



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.

Editor.

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(1922) I.L.R., 45 Mad.

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not a defence; the award can be set aside on those grounds only by motion under the (English) Arbitration Act, 1889, and within the time limited by Order LXIV, rule 14 of the Rules of the Supreme Court (England). *Thornburn v. Barnes*, (1887) L.R., 2 C.P., 384, approved and followed. A judgment on the award obtained in England by default cannot be sued on in India, since it is not a judgment "on the merits" within section 13 of the Code of Civil Procedure (Act V of 1908), *Keymer v. Visvanatham Reddi*, (1917) I.L.R., 40 Mad., 112 (P.C.); L.R., 44 I.A., 6, followed. *Quaere*, whether where a judgment is obtained in England the award is merged in it, a contention not raised in the present case.

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-----, SEC. 48—Limitation Act (IX of 1908), sec. 15 (1)—Execution of decrees, more than twelve years old—Execution stayed by injunction or order of Court—Application made after 12 years—Computation of time—Deduction of time occupied by stay of execution—Applicability of section 15 (1) of Limitation Act—"Prescribed" in section 15, meaning of—"Period of Limitation," meaning of—Limitation Act, sections 4 to 25, whether applicable to section 43 of Civil Procedure Code.] Section 48 of the Civil Procedure Code contains an unqualified prohibition (subject to exceptions contained in clause (2) thereof) against execution of certain kinds of decrees more than twelve years old and is not controlled by section 15(1) of the Limitation Act, 1908; hence an application for execution of such a decree stayed by an injunction or order of Court, filed after twelve years from the date of the decree, cannot be saved from the bar under section 48 of the code by excluding under section 15 (1) of the Act the time during which execution was stayed. <i>Per SPENCER, J.</i> —The word "prescribed" used in section 15 of the Limitation Act, means prescribed by the first schedule to the Act, though the words "in the Schedule" do not occur in the section as in sections 3 and 6 of the Act. <i>Gvinda v. Unrao Singh</i> , (1920) 54 I.O., 279, followed. <i>Per RAMESAM, J.</i> —The provisions of the Limitation Act are intended to govern the Civil Procedure Code which is a General Act; and it cannot therefore be laid down as a rule that sections 4 to 25 of the Act do not apply to the Code. <i>Phoolbus Koonwar v. Lalla Jogeswar Sahay</i> , (1876) I.L.R., 1 Calo., 225 (P.C.), followed. The period mentioned in section 48, Civil Procedure Code, is not a period of Limitation in the strict sense; and consequently section 15 (1), Limitation Act, is not applicable to it.	
<i>Subbarayan v. Natarajan</i> (1922) I.L.R., 45 Mad., 785	
-----, SEC. 64—Attachment of debt—Raising of attachment after successful claim proceedings—Success of suit to contest order on claim—Payment of debt in the interval, validity of—Revival of attachment—Payment of debt to benamidar, validity of.] The raising of an attachment on the success of claim proceedings is only provisional and the attachment is revived on the success of the suit by the attaching decree-holder. <i>Bonomalai Rai v. Prosunno Narain Chowdhury</i> , (1898) I.L.R., 28	

Oale, 823, followed. Hence, any payment made by a debtor to his creditor, though after the raising of the attachment of the debt, cannot prevail against the attaching decree-holder who eventually succeeds in his suit.

Anthaya v. Manjaya ... (1922) I.L.R., 45 Mad., 84

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 64:—See MUHAMMADAN LAW, 103

SEC. 66—Old Code (Act XIV of 1882), sec. 817—*Benami sale—Execution—Sale—Managing member of a joint Hindu family—purchase of property in the name of another—Suit for partition by other members of the family in respect of such property—Maintainability of suit—Bar of suit—Act of managing member in buying benami, whether on behalf of other members—Right of benamidar.* Where in a sale held in execution of a decree the manager of a joint Hindu family purchased property, benami, in the name of another person, using family funds for the purpose, and some of the other members of the family instituted a suit for partition of the property as joint family property against the other members and the benamidar, Held, that section 66 of the Civil Procedure Code, 1908, was no bar to the plaintiff's recovering their share in the property in the partition suit. The managing member buying property in the name of another person, using family funds for that purpose, cannot be properly said to buy benami on behalf of the other members of the family, under section 66 of the Code, as he is doing something wholly wrong in putting the benamidar in a position, if so minded to set up a claim in derogation of the claims of the joint family. The language of section 817 of the old Code (Act XIV of 1882) is wider than that of section 66 of the new Code (Act V of 1908). *Suraj Narain v. Katan Lal*, (1918) I.L.R., 40 All., 159 (P.C.); s.c., 44 I.A., 201, distinguished, as a decision under the old Code *Bajinath Dass v. Bishen Devi*, (1921) 19 A.L.J., 787, dissented from.

