likely to make a higher bid. When he took this step he could not have insisted upon Ramamurthi Chetti, if he were alive, purchasing the property. Much less was it open to him to have asked the appellant to take the property. It was argued by Mr. Narayanamurthi that this English decision enunciates a principle too revolutionary for acceptance in this country. I do not think so. Under section 6 of the Contract Act, clause (2), "a proposal is revoked by lapse of a reasonable time without communication of the acceptance." It may be that the few minutes which elapsed between the offer and acceptance in the case of *Jones* v. *Nanney*(1) may not be regarded in this country as "reasonable time."

The question will depend upon the business habits of particular communities. But even in this country where it is

(1) (1824) 13 Price, 76.

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said that people conclude their contracts more leisurely than in England, when the Judge in the lower Court adjourned the sale to another date with a view to get a higher bid for the property, he certainly must be regarded not to have intended to accept the previous offer. I therefore think that the principle of the case is applicable to India subject to reservations on the question of the reasonableness of the time. The result is that the appellant's offer which was made on the 22nd of October 1918 not having been accepted within a reasonable time, was no longer in existence. This result would follow even if there were no higher offers than his. The acceptance of the conclusion of the Subordinate Judge must lead us to hold that every bid at an auction sale is a subsisting offer which can be converted into a contract at the option of the auctioneer at any moment of time. The theory that every bid is a contract has been repudiated long ago in England see *Warlow* v. *Harrison*(1) and is not law in this country. The reasoning in the above case applies against accepting the position that every bid is a subsisting offer. I have therefore come to the conclusion that the decision of the Subordinate Judge is wrong from every point of view.

The only difficulty I felt was about our powers of interference under section 115 of the Code of Civil Procedure. There can be no doubt that there has been very great irregularity and grave illegality in the procedure of the Subordinate Judge; and I do think that he has clutched at jurisdiction by these irregular and illegal methods. The auction had come to an end so far as the appellant was concerned when his offer was not accepted within a reasonable time and also when there was a higher offer. To foist upon him under these circumstances the position of a purchaser is equivalent to foisting upon any man in the street the status of an auction purchaser when he made no bid at all at the auction. The language of the Judicial Committee in *Balakrishna Udayar* v. *Vasudeva Ayyar*(2) was relied upon by Mr. P. Narayanamurti to show that these irregularities do not affect jurisdiction. I do not think the two cases are in *pari materia*. In my opinion the procedure of the Subordinate Judge amounts to acting illegally and with material irregularity in the exercise of jurisdiction. I therefore hold that we have power to interfere

(1) (1858) 1 Ellis & Ellis, 309. (2) (1917) I.L.R., 40 Mad., 793.

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with the order of the Subordinate Judge. It was contended by Mr. Narayanamurti that the order of the Subordinate Judge was an interlocutory one and that there was no case for revision until there has been a resale and a declaration of the deficiency recoverable from the appellant. I do not agree with this contention either. The Subordinate Judge has declared the appellant to be the purchaser and has given directions to sell the property treating him as the person responsible for any deficiency that may arise in the resale. I do not see why a man who expects to be damnified and who certainly would be put to the necessity of taking part in the resale to prevent the property being sold at a low price should not have the right to move the Court to interfere at this stage. I think the order of the Subordinate Judge was a final one although further orders may follow in the wake of the one which he has passed. Mr. K. Srinivasa Ayyangar has also filed a Civil Miscellaneous Appeal. It is open to argument that the appellant is the representative of either the auction-purchaser or of the judgment-debtor. The language of rules 71 and 84, Order XXI, of the Civil Procedure Code indicates that the appellant may be within section 47 of the Code. But the course of decisions in this Presidency as well as in the other High Courts have left this question of the representative character of the auction-purchaser in so confused a state that I do not think it safe to base my decision upon the assumption that the appellant is the representative of a party to the suit so as to invite the operation of section 47 of the Civil Procedure Code; if there is an appeal there can be no doubt that the order should be set aside as wholly unwarranted and illegal. But I think it would be safer to hold that no appeal lies and that the case should be dealt with under section 115, Civil Procedure Code. The petition should be allowed and the order of the Subordinate Judge should be set aside. I agree with the order as to transfer and as to costs made by my learned brother.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Phillips and Mr. Justice Napier.

1919, March 31.

THE PUBLIC PROSECUTOR, APPELLANT,

v.

SANKARALINGA MOOPAN (ACCUSED), RESPONDENT.*

Local Boards Act, Madras (V of 1884), ss. 33, 98 (1) and (2)—Delegation of duty to give notice of removal of obstruction to a public road by the president of a taluk board to a chairman of a union, validity of—"Other person duly authorized by him as aforesaid" in sec. 98 (2), meaning of.

Section 33 of the Madras Local Boards Act (V of 1884) does not restrict the specific delegations of duty allowed to the president of a taluk board by other sections of the Act. The words "other person duly authorized by him as aforesaid" in section 98, clause (2), mean "*any* person duly authorized by him in that behalf," viz., the one mentioned in section 98, clause (1), and do not mean only the vice-president of the taluk board. Hence a notice to remove an obstruction to a public road given by the chairman of a union to whom the president of the taluk board within which the union was situated delegated the power to give such notice is a legally valid notice; and disobedience to the notice is an offence under the Act.

CRIMINAL APPEAL under section 417 of the Criminal Procedure Code (V of 1898) against the acquittal of the accused by T. S. JAMBUNATHAN, Subdivisional Magistrate of Sivakāsi, Rāmnād district, in Criminal Appeal No. 18 of 1918, against the conviction of the accused by R. SAMI AYYAR, Third-class Magistrate of Sattur, in C.C. No. 11 of 1918.

The accused, one Sankaralinga Moopan of Sivakāsi, was charged with an offence under section 162 (c) of Madras Local Boards Act (V of 1884) in that he had erected without permission a masonry pial in a public street in front of his house in Sivakāsi town and that he had failed to remove the same within the time allowed by the notice issued to remove the same by the Union Chairman of Sivakāsi. The accused pleaded *inter alia* that the notice issued by the Union Chairman was not a legal one and that he had therefore committed no offence. The Court of first instance found that the Chairman was authorized by the President of the Taluk Board of Sattur under

* Criminal Appeal No. 778 of 1918.

PUBLIC PROSECUTOR v. SANKARALINGA MOOPAN.

section 98, clause (2), of the Local Boards Act to issue notices to remove encroachments on public roads, that the same was valid and that the accused was therefore guilty. On appeal against the conviction by the accused, the Subdivisional Magistrate acquitted the accused holding that the delegation of the duty to issue the notice to any one but the Vice-President of the Taluk Board was not valid. The Government preferred this appeal against the acquittal under section 417 of the Criminal Procedure Code.

E. R. Osborne, the Public Prosecutor, for the Crown.

Accused was not represented.

The JUDGMENT of the Court was delivered by

PHILLIPS, J.

PHILLIPS, J.—We cannot agree with the Subdivisional Magistrate that the words "other person duly authorized as aforesaid" in section 98 (2) of the Local Boards Act refer only to "some person, duly authorized by him in that behalf" mentioned in section 98 (1) for we think that the use of the single word 'other' precludes this view which would require the word 'any' or "such other" to support it. In our opinion there must be a separate authorization under each clause of the section and the words "as aforesaid" in clause (2) must be read as meaning "by him in that behalf". In this view the notice issued by the Union Chairman was valid, as authority had been given to him by exhibit C. Section 33 of the Act does not restrict specific delegations allowed by other sections of the Act, and there is no reason to read the words "other person" as meaning vice-president alone.

The case against accused being a summons case no charge was necessary and as accused was represented by a vakil he must have been aware of the charge against him and could not have been prejudiced by the Magistrate's omission to explain it to him.

We set aside the order of acquittal and confirm the conviction and sentence of the Sub-Magistrate.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Napier.

RAVANNI ACHAN, APPELLANT (PLAINTIFF)

v.

THANKUNNI, RESPONDENT (FIRST DEFENDANT).*

1913, April 4.

Malabar Law—Claim by an anandravan for arrears of menchilavu for himself and his wife, maintainability of.

An anandravan of a Malabar tarwad is not entitled to claim maintenance from his tarwad for his wife, who belongs to another tarwad, and much less is he entitled to claim for her any *menchilavu* (pocket money for meeting expenses other than maintenance). *Parvathi* v. *Kamaran*, (1883) I.L.R., 6 Mad., 341, referred to and explained.

An anandravan is entitled to a decree from his tarwad for arrears of his *menchilavu*, which in law stands on the same footing as arrears of maintenance. *Kunhammath* v. *Kunhi Kutti Ali*, (1884) I.L.R., 7 Mad., 233, *Valiya Konikel Edom Kalu* v *Lakshmi Nattyar Ammal*, (1913) 1 M.W.N., 379, and *Govindan Nair* v. *Kunju Nair*, (1919) 36 M.L.J., 565, followed.

SECOND APPEAL from the decree of G. H. B. JACKSON, District Judge of South Malabar, in Appeal Suit No. 501 of 1917, preferred against the decree of M. C. KRISHNA NAMBIYAR, the District Munsif of Alatur, in Original Suit No. 314 of 1916.

This was a suit for Rs. 1,200 brought by the senior anandravan of an ancient and rich Malabar tarwad in Palghat taluk against the karnavan and other members, being the amount of arrears of *menchilavu* (pocket money for expenses other than bare maintenance) which the plaintiff claimed had not been paid to him for four years before suit. The plaintiff made up his claim of Rs. 300 a year as follows:—clothes, oil and soap Rs. 100; tea, coffee and confectionery Rs. 16; wife's expenses Rs. 100; extras for festivals and carriage hire Rs. 40. The defendants pleaded that for a portion of the period sued for, the plaintiff was given his maintenance, that for the rest of the period he was not entitled to any *menchilavu*, as he was residing away from the tarwad house and was not behaving properly, that the amount claimed was excessive and that the plaintiff was not entitled to claim any *menchilavu* for his wife. The District Munsif allowed the claim in full. On appeal by

* Second Appeal No. 1287 of 1918.

RAVANNI ACHAN v. KANKUNNI.

the defendants the District Judge held that the plaintiff was not entitled to get (a) any *menchilavu* for his wife who belonged to another tarwad, and (b) any amount for festivals and carriage hire as there were no accounts to corroborate plaintiff's claim therefor, and that Rs. 100 a year was a sufficient amount to cover the other items of expenditure claimed by the plaintiff and gave a decree accordingly. The plaintiff preferred this Second Appeal and the defendants preferred a memorandum of objections.

C. Madhavan Nayar and *K. Kuttikrishna Menon* for appellant.

C. V. Anantakrishna Ayyar for respondent.

The JUDGMENT of the Court was delivered by

PHILLIPS, J.

PHILLIPS, J.—Appellant's counsel contends that an anandravan of a Malabar tarwad is entitled to *menchilavu* not only for himself but also for his wife, who belongs to another tarwad. *Prima facie* a junior member of a Malabar tarwad whether male or female must look to the karnavan of his or her own tarwad for maintenance. If therefore a woman who can claim maintenance from her own karnavan is entitled also to claim maintenance from her husband's tarwad, it gives her a right apparently opposed to the principles of Marumakkattayam law, and we have not been referred to any authority which recognizes such a right except *Parvathi* v. *Kamaran*(1). That case is, however, no authority for any such proposition of law. This Court merely accepted a finding that such a custom existed in North Malabar and this finding based on the evidence of two witnesses was not objected to. We are not therefore prepared to accept without authority this new proposition of law that a wife is entitled to maintenance from her husband's tarwad, a proposition which, even in *Parvathi* v. *Kamaran*(1), was described as inconsistent with the principles of Marumakattayam law. If the wife has not a legal right to bare maintenance *a fortiori* her claim to *menchilavu* which may be termed a luxurious form of maintenance must be negatived.

A memorandum of objections is filed for respondent and it is contended that plaintiff is not entitled to any money allowance from the karnavan and reliance is placed on *Kunhammath* v. *Kunhi Kutti Ali*(2). In this case, however, no money allowance

(1) (1883) I.L.R., 6 Mad., 341. (2) (1884) I.L.R., 7 Mad., 233.

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is decreed, but only compensation for *menchilavu* not received in the past to which plaintiff has been held to be entitled. This claim to *menchilavu* must be treated as on the same footing as a claim to past maintenance for which undoubtedly a decree could be given. [Vide *Valiya Konikal Edom Kalu* v. *Lakshmi Nattyar Ammal*(1) and *Govindan Nair* v. *Kunju Nair* (2)].

The Second Appeal and memorandum of objections are both dismissed with costs.

N.R.

APPELLATE CRIMINAL.

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

GANAPATHY CHETTY AND ANOTHER (ACCUSED), PETITIONERS,

v.

REX.*

1919, April, 14.

Criminal Procedure Code (Act V of 1898), ss. 177 to 187, 526 and 531—Murder committed outside Madras—Inquiry by Chief Presidency Magistrate and commitment to High Court Sessions—Jurisdiction of Magistrate—Original Criminal Jurisdiction of High Court—Letters Patent, cl. 24—Jurisdiction, whether conferrable under section 526, Criminal Procedure Code.

The petitioners were charged before the Chief Presidency Magistrate of Madras with having kidnapped a child from his guardian in Madras, with having stolen his jewels from him in Madras and with having taken him out of the city to a place within the jurisdiction of the Sessions Judge of Chingleput and there murdered him. The Chief Presidency Magistrate, after inquiry, committed the petitioners to the High Court Sessions on the abovesaid charges.

On an application to the High Court on its appellate side to set aside the commitment so far as the charge of murder was concerned on the grounds that (a) the Magistrate had no local jurisdiction to inquire into the case, and (b) the High Court had no local jurisdiction to try the charge of murder:

Held (i) that the irregularity or illegality, if any, in the Magistrate's proceedings was cured by section 531, Criminal Procedure Code, (ii) that, even if the High Court had no jurisdiction on its Original Side to try the case, an order could be made under section 526, Criminal Procedure Code, directing the trial at the High Court Sessions. Ordered accordingly.

Semble.—The High Court has power under clause 24 of the Letters Patent in the exercise of its original criminal jurisdiction to try persons for offences committed outside the City of Madras.

* Criminal Miscellaneous Petition No. 159 of 1919.

(1) (1913) M.W.N., 379. (2) (1919) 36 M.L.J., 565.

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Queen-Empress v. *James Ingle* (1892) I.L.R., 16 Bom., 200, and *Queen-Empress* v. *Ram Dei* (1896) I.L.R., 18 All., 387, referred to; *Assistant Sessions Judge of North Arcot* v. *Ramammal* (1913) I.L.R., 36 Madras, 387, distinguished.

PETITION under sections 215 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court will be pleased to quash the order of commitment passed by J. C. ADAM, Esq., the Chief Presidency Magistrate, dated the 20th day of March 1919, in Calendar Case No. 4556 of 1919 (Sessions Case No. 8 of 1919 on the file of the High Court).

K. W. Luke for the first (accused) petitioner.

C. Kunhiraman for the second (accused) petitioner.

The Crown Prosecutor (*C. Sidney Smith*) on behalf of the Crown.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—This is an application praying to quash the order of commitment passed by the Chief Presidency Magistrate in Calendar Case No. 4556 of 1919. The commitment was made to the High Court Sessions. The application is made under sections 215 and 439 of the Criminal Procedure Code and section 107 of the Government of India Act. The offences with which the petitioners are charged relate to acts of kidnapping and theft committed in Madras and the offence of murder committed on the Avadi-Poonamallee Road within the jurisdiction of the Sessions Court of Chingleput. They all formed parts of the same transaction.

So far as the objection based on the alleged want of jurisdiction of the Chief Presidency Magistrate over the offences which took place on the Avadi-Poonamallee Road are concerned, that defect, assuming it to exist, is clearly cured by section 531, Criminal Procedure Code.

Then there is the more serious question, that is, the commitment having been made to this High Court Sessions as regards the offence which took place in the Chingleput district whether the High Court has got power in the exercise of its original criminal jurisdiction to try that offence and whether even if it has not the defect is cured by section 531 or 532. I think the policy of the Criminal Procedure Code as shown by sections 531 to 538 is to uphold in most cases the orders passed by the Criminal Court which was lacking in local jurisdiction or which

GANAPATHY CHETTY v. REX.

SADASIVA AYYAR, J.

had committed illegalities or irregularities unless failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities. However there is a decision of this Court in *Assistant Sessions Judge of North Arcot* v. *Ramammal*(1) to which my learned brother was a party and which holds that if the Sessions Court to which a commitment was made had no local jurisdiction over the place where the offence took place such commitment should be quashed (though of course after the trial had taken place to its termination section 531 might cure the defect). It is unnecessary for me to express any final opinion whether the decision in *Queen-Empress* v. *Ram Dei*(2) which seems to be opposed to the decision in *Assistant Sessions Judge of North Arcot* v. *Ramammal* (1) does not take the better view. I shall, therefore, proceed on the footing that, in the matter before us, *Assistant Sessions Judge of North Arcot* v. *Ramammal*(1) should be followed.

The next question is whether the High Court in its original criminal jurisdiction has power to try a case of murder committed in the Chingleput district. In *Queen-Empress* v. *James Ingle*(3), which was a case almost similar to the present, Mr. Robertson for the prosecution contended that under the Letters Patent the High Court had criminal jurisdiction to try cases arising throughout the Presidency. Clause 24 of the Letters Patent of this Court says that the

"High Court of Judicature at Madras shall have extraordinary original criminal jurisdiction *over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court.*"

It is objected that the High Court Sessions will then be flooded with commitments if it is held to have the original criminal jurisdiction over the whole Presidency. I think that it was to prevent that inconvenience that section 206, clause (2), was enacted prohibiting Magistrates from committing to the High Court where they could commit to a Sessions Court. In the above-quoted case in *Queen-Empress* v. *James Ingle*(3) Mr. Justice FARRAN refused to quash the commitment made wrongly to the Bombay High Court Sessions evidently accepting the

(1) (1913) I.L.R., 36 Mad., 387. (2) (1896) I.L.R., 18 All., 358.
(3) (1892) I.L.R., 16 Bom., 200.

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contention of Mr. Robertson already referred to. The present case is therefore not a case of want of jurisdiction in the Court to which the commitment was made and can therefore be distinguished from the case decided in *Assistant Sessions Judge of North Arcot* v. *Ramammal*(1).

Assuming again that the High Court in its original criminal jurisdiction has no power in the usual course to try this case, I think this is a matter in which we should exercise the power given to us by section 526, clause (1), sub-clause (1), for reasons (*d*) and (*e*) of the Criminal Procedure Code and pass an order that the offences committed outside the jurisdiction of Madras be also tried in the High Court Criminal Sessions along with other offences which were committed in Madras. If that power is exercised the trial before the Madras Sessions becomes legal and it then becomes unnecessary to decide the other questions. I would therefore pass that order and dismiss this petition.

SPENCER, J.

SPENCER, J.—I agree.

So far as the proceedings in the Presidency Magistrate's Court are concerned, section 531, Criminal Procedure Code, is sufficient authority for our refusing to set aside the order of commitment. This section, however, cannot be invoked as regards the proceedings in the High Court Sessions, for the trial of this case has not yet been taken up in the High Court Sessions and therefore so far there are no proceedings in the Sessions Court requiring to be cured.

Section 177, the effect of which was considered in *Assistant Sessions Judge of North Arcot* v. *Ramammal*(1) to which I was a party, declares that

"every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed."

The question, therefore, now for our consideration is whether the trial can be allowed to proceed in this Court or whether so far as the offence of murder is concerned the case should be tried by the Sessions Judge of Chingleput, who appears so far as the facts are before us to have jurisdiction over that offence committed at Poonamallee just outside the Madras City in the Chingleput district. On the question of convenience there can

(1) (1913) I.L.R., 36 Mad., 387.

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SPENCER, J.

be no doubt that it will be convenient for the case to be tried where the witnesses are assembled; the case is ready for trial; and the offences of kidnapping and theft have in any case to be tried in Madras unless an order of transfer is made. I do not think it can be suggested seriously that the accused would be prejudiced by being tried by a jury and by losing his right of appeal if convicted. Having regard to clause 24 of the Letters Patent it cannot be said that the Judge presiding over the High Court Sessions has no power to try persons brought before him on charges preferred by any Magistrate. This case in that respect differs from the case in *Assistant Sessions Judge of North Arcot* v. *Ramammal*(1), in which the Sessions Judge of North Arcot, to whom the commitment was made, had no power to try an offence arising out of the local limits of the Salem district. Under section 526, clause (1), sub-clause (1), the High Court is empowered to make a direction

"that an offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive) but in other respects competent to inquire into or try such offence"

in cases where such order is expedient for the ends of justice. I therefore agree with my learned brother that that is the order we should make in this case and that it will be expedient for the ends of justice that all the charges be tried together against the accused at the High Court Sessions.

K.R.

(1) (1913) I.L.R., 36 Mad., 387.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

1918, December, 10, 11 and 20, and 1919, April, 23.

RAMA ROW (FIRST DEFENDANT), APPELLANT,

v.

MARTHA SEQUEIRA AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

District Municipalities Act (Madras Act IV of 1884), ss. 207, 264 (a) and 278—Erection of a latrine by a house-owner—Nuisance to neighbours—Nuisance avoidable—Injunction—Damages whether sole remedy.

The fact that a municipality, governed by the Madras District Municipalities Act, which is empowered to see that house-owners provide latrines in their houses, ordered the erection of a latrine in a certain house does not enable the house-owner to erect a latrine at a place where it would be a nuisance to his neighbour. If he could erect it at any other place where it would not be a nuisance he can be restrained by an injunction to abate the nuisance. Award of damages as provided for by section 278 of the Act is not the only remedy.

SECOND APPEAL against the decree of L. G. MOORE, the District Judge of South Kanara, in Appeal Suit No. 85 of 1917 preferred against the decree of JAGANNATHA RAO, S. TAGAT, the District Munsif of Mangalore, in Original Suit No. 269 of 1914. The facts are given in the judgment of the High Court.

The first defendant preferred this second appeal.

B. Sitarama Rao and *K. P. Lakshmana Rao* for appellant.

K. Ramanatha Shenai for respondent.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The first defendant and the plaintiff are neighbours. The former owns a large piece of land on which he has built cottages which he has let out for rent. For the convenience of the tenants he had put up a latrine in a particular place. This was objected to by the Municipal Council who directed the demolition of it

"and the construction of a proper and substantial one for the use of his tenants in the garden in an unobjectionable place about 25 yards to the west of the latrine complained of"

(vide exhibit II). The first defendant began to put up the latrine close to the house of the plaintiff. The site was

* Second Appeal No. 494 of 1918.

approved of by the Municipal Chairman. The plaintiff complained against it and appealed to the Collector. The Collector passed orders stating that the site for the latrine was chosen by the Municipal Chairman after consulting both the parties and it could not be changed. This suit was brought for a mandatory injunction to remove the latrine as it is a nuisance to the plaintiff. In both the Courts below plaintiff was successful. They held that the statement in the order of the Collector that the Chairman consulted both the parties was wrong. They further held that the latrine was a nuisance. The District Munsif stated:

"the place is an abomination and it is an unmitigated nuisance to the plaintiff."

The learned District Judge says:

"that the erection of the latrine opposite to and at a distance of only 25 yards from her house causes serious discomfort to, and is likely to endanger the health of the inmates of the plaintiff's house."

In the lower Courts the decision was largely based upon *Sayad Jafir Saheb* v. *Sayad Kadir Rahiman*(1).

In Second Appeal Mr. Sitarama Rao has addressed to us a very able and elaborate argument on the question. His main contention was that under section 207 of the Municipal Act he was bound on the direction of the Municipal Council to put up a latrine, that otherwise he would have rendered himself liable to be fined for his neglect, and that as he put up the latrine in the place approved by the Municipal Council through its Chairman no action lies against him He also contended that the injunction to remove the building was wrong. Upon the latter question there can be no doubt. All that the plaintiff can complain against is the use of the building as a latrine, for that alone constitutes the nuisance. She has no right to object to the building itself, which can be utilized for other purposes which would not cause any nuisance nor injure the inmates of her house. She was not justified in coming to Court with a prayer for the removal of the building. To that extent the decree must be modified and, as we understand that

(1) (1888) I.L.R., 12 Bom., 634.

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SESHAGIRI AYYAR, J.

the walls have been pulled down, she should be directed to restore the building at her own expense. The more important question is whether the plaintiff has a right of suit under the circumstances mentioned.

Very recently we had to consider the liability of a Taluk Board for damages in the execution of a duty enjoined by the legislature—*Krishnamoorthi Ayyar* v. *The Taluk Board of Mayavaram*(1). We there pointed out that there is a well-marked distinction between permissive and obligatory duties; but as the question has been more fully argued on the present occasion, we think it desirable to state succinctly the rules and the limitations applicable to the two branches of duties. If the act is only permitted by the statute to be done, the corporation is practically under the same obligations to respect the rights of others as a private individual. The corporation should so perform the duty as not to injure private rights—see *Attorneys-General* v. *The Conservators of the River Thames*(2) and *Madras Railway Company* v. *Zemindar of Carvetnagaram*(3). Further the duty must be done without negligence and with care—see *Khagendranath Mitter* v. *Bhupendra Narain Dutt*(4). There is no distinction between misfeasance and non-feasance in such cases—see *Canadian Pacific Railway* v. *Parke*(5). The position of a corporation which is bound to carry out certain duties is different. In enjoining the performance of them the legislature contemplates the fact that private individuals will have to submit to a certain amount of infraction of their rights. The principle is that where the legislature directs a duty to be done, it must be deemed to have weighed the balance of convenience between public benefit and private rights and to have laid down that the latter should give way to the former—see *Geddis* v. *Proprietors of Bann Reservoir*(6), *London Brighton and South Coast Railway Company* v. *Truman*(7), *West* v. *Bristol Tramways Company*(8) and *Westminster Corporation* v. *London and North Western Railway*(9). But the private individual is not altogether without remedy even in such cases.

(1) (1919) I.L.R., 42 Mad., 331. (2) (1862) 1 Hemming and Miller, 1.
(3) (1874) 1 I.A., 364, at page 385.
(4) (1911) I.L.R., 38 Calc., 296 (5) (1899) A.C., 535.
(6) (1878) 3 A.C., 430, 455. (7) (1885) 11 A.C., 45.
(8) (1908) 2 K.B., 14. (9) (1905) A.C., 426.

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If the work has been done negligently or carelessly the corporation will be liable—see *Hammersmith, etc., Railway Company* v. *Brand*(1), *Thompson* v. *Eccles Corporation* and *Haedicke* v. *Friern Barnet Urban Council*(2). The corporation will also be liable where it acts maliciously and with a wanton desire to injure private rights. But it is not liable for mere non-feasance. The question now is under which of the two categories we should place the erection by the first defendant of the latrine ordered by the municipality. Section 207 runs "The Municipal Council may by a notice require, etc." Mr. Sitarama Rao drew our attention to section 264 (*a*) which contains the penal clause. He also referred to section 35 which enables the Governor in Council to suspend the operations of the resolutions passed under the Act if the execution of such resolutions is likely to cause obstruction, injury or annoyance to any person lawfully employed or danger to human life, health, or safety. The learned vakil argued from these provisions that the duty cast upon the municipality must be regarded as obligatory. We are unable to agree with him. *Prima facie* the provision of a latrine is for the convenience of the inmates of the place and has no doubt a bearing on the health of the town. But a direction to build at a particular place without reference to the surroundings cannot be said to be obligatory on the municipality. Under very similar circumstances it was held in *Verno* v. *Vestry, St. James', Westminster*(3), to which Mr. Shenai drew our attention, that the corporation would be liable in damages to a private individual. In that case MALLINS, V.C., stated :—

"Therefore, I repeat, if the question before me were simply whether they were right in selecting the place, and whether one place or another was better, I should be bound to decide that the vestry are the sole judges as to what the situation should be. But great as the powers of the vestries under the Act are, they are not absolute, and vestries are, like all other public bodies, liable to be controlled by this Court if they proceed to exercise their powers in an unreasonable manner, whether they are induced to do so by improper motives or from error of judgment."

