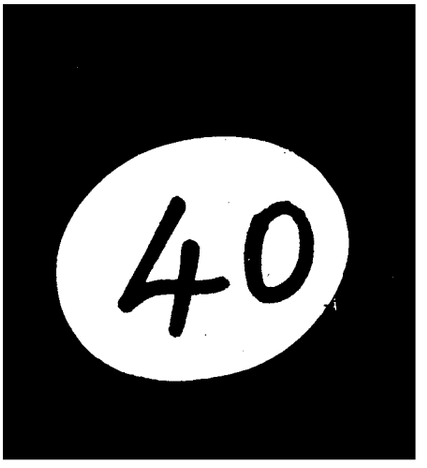

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CORRIGENDA, VOLUME XLI.

Page 8, footnote, reference (10), for *Beng.L.R.* read *B.L.R.*
„ 11, „ „ (7), „ „ „ „
„ 16, „ „ (10), „ „ „ „
„ „ „ „ (9), at the end add (*P.B.*)
„ 113, line 16, for *Prosecution* read *plaintiff*
„ 114, line 17, for *Ramaswami* read *Ramesam*
„ 129, line 13, for *Govindan Nair* v. *Achutha Menon* read *Arunachallam Chettiar* v. *Velappa Thambiran*
„ 147, footnote, reference (4), for *I.L.R.* read *L.R.*
„ 222, „ „ (6), at the end add (*P.C.*)
„ 324, for page No. 24 read 324
„ „ headnotes, line 8, for *for* read *of*
„ 433, line 16, for *Ramaswami Chetti* read *Ramaswami Chettiar*
„ 465, headnote, 1st line, before *XXIV* insert *Madras Act*
„ „ „ 13th line from bottom, before *XXIV* insert *Madras Act*
„ „ „ 10th „ „ „ „ „ „ „
„ 525, footnote, reference (6), before 20 *L.R.A.* insert (1913)
„ 528, 4th line in headnotes, after *Sch.* insert *II*
„ 531, line 24, for *Parakal Kathirikutti* read *Parakat Kadirkutti*
„ 544, footnote, reference (2), for *B.L.R.* read *Bom.L.R.*
„ 557, „ „ (1), at the end insert (*P.C.*)
„ „ „ „ (2), for *L.W.* 89 read (1913) 1 *L.W.*, 89
„ 611, line 33, for *Vallanki* read *Vellanki*
„ footnote, reference (4), at the end add 's.c., L.R. 4 I.A., 1'
„ 653, „ „ (1), delete 's.c., (1915) 26 I.C., 873'
„ 656, „ „ (2), „ „ „ „ „
„ 711, line 19, for *Westinghouse* read *Westing House*
„ 738, „ 3, for *Doyal* read *Doyal*
„ 753, footnote, reference (5), at the end add 's.c., L.R. 15 I.A., 51'
„ 755, „ „ (10), „ „ „ „ „
„ 762, line 3, for *Naragunty case* read *Naragunty Lutchmeedevamma* v. *Venjamma Naidu*
„ 779, footnote, reference (2), at the end add (*P.C.*)
„ 780, „ „ (1), „ „ „

Page 781, footnote, reference (3), at the end add (*P.C.*)
„ 782, „ „ (2), „ „ „
„ 783, „ „ (1), „ „ „
„ 785, „ „ (1), „ „ „
„ 786, „ „ (1), for 1900 read 1901
„ 834, line 10, for *Chidambaram Chettiar* read *Chidambaram Chetti*
„ 837, line 13, for *Ramaswami Chettiyar* read *Ramaswami Chettiar*
„ 855, 10th line from bottom, at the end add *referred to*
„ 861, 3rd line from bottom, for *A. Krishnaswami Ayyar* read *N. A. Krishna Ayyar*
„ 895, line 20, for *Ibrambibi* read *Ibram Bibi*
„ 896, „ 20, in *Dhuncooverbai and others* delete *and others*
„ 913, „ 4, after *Naidu* add *Bahadur*
„ 923, 4th line from the bottom, after (1914) insert *I.L.R.*



THE INDIAN LAW REPORTS

MADRAS SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT MADRAS AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

REPORTED BY

Privy Council... J. V. WOODMAN, *Middle Temple.*

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ADVOCATE-GENERAL.

The Honourable Mr. S. SRINIVASA AYYANGAR, B.A., B.L.

(1918) I.L.R., 41 MAD.

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Venkata Row v. *Tuljaram Row* (1917) M.W.N., 30, overruled 359

Venkata Surya Mahipati Ramakrishna Rao v. *Court of Wards* (1899) I.L.R., 22 Mad., 393; L.R., 26 I.A., 83, followed 778

Venkatachalam v. *Narayanan* (1916) I.L.R., 39 Mad., 386, referred to ... 1

Venkatanarasayya v. *Achemma* (1881) I.L.R., 3 Mad., 3, followed 624

Venkatanarayana Pillai v. *Subbammal* (1915) I.L.R., 38 Mad., 406 (P.C.), followed 659

Venkatappa Naick v. *Subba Naick* (1916) I.L.R., 29 Mad., 179, overruled ... 743

Vijaya Raghava v. *Secretary of State for India* (1884) I.L.R., 7 Mad., 466, followed 357

Watson and Company v. *Ramchund Dutt* (1891) I.L.R., 18 Calc., 10 (P.C.), explained 1038

West Derby Union v. *Metropolitan Life Assurance Society* (1897) A.C., 647, followed 692

Williamson v. *Barbour* (1877) 9 Ch. D., 529, referred to 1060

Yarlagadda Malikarjuna Prasada Nayudu v. *Yarlagadda Durga Prasada Nayudu* (1900) I.L.R., 24 Mad., 147 (155); L.R., 27 I.A., 151 (157), approved 779

Zamora, The (1916) 2 A.C., 77, followed 225

CHARITABLE TRUST—*Hundi by trustee—Liability of property*:—*See* NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), SS. 26, 27 AND 28 815

————————*Management of*:—*See* HINDU LAW. 296

CIVIL PROCEDURE CODE (Act XIV of 1882), SEC. 244:—*See* MORTGAGE ... 408

CIVIL PROCEDURE CODE (Act V of 1908), SEC. 11, EXPL. V: SEC. 47 AND O. XX, R. 12:—*See* RES JUDICATA 188

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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 13 (*b*) AND (*d*)—'*Natural justice*', *meaning of the term—Wrong view as to legal liability or onus, whether renders foreign judgment one not given on the merits.*] A wrong view as to the legal liability of a party or as to onus does not render a foreign judgment one not given on the merits within the meaning of section 13 (*b*) of the Civil Procedure Code. The term 'natural justice' in section 13 (*d*) of the Code of Civil Procedure with reference to foreign judgments refers rather to the form of procedure than to the merits of the case. *Crawley* v. *Isaacs* (1867) 16 L.T. (N.S.), 529, followed. *Liverpool Marine Credit Co.* v. *Hunter* (1868) L.R., 3 Ch. App., 479, applied and followed. *Imrie* v. *Castrique* (1860) 8 C.B. (N.S.), 405; s.c., 141 E.R., 1222 and *Scott* v. *Pilkington* (1862) 2 B. & S., 11; s.c., 121 E.R., 978, referred to.

Rama Shenoi v. *Hallagna* ... ... (1918) I.L.R., 41 Mad., 205

——————————SEC. 18: SCH. II:— *See* ARBITRATION. 115

——————————, SEC. 36:—*See* GUARDIANS AND WARDS ACT (VIII OF 1890), SEC. 34 24

——————————, SEC. 47, *Explanation—Abandonment of case against defendant properly impleaded, whether dismissal against such defendant—Madras Proprietary Estates Village Service Act (II of 1894), sec. 17—Madras Hereditary Village Offices Act (III of 1895), sec. 5—Service inam lands—Issue of inam title-deed therefor on one date with notification under section 17 of Madras Act II of 1894 enfranchising the lands at date subsequent to issue of deed—Mortgage of the lands in the interval, whether valid—Transfer of Property Act (IV of 1882), sec. 43, whether applicable to illegal transfers.*] *Held* by the Full Bench:—Where a person has been properly impleaded as one of the defendants in a suit but the suit is dismissed as against him on account of the plaintiff's election to abandon his case so far as it affected that defendant, such a person is a 'defendant against whom a suit has been dismissed' within section 47, Civil Procedure Code. *Krishnappa* v. *Periasami* (1917) I.L.R., 40 Mad., 964, distinguished. An alienation of village service inam lands in a proprietary estate made after the grant of an inam title-deed of enfranchisement but before the date of the notification contemplated by section 17 of the Madras Act II of 1894 is invalid and inoperative on account of the prohibition contained in section 5 of the Madras Act III of 1895. The alienation being a prohibited and illegal one on the date on which it was made, the subsequent removal of the prohibition by the notification of enfranchisement of the service inam land does not render the alienation valid; section 43 of the Transfer of Property Act cannot be applied to make a transfer valid which on the date on which it was made was prohibited by a statute. *Narahari Sahu* v. *Korithan Naidu* (1913) 24 M.L.J., 462 and *Sri Kakarlapudi Lakshminarayana Jagannada* v. *Sri Raja Kandukuri Balasurya Prasada Rao* (1915) 28 M.L.J., 650, followed. *Anganayya* v. *Narasayya* (1908) 18 M.L.J., 241, overruled.

Sannamma v. *Radhabhayi* ... ... (1918) I.L.R., 41 Mad. (F.B.), 418

——————————, SEC. 64, EXPLN., *effect of—Attachment of land by one decree-holder—Application for rateable distribution by other decree-holders—Satisfaction of attaching decree-holder's decree by subsequent private alienation of the land attached—The other decree-holders cannot impeach the alienation.*] Where a decree-holder attached land in execution of his decree and the other decree-holders applied for rateable distribution without attaching the land in execution of their decrees and subsequently the judgment-debtor alienated the land and paid off the attaching decree-holder. *Held* by the Full Bench, that the other decree-holders were not entitled to question the alienation under section 64 of the Civil Procedure Code. *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (1917) I.L.R., 44 Calc., 662 (P.C.), relied on. Effect of Explanation to section 64, Civil Procedure Code, considered.

Annamalai Chettiar v. *Palamalai Pillai* ... (1918) I.L.R., 41 Mad. (F.B.), 265

——————————, SEC. 73 AND O. XXI, R. 83—*Several decree-holders—Execution—Attachment in each decree—Applications for sale—Permission to judgment-debtor to raise money by private alienation to pay off one of the decrees—Money paid into Court by alienee—Rateable distribution—'Assets held by a Court,' meaning of.*] Where several decree-holders in different suits had attached the same property of their judgment-

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debtor and applied for sale in execution of their respective decrees, but the judgment-debtor obtained permission of the Court under Order XXI, rule 83, to raise money by private alienation of the property to pay the decree amount due in one of the decrees, and the amount was paid into Court by the alienee. *Held*, that the money, having been paid into Court under a pending execution application, was assets held by the Court under section 73 of the Code, and was liable to rateable distribution among the several decree-holders who had applied for execution. *Sorabji Coovarji* v. *Kala Raghunath* (1912) I.L.R., 36 Bom. 156, dissented from. *Kathum Sahiba* v. *Hajee Badsha Sahib* (1915) I.L.R., 38 Mad., 221 at p. 224, referred to. *Golstrum* v. *Woomes Chandra Bonnerjee* (1917) I.L.R., 44 Calc., 789, distinguished.

Thiraviyam Pillai v. *Lakshmana Pillai* ... (1918) I.L.R., 41 Mad., 616

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 80—*Public Officer acting* mala fide—*Suit against Public Officer—Notice of suit, whether necessary—'Purporting to be done' in section 80, meaning of.*] A Public Officer is entitled to notice of suit under section 80 of the Civil Procedure Code even if, in the discharge of his duty, he has acted *mala fide*. Meaning of 'purporting to be done' discussed. *Shahebzadee Shahunshah Begam* v. *Fergusson* (1881) I.L.R., 7 Calc., 499, and *Muhammad Saddiq Ahmad* v. *Panna Lal* (1904) I.L.R., 26 All., 220, not followed. *Jogendra Nath Roy Bahadur* v. *Price* (1897) I.L.R., 24 Calc., 584, and *Jugul Kishore* v. *Jugul Kishore* (1911) I.L.R., 33 All., 540, followed.

Koti Reddi v. *Subbiah* ... ... (1918) I.L.R., 41 Mad. (F.B.), 792

——————————, SEC. 98:—*See* LAND ACQUISITION ACT 943

——————————, SEC. 100—*Custom or usage having the force of law—Extent of jurisdiction of High Court in second appeal in deciding custom or usage—Mirasidar in Chingleput district, right to* thunduvaram *by custom from Government ryots—Onus of proving custom on mirasidar—Civil Procedure Code, sec. 103—Power of High Court to decide facts under—Admissions of a party, binding nature of, unless explained—Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 13*—Thunduvaram, *dues within—Burden of proving abandonment of customary right—Non-exercise of right for a long time, effect of.*] *Held* by the Full Bench:—The existence of a custom or 'usage having the force of law' is a mixed question of fact and law. Section 100, Civil Procedure Code, precludes the High Court from interfering in second appeal with the findings arrived at by the lower Court of actual facts from which the existence of the custom has been inferred; the inference as to the existence and the decision as to the validity of the custom being matters of law, revisable by the High Court in second appeal. *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (1906) I.L.R., 29 Mad., 24, overruled. *Kailas* v. *Padmakisor* (1917) 25 C.L.J., 613 and *Pankajammal* v. *The Secretary of State for India* (1917) I.L.R., 40 Mad., 1908, followed. *Palaniappa Chetty* v. *Sreemath Devasikamony Pandarasannadhi* (1917) I.L.R., 40 Mad., 709 (P.C.), referred to. *Held* further: (*a*) that in a suit by an *ekoboga mirasidar* in a village in the Chingleput district, for certain customary dues called *thunduvaram* from the non-mirasidar Government ryots in the village, the onus of proving the custom was on the mirasidar, (*b*) that on the facts found he had established the custom, (*c*) that express admissions of a party to a suit are strong evidence against him unless and until explained and (*d*) that the onus of proving discontinuance of the custom was on the ryot. *Per* SADASIVA AYYAR, J.—The High Court can, under section 103, Civil Procedure Code, decide in second appeal the genuineness or otherwise of the material documents in the case in the absence of a finding by the lower Appellate Court. *Held* by the Division Bench (SADASIVA AYYAR and NAPIER, JJ.): Mirasi right is an interest in the village lands though not a proprietary interest therein. The *thunduvaram* payable to the mirasidar by a ryot according to custom is not in the nature of 'rent' but falls under 'dues' within article 13 of the second schedule to the Provincial Small Cause Courts Act (IX of 1887) and in a suit for such dues a second appeal lies to the High Court.

Kumarappa Reddi v. *Manavala Goundan* ... (1918) I.L.R., 41 Mad. (F.B.), 374

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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 103 :—*See* SEC. 100 supra. 374

———————, SEC. 115:—*See* CIVIL PROCEDURE CODE, O. XXIII 701

———————, SEC. 144 :—*See* SEC. 151 infra. 316

———————, ss. 144, 151 AND O. XXI, R. 90—*Restitution—Order refusing to set aside sale—Order reversed on appeal—Auction-purchaser, not a party to proceedings or appeal—Application by judgment-debtor for restitution against auction-purchaser, whether maintainable—Auction-purchaser, whether a representative of decree-holder.*] Where an order passed under Order XXI, rule 90, of the Civil Procedure Code, refusing to set aside a sale held in execution of a decree, was reversed on appeal but the auction-purchaser was not made a party to the proceedings for setting aside the sale or to the appeal therefrom and the judgment-debtor subsequently applied for restitution against the auction-purchaser: *Held*, (1) that section 144 of the Civil Procedure Code did not in terms apply, as no decree was varied or reversed but only an order under Order XXI, rule 90, was reversed on appeal; (2) that, assuming that section 151 allowed an order for restitution in appropriate cases not falling under section 144, such an order could not be made unless the auction-purchaser was a party before the Appellate Court which set aside the sale; and (3) that a Court auction purchaser was not a representative of the decree-holder. *Manicka Udayan* v. *Rajagopala Pillai* (1907) I.L.R., 30 Mad., 507 and *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* (1911) I.L.R., 34 Mad., 417, referred to.

Subbamma v. *Chennayya* ... ... (1918) I.L.R., 41 Mad., 467

———————, SEC. 145 AND O. XXXII, R. 6—*Security enabling next friend to receive monies due to minor under decree—Attachment of surety's property for sums not accounted for, legality of.*] Security being furnished, the next friend of a minor and the surety were permitted to draw from the Court monies due to a minor under a decree. On default in accounting, the amount due to the estate of the minor was directed to be realized by attachment of the property of the surety. *Held*, that the order for attachment was made without jurisdiction as neither section 145 nor any other provision of the Code of Civil Procedure empowers the Court to attach the property of the surety.

Kurugodappa v. *Soogamma* ... ... (1918) I.L.R., 41 Mad., 40

———————, SEC. 146, AND O. XXII, R. 10—*Suit originally filed in a District Munsif's Court—Plaint returned and filed in a Subordinate Judge's Court—Suit property mortgaged to another during pendency of suit in the former Court—Decree for plaintiff by Subordinate Court—Petition to District Court by mortgagee for permission to appeal, if competent—Appeal by mortgagee against decree of Subordinate Judge's Court, whether maintainable.*] A plaint filed in a District Munsif's Court was, on objection taken by the defendant to the valuation of the suit, ordered to be returned and was presented in the Subordinate Judge's Court. While the suit was pending in the District Munsif's Court, the suit property was mortgaged by the defendant to the appellant. On the suit being decreed by the Subordinate Judge in favour of the plaintiff, the defendant did not prefer an appeal; the *appellant*, as the mortgagee of the suit property pending suit alleging collusion between the plaintiff and the defendant, filed an application in the District Court under Order XXII, rule 10, for an order allowing him to prefer an appeal, and also preferred an appeal against the decree. The District Judge dismissed both the petition and the appeal as incompetent. The appellant preferred to the High Court a Civil Miscellaneous Appeal and a second appeal against the decisions respectively. *Held*, that Order XXII, rule 10, only governs applications made to continue a suit and that an application presented after the termination of the suit was not within the rule; *Subba Pillai* v. *Rungasami* (1917) M.W.N., 306 and *The Collector of Muzaffernagur* v. *Husaine Begam* (1896) I.L.R., 18 All., 86, followed. *Held also*, that, under section 146 of the Civil Procedure Code, it was competent to the mortgagee to prefer an appeal to the District Court against the decree of the Subordinate Judge, and that the District Judge was bound to dispose of the appeal on the merits, notwithstanding the dismissal of the petition under Order XXII, rule 10. Where a plaint is returned for presentation to the proper Court, any devolution of interest during the pendency of proceedings in the first Court must be taken to be a devolution of interest during the pendency of the suit in the second Court. *Seshagiri Rao* v. *Vapa Velayudam Pillai* (1913) I.L.R., 36 Mad., 492, distinguished.

Sitaramaswami v. *Lakshmi Narasimha* ... ... (1910) I.L.R., 41 Mad., 510

CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 151 AND 144—*Money deposited in Court—Withdrawal by one party—Undertaking by party to repay amount—No provision in undertaking to pay interest—Application by party entitled to recover amount with interest—Power of Court to enforce undertaking—Liability for interest.*] The plaintiffs having sued to establish their right to certain money which had been paid into Court by a third party, the defendant was allowed to draw the money on an undertaking to repay it if the plaintiffs succeeded. The plaintiffs having obtained a decree, *Held*, that the Court had inherent power to order the defendant to repay the money, and that he could be made liable for interest as he had had the wrongful use of the money. *Rodger* v. *The Comptoir D'Escompte DeParis* (1871) L.R., 3 P.C.A.C., 465; *Subbarayudu* v. *Yerram Setti Seshasani* (1917) I.L.R., 40 Mad., 299, and *Indra Chund Bothra* v. *Mr. A. H. Forbes* (1917) 2 Pat. L.J., 149, referred to.

Alagappa Chettiar v. *Muthukumara Chettiar* ... (1918) I.L.R., 41 Mad., 316

———————, O. I, R. 8 :—*See* MUTT. 124

———————, O. III, R. 1 AND O. IX, R. 12—*Order of Court directing a party to appear in person—Refusal of the party to comply with the order—Order of Court declaring him ex parte, legality of.*] A Court is empowered, under Order III, rule 1, of the Civil Procedure Code, to direct the appearance in Court of a party in person and if the party so directed refuses to appear, the Court may declare him *ex parte* even though he has engaged a pleader who is prepared to appear for him in the case. *Satu* v. *Hanmantrao* (1899) I.L.R., 23 Bom., 318, dissented from.

Vaiguntathammal v. *Valliamman* ... ... (1918) I.L.R., 41 Mad., 256

———————, O. IX, R. 13.—*Order XVII, rules 2 and 3, scope of—Decree ex parte—Defendant absent at adjourned hearing after taking adjournment for letting evidence.*] Where, at the close of the plaintiff's case, an adjournment was granted to the defendant to enable him to produce his evidence and he failed to appear at the adjourned hearing, and the Court proceeded to pass a decree against him. *Held* by the Full Bench, that the case came within Order XVII, rule 2, and the decree could be set aside under Order IX, rule 13. *Per* SADASIVA AYYAR and KUMARASWAMI SASTRI, JJ.—Rules 2 and 3 of Order XVII, Civil Procedure Code, are mutually exclusive: rule 2 applies to all cases of absence of parties whether time was granted or not to do any of the acts mentioned in rule 3 of the order, while rule 3 applies only to cases where parties are present and commit default of the kind mentioned in the rule. *Per* WALLIS, C.J.—Rules 2 and 3 of Order XVII are not mutually exclusive. Rule 3 *may* be applied even in the absence of the defendant, but the decree will none the less, be *ex parte* and liable to be set aside. *Chandramathi Ammal* v. *Narayanaswami Aiyar* (1910) I.L.R., 33 Mad., 241, followed *Nagnada Aiyar* v *Krishnamurti Aiyar* (1911) I.L.R., 34 Mad., 97, overruled.

Pichamma v. *Sreeramulu* ... ... (1918) I.L.R., 41 Mad (F.B.), 286

———————, O. XVII, RR. 2 AND 3:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. IX, R. 13 286

———————, O. XXI, R. 2, CL. (1):—*See* EXECUTION PETITION 251

———————, O. XXI, RR. 58 TO 63—*Order refusing in effect to investigate claim whether an order 'against' claimant within O. XXI, r. 63, Civil Procedure Code and art. 11 of Limitation Act IX of 1908).* *Held* by the FULL BENCH (1) that an order refusing to investigate a claim to attached property, on the ground that there was delay in filing it, is an order passed 'against' the claimant within Order XXI, rule 63, Civil Procedure Code, and article 11 of the Limitation Act (IX of 1908) and (2) that an order on a claim petition merely stating that, as it was filed late, it will be notified to the bidders is in effect an order rejecting

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the claim to which the provisions of Order XXI, rule 63, will apply. *Narasimha Chetty* v. *Vijiapala Nainar* (1915) 2 L.W., 206 and *Ponnusami Pillai* v. *Samu Ammal* (1915) 31 M.L.J., 247, *followed*. *Thithikutti Umma* v. *Thalathodi Chekkammutti*, Second Appeal No. 1986 of 1916, *overruled*.

Venkataratnam v. *Ranganayakamma* ... (1918) I.L.R., 41 Mad., (F.B.) 985

CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 63, *applicability to claims to property attached before judgment*—O. XXXVIII, *r.* 5.] *Held* by the Full Bench that Order XXI, rule 63, Civil Procedure Code, applies also to orders on claims preferred to property attached before judgment. *Ramanamma* v. *Bathula Kamaraju* (1918) I.L.R., 41 Mad., 23, overruled.

Prasada Nayudu v. *Virayya* ... ... (1918) I.L.R., 41 Mad., (F.B.), 849

———————————————, O. XXI, RR. 71 AND 84 TO 87—*Purchase in a Court sale of judgment-debtor's right to get a re-conveyance of certain lands—Default in payment of balance of purchase-money within fifteen days of Court sale—Liability of purchaser for deficiency on re-sale.*] A purchaser in a Court auction of a judgment-debtor's right to get a re-conveyance of certain lands on payment of a specified sum is, on default in payment of the purchase-money within fifteen days of the Court sale, liable to pay under summary process under Order XXI, rule 71, Civil Procedure Code, any deficiency in the price on a re-sale, though the date stipulated for payment to get the re-conveyance happens to be shortly after the Court sale and before the expiry of the fifteen days allowed for the payment of the balance. The loss of the right to get a re-conveyance which is a substantial right, occasioned by the neglect of the purchaser to exercise his right to pay at the stipulated time, does not make the property re-sold, any the less the same property as the one sold before, provided all the then existing rights of the judgment-debtor therein are correctly stated in the proclamation for the resale: Cases in which an existing encumbrance on the property is omitted to be mentioned at the time of the first sale but finds a place in the proclamation for the re-sale stand on a different footing. *Raijnath Sahai* v. *Mohesp Narain Singh* (1889) I.L.R., 16 Calc., 535 and *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukal* (1898) I.L.R., 25 Calc., 99, distinguished.

Venkatachellamayya v. *Nilakanta Girjee* ... (1918) I.L.R., 41 Mad., 474

———————————————O. XXIII, R. 1 (2) (A) AND (B), O. VII, R. 10 AND SEC. 115—*Withdrawal of suit—Suit grossly undervalued in the plaint—Real valuation beyond the jurisdiction of the District Munsif's Court—Application by plaintiff for leave to withdraw portion of the suit with liberty to bring fresh suit—Leave, whether properly can be granted—Judicial discretion—Jurisdiction*—Ejusdem generis—*Material irregularity in exercise of jurisdiction*—'*Other sufficient grounds, in O. XXIII,*' *r.* 1 (2) (*b*), *construction of.*] The plaintiffs instituted a suit in a District Munsif's Court for recovery of possession of several items of immovable property including a house, valuing the house at Rs. 200 and other items at Rs. 1,917 and odd for purposes of jurisdiction. The defendant objected that the house was grossly undervalued and that the suit was, on proper valuation, beyond the jurisdiction of the District Munsif. A commissioner, appointed to ascertain its value, reported that the house alone was worth Rs. 6,500. The plaintiff thereupon applied to the Court for leave to withdraw the suit in respect of the house with liberty to bring a fresh suit therefor; the Court granted the application, notwithstanding the objection of the defendant. The latter preferred a Civil Revision Petition to the High Court against the order: *Held*, that, assuming that the lower Court had jurisdiction to act under Order XXIII, rule 1 (2) (*b*), it acted with material irregularity in the exercise of its jurisdiction, as it did not exercise a *judicial discretion* in passing the order; that the plaintiff ought not to have been permitted to withdraw his claim for the house, as the undervaluation in the plaint was so gross that he could not have acted honestly in doing so and did not deserve any indulgence from the Court; and that consequently the High Court should interfere under section 115 of the Civil Procedure Code and set aside the order. *Per* SADASIVA AYYAR, J.—The words 'other sufficient grounds' in Order XXIII, rule (2) (*b*), should not be interpreted *ejusdem generis* with 'formal defect' in rule 1 (2) (*a*). Limits of the doctrine of *ejusdem*

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generis discussed. After a Court of first instance has come to the conclusion that the suit as brought is beyond its jurisdiction, it has no power to pass any other judicial order in the suit except those which the statute expressly empowers it to pass, such as an order returning the plaint for presentation to the proper Court under Order VII, rule 10, or an order awarding costs under section 35 of the Code.

Kannuswami Pillai v *Jagathambal* ... ... (1918) I.L.R., 41 Mad., 701

CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R 3, AND SEC. 96, CL. (3)—*Compromise—Power of vakil to enter into—Construction of* vakalat—*Recording of compromise—Duty of Court to inquire—Decree in terms of compromise—Appeal, when allowed.*] A *vakalat* containing a provision authorizing the vakil "to present if necessary petitions for *razinama* for withdrawal and for referring to arbitration and to sign the *razinama*, etc., petitions," does not give authority to the vakil to enter into a compromise without reference to his clients. An appeal lies against a decree passed in accordance with a compromise, where the authority to enter into it, is impeached. *Ayyagiri Veerasalingam* v. *Kovur Rasivi Reddi* (1915) 27 M.L.J., 173, followed. *Jagapati Mudaliar* v. *Ekambara Mudaliar* (1898) I.L.R., 21 Mad., 274 and *Raghoji Rao* v. *Lakshman Rao Sahib* (1912) 22 M.L.J., 881, referred to. Duty of Courts to scrutinize compromises before recording them pointed out.

Thenal Ammal v. *Sokkammal* ... ... (1918) I.L.R., 41 Mad. 233

———————————————, O. XXXIII—*Company—Official liquidator, right of, to apply for leave to sue* in forma pauperis—'*Person,*' *definition of—General Clauses Act* (*X of* 1897), *whether applicable to Order XXXIII—Explanation to rule* 1 *and rule* 3 *of Order XXXIII, construction of.*] An official liquidator of a company is competent to apply for leave to sue *in forma pauperis* on behalf of the company under Order XXXIII of the Civil Procedure Code, if the company is a pauper within rule 1 thereof The reference to 'necessary wearing apparel' in the explanation to rule 1 and the provisions of rule 3 requiring presentation of petition by 'applicant in person' in Order XXXIII do not necessarily exclude the application of the Order to a company, and the definition of 'person' as including a company under the General Clauses Act (X of 1897) applies to Order XXXIII of the Code as there is nothing in the definition which is repugnant to the subject or context of the Order. The fact that the liquidator in his personal capacity is not a pauper does not affect the question; nor does the fact that the liquidator receives a commission on collections realized, make him a person interested in the subject-matter of the suit within clause (*e*), rule 5 of Order XXXIII. *Cortes* v. *Kent Water-works Company* (1827) 7 B. & C., 314, and *Venkataramayya* v. *Achamma* (1881) I.L.R., 3 Mad., 3, followed. *In the matter of the will of Demubai* (1894) I.L.R., 18 Bom., 237, and *Manaji Rajinji* (*Rao Sahib*) v. *Kandoo Baloo* (1912) I.L.R., 36 Bom., 279, distinguished.

Perumal Gnundan v. *Thirumalarayapuram Jananukoola Dhanasekhara Sangha Nidhi* ... ... (1918) I.L.R., 41 Mad., 624

———————————————, O. XXXIII, R. 5—*Application for leave to sue* in forma pauperis—*Question to be decided by Court before granting leave—Limitation—Doubtful question—Difference of judicial opinion—Duty of Court.*] Upon an application for leave to sue *in forma pauperis*, the Court is not justified in determining, at the stage contemplated by Order XXXIII, rule 5, of the Civil Procedure Code, a question of limitation as to which there has been considerable difference of judicial opinion. Order XXXIII, rule 5 (*d*) applies only to cases where the allegations of the petitioner do not show a cause of action, and this should appear *clearly upon the face* of the petition.

Govindasami Pillay v. *Municipal Council, Kumbakonam* ... (1918) I.L.R., 41 Mad., 620

———————————————, XXXVIII, R. 2—*Arrest of defendant before judgment—Deposit of money in Court—Right of the plaintiff to the amount on obtaining decree—Rights of Official Receiver in insolvency and of other attaching creditors of the defendant.*] The defendant was arrested before

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judgment and was ordered to be released from custody on his depositing in Court a sum of money sufficient to meet the plaintiff's claim in the suit, under Order XXXVIII, rule 2, of the Civil Procedure Code. There was subsequently an attachment of the money by a decree-holder and an adjudication of the defendant as an insolvent. *Held*, that the money was paid into Court to the general credit of the action and charged with a lien in favour of the plaintiff on the latter obtaining a decree in his favour; and that the attaching creditor's and the Official Receiver's claims were subject to this lien.

Ramiah Aiyar v. *Gopalier* ... ... (1918) I.L.R., 41 Mad., 1053

CIVIL PROCEDURE CODE (ACT V of 1908), O. XXXVIII, R. 5 :—*See* CIVIL PROCEDURE CODE (V OF 1908), O. XXI, R. 5 ... ...

——————————, O, XXXIX, R. 2 :—*See* INJUNCTION 849

——————————, O, XLI, R. 5—*Stay of execution by an Appellate Court—Order for execution by Court of first instance in ignorance of order of stay—Order for execution, validity of.*] *Held* by the Full Bench :—Where subsequent to an interim order for stay of execution made by an Appellate Court without notice to the decree-holder but before its communication to the Court of first instance, an order of attachment is made by the latter Court, the order of attachment is not void and ineffectual as having been made without jurisdiction, but is legally valid. The order is effective only from the time it is communicated to the first Court. *Muthukumarasami Mowther* v. *Minda Nayinar* v. *Kuppusami Aiyangar* (1910) I.L.R., 33 Mad., 74 and *Bessesswari Chowdhurany* v. *Hurro Sundar Mozumdar* (1892) 1 C.W.N., 226, followed. *Hukum Chand Boid* v. *Kamalanand Singh* (1906) I.L.R., 33 Calc., 927, not followed. *Ramanathan* v. *Arunachellam* (1915) I.L.R., 38 Mad., 766, overruled.

Venkatachallapati Rao v. *Kameswaramma* ... (1918) I.L.R., 41 Mad. (F.B.), 151

——————————, O. XLI, R. 5—*Whether applicable to stay execution not of the decree appealed against, but of some other decree—Petition to stay sale of immovable properties—Jurisdiction of Appellate Court to grant.*] An application under Order XLI, rule 5, to stay the sale of immovable property in execution of a decree pending an appeal therefrom can be made not only to the Court which passed the decree but also to the Appellate Court, both of which have concurrent jurisdiction. The rule however did not authorize an application to the Appellate Court for stay of execution in another suit. *Kanniappan Chetty* v. *Manickavasagam Chetty* (1912) 23 M.L.J., 677, dissented from; *Triboni Sahu* v. *Bhagawat Bux* (1907) I.L.R., 34 Calc., 1037 and *Rama Prosad* v. *Anukul Chandra* (1914) 20 C.L.J., 512, referred to.

Lakshmanan Chetty v. *P. P. V. Palaniappa Chetty* ... (1918) I.L.R., 41 Mad., 813

——————————, O. XLI, R. 5 (3)—*Order under—Immovable property given as security for decree by judgment-debtor, whether realizable in execution—Judgment-debtor taking advantage of a favourable order in execution—Estoppel.*] Immovable property given by a judgment-debtor as security for the due performance of a decree, pursuant to an order made under Order XLI, rule 5 (3), Civil Procedure Code, can be realized in execution without attachment, the matter being one relating to an execution within section 47, Civil Procedure Code, and a separate suit does not lie. *Sadasiva Pillai* v. *Ramalinga Pillai* (1875) 2 I.A., 219, applied. *Shyam Sundar Lal* v. *Bajpai Jainarayan* (1903) I.L.R., 30 Calc., 1060, followed. *Mukta Prasad* v. *Mahadeo Prasad* (1916) I.L.R., 38 All., 327 and *Saminatha Pathan* v. *Sornatha Ammal* (1912) 22 M.L.J., 190, referred to. *Tokhan Singh* v. *Girwar Singh* (1905) I.L.R., 32 Calc., 494, distinguished. Where a judgment-debtor who could have been arrested for the entire amount of a decree is on his objection ordered to be arrested only for a certain amount on the ground that the balance could be realized by the sale of the lands given by him as security for the decree amount, he is estopped from afterwards disputing the right of the decree-holder to sell the lands for all the then balance of the decree even though such balance may exceed the amount for which the lands were originally tendered as security. *Sadasiva Pillai* v. *Ramalinga Pillai* (1875) 2 I.A., 219 followed.

Subramanian Chettiar v. *Raja of Ramnad* ... (1918) I.L.R., 41 Mad., 327

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CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLI, R. 22.] When an appeal is dismissed as filed out of time a memorandum of objections filed by a respondent cannot be heard

Alagappa Chettiar v. *Chockalingam Chettiar* (1918) I.L.R., 41 Mad. (F.B.), 904

——————————, O. XLIII, AND SEC. 115—*Suit for rent in a Revenue Court—Service inam—Discontinuance of service—Ryoti land—Decree in Revenue Court—Appeal—Jurisdiction of Revenue Court—Plaint ordered by District Judge to be returned for presentation to Civil Court—Appeal to the High Court against order of District Judge, if competent—Order whether a decree—Estates Land Act (Madras Act I of 1908), sec. 192, cl. (a)—Prohibition of appeals—Conversion of appeal into civil revision petition.*] A landholder sued for arrears of rent in a Revenue Court from the defendants who originally held the lands on service tenure but had ceased to perform the services prior to the suit. The Revenue Court passed a decree in favour of the plaintiff. On appeal, the District Judge set aside the decree holding that the Revenue Court had no jurisdiction to entertain the suit and ordered that the plaint should be returned to the plaintiff for presentation to a proper Court. On plaintiff preferring an appeal to the High Court, the respondent raised a preliminary objection that the appeal did not lie. *Held*, that no appeal lay against the order of the District Judge, because section 192, clause (a) of the Estates Land Act prohibited the applicability of Order XLIII of the Civil Procedure Code to proceedings under the Act, and the order was not a decree under the Civil Procedure Code. *Held also*, that the appeal should be converted into a civil revision petition under section 115 of the Civil Procedure Code, as the latter section was not excluded by section 192 of the Act; and that the Revenue Court had jurisdiction to entertain the suit, as the lands were ryoti lands and did not fall within the exception to ryoti land in section 3 of the Act, inasmuch as the services were not performed at the date of the suit. *The Secretary of State for India* v. *Chelekani Rama Rao* (1916) I.L.R., 39 Mad., 617 (P.C.), distinguished.

Rajah Venkata Ramayya v. *Veeraswami* ... (1918) I.L.R., 41 Mad., 554

——————————, O. XLVIII, R. 1 :—*See* MADRAS CIVIL COURTS ACT (III OF 1873), SEC. 14 721

——————————SECOND SCHEDULE, PARA. 14, CLAUSE (c)—*Award—'Illegal on the face of it', meaning of—Patent illegality—Remittance to arbitrators for re-consideration, when permission.*] In a suit for partition and recovery of a share in the family properties, the defendants pleaded *inter alia* that the plaintiff was born blind and was therefore not entitled to any share under Hindu Law. After issues were framed, the whole dispute was, by agreement of the parties, referred to arbitrators who, without deciding the question as to congenital blindness, passed an award to the effect that the plaintiff was entitled to a life-interest in one-fourth share subject to its becoming an absolute interest in case the plaintiff married. *Held*, on objection to the award, that the award was not so patently illegal as to come within the mischief of clause (c) of paragraph 14 of the second schedule of the Civil Procedure Code, and that the award could not be remitted to the arbitrators for re-consideration. English and Indian cases reviewed.

Madepalli Venkataswami v. *Madepalli Suranna* ... (1918) I.L.R., 41 Mad., 1022

COMPANIES ACT (INDIAN) (ACT VII OF 1913), SEC. 104, CL. (1) (b)—'*Share fully paid-up otherwise than in cash,' meaning of—Exchange of debenture not matured for share, whether a payment in cash for share.*] Where in accordance with the terms of a debenture deed a company allots to a debenture-holder a fully paid-up share in exchange for the surrender of a debenture deed *not then mature*, the share as allotted is one "fully paid up otherwise than in cash" within section 104 (1) (b) of the Indian Companies Act (VII of 1913). *Spargo's Case* (1873) L.R., 8 Ch. App., 407, distinguished.

Thodapuzha Rubber Company v. *The Registrar of Joint Stock Companies, Madras* ... ... (1918) I.L.R., 41 Mad., 307

COMPANY :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII ... 624

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COMPENSATION:—*See* EJECTMENT SUIT IN 641

COMPROMISE, *power of vakil to enter into*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R. 3, AND SEC. 96, CL. (5) 233

————, *recording of—Duty of Court to inquire into*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R. 3, AND SEC. 96, CL. (5) ... 233

CONTRACT—*Breach of—Suit for damages—Contract after outbreak of war to supply enemy goods out of stock in a particular ship—Royal Proclamation, prohibiting contract as illegal, effect of—Capture and condemnation of steamer and goods by Prize Court, effect of, on contract—Purchase of goods from Prize Court by defendant and bringing goods to place of performance by other steamers, effect of—Contract to supply goods of a certain description and quality—Supply of inferior goods, effect of.*] A contract made on the 25th August 1914, after the outbreak of war with Germany on the 4th August 1914, to supply German dyes expected to arrive by certain steamers believed to have started on their voyage from Germany before the war, is unenforceable, if under the contract the defendant was not to be liable in case of non-arrival of the steamers at certain ports on account of the state of war and the ship and the dyes therein were as a fact seized during the voyage and condemned as prize by a Prize Court. *Held* further, (*a*) that the effect of the Royal Proclamation of 9th September 1914, prohibiting trading with the enemy and in enemy goods as illegal, was to render the further performance of the contract illegal and to put an end to the contract; (*b*) that the condemnation of the goods by the Prize Court related back to the date of seizure and divested the owners of the goods as from the date of seizure; (*c*) that the fact that the defendants for their own convenience bought the goods from the Prize Court and brought them to the place of performance is immaterial as the goods ceased to be goods consigned to the defendants; and (*d*) that a contract to supply dyes of 40 per cent. strength on arrival of certain steamers is not enforceable when the steamers arrive with dyes of inferior description and quality, viz., 16 per cent. strength. *Hale* v. *Rawson* (1858) 27 L.J., C.P., 189, distinguished. *Arnhold Karberg & Co.* v. *Blythe Green Jourdain & Co.* (1916) 1 K.B., 495, *The Odessa* (1916) A.C., 153 and *The Zamora* (1916) 2 A.C., 77, followed.

Abdul Razack v. *Khandi Row* ... ... (1918) I.L.R., 41 Mad., 225

————, *C.I.F., nature of*:—*See* CONTRACT TO PURCHASE AND SHIP GOODS ... 1060

————, *suit for specific performance of*:—*See* LIMITATION ACT (IX OF 1908), ART. 113 18

———— *to purchase and ship goods—C.I.F. contracts, nature of—C.I.F. contract with ordinary vendor and with commission agent, difference between—Outbreak of war, effect of—Liability of vendor and vendee—Special terms as to risk in contract, effect of—Indian Contract Act, sec.* 222.] E. & Co., who were commission agents, entered into a contract with the defendants under which they undertook to purchase and ship certain goods "on account and risk" of the defendants, and did ship them under a C.I.F. contract on board a German ship. Owing to the outbreak of war during their transit, the goods did not arrive at their destination until long after due time. On defendants' refusal to accept the goods, they were sold by the plaintiff, the liquidator of E. & Co., who sued the defendants for damages for breach of contract; the defendants denied the liability. *Held*, that E. & Co. being commission agents of the defendants, were entitled both under the special terms of the contract and under the general law of agency embodied in section 222 of the Indian Contract Act to recover damages for breach of Contract. In an ordinary C.I.F contract between vendors and vendees, the tender of a bill of lading after the contract of affreightment has been dissolved by the outbreak of war is not such a tender as the vendees are bound to accept and they are not bound to pay for the goods. *Arnhold Kalberg & Co.* v. *Blythe Green Jourdain & Co.* (1916) 1 K.B., 495, followed. Where, however, goooods are purchased from a commission agent, though he is regarded for some purposes as a principal as any other vendor under a C.I.F. contract, yet the relationship of principal and agent still subsists for all other purposes; the true principle is that the assimilation is only to be

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carried so far as is necessary to give necessary efficacy to the transaction. *Ireland* v. *Livington* (1871-2) L.R., 5 H.L., 395, *Cassaboglou* v. *Gibb* (1883) 11 Q.B.D., 797, *Williamson* v. *Barbour* (1877) 9 Ch.D., 529, referred to.

Harry Meredith v. *V. K. Abdulla Sahib* ... ... (1918) I.L.R., 41 Mad., 1060

CONTRACT—*Third party's right to sue on—Limitation Act (IX of* 1908), *sec.* 18, *arts.* 62, 115 *and* 116—*Suit for rent by the third party to contract—Date from which limitation begins.*] Contrary to his undertaking to redeem a prior *kanom* and to collect and pay the *jenmi* arrears of rent due by the *kanomdar* a *melkanomdar* assigned his rights and liabilities under the *melkanom* to the *kanomdar* by registered deed in 1909 without the knowledge of the *jenmi* and thus enabled the *kanomdar* to continue in possession for a further period. The *jenmi* who came to know of the assignment in 1912 at once recognized it, demanded arrears of rent from the *kanomdar* and brought the suit in 1913 against the *kanomdar* and the *melkanomdar* for all the rent due during the periods of the *kanom* and the *melkanom*, *Held* by WALLIS, C.J., and KUMARASWAMI SASTRI, J. (BAKEWELL, J., dissenting) that (*a*) the *jenmi* was entitled to recover from the *kanomdar* the arrears of rent as moneys had and received to the plaintiff's use and that the suit was not barred by limitation by reason of article 62, and section 18 of the Limitation Act. *Per* WALLIS, C.J., and BAKEWELL, J.—The *jenmi* was not entitled to sue on the assignment to which he was not a party. *Per* KUMARASWAMI SASTRI, J.—The *jenmi* was entitled to sue on it. *Jamna Das* v. *Ram Autor Pande* (1892) I.L.R., 34 All., 63 (P.C.) and *Tweddle* v. *Atkinson* (1855) 30 Ch. D., 57 and other cases considered.

Itti Panku Menon v. *Dharman Achan* ... ... (1918) I.L.R., 4 Mad., 488

CONTRACT ACT, INDIAN (IX OF 1872), SS. 15 AND 16—*Threat by a stranger to a contract, to commit suicide, held out to his wife and son and inducing them to enter into contract on that account—Validity of contract—Coercion and undue influence—Suicide whether 'an act forbidden by Indian Penal Code' —'Prejudice' in section* 15, *meaning of.*] By a threat of suicide, a Hindu induced his wife and son to execute a release deed in favour of his brother in respect of certain properties which they claimed as their own. *Held* by WALLIS, C.J., and SESHAGIRI AYYAR, J. (OLDFIELD, J., dissenting) that the threat of suicide amounted to coercion within section 15 of the Indian Contract Act, and that the release deed was therefore voidable. *Per* WALLIS, C.J., and SESHAGIRI AYYAR, J.—Suicide is an 'act forbidden by the Indian Penal Code' and suicide by a Hindu, if actually committed, will be an act not only to his own prejudice but also 'to the prejudice' of his wife and son within section 15. *Per* OLDFIELD, J.—Suicide is not 'an act forbidden by the Indian Penal Code,' directly or inferentially; and hence the threat did not amount to coercion and the release was not voidable on that account. As the person who held out the threat was not a party to the release deed, it was not voidable on account of 'undue influence' within section 16 of the Indian Contract Act.

Ammiraju v. *Seshamma* ... ... (1918) I.L.R., 41 Mad., 33

————————————, SEC. 23.—*Agreement to pay money to Vakil's clerk for giving special attention to a case, whether opposed to public policy.*] An agreement by which a litigant binds himself to pay his vakil's clerk a certain amount for giving special attention to his legal business which his vakil was bound to see to in consideration of his fee, is opposed to public policy and is void and unenforceable. *Ex parte Cotton* (1846) 9 Beav., 107, referred to.

Suryanarayana v. *Subbayya* ... ... —... (1918) I.L.R., 41 Mad., 471

————————————, SS. 23 AND 65.—*Marriage brocage agreement—Money paid under, when recoverable—Principle of English Law, applicability of—Transfer, ostensible or real, whether a proper test.*] A marriage brocage agreement is unlawful and void *ab initio* and brokerage paid thereunder is recoverable if the agreement or a substantial part of it is not performed. Such an agreement does not fall within section 65 of the Contract Act and the rule to be applied is the rule of English Law. *Taylor* v. *Bowers* (1876) 1 Q.B.D., 291, *Kearley* v. *Thomson* (1890) 24 Q.B.D.,

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742 ; *Barclay* v. *Pearson* (1893) 2 Ch., 154 and *Petherperumal Chetty* v. *Muniandy Servai* (1908) I.L.R., 35 Calc., 551 (P.C.), referred to. *Ledu Coachman* v. *Hiralal Bose* (1916) I.L.R., 43 Calc., 115, dissented from. The rule applies whether the transfer of the property under the agreement was merely ostensible or real. *In re Great Brelin Steamboat Company* (1884) 26 Ch. D., 616, followed.

Srinivasa v. *Sesha* ... ... (1918) I.L.R., 41 Mad., 197

CONTRACT ACT, INDIAN (IX OF 1872), SEC., 73, ILL. (*a*)—*Breach of contract to sell goods—Measure of damages—No actual loss by breach—No market for the goods at place of delivery—Liability for damages—Rule of Indian and English Law, comparison of.*] The defendants agreed to sell a certain quantity of molasses to the plaintiffs by monthly instalments, and failed to deliver one of the instalments assigning as a reason the difficulty of obtaining freight. The plaintiffs did not purchase other molasses against the contract and there was no market for the goods at the place of delivery. The plaintiffs, who were not found to have incurred any actual loss from the non-delivery, sued to recover damages from the defendants for breach of the contract. *Held*, that the plaintiffs were entitled to damages as the case fell within illustration (*a*) of section 73 of the Indian Contract Act which lays down that the measure of damages in a case like this is the sum by which the contract price falls short of the price for which the purchaser *might have* obtained goods of like quality at the time when they ought to have been delivered. English and Indian cases discussed.

Hajee Ismail and Sons v. *Wilson & Co.*... ... (1918) I.L.R., 41 Mad., 709

——————————, SEC. 222 :—*See* CONTRACT TO PURCHASE AND SHIP GOODS 1060

——————————, SS. 239, 247 AND 248—*Hindu Law—Joint Hindu family—Family business, started during minority of undivided son—Business continued after son became major—Debts incurred in business—Son, whether partner and personally liable and for what debts—Adjudication as insolvent—Son, whether liable to adjudication—Partner, whether son becomes by helping during minority or taking part in business after majority—Admission of minor to benefits of partnership, meaning of.*] A Hindu father, of the Nattukottai Chetti caste, started a business during the minority of his undivided son; it was continued after the son became a major; no public notice of repudiation of partnership (if the son were a partner) was given by the son on his becoming a major; it was found that the son was helping in the business during his minority and was taking an active part in the business after attaining majority. In respect of the debts incurred in the business, both the father and the son were adjudicated insolvents; the son applied to set aside the order of adjudication passed against him, contending that he was not liable to adjudication: *Held* (by the Court) that the business should be held to be joint family business of the father and the son; *Held* (by WALLIS, C.J. and SPENCER, J., SADASIVA AYYAR, J., dissenting), that the members of a joint Hindu family on attaining majority do not necessarily by virtue of sections 247 and 248 of the Contract Act or otherwise become personally liable for, and liable to adjudication in respect of, debts contracted in the joint family business during their minority. Meaning of "admitted to the benefits of the partnership" in section 247 considered. The fact that the minor helped in the joint family business is not enough to show admission within the meaning of the section. *Samalbhai Nathubhai* v. *Someshwar* (1881) I.L.R., 5 Bom., 38; *In the matter of Haroon Muhammad* (1890) I.L.R., 14 Bom., 189, and other cases considered. *Lutchmanan Chetty* v. *Sivaprakasa Mudaliyar* (1899) I.L.R., 26 Calc., 349, followed. *Per* SADASIVA AYYAR, J.—Both by the rules of Hindu Law and by section 248 of the Contract Act (which also applies to this case), the son was personally liable for all the debts in respect of non-payment of which he was adjudicated an insolvent. Partnership in a family business does not depend upon the consent of the partners in many cases but upon the family being a trading family and the business being conducted for the benefit of the family, persons born into the family from time to time becoming partners as a matter of course.

The Official Assignee of Madras v. *Palaniappa Chetty* (1918) I.L.R., 41 Mad., 824

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CO-OWNER:—*See* TRUSTS ACT, SEC. 90 861

CO-SHARERS—*Lease by majority of common land—Validity of lease—Lease, whether binding on minority—Suit by minority in ejectment—Remedy, whether limited to partition only—Form of decree.*] A majority of co-sharers in samudayam or common land cannot grant a perpetual lease of the common property. Where a lease by some of the co-sharers is found to be invalid, the lessee is not entitled to be maintained in his possession, leaving it to those co-sharers objecting to his lease to sue for partition as their only remedy. Where the lease is by some of the co-sharers to a person who is also a co-sharer, and the suit is by other co-sharers to eject the lessee, the proper decree to be passed is one declaring that the lease is not binding on the plaintiffs and directing recovery of possession by the latter on their own behalf and that of the other co-sharers. *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* (1917) I.L.R., 43 Mad., 709 (P.C.), applied. *Watson and Company* v. *Ramchund Dutt* (1891) I.L.R., 18 Calc., 10 (P.C.), explained.

Raghavacharyulu v. *Govindasari* .. .. (1918) I.L.R., 41 Mad., 1068

COURT FEES ACT (VII OF 1887), SEC. 7:—*See* MADRAS CIVIL COURTS ACT (III OF 1873), SEC. 14 721

COURT OF WARDS ACT (MADRAS ACT II OF 1902), SS. 41 AND 37—*Non-notification of pecuniary claims as required by section 37, effect of—Cessation of interest, whether, final—Postponement of payment of unnotified claims to notified claims, whether, continued after cessation of Court of Wards management.*] The direction contained in section 41 of the Madras Court of Wards Act (II of 1902) to postpone payment of pecuniary claims against a ward of the Court which are not notified to claims notified, to the Collector as required by section 37 of the Act applies only to the Court of Wards and not to others authorized to execute decrees under the Civil Procedure Code; and that too in respect of unsecured claims; and the direction is not operative after the ward's estate ceases to be under the Court of Wards. Hence a mortgage decree against a person which the decree-holder failed to notify to the Collector while the person was under the Court of Wards is executable in Civil Courts, without any liability to postponement to notified claims, after the Court of Wards' management ceases. But non-notification of the existence of the claim as required by section 37 entails a final cessation of interest from six months after the notification prescribed in section 37 of the Act except in the event specified in section 55 (4). *Depuru Kalappa Reddy* v. *Umada Rajah* (1911) 1 M.W.N., 75, considered.

Ranga Row v. *Rajah of Karvetnagar* ... ... (1918) I.L.R., 41 Mad., 503

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 107, 192 AND 528—*Previous proceedings under section 107 and prosecution under the Penal Code—Discharge—Subsequent proceedings under sec. 107 on the same facts, if maintainable—Jurisdiction of Magistrates—Transfer by District Magistrate to a Magistrate without local jurisdiction before issue of notice to accused—Order of such Magistrate, validity of—Notice to accused, vague—Effect of notice.*] A Magistrate is not entitled to institute proceedings under section 107 of the Criminal Procedure Code upon facts and information which have already been the subject of enquiry under that section or in connexion with charges under the Penal Code brought against persons who have been discharged in those proceedings. A District Magistrate cannot be said to have taken cognizance of a case under section 107, in which he has not issued notice to the accused to show cause why they should not be proceeded against, and has no power under section 192 of the Criminal Procedure Code to transfer such a case to another Magistrate. A District Magistrate has no power under section 528 of the Criminal Procedure Code to make over the initiation of proceedings in a case under section 107 of the Criminal Procedure Code to a Magistrate who has no local jurisdiction in the matter. A Magistrate who has no local jurisdiction to initiate proceedings in a matter under section 107, Criminal Procedure Code, acquires none by the transfer of a case to him from a Magistrate who has jurisdiction but has not taken proceedings, and his proceedings are void and should be quashed. Proceedings under section 107 of the Criminal Procedure Code should be

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quashed if the notice issued to the accused under that section is so vague as not to give the accused particulars of the offences charged. *Nirbeekar Chandra Mukerjee* v. *The Emperor* (1909) 13 C.W.N., 580, *Surjya Kanta Roy Chowdhry* v. *Emperor* (1904) I.L.R., 31 Calc., 350 and *King-Emperor* v. *Munna* (1902) I.L.R., 24 All., 151, followed.

Konda Reddy v. *King-Emperor* ... ... (1918) I.L.R., 41 Mad., 246

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 195, CL. 1 (*b*) AND 7—*Sanction for perjury—Appellate Court to which appeals do not ordinarily lie, hearing appeal by transfer—Jurisdiction of, to grant sanction for perjury, whether as original or as appellate Court.*] The offence of perjury is complete when the false statement is made in the Court of first instance and it is not re-committed in the Appellate Court by the production of the record or otherwise in appeal, so as to entitle the Appellate Court to grant sanction as an original Court. And a Joint Magistrate to whose Court appeals from convictions by a Third-class Magistrate do not ordinarily lie but who hears an appeal from such Court by transfer from the District Magistrate cannot grant sanction for perjury committed before the Third-class Magistrate either as a Court of first instance or as an Appellate Court. *Eroma Variar* v. *Emperor* (1903) I.L.R., 26 Mad., 656, referred to. *Bhadesar Tiwari* v. *Kamta Prasad* (1913) I.L.R., 35 All., 90, not followed.

Anantharamayya v. *Tukkadu* ... ... (1918) I.L.R., 41 Mad., 787

———————————, SS. 247 AND 259—*Indian Penal Code* (*Act XLV of* 1860), *ss.* 352 *and* 504—*Summons-case—Warrant-case—Trial of both offences in one trial—Procedure to be followed—Absence of complainant at the hearing—Discharge of accused, effect of—Subsequent trial for the same offences, whether barred.*] Where a complaint was preferred against a person for offences under sections 352 and 504 of the Indian Penal Code committed in the course of the same transaction, the former offence being triable as a summons-case and the latter as a warrant-case, and the Magistrate discharged the accused owing to the absence of the complainant on the day of hearing, and a fresh complaint was preferred in respect of the same offences. *Held*, that the procedure to be followed in such a trial is the one provided for the trial of a warrant-case; and that the discharge of the accused did not amount to an acquittal of the offence under section 352 of the Indian Penal Code and was not a bar to the subsequent trial for the same offence. *Rajnarain Koonwar* v. *Lala Tamoli Raut* (1885) I.L.R., 11 Calc., 91, *Re Sobhanadri* (1916) I.L.R., 39 Mad., 503, *Hossein Sardar* v. *Kalu Sardar* (1902) I.L.R., 29 Calc., 481, and *In re Samsudin* (1898) I.L.R., 22 Bom., 711, followed.

Raghavalu Naicker v. *Singaram* ... ... (1918) I.L.R., 41 Mad., 727

———————————, SEC. 345—*Composition of an offence with one of several accused persons, effect of.*] The composition of an offence under section 345 of the Criminal Procedure Code with one of several accused persons does not effect an acquittal of the others. *Chandra Kumar Das* v. *The Emperor* (1902) 7 C.W.N., 176, dissented from.

Muthia Naick v. *The King-Emperor* ... ... (1918) I.L.R., 41 Mad., 323

———————————, SEC. 345—*Compounding of an offence before filing complaint, whether lawful.*] The compounding of offences mentioned in the first paragraph of section 345, Criminal Procedure Code, is lawful even if it takes place before any complaint is filed in respect thereof in a Court and once a composition has been arrived at, it has the effect of an acquittal under the section so as to bar the trial of the offence.

Kumaraswami Chetti v. *Kuppuswami Chetty* ... (1918) I.L.R., 41 Mad., 685

———————————, SEC. 436—*Indian Penal Code* (*Act XLV of* 1860), *ss.* 323, 354, 376, 511—*Subordinate Magistrate taking cognizance on police charge-sheet—No mention of offence under sections* 376, 511, *Indian Penal Code—Prosecution not pressing for committal before Magistrate—Order by District Magistrate directing committal—Validity of order—Reference by Sessions Judge—Quashing of commitment by High Court—*

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Jurisdiction of District Magistrate.] Where a Subordinate Magistrate took cognizance of a case on a police charge-sheet charging the accused with offences of assault and hurt under sections 354 and 323, Indian Penal Code, but no charge was made therein of the offence of attempt to rape, under sections 376 and 511, Indian Penal Code, and the prosecution did not press for the framing by the Magistrate of a charge in respect of that offence, but the District Magistrate purporting to act under section 436, Criminal Procedure Code, directed the Subordinate Magistrate to commit the accused to the Sessions for an offence under sections 376 and 511, Indian Penal Code, and the accused was so committed. *Held* (on a reference by the Sessions Judge), that the proceedings of the Subordinate Magistrate did not amount to an order of discharge on the major offence and the District Magistrate had no jurisdiction to pass an order under section 436 of the Criminal Procedure Code directing the Subordinate Magistrate to commit the accused to the Sessions for the offence under sections 376 and 511, Indian Penal Code. Commitment quashed and the Subordinate Magistrate directed to proceed with the trial of the minor offences. *Krishna Reddi* v. *Subbamma* (1901) I.L.R., 24 Mad., 136 (F.B.), distinguished.

Sessions Judge of Coimbatore v. *Murappa Goundan.* (1918) I.L.R., 41 Mad., 982

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 517—*Power under, to confiscate property produced before Court—Conviction for gambling under sections* 6 *and* 7 *of Madras Towns Nuisances Act* (*III of* 1889), *sections* 6 *and* 7—*Confiscation of money not actually used for gambling but found on gambler's person, validity of.*] On a conviction for gambling under sections 6 and 7 of the Madras Towns Nuisances Act (III of 1889), an order to confiscate money found with the gamblers can only be passed under section 517 of the Criminal Procedure Code; and only in respect of such money as has been actually employed in gambling and not in respect of other money found on the person of the gambler. *Per* AYLING, J.—Although section 517 is in its terms wide, confiscation of property 'produced' before a Criminal Court is not justifiable unless it has been used for an offence, or an offence has been committed regarding it. *Per* PHILLIPS, J.—The powers under section 517 are very large and the Magistrate's discretion is wide and the section empowers him to make such order as he thinks fit for the disposal of property 'produced' before him; but the discretion must be exercised judicially and not arbitrarily.

Re Appaji Ayyar ... ... (1918) I.L.R., 41 Mad., 644

———————————, SEC. 562—*Penal Code* (*Act XLV of* 1860), *sec.* 420—*Section* 562, *whether applicable to a conviction under section* 420.] The word 'cheating' in section 562 of the Code of Criminal Procedure does not cover the form of cheating punishable under section 420 of the Indian Penal Code. *Emperor* v. *Ramjan Dadubhai* (1915) 16 C.L.J., 781, approved and followed. *Harnarain* v. *Ramji Das* (1915) 12 A.L.J., 465, dissented from.

Sundaram Ayyar v. *The King-Emperor* ... ... (1918) I.L.R., 41 Mad., 533

CUSTOM, *finding as to existence of, whether revisable under section* 100, *Civil Procedure Code*:—*See* CIVIL PROCEDURE CODE, SEC. 100 374

CUSTOMARY LAW OF SOUTH KANARA—Kuzhikanam *lease—Compensation for improvements—Right of tenant to possession until payment—Possession by tenant after period of lease, nature of—Possession, if adverse—Notice to quit, if necessary—Customary law of Malabar—Malabar Compensation for Tenants' Improvements Act* (*Madras Act I of* 1900), *principles of, if applicable.*] Under the customary law of South Kanara, a *kuzhikanam* lessee is, as in Malabar, entitled to remain in possession of the holding after the expiry of the period fixed in the lease until he is paid the value of the improvements; consequently he does not acquire title by adverse possession by remaining in possession of the lands for more than twelve years after the expiry of the lease. *Srinivasa Pillai* v. *Venkatammal* (1913) 24 M.L.J., 296 and *Kummatha vittil Kunhi Kuthalai Haji* v. *Reverend Antoni Goveas* (1913) M.W.N., 339, referred to. *Subbraveti Ramiah* v. *Gundala Ramanna* (1910) I.L.R., 33 Mad., 260, distinguished. A *kuzhikanam* lessee who remains on the land after the

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period fixed in the lease, awaiting the payment of compensation for improvements, is not holding over as a tenant, and in the absence of evidence of assent by the landlord to the continuance of the tenancy, is not entitled to a notice to quit. Section 5 of the Malabar Tenants' Improvements Act (I of 1900) only embodies the customary law of Malabar and South Kanara.

Thema v. *Kunhi Pathumma* ... ... (1918) I.L.R., 41 Mad., 118

DAMAGE, *Too Remote*: —*See* RAILWAYS ACT, INDIAN 871

DAMAGES:—*See* TORTS 538

———*Measure of*:—*See* CONTRACT ACT (IX OF 1872), SEC. 73, ILL. (*a*) ... 706

DISTRICT MUNICIPALITIES ACT (MADRAS ACT IV OF 1884), SS. 172 AND 173:—*See* TORTS 538

EASEMENTS ACT (V of 1882), SEC. 15—*Easements—Prescription against Government—Right of way, and to surface water over land belonging to Government—Enjoyment for thirty or forty years against Government—Assignment, by Government to private person—Suit against latter within two years of assignment—Right of easement against assignee, whether acquired by prescription—'Belongs to Government' in section 15 of the Easements Act, meaning of.*] Where an easement had been exercised by the plaintiff over land belonging to Government for thirty or forty years before the land was assigned by the Government to the defendant, and the plaintiff sued within two years of the assignment to enforce the right of easement against the defendant. *Held*, that the plaintiff had not acquired a right to the easement by prescription against the defendant. The words 'belongs to Government' in the last paragraph of section 15 of the Indian Easements Act (V of 1882), must refer not to the time of suit but to the time during which the easement is enjoyed.

Srinivasa Upadya v. *Ranganna Bhatta* ... (1918) I.L.R., 41 Mad., 622

EJECTMENT, *Suit in—Decree directing payment of compensation—Decree allowed to be barred by limitation—Subsequent suit on title to recover the property, maintainability of.*] The plaintiff's father sued the defendant on a lease deed and obtained a decree in ejectment directing payment of compensation under the Malabar Compensation for Tenants' Improvements Act. He allowed the decree to become barred. Plaintiff then sued on his jenm title: *Held*, that the plaintiff was not entitled to maintain another suit to recover the property. *Kutti Ali* v. *Chindan* (1900) I.L.R., 23 Mad., 629, dissented from and *Vedapuratti* v. *Vallabha Valia Raja* (1902) I.L.R., 25 Mad., 300, approved.

Mayan Kutti v. *Kunhammad* ... ... (1918) I.L.R., 41 Mad., 641

———*See* LIMITATION ACT (IX OF 1900), SEC. 7, AND ART. 44.

ESTATES LAND ACT (MADRAS ACT I OF 1908), SS. 3 (2) (*d*) AND 8—*One of several* inamdars, *acquiring the entire* kudivaram *right in an* inam *village—Lease of lands by such* inamdar—*Suit for rent in Civil Court—Jurisdiction of Civil or Revenue Court—Exception to section* 8, *applicability of, to clause* (1) *or* (2) *of section* 8—*Strict construction, necessity for.*] Where one of several *inamdars* in an *inam* village, having acquired by gift the *kudivaram* right in the whole village and leased fifty cents of land out of the whole village, sued to recover rent in a Civil Court on the basis of the lease; *Held*, that the Civil Court had no jurisdiction to entertain the suit, and that the plaint should be returned for presentation to a Revenue Court having jurisdiction. The expression 'the *inamdar*' in the exception to section 8 of the Estates Land Act should be read in its strict sense as equivalent only to the owner of the entire interest in the *inam*, and the exception should be treated as governing only sub-section (1) and not sub-section (2) of section 8 of the Act.

Rajachari v. *Tirumugoor Devastanam* ... ... (1918) I.L.R., 41 Mad., 724

———SEC. 3 (2) (*d*)—*Grant in inam of an agraharam by an ancient king—Presumption as to rights conveyed, Agraharam granted, whether an 'estate'—Right of agraharamdar to sue in ejectment in Civil Court.*] There is no presumption in law that the grant of an inam by a Native ruler prior to British rule conveyed only the melvaram (revenue due to the State). *Held* accordingly, that a grant of an agraharam in inam made by a Reddi king of Nellore more than 400 years ago and validated under section 15 of Madras Regulation XXXI of 1802 conveyed both the melvaram and kudivaram rights. *Held* further, that the agraharam was not an 'estate' within section 3 (2) (*d*) of the Madras Estates Land Act and the agraharamdar was entitled to sue the tenants in ejectment in a Civil Court.

Suryanarayana v. *Patanna* ... ... (1918) I.L.R., 41 Mad. (P.C.), 1012

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

Sethurama Ayyangar v. *Suppiah Pillai* ... ... (1918) I.L.R., 41 Mad., 121

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

Sivanupandia Thevar v. *Zamindar of Urkad* ... (1918) I.L.R., 41 Mad., 109

———SEC. 192, CL. (*a*):—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLIII, AND SEC. 115 554

ESTOPPEL:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLI, R. 5 (3) ... 327

EVIDENCE ACT (I OF 1872), SEC. 35—*Register of births and deaths kept by village officials—Extract from the register, whether receivable in evidence and whether evidence of the date of death of a person.*] A register of births and deaths kept by village officials under the orders of the Board of Revenue is a public document within the meaning of section 35 of the Evidence Act and an entry in such register recording the death of a person is evidence of the actual date of his death. *Ratcliff* v. *Ratcliff and Anderson* (1859) 1 Swabey and Tristram, 467 and *In the Estate of Goodrich*: *Payne* v. *Bennet* (1904) Pr. D., 138, referred to.

Ramalinga Reddi v. *Kotayya* ... ... (1918) I.L.R., 41 Mad., 26

———, SEC. 68—*Attesting witness, meaning of—Writer of a document, whether can be regarded as an attesting witness.*] The writer of a document who signed the same as a scribe, can be regarded as an attesting witness, if he saw the signing of the document by the executant. *Veerappudayan* v. *Muthukaruppan Thevan* (1913) 24 M.L.J., 534, *Ayyasami Iyengar* v. *Kylasam Pillai* (1915) 26 I.C., 409 and *Ranu* v. *Laxman Rao* (1909) I.L.R., 33 Bom., 44, referred to. *Badri Prasad* v. *Abdul Karim*

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(1913) I.L.R., 35 All., 254 and *Ram Bahadur Singh* v. *Ajodhya Singh* (1916) 20 C.W.N., 699, dissented from.

Paramasiva Udayan v. *Krishna Padayachi* ... (1918) I.L.R., 41 Mad., 535

EVIDENCE ACT (I OF 1872), SEC. 165—*Suit under Registration Act (XVI of 1908), sec. 77—Suit to enforce registration of a will—Evidence taken before Sub-Registrar, filed in Court by the consent of parties—Evidence, not found to be relevant under sec. 33 of the Act or otherwise—Judgment and decree, based on such evidence whether valid.*] A suit, instituted under section 77 of the Registration Act to enforce registration of a will, was decided by the Court on evidence taken before the Sub-Registrar and filed as evidence in the suit by consent of the parties who did not want to adduce any further evidence in the Court. The Court did not find that the evidence was relevant under section 33 or any other section of the Evidence Act but admitted the same solely on the ground of the consent of the parties. On objection being taken in appeal to the validity of the judgment: *Held*, that the judgment was invalid under section 165 of the Evidence Act, as it was not based on facts declared to be relevant by the Act and duly proved, that the consent of parties could not take the place of a declaration of the Evidence Act, and that consequently the judgment and the decree should be set aside. *Sri Raja Prakasaravanim Garu* v. *Venkata Rao* (1915) I.L.R., 38 Mad., 160, dissented from.

Ponnusami Pillai v. *Singaram Pillai* ... ... (1918) I.L.R., 41 Mad., 731

EXECUTION:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 73 AND O. XXI, R. 83.

——— ———, *order for by Court of First Instance in ignorance of the Appellate Court's order for stay*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLI, R. 5 813

——— ———, *purchase of mortgage property in, by prior mortgagee who did not implead puisne mortgagee—Receipts of rents and profits, thereafter*:—*See* MORTGAGE 513

EXECUTION PETITION, *prayer therein for attachment—Attachment ordered—Failure to pay batta—Presumed oral application at the hearing of the petition to issue warrant of attachment—Whether such application is step in aid of execution—Part-payment entered in the petition—Civil Procedure Code (Act V of 1908), O. XXI, r. 2, cl. 1, whether certificate of payment proved—Limitation Act (IX of 1908), sec. 20, saving of limitation.*] Where an assignee of a decree filed a petition for execution on the 13th July 1911 and an order of attachment was made on the day of hearing, the 12th August 1911, and the petition was subsequently dismissed on the 26th August 1911 on his failure to pay batta within the time allowed, and a fresh application was filed on the 10th August 1914. *Held*, that, though in the above circumstances, the Court might presume that the decree-holder made an oral application on the day of hearing to proceed with the execution, such application was not a step in aid of execution and that the second application filed more than three years after the date of the first was barred by limitation. *Held* also, that the part-payment of a decree amount entered in an execution petition, presented within three years from the date of such alleged payment amounts, if the fact of payment is proved, to a certificate of payment under Order XXI, rule 2 of the Code of Civil Procedure, and will operate to save limitation under section 20 of the Limitation Act. *Rajam Ayyar* v. *Anantharatnam Ayyar* (1915) 29 M.L.J., 669 and *Lakhi Narain* v. *Pelamani Dasi* (1914) 20 C.L.J., 131, referred to.

Masilamani Mudaliar v. *Sethusami Ayyar* ... (1918) I.L.R., 41 Mad., 251

EXECUTION SALE, *confirmation of*:—*See* MORTGAGE 403

FRAUD—*Judgment obtained by perjured evidence—Suit to set aside, whether maintainable.*] A suit does not lie to set aside a judgment in a previous suit on the ground that it was obtained by perjured evidence. *Venkatappa Naick* v. *Subba Naick* (1906) I.L.R., 29 Mad., 179, overruled.

Kadirvelu Nainar v. *Kuppuswami Naiker* ... (1918) I.L.R., 41 Mad. (F.B.), 743

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FRAUDULENT ALIENATION *to defeat or delay creditors, whether binding until set aside by suit—Transfer of Property Act (IV of 1882), sec. 53, nature of suit under—Attachment of alienated property—Claim by alienee—Suit by unsuccessful claimant—Plea of attaching decree-holder of fraudulent nature of alienation, validity of.*] An alienation which is not a sham transaction but is only a fraudulent one intended to defeat or delay creditors of the alienor is only voidable and continues in force until set aside in proceedings properly instituted for the purpose; and in a suit by the alienee to set aside an adverse order passed against him in claim proceedings, it is not open to an attaching decree-holder against the alienor to plead in defence the fraudulent character of the alienation. *Palaniandi Chetti* v. *Appavu Chettiar* (1916) 30 M.L.J., 565, approved and *Abdul Kadir* v. *Ali Mia* (1912) 14 I.C., 715, s.c. (1912) 15 C.L.J., 649, not followed. *Quære*: Whether a suit by a creditor to avoid an alienation as infringing section 53 of the Transfer of Property Act must be brought in a representative capacity on behalf of all the creditors?

Subrahmanya Ayyar v. *Muthia Chettiar* ... (1918) I.L.R., 41 Mad. (F.B.), 612

GENERAL CLAUSES ACT (X OF 1897), *'Person,' definition of—Applicability of definition to 'person' in Civil Procedure Code, O. XXXIII*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII 624

GRANT—*Construction of—Grant of land by Government as bounded by a non-navigable river—Right of grantee to half the bed of the river, presumption as to—Onus of proving contrary on grantor.*] *Held* by the Full Bench:—(1) that in the case of a grant of land by Government described as bounded by a non-navigable river, the presumption (which may be strong or weak according to circumstances of each case) is that the grant passes to the grantee the bed of the river *ad medium filum aquae*, and (2) that the onus of showing the contrary is on the grantor.

Venkata Lakshminarasamma v. *The Secretary of State* ... (1918) I.L.R., 41 Mad. (F.B.), 840

GUARDIAN—*Adult coparcener's power to appoint by will*:—*See* HINDU LAW ... 561

GUARDIANS AND WARDS ACT (VIII OF 1890), SEC. 34—*Civil Procedure Code (Act V of 1908), sec. 36—Order—Decree—Marriage expenses of person dependent on the ward—Order against guardian—Ward attaining majority—Discharge of guardian—Application for execution against ward after majority—Jurisdiction of Court to order execution—Omission to object before attachment—Waiver—Estoppel.*] An order under section 34 of the Guardians and Wards Act directing a guardian to pay a sum of money out of his ward's estate for the marriage expenses of a person dependent on his ward is neither a decree nor an order executable as a decree under the Civil Procedure Code, and cannot be enforced against the ward after he has attained majority and the guardian has been discharged. There being an initial want of jurisdiction in the Court to execute such an order, the omission of the ward to object, after notice, to an order for attachment of his property, does not estop him from objecting to the jurisdiction of the Court to sell the property after attachment. *Somakka* v. *Ramiah* (1913) I.L.R., 36 Mad., 89, referred to.

Parvathammal v. *Chockalinga Chetty* ... ... (1918) I.L.R., 41 Mad., 241

HEREDITARY OFFICE:—*See* LIMITATION ACT, ARTS. 120, 124 4

———*See* HINDU LAW 816

———*See* MUHAMMADAN LAW 1084

HEREDITARY VILLAGE OFFICES ACT (MADRAS ACT III OF 1895), SEC. 5:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 47, EXPL. ... 418

HINDU LAW—*Adoption—Assent of nearest sapindas not sought—Consent of remote sapindas whether sufficient—Knowledge that sapinda will refuse, whether a good ground for not asking for his consent.*] In the Dravida country an adoption by a Hindu widow having no authority from her deceased husband to adopt, made with the consent of remote sapindas but without asking for the consent of the nearest sapindas is invalid. It is immaterial that the widow knew that the nearest sapindas, if asked for their consent, would

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have refused it. *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868) 12 M.I.A., 397 (400, 440, 411), *Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (1876) I.L.R., 1 Mad., 174 (190); L.R., 4 I.A., 1 (13, 14) and *Raghunada Deo* v. *Brozo Kishore Patta Deo* (1876) I.L.R., 1 Mad., 69; s.c., L.R., 3 I.A., 154, discussed and followed. *Quære*, whether the widow of a coparcener, who died in or before 1853, could adopt a son in 1896 after the joint family property had vested in the widow of his brother's son?

Veerabasavaraju v. *Balasurya Prasada Rao* ... (1918) I.L.R., 41 Mad. (P.C.), 998

HINDU LAW—*Adoption—Successive adoptions—Limit for exercise of power to adopt—Death of first adopted son leaving widow but no son—Second adoption by widow of previous owner of impartible zamindari—Family governed by Mitakshara Law—Divesting of property by adoption—Rule that adoption must be made to last male owner.*] *A*, the holder of an impartible zamindari and a member of a joint family governed by Mitakshara Law, gave authority to his wife to adopt a son to him. On *A*'s death his brother *R* took possession of the property. The widow subsequently adopted a son *B* who recovered the estate of *R* and held it until 1906, when he died leaving a widow but no son. A descendant of *R* then took possession of the property but died in the same year, and was succeeded by his son the respondent. In 1907 *A*'s widow purported to make a second adoption to *A* under the authority from him, by taking in adoption the appellant. In a suit brought by him to recover the zamindari, *Held* that the law imposed a limit within which a widow can exercise a power of adoption conferred on her, and the limit to her power was reached when *B* died after attaining full legal capacity to continue the line of descent either by a natural born son, or by the adoption to him of a son by his own widow against whom it had not been established (she not being a party to the suit) that she had no power to adopt. This conclusion was in no way in conflict with the previous decision of the Board in *Raghunada Deo* v. *Brozo Kishore Patta Deo* (1876) I.L.R., 1 Mad., 69; L.R., 3 I.A., 154, referred to. It was therefore not necessary to decide whether the authority to adopt empowered *A*'s widow to take a second adoption.

Madana Mohana Deo v. *Purushotthma Deo* ... (1918) I.L.R., 41 Mad. (P.C.), 855

———*Adoption by widow—Consent of Sapindas—Revocation of consent, effect of—Arbitrary revocation, whether competent—Delay in adoption or death of Sapinda, effect of—Divesting of estate.*] A Sapinda, who has given his consent to a widow to make an adoption to her husband, cannot *arbitrarily* withdraw his consent before it is acted upon by the widow. The party giving his consent can deliberately revoke it for justifiable reason, but where no reasons are given by him, Courts will not find out a justification for the revocation. Mere lapse of time without more, or the death of the consenting *Sapinda* will not put an end to a consent freely and *bona fide* granted. The assent of the Sapinda is presumptive evidence of the goodness of the act of adoption by the widow. Analogy of the rule as to consent of the nearest reversioner to an *alienation* by a widow applied. *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishore Patta Deo* (1876) I.L.R., 1 Mad., 69 (P.C.); *Bhimappa* v. *Basawa* (1905) I.L.R., 29 Bom., 400; *Narasimha* v. *Parthasarathy* (1914) I.L.R., 37 Mad., 199 (P.C.), referred to; *Mami* v. *Subarayar* (1913) I.L.R., 36 Mad., 145, and *Subrahmanayam* v. *Venkamma* (1903) I.L.R., 26 Mad., 635, explained. Where a widow, having succeeded as heir to her adopted son who died unmarried, adopted, with the consent of the nearest Sapinda, another son to her late husband, the latter would divest the estate vested in the adoptive mother, whether the estate was the ancestral or the self-acquired property of the first adopted son. *Veltanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (1876) I.L.R., 1 Mad., 174 and *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdry* (1865) 10 M.I.A., 209, referred to.

Suryanarayana v. *Ramadoss* ... ... (1918) I.L.R., 41 Mad., 604

———*Conversion of a Hindu widow to Muhammadan and marriage with a Muhammadan—Section 2 of Hindu Widows' Re-marriage Act (XV of 1856)—Forfeiture of Hindu husband's estate.*] *Held* by the Full Bench (SESHAGIRI AYYAR, J., dissenting) that a Hindu widow, who becomes a Muhammadan, forfeits under the Hindu Law, by her re-marriage, her interest in her Hindu husband's estate. *Murugai* v. *Viramakali* (1877) I.L.R., 1 Mad., 226, followed. *Moniram Kolita* v. *Keri Kolitani* (1880) I.L.R., 5 Calc., 776 (P.C.), distinguished; *Chowdappa* v. *Narasamma* (1917) 23 M.L.T., 81, overruled. *Held* further, by WALLIS, C.J. (OLDFIELD, J., and SESHAGIRI AYYAR, J., *contra*)—She forfeits also under section 2 of Act XV of 1856, which only embodied the existing law on the subject. *Per* SESHAGIRI AYYAR, J.—Neither by Hindu Law nor by section 2 of Act XV of 1856, which is only an enabling Act, does she forfeit her interest.

Vitta Tayaramma v. *Chatakondu Sivayya* ... (1918) I.L.R., 41 Mad. (F.B.), 1078

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HINDU LAW—*Co-parceners—Junior member of a joint Hindu family—Bond in the name of manager—Payment to a junior member during lifetime of manager—Liability of promisor—Discharge—Rule as to co-heirs and co-promisees—English Law.*] Payment made to a junior member of a joint Hindu family during the lifetime of its manager in whose favour a bond has been executed, will not discharge the promisor from his liability under the bond. Rule as to co-heirs applied, and the rulings as to co-promisees considered, and cases reviewed.

Ankalamma v. *Chenchayya* .. ,... ... (1918) I.L.R., 41 Mad., 637

———*Family business—Insolvency—Liability of son*:—*See* CONTRACT ACT, SEC. 239. 824

———*Grants made of properties for non-religious and for religious and charitable purposes by Raja of Tanjore to his guru, the ancestor of the parties—Suit for partition—Dispute whether granted to the guru personally or to the office of head of a mutt held by him—Perpetual conducting of food chatram and building agrahar—Private charities, management of—Non-religious properties, liable to partition—Charities not liable.*] Grants of the property in suit had been made by the Raja of Tanjore from time to time to the ancestor of the parties, a holy man whom the Raja brought to Tanjore as his guru. Some of the grants were for non-religious purposes and others for religious and charitable purposes in connexion with a mutt founded when the guru came to Tanjore; and the properties descended to a joint family the adult members of which consisted of three brothers, the eldest of whom (the appellant) was the manager of the joint family and the head of the mutt. To a suit by the second brother (the first respondent) to have partition of the non-religious properties, and as to the religious and charitable properties for a scheme of management in which he claimed a share, to be settled by the Court, the other brothers were made defendants, the youngest brother (as second defendant-respondent) supporting the plaintiff-appellant. *Held* as to the non-religious properties (upholding the decision of the Courts in India) that there was nothing in the documentary evidence (the original grants, and confirmatory inam grants made by the Government after the escheat of the Tanjore Raj) or in any of the other circumstances of the case to take the descent of the properties out of the ordinary rule of inheritance, and they were therefore liable to partition. The objects for which the religious and charitable properties were given were described in the grants as being for the purpose "of perpetually conducting a food chatram near the tomb of a holy man, and in one case of making an agrahar by building houses round the holy place." *Held* (reversing the decision appealed from) that there was sufficient indication in the grants and in the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee was inconsistent with the purposes of the founder who must be deemed to have intended that the religious charities should be administered by the man who was head of the mutt, to which office the eldest son of the previous holder would succeed, the office not being the subject of partition, but being indivisible among the members of the family, and the principles to be applied being those laid down in *Jaafar* v. *Aji* (1863) 2 M.H.C.R., 19 and *Trimbak* v. *Lakshman* (1896) I.L.R., 20 Bom., 495. Even if this were not so, *quære* whether the rules laid down in some cases as to the devolution of the management of private charities such as the support of a family idol would be applicable to charities such as those in question.

Sethuramaswamiar v. *Meenuswamiar* ... (1918) I.L.R., 41 Mad. (P.C.), 296

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HINDU LAW—*Inheritance—Illegitimate son—Right of putative father to succeed as heir.*] *Held* by the Full Bench :—Where an illegitimate son, who if he had survived his putative father, would have inherited his estate either alone or along with others, dies leaving no issue, widow or mother, his putative father is entitled to succeed as his heir. *Jogendro Bhupati Hurrochundra Mahapatru* v. *Nityanand Man Sing* (1891) I.L.R., 18 Calc., 151 (P.C.) and *Sadu* v. *Baiza and Genu* (1880) I.L.R., 4 Bom., 37, applied.

Subramania Ayyar v. *Rathnavelu Chetty* ... (1918) I.L.R., 41 Mad. (F.B.), 44

——— *Joint family—Impartible zamindari—Right of junior members of family to maintenance—Custom of impartibility—No coparcenery in impartible estate—Exceptions are subjects of special texts in Mitakshara—Custom or usage brought so repeatedly before the Courts as to be recognized becoming law without necessity of proof.*] In the absence of special custom the grandsons of a deceased zamindar are not entitled to maintenance out of the impartible estate in the hands of his successor. This follows from the fact that in an impartible zamindari there is no co-parcenery. *Sartaj Kuari* v. *Deoraj Kuari* (1888) I.L.R., 10 All., 272 ; L.R., 15 I.A., 15 ; and *Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards* (1889) I.L.R., 12 Mad., 393 ; I.L.R., 26 I.A., 83, followed. *Bachoo* v. *Mankorebai* (1914) I.L.R., 29 Bom., 51 (58), approved. The view taken in the Madras Courts prior to the cases above cited that there was joint property in an impartible zamindari which only fell short of co-parcenery because by custom there was no right to partition is no longer tenable. The right of sons to maintenance in an impartible zamindari had been so often recognized that it is not necessary in each case to prove a custom. There are other persons entitled to maintenance either by reason of their exclusion from the succession owing to personal disqualification or by reason of personal relationship to one of the line of zamindars, but the latter class does not include grandsons. *Yarlagadda Mallikarjuna Prasada Nayudu* v. *Yarlagadda Durga Prasada Nayudu* (1900) I.L.R., 24 Mad., 147 (155); L.R., 27 I.A., 151 (157) and *Nilmony Singh Deo* v. *Hingoo Lall Singh Deo* (1870) I.L.R., 5 Calc., 256 (259), approved. In the present case no special custom had been proved or even alleged ; and the claim was not based on personal relationship.

Rama Rao v. *Rajah of Pittapur* ... ... (1918) I.L.R., 41 Mad. (P.C.), 778

——— *Joint family—Suit for partition on behalf of minor—Death of minor before the filing of written statement—Severance of the joint status, if effected—Legal representative of minor, right of, to continue the suit.*] The rule that the institution of a suit for partition of joint family property effects a severance of the joint status is not applicable to a suit instituted on behalf of a minor ; for in such a suit it is for the Court to determine whether a decree for partition will be beneficial to the minor. Where a minor plaintiff dies during the pendency of the suit his legal representatives are not entitled to continue the suit. *Girja Bai* v. *Sadashiv Dhundira* (1916) I.L.R., 43 Calc., 1931 ; *Sundara Rajan* v. *Arunachalam Chetti* (1916) I.L.R., 39 Mad., 159, referred to.

Chelimi Chetty v. *Subbamma* ... ... (1918) I.L.R., 41 Mad., 442

——— *Mitakshara joint family—Power of adult coparcener to appoint by will guardian for minor coparcener's property.*] *Held* by the Full Bench that the only adult coparcener of a Mitakshara family consisting of himself and his minor coparceners, is not competent to appoint a testamentary guardian to the coparcenary properties of the minor coparceners. *Cases on the subject reviewed.*

Chidambara Pillai v. *Rangasami Naicker* ... (1918) I.L.R., 41 Mad. (F.B.), 561

——— *Promissory note executed by father before partition—Renewal of the note by father after partition—Son's liability on such note—Pious obligation to discharge father's debts, extent of.*] A Hindu son is not liable during his father's lifetime on a promissory note executed by his father after partition in renewal of a note executed by the father before partition. The recent

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

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

HINDU LAW—*Religious office and emoluments—Hindu females, right of, to inherit.*] *Held* by the Full Bench (SADASIVA AYYAR, J., dissenting), that according to the practice and precedents obtaining in the Madras Presidency, a Hindu female is not incompetent by reason of her sex to succeed to the office of archaka in a temple and to the emoluments attached thereto. *Sundarambol Ammal* v. *Yogavana Gurukkal* (1915) I.L.R., 38 Mad., 850, overruled. *Mohan Lalji* v. *Gordhan Lalji Maharaj* (1913) I.L.R., 35 All., 283 (P.C.), distinguished.

Annaya Tantri v. *Ammakka Hengsu* ... (1918) I.L.R., 41 Mad. (F.B.), 886

——— *Surety—Son's liability—Kinds of sureties—Surety for appearance, assurance and payment, meaning of—Texts of Yajnavalkya, construction of—Debt contracted prior to surety-bond—Effect on son's liability.*] Where a Hindu executed a surety-bond stating that he would make the debtor pay within two months the amount due on a promissory note already executed by the latter and that, in default of payment by the debtor, he would pay. *Held*, that the surety was one for payment ; that the sons of the surety were liable under Hindu Law for the payment and that it made no difference that the money had already been lent to the creditor before the surety-bond was executed. Suretyship, according to the texts of Yajnavalkya, is of three kinds, viz., for appearance, for assurance and for payment : in the last case the surety's sons are also liable to pay his surety-debts. According to the Mitakshara commentary, the suretyship by way of assurance consists of a general warranty of credit, but a surety for payment is one who says, "If he does not pay, then I myself will pay". *Tukaram Bhat* v. *Gangaram* (1899) I L.R., 23 Bom., 454 ; *Rasik Lal Mandal* v. *Singheswar Rai* (1912) I.L.R , 39 Calc., 843, referred to.

Thangathammal v. *Arunachalam Chettiar* ... ... (1918) I.L.R., 41 Mad., 1071

——— *Widow's alienation, not for necessary purpose—Subsequent adoption—Right of adopted son to set aside alienation and recover alienated property.*] A Hindu widow alienated certain properties for a purpose not binding on the inheritance, and thereafter adopted a son : *Held*, by the FULL BENCH that the alienation was not binding on the adopted son and that he could sue, during the lifetime of the widow, to set aside the alienation and recover the properties so alienated, his cause of action arising from the time of his adoption. *Sreeramulu* v. *Kristamma* (1903) I.L.R., 26 Mad., 143, overruled. *Boncmali Roy* v. *Jagat Chandra Bhowmick* (1905) I.L.R., 32 Calc., 669 (P.C.), and dictum in *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868) 12 M.I.A., 397 at *p.* 443, followed.

Vaidyanatha Sastri v. *Savithri Ammal* ... (1918) I.L.R., 41 Mad. (F.B.), 75

HINDU WIDOWS' RE-MARRIAGE ACT, SEC. 2 :—*See* HINDU LAW, CONVERSION OF A HINDU WIDOW 1078

IMPARTIBLE ZAMINDARI—*Maintenance of junior members* :—*See* HINDU LAW. 778

INAM, *grant of, prior to British rule—Conveyance of melvaram*:—*See* ESTATES LAND ACT (MADRAS ACT I OF 1908), SEC. 3 (2) (*d*) 1012

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INDIAN RAILWAYS ACT (X OF 1890):—*See* RAILWAYS ACT 871

INHERITANCE—*Putative father, right of, as heir to his illegitimate son*:—*See* HINDU LAW 44

INJUNCTION—*Temporary injunction in mandatory form—Power of Indian Courts to grant under Order XXXIX, rule 2, Civil Procedure Code (Act V of 1908).*] Courts in India can under Order XXXIX, rule 2, Civil Procedure Code, issue temporary injunctions in a mandatory form. *Israil* v. *Shamser Rahman* (1914) I.L.R., 41 Calc., 436, and *Champsey Bhimji & Co.* v. *Jamna Flour Mills & Co.* (1914) 16 Bom. L.R., 566, referred to. The view of BEAMAN, J., in *Rasul Karim* v. *Pirmbhai Amirbhai* (1914) I.L.R., 38 Bom., 381, not followed.

Kandaswami v. *Subramanya* ... ... (1918) I.L.R., 41 Mad., 208

INSOLVENCY *of father—Liability of son*:—*See* CONTRACT ACT, SEC. 239. ... 824

JUDICIAL OPINION:—*See* LETTERS PATENT 943

JURISDICTION *of Inferior Court to set aside decree of Superior Court obtained by fraud—Reliefs that can be granted.*] A District Munsif can entertain a suit for a declaration that a decree passed by a District Court was obtained by fraud when the amount decreed and the subject-matter of the suit are within his jurisdiction; but he cannot direct a re-trial of the suit by the District Court. The previous suit can be revived only by an application to the District Court.

Arunachellam v. *Sabapathy* ... ... (1918) I.L.R., 41 Mad., 213

——————— *of Magistrate*:—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 107, 192 AND 528 246

LAND ACQUISITION ACT (I OF 1894)—*Award, whether a decree*:—*See* LETTERS PATENT, CLAUSES 15 AND 36 943

LAND IMPROVEMENT LOANS ACT (XIX OF 1883), SEC. 7 (1) (*c*) *sale under—Loan, a first charge on the land—Sale, free of prior encumbrances—Improvements effected before receipt of loan, effect of—Non-completion of improvements within time and extension of time, effect of, on further advance of loan—Proviso to a section, use of, to interpret the section.*] A loan advanced under the Land Improvement Loans Act (XIX of 1883) is, subject to proviso to section 7 (1), a first charge on the land for the improvement of which the loan is advanced; hence a sale under section 7 (1) (*c*) of the Act to recover the loan is free of prior encumbrances. Neither the fact that a portion of the improvement had been effected with the help of a private loan before the loan applied for was actually advanced, nor the fact that the Government relaxed the rigour of its rules and allowed the borrower an extension of time to utilize the first instalment of the loan before the second was disbursed makes the loan any the less a loan under the Act, if in effect the loan was utilized for the purpose for which it was borrowed. Though a proviso to a section cannot be used to extend its operation, yet in case of doubt or ambiguity as to the meaning of the substantive part of the section, the proviso can be looked to to ascertain its proper interpretation. *West Derby Union* v. *Metropolitan Life Assurance Society* (1897) A.C., 647, followed.

Sankaran Nambudripad v. *Ramaswami Ayyar* ... (1918) I.L.R., 41 Mad., 691

LANDLORD AND TENANT, *agreement between, for a consolidated grain rent*:—*See* ESTATES LAND ACT (MADRAS ACT I OF 1908), SEC. 40, CL. (3) 109

———————, *Denial of landlord's title when entails forfeiture—Power of Court to relieve forfeiture.*] In order that a denial of landlord's title should work a forfeiture of the tenancy, three things are necessary: (*a*) the tenant must set up title either in himself or in a third party, inconsistent with their mutual relationship, (*b*) the denial must be direct and unequivocal and not casual and (*c*) it must be made to the knowledge of the landlord. A casual statement, uncommunicated to the landlord,

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made by a tenant in a sale-deed executed by him in favour of a third party in respect of *other* properties, to the effect that the executant is the owner of the properties leased, does not amount to a disclaimer of the landlord's title. *Per* SESHAGIRI AYYAR, J. *Obiter*—A disclaimer of the landlord's title effects a forfeiture even if the tenure be for a specific term, and Courts have no power to relieve against it unless the disclaimer was occasioned by the fraud, mistake or accident of the landlord and the tenant was neither careless nor negligent.

Kenaloori v. *Muhamed* ... ... (1918) I.L.R., 41 Mad., 629

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

LETTERS PATENT, CLAUSES 15 AND 36—*Appeal to High Court from award under Land Acquisition Act (I of 1894)—Bench of two Judges—Difference of opinion—Appeal under clause 15 of the Letters Patent, whether maintainable—Section 98 (2), Civil Procedure Code (V of 1908) and clause 36, Letters Patent, applicability of, to appeals in Land Acquisition cases—Rule 2 of Appellate Side Rules, applicability of, to such appeals.*] The decision of the High Court in a Land Acquisition appeal is not a 'judgment' within clause 15 of the Letters Patent so as to enable a party to file a further appeal to the High Court under that article. *Rangoon Botatoung Company, Ld.* v. *The Collector, Rangoon* (1914) I.L.R., 40 Calc., 21 (P.C.) and *The Special Officer, Salsette Building Sites* v. *Dessabhai Basanji Motiwala* (1913), 17 C.W.N., 421 (P.C.), followed. Section 98 of the Civil Procedure Code applies to Land Acquisition appeals and if a bench of two Judges hearing an appeal differ as to the amount of additional compensation awardable, the proper order to pass on the appeal is to confirm the award of the lower Court under that section and not to give a decree up to the lower limit of additional compensation. *Kishen Dayal* v. *Irshad Ali* (1915) 22 C.L.J., 525, distinguished. An award is a decree or order of a Civil Court within Rule 2 of the Appellate Side Rules of the High Court. PER SESHAGIRI AYYAR, J.—Section 98, Civil Procedure Code, is not strictly applicable to the facts of the case.

Manavikraman Tirumalpad v. *The Collector of the Nilgiris.* (1918) I.L.R., 41 Mad., 943

LIMITATION—*Admission of appeal after period of limitation has expired without notice to respondent—Power of Court to grant reconsideration of order admitting it at instance of respondent—Practice of Courts in India—Suggestion by Privy Council that such practice should be altered by the Indian Courts with the view of securing final determination of any question of limitation at time of admission of appeal—Limitation Act (IX of 1908), ss. 4 and 5.*] The admission of an appeal after the period of limitation has expired deprives the respondent of a valuable right by putting in peril the finality of the order in his favour. When an order admitting an appeal has been made in the absence of the respondent, and without notice to him, to preclude him from questioning its propriety would amount to a denial of justice. Such an order, so made, should therefore be treated as open to reconsideration at the instance of the respondent. This view is sanctioned by the practice of the Courts in India. *Held* also, that the Court was not exceeding its jurisdiction in permitting the question of limitation to be re-opened when the appeal came before it for hearing, and under the circumstances it had power to reconsider the sufficiency of the cause shown for the delay. That practice was not peculiar to Madras, but prevailed in other Courts in India. Such a practice, however, was in their Lordships' opinion open to grave objection, and it was urgently expedient that in place of such a practice, a procedure should be adopted by Courts in India which would secure, at the stage of the admission of an appeal, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal.

Krishnaswami Panikondar v. *Ramaswami Chettiar* ...(1918) I.L.R., 41 Mad. (P.C.), 412

——————:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII, R. 5. 620

——————:—*See* LIMITATION ACT (IX OF 1908), SEC. 7 AND ART. 44 102

——————:—*See* MUTT 124

——————:—*See* LIMITATION ACT (IX OF 1908), ART. 118 12

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LIMITATION, *decree allowed to be barred by*:—*See* EJECTMENTS, *suit in*.

LIMITATION ACT (IX OF 1908), SEC. 2:—*See* LIMITATION ACT (IX OF 1908), ART. 124.

———————————, SS. 4 AND 5:—*See* LIMITATION.

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

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

———————————, SEC. 10, *whether applicable to suits in respect of property which has not been received by a trustee.*] The insertion in section 10 of the Indian Limitation Act, 1908, of the words "or the proceeds thereof, or for an account of such property or proceeds" has not had the effect of exempting from the ordinary rules of limitation suits against trustees for failure to reduce the trust property into possession. *New Fleming Spinning and Weaving Company Limited* v. *Kessowji Naik* (1885) I.L.R., 9 Bom., 378 at p. 399, followed.

Tholasingam Chetty v. *Vedachella Aiyah* ... ... (1918) I.L.R., 41 Mad., 319

———————————, SS. 13, 19 AND 20—*Loan to a partnership—One of the partners absent from British India—Suit for loan more than three years after loan but within three years after return of partner, whether barred and against whom—Release by some partners of a partnership debt, whether binding on legal representative of a deceased partner—Entries in debtor's accounts, whether payment of interest or acknowledgment.*] The plaintiff's father was a partner along with the third, the sixth and eighth defendants, of a firm at *E*, which advanced certain loans in 1903 and 1904 to a firm at *S* of which the first defendant and the former defendants were partners; the first defendant was out of British India from 1903 to 1908. The plaintiff sued in 1909 to recover his share of the loans from the partners of the firm at *S*. The defendant pleaded that the suit was barred by limitation; the plaintiff relied in bar of limitation on section 13 of the Limitation Act and also on certain unsigned entries in defendants' account books in which the interest accruing due were added to principal from time to time; the first defendant further pleaded a release by defendants Nos. 3, 6 and 8 of the claim against him as binding on the plaintiff: *Held*, that the suit was not barred by limitation against the first defendant as the plaintiff was entitled to a deduction of the time during which the first defendant was out of British India but was barred against the other defendants under section 13 of the Limitation Act; that the entries in the debtor's accounts could not be treated as payments of interest under section 20 of the Limitation Act, or as acknowledgments under section 19 of the Act as they were not signed by the debtors. *Held* also, that a partner can release a partnership claim, and, after the death of a partner, the surviving partners have a right to release such a claim; that, if a release by any of the partners is fraudulent the other partners can avoid it and seek to recover their share of the released debt, but the legal representative of a deceased partner is not entitled to avoid it as the right to do so is personal to the partners; *Held* (on the facts) that the release of the first defendant by the third, sixth and eighth defendants was *bona fide* and binding on the plaintiff.

Palaniappa Chettiar v. *Veerappa Chettiar* ... (1918) I.L.R., 41 Mad., 416

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LIMITATION ACT (IX OF 1908), SEC. 18, ARTS. 62, 115 AND 116:—*See* CONTRACT 488

———————————, SEC. 20:—*See* EXECUTION PETITION 251

———————————, SS. 21 (2), 19 AND 20—*Partnership—Acknowledgment of liability or payment by one partner, when binding on others.*] Direct evidence that one of several partners or co-contractors had authority to acknowledge liability or make payments so as to save limitation as against his partners or co-contractors is not necessary, but such authority can be inferred from surrounding circumstances such as the position of other co-contractors or partners. *Valasubramania Pillai* v. *S.V.R.R.M. Ramanathan Chettiar* (1909) I.L.R., 32 Mad., 421 and *Shaik Mohideen Sahib* v. *The Official Assignee of Madras* (1912) I.L.R., 35 Mad., 142 at p. 145, considered.

Veeranna v. *Veerabhadraswami* ... ... (1918) I.L.R., 41 Mad. (F.B.), 427

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

Lingayya v. *Chinna Narayana* ... ... (1918) I.L.R., 41 Mad. (F.B.), 169

———————————, SCH. II, ARTS. 120, 142 AND 144:—*See* UNSETTLED-PALAYAM 749

———————————, ARTS. 4, 7, 101, 102 AND 120—*Hereditary archaka of a temple—suspension by trustees—Suit by archaka, for pay, perquisites and damages against trustees—Limitation for suit—Provincial Small Cause Courts Act* (*IX of* 1887), *sch. II, art.* 13—*Suit*, whether *cognizable by a Small Cause Court—Appeal against order of remand, whether competent.*] The plaintiffs, who were hereditary *archakas* in a temple, were suspended from their office in June 1912, by the trustees of the temple; the order was passed on the 19th June 1912 and the suspension lasted till 3rd July 1912. The plaintiffs, alleging that the suspension was illegal and unjust, sued on the 28th June 1915 to recover their pay and perquisites as well as damages for mental distress, loss of dignity, etc., for an amount below Rs. 500 as against the trustees, the *peishkar* of the temple and the person who performed the duties of their office during their suspension. The lower Appellate Court having held that the suit was not barred by limitation as regards pay and perquisites and remanded the case to the Court of First Instance, one of the trustees preferred an appeal against the order of remand, contending that the suit was wholly barred. The respondents (plaintiffs) raised a preliminary objection that the appeal was incompetent as the suit was of a small cause nature: *Held*, that an appeal lay to the High Court against the order of remand, as the suit was not cognizable by a Small Cause Court; that article 102 of the Limitation Act applied to the suit as against the trustees as regards the pay and the perquisites if payable by the temple, and the suit was not barred as regards such claims; that article 36 applied to the claim for perquisites if payable by third persons, as well as to the claim for damages, and the claims were barred; and that, as against the *peishkar*, there was either no cause of action or it was barred under article 36 of the Limitation Act.

Baradwaja Mudaliar v. *Arunachala Gurukkal* ... (1918) I.L.R., 41 Mad., 528

———————————, ART. 13—*Attachment of property before judgment—Order raising the attachment—Decree in the suit—Subsequent suit for a declaration that the property is liable to be attached for the decree—Existence of the order, whether bar to such suit.*] An order releasing certain properties from attachment before judgment, is no bar to a subsequent suit for a declaration that they are liable to attachment in execution of the decree in the prior suit, and such suit is not governed by articles 13 of the Limitation Act. *Bisheshar Das* v. *Ambika Prasad* (1915) I.L.R., 37 All., 575, not followed.

Ramanamma v. *Kamaraju* ... ... (1918) I.L.R., 41 Mad., 28

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LIMITATION ACT (IX OF 1908), ARTS. 89 AND 90 :—*See* PRINCIPAL AND AGENT. 1

——————————, ART. 113—*Contract between two parties that on payment of a specified sum by one to the other, the latter would transfer a decree in his favour to a third party—Suit by such third party for specific performance of the contract—Limitation—Starting point.*] *A* agreed with *B* that on the latter paying him a specified sum of money he would transfer a decree in his favour to *C*. In a suit by *C* against *A* for the specific performance of the contract by the execution of a deed of transfer, *Held*, that the suit was governed by the second part of article 113 and time began to run from the date on which *C* had notice that performance was refused and not from the date of payment to *A* by *B* of the sum agreed in the contract. Applicability of the doctrine of *certum est quod certum redde potest* to third parties, considered.

Venkanna v. *Venkatakrishnayya* ... ... (1918) I.L.R., 41 Mad., 18

——————————, ARTS. 120, 134 AND 144:—*See* MUTT 124

——————————, ART. 124—Stani *in Malabar constituted trustee of a temple and its properties—Absolute transfer by the* stani *of the trusteeship and temple properties to defendant's predecessor—Effect of adverse possession for over the statutory period on succeeding* stani—*Section* 2 (*d*) *of Limitation Act, definition of 'plaintiff' in.*] According to the customary law of Malabar a *stanom* is descendible from one *stani* to another in a peculiar line of succession. A suit by a *stani* to recover a hereditary office of trustee of a temple and its properties, attached to the *stanom* is governed by article 124 of the Limitation Act and adverse possession for over the statutory period of the office of trustee and the properties of the trust as against a prior *stani* is a bar to a suit by the successor to recover the same. Though the successor gets his title not by any act of his predecessor but by succession according to the law of the land, he derives his right to sue only *from or through* his predecessor within section 2, clause (8) of the Limitation Act. *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1900) I.L.R., 23 Mad., 271 at p. 281 (P.C.), applied.

Raja of Palghat v. *Raman Unni* ... ... (1918) I.L.R., 41 Mad., 4

——————————, ART. 125—*Alienation by a Hindu widow—Failure of existing reversioners to sue to set it aside within twelve years, effect of, on future reversioners—Representative character of the suit.*] A suit by a reversioner to set aside an alienation by a Hindu widow is a representative suit on behalf of all her reversioners, then existing or thereafter to be born, and all of them have but a single cause of action, which arises on the date of the alienation. Hence, if by failing to sue within twelve years, allowed by article 125 of the Limitation Act (IX of 1908), the existing reversioners become barred by limitation, reversioners thereafter born are equally barred. *Venkatanarayana Pillai* v. *Subbammal* (1915) I.L.R., 38 Mad., 406 (P.C.), *Janaki Ammal* v. *Narayanaswami Aiyer* (1916) I.L.R., 39 Mad., 734 (P.C.), followed. *Govinda Pillai* v. *Thayammal* (1905) I.L.R., 28 Mad., 57, *Veerayya* v. *Gangamma* (1913) I.L.R., 36 Mad., 570, *Narayana* v. *Rama* (1915) I.L.R., 38 Mad., 396 and *Venkata Row* v. *Tuljaram Row* (1917) M.W.N., 30, overruled. *Semble.*—A decision one way or other, in a suit by one of them binds all of them. *Per* SESHAGIRI AYYAR, J.—*Semble* that article 125 does not apply to persons not born at the date of the alienation, but that the right to declaratory relief of this nature is only conferred on persons alive at the date of the alienation.

Varamma v. *Gopaladasayya* ... ... (1918) I.L.R., 41 Mad. (F.B.), 659

—————————— ARTS. 126, 144 AND 148—*Sale of equity of redemption by one of two mortgagors—Redemption by vendee—Possession of property by vendee for more than twelve years—Sale by the other co-mortgagor to another—Suit by latter to redeem his half-share—Suit, more than twelve years after first vendee took possession on redemption, whether barred.*] The first defendant and his father *G*, mortgaged with possession the suit lands to the second defendant in 1892; in 1897 *G* sold the equity of redemption to the third defendant, who redeemed the lands and obtained possession in 1898. The first defendant sold his interest in the lands in 1910 to the plaintiff, who instituted a suit in 1912 to redeem his half-share in the property on payment of half the mortgage-debt. The third defendant pleaded that the suit was barred by limitation: *Held*, that article 148 of the Limitation Act was not applicable to the case and the suit was barred by limitation, as the case fell within article 126. *Semble.*—The suit was also barred under article 144. *Jai Kishen Joshi* v. *Budhanand Joshi* (1916) I.L.R., 38 All., 138, *Bhaiji Shamrao* v. *Hajimiya Mahomed* (1890) 14 Bom., L.R., 314, followed; and *Ramaswami Ayyar* v. *Vanamamalai Ayyar* (1899) I.L.R., 23 Bom., 137; s.c., (1915) 26 I.C., 873, *Vasudeva Mudaly* v. *Srinivasa Pillai* (1907) I.L.R., 30 Mad., 426 (P.C.), explained.

Munia Goundan v. *Ramasami Chetty* ... ... (1918) I.L.R., 41 Mad., 650

LIS PENDENS—*Transfer of Property Act* (*IV of* 1882), *sec.* 52—*No contest between defendants—Alienation by one defendant to a stranger pending suit, whether affected by* lis pendens.] The rule of *lis pendens* enunciated in section 52 of the Transfer of Property Act does not differ from the English rule and it protects parties to litigation against alienations by their opponents pending suit; and the prohibition contained in the section is like *res judicata* inapplicable between parties to the suit who are ranged on the same side and between whom there is no issue for adjudication. 'Any other party' in section 52 means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation *Ballamy* v. *Sabine* (1857), De. G. & J., 566 and *Faiyaz Husain Khan* v. *Prag Narain* (1907) I.L.R., 29 All., 339 at p. 345 (P.C.), applied. In a previous suit by *A* to set aside a sale made by him to *B* as void and invalid and consequently to set aside a mortgage made by *B* to *C* also as invalid, the plea of *B* and *C* that both the sale and mortgage were good was upheld. Pending the suit *D* bought *B*'s rights in a Court auction. In a subsequent suit by *C* to enforce the mortgage, *Held* that *D*'s purchase was not affected by *lis pendens* as there was no contest between *B* and *C* in the previous suit as to the validity of the mortgage and that *D* was entitled to plead that the mortgage was invalid as having no consideration.

Krishnaya v. *Mallya* ... ... (1918) I.L.R., 41 Mad., 458

MADRAS CIVIL COURTS ACT (III OF 1873), SEC. 14—*Court Fees Act* (*VII of* 1887), *sec.* 7 (v) *and* (vi)—*Suit for pre-emption—Valuation of suit for purposes of jurisdiction—Suit originally filed in District Munsif's Court—Return of plaint as beyond its jurisdiction—Presentation of plaint in a Subordinate Judge's Court—Plaint again returned by latter Court—Appeal to District Court against order of District Munsif, whether competent—Election of remedies—Civil Procedure Code*, O. 48, r. 1.] The plaintiff instituted the suit in a District Munsif's Court to enforce his right of pre-emption in respect of the suit lands which had been mortgaged to him on otti for Rs. 3,190, and were sold to some of the defendants for Rs. 4,500. The District Munsif returned the plaint for presentation to the proper Court, holding that the suit was beyond his pecuniary jurisdiction. On the plaint being presented in a Subordinate Judge's Court, it was returned again by that Court which held that the former Court had jurisdiction. The plaintiff, thereupon, preferred an appeal to the District Court against the order of the District Munsif. The defendants raised a preliminary objection that the appeal was incompetent and also contended that the District Munsif had no jurisdiction to entertain the suit. *Held*, that the appeal to the District Court was maintainable, although the plaintiff had filed the plaint in the Subordinate Judge's Court in pursuance of the order of the District Munsif: *Held also*, that the proper valuation of a suit for pre-emption is, for purposes of jurisdiction, in accordance with section 14 of the Madras Civil Courts Act that fixed in the manner provided by the Court Fees Act, section 7 (v); and that so valued, the present suit was within the jurisdiction of the District Munsif's Court.

Narayanan Nair v. *Cheria Kathiri Kutty* ... (1918) I.L.R., 41 Mad., 721

MADRAS DISTRICT POLICE ACT (XXIV OF 1859):—*See* UNSETTLED-PALAYAM 749

MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895):—*See* UNSETTLED-PALAYAM 749

——————————:—*See* CIVIL PROCEDURE CODE, SEC. 47 418

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MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894): —*See* CIVIL PROCEDURE CODE, SEC. 47 418

MADRAS REGULATIONS :—*See* REGULATION.

MADRAS SALE OF MINORS' ESTATES REGULATION (X OF 1831) :—*See* REVENUE RECOVERY ACT (II OF 1864) 738

MADRAS TOWNS NUISANCES ACT (MADRAS ACT III OF 1889), SS. 6 AND 7 :—*See* CRIMINAL PROCEDURE CODE, SEC. 517 644

MAINTENANCE :—*See* HINDU LAW. 778

———————*See* MALABAR LAW 1076

———————*See* MUHAMMADAN LAW. 211

MAJORITY ACT, INDIAN (IX OF 1875), SEC. 2:—*See* MUHAMMADAN LAW—DOWER 1026

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (MADRAS ACT I OF 1900) :—*See* CUSTOMARY LAW OF SOUTH KANARA ... 118

MALABAR LAW—Karnavan *appointed by family karar—Right of other members to remove such* karnavan *by suit, for misconduct.*] *Held* by the Full Bench that a person appointed as *karnavan* of a *tarwad* by an agreement (*karar*) of the members of the *tarwad* is liable to be removed for gross misconduct by a suit at the instance of the other members. *Cheria Pangi Achan* v. *Unnalachan* (1917) M.W.N., 185, explained.

Chindan Nambiar v. *Kunhi Raman Nambiar* ... (1918) I.L.R., 41 Mad. (F.B.), 577

———————*Right of a member of a tarwad to a separate maintenance—Female member marrying under Malabar Marriage Act (IV of* 1896)*—Act whether bar to her claim for maintenance from tarwad.*] The right of every member of a Malabar tarwad to be maintained out of the tarwad property is based on his or her right as a co-proprietor in the same and a female member of the tarwad is not deprived of such right by reason of her marriage under the provisions of the Malabar Marriage Act (IV of 1896).

Ammani Amma v. *Padmanabha Menon* ... (1918) I.L.R., 41 Mad., 1075

MALABAR MARRIAGE ACT :—*See* MALABAR LAW 1075

MALABAR OTTI—*Pre-emption in Court Sale* :—*See* PRE-EMPTION 582

MARRIAGE BROCAGE AGREEMENT :—*See* CONTRACT ACT (IX OF 1872), SS. 23 AND 65 197

MINOR, *suit for partition on behalf of* :—*See* HINDU LAW 442

MORTGAGE—*Sale of equity of redemption by one of two co-mortgagors—Redemption by vendees. Possession of property by vendee for more than twelve years—Sale by the other co-mortgagor to another—Suit by latter to redeem his half-share—Limitation* :—*See* LIMITATION ACT (IX OF 1908), ARTS. 126, 144 AND 148 650

———————*Suit and decree by prior mortgagee without impleading puisne mortgagee—Purchase of mortgage property by prior mortgagee in execution—Receipt of rents and profits thereafter—Mode of accounting between the two mortgagees.*] A mortgage decree obtained by a prior mortgagee without impleading a puisne mortgagee does not affect the latter and the amount therefore payable by the latter in discharge of the prior mortgage is not the amount of the decree but that which is due on the footing of the prior mortgage as if no suit had been brought; and if the prior mortgagee buys the mortgage property in execution of his decree and gets possession of the same, the rents and profits received by him cannot be set off as equivalent to the interest due for the period of possession, but must be accounted for and deducted from the amount payable by the puisne mortgagee. *Umes Chunder Sircar* v. *Zahur Fatima* (1891) I.L.R., 18 Calc., 164 (P.C.) and *Ganga Pershad Sahu* v. *The Land Mortgage Bank of India* (1894) I.L.R., 21 Calc., 366 (P.C.) applied. *Syed Ibrahim Sahib* v. *Armugathayee* (1915) I.L.R., 38 Mad., 18, considered.

Muthammal v. *Razu Pillai* ... ... (1918) I.L.R., 41 Mad., 513

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MORTGAGE—*Suit for sale of mortgaged property—Decree not in accordance with section 88, Transfer of property Act (IV of* 1882)*—Sale in execution of decree—Confirmation of sale—Purchase by mortgagee at auction sale with leave of the Court—Right of redemption by mortgagor—Suit to redeem against auction-purchaser—Parties—Civil Procedure Code (Act XIV of* 1882)*, sec.* 244*—Question in execution of decree.*] In a suit to enforce a mortgage and for sale of the mortgaged property the decree made was not in accordance with the provisions of section 88 of the Transfer of Property Act (IV of 1882), no day being fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due. In execution of the decree the mortgaged property was attached, sold and purchased with the leave of the Court by the mortgagee decree-holder, and the sale was duly confirmed. In a suit by the mortgagor for redemption of the mortgage, which was one of ancestral property made by the plaintiff's father before the birth of his sons, *Held* that whether or not the decree was in accordance with the provisions of the Act, the property, and all the right title and interest of the defendant were in fact sold in execution of the decree of a Court which had jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed from; and that consequently the mortgagor had no right of redemption. *Held* further, that the question now raised could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court executing the decree, and that the suit was therefore barred by section 244 of the Code of Civil Procedure (Act XIV of 1882). *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1892) I.L.R., 19 Calc., 683; s.c., L.R., 19 I.A., 166, followed.

Ganapathy Mudaliar v. *Krishnamachariar*... (1918) I.L.R., 41 Mad. (P.C.), 403

———————*Transferee from benamidar—Right of suit.*] A transferee-mortgagee can maintain a suit on the mortgage though the mortgagee named in the bond is only a benamidar and though the beneficial owner is not added as a party. *Kirtibas Das* v. *Gopal Jiu* (1914) 19 C.L.J., 193, and *Parameshwar Dat* v. *Anardan Dat* (1915) I.L.R., 37 All., 113, followed.

Singa Pillay v. *Govinda Reddy* ... ... (1918) I.L.R., 41 Mad., 435

———————, *usufructuary* :—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 58 (*a*) AND (*d*), 67 AND 68 (*c*) 259

———————*by conditional sale—Mortgagor in possession as tenant of mortgagee—Rent in arrear—Suit for rent—Decree for rent barred by limitation—Suit for redemption—Mortgagee, whether entitled to claim arrears of rent and interest decreed as part of price of redemption—Abandonment of charge—Election of remedies.*] In a suit for redemption, the mortgagee is not entitled to claim any arrears of rent with interest thereon in respect of the mortgaged lands which were left in the possession of the mortgagor as tenant of the mortgagee under the terms of the mortgage-deed, when the mortgagee has already sued and obtained a decree for such rent with interest and has allowed the decree to become barred by limitation, even though the arrear of rent is a charge under the deed. English and Indian cases reviewed. *Hewanchal Singh* v. *Jawahir Singh* (1889) I.L.R., 16 Calc., 307 (P.C.), distinguished; *Imdad Hasan Khan* v. *Bachu Prasad* (1898) I.L.R., 20 All., 401, referred to.

Naraina Rao v. *Shiva Rao* ... ... (1918) I.L.R., 41 Mad., 1043

MORTGAGEE, *purchase by, with leave of Court* :—*See* MORTGAGE 403

———————, *right of, to sue for sale* :—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 58 (*a*) AND (*d*), 67 AND 68 (*c*) 259

MORTGAGOR, *failure of, to deliver possession* :—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 58 (*a*) AND (*d*), 67 AND 68 (*c*) 259

———————, *right of, to redeem property purchased by mortgagee with leave of Court at an auction sale* :—*See* MORTGAGE 403

MOTOR VEHICLES ACT (MADRAS ACT I OF 1907) NEGLIGENCE :—*See* TORTS. 538

MUHAMMADAN LAW—*Astan—Mujavar—Religious office—Competency of women to hold or succeed to such office—Right to perform fatiha—Rule of Muhammadan Law.*] A religious office can be held by a woman under the Muhammadan Law unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy and the burden of establishing

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that a woman is precluded from holding a particular office is on those who plead the exclusion. Though there is no general rule of Muhammadan Law prohibiting a woman from holding a religious office, prohibition may arise by local usage or custom. *Imam Bee* v. *Molla Khasim Sahib* (1916) 5 L.W., 226, followed. *Shahoo Banoo* v. *Aga Mahomed Jaffer Bindaneem* (1907) 34 Calc., 118 (P.C.), referred to. *Held* (on the facts of the case), that a woman was competent to succeed to the office of Head Mujavar of the suit Astan.

Munnavaru Begam Sahibu v. *Mir Mahapalli Sahib.* (1918) I.L.R., 41 Mad., 1033

MUHAMMADAN LAW—*Contingent right to inherit, transfer or renunciation of, whether prohibited.*] A transfer or renunciation of a contingent right of inheritance is prohibited under Muhammadan Law. *Mussummant Khanum Jan* v. *Mussummant Jan Bee-bee* (1827) 4 S.D.A., 210, followed. *Kunhi Mamod* v. *Kunhi Moidin* (1896) I.L.R., 19 Mad., 176, considered. *Mussamut Hurmutt-Ool-Nissa Begam* v. *Allahdia Khan and Hajee Hidayat* (1871,) 17 W.R., 108 (P.C.), explained.

Asa Beevi v. *Karuppan Chetty* ... ... (1918) I.L.R., 41 Mad., 365

——————————*Dower, relinquishment of, by a Muhammadan woman of the age of 15, whether valid—Indian Majority Act (IX of 1875), sec. 2—'Act in the matter of dower', meaning of—Indian Contract Act, sec. 11.*] A relinquishment of her right to dower by a Muhammadan woman, who is a minor under the Indian Majority Act, is invalid under the Indian Contract Act (IX of 1872). To relinquish dower is not "to act in the matter of dower" within section 2 of the Indian Majority Act.

Abi Dhunimsa Bibi v. *Muhammad Fathi Uddin* ... (1918) I.L.R., 41 Mad., 1026

——————————*Shafi school—Maintenance, arrears of—Whether recoverable in the absence of a decree or agreement to pay.*] According to the Shafi school of Muhammadan Law maintenance is a debt and the wife is entitled to recover from her husband arrears of maintenance though there be no decree of Court or mutual agreement in respect of such maintenance. The distinction in this respect between Shafi and Hanafi schools pointed out. Muhammadan Law texts examined.

Muhammad Haji v. *Kalimabi* ... ... (1918) I.L.R., 41 Mad., 211

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

Chidambaranatha Thambiran v. *Nallasiva Mudaliar.* (1918) I.L.R., 41 Mad., 124

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss. 26, 27 AND 28—*Agent, meaning of—Hundi or promissory note drawn or made by a trustee of a charity—Personal liability of trustee—Liability of charity property and other members of the family—Signature of trustee with vilasam of charity prefixed, effect of—Liability of non-executants.*] A person drawing a hundi or bill of exchange or making a promissory note as trustee of a temple or of a charity is *personally* liable on such bill or note. Rule of English Law as to bills drawn or notes made by church-wardens, overseers and others who describe themselves in their official capacities, applied. English and Indian cases reviewed. 'Agent' referred to in sections 27 and 28 of the Indian Negotiable Instruments Act means the agent of a person capable of contracting

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within the meaning of section 26, and when the agent is not liable, the principal is. A person drawing a bill or making a note as trustee of a temple or charity is not acting on behalf of such a principal and cannot claim the benefit of section 28. When the agent of a Chetti firm in executing a negotiable instrument prefixes the firm's vilasam, this is a well understood indication that he is acting only as an agent and has been so recognized by the Courts; but when a man signs as trustee prefixing the charity vilasam, there is on the face of the document no clear indication that he contracts for any one else but himself.

Palaniappa Chettiar v. *Shunmugam Chettiar* ... (1918) I.L.R., 41 Mad., 815

PALAYAM, *unsettled, and* **ZAMINDARI**, *difference between*:—*See* UNSETTLED PALAYAM 749

PARTITION, *suit for, on behalf of a minor—Death of minor* pendente lite—*Joint status, whether severed—Legal representative's right to continue suit*:—*See* HINDU LAW 442

PARTNERSHIP, *acknowledgment of liability or payment by partner, when binding on others*:—*See* LIMITATION ACT (IX OF 1908), ss. 21 (2), 19 AND 20 427

——————————*Boat, co-owners of—Employment of a boat to earn freight—Partnership in freight—Suit for dissolution, whether maintainable—Section 239, Indian Contract Act (IX of 1872).* Where the co-owners of a boat employ it to earn freight, they become partners in respect of such earnings and a suit for dissolution of such partnership is maintainable although the plaintiff being only a co-owner is not entitled to a decree for the sale of the boat employed by the partnership.

Vanamati Sattiraju v. *Bollapragada Pallamraju* ... (1918) I.L.R., 41 Mad., 939

——————————*by manager of joint Hindu family with strangers—Right of other members of family to institute suits in respect of partnership.*] A contract of partnership entered into by the manager of a joint Hindu family with strangers does not *ipso facto* make the other members of the family partners; and not being partners, the other members whether divided or undivided cannot institute any suit in respect of partnership (e.g.), a suit for dissolution of partnership. *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (1905) I.L.R., 28 Mad., 344 and *Ramanathan Chetty* v. *Yegappa Chetty* (1916) 30 M.L.J., 241, applied. *Joopoody Sarayya* v. *Lakshmanaswamy* (1913) I.L.R., 36 Mad., 185 (P.C.), distinguished.