Nataraja Mudaliyar v. Ramasami Mudaliyar ... (1922) I.L.R., 45 Mad., 856

SEC. 92—Suit for accounts—*Suit by trustee of temple against co-trustee—Sanction of Advocate-General whether necessary.* A suit by a trustee of a public charitable or religious trust against a co-trustee for accounts does not fall within section 92 of the Code of Civil Procedure and may be brought without the sanction of the Advocate-General.

Appanna Poricha v. Narasinga Poricha ... (1922) I.L.R., 45 Mad. (F.B.), 118

SS. 105 AND 107, O. XXI, R. 23, AND O. XLIII, R. 1 (u)—*Preliminary point—Construction of grant—Evidence disallowed—Remand by lower Appellate Court for taking evidence and disposal—Appeal against order of remand, whether competent.* A preliminary point under Order XXI, rule 23, of the Civil Procedure Code, is any point the decision of which avoids the necessity for the full hearing of the suit. Such points comprise not only points like limitation, jurisdiction and res judicata, but also points such as, that evidence tendered was not admissible, or that there was no case for the defendant to answer, or that there was no proof of publication in a libel suit. In all these cases the points are preliminary to the final disposal of the suit. Where, therefore, a District Munsif held that the true construction of a service grant was clear, and that evidence of the consideration for the grant and of whether services were in fact rendered or not, was irrelevant; but on appeal the lower Appellate Court held that such evidence was relevant, and remanded the case to the original Court for disposal according to law. Held, that the lower Appellate Court was competent to pass the order of remand under section 107 and Order XLII, rule 23, Civil Procedure Code, and that there was a right of appeal against that order under Order XLIII, Rule 1(u) of the Code.

Raman Nayar v. Krishnan Nambudripad ... (1922) I.L.R., 45 Mad. (F.B.), 900

CIVIL PROCEDURE CODE (ACT V OF 1908), O. I, RR. 3 AND 10—Suit for partition—Money-decree holders, whether proper parties to the suit.—Misjoinder of parties and causes of action—Plaint containing allegations that such decrees were not binding on plaintiffs—Order of lower Court, striking out names of decree-holders joined as defendants—Appeal—Revision.] Where in a partition suit the plaintiff contained allegations that money decrees obtained by certain creditors were not binding on the plaintiffs, the joinder of such decree-holders as defendants along with members of the family and their alienees, is proper under Order I, rule 3, Civil Procedure Code. *Tira Chand v. Reeb Ram*, (1866) 3 M.H.C.R., 177, referred to.

Shanmuka Nadan v. Arunachalam Chetty ... (1922) I.L.R., 45 Mad., 194

O. IX, R. 13—*Provincial Small Cause Courts Act (IX of 1887), sec. 17 (1), proviso—Small Cause suit—Ex parte decree—Setting aside of—Application within time—Payment of full amount under sec. 17 (1), proviso, after time limited—Delay, whether can be excused—Limitation Act (IX of 1908)—Rules of High Court.]* Order IX, rule 13, Civil Procedure Code, is applicable to suits in Provincial Small Cause Courts, as the order has not been excluded from application to such Courts by section 7 or Order L of the Code. Section 5 of the Limitation Act relating to the power of Court to excuse delay in making applications, which has been extended by a rule of the High Court to applications under Order IX, rule 13, Civil Procedure Code, applies also to applications to set aside ex parte decrees in Provincial Small Cause Courts. The payment, required to be made along with the petition to set aside an ex parte decree in a small cause suit under the proviso to section 17 (1) of the Provincial Small Cause Courts Act, is an element required in order to the completeness of the petition, and the delay in making the payment can be excused under section 5 of the Limitation Act, as delay in filing the completed petition. *Assan Mohamed Sahib v. Rahim Sahib*, (1920) I.L.R., 43 Mad., 579 (F.B.), referred to.