(1) (1869) L.R., 4 H.L., 171. (2) (1905) 1 K.B., 110.
(3) (1880) 16 Ch.D., 449.

RAMA ROW v. MARTHA SEQUEIRA.

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Further on the V.C., says:

"It is clear that the Court has power to entertain such suits, and that these vestries must not execute those powers in such a manner as to create a nuisance when the object of the Act is to remove nuisance."

The case was taken up to the Court of Appeal. Lord Justice JAMES said:—

"If the erection in question were made by a private landowner on his own soil and freehold, it would seem to be beyond all question a nuisance so grave and so serious that the neighbours would be entitled to apply to the Court for an injunction to restrain it. The question is whether the fact that the thing is done, not by a private owner on his private soil, but by the parish vestry on a place that is said to be a public highway, makes any difference."

The learned Lord Justice then quoted section 6 which is very similar to section 207 of the District Municipalities Act and proceeded:—

"*Prima facie* nobody is authorized to commit a nuisance and nobody is to be held so authorized under an Act of Parliament unless it appears from express words or by necessary implication that the act was to be done or might be done notwithstanding its tending to the creation of a nuisance."

Lord Justice COTTON said:—

"Therefore the mere fact that urinal is authorized to be erected does not necessarily or by necessary implication give parliamentary power to do it if it is a nuisance."

Lord Justice LUSH said:—

"That if the inconvenience is only to the public and there is no special injury to a particular individual no action would lie."

This case is strong authority for the position that although the Municipal Act has authorized the council to direct the location of latrine in a particular place, the work should not be carried out so as to affect injuriously private interests more than is necessary. In *Sellors* v. *Matlock Bath Local Board*(1) the same principle was enunciated. In *Rapier* v. *London Tramways Company*(2) also this principle was affirmed. It seems to us therefore that in the contemplation of the legislature the power given to the municipality to supervise the erection by a

(1) (1885) 14 Q.B., 928. (2) (1893) 2 Ch., 588.

RAMA ROW v. MARTHA SEQUEIRA.

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private individual of a latrine must be regarded as a permissive obligation which should be exercised without unnecessary detriment to private rights and without creating unreasonable nuisance. The evidence of the Medical officer is to the effect that all latrines in Mangalore are to a certain extent a nuisance. This being so, their erection must be detrimental to some private right.

The learned vakil for the appellant further relied upon the fact that, by section 278 of the Act, compensation is payable by the Municipal Council for any damage caused by the exercise of its powers and hence the plaintiff is not entitled to any further remedy from the defendant in this suit. In the case already referred to, namely, *Verno* v. *Vestry, St. James', Westminster*(1), Lord Justice JAMES referred to the clause which provided for compensation and held that the plaintiff was not confined to that remedy alone. In *Attorney-General* v. *Lewis Corporation*(2) it was held that none of the provisions relating to remedies in the Act would interfere with the common law rights of injured parties. We do not think the decision in *West* v. *Bristol Tramways Company*(3) is any authority for the proposition contended for by the learned vakil for the appellant.

Moreover this is not a suit against the corporation for any injunction or for damages although the Municipal Council has been impleaded as a defendant. The suit is primarily against the first defendant for what he has done on his premises. It would be unreasonable to expect that the Municipal Act should provide for reliefs as against private individuals.

We are therefore of opinion that there is no substance in this contention. In the result our conclusion is that the direction to pull down the whole building was wrong and that there should be an inquiry as to whether the defendant could have located the latrine in such a place as not to cause unreasonable injury to the plaintiff. Even should the defendant be obliged to remove some of the cottages in order that a convenient place may be found for erecting a latrine without causing inconvenience to the plaintiff he should be required to do so. Therefore we must

(1) (1880) L.R., 16 Ch.D., 449. (2) (1911) 2 Ch., 495.
(3) (1908) 2 K.B., 14.

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ask the District Judge to return a finding on the following issue :—

"Was the latrine erected by the defendant in a reasonable manner so as not to infringe unnecessarily the rights of plaintiff"?

Six weeks for finding and seven days for objections.

In compliance with the order contained in the above judgment, the District Judge of South Kanara submitted a FINDING to the effect (1) that the erection of the latrine at the particular place was not consented to either by the plaintiff or by the municipality. (2) that the first defendant's garden was an extensive one wherein a latrine could be constructed at another place without causing any nuisance to the neighbours, and (3) that the latrine was not erected by the defendant in a reasonable manner so as not to unnecessarily infringe the rights of plaintiff.

This Second Appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by the High Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and subject to the modification indicated in our remand order the Second Appeal is dismissed. Each party to bear his own costs throughout.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1919, January, 22 and 23, and May, 2.

SAMARAPURI CHETTIAR (SECOND DEFENDANT), APPELLANT

v.

A. SUDARSANACHARIAR AND A. SADAGOPACHARIAR (PLAINTIFFS), RESPONDENTS. *

Sale of land—Contract of resale—Time, essence of the contract—Doctrine applicable to contracts of sale, whether applicable to contracts of resale—Rule of English law, applicability of, to India.

The doctrine, that time may not be of the essence of the contract which arises on the construction of contracts of sale of immoveable property, is not applicable to contracts of *resale* of property conveyed.

If the transaction is not a mortgage, the right to repurchase being an option must be exercised according to the strict terms of the power.

* Second Appeal No. 1218 of 1918.

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Rule of English law followed; *Joy* v. *Birch*, (1836) 7 E.R., 22; *Ranelagh* v. *Melton*, (1864) 62 E.R., 627; and *Dibbins* v. *Dibbins*, (1896) 2 Ch., 348, referred to.

SECOND APPEAL against the decree of V. VENUGOPAUL CHETTI, the District Judge of Chingleput, in Appeal Suit No. 80 of 1917, preferred against the decree of A. VEKATARAMAYYA PANTULU Garu, the Temporary Subordinate Judge of Chingleput, in Original Suit No. 14 of 1916.

The plaintiff and another person sold the suit lands under a sale-deed, dated 19th August 1908, in favour of the second defendant for a consideration of Rs. 4,500. Two days after the sale, on the 21st August 1908, the second defendant executed an agreement in favour of the two plaintiffs by which the former agreed to convey the lands purchased by him on 19th August 1908. The material terms of the agreement were as follows:

"If you or any one authorized by you pay up the sale amount (Rs. 4,500) to me or my heirs at any time within five years from this day (i.e.), within 21st October 1913, myself or my heirs shall sell to you, etc. This agreement will not be valid after the stipulated period. After the expiration of the said period, you will claim no right or privilege whatever to this agreement."

The plaintiffs did not pay the price on the stipulated date. About a year and a few months after the stipulated time, the plaintiffs sent a notice to the defendants to receive the money due to them and to re-convey the property. On the refusal of the second defendant, the plaintiffs brought the present suit for redemption on the footing of a mortgage to the second defendant; the plaint was subsequently amended by asking for an alternative relief by way of specific performance of the contract to sell under the agreement of the 21st August 1908; the plaintiffs contended that time was not of the essence of the contract of resale of the suit properties to them. The trial Court framed issues both as to the case relating to redemption on the footing of a mortgage and as to the case for specific performance of the contract to sell. The trial Court held that the transaction viewed as a contract of sale, could be specifically enforced, as time was not of the essence of the contract, and passed a decree for specific performance in favour of the plaintiffs. On appeal by the second defendant, the District Judge affirmed the decision of the former Court, holding that time was not of the

SAMARAPURI CHETTIAR v. SUDARSANA-CHARIAR.

essence of the contract. The second defendant preferred a second appeal.

T. Narasimha Ayyangar and *N. Srinivasa Achariyar* for the appellants.

S. Krishama Achariyar for the respondents.

The JUDGMENT of the Court was delivered by

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The lower Appellate Court was in error in applying the doctrine that time may not be of the essence of the contract which arises on the construction of contracts of sale to contracts for resale of property conveyed. The true doctrine is stated in Fisher on Mortgages, chapter 1, section 1, paragraph 18, and is that if the transaction is not a mortgage the right to repurchase being an option must be exercised according to the strict terms of the power—vide *Joy* v. *Birch*(1), *Lord Ranelagh* v. *Melton*(2) and *Dibbins* v. *Dibbins*(3). There is no reason why a different rule should prevail in India. We therefore reverse the decisions of the lower Courts and remit the case to the Court of First Instance for the trial of issues Nos. 1 and 4 in the light of observations of the Full Bench in *Muthuvelu Mudaliar* v. *Vythilinga Mudaliar*(4).

K.R.

(1) (1836) 7 E.R., 22.
(2) (1864) 62 E.R., 627.
(3) (1896) 2 Ch., 348.
(4) (1919) 36 M.L.J., 385.

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Sections 37, 38 and 150, Civil Procedure Code, construed.

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family—Parties to suit, Sudras and members of the Kamma caste.] In this case in which the parties were Sudras of the Kamma caste and governed by the law of the Mitakshara, except where that law had been altered by custom, a custom was alleged by which an adoption made by a member of the caste of an *illatom* son-in-law was valid, though the adoptive father had a natural son living at the time, and was a member of a joint family with his brothers. The appellant contended that no such custom had been proved, and that such a custom, even if proved, would be invalid. The Courts below found that the custom had been judicially recognized by the High Court in an unreported case, *Hammayya* v. *Yellamanda*, S.A. No. 45 of 1905, in which many instances of *illatom* adoption by persons who had sons living were proved, and upheld it on that ground together with the evidence in the case. *Held*, that having regard to the decision in *Hammayya* v. *Yellamanda*, S.A. No. 45 of 1905, and to the fact that the Courts below agreed that the adoption was valid in law, and had been so treated by the family for many years, their decisions should be affirmed and the appeal dismissed.

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HINDU LAW—*Surrender by widow—Essentials of a valid surrender—Provision for maintenance and residence of widow, whether invalidates surrender—Surrender, to be bona fide, of entire interest in whole property and to nearest reversioner.*] A reasonable provision for maintenance and residence in favour of a Hindu widow, does not affect the validity of a surrender by her of her husband's estate to the nearest reversioner, provided it is a bona fide surrender of the *entire* interest of the widow in the *whole* estate and is not a mere device to divide the estate with the nearest reversioner. *Rangasami Goundan* v. *Nachiappa Goundan*, (1919) I.L.R., 42 Mad., 523 (P.C.), explained. *Mussammat Bhagwat Koer* v. *Dhamukdhari Prasad Singh* (1919), 37, M.L.J., 513 (P.C.), relied on.

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JURISDICTION—*Mortgage of property situated partly in district subject to the Code of Civil Procedure, 1908, and partly in a scheduled district under Act XXIV of 1839—Mortgage of such property and order for sale made by Court under Code of Civil Procedure—Order for sale without jurisdiction—Civil Procedure Code, 1908, sec. 1 sub-section (3), and ss. 17, 21—Meaning of 'Courts' in sec. 17.*] A suit was brought under the Code of Civil Procedure, 1908, to enforce a mortgage of property which was situate partly in a district to which that Code applied, and partly in a scheduled district under Act XXIV of 1839, and therefore subject to the special jurisdiction of the Agency Courts, and a decree, on the mortgage and for sale of the mortgaged property, was made by the Subordinate Judge, and affirmed by the High Court. *Held*, that so far as the decree was for sale of the mortgaged property in the scheduled district the Courts had no jurisdiction to make it, section 21 of the Code not being applicable to such case. And it could be set aside, notwithstanding that no objection to the jurisdiction had been taken in the Subordinate Judge's Court. The word 'Court' in section 17 of the Civil Procedure Code, 1908, means Courts to which that Code applied, and not Courts one of which

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was subject to the Civil Procedure Code, and the other to the Agency jurisdiction. The alteration made in the decree by striking out that part of it which ordered the sale of the mortgaged property would not interfere with the plaintiff's right to obtain from the Agency Court an order for the sale of the property situate in its jurisdiction.

Ramabhadra Raju Bahadur v. *Maharaja of Jeypore* ... (1919) I.L.R., 42 Mad. (P.C.), 813

LIMITATION ACT (IX OF 1908), ART. 182, CL. (5): *See* CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 37, 38, 39 AND 150 821

MALABAR LAW—*Tarwad—Tavazhi—Branches of a tavazhi whether can be established under the law—Gift by a husband to his wife and her children by him—Donees, whether exclusively entitled as a branch tavazhi—Rights of her children by another husband—Rights of tarwad to such properties—Adverse possession by branch tavazhi against tarwad.*] Under the Malabar Law, a separate branch of a tavazhi can be established consisting of a woman and her children by one husband to the exclusion of her children by another husband. *Dictum of* SADASIVA AYYAR, J., *in Chakkra Kannan* v. *Kunhi Pakker* (1916) I.L.R., 39 Mad., 317, followed. Where a husband gives property to his wife and his children, there is no presumption that he intended to benefit her children by a former or subsequent husband, in the absence of any expression of such intention. Where the suit properties were acquired in the name of a woman and her son by a second husband out of the income of properties given by the latter to her and her children by him, and it appeared that they had dealt with the properties for forty years exclusively although there were members of the tarwad senior to them, and a suit was instituted by the karnavan of the whole tarwad to redeem the properties as belonging to the entire tarwad, *Held*, that the properties belonged in law to the branch of the tavazhi of the woman and her children by her second husband; and that the branch tavazhi had also acquired title to the suit properties by adverse possession against the tarwad, of which the plaintiff was the present karnavan.

Imbichi Beevi Umma v. *Raman Nair* ... ... (1919) I.L.R., 42 Mad., 869

MALICIOUS PROSECUTION—*Prosecution by the police—Report made by a person to a village munsif of theft by another—Investigation by police—Prosecution for theft instituted and conducted by police—Acquittal—Suit by accused for damages for malicious prosecution against informant, whether maintainable.*] A suit for damages for malicious prosecution is maintainable, by a person who was prosecuted by the police and acquitted, against another who had made the report containing maliciously false information against the former to a village munsif, as the result of which the police after investigation launched and conducted the prosecution, even though the informant was not the prosecutor in the criminal case. *Narasinga Row* v. *Muthaya Pillai* (1903) I.L.R., 26 Mad., 362, dissented from; *Gaya Prasad* v. *Bhagat Singh* (1908) I.L.R., 30 All., 525 (P.C.), referred to.

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PRIVY COUNCIL.*

NALLURI KRISTNAMMA AND ANOTHER (PLAINTIFFS),

v.

KAMEPALLI VENKATASUBBAYYA AND OTHERS (DEFENDANTS).

1919, February 6, 7, 25.

[On appeal from the High Court of Judicature at Madras.]

Hindu law—Adoption—Custom of illatom *adoption of son-in-law—Adoption by person who had a natural son living at the time and was a member of a joint family—Parties to suit, Sudras and members of the Kamma caste.*

In this case in which the parties were Sudras of the Kamma caste and governed by the law of the Mitakshara except where that law had been altered by custom, a custom was alleged by which an adoption made by a member of the caste of an *illatom* son-in-law was valid though the adoptive father had a natural son living at the time, and was a member of a joint family with his brothers. The appellant contended that no such custom had been proved, and that such a custom, even if proved, would be invalid. The Courts below found that the custom had been judicially recognized by the High Court in an unreported case (*Hammayya* v. *Yellamanda*, Second Appeal No. 45 of 1905) in which many instances of *illatom* adoption by persons who had sons living were proved, and upheld it on that ground together with the evidence in the case.

Held, that having regard to the decision in *Hammayya* v. *Yellamanda*, S.A. No. 45 of 1905, and to the fact that the Courts below agreed that the adoption was valid in law, and had been so treated by the family for many years, their decisions should be affirmed and the appeal dismissed.

APPEAL No. 9 of 1917 from a judgment and decree of the High Court of Madras, dated 11th September 1914, which affirmed a judgment and decree of the Court of the Subordinate Judge of Guntūr, dated 19th December 1910.

The parties to the suit out of which the present appeal arose are Sudras, governed by the Mitakshara law as administered in the Madras Presidency, and the question for decision in the appeal is whether the *illatom* adoption of the paternal grandfather of the first two respondents, Ramakristnamma, by one Lingayya, the paternal grandfather of the appellants, was valid in law.

The facts are sufficiently stated in the Judgment of the Judicial Committee.

ON THIS APPEAL, which was heard ex parte:

* *Present*: Viscount HALDANE, Viscount CAVE, Sir JOHN EDGE and Mr. AMEER ALI.

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DeGruyther, K.C., and *J. M. Parikth*, for the appellants, contended that by the Hindu law no such adoption as was made in this case could legally take place, and that a special custom must therefore be proved to support the alleged adoption. The burden of proving such an adoption lay on the respondents—*Ram Nundun Singh* v. *Jankikoer*(1)—to prove a custom by which a male member of the sect of Kammas, to which the parties in the present case belong, can make an *illatom* adoption, when he has at the time of making it a son living, or is living jointly with his brothers; and both Courts have found that the respondents had not discharged that onus. Such a custom if proved would be contrary to the rule of Mitakshara law under which a co-parcener or a father cannot alienate any portion of the joint family property without the consent of his co-parcener or son respectively, and be therefore invalid. The decision in *Hammayya* v. *Yellamandu*(2) relied on by the High Court as recognizing an *illatom* adoption such as is alleged in the present case did not, it was submitted, govern this case. Reference was made in the course of the argument to the following cases which recognized a custom of adopting an illatom son-in-law: *Tayamana Reddi* v. *Perumal Reddi*(3), *Challa Papi Reddi* v. *Challakoti Reddi*(4), *Hanumantamma* v. *Rambi Reddi*(5), *Balasami Reddi* v. *Pera Reddi*(6), *Chenchamma* v. *Subbaya*(7), *Ramakristna* v. *Subbakka*(8), *Malla Reddi* v. *Padmamma*(9), *Narasimha Razu* v. *Veerabhadra Razu*(10) and *China Obayya* v. *Sura Reddi*(11).

The JUDGMENT of their Lordships was delivered by

Sir JOHN EDGE.

Sir JOHN EDGE.—This is an appeal by the plaintiffs from a decree, dated the 11th September 1914, of the High Court at Madras, which affirmed a decree, dated the 19th December 1910, of the Subordinate Judge of Guntūr, which dismissed the suit. The suit in which this appeal has arisen was instituted on the 27th April 1906, in the Court of the District Judge of Guntūr, and was subsequently transferred to the Court of the Subordinate Judge in which it was entered as Original Suit No. 1 of 1910. The plaintiffs in this suit (No. 1 of 1910) were

(1) (1902) I.L.R., 29 Calc., 828; s.c. L.R., 29 I.A., 178.
(2) Second Appeal No. 45 of 1905 (unreported).
(3) (1862) 1 Mad. H.C., 51.
(4) (1872) 7 Mad. H.C., 25.
(5) (1881) I.L.R., 4 Mad., 272.
(6) (1883) I.L.R., 6 Mad., 267.
(7) (1885) I.L.R., 9 Mad., 114.
(8) (1889) I.L.R., 12 Mad., 442.
(9) (1893) I.L.R., 17 Mad., 48.
(10) (1893) I.L.R., 17 Mad., 287.
(11) (1897) I.L.R., 21 Mad., 226.

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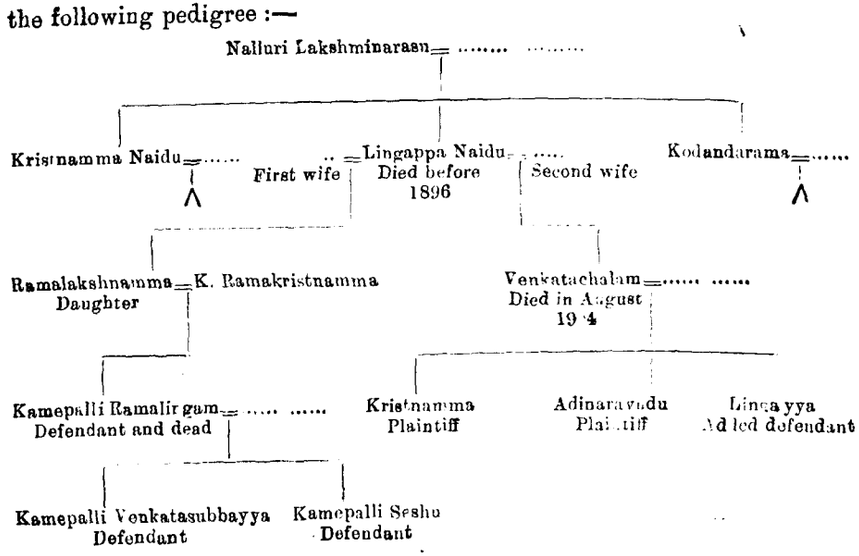
Nalluri Kristnamma and his brother, Nalluri Adinarayudu. The original defendants in this suit were Kamepalli Ramalingam, who is now dead, and his sons, Kamepalli Venkatasubbayya and Kamepalli Seshu. Nalluri Lingayya, who is a natural brother of these plaintiffs, was added as a defendant to the suit on the 17th September 1908, and is a nominal respondent to this appeal. He has not appeared, and it has been stated by counsel for the appellants that Nalluri Lingayya has been adopted, according to Hindu law, into another family, and is not interested in the suit or in this appeal.

In 1907 Kamepalli Ramalingam and his sons, Kamepalli Venkatasubbayya and Kamepalli Seshu, instituted a suit in the Court of the District Judge of Guntūr against Nalluri Kristnamma, Nalluri Adinarayudu, and others, which was subsequently transferred to the Court of the Subordinate Judge, in which it was entered as Original Suit No. 2 of 1910. The two suits (No. 1 of 1910 and No. 2 of 1910) were tried together by the Subordinate Judge, and the evidence in each suit was used in the other. The Subordinate Judge made a separate decree in each suit. Those decrees were appealed to the High Court at Madras, which dismissed the appeal from the decree in Suit No. 2 of 1910, and from that decree of the High Court there has been no appeal.

The relationship of the parties to the suit will be seen from the following pedigree :—



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The main question in this appeal relates to an alleged *illatom* adoption of Ramakristnamma as his *illatom* son-in-law by Lingappa Naidu. If that *illatom* adoption is established as valid in law the suit of the plaintiffs fails and must be dismissed. The factum of that adoption cannot now be disputed and is not disputed in this appeal, but it is contended on behalf of the appellants that Lingappa Naidu could not legally take Ramakristnamma as his *illatom* son-in-law because at the time of the adoption he had a natural son, Venkatachalam, living, and also because at that time Lingappa Naidu was joint with his brothers, Kristnamma Naidu and Kodandarama, and no custom authorizing an *illatom* adoption under such circumstances has been proved. The parties are Hindus of the Sudra caste and sub-caste Kamma, and are governed by the law of the Mitakshara except in so far as that law has been altered by custom. The law of the Mitakshara would not allow a Hindu to adopt a son when he had a natural born son living. But if a custom was proved allowing a Kamma to take an *illatom* son-in-law when he had a natural born son living, both grounds of objection to the *illatom* adoption in this case would fail.

The three sons of Nalluri Lakshminarasu with their families lived together as a joint Hindu family in the village of Mangamoor, and as a joint family possessed a large ancestral estate and some movable property. Mangamoor is a village of Guntūr in Nellore. Lingappa Naidu was twice married. He had by his first wife, a daughter, Ramalakshmamma, who over 60 years ago married Kamepalli Ramakristnamma, and bore to him a son, Kamepalli Ramalingam, who was the father of the defendants-respondents, Kamepalli Venkatasubbayya and Kamepalli Seshu. By his second wife Lingappa Naidu had a son, Venkatachalam, who was the father of the plaintiffs and of the added defendant. Kamepalli Ramakristnamma was a near relation of Lingappa Naidu, and lived in his house as one of his family, and assisted in the management of the property. Lingappa Naidu took Kamepalli Ramakristnamma as his *illatom* son-in-law, after Venkatachalam was born and when Venkatachalam was three or four years of age, promising to give him a share of his property. Lingappa Naidu died before 1896. In 1896 his two surviving brothers, Kristnamma Naidu and Kodandarama, and their nephew, Venkatachalam, separated and partly partitioned the

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family estate. Venkatachalam died on the 23rd August 1904. The Subordinate Judge found as a fact that Ramakristnamma lived in the family with his wife and children, and that after his death Kamepalli Ramalingam, Kamepalli Venkatasubbayya, and Kamepalli Seshu continued to live in the family, and lived with Venkatachalam after the division of 1896 until about six months before Venkatachalam's death; that finding was not dissented from by the High Court. The Subordinate Judge considered that those facts corroborated the evidence, which he believed that there had been an *illatom* adoption.

In 1904 it was arranged between Kamepalli Ramalingam, as representing himself and his sons, and Venkatachalam, as representing himself and his sons, in the presence of mediators that their joint family properties should be divided into three shares, and that Kamepalli Ramalingam and his sons should take one share and should leave the remaining two shares to Venkatachalam and his sons.

On 5th September 1905, the plaintiff, Nalluri Kristnamma, signed and presented to the Tahsildar the following statement:—

"The deceased Nalluri Venkatachalam, who was pattadar Nos. 2312, 2313, in Mangamoor, is my father. In the said *pattas*, which stand in my father's name, the following 13 names should be included:—

"1. Myself, Nalluri Kristnamma.

"2. Nalluri Adinarayadu.

"3. Nalluri Lingayya.

"4. Kamepalli Ramalingam.

". . . . .

"All these are sharers in the family."

The evidence shows that a joint *patta* was accordingly issued.

In this suit the Subordinate Judge framed the following issues amongst others:—

(ii) Whether Ramakristnamma, *father of the first defendant*, was taken as *illatom* son-in-law by Lingappa Naidu, and, if so, *whether such taking is valid in law?*

(iii) Whether there was an agreement or arrangement that a one-third share of the family properties should be given to the first defendant as alleged in his written statement, and, if so, this agreement or arrangement is valid or binding on plaintiffs?

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(iv) Whether, as alleged by the defendants, there was a partition in November 1904, and, if so, what properties were divided and allotted to what shares and what properties were reserved for future division or joint enjoyment?

(v) Whether defendants have joint right with the plaintiffs to the suit properties, items Nos. 8, 15 to 55, and 59 in the plaint-schedule A; if so, is the suit for declaration in respect of these items maintainable?

For the reasons recorded in his judgment in Original Suit No. 2 of 1910 the Subordinate Judge found the issues (ii) to (v) against the plaintiffs.

On the question whether Lingappa Naidu, having at the time of the *illatom* adoption a natural born son and two undivided brothers living, could lawfully have taken Ramakristnamma as an *illatom* son-in-law, the Subordinate Judge stated:

"The parties in the present case belong to the Kamma caste, and in this respect (the right to make *illatom* adoptions) there is no difference between them and the Reddis. The practice of *illatom* affiliation is very common in both castes."