Gangayya v. *Venkataramiah* ... ... (1918) I.L.R., 41 Mad., 454

PENAL CODE (ACT XLV OF 1860), ss. 29, 30, 464, 467 AND 474—*Forgery—Document, meaning of—Valuable security—Incomplete document—Material alteration of incomplete document, effect of.*] An agreement in writing, which purported to be entered into between five persons, was signed by only two of them; it was altered by the addition of some material terms by the accused who was one of the two executants without the consent or knowledge of the other executant and was not signed by the other parties to the agreement. The accused was in possession of the instrument which was altered by him: *Held*, by OLDFIELD, J. (on a reference under section 429, Criminal Procedure Code, owing to difference of opinion between SADASIVA AYYAR and PHILLIPS, JJ.), that the accused was guilty of the offence of forgery of a valuable security under section 467, or of being in possession of a forged document under section 474 of the Indian Penal Code. The instrument, though not signed by all the parties thereto, fulfilled the requirements of the definition of a 'document' in section 29 of the Code. The document was a valuable security because it imposed an obligation on the actual executants and an option on the others and there was no express or implied condition precedent to be found in the document or established by independent evidence that the document was to be inoperative against the executants until all the parties executed it. It is open to the accused to plead and to prove that the alterations were not made fraudulently or dishonestly, because they represented what accused in good faith believed to be the truth and intended to use to support what in good faith he claimed or might claim. *Queen-Empress* v. *Syed Husain* (1885) I.L.R., 7 All., 403; *Queen Empress* v. *Sheo Dyal* (1885) I.L.R., 7 All., 469; *Queen* v. *Kishan Pershad* (1870) 2 N.W.P.H.C.R., 302; and *Manicka Asari*

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v. *Emperor* (1915) M.W.N., 278, referred to. *Regina* v. *Turpin* (1849) 2 C. & K., 820, disapproved. *R.* v. *Bingley* (1821) R. & R., 449, referred to. *R.* v. *Lee* (1848) 3 Cox., 80 and *Reg.* v. *Harper* (1871) 7 Q.B.D., 78, followed.

Ramaswami Ayyar v. *The King-Emperor* ... (1918) I.L.R., 41 Mad., 589

PENAL CODE (ACT XLV OF 1860), SEC. 295—'*Defile*' *meaning of—Moothans, presence of, inside a temple, whether defilement.*] The presence of Moothans, a sub-caste of Sudras, whose status is equal to, if not higher than that of Nairs, in such portions of a Hindu temple as are open to non-Brahman is not a 'defilement' within section 295, Indian Penal Code.

Kuttichami Moothan v. *Rama Pattar* ... ... (1918) I.L.R., 41 Mad., 980

——— SEC. 370—*Buying and selling as a slave, what amounts to.*] The appellants in these cases were convicted by the Sessions Court of North Malabar under section 370, Penal Code, the second appellant having been found to have sold, and the first to have bought, a Pulayan named Vellan as a slave. The document recording the above transaction ran as follows:—"I execute to you and give you this day this jenmam deed giving you Velandi's son Pulayan Vellan with his heirs. The sum that I received from you in cash to-day is ten rupees. For this sum of ten rupees, you should get work done for you by the said Vellan and his offspring that may come into being as your jenmam, and act as you please." On a difference of opinion between ABDUR RAHIM and NAPIER, JJ., as to whether the said transaction amounted to an offence under section 370, Indian Penal Code: *Held* by AYLING, J., that the transaction in question was a sale of Vellan and his offspring as mere chattels and that the appellants were guilty of an offence under section 370, Penal Code. *Empress of India* v. *Ram Kuar* (1880) I.L.R., 2 All., 723 and *Amina* v. *Queen-Empress* (1884) I.L.R., 7 Mad., 277, referred to.

Koroth Mammad v. *The King-Emperor* ... (1918) I.L.R., 41 Mad., 334

——— SEC. 420:—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 562. 533

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

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

POLICE ACT (MADRAS ACT XXIV OF 1859), *sec.* 46—'*Threat*,' *meaning of—Demand by a police constable of mamul or customary payment, whether an offence under the section.*] A demand by a police constable, of a 'mamul' (customary payment made to obtain his favour), is a '*threat*' within section 46 of the Police Act (XXIV of 1859) and obtaining money by such a threat is an offence under the section.

The King-Emperor v. *Lal Bage* ... ... (1918) I.L.R., 41 Mad., 465

PRACTICE:—*See* CIVIL PROCEDURE CODE, O. XLI, *r.* 5. 818

———: *See* PROVINCIAL INSOLVENCY ACT, SEC. 46 904

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PRE-EMPTION—*Right of, in involuntary sales. Held* by the Full Bench:—In the absence of any statutary reservation of the right, a right of pre-emption does not exist in cases of involuntary sales; hence a Malabar otti mortgagee has no right of pre-emption against a purchaser in Court auction of the mortgaged property and he is not entitled to any notice of the intended Court sale or of the price fetched at the sale.

Vasudevan Moosad v. *Ittirarichan Nair* ... (1918) I.L.R., 41 Mad. (F.B.), 582

PRINCIPAL AND AGENT—*Ordinary money account—Lending of money to persons to whom agent is not authorized to lend—Suit for account—Limitation Act (IX of* 1908), *arts.* 89 *and* 90—*Termination of agency.*] A suit by a principal against an agent for the recovery of money lent to persons to whom the agent was not authorized to lend, is a suit for an ordinary money account and is governed by article 89 and not article 90 of the Limitation Act. The question when an agency terminates, is a question of fact. *Great Western Insurance Co.* v. *Cunliffe* (1874) 9 Ch. Ap., 525, distinguished. *Venkatachalam* v. *Narayanan* (1916) I.L.R., 39 Mad., 876, referred to.

Muthiah v. *Alagappa* ... ... (1918) I.L.R., 41 Mad., 1

PROMISSORY NOTE, *executed by father before partition—Renewal after partition—Son's pious obligation to discharge the debt*:—*See* HINDU LAW 136

——— ——— *in favour of the managing trustee of a charity—The trustee succeeded by another—Latter's right to sue on the note without any assignment or endorsement.*] A promissory note executed in favour of a trustee can be sued on by his successor without endorsement or assignment, the Negotiable Instruments Act not affecting devolution of rights by operation of law. *Catherwood* v. *Chabaud* (1823) 1 B. & C., 150, applied and followed. *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu* (1908) I.L.R., 31 Mad., 534, referred to.

Ramanadhan Chetty v. *Kathu Velan* ... ... (1918) I.L.R., 41 Mad., 353

PROPRIETARY ESTATES VILLAGE SERVICE ACT (MADRAS ACT II OF 1894):—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 47, EXPL.

PROVINCIAL INSOLVENCY ACT (III OF 1907)—*Limitation, periods of, prescribed by*:—*See* LIMITATION ACT (IX OF 1908), SEC. 29 (1) (*b*). 169

———, SEC. 16 (1)—*Adjudication by Official Receiver—No order vesting property in Receiver, effect of—Action for money had and received, scope of—Privity of plaintiff and defendant, necessity for—Nature of privity.*] The Official Receiver in the insolvency of *R* put up for sale the debts of a firm in which *R* and the second, third and fourth defendants were partners, and the first defendant purchased them from the Receiver and afterwards recovered a debt due to the firm. The plaintiff having attached three-fourths of the money so recovered by the first defendant in execution of a decree obtained by him against the second, third and fourth defendants for a debt due by the firm and having been appointed Receiver in the execution proceedings, sued the first defendant to recover the said three-fourths of the money as money had and received to the use of the second, third and fourth defendants. *Held*, that the plaintiff had no cause of action against the first defendant, because in an action for 'money had and received' there must be, as shown by the English decisions, privity of a legally recognizable nature between the plaintiff and the defendant and no such privity existed in this case and that the suit also failed as regards the shares of the second and third defendants by reason of their adjudications as insolvents prior to the attachment. Scope of the action for money had and received, pointed out; English and Indian cases reviewed. *Sinclair* v. *Brougham* (1914) A.C., 398, explained. *Sankuni* v. *Govinda* (1914) I.L.R., 37 Mad., 381, referred to. *Per* SADASIVA AYYAR, J.—While privity of *contract* between the parties is of course not necessary to sustain an action for money had and received, there must be what might be called some privity of a legally recognizable nature such as some knowledge of particular facts in the man who received the money and some mistake or ignorance of fact on the part of the man who paid the money or some relation of trust and confidence between them on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant.

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Per OLDFIELD, J.—*(Obiter)* It may be permissible in India as it is in England to sue only the solvent members of a firm when a decree is sought against it. *Hawkins* v. *Ramsbottam* (1815) 6 Taunton, 179, referred to.

Ramasami Naidu v. *Muthusami Pillai* ... ... (1918) I.L.R., 41 Mad., 923

PROVINCIAL INSOLVENCY ACT (III OF 1907), ss. 20 AND 47—*Sale by Receiver of property alleged to belong to an insolvent—Property in possession of third person—Obstruction by such third person—Summary enquiry by District Judge—Order directing delivery of possession, legality of—'Proceedings' in section 47 of the Act, meaning of.*] Certain property alleged to belong to an insolvent was sold by the receiver under section 20 of the Provincial Insolvency Act. The purchaser, whilst attempting to take possession, was obstructed by the appellants who claimed to be in possession of the property as owners thereof. The District Judge, purporting to act under section 47 of the Act, after a summary enquiry ordered possession to be given to the purchaser: *Held*, that the District Judge had no jurisdiction to pass such an order as section 47 only lays down the procedure to be followed by the Insolvency Judge with regard to proceedings under the Act. *Held*, also, that the word 'proceedings' in section 47 of the Act means the proceedings of the Court and not the act of the Receiver under section 20 of the Act. *Minatoonnessa Bibee* v. *Khatoonessa Bibee* (1894) I.L.R., 21 Calc., 479 and *Golam Hossein Cassim Arief* v. *Fatima Bejam* (1910) 6 I.C., 300, explained. *Cheda Lal* v. *Lachman Parshad* (1917) 37 I.C., 830, approved.

Narasimhaya v. *Viraraghavalu* ... . (1918) I.L.R., 41 Mad., 440

———————————ss. 24, 26, 36 AND 52—*Rules—Official Receiver—Delegation of powers—Framing of schedule by Receiver—Enquiry, nature of—Order of Receiver, if judicial or final—Entry of name of a creditor in schedule—Subsequent application by Receiver to Court to expunge name—Power of Court to entertain application.*] An Official Receiver under the Provincial Insolvency Act in framing a schedule of creditors does not decide judicially or finally upon contested claims. Where therefore, an Official Receiver passed an order upon the claim of a creditor of an insolvent to rank as a secured creditor under a mortgage which was disputed by another creditor, the action of the Receiver amounted only to an entry of the name of the creditor in the schedule framed under section 24 of the Act, and did not preclude the Court from entertaining an application by the Receiver under sections 26 and 36 of the Act to expunge the name of the creditor from the schedule.

Khadirshaw Maraikar v. *The Official Receiver, Tinnevelly* ... (1918) I.L.R., 41 Mad., 80

———————————, ss. 46, 47 (1) AND (2)—*Appeal under section 46, filed out of time—Dismissal of Memorandum of objections, right of respondent to file—Civil Procedure Code, section 108 (2), O. XLI, r. 22.*] Section 47 (2) of the Provincial Insolvency Act and section 108 (2), Civil Procedure Code, apply the procedure of the Civil Procedure Code to appeals filed under section 46 of the Provincial Insolvency Act; hence a respondent in such an appeal is entitled to file a memorandum of cross-objections under Order XLI, rule 22, Civil Procedure Code. When an appeal is dismissed as filed out of time, a memorandum of objections filed by a respondent under Order XLI, rule 22, cannot be heard. *Ramjivan Mal* v. *Chand Mal* (1888) I.L.R., 10 All., 587, followed. Decisions on Order XLI, rule 22 (formerly section 561, C.P.C.), reviewed.

Alagappa Chettiar v. *Chockalingam Chettiar.* (1918) I.L.R., 41 Mad. (F.B.), 904

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 7—*Suit involving apportionment of rent, whether a suit of small cause nature—Transfer of Property Act (IV of 1882), ss. 2 (d) and 36, applicability of, to transfer in execution.*] A suit the determination of which involves apportionment of rent by the Court, falls within article 7 of the second schedule of the Provincial Small Cause Courts Act and is exempted from the cognizance of a Provincial Small Cause Court. Though according to section 2 (*d*) of the Transfer of Property Act, the Act does not apply to sales in execution, yet the principle of section 35 of the Act which embodies a rule of

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justice, equity and good conscience can be applied and rent apportioned from day to day as between a lessor and the transferee of his right in execution in the course of a year of the lease.

Rangiah Chetty v. *Vajravelu Mudaliar* ... ... (1918) I.L.R., 41 Mad., 370

PROVINCIAL SMALL CAUSE COURTS (ACT IX OF 1887), SCH. II, ART. 13:—*See* CIVIL PROCEDURE CODE, SEC. 47 418

——————————————————————— *See* LIMITATION ACT (IX OF 1908), ARTS. 4, 7, 101, 102 AND 120 528

——————————————————————— SCH. II, ART. 13:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 100 374

PUBLIC OFFICER, *notice of suit:*—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 80... 792

RAILWAYS ACT, INDIAN (IX OF 1890), ss. 72 AND 77—*Duty of Railway Company, as a bailee, under the Indian Contract Act* (IX of 1872)—*Delivery of goods to person entitled but without production or delivery of railway receipt—Subsequent pledge of railway receipt—Suit by pledgee—Notice of claim, whether necessary—Damage, cause of.*] The liability of a Railway Company under the Indian Railways Act in respect of goods consigned for carriage is at an end when the goods are delivered to a person rightfully entitled to them, even though he is not the consignee and even if the delivery is not made against the railway receipt. After delivery of the goods to the rightful person, the railway receipt ceases to be a symbol of goods and ceases to be negotiable. Hence an innocent endorsee for value of the railway receipt after delivery to such a person has no cause of action for damages against the Railway Company. A Railway Company is not under any duty to the public to insist upon the return of the railway receipt. *Held* further, that delivery of goods by the Railway Company without getting in the railway receipt was not the proximate cause of the loss to the endorsee. *Barber* v. *Meyerstein* (1870) 4 E. & Ir. App., 317, followed. *Held* also, that the suit was barred for want of notice under section 77 of Indian Railways Act which applies to claims for compensation arising not only from non-delivery or accidental loss or destruction or deterioration of goods but also from wilful delivery to a person not entitled to them. The Indian Common Carriers Act III of 1865 and the Indian Railways Act are not in *pari materia* with the English Carriers Act of 1830 as to when notice of loss is necessary. Hence decisions under the English Act are not applicable to India.

M. & S. M. Ry. Co., Ltd. v. *Haridoss Banmalidoss* (1918) I.L.R., 41 Mad., 871

REDEMPTION:—*See* MORTGAGE 435

REGISTRATION ACT (XVI OF 1908), SEC. 77:—*See* EVIDENCE ACT (I OF 1872), ss. 33 AND 165 781

REGULATION—1802—XXV:—MADRAS PERMANENT SETTLEMENT REGULATION—*See* UNSETTLED PALAYAM 749

——————————1802—XXXI—*See* ESTATES LAND ACT 1010

——————————1828—VII—*See* REVENUE RECOVERY ACT 955

——————————1831—VI—*See* UNSETTLED PALAYAM 749

——————————1831—X—*Madras Sale of Minors' Estates Regulation:*—*See* REVENUE RECOVERY ACT 733

——————————1903—I, II:—*See* REVENUE RECOVERY ACT 955

RELIGIOUS ENDOWMENTS (ACT XX OF 1863), SEC. 14.—*Procedure to be followed by committee in the transaction of its business—Suspension of a temple trustee by a temple committee—Legality of procedure—Suit by the trustee for damages for illegal suspension—Liability of individual members of the committee in damages.*] Notice of suspension was given to a temple trustee in accordance with the opinion of the majority of the members of the local temple committee, to each of whom one of the members sent a copy of his report recommending suspension, and in spite of the objection taken by one member that the matter should be disposed of at a meeting. *Held*, that a temple committee under the Religious Endowments Act resembles

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a corporation and that the ordinary way to transact its business is at a meeting. Assuming that it can do some of its business in circulation, it cannot remove or suspend trustees in this manner. *Rex v. Taylor* (1694) 3 Salk, 231, s.c., 91 E.R., 795, *Rex v. Sutton* (1711) 10 Mad., 74; s.c., 88 E.R., 632, *Thandavaraya Pillai* v. *Subbayyar* (1908) I.L.R., 23 Mad., 488 at p. 485 and *Ponnambala Pillai* v. *Muthu Chettiar* (1916) 30 M.L.J., 619, referred to. The procedure being *ultra vires*, it is no answer to the trustee's suit for damages for illegal suspension that there were sufficient grounds for suspension. In India individual members of a temple committee who are parties to an illegal suspension of this kind, are liable in damages. *Vijaya Raghava* v. *Secretary of State for India* (1884) I.L.R., 7 Mad., 466 and *Ferguson* v. *Kinnoull* (1842) 9 Cl. & F., 251, followed. Indian and English decisions considered.

Venkata Narayana Pillai v. *Ponnusawmi Nadar* ... (1918) I.L.R., 41 Mad., 357

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), ss. 14 AND 18—*Leave given to four persons under section* 18 *of the Act—Suit by them under section* 14—*Death of one of the plaintiffs after suit, whether it effects abatement.*] A suit instituted under section 14 of the Religious Endowments Act by four persons with the leave of the Court under section 18 of the Act does not abate on the death of one of the plaintiffs. *Venkatesha Malia* v. *Ramayya Hegade* (1915) I.L.R., 38 Mad., 1192, *Maddala Bagavannarayana* v. *Vadapalli Perumalla Charyulu* (1916) 29 M.L.J., 231, distinguished. *Chabile Ram* v. *Durga Prasad* (1915) I.L.R., 37 All., 296, not approved. *Parameswaran Munpee* v. *Narayanan Nambodri* (1917) I.L.R., 40 Mad., 110, referred to.

Alagappa v. *Muthiah* ... ... (1918) I.L.R., 41 Mad., 237

RELIGIOUS OFFICE, *competency of woman to hold*:—*See* HINDU LAW ... 886

——— *See* MUHAMMADAN LAW 1033

RENT, *rate of, lower than the lawful one, contract as to, validity of*:—*See* ESTATES LAND ACT (I OF 1908), SEC. 26 121

——— *suit for, by a third party—Limitation*:—*See* CONTRACT 488

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

Doraisami v. *Subramania* ... ... (1918) I.L.R., 41 Mad. (F.B.), 188

REVENUE COURT, *jurisdiction of*:—*See* ESTATES LAND ACT (MADRAS ACT I OF 1908), SEC. 26 121

REVENUE RECOVERY ACT (MADRAS ACT II OF 1864), ss. 37 (A), 38 AND 59—*Sale for arrears of revenue—Applications under ss.* 37 (*A*) *and* 38—*Dismissal by Deputy Collector and Collector—Confirmation of sale, whether final—Application to Board of Revenue—Powers of general supervision of Board of Revenue—Power to direct Collector to cancel sale—Cancellation by Collector—Validity of—Title of purchaser, whether affected—Suit by purchaser for possession—Limitation—Material irregularity—Proof of substantial loss—Madras Regulations I, II of* 1803 *and VII of* 1828.] The plaintiff purchased the suit lands in a revenue auction sale held under the Madras Revenue Recovery Act (II of 1864). A petition to set aside the sale under section 37 (A) of the Act was filed by the defaulter before the Deputy Collector and was dismissed; another petition under section 38 (1) of the Act was also dismissed by the Deputy Collector who confirmed the sale; the District Collector also confirmed the sale; the first defendant then filed a petition before the Board of Revenue to set aside the sale. The Board of Revenue, in the exercise of their powers of general supervision, directed the Collector to cancel the sale which was accordingly cancelled by him. The plaintiff thereupon instituted this suit to recover possession of the suit lands

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more than six months after the order cancelling the sale. The first defendant pleaded that the sale was validly cancelled by the Collector, that the suit was barred by limitation under section 59 of Act II of 1864, and that the sale should have been set aside on account of material irregularity. *Held*, that when a Collector is empowered by a statute to pass a certain order, it is not open to the Board of Revenue having only general powers of supervision over him to direct him to pass a special order contrary to that he had already passed; that the order cancelling the sale, though purporting to be passed by the Collector, was really the order of the Board of Revenue who had no power under Act II of 1864 to pass such an order; that after an order under section 38 (3) was passed by the Deputy Collector and confirmed by the Collector, it became final under that section, and neither of them had power under the Act to pass any further order; that the suit was not barred by limitation as section 59 of Act II of 1864 was not applicable for the reason that the order complained of was passed wholly without jurisdiction and not under any power conferred by the Act; and that, on the merits, the sale should not have been set aside, as no substantial loss was proved to be due to the irregularity.

Sundaram Ayyangar v. *Ramaswami Ayyangar* ... (1918) I.L.R., 41 Mad., 955

REVENUE RECOVERY ACT (MADRAS ACT II OF 1864), SEC. 59—*Sale of a minor's ryotwari land-holder's lands for arrears of revenue, validity of—Madras Regulation* (*X of* 1831), *sec.* 2—*Wrong entry of minor's mother as pattadar instead of minor, effect of—Suit to set aside revenue sale more than six months after sale, whether barred by limitation.*] On the death of a ryotwari landholder, the Revenue authorities erroneously registered his widow as the pattadar instead of the plaintiff, his minor adopted son. Default in payment of revenue having occurred, the lands were sold for arrears of revenue during plaintiff's minority and he then sued to set aside the revenue sale and recover the lands within twelve years of the sale but more than six months after attaining majority. *Held* by the Full Bench:—(*a*) that section 2 of Madras Regulation X of 1831 which prohibits the sale for arrears of revenue of minor's properties applies to all lands of minors whether permanently settled or only ryotwari, whether the lands be considerable or so small as not to be taken charge of by the Court of Wards; (*b*) that the sale being *ultra vires*; the special period of limitation of six months prescribed by section 59 of the Madras Revenue Recovery Act (II of 1864) did not apply to the suit; and (*c*) that the fact that the Revenue authorities mistakenly registered the plaintiff's adoptive mother as pattadar did not in any way affect him. *Krishna* v. *Mekam Peruma* (1887) I.L.R., 10 Mad., 44, considered. *Subramania Chetty* v. *Mahalingasami Sivan* (1910) I.L.R., 33 Mad., 41, distinguished. *Secretary of State* v. *Ashtamurthi* (1890) I.L.R., 13 Mad., 89, followed.

Swaminatha Ayyar v. *Govindaswami Padayachi* ... (1918) I.L.R., 41 Mad. (F.B.), 733

REVERSIONERS:—*See* LIMITATION ACT (IX OF 1908), ART. 125 659

RIVER—*Boundary—Right to bed*:—*See* GRANT 840

SCHEDULED DISTRICTS ACT (XIV OF 1874), RR. 8 AND 16:—*See* AGENCY RULES OF GODAVARI DISTRICT 325

SERVICE TENURE—*See* UNSETTLED PALAYAM 749

SPECIFIC PERFORMANCE *of unregistered agreement to mortgage on which an advance has been paid, whether enforceable—Swamibhogam, whether lease or mortgage.*] The plaintiff sued for specific performance of an agreement in writing but not registered by which the first defendant agreed *inter alia* to execute a deed of swamibhogam in respect of the suit lands to be enjoyed by the plaintiff for twenty years for a consideration of Rs. 5,000 which could however be repaid at defendants' option, after eight years from its date. The plaintiff having advanced about Rs. 4,000 and not having obtained possession or a mortgage-deed sued for specific performance. The first defendant pleaded that the agreement was one to execute a lease and as such required registration and, not being registered, could not form the basis of a suit for specific performance; he further contended that even if the agreement were one to execute a mortgage, no suit for specific performance to enforce an agreement to grant a mortgage was sustainable. *Held*, that the agreement

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was one to grant a mortgage and as such did not require registration; and that a Court will not specifically enforce an agreement to lend or borrow money whether on security or not; but where money has been advanced either wholly or in part, if the debtor is prepared to pay off the advance at once, the Court will not decree specific performance, but if the borrower is not prepared to pay off the advance, the Court should decree specific performance. *South African Territories* v. *Wallington* (1898) A.C., 309, referred to. *Ashton* v. *Corrigan* (1871) L.R., 13 Eq., 76 and *Herman* v. *Hodges* (1876) L.R., 16 Eq., 18, followed.

Meenakshisundara Mudaliar v. *Rathnasami Pillai* ... (1918) I.L.R., 41 Mad., 959

STAMP ACT (II OF 1899), SEC. 25—Marupat—*Counterpart of lease—Document giving a charge on improvements for arrears of rent—Stamp duty, whether payable both as counterpart and as mortgage.*] Where a tenant executed a *marupat* in favour of a landlord, agreeing therein that the arrears of rent, if any, should be a charge on the improvements that might be made by him: *Held*, that a *marupat* is the counterpart of a lease or a deed executed by a tenant promising to pay a certain rent, and that the document in question must be stamped both as a counterpart and as a mortgage.

Govindan Nambudiri v. *Moidin* ... ... (1918) I.L.R., 41 Mad., 469

STANI—*A constituted trustee of a temple—Transfer of trusteeship and temple properties by* :—*See* LIMITATION ACT (IX OF 1908), ART. 124 4

STATUTES—*Construction of proviso to section, use of, to interpret section* :—*See* LAND IMPROVEMENTS AND LOANS ACT 691

SURETY—*Attachment of property of*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 145, O, XXXII, R. 6 40

————*See* HINDU LAW 1072

TORTS—*Negligence—Municipalities, liability of—Repair of Road—Independent contractor—Heaping of gravel on road without light—Injury to plantiff—Damages—Statutory bodies, liability of—District Municipalities Act (IV of 1884), ss. 172 and 173—Madras Motor Vehicles Act (I of 1907) Absence of licence, effect of.*] The plantiff sued the Municipality of Vizagapatam to recover compensation for injuries sustained by him owing to the negligent stacking of gravel in a municipal road which was being repaired by a contractor employed by the municipality. The defendaut pleaded non-liability under the general law and also on the ground that it had employed an independent contractor for the repair of the road: *Held*, that the municipality was liable to pay damages to the plaintiff for the injuries sustained by him. *Per* SESHAGIRI AYYAR, J.—In laying and maintaining a road, municipalities in this country are not exercising purely sovereign functions and consequently they are liable for misfeasance. *The Secretary of State* v. *Cockcraft* (1916) I.L.R., 39 Mad., 351, distinguished. The absence of a provision for payment of damages in the District Municipalities Act which directs the application of the municipal fund in a particular manner, does not affect the right of a person against whom a wrong has been committed by the statutory body to recover compensation for such injury. The fact that the plaintiff did not obtain a licence under the Madras Motor Vehicles Act at the time of the accident did not disentitle him to damages. Although an employer is not *ordinarily* liable for illegality or neglect on the part of a contractor employed by him, there are certain recognized exceptions to the rule, namely :—(1) Where the employer is aware that the doing of a contract work involved a public danger, he ought to see that the contractor so discharges his duty as to avoid such a danger; *The Corporation of the Town of Calcutta* v. *Anderson* (1884) I.L.R., 10 Calc., 445, referred to. (2) Where statutory bodies are entrusted with the performance of a public duty, their liability cannot be shifted to a contractor; *Hardaker* v. *Idle District Council* (1896) 1 Q.B., 335, referred to. *Per* NAPIER, J.—(1) A statutory body like a municipal council cannot be said to be either the servant or the agent of the Crown unless it is so constituted by the provisions of the Act. (2) With regard to statutory bodies, the liability does not depend on their levying tolls or taxes on account of the work undertaken by them. (3) Section 173 of the District Municipalities Act does not control the provisions of section 172 of the same Act. (4) Where a statutory authority has power to do

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something to a road which will make it dangerous while it is being done, it is liable for any negligence in the doing of that which has to be done, whether the action be that of its own servant or of an independent contractor.

Municipal Council of Vizagapatam v. *Foster* ... (1918) I.L.R., 41 Mad., 538

TOWNS NUISANCES :—*See* MADRAS TOWNS NUISANCES ACT 644

TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 2 (*d*) AND 36:—*See* PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 7 370

————————————————, SEC. 43:—*See* CIVIL PROCEDURE CODE, SEC. 47 415

————————————————, SEC 52:—*See* LIS PENDENS ... 458

————————————————, SEC. 53:—ALIENATION, FRAUDULENT 612

————————————————, SS. 58 (*a*) AND (*d*), 67 AND 68 (*c*)—*Usufructuary mortgage—Failure of mortgagor to deliver possession—Right of mortgagee to sue for sale.*] *Held*, by the Full Bench:—Where a mortgagor fails to deliver possession to his mortgagee, the mortgage is not a usufructuary mortgage within the meaning of section 58 (d) of the Transfer of Property Act, and the mortgagee is entitled to bring a suit for sale of the mortgaged property. Sections 58 (*a*) and (*d*), 67 and 68 (*c*) of the Transfer of Property Act, referred to. *Ram Narayana Singh* v. *Adhindra Nath Mukherji* (1917) I.L.R., 44 Calc., 388 (P.C.), followed. *Arunachalam Chetti* v. *Ayyavayyan* (1898) I.L.R., 21 Mad., 476 (F.B.), overruled.

Subbamma v. *Narayya* ... ... (1918) I.L.R., 41 Mad., 259

TRANSFEREE *from benamidar, right of, to sue* :—*See* MORTGAGE 435

TRUSTEE, *liability of, on hundi or promissory note* :—*See* NEGOTIABLE INSTRUMENTS ACT, ss. 26, 27 AND 28.

———————— *of a temple in Malabar—Transfer of trusteeship and temple properties* :—*See* LIMITATION ACT (IX OF 1908), ART. 124.

————————, *suit against—Limitation* :—*See* LIMITATION ACT (IX OF 1908), SEC. 10.

TRUSTS ACT (II OF 1882), SEC. 90—*Co-owner, right of, to appropriate rents collected by him towards his share.*] A co-owner who has collected as rent more than sufficient to pay the Government peshkash and has paid it, is not entitled to sue another co-owner for contribution to the peshkash. Section 90 of Trusts Act (II of 1882), referred to.

Sivanarasa Reddi v. *Doraisami Reddi* ... ... (1918) I.L.R., 41 Mad., 861

UNSETTLED PALAYAM, *alienability of, for debts of holder for the time being—Lands held on service tenure, alienability of—Enfranchisement of service tenure, effect of, on alienation, prior and subsequent—Regulation XXV of 1802, effect of—Private Police service, abolition of, by legislation—Military service, imposition of, on landed proprietors—Abolition of—Limitation (Act IX of 1908), sch. II, arts. 120, 142 and 144—Madras Regulation XI of 1816—Madras Regulation VI of 1831—Madras District Police Act XXIV of 1859—Madras Act III of 1895.*] Lands held on service tenure are, even apart from statute, inalienable by the Common Law of India beyond the lifetime of the holder for the time being. *Papaya* v. *Ramana* (1884) I.L.R., 7 Mad., 85 and *Pakkiam Pillay* v. *Seetharama Vadhyar* (1901) 14 M.L.J., 134, followed. Abolition of service prior to the alienation renders the alienation valid. *Mussamut Kustoora Koomaree* v. *Monohur Deo* (1864) W.R., 39, *Ravlojirav Bin Tamajirav* v. *Balvantrav Venkatesh* (1881) I.L.R., 5 Bom., 437 and *Radhalai and Ramachandra Konher* v. *Anantrau Bhagavant Deshapande* (1884) I.L.R., 9 Bom., 198 at p. 212 (F.B.), followed. Enfranchisement of the land from service subsequent to an alienation thereof will not validate the alienation. *Padapa* v. *Swamirao* (1900) I.L.R., 24 Bom., 556 (P.C.) and *Sannamma* v. Radhabhayi (1918) I.L.R., 41 Mad., 418 (F.B.), followed. An unsettled palayam in the Presidency of Madras resembles a zamindari, is hereditary in its character and is alienable for the debts of the previous holders and of the holder for the time being, so as to bind the successors. The only difference between an unsettled palayam and a permanently settled zamindari

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is that in the latter the Government is precluded for ever from raising the revenue and in the former the Government *may* or *may not* have that power. *Oolagappa Chetti* v. *Arbuthnot* (1874) 1 I.A., 268 at p. 306, followed. *Held*, on a review of the facts of the case, that the palayam of Kannivadi in Madura district which was permanently settled in 1905 and which was in the eighteenth century liable to render military and police service to the Government of the day, was as a fact unconditionally released from such services prior to 1895 and that accordingly a mortgage executed by the grandfather and father of the present zamindar in 1895 for debts incurred by the grandfather prior to that date and a decree and a Court sale held to satisfy the mortgage debt were binding upon the present zamindar and precluded him from recovering the zamindari from the auction purchaser. That the East India Company had by its proclamations of 1799 and 1801 suppressed military service once imposed on landed proprietors in Southern India and police service similarly imposed was abolished pursuant to Regulation XXV of 1802, Regulation XI of 1816, Act XXIV of 1859, Act XVII of 1862 and Madras Act III of 1895. Regulation VI of 1831 which restrained the alienation of all public service inams is only partially repealed and replaced by Act III of 1895, as services other than those of village officers had become long ago obsolete. *Quære*: Whether if the plaintiff's father had debarred himself from suing, article 120 of the Limitation Act was the article applicable in which case the plaintiff would not be barred.

Midnapore Zamindari Company v. *Appayasami Naicker*.

(1918) I.L.R., 41 Mad., 749

VAKIL, *power of, to enter into compromise*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R. 3 AND SEC. 96, CL. (5) 223

WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859)—*Scope of the Act*—'*Workman*,' *meaning of*—*Status of accused, proof of*—*Duty of complainant to prove*—*Absence of proof*.] The accused received an advance of Rs. 2,500 and contracted to supply coolies to a rubber estate. Under the contract, he was to receive a commission of 10 per cent. on the wages of the Kol maistris and coolies and an additional Rs. 25 a month, if he resided on the estate. Having failed to fulfil his contract, he was proceeded against under the Workman's Breach of Contract Act. On a difference of opinion between SADASIVA AYYAR and PHILLIPS, JJ., as to whether the accused was a 'workman' within the meaning of the Act. *Held*, by AYLING, J., agreeing with SADASIVA AYYAR, J.:—(1) That the accused was not a 'workman' within the meaning of the Act, and (2) That the word 'workman' means a person who engages in manual labour of some kind, whether skilled or unskilled. *Gilby* v. *Subbu* (1884) I.L.R., 7 Mad., 100, *Calarum* v. *Chengappa* (1890) I.L.R., 13 Mad., 351, *Mamubeari, In re* (1914) 27 M.L.J., 392 and *Re Rosario Quadros* (1915) I.L.R., 38 Mad., 551, followed. *Rowson* v. *Hanama Mestri* (1877) I.L.R., 1 Mad., 280 and *High Court Proceedings, dated 13th July* 1867 (1867) 3 M.H.C.R., App. XXV, disapproved.

Kunhi Moidin v. *Chamu Nair* ... ... (1918) I.L.R., 41 Mad., 182

ZAMINDARI, IMPARTIBLE—*Right of junior members to maintenance*:—*See* HINDU LAW, 778. 778

———————, **UNSETTLED**:—*See* UNSETTLED PALAYAM ... 749

THE

INDIAN LAW REPORTS

MADRAS SERIES.

APPELLATE CIVIL.

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

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

1917. January, 26 and 29.

v.

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

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

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

The question when an agency terminates, is a question of fact.

Great Western Insurance Co. v. *Cunliffe* (1874) 9 Ch. Ap., 525, distinguished.

Venkatachalam v. *Narayanan* (1916) I.L.R., 39 Mad., 376, referred to.

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

The material facts appear from the judgment.

A. Krishnaswami Ayyar for the appellants.

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

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

* Appeals Nos. 192 and 193 of 1915.

MUTHIAH v. ALAGAPPA. — WALLIS, C.J.

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

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

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

and not by article 89 which deals with suits

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

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

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

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

MUTHIAH v. ALAGAPPA. — WALLIS, C.J.

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

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

Then the question arises as to whether this case was properly disposed of with regard to that article. Now the Judge has simply held the suit to be barred on the authority of a decision of my learned brother and myself in *Venkatachalam* v. *Narayanan*(1). All that we decided in that case was that termination of agency is a question of fact for purposes of article 89 of the Limitation Act and the agency must be considered as having terminated when the authority to the agent is revoked or the agent renounces the agency, or the business of the agency is completed which is practically another case of revocation or determination of authority. Now that must be a question of fact in each case to be decided upon the evidence.

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

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

SESHAGIRI AYYAR, J.—I agree. — SESHAGIRI AYYAR, J.

K.R.

(1) (1916) I.L.R., 39 Mad., 376.

APPELLATE CIVIL.

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

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

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

v.

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

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

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

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

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

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram* (1900) I.L.R., 23 Mad., 271 at p. 281 (P.C.), applied.

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

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

* Appeal No. 300 of 1914.

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

"*From the Honourable the Government of East India Company.*

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

"Lands have been set apart according to the inventory sent along with this, which will fetch 5,049 paras and 4½ edangalis of paddy inclusive of assessment and *michavaram*. These lands you must take charge of and from their rent you must meet the expenses of the abovementioned temples. As the assessment of the abovementioned lands is included in the rent set apart, no more assessment need be paid for them.

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

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

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

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

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

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

"Written in the handwriting of Panichamekakandy.
(Signed) Rajah Avergal."

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

The plaintiff preferred this appeal.

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

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

(1) (1915) 28 M.L.J., 669 at pp. 673 to 675.
(2) (1881) I.L.R., 3 Mad., 384 at p. 386 (P.C.).

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

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

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

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

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

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

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

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

(1) (1917) I.L.R., 40 Mad., 845.
(2) (1906) I.L.R., 29 Mad., 390 at p. 394 (F.B.).
(3) (1913) I.L.R., 36 Mad., 570. (4) (1916) 32 I.C., 50; s.c., 19 M.L.T., 1.
(5) (1913) I.L.R., 40 Calc., 173 at p. 180.
(6) (1905) I.L.R., 28 Mad., 197 at p. 200.
(7) (1879) I.L.R., 3 Bom., 186 at p. 193 (P.C.).
(8) (1890) I.L.R., 17 Calc., 233 (P.C.).
(9) (1900) I.L.R., 25 Mad., 271 (P.C.).
(10) (1911) I.L.R., 33 All., 356 (P.C.).
(11) (1881) I.L.R., 3 Mad., 334 at p. 335 (P.C.).

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

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

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

(1) (1893) I.L.R., 16 Mad., 456 at p. 459. (2) (1900) 10 M.L.J., 114.
(3) (1905) I.L.R., 28 Mad., 197 at p. 201. (4) (1912) 23 M.L.J., 260 at p. 263.
(5) (1910) I.L.R., 37 Calc., 885 (P.C.). (6) (1907) 6 C.L.J., 621 at p. 636.
(7) (1905) 2 C.L.J., 546 at p. 554. (8) (1917) 32 M.L.J., 24.
(9) (1884) I.L.R., 6 All., 1 (P.C.).
(10) (1875) 15 Beng. L.R., 10 at p. 19 (P.C.).
(11) (1895) I.L.R., 22 Calc., 445 (P.C.).
(12) (1899) I.L.R., 23 Bom. 725 (P.C.). (13) (1915) 28 M.L.J., 217.
(14) (1916) I.L.R., 43 Calc., 779. (15) (1915) I.L.R., 42 Calc., 244 (P.C.).
(16) (1879) L.R., 4 A.C., 324.

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

WALLIS, C.J.

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

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

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

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WALLIS, C.J.

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

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

and Mr. Ramachandra Ayyar's main argument was that the previous holders of the *stanom* were not persons "from or through whom the plaintiff derived his right to sue" and so do not come within the definition of 'plaintiff' in section 2 of the Limitation Act. According to him each successive holder of the *stanom* who brings a suit falling under article 124 or 144, can only be barred under these articles if there is possession adverse to himself for the requisite periods, as possession adverse to his predecessors cannot be taken into account not being possession adverse to the plaintiff within the meaning of the Act. I am wholly unable to accept this contention. A *stanom*, according to the customary law of Malabar, is descendible from one *stanom*-holder to another in a peculiar line of succession, and it appears to me each successive holder is in the same position as an ordinary heir succeeding on intestacy. In either case it is the law of the land and not any act of the previous holder or owner that confers title on the successor. The fact that the law of the land confers limited powers of disposition in one case and unlimited powers in the other case can make no difference. In both cases it seems to me that for the purposes of the definition of 'plaintiff' in the Limitation Act, which is intended to include predecessors in title of whom the successor is the representative, the heir must be considered to derive his title from and through the purchaser and the intermediate holders or owners who have taken by inheritance. It would defeat the whole scheme of the Limitation Act to hold that adverse possession against the predecessors of an owner taking by inheritance was of no avail against such owner unless it could be shown that the owner derived title from him otherwise than by inheritance, and I think, as I have already said, that the succession to mutts, *stanom*, etc., stands on the same footing. As regards cases of ordinary succession I am not aware that this has ever been questioned, but if authority be wanted, it is to be found in the decision of the Privy Council on this very article 124 in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(1). There is also a strong current of authority in this Court on the present question. SUBRAHMANYA AYYAR, J., in his reference to the Full Bench in *Chiruvolu Punnamma* v. *Chiravolu Perrazu*(2) refers to the decisions in which succeeding trustees, *Mahants* and Malabar *stanis* have been treated as claiming through or under their predecessors, and these decisions are approved in the opinion of the Full Bench at page 409 subject no doubt to the observation which was unnecessary for the decision, that they did not in strictness so claim from or through the predecessors. *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(1) deals with the case of trustees. *Sankaran* v. *Krishna*(3) proceeds upon the same view in the case of *stanis*, as though article 124 was not considered to apply—why is not apparent—it was held that the suit might be governed by article 144 which equally raises the present question: see also *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik*(4), *Ambalavana Pandara Sannadhi* v. *Sree Minakshi Devastanam*(5). Mr. Ramachandra Ayyar relied on a dictum of the Privy Council in *Runchordas* v. *Parvatibai*(6) that the plaintiff who sued as next reversioner after the death of the widows of the last male owner did not derive his title from or through the widows and the extinguishment of their right could not extinguish his. In my opinion this means at most that under the existing and recent Limitation Acts which give the reversioner a fresh starting point from the death of the widow under article 141, a reversioner cannot be treated as claiming from or through the widow. Prior to the introduction of article 141, the next reversioner was held to claim from or through the widow; *Amirtolal Bose* v. *Rajonesekant Mitter*(7) and *Sambasiva* v.

(1) (1900) I.L.R., 23 Mad., 271 at p. 281 (P.C.).
(2) (1906) I.L.R., 29 Mad., 390 at p. 396 (F.B.).
(3) (1893) I.L.R., 16 Mad., 456.
(4) (1905) I.L.R., 28 Mad., 197. (5) (1915) 28 M.L.J., 217.
(6) (1899) I.L.R., 23 Bom., 725 (P.C.). (7) (1875) 15 Beng. L.R., 10 (P.C.).

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

SESHAGIRI AYYAR, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) (1876) I.L.R., 1 Mad., 235 (P.C.). (2) (1881) I.L.R., 3 Mad., 384 (P.C.)
(3) (1915) 28 M.L.J., 669.

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

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

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

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

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

(1) (1875) 23 W.R., 253 (P.C.). (2) (1900) I.L.R., 23 Mad., 271 (P.C.).
(3) (1896) I.L.R., 23 Calc., 536 at p. 545.

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

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

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

(1) (1900) 10 M.L.J., 114. (2) (1893) I.L.R., 16 Mad., 456.
(3) (1905) I.L.R., 28 Mad., 197.
(4) (1906) I.L.R., 29 Mad., 390 at p. 409 (F.B.).
(5) (1913) I.L.R., 40 Calc., 173. (6) (1915) 28 M.L.J., 669.
(7) (1902) I.L.R., 24 All., 94. (8) (1899) I.L.R., 23 Bom., 725.
(9) (1885) I.L.R., 9 Bom., 198.

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

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

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

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

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

N.R.

(1) (1913) I.L.R., 36 Mad., 570. (2) (1915) 28 M.L.J., 669.
(3) (1910) I.L.R., 37 Calc., 885 (P.C.). (4) (1900) I.L.R., 23 Mad., 271 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Napier.

1917, February, 2, 5 and 6.

BATHULA VENKANNA (FIRST DEFENDANT), APPELLANT,

v.

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

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

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

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

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

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

Facts appear from the judgment.

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

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

* Second Appeal No. 842 of 1915.

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

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

The other respondent did not appear.

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

AYLING AND NAPIER, JJ.

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

(1) (1859) 7 M.I.A., 263.
(2) (1873) 9 Q.B., 99.
(3) (1893) A.C., 429.
(4) (1873) 10 Q.B., 371.
(5) (1880) I.L.R., 3 Mad., 87.

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the plaintiff. The particular clauses of that agreement which are important are to the following effect:—

"1. The amount was to be paid within six months. The transfer in favour of the present plaintiff was to be made as soon as the amount in respect of this *razinama* was paid."

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

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

(1) (1859) 7 M.I.A., 263. (2) (1873) 9 Q.B., 99.
(3) (1893) A.C., 429.

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

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

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

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

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

(1) (1873) 9 Q.B., 99. (2) (1873) 10 Q.B., 371.

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

(1) (1884) I.L.R., 6 All., 231. (2) (1907) I.L.R., 30 Mad., 486.

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

S.V.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Napier.

1917, February, 9.

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

v.

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

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

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

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

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

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

* Second Appeal No. 916 of 1916.

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

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

T. Prakasam for the first respondent.

The others were not represented.

AYLING, J.

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

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

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

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

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AYLING, J.

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

I would therefore dismiss the appeal with costs.

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

NAPIER, J.

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

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

The Second Appeal is dismissed with costs.

S.V.

APPELLATE CIVIL.

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

1917, February, 6 and 19.

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

v.

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

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

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

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

* Appeal No. 71 of 1916.

RAMALINGA REDDI v. KOTAYYA.

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

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

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

T. Prakasam for the respondents.

COUTTS TROTTER AND SESHAGIRI AYYAR, JJ.

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

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

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

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

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

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

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

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

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

S.V.

(1) (1903) I.L.R., 26 Mad., 268. (2) (1870) L.R., 9 Eq., 373.
(3) (1904) Pr. D., 138.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Bakewell.

1917, February, 6 and 23.

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

v.

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

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

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

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

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

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

* Appeal gainst Order No. 58 of 1916.

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

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

M. D. Devadas for the respondents.

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

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

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OLDFIELD AND BAKEWELL, JJ.

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

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

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

K.R.

APPELLATE CIVIL.

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

1917, February, 14, 15 and 28.

CHIKKAM AMMIRAJU AND FIVE OTHERS (DEFENDANTS), APPELLANTS,

v.

CHIKKAM SESHAMMA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

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

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

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

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

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

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

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

* Letters Patent Appeal No. 121 of 1916.

(1) Second Appeal No. 1357 of 1914, preferred against the decree of J. J. COTTON, the District Judge of Godavari at Rajahmundry, in Appeal No. 6 of 1913, against the decree of A. SAMBAMURTI AYYAR, the Temporary Subordinate Judge of Rajahmundry.

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

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

ON THIS APPEAL,

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

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

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

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

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

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

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

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

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

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

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

OLDFIELD, J.

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

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

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

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

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

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

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

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

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

SESHAGIRI AYYAR, J.

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

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

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

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

The appeal should be dismissed with costs.

N.R.

(1) (1863) 3 B. & S., 710. (2) (1906) 2 K.B., 648.

APPELLATE CIVIL.

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

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

NADANALIGI KURUGODAPPA (COUNTER-PETITIONER), PETITIONER,

v.

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

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

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

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

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

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

T. R. Venkatarama Sastriyar for the petitioner.

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

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

* Civil Revision petition No. 218 of 1915.

KURUGODAPPA *v.* SOOGAMMA.

SPENCER, J.

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

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

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

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

(1) (1905) I.L.R., 28 Mad., 161. (2) (1905) I.L.R., 30 Bom., 164.

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

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

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

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

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

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

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

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

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

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

SADASIVA AYYAR, J. — SADASIVA AYYAR, J.

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

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

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

S.V.

APPELLATE CIVIL—(FULL BENCH).

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

1916 September 4, 5 and 19 and 1917, April 16 and 17 and May 4.

V. SUBRAMANIA AYYAR (PLAINTIFF), APPELLANT,

v.

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

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

Held by the Full Bench:—

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

Jogendro Bhupati Hurrochundra Mahapatra v. *Nityanand Man Sing* (1891) I.L.R., 18 Calc., 151 (P.C.) and *Sadu* v. *Laiza and Genu* (1880) I.L.R., 4 Bom., 37, applied.

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

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

* City Civil Court Appeal No. 1 of 1916.

SUBRAMANIA AYYAR v. RATHNAVELU CHETTY.

W. Chakrapani Nayudu for *T. Ethiraja Mudaliyar* for the appellant.

T. Narasimha Ayyangar for the first respondent.

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

The other respondents did not appear.

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

SADASIVA AYYAR, J.

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

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

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

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

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

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

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

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

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

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

(1) (1910) I.L.R., 33 Mad., 366. (2) (1912) 16 I.C., 787.
(3) (1916) I.L.R., 39 Mad., 186 (F.B.).

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

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

The Pandit returned the following answer:—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally the learned Judges felt justified in holding that:

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

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

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

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

(1) (1866) 3 M.H.C.R., 50. (2) (1863) 9 M.I.A., 195.
(3) (1884) I.L.R., 7 Mad., 407.

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

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

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

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

Then they state:

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

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

(1) (1864) 2 M.H.C.R., 198. (2) (1884) I.L.R., 7 Mad., 407.

followed in *Ranoji* v. *Kandoji*(1) by TURNER, C.J., and MUTTUSWAMI AYYAR, J., and again in *Parvathi* v. *Thirumalai*(2) by COLLINS, C.J., and MUTTUSWAMI AYYAR, J. In *Parvathi* v. *Thirumalai*(2) the learned Judges seem to disapprove of *Sadu* v. *Baiza and Genu*(3) and *Jogendro Bhupati* v. *Nityanund Man Singh*(4) which applied the analogy of adopted sons to illegitimate sons. In *Siva Sengu* v. *Minal*(5) MUTTUSWAMI AYYAR and PARKER, JJ., went so far as to say that the legitimate daughter could not succeed to the property of her mother who had become degraded through prostitution on the ground that all heritable blood connexion ceases between the legitimate daughter and the degraded mother on the mother's degradation. This was, however, not followed in *Meenakshi* v. *Muniandi Panikkan*(6) (by OLDFIELD and SESHAGIRI AYYAR, JJ.) wherein it was held (see page 357) that *Siva Sengu* v. *Minal*(5) was overruled by *Subbaraya Pillai* v. *Ramasami Pillai*(7) decided by BODDAM and SUBRAHMANYA AYYAR, JJ. In *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nittyanand Man Sing*(8) the head-note is :

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

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

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

(1) (1885) I.L.R., 8 Mad., 557. (2) (1887) I.L.R., 10 Mad., 334.
(3) (1880) I.L.R., 4 Bom 37. (4) (1885) I.L.R., 11 Calc., 702.
(5) (1889) I.L.R., 12 Mad., 277. (6) (1915) I.L.R., 33 Mad., 1144.
(7) (1900) I.L.R.,23 Mad., 171. (8) (1891) I.L.R., 18 Calc., 151 (P.C.).
(9) (1880) I.L.R., 4 Bom., 37 at p. 46.

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

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

(1) (1884) I.L.R., 7 Mad., 407. (2) (1885) I.L.R., 8 Mad., 557.
(3) (1887) I.L.R., 10 Mad., 334. (4) (1895) I.L.R., 18 Calc., 151 (P.C.).
(5) (1902) I.L.R., 25 Mad., 519 *et seq.*

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

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

"There is no direct authority either in the Hindu Law texts or in judicial decisions, applicable to the case"

before him. I might say almost the same about the present case. Then at page 524, the learned Judge proceeds to decide by analogy and says:

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

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

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

(1) (1884) I.L.R., 7 Mad., 407. (2) (1887) I.L.R., 10 Mad., 334.
(3) (1895) I.L.R., 18 Calc., 151 (P.C.). (4) (1910) I.L.R., 34 Bom., 321.

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

(1) (1864) 2 M.H.C.R., 196. (2) (1916) I.L.R., 39 Mad., 136 (F.B.).
(3) (1899) I.L.R., 21 All., 99.

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

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

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

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

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

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

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

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

NAPIER, J.—I concur.

NAPIER, J.

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

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ON THIS REFERENCE—

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

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

(1) (1891) I.L.R., 18 Calc., 151 (P.C.). (2) (1880) I.L.R., 4 Bom., 37.
(3) (1864) 2 M.H.C.R., 196.
(4) (1916) I.L.R., 39 Mad., 136 (F.B.). (5) (1915) I.L.R., 38 Mad., 1144.

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

The other respondent did not appear.

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

The Court expressed the following OPINIONS:—

WALLIS, C.J.

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

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

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

(1) (1891) I.L.R., 18 Calc., 151 (P.C.). (2) (1880) I.L.R., 4 Bom., 37.

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

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

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

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

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

OLDFIELD, J.

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

(1) (1880) I.L.R., 4 Bom., 37. (2) (1891) I.L.R., 18 Calc., 151 (P.C.).
(3) (1884) I.L.R., 7 Mad., 407. (4) (1885) I.L.R., 8 Mad., 557.
(5) (1887) I.L.R., 10 Mad., 334.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

—a view in which SADASIVA AYYAR, J., concurred in *Soundararajan* v. *Arunachalam Chetty*(1).

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

(1) (1916) I.L.R., 39 Mad., 136 at p. 152 (F.B.).
(2) (1902) I.L.R., 25 Mad., 519 at p. 524.
(3) (1885) I.L.R., 8 Mad., 557 at p. 563. (4) (1887) I.L.R., 10 Mad., 334 at p. 345.

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

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

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

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

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

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

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

(1) (1863) 1 M.H.C.R., 478. (2) 2 Strange, 136.
(3) (1864) 2 M.H.C.R., 196. (4) (1880) I.L.R., 4 Bom., 37.

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

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

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

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

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and that

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

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

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

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

(1) (1891) I.L.R., 18 Calc., 151 (P.C.). (2) (1880) I.L.R., 4 Bom., 37.
(3) (1884) I.L.R., 7 Mad., 407. (4) (1885) I.L.R., 8 Mad., 557.
(5) (1902) I.L.R., 25 Mad., 510 at p. 523.

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

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

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

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

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

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

(1) (1902) I.L.R., 25 Mad., 519 at p. 523. (2) (1887) I.L.R., 10 Mad., 334.
(3) (1892) I.L.R., 15 Mad., 407. (4) (1910) 20 M.L.J., 359.

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

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

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

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

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

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

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

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

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

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

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

(1) (1884) I.L.R., 7 Mad., 407.
(2) (1885) I.L.R., 8 Mad., 557.
(3) (1887) I.L.R., 10 Mad., 234.
(4) (1898) I.L.R., 21 All., 99.
(5) (1902) I.L.R., 25 Mad., 519.
(6) (1870) 5 M.H.C.R., 161.
(7) (1917) 33 M.L.J., 207.

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

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

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

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

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

(1) (1888) I.L.R., 11 Mad., 393. (2) (1870) 5 M.H.C.R., 161.
(3) (1902) I.L.R., 25 Mad., 519 at p. 524.

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

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

N.R.

APPELLATE CIVIL—(FULL BENCH).

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

VAIDYANATHA SASTRI (PLAINTIFF), APPELLANT,

v.

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

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

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

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

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

Sreeramulu v. *Kristamma* (1903) I.L.R., 26 Mad., 143, overruled.

Bonomali Roy v. *Jagat Chandra Bhowmick* (1905) I.L.R., 32 Calc., 669 (P.C.), and *dictum* in *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868) 12 M.I.A., 397 at p. 443, followed.

* Second Appeal No. 275 of 1915.

VAIDYANATHA SASTRI v. SAVITHRI AMMAL.

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

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

T. R. Krishnaswami Ayyar for the appellants.

K. S. Ganesa Ayyar for the second respondent.

The other respondents were not represented.

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

SADASIVA AYYAR, J.

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

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

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

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

(1) (1903) I.L.R., 26 Mad., 143. (2) (1916) 30 M.L.J., 260.
(3) (1909) I.L.R., 33 Bom., 88. (4) (1905) I.L.R., 32 Calc., 669 (P.C.).

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

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

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

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

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

SPENCER, J.

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

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

(1) (1903) I.L.R., 26 Mad., 143. (2) (1909) I.L.R., 33 Bom., 88.
(3) (1911) 10 M.L.T., 463.

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was not terminated by the act of adoption as much as by civil death."

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

(1) (1915) I.L.R., 32 Calc., 669 (P.C.).
(2) (1908) I.L.R., 33 Bom., 88.
(3) (1890) I.L.R., 13 Mad., 512.
(4) (1903) I.L.R., 26 Mad., 143.

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

ON THIS REFERENCE—

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

(1) (1916) 30 M.L.J., 260.
(2) (1909) I.L.R., 33 Bom., 88.

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

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

(1) (1903) I.L.R., 26 Mad., 143. (2) (1909) I.L.R., 33 Bom., 88.
(3) (1880) I.L.R., 5 Calc., 776.
(4) (1905) I.L.R., 32 Calc., 669 at p. 677 (P.C.).
(5) (1911) 10 M.L.T., 463. (6) (1914) 27 M.L.J., 569.
(7) (1895) I.L.R., 19 Bom., 809 at p. 819.
(8) (1900) 2 Bom. L.R., 411. (9) (1905) 9 C.W.N., 795 at p. 798.
(10) (1905) I.L.R., 32 Calc., 165. (11) (1907) 4 A.L.J., 354.
(12) (1910) 8 M.L.T., 320. (13) (1914) M.W.N., 735.
(14) (1916) 30 M.L.J., 260 at p. 262.
(15) (1916) I.L.R., 39 Mad., 565.
(16) (1910) 6 I.C., 443.

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

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

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

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

The FULL BENCH delivered the following OPINIONS :—

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

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

(1) (1905) I.L.R., 32 Calc., 669 (P.C.).
(2) (1878) I.L.R., 1 Mad., 226 at p. 228. (3) (1861) 8 M.I.A., 529 at p. 550.
(4) (1882) I.L.R., 4 Mad., 160.
(5) (1903) I.L.R., 26 Mad , 143. (6) (1909) I.L.R., 33 Bom., 88.
(7) (1858) 7 M I.A., 169. (8) (1880) I.L.R., 5 Calc., 776.
(9) (1823) 3 Sud. Dew. Ad. Rep., 228.

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

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

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

"the rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption,"

but this observation again was purely *obiter*.

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

(1) (1858) 7 M.I.A., 169.
(2) (1823) 3 Sud. Dew. Ad. Rep., 228.
(3) (1868) 12 M.I.A., 397 at p. 443.
(4) (1880) I.L.R., 5 Calc., 776.

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

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

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

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

(1) (1905) I.L.R., 32 Calc., 669 (P.C.).
(2) (1868) 12 M.I.A., 397 at p. 443.
(3) (1903) I.L.R., 26 Mad., 143.

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

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

OLDFIELD, J.

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

(1) (1916) 30 M.L.J., 260. (2) (1868) 12 M.I.A., 397 at p. 443.
(3) (1905) I.L.R., 32 Calc., 669 (P.C.).

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

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

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

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

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

(1) (1903) I.L.R., 26 Mad., 143. (2) (1843) 3 M.I.A., 229 at p. 242.

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

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

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

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

(1) (1843) 3 M.I.A., 229 at p. 242. (2) (1903) I.L.R., 26 Mad., 143.
(3) (1858) 7 M.I.A., 169. (4) (1823) 3 Sud. Dew. Ad. Rep., 228.

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

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

(1) (1858) 7 M.I.A., 169. (2) (1868) 12 M.I.A., 397 at p. 443.
(3) (1905) I.L.R., 32 Calc., 669 (P.C.). (4) (1890) I.L.R., 13 Mad., 512.
(5) (1891) 1 M.L.J., 392. (6) (1903) I.L.R., 26 Mad., 143.
(7) (1909) I.L.R., 33 Bom., 88. (8) (1882) I.L.R., 4 Mad., 160.

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therefore had no occasion, especially as it held that the alienation in question before it was made for a necessary purpose, to define an adopted son's rights, to decide the date from which he could assert them or to consider the portion of the judgment extracted above, in which *Ranee Krishnamonee* v. *Rajah Oodwunt Singh*(1) is referred to. The reference, which follows in *Sreeramulu* v. *Kristamma*(2) to the decision in *Ganapathi Aiyar* v. *Savitriammal*(3) appears to disregard the fact that no alienation by the widow was in question in the latter case, her action, as the Court found, consisting only in the creation of documentary evidence of the oral devise by her husband, under which the alienee claimed; and therefore nothing at present material was decided. Next an extract from the judgment in *Moniram Kolita* v. *Keri Kolitani*(4) is relied on as showing that the validity of a widow's alienation can be affected only by her conduct prior to it and not, it is to be inferred, by her subsequently making an adoption; but the *dictum* in question, which no doubt actually mentions only prior conduct, is not statedly applicable to it alone and occurs in the course of a hypothetical argument from inconvenience, in connexion with which any conclusion *ex silentio* would be unsafe. Lastly it is argued that article 125, Schedule II of the Limitation Act, 1908, impliedly postpones the right to recover possession from a widow's alienee until after her death or re-marriage. The answer is firstly that substantive rights under Hindu Law cannot be regarded as curtailed by mere implication from a provision relating to procedure; and secondly that an adopted son is not and has not been shown to be on the same footing as a reversioner and that his suit for possession will be covered by article 144.

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

KUMARASWAMI SASTRIYAR, J.

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

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

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

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

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

(1) (1895) I.L.R., 19 Bom., 809. (2) (1858) 7 M.I.A., 169.

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

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

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

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

(1) (1823) 3 Snd. Dew. Ad. Rep., 228.
(2) (1858) 7 M.I.A., 169 at p. 206.
(3) (1868) 12 M.I.A., 397.
(4) (1882) I.L.R., 4 Mad., 160.

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

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

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

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

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

(1) (1858) 7 M.I.A., 169.
(2) (1871) 8 Bom. H.C.R.(A.C.J.,) 67.
(3) (1887) I.L.R., 11 Bom., 609.
(4) (1895) I.L.R., 19 Bom., 809.
(5) (1909) I.L.R., 33 Bom., 88.
(6) (1843) 3 M.I.A., 229.

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

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

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

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

(1) (1911) 1 M.W.N., 82. (2) (1099) I.L.R., 33 Bom., 88.

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

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

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

(1) (1903) I.L.R., 26 Mad., 143.
(2) (1909) I.L.R., 33 Bom., 88. (3) (1893) I.L.R., 16 Mad., 400 at p. 404.
(4) (1905) I.L.R., 32 Calc., 669 (P.C.).

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

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

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

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

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

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

(1) (1903) I.L.R., 26 Mad., 143.
(2) (1912) 22 M.L.J., 85.
(3) (1905) I.L.R., 32 Calc., 165.
(4) (1887) I.L.R., 11 Bom., 609.
(5) (1871) 8 Bom. H.C.R., 167.
(6) (1895) I.L.R., 19 Bom., 809.
(7) (1903) I.L.R., 30 Calc., 990.
(8) (1914) 27 M.L.J., 559.
(9) (1900) 2 Bom. L.R., 411.
(10) (1905) 9 C.W.N., 795.

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

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

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

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

(1) (1903) 26 Mad., 143.
(2) (1899) I.L.R., 23 Bom., 725 (P.C.).

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

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the estate. I have already shown that the theory that she could do what she pleases with the estate during her life-time finds no sanction in Hindu Law. From the point of view of the widow's interest I should think that any check on her power of squandering her husband's estate or alienating it without any necessity is for her benefit having regard to the ignorance of the vast majority of Hindu females. In an age when legislation has been directed towards and is being called for to protect ignorant people against their own imprudent acts, I think we can well preserve the rules of Hindu sages and law-givers who recognizing the limitations of Hindu females and the temptations afforded by poverty have secured to them protection against their own improvidence. It is difficult to see why a purchaser who purchases without any necessity for the sale and who knows that death or remarriage would put an end to her rights should be encouraged in any 'reasonable expectation' that the widow would violate a clear moral duty for her benefit.

Cases relating to agreements between the widow and the father or guardian of the adopted son or the adopted son himself if he is of age, whereby the rights of the adopted son are postponed or put an end to have also no bearing on the question. Where an adopted son is a minor the arrangement is supported on the ground that it was for his benefit and that but for the arrangement he would not have been adopted and so worse off. I doubt very much if courts would uphold an agreement which is distinctly disadvantageous to the minor. In cases where the adopted son is a major he is competent to contract so as to divest himself of rights which accrue to him under Hindu Law.

As observed by Mayne in his work on Hindu Law it would be cutting at the root of all well-recognized principles as to the status of an adopted son and the consequences of an adoption to hold that alienations without necessity would bind the adopted son during the widow's life-time. I feel little hesitation in following *Ramakrishna* v. *Tripurabai*(1), and answering the question referred to us in the affirmative.

N.R.

(1) (1909) I.L.R., 33 Bom., 88.

APPELLATE CIVIL.

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

1917, January, 8 and 23.

KANDASAMI NAIKEN (FIRST DEFENDANT), APPELLANT,

v.

IRUSAPPA NAIKEN AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Limitation Act (IX of 1908), sec. 7 and art. 44—Sale by a Hindu mother as guardian of her only son—Second son in the womb at the time of sale—Subsequent sale by both the sons to another—First purchaser dispossessed by the latter—Suit in ejectment—Limitation.

The plaintiff claimed under a sale-deed executed by a Hindu widow as guardian of her only son at a time when she had another son in the womb. The plaintiff was afterwards forcibly ejected by the appellant who had obtained a later sale-deed from the elder son who executed it both on behalf of himself and his minor brother. The plaintiff sued in ejectment more than three years after the first son's attaining majority but within three years of the attainment of majority by the second.

Held, that no suit having been brought by the first son within the period prescribed by article 44 of the Limitation Act to set aside the sale, the plaintiff's right to the share of the first son became absolute and that as the mother did not execute the sale-deed as guardian of the second son, his share in the suit land did not pass to the plaintiff.

Held also, that as the causes of action for the two sons were different, section 7 of the Limitation Act had no application to the facts of the case.

Doraisami Serumadan v. *Nondisami Saluvan* (1915) I.L.R., 38 Mad., 118, distinguished.

SECOND APPEAL against the judgment of V. VENUGOPALA CHETTI, the District Judge of Chingleput, in Appeal No. 260 of 1914, preferred against the decree of R. V. KRISHNA AYYAR, the Additional District Munsif of Chingleput, in Original Suit No. 317 of 1913.

The material facts and contentions are set out in the judgment of SADASIVA AYYAR, J.

C. V. Anantakrishna Ayyar and *P. S. Narayanaswami Ayyar* for the appellant.

K. Bhashyam Ayyangar for the first respondent.

The other respondents were not represented.

* Second Appeal No. 954 of 1915.

SADASIVA AYYAR, J.—The first defendant is the appellant. The plaintiff sued in ejectment basing his title on a sale-deed of 1893 (Exhibit A) executed to him by the mother of the defendants Nos. 2 and 3. The plaintiff was in possession till 1909 when he was ejected forcibly by the first defendant who had obtained a sale-deed from the second defendant in 1908 (Exhibit II). The sale-deed (Exhibit II) was executed by the second defendant for himself and also for the third defendant who was then a minor. The second defendant attained majority in 1903 while the third defendant attained majority about the end of 1911 or the beginning of 1912. The suit was brought in July 1912.

The sale-deed by the mother of the defendants Nos. 2 and 3 to the plaintiff was executed by her as guardian of the second defendant alone, the third defendant (the posthumous son of his father) not having been born then. The statement of the District Judge in paragraph 2 of his judgment that the plaintiff's sale-deed was executed by the mother of the defendants Nos. 2 and 3 *acting as the guardian of both* is clearly an error.

Both the lower Courts have found that the sale-deed of 1893 in favour of the plaintiff was executed for no consideration and that the minor second defendant as whose guardian his mother executed it got no benefit under it. The District Munsif dismissed the plaintiff's suit.

On appeal the learned District Judge has given a decree in plaintiff's favour on the following reasoning, as I understand his judgment:—

(*a*) The second defendant did not sue to set aside his mother's sale-deed of 1893 within three years of his attaining majority. (The said three years expired in 1906.) Both the defendants Nos. 2 and 3 ought to have sued to set aside such sale within 1906. As they did not do so they are barred under article 44 of Limitation Act from questioning the sale.

(*b*) Even if article 44 did not apply, article 144 would have applied to a hypothetical suit for possession if it had been brought by the defendants Nos. 2 and 3 just before the plaintiff was forcibly dispossessed in 1909. Such a suit would have been dismissed as barred as at that time the plaintiff had been in possession for sixteen years. (The District Judge gives the figure 18.) Hence the plaintiff had obtained title by adverse possession against the defendants Nos. 2 and 3 on the date when he was

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dispossessed in 1909. The plaintiff basing his right on his title so perfected by adverse possession is entitled to sue in ejectment the first defendant who claims from the defendants Nos. 2 and 3.

Mr. Anantakrishna Ayyar, the appellant's learned vakil, argued as follows :—

(*a*) That even though a suit by a ward who has attained majority to set aside his guardian's alienation may be barred under article 44, he can avoid it as defendant by denouncing it in the suit for possession brought by the alienee.

(*b*) That the lower Appellate Court was wrong in holding that the plaintiff was in adverse possession of the land as against the defendants Nos. 2 and 3 between 1893 and 1909 as his possession between 1893 and 1903 at least (when the second defendant attained majority) must have been as agent of the defendants Nos. 2 and 3 ; and

(*c*) That the sale-deed of 1893 was executed by the mother, not as guardian of both the defendants Nos. 2 and 3 as mistakenly supposed by the lower Appellate Court but as guardian of the second defendant alone.

The third defendant was therefore not bound to have it set aside so far as his interest in the property is concerned. The plaintiff also could not have acquired the third defendant's undivided interest by adverse possession as the third defendant had three years from his attaining majority (that is, till the end of 1914) to sue to recover possession of his interest and as the first defendant had recovered possession in 1909 itself of third defendant's said interest before third defendant's right to recover possession from plaintiff had become barred. It is clear from *Madugula Latchiah* v. *Pally Mukkalinga*(1) that the sale-deed executed by a guardian ought to be set aside by a ward by instituting a suit within the period mentioned in article 44 and that till it is so set aside, the title vests in the alienee. It is also established by that decision that, though article 44 describes the suit to be brought by the ward as a suit merely to set aside the transfer of his property by his guardian, if the transferee has obtained, and is in, possession and the ward has therefore to add a prayer for the relief of possession, article

(1) (1907) I.L.R., 30 Mad., 393.

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44 alon still applies to the suit though brought for both the reliefs. Section 28 of the Limitation Act says that at the determination of the period limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. As the second defendant's right to institute a suit under article 44 for setting aside the sale of 1893 and for possession of the property from the plaintiff became barred in 1906, his right to such property became extinguished under section 28 of the Limitation Act and the plaintiff became the owner of the second defendant's interest in the property in 1906. As he has brought the suit in 1912 and as his title to the second defendant's interest of which he became the owner in 1906 subsisted at the date of the suit, his claim for possession of such interest has to be decreed. I must therefore reject the contention (*a*) put forward by Mr. Anantakrishna Ayyar.

Coming to his contention (*b*), I am unable to accept Mr. Anantakrishna Ayyar's argument that the agency power given to the plaintiff by the second defendant's mother under Exhibit I was a general power of attorney which made him the second defendant's agent as regards the management of the plaint property also which had been alienated by the second defendant's mother on the day previous to the execution of the agency deed. It seems to me clear that the plaint property was excluded from the agency and I am unable to differ from the finding of fact arrived at by the lower Appellate Court that plaintiff's possession between 1893 and 1903 was adverse to the defendants Nos. 2 and 3.

Coming to the last contention (*c*), it is clear from the wording of Exhibit A that the sale-deed was executed by the second defendant's mother as guardian of the second defendant alone. Plaintiff-respondent's learned vakil asked us to presume in the plaintiff's favour that the second defendant's mother intended to execute it in the exercise of all the powers to alienate which she possessed though she may not have known that she had the power to execute it also as guardian of the child then in her womb. I do not think that a Court is bound to stretch any point in favour of a person like the plaintiff who took advantage of the helplessness of his mother-in-law (the second and the third defendant's mother) to obtain a sale-deed without consideration in fraud of his brother-in-law from her. The sale-deed therefore

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did not affect the third defendant's undivided interest in the plaint properties. He was hence not bound to have it set aside under article 44. As against his interest, the plaintiff could rely only upon adverse possession under article 144. But as article 144 read with sections 6 and 28 of the Limitation Act did not bar the third defendant's rights or confer title on the plaintiff as regards third defendant's rights before the plaintiff was dispossessed in 1909, the plaintiff cannot claim any title to the third defendant's interests in the properties. (It is unnecessary to consider whether the third defendant's interest has passed to the first defendant in this case owing to the sale-deed executed by the second defendant in the first defendant's favour in 1908.) The contention (c) has therefore to be upheld. Mr. K. Bashyam Ayyangar next contended for the plaintiff that, as the second defendant could have when suing on his own behalf (in the suit governed by article 44) to set aside the sale by his mother of his undivided interest also joined in that suit a cause of action as the next friend of the third defendant (or as managing member of the undivided family consisting of himself and the third defendant) to recover possession of the third defendant's interests also in that same suit, the principle of the Full Bench decision in *Doraisami Serumadan* v. *Nondisami Saluvan*(1) applied and that, therefore, the third defendant had also become barred in 1906 from claiming title to his undivided share. I think that, that decision gave as wide an effect to section 8 of Act XV of 1877 (corresponding to section 7 of the present Act) as possible and that it is wholly undesirable to extend the scope of that section further. Where two brothers have got the same cause of action (that is, where all the material allegations giving rise to a right of suit are the same), where the whole right litigated and the nature of the entire claim litigated are the same and where under such circumstances the elder brother could institute a suit for himself and his younger brother on that joint right and joint cause of action, section 7 would become applicable according to the Full Bench decision and would bar the younger brother's right when the eldest brother's became barred. But in this case the second defendant's cause of action and his right to bring a suit depend upon the fact of his mother's

(1) (1915) I.L.R., 38 Mad., 118.

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execution of Exhibit A and a suit on such right of his is governed by article 44 whereas the third defendant's right of suit has nothing to do with Exhibit A or with article 44 and his suit would have been governed by article 144. The mere fact that under Order I, rule 1, Civil Procedure Code, the second defendant suing for himself and praying for one particular remedy could have joined in that same suit another cause of action vesting in the third defendant for whom he (second defendant) could have acted as next friend will not bring such a suit within the ambit of section 7 of the Limitation Act which contemplates the existence in two or more persons of a joint right and a joint cause or joint causes of action in support of a single suit.

In the result the lower Appellate Court's decree will be modified and a preliminary decree for partition of the plaint properties into two equal shares will be passed. The plaintiff's right to recover from the first defendant mesne profits on the said half share from fasli 1319 is also declared. Final decree will be passed (after taking the necessary steps contemplated by law) by the District Munsif as regards possession to plaintiff of the particular land which might fall to his half share in division and in respect of the sum due to him for value of mesne profits.

The plaintiff must pay the first defendant's costs on half the value of the plaintiff's claim throughout and bear his own costs. (The right to the other half share as between the defendants Nos. 1 and 3 is not decided in this suit.)

SPENCER, J. — SPENCER, J.—The plaintiff obtained a sale-deed in respect of the suit properties in 1893 from the mother of the defendants Nos. 2 and 3. In this document (Exhibit A) she described herself as the wife of her deceased husband and as the mother and protecting guardian of second defendant. The statement of the District Judge that she acted as guardian of defendants Nos. 2 and 3 in this transaction is incorrect. In the plaint it was stated that she acted in the capacity of guardian of the second defendant alone, and for the purpose of this Second Appeal it may be taken that the third defendant was in his mother's womb on the date of sale.

Accepting the finding of the Judge that the possession by the plaintiff of the plaint lands which are not included in the lands entrusted under Exhibit I to his management as an agent

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of the family, was adverse, it is clear that, unless the time be extended under section 6 of the Limitation Act, his title must have been perfected by prescription before the first defendant obtained a conveyance of them from the second defendant in 1908.

The second defendant being eight years old in 1893 as stated in Exhibit A must have attained his majority in 1902 or at least by 1903.

His title to his share of the ancestral property alienated became extinguished in 1906, when for three years after attaining majority he failed to set aside the transfer made by his guardian during his minority (vide sections 6 and 28 of the Limitation Act), and therefore he had no interest of his own to convey to his transferee (first defendant) in 1908 when he executed Exhibit II on behalf of himself and his minor brother.

But in 1893, there was not any alienation of the third defendant's share in the property of the Hindu joint family to which he belonged at his conception.

Both the lower Courts have found that the sale in 1893, regarded as an alienation of ancestral property, was without consideration and for no justifiable necessity. Third defendant attained majority less than three years before the institution of this suit.

Hence the title of the third defendant which was not alienated in 1893 and was kept alive by his legal disability up to the date of this suit (section 6 of the Limitation Act) does not stand on the same footing with the title of the second defendant which was alienated in 1893 and became extinguished by limitation in 1906.

The District Judge without making any distinction has treated the title of both these defendants as extinguished. It is now argued in support of his judgment that time should be calculated under section 7 of the Limitation Act as running against both, on the ground that they were jointly entitled to institute a suit to recover their property and that one could give a valid discharge without the concurrence of the other.

I consider that section 7 of the Limitation Act does not apply to the circumstances of this case. Owing to their interests having become split up, defendants Nos. 2 and 3 were not joint in estate in respect of this particular property, after the execution of Exhibit A.

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The cause of action for the second defendant to set aside the alienation made by his guardian is not identical with the cause of action for the third defendant or his representative in interest to obtain a partition of his share of family property upon a subsisting title from a third party who was in wrongful possession thereof.

When the second defendant attained majority he was not competent to give a lawful discharge of the third defendant's claim, under the circumstances found to have existed in this case.

Thus this case is distinguishable from *Doraisami Serumadan* v. *Nondisami Saluvan*(1). I agree that the appellant is entitled to succeed in respect of third defendant's undivided moiety of the suit property and that he must fail as regards the second defendant's moiety, and that costs should be awarded as stated in my learned brother's judgment.

S.V.

APPELLATE CIVIL.

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

SIVANUPANDIA THEVAR AND TEN OTHERS (PLAINTIFFS), APPELLANTS,

v.

MEENAKSHI SUNDARA VINAYAKA VISAKAPERUMAL SETHURAYAR AVARGAL,

MINOR ZAMINDAR OF URKAD REPRESENTED BY KRISHNA RAO, MANAGER OF THE ESTATE UNDER THE COURT OF WARDS (DEFENDANT), RESPONDENT.*

1917, March, 6 and 7.

Estates Land Act (Madras Act I of 1908), sec. 40, cl. (3)—'Years' in, meaning of — Swami-bhoyam, whether rent or cess within section 3, clause (11) — Agreement between landlord and tenant for a consolidated grain rent, enforceability of.

In section 40, clause (3) (a) of the Madras Estates Land Act, 'preceding ten years,' means the ten years preceding the year in which the Collector

(1) (1915) I.L.R., 38 Mad., 118.

* Second Appeals Nos. 1074 to 1084 of 1916.

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determines the amount of the commuted rent and not the ten years preceding the year in which the suit is instituted; and 'year' means the year of the lease, that is, the year for which the landlord is entitled either by custom or contract to claim rent, and not the *fasli* or the calendar year.

Swami-bhogam is 'rent' within section 3, clause (11) and is not a cess.

Where a fixed grain *pattam* (rent) has been agreed to, the arrangement is binding on both the parties and it is not open to the tenant to reopen the same on the ground that certain illegal cesses were included therein.

When the Revenue Court refuses commutation, an appeal lies under Schedule A, clause 4 of the Act only to the District Collector and not to the District Court; and hence no second appeal lies to the High Court from such order of refusal.

Jeeatoollah Paramanick v. *Jugodindro Narain Roy* (1874) 22 W.R., 12, followed.

SECOND APPEALS against the decrees of A. EDGINGTON, the District Judge of Tinnevelly, in Appeals Nos. 186 to 188, 191, 195, 196, 205, 206, 210, 222 and 226 of 1915, preferred against the decrees of J. GANAPATI PILLAI, the Honorary Deputy Collector of Tinnevelly, in Summary Suits Nos. 121—123, 126, 131, 132, 141, 142, 146, 153 and 162 of 1914, respectively. The material facts appear from the judgment.

T. R. Venkatarama Sastriar, T. R. Ramachandra Ayyar and *S. Ramaswami Ayyar* for the appellant.

V. Ramesam for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—These eleven second appeals have arisen out of suits brought by the tenants of the Urkad Estate to have their rents, which had been mostly paid in grain and partially in cash consolidated and commuted to a definite money rent under section 40, clause 1 of the Madras Estates Land Act. One or more or all of the following six questions arise for decision in these second appeals.

Firstly, whether the lower Courts were right in construing section 40, clause 3 (*a*) of the Estates Land Act to mean that the Collector in making the determination as to the proper money rent should have regard to the average value of the rent actually accrued due to the landholder during the ten years *preceding the year of the determination of such commuted rent* or whether the true meaning of that section is that the Collector should have regard to the average value of the rent during the ten years preceding the institution of the suit. I am clear that according to the true construction of the language of the section, it means the ten years preceding the year when the Collector

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SADASIVA AYYAR, J.

determined the amount of the commuted rent by his decision in the suit. I think that it is unreasonable to hold that an average rent of ten preceding years was intended (ordinarily) to come into force not immediately after the ten years but with a break or interval occupied by the period during which the suit was pending.

Mr. Venkatarama Sastriar mentioned some inconveniences which would be felt by the Courts (Original and Appellate) in the trial of such suit if his interpretation of the section (namely the ten years preceding the institution of the suit) was not accepted. I do not think that those inconveniences are of such a serious nature as to override what I consider to be the plain meaning of the clause. It was further to be remembered that this average of ten years is only to form one of the considerations for the fixing of the commuted rent that the Court is at liberty to take other facts also into consideration where the circumstances are peculiar (such as where some of the ten years are extraordinary years). I think that in the decision of these cases relating to commutation of rent in second appeal, we ought not to interfere with the discretion of the lower Courts except on very clear grounds as the whole question of commutation permits of and is intended by the legislature to be governed by the experience of Revenue officers and by equitable considerations (some of a rough and ready character) permitting of the use of large discretion and practical sense.

Then the second contention of the appellants is that the year mentioned in the clause means the calendar year beginning with the 1st January and not the fasli year as taken by the lower Courts. I am unable to find that this contention was raised in the lower Courts and I do not think that it is raised even in the grounds of the second appeal to this Court. However, I may shortly state that neither the calendar year nor the fasli year *as such* is intended by this clause, but the year for which the landlord according to custom or contract is entitled to claim rent in other words, the year of the lease. Section 3, clause 59 of the General Clauses Act (X of 1897) applies only as stated in the beginning of the section itself "where there is nothing repugnant in the subject or context." I think it is very clear from the subject and context of section 40 of the Madras Estates Land Act that the year

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SADASIVA AYYAR, J.

mentioned therein means the yearly period for which rent is claimable as between the landlord and tenant and not the calendar year which would break up the year of the lease into two. In the present suits, the year of the lease happens to be the fasli year.

Then the third question argued related to the point whether the landlord is entitled to claim a small cash, *swami-bhogam* rent of seven fanams per kottah of lands. The word *swami-bhogam* itself implies that it is the landlord's perquisites as owner of the land (in other words profits which he is entitled to get from the tenant who occupies his land) and it clearly comes within the definition of rent found in section 3, clause (11). I do not think it is open to us to indulge in mere speculation and to infer that because the landlord gets half the net grain profits (after making certain deductions) as grain rent the cash rent or *swami-bhogam* cannot also form part of the rent, but it is a 'cess' having nothing to do with rent.

The fourth question that we have to consider is really the most important question in these cases:—namely, whether when a fixed grain pattam had been agreed upon between the landlord and the tenant in respect of the lands (in one case seven years before suit and in other cases twenty years before suit) the lower Courts ought to have made a deduction from that pattam rent in order to ascertain what may be called the real grain rent which is commuted under section 40. This deduction is claimed by the appellants on the ground that the pattam so agreed upon included some cesses and dues declared to be illegal in the case of waram lands.

I think that the very word 'pattam' clearly means 'rent' and even though the pattam might have been fixed after considering the claims of the landlord to certain dues which are not legally recoverable, we must treat the transaction under which the pattam was so fixed as due to an arrangement of compromise between the landlord and the tenant by which both parties gave up their respective claims to insist upon the actual measurement of the gross produce each year by which the landlord gave up his claim whether enforceable or not to recover certain cesses and by which both parties finally agreed that the rent shall be such and such a consolidated quantity of grain thereafter. In such a case, I think it is not only very inconvenient,

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SADASIVA AYYAR, J.

but is also not permissible to allow either party to go behind that arrangement and re-open it by contending that the rent ought to be higher or lower than the rents then fixed. I think I am fortified in this view by *Jeeatoollah Paramanick* v. *Jugodindro Narain Roy*(1) where Mr. Justice AINSLIE says (page 13):

"The attempt which is now made to break up the total rent into its elements and take exception to some of them on the ground that they are illegal cannot be permitted."

The present case is stronger than *Jeeatoollah Paramanick* v. *Jugodindro Narain Roy*(1) as the details by which the total fixed rent was made up seem to have been specified in the contract in that case, whereas we have had no such details in writing before us. It is complained that the Deputy Collector did not allow such details to be brought up in the evidence of witnesses. So far as I could see it seems to have been allowed by the Deputy Collector to be brought out in the evidence of prosecution witness No. 11 who prepared a statement showing those cesses so far as the waram lands are concerned. As regards defendant's witness No. 1 he said in answer to Court "In fixing the grain rent whether all items, such as kaval, kankanam, pichai, kalvaivari, which are set apart either for the landlord or the ryot or for common expenses when produce is divided were taken into consideration or not, *I do not know I was not present when the grain rent was fixed.*" He could not therefore have given any evidence as to whether the grain pattam was fixed with reference to the inadmissible cesses also or not. I think therefore that no importance could be attached to the Deputy Collector's not having allowed questions to be put to the witness about these details.

The next fifth contention in these appeals relates to the commutation prices fixed by the lower Courts at Rs. 9 per kottah. That price was based on the Taluk office reports. The objection to that price is based on the ground that the price of grain prevailing at the Zamindar's village granary was the price which ought to be considered. The lower Courts adopted the Taluk office prices as the plaintiffs did not prove that they were higher than the village prices, the Taluk office prices being based on the bazaar prices. Having regard to the evidence

(1) (1874) 22 W.R., 12.

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SADASIVA AYYAR, J.

which shows that about 4 annas per kottah might be required to transport the grain to the bazaar from the village and also considering that it is always understood that the price at the village of the parties is invariably less than the price prevailing in the bazaar of the nearest town, I think that a deduction from the bazaar prices of at least 4 annas per kottah ought to be allowed. I would therefore allow such a deduction as regards the price.

Then the last point argued was whether the lower courts were justified in refusing to commute the rent as regards some of the lands involved in Second Appeals Nos. 1077 and 1083 of 1916 on the ground that the tenants of those lands had not got themselves recognized as pattadars by the landlord and hence those lands could not be said to be in their holdings having regard to the definition of holding in section 3, clause (3) of the Madras Estates Land Act (Section 40 allows the ryot to sue for commutation only in respect of lands in his 'holding'). Mr. Ramaswami for the respondent took a preliminary objection to our considering this point. That objection is that when the revenue court has refused commutation, an appeal lies to the Collector [see column 6 (*a*) of Schedule A to the Madras Estates Land Act against serial No. 4] and that therefore the appeals filed to the District Court on that point and the second appeals filed to this Court against the District Judge's decision on that same point are both incompetent. I think I must accept the validity of this preliminary objection and therefore express no opinion on the soundness of this (sixth) contention.

In the result subject to the modification as regards the price of grain these second appeals must stand dismissed with costs.

SPENCER, J.

SPENCER, J.—I agree. On the first point I would add that I think that if the legislature had intended that the years to be taken as a basis for the calculation of rent should be the ten years preceding the institution of the suit, it would have said so in section 40 as it did in sections 31 and 37, and that in the absence of such words the lower courts were not wrong in considering what was the rent in the years next preceding the determination of the rent. On the other points, I have nothing to add as I entirely agree with the views taken by my learned brother.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

APPAVU ROWTHER *alias* KADIRSA ROWTHER (DEFENDANT), APPELLANT,

v.

SEENI ROWTHER *alias* MUHAMMAD ABDUL KADIR ROWTHER (PLAINTIFF), RESPONDENT.*

1916, November 21 and 1917, March, 14.

Arbitration—Suit after submission, with respect to the subject-matter of the reference—Award given during the pendency of the suit, validity of—Power of Court to stay trial—Civil Procedure Code (Act V of 1908, Schedule II, Sec. 18.)

A private reference to arbitration of a subject of a dispute, does not prevent either party filing a suit in a Court of law in respect of the same matter. The arbitrators thereupon become *functus officio* and any award by them is without jurisdiction.

Where there is a previous agreement to refer a matter to arbitration and a suit is filed in respect of the subject-matter of that agreement the Court has a discretion under section 18 of the second schedule to the Civil Procedure Code to stay the trial of the suit.

Doleman and Sons v. *Ossett Corporation* (1912) 3 K.B., 257 and *Sheo Babu* v. *Udit Narain* (1914) 12 A.L.J., 757, followed.

Rama Chandra Pal v. *Krishna Lal Pal* (1912) 17 C.W.N., 351, explained.

Indian legislation on the subject historically reviewed.

APPEAL against the order of V. DANDAPANI for K. KRISHNAMA ACHARIYAR, the Subordinate Judge of Madura, in Original Suit No. 122 of 1913.

The necessary facts appear from the judgment.

K. V. Krishnaswami Ayyar and *K. V. Sesha Ayyangar* for the appellant.

L. A. Govindaraghava Ayyar for the Hon. Mr. *T. Rangachariyar* for the respondent.

AYLING AND SESHAGIRI AYYAR, JJ.

JUDGMENT.—The facts which have led up to this appeal may be thus shortly stated. The appellant and the respondent agreed to refer their disputes to the decision of certain arbitrators on the 20th of August 1912 (Exhibits I and I*a*). For some time nothing was done under the reference. The appellant sent a notice revoking the arbitration and subsequently filed a

* Appeal Against Order No. 90 of 1916.

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suit to enforce his rights ignoring the reference altogether. This was on the 25th of August 1913 (Original Suit No. 17 of 1913), while the suit was pending, the arbitrators gave the award on the 1st of October 1913. Thereupon on the 18th December 1913 the respondent filed Original Suit No. 122 of 1913 for a decree in terms of the award. The lower Court passed a decree as prayed for. Mr. K. V. Krishnaswami Ayyar, the learned vakil for the appellant, has raised various objections to the decree. The only one which requires consideration is the contention that on the filing of Original Suit No. 77 of 1913 the arbitrators became *functus officio*, that consequently their award was *ultra vires* their powers and that the Court acted without jurisdiction in passing a decree embodying the terms of the award.

We think this objection is well founded. A short resume of the legislative provisions on this question is necessary to appreciate the appellant's contention. Under section 28 of the Contract Act it was not ordinarily open to parties to ignore the Courts of the country and to set up a tribunal for deciding their disputes. One exception was recognized to the effect that if the parties had agreed to refer their disputes to arbitration, the existence of the agreement shall be a bar to seeking redress in the ordinary courts. The section also recognized the right of one of the parties to sue for the specific performance of the agreement to refer.

Then came the Specific Relief Act of 1877 which by section 21 took away the right to sue for the specific enforcement of the contract, but preserved the right to the party who was willing to abide by the agreement, to object to the trial of a suit filed by the other party.

Lastly, we have section 22 of second schedule to the Code of Civil Procedure which has repealed that portion of section 21 of the Specific Relief Act which enabled the defendant to plead the agreement to refer as a bar to the suit. The result of these various legislative provisions is to bring the Indian Law into conformity with the English Law on the subject. The provisions of the Indian Arbitration Act which apply to Presidency Towns and to Karachi are to the same effect.

In our opinion the intent to be gathered from these Acts is that the rights of a party to seek the assistance of the properly

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constituted Courts of the realm are unrestricted. The right inhering in a suitor to sue is preserved intact.

In order to provide against the contumacious conduct of a plaintiff who has agreed to refer, but who wants to resile from it by instituting a suit, section 18 of the second schedule has been introduced. Under that section if the Court is appraised that an agreement to refer was entered into, it may stay the trial of the suit. In a given case, the Court may consider that the arbitrators would be able to decide the case far more efficaciously than the Court itself. In such a case, the Court may ask the arbitrator to give his decision. But the discretion is in the Court, the paramount idea being that a tribunal constituted by the parties should not come in conflict or usurp the function of the tribunal which the sovereign has provided.

This view receives support from the judgment of FLETCHER MOULTON, L.J., in *Doleman and Sons* v. *Ossett Corporation*(1). The learned LORD JUSTICE points out that as soon as an action is brought in respect of the subject-matter of the reference, the arbitrators became *functus officio*. It is also pointed out that the case of an award having been given prior to the suit would be different, for then a new right would have been substituted for the original one to enforce which a suit can be instituted. Mr. L. A. Govindaraghava Ayyar contended that the language of section 18 of the second schedule implies that the arbitrator's jurisdiction ceases only on the settlement of the issues in the suit, because it is open to the defendant till then to ask for stay of the suit. We are unable to accept this contention. The time limit for filing objections should not be construed as validating the reference till then.

The learned vakil for the respondent also argued that his client had referred to the existence of the agreement to refer and to the award passed, in his written statement, and that further steps should have been taken by the Court with reference to these contentions. He also contended that the adjournment of the trial practically amounted to a stay of the suit. On examining the B diary, we are satisfied that the trial was never stayed as contemplated by section 18 of the second schedule. The decision in *Rama Chandra Pal* v. *Krishna Lal Pal*(2) was on section 21 of

(1) (1912) 3 K.B., 257.

(2) (1913) 17 C.W.N., 351.

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the Specific Relief Act before the last 37 words were repealed. On the other hand *Sheo Babu* v. *Udit Narain*(1) supports the view we have taken.

We must therefore set aside the decree passed in the respondent's suit, Original Suit No. 122 of 1913, and dismiss it. It is said that the suit of the defendant is still pending. In the circumstances, we think each party should bear his own costs throughout.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

1917, March, 20.

THEMA AND ANOTHER (PLAINTIFFS), APPELLANTS IN BOTH SECOND APPEALS,

v.

KUNHI PATHUMMA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Customary law of South Kanara—Kuzhikanam *lease—Compensation for improvements—Right of tenant to possession until payment—Possession by tenant after period of lease, nature of—Possession, if adverse—Notice to quit, if necessary—Customary law of Malabar—Malabar Compensation for Tenants Improvements Act (Madras Act I of* 1900), *principles of, if applicable.*

Under the customary law of South Kanara, a *kuzhikanam* lessee is, as in Malabar, entitled to remain in possession of the holding after the expiry of the period fixed in the lease until he is paid the value of the improvements; consequently he does not acquire title by adverse possession by remaining in possession of the lands for more than twelve years after the expiry of the lease.

Srinivasa Pillai v. *Venkatammal* (1913) 24 M.L.J., 296 and *Kummatha Vittil Kunhi Kuthalai Haji* v. *Reverend Antoni Goveas* (1913) M.W.N., 339, referred to.

Subbraveti Ramiah v. *Gundala Ramanna* (1910) I.L.R., 33 Mad., 260, distinguished.

A *kuzhikanam* lessee who remains on the land after the period fixed in the lease, awaiting the payment of compensation for improvements, is not holding over as a tenant, and, in the absence of evidence of assent by the landlord to the continuance of the tenancy, is not entitled to a notice to quit.

Section 5 of the Malabar Compensation for Tenants Improvements Act (I of 1900) only embodies the customary law of Malabar and South Kanara.

SECOND APPEALS against the decrees of V. C. MASCARENHAS, the Subordinate Judge of South Kanara, in Appeals Nos. 50 and 51

(1) (1914) 12 A.L.J., 757.

* Second Appeals Nos. 1504 and 1505 of 1916.

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of 1916, preferred against the decrees of V. KUNHI RAMAN NAYAR, the District Munsif of Kasaragod, in Original Suits Nos. 426 and 427 of 1914 respectively.

The suit properties belonged to the second defendant's tarwad. They were granted by the karnavan to the first defendant's uncle Kunhali under a registered *kuzhikanam* deed, dated 6th August 1885, for a term of fifteen years. The lease was transferred by Kunhali to the first defendant, who continued in possession of the land even after the expiry of the period of the lease. The plaintiff obtained a usufructuary mortgage of the suit lands as well as some other lands from the second defendant and instituted these suits on the 22nd July 1914 for recovery of possession of the lands comprised in the *kuzhikanam* lease and offered to pay the value of the improvements made by the first defendant on the holding in each of the suits. The plaintiff also alleged that he gave notice to quit on 7th March 1914 to the first defendant asking the latter to quit the lands by the 13th April 1914. The District Munsif decreed the suit, but on appeal the learned Subordinate Judge reversed the decree and dismissed the suit, holding that the notice to quit was not a proper and reasonable notice in the circumstances of the case, and that the suit was also barred by limitation. The plaintiffs preferred those Second Appeals in the two suits.

J. L. Rosario for the appellants.

C. Madhavan Nair for the respondents.

The following JUDGMENT of the Court was delivered by :—

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The Subordinate Judge is wrong on both the points decided by him. There can be no question of adverse possession in favour of the defendant, because under the customary law of Malabar, the *kuzhikanam* lessee is entitled to remain in possession until he is paid the value of the improvements.

In this respect, the law is the same in South Kanara: *Srinivasa Pillai* v. *Venkatammal*(1). It is true that section 5 of the Malabar Compensation Act does not in terms apply to South Kanara but as was pointed out in *Kummatha Vittil Kunhi Kuthalai Haji* v. *Reverend Antoni Goveas*(2), that section only embodies the customary law of Malabar and South Kanara.

(1) (1913) 24 M.L.J., 296. (2) (1913) M.W.N., 339.

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Consequently on the expiry of the period fixed, the tenant does not become a trespasser. The decision in *Subbraveti Ramiah* v. *Gundala Ramanna*(1) quoted by the Subordinate Judge has no application to Malabar *kuzhikanam* tenants. We must therefore hold that the defendant has not acquired a title by prescription.

On the question of the reasonableness of the notice to quit, we think that under the law a tenant who remains on the land awaiting the payment of the compensation to him is not holding over as a tenant. Section 5 of the Malabar Compensation Act says that he is entitled to remain on the land, notwithstanding the fact that the tenancy has determined; therefore his possession is not by virtue of a tenant's right, but because there are moneys due to him which have to be ascertained and paid. In the present case the period of lease was fixed, and on the expiry of that period, the tenancy came to an end. We have not been referred to any evidence showing that the landlord assented to the continuance of the tenancy. Mr. Madhavan Nair strongly relied upon a decision of this Court in Second Appeals Nos. 771 to 773 of 1914. In that case it was found that the tenant made a yearly payment. Moreover the period of the tenancy was not fixed. We do not think that decision compels us to hold that when a period is fixed and there is no subsequent assent by the landlord, the quandom tenant is entitled to any notice.

Such suits should be regarded as practically suits for redemption. The Court should on ascertaining the value of the improvements fix a time within which the compensation will have to be paid and pass a decree directing surrender on the expiry of that period.

We reverse the decree of the lower Appellate Court, direct him to get the improvements re-valued, to fix a time for payment and to pass a decree for surrender on the expiry of that period. The tenant in possession is bound to give credit to the plaintiff for the rent reserved. This will be done in taking the accounts. Costs will abide the result.

K.R.

(1) (1910) I.L.R., 33 Mad., 260.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Srinivasa Ayyangar.

SETHURAMA AYYANGAR (DEFENDANT), APPELLANT,

v.

SUPPIAH PILLAI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1917, March, 15 and 21.

Estates Land Act (Madras Act I of 1908), sec. 26—Suit in a Revenue Court—Contract between previous landholder and tenant as to rate of rent—Rate, lower than the lawful rate, whether binding on successor—Validity of contract—Jurisdiction of Revenue Court to decide.

A Revenue Court exercising jurisdiction under the Madras Estates Land Act is competent to decide all incidental questions the determination of which is necessary for the disposal of the main question arising in the case; and in a suit filed to contest the right to sell a holding for arrears of rent under the Act the Revenue Court can decide on the validity of a contract between the landholder's predecessor in title and the tenant as to the rate of rent, although the objection to its validity is based on grounds other than those specified in section 26 of the Act.

Raja of Pittapore v. *Sreerama Charyulu* (1911) M.W.N., 30, explained.

SECOND APPEAL against the decree of J. G. BROWN, the District Judge of Madura, in Appeal No. 199 of 1914, preferred against the decree of MUHAMMAD GHOUSE SAHIB Bahadur, the Deputy Collector of Melur Division, in Summary Suit No. 17 of 1914.

The defendant was the landholder of the holding of which the plaintiffs were the tenants. The defendant attached the holding under the Madras Estates Land Act for arrears of rent said to be due from the plaintiffs. The plaintiffs brought this summary suit in the Deputy Collector's Court of Melur under section 112 of the Act to set aside the attachment on the ground that the amount of arrears for which the attachment was made was not due to the defendant inasmuch as the plaintiffs were entitled to a remission under a contract entered into between them and the predecessor in title of the defendant. The plaintiff claimed that the said contract was binding on the defendant (who was the present landholder) and that the Revenue Court was not competent to go behind the contract in the summary suit. The Revenue Court found that there was a payment

* Second Appeal No. 1323 of 1915.

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of the amount of rent due after deducting the amount agreed to be remitted, and held that the amount for which the attachment was made was not due and that the attachment should consequently be raised. The defendant appealed to the District Court, which dismissed the appeal, holding that the Revenue Court was not competent to decide upon the validity of the contract which was found to be true and observed that a question of this kind could not be gone into in summary proceedings in a Revenue Court but only in an ordinary action in a Civil Court. The defendant preferred this Second Appeal.

A. Krishnaswami Ayyar for the appellant.

C. S. Venkatachariyar for the respondent.

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JUDGMENT.—The question which arises for decision in this appeal is whether a Revenue Court exercising jurisdiction under the Estates Land Act is entitled to decide objections (other than those specified in section 26 of the Act), to the validity of a contract under which a ryot claims to hold the holding on a rent less than the ordinary or the lawful rent payable on the land. The landlord is an office holder in a temple and the lands or rather the revenue constitute the manyam attached to the office. A predecessor of his received Rs. 200 from the ryot and agreed to allow him remission of five-eighths of the assessment in perpetuity. The present office holder claims the full rent, declines to be bound by the agreement and contends that his predecessor who owned the manyam as an office holder cannot bind his successor by such an agreement. The question arises in a suit brought by the tenant contesting the landlord's right of sale under section 112 of the Act. The learned District Judge in appeal declined to go into the question as he thought that that question was competent only to an ordinary Civil Court.

We are unable to agree with him. For deciding whether the landlord is entitled to sell the holding the Court must find whether any arrears of rent are due and for this purpose, it must decide what the rent or rate of rent is. The rent or rate of rent cannot be determined without considering for the purpose of the suit whether the contract granting the remission is valid. Section 26 assumes that the contract except as affected by the provisions of the section is valid. If the existence or the validity of the contract is questioned that must be first determined before

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the provisions of section 26 are applied. If the Court has jurisdiction to determine a matter, it must have jurisdiction to decide all questions necessary for that determination. If a previous judicial rescission is necessary before the contract could be repudiated, it may be that the Revenue Court would be bound to give effect to the contract subject only to the provisions of section 26; but the landlord in this case was not a party to the contract and denies the authority of his predecessor to bind the successor.

In *Raja of Pittapore* v. *Sreerama Charyulu*(1) the Raja of Pittapore sued a ryot in the ordinary Civil Court and prayed for declarations: (i) that the contract of his predecessor granting remission to the ryot was not binding on him, and (ii) that the proper rent was Rs. 500 a year and prayed for the recovery of arrears of rent. Objection was taken to the jurisdiction of the Civil Court to entertain the suit on the ground that a suit to determine the rent and for recovery of arrears was exclusively cognizable by the Revenue Court and that the declaration as to the invalidity of the contract was only ancillary to the main reliefs. This contention prevailed in the first Court, but in appeal here the plaintiff withdrew his last two prayers, and this Court held that the prayer for declaration of the invalidity of the agreement was not ancillary, but was substantial relief and on that ground held that the Civil Court had jurisdiction, no doubt was entertained that the Revenue Court would have jurisdiction to decide on the validity of the contract if the matter arose incidentally, for determining the rate of rent. We must therefore reverse the decree of the Lower Appellate Court and remand the appeal for disposal according to law. Costs to abide.

K.R.

(1) (1911) M.W.N., 30.

APPELLATE CIVIL.

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

1917, February, 22, 23 and March, 22.

CHIDAMBARANATHA THAMBIRAN *alias* SIVAGNANA DESIKA GNANA SAMBANDA PANDARA SANNADHI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

P. S. NALLASIVA MUDALIAR AND FIFTY-ONE OTHERS (DEFENDANTS NOS. 2—23, 25—27, 29—54, AND LEGAL REPRESENTATIVE OF THE TWENTY-THIRD DEFENDANT), RESPONDENTS.*

Mutt—Improper alienation of mutt properties by the head of the mutt—Suit by disciples under Order I, rule 8, Civil Procedure Code (Act V of 1908) to set aside the alienation and for possession to be given to the head of the mutt for the time being, whether maintainable—Limitation—Limitation Act (IX of 1908), arts. 120, 134 and 144, applicability of.

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

APPEAL against the decree of V. K. DESIKACHARIYAR, the Subordinate Judge of Tinnevelly, in Original Suit No. 36 of 1913.

Two disciples of the Dharmapuram Mutt sued on behalf of themselves and other disciples under Order I, rule 8, Civil Procedure Code, to set aside a sale of the mutt properties made by the head of the mutt, viz., first defendant's predecessor, on 12th July 1901 in favour of the other defendants as being improper, and prayed for possession of the alienated properties to be given to the first defendant as the then head of the mutt.

* Appeal No. 399 of 1915.

In the course of the suit the first defendant died and the plaint was amended by adding a prayer that the first plaintiff who succeeded him as head of the mutt be given possession. The suit was brought on 11th July 1913, more than six years but within twelve years from the date of the alienation. The defendants pleaded *inter alia* that the plaintiffs had no right to sue under Order I, rule 8, Civil Procedure Code, that the head of the mutt was not in the position of a trustee, that if he was a trustee the suit was bad for want of sanction under section 92, Civil Procedure Code, that the suit brought for possession to be given, not to any of the plaintiffs but to somebody else, was not maintainable and that the suit was barred by limitation. The Subordinate Judge who tried the suit dismissed it holding that the plaintiffs were not entitled to sue for possession, that they were not competent to ask for possession to be given to the first defendant, that mutt properties as such are not trust properties, that the suit was not barred for want of sanction under section 92, Civil Procedure Code, and that the suit was barred under article 120 of the Limitation Act. The plaintiffs appealed.

Hon. Mr. *S. Srinivasa Ayyangar, the Advocate-General,* with *T. Narasimha Ayyangar* and *V. Raghavachariyar* for the first appellant.—Whether the head of a mutt is a trustee or is considered to have only a life-interest, the disciples of the mutt are entitled under Order I, rule 8, Civil Procedure Code, as persons interested in the mutt, to bring a suit on behalf of the mutt. It is not necessary to ask for the removal of the head of the mutt; see *Subramanian Chettiar* v. *Rajeswara Dorai*(1). Plaintiffs as disciples and beneficiaries can ask for possession to be given to the head of the mutt for the time being: *Subramania Iyer* v. *Nagarathna Naicker*(2), *Miyaji* alias *Mahomed Ghouse Sahib* v. *Sheik Ahmed Sahib*(3), *Arunachellam Chettiar* v. *Velappa Thambiran*(4), *Kazi Hassan* v. *Sagun Balkrishna*(5), Seton on Decrees, volume 2, page 1255, *Gandy* v. *Gandy*(6), *Sharp* v. *San Paulo Railway Co.*(7), *Dance* v. *Goldingham*(8), *Yeatman*

(1) (1909) I.L.R., 32 Mad., 490 at p. 507.
(2) (1909) 20 M.L.J., 151.
(3) (1908) I.L.R., 31 Mad., 212.
(4) (1915) 28 M.L.J., 410.
(5) (1900) I.L.R., 24 Bom., 170.
(6) (1885) 30 Ch.D., 57 at pp. 64, 69 and 72.
(7) (1873) 8 Ch. App., 597 at pp. 600 and 610.
(8) (1873) 8 Ch. App., 902 at pp. 905 and 911.

CHIDAMBARA-NATHA THAMBIRAN v. NALLASIVA MUDALIAR.

v. *Yeatman*(1), *Meldrum* v. *Scorer*(2) and *Beningfield* v. *Baxter*(3), *Consett* v. *Bell*(4). If a trustee does not do his duty, beneficiaries can sue to enforce execution of the trust. This suit is for the execution of the trust: See sections 59 and 63 of the Indian Trust Act. Section 10 and article 134 of the Indian Limitation Act show that such a suit can be brought. This is a suit *for possession*, to whomsoever possession is prayed to be given, whether to plaintiff or somebody else as trustee. Hence article 120 of the Limitation Act will not apply; but article 134 or 144 will apply. The words '*conveyed* or bequeathed in trust' in article 134, will cover cases where properties *vest* in the head of a mutt. We must presume a conveyance at some time or other. Accretions to the trust from the original funds must also be taken to be for the trust. Article 134 was applied in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*(5). The head of a mutt is a trustee: *Ram Parkash Das* v. *Anand Das*(6) and *Baluswamy Iyer* v. *Venkitaswamy Naicken*(7). If he is not a trustee, he has a life interest, in which case article 144 will apply: *Muthusamier* v. *Sree Sreemethanithi Swamiyar*(8). Though the possession of the alienee may be adverse to the trustee, it cannot be deemed to be adverse to the beneficiary. Beneficiaries do not claim 'from' or 'through' the trustee; see the definition of 'plaintiff' in section 2 of the Indian Limitation Act.

Hon. Mr. *T. Rangachariyar* for the respondents Nos. 14 and 15.—Plaintiffs are mere disciples with no proprietary right in the property sued for; so they cannot sue for possession. They can sue only for a declaration as to invalidity of the alienation or for a direction to the trustee to sue: see sections 60, 61 and 63 of the Indian Trusts Act; *Chattappa Nambiar* v. *Koman*(9) and *Kamaraju* v. *Asanali Sheriff*(10). *Subramanian Chettiar* v. *Rajeswara Dorai*(11) ignores section 63 of the Indian Trusts Act. Only a person having title can sue for possession.

(1) (1877) 7 Ch.D., 210.
(2) (1887) 56 L.T. (*N.S.*), 471 at p. 474.
(3) (1886) 12 A.C., 167 at p. 168.
(4) (1842) 1 Y.& C.C.C., 569, 62 E.R., 1020.
(5) (1897) I.L.R., 24 Calc., 418. (6) (1916) I.L.R., 43 Calc., 707 (P.C.).
(7) (1917) 32 M.L.J., 24. (8) (1915) I.L.R., 38 Mad., 356 at p. 361.
(9) (1914) 2 *L.W.*, 61. (10) (1900) I.L.R., 23 Mad., 99.
(11) (1909) I.L.R., 32 Mad., 499 at p. 507.

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Dasondhay v. *Muhammad Abu Nasar*(1), *Srinivasa Chariar* v. *Raghava Chariar*(2) and *Strickland* v. *Weldon*(3). *Jagardindra Nath Roy* v. *Hemanta Kumari Debi*(4) shows that trustees alone can bring a suit; hence worshippers cannot. Neither article 144 nor 134 is applicable. Article 134 does not apply, for it cannot be said in this case that the property was by any one conveyed in trust to a former head of the mutt. The article cannot apply for this is not a suit for possession to the plaintiff: *Sajedur Rajah Chowdhuri* v. *Gour Mohun Das Baishnav*(5). Article 120 is the proper article applicable under such circumstances: *Venkatachella Reddiar* v. *The Collector of Trichinopoly*(6), *Kidambi Ragava Chariar* v. *Tirumalai Asari Nallur Ragavachariar*(7) and *Govindaswami Pillai* v. *Dakshinamurthi Poosari*(8). The first plaintiff sued originally as a beneficiary but in the course of the suit he became the head of the mutt and as he elected to continue the suit only as beneficiary possession cannot be given to him. When he became the head of the mutt during the course of the suit, more than 12 years had elapsed from the date of alienation; hence he is barred by limitation; see first part of section 22 of the Limitation Act.

[SESHAGIRI AYYAR, J., referred to *Hossainara Begam* v. *Rahimannessa Begam*(9) to the contrary.]

If there is a change of capacity, limitation applies: *Arunachella Ambalam* v. *Orr*(10), *Sheik Meera Sahib and Co.* v. *Sheik Nama*(11) and *Jagabandhu Biswas* v. *Srinath Chatterjee*(12). If the first plaintiff now claims as owner, I have not been given opportunity to contest his right to succeed.

Hon. Mr. *S. Srinivasa Ayyangar, the Advocate-General*, replied.

A. Krishnaswami Ayyar and *S. Aravamudu Ayyangar* for the fourteenth respondent.

C. Krishnamachariyar for other respondents.

WALLIS, C.J. WALLIS, C.J.—This is a suit brought by the two plaintiffs with leave under Order I, rule 8 of the Code of Civil Procedure

(1) (1911) I.L.R., 33 All., 660 at p. 664.
(2) (1900) I.L.R., 23 Mad., 28. (3) (1885) 28 *Ch.D.*, 426 at p. 430.
(4) (1905) I.L.R., 32 Calc., 129 (P.C.).
(5) (1897) I.L.R., 24 Calc., 418. (6) (1915) I.L.R., 38 Mad., 1064.
(7) (1903) I.L.R., 26 Mad., 113. (8) (1912) I.L.R., 35 Mad., 92.
(9) (1911) I.L.R., 38 Calc., 342. (10) (1917) I.L.R., 40 Mad., 722.
(11) (1913) 25 M.L.J., 259. (12) (1913) 18 I.C., 892.

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1908, as representing themselves and other Tambirans and disciples of the suit mutt to declare certain alienations made by the Mahant, invalid and have the property alienated handed over to the Mahant, the first defendant. The Mahant having died during the pendency of the suit and been succeeded by the first plaintiff, the plaint was amended accordingly and now prays for possession to be given to the first plaintiff.

The Subordinate Judge has held that mutt properties as such are not trust properties, and that consequently the suit is not barred under section 92, Civil Procedure Code; but he has also held that the plaintiffs are not entitled to sue for possession to be given to the first defendant and that the suit must be treated as one for a declaration and is barred under article 120 of the Limitation Act.

If the suit properties were held by the Pandarasannadhi on trust, I think the Subordinate Judge was wrong in holding that the claim for possession was not maintainable and that the suit was barred under article 120 of the Limitation Act.

As regards the first point, it seems to me that the present suit which is brought on behalf of all the beneficiaries stands in some respects on the same footing as an information filed by the Attorney-General in England on the information of relators to recover charitable property improperly alienated by the trustees. This was the regular method of recovering charity property improperly alienated, and it has been explained that in such a proceeding the beneficiaries are the persons on whose behalf the information is brought and that the function of the Attorney-General representing the Crown as *parens patriae* is simply to bring the case to the attention of the Court and ask it to provide for the due execution of the trust by securing for it the properties that belong to it. On such information the Court of Chancery recovered the property so alienated by cancelling the conveyance and directing possession to be given up to the trustees who ex-hypothesi did not formally occupy the position of plaintiffs in the suit; *St. Mary Magdalen, Oxford* v. *Attorney-General*(1) and *Attorney-General* v. *Flint*(2): and in the former case, it was held that the claim for relief was barred by limitation

(1) (1857) 6 H.L.C., 189; s.c., 10 E.R., 1267. (2) (1844) 4 Hare, 147.

CHIDAMBARA-NATHA THAMBIRAN v. NALLASIVA MUDALIAR.

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in the same manner as if the beneficiaries on whose behalf the information was filed had themselves been plaintiffs.

The case was argued on the footing that the Mahant was in the position of a trustee. If this be so, there is no reason why the plaintiffs should not be treated in this country as performing the same function as the Attorney-General on an information and asking the Court to undertake the execution of the trust; and to recover possession of the suit properties which have been improperly alienated, such possession being given to the trustee as the person entitled to it on behalf of the institution. But, even if the Mahant be not in the position of a trustee, a question it is unnecessary to consider, I think, that the plaintiffs as held in *Govindan Nair* v. *Achutha Menon*(1) have sufficient interest in the institution to entitle them in India to sue under Order I, rule 8, Civil Procedure Code, in respect of an alleged wrongful alienation of mutt property, and that, if they are allowed to sue there is no sufficient reason under our procedure for not granting them their full relief by ordering the property to be delivered to the present Mahant or to a receiver.

As regards limitation if the plaintiffs have a right to sue, it arose at the time of the alienation or later and is not barred under article 144 or under article 134, if that is the article applicable; and, I think, the possession of the alienee must be regarded as adverse to the institution and to the plaintiffs who claim on its behalf. I would therefore reverse the decree and remand the suit for disposal according to law.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The properties in suit were purchased by a pandarasannadhi of the Dharmapuram adheenam in the year 1869. Another pandarasannadhi sold them to the various contesting defendants in July 1901. The plaintiffs are the Tambirans of the mutt. They obtained leave under Order I, rule 8 of the Code of Civil Procedure, 1908, to institute a suit on behalf of all the persons interested in the mutt. Their case was that the properties belonged to the mutt, and that their alienation in 1901 was invalid. They prayed for a declaration that the alienation was not binding on the mutt and for possession being delivered to the first defendant, who was at the time of the suit,

(1) (1915) 28 M.L.J., 310.

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the pandarasannadhi. Since then, the first defendant has died and the first plaintiff has succeeded him in the office. The plaint was thereafter amended to the effect that the first plaintiff should be given possession on behalf of the mutt. There has been some dispute as to the scope of this amendment and of the undertaking given by the plaintiffs at the time. Although the language of the petition for amendment is not very clear it seems to me that all that was agreed upon was that the parties should proceed on the footing that the name of the first plaintiff was to be substituted for that of the deceased first defendant.

The alienee defendants raised various pleas. The Subordinate Judge disposed of the case on the pleadings. His conclusions were that the plaintiffs were not entitled to sue for possession, that they were not competent to ask that possession should be given to the first defendant and that the suit was barred by limitation. These findings were given on issues Nos. 1, 9 and 16 and the suit was dismissed. The plaintiffs have appealed.

The question which was debated with great ability at the Bar mainly related to the right of the plaintiffs to ask for possession in favour of the first defendant, the head of the mutt.

The plaintiffs by obtaining the leave already referred to represent the whole body of the worshippers. They may be said to be the beneficiaries. There is no doubt that the legal owner of the properties is the pandarasannadhi. Ordinarily he alone should sue for the possession and for other reliefs in respect of them. The general right of the beneficiaries is to see that there is no violation of the trust, and, if the trustee does not discharge his duties properly, to apply for his removal and for the appointment of a new trustee. These are the ordinary remedies; but circumstances may arise which may estop the trustee from suing to recover possession, and the beneficiaries may not desire that he should be removed from his office. In such cases, it is in the interests of the mutt that the *cesti qui trustent* should have the right to move the Court to deprive the wrong-doer of his possession and to vest it in the trustee.

The authorities in England, as I shall show presently, have recognized this right. The principle upon which the English Courts have acted is that,

"it is a rule in equity which admits of no exception that a Court of Equity never wants a trustee."

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Once the Court is apprised that there has been a violation of the trust, it acts on the maxim that a trust shall never fail for want of a trustee. It is obvious that such a resort to the extraordinary powers of the Court should be made under exceptional circumstances. The authorities have laid down the limitations under which alone the beneficiaries would be permitted to sue for possession; but the rule stands good that under proper safeguards, the *cesti qui trustent* have the right to invoke the aid of the Court to deprive the trespasser of his wrongful possession and to vest possession in the trustee.

Both the learned Advocate-General and Mr. T. Ranga Achariyar relied upon sections 59 and 63 of the Indian Trusts Act. These provisions only relate to private trusts, but the underlying principles are applicable to public and charitable trusts as well. Section 59 of the Trust Act lays down that

"where for any other reason the execution of a trust by a trustee is impracticable, the beneficiary may institute a suit for the execution of the trust."

An inadvertent ratification by the trustee in office of an alienation by his predecessor would be covered by clause

"the execution of a trust by a trustee is impracticable."

This would let in the beneficiary. No doubt, he can only claim that the trust should be executed. That is to say he can ask that the trust be administered. It would be in the discretion of the Court when it is seized of the trust either to direct the existing trustee to carry out the terms, or to appoint a new trustee in that behalf, or to entrust the management to an interim receiver. By giving any of these directions, the Court would be executing the trust. There is no machinery in this country, for the Court itself administering to its fullest extent the trust until the objects of the trust and the fund are exhausted. Consequently, the Court often appoints a receiver until the right to the trusteeship is settled. Section 63 is a very important provision. Mr. T. Rangachariyar contended that this section expressly limits the right of the beneficiary to a bare declaration, and that consequently he is not entitled to ask for possession. I do not think that the word *declaration* should be given such a narrow interpretation. Even in a suit for possession, there must be an antecedent declaration. I am inclined to think that the legislature did not intend to prevent a beneficiary from suing for

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possession in favour of the trustee. The beneficiary is only entitled to a declaration in his own right, but that would not prevent him from asking that the declaration be followed up by giving possession to the trustee. However that may be, section 63 is not in terms applicable to charitable trusts and consequently its language is not conclusive of the rights of a public trustee. If this section is read along with section 10 of the Limitation Act, it is clear that wherever trust property has gone into the hands of a stranger, the beneficiary can take all the necessary steps to place it in the hands of person who can legally administer the trust.

As regards decided cases, the learned vakil for the appellant relied strongly on *Sharp* v. *San Paulo Railway Co.*(1). It was decided in 1873. The decision was that individual beneficiaries were not entitled to claim their share of a debt from the debtor. Lord Justice JAMES pointed out that a bare allegation 'that the trustee would not sue' cannot give a right of action to the beneficiary. Then the remedies open under such circumstances are pointed out. This is not a pronouncement that where a trustee *could not sue* (not *would not sue*) the beneficiaries are not entitled to claim that possession should be given to him. The same learned Lord Justice a few months later held that a beneficiary can sue for an injunction that a contract of the trustee should not be completed; *Dance* v. *Goldingham*(2). If a claim for an injunction is competent, I fail to see why a suit for possession should not be. The decision in *Gandy* v. *Gandy*(3) is exactly in point. In that case the trustees refused to be made co-plaintiffs with the beneficiaries. Lord Justice COTTON negatived the contention that the only remedy possessed by the beneficiaries is to sue for the removal of the trustee and said

"that where a covenant is entered into with one person for the benefit of another, then, if the covenantee will not sue, the person beneficially interested may sue in equity."

LINDLEY, L.J., and BOWEN, L.J., concurred in this view. *Yeatman* v. *Yeatman*(4) and *Beningfield* v. *Baxter*(5) are to the same effect: see also observations of Lord HOBHOUSE in *The Heirs of Hiddingh* v. *De Villiers Denyssen*(6). The latest case

(1) (1873) 8 Ch. App., 597.
(2) (1873) 8 Ch. App., 902.
(3) (1885) 30 Ch.D., 57.
(4) (1877) 7 Ch.D., 210.
(5) (1886) 12 A.C., 167.
(6) (1887) 12 A.C., 624 at p. 641.

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on the subject is *Meldrum* v. *Scorer*(1). Mr. Justice KAY reviewed all the earlier authorities and said:

"Therefore, in this case, I have first to see whether there are real grounds for the trustee not suing. I have to ascertain whether there has been simply a refusal on his part or whether it is a case in which the circumstances are such as to render it an inconvenient or ineffectual course that he should sue."

It is clear from this dictum that it is a question in each case whether the beneficiary should be allowed to ask for the reliefs which prima facie should be claimed only by the trustee. The learned Advocate-General drew our attention to the nature of the relief claimed by the beneficiaries in *Consett* v. *Bell*(2) as showing that a claim that the trustee should be put in possession is within their rights. In none of the above cases was any decree passed giving the trustee possession at once. That is so, because the Chancery Court itself administered the estate and was not overanxious to part with its control over the trust. The peculiar jurisdiction exercised by the Court of Chancery is thus stated by WILMOT, C.J., in *Attorney-General* v. *Lady Downing*(3):

"The person who creates a trust means it should at all events be executed. The individuals named as trustees are only the nominal instruments to execute that intention, and if they fail, either by death, or by being under disability, or by refusing to act, the constitution has provided a trustee . . . Where no trustees are appointed at all, this Court assumes the office . . . There is some personality in every choice of trustees and if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium which the constitution has substituted in its place."

The same conditions do not apply in India although the Courts here have the same general right of supervision over trusts and trustees. In Perry on Trusts, after examining the English and the American authorities the law is thus summarized:

"If a *cestui que trust* desires to bring a suit against a stranger, he should apply to the trustee to allow his name to be used as co-plaintiff, and the trustee is bound to comply, on being indemnified against the costs. If the trustee refuses improperly, he may be made a defendant."

(1) (1887) 56 L.T. (N.S), 471.
(2) (1842) 1 Y. & C.C.C., 569.
(3) (1767) Wilm., 24.

This is exactly what has been done in the present case.

As regards Indian decisions, *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*(1) is directly in point. In Madras, it was held in *Padmanabha Chettiar* v. *Williams*(2) that the proper procedure is to apply either for the removal of the trustee or to have a receiver appointed. It does not appear whether in that case possession was asked to be given to the trustee. The same remarks apply to *Kamaraju* v. *Asanali Sheriff*(3). There is an observation in this case that if a representative suit were brought, the result might be different. I do not think that these two cases have laid down anything more than that a few among the beneficiaries are not entitled to sue for possession being given to themselves on behalf of the trust. If they negative the right of the beneficiaries, under certain circumstances to ask for possession being given to the trustee defendant I respectfully decline to accept them as good law. The decision in *Chettappa Nambiar* v. *Koman*(4) does not affect the present case. To that case, the trustee was not a party, nor did the plaintiffs ask that possession should be given to them. On the other hand, *Subramania Iyer* v. *Nagarathna Naicker*(5) is in point. In a later case *Subramanian Chettiyar* v. *Raja Rajeswara Dorai*(6), after full argument on the question the right of the beneficiary to claim that possession should be given to the trustee was expressly upheld. When the case was taken before the Judicial Committee in *Subramanian Chettiyar* v. *Raja Rajeswara Dorai*(7), the eminent equity lawyer who appeared for the appellant apparently did not consider the question arguable. Although *Miyaji* alias *Mahomed Ghouse Sahib* v. *Sheik Ahmed Sahib*(8) proceeds on the construction of section 14 of Act XX of 1863, the judgment shows that where a trustee is made a defendant, possession can be given to him in a case instituted by the beneficiaries. I am therefore of opinion that the Subordinate Judge is wrong in his view that under no circumstances can the beneficiaries sue that possession should be given to the lawful trustee.