Sudalaimuthu Kudumban v. Andi Beddier ... (1922) I.L.R., 45 Mad., 628

O. XX, R. 12:—*See HINDU LAW—SALE BY FATHER OR MANAGER OF A JOINT HINDU FAMILY* ... 449

O. XX, R. 12 (2):—*See COURT FEES ACT (VII OF 1870), ART. 1, SCH. 1* ... 280

O. XXI, R. 58—*Claim petition—Decree for money—Attachment and sale—Petition by mortgagee to keep sale proceeds in Court—Order dismissing petitions on the ground sales had already been concluded and property delivered—Suit by mortgagee to recover from purchaser the amount due on his mortgage—Bar of Limitation:—See LIMITATION ACT (IX OF 1908), ARTS. 11 AND 132* ... 827

O. XXI, R. 22 (1) AND (2)—*Execution of decree, more than a year after date of decree—Omission to give notice to judgment-debtor—Omission of Court to record reasons for not issuing notice—Sale—Validity of—Void or voidable—Jurisdiction of Court to execute decree—Material irregularity or illegality affecting jurisdiction of Court—Proof of substantial loss for setting aside sale.]* Omission to issue notice to the judgment-debtor under Order XXI, rule 22 (1), Civil Procedure Code, is only a material irregularity in procedure and not an illegality affecting the jurisdiction of the Court in executing the decree. The provision in Order XXI, rule 22, sub-rule (2), requiring the Court to record reasons for not issuing notice under sub-rule (1), is only directory, and the omission to record reasons will not invalidate the proceedings in execution. Where therefore a sale was held in execution of a decree on an application

for execution made more than a year after the date of the decree but the Court did not issue notice under Order XXI, rule 22, sub-rule (1), nor record reasons for not doing so under sub-rule 2 of the same rule. *Held*, that there was only a material irregularity in procedure and that the sale could not be set aside in the absence of proof of substantial loss by reason of such irregularity.

Viswanathan Chetti v. Somasundaram Chetti ... (1922) I.L.R., 45 Mad., 876

CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, RR. 62 AND 63—Limitation Act (IX of 1908), art. 11—Attachment before judgment—Order for attachment passed, no actual attachment made—Claim petition by mortgagee from judgment debtor—Petition dismissed on merits—Subsequent suit by mortgagee to establish his right withdrawn after obtaining leave of Court to file another suit—Later suit for sale on mortgage more than one year after order on claim petition—Suit, whether barred by limitation—Claim petition in the absence of attachment, whether competent—Acquiescence of parties—Jurisdiction of Court—Effect of order. A mortgagee from a judgment-debtor filed a claim petition in respect of his hypothecation under Order XXI, rule 62, Civil Procedure Code, in execution proceedings in a suit in which the plaintiff had obtained a conditional order for attachment before judgment, but no attachment had ever been actually made. On the claim petition being dismissed on the merits, the mortgagee filed a suit to establish his right but withdrew it after obtaining leave of the Court to file another suit. More than a year after the order on his claim petition, he instituted a suit for sale on his mortgage against the auction purchasers in the execution sale in the previous suit and the mortgagors, who pleaded the bar of limitation under article 11 of the Limitation Act. It appeared that neither the Court nor the parties to the claim petition were aware of the absence of attachment in the previous suit. *Held*, that the mortgagee having filed the claim petition as if the properties had been attached, and the decree holders having acquiesced in the procedure adopted by him, the Court had jurisdiction to deal with his claim petition as one made under Order XXI, rule 62, Civil Procedure Code, and the order passed thereon was subject to the incidents specified in Order XXI, rule 63, of the Code; and that the suit for sale fell under article 11 of the Limitation Act, and was barred by limitation.