There is evidence in this record that the custom of taking an *illatom* son-in-law is the same in the Kamma caste and in the Reddi caste. The Subordinate Judge then referred in general terms to the witnesses who had given evidence on behalf of Kamepalli Ramalingam and his sons as to the custom of *illatom* adoptions, and particularly observed that one of their witnesses, a Kamma, had given two instances in which, where brothers were living jointly, one of them had taken an *illatom* son-in-law. The Subordinate Judge then stated:—

"Defendants' witnesses (that is, witnesses on behalf of the defendants in Suit No. 2 of 1910, who are the plaintiffs in this suit) Nos. 5, 6, 8, 9 and 11 say that a Kamma takes an *illatom* son-in-law only when he has no son or undivided brother. This is a matter of opinion. The evidence in this case is insufficient to establish a special custom. But I think that as the custom of *illatom* affiliation has been judicially recognized, it is for the defendants (the plaintiffs in this Suit No. 1 of 1910) to show that a father living with a son and an undivided brother cannot exercise that right. In the present case the first plaintiff's (Kamepalli Ramalingam's) father was, I think, treated by all members of the family as an *illatom* son-in-law, and after his death the plaintiffs (original defendants in Suit No. 1 of 1910) continued to live as members of a joint family till six

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months before Venkatachalam's death. I therefore find the first issue in the affirmative."

The first issue which the Subordinate Judge so found in the affirmative was "Whether the plaintiffs' brother (Ramakristnamma) was taken as *iltatom* son-in-law by Lingappa Naidu, and, if so, whether such taking is valid in law."

In the judgment on the appeal the learned Judges, SANKARAN NAYAR and SPENCER, JJ., say:—

"The adoption took place more than 50 years ago, when Lingayya was living with his two brothers as members of an undivided family. Ever since the adoption or marriage, Ramakristnamma was living with the other members of the family. An *illatom* son is adopted when assistance is needed by the adoptor in the cultivation of the family estate or for its management; and, in this case there is no doubt that Ramakristnamma participated in the management of the estate. When a partition was effected between Lingayya and his brothers, Ramakristnamma was treated as member of Lingayya's (Lingappa's) branch and remained with them. Shortly before Venkatachalam's death in August 1904, there was an agreement for partition between him and Ramakristnamma.

"This, no doubt, is denied by the appellants. But Ramakristnamma's descendants are admittedly in exclusive possession of certain properties which were in the possession of Venkatachalam, and the appellants' plea that such possession was obtained by trespass is not proved. Their complaint was dismissed by the Magistrate; and the Judge rightly points out that possession by trespass is inconsistent with the fact that the respondents are in possession of portions of properties. After Venkatachalam's death, his son, one of the appellants before us, called Ramakristnamma's son a co-sharer (exhibit B2). This conduct of the family for about 50 years and the agreement for partition in particular is very strong evidence against the appellants.

"It is contended before us that an *illatom* adoption made when there is a son living is invalid. It is true that an adoption is invalid under Hindu law when the adoptive father has a son. But *illatom* adoption itself is opposed to Hindu law, and no presumption of invalidity, therefore, arises on the ground suggested.

"The evidence of appellants' witnesses is not that the existence of a son alone precludes an adoption, but no adoption can be legally made when there is a son or brother alive. This finds no support in Hindu law, and is in favour of the view that we should not look to the principle of the Hindu law to determine the incidents of the

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custom. The respondents have proved only two instances of adoption where there was a son, and the Judge rightly observes that the evidence is insufficient to prove a custom. But we find that it has been judicially recognized. In the suit out of which *Hammayya* v. *Yellamanda*(1) arose many instances of *illatom* adoption by persons who had sons were proved, and this Court held that the evidence was sufficient to prove the custom.

"We are, therefore, of opinion that Ramakristnamma's adoption is valid and dismiss this appeal with costs."

Their Lordships have had the opportunity of reading the judgments of the Subordinate Judge and of the learned Judges of the High Court at Madras in *Hammayya* v. *Yellamanda*(1). That case has not been reported. In that case, which depended upon the existence of a custom in the Kamma families to which the parties belonged, "fifteen instances were cited in support of it (the custom), in the majority of which *illatom* took place when there were sons existing." Before the decision in *Hammayya* v. *Yellamanda*(1), it seems never to have been expressly decided that a Kamma or a Reddi could not or could lawfully take a son-in-law in *illatom* adoption when he had a son living, but having regard to the decision in that case and to the fact that the two Courts in the present suit agree that the adoption was valid in law, and as the family for very many years treated the *illatom* adoption as valid, their Lordships think that this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The respondents, who did not appear at the hearing, will have such costs as they may be entitled to.

Appeal dismissed.

Edward Dalgado for the appellants.

Chapman, Walker and Shephard for the respondents.

J.V.W.

(1) Second Appeal No. 45 of 1905.

PRIVY COUNCIL.*

SETRUCHARLU RAMABHADRA RAJU BAHADUR AND OTHERS (DEFENDANTS),

v.

MAHARAJA OF JEYPORE (PLAINTIFF).

1919. February, 13, 14, 25.

[On appeal from the High Court of Judicature at Madras.]

Jurisdiction—Mortgage of property situated partly in district subject to the Code of Civil Procedure, 1908, and partly in a scheduled district under Act XXIV of 1839—Mortgage of such property and order for sale made by Court under Code of Civil Procedure—Order for sale without jurisdiction—Civil Procedure Code, 1908, sec. 1, sub-section 3, and ss. 17, 21—Meaning of 'Courts' in sec. 17.

A suit was brought under the Code of Civil Procedure, 1908, to enforce a mortgage of property which was situate partly in a district to which that Code applied, and partly in a scheduled district under Act XXIV of 1839, and therefore subject to the special jurisdiction of the Agency Courts, and a decree, on the mortgage and for sale of the mortgaged property, was made by the Subordinate Judge, and affirmed by the High Court.

Held, that so far as the decree was for sale of the mortgaged property in the scheduled district the Courts had no jurisdiction to make it, section 21 of the Code not being applicable to such a case, and it could be set aside, notwithstanding that no objection to the jurisdiction had been taken in the Subordinate Judge's Court.

The word 'Courts' in section 17 of the Civil Procedure Code, 1908, means Courts to which that Code applied, and not Courts one of which was subject to the Civil Procedure Code, and the other to the Agency jurisdiction.

The alteration made in the decree by striking out that part of it which ordered the sale of the mortgaged property would not interfere with the plaintiff's right to obtain from the Agency Court an order for the sale of the property situate in its jurisdiction.

APPEAL No. 93 of 1917 from a judgment and decree of the High Court of Madras, dated 3rd March 1916, which affirmed a judgment and decree of the Subordinate Judge of Vizagapatam, dated 1st May 1914.

The suit out of which this appeal arose was brought by the respondent, the Maharaja of Jeypore to enforce two mortgages, dated respectively 4th January 1906 and 4th July 1911. The

* *Present*: Viscount HALDANE, Viscount CAVE, Lord DUNEDIN, Sir JOHN EDGE and Mr. AMEER ALI.

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properties comprised in both mortgages were the same and were situate partly within the Vizagapatam district and partly within the jurisdiction of the Agent's Court of Vizagapatam, known as the Agency Tract. The mortgage of 4th January 1906, described as a "deed of mortgage without possession," was executed by the appellants (defendants) to secure 5 lakhs of rupees with interest as to half the amount at 4½ per cent and as to the other half at 4 per cent per annum. The mortgage of 4th July 1911 the appellants executed to secure a further sum of Rs. 1,20,000 with interest at 4½ per cent per annum.

By the earlier of the two mortgages the interest was to be paid annually, the first payment being due on 4th January 1907; in default the arrears were to bear interest at 6 per cent until payment, and the whole amount of principal and interest was made payable by 4th January 1913; but it was provided that if two consecutive instalments of interest were not paid on the due dates, the respondent should be at liberty to take possession of the mortgaged properties for the discharge of the debt out of the income.

By the second mortgage the first instalment of interest was payable on 4th January 1912, and the succeeding instalments on the same date in each year; in default the arrears were to carry interest at 6 per cent per annum; and it was further provided that the whole amount of principal and interest on both mortgages should be repayable on 4th January 1916, and that the terms of the first mortgage should be deemed by this change to be included in the second mortgage.

The interest on the prior mortgage was not paid on the stipulated dates, but part of it was afterwards paid with interest on the arrears. No interest was paid on the second mortgage.

The respondent brought the present suit on 21st July 1913 against the appellants for recovery of the whole of the principal and interest on both mortgages, and in default for sale of the mortgaged properties, and in the alternative for possession of the mortgaged properties as usufructuary mortgagee and for ther reliefs.

The appellants pleaded that the suit was premature as regarded the principal sums secured by the mortgages, and that the mortgaged properties could not be sold to satisfy either the

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principal sums or the arrears of interest until after the due date prescribed by the second mortgage, namely, 4th January 1916.

The Subordinate Judge held on the construction of the mortgages that the respondent was entitled under the earlier one to bring the mortgaged properties to sale or to take possession of them in case of failure to pay either the principal and interest on the due dates, or to pay two consecutive instalments of interest; that all the terms of the former mortgage were embodied in the later one; that continuous default had been made in the payment of interest, and the suit was therefore not premature, and he accordingly made the usual mortgage decree in favour of the respondent, directing payment of the principal and interest secured by both mortgages, and in default that the mortgaged properties should be sold.

The appellants appealed to the High Court and, in addition to the contentions raised in the first Court, put forward as one of the grounds of appeal that in any case the Subordinate Judge had no jurisdiction to order the sale of such of the mortgaged properties as were situate in the Agency Tracts.

A Bench of the High Court (ABDUR RAHIM and SRINIVASA AYYANGAR, JJ.) which heard the appeal held that the Subordinate Judge was wrong on the construction of the mortgages; that the respondent was only entitled at the date of the suit to ask for the sale of a sufficient portion of the mortgaged properties to satisfy the arrears of interest, the principal sums not being due or payable until the 4th January 1916. The High Court further held however that as that date was now past, and as forcing the respondent to another suit would only increase the costs without in any way benefiting the appellants, there was no necessity to interfere with the mortgage decree passed by the Subordinate Judge.

With regard to the objection to the jurisdiction, the High Court held that it was only an objection to the "place of suing" within the meaning of section 21 of the Civil Procedure Code, and that as it had not been taken in the first Court, it could not be now raised by the appellants. The appeal was therefore dismissed with costs.

ON THIS APPEAL

Sir William Garth, for the appellants, contended that on the true construction of the mortgages the suit, so far as it asked for

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a sale of the mortgaged properties, was premature, and should have been dismissed. It was wrongly held by the High Court that the decree of the Subordinate Judge ought not to be disturbed on the ground that the due date for payment of principal had passed during the pendency of the appeal. For determining the rights of the parties in a suit, the situation at the time the suit is brought must alone be considered, and consequently the plaintiff in a suit was not as a rule entitled to any relief to which he was not entitled at the institution of his suit. Events taking place subsequently could entitle him to no relief to which he was not then entitled. Reference was made to *Evans* v. *Bagshawe*(1); *Rays* v. *Royal Exchange Assurance Corporation*(2), *Ram Rattan Sahu* v. *Mohant Sahu*(3). The decree of the Subordinate Judge was also invalid because part of the land mortgaged was in the Agency Tracts and to make the decree was not within the jurisdiction of the Subordinate Judge nor of the High Court. Reference was made to *Maha Prasad* v. *Ramani Mohan Singh*(4), in which it was decided that in such a case the whole decree was invalid, as the decree should have been held to be in the present case. Section 17 of the Code is only applicable where the Court is not in a scheduled district, but is one which is subject to the Civil Procedure Code. In *Maha Prasad's* case objection to the jurisdiction was only taken when the case came before the Judicial Committee; here it was taken in the High Court which, it was submitted, was in time. Section 21 of the Civil Procedure Code does not apply to the present case, and the objection to the jurisdiction as regards the properties within the Agency Tracts should have been upheld.

De Gruyther, K.C., and *Kenworthy Brown*, for the respondent, contended that, on the construction of the mortgages, he was entitled to bring his suit for sale in July 1913, and the suit was not premature. It was rightly held by the High Court that the respondent was entitled to retain the decree for sale because there was no dispute as to the amount of the mortgage debts, nor as to the validity of the mortgages. Reference was made to the Civil Procedure Code, 1908, Order XLI, rule 33. Section 17 of the Code gave the Subordinate Judge power to make the

(1) (1870) L.R., 5 Ch. App., 340 (2) (1897) 2 Q.B., 135.
(3) (1907) 6 C.L.J., 74.
(4) (1914) I.L.R., 42 Calc., 116; s.c., 41 I.A., 197.

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decree he passed, the suit having been brought in a Court subject to the Code. The rules made under Act XXIV of 1839 show that that Act, whilst providing particular Courts for suits arising in the Agency Tracts, did not otherwise affect the procedure. Reference was made to the Madras Code (Fourth Edition), Volume II, Appendix X, page 1264. The case of *Maha Prasad* v. *Ramani Mohan Singh*(1) was decided on special legislation enacted for the Sonthal Parganas. The suit was, it was submitted, rightly brought in the Subordinate Judge's Court; and the objection that the plaintiff should have sought relief in the Agency Courts should have been taken early in the suit. In any view there was power to decree sale of land not in the Agency Tracts.

Sir W. Garth, in reply, citedthe case of *Kannu* v. *Natesa*(2) to show that the interest was not recoverable irrespective of the provision in the mortgage deed.

The JUDGMENT of their Lordships was delivered by

Lord DUNEDIN.

Lord DUNEDIN.—On the 4th January 1906, the appellants, who are zamindars, borrowed from the respondent, the Maharaja of Jeypore, 5 lakhs of rupees, and in security thereof mortgaged certain lands. The mortgage is in ordinary form providing for payment of interest and compound interest, but contains the following special clause :—

"These properties are mortgaged and retained in our possession. But in case at any time any amount remains due out of the amount of interest payable on the due dates of any two years consecutively, or in case, within seven years from this date, the entire amount of principal and interest then remaining due be not paid, though the interest is paid according to instalments, we shall raise no sort of objections to your entering on and taking possession of the above-mentioned mortgaged properties, irrespective of the said mortgage term."

The term of payment was, therefore, on the 4th January 1913. By the 4th January 1911 the borrowers were two years in arrear in payment of interest, and were in need of further monies. Accordingly, a second mortgage was granted in July 1911 for the said two years of interest and compound interest and further monies, amounting in all to Rs. 1,20,000. The

(1) (1914) I.L.R., 42 Calc., 116; s.c., 41 I.A., 197.
(2) (1891) I.L.R., 14 Mad., 477.

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deed, after reciting the various sums, which amount to the Rs. 1,20,000, continues as follows :—

"We shall pay the above principal sum of Rs. 1,20,000 and the interest accruing according to the terms of the deed, in full, on the 4th January 1916. Further, though the 4th January 1913 is the due date for the mortgage deed for Rs. 5,00,000 executed on the 4th January 1906 in your favour by Nos. 1, 2, 3, 4, 5 and 7 among us and by late Sri Somasekhararaju Bahadur Garu and registered as No. 22 of 1906 in the Sub-Registrar's office at Parvatipur, you and we have settled now that the due date for the said deed should also be the 4th January 1916, along with this deed. Therefore, by this change, the entire terms of the registered deed, dated the 4th January 1906, are deemed to have been included in this deed, and we shall agree to the said terms even regarding the discharge of the principal and interest of this deed also and be bound by them. If, according to the terms of this deed, the interest of each year be not paid on the respective due date, these terms will not prevent you from recovering the said amount then and there, if you should so desire, without waiting for the due date, namely, the 4th January 1916."

The appellants paid no interest whatever after the date of the second deed, and accordingly, in July 1913, there being two years' interest in arrear, the respondent brought the present suit for decree for the whole sum due and for an order of sale of the mortgaged properties. To this action the appellants pleaded in defence, first, that the mortgage was a usufructuary mortgage and did not authorize sale; and secondly, that the action was premature, the term of the 4th January 1916 not having yet arrived. The learned Subordinate Judge held that the mortgages were simple mortgages, with merely an alternative power of entry into possession, and granted decree and order for sale in ordinary form.

Appeal being taken to the High Court of Madras, that Court affirmed the view that the mortgages were simple mortgages. They further held that the sale of the lands for principal was premature at the date of the decree of the Subordinate Judge, but in respect that by the time the case was before them the term of the 4th January 1916 had been passed and no payment had been made, they allowed the decree of the Subordinate Judge to stand.

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Appeal being taken to this Board the appellants urged that inasmuch as the Appeal Court had held that the sale was premature in respect of the principal and only good for the interest, it was not permissible for them to enlarge the suit as laid because at the time they came to deal with the appeal a decree for the principal on a new suit would have been competent, to which the respondent replied that, as the proceeding was entirely executory, it was proper for the Appellate Court to pronounce a decree which would regulate the true rights of parties as they stood at the time when the final judgment came to be pronounced.

The first question, however, which arises, and which if settled one way renders any further discussion unnecessary, is whether, in view of the terms of the second mortgage, the suit raised in July 1913 for the whole sum due was or was not premature. This question depends on the meaning of the clause—

"If according to the terms of this deed, the interest of each year be not paid on the respective due date, these terms will not prevent you from recovering the said amount then and there, if you should so desire, without waiting for the due date, namely, the 4th January 1916."

It is settled, that apart from special stipulation, there is no right to demand a sale of mortgaged lands for payment of interest in arrear. The learned Judges of the High Court thought that "the said amount" meant interest alone, and that the clause received meaning as giving the right of sale for interest. Their Lordships do not think that that is the meaning of the clause. It was a most natural thing that, as nothing had been ever paid by the borrowers, the lender, on being asked to allow the surplus interest to become principal in a new mortgage and to postpone the term of the old mortgage, should stipulate that, if this non-payment of anything should continue, he might be done with the whole matter and call everything up. Besides, a power to enter into possession if interest was not paid had already been given, for all the terms of the first mortgage are incorporated in the second. It seems, therefore, antecedently much more probable that the meaning of the clause, if ambiguously expressed, should be to give the power of recalling the prolongation of the term than to give a mere power of sale for interest, which would avail little. This view would lead to an affirmance of the decree, though on different grounds.

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There is, however, another point. Some of the lands of which sale had been decreed are situate in what are known as the Agency districts. Now the suit is raised in terms of the Code of Civil Procedure, 1908. By section 1 (3) the Code is, with the exception of certain sections not here in point, excluded from the scheduled districts, and by Act XXIV of 1839 the district in which the lands above referred to are situate was scheduled. The learned Judges of the Court of Appeal thought that the matter was met by section 21 of the Code, which provides that no objection as to the place of suing shall be allowed by any Appellate Court unless the objection was taken in the Court of First Instance, which in this case had admittedly not been done. Their Lordships cannot agree with this view. This is not an objection as to the place of suing; it is an objection going to the nullity of the order on the ground of want of jurisdiction. The order for sale is made under sections of the Code of Civil Procedure which the Code itself says are not to apply to the scheduled district.

The learned Counsel for the respondent sought to justify the decree in respect of the terms of section 17, which provides that—

"Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate."

Their Lordships think that 'Courts' here must be held as meaning Courts to which the Code applies, and that therefore no help is to be claimed from this section.

Their Lordships think, therefore, that the decree pronounced by the High Court must be varied by deleting the order for sale so far as applicable to the lands situate within the Agency districts. This will be, of course, without prejudice to the respondent's right to apply in the Agency Court for an order for sale of those lands.

This variation is insufficient in their Lordships' opinion to deprive the respondent of any portion of his costs here or in the Courts below. Their Lordships will humbly advise His Majesty accordingly.

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Appeal dismissed.

Douglas Grant, Solicitor for the appellants.

T. L. Wilson & Co., Solicitors for the respondent.

J.V.W.

APPELLATE CIVIL (FULL BENCH).

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

1919, April, 8, 9 and 24.

SEENI NADAN (SECOND COUNTER-PETITIONER), APPELLANT,

v.

MUTHUSAMY PILLAI AND NINE OTHERS (PETITIONERS AND COUNTER-PETITIONERS NOS. 5 TO 9 AND LEGAL REPRESENTATIVE, THIRD COUNTER-PETITIONER), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), ss. 37, 38, 39 and 150—Limitation Act (IX of 1908), art. 182, cl. 5—Application for execution of decree—Proper Court—Transfer of territorial jurisdiction of Court which passed the decree to another Court—Subsequent application for execution to former Court, whether made to proper Court—Jurisdiction of former and latter Court to execute decree—'Include' in sec. 37, Civil Procedure Code, meaning of.

Held, by the Full Bench, that the Court which passed the decree is *a proper Court* for execution within the meaning of clause 5 of article 182 of the Limitation Act, notwithstanding the fact that the jurisdiction which it had at the time of the decree was taken away from it and assigned to another Court at the time of the presentation of the application for execution.

Sections 37, 38 and 150, Civil Procedure Code, construed.

Dicta in *Subbiah Naiker* v. *Ramanathan Chettiar*, (1914) I.L.R., 37 Mad., 462, overruled.

APPEAL against Appellate Order of MUHAMMAD FAZL-UD-DIN, the Subordinate Judge of Tinnevelly, in Appeal Suit No. 30 of 1917 preferred against the order of T. N. KRISHNAMURTI, the

* Civil Miscellaneous Second Appeal No. 44 of 1918.

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Additional District Munsif of Tinnevelly, in Execution Petition No. 312 of 1916 in Original Suit No. 104 of 1901.

The material facts appear from the Judgment of SESHAGIRI AYYAR, J.

This appeal against appellate order came on for hearing in the first instance before OLDFIELD and SESHAGIRI AYYAR, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.

OLDFIELD, J.—I have had the advantage of reading the judgment, which my learned brother is about to deliver, and agree with him as to the effect of the judgment of the Judicial Committee in *Ashfaq Husain* v. *Gauri Sahai*(1). On the first point argued we must hold that time began to run on the date on which the decree was made absolute.

I do not think it necessary to add to my learned brother's discussion of the decision in *Subbiah Naicker* v. *Ramanathan Chettiar*(2), because I should be content to follow it, and should prefer to apply the principle of *stare decicis* in dealing with a question, such as this, of procedure. In deference however to his opinion I agree to a reference to a Full Bench in the terms he proposes.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—A mortgage decree was obtained on the 28th of August 1901 in the Additional District Munsif's Court, Tinnevelly. The suit was originally instituted in the Principal District Munsif's Court which had jurisdiction over the property mortgaged. It was conceded in the lower Court and it seems fairly clear that at the time of the decree the Additional District Munsif's Court was not assigned any local jurisdiction. Therefore the Additional District Munsif's Court was an auxiliary to the Principal District Munsif's Court and as such the decree may be taken to have been passed by the Principal District Munsif himself. Under the decree money was made payable in six months. By an application to the Principal District Munsif the decree was made absolute on the 16th of September 1904. The

(1) (1911) I.L.R., 33 All., 264 (P.C.). (2) (1914) I.L.R., 37 Mad., 462.

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present application for execution was made on the 6th of July 1916. It was first contended that as more than twelve years had elapsed since the passing of the decree and since the time fixed for payment, the present application is barred by limitation by virtue of section 48 of the Code of Civil Procedure. But the decree was passed when Act XIV of 1882 was in force and as was held by the Judicial Committee in *Ashfaq Husain* v. *Gauri Sahai*(1) the decree-holder had twelve years from the date on which the decree was made absolute.

The more serious contention was this. In June 1910 by a notification in the *Fort St. George Gazette* the respective jurisdictions of the Principal District Munsif and the Additional District Munsif were fixed, and the property mortgaged fell within the jurisdiction of the Additional District Munsif. Notwithstanding this fact, prior to and after the notification and until February 1914, all applications for execution in the present suit were made to the Principal District Munsif. It was contended on behalf of the judgment-debtor that these applications were not made to the *proper Court* and that consequently the present application was barred by limitation. We need only consider the propriety of the application of 12th of July 1913, for, if that was not properly made, the present application was undoubtedly out of time. The Subordinate Judge has held that the application to the District Munsif was a step in aid of execution. He was greatly influenced by the fact that the records of the case were in the custody of the Principal District Munsif, and that the decree-holder had vainly tried to induce that officer to transfer these records to the Additional District Munsif. In this Court reliance was mainly placed on *Subbiah Naicker* v. *Ramanathan Chettiar*(2). That was also a case from Tinnevelly. After the attachment of the property by the Court which passed the decree the Taluk in which the property was situate was assigned to the jurisdiction of another Court. The learned Judges held that the proper Court for entertaining applications for sale was the new Court and not the Court which passed the decree. The decision very elaborately discusses the whole question of executory process where there is a change in

(1) (1911) I.L.R., 33 All., 264 (P.C.). (2) (1914) I.L.R., 37 Mad., 462.

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venue after the passing of the decree. There are strong observations suggesting that on the assignment of jurisdiction the Original Court ceases to have any right to execute the decree. At page 473 the learned Judges say :—

"the business of a Court which loses jurisdiction over a certain area so far as it relates to cases affecting the lands in the transferred area will be *ipso facto* transferred to the new Court,"

and they point out that suits and execution proceedings stand upon the same footing. They conclude by saying :

"Even if we are wrong in the above view we are prepared to get over the difficulty sought to be raised on the question of jurisdiction by transferring Execution Petition No. 389 of 1909 from the Srīvilliputtūr Munsif's Court for disposal to the file of the Additional District Munsif of Tinnevelly."

In another place also they expressed their opinion with some reserve. In the course of the judgment they refer to the decision in *Panduranga Mudaliar* v. *Vythilinga Reddi*(1), in which it was held that the original Court did not cease to have jurisdiction to execute the decree on the transfer of property from its jurisdiction, as such transfer did not take away the jurisdiction which it had to execute its own decree under the Civil Procedure Code. Although the learned Judges who decided *Subbiah Naicker* v. *Ramanathan Chettiar*(2) do not say so expressly, it is clear from the trend of their judgment that they dissented from the view taken in *Panduranga Mudaliar* v. *Vythilinga Reddi*(1).

Now the question for consideration, apart from authority, is whether in this state of conflict of decisions I should not on the principle of *stare decicis* accept the view taken in the later decision or whether the more proper course is to refer the matter to a Full Bench. I am aware that in matters relating to procedure there should be some endeavour to maintain uniformity. But it may not unreasonably be argued that the observations in *Subbiah Naicker* v. *Ramanathan Chettiar*(2) are *obiter*, whereas *Panduranga Mudaliar* v. *Vythilinga Reddi*(1) actually decides the case which is on all fours with the present one. If such an argument was addressed to the lower Court it cannot be blamed for falling back upon the express decision in *Panduranga*

(1) (1907) I.L.R., 30 Mad., 537. (2) (1914) I.L.R., 37 Mad., 462.

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Mudaliar v. *Vythilinga Reddi*(1) and for refusing to act on the observations in the later case. It is true that *Subbiah Naicker* v. *Ramanathan Chettiar*(2) has since been followed without further discussion in *Maharajah of Bobbili* v. *Narasaraju Peda Baliara Simhulu Bahadur*(3), *Kasi Viswanathan Chetty* v. *Murugappa Chetty*(4), and *Sri Rajah Parthasaradhi Appa Rao Bahadur Zamindar* v. *Sri Rajah Maka Venkatadri Appa Rao Bahadur Zamindar*(5), and in *Seshadri Iyer* v. *Anantha Iyer*(6). In those cases curiously enough the conflict between *Panduranga Mudaliar* v. *Vythilinga Reddi*(1) and *Subbiah Naicker* v. *Ramanathan Chettiar*(2) was not emphasised. Nor was there any discussion as to the principles to be applied to such cases. Therefore we have this state of facts ; a reported decision directly in point which has not been expressly overruled and a later decision which has been followed and which may be said to contain observations by way of *obiter dicta*. I think in the interests of litigants and in order that proper guidance may be given to the Courts below, it is desirable that there should be a reference to a Full Bench on the question.