(1) (1897) I.L.R., 24 Calc., 418.
(2) (1900) I.L.R., 23 Mad., 239. (3) (1900) I.L.R., 23 Mad., 99.
(4) (1914) 2 L.W., 61. (5) (1903) 20 M.L.J., 151.
(6) (1909) I.L.R., 32 Mad., 490 at p. 507.
(7) (1915) I.L.R., 39 Mad., 115 (P.C.). (8) (1908) I.L.R., 31 Mad., 212.

On the question of limitation, Mr. Ranga Achariyar contended that article 120 of the Limitation applies to the case. I am unable to agree. It may be that before article 134 of the Limitation Act is held applicable, more facts and more of the history of the institution of which the plaintiffs are the disciples may have to be ascertained.

The allegations in the plaint state that the properties in suit appertain to the trust. The learned Advocate-General argued that the words "bequeathed in trust" contemplate an original entrustment and that if the properties can be shown to have been acquired *from* the income of the trust property, the acquisitions would be included in it. There is great force in this contention. It is not necessary to decide this question at this stage of the case, nor the other question whether a *matathipathi* is not a trustee. In my opinion article 144 of the Limitation Act directly applies to this case. The suit is for possession of immoveable property and consequently the first column applies. The learned vakil for the appellant contended that the third column is inapplicable, as the possession of the alienees is not adverse to the plaintiffs, the beneficiaries, but only to the trustee. Authorities were quoted to show that the beneficiaries have not the same character as the trustees. I do not think it necessary to pronounce any opinion on this question as the word *plaintiff* in column 3 would include the beneficiary plaintiff according to the definition of that expression in the Limitation Act.

The beneficiaries sue only in the right of the trustee. They are only the aliases for the trustees. Under the common law of England, the beneficiaries were compellable to use the name of the trustee as plaintiff. Consequently the beneficiaries derive their right to sue *through* the trustee. It is his action that they are prosecuting. In this view, what is adverse to the trustee is also adverse to the persons who derive their right to sue through him. Article 144, therefore, applies and there is no necessity for seeking the aid of the residuary article 120 in this case. The suit is not barred by limitation.

Another aspect of the question of limitation relates to the character in which the trustee held the properties. The dictum of MILLER, J., in *Muthuswamier* v. *Sree Sreemethanithi Swamiyar*(1) that the alienation may be binding on the alienating

(1) (1915) I.L.R., 38 Mad., 356.

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trustee during his life-time opens up a question which requires investigation. The learned Judge, as I understand him, did not lay down that such a proposition is applicable to all trust properties. It may be that his view may have to be reconsidered after the facts have been ascertained. At this stage, I do not think it advisable to say more on that question.

For the above reasons, I would reverse the judgment of the Subordinate Judge and remand the case to him for disposal. Costs will abide the result.

N.R.

APPELLATE CIVIL.

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

1917, August, 6 and 28.

VINJAMAMPATI PEDA VENKANNA AND ANOTHER (DEFENDANTS NOS. 2 AND 4), APPELLANTS,

v.

VADLAMANNATI SREENIVASA DEEKSHATULU (PLAINTIFF), RESPONDENT.*

Hindu Law—Promissory note executed by father before partition—Renewal of the note by father after partition—Son's liability on such note—Pious obligation to discharge father's debts, extent of.

A Hindu son is not liable during his father's lifetime on a promissory note executed by his father after partition in renewal of a note executed by the father before partition.

The recent decision of the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Sing* (1917) L.R., 44 I.A., 126, does not overrule the long line of decisions as to the right of the creditor of a Hindu father to sue the father and the sons for an antecedent debt incurred by the father for purposes neither illegal nor immoral and to attach and to bring to sale the interest of the sons as well as of the father in execution of the decree in such a suit.

Per KUMARASWAMI SASTRIYAR, J.—The decision in *Sahu Ram Chandra* v. *Bhup Sing* (1917) L.R., 44 I.A., 126, makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son assuming that it arises at all during the lifetime of the father, arises only if the father's share or his self-acquisitions are insufficient to meet the debts.

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* Second Appeal No. 339 of 1916.

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SECOND APPEAL against the decree of J. C. FERNANDEZ, the District Judge of Guntur, in Appeal No. 8 of 1915, preferred against the decree of V. PURNAYYA, the Additional District Munsif of Bapatla, in Original Suit No. 170 of 1913.

The plaintiff-respondent sued to recover money due on a promissory note executed by the father of the appellants. The suit promissory note was executed by the father in renewal of a prior promissory note executed by him before partition. The Court of First Instance gave a decree against the father alone and exonerated the sons from liability. On appeal by the respondent against such exoneration, the lower Appellate Court modified the decree by making the appellants liable for the suit-debt to the extent which fell to their share on partition. The appellants preferred this Second Appeal against the decree of the lower Appellate Court.

M. O. Parthasarathi Ayyangar for the appellants.

A. Krishnaswami Ayyar for the respondent.

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WALLIS, C.J.—The question in this Second Appeal is whether a son can be made liable, during his father's life-time, as held by the District Judge, on a promissory note executed by his father after partition in renewal of a note executed by the father before partition. One of the contentions raised by Mr. Parthasarathi for the appellant is that since the recent decision of the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Singh*(1) payment of the father's debts cannot be enforced by suit against the sons during the father's life-time. This is a most important question because, if the contention is right, the recent decision involves the overruling of what has long been treated in this and other High Courts as a settled rule of every day application, and it is therefore incumbent upon us to satisfy ourselves that this result is really involved in the recent decision.

Now there are two distinct and closely connected things, one, the father's power to bind the sons' shares by alienations during his life-time for debts not incurred for necessary purposes and not tainted with immorality, and the other, the creditor's remedies by suit in respect of such debts against the sons' shares; and this distinction is observed in the well-known passage of Lord HOBHOUSE's judgment in *Mussamut Nanomi Babuasin* v.

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(1) (1917) L.R., 44 I.A., 126.

Modun Mohun(1) which is quoted in the recent decision. That decision relates to the first question, viz., whether the father's power of alienation to satisfy the class of debts already mentioned could only be exercised where the debt was antecedent or extended to alienations for present debts as well, and does not of itself affect the other question as to the extent of the creditors' remedies by suit against the sons' shares. It is said however that the reasoning of the judgment is consistent with the Indian rulings as to the creditors' remedies against the son during the father's life-time, and the passage on which most reliance is placed is as follows:—

"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truely incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing."

Now it may be said that the reasoning in this passage applies equally whether the debt for which the alienation is made by the father is an antecedent debt or a present debt and that it involves a departure from the decisions in *Girdharee Lall* v. *Kantoo Lall*(2), *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(3), *Mussamut Nanomi Babuasin* v. *Modun Mohun*(1), and other decisions of their Lordships in which the father's right to alienate for antecedent debts was rested on the pious obligations of the sons to pay them. Their Lordships, however, considered that the rule as to alienations for an antecedent debt was too firmly established to be disturbed, and treated it as an exception from a general and sound principle not to be extended and to be very carefully guarded. They proceeded to say that much, if not all, the law upon the subject had arisen from the necessity of protecting the rights of third persons, say the purchasers of the property who have taken their title for onerous consideration and in good

(1) (1885) L.R., 13 I.A., 1.
(2) (1874) L.R., 1 I.A., 321. (3) (1879) L.R., 6 I.A., 88.

faith, and quoted with approval a passage from the judgment of Sir JOHN STANLEY, C.J., which thus interpreted the observations in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(1). They then set out the well-known passage from Lord HOBHOUSE's judgment in *Mussamut Nanomi Babuasin* v. *Modun Mohun*(2), which contains the express statement that the sons cannot set up their rights against the remedies of the creditors for debts not tainted with immorality, and observed that it lent no countenance to the idea that the joint family estate could be effectively sold or charged except where the sale or charge has been made in order to discharge an obligation, not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. It is important to note that their Lordships, perhaps advisedly, did not say here that the joint family estate cannot be sold by the Court in satisfaction of an antecedent debt, or comment on the very general words as to the extent of the creditor's remedies to which so much importance has been attached by all the Courts in India. They then observed that they had set forth the limits to the exception because they formed a guide to the settlement of the conflict of authority in India on the subject of antecedent debt; and after mentioning the case in which the conflict arose they again adopted as the true rule the statement of Sir JOHN STANLEY as to alienation by the father for an antecedent debt.

There is no reference to the subject of the creditor's right by suit to bring the son's interest to sale for an antecedent debt or to the Indian decisions affirming that right; and the question is whether these decisions which proceed upon the authority of their Lordships' earlier decisions should now be overruled because, it is said, the reasoning in the recent judgment is in favour of allowing the sons to resist a sale of their shares. As to this, Lord HALSBURY's well-known observations in *Quinn* v. *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, appears to me to apply with special force. That the Indian Courts have interpreted the earlier decisions ending with

(1) (1879) L.R., 6 I.A., 88 at p. 101. (2) (1885) L.R., 13 I.A., 1.
(3) (1901) A.C., 495 at p. 506.

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Mussamut Nanomi Babuasin v. *Modun Mohun*(1), in which last case it is stated that the sons cannot set up their rights against his creditors' remedies for their debts if not tainted with immorality, as authorizing suits for such debts against the son as well as father may be seen, as regards Calcutta, from the Full Bench decision in *Luchmun Dass* v. *Giridhur Chowdhry*(2) and the judgment of MOOKERJEE and HOLMWOOD, JJ., in *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh*(3) where the other decisions are dealt with. In Bombay the point was expressly decided in *Jagabhai Lalubhai* v. *Bhukandas Jagjivandas*(4), after the decision in *Mussamut Nanomi Babuasin* v. *Modun Mohun*(1), and that decision is followed in *Umed Hathising* v. *Goman Bhaiji*(5). In Allahabad there is an express decision of a Full Bench in *Karan Singh* v. *Bhup Singh*(6), and this decision to which Sir JOHN STANLEY, C.J., was a party was referred to by him in his judgment in *Chandra Deo Singh* v. *Mata Prasad*(7) which is repeatedly referred to with approval by their Lordships in the recent case.

As regards our own Court, the case is, if anything stronger, because it has expressly based the creditor's right to bring to sale the sons' shares for an antecedent debt on the father's right to sell the sons' shares for such a debt, a right which is expressly recognized. In the leading case in *Ponnappa Pillai* v. *Pappuvayyangar*(8) which overruled the earlier decisions of this Court in deference to *Girdharee Lall* v. *Kantoo Lall*(9) and *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(10) Sir CHARLES TURNER, C.J., in a judgment approved by the Privy Council in *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar*(11), observed at page 64 that, when it is decided that for the discharge of debts other than debts incurred for immoral purposes a father can make a valid alienation of ancestral property so as to bind his sons' interest, it is a corollary that the interest of the sons as well as of the father may be attached and sold in execution for such a debt. Again in the Full Bench decision in *Ramasami Nadan* v. *Ulaganatha Goundan*(12) which

(1) (1885) L.R., 13 I.A., 1.
(2) (1880) I.L.R., 5 Calc., 855 (F.B.).
(3) (1907) I.L.R., 34 Calc., 735.
(4) (1887) I.L.R., 11 Bom., 37.
(5) (1896) I.L.R., 20 Bom., 385.
(6) (1905) I.L.R., 27 All., 16.
(7) (1909) I.L.R., 31 All., 176.
(8) (1881) I L.R., 4 Mad., 1 (F.B.).
(9) (1874) L.R., 1 I.A., 321.
(10) (1879) L.R., 6 I.A., 88
(11) (1882) L.R., 9 I.A., 128.
(12) (1899) I.L.R., 22 Mad., 49.

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has been treated till now as finally setting the question in this Presidency, SHEPHARD, O.C.J., observed at page 61 :

"Since 1874, the decisions of the Judicial Committee are consistent in holding that, as the sons' liability may be enforced through the medium of a sale of the ancestral property executed by the father, so it may be enforced by a sale in execution of a decree against the father, and that in neither case can the son recover the property except by proving that the debts were of a kind for which he would not be liable."

BENSON, J., also proceeded on the authority of the Privy Council decisions. SUBRAHMANYA AYYAR, J., went somewhat further, and held in an elaborate judgment that under Hindu Law a son was liable for his father's debts even in the latter's lifetime, a conclusion which is perhaps hardly reconcilable with the recent decision of their Lordships. This Court has adhered to the view of TURNER, C.J., and has held in a series of cases that, as the effect of partition is to put an end to the father's right to sell the son's share for an antecedent debt, it also puts an end to the creditor's right to bring the son's share to sale during his lifetime, at any rate where the partition has not been effected to defeat and delay creditors : *Krishnasami Konan* v. *Ramasami Ayyar*(1), *Rathna Naidu* v. *Aiyanachariar*(2) and *Kameswaramma* v. *Venkatasubba Row*(3).

In these circumstances, and as it appears to me that the creditor's right to bring the sons' shares to sale for an antecedent debt and the long line of decisions which support it were not considered by their Lordships in the recent case, I think it should not be treated as overruling them, and that, if we are to depart from what has been the settled law of this and other High Courts for so many years, it should be in deference to a clear expression of their Lordships' opinion with reference to this particular question, and not on any inference from the reasons given by their Lordships in settling a conflict in the Indian Courts on another point.

While we overrule Mr. Parthasarathi's first contention, he is entitled, as appears from what I have already said, to succeed on the ground that the suit was filed by the creditor after partition, to say nothing of the further ground that the father had

(1) (1899) I.L.R., 22 Mad , 519.
(2) (1908) 13 M.L.J., 599.
(3) (1915) I.L.R., 38 Mad., 1120.

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no authority from the son to renew the note after partition. The appeal is allowed, and the decree of the District Munsif restored with costs here and in the lower Appellate Court.

KUMARASWAMI SASTRIYAR, J.—I have had the advantage of reading the judgment of my Lord and agree in holding that the Second Appeal should be allowed not on the broad question raised by Mr. Parthasarathi Ayyangar as to the non-liability of a son to pay his father's debts during the father's lifetime, a conclusion which according to appellant's counsel is the logical result of the recent decision of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh*(1) but on the narrower one that a son is not after partition liable to be proceeded against in respect of a simple personal debt incurred by the father before partition whatever his rights may have been if they had continued joint.

It has been contended by Mr. Krishnaswami Ayyar that the pious duty which lay on the son to discharge his father's debts is under Hindu Law irrespective of the possession of any assets or joint family properties and that consequently it is unaffected by any partition and attaches so long at least as there is any property which was once joint property in existence in the son's hands, the change in the character of the property created by the partition being unaffected by an obligation which arose irrespective of the possession of any assets.

Whatever may be the strict rule of Hindu Law as to the extent of the pious obligation it has been now well settled that it is circumscribed by the possession of assets or joint family property and that it does not attach to the son's self-acquisitions. So far as the creditor of the father is concerned all that he can do is to avail himself of any remedy that may be open to the father and work it out either by suit or in execution proceedings and if the father has lost his power of dealing with the son's interests owing to a *bona fide* partition between them, the creditor can be in no better position. The effect of a *bona fide* partition is *prima facie* to secure to each of the parties absolute control over the properties that fall to his share unfettered by any liabilities which at the date are not charged upon them. The personal debts of each member are payable only out of his share and the transaction is one in the nature of a conveyance

(1) (1917) L.R., 44 I.A., 126.

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by one party to the other of the property that falls to him. There is nothing in Hindu Law to prevent a father from taking certain properties absolutely or receiving certain benefits and releasing the son from the duty cast upon him by Hindu Law to pay his debts and so long as the transaction is *bona fide* a simple creditor can have no right to object to a transaction which both the father and son were competent to enter into.

In *Krishnasami Konan* v. *Ramasami Ayyar*(1) it was held that after a *bona fide* partition between a father and son it was not open to the creditor at least during the father's lifetime to proceed in execution against the son's share in respect of a decree obtained against the father. In *Rathna Naidu* v. *Aiyanachariar*(2) it was held following the above case that a Hindu father has no power to mortgage the share got by the son on partition even though the mortgage was in respect of a debt that was contracted before partition. In *Kameswaramma* v. *Venkata Subba Rao*(3) WALLIS, C.J., after reviewing the authorities followed the decision in *Krishnasami Konan* v. *Ramasami Ayyar*(1) and held that a creditor had no right to proceed against the son's properties. With reference to *Ramachandra Padayachi* v. *Kondayya Chetti*(4) cited by the respondent's vakil it is distinguishable as the debt sued on arose out of a joint family business carried on by the father and son before partition and the liability of the son rested not merely on pious obligation to pay a debt incurred without any family necessity or for the family benefit but on contract, every member being liable on the contract entered into in respect of a joint family trade at least to the extent of the joint family assets as the profits of the trade would in the ordinary course be shared by all the members.

In the case of renewal by the father alone after partition of a note executed before partition the case is much stronger as I can see no equity in allowing a Hindu father to renew and keep alive a debt (increased by the addition of interest and principal at each renewal) so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must in my opinion be treated as a new obligation incurred after partition. It has been argued that in the present case the

(1) (1889) I L.R., 22 Mad., 519.
(2) (1908) 18 M.L.J., 599.
(3) (1915) I.L.R., 38 Mad., 1120.
(4) (1901) I.L.R., 24 Mad., 555.

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creditor took the note without notice of the partition. I do not think this will make any difference so far as the son's rights are concerned. The pious duty creates no charge on the son's share prior to partition, the presumed agency of the father ceases on partition and as the creditor can only work out the father's rights at the date of the suit he can have no right if that right is lost owing to a *bona fide* partition.

Turning to the broader question raised I do not think that we can in effect overrule a series of decisions and disturb the settled state of the law mainly based on the previous decisions of the Privy Council without some more definite pronouncement of their Lordships in a case in which the question is directly raised.

In *Sahu Ram Chandra* v. *Bhup Singh*(1) their Lordships of the Privy Council while upholding the father's power of alienation either by an absolute sale or a mortgage of joint property *in order to satisfy an antecedent debt* meet the contention that so long as there is a pious duty the distinction between antecedent and contemporaneous debts is immaterial with the following remarks:—

"While the father, however, remains in life, the attempt to affect the sons' and grand-sons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged."

It has been argued that this involves two propositions: namely, (1) that the pious obligation does not arise till the death of the father and (2) that it is only enforceable to the extent of the portion of the debt which cannot be met out of the share or assets of the father. Pushed to its logical conclusion the observations above cited do no doubt, while preserving (1) to the father the right to deal with his son's shares by sale or mortgage so long as it is for the purpose of discharging an antecedent debt, (2) to a mortgagee for an antecedent debt the right to proceed against the son's share and (3) to a purchaser

(1) (1917) L.R., 44 I.A., 126.

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to whom property is sold to satisfy an antecedent debt the right over the entire property including the son's share, negative the right of a simple creditor or a transferee not for an antecedent debt to proceed against the son's share during the life time of the father or in other words subordinates the rights of the creditor of the father whose debt is not for the family benefit to the Mitakshara rights of the sons in respect of their undivided share and puts him *qua* such debts in the same position as if he was the creditor of any other member of a joint Mitakshara family. The result is to overrule a series of decisions referred by the Chief Justice in his judgment of this and the other High Courts extending over several years and to restore the state of the law in this Presidency to what it was before the Full Bench decision in *Ponnappa Pillai* v. *Pappuvayyangar*(1).

I do not think that we can do this without a further pronouncement by their Lordships as to the effect of their observations on the cases relating to the creditor's remedies during the lifetime of the father.

It has been settled by a series of decisions commencing from *Ponnappa Pillai* v. *Pappuvayyangar*(1) on the authority of the decisions of the Privy Council in *Girdharilall v. Kantoo Lall*(2) and *Mussamut Nanomi Babuasin v. Modun Mohun*(3) that a creditor of the father whose debt has not been incurred for an illegal or immoral purpose can in execution of his decree against the father bring to sale the interest both of the father and his sons in joint family property and that it is open to the creditor to join the father and sons in a suit and obtain a decree declaring the liability of the interest of the sons in the joint property to satisfy the debt, the only defence open to the sons being that the debt was contracted for illegal or immoral purposes. The *ratio decidendi* was that as the father had power to dispose of his son's share to satisfy a debt neither illegal nor immoral the creditor had the right to sell in execution what the father could have done by alienations *inter vivos*. Nothing can be clearer than the observation in *Mussamut Nanomi Babuasin* v. *Modun Mohun*(3), to the effect that the sons

(1) (1881) I.L.R., 4 Mad., 1 (F.B.). (2) (1874) L.R., 1 I.A., 321.
(3) (1885) L.R., 13 I.A., 1.

cannot set up their rights against the creditor's remedies for their father's debts if not tainted with immorality.

While the decisions recognized alienations for antecedent debts on a different category and denied the power of the father to sell or mortgage joint family properties except for an antecedent debt and excluded the loan secured by a mortgage or the purchase money got from the vendee from the category of antecedent debts, the result of the ruling of the Privy Council in *Mussamut Nanomi Babuasin* v. *Modun Mohun*(1) as understood by all the Courts was simply to alter the form of the creditor's remedy. He was entitled to treat the balance due on his mortgage after selling the father's share as a simple debt due by the father and so liable to be paid by the sons by reason of their pious duty. It was similarly open to him in cases of sales to sue the father as for failure of consideration in case the sons succeeded on getting their share excluded from liability and to proceed against the sons for the damages payable by their father who sold more than he was entitled to.

In the case of simple debts or suits on the personal covenant to pay by the father in mortgages the sons were held to have no defence to the suit unless they showed that the debt was illegal or immoral, no question of antecedent debt arising on a suit to recover a simple debt. The following observations in *Surjaprasad* v. *Golab Chand*(2) where the debt secured was on the one hand not antecedent and on the other not illegal or immoral indicate the position of the parties in such cases :—

"The plaintiff seeks to enforce the mortgage security in this case, and he is bound to show that the mortgage is binding upon the defendant. Having regard to the rulings both of the Privy Council and this Court, he could do so by showing that the debts for which the mortgage was given were 'antecedent debts' that is to say, antecedent to the transaction in question, but we are unable to find upon the evidence such as it is that this was so. If then the mortgage is not binding upon the defendant, the question is whether the plaintiff is entitled to a decree declaring that the money covered by the bond may be realized out of the whole of the ancestral estate, the debt not being proved to have been incurred for immoral or illegal purposes, and it being antecedent to the suit. If the plaintiff had brought his suit within six years from the time when the

(1) (1885) L.R., 13 I.A., 11. (2) (1900) I.L.R., 27 Calc., 782.

bond fell due, there could be no doubt that he would be entitled to the relief which was declared as the proper relief to be granted to a party in the position of the plaintiff in *Luchmun Dass* v. *Giridhur Chowdry*(1) decided by a Full Bench of this Court and *Khalilul Rahman* v. *Gobind Pershad*(2)."

These observations have to be borne in mind when we have to consider the remark of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh*(3) to the effect

"that except under the mortgage all other remedies have long ago disappeared."

In *Sahu Ram Chandra* v. *Bhup Singh*(3) the question directly before their Lordships was whether a mortgage for an antecedent debt was binding on the sons and this question was answered in the affirmative and so far the decision confirmed the view taken in all the High Courts. The decision in *Mussamut Nanomi Babuasin* v. *Modan Mohun*(4) which has been treated by Courts in India as the basis for allowing the creditor to sue the sons in their father's lifetime for their father's debt on the ground that he was entitled to do by suit and execution proceedings thereunder what the father could have done of his own volition though referred to by their Lordships as establishing the son's liability for mortgages or alienations created to pay off antecedent debts was not explained as being limited to such cases. So far as I can see the attention of their Lordships was not called to the remedies of a simple creditor as enunciated by the decisions of the various High Courts. The passages in the Hindu Texts and commentaries (which I shall refer to later on) which show that the pious obligation of the son was not purely a post mortem obligation but one which would under certain circumstances arise during the life of the father were not brought to the notice of their Lordships. The passage in their judgment to the effect that the case was free from complications because

"except under the mortgage all other remedies have long ago disappeared, and the appellants rear it up and claim under it now, there being no right in them to invoke the doctrine of the pious obligation to discharge the debt incurred by Bhup Singh, because that debt as such cannot be successfully sued for"

(1) (1880) I.L.R., 5 Calc., 855 (F.B.). (2) (1893) I.L.R., 20 Calc., 328.
(3) (1917) L.R., 44 I.A., 126. (4) (1885) I.L.R., 13 I.A., 1.

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indicates that their Lordships had in view the cases where a suit on the debt evidenced by a mortgage not illegal or immoral would lie against the sons even though the mortgage was not for an antecedent debt: *Surjaprasad* v. *Golab Chand*(1), and other cases. If there was no pious obligation at all during the father's lifetime and the father was in the position of any other co-parcener it is difficult to see how any suit would lie against the sons except for debts incurred for necessary family purposes and it would be perfectly immaterial to the sons whether the debt is barred or not.

In *Sripat Singh* v. *Tagore*(2), where their Lordships had to consider the effect of a sale of joint family properties in execution of the decree obtained on a simple debt incurred by father alone observe:

"The grounds for that action were these: The property in question was joint property, governed by the Mitakshara Law. By that law a judgment against the father of the family cannot be executed against the whole of the joint family property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

They also observe that the creditor had the *undoubted right* to bring the property to sale except where the sons show that the debt was illegal or immoral.

While I am not prepared to hold that the decision in *Sahu Ram Chandra* v. *Bhup Singh*(3), must be taken to overrule by implication the whole current of authorities during the past 35 years and to restore the state of the law to what it was prior to the year 1881, I am of opinion that the decision makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son only arises when the assets of the father are insufficient assuming that it arises at all during the lifetime of the father. In other words the pious duty is limited to the debts which the father is unable to satisfy out of his share or his self-acquired properties. This limitation introduced by the Privy Council is, if I may say so with respect,

(1) (1900) I.L.R., 27 Calc., 782. (2) (1916) L.R., 44 I.A., 1.
(3) (1917) L.R., 44 I.A., 126.

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entirely in accordance with Hindu Smrithis and safeguards the spiritual interest of the father and the temporal interests of his sons. According to the notions of Smriti writers it is regarded as sinful to remain in debt and a debtor's salvation is deeply imperilled if he dies indebted. According to Vrihaspati a person who does not repay his debt "will be born in his creditor's house as a slave or servant or woman or a quadruped." According to other writers a person dying in debt goes to hell. A duty is therefore cast upon every person to discharge debts incurred by him. The liability of the son to come to the help of his father is only stated to arise when the father is, owing to misfortune, unable to pay his debts. Yagnavalkya says:

"If a father has gone abroad or died or been subdued by calamity his debts shall be paid by his sons and grandsons, on their denial the creditor must prove the debt by witnesses."—Chapter 2, sloka 51.

Vignaneswara in the Mitakshara commenting on the sloka observes:

"If the father not having paid the debt due has died or has gone to a distant country or is overpowered by incurable disease *et cetera*, then the debts contracted by him must be paid by his son or grandson even in the absence of the father's property. Thereon this is the order—on the father's default it is the son, on the son's default it is the grandson (who should pay). Therefore by a son born giving up his self-interest should the father be carefully released from debt so that he may not go to hell."

In the Smriti Chandrika reference is made to the sloka of Katyayana to the effect that

"Even though the father be living if he is afflicted by disease or has gone to sojourn away from his own country the debt contracted by the father should be paid by the sons after the twentieth year"

and so the text of Vrihaspati that

"Even when the father is alive if he be afflicted with disease such as consumption, leprosy or if he be born a blind person, then the sons should pay the debt when it has been proved."

The lawgivers while casting on the son the duty to pay the debts which the father was owing to misfortune unable to pay also enjoins the father not to get into debt as he thereby becomes 'an enemy to his son.' It is clear that whatever may be the pious duty of the son after the father's death the duty in the father's lifetime is only to pay if the father is unable to do so.

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To this extent I think Courts can safely safeguard the interests of the sons in respect of a liability based simply on their pious duty. Any further extension of the immunity of the son cannot, I think, be made in the state of the authorities as they stand at present. Till the decision in *Girdhari Lall* v. *Kantoo Lall*(1), the view taken by Courts in this Presidency was that the son was not during his father's lifetime liable under any circumstances to pay his father's personal debts. The contrary view has been taken since 1881 when the majority of the Judges in the Full Bench in *Ponnappa Pillai* v. *Pappuvayyangar*(2) followed what they thought to be the obvious result of the decision in *Girdhari Lall* v. *Kantoo Lall*(1). I think a clear pronouncement of their Lordships of the Privy Council reversing the whole current of decisions of all the High Courts and restoring the state of the law as it stood before the decision in *Girdhari Lall* v. *Kantoo Lall*(1), is necessary before we can push certain observations of their Lordships in *Sahu Ram Chandra* v. *Bhup Singh*(3) to what it is contended is their logical conclusion.

The power given to a creditor to work out the rights which a Hindu father has to require his son to pay his debts has its foundation not on any Hindu Law texts (attachment and sale in execution of decrees being unknown to the text writers) but on principles of modern jurisprudence. The question in these cases is (to quote the words of Sir JAMES COLVILE in *Lakshman Dada Naik* v. *Ramachandra Dada Naik*(4):

"Not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence"

I agree that the appeal should be allowed with costs in this and the lower Courts.

S.V.

(1) (1874) L.R., 1 I.A., 321.
(2) (1881) I.L.R., 4 Mad. 1 (F.B.).
(3) (1917) 44 I.A., 126.
(4) (1880) L.R., 7 I.A., 195.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ayling, Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

KASARIBADA VENKATACHALAPATI RAO (APPELLANT, DECREE-HOLDER), APPELLANT,

v.

MADDIPATLA KAMESWARAMMA *alias* KAMAKSHAMMA (SECOND RESPONDENT—JUDGMENT-DEBTOR'S LEGAL REPRESENTATIVE), RESPONDENT.*

1917 August 6 and 7 and September 19.

Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Stay of execution by an Appellate Court—Order for execution by Court of first instance in ignorance of order of stay—Order for execution, validity of.

Held by the Full Bench:—Where subsequent to an interim order for stay of execution made by an Appellate Court without notice to the decree-holder but before its communication to the Court of first instance, an order of attachment is made by the latter Court, the order of attachment is not void and ineffectual as having been made without jurisdiction, but is legally valid.

The order is effective only from the time it is communicated to the first Court.

Muthukumarasami Rowther Minda Nayinar v. *Kuppusami Aiyangar* (1916) I.L.R., 33 Mad., 74 and *Bessesswari Chowdhurany* v. *Hurro Sundar Mozumdar* (1892) 1 C.W.N., 226, followed.

Ilukum Chand Boid v. *Kamalanand Singh* (1906) I.L.R., 33 Calc., 927, not followed.

Ramanathan v. *Arunachellam* (1915) I.L.R., 38 Mad., 766, overruled.

APPEAL against the Appellate Order of P. N. SATAGOPA NAYUDU, the Temporary Subordinate Judge of Kistna, in Appeal No. 118 of 1915, preferred against the order of C. VARADARAJULU PANTULU, the District Munsif of Narasapur, in Civil Miscellaneous Petition No. 1950 of 1914 in Original Suit No. 38 of 1912.

The facts are given in the ORDER OF REFERENCE.

V. Ramasam for the appellant.

P. Narayanamurti for the respondent.

This Appeal coming on for hearing in the first instance before ABDUR RAHIM and BAKEWELL, JJ., the following ORDER OF REFERENCE TO A FULL BENCH was made by:—

* Appeal Against Appellate Order No. 128 of 1916 (F.B.).

VENKATA-CHALAPATI RAO v. KAMESWA-RAMMA.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—In this case the appellant decree-holder obtained an order of attachment of certain properties of the judgment-debtor on the 14th March, 1914 and attachment was actually carried out on the 17th March. It appears that the judgment-debtor who had filed an appeal against the decree made an application for stay of execution and obtained an interim order staying execution till the disposal of the appeal, on the 13th March, 1914. This order was finally vacated on the 15th April, the judgment-debtor having failed to furnish security as required by the Appellate Court. In the meantime, that is, after the order for interim stay was passed, and before that order was set aside, the judgment-debtor sold the property to a third person. The question that we have been asked to consider in the appeal is whether the order of attachment of the 14th March has any effect so as to affect the alienation subsequently made by the judgment-debtor or whether the attachment must be held to be *ultra vires* and ineffectual because of the fact that the Appellate Court had made an interim order of stay previous to the date of attachment, though it was not communicated to the Court that passed the order of attachment and the decree-holder had no knowledge of it at the time he made the application.

The question, so far as the principle involved is concerned, was decided by a bench of this Court in *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar*(1) where it was laid down accepting the view of the law laid down by the Calcutta High Court in *Bessesswari Chowdhurany* v. *Hurro Sundar Mozumdar*(2) that an order of the Appellate Court granting interim stay does not operate so as to suspend proceedings in execution before the first Court before the date of its communication to the latter Court. The learned Judges had before them another ruling of the Calcutta High Court in *Hukum Chand Boid* v. *Kamalanand Singh*(3) which was to the contrary effect, but they preferred the view expressed in *Bessesswari Chowdhurany* v. *Hurro Sundar Mozumdar*(2). In a subsequent case in this Court reported in *Ramanathan* v. *Arunachellam*(4), the same question came up for consideration before Mr. Justice SADASIVA AYYAR and Mr. Justice SPENCER. Mr. Justice SADASIVA AYYAR

(1) (1910) I.L.R., 33 Mad., 74.
(2) (1892) 1 C.W.N., 226.
(3) (1906) I.L.R., 33 Calc., 927.
(4) (1915) I.L.R., 38 Mad., 766.

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expressly dissented from the decision in *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar*(1) and Mr. Justice SPENCER also seemed to be inclined to the same opinion though he thought that *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar*(1) might be distinguished from the case which he had to deal with. We are inclined to agree with the earlier ruling of this Court in *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar*(1). We think that it is ordinarily the duty of a division bench to follow on a pure question of law a previous ruling of another division bench unless it is of opinion that that ruling is wrong in which case the proper course is to refer the question to a full bench so that the law on the point may be conclusively ascertained so far as this High Court is concerned. Having regard, however, to the fact that dissent has been expressed by Mr. Justice SADASIVA AYYAR and also by Mr. Justice SPENCER from the view of the law expressed in *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar*(1), it is necessary that the question involved which is one of importance should be settled by a Full Bench.

The Court which passed the decree has full jurisdiction to proceed with its execution until its hands are stayed by the order of the Appellate Court, and it is difficult to see how that Court, if a proper application for execution is made to it, could refuse the application until the order of the Appellate Court granting stay of execution has been communicated to it. There can be no doubt that an order for prohibitory injunction, so far as it affects the question of validity of any act of the party against whom it is made is concerned, does not come into operation until it is communicated to him. The Civil Procedure Code expressly lays down that the mere preferring of an appeal will not operate to stay execution. It seems to follow that until the first Court receives the order of the Appellate Court staying execution, it is bound to proceed to execute the decree on proper application being made to it by the judgment-creditor. It is then difficult to conceive how an order, which the Court of first instance was bound by law to pass, could be said to be made without authority. The grounds of convenience seem also to

(1) (1910) I.L.R., 33 Mad., 74.

VENKATA-CHALAPATI RAO v. KAMESWA-RAMMA.

ABDUR RAHIM, J.

preponderate against the opposite view. The question which we refer to the Full Bench is :—

" Where subsequent to an interim order for stay of execution made by the Appellate Court without notice to the decree-holder but before its communication to the Court of first instance, an order for attachment has been made by the latter Court, is the order of attachment void and ineffectual as having been made without jurisdiction ? "

ON THIS REFERENCE,

V. Ramesam for the appellant.—An order of attachment made by a Court of first instance in ignorance of an order of stay by an Appellate Court is not a nullity and it is good until it is set aside : Halsbury's Laws of England, volume 14, page 30, section 63. (He was stopped.)

P. Narayanamurti for the respondent.—The order of the first Court is a nullity and it need not be set aside ; *Ramanathan* v. *Arunachellam*(1). In the case of an injunction the order is addressed to a party, but in the case of a stay the order is not addressed to anybody : *Hukum Chand Boid* v. *Kamalanand Singh*(2), *Ex parte Hookey*(3), Spelling on Injunctions, volume 1, article 177, *Mian Jan* v. *Man Singh*(4) and Halsbury's Laws of England, volume 14, page 29.

Their Lordships delivered the following OPINIONS :—

AYLING, J.

AYLING, J.—With all respect to the views of the learned Judges in *Hukum Chand Boid* v. *Kamalanand Singh*(2) I prefer to follow the reasoning of an earlier Bench of the same Court, *Bessesswari Chowdhurany* v. *Hurro Sundar Mozumdar*(5) which has been adopted by this Court in *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar*(6). I regard an order of an Appellate Court staying execution as in the nature of a prohibitory order to the Lower Court which becomes effective only on communication. Till it is communicated steps in execution taken by the Lower Court must be treated as legally valid.

I would answer the reference in the negative.

(1) (1915) I.L.R., 38 Mad., 766.
(2) (1906) I.L.R., 33 Calc., 927 at pp. 934 and 943.
(3) (1862) 31 L.J., Ch., 429 ; s.c. 45 E.R., 1261.
(4) (1880) I.L.R., 2 All., 686.
(5) (1892) 1 C.W.N., 226.
(6) (1910) I.L.R., 33 Mad., 74.

VENKATA-CHALAPATI RAO v. KAMESWA-RAMMA.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—Notwithstanding the high regard I entertain for the opinions of the two learned Judges who decided *Hukum Chand Boid* v. *Kamalanand Singh*(1) and to the opinion of SADASIVA AYYAR, J., I am unable to agree with their conclusions. In my opinion, sufficient attention has not been paid by these learned Judges to the provisions of Order XLI, rule 5. The legislature has enacted by that rule that the Court of first instance still retains jurisdiction to order execution notwithstanding the fact that an appeal has been preferred against its decision. That power can only be taken away by some communication made to it by the Court to which it is subordinate and in which an appeal has been preferred. A Court exercising jurisdiction which is conferred on it in express terms cannot be regarded as having been deprived of it unless the superior authority informs it that that has been done. This principle of jurisprudence should not be departed from unless there is any legislative provision to the contrary.

As regards the citation of the American authorities, I wish to point out that it appears from what is said in Spelling on Injunctions, volume II, section 1713, that the preferring of an appeal operates in some of the States to suspend the powers of the Court below. In that view, it may be justifiable to hold that the lower Court need not be informed of the action taken by the Court of Appeal.

I agree in holding that *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar*(2) was rightly decided. My answer to the reference is in the negative.

BAKEWELL, J.

BAKEWELL, J.—I agree with Mr. Justice AYLING.

N.R.

(1) (1906) I.L.R., 33 Calc., 927 at pp. 938 and 943.
(2) (1910) I.L.R., 33 Mad., 74.

APPELLATE CRIMINAL—FULL BENCH.

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

1917, August, 28, September, 21, October, 8 and November, 9.

S. VULLAPPA AND FOUR OTHERS, ACCUSED,

v.

S. BHEEMA ROW—COMPLAINANT.*

Penal Code (Act XLV of 1860), ss. 441 and 448—Criminal trespass—Finding that the trespass was committed with one of the intents specified in the section, whether necessary—Knowledge of the consequences of the trespass, whether sufficient to inculpate.

Held by the Full Bench (AYLING, J., differing):—Trespass is an offence under section 441, Indian Penal Code, *only* if it is committed with one of the *intents* specified in the section and proof that a trespass committed with some other object was *known* to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction under section 448, Indian Penal Code.

Distinction between 'intention' and "knowledge of likelihood," pointed out.

Queen-Empress v. *Rayapadayachi* (1896) I.L.R., 19 Mad., 240, followed.

Emperor v. *Lakshman* (1902) I.L.R., 26 Bom., 558, and the view of BENSON, J., in *Sellamuthu Servaigaran* v. *Pallamuthu Karuppan* (1912) I.L.R., 35 Mad., 186, not followed.

Per AYLING, J.—A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intent to insult or annoy within section 441, Indian Penal Code: but where the trespasser knows that his trespass is practically certain in the natural course of events to cause insult or annoyance, it is open to the Court to infer an intent to insult or annoy. It is a question of fact whether this presumption of intent is displaced by proof of any independent object of the trespass.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure (Act V of 1898) by W. W. PHILLIPS, the Sessions Judge of Bellary.

The facts are given in the first paragraph of the ORDER OF REFERENCE of ABDUR RAHIM, J.

K. Koti Reddi for the accused.

Dr. *S. Swaminadhan* for the complainant.

E. R. Osborne, Acting Public Prosecutor, for the Crown.

* Criminal Revision Case No. 194 of 1917 (F.B.).

VULLAPPA v. BHEEMA ROW.

This case came on for hearing in the first instance before ABDUR RAHIM and OLDFIELD, JJ., who made the following ORDERS OF REFERENCE TO A FULL BENCH:—

ABDUR RAHIM, J.

ABDUR RAHIM, J.—The second accused's son, a young boy, having stolen some jewels belonging to his father, told him that he had given them to the Head Master of his school, the complainant, who kept them in a box in his house. Thereupon the second accused with his friends, the other four accused in the case, went into the complainant's house, and in spite of the latter's protest and remonstrances insisted on searching, and did in fact search, the house. But nothing was found. The complainant naturally felt insulted and annoyed at the high-handed conduct of the accused and lodged a complaint before the Magistrate. The trial Magistrate found that the accused knew that the consequences of their action would be to annoy or insult the complainant. The appellate Magistrate being of opinion that that finding was not sufficient to bring the case within section 448, Indian Penal Code, as the primary intention of the accused was not to insult or annoy the complainant, set aside the conviction and sentence. The Sessions Judge wants us to revise the case, for he says:

"the accused pushed their way into the complainant's house notwithstanding his remonstrances and must have known that they were annoying the complainant by so doing and consequently must be deemed to have intended the ordinary consequences of their act."

The finding to my mind amounts to this: the accused went into the complainant's house with the intent to search for the jewels and they must be taken to have known that the search would annoy the complainant. Is that sufficient to make out a case under section 441, Indian Penal Code? I think not. The accused when insisting on searching the house had a known intent and that was to recover the jewels. It may be that at the same time they did not mind or care that their act would annoy the complainant; but they certainly did not enter into the complainant's house or remain there with the object of annoying the complainant. If it was found or could fairly be inferred that the accused had in addition to their intention to recover the jewels a further intent, namely, to insult or annoy the complainant, section 441, Indian Penal Code, would apply (see the criticism of *Madras High Court, Appellate Side, Proceedings, 28th*

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March 1871(1) in sections 577 and 578 of Mayne's Criminal Law). But that is not the case here. The framers of the Indian Penal Code have throughout borne in mind the distinction between the 'intention' or 'intent' of a person and his knowledge that a certain result is likely to follow from his act; see for instance sections 295, 299 and 304. There is a conflict of authority on the question, but the preponderance of authority seems to be in support of the view I have suggested: vide *Re Chinna Thoyi*(2) and *Re Durgaiya*(3); *In the matter of Jotharam Davay*(4); *Queen-Empress* v. *Rayapadayachi*(5); and *Manikka Veera Raghava Chariar* v. *Emperor*(6); opinion of SANKARAN NAYAR, J., in *Seliamuthu Servaigaran* v. *Pallamuthu Karuppan*(7); a decision of myself sitting alone in *Chinna Krishna Reddi* v. *Marri Poliah*(8); *In the matter of the petition of Chunder Narain* v. *Farquharson*(9); *Chandi Persad* v. *Evans*(10); *In the matter of the petition of Gobind Prasad*(11); and *Emperor* v. *Gaya Bhar*(12); while a different view has been expressed by BENSON, J., in *Sellamuthu Servaigaran* v. *Pallamuthu Karuppan*(7) followed by SADASIVA AYYAR, J., in *Somadurai Mudaliar* v. *Emperor* (13); and also *Emperor* v. *Lakshman*(14). I would therefore refer the following question to the Full Bench:—

"*If a person enters into property in possession of another or remains there with an intent other than to intimidate, insult or annoy him or to commit any offence, but with the knowledge that his act is likely or certain to cause annoyance or insult to the person in possession is he guilty of an offence under section* 448 *of the Indian Penal Code?*"

OLDFIELD, J.

OLDFIELD, J.—I take the facts as stated by my learned brother, that accused entered and remained on complainant's premises with the primary intention to recover their property, which they wrongly thought was there, and with knowledge of the probability, so strong that according to ordinary standards it amounted to certainty, that their conduct would cause annoyance. The First Class Deputy Magistrate has held, and

(1) 6 M.H.C.R., App. xxv. (2) (1895) 1 Weir's Cr. R. (fourth edition), 518.
(3) (1882) 1 Weir's Cr. R. (fourth edition), 524.
(4) (1878) I L.R., 2 Mad., 30. (5) (1896) I.L.R., 19 Mad., 240.
(6) (1900) 8 M.L.T., 246. (7) (1912) I.L.R., 35 Mad., 186.
(8) (1912) M.W.N., 395. (9) (1879) I.L.R., 4 Calc., 837.
(10) (1895) I.L.R., 22 Calc., 123. (11) (1879) I.L.R., 2 All., 465.
(12) (1916) I.L.R., 38 All., 517.
(13) (1917) 9 Cri. L.R., 196. (14) (1902) I.L.R., 26 Bom., 558.

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it is argued here, that no offence was committed because their primary intention was to recover their property.

This conclusion was based on *Queen-Empress* v. *Rayapadayachi*(1). But it involves the further assumption, which we have been asked explicitly to make, that section 441, Indian Penal Code, is not worded so as to include an act done with knowledge of the probability of any particular consequence and that such knowledge, whatever the degree of probability in question, is not to be taken into account in deciding whether an offence has been committed. My learned brother has referred to authorities as justifying this assumption. But of the cases from the authorized reports, with which alone I feel bound to deal, some do not, with all respect, do so. In *In the matter of Jotharam Davay*(2) and *Chandi Persad* v. *Evans*(3), the accused were doing what was and what they believed in good faith to be a lawful thing in a lawful way and in the absence of any finding of an intent to annoy or any probability that the complainants, presumably law-abiding persons, would suffer legitimate annoyance, no presumption that they would be annoyed could arise. Similarly in *In the matter of the petition of Gobind Prasad*(4), except that there was no finding on the immaterial point, whether the act of the accused was in fact lawful. And, to contrast these two cases with that before us, in both of them accused acted in good faith, whilst here they must have known that their conduct was against the law. In *Queen-Empress* v. *Rayapadayachi*(1) and *Emperor* v. *Gaya Bhar*(5) the existence of an intent to annoy was directly negatived in the first case at least by accused's precautions against discovery; and in both the ground of decision was the distinction 'between entertaining a certain intention and having the knowledge that one's act may possibly,' not 'may probably' or, as my learned brother apparently would hold, 'will certainly' lead to a certain result. *In the matter of the petition* of *Chunder Narain* v. *Farquharson*(6) is of little weight since the point is not discussed at length. Lastly the judgment of SANKARAN NAYAR, J., in *Sellamuthu Servaiyaran* v. *Pallamuthu Karuppan*(7) no doubt supports the contention under discussion. But it is in conflict with the view taken by BENSON, J., in the

(1) (1896) I.L.R., 19 Mad., 240. (2) (1878) I.L.R., 2 Mad., 30.
(3) (1895) I.L.R., 22 Calc., 123. (4) (1878) I.L.R., 2 All., 465.
(5) (1916) I.L.R., 38 All., 517. (6) (1879) I.L.R., 4 Calc., 837.
(7) (1912) I.L.R., 35 Mad., 186.

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same case and with *Emperor* v. *Lakshman*(1) and *Premanund Shaha* v. *Brindabun Chung*(2).

The opinion of BENSON, J., is, it may be respectfully suggested, in accordance with general principles. It is true that the Penal Code distinguishes, when it is necessary to do so, between 'intention' and 'knowledge' and does not treat the one as invariable accompaniment of the other. But it is only necessary to compare sections 299 and 304 (3) and (4) in order to see that knowledge of a probability is treated as equivalent to intention, when the probability is of more than a particular strength; that is, when the consequence, on which the character of the act in question depends, is known to be that, which will follow in the natural course. This seems to me consistent with the decision in *Queen-Empress* v. *Rayapadayachi*(3) and other similar cases, in which the annoyance alleged to be the consequence of the accused's act was, owing to precautions taken by him, or for other reasons, regarded as no more than possible. Here however the accused must, as persons of ordinary sense, have known that their conduct would in the natural course cause legitimate annoyance inevitably; and I would therefore hold that annoyance was their intention. I add that the contrary view would make any immediate intention, which the accused might allege as entertained, whether or no in good faith, the measure of their responsibility and authorize an unlimited extension of the right of self-help, which would be disastrous to security.

With these observations I concur in the reference proposed by my learned brother and with the form, in which he has framed the question to be referred, on the understanding that the intent referred to in it is the primary or immediate one which the accused may entertain.

ON THIS REFERENCE—

E. R. Osborne, Acting Public Prosecutor, for the Crown.—The view taken by ABDUR RAHIM, J., should be adopted. Mere knowledge on the part of the accused that his trespass committed with some ulterior object is likely or certain to insult or annoy the occupier is not sufficient to constitute the offence. The word 'knowingly' which is to be found in several other sections of the

(1) (1902) I.L.R., 26 Bom., 558. (2) (1895) I.L.R., 22 Calc., 994.
(3) (1896) I.L.R., 19 Mad., 240.

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Code is not found in section 441. An intention to insult or annoy must be specifically found. In addition to the cases cited in the Orders of Reference, he referred to *In re Venkataramanuja Reddy*(1), *Emperor* v. *Mulla*(2), *In re Ratna Mudali*(3), *Golap Pandey* v. *Boddam*(4) and *Balmakund Ram* v. *Ghansamram*(5).

S. Ranganatha Ayyar for *Dr. Swaminadhan* for the complainant.—If the natural consequence of the act is to annoy, then annoyance is 'intended'. In the Penal Code 'intention' and 'knowledge' are used as equivalent terms—*vide* the definition of 'voluntarily' in section 39. If in spite of protest as in this case, an accused persists and enters, 'intention to annoy' is certainly to be gathered though there might also be some ulterior motive or intention. The existence of one intention does not displace the existence of another.

K. Koti Reddi for the accused.—I adopt the arguments of the Public Prosecutor. The mere fact that the accused knew that annoyance *might* or *would be* caused by the trespass cannot necessarily lead to the conclusion that annoyance was 'intended.' For the distinction between 'knowledge' and 'intention'—see Markby's Elements of Law, section 217. 'Intent' is stronger than 'knowledge.' It is the accused's intent and not the consequence of his act, e.g., annoyance to the complainant which is the criterion—see *Jhulan Sain* v. *Emperor*(6).

The Court expressed the following OPINIONS:—

WALLIS, C.J.

WALLIS, C.J.—The question in this case is, what is the meaning of 'with intent to annoy' in section 441 of the Indian Penal Code. In his History of the Criminal Law, Volume 2, page 100, Sir James Stephen gives the following definition of 'intention':—

> "The direction of conduct towards the object chosen is called the intention or aim (the metaphor involved in the word is obviously taken from the aiming with a bow and arrow)",

and he distinguishes the aim or intention of an act from the motive or reason which actuated the person doing it. At the same time he admits (page 110) that intention is frequently

(1) (1908) 6 M.L.T., 262. (2) (1915) I.L.R., 37 All., 395 at p. 398.
(3) (1887) I.L.R., 10 Mad., 126. (4) (1889) I.L.R., 16 Calc., 715.
(5) (1895) I.L.R., 22 Calc., 391. (6) (1913) I.L.R., 40 Calc., 548.

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used and understood as being synonymous with motive, and speaks of

> "two common fallacies, namely, the confusion between motive and intention, and the tendency to deny an immediate intention because of the existence, real or supposed of some ulterior intention. For instance, it will often be argued that a person ought to be acquitted of *wounding* a police man with intent to do him grievous bodily harm, because his intention was not to hurt the police man but only to escape from his pursuit. This particular argument was so common that to inflict grievous bodily harm with intent to resist lawful apprehension is now a specific statutory offence."

That is to say, the legislature in England has now solved the difficulty by making the intent to resist lawful apprehension the gist of the offence. If we are to apply these tests to the present case, there can be no doubt that the accused must be taken to have intended to annoy the complainant when he trespassed on his house in spite of his protests even though his ulterior intention was to search for his own jewels which he believed to be hidden there. On the other hand, it is clear that this was not the view of the meaning of 'intent' taken by Macaulay and the other Indian Law Commissioners in the draft Penal Code. They regarded the maxim that everyone must be taken to intend the natural consequences of his acts as a fiction which should not be recognized in the Penal Code. Their treatment of this question elicted many criticisms which were met in paragraph 100 of the first report on the Penal Code by the Indian Law Commissioners.

> "The Commissioners saw clearly the difference between 'intent' and 'knowledge of likelihood' and meant to express it distinctly in order to avoid the necessity of fiction in laying a charge as for example by imputing 'intent' constructively when the circumstances imply only 'a knowledge of likelihood' advisedly intending as they did that there should be no distinction in general, in respect of penal consequences between cases in which a man causes an effect which is an offence designedly, and cases in which he causes it by doing what 'he knows is likely to cause it.' Advisedly intending this in general they worded the enactment so that the charge may be always expressed according to the truth" (The Indian Penal Code as originally framed, Madras Higginbotham & Co., page 215).

Their view was, in the language of the Commissioners, that there should in general be no distinction in respect of penal consequences between cases in which a man causes an effect which is an offence designedly and cases in which he causes it by doing what he knows is likely to cause it, but that it should expressly be made punishable to do the act with knowledge of the likelihood as they call it. An examination of the Indian Penal Code as finally passed into law shows that it was framed on these lines. The maxim that everyone must be taken to intend the natural consequences of his acts is incorporated in the definition of 'voluntarily' in section 39, and thus made applicable in every section where that word is used. More generally doing the act with a criminal knowledge or a criminal intent is expressly made punishable. Section 35 speaks of 'an act which is criminal only by reason of its being done with a criminal knowledge or intention' and the distinction is observed in sections 87 to 89, 166 and 167, 194, 295, 297, 299, 350, 366, 367, 425, 499, 504 and 505, in all of which doing the act with intent and doing the act with a knowledge of the consequences are both made punishable. The same result is effected by the addition of the explanation to section 188. In section 350 in particular it is made punishable to use force "intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used." The contrast with the language of section 441 is very suggestive.

In these circumstances, when in the isolated section 441 doing the act with the specified intent is alone made punishable, the inference appears to be that the legislature did not intend that in this section doing the act with a knowledge of its consequences should be punishable. The only other section resembling this which I have noted on a cursory examination of the Code is section 201, and the omission as regards section 441 may be explained by the fact that trespassing with intent to annoy was a new offence unknown in English law. This is the view on which *Queen-Empress* v. *Rayapadayachi*(1) was decided and I think it should be followed in preference to *Emperor* v. *Lakshman*(2) and the judgment of BENSON, J., in *Sellamuthu Servaigaran* v. *Pallamuthu Karuppan*(3).

I will only add that the decision in my opinion does not involve any risk to the public security. A man who forces his

(1) (1896) I.L.R., 19 Mad., 240. (2) (1902) I.L.R., 26 Bom., 558.
(3) (1912) I.L.R., 35 Mad., 186.

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way into another's house against his will commits a civil trespass for which he may be made answerable in substantial damages. Further, the owner of the house may obstruct his entry and even, I think, use reasonable force to remove him without committing the offence of wrongful restraint punishable under section 341; and any active resistance to such obstruction would amount to the use of criminal force punishable under section 350, as under that section it is sufficient if the accused knows that the use of such force is likely to cause annoyance to the person to whom it is used; and any preparation for the use of such force will constitute an assault punishable under section 351. I would answer the question in the negative. It must of course be a question of fact in each case whether the intent was to annoy or not.

AYLING, J.

AYLING, J.—With all respect, I find it impossible to answer the question referred to us with a simple affirmative or negative. That a mere knowledge that the entry is likely to cause insult or annoyance cannot be taken to be equivalent to an intent to insult or annoy must, I think, be conceded: a comparison of section 441, Indian Penal Code, with the other sections of the Code referred to by the learned Chief Justice makes this clear. Where the legislature has in so many instances specifically placed a knowledge that a certain result is likely to follow from the act on the same footing as an intent to cause that result, it can hardly be contended that the two are synonymous.

On the other hand it seems to me necessary to bear in mind that a person's object (to use a non-contentious word) in entering on another person's property may be two-fold: and that, while intent must in most cases be a matter of inference, there are degrees of probability ranging up to practical certainty, from the stronger of which an inference of intent may not improperly be drawn (vide the distinction emphasized in *Emperor* v. *Lakshman*(1). The reference deals with *certainty* as well as *likelihood* of causing annoyance.

The practical difficulty however seems to me to lie less in the degrees that intervene between likelihood and certainty than in the question of the extent to which one motive displaces another or should be treated to the exclusion of another as influencing a man's act.

(1) (1902) I.L.R., 26 Bom., 558.

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AYLING, J.

Suppose *A* enters the dining-room of *B*, a total stranger, during a dinner party. Annoyance to *B* is so certain that in the absence of special circumstances or any evidence tending to suggest an independent motive for the intrusion, a Court might, I think, fairly infer that *A*'s intent was to annoy *B* and nothing else.

Now suppose it is shown that *A*, on entering, meant

(1) to convey warning to one of *B*'s guests in a matter of life and death;

(2) to gratify his curiosity by looking at a picture in *B*'s dining room.

Is *A*'s action to be treated as equally criminal or non-criminal in each of these cases?

I think not, and it seems to me that in every such case, where a specific intent other than one to insult or annoy is set up, the Court must determine whether the motive involved in it is sufficiently strong to displace the intent of annoyance which would otherwise be inferred. The existence of an independent motive for the entry does not in all cases preclude the consideration of an intent to annoy inferable from the practical certainty that annoyance would be caused.

In case 1, I should hold that the intruder's intent (in the sense contemplated by section 441, Indian Penal Code) is not to annoy and that he has committed no offence.

The principle of section 81, Indian Penal Code, might be applied and it might be held that the danger to be averted by the warning far outweighed the annoyance caused to the owner of the house: or it might be held that the urgency of the matter precluded the intruder from realizing, as he must be presumed to do in ordinary circumstances, the certainty of annoyance.

In case 2 the motive put forward by the intruder is so trivial, that neither line of reasoning can be adopted. In effect it is as if he said to the owner of the house: "I know my entry will annoy you, but I want to see your picture, and I mean to do so even at the cost of annoying you, I don't wish to annoy you, but I propose to gratify my curiosity whether I annoy you or not."

In this case, I do not think the intent inferable from the known certainty of annoyance is displaced by the trivial intent

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set up by the intruder: and I should be inclined to hold that the offence of criminal trespass had been committed.

If it be held otherwise it would follow that against such an entry there would be no right of private defence. For the trespass would not be criminal, and section 97, Indian Penal Code, only gives a right of private defence of property against a *criminal* trespass. It is true that this difficulty is to some extent modified as pointed out in the concluding portions of the judgment of the learned Chief Justice, which I have had the advantage of perusing. Obstructions of an intruder's entry would doubtless not amount to wrongful restraint under section 341, Indian Penal Code, and might be resorted to by the owner or occupier without infringement of the law. But I am not clear how far his rights would extend against an intruder who had already effected his entry; or whether he would be legally justified in using reasonable force to expel him. I cannot therefore altogether dismiss this aspect of the case, in endeavouring to ascertain the intention of the legislature in regard to section 441, Indian Penal Code. If my reading of the latter is incorrect, it seems worthy of consideration whether section 97, Indian Penal Code, does not need amendment. I would therefore answer the reference as follows:—

A mere knowledge that the trespass is likely to cause insult or annoyance to the owner of the property does not amount to an intent, to insult or annoy within the meaning of section 441, Indian Penal Code; but where the trespasser knows that his trespass is practically certain in the natural course of events to cause insult or annoyance to the owner of the property, it is open to the Court to infer an intent to insult or annoy. It is a question of fact whether this presumption of intent is displaced by proof of any independent object of the trespass.

KUMARASWAMI SASTRIYAR, J.

KUMARASWAMI SASTRIYAR, J.—The question referred to us for decision is whether an accused's knowledge that his act is likely or certain to cause annoyance or insult to the person in possession, would, if his intention was other than one to intimidate insult or annoy, render him guilty of an offence under section 448 of the Indian Penal Code.

Though there is a conflict of decisions on the question, the preponderance of authority is in favour of the view taken by ABDUR RAHIM, J., one of the referring Judges, that it is not

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sufficient to prove that the person charged under section 448 must have known or had reason to believe that his act would cause insult or annoyance to the person in possession. The question is not free from difficulty, but I am of opinion that the reference should be answered in the negative.

It is clear from a perusal of the various sections of the Indian Penal Code that a difference is drawn between 'intention' and 'knowledge of consequences' and that the Code takes notice of actual and not presumed intention in determining criminality though in determining what a man's actual intention was courts can raise all fair inferences that can be drawn from his acts. When an act is made an offence by reason of its having been committed with a specified intention the intention has to be found as a matter of fact upon evidence which justifies the inference that the accused had the intention required to render his action criminal.

When proof of intention is necessary it is clear that unless the accused admits that his intention was such as would render him guilty of the offence charged, intention, which is a psychological fact, can only be proved by having regard to the nature of the act he commits and a criminal intent is often presumed from acts which are reasonably susceptible of but one interpretation. The rule of law that a man must be taken to intend the natural consequences of his act is really a rule of evidence. The court is not bound to accept the statement of the accused as to his intention but may find from the facts what his intention was and in order to arrive at a conclusion may hold that when a man uses means which at the time he used them he knew or had reason to believe to be likely to cause a result his intention was to cause the 'result'.

When however the court on the materials before it comes to the conclusion that a person had a specified intention when he did an act which is not the intention required to make his act an offence under section 441 the mere fact that he would have known that certain consequences would happen if he had paused to consider would in my opinion be insufficient.

The view taken by the framers of the Act has been pointed out by the Chief Justice in his judgment and I think that in construing section 441 it must not be forgotten that wherever the Penal Code wants to make a man liable for knowledge of

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consequences if expressly says so. As pointed out by Sir William Markby (Elements of Law, paragraph 222) expectation that a consequence would follow or a knowledge that it is likely to follow without any desire that it should follow is an attitude of mind which is distinct from intention and the framers of the Act clearly kept the two distinct and treat knowledge as a state of mind differing from intention. In some sections, e.g., 118 to 120, 153, 154, 217, 293, etc., the words used are 'intending or knowing it to be likely.' In others only 'intention' is referred to, e.g., 124, 140, 174 to 176, 193, 211, 509, etc. In some sections the word used is 'knows,' e.g., 127, 130, 188, 196, 260, etc. In some sections the words are 'knowing' or 'having reason to believe' or 'believing,' e.g., 136, 181 to 183, 201 to 203, 499, etc. In certain sections the words are 'reason to believe,' e.g., 155, 156, and in others 'for the purpose of,' e.g., 189, 190. In section 298 the words used are 'deliberate intention'.

I think the correct view has been taken in *Queen-Empress* v. *Rayapadayachi*(1). Though the facts show that the accused wanted to conceal his presence in the house, the judgment proceeds on the broad ground that "section 441 is so worded as to show that the act must be done with 'intent' and does not, as other sections do (e.g., section 425), embrace the case of an act done with 'knowledge of the likelihood of a given consequence'." To introduce the rule that knowledge of consequences is equivalent to an intention when the probability of consquences following is of more than a particular strength would, in my opinion, introduce, into the section, which, as pointed out by STRAIGHT, J., in *In the matter of the petition of Gobind Prasad*(2) enough, further difficulties.

N.R.

(1) (1896) I.L.R., 19 Mad., 240.

(2) (1879) I.L.R., 2 All., 465.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ayling, Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

KOPPARTHI LINGAYYA AND THREE OTHERS (PETITIONERS, CREDITORS), APPELLANTS,

v.

ARAVETI CHINNA NARAYANA AND EIGHT OTHERS (RESPONDENTS), RESPONDENTS.*

1917, April, 19 and 24 and September, 18, 19 and 26.

Limitation Act (*IX of* 1908), *sec.* 29 (1) (*b*), *'affect' in, meaning of—Applicability of the Act to affect periods of limitation prescribed by Provincial Insolvency Act* (*III of* 1907).

Held by the Full Bench, that recourse cannot be had to the general provisions of the Limitation Act (IX of 1908) in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act (III of 1907), as such recourse would *affect* the specially prescribed period of limitation, within section 29 (i) (*b*) of the Limitation Act.

Abu Backer Sahib v. *The Secretary of State for India* (1911) I.L.R., 34 Mad., 505 (F.B.), followed.

APPEAL against the Order of J. W. HUGHES, the District Judge of Cuddapah, in Insolvency Petition No. 9 of 1915.

The facts are given in the first two paragraphs of the ORDER OF REFERENCE.

C. A. Seshagiri Sastriyar for the appellants.

Dr. *S. Swaminathan* for the fifth respondent.

P. Somasundaram for *V Subrahmanyan Pantulu* for respondents Nos. 4 and 9.

V. S. Narasimhachariyar for respondents Nos. 1, 7 and 8.

The other respondents were not represented.

This appeal came on for hearing in the first instance before SPENCER and SRINIVASA AYYANGAR, JJ., who made the following

SPENCER AND SRINIVASA AYYANGAR, JJ.

ORDER OF REFERENCE TO A FULL BENCH:—This is an appeal against an order of the District Judge of Cuddapah passed under section 15 of the Provincial Insolvency Act dismissing an application made by creditors to declare the respondents insolvent. The learned Judge dismissed the application on

* Appeal Against Order No. 137 of 1916.

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the ground that the act of insolvency complained of occurred more than three months before the presentation of the petition, the last date for presentation having fallen in the period during which the Court was closed for vacation. He held that the petition could not be presented on the reopening day as section 4 of the Indian Limitation Act was not applicable, and that section 10 of the General Clauses Act could not save the petitioners, as a question of limitation was involved.

The appeal against the District Judge's order, for which section 46 of the Act provides, has not been presented within ninety days of the order. Unless the time occupied in obtaining a copy of the order appealed against be excluded under section 12 or section 5 of the Indian Limitation Act, this appeal must be rejected.

The question for our decision therefore is whether sections 4, 5 or 12 of the Indian Limitation Act are applicable to proceedings under the Provincial Insolvency Act.

The latest decision of this Court on the point is *Sivaramayya* v. *Bhujanga Rao*(1) wherein OLDFIELD, J., expressed his opinion that section 12 (2) of the Indian Limitation Act could not be applied to proceedings under the Provincial Insolvency Act. The learned Judge was inclined to think that section 5, being one of the general provisions of the Act and not altering or affecting any period of limitation within the meaning of section 29 (1) (*b*), might be applicable, but he felt himself bound to follow the decisions in *Veeramma* v. *Abbiah*(2) and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi*(3). SADASIVA AYYAR, J., who sat with him, considered that section 5 was applicable. He distinguished *Veeramma* v. *Abbiah*(2), dissented from *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi*(3) and followed *Nijabutoolla* v. *Wazir Ali*(4), *Reference under Forest Act V of* 1882(5) and *Seshama* v. *Sankara*(6). Both learned Judges agreed to cut the Gordian knot under the exceptional circumstances of that case by treating the time-barred appeal as a revision petition and dealing with it under section 15 of the Charter Act, a course which can be taken only when the High Court in the exercise of its power of superintendence considers that a Subordinate Court has failed to do its duty : [*vide Abdullah* v. *Salaru*(1).]

(1) (1916) I.L.R., 39 Mad., 593.
(2) (1895) I.L.R., 18 Mad., 99 (F.B.).
(3) (1897) I.L.R., 20 Mad., 249.
(4) (1882) I.L.R., 8 Calc., 910.
(5) (1887) I.L.R., 10 Mad., 210.
(6) (1889) I.L.R., 12 Mad., 1.

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The present appeal purports to have been brought under section 15 of the Charter Act, as well as under section 46, clause (2) of Act III of 1907, but the circumstances are not such as to warrant our proceeding under the Charter.

Duraiswami Iyengar v. *Meenakshi Sundara Iyer*(2) to which OLDFIELD, J., was again a party, is a direct decision that section 12 of the Indian Limitation Act is not applicable to applications under the Provincial Insolvency Act, and was followed by the same learned Judge in *Trasi Deva Rao* v. *Parameshwaraya*(3), in respect to another section, namely section 14 of the Indian Limitation Act, with the remark that the whole of that Act is inapplicable to proceedings under the Provincial Insolvency Act.

In none of the above cases was the decision in *Srinivasa Ayyangar* v. *The Secretary of State for India*(4) considered. That was a case wherein BENSON and SUNDARA AYYAR, JJ., after a very full consideration of the law on the subject, applied section 15 of the Indian Limitation Act to a suit instituted under section 59 of the Revenue Recovery Act (II of 1864). They held (we think rightly) that the special period for bringing suits under that Act was governed by the provision in section 59, which allows six months' time, rather than by any article in the schedules to the Indian Limitation Act, but that the general provisions in the body of the Act were intended to be applicable, in the absence of anything to the contrary, to proceedings under special or local laws. In so doing, they followed the authority of a Bench of this Court in *Seshama* v. *Sankara*(5) and of a Full Bench in *Venkata* v. *Chengadu*(6).

The Full Bench decision in *Abu Backer Sahib* v. *The Secretary of State for India*(7), which formed the basis for the decision in *Duraiswami Iyengar* v. *Meenakshi Sundara Iyer* (2) was to the effect that appeals under section 10 of the Madras Forest Act (V of 1882) are independent of the general provisions of the Indian Limitation Act.

(1) (1899) I.L.R., 18 All., 4.
(2) (1914) 16 M.L.T., 246.
(3) (1910) I.L.R., 39 Mad., 74.
(4) (1915) I.L.R., 38 Mad., 92.
(5) (1889) I.L.R., 12 Mad., 1.
(6) (1889) I.L.R., 12 Mad., 168 at p. 169 (F.B.).
(7) (1911) I.L.R., 34 Mad., 505 (F.B.).

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The rights conferred by sections 10 and 14 of the Madras Forest Act to appeal against decisions of Forest Settlement Officers upon claims to have certain rights recognized at the time of afforestation, to a District Court and to a Forest Court respectively are evidently rights of a very special nature. As pointed out by the Chief Justice, the vesting of a power to extend time for appealing in the hands of the Governor in Council is in itself an indication that the Courts were not intended to exercise a similar power under the Indian Limitation Act in regard to these so-called appeals.

The cases in *Veeramma* v. *Abbiah*(1) and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi*(2), related to the applicability of the provisions of the Indian Limitation Act to acts done in relation to the Indian Registration Act. *Sivarama Patter Kariakar* v. *Krishna Aiyar*(3), which followed these two decisions, held that independently of the Indian Limitation Act, section 10 of the General Clauses Act would operate to make a presentation on the first day after the Court reopened, though after the time allowed in the Registration Act, a good presentation. So too in *Messrs. Arbuthnot and Co.* v. *Sabapathy Mudaliar*(4), an appeal presented under the Indian Insolvency Act on the reopening day, when the last day for filing it fell on a holiday, was admitted.

In *Veeramma* v. *Abbiah*(1) and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi*(2), as in other decisions, it has always been held that what must be looked to in deciding whether the Indian Limitation Act can be applied to a special or local law is the question whether the particular Act is or is not self-contained and complete in itself.

It has been settled by a course of decisions that the Madras Forest Act and the Indian Registration Act are special Acts complete in themselves, and we do not here propose to question the reasoning by which that result has been arrived at.

But sections 6 and 47 of the Provincial Insolvency Act show that that enactment is at least not independent of the rules of Civil Procedure followed in the trial of regular suits and appeals under the Civil Procedure Code.

(1) (1895) I.L.R., 18 Mad., 99 (F.B.).
(2) (1897) I.L.R., 20 Mad., 249.
(3) (1914) 26 M.L.J., 307.
(4) (1912) 23 M.L.J., 221.

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We also think that the analogy of the Madras Forest Act did not justify the assumption in *Duraiswami Iyengar* v. *Meenakshisundara Iyer*(1), that the general provisions of the Indian Limitation Act were not applicable to the Provincial Insolvency Act on the strength of *Abu Backer Sahib* v. *The Secretary of State for India*(2).

In our opinion the correct view is that taken by the Allahabad High Court in *Dropadi* v. *Hira Lal*(3), where the matter has been fully discussed by a Full Bench.

We consider that *Duraiswami Iyengar* v. *Meenakshisundara Iyer*(1), and *Trasi Deva Rao* v. *Parameshwaraya*(4), were wrongly decided, and that the *dictum* of OLDFIELD, J., in *Sivaramayya* v. *Bhujanga Rao*(5), as to the applicability of sections 5 and 12 of the Limitation Act to proceedings under the Provincial Insolvency Act was also incorrect. But as there is so much divergence of opinion on the point, we refer to a Full Bench the question—

"*Whether recourse can be had to the general provisions of Act IX of* 1908 *in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act* (*III of* 1907)."

ON THIS REFERENCE,

A. Krishnaswami Ayyar with *C. A. Seshagiri Sastriyar* for the appellant.—Recourse can be had to the provisions of the Limitation Act. Section 46, Provincial Insolvency Act, prescribes that the procedure is that prescribed in the Civil Procedure Code, which by Order XLI requires that an appeal *shall* be accompanied by a copy of the first Court's order; otherwise the appeal will be rejected. The Provincial Insolvency Act is not in itself a complete Code as to procedure. The Limitation Act is a consolidating and amending Act. Section 29 thereof only says that the periods prescribed by any special or local laws shall not be altered. It does not say that its other provisions, such as the mode of computation, etc., do not apply. The presentation of an appeal without a copy of the decree appealed against is not a valid presentation; *Abdul Hakim Chowdhury* v. *Hem Chandra Das*(6).

(1) (1914) 16 M.L.T., 246.
(2) (1911) I.L.R., 34 Mad., 505 (F.B.).
(3) (1912) I.L.R., 34 All., 496.
(4) (1916) I.L.R., 39 Mad., 74.
(5) (1916) I.L.R., 39 Mad. 593.
(6) (1915) I.L.R., 42 Calc., 433.

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[BAKEWELL, J.—The word is not only 'alter' but 'affect'. Your argument would affect the special period prescribed.]

Section 6 of the Limitation Act refers specifically to the first schedule and section 12 deals only with *computation* of the time. 'Affecting' refers to changing the suits from one category to another as was attempted to be done in *The Secretary of State for India* v. *Assan*(1). The cases under the Forest Act are distinguishable on the ground that the Forest Act does not require a copy of the original decree to be filed with the appeal: see *Srinivasa Ayyangar* v. *Secretary of State*(2).

[Court.—The meaning given to the word 'affect' in *Abu Backer Sahib* v. *The Secretary of State for India*(3) is against you.]

That case turned on the fact of its being a case under the Forest Act and no reference is made in it to *Venkata* v. *Chengadu*(4), a previous Full Bench decision of this Court, or to *Kullayappa* v. *Lakshmipathi*(5), *Iswara Patter* v. *Karuppan*(6). Reference was made to *Veeramma* v. *Abbiah*(7) and *Haji Ismail Sait* v. *Trustees of the Harbour, Madras*(8). If ninety days be strictly insisted on, then it is possible that the Court will not be able to give a copy of the decree within the ninety days and thus the right of appeal given by section 46 may be made useless. The first question as to whether the original petition was filed in time need not be argued now.

Dr. *S. Swaminadhan* for the fifth respondent was not called upon.

P. Somasundaram for *V. Subrahmanyam Pantulu* for respondents Nos. 4 and 9.

V. S. Narasimha Acharya for respondents Nos. 1, 7 and 8.

The other respondents were not represented.

The Court expressed the following OPINIONS:—

AYLING, J.

AYLING, J.—The question propounded for our decision is—

Whether recourse can be had to the general provisions of Act IX of 1908 *in dealing with the admission of petitions and appeals*

(1) (1916) I.L.R., 39 Mad., 727 (F.B.). (2) (1915) I.L.R., 38 Mad., 92 at p. 96.
(3) (1911) I.L.R., 34 Mad., 505 (F.B.).
(4) (1889) I.L.R., 12 Mad., 168 at p. 171 (F.B.).
(5) (1888) I.L.R., 12 Mad., 467 at pp. 470 and 471.
(6) (1893) 3 M.L.J., 255.
(7) (1895) I.L.R., 18 Mad., 99 at pp. 103 and 109 (F.B.).
(8) 1900) I.L.R., 23 Mad., 389.

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presented after the time prescribed under the provisions of the Provincial Insolvency Act III of 1907?

The obstacle to the application of these general provisions is section 29 of the same Act which says:—

"Nothing in this Act shall . . . . affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India."

The meaning of this section has been considered by a Full Bench of this Court in *Abu Backer Sahib* v. *The Secretary of State for India*(1), and in my opinion that judgment effectively answers the question before us. In place of section 29 of Act IX of 1908 and the Provincial Insolvency Act, the learned Judges were dealing with section 6 of Act XV of 1877 (the previous Limitation Act).

The learned vakil for appellants has in fact been forced to argue that the decision in *Abu Backer Sahib* v. *The Secretary of State for India*((1) was wrong and requires reconsideration. How far we are entitled to question the correctness of a considered ruling of a Full Bench of equal numerical strength is a matter into which I do not propose to enter: for I entirely and respectfully concur in the ruling now called in question. It is a pure question of interpretation of a statute. The juxtaposition of the words 'affect' and 'alter' compel us to give an independent meaning to the word 'affect'; and I cannot understand how the application of the general provisions extending in certain circumstances the period fixed by law can be held not to 'affect' that period.

The cases mainly relied on by appellants' vakil are *Venkata* v. *Chengadu*(2) and *Srinivasa Ayyangar* v. *Secretary of State*(3). In the latter case the two learned Judges were inclined to question the correctness, or rather the general applicability, of the decision in *Abu Backer Sahib* v. *The Secretary of State for India*(1), largely because the Full Bench ruling in *Venkata* v. *Chengadu*(2) had not been considered; but they deemed it unnecessary to decide whether section 29, Indian Limitation Act, rendered the general sections of the Limitation Act inapplicable to special and local Acts generally. They

(1) (1911) I.L.R., 34 Mad., 505 (F.B.). (2) (1889) I.L.R., 12 Mad., 168 (F.B.).
(3) (1915) I.L.R., 38 Mad., 92.

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disposed of the case before them with an eye solely to the peculiar features of the Act with which they were dealing—Act II of 1864: and I need hardly point out even if the two were mutually destructive, the authority of this ruling cannot be held to counterpoise the Full Bench decision.

The decision in *Venkata* v. *Chengadu*(1) was that of a Bench of four Judges, the main judgment being that of MUTTUSAMI AYYAR, J.; the question referred for their decision did not relate to the applicability of the general sections of the Limitation Act, or the interpretation of section 6 of the same (corresponding to section 29 of the present Act); but to whether the provisions of the Limitation Act (article 95, Schedule II) or section 59 of Act II of 1864 should be followed in computing the period of limitation. No doubt MUTTUSWAMI AYYAR, J., expressed the opinion, with the concurrence of KERNAN, J., that section 6 of the Limitation Act did not bar the application of the general sections. *Kullayappa* v. *Lakshmipathi*(2) is another pronouncement of the same two learned Judges to the same effect. But the other two Judges, who were parties to *Kullayappa* v. *Lakshmipathi*(2) (PARKER and WILKINSON, JJ.), expressed no opinion on the point; and this is remarked by BENSON and SUNDARA AYYAR, JJ., in their judgment in *Srinivasa Ayyangar* v. *Secretary of State*(3). The decision in *Kullayappa* v. *Lakshmipathi*(2) is certainly not entitled to be treated as a Full Bench decision on the question now before us.

Veeramma v. *Abbiah*(4) is another Full Bench case in which MUTTUSWAMI AYYAR and SHEPHARD, JJ., expressed contrary views as to the effect of section 6 of Act XV of 1877. COLLINS, C.J., does not refer to the section; but, by implication, he would seem to have favoured SHEPHERD, J.'s view.

I can find nothing in these cases, which would induce me to differ from the view of the learned Judges in *Abu Backer Sahib* v. *The Secretary of State for India*(5).

It has been suggested that in the case of an appeal to a District Court (with which we are not concerned here) the period allowed by section 47 (4), Provincial Insolvency Act (thirty days),

(1) (1889) I.L.R., 12 Mad., 168 (F.B.). (2) (1889) I.L.R., 12 Mad., 467.
(3) (1915) I.L.R., 38 Mad., 92. (4) (1895) I.L.R., 18 Mad., 99 (F.B.).
(5) (1911) I.L.R., 34 Mad., 505 (F.B.).

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is so short that it might be impossible to procure a copy of the order in time for presentation with the appeal, as required by Order XLI, rule 1 *(mutatis mutandis)*, and that in such a case a Court could not be asked to enforce the limitation clause, section 46 (4). That is not the case here: and we are not called on to say what a Court should do, if such facts were established. The possibility of such a difficult case may be a ground for legislation, or, possibly, the provision of a remedy in the rules and orders under the Civil Procedure Code. But we have merely to interpret the law as it stands: and I feel no hesitation in answering the Reference in the negative.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—Both sides are agreed that the only question to be considered in this Reference is whether the time taken up for obtaining copies of the order appealed against should be deducted in computing the period of limitation fixed by section 46, clause (4) of the Provincial Insolvency Act. The decision of the question turns largely upon the interpretation to be placed upon section 29 of the Indian Limitation Act. A very learned argument was addressed to us by Mr. A. Krishnaswami Ayyar upon the meaning to be attached to the word 'affect' in clause (1) (*b*) of that section. Apart from authority, if I were deciding this question for the first time, I would have respectfully concurred in the view taken by three learned Judges of this Court including the present CHIEF JUSTICE in *Abu Backer Sahib* v. *The Secretary of State for India*(1). The word '*alter*' would apply directly to similar provisions in the Limitation Act, if any, giving an extended period to suits or appeals of the nature provided for in the Special Act. The word '*affect*' is more comprehensive. Whenever by a process of computation or exclusion or deduction the special period fixed by the enactment is indirectly extended or cut down, it must be taken that that period has been *affected*. The illustration which Mr. Krishnaswami Ayyar suggested would also be connoted by the term 'affect'; for example, there may be a special period compelling a party to take steps to set aside the order of a Special Officer under the Boundaries Act. When a party instead of adopting that course wants to avail himself of the general period of limitation prescribed for a declaration of title

(1) (1911) I.L.R., 34 Mad., 505 (F.B.).

ticle 120 of the Limitation Act, the relief granted to him
l indirectly affect the period of limitation prescribed in the
al law. The decision of the Full Bench in *The Secretary of
for India* v. *Assan*(1) is an illustration of this mode of
ing the period of limitation fixed in a special Act. But, I am
repared to agree with the learned vakil that this category
ses exhausts the significance of the word 'affect.' Nor am
pared to accede to the contention that a computation of period
itation which in effect extends the time fixed does not *affect*
eriod of limitation. In my opinion, wherever an attempt is
to construe a special period fixed by an enactment with
nce to the general provisions of the Limitation Act con-
in sections 5 to 18, the effect of such a process would be
ct the period of limitation prescribed by the local Act.
fore my reading of the section apart from authority is in
lance with the pronouncement in *Abu Backer Sahib* v. *The
ary of State for India*(2). But the matter has been compli-
a great deal by other decisions to which I shall presently
riefly refer.

fore dealing with the cases quoted at the Bar, I may
e of one aspect of the case which was very strongly pressed
s by Mr. Krishnaswami Ayyar. He did not dispute the
ition that where a special Act is self-contained the general
ons of the Limitation Act should not be imported into the
eration of questions arising under the former Act. Upon
int we have the judgment of the Judicial Committee in
mud Buhadoor Khan v. *The Collector of Bareilly*(3), that
s of a special kind which are self-contained, the general
ons of the Limitation Act should not be annexed. Sir
R COLLINS, C.J., and MUTTUSWAMI AYYAR, J., followed this
n in *Veeramma* v. *Abbiah*(4). There are other decisions to
ne effect; and therefore it may be taken as settled tha t
he Code is complete in itself the general provisions of
itation Act commencing from sections 5 to 18 should not
l as forming part of that Code. In the present case it
ntended that the Provincial Insolvency Act is not a
mplete in itself. I think this contention is well founded.

) I.L.R., 39 Mad., 727 (F.B.).
) 1 I.A., 167.
(2) (1911) I.L.R., 34 Mad., 505 (F B.).
(4) (1895) I,L.R., 18 Mad., 99 (F.B.).

We have only to refer to sections 6 and 47 to show that the Civil Procedure Code was intended to be largely utilized in regard to proceedings under the Act. Therefore the Act has to be supplemented by the importation of the general rules of procedure as to suits.

One special matter affecting limitation may also be pointed out, and that is, by section 47 of the Provincial Insolvency Act, the procedure to be followed in presenting appeals under that Act are to be the same as in the case of appeals under the Civil Procedure Code. As the learned vakil pointed out, under the Civil Procedure Code an appeal can be filed only if the memorandum is accompanied by copies of the decree and of the judgment. It is well recognized that an appeal filed without these annexures must be regarded as no presentation in the eye of law: see *Chamela Kuar* v. *Amir Khan*(1) and *Abdul Hakim Chowdhury* v. *Hem Chandra Das*(2). It therefore follows that under the Provincial Insolvency Act, it is incumbent upon the party preferring an appeal that he should file copies of the order or judgment appealed against. It is not disputed that in a considerable number of cases such a copy may not be obtainable within the thirty days allowed for presenting an appeal to the First Appellate Court. It was not therefore unreasonably suggested that the legislature could not have intended that the period of thirty days fixed by section 46, clause (4), should be inclusive of the period for obtaining copies of the order appealed against. The result of such a construction would be to deny the right of appeal in many cases. If it were shown in the present case that an application was made immediately after the order was passed and that more than ninety days had elapsed before the copies were obtained I would have hesitated a great deal before coming to the conclusion that the party is not entitled to prefer the appeal after obtaining the copies, because to hold otherwise would be to deny the right of appeal given by the section. However, it has not been shown that in this particular case the copies were not granted expeditiously.

Apart from this particular aspect of the case, the general question now remains whether by virtue of the fact that the

(1) (1894) I.L.R., 16 All., 77.
(2) (1915) I.L.R., 42 Calc., 483.

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Provincial Insolvency Act is not self-contained we are at liberty to introduce into the construction of section 46, clause (4), the general provisions of the Limitation Act. In *Venkata* v. *Chengadu*(1) a Bench of four Judges had to consider this question with reference to section 18 of the Limitation Act. That was a case under the Revenue Recovery Act. Two Judges, KERNAN, J., and MUTTUSWAMI AYYAR, J., held that section 18 was applicable to the Revenue Recovery Act. Justices PARKER and WILKINSON expressed no definite opinion on the question. In *Seshama* v. *Sankara*(2), COLLINS, C.J., and MUTTUSWAMI AYYAR, J., in dealing with a case under the Madras Boundary Act XXVIII of 1860 held that section 14 of the Limitation Act was applicable to the special period fixed in that Act. In *Kullayappa* v. *Lakshmipathi*(3), KERNAN and MUTTUSWAMI AYYAR, JJ., applied section 14 of the Limitation Act to a case arising under the Rent Recovery Act. In *Iswara Patter* v. *Karuppan*(4), COLLINS, C.J., and DAVIES, J., applied section 18 of the Limitation Act to a case arising under the Revenue Recovery Act. In *Veeramma* v. *Abbiah*(5), which was a case under the Registration Act all the three learned Judges who took part in it, viz., COLLINS, C.J., MUTTUSWAMI, AYYAR, J., and SHEPHARD, J., held that the Act was complete in itself and that consequently there was no occasion for invoking the aid of the general provisions of the Limitation Act. The CHIEF JUSTICE and Justice MUTTUSWAMI AYYAR once again reiterated the proposition that if the Act was not complete in itself the general provisions of the Limitation Act may be looked into for construing a special Act. On the other hand SHEPHARD, J., gave an interpretation of the term 'affect' which subsequently found favour with the Judges who decided *Abu Backer Sahib* v. *The Secretary of State for India*(6). All these decisions were passed under section 6 of the Limitation Act of 1877. There was thus a considerable divergence of opinion regarding the interpretation to be placed upon the word 'affect' at least in Madras, and yet when the new Limitation Act of 1908 was passed, the legislature did not choose to give an authoritative interpretation of the term. My mind has been exercised considerably as to

(1) (1889) I.L.R., 12 Mad., 168 (F.B.).
(2) (1889) I.L.R., 12 Mad., 1.
(3) (1899) I.L.R., 12 Mad., 467.
(4) (1893) 3 M.L.J., 255.
(5) (1895) I.L.R., 18 Mad., 99 (F.B.).
(6) (1911) I.L.R., 34 Mad., 505 (F.B.).

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whether the legislature intended to adopt the interpretation placed upon the term by COLLINS, C.J., MUTTUSWAMI AYYAR, J., KERNAN, J., and DAVIES, J., or whether it preferred the interpretations placed upon the word by SHEPHARD, J. The opinion of ARNOLD WHITE, C.J., MILLER, J., and WALLIS, J., was not given until after the new Act was passed although they had to construe the language of section 6 of the Act. The view taken by SHEPHARD, J., is shared by a very large number of Judges in the other High Courts, and as that view is in consonance with the natural interpretation to be placed upon the word 'affect' I prefer to hold with the Judges who decided *Abu Backer Sahib* v. *The Secretary of State for India*(1), that even in cases where the Act is not complete in itself, if by importing the general provisions of the Limitation Act the period fixed in a special Act is likely to be enlarged either by the process of computation in obtaining copies or by excluding the period during which a fraud was practised or during which another litigation was proceeding in a different Court, still the period of limitation would be 'affected'.

It seems to me that this is eminently a matter in which the legislature should interfere. I fail to see why litigants preferring appeals under special Acts should not have the same privilege of extension provided by the general provisions of the Limitation Act as they have in cases directly coming under the Civil Procedure Code. There is no conceivable reason for putting one class of litigants under a disability of this kind. I may also be permitted to suggest that until the legislature intervenes to amend the Limitation Act, our High Court should amend the rule in Order XLI by saying that the presentation of an appeal in cases under the Insolvency Act need not be accompanied by copies of the order, decree or judgment appealed against. My answer is in the negative.

BAKEWELL, J. — BAKEWELL, J.

BAKEWELL, J.—I agree with Mr. Justice AYLING.

N.R.

(1) (1911) I.L.R., 34 Mad., 505.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling.

1917, September, 17 and 21, and October, 2 and 12.

NATUTHODI KUNHI MOIDIN (ACCUSED), PETITIONER,

v.

P. R. CHAMU NAIR (COMPLAINANT), RESPONDENT.*

Workman's Breach of Contract Act (XIII of 1859)—Scope of the Act—'Workman', meaning of—Status of accused, proof of—Duty of complainant to prove—Absence of proof.

The accused received an advance of Rs. 2,500 and contracted to supply coolies to a rubber estate. Under the contract, he was to receive a commission of 10 per cent on the wages of the Kol maistris and coolies and an additional Rs. 25 a month, if he resided on the estate. Having failed to fulfil his contract, he was proceeded against under the Workman's Breach of Contract Act.

On a difference of opinion between SADASIVA AYYAR and PHILLIPS, JJ., as to whether the accused was a 'workman' within the meaning of the Act.

Held, by AYLING, J., agreeing with SADASIVA AYYAR, J.:

(1) That the accused was not a "workman" within the meaning of the Act, and

(2) That the word 'workman' means a person who engages in manual labour of some kind, whether skilled or unskilled.

Gilby v. *Subbu* (1884) I.L.R., 7 Mad., 100, *Caluram* v. *Chengappa* (1890) I.L.R., 13 Mad., 351, *Mamubeari, In re* (1914) 27 M.L.J., 392 and *Re Rosario Quadros* (1915) I.L.R., 38 Mad., 551, followed.

Rowson v. *Hanama Mestri* (1877) I.L.R., 1 Mad., 280 and *High Court Proceedings, dated 13th July* 1867. (1867) 3 M.H.C. App. xxv, disapproved.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of T. A. NARAYANA AYYAR, the acting Stationary Second Class Magistrate of Manjir in Ernad taluk, in Miscellaneous Case No. 193 of 1916.

The accused entered into an agreement with the complainant to supply coolies for work on a rubber estate. The material terms of the agreement, dated 10th March, 1916, were as follows:—

"That in consideration of the sum of rupees two thousand and five hundred this day advanced, the said N. Kunhi Moidin does hereby agree to supply 170 coolies for tapping for a period of ten months from April 15th to February 15th to work permanently every day except in case of illness or reasonable excuse or permission of superintendent for absence, failing which the said N. Kunhi Moidin Maistry agrees to pay to the estate a penalty of annas two, pies six for each and every coolie so absenting himself as aforesaid.

* Criminal Revision Case No. 332 of 1917 (Criminal Revision Petition No. 262 of 1917).

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"The said N. Kunhi Moidin and his coolies to receive in remuneration as follows:—

"For an able bodied man annas five a day, for an able bodied youth or woman annas three a day, for an able bodied boy annas two a day, for him a monthly salary of rupees twenty-five provided he resides on the estate, for tapping maistris, one Kol maistri and for every sixteen coolies at the rate of annas seven, pies six per diem, for Estate, Field or other works one Kol maistri at six annas per day for every twenty-five coolies and to Kunhi Moidin commission at the rate of 10 per cent to be paid on the wages of his Kol maistris and coolies, always provided that he and his Kol maistris and coolies shall perform works to the satisfaction of the manager or his assistants."

The accused made default in supplying coolies regularly for work as agreed and did not repay the balance of the advance after deducting the amount which was discharged by service.

The complainant filed a complaint in the Stationary Magistrate's Court of Ernad taluk, praying that a warrant might be issued for the arrest of the accused under the Workman's Breach of Contract Act (XIII of 1859) and that the amount might be realized from him. No evidence was adduced by the complainant to prove that the accused was to do any manual work under the contract; the accused had not taken any specific objection before the Magistrate that he could not be proceeded against under the Act. The Magistrate passed an order under section 2 of the Act against the accused directing him to repay the balance within six months. The accused filed a Criminal Revision Petition to the High Court.

B. Pocker for the petitioner.

D. Chamier for the respondent.

E. R. Osborne, the Acting Public Prosecutor, for the Crown.

The case was originally heard by SADASIVA AYYAR and PHILLIPS, JJ., who differed in opinion in the following judgments:—

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I am clear that the words 'workman' and 'labourer' in Act XIII of 1859 (which does not define these terms) are used in the ordinary popular sense. 'Labourer'

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means 'man doing for wages work that requires strength or patience rather than skill or training' and 'workman' means 'operative, man hired to do manual labour.' (See the Concise Oxford Dictionary.)

It seems to me that the petitioner who was entrusted with such a large sum of money as Rs. 2,500 as advance and who was considered to possess the influence, tact and skill necessary to bring and keep on the estate 170 ordinary coolies and 80 coolies skilled in tapping for rubber cannot be presumed to be a workman or labourer. He was to be given 10 per cent commission on the wages of his Kol maistris and coolies and he was to be given a *further* sum of Rs. 25 a month if he chose to reside on the estate. The promise to pay Rs. 25 a month to induce him to reside in the estate was (according to what I consider the natural and reasonable construction of the agreement) evidently in order that the estate might have the benefit of his continual supervision of his coolies on the very spot and it does not show that he was himself a workman or labourer or that it was intended that he should employ himself as such during his residence on the estate.

The Sub-Magistrate has passed his order in a very summary manner. While the agreement states that the petitioner was to supply 170 ordinary coolies and 80 tapping coolies, the Magistrate refers only to the latter 80 coolies; the complaint and the sworn statement of complainant do not allege that the petitioner is a workman or labourer, the Magistrate does not state in his order that the petitioner is a workman or labourer (admittedly he is not an 'artificer') and on the petitioner's bare admission that he had executed the contract, received the advance and failed to have the work completed, an order was made under section 2 of Act XIII of 1859. There is nothing to show that the petitioner was asked to state his defence whether on the law or on the facts. I would therefore set aside the order as the complaint does not state that the petitioner is a workman or labourer, as the Magistrate has not found that the petitioner is a workman or labourer and as there is no legal evidence on the record to prove that he is one.

PHILLIPS, J.

PHILLIPS, J.—The Magistrate has dealt with this case as one falling under section 2 of Act XIII of 1859, but petitioner now contends that he was wrong. His two chief grounds of contention

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are: (1) that petitioner did not contract to do any work but only to supply coolies and (2) that petitioner is not a workman, labourer or artificer within the meaning of the Act. It has been held by this Court that when a workman contracts to get work done by coolies, he comes within the provisions of the Act even though he does not actually work himself: *High Court Proceedings, dated 13th July* 1867(1); *High Court Proceedings No.* 1510 *of 20th July* 1877(2) and *High Court Proceedings No.* 628 *of 23rd February* 1896(3) and *Ramasami* v. *Kandasami*(4). In the present case the contract was clearly one to get work performed and not merely one to supply labour, and therefore comes within the Act.

As regards the second point we have really no direct evidence of petitioner's status. No doubt to bring him within the Act petitioner must be a labourer, workman or artificer. The word 'workman' has a very wide meaning and is defined in the Century Dictionary as (1) a man who is employed in manual labour whether skilled or unskilled and (2) one who works in any department of physical or mental labour. Even under the Workman's Compensation Act the word has a very wide meaning—vide Stroud's Judicial Dictionary. In *Mamubeari, In re*(5) the question was considered and it was held that 'conveying clay' would be work within the meaning of Act XIII of 1859 provided the personal labour of the person undertaking the conveyance is intended to be utilized. *Gilby* v. *Subbu*(6) may be distinguished on the ground that in that case there was a distinct finding of fact that the contractor was not a workman. In the present case it is clear from the contract that petitioner was to do some kind of work, for he is to be paid Rs. 25 per mensem as remuneration and an additional commission provided he 'works' satisfactorily. His work might merely consist in supervision, but in any case he had some work to do. The provision in the contract that he was to live on the estate shows that he was expected to do some work in connexion with the contract which was a contract for the performance of manual labour. This being so it would appear that he was a workman within the meaning of the Act, and as he did not raise

(1) (1867) 8 M.H.C.R., App. xxv; s.c., 1 Weir's Cr. R. 675.
(2) (1877) I.L.R., 1 Mad., 280; s.c., 1 Weir's Cr. R., 675.
(3) 1 Weir's Cr. R., 676.
(4) (1885) I.L.R., 8 Mad., 379.
(5) (1914) 27 M.L.J., 392.
(6) (1884) I.L.R., 7 Mad., 100.

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PHILLIPS, J.

this point in the lower Court I do not think he can now be allowed an opportunity of showing that he was not to do any work under the contract and was not a workman. I would therefore dismiss this petition.

B. Pocker for the petitioner.

Dr. *K. Pandalai* for the respondent.

E. R. Osborne, the Acting Public Prosecutor, for the Crown.

This petition again coming on for hearing under section 429 of the Code of Criminal Procedure, the following ORDER of the Court was made by

AYLING, J.

AYLING, J.—I agree with PHILLIPS, J., that the contract was one, not merely to supply labour, but to get work performed by workmen or labourers, and, to that extent, comes within the scope of Act XIII of 1859. But it is further necessary (vide section 1) that any person against whom the Act is sought to be enforced should be himself 'an artificer, workman or labourer'; and this is a point, on which not only is there no finding by the Magistrate but which has apparently escaped his attention altogether.

This status of the accused person is an integral part of the case which the complainant has to establish; and if there is no evidence, the Magistrate's order cannot stand, no matter whether the accused did, or did not, raise the point before him.

With all respect, I cannot agree with my learned brother PHILLIPS, J., in holding (as I think he does) that the evidence on record is sufficient to establish that the present petitioner (accused) is a workman within the meaning of the Act. The secondary definition of 'workman' quoted by him from the Century Dictionary 'one who works in any department of physical or mental labour' cannot in my opinion be applied here. It is broad enough to include anyone but an absolute idler, and would cover many classes who have been specifically held not to come under the Act, e.g., horsekeepers, cooks, temple servants and cartmen—vide *Re Sullimon Khan*(1), *Re Murugan*(2), *Re Muthu Pandiya Gurukkal*(3) and *High Court Proceedings No. 1427 of 13th July*, 1877(4). In a recent case, MILLER, J., held that a musician in a band was not a workman—vide *Re*

(1) (1883) 1 Weir's Cr. R., 688.
(2) (1890) 1 Weir's Cr. R., 689.
(3) (1902) 1 Weir's Cr. R., 689.
(4) (1877) 1 Weir's Cr. R., 690.

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Rosario Quadros(1). Of course all these are very different from plantation coolies, but the cases are good authority for holding that the word 'workman' cannot be understood in this sense. The position of the word 'workman' sandwiched in between 'artificer' and 'labourer' is most significant, and I am inclined to agree with petitioner's vakil that the words were purposely used in the order in which they appear in order to indicate a descending scale from skilled to unskilled labour. A perusal of the preamble of the Act, which was passed primarily in the interests of manufacturers, tradesmen and others in the Presidency towns goes to strengthen this impression. I think the word 'workman' must be understood as connoting manual labour of some kind, whether skilled or unskilled.

Then it is argued that as the coolies and tapping coolies by whom petitioner contracted to get work done were undoubtedly workmen, he also must be regarded as a workman, on the ground that he was employed to supervise them. It is not suggested that he had any other work to do beyond supervision of the most general description. There is a separate provision for 'Kol maistris'—one for every 16, or 25 coolies according to the nature of the work. Even this general supervision by petitioner is no essential part of the contract. There is no provision requiring that he should live on the estate; it is simply provided that, *if he does*, he is to get Rs. 25 a month. His work even as a general supervisor is purely optional, and there is nothing to show that he did any or cared to avail himself of the clause in question. Even apart from this and assuming that his working as a supervisor over the coolies supplied by him was a part of his undertaking, I should find the greatest difficulty in the way of holding that a supervisor over 250 coolies, regarding whose labour he has contracted, is a 'workman' within the meaning of the Act. A man, who does work of an intellectual nature in connexion with a contract involving manual labour, cannot, I think, simply for that reason, be viewed as a manual labourer, and the word 'workman' must be understood in the same sense wherever it occurs in the Act. That personal (in the sense of manual) labour by the defendant-contractor is essential to the enforcement of the Act seems to me to be recognized in *Gilby* v. *Subbu*(2) and *Caluram* v. *Chengappa*(3) as well as in a recent

(1) (1915) I.L.R., 38 Mad., 551. (2) (1884) I.L.R., 7 Mad., 100.
(3) (1890) I.L.R., 13 Mad., 351.

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case to which I was a party [*Mamubeari, In re*(1)] while in another reported case [*Ramasami* v. *Kandasami*(2)] it is made clear that the defaulting contractor was a person of the coolie class who bound himself to render personal labour, if the advance was not worked out by the coolies whom he contracted to supply.

I find two early cases, *High Court Appellate Side Proceedings 13th July* 1867(3) and *Rowson* v. *Hanama Mestri*(4) in which the enforcement of the Act was certainly allowed without, so far as appears, any consideration of this point—merely on the ground that the contract was one to get work performed. But it seems to me more likely that the point was one to which the attention of the learned Judges was not directed, rather than one which they considered immaterial. There is nothing in these judgments to suggest that they adopted the reasoning referred to above. All the later cases tend in the contrary direction, and they seem to me to be in accord with the wording of the Act.

After careful consideration I can only concur in the conclusion of SADASIVA AYYAR, J., and direct that the order be set aside.

Attorneys for the respondent—*Messrs. King and Partridge.*

K.R.

APPELLATE CIVIL—FULL BENCH.

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

1917, May, 2 and 4, and October, 10 and 16.

DORAISWAMI AYYAR AND FIVE OTHERS (PLAINTIFFS), APPELLANTS,

v.

T. SUBRAMANIA AYYAR AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Res judicata—*Civil Procedure Code (Act V of 1908), sec. 11, expl. V, sec. 47 and O. XX, r. 12—Previous suit for land and past and future profits—Decree for land and past profits and no decision as to future profits—Second suit for future profits, maintainability of.*

Held by the Full Bench (AYLING, J., *contra*) :—When in a suit for possession and past and future mesne profits the Court gives a decree for mesne profits

(1) (1914) 27 M.L.J., 392. (2) (1885) I.L.R., 8 Mad., 379.
(3) (1867) 3 M.H.C.R., App. XXV. (4) (1877) I.L.R., 1 Mad., 280.

* Second Appeal No. 100 of 1916 (Full Bench).

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down to the date of suit and says nothing about subsequent mesne profits, a fresh suit to recover them is not barred under section 11, Civil Procedure Code.

Ramaswami Iyer v. *Sri Rangaraja Iyangar* (1915) 2 L.W., 8, overruled.

Kuppusamy Aiyar v. *Venkataramier* (1905) 15 M.L.J., 462, applied.

SECOND APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Tanjore, in Appeal No. 680 of 1914 preferred against the decree of C. GOVINDAN NAYAR, the District Munsif of Tiruvadi, in Original Suit No. 20 of 1914.

The necessary facts are given in the first paragraph of the ORDER OF REFERENCE.

C. V. Anantakrishna Ayyar for the appellants.

S. T. Srinivasa Gopalachariyar for the respondents.

This Second Appeal came on for hearing in the first instance before SADASIVA AYYAR and SPENCER, JJ., who made the following :—

SADASIVA AYYAR AND SPENCER, JJ.

ORDER OF REFERENCE TO A FULL BENCH.—This is a suit for mesne profits. The plaintiffs brought a previous suit (Original Suit No. 288 of 1909) for partition of family property including a prayer for mense profits.

They obtained a decree directing a division to be made into five equal shares and awarding Rs. 108 for past mesne profits. The judgment was silent on the subject of future mesne profits.

In the present suit the District Munsif gave the plaintiffs a decree for the recovery of Rs. 254-8-0 mesne profits accruing after the institution of Original Suit No. 288 of 1909; but on appeal, the Subordinate Judge dismissed the suit with the remark that, although his decision might seem hard, he was bound by the ruling in *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(1), to hold that no separate suit could be brought for mesne profits claimed in a previous suit as the matter was *res judicata* by reason of the former decision.

Under the Code of 1882 it was well settled by a Full Bench decision of this Court—*Kuppusamy Aiyer* v. *Venkataramier*(2)—that such a suit would lie. The same principle was upheld in Calcutta in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council*(3) (see the observations of AMEER ALI, J., at pages

(1) (1915) 2 L.W., 8. (2) (1905) 15 M.L.J., 462.
(3) (1890) I.L.R., 17 Calc., 968.

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970 and 971 on the discretionary form of section 211 of the Code of Civil Procedure, 1882). It was also decided by another Full Bench that claims for possession and claims for mesne profits form separate causes of action under the old Code and under the new Code: vide *Ponnammal* v. *Ramamirda Aiyar*(1).

The learned Judges who decided *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(2) base their opinion on the change of language in the Code of 1908. They say that in this Code, section 211 of the Code of 1882 disappears altogether, and, as Order XX, rule 12, now reads, it is made equally a matter of discretion with Courts to direct an enquiry into future mesne profits as it is to pass a decree for possession or for future mesne profits.

With due respect to those learned Judges, we are unable to see that there has been any substantial change of language. Section 211 has not disappeared, but combined with section 212 it has been recast into Order XX, rule 12.

Section 211 declared "the Court may provide in the decree" for the payment of future mesne profits. Order XX, rule 12 (1) (*c*), declares that "the Court may pass a decree . . . directing an enquiry as to rent or" future mesne profits.

Section 212 permitted the Court either to determine the amount of past mesne profits by the decree itself or to pass a decree for the property and direct an enquiry into the amount of mesne profits. Order XX, rule 12 (1) (*a*) and (*b*) is to the same effect. The only essential difference in procedure is that under the new Code mesne profits are not to be left to be determined in execution.

A more important change and one to which the judgment in *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(2) contains no allusion, is the omission of the proviso to section 244 from section 47 of the new Code. This ran as follows:—

"Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein where such profits are not dealt with by such decree."

It may be that these words were omitted because they were considered superfluous. Similarly a provision that a claim for the recovery of land and a claim for mesne profits from such land

(1) (1915) I.L.R., 38 Mad., 829 (F.B.). (2) (1915) 2 L.W., 8.

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should be deemed to be distinct causes of action, found place in the Code of 1859 but dropped out of the Code of 1882 for the reason that it became superfluous, as explained in *Ponnammal* v. *Ramamirda Aiyar*(1), but this did not prevent the Court from arriving at a conclusion that such claims constitute separate causes of action in the present state of the law.

The use of the word 'may' in Order XX, rule 12, like the same word in the old section 211, seems to indicate that it is discretionary with the Court to award future mesne profits. The plaintiff could not insist on their being granted to him because at the date of the first suit the cause of action for mesne profits is not completed. In this connection the use of the word 'shall' in Order XX, rule 16, which deals with suits for accounts may be compared with the use of the word 'may' in Order XX, rule 12.

As regards the question of *res judicata*, section 11, explanation 5, declares that any relief claimed in the plaint, which is not expressly granted by the decree, shall be, for the purposes of this section, deemed to have been refused. But if mesne profits were claimed in the first suit and through mistake or oversight they were neither granted nor refused, the section will not prevent a second suit being instituted for their recovery, when the relief claimed in the plaint is a relief which the Court was not bound to grant if the defence failed. This is made clear in *Kuppusamy Aiyer* v. *Venkataramier*(2).

Ramaswami Iyer v. *Sri Rangaraja Iyangar*(3) has since been followed in C.R.P. No. 858 of 1913 (unreported), but one of the two learned Judges who decided it was a party one and a half months later to *Thavasi* v. *Arumugam*(4), which followed *Kuppusamy Aiyar* v. *Venkataramier*(2), without referring to the more recent decision under the Code of 1908. The other learned Judge was a party to the Full Bench in *Ponnammal* v. *Ramamirda Aiyar*(1), which proceeds on considerations not easily reconcilable with those upon which *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(3) was decided.

We are inclined to the opinion that *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(3) was wrongly decided and requires reconsideration and as the question involved is of considerable

(1) (1915) I.L.R., 38 Mad., 829 (F.B.). (2) (1905) 15 M.L.J., 462.
(3) (1915) 2 L.W., 8. (4) (1915) M.W.N., 170.

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importance and of frequent occurrence, we refer to the decision of a Full Bench the question:

"Whether after a suit for possession of lands and mesne profits past and future has been brought and decided and a decree has been obtained for possession and past mesne profits without the claim to future mesne profits being decided, a second suit will lie to recover mesne profits from the institution of the first suit till delivery of possession."

ON THIS REFERENCE

C. V. Anantakrishna Ayyar for the appellants.—The present suit is not *res judicata*: compare *Kuppusamy Aiyar* v. *Venkataramier*(1). In this respect there is no change between the old and the new Civil Procedure Codes. Claim for future mesne profits is not 'relief' within section 11(5), Civil Procedure Code. It is not part of 'the cause of action.' 'Future mesne profits' need not be valued for purposes of Court Fees Act; see also *Ponnammal* v. *Ramamirda Aiyar*(2). *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(3) is wrong. See sections 211 and 244, Civil Procedure Code of 1882 and Order XX, rule 12. What was left to be done in execution by section 244 of the old Civil Procedure Code is now left to be done before the final decree under Order XX, rule 12 of the new Civil Procedure Code, in the form of a preliminary decree. The word 'may' in Order XX, rule 12, Civil Procedure Code, is used only to enable a Court to pass a preliminary decree for future mesne profits also if it is so inclined. Compare Order XX, rule 16, Civil Procedure Code, which says that a Court *shall* pass a preliminary decree in a suit for accounts; see *Ram Dayal* v. *Madan Mohan Lal*(4) and *Mon Mohun Sirkar* v. *The Secretary of State for India in Council*(5). Compare section 34, Civil Procedure Code and *Seth Gokul Dass Gopal Dass* v. *Murli and Zalim*(6).

S. T. Srinivasa Gopalachariyar for the respondent.—*Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(3) is right and the present suit is *res judicata*. Future mesne profits are put

(1) (1905) 15 M.L.J., 462. (2) (1915) I L.R., 38 Mad., 829 (F.B.).
(3) (1915) 2 L.W., 8. (4) (1899) I L.R., 21 All., 425 at 1433 (F.B.).
(5) (1890) I.L.R., 17 Calc., 968.
(6) (1878) I.L.R., 3 Calc., 602 at p. 609 (P.C.).

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by the new Code on the same footing as past profits. Even if *Kuppusamy Aiyar* v. *Venkataramier*(1) was right, the new Code has made certain changes under which it must now be held that it is wrong. The changes are provided by Order XX, rule 12. Future mesne profits can now be included in the preliminary decree. Under the new Code the grant of future mesne profits is not a matter of discretion with the Court. A plaintiff is not compelled to join a claim for past or future mesne profits with a suit for land but he has got an option. But once he exercises his option and sues for future mesne profits also, section 11, Civil Procedure Code, comes into operation: *vide* Order X, rule 4, Civil Procedure Code. If the principle of *res judicata* applies when future mesne profits are expressly granted or expressly refused, it must equally apply where the decree is silent about it. 'Shall be deemed to have refused' mean shall be deemed to have been *heard* and refused; *Bayyan Naidu* v. *Suryanarayana*(2), *Fakharuddin Mahomed Ahsan* v. *Official Trustee of Bengal*(3). If silence in a previous decree as to past profits acts as *res judicata*, similar must be the result in the case of future mesne profits; see Woodroffe's Civil Procedure Code, page 880.

The Court expressed the following OPINIONS:—

WALLIS, C.J.

WALLIS, C.J.—I agree with the referring Judges. Explanation V to section 11 of the present Code of Civil Procedure is in exactly the same terms as the corresponding explanation III to section 13 in the Code of 1882. Under the Code of 1882 it was held by a Full Bench of this Court in *Kuppusamy Aiyar* v. *Venkataramier*(1), in conformity with the decisions of other High Courts, that the word 'relief' in the explanation means relief arising out of a cause of action which had accrued at the date of suit and on which the suit was brought, and did not include relief such as mesne profits accruing after the date of suit as to which no cause of action had then arisen, but which the Court was nevertheless expressly empowered to grant. The explanation having been reproduced in exactly the same words, the presumption is that it was intended to have precisely the same effect. I do not find any sufficient

(1) (1905) 15 M.L.J., 462. (2) (1914) I.L.R., 37 Mad., 70 (F.B.).
(3) (1882) I.L.R., 8 Calc., 178 (P.C.).

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indication to rebut this presumption in the fact that sections 211 and 212 of the old Code were amalgamated to form Order XX, rule 12. The change introduced by the new rule is that the award of mesne profits in all cases is to be by preliminary decree, and that when ascertained they are to be embodied in a final decree, whereas under sections 211 and 212 they were to be ascertained in execution. This change does not appear to me to affect the construction of explanation V to section 11, nor do I think is effected by the omission in section 47 of the new Code of the proviso to the corresponding section 244 of the old Code. I answer the question in the affirmative.

AYLING, J.

AYLING, J.—I regret that I am unable to concur. The point referred is identical with that considered by HANNAY, J., and myself in *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(1), and with all respects after hearing it reargued, I remain of the same opinion.

I would answer the question in the negative.

KUMARASWAMI SASTRIYAR.

KUMARASWAMI SASTRIYAR, J.—The question referred to us for decision is

"Whether after a suit for possession for lands and mesne profits past and future has been brought and decided and a decree has been obtained for possession and past mesne profits without the claim to future mesne profits being decided, a second suit will lie to recover mesne profits from the institution of the first suit till delivery of possession."

I agree with the CHIEF JUSTICE whose Judgment I have had the advantage of perusing and with SADASIVA AYYAR and SPENCER, JJ., the referring Judges, that the question should be answered in the affirmative.

As there has been no adjudication as to future mesne profits the second suit can only be barred if it can be brought under explanation V to section 11, Civil Procedure Code, 1908. It is now well settled that the word 'relief' in explanation V means a relief which the plaintiff can claim as a matter of right in respect of a cause of action which has accrued to him at the date of suit and that relief in respect of future mesne profits is not claimable as a matter of right no cause of action accruing to the plaintiff at the date of suit in respect of the future injury

(1) (1915) 2 L.W., 8.

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he might suffer if the defendant continues to be in wrongful possession in spite of the suit and that explanation III of section 13 of the Code of 1882 which is the same as explanation V of section 11 of the Code of 1908 will not bar a second suit. *Mon Mohun Sirkar* v. *The Secretary of State for India in Council*(1), *Jiban Das Oswal* v. *Durga Pershad Adhikari*(2), *Bhivrav* v. *Sitaram*(3), *Ram Dayal* v. *Madan Mohan Lal*(4) and *Kuppusamy Aiyar* v. *Venkataramier*(5).

There is nothing in the present Code that alters the nature of the claim for future mesne profits. It is still a claim in respect of a cause of action that has not accrued to the plaintiff at the date of suit and it cannot be contended after the recent decision of the Full Bench in *Ponnammal* v. *Ramamirda Aiyar*(6), that if the plaintiff had omitted to ask for the relief in his plaint a separate suit would be barred.

The main contention for the respondents is that Order XX, rule 12, has now rendered it obligatory on the Court to pass a decree as to mesne profits from date of suit to date of delivery of possession if the plaintiff makes out a claim for such relief and that consequently the decisions under the Code of 1882 have no application.

I do not think that the Code of 1908 which enacts as Order XX, rule 12, what was contained in sections 211 and 212 of the Code of 1882 has made any material alteration in the nature of the claim as to future mesne profits. Rule 12 provides that the Court may pass: (1) a decree for possession of the property, (2) a decree for rent or mesne profits up to suit or direct an inquiry as to the same and may (3) direct an inquiry as to future mesne profits. It provides for a final decree being passed after the inquiry directed is made and the liability ascertained. So far as clause (*c*) of Order XX, rule 12, is concerned the power of the Court is still discretionary as all the Order does is to provide that the Court *may* pass a decree directing an inquiry as to rent or mesne profits from the institution of the suit till the period provided for by clauses (i), (ii) and (iii). It has been argued that even as regards clauses (*a*) and (*b*) the word used is 'may' and not 'shall' though the Court is

(1) (1890) I.L.R., 17 Calc., 968.
(2) (1894) I.L.R., 21 Calc., 252.
(3) (1895) I.L.R., 19 Bom., 532.
(4) (1899) I.L.R., 21 All., 425 (F.B.).
(5) (1905) 15 M.L.J., 462.
(6) (1915) I.L.R., 38 Mad., 829 (F.B.).

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bound to pass a decree in terms of clauses (*a*) and (*b*) if plaintiff's claim is established. Section 212 of the old Code provides that the Court may either determine the amount by the decree itself or may pass a decree for the property and direct an inquiry into mesne profits and dispose of the same on further orders and the legislature in including in one section what was embodied in two by using the word 'may' which occurred in both the sections cannot be said to have introduced any new principle as regards future mesne profits. When different claims are dealt within one rule under various sub-sections the fact that the word 'may' should be construed as 'shall' in respect of one of the sub-sections owing to nature of the claim which it deals with, does not necessarily mean that the word cannot be construed in its ordinary sense as regards other clauses. With all respect I am unable to agree with the decision in *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(1), that the grouping out one section of past and future mesne profits affects the nature of future mesne profits so as to attract to it the provisions of explanation V to section 11. The omission of the proviso to section 244 in section 47 of the Code of 1908 is due to the fact that under the Code of 1908 the determination of questions as to mesne profits was to be in the suit itself and not subsequent to decree in execution proceedings. Under the scheme of the present Code there is no necessity for any such proviso to section 47 which corresponds to section 244 of the old Code.

There being in my opinion no material difference between section 211 of the old Code and rule 12, clause (*c*) of Order XX of the present Code, there is no reason for departing from the decisions of this and the other High Courts as to the second suit not being barred by explanation V of section 11 of the Code.

N.R.

(1) (1915) 2 L.W., 8.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Bakewell.

P. R. SRINIVASA AYYAR (PLAINTIFF), APPELLANT,

v.

A. SESHA AYYAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1917, February, 28 and March, 1 and 14.

Indian Contract Act (IX of 1872), ss. 23 and 65—Marriage brocage agreement—Money paid under, when recoverable—Principle of English Law, applicability of—Transfer, ostensible or real, whether a proper test.

A marriage brocage agreement is unlawful and void *ab initio* and brokerage paid thereunder is recoverable if the agreement or a substantial part of it is not performed. Such an agreement does not fall within section 65 of the Contract Act and the rule to be applied is the rule of English Law.

Taylor v. *Bowers* (1876) 1 Q.B.D., 291, *Kearley* v. *Thomson* (1890) 24 Q.B.D., 742, *Barclay* v. *Pearson* (1893) 2 Ch., 154, and *Petherperumal Chetty* v. *Muniandy Servai* (1908) I.L.R., 35 Calc., 551 (P.C.), referred to.

Ledu Coachman v. *Hiralal Bose* (1916) I.L.R., 43 Calc., 115, dissented from.

The rule applies whether the transfer of the property under the agreement was merely ostensible or real.

In re Great Berlin Steamboat Company (1884) 26 Ch. Div., 616, followed.

APPEAL under clause 15 of the Letters Patent against the order of BURN, J., in *Srinivasa Ayyar* v. *Sesha Ayyar*(1).

The plaintiff paid the defendants rupees four hundred under an agreement for the marriage of the first defendant's son (Raman) with the plaintiff's minor sister. The amount was not paid as a settlement for the bride or her issue but as remuneration to the defendants to bring about the marriage. The marriage did not take place and the plaintiff sued for recovery of the amount, and alleged that there was breach of the agreement by the defendants. The defendants contended (1) that there was no cause of action against them, as the first defendant agreed only on behalf of Raman and that the second defendant was not a party at all; (2) that the agreement was not broken by the defendants and (3) that the agreement was invalid as being contrary to public policy, and that the money advanced under it

* Letters Patent Appeal No. 233 of 1916.

(1) Civil Revision Petition No. 862 of 1915 praying the High Court to revise the decree of K. KRISHNAMA ACHARIYAR, Subordinate Judge of Madura, in Small Cause Suit No. 1314 of 1915.

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was therefore irrecoverable. The Subordinate Judge, who tried the suit on the small cause side, held that the agreement was broken by the plaintiff and that consequently he could not recover the suit amount. The plaintiff preferred a civil revision petition to the High Court which was heard by BURN, J., who dismissed the petition holding that the plaintiff could not recover the amount as he was responsible for the breach of the agreement. The learned Judge did not allow the plaintiff to raise the contention that he was entitled to recover the money as paid under an agreement which was unlawful as being opposed to public policy and expressed the opinion that section 65 of the Indian Contract Act had no application to the case. The plaintiff preferred this Letters Patent Appeal.

Dr. *K. Pandalai* for the appellant.

T. R. Venkatarama Sastriyar for the respondents.

OLDFIELD, J.

OLDFIELD, J.—Plaintiff, here appellant, sued defendants for Rs. 400 alleged to have been advanced to them out of Rs. 1,100, payable under an agreement as consideration for the marriage of his minor sister with Raman, the first defendant's son and the second defendant's brother. There were three defences; that (1) there was no cause of action, because the first defendant entered into the agreement only on behalf of Raman and the second defendant was not a party to it at all; (2) the agreement was not broken by defendants; (3) it was invalid, as being against public policy; and (4) the money advanced under it was therefore irrecoverable.

Of these defences, the first was not dealt with either at the trial or by the learned Judge in this court though one would have supposed that a decision regarding the existence of a cause of action would have been reached, before enquiry began into the validity of the agreement set up as constituting it or the responsibility for breaking that agreement. It is said that the plea was abandoned. But the trial was under Small Cause Procedure and no issues were framed. Raman was, according to plaintiff's second witness and first defendant, of age at the date of the agreement. The latter said that he took away the Rs. 400 paid under it. It is not the case that no evidence to support defendant's pleas was adduced; and it was admitted before us that they were relied on in this court, although the learned Judge did not mention them. It is not possible in these

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circumstances to hold that they were abandoned or that defendants cannot support the learned Judge's decision with reference to them, if they can be established and if it is not sustainable on other grounds.

The learned Subordinate Judge's finding on the second defence, that plaintiff, not defendants, broke the agreement is one of fact and must be accepted. It is, however, to be observed that coupled as it was with a plea that the agreement was unlawful and therefore unenforceable, it could justify no legal conclusion. For the plea, in effect that defendants were absolved by plaintiff's refusal to perform his part from any duty under the agreement was irreconcilable with the contention that such performance would have been in conflict with public policy. Shortly they could not complain of plaintiff's refusal to do what they alleged would have been wrong.

On the remaining question raised there is no doubt that the agreement was unlawful and therefore void. As set up in the plaint, it involved no suggestion that the money to be paid was for settlement on the bride or her issue or was anything but remuneration to defendants for bringing about the marriage; and as plaintiff's grounds of appeal Nos. 5 and 6 and first defendant's written statement (paragraph 8) and the second defendant's (paragraph 13) show, both sides are agreed that such an agreement would be unlawful. *Venkatakrishnayya* v. *Lakshminarayana*(1) and *Devarayan* v. *Muthuraman*(2). The question is then whether plaintiff is entitled to recover what he paid under such an agreement and whether defendants can retain an advantage received under it. This question was not raised in the plaint, the Subordinate Judge refusing to deal with defendant's allegation that the agreement was unlawful, because he had found in their favour as to responsibility for its breach. On this account the learned Judge held that plaintiff could not raise that contention here also expressing the opinion that his claim was unsustainable with reference to section 65 of the Indian Contract Act. That section, however, is not applicable: *Dayabhai Tribhovandas* v. *Lakshmichand Panachand*(3), *Gulabchand* v. *Fulbai*(4) and *Ledu Coachman* v.

(1) (1909) I.L.R., 32 Mad., 185.
(2) (1914) I.L.R., 37 Mad., 393.
(3) (1885) I.L.R., 9 Bom., 358.
(4) (1909) I.L.R., 33 Bom., 411.

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Hiralal(1). The Indian Contract Act affording no direct guidance, the conclusions of the learned Judge must be tested with reference to authority.

He has supported his conclusion against the existence of any right to recover what has passed in connexion with an unlawful agreement by citation of three cases. But in one of them, *Girdhari Singh* v. *Neeladhar Singh*(2), it was conceded that, if the contract was contrary to public policy, the plaintiff was not entitled to recover; and the case is therefore no authority against the contention, advanced before us, that the general rule is subject to an exception in the plaintiff's favour, when no portion or when no substantial portion of the unlawful purpose has been carried out. So also the next case, *Hathu Khan* v. *Sewak Koer*(3), since it was one of completed performance. The third case, *Ledu Coachman* v. *Hiralal*(1), cannot be dismissed so shortly, since it directly negatives the contention just referred to by the statement:

"It is plain that, although where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed, if the agreement is actually criminal or immoral; where the contract is illegal because contrary to positive law, or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered or money paid on it."

The distinction drawn would appear to be between agreements contrary to law or public policy and others, which would merely have an unlawful object and would also therefore be void under section 23 of the Indian Contract Act. But there is no warrant for it in that section, since all alike are made unlawful or (with all respect) in the cases referred to by the learned Judges, who moreover take no account of other cases, in which the exception was applied without reference to the distinction proposed.

Of the cases referred to by them, *Taylor* v. *Chester*(4) was a case of completed performance and *Howson* v. *Hancock*(5) one of a claim to recover money paid on a wager, in which no further performance was possible: *Tappenden* v. *Randall*(6) is

(1) (1916) I.L.R., 43 Calc., 115.
(2) (1912) 10 A.L.J., 159.
(3) (1911) 15 C.W.N., 408.
(4) (1864) L.R., 4 Q. B., 309.
(5) (1800) 8 T.R., 575.
(6) (1801) 2 Boss. and P., 467.