Muthiah Chetty v. Palaniappa Chetty ... (1922) I.L.R., 45 Mad., 90

..., O. XXII, RR. 3, 10—See RELIGIOUS ENDOWMENT ... 708

..., O. XXII, RR. 8 AND 10—Mortgagee dying after preliminary decree leaving a will—Legatee's application to continue suit—Limitation.] A mortgagee who had obtained a preliminary decree for sale died leaving a will bequeathing the mortgage decree to A. *Held* that A was his "legal representative" within Order XXII, rule 8, Civil Procedure Code, that the "right to sue" continued up to obtaining a final decree and that an application by A to bring himself on record as legal representative must be filed within the time allowed for applications under rule 3 and not rule 10 of Order XXII, Civil Procedure Code. *Bhugwan Das Khetry v. Nilakanta Ganguli*, (1904) 9 C.W.N., 171, distinguished.

Subbarayudu v. Ramadasu ... (1922) I.L.R., 45 Mad., 872

..., O. XXVI—Appointment of successive Commissioners for one valuation, legality of—Duty of Court on receipt of objections to a Commissioner's report.] Unless a Commissioner appointed under Order XXVI, Civil Procedure Code, has so totally misconceived his duties as to render his report and valuation useless as a basis for decision, in which case his report should be superseded and a new Commissioner appointed, the duty of the Court, whenever a Commissioner's report is objected to, is to hear objections in open Court and to decide with the aid of such evidence as it may take whether the valuation should be varied and

if so in what direction. Once a report is superseded it cannot thereafter be used as a basis for a valuation. The practice in Malabar of appointing successive Commissioners, whenever objections are filed to their reports, deprecated.

Thottamma v. Subramaniyan ... (1922) I.L.R., 45 Mad., 79

CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLI, R. 13:—See HINDU LAW—SALE BY FATHER OR MANAGER OF A JOINT HINDU FAMILY ... 449

..., O. XLI, R. 17—Absence of appellant at hearing—Pleader instructed only to ask for adjournment—Withdrawal of pleader on refusal of adjournment—Court dismissing appeal on merits, legality of.] Where the pleader of an appellant who was absent represented to the Court at the hearing of the appeal that he had instructions only to apply for an adjournment and withdrew from the appeal when the adjournment was refused. *Held* that the Court had thereafter no jurisdiction to dismiss the appeal on the merits, but should have dismissed it for "default" both of the party and of his pleader within the meaning of Order XLI rule 17, Civil Procedure Code; *Satis' Chandra Mukerjee v. Ahara Prasad Mukerjee* (1907) I.L.R., 34 Cal., 403 (F.B.), followed. *Patinhare Tarkatt Rama Mannadi v. Vellur Krishnan Menon*, (1903) I.L.R., 26 Mad., 237, explained.

Muhammad v. Manavikrama ... (1922) I.L.R., 45 Mad., 882

CLAIM PETITION—Limitation Act, arts. 11 and 132—Civil Procedure Code (V of 1908), O. XXI, r. 58—Decree for money—Attachment and sale—Petition by mortgagee to keep sale-proceeds in Court—Dismissed on the ground sales already been concluded and property delivered—Suit by mortgagee—Limitation:—See LIMITATION ACT, ARTS. 11 AND 132 ... 827

COMMISSIONERS—Successive appointments for one valuation, legality of—Duty of Court on receipt of objections to Commissioner's report:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXVI ... 79

COMPLAINT—Frivolous or vexatious—Magistrate trying accused for lesser offence whether acting illegally—Compensation:—See CRIMINAL PROCEDURE CODE (V OF 1898), SEC. 250 ... 29

CONFESSION BY ACCUSED—Magistrate—Inquiry under section 159—Confession not recorded in writing—Oral evidence of Magistrate, whether admissible:—See CRIMINAL PROCEDURE CODE (V OF 1898), SS. 159, 164, 288, 384, 533 ... 280

CONSENT—Jurisdiction—Towns Nuisance Act—Conservancy Clauses of Police Acts:—See Towns Nuisance Act ... 843

CONTRACT (INDIAN) ACT (IX OF 1872), SEC. 25 (8)—"Debt" contracted by a Hindu father for joint family—Son's promise to pay after period of limitation—Liability of son—Meaning of "debt" in section 25 (3).] A debt contracted by a Hindu father for the benefit of the joint family is none the less a "debt" within section 25 (8) of the Indian Contract Act, binding on the son because his liability to pay his father's debt is not personal but limited to the extent of the family assets. The son promising to pay such debt of the father after it is barred is personally liable to pay the whole of it.