Now I shall give my reasons very shortly for doubting the correctness of *Subbiah Naicker* v. *Ramanathan Chettiar*(2). Mr. A. Krishnaswami Ayyar frankly confessed that the reason of the rule for the pronouncement in *Subbiah Naicker* v. *Ramanathan Chettiar*(2) is that only one Court can at the same time execute a decree. I think that this proposition is not unexceptionable. For a long time it has been the practice in this Presidency to order concurrent executions of the same decree. Rule 221 of the Original Side Rules of the High Court impliedly sanctions this course. In *Saroda Prosaud Mullick* v. *Luchmeeput Sing Doogur*(7), the Judicial Committee stated that there can be concurrent execution of the same decree. *Krishto Kishore Dutt* v. *Rooplall Doss*(8) follows this ruling as also *Baij Nath Goenka* v. *F. H. Holloway*(9). All these decisions were under the old Code of Civil Procedure. It is not easy to

(1) (1907) I.L.R., 30 Mad., 537.
(2) (1914) I.L.R., 37 Mad., 462.
(3) (1916) I.L.R. 39 Mad., 640.
(4) (1917) 33 M.L.J., 750.
(5) (1914) M.W.N., 896.
(6) C.M.S.A. No. 23 of 1917 (unreported).
(7) (1872) 14 M.I.A., 529.
(8) (1882) I.L.R., 8 Calc., 687.
(9) (1905) 1 C.L.J., 815.

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trace in the sections and the orders of the Civil Procedure Code the provisions of law on which this theory is founded. Mr. AMEER ALI in his edition of the Civil Procedure Code seems to incline to the view that the practice is not justifiable on principle. However there can be no doubt that it has always been regarded as undisputed law in this Presidency that there can be concurrent execution. As against these decisions it was said that the view taken by the Judicial Committee in *Maharajah of Bobbili* v. *Narasaraju Peda Baliara Simhulu Bahadur*(1) is inconsistent with the theory. I do not think so. In this latter case what the Privy Council said was that after the transfer of the records at the instance of a party from one Court to another it was not open to that party to apply to the Original Court for execution. In the second place I am not satisfied that the Court which passes a decree *ipso facto* ceases to have jurisdiction by the deprivation of territorial jurisdiction. If a decree was passed by a Court and if proceedings in execution had been started in that Court, until the records are transferred to another Court, that Court, in my opinion, will have jurisdiction to entertain applications. It is undoubtedly the Court which passed the decree and under section 38 of the Civil Procedure Code a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. The fact that under clause (b) of section 37 the Court to which jurisdiction has been assigned is within the definition of the expression "Court which passed a decree" does not make it clear that the Original Court becomes *functus officio* by the bare fact of ceasing to have territorial jurisdiction. It was held with reference to section 234 of the Civil Procedure Code of 1882 in *Swaminatha Ayyar* v. *Vaidyanatha Sastri*(2) that, notwithstanding the transfer to another Court for execution, the first Court is the only Court which can entertain applications for bringing in the legal representatives of the parties. That provision has been re-enacted in section 50, clause (1). The expansion of the definition of the term "Court which passed the decree" may enable the party to apply to the transferred Court for bringing in the legal representatives. Supposing after a partial execution by the

(1) (1916) I.L.R., 39 Mad., 640. (2) (1905) I.L.R., 28 Mad., 466.

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first Court it is found that there is no property within the jurisdiction of that Court sufficient to satisfy the balance of the decree, then the records would be sent to the Court where either the judgment-debtor resides or where he has got other property. If in these circumstances the records are transferred, cannot the decree-holder regard the application which was made to the Original Court as still pending and ask the transferred Court either to arrest or attach and sell the other properties of the judgment-debtor? If I am right in this, it would show that an application made to a Court which cannot give the particular relief prayed for would be effectual in another Court where that relief can be obtained. I am inclined to agree with the view taken in Calcutta that the Court which passed the decree does not cease to have jurisdiction to entertain applications until the records are sent away to the Court to which jurisdiction has been assigned. Even if I am not right in this conclusion I think it is desirable, as I stated already, that the matter should be set at rest by a pronouncement from a Full Bench having regard to the difference of view between *Panduranga Mudaliar* v. *Vythilinga Reddi*(1) and *Subbiah Naicker* v. *Ramanathan Chettiar*(2). I would therefore refer for the opinion of the Full Bench the following question:—

Whether the Court which passed the decree is not the proper Court for execution within the meaning of clause (4) of article 182 of Limitation Act by virtue of the fact that the property over which it had jurisdiction at the time of the decree was taken away from it and assigned to another Court at the time of the presentation of the application for execution.

ON THIS REFERENCE

A. Krishnaswami Ayyar (with him *T. M. Ramaswami Ayyar*) for appellant.—After the transfer of the territorial jurisdiction including the area in which the suit hypothecated properties were situate from the Principal District Munsif's Court to that of the Additional District Munsif, the former Court became incompetent to entertain any application for execution whether for sale of properties or for transmission of the decree to another Court The transfer of jurisdiction

(1) (1907) I.L.R., 30 Mad., 537. (2) (1914) I.L.R., 37 Mad., 462.

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was made by a notification in 1910. The order absolute was passed by the Principal District Munsif on 16th September 1904. The intermediate applications were all made to that Court even after the transfer of territorial jurisdiction. The previous application of 12th July 1913 which was made to the above Court was not made to the proper Court within the terms of article 182, clause (5) of the Limitation Act. Application for execution can be made only to a Court which passed the decree or a Court to which it is transferred for execution under Order XXI, rule 8, Civil Procedure Code. The Court which passed the decree is for this purpose defined by section 37. The question is governed by the provisions of sections 37, 38 and 150 of the Code. Where the business of a Court is transferred from one Court to another, the former Court ceases to be a "Court which passed the decree" for purposes of execution under section 37 of the Code. Section 37, clause (b) shows that an Appellate Court (which might have passed the decree) is not a Court falling within the definition of section 37. The term 'include' in section 37 should be construed as equivalent to "means and includes" though ordinarily it will take in some things in addition to certain other things—Stroud's Judicial Dictionary. The fact that there is no express exclusion of the Court which passed the decree in sections 37 and 38 of the Code is not conclusive. The term 'include' is used in a restrictive sense, and from the context only the Court to which jurisdiction is transferred is denoted as the Court which passed the decree for this particular purpose. Even in the case of a transfer of the decree by the original Court to another Court for execution, the transferring Court is not expressly excluded, but still the Privy Council has held that the transferring Court has no jurisdiction to entertain an application for execution. See *Maharajah of Bobbili* v. *Narasaraju Peda Baliara Simhulu Bahadur*(1), *Subbiah Naicker* v. *Ramanathan Chettiar*(2), *Venkatachallam* v. *Sithayamma*(3), *Subbayya* v. *Rachayya*(4), *Kasi Viswanathan Chetty* v. *Murugappa Chetty*(5), *Sri Rajah Parthasaradhi Appa Rao Bahadur Zamindar* v. *Sri Rajah Maka Venkatadri Appa Rao Bahadur Zamindar*(6),

(1) (1916) 39 Mad., 640 (P.C.).
(2) (1914) I.L.R., 37 Mad., 462.
(3) (1916) 31 M.L.J., 22, at p. 79.
(4) (1914) I.L.R., 37 Mad., 477.
(5) (1917) 33 M.L.J., 750.
(6) (1914) M.W.N., 896.

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Latchman Pundeh v. *Maddan Mohun Shye*(1), *Begg Dunlop & Co.* v. *Jagannatha Marwari*(2), *Mohendro Narain Chaturaj* v. *Gopal Mondul*(3).

There is no distinction as to proper Court whether the application is one for sale of property in execution or the application is worded as one for execution by transmission of the decree for execution to another Court.

K. R. Rangaswami Ayyangar for respondent.—Under section 37, the Court which passed the decree does not cease to have jurisdiction to execute the decree by the mere fact that local jurisdiction is taken away from such Court. The Court can sell property outside its jurisdiction in certain cases. Though property is transferred, the Court may execute the decree personally against the judgment-debtor if he remain within its jurisdiction; or the Court may execute by appointing a receiver of properties outside its jurisdiction. For several purposes the Court which passed the decree still has jurisdiction, sometimes exclusive jurisdiction in certain matters relating to execution, even if the decree was transferred to another Court. See Order XXI, rules 3, 6, 8 10, 16, 26 and 28, and section 39, clause (c) of the Civil Procedure Code; also section 46, under which the Court can issue precepts to another Court.

When only territorial jurisdiction in whole or in part is transferred to another Court, the business of the Court is not transferred to the latter under section 150, Civil Procedure Code.

Subbiah Naicker v. *Ramanathan Chettiar*(4) is based on the terms of section 150 of the Code, and the observations on the question now under reference are only *obiter*. The reference to American Cyclopædia is not in point, as the passage deals with abolished Courts and not to transfer of territorial jurisdiction.

Reference was made to the following cases: *Jahar* v. *Kamini Debi*(5), *Maharajah of Bobbili* v. *Sri Raja Narasaraju Peda Baliar Simhulu Bahadur*(6), *Panduranga Mudaliar* v.

(1) (1881) I.L.R., 6 Calc., 513, at p. 518.
(2) (1911) 14 C.L.J., 228.
(3) (1890) I.L.R., 17 Calc., 769, at p. 776 (F.B.).
(4) (1914) I.L.R., 37 Mad., 462.
(5) (1901) I.L.R., 28 Calc., 238.
(6) (1914) I.L.R., 37 Mad., 231, at p. 233.

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Vythilinga Reddi(1), *Prem Chand Dey* v. *Mokhoda Debi*(2), *Venkatasami Naik* v. *Sivanu Mudali*(3), *Sivakolundu Pillai* v. *Ganapathi Ayyar*(4).

A. Krishnaswami Ayyar in reply.—The mode of execution is also part of the application for execution; if the Court cannot grant the relief asked for, the Court cannot entertain the application for execution. See Order XXI, rules 10 and 11, Civil Procedure Code. Stroud's Judicial Dictionary points out that 'include' may signify 'mean and include.' See *Dilworth* v. *Commissioner of Stamps*(5).

OPINION.

WALLIS, C.J.

WALLIS, C.J.—The terms of the reference have, if I may say so, been very properly framed with reference to the terms of article 182, clause (5) of the Limitation Act (4 is a misprint) which makes the date of applying in accordance with law to the proper Court for execution or to take some steps in aid of execution of the decree a fresh starting point for the purposes of the article which deals generally with applications for the execution of decrees. The question really is, whether a litigant who has been authorized to bring his suit in a particular Court and has obtained a decree in such Court in his favour, which he is strictly bound to execute within the time limited in article 182, is not entitled to apply as of course to that Court as the proper Court for the purpose of saving limitation under the article, or whether, when he decides to apply for execution possibly at the last moment, he is bound to stop and inquire whether the limits of the territorial jurisdiction of the Court which passed the decree have been altered, and, if so, whether the immovable property which is the subject of the suit or the place where the cause of action arose was within the limits of the transferred area, on pain of losing his right to execute under the article if he omits to make these inquiries or comes to a wrong conclusion when he makes them. This last proposition is so unreasonable and involves such hardships to the decree-holder in a country such as India with a stringent law of

(1) (1907) I.L.R., 30 Mad., 537. (2) (1890) I.L.R., 17 Calc., 699 (F.B.).
(3) (1919) 36 M.L.J., 199. (4) (1916) 3 L.W., 336.
(5) (1899) A.C., 105.

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limitation that we should hesitate to impute such an intention to the legislature if we can possibly avoid it.

Under the Code of 1859 it was open to the decree-holder to apply to the Court which passed the decree to execute it itself or to transmit it to another Court for execution, and such an application would have been sufficient for the purpose of saving limitation under article 167 (now 182) of the Limitation Act of 1871. The question is, when and how has the decree-holder been deprived of this right? In 1877 and again in 1882 the Code was repealed, and re-enacted with some re-drafting and re-arrangement which included the insertion of the present sections 37 and 38 in the Code of 1877. Now there is a well-known presumption that such re-drafting and re-arrangements leave the substance of the law unaltered, and it follows that such a serious change as the abolition of the decree-holder's right to apply in all cases to the Court which passed the decree in the first instance cannot be raised by implication but should plainly and clearly appear on the language of the sections. Now at the time when the Code of 1908 was enacted there was a long and unbroken series of express decisions that this was not the effect of these sections—*Latchman Pundeh* v. *Maddan Mohun Shye*(1), *Kartrick Nath Pandey* v. *Tilukdhari Lall*(2), *Kali Pado Mukerjee* v. *Dino Nath Mokerjee*(3), *Juhar* v. *Kamini Debi*(4), and *Panduranga Mudaliar* v. *Vythilinga Reddi*(5). So that the legislature was well warranted in considering this point as settled. Two questions only had arisen under these sections, one whether the Court which passed the decree had jurisdiction to execute fully a decree for the sale of immovable property by selling it where the area in which the immovable property was situated had been removed to another jurisdiction. It was held by the Full Bench in *Prem Chand Dey* v. *Mokhada Debi*(6) that it had not, but it was assumed in that case and expressly decided in *Girindro Chunder Roy* v. *Jarawa Kumari*(7), PIGOT, J., being a party to both decisions, that in such a case it was a proper course to apply to the Court which passed the decree to send the decree for execution to the other Court.

(1) (1881) I.L.R., 6 Calc., 513. (2) (1888) I.L.R., 15 Calc., 667.
(3) (1898) I.L.R., 25 Calc., 315. (4) (1901) I.L.R., 28 Calc., 238.
(5) (1907) I.L.R., 30 Mad., 537. (6) (1890) I.L.R., 17 Calc., 699 (F.B.).
(7) (1893) I.L.R., 20 Calc., 105.

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Then there was a difference of opinion as to whether this was the only proper course, or whether after such a transfer the Court which passed the decree could be treated as "having ceased to have jurisdiction to execute the decree" within the meaning of section 649, now section 37, so as by virtue of that section to cause the Court to which the area had been transferred, to be regarded as a Court which passed the decree within the meaning of section 223 (now 38). One view was taken in *Lutchman Pundeh* v. *Maddan Mohun Shye*(1), *Jahar* v. *Kamini Debi*(2) and another in *Kali Pado Mukerjee* v. *Dino Nath Mokerjee*(3) and *Panduranga Mudaliar* v. *Vythilinga Reddi*(4). This was the state of the authorities when the Code of 1908 was enacted, and we are told by Messrs. WOODROFFE and AMEER ALI that it was proposed to enact expressly that application might be made to either Court. The draft section to that effect which dealt with other complicated questions was not adopted, but it seems to me that the legislature brought about the same result in another way. The jurisdiction of the Court which passed the decree was sufficiently recognized by the decisions, as I have pointed out, and indeed had never been doubted up to that time, and there was therefore no need to re-affirm it. The case of direct application to the Court to which the area had been transferred was met by the enactment of the new section 150 which was in terms wide enough to authorize that Court to entertain in the first instance any application which might have been made to the Court which passed the decree.

This, I think, should have settled the question. Unfortunately in *Alagappa Mudaliyar* v. *Thiyagaraja Mudaliyar*(5) when I was sitting with KRISHNASWAMI AYYAR, J., the Advocate-General cited certain American treatises to us passages from which are cited in the later case of *Subbiah Naicker* v. *Ramanathan Chettiyar*(6), and formed the main ground for that decision, and though we came to no decision we were sufficiently influenced by them to leave the point open and proceed by way of transfer in the particular case. In this, I think, we were wrong. The Privy Council has since deprecated the tendency of Indian Courts to resort unnecessarily to American instead of the

(1) (1881) I.L.R., 6 Calc., 513.
(2) (1901) I.L.R., 28 Calc., 238.
(3) (1898) I.L.R., 25 Calc., 315
(4) (1907) I.L.R., 30 Mad., 537.
(5) (1910) M.W.N., 417.
(6) (1914) I.L.R., 37 Mad., 462.

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English authorities. That is how I understand their observations in *Imambandi* v. *Mutsaddi*(1), and in this case it would have been better to see how the question had been dealt with in England, especially as the case of the County Courts affords a complete analogy. Those Courts were established some years before the Code of 1859, and have jurisdiction over immoveable property. Power to transfer particular areas from one Court to another was given and has been freely exercised, but it has never been suggested that the fact of such a transfer takes away the power of the Court which passed the decree to entertain application for execution. The power of sending the decree to another Court, if the Court itself was not in a position to execute it, has been found sufficient to meet the case. That, it seems to me, was the scheme of the Code as held in *Panduranga Mudaliar* v. *Vythilinga Reddi*(2) until 1908 when section 150 then conferred upon the Court of the transferred area power to entertain the application in the first instance; but this cannot be read as taking away from the Court which passed the decree the power which it then had according to the unbroken current of authorities for many years which the legislature must be taken to have recognized. Again, as the American writers allow, in questions of the kind, the particular statutes must always be looked to, and where, as in the present case, the Code provided two methods of executing decrees both originating in the Court which passed the decree and one of them admittedly applicable to the case of the area having been transferred to the jurisdiction of another Court before the application for execution, this sufficiently indicated the procedure which the legislature desired to be followed, and removed all occasion for raising inferences which might possibly have had to be raised if the legislature had provided no method at all of executing decrees where the areas had been transferred.

It only remains to refer to the arguments which have been addressed to us on the language of sections 37 and 38 (formerly 649 and 223) to show that all the decisions on this point down to 1908 were wrong. The words to be interpreted are "a decree may be executed by the Court which passed it" in section 38 (223), a section first inserted in 1877 and merely

(1) (1918) L.R., 45 I.A., 73, at p. 93.
(2) (1907) I.L.R., 30 Mad., 537.

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declaratory of the existing law. These words again have to be interpreted in the light of section 37, an interpretation clause reproduced from section 649 of the Code. Section 37 provides that the words "Court which passed a decree" shall be deemed to include (*a*) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of First Instance, and an argument has been based on this clause. Now it may well be that under sections 37 and 38 the Appellate Court has no jurisdiction to execute its own decree, but that is not because such jurisdiction is excluded by the use of the word 'include' as has been argued, but because it had no such jurisdiction under section 362 of the Code of 1859, and it may well be questioned, having regard to the presumption already referred to, whether, when that section was eliminated in re-drafting and the matter was dealt with in sections 649 and 223 (now 37 and 38), there was any intention to confer on the Appellate Court jurisdiction which it had not till then possessed. We have however to deal with clause (*b*), and where the decree-holder had a valuable right under the Code of 1859 to apply to the Court which passed the decree at least for execution by way of transmission, and where the present Code provides expressly that a decree may be executed by the Court which passed it, the contention that this important right must be held to have been taken away because of the provision in section 37 that these words shall be deemed to 'include' another Court appears to me to be altogether untenable. It may be that in some rare and exceptional instances the category of things 'included' in a definition may be held to be exhaustive, but ordinarily, as observed in Stroud's Dictionary, it is "a phrase of extensive and not of restrictive jurisdiction", and it cannot in my opinion be used here to deprive the decree-holder of the important right which he had till then of applying in all cases in the first instance to the Court which passed the decree, especially having regard to the fact that the section itself was inserted when the Code was in process of re-drafting and re-arrangement, when, as I have already said, there is a presumption against alterations by implication only. In *Subbiah Naicker* v. *Ramanathan Chettiar*(1) the question does not seem

(1) (1914) I.L.R., 37 Mad., 462.

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to have been sufficiently argued from the point of view of the decree-holder's rights, and attention was not called to the history of the section. Further the decision is opposed to a long line of authorities which I think the legislature accepted in 1908, and is also mainly based on citations from American treatises which I now think do not afford a satisfactory basis for the decision of a question of this kind, or afford any sufficient reason for answering the question in the negative. Both on principle and on the balance of authority and convenience my answer is that the Court which passed the decree is a proper Court for the purpose mentioned in the question referred to us.

AYLING, J.

AYLING, J.—I agree. After careful reconsideration in the light of the arguments now adduced before us, I am inclined to think that, in our judgment in *Subbiah Naicker* v. *Ramanathan Chettiar*(1), we went too far in saying that the Court which passed the decree for sale of a property could not even entertain an application for sale of such properties, once they had been transferred out of its territorial jurisdiction. This decision was not necessary for the disposal of the case before us where the question was whether such an application could be properly made to the Court to whose jurisdiction the property had been transferred. I think it could, if only by reason of section 150, Code of Civil Procedure: for this section certainly seems to me to cover the case of the transfer of all the litigations arising out of a tract of country from one Court to another. I would prefer to base this proposition on section 150, rather than on an interpretation of section 37, regarding which I must confess to considerable difficulty. But I am of opinion that the latter section, whatever it means by ceasing to have jurisdiction to execute, does not operate to exclude the Court which actually passed the decree, and to substitute for it another Court; and that it is still open to the decree-holder to apply to the former for execution by way of transmission of the decree to the Court which has territorial jurisdiction.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The question referred to the Full Bench is "whether the Court which passed the decree is not the proper Court for execution within the meaning of the clause (5) of article

(1) (1914) I.L.R., 37 Mad., 462.

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182 of the Limitation Act by virtue of the fact that the property over which it had jurisdiction at the time of the decree was taken away from it and assigned to another Court at the time of the presentation of the application for execution."

The answer to this question depends upon one's view on the following points :—

(1) Does a Court which passes a decree for sale of land within its jurisdiction at the time of the passing of the decree continue according to general principles of jurisprudence to have jurisdiction to execute (*a*) such a decree by sale or (*b*) even to entertain an application for execution of such decree by sale after it ceases to have territorial jurisdiction over that property; (2) even if it has not got the power according to general principles of jurisprudence, has it got such power owing to the provisions of section 37 of the Civil Procedure Code (old section 649, paragraph 2) read with sections 38 and 39 (old section 223)?

On the first point I have very little to add to what has been said in the judgment of AYLING, J., and myself in *Subbiah Naicker* v. *Ramanathan Chettiar*(1). That was a considered judgment of ours in which we attempted to show that the Calcutta High Court from 1890 (see *Prem Chand Dey* v. *Mokhada Debi*(2), Full Bench of five Judges including Justices PRINSEP and O'KINEALY who were Judges learned in Procedure law) has uniformly held that a Court though it passed a decree for sale ceases to have jurisdiction to execute that decree for sale when the property has passed out of its territorial jurisdiction. The learned Judges refer to section 16 of the Civil Procedure Code as indicating that the Code intended the Courts in this country to have no power to determine any right or interest in any immoveable property lying wholly outside its jurisdiction. The execution of a decree being only a continuation of the suit, there appears to be no legitimate reason

"why a Court in the later stage of a suit should have greater powers than it possessed at its institution."

The earlier case in *Lutchman Pundeh* v. *Maddan Mohun Shye*(3), though quoted by Dr. Rash Behari Ghose in his

(1) (1914) I.L.R., 37 Mad., 462. (2) (1890) I.L.R., 17 Calc., 699 (F.B.).
(3) (1881) I.L.R., 6 Calc., 513.

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arguments, must be deemed to have been overruled by this Full Bench decision in *Prem Chand Dey* v. *Mokhada Debi*(1).

Of course in a matter of procedure when there is a uniform practice of this Court, that must no doubt override even the Full Bench decision of the Calcutta High Court, unless there is a decision of the Privy Council which settles the question for all Courts. I cannot say that there are any such pronouncements of the Privy Council. The case in *Kamini Sundari Chaodhrani* v. *Kalliprossunno Ghose*(2), relied on in *Prem Chand Dey* v. *Mokhada Debi*(1), merely dealt with the power of the High Court as an Appellate Court making a remand order to give jurisdiction to a Court having no territorial jurisdiction over the suit land to deal with a question relating to that land. In *Maharajah of Bobbili* v. *Narasaraju Peda Baliara Simhulu Bahadur*(3), it was held that after the District Court which had passed a decree sent that decree to a District Munsif's Court for execution by the latter Court with a copy of the decree, no execution application could be presented to the District Court for the sale of the property attached by the District Munsif in execution, unless the copy of the decree with a certificate of non-satisfaction was returned back to the District Court. I do not think that any clear guidance can be obtained on the present point from these two Privy Council decisions.

On principles recognized in the Civil Procedure Code, section 16, it seems to me clear that no Court has any jurisdiction either to entertain an execution application for the attachment of property outside its jurisdiction or for the sale of immoveable property outside its jurisdiction or to sell it in execution, even though it had jurisdiction at the time of the passing of the decree to pass such a decree. The fact that at a particular time it was competent to pass a decree for sale cannot mean that its jurisdiction to proceed further could be retained for ever. An extreme case might be taken as an illustration. Supposing the District Munsif of Cuddalore passes a mortgage decree in 1918 for sale of a property within his jurisdiction but situated near the French limits and suppose in this year that property is ceded to the French by treaty with

(1) (1890) I.L.R., 17 Calc., 699 (F.B.). (2) (1886) I.L.R., 12 Calc., 225 (P.C.).
(3) (1916) I.L.R., 39 Mad., 640 (P.C.).

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the British, can it be said that in 1920 that decree could be executed by the Cuddalore Munsif or an application for execution of the said property could be entertained by him? On principle, I do not see why the loss of territorial jurisdiction in any other manner not to a foreign power but to a Native State or to some other Court within British India should make any difference.

This question was further considered with reference to the new section 150, Civil Procedure Code, in *Subbiah Naicker* v. *Ramanathan Chettiar*(1), and also on general principles on pages 471 and 472 of the same case. It is also clear from OLDFIELD, J.'s opinion in this Order of Reference to the Full Bench that from 1910 [(see *Alagappa Mudaliyar* v. *Thiyagaraja Mudaliyar*(2) up to date—see also *Seshadri Iyer* v. *Ananthayee*(3), decided in September 1917; and *Venkatasami Naik* v. *Sivanu Mudali*(4)]—the course of decisions has been pretty uniform in this Court on this point. In *Begg Dunlop & Co.* v. *Jagannatha Marwari*(5), MOOKERJEE, J., with whom CARNDUFF, J., agreed, held that it was not competent to a Court in execution even of a decree for money to attach a debt payable to the judgment-debtor by a non-resident debtor. The matter is elaborately discussed on principles at pages 233 to 236 citing English and American authorities also, the conclusion being that where the situs of a bond debt is outside the jurisdiction the Court has no power to deal with it. *A fortiori* it seems to me that where the situs of an immoveable property is outside the jurisdiction, the Court has no power to deal with it unless the statute law gives it such power. Because there was some conflict whether the statute law enacted in sections 223 and 649 of the old Civil Procedure Code really intended to give such jurisdiction that the legislature seems to have indicated in the new section 150 that the Calcutta view in *Prem Chand Day* v. *Mokhada Debi*(6) should be followed and not the view enunciated in *Panduranga Mudaliar* v. *Vythilinga Reddi*(7). As to the argument based on the language of section 37

(1) (1914) I.L.R., 37 Mad., 462, at p. 473. (2) (1910) M.W.N., 477.
(3) C.M.S.A., 23 and 24 of 1917 (unreported).
(4) (1919) 36 M.L.J., 199. (5) (1911) 14 C.L.J., 228.
(6) (1890) I.L.R., 17 Calc., 669 (F.B.). (7) (1907) I.L.R., 30 Mad., 537.