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relied on only for a dictum which apparently has not affected later decisions. So also the learned Judge's quotation from *Collins* v. *Blantern*(1), though it is reproduced in *Kearley* v. *Thomson*(2) and *Barclay* v. *Pearson*(3) to be referred to later. Of the Indian cases cited, *Bai Vijli* v. *Nansa Nagar*(4) is not of importance, since this point and the authorities regarding it were not considered. The learned Judge's reason for rejecting two decisions in the opposite sense, *Bakshi Das* v. *Nadu Das*(5) and *Gulabchand* v. *Fulbai*(6), that they relate to marriage brocage contracts, is in any case not available to us in the present connexion.

On the other hand the exception to the general rule, based on the absence of any or of any substantial performance is clearly recognized without reference to the distinction proposed in a case later than the majority of those relied on by the learned Judges, *Taylor* v. *Bowers*(7) in which the object of the agreement a fraud on creditors would, if persisted in, have resulted in the frustration of the Insolvency law. Distrust of the decision in *Taylor* v. *Bowers*(7) was no doubt expressed in *Kearley* v. *Thomson*(2) but not on the ground that it overlooked the distinction drawn by the learned Judges, which was not in fact referred to, although the object of the agreement was described as to defeat justice. The principle of *Taylor* v. *Bowers*(7) was moreover adopted fully in *Barclay* v. *Pearson*(3), already referred to, though the agreement related to what was regarded as a lottery, the opinion being expressed that those who had paid money under it could recover. Of the Indian cases those must be distinguished, in which the title sued on could be established only on the foundation of the validity of the unlawful agreement as for instance in *Yeramati Krishnayya* v. *Chundru Papayya*(8). In *benami* cases however, for example, *Banka Behary Dass* v. *Raj Kumar Dass*(9) and *Govinda Kuar* v. *Lala Kishun Prosad*(10) the decision has always turned not on the extent to which the agreement if it were performed, would conflict with law or public policy, but on whether it was performed

(1) (1765) 2 Wilson, 341.
(2) (1890) 24 Q.B.D., 742.
(3) (1893) 2 Ch., 154.
(4) (1886) I.L.R., 10 Bom., 152.
(5) (1905) 1 C.L.J., 261.
(6) (1909) I.L.R., 33 Bom., 411.
(7) (1876) 1 Q.B.D., 291.
(8) (1897) I.L.R., 20 Mad., 326 at p. 329.
(9) (1900) I.L.R., 27 Calc., 231.
(10) (1901) I.L.R., 28 Calc., 870.

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and the unlawful purpose was effected wholly or substantially or not. The decision of the Privy Council in *Petherperumal Chetty* v. *Muniandy Servai*(1) may in particular be mentioned firstly because it refers to the weight of the decision in *Taylor* v. *Bowers*(2) as unimpaired by *Kearley* v. *Thomson*(3) and secondly because the contention that there had been a fraudulent arrangement to defeat creditors and a step taken to carry it out,

"which would on the trial of an indictment for conspiracy have amounted to a good overt act of conspiracy,"

was brushed aside as irrelevant and the effecting of the contemplated fraud alone was regarded as material. Authority standing thus, it is, with all due deference, not possible to follow the decision in *Ledu Coachman* v. *Hiralal Bose*(4) or to confirm the decision, which is under appeal.

It is however argued by Mr. T. R. Venkatarama Sastri for defendants firstly that the exception above referred to to the general rule depends, not on whether there has been performance of the unlawful agreement but on whether the transfer of an advantage under it was merely ostensible or was intended to be real, recovery of the advantage being allowed only in the former class of cases. That is not the test recognized in the authorities already referred to or in *In re Great Berlin Steamboat Company*(5) in which the transfer was treated as irrevocable though it was clearly ostensible. It is then urged with reference to *Kearley* v. *Thomson*(3) that plaintiff cannot recover, because though the whole of the unlawful agreement has not been performed a substantial portion has been; and on the view already expressed a remand on this point may no doubt be fairly claimed.

The last question raised is whether plaintiff can rely on defendants' admission that the agreement was unlawful either generally or when, as in this case, he did not refer to its unlawfulness in his plaint. The answer however to the question in both forms is the same, that in the words of MELLISH, L.J., in *Taylor* v. *Bowers*(2) plaintiff does not

"as the rule is laid down in *Simpson* v. *Bloss*(6), require any aid from the illegal transaction to establish his case. He is not bringing the action for the purpose of enforcing the illegal transaction.

(1) (1908) I.L.R., 35 Calc., 551 (P.C.). (2) (1876) 1 Q.B.D., 291.
(3) (1890) 24 Q.B.D., 742. (4) (1913) I.L.R., 43 Calc., 115.
(5) (1884) 26 Ch.D., 616. (6) (1816) 7 Taunt, 246.

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To hold that plaintiff is entitled to recover does not carry out the illegal transaction but the effect is to put everybody in the same situation as they were before it was determined upon";

or, as the point was put by JAMES, L.J.:

"It is the defendant who has really got to show the fraud"

the element vitiating the agreement in the case under consideration. . .

"It is the defendant who has got to make out his title to the goods from the transaction, which is a fraud and which it seems he was a party to . . . and there would be no title in defendant independently of that."

To adapt these principles to the present case, the plea that the agreement is unlawful is not plaintiff's but defendant's. Defendants, as already pointed out, cannot, relying on it, also complain of plaintiff's default. They can (and this is the point at present material) rely on it, only if they further allege and prove that the unlawful agreement or a substantial part of it has been performed. On this point their written statements contained nothing; and it was, therefore, not plaintiff's but their pleading, which was defective. If the Subordinate Judge had considered the unlawfulness of the contract, plaintiff would (for all that appears) have pointed this out. The contention on his side is one purely of law, and in the circumstances there is no adequate reason for depriving him of the benefit of it.

Defendants have further proposed to support the lower Court's judgment with reference to the counterclaim made in their written statements to damages on account of loss of reputation. It has not however been shown how this claim can be sustainable as arising out of the breach of an admittedly unlawful agreement or how it can be reconcilable with defendant's denial, that they were parties to that agreement. The questions for consideration are therefore only:—

(1) Whether the plaint agreement was entered into with defendants or either of them or with Raman with or without first defendant as his agent.

(2) Whether, with reference to the authorities above referred to, the agreement or a substantial part of it was performed?

The Letters Patent Appeal must be allowed and the Subordinate Judge's decision set aside with a direction to restore the small cause suit to file and rehear it, admitting any additional

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evidence tendered in the light of the foregoing. Costs to date in both Courts will be posts in the cause and will be provided for in the decree to be passed.

BAKEWELL, J.

BAKEWELL, J.—In India marriage is not generally a matter of contract between the parties thereto but is a status or condition imposed upon them by persons who are under a social duty to do so. The authorities which have been cited support, I think, the proposition that they who undertake this duty must have regard solely to the interests of their wards and must not stipulate for a profit for themselves.

The pleadings in this case are not clear but I think that the plaint alleges an arrangement between the parties that a marriage portion should be paid out of the estate of the deceased father of the prospective bride and that certain jewels should be presented to her by the relations of the prospective bridegroom; and, apart from other averments in the written statement of the first defendant it might be inferred that his case was that the marriage portion was to be paid to the bridegroom, the sum of Rs. 400 now claimed, being portion thereof, had been in fact paid to him and that the defendants gained no benefit from this payment because the bridegroom had been adopted into another family. I fail to see anything contrary to public policy or morality in an agreement between third parties which is intended solely for the benefit of the married couple or either of them. Having regard, however, to the defendants' admission that the agreement was illegal and that they had some interest in the sum now claimed, I do not think that it is open to the defendants at this stage to maintain that the agreement was valid.

The words 'discovered to be void' in section 65 of the Contract Act are more apt to describe an agreement which was void *ab initio* but not then known by the parties to be so, than an agreement of which the illegality must be taken to have been always known to them, and I agree that in this case it is safer to rely upon the authorities cited by my learned brother. These authorities show, I think, that in a suit for money had and received to the use of the plaintiff, the defendant may plead that it has been applied in accordance with their agreement and the plaintiff cannot reply that the agreement was illegal because he is *particeps criminis*. If the agreement is still wholly executory and no material part of the illegal purpose has been

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accomplished, the defendant cannot plead that he holds the money for that purpose: [see *Barclay* v. *Pearson*(1), *Petherperumal Chetty* v. *Muniandy Servai*(2)] and the cases there cited. These propositions apply when the parties are in *pari delicto*, and to agreements void under Civil Law; different considerations may arise in the case of an agreement to commit an offence against the Crown. I agree to the order proposed by my learned brother.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

R. S. RAMA SHENOI AND ANOTHER (PLAINTIFFS), APPELLANTS,

1917, March, 19 and 20.

v.

M. A. HALLAGNA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 13 (b) and (d)—Natural justice, meaning of the term—Wrong view as to legal liability or onus, whether renders foreign judgment one not given on the merits.

A wrong view as to the legal liability of a party or as to onus does not render a foreign judgment one not given on the merits within the meaning of section 13 (*b*) of the Civil Procedure Code.

The term "Natural justice" in section 13 (*d*) of the Code of Civil Procedure with reference to foreign judgments refers rather to the form of procedure than to the merits of the case.

Crawley v. *Isaacs* (1867) 16 L.T. (N.S.), 529, followed.

Liverpool Marine Credit Co. v. *Hunter* (1868) L.R., 3 Ch. App., 479, applied and followed.

Imrie v. *Castrique* (1860) 8 C.B. (N.S.), 405; s.c., 141 E.R., 1222, and *Scott* v. *Pilkington* (1862) 2 B. & S., 11; s.c., 121 E.R., 978, referred to.

SECOND APPEAL against the decree of G. H. B. JACKSON, the District Judge of South Malabar, in Appeal No. 528 of 1912, preferred against the decree of J. A. DEROZARIO, the Subordinate Judge of South Malabar at Cochin, in the Original Suit No. 8 of 1913.

Appeal under Clause 15 of the Letters Patent preferred against the decision of AYLING, J.

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(1) (1893) 2 Ch., 154. (2) (1908) I.L.R., 35 Calc., 551 (P.C.).

* Second Appeal No. 2181 of 1915 and Letters Patent Appeal No. 56 of 1915.

RAMA SHENOI v. HALLAGNA.

The material facts and contentions appear from the judgment.

Dr. *K. Pandalai* and *C. V. Anantakrishna Ayyar* for the appellants.

C. Madhavan Nayar for the respondents.

The following judgment of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—A decree was obtained against the elder brother of the plaintiff in the Cochin Court. In the cause title, he was described as the manager of the joint family. Apparently the plaint alleged that the family property was liable for the claim as the debt was contracted for family purposes. The defendants in the Cochin Court pleaded that no decree should be passed against him as manager.

Therefore issue 7 was framed. The Cochin Judge held that the burden of proving that the defendant was not the manager and that the debt was not binding on the family lay upon him, and passed a decree against him personally against the family properties. The decree was executed against the Cochin properties and then transferred to the British Court under section 44 of the Code of Civil Procedure. In our Court, a claim was preferred by the plaintiff against the attached properties on two grounds : (*a*) that the defendant in the Cochin suit had become divided from the plaintiff before suit and (*b*) that the decree was otherwise not executable against the properties in the possession of the plaintiff. The claim was rejected. The plaintiff has brought this suit to establish his right. The Courts below have dismissed the suit. Hence this second appeal.

Dr. Pandalai for one of the brothers, the appellant in Second Appeal No. 2181 of 1915, contended that it was the duty of the Courts below to have decided whether there was a division prior to the Cochin suit and whether the brother who was sued in that Court was the manager. It is clear under rule 63 of Order XXI that the burden of proof is on the plaintiff to establish his claim. Beyond stating that he was divided, he has asked for no issue ; and has adduced no evidence on the question of division or managership ; the plaintiff is not therefore entitled to ask us to send the case down for a finding on that question.

The learned counsel further contended that as the Cochin Court was wrong on the question of the burden of proof the judgment must be deemed not to have been given on the merits.

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We are unable to accept this contention. In the Cochin Court the general law administered relates to Marumakkattayam tarwards and as in a suit against the karnavan as such the decree would be binding on the Anandiravans unless the latter could show that the karnavan was not acting on behalf of the tarward, the idea seems to have gained ground that in the case of suits against managers of Makkattayam families the onus is on the other members to show that the debt is not binding on them. This is not the law as it obtains in British India. It is for the creditor to prove that the debt is recoverable against the other members of the family ; we may therefore take it that the Cochin Court was not right in its view of Hindu Law. Does that render the judgment one not given on the merits ? We have not before us all the materials on which the Cochin judgment was based. Consequently we are unable to hold that the decision was not on the merits. The decision of the Judicial Committee in *Keymer* v. *Visvanatham Reddi*(1) has no bearing on the present case. There is no warrant for the proposition that a wrong view as to onus would have the effect of rendering a foreign judgment one not given on the merits.

Mr. Anantakrishna Ayyar who appeared for another brother the appellant in the connected appeal raised a more serious contention. He argued that as the Cochin Court was manifestly wrong on a point of Hindu Law, the judgment was contrary to natural justice. In this connexion we notice that the language of clause (*d*) of section 13 has undergone a change. In the old code the words were—

"If it is in the opinion of the Court before which it is produced contrary to Natural Justice."

The present language in section 13 (*d*) is—

"Where the proceedings in which the judgment was obtained are opposed to Natural Justice."

This change carries out the view of BRAMWELL, B., in *Crawley* v. *Isaacs*(2). The learned Baron there said :

"I think the term 'Natural Justice' which has been used in reference to foreign judgments refers rather to the form of procedure than to the merits of the particular case." (Page 531.)

(1) (1917) I.L.R., 40 Mad., 112 (P.C.).
(2) (1867) 16 L.T. (N.S.), 529.

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Consequently the mere fact that a judgment is wrong in law is not enough. There must be something in the procedure anterior to the judgment which is repugnant to natural justice. That cannot be said of the present case. Further as pointed out by Lord CHELMSFORD in *Liverpool Marine Credit Co.* v. *Hunter*(1), a mere incorrect view of law by a foreign Court would not give jurisdiction to our Courts to say that the judgment is opposed to natural justice: see also per COCKBURN, J., in *Imrie* v. *Castrique*(2) and *Scott* v. *Pilkington*(3), Mr. Anantakrishna Ayyar drew our attention to *Messina* v. *Petrococchino*(4). In that case it was pointed out that unless there was a manifest error or fraud in the proceedings of the judgment the British Court should give effect to it. A wrong view as to onus does not render a judgment erroneous on the face of it. Moreover having regard to *Liverpool Marine Credit Co.* v. *Hunter*(1), we are unable to hold that a mistake as to law which is all that can be alleged against the decision in the present case, would be sufficient to vacate a foreign judgment. For these reasons, we think the decision of the Courts below is right and we dismiss the second appeal with costs. The Letters Patent Appeal follows.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Srinivasa Ayyangar.

1917, March, 26.

M. KANDASWAMI CHETTY (DEFENDANT), APPELLANT,

v.

P. SUBRAMANIA CHETTY (PLAINTIFF), RESPONDENT.*

Injunction—Temporary injunction in mandatory form—Power of Indian Courts to grant under Order XXXIX, rule 2, Civil Procedure Code (Act V of 1908).

Courts in India can under Order XXXIX, rule 2, Civil Procedure Code, issue temporary injunctions in a mandatory form.

Israil v. *Shamser Rahman* (1914) I.L.R., 41 Calc., 436, and *Champsey Bhimji & Co.* v. *Jamna Flour Mills & Co.* (1914) 16 Bom. L.R., 566, referred to.

The view of BEAMAN, J., in *Rasul Karim* v. *Pirmbhai Amirbhai* (1914) I.L.R., 38 Bom., 381, not followed.

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(1) (1868) L.R., 3 Ch. App., 479.
(2) (1860) 8 C.B. (N.S.), 405; s.c., 141 E.R., 1222.
(3) (1862) 2 B. & S., 11; s.c., 121 E.R., 978.
(4) (1872) 4 L.R.P.C., A.C., 144.
* Appeal Against Order No. 64 of 1917.

KANDASWAMI v. SUBRAMANIA.

APPEAL against the Order of C. R. THIRUVENKATA ACHARIYAR, the City Civil Judge of Madras, in Civil Miscellaneous Petition No. 1652 of 1916 in Original Suit No. 460 of 1916.

The following facts are taken from the judgment of the lower Court:—

"This is an application for a temporary injunction, under Order No. 39, rule 2 of the Civil Procedure Code, praying for the removal of an obstruction which had been put up by the defendant shortly before the suit which prevents the flow of light and air through a window in the second compartment of plaintiff's house.

"The suit itself is brought for the purpose of establishing an easement of light and air in respect of plaintiff's house through the said window and for a permanent injunction restraining the defendant from obstructing the flow of air and light through the said window. The plaintiff in the alternative prays for damages which he assesses at Rs. 500.

"On behalf of the defendant, two contentions have been pressed, viz., (1) that the Court has no jurisdiction to direct the removal of the obstruction on an application for an interim injunction, in other words, there is no power to pass an interim mandatory injunction, (2) that the inconveniences to which the defendant and his people would be put by the window being open are far more serious than the inconveniences which would be caused to the plaintiff by the closing of the window.

"As regards the first contention I am of opinion that the Court has power in granting an interim injunction to direct the removal of any obstruction which, in its opinion, was quite recently made by the defendant in spite of the plaintiff's objection and which has led to the institution of the suit.

"The next question is whether, in the circumstances of the case, such an interim injunction ought to be granted. . . . There will be an interim injunction as prayed directing the defendant to remove the obstruction which he has placed against the window in question and restraining the defendant from, in any manner, interfering with the access of light and air through the said window pending the disposal of the suit. Costs of this petition to be costs in the cause. Execution of this order will be stayed till 7th March 1917."

The defendant preferred this appeal to the High Court.

T. R. Venkatarama Sastriyar, V. S. Govinda Achariyar and *V. S. Kallabhiran Ayyangar* for the appellant.

O. Thanikachalam Chettiyar for the respondent.

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SPENCER AND SRINIVASA AYYANGAR, JJ.

JUDGMENT.—Upon the question whether Courts in this country have the power by virtue of Order XXXIX, rule 2 of the Code of Civil Procedure, to issue temporary injunctions in a mandatory form, we are not prepared to adopt the opinion expressed by BEAMAN, J., in *Rasul Karim* v. *Pirubhai Amirbhai*(1). The description of temporary injunctions in section 53, Specific Relief Act, does not exclude injunctions of a mandatory nature, and in *Israil* v. *Shamser Rahman*(2), upon an application for an interim injunction, pending the disposal of a suit it was ordered that defendant should not only be restrained from further erection of a building but that he should pull down so much of it as he had erected after he became aware of the institution of the plaintiff's suit. We also may observe that SHAH, J., did not agree with the opinion of his learned brother in *Rasul Karim* v. *Pirmbhai Amirbhai*(1) and that two other Judges of the Bombay High Court took a different view from BEAMAN, J., in *Champsey Bhimji & Co.* v. *Jamna Flour Mills & Co.*(3)

On the merits, however, we are of opinion that the present was not a case of such urgency as to make it necessary for the protection of the plaintiff's rights that the defendant should be made to remove the screen put up by him before the rights of the parties were heard and determined in the regular suit which was filed for this very purpose. The facts of this case resemble those of *Bonner* v. *Great Western Railway Company*(4) in which a temporary injunction was disallowed.

The question of what rights the plaintiff possessed to light and air through the window which the defendant blocked by his screen might very well have been left to be decided in the suit without anticipating the results of it. We allow the appeal. Each party will bear his own costs in this Court.

N.R.

(1) (1914) I.L.R., 38 Bom., 381. (2) (1914) I.L.R., 41 Calc., 436.
(3) (1914) 16 Bom. L.R., 566. (4) (1883) 24 Ch. D., 1.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Ayyangar.

KOZHIKOTI KHADIR PALLIVEETIL MAHAMED HAJI (DEFENDANT), APPELLANT,

1917, March, 28

v.

MOIDEEN VEETTIL KALIMABI (PLAINTIFF), RESPONDENT.*

Muhammadan Law—Shafi School—Maintenance, arrears of—Whether recoverable in the absence of a decree or agreement to pay.

According to the Shafi School of Muhammadan Law maintenance is a debt and the wife is entitled to recover from her husband arrears of maintenance though there be no decree of Court or mutual agreement in respect of such maintenance.

The distinction in this respect between Shafi and Hanafi school pointed out. Muhammadan Law Texts examined.

SECOND APPEAL against the decree of F. J. DEROZARIO, the acting Subordinate Judge of South Malabar at Calicut, in Appeal No. 910 of 1914, preferred against the decree of L. R. ANANTHANARAYANA AYYAR, the Principal District Munsif of Calicut, in Original Suit No. 563 of 1913.

This Second Appeal arises out of a suit brought by a Muhammadan woman against her husband for arrears of maintenance. The parties belonged to the Shafi sect of the Sunni school. The husband neglected to maintain his wife for some time past. The wife filed a suit against the husband for the recovery of arrears of maintenance for about a year and a half. The defendant pleaded that according to the law of his sect arrears of maintenance were not recoverable unless the amount had been previously fixed by agreement between the parties. The Court of First Instance decreed the claim. The decree was confirmed on appeal. The defendant preferred this Second Appeal.

P. Appu Nayar for *C. Madhavan Nayar* for the appellant.

K. V. Madhavan Nayar for *K. P. M. Menon* for the respondent.

* Second Appeal No. 1326 of 1915.

JUDGMENT.—That in the Shafi Law which governs the parties to this case the wife is entitled to recover arrears of maintenance, though not due under a decree of Court or a mutual agreement, contrary to the Hanafi Law, admits of no doubt. For according to the theory of the former system, maintenance is a debt and not in the nature of a gratuity as is the doctrine of Hanafi lawyers. In the Hedaya (Hamilton, Volume I, page 398), it is expressly laid down as the rule of Hanafi Law that,

"if a length of time should elapse during which the wife has not received any maintenance from her husband she is not entitled to demand any for that time except when the Kajee had before determined or decreed it to her. . . ."

Then the learned author after giving the reasons in support of the Hanafi view and in connection with the further deduction that "arrears of decreed maintenance drop in the case of the death of either party" states, that

"Shafi says that the maintenance is in all circumstances to be considered as a debt upon the husband in conformity with his tenet that it is not a gratuity but a return, wherefore it cannot drop like demands of the former description."

The Hedaya is devoted to the exposition of the Hanafi Law, but the erudition and accuracy of its learned author was so great that whenever according to the practice that prevailed in those days, he states on any point the contrary doctrine of the Shafi or any other branch of the Sunni system, that statement may generally be safely accepted as correct. In Minhajet Talabin of Namawi, a high authority on the Shafi Law and recently translated by Messrs. Van Ien Beg and Howard it is stated (at page 385 of the translation) :

"During his stay in Egypt, Shafi adopted the doctrine that a wife's maintenance is obligatory only if she puts herself at her husband's disposition and not in virtue of the contract of marriage . . . ; consequently a husband owes his wife no maintenance so long as she refuses to come to him; but *owes it from the moment* he hears she is willing to put herself at his disposition."

Then further on it is laid down,

"when a husband during his marriage becomes so insolvent that he can no longer give the minimum maintenance prescribed, but his wife in spite of this continues to live with him the maintenance becomes a debt due to her from him and exigible at any moment."

This makes it clear that according to the Shafi school arrears of maintenance can be recovered by the wife counting from the date when her husband wrongfully refused or neglected to maintain her.

In Tohfatal Mierhaj which is an authoritative commentary on the Mirhaj by Shahabuddin Ahmad Ibu Hayanul Hailini who flourished in the sixteenth century, it is expressly stated that the maintenance is a debt on her husband "even if it was not decreed by the Kazee" (Volume 3, page 382, in original Arabic text). The law therefore is correctly stated in Mr. Tyabji's Principles of Muhammadan Law, section 307, cited in the lower Court's judgments. It may however be pointed out that in paragraph (2) of that section 'Sunni Law' is a mistake for the 'Hanafi Law.' The decision in *Abdul Futter Moulvie* v. *Pabunesa Khatun*(1) is according to the Hanafi school of law which is followed by the Muhammadans of Bengal generally. The appeal is dismissed with costs.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Srinivasa Ayyangar.

ARUNACHELLAM CHETTY (PLAINTIFF), APPELLANT,

1917, March, 28.

v.

SABAPATHY CHETTY (DEFENDANT), RESPONDENT.*

Jurisdiction of Inferior Court to set aside decree of Superior Court obtained by fraud—Reliefs that can be granted.

A District Munsif can entertain a suit for a declaration that a decree passed by a District Court was obtained by fraud when the amount decreed and the subject-matter of the suit are within his jurisdiction; but he cannot direct a retrial of the suit by the District Court. The previous suit can be revived only by an application to the District Court.

APPEALS under clause 15 of the Letters Patent against the judgment of NAPIER, J., in *Arunachallam* v. *Sabapathy*(2).

(1) (1881) I.L.R., 6 Calc., 631.

* Letters Patent Appeal No. 215 of 1916.

(2) Civil Revision Petition No. 951 of 1916 praying the High Court to revise the order of D. G. WALLER, the District Judge of Coimbatore, in Civil Miscellaneous Appeal No. 6 of 1916, preferred against the order of S. RAJAGOPALA AYYANGAR, the District Munsif of Tiruppur, in Original Suit No. 1631 of 1915.

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The plaintiff brought the present suit (Original Suit No. 1631 of 1915) in the District Munsif's Court of Tiruppur, to set aside a decree passed by the District Court of Coimbatore in Original Suit No. 20 of 1914. The decree of latter Court was a mortgage-decree passed on compromise for the payment of Rs. 1,700 with subsequent interest and costs in favour of the defendant against the plaintiff in the present suit, but the plaint in the previous suit was filed in the District Court for recovery of Rs. 2,732 and odd from the plaintiff herein. The property secured by the compromise decree was situate, and the defendant resided, within the local limits of the jurisdiction of the District Munsif's Court of Tiruppur. The plaintiff prayed in the plaint that the District Munsif's Court "may be pleased to pass a decree setting aside the razinama decree passed in Original Suit No. 20 of 1914, on the file of District Court of Coimbatore, declaring that it is not binding on the plaintiff, and directing that the suit be re-tried and decided on the evidence," and for some other reliefs. The defendant contended that the District Munsif's Court was not competent to entertain the suit. Both the lower Courts held that the District Munsif's Court, being a Court of inferior jurisdiction, was not competent to entertain a suit for setting aside a decree of a Court of superior jurisdiction. The plaintiff preferred a Civil Revision Petition to the High Court, which was heard by NAPIER, J., who delivered the following judgment:—

"The petitioner is unable to invite my attention to any case in which it has been held that a person who was a party to a suit in the District Court which was not within the pecuniary limits of the jurisdiction of a District Munsif's Court can sue to set aside the decree in that suit in a District Munsif's Court because the amount disposed of by the terms of the compromise decree was within the jurisdiction of a District Munsif.

The petition is dismissed."

The plaintiff preferred a Letters Patent Appeal against the judgment of NAPIER, J.

N. A. Krishna Ayyar for the appellant.

T. Narasimha Ayyangar for the respondent.

SPENCER, J.

SPENCER, J.—The question that has been argued in this Letters Patent Appeal is whether it is competent to a Court of inferior jurisdiction to entertain a suit to declare a compromise

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decree obtained in a Court of superior jurisdiction to be not binding on the plaintiff as having been obtained by fraud. The plaintiff asked in his plaint not only for a declaration that the decree in Original Suit No. 20 of 1914 on the file of the District Court of Coimbatore was not binding on him but also that it should be set aside and that the said suit should be re-tried and decided on the evidence. The District Munsif to whom the plaint was presented held that he had no jurisdiction to go into the question whether the former decree was obtained by fraud and that only an appellate Court or a Court transferring a suit from one Court to another would have the power to direct a re-trial. The District Judge, who heard an appeal from the District Munsif's decision, was of opinion that a Court of inferior jurisdiction could not either set aside or order a re-hearing of a suit tried by a Court of superior jurisdiction.

The learned Judge of this Court, who disposed of a petition to revise the District Judge's order, gave as his reason for refusing to interfere in the matter that the suit as originally instituted was not within the pecuniary jurisdiction of the District Munsif, although the amount involved in the compromise decree was.

There seems to have been a considerable misapprehension as to the course that the Court trying the question of fraud would have to follow if it decided in the plaintiff's favour. As observed in *Vijaya Ramayya* v. *Venkata Subba Rao*(1), it would be sufficient for the Court to declare that the previous decree was of no effect so far as he was concerned. Their Lordships remarked in that case that the trial of the suit, which had been improperly compromised, after a declaration to that effect would no doubt proceed if a proper application were made to the proper Court. They refused in second appeal to make any order as to that. So here, the fact that the plaintiff asked for two reliefs which could not in the nature of things be granted was no reason for not deciding whether he was entitled to the declaration which he demanded if he proved that the compromise was fraudulent.

Next as regards the powers of the District Munsif to try a suit brought for a declaration that a decree obtained in the

(1) (1916) I.L.R., 39 Mad., 853 at p. 873.

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District Court was obtained by fraud, section 9 of the Civil Procedure Code runs thus:—

"The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

The respondent has not shown that there is any express or implied bar to such a suit as this. Under section 56, clause (*b*) of the Specific Relief Act a Court has no power to stay proceedings in a Court not subordinate to it; but there is no such limit placed by section 42 on a Court that has otherwise jurisdiction over the suit making a declaration as to a plaintiff's title to a legal right and granting a permanent injunction against the decree-holder executing his fraudulent decree against the plaintiff.

If it were only the Court which possessed the jurisdiction to try the suit in which the fraud was committed that could entertain a question whether a decree so obtained was vitiated by fraud, there would be no relief by suit under article 95, Limitation Act, for parties aggrieved by fraud perpetrated in the trial of small cause suits, or of rent suits in Revenue Courts, or in appeals to the Privy Council, however gross the fraud. In *Nistarini Dassi* v. *Nando Lall Bose*(1) STANLEY, J., quoting from *Sheddess* v. *Patrick*(2) observed:

"It matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest Court of judicature in the realm; in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud."

His judgment was upheld in appeal by a bench of three Judges in *Nistarini Dassi* v. *Nando Lall Bose*(3) (see observations of MACLEAN, C.J., at pages 381—2) and confirmed by the Privy Council in *Benode Behary Bose* v. *Nistarini Dassi*(4).

In *Banke Behari Lal* v. *Pokhe Ram*(5) and *Jawahir* v. *Neki Ram*(6) it was held that a Subordinate Judge and a District Munsif could try suits to declare that decrees passed by the

(1) (1899) I.L.R., 26 Calc., 831. (2) (1854) 1 Macq. H.L.C., 607.
(3) (1903) I.L.R., 30 Calc., 369.
(4) (1906) I.L.R., 33 Calc., 180 (P.C.).
(5) (1903) I.L.R., 25 All., 48. (6) (1915) I.L.R., 37 All., 189.

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Calcutta High Court and by another Court in Bengal respectively were void as against the plaintiff, when the cause of action arose within the jurisdiction of the former Courts owing to execution proceedings having been taken in that locality.

As regards pecuniary jurisdiction the compromise decree was for Rs. 1,700 and interest, and that is therefore the extent to which the interests of the plaintiff in this suit have suffered. It is not suggested that there has been any undervaluation. The property is situated, and the defendant resides, within the jurisdiction of the Tiruppur District Munsif's Court. Under section 12 of the Civil Courts Act the Tiruppur District Munsif's Court is the proper Court to try the suit unless it is shown to be "otherwise exempted from his cognizance." I am not aware of any provision of law which has the effect of exempting from the jurisdiction of a Court, otherwise competent to try them, suits brought to avoid decrees obtained in suits when the original plaintiff claimed in his plaint more than he got by the final decree.

I consider therefore that this appeal should be allowed and that the District Munsif of Tiruppur should be directed to restore Original Suit No. 1631 of 1915 to his file and dispose of it according to law. Costs throughout to abide and follow the result.

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—I agree. The question in this appeal is whether one Court has jurisdiction to entertain a suit to set aside the decree of another Court, in this case a superior Court, on the ground of fraud. The present suit was filed in the Munsif's Court, Tiruppur, to set aside a mortgage decree passed by consent by the District Court, Coimbatore, for a sum of Rs. 1,700 in favour of the defendant against the plaintiff in a previous suit in that Court by the former against the latter to recover a sum of money which was beyond the pecuniary jurisdiction of the Munsif. The lands charged are wholly within the local limits and the value of the relief sought is within the pecuniary limits of the jurisdiction of the Munsif. The plaintiff's claim is to relieve himself from the liability to pay Rs. 1,700 under the previous decree and to get rid of the charge on his lands for the same amount. The defendant also lives within the jurisdiction of the Munsif.

It is now quite settled that the more appropriate mode of setting aside a consent-decree for fraud is by a separate action

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instituted for that purpose where charges of fraud can be fully investigated, rather than by a motion in the cause in the nature of a review; but such a suit is not, I think, the same as an action of review or the old bill of review: *Mussummut Gulal Koer* v. *Badshah Bahadur*(1). Legislative recognition of this mode of procedure is afforded by article 95 of the Limitation Act. A suit instituted for that purpose is an ordinary civil suit and the jurisdiction of the Court to entertain such a suit must depend on the provisions of the Civil Courts Act and the Code of Civil Procedure. It was not said that suits to set aside decrees were exempted from the cognizance of Munsifs and under section 12 of the Civil Courts Act therefore Munsifs have jurisdiction to try suits of this class. If the suit is considered to be one for the determination of a right to, or interest in, immoveable property, the District Munsif's Court, Tiruppur, was the proper Court to try it (section 16 of the Code); otherwise the same Court will have jurisdiction to try it as the defendant actually and voluntarily resides within the local limits of its jurisdiction (section 20 of the Code). If for instance the plaintiff in the present suit had executed a mortgage deed in favour of the defendant for Rs. 1,700 and interest on the security of the property charged by the decree in satisfaction of his claim in the previous suit and if that suit had been withdrawn or dismissed as adjusted without there being a decree and if the present suit was to set aside the mortgage on the ground of fraud, there can scarcely be any doubt that the District Munsif of Tiruppur would have jurisdiction to entertain it. For the purpose of determining the Court in which the suit should be filed I do not see any difference between the two suits. The District Judge may also have concurrent jurisdiction, but the suit must be instituted in the District Munsif's Court as that is the Court of the lowest grade competent to try it. That is how the matter stands on the construction of the relevant portions of the statutes which prescribe or limit the jurisdiction of Courts.

A certain amount of confusion has however arisen, by not keeping quite distinct the question of the appropriate relief or reliefs which a Court can grant in a suit to set aside a decree or

(1) (1909) 10 C.L.J., 420.

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the consequences which follow the setting aside of a decree, from the question of competency of the Court to try the suit. In this very suit the plaintiff after praying that the consent decree should be set aside, further prayed that the Court should direct the previous suit in the District Court to be re-tried and decided on the evidence; this latter relief he was not entitled to in the suit and the District Munsif was not competent to grant it. If the plaintiff succeeds in the suit, and gets the consent-decree set aside, any application in the previous suit, either to revive it or proceed with it, can only be made to the Court in which that suit was pending and it is only that Court that can make any order in respect of that suit; but that in no way affects the jurisdiction of the Munsif to try the suit to set aside the decree. What exactly are the forms of relief which a Court can grant when a party establishes his right to set aside a decree for fraud need not be considered or specified now as they may conceivably depend on the nature of the decree sought to be set aside and other circumstances of the case. Ordinarily a declaration that the decree is not binding on the plaintiff and an injunction restraining the other party from executing it, would be sufficient and proper.

The learned District Judge in his judgment in appeal in this case draws a distinction between the jurisdiction of the Court to treat a decree obtained by fraud as a nullity when the impeachment of the decree arises incidentally or is only one of the reliefs prayed, and the jurisdiction of the Court where the impeachment of the decree is the sole object of the suit. It is quite possible that a Court which has jurisdiction over a cause, may have jurisdiction to decide on the validity of a decree though if the suit was wholly to set aside that decree it may have no jurisdiction on the ground that no part of the cause of action arose within its local limits or the defendant did not reside there. That difference arises, not out of any distinction between a direct and collateral impeachment of the decree, not out of any difference in the nature of the suits, but arises solely out of the difference in the place of suing as determined by the provisions of the Code or any other law determining the venue. I do not understand how a Court which is not competent to adjudicate directly on the validity or the invalidity of a decree can do so indirectly. If a decree obtained

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by fraud is a nullity and is wholly void (which I think it is not in spite of some expressions to the contrary in the reported judgments), the Court may ignore it; but if it is binding till set aside, the fact that it is impeached in a suit in which other or substantial reliefs are asked which depend or are consequential on the setting aside of the decree cannot confer a jurisdiction which otherwise the Court did not possess. The recent decisions of the Calcutta and Allahabad High Courts, some of which were confirmed by the Privy Council, support the veiw taken above. In an early case in Calcutta, PONTIFEX, J., in connection with an application to take the plaint off the file on the ground that leave to sue was not obtained is reported to have said, that

"where the principal part of the prayer of the suit was to set aside a consent-decree of the High Court in a previous suit, that Court and that Court alone had jurisdiction."

Bibee Soloman v. *Abdool Aziz*(1). In that case the whole cause of action appears to have arisen within the local limits of the original jurisdiction of the High Court as the fraud which gave rise to the action was committed within the local limits. The suit itself appears to be one in which substantial relief for the recovery of property appears to have been claimed and the previous decree which limited the right of the plaintiff was sought to be set aside as a preliminary to obtain such relief. If that be so, the later decision of the same Court on the original side in *Nistarini Dassi* v. *Nundo Lall Bose*(2) which was confirmed in appeal, which again was confirmed by the Privy Council, is conclusive authority for the position that a Court which has jurisdiction over the cause has jurisdiction to set aside the decree of another Court on the ground of fraud as an auxiliary to the granting of the other reliefs: *Benode Behari Bose v. Nistarini Dassi*(3). I would draw particular attention to the judgment of Chief Justice MACLEAN in appeal at pages 380 and 381 in *Nistarini Dassi* v. *Nundo Lal Bose*(4) where the question of jurisdiction of one Court to set aside the decree of another Court for fraud is discussed with reference to the Indian statutes. In *Kedar Nath Mukerjee*

(1) (1879) 4 C.L.R., 366.
(2) (1899) I.L.R., 26 Calc., 891.
(3) (1906) I.L.R., 33 Calc., 180 (P.C.).
(4) (1903) I.L.R., 30 Calc., 369.

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v. *Prosonna Kumar Chatterjee*(1) the suit was to set aside on the ground of fraud a decree of a Small Cause Court at Krishnagar and sale of immoveable properties in execution of that decree on transfer by a Munsif's Court. The plaintiff also claimed to recover possession of the property sold in execution and instituted the suit in the Munsif's Court. On objection taken, the jurisdiction of the Munsif to entertain the suit was sustained, but the learned Judges were disposed to hold that if the action was brought simply to set aside the decree, the suit should have been instituted in the Krishnagar Civil Court. It is important to note that the learned Judges say that the suit to set aside the decree of the Small Cause Court *would not lie in that Court*, but would have to be brought in the ordinary Civil Court, and it may be that Krishnagar Civil Court was the only Court which could take cognizance of a suit under the Code of Civil Procedure, if it was simply to set aside the decree.

The precise question now raised came up for decision in *Sarthakram Maiti* v. *Nundo Ram Maiti*(2) and the Calcutta High Court decided that a Munsif's Court had jurisdiction to declare that a decree obtained by fraud in a Subordinate Court was not binding on the plaintiff and to grant an injunction restraining the defendant from executing the decree. There also the decree in the previous suit was for a sum which was within the pecuniary jurisdiction of the Munsif, though apparently the claim was for an amount above it. In this judgment the learned Judges appear to draw a distinction between "setting aside a decree" and declaring it to be a nullity; but what exactly is the difference is not explained. No doubt one Court has no control over the record of another Court, and one Court setting aside the decree of another Court on the ground of fraud in an action brought for that purpose, does not do so in the sense in which a judgment is vacated in appeal or on review. The consequences are, or may be, different; further in the latter case directions may be given as to revivor, new trial or continuance of the proceedings and the Court may even enter a fresh judgment in the old suit. Again there may be matters over which particular Courts have exclusive jurisdiction as for

(1) (1901) 5 C.W.N., 559.
(2) (1906) 11 C.W.N., 579.

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instance Probate Courts. If an order or decree is passed by such Courts in matters within their exclusive jurisdiction, such order or decree cannot be set aside by another Court, though the latter Court may be able to make a declaration, that a party was guilty of fraud in obtaining that order : see *Priestman* v. *Thomas*(1). In *Earl of Baudon* v. *Becher*(2), Lord BROUGHAM said :

"it is undeniably true that the Court of Chancery has no right to review a decree of the Court of Exchequer; that nothing but a Court of Appeal can give redress if such decree is erroneous is clear, and indeed nothing can be more true than such a proposition; but it is equally true that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim, or to the defence of a right."

How far such a distinction applies to Courts exercising the same or similar jurisdiction as the ordinary Civil Courts in British India may be a question. If however that was the distinction made by the learned Judges in *Sarthakram Maiti* v. *Nundo Ram Maiti*(3), as probably it was, that does not affect the present question. In a later case in the same Court, *Abdul Huq Chowdhry* v. *Abdul Hafez*(4), the suit was instituted in a Munsif's Court to set aside a decree of the Presidency Small Cause Court. The jurisdiction of the Munsif was upheld and the learned Judges pointed out that where a decree is set aside on the ground of fraud an injunction restraining execution is necessarily consequential thereon, even where no other relief is sought and that such a decree is more than a mere declaratory decree. They followed their previous decision in *SarthakramMaiti* v. *Nundo Ram Maiti*(3), and also another decision in *Pramnath Roy* v. *Monesh Chandra Moitra*(5) which was confirmed by the Privy Council. *Radha Raman Shaha* v. *Pram Nath Roy*(6), and *Khagendra Nath Mahata* v. *Pram Nath Roy*(7). In these cases the main question in dispute was whether a party who had applied to the Court which passed the decree, under sections 108 and 311 of the old Code, to set aside an *ex parte* decree and a sale in execution of it, can sue to set them aside on the ground

(1) (1884) L.R., 9 P.D., 210.
(2) (1835) 3 Cl. and Fin., 479 at p. 510.
(3) (1906) 11 C.W.N., 579.
(4) (1910) 14 C.W.N., 695.
(5) (1897) I.L.R., 24 Calc., 546.
(6) (1901) I.L.R., 28 Calc., 475.
(7) (1902) L.R., 29 I.A., 99.

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of fraud in a fresh suit. Their Lordships in the Privy Council confirming the judgment of the High Court held that he can; but these cases are important for the present purpose for two reasons. In the first place though relief by way of recovery of possession of immoveable property sold in execution of the fraudulent decree was asked, their Lordships do not appear to think that this made any difference, for they describe the suit as one "for setting aside a decree and auction sale on finding them to be illegal, fraudulent and collusive"; in the next place though the previous decree was passed and the auction held by the Munsif, the suit to set them aside was instituted in a different Court, the Court of the Subordinate Judge. These two decisions of the Privy Council appear to me to conclude the question in the present appeal.

The latest case in Allahabad is *Jawahir* v. *Neki Ram*(1). There a suit was instituted in the Munsif's Court, Fatehabad (Agra), to set aside a decree of a Court in Silguri in Bengal. The learned Judges held that the Munsif had jurisdiction. They based their judgment on the ground that a portion of the cause of action at least arose within the jurisdiction of the Fatehabad Munsif as the fraudulent decree was sought to be executed by attaching properties situate within his local jurisdiction and they followed an earlier case in the same Court where it was held that it was competent for the Cawnpore Court to set aside a decree of the Calcutta High Court : *Banke Behari Lal* v. *Pokke Ram*(2). The decision in *Banke Behari Lal* v. *Pokke Ram*(2) was followed in this Court in *Arunachallam Chetti* v. *Vellappa Tambiran*(3), by the CHIEF JUSTICE and HANNAY, J.

There was a reference made to section 56 of the Specific Relief Act, but that section has no application to the present case, for the Court is not asked to stay any proceedings in a superior Court.

The respondent broadly contended that there was some principle of law which obliged a party desirous of setting aside a decree obtained by fraud, to seek relief in the Court which passed the decree; but except the dictum of PONTIFEX, J., he did

(1) (1915) I.L.R., 37 All., 189.
(2) (1903) I.L.R., 25 All., 48.
(3) (1914) 28 M.L.J., 410.

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not refer to any other authority. If that contention is correct, a Court of Appeal which has no original jurisdiction and a Small Cause Court or a Revenue Court which has only a limited jurisdiction cannot entertain an original suit to set aside its decree, and no other Court can. This, however, does not appear to be the law. In *Flower* v. *Lloyd*(1), the Court of Appeal in England held that that Court had no original jurisdiction to hear an application to set aside their decree passed in appeal on the ground of fraud but that a fresh action should be brought in a Court having original jurisdiction to set aside the decree. In the same case, BAGGALLAY, L.J., no doubt said that under the old practice when a decree has been obtained by fraud a bill was filed in the Original Court in which suit had been brought for the purpose of setting the decree aside and the same may be done even after the Judicature Acts came into force. I doubt however whether the Lord Justice was thinking of Courts of different grades exercising similar jurisdiction. I therefore think that the District Munsif of Tiruppur had jurisdiction to entertain the suit, though he had no power to grant the second prayer of the plaint which however did not affect the jurisdiction of the Court. It may be mentioned that the plaintiff agreed to withdraw this prayer in the first Court.

K.R.

(1) (1877) 6 Ch.D., 297.

APPELLATE CIVIL.

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

1917, March, 21 and 29.

BANGHY ABDUL RAZACK SAHIB OF MESSRS. KHAN SAHIB BANGHY ABDUL KHADAR SAHIB & CO. (PLAINTIFF), APPELLANT,

v.

KHANDI ROW AND ANOTHER OF W. K. A. RANE & CO. (DEFENDANTS), RESPONDENTS. *

Contract, breach of—Suit for damages—Contract after outbreak of war to supply enemy goods out of stock in a particular ship—Royal Proclamation, prohibiting contract as illegal, effect of—Capture and condemnation of steamer and goods by Prize Court, effect of, on contract—Purchase of goods from Prize Court by defendant and bringing goods to place of performance by other steamers, effect of—Contract to supply goods of a certain description and quality—Supply of inferior goods, effect of.

A contract made on the 25th August 1914, after the outbreak of war with Germany on the 4th August 1914, to supply German dyes expected to arrive by certain steamers believed to have started on their voyage from Germany before the war, is unenforceable, if under the contract the defendant was not to be liable in case of non-arrival of the steamers at certain ports on account of the state of war and the ship and the dyes therein were as a fact seized during the voyage and condemned as prize by a Prize Court.

Held further,

(*a*) that the effect of the Royal Proclamation of 9th September 1914, prohibiting trading with the enemy and in enemy goods as illegal, was to render the further performance of the contract illegal and to put an end to the contract;

(*b*) that the condemnation of the goods by the Prize Court related back to the date of seizure and divested the owners of the goods as from the date of seizure;

(*c*) that the fact that the defendants for their own convenience bought the goods from the Prize Court and brought them to the place of performance is immaterial as the goods ceased to be goods consigned to the defendants; and

(*d*) that a contract to supply dyes of 40 per cent strength on arrival of certain steamers is not enforceable when the steamers arrive with dyes of inferior description and quality, viz., 16 per cent strength.

Hale v. *Rawson* (1858) 27 L.J., C.P., 189, distinguished.

Arnhold Karberg & Co. v. *Blythe Green Jourdain & Co.* (1916) 1 K.B., 495, *The Odessa* (1916) A.C., 153, and *The Zamora* (1916) 2 A.C., 77, followed.

* Original Side Appeal No. 22 of 1916.

ABDUL RAZACK v. KHANDI ROW.

APPEAL against the judgment of BAKEWELL, J., in Civil Suit No. 229 of 1915.

This is a suit for damages for breach of contract entered into between the plaintiffs who were merchants at Ambur and the defendants who were importers of German dyes on the 25th August 1914 after the outbreak of war with Germany. The contract was as follows:—

Madras, 25*th August* 1914.

"KHAN SAHIB

BANGHI ABDUL KADIR SAHIB,

AMBUR.

DEAR SIR,

We agree to deliver to you the following packages from the lot that is coming per S.S. *Steinturm*, 3 casks = 12 cwt. Alizarine per cent 4 cwt. at 501-4-0.

From Bombay lot—

5 kegs 1 cwt. each Alizarine 20 per cent at 55.

(initialled) .....

N.B.— *for* W. K. A. RANE & Co.

2 casks each 4 cwt. 40 per cent. To be delivered on arrival of
2 „ „ „ other steamers, one lot of 2
2 „ „ „ casks to be delivered each

time at the abovementioned rate, i.e., Rs. 501-4-0 per cwt. We are not responsible for the supply of goods if steamers do not come to Madras or Madura."

The Royal Proclamation prohibiting trading with the enemy and in enemy goods as illegal came into force on 9th September 1914. The steamer *Barenfels* and its cargo (the dyes in question) were captured in October 1914 as prize of war and taken into Alexandria for condemnation and were eventually condemned as prize of war in September 1915. In the meanwhile the defendants got the goods released on payment of double the invoice value agreeing to treat it as their sale price in case of their eventual condemnation and the ship and the goods in question arrived in Colombo in May 1915. In addition to claiming a right to delivery of the abovementioned goods the plaintiffs claimed that the defendants were bound to deliver them certain dyes which arrived by S.S. *Frimley* though they were not of 40 per cent strength but only 16 per cent. On defendant's failure to supply goods the plaintiffs sued for

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damages for breach of contract. The defendants pleaded that they were not liable for the following reasons:—(1) the contract freed them from liability, as in the events that were contemplated and happened, the steamer *Barenfels* did not arrive, (2) that the contract was void, illegal and unenforceable, having been made after the outbreak of war, (3) that it was later on cancelled, (4) that no dyes of 40 per cent strength arrived by the other steamers named, and (5) that the seizure and condemnation of the goods relieved them of all liability though they bought the goods from the Prize Court for purposes of their own and brought them to India, as they ceased to be goods consigned to them. The following issues were framed:—

(1) Has the contract sued on become void and unforceable owing to the outbreak of war between England and Germany?

(2) Are defendants liable in respect of the two casks that arrived by S.S. *Barenfels*?

(3) Are the defendants absolved from liability owing to their not being able to obtain delivery of the two casks?

(4) Is the contract in respect of the remaining casks premature owing to the non-arrival of the steamers?

(5) To what damages is the plaintiff entitled?

Mr. Justice BAKEWELL, who tried the suit, dismissed it by the following judgment:—

BAKEWELL, J.

JUDGMENT.—The plaintiffs are owners of a factory for dyeing yarn and have obtained their dyes for the last few years from the defendants who are importers. I hold that the plaintiffs were aware that the dyes which they obtained from the defendants were obtained by the latter from a German firm, and that on the 25th August 1914, the date of the contract in suit, the plaintiffs were aware that the defendants had consignments coming to Madras of dye which had been shipped before the 4th of August. War broke out between England and Germany on the 4th August 1914 and the contract in suit of the 25th of August, was evidently entered into in contemplation of the fact that the dyes coming from Germany would be difficult to obtain.

The contract is for the delivery of three casks of Alizarine dye ex S.S. *Steinturm* and five kegs from the Bombay consignment, and it contains the following postscript:—

"Six casks of 4 cwt. 40 per cent to be delivered on arrival of other steamers, one lot of two casks to be delivered each time at the abovementioned rate, i.e., Rs. 501-4-0 per cask; we are not

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responsible for the supply of goods if the steamers do not come to Madras or Madura."

The quality of the goods S.S. *Steinturm* was to be 40 per cent and from Bombay lot 20 per cent. I think it is clear that the contract was for the supply of goods manufactured in Germany and purchased by the defendants from a German firm, which the parties contemplated would be shipped before the outbreak of the war but delivered subsequently. I have no doubt that both parties were aware of the outbreak of the war and of the Proclamation against dealing with enemy goods; but it is equally probable that they thought that goods shipped before the outbreak of war might be safely dealt with.

The plaint relates to goods shipped by S.S. *Barenfels* and *Frimley*? A claim was also made with regard to another ship *Waturm* but I do not think that any question arises as to this steamer which carried goods consigned to Bombay. The S.S. *Barenfels* carried goods consigned to Madras which would fall within the terms of the contract, but she was captured and the ship and the goods were condemned by the Prize Court at Alexandria. I think that it is clear from the finding of that Court that the goods were enemy goods and therefore that the contract between the parties related to enemy goods coming from the enemy country. If therefore the defendants had taken up these goods and paid for them, they would have been trading in goods coming from the German Empire and from a person carrying on business therein, and the contract to sell such goods to the plaintiff falls, I think, within the Proclamation and is illegal and void.

It has been argued that the defendants obtained part of the goods consigned to them from S.S. *Barenfels* but procured their transhipment to Bombay instead of to Madras, and that having thus diverted the goods from their proper port of delivery they are liable for this consignment; but the correspondence that has been put in shows, I think, that these goods were taken by the defendants provisionally and subject to a decision by the Prize Court at Alexandria, and having been subsequently condemned they became the property of the Crown, and the voyage of the captured ship came to an end. The result is, therefore, that the goods came to the defendants as purchasers from the Crown at Colombo and they were at perfect liberty to treat this purchase as one independent of their contract with the plaintiffs and to deal with the goods as a separate consignment.

It has also been argued that the consignment ex S.S. *Frimley* is included in the suit contract. The facts as to this shipment are not

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BAKEWELL, J.

at all clear It appears that the goods were shipped at Antwerp on the 7th June, 1914, for Masulipatam via Colombo and that they were transhipped at Colombo on the 5th January, 1915, but it does not appear that the property in these goods had not passed to the defendant before the outbreak of the war, and I do not think they have shown that this consignment consisted of goods coming from Germany. It would seem that they are foreign goods which have Germany as their country of origin; but goods of that kind would not come within the Proclamation, which covers 'goods coming from the German Empire' and not goods which may originally have come from Germany. The consignment was to Masulipatam and I do not think that the fact that the defendant diverted the consignment to Madras brings these particular goods within the contract. Moreover the goods ex S.S. *Frimley* do not come within the precise terms of the contract which relates only to goods of 40 per cent, the consignment ex S.S. *Frimley* being all kegs of 16 per cent only. I think the onus is on the plaintiffs to show that the goods of 16 per cent are substantially equivalent to those of 40 per cent. The evidence on the point is not very satisfactory. The point does not seem to have been clearly raised in the pleadings and the working partner of the plaintiffs' firm was not cross-examined on the point, but I think the onus was upon the plaintiffs to show that the two classes of goods are practically identical, and the fact that the contract itself draws a distinction between goods of 40 per cent and 20 per cent and expressly stipulates for those of 40 per cent shows that what the parties had in contemplation was a particular quality, and that prima facie the plaintiffs would have been entitled to reject the tender of goods of any other quality. I hold, therefore, that the plaintiffs have failed to prove that the defendants received any consignment in Madras or Madura of the particular goods stipulated in the contract. It has been argued on their behalf that the arrival of any steamer containing goods of a particular description, whether consigned to the defendants or not, would entitle the plaintiffs to claim delivery of the contract goods. Having regard to the knowledge of the plaintiffs of the course of business carried on by the defendants, I think that this exceedingly wide interpretation of the contract is not admissible. I think it is reasonably clear that the contract relates only to consignments which the parties knew were coming to the defendants in the ordinary course of business.

The result is that the plaintiffs' suit fails and is dismissed with costs.

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The plaintiffs preferred this appeal.

Hon'ble Mr. *S. Srinivasa Ayyangar*, the *Advocate-General*, and *M. D. Devados* for the appellants.

W. Barton and *V. L. Ethiraj* for the respondents.

WALLIS, C.J., AND OLDFIELD, J.

JUDGMENT.—This is a suit for breach of contract between the plaintiffs who are merchants at Ambur and the defendants who were importers of German dyes to Madras and Tuticorin, entered into on the 25th August 1914 after the outbreak of the war, by which the defendants undertook to deliver certain casks of dye from the lot to arrive per S.S. *Steinturm* and certain other casks from what is described as the "Bombay lot" meaning the lot imported by the defendants at Bombay. The contract went on to stipulate for three deliveries of two casks each of the weight and description mentioned,

"to be delivered on arrival of other steamers, one lot of two casks to be delivered each time at the abovementioned rate, i.e., Rs. 501-4-0 for each cask. We are not responsible for the supply of goods if steamers do not come to Madras or Madura".

The evidence shows that the defendants had arranged for consignments by successive steamers, and having regard to this we have no doubt that what the defendants undertook to deliver was two casks of the required description arriving in the ordinary course in successive steamers consigned to the defendants at Madras or Tuticorin, the port for Madura. In the case of Tuticorin the ship either touched at Tuticorin or landed the goods at Colombo for transhipment. One of the steamers, S.S. *Barenfels*, had left Hamburg and Antwerp before the outbreak of war and, according to the evidence, should have arrived in Madras about the 17th August, in the ordinary course. On the date of the contract she was overdue and the defendant says he did not know what had happened to her. She did arrive ultimately in May, 1915, and the first contention of the learned Advocate-General was that under the contract on the arrival of the S.S. *Barenfels* the defendants became bound to make delivery, even if the goods were not on board, citing *Hale* v. *Rawson*(1). In that case which was an action for failure to deliver tallow, the defendants had contracted to deliver tallow on the arrival of a certain steamship and it was held that they were not relieved

(1) (1858) 27 L.J., C.P., 189.

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from their obligation, because it turned out the ship had no tallow on board. Here we think it is clear from the language of Exhibit A and having regard to the course of business and the stipulation as to the non-arrival of the steamers, that the defendants were only bound to make deliveries out of the lots consigned to the defendants in the ordinary course of business by the steamers referred to and arriving therein, and that they were not bound to make any such delivery on the arrival of the steamer without having on board any such goods consigned to the defendants.

This being the interpretation of the contract, as the goods had not arrived before the coming into force of the Proclamation of the 9th September, 1914, against trading with the enemy, the effect of that Proclamation was to render the further performance of the contract illegal, as it would admittedly have been impossible for the defendants to take up the goods and pay for them, and to put an end to the contract; *Arnhold Karberg & Co.* v. *Blythe Green, Jourdain & Co.*(1).

The case may also be disposed of on another ground. The S.S. *Barenfels* and her cargo were captured in October, 1914, as Prize of War and taken into Alexandria for condemnation, and they were subsequently condemned as Prize of War in September, 1915, a condemnation which related back and divested the owners of the goods as from the date of seizure: *The Odessa*(2), *The Zamora*(3). Under the contract, as already stated, the defendants were not to be responsible for the supply of goods, if steamers did not come to Madras or Madura; and these steamers clearly were the "other steamers", already mentioned by which the three consignments were coming out. In these circumstances the capture of the S.S. *Barenfels* which must have been one of the possibilities contemplated, in our opinion, relieved the defendants of liability under this clause and put an end to the contract so far as this particular consignment was concerned. And it seems to us immaterial that some six months later the ship and cargo were sent out to Colombo, Madras and Calcutta by bailees from the Prize Court who landed the goods in question, which were consigned to Tuticorin, at Colombo and did not forward

(1) (1916) 1 K.B., 495.
(2) (1916) A.C., 153.
(3) (1916) 2 A.C., 77.

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them by transhipment to the defendants, the consignees at Tuticorin. There was no certificate of release from the Prize Court in respect of these goods, which at the time were being proceeded against for condemnation; and the only terms on which the defendants were able to obtain delivery of them was by depositing a sum amounting to twice their invoice value, and by agreeing that, if the goods were condemned, as happened, this sum should be treated as the sale price paid to the Prize authorities as vendors. It cannot be said that the defendants were under any obligation to purchase these goods at a greatly enhanced price from the Prize authorities and make them over to the plaintiff, and we think the plaintiff's claim in respect of these casks fails.

The case as regards the plaintiff's other ground of claim on account of the consignment on the S.S. *Frimley* is even clearer. The evidence, for there is nothing explicit in the plaint, is that kegs of 16 per cent strength arrived by that ship. The contract being for delivery of kegs of 40 per cent strength it was for the plaintiff to show that the defendants were in a position to deliver dye such as that described in the contract. We think it is clear that the plaintiffs have not done so and that the description of the dye on the S.S. *Frimley* differs in toto from the description stipulated for. We may add that on the evidence the plaintiffs failed entirely to establish that the dye on the S.S. *Frimley* could be accepted as equivalent to that referred to in the contract, the only witness who had any practical knowledge of dyeing deposing that dye of 16 per cent strength would not produce the same quality of colour as that of 40 per cent strength after admixture.

In the result, the appeal fails and is dismissed with costs. (Two counsel.)

Solicitors for the appellants.—Messrs. *Grant* and *Greatorex*.

Solicitors for the respondents.—Messrs. *Short, Bewes & Co.*

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar.

1917, April, 11.

THENAL AMMAL AND ANOTHER (PLAINTIFFS NOS. 1 AND 3), APPELLANTS,

v.

SOKKAMMAL AND FORTY-SIX OTHERS (DEFENDANTS NOS. 1 TO 7. 10 TO 15, 17 TO 19, 21 TO 27, 29 TO 37, 39, 42, AND 42 TO 54), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3, and sec. 96, cl. (3)—Compromise—Power of vakil to enter into—Construction of vakalat*—Recording of compromise—Duty of Court to inquire—Decree in terms of compromise—Appeal, when allowed.*

A *vakalat* containing a provision authorizing the vakil "to present if necessary petitions for *razinama* for withdrawal and for referring to arbitration and to sign the *razinama*, etc., petitions," does not give authority to the vakil to enter into a compromise without reference to his clients.

An appeal lies against a decree passed in accordance with a compromise, where the authority to enter into it, is impeached.

Ayyagiri Veerasalingam v. *Koovur Basivi Reddi* (1915) 27 M.L.J., 173, followed.

Jagapati Mudaliar v. *Ekambara Mudaliar* (1898) I.L.R., 21 Mad., 274, and *Raghoji Rao* v. *Lakshman Rao* (1912) 22 M.L.J., 381, referred to.

Duty of Courts to scrutinize compromises before recording them pointed out.

SECOND APPEAL against the decree of H. O. D. HARDING, the District Judge of Trichinopoly, in Appeal No. 265 of 1913, preferred against the decree of R. ANNASWAMI AYYAR, the Temporary Subordinate Judge of Trichinopoly, in Original Suit No. 9 of 1912 (Original Suit No. 70 of 1910, on the file of Subordinate Judge of Trichinopoly).

The plaintiffs sued for a declaration that certain alienations made by the first defendant who was their mother, were not binding on them and the second defendant who were the daughters and reversioners to the estate of their late father. The first defendant was the mother of the plaintiffs and the second defendant, and was in possession and enjoyment of a widow's estate in her husband's property. The other

* Second Appeal No. 1755 of 1914.

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defendants were alienees from the first defendant of different portions of the property. The suit ended in a compromise between the plaintiffs and the contesting defendants. The first and second defendants were *ex parte*. A compromise petition was filed by the plaintiffs' pleader and by the pleaders for the contesting defendants and was signed by the said pleaders and by the husband of the second defendant. On the day to which the case was adjourned for hearing, the plaintiffs' pleader stated that the second defendant did not consent to the compromise, and the latter also applied to set aside the order declaring her *ex parte*. The first plaintiff also applied through another pleader that the case should be tried as against all the defendants, as the former pleader for the plaintiffs had no power to compromise on behalf of the first plaintiff and that she had not given her consent to its terms. The Subordinate Judge, who tried the suit, dismissed both the petitions and passed a decree in terms of the compromise. On appeal by the plaintiffs Nos. 1 and 3 (the second plaintiff being dead), the District Judge confirmed the decree, holding that the compromise was binding on the plaintiffs as the *vakalat* expressly gave him power to compromise. The *vakalat* was in the following terms :—

"Whereas we have hereby fully authorized you to appear on our behalf in the Temporary Sub-Court of Trichinopoly to present petitions, etc, to examine witnesses, to argue the case, to pay batta, etc., to get copies, to get refund of batta, document, etc., that can be taken back, to present if necessary petition, etc., for *razinama*, for withdrawal, and for referring to arbitration under section 1, second schedule, to sign *razinama* withdrawal, etc., petitions yourself, to conduct proceedings necessary for the execution of decrees or order, etc. . . . ; we shall accept everything that may be done by you with regard to this matter, either orally or in writing as if done by ourselves alone."

The plaintiffs preferred this Second Appeal.

L. A. Govindaraghava Ayyar for the appellants.

T. Narasimha Ayyangar for the respondents.

SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

JUDGMENT.—A preliminary objection is taken by Mr. Narasimha Ayyangar that no Second Appeal lies as the compromise was recorded *wihout protest* and as subsequently a decree was passed in terms of the compromise. This objection should be overruled, as the very foundation of the compromise, namely the

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authority to enter into it, is impeached. Following *Ayyagiri Veerasalingam* v. *Koovur Basivi Reddi*(1) we hold that the appeal is competent. The Courts below have held that the plaintiffs were bound by the compromise as the *vakalat* given by them to their vakil expressly enabled him to enter into a compromise. We do not think that the word அவசியமானால் supports this conclusion. We understand the expression "to mean" that the vakil is to do certain acts when and if the occasion arises. The acts themselves are subsequently enumerated. They are (*a*) to sign the petition for entering into the compromise or for withdrawing the suit, and (*b*) to sign the final compromise petition to the Court. These two enumerated powers show that the plaintiff did not intend that the vakil should have unlimited powers to settle the claim of his clients.

Mr. Narasimha Ayyangar contended that the ordinary power of the vakil to enter into compromises and to withdraw suits in which he is engaged is inherent in him by the engagement, and cites Justice SADASIVA AYYAR'S decision in *Ragoji Rao* v. *Lakshman Rao Sahib*(2) in support of this contention. In *Jagapati Mudaliar* v. *Ekambara Mudaliar*(3) SUBRAHMANYA AYYAR and BENSON, JJ., pointed out that the practice prevailing in England by which Counsel and Solicitor are clothed with extensive powers to agree to terms on behalf of the client should not be imported into this country. We are inclined to agree with this view. It is not the ordinary duty of an Advocate to negotiate terms, without reference to his client, with the opposite party. Such an action is calculated to place the practitioner in a false position. We do not think it desirable that such a power should vest in him in the interest of the profession. From the point of view of the client, we think that it is not safe that he should be regarded by engaging a vakil to have given him authority to dispose of his rights in any way he chooses. Therefore we think that the general power claimed is not in consonance with the highest ideals of the profession or of justice. For these reasons we think that a very strict interpretation should be placed upon *vakalats* containing powers of this kind. The learned vakil quoted *Matthews* v. *Munster*(4) to show that

(1) (1915) 27 M.L.J., 173.
(2) (1912) 22 M.LJ., 381.
(3) (1898) I.L.R., 21 Mad., 274.
(4) (1887) 20 Q.B.D., 141.

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Counsel was allowed to settle the amount of the damages awardable to his clients. Lord Justice BOWEN points out in that case that the client asked the Counsel to do the best he can in the case; such an unlimited authorization might have justified the view taken in that case. It is pointed out by all the Lords Justices that the Court has plenary powers in any case to enquire into the justness or bona fides of the settlement reported to it. In this country such a power should be exercised by the Court even more largely than in England. It is for that reason that the intermediate stage of recording the compromise is introduced in the Code. We are afraid that Courts seldom appreciate the significance of this provision. At any rate, we are satisfied that in this case the importance and necessity of recording the compromise was not realized by the Subordinate Judge.

We must hold that there has not been a sufficient enquiry into the question whether the compromise was authorized by the appellants especially as we hold that the *vakalat* does not give authority to the vakil to enter into the compromise without reference to his clients.

We must set aside the decrees of the Courts below and remand the case to the Court of First Instance for ascertaining whether the compromise is binding on the plaintiffs. If he comes to the conclusion that it is not binding, he must proceed to dispose of the case in the usual way. Costs will abide the result.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

P. L. A. ALAGAPPA CHETTIAR AND TWO OTHERS (PLAINTIFFS Nos 2 TO 4), APPELLANTS,

1917, April 20, and 25.

v.

R. M. P. CH. MUTHIAH CHETTIAR (DEFENDANT), RESPONDENT.*

Religious Endowments Act (XX of 1863), ss. 14 and 18—Leave given to four persons under section 18 of the Act—Suit by them under section 14—Death of one of the plaintiffs after suit, whether it effects abatement.

A suit instituted under section 14 of the Religious Endowments Act by four persons with the leave of the Court under section 18 of the Act does not abate on the death of one of the plaintiffs.

Venkatesha Malia v. *Ramayya Hegade* (1915) I.L.R., 38 Mad., 1192, *Maddala Bagavannarayana* v. *Vadapalli Perumalla Charyulu* (1916) 29 M.L.J., 231, distinguished.

Chabile Ram v. *Durga Prasad* (1915) I.L.R., 37 All., 296, not approved.

Parameswaran Munpee v. *Narayanan Nambodri* (1917) I.L.R., 40 Mad., 110, referred to.

APPEAL against the decree of W. L. VENKATARAMAYYA, the District Judge of Ramnad at Madura, in Original Suit No. 22 of 1913.

The facts appear from the judgment of AYLING, J.

S. T. Srinivasagopala Achariyar for the appellants.

G. S. Ramachandra Ayyar for the first appellant.

A. Krishnaswami Ayyar and *M. Patanjali Sastri* for the respondent.

AYLING, J. AYLING, J.—The suit from which this appeal arises was instituted under section 14, Religious Endowments Act XX of 1863, by four persons who had obtained leave of the Court under section 18 of the same. Subsequent to its institution one of these persons died and the District Judge has dismissed the suit on the single ground that it is not competent to the three survivors to maintain it, it being "essential that all the donees of the power (to institute a suit) conferred by the Court should jointly exercise that power right up to the finish of the suit". The surviving plaintiffs appeal.

* Appeal No. 44 of 1916.

ALAGAPPA v. MUTHIAH. — AYLING, J.

The chief authority relied on by the District Judge is that of *Venkatesha Malia* v. *Ramayya Hegade*(1) in which it was held that where sanction was given under section 18 of the Religious Endowments Act to two men, it was not open to one of them alone to institute the suit under that sanction. It may be pointed out at once that this ruling does not necessarily cover the present case, in which the suit was validly instituted by all the persons who obtained leave to sue but one of them subsequently died. It does not necessarily follow that a validly instituted suit abates for this reason. Another judgment of this Court quoted in support of the lower Court's decree, *Maddala Bagavannarayana* v. *Vadapalli Perumalla Charyulu*(2), also deals with a case in which the institution was itself defective (in the above sense) : and the only authority brought to our notice in support of the abatement is *Chabile Ram* v. *Durga Prasad*(3) which was expressly dissented from in a recent case of this Court : *Parameswaran Munpee* v. *Narayanan Nambodri*(4). All the last three cases were of suits instituted under section 92, Civil Procedure Code ; but as I shall endeavour to show presently the difference between the two sections is in the present appellant's favour.

Section 18 of the Religious Endowments Act is very similar to section 195 of the Code of Criminal Procedure. In each the Courts are expressly forbidden to entertain a complaint or suit, unless express sanction or leave for its institution has been previously obtained. The grant of the sanction or leave in each case removes the bar to the Court taking cognizance of the matter ; and once that bar is removed it is not easy to see how either of the two sections can have further effect. In the case of section 195 of the Code of Criminal Procedure the complaint may be filed by a different person altogether from the person who applied for the sanction [vide *In re Thathayya*(5)] and though it is not necessary for us to go so far as the present case, I do not see why the same should not hold good in the case of leave granted under section 18 of the Religious Endowments Act.

With all respect to the learned Judges who decided *Venkatesha Malia* v. *Ramayya Hegade*(1) the wording of section 18 of the

(1) (1915) I.L.R., 38 Mad., 1192. (2) (1916) 29 M.L.J., 231.
(3) (1915) I.L.R., 37 All., 296. (4) (1917) I.L.R., 40 Mad. 110.
(5) (1889) I.L.R., 12 Mad., 47.

ALAGAPPA v. MUTHIAH. — AYLING, J.

Religious Endowments Act seems to afford no warrant for the consideration by the Court of the personality of the applicant. The duty of the Court is specifically defined as the determination of whether there are sufficient prima facie grounds for the institution of the suit. In dealing with applications under section 195 of the Code of Criminal Procedure Courts do not uncommonly bear in mind the personality of the applicant and his probable motives, although section 195 is in this respect quite general in its terms, and does not attempt to define the matters for the Court's determination. Nevertheless, as already stated, a sanction granted to one person may be utilized by another. Section 92 of the Code of Civil Procedure is different. It expressly authorizes the institution of a suit by

"two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General."

This wording certainly supports the view that the persons who institute the suit must be identical with those who obtained the sanction

Under section 14 of the Religious Endowments Act, on the contrary, any person or persons interested may sue : and section 18 merely interposes an independent condition that the suit shall not be entertained unless leave has been previously granted on application but without indicating in any way by whom the application should be made.

There seems to me therefore no need to adopt the District Judge's very narrow view of the section : and where the District Court has, on due consideration, decided that there are sufficient prima facie grounds for the institution of a suit against trustees of religious endowments it is undesirable in the public interest that unnecessary obstacles should be thrown in the way of its prosecution.

I would set aside the decree of the District Court and remand the suit for disposal on its merits. Costs in this Court should be costs in the cause.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I should like to reserve my opinion on the question whether when leave is granted to *A* under section 18 of Act XX of 1863 to institute a suit, *B* could institute that suit under section 14.

But I entirely agree with my learned brother that there is nothing in section 18 which can be construed as putting an end

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SADASIVA AYYAR, J.

to the suit after it is once legally instituted simply because one of several persons who obtained the leave under section 18 died during the pendency of the suit. I think that the general provisions of the Civil Procedure Code become applicable as much to a suit brought in the special Court mentioned in section 14 of the Religious Endowments Act after the first step, namely, the institution of the suit has taken place, as to a suit brought under section 92, Civil Procedure Code, except that a certain special or rather supplemental provision regarding reference to arbitration (see section 16 of the Religious Endowments Act) is also applicable to the former case and the Court is given express powers to award certain named reliefs in its decree to a suit under section 92, Civil Procedure Code (see also *Parameswaran Munpee* v. *Narayanan Nambodri* (1) and *Varadayya Chetty* v. *Munusami Chetty*(2).

A suit under section 14 of Act XX of 1863 is, in my opinion, as much a representative suit as one brought under section 92 of the Civil Procedure Code or some of the suits under Order I, Rule 8 of that Code, as it is equally brought in and as it affects the rights of all those interested in the religious endowment. All such interested persons become in the eye of the law parties to such a suit and the death of one or more of them cannot cause the suit to abate nor would it prevent the suit from being heard till "its finish" after it has been once properly and legally instituted unless perhaps in the almost impossible contingency of all the persons interested ceasing to exist in this world by death or by wholesale apostasy. I agree in the order proposed by my learned brother.

S.V.

(1) (1917) I.L.R., 40 Mad., 110.

(2) (1911) 10 M.L.T., 514.

APPELLATE CIVIL.

Before Mr Justice Spencer and Mr. Justice Srinivasa Ayyangar.

PARVATHAMMAL (SECOND RESPONDENT), PETITIONER,

1917, April, 26.

v.

CHOKKALINGA CHETTY (PETITIONER), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), sec. 34— Civil Procedure Code (Act V of 1908), sec. 36—Order—Decree—Marriage expenses of person dependent on the ward—Order against guardian—Ward attaining majority—Discharge of guardian—Application for execution against ward after majority—Jurisdiction of Court to order execution—Omission to object before attachment—Waiver—Estoppel.

An order under section 34 of the Guardians and Wards Act directing a guardian to pay a sum of money out of his ward's estate for the marriage-expenses of a person dependent on his ward is neither a decree nor an order executable as a decree under the Civil Procedure Code, and cannot be enforced against the ward after he has attained majority and the guardian has been discharged.

There being an initial want of jurisdiction in the Court to execute such an order, the omission of the ward to object, after notice, to an order for attachment of his property, does not estop him from objecting to the jurisdiction of the Court to sell the property after attachment.

Somakka v. *Ramiah* (1913) I.L.R., 36 Mad., 39, referred to.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the order of J. T. GILLESPIE, the District Judge of Salem, in Execution Petition No. 14 of 1914, in Interlocutory Application No. 20 of 1908 connected with Original Petition No. 28 of 1906.

The material facts appear from the judgment of SPENCER, J.

Pattabhirama Ayyangar for the petitioner.

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

SPENCER, J.

SPENCER, J.—One Anganna Chetti had three wives. At his death he left surviving him a daughter by his first wife, named Thayammal, and Parvathammal, his third wife. Application was made to the District Court of Salem to appoint a guardian for the estate of Parvathammal. As the result of a *razinama* put in by

* Civil Revision Petition No. 181 of 1916.

PARVA-THAMMAL v. CHOKKALINGA CHETTY.

SPENCER, J.

the contending parties, it was arranged that Chokkalinga Chetty should be guardian of Thayammal. Subsequently Gurunatha Chetty was appointed by Court guardian of the person and property of the minor Parvathammal, he being her own father. In 1908 an application was made to the Court to allot a sum of money for the marriage-expenses of the minor Thayammal. The District Judge after considering all the circumstances of the case, fixed Rs. 1,600 as a proper sum to be paid out of the estate for the said marriage, and on appeal to this Court, the order was confirmed. Parvathammal has now attained majority and her guardian Gurunatha Chetty has been discharged. Chokkalinga Chetty now seeks to have the order directing the minor's guardian to pay Rs. 1,600 for the marriage-expenses of Thayammal, executed under the Civil Procedure Code by attachment and sale of the property of Parvathammal and the District Judge has made an order accordingly.

Objection has been taken in appeal that the Court was not competent to pass an order of this kind as though it was an order passed between parties in execution, orders passed under the Guardians and Wards Act being by way of administrative directions to the guardian.

Under section 34 of the Guardians and Wards Act, a guardian may apply for the maintenance, education and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of the persons dependent on him may be a party, such portion of the income of the property of the ward as the Court may direct to be employed for the purpose. But this Act contains no provision for the execution of such order as decrees of the Court. It is however sought to justify the District Judge's order by a reference to section 36, Civil Procedure Code. That section says :

" the provisions of this Code relating to the execution of decree shall, so far as they are applicable, be deemed to apply to the execution of orders,"

and an "order" has been defined in section 2 (14) of the Civil Procedure Code as, "the formal expression of any decision of a civil Court which is not a decree." I do not think that the order passed by the District Judge in 1908 was such an order as is contemplated in this section. Moreover the order was one

PARVA-THAMMAL v. CHOKKALINGA CHETTY.

SPENCER, J.

intended to be obeyed by the guardian appointed by the Court and to relate to the property of the minor who was a ward of Court. There is now no guardian and no minor. It is therefore not possible to execute it against Parvathammal who has now become a major, without allowing her an opportunity to contest the order in her own right. In *Somakka* v. *Ramiah*(1) to which I was a party, it was pointed out by ABDUR RAHIM, J., that the Guardians and Wards Act does not provide any machinery for deciding upon and enforcing claims of third parties for or against a ward as those are left to be regulated by ordinary proceedings by suits.

We decided that an order purporting to be made under the Guardians and Wards Act, could not be enforced as a decree passed in a suit.

Secondly, an attempt has been made to justify the order by relying on the fact that notice was given to Parvathammal of the application and that she did not object that the Court had no jurisdiction. In *Somakka* v. *Ramiah*(1), that point also was considered, but there the respondent's pleader did not attempt to argue that, if the Court did make an order without jurisdiction altogether any waiver of objection or consent on the part of a party would make it valid. I am clearly of opinion that if there is an initial absence of jurisdiction, the conduct of the parties cannot validate an order passed without such jurisdiction.

Lastly, it is suggested that justice does not require the order to be set aside, that it is an order held by three Courts to be a fair one and therefore that we should not interfere in revision. In the previous proceedings, Parvathammal was represented by her guardian Gurunatha Chetty who has since been discharged. She has had no opportunity of raising any contention as to her personal liability to pay the sum now sought to be recovered, the order in that case being one of the nature of a direction to the guardian appointed by Court. It is thus an open question whether Parvathammal should justly be made to pay the sum.

I therefore consider that the order under appeal was one that the Court was not competent to pass and it should be set aside with costs here and in the lower Court.

(1) (1913) I.L.R., 36 Mad., 39.

PARVATHAMMAL v. CHOKKALINGA CHETTY.

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—I agree. The facts of the case have been fully stated in the judgment just delivered. The order that was passed in favour of Chokkalinga Chetty on behalf of the minor girl Thayammal in the guardianship matter of Parvathammal was in these terms: "I accordingly direct that the respondent (i.e., Gurunatha Chetty) pay this amount (viz., Rs. 1,600) to the petitioner (i.e., Chokkalinga Chetty)." This order was passed under section 34, clause (*e*) of the Guardians and Wards Act, under which a Court may direct a guardian to apply the income of the property or if the Court so directs the whole of the property for among other things the celebration of the ceremonies of any person who is dependent on a ward. This is in the nature of a direction to the guardian over whom the Court has control, to pay a certain sum of money out of the funds of the minor in discharge of the liability of the minor's estate. If this is obeyed by the guardian, that would be so far as between himself and the minor a good payment, and to that extent the guardian will be discharged of his liability to account for that sum. But this does not, in my opinion, give any right to the person to whom the money is directed to be paid, to enforce it as if there was a decree in his favour. The order, as a matter of fact, does not purport to adjudicate upon the relative claims of the minor and the person who seeks to enforce the liability against the minor's estate. If, for example, a person calling himself a creditor of the minor's estate applies to the Court for a direction to the guardian to discharge that debt, and if on enquiry, the Court comes to the conclusion that the liability is subsisting and the debt is payable out of the minor's estate, and makes an order to pay that debt, still I conceive that the minor would be entitled to challenge the order or the amount of debt so directed to be paid. That is the nature of the order and I think there was nothing to execute. It was quite competent to the person in whose favour this order was made to go to the Court which had jurisdiction in the guardianship matter and ask for a direction that the guardian should pay the money or the income of the minor's estate in his hands into Court, and if he gets such an order the Court will be competent to pay the money on behalf of the guardian or of the minor to the person so entitled. But I do not think that this so-called order can be executed as if it was a decree. In this case, as has been pointed out, the guardian has been discharged and the minor has been allowed to take possession of her property.

PARVATHAMMAL v. CHOKKALINGA CHETTY.

SRINIVASA AYYANGAR, J.

One argument which was advanced by Mr. Krishnaswami Ayyar is that at the time the guardian was discharged, in view apparently of some objection by the guardian with reference to this order for payment of Rs. 1,600 which he had not obeyed, there was an undertaking by Parvathammal who had then attained majority that she would pay this sum. That undertaking evidently was given in order that the guardian may be free from all liability with reference to this matter. But that, to my mind, does not, by itself, impose any liability on the minor, for it is not shown that undertaking was given to or that agreement was made with Chokkalinga Chetty on behalf of Thayammal.

The next objection taken is, there having been notice to Parvathammal of an application made to execute this order and there having been an order for attachment, that order is *res judicata* and binding on her. But it is clear that she is entitled to raise the question that the order cannot be executed at all, in that it is not an order within the meaning of section 36, Civil Procedure Code. I do not think there is any substance in the contention and further it was quite open to the Court which previously passed the order on objection made at a later stage to vacate the previous order, if it came to the conclusion that that order was *ultra vires*, as I think it was in this case.

I do not wish to add anything with regard to the last contention of the learned pleader, viz., that in this case we ought not to interfere in the interests of justice, for we do not know whether the order directing Rs. 1,600 to be paid out of the minor's estate is just or unjust.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Abdur Rahim and Mr. Justice Napier.

1917, April, 30.

NAGIREDDY KONDA REDDY AND SIX OTHERS (ACCUSED),

v.

KING-EMPEROR.*

Criminal Procedure Code (Act V of 1898), ss. 107, 192 and 528—Previous proceedings under section 107 and prosecution under the Penal Code—Discharge—Subsequent proceedings under section 107 on the same facts, if maintainable—Jurisdiction of Magistrates—Transfer by District Magistrate to a Magistrate without local jurisdiction before issue of notice to accused—Order of such Magistrate, validity of—Notice to accused, vague—Effect of notice.

A Magistrate is not entitled to institute proceedings under section 107 of the Criminal Procedure Code upon facts and information which have already been the subject of enquiry under that section or in connexion with charges under the Penal Code brought against persons who have been discharged in those proceedings.

A District Magistrate cannot be said to have taken cognizance of a case under section 107, in which he has not issued notice to the accused to show cause why they should not be proceeded against, and has no power under section 192 of the Criminal Procedure Code to transfer such a case to another Magistrate.

A District Magistrate has no power under section 528 of the Criminal Procedure Code to make over the initiation of proceedings in a case under section 107 of the Criminal Procedure Code to a Magistrate who has no local jurisdiction in the matter.

A Magistrate who has no local jurisdiction to initiate proceedings in a matter under section 107, Criminal Procedure Code, acquires none by the transfer of a case to him from a Magistrate who has jurisdiction but has not taken proceedings, and his proceedings are void and should be quashed.

Proceedings under section 107 of the Criminal Procedure Code should be quashed if the notice issued to the accused under that section is so vague as not to give the accused particulars of the offences charged.

Nirbeekar Chandra Mukerjee v. *The Emperor* (1909) 13 C.W.N., 580, *Surjya Kanta Roy Chowdhry* v. *Emperor* (1904) I.L.R., 31 Calc., 350, *and King-Emperor* v. *Munna* (1902) I.L.R., 24 All., 151, followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to quash the proceedings of T. V. TYAGARAJA AYYAR, the Headquarters

*Criminal Revision Case No. 752 of 1916 (Criminal Revision Petition No. 614 of 1916).

KONDA REDDY v. KING-EMPEROR.

First-class Deputy Magistrate of Nellore, in Miscellaneous Case No. 20 of 1916.

The material facts are set out in the judgment.

Dr. *S. Swaminathan* for the petitioner.

P. R. Narayanaswamy Ayyar for *the Acting Public Prosecutor* for the Crown.

ABDUR RAHIM AND NAPIER, JJ.

ORDER.—In this case notice has been issued by the Headquarters Deputy Magistrate of Nellore calling on the petitioners to show cause why they should not give security under section 107, Criminal Procedure Code. The matter has a long history. It appears that in the village of Kaluvoy there are two factions, one headed by the first petitioner Nagireddy Konda Reddy who has under his protection a number of Muhammadans, some of whom are also petitioners in this matter, and on the other side are the rest of the influential Hindus of that locality. For some time there has been a dispute as regards the right to play music during the *Mohurrum* before the Hindu temples. On the other hand, the Hindus claim the right to play music during their festivals before the local mosque. There seems to be also a private quarrel between the first petitioner on the one side and some of the other leading Hindu residents of that village on the other. There have been a number of cases and proceedings going on since 1914 between the parties and strange to say, in all these cases the persons accused of the offences were either acquitted or discharged and the proceedings taken under section 107 fell through. These proceedings now in question are the last of the series. Two objections are taken to them. The first is that the facts and the information upon which the proceedings were had, had already been the subject of enquiry in previous proceedings under section 107 and also in certain criminal charges, and that in those proceedings and charges the present petitioners were discharged. This is undoubtedly so and further, it is clear, that there are no fresh materials of any importance available on which it could be said that fresh apprehension arose of a breach of the peace being committed by the petitioners. It is also a fact, that since at least September 1916 when the Police applied for proceedings to be taken under section 107 there has been no breach of the peace. We are quite clear that the Magistrate was not entitled to initiate proceedings upon facts and information which had already been

KONDA REDDY v. KING-EMPEROR. — ABDUR RAHIM AND NAPIER, JJ.

the subject of enquiry under section 107, or in connexion with charges under the Penal Code brought against the petitioners. The same facts cannot form the subject of repeated proceedings either under the Penal Code or the Criminal Procedure Code. If fresh facts had occurred upon which the Police and the Magistrate were apprehensive that there was a likelihood of a breach of the peace, then, there would have been justification for the initiation of proceedings under section 107. If there had been any such information forthcoming, it was the duty of the Magistrate to set out the substance of such information in the proceedings, but on looking at the preliminary order we find that the information therein referred to is only what had already been before other Magistrates in connexion with other proceedings and had been the subject of orders which must be taken to be final so far as those matters are concerned. The wording of the notice we may also point out in passing is vague to a degree. All that is stated there is that "seven persons headed by Nagireddy Konda Reddy, the first accused, a rich and influential resident of Kaluvoy, and others are addicted to crimes of violence involving a breach of the peace and threatened injury to the lives and property of several persons and there is an imminent danger of a breach of the peace." It does not at all state when these threats were uttered, who are the persons who were threatened and when this apprehension of a breach of the peace arose. We think that the above objection is good in law and the proceedings must be quashed on that ground.

But there is also another valid objection to these proceedings. Under section 107, Criminal Procedure Code, it is the District Magistrate or Subdivisional Magistrate or any Magistrate of the first class, who is informed that a person is likely to commit a breach of the peace, that may require such person to show cause why he should not be bound down. Sub-section (2) says, that

> "proceedings shall not be taken under this section unless the person informed against and the place where the breach of the peace is likely to occur, are within the local limits of the Magistrate's jurisdiction."

From the operation of this provision the District Magistrate is excepted in so far that he can take cognizance of a matter like this, if either the person informed against or the place

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where the breach of the peace is likely to occur is within the local limits of his jurisdiction. Then sub-section (3) empowers a Magistrate who is not authorized to act under sub-section (1) to order the arrest of a person who is likely to commit a breach of the peace, and send him to the Magistrate who is empowered to institute proceedings under the section. These provisions of section 107 seem to us to be very specific and clear in laying down this imperative prohibition with regard to Magistrates, other than a District Magistrate.

Now a Magistrate cannot be said to have taken proceedings under section 107 until he issues notice to the person charged to show cause why he should not be proceeded against under that section. In this case it is clear that the Police reported the matter to the District Magistrate who ordered, without stating that, in his opinion as head of the district, there was a likelihood of a breach of the peace, the case to be transferred to the file of the Headquarters Deputy Magistrate within whose jurisdiction neither the accused resided nor was the place where there was a likelihood of the breach of the peace occurring situate. It was the Headquarters Deputy Magistrate of Nellore that issued notice to the accused under section 107 and he must therefore be taken to have initiated proceedings under that section. It was suggested that, under section 192, the District Magistrate could make over the case to the Headquarters Deputy Magistrate before any notice was issued. Section 192 of the Criminal Procedure Code is a general section which empowers a District Magistrate to transfer any case of which he has taken cognizance, for enquiry or trial, to any Magistrate subordinate to him. In the matter of proceedings under section 107 it could not be said that the District Magistrate to whom the Police reported certain facts had taken cognizance of a case against the accused by reason of that fact alone.

Nor do we think that section 528 of the Criminal Procedure Code empowers the District Magistrate in a case under section 107 to make over the initiation of proceedings to a Magistrate who has no local jurisdiction over the matter. That is a general section which empowers a District Magistrate to withdraw any case or recall any case on the file of a Subordinate Magistrate and make it over to any such Subordinate Magistrate. But section 107 is a specific provision dealing with certain preventive

KONDA REDDY v. KING-EMPEROR.

ABDUR RAHIM AND NAPIER, JJ.

proceedings, and its sub-section (2) expressly prohibits proceedings being instituted except by certain Magistrates. It is the District Magistrate or Subdivisional Magistrate or any other First-class Magistrate who is in executive charge of a certain area that is the best person to judge whether there is a likelihood of a breach of the peace within the local limits of his jurisdiction and whether it is necessary or desirable that preventive proceedings should be taken under section 107. It appears to us that the legislature purposely left it to the discretion of such a Magistrate to say whether proceedings ought to be taken or not, and in this respect the provision of section 107 stands on a very different footing from the provision of section 177. Section 177 says:

"Every offence shall ordinarily be enquired into and tried by a court within the local limits of whose jurisdiction it was committed."

Here the legislature has, advisedly, used the word ordinarily which does not occur in section 107.

This view of the law finds support from a number of rulings; see *Nirbeekar Chandra Mukerjee* v. *The Emperor*(1), *Surjya Kanta Roy Chowdhry* v. *Emperor*(2) and *King-Emperor* v. *Munna*(3). The proceedings, therefore, in this case were without jurisdiction. On this as well as the other ground already mentioned the proceedings must be set aside.

K.R.

(1) (1909) 13 C.W.N., 580. (2) (1904) I.L.R., 31 Calc., 350.
(3) (1902) I.L.R., 24 All., 151.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Kumaraswami Sastriyar.

MASILAMANI MUDALIAR (SECOND RESPONDENT), APPELLANT,

v.

SETHUSWAMI AYYAR AND ANOTHER (PETITIONER AND FIRST RESPONDENT), RESPONDENTS.

1916, November, 28 and December, 12. and 1917 April, 30.

Execution Petition, prayer therein for attachment—Attachment ordered—Failure to pay batta—Presumed oral application at the hearing of the petition to issue warrant of attachment—Whether such application is step in aid of execution—Part-payment entered in the petition—Civil Procedure Code (Act V of 1908), O. XXI, r. 2, cl. 1, whether certificate of payment proved—Limitation Act (IX of 1908), sec. 20, saving of limitation.

Where an assignee of a decree filed a petition for execution on the 13th July 1911 and an order of attachment was made on the day of hearing, the 12th August 1911, and the petition was subsequently dismissed on the 26th August 1911 on his failure to pay batta within the time allowed, and a fresh application was filed on the 10th August 1914,

Held, that, though in the above circumstances, the Court might presume that the decree-holder made an oral application on the day of hearing to proceed with the execution such application was not a step in aid of execution and that the second application filed more than three years after the date of the first was barred by limitation.

Held also, that the part-payment of a decree amount entered in an execution petition, presented within three years from the date of such alleged payment amounts, if the fact of payment is proved, to a certificate of payment under Order XXI, rule 2 of the Code of Civil Procedure, and will operate to save limitation under section 20 of the Limitation Act.

Rajam Aiyar v. *Anantharatnam Aiyar* (1915) 29 M.L.J., 669, *and Lakhi Narain* v. *Felamani Dasi* (1914) 20 C.L.J., 131, referred to.

APPEAL against the order of G. KODANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Tanjore, in Appeal No. 203 of 1915, preferred against the order of K. M. KRISHNA KURUP, the Acting District Munsif of Tanjore, in Execution Petition No. 526 of 1914, in Original Suit No. 379 of 1906, on the file of C. V. VISVANATHA SASTRIYAR, the District Munsif of Kumbakonam.

The necessary facts appear from the judgment of AYLING, J.

* Appeal Against Appellate Order No. 30 of 1916.

MASILAMANI MUDALIAR v. SETHUSWAMI AYYAR.

K. R. Subrahmanya Sastriyar for the appellant.

K. Ramachandra Ayyar for the respondent.

The appeal coming on for hearing the Court delivered the following JUDGMENTS :—

AYLING, J.

AYLING, J.—The first respondent in this case is the assignee decree-holder in Original Suit No. 379 of 1906 on the file of the Court of the District Munsif of Kumbakonam, and the sole question for disposal is whether his Execution Application (Execution Petition No. 526 of 1914) presented on 12th August 1914, was barred by article 182 of the Indian Limitation Act, 1908 (Schedule I). The next previous application of which there is record was Execution Petition No. 385 of 1911, presented on 13th July 1911 ; but the decree-holder relies on the following circumstances to save limitation :—

(1) an oral application in aid of execution presumed to have been made on the 12th August 1911, in the course of the hearing of Execution Petition No. 385 of 1911,

(2) an alleged payment towards the decree on 17th August 1911.

As regards the first, the facts are simple. In Execution Petition No. 385 of 1911, the decree-holder applied for attachment and sale of the judgment-debtor's moveables after issue of the preliminary notice required by Order XXI, rule 22 of the Code of Civil Procedure. Notice was accordingly issued to the judgment-debtor for 12th August 1911. On that date as the judgment-debtor did not appear, attachment order was issued ; but, as the decree-holder failed to pay batta within the time allowed, the petition was dismissed on the 26th August 1911. The Subordinate Judge says :

"It seems to me, looking to the liberal spirit in which acts done by a decree-holder are viewed by the Madras High Court to operate as steps in aid of execution, vide *Abdul Kader Rowther* v. *Krishnan Manamal Nair*(1), it will not be wrong to hold that the decree-holder should be presumed to have made an oral application for issue of a warrant of attachment on 12th August 1911 and this was a step in aid of execution."

Now in my opinion the utmost that can be presumed is that the decree-holder was present in Court on 12th August 1911

(1) (1915) I.L.R., 38 Mad., 695.

MASILAMANI MUDALIAR v. SETHUSWAMI AYYAR.

AYLING, J.

either in person or by pleader and intimated his desire to proceed with execution. He had already asked for attachment in his written application ; and assuming that he repeated his request by word of mouth in Court, I am unable to see any ground for viewing this as fresh step in aid of execution. The point is, not that the application was oral, but that it was the merest repetition, and an entirely superfluous repetition, of an application, which he had already made in writing, and which was pending orders of the Court. None of the cases relied on by the first respondent's vakil seem to me to be of use to him. In the Calcutta Full Bench Case, *Ambica Pershad* v. *Sing Surdhari Lal*(1), there was an application to issue proclamation nearly a year after the attachment, which indeed the judgment-debtor claimed to be no longer subsisting ; and the judgment of GARTH, C.J., makes it quite clear that he held that, without such a fresh application, no further action should have been taken by the Court. In *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu*(2) the batta memorandum was accompanied by a written application ; and the Court laid stress on the fact that the proclamation would not have issued if the batta memorandum had not been put in. *Abdul Kader Rowther* v. *Krishnan Malamal Nair*(3) is a case in which SADASIVA AYYAR and SPENCER, JJ., held that an oral application by a decree-holder for an adjournment to enable him to adduce evidence was a step in aid of execution. This is a view, in which speaking with all deference, I find it impossible to concur ; and, if the facts of that case were similar to those of the present case, I should be inclined to make a reference to a Full Bench. Fortunately they are not : and with the general principle enunciated I have no quarrel, i.e., if even an oral application is for an order which is really a step in aid, it may be treated as within the scope of article 182 of the Indian Limitation Act. I am inclined to think however that such applications will be rare.

The most recent case, *Varadaraja Mudali* v. *Murugesam Pillai*(4) is cited chiefly for the proposition that article 182 of the Indian Limitation Act, 1908, should receive a fair, liberal, and not too technical construction so as to enable the decree-holder to obtain the fruits of his decree. I quite agree : but it seems to me that the danger is, not of too technical construction of the article,

(1) (1884) I.L.R., 10 Calc., 851. (2) (1905) I.L.R., 29 Mad., 399.
(3) (1915) I.L.R., 38 Mad., 695. (4) (1916) 30 M.L.J., 460.

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but that the courts in their anxiety to prevent justice being defeated by technicalities, may introduce so much uncertainty, that it will be most difficult for any party to know whether execution of a decree is barred or not. Where the starting point is the recorded date of presentation of a formal application, we are on sure ground; but if any unrecorded oral intimation of the decree-holder's desire to proceed may be treated as such, the ascertainment of the period will be beset by extraordinary difficulties. I feel confident that nothing of the kind was contemplated by the Legislature and that there is nothing in the Act to support such a construction.

I would therefore hold that the presumed oral application of 12th August 1911 does not save limitation.

It then becomes necessary to consider the second point regarding which the Subordinate Judge decided against the decree-holder on the ground that the payment was not certified to the Court, and, therefore, under Order XXI, rule 2 of the Code of Civil Procedure, could not be taken into account.

The payment is set forth in column 5 of Execution Petition No. 526 of 1914, which was presented within 3 years of the date of the alleged payment. I see no reason why this should not be accepted as a certificate of payment under clause (1) of the rule; for nothing is prescribed in the rule as to the time within which or the manner in which the decree-holder must certify payment—vide *Rajam Aiyar* v. *Anantharatnam Aiyar*(1) and *Lakhi Narain* v. *Felamani Dasi*(2). No doubt a Court will do well to carefully scrutinize evidence of a payment reported in such circumstances, where the fact of payment is denied; but there is no reason why, if proved, such a payment should not be considered in the light of section 20 of the Indian Limitation Act.

I would therefore call for a finding on the following issue from the Court of the Subordinate Judge after taking evidence:

> 'Is the alleged payment of Rs. 25 by the judgment-debtor on 17th August 1911 true? and does it operate to save limitation under section 20 of the Indian Limitation Act'?

Two months will be allowed for submitting the finding and seven days for filing objections.

(1) (1915) 29 M.L.J., 669. (2) (1914) 20 C.L.J., 131.

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KUMARASWAMI SASTRIYAR, J.—I agree and have little to add. I do not think that the *mere* oral repetition of request contained in the execution application is a step in aid of execution. Where, however, several reliefs are prayed for in the execution application, which the Court is not bound to grant concurrently, or, where an application to the Court is made, asking it to exercise its discretion in matters where it is not bound to grant the prayer asked for in the execution application as a matter of course, the fact that the relief asked for orally is already contained in the execution application, would not prevent the oral application from being effective as a step in aid of execution. Order XXI, rule 11 of the Civil Procedure Code, 1908, after providing for an oral application for execution at the time of the passing of the decree requires a written application containing the particulars specified in the order and specifying the mode in which execution is sought. Rule 176 of the Civil Rules of Practice, 1905, only enables a party to apply orally for orders which are necessary to give effect to or work out the prayers contained in the execution application without the necessity for putting in an application in writing for every small step necessary for realizing the fruits of a decree. When the Code requires a written application for execution, it cannot be contended that a mere oral application would be a step in aid of execution, and where a written application is filed as required by the Code, an oral application to the same effect is a mere superfluity.

In order that an oral application may be effective as a step in aid of execution the application must be one which it is necessary to make in order to get the main reliefs prayed for in the execution petition. It must be of such a nature that, if the application were not made, further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application, or by reason of the Code or the rules or practice requiring some further acts to be done before the main reliefs prayed for in the execution application can be granted or enforced.

As regards the payments acknowledged in the execution application the decision of this Court in *Rajam Aiyar* v. *Anantharatnam Aiyar*(1) is clear, and I do not think that the payments

(1) (1915) 29 M.L.J., 669.

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can be ignored as not certified if they were as a matter of fact made. I agree with the order proposed by my learned brother.

In compliance with the above order, the temporary Subordinate Judge of Tanjore submitted a finding that the payment set up was not true and did not operate to save limitation under section 20 of the Indian Limitation Act.

This appeal coming on for final hearing the Court delivered the following

AYLING AND KUMARASWAMI SASTRIYAR, JJ.

JUDGMENT.—We accept the findings and as a result set aside the order of the Subordinate Judge, and direct that the petition be dismissed with costs throughout.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Bakewell.

1917, May, 1.

VAIGUNTATHAMMAL AND ANOTHER (DEFENDANTS NOS. 3 AND 4), APPELLANT,

v.

VALLIAMMAN AMMAL AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. III, r. 1 and O. IX, r. 12—Order of Court directing a party to appear in person—Refusal of the party to comply with the order—Order of Court declaring him ex parte, *legality of.*

A Court is empowered, under Order III, rule 1, of the Civil Procedure Code, to direct the appearance in Court of a party in person and if the party so directed refuses to appear, the Court may declare him *ex parte* even though he has engaged a pleader who is prepared to appear for him in the case.

Satu v. Hanmant rao (1899) I.L.R., 23 Bom., 318, dissented from.

SECOND APPEAL against the decree of S. MAHADEVA SASTRIYAR, the Subordinate Judge of Tuticorin, in Appeal No. 44 of 1915, preferred against the decree of M. ANANTHAGIRI RAO, the

* Second Appeal No. 78 of 1916.

VAIGUNTATHAMMAL v. VALLIAMMAN.

Temporary Additional District Munsif of Tinnevelly, in Original Suit No. 37 of 1914.

The necessary facts appear from the judgment of SADASIVA AYYAR, J.

K. R. Guruswami Ayyar and *A. Subrahmanya Ayyar* for the appellants.

T. R. Venkatarama Sastriyar for the respondents.

SADASIVA, AYYAR, J.

SADASIVA AYYAR, J.—Defendants Nos. 3 and 4 are the appellants in the second appeal. After the issues were settled, which was on the 27th June 1913, the District Munsif on the 15th August 1914 directed the defendants Nos. 3 and 4 to make their appearance in person on the 29th August 1914 to which date the hearing was adjourned. On the said 29th August 1914 defendants Nos. 3 and 4 failed to appear and represented through their vakil that they would refuse to appear even if they were granted time. The learned Munsif, thereupon, on the 29th August 1914, declared them *ex parte* and decided the suit, on the evidence of the plaintiff's husband, in plaintiff's favour. The Subordinate Judge, on appeal, confirmed this decree. Hence this second appeal.

It is to be regretted that the District Munsif did not mention the provision of law under which he acted in calling upon defendants Nos. 3 and 4 to appear in person, nor the provision of law under which, on their failure to do so, he declared them *ex parte*. The learned Subordinate Judge has also failed to state the provision of law under which, according to him, the Munsif acted in calling upon defendants Nos. 3 and 4 to appear in person, though he considered that the decree *ex parte* was granted under Order XVII, rule 3, Civil Procedure Code. I do not see how Order XVII, rule 3, has any application to the circumstances of this case. As my learned brother pointed out during the course of the argument, I think the direction to defendants Nos. 3 and 4 to appear in person must be deemed to have been made under Order III, rule 1, Civil Procedure Code. That rule empowers the Court to make an order that

"any appearance required or authorized by law to be made by a party shall be made by the party in person."

Now, the appearance for 29th August 1914 was one which was authorized by law to be made by the party and such appearance for that particular date could be directed by the Court under this

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provision to be made in person. Then, we came to Order IX, rule 12, which provides that if a party who has been ordered to appear in person does not appear in person, or show sufficient cause to the satisfaction of the Court for failing to appear in person, he might be treated as not appearing even though (I take it), he had engaged a pleader who had appeared and was then prepared to appear for him in the case. In this view, it is unnecessary to resort to the principle indicated by me (sitting as a single Judge) in *Anni Ammal* v. *MuthukumaraChettiar* (1) namely that, even if not empowered by any specific provision found in the Civil Procedure Code, the Court has inherent power to order a party to appear in person if it considers it necessary to do so in the interests of justice. That Order IX, rule 12, applies to all cases where a party has been ordered to appear in person is clear from the fact that the words "under the provisions of section 66" (corresponding to Order V, rule 3) "or section 436" (correspondent to Order XXIX, rules 2 and 3) appearing in the corresponding section 107 of the old Civil Procedure Code have been deliberately omitted from Order IX, rule 12. Cases decided under section 107 of the old Code [for example, *Satu* v. *Hanmantrao*(2)] are, therefore, no authorities on the construction of Order IX, rule 12, so far as this point is concerned. The other contentions put forward on behalf of the appellants need not be dealt with in detail, there being nothing in them. I would, therefore, dismiss this second appeal with costs.

BAKEWELL, J.

BAKEWELL, J.—A party is bound to attend the Court whenever so required, and although ordinarily he may fulfil this obligation by means of an agent, if the Court so directs he is bound to attend in person. (Order III, rule 1, Civil Procedure Code.) If the evidence of the party is required, a summons can be issued in the same manner as to a stranger to the suit; but when the parties are before the Court either personally or by their pleader, it is competent for the Court to direct them orally to attend without a summons. The provisions of Order IX, rule 12, are perfectly general and are evidently framed for the purpose of dealing with obstructive tactics and of enabling the Court to proceed against any party who does not attend. The diary in the present case shows that there were numerous adjournments

(1) (1912) 23 M.L.J., 676.

(2) (1899) I.L.R., 23 Bom., 318.

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for the purpose of settlement and for other reasons and it may well have been that the District Munsif thought that he should put a stop to these tactics and have the parties before him personally. I think that he was perfectly right in proceeding under his rule. With regard to the provisions of Order X on which the learned vakil for the appellants relied, I think that they relate primarily to the ascertainment of points in dispute and may point out that they do not refer to the administration of an oath or provide for the examination or cross-examination of parties. I must respectfully dissent from the decision in *Satu* v. *Hanmantrao*(1). With regard to the merits of the case, the plaintiff set up a possessory title under which she and all the defendants claimed the property as owners in common, and I think the evidence was sufficient to support the plaintiff's claim. I agree that this second appeal should be dismissed with costs.

S.V.

APPELLATE CIVIL—FULL BENCH.

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

MARTURU SUBBAMMA (DEFENDANT), APPELLANT,

v.

GADDE NARAYYA (PLAINTIFF), RESPONDENT.*

1917, April, 4 and 11 and October, 8, 9 and 12

Transfer of Property Act (IV of 1882), ss. 58 (a) and (d), 67 and 68 (c)— Usufructuary mortgage—Failure of mortgagor to deliver possession—Right of mortgagee to sue for sale.

Held, by the Full Bench :—Where a mortgagor fails to deliver possession to his mortgagee, the mortgage is not a usufructuary mortgage within the meaning of section 58 (*d*) of the Transfer of Property Act, and the mortgagee is entitled to bring a suit for sale of the mortgaged property.

Sections 58 (*a*) and (*d*), 67 and 68 (*c*) of the Transfer of Property Act referred to.

Ram Narayan Singh v. *Adhindra Nath Mukherji* (1917) I.L.R., 44 Calc., 883 (P.C.), followed.

Arunachalam Chetti v. *Ayyavayyan* (1898) I.L.R., 21 Mad., 476 (F.B.), overruled.

(1) (1899) I.L.R., 23 Bom., 318.

*Second Appeal No. 1672 of 1915 (F.B.).

SUBBAMMA v. NARAYYA.

SECOND APPEAL against the decree of J. C. FERNANDEZ, the District Judge of Guntūr, in Appeal No. 339 of 1913, preferred against the decree of L. NARAYANA AYYAR, the District Munsif of Tenali, in Original Suit No. 45 of 1913.

This was a suit brought in 1912 for sale of property usufructuarily mortgaged by the defendant to plaintiff on 15th March 1902, for Rs. 75, on the allegation that the defendant did not give him possession. The defendant pleaded *inter alia* that plaintiff was put in possession of the mortgaged property and was therefore not entitled to sue for sale and that the mortgage amount was discharged from the usufruct. The Court of first instance held on the authority of *Arunachalam Chetti* v. *Ayyavayyan*(1) that the plaintiff being a usufructuary mortgagee, pure and simple, was not entitled to sue for sale and was also barred by article 120 of the Limitation Act from suing for sale, more than six years having elapsed from the time when defendant failed to give possession. On appeal by the plaintiff, the District Judge held that the mortgage deed did not contain a covenant to pay that the defendant never put the plaintiff in possession, and that the plaintiff was entitled to sue for sale. The defendant preferred this second appeal to the High Court.

The mortgage document ran as follows :—

"EXHIBIT A.

The mortgage deed of immoveable property executed on the 15th of May, 1902, by Subbamma . . . in favour of Gadde Narasayya Garu . . . .

I borrowed from you for my own necessities. . . . Rs. 75. I have borrowed seventy-five rupees and the interest upon it is at the rate of Rs. 1-9-0 (one rupee nine annas, per cent). For the principal and interest upon this, you shall, out of the mortgaged property detailed below, deduct from the income upon my half share in the Sngupalam inam after meeting the expenses, the interest first and then, if anything remains, it shall go to reduce the principal. The mortgage for this is the inam land of acres 3 and 73 cents . . . I have not as yet mortgaged or otherwise alienated the aforesaid property. I herewith give to you the said inam sale-deed, which was executed in my favour by Dhanikonda Ramaswamy

(1) (1898) I.L.R., 21 Mad., 476 (F.B.).

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Garu. Therefore, as soon as the said debt is discharged I shall take back the said sale-deed. This deed of mortgage of dry inam and backyard compound is executed with my consent.

(Signed) Maruturu Subbamma."

V. Ramadoss for the appellant.

K. V. L. Narasimham for the respondent.

This Second Appeal coming on for hearing in the first instance before SESHAGIRI AYYAR and KUMARASWAMI SASTRIYAR, JJ., the following ORDER OF REFERENCE TO A FULL BENCH was made by

KUMARA-SWAMI SASTRIYAR, J.

KUMARASWAMI SASTRIYAR, J.—As regards the contention that there is a covenant to pay in respect of the mortgage of item No. 1, we must overrule it, having regard to *Ram Narayan Singh* v. *Adindra Nath Mukherji*(1) and *Hakeem Patte Muhammad* v. *Shaik Davood*(2). Consequently section 68, clause (*a*) of the Transfer of Property Act, is not applicable. The further question is whether in the events which have happened, the mortgagee is not entitled to bring item No. 1 to sale. The mortgagor covenanted to put the mortgagee in possession, and the finding is that he has broken the covenant. Therefore section 68, clause (*c*) of the Transfer of Property Act, applies.

Mr. Ramadoss argued that the failure to give possession, although it may give a right to the mortgage money, would not enable the mortgagee to sue for the sale of the property. He is supported in his contention by *Arunachalam Chetti* v. *Ayyavayyan*(3) and by the cases following that decision. On the other hand the recent decision of the Judicial Committee in *Ram Narayan Singh* v. *Adhindra Nath Mukherji*(1) seems to suggest that the failure to fulfil the conditions mentioned in clauses (*b*) and (*c*) of section 68 would ensure the same legal consequences as may be enforced under clause (*a*).

The right to sue for sale under a covenant to pay the mortgage money is provided for by section 67 of the Transfer of Property Act. As at present advised, we fail to see why that section should not be appealed to where there is a default under

(1) (1917) I.L.R., 44 Calc., 388. (2) (1916) I.L.R., 39 Mad., 1010.
(3) (1898) I.L.R., 21 Mad., 476 (F.B.).

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clauses (*b*) and (*c*) of section 68. *Arunachalam Chetti* v. *Ayyavayyan*(1) seems to proceed on the footing that the ordinary right of a usufructuary motgagee to realize the monies due to him is to claim possession. In other words, notwithstanding the fact that the mortgagor refuses to perform his part of the contract, the mortgagee is only entitled to specific performance of the contract and is precluded from claiming any other relief. We think this position requires reconsideration. The Judicial Committee by saying that accounts might have to be taken in the case already referred to impliedly recognize the mortgagee's right to sue for the sale of the property and we think that the restriction on the mortgagee's right enunciated in *Arunachalam Chetti* v. *Ayyavayyan*(1) is not justifiable.

Under these circumstances, we must refer the following question for the decision of the Full Bench :—

"Whether a usufructuary mortgagee is not entitled to sue for the sale of the property mortgaged to him when the mortgagor fails to deliver possession of the said property to him and has consequently to sue for the money."

ON THIS REFERENCE—

V. Ramadoss for the appellant.—The mortgage does not contain any covenant to pay and it is purely a usufructuary mortgage and as there is no contract to the contrary, the mortgagee has no right to sue for sale ; see *Arunachalam Chetti* v. *Ayyavayan*(1) and section 67 (*a*) of the Transfer of Property Act. The mortgagee has also no charge ; *Ram Narayan Singh* v. *Adhindra Nath Mukherji*(2). Reference was also made to *Lazarannessa Bibi* v. *Mahomed Jaffar*(3), *Luchmeshar Singh* v. *Dookh Mochan Jha*(4), *Kangaya Gurukal* v. *Kalimuthu Annavi*(5), *Perianna Servaigaran* v. *Marudainayagam Pillai*(6) and *Samayya* v. *Nagalingam*(7).

K. V. L. Narasimham for the respondent.—As possession was not given, the plaintiff was not a usufructuary mortgagee, but is only a simple mortgagee ; see the definition of 'usufructuary mortgage' in section 58 (*d*) of the Act. Section 67 (*a*)

(1) (1898) I.L.R., 21 Mad., 476 (F.B.).
(2) (1917) I.L.R., 44 Calc., 388.
(3) (1912) 13 I.C., 336.
(4) (1897) I.L.R., 24 Calc., 677.
(5) (1904) I.L.R., 27 Mad., 526 (F.B.).
(6) (1899) I.L.R., 22 Mad., 332.
(7) (1892) I.L.R., 15 Mad., 174.

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cannot apply as the restriction therein contained refers only to a usufructuary mortgagee 'as such.' The words 'as such' must be given their due meaning. The property has been secured for the money ; see the definition of 'mortgage money' in section 58 (*a*) of the Act. On failure to give possession the mortgage money has become payable according to section 68 (*c*) of the Act ; and the mortgagee is entitled to sue for sale and realize his money by sale of the property : see *Venkatarao* v. *Mahableshwar*(1) and *Bihari Lal* v. *Deoki Nandal Lal*(2).

The Court expressed the following OPINIONS :—

WALLIS, C.J.

WALLIS, C.J.—I agree with the referring Judges and answer the question in the affirmative. A mortgagee does not become a usufructuary mortgagee within the meaning of section 58 (*d*) until the mortgagor has given him possession of the mortgaged property and so put him in a position to realize his security out of the accruing rents and profits. It is because the intention is that the security shall be realized in this manner that by section 67, proviso (*a*), a usufructuary mortgagee as such is debarred from suing for foreclosure or sale under the section. A mortgagee to whom possession has not been given is not a usufructuary mortgagee. Consequently he does not come within the proviso and is entitled to sue for foreclosure or sale under the section, in the absence of a contract to the contrary, "at any time after the mortgage money has become payable to him." Section 68 entitles the mortgagee to sue the mortgagor for the mortgage money,

> "where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person."

The first of these events having happened, the mortgagee has become entitled to sue for the mortgage-money, or in other words, the mortgage-money has become payable to him, and he is entitled under section 67 to sue for foreclosure or sale, in the absence of a contract to the contrary which cannot be implied. On the contrary the fact that the mortgagor was unable to put the mortgagee in a position to realize his security out of the rents and profits makes it only reasonable that he should be

(1) (1902) I.L.R., 26 Bom., 241.
(2) (1914) 24 I.C., 867.

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WALLIS, C.J.

remitted to the ordinary remedies of a mortgagee by foreclosure or sale, and the legislature has recognized this by making the mortgage money payable in this event. He has advanced his money on the security of the mortgagor's interest in the property, and mortgagor has failed to perform his part of the contract by putting him in possession and enabling him to realize his security in that manner, and there is no reason why he should not be allowed to realize it by bringing the mortgagor's interest to sale if he so desires or for requiring him to undergo the expense and trouble of litigation with third parties unless he is content to lose his security. These aspects of the question appear to have been overlooked in *Samayya* v. *Nagalingam*(1) and *Arunachalam Chetti* v. *Ayyavayyan*(2). In *Ram Narayan Singh* v. *Adhindra Nath Mukherji*(3) the Judicial Committee observed:

> "It must also be borne in mind that if the mortgagor be in the first instance under no personal liability, such liability may arise under section 68 (*b*) or (*c*) of the Transfer of Property Act."

As pointed out in the Order of Reference, once the mortgage-money becomes payable under any clause in section 68, there can be no reason for refusing to give effect to section 67 which allows of a suit for foreclosure or sale "at any time after the mortgage money has become payable" except in certain cases of which this is not one.

I accordingly answer the question in the affirmative.

AYLING, J.

AYLING, J.—I concur.

KUMARASWAMI SASTRIYAR, J.

KUMARASWAMI SASTRIYAR, J.—I agree and have nothing useful to add to what I have said in the ORDER OF REFERENCE.

N.R.

(1) (1892) I.L.R., 15 Mad., 174. (2) (1898) I.L.R., 21 Mad., 476 (F.B.).
(3) (1917) I.L.R., 44 Calc., 388 at p. 400.

APPELLATE CIVIL—FULL BENCH.

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

ANNAMALAI CHETTIAR (TWENTY-FIFTH DEFENDANT), APPELLANT,

v.

PALAMALAI PILLAI AND TWO OTHERS (PLAINTIFFS NOS. 2 TO 4), RESPONDENTS.*

1917, March, 27 and 28, April, 18, and October, 9, 10 and 26.

Civil Procedure Code (Act V of 1908), sec. 64, Expl., effect of—Attachment of land by one decree-holder—Application for rateable distribution by other decree-holders—Satisfaction of attaching decree-holder's decree by subsequent private alienation of the land attached—The other decree-holders cannot impeach the alienation.

Where a decree-holder attached land in execution of his decree and the other decree-holders applied for rateable distribution without attaching the land in execution of their decrees and subsequently the judgment-debtor alienated the land and paid off the attaching decree-holder.

Held by the Full Bench, that the other decree-holders were not entitled to question the alienation under section 64 of the Civil Procedure Code.

Mina Kumari Bibi v. *Bijoy Singh Dudhuria* (1917) I.L.R., 44 Calc., 662 (P.C.), relied on.

Effect of Explanation to section 64, Civil Procedure Code, considered.

SECOND APPEAL against the decree of E. H. WALLACE, the District Judge of Tanjore, in Appeal No. 40 of 1914, preferred against the decree of A. S. BALASUBRAHMANYA AYYAR, the Subordinate Judge of Kumbakonam, in Original Suit No. 2 of 1912.

The facts are given in the first paragraph of the ORDER OF REFERENCE of SESHAGIRI AYYAR, J.

Hon. Mr. *S. Srinivasa Ayyangar, the Advocate-General*, and *K. Raja Ayyar* for the appellant.

Hon Mr. *T. Rangachariar, E. Duraiswami Ayyar* and *K. R. Narayanaswami Ayyar* for the respondents.

This Second Appeal came on for hearing in the first instance before SESHAGIRI AYYAR and BAKEWELL, JJ., who made the following ORDERS OF REFERENCE to a Full Bench:—

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The twenty-ninth defendant was heavily indebted and a large number of decrees were passed

* Second Appeal No. 990 of 1915 (F.B.).

against him. A number of execution applications were presented under those decrees. We are concerned at present only with three of them, namely applications in the decree in Original Suit No. 22 of 1909, in the decree in Original Suit No. 8 of 1910 and the decree obtained by the twenty-fifth defendant in Original Suit No. 32 of 1909. The allegation of this last decree-holder is that the twenty-ninth defendant with a view to defraud him and the other creditors executed a sale-deed nominally in favour of the plaintiff. The deed is dated the 15th June 1910. When an application for attachment was made against the properties in suit, the plaintiff put in a claim petition alleging that they were his and that they should be released from attachment. The Subordinate Judge of Kumbakonam held that the claim was fraudulent and dismissed it. Thereupon the present suit was instituted for a declaration that the sale is valid. The first Court held that no consideration passed for the sale and that the plaintiff and the twenty-ninth defendant colluded together to defraud the creditors. On appeal, the District Judge differed from the Subordinate Judge on this question and held that the sale was supported by consideration. Hence this Second Appeal by the twenty-fifth defendant. The learned Advocate-General does not contest the finding as to consideration. He contended that even on that finding, the sale should be held invalid. The question of law now argued was raised in both the lower Courts, but has not been adequately dealt with by either of them. The contention of the learned Advocate-General is that as at the time of the sale to the plaintiff an attachment of the properties was subsisting, although his client was not the attaching creditor, he is entitled to take advantage of the attachment as his client had applied under section 73 of the Code of Civil Procedure for rateable distribution. The attachment referred to was in Original Suit No. 22 of 1909. Exhibit DDD is the execution application. On that application the properties were attached on the 22nd January 1910. On that day, the application was adjourned for taking further steps to the 9th February 1910. The application was ultimately dismissed on the 29th March 1910. The contention of Mr. Rangachariar, the learned vakil for the respondents, is that this dismissal operated to put an end to the attachment made in January 1910 and that therefore at the time of the sale to the plaintiff, there was no subsisting

attachment. It may be mentioned that against this dismissal the decree-holder in Original Suit No. 22 of 1909 appealed to the High Court. The order of the High Court is Exhibit DDD2. The dismissal was confirmed. It was argued before us that the appeal was really withdrawn. But as the matter has not been enquired into, I prefer not to express any opinion on that question. Notwithstanding the dismissal of the petition by the Subordinate Judge and the dismissal of the appeal by the High Court, the properties were directed to be sold under the original execution application. Thereupon the present plaintiff put in a claim petition, Exhibit VIIc, for releasing the property from attachment and to prevent the threatened sale. The claim was enquired into by the Subordinate Judge and it was contended before him that the attachment ceased to exist by the dismissal of the petition on the 29th March 1910. He, however, held that the attachment subsisted. It may be that this conclusion is not *res judicata* as the present appellant was not a party to the proceedings. It has, however, to be found whether there was default on the part of the decree-holder and whether in consequence of that default, his application was dismissed. Consequently, if it is necessary to express a final opinion on that question, I would ask the lower Court to return a specific finding as to whether the dismissal of the 29th March 1910 was due to want of prosecution on the part of the decree-holder in Original Suit No. 22 of 1909. Another disputed point should also be mentioned before dealing with the question of law. The present appellant's decree was obtained in Original Suit No. 32 of 1909. It is dated the 22nd September 1909. He applied for execution on the 4th January 1910. It is said that this application also was dismissed for want of prosecution and that therefore on the date of the sale to the plaintiff, the twenty-fifth defendant's application for rateable distribution was not pending. That question again has not been considered by the Courts below. They seem to have taken it for granted that he would be entitled to rateable distribution. It may become necessary to call for a definite finding on this question as well.

As regards the attachment in Original Suit No. 8 of 1910, it is enough to point out that that was issued by the District Court of Tanjore, and as neither the twenty-fifth defendant nor the other decree-holders had their decrees transferred to the District

Court, the attachment under that decree is of no value to them.

Now I proceed to consider the question of law argued by the learned Advocate-General. The contention of the learned vakil for the respondents was that as the decree in Original Suit No. 22 of 1909 was satisfied in September 1911, the sale to his client was not obnoxious to section 64 of the Code. Broadly put, Mr. Rangachariar's reasoning is that in order that a private alienation during the pendency of an attachment may be caught by section 64, the particular attachment under which the twenty-fifth defendant and the other decree-holders claim should have resulted in the realization of the assets. If the matter were *res integra*, and if I were not hampered by precedents, I would have found great difficulty in accepting this contention. In my opinion, the legislature by section 73 has enabled decree-holders other than the one who attaches the property to reap the benefit of his labours, provided they comply with certain requirements. The attaching decree-holder is *dominus litis*. He alone can apply to bring the property to sale, and he is entitled in the first instance to get his expenses paid out of the sale-proceeds. Subject to this reservation, he holds no higher position than the other decree-holders who have applied for rateable distribution prior to the realization of the assets. The object is on the one hand not to harass the judgment-debtor by too many applications for attachment by decree-holders, and on the other, to relieve the various decree-holders from the necessity of applying for separate attachments when their object can be gained by taking shelter under a pre-existing attachment. Such an attachment, although it does not prevent the decree-holders from separately attaching the property secures to them a benefit without themselves attaching the properties. Consequently, the attaching creditor is in a sense the representative of all the other decree-holders.