Rama Pattar v. Viswanatha Pattar ... (1922) I.L.R., 45 Mad., 345

..., SEC. 62—Breach of original contract—Substitution, rescission or alteration—English doctrine, whether applicable.] There is nothing in section 62, Contract Act, to imply that the substitution, rescission or alteration of a contract, after its breach, must be supported by consideration. The English doctrine on the subject is not applicable to India. *Manohur Koyal v. Thakur Das Naskar*, (1883) I.L.R., 15 Cal., 319, disapproved. (Observations of KUMARASWAMI SASTRI, J., in *Ramiah Bhagavatur v. Somasi Ambalam*, (1915) 29 M.L.J., 125, followed.

N. M. Firm v. Theperumal Chetty ... (1922) I.L.R., 45 Mad., 180

CONTRACT ACT (IX OF 1872), ss. 108, 178:—See CONTRACT ACT (IX OF 1872), sec. 148 ...	173
SEC. 148 —Bailment— <i>Gratuitous bailment of jewels—Bailee, whether trustee for bailor—Indian Trusts Act (II of 1882), Chapter IX—Bona fide purchaser for consideration from bailee—Trusts Act (II of 1882), sec. 96, and Contract Act (IX of 1872), ss. 108, 178, whether purchaser protected by.] In a gratuitous bailment the bailee is not a trustee for the bailor, within the meaning of Chapter IX of the Indian Trusts Act. A purchaser in good faith and for consideration from such bailee is not protected by the provisions of section 96 of the Indian Trusts Act or section 108 or 178 of the Indian Contract Act.</i>	
<i>Ramasami Gupta v. Kamalammal</i> ...	(1922) I.L.R., 45 Mad., 173
SEC. 148 ...	173
SEC. 178:—See CONTRACT ACT (IX OF 1872), ss. 215, 17, 19—Principal and agent—Dis-honest concealment—Dealing disadvantageous to principal—Repudiation by principal—Difference between English and Indian Law.] By the law of England, if an agent without disclosing that he is the person dealing, himself enters into a contract with his principal the latter on discovering the fact can have the transaction set aside and it is immaterial whether there has been fraud or not or whether the transaction is advantageous or otherwise to the principal. Under section 215 of the Indian contract Act, to set aside such a transaction the agent should have dishonestly concealed a material fact or the dealing should have been in fact to the disadvantage of the principal. <i>Per SCHWABE, O.J.</i>—The fact that the plaintiff was a mere dummy is a dishonest concealment of a material fact. The general rules as to fraud which are contained in sections 17 and 19 of the Contract Act are made applicable to principal and agent by section 215 of the Act. <i>Per WALLACE, J.</i>—Mere concealment of the fact that the agent is dealing in the business of the agency on his own account is not itself dishonest.	
<i>Achutha Naidu v. Oakley Bowden & Co.</i> ...	(1922) I.L.R., 45 Mad., 1005
SEC. 265:—See PARTNERSHIP ...	378
CO-RESPONDENT — <i>Divorce—Indian Divorce Act (IV of 1869), s. 7—Petition by husband for divorce on the ground of adultery of wife—One of the adulterers not made a party—Corroboration, necessity for—Nature of corroboration—Joinder of known adulterer as co respondent—Settled principles and rules of practice of English Matrimonial Court, application of, in India:—See DIVORCE</i> ...	982
CORROBORATION — <i>Nature of—Necessity for—Joinder of known adulterer as co-respondent—Settled principles and rules of practice of English Matrimonial Court, application of, in India—Divorce—Evidence of husband or wife alone whether sufficient—Petition by husband for divorce on the ground of adultery of wife—Indian Divorce Act, IV of 1869, s. 7:—See DIVORCE</i> ...	982
COSTS — <i>Power of High Court to grant—Revision petition—Dismissal—Acquittal irregularity—Judgment—Criminal Procedure Code, ss. 336, 367, 433, 537:—See CRIMINAL PROCEDURE CODE</i> ...	418
COURT FEES ACT (VII OF 1870), ss. 3 AND 5—Charter Act, 23 and 24 Fict., Ch. 104, s. 15—High Court's power to make rules for imposition of court fees on Original Side—Memorandum of Appeal against order of Judge on Original Side—Reference by Tazing Officer—Jurisdiction—Stamp leviable—Final order—Original Side Fees Rules, Appendix II, arts. 36.] The High Court can make rules for the imposition and collection of court fees in proceedings on the Original Side of the Court in virtue of the power to make regulations for its procedure conferred by section 15 of the Charter Act. Such fees are fees payable to clerks and officers of the Court within the meaning 3 of the Court Fees Act, and a dispute regarding the same falls in this	