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(old section 649) when an expression is said in a statute to include something, it no doubt means ordinarily that it should mean that thing *in addition* to the thing which the expression naturally means. But it is clear from the context of section 37, namely clauses (*a*) and (*b*), that the word 'include' in section 37 signifies "mean and include and comprise" and that is a permissible meaning where the context requires it—see Stroud's Judicial Dictionary, pages 945 and 946. If the natural meaning is not to be excluded under any circumstances *and in any case* so as to substitute for it the new meaning *in that case*, section 37 ought to be interpreted as follows: the expression "the Court which passed a decree" shall in relation to the execution of decrees be deemed to mean (*a*) where the decree to be executed has been passed in the exercise of appellate jurisdiction (1) the Court of First Instance and (2) *also the Appellate Court or the Second Appellate Court which passed the decree*; (*b*) where the Court of First Instance has ceased to exist or to have jurisdiction to execute it (1) the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suits and (2) *also the Court of First Instance which has ceased to exist or to have jurisdiction to execute it.* These natural meanings which I have italicised as (*a*) (2) and (*b*) (2) which would have to be taken in addition to the new meanings, if the ordinary meaning of 'include' was to be given to the word, are inadmissible from the context. Therefore, the real meaning of the section is that the expression "the Court which passed the decree" shall mean, of course, the Court which passed the decree *ordinarily* but shall exclude that Court and "include and mean" (*a*) where the decree to be executed, (*b*) where the Court of First Instance has ceased to exist, etc.

In the result, both on principle and on the interpretation of sections 37, 38, 39 and 150 of the Civil Procedure Code and on the principle of *stare decicis*, I am inclined to answer the question against the jurisdiction of the Court which passed the decree but which has lost jurisdiction over the immoveable property sought to be pursued in execution.

After I had written the above, I had the advantage of perusing the opinions of my lord and AYLING, J., in this case. I was at first inclined to think that the hardship pointed

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out by my lord as caused to a litigant who has obtained a decree and who may not know when he applies for execution to the Court which passed the decree in his favour that its territorial limits had been altered is a matter for the legislature to consider. I would venture to suggest that article 182 of the Limitation Act, clause (5), should be amended by adding after the words "to the proper Court" the words "or to a Court which the decree-holder in good faith believed to have jurisdiction to entertain the application." This suggestion I would make to the legislature notwithstanding that I have come to the conclusion that I should not differ from my learned colleagues on the narrow question referred to us. I have been much pressed by the fact referred to in the judgment of my lord that notwithstanding *Prem Chand Dey* v. *Mokhada Debi*(1) it was held in *Girindoo Chunder Roy* v. *Jarawa Kumari*(2) that an application might be made to a Court which passed the decree to send the decree for execution to the Court which had jurisdiction to sell the property in execution. On principle I am unable to see any distinction between jurisdiction to entertain an application for sale of property outside the jurisdiction and jurisdiction to execute the decree by sale of such property. I am still inclined to think that section 150 was enacted so as to take away both rights from the Court which ceased to have territorial jurisdiction.

No doubt I quoted the American Cyclopædia in support of my view in *Subbiah Naicker* v. *Ramanathan Chettiar*(3). I am myself not very familiar with American or English decisions and I felt glad when their Lordships of the Privy Council made the following pronouncement in *Imambandi* v. *Mutsaddi*(4) :—"Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, reference to judgments of *foreign Courts* to which Indian practitioners cannot be expected to have access based on considerations and conditions totally differing from those applicable to or prevailing in India is only likely to confuse the administration of justice."

(1) (1890) I.L.R., 17 Calc., 669 (F.B.). (2) (1898) I.L.R., 20 Calc., 105.
(3) (1914) I.L.R., 37 Mad., 462. (4) (1918) I.L.R., 45 I.A., 73, at p. 93.

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The case in which their Lordships made this pronouncement was an appeal against the decision of the Calcutta High Court decided in 1911 in *Imambandi* v. *Mutsaddi*(1). In that judgment, at pages 627 and 630, several English and American cases have been quoted. Not a single foreign decision, however, is referred to in the judgment of their Lordships of the Privy Council on appeal. I take it that, as in the eye of the law, both English and American Courts except, of course, the Privy Council are "Foreign Courts", their Lordships deprecated quotations from decisions of such Courts. That their Lordships of the Privy Council deprecated unnecessary references to English decisions in their strict sense seems to me to be supported by what Lord MACNAGHTEN said in delivering the judgment of their Lordships in *Bhola Nath Nundi* v. *Midnapore Zemindary Co.*(2) as follows :—

"Unfortunately, however, both in the Munsif's Court, and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured, by copious references to English authorities, and by the application of principles or doctrines more or less refined, founded on legal conceptions not altogether in harmony with Eastern notions. The result is that, although the decrees appear to be justified by the main facts, which both the lower Courts held to be established, it is impossible to say that the judgments delivered are entirely satisfactory."

It may be that where questions of International Law or of Commercial Law or Constitutional Law are involved, it becomes indispensable (owing to paucity of Indian decisions) to refer to such cases and even then it would be no doubt advisable to confine ourselves to English decisions. Also where the Statute Law of India "is silent" and rules of justice, equity and good conscience have to be applied by Indian Courts and such rules have been clearly set out in famous decisions of foreign Courts (such as those collected in Smith's Leading Cases), references to such authorities cannot conveniently be avoided; see the very recent Privy Council decision in *Maharaja of Jeypore* v. *Rukmani Pattamahadevi*(3) on the question of forfeiture of tenancy by denial of title, a thing which is "not ancient

(1) (1918) L.R., 45, I.A., 73, at p. 93.
(2) (1904) I.L.R., 31 Calc., 503, at p. 509 (P.C.).
(3) (1919) I.L.R., 42 Mad., 589 (P.C.).

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Indian Law" and rules relating to which were adopted by Indian Courts from rules laid down in English cases.

Why then did I quote the American Cyclopædia in *Subbiah Naickar* v. *Ramanathan Chettiar*(1)? My explanation is that when I was first appointed to the Bench of this Court (about the beginning of 1912) I found that reference to and quotations from American and English treatises and decisions were not only permissible but were generally treated by respectable lawyers of greater learning than I could ever hope to have as indications of a laudable desire to possess an up-to-date knowledge of legal principles and precedents. I, therefore, ventured to do so in that case with great diffidence and I am glad that I am able to give up that practice now. But wholly apart from American treatises and decisions, there seems to be much in principle in favour of the view taken in *Subbiah Naicker* v. *Ramanathan Chettiar*(1).

As my lord is inclined to the view that, notwithstanding the enactment of the new section 150 the probabilities are that the legislature did not thereby intend to overrule the then prevalent view of the Calcutta High Court that the Court which passed the decree could entertain as "the proper Court" or as a "proper Court" within the meaning of article 182, clause (5), an application for execution, though it might be bound to transfer the decree for execution to the new Court which has obtained territorial jurisdiction over the land to be proceeded against in execution, and as AYLING, J., who was a party with me to *Subbiah Naicker* v. *Ramanathan Chettiar*(1) is also of that opinion, I do not feel strong enough to differ from them on that point. I would, however, suggest that rules should be made under the rule-making power of the High Court, clearly including (a) that though under Order XXI, rule 11, read with sections 37 and 38, an application for execution might be made to the Court which passed the decree notwithstanding that it had ceased to have jurisdiction to execute it owing to the transfer of territorial jurisdiction, the Court which passed the decree might and should treat it as also an application for transfer of the decree for execution to the new Court and pass orders accordingly and that it should not order the sale of the property

(1) (1914) I.L.R., 37 Mad., 462.

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which has passed out of its territorial jurisdiction, if it could not then entertain a suit brought for the same reliefs; (b) that where applications are made to both Courts, an order analogous to the order passed under section 10 in respect of suits between the same parties in two different Courts having concurrent jurisdiction should be passed; (c) that Order XXI, rule 16, which refers to the Court which passed the decree should be modified by adding an explanation that unless the Court which passed the decree has ceased to exist, it is that Court to which an application should be made under Order XXI, rule 16, though it ceased to have jurisdiction to execute it by reason of a suit for the same relief having since passed out of its jurisdiction. The Court which passed the decree should, in such a case, pass orders not for execution in favour of the assignee decree-holder or the heir of the decree-holder but recognizing the assignee decree-holder's or the heir's rights to execute it should then transfer the execution to the new Court. If both Courts are given concurrent jurisdiction, the result would be that one alleged assignee decree-holder might make his application to the Court which passed the decree and another alleged assignee decree-holder or the original decree-holder himself might make his application to the new Court (which is included in the definition of the Court which passed the decree) and there might be conflicting decisions as to who is the real assignee decree-holder or who is really entitled to execute the decree. It is because Order XXI, rule 16, raises such difficulties and because very complicated questions might arise, under some of the other orders and sections (such as section 47) if concurrent jurisdiction is recognized and if the expression "the Court which passed the decree" may mean two Courts at the same time, that I have felt so much difficulty in agreeing with my learned colleagues in the answer to the question referred to us and it was the consideration that in a matter of procedure an unanimous decision of a question referred to the Full Bench is desirable that has finally settled the matter in my mind.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Abdur Rahim, Kt., Officiating Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919, April 29 and 30, August 26.

SINNAPPAN ALIAS METHARMAMANA ROWTHER (PLAINTIFF), APPELLANT,

v.

ARUNACHALAM PILLAI AND TWO OTHERS (DEFENDANTS' LEGAL REPRESENTATIVES), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 64, and O. XXI, r. 54—Attachment of immoveable property—Order for attachment made—Alienation by judgment-debtor, subsequent to order but before proclamation of attachment, validity of—Prohibition against alienation, effective from what date.

An attachment operates as a valid prohibition against alienation of the attached property only from the date on which the necessary proclamation is made and copy of the order affixed as contemplated in Order XXI, rule 54, Civil Procedure Code.

Ramanayakudu v. *Boya Pedda Basappa*, (1919) I.L.R., 42 Mad., 565, approved; *Venkatasubbiah* v. *Venkata Seshiah*, (1919) I.L.R., 42 Mad., 1, distinguished; *Venkatachelapati Rao* v. *Kameswaramma*, (1918) I.L.R., 41 Mad., 151 (F.B.), and *Kanai Lal* v. *Ahed Bux*, (1917) 39 I.C. 562, referred to.

SECOND APPEAL against the decree of K. V. KARUNAKARA MENON, the Temporary Subordinate Judge of Madura, in Appeal Suit No. 34 of 1917, preferred against the decree of R. RANGASWAMI AYYANGAR, the Additional District Munsif of Dindigul, in Original Suit No. 67 of 1915.

The plaintiff instituted this suit to recover the suit lands as a purchaser deriving title from an auction-purchaser who had bought the same on the 11th December 1909 in a court-auction held in execution of the decree in Original Suit No. 219 of 1908 on the file of the District Munsif's Court of Dindigul. The Court ordered the attachment of the suit lands by an order, dated 12th July 1909, and the warrant was issued on the 16th July 1909, but the actual attachment, by means of the proclamation and affixture of notice of the attachment, was made only on the 22nd July 1909. In the meantime, the judgment debtor sold

* Second Appeal No. 1098 of 1918.

the lands to the defendant by a sale-deed executed on the 19th July 1909 which was registered on the 14th August 1909. The plaintiff contended inter alia in the lower Courts that the sale-deed to the defendant was really executed subsequent to the date of the actual attachment and was antedated, and that it was therefore inoperative against him under section 64 of the Civil Procedure Code. Both the lower Courts found against this contention and dismissed the suit. The plaintiff preferred this Second Appeal and contended inter alia that the sale to the defendant was void and inoperative as against the auction-purchaser under the provisions of section 64 of the Civil Procedure Code, as the attachment was effective from the date of the order for attachment and not merely from the date of the actual attachment, and that in any event the subsequent attachment would take effect retrospectively from the date of the order.

This Second Appeal came on for hearing in the first instance before OLDFIELD and SADASIVA AYYAR, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—The question raised is in general terms whether an attachment operates as a valid prohibition against alienation of the attached property from the date on which it is ordered or from that on which the necessary proclamation is made and copy of the order affixed.

OLDFIELD, J.

I should be content to treat the matter as concluded by the decision of PHILLIPS and KRISHNAN, JJ., in *Yuna Ramanayakadu* v. *Boy Pedda Basappa*(1). There is, however, it seems to me great difficulty in reconciling that decision with some expressions in the judgments of the former learned Judge and of KUMARASWAMI SASTRI, J., in an earlier case which is included in the authorized reports, *Venkatasubbiah* v. *Venkata Seshaiya*(2). In that case PHILLIPS, J., said

"The attachment, when effected, is an attachment made in pursuance of an order to attach before judgment and must be treated as an attachment before judgment and not as a nullity merely because as a matter of fact the attachment is not completed until after judgment. To adopt the opposite view would be to allow a formal judicial order to be upset by the negligence or default of a subordinate ministerial officer"

(1) (1919) I.L.R., 42 Mad., 565. (2) (1919) I.L.R., 42 Mad., 1.

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and KUMARASWAMI SASTRI, J.,

"Attachment of the property in the manner prescribed by Order XXI, rule 54, is a purely ministerial act. Any delay of the officers of Court in effecting the attachment should not prejudice the decree-holder and the validity of the order of attachment under rule 5, Order XXXVIII, should not depend on the date when it is actually effected."

These observations were not, so far as appears, brought to the notice of the learned Judges in *Yuna Ramanayakadu* v. *Boya Pedda Basappa*(1). There may, it must be respectfully suggested, be some difficulty in following their connexion with the context in which they occur, and in particular with the reference in it to completion of an attachment by the proclamation, etc. But in view of Order XXXVIII, rule 7, I do not think that their application can be restricted to cases, such as that actually then before the Court, of attachment before judgment. In these circumstances there is a conflict which in my opinion must be resolved by a Full Bench and I therefore refer the question stated at the beginning of this order.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—It must be admitted that there are observations in the judgments of both the learned Judges who took part in the decision in *Venkatasubbiah* v. *Venkata Seshaiya* (2), which lend support to the contention of the appellant's learned vakil, Mr. Jayarama Ayyar, that an attachment, which prevents a valid alienation after it is made, is effected or made as soon as the order directing the attachment is passed by the Court and even before the order is proclaimed in the manner directed by clause (2) of Order XXI, rule 54. But the real basis of that decision seems to me to have been (as stated in the judgment of PHILLIPS, J.) that it is not necessary at all that there should be an attachment fully effected before judgment to attract the provisions of Order XXXVIII, rule 11 (which dispenses with re-attachment after decree), and as a consequence the provisions of section 64; but it is only necessary that the property should have become attached and "under attachment" (whether before or after judgment) "by virtue of the provisions of this order" (that is, of Order XXXVIII).

There is also the observation of KUMARASWAMI SASTRI, J., in the course of his judgment that

(1) (1919) I.L.R., 42 Mad., 565. (2) (1919) I.L.R., 42 Mad., 1.

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"under section 64, the attachment invalidates an alienation only when the alienation is after the actual compliance with the provision of rule 54,"

that is, I take it, after proclamation is also made under clause 2 of rule 54. This opinion of KUMARASWAMI SASTRI, J., is supported by the decision in *Yuna Ramanayakadu* v. *Boy Pedda Basappa*(1), to which PHILLIPS, J., was a party, though the decision in *Venkatasubbiah* v. *Venkata Seshaiya*(2) is not referred to in *Yuna Ramanayakadu* v. *Boya Pedda Basappa* (1). This latter case is directly against the contention of the appellant.

As regards the omission from section 64 of the words "by actual seizure or by written order duly intimated and made known in manner *aforesaid*" (that is, in the manner mentioned in old section 274) found in the old section 276 (which corresponded to the present section 64) it might first be remarked that old section 276 followed in order the old section 274, but section 64 in the body of the new Code precedes all orders including Order XXI, rule 54. The legislature could not therefore reproduce the words "in manner *aforesaid*" but should have substituted the words "in manner provided by Order XXI, rule 54 *infra*," if it wanted to reproduce as many of the words as is possible to be found in the language of the old Act. But the legislature knew (what Mr. Jayarama Ayyar conceded) that all the decisions under the old Code, section 276, had held that an alienation is not invalidated merely by an order for attachment having been passed before its date, but such order should have been also proclaimed in the manner provided by Order XXI, rule 54, clause (2). (I might add that the language of Order XXI, rule 54, can be modified by the High Court so that even further conditions might be imposed to completely 'make' an attachment.) It seems, therefore, to have been thought by the legislature unnecessary to retain the omitted words, though it might be considered (if I may say so with respect) injudicious on the part of the legislature to have so omitted them. As stated in Maxwell

"Language is rarely so free from ambiguity as to be incapable of being used in more than one sense."

(1) (1919) I.L.R., 42 Mad., 565. (2) (1919) I.L.R., 42 Mad., 1.

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"There is enough in the vagueness and elasticity inherent in language to account for the difficulty so frequently found in ascertaining the meaning of an enactment."

But I think that the intention of the legislature not to interfere with the settled law which made an alienation invalid only if notice of attachment had been given to the judgment-debtor and the public by a proclamation as provided for in Order XXI, rule 54, clause (2), seems to me to be reasonably clear notwithstanding the omission of certain words in old section 276 when re-enacting it as section 64.

I am prepared therefore to follow *Yuna Ramanayakadu* v. *Boya Pedda Basappa*(1), but as my learned brother considers that it is advisable to have the question referred to a Full Bench I agree.

ON THIS REFERENCE

K. S. Jayarama Ayyar for appellant.—The making of the order for attachment is sufficient. Order XXI, rule 54, relates only to the mode of attachment. Section 276 of the Code of 1882, which corresponded to section 64 of the New Code of 1908, contained express words that the attachment should not only be ordered, but also duly published, etc. These words have been omitted in section 64 of the New Code of 1908. Order XXI, rule 43, shows that, in the case of moveables, the attachment is by actual seizure subsequent to the order to seize the goods, while in the case of lands only an order is necessary. Under rule 46 of Order XXI attachment is by prohibitory order only. Section 64 is applicable to both moveables and immoveables. In *Venkatasubbiah* v. *Venkatasesha Ayyar*(2) it was held that the actual attachment is only a ministerial act and not a judicial act under Order XXXVIII, rules 7 and 11, of the Code.

Secondly, even if proclamation of attachment is necessary before completion of the attachment, for purposes of protection under section 64 of the Code, if the attachment is as a fact subsequently made, it takes retrospective effect from the date of the order directing the attachment. The delay of the Court or its ministerial officer cannot prejudice the parties who obtained the order for prohibition. Reference was made to *Murgatroy* v.

(1) (1919) I.L.R., 42 Mad., 565. (2) (1919) I.L.R., 42 Mad., 1.

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Wright(1) and *Sivakolundu Pillai* v. *Ganapathi Ayyar*(2).

K. S. Ganapati Ayyar for respondent.—The question under reference is covered by authority of two cases under the New Code, namely, *Kanai Lal* v. *Ahed Bux*(3) and *Simrik Lal Bhakat* v. *Radharaman*(4). The above cases show that the attachment cannot have retrospective effect from the date of the order directing attachment, and that the omission of the words found in the Old Code from section 64 of the New Code was on the ground that such words were surplusage.

OPINION.

ABDUR RAHIM, OFFG. C.J.

ABDUR RAHIM, OFFG. C.J.—The question referred to the Full Bench is

"whether an attachment operates as a valid prohibition against alienation of the attached property from the date on which it is ordered or from that on which the necessary proclamation is made and copy of the order affixed."

This depends upon the proper construction of section 64 and Order XXI, rule 54, of the Code of Civil Procedure. Section 64 lays down that

"where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

Rule 54 lays down how an attachment is made. It is in these words:

"(1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge.

"(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate."

(1) (1907) 23 K.B., 333. (2) (1916) 3 L.W., 336.
(3) (1917) 39 I.C., 562. (4) (1917) 39 I.C., 857.

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It is contended before us by Mr. Jayaram Ayyar that the attachment is made when the order prohibiting the judgment-debtor from transferring the property is passed and that from that date the alienation of the property is prohibited. His argument is that, although the order has to be proclaimed as required by the second paragraph of the rule, the attachment must be taken to have been made when the Court passed the order of prohibition. He is unable to cite any authority in support of his contention, but he says that the language of section 64 and rule 54 supports it. Section 64 does not say "where an order for attachment has been made," but "where an attachment has been made." No doubt rule 54 says that an attachment shall be made by an order, but that does not necessarily mean that the order completes the attachment. In fact Mr. Jayaram Ayyar seemed in one part of his argument to concede that the attachment is not completed until the order is proclaimed and a copy of the order affixed in the way described in paragraph 2 of rule 54. That seems to be obvious. The object of section 64 is to prohibit alienation after attachment, and, if the mere passing of an order in Court would have that effect, one can easily imagine that the judgment-debtor would be in a position to make alienations to innocent purchasers to their prejudice. The essence of an order for attachment is to prohibit the judgment-debtor from transferring the property and until such a prohibition is proclaimed and made known in the way provided by the rule it cannot be said to have come into operation.

Our attention has been drawn to a somewhat different wording of rule 43 and rule 46 of Order XXI. The first rule provides that in case of moveable property the attachment shall be made by actual seizure, and it does not contain reference to any order. Rule 46 provides that the attachment shall be made by a written order prohibiting the debtor from paying the debt to his creditor. But so far as rule 43 is concerned there can be no doubt that there must be an order preceding the actual seizure; and when the debtor receives notice under rule 46, that is when the order is served on the debtor, there can be no question of his paying the debt to his creditor without notice of any prohibitory order. In a recent Full Bench ruling of this Court, *Venkatachalapati Rao* v. *Kameswaramma* (1), it was laid

(1) (1918) I.L.R., 41 Mad., 151 (F.B.).

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down that 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 reason given is that the order staying execution is in the nature of a prohibitory order to the lower Court and until it is communicated the steps taken by the lower Court must be treated as legally valid. It cannot be denied that so far as prohibitory orders, properly so called, are concerned they do not come into operation until notice of the order is given to the prohibited person. Applying the same principle to the case now under consideration it would not be right to hold that the mere passing of the order by a Court without anything being done to effectuate the attachment would operate as an attachment of the property.

The main argument of Mr. Jayaram Ayyar is based on the omission from section 64, Civil Procedure Code, of the words "by actual seizure" or "by written order duly intimated and made known in the manner aforesaid" after the words "where an attachment has been made." The reason for the omission seems to be obvious. The mode of attachment is laid down in the Code, that it is to be effected by actual seizure or by written order duly intimated and made known in the manner referred to, and the legislature apparently thought that it was superfluous to repeat those words. This is what was pointed out by WOODROFFE and MOOKERJEE, JJ., in *Simrik Lal Bhakat* v. *Radharaman* (1).

It is also argued by Mr. Jayaram Ayyar that although an attachment is not completed until the proclamation is made, still once the proclamation is made the attachment takes effect from the date of the order of the Court. It is difficult to appreciate the force of this argument. The attachment can be said to be made only on the date on which it is completed and becomes operative.

There is only one ruling of this Court in point and that is a ruling in *Ramanayakudu* v. *Boya Pedda Basappa* (2), to which PHILLIPS and KRISHNAN, JJ., were parties. That is directly

(1) (1917) 39 I.C., 857. (2) (1919) I.L.R., 42 Mad., 565.

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in support of the view just indicated. There is another decision by PHILLIPS and KUMARASWAMI SASTRI, JJ., in *Venkatasubbiah* v. *Venkata Seshiah*(1). That was a case of attachment before judgment and the question for consideration was whether, where an order for attachment was made before judgment and the attachment was not actually made until after the decree, that was a valid attachment. They hold that it was a valid attachment and in so holding certain general expressions were used in the course of the judgment which have been seized upon by Mr. Jayaram Ayyar in support of his argument. The general observations ought to be read in connexion with the point which the learned Judges had before them and if so read they cannot be said in any way to countenance the construction contended for on behalf of the appellant.

There is only one other case that has been brought to our notice and that is a Calcutta decision in *Kanai Lal* v. *Ahed Bux*(2). That also is in support of the view which has been indicated. The answer will therefore be that an attachment operates as a valid prohibition against alienation of the attached property only from the date on which the necessary proclamation is made and copy of the order affixed as contemplated in Order XXI, rule 54.

OLDFIELD, J.

OLDFIELD, J.—I agree.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I entirely agree. I think the principle enunciated in *Venkatachalapati Rao* v. *Kameswaramma*(3) is applicable to this case.

As regards the contention that the omission of the words commented upon by the learned Chief Justice makes for the position that the order was intended to be efficacious from the moment of its promulgation and not from its publication, I agree with the view taken by the Calcutta High Court that the legislature must have thought that these wor s were mere surplusage. If the legislature had intended to introduce such a fundamental change as is suggested by Mr Jayaram Ayyar, it could have very easily stated in section 64 " where an order for an attachment has been made, any private transfer," etc. That is not what the legislature has said and it would not be in consonance with any

(1) (1919) I.L.R., 42 Mad., 1. (2) (1917) 39 I.C., 562.
(3) (1918) I.L.R., 41 Mad., 151 (F.B.).

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canon of construction to impute to the legislature such a violent change in the law because of the omission of certain unnecessary words. In my view the decision in *Ramanayakudu* v. *Boya Pedda Basappa*(1) is correct. As regards *Venkatasubbiah* v. *Venkata Seshaiya*(2), as I understand the learned Judges, the question before them was whether an order for attachment which was made before the decree was passed had spent itself out as it had not been effectuated by doing the acts enjoined before the passing of the decree. The learned Judges in construing Order XXXVIII, rule 11, were of opinion that although nothing might have been done between the passing of the order and the passing of the decree the order still remained in force and could be effectuated by publication and proclamation after the date of the decree. That is not the point we are concerned with. Apart from that point, the learned Judges have expressed themselves in no uncertain terms on the question we have to decide; they say that until the order has been proclaimed there can be no attachment, and to that extent are therefore in agreement with the view taken in *Ramanayakudu* v. *Boya Pedda Basappa*(1).

The second argument which Mr. Jayaram Ayyar advanced before us is that, although the order might have been proclaimed only at a later date, it dates back to the date of its being made. The answer to that is this: section 64 attempts at preventing a party from exercising his undoubted right of alienation. Therefore, unless we find in section 64 any provision which says that the order of publication was to date back to the date of its promulgation, the Courts are not justified in saying that this should be read into the language of the section. The right was intended to be affected only from the date which is actually mentioned in the section and not from an anterior date. This is the view taken by the Calcutta High Court in *Kanai Lal* v. *Ahed Bux* (3), and in my opinion that view is right.

For both these reasons the answer must be the one suggested by the learned Chief Justice.

K.R.

(1) (1919) I.L.R., 42 Mad., 565. (2) (1919) I.L.R., 42 Mad., 1.
(3) (1917) 39 I.C., 562.

APPELLATE CIVIL (FULL BENCH).

Before Sir Abdur Rahim, Kt., Officiating Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919, February, July 17, August, 25 and 26, and September 3.

ANGAMUTHU CHETTI (FIRST DEFENDANT), APPELLANT,

v.

VARATHARAJULU CHETTI (PLAINTIFF), RESPONDENT.*

Hindu Law—Surrender by widow—Essentials of a valid surrender—Provision for maintenance and residence of widow, whether invalidates surrender—Surrender, to be bona fide, of entire interest in whole property and to nearest reversioner.

A reasonable provision for maintenance and residence in favour of a Hindu widow does not affect the validity of a surrender by her of her husband's estate to the nearest reversioner, provided it is a bona fide surrender of the *entire* interest of the widow in the *whole* estate and is not a mere device to divide the estate with the nearest reversioner.