The language of the section as well as of the explanation suggests that if at the time of the private alienation there was a subsisting attachment, all persons who could have enforced their claim for rateable distribution should have the benefit of such an attachment. In the explanation, the language is 'claims enforceable under an attachment' and not 'enforced under an attachment.' The other construction would enable an attaching

decree-holder to enter into a fraudulent compromise with the judgment-debtor and the private alienee and thus defeat all the claims for rateable distribution. I do not think the legislature contemplated such a state of affairs; but the course of decisions under section 276 of the old Code of Civil Procedure and under section 64 of the new Code are all one way. Under the old Code, there were two classes of decisions. In the one, it was held that it is the attaching decree-holder alone that can avoid a private alienation. *Manohar Das* v. *Ram Autar Pande*(1) has taken this view. The other view was that all persons who would be entitled to rateable distribution have the right to impeach a private alienation if the attachment under which they claim was subsisting. The able and exhaustive judgment of Mr. Justice TELANG in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(2) enunciates this proposition. In that judgment, the learned Judge discussed *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*(3) and *Ganga Din* v. *Khushali*(4) where it was held that if the attachment ceased to have force by the decree being satisfied, other decree-holders could derive no benefit under it. Mr. Justice TELANG apparently accepted this view as correct. The same view was held in Madras under the old Code: *Kunhi Moossa* v. *Makki*(5), *Vibudhapriya Tirthaswami* v. *Yusuf Sahib*(6) and *Venkatrama Iyer* v. *Esumsa Rowthen*(7). In this state of the authorities the Act of 1908 was passed and it introduced the explanation to section 64 which did not exist under the old Code. It is clear that the legislature intended to uphold the view of Mr. Justice TELANG, as against the view of the Allahabad Judges in *Manohar Das* v. *Ram Autar Pande*(1). If the legislature intended to go further, the language could certainly have been clearer. It must be noticed that until the new Act was passed, there was no decision which went to the length of holding that even though the decree of the attaching creditor had been satisfied, still the other decree-holders would be entitled to impeach the private alienation, provided at the time of the private alienation, they had applied for rateable distribution. The natural inference to be drawn from the action of the legislature is that the

(1) (1908) I.L.R., 25 All., 481. (2) (1892) I.L.R., 16 Bom., 91.
(3) (1888) I.L.R., 15 Calc., 771. (4) (1885) I.L.R., 7 All., 702.
(5) (1900) I.L.R., 23 Mad., 478. (6) (1905) I.L.R., 28 Mad., 380.
(7) (1910) I.L.R., 33 Mad., 429.

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explanation to section 64 was intended to give legislative sanction to the view enunciated by Mr. Justice TELANG in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1) and no more. Since the explanation, there have been some decisions in Bombay. The other High Courts have not dealt with the question. In *Khushalchand* v. *Nandram Sahebram*(2), in *Jetha Bhima & Co.* v. *Lady Janbai*(3) and in *Jetha Bhima & Co.* v. *Lady Janbai*(4) the learned Judges of the Bombay High Court have held that if the decree under which an attachment was made was satisfied, other decree-holders who had applied for rateable distribution will not be entitled to impeach the alienation. In *Bibi Miyakhan* v. *Gulabchand*(5), apparently, a different view was taken. But it is pointed out in *Jetha Bhima & Co.* v. *Lady Janbai*(3) by Mr. Justice BEAMAN that the learned Judges who decided *Bibi Miyakhan* v. *Gulabchand*(5) disclaimed any intention of enunciating the proposition imputed to them. Moreover one of the learned Judges who took part in *Bibi Miyakhan* v. *Gulabchand*(5) was a party to the decision in *Khushalchand* v. *Nandram Sahebram*(2) and in *Jetha Bhima & Co.* v. *Lady Janbai*(4). Under these circumstances, I would have held that as the decree in Original Side No. 22 of 1909 was satisfied, the twenty-fifth defendant and persons like him are not entitled to question the private alienation made in favour of the plaintiff. But my learned brother is inclined to take a different view, and as I have said before, the language of the section and reason and justice are in favour of the broader proposition contended for by the learned Advocate-General.

Since writing the above, I came across the decision of the Judicial Committee in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(6). Although the decision was under the old Code, in the argument, Counsel referred to the new Code as well. The Board seem to doubt the correctness of *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1). Further they lay down that an attachment which does not finally fructify is of no avail. I drew the attention of my learned colleague to this judgment. He thinks that as the decision was under the old Code, it is not

(1) (1892) I.L.R., 16 Bom. 91.
(2) (1911) I.L.R., 35 Bom., 516.
(3) (1912) 14 Bom. L.R., 511.
(4) (1914) I.L.R., 37 Bom., 138.
(5) (1911) 13 Bom. L.R., 1189.
(6) (1917) I.L.R., 44 Calc., 662 (P.C.).

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binding on us, having regard to the explanation added to the new Code. I would, therefore, refer for the decision of the Full Bench the following question :—

" Whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise are entitled to question a private alienation made during the continuance of such attachment ? "

BAKEWELL, J.—In order that a judgment-creditor may obtain a rateable distribution of assets of his debtor, he must have applied for execution of his decree to the Court by which the assets are held before the receipt thereof. This claim may therefore be made either before or after property of the debtor has been attached and must be made before the proceeds of that property have been received by the Court, but it subsists independently of the attachment. Where assets result from the sale of immoveable property, any person entitled to share in a rateable distribution thereof may apply to the Court to set aside the sale (Order XXI, rule 90); and, since an order setting aside a sale destroys the fund in which he claims a share, I think that such a person's interests are affected within the meaning of rule 92 and that he should be given notice of an application for such an order. For the purposes therefore of challenging and upholding a sale of his debtor's property a person entitled to rateable distribution may become a party to proceedings instituted by a rival judgment-creditor.

BAKEWELL, J.

The Code does not declare the procedure to be observed upon the distribution of assets, but since it is a general principle that all persons interested in a fund are entitled to appear and to be heard when it is dealt with, and since a person cannot complain that his interests have been neglected if he has failed to bring them to the notice of the Court and the other claimants, I think that each claimant should present an application in the execution proceedings instituted for the realization of assets and should give notice thereof to the decree-holder who is prosecuting them. He will then be entitled to notice of any application relating to the assets and to this extent at least is in the position of a party to the execution proceedings. As my learned brother has pointed out, this procedure avoids multiplicity of proceedings in

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execution of decrees against the same debtor and the resulting complications. An attachment of immoveable property is effected by an order prohibiting the debtor from dealing with the property and all persons from taking any benefit from such dealing, and by a proclamation and publication of this order intended to give notice thereof to all persons interested. *Prima facie* a public injunction of this kind should only be dissolved by an express order of the Court upon notice to the parties interested. The explanation to section 64 of the Code declares that the words used therein "claims enforceable under the attachment" include "claims for the rateable distribution of assets," and accordingly I think that the section should be read as providing that where an attachment has been made, any private transfer of the property attached shall be void as against all claims enforceable under the attachment or for the rateable distribution of assets to be realized thereunder.

Having regard to the above provisions, I think that it was the intention of the legislature to place claimants for rateable distribution of assets as far as possible in the same position as the decree-holder who is actively prosecuting the proceedings from which all expect to benefit and no order should be passed by the Court which may affect their interests without notice to them, such, for instance, as an order raising an attachment or directing satisfaction to be entered of the decree which is in course of execution.

The Bombay cases and the decision in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1), which have been cited, were with reference to the Code of 1882, from which the present Code differs largely both in form and matter, and with all respect I deprecate the use of decisions under the former law for the purpose of construing a comprehensive enactment such as the Code of Civil Procedure when the provisions construed are not identical.

I agree with the reference proposed by my learned brother.

ON THIS REFERENCE—

K. Raja Ayyar for the appellant.—Decree holders who have not attached but who are entitled to rateable distribution are

(1) (1917) I.L.R., 44 Calc., 662 (P.C.).

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entitled to all the benefits of the attachment effected by another decree-holder. Hence if an alienation is made pending the attachment, that alienation is void as against all the other decree-holders entitled to rateable distribution, even though the attaching decree-holder is thereafter satisfied; vide Explanation to section 64, Civil Procedure Code; *Lakshmi* v. *Kuttunni*(1) and *Mohunt Megh Lall Pooree* v. *Shib Pershad Madi*(2). As to what 'assets' mean, see *Narasimhachariar* v. *Krishnamachariar*(3). He referred to *Mina Kumari Bibi* v. *Bejoy Singh Dudhuria*(4). The respondent has prevented the realization of the assets by means of the private alienation. The word is '*enforceable*.' The claim of others will be enforceable if the attachment had been followed by sale, etc., in the normal course. [He was stopped.]

Hon. Mr. *T. Rangachariar* for the respondents.—The explanation to section 64 is only nominally new; the decisions under the old Civil Procedure Code proceeded on the view of the law as now laid down by the explanation. All decree-holders are entitled to attach; unless each is vigilant and himself attaches, he will not have the benefit of another's attachment if that other is otherwise satisfied and his attachment consequently ceases. The Privy Council point out that there is only one attachment; vide *Mina Kumari Bibi* v. *Bejoy Singh Dudhuria*(4). The right given by section 73 fructifies only when assets are held by a Court. Assets can be realized or held by a Court only if there is a sale and there can be a sale only if there is an attachment; vide *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(5), *Kunhi Moossa* v. *Makki*(6) and *Vibudhapriya Tirthaswami* v. *Yusuf Sahib*(7). The difference between the old and new Codes is only verbal. Effect must also be given to Order XXI, rule 69, which enacts that if the decree amount is paid into Court, the sale shall be stopped. See also Order XXI, rules 89, 55 and 57. The claims will be 'enforceable' only if assets are realized; vide *Jetha Bhima & Co.* v. *Lady Janbai*(8), *Venkatrama Iyer* v. *Esumsa Rowthen*(9), *Khushalchand* v.

(1) (1887) I.L.R., 10 Mad., 57. (2) (1881) I.L.R., 7 Calc., 34.
(3) (1915) 26 M.L.J., 406. (4) (1917) I.L.R., 44 Calc., 662 (P.C.).
(5) (1892) I.L.R., 16 Bom., 91 at p. 105.
(6) (1900) I.L.R., 23 Mad., 478. (7) (1905) I.L.R., 28 Mad., 380.
(8) (1913) I.L.R., 37 Bom., 138 at p. 142.
(9) (1910) I.L.R., 33 Mad., 429.

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Nandram Sahebram(1), *Galstaun* v. *Woomes Chundra Bonnerjee*(2) and *Sorabji Coovarji* v. *Kala Reghunath*(3). This is only a question of procedure and there must be uniformity. See also *Jetha Bhima & Co.* v. *Lady Janbai*(4). The case against my position is *Bibi Miyakhan* v. *Gulabchand*(5). Other cases in favour of my position are *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*(6) and *Gouri Dutt* v. *Amar Chand*(7). *Katum Sahiba* v. *Hajee Badsha Sahib*(8) holds that assets mean assets realized in execution.

[KUMARASWAMI SASTRIYAR, J.—The word is 'enforceable' in the Explanation to section 64. Enforceable when? Is it not on the date of 'alienation'?]

No; at the date when the validity of the alienation subsequently comes into question. The alienation is not void but only voidable, see *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*(9) and *Gosta Behari* v. *Sankar Nath*(10). Once the attachment is withdrawn by payment the alienation becomes valid; see *Umesh Chunder Roy* v. *Raj Bullabh Sen*(11). See the form of the order of attachment in Civil Procedure Code, viz., Form No. 24. The claim for rateable distribution is dependent or contingent upon the attachment.

K. Rajah Ayyar in reply.—The claims enforceable under the attachment include the claim of the attaching creditor and of the other decree-holders. The alienation is void against all claims, whatever may become of the attachment. If we look to Order XXI, rule 90, a person entitled to share can set aside a sale though he applies after sale but before the assets are realized; *Hafez Mahomed Ali Khan* v. *Damodar Pramanick*(12) and *Maharaja of Burdwan* v. *Apurba Krishna Roy*(13). But the people who would be entitled to the benefit of section 64 are only those who applied before the alienation. If there are two attachments and other persons have applied for rateable distribution between the two, then they are entitled to rateable

(1) (1911) I.L.R., 35 Bom., 516. (2) (1917) I.L.R., 44 Calc., 789.
(3) (1912) I.L.R., 36 Bom., 156 at p. 163.
(4) (1912) 14 Bom. L.R., 511. (5) (1911) 13 Bom. L.R., 1189.
(6) (1888) I.L.R., 15 Calc., 771. (7) (1911) 15 C.L.J., 49.
(8) (1915) I.L.R., 38 Mad., 221 at p. 224.
(9) (1902) I.L.R., 29 Calc., 154. (10) (1916) 36 I.C., 510.
(11) (1882) I.L.R., 8 Calc., 279 at p. 281.
(12) (1891) I.L.R., 18 Calc., 242. (13) (1911) 14 C.L.J., 50.

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distribution even if the first attachment is taken away or withdrawn. The argument based on Order XXI, rules 54, 55 and 57 is useless as they do not deal with the effect of alienation. Under section 73, Civil Procedure Code, the claims do not depend upon the attachment but upon money coming into Court by whatever means. Section 63, Civil Procedure Code, shows that an attaching creditor is a trustee for others. Section 73 aims against multiplicity of attachments and proceedings thereon. A second attachment of the same property is unnecessary. The mischief against which section 64 was enacted will be allowed full play if the other argument is accepted; for a judgment-debtor having several decrees against him may combine with a decree-holder for a very small sum and by paying him by a private alienation can defeat all the others. The Privy Council case of *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) was one for possession and was under the old Code and it does not decide anything in favour of the opposite view. The Explanation to section 64, Civil Procedure Code, was added expressly to overrule *Manohar Das* v. *Ram Autar Pande*(2) and *Ramakrishna Reddi* v. *Kotta Kota Reddi*(3) and the Calcutta cases quoted by the other side. The other cases quoted by the other side were explained and distinguished on the ground that all of them were decided under the old Code.

The Court expressed the following OPINIONS:—

WALLIS, C.J.

WALLIS, C.J.—The question is as to the effect of the explanation added to section 64 (formerly section 276) of the Code of Civil Procedure of 1908 that for the purposes of the section "claims enforceable under an attachment include claims for the rateable distribution of assets." It had been held by the Courts in India that decree-holders other than the attaching decree-holder acquired no right to rateable distribution under section 295 (now 73) of the Code until assets had been realized in execution, and Sir LAWRENCE JENKINS delivering the judgment of the Judicial Committee has observed in the recent case of *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1):

"To bring section 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court."

(1) (1917) I.L.R., 44 Calc., 662 (P.C.).
(2) (1903) I.L.R., 25 All., 431. (3) (1907) I.L.R., 30 Mad., 96 at p. 100.

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Applying this principle the Indian Courts held under section 276 that, if the judgment-debtor has satisfied the claim of the attaching decree-holder even by alienating the attached property, that does not give the other decree-holders who have applied for execution any right to question the alienation; and in the case referred which was decided with reference to the old Code, the Judicial Committee seem to have gone, if anything, further, and have held that the attaching decree-holder himself cannot object to a private alienation by the judgment-debtor subsequent to the attachment unless the attached property has been brought to sale in execution of the decree in respect of which the property was attached. In that case a decree-holder, who had attached and brought to sale and purchased the suit property subsequently to a private alienation by the judgment-debtor, was held not to be entitled to defend his title as against the alienee from the judgment-debtor under section 276 by relying on the fact that before the date of the alienation he had attached the suit property in execution of another decree without bringing the property to sale in execution of that decree. In these circumstances, it was held that section 276 did not protect him.

Section 64 of the present Code affords no greater protection to the attaching decree-holder than section 276 of the old Code, and if he cannot protect himself against an alienation after attachment unless the attached property is brought to sale in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in any better position. It may even be said that, as regards other decree-holders, the language used in the body of section 64 is, if anything, less favourable than the language of section 276, because it only renders void as against the claimants specified alienations which are "contrary to such attachment," and an alienation by means of which the decree in execution of which the attachment was made is satisfied can scarcely be regarded as an alienation contrary to the attachment.

As pointed out by SESHAGIRI AYYAR, J., full effect is given to the explanation to section 64 by regarding it as intended to settle the difference between *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1) and *Manohar Das* v. *Ram Autar Pande*(2) in favour of the Bombay decision. Further, if it had been intended to prevent all alienations of the attached property after attachment unless made in execution of the decree and for the benefit of the decree-holders entitled to rateable distribution under section 73 (formerly 295), the legislature would have said so plainly. On the contrary, not only is the language of the body of section 64, if anything, more restrictive than the language of section 276, but the legislature has strengthened the provisions of the former section 275 by providing in Order XXI, rule 59, that on satisfaction of the decree, whether made through the Court or certified to the Court, the attachment shall be deemed to be withdrawn, whereas section 275 only provided for its being withdrawn in such event on the application of any person interested. There are other alterations pointing the same way which are fully dealt with in the Opinion of KUMARASWAMI SASTRI, J. The fact that, when the attached property has been sold in execution, the other decree-holders are now expressly empowered to apply to set aside the sale under Order XXI, rule 90, a point on which there was a conflict of opinion under the former section 311, does not appear to me to affect the present question. A decree-holder who is entitled to share in the sale-proceeds should obviously be regarded as interested in the sale.

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For the reasons given, I would answer the question in the negative.

AYLING, J.—I agree.

AYLING, J.

KUMARASWAMI SASTRIYAR, J.—The question referred to us for decision is:

KUMARASWAMI SASTRIYAR, J.

"whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise, are entitled to question a private alienation made during the continuance of such attachment"

and the answer turns on the scope and effect of the explanation added to section 64 of the Civil Procedure Code of 1908 which runs as follows:

"For the purpose of this section claims enforceable under an attachment include claim for the rateable distribution of assets."

(1) (1892) I.L.R., 16 Bom., 91. (2) (1903) I.L.R., 25 All. 421

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The section otherwise reproduces section 276 of the Code of Civil Procedure of 1882, which rendered private alienations of property after attachment void against all claims enforceable under it.

Under the Civil Procedure Code of 1859, section 240, which is practically the same as section 276 of the Acts of 1877 and 1882 rendered private alienation subsequent to the attachment void. This section was construed by their Lordships of the Privy Council in *Anund Loll Doss* v. *Jullodhur Shaw*(1) to mean that the private alienation was only void in so far as it was necessary to secure the execution of the decree to the creditor who obtained the attachment and that the protection cannot be extended to all persons who at any future time might possibly obtain execution of their decrees. Section 276 of the Act X of 1877 which introduced the words "as against all claims enforceable under the attachment" was, in recognition of the limitation imposed by Courts in India and the Privy Council on the general language used in section 240 of the Act of 1859. Sections 270 and 271 of the Act of 1859 gave priority to the first attaching creditor and provided for rateable distribution between other decree-holders who had taken out execution and not obtained satisfaction in so far as any surplus remained out of the sale-proceeds.

The Acts of 1877 and 1882 took away the priority of the first attaching creditor and in place of sections 270 and 271 of the old Code enacted section 295 which provided for rateable distribution between all decree-holders who prior to the realization of assets had applied to the Court for execution and had not obtained satisfaction.

Though the position of decree-holders who were entitled to rateable distribution in case the attachment culminated in a sale was fairly clear, questions arose as to what was to happen if there was a private alienation during the existence of an attachment which was put an end to either by satisfaction of the decree or was raised owing to other reasons. In *Ganga Din* v. *Khushali*(2), the judgment-debtor sold attached property and paid off the decree-holder who attached it. Decree-holders who would have been entitled to rateable distribution if the attachment had not been put an end to objected to the removal of the attachment but their objection was overruled on the ground that their claims were not protected by section 276 they having no right to anything till there was an actual sale and realization of assets, and applications for execution, though entitling the decree-holder to rateable distribution under section 295, were not equivalent to an attachment under section 276. The same view was taken in *Manohar Das* v. *Ram Autar Pande*(1). In *Umesh Chunder Roy* v. *Raj Ballabh Sen*(2), where an alienation was made pending an attachment, it was held that the attachment ceased on the decree being paid off and that the assignment was good against a subsequent attachment by the same party in execution of another decree.

(1) (1872) 14 M.I.A., 543. (2) (1885) I.L.R., 7 All., 702.

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In *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*(3), it was held following *Ganga Din* v. *Khushali*(4), that a claim under section 295 is not enforceable as an attachment against which an assignment is rendered void by the provisions of section 276. PIGGOTT and RAMPINI, JJ., after pointing out that the legislature had not provided that a petition under section 295 shall have the same effect as an attachment observed as follows:—

"To hold that claims under section 295 are claims enforceable by attachment against which assignments made under section 276 are void, would perhaps be carrying out the intention of the legislature when section 295 was introduced. Unfortunately, the sections of the Code relating to execution were not recast so as to be fully adapted to the new state of things. Section 276 has not been successfully framed with the object of protecting rateable distribution amongst claimants under section 295."

In *Kunhi Moossa* v. *Makki*(5) a kanom was executed pending an attachment and the decree in execution of which the property demised under the kanom was attached was paid off. It was held that the kanom was valid as against decree-holders who had applied for execution and who would in the ordinary course have been entitled to rateable distribution if the property had been sold. SUBRAHMANYA AYYAR, J., was of opinion that the attachment ceased to be operative in so far as the attaching

(1) (1903) I.L.R., 25 All., 431.
(2) (1882) I.L.R., 8 Calc., 279 at p. 281. (3) (1883) I.L.R., 15 Calc., 771.
(4) (1885) I.L.R., 7 All., 702. (5) (1900) I.L.R., 23 Mad., 478.

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creditor was concerned on the decree amount due to him being paid off and that

"on principle it follows that with reference to the other judgment-creditors also, who, had the attachment resulted in the realization of assets, would have been entitled to a rateable distribution, the attachment became inoperative."

In *Vibudhapriya Tirthaswami* v. *Yusuf Sahib*(1) a similar view was taken. It was held by Sir ARNOLD WHITE, C.J., and DAVIES, J., that the rights of decree-holders who had applied for execution of their decrees depended upon section 295 and that unless the events upon the happening of which section 295 would have come into operation, namely, the realization of assets by the Court, happened, they had no claims enforceable under the attachment so as to attract the provisions of section 276 to the alienations questioned. The further question as to whether the words "claims enforceable under the attachment" would include claims of judgment-creditors other than the attaching creditor as was held in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(2) or only the claims of the attaching creditor as was held in *Manohar Das* v. *Ram Autar Pande*(3) was left undecided.

The decisions in Bombay have placed a more liberal interpretation on section 276. In *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(2) a more liberal interpretation was placed on the words "claims enforceable under the attachment" than was placed by the Allahabad and Calcutta High Courts. It was held that when a sum of money due to the judgment-debtor was attached and he assigned his rights after attachment and other decree-holders subsequently attached the same sum they were entitled to rateable distribution of the sum paid into Court by the garnishee as against the transferee from the judgment-creditor prior to their attachment on the ground that their claims were claims enforceable under the attachment. Mr. Justice TELANG in an elaborate judgment after a review of all the authorities on the point held that while realization of assets under section 295 would protect decree-holders who had applied for execution even subsequent to the alienation their

(1) (1905) I.L.R., 28 Mad., 380. (2) (1892) I.L.R., 16 Bom., 91.
(3) (1903) I.L.R., 25 All., 431.

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rights were dependent on realization and consequently would not prevail over the purchaser after attachment if the attachment ceased to have effect owing to the satisfaction of the decree or other causes—the purchaser being perfectly safe in the latter case.

It was in this state of the authorities that the legislature enacted section 64 of the present Code (Act V of 1908). An explanation was added to section 64 to the effect that for the purposes of that section claims enforceable under the attachment included claims for rateable distribution. As pointed out in *Jetha Bhima & Co.* v. *Lady Janbai*(1), the effect of the explanation is to give legislative approval to the extended meaning given to the words "claims enforceable under the attachment" in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(2). In this view a reference to the authorities as they stood prior to the passing of the new Act would be relevant. It will be useful to consider in this connexion the other relevant provisions of the Code. In section 73 which corresponds to section 295 of the Act of 1882 the words used are "where assets are held by a Court and more persons than one have, before the receipt of assets, made application" instead of "whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court" in section 295 of the old Code. In Order XXI, rule 55, which corresponds to section 275, a clause is added providing that the attachment shall be deemed to be withdrawn and for notification of such withdrawal by proclamation at the place where the property is situate. The only amount to be paid in order to get the attachment withdrawn is the amount decreed with costs and all charges and expenses resulting from the attachment and clauses (*b*) and (*c*) only refer to satisfaction and reversal of the decree in execution of which the property is attached. Order XXI, rule 57, which is new, provides for the determination of the attachment if the execution application is dismissed owing to the decree-holder's default. Order XXI, rule 69, which corresponds to section 291 of the Act of 1882, provides that the sale shall be stopped if before the lot is knocked down the debt and costs including the costs of sale are tendered to the officer

(1) (1913) I.L.R., 37 Bom., 138. (2) (1892) I.L.R., 16 Bom., 91.

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conducting the sale or proof given that the amount has been paid into Court. Order XXI, rule 89, corresponding to section 310A, requires that only the amount specified in the proclamation of sale less any payment subsequently made should be paid into Court with 5 per cent of the purchase money. Form 8 of Appendix E to the Code specifies the sum due and authorizes attachment and direct the officer to hold the same until further order of the Court unless the amount specified is paid and similarly the prohibitory order specifies the amount for which the decree has been passed. Form 24 which relates to attachment of immoveable property under Order XXI, rule 54, also gives the amount of the decree in execution of which the attachment is made. It is clear from the rules and forms above referred to that the attachment ceases to have any force as soon as the decree in execution of which the property has been attached is satisfied or the execution application is dismissed owing to the decree-holder's default. It is significant that the last clause of Order XXI, rule 55, and the whole of rule 57 are new and that no reference is made to the claims of persons who would be entitled to rateable distribution. In contrast with this Order XXI, rule 90,which relates to the setting aside of sales for irregularity which corresponds to section 311 of the old Code contains the words " entitled to share in a rateable distribution of assets " not found in section 311. Reference was made in the course of argument to *Lakshmi* v. *Kuttunni*(1), *Athappa Chetti* v. *Ramakrishna Nayakan*(2), *Chakrapani Chettiar* v. *Dhanji Settu*(3) and *Ayodhya* v. *Nani*(4), which decided that the term "decree-holder" included a person entitled to rateable distribution for the purpose of section 311 and rule 90 has incorporated the result of the decisions. If the legislature intended the attachment to enure for the benefit of all persons entitled to rateable distribution it would similarly have declared that the attachment should cease only on all their claims being satisfied or that the cesser of the attachment should be without prejudice to their rights. That the difficulty created by rules 55 and 57 of Order XXI is real will be clear from the fact that the existence of a valid attachment is necessary in order to bring the property to sale and

(1) (1887) I.L.R., 10 Mad., 57. (2) (1898) I.L.R., 21 Mad., 51.
(3) (1901) I.L.R., 24 Mad., 311. (4) (1898) I.L.R., 15 All., 318.

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if the attachment ceases when the decree-holder who attaches is paid off a re-attachment will be necessary which will be of no avail if it is subsequent to the alienation, see *Gobind Singh* v. *Zalim Singh*(1) and *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2). In order to get over this difficulty we shall have to read into all the rules in Order XXI relating to the raising of the attachment and in rule 89 the words " the amount due to decree-holders who would be entitled to rateable distribution prior to the private alienation." It is difficult to see under what rules of construction such a wholesale addition to the rules can be made.

It is contended for the appellant with some force that section 64 enacts that the alienation pending attachment shall be void as against all claims for rateable distribution of assets, that claims for rateable distribution are not dependent on the attachment but on section 73 that the claim for rateable distribution would have been enforceable if the properties had been allowed to be sold, that the legislature in enacting the explanation to section 64 intended to make an attachment by one decree-holder to enure for the benefit of all persons entitled to rateable distribution (the policy of the law being to prevent multiplicity of attachments) that the decree-holder who actually attaches and who under the law would have no priority in case the assets were realized by sale ought not to be allowed to defeat the rights of the other decree-holders and that by sanctioning the alienations of property behind their back and paying off the attaching creditor he will virtually get priority. It is also contended that though under rules 55 and 57 the attachment ceases on payment of the decree-debt of the attaching creditor yet a fresh attachment by those entitled to rateable distribution should be treated as a continuation of the original attachment and that in any event section 64 should be read as making the alienation void as against subsequent attachment by those who would if the execution have been allowed to proceed would have been entitled to rateable distribution.

It has been argued for the respondent that the explanation added to section 64 only protects " claims for rateable distribution " that such claims can only arise when assets are held by a

(1) (1884) I.L.R., 6 All., 33. (2) (1917) I.L.R., 44 Calc., 662 (P.C.).

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Court under section 73, that the explanation was merely the legislative recognition of the principle enunciated by the Bombay High Court in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1) and that the decision of their Lordships of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2) is conclusive on the matter.

The decision of the question which is not free from difficulty is in my opinion really concluded by the observation of their Lordships of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2). Though section 276 of the old Code did not contain any provision corresponding to the explanation, the effect of the ruling in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1) was to read the section in the same way as it would have read if the explanations were there and it is difficult to explain away the clear remark of their Lordships [who assume for the purposes of the argument that the decision in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1) is correct] as having reference only to the wording of the old Code. In that case a decree-holder held two decrees against the same person and attached certain properties in execution of one of his decrees and would have been entitled to rateable distribution if the attachment had resulted in a sale. Pending attachment the judgment-debtor sold the property. The attachment subsequently ceased to be operative and the decree-holder subsequently attached the property and brought it to sale. The purchaser sought to recover the property from the alienees from the judgment-debtor. A decree was passed in his favour by the High Court but it was reversed on appeal by the Privy Council on the ground that the sale in execution being under an attachment subsequent to the private alienation was not protected by section 276. Dealing with the argument that section 276 rendered the alienation void as against the subsequent attachment their Lordships observe:

"That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hypothesi* the alienation to the plaintiff was not during the continuance of the attachment in

(1) (1892) I.L.R., 16 Bom., 91. (2) (1917) I.L.R., 44 Calc., 662 (P.C.).

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Execution Case No. 16 of 1907 or in other words the attachment under which the execution sale to the decree-holders was made. Therefore it cannot be avoided by the attachment".

It was also urged before their Lordships that, having regard to the decision of the Bombay High Court in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1), the decree-holder was a person who would have been entitled to rateable distribution and was consequently protected against the private alienation. Their Lordships dispose of the argument with the following observations:—

"He relies on section 295 of the Code of Civil Procedure as entitling him to the benefit of section 276 and for this purpose he calls in aid the application for attachment in Execution Case No. 8 of 1902. To bring section 295 into play certain conditions are necessary and one of them is that there should be assets held by the Court. It has not been shown that there was such assets and the indications in the record point the other way. But apart from this section 295 cannot help the decree-holder. Though the word 'attachment' occurs three times in section 276 the reference is to one and only one attachment; and that one in this case is the attachment in Execution Case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation, for it is on that alone that the decree-holder's title to the property in the suit at present rests. So that even if it be assumed for the sake of argument that the view which prevailed in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1) is correct and that the conditions of section 295 have been satisfied it cannot advance the decree-holder's case."

There can be little doubt that section 64 as it stands at present can protect decree-holders entitled to rateable distribution against private alienation, only where assets have been realized in which case they will be entitled to share the proceeds in preference to the alienee. This can happen only in a very limited class of cases, e.g., where the garnishee pays the attached amount into Court. In the numerous and important class of cases relating to attachment of immoveable property the amendment would be of no use to decree-holders entitled to rateable distribution. Assuming that the legislature intended the attachment

(1) (1892) I.L.R., 16 Bom., 91.

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under section 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation it has not gone far enough when it introduced the explanation to section 64 worded as it is and made no provision for the continuance of the attachment in Order XXI in cases where the attaching creditor was paid off. The result is not very happy, but the remedy is in the hands of the legislature.

I agree with the view expressed by SESHAGIRI AYYAR, J. and would answer this reference in the negative.

N.R.

APPELLATE CIVIL—FULL BENCH.

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

1917, September, 18 and 19 and November, 14 and 21.

PRATIVADI BHAYANKARAM PICHAMMA *alias* MANGAMMA (COUNTER-PETITIONER, PLAINTIFF), PETITIONER,

v.

KAMISETTI SREERAMULU AND TWO OTHERS (PETITIONERS—DEFENDANTS NOS. 2, 3 AND 5), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Order XVII, rules 2 and 3, scope of—Decree ex parte—Defendant absent at adjourned hearing after taking adjournment for letting evidence.

Where, at the close of the plaintiff's case, an adjournment was granted to the defendant to enable him to produce his evidence and he failed to appear at the adjourned hearing, and the Court proceeded to pass a decree against him.

Held by the Full Bench, that the case came within Order XVII, rule 2, and the decree could be set aside under Order IX, rule 13.

Per SADASIVA AYYAR and KUMARASWAMI SASTRIYAR, JJ.—Rules 2 and 3 of Order XVII, Civil Procedure Code, are mutually exclusive: rule 2 applies to all cases of absence of parties whether time was granted or not to do any of the acts mentioned in rule 3 of the Order, while rule 3 applies only to cases where parties are present and commit default of the kind mentioned in the rule.

Per WALLIS, C.J.—Rules 2 and 3 of Order XVII are not mutually exclusive. Rule 3 *may* be applied even in the absence of the defendant, but the decree will none the less be *ex parte* and liable to be set aside.

Chandramathi Ammal v. *Narayanasami Aiyar* (1910) I.L.R., 33 Mad., 241, followed.

Naganada Aiyar v. *Krishnamurti Aiyar* (1911) I.L.R., 34 Mad., 97, overruled.

* Civil Revision Petition No. 1248 of 1916 (F.B.).

PICHAMMA v. SREERAMULU.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the decree of V. R. KUPPUSWAMI AYYAR, the Subordinate Judge of Kistna at Ellore, in Miscellaneous Appeal No. 233 of 1916, preferred against the order of T. M. GOPALA ACHARYA, the Additional District Munsif of Kovvur at Ellore, in Civil Miscellaneous Petition No. 154 of 1916 in Original Suit No. 49 of 1915.

In this case, after the plaintiff's witnesses were examined and cross-examined, the defendant's pleader applied for an adjournment to enable him to produce evidence, and time was granted. Neither the defendant nor his pleader was present at the adjourned hearing. Thereupon the Court made a decree in favour of the plaintiff. Defendant applied to set aside the decree under Order IX, rule 13, Civil Procedure Code, but the Court refused the same, holding that the decree was not one passed *ex parte* and that Order XVII, rule 3, was applicable, relying on *Enatulla Basunia* v. *Jiban Mohan Roy*(1). On appeal by defendant, the Subordinate Judge held that the decree was, according to *Chandramathi Ammal* v. *Narayanasami Aiyar*(2), one passed *ex parte* and finding that there was sufficient cause for non-appearance of the defendant and his vakil, reversed the decree and remanded the suit for disposal according to law. Plaintiff preferred a revision petition to the High Court under section 115, Civil Procedure Code, against the said order of the Subordinate Judge.

K. V. L. Narasimham for the petitioner.

P. Somasundaram for the respondents Nos. 1 and 2.

The third respondent did not appear.

This petition came on for hearing in the first instance before ABDUR RAHIM and OLDFIELD, JJ., who made the following ORDERS OF REFERENCE to a Full Bench.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—The question in this appeal relates to the interpretation of rules 2 and 3 of Order XVII of the Code of Civil Procedure. What happened in this case is shortly stated in the judgment of the Subordinate Judge. The suit was instituted first in the Court of the District Munsif of Kovvur and afterwards transferred to that of the Additional District Munsif. In the latter Court, the plaintiff examined most of his witnesses and on the application of the defendants, the suit was adjourned

(1) (1914) I.L.R., 41 Calc., 956. (2) (1910) I.L.R., 33 Mad., 241.

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to 7th February 1916. On that date neither the defendants' guardian nor the vakils were present. The District Munsif closed the case and delivered judgment in favour of the plaintiff on the 8th February 1916. There is, in my opinion, a conflict of rulings in this Court as to whether rule 2 or rule 3 of Order XVII applies to facts like these. In *Naganada Aiyar* v. *Krishnamurti Aiyar*(1), which was a judgment of MUNRO, J., and myself, it was held that section 158 of the old Code empowers the Court in circumstances such as those in this case to decide the suit on the merits whether the party at whose instance the adjournment was granted was present or not at the date fixed for hearing. If the parties or any of them fail to appear on the fixed date, it is open to the Court to proceed either under section 157 or 158. If there are no materials before the Court on which to come to a proper decision on the merits, it would ordinarily deal with the case under rule 2, otherwise under rule 3. In *Naganada Aiyar* v. *Krishnamurti Aiyar*(1), an earlier decision of this Court in *Chandramathi Ammal* v. *Narayanasami Aiyar*(2), to which the present learned Chief Justice and KRISHNASWAMI AYYAR, J., were parties, was not noticed. There it was held that section 158 of the old Civil Procedure Code which corresponds to rule 3 of Order XVII of the new Code would only apply if the parties are in attendance and there is failure to do what a party is given time to do. If the parties are not in attendance, then according to that ruling section 157 of the old Code corresponding to rule 2, Order XVII of the present Code, would alone apply and that these two rules are mutually exclusive. This view seems to have been approved in *Chenroyan* v. *Rama Chetti*(3), while the view propounded in *Naganada Aiyar* v. *Krishnamurti Aiyar*(1) appears to be the same as that taken in *Enatulla Basunia* v. *Jiban Mohan Roy*(4).

The question is one of importance and frequently arises and I think that it ought to be settled by a Full Bench. The question therefore referred to the Full Bench is:

Whether the view taken in Chandramathi Ammal v. *Naranayasami Aiyar*(2), *or in Naganda Aiyar* v. *Krishnamurti Aiyar*(1) *as to the proper scope and meaning of Order XVII, rule* 2 *and rule* 3, *is correct.*

(1) (1911) I.L.R., 34 Mad., 97.
(2) (1910) I.L.R., 33 Mad., 241.
(3) (1916) 3 L.W., 524.
(4) (1914) I.L.R., 41 Calc., 956 at p. 962.

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OLDFIELD, J.—I agree to the reference proposed by my learned brother.

ON THIS REFERENCE—

B. Narasimha Rao (with *K. V. L. Narasimham*) for the petitioner.—The decree that was passed was not an *ex parte* one. Order XVII, rule 3, Civil Procedure Code, and not rule 2, applies to the case as time was granted to the defendant at his request to let in his evidence at the adjourned hearing and the District Munsif in his order refusing to restore says that he acted under Order XVII, rule 3, Civil Procedure Code. Reference was made to the following cases: *Naganada Aiyar* v. *Krishnamurti Aiyar*(1), *Enatulla Basunia* v. *Jiban Mohan Roy*(2), *Kader Khan* v. *Juggeswar Prasad Singh*(3), *Droupadi Ammal* v. *South Indian Railway Co., Ltd.*(4), *Ningappa* v. *Gowdappa*(5), *Subramania Othuwar* v. *Munusamiya Pillai*(6), *Anandaraju* v. *Venkataraju*(7), *Badam* v. *Nathu Singh*(8) and *Gaura Bibi* v. *Ghasita*(9).

P. Somasundaram for the respondents Nos. 1 and 2, contended that the proper rule applicable is rule 2 and not rule 3 in all cases of absence whether time was granted or not. Reference was made to *Chandramathi Ammal* v. *Narayanasami Aiyar*(10), *Maharaja of Vijayanagaram* v. *Lingam Krishna Bupati*(11), *Majeti Nagaratnam* v. *Pachigolla Ramayya*(12) and *Chenroyan* v. *Rama Chetti*(13). The decree is one passed *ex parte*.

The third respondent did not appear.

The Court expressed the following OPINIONS:—

WALLIS, C.J. — WALLIS, C.J.—I am of opinion that *Chandramathi Ammal* v. *Narayanasami Aiyar*(10), to which I was a party, was rightly decided. As the question is very fully dealt with in the opinion of my learned brother, I shall merely state the conclusions at which I have arrived on further consideration. Under the Code,

(1) (1911) I.L.R., 34 Mad., 97.
(2) (1914) I.L.R., 41 Calc., 956 at p. 962.
(3) (1905) I.L.R., 35 Calc., 1023.
(4) (1914) 24 I.C., 358.
(5) (1905) 7 Bom., L.R., 261.
(6) (1915) 31 I.C., 869.
(7) (1914) 1 L.W., 428.
(8) (1903) I.L.R., 25 All., 194.
(9) (1912) I.L.R., 34 All., 123.
(10) (1910) I.L.R., 33 Mad., 241.
(11) (1902) 12 M.L.J., 473.
(12) (1915) 2 L.W., 105.
(13) (1916) 3 L.W., 524.

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where the plaintiff appears and the defendant does not appear either on the day fixed for the first hearing [Order IX, rule 61] or on any day to which the hearing of the suit is adjourned [Order XVII, rule 2, read with Order IX, rule 61], the Court, if it is proved that the summons was duly served, may proceed *ex parte*. In either case, where the Court has disposed of the case *ex parte* and passed a decree against the absent defendant, he may, under Order IX, rule 13, move to set aside the decree on the ground that he was prevented by any sufficient cause from appearing when the suit was called on. When a case is called on and the defendant is absent, and the Court resolves to proceed against him *ex parte*, there is nothing, I am now of opinion, to prevent the Court from applying the provisions of Order XVII, rule 3, and disposing of the suit notwithstanding the defendant's failure to do what he had been granted time to do, but that disposal will be none the less both in fact and in law *ex parte*, and the decree will be liable to be set aside by the defendant under Order IX, rule 13. If the *ex parte* decree is set aside and the case restored and the defendant appears, it will still be open to the Court to apply the provisions of Order XVII, rule 3, after hearing what the defendant has to say in explanation of his failure to do what he had been given time to do. There is, I think, no conflict at all between the two rules, and each may be fully applied on this construction at the proper stage of the case. In so far as we laid down in *Chandramathi Ammal* v. *Narayanasami Ayyar*(1) that the two rules must be read as mutually exclusive, I think we went too far.

With great respect I am unable to agree with any of the rulings or observations in the cases cited that take a different view.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I have nothing to add to the judgment which my learned brother KUMARASWAMI SASTRIYAR, J., is about to pronounce and I entirely concur in it.

KUMARASWAMI SASTRIYAR, J.

KUMARASWAMI SASTRIYAR, J.—The question raised by this reference relates to the scope of rules 2 and 3 of Order XVII of the Civil Procedure Code. Rule 1 empowers the Court on proper cause being shown to grant time to the parties at their

(1) (1910) I.L.R., 33 Mad., 241.

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instance and to adjourn the suit on such terms as to costs as it thinks fit. Rule 2 provides that, if the parties or any of them failed to appear on the adjourned date, the Court may dispose of the suit in one of the modes directed in that behalf in Order IX or make such other order as it thinks fit. Order IX relates to the procedure to be followed on the date fixed in the summons for the parties to appear and provides for the consequence of non-appearance. Rule 3 provides that the Court may dismiss the suit if both parties fail to appear. Where the plaintiff appears and not the defendant, rule 6 empowers the Court to decide the suit *ex parte* if the summons has been duly served on the defendant in time to enable him to appear. Where the defendant appears and not the plaintiff, rule 8 directs that the Court should dismiss the suit wholly or partially if the claim or any part is not admitted. Rule 9 entitles the plaintiff to have the dismissal set aside if he satisfies the Court that he had sufficient cause for non-appearance. Rules 7 and 13 enable the defendant who failed to appear to set aside the *ex parte* order or decree against him on showing proper cause for his non-appearance. Rule 3 of Order XVII empowers the Court to decide the suit forthwith notwithstanding the failure of either party to whom time is granted to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary for the progress of the suit. It will thus be seen that rule 2 of Order XVII empowers the Court to apply to adjourned hearings the same procedure to be followed in case of failure of the parties to attend at the first hearing. It however expressly empowers the Court instead of proceeding under Order IX to pass such other order as it thinks fit. There is therefore nothing to prevent the Court from adjourning the case to another day if the parties fail to appear and the Court thinks that in the interests of justice it should not dismiss the suit or decree it *ex parte*. This should be borne in mind as it has been strenuously argued before us on the strength of some of the observations in some of the decisions referred to in the course of argument that the view taken in *Chandramathi Ammal* v. *Narayanasami Aiyar*(1), is likely to entail great hardship on the defaulting party. Where the Judge thinks that a defaulting party has proved his case, he is not

(1) (1910) I.L.R., 33 Mad., 241.

bound to apply the provisions of Order IX but can adjourn the case to another day in case he fails to appear and I am sure no Judge with any sense of justice would dismiss a just claim which he considers proved *simply because a party fails to appear* on an adjourned date. On the other hand it seems to me to be pretty plain that the application of rule 3 will be the harder of the two courses as rule 3 empowers the Court to proceed to decide the suit forthwith on the materials before it. So far as the plaintiff is concerned the Court may dismiss the suit on the merits if the evidence on record does not prove plaintiff's case. It may pass a decree if the defendant is absent and there is formal proof of plaintiff's claim or the onus is on the defendant. The dismissal of the suit or the passing of a decree being on the merits, the only remedy of the party aggrieved will be by appeal or review. It is difficult to see what the use of an appeal will be if there was no application for adjournment which was refused. The case will have to be considered by the Appellate Court and decided on the materials before it and the Court cannot in very many cases say that the decision of the lower Court on the materials before it is erroneous. As regards review, the scope of Order XLVII is more restricted than that of Order IX. If the plaintiff's evidence is sufficient, then the defendant if he appears will be entitled to let in his evidence in the absence of the plaintiff and it will often be extremely difficult to determine how far reliance ought to be placed on evidence which has not been tested by cross-examination. The provisions of rule 3 are certainly more stringent than the provisions of rule 2 and except in cases where the case has been closed on both sides and the adjournment is only for argument, it is difficult to see how any decision on the materials before the Court can be satisfactory.

If a party is absent and the Judge proceeds to dispose of the case on the merits under rule 3, there can be no review if the Judge does not preside over the Court when the application is made, as rule 2 to Order XLVII limits the power of the successor to grant a review only in cases of discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree. It cannot be said that a party who is given time to adduce evidence and who owing to absence is unable to do so has discovered new and important matter or

evidence. If owing to absence he is unable to do any other act necessary for the further progress of the suit for which time has been allowed, it is equally a case where no review can be applied for in case the Judge who decided a suit under Order XVII, rule 3, is not presiding over the Court. The Appellate Court in such cases cannot reverse the decree based on the material before it. It cannot say that the Court should have granted an adjournment where the party was absent and did not ask for one and it seems to me that the Appellate Court cannot interfere on the ground that sufficient cause was shown for absence unless it can apply the provisions of Order IX and it cannot do this if rule 3 is held to be the only rule applicable to cases where a decree is passed in the absence of a party to whom time has been given for the doing of an act and the Court in his absence proceeds to decide the suit "forthwith" on the materials before it. Leaving out of consideration the case of a party who is absent on an adjourned date without sufficient excuse (and who deserves no consideration either under rule 2 or 3) the application of rule 2 which would give the party the right to set aside the order of dismissal or *ex parte* decree on merely showing that he was prevented from sufficient cause from appearing and to have the whole case reheard on its merits after adducing all the evidence available is more beneficial and wider in scope than an application for review or an appeal which would be the only course available if rule 3 is held applicable to cases of absence.

The scope of sections 157 and 158 of the old Code which correspond to rules 2 and 3 of Order XVII of the present Code has been the subject of conflicting decisions. The decision of WALLIS and KRISHNASWAMI AYYAR, JJ., in *Chandramathi Ammal* v. *Narayanaswami Aiyar*(1) which follows *Shrimant Sagajirao* v. *Smith*(2), is in accordance with the view taken in *Maharaja of Vijayanagaram* v. *Lingam Krishna Bhupati*(3). It has been followed by SESHAGIRI AYYAR, J., in *Majeti Nagaratnam* v. *Pachigolla Ramayya*(4) and by SADASIVA AYYAR and MOORE, JJ. in *Chenroyan* v. *Rama Chetti*(5). It supports the view that rules 2 and 3 of Order XVII are independent and mutually exclusive

(1) (1910) I.L.R., 33 Mad., 241. (2) (1896) I.L.R., 20 Bom., 716.
(3) (1902) 12 M.L.J., 473. (4) (1915) 2 L.W., 105.
(5) (1916) 3 L.W., 524.

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and that where the requisites of rule 2 are satisfied, that rule and not rule 3 should be applied, although in addition to the absence of the party circumstances exist which would satisfy the requirements of rule 3.

On the other hand, a different view was taken by MUNRO and ABDUR RAHIM, JJ., in *Naganada Ayyar* v. *Krishnamurti Ayyar*(1), where it was held that absence of a party on the date of the adjourned hearing does not preclude the Court from dealing with the case under section 158 (Order XVII, rule 3). The earlier decision in *Chandramathi Ammal* v. *Narayanaswami Aiyar*(2) has not been considered and the reasons given in that decision have not been met. In *Mariannissa* v. *Ramkalpa Gorain*(3) (MOOKERJEE and HOLMWOOD, JJ.) it was held that the scope of section 157 was distinct from that of section 158 but that the Court can act under section 158 even though the parties are absent if the requirements of section 158 are otherwise satisfied and the Judge thinks there are materials on record on which it can pronounce judgment. The learned Judges were however of opinion that there was no justification for applying section 158 to a case to which section 157 is more appropriately applicable. In *Enatulla Basunia* v. *Jiban Mohan Roy*(4), IMAM and CHAPMAN, JJ., held that where an adjournment was granted at the instance of a party for the purposes stated in rule 3 and there are materials enabling the Court to decide the suit, it must act under rule 3 and not rule 2. In *Ningappa* v. *Gowdappa*(5), a similar view was taken. The learned Judges thought that section 102 contemplates that on the record as it stands the plaintiff has not made a case which if unrebutted would entitle him to any relief and that application of section 158 would be less burdensome to the party but with all deference I think for the reasons already given that the balance of hardship is the other way in the very great majority of cases that are likely to arise under sections 157 and 158. Section 102 contains no such qualification as is indicated and compels the Court to dismiss the suit if plaintiff is absent and defendant does not admit the claim. This decision was followed by PHILLIPS, J., in *Subramania Othuvar* v. *Munusamiya Pillai*(6), but no reference is made to the decision in

(1) (1911) I.L.R., 34 Mad., 97.
(2) (1910) I.L.R., 33 Mad., 241.
(3) (1907) I.L.R., 34 Calc., 235.
(4) (1914) I.L.R., 41 Calc., 957.
(5) (1905) 7 Bom. L.R., 261.
(6) (1915) 31 I.C., 869.

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Chandramathi Ammal v. *Narayanaswami Aiyar*(1), nor is there of any discussion of the authorities.

I am of opinion that the decision in *Chandramathi Ammal* v. *Narayanaswami Aiyar*(1), which if I may say so with respect is a well-considered judgment dealing fully with the matter, correctly sets out the principle to be applied to cases of absence of either party at the adjourned hearing.

The decision of the question must depend on the express language of Order XVII, rules 2 and 3. As pointed out in *Chandramathi Ammal* v. *Narayanaswami Aiyar*(1), section 157 (rule 2) deals with cases of absence of parties and section 158 (rule 3) with failure to do what was ordered. If the party fails to appear section 157 (rule 2) applies and there is no reason why the Court should assume (in the absence of any explanation) that he is guilty of default so as to apply the stringent provisions of section 158 (rule 3). I think the correct rule is to treat rule 3 as applying only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were directed to do. I have already dealt with the matter from the point of view of hardship to the parties and my own experience is that the rule laid down in *Chandramathi Ammal* v. *Narayanaswami Aiyar*(1) has been a safe and uniform guide to Courts. The construction moreover is one that suggests itself on a consideration of the plain language of rules 2 and 3. I have no hesitation in coming to the conclusion that the decision in *Chandramathi Ammal* v. *Narayanaswami Aiyar*(1) ought to be followed.

N.R.

(1) (1910) I.L.R., 33 Mad., 241.

PRIVY COUNCIL.*

1917, July 13, 16, 17 and October, 23.

SETHURAMASWAMIAR AND OTHERS (DEFENDANTS NOS. 1, 2 AND 3),

v.

MERUSWAMIAR (PLAINTIFF).

[On appeal from the High Court of Judicature at Madras.]

Hindu Law—Grants made of properties for non-religious and for religious and charitable purposes by Raja of Tanjore to his guru the ancestor of the parties—Suit for partition—Dispute whether granted to the guru personally or to the office of head of a mutt held by him—Perpetual conducting of food chatram and building agrahar—Private charities, management of—Non-religious properties liable to partition—Charities not liable.

Grants of the property in suit had been made by the Raja of Tanjore from time to time to the ancestor of the parties a holy man whom the Raja brought to Tanjore as his guru. Some of the grants were for non-religious purposes and others for religious and charitable purposes in connexion with a mutt founded when the guru came to Tanjore; and the properties descended to a joint family the adult members of which consisted of three brothers the eldest of whom (the appellant) was the manager of the joint family and the head of the mutt. To a suit by the second brother (the first respondent) to have partition of the non-religious properties, and as to the religious and charitable properties for a scheme of management in which he claimed a share, to be settled by the Court, the other brothers were made defendants the youngest brother (as second defendant-respondent) supporting the plaintiff-appellant.

Held as to the non-religious properties (upholding the decision of the Courts in India) that there was nothing in the documentary evidence (the original grants, and confirmatory inam grants made by the Government after the escheat of the Tanjore Raj) or in any of the other circumstances of the case to take the descent of the properties out of the ordinary rule of inheritance, and they were therefore liable to partition.

The objects for which the religious and charitable properties were given were described in the grants as being for the purpose 'of perpetually conducting a food chatram near the tomb of a holy man, and in one case of making an agrahar by building houses round the holy place.'

Held (reversing the decision appealed from) that there was sufficient indication in the grants and in the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee was inconsistent

* *Present*:—Lord BUCKMASTER, Sir JOHN EDGE, Mr. AMEER ALI, and Sir WALTER PHILLIMORE, *Bart.*

with the purposes of the founder who must be deemed to have intended that the religious charities should be administered by the man who was head of the mutt, to which office the eldest son of the previous holder would succeed, the office not being the subject of partition, but being indivisible among the members of the family, and the principles to be applied being those laid down in *Jaafar* v. *Aji* (1863) 2 M. H.C.R., 19; and *Trimbak* v. *Lakshman* (1896) I.L.R., 20 Bom., 495.

Even, if this were not so, *quære* whether the rules laid down in some cases as to the devolution of the management of private charities such as the support of a family idol would be applicable to charities such as those in question.

APPEAL No. 149 of 1915 from a judgment and decree (18th August 1909) of the High Court at Madras, which affirmed a judgment and decree (11th December 1906) of the Court of the Subordinate Judge of Tanjore.

The facts of the case are sufficiently stated in the judgment of their Lordships of the Judicial Committee, and will also be found in the judgment of the High Court (WALLIS and SANKARAN NAIR, JJ.) appealed from *Sethuramaswamiar* v. *Meruswamiar*(1).

The suit from which this appeal arose was brought by Meruswamiar, the first respondent for partition and possession of a one-third share of certain properties, movable and immovable (referred to as the non-religious properties), of the Hindu joint family governed by the Mitakshara Law, consisting of himself and his two minor sons and his two brothers. The plaint also contained a prayer that a scheme should be settled for the management of certain other properties (referred to as the religious properties and therefore not available for partition) which were subject to charitable and religious trusts, but the management of which the first respondent alleged he was entitled to in rotation with the first and second defendants. Sethuramaswamiar, the first defendant (now the first appellant), was the eldest brother, and manager, of the joint family; the youngest brother, Sundaraswamiar, was the second defendant (now the second respondent) who supported the case of the first respondent (plaintiff) and asked for possession of his one-third share. The other defendants were Ramasetuswami and Lakshmanaswamy, the third and fourth defendants, and certain widows entitled to maintenance.

(1) (1911) I.L.R., 34 Mad., 470.

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The first defendant pleaded that the properties of which partition was sought were impartible. In paragraph 3 of his written statement he alleged that 'the properties set out in Schedule II annexed to the plaint' (the non-religious properties) 'in so far as they are actually in existence are not divisible joint family properties. The said properties are attached to the Raja Guru Adhinam of Sri Setubhavaswami (the original ancestor of the family) and go by the name of Sri Setubhavaswami's inams and descend according to primogeniture.' He claimed that these lands were given to the guru for the time being for the support of the dignity of his office; and he alone as Raja Guru was entitled to them, his brothers and other members of the family being only entitled to maintenance therefrom; and that as head of the mutt he alone was entitled to manage the religious properties. The Subordinate Judge made a decree in favour of the plaintiff which was on appeal affirmed by the High Court.

On this appeal—

Sir *H. Erle Richards*, *K.C.*, and *J. M. Parikh* for the appellants contended that the grantor intended to make the grants to the grantee and his successors to the headship of the grantee's mutt, and to the office of the Raja Guru which the appellant now represents. They were oral grants and the Courts in India wrongly treated the orders to the officials as if they were the original grants. The grants were given to the founder of the family who was the Royal 'Guru' and were made from time to time to support the dignity of his office, which has now devolved by primogeniture on the first appellant, who, it was submitted, was exclusively entitled to the properties as being the holder of the office of Raja Guru. There was consequently no right in the first respondent to have partition of them. These properties devolved in the same way by primogeniture. The succession in the family was not governed by the ordinary rules of succession under the Mitakshara Law; the custom of gaddinishini in the family supports the contention that the rule of descent was by primogeniture. Reference was made to *Nitrpal* v. *Jai Singh Pal*(1), *Garudhwaja Parshad Singh* v. *Saparandhwaja*

(1) (1897) I.L.R., 19 All., 1 at pp. 8, 9, 10; s.c., L.R., 23 I.A., 147 at pp. 151, 152 and 156.

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Parshad Singh(1) and Mayne's Hindu Law, 8th edition, paragraph 469. *Secretary of State for India* v. *Kamachee Boye Sahiba*(2) was also referred to as to the action taken by the Government on the escheat of the Raj of Tanjore with regard to properties similar to those now in suit. The plaintiff only received and accepted a fixed monthly allowance; the inference from which was that he became excluded from enjoying the alleged joint family properties as a co-parcener, and lost any right he might have had to partition: see *Raghunath Bali* v. *Maharaj Bali*(3).

The religious properties were given to the founder of the family to manage for the purposes, charitable and religious, stated in orders to the officials issued at the time. These properties could not be divided, but must be held by the guru himself as head of the mutt. They should, it was submitted, so remain now with the first appellant as head of the mutt, the management of them being his right; they having been managed by the head of the mutt for 140 years. The office of headship of a mutt was not partible, and the properties managed by the holder of that office were consequently not partible: see *Trimbak* v. *Lakshman*(4) and Mayne's Hindu Law, 8th edition, paragraph 439. The title-deeds of the Inam Commission were always made in the name of the manager of a charity or a religious trust and such manager has always been the head of the mutt as it is admitted the first appellant is here. The first respondent does not claim to be the head of the mutt, but admits that the right to hold that office is in the first appellant: it is submitted that he alone is entitled to manage the religious properties. Reference was made to *Nubkissen Mitter* v. *Harrichunder Mitter*(5), *Ramanathan Chetty* v. *Murugappa Chetty*(6), and *Thandavaraya Pillai* v. *Shunmugan Pillai*(7), relied on by the High Court, but distinguishable from the present case on the facts. The first case related to the endowment of a family idol and

(1) (1900) I.L.R., 23 All., 37 at p. 50; s.c., L.R., 27 I.A., 238, 250.
(2) (1885) 7 M. I.A., 476.
(3) (1885) I.L.R., 11 Calc., 777 at p. 783; s.c., L.R., 12 I.A., 112 at p. 115.
(4) (1896) I.L.R., 20 Bom., 495 at pp. 500, 501.
(5) (1816) 2 Morley's Digest, 146. (6) (1904) I.L.R., 27 Mad., 193 at p. 200.
(7) (1909) I.L.R., 32 Mad., 167.

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public endowment made by a sovereign ruler, and is one to which the rules as to the management of a private endowment are not applicable: *Trimbak* v. *Lakshman*(1). In the other cases, though the endowments were public, it was admitted that the office devolved on the heirs of the last sole trustee: they are not authorities for the present case. They also related to the management of a temple, not of charities connected with a mutt. A scheme which provided for an equal right of management by all the co-parceners in a joint family would not be beneficial to the interest of the charities.

DeGruyther, K.C., and *Kenworthy Brown* for the respondents (who were called on only as to the management of the religious properties) contended that the grants were made to Sethubhavaswami, the ancestor of the parties, personally, but subject to a charge for the charities, and the succession in that case would be governed by the ordinary rules of the Hindu Law as to succession. There was no difference in that respect between the non-religious and the religious properties. Reference was made to *Lahar Puri* v. *Puran Nath*(2) and *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(3), and it was submitted the institution was neither a mutt, nor a religious institution. There is no evidence that there was a mutt; and even if there was a mutt the gift was not to the mutt but to the individual managing it: the dwelling house in fact was called a mutt. There is nothing to show that any mutt was in existence at the time of the grant; nor are the properties endowed properties of the mutt. They were managed by the Court of Wards which is not empowered to perform duties connected with a mutt. It is also held by both the Courts below that these properties were not attached to the mutt. They are family properties charged with a religious trust, and descend to the heirs of the grantee: see Mayne's Hindu Law, 8th edition, paragraphs 438 and 439. The inam grants cannot alter the succession not being the foundation of the title: see rule 3 of the rules under which the Inam Commissioners were working. The 'successors' in inam

(1) (1896) I.L.R., 20 Bom., 495 at p. 501.
(2) (1915) I.L.R., 37 All., 298; L.R., 42 I.A., 115.
(3) (1887) I.L.R., 10 Mad., 375 at pp. 386, 387.

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titledeeds means the heirs of the grantee. Reference was made to *Ramanathan Chetty* v. *Murugappa Chetty*(1).

Sir *H. Erle Richards*, K.C., in reply referred to *Sathianama Bharati* v. *Saravanabagi Ammal*(2), and contended it was for the first respondent to prove his right to share in the management. Mayne's Hindu Law, 8th edition, paragraph 601, the first appellant came within the qualification there mentioned.

THE JUDGMENT of their Lordships was delivered by

SIR WALTER PHILLIMORE.

Sir WALTER PHILLIMORE.—The plaintiff in this suit is the younger brother of the first defendant, and the nature of his claim is twofold.

He alleged, first, that there were certain joint family properties, of which the first defendant had been manager, and of which he now desired his share.

Secondly, that there were certain properties devoted to charitable and religious purposes, and therefore not available for division, in the management of which he was entitled to share, and for which he desired that there should be a scheme of management settled by the Court.

The second defendant is another younger brother having the same interest as the plaintiff; and the other defendants are widows entitled to allowances during their lives.

The properties, both non-religious and religious, were granted at various times by the then Raja of Tanjore to the ancestor of the parties, one Setubhavaswami. They descended to his son and that son having no natural children, to an adopted son, and then to his adopted son, Ramasetuswami, who died, leaving three natural sons, viz., the plaintiff and the first and second defendants.

At the time of the death of Ramasetuswami in 1886 his three sons were minors. The first defendant came of age in 1890, and the plaintiff somewhere about the year 1894. He made a demand of his rights in 1901 and brought his action in 1904.

There is no dispute as to the circumstances in which the original ancestor received the grants of land from the Raja of

(1) (1904) I.L.R., 27 Mad., 193; s.c. on appeal to the Privy Council (1906) I.L.R., 29 Mad., 283; L.R., 33 I.A., 139.
(2) (1893) I.L.R., 18 Mad., 266 at p. 270.

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Tanjore. He was a holy man, who, somewhere about the year 1739, was brought from a mutt or religious institution at Mannārgudi to Tanjore, and was constituted by the Mahratta Ruler of Tanjore his *guru*, or spiritual preceptor. His descendants in regular succession became *gurus* to the Raja as long as the Raj remained, and were installed by the Raja for the time being with certain ceremonies, one of the most important being the placing of the new *guru* on the *gadi*. There was also a religious ceremony, in which the head of the mutt at Mannargudi and certain other heads of mutts took part, to which reference will be made later on.

When Ramasetuswami, the father of the parties, died the Raj had escheated; but after the usual religious ceremony had taken place, the man claiming to be the adopted son of the last Raja installed the first defendant with the accustomed ceremony; and there is no doubt that the first defendant is the *guru* of the man who installed him.

The contention on behalf of the first defendant is that the office of *guru* is hereditary by way of primogeniture, and that the non-religious lands were given to the *guru* for the time being to maintain the dignity of his office, and are therefore impartible.

The contention for the plaintiff is that these lands were granted to the original *guru*, no doubt as a reward for his services, but to him personally and his heirs, and not as an appanage or endowment of the office of *guru*.

Shortly after the escheat of the Raj in 1855, enquiries were directed by the Government with a view of ascertaining whether the properties enjoyed by Ramasetuswami were service lands, that is, land enjoyed or endowments of offices held by servants or ministers of the Raja, which would escheat upon the termination of the Raj, or whether they had been bestowed as personal grants; and a report was made which was acted upon by the Government to the effect that these non-religious properties were not service lands but personal grants, and consequently had not escheated. Thereupon new *inam* grants in confirmation of the original grants were made by the Government to the father of the parties.

The original grants of the non-religious lands show no indication that they were made by way of endowment of an office.

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The utmost that can be said on behalf of that contention is that the grantee is sometimes described as a Royal Priest. But this is mere description.

The confirmation grants of the non-religious lands describe them as the personal *inams* of the grantee to be held by him as his absolute property to hold or dispose of as he thinks proper, subject to the quit-rent. In some of the grants the *inam* is said to be tax free and hereditary, and that on failure of lineal heirs it will lapse to the State.

There is nothing in these documents, or in any of the other circumstances of the case, to take the descent of the non-religious lands out of the ordinary rule of inheritance. This is what has been decided in favour of the plaintiff by the Subordinate Judge, and in the High Court of Judicature of Madras upon appeal; and their Lordships see no reason to differ from this conclusion. They arrive without hesitation at the result that the appeal of the first defendant against this part of the decision in the Courts of India fails.

Both Courts have also decided in favour of the plaintiff on the other claim, and have directed that there should be a scheme for the management of the religious and charitable properties, to be settled in due course. This part of the case has given their Lordships more difficulty.

No scheme has, so far, been settled, but there is no doubt as to the lines on which the scheme would proceed. It would, as asked by the plaintiff, provide for equal rights of management by the plaintiff and the first and second defendants and their heirs, either by giving the management to each in rotation, or possibly by dividing the charities and assigning the management of some to one and of the others to the others.

This will be the nearest approach that can be made to the ordinary partition which is granted at the request of any one of the co-parceners of Hindu family lands.

The objects for which these properties were given are described in the deeds as being for the purpose of perpetually conducting a food chatram near the tomb of the holy man Meruswami, and in one case for the purpose of making an agrahar by building houses round about the holy place.

With regard to what are called private charities, such as endowments for the support of the family idol, the law, as laid

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down by various decisions in India, and apparently accepted in one case by the Privy Council [*Ramanathan Chetty* v. *Murugappa Chetty*(1)], is that, if there is no contrary provision in the original grant, the right of management passes to the natural heirs of the original grantee, and, if there be no other arrangement or usage and no scheme settled by the Court, will be exercised by the managing member of the family before partition, or in turn by the several heirs after partition

But their Lordships' attention has not been drawn to any case in which these decisions as to management have been applied to lands which constitute the endowment of such a charity as those in question in this suit.

The case most nearly in point is *Thandavaroya Pillai* v. *Shunmugam Pillai*(2); but it does not decide this question, and does not seem to have come up before the Privy Council.

It is unnecessary, however, to decide whether there is a general rule for the devolution of the management of charities of this class because, in their Lordships' view, there is sufficient indication in the documents and in the surrounding circumstances of this case that a devolution of the management to the heirs of the original donee is inconsistent with the purposes of the founder when he created the endowments.

The grants of the religious or charitable lands made by the Mahratta Raja to Setubhavaswami, which take the form of orders to his officers, describe them as being for the purpose of *inam* and for the purpose of perpetually conducting or establishing the defined charity; and they proceed to state that for this purpose they had been given to the Royal Priest Setubhavaswami.

Having regard to the donee's position and the way in which these grants are set forth, it would be difficult if there was nothing else to guide the Court to determine whether these grants were made to the person or to the office. But the deeds of confirmation of the religious lands made by Government in 1865 are of assistance. They are in a different form from that used in the confirmation grants of the non-religious lands. Each is described as a title-deed granted to the manager for the

(1) (1904) I.L.R., 27 Mad., 193; s.c., in Privy Council (1906) I.L.R., 29 Mad., 283; s.c., L.R., 33 I.A., 139.

(2) (1909) I.L.R., 32 Mad., 167.

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time being of the charity, which is then described. By the deed the title of the manager is acknowledged, and the *inam* is confirmed to him and his successors. There is no personal name, and it is only from external evidence that it can be determined that the grant was to Ramasetuswami, the father of the parties.

Taking, as their Lordships do, the view that it was not intended by these confirmation deeds to vary the previous rules as to the descent of the religious lands, any more than it was intended to vary the previous rules as to the descent of the non-religious lands, these confirmation grants afford evidence as to the nature of the tenure, as it was commonly understood at the time. These lands, then, had been held, and were to be held in future, by the particular office-bearer from time to time. That office-bearer is, in their Lordships' opinion, to be found in the head of the *mutt*, or institution founded when the original *guru* was induced by the Raja to migrate from Mannārgudi. He would be one person, not several, and the first defendant is the present head.

It is in evidence that the installation ceremonies which are believed to have occurred upon the succession of each new *guru* were of a double character. The induction, as it may be called, by the Raja to the office of Royal Guru with a seat upon the *gadi* was preceded by a religious ceremony in the nature of an ordination or institution in which the *Mohunt*, or head of the parent *mutt*, placed the first defendant in the seat of headship, other heads of *mutts* taking part in this ceremony, and certain religious rites following.

It is in evidence that the defendant, as the head of the *mutt* thus constituted, performs in person, or by deputy, certain religious rites, has given initiation to some people, no doubt not many, and has on some, not very frequent, occasions given religious instruction. He is thus pointed out as the natural head and administrator of the religious charity; and the office of head of the *mutt* and administrator of the charity have been associated from the first.

The headship of a *mutt* is not a matter of partition. Indeed, the plaintiff admits that he has no claim to share in it. This being so, it appears to their Lordships that the intention of the founder must be deemed to have been that his religious charities should be administered by the man who was head of the *mutt*,

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to which office the eldest son of the previous holder would naturally succeed, the office being indivisible among the members of the family, and the principles to be applied being those laid down in the case of *Jaafar* v. *Aji*(1) ; and further approved in *Trimbak* v. *Lakshman*(2). This being so, there was no jurisdiction in the Indian Court to settle a scheme, the only object of which would be to take away the sole power of management from the eldest son.

This part of the appeal therefore succeeds.

Their Lordships think that the plaintiff should have his costs in the Court of First Instance, as he there recovered a very substantial part of his claim, viz., his right to share in the inheritance, and to have partition, if he desired, of the non-religious lands; but they think that there should be no costs of the appeals to the High Court and to His Majesty in Council.

Their Lordships will therefore humbly recommend His Majesty that the decree of the High Court of Judicature of Madras be varied, in so far as it confirmed that part of the decree of the lower Court, paragraph 8, which ordered that a scheme be settled for the due management of the religious and charitable properties, and so far as it ordered the first defendant to pay the costs on appeal of the plaintiff and second defendant ; and that the decree of the lower Court be varied by striking out paragraph 8, and that there be no costs of the appeal to the High Court or to His Majesty in Council.

Decree varied.

Solicitors for the appellants :—*Chapman-Walker and Shephard.*

Solicitor for second, sixth and seventh respondents :—*Douglas Grant.*

J.V.W.

(1) (1863) 2 M. H.C.R., 19.

(2) (1896) I.L.R., 20 Bom., 495.

APPELLATE CIVIL.

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

THE THODAPUZHA RUBBER COMPANY, LIMITED (PETITIONERS), APPELLANTS,

1917. July, 16.

v.

THE REGISTRAR AND ASSISTANT REGISTRAR OF JOINT STOCK COMPANIES, MADRAS (RESPONDENTS), RESPONDENTS.*

Indian Companies Act (VII of 1913), sec. 104, cl. (1) (b)—'Share fully paid up otherwise than in cash,' meaning of—Exchange of debenture not matured for share, whether a payment in cash for share.

Where in accordance with the terms of a debenture deed a company allots to a debenture-holder a fully paid-up share in exchange for the surrender of a debenture deed *not then mature*, the share as allotted is one 'fully paid up otherwise than in cash' within section 104 (1) (b) of the Indian Companies Act (VII of 1913).

Spargo's case (1873) L.R., 8 Ch. App., 407, distinguished.

APPEAL against the judgment of COUTTS TROTTER, J., in *In the matter of the claim of Thodapuzha Rubber Company, Limited, Messrs. Huson and Robinson, the Secretaries*, to file a return of allotment of shares under clause I (*a*) of section 104 of the Indian Companies Act (VII of 1913).

The facts appear from the third paragraph of the judgment of COUTTS TROTTER, J. (see next page).

The judgment of COUTTS TROTTER, J., was as follows :—

COUTTS TROTTER, J.

COUTTS TROTTER, J.—This is a motion by the Thodapuzha Rubber Company, Limited, for an order, under section 45 of the Specific Relief Act, in the nature of a Mandamus to compel the Registrar of Joint Stock Companies to accept and file a return, under Form VI of the Indian Companies Rules, 1914, of the allotment of a number of shares. The Registrar refused to file the return on the

* Original Side Appeal No. 10 of 1917.

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ground that the mere filling up of Form VI was not sufficient and that it was necessary to file further particulars under section 104 of the Act; and the real question is as to whether certain additional stamp duties are or are not payable by the company.

The short point that I have to determine is the true construction of section 104 of the Indian Companies Act, 1913. That is a Consolidation Act and is based in the main on the English Companies Consolidation Act of 1908. Section 104 specifies what the company is to do when it makes an allotment of shares. It must, by sub-section 1 (*a*), file with the Registrar the number and nominal amount of the shares, the names, etc., of the allottees and the amount paid or payable on each share. By sub-section 1 (*b*) in the case of shares allotted as fully or partly paid up otherwise than in cash, it must produce the contract in writing which constitutes the title of the allottee and various other particulars. By sub-section (2) where there is a contract upon which the title of the allottee depends but it is not in writing, particulars of its terms are to be reduced into writing and filed with the Registrar. It is unnecessary for me in this case to decide whether the contract evidencing the title of the allottee was or was not wholly in writing. The only question I am asked to decide is whether these shares were fully or partly paid up otherwise than in cash. The object of the section is to let those who have dealings with the company know when its shares have cash behind them and if they have not, to know the nature and value of the consideration or the alleged consideration. It is clear that the promoters of a company can put any value they like on such intangible assets as the good will of a business previously existing and made over to the company and can allot as many shares for it as they are minded to. What is essential is that they should let the public know that those shares so allotted as fully paid up do represent that intangible asset and not hard cash available in the coffers of the company as trading capital.

The facts giving rise to the present motion are very simple and are as follows: The proposed allottees were debenture-holders in the company and they held debentures of one hundred rupees each payable on the 1st of January, 1918. The only material clause in the conditions endorsed on the debenture is No. 11 which runs as follows: "The registered holder hereof shall, while the same remains in force and upon giving previous notice in writing, be entitled to surrender this debenture and receive in consideration thereof one fully paid ordinary share of Rs. 100 of the company

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part of or ranking *pari passu* with the ordinary shares of the original capital." The allottees in this case had exercised the option given them by the clause of giving notice to surrender their debentures and receive shares in exchange. The company has allotted them shares in accordance with the notice which rank as fully paid up shares: and the only question I have to determine is whether or no these shares are fully or partly paid up otherwise than in cash. The precise circumstances have not, so far as I can ascertain, been before a Court either in England or in this country. But there is a long line of decisions in the English Courts on various sections of the successive English Company Acts which have exhaustively considered and defined what is meant by a share paid up in cash. I think I ought not to do otherwise than follow those decisions, not only from respect to the very learned Judges who decided them but for the additional reason that the Indian Companies Act was framed on the lines of the English Act and must, I think, be supposed to have been intended to give effect to the settled law of the English Courts on the matters with which it deals. But for this, I should regard this as a plain case. It is, in no sense, within the mischief which the section is designed to obviate. These debentures were paid for in hard cash up to their full face value. When they were converted into shares, there remained behind the shares the one hundred rupees of hard cash in the coffers of the company which had been paid by the debenture-holders. If the public assumed from the register that the face value of these shares had passed to the company in money available to it as trading capital, the public was right. I go further and think that a lay member of the public would be far more likely to be misled if the particulars of the arrangement were placed upon the register as demanded. A lawyer would, no doubt, understand the true nature of the arrangement, I think it quite possible that a layman might misapprehend it and go away with a confused notion that these shares were represented in some way by a paper consideration. I am sorry to say I feel unable, in the face of the decisions, to take this broad view.

Prima facie, 'share fully paid up in cash' would seem to import a handing over of money, including, of course, negotiable instruments, in return for the shares. But it was early seen that the matter was not quite so simple as that. In *Spargo's case*(1), the facts were as follows: Spargo had agreed to take up 51 shares in a

(1) (1873) L.R., 8 Ch. App., 407.

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company for the price of £ 2,550. He had also agreed to sell a certain mining lease for the sum of £2,176. In the books of the company, he was debited with the price of the shares and credited with the purchase price of the mining lease and paid the balance in cash. It was held that this was a purchase of the shares for cash on the ground that, as there were debts presently due on either side, it was unnecessary to go through the form of handing over cash on one transaction and returning it immediately on the other. Lord Justice MELLISH laid down a test which he had formerly elaborated in *Fothergill's Case*(1) that the shares must be treated as paid for in cash if what had been done would give rise to a good plea of payment, as distinct from a plea of accord and satisfaction. That sounds like a technical rule of English pleading, but it is a very convenient test and is one which, if applied, harmonises all the decisions with the possible exception of some observations of FRY, L.J., in *In re Johannesburg Hotel Company*(2). In *Kent's case*(3), Kent was a holder of shares in a Company which were not fully paid up but in respect of which there were no arrears of past calls or any present calls due. He took an assignment from a creditor of the company of the debt owed by the company to the assignor, but which, by an agreement between the assignor and the company was made repayable in future instalments, none of which was at the moment due or in arrears. Kent and the company came to an arrangement by which the payment of the future calls on Kent's shares was to be satisfied by crediting towards them the instalments as they fell due from the company under its debt to Kent's assignor. It was held by the Court of Appeal that Kent's shares could not be treated as paid for in cash. The Court took notice of the fact that no entries were made in the company's books carrying out the transaction, but the real ground of the decision was that the debt purchased by Kent and the unpaid calls were neither of them debts payable *in præsenti*.

In *In re Jones Lloyd and Co., Limited*(4), the company owed a shareholder a present liability in cash which it was agreed should be set off against calls on shares to become due *in future*. Mr. Chamier urges that the real ground of that decision is that the matter is to be looked at broadly to see whether the company has had the enjoyment of cash in return for the shares. If that were so, and I were to follow that case on that supposition that would be enough for

(1) (1873) L.R. 8 Ch. App., 270.
(2) (1891) 1 Ch., 119.
(3) (1888) L.R. 39 Ch.D., 259.
(4) (1889) L.R., 41 Ch. D., 159.

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Mr. Chamier's contention. But I think the decision is perfectly consistent with the narrower test adopted in the earlier cases. If the Company in that case had brought an action on one of the calls, the share-holder, in my opinion, could have pleaded payment, not the less so because the payment had been made before it was legally due. In *In re Johannesburg Hotel Company*(1), the promoters of the Company agreed to have their promotion expenses discharged by the Company in fully paid shares. The Court held that these shares could not be treated as having been paid for in cash. The decision was arrived at by drawing a distinction between discharging a debt by the allotment of fully paid up shares and the setting off of a debt against the money due on shares which were not fully paid up until the transaction set off had been completed. The distinction is a very fine one and Lord HALSBURY who formed one of the Court took no pains to conceal his view that *Spargo's case*(2) was wrongly decided; and Lord Justice FRY said of *Spargo's case*(2) that it, in effect, struck the words 'in cash' out of the statute. *Spargo's case*(2) has since been re-habilitated by a very strong Committee of the Privy Council in *Larocque* v. *Beauchemin*(3). In *North Sidney Investment and Tramway Company* v. *Higgins*(4), *In re Johannesburg Hotel Company*(1) was supported on the narrower ground that as the agreement in that case for promotion expenses was made before the Company came into existence, it could not be said to create a present debt from the Company at all. I am, therefore, of opinion that there is nothing to prevent my applying the principle of *Spargo's case*(2) if the present facts can be brought within it. I need, I think, only refer to one other case and that is *Barrow's case*(5). With the actual decision, I am not concerned; but Sir GEORGE JESSEL, M.R., with the concurrence of JAMES and BAGGALLAY, LL. JJ., made some observations which appear to me exactly opposite to the present case. In that case, the Company had agreed to buy a colliery and to pay for it at their option either in cash or fully-paid-up shares; and at the material period they had exercised their option and elected to pay in shares. Sir GEORGE JESSEL, M.R., says this: 'The appellant must show that there was money due from the Company which could be set off. There never was any due as regards these shares because, before the time for conveying the property had arrived, that is, before any money was receivable from the Company, the Company had exercised the option to pay in shares;

(1) (1891) 1 Ch., 119.
(2) (1873) L.R., 8 Ch. App., 407.
(3) (1897) A.C., 358.
(4) (1899) A.C., 263.
(5) (1880) L.R., 14 Ch.D., 432.

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so that there never was a moment of time when there was any money due from the Company to the appellant which was capable of being set off.' (I insert the word 'because' into the sentence which is omitted in the report by an obvious typographical error.) I see nothing in this inconsistent with the decision in *Spargo's case*(1) and I think it is a direct authority for the proposition that where the taking of shares is the original consideration and not due to a subsequent adjustment by way of set-off there is not a payment of cash within the meaning of the authorities. If I treat that pronouncement of JESSEL, M.R., as forming part of the decision in *Barrow's case*(2) and follow it, it is necessarily fatal to Mr. Chamier's contention. But even if I do not and apply the test of *Spargo's case*(1) directly, I think the same result follows. These debentures were not repayable until the 1st of January, 1918. By an arrangement the terms of which are contained in the 11th clause of the debenture and the notice given by the debenture-holder in accordance with it, the debenture-holder agreed to surrender his debenture before it was repayable and to accept shares in return. It was not within the contemplation of the parties at any time that cash should pass or be considered as due on either transaction. If the debenture-holder had sought before its maturity to surrender his debenture in return for cash, the Company would have been entitled to refuse him. I think it really comes to this: was there a single transaction or was there a conflation of two transactions? An illustration was put in the course of the argument which, at first sight, looked very cogent. Supposing I go into a shop, buy a table and pay for it and subsequently, by arrangement with the shopkeeper, return the table and take a side-board instead, the shopkeeper throughout retaining my money, could any one say that the side-board had not been paid for in cash. Possibly not, though I think it is arguable that the legal effect of the transaction was that I gave up my table in exchange for the shopkeeper's side-board. But the real question is: Could it be said that the true effect of the transaction was that the shop-keeper cancelled the debt which I owed him for the side-board in return for my foregoing the price of the table due from him to me? No one, I think, would so describe the transaction for the simple reason that it was never in the contemplation of the parties that the shop-keeper should pay me a sum of money in any contingency. Applying the direct test of *Spargo's case*(1) to the present facts I am clearly of opinion that, if the Company had sued the allottees of

(1) (1873) 8 Ch. App., 407. (2) (1880) L.R., 14 Ch.D., 432.

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these shares for their value, they could not have pleaded payment but would be compelled to set out the special arrangement and allege it as accord and satisfaction only.

I come to this conclusion with much regret because, as I have said, the transaction is, in my opinion, not within the mischief which the statute meant to guard against and I cannot think that the legislature could have intended, if such cases as the present had been in its contemplation, to inflict so heavy a penalty upon the parties. If an Appellate Court can see its way to cut the knot and declare this broadly to be a payment in cash because the end of the transaction is that the Company is left with the debenture-holder's cash, and the debenture-holder with the Company's shares to the same value, I should welcome the decision. I do not feel myself, as a judge of first instance, free to take that view in the face of the decided cases; and I fear the hardship can only be put right by the legislature. My decision, therefore, must be in favour of the respondent and I dismiss the motion accordingly.

With regard to costs, Mr. Chamier has invited me, should I be against him to deprive the respondent of costs on the ground that the Assistant Registrar of Joint Stock Companies had filed a disingenuous affidavit in response to the notice of motion. At the time I was inclined to agree with his criticism of the affidavit, but on reflection I do not think it can be charged with anything worse than unfortunate wording. Certainly, if the affidavit did hint at a plea evasive of the real merits of the question, the learned Advocate-General has, as one would expect, discarded it and confined his arguments to the substance of what I have to decide. In any case, the correspondence shows, beyond question, that the argument which has prevailed to-day was put before the petitioners and that the Registrar was quite ready to assist them, so far as lay in his power, to mitigate the severity of the result by treating the case as falling under sub-section (2) rather than under sub-section (1) (*b*). Whether that can be done or not is an extremely difficult question on which I cannot assist the parties, but must leave them to settle with the Revenue authorities. I see no ground for departing from the ordinary course and dismiss the motion with taxed costs."

The petitioners preferred this appeal.

D. Chamier for the appellants relied on his arguments as appearing in the judgment of COUTTS TROTTER, J.

Hon. Mr. *S. Srinivasa Ayyangar*, the Advocate-General for the respondent, in addition to his arguments which appear in

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the judgment of COUTTS TROTTER, J., cited Palmer's Company Precedents, Part III, Form 44, page 297 (Eleventh Edition), Palmer on Company, Volume I, page 69, Buckley on Companies (Ninth Edition), page 203, to show that unless cash was actually due by the Company there can be no set-off.

WALLIS, C.J.—This is an appeal from a decision of Mr. Justice COUTTS TROTTER that an allotment by the appellant company of a fully-paid-up share to a debenture-holder in exchange for his debenture pursuant to a condition in the debenture is an allotment of a share 'as fully paid up otherwise than in cash' within the meaning of section 104 (1) (*b*) of the Indian Companies Act, 1913. The debenture deed provides:

> "The registered holder hereof shall, while the same remains in force and upon giving previous notice in writing, be entitled to surrender this debenture and receive in consideration thereof one fully-paid ordinary share of Rs. 100 of the Company part of or ranking *pari passu* with the ordinary shares of the original capital. Upon the surrender of this debenture under this condition the holder will not be entitled to proportionate interest thereon and the ordinary share so allotted in exchange shall rank for dividend from and after the half-year in which the registration is made."

I agree entirely with the learned Judge in holding that the share allotted in these circumstances was allotted as fully paid up otherwise than in cash and therefore came within the provisions of section 104 (1) (*b*) of the Act.

It has been argued before us that because the debenture-holder originally paid Rs. 100 in cash for his debenture the share in the company which was allotted to him some years afterwards should be regarded as paid up in cash. What the debenture-holder got for his Rs. 100 was a debenture and all the rights which a debenture-holder has, and he enjoyed those rights for a number of years and afterwards parted with those rights pursuant to the provision in the debenture deed and acquired a share in consideration of his surrender of the debenture deed, so that he acquired the share, as stated in the clause itself, in exchange for the debenture. Speaking for myself I fail altogether to see how that can be said to be a case in which the share was allotted to him as fully paid up in cash. It seems to me that it was allotted to him as expressly stated not for cash but in consideration of the surrender of his debenture and

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the rights which he held under it. There is admittedly no case in the books upon section 25 of the English Companies Act, 1867, or the more recent sections, which precisely covers this point. But I am glad to see that the same view is taken by Sir Francis Palmer with regard to a clause in the debenture which is practically in the same terms, in Part III of the eleventh edition of his Company Precedents, Form 44 at page 297. I do not think it necessary to go through the cases which have been cited before us; many of which are dealt with by the learned Judge in his judgment. The present case is clearly distinguishable from *Spargo's case*(1) where money was actually due by the company to the person (the vendor to the company) to whom the share was allotted. Here the debenture has not yet become payable to the allottee and therefore there is nothing which can be made the subject of a set-off. It is, I think, clear upon the authorities that in a case like this there must be a debt actually due and owing by the company to make the doctrine of *Spargo's case*(1) applicable. It is also unnecessary to consider whether there must also be a debt immediately due and payable by the company to the allottee. In *Ferrao's case*(2) it was held that this is not necessary. It does, however, appear abundantly clear that to apply that doctrine there must be a debt immediately due and payable by the company to the allottee. For these reasons, I think the appeal fails and must be dismissed with costs.

OLDFIELD, J.—I agree.

OLDFIELD, J.

N.R.

(1) (1873) L.R., 8 Ch. App., 407. (2) (1874) L.R., 9 Ch. App., 355.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Kumaraswami Sastriyar.

1917, July 16.

ALAGAPPA CHETTIAR AND TWO OTHERS (RESPONDENTS), APPELLANTS,

v.

MUTHUKUMARA CHETTIAR (PETITIONER) (RESPONDENT).*

Civil Procedure Code Act of V 1908, secs. 151 and 144—Money deposited in Court—Withdrawal by one party—Undertaking by party to repay amount—No provision in undertaking to pay interest—Application by party entitled to recover amount with interest—Power of Court to enforce undertaking—Liability for interest—

The plaintiffs having sued to establish their right to certain money which had been paid into Court by a third party, the defendant was allowed to draw the money on an undertaking to repay it if the plaintiffs succeeded. The plaintiffs having obtained a decree,

Held, that the Court had inherent power to order the defendant to repay the money, and that he could be made liable for interest as he had had the wrongful use of the money.

Rodger v. *The Comptoir D'Escompte De Paris* (1871) L.R., 3 P.C.A.C., 465; *Subbarayudu* v. *Yerram Setti Seshasani* (1917) I.L.R., 40 Mad., 299, and *Indra Chund Bothra* v. *Mr. A. H. Forbes* (1917) 2 Pat., L.J., 149, referred to.

APPEAL against the decree of SRINIVASA AYYANGAR, J., in *Muthukumara* v. *Alagappa*(1).

The defendant obtained a decree against X and attached a sum of money belonging to X which was deposited in the District Munsif's Court at M. The plaintiffs preferred a claim petition claiming this sum under a deed of trust executed by X for the benefit of his creditors. The claim petition was dismissed; the plaintiffs then brought this suit in the Court of the District Munsif of T for a declaration that as against the defendant they were entitled to the money and applied for a

* Letters Patent Appeal Nos. 247 and 248 of 1916.

(1) Civil Revision Petition Nos. 591 and 592 of 1915 praying the High Court to revise the order of F. H. WALLACE, the District Judge of Tanjore, in Civil Miscellaneous Appeal No. 78 of 1914, against the order of K. S. RAMASWAMI SASTRI, the District Munsif of Tirutturaippundi, in Original Petition No. 787 of 1914 in Original Suit No. 288 of 1912.

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temporary injunction restraining the defendant from drawing the money. Plaintiff's application was allowed to be dismissed on the defendant undertaking to repay the same in case of plaintiff's success in the suit. On plaintiff's success, he applied by a miscellaneous petition for repayment of the amount with interest. The lower Courts allowed the same but on revision by the defendant to the High Court, SRINIVASA AYYANGAR, J., disallowed the interest on the ground that the undertaking did not contain a covenant to pay interest. Hence this Letters Patent Appeal by the plaintiff.

C. V. Anantakrishna Ayyar for the appellants.

S. Muthiah Mudaliyar for the respondent.

The JUDGMENT of the Court was delivered by

ABDUR RAHIM, J.

ABDUR RAHIM, J.—In this case there was a sum of money in deposit in Court and there was a dispute as to who was entitled to that money—the appellants whose claim was based on a trust-deed, or the judgment-debtor of the respondent. The appellants filed a suit to establish their right and obtained a temporary injunction restraining the respondent from drawing the money. Thereupon the respondent, on giving an undertaking to the Court, was allowed to draw the money. The appellants succeeded in establishing their title and the only question now before us in the Letters Patent Appeal is whether the appellants are entitled to interest on the amount drawn by the respondent till the date when he paid back the amount. Mr. Justice SRINIVASA AYYANGAR has decided against the appellants' contention on the ground that the undertaking given by the respondent did not provide for the payment of interest. We do not think that this is a conclusive factor. There is no express provision in the Civil Procedure Code or any of the other Indian Acts to which we have been referred which covers the question. Section 144 of the Code provides for proper orders being passed as regards payment of interest or damages in cases of restitution. This is not exactly a case of restitution though the principle of that section has been applied to a case somewhat similar to this by a Bench of this Court in *Subbarayudu* v. *Yerram Setti Seshasani*(1). We have also been referred to a decision

(1) (1917) I.L.R., 40 Mad., 299 at p. 300.

ALAGAPPA CHETTIAR v. MUTHU-KUMARA CHETTIAR.

ABDUR RAHIM, J.

of the Patna High Court in *Indra Chund Bothra* v. *Mr. A. H. Forbes*(1). There also, though it was not a case exactly covered by section 144, the principle of that section was applied. The Privy Council has laid down the principle applicable to such cases in *Rodger* v. *the Comptoir D'Escompte De Paris*(2). Here the facts show that the appellants were entitled to this money and the respondent who had no title to the money obtained it from the Court by representing that he had a title. The principle therefore applies that having had wrongful use of the appellants' money, he is bound to pay interest during the time he had the use of the money.

The learned pleader for the respondent argued that the Court had no power to order the payment of the money or interest thereon in this proceeding. But the order is simply to enforce the undertaking which was given by the respondent to the Court and we have no doubt in holding that the Court had inherent power to enforce that undertaking on the faith of which the respondent obtained the money. We must allow the appeals reversing the judgment of the learned Judge and the decree will be varied in this way. The decree will provide for payment of interest by the respondent at 6 per cent from the date he drew the money from Court till the date of repayment. The respondent must bear the costs of these appeals and of the revision petitions. The memoranda of objections are dismissed.

K.R.

(1) (1917) 2 P.L.J., 149. (2) (1871) L.R., 3 P.C.A.C., 465 at p. 476.

APPELLATE CIVIL.

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

KATTA THOLASINGAM CHETTY (DEFENDANT), APPELLANT,

v.

VEDACHELLA AIYAH AND FOUR OTHERS (PLAINTIFFS), RESPONDENTS.*

1917, July, 17 and 19.

Limitation Act (IX of 1908), sec. 10, whether applicable to suits in respect of property which has not been received by a trustee.

The insertion in section 10 of the Indian Limitation Act, 1908, of the words "or the proceeds thereof, or for an account of such property or proceeds" has not had the effect of exempting from the ordinary rules of limitation suits against trustees for failure to reduce the trust property into possession.

New Fleming Spinning and Weaving Company, Limited v. *Kessowji Nàik* (1885) I.L.R., 9 Bom., 373 at p. 399, followed.

APPEAL against the judgment of COUTTS TROTTER, J., in Civil Suit No. 376 of 1913.

The following summary of facts is from the material portions of the judgment of COUTTS TROTTER, J. :—

This suit was instituted by the worshippers of Sri Venugopala Krishnaswami temple in Coral Merchant Street, Georgetown, against the defendant as Dharmakarta in relation to his conduct as Dharmakarta of that temple and asking for various reliefs against him. Among the allegations made against the defendant were several breaches of trust with regard to the properties of the temple and one in particular was that the defendant had allowed item No. 11 mentioned in the schedule to the plaint which had been dedicated to the temple by a deed of gift in 1892 to remain in the possession of the donors until the rights of the temple were lost by the law of limitation. The defendant in his written statement pleaded that, though about 1903 he attempted to get possession of the property, as the manager, one Madamorayya Mudaliar whose name was also included in the instrument of gift, was colluding with the relations of the donor and would not part with the possession of the documents

* Original Side Appeal No. 64 of 1916.

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relating to the house or join the defendant in any action, he could not obtain possession of the same. The defendant further alleged that he was taking steps to recover the property for the temple.

The learned Judge, on a consideration of the evidence before him, came to the conclusion that the said property had been allowed to pass into the hands of others irrevocably by the gross misconduct of the defendant and held that he was liable to account both for the corpus and the income of the property and referred the matter to the Official Referee for accounts and enquiries and further gave direction to the Official Referee that the defendant would be at liberty to argue and satisfy him if he could that he was not accountable for the income but only for the corpus. The defendant preferred this appeal against the decision of COUTTS TROTTER, J., and contended that the claim for the loss of property, if any, was barred by limitation.

T. R. Venkatarama Sastriyar, *V. S. Govindachariyar* and *V. S. Kallabhiran Ayyangar* for the appellant.

C. P. Ramaswami Ayyar and *M. Subbaraya Ayyar* for the respondents.

WALLIS, C.J.

WALLIS, C.J.—In this case a trustee was ordered to be removed by Mr. Justice BAKEWELL and an account was directed to be taken against him. That decision was confirmed on appeal and the case went to the learned Official Referee. But the learned Official Referee was of opinion that certain questions of fact involved should be decided by the Court itself, and the case, therefore, came before Mr. Justice COUTTS TROTTER sitting on the Original Side and we have now to deal with an appeal from his decision.

The question argued before us on appeal relates to item 11, certain house property to which the trust became entitled in the time of the former trustee, some ten years before the accession to the office of trustee of the defendant in this suit so that the defendant had two years in which he could have taken steps for recovery of the property. It is stated by the learned Judge, and the case proceeds upon that basis, that neither the present defendant nor his predecessor did anything to recover the property and therefore it became lost to the trust by reason of the law of limitation. There is not much said about limitation in the judgment under appeal, but the learned Judge

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observed at the close of the judgment that it would be open to the defendant when the case went back to the Official Referee to show if he could that he was not accountable for the income but only for the corpus.

WALLIS, C.J.

Before us it has been argued that on the facts stated and under the present law of limitation the remedy against the trustee is barred both as to the corpus and income, the suit having been instituted some nine years after the property was finally lost to the trust by the operation of the statute of limitation.

The question of the interpretation of section 10 as amended in the Act of 1908 is one of considerable importance and we have had it fully argued before us. As is well known, the statutes of limitation were not applied in England to claims against trustees. There was a provision in the Judicature Act(1) which specially excepted from their operation suits for following trust property, and that section of the Judicature Act was very closely reproduced as section 10 of the Limitation Act of 1877. It provided—

"No suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property shall be barred by any length of time."

There was some variance of opinion as to the scope of this section, and there were some cases which held that a claim for an account of property which had actually come into the hands of the trustee was not saved from the bar of limitation unless the property still continued in the hands of the trustee in one case it was said 'in specie' whereas a more liberal view was taken in some other cases that the section saved from the bar of limitation claims to property which had come into the hands of the trustee and for which he had become accountable. But we have not been referred to any case, and I am not aware of any, in which it was held that the bar of limitation under the old section was saved as regards cases where it was sought to render a trustee accountable not for property which had come into his hands, but for property which but for his wilful default or

(1) (1873) 36 and 37 Vic., Cap. 66, sec. 25 (2).

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neglect would have come into his hands. Mr. Justice SCOTT in *The New Fleming Spinning and Weaving Company, Limited* v. *Kessowji Naik*(1), expressly ruled that such claims were within the operation of the ordinary law of limitation. The next thing we observe is that the English legislature in 1888(2) departed from the policy till then followed as regards trustees, and afforded them the benefit of the operation of the statutes of limitation except in two specific cases, that is to say, except where a claim was founded on fraud or a fraudulent breach of trust, or—these are the important words—was

"to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use."

So that, unless the claim is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use, the ordinary provisions of the Limitation Act are to apply in England. It is important to observe that the policy of the English legislature as shown in that provision clearly was to introduce a fresh protection for trustees by relieving them from an indefinite liability to account except in cases of fraud or fraudulent breach of trust or cases in respect of trust property or the proceeds thereof still retained by the trustees or previously received by them and converted to their own use.

That brings us now to the recent amendment of the Act of 1877 by section 10 of the Limitation Act of 1908 which amendment was effected by inserting in that section, after 'following in his or their hands such property', the words 'or the proceeds thereof or for an account of such property or proceeds'.

Now it has been contended by Mr. Ramaswami Ayyar for the respondent that the effect of introducing the words 'or for an account of such property or proceeds' has been to make trustees liable for an indefinite time and without bar of limitation for breaches of trust consisting in failure to get in the trust property.

If this be the true construction, the Indian legislature has gone far beyond the authority of any Indian case in direct opposition to the recent legislation in England. It is impossible

(1) (1885) I.L.R., 9 Bom., 373 at p. 399. (2) 51 & 52 Vict., Cap. 59, sec. 8.

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in my mind to attribute to them such an intention unless most clearly expressed. It may be said that the words 'suit for an account' may cover a suit for an account of the proceeds the trustee had received or might have received but for his wilful default or neglect, that is to say, an account on the footing of wilful default or neglect. But to give that meaning to the words 'suit for an account' as introduced into section 10 of the Indian Limitation Act, 1908, would be entirely to alter the whole scope of the section and to run counter to the whole tendency of modern legislation. I cannot therefore accept that contention. It follows that the present claim both for failure to get possession of the corpus and income of the trust property falls within the operation of the ordinary law of limitation. If that be so, it is not suggested that the suit is not barred. In the result, on this ground the appeal must be allowed with costs of this appeal and with any extra cost incurred in the proceeding before the learned Judge which is now under appeal payable out of the temple funds.

OLDFIELD, J.—I agree. OLDFIELD, J.

S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

MUTHIA NAICK AND TWO OTHERS (ACCUSED NOS. 1, 2 AND 5), PETITIONER, 1917. July 19.

v.

THE KING-EMPEROR (RESPONDENT) *

Criminal Procedure Code (Act V of 1898), sec. 345—Composition of an offence with one of several accused persons, effect of.

The composition of an offence under section 345 of the Criminal Procedure Code with one of several accused persons does not effect an acquittal of the others.

Chandra Kumar Das v. *The Emperor* (1902) 7 C.W.N., 176, dissented from.

PETITION under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898) praying the High Court to revise

* Criminal Revision Case No. 187 of 1917.
Criminal Revision Petition No. 149 of 1917.

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the judgment of F. H. SENNECK, the Sub-Divisional Magistrate of Sivakasi, in Criminal Appeal No. 45 of 1916, preferred against the judgment of S. AYYATHURAI AYYAR, the Second-class Magistrate of Virudupatti, in Calendar Case No. 100 of 1916.

A complaint of 'hurt' under section 323, Indian Penal Code, was preferred against five persons in the Sub-Magistrate's Court of Virudupatti. The complaint against two of them was not proceeded with as the offence was compounded with them and the Sub-Magistrate acquitted them under section 345 (6) of the Criminal Procedure Code. A charge of hurt was framed against the other accused and they were convicted of the offence. The conviction was confirmed on appeal by the Sub-Divisional Magistrate. The accused preferred a revision petition to the High Court and contended *inter alia* that, on the compounding of the offence with some of the accused, all the accused were entitled to an acquittal under section 345 of the Criminal Procedure Code.

S. Ranganadha Ayyar for Dr. *S. Swaminadhan* for the petitioner.

E. R. Osborne, the Acting Public Prosecutor, for the Crown.

AYLING AND SADASIVA AYYAR, JJ.

ORDER.—Petitioners' vakil contends that the composition of an offence under section 345 of the Code of Criminal Procedure with one of several accused persons has the effect of an acquittal of all the accused persons. We can find nothing in the section to support this interpretation and if this is really the meaning of the learned Judges in *Chandra Kumar Das* v. *The Emperor*(1), we must respectfully dissent. No other authority is quoted by petitioner.

The petition is dismissed.

K.R.

(1) (1902) 7 C.W.N., 176.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Kumaraswami Sastriyar.

1917. August 1.

LAGADAPATI VENKATA NAGABUSHANAM (FIRST DEFENDANT), PETITIONER,

v.

GARLAPATI MAHALAKSHMI AND TWO OTHERS (APPELLANTS, AND RESPONDENTS NOS. 2 AND 3), RESPONDENTS.*

Agency Rules of Godavari district, rules 8 *and* 16†*—Dismissal of suit, for default, by Assistant Agent—Order of Agent restoring suit—Revision petition to High Court, maintainability of—Decree under rule* 8, *construction of—Order setting aside dismissal without notice to defendant, validity of—Petition to Government, necessity for.*

An order, passed by a Government Agent, directing that a suit dismissed by an Assistant Agent for default of appearance of the plaintiff be restored to file, is not a decree within the meaning of rule 8 of the Agency Rules for the Godavari district, and is not revisable by the High Court by a petition filed directly in the High Court.

Sri Pedda Vikrama Deo Garu v. *The Maharaja of Jeypore* (1916) 4 L.W., 499, followed.

PETITION under rule 8 of the Agency Rules for the Godavari district praying the High Court to direct Mr. COUCHMAN, the Government Agent in Godavari, to revise his order in D. Dis. No. 52/Ag., dated 4th February 1916, reversing in appeal the order of CHARLES HENDERSON, the Assistant Agent of Bhadrachalam Division, dated 19th July 1916, refusing to restore Original Suit No. 25 of 1913 on the file of this Court.

* Civil Miscellaneous Petition No. 319 of 1917.

† Rules framed by Government for the guidance of the Government Agent in Godavari under section 6 of the Scheduled Districts Act (XIV of 1874).

Rule VIII.—"All decrees passed by the Government Agent on appeal from decrees of his subordinates shall be final the High Court having the power on special grounds to require him to review his judgment as may be directed by them."

Rule XVI.—"All petitions against the proceedings of the Government Agent must, in the first instance, be submitted to the Government, and will be referred, when necessary, either to the High Court or the Board of Revenue, as the case may be."

The facts of the case appear from the judgment.

P. Narayanamurti for the petitioner.

P. Somasundaram for the respondent.

The judgment of the Court was delivered by

ABDUR RAHIM, J.—The first respondent brought a suit against the petitioner in the Court of the Assistant Agent in the Godavari district for dissolution of partnership and other reliefs. The suit was dismissed for default. Then the plaintiff appealed to the Agent who, without hearing the defendant in the suit, set aside the order dismissing the suit for default and directed that the suit be restored to the file of the Assistant Agent to be heard and disposed of according to law. Against the order of the Agent the present civil miscellaneous petition has been preferred asking us to direct the Agent to review his order according to rule 8 of the Agency Rules. But that rule applies only to decrees passed by the Government Agent and to judgments leading to decrees.

A preliminary objection is taken that the order of the Agent directing that the suit be restored to file is not a decree within the meaning of the Agency Rules. We think that this contention is sound. The point has been decided in *Sri Pedda Vikrama Deo Garu* v. *The Maharaja of Jeypore*(1) following a number of other decisions of this Court. There a decree is understood as meaning the same thing as a decree under the Civil Procedure Code, for the Agency Rules themselves do not contain any definition of 'decree.' We see no reason for differing from that interpretation. What, however, was argued by the learned vakil for the petitioner was that though the order of the Assistant Agent dismissing the suit for default is not a decree yet the order of the Agent setting aside that order and directing the restoration of the suit is an adjudication of the rights of the parties within the meaning of the definition of 'decree' as given in the old Civil Procedure Code. But it is difficult to accept this contention. The right contemplated by that definition is not a right to the benefit of certain rules of procedure, that is to have an order of Court set aside by which the plaintiff's suit has been disposed of without trial. We may observe that rule 16 of the Agency Rules provides that all petitions against the

(1) (1916) 4 L.W., 499.

proceedings of the Government Agent must, in the first instance, be submitted to the Government and then it is open to the Government to refer the matter to the High Court or to the Board of Revenue, as the case may be. There can be no doubt that the Government Agent in this case was not justified in setting aside the order dismissing the suit for default without giving an opportunity to the defendant to be heard.

The proper remedy of the petitioner is to submit a petition to the Government and it is for the Government if it so chooses to refer the petition to the High Court for disposal. The present petition must be dismissed with costs.

K.R.

APPELLATE CIVIL.

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

M. R. M. A. SUBRAMANIAN CHETTIAR (JUDGMENT-DEBTOR), APPELLANT,

v.

HON. P. RAJARAJESWARA SETHUPATHI *alias* MUTHU-RAMALINGA SETHUPATHI AVARGAL, RAJA OF RAMNAD (DECREE-HOLDER), RESPONDENT.*

1917. August 9 and 10.

Civil Procedure Code (Act V of 1908), O. XLI, r. 5 (3)—Order under—Immoveable property given as security for decree by judgment-debtor, whether realizable in execution—Judgment-debtor taking advantage of a favourable order in execution—Estoppel.

Immoveable property given by a judgment-debtor as security for the due performance of a decree, pursuant to an order made under Order XLI, rule 5 (3), Civil Procedure Code, can be realized in execution without attachment, the matter being one relating to execution within section 47, Civil Procedure Code, and a separate suit does not lie.

Sadasiva Pillai v. *Ramalinga Pillai* (1875) 2 I.A., 219, applied.

Shyam Sundar Lal v. *Bajpai Jainarayan* (1903) I.L.R., 30 Calc., 1060, followed.

* Appeal Against Order No. 195 of 1917.

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Mukta Prasad v. *Mahadeo Prasad* (1916) I.L.R., 38 All., 327, and *Saminatha Pathan* v. *Sornatha Ammal* (1912) 22 M.L.J., 190, referred to.

Tokhan Singh v. *Girwar Singh* (1905) I.L.R., 32 Calc., 494, distinguished.

Where a judgment-debtor who could have been arrested for the entire amount of a decree is on his objection ordered to be arrested only for a certain amount on the ground that the balance could be realized by the sale of the lands given by him as security for the decree amount, he is estopped from afterwards disputing the right of the decree-holder to sell the lands for all the then balance of the decree even though such balance may exceed the amount for which the lands were originally tendered as security.

Sadasiva Pillai v. *Ramalinga Pillai* (1875) 2 I.A., 219, followed.

APPEAL against, and Civil Revision Petition under section 115 of Civil Procedure Code (Act V of 1908) and section 107 of the Government of India Act of 1915, to revise, the order of P. SUBBAYYA MUDALIYAR, the Subordinate Judge of Ramnad at Madura, in Execution Application No. 515 of 1917 (in Execution Petition No. 91 of 1917 in Original Suit No. 6 of 1902).

A security bond given by the judgment-debtor for the purpose of staying the execution of the decree against him pending his appeal against the decree was in these terms :—

"Security bond, dated 12th October 1903, executed to the Court of the Subordinate Judge, Madura East, by Subramanian Chettiar, son of Devakottai M. R. A. Ramanathan Chettiar, Nattukottai Chetti, money-lender, residing in North Veli Street, Municipal sixth ward, Madura town. As the suit O.S. No. 6 of 1902 on the file of this Court in which I am the first defendant has been decided against me, I have now preferred an appeal to the High Court. I presented a petition in the High Court that the execution of the said decree be stayed till the disposal of the appeal. Thereupon the High Court passed on 31st August 1903 an order in C.M.P. 771 that I should give a security for the said decree appeal amount Rs. 39,087-8-4 and for interest thereon for two years at the current rate among the Madura Chetti people which interest was ascertained to be Rs. 6,967-1-4, that is, Rs. 46,054-9-8. For this sum of Rupees forty-six thousand and fifty-four, annas nine and pies eight, I have given as security the immoveable properties to which I am entitled, which are in my enjoyment and which are specified herein below. I have not subjected the said properties to any encumbrance whatever. In case the said High Court appeal be decided against me, I content to the plaintiff recovering the amount of this Court's decree from the undermentioned properties . . . "

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The facts of the case which are extracted from the judgment of the lower Court are as follows :—

"In this case decree was passed on 30th March 1903 for Rs. 39,000 odd against the first defendant. The first defendant preferred an appeal to the High Court and the plaintiff filed memorandum of objections. Pending disposal of the appeal, their Lordships ordered that the execution of the decree be stayed except with respect to costs, on first defendant giving security for the amount of decree of this Court together with interest for two years at the *Chetti Nadappu* rate. The first defendant executed a security bond in favour of the Court on 12th October 1903 for Rs. 39,000 and odd and two years' interest or in all for Rs. 46,054-9-8 on the security of two items of immoveable property valued at Rs. 50,000 and Rs. 20,000 respectively. The bond recites that if the appeal went against the first defendant, the latter agreed to the amount of the decree of this Court being recovered from the secured properties. On the 21st April 1909 the High Court modified the decree of this Court and passed a decree against the first defendant for Rs. 41,092-11-7 with interest thereon at 9 per cent per annum from the date of the plaint. Their Lordships also allowed Rs. 2,022-14-10 to the plaintiff for his costs of the appeal and Rs. 392-4-3 for his costs on the memorandum of objections. Then on 11th October 1909 the plaintiff applied for execution of the decree for the full amount due under the High Court's decree including costs, i.e., for Rs. 74,492-0-2 by arrest of the first defendant and by sale of the secured properties without attachment. Then the first defendant appeared by vakil and contested the execution petition only so far as it prayed for his arrest. After hearing both sides the following order was passed on Execution Petition No. 291 of 1909 on 20th October 1909 :—

'I can see no valid objection at all to this application. It is however seen that property accepted as worth Rs. 70,000 has been given as security for the satisfaction of the decree. That being so, I do not consider it necessary to allow both arrest and sale of the property at the same time, for the entire amount. But seeing that the decree amount now to be paid exceeds Rs. 70,000, I think it will be sufficient to safeguard the plaintiff's interest to direct arrest for Rs. 7,000 in the decree amount at present and postpone issue of arrest or other process for the balance, if any, remaining unpaid after the sale of the property . . . Meanwhile arrest also will issue for the present for payment of Rs. 7,000 in the decree amount if the same is not paid in fifteen days; returnable 6th December 1909'.

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"The sale however did not take place. The defendant paid Rs. 7,000 and the petition was closed. Subsequently the matter went up before Privy Council and their Lordships dismissed the first defendant's appeal on 30th November 1915.

"Now the plaintiff's costs before the Privy Council have been recovered and he now seeks to recover the balance still due as per High Court's decree, by sale of the first defendant's secured properties without attachment. The first defendant took various objections to the plaintiff's execution of the decree."

The Subordinate Judge ordered, without effecting an attachment, the sale of the properties given as security for the entire balance of the decree amount.

The first defendant preferred this appeal.

A. Krishnaswami Ayyar (with *M. Patanjali Sastriyar*) for appellant.—A security bond making immoveable property liable for any decree that may be passed in the case operates as a mortgage, and such a bond requires to be registered; being unregistered it cannot be acted upon; *Nagaruru Sambayya* v. *Tangatur Subbayya*(1). Even if it can be acted upon the security can be realized only by a suit and not by a petition in execution. Section 99 of the Transfer of Property Act was in force when the security bond was given; hence, a suit alone is the proper remedy: see *Tokhan Singh* v. *Girwar Singh*(2). Even if it could be realized in execution, order to sell without an attachment is invalid. The security bond made the lands security only for Rs. 46,000 and they cannot therefore be sold for any higher amount. The prior order in execution does not operate either as estoppel or as *res judicata*. The questions now argued were not the subject of the prior order.

Hon. Mr. *S. Srinivasa Ayyangar, the Advocate-General*, with *R. Krishnama Achariyar* for the respondent.—Realization of security given for a decree is a matter relating to execution within section 47, Civil Procedure Code: *Sadasiva Pillai* v. *Ramalinga Pillai*(3), *Chutterdharee Lall* v. *Rambelashee Koer*(4), *Abdool Wahed* v. *Fareedoonnissa*(5), *Saminatha Pathan* v.

(1) (1908) I.L.R., 31 Mad., 330.
(2) (1905) I.L.R., 32 Calc., 494.
(3) (1875) 2 I.A., 219 at p. 233.
(4) (1878) I.L.R., 3 Calc., 318.
(5) (1889) I.L.R., 16 Calc., 323.

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Sornatha Ammal(1), *Mukta Prasad* v. *Mahadeo Prasad*(2) and *Shyam Sundar Lal* v. *Bajpai Jainarayan*(3). Attachment is not necessary, as the property has been given as security. The sale can now be ordered not only for Rs. 46,000 but for the whole amount due under the decree. Rupees 46,000 was mentioned in the security bond as that was the whole amount then due. At the time of the previous execution when the judgment-debtor could have been arrested not only for the Rs. 70,000 for which he gave security but also for nearly Rs. 7,000 more, he was after his objection allowed to be arrested only for Rs. 7,000, the Court accepting his statement that the rest of the decree amount could be realized from the sale of the lands tendered as security. Having taken advantage of that order, the judgment-debtor is now estopped from contending that the property could not be sold for all the present balance of the decree amount. *Sadasiva Pillai* v. *Ramalinga Pillai*(4) *Subbaraya Ayyar* v. *Ramasawmi Pillai*(5), *Durga Prasad Bannerjee* v. *Lalit Mohan Singh Roy*(6) and *Gokhai* v. *Gones Lal*(7).

A. Krishnaswami Ayyar in reply.—*Sadasiva Pillai* v. *Ramalinga Pillai*(4) does not lay down that the security is realizable in execution. The decision therein turned upon the construction of the particular security bond given in that case.

The following judgment of the Court was delivered by

WALLIS, C.J.—The question raised in the appeal, which is of some importance is, when immoveable property has been given by the judgment-debtor as security for the due performance of a decree pursuant to an order made under Order XLI, rule 5 (3) (*c*), Civil Procedure Code, whether that property can be realized by the decree-holder in execution or can only be realized in a separate suit. We have been referred to a decision in *Tokhan Singh* v. *Girwar Singh*(8) that a separate suit is necessary. But the learned Judges who decided that case proceeded upon the prohibition in section 99 of the Transfer of Property Act, as it then was, against bringing mortgaged property to sale except by means of a suit under section 67 of that Act. That section has been repealed and the prohibition has been limited in Order

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(1) (1912) 22 M.L.J., 190.
(2) (1916) I.L.R., 38 All., 327.
(3) (1903) I.L.R., 30 Calc., 1060.
(4) (1875) 2 I.A., 219 at p. 233.
(5) (1912) 22 M.L.J., 166.
(6) (1893) I.L.R., 25 Calc., 86.
(7) (1912) 16 C.L.J., 404.
(8) (1905) I.L.R., 32 Calc., 494.

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XXXIV, rule 14, Civil Procedure Code, and that decision is therefore inapplicable to the present case and affords no reason for refusing to follow the earlier decision of the same Court in *Shyam Sundar Lal* v. *Bajpai Jainarayan*(1). Further in that case the point was not taken before the learned Judges that such a sale comes within the provisions of section 47 (formerly section 244), Civil Procedure Code, which provides that

"all questions arising between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit."

If we look at the question on principle and independently of authority, it is difficult to see how the realization of the security given to the Court pursuant to an order of the Court, for the purpose of satisfying the decree-holder can possibly be said to be a matter not relating to the execution, discharge or satisfaction of the decree, or not to be a question arising between the parties to the decree. The fact that the bond is given to the Court does not make it a question arising between the judgment-debtor and a third party so as to take it out of the section. The bond was given to the Court in *Sadasiva Pillai* v. *Ramalinga Pillai*(2), and yet the case was held to come within the section of the Code corresponding to section 47. If the section is applicable, then that being the special provision governing these matters, it would have overridden any general provision contained in section 99 of the Transfer of Property Act. We are therefore clearly of opinion that apart altogether from authority it is a matter arising in execution within the meaning of section 47, Civil Procedure Code. The effect of immovable property being given as security is something more than attachment because it makes the property applicable solely in discharge of the judgment-debt and not liable to rateable distribution among other judgment-creditors. But the realization by the Court of such security in execution is of the same nature as sale by the Court of the immoveable property attached, that is to say, it transfers the right, title and interest of the judgment-debtor who has given security. There is no need in such a case that there

(1) (1903) I.L.R., 30 Calc., 1060. (2) (1875) 2 I.A., 219 at p. 233.

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should be anything in the nature of a mortgage suit for sale under section 67 of the Transfer of Property Act with all the expense and delay which would be thereby involved. It would be a most mischievous state of law if such a thing were necessary and it would fetter the discretion of the Court in accepting immoveable property as security for the execution of the decree. This view is in accordance not only with *Shyam Sundar Lal* v. *Bajpai Jainarayan*(1), but also with *Mukta Prasad* v. *Mahadeo Prasad*(2), and the dictum of two learned Judges of this Court in *Saminatha Pathan* v. *Sornatha Ammal*(3). What is more important is, that it is strongly supported by the decision of their Lordships of the Judicial Committee in *Sadasiva Pillai* v. *Ramalinga Pillai*(4), where security of immoveable property given for mesne profits which were not awarded by the decree was held to be realizable in execution for such mesne profits, instead of leaving the parties to recover them in a separate suit. Their Lordships observe at page 232 that the security bonds were

"proceedings in Court importing a certain liability to be enforced in the suit against the defendant to that suit."

They further observed at page 233 that the liability incurred under those bonds amounts to a "question relating to the execution of the decree" within the meaning of the latter clause of section 11 of Act XXIII of 1861. If the question in that case was one relating to the execution of the decree, *a fortiori* it is so in the present case where security has been furnished to the Court pursuant to an order of Court under Order XLI, rule 5 (3) (c), Civil Procedure Code. It is unnecessary in this case to deal with cases of security given by third parties under section 145, Civil Procedure Code, or with the decisions on that question.

The second objection taken to the order under appeal is that it was for the enforcement of the security for a larger amount than that provided for in the bond. Now we think that that bond has already formed the subject of adjudication because the property has been ordered to be sold for the full decree amount and that order was allowed to become final. Further on the basis that this security was enforceable for the full amount of

(1) (1903) I.L.R., 30 Calc., 1060. (2) (1916) I.L.R., 38 All., 327.
(3) (1912) 22 M.L.J., 190. (4) (1875) L.R., 2 I.A., 219.

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the decree, the Court refused to enforce the decree personally against the judgment-debtor as it would have otherwise been bound to do, except to the extent of Rs. 7,000, the balance of the decree amount over the estimated value of the immoveable property given as security. In these circumstances we think the appeal also fails on this point.

In the result, the appeal fails and is dismissed with costs. The Civil Revision Petition is dismissed. As regards the Civil Miscellaneous Petitions Nos. 1684 and 1685 of 1917 for stay no order is necessary.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling.

1917. March 29, April 24, and August 24 and 27.

KOROTH MAMMAD AND ANOTHER (PRISONERS NOS. 1 AND 2), APPELLANTS,

v.

THE KING-EMPEROR, RESPONDENT.*

Penal Code (Act XLV of 1860), sec. 370—Buying and selling as a slave, what amounts to.

The appellants in these cases were convicted by the Sessions Court of North Malabar under section 370, Penal Code, the second appellant having been found to have sold, and the first to have bought, a Pulayan named Vellan as a slave. The document recording the above transaction ran as follows:—"I execute to you and give you this day this jenmam deed giving you Velandi's son Pulayan Vellan with his heirs. The sum that I received from you in cash to-day is ten rupees. For this sum of ten rupees, you should get work done for you by the said Vellan and his offspring that may come into being as your jenmam, and act as you please."

On a difference of opinion between ABDUR RAHIM and NAPIER, JJ., as to whether the said transaction amounted to an offence under section 370, Indian Penal Code:

Held by AYLING, J., that the transaction in question was a sale of Vellan and his offspring as mere chattels and that the appellants were guilty of an offence under section 370, Penal Code.

Empress of India v. *Ram Kuar* (1880) I.L.R., 2 All., 723, and *Amina* v. *Queen Empress* (1884) I.L.R., 7 Mad., 277, referred to.

* Criminal Appeals Nos. 26 and 27 of 1917.

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APPEAL against the judgment of H. D. C. REILLY, the Sessions Judge of North Malabar, in Calendar Case No. 35 of 1916.

The necessary facts are to be found in the opening paragraph of the judgment of ABDUR RAHIM, J.

The accused were not represented.

J. C. Adam, Crown Prosecutor, for *E. R. Osborne, the Acting Public Prosecutor*, for the Crown.

These appeals came on for hearing in the first instance before ABDUR RAHIM and NAPIER, JJ., who delivered the following judgments:—

ABDUR RAHIM, J.

ABDUR RAHIM, J.—These are appeals from the convictions of two persons under section 370, Indian Penal Code, the second accused having been found to have sold a Pulayan named Vellan and the first accused to have bought the said Vellan as a slave. The case comes from North Malabar; the two accused are Mappillas and Vellan, who is of the age of 25 years, is a Cheruman, a caste which until the abolition of slavery by different Acts, the last and most important of which was Act V of 1843, occupied the position of serfs or 'rice slaves,' as Pulayans are called in Gundert's Malayalam Dictionary. The transaction is evidenced by a document executed by the second accused in favour of the first accused in these terms:

"I execute to you and give you to-day the 27th Metam 1088 (this) jenmam deed giving you Velandi's son Pulayan Kurungot parkum Vellan, with his heirs. The sum that I received from you in cash to-day is Rs. 10. For this sum of Rs. 10, you should get work done for you by the aforesaid Vellan and his offspring that may come into being as your *jenmam* and act as you please."

The use of the word *jenmam*, which means property, might, if it stood alone, imply that these two persons were dealing with Pulayan Vellan as a chattel. The nature and object of the transaction is however explained more explicitly as being to the effect that the first accused, the so-called purchaser, was to get work done by the said Vellan and his offspring.

The question is, was Pulayan Vellan sold and bought as a slave? This has to be determined not merely with reference to the language of the document, but with reference to the evidence and conduct of the parties. In this connexion, the consciousness and conduct of prosecution first witness himself who was a

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grown up person, at the date of the transaction and had been born and brought up in British India, must also be taken into consideration.

The word 'slave' is not defined in the Indian Penal Code or in any other Act, so far as I know. In Webster's Dictionary, a slave is defined as 'one who has no freedom of action, but whose person and services are wholly under the control of another'; in the Century Dictionary, as 'a person who is the chattel or property of another and is wholly subject to his will.' In Wharton's Law Lexicon, 'slavery' is defined as 'the civil relation in which one man has absolute power over the liberty of another.' In Roman Law, slavery, properly speaking, was, as stated by Mr. Hunter in his book on Roman Law, an institution of the *jus gentium* by which, contrary to nature, a man became the property of a master. Even under that system, the full rights incident to property, such as the right of destroying, ceased to be recognized during the Empire and the rescripts of the different Emperors afforded considerable protection to the life of a slave. But, as stated by Mr. Hunter, it must be taken to be inherent in the condition of slavery as conceived in the Roman Law that the master has a right to all the services the slave is capable of rendering and to everything that the slave, if free, would have acquired for himself, and conversely the slave himself has no right to property. In Muhammadan Law, the slave has a complete right to the protection of his person and life, just like a free man. The condition of slavery according to that law amounts to this, that he cannot own any property, his master being entitled to the full usufruct of his labour. In my opinion therefore the statement in *Empress of India* v. *Ram Kuar*(1), which is cited with approval in *Amina* v. *Queen-Empress*(2) that section 370, and the cognate sections of the Indian Penal Code

"were enacted for the suppression of slavery not only in its strict and proper sense, viz., that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but in any modified form where an absolute power is asserted over the liberty of another"

(1) (1880) I.L.R., 2 All., 723 at p. 727.
(2) (1884) I.L.R., 7 Mad., 277 at p. 279.

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is correct. The minimum requirement of the status of slavery would thus seem to be, that absolute power should be asserted over the liberty of the slave and on his personal services. As observed by STUART, C.J., in *Empress of India* v. *Ram Kuar*(1)

"the actual accomplishment of placing a human being in the condition of a slave could not have been contemplated, inasmuch as the possibility of accomplishing anything unknown to the law, cannot be supposed to have been meant or intended; section 370 therefore can only be understood as directed against attempts to place persons in the position of slaves, or to treat them in a way which is inconsistent with the idea of the persons so treated being free as to his property, services or conduct in *any respect*."