section 5 of that Act. The court fee leviable on a Memorandum of Appeal against a final order passed by a single Judge sitting on the Original Side is Rs. 100 under article 36 of the said Appendix.

Mahomed Ishack Sahib v. Mahomed Moideen ... (1922) I.L.R., 45 Mad., 849

COURT FEES ACT (VII OF 1870), Appeals Court-fee payable—Test—Relief on payment of specified sum—Ad valorem on such sum.] In cases of Appeals where the value of the subject-matter of the Appeal can be determined the court fee payable on the Memorandum of Appeal must be calculated on the value of the subject-matter. The test is what is the value of the relief granted which is sought to be got rid of. Where a decree grants relief on payment of a certain sum to the defendant the court-fee payable on a Memorandum of Appeal against so much of the decree as directs payment is ad valorem on the said sum irrespective of the nature of the suit.

Porkodi Achi, In re. ... (1922) I.L.R., 45 Mad., 246

ART. 1, SCH. I—Final decree determining mesne profits under O. XX, r. 12 (2), Civil Procedure Code—Appeal—Court-fee in.] An order determining the amount of mesne profits payable, subsequent to the filing of a suit is a final decree within Order XX, rule 12 (2), Civil Procedure Code; and ad valorem Court-fee is chargeable under article 1 of Schedule I of the Court Fees Act calculated on the amount of mesne profits in dispute in Appeal.

Balarama Naidu v. Sangan Naidu ... (1922) I.L.R., 45 Mad., 280

CRIMINAL PROCEDURE CODE (V OF 1898), ss. 159, 164, 238, 364, 533—Magistrate—Inquiry under section 159—Confession by accused—Not recorded in writing—Oral evidence of Magistrate, whether admissible.] Under section 164, Criminal Procedure Code, it is not obligatory on a Magistrate holding on investigation or preliminary inquiry under section 159 of the Code to record writing a confession made to him by an accused person and such confession may be proved by the oral testimony of the Magistrate.

Pedda Obigadu v. King-Emperor ... (1922) I.L.R., 45 Mad., 230

SEC. 164—Statement by witness recorded by Magistrate—Evidence Act (I of 1872), sec. 157—Relevancy to corroborate statement before Committing Magistrate.] A statement by a witness recorded by a Magistrate under section 164 of the Criminal Procedure Code is admissible in evidence to corroborate the statement made by that witness before the Committing Magistrate and from which statement he resiles in the Sessions Court. *Emperor v. Akbar Badoo* (1910) I.L.R., 34 Bom., 399, dissented from; 2 Weir's Cr. Rulings 821, followed.

Felliah Kone v. King Emperor ... (1922) I.L.R., 45 Mad., 766

SEC. 195 (b) AND (c), SUB-SECTIONS (8) AND (7)—Sanction to prosecute for offences under ss. 193, 465, 467, 474 and 109, Indian Penal Code—Suit withdrawn on the Original side, High Court—Document, not produced in suit—Produced under order of Court in sanction proceedings—Disclosure in affidavit, filing in Translator's office and allowing inspection, effect of—Actual production in suit, necessary—Prima facie case, not enough—Public interest—Prosecution, necessity for—Judicial discretion—Appeal—Criminal trial—Judgment—Letters Patent, clause (15), sub-sections (8) and (7) of sec. 195—Appeal ordinarily from Original side to Division Bench, Appellate Side, High Court.] After the withdrawal of a suit on the original side of a High Court before trial, the learned Judge granted sanction for the prosecution of the plaintiff for offences under sections 193, 465, 467, 474 and 109 of the Indian Penal Code. It appeared that the document, in respect of which the offences were alleged to have been committed, was not produced in Court in the suit but was disclosed in an affidavit filed therein and inspection thereof allowed to the other side; that it was filed