Rangasami Goundan v. *Nachiappa Goundan*, (1919) I.L.R., 42 Mad., 523 (P.C.), explained; *Mussammat Bhagwant Koer* v. *Dhamukdhari Prasad Singh*, (1919) 37, M.L.J., 513 (P.C.), relied on.

APPEAL against Appellate Order of F. A. COLERIDGE, the District Judge of Madura, in Appeal No. 16 of 1917, preferred against the order of S. C. RAMASWAMI AYYAR, the District Munsif of Melur at Madura, in E.A. No. 212 of 1916, in E.P. No. 329 of 1915, in Original Suit No. 534 of 1912.

The respondent obtained a decree for money against the defendants for a debt due by their father, one Mariappa Chetti; the decree directed that the amount due thereunder should be recovered out of the assets of the defendant's father in their hands. In execution of the decree, the respondent attached the properties in question as properties obtained by Mariappa Chetti under a deed of surrender executed by the widows of his divided brother, Govinda Chetti, who died in 1909, leaving two widows and no issue. Mariappa Chetti was the nearest reversioner at the time of the surrender.

One of the widows, named Sinnammal, received five hundred rupees in cash for her maintenance and residence as well as her own jewels from Mariappa Chetti and separated herself from

* Appeal against Appellate Order No. 22 of 1918.

his family; the other widow, Thangammai, agreed to reside with his family and under his protection. The document contained a provision that in the event of her having to live separately from him, she should have a right of residence for her life in a room in her late husband's house and should get for herself the produce from some of the wet lands included in the deed for her maintenance for her lifetime; the document proceeded to state that Mariappa Chetti and his heirs should take the properties left for her maintenance after her lifetime. The decree-holder attached the properties allotted for her maintenance after her death in 1915. The first defendant, one of the sons of Mariappa Chetti, put in a petition in the District Munsif's Court to raise the attachment on the ground that the properties were not the assets of Mariappa Chetti, as the surrender by the widow was not valid in law and not binding on them who were the ultimate reversioners to the estate, Mariappa having predeceased the widow who died in 1915. The lower Court held that the surrender was of the entire estate of Govinda Chetti and was valid in law, that the decree-holder was entitled to attach the properties as the assets of Mariappa Chetti and dismissed the petition of the first defendant to raise the attachment. The first defendant preferred this civil miscellaneous second appeal to the High Court.

The case came on for hearing originally before OLDFIELD and SESHAGIRI AYYAR, JJ., who called for findings on the two following issues, viz.:—

"(1) Did exhibit I effect a total surrender of the widow's right, and (2) if the surrender was partial did exhibit I effect a valid transfer to Mariappa Chetti?"

The District Judge submitted a finding on the first issue in the affirmative, and gave no finding on the second issue as it became unnecessary.

The case came on for hearing after the return of the above finding before SESHAGIRI AYYAR and ODGERS, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

SESHAGIRI AYYAR, J.—The finding is that the widow surrendered the whole property she inherited from her husband by exhibit I which contained a stipulation that if Thangammai

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(meaning the widow) should wish to live separately, she could then claim for her maintenance a certain wet land and a room in the house. Mr. A. Krishnaswami Ayyar argues that this stipulation vitiates the surrender. Mr. Jayarama Ayyar, on the other hand, contends that the provision for maintenance and residence does not detract from the completeness of the surrender and the stipulation objected to is not within the mischief of the pronouncement of the Judicial Committee in *Rangasami Goundan* v. *Nachiappa Goundan*(1). We are inclined to think that the Board had not in its mind provisions for maintenance which even a widow "effacing herself" must have for the sustenance of her physical body. At the same time, the language of the Privy Council is very comprehensive and may affect any reservation of property whether it is for maintenance or not. We are aware that ABDUR RAHIM and OLDFIELD, JJ., are inclined to restrict the scope of the Privy Council judgment to instances in which a temporal advantage is obtained in the guise of surrender. But they follow the view of SADASIVA AYYAR and NAPIER, JJ., in *Chinnaswami Pillai* v. *Appaswami Pillai*(2), which was based on the judgment of the Full Bench of the High Court in *Nachiappa Goundan* v. *Rangasami Goundan*(3), which was under appeal before the Judicial Committee. As we said before, the language of Lord DUNEDIN goes further than that employed in the Full Bench judgment of the High Court, and as the question is one of great importance and may recur often, it seems desirable, in our opinion, that there should be an authoritative pronouncement by the Full Bench on the subject. We have, therefore, resolved to refer for the opinion of the Full Bench the following question:

"Is a deed of surrender by a Hindu widow invalid by reason of a provision for maintenance and residence in her favour contained therein?"

ON THIS REFERENCE

A. Krishnaswami Ayyar and *K. Raja Ayyar* for appellant.—There was no valid surrender in law, as the widow retained substantial rights in the estate by way of maintenance and residence in the estate of her husband. Only a portion of the estate was thus surrendered; though the maintenance was not

(1) (1919) L.R., 46 I.A., 72. (2) (1919) I.L.R., 42 Mad., 25.
(3) (1915) 28 M.L.J., 1.

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made a charge, still the right was reserved and the surrender was not a total surrender. The surrender must amount to a total annihilation of the widow's estate. The widow's act must amount to a civil death. There ought to be no consideration for the surrender or a reservation of a part of, or any interest in, the estate in favour of the widow. [See the language of the Privy Council in *Rangasami Goundan* v. *Nachiappa Goundan*(1).] If there is consideration, whether considerable or otherwise, there is no valid surrender. Where the inheritance is cast on the reversioner by a valid surrender, the widow's estate is at an end and no question of her maintenance can arise. The decision in *Sriramulu Naidu* v *Andalammal*(2) shows that a surrender for consideration is bad as a surrender. The tests of a valid *alienation*, viz., whether it is bona fide or not, should not be applied to a *surrender*. If the subsequent grant by the reversioner to the widow is dissociated in fact from the prior act of surrender, the subsequent re-grant or the original surrender will not be bad; but if on the evidence it is shown that both surrender and re-grant are all one transaction, the surrender will be bad in law.

Reference was made to the following cases:—*Mulugu Kotayya* v. *Muligonda Chandramowli Sastri*(3), *Pilu* v. *Babaji*(4), *Behari Lal* v *Madho Lal Ahir Gayawal*(5), *Debi Prosad Chowdhury* v. *Golap Bhugah*(6) and *Raj Kishore* v. *Durga Charan Lal*(7).

K. Srinivasa Ayyangar (with him *K. S. Jayarama Ayyar*) for respondent.—The reference assumes that the widow had surrendered all her interest in all the properties to the nearest reversioner. The Privy Council have laid down in the case of *Rangasamy Goundan* v. *Nachiappa Goundan* (1), (1) that the surrender should be of the entire estate and (2) that the surrender should be a bona fide one and not a device to divide the estate between the widow and the reversioner. The provision for maintenance and residence for the widow who surrenders her estate as such is not a reservation of the right of inheritance as a widow. The heir who takes it on her surrender is bound to maintain her as well as other persons who had similar rights in

(1) (1919) 42 Mad., 523 (P.C.). (2) (1907) I.L.R., 30 Mad., 145.
(3) (1916) 31 M.L.J., 406 (420). (4) (1910) I.L.R., 34 Bom., 165.
(5) (1892) I.L.R., 19 Calc., 236 (P.C.). (6) (1913) I.L.R., 40 Calc., 721.
(7) (1907) I.L.R., 29 All., 70 at p. 75.

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the estate, e.g., the daughter living in the family, mother-in-law or widows of other co-parceners who had predeceased her. The surrender only restores the estate to the normal rule of inheritance by males. See Ghose's Hindu Law, Volume II, page 891, sections 56 to 61; Narada, Sacred Books of the East, Volume XXXIV, chapter XIII, page 195. The case of *S. Jadamoney Dabee* v. *S. Mookerjee*(1) also reported in 3 Indian Decisions (old series), page 72, sets out the true theory as to 'surrender'. This case is referred to in later cases, e.g., in *Lalla Kundee Lal* v. *Lalla Kales Pershad*(2). Whether it is joint family property taken by survivorship or the widow surrenders or she is disqualified and the next heir takes the estate, in all these cases, the widow is entitled to maintenance. *Debi Prosad Chowdhury* v. *Golap Bhagat*(3) discusses the nature of surrender and refers to the case of *S. Jadamoney Dabee* v. *S. Mookerjee*(1). There is nothing inconsistent with the doctrine of surrender in stipulating to give maintenance and making provision for residence to the widow who surrenders. Reference was made to *Raghunatha Singh* v. *Kura Kumari*(4), *Kareti Brahmanai Kulu* v. *Kareti Mahalakshmi*(5), *Ramasami Aiyangar* v. *Govinda Ayyar*(6), *Ramchandra Thevar* v. *Nagamuthu Nachiar*(7) and *Gopalakrishnayya* v. *Gangayya*(8).

A. Krishnaswami Ayyar in reply.—The old rule was that a widow could inherit all property in the place of her husband; it is not correct to say that women could not inherit in the full sense of the term. No analogy can be drawn from the rule as to maintenance in the case of a person taking by survivorship and applied to the case of a person taking the estate by surrender from a widow; suppose the surrender was to a divided collateral or daughter's son, the analogy will not hold good.

OPINION.

ABDUR RAHIM, OFFG. C.J.

ABDUR RAHIM, OFFG. C J.—The answer to the question referred depends mainly upon the interpretation of the scope and effect of a recent ruling of the Judicial Committee in *Rangasami*

(1) (1856) 1 Boulnois, 120 at p. 134.
(2) (1874) 22 W.R., 293.
(3) (1913) I.L.R., 40 Calc., 721 at p. 770.
(4) (1917) 38 I.C., 167.
(5) (1913) M.W.N., 433.
(6) (1917) 38 In Ca. 1.
(7) Appeal No. 162 of 1916, (unreported.)
(8) Appeal No. 373 of 1915 (unreported).

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Goundan v. *Nachiappa Goundan*(1), where the law on the subject of surrender and alienation by a Hindu widow has been authoritatively considered. They begin by pointing out that these two classes of transactions are different in their nature and legal incidents. Surrender is described as

"an effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date."

In another place it is stated to be a withdrawal of the widow's life estate so that the whole estate should get vested at once in the grantee, thus approving of the proposition as stated in *Behari Lal* v. *Madho Lal Ahir Gayawal*(2) by Lord MORRIS that

"according to Hindu Law the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate."

Then their Lordships sum up the law in these words:

"An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, not a device to divide the estate with the reversioner."

It may be observed here that their Lordships speak of surrender as an alienation and in another place as a gift. But that in my opinion cannot be taken to obscure in any way the distinction between a surrender as defined above and an alienation of the whole or part of the estate on the ground of necessity. So far as this judgment of the Privy Council goes, I find no warrant for holding that, where a transaction is by way of surrender of the widow's whole interest in the whole estate in favour of the nearest reversioner and such surrender is bona fide and not a mere device to divide the estate with the reversioner, it would not be valid in law, simply because the deed of surrender makes a bona fide provision for a reasonable maintenance and residence for the widow or widows making the surrender. On the other hand, it seems to me that their Lordships intended to lay down that, if the conditions mentioned by them were satisfied,

(1) (1919) I.L.R., 42 Mad., 523 (P.C.). (2) (1891) I.L.R., 19 Calc., 236 (P.C.).

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that was all that was required for a valid surrender and any provision or benefit reserved for the widow not inconsistent with those conditions would not affect the legality of the transaction. Mr. A. Krishnaswami Ayyar contends that the description of surrender as "an effacement of the widow which in other circumstances is effected by actual death or by civil death opening the estate of the deceased husband to his next heirs at that date," shows that any provision for maintenance and residence in favour of the widow surrendering her life estate is inconsistent with a proper surrender. But I fail to appreciate this argument. If the Privy Council had intended any such result I think they would have made it clear that reservation of any sort of benefit or provision for maintenance would vitiate a surrender. On the other hand, all that they were prepared to lay down was that it must not be a device to divide the estate with the reversioner. The transaction which has given rise to this reference, it is conceded, is not such a device, but a bona fide surrender. All that was argued was that the stipulation by the nearest reversioner in whose favour the surrender is made (which was a payment of a lump sum of Rs. 500 to one widow for her maintenance and an undertaking to maintain the other widow and to provide for their residence), though perfectly reasonable, was in itself sufficient to vitiate the surrender. As I said, this contention is not borne out by the judgment of the Privy Council. It is obvious that if it were to be accepted, if the law were that the widow surrendering her estate cannot stipulate for her maintenance, that would virtually be prohibiting surrenders in most of the cases, even though the widow be actuated by a bona fide desire to divest herself of the entire estate which she inherited from her husband in favour of the next heir.

Mr. Krishnaswami Ayyar was not able to produce a single authority in support of his proposition. On the other hand, as far back as 1856 Sir JAMES COLVILE, then Chief Justice of the Calcutta High Court, laid down that a relinquishment of the inheritance by a widow in consideration of maintenance in favour of the next heir was valid, see *S. Jadamoney Dabee* v. *S. Mookerjee*(1). It was not, so far as one can gather, for the first time that the law was so laid down in 1856. On the other hand, it would appear

(1) (1856) 1 Boulnois, 120, at p. 134.

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from *Lukhiprea Dassee* v. *Sheosendri Dassee*(1), referred to by Sir JAMES COLVILLE, that that was the Hindu law as understood for a long time. In *Lalla Kundee Lall* v. *Lalla Kalee Pershad*(2) a surrender was upheld as a family arrangement in spite of a stipulation for maintenance. In *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy*(3) the previous authorities appear to have been fully discussed including the case in *S. Jadamoney Dabee* v. *S. Mookerjee*(4). I find no suggestion in the judgment of GARTH, C.J., or of MITTER, J., throwing doubt on what was laid down by COLVILLE, C.J., nor is there any doubt cast on that proposition in the elaborate judgments of JENKINS, C.J., and MOOKERJEE J., in *Debi Prosad Chowdhury* v. *Golap Bhagat*(5) referred to with approval by the Privy Council in *Rangasami Goundan* v. *Nachiappa Goundan*(6). In this Court in *Rangappa Naik* v. *Kamti Naick*(7) it was laid down that a provision for maintenance does not vitiate a surrender and though their Lordships of the Privy Council in the recent case have said that they did not approve of "a good deal of what was said" in that case, I cannot assume that they meant to hold that the High Court's ruling was bad on this particular point. That was also how the law was enunciated in *Chinnaswami Pillai* v. *Appaswami Pillai*(8), although the learned Judges following the Full Bench of the High Court in *Nachiappa Goundan* v. *Rangasami Goundan*(9) [which was the case in appeal to the Privy Council in *Rangasami Goundan* v. *Nachiappa Goundan*(6)], laid down certain other propositions which were disapproved by the Privy Council. I may also mention that sitting with OLDFIELD, J., I had recently to consider the effect of the recent Privy Council ruling on this point and on the matter being more fully discussed on this occasion I am strengthened in my view that there is nothing in the judgment of the Privy Council to militate against what appears to me to have been always understood as the law, namely that a reasonable stipulation for maintenance and residence does not affect the validity of a surrender provided it is a bona fide surrender of the entire interest of the widow in the whole estate and is not a mere device to divide the estate

(1) 5 S.D.A., 547.
(2) (1874) 22 W.R., 307.
(3) (1884) I.L.R., 10 Calc., 1102.
(4) (1856) 1 Boulnois, 120, at p. 134.
(5) (1913) I.L.R., 40 Calc., 721.
(6) (1919) I.L.R., 42 Mad., 523.
(7) (1908) I.L.R., 31 Mad., 366.
(8) (1919) I.L.R., 42 Mad., 25.
(9) (1915) 28 M.L.J., 1.

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with the next reversioner. That is how I would answer the question under reference.

Since I had prepared the above opinion the judgment of the Privy Council in the consolidated appeals from Bengal Nos. 100 of 1916, etc., delivered by Viscount CAVE on 30th June 1919(1) (not yet reported in the Law Reports) has come to my notice. It certainly confirms the view of law I have expressed. In that case, in the course of certain proceedings under the Succession Certificate Act instituted by the adopted son of one of three Hindu brothers alleging that they were joint in estate, the widow of one of the brothers also claimed his estate alleging that they had divided and an agreement was arrived at by which, in consideration of certain property being allotted to her for maintenance during her life, she gave up all her rights in favour of the adopted son. Their Lordships held that the agreement which was subsequently acted upon amounted to an effective surrender. It does not appear that the surrender was even attacked on the ground that it was made in consideration of the widow being given a certain portion of the estate for her maintenance during her life; in any case the Privy Council had no hesitation in upholding the surrender in spite of such a provision. They say:

"In the present case there was indeed no formal surrender by the widow of her estate; but there was an express agreement, binding upon her, that for considerations which appeared to her sufficient she would abandon the claim which at the time she had a good right to make and would have no right, claim or demand in respect of the estate of her late husband. It is true that the documents were drawn up on the footing not of a surrender of an acknowledged right but of an admission that the right did not exist; but in substance, and disregarding the form, there was a complete self-effacement by the widow which precluded her from asserting any further claim to the estate. The question is no doubt one of difficulty, but upon the whole their Lordships have come to the conclusion that the execution of the two *ekrarnamas*, followed by the acceptance for thirty years of maintenance under the terms of those documents, amounted to a complete relinquishment by Anandi Koer of her estate in favour of Mahabir, and accordingly that the title of Mahabir's representatives is established and the plaintiff's action should have been dismissed on this ground."

(1) (1919) 37 M.L.J., 513 (P.C.).

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OLDFIELD, J.

OLDFIELD, J.—The reservation in favour of the widow of a right to maintenance is a common term in surrenders; and it is not necessary to explain or justify it, as proposed by Mr. K. Srinivasa Ayyangar for respondent, with reference to any fiction of a revival, when her separate property passes from her, of the right she would have enjoyed if no such property had ever been in question and the family had been joint. It is a sufficient reason for allowing the validity of a surrender, notwithstanding the inclusion of a provision for the widow's maintenance that she cannot be supposed to make a surrender so comprehensive as to deprive herself entirely of the means of subsistence. Yet that, except in the rare cases in which she had or has means of earning separate income, would be entailed by the acceptance of appellant's argument. No doubt the widow has been described in some authorities as operating by the surrender her physical or civil death. But those, as SADASIVA AYYAR, J., held in *Chinnaswami Pillai* v. *Appaswami Pillai*(1), are

"loose expressions, which can mean only that the reversioner succeeds in such a case as if the widow died at the moment of surrender"

and should not be pressed as embodying the law in all their implications.

As the judgment just delivered shows there is very little authority dealing directly with the matter; but, so far as it goes, it is in respondent's favour. We have moreover been shown no decision, in which the inclusion of a bona fide provision for maintenance was regarded as invalidating a surrender; and the negative inference is strong, since, if the contrary view had been tenable, it would have afforded a clear and immediate ground of decision in the majority of the cases in the reports. The contention that a surrender cannot be valid, unless it is literally of the whole estate and reserves no benefit to the widow whatever, has been supported by reference to the latest comprehensive exposition of the law on the subject, the judgment of the Judicial Committee in *Rangasami Goundan* v. *Nachiappa Goundan*(2); and certainly according to it the surrender must be of the whole estate. But it is material that

(1) (1919) I.L.R., 42 Mad., 25. (2) (1919) I.L.R., 42 Mad., 523 (P.C.).

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in that case the widow retained or received more than a mere right to maintenance, since she was also allowed possession of certain *mittah* lands; and, as the latter fact was a sufficient foundation for the conclusion against the validity of the transaction as a surrender, there is no reason for assuming that the effect of the stipulation for maintenance was considered or influenced the decision. It is indeed clear that the widow's acceptance of some benefit was not regarded as inconsistent with her effacement or the total withdrawal of her estate, which was held essential to the validity of her surrender, since reference was made in the course of the judgment to the necessity for the surrender being "bona fide and not a mere device to divide the estate with the reversioner," requirements which would be meaningless, if the widow's right to receive anything were denied *in toto*. And this interpretation is confirmed by the fact that in a very recent decision, received since the argument on the present reference, *Mussammat Chagwat Koer* v. *Dhamukdhari Prasad Singh*(1), the Judicial Committee proceeding statedly in conformity with *Rangasami Goundan* v. *Nachiappa Goundan*(2) and reiterating the necessity for a bona fide and total renunciation by the widow of her right, held that such a renunciation was effected by a document, under which she was to hold certain land for life for her maintenance, that being the sole stipulation for her benefit. The surrender, which the law recognizes, is, as I understand these decisions and as the language used in the later decision suggests, a surrender of the estate held by the widow as such; and it will not be the less total owing to a reservation in her favour of a right of maintenance, to which she was not previously entitled as widow, even if that right be secured on part of the property comprised in her widow's estate.

It is conceded that the provision for residence must stand or fall with that for maintenance. I concur with the learned Chief Justice in answering the question referred in the negative.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The question for decision may be examined from three standpoints. Firstly with reference to the recent decision of the Judicial Committee in *Rangasami Goundan*

(1) (1919) 37 M.L.J., 513 (P.C.). (2) (1919) I.L.R., 42 Mad., 523 (P.C.).

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v. *Nachiappa Goundan*(1); secondly with reference to the theory of surrender apart from decided cases; and thirdly with reference to decided cases.

Mr. Krishnaswami Ayyar's attempt was, in the main, directed to showing that the pronouncement of the Judicial Committee leaves Indian Courts no option in the matter. The judgment has been ably commented upon. The Board had before them a case which was not essentially one of surrender. They had mainly to deal with the proposition whether the consent of a reversioner to an alienation was conclusive proof of its binding character. Incidentally they referred to the distinction between surrender and alienation. In dealing with these matters they roughly classified them under three heads—(*a*) surrender proper, (*b*) indirect surrender and (*c*) alienation. As regards alienation they held that the consent of the immediate reversioner was only presumptive proof of its validity. In this connexion they point out that the principle is an offshoot of the theory of surrender which alone is referred to by the Smrithi writers. As regards surrender itself, they say:

"The surrender must be a bona fide surrender, not a device to divide the estate with the reversioner."

As regards indirect surrender they seem inclined to hold that where the widow in possession alienates to a stranger and the consideration wholly passes into the hands of the immediate reversioner the transaction may be regarded as one of surrender.

The learned vakil for the appellant relied upon certain expressions in the judgment, for the broad proposition that there should be no element of *quid pro quo* in effecting the surrender. The expression "civil death" and "effacement" must be taken to have been used figuratively *qua* the estate surrendered. I am clear that it was not the intention of Lord DUNEDIN that these words should be understood as suggested in this Court. Reading the whole judgment it is apparent that the noble Lord thought that to make a surrender effectual it must comply with the following requirements:—(1) it must be to the nearest reversioner; (2) there must be no reservation; and (3) it should be done bona fide and not as a device to effect a bargain between the widow and the reversioner. Mr. Krishnaswami Ayyar wanted to import a fourth condition, namely entire absence of consideration.

(1) (1919) I.L.R., 42 Mad., 523 (P.C.).

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I do not think there is anything in the judgment to support this suggestion. As I said in the order of Reference, and suggested at the course of the hearing, a provision for maintenance does not in the least affect the spiritual character of the surrender. The commonest instance of a bona fide surrender is where a religiously inclined widow seeks relief from the worries of temporal management of her estate and retires to a place of pilgrimage like Benares; she would then surrender the whole of her property to the next reversioner. But she will have to live even in Benares. Any provision made for her maintenance there would not, in the least, derogate from the completeness of the surrender. Therefore, in my opinion, if a transaction is *ex facie*, in substance, and in intention, a surrender which reserves no portion of the property to the widow, the fact that the surrenderee agreed to provide for the maintenance of the surrenderer should not vitiate the transaction.

Since this case was argued the judgment of the Judicial Committee in Appeal No. 100 of 1916 from the Calcutta High Court has been circulated to us. That decision makes it clear that a provision for maintenance would not affect the validity of a surrender. In the judgment of the Board the passage quoted by the learned Chief Justice makes it clear that, if the provision for maintenance is bona fide and reasonable, the transaction will be upheld.

An examination of the texts on which the theory of surrender has been built leads to the same conclusion. Mr. K. Srinivasa Ayyangar in his very interesting argument drew attention to the fact that, excepting Yagnavalkya and Vishnu, none of the Smrithi writers recognized the right of a Hindu widow to a share in the joint family property. The two Smrithi writers apparently gave expression to the prevailing sentiment at the time they wrote. When the texts were commented upon, two theories were propounded. Vygnaneswara held that the texts should be confined to awarding property only where the husband had become divided from the rest of the family. His view was that the theory of survivorship should not be prejudiced by granting a share to the widow. Jeemuthavahana did not agree with this interpretation. He held that the share should be allotted whether the family was divided or undivided. At the same time he gave expression to a sentiment which has since

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assumed large proportions. The unpretentious words in Chapter 11, section 1, paragraph 59:—

"If her right ceases or never takes effect the residue of the estate is taken in the same manner as they (reversioners) would have succeeded if the widow's right had never taken effect"

have led to all the trouble. As I understand the position, both Vygnaneswara and Jeemuthavahana were trying to placate their opinion against the innovation by Yagnavalkya and Vishnu. Both of them wanted to put limitations upon the texts. Jeemuthavahana apparently thought that by enabling the widow to give up the estate he would expound the text in a manner not very unacceptable to persons who have been accustomed to the belief that women have no share in the joint family property. However that may be, there is no doubt that the prevalent idea was that by surrender the widow would gain spiritual benefit, and that for this end she should walk out of the estate as if the property still belonged to the undivided family and as if her husband had never become divided from the rest. As SUBRAHMANYA AYYAR, J., pointed out in *Marudamuthu Nadan* v. *Srinivasa Pillai*(1), the principle enunciated by Jeemuthavahana has been applied to cases governed by Mitakshara The conclusion, I come to, is that the theory that by the operation of surrender the widow secures for herself at least as much right as she would have had, had she never taken the property by inheritance, is inferable from the language of Jeemuthavahana. It follows from this that any provision for maintenance would be perfectly legitimate and would not offend the doctrine of surrender. This is the view which underlies the decision of the Chief Justice COLVILE in *S. Jadamoney Dabee* v. *S. Mookerjee*(2), although Mr. Justice JACKSON was of a different opinion. COLVILE, C.J., refers to *Lukhiprea Dassee* v. *Sheosendi Dassee*(3), 5 Sudder Dewanny Adaulut, 457, in support of his view, and this undoubtedly must have been in the mind of Mr. Justice MITTER when he says in *Gunga Pershad Kur* v. *Shumbhoonath Burmun*(4) that relinquishment brings in the normal rule of succession.

Lastly, turning to decided cases, it seems to me that the weight of authority is against the contention of Mr. Krishnaswami Ayyar. In *Marudamuthu Nadan* v. *Srinivasa Pillai*(1)

(1) (1898) I.L.R., 21 Mad., 128.
(2) (1856) 1 Boulnois, 120.
(3) 5 S.D.A., 457.
(4) (1874) 22 W.R., 393.