This, in my opinion, being the proper test, the question is, whether the accused attempted to treat Vellan in a way which is inconsistent with the idea of his being 'free as to his property, services or conduct in any respect.' In this connexion I shall take the following facts to be proved and that is practically what is found by the Sessions Judge. Vellan did not live on the land of either of the accused, but lived on the land of another person, with his mother and step-father, his own father having died when he was a child. None of his parents were ever treated as slaves and it appears from the evidence that his father worked not only for the second accused but also for other persons and he never lived on the land of the second accused. Vellan began to work for the second accused about three years before the date of Exhibit B and it is not suggested that the second accused bought or received him either from his mother or step-father or anybody else as a slave. There is also evidence that before the date of Exhibit B, Vellan sometimes worked for other employers and received daily wages which he was free to spend as he chose, though it may be taken as proved that during the three years before Exhibit B, Vellan worked practically exclusively for the second accused. The man married, borrowed money for this and other purposes on his own credit and paid off the debt with his earnings. He used to buy supplies from shops on credit and afterwards settle the account himself. The

(1) (1880) I.L.R., 2 All., 723 at p. 727.

wages he used to get from the second accused were a measure of paddy a day, which he admits to be the usual payment for Cheruma labourers. The payment of prevalent wages to Vellan would in itself indicate that the relation between him and either of the accused was not that of a slave and a master. There is the further fact that just before the execution of Exhibit B, the first accused had agreed to lend Vellan Rs. 8. Even after the execution of Exhibit B, Vellan continued to live with his mother and step-father, was paid daily wages by his new master, the first accused. These facts make it clear that neither the accused nor Vellan himself ever thought or intended that Vellan was or should be incapable of acquiring property or of entering into contracts, and that both the first accused and the second accused in fact treated Vellan as if he was fully possessed of such capacity. The evidence of Vellan himself shows that he received wages from the second accused only on the days on which he worked, and the second accused never made himself responsible for his maintenance for the days that he did not work or could not work owing to sickness. It may also be presumed that this state of things continued when Vellan worked under the first accused. All these facts indicate that the second accused and after the date of Exhibit B, the first accused never understood that they were in any way responsible for the lodging and maintenance of Vellan which would have been the case if Vellan stood in the position of a slave.

As regards Vellan's liberty of movement, the effect of the evidence, in my opinion, is that so long as he worked for the second accused or for the first accused after the date of Exhibit B, it was understood that he was not at liberty to offer his services to another without the permission and consent of his employer for the time being. Once he obtained the permission of the second accused to go to Wynaad and work there, but it is not suggested that the second accused claimed any share in his earnings at Wynaad. He, sometimes, though not often, went to other places also for work, after obtaining the permission of the second accused. Similarly after he went over to the first accused, he apparently used sometimes to work elsewhere with the latter's consent. The legal relation which, the parties thought, subsisted between them, was that of employer and labourer and I do not think it makes any difference in this respect, that during the

time Vellan worked for the second accused or the first accused, both Vellan and his employer thought that Vellan was not at liberty to work elsewhere without the consent of the second or the first accused.

The law does not allow contracts for personal service to be specifically enforced, but it recognizes such contracts as valid in law. If a person enters into a contract for personal service for a reasonable term and afterwards breaks it without lawful excuse, he is liable in damages to the promisee. And a contract for service by which a person competent to contract precludes himself from serving another person during a specified term, though it cannot be specifically enforced, is a legal and valid contract the breach of which will make the party guilty of the breach liable in damages to the other party. There may, however, be contracts for personal service, such as one for an unlimited period, which would be void on grounds of public policy and no rights which the Court could recognize, would arise under such a contract. For instance if a grown up person competent to contract enters into a contract with another agreeing to render him personal service throughout his life and not to serve any other person, such a contract would be unenforceable specifically and may be void on grounds of public policy, but it would, in my opinion, be going much too far to say that the relation sought to be created thereby, would be that of a 'slave' and a master. The inference to be drawn from the facts relating to Vellan's employment under the second accused before the date of Exhibit B imply at the highest nothing more than a contract of this nature. Every contract of personal service must necessarily be a restraint upon the liberty of the person who has agreed to render such service, but that is not the sort of restraint, which is implied in the status of a slave. Both *Empress of India* v. *Ram Kuar*(1) and in *Amina* v. *Queen-Empress*(2) make it clear that the control sought to be established over the liberty of person who is purported to be dealt with as a slave must be of an absolute character. This is a distinction which it is important to bear in mind. There is a very large class of domestic servants in this country—and I believe there are also such classes elsewhere—who ordinarily adhere to the same master throughout their

(1) (1888) I.L.R., 2 All., 723. (2) (1884) I.L.R., 7 Mad., 277.

lives and their offspring also continue as domestic servants in the same family. It may or may not be that such service had its historical origin in the status of slavery. Whatever that may be, it would be an outrage on one's common sense to suppose that domestic servants of this class occupy the position of slaves.

One of the prosecution witnesses, prosecution tenth witness, says :

"There are many Cherumas in my amsam. It is usual for particular Cherumas to go on working for particular families year after year. It is usual for them to obtain the permission of their masters before leaving them to work for other masters. So far as I have noticed, Cherumas leave their masters only after getting their permission to do so."

Upon that, the learned Sessions Judges rightly observes :

"that indicates little, if anything, more than a hereditary relation of master and servant such as in many societies is a wholesome relic of a traditional and perhaps very different relation in the past."

The facts of the case prove that the relation subsisting between Vellan and the second accused and that sought to be created between Vellan and the first accused was nothing more than what is described in prosecution tenth witness's evidence.

There cannot be the slightest doubt upon the evidence that Vellan who signed or put his mark on Exhibit B as an attesting witness knew of the nature of the transaction and gave his consent to it. He consented to his services being transferred by second accused to first accused. That is how he understood Exhibit B and so also the second and first accused ; none of the parties, I am persuaded, thought that any change was intended in the status of Vellan and I have already described what in my opinion is proved to have been the relation between the second accused and Vellan before the execution of Exhibit B. By Exhibit B, therefore, all that the second accused purported to transfer to the first accused was the right which he had or supposed he had to the services of Vellan. The use of the word '*jenmam*' and the mention of Vellan's offspring has been transferred, if they stood alone and were not to be interpreted in the light of the facts, would undoubtedly suggest that it was attempted to deal with Vellan as a slave. But if we read the document in the light of the evidence showing the intention and conduct of the parties, then

it seems to me that the proper conclusion which is to be drawn is that nothing more was intended than a transfer of the right to the personal services of Vellan and his children which the second accused thought or pretended that he had. If a lawyer had drafted the document of transfer, he would be expected to know and make clear the distinction between a transfer of a right to the personal services of a man and a transfer of property. But I think it would be altogether unsafe to impute such technical knowledge to the second accused who wrote Exhibit B or to the first accused and convict them on the basis of certain expressions used in that document, which the second accused in all likelihood simply borrowed from ordinary documents relating to sales of property. In *Amina* v. *Queen-Empress*(1) the word '*Vellati*' which means 'slave' was used. No such word is to be found in Exhibit B and we have to ascertain what was actually intended and done in the light of the surrounding circumstances. That the accused themselves never thought that the transaction recorded in Exhibit B amounted to an offence of selling and buying a slave or to any offence at all, is evident from the fact that a suit was actually instituted on the basis of that document and a pleader was engaged to, and did in fact, conduct the plaintiff's case. I need hardly point out that if a labourer or domestic servant of this class is detained against his will, the person so detaining is liable to be prosecuted for wrongful restraint or wrongful confinement, or if he is ill-treated by the master, the latter would be liable for other offences under the Indian Penal Code. But any such high-handed proceedings alone would not be sufficient to show that the relation of master and slave was sought to be asserted.

I would therefore set aside the convictions and sentences against the prisoners and direct that they may be discharged from bail.

But as my learned brother holds a different opinion, the papers will be placed before the Chief Justice for reference to a third Judge or such other order as he may think fit to pass.

NAPIER, J.—The accused in this case have both been convicted under section 370 of the Indian Penal Code, the first accused

(1) (1884) I.L.R., 7 Mad., 277.

with buying, and the second accused with selling, a person as a slave. The language of section 370 is as follows :—

"Whoever imports, exports, removes, buys, sells or disposes of any person as a slave shall be punished, etc."

The transaction was effected by a document, Exhibit B, which is as follows :—

"Edavad Adharam executed by the second accused to the first accused, 'I execute to you and give you this day this *jenmam* deed giving you Velandi's son Pulayan Vellan with his heirs. The sum that I received from you in cash to-day is Rs. 10. For this sum of Rs. 10 you should get work done for you by the said Vellan, and his offspring that may come into being as your *jenmam*, and act as you please."

The important words in this document are, first, the word '*jenmam*' used twice over, secondly the word 'heirs' and thirdly the word 'offspring.'

The document purports to be a deed of hereditary ownership and the granting of Pulayan Vellan and his heirs as *jenmam* can only mean the grant of that person and his heirs to the grantee and his heirs in absolute ownership. It is to be noted that the grant is not of the services of Pulayan Vellan, but the grant of the man himself and his heirs, the provision for getting work done for him being a second clause.

The Sessions Judge in convicting the accused states his opinion that such an assertion of the right to control the liberty of a Cheruman as the transaction implies is not so far divorced from the facts of life at present that it can be treated as a matter of no moment. He therefore thought that it was not an offence which could be treated lightly and sentenced the accused each to one year's rigorous imprisonment. It is to be noted that the District Munsif of Quilandi before whom this document was filed in a suit and who is himself a Malayalee, speaks of the document as a very curious one. He of course dismissed the suit founded on it, holding the consideration to be illegal, immoral and opposed to public policy.

The first question that has to be considered is, what is the meaning of the phrase 'selling as a slave.' There is no definition of the word 'slave' in the Code, and our attention has been drawn to various elements of slavery extending over a period

from early Roman history to modern times. To my mind we have nothing to do with ancient history but have only to consider what was in the mind of the framers of the Penal Code. The history of this section is dealt with in the judgment of SPANKIE, J., in *Empress of India* v. *Ram Kuar*(1) and he there refers to a report of the Commissioners in 1837 (the year of the first draft) which points out that 'there is at present no law defining the extent of the power of a master over his slaves.' It must be remembered, too, that at that time slavery was an established institution in the greater part of the United States and had only very recently ceased to exist in some British Colonies. The idea may seem remote to people of the present day, but thousands of people are alive who were born in slavery and thousands who witnessed the emancipation of slaves in the United States. There being no absolute standard of slavery and no uniformity of practice, it is, therefore, not surprising that when the first Act dealing with the condition of slavery was passed in India in 1843, it was not thought advisable to include any definition of the word. Act V of 1843 provides :—

"Section (1)—that no person, nor the right to the compulsory labour or services of any person on the ground that such person is in a state of slavery, shall be sold in execution of a decree of Court,

Section (2)—that no right arising out of an alleged property in the person and services of another as a slave shall be enforced by a Court,

Section (3)—that no person shall be deprived of any property on the ground that such person was a slave,

Section (4)—that any act which would be penal offence if done to a free man, shall be equally an offence if done to a person on the pretext of his being a slave."

It is to be noted that this Act does not go nearly as far as the Penal Code, for it imposes no penal consequences whatsoever in connexion with slavery. It does not forbid the keeping of slaves or dealing in slaves; but only gives to such persons their right to hold property and to be protected by law. Such a transaction as is the subject of this conviction would not have

(1) (1880) I.L.R., 2 All., 723.

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been any offence against any law, though, as will be shown later, it was forbidden by proclamation prior to the passing of the Penal Code. It is therefore clear to my mind that the word 'slave' in the Penal Code does not connote anything more than a right to property in the person, a right to retain his services, and a right to dispose of his person and services. These conditions are dealt with by the Penal Code with the effect that slavery as then existing in India was made illegal. That being so, it cannot, I think, be disputed that this document, if taken by itself, offends against the provision of the section and the parties to it would be guilty of the offence. A similar case came before the High Court in 1884: vide *Amina* v. *Queen-Empress*(1). A document vouching the payment of Rs. 25 to one Supi in consideration of his transferring all his rights over a girl described as his *Vellati* whom he had purchased from Pakir Haji was given to one Amina. She refused to let the girl go until she got back the money she had paid for her. Supi and Pakir Haji were convicted of selling the girl as a slave and Amina of buying. The convictions were upheld by the High Court. The assessors in that case gave their opinion that the use of the word *Vellati*, as understood by the Mappillas of North Malabar, clearly showed that Bhima was sold as a slave. The learned Judges state their opinion as to the purview of sections 370 and 371 and adopt the language used by the High Court of Allahabad in the case already referred to, namely, that the sections were enacted for the suppression of slavery, not only in its strict and proper sense, viz., that condition whereby an absolute and unlimited power was given to the master, but also where an absolute power is asserted over the liberty of another, whereby one who claims to have a property in the person as a slave transfers that property to another. The same idea is expressed in other words in *Empress of India* v. *Ram Kuar*(2):

"The section is directed against attempts, etc., to place persons in the position of slaves or to treat them in a way that is inconsistent with the idea of the person so treated being free as to his property, services, or conduct in any respect."

I am not prepared for the reasons given earlier in this judgment to agree that the strict and proper sense of the word

(1) (1884) I.L.R., 7 Mad., 277. (2) (1880) I.L.R., 2 All., 723 at p. 727.

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'slavery' connotes an absolute and unlimited power over the life of another as was thought by the Judges in *Amina* v. *Queen-Empress*(1). I entirely accept the view taken by the Court as to the object of section 370. It is urged, however, that we have to look not so much to the language as to the intention of the parties to be gathered from the conditions which prevailed. I give a certain amount of weight to this contention though I am not prepared to say that even where servile conditions were unknown, a document executed with the intention that the subject of the document should be kept in a condition of slavery would not constitute an offence. I proceed, therefore, to examine the history and conditions of people of this class. The person sold is shown in the document to be a Pulayan. Exhibit A is the document executed by this Pulayan to the first accused. It shows that the Pulayan borrowed eight rupees from him and it provides that for the interest on this sum of eight rupees he shall make a hut in such place as is required by his master and live in it and do cooly work 'as you may require me to do'; receiving from his master a kalapadu dangali of paddy every day for his maintenance, *while the balance of the profits of his work are to belong to his master.* The value of a year's paddy which constitutes the entire amount that he is entitled to receive is stated in the document to be Rs. 20-1-8 which works out at Rs. 1-10-0 a month. There is, obviously, no room under this document for his working off the amount of the debt with the necessary result that unless he can get a sum of eight rupees elsewhere he must remain with his master for the rest of his life. The provision for payment in paddy only is to be especially noted. Turning to Gundert's Malayalam Dictionary which was published in 1872, I find that 'Pulayan' is translated as first an 'outcast,' secondly 'a caste of rice slaves.' This latter meaning seems to me to be singularly applicable to the conditions of service which this man undertook. The history of these people is set out in Logan's Manual of Malabar published in 1887, beginning at page 146 of volume I. The Pulayan is stated to be one of two sections of the Cherumas, the other being Iraya Cheruma. Speaking of the Cherumas Mr. Logan says as follows:—

"The next caste to be noticed is formed of the Cherumar or agrestic slaves."

(1) (1884) I.L.R., 7 Mad., 277.

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and he sets out the result of a census taken in 1857 of the slave population, showing their distribution over the district, the total number being 187,812, the largest number being in Ernad, Walluvanad and Ponnani; Kurumbranad taluk the place where this man lived having at that time 16,590 slaves. Mr. Logan then gives a very interesting account of the action of the East India Company in respect of slavery. As early as 1792, the year in which the British rule commenced, a proclamation was issued by the company against dealing in slaves, subject to this—

"that the superior castes were still to be permitted to buy the children of famine-stricken parents on condition that the parents may repurchase their children when they were in a position to do so."

In 1819 the practice of selling slaves for arrears of revenue was forbidden. This prohibition is repeated in the Act of 1843 above referred to. The matter was allowed to drop until 1836 in which year Government was pleased to accede to the recommendation in favour of emancipating slaves on Government lands. This was however not to be proclaimed but to be carried out in such a manner as not to create alarm on the part of other proprietors or "premature hopes of emancipation on that of other slaves." In 1839 a Collector stated his opinion that there are few or no slaves in North Malabar But the incorrectness of this statement was demonstrated a few years later by a letter from Mr. Thomas, Judge of Calicut, in 1841 to the Sudder Adawlat pointing out facts which had come judicially to his notice. He referred to a sale in Court auction of an infant slave, and to a suit in which the right to 27 slaves was the sole matter of litigation and further stated that women in some taluks fetched higher prices in order to breed slaves. In the next year he returned to the same subject and stated that the number of slaves had increased in seven years from 144,000 to 159,000. In consequence of these letters apparently, the directors in dealing with the proposal to abolish slavery entirely, drew the attention of the Government of India to the fact that the evils connected with slavery in Malabar were aggravated as compared with other portions of India. After the passing of the Act in 1843, which, as noted above, did not abolish the status of slavery, the Collector of Malabar endeavoured to pave the way to eventual abolition by a proclamation to Cherumas and their masters, his action being

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approved of by the directors in 1845. Mr. Logan then states that in 1852 and 1855 the traffic in slaves still continued, that it was considered by Government but no further measures for the emancipation of the Cherumas were deemed to be necessary. He then sums up the position in the year 1887 in which he wrote:

"There is reason to think that they are still, even now, with their full consent, bought and sold and hired out, although of course the transaction must be kept secret for fear of the penalties in the Penal Code."

It seems to me that this language used by Mr. Logan applies exactly to the transaction before us. This Pulayan was, on the evidence, sold and bought with his full consent. His personal history is as follows: He is 25 years of age. His father worked under the second accused. He himself began to work for the second accused when he was about 12 years of age receiving 3 nazhis of paddy on days when he worked; and he continued to work for this man until he executed Exhibit A to the first accused, except for a short time when he went to Wynaad under the orders of the second accused to work there 'under the Sahib.' He only stayed in the Wynaad a month and came back under orders from the second accused. That is his own account given in his evidence before the Court as prosecution first witness. His statement is corroborated by prosecution second witness, his uncle, who states that prosecution first witness began to work under the second accused between the age of 10 and 15, and remained with him until he went to the first accused. This man states his view of the position of his caste as follows:—

"I work under Kunnumayil Tambiran. I have never worked for any one else. All my sons and daughters work for Kunnumayil Tambiran. My father worked for Kunnumayil Tambiran. If any of us wished to go and work for any other master we could not do so. If Kunnumayil Tambiran consented, they could go and work for another master for a day. If Kunnumayil Tambiran made them over to a new master they could work under him. They need not go to a new master unless they liked. If they consented to go to a new master he would then be the permanent master and they would always have to obey his orders. I have never heard of our master handing over his Cherumas to another master like that."

The *adhigari* endeavoured to minimize this condition of service, but even he, in answer to the Court, admits "so far as I

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have noticed, Cherumas leave their masters only after getting their permission to do so." Some light is thrown on the view taken by the first accused himself of his rights as purchaser by the evidence of prosecution eleventh witness. He states that, in consequence of a complaint made to him by prosecution first witness's wife who was working for him, he went to the house of the first accused and found prosecution first witness tied to the leg of a cot in the outer verandah. He asked him for an explanation and the first accused said "I tied him up because he does not come and work for me." Taking the evidence of prosecution second witness an old man as proving the custom among this caste, it appears to me that there is only one matter in which the condition of these people at the present day differs from that of slavery fifty years ago, namely, that the Pulayan need not go to a new master unless he likes. Even assuming that this right is generally recognized, we get the position stated by Mr. Logan to exist in 1887, that they are still, with their full consent, bought and sold and hired out. No evidence was given as to rights in the offspring of the Pulayan, but the evidence shows that the children do work for their father's master and it is difficult to suppose that the language used in this document "giving you Vellan with his heirs", "you should get work done for you by the aforesaid Vellan and his offspring" do not represent actual existing conditions. I am satisfied, therefore, that there is nothing in the conditions of service of these Pulayans to detract from the obvious intention of the document and in my opinion the case is on all fours with *Amina* v. *Queen-Empress*(1), and following that decision I am clear that the offence under section 370 has been made out. With regard to sentence, being satisfied as I am, that this document only puts on paper the general practice of dealing with these Pulayans, and that the amount of consideration for the sale was almost nominal, I consider the sentence unnecessarily severe. I have no doubt that the first and second accused believed that they were exercising their lawful rights. This is indeed proved by the fact that the first accused actually brought a suit against the second accused on this document and, what is still more extraordinary, found a pleader who was prepared to appear for him. In these

(1) (1884) I.L.R., 7 Mad., 277.

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circumstances, I would reduce the sentences to the period of imprisonment already undergone and a fine of Rs. 100 each, in default, two months' simple imprisonment.

The accused were not represented.

J. C. Adam, the Crown Prosecutor, for *E. R. Osborne, the Acting Public Prosecutor*, for the Crown.

These appeals coming on for hearing under section 429 of the Code of Criminal Procedure, the following judgment was delivered by

AYLING, J.

AYLING, J.—The case has been so exhaustively dealt with by the learned Judges who heard the appeals (not to mention the very careful judgment of the Sessions Judge) that it is unnecessary for me to set forth the particulars or the arguments for and against the convictions. I shall therefore confine myself to stating briefly the conclusions to which I have arrived after the best consideration I could give to the matter.

The difficulty of decision arises chiefly from the lack of definition of the term 'slave' as used in section 370 of the Indian Penal Code. Both the learned Judges have held (and I entirely agree) that it includes something very far short of slavery in its most extreme forms wherein the master has absolute and unlimited power over the life, fortune and liberty of the slave. This is clearly the view of the Courts in the two reported cases in which the question is discussed [*Empress of India* v. *Ram Kuar*(1) and *Amina* v. *Queen-Empress*(2).] What it does require is not so easy to say. To quote from the judgments of the Allahabad Full Bench in the first named case, OLDFIELD, J., says that section 370 of the Indian Penal Code and the cognate sections were intended for the suppression of slavery 'in any modified form, where an absolute power is asserted over the liberty of another.' STUART, C.J., puts it somewhat differently and regards section 370 as directed against

"Attempts to place persons in the position of slaves, *or to treat them in a way which is inconsistent with the idea of the person so treated being free as to his property, services or conduct in any respect.*"

If much stress is laid on the word 'absolute' in OLDFIELD, J.'s definition, it may be argued that the latter is narrower and

(1) (1880) I.L.R., 2 All., 723. (2) (1884) I.L.R., 7 Mad., 277.

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stricter than that of STUART, C.J. On the other hand the learned Judges do not seem to have been conscious of any material difference of view and their judgments are treated by a Bench of this Court in *Amina* v. *Queen-Empress*(1) as a consistent and homologous interpretation of the law which should be followed. I shall not venture on an independent definition of my own but would prefer to deal with the case in the light of both those above quoted—although this may involve somewhat detracting from the force of the word 'absolute' in the first and of the penultimate word 'any' in the second. As a matter of fact, the circumstances of this case as I view them would justify the application of either definition taken singly.

Mr. Adam, who appeared for the Public Prosecutor, has argued, and I think rightly, that in determining the nature of the transaction, the Court should look primarily to the terms of the document in which it is embodied and secondarily to the surrounding circumstances as indicating whether the parties had in mind something different from what is set forth in the document. In a Civil Court, section 91 of the Indian Evidence Act would probably be a bar to such a course, if the terms of the contract were in question: but in connexion with a criminal charge, in which the intention of the accused persons has to be established, it is surely legitimate to look outside the terms of the document, and this course has been followed both by the Sessions Judge and by the learned Judges in appeal.

Looking then to the words of Exhibit B, this document appears to me to evidence nothing more or less than the sale of Vellan and his offspring as mere chattels. The word 'jenmam' is defined in Gundert's Malayalam Dictionary as meaning 'hereditary proprietorship' and is the same term used in reference to land held in fee simple or subject only to the payment of Government revenue. The double reference to Vellan's 'heirs' and his 'offspring that may come into being' strengthens the conclusion. The phrases used, *mutatis mutandis*, would be not inapplicable to the sale of a cow and its calf, born or unborn: and I do not think this conclusion is affected by the clause specifying that the vendee should get work done by the said Vellan and his offspring.

(1) (1884) I.L.R., 7 Mad., 277.

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If we confine our attention to the terms of Exhibit B, I think it can only be viewed as a sale of the man as if he were a beast and as certainly satisfying either of the definitions of the learned Judges in the Allahabad case.

I pass to the other circumstances of the case, as throwing light on what the parties had in mind. In favour of appellants, may be mentioned the comparatively mild terms of Vellan's service under second accused as described by him in his evidence. I agree with ABDUR RAHIM, J., that there is nothing in second accused's treatment of Vellan up to May 1913, indicative of slavery in even a modified form. Vellan received the ordinary wages for his work, and spent them as he liked; he was not allowed to work for others, but his master prevented him from doing so by the simple expedient of giving him a job of work of his own whenever Vellan wanted to go elsewhere. This, however, is hardly conclusive. Second accused may have been a lenient master as long as things went smoothly: but it is of more importance to consider his conduct, when the servant chose to assert his independence. This happened in May 1913, when Vellan who had got into debt, executed a bond, Exhibit A, binding himself in consideration of a loan of eight rupees to work for first accused only instead of his old master. The terms of this document are so stringent as to practically bind Vellan to first accused's service for life without hope of redemption.

Now what was second accused's conduct at this juncture? It is described by Vellan himself as prosecution first witness: his evidence is accepted by the Sessions Judge and I do not gather that either of my learned brothers took a different view of the evidence of this or the other prosecution witnesses. Certainly for my own part, I see no reason to differ from the Sessions Judge's appreciation of the evidence. According to prosecution first witness, second accused at once objected to the payment of the rupees eight, the loan under Exhibit A, and announced his intention of selling prosecution first witness out and out to first accused ("I shall execute a jenmam document selling you to Koroth Mammad and get money for it"). Apparently no money at all was advanced under Exhibit A, then or later although an *ex parte* decree was subsequently passed on it (Exhibit J); but for the consideration therein provided for and an extra rupees two all paid to himself, second

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accused executed the jenmam sale, evidence by Exhibit B. Prosecution first witness says "after the sale, second accused said to me 'I have no more right in you.' He made me over to first accused and handed over the document." "Second accused said to first accused, I shall execute a jenmam deed to you for this Cheruman, you need not pay the consideration for the advance document" (Exhibit A). "After second accused received the money and went away, first accused said to me 'My fine fellow, I have bought you in jenmam.' I said 'I don't understand what you mean.' He said 'You don't understand because you are uneducated'."

If this account be true, there is nothing in the surrounding circumstances to detract from the effect of the terms of Exhibit B: and the intention of the parties at the time of the latter's execution is what we have to consider—not the treatment of prosecution first witness at an earlier period.

All the evidence on record as to what followed is adverse to the defence: it goes to show that first accused beat Vellan, tied him up like an animal that had strayed, and behaved generally in a manner not dissimilar to that of a master of a slave in the most primitive sense. I attached no undue weight to this; it has only very secondary bearing on first accused's intentions at the time of the bargain and none on that of second accused. But in so far as it is relevant at all it is certainly against the defence theory of the transaction set up on first accused's behalf. The fact that first accused was subsequently so foolish as to sue on Exhibit B has no significance. No doubt he had never heard of section 370 of the Indian Penal Code and did not realize that he had brought himself within the scope of the Criminal Law. But ignorance of law is no defence: and the only intention required by section 370 of the Indian Penal Code is in relation to the position of the persons bought and sold. Second accused has elected to deny the whole story—his execution of Exhibit B, and even the fact that Vellan was at any time his servant. I have no hesitation whatever in rejecting this defence as false.

I agree with Mr. Justice NAPIER, and concur in the order proposed by him.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

RAMANADHAN CHETTY (PLAINTIFF), APPELLANT,

v.

KATHA VELAN AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

1916, November, 24, and 1917, August, 30 and September, 11.

Promissory-note in favour of the managing trustee of a charity—The trustee succeeded by another—Latter's right to sue on the note without any assignment or endorsement.

A promissory-note executed in favour of a trustee can be sued on by his successor without endorsement or assignment, the Negotiable Instruments Act not affecting devolution of rights by operation of law.

Catherwood v. *Chabaud* (1823) 1 B. & C., 150, applied and followed.

Sowcar Lodd Govinda Doss v. *Muneppa Naidu* (1908) I.L.R., 31 Mad., 534, referred to.

APPEAL under clause 15 of the Letters Patent against the judgment of COUTTS TROTTER, J., in Civil Revision Petitions Nos. 131 and 132 of 1915 praying the High Court to revise the decrees of GOVINDA RAO, the District Munsif of Pattukottai, in Small Cause Suits Nos. 1065 and 1067 of 1914.

Plaintiff sued as trustee of a charity on promissory-notes executed by the first defendant in favour of the second defendant who was the trustee at the time of execution. The defendants contended *inter alia* that the action was not maintainable for want of endorsement or assignment of the note in plaintiff's favour. The Court of first instance decreed the suit. The second defendant filed a Civil Revision Petition against the decree.

COUTTS TROTTER, J., allowed this petition and dismissed the suit by the following judgment:—

I think that the decision in *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*(1) is in conflict with that in *Arunachalla Reddi* v. *Subba Reddi*(2) and the authorities therein referred to. Apart from authority I am very strongly of opinion myself that *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*(1) cannot possibly be supported as it amounts *pro tanto* to a repeal to the Negotiable Instruments Act. I therefore think that the present suit was unsustainable being

* Letters Patent Appeals Nos. 35 and 36 of 1916.

(1) (1908) I.L.R., 31 Mad., 534. (2) (1907) 17 M.L.J., 393.

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a suit on a promissory-note which had not been endorsed to the plaintiff and I must hold that the District Munsif was wrong in decreeing the plaintiff's suit. I allow the petition and dismiss the suit with costs here and in the Court below.

The plaintiff filed these Letters Patent Appeals against the decision of COUTTS TROTTER, J.

T. V. Gopalaswami Mudaliyar for the appellant.

S. R. Muttuswami Ayyar for the respondents.

These Letters Patent Appeals coming on for hearing the Court made the following

AYLING AND SESHAGIRI AYYAR, JJ.

ORDER.—We must call for a finding as to whether at the time of the suit the right to collect monies due to the trust had devolved solely on the plaintiff.

Fresh evidence may be adduced, if desired. The finding will be submitted within two months from this date, and the parties will be at liberty to file objections to the said finding within seven days after notice of the return of the same shall have been posted up in this Court.

In compliance with the above order of this Court, the District Munsif of Pattukkottai submitted the finding that at the date of these suits, the right to collect monies due to the trust had devolved on the plaintiff.

On the return of the above finding of the lower Court, the Court delivered the following

AYLING AND SESHAGIRI AYYAR, JJ.

JUDGMENT.—We must accept the finding that the promissory-note sued on was executed to Ulagappa Chettiar as trustee of the charity. The question whether the said payee could alone have maintained the suit without joining his co-trustees was not raised in the Court below. It would depend in each case upon the powers and duties of the managing trustee whether such a person is competent to represent the trust solely. That question has not been put in issue and we are not prepared to allow it to be debated now.

Another question which was argued at some length need not be discussed now, namely, whether if there is an assignment of the note by the act of parties, it should not be only in the mode prescribed by the Negotiable Instruments Act. There is a

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considerable conflict of opinion on this question and it can only be settled by a reference to a Full Bench.

The possibility of transfer of right in the note by operation of law has not been the subject of judicial pronouncements to any considerable extent. In this Presidency, apart from certain observations of MILLER, J., in *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*(1), the matter is *res integra*.

The Negotiable Instruments Act only deals with transfers by negotiation. Under the English Bills of Exchange Act the common law of the land is expressly saved (see section 97). It is a pity that there is no such saving clause in the Indian Enactment. Section 57 of the Act, by implication, seems to contemplate that the legal representatives of a deceased person can negotiate a promissory-note. The practice of allowing legal representatives in this country to sue on notes executed to their predecessors is apparently founded on the principle that the Act does not abrogate rules of devolution of rights in the properties of the deceased.

If a son, as legal representative, can sue on a note executed to his father, there could be no impediment in principle to other heirs or successors having a similar right. The case of trustees is, in some respects, stronger than that of other heirs. In the case of private trusts, section 75 of Act II of 1882 enacts that the property standing in the name of the predecessor shall vest in the successor. It is not necessary to obtain a transfer by an instrument or by endorsement. We fail to see why this principle should not be extended to public trusts. In Byles on Bills it is stated, "The executor of a deceased party to a bill or note has, in general, the same rights and liabilities as his testator." "The executors of every person", says Lord Macclesfield, "are implied in himself and bound without naming" . . . "On the death of the holder of a bill or note, his executors or administrators may indorse; and an indorsement by the executors or administrators is for all purposes as effectual as an indorsement by the deceased." The cases quoted by the author in support of the above propositions show that the English Bills of Exchange Act does not affect the

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(1) (1908) I.L.R., 31 Mad., 534.

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common law right of devolution by operation of law. The same considerations are applicable to the construction of the Indian Enactment.

In *Catherwood* v. *Chabaud*(1) it was held that a note given to an administrator as such can be sued on without assignment by an administrator *de bonis non* to the original estate. BAYLEY, J., points out that 'the money recovered is applicable to the right fund, as assets of the first intestate.' The case of a trustee replacing another stands on the same footing.

Broadly speaking, trustees exercise rights and obligations as agents of the trust. The trust being the owner, succeeding trustees derive their rights and office by relation to the trust and not as the heirs of the last holder of that office. All of them form a chain of representatives in respect of the trust, as was once said by the Judicial Committee. In this view, each trustee by virtue of his appointment takes up the management of the trust properties at the place left by the previous trustee. It is not necessary that the authority or consent of such a person should be given to the successor. As pointed out by MILLER, J., in *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*(2) the predecessor being *functus officio* would have no power to endorse the note given to him in a capacity which he was divested of. Consequently the present plaintiff who has replaced Ulagappa Chetty is entitled to sue on the note without any assignment or endorsement.

We are, therefore, of opinion that the decision of the learned Judge must be reversed and that of the Court below must be restored. Appellant will get his costs from the second defendant in this Court.

S.V.

(1) (1823) 1 B & C., 150. (2) (1908) I.L.R., 31 Mad., 534.

APPELLATE CIVIL.

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

A. T. VENKATA NARAYANA PILLAI (PLAINTIFF), APPELLANT,

v.

V. PONNUSAWMI NADAR AND SEVEN OTHERS (DEFENDANTS NOS. 1 TO 4 AND 6 TO 9), RESPONDENTS.*

1917, August, 29 and 30, and September, 3 and 12.

Religious Endowments Act (XX of 1863), sec. 14 Procedure to be followed by committee in the transaction of its business—Suspension of a temple trustee by a temple committee—Legality of procedure—Suit by the trustee for damages for illegal suspension—Liability of individual members of the committee in damages.

Notice of suspension was given to a temple trustee in accordance with the opinion of the majority of the members of the local temple committee, to each of whom one of the members sent a copy of his report recommending suspension, and in spite of the objection taken by one member that the matter should be disposed of at a meeting:

Held, that a temple committee under the Religious Endowments Act resembles a corporation and that the ordinary way to transact its business is at a meeting. Assuming that it can do some of its business in circulation, it cannot remove or suspend trustees in this manner.

Rex v. *Taylor* (1694) 3 Salk, 231; s.c., 91 E.R., 795, *Rex* v. *Sutton* (1711) 10 Mod., 74; s.c., 88 E.R., 632, *Thandavaraya Pillai* v. *Subbayyar* (1900) I.L.R., 23 Mad., 483 at p. 485 and *Ponnambala Pillai* v. *Muthu Chettiar* (1916) 30 M.L.J., 619, referred to.

The procedure being *ultra vires*, it is no answer to the trustee's suit for damages for illegal suspension that there were sufficient grounds for suspension.

In India individual members of a temple committee, who are parties to an illegal suspension of this kind are liable in damages.

Vijaya Raghava v. *Secretary of State for India* (1884) I.L.R., 7 Mad., 466 and *Ferguson* v. *Kinnoull* (1842) 9 Cl. & F., 251, followed.

Indian and English decisions considered.

APPEAL against the decree of C. V. VISWANATHA SASTRIYAR, Subordinate Judge of Kumbakonam, in Original Suit No. 44 of 1912.

The plaintiff was one of the trustees of a temple under the superintendence of the Kumbakonam Devastanam Committee of

* Appeal No. 430 of 1915.

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which defendants Nos. 1 to 6 were members. After plaintiff had been given notice of certain charges of misconduct against him as temple trustee, the second defendant drew up a report (Exhibit B-1) and forwarded copies of the same to other members of the committee proposing that the plaintiff should be suspended until further orders. In the report the second defendant requested the other members simply to give their opinion and not to insist upon the matter being placed before a meeting. On receipt of this report the third defendant replied that the procedure adopted was illegal and that the matter should be disposed of at a meeting. The matter, however, was not placed before a meeting and as all the members, except the third defendant, assented to the course adopted by the second defendant and sent in their opinions agreeing with the proposal that the plaintiff should be suspended, an order (Exhibit A-1) was sent to the plaintiff by the second defendant as managing member informing him that he was suspended until further orders by the committee. On these facts the plaintiff filed this suit for a declaration of the illegality of the suspension and for damages for Rs. 5,200 against the defendants. Defendants Nos. 1, 2, 4, 5 and 6 pleaded *inter alia* that the order of suspension was proper and that the plaintiff was not entitled to any damages. The third defendant filed a written statement denying the correctness of certain allegations in the plaint and the plaintiff's right to get any damages or costs against him. The Subordinate Judge who tried the case dismissed the suit holding that the suspension was justifiable on account of the plaintiff's dereliction of his duty as a trustee and that he was not entitled to any damages. The plaintiff appealed.

Hon. Mr. *S. Srinivasa Ayyangar, the Advocate-General* (with *S. Muttayya Mudaliyar, A. Krishnaswami Ayyar* and *K. Narasimha Ayyangar*) for the appellant.—A temple committee has no power to suspend a temple trustee. *Seshadri Ayyangar* v. *Nataraja Ayyar*(1). The power of suspension, if it exists at all, exists only under circumstances which will validate a dismissal. A suspension can be decided upon only at a meeting and the majority's opinion prevails: *Anantanarayana Ayyar* v.

(1) (1898) I.L.R., 21 Mad., 179.

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Kuttalam Pillai(1), *Reg.* v. *Saddlers' Co.*(2), *Wilkinson* v. *Malin*(3) and *Raja* v. *Ali*(4). What was done in this case is this. One member of the committee (second defendant) styled the 'managing member' prepared a report and sent a copy of it to each of the other members recommending the dismissal of the plaintiff; and out of seven members of the committee, one returned an opinion that the procedure was illegal and wanted the matter to be discussed at a meeting; four others sent in their separate opinions agreeing to suspend. The matter was not disposed of even by circulation. Such a suspension is illegal: *Thandavaraya Pillai* v. *Subbayyar*(5), *Subba Naidu* v. *Gopalaswamy Naidu* (6) and *Ponnambala Pillai* v. *Muthu Chettiar*(7). Moreover no notice was given to the trustee; no charges were framed and no enquiry was held before suspending him. The cases of master and servant may be different; see *Seshadri Aiyangar* v. *Ranga Bhattar* (8) and *Tiruvambala Desikar* v. *Manikkavachaka Desikar*(9). In the present case the suspension was ordered as a punishment as no further enquiry was contemplated pending the suspension: *Sundararama Sastri* v. *Anantha Krishna Naidu*(10), *In re Great Northern Salt and Chemical Works, Ex parte Kennedy*(11), *In re Haycraft Gold Reduction and Mining Company*(12), *Mayor, etc., of Merchants of the Staple of England* v. *Governor and Company of Bank of England*(13) and *Hallows* v. *Fernie*(14). If all the members concur in an act, circulation may be sufficient; *In re Great Northern Salt and Chemical Works, Ex parte Kennedy*(11); but there was no circulation in the present case as each member's opinion was given without reference to the opinion of another.

T. Narasimha Ayyangar for Hon. Mr. *T. Ranga Achariyar* with *T. V. Gopalaswami Mudaliyar* and *N. Kunjithapatham Ayyar* for the respondent submitted that there was no prejudice to the plaintiff, that he was fully heard and he gave all his explanations

(1) (1899) I.L.R., 22 Mad., 481.
(2) (1863) 10 H.L.C., 404. (3) (1832) 37 R.R., 792; s.c., 2 Cr. & J., 636.
(4) (1917) I.L.R., 40 Mad., 941. (5) (1900) I.L.R., 23 Mad., 483.
(6) (1905) 15 M.L.J., 185. (7) (1916) 30 M.L.J., 619.
(8) (1912) I.L.R., 35 Mad., 631. (9) (1917) I.L.R., 40 Mad., 177.
(10) (1917) 5 L.W., 672 at p. 678.
(11) (1890) 44 Ch. D., 472 at pp. 480 and 481.
(12) (1909) 2 Ch., 230. (13) (1888) 21 Q.B.D., 160 at p. 165.
(14) (1867) L.R., 3 Eq., 520 at pp. 536 and 537.

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to the charges framed and that all the committee members later on ratified the suspension at a meeting.

[Court—But that was after the suit.]

There is no by-law or statute compelling the committee to suspend a trustee only at a meeting. All depends upon what was the previous practice. A similar case is *Subba Naidu* v. *Gopalaswamy Naidu*(1). Disposal of business by circulation is only a less formal method than by meeting. Moreover a dismissal in a wrong manner can be justified otherwise, e.g., on the merits, during action: see *In re Great Northern Salt and Chemical Works, Ex parte Kennedy*(2), *Vijaya Raghava* v. *Secretary of State for India* (3) and *Seshadri Ayyangar* v. *Nataraja Ayyar*(4). Mere irregularity in procedure does not affect the legality of the eventual order especially if the order is just on the merits: Halsbury's Laws of England, Volume 8, page 330. *The King* v. *Mayor, etc., of London*(5), *Seshadri Ayyangar* v. *Ranga Bhattar* (6) and *The King* v. *Griffiths*(7).

Hon. Mr. *S. Srinivasa Ayyangar, the Advocate-General,* in reply was asked to argue the question of quantum of damages.

The judgment of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—This is an appeal from a decree of the Subordinate Judge of Kumbakonam dismissing the suit brought by the plaintiff for a declaration that his suspension from the office of temple trustee by the Kumbakonam Devasthanam Committee was illegal and for damages. The decision as to the legality of the suspension depends mainly in this case on the question whether the procedure adopted by the committee can be supported. What happened was that, after the plaintiff had been given notice of some or all of the charges against him, the second defendant, a member of the committee, drew up a report (Exhibit B-1) and forwarded copies of it to the other members of the temple committee proposing that the plaintiff and some other trustees should be suspended until further orders. In it he stated that, though the subject had been for a long time before

(1) (1905) 15 M.L.J., 185.
(2) (1890) 44 Ch. D., 472 at pp. 480 and 481.
(3) (1884) I.L.R., 7 Mad., 466.
(4) (1898) I.L.R., 21 Mad., 179 at pp. 186 and 206.
(5) (1787) 8 T.R., 209; s.c., 100 E.R., 66. (6) (1912) I.L.R., 35 Mad., 631.
(7) (1822) 5 B. and Ald., 731; s.c., 106 E.R., 1358.

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the meeting, it had not been concluded; "It is therefore sent in circulation. I request that instead of writing 'meeting' in this you will write your opinion." Defendants Nos. 1, 4 and 6 are proved to have assented to the course. The fifth defendant died after suit, and defendants Nos. 7, 8 and 9 were not in office at the date of suspension. The third defendant on receipt of Exhibit B-1 sent an answer (Exhibit C) in which he stated "It is not legal to take this step by circulation, much less by taking individual opinions as you are now doing. The procedure adopted is wrong from beginning to end; I request you therefore to call a meeting for the purpose." Ignoring this request the second defendant wrote to the plaintiff the letter (Exhibit A-1) in which he stated that the plaintiff had been suspended for the reasons set forth in the accompanying proceedings order and asked him to hand over to another of the trustees. The proceedings (Exhibit A-1) recorded the opinion of the majority that the plaintiff should be suspended and disclosed the fact that the matter had been dealt with in circulation. Now the temple committee are a statutory body to which the powers formerly exercised by the Board of Revenue under Regulation VII of 1817 have been transferred as regards certain temples by the Religious Endowments Act and these powers, it may now be taken as settled, include a power of suspending or dismissing the temple trustees for sufficient cause. It has, however, been held that in exercising these powers they are to a large extent in the position of a corporation and that their actions must be tried by the same tests. Now it is well settled that the ordinary way for bodies in the position of a corporation to transact their business is at a meeting; and, assuming that it is open to them to transact some of their business in circulation, I think they have no such power as regards matters such as suspension, or dismissal of freehold officers under their superintendence as to which their authority must be strictly pursued: *Rex* v. *Taylor*(1), *Rex* v. *Sutton*(2), *Thandavaraya Pillai* v. *Subbayyar*(3), and *Ponnambala Pillai* v. *Muthu Chettiar*(4). Even if the matter could properly have been dealt with in circulation, that

(1) (1694) 3 Salk, 231.
(2) (1711) 10 Mod., 74.
(3) (1900) I.L.R., 23 Mad., 483 at p. 485.
(4) (1916) 30 M.L.J., 619.

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could only have been by consent of all members, and any one of them would have had the right to insist on the matter being dealt with at a meeting, as the third defendant endeavoured to do in this case. See the observation of PAGE WOOD, V.C., in *Hallows* v. *Fernie*(1), which were approved by STERLING, J., in *In re Great Northern Salt and Chemical Works, Ex parte Kennedy*(2). Here there was not even what is ordinarily known as circulation, as the second defendant merely sent copies of his proposals to each of the other members and obtained their individual assents to his proposals. In these circumstances we are clearly of opinion that the action of the committee in suspending the plaintiff was *ultra vires*.

It is then said that we ought to enquire whether there were valid grounds for suspending the plaintiff and, if so, to dismiss his suit. Certain observations of Mr. Justice SHEPHARD in *Seshadri Ayyangar* v. *Nataraja Ayyar*(3) were referred to, but these observations appear to have been *obiter* and no authority was cited. There are similar observations by Mr. Justice SUNDARA AYYAR in *Seshadri Aiyangar* v. *Ranga Bhattar*(4). The case cited by him—*The King* v. *Mayor, etc., of London* (5)—is no authority thatt his is a good answer to a suit, as in that case the Court merely refused to issue the discretionary writ of mandamus and observed that

"no case has been cited to show that an assize will not lie for such an office as the present; or that he could not maintain an action for money had and received during his suspension."

Further the office with which Mr. Justice SUNDARA AYYAR was dealing was that of archaka and other considerations may possibly apply to it. On the other hand in *Willis* v. *Sir G. Gipps*(6), the Privy Council recommended that an order of amotion made without due notice should be set aside, although they at the same time reported that there were sufficient grounds for making the order. We are therefore of opinion that it would not be a good answer to the present suit to show that there were

(1) (1867) L.R., 3 Eq., 520 at p. 537. (2) (1890) 44 Ch. D., 472.
(3) (1898) I.L.R., 21 Mad., 179 at pp. 186 and 187.
(4) (1912) I.L.R., 35 Mad., 631.
(5) (1787) 8 T.R., 209; s.c., 100 E.R., 66.
(6) (1846) 5 Moo., P.C., 379.

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sufficient grounds for suspending the plaintiff. In this view it is unnecessary to consider the further objection that the plaintiff was removed without due notice, as we have held that the action was *ultra vires* on the other ground.

As regards the liability of the defendants or some of them for damages, there can be no doubt that the decision of a Bench of three Judges sitting on the original side in *Vijaya Raghava* v. *Secretary of State for India*(1) is authority at any rate for the proposition that a person in the enjoyment of a public office who is wrongfully removed is ordinarily entitled to damages from the authority removing him. In *Seshadri Ayyangar* v. *Nataraja Ayyar*(2) a trustee who was illegally suspended recovered Rs. 1,000 against the temple committee, COLLINS, C.J., being influenced by the fact that the committee were actuated by an indirect motive, the fact that the plaintiff was a vadagalai. In *Thandavaraya Pillai* v. *Subbayyar*(3) the plaintiff recovered damages before the District Munsif, and to this extent the decree seems to have been reversed by the District Judge, and the plaintiff did not appeal. As early as *Syed Amin Sahib* v. *Ibram Sahib*(4), it seems to have been assumed that damages might be recovered by a temple trustee for wrongful dismissal. On the other hand there does not seem to be any instance of an action of this kind having been successfully maintained in England. In *The King* v. *Mayor, etc., of London*(5) already cited, the suggested remedies of the removed officer were an assize or an action for money had and received to his use during the period of suspension, and not an action against the corporation for wrongfully suspending him; and in *Osgood* v. *Nelson*(6) it was thought well for the removed officer to proceed by action for money had and received against his successor. In *Harman* v. *Tappenden*(7), where a freeman of the corporation was alleged to have been illegally removed from his office, it was held that an action did not lie against individual corporators for acts erroneously done by them in their corporate capacity, at least not without proof of malice. This case was relied on by KELLY, C.B., in *Mill* v.

(1) (1884) I.L.R., 7 Mad., 466.
(2) (1898) I.L.R., 21 Mad., 179 at pp. 186 and 187.
(3) (1900) I.L.R., 23 Mad., 483. (4) (1868) 4 M.H.C.R., 112.
(5) (1787) 8 T.R., 209. (6) (1872) L.R., 5 H.L., 636.
(7) (1801) 1 East, 555.

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Hawker(1), who held that for a tort committed by a corporation it could only be sued as a body. On the other hand CLEASBY and PIGOTT, BB., held that the individual members who exceeded their authority by ordering a trespass to the plaintiffs' land were liable in damages. In *Mill* v. *Hawker*(2), the same case in the Exchequer Chamber, BLACKBURN, J., said that the question whether the corporators were liable was one of considerable importance and great difficulty. It would, he said, require time for consideration and probably the decision would not be unanimous. Accordingly he declined to decide it at that stage, and it has not been decided since in any English case. It had however long previously been ruled by the House of Lords in a Scotch appeal, *Ferguson* v. *Kinnoull*(3), that where the law imposes a duty on any person or body of persons and they fail or neglect to perform that duty they are answerable in damages to those whom their failure or neglect injures. The appeal was from Scotland, but the judgments proceeded on grounds common to the laws of England and Scotland, as was expressly stated, and they contain general expressions which are rather in favour of extending liability of individual corporators at any rate to cases of excess of jurisdiction such as the present. It is also to be observed that it has been held by the Judicial Committee on appeal from India in *Calder* v. *Halket*(4), that even judicial acts at any rate of inferior Courts are actionable, in the absence of statutory provision, if done wholly without jurisdiction. *Ferguscn* v. *Kinnoull*(3) is also important because it lays down that it is only corporators who are parties to the failure or neglect of duty who can be held answerable in damages. It is also clear that section 14 of the Religious Endowments Act contemplates that members of temple committees should be sued individually in cases under that section. On the whole, it does not appear that the Madras cases are opposed to any settled rule of English Law, or that there is sufficient reason for calling them in question.

As regards damages it is not shown that the plaintiff sustained any substantial damage by reason of the suspension though it was of course annoying to have the suspension tomtommed in the neighbourhood. On the whole we assess the damages at

(1) (1874) L.R., 9 Ex., 321.
(2) (1875) 10 Ex., 92.
(3) (1842) 9 Cl. and F., 251.
(4) (1839) 3 Moo. P.C., 28.

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Rs. 50 and reverse the decision of the lower Court and give the plaintiff a declaration that his suspension was illegal and a decree against defendants Nos. 1, 2, 4 and 6 who must be considered as parties to the suspension, for Rs. 50 damages and for costs here and below calculated on that amount.

N.R.

APPELLATE CIVIL.

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

1917, September, 11 and 12.

ASA BEEVI AND TWO OTHERS (DEFENDANTS NOS. 5 TO 7), APPELLANTS,

v.

S. K. M. KARUPPAN CHETTY (PLAINTIFF), RESPONDENT.*

Muhammadan Law—Contingent right to inherit, transfer or renunciation of, whether prohibited.

A transfer or renunciation of a contingent right of inheritance is prohibited under Muhammadan Law.

Mussummant Khanum Jan v. *Mussummant Jan Bee-bee* (1827) 4 S. D. A., 210, followed.

Kunhi Mimod v. *Kunhi Moidin* (1896) I.L.R., 19 Mad., 176, considered.

Mussamut Hurmutt-Ool-Nissa Beyam v. *Allahdia Khan and Hajee Hidayat* (1871) 17 W.R., 108 (P.C.), explained.

APPEAL under clause 15 of the Letters Patent against the judgment of SADASIVA AYYAR, J., in *Asa Beevi* v. *Karuppan Chetty*(1).

The following statement of facts is taken from the judgment of SADASIVA AYYAR, J. :—

"One Pachakanni had two children, a son and a daughter, by his wife Vellayammal. The son's name was Mira Moideen and the

* Letters Patent Appeal No. 47 of 1917.

(1) Second Appeal No. 1471 of 1915 against the judgment of R. GOPAL RAO, the Temporary Subordinate Judge of Sivaganga, in Appeal No. 301 of 1914, preferred against the decree of N. KAILASAM AYYAR, the Additional Distric Munsif of Sivaganga, in Original Suit No. 96 of 1913.

daughter's name is Nagoor Ammal. Pachakanni married two other wives. About 25 years after her marriage, Vellayammal and her son Mira Moideen executed a release deed, Exhibit I, on the 28th April 1902, in favour of Pachakanni. The daughter Nagoor Ammal did not join in this release deed, Exhibit I. Under this release deed, Exhibit I, Vellayammal and her son Mira Moideen received Rs. 500 from Pachakanni. The operative portion of the deed is 'as we have received the said Rs. 500 we make a release of the rights and connections of ourselves and our heirs to all the properties or liabilities of yours and your heirs.' It is not denied that, on the true construction of this document, the mother and the son released their rights of inheritance also to Pachakanni.

Pachakanni died about the middle of 1908. Shortly afterwards his son Mira Moideen and his daughter Nagoor Ammal by his first wife sold their father's properties to the plaintiff as if they were the sole heirs of their father, ignoring the release deed, Exhibit I, by which one of them had relinquished his interest in the inheritance and ignoring also the fact that the father had left a widow at his death. Defendants Nos. 5, 6 and 7 represent the heirs of the second wife of Pachakanni who was the only heir left by him at his death (besides his daughter and his son by his first wife). The fourth defendant is the alience from one of the heirs of the widow. Defendants Nos. 1 to 3 disclaimed all interest.

The District Munsif found (*a*) that Nagoor Ammal, one of the plaintiff's vendors, was not proved to be the legitimate daughter of Pachakanni by his first wife Vellayammal; (*b*) that the other vendor of the plaintiff had given up all rights of inheritance in his father's properties by Exhibit I; and (*c*) that the plaintiff therefore got no title under his sale-deed, Exhibit A. On these findings the District Munsif dismissed the suit with costs.

On appeal, the learned Subordinate Judge held (*a*) that Nagoor Ammal was the legitimate daughter of Pachakanni, (*b*) that the release deed, Exhibit I, was legally inoperative both under the Muhammadan Law and by and on the analogy of section 6 of the Transfer of Property Act and that therefore the plaintiff was entitled to $\frac{7}{8}$th share under the Muhammadan Law in Pachakanni's estate, such $\frac{7}{8}$th ($\frac{7}{12}$ and $\frac{7}{24}$) being the sum of the fractional shares belonging to his two vendors in that estate."

Defendants Nos. 5 to 7 preferred a second appeal to the High Court which was heard by SADASIVA AYYAR and SPENCER, JJ. SADASIVA AYYAR, J., agreed with the Subordinate Judge and

holding that the renunciation of the contingent right of inheritance was prohibited by the Muhammadan Law and that there was no estoppel created by such renunciation beforehand though the renunciation had been for a consideration, dismissed the second appeal; while SPENCER, J., allowed the second appeal holding on the authority of *Mussamut Hurmutt-Ool-Nissa Begam* v. *Allahdia Khan and Hajee Hidayat*(1), that the renunciation was not repugnant to Muhammadan Law, that it was good as a family settlement and that an estoppel was created by receipt of consideration, and gave a decree to the plaintiff to the extent of three-eighths of the deceased's estate. In the result the second appeal was dismissed with costs under section 98, Civil Procedure Code.

Defendants Nos. 5 to 7 preferred this Letters Patent Appeal.

A. Krishnaswami Ayyar (with *E. Duraiswami Ayyar*) for the appellants.—I contend for the view of SPENCER, J. Section 6 of the Transfer of Property Act does not in terms apply to Muhammadans. The Muhammadan Law alone applies. A release or renunciation of a right to inherit to a living propositus, for a consideration is valid under that law. I rely on *Mussamut Hurmutt-Ool-Nissa Begam* v. *Allahdia Khan and Hajee Hidayat*(2). See also *Kunhi Mamod* v. *Kunhi Moidin*(3) and *Nasir-ul-Haq* v. *Fazil-ul-Rahman*(4). The case against me is *Sumsuddin* v. *Abdul Hussain*(5). This point did not directly arise in *Marangami Rowther* v. *Nagur Meera Labbai*(6). There is at least a personal estoppel so far as the executant of the release is concerned: *Har Chandi Lal* v. *Sheoraj Singh*(7), *Rangappa Naik* v. *Kamti Naik*(8), *Raghupathy* v. *Kannamma*(9), *Nachiappa Gounden* v. *Rangasami Gounden*(10), *Muhammad Hashmut Ali* v. *Kaniz Fatima*(11) and *Barati Lal* v. *Salik Ram*(12). Tyabji's Muhammadan Law, page 285; Ameer Ali in his Muhammadan Law, Volume 2, page 50, doubts the correctness

(1) (1871) 17 W.R., 108 (P.C.). (2) (1871) 17 W.R., 108, at p. 112 (P.C.).
(3) (1896) I.L.R., 19 Mad., 176. (4) (1911) I.L.R., 33 All., 457.
(5) (1907) I.L.R., 31 Bom., 165. (6) (1913) 24 M.L.J., 258 at p. 262.
(7) (1917) I.L.R., 39 All., 179 at p. 184 (P.C.).
(8) (1908) I.L.R., 31 Mad., 366 at p. 371.
(9) (1912) 23 M.L.J., 363. (10) (1914) 28 M.L.J., 1.
(11) (1915) 13 A.L.J., 110. (12) (1915) 13 A.L. J., 1141.

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of *Kunhi Mamod* v. *Kunhi Moidin*(1). *Sri Jagannada Raju* v. *Sri Rajah Prasada Rao*(2), does not touch the present question.

C. V. Anantakrishna Ayyar for the respondent.—Under Muhammadan Law there can be no release of a prospective heirship or reversionary right to the owner or to the other heirs; such a renunciation is null and void: *Mussummant Khanum Jan* v. *Mussummant Jan Bee-bee*(3); Macnaughten's Precedents, page 89 (Precedent No. 11) and Wilson's Anglo-Muhammadan Law, page 268. *Kunhi Mamod* v. *Kunhi Moidin*(1) is wrong and is also distinguishable. In *Muhammad Hashmut Ali* v. *Kaniz Fatima*(4) no rule of Muhammadan Law or authorities are quoted. There is no specific decision of this point in *Mussamut Hurmutt-Ool-Nissa Begum* v. *Allahdia Khan and Hajee Hidayat*(5), and it deals only with a release of a vested right after the inheritance opened. See Ameer Ali's Muhammadan Law, Volume 2, pages 50 and 51. See also *Marangami Rowther* v. *Nagur Meera Labbai*(6) and Tyabji's Muhammadan Law, page 568.

WALLIS, C.J., BAKEWELL AND KUMARASWAMI SASTRIYAR, JJ.

JUDGMENT.—We agree with the conclusion arrived at by Mr. Justice SADASIVA AYYAR in this case on the ground that a transfer of an expectancy of this kind is not permitted by the Muhammadan Law. That was decided in accordance with the opinion of the numerous law officers consulted in *Mussummant Khanum Jan* v. *Mussummant Jan Bee-bee*(3). Case No. 11 cited at page 89 of Macnaughten's Principles and Precedents of Muhammadan Law is to the same effect. This view has also been taken by the text-writers on Muhammadan Law. (Sir Roland Wilson's Digest of Anglo-Muhammadan Law, page 268, and more particularly Volume 2, pages 50 and 51 of the third edition of Mr. Ameer Ali's Muhammadan Law where the subject is more fully dealt with.) Mr. Tyabji's Principles of Muhammadan Law is to the same effect.

On the other hand, reliance has been mainly placed on the decision of the Privy Council in *Mussamut Hurmutt-Ool-Nissa Begum* v. *Allahdia Khan and Hajee Hidayat*(5) by which Mr. Justice SPENCER appears to have been mainly influenced in

(1) (1896) I.L.R., 19 Mad., 176.
(2) (1916) I.L.R., 39 Mad., 554.
(3) (1827) 4 S.D.A., 210.
(4) (1915) 13 A.L.J., 110.
(5) (1871) 17 W.R., 108 at p. 112.
(6) (1913) 24 M.L.J., 258 at p. 262.

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dissenting from the conclusion come to by Mr. Justice SADASIVA AYYAR. On examining that case, we do not think that their Lordships intended to lay down that a Muhammadan could renounce his right of inheritance before that right had become vested on the death of the person to whom he was entitled to succeed. In that case there had been very great delay in putting forward the plaintiff's claim to succeed as heir of the deceased and their Lordships observe at page 112:

"They may further remark that, according to the Muhammadan Law, there may be a renunciation of the right to inherit, and that such a renunciation need not be expressed but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another."

Having regard to the words 'right to inherit' and the words 'prosecuting a claim' which claim would only arise after the succession had opened, we think that these observations of their Lordships may be taken as dealing with a renunciation after the right of inheritance has vested, and are not authority for the proposition that a prior renunciation is authorized by the Muhammadan Law. Mr. Ameer Ali in the passage referred to deals with renunciation after the inheritance has vested.

Reliance has also been placed on a decision of this Court in *Kunhi Mamod* v. *Kunhi Moidin*(1). That decision has been questioned by all the text-book writers who have since dealt with the subject. As pointed out in Wilson's book, the recital that all the law officers were not agreed in *Mussummant Khanum Jan* v. *Mussummant Jan Bee-bee*(2) is not accurate. Further, the respondent was not represented and therefore the case was not so fully argued. The learned Judges also proceeded upon the footing that the right of inheritance had vested. We are not prepared to accept this case as an authority for the proposition that under the Muhammadan Law a right of inheritance can be renounced before it vests. The decision in *Mussummant Khanum Jan* v. *Mussummant Jan Bee-bee*(2) has since been referred to with approval by this Court in the judgment of BENSON and SUNDARA AYYAR, JJ., in *Marangami Rowther* v. *Nagur Meera*

(1) (1896) I.L.R., 19 Mad., 176.
(2) (1827) 4 S.D.A., 210.

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Labbai(1), and the same view appears to have been expressed by Sir LAWRENCE JENKINS, C.J., in *Sumsuddin* v. *Abdul Hussain*(2), though the judgment in that case proceeded upon the construction of the provisions of the Transfer of Property Act. Reliance has also been placed upon the decision in *Muhammad Hashmat Ali* v. *Kaniz Fatima*(3), but there is no discussion of the authorities in that case.

On the whole, we think that there is a large preponderance of authority in favour of the view that a transfer or a renunciation of the right of inheritance before that right vests is prohibited under the Muhammadan Law. The rules of Muhammadan Law are not affected by the Transfer of Property Act and it is, therefore, unnecessary to consider whether this transfer or renunciation would not also be invalid under the provisions of section 6 of the Transfer of Property Act itself.

For these reasons, the Letters Patent Appeal fails and is dismissed with costs.

N.R.

APPELLATE CIVIL.

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

1917, September 12.

VEMA RANGIAH CHETTY (DEFENDANT), APPELLANT,

v.

V. M. VAJRAVELU MUDALIAR (PLAINTIFF), RESPONDENT.*

Provincial Small Cause Courts Act (IX of 1887), Sch. II, art. 7—Suit involving apportionment of rent, whether a suit of small cause nature—Transfer of Property Act (IV of 1882), ss. 2 (d) and 36, applicability of, to transfer in execution.

A suit the determination of which involves apportionment of rent by the Court, falls within article 7 of the second schedule of the Provincial Small Cause Courts Act and is exempted from the cognizance of a Provincial Small Cause Court.

(1) (1913) 24 M.L.J., 258. (2) (1907) I.L.R., 31 Bom., 165.
(3) (1915) 13 A.L.J., 110.
* Letters Patent Appeal No. 57 of 1917.

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Though according to section 2 (*d*) of the Transfer of Property Act, the Act does not apply to sales in execution, yet the principle of section 36 of the Act which embodies a rule of justice, equity and good conscience can be applied and rent apportioned from day to day as between a lessor and the transferee of his right in execution in the course of a year of the lease.

APPEAL under clause 15 of the Letters Patent against the judgment of SADASIVA AYYAR, J., in *Rangiah Chetty* v. *Vajravelu Mudaliar*(1).

Plaintiff gave on lease two properties on 27th February 1901 to the defendant's father for ten years at a fixed rent for each year and the rent of each year was made payable in three equal instalments, on the 15th of May, 15th November and 15th February. Plaintiff lost the first of the two properties early in 1901 and the second by virtue of a court-sale held in April 1907 in execution of a decree against him, the sale being confirmed in December 1907. In this suit the plaintiff claimed that he was entitled to a rateable amount of each year's rent (viz., one-third of the whole rent) in respect of the second property for the instalments payable in February, May and November 1907 and February and May 1908. The plaintiff stated in his evidence that the defendant's father apportioned the rent for the suit property at one-third of the whole rent. The defendant denied the truth of the lease and stated that the rent was discharged by his father and the rateable amount claimed was excessive. The District Munsif held that the plaintiff was entitled to rent only up to April 1907 (the date of sale) but that the rent was discharged and that there was no apportionment. On appeal the Subordinate Judge held that there was no apportionment by defendant's father, that there was no discharge, that the plaintiff was entitled for the ten months' rent in 1907, viz., from February 1907 to December 1907, when the sale was confirmed and that the purchaser in court-sale was entitled to rent thereafter.

The defendant preferred a second appeal which was heard by SPENCER and SADASIVA AYYAR, JJ. A preliminary objection was raised that no second appeal lay. SPENCER, J., held that there was no apportionment prior to suit, that as the suit involved an

(1) Second Appeal No. 1431 of 1915 preferred against the decree of K. KRISHNAMACHARIYAR, the Subordinate Judge of North Arcot, in Appeal No. 142 of 1914, preferred against the decree of M. A. KRISHNA RAO, the District Munsif of Sholinghur, in Original Suit No. 140 of 1913.

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apportionment of rent it was not a suit of a small cause nature, so as to preclude a second appeal, but that as the rent for the third instalment of 1907 was not due in December 1907 when plaintiff lost possession but was due only in February 1908, he was not entitled to ten months' rent but was entitled only to the rent of the two out of the three instalments of 1907. SADASIVA AYYAR, J., held that there was an apportionment by defendant's father, that even if there was no apportionment, the suit was of a small cause nature as the plaintiff claimed a specific mount as rent on the basis of an equitable apportionment, that the determination of the apportionment which was not prayed for in the plaint was only incidental to the main relief and that hence no second appeal lay. In the result the second appeal was dismissed with costs under section 98, Civil Procedure Code.

The defendant preferred this Letters Patent Appeal.

T. V. Muttukrishna Ayyar for the appellant.—On both the questions raised in the case I contend for the view taken by SPENCER, J.: (1) The suit is not of a small cause nature. There was no contract of apportionment between the parties of the rent payable on the loss of one of the two properties. Whatever apportionment there was before, it was all one-sided and not with my consent. It is in this suit that the apportionment has to be made by the Court for the first time and hence this suit falls under clause (7) of the second schedule to the Provincial Small Cause Courts Act. (2) One of the two properties leased passed to a stranger in a court-sale. Section 36 of the Transfer of Property Act does not apply to execution sales—see section 2 (*d*) of the Transfer of Property Act. Rent cannot be apportioned from day to day—see *Mathewson* v. *Shyam Sunder Sinha*(1). *Kunhi Sou* v. *Mulloli Chathu*(2) and *Lakshminaranappa* v. *Melothraman Nair*(3) are against me.

K. Yegnanarayana Adiga for *K. P. Lakshmana Rao* for the respondent.—The suit is of a small cause nature. It is the frame of the plaint that determines the *forum*. No apportionment is prayed for in the plaint but only a money rent; and even if rent has to be apportioned by the Court on account of

(1) (1906) I.L.R., 33 Calc., 786. (2) (1915) I.L.R., 38 Mad., 86.
(3) (1903) I.L.R., 26 Mad., 540.

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eviction from a portion of the leased premises (for which see Foa's Landlord and Tenant, page 170), it arises only incidentally. The vakil was not called upon to argue on the merits.

The following judgment of the Court was delivered by

WALLIS, C.J.—The learned Judges have differed on the question whether a second appeal lies to this Court and that depends upon the question whether the present suit is one of a small cause nature, and if it be a suit for the apportionment of rent it is not of a small cause nature; see article 7 of second schedule of the Provincial Small Causes Courts Act. The plaint in this case recites that the lessee failed to get possession of a portion of the demised premises by reason of a decree against the lessor. The plaintiff who sues for rent claims only a rateable amount, namely, one-third of the stipulated rent or Rs. 116-10-8 a year. He does not allege that the rent had been apportioned at this figure by consent of the parties but only that the defendant had settled the claim for rent up to 1904—on what terms he does not say. The finding is that there was no agreement about it, and therefore it is quite clear that the suit did involve an apportionment of rent and could not have been decided without it, that, therefore, it was not a suit of a small cause nature, and that a second appeal lies. The Letters Patent Appeal must be allowed with costs and we must proceed to dispose of the second appeal. WALLIS, C.J.

The only ground taken is that the lower Courts were wrong in apportioning the rent between the original lessor and the purchaser of his interest in execution at a court-sale. Section 36 of the Transfer of Property Act provides for such apportionment, and although it is no doubt true that, under section 2 (*d*) of the Act, it does not apply to sales in execution, yet the section embodies a rule of justice, equity and good conscience which we think should be applied. That appears to be the view taken by this Court in *Kunhi Sou* v. *Mulloli Chathu*(1) following *Lakshminaranappa* v. *Melothraman Nair*(2). The case reported in *Satyendra Nath Thakur* v. *Nilkantha Singha*(3) was a case of a transfer of the lessee's interest, and it is unnecessary for us to consider it. With great respect we are unable to follow the

(1) (1915) I.L.R., 38 Mad., 86. (2) (1903) I.L.R., 26 Mad., 540.
(3) (1894) I.L.R., 21 Calc., 383.

RANGIAH CHETTY v. VAJRAVELU MUDALIAR. — WALLIS, C.J.

decision in *Mathewson* v. *Shyam Sunder Sinha*(1). In this case the question may depend upon the terms of the contract of sale and neither the sale proclamation nor the sale certificate have been produced and in the absence of any evidence we must presume that what was sold was simply the land. The second appeal therefore fails and is dismissed with costs.

N.R.

APPELLATE CIVIL—FULL BENCH.

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

1916, September. 5, 6 and 20 and 1917, May, 3, August, 7 and 15 and November, 12 and 23.

KUMARAPPA REDDI (PLAINTIFF), APPELLANT,

v.

MANAVALA GOUNDAN (DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 100—Custom or usage having the force of law—Extent of jurisdiction of High Court in second appeal in deciding custom or usage—Mirasidar in Chingleput district, right to thunduvaram *by custom from Government ryots—Onus of proving custom on Mirasidar—Civil Procedure Code, sec. 103—Power of High Court to decide facts under—Admissions of a party, binding nature of, unless explained—Provincial Small Cause Courts Act (IX of 1887), Sch. II, art. 13*—Thunduvaram, *dues within—Burden of proving abandonment of customary right—Non-exercise of right for a long time, effect of.*

Held by the Full Bench:—The existence of a custom or 'usage having the force of law' is a mixed question of fact and law. Section 100, Civil Procedure Code, precludes the High Court from interfering in second appeal with the findings arrived at by the lower Court of actual facts from which the existence of the custom has been inferred; the inference as to the existence and the decision as to the validity, of the custom being matters of law, revisable by the High Court in second appeal.

Kakarla Abbayya v. *Raja Venkata Papayya Rao* (1906) I.L.R., 29 Mad., 24, overruled. *Kailas* v. *Padmakisor* (1917) 25 C.L.J., 613 and *Pankajammal* v. *The Secretary of State for India* (1917) I.L.R., 40 Mad., 1108, followed. *Palaniappa Chetty* v. *Sreemath Devasikamony Pandarasannadhi* (1917) I.L.R., 40 Mad., 709 (P.C.), referred to.

Held further, (*a*) that in a suit by an *ekaboga mirasidar* in a village in the Chingleput district, for certain customary dues called *thunduvaram* from the

(1) (1906) I.L.R., 33 Calc., 786.

* Second Appeal No. 1660 of 1913.

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non-mirasidar Government ryots in the village the onus of proving the custom was on the mirasidar, (*b*) that on the facts found he had established the custom, (*c*) that express admissions of a party to a suit are strong evidence against him unless and until explained and (*d*) that the onus of proving discontinuance of the custom was on the ryot.

Per SADASIVA AYYAR, J.—The High Court can, under section 103, Civil Procedure Code, decide in second appeal the genuineness or otherwise of the material documents in the case in the absence of a finding by the lower Appellate Court.

Held by the Division Bench (SADASIVA AYYAR and NAPIER, JJ.) Mirasi right is an interest in the village lands though not a proprietary interest therein. The *thunduvaram* payable to the mirasidar by a ryot according to custom is not in the nature of 'rent' but falls under 'dues' within article 13 of the second schedule to the Provincial Small Cause Courts Act (IX of 1887) and in a suit for such dues a second appeal lies to the High Court.

SECOND APPEAL against the decree of P. A. BOOTY, the District Judge of Chingleput, in Appeal No. 542 of 1911, preferred against the decree of A. VENKATARAMAYYA PANTULU, the District Munsif of Chingleput, in Original Suit No. 12 of 1910.

The plaintiff in this case, an *ekaboga mirasidar* in a village in Chingleput district, brought this suit for Rs. 168 being the value of *thunduvaram*, perquisites alleged to be due to him from the defendant, a non-mirasidar ryot in the village holding under a patta from the Government certain waste lands and other lands relinquished by the mirasidar. The plaintiff claimed the right not only by reason of a registered agreement executed by the defendant in his favour (Exhibit B) on 26th January 1905 but also by virtue of a customary right in him as mirasidar. The defendant pleaded that he was not liable, on the grounds (*a*) that there was no consideration for the agreement and (*b*) that there was no such custom as alleged by the plaintiff. The Munsif and the District Judge on appeal upheld both the above pleas of the defendant and dismissed the suit. The plaintiff preferred this second appeal to the High Court.

Further facts are to be found in the first judgment of the High Court (dated 20th September 1916) calling for a finding on certain issues from the District Court (for which see *infra*, page 376) and from the ORDER OF REFERENCE of SADASIVA AYYAR, J. (at page 381).

L. A. Govindaraghava Ayyar and *D. V. Nilamegha Achariyar* for the appellant.

T. R. Ramachandra Ayyar for the respondent.

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This Second Appeal came on for hearing in the first instance before SADASIVA AYYAR and NAPIER, JJ., who delivered the following

JUDGMENT.—The plaintiff is the appellant. He brought the suit to recover *thunduvaram* alleged to be due to him as mirasidar by the defendant who is a Government ryot in a mirasi village A preliminary objection was raised by the respondent's learned vakil (Mr. T. R. Ramachandra Ayyar) that no second appeal lies as the suit was of a small cause nature and the value of the claim is less than Rs. 500. In our opinion, mirasi right is an interest in the village lands, though it may not now be a proprietary interest therein. The *thunduvaram* payable to the mirasidar (assuming it to be payable) might have once been part of the *kudivaram* produce, but it is now claimed merely as the fee due to the mirasidar as such by custom. Hence it is not of the nature of 'rent' (like *jodi*), but comes under the general expression 'dues' in article 13 of the Provincial Small Cause Courts Act.

We therefore overruled the above preliminary objection. We are unable to agree with the learned District Judge that the plaintiff's claim to obtain *thunduvaram* (a part of the mirasidar's *swatantram*) from the defendant became barred in 1890, because the Government refused some time prior to 1878 to recognize the custom under which the mirasidar claimed such dues. Evidently the learned District Judge has applied article 131 of the Limitation Act as he states that 'there must have been a refusal' (by the defendant to pay the *thunduvaram* to the mirasidar) 'prior to 1878.' The learned Judge then, on this sole ground of the Government's disinclination in 1878 to recognize the custom in favour of the mirasidar, considered that he would be legally justified in finding that 'there must have been a refusal' (by the defendant) 'prior to 1878.' We think that such a finding must be treated as one based on no legal evidence and cannot be accepted. The recent Full Bench decision in *Seshachala Chetty* v. *Chinnasami*(1) does not deal directly with the mirasidar's right to *thunduvaram* (the question directly in issue in that case being the mirasidars' alleged right to eject occupiers of *nattam poramboke* land (sites held under

(1) (1917) I.L.R., 40 Mad., 410 (F.B.).

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pattas). There are, however, passages in two of the judgments in that case which relate to *thunduvaram* and which are entitled to great respect. We therefore refer to them. Mr. Justice AYLING says—

"There are undoubtedly certain incidents, which have been claimed as attaching to it" (the mirasi tenure) "from ancient times, and have to some extent been recognized, one of such incidents being the right to certain fees (*thunduvaram*) on lands granted for cultivation to non-mirasi cultivators (*payakaris*) by the Government."

Then the learned Judge says that this right also requires to be separately established by the mirasidar and that he ought to adduce proof of the existence of the custom to pay such dues, and he refers to *Sakkaji Rau* v. *Latchmana Gaundan* (1). Mr. Justice KUMARASWAMI SASTRIYAR refers to the opinion of the Collector of Chingleput in 1839 which admitted the mirasidars' right to collect *thunduvaram*, *swatantrams*, etc., in the *sheikal* lands. In another place, the learned Judge quotes the opinion of the Board of Revenue in 1892 as follows :—

"Briefly, the system, as it at present exists, rests on the claims of the mirasidars to all the waste lands in their villages and to the levy of *swatantram* or fees from *payakaris* or non-mirasidars who may take up land for cultivation. This claim was fully recognized in the new settlement carried out in 1876—78 (*vide* G.O. No. 221, dated 15th February 1876) and after full consultation with the mirasidars, a memorial fee *swatantram*, fixed at an average rate of two annas on every rupee of Government assessment, was declared to be leviable by the mirasidars not only on every field lying waste in each village, but also on all lands now held by the mirasidars themselves and included in their pattas, should such land be subsequently relinquished and taken up by a non-mirasidar. The fee claimable on each field was duly entered in the settlement registers against every field liable to it. The only lands against which fees were not entered were those which had already been obtained by strangers and which were held under lease or patta from Government."

Then the learned Judge refers to the Government orders passed on the 19th October 1909 about *swatantrams* as follows :—

"The right of the mirasidars to levy a fee at the rate of two annas in the rupee of the assessment of both dry and wet lands has been recognized by Government except in the case of the

(1) (1880) I.L.R., 2 Mad., 149 (F.B.).

undermentioned fields which are free of *swatantrams* so long as they are held under the terms of the original grants."

Next the learned Judge referred to *Sakkaji Rau* v. *Latchmana Gaundan*(1) in which it was held that

"where the right was denied there should be enquiry whether by custom it prevails on the estate or if there are not sufficient instances on the estate to afford grounds for a decision, on similar estates in the neighbourhood."

In the result, following the decision in *Sakkaji Rau* v. *Latchmana Gaundan*(1) which was recognized as good law by the Judges who decided the above Full Bench case, we hold that where (as in this case) the tenant denies the right of the mirasidar to *thunduvaram*, the burden of proof is on the mirasidar to prove the existence in himself of the right by establishing a custom to pay such dues.

Now the learned District Judge in considering the evidence in this case as to custom has fallen into several material errors. He thinks that documents relating to other than the plaint lands which establish the claim of the mirasidar to *thunduvaram* are not of much value. But the decision in *Sakkaji Rau* v. *Latchmana Gaundan*(1) which states that evidence even as to neighbouring villages and estates is admissible is clearly against the District Judge's view. Then he seems to think that Exhibits H, E and K do not relate to plaint lands, but it has been shown that they do relate to some of the lands against which no *swatantram* is shown as due in Exhibit J. It is contended for the respondent that the lands to which those documents refer were waste lands granted by Government after the year 1878 when an arrangement was made between the Collector and the mirasidars by virtue of which they were to be allowed *swatantrams* on such lands in consideration of their waiving their claim in respect of lands already granted by Government and lands taken up by the mirasidars themselves and abandoned. This may or may not be so, but we are at present only concerned with the question how these documents have been dealt with by the District Judge and there is no doubt that he has fallen into an error of fact. Then he thinks that the omission in the documents (Exhibits III to V (*b*) and VII to VIII (*b*) of any reference to *thunduvaram* is

(1) (1880) I.L.R., 2 Mad., 149 (F.B.).

strong evidence in the defendant's favour. Most of them are, however, sale-deeds and it is not usual or necessary in such deeds to insert a recital that a purchaser should thereafter pay the *thirvai* or *thunduvaram* payable on the lands sold. It is the duty of the purchaser to do so, whether it is mentioned in the sale-deed or not. The District Judge has declined to give any weight to old documents on the ground that it is admitted that mirasidars had many more privileges in the old days. (vide paragraph 5). This method of dealing with a question of custom is not correct. The evidence covering the whole period must be examined. It may be that the earlier evidence is not sufficient to establish the custom: it may be that it is sufficient but that later evidence establishes a discontinuance—all these aspects must be considered which admittedly has not been done in this case. The agreement (Exhibit B) again is brushed aside by the District Judge as a document executed without consideration. If, of course, we assume that the mirasidar has no right to *thunduvaram*, Exhibit B was executed without consideration. But that is the very point in issue. Anyhow, Exhibit B is a clear acknowledgment by the tenant of the mirasidar's right to *thunduvaram* and must be given whatever consideration it is worthy of in arriving at a conclusion on the question of the mirasidar's right by custom to claim *thunduvaram*. The Diglott Register (Exhibit VII) read with Mr. Puckle's report and the subsequent conduct of the mirasidar in not claiming *thunduvaram* for sixteen years before 1905 may afford evidence that the mirasidar had no right by custom to claim *thunduvaram* on waste lands which he had not been cultivating and which had been granted as waste by Government to outside *payakari* tenants and it can even afford evidence that he abandoned his customary right so far as those lands are concerned. But as regards those lands in respect of which the right to *thunduvaram* is recognized in the Diglott Register itself, it is for the defendant to prove that the mirasidar has abandoned such customary rights and mere non-receipt of the dues will afford very weak evidence of such abandonment. There are other matters in which the judgment is unsatisfactory, notably the statement in paragraph 4, line 35, that the defence witnesses deny payment of *thunduvaram*. This is not correct. They admit payment but seek to explain it away.

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We cannot accept findings based on incorrect tests as to custom and mistakes of fact as to the effect of documents. We therefore send back the records to the District Judge for fresh findings on issues 1 and 2 with reference to the above observations and for findings on the third and fourth issues. The time for submission of findings will be four weeks from the receipt of records and ten days for objections.

The issues and the findings thereon are given below:

In compliance with the order contained in the above judgment, the District Judge of Chingleput, submitted the following

FINDINGS:—The High Court has called for findings on issues 1, 2, 3 and 4.

2. This was a suit to recover arrears of *thunduvaram* or mirasi perquisites alleged to be due to the plaintiff from the defendant, a ryot of Sittamur village.

3. Sittamur is a Government village in Madurantakam taluk. It is undoubtedly a mirasi village and it is not disputed that the plaintiff is the sole mirasidar.

4. The plaintiff bases his right (1) on custom, and (2) on Exhibit B, an agreement alleged to have been executed by the defendant in his favour in 1905. In his written statement the defendant denied the plaintiff's right. As laid down in *Sakkaji Rau* v. *Latchmana Gaundan*(1) and the remand order of the High Court in the present case, the main question for consideration is whether by custom prevailing in the village the plaintiff is entitled to *thunduvaram*. The defendant's holding consists of A and B Schedule lands attached to the plaint, the former being wet lands and the latter dry. As regards the wet lands, in the settlement register (Exhibit J) no *swatantram* fee is entered, but in respect of the first seven fields, viz., Nos. 5, 6, 20, 22, 24, 46, 48 and 129 in B Schedule it is entered and against No. 114-B the remark is, no *swatantram* is due until resigned.

* * * * *

12. I therefore hold that the plaintiff is not entitled by custom to collect *thunduvaram* and this applies even to the lands in the B Schedule some of which are liable to *swatantram* fees according to the settlement register, and I find accordingly on issue 2.

(1) (1880) I.L.R., 2 Mad., 149 (F.B.).

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13. *Issue* 1—Whether the plaint agreement bears no consideration. Exhibit B is the plaint agreement. The defendant brought a suit in 1905 to declare that it was not genuine. Both the Courts of first instance and the Appellate Court found it to be genuine. The consideration for it is said to be the pre-existing liability of the defendant to pay *thunduvaram*. In the view I have taken, I hold that there was no consideration for it, and find accordingly.

14. *Issue* 3—Whether the plaintiff's right to the dues became barred by limitation to any and to what extent. The contention raised on behalf of the plaintiff is that the plaint claim is not one for rent but for a customary due and that the article of the Limitation Act which applies to it is article 120. On behalf of the defendant it is urged that *thunduvaram* is in the nature of rent as the mirasidar is a middleman between the tenant and the Government. The plaintiff relies on the observations in the remand judgment in the present case. Following *Venkatavaraga* v. *District Board of Tanjore*(1) and *Rathna Mudaliar* v. *Tiruvenkata Chariar* (2) I hold that it is not rent but a customary due. I find that the article applicable is 120 of the Limitation Act, and therefore the suit is not barred by limitation.

15. *Issue* 4—What sum, if any, is due to the plaintiff? If it is held that the plaintiff is entitled to *thundu*, I hold that, according to Exhibits B and D, he is entitled to it at 15 *marakals* per *cawni* of wet for the first crop and 7½ *marakals* for the second crop, and 3½ annas per *cawni* of dry land and that he is not bound to collect only at the rate of 2 annas in the rupee as laid down in the settlement register. I find accordingly on issue 4.

This Second Appeal again came on for hearing before SADASIVA AYYAR and PHILLIPS, JJ., who made the following ORDER OF REFERENCE TO A FULL BENCH:—

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant. This litigation commenced in December 1909 (nearly eight years ago) but I have felt it advisable that the whole matter of this second appeal should be referred to a Full Bench as some questions of law of more than ordinary importance are involved in its decision. Without expressing a final opinion on any of the questions involved or as to what should be the final result of the second appeal, I shall set out the material questions of fact and law making provisional comments here and there.

(1) (1883) I.L.R., 16 Mad., 305. (2) (1899) I.L.R., 22 Mad., 351.

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The suit was brought for recovery of Rs. 168-11-3 being the amount of *thunduvaram* perquisites due to the plaintiff as *ekaboga* mirasidar of Sittamur village (in the Madurantakam taluk, Chingleput district) from the defendant who is a ryot in the village, the *thunduvaram* being claimed at 15 *marakals* per *cawni* of wet land for the first crop, 7½ *marakals* per *cawni* for the second crop and 3½ annas per *cawni* of dry land. The *thunduvaram* was claimed by the plaintiff by virtue of his mirasi right over the village and also by reason of an agreement, that is, a registered muchilika, dated 26th January 1905 (Exhibit B), executed by the defendant. The District Munsif held (*a*) that the mirasidar's right to collect the plaint perquisites 'fell into disuse' about 1870, that 'it was too late in the day for him now to seek its enforcement as a subsisting right on the basis of the general custom in the village'; (*b*) that the defendant executed the muchilika (Exhibit B of 1905) possibly 'in order to help the plaintiff in his endeavours to resuscitate the plaintiff's primitive right which had fallen into disruption' and that it was also possible 'that the defendant executed a document under a misapprehension as to the exact right of plaintiff to enforce the fee at present' and the District Munsif finally thought that 'on the whole there was no legal consideration' for the plaint agreement. He therefore dismissed the plaintiff's suit.

On appeal, the learned District Judge (Mr. BOOTY) held that as in the Settlement Register (Exhibit J of 1878) it was recorded that 'the lands for which pattas had been given by Government to *payakaris* or on darkhast to mirasidars were exempted from *swatantram* fees' and as the plaintiff had failed to prove that the plaint lands fell under the category of lands other than those exempted from *swatantram* fees according to that Settlement Register and as the defendant had probably refused prior to 1878 to pay *thunduvaram* to the mirasidar on the strength of the statement in the Settlement Register, 'the mirasidar's right was dead by limitation in 1890.' He further held that the muchilika (Exhibit B of 1905) had absolutely no consideration to support it. He therefore dismissed the appeal.

When this second appeal first came on for hearing on the 17th December 1914 before a Divisional Bench of this Court, it

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was adjourned *sine die* for the decision of the Full Bench to which the general question of mirasidars' rights were referred in *Seshachala Chetty* v. *Chinnasami*(1). The opinions of the Full Bench in that case were pronounced on the 17th February 1916 and they are reported in *Seshachala Chetty* v. *Chinnasami*(1) (see from page 447). The present second appeal then came on for hearing before myself and Mr. Justice NAPIER in September 1916. We found ourselves unable to accept the finding of the District Judge 'that the plaintiff's claim to obtain *thunduwaram*' (a part of the mirasidar's *swatantram*) 'became barred in 1890.' Then as regards the right of the mirasidar to collect *thunduvaram*, I shall here quote from my above order of the 20th September 1916 concurred in by Mr. Justice NAPIER:

"Mr. Justice AYLING (in *Seshachala Chetty* v. *Chinnasami*(1) says: 'There are undoubtedly certain incidents which have been claimed as attaching to it' (the mirasi tenure) 'from ancient times, and have to some extent been recognized,' one of such incidents being 'the right to certain fees (*thunduvaram*) on lands granted for cultivation to non-mirasi cultivators (*payakaris*) by the Government' . . . 'In the result, following the decision in *Sakkaji Rau* v. *Latchmana Gaundan*(2) which was recognized as good law by the Judges who decided the above Full Bench case, we hold that where (as in this case) the tenant denies the right of the mirasidar to *thunduvaram*, the burden of proof is on the mirasidar to prove the existence in himself of the right by establishing a custom to pay such dues." (See pages 377 and 378 supra.)

After thus indicating our opinion that the custom of paying *thunduvaram* when set up by the mirasidar is one to be proved by the mirasidar by adducing proofs of instances of levy of such fees in his own estate and similar estates in the neighbourhood, we sent back the records to the District Court for fresh findings on issues Nos. 1 and 2, pointing out some of the errors which, in our opinion, occurred in the judgment of the District Judge. The issues Nos. 1 and 2 are as follows:—

(1) Whether the plaint agreement (Exhibit B) bears no consideration?

(2) Whether the plaintiff is entitled to the dues claimed even apart from the agreement?

(1) (1917) I.L.R., 40 Mad., 410 (F.B.). (2) (1878) I.L.R., 2 Mad., 149 (F.B.).

On remand, the case was heard in the District Court by another District Judge (Mr. VENUGOPALA CHETTI) and he recorded findings against the plaintiff, his material conclusions being as follows :—

(*a*) In the Settlement Register (Exhibit J of 1878) *swatantram* fee due to the mirasidar is entered only in respect of some fields, namely, Nos. 5, 6, 20, 22, 24, 46, 48 and 129 in the plaint B schedule (which relates to dry lands in defendant's patta). Against 114-B in that same schedule, the remark in the Settlement Register is that no *swatantram* is due until the land was relinquished, that is, until it was given up by the then pattadar and taken up by another. Against the wet lands in the A schedule, no *swatantram* fee is entered in the appropriate column as due to the mirasidar.

"The Settlement Register must be regarded as a record-of-rights showing how far the Government were prepared to recognize the claims of the mirasidars." "The ryots knowing as they did that there was a conflict between the mirasidar and the Government, would have naturally refrained from paying all the dues claimed by the mirasidar. The Settlement Register coupled with the oral evidence shows that there was interruption in the enjoyment of the mirasidar's right to *thunduvaram*. There is no evidence that the mirasidar has attempted to enforce his right in a Court of Law during all these years. Under these circumstances, the interruption raises a presumption against the existence of the custom."

(*b*) Exhibits L and LI of the year 1826 relate to litigation between the plaintiff's grandfather and certain *manyamdars* (not *sukhawasi* tenants). Though the plaintiff's predecessor's right to collect *thunduvaram* and other mirasi dues was recognized therein, the dispute there was not between the mirasidar and the *sukhawasi* ryots and the question of the right to collect mirasi dues was not formally adjudicated upon by the Court. (Though the District Judge does not expressly say that these ancient documents of 1826 are therefore not of much value, he evidently means to suggest it.)

(*c*) The documents (Exhibits C-2 to C-15) beginning with 1864 are debt-bonds executed to the mirasidar by *sukhawasi* tenants. Some of them are for arrears of village *adaya* (income) and others expressly state that they are debt bonds for arrears of *thunduvaram*. "It is possible that they refer only to lands leased

by the mirasidar." "The practice in the case of such lands cannot be invoked in proof of a customary right to mirasi dues from tenants introduced by the Government." (The reasoning in this part of the learned District Judge's judgment is not quite clear, but he evidently means that as the Settlement Register (Exhibit J) does not mention the *swatantram* fees with reference to most of the plaint lands, the defendant's predecessor in title must be deemed to have been a tenant introduced to those lands by the Government and a customary right to collect mirasi dues from such lands can only be proved by evidence of payment made specifically for such lands.)

(*d*) As regards Exhibits F and G, Exhibit F was a statement prepared by the then karnam and the agent of the plaintiff's grandfather at the time of the settlement in 1878. Having regard to the fact that the Government did not act upon it as is clear from the Settlement Register (Exhibit J), not much importance can be attached to it. As regards Exhibit G, it is not signed by any one and does not convey any information as to what lands are included in it and it is therefore doubtful whether it included also lands not *included in the mirasidar's patta* (that is, lands for which Government issued pattas directly to the tenants).

(*e*) Exhibits E, H and K (two of them executed to the defendant himself) no doubt refer to the right of the mirasidar to receive *melvaram thundu* from certain lands in the village. They are of the years 1885, 1887 and 1889, long after the Settlement Register, and though in the Settlement Register (Exhibit J) *swatantram* is not entered against the lands mentioned in these mortgage deeds, the right of the mirasidar is acknowledged in these documents. The District Judge, however, held that there was 'considerable force in the defendant's argument that these documents are not sufficient to prove a general custom, especially as they relate only to a small extent of the lands.'

(*f*) As regards B and D series, Exhibit B being the plaint agreement executed by the defendant himself in 1905 and the other exhibits, agreements, taken from other tenants, though attested by the defendant himself, the District Judge thinks that no importance should be attached to these documents of 1905-as they were 'recent.'

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(*g*) Then the District Judge refers to some documents on defendant's side on which it was argued that the omission to expressly mention *thunduvaram* in those documents was against the plaintiff's claim and to the fact that no *thunduvaram* has been collected for several years before suit. (The question whether Exhibit B was supported by consideration or not is so closely interwoven with the question whether the mirasidar has a right by custom to recover *thunduvaram* that it might be said to stand or fall with it. As regards the rate of the *thunduvaram*, the District Judge decided that if the plaintiff was entitled to it at all, he was entitled at the rates claimed by him.)

Mr. Govindaraghava Ayyar, the learned vakil for the appellant, strenuously contended (*a*) that he was entitled to argue on the whole evidence adduced as to custom just as if it were a question of fact, the finding on which might be attacked in a regular appeal preferred to this Court, (*b*) that even if he was bound to accept particular facts and pieces of evidence which the lower Court held to be not established or false as conclusive, he was entitled to argue that on the facts held to be established and the pieces of evidence accepted as genuine by the District Judge, the District Judge ought to have found as a matter of law that the custom set up by the plaintiff was established, (*c*) that the learned District Judge was mistaken in his statement that Exhibit G is not signed by any one and (*d*) that he was not justified in making a distinction between the right to collect mirasi dues from tenants introduced by the Government and tenants introduced by the mirasidar and in rejecting the evidence indicating the collection of *thunduvaram* on the mere ground that it was not specifically shown that that evidence related to the former class of lands.

I shall deal now with the first question, namely, that as this second appeal relates to a question of custom we are entitled to consider the whole evidence ourselves including the evidence which was not believed by the District Judge to be true or genuine. As I said in the very beginning I do not intend to deal finally with any of these questions as I have considered it advisable that the whole case should be decided by a larger Bench.

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In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(1), Sir S. SUBRAHMANYA AYYAR, Officiating Chief Justice, and BODDAM, J., refer to *Hanumantamma* v. *Rami Reddi*(2), *Mirabivi* v. *Vellayanna*(3) and *Vishnu* v. *Krishnan*(4) (the last of which was decided by a Full Bench) as establishing that a finding as to the non-existence of an alleged local custom could be revised by the High Court on second appeal *on the evidence*. They then refer to the language of section 584 of the old Civil Procedure Code [corresponding to the present section 100(*a*)] which contains the words 'the decision being contrary to (some specified) law *or usage having the force of law*.' The learned Judges then continue—

"This language is so explicit as to render superfluous the seeking for the reason of the provision though that is not difficult to discover, viz., that a usage of the kind mentioned, being in its nature such as must necessarily affect not only parties to the particular litigation and their privies, but whole bodies of people, stands on a footing similar to a matter of law derived from other sources than usage. The very limited scope which is allowed to usages in England, due to special historical causes (see Pollock and Maitland's History of English Law, 1st Edition, Vol. I, page 163), accounts for questions as to their existence being treated as falling under the category of questions for the jury. Of course, it is otherwise in this country where from the days of Manu it has been laid down that 'custom is transcendent law.' It is clear, therefore, both upon authority *which is binding upon us as the opinion of a Full Bench*, and as the right interpretation of the provision in question of section 584 of the Civil Procedure Code, that though the section disallows a second appeal with reference to findings of facts, yet the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of this Court, when it has to pronounce upon that question, to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, *but also the credibility of the evidence relied on and the weight due to it.*" "*Accordingly we heard Mr. Rangachariar upon the evidence in support of the alleged usage.*"

(1) (1916) I.L.R., 29 Mad., 24.
(2) (1882) I.L.R., 4 Mad., 272.
(3) (1885) I.L.R., 8 Mad., 464.
(4) (1884) I.L.R., 7 Mad., 3 (F.B.).

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Thus according to this decision even the credibility of pieces of evidence adduced in support of local usage can be considered by the High Court on second appeal. In *Muhammad Meeran Bibi* v. *Sheik Muhammad Rowther*(1) SPENCER and PHILLIPS, JJ., have held that the question whether the parties in a suit are governed by the Hindu or Muhammadan Law is a question of fact and does not relate to any usage having the force of law. The parties in that case were Muhammadan Labbais of the Trichinopoly district. It seems to me fairly arguable with the greatest respect to the above decision, that the question whether the local usage among these Labbais had the force of a law which made their rights of succession governed by the rules of Hindu Law comes under section 100 of the Code of Civil Procedure, though the rules of both the Hindu and Muhammadan laws always have the force of law. (The learned Judges refer to a prior decision in *Kunhambi* v. *Kalanthar*(2) decided by TYABJI and SPENCER, JJ.) The most recent case which I have come across in this Court (decided in November 1916 is *Pankajammal* v. *The Secretary of State for India*(3) by AYLING and SESHAGIRI AYYAR, JJ. That related to the custom as to the order of succession of trustees of a particular kattalai in the Conjeeveram temple. The following observations occur :—

" Before we send the case down, it is desirable to advert to the extreme contention that was put forward in this Court that in all cases where evidence as to custom has been let in, we are bound to weigh such evidence and decide for ourselves upon the materials. Mr. Ramachandra Ayyar who came in at a later stage of the case conceded that this contention is not supported by authority. The learned vakil argued that a question whether on the facts as found, the Courts below were justified in saying that a custom has not been proved is a point on which the High Court is entitled to draw its own inference. To the proposition thus advanced we see no objection. But we must point out that the value to be attached to the evidence let in, its reliability and, in a measure, its relevancy are all matters for the Court below and that the High Court *would not be justified in weighing the evidence*, as if it were sitting to hear a

(1) (1917) M.W.N., 98. (2) (1914) 27 M.L.J., 156.
(3) (1917) I.L.R., 40 Mad., 1108.

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first appeal." " It is open to doubt whether the expression, 'a usage having the force of law' in section 100 (*a*) of the Civil Procedure Code should not be confined to the usages of the country or of the community as suggested by PETHERAM, C.J., in *Nivath Singh* v. *Bhikki Singh*(1); customs like pre-emption, the law merchant and usages like those referred to in section 11 of Act VIII of 1865 seem to have been in the contemplation of the legislature. It seems doubtful whether a private right, like the one we are considering, falls within section 100, clause (*a*). However that may be, we feel no doubt that the High Court should not be called upon to examine the oral and documentary evidence relating to a private custom as if it were hearing a first appeal."

I must, however, say that the decision of this Court in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(2), following the Full Bench decision in *Vishnu* v. *Krishnan*(3), is not adverted to by the learned Judges who refer to *Nivath Singh* v. *Bhikki Singh*(1), which seems to have never been followed in this Court as law. I shall now refer to a very recent decision of the Privy Council in *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*(4). There, a custom of granting permanent leases of the property of a particular temple was set up. Their Lordships of the Privy Council say at page 721 :

" It has, however, been pressed on behalf of the appellants that there are two findings : one by the Munsif and one by the Subordinate Judge, who agrees with him that the ancient custom relied upon has been proved, and that, as that is an issue of fact, it must be accepted. No doubt, two findings upon question of pure fact must be accepted by this Board, but questions of the existence of an ancient custom are generally questions of mixed law and fact ; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a *question of law—not fact* ".

I think that this case gives to the expression 'local usage' a much wider meaning than Sir C. PETHERAM, C.J., was inclined to allow in the case of *Nivath Singh* v. *Bhikki Singh*(1). I shall now turn to the case of *Kailas* v. *Padmakisor*(5), decided

(1) (1885) I.L.R., 7 All., 649. (2) (1906) I.L.R., 29 Mad., 24.
(3) (1884) I.L.R., 7 Mad., 3 (F.B.). (4) (1917) I.L.R., 40 Mad., 709 (P.C.).
(5) (1917) 25 C.L.J., 613.

in April 1917. Here MOOKERJEE, J., reviews the authorities, dissents from *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(1) and *Vishnu* v. *Krishnan*(2) and sums up as follows : —

"But this does not entitle the High Court in second appeal to determine whether the evidence of the existence of the alleged usage is or is not credible, *though the High Court is competent to determine, whether the usage, proved by evidence to exist, does or does not possess the force of law.* The substance of the matter is that, while the question *whether a given state of facts established a binding custom or usage is a question of law*, the question whether such a state of facts has been proved by the evidence is a question of fact."

In this conflict of authorities, in view of the facts that *Vishnu* v. *Krishnan*(2) was decided by a Full Bench of this Court consisting of four very learned Judges (TURNER, C.J., INNES, J., KINDERSLEY, J., and MUTTUSWAMI AYYAR, J.) and was followed in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(1), and having in view the fact that this question of mirasi rights is reaching its final stage, I think that not only the mere questions of law, namely, whether the High Court in second appeal can go into the credibility of the evidence, whether it can consider the weight to be given to the evidence which is believed by the lower Appellate Court and whether the evidence taken as a whole is legally sufficient to establish the custom and the legality and binding force as law of the custom, etc.), but even the decision of the whole matter might be left to a larger Bench.

The Appellate Side Rules of the High Court, page 3, rule 2, says: "The following matters shall ordinarily be heard and decided by two Judges," and then among the matters are mentioned "appeals from the decree of a Civil Court" which, I take it, includes a second appeal. So, a second appeal is treated as one of the 'matters' to be heard by a Bench of two Judges. Then it says :

"Provided both Judges agree that the determination involves a question of law, they may order that the *matter*, or the question of law, be referred to a Full Bench."

(1) (1906) I.L.R., 29 Mad., 24. (2) (1884) I.L.R., 7 Mad., 8 (F.B.).

I think that this empowers us to refer not only a question of law but the whole 'matter' of the Second Appeal to a Full Bench. If a question of law alone is referred, then Rule 3 (page 4) would apply and the 'matter' (or the case) would ultimately come back to us.

I have thus dealt with the contentions (*a*) and (*b*) of Mr. Govindaraghava Ayyar. As regards contention (*c*) about the learned District Judge's alleged mistake in his statement that Exhibit G is not signed by any one, Mr. Govindaraghava Ayyar has not printed the whole of Exhibit G and I think it is better to leave it to the Full Bench to decide whether they would allow him to have it printed in order to prove his contention.

As regards the last contention (*d*), I think there is much force in his argument that the District Judge ought not to have rejected the evidence afforded by Exhibit C series on the ground that such evidence is valueless unless it was shown to specifically relate to lands granted by Government. I am also inclined to hold that the Government's non-recognition in the settlement register of the mirasidar's right to collect *swatantrams* from such lands cannot be said to detract in any appreciable manner from the weight of the other evidence relating to the mirasidar's right by custom to collect such dues having regard to the history of the mirasi tenure rights and to the fact that the Government has been trying to gradually restrict such rights. I might also state that as at present advised (assuming that this Court is entitled to weigh the evidence) I should be inclined to hold that the learned District Judge has not given sufficient weight to Exhibits E, H, K, B and the old legal records Exhibits L and LI. (I would accept the rate of *thunduvaram* found by the District Judge if the plaintiff is held entitled to collect *thunduvaram*.) I am inclined further to doubt very much the soundness of the view of the District Judge that even as regards the plaint lands, fields Nos. 5, 6, 20, 22, 24, 46, 48 and 129 which are specially mentioned in the Settlement Register itself as liable to pay *swatantram* fee to the mirasidar, the custom set up should be held to be not proved because the custom is not (in the learned Judge's view) proved as regards the other lands also and because there has been an interruption

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for several years. However, as I said, I would, having regard to the difficulty and importance of all the questions involved, refer the whole matter to a Full Bench.

PHILLIPS, J.—This suit was remanded for a finding on several issues the most important of which is issue No. 2 'whether the plaintiff is entitled to the dues claimed even apart from the agreement.' The dues claimed consist of what is called *thunduvaram*, and the plaintiff alleges that, as mirasidar, he is, according to custom, entitled to levy those dues from the defendant. The District Judge has tried the issue and has found that no custom has been proved to exist under which the plaintiff is entitled to make this claim. This finding is a finding on custom and it is now sought to impeach it upon the evidence.

No doubt, a question of the existence of a custom is a question of mixed law and fact, and under section 100 of the Code of Civil Procedure a second appeal may lie to the High Court on the ground that the decision is contrary to law or to some usage having the force of law. The question of custom has been repeatedly considered and it has been held that the question of the mere existence of a custom is a question of fact—vide *Hureehur Mookerjee* v. *Judoonath Ghose*(1) and *Syud Ali* v. *Gopal Doss*(2)—and this has also been the view of the Judicial Committee in *Muhammad Kamil* v. *Imtiaz Fatima*(3) and in *Anant Singh* v. *Durga Singh*(4). In *Ramratan Sukal* v. *Nandu*(5) it was held by the Judicial Committee that

"no Court of Second Appeal can entertain an appeal upon any question as to the soundness of findings of fact by the Court of First Appeal, and if there is evidence to be considered, the decision of the Court, however unsatisfactory it might be, if examined, must stand final."

In *Ramgopal* v. *Shamskhaton*(6) this principle was approved, although it was held that in that particular case, which related to a custom, the facts found need not be questioned, but the soundness of the conclusions from them was in question and that was a matter of law. In *Mohesh Chunder Dhal* v. *Satrughan*

(1) (1868) 10 W.R., 153.
(2) (1870) 13 W.R., 420.
(3) (1892) I.L.R., 31 All., 557 (P.C.).
(4) (1910) I.L.R., 32 All., 363.
(5) (1892) I.L.R., 19 Calc., 249.
(6) (1893) I.L.R., 20 Calc., 93 (P.C.).

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Dhal(1) it was held that the question of the existence of a custom of lineal primogeniture as the rule of succession was a question of fact. In *Kunhambi* v. *Kalanthar*(2) it was held by this Court that

"whether an alleged custom can be enforced at all or whether it is uncertain, irregular or unreasonable and as such ought not to be recognized is a question of law, but the question whether the custom exists and if it exists, it applies to a particular person or set of persons is a question of fact;"

and this seems to me to correctly describe the principle laid down by the Judicial Committee in the above cases. In the present case, the question that has to be decided is whether the plaintiff is entitled to collect *thunduvaram* from the defendant, the right claimed being based upon an alleged custom. The existence of this custom in certain places has been held to be true and the right has been held to rest in certain mirasidars as such. The Full Bench decision in *Seshachala Chetty* v. *Chinnasami*(3) has recognized this customary right of levying *thunduvaram*, but the Court was of opinion that its existence in any particular case was a matter of proof. When, therefore, it is not a question as to whether a certain set of circumstances forms a custom having the force of law, but where the question is whether a custom which has already been recognized by Courts as having the force of law exists in a particular locality or between particular parties, it seems to be a question of fact, and if the matter were *res integra* I should feel inclined to hold that the present finding of the District Judge, to which exception has been taken, is a finding of fact with which this Court cannot interfere in Second Appeal. In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(4), however, it was held that when the finding was as to an alleged local custom, the finding could be examined in second appeal and a conclusion arrived at. The decision was based upon the decisions in *Hanumantamma* v. *Rami Reddi*(5), *Vishnu* v. *Krishnan*(6) and *Mirabivi* v. *Vellayanna*(7), in all of which cases a question of custom has been considered by this Court in Second

(1) (1902) I.L.R., 29 Calc., 343.
(2) (1914) 27 M.L.J., 156.
(3) (1917) I.L.R., 40 Mad., 416.
(4) (1906) I.L.R., 29 Mad., 24.
(5) (1882) I.L.R., 4 Mad., 272.
(6) (1884) I.L.R., 7 Mad., 3.
(7) (1885) I.L.R., 8 Mad., 464.

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Appeal, but in which the contention had not been put forward that such a question could not be raised in Second Appeal. In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(1), this Court went, as it seems to me, considerably further than the dictum laid down by the Privy Council in *Ramgopal* v. *Shamskhaton*(2), which was that the facts found need not be questioned but the question of the soundness of the conclusion arrived at was a matter of law, for it held that where the existence or non-existence of a usage having the force of law was in question

"it is the duty of this Court . . . to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it."

If this be accepted as correct law, a Court in Second Appeal would be bound to examine the whole evidence relating to an alleged custom and to see what weight is to be attached to each particular portion of it, and decide whether the evidence was reliable and witnesses worthy of credit. This appears to be somewhat inconsistent with the usual understanding that in a finding of fact upon the evidence, the lower Appellate Court's decision is final; and in *Kilas* v. *Padmakisor*(3), *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(1) has been expressly dissented from. In a recent case in *Pankajammal* v. *The Secretary of State for India*(4) another bench of this Court remarked that the contention put forward that, in all cases where evidence as to custom had been let in, the Court was bound to weigh such evidence and decide upon the materials was not supported by authority but apparently the decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(1) was overlooked. The learned Judges proceeded to say that the question whether, on the facts as found, the Courts below were justified in saying that the custom had not been proved was a point on which the High Court was entitled to draw its own inference, and that is in accordance with the abovementioned dictum of the Privy Council in *Ramgopal* v. *Shamskhaton*(2). In *Palaniappa*

(1) (1906) I.L.R., 29 Mad., 24.
(2) (1893) I.L.R., 20 Calc., 93 (P.C.).
(3) (1917) 25 C.L.J., 613.
(4) (1917) I.L.R., 40 Mad., 1108.

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Chetty v. *Sreemath Devasikamony Pandara Sannadhi*(1), the Judicial Committee also remarked that

"questions of the existence of an ancient custom are generally questions of mixed law and fact, the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact."

If we apply this principle to the present case it would appear that the finding that the custom of levying *thunduvaram* does not exist as between plaintiff and defendant is a finding of fact. In view, however, of the decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(2) I agree that it is advisable that the question should be submitted to a Full Bench, and, as my learned brother wishes to refer, not an abstract question, but the whole of this case, I concur.

On this REFERENCE—

L. A. Govindaraghava Ayyar (with *D. V. Nilameghachariyar*) for the appellant.—It is competent to the High Court in a second appeal to decide on the evidence whether a certain usage or custom alleged to govern the parties to the suit has been proved or not. Section 100, Civil Procedure Code, puts such usage or custom on the same footing as a question of law: compare section 110, Civil Procedure Code, last paragraph. Reliance was placed on *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(2), *Vishnu* v. *Krishnan*(3), *Mirabivi* v. *Vellayanna*(4), *Hanumantamma* v. *Rami Reddi*(5), *Vayidinada* v. *Appu*(6), *Bai Shirinbai* v. *Kharshedji*(7), *Desai Ranchhoddas* v. *Rawal Nathubhai*(8), *Hureehur Mookerjee* v. *Judoonath Ghose*(9), *Wuzeerooddeen* v. *Sheobund Lall*(10) and *Syud Ali* v. *Gopal Doss*(11). Reference was made to *Ramgopal* v. *Shamskhaton*(12) and sections 4 and 11 of Rent Recovery Act. He referred to and distinguished *Kunhambi* v. *Kalanthar*(13), *Mohesh Chunder Dhal* v. *Satrughan*

(1) (1917) I.L.R., 40 Mad., 709 (P.C.).
(2) (1906) I.L.R., 29 Mad., 24.
(3) (1884) I.L.R., 7 Mad., 3. (F.B.)
(4) (1885) I.L.R., 8 Mad., 464.
(5) (1882) I.L.R., 4 Mad., 272.
(6) (1886) I.L.R., 9 Mad., 44 (F.B.).
(7) (1898) I.L.R., 22 Bom., 430.
(8) (1897) I.L.R., 21 Bom., 110.
(9) (1868) 10 W.R., 153.
(10) (1869) 11 W.R., 285.
(11) (1870) 13 W.R., 420.
(12) (1893) I.L.R., 20 Calc., 93 at p. 99 (P.C.).
(13) (1914) 27 M.L.J., 156.

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Dhal(1), *Muhammad Kamil* v. *Imtiaz Fatima*(2), *Anant Singh* v. *Durga Singh*(3), *Pankajammal* v. *The Secretary of State for India*(4) and *Muhammad Meeran Bibi* v. *Sheik Muhammad Rowther*(5). Desuetude or discontinuance of a usage or its non-exercise does not put an end to it: *Scales* v. *Key*(6) and Halsbury's Laws of England, volume 10, pages 235 and 272. Then evidence to show admission and recognition of liability to pay *thunduvaram* was referred to. Evidence to show that the custom was not discontinued was then referred to. The recent decision of the Full Bench in *Seshachala Chetty* v. *Chinnasami*(7) has recognized this as a well-known incident of the mirasi tenure.

T. R. Ramachandra Ayyar for respondent.—Existence of a usage having the force of law, is a question of fact. He submitted that *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(8), was wrong. In *Hanumantamma* v. *Rami Reddi*(9) *Vishnu* v. *Krishnan*(10) and *Mirabivi* v. *Vellayana*(11) this point was not considered. He relied on *Kailas* v. *Padmakisor*(12), *Subraya Poi* v. *Appu Bhandary*(13), *Muhammad Meeran Bivi* v. *Sheik Muhammad Rowther*(5), *Kumhambi* v. *Kalanthar*(14) and *Palaniappa Chetty* v. *Sreenath Devasikamony Pandara Sannadhi*(15). Then he dealt with facts to show non-existence of the custom, for which he referred *inter alia* to *Sakkaji Rau* v. *Latchmana Gaundan*(16) and *Chinnan* v. *Kondam Naidu*(17).

WALLIS, C.J. The Court delivered the following OPINIONS:—

WALLIS, C.J.—As regards the question of law referred to us I am of opinion that the decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(8) must be overruled. In the cases to which SIR CHARLES TURNER was a party the Court no doubt examined the evidence in detail to see if it was sufficient to support the custom, but in no case did they interfere with the

(1) (1902) I.L.R., 29 Calc., 343. (2) (1909) I.L.R., 31 All., 557 (P.C.).
(3) (1910) I.L.R., 32 All., 363 at p. 372.
(4) (1917) I.L.R., 40 Mad., 1108. (5) (1917) M.W.N., 98.
(6) (1840) 11 Ad. & E., 819; s.c., 113 E.R., 625.
(7) (1917) I.L.R., 40 Mad., 410 (F.B.).
(8) (1906) I.L.R., 29 Mad., 24. (9) (1882) I.L.R., 4 Mad., 272
(10) (1884) I.L.R., 7 Mad., 3 (F.B.). (11) (1885) I.L.R., 8 Mad., 464
(12) (1917) 25 C.L.J., 613. (13) Second Appeal No. 773 of 1881.
(14) (1914) 27 M.L.J., 156. (15) (1917) I.L.R., 40 Mad., 709 (P.C.).
(16) (1880) I.L.R., 2 Mad., 149 (F.B.). (17) (1914) 26 M.L.J., 169 at p. 180.

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findings except in *Mirabivi* v. *Vellayanna*(1) and there after referring to the findings they observed that the question before them was 'whether there is evidence on which such custom could reasonably have been found to exist.' They came to the conclusion that the evidence was not reasonably sufficient to support the custom. No question of the limits of the Court's right of interference in Second Appeal was raised or decided in these cases. As regards *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(2), I am unable with great respect to agree with the observations of SUBRAHMANYA AYYAR, J., as to the effect of the words 'usage having the force of law' in that section. This section has a long history going back to the days of Sudder Court. Act XVI of 1853 gave a special appeal to the Sudder Courts from any decision passed on a regular appeal in any of the Subordinate Civil Courts

> "first on the ground that the decision hath failed to determine all material points in difference in the cause, or hath determined the same or any of them contrary to law or usage having the force of law."

Under that section, as under this, where one of the "material points" in the case was the existence of a custom, that, as the Privy Council has recently laid down, is a mixed question of fact and law; and the Sudder Court was only entitled to interfere if the Subordinate Court had determined the point 'contrary to law or usage having the force of law,' and not, also, as in ordinary appeals, on the ground that the Subordinate Court had determined the point contrary to the weight of the evidence. The words 'usage having the force of law' in the section appear to me to be little more than words of amplification, and in any view not to give the Court any larger powers of interference with findings as to custom in so far as they are findings of fact than with any other findings of fact. This section was reproduced in the successive Codes of Civil Procedure with alterations that in no way affect its scope so far as the present question is concerned. The more recent decisions of AYLING and SESHAGIRI AYYAR, JJ. in *Pankajammal* v. *The Secretary of State for India*(3), and of MOOKERJEE and BEACHCROFT, JJ., in *Kailas* v.

(1) (1885) I.L.R., 8 Mad., 464. (2) (1906) I.L R., 29 Mad., 24.
(3) (1917) I.L.R., 40 Mad., 1108.

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Padmakisor(1), where all the cases are exhaustively reviewed, take the same view.

Even so, I am of opinion that the finding of the District Judge that the custom is inapplicable to this estate cannot be accepted. He does not find that there has been in law a discontinuance of the custom, but uses the fact that *swatantrams* are not proved to have been paid for a long time as evidence against the existence of the liability. He gives no effect to the record in the Settlement Register of 1878 that the lands in B schedule were liable to pay *swatantrams*. This is a strong instance of the assertion of the right on the estate and entitled to great weight, while on the other hand the refusal of the Settlement Officers to register the *swatantram* as payable in support of the lands in A schedule is not conclusive as they had no authority to determine the question. As regards Exhibits E, H, K, the District Judge finds that they indicate a right to *thunduvaram* even in suit lands against which no *swatantram* is entered in the register, but observes that they relate only to a small extent of land. Lastly we come to the documents Exhibit B in which the defendant agrees to pay *swatantrams* and Exhibit D series to the same effect which were taken from the other tenants. These are strong admissions against interest, and the District Judge was not justified in dismissing them as of no importance because they are recent. The liability to pay *swatantrams* is a well known incident of mirasi tenure in Chingleput; but, as it is not universally applicable, it has been held by the Full Bench in *Sakkaji Rao* v. *Latchmana Gaundan*(2) that it is for the mirasidar to show that he is entitled to it "by the custom of the estate or the neighbourhood." The above findings of fact by the District Judge are, in my opinion, sufficient to raise a presumption in the plaintiff's favour which is not rebutted by any other findings, and I would reverse the decrees and decree the suit with costs throughout.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I confess that I have felt great hesitation in arriving at a conclusion on the question whether in second appeal, the High Court has got a right to itself examine the evidence with reference to which the finding of the District

(1) (1917) 25 C.L.J., 613. (2) (1878) I.L.R., 2 Mad., 149 (F.B.).

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Judge on the issue of custom was given. On the one side, there are the decisions of this Court in *Hanumantamma* v. *Rami Reddi*(1), *Vishnu* v. *Krishna*(2), and *Mirabivi* v. *Vellayanna*(3) where several learned Judges of this Court (including Sir CHARLES TURNER, C.J., and MUTHUSWAMI AYYAR, J.) have assumed as indisputable that this Court has got such a right. I agree with Sir S. SUBRAHMANYA AYYAR (*Officiating Chief Justice*) in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(4) that

"it is impossible to believe that the learned Judges who decided" those cases "overlooked so obvious an objection."

In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(4), Sir S. SUBRAHMANYA AYYAR (Officiating Chief Justice) and BODDAM, J., directly decided that whatever may be the English law, where a question of 'usage having the force of law,' is concerned, the High Court in second appeal ought to have and has the power to consider even the oral evidence as regards facts, incidents and instances on which the parties relied in the lower Courts to prove or to disprove the alleged usage. The tendency of recent decisions in this Court has been to follow the Calcutta decisions. In *Kailas* v. *Padmakisor*(5) that very learned Judge, Sir ASHUTOSH MUKERJEE who was one of the Bench which decided the case, very exhaustively deals with the question and I shall extract from that judgment the material conclusions arrived at therein:—

(1) "The question of the existence of an alleged custom is a question of fact."

(2) The finding of the lower Appellate Court "is liable to attack on the ground that irrelevant evidence has been received" or "that relevant evidence has been excluded."

(3) "also on the ground that there is no evidence of the alleged custom" or "that the finding is based on *legally insufficient evidence*" or "that the facts found do not constitute evidence of the alleged custom."

(4) also, "on the ground that legal principles or tests have been erroneously applied or that the Court has not correctly appreciated the essential attributes of a custom," or "has overlooked the distinction between a custom and a usage."

(1) (1882) I.L.R., 4 Mad., 272. (2) (1884) I.L.R., 7 Mad., 3 (F.B.).
(3) (1885) I.L.R., 8 Mad., 464. (4) (1906) I.L.R., 29 Mad., 24.
(5) (1917) 25 C.L.J., 613.

(5) " consequently, the question whether the *facts found prove* the existence of the essential attributes of a custom is a question of law which may be discussed in second appeal."

I am naturally very loth to differ from the opinion of Sir S. SUBRAHMANYA AYYAR, J., especially as he gives very cogent reasons for his conclusion in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(1), but I think that there are certain *dicta* of their Lordships of the Privy Council which are more binding upon me. In *Ramgopal* v. *Shamskhaton*(2), their Lordships quote their own decision in *Ramratan Sukal* v. *Nandu*(3) and lay down as regards the construction of sections 584 and 585 of old Civil Procedure Code (re-enacted practically in the same terms in the new Code) that

" it has now been conclusively settled that the third Court cannot entertain an appeal upon any question as to the soundness of *findings of fact* by the second Court; and if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final."

Now, the findings as to *instances* of usage, as to the genuineness of documents put forward as regards usage and the credibility of witnesses are clearly *findings of fact*. But as pointed out by their Lordships of the Privy Council themselves in *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*(4), the Judge's findings as to 'what were the things *actually done* in alleged pursuance of custom' may be findings of fact, but whether the facts so found satisfy the requirement of the law is a question of law. The decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(1) is not expressly referred to in *Pankajammal* v. *The Secretary of State for India*(5). Mr. T. R. Ramachandra Ayyar who appeared in the latter case assures us that *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(1) was in the minds of the learned Judges who decided the latter case and that it was quoted to them. Of course, I accept his statement. The position laid down in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(1), namely, that the evidence can be gone into

(1) (1906) I.L.R., 29 Mad., 24. (2) (1893) I.L.R., 20 Calc., 93.
(3) (1892) I.L.R., 19 Calc., 249.
(4) (1917) I.L.R., 40 Mad., 709 at p. 721 (P.C.).
(5) (1917) I.L.R., 40 Mad., 1108.

in detail in the High Court in second appeal is characterised in the judgment in *Pankajammal* v. *The Secretary of State for India*(1), as an 'extreme contention.' The learned Judges proceed to say that

" the value to be attached to the evidence let in, its reliability and in a measure, its relevancy are all matters for the Court below."

They again indicate their inclination to the view that the usage having the force of law mentioned in section 100 (*a*) of the Civil Procedure Code should be confined to the usages referred to by PETHERAM, C.J., in *Nivath Singh* v. *Bikki Singh*(2). While the reliability of evidence let in is for the lower Appellate Court, I think (with the greatest respect) that the value to be attached to the evidence (provided it is not mere 'opinion' evidence) supposing it is accepted as true and the relevancy of evidence are questions to be considered by the High Court also. If notwithstanding uncontradicted instances ranging over a long period and recognised judicially in several cases, the lower Appellate Court finds against the existence of a proper custom on the ground that in its opinion the instances are insufficient in number, the High Court is clearly entitled to hold that on the facts found by the lower Appellate Court, the custom is legally established. As regards the observations of PETHERAM, C.J., in *Nivath Singh* v. *Bikki Singh*(2) they have been expressly overruled by their Lordships of the Privy Council in *Ramgopal* v. *Shamskhaton*(3). However, as I said already, I feel (though after some hesitation) that I should follow the principles laid down in *Kailas* v. *Padmakisor*(4) in preference to the conclusions in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(5) as the former decision seems to be more in consonance with the *dicta* of the Privy Council in *Ramgopal* v. *Shamskhaton*(3) and in *Muhammad Kamil* v. *Imtiaz Fatima*(6) and in *Anant Singh* v. *Durga Singh*(7).

In the present case, accepting the facts as found, I agree with my Lord that they do satisfy the requirements of the law as to the existence and validity of the custom. I am inclined also

(1) (1917) I.L.R., 40 Mad., 1108. (2) (1885) I.L.R., 7 All., 649.
(3) (1893) I.L.R., 20 Calc., 93 at p. 90. (P.C.).
(4) (1917) 25 C.L.J., 613. (5) (1906) I.L.R., 29 Mad., 24.
(6) (1909) I.L.R., 31 All., 557. (7) (1910) I.L.R., 32 All., 363.

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to hold that we are entitled, under section 103 of the Civil Procedure Code to go into the genuineness of the documents in Exhibit C series (except C-1), the District Judge, in my opinion, having not given a finding about the genuineness of the documents (except C-1) and I would find that they are genuine. They strongly corroborate the other evidence as to custom.

Further, the document Exhibit B executed by the defendant is a clear admission of the existence of the custom in 1905 and of the defendants' liability to pay *thunduvaram* according to that custom. Their Lordships of the Privy Council in *Chundra Kunwar* v. *Chaudhri Narpat Singh*(1), quoting from English cases state :

"What a party himself admits to be true may be reasonably presumed to be so". "The express admissions of a party to the suit are evidence, and strong evidence against him."

No explanation was given by the defendant from the box as to his admission in Exhibit B and

"unless and until he explains such admission the fact admitted *must be taken to be established*"—(page 195).

The lower Courts merely argue in a circle when they find that Exhibit B has no consideration because the liability by custom to pay *thunduwaram* is not established. Further the lower Courts have ignored the consideration that as regards the right to *thunduvaram*, the mirasidar has a far less heavy burden to discharge than when he lays claim to nattam poramboke lands, etc. [See judgments in the Full Bench case in *Seshachala Chetty* v. *Chinnasami*(2).]

I therefore agree in reversing the lower Court's decrees and allowing the appeal as proposed by my Lord.

KUMARASWAMI SASTRIYAR, J. — KUMARASWAMI SASTRIYAR, J.—I agree with the conclusions arrived at by my learned brother SADASIVA AYYAR, J., and have nothing useful to add.