in the office of the Translator of the High Court for translation, and that it was produced in Court in the sanction proceedings under an order of the Judge. On an appeal being preferred by the plaintiff against the order granting sanction, a preliminary objection was taken to the maintainability of the appeal. *Held*, that an appeal lay under section 195, sub-sections (6) and (7) of the Criminal Procedure Code to the Division Bench of the Appellate Side of the High Court hearing appeals from a single Judge on the Original Side of the High Court, as appeals ordinarily lie from a single Judge on the Original Side to the Division Bench on the Appellate Side, of the High Court; that, under section 195 (c), Criminal Procedure Code, sanction for prosecution for offences under sections 465, 467 and 474, Indian Penal Code, cannot be granted by a Court unless the document in connexion with which the offences are alleged to have been committed *had been actually produced in Court* in the suit in which the offences were said to have been committed, if indeed sanction was necessary in respect of an offence under section 474, Indian Penal Code; That neither the disclosure of the document in the affidavit, permitting its inspection, filing it in the Translator's office, nor its production under order of Court in the sanction proceedings, amounted to producing or giving in evidence in the suit, and that the granting of sanction under section 195 (c), Criminal Procedure Code, was illegal and the sanction should be revoked; that the granting of sanction in respect of an offence under section 193, Indian Penal Code falls under section 195 (b), Criminal Procedure Code, and a Court granting sanction there under should exercise a judicial discretion, and the exercise of the Court's discretion will be judicial, only if it considered whether, with reference to the evidence available and the other circumstances, *prosecution was desirable in the public interest*, and not if it merely satisfied itself that a *prima facie* case had been made out; and as the learned Judge had not exercised his discretion as required by law, the appellate Court was competent to consider all the facts and to revoke the sanction, as the prosecution was vindictive and coercive and not in the public interest.

Munisamy Mudaliar v. Rajaratnam Pillai ... (1922) I.L.R., 45 Mad. (F.B.), 928

CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 205, 353—*Sessions Judge Personal attendance of accused—Power to dispense with such attendance.* [A Sessions Judge has power to dispense with the personal attendance of an accused and allow him to appear by pleader during the Sessions trial. Such a power may properly be exercised in favour of "Pardanishin" ladies at least until they are convicted.]

Kandamani Devi, In re. ... (1922) I.L.R., 45 Mad., 859

..., sso. 250—*Complaint frivolous or vexatious—Magistrate trying accused for lesser offence whether acting illegally—Compensation.* [When a Magistrate tries an accused person for an offence under a less serious section of the Penal Code when really the offence falls under a more serious section, which is beyond his competence, his proceedings are not illegal; and an award of compensation made by him under section 250 of the Criminal Procedure Code is not illegal, although the offence would really be triable exclusively by a Court of Session. *King, Emperor v. Ayyan* (1901) I.L.R., 24 Mad., 675, applied.]

Venkatraya v. Venkatraya ... (1922) I.L.R., 45 Mad., 29

..., ss. 256, 342 AND 537—*Warrant cases—Examination of accused before charge framed—Omission to examine by Magistrate after further cross-examination of Prosecution witnesses—Irregularity—Illegality.* [In warrant cases accused must be examined after the further cross-examination of prosecution witnesses even though he has been examined before charge was framed. Failure to so examine an accused is not a mere irregularity such as is contemplated in section 537 but an illegality which vitiates the trial.]

Madura Muthu Vanniah, In re ... (1922) I.L.R., 45 Mad., 820

CRIMINAL PROCEDURE CODE (ACT V OF 1898), sso. 346—*Sub-Magistrate—Submitting a case—Subdivisional Magistrate—Returning the case—Jurisdiction.* [When a Sub-Magistrate submits a case to a Subdivisional Magistrate