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it was held that the surrender must be absolute and complete. *Sriramulu Naidu* v. *Andalammal*(1), which was very much relied on, was really a case of a device by the widow to get advantages for herself and for her dependants in the guise of a surrender. The observations in *Mulugu Kotayya* v. *Muligonda Chandramowli Sastri*(2), that there should be no benefit for the widow except possibly for maintenance is purely obiter and was not a considered pronouncement. On the other hand Mr. Justice SADASIVA AYYAR in *Chinnaswami Pillai* v. *Appaswami Pillai*(3) lays down explicitly that an obligation to maintain does not vitiate a surrender. One of his reasons for the conclusion is that the surrenderor would have otherwise a right to be maintained. This statement is in accordance with the decision in *Raghunath Singh* v. *Kura Kumari*(4); but I think there is force in the contention of the learned vakil for the appellant that the surrenderor can have no legal claim against the surrenderee at least in cases of surrender of her husband's self-acquired properties. But this criticism of one of the reasons for the opinion does not affect the main conclusion. In *Challa Subbiah Sastri* v. *Puluri Pattabhiramayya*(5) an absolute surrender which was followed by a reconveyance was held good. In *Ramachandra Thevar* v. *Nagamuthu Nachiar*(6) the learned Officiating Chief Justice has put the theory of surrender on the ground that the widow by walking out of the estate is practically restoring the property to the joint family. In *Pilu* v. *Babaji*(7) there was a reservation of the estate which was held to vitiate the surrender. In *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*(8), although the case was one of alienation and observations relating thereto may be open to exception, having regard to the recent pronouncement of the Judicial Committee, GARTH, C.J., referred to surrender as if all that is necessary is that there should be completeness and bona fides. In *Behari Lal* v. *Madho Lal Ahir Gayawal*(9), there was no conveyance of estate at all but only the right of management. It was held by the Judicial Committee in that case that the transaction cannot be supported as a surrender. The observations of MOOKERJEE, J., in *Devi*

(1) (1907) I.L.R., 30 Mad., 145.
(2) (1916) 31 M.L.J., 412.
(3) (1919) I.L.R., 42 Mad., 25.
(4) (1917) 38 I.C., 167.
(5) (1908) I.L.R., 31 Mad., 446.
(6) Appeal No. 162 of 1916.
(7) (1910) I.L.R., 34 Bom., 165.
(8) (1884) I.L.R., 10 Calc., 1102.
(9) (1892) I.L.R., 19 Calc., 236.

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Prosad Chowdury v. *Golap Bhaghat*(1), are really in favour of the view that a bona fide reservation for maintenance would not affect the validity of a surrender. Therefore the authorities do not lend support to the contention advanced by the learned vakil for the appellant. I agree in the answer given by the learned Officiating Chief Justice.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Bakewell and Mr. Justice Phillips.

IMBICHI BEEVI UMMA (EIGHTH DEFENDANT), APPELLANT,

v.

ERANHIPPURATH RAMAN NAIR AND FOUR OTHERS (PLAINTIFFS AND DEFENDANTS Nos. 12 TO 15), RESPONDENTS.*

1919, February, 19 and 24, March, 6.

Malabar Law—Tarwad—Tavazhi—Branches of a tavazhi, whether can be established under the law—Gift by a husband to his wife and her children by him—Donees, whether exclusively entitled as a branch tavazhi—Rights of her children by another husband—Rights of tarwad to such properties—Adverse possession by branch tavazhi against tarwad.

Under the Malabar law, a separate branch of a tavazhi can be established consisting of a woman and her children by one husband to the exclusion of her children by another husband.

Dictum of SADASIVA AYYAR, J., *in Chakkra Kannan* v. *Kunhi Pokker*, (1916) I.L.R., 39 Mad., 317, followed.

Where a husband gives property to his wife and his children, there is no presumption that he intended to benefit her children by a former or subsequent husband, in the absence of any expression of such intention.

Where the suit properties were acquired in the name of a woman and her son by a second husband out of the income of properties given by the latter to her and her children by him, and it appeared that they had dealt with the properties for forty years exclusively although there were members of the tarwad senior to them, and a suit was instituted by the karnavan of the whole tarwad to redeem the properties as belonging to the entire tarwad.

Held, that the properties belonged in law to the branch of the tavazhi of the woman and her children by her second husband;

and that the branch tavazhi had also acquired title to the suit properties by adverse possession against the tarwad of which the plaintiff was the present karnavan.

(1) (1913) I.L.R., 40 Calc., 721.

* Second Appeal No. 1034 of 1918.

IMBICHI BEEVI UMMA v. RAMAN NAIR.

SECOND APPEAL against the decree of K. A. KANNAN, the Temporary Subordinate Judge of Palghat, at Calicut, in A.S. No. 333 of 1917, preferred against the decree of M. NARASINGA RAO, the District Munsif of Parappanangadi, in Original Suit No. 594 of 1915.

The material facts and contentions appear from the judgment.

O. V. Anantakrishna Ayyar for the appellant.

K. P. M. Menon for the respondents.

The JUDGMENT of the Court was delivered by

PHILLIPS, J.

PHILLIPS, J.—Plaintiff sues as karnavan of Eranhippurath tarwad to recover the plaint properties from the eighth defendant. The plaint property was acquired in the names of Goli Amma and Kelu Nair who was her eldest son by her second husband. Goli Amma married twice and had some children by her first husband Rarappan Nair who divorced her. She afterwards married Raman Nair by whom she had a son Kelu Nair and other children.

The real question for decision is whether the plaint property belonged to Goli Amma and all her children by both the husbands or whether it belonged to her and her children by the second husband alone. The main contention for the respondents is that there could be no separate tavazhi consisting of the children by one husband alone. The facts as found are as follows:—The plaint property was acquired in the names of Goli Amma and Kelu Nair, the son of Raman Nair. The learned Subordinate Judge does not believe plaintiff's evidence that the property was given to Goli Amma by her first husband Rarappan Nair, and he also finds that it is not proved that it was given to her and her children by her second husband Raman Nair. It is however admitted that Raman Nair did give certain properties to his wife and his children by her as is evidenced by exhibits XVI and XVII, but the plaint property is not included in those documents. We therefore see that Goli Amma had some properties which she got from her husband Raman Nair for herself and his children. As it does not appear that she had any other friends, the presumption would be that any additional property which she obtained was acquired out of the proceeds of the property she so held. The Subordinate Judge merely says that Rarappan Nair might have

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given something to Goli Amma. This cannot be treated as a finding; but on the finding, that the plaint property is not proved to have been given by Rarappan Nair, we are thrown back on the presumption that the property was acquired with the funds already in Goli Amma's hands.

There remains the real question for consideration, i.e., whether a separate branch of the tavazhi can be established consisting of a woman and her children by one husband to the exclusion of the children by another husband. When property is given to his family by a father, it is held with all the incidents of tarwad tenure—*Kunhacha Umma* v. *Kutti Mammi Hajee*(1)—and this view is based on the presumed intention of the father to benefit his own children. If, therefore, the second husband gives property to his wife and his own children, it is difficult to presume that he intended also to benefit the children by the former husband or even children by subsequent husband, in the absence of any expression of such intention. No doubt the word tavazhi may be, as suggested by SANKARAN NAYAR, J., derived from tayar (mother) and vazhi (way), and it would naturally include all the descendants of that woman. But even though that is the real meaning of tavazhi, it has been held that branches of a tarwad consisting of persons who have acquired separate property from their father are constituted as tavazhi by virtue of the possession of that property. If, therefore, the property was intended for that man's children alone, there is no reason for adding to the branch, which is to enjoy that property the children by another husband. The very fact that the tavazhis are very frequently called puthravakasam tavazhis leads to the inference that they are not merely descendants of one female but also branches of the family which are benefited by a gift from their father and are thereby constituted as tavazhis. In this view there is no real difficulty in supposing that the tavazhi of a woman could consist of two branches, one branch made up of children by one husband and the other of children by another husband and each branch might own separate properties obtained from their respective fathers. This has been recognized by SADASIVA AYYAR, J., in *Chakkrakannan* v. *Kunni Pokker*(2) and apparently is the view

(1) (1893) I.L.R., 16 Mad., 201 (F.B.).

(2) (1916) I.L.R., 39 Mad., 317, at p. 335 (F.B.).

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taken in Travancore. No doubt SANKARAN NAYAR, J., in the same case at page 324 suggests that children born by another husband would benefit in the gift made by the first husband and he proceeds on the assumption that a tavazhi must consist of a woman and all her children by whomsoever begotten. SRINIVASA AYYANGAR, J., also assumes that a tavazhi must consist of a woman and all her children by the various husbands but he goes on to say that—

"It is certainly difficult to presume an intention in the first husband to grant the property to his wife's children by another husband. Such cases are likely to occur very rarely."

Neither of these learned Judges has considered the possibility of branches within the tavazhi, and as pointed out by SADASIVA AYYAR, J., when there are branches within a tarwad there is really no reason why there should not be similar branches within the tavazhi. If the possibility of that is conceded, then undoubtedly Goli Amma and her children by Raman Nair would constitute a separate branch and we think that that was the effect of the gifts in their favour by Raman Nair. If that is so, plaintiff as the karnavan of the main tarwad would have no interest in these properties although he is a descendant of Goli Amma by Rarappan Nair, and would have no right to interfere with the alienation of the property by members of the branch consisting of the children of Raman Nair.

Apart from this point, there is the question of adverse possession. The plaint property has been dealt with ever since 1875 by the sons of Raman Nair, although at the time these dealings took place there were members of the tarwad senior to them. In fact, at one period, Kanaran Nair, son of Goli Amma by Rarappan Nair, was karnavan of the tarwad when the property was dealt with by the children of the other husband, and also later on Benares Govindan Nair was the karnavan and his claim in respect of other properties of the sub-tavazhi was disallowed in a suit brought by him. No doubt the learned Subordinate Judge has found that there was no adverse possession by this tavazhi. But in coming to this conclusion he has relied upon a proposition for which there is apparently no support on the record, for he says that

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"It is not uncommon in Malabar to take demises in the names of junior members of the tarwad".

This may be correct, but it is not in evidence in this case, and when it is remembered that the demise was taken in the name of a man who was not only a junior member of the main tarwad but might be also the karnavan of a branch, the case bears a somewhat different appearance. The dealing of this property by this tavazhi was to the knowledge of the plaintiff's predecessors and apparently of plaintiff himself and consequently the fact that it has been so dealt with for the last forty years would constitute adverse possession against the tarwad of which plaintiff is now the karnavan.

The appeal must accordingly be allowed and the suit dismissed with eighth defendant's costs throughout.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Bakewell and Mr. Justice Phillips.

PANUGANTI NARASIMHA RAO AND ANOTHER (PLAINTIFFS NOS. 2 AND 3), APPELLANTS,

1919, March 12, 13 and 20.

v.

ZAMINDAR OF TIRUVUR (DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. VIII, r. 6, and O. XX, r. 19—Set-off under the Code, essentials of—Equitable set-off—Principal and agent—Suit by agent to recover money on accounts against principal—Claim of defendant to set-off—Defendant's claim, not barred by limitation at date of suit but barred at date of written statement—Right of defendant to set-off against plaintiff's claim—Right of defendant to get decree for amount found due to him in this suit.

An agent sued his principal on the 17th June 1912 to recover a sum of money that might be found due to him on the taking of accounts of his agency which terminated on the 31st May 1909. The defendant pleaded in his original written statement filed on the 26th February 1913 that no amount was due to the plaintiff but that a sum would be found due to himself on taking accounts and that the suit should be dismissed; he subsequently filed an additional written statement, with the leave of Court praying that a decree might be given to him in this suit for such amount as might be found due to him on the

* Second Appeal No. 813 of 1918.

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accounts. The plaintiff contended that the defendant was not entitled to a set-off or to a decree in this suit as his claim was barred by limitation.

Held, that the set-off claimed by the defendant did not fall within the terms of Order VIII, rule 6, Civil Procedure Code, as it was not for an ascertained sum of money, since the money was not legally recoverable on the date the claim was made, and the written statement did not contain particulars of the debts sought to be set-off.

Held further, that, since the defendant's claim was not barred *at the date of the suit*, he was entitled to plead that there was a sum in the plaintiff's hands which the latter was bound to apply in satisfaction of his demand; but that since a suit could not be brought by the defendant to enforce his claim which was barred at the date of his written statement, he could not get a decree in this suit for the further sum that might be found due to him on the accounts.

Principles of equitable set-off discussed and cases reviewed.

SECOND APPEAL against the decree of K. KRISHNAMA ACHARYA, the Temporary Subordinate Judge of Masulipatam, in Appeal Suit No. 51 of 1917 (Appeal Suit No. 349 of 1915 on the file of the Subordinate Judge of Ellore) preferred against the decree of K. KALYANASWAMI, the District Munsif of Tanuku, in Original Suit No. 363 of 1912.

The material facts appear from the JUDGMENT of BAKEWELL, J.

N. Rama Rao for the appellant.

T. R. Venkatarama Sastri for the respondent.

BAKEWELL, J.

BAKEWELL, J.—The plaint in this case was presented on 17th June 1912 and alleged that the plaintiff was the agent of the defendant and his father for the collection of the kist of a certain village and borrowed monies on their authority, and claimed payment of a specific sum, the balance shown by the statement of account therewith filed, interest thereon, and damages for costs incurred by the plaintiff in a suit filed against him in respect of money borrowed on behalf of the defendant. In his defence, dated 26th February 1913, the defendant denied the authority of the plaintiff to borrow monies and defend suits and otherwise challenged the correctness of plaintiff's accounts and alleged that upon proper accounts being taken a balance would be found due to the defendant in respect of which he was about to take steps against the plaintiff.

On the 24th February 1913 issues were framed as to the correctness of plaintiff's accounts. On the 20th June 1913 the defendant applied for leave to file an additional written statement containing a prayer that a decree might be given in the suit for the amount found due to him on taking the accounts between

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the parties; and by order, dated 24th June, 1913, the defendant was allowed to amend his written statement accordingly.

The learned District Munsif found that the defendant's claim was barred, and that his written statement was not within the terms of Order VIII, rule 6, Civil Procedure Code, but the learned Subordinate Judge held that the suit being for an account, a decree could be passed against the plaintiff in favour of the defendant.

It is clear that the defendant's written statement does not fall within the terms of Order VIII, rule 6, because it does not claim an ascertained sum of money and it does not contain the particulars of the debt. It has been held by this Court that debt means a present obligation to pay a liquidated sum of money—*Sabju Sahib v. Noordin Sahib*(1). As is pointed out in that case, it is not sufficient to constitute a debt that a sum of money may ultimately be recoverable. The claim of both the plaintiff and the defendant is for the balance to be found due on taking an account of the agency transactions, and the allegation contained in paragraph 4 of the defendant's original written statement that the plaintiff was compelled to employ persons to perform defendant's duties and the allegation of plaintiff that he incurred costs in proceedings against which defendant was bound to indemnify him constitute claims for damages for breach of the contract of agency.

It has been argued that under Order XX, rule 19, a set-off is admissible otherwise than under Order VIII, rule 6, and a decree may be given for the defendant. This rule appears to adopt the decisions of this Court that cross demands arising out of the same transaction may be set-off though they do not fall within the strict terms of Order VIII, rule 6, and to allow a decree to be passed for the defendant in such cases, but it does not deal with the question of limitation.

A set-off was originally merely a defence to an action, and it has been held that the right to plead this defence arises when the action is brought, so that it does not become barred subsequently by the statute of limitations, *Walker* v. *Clements*(2).

The right has now become one of attack as well as of defence and the defendant occupies the position of a plaintiff in respect

(1) (1899) I.L.R., 22 Mad., 139. (2) (1850) 15 Q.B., 1043.

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of any balance claimed by him. No decision of this Court has been cited before us that in a suit upon a contract the plaintiff is precluded from setting up the defence of the statute as well as any other defence to the attack of the defendant.

In taking an account of the amount due under a mortgage the mortgagor is entitled to set-off any sums due to him under the mortgage contract whether a suit would lie therefor or not; the mortgagee is a creditor claiming payment of his debt, and the mortgagor's claim is in effect a defence, and his rights under the contract have not been extinguished though he may be precluded by the statute from bringing a suit—*Parasurama Pattar* v. *Venkatachellam Pattar*(1). If the mortgagee, on the other hand, has monies of the mortgagor in his hands, he can, in taking the account in a suit by the mortgagor, appropriate them towards payment of a sum due to him by the mortgagor notwithstanding that a suit would be barred—*Sheo Saran Singh* v. *Mohabir Pershad Shah*(2). This is also a set-off in defence to the plaintiff's claim. In *Chidambara Mudaliar* v. *Krishnaswami Pillai*(3) a trustee was held to be entitled to set up his right to be indemnified out of the trust estate when called upon for an account; he still held the office of trustee and the Court would not remove him from his office and so deprive him of the right to possession of the trust property and of paying himself thereout without providing for payment of the amount found due to him. In cases where the Court is administering a fund, it will have regard to the subsisting rights of the parties, and the fact that any party could not take separate proceedings to enforce this right is immaterial—*Chidambara Mudaliar* v. *Krishnaswami Pillai*(3).

In the case of a suit upon contract it has been held by this Court that the defendant cannot plead an equitable set-off which is barred at the date of suit, because the amount claimed is not legally recoverable *Vyravan Chetty* v. *Srimath Deivasikamani Nataraja Desikar*(4).

I respectfully agree with the observations of my learned brother upon the decisions of the Allahabad High Court which have been cited, and I am of opinion that in pleading an

(1) (1913) 25 M.L.J., 561.
(2) (1905) I.L.R., 32 Cal., 576.
(3) (1915) 28 M. L.J., 285.
(4) ((1916) I.L.R., 39 Mad., 939.

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equitable set-off the procedure of Order VIII, rule 6, of the Code, should be followed.

In the present case, the defendant's right to sue his agent for an account was not barred on the 17th June 1912 when the plaintiff's suit was instituted, but became barred immediately thereafter under article 89 of the Limitation Act, 1908. I am of opinion that when the defendant filed his written statement there was no sum due by the plaintiff to the defendant within the meaning of Order XX, rule 19, because there was no amount then legally recoverable by the defendant from the plaintiff. I think that, since the defendant's claim was not barred at the date of the suit, he was entitled to plead that there was a sum in the plaintiff's hands which the latter was bound under his contract to apply in satisfaction of his demand; but that, since a suit could not be brought by the defendant to enforce his claim, he could not plead that there was a further sum payable to him.

I would allow the appeal and restore the District Munsif's decree with costs here and in the Lower Appellate Court.

PHILLIPS, J.

PHILLIPS, J.—In this case, the plaintiff sues as agent of the defendant to recover the balance of money due to him by the latter and states that, if accounts of receipts and disbursements are looked into, it will be found that money is owing to him. The defendant put in a written statement stating that as a matter of fact nothing was due by him to the plaintiff and asked that the suit should be dismissed. At a later date he put in an additional written statement which was permitted to be filed under Order VIII, rule 6, in which he claimed that a balance was due to him on the accounts and stated that he was prepared to pay the requisite Court-fee if ordered to do so. The defendant's claim being that of principal against agent, it would be governed by article 89 of the Limitation Act and his claim would have been barred on the day after the plaint in this suit was filed as the agency terminated on the 31st May 1909.

The question in this appeal is whether a decree can be given to the defendant for the balance found due to him, notwithstanding the fact that when he put in his claim to set-off that claim would have been barred by limitation. No doubt if the claim could be treated as a set-off under Order VIII, rule 6, the provisions of Order XX, rule 19 (1), would justify

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the decree in defendant's favour. I have, however, no hesitation in stating that this is not a case of set-off under Order VIII, rule 6. In the first place, there is no ascertained sum of money. The amount depends upon the examination of the accounts. Money was not legally recoverable on the date the claim was made, and the written statements do not contain particulars of debts sought to be set-off. This being so, I do not think that the provisions of Order VIII, rule 6, can be applied to this case

The next question is whether it can be treated as an equitable set-off. In the first place, I would point out that there is really no set-off pleaded, for all that the defendant says is, that if the accounts between himself and the plaintiff are looked into, a balance will be found due to him, that is to say, that on the true view of the facts stated in the plaint the decree should be for defendant and not for plaintiff. However, treating it as an equitable set-off, we have to see whether it can be allowed although barred by limitation. In mortgage suits, sums are allowed to be set off in taking accounts of the mortgage even though barred by limitation and this principle is recognized in *Parasurama Pattar* v. *Venkatachalam Pattar*(1), *Sheo Saran Singh* v. *Mohabir Pershad Shah*(2) and *Edward Dalgleish* v. *Ramdin Singh Chowdhury*(3), and it was held in *Chidambara Mudaliar* v. *Krishnaswami Pillai*(4) that a trustee was entitled to have a decree for the amounts due to him from the trust in a suit brought for his removal, although his right to sue for these amounts was barred by limitation. But those cases are cases in which the relationship between the parties still subsisted. In the former cases it was that of a mortgagor mortgagee and in the latter case the trustee was still in possession of trust property. In *Vyravan Chetty* v. *Srimathi Deivasikamani Nataraja Desikar*(5) it was held by the same Bench that decided the case in *Parasurama Pattar* v. *Venkatachalam Pattar*(1) that a lessee could not set up by way of an equitable set-off an unliquidated claim for damages which was barred at the date of the suit. The main difference between that case and the

(1) (1913) 25 M.L.J., 561.
(2) (1905) I.L.R., 32 Calc., 576.
(3) (1909) 14 C.W.N., 170, at p. 173.
(4) (1915) 28 M.L.J., 285, at p. 294.
(5) (1916) I.L.R., 39 Mad., 939.

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present is that the present defendant's claim was not barred at the date of the suit, but became barred on the following day. The question is whether in equity he should be allowed not only to set off an amount equivalent to plaintiff's claim and thus have the suit dismissed, but also to claim a decree for an additional amount. No doubt in *Walker* v. *Clements*(1) it was held that a set-off which was treated as a cause of action must be deemed to date from the cause of action. That case, however, was decided before Courts were empowered to decree claims on set-off, for until 1875 a set-off could only be pleaded as a defence and could not be treated as a substantial claim and the English Courts have always recognized that a claim on a set-off is subject to the law of limitation in the same way as the principal claim—vide *Rawley* v. *Rawley*(2). On principles of equity, therefore, is the defendant entitled to get a decree in this suit? It is not disputed that his claim must be allowed to the extent of plaintiff's claim and the plaintiff's suit dismissed. But the further question, whether he is entitled to a decree for money, has arisen. If his claim is allowed, he will be in the exceptionally fortunate position of putting forward a claim in a Court of law which he claims to have tried at no risk to himself. He has paid no Court-fee on his claim and merely undertakes to pay what is necessary in case he gets a decree. Whereas, if no decree is given, he evades all liability. If the plaintiff had not brought this suit, he certainly could not have prosecuted his claim. It would, therefore, not seem right that he should be allowed to evade the statute of limitation merely because plaintiff has filed a suit against him. No doubt in *Pagi Lal* v. *Maxwell*(3) it was held by OLDFIELD, J., that a claim like the present one should be allowed, but the other learned Judge in that case expressly differed on the ground that although a set-off could be admitted as an equitable protection to the defendant against his being cast in the plaintiff's suit, it could not be allowed in order to obtain a decree in his favour. No authority in this Court has been brought to our notice in which a decree has been given for defendant in a suit brought by plaintiff on accounts, but there is a case in *Parmanand* v. *Jaget Narain*(4), in which such a

(1) (1850) 15 Q.B., 1046.
(2) (1876) 1 Q.B.D., 460, at p. 463.
(3) (1885) I.L.R., 7 All., 284.
(4) (1910) I.L.R., 32 All., 525.

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decree was given for the defendant. The ground on which this decision was based was that a suit for accounts against an agent necessarily involves an undertaking by the plaintiff to pay to the defendant any sum that may be found due to him. This, I think, is taking a somewhat large view of the intention of a plaintiff in such a suit, for it could rarely be his intention to bring a suit in order that a decree might be given against him. On principles of equity, therefore, I think that the defendant's claim to a decree should be disallowed on the ground that such a decree would have the effect of enabling him to evade the law of limitation. In that view I agree in the order proposed.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Napier.

1919, March, 20 and 21, April 2.

PERIYA GOUNDAN (PLAINTIFF), APPELLANT,

v.

KUPPA GOUNDAN (DEFENDANT), RESPONDENT.*

Malicious prosecution—Prosecution by the police—Report made by a person to a village munsif of theft by another—Investigation by police—Prosecution for theft instituted and conducted by police—Acquittal—Suit by accused for damages for malicious prosecution against informant, whether maintainable.

A suit for damages for malicious prosecution is maintainable, by a person who was prosecuted by the police and acquitted, against another who had made the report containing maliciously false information against the former to a village munsif, as the result of which the police after investigation launched and conducted the prosecution, even though the informant was not the prosecutor in the criminal case.

Narasinga Row v. *Muthaya Pillai*, (1903) I.L.R., 26 Mad., 362, dissented from; *Gaya Prasad* v. *Bhagat Singh*, (1908) I.L.R., 30 All., 525 (P.C.), referred to.

SECOND APPEAL against the decree of J. T. GILLESPIE, the District Judge of Salem, in Appeal Suit No. 3 of 1917, preferred against the decree of K. S. KODANDARAMA AYYAR, the Principal District Munsif of Salem, in Original Suit No. 587 of 1915.

* Second Appeal No. 882 of 1918.

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The plaintiff sued to recover damages for malicious prosecution against the defendant who had sent a report to a village munsif, charging the plaintiff and his father with having committed theft of his buffalo, as a result of which report the police made an investigation and instituted and conducted in the Court of the Divisional Magistrate the prosecution of the plaintiff and his father for theft. Both the accused were acquitted of the offence after trial by the magistrate. The plaintiff subsequently instituted the present suit for damages for malicious prosecution against the defendant, alleging that the allegations against him were maliciously false. The defendant pleaded, inter alia, that the suit was not sustainable on the ground that the prosecution was not instituted or conducted by him, but that the police had after full investigation satisfied themselves as to the propriety of instituting the criminal prosecution against the plaintiff, and that the defendant was not in law or in fact the prosecutor in the case so as to be held liable for malicious prosecution. The defendant relied on the ruling in *Narasinga Row* v. *Muthaya Pillai*(1). The District Munsif, who tried the suit, overruled this objection and, having found that the allegations against the plaintiff were maliciously false, awarded damages to the plaintiff. On appeal the District Judge, holding that the suit was not maintainable against the defendant, as he was not the prosecutor in the criminal case against the plaintiff, reversed the decree and dismissed the suit. The plaintiff preferred this Second Appeal.

S. S. Ramachandra Ayyar for the appellant.

C. Srinivasa Ayyangar for the respondent.

The JUDGMENT of the Court was delivered by

AYLING, J.

AYLING, J.—Appellant sued respondent for damages for malicious prosecution. He got a decree for Rs. 100 in the Munsif's Court. The District Judge set it aside on the ground that respondent could not be said to have prosecuted appellant, because he only made a report to the village munsif, as a result of which the police after investigation launched and conducted a prosecution for theft against appellant and his father. The authority relied on is the ruling of this Court in *Narasinga Row* v. *Muthaya Pillai*(1).

(1) (1903) I.L.R., 26 Mad., 362.

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Any person desirous of setting the criminal law in motion against another in respect of an act amounting to a cognizable offence can do so in three ways:—

(1) He can present a complaint to a magistrate having jurisdiction who will thereupon take action under chapter XVII, Criminal Procedure Code.

(2) He may give information to an officer in charge of a police station who will take action under chapter XIV, Criminal Procedure Code.

(3) He may (in the case of all non-bailable and certain other offences) give information to the headman of his village who is bound under section 45, Criminal Procedure Code, to forthwith communicate the information to the nearest magistrate and to the officer in charge of the nearest police station. It then becomes the duty of the police officer to investigate the case as laid down in chapter XIV.