N.R.

(1) (1907) I.L.R., 29 All., 184 at pp. 194 and 195 (P.C.).
(2) (1917) I.L.R., 40 Mad., 410 at pp. 473, 487 and 522.

PRIVY COUNCIL.*

GANAPATHY MUDALIAR (PLAINTIFF),

v.

KRISHNAMACHARIAR AND OTHERS (DEFENDANTS).

1917, November 12 and 13, and December, 14.

[On appeal from the High Court of Judicature at Madras.]

Mortgage—Suit for sale of mortgaged property—Decree not in accordance with section 88, Transfer of Property Act (IV of 1882)—Sale in execution of decree—Confirmation of sale—Purchase by mortgagee at auction sale with leave of the Court—Right of redemption by mortgagor—Suit to redeem against auction-purchaser—Parties—Civil Procedure Code (Act XIV of 1882), sec. 244—Question in execution of decree.

In a suit to enforce a mortgage and for sale of the mortgaged property the decree made was not in accordance with the provisions of section 88 of the Transfer of Property Act (IV of 1882), no day being fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due. In execution of the decree the mortgaged property was attached, sold and purchased, with the leave of the Court by the mortgagee-decree-holder, and the sale was duly confirmed in a suit by the mortgagor for redemption of the mortgage, which was one of ancestral property made by the plaintiff's father before the birth of his sons,

Held, that, whether or not the decree was in accordance with the provisions of the Act, the property, and all the right, title and interest of the defendant were in fact sold in execution of the decree of a Court which had jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed from ; and that consequently the mortgagor had no right of redemption.

Held further, that the question now raised could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court executing the decree, and that the suit was therefore barred by section 244 of the Code of Civil Procedure (Act XIV of 1882).

Prosunno Kumar Sanyal v. *Kali Das Sanyal* (1892) I.L.R., 19 Calc., 683 ; s.c., L.R., 19 I.A., 166, followed.

APPEAL No. 155 of 1915 from a judgment and decree (17th February 1914) of the High Court at Madras, which affirmed a judgment and decree (9th February 1910) of the District Judge of North Arcot.

One Kumarasami Mudaliar, a Hindu governed by the Mitakshara law, executed three mortgages of ancestral property,

* *Present* :—Lord BUCKMASTER, Sir JOHN EDGE, Sir WALTER PHILLIMORE, *Bart.* and Sir LAWRENCE JENKINS.

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on 12th December 1876 in favour of one Varadappa; on 7th January 1879 in favour of one Vijayaraghava Chariar, the father of the first respondent Krishnama Chariar; and on 10th May 1881, in favour of one Narasingha. Subsequently to the mortgage of 1881, two sons were born to the mortgagor, namely, Ganapathy Mudaliar, the appellant, in September 1881, and Ramasami (since deceased) in May 1882. On 20th January 1886 Narasingha, the third mortgagee, assigned his mortgage to Vijayaraghava, and on 19th March 1886 Vijayaraghava filed a suit on that mortgage in the District Court of North Arcot against the mortgagor and his two minor sons, describing the latter as "infants maintained by their father." No mention was made of the first and second mortgages in the plaint, and the first mortgagee was not made a party to the suit. It was alleged in the plaint that most of the properties were the self-acquired properties of the mortgagor.

The mortgagor did not contest the suit himself, but at the hearing he appeared and denied that he was the guardian of his sons. The Court however decided that he was the guardian, and on 15th April 1886 the District Judge made a decree against all three defendants for the amount of the mortgage debt, with interest at 6 per cent and costs "to be recovered from the mortgagor personally, and by sale of the mortgaged property." No time was fixed for payment of the amount decreed, and no further order was made as directed by the Transfer of Property Act, sections 88 and 89, but on 16th August 1886, Vijayaraghava applied for execution of the decree by attachment and sale of the mortgaged properties, and with his application filed a schedule of the properties to be sold in which he for the first time mentioned the fact that there were two other mortgages on the properties, and asked that the sale should be subject to the claims under those mortgages.

On 28th September 1886, one Govindaraju, an uncle of the two minors, applied in the suit to be appointed their guardian, and that the decree might be set aside as against them on the ground that their father was not, and had not consented to be, their guardian *ad litem*. On the hearing of this application on 10th November 1886 the District Judge held that the appointment of the father as guardian was illegal, and appointed Govindaraju to be guardian in his place, set aside the decree as

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against the minors, and ordered Govindaraju to file a written statement on their behalf on the 15th November 1886. Govindaraju never filed any written statement, nor did he appear, and the Judge then made an ex parte decree against all three defendants in the same terms as before, except that the two sons were described as 'minors by their maternal uncle and guardian Govindaraju.'

No execution was ever taken out under that decree, but on 24th January 1887 a proclamation of sale of the mortgaged properties was issued under the execution of August 1886 already taken, the minors being described as 'under the protection of their father,' and this proclamation was duly published and returned to the Court.

On 15th September 1887 a sale warrant was issued by the District Court in pursuance of the proclamation and the properties were subsequently sold in execution and were purchased by the decree-holder with leave of the Court.

The mortgagor died in May 1894; the appellant, on 10th June 1904, obtained a release from his brother of the latter's rights in the equity of redemption; and in September 1904 the younger brother died.

On 16th November 1907 the appellant brought the present suit to redeem the mortgages in suit.

The District Judge held that the plaintiff had been properly represented in the suit to enforce the mortgages, and was bound by the decree and the execution proceedings, and that the suit was barred by section 244 of the Civil Procedure Code, 1882.

On appeal the High Court (MILLER and TYABJI, JJ.), affirmed, that decision, and dismissed the suit.

On this appeal—

Sir W. Garth for the appellant contended that the sale took place in execution of the decree of 15th April 1886 which had been set aside as regards the appellant and his brother, to which decree therefore they were not parties, and consequently their interests in the mortgaged properties and in the equity of redemption could not and did not pass on the sale under the decree. The attachment was made under the application of 16th August 1886, and in the proceedings which led up to the sale the minors were described as being 'under the protection

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of their father.' They were not properly represented in those proceedings, and the sale was therefore not binding on the plaintiff. *Khiarajmal* v. *Daim*(1) and *Rashidunnissa* v. *Muhammad Ismail Khan*(2) were relied upon. The right to redeem, it was submitted, was not extinguished by the sale, for the necessary decree for the sale, and an order absolute for sale were *not* made by the Court as required by the provisions of sections 58, 60, 85, 86, 88 and 89 of the Transfer of Property Act (IV of 1882). The legislature having provided that certain steps must be taken in order to make a valid sale, a sale made without such requirements would be invalid, and ineffective to extinguish the plaintiff's right of redemption.

Reference was made to *Mallikarjunadu* v. *Lingamurti*(3).

Sir *H. Erle Richards, K.C.*, and *Kenworthy Brown* for the respondent contended that the sale of 1887 and the purchase thereat by Vijayaraghava, the father of the first respondent and assignee of the mortgage who had previously obtained leave to bid at the sale, was valid and effectual for all purposes, and the appellant had no right of redemption. The sale bound the sons having regard to what had taken place in the suit. There were not really two separate decrees; the second decree was really substituted for the first. The proceedings show that the guardian had knowledge of the proposed sale. In any case the sale being of ancestral property binds the sons in the absence of immorality or fraud: *Sripat Singh Dugar* v. *Prodyot Kumar Tagore*(4). The minors, it was submitted, were properly represented in the suit and the execution proceedings. The effect of the substitution of the decree of 15th November 1886 for the decree of 15th April 1886 was that the attachment and sale took place under the second decree. The plaintiff, moreover, was a party to the retrial of the suit, and was bound by the proceedings therein. The present suit was barred by section 244 of the Civil Procedure Code (Act XIV of 1882); *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(5). The questions now raised might have been raised before the sale was confirmed.

(1) (1904) I.L.R., 32 Calc., 296 at 332; s.c., L.R., 32 I.A., 23 (35).
(2) (1909) I.L.R., 31 All., 572; s.c., L.R., 36 I.A., 168.
(3) (1902) I.L.R., 25 Mad., 244.
(4) (1916) I.L.R., 44 Calc., 524; s.c., L.R., 44 I.A., 1.
(5) (1892) I.L.R., 19 Calc., 683 at p. 689; s.c., L.R., 19 I.A., 166 at p. 169.

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Sir *W. Garth* in reply:—In order to see what was sold in execution of a decree, the proceedings which led up to the sale must be looked at: *Thakur Bashma* v. *Jiban Ram Marwari*(1). Section 244 of the Civil Procedure Code, 1882, was not applicable to the present suit so far as the minors were concerned, as they were not parties to the execution proceedings not having been properly represented therein.

SIR JOHN EDGE.

The JUDGMENT of their Lordships was delivered by

Sir JOHN EDGE.—This is an appeal from a decree of the High Court at Madras, dated the 17th February 1914, which affirmed a decree, dated the 9th February 1910, of the District Judge of North Arcot, by which the suit was dismissed. The plaintiff is the appellant.

The suit was brought in the Court of the District Judge of North Arcot on the 16th November 1907 to redeem three mortgages, dated respectively the 12th December 1876, the 7th January 1879 and the 10th May 1881. The mortgages were of ancestral property, and were made by the father of the plaintiff before the plaintiff or his brother, since deceased, were born. The mortgage of the 7th January 1879 was in favour of N. Vijayaragavachariar, a vakil, to whom their Lordships will refer as the vakil. The mortgages of the 12th December 1876 and the 10th May 1881 vested by assignment in the vakil. The plaintiff in this suit was born in September 1881; his brother was born in May 1882.

On the 19th March 1886, the vakil brought in the District Court of North Arcot a suit for sale on the mortgage of the 10th May 1881, against the plaintiff's father, the plaintiff, aged 4 years, and his brother, aged 3 years, the brothers being described as 'maintained by the first defendant,' who was their father. The suit was entered on the files of the Court as Original Suit No. 5 of 1886. Their father, who had not been appointed as their guardian for the suit, objected that he was not their guardian, but the District Judge overruled the objection, and, on the 15th April 1886, made a decree in the following terms:—

"It is ordered that plaintiff do recover Rs. 10,891 together with further interest at 6 per cent per annum from date of plaint to

(1) (1913) I.L.R., 41 Calc., 590 at p. 599; s.c., L.R., 41 I.A., 38 at p. 43.

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date of payment and costs, to be recovered from the first defendant personally, and by sale of the mortgaged property."

That decree was doubtless intended to be in compliance with the provisions of 'The Transfer of Property Act, 1882,' but it did not comply with those provisions.

On the 16th August 1886, the vakil presented to the District Court his petition, under section 230 of the Code of Civil Procedure, 1882, for execution of the decree of the 15th April 1886. The petition was entered on the files of the Court as 'Execution Petition No. 57 of 1886 in O.S. (Original Suit) No. 5 of 1886,' and by it the petitioner prayed 'that the amount may be recovered with further costs, together with further interest, by the attachment and sale of immovable property set out in the schedule herewith filed.' In that petition the present plaintiff and his brother were described as minors, defendants 'by their guardian, the first defendant.' In the schedule the vakil disclosed the fact that there existed the mortgages of the 12th December 1876 and the 7th January 1879. On the 18th August 1886, the warrant of attachment was issued, and on the 13th September 1886 a notice of sale was issued.

On the 28th September 1886, one Govindaraju Mudali, who was a maternal uncle of the present plaintiff, and his brother, applied to the District Court to be appointed their guardian and to have the decree of the 15th April 1886 set aside, on the ground that their father was not their proper guardian. Govindaraju Mudali apparently contended in support of his application that the debt, in respect of which the mortgage of the 10th May 1881 had been given, was not one which the minors or the properties were liable to discharge. On the 10th November 1886, the District Judge held that the appointment of the father as guardian had been illegal, and in his place appointed Govindaraju Mudali as guardian of the minors, and set aside the decree of the 15th April 1886 as against them. Govindaraju was ordered to put in a written statement on the 15th November 1886 on behalf of the minors, but he failed to do so and did not appear. On the 15th November 1886, the District Judge made a decree that the plaintiff (the vakil) 'do recover Rs. 10,891 together with further interest at 6 per cent per annum from date of plaint to date of payment, and

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costs to be recovered from the first defendant personally and by sale of the mortgaged property.' That decree did not comply with the provisions of 'The Transfer of Property Act, 1882,' but it was not appealed and it became final. It was obviously intended to be in supersession of the decree of the 15th April 1886, and must be regarded as having superseded that decree.

On the 24th January, 1887, the Court of the District Judge caused a proclamation of the intended sale to be made under section 287 of the Code of Civil Procedure, 1882. The proclamation is described on the face of it as in Original Suit No. 5 of 1886, application No. 57 of 1886, and proclaimed that—

"Whereas the immovable property mentioned in the list attached hereto and belonging to the said defendants (the father and his two sons) has been attached upon a petition being presented for execution of the decree passed in the above suit. Take notice that if the amounts specified below be not paid into this Court, or if no other steps be taken to satisfy the decree, the said property shall be sold in public auction in this Court on the 19th September, 1887, and that in that sale the right, title and interest possessed by the above defendants alone in respect of that property shall be sold."

So far as appears from the documents in the record, the only attachment which had issued was that of the 18th August 1886.

It appears that Govindaraju Mudali, as the guardian of the minors, had appealed to the High Court at Madras from some order which the District Judge had made on the 20th December, 1886, in Original Suit No. 5 of 1886. What the order appealed from was does not appear, nor is there anything in the record which suggests what the nature of the order was. However, that appeal not having been disposed of, Govindaraju Mudali, at some time between the 24th January, 1887, and the 2nd March, 1887, applied to the High Court for an order to stay the sale of the property attached in execution of the decree of the District Court of North Arcot in Original Suit No. 5 of 1886. That application was dismissed by the High Court on the 1st August, 1887.

On the 28th February, 1887, the District Court made an order permitting the vakil to bid at the sale. On the 19th September, 1887, the immovable properties in question were sold,

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subject to incumbrances, by public auction, and the vakil became the purchaser.

The sale was confirmed by the District Judge on the 13th December, 1887, and he, on the 1st February, 1888, gave the sale certificate under his hand and the seal of the Court. The vakil died before this present suit; the first respondent is his son. The other respondents are purchasers from the vakil. The father of the present plaintiff died in May 1894. The plaintiff's brother died in September 1904. The present plaintiff, his brother and their father had constituted a Hindu joint family.

On behalf of the appellant here it was contended that the sale took place in execution of the decree of the 15th April, 1886, and not in execution of the decree of the 15th November, 1886, and that under such circumstances only the right, title and interest of the father were sold. That contention is based on the fact that the attachment of the 16th August, 1886, was made under the decree of the 15th April, 1886. The sale must have been under the decree of the 15th November, 1886. No one was or could have been misled as to the decree under which the sale was taking place. The proclamation of sale of the 24th January, 1887, was made subsequent to the decree for sale of the 15th November, 1886, and must have been made consequent on that decree, with the knowledge of all parties and without challenge, and that proclamation shows that what was to be sold by auction was the right, title and interest in the property of the defendants to the suit of the 19th March, 1886, and the certificate of sale shows that the right, title and interest in the property of the defendants to that suit were sold to the vakil. The present plaintiff and his brother were defendants to that suit, under the guardianship of Govindaraju Mudali, at the time when the decree of the 15th November, 1886, was made and at the time when the sale took place, and thence until the sale was confirmed and the certificate of sale was made.

It has also been contended on behalf of the appellant here that as the provisions of 'The Transfer of Property Act, 1882,' were not complied with in the suit for sale of the 19th March, 1886, and as no day was fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due, the defendants to the suit of the 19th March, 1886, were not debarred from a right to redeem. It

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appears to their Lordships that the answer to the contention is that whether or not the provisions of 'The Transfer of Property Act, 1882,' were complied with, the property and all right, title and interest of those defendants in it were in fact sold to the vakil in execution of a decree of a Court which had jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed.

By section 244 of the Code of Civil Procedure, 1882, it was enacted that:—

"244. The following questions shall be determined by order of the Court executing a decree and not by a separate suit (namely):—

"(*c*) Any other question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, or to the stay of execution thereof."

This Board decided in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(1), that section 244 had been rightly held in India to apply in a case in which the question raised concerned the auction purchaser at an auction sale as well as the parties to the suit. In this case the vakil was the auction purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court which was executing the decree of the 15th November, 1886.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed.

The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitors for first respondent: *Chapman, Walker and Shephard.*

J.V.W.

(1) (1892) I L.R., 19 Calc., 683; s.c., L.R., 19 I.A., 166.

PRIVY COUNCIL.*

1917, October, 16, 17 and 18 and November, 8.

KRISHNASAMI PANIKONDAR (DEFENDANT No. 1)

v.

RAMASAMI CHETTIAR (PLAINTIFF).

[On appeal from the High Court of Judicature at Madras.]

Limitation—Admission of appeal after period of limitation has expired without notice to respondent—Power of Court to grant reconsideration of order admitting it at instance of respondent—Practice of Courts in India—Suggestion by Privy Council that such practice should be altered by the Indian Courts with the view of securing final determination of any question of limitation at time of admission of appeal—Limitation Act (IX *of* 1908), *ss.* 4 *and* 5.

The admission of an appeal after the period of limitation has expired deprives the respondent of a valuable right by putting in peril the finality of the order in his favour. When an order admitting an appeal has been made in the absence of the respondent, and without notice to him, to preclude him from questioning its propriety would amount to a denial of justice. Such an order, so made, should therefore be treated as open to reconsideration at the instance of the respondent. This view is sanctioned by the practice of the Courts in India.

Held also that the Court was not exceeding its jurisdiction in permitting the question of limitation to be re-opened when the appeal came before it for hearing, and under the circumstances it had power to reconsider the sufficiency of the cause shown for the delay. That practice was not peculiar to Madras, but prevailed in other Courts in India.

Such a practice, however, was in their Lordships' opinion open to grave objection, and it was urgently expedient that in place of such a practice a procedure should be adopted by Courts in India which would secure, at the stage of the admission of an appeal, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal.

APPEAL No. 119 of 1915 from an order (4th November, 1908) of the High Court at Madras, which dismissed an appeal presented by the appellant against a decree (8th February, 1905) of the Subordinate Judge of Tanjore in Original Suit No. 52 of 1904.

The suit, which was brought to recover possession of a zamindari, was decided by the Subordinate Judge in favour of the plaintiff, the present respondent; and the first defendant, now the appellant, was desirous of appealing from that decree.

* *Present* :—Lord PARKER OF WADDINGTON, Lord WRENBURY, Sir JOHN EDGE, Mr. AMEER ALI and Sir LAWRENCE JENKINS.

His account of the matter was that his agent understood that the time for appealing had expired during the vacation of the Madras High Court, and that it was necessary therefore that the appeal should be presented on the day the High Court re-opened. The ninety days allowed by the Limitation Act, 1877, for such an appeal expired on 9th July 1905, but that being a Sunday, the appeal would have been in time if presented on 10th July, and it was arranged that the presentation of the appeal should be made on the 10th. The agent arrived at Madras on Sunday 9th and learnt that the office of the High Court had been open on Saturday 8th for the reception of appeals, and that his memorandum of appeal would be rejected unless an affidavit explaining the delay were presented with it. On hearing of this the present appellant came at once to Madras on the 11th July, and the memorandum of appeal was presented by his counsel on 12th together with affidavits of the appellant and his agent with an explanation of the delay. On 31st July the matter came, according to the rules of the High Court, for disposal by the Judge (SANKARAN NAIR, J.) sitting for that purpose. His order was, "Delay excused in the circumstances, and the appeal admitted." Thereupon the preparation of the appeal and the printing of the record were begun.

Counter-affidavits were lodged by the respondent on 22nd November 1905 which were to the effect that the appellant and his agent were both seen in Madras on 10th July, 1905 and that the affidavits of the appellant were consequently untrue.

In August 1908 when the appeal was ready for hearing the appellant received notice of an application to be made by the respondent for the dismissal of the appeal as having been presented too late. That application was made on 7th October, 1908, before a Division Bench of the High Court (MUNRO and ABDUR RAHIM, JJ.). It was supported by various affidavits, and the Court was asked to set aside the ex parte order of SANKARAN NAIR, J., and dismiss the appeal as barred by limitation. On 4th November, 1908, the Court held that the affidavits of the appellant and his agent were untrue, and even if they were true they did not amount to 'sufficient cause' within the meaning of section 5 of the Limitation Act, so as to justify them in admitting the appeal after the prescribed period of limitation had expired. "The delay", they said, "should not have been excused".

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The appellant subsequently made an application for a review of the above decision, but it was dismissed on 31st March, 1909. His ground (*inter alia*) was that the appeal having been once admitted, the Division Bench 'had no jurisdiction to consider the propriety of that admission, and to dismiss the appeal as time-barred.'

The High Court refused an application by his daughter and representative, who, on the death of her father, had been put on the record in his place, for a certificate for leave to appeal to His Majesty in Council, but she subsequently, on 7th March, 1913, obtained an order in council granting her special leave to appeal.

On this appeal—

Sir *H. Erle Richards*, K.C. and *Kenworthy Brown* for the appellant contended that the long delay (31st July, 1905, to 28th September, 1908) made by the respondent after he received notice of the admission of the appeal was sufficient to bar his application to set aside the order admitting it, and it should have been dismissed as out of time. The power to set aside such an order is derived from the provisions of the Civil Procedure Code: there is no inherent power in the Court; and a mere practice cannot create such a power. Under rules of the Madras High Court which came into force in January, 1905, the Judges (even a single Judge) can hear and determine an application out of time; it was under those rules that the order for the admission of the appeal was made. The practice of the Madras High Court since *Venkatrayudu* v. *Nagadu*(1) has been against my present contention. The Judges who heard it, it is submitted, had no power to set aside the order of SANKARAN NAIR, J., which was a determination of the question in issue: at any rate they should not have permitted the question of limitation to be re-opened at so late a stage as the hearing of the appeal. The proper, if not the only, remedy against the order was an application for a review under section 623 of the Civil Procedure Code, 1882, but that had to be made within a certain time. The application for review should have come before the same Court which allowed the admission of the appeal. In *Bharat Chunder Roy* v. *Issur Chunder Sircar*(2) it was held by the Calcutta High Court that after an appeal had been admitted

(1) (1886) I.L.R., 9 Mad., 450. (2) (1867) 8 W.R., 141.

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and notice given to the respondent the appellate Court before which it came had no power to reject the appeal at the hearing. That was a decision of Sir BARNES PEACOCK, and is relied on as governing the present case. Reference was made also to *Jhotee Sahoo* v. *Omesh Chunder Sircar*(1), *Dubey Sahai* v. *Ganeshi Lal*(2) and *Vismadev Das* v. *Sitanath Roy*(3).

On counsel proceeding to go into the merits of the case [*De Gruyther*, K.C., referring to *Corporation of St. John* v. *Central Vermont Railway Co.*(4) objected that no ground could be taken now other than that already argued which had alone been urged in applying for special leave to appeal, but he did not press the objection].

SANKARAN NAIR, J., might have qualified his order by the words 'subject to objection at the hearing,' but there is still an order which he had jurisdiction to make, and which under the circumstances should stand.

De Gruyther, K.C. and *C. O'Gorman* for the respondents were not called upon.

The judgment of their Lordships was delivered by

SIR LAWRENCE JENKINS.

Sir LAWRENCE JENKINS.—On the 4th November, 1908, the High Court of Madras dismissed an appeal from an original decree on the ground that it was barred by limitation. From this order of dismissal the present appeal has been preferred, and in its support it has been contended, first, that the order was without jurisdiction and, secondly, that it was erroneous on the merits.

The original decree was passed on the 8th February, 1905, in the Court of the Additional Subordinate Judge at Tanjore in the plaintiff's favour.

Against it the first defendant, Krishnasami Panikondar, preferred an appeal to the Madras High Court. The last day for its presentation was the 10th July, when the Court re-opened after vacation; but it was not presented until the 12th July 1905.

It was then returned to the appellant as out of time. It thus became necessary for the appellant to satisfy the Court that he had sufficient cause for not presenting his appeal within the prescribed period.

(1) (1879) I.L.R., 5 Calc., 1. (2) (1878) I.L.R., 1 All., 35.
(3) (1912) I.L.R., 40 Calc., 259. (4) (1889) L.R., 14 A.C., 590.

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He accordingly again presented his appeal on the 26th July, supported this time by affidavits purporting to explain the delay. The application for admission came before SANKARAN NAIR, J., sitting as a single Judge, and on the 31st July he made an order in these terms: "Delay excused in the circumstances and appeal admitted."

When notice of this appeal was served on the respondents does not appear, but in the following November affidavits were filed controverting the material allegations in those on which delay had been excused. Further affidavits were subsequently filed on both sides.

The appeal thus admitted came on for hearing before a Division Bench of the Court on the 7th October, 1908, and at the outset it was objected that the appeal was out of time, and so not competent. The Court, after an examination of the several affidavits, accepted this view and dismissed the appeal as provided by section 4 of the Indian Limitation Act. A subsequent application for review failed.

It has been argued that the admission of the appeal by SANKARAN NAIR, J., was final, and that the Division Bench had no jurisdiction at the hearing of the appeal to reconsider the question whether the delay was excusable. But this order of admission was made not only in the absence of Ramasami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be egarded as a tacit term of an order like the present that though unqualified in expression it should be open to reconsideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the Courts in India.

But there remains the contention that, at any rate, the Court exceeded its jurisdiction in permitting the question of limitation to be reopened at so late a stage as the hearing of the appeal. This objection, however, has all the appearance of an afterthought. It was not urged at the hearing, though the appellant was represented by so experienced an advocate as Sir Bashyam Ayyangar; nor was it even mentioned in the original review

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petition. It was no doubt advanced at a later stage as an additional ground for review, but it met with no success, for the High Court held that the procedure adopted in this case was in accordance with the usual practice of the Court. The authorities, moreover, show that this practice is not peculiar to Madras, and in the circumstances their Lordships hold that the Division Bench had jurisdiction to reconsider the sufficiency of the cause shown, and to do this at the hearing of the appeal.

But while this procedure may have the sanction of usage, it is manifestly open to grave objection. It may, as in this case, lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the Court comes to decide on the question of delay. Their Lordships therefore desire to impress on the Courts in India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal.

On the merits little need be said. It is the duty of a litigant to know the last day on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in section 5 of the Indian Limitation Act, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies. It was with the claim of such a litigant that the Division Bench had to deal, and after a careful and critical examination and appreciation of the evidence, the learned Judges distrusted his explanation and held that sufficient cause had not been shown. The Court therefore declined to exercise in his favour the power to excuse delay. It has not been shown that in this the Court fell into any error, and their Lordships consequently decline to interfere with its decision. They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitor for the respondent: *Chapman-Walkers* and *Shephard.*

J.V.W.

APPELLATE CIVIL—FULL BENCH.

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

1917, August, 10, 13 and 24 November, 14 and 21.

VADDADI SANNAMMA (PETITIONER), APPELLANT,

v.

KODUGANTI RADHABHAYI AND TWO OTHERS (RESPONDENTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 47, explanation—Abandonment of case against defendant properly impleaded, whether dismissal against such defendant—Madras Proprietary Estates Village Service Act (II of 1894), sec. 17—Madras Hereditary Village Offices Act (III of 1895), sec. 5—Service inam lands—Issue of inam title-deed therefor on one date with notification under section 17 of Madras Act II of 1894 enfranchising the lands at date subsequent to issue of deed—Mortgage of the lands in the interval, whether valid—Transfer of Property Act (IV of 1882), sec. 43, whether applicable to illegal transfers.

Held by the Full Bench:—Where a person has been properly impleaded as one of the defendants in a suit but the suit is dismissed as against him on account of the plaintiff's election to abandon his case so far as it affected that defendant, such a person is a 'defendant against whom a suit has been dismissed' within section 47, Civil Procedure Code.

Krishnappa v. *Periasami* (1917) I.L.R., 40 Mad., 964, distinguished.

An alienation of village service inam lands in a proprietary estate made after the grant of an inam title-deed of enfranchisement but before the date of the notification contemplated by section 17 of the Madras Act II of 1894 is invalid and inoperative on account of the prohibition contained in section 5 of the Madras Act III of 1895. The alienation being a prohibited and illegal one on the date on which it was made, the subsequent removal of the prohibition by the notification of enfranchisement of the service inam land does not render the alienation valid; section 43 of the Transfer of Property Act cannot be applied to make a transfer valid which on the date on which it was made was prohibited by a statute.

Narahari Sahu v. *Korithan Naidu* (1913) 24 M.L.J., 462 and *Sri Kakarlapudi Lakshminarayana Jagannada* v. *Sri Raja Kandukuri Balasurya Prasada Rao* (1915) 28 M.L.J., 650, followed.

Angannayya v. *Narasayya* (1908) 18 M.L.J., 241, overruled.

APPEAL against the Order of A. T. FORBES, the District Judge of Vizagapatam, in Appeal No. 414 of 1915, preferred against the

* C.M.S.A. No. 132 of 1916.

Order of N. RAMASWAMI, the District Munsif of Chodavaram, in Miscellaneous Petition No. 800 of 1915, in Execution Petition No. 241 of 1915, in Original Suit No. 384 of 1913. SANNAMMA v. RADHABHAYI.

The facts are given in the ORDER OF REFERENCE of ABDUR RAHIM, J.

Hon. Mr. *B. N. Sarma* for the appellant.

C. Rama Rao for *Narayana Murti* for the first respondent.

The other respondents did not appear.

This appeal came on for hearing in the first instance before ABDUR RAHIM and BAKEWELL, JJ., who made the following ORDERS OF REFERENCE TO A FULL BENCH.

ABDUR RAHIM, J.—The lands to which the dispute relates appertain to a village service inam and are situate in a proprietary estate. The authorities having decided to enfranchise the inam, the inam title-deed was granted on 18th August, 1906 but the notification spoken of in section 17 of Madras Act II of 1894, fixed 1st April, 1911, as the date from which the enfranchisement would take effect. Between these two dates, i.e., on 23rd January, 1909, these lands described by the mortgagors as 'the enfranchised mirasi and inam lands belonging to us' were mortgaged to the appellant who subsequently in 1915 obtained an ordinary mortgage decree. The first respondent also had a mortgage on the same property and sued to enforce it making the appellant a party; but being advised that a mortgage of service inam lands was unenforceable, he gave up his claim on the mortgage and obtained a simple money decree against mortgagors, his suit being dismissed as against the appellant. The first respondent's decree was in 1914, i.e., before the decree of the appellant. The properties being attached in execution of the former money decree, the latter asked by a petition in the execution proceedings that the lands may be sold subject to his mortgage decree. That petition has been rejected and the appeal is against that order. ABDUR RAHIM, J.

The respondent has taken the preliminary objection that no appeal lies, contending that although the appellant was impleaded as a party to the suit and his name is borne on the decree, he is not 'a party to the suit in which the decree was passed' within the meaning of section 47 of the Code of Civil Procedure, inasmuch as he ceased to be a proper party when the respondent gave up his claims on the mortgage. This proposition

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is laid down by AYLING and KUMARASWAMI SASTRIYAR, JJ., in *Krishnappa* v. *Periyaswamy*(1) but SADASIVA AYYAR and PHILLIPS, JJ., held otherwise in *M. Venkataswami* v. *K. Chidambaram*—Second Appeal No. 888 of 1916(2) printed as a footnote to this page. It seems to me with all respect that in the former decision sufficient effect has not been given to the plain language of the section which is made still clearer by the explanation attached to it. The explanation says 'For the purposes of this section, a defendant against whom a suit has been dismissed is a party to the suit.' Nor can it be said that it is the duty of a Court charged with execution of a decree to see that a defendant against whom the suit has been dismissed was properly made a party or not. Having in view however the conflict of views expressed in *Krishnappa* v. *Periaswamy*(1) and *M. Venkataswami* v. *K. Chidambaram*(2), the question should be solved by a Full Bench.

Upon the merits section 43 of the Transfer of Property Act has been invoked to validate the mortgage in favour of the appellant. But it has been ruled by this Court that that section has no application to alienations which are prohibited by law on the grounds of public policy. The matter is fully discussed by the learned Chief Justice in *Sri Kakarlapudi Lakshminarayana*

(1) (1917) I.L.R., 40 Mad., 964.
(2) (1918) I.L.R., 41 Mad., 420 (Footnote).

SADASIVA AYYAR AND PHILLIPS, JJ.

JUDGMENT.—An important question of law as to the interpretation of section 47 of the Code of Civil Procedure (with the new explanation added by the Code of 1908) is involved in this appeal. The contention of Mr. Venkataramana Rao for the respondent is that *Krishnappa* v. *Periyaswamy*(1) relied on by the appellant is opposed to the Full Bench decision in *Ramaswami Sastrulu* v. *Kameswaramma*(2) and to the plain language of the explanation to section 47 of the Code of Civil Procedure and ought not to be followed.

We agree with Mr. Venkataramana Rao's contention and we do not think that the anomaly pointed out at page 967 of *Krishnappa* v. *Periyaswamy*(1) is a sufficient reason for overriding the plain legislative provision which was apparently introduced into the new Code for the express purpose of enacting as law the views

(1) (1917) I.L.R., 40 Mad., 964. (2) (1900) I.L.R., 23 Mad., 361.

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Jagannada v. *Sri Raja Kandukuri Balasurya Prasada Row*(1) with which I respectfully agree. The same view of the law is expressed in *Narahari Sahu* v. *Korithan Naidu*(2), *Batchu Ramayya* v. *Dara Satchi*(3) and *Karri Ramayya* v. *Villoori Jagannadhan*(4), while a different view prevailed in *Angannayya* v. *Narasanna*(5). The decision in the last case is in direct conflict with the other decisions, all relating to alienations of service inam lands. And in my opinion the present case cannot be effectively distinguished from these by reason of the fact that on the date of the appellant's mortgage the inam title had been issued though the notification was not issued till long afterwards. When section 17 of Madras Act II of 1894 expressly says that the enfranchisement shall take effect only from the date of the notification, it seems to me that before that date the legal incidents attaching to the property including its inalienability remained unaltered. It could not be said that by issuing the title-deed the Government bound itself by way of contract to issue the notification, though the notification was certain to issue in ordinary course and in the latter sense it would be right to say that this expectation of the inam holder was not a 'mere possibility.' If the mortgagee could not rely on any contract in favour of the mortgagor, I find it still more difficult to say that the inam title-deed by itself created some sort of inchoate interest in the property free from all restraint of alienation,

(1) (1915) 28 M.L.J., 650. (2) (1913) 24 M.L.J., 462.
(3) (1913) 14 M.L.T., 430. (4) (1915) 18 M.L.T., 360.
(5) (1908) 18 M.L.J., 247.

SADASIVA AYYAR AND PHILLIPS, JJ.

expressed in the decisions of the Bombay and Madras High Courts on the old section 244 (corresponding to the present section 47) and embodied in the Full Bench decision in *Ramaswami Sastrulu* v. *Kameswaramma*(1) and of overruling by statutory enactment the decisions contra of the other High Courts on the question whether a defendant whose name appears in the decree without having been struck off previously from the record is a party with respect to whom the prohibition of a separate suit enacted in section 47 (old section 244) applies notwithstanding that he had been exonerated by the decree passed in the suit without an adjudication on the controversial questions between him and the plaintiff.

The second appeal is therefore dismissed with costs.

(1) (1900) I.L.R., 23 Mad., 361 (F.B.).

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although the Act says that the enfranchisement shall have no effect except from the date of notification. But as there is a conflict of decisions on the applicability of section 43 to village service inams I think this question also should be referred to the Full Bench.

I would therefore refer the following questions to a Full Bench for OPINION:

(1) Is a person who was impleaded as a defendant in a suit and against whom the suit is dismissed by the decree, a party to the suit in which the decree was passed within the meaning of section 47 of the Code of Civil Procedure, if the dismissal of the suit against him was due to the fact that at the trial the plaintiff abandoned that part of his claim by reason of which the defendant would be a proper party to the suit?

(2) Is a mortgage of village service inam lands in a proprietary estate executed after the grant of the title-deed of enfranchisement but before the date of the notification contemplated under section 17 of the Madras Act II of 1894 valid and operative?

BAKEWELL, J. BAKEWELL, J.—By section 17 of the Madras Proprietary Estates Village Service Act, 1894, the Government was empowered to enfranchise lands granted as remuneration of a village office from the condition of service, but 'such enfranchisement' was declared to 'take effect on or after the date fixed in the notification issued under section 19 for the levy of a village service cess.' That is to say the Government might perform the act constituting an enfranchisement but its operation was suspended until provision had been made for the remuneration of the services on which the land had been previously held. The holder of the office therefore retained the land on the former tenure until such provision had been made, but he acquired a further interest in the land which on the occurrence of the prescribed event would ripen into an absolute interest. In my opinion such an interest is assignable, and is not a mere possibility of a like nature with a chance of an heir-apparent succeeding to an estate or the chance of a relation obtaining a legacy on the death of a kinsman within the meaning of section 6 of the Transfer of Property Act, 1882, since it would become an absolute interest in the ordinary course of business.

In the present case the holder of the lands, after the execution of a deed of enfranchisement but before a notification had been issued by Government for the levy of cess, purported to transfer by way of mortgage 'enfranchised mirasi and inam lands' held on service tenure, and I think that this was a transfer of the inchoate interest which I have described. The transfer could not operate to convey the subsisting interest in the lands in so far as it consisted of a service tenure (Madras Act III of 1895, section 5), but on the issue of the notification that interest became extinguished and the interest which passed under the mortgage became absolute, without any further act of the parties. The petitioner had therefore a valid security and was entitled to apply to the Court that an attachment of the lands should be declared subject thereto.

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The decree under which the attachment was issued contains the name of the petitioner as party defendant, and recites the plaintiff's claim as being for a sum due on a mortgage and the decretal portion directs that the suit be dismissed as against the petitioner. The petitioner was a proper party to the suit as framed and the form of the decree was due to the relinquishment by the plaintiff of his claim under his mortgage and his acceptance of a simple money decree. The case in my opinion falls precisely within the explanation to section 47 of the Code of Civil Procedure, and the petitioner was a party to the suit and this appeal accordingly lies.

Having regard to the differences of opinion mentioned by my learned brother, I agree that the questions framed by him should be referred to a Full Bench.

ON THIS REFERENCE—

Hon. Mr. *B. N. Sarma* for the appellant.—An appeal lies as I was a party to the suit; see explanation to section 47, Civil Procedure Code. There is no statutory prohibition on the Government from alienating their reversionary interest to come into effect from the date of the notification. That is the reason for the wording in section 17 of the Madras Act II of 1894. The prohibition is only on the service holder. The inam title-deed is equivalent to an assignment of the Government revenue in return for a quit-rent and the party can mortgage the same.

[WALLIS, C.J.—The inam title-deed does not purport to grant the reversionary interest of the Government, nor does

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the deed purport to free from liability to service whatever was the service inam, viz., the melwaram or kudivaram or both.]

BAKEWELL, J. It has not been ascertained in this case whether kudivaram was also subject to service. If it was not so subject, it could have been validly alienated. Even supposing both the warams, i.e., the lands themselves were subject to service, there can be a valid mortgage of the lands as from the date of freedom from service; see section 43 of the Transfer of Property Act. *Narahari Sahu* v. *Korithan Naidu*(1) is against me and it is followed in other cases. *Angannayya* v. *Narasanna*(2) is in my favour.

P. Narayanamurti for the first respondent was not called upon.

The other respondents did not appear.

This appeal coming on for hearing the Court expressed the following OPINIONS:—

WALLIS, C.J. WALLIS, C.J.—I am clearly of opinion that, when a party has been properly impleaded as one of the defendants in a case and the case as against him would have proceeded to judgment but for the fact that the plaintiff elected to abandon part of his case and the suit was in consequence dismissed as against such defendant, he is 'a defendant against whom a suit has been dismissed' within the meaning of the explanation to section 47, Civil Procedure Code. The case which came before the Court in *Krishnappa* v. *Periyaswamy*(3), of a misjoinder of causes of action and of the plaintiff being required to proceed with one cause of action only and the suit being dismissed as against the defendants who had been joined in respect of the other cause of action only, may possibly stand on a different footing, as to hold that the cause of action which the Court was prohibited from trying may be gone into in execution by virtue of section 47, goes far to defeat the prohibition of joinder, and such a construction of section 47 should therefore be avoided if it is possible to do so. As that question is not before us, I express no opinion upon it, and will only say that the proper course in these cases appears to be for the Court to exercise the power, which it now has under Order I, rule 10 (2),

(1) (1913) 24 M.L.J., 462. (2) (1908) 18 M.L.J., 247.
(3) (1917) I.L.R., 40 Mad., 964.

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of ordering at any stage of the proceedings, the name of a defendant improperly joined to be struck out, instead of dismissing the suit as against him. That will, as held by the Full Bench in *Ramaswami Sastrulu* v. *Kameswaramma*(1), have the effect of taking him out of the operation of section 47 which ought not to apply to him seeing that he has no real concern with the suit. I would answer the first question in the affirmative.

WALLIS, C.J.

As regards the second question, under section 4 of the Madras Hereditary Village Offices Act, III of 1895, the word 'emoluments' includes 'lands and assignments of revenue payable in respect of such lands,' and according to the finding the emoluments in this case included both the lands and an assignment of revenue arising out of them. Under section 5 these emoluments are 'not liable to be transferred or encumbered in any manner whatsoever,' reproducing in substance the provisions of Regulation VI of 1831 which made such alienations null and void. Section 17 of the Madras Proprietary Estates Village Service Act, II of 1894, provides that:

"if the remuneration of a village office consists in whole or in part of lands, or assignments of revenue payable in respect of lands, granted or continued in respect of or annexed to such village office by the State, the Government may enfranchise the said lands from the condition of service by the imposition of quit-rent,—and such enfranchisement shall take effect from such date as Government may notify."

Government in this case issued an inam title-deed which recited that the inam consisted of an assignment of land revenue and commuted its right to resume the assignment in consideration of payment to Government of a quit-rent in addition to the existing jodi payable to the proprietor. It said nothing about the enfranchisement of the inam or the lands from the condition of service and they remained liable as before, and continued to form the emoluments of the village office until the issue of the notification which was after the date of the alienation now in question. The lands therefore continued subject to the prohibition against the incumbrance in any manner whatsoever, and the alienation in question was undoubtedly

(1) (1900) I.L.R., 23 Mad., 361 (F.B.).

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void at the time it was made. As pointed out in the ORDER OF REFERENCE, there is a conflict of decisions in this Court as to whether the subsequent enfranchisement has the effect of validating such alienations. In 1905 it was held by WHITE, C.J., and MILLER, J., in *Angannayya* v. *Narasayya*(1), that, though the transfer was null and void under Regulation VI of 1831, yet after enfranchisement the transferee was entitled under section 43 of the Transfer of Property Act to require that the transfer should operate on the alienable interest subsequently acquired by the transferor. No authority was cited, and the original illegality of the transfer was not referred to. On the other hand, in *Narahari Sahu* v. *Korithan Naidu*(2) it was held on similar facts by SUNDARA AYYAR and BENSON, JJ., that section 43 has no application to cases where the transfer is forbidden by law on grounds of public policy, referring to *Ramasami Naik* v. *Ramasami Chetti*(3). This case was approved and followed in *Batchu Ramayya* v. *Dara Satchi*(4) and *Karri Ramayya* v. *Villoori Jagannadhan*(5). The decision in *Ramasami Naik* v. *Ramasami Chetti*(3), on which reliance was placed, has since been followed in *Sri Kakarlapudi Lakshminarayana Jagannada* v. *Sri Rajah Kandukuri Balasurya Prasada Row*(6). We have not been referred to any English decisions pointing the other way, and on the whole I think the sound position for us to proceed on is that no equities arise out of a transaction which is prohibited by law on grounds of public policy. The present case no doubt differs from the earlier cases because the transfer by way of mortgage purported to be of 'enfranchised mirasi and inam lands' and was made after execution of the inam deed by which a quit-rent was imposed on the lands, a step which was intended to be followed, and was followed at an early date, by a publication of the notification enfranchising the lands. The transfer was none the less illegal when it was made, and on the whole I do not think there are sufficient reasons for departing from what I understand to be the general rule especially in the absence of English authority in point. In *Bettesworth* v. *Dean of St. Paul's*(1), which is referred to by Lord Macnaghten in *Tailby* v. *The Official Receiver*(2), where a covenant in a lease to renew for ninety-nine years which was lawful when made was rendered illegal by subsequent statutes, it was held by the House of Lords, that, as the statutes permitted leases for forty years, specific performance by executing a fresh lease for forty years might be decreed, but in that case the original agreement was lawful, and it does not cover the present case where the transaction was illegal at the time it was entered into. As regards the second question my answer is that the transfer was clearly illegal and inoperative when it was made and did not become operative on the subsequent enfranchisement of the lands.

(1) (1908) 18 M.L.J., 247.
(2) (1913) 24 M.L.J., 462.
(3) (1907) I.L.R., 30 Mad., 255.
(4) (1913) 14 M.L.T., 430.
(5) (1915) 18 M.L.T., 360.
(6) (1915) 28 M.L.J., 650.

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SADASIVA AYYAR, J.—I agree with my Lord in the answers to be given to the two questions referred to us.

SADASIVA AYYAR, J.

KUMARASWAMI SASTRIYAR, J.—I agree.

KUMARASWAMI SASTRIYAR, J.

N.R.

(1) (1728) 1 Bro. P.C., 240.
(2) (1888) 13 A.C., 523 at p. 552.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ayling, Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Ayyar.

PANDIRI VEERANNA (PLAINTIFF), APPELLANT,

v.

GRANDI VEERABHADRASWAMI *alias* VEERABHADRUDU (SECOND DEFENDANT), RESPONDENT.*

1917, September 28, October 1 and 1918 February 20.

Limitation Act (IX of 1908), ss. 21 (2), 19 and 20—Partnership—Acknowledgment of liability or payment by one partner, when binding on others.

Direct evidence that one of several partners or co-contractors had authority to acknowledge liability or make payments so as to save limitation as against his partners or co-contractors is not necessary, but such authority can be inferred from surrounding circumstances such as the position of other co-contractors or partners.

Valasubramania Pillai v. *S. V. R. R. M. Ramanathan Chettiar* (1909) I.L.R. 32 Mad., 421 and *Shaik Mohideen Sahib* v. *The Official Assignee of Madras* (1912) I.L.R., 35 Mad., 142 at p. 145, considered.

* Appeal No. 343 of 1916 (F.B.).

VEERANNA v. VEERA-BHADRA-SWAMI.

APPEAL against the decree of P. C. TIRUVENKATA ACHARIYAR, the Additional Temporary Subordinate Judge, Rajahmundry, in Original Suit No. 3 of 1916.

This was a suit brought in December 1914 for Rs. 11,000 due on transactions carried on between the plaintiff and the defendants Nos. 1 and 2 (father and son) under an agreement that the plaintiff was to advance the necessary capital at 12 per cent interest to the defendants to enable them to purchase timber on their own account and to forward the same to the plaintiff for sale at 2 per cent commission. The defendants constituted a joint Hindu family and were carrying on the trade as a joint family concern and the account of the plaintiff for several years showed the names of both the defendants as the parties liable. There were several periodical settlements of accounts and acknowledgments of liability by both the defendants up to the year 1910. In the year 1913 the first defendant alone settled accounts with the plaintiff and executed in his favour a promissory note for the balance found due and also gave a letter to the plaintiff acknowledging the joint liability of himself and his son (the second defendant) for Rs. 9,855. On these facts the plaintiff prayed for a decree against both the defendants for Rs. 11,000. The first defendant was *ex parte*. The second defendant contended *inter alia* that he had no connexion with the timber trade, that he was carrying on separately a cloth trade, that at any rate his father had no authority to acknowledge liability on his behalf and that the settlement, acknowledgment of liability, and the promissory note signed by his father were not binding on him. The Subordinate Judge held that the timber trade was an ancestral family trade of both the defendants, that both of them were liable to pay the plaintiff Rs. 11,000 from out of their family ancestral property and that the first defendant alone and not the second defendant was personally liable for the claim as the second defendant was not a party to the settlement, promissory note and the letter of acknowledgment given to the plaintiff by the first defendant.

The plaintiff preferred this appeal for a personal decree against the second defendant also on the ground that the settlement, promissory note and acknowledgment made by the father in 1913 bound the second defendant also.

V. Ramadoss for the appellant.

T. Ramachandra Rao for the respondent.

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This appeal came on for hearing in the first instance before WALLIS, C.J., and KUMARASWAMI SASTRIYAR, J., who made the following ORDERS OF REFERENCE TO A FULL BENCH :—

WALLIS, C.J.—It is quite clear in this case that the first defendant and his adult son, the second defendant, carried on business as timber merchants with the joint family property. It is also clear that the advances made by the plaintiff were made to them both, and that the second defendant was personally liable on them as well as the first defendant. This is abundantly proved by the fact that the second defendant has signed the settlements in the plaintiff's books (Exhibit A), dated the 27th April, 1907, and A-1, dated the 12th September, 1909, and the promissory notes D, dated the 1st May 1907, and E, dated the 13th September, 1909. He did not sign the settlement A-2, the promissory note F, dated the 26th September, 1910, or the letter J, dated the 1st October, 1910, as he was absent, but on the 7th February, 1911, he signed the letter (Exhibit G), set out in the judgment of the Subordinate Judge, in which he stated that he and his father had been borrowing from the plaintiff, that his father had settled accounts on the 26th September, 1910, and signed in the plaintiff's book, that he had not signed as he was not present, and that subsequently they had received further advances to the extent of Rs. 4,000. In this letter he undertook to discharge both these amounts on his personal liability and added : "There subsists also my personal liability for the whole of the amount payable according to your accounts. As I did not sign in your accounts, this letter was written and given." He did not however sign the subsequent settlement A-3, dated the 7th September 1913, or the promissory-note (Exhibit H), dated the 7th September 1913, or the letter (Exhibit K), dated the 9th September 1913, by which the first defendant acknowledged the joint indebtedness to amount to Rs. 9,855 and arranged for a further advance of Rs. 1,200 for which they were to give a fresh mortgage. The plaintiff has given evidence in support of his case, and neither the first nor the second defendant has ventured to go into the box; and the witnesses called for the second defendant to prove that he had no

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connexion with his father's business are contradicted by the documents under his own signature already mentioned. There is evidence, and it is the second defendant's case, that for the last few years he has been looking after a cloth business, and according to the plaintiff's evidence the first defendant was the manager and always wrote the letters and invoices relating to the timber business.

In these circumstances, the only question is whether the suit is barred against the second defendant personally, and this depends on whether the first defendant can be assumed to have had implied authority to sign the settlement in Exhibit A-3 and the letter Exhibit K on behalf of the second defendant as well as himself. The last acknowledgments were made by the first defendant when he was managing the joint timber business which was being carried on with joint family funds by the first and second defendants as co-contractors or partners and while the second defendant was looking after another business. According to the decisions of this Court in *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar*(1) and in *Shaik Mohideen Sahib* v. *Official Assignee of Madras*(2), these facts are not sufficient to raise a presumption that the first defendant had authority to make an acknowledgment on behalf of the second defendant. In the latter case it was expressly decided that the fact of a partner being left in management of the business did not give rise to a presumption that he was authorized to sign acknowledgments. I have pointed out in *K. R. V. Firm* v. *Seetharamaswami*(3) that a different view has been taken by other Courts in India in the cases cited [to which may be added *Lalta Prasad* v. *Babu Prasad*(4)] and also apparently in England where the statutory provisions are substantially the same as in India. The point is fully discussed in *K. R. V. Firm* v. *Seetharamaswami*(3) and, as it is one of great importance to the commercial community, we have decided to refer to a Full Bench the question :

"Whether, in the absence of direct evidence that a co-contractor or partner has authorized his co-contractor or partner to make acknowledgments or payments saving limitation on his

(1) (1909) I.L.R., 32 Mad., 421. (2) (1912) I.L.R., 35 Mad., 142.
(3) (1914) I.L.R., 37 Mad., 146. (4) (1910) I.L.R., 32 All., 51.

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behalf, such authority can be inferred from other circumstances such as the position of the other co-contractors or partners in the business ?"

KUMARASWAMI SASTRIYAR, J.—I agree to the reference proposed by my Lord, as I am of opinion that the decisions in *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar*(1) and in *Shaik Mohideen Sahib* v. *Official Assignee of Madras*(2) require reconsideration in the light of the decision in *K. R. V. Firm* v. *Seetharamaswami*(3) which, if I may say so with respect, gives cogent reasons for placing on section 21 of the Limitation Act a more liberal construction in conformity with the decisions of the other High Courts. There is no essential difference between the position of partners in England and India and if under section 251 of the Contract Act the act of one partner which is necessary for or is usually done in the course of the business binds the other partners there is no reason why acknowledgments of liability or payments made by one partner should not bind the others. I have rarely come across any instance where partners, while providing for authority to borrow on behalf of the firm, make any express provision for acknowledgments or payments with reference to limitation. Very often partnership agreement restricts the powers of certain of the partners to borrow, but when there is no restriction, business is conducted on the footing that one who has the power to borrow has also power to settle accounts, make payments and in general to do all things necessary to ensure the credit of the firm. It is well known that Marvadis and Nattukottai Chettis who open accounts with persons insist on periodical settlements and would make no further advances unless accounts are settled when required. The object of the settlement is to prevent disputes as to its correctness and pleas of limitation from being raised. It is difficult to see why partners who allow business to be conducted on lines which are well known to everybody should not be presumed to have given authority in the absence of evidence that the authority to borrow was limited and excluded the doing of things which are ordinarily done where accounts are opened with money-lenders.

(1) (1909) I.L.R., 32 Mad., 421. (2) (1912) I.L.R., 35 Mad., 142.
(3) (1914) I.L.R., 37 Mad., 146.

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I do not think that the wording of section 21 concludes the matter or makes any difference in the general law applicable to partners. The use of the words ' by reason only of ' in the Acts of 1877 and 1908 instead of the words ' by reason of ' suggests that the legislature did not intend to affect the powers of one partner to bind another by acts falling under section 251 of the Contract Act. If it is shown that one partner has been borrowing moneys, making payments and settling accounts without objection by the other partners, it may well be presumed that he was authorized to do so. There is no reason why we should go further and require an express authority treating the implied authority as useless for the purpose of section 21.

Section 21 is similar in language to section 14 of the Mercantile Law Amendment Act of 1856 which has received judicial interpretation in England so far as partners are concerned. The following passage from Lightwood's Time Limit on Actions, page 383, correctly summarizes the law in England on the subject :—

"Though the doctrine of implied agency as between co-debtors is abolished one may still be the actual agent of the other so as to bind him by payment. In the absence of evidence to the contrary one partner is presumed to be the agent of the other to make payments in respect of partnership debts [*Goodwin* v. *Parton*(1)], and though the agency is in general terminated by a dissolution of partnership [*Watson* v. *Woodman*(2)], it may, under special circumstances, be treated as continuing where for instances the retirement of a partner is kept secret and payments of interest are made in the name of the firm, *In re Tucker*(3)."

I agree with the judgment in *K. R. V. Firm* v. *Seetharamaswami*(4), which deals fully with the English and Indian statutes and decisions and which is entirely in accordance with my experience of the consciousness of the mercantile community and the course of business usually followed. The same view has subsequently been taken in *Lalta Prasad* v. *Babu Prasad*(5), and in *Abdulalli* v. *Ranchodlal*(6) and in *Karmlai Abdulla* v. *Karimji Jiwanji*(7).

(1) (1879) 41 L.T., 91.
(2) (1875) 20 Eq., 721.
(3) (1894) 3 Ch., 429.
(4) (1914) I.L.R., 37 Mad., 146.
(5) (1910) I.L.R., 32 All., 51.
(6) (1917) 19 Bom. L.R., 86 at p. 95.
(7) (1915) I.L.R., 39 Bom., 261 (P.C.).

ON THIS REFERENCE—

V. Ramadoss for appellants.—The authority to acknowledge liability, to pay or settle so as to bind partners or co-contractors need not be expressed but may be implied. Implication may be from other evidence in the case, such as that such acts are usually done by the partners: see *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar*(1) and *Shaik Mohideen Sahib* v. *Official Assignee of Madras*(2). In section 21 (2) of the Limitation Act the words are "by reason *only* of payment;" *i.e.*, mere *payment* alone is not such evidence. The case of *K. R. V. Firm* v. *Seetharamaswami*(3) is *inclined* to the opinion that such authority can be inferred from other evidence. There is really no inconsistency between all the three Madras cases. Compare section 251 of the Contract Act. Such authority can be implied if the partner had authority to borrow: *Muthuswami Nadan* v. *Sankaralingam Chetty*(4) and *Chidambaram Chetti* v. *Ramaswami Chetti*(5). The fact that the person paying is father of the second defendant and manager of the family is other evidence from which the authority can be inferred. See also *In re Tucker*(6) and *In re Macdonald, Dick* v. *Fraser*(7).

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T. Ramachandra Rao for respondents.—From the mere fact of the person paying being a partner, authority to pay on behalf of another cannot be inferred. It is true that express authority to pay need not be proved. The mere fact that he is the manager or that he was generally conducting the business is not enough. There are no facts in the case from which authority can be inferred.

OPINION.—In this case the two defendants carried on the business of timber merchants as a family business, they being father and son in an undivided Hindu family. They are sued on a debt which would be statute barred in the absence of an acknowledgment, sufficient within section 19 of the Limitation Act to take it out of the statute. There is such an acknowledgment, but it is only signed by the first defendant, the father, and the question is whether it can operate as against the son, the co-defendant also.

AYLING, COUTTS TROTTER AND SESHAGIRI AYYAR, JJ.

(1) (1909) I.L.R., 32 Mad., 421.
(2) (1912) I.L.R., 35 Mad., 142.
(3) (1914) I.L.R., 37 Mad., 146.
(4) (1915) 18 M.L.T., 273.
(5) (1914) 27 M.L.J., 631 at p. 634.
(6) (1894) 3 Ch., 429 C.A.
(7) (1897) 2 Ch. 181 at p. 188.

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The learned Judges who referred the case have propounded a question about the answer to which we feel no hesitation, but it is obviously referred to us because they felt a doubt as to whether the decisions in *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar*(1) and *Shaik Mohideen Sahib* v. *The Official Assignee of Madras*(2) did not preclude them from arriving at the conclusion which they clearly thought to be the right one.

The exact question propounded is "whether in the absence of direct evidence that a co-contractor or partner has authorized his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other circumstances such as the position of the other co-contractors or partners in the business." Our answer is in the affirmative. We think that direct evidence of a specific authority to give acknowledgments is quite unnecessary, and that authority may be inferred from the surrounding circumstances, though it is of course quite beyond our province to indicate what circumstances should in our opinion be deemed sufficient to warrant the inference. It is important to notice the exact wording of section 21 (2) of the Limitation Act. The section does not say that a person shall not be liable on an acknowledgment signed by the partner by reason only of his being a partner but by reason only of a written acknowledgment signed by his partner; and it amounts to saying that if you have no more than a written acknowledgment signed by one defendant the fact that the other defendant is his partner cannot affect the latter's liability. You could obviously have a case where one partner signed an acknowledgment in respect of a gambling debt of his own; but for the sub-section, proof of the acknowledgment would be sufficient to fix the other partner with liability, a conclusion manifestly repugnant both to sense and justice. We see nothing in the sub-section to make it necessary to suppose that it is intended to apply to transactions conducted in the ordinary course of partnership business. We need only refer to the general principle of law embodied in section 251 of the Contract Act that partners are the agents of one another and that their acts done in the ordinary course of the partnership business bind the partnership.

(1) (1909) I.L.R., 32 Mad., 421. (2) (1912) I.L.R., 35 Mad., 142.

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As regards the two decisions referred to, it is not quite easy to say whether they should properly be regarded as laying down as a condition of liability that there should be direct evidence of express authority to give acknowledgments. But at least one sentence in *Shaik Mohideen Sahib* v. *The Official Assignee of Madras*(1) lends colour to that view. WHITE, C.J., referring to the former decision in *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar*(2), says: "Following the principle we here (i.e., 32 Mad., 421) lay down, we have to see in this case if there is evidence that the person who made the acknowledgment had authority to do so on behalf of his firm." Those words are capable of the construction that what is meant is direct evidence of specific authority, and they were obviously so regarded by the learned Judges who referred this question to us. If that be so we have no hesitation in saying that they were wrongly decided and should no longer be regarded as law. Such a view is completely at variance with that taken by the other Courts of India and by the English Courts in their construction of the corresponding sections of the English Acts and would obviously put a premium on commercial dishonesty.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

SINGA PILLAY (PLAINTIFF), APPELLANT,

v.

AYYANERI GOVINDA REDDY AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1917. July 16 and 27.

Mortgage—Transferee from benamidar—Right of suit.

A transferee—Mortgagee can maintain a suit on the mortgage though the mortgagee named in the bond is only a benamidar and though the beneficial owner is not added as a party.

Kirtibas Das v. *Gopal Jiu* (1914) 19 C.L.J., 193, and *Parameshwar Dat* v. *Anardan Dat* (1915) I.L.R., 37 All., 113, followed.

SECOND APPEAL against the decree of K. KRISHNAMA ACHARIYAR, the Subordinate Judge of North Arcot, in Appeal No. 113 of

(1) (1912) I.L.R., 35 Mad., 142 at p. 145. (2) (1909) I.L.R., 32 Mad., 421.

* Second Appeal No. 1887 of 1915.

SINGA PILLAY v. GOVINDA REDDY.

1914, preferred against the decree of M. A. KRISHNA RAO, the District Munsif of Sholingar, in Original Suit No. 203 of 1913.

The plaintiff brought this suit upon a registered mortgage deed executed by the first defendant in favour of one Rengasami Reddi and transferred by him to the plaintiff. The second defendant is a subsequent purchaser of the property. The second defendant contended that the original mortgagee, Rengasami Reddi, was only a benamidar for the second defendant's judgment-debtors, the mother and sister of the first defendant, and that the assignment in favour of the plaintiff was a nominal and sham transaction. The court of first instance upholding the above contentions dismissed the plaintiff's suit. The lower Appellate court confirmed the above decision, observing that a benamidar in respect of a mortgage deed cannot sue and recover on the mortgage. The plaintiff preferred this Second Appeal.

C. V. Anantakrishna Ayyar for the appellant.

P. Venkataramana Rao for the respondents.

SPENCER, J. SPENCER, J.—In the Calcutta and Allahabad High Courts it appears to have been settled by judicial decisions that a benami mortgagee may maintain a suit upon a mortgage: vide *Kirtibas Das* v. *Gopal Jiu*(1), *Sachita Nandu Mohapatro* v. *Baloram Gorain*(2), and *Parmeshwar Dat* v. *Anardan Dat*(3). In this Court there is no reported case on the point so far as I am aware; but in *Chidambara Mandarayan* v. *Singaram*(4), the same view was taken as in Calcutta and Allahabad and three more unreported cases were therein referred to as authorities that precluded arguments being raised to the contrary. In *Kutha Perumal Rajali* v. *The Secretary of State for India*(5), the decision in *Chidambara Mandarayan* v. *Singaram*(4), was quoted with approval and its principle was explained as being that a benamidar's suit is equivalent to a suit by an agent of an undisclosed principal. If a mortgagor can successfully resist a suit brought by the beneficial owner of the bond on the ground that he is not the person named in the bond as mortgagee, it is difficult to see on what grounds he could also be successful

(1) (1914) 19 C.L.J., 193.
(2) (1897) I.L.R., 24 Calc., 644.
(3) (1915) I.L.R., 37 All., 113.
(4) Second Appeal No. 186 of 1903.
(5) (1907) I.L.R., 30 Mad., 245.

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against the *ostensible* owner of the legal estate when the real owner holds back. In case of dispute the remedy would be to join the person alleged to be the real owner as a party, so that he might be bound by the decision. If the benamidar can sue upon the bond there is no reason why he should not assign his right of suit to another for proper consideration. In this case, however, there is a further difficulty. Both the lower Courts have found that the transfer to the plaintiff by Rangaswamy Mudali, the benamidar, was not a *bona fide* transaction.

The Subordinate Judge gives as one of his reasons for this finding that the transfer was made on the very date upon which the second defendant sued to recover the consideration of the pro-note from the real mortgagee. If he meant that the transaction was one in fraud of creditors, it must be set aside in a suit framed for that purpose. So far as the parties to this suit are concerned it is sufficient that Rangaswamy Mudali says he transferred his title to the plaintiff and received consideration for the transfer. His act must be taken as operating to pass whatsoever title he had to sue the mortgagor and I have held above on the point of law that he had a title to sue as mortgagee though he was a benamidar.

I agree therefore that the lower Court's decree must be reversed and a decree passed for the plaintiff.

SESHAGIRI AYYAR, J. SESHAGIRI AYYAR, J.—Both the Courts below have found that the plaintiff's assignor was only a benamidar in respect of the mortgage sued on. We see no reason to differ from this conclusion. The further question whether a benamidar can sue in his own name on the mortgage is not free from difficulty.

There is only a thin line of demarcation between a benamidar and an agent or trustee. The element of confidence in the ostensible owner exists in all the three cases. In the case of an agent, the law gives a qualified right of suit to him. See section 230 of the Contract Act. In the case of a trustee, the law recognizes him alone as entitled to deal with the outside world, because the legal estate vests in him; and until discharge he represents that estate: The case of a benamidar is slightly different. He is not the legal owner because although from the utset he is expected to screen the real owner from the public, e is to be only the alias of the latter, until he chooses to reveal

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himself as the person entitled. Such an attitude is insufficient to create a relationship of principal and agent either.

In this view of his status, the question is whether he should be allowed to sue in his own name. The Judicial Committee of the Privy Council apparently held that he can sue to recover debts; *Gopeekrist Gosain* v. *Gungapersaud Gosain*(1). In regard to negotiable instruments, it was held in *Subba Narayana Vadhiyar* v. *Ramaswami Aiyar*(2) that he alone was competent to maintain a suit. An extension of this principle was made in *Sivasankaran Pillai* v. *Panchami Kesiyar*(3), where he was held entitled to sue for a debt due on a simple bond: A still further inroad upon the rights of the real owner was made in *Sree Raja Datla Venkata Suryanarayana Jagapathiraju* v. *Goluguri Bapiraju*(4). In that case it was held that a benamidar can sue to set aside a sale. It may here be mentioned that an attempt to bar his right in all cases of suits relating to immovable property in general did not meet with approval in Madras. See observations in *Kuthaperumal Rajali* v. *The Secretary of State for India*(5). None the less it was held that he is not entitled to sue for rent: *Kuppu Konan* v. *Thirugnana Sammandan Pillai*(6). Suits in ejectment have been regarded as outside his rights; *Kuthaperumal Rajali* v. *The Secretary of State for India*(5).

As regards the other High Courts, in Allahabad the benamidar is allowed to sue on the mortgage: *Parmeshwar Dat* v. *Anardan Lal*(7). A suit in ejectment is also allowed by that High Court: *Nand Kishore Lal* v. *Ahamad Ata*(8). In Calcutta, notwithstanding *Munshi Basiruddin Ahmed* v. *Mahomed Jalish Patwari*(9), the later decisions concede his right to sue on a mortgage: *Hara Gobinda Saha* v. *Purna Chendra Saha*(10) and *Kirtibas Das* v. *Gopal Jiu*(11) following *Sachitananda Mohapatra* v. *Baloram Gorain*(12). But he is not allowed to sue in ejectment: *Mohendra Nath Mookerjee* v. *Khali Proshad*

(1) (1854) 6 M.I.A., 53 at pp. 72 and 73.
(2) (1907) I.L.R., 30 Mad., 88. (3) (1898) 8 M.L.J., 302.
(4) (191) I.L.R., 34 Mad., 143. (5) (1907) I.L.R., 30 Mad., 245.
(6) (1908) I.L.R., 31 Mad., 431. (7) (1915) I.L.R., 37 All., 113.
(8) (1896) I.L.R., 18 All., 69. (9) (1908) 12 C.W.N., 409.
(10) (1910) 11 C.L.J., 47. (11) (1914) 19 C.L.J., 193.
(12) (1897) I.L.R., 24 Calc., 644.

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Johuri(1). In Bombay also, the same view seems to prevail: see *Ravji* v. *Mahadev*(2).

Probably, it would be more logical to permit the benamidar to sue in all cases, leaving it to the real owner, to his remedies against him in a separate suit. The decisions which apply the rule of res judicata against the real owners and even permit him to execute a decree obtained by the benamidar are not inconsistent with this view. It may be that suits in ejectment stand on a different footing from other suits. In such suits the legal right of the plaintiff and his right to eject are directly in question. It may be said that the defendant can plead *jus tertii*. These considerations may not be altogether absent in other suits. However that may be, it is not necessary at present to canvass the correctness of his position in regard to suits for ejectment.

I think that prima facie a suit on a mortgage is one to recover a debt, although such a debt is charged on immovable property: consequently, the dictum of the Privy Council in *Gopeekrist Gosain* v. *Gungapersaud Gosain*(3) is applicable to such a suit. It was pointed out in *Chidambara Mandarayan* v. *Singaram*(4) that the practice in this Presidency is to permit the benamidar to sue on a mortgage; and that practice is in consonance with what obtains in the other High Courts. A further argument was addressed to us on the finding of the Subordinate Judge that the transfer to the plaintiff by the first benamidar Rengaswami was in fraud of the creditor, the second defendant. Even accepting this finding it is not open to the second defendant to resist the suit without first suing to set aside the transfer: Vide *Palaniandi Chetty* v. *Appavu Chettiar*(5). Under these circumstances we must hold that the plaintiff must be allowed to sue in his own name. The decrees of the Courts below must be reversed and the usual mortgage decree should be passed for the amount sued for. Time for payment will be six months from this date. Each party will bear his own costs throughout.

S.V.

(1) (1903) I.L.R., 30 Calc., 265. (2) (1898) I.L.R., 22 Bom., 672.
(3) (1854) 6 M.I.A., 53. (4) Second Appeal No. 186 of 1908.
(5) (1917) 30 M.L.J., 565.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Bakewell.

1917, August 9.

GUNTAPALLI NARASIMHAYA AND THREE OTHERS (COUNTER-PETITIONERS), APPELLANTS,

v.

MARLAPATI VEERARAGHAVULU AND OTHERS (PETITIONER AND FIFTH COUNTER-PETITIONER), RESPONDENTS.*

Provincial Insolvency Act (III of 1907), ss. 20 and 47—Sale by receiver of property alleged to belong to an insolvent—Property in possession of third person—Obstruction by such third person—Summary enquiry by District Judge—Order directing delivery of possession, legality of—'Proceedings' in section 47 of the Act, meaning of.

Certain property alleged to belong to an insolvent was sold by the receiver under section 20 of the Provincial Insolvency Act. The purchaser whilst attempting to take possession, was obstructed by the appellants who claimed to be in possession of the property as owners thereof. The District Judge, purporting to act under section 47 of the Act, after a summary enquiry, ordered possession to be given to the purchaser:

Held, that the District Judge had no jurisdiction to pass such an order as section 47 only lays down the procedure to be followed by the Insolvency Judge with regard to proceedings under the Act.

Held, also, that the word 'proceedings' in section 47 of the Act means the proceedings of the Court and not the act of the receiver under section 20 of the Act.

Minatoonnessa Bibee v. *Khatoonessa Bibee* (1894) I.L.R., 21 Calc., 479 and *Golam Hossein Cassim Arif* v. *Fatima Begam* (1910) 6 I.C., 300, explained.

Cheda Lal v. *Lachman Parshad* (1917) 37 I.C., 830, approved.

APPEAL against the order of K. SRINIVASA RAO, the District Judge of Guntūr, in Interlocutory Application No. 609 of 1916, in Insolvency Petition No. 3 of 1912.

The necessary facts appear from the judgment.

M. Subbaraya Ayyar for the appellants.

R. Satyamurti Ayyar for the respondents.

The judgment of the Court was delivered by

ABDUR RAHIM, J.

ABDUR RAHIM, J.—This appeal arises in certain insolvency proceedings in the mufassal Court to which the Provincial Insolvency Act III of 1907 applies. A man called Venkatakrishnayya was declared insolvent and the receiver who was

* Appeal Against Order No. 68 of 1917.

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ABDUR RAHIM, J.

appointed in insolvency sold some property which was alleged to belong to the insolvent and to have been mortgaged by him to the first respondent and in that sale, the first respondent bought the property. When the purchaser the first respondent, wanted to take possession, he was obstructed by the appellants before us who claimed title to the property in their own right and also alleged that they had been for a long time in possession of the land. The District Judge purporting to act under section 47 of the Provincial Insolvency Act has held a summary enquiry and directed that the purchaser, the first respondent, be put in possession of the land. We do not think that section 47 of the Insolvency Act authorized the District Judge to act in this manner and by a summary proceeding to order the appellants to deliver possession of the land to the first respondent. Section 47 says:

"Subject to the provisions of this Act, the Court in regard to proceedings under this Act shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction."

What this section lays down is the procedure to be followed by the Insolvency Judge with regard to proceedings had under this Act. But the 'proceedings' referred to means the proceedings of the Court and not the act of a receiver done under section 20 of the Insolvency Act. The powers given to the receiver under section 20 are exercised by him standing in the shoes of the insolvent in the interests of the creditors. He does not in any way act as a Court and whatever he does in this connexion he does merely on behalf of the insolvent. The learned counsel for the respondent has asked us to say that under section 47 the District Judge sitting in the Insolvency Court is empowered to try this matter as one in execution of a decree. To that the simple answer is that there was no decree for execution. There was no decree at all in the case and it would be going much too far to say that a judge in insolvency in the mufassal has powers by a summary proceeding to decide questions of title with respect to property which is claimed by third persons. The two Calcutta decisions *Minatoonnessa Bibee* v. *Khatoonessa Bibee*(1) and *Golam Hossein Cassim Arif* v. *Fatima*

(1) (1894) I.L.R., 21 Calc., 479.

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Begam(1), which were cited by the District Judge in support of his view were not under the Insolvency Act at all. They were rulings in connexion with questions arising in the execution of decrees under the Civil Procedure Code. On the other hand there is a ruling of the Allahabad High Court in *Cheda Lal* v. *Lachman Parshad*(2), which enunciates the same view as we have suggested.

The appeal is allowed and the judgment of the District Judge must be set aside and the first respondent's petition dismissed with costs throughout.

S.V.

APPELLATE CIVIL.

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

1917 August 29.

CHELIMI CHETTY AND FIVE OTHERS (RESPONDENTS NOS. 1 AND 3 TO 6), APPELLANTS,

v.

SUBBAMMA (PETITIONER, SEVENTH DEFENDANT), RESPONDENT.*

Hindu Law—Joint family—Suit for partition on behalf of minor—Death of minor before the filing of written statement—Severance of the joint status, if effected—Legal representative of minor, right of, to continue the suit.

The rule that the institution of a suit for partition of joint family property effects a severance of the joint status is not applicable to a suit instituted on behalf of a minor; for in such suit it is for the Court to determine whether a decree for partition will be beneficial to the minor.

Where a minor plaintiff dies during the pendency of the suit his legal representatives are not entitled to continue the suit.

Girja Bai v. *Sadashiv Dhundira* (1916) I.L.R., 43 Calc., 1931; *Sundara Rajan* v. *Arunachalam Chetti*(1916) I.L.R., 39 Mad., 159, referred to.

SECOND APPEAL against the decree of J. N. ROY, the District Judge of North Arcot, in Miscellaneous Appeal No. 18 of 1915, preferred against the order of K. KRISHNAMA ACHARIYAR, the Subordinate Judge of North Arcot, Civil Miscellaneous Petition No. 67 of 1915 in Original Suit No. 59 of 1914.

The material facts and contentions appear from the judgment.

A. Krishnaswami Ayyar for the appellants.

(1) (1910) 6 I.C., 300. (2) (1917) 37 I.C., 830.

* Second Appeal No. 1543 of 1917.

CHELIMI CHETTY v. SUBBAMMA. — ABDUR RAHIM, J.

N. S. Rangaswami Ayyangar for *T. Narasimha Ayyangar* for the respondents.

The judgment of the Court was delivered by

Abdur Rahim, J.—This matter arises in connexion with a suit instituted on behalf of a minor member of a joint Hindu family for partition. The minor plaintiff died after the institution of the suit but before the written statement was filed. The respondent before us, who is the mother of the plaintiff, applied to the first Court to be brought on record and for permission to continue the suit as legal representative of the deceased plaintiff. That Court held that no cause of action survived and refused the application of the respondent. On appeal, however, the District Judge set aside the order of the first Court holding that the respondent was entitled to continue the suit as legal representative of the plaintiff. The contention before us on behalf of the defendants in the suit is that when the minor died whatever rights he had in the family property survived to the other members of the family as there was no partition. A rather interesting question was discussed before us as to whether an appeal lay to the District Judge from the order of the Court of first instance, but the learned vakil for the respondent did not mean to persist in the objection as to whether the proper remedy of the defendants in this Court was by way of second appeal or by way of moving us in revision. We need not therefore decide any such question.

On the merits the question that requires our decision is whether by the filing of the plaint severance was effected of the joint status of the family. This is an important point, but there is no authority expressly dealing with it. It is now settled law especially after the recent Privy Council decision in *Girja Bai* v. *Sadashiv Dhundiraj*(1) and the Full Bench decision of this Court in *Sundara Rajan* v. *Arunachalam Chetti*(2) that it is open to a member of a joint Hindu family to effect a division of his status by a clear and unequivocal expression of his intention without the necessity of any concurrence on the part of the other co-parceners. The last case laid down that the filing of the plaint is such an unambiguous and unequivocal manifestation of intention within the meaning of the ruling of the Privy Council. It is curious, as has been pointed out to us by the

(1) (1916) I.L.R., 43 Calc., 1031. (2) (1916) I.L.R., 39 Mad., 159 (P.C.).

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learned vakil for the respondent, that in the Full Bench case the plaintiff who instituted the suit was a minor. Apparently however no question such as has been raised before us was raised before the Full Bench for decision. There can be no doubt that what the Privy Council decided and what the Courts have followed is that it depends upon the discretion of a member of a joint Hindu family whether he is to continue the joint status or whether there should be a separation. That *prima facie* implies that the member who exercises such discretion must be of an age capable of exercising discretion in law. That will not be the case with a minor at least if he is of an age when discretion cannot be imputed to him. In the case of a suit instituted on behalf of a minor member of a Hindu family for partition, it has been laid down that it depends upon the discretion of the Court whether to make a decree for partition or not, that is to say, the Court has to consider in such cases whether a decree for partition would be for the benefit of the minor. If it is satisfied that it is not for the benefit of the minor to give a decree for partition the Court will dismiss the suit. This is laid down by the Privy Council in *Bachoo* v. *Mankosi Bai*(1) approving the decision of the Bombay High Court on this point. This has also been the law in this Presidency as stated in *Kamakshi Ammal* v. *Chidambara Reddi*(2) and that position has not been contested before us. If it is left to the discretion of the Court to say in a suit instituted on behalf of a minor whether there should be a division of the family or not, it seems to us *prima facie* to follow that the matter does not depend on the choice or option of any person who chooses to act on behalf of a minor member of a Hindu family. Any person is at liberty to institute a suit on behalf of a minor as the next friend and it is forcibly urged upon us by Mr. A. Krishnaswami Ayyar that it would lead to great hardship and inconvenience, if it were left to the discretion of any person who chooses to file a suit on behalf of a minor to decide whether the family of which the minor is a member shall continue joint or become separate. The institution of a suit so far as it expresses the intention of a member of the family to divide, depends on principle on the same basis as any other expression of intention

(1) (1907) I.L.R., 31 Bom., 373 (P.C.). (2) (1866) 3 M.H.C.R., 94 at p. 96.

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of a competent member of the family. If we are to hold that the filing of a plaint on behalf of a minor *ipso facto* constitutes a severance of the family status, then logically one would be driven to hold also that a notice given by such a person on behalf of the minor to the other members of the family of the intention to divide would also effect a severance of the joint status. This seems to us to be a position which we would not like to uphold without authority and no authority has been cited to us in support of it. It was strongly argued by the learned pleader for the respondent that as the plaint states facts and circumstances which, if proved, would be good justification for the Court decreeing partition, therefore at this stage we must proceed on the basis that there was a good cause of action and there was thus a severance of status effected by the institution of the suit. This clearly does not amount to anything more than this, that it is open to a person who chooses to act on behalf of a minor member of a Hindu family to exercise the discretion on his behalf to effect a severance. What causes the severance of a joint Hindu family is not the existence of certain facts which would justify any member to ask for partition, but it is the exercise of the option which the law lodges in a member of the joint family to say whether he shall continue to remain joint or whether he shall ask for a division. In the case of an adult he has not got to give any reasons why he asks for partition but has simply to say that he wants partition, and the Court is bound to give him a decree. In the case of a minor the law gives the Court the power to say whether there should be a division or not, and we think that it will lead to considerable complications and difficulties if we are to say that other persons also have got the discretion to create a division in the family, purporting to act on behalf of a minor. It is urged that there might be cases in which it would be desirable that partition should be effected in the best interests of the minor and as soon as possible. In such cases those who are interested on behalf of the minor are entitled to institute a suit, but having regard to the decision in *Bachoo* v. *Mankosi Bai* (1) and *Kamakshi Ammal* v. *Chidambara Reddi*(2), it must be left to the Court to decide whether there should be a partition or not.

(1) (1907) I.L.R., 31 Bom., 373 (P.C.). (2) (1866) 3 M.H.C.R., 94 at p. 96.

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We treat the Civil Revision Petition as a Second Appeal and set aside the order of the District Judge with costs here and in the Courts below. The respondents' petition will stand dismissed. This decree will not be drawn up unless the learned pleader for the appellants pays court fee within a week.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1917, August 10, 13, 16, 17 and 30.

P. L. A. PALANIAPPA CHETTIAR (PLAINTIFF), APPELLANT,

v.

V. L. A. R. VEERAPPA CHETTIAR AND NINE OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), ss. 13, 19 and 20—Loan to a partnership—One of the partners absent from British India—Suit for loan more than three years after loan but within three years after return of partner, whether barred and against whom—Release by some partners of a partnership debt, whether binding on legal representative of a deceased partner—Entries in debtor's accounts, whether payment of interest or acknowledgment.

The plaintiff's father was a partner along with the third, the sixth and the eighth defendants, of a firm at E, which advanced certain loans in 1903 and 1904 to a firm at S of which the first defendant and the former defendants were partners; the first defendant was out of British India from 1903 to 1908. The plaintiff sued in 1909 to recover his share of the loans from the partners of the firm at S. The defendants pleaded that the suit was barred by limitation; the plaintiff relied in bar of limitation on section 13 of the Limitation Act and also on certain unsigned entries in defendants' account books in which the interest accruing due were added to principal from time to time; the first defendant further pleaded a release by defendants Nos. 3, 6 and 8 of the claim against him as binding on the plaintiff:

Held, that the suit was not barred by limitation against the first defendant as the plaintiff was entitled to a deduction of the time during which the first defendant was out of British India but was barred against the other defendants under section 13 of the Limitation Act;

that the entries in the debtor's accounts could not be treated as payments of interest under section 20 of the Limitation Act, or as acknowledgments under section 19 of the Act as they were not signed by the debtors.

Held also, that a partner can release a partnership claim, and, after the death of a partner, the surviving partners have a right to release such a claim;

that, if a release by any of the partners is fraudulent the other partners can avoid it and seek to recover their share of the released debt, but the legal

* Appeal No. 134 of 1911.

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representative of a deceased partner is not entitled to avoid it as the right to do so is personal to the partners;

Held (on the facts) that the release of the first defendant by the third, sixth and eighth defendants was *bona fide* and binding on the plaintiff.

APPEAL against the decree of A. SAMBAMURTI AYYAR, the Temporary Subordinate Judge of Rāmnād, in Original Suit No. 72 of 1910.

The plaintiff's father, Velliappa Chetty, and the third, the sixth and the eighth defendants were doing business as partners at Epoh, while the latter and the first defendant were doing business as partners at Singapore. The other defendants were the undivided sons of the above said defendants respectively. On the 28th December, 1903, and the 20th January, 1904, the firm at Epoh advanced the suit loans to the Singapore firm. Velliappa died in 1904. The Singapore firm showed signs of failure and a composition deed was entered into between the said firm and its creditors including the firm at Epoh represented by the third, sixth and eighth defendants who were its surviving partners after the death of the plaintiff's father. Under the terms of the composition deed, *inter alia*, the first defendant was released from all liability to the creditors of the Singapore firm on his paying a certain amount for his share of the liability. This was assented to by the third, sixth and eighth defendants as partners of the Epoh firm. The first defendant paid the amount as agreed. The plaintiff, as the son of Velliappa who was a partner of the firm at Epoh during his life-time, sued to recover his five-elevenths share in the loans advanced by the Epoh firm to the Singapore firm and impleaded all the partners of the latter firm as defendants, impeaching the composition deed as fraudulent and collusive between the first and the other defendants. The first defendant was residing outside British India from 1903 to 1908 and the suit was instituted on the 3rd November, 1909, after the first defendant returned to British India. The first defendant and his undivided son, the second defendant (the other defendants being *ex parte*), contended that the suit was barred by limitation and that they were not liable by reason of the release of the first defendant's liability under the composition deed. The plaintiff relied in bar of the plea of limitation on section 13 of the Indian Limitation Act and also on certain alleged payments of interest and acknowledgments furnished by certain entries in the account-books of

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the Singapore firm, in which the interest accruing due on the loans were added to the principal from time to time, though the entries were not signed by the debtors or anyone on their behalf. The Subordinate Judge dismissed the suit ; the plaintiff preferred this appeal to the High Court.

K. Srinivasa Ayyangar A. Krishnaswamy Ayyar and *Patanjali Sastri* for the appellant.

Hon. Mr. *S. Srinivasa Ayyangar, Advocate-General*, for the respondents.

The judgment of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The suit was found by the Subordinate Judge to be barred by limitation. The suit loans were taken on 28th December, 1903, and 20th January, 1904, but the suit was not instituted till 3rd November, 1909.

Appellant's first contention may be briefly disposed of. His vakil argues that in accordance with a usage of the trading community to which the parties belong, there was an automatic renewal at the end of every three months, the accrued interest being added to the principal and the total being treated as a fresh loan. There are entries in defendants' accounts which might be consistent with such a usage, but no evidence whatever has been adduced to show its actual existence. No such contention appears to have been raised in the Lower Court as far as can be seen and in paragraph 14 of his judgment the Subordinate Judge says these quarterly entries were made according to custom merely with a view to record exactly the amount of liability. In the absence of evidence of the usage this plea must be rejected.

It is next urged that these entries in defendants' accounts should be treated as payments of interest within the meaning of section 20, Indian Limitation Act. This position is equally untenable. Entries in the debtors' account-books cannot be treated as payments : vide *Ichha Dhanji* v. *Natha*(1). Appellant relies on *Kariyappa* v. *Rachapa*(2) but the ruling in that case is clearly against him. There is nothing to show that similar entries were made in plaintiff's own books ; and the entries in the books of the debtor firm could in no circumstances be a complete answer to a suit brought by the creditor for recovery of the amount due to him. The entries are not signed and so cannot be treated as acknowledgments under section 19, Indian Limitation Act.

(1) (1889) I.L.R., 13 Bom., 338. (2) (1900) I.L.R., 24 Bom., 493.

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The last argument of Mr. Patanjali Sastri on the question of limitation is entitled to far more weight. He argues that as the first defendant was not in British India for six years from 1903 to 1908 the plaintiff's cause of action was suspended during that period under section 13 of the Limitation Act, not only against the first defendant but also against defendants Nos. 6 and 8. Before disposing of this question of law, we must deal with a preliminary objection raised by the respondents to its consideration. It was argued on their behalf that this exemption from limitation was not specifically pleaded in the plaint, and that consequently the appellant is not entitled to be heard on it. We asked the learned Vakils that as the question was considered at length by the Subordinate Judge, whether there are any grounds for holding that they were prejudiced by the procedure adopted by the lower Court. In answer, we were told that if this point had been mentioned in the plaint and raised in the issue, the defendants could have pleaded that under the law of Epoh the suit was barred by limitation altogether. We are unable to understand why this plea should not have been put forward even though the exemption under section 13 of the Indian Limitation Act was not specifically raised in the plaint. Having regard to the fact that the plea of limitation can be disposed of upon the admissions made by the defendant himself and having also regard to the fact that the question was considered by the lower Court, we think we should not be justified in refusing to hear the appellant on this point. Before proceeding further we may say that the deposition of the first defendant is clear and unambiguous that between 1903 (we shall take the end of 1903) and December 1908 he was not in British India. On this evidence there can be no doubt that if the first defendant were the sole defendant, the suit would be in time.

The question argued by the learned vakil for the appellant has two aspects :—One is whether the plaintiff is entitled to claim a reduction of time as against all the defendants by the fact that one of them was absent from British India, and the other whether the plaintiff is not entitled to deduct the time at least as against the particular defendant who was not resident in India. These questions are not covered by any Indian authority. Mr. Patanjali Sastri drew our attention to some English cases bearing upon the statute of Queen Anne. The language of that

statute is not very different from the one we have to construe. In *Fannin* v. *Anderson*(1) Lord DENMAN, Chief Justice, held that if one of the defendants was absent in a foreign country, the plaintiff was entitled to have the period of absence deducted in his favour as against the particular defendant and his co-promisors. This was followed by JERVIS, C.J., in *Towns* v. *Mead*(2). The other learned Judges who sat with him expressed no opinion on the question. These two cases were quoted with approval in *Roddam* v. *Morley*(3). Prima facie therefore the extreme contention of the learned vakil for the appellant would seem to derive support from these decisions; that on examining them, we are of opinion that the plaintiff is not entitled to deduct the time of absence of the first defendant as against the other defendants. Mr. Shephard in his commentary on the Indian Limitation Act points out that under the English law if a co-obligor who is within the jurisdiction is sued, it is open to him to demur to the trial of the action on the ground that the other co-obligors should also be proceeded with at the same trial. Reference may be made in this connexion to the well-known case of *King* v. *Hoare*(4). Having regard to section 43 of the Indian Contract Act which declares that co-promisors are jointly and severally liable such a plea will not be available in India. Secondly, it is stated in *Fannin* v. *Anderson*(1):

"The plaintiff cannot bring the absent defendants into Court by any act of his; and, therefore, if he be compelled to sue those who are within six years, without joining those who are absent, he may possibly recover against insolvent persons, and lose his remedy against the solvent ones who are absent."

That again is not the rule of law which obtains in this country. See *Mahammad Askari* v. *Radha Ram Singh*(5) and *Mool Chand* v. *Alwar Chetty*(6). It is doubtful whether the principle mentioned by Lord DENMAN, Chief Justice, is good law now even in England. See Bullen and Leake's Precedents of Pleadings note (*a*) at page 614 and Leake on Contracts, page 684 (6th edition). In this treatise, the law is stated in these terms:

(1) (1845) 7 Q.B., 811. (2) (1855) 16 C.B., 123.
(3) (1857) 1 De G. & J. 1 at p. 11.
(4) (1844) 13 M. & W., 494; s.c., 153 E.R. 206.
(5) (1900) I.L.R., 22 All., 307.
(6) (1916) I.L.R., 39 Mad., 548.

judgment recovered against one of joint obligors of a bond merges the joint liability on the bond, and is a bar to an action against the others; but if the obligors are bound jointly and severally the judgment against one, without satisfaction, is no bar to an action against another upon his several liability, whilst any part of the debt remains due."

A third ground upon which the English decisions proceed is pointed out in Darby and Bosanquet on Limitation and that is that the principle of the cases decided under the Statute of James which applies to one of several plaintiffs residing abroad should govern the construction of the Statute of Queen Anne as well. None of the above special grounds are applicable to India. Moreover the language of section 13 of the Limitation Act does not lend itself to the extreme contention of the appellant. Although the singular 'defendant' would include the plural 'defendants,' the contention would necessitate our reading into the section some words like these, namely, "if there are more defendants than one and any one of them happens to be out of British India." We see no reason for adopting such a construction. We must therefore hold that the absence of the first defendant would not entitle the plaintiff to count the period of his absence in his favour as against defendants Nos. 6 and 8.

On the other hand we think that the alternative contention of the learned vakil for the appellant is well-founded. As we have stated already under section 43 of the Indian Contract Act the liability of co-promisors is joint and several. Section 249 of the Contract Act enunciates the same principle as regards partners. Consequently the plaintiff could sue for the whole of the amount the first defendant alone; and he would be entitled under section 13 of the Limitation Act to deduct the time during which the latter was absent from British India. The fact that in the suit thus brought, the plaintiff has impleaded defendants Nos. 6 and 8 is no ground for rejecting the claim as against the first defendant also. No violence will be done to the language of section 13 of the Limitation Act by holding that as against the absentee—defendant alone the plaintiff is entitled to the deduction of time during which he was away from British India. The fact that he could have sued his co-obligors who were within British India is not a ground for holding that the claim against the first defendant is barred by limitation: see *Abdulkhadir* v. *Ahammad Shaiwa Ravuthar*(1). We must therefore hold that the

(1) (1915) I.L.R., 38 Mad., 419.

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appeal, so far as defendants Nos. 6 and 8 are concerned, fails and must be dismissed; the appeal also fails as against defendants Nos. 3, 4, 5, 7, 9 and 10 who are members of a joint family with defendants Nos. 6 and 8. We must now proceed to hear the appeal against the defendants Nos. 1 and 2 on the merits.

This appeal as against respondents Nos. 1 and 2 again coming on for hearing the following judgment of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—On the second question argued by Mr. A. Krishnaswami Ayyar, the facts are these:—The father of the plaintiff was a partner with defendants Nos. 3, 6 and 8, in the Epoh firm, which we shall denominate as the creditor-firm. Defendants Nos. 3, 6 and 8 were also partners with the first defendant in the Singapore firm, which we shall call the debtor-firm. The plaintiff's father died in 1903. During the course of the winding up of the creditor-firm defendants Nos. 3, 6 and 8 lent to the debtor-firm a certain sum of money. The present suit is to recover the plaintiff's share of that loan. The question whether the plaintiff can maintain the suit against a firm which consists of some of his own partners need not be decided as we agree with the lower Court upon another point.

By Exhibit I, the debtor-firm entered into a deed of composition with the outside creditors of that firm. The main provisions of that document are that the first defendant should pay a certain sum of money to pay off these outside creditors and that he should be released from liability to his partners for any moneys advanced by them. The arrangement come to appears to us to have been bona fide and reflects credit on the partners in that they agreed to forego their own rights with a view to pay off those who had lent monies to the firm. We are unable to agree with Mr. A. Krishnaswami Ayyar that by such an understanding defendants Nos. 3, 6 and 8 secured any personal advantage to themselves. We agree that moral turpitude need not be brought home to them, see *Norton* v. *Lord Ashburton*(1), but we think that the arrangement was a business like one and was entered into for the purpose of securing the best interests of the debtor-firm. The question, under these circumstances, is whether the release of the first defendant is impeachable by the plaintiff. That one partner can release a partnership liability is well established—see Lindley, page 180. That after dissolution by the

(1) (1914) A.C., 932.

PALANIAPPA CHETTIAR v. VEERAPPA CHETTIAR. — SESHAGIRI AYYAR, J.

death of one of the partners the surviving partners still have the right of releasing a claim is clear from section 263 of the Contract Act: vide also *Motilal Bechardass* v. *Ghellabhai Hariram*(1).

Mr. A. Krishnaswami Ayyar put forward the ingenious argument that after the death of one of the partners, his legal representative continues to be a partner for the purpose of winding up. We are unable to accede to this proposition. Under section 241, the legal representative of a deceased partner will become a lender in respect of any business that might have been carried on by the surviving partners. If no business is carried on then the legal representative will be a tenant in common with the surviving partners in respect of the assets of the business—vide Story on Partnership, section 346. That the principle of section 45 of the Contract Act is applicable to partners was decided in *Motilal Bechardass* v. *Ghellabhai Hariram*(1) and we agree with this proposition. The argument that by section 263 of the Contract Act, the legal representative of a deceased partner is by implication a partner is opposed to the language of the section. Clause (2) of section 29 of the English Partnership Act was relied on. That only shows that if during the winding up the partner makes a secret profit, he is accountable to the legal representatives of the deceased partner for it. That section is no authority for the position contended for by the learned vakil. *Piercy* v. *Fynney*(2), *Veerasawmy Naicker* v. *Ibramsa Rowther*(3) and *Baikunt Nath Chakrabarti* v. *Haree Lal Pal Chowdhury*(4) lay down that if a release by one of the parties is fraudulent, the other partners can avoid it and seek to recover their share of the released debt. The legal representative is not entitled to such a right which is personal to the partners. We are therefore of opinion that the release of the first defendant is binding on the plaintiff. If he had been damnified by the conduct of defendants Nos. 3, 6 and 8, his remedy is to sue them for damages. As we have held that the claim against defendants Nos. 3, 6 and 8 is barred by limitation, this matter need not be pursued any further.

The decision of the Court below is right and we dismiss the appeal with the costs of defendants Nos. 1 and 2.

K.R.

(1) (1893) I.L.R., 17 Bom., 6 at p. 13.
(2) (1871) L.R., 12 Eq., 69.
(3) (1909) 19 M.L.J., 221.
(4) (1911) 13 C.L.J., 234.

APPELLATE CIVIL.

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

GRANDE GANGAYYA (PLAINTIFF), APPELLANT,

v.

1917, September, 20.

GRANDE VENKATARAMIAH AND THREE OTHERS (DEFENDANTS), RESPONDENTS. *

Partnership by manager of joint Hindu family with strangers—Right of other members of family to institute suits in respect of partnership.

A contract of partnership entered into by the manager of a joint Hindu family with strangers does not *ipso facto* make the other members of the family partners; and not being partners, the other members whether divided or undivided cannot institute any suit in respect of partnership (e.g.) a suit for dissolution of partnership.

Sokkanadha Vannimundar v. *Sokkanadha Vannimundar* (1905) I.L.R., 28 Mad., 344, and *Ramanathan Chetty* v. *Yegappa Chetty* (1916) 30 M.L.J., 241, applied.

Joopoody Sarayya v. *Lakshmanaswamy* (1913) I.L.R., 36 Mad., 185 (P.C.), distinguished.

APPEAL under clause (15) of the Letters Patent against the judgment of SPENCER, J., who differed from PHILLIPS, J., in *Gangayya* v. *Venkataramiah*(1).

Plaintiff and defendants Nos. 1 and 4 were members of an undivided Hindu family and first defendant as manager and on behalf of his family entered into a partnership with third defendant, a stranger, for the purpose of carrying on a trade. Subsequently plaintiff and defendants Nos. 1 and 4 became divided, and effected an actual partition of a considerable portion of the family property, but the property invested in the joint trade with third defendant was not divided. Thereafter plaintiff brought this suit to recover his share in that trade, and prayed for a dissolution of the partnership and for taking an account. The suit was dismissed by the lower Courts on the ground that as he was not a partner, he could not sue for dissolution of partnership. Against the dismissal the plaintiff preferred a Second Appeal to the High Court, which was heard by SPENCER and PHILLIPS, JJ. SPENCER, J., agreed with the lower Courts and

* Letters Patent Appeal No. 261 of 1916.

(1) Second Appeal No. 1897 of 1915, preferred against the decree of H. R. BARDSWELL, the District Judge of Kurnool, in Appeal Suit No. 163 of 1914 preferred against the decree of C. V. KRISHNASWAMI AYYAR, the District Munsif of Kurnool, in Original Suit No. 885 of 1913.

dismissed the second appeal, while PHILLIPS, J., allowed the second appeal holding that the plaintiff had a cause of action and could get a decree at least for taking accounts of the partnership and for delivery of his share. In the result the second appeal was dismissed with costs. The plaintiff preferred this Letters Patent Appeal. GANGAYYA v. VENKATARAMIAH.

B. Sitarama Rao for *A. Krishnaswami Ayyar* for the appellant.—Where a manager of a joint Hindu family is a partner of a firm, the other members of the family are also in law members of the partnership; and as soon as there is a partition in the family, different *personæ* arise as regards partnership and each member has a right to sue for dissolution of the partnership: *Joopoody Sarayya* v. *Lakshmanaswamy*(1).

T. R. Venkatarama Sastriyar for the respondent.—Some of the other properties of the family have not been fully divided and if this suit is allowed it will be encouraging a suit for partial partition. Even when the manager carries on a trade on behalf of the family, without any strangers as partners, junior members of the family have no right to interfere in the affairs of the trade: See *Kishan Prasad* v. *Har Narain Singh*(2). See also *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar*(3). The meaning of the passage in page 192 of *Joopoody Sarayya* v. *Lakshmanaswamy*(1) is given in *Ramanathan Chetty* v. *Yegappa Chetty*(4).

KUMARASWAMI SASTRIYAR, J.—The question for decision is whether it is open to a member of a Hindu family who has become divided in status to sue for dissolution of a partnership entered into between the managing member of the family and strangers when the family was joint. KUMARASWAMI SASTRIYAR, J.

Sections 254 and 265 of the Indian Contract Act only contemplate suits by one of the partners (as defined in section 239) for dissolution of partnership and the taking of the partnership accounts and there is nothing in the Act which confers such right of suit on a person merely by reason of his being entitled to a share in the interest of one of the partners in the firm. Such a person cannot be in a better position than a sub-partner

(1) (1913) I.L.R., 36 Mad., 185 at p. 192 (P.C.).
(2) (1911) I.L.R., 33 All., 272 (P.C.).
(3) (1905) I.L.R., 28 Mad., 344.
(4) (1916) 30 M.L.J., 241.

GANGAYYA v. VENKATA-RAMIAH. — KUMARA-SWAMI SASTRIYAR, J.

and it is settled law that he has no right to ask for dissolution of partnership or the taking of the partnership accounts, there being no contract or privity except between him and the partner with whom he is a sub-partner.

In the present case the plaintiff was not admitted as a partner in the firm during his minority so as to entitle him to the benefit of section 247 of the Contract Act or after he became a major so as to make him a partner within the meaning of section 239. The only ground on which he became a partner in the firm is that he became in law a partner of the firm when the managing member of the family entered into the contract of partnership with the third defendant or when owing to a partition between himself and the other members of the family he became entitled to a specific divided share in the joint family properties.

It is well settled that a contract of partnership between a member of a joint family and a stranger does not make every member of the joint family which the managing member represents a partner so as to clothe him with all the rights and obligations of a partner as defined in section 239 of the Contract Act. I need only refer to *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar*(1), *Ramanathan Chetty* v. *Yegappa Chetty*(2) and *Vadilal* v. *Shah Khushal*(3). It is no doubt true that as between the members of the undivided family and the co-parcener who enters into a contract of partnership for the benefit of the family they will be entitled to call upon him to account for the profits earned by him from the partnership and to share in such profits but this will not place them in any position of direct contractual relationship with the other partners of the firm. Nor would the fact that the entire assets of the joint family might be available to the creditors of the firm make any difference. The position of the plaintiff in the present case cannot be higher than that of a sub-partner. The managing member of an undivided family though he has the power of representing the interests of the other members is not their agent in the strict sense of the term so as to clothe the other members of the family with all the rights of principals in respect of contracts entered into by their agent. His position is, as pointed out by their

(1) (1905) I.L.R., 28 Mad., 344. (2) (1916) 30 M.L.J., 241.
(3) (1903) I.L.R., 27 Bom., 157.

GANGAYYA v. VENKATA-RAMIAH. — KUMARA-SWAMI SASTRIYAR, J.

Lordships of the Privy Council in *Annamalai Chetty* v. *Murugesa Chetty*(1) more analogus to that of a trustee.

If a member of a joint family does not become *ipso facto* a partner by reason of the contract of partnership entered into between a member of his family, it is difficult to see on what ground a partition would place him in a better position. Reliance has been placed by Mr. Seetarama Rao on the observations of their Lordships of the Privy Council in *Joopoody Sarayya* v *Lakshmanaswamy*(2) to the effect that different *personæ* arose in law on a partition between members of joint family one of whom was carrying on business in partnership with a stranger so as to entitle the stranger to refuse alliance in partnership with the divided members. What their Lordships were considering was the question of fact as to when a partnership became dissolved so as to attract the provisions of article 106 of the second schedule of the Limitation Act and I entirely agree with the observations of COUTTS TROTTER, J., and SRINIVASA AYYANGAR, J., in *Ramanathan Chetty* v. *Yegappa Chetty*(3) to the effect that their Lordships cannot be taken to have overruled the decisions of Indian Courts as to the position of co-parcener in relation to a partnership entered into by one of the members of the family.

When there has been a partition between the members of a joint family all that the divided co-parcener can do is to call upon the managing member or co-parcener partner of the firm to get in the assets which would be due to him as partner by proper proceedings against his partners and divide it between them in the proportion of their shares in the joint family property. If he refuses or neglects to do so their remedy is to treat the interest of the co-parcener in the firm as joint family assets and to sue for partition. In such a suit the assets can be realized by the appointment of a receiver who as representing the partner co-parcener can by appropriate proceedings get in what may be due to him. It has been argued that this procedure will lead to a multiplicity of actions, but looking at the question from the mere stand point of convenience I think it would be mischievous to hold that a co-parcener can interfere with the affairs of the partnership simply because he has on partition got a specific

(1) (1903) I.L.R., 26 Mad., 544 at p. 545 (P.C.).
(2) (1913) I.L.R., 36 Mad., 185 (P.C.). (3) (1916) 30 M.L.J., 241.

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share in the interest of one of the partners and to treat him as a partner because of a partition with which the other partners have no concern. In cases of a mere change of status which according to the recent decision of the Privy Council can be effected by a mere unilateral declaration of intention the position is still more complicated as it may well be that on actual partition of the various items of joint family property the interest of the family in the business may go to some other co-parcener. I do not think that any consideration of inconvenience to the members of a joint family should affect the settled rules of law as to the rights and obligations of partners *inter se*.

I am of opinion that the decision of Mr. Justice SPENCER is right and would dismiss the Letters Patent Appeal with costs.

WALLIS, C.J. WALLIS, C.J.—I agree.

BAKEWELL, J. BAKEWELL, J.—I agree.

N. R.

APPELLATE CIVIL.

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

1917, September 11 and 21.

MANJESHWARA KRISHNAYA (THIRD DEFENDANT), APPELLANT,

v.

VASUDEVA MALLYA AND FOUR OTHERS (PLAINTIFFS NOS. 1 TO 5 AND FIRST DEFENDANT), RESPONDENTS.*

Lis Pendens—*Transfer of Property Act (IV of 1882), sec. 52—No contest between defendants—Alienation by one defendant to a stranger pending suit, whether affected by* lis pendens.

The rule of *lis pendens* enunciated in section 52 of the Transfer of Property Act does not differ from the English rule and it protects parties to litigation against alienations by their opponents pending suit; and the prohibition contained in the section is like *res judicata* inapplicable between parties to the suit who are ranged on the same side and between whom there is no issue for adjudication. 'Any other party' in section 52 means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation.

Bellamy v. *Sabine* (1857) 1 De. G. & J., 566 and *Faiyaz Husain Khan* v. *Prag Narain* (1907) I.L.R., 29 All., 339 and 245 (P.C.), applied.

* Letters Patent Appeal No. 283 of 1916.

KRISHNAYA v. MALLYA.

In a previous suit by *A* to set aside a sale made by him to *B* as void and invalid and consequently to set aside a mortgage made by *B* to *C* also as invalid, the plea of *B* and *C* that both the sale and mortgage were good was upheld. Pending the suit *D* bought *B*'s rights in a Court auction. In a subsequent suit by *C* to enforce the mortgage,

Held that *D*'s purchase was not affected by *lis pendens* as there was no contest between *B* and *C* in the previous suit as to the validity of the mortgage and that *D* was entitled to plead that the mortgage was invalid as having no consideration.

APPEAL under clause 15 of the Letters Patent against the judgment of PHILLIPS, J., who differed from OLDFIELD, J., in *Krishnaya* v. *Vasudeva Mallya*(1):

One Manjunatha Bhandari filed a suit (O.S. No. 114 of 1898) for a declaration that a sale-deed of the suit properties which he had executed in favour of one who was the first defendant in that suit and in this, was not binding on him, and for a further declaration that the mortgage for Rs. 2,000 executed by the first defendant in favour of the third defendant in that suit, the father of the present plaintiffs, was not valid and binding on him. The real question then was as to the validity of the sale under Exhibit D, as, if that was upheld, the plaintiff had no concern with the subsequent mortgage executed by the vendee, the first defendant, to the third defendant (the father of the present plaintiffs). The first and third defendants in that suit made common cause by pleading the validity of the sale and the mortgage and succeeded in upholding the validity of the sale under Exhibit D, subject to the plaintiff's lien for unpaid purchase money. The first defendant in his written statement in the previous suit admitted his mortgage to the third defendant, and the High Court in second appeal decided in effect that the plaintiff was entitled to a charge on the property for his unpaid purchase money in priority to the third defendant's mortgage. While that suit (O.S. No. 114 of 1898) was pending, the present second defendant, by Exhibit H, dated 18th December 1899, acquired the first defendant's interest in the same properties at a sale in execution. Thereafter the plaintiffs in the present suit, viz., the sons of the third defendant in the previous suit

(1) Second Appeal No. 1736 of 1914 preferred against the judgment of E. L. THORNTON, the District Judge of South Kanara, in Appeal Suit No. 45 of 1913, preferred against the decree of D. RAGHAVENDRA RAO, the Subordinate Judge of South Kanara, in Original Suit No. 60 of 1911 (Original Suit No. 63 of 1906) on the file of the District Court of South Kanara.

KRISHNAYA v. MALLYA.

brought this suit to enforce the mortgage against the first defendant and the second defendant, who was the purchaser of his rights in Court auction, and the present third defendant who was the alienee from him. The defendants pleaded *inter alia* that the mortgage had no consideration and was not valid.

The plaintiffs answered that the defendants were not entitled to raise this defence as the Court sale to them was, pending the suit in which the sale under Exhibit D, and the mortgage were in question. The lower Courts, upholding this answer allowed the suit. A second appeal filed by the third defendant was heard by OLDFIELD and PHILLIPS, JJ. OLDFIELD, J., allowed the appeal holding that the defendants were not affected by *lis pendens* as there was no contest in the previous suit as to the validity of the mortgage and remanded the suit for disposal on the merits of the plea as to the want of consideration for the mortgage. PHILLIPS, J., agreed with the lower Courts and dismissed the second appeal. In the result the second appeal was dismissed with costs under section 98, Civil Procedure Code. The third defendant preferred this Letters Patent Appeal.

B. Sitarama Rao for the appellant.—I am not affected by *lis pendens*, as there was no *lis* between the defendants about the mortgage in the previous suit. The previous suit was by the plaintiff therein to have the sale by him to the first defendant herein and the mortgage executed by the first defendant to the second defendant therein declared void. The decree was that the sale was good and that the plaintiff therein was entitled to a charge for unpaid purchase money in priority to the mortgage. Once it was declared that the sale was good, plaintiff therein had no right or interest to question the mortgage and the Court could not and did not give any declaration as to the validity of the mortgage. An adjudication as to the mortgage was unnecessary to give the necessary relief to the plaintiff and both the defendants pleaded that the mortgage was good.

A. Narasimhachariar for *V. V. Srinivasa Ayyangar* for respondent.—The defendant is affected by *lis pendens*. There was in the previous judgment an actual adjudication that the mortgage in my favour was good. The plaintiff attacked the mortgage.

KRISHNAYA v. MALLYA.

[Court—But not the defendants *inter se*, all of whom supported the mortgage. It was not then necessary to decide the validity of the mortgage.]

I rely on *Bellamy* v. *Sabine*(1).

[WALLIS, C.J.—That lays down that an alienation cannot be made *pendente lite* so as to prejudice the opposite party. That is the meaning to be given to the words 'other party' in section 52 of Transfer of Property Act.]

I rely on *Tyler* v. *Thomas*(2). The principle of *lis pendens* is not that there is a judgment against one party or another but that the judgment affects the land; Story's Equiety Jurisprudence, sections 405 and 406.

B. Sitarama Rao in reply quoted *Annamalai Chettiar* v. *Malayandi Appaya Naik*(3) to show that there must be a contest between the defendants. He referred to *Faiyaz Husain Khan* v. *Prag Narain*(4) and *Krishna Kamini Debi* v. *Deno Money Chowdhurani*(5). Section 52 of the Transfer of Property Act does not in terms apply but its principle applies.

WALLIS, C.J.—Manjunatha Bhandari filed a suit, Original Suit No. 114 of 1898, for a declaration that the sale deed of the suit properties which he had executed in favour of the first defendant in that suit and this was not binding on him, and for a further declaration that the mortgage for Rs. 2,000 executed by the first defendant in favour of the third defendant in that suit, the father of the present plaintiffs, was not valid and binding on him. The real question was the validity of the sale under Exhibit D, as if that was upheld, the plaintiff had no concern with the subsequent mortgage by the vendee, the first defendant, to the third defendant, the father of the present plaintiffs. The first and third defendants in that suit made common cause and succeeded in upholding the validity of the sale under Exhibit D, subject to the plaintiffs' lien for unpaid purchase money. The first defendant in his written statement admitted his mortgage to the third defendant, and as there was no contest about the mortgage what the High Court apparently

WALLIS, C.J.

(1) (1857) 1 De. G. & J., 566. (2) (1858) 25 Beav. 47.
(3) (1906) I.L.R., 29 Mad., 426 at p. 434.
(4) (1907) I.L.R., 29 All., 339 at p. 345 (P.C.).
(5) (1904) I.L.R., 31 Calc., 658 at p. 663.

KRISHNAYA v. MALLYA. — WALLIS, C.J.

decided was that the plaintiff was entitled to a charge on the property for his unpaid purchase money in priority to the third defendant's mortgage. While this suit, Original Suit No. 114 of 1898, was pending, the present second defendant, by Exhibit H, dated 18th December 1899, acquired the first defendant's interest in the suit properties at a sale in execution. It is well settled that the doctrine of *lis pendens* applies to purchases at auction sales in execution of decrees against parties to the suit as well as to private alienations by the parties, and the question before us is whether the second defendant's purchase from the first defendant pending the suit was subject to the result of the suit and whether the result of the suit was to preclude the present second defendant as alienee from the first defendant from disputing the validity of the mortgage executed by the first defendant to the third defendant, the father of the present plaintiffs, in the present suit which they have brought to enforce it. That again raises the question whether the alienation by the first to the second defendant pending suit is affected by the doctrine of *lis pendens* as embodied in section 52 of the Transfer of Property Act. As there was absolutely no contest on the point between the first and third defendants in that suit, it seems clear that the present case is not within the English doctrine as to *lis pendens* which is intended to protect the parties to litigation against alienations by their opponents pending suit. This is clearly explained by Lord CRANWORTH in *Bellamy* v. *Sabine*(1) where he observes that *lis pendens* affects a purchaser,

"not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property, in dispute so as to prejudice the opposite party."

Later on he observes

"*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent,"

and in *Faiyaz Husain Khan* v. *Prag Narain*(2) Lord MACNAUGHTEN, delivering the judgment of the Judicial Committee in a case governed by section 52 of the Transfer of Property Act, referred to this as the 'correct mode of stating the doctrine'. If then the English doctrine and the principle on which it rests is only

(1) (1857) 1 De. G. & J. 566. (2) (1907) I.L.R., 29 All., 339 at p. 345 (P.C.).

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applicable as between opponents with regard to alienations made by any one of them during suit, does the language of section 52 of the Transfer of Property Act compel us to apply the doctrine as between parties to the suit who were ranged on the same side and between whom there was no issue for adjudication? The section provides that

"during the active prosecution of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein."

It is not, I think, putting an unduly restrictive construction on the section to say that 'any other party' whose rights are not to be affected means any other party who can be said to be arrayed on the opposite side to the party alienating owing to the existence of some issue between them upon which the Court is called to adjudicate in the suit which may thus be regarded as a contentious suit between them in which each of them requires the protection of the doctrine against alienations by the other. In other words 'any other party' in this section means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation.

To hold otherwise would have strange and incongruous results which cannot have been contemplated by the legislature. The law of *lis pendens* is an extension of the law of *res judicata*, and makes the adjudication in the suit binding on alienees from the parties pending suit, just as the law of *res judicata* makes the adjudication binding on the parties to the suit and on alienees from them after decree. Now it is well settled that the bar of *res judicata* does not arise between defendants in a suit unless there is an active contest between them. Consequently the issue as to the validity of the mortgage would not be *res judicata* as between the present plaintiffs, the representatives of the third defendant in the former suit, and the first defendant in that suit and this, or between them and the second defendant if the alienation by the first defendant to the second defendant had been made after the decree instead of during the pendency of the suit. It would be indeed incongruous if the effect of section 52 were to bar a transferee from one of the parties pending suit from raising an issue which his transferor and

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transferees from his transferor after decree are at liberty to raise. In these circumstances I think we are justified in placing a restrictive construction on the language of section 52 so as to avoid this incongruity and to bring the section into line with the English law, more especially as the observations of Lord MACNAUGHTEN already referred to seem to support this interpretation. This is the construction put on the section by OLDFIELD, J., with whom I agree.

This is sufficient to dispose of the appeal but, as some reliance has been placed on the fact that the decree of the High Court in Second Appeal No. 323 of 1902 on appeal from the decree of the District Judge in Appeal No. 299 of 1900 affirming the decree of the District Munsif in Original Suit No. 114 of 1898 contains a declaration of the validity of the mortgage, Exhibit I, by the first defendant to the third defendant subject to the plaintiff's claim for Rs. 1,000 for unpaid purchase money which, it is said, amounts to an adjudication on the question, I may state that this declaration is not, in my opinion, an adjudication between the first and the third defendants in that suit. In their judgment, Exhibit E, the High Court expressly directed the decree of the lower Court to be modified by the insertion of this declaration 'as between the plaintiff and the third defendant' and accepted the findings of the lower Court, one of which was that the mortgage by the first defendant to the third defendant was fraudulent and without consideration (paragraph 5). It is not easy to reconcile their acceptance of this finding with the declaration they granted of the validity of the mortgage as between the plaintiff and the third defendant. But, as already pointed out, in the result of the suit the plaintiff was not concerned with the validity of the mortgage seeing that it was postponed to his claim for unpaid purchase money and that he had failed to set aside his sale to the first defendant, and probably all that was meant was that the mortgage, which the first defendant the mortgagor did not dispute, was to be subject to the plaintiff's lien for Rs. 1,000 for unpaid purchase money. In the result I agree with OLDFIELD, J., and would allow the Letters Patent Appeal with costs and make the order proposed by him.

BAKEWELL, J.

BAKEWELL, J.—I agree.

KUMARASWAMI SASTRIYAR, J.

KUMARASWAMI SASTRIYAR, J.—I agree.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Phillips and Mr. Justice Krishnan.

1917 October 8.

THE KING-EMPEROR, APPELLANT,

v.

LAL BAGE (ACCUSED), RESPONDENT.*

Police Act (XXIV of 1859), sec. 46—'Threat,' meaning of—Demand by a police constable of mamul or customary payment, whether an offence under the section.

A demand by a police constable, of a 'mamul' (customary payment made to obtain his favour), is a '*threat*' within section 46 of the Police Act (XXIV of 1859) and obtaining money by such threat is an offence under the section. †

APPEAL under section 417 of the Code of Criminal Procedure (Act V of 1898) against the acquittal of the accused by *Janab Moulvi Muhammad Hubibullah Khan* Bahadur, the Sub-divisional Magistrate of Guntur, in Criminal Appeal No. 20 of 1917, preferred against the conviction and sentence by *R. Kotayya*, the Stationary Sub-Magistrate of Guntur, in Calendar Case No. 51 of 1917.

The accused, a police constable in the town of Guntur, demanded of a shepherd who had as usual brought his goats to Guntur for sale, the payment of his 'mamul' (a customary payment) and threatened to take him to the police station in case of non-compliance. The shepherd accordingly paid three annas to the accused. On these facts deposed to by the shepherd and two others, the Sub-Magistrate convicted the accused of having committed an offence under section 46 of the Police Act (XXIV of 1859) but the conviction was set aside on appeal by the

* Criminal Appeal No. 327 of 1917.

† Section 46 of the Police Act (XXIV of 1859) is as follows:—

"Any police officer who shall, directly or indirectly, extort, exact, seek, or obtain any bribe or unauthorized reward or consideration, by any illegal threat or pretence, or for doing or omitting or delaying to do, any act which it may be his duty to do or to cause to be done, or for withholding or delaying any information which he is bound to afford or to communicate, or who shall attempt to commit any of the offences abovesaid, or shall be guilty of cowardice, shall be liable, upon conviction before a Magistrate, to a fine not exceeding twelve months' pay, or to imprisonment, with or without hard labour, not exceeding twelve months or both."

THE KING-EMPEROR v. LAL BAGE.

First-class Magistrate of Guntur who disbelieved the prosecution evidence. The Public Prosecutor preferred this appeal to the High Court under section 417, Criminal Procedure Code.

E. R. Osborne, the acting Public Prosecutor, for the Crown.

K. P. Padmanabha Pillai for the accused.

The judgment of the Court was delivered by

PHILLIPS, J. PHILLIPS, J.—The prosecution case is that prosecution first witness paid three annas to accused as 'mamul.' The demand of the 'mamul' is spoken to not only by prosecution first witness but also by prosecution second witness, and the payment of the money was witnessed by prosecution fourth witness, the Circle Inspector. The Sub-Magistrate who tried the case believed these witnesses, and there is certainly no reason, in our opinion, for disbelieving prosecution first witness, who made his statement to the Inspector at the earliest opportunity. Accused's story is that he paid three annas to prosecution first witness as earnest money for purchase of a goat, and that prosecution first witness returned the money as he withdrew from the bargain. Defence witnesses Nos. 1 to 3 are examined in support of this story, but the prosecution witnesses were not cross-examined as to their presence at the scene of offence and the Sub-Magistrate has given good reasons for rejecting their evidence. On the facts we think the Deputy Magistrate has paid too little regard to the opinion of the Magistrate who heard the evidence, an opinion in which we entirely agree.

As regards the point of law the Deputy Magistrate considers that all the elements necessary to constitute an offence under section 46 of the Police Act are not established. The mere demand of a 'mamul' or customary payment made in order to obtain the favour of the official demanding it is itself a threat and consequently the obtaining of money by such a demand comes within section 46 of the Police Act. In this case we have also the evidence of prosecution first witness that he paid as the police were troubling him and in Exhibit A he says the police threatened to take him to the police station. We therefore restore the conviction by the Sub-Magistrate under section 46 of the Police Act and confirm the sentence of imprisonment, but reduce the fine to Rs. 15.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Bakewell.

MEDA CHINNA SUBBAMMA (PETITIONER), APPELLANT,

1917, October 10.

v.

PAPIREDDIGARI CHENNAYYA, MINOR BY HIS GUARDIAN *ad litem* NAGA PEDDAYYA (LEGAL REPRESENTATIVE OF THE RESPONDENT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), ss. 144 and 151 and Order XXI, r. 90—Restitution—Order refusing to set aside sale—Order reversed on appeal—Auction-purchaser, not a party to proceedings or appeal—Application by judgment-debtor for restitution against auction-purchaser, whether maintainable—Auction-purchaser, whether a representative of decree-holder.

Where an order passed under Order XXI, rule 90, of the Civil Procedure Code refusing to set aside a sale held in execution of a decree, was reversed on appeal but the auction-purchaser was not made a party to the proceedings for setting aside the sale or to the appeal therefrom and the judgment-debtor subsequently applied for restitution against the auction-purchaser:

Held: (1), that section 144 of the Civil Procedure Code did not in terms apply, as no decree was varied or reversed but only an order under Order XXI, rule 90, was reversed on appeal;

(2) that, assuming that section 151 allowed an order for restitution in appropriate cases not falling under section 144, such an order could not be made unless the auction-purchaser was a party before the Appellate Court which set aside the sale; and

(3) that a Court auction-purchaser was not a representative of the decree-holder.

Manicka Udayan v. *Rajagopala Pillai* (1907) I.L.R., 30 Mad., 507; and *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* (1911) I.L.R., 34 Mad., 417, referred to.

APPEAL against the order of G. GANGADHARA SOMAYAJULU, the Temporary Subordinate Judge of Cuddapah, in Appeal No. 71 of 1916, preferred against the order of T. A. NARASIMHACHARIYAR, the District Munsif of Nandalur, in Civil Miscellaneous Petition No. 183 of 1913, in Original Suit No. 168 of 1905.

The respondent purchased the lands in dispute in an auction sale held in execution of a decree passed against the appellant and another in favour of a third party in Original Suit No. 168 of 1905 on the file of the District Munsif of Nandalur. The

* Appeal Against Appellate Order No. 71 of 1916.

SUBBAMMA v. CHENNAYYA.

appellant applied under Order XXI, rule 90, of the Civil Procedure Code to set aside the sale; the petition was dismissed; the appellant preferred an appeal from the order refusing to set aside the sale; the Appellate Court reversed the order and set aside the sale. The respondent, who was the auction-purchaser, was not made a party to the proceedings taken to set aside the sale or to the appeal in which the sale was set aside. The appellant, who was the second defendant, filed an application in the District Munsif's Court for restitution against the auction-purchaser (respondent) by delivery of possession of the lands which had been purchased by him and put in his possession and also claimed to recover mesne profits from him. Both the lower Courts dismissed the petition as incompetent; the second defendant preferred this civil miscellaneous second appeal.

V. Ramesam for the appellant.

N. Chandrasekara Ayyar for the respondent.

The judgment of the Court was delivered by

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Section 144 of the Code of Civil Procedure cannot, in terms apply as no *decree* was varied or reversed but only an *order* under Order XXI, rule 90, refusing to set aside a sale in execution, was reversed by the Appellate Court.

Assuming that section 151 of the Code of Civil Procedure allows an order for restitution in appropriate cases even though it does not fall under section 144 of the Code of Civil Procedure, such an order cannot be made on the analogy of section 144 unless the auction-purchaser was a party before the Appellate Court which set aside the sale in the proceedings instituted for setting it aside.

The mere fact that the decree-holder was a party to those proceedings will not suffice as the Court auction-purchaser is not the representative of the decree-holder. *Manicka Udayan* v. *Rajagopala Pillai*(1) which held otherwise has been disapproved of in *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai*(2) to both of which decisions the present learned CHIEF JUSTICE was a party.

The Munsif says, that the 'auction-purchaser need not at all be a party to any proceedings for confirmation of or setting aside the sale.' The petition for restitution does not expressly

(1) (1907) I.L.R., 30 Mad., 507. (2) (1911) I.L.R., 34 Mad., 417.

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SADASIVA AYYAR, J.

state that the Court auction-purchaser was a party to the proceedings taken to have the auction sale set aside. No records have been produced before us to establish that fact. We therefore cannot hold that section 151 empowers the Court to pass an order for restitution against a person not shown to be a party to and so bound by the order of the Appellate Court setting aside the sale.

The appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

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

PALAKKUNNATH ILLATH GOVINDAN NUMBUDIRI (PLAINTIFF),

1917, October 11.

v.

OTTATHAYIL MOIDIN (DEFENDANT).*

Stamp Act (II of 1899), sec. 25—Marupat—Counterpart of lease—Document giving a charge on improvements for arrears of rent—Stamp duty, whether payable both as counterpart and as mortgage.

Where a tenant executed a *marupat* in favour of a landlord, agreeing therein that the arrears of rent, if any, should be a charge on the improvements that might be made by him:

Held, that a *marupat* is the counterpart of a lease or a deed executed by a tenant promising to pay a certain rent, and that the document in question must be stamped both as a counterpart and as a mortgage.

CASE stated under section 60 of Stamp Act (II of 1899) by H. D. C. REILLY, the acting District Judge of North Malabar, in Original Suit No. 675 of 1915, on the file of S. V. PADMANABHA AYYANGAR, the District Munsif of Taliparamba.

This is a reference made to the High Court by the District Munsif of Taliparamba through the District Judge of North Malabar under section 60 of the Indian Stamp Act (II of 1899) in respect of a document sued on by the landlord to recover rent in Original Suit No. 675 of 1915 on the file of the District Munsif's Court.

The document sued on was a *marupat* or counterpart of a lease, executed by the tenant; it contained a provision charging

* Referred Case No. 7 of 1916.

GOVINDAN NAMBUDIRI v. MOIDIN

the arrears of rent on the improvements that might be made by the tenant. The portion of the document providing for a charge was as follows :—

"But if the *pattam purappad* fixed on inspection as agreed is kept in arrears without being paid up every year, I consent to the amounts that may be in arrears, being realized together with interest thereon at the usual rate till the date of realization and to the properties being recovered possession of from me within the prescribed period after paying to me the *kushikkur* value.

"The *purappad* along with the *pattam purappad* that may be fixed on inspection would not exceed Rs. 20.

"I further agree to the amount that may be in arrears on account of *purappad*, etc., mentioned above, being always charged as *kudikkadum* (encumbrance) on the entire *kushikkur chamayams* belonging to me in the said puramba. There are no encumbrances (*kudikkadums*) whatever on these till now, etc."

The District Munsif levied a stamp duty as on a mortgage-deed and also a penalty and forwarded the document and the certificate under sections 35 and 38 of Act II of 1899 to the Sub-Collector. The Sub-Collector returned the document holding that the document was an agricultural lease exempt from stamp duty and that it could not be impounded and that duty and penalty should not have been levied. The District Munsif re-submitted the papers to the Sub-Collector who returned the same and pointed out that the Board of Revenue had in B.P. No. 2389, dated 19th August 1885, ordered that such documents were only agreements to lease and not mortgages and relied also on *Eressa Menon* v. *Shamu Patter*(1).

The District Munsif thereupon stated a case for reference to the High Court through the District Judge under section 60 of the Stamp Act.

WALLIS, C.J., AYLING AND KUMARASWAMI SASTRIYAR, JJ.

JUDGMENT.—A *marupat* is a counterpart of lease or a deed executed by a tenant promising certain rent—*Moore's Malabar Law*.

We think it must be stamped both as a counterpart and as a mortgage.

K.R.

(1) (1898) I.L.R., 21 Mad., 138.

APPELLATE CIVIL.

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

TENJERLA SURYANARAYANA (DEFENDANT), APPELLANT,

v.

PRABHALA SUBBAYYA (PLAINTIFF), RESPONDENT.*

1917, October 8 and 16.

Contract Act (IX of 1872), sec. 23—Agreement to pay money to the vakil's clerk for giving special attention to a case, whether opposed to public policy.

An agreement by which a litigant binds himself to pay his vakil's clerk a certain amount for giving special attention to his legal business which his vakil was bound to see to in consideration of his fee, is opposed to public policy and is void and unenforceable.

Exparte Cotton (1846) 9 Beav., 107, referred to.

APPEAL under clause 15 of the Letters Patent against the Judgment of OLDFIELD, J., who differed from BAKEWELL, J., in *Subbayya* v. *Suryanarayana*(1), Letters Patent Appeal against the Judgment of NAPIER, J., in *Suryanarayana* v. *Subbayya*(2).

The defendant who had a decree in his favour engaged a vakil for a fee to conduct execution proceedings therein and agreed to pay the vakil's clerk, the plaintiff, Rs. 20 in consideration of the clerk taking special interest in the matter. The agreement further provided that defendant was to make all arrangements for service of notices, attachments, etc., in the debtor's village, and was to pay the amount promised at the end of the execution proceedings without reference to his gaining or losing by them. After the close of the execution proceedings the plaintiff filed a small cause suit against the defendant for the recovery of Rs. 20. The defendant pleaded *inter alia* that the agreement had no consideration and was opposed to public policy. The Munsif decreed the claim. The defendant preferred a Civil Revision Petition (No. 346 of 1915) to the High Court. NAPIER, J., allowed the Revision Petition and dismissed the suit holding that the agreement was against public policy. An Appeal (No. 167 of

* Letters Patent Appeal No. 36 of 1917.

(1) Letters Patent Appeal No. 167 of 1916.

(2) Civil Revision Petition No. 346 of 1915, praying the High Court to revise the decree of G. G. SOMAYAJULU, the Principal District Munsif of Masulipatam, in Small Cause Suit No. 2680 of 1914.

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1916) under clause 15 of the Letters Patent was thereupon filed by the plaintiff and it was heard by OLDFIELD and BAKEWELL, JJ. OLDFIELD, J., held that the plaintiff was entitled to a decree, while BAKEWELL, J., dismissed the suit agreeing with NAPIER, J. In the result the judgment of OLDFIELD, J., prevailed under clause 36 of the Letters Patent and the Letters Patent Appeal was allowed. The defendant then preferred this Letters Patent Appeal No. 36 of 1917 under clause 15 of the Letters Patent.

P. Nagabhushanam for the appellant.—I contend for the view of BAKEWELL, J., who agreed with NAPIER, J. The policy of the legislature is to prohibit such contracts with vakil's clerks: see sections 10 and 28 of the Legal Practitioners Act, Order III, rule 1, Civil Procedure Code, and *Ramachandra Chintaman* v. *Kelu Raju*(1), and *Harrington* v. *Victoria Graving Dock Co.*(2). Such contracts are against public policy and in England they are not at all known. The rule in India should be similar. This contract, if recognized, will amount to this, viz., that the clerk who is paid for his services by his master has a right to stipulate for a special fee in some cases and thus neglect the cases of other clients who do not remunerate him in the same manner.

V. Ramadoss for the respondent.—The contract in this case is to do something which is not what a vakil or his clerk has to do ordinarily; such a contract is valid; *Kali Kumar Roy* v. *Nobin Chunder Chuckerbutty*(3). Unless such a contract is contrary to some known head of public policy, new grounds of public policy ought not to be introduced; vide *Janson* v. *Driefontien Consolidated Mines, Limited*(4), *Bhagwan Dei* v. *Murari Lal*(5) and *Fraser and Company* v. *The Bombay Ice Manufacturing Company*(6).

WALLIS, C.J.

WALLIS, C.J.—The agreement in question is one by which a litigant binds himself to pay his vakil's clerk Rs. 20 for giving special attention to legal business which the vakil was bound to see to in consideration of his fee. The revised translation makes it clear that this is the scope of the agreement. The law has never allowed legal practitioners of any kind to enforce

(1) (1878) I.L.R., 2 Bom., 362. (2) (1878) K.R. 3 Q.B., 549.
(3) (1881) I.L.R., 6 Calc., 585. (4) (1902) A.C., 484.
(5) (1917) I.L.R., 39 All., 51 (F.B.). (6) (1905) I.L.R., 29 Bom., 107 at p. 120.

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contracts with clients irrespectively of the consideration whether they conformed to public policy or not. Barristers cannot sue at all for their fees, and the fees which barrister's clerks receive by custom according to a fixed scale are mere gratuities and cannot be sued for though they are recognized on taxation: *Exparte Cotton*(1). Solicitors' charges are now the subject of legislative enactment in England resembling the provisions in the Legal Practitioners Act as to charging more than the regulation fees. But even before these enactments, such agreements were jealously scrutinized and required to conform to the dictates of public policy. In *Pomfret* v. *Murray*(2), speaking of a novel stipulation by an attorney who was also a trustee, Lord HARDWICKE said:

"This is a case of great consequence: and it is incumbent on the Court to proceed warily before they allow such a demand,"

an observation which appears to me to be peculiarly applicable to the present case. In *Saunderson* v. *Glass*(3) the same great Judge observed:

"It is truly said at the bar, that a security obtained by an attorney, whilst he is doing business for his client, or whilst a cause is depending, appears to this Court in a quite different light than between two common persons; for if an attorney, *pendente lite*, prevails upon a client to agree to an exorbitant reward, the Court will either set it aside entirely, or reduce it to the standard of those fees to which he is properly entitled; . . . . and if the Court did not observe such a rule, it would expose clients very much to the artifices of attorneys."

See also *Drax* v. *Scroope*(4) and *Philby* v. *Hazle*(5), where ERLE, C.J., and WILLIAMS and BYLES, JJ., all speak of agreements by solicitors of the kind there in question as being in the words of WILLIAMS, J., manifestly 'contrary to the general policy of the law.' It is clear then that we shall be introducing no new law if we apply the test of public policy to agreements of the character now sued on. We have not been referred to any case in England in which a solicitor's clerk has stipulated with his employer's client for remuneration for giving special attention to his business. Such conduct might very possibly afford good

(1) (1846) 9 Beav., 107. (2) (1740) 9 Mod., 231.
(3) (1742) 2 Atk., 296. (4) (1881) 2 B. & Ad., 581.
(5) (1860) 8 C.B. (N.S.), 647.

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WALLIS, C.J.

ground for his immediate dismissal, and the fact that in this case the vakil does not object to his clerk's adopting this course in this and other cases, far from making the case any better, opens out a fresh vista of undesirable possibilities, and only makes it the more incumbent on us to interfere for the protection of clients by refusing to enforce such agreements as contrary to public policy. I would allow the appeal and dismiss the suit with costs throughout.

AYLING, J.

AYLING, J.—I concur.

KUMARASWAMI SASTRIYAR, J.

KUMARASWAMI SASTRIYAR, J.—I agree.

N.R.

APPELLATE CIVIL.

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

1917, October 26.

ANNAVAJHULA VENKATACHELLAMAYYA (PETITIONER—DECREE-HOLDER), APPELLANT,

v.

RAMA GIRJEE NILAKANTA GIRJEE (AUCTION-PURCHASER, FIRST COUNTER-PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXI, rr. 71 and 84 to 87—Purchase in a Court sale of judgment-debtor's right to get a reconveyance of certain lands—Default in payment of balance of purchase-money within fifteen days of Court sale—Liability of purchaser for deficiency on re-sale.

A purchaser in a Court auction of a judgment-debtor's right to get a reconveyance of certain lands on payment of a specified sum is, on default in payment of the balance of purchase-money within fifteen days of the Court sale, liable to pay under summary process under Order XXI, rule 71, Civil Procedure Code, any deficiency in price on a re-sale, though the date stipulated for payment to get the reconveyance happens to be shortly after the Court sale and before the expiry of the fifteen days allowed for the payment of the balance.

The loss of the right to get a reconveyance which is a substantial right, occasioned by the neglect of the purchaser to exercise his right to pay at the stipulated time, does not make the property re-sold, any the less the same property as the one sold before, provided all the then existing rights of the judgment-debtor therein are correctly stated in the proclamation for the re-sale.

* Letters Patent Appeal No. 42 of 1917.

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Cases in which an existing encumbrance on the property is omitted to be mentioned at the time of the first sale but finds a place in the proclamation for the re-sale stand on a different footing.

Baijnath Sahai v. *Moheep Narain Singh* (1889) I.L.R., 16 Calc., 535, and *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukal* (1898) I.L.R., 25 Calc., 99, distinguished.

APPEAL under clause 15 of the Letters Patent against the judgment of OLDFIELD, J., who differed from BAKEWELL, J., in *Venkatachellamayya* v. *Nilakanta*(1).

The appellant, who was the petitioner in the lower Court, brought to sale in execution of a decree of his, the judgment-debtor's right to get a reconveyance of certain properties from a stranger in possession. The respondent purchased this right in the Court sale for Rs. 6,90,000 on 25th August 1914, and deposited a fourth of that sum under Order XXI, rule 84, Civil Procedure Code, but failed to deposit the remainder within fifteen days thereafter as provided by rule 85. The stipulation of the judgment-debtor with the stranger in respect of the reconveyance was, that on payment of Rs. 6,00,000 for which the property was originally sold by the judgment-debtor to the stranger, on or before 31st August 1914, the property should be reconveyed. Though the respondent, viz., the purchaser of this right at the Court sale had nearly a week after the Court sale to pay this Rs. 6,00,000 to the stranger, he neglected to do so either himself or with the aid of the judgment-debtor. In addition, he failed to pay the balance of the purchase-money within fifteen days as stated before. Consequently the property was re-sold on a fresh proclamation which simply mentioned the original conveyance and the agreement to reconvey and stated that the two amounted to a mortgage. On resale the property was purchased by a third party for Rs. 1,01,000 and the sale was confirmed. The decree-holder, viz., the appellant, then filed this petition under Order XXI, rule 71, Civil Procedure Code, for recovery of the deficit of Rs. 5,89,000 from the respondent, the purchaser in Court auction. The respondent contended *inter alia* that he was not liable for the deficit, for the reason, among others, that the

(1) Appeal against Order No. 91 of 1916 against the order of C. KRISHNASWAMI RAO, the District Judge of Nellore, in Civil Miscellaneous Petition No. 108 of 1915 in Execution Petition No. 55 of 1914 in Civil Suit No. 1879 of 1912 on the file of the High Court in the exercise of its Ordinary Original Civil Jurisdiction.

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property re-sold was not the same as the one sold before and that the deficit was not recoverable in execution proceedings. The District Judge dismissed the petition holding that the petitioner was not entitled either under Order XXI, rule 71, or under Order XXI, rule 86, to claim the deficit or the amount originally deposited. The petitioner preferred an appeal to the High Court (Civil Miscellaneous Appeal No. 91 of 1916) which was heard by OLDFIELD and BAKEWELL, JJ. OLDFIELD, J., agreed with the District Judge while BAKEWELL, J., held that the appellant was entitled to succeed. The result was that the appeal was dismissed with costs.

The petitioner, viz., the decree-holder, preferred this appeal under clause 15 of the Letters Patent.

K. Srinivasa Ayyangar (with *S. Varadachariar*) for the appellant.—The property sold on the second occasion is the same as the one sold before. If the same property is again sold, depreciation of the property in the interval does not change the nature of the property though it may give rise to a claim for damages. The title of the auction-purchaser relates back to the date of sale; hence any accretion or mesne profits in the interval go to the purchaser. If the judgment-debtor has any interest, however small, that goes to the purchaser. There is no warranty of title in a court sale. If the deterioration is owing to the default of the purchaser, he alone is liable. If after having bid and paid one-fourth of the price, he defaults to pay the remainder for any reason of his own, he alone is to blame. Any liability that may arise after the sale to him and before confirmation will also fall on him: *Bhawani Kumar* v. *Mathura Prasad Singh*(1) and *Scoruj Buksh Singh* v. *Sree Kishen Doss*(2); see also Order XXI, rule 86, as to re-sale owing to non-payment of the 25 per cent. The present is not a case of 'no title' in the judgment-debtor.

Hon. Mr. *S. Srinivasa Ayyangar*, the *Advocate-General*, for the respondent.—Order XXI, rule 71, gives only a cumulative remedy. There is also a right of suit; hence it is discretionary with the Court to allow this summary remedy. Under the rule the property sold must be the same. If owing to the decree-holder's mistake there occurs a loss on the second sale, the first purchaser

(1) (1913) I.L.R., 40 Calc., 89 (P.C.). (2) (1865) 6 W.R., Mis., 12 6.

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is not at all liable. The description of the property on the second sale is different from that on the first. The right that was first sold is a right to a reconveyance (an actionable claim). What was sold on the second occasion was an equity of redemption, because owing to lapse of the time specified to get a reconveyance, the right to reconveyance was lost. On the construction of Order XXI, rule 71, see *Baijnath Sahai* v. *Moheep Narain Singh*(1), *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul*(2), *Gangadas Dayabhai* v. *Bai Suraj*(3) and *Bavaneshwar Prasad Singh* v. *Baijnath Ram Goenka*(4). The words 'by reason of the purchaser's default' in Order XXI, rule 71, go only with 're-sale' and not with 'deficiency of price'. The conditions of the second sale are in this case more onerous to the purchaser than those of the first. As the sale was not eventually confirmed to the original purchaser in this case, no title vested in him as from the date of the purchase. And hence he had no right or liability to pay for the reconveyance: *Ram Chander* v. *Kallu*(5). It was the judgment-debtor that was bound to pay for it. If a life-interest is brought to sale and the life-tenant dies before confirmation the purchaser is liable: *Anson* v. *Towgood*(6). But the rule is otherwise, if any *vis major* occurs or if there are any taxes to be paid or covenants to be observed whose non-compliance may entail a forfeiture; see volume I, Daniell's Chancery Practice, page 951, *Ex parte Minor*(7), *Palmer* v. *Goren*(8), Sugden's Vendors and Purchasers, page 101 and *Jitandra Nath Basu* v. *Peyer Deye Debi*(9). The principle of section 56 of Contract Act applies. Under Order XXI, rule 71, there must be a certificate as to the amount of the deficiency. There was none here. The cases referred to by the other side were distinguished.

K. Srinivasa Ayyangar in reply.—The purchaser purchased with knowledge that the time for reconveyance will lapse before the fifteen days. As there is no warranty of title in court sales the judgment-debtor or anybody else is not bound to see to the title

(1) (1889) I.L.R., 16 Calc., 535 at p. 538. (2) (1898) I.L.R., 25 Calc., 99.
(3) (1912) I.L.R., 36 Bom., 329 at p. 333.
(4) (1915) I.L.R., 42 Calc., 897 (P.C.) at p. 912.
(5) (1908) I.L.R., 30 All., 497.
(6) (1890) 1 Jac. & W., 637. (7) (1805) 11 Ves. Jun., 559.
(8) (1856) 4 W.R. (E.) 688. (9) (1916) I.L.R., 43 Calc., 990 (P.C.).

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being made good or kept good. In India, unlike in England, the bid becomes complete as soon as the bid is accepted. In England, in a sale before the master, it is complete only on the master's certificate, who in the *interim* looks to the title being good; *Ex parte Minor*(1) was a case of sale before the master. There was no covenant which the judgment-debtor in the present case undertook with reference to the property.

WALLIS, C.J.

WALLIS, C.J.—Under Order XXI, rules 84—86 of the Code of Civil Procedure on the default of a purchaser at a Court auction either in making the deposit or paying the balance of purchase-money within the specified period the property is to be re-sold; and under Order XXI, rule 71, any deficiency in price which may occur at the re-sale together with the expenses attending the re-sale, as certified to the Court, are recoverable at the instance of the decree-holder or the judgment-debtor under the provisions relating to the execution of a decree for the payment of money. By his failure to complete his purchase the purchaser commits a breach of contract and is answerable in damages to the Court or the persons on whose behalf it sells, viz., the decree-holdor and the judgment-debtor. These damages estimated by the ordinary rule consist of the deficiency, if any, in the price obtained at the re-sale as compared with the price at the first sale together with the expenses of the re-sale; and the rule provides a summary method of recovering these damages in execution by the Court at the instance of either of the parties interested, the decree-holder or the judgment-debtor. This is a salutary provision intended to minimise the hardship resulting from the purchaser's default, and I see no reason why the Court should refuse to give effect to it unless the defaulting purchaser would be substantially prejudiced. This was the case in *Baijnath Sahai* v. *Moheep Narain Singh* (2), where he had been induced to bid for the property as unincumbered by the fact that the incumbrances were not mentioned in the proclamation of sale and the re-sale was on a proclamation in which the incumbrances were mentioned. In such a case the difference between the two prices could not be regarded as a fair measure of damages, as the purchaser who afterwards defaulted must obviously have made a higher bid than he would have done if he had known of the

(1) (1805) 11 Ves. Jun., 559. (2) (1889) I.L.R., 16 Calc., 535.

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incumbrances. If the learned Judges in *Baijnath Sahai* v. *Moheep Narain Singh*(1) and *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul*(2) intended to lay down a more stringent rule, I am with great respect unable to agree with them.

There was no circumstance of this kind in the present case. The efforts, in which the legislature joined, to save the ancient Zamindari of Kalahasti from being sold in execution having finally failed, a taluk of the North Arcot district, was attached and brought to sale at the instance of a judgment-creditor. The taluk had been conveyed to a Mahant for six lakhs of rupees with an agreement for reconveyance if the money was repaid before a stipulated date, the 31st August 1914. The sale in execution to the respondent took place on the 25th August 1914 only a few days before the stipulated time for repayment to the Mahant, and the respondent was no doubt aware of this when he bid, as he would not have bid more than five lakhs for the judgment-debtor's interest without satisfying himself of the terms of the agreement for reconveyance mentioned in the sale proclamation, and in any case he must be taken to have had notice of it. The case for the appellant is that the respondent was a man of straw employed by the Mahant to get the property knocked down to him as the highest bidder and make the necessary deposit with the money supplied by the Mahant in order to keep out genuine purchasers and to ensure that the specified date should be allowed to go by without repayment and the right to a reconveyance be lost; but all this has not been gone into and it is unnecessary to rely on it. On the 25th of August, the date of the sale, the respondent made the necessary deposit of Rs. 1,72,500 which entitled him to a delay of fifteen days to complete the purchase, *vide* Order XXI, rule 85. On the completion of the fifteen days he defaulted, and it became necessary to re-sell. By that time the 31st August 1914 had gone by, and the purchaser would no longer have a clear right to a reconveyance from the Mahant on payment of six lakhs, and could only rely on the positions that the transaction was really a mortgage or that the tender had been made before the specified date and refused. Now it is quite clear that what was put up to sale and purchased by the respondent on the 25th August included the right to get

(1) (1889) I.L.R., 16 Calc., 535. (2) (1898) I.L.R., 25 Calc., 99.

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back this taluk from the Mahant on payment of six lakhs before 31st August, and if he chose to purchase the judgment-debtor's interest and let the day go by, I am clearly of opinion that he is the person to bear the resulting loss. The other view as regards this part of the case appears to be that the judgment-debtor's right to a reconveyance on payment of a fixed sum before a stipulated day, which might be a most valuable right and in this case is said to have been worth much more than the five lakhs which the respondent agreed to pay for it, cannot be made the subject of an effective sale in execution, if the sale takes place less than fifteen days before the stipulated date, as under Order XXI, rule 85, the purchaser has fifteen days to pay the balance and the sale is not final until confirmed after not less than thirty days. These provisions, in my opinion, were made *alio intuitu* and were not intended to have that effect. The respondent could, if necessary, have procured the concurrence of the judgment-debtor in making the tender to the Mahant without prejudice to the question of the confirmation of the sale, and in that case would have been entitled to a charge on the property so released. In any view he got what he bargained for, and I can see no reason why he should not incur the ordinary consequences of failing to complete his bargain.

It is quite clear, and has not been disputed before us, that at the re-sale consequent on the respondent's default, the judgment-debtor's right, title and interest in the same properties was brought to sale. It was, however, no longer possible to put up a right to reconveyance on payment before the 31st August 1914 as that date had gone by; but the nature of the judgment-debtor's interest was represented as favourably as possible in the proclamation as it alleged that the transaction with the Mahant was a mortgage and also that the agreement for the reconveyance still subsisted because, it alleged, the Mahant had fraudulently gone away from his residence to avoid receiving the tender of six lakhs which the judgment-debtor made before the stipulated date. In this case the sale and the re-sale were both duly held and were of the judgment-debtor's interest as it existed at the date of the sale and re-sale respectively, and the depreciation which occurred in the meantime was one for which the respondent was exclusively responsible. In these circumstances I see no reason why the deficiency should not be recovered from him

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under the Code. It was scarcely disputed before us that he would have no answer to a suit for damages, and I see no reason for refusing to give effect to the plain language of the Code. I concur in the order proposed by KUMARASWAMI SASTRIYAR, J.

AYLING, J.—I concur.

KUMARASWAMI SASTRIYAR, J.—This appeal arises out of an application by the decree-holder to recover from the auction purchaser the loss arising from a re-sale held in consequence of his default. Certain villages forming part of the Kalahasti Zamindari were brought to sale in execution of a decree against the Zamindar. The villages had been conveyed by the Zamindar to one Raja Bahadur Narasingar Gyangirji of Hyderabad for six lakhs of rupees by a deed dated 4th August 1908. The Zamindar got an agreement to reconvey bearing the same date if the sum of six lakhs was re-paid by the 31st August 1914. The sale proclamation specified the two documents as also other documents not material for the purpose of this Appeal. The Zamindar's interest in the property conveyed was described as "the right of obtaining a reconveyance under the reconveyance agreement dated 4th August 1908 executed and given to the defendant by Raja Narasingar Gyangirji Garu residing at Hyderabad and all the other rights and interest possessed by the defendant in these villages." The sale took place on the 25th August 1914 and the respondent, who was the highest bidder, was declared the purchaser for six lakhs and ninety-thousand rupees. He paid Rs. 1,72,500, the deposit required by Order XXI, rule 84, of the Code of Civil Procedure. Rule 85 gave him fifteen days for the payment of the balance, but he failed to pay the sum and complete the purchase.

There was so far as I can see no excuse for his not paying the balance. It is not shown that there was any irregularity in the proceedings that led up to the sale or that any circumstances existed on the date of sale which would justify the purchaser in refusing to complete the purchase. He knew perfectly well what he was purchasing and the risks he ran. There is no warranty of title in sales by Court in execution of decrees and as Order XXI, rule 91, only applies to cases where there is no saleable interest. So long as the judgment-debtor has any interest however small in the property the purchaser cannot except in cases where he would have the right to set aside the sale on the ground

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of material irregularity under Order XXI, rule 90, avoid his purchase.

Order XXI, rule 86, provides for a re-sale in case the purchaser makes default in paying the balance of the purchase money within the time limited by rule 85. The defaulting purchaser is under rule 71 liable to pay the deficiency in price, if any, and the same on being certified by the officer holding the sale is recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

Owing to the respondent's default the property was put up for resale. Both Mr. Justice OLDFIELD and Mr. Justice BAKEWELL agree in holding that the same villages were put up for sale the second time and this is not disputed before us. When the property was purchased by the respondent at the first sale there were only six days within which six lakhs had to be paid in pursuance of the agreement to reconvey dated 4th August 1908. This period elapsed within the fifteen days allowed to the respondent to pay the balance of purchase money and it is clear that no re-sale was possible within the period when the six lakhs was payable. At the date of the fresh proclamation rendered necessary by rule 87 before re-sale the position of the Zamindar, the judgment-debtor, in relation to the villages advertised for sale became altered. Whereas prior to the 31st August 1914 he was entitled to a reconveyance on tender or payment of six lakhs, he could after that date in the absence of proof of tender in time only get a reconveyance if he was able to show that the transaction evidenced by the sale deed and agreement to reconvey of the same date was in law a mortgage and not a mere sale with an agreement to repurchase. It was alleged by the Zamindar that he did make a tender within the 31st August which was improperly refused, but as this allegation has not been enquired into by the District Judge, I shall proceed on the footing that no such tender was made.

The proclamation for re-sale had to mention the state of facts as they stood on the date when it was settled by the Court There is nothing in the Code requiring that the proclamations of sale and re-sale should in all respects be identical and having regard to the duty of the Court to give intending purchasers correct information, it is difficult to see how mention of a material alteration in the circumstances between the first and

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second proclamations could be avoided. The second proclamation therefore contained a statement to the effect that tender of six lakhs was made and was improperly refused, that the transaction evidenced by the deed of sale and agreement to repurchase dated 4th August 1908 was a mortgage, that Gyangirji has only the right to recover six lakhs of rupees and that the property was sold subject to the right.

It is difficult to see how these statements could be prejudicial to the first purchaser. Their tendency was, if anything, to induce persons to purchase for a higher price, as a bald statement after the 31st August 1914 that the property was agreed to be reconveyed if six lakhs were paid before the 31st August 1914 would be useless. The only person to complain would be the second purchaser if the allegation as to the tender and the effect of the sale and agreement to reconvey were not correct, but he has raised no objection and the sale to him has been confirmed.

The chief contention raised by the learned Advocate-General for the respondent is that in order to attract the provisions of Order XXI, rule 71, what is sold at the re-sale should be in all respects the identical property that was sold the first time, identical not only with reference to the description and area of the property sold but also with respect to the interest of the judgment-debtor therein, and that consequently the sale at which his client purchased being the right of the judgment-debtor to get a reconveyance on tender of six lakhs without reference to the nature of the transaction evidenced by the sale deed and agreement to reconvey (which was a clear and good title), the re-sale of the properties in which the judgment-debtor's interest was only the right to obtain a reconveyance on proof that the transaction was only a mortgage—a fact which the subsequent purchaser had to prove at his risk, was not a re-sale contemplated by rule 71. Reference has been made to *Baijnath Sahai* v. *Moheep Narain Singh*(1), *Kali Kishore Deb Sarkar* v. *Guru Prasad Sukul*(2) and *Gangadas Dayabhai* v. *Bai Suraj*(3).

In *Baijnath Sahai* v. *Moheep Narain Singh*(1) the first proclamation of sale contained no statement as to the encumbrances on the property put up for sale while the proclamation

(1) (1889) I.L.R., 16 Calc., 535. (2) (1898) I.L.R., 25 Calc., 99.
(3) (1912) I.L.R., 36 Bom., 329.

for re-sale set out the encumbrances. It was therefore clear that the purchaser at re-sale would have paid considerably less than the first purchaser who purchased the property on the assumption that it was unencumbered, and the deficiency of price was attributable not to the first purchaser's default but to the misdescription in the first proclamation. In *Kali Kishore Deb Sarkar* v. *Guru Prasad Sukul*(1), the defaulting purchaser had applied to set aside the sale under section 313 of the Civil Procedure Code and the finding was that there was a material misdescription in the sale proclamation. In the first case the learned Judges observe that a change in the nature of the property by diluvion and the like causes beyond the control of anybody might not relieve the defaulting purchaser from liability. Their observations as to the effect that section 293 of the Act of 1882 applied only to cases when the same property was sold under the same description at both sales must be read in the light of the later observations as to the change in the property by causes beyond the control of the parties.

I do not think that it was intended to lay down as an inflexible rule that if a few trees on the land fell down or a portion was washed away between the dates of sale and re-sale there could be no re-sale so as to make the defaulting purchaser liable for the deficiency. The obvervations in *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul*(1) as to the effect of correctly stating in the proclamation of re-sale what was incorrectly set out in the first proclamation are *obiter* and with all respect I fail to see why the correction of errors at least of such as would in the ordinary course enhance the value of the property at the second sale should be a valid ground of objection.

The general rule no doubt is that it is the property which was sold on the first occasion that must be put up for sale but this is subject to the property remaining identical. If owing to natural causes or causes attributable to the defaulter, there should be any change either in the property or the wording of the sale proclamation, there is nothing in the Code to release the defaulting purchaser from his liability under rule 71.

Gangadas Dayabhai v. *Bai Suraj*(2) was a case where it was admitted that the first proclamation did not state either fairly or

(1) (1898) I.L.R., 25 Calc., 99. (2) (1912) I.L.R., 36 Bom., 329.

accurately the property to be sold. The property was described as that of A in the first sale and as that of B in the second.

Sooruj Buksh Singh v. *Srpe Kishen Doss*(1) cited by the vakil for the appellant is more in point. In that case a purchaser at a Court sale declined to complete the purchase on the ground that the property had been sold the next day in execution of another decree by a party who had a previous mortgage on the estate. The property was subsequently re-sold and he was asked to pay the difference. The Sudder Ameen held that the first purchaser was not liable under section 254 of Act VIII of 1859 which is substantially the same as Order XXI, rule 71, of the Act of 1908, but his decision was reversed by the High Court on the ground that he had purchased something though perhaps less than what he had expected and that if he chose to bid he was bound to complete his purchase. From the facts as set out in the judgment it appears that the decree obtained by the mortgagee was in force at the date of sale which, unless discharged before the sale fixed for the day after the first sale, would entail the consequences that the property would pass under a title paramount to that of the first purchaser and that the re-sale was after the sale in execution of the mortgage decree when no title remained in the judgment-debtor.

Time runs and with it follows change. The provisions of Order XXI of the Code of Civil Procedure as to re-sale in case the balance of purchase money is not paid necessitate a delay of at least one and a half months from the date of the first sale. The reasonable construction to place on rule 71 is that the re-sale should be within a reasonable time after the first sale and property re-sold should be substantially the same and that any difference will not matter if the difference in the condition of the property or the title thereto is one which would occur in the ordinary course of things having regard either to the nature of the property or the transactions in respect thereof having legal force at the date of sale or was brought about by the first purchaser's default.

It has been argued that the provisions of rule 71 are summary in their nature and so should receive a very strict interpretation. Rule 71 only enacts the rule that the measure of damages in

(1) (1866) 6 W.R. Mis., 126.

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cases when a purchaser commits default is the difference between the price at which he agreed to purchase and the price realized at a re-sale. I do not think the rule prevents the defaulting purchaser from raising such objections as are competent to him under Order XXI of the Civil Procedure Code to raise. It is a principle of natural justice that a person should be given an opportunity of showing cause before an order adverse to him is passed and though rule 71 does not expressly provide for the issue of a notice to the defaulting purchaser it is the duty of the Court to give him notice and to hear and decide on his objections before it orders execution to issue against him. In all the cases decided under the old and new Code the defaulting purchaser did appear and raise objections which were adjudicated upon by the Court and he was held by the Calcutta and Madras High Courts to have a right of appeal. I need only refer to *Sooruj Buksh Singh* v. *Sree Kishen Doss*(1), *Baijnath Sahai* v. *Moheep Narain Singh*(2), *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul*(3), and *Amir Baksha Sahib* v. *Venkatachala Mudali*(4).

I do not, therefore, see any good reason for placing an unduly restricted interpretation on Order XXI, rule 71. Having regard to the fact that there is no warranty of title in the case of sales by Court the maxim *caveat emptor* applying, and that the purchaser cannot avoid the sale so long as the judgment-debtor has some interest however small in the property, the objections which the defaulting purchaser can urge are practically confined to those which can be urged in an application to set aside a sale under Order XXI and proceedings under rule 71 are neither more nor less summary than proceedings under Order XXI to set aside a sale.

It was also argued that it was the duty of the judgment-debtor or the decree-holder to keep the title alive between the period of sale and confirmation and that as no tender was made of six lakhs the defaulting purchaser is not liable. As the sale was only of the right, title, and interest of the judgment-debtor subject to the conditions in the agreement to reconvey on repayment of six lakhs, it is clear that the person to pay the six lakhs was the purchaser, the price he pays being estimated with reference to

(1) (1866) 6 W.R. Mis., 126. (2) (1889) I.L.R., 16 Calc., 535.
(3) (1898) I.L.R., 25 Calc., 99. (4) (1895) I.L.R., 18 Mad., 439.

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the existing liability on the property. There was under the terms of the proclamation no duty on the decree-holder or judgment-debtor to pay six lakhs.

With reference to the argument that the defaulting purchaser had no legal right to tender six lakhs as he acquired no title on the 31st of August, the last date for the tender, I think the auction purchaser has an interest in the property which would make any tender by him valid. The position of a person between the date of sale and the date of confirmation is not that of a person who has only an agreement to sell in his favour. Section 65 of the present Code unlike section 316 of the old Code vests title in him from the date when the property is sold and not from the time the sale becomes absolute. It is no doubt true that the sale is liable to be set aside either by payment under Order XXI, rule 89, or for irregularity or want of title under Order XXI, rules 90 and 91, but it does not follow that a person who under Order XXI, rule 84, has been "declared to be the purchaser" by the officer conducting the sale has no interest in the property sufficient to prevent a forfeiture or preserve the title from destruction. The observations of their Lordships of the Privy Council in *Bhavani Kumar* v. *Mathura Prasad Singh*(1) as to the rights and duties of an auction purchaser as from the date of sale are in point.

I am of opinion that no valid grounds exist in the present case for not making the defaulting purchaser liable for the loss arising from the re-sale. I would allow the Letters Patent Appeal and set aside the order of the District Judge with costs in this and the lower Court. The District Judge will dispose of the application of the appellant with regard to the deposit paid by the respondent according to law.

N.R.

(1) (1913) I.L.R., 40 Calc., 89 at p. 103. (P.C.)

APPELLATE CIVIL.

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

1917, September, 10 and 11, and October, 5.

MANNATH VEETTIL ITTI PANKU MENON (SECOND DEFENDANT), APPELLANT,

v.

THAZETH MELADAM DHARMAN ACHAN AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Contract—Third party's right to sue on—Limitation Act (IX of 1908), sec. 18, and arts. 62, 115 and 116—Suit for rent by the third party to contract—Date from which limitation begins.

Contrary to his undertaking to redeem a prior *kanom* and to collect and pay the *jenmi*, arrears of rent due by the *kanomdar*, a *melkanomdar* assigned his rights and liabilities under the *melkanom* to the *kanomdar* by a registered deed in 1909 without the knowledge of the *jenmi* and thus enabled the *kanomdar* to continue in possession for a further period. The *jenmi* who came to know of the assignment in 1912 at once recognized it, demanded arrears of rent from the *kanomdar* and brought the suit in 1913 against the *kanomdar* and the *melkanomdar* for all the rent due during the periods of the *kanom* and the *melkanom*.

Held by WALLIS, C.J., and KUMARASWAMI SASTRIYAR, J. (BAKEWELL, J., dissenting) that the *jenmi* was entitled to recover from the *kanomdar* the arrears of rent as moneys had and received to the plaintiff's use and that the suit was not barred by limitation by reason of article 62, and section 18 of the Limitation Act.

Per WALLIS, C.J. and BAKEWELL, J.—The *jenmi* was not entitled to sue on the assignment to which he was not a party.

Per KUMARASWAMI SASTRIYAR, J.—The *jenmi* was entitled to sue on it.

Jamna Das v. *Ram Autar Pande* (1912) I.L.R., 34 All., 63 (P.C.) and *Tweddle* v. *Atkinson* (1855) 30 Ch. D. 57 and other cases considered.

APPEAL under clause 15 of the Letters Patent against the judgment of PHILLIPS, J., who differed from ABDUR RAHIM, J., in *Ittipanku Menon* v. *Dharman Achan*(1).

The plaintiff granted a *Kanom* (Exhibit III) to the second defendant on 6th July 1893 whereby the latter became entitled to be in possession for twelve years, i.e., till 6th July 1905. On

* Letters Patent Appeal No. 19 of 1917.

(1) Second Appeal No. 586 of 1915, preferred against the decree of A. NARAYANAN NAMBIYAR, the Subordinate Judge of Palghat at Calicut, in Appeal No. 851 of 1914 preferred against the decree of K. A. KANNAN, the District Munsif of Palghat, in Original Suit No. 3479 of 1913.

28th January 1904 the plaintiff granted a *melcharth* to the first defendant by Exhibit I, the material portions of which ran as follows:—

"On the expiry of the term of the demise, you shall either directly or by suit pay to Gopala Menon and another (the *kanomdars* under Exhibit III) the balance *kanom* after setting off the arrears of *purapad* and interest against the *kanom* and obtain possession of the properties. And you shall hold the properties on paying properly the *purapad* due from 1081 (1905—1906). You shall then pay to Edom (plaintiff) the value of the *purapad* which you get set off against the *kanom* and obtain receipt therefor. . . . It is stipulated that you should pay the whole of the *purapad* from 1081 (1905-06) even in case there is delay in getting possession of the properties."

The first defendant did not redeem the *kanom* of the second defendant when it became redeemable on the 6th July 1905 but assigned his rights under the *melcharth* deed (Exhibit I) to the *kanomdar* by a registered deed of assignment (Exhibit II), dated the 6th July 1909. The material portion of the assignment deed ran as follows:—

"I have this day received in cash from you Rs. 600 made up of the renewal fee of Rs. 400 due to me in accordance with the said *melcharth* and interest thereon and Rs. 56 being the value of paddy consisting of the michavaram paid by me to the *jenmi* from 1081 (1905-06) to 1084 (1908-09) with interest thereon and I have hereby assigned to you all the rights belonging to me under the said *melcharth* . . . You should directly pay to the *jenmi* the arrears of *michavaram*, etc., payable to the *jenmi* from 1071 (1895-96) to 1080 (1904-05) inclusive. If you do not do so, you shall be liable for the damages arising therefrom."

As soon as the plaintiff came to know of the assignment, he recognized the same and demanded on 8th January 1912 all the arrears of rent from 1896 from the second defendant as undertaken by the second defendant in the deed of assignment.

In the suit the plaintiff prayed for payment of rent from 1896 to 1905 and from 1910 to 1913 and for sale of the defendant's *kanom* right. The cause of action was alleged to have arisen on 28th January 1904, the date of *melcharth*. The first defendant pleaded that he had assigned his right to second defendant with the liability of paying the arrears to plaintiff, that the plaintiff had consented to collect the *michavaram* from

second defendant and that he was not liable for the claim. The second defendant pleaded *inter alia* that the plaintiff was not entitled to sue him for rent of the period from 1896 to 1905, that the rent therefor was barred by limitation and that there could be no charge in law for arrears of rent. Plaintiff's vakil conceded in both the lower Courts that the rent was not a charge on the kanom.

The District Munsif held that the plaintiff was not entitled to sue for the former period and that the same was barred by limitation. He therefore gave a mortgage decree as against both the defendants for Rs. 173 with interest as for the rent due for the later period (1910 to 1913). The plaintiff appealed and the second defendant preferred a memorandum of objections. On appeal the Subordinate Judge held that the plaintiff was entitled to sue the second defendant as the second defendant undertook to pay the arrears of rent under the assignment deed (Exhibit II) and got possession of the property for a further period by virtue of the same. The Subordinate Judge further held that the rent for the earlier period was not barred by limitation as the suit was brought within six years from the date of the undertaking contained in the registered deed of assignment. He therefore gave a decree for the full amount claimed by the plaintiff, viz., Rs. 877, as against the second defendant and exonerated the first defendant as the second defendant undertook his liability. A second appeal filed by the second defendant was heard by ABDUR RAHIM and PHILLIPS, JJ. ABDUR RAHIM, J., held that the plaintiff was entitled to a decree against the first defendant alone for arrears of rent for the earlier period, viz., 1894 to 1904, and against the second defendant for rent since the date of the assignment, while PHILLIPS, J., confirmed the decree of the Subordinate Judge. In the result the second appeal was dismissed with costs. Thereupon the second defendant preferred this appeal under clause 15 of the Letters Patent against the plaintiff and the first defendant on the grounds that the plaintiff being a stranger to the contract was not entitled to sue him for rent for the earlier period and that the same was barred by limitation.

K. P. M. Menon for the appellant.—I contend for the view upheld by ABDUR RAHIM, J. The plaintiff being a third party cannot enforce against me a liability which I undertook with

another, see *Jamna Das* v. *Ramantar Pande*(1), which was affirmed on appeal by the Privy Council in *Jamna Das* v. *Ram Autar Pande*(2). The suit is for rent and I am sued as *kanomdar*. More than six years' rent cannot be recovered. If I am sued as a transferee of the melcharth, then I am liable only for the last three years' rent subsequent to the assignment, for there is no privity of contract between me and the plaintiff, but there is only a privity of estate. Article 62 and not article 116 applies. *Naduvil Edomkelu Achan* v. *Varadaraja Iyer*(3), *Rangasami Naden* v. *Subbaroya Iyen*(4), *Manyal Sen* v. *Muhammad Husain*(5) and *Nochulliyil Eazhuvan Theethisson Theethalan* v. *The Eralpad Raja* styled as *Elaya Rajah*(6). The assignment transfers only the rights and not the obligations.

C. Madhavan Nair for respondents.—I contend for the view of PHILLIPS, J. The transfer of *melcharth* in effect extinguished the kanom. Instead of a formal redemption there was a settlement of accounts making the arrears payable as a charge on the estate. There is a merger of the two mortgages here and the *jenmi* has recognized the transfer. The kanomdar is now in possession only under the transfer of the melcharth which imposes payment of arrears of rent as a condition of the transfer. On redemption of the first kanom even barred arrears of rent stand as a charge on the kanom amount. That position the *kanomdar* undertook on transfer. I rely on *Kanna Pisharodi* v. *Kombi Achen*(7), and *Hurihara Mangalath* v. *Ibrayan Kutti*(8). A question of law turning upon a proper construction of a document if wrongly given up by a vakil in the lower Courts can be argued in the Appellate Court, *Beni Pershad Koeri* v. *Dudhnath Roy*(9).

P. Appu Nair for the first defendant.—All the parties are before the Court and the liabilities of the defendants *inter se* can be adjusted now.

K. P. M. Menon in reply. *Kanna Pisharodi* v. *Kombi Achan*(7) does not say that a charge is given, but only decides that arrears can at the time of redemption be set off against the

(1) (1909) I.L.R., 31 All., 352.
(2) (1912) I.L.R., 34 All., 63 (P.C.).
(3) (1914) 26 M.L.J., 283.
(4) (1907) I.L.R., 30 Mad., 410.
(5) (1915) I.L.R., 37 All., 115.
(6) (1917) 32 M.L.J., 442.
(7) (1885) I.L.R., 8 Mad., 381 at p. 383.
(8) (1917) M.W.N., 275 at p. 276.
(9) (1900) I.L.R., 27 Calc., 156 at pp. 162 and 163 (P.C.).

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mortgage amount. See *Eressa Menon* v. *Shamu Patter*(1), *Vasudeva Shenoi* v. *Damodaram*(2), *Vedapuratti* v. *Avara*(3), *Achuta* v. *Kali*(4), *Unnian* v. *Rama*(5) and *Parasurama Pattar* v. *Venkatachalam Pattar*(6). If there is a charge, it will be barred after twelve years, but under the customary law arrears of rent even for more than twelve years can be set off. The charge given in the melcharth does not apply to prior arrears. Even if the transferor has a charge the *jenmi* has not a charge.

WALLIS, C.J.

WALLIS, C.J.—This appeal raises a question of some difficulty. In 1904 the plaintiff, jenmi, who was entitled to redeem in 1905 a *kanom* granted by him to the second defendant in 1893, executed a melcharth in favour of the first defendant by which the latter became entitled to redeem the second defendant on the expiry of his *kanom* and to hold the lands himself on a fresh *kanom*. The *kanom* debt payable to the second defendant on redemption was subject to reduction by the amount of the arrears of rent due from the second defendant to the plaintiff under the *kanom* even though a suit for the arrears had become barred, and the first defendant was required on redemption to deduct this amount from the *kanom* debt and pay it over to the plaintiff, or in other words to collect the arrears due to the plaintiff. He did nothing till 1909 when he assigned his rights under the melcharth to the *kanomdar*, the second defendant, stipulating at the same time that the second defendant should pay the plaintiff the arrears of rent due under the *kanom* which he had bound himself to collect and pay on redeeming the second defendant.

One of the questions argued before us was whether the plaintiff is entitled to sue on this contract made between the first defendant and second defendant. As regards this I agree with ABDUR RAHIM, J., that he cannot, and that the question is concluded by the recent decision of the Privy Council in *Jamna Das* v. *Ram Autar Pande*(7) where Lord MACNAGHTEN delivering their Lordships' judgment held that a purchaser's contract with his vendor to pay off a mortgage on the property sold could not be enforced by the mortgagee.

(1) (1898) I.L.R., 21 Mad., 138. (2) (1900) I.L.R., 23 Mad., 86.
(3) (1902) I.L.R., 25 Mad., 568. (4) (1884) I.L.R., 7 Mad., 545.
(5) (1885) I.L.R., 8 Mad., 415. (6) (1913) 25 M.L.J., 561.
(7) (1912) I.L.R., 34 All., 63 (P.C.).

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"The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him and the purchaser is not personally bound to pay off the mortgage debt."

WALLIS, C.J.

This, in my opinion, recognizes the general applicability in India of the common law rule that the parties to a contract are the proper parties to sue on it, which was also the rule in equity except in so far as equity made an exception as explained in *Gandy* v. *Gandy*(1) in cases where the contract was made for the benefit of the third party and in such circumstances as to give rise to a trust in his favour which is not the case here. In the earlier case of *Kwaja Muhammad Khan* v. *Husaini Begam*(2), their Lordships held that this common law rule was not applicable to the facts and circumstances of that case in which the agreement executed by the defendant had specifically charged immovable property for the allowance which he had bound himself to pay to the plaintiff then a minor in contemplation of her marriage. Their Lordships observed that, although no party to the document, she was clearly entitled in equity to proceed to enforce her claim, and that in India, where marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connexion with such contracts. It is clear however from the later case that their Lordships did not intend to lay down that the common law rule had no application to India. In *Tweddle* v. *Atkinson*(3), to which their Lordships referred, reliance had been placed on certain old cases in which persons not parties to the contract had been allowed to maintain an action in assumpsit apparently, as observed by CROMPTON, J., on the ground that the action of assumpsit was in its origin an action of trespass on the case. In *Gandy* v. *Gandy*(4), BOWEN, L.J., considered that it would be mere pedantry now to go through the history of that idea; and this is probably why their Lordships in the case we are considering disposed of *Tweddle* v. *Atkinson*(3), with the remark that it was an action of assumpsit; but, as I have already said, they did not

(1) (1885) 30 Ch. D., 57.
(2) (1910) I.L.R., 32 All., 410 (P.C.). (3) (1861) 1 B.& S., 393.
(4) (1885) 30 Ch. D., 57 at p. 69.

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mean by this that the common law rule on the basis of which that action was dismissed was generally inapplicable in India.

This however does not appear to me to dispose of the present case. The assignment by the first defendant of his right under the melcharth to the second defendant has been recognized by the plaintiff who by the notice (Exhibit B), dated 8th January 1912, demanded payment of the arrears from the second defendant by reason of the assignment and has also framed the present suit upon it; and, even if it could be said that the melcharth contained an implied covenant against assignment to the second defendant, I do not think the validity of the assignment can now be questioned. I think however that by reason of this assignment the second defendant became bound to redeem the old *kanom* and to hold the demised lands for a further term for the old *kanom* debt less the amount of arrears which were due at the date of redemption, and that the plaintiff *jenmi* when he came to know of the assignment, which was apparently shortly before he served the notice (Exhibit B) on the second defendant, became entitled to insist on his so redeeming the old *kanom* and to treat the arrears as money in the second defendant's hands had and received to the plaintiff's use and to recover it within three years under Article 62 and I think he must be taken to have exercised this right when he demanded payment of the arrears from the second defendant by Exhibit B on the basis of the assignment. I do not think we are bound to treat the redemption as having taken place on the date of the assignment by the first defendant to the second defendant seeing that the arrears were not paid over to the plaintiff as they should have been. Even if we were, I should be prepared to hold that under Article 62 read with section 18 of the Limitation Act time would not run against the plaintiff so long as he was kept in the dark as to the manner in which his rights had been affected by the assignment of the first defendant's melcharth rights to the second defendant.

In this view of the case I do not think it necessary to decide the question which has been raised, whether under the Malabar Law the jenmi has a charge on the amount of the *kanom* debt for arrears of revenue or merely a right to take credit for the amount of such arrears when the account is taken as between the mortgagor and the mortgagee. A charge may be realized at any time under section 100 of the Transfer of Property Act,

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and one test would appear to be whether under the Malabar custom barred arrears can be recovered at any time by enforcing the charge. If not, I should as at present advised be disposed to hold that there cannot strictly speaking be said to be a charge. In the result, the Letters Patent Appeal will be dismissed with costs.

BAKEWELL, J. — BAKEWELL, J

The plaint recites a kanom deed, dated the 6th July 1893, granted by the plaintiff to the second defendant, and a melcharth, dated the 28th January 1904, to the first defendant, and alleges that under the provisions of the melcharth the first defendant was bound to redeem the second defendant on the expiration of the term of the kanom in 1905 and to pay to the plaintiff the arrears of rent due by the second defendant for the years 1896 to 1905. The plaint also recites an assignment of the melcharth, dated the 6th July 1909, by the first defendant to second defendant and an agreement therein contained that the latter would pay the arrears of rent to the plaintiff.

The cause of action is stated to have arisen on the date of the melcharth and the plaint prays for payment of the arrears of rent from 1896 to 1905 and from 1910 to 1913 and for sale of the defendants' *kanom* right.

The suit is therefore to enforce payment of monies due to the plaintiff under the provisions of the melcharth. The plaintiff's remedy for rent for the earlier period is barred, but in a suit for redemption he would be entitled to have it credited to him in taking an account as between the mortgagee in possession and the mortgagor. In such a suit the mortgagor is entitled to be credited with any monies received or due by the mortgagee, including rent, as on the dates on which they were received or fell due; and I do not think that it is correct to say that these monies are a charge on the mortgage monies, or that the learned Judges in *Kanna Pisharodi* v. *Kombi Achen*(1) intended to hold that any kind of charge is created by non-payment of rent. I do not think that the sum due for rent can be said to be money had and received by the mortgagee for the use of the mortgagor; he was bound to pay this sum but he never in fact received it on account of the mortgagor. At the

(1) (1885) I.L.R., 8 Mad., 381.

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date of the melcharth the plaintiff was therefore entitled to have an account taken of the amount due to the second defendant under his kanom, in which the arrears of rent would be credited to the plaintiff, and to redeem this defendant by payment of the balance, but there was no specific sum due and payable by the defendant to the plaintiff.

It appears from the recitals of the melcharth that the plaintiff had disputes with the second defendant and was anxious to redeem him and compel him to give up possession of the land, and also to obtain payment of arrears of rent, and the bargain between the plaintiff and the first defendant as evidenced by this document was that on the expiry of the term granted by the kanom the first defendant should redeem the second defendant by payment of the balance due to the latter and take possession of the land, and that the first defendant should then pay to the plaintiff the arrears of rent which would have been credited to him in the account.

The document contains a demise of the land to the first defendant "for a period of twelve years commencing from the date of recovering possession of the said properties", but provides that the first defendant shall pay rent from 1905, when the kanom term expired, "even in case there is delay in getting possession of the properties". The last provision appears to have been inserted for the purpose of ensuring prompt performance of the first defendant's obligation to redeem the mortgagee.

In my opinion the demise under this document was not intended to take effect until this obligation had been fulfilled and that since this has not been done the term of twelve years contemplated by the melcharth has not yet come into existence, and the assignment of the benefit of the document was in breach of its terms and passed nothing to the second defendant.

The relations between the plaintiff and the second defendant therefore fall to be determined, in accordance with the provisions of the kanom, and the plaintiff is not entitled to any remedy under the melcharth as against the second defendant.

Assuming that on the true construction of the melcharth a leasehold interest was created in favour of the first defendant immediately upon the determination of the term granted by the kanom to the second defendant, and that the assignment of the melcharth to the second defendant imposed upon him an

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obligation to take an account of the amount due under his kanom and to redeem himself, the result would be that he would hold the term granted by the melcharth as security for the balance found to be due to him. The obligation to pay a certain item taken the account in ascertaining the balance would arise not from the redemption but from the personal liability undertaken by the first defendant under his melcharth.

The first defendant's obligation to pay a sum of money determined by the arrears of rent due under the previous demise in fact formed part of the consideration for the grant of the new lease; this sum was not rent due under the latter, and the agreement to pay it cannot be said to run with the land so as to be binding upon an assignee.

The sum agreed to be paid might possibly be a charge upon the interest (if any) of the first defendant in the land, as unpaid purchase money, but this point has not been taken either in the plaint or the arguments.

I respectfully agree with the learned Chief Justice that a contract cannot be enforced by a person not party to it, and I think that the provisions of the melcharth that the first defendant shall redeem the kanomdar and pay a certain sum to the plaintiff are personal covenants and cannot be enforced against the second defendant. The same reasoning applies to the provisions of the assignment to the second defendant.

The plaintiff appears to have acquiesced in the assignment of the melcharth to the second defendant but it has not been shown that the latter has by conduct or otherwise agreed to be bound by its terms; on the contrary the assignment appears to have been obtained by him with the view of preventing the provisions of the melcharth from coming into force and thus postponing the redemption of his mortgage.

The lower Appellate Court refused relief against the first defendant; and there is no appeal from that order by the plaintiff.

For these reasons I think that this appeal should be allowed, the decrees of the lower Courts set aside and the plaintiff's suit in respect of rent for the period from 1895 to 1905 dismissed.

KUMARA-SWAMI SASTRIYAR, J.

KUMARASWAMI SASTRIYAR, J.—The suit out of which this appeal arises was filed by the plaintiff (the jenmi) to recover arrears of rent. The second defendant obtained a kanom from

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the jenmi under Exhibit III on the 6th July 1893 whereby he was entitled to be in possession of the properties demised for twelve years (i.e., till 6th July 1905). On the 28th January 1904 the *jenmi* granted a *melcharth* to the first defendant by Exhibit I, the material portion of which runs as follows :—

"On the expiry of the term of the demise you shall either directly or by suit pay to Gopala Menon and another (the kanomdars under Exhibit III) the balance kanom after setting off the arrears of purapad and interest against the kanom and obtain possession of the properties. And you shall hold the properties on paying properly the purapad due from 1081 (1905-1906). "You should then pay to the Edom the value of the purapad which you get set off against the kanom and obtain receipt therefor . . . It is stipulated that you should pay the whole of the purapad from 1081 (1905—1906) even in case there is delay in getting possession of the properties."

The first defendant did not redeem the kanom of the second defendant when it became redeemable on the 6th July 1905 but assigned his rights under the melcharth deed (Exhibit I) to the kanomdar by the deed of assignment (Exhibit II), dated the 6th July 1909. The material portion of the document runs as follows :—

"I have this day received in cash from you Rs. 600 made up of the renewal fee of Rs. 400 due to me in accordance with the said melcharth and interest thereon and Rs. 56 being the value of paddy consisting of the michavaram paid by me to the *jenmi* from 1081 (1905—1906) to 1084 (1908—1909) with interest thereon and I have hereby assigned to you all the rights belonging to me under the said melcharth . . . You should directly pay to the *jenmi* the arrears of michavaram, etc., payable to the *jenmi* from 1071 (1895—1896) to 1080 (1904—1905) inclusive. If you do not do so, you shall be liable for the damages arising therefrom."

Although the *jenmi* might have repudiated the melcharth owing to the melcharthdar's failure to redeem the prior kanom as expressly stipulated in the melcharth, he did not choose to do so; but on the contrary sent the notice Exhibit B to the assignee of the melcharth demanding arrears of rent "as he held in himself the entire rights of the prior tenant and the melcharthdar." In his plaint the *jenmi* recognizes both the melcharth and the assignment as valid and subsisting transactions at the date of suit and he obtained a decree against the second defendant.

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The melcharth provides for rent being paid to the *jenmi* even if the melcharthdar delayed in redeeming the kanom and there is nothing so far as I can see to prevent (in the absence of any objection raised by the *jenmi*) the kanomdar and melcharthdar from agreeing between themselves that the kanomdar is to remain in possession so long as the rights of the *jenmi* to the rent reserved by the melcharth and his right to recover arrears of rent on the kanom are not affected. I do not think that the melcharth was at the date of the assignment invalid and inoperative by reason of the failure of the grantee to redeem the kanom.

The rights of the parties must be dealt with on the footing that the second defendant remains liable for all the legal consequences that would flow from his being both the kanomdar and the assignee of the melcharth.

I am of opinion that the effect of the assignment of the melcharthdar's rights to the kanomdar was to extinguish the kanom at least from the date *jenmi* assented to the assignment. The *kanomdar* then became entitled to use the melcharth as a shield against any attempts which the *jenmi* might make to recover possession of the land. If the *melcharthdar* instead of assigning the melcharth had acted according to its terms and redeemed the kanom the *jenmi* would, under the terms of Exhibit I, have been entitled to recover the sum which would be in the *melcharthdar's* hands as arrears of rent which had been set off against the kanom amount. There can be little doubt that the effect of the assignment of the melkanom to the kanomdar was to allow the kanomdar to remain in possession for the period provided in the melkanom and the question is whether the kanomdar can be heard to say that he is under no obligation to pay the *jenmi* under arrears of rent on the kanom which the kanomdar bound himself to pay the *jenmi* under Exhibit II. I do not think it is open to the kanomdar to claim the advantages which he got by reason of the assignment of the melcharth without performing the obligations imposed by the melcharth. In *Kulandavelu Padayachi* v. *Kamatchi Aiyer*(1), it was held that a person who though not a party to a contract, takes benefits under it, is bound to pay money due under the contract. The case was one where by a partition deed between two brothers

(1) (1912) M.W.N. 409.

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lands were given to a female member for her maintenance on condition that she paid a certain sum of money to each of the brothers. She took possession and was sued by one of the brothers for the amount payable. The lower Court dismissed the suit on the ground that she was no party to the contract but in revision SUNDARA AYYAR, J., held that though not a party to the contract she took a benefit under it and was subject to the burden imposed on her by the document. I might in this connection refer to *Irving* v. *Turnbull*(1). It was a case where a common vendor of various plots of land agreed to pay the purchaser of one plot, one half of the cost of erecting a party wall which was partly built on a portion of an adjacent plot and then sold the adjacent plot to another person with covenant that the second purchaser should pay to the first purchaser the sums which the vendor had agreed to pay in respect of the building of the party wall. In a suit by the first purchaser against the second, objection was taken that there was no privity of contract but a decree was passed on the ground that

"sufficient had taken place to constitute privity of contract where the second purchaser in fact used the wall that had already been built upon by his neighbour and that consequently at that stage there was sufficient for the Court to hold that an action at common law as upon an implied contract would arise from such a use of the wall."

CHANNEL, J., observed that

"very little will create that privity of contract where it is so convenient for all parties that the matter should be carried out between two parties really interested in it."

It has been contended on the authority of *Tweddle* v. *Atkinson*(2), that no stranger to the consideration can enforce performance of a contract though made for his benefit. That the rule laid down in *Tweddle* v. *Atkinson*(2), has exceptions and is not of universal application in India is clear from the following observations by their Lordships of the Privy Council in *Khwaja Muhammad Khan* v. *Husaini Begam*(3):

"First, it is contended, on the authority of *Tweddle* v. *Atkinson* (2), that as the plaintiff was no party to the agreement she cannot take advantage of its provisions. With reference to this it is enough

(1) (1900) 2 Q.B., 529.
(2) (1861) 1, B. & S., 393. (3) (1910) I.L.R., 32 All., 410 (P.C.).

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to say that the case relied upon was an action of assumpsit and that the rule of common law on the basis of which it was dismissed is not, in their Lordships' opinion applicable to the facts and circumstances of the present case."

Their Lordships were of opinion that the fact that the payment was charged on the immoveable property and that the plaintiff was beneficially entitled to it gave her the right to sue on the contract to which she was not a party.

In *Shuppu Ammal* v. *Subramanian*(1), it was held on the authority of *Rahmabai* v. *Govind*(2) and *Husaini Begam* v. *Khwaja Muhammal Khan*(3), which was confirmed by the Privy Council in *Khwaja Muhammad Khan* v. *Husaini Begam*(4), that a person who is no party to a document but in whose favour a charge is created by it was entitled to file a suit to enforce its terms either as actual beneficiary or charge-holder. If the decision in *Tweddle* v. *Atkinson*(5) is to be followed, as a rule of general application it is difficult to see how the fact that a charge has been created makes any difference so far as the person not a party to the contract is concerned. In *Arumuga Gounden* v. *Chinnammal*(6), it was held that a person could sue on an agreement to which she was no party, whereby two persons agreed to give her a certain quantity of paddy for her maintenance, SUNDARA AYYAR, J, referring to *Khwaja Muhammad Khan* v. *Husaini Begam*(4), observed that

"the rule that a person not a party to the contract cannot sue to enforce any rights created by it is one which would require considerable modification in this country."

He thought that if the rule was subject to exceptions one very proper exception was where co-parceners agreed to provide for maintenance of female members of the family. In *Kulandavelu Padayachi* v. *Kamakshi Aiyer*(7), the same learned Judge held that a person who is not a party to a contract but who takes a benefit under it was subject to the burden imposed.

Though *Dutton* v. *Poole*(8) affirmed on error in the *Exchequer Chamber* was dissented from in *Tweddle* v. *Atkinson*(5) it was followed in *Chinnaya Rau* v. *Ramaya*(9), and as pointed

(1) (1910) I.L.R., 33 Mad., 238.
(2) (1904) 6 Bom., L.R., 421.
(3) (1910) I.L.R., 29 All., 151.
(4) (1910) I.L.R., 32 All., 410 (P.C.).
(5) (1861) 1, B. & S., 393.
(6) (1911) 21 M.L.J., 918.
(7) (1912) M.W.N., 409.
(8) (1793) 2 Lev., 210; s.c., 1 Vent., 281; s.c., Ray., 303.
(9) (1882) I.L.R., 4 Mad., 137.

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out by Pollock in his commentaries to the Contract Act, *Dutton* v. *Poole*(1) is having regard to 'consideration' in section 2, clause (d) of the Contract Act good law in India, where consideration need not move from the promisee.

All that was decided in *Jamna Das* v. *Ram Autar Pande*(2), was that a purchaser of property subject to a mortgage was not personally liable to pay the sum due on the mortgage to the mortgagee so as to entitle him to a personal decree should the sale-proceeds of the mortgaged property be insufficient. It was not alleged that the mortgagee was in any way prejudiced by the transfer or that any exceptional circumstances existed.

If as pointed out by their Lordships of the Privy Council in *Khwaja Muhammad Khan* v. *Hussaini Begam*(3), and by SUNDARA AYYAR, J., in *Arumuga Gounden* v. *Chinnammal*(4), the rule in *Tweddle* v. *Atkinson*(5), is not of universal application and is subject to exceptions in India, I think the *jenmi* situated as the plaintiff in the present case is, is entitled to sue on the contract between the kanomdar and melkanomdar.

Even assuming that the *jenmi* cannot enforce the contract evidenced by Exhibit I against the kanomdar I think that an action for money had and received would lie. This aspect of the case has been fully dealt with by the Chief Justice in his judgment which I have had the advantage of perusing and I entirely agree with his observations on the point.

Whether the claim of the *jenmi* is based on his right to sue on the arrangements evidenced by Exhibits I and II or on the ground that the kanom must be deemed to have been redeemed when the assignment of the melcharth to the kanomdar was assented to by the *jenmi* it is not barred. In the former case he would have six years within which to file the suit as Exhibits I and II are registered documents and in the latter he would have three years from the date of his assent. It is unnecessary to deal with the contention of the respondents that the *jenmi* has a charge on the kanom amount in respect of rent due to him from the kanomdar.

I am of opinion that the decision of PHILLIPS, J., is right and would dismiss the Letters Patent Appeal with costs.

N.R.

(1) (1793) 2 Lev., 210; s.c., 1 Vent., 381.
(2) (1912) I.L.R., 34 All., 63 (P.C.). (3) (1910) I.L.R., 32 All., 410 (P.C.).
(4) (1911) 21 M.L., 918. (5) (1861) 1, B. & S., 893.

APPELLATE CIVIL.

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

1917, September, 10 and 19.

SRINIVASA RUNGA ROW PANTULU (DEAD) (REPRESENTED BY THE OFFICIAL ASSIGNEE, HIGH COURT, MADRAS) AND ANOTHER (PETITIONER), APPELLANTS,

v.

RAJAH OF KARVETNAGAR, BY HIS GUARDIAN, VARADACHARIAR (COUNTER-PETITIONER), RESPONDENT.*

Madras Court of Wards Act (II of 1902), ss. 41 and 37—Non-notification of pecuniary claims as required by section 37, effect of—Cessation of interest whether final—Postponement of payment of unnotified claims to notified claims, whether continued after cessation of Court of Wards' management.

The direction contained in section 41 of the Madras Court of Wards Act (II of 1902) to postpone payment of pecuniary claims against a ward of the Court which are not notified, to claims notified to the Collector as required by section 37 of the Act applies only, to the Court of Wards and not to others authorized to execute decrees under the Civil Procedure Code; and that too in respect of unsecured claims; and the direction is not operative after the ward's estate ceases to be under the Court of Wards. Hence a mortgage decree against a person which the decree-holder failed to notify to the Collector while the person was under the Court of Wards is executable in Civil Courts, without any liability to postponement to notified claims, after the Court of Wards' management ceases. But non-notification of the existence of the claim as required by section 37 entails a final cessation of interest from six months after the notification prescribed in section 37 of the Act except in the event specified in section 55(4).

Depuru Kalappa Reddy v. *Umada Rajah* (1911) 1 M.W.N., 75, considered.

APPEAL under clause 15 of the Letters Patent against the Judgment of OLDFIELD, J. (who differed from KRISHNAN, J.), in *Srinivasa Runga Row* v. *Minor Rajah of Karvetnagar*(1).

One V. Krishnaswami Row became an insolvent and his estate vested in the Official Assignee of Madras. He was a member of a joint Hindu family of four persons. One of the

* Letters Patent Appeal No. 266 of 1916.

(1) Civil Miscellaneous Appeal No. 107 of 1912 preferred against the order of L. G. MOORE, the District Judge of North Arcot, in Civil Miscellaneous Petition No. 118 of 1911, dated 4th December 1911, in Execution Petition No. 132 of 1905, in Original Suit No. 7 of 1894.

assets of the family was a mortgage decree for a lakh of rupees against the Zamindar of Karvetnagar in Original Suit No. 7 of 1894. The Official Assignee brought a suit (Original Suit No. 116 of 1897) for partition and was appointed receiver to execute the mortgage decree. But before this was done a twenty-fourth share in the decree had passed to a person not a party to the partition suit or the order in it; this share finally passed to one Srinivasa Raghavachari. The Court of Wards had taken charge of the Karvetnagar Estate in 1899, the then zamindar having been declared a ward. The management continued up to 1905 when the estate was released as the zamindar died. The Official Assignee filed Execution Petition No. 132 of 1905 for executing the mortgage decree. The minor zamindar who had succeeded to the estate was also declared a ward of the Court of Wards who assumed management again in August 1907 before the execution was carried out. The management continued till January 1910 when the estate was released under the discretionary power given under the first part of section 54. The usual notification was published by the Collector under section 37 (1) in February 1908 calling upon all creditors to notify their debts and a special notice was apparently sent to the Official Assignee. For some reason not apparent the Official Assignee failed to notify his mortgage decree debt. In December 1914, the District Court held in Civil Miscellaneous Petition No. 148 of 1911 (in the above Execution Petition No. 132 of 1905) that under section 41 of the Act, the claim of the Official Assignee to execute his decree should be postponed until after discharge or satisfaction of the claims of creditors notified or admitted under section 38 and that interest should cease from August 1908, i.e., at the expiry of six months from the date of notification under section 37 (1). Against this order the present appeal was filed in the High Court by the Official Assignee and two others.

In the meanwhile Srinivasa Raghavachari, abovementioned assignee of a twenty-fourth share in the decree, applied for execution of the decree in Original Suit No. 7 of 1894. His application was allowed as he had properly notified his claim under section 38. In execution the mortgaged property was sold in April 1916 and purchased by one Muthia Chetty, a stranger, nd the sale-proceeds were deposited in Court.

The decree in Original Suit No. 7 of 1894 having been fully executed, the prayer in the Execution Petition No. 132 of 1905 under appeal, to sell the mortgaged properties became useless; and the decree-holder therefore prayed in the High Court that the balance of the sale-proceeds deposited in Court be paid to him in execution of his decree.

The appeal was heard by OLDFIELD and KRISHNAN, JJ. OLDFIELD, J., agreed with the lower Court and held that as the appellant had not notified his claim to the Collector as required by section 37 (1) of the Madras Court of Wards Act (II of 1902) he had lost his right to subsequent interest and was not entitled to be paid until the creditors who had notified their claims were paid; while KRISHNAN, J., reversed the lower Court's order and remanded the petition holding that on non-notification of the claim interest ceased *for ever*, but that the penalty of postponement was operative only so long as the management of the Court of Wards lasted, and that therefore the decree-holder was entitled to be paid out of the sale-proceeds. In the result the application was dismissed with costs.

The decree-holder then preferred this appeal under clause 15 of the Letters Patent.

T. Narasimha Ayyangar for the appellant.—I contend for the view taken by KRISHNAN, J. The penalty of postponement contained in the second part of section 41 of the Court of Wards Act is only operative during the period of the Court of Wards' management and not after it ceases. *Depuru Kalappa Reddy* v. *Umada Rajah*(1) is wrong.

L. A. Venkata Raghava Ayyar for *L. A. Govinda Raghava Ayyar* for the respondent.—section 41 (second part) is imperative and the penalty is absolute and extends after the termination of the Court of Wards' management. I adopt the view of OLDFIELD, J. Section 55 gives a clue to the interpretation to be put on section 41. Interest ceases for ever as has been held in *Depuru Kalappa Reddy* v. *Umada Rajah*(1). The same finality must result in the case of non-notification of security. There are no words in the section stating that the penalty is to be only during the Court of Wards' management.

WALLIS, C.J. WALLIS, C.J.—In construing the provisions of section 41 of the Madras Court of Wards Act I of 1902, regard must be

(1) (1911) 1 M.W.N., 75.

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had to the scope and object of the amendments introduced into the Madras Court of Wards Regulation V of 1804 by Madras Act IV of 1899 and reproduced without substantial alteration in the Act of 1902. The object was to save the estates of embarrassed proprietors or at least a portion of them for their owners and it was hoped that with the aid of the additional powers conferred on it the Court of Wards would be able to provide for the full discharge of the proprietors' debts and liabilities. If not, the creditors were left to their ordinary remedies which were only interfered with as expressly provided. Among the powers conferred on the Court of Wards and its agent the Collector specified in the order under section 19 of the Act, was that of requiring all persons having pecuniary claims on the ward, whether decrees or not, to notify those claims within a specified period, failure to do so being visited with the penalties prescribed by sections 41 and 42. With the information thus acquired and with aid of further powers of ousting usufructuary mortgagees from possession and converting them for the time into simple mortgages and of revising improvident leases it was hoped that the Court of Wards might find itself in a position to raise sufficient money to discharge all the liabilities. Section 41 imposes two penalties with regard to claims which have not been duly notified. The first of them is that

"it shall, notwithstanding any law, contract, decree, or award to the contrary, cease to carry interest from the expiration of the period prescribed by section 37"

for notifying claims. This threatened loss of interest was a strong inducement to notify claims and having regard to the express provision that interest shall cease even when payable under a decree and to the absence of any provision as to its again becoming payable except in the event specified in section 55 (4), I agree with both the learned Judges that, under the sections, the cessation of interest is final and that the claimant is left to prosecute his legal remedies for the amount already accrued due to him.

As regards the second penalty that the unnotified claim

"shall not be paid until after the discharge or satisfaction of the claims notified or admitted under section 38",

it may be observed in the first place that the provision cannot be construed as depriving secured creditors of their security or as

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authorizing the application of money raised on their securities otherwise than in satisfaction of their claims. If not paid the secured creditor is entitled to retain his security till he is paid. In these circumstances to hold that the Court of Wards is prohibited by this section from raising money on the security and discharging the secured creditor and applying the surplus in the discharge of the general indebtedness would merely be to prevent the Court from raising money for the beneficial purposes specified in section 323 (3), Code of Civil Procedure and would unnecessarily embarrass it in the discharge of the difficult function entrusted to it without advantage to any body. This cannot, I think, have been the intention of the Legislature and I think that therefore we are justified in putting a restrictive construction on this highly general section and holding that in the case of secured creditors who have not notified it only prohibits payments to them by the Court of Wards out of the unincumbered funds at its disposal and does not prohibit the realization of the security and the satisfaction out of the proceeds of the secured creditor's claim.

If the prohibition of payment in section 41 is directed to the Court of Wards it follows of course that it must cease as held by KRISHNAN, J., when the Court of Wards withdraws from superintendence. I am disposed to think that it must be confined to the Court of Wards and that it does not extend to the authorities executing decrees even during the continuance of the superintendence of the Court of Wards. Creditors whether they have notified or not are not prevented from obtaining decrees and proceeding to execute them. If the execution is left to the Civil Courts, each Court must execute the decree before it with due regard to the rights of secured creditors and to the rights of unsecured decree-holders to rateable distribution. It can hardly have been intended that on each occasion of executing a decree the executing Court should have to embark on an inquiry as to whether all the notified debts have been paid and I think that sufficient effect may be given to section 41 without construing it as affecting the duties of executing Courts and that if it had been intended to affect them, there would have been express provisions to that effect. Again when the Local Government exercises its power under section 45 of transferring decrees against the ward to Collector for execution,

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I think the same considerations apply and that the provisions of section 41 as to order of payment do not affect the decree collector, as he is called, in the discharge of his duties under sections 321—325 (C) of the old Code of Civil Procedure which are made applicable by section 47 subject to the rules prescribed by the Local Government under section 45 (2) which rules however apply only to procedure and do not affect the substantive rights of the parties. In the case of decrees such as the present obtained by secured creditors ordering the sale of immoveable property in pursuance of a contract specifically affecting the same the decree collector has the powers conferred upon him by section 321 and is required by section 324 (A), to apply the moneys realized by him, subject to the claims of maintenance holders, in execution of the decree for which the Court ordered the sale of the immoveable property and in the case of other decrees to apply such moneys by way of rateable distribution under section 323 (3); the decree collector is also empowered to discharge the claim of any incumbrancer whether it has matured or not

"for the purposes of improving the saleable value of the property available or any part thereof or rendering it more suitable for letting or managing or for preserving the property from sale in satisfaction of an incumbrance."

I do not think that the second part of section 41 was intended to affect the decree collector as regards these powers and duties.

This is an attempt to execute a mortgage decree passed in 1895. It is stated by the District Judge of North Arcot in his order on the connected Execution Petition No. 79 of 1912, dated 21st November 1912, that the Court of Wards assumed management on 26th July 1899 and gave up management of the estate on 27th September 1905 and that decrees were transferred to the Collector for execution and retransferred to the Civil Courts on 27th February 1906. It is also stated that the Court of Wards again assumed superintendence on 17th August 1907, and relinquished it on 15th January 1910, but it is not stated that decrees were again transferred to the Collector for execution during that period and the execution still remains with the Civil Courts. As it is now more than eighteen years since the Court of Wards first took over management and the other secured and unsecured claims have not yet been satisfied it seems exceedingly

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unlikely that they ever will be satisfied and if they are not, the money which has been realized on account of the defendant's security and which is in Court must according to the District Judge's order remain there for ever, a result which the Legislature can certainly not have contemplated. In passing the order the learned District Judge relied on a ruling contained in a judgment to which I was a party with KRISHNASWAMI AYYAR, J., in *Depuru Kalappa Reddi* v. *Umada Rajah*(1) that the provisions of section 41 are absolute except in so far as they are cut down by section 55 (3) and OLDFIELD, J., has also relied on this ruling. That was an appeal against an order in which the District Judge had held that the zamindari was not liable to be proceeded against for many debts incurred by the previous holder and the order was reversed on the ground that his view was wrong. Apparently the District Judge's ruling in that case that section 41 was not applicable when the decree was being executed in the Civil Court was also questioned before us; and, as to this, I now think we expressed ourselves too broadly, because while I am still of opinion that the provisions of section 41 as to the cessation of interest continue to apply, I have come to the conclusion on a fuller consideration of the subject that the further provisions of the section are inapplicable for the reasons already given to the present case. In the result we agree with the order proposed by KRISHNAN, J. Costs of the appeal to abide the result.

BAKEWELL, J.—I agree.

KUMARASWAMI SASTRIYAR, J.—I agree.

BAKEWELL, J. — KUMARASWAMI SASTRIYAR J.

N.R.

(1) (1911) 1 M.W.N., 75.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1917, October, 31 and November, 2.

S. SITARAMASWAMI (PETITIONER-ASSIGNEE FROM THE DEFENDANT), APPELLANT IN BOTH THE APPEALS,

v.

D. LAKSHMI NARASIMHA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 146, and O. XXII, r. 10—Suit originally filed in a District Munsif's Court—Plaint returned and filed in a Subordinate Judge's Court—Suit property mortgaged to another during pendency of suit in the former Court—Decree for plaintiff by Subordinate Court—Petition to District Court by mortgagee for permission to appeal, if competent—Appeal by mortgagee against decree of Subordinate Judge's Court, whether maintainable.

A plaint filed in a District Munsif's Court was, on objection taken by the defendant to the valuation of the suit, ordered to be returned and was presented in the Subordinate Judge's Court. While the suit was pending in the District Munsif's Court, the suit property was mortgaged by the defendant to the appellant. On the suit being decreed by the Subordinate Judge in favour of the plaintiff, the defendant did not prefer an appeal; the *appellant*, as the mortgagee of the suit property pending suit, alleging collusion between the plaintiff and the defendant, filed an application in the District Court under Order XXII, rule 10, for an order allowing him to prefer an appeal, and also preferred an appeal against the decree. The District Judge dismissed both the petition and the appeal as incompetent. The appellant preferred to the High Court a Civil Miscellaneous Appeal and a Second Appeal against the decisions respectively:

Held, that Order XXII, rule 10, only governs applications made to continue a suit and that an application presented after the termination of the suit was not within the rule;

Subba Pillai v. *Rungasami* (1917) M.W.N., 306, and *The Collector of Muzaffernagar* v. *Husaini Begam* (1896) I.L.R., 18 All., 86, followed.

Held also, that, under section 146 of the Civil Procedure Code, it was competent to the mortgagee to prefer an appeal to the District Court against the decree of the Subordinate Judge, and that the District Judge was bound to dispose of the appeal on the merits, notwithstanding the dismissal of the petition under Order XXII, rule 10.

* Second Appeal No. 1153 of 1916 and Civil Miscellaneous Appeal No. 74 of 1916.

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Where a plaint is returned for presentation to the proper Court any devolution of interest during the pendency of proceedings in the first Court must be taken to be a devolution of interest during the pendency of the suit in the second Court.

Seshagiri Row v. *Vapa Velayudam Pillai* (1913) I.L.R., 36 Mad., 492, distinguished.

SECOND APPEAL against the decree of K. SEINIVASA RAO, the District Judge of Ganjām at Berhampur, in Appeal No. 200 of 1915, preferred against the decree of T. JIVAJI RAO, the Temporary Subordinate Judge of Ganjām at Berhampur, in Original Suit No. 25 of 1914.

Appeal against the order of K. SRINIVASA RAO, the District Judge of Ganjām, in Appeal No. 200 of 1915.

The material facts appear from the judgment.

K. V. L. Narasimham for the appellant.

C. Srinivasan for *S. Varadacharlar* for the first respondent.

The Judgment of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—Plaintiff, the mother, sued her son, the defendant, for a declaration that the property in suit was her stridhanam. The suit was first filed in the District Munsif's Court and on objection being taken to valuation, it was returned for presentation to the Court of the Subordinate Judge and was tried in that Court. When the suit was in the Munsif's Court, the defendant executed a mortgage in favour of the present appellant. The suit was decided by the Subordinate Judge in favour of the plaintiff. It is alleged that while the son was taking steps to file an appeal he colluded with his mother and gave up the idea of preferring an appeal. Thereupon the present appellants filed an application to the District Court under Order XXII, rule 10, for an order that he be allowed to prefer an appeal, as the right to the property in suit devolved on him pending the suit. At the same time, he filed memorandum of appeal against the decree of the Subordinate Judge. On the application the District Judge held that Order XXII, rule 10, was not applicable and dismissed it. On the appeal he held that his order on the application concluded the right of the appellant. Against these two decisions a Civil Miscellaneous Appeal and a Second Appeal have respectively been preferred. As regards the dismissal of the application we agree with the conclusion of the District Judge though not with the reasons given by him. He has

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relied on *Seshagiri Rao* v. *Vapa Velayudam Pillai*(1) for the proposition that the suit in the Munsif's Court was not continued in the Court of the Subordinate Judge. We reserve our opinion on the exact point decided in *Seshagiri Rao* v. *Vapa Velayudam Pillai*(1). That decision is authority only for the proposition that for purposes of limitation, the suit in the Court of the Subordinate Judge was different from that which was first filed in the Munsif's Court. As at present advised we are inclined to think that when a plaint is returned for presentation to the proper Court, any devolution of interest which took place while the proceedings were pending in the first Court must be taken to be a devolution in the course of the suit which was subsequently tried in the second Court. But the order of the District Judge can be supported on the ground that when the appellant applied to the District Judge, there was no suit pending. Order XXII, rule 10 only governs applications made to continue a suit. Consequently the application presented after the termination of the suit was not within the rule. The recent decision of this Court in *Subba Pillai* v. *Rungasami*(2), takes that view which is also supported by *The Collector of Muzaffernagar* v. *Husaini Begam*(3). We agree with the view taken in these decisions. Following them we hold that the District Judge was right in rejecting the application and we dismiss the Civil Miscellaneous Appeal with costs.

The District Judge is clearly wrong in holding that the appeal failed by reason of his rejection of the application. Apparently his attention was not drawn to the provisions of section 146 of the new Code of Civil Procedure. It is rather anomalous that if the person claiming under a party applied to continue the suit while it was pending, the Court had a discretion to permit him to do so or to refuse his application while the effect of section 146 is to grant such a person an undeniable right to prefer the appeal which his assignor could have preferred. But the language of the section is clear and we are not at liberty to go behind its plain terms. The proceeding contemplated by the section would include an appeal and the expression *claiming under* is wide enough to cover cases of devolution, etc., mentioned in Order XXII, rule 10. We

(1) (1913) I.L.R., 36 Mad., 482. (2) (1917) M.W.N., 306.
(2) (1896) I.L.R., 18 All., 86.

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therefore hold that the appellant was entitled to prefer the appeal to the District Judge. That appeal must now be heard on the merits. We reverse the decree of the District Judge and remand the appeal to him for disposal. Costs of the Second Appeal will abide the result.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Ayyangar.

MUTHAMMAL (PLAINTIFF), APPELLANT,

v.

RAZU PILLAI AND FIVE OTHERS (DEFENDANTS), RESPONDENTS.*

1917, February, 19 and 22, March, 29, and November, 14.

Mortgage—Suit and decree by prior mortgagee without impleading puisne mortgagee —Purchase of mortgage property by prior mortgagee in execution—Receipt of rents and profits thereafter—Mode of accounting between the two mortgagees.

A mortgage decree obtained by a prior mortgagee without impleading a puisne mortgagee does not affect the latter and the amount therefore payable by the latter in discharge of the prior mortgage is not the amount of the decree but that which is due on the footing of the prior mortgage as if no suit had been brought; and if the prior mortgagee buys the mortgage property in execution of his decree and gets possession of the same, the rents and profits received by him cannot be set off as equivalent to the interest due for the period of possession but must be accounted for and deducted from the amount payable by the puisne mortgagee.

Umes Chunder Sircar v. *Zahur Fatima* (1891) I.L.R., 18 Calc., 164 (P.C.) and *Ganga Pershad Sahu* v. *The Land Mortgage Bank of India* (1894) I.L.R., 21 Calc., 366 (P.C.), applied. *Syed Ibrahim Sahib* v. *Armugathayee* (1915) I.L.R., 38 Mad., 18, considered.

APPEAL against the decree of S. MAHADEVA SASTRIYAR, the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 54 of 1914 (Original Suit No. 108 of 1912 on the file of the Subordinate Judge of Madura).

The facts are given in the first paragraph of the judgment of the High Court.

M. D. Devadoss, T. V. Gopalaswami Mudaliyar and *A. Ganesa Ayyar* for the appellant.

K. Bhashyam Ayyangar, S. Aravamudu Ayyangar and *A. Krishnaswami Ayyar* for the respondent.

* Appeal No. 393 of 1914.

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The Judgment of the Court was delivered by

SRINIVASA AYYANGAR, J.—This is an appeal by the plaintiff from the decree of the Temporary Subordinate Judge of Ramnad, dated 21st September 1914, in a suit to enforce a mortgage. The question is what amount is due to the fourth defendant on two prior mortgages which, it is agreed, should be deemed to be still outstanding against the plaintiff. On March 29, 1899, defendants Nos. 1 to 3, the owners of certain houses in the town of Madura, mortgaged them to the Hindu Permanent Fund of that town to secure the repayment of the sum of Rs. 1,500 and interest. On the 26th September of the same year they again mortgaged the same houses and certain lands of theirs to Sevugan Chetty, the fourth defendant, to secure the repayment of Rs. 1,000 and interest. On February 9, 1901, they again mortgaged the houses alone to the plaintiff's husband (deceased) to secure the repayment of Rs. 500 and interest. Sevugan Chetty sued on his mortgage in the Madura Munsif's Court, obtained a decree for Rs. 1,265-10-0 and further interest till payment, and for sale of the mortgaged properties, brought them to sale and purchased the houses on the 15th April 1904 for Rs. 1,100 and the lands on the 21st August 1905 for Rs. 500, and soon after obtained possession. His decree was satisfied except for a small sum of about Rs. 95. As the Fund had a first mortgage on the houses, Sevugan Chetty after his purchase paid to the Fund Rs. 2,537-6-11 on June 18, 1906, that being the sum then due for principal and interest and redeemed the mortgage. Plaintiff's husband was not a party to Sevugan Chetty's suit, and was not bound by the proceedings therein. He, in September 1906, claimed to redeem Sevugan Chetty, unless he was himself redeemed; Sevugan Chetty was quite willing to be redeemed on payment of the sum due on foot of both his mortgages, but nothing was done as plaintiff's husband probably found that the properties were not worth more than the value of the prior mortgages. Sevugan Chetty has subsequently sold the properties and the purchasers of the houses are parties to this suit. Plaintiff's husband died in August 1912, without taking any steps to enforce his mortgage. In the meantime house property in Madura has risen considerably in value and the plaintiff instituted this suit in December 1912, claiming

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over Rs. 5,000 on her mortgage offering to redeem Sevugan Chetty or his assignees, but claims to do so on payment of what would be found due on the prior mortgages up to the date of delivery of possession to Sevugan Chetty. Sevugan Chetty and his assignees on the other hand claim the whole amount that would be found due according to the terms of the deeds of mortgage up to the date of payment, without taking into account the profits or the income which they have received from the lands and houses. The learned Judge in the Court below has substantially accepted the contention of Sevugan Chetty, and allowed the amount due up to the date of the written statement in this suit—why that particular date was fixed is not clear—though in calculating the sum due he made a mistake. The question then is on what basis is to be calculated the amount due on the prior mortgages which must be deemed to be still outstanding as against the plaintiff.

A number of cases were referred to in which the question has come up for decision, but before we deal with them let us first consider how the matter stands on principle. A mortgagee who sues for foreclosure of the equity of redemption or for the sale of the secured properties, if he succeeds, gets the title of the mortgagor as it stood on the date of his mortgage or transfers that title to the purchaser, free from all interests or liens subsequently created by the mortgagor, provided he makes the owner of such interests or liens parties to the suit; but if he omits to make any of them parties, their rights or liabilities are not affected, but the purchaser (we are concerned in this case only with sales, though the same principle would apply to foreclosure also) would acquire the rights in the mortgaged properties of all the persons who were parties, just as if he had obtained an assignment from all of them, without however a merger of the interests or extinction of the liens so acquired. It is immaterial whether the purchaser is the mortgagee who sued, or another person except that the latter would be subrogated to the rights of the mortgagee only to the extent to which the debt was paid out of the price. It must, however, be remembered that the several interests or liens so acquired are kept distinct or kept alive only against the excluded party; for example, the purchaser at a first mortgagee's sale in a suit against the mortgagor to which the puisne encumbrancer is not a party cannot by

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subrogation claim to keep alive the first mortgage debt against the mortgagor. This is a matter of substantive rights and no mere conveyancing device can give a larger right; and the same result would follow if instead of a purchase in a court-sale, the purchaser had obtained by private treaty a transfer of the first mortgage and the equity of redemption subject to that mortgage. In such a case as between himself and the mortgagor, the purchaser assumes the payment of the mortgage and whether on payment he extinguishes the debt or takes a transfer, cannot in any way affect the mortgagor. Further if a purchaser agrees with the mortgagor to pay all the encumbrances, he cannot by paying an earlier mortgage keep it alive as against a puisne encumbrance, for he has got all he bargained for, and by merely performing his own obligation cannot get a larger right. The matter may also be viewed in another aspect which brings it closer to the present question. The mortgagor having given money's worth to the purchaser to pay all the encumbrances, when the purchaser pays them or any of them he does so really with the money of the mortgagor and the mortgage is extinguished in just the same way as if it had been paid by the mortgagor himself, provided that the purchaser is not deprived of the property given to him. If, before he is deprived of the property given to him by the mortgagor, he has derived any benefit from it, to that extent it is the mortgagor's money in his hands for which he must account in a suit to redeem him. It follows therefore that if the mortgagor or the owner of the final equity of redemption is not made a party to the suit, the purchaser at the sale at the best acquires only the interest of the mortgagee and he can be redeemed on payment of whatever is due on the mortgage at the time of payment, on taking accounts, as if such purchaser was a legal assignee of the mortgages. *Sivathi Odayin* v. *Rama Subbayyar*(1), *Dadoba Arjunji* v. *Damodar Raghunath*(2). If the mortgage was a simple mortgage the purchaser would be entitled to the whole of the principal and interest then due. If however such a purchaser takes possession claiming to do so as purchaser of the equity of redemption, though he did not obtain the title, he would be accountable; for the profits derived from the property

(1) (1898) I.L.R., 21 Mad., 64. (2) (1882) I.L.R., 16 Bom., 486.

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for such profits would be money of the mortgagor in his hands. If after such purchase he does not get possession as purchaser of the equity of redemption, but by subrogation by paying a mortgagee with possession, he can only be called on to account on foot of the mortgage with possession when that mortgage is sought to be redeemed. If the owner of the equity of redemption is a party to the suit, but a puisne encumbrancer is not, the purchaser becomes the assignee of the mortgage sued on, as well as the transferee of the equity of redemption subject to the mesne mortgage, and if the purchaser obtains possession on sale from the owner, he must account for the profits at least in cases where the price he pays is not more than sufficient to pay the mortgage sued on; for in such a case the purchaser pays nothing for the equity of redemption and the profits of the land are to be considered as the money of the mortgagor placed in the hands of the purchaser to discharge the mortgage *pro tanto*. If beyond the value of the mortgages a price is paid for the equity of redemption and the purchaser gets possession from the owner of the equity of redemption who is and who is entitled to be in possession, it may be the purchaser would not be bound to account for the profits (Jones on Mortgages, Volume II, Section 1118(*a*); but we think justice requires that there should be an apportionment of the profits between the value of the mortgage and of the equity of redemption.

In this case all the three mortgages are simple mortgages and the mortgagees as mortgagees were not entitled to possession either before or after default. The price paid at the court-sale was not sufficient even to pay the mortgage sued on. The fourth defendant and his assignees would therefore be entitled to the principal and interest due on foot of the two mortgages dated March and September 1896 and be bound to account for the rents and profits of the properties from the respective dates on which the fourth defendant obtained possession through Court, the account being carried up to the date fixed for payment.

This view is consistent with and we think supported by the authority of the cases, binding on us. In *Umes Chunder Sircar* v. *Zahur Fatima*(1), Zahur Fatima sued on a mortgage dated the 29th July 1873 executed to her predecessor-in-title, obtained

(1) (1891) I.L.R., 18 Calc., 164 (P.C.).

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a decree in 1875, brought the mortgaged property to sale, purchased it herself in 1879 and soon after obtained possession. She did not join as parties to her suit, the owners of the encumbrances created before the institution of her suit. The plaintiff became the assignee of these mortgages and sued to enforce them. Zahur's mortgage carried 24 per cent interest which was reduced to 6 per cent per annum, after it had passed into a decree. The trial Judge held that her mortgage was not extinguished by the decree and she was entitled to the amount due under it irrespective of the price paid at the sale, but was entitled to interest only at 6 per cent per annum the rate fixed in the decree after its date, and that no interest was to be calculated after the date of the purchase, as the profits of the land were to be considered a *fair* equivalent for further interest. Their Lordships in the Privy Council altered the rate of interest to that provided in the bond, and the reasons given by their Lordships for their alteration is this ;

"The court's power to regulate interest is given by section 10 of Act XXIII of 1861, which answers to the 209th section of the present Civil Procedure Code. That power is given when a plaintiff sues for money due to him, and it is a discretionary power to give such rate as the court may think proper by decree. The decree can only operate between the parties to the suit and those who claim under them. The plaintiff getting the security of a decree has his interest reduced in the generality of cases. But the plaintiff in this case comes to take away from Zahur the benefit of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of the decree. His case is, that as to him Zahur is still but a mortgagee, and if so, she would be allowed such benefit as her mortgage gives her. If Zahur had not got a decree, and the plaintiff had come to redeem her mortgage, he must have paid whatever interest her contract entitled her to, and the court would have had no jurisdiction to cut it down; and that is the position in which the parties are placed by the decree in this suit."

That to our minds is conclusive to show that the mortgage which is revived against the puisne mortgagee though extinguished against the mortgagor is kept alive to the fullest extent as if no action had ever been brought on it. The price of redemption must be the same whether it is the puisne incumbrancer or the mortgagor who redeems. It is on this principle that the

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purchaser in the prior mortgagee's execution sale is required to account for the profits. On the same principle if the purchase was for a sum less than the amount due on the mortgage sued on and if the mortgagor paid the balance, the puisne mortgagee would be entitled to redeem on payment of the price, i.e., the amount due on the mortgage less the amount paid by the mortgagor: see *Bradley* v. *Snyder*(1). As to the other rule, viz., that the profits should be taken as equivalent to the interest, their Lordships observe that the rule appears just and convenient and *is not objected to by either party*, will relieve Zahur from giving an account of her receipts and will deprive her of interest from the time she took possession. We understand that observation to mean that in that particular case, the profits and the interest were taken to be fairly equal as a matter of fact—that obviously must be the reason for the parties not objecting to it —and we do not think their Lordships meant to lay down, as a matter of law, that even if either party insisted, there should be no account of profits or allowance of interest. This was the view taken in two cases in this Court after discussion ; *Thenappa Chettiyar* v. *Marimuthu Nadan*(2), *Ponnambala Chetti* v. *Muthusami Pillai*(3) and it is materially strengthened by what happened in *Ganga Pershad Sahu* v. *The Land Mortgage Bank of India*(4) a decision of the Privy Council after *Umes Chunder Sircar* v. *Zahur Fatima*(5). There also the rights of the parties as finally settled by the decision were exactly the same as those in the previous case. The decree of the High Court directed accounts of profits to be taken and allowed interest up to the date of redemption at the rate fixed in a previous decree against the mortgagor : see the decree set out at page 370 of the report. The Privy Council altered the rate of interest to that in the bond and confirmed the rest of the decree, namely, that portion which directed the taking of accounts. The judgment in both the cases was delivered by Lord Hobhouse. It is to be observed that the amount of profits is to go in reduction of the amount due for principal and interest and not to be set off against the interest alone. The same principle appears to

(1) (1853) 58 Amer. Dec., 564.
(2) (1908) I.L.R., 31 Mad., 258. (3) (1912) 23 M.L.J., 284.
(4) (1894) I.L.R., 21 Calc., 366 (P.C.). (5) (1891) I.L.R., 18 Calc., 164 (P.C.).

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have been adopted in Calcutta, *Girish Chunder Nandi* v. *Kader Nath Kundu*(1), *Satnarain Tewari* v. *Chowdhuri Sheo Baran Singh*(2).

Counsel for the appellant however relied on a later case in this Court in which the learned Judges apparently adopted the rule of disallowing interest after the date of purchase; *Syed Ibrahim Sahib* v. *Arumugathayee*(3). There the plaintiff's father had a first and second mortgage of which the first was a usufructuary mortgage, the profits being taken in lieu of interest. He purchased the property from the mortgagor, the price settled being Rs. 900, of which Rs. 830 was the amount due till then for the principal of the two mortgages and interest on the simple mortgage, Rs. 55 due to the mortgagee for certain taxes and other small sums lent to the mortgagor; the balance Rs. 15 was paid in cash. Before the sale the mortgagor had mortgaged the same property to the defendant who sued the plaintiff who had succeeded to her father, brought the properties to sale and purchased them himself subject to the previous encumbrances of the plaintiff. The plaintiff in her turn sued to recover the amount due on her mortgages and claimed interest till payment on the simple mortgage at the rate fixed in the bond. The learned Judges held that during the period the plaintiff or her father was in possession as vendee, interest should cease. The reasons given for this conclusion are (1) that as the mortgagee and mortgagor agreed that after the sale the property should be enjoyed for the price settled, the mortgagee is not entitled to any compensation in the shape of interest for his money so long as he had the enjoyment; (2) that the prior mortgage is kept alive only to a limited extent, and in each case the Court is to determine how far it is kept alive for doing justice. We very respectfully differ from both these propositions. It is to be observed that it is because the agreement is not binding on the mesne incumbrancer, that he is entitled to ignore it, and it is difficult to see why he should have any benefit out of it. It often happens that a person is willing to pay much more to obtain an absolute title than what he would be willing to lend on the same property as usufructuary mortgagee. The mortgagee

(1) (1906) I.L.R., 33 Calc., 590. (2) (1911) 14 C.L.J., 500.
(3) (1915) I.L.R., 38 Mad., 18.

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may pay a large price for the equity of redemption which he may wholly lose by the action of the puisne encumbrancer. On principle we do not think that it is possible to sustain the doctrine of partial revivor against the puisne mortgagee and the illustration given by the learned Judges, viz., a stipulation for lower rate of interest does not support it. Such a stipulation operates to extinguish or release a portion of the debt and there is no question of merger against the mortgagor and no merger against the mesne encumbrancers. The puisne mortgagee pays the same price for redemption as the mortgagor and that as we have said already is the test, namely, what amount the mortgagor could have to pay if there had been no sale. If for instance in the case under reference the mortgagee had the transfer of the equity of redemption made to a trustee for him, there can be no merger in law and there would apparently be nothing to prevent the mortgagee from recovering the whole amount due on the mortgages if a subsequent mortgagee brings the equity of redemption to sale. So long then as the prior mortgage is kept alive, the senior mortgagee is entitled to the rights and is subject to the liabilities under his mortgage against the puisne encumbrancer. We therefore think that in that case the plaintiff was entitled to the interest on the simple mortgage, as she was entitled to take the profits in lieu of interest on the usufructuary mortgage, and there was no money of the mortgagor in her hands for which she was bound to account. The attention of the learned Judges does not appear to have been drawn to *Thenappa Chettiyar* v. *Marimuthu Nadan*(1) and *Ponnambala Chetti* v. *Muthusami Pillai*(2); the latter decision had not then been reported. They however refer to certain decisions which we shall consider now. The first is the decision of the Privy Council in *Umes Chunder Sircar* v. *Zahur Fatima*(3) to which we have already drawn attention. In *Gangadhara* v. *Sivarama*(4), the mortgagor borrowed Rs. 3,500 in May 1878 on the security of certain lands and paid Rs. 1,900 out of it to discharge a mortgage decree on a mortgage of 1866 on some of the lands. Plaintiff in the suit was an intermediate mortgagee. It was held that the later mortgagee had priority over the plaintiff to the

(1) (1908) I.L.R., 31 Mad., 258. (2) (1912) 23 M.L.J., 284.
(3) (1891) I.L.R., 18 Calc., 164 (P.C.). (4) (1885) I.L.R., 8 Mad., 246.

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extent of Rs. 1,900, the sum paid to discharge the previous mortgage. Apparently no subsequent interest was allowed. It does not appear from the report whether the subsequent mortgagee or the mortgagor had possession. If the former had possession the interest on his mortgage was being discharged from the usufruct and as he was not entitled to interest against the mortgagor, he was not entitled to it against the puisne mortgagee. If the mortgagor was in possession, then even according to the decision in *Syed Ibrahim Sahib* v. *Arumugathayee*(1) interest should have been allowed, for the decision in *Syamalarayudu* v. *Subarayudu*(2) where interest was allowed is distinguished on that very ground. In *Seetharama* v. *Venkatakrishna*(3) the suit was, as finally decided, by a prior simple mortgagee against the mortgagor and the puisne encumbrancer who had sued on his mortgage and purchased the property without making the first mortgagee a party. There was a remand for a finding as to the amount due and the finding was that the plaintiff was entitled to Rs. 300 for principal and interest thereon at 9 per cent and this finding was accepted. In the report no mention is made of the interest. Curiously enough the decree as drafted here omits mention of interest, though apparently the judgment allowed it. In *Vanmikalinga Mudali* v. *Chidambara Chetty*(4), the mortgagee who claimed priority by subrogation had a usufructuary mortgage. Under the bond there was no interest payable and the usufruct was to be taken in lieu of it. It is to be observed that in this last case as well as in *Chetwyud* v. *Allen*(5) and in other cases where a mortgage was executed in renewal of or to pay off a previous mortgage, the mortgage was in force against the mortgagor himself and the agreement charging a lower rate of interest or no interest accrued to the benefit of the mortgagor, as well as the puisne mortgagee. The mesne incumbrancer in such cases does not repudiate the subsequent transaction between the mortgagor and the mortgagee but seeks to avail himself of it as a discharge or extinguishment of the *debt* while such is not its effect as between the parties to the transaction.

(1) (1915) I.L.R., 38 Mad., 18.
(2) (1898) I.L.R., 21 Mad., 143.
(3) (1893) I.L.R., 16 Mad., 94.
(4) (1906) I.L.R., 29 Mad., 37.
(5) (1899) 1 Ch., 353.

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A number of decisions of the Allahadad High Court were cited in which it appears to have been held that the profits should be taken in lieu of interest after purchase. In the first of these cases *Dip Narain Singh* v. *Hira Singh*(1), BANERJI and AIKMAN, JJ., held that the puisne mortgagee can only redeem on payment of the full amount due on the prior mortgage, just the same amount as the mortgagor himself would have to pay if a suit had not been brought against him, and refer as authority to the judgment of the Calcutta High Court in *Ganga Pershad Sahu* v. *The Land Mortgage Bank of India*(2) and of the Bombay High Court in *Dadoba Arjunji* v. *Damodar Raghunath*(3); in the former interest was allowed at the bond rate and accounts were directed of the profits, and in the latter interest was allowed at the bond rate till decree without accounts as the mortgagee had no possession. In answer to the contention that the profits should be accounted for, the learned Judges say that considering the amount of profits arising from the property it would be *fair* not to take the profits into consideration at the same time not to allow interest on the mortgage money (i.e.) not, as we understand it, as a rule of law, but as being fair in that case. In a later case *Sri Ram* v. *Keseri Mal*(4), it was ruled that the prior mortgagee cannot claim interest after the purchase, giving credit for the profits realized; the reason given being the same as that given in *Syed Ibrahim Sahib* v. *Arumugathayee*(5), viz., that every person who purchases property for a certain value must be presumed to pay such value as would yield to him a sufficient return for the money invested by him in the property. In this case there were three mortgages. An intermediate mortgagee purchased the property by private sale for a price enough to pay all the three mortgages, the price being reserved with the vendee for that purpose. The vendee paid the first morgagee and paid himself the amount due on his. He did not pay the third mortgagee who sued to enforce his security. We do not understand how the vendee was allowed to set up the prior mortgages which were extinguished by payment of the money belonging to the mortgagor, the party primarily liable to pay, and how by merely

(1) (1897) I.L.R., 19 All., 527 at p. 534.
(2) (1894) I.L.R., 21 Calc., 366 (P.C.).
(3) (1892) I.L.R., 16 Bom., 486.
(4) (1904) I.L.R., 26 All., 185.
(5) (1915) I.L.R., 38 Mad., 18.

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performing his duty the vendee obtained an advantage. The third mortgage under the circumstances became the first. It is not a case of a person who did not get what he bargained for and the vendee was not entitled to even the principal of the mortgages which he paid, much less to interest. This case however was followed in *Jugal Kishore* v. *Bahal Rai*(1) in the same Court and the learned Judges held, setting aside the accounts taken by the lower Court, that the profits and interest must be deemed equal. But in the latest case in that Court *Phul Chand* v. *Roshan Lal*(2), under circumstances precisely similar to those in *Syed Ibrahim Sahib* v. *Arumugathayee*(3) the learned Judges one of whom was BANERJI, J., came to just the opposite conclusion, and held that a purchaser at a senior mortgagee's execution sale who obtains possession from a prior usufructuary mortgagee whom he redeemed after his purchase was entitled to the whole of the principal and interest at the contract rate till the date of the suit. The purchaser in this case, who knew of the previous usufructuary mortgage subject to which he bought, must on the reasoning in *Sri Ram* v. *Kesri Mal*(4), be presumed to have paid such value for the property, i.e., the equity of redemption and the first mortgage as would yield a sufficient return for his money, in which case he should not get any interest after the date of the purchase. We do not propose to deal with the other cases as they follow one or other of the cases mentioned above.

The conclusion then we come to which is supported by preponderance of authority is that if either party insists accounts of the profits must be taken, allowing interest on the mortgage as provided in the bond. It is, however, unnecessary to express dissent from *Syed Ibrahim Sahib* v. *Arumugathayee*(3) as the learned Judges do not lay down an inflexible rule, but say that each case should be dealt with on the merits. The circumstances here strongly support the suggestion of the learned Judge in the Court below that owing to the considerable increase in the value of house property in Madura, the plaintiff in this suit is now attempting to revive a claim which was practically abandoned by her husband. The fourth defendant and his assignees have made considerable improvements in the property and it would not be

(1) (1913) 21 I.C., 593.
(2) (1916) 14 A.L.J., 237.
(3) (1915) I.L.R., 38 Mad., 18.
(4) (1904) I.L.R., 26 All., 185.

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fair to them not to allow interest on the prior mortgages, as it is fairly certain that the income from the properties even in the improved condition would be wholly insufficient to meet the interest. We are therefore unable to accept the contention of the appellant. We are equally unable to accept the contention of the fourth defendant who claims the whole of the principal and interest due on the mortgages without accounting for the profits. The learned Judge in the Court below misunderstood the decision in *Ponnambala Chetti* v. *Muthusami Pillai*(1) which he purported to follow, but the learned pleader for the fourth defendant argues that as his client was entitled to and obtained possession of the mortgaged properties only as purchaser of the equity of redemption (for which however he paid nothing), he was entitled to the enjoyment of the properties as the transferee of the mortgagor; and inasmuch as the mortgagor if he had remained in possession would not be accountable for the profits, similarly he too should not be obliged to account for them. He relied on a passage in section 1118 (*a*) of Jones on Mortgages, Volume II, and a similar passage in Dr. Ghose's book which appears to be really based on Jone's book. He was not able to refer us to any report. It is to be remembered that in some States, the English theory of mortgages as a conditional transfer of the fee, with an equitable right to redeem is adopted, in others, probably the largest number, a mortgage is considered to be merely a security though for certain purposes, as between the parties, it is considered to be a conveyance of the property and in yet others a mortgage is only a lien, the mortgagee not being entitled to foreclosure under any circumstances: see *Broboot* v. *Brock*(2) *McMillan* v. *Richards*(3), *Goodenow* v. *Ewer*(4) and *Frische* v. *Kramer's Lessee*(5). It would therefore be necessary to examine with care any particular decision which may be relied on as supporting an incident of the mortgage relation in India as our statute recognizes different kinds of mortgages. In *Moulton* v. *Cornish*(6), from New York where sale is the ordinary remedy in a case similar to the present, it was held that the purchaser was bound to account, though he obtained possession from the

(1) (1912) 23 M.L.J., 284.
(2) 10 Wallace, 519.
(3) (1858) 70 Am. Dec., 655 at p. 658.
(4) (1860) 76 Am. Dec., 540.
(5) (1847) 47 Am. Dec., 368.
(6) 20 L.R.A., 870.

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owner of the equity of redemption after sale. To the same effect is the decision in *Anson* v. *Anson*(1), from another State. In *Harrison* v. *Wyse*(2), the mortgagee had first entered on the property and then purchased the equity of redemption. It was held he was bound to account as mortgagee in possession though the mortgagor would not be, if he was in possession. It would therefore appear that there is no authority in support of such a broad contention as that raised here by the respondent. However that may be the decision of the Privy Council and the decisions of this Court to which we have already referred are conclusive on this point and there is no need to speculate on the theoretical basis of this doctrine, though we have ventured to point out that on principle the purchaser may justly be held liable to account for the profits in cases like the present.

Two further points were raised—one by the appellant and the other by the sixth respondent. As we have already stated the purchase by the fourth defendant included the lands on which the plaintiff has no lien. In these lands the fourth defendant acquired absolute rights and he has sold them to persons who are not parties now. The plaintiff claims that the mortgage money due to the fourth defendant on his mortgage should be apportioned among the several properties, according to their value and the plaintiff allowed to redeem on payment of that portion of the mortgage debt that is chargeable on the houses on such apportionment. He has not laid any basis in his plaint or evidence to claim marshalling, and he has not made the owners of the lands parties to the suit so as to claim contribution. We have tried to see if the plaintiff cannot be allowed to redeem a portion of the mortgage on the ground that the mortgage has been split by the mortgagee purchasing the equity of redemption in a part of the secured property (see last clause of section 60 of the Transfer of Property Act), but on consideration we think the plaintiff is not entitled to a decree for partial redemption. As she sues to redeem ignoring the purchase, she cannot be allowed to treat it as good in part against the prior mortgagee purchaser.

The sixth respondent, the transferee of the houses from the fourth respondent, claims the value of improvements. According

(1) (1865) 89 Am. Dec., 514. (2) (1855) 68 Am. Dec., 152.

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to the decision in *Syed Ibrahim Sahib* v. *Arumugathayee*(1) she is not entitled to them (see also *Rangiah Chettiar* v. *Parthasarathy Naicker*(2). It is argued that she is entitled to them as a *bona fide* purchaser for value under section 51 of the Transfer of Property Act. Assuming that that section applies to this case, the sixth respondent cannot be considered to be a *bona fide* purchaser as the sale certificate to the fourth defendant of which the sixth defendant had notice before her sale, distinctly mentions the encumbrance to the plaintiff's husband as a subsisting lien. In determining the amount due to the fourth defendant on the mortgage to the fund the learned Judge in the Court below allowed compound interest at 2 *per cent per mensem*. The bond provides only for simple interest after the period fixed for repayment and the amount due to the fourth defendant should be calculated on that basis. Before passing a final decree it would be necessary to have a finding on the amount due to the fourth defendant on taking accounts on the basis above set out. New evidence may be allowed as to the amount of profits. Time for the submission of the findings will be till the re-opening of this Court after summer recess and seven days will be allowed for objections.

The memorandum of cross objections filed by the sixth respondent will be dismissed with costs.

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Ramnad found that the amount due to the fourth defendant from the plaintiff up to 31st August 1917 was Rs. 12,400.

On return of the finding their Lordships (ABDUR RAHIM and OLDFIELD, JJ.) accepted the same and passed on 24th November 1917 a mortgage decree accordingly.

N.R.

(1) (1915) I.L.R., 38 Mad., 18. (2) (1897) I.L.R., 20 Mad., 120.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Bakewell.

1917, October, 29 and 30, and November, 15.

BARADWAJA MUDALIAR (FIRST DEFENDANT), APPELLANT,

v.

ARUNACHALA GURUKKAL AND FOUR OTHERS (PLAINTIFFS AND DEFENDANTS 2 TO 4), RESPONDENTS.*

Limitation Act (IX *of* 1908), *arts.* 4, 7, 101, 102 *and* 120—*Hereditary archaka of a temple—Suspension by trustees—Suit by archakas for pay, perquisites and damages against trustees—Limitation for suit—Provincial Small Cause Courts Act* (IX *of* 1887), *Sch. Art.* 13—*Suit, whether cognizable by a Small Cause Court—Appeal against order of remand, whether competent.*

The plaintiffs, who were hereditary *archakas* in a temple, were suspended from their office in June 1912, by the trustees of the temple; the order was passed on the 19th June 1912 and the suspension lasted till 3rd July 1912. The plaintiffs, alleging that the suspension was illegal and unjust, sued on the 28th June 1915 to recover their pay and perquisites as well as damages for mental distress, loss of dignity, etc., for an amount below Rs. 500 as against the trustees, the *peishkar* of the temple and the person who performed the duties of their office during their suspension. The lower Appellate Court having held that the suit was not barred by limitation as regards pay and perquisites and remanded the case to the Court of First Instance, one of the trustees preferred an appeal against the order of remand, contending that the suit was wholly barred. The respondents (plaintiffs) raised a preliminary objection that the appeal was incompetent as the suit was of a small cause nature:

Held, that an appeal lay to the High Court against the order of remand, as the suit was not cognizable by a Small Cause Court; that article 102 of the Limitation Act applied to the suit as against the trustees as regards the pay and the perquisites if payable by the temple, and the suit was not barred as regards such claims; that article 36 applied to the claim for perquisites if payable by third persons, as well as to the claim for damages, and the claims were barred; and that, as against the *peishkar*, there was either no cause of action or it was barred under article 36 of the Limitation Act.

APPEAL against the order of T. S. TYAGARAJA AYYAR, the Subordinate Judge of North Arcot, in Appeal No. 100 of 1916 preferred against the decree of T. SUNDARAM AYYAR, the District Munsif of Tiruvannamalai, in Original Suit No. 616 of 1915.

The plaintiffs, claiming to be the hereditary *archakas* of the temple of Tiruvannamalai, sued for a declaration that the order

*Appeal against Order No. 113 of 1917.

of suspension passed against them by the first and second defendants who were the trustees of the temple, was illegal and improper and for recovery of the pay and the perquisites during the term of their suspension from office and for damages for mental distress, loss of dignity, etc. The third defendant, who was the *peishkar* of the temple, was impleaded as he issued the suspension order under the authority of the trustees. The order of suspension was passed on the 19th June 1912 and lasted till 3rd July 1912 when the *archakas* were restored to their office. The fourth defendant was the person who performed the duties of the office under the order of the trustees during the period of suspension. The plaintiffs claimed Rs. 4-4-0 for pay, Rs. 25 for perquisites from other sources, and Rs. 50 for damages for mental distress, loss of dignity, etc., and instituted the suit in the District Munsif's Court of Tiruvannamalai, on 21st June 1915, on which day the Court reopened after summer vacation. The District Munsif dismissed the suit holding that the entire claim was barred by limitation under article 36 of the Limitation Act. On appeal the Subordinate Judge held, that the suit was not barred in respect of pay and perquisites, on the ground that article 120 of the Act applied but that the claim for damages was barred under article 36 of the Act; and he remanded the suit for trial to the Court of first instance. The first defendant (one of the trustees) preferred an appeal to the High Court against the order of remand, contending that the suit was entirely barred by limitation. The respondents (plaintiffs) raised a preliminary objection that no appeal lay against the order of remand, as the original suit was of a nature cognizable by Small Cause Court. The preliminary objection was overruled and the question of limitation was decided by the following judgment of their Lordships.

T. Narasimha Ayyangar and *N. S. Rangaswami Ayyangar* for the appellant.

Hon. Mr. *T. Rangachariar*, *K. Bhashyam Ayyangar* and *R. T. Krishnamachariar* for the respondents.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The first defendant is the appellant. The appeal is against the order of remand passed by the appellate Court which held that the plaintiffs' suit was not wholly barred by limitation, the Court of first instance, having held otherwise and dismissed the suit.

The material allegations in the plaint are as follows:—

(*a*) The two plaintiffs (father and son) are the hereditary *archakas* of the famous temple at Tiruvannamalai. The first defendant, appellant before us, is the trustee of the temple. The third defendant is the temple *peishkar*. The first defendant in June 1912 suspended the plaintiffs from office. The third defendant intimated this fact to the plaintiffs on 19th June 1912 and the suspension of the plaintiffs lasted till 3rd July 1912;

(*b*) The plaintiffs contend that the suspension order was illegal and unjust and that the third defendant maliciously made misrepresentations to the first defendant and made the first defendant pass such an unjust order; and

(*c*) The fourth defendant discharged the duties of the office during the fourteen days during which the plaintiffs remained under suspension. The plaint concluded for the following reliefs:—(1) Pay for the days of suspension Rs. 4–14–4, (2) the value of perquisites from other sources during such period Rs. 25 and (3) damages for mental distress, loss of dignity, etc., Rs. 50. Total Rs. 79–14–4.

The District Munsif dismissed the suit applying article 36 of the Limitation Act which allows two years for a suit for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not specially provided for. The suit was brought on 28th June 1915, the cause of action having arisen on 19th June 1912, more than two years before the suit was brought. The plaint was filed on the day on which the Tiruvannamalai District Munsif's Court opened after the summer vacation and if the limitation period of three years under article 62 or article 102 applied, the claim for at least Rs. 4-14-4 (the pay) was not barred. If article 120 applied, which provides six years to the claim for pay, then also, the District Munsif was not justified in dismissing the whole claim as barred.

The Subordinate Judge in appeal held that article 120 applied so far as the claim for the pay (Rs. 4–14–4) and the perquisites (Rs. 25) against the defendants Nos. 1 to 3 was concerned. As regards the claim against the fourth defendant (the locum tenens during the plaintiff's suspension), the Subordinate Judge was inclined to apply article 62 (and only in the alternative article 120), the fourth defendant having "constructively received" the "money" made up of the pay and the perquisites "for the plaintiff's use." So far as the claim for Rs. 50 was concerned, that is, the compensation for mental distress, loss of dignity, etc., he held that article 36 applied and concurred with the District Munsif in dismissing that portion of the claim as barred. He then remanded the suit for disposal in respect of the claim for Rs. 29–14–4.

The contention of the first defendant, the only appellant before us, on appeal is that the whole claim including the claim for salary and perquisities is a claim for damages for tort and not for a breach of contract and hence article 36 alone applied and the suit even for this portion of the claim was barred by limitation.

A preliminary objection was taken by the respondents to the appeal on the ground that the suit was of a small cause nature and of the value of less than Rs. 500. We overruled it following the decision of SRINIVASA AYYANGAR, J., in *Subraya Acharya* v. *Kesava Upadhaya*(1), that the learned Judge having held that a suit to recover an amount alleged to be due to a hereditary archaka as the dues of his office falls under article 13 of the schedule to the Provincial Small Cause Courts Act. [If any portion of a claim is not cognizable by a Small Cause Court, the whole claim ought to be brought in the regular Court: see *Mulambath Kunhammad* v. *Parakal Kathiri Kutti*(2)].

I shall now consider the question of limitation. The suit in *Subbier* v. *Ranga Ayyangar*(3) was brought by a hereditary Stanikam office holder against the dharmakarta for the recovery of emoluments wrongfully withheld between the date when the plaintiff brought a former suit for the recovery of the office against the trustee and the date when he recovered possession of the office in execution of the decree in that suit. The relevant portion of the judgment is very short and is as follows:—

"We are unable to agree with the contention that article 36 of the Limitation Act applies. The case is not specifically provided for and in our opinion comes under article 120."

(1) (1915) M.W.N., 846; s.c., 31 I.C., 206. (2) (1916) 31 M.L.J., 829.
(3) (1899) 9 M.L.J., 143 at p. 163.

I think that neither article 36 nor article 120 which are very generally worded articles should be applied if any other more specifically worded article applies to a case. Article 102 applies to suits for "wages not otherwise expressly provided for by this schedule." "Wages" is a very general term; though it is usually used in connexion with daily wages, it also includes the wages paid as monthly salary: see *Kalichurn Mitter* v. *Mahomed Soleem*(1). Article 4 which prescribes a period of six months applies to wages accruing due under the Employers and Workmen Act; article 7 prescribing one year applies to the wages of a household servant, artisan or labourer not provided for by article 4; article 101 for a seaman's wages and prescribes a limitation period of three years. The plaintiff's claim in this case does not fall under any of the three articles. It therefore clearly falls under article 102. The plaintiff is a servant of the temple paid in monthly wages though a hereditary servant. In *Seshadri Aiyangar* v. *Ranga Bhattar*(2). BENSON and SUNDARA AYYAR, JJ., say at page 633:—

"The position of an archaka, though he may have a hereditary tenure in the office, is, in our opinion, essentially that of a servant. The trustee is the representative of the temple and the archaka must be subject to his disciplinary authority."

So far therefore as the claim for the pay Rs. 4-14-4 due to plaintiff is concerned, I think article 102 applies and the suit is therefore not barred by limitation. As regards the perquisites (Rs. 25) if they are payable by the temple they are part of the wages (that is, remuneration for work done and payable by a master to his servant) and the claim for them as against the defendants Nos. 1 and 2, trustees, also falls under article 102. If the perquisites are received from third persons, they are not wages, article 102 will therefore not apply and the plaintiff's claim as against the defendants 1 and 2 will be in tort and article 36 might apply. As regards the third defendant (the temple *peishkar*) there is either no cause of action against him or the claim against him falls under article 36 and it is therefore barred. As regards the fourth defendant if article 62 applies, that is, if it could be held that he received the plaintiff's salary and perquisites for the plaintiff's use [see *Sankunni Menon* v. *Govinda*

(1) (1866) 6 W.R., 3.

(2) (1912) I.L.R., 35 Mad., 631.

Menon(1)], the claim against him for such salary and perquisites is not barred. I shall not finally decide just now whether, in law it could be so held.

In the result, I would modify the order of remand by confirming it to the plaintiff's claims against the defendants Nos. 1, 2 and 4 alone. The appeal has substantially failed against the contesting respondents. The first defendant (appellant) will therefore pay the plaintiff's (contesting respondents') costs in this appeal.

BAKEWELL, J.—I agree. BAKEWELL, J.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Phillips.

SUNDARAM AYYAR (ACCUSED), APPELLANT, 1917, November, 21.

v.

THE KING-EMPEROR, RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 562—Indian Penal Code (Act XLV of 1860), sec. 420—Section 562, whether applicable to a conviction under section 420.

The word "cheating" in section 562 of the Code of Criminal Procedure does not cover the form of cheating punishable under section 420 of the Indian Penal Code.

Emperor v. *Ramjan Dadubhai* (1915) 16 Cr. L.J. 781, approved and followed.

Harnarain v. *Ramji Das* (1915) 12 A.L.J., 465, dissented from.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code by G. F. PADDISON, the District Magistrate of Madura, in his letter, dated the 7th September 1917, R.O.C. No. 1370/17 Magl.

Two women were waiting in the Madura railway passenger shed to purchase tickets for Sholavandan. There was a crowd at the ticket-door and so the women could not get near. The

(1) (1912) 14 I.C., 254.

* Criminal Revision Case No. 655 of 1917 (Referred case No. 98 of 1917).

SUNDARAM AYYAR v. THE KING-EMPEROR.

accused offered to buy the tickets for them. The women trusted the accused and each gave him three annas which they thought was the price of a ticket for their destination. Accused received the money and went away promising to get the tickets for them. After some time the accused returned and gave a ticket and three pies to each of the women. The women could not understand how they received three pies each. The accused tried to satisfy them by saying that it was a local train for which the fare was three pies less. While this was going on, a police constable turned up and looked at the tickets and found that the two tickets were for Sholavandan which cost accused only one anna nine pies each. On searching the accused, the two annas he had saved by the deception practised by him on the two women was found on him. The constable seized the accused, took a statement from one of the women and charged him before the Subdivisional First-class Magistrate of Madura. The accused pleaded guilty and was convicted by the Magistrate of an offence under section 420, Indian Penal Code, but considering the youth of the accused and the readiness with which he admitted his guilt, the Magistrate took action under section 562 of the Code of Criminal Procedure. The District Magistrate of Madura doubting the legality of the procedure of the First-class Subdivisional Magistrate, reported the case to the High Court under section 438 of the Code of Criminal Procedure.

K. S. Jayarama Ayyar for the accused.

C. Narasimha Achariyar for *the Public Prosecutor* for the Crown.

The ORDER of the Court was delivered by

AYLING, J.

AYLING, J.—The question for decision in this case is whether we can give an extended meaning to the word "cheating" in section 562 of the Criminal Procedure Code so as to cover an offence under section 420 of the Indian Penal Code (cheating and dishonestly inducing delivery of property, etc.).

We should be glad to do so, as we recognize that equally strong reasons on public and humanitarian grounds may exist for lenient treatment of an offence under either section. On the other hand a careful consideration of the wording of section 562 of the Criminal Procedure Code seems to preclude the possibility of such a construction. If the term "cheating" is to be held to