Method (3) in fact only differs from method (2) in that the village headman being the officer presumably most accessible to the person giving information is made the channel of communication to the police officer. It was the method adopted in the present case: and, as the District Judge himself recognizes, the fact that this indirect method of communicating with the police was resorted to makes no difference to the defendant's liability for damages. The contention is that whenever the prosecution in Court is instituted on a police report under section 173, Criminal Procedure Code, the person who furnished the original information to the police whether directly or through the village headman is not responsible for the act of the police and cannot be sued for damages for malicious prosecution.

This certainly seems to me to be the meaning of the learned Judges in *Narasinga Row* v. *Muthaya Pillai*(1), but with all respect I am unable to agree. If it be conceded that a person is liable for damages in respect of a prosecution on the ground that it was instituted on maliciously false information communicated by him to the Court in the shape of a complaint under section 200, Criminal Procedure Code, why should he not be equally liable where he induces the police by maliciously false information to

(1) (1903) I.L.R., 26 Mad., 362.

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send the case to the magistrate under section 170, Criminal Procedure Code? No doubt it is the duty of the police to hold an investigation as laid down in Chapter XIV before sending the case to the magistrate, with a view to verifying as far as possible the truth of the information furnished to them. But a similar duty is cast on the magistrate receiving a complaint; he must examine the complainant on oath (section 200) and if not satisfied of the truth of the complaint he may hold or direct a preliminary inquiry (section 202) and he only takes action against the accused person by the issue of process under section 204, Criminal Procedure Code, if he is of opinion that there is sufficient ground for proceeding. The fact that some officer, whether policeman or magistrate, has to form an opinion on the apparent truth of the informant's information before the prosecution proceeds is no more reason in the one case than in the other for exonerating the informant from liability for what follows. It is in each case his false information out of which the prosecution arises and it makes no difference whether the person led astray in the first instance is the police officer or the magistrate. The police, or as the form usually runs, the King-Emperor, may be the nominal prosecutor; but the person primarily responsible for the prosecution is the person who furnished the false information on which the police act. "Qui facit per alium, facit per se." The true principles on which responsibility for the prosecution should be fixed are laid down by their Lordships of the Privy Council in *Gaya Prasad* v. *Bhagat Singh*(1). They are at pains to make it clear that it is not enough to say (as the learned District Judge has in effect said here) that the prosecution was instituted and conducted by the police. The whole circumstances of the case must be looked to.

It is true that their Lordships in their judgment referred to the judgment of this Court in *Narasinga Row* v. *Muthaya Pillai*(2) and add:

"The principle here laid down is sound enough if properly understood and its application to the particular case was no doubt justified; but in the opinion of their Lordships it is not of universal application."

(1) (1908) I.L.R., 30 All., 525 (P.C.).
(2) (1903) I.L.R., 26 Mad., 362.

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I cannot understand this as meaning that their Lordships considered the facts of that case and endorsed this Court's decision on them as correct. To do so would, as it seems to me and if I understand the Court's decision aright, run counter to all the rest of their Lordships' judgment. The language suggests to me that they deemed it unnecessary to consider the correctness of the decision in that particular case; rather, they wished to point out that while it might be correct it was based on a principle which was not to be universally applied. If, as I presume, they had only the report in the Indian Law Reports series before them, they may well have been misled. The latter is very incomplete and contains nothing to suggest that any of the Courts which dealt with the case found the prosecution to be as a fact malicious. It recites that the District Munsif found that it was not, but it fails to state, what we have ascertained from the original record, that the Sub-Judge who was the final Judge of fact found,

"That prosecution of the plaintiff by the first defendant was malicious and without reasonable and probable cause."

With all respect I do not think their Lordships realized that the Bench of this Court had in effect held that even if the information to the police was maliciously false the plaintiff's suit for damages could not succeed simply because the case having been taken up, on a police report [section 190 (1) (*b*), Criminal Procedure Code], the police and not defendant must be regarded as prosecutor.

From such a proposition which is clearly contrary to the views expressed in the rest of their Lordships' judgment I must respectfully dissent.

It is not inappropriate in this connexion to draw attention to the view taken by this Court as to the applicability of section 211, Indian Penal Code, to cases such as the present one. The matter is fully discussed by a Full Bench in the *Sessions Judge of Tinnevelly Division* v. *Sivan Chetty*(1), and according to the opinion of the majority, the action of defendant in this case, provided the information given by him to the village headman was maliciously false, would render him liable to prosecution for an offence under section 211, Indian Penal Code. It would be a curiou

(1) (1909) I.L.R., 32 Mad., 258.

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anomaly if an action for damages against him could not be sustained on the same facts.

I would set aside the decree of the District Judge and direct him to restore the appeal to file and dispose of it in the light of the above remarks. Costs in this Court to be costs in the cause.

K.R.

APPELLATE CRIMINAL—SPECIAL BENCH.

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

P. VARADARAJULU NAIDU (ACCUSED), APPELLANT,

v.

KING-EMPEROR.*

1919, April, 2, 3 and 4.

Criminal Procedure Code (Act V of 1898), ss. 196 and 428—Prosecution for offence under section 124-A, Indian Penal Code—Sanction by whom to be given—Local Government—Sanction by one Member of Government alone, whether sufficient—Sanction after complaint, whether valid—Sanction by telegram—Proof of sanction—Telegram purporting to be sent by Government—Presumption as to sender—Evidence Act (Indian), sec. 88—Objection, overruled by Magistrate—Conviction—Appeal—Additional evidence on appeal as to proof of sanction, if can be permitted—Policy in granting sanction under section 196, Criminal Procedure Code.

Sanction, given *after the filing* of the complaint, does not fulfil the requirements of section 196, Criminal Procedure Code.

Barindra Kumar Ghose v. *King-Emperor*, (1910) I.L.R., 37 Calc., 467, followed.

Sanction granted under section 196 of the Code must, in order to satisfy the section, have been the act of the Local Government and not of a single Member of such Government.

Section 88 of the Evidence Act forbids the raising of any presumption as to the person by whom a telegram is sent, and the Act does not contain any special provision as to telegrams purporting to emanate from Government.

Where therefore a telegram containing a sanction to prosecute a person under section 124-A, Indian Penal Code, purported to be despatched from Ootacamund and to be signed 'Madras' which is the telegraphic name of the Chief Secretary to the Government of Madras, there was no presumption as to the

* Criminal Appeal No. 17 of 1919 and Criminal Miscellaneous Petition No. 143 of 1919.

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person by whom it was sent, and, in the absence of proof, it could not be held that the telegram was sent by the authority of the Madras Government.

The powers given by section 428, Criminal Procedure Code, to an Appellate Court to take additional evidence are perfectly general and are subject only to the condition that the Court should record its reasons.

Where a conviction on a serious charge, such as sedition, if otherwise sustainable, would have to be upset for want of formal proof of sanction, owing to a misconception as to the proper mode of proving it on the part of the prosecution, a misconception which was shared by the trial magistrate,

Held (by WALLIS, C.J., and AYLING, J., SADASIVA AYYAR, J., dissenting) that it was a fit case for the Appellate Court to admit additional evidence to supply the defect in formal proof of the sanction; but on its being elicited in Court that the sanction sought to be proved was not the act of all the members of the Local Government, the Court declined to order fresh evidence to be taken, and set aside the conviction and sentence.

Per SADASIVA AYYAR, J.—Under section 428, Criminal Procedure Code, an Appellate Court should permit additional evidence to be taken only where it feels a reasonable doubt whether on the evidence as it stands the conviction is justified, and not where being convinced that the prosecution fails on the evidence on record, it considers that the negligence of the prosecutor might be excused; the discretion to be exercised under the section is not an arbitrary one and should not be exercised, especially against the accused in a criminal case if the prosecution had ample opportunity to adduce all its evidence, and is similar to the power exercised by an Appellate Court in a civil appeal under Order XLI, rule 27, Civil Procedure Code.

Considerations of public policy involved in granting sanction under section 196, Criminal Procedure Code, in the first instance, or after failure of a prosecution on technical grounds, pointed out by SADASIVA AYYAR, J.

APPEAL against the order of S. V. NARGUNAM, the Subdivisional First-class Magistrate of Madura division, in Calendar Case No. 53 of 1918, and petition praying the High Court will be pleased to pass an order directing the taking of additional evidence in the said Calendar Case No. 53 of 1918 on the file of the Court of the Subdivisional First-class Magistrate of Madura.

The material facts appear from the Judgment.

K. Srinivasa Ayyangar, A. Krishnaswami Ayyar and *K. Balasubrahmanya Ayyar* for the accused.

The Public Prosecutor with him *D. M. Durai Raja* for the Crown.

WALLIS, C.J.

WALLIS, C. J.—In this case the accused appeals from a conviction under section 124-A of the Indian Penal Code, and Mr. K. Srinivasa Ayyangar who appears for him has raised the contention that the conviction is bad for want of legal proof of the sanction required by section 196 of the Criminal Procedure Code in the case of prosecutions under this section.

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The telegram which contains the sanction on which reliance is placed was filed with the complaint, and the defence, having obtained a copy, took several objections to it, which were overruled by the trial Magistrate on the 26th September 1918. On the same day the trial began, and the Public Prosecutor of Madura went into the box as the first prosecution witness, and deposed to receiving a letter marked exhibit A-1 from the District Magistrate, Madura, enclosing a telegram marked exhibit A. The defence objected that the telegram was not proved and it was marked exhibit A for purposes of identification. In October, while the trial was going on, the defence filed a revision petition in the High Court against the Magistrate's order and in ground 6(*a*) alleged the Magistrate ought to have held that there was no proof of the sending of the telegram by the Governor in Council or the Local Government. At that time the Magistrate had only held that the telegram might be marked for purposes of identification. Mr. K. Srinivasa Ayyangar explains that this ground of objection was not pressed before the learned Judges as it was still open to the prosecution to supply the necessary proof. They did not do so. We are told that accused's vakil in his address to the Court at the close of the case again raised this point and that it was argued on both sides, but the Magistrate's judgment does not refer to this. In these circumstances we proceed to deal with it.

The telegram, exhibit A, was as follows:—

Ootacamund, 22-17-15, State 3 to 5.
Clear line, District Madura.

Your letter 20th instant. Under section 196, Criminal Procedure Code, Government authorize Public Prosecutor prefer complaint under section 124-A, Indian Penal Code, against Varadarajulu Nayudu in respect of speech made at Madura on 18th August. Public Prosecutor may act on this authority immediately if after consultation with him you are satisfied that this is desirable. Complaint prepared should be submitted at once to Government for issue of supplemental sanction—Madras.

The word 'Madras' as appears from the Official Telegraphic Guide, and as is matter of general knowledge, is the telegraphic name of the Chief Secretary to the Government of Madras, and it may be taken that the telegram purports to come from the Chief Secretary.

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The witness also filed exhibit A-2 which he subsquently received from the District Magistrate. Exhibit A-2 is in the following terms:—

Extract from G.O. No. 787, Confidential, Public, *dated 30th August 1918.*

Under section 196, Criminal Procedure Code, His Excellency the Governor in Council sanctions the prosecution of P. Varadarajulu Nayudu for an offence under section 124-A, Indian Penal Code, in respect of a speech entitled "The Present Political Situation" delivered at Madura on the 18th August 1918.

* * * *

(True Extract.)

(Sd.) L. DAVIDSON,
Ag. Chief Secretary.

Exhibit A-2 is legal proof under sections 76 to 78 of the Indian Evidence Act that sanction to prosecute the accused was duly given by the Government of Madras on the 30th August 1918, but unfortunately that was after the filing of the complaint, and it has been held in *Barindra Kumar Ghose* v. *Emperor*(1), the authority of which has not been questioned before us, that a sanction given after the filing of the complaint does not fulfil the requirements of section 196 of the Criminal Procedure Code.

We have, therefore, to see whether the alleged sanction of the 22nd of August contained in the telegram, exhibit A, is duly proved. The Evidence Act does not contain any special provisions as to telegrams purporting to emanate from Government, and they are governed like other telegrams by the provisions of section 88 of the Indian Evidence Act, which is as follows:—

"The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission."

We are therefore forbidden by the express provisions of the section to make any presumption as to the person by whom the telegram, exhibit A, was delivered for transmission. That the

(1) (1910) I.L.R., 37 Calc., 467.

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telegram, exhibit A, was despatched from Ootacamund on the 22nd of August 1918 may be considered proved, but we are forbidden to raise any presumption as to the person by whom it was sent; and, therefore, we cannot hold, in the absence of proof, that it was sent by the authority of the Madras Government.

In view of our decision that it was not proved by whom the telegram, exhibit A, was sent the Public Prosecutor applied to the Court to take additional evidence under section 428 of the Criminal Procedure Code which requires an Appellate Court, if it thinks additional evidence to be necessary, to record its reasons and empowers it to take the evidence itself or cause it to be taken. The terms of the present section are perfectly general, and are subject only to the condition that the Court should record its reason, a provision introduced by way of amendment in 1897. As recently observed by Lord READING, L.C.J., in admitting additional evidence for the prosecution under the similar power now possessed by the Court of Criminal Appeal in England, the jurisdiction must always be exercised with great care—*Rex* v. *Robinson*(1)—but I cannot agree with the contention that it is inapplicable in a case of this kind. It would not in my opinion be creditable to the administration of justice or in accordance with modern ideas on the subject that a conviction or a charge such as this, if otherwise sustainable, should be upset owing to a misconception on the part of the prosecution as to the proper mode of proving a statutory requisite not affecting the merits, a misconception which was shared by the trial magistrate. When the Appellate Court has statutory power to prevent such a miscarriage, by directing fresh evidence to be taken on the point, I am unable, with great respect, to agree with the observation of one of the learned Judges in *Jeremiah* v. *Vas*(2) in so far as they question the propriety of taking action under section 428 in such a case to supply a defect in formal proof. The learned Judges before whom the case first came differed in opinion as to the scope of the section and the decision of Mr. Justice BENSON, to whom the case was referred, proceeded entirely on facts peculiar to that case.

But before allowing the prosecution to tender additional evidence in this case we ought, I think, to be satisfied that the

(1) (1917) 2 K.B., 108. (2) (1913) I.L.R., 36 Mad., 457.

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case is one of formal proof only. The sanction communicated in the telegram, exhibit A, must in order to satisfy the section have been the act of the Local Government and not of a single Member of such Government.

We have now elicited in Court that this is not the case for the prosecution and in these circumstances we must decline to order fresh evidence to be taken.

We are therefore constrained to allow the appeal, set aside the conviction and sentence and discharge the accused's bail bond on the ground that the requisite sanction has not been proved. I do so with great reluctance as the point in no way affects the merits of the case but the law leaves us no alternative.

AYLING, J.

AYLING, J.—I agree.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—After we had pronounced our order answering in the negative the question whether there was legal proof that the Governor in Council (that is the Local Government) had sanctioned the complaint (the existence of which sanction was the indispensable foundation on which the validity of the whole prosecution rested), Mr. Osborne made an oral application to us requesting us to exercise our powers as an Appellate Court under section 428, Criminal Procedure Code, to take "additional evidence" in proof of the genuineness of the telegram which had been marked exhibit A by the Magistrate only for the purpose of identification.

Section 428 says (omitting words unnecessary for our purpose):

"The Appellate Court (*a*) if it thinks additional evidence to be necessary, (*b*) shall record its reasons and (*c*) may . . . take such evidence itself."

When the learned Public Prosecutor asked us to exercise our indubitable power under the above section in favour of the prosecution I expected that he would make his application in writing setting forth his reasons, because the law required the Appellate Court to record its own reasons before taking what the legislature evidently considered as the exceptional course of allowing additional evidence to be adduced in appeal. If I remember right it was even suggested to him that even though we heard his oral application he was expected to file a written application in the course of the day. No such written application

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was, however, filed yesterday. The failure on the part of the prosecution to establish by evidence the very foundation of their case, notwithstanding that the existence of that foundation was denied even during the course of the examination of the very first witness for the prosecution (namely, Mr. C. Krishna Nayar) who produced exhibit A on the 26th September 1918; notwithstanding that that alleged foundation was again disputed in October 1918 [see ground 6 (*a*) of the Revision Petition] in the revision case in this Court; and notwithstanding that the defence insisted on that fundamental defect in the prosecution case during the final arguments before the trial Magistrate, this glaring failure is, to say the least, extraordinary. The only explanation given by the learned Public Prosecutor was that the prosecution erroneously thought that there was nothing in the objection (as the want of legal proof of the sanction required by section 196) as it was not argued during the hearing of the revision petition in this Court. I regret to state that this explanation to my mind is unsatisfactory.

Then it was argued that there could be no reasonable doubt from the common sense point of view that exhibit A represented a real sanction given by the Governor in Council, that evidence of a conclusive character to prove its character as a real sanction was and is easily available, that to refuse to allow that evidence to be produced in appeal would lead to the failure of the prosecution on a mere technicality and that because even if the present prosecution fails on this technicality, a new prosecution could and would be launched at once on the undoubtedly genuine sanction, exhibit A-2, or on a new sanction, that it would tend to the convenience of both sides to the saving of expense to both sides and to economy of time of Courts if the additional evidence is allowed to be let in.

As regards the first point, there would have been greater force in it if exhibit A-2 had referred to the existence of a previous sanction like that stated in exhibit A and if the trial Magistrate had not altogether ignored the objection to the want of legal proof of the requisite sanction in his judgment.

As regards the second argument, the tendency of my mind (if I may be permitted to say so) is against allowing mere technicalities to stand in the way of a decision on the merits, if it could be reasonably helped. But in a matter of discretion,

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it has been almost an invariable rule with Courts not to exercise it against the accused, and in favour of the prosecution, unless in exceptional cases or where the merits are clearly against the accused. (For example unsuccessful complainants are very rarely allowed to apply in revision against orders of discharge or acquittal, though our power to interfere cannot be doubted.) As we have not heard the appeal yet on the merits, we cannot at this stage say that on the ground of not allowing a clearly or confessedly guilty man to escape, we should exercise our discretion in favour of the prosecution. In fact, in a case involving the consideration of a very difficult question as to the scope of the obscure explanation to section 124-A it is almost impossible to hold any definite view as to the prima facie guiltiness of the appellant at this stage or whether his guilt is grave enough to justify the view that it is desirable to allow additional evidence in order not to allow an offence of a grave and clear character to go unpunished.

As regards the convenience of all parties and the saving of expense and time to both sides, the appellant's vakil, Mr. A. Krishnaswami Ayyar, refused to see the benefit of the course proposed so far as his client is concerned. Further, it is only if we could be reasonably sure that, on the failure of the present prosecution, the Governor in Council would at once launch a fresh prosecution that the alleged conveniences and savings of time and money would accrue through the cure of the defect in the present prosecution by the reception of additional evidence. There is nothing on the record to show that the Governor in Council may not drop the matter altogether on failure of this prosecution on the technical ground (of want of proof of the alleged sanction of the 22nd August 1918). It has to be remembered that the offence under section 124-A occurring in chapter VI is an offence against the State. Further, the body of the section is supplemented by three explanations, of which the second and third are more in the nature of exceptions than explanations. The question whether a particular passage alleged to offend against the provisions of the body of section 124-A is or is not saved by one or other or both of these explanations 2 and 3 is almost always a contested matter and frequently one of great dubiety. That the gravity of the offence varies according to the time, the place and the circumstances in which the words were

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spoken or written is clear from the convicting Court having the discretion to impose sentences ranging from a mere fine to transportation for life. [See *Queen-Empress* v. *Ramachandra Narayan*(1) as to severe sentences being reserved for violently seditious writings in times of public disturbance.] Liberty of free expression, of the discontents and the misapprobations at the acts and policies of Government with a view to obtain desirable alterations and ameliorations, is a fundamental constitutional right recognized by the British Government. Whether such expression passes the prescribed bounds and becomes a danger to the stability of the State, and whether even when it had passed reasonable limits, it is desirable on grounds of State policy to launch a prosecution are questions which the Governor in Council has deeply and anxiously to consider before sanctioning a prosecution and the like considerations apply in the case of a prosecution once launched.

Hence, such cases are concerned not merely with the guilt or innocence of the accused person and are not therefore governed to the same extent as other cases by the consideration that a presumably guilty party should not be allowed to escape from justice on mere technicalities. As JENKINS, C.J., said in *Barindra Kumar Ghose* v. *Emperor*(2) "the policy of this safeguard" (that is the safeguard of a sanction under section 196 by the highest executive authority, the Governor in Council) is manifest; the maintenance of this control is of the highest importance; and it is beyond the competence of the Local Government to delegate to any other body or person this controlling power and the discretion it implies. The question whether action should be taken under chapter VI is more than a matter of law; considerations of policy arise and these can only be determined by the authorities specially designated in the section.

"It would, I think, be opposed to the true intendment of section 196 for the Local Government to abandon to"

(its legal or other advisers) and I might add, even to the Court:

"The discretion and responsibility that properly belongs to itself; and I should hesitate to take a view of this section that

(1) (1898) I.L.R., 22 Bom., 152, at p. 159 (F.B.).
(2) (1910) I.L.R., 37 Calc., 467, at p. 489.

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might permit the Government to entrust to the zeal of an advocate or of those by whom he may be instructed the determination of the serious questions involved."

I think that the important considerations of policy referred to in the above weighty observations apply not only to the desirability or otherwise of initiating a prosecution under chapter VI but also to the question whether it is desirable to launch a fresh prosecution if the first prosecution fails or is likely to fail on account of technical defects. Such questions are intended by the legislature to be left to the sole determination and discretion of the Governor in Council. We cannot safely assume that the reasons of State policy which led to the issue of exhibit A-2 still continue in the opinion of the Governor in Council; that, therefore, they are sure to launch a fresh prosecution if this fails, and that, therefore, there would be less waste of time if the fundamental defect in this prosecution is allowed to be remedied by additional evidence. The above considerations, in my opinion, distinguish this class of cases to which section 196, Criminal Procedure Code, applies from other similar cases where failure of justice for want of sanction under section 195, Criminal Procedure Code, is prevented by the application of section 537, Criminal Procedure Code. I think that the intention of the legislature to give unfettered discretion to the Governor in Council in the matter of the desirability of creating public excitement by launching prosecutions for offences under chapter VI is likely to be rather furthered by throwing out this case on the record as it stands, leaving it to the Government to fully consider the present conditions and if they consider it still desirable to do so to initiate a fresh case against the appellants, than to act on the learned Public Prosecutor's application to take additional evidence in this case itself.

Even assuming that the above distinction is not sound, is it desirable to set up the precedent of permitting an Appellate Court to take additional evidence not because the Appellate Court feels a reasonable doubt whether on the evidence, as it stands, the conviction is justified but because, after being convinced that the prosecution fails on the evidence on record, it considers that the negligence of the prosecution might be excused? I do not deny the power of the Appellate Court to do so under section 428, Criminal Procedure Code, but I am clearly

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of opinion that it should be exercised against the accused only in very exceptional cases. Sitting with NAPIER, J., to try a criminal appeal recently, I felt a doubt whether the medical evidence of a Subordinate Medical officer was sufficient to arrive at the conclusion that the injuries to rib bones found on a buried and disinterred corpse had been caused by ante-mortem violence. We had therefore the additional evidence of a higher Medical officer taken who supported the evidence of his subordinate, and we then arrived at a decision satisfactory to both our minds and confirmed the conviction for murder. But the present is not a case where there is evidence which, if reliable, proves a relevant fact but the Appellate Court feels a doubt on the point and thinks that additional evidence might throw fresh light which would enable it to arrive at a definite and satisfactory conclusion. In *Empress of India* v. *Fatch*(1) Mr. Justice MAHMOOD says

"When . . . that Court" (Sessions Court) "takes all the evidence produced by the prosecution and that evidence fails to sustain the charge, this Court (that is the High Court) will not except in very exceptional circumstances direct that additional evidence should be taken. The powers conferred by section 282, Criminal Procedure Code (of 1872), are not in my opinion intended to be exercised in cases like the present in which the prosecution having had ample opportunities to produce evidence have done so and that entire evidence falls short of sustaining the charge."

In *Jeremiah* v. *Vas*(2) SUNDARA AYYAR, J., says at page 467

"At any rate, it (section 428) does not appear to be applicable where the prosecution having had ample opportunities to produce evidence has failed to do so."

When that case went before BENSON, J., owing to difference of opinion between SUNDARA AYYAR and PHILLIPS, JJ., that learned Judge did not dissent from the above enunciation of the law but on "the affidavit of the complainant's counsel in the Magistrate's Court" and "the report of the Magistrate" held it to be clearly established—

"That the prosecution was prepared to adduce evidence of the publication of the libel, but that when counsel proceeded to adduce his evidence, the Magistrate intervened and stated that it was unnecessary."

(1) (1883) I.L.R., 5 All., 217. (2) (1913) I.L.R., 36 Mad., 457.

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Thus BENSON, J., differed from SUNDARA AYYAR, J., on the question whether the prosecution had "had ample opportunities of adducing evidence" "and yet had failed to do so" and so he felt himself justified in calling for additional evidence.

There is no affidavit filed in the present case to the effect that the prosecution while prepared to adduce evidence were not given opportunities to adduce it and, as I have said already, the learned Public Prosecutor was not even prepared to state in a written application the grounds on which he desired indulgence for the prosecution and (if I understood him aright) was not prepared to say definitely which witness or witnesses he was going to examine and whether the additional evidence related only to the fact that the message delivered at the Ootacamund Telegraph Office transmitted from Ootacamund and corresponding with exhibit A was signed by the Chief Secretary or also to the questions whether the Local Government in this case (that is the persons authorized by law to administer the Executive Government of the Madras Presidency as defined in clause 29, section 3 of the General Clauses Act) sanctioned the prosecution or one Member alone of the Government gave the sanction taking on himself the sole responsibility of the Local Government and then the Chief Secretary sent the telegram taking that decision of the single Member as that of the Local Government. (I do not intend to express any opinion at this stage whether such a decision by a single Member under departmental rules would in the eye of the law be treated as the act of the Local Government, but it has to be noted that the defence took the objection at the earliest stage that an 'individual' Member or Members of the Local Government cannot exercise the power under section 196 in the name of the Government.) After I had written this opinion I found that at the last moment a written application was filed for the prosecution, praying for the taking of additional evidence; but it gives no further definite information and therefore does not materially affect the cogency to my mind of the reasons I have attempted to make clear. The statements made by Mr. Durai Raja in answer to my Lord's questions in no way tended to the further elucidation of the exact scope of the additional evidence. The discretion to be exercised by the Appellate Court in taking additional evidence is not an arbitrary discretion as is shown by the provision that

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it "shall record its reasons". Surely it should not be exercised, especially against the accused, in a criminal case where under similar circumstances the Court of Appeal hearing a civil appeal would not admit additional evidence on appeal under Order XLI, rule 27, of the Code of Civil Procedure (which also directs the Appellate Court to record its reasons before admitting additional evidence). In *Arasappa Pillai* v. *Manika Mudaliar*(1) and *Satis* v. *Takurdas*(2) it was held that where no evidence or insufficient evidence had been offered on a relevant point in the Court of First Instance by a party who had ample opportunity to adduce all his evidence, an Appellate Court ought not in appeal to allow his application to adduce further evidence on that point. For the above reasons I concur with my Lord in allowing the appeal.

K.R.

(1) (1914) 16 M.L.T., 301. (2) (1917) 25 C.L.J., 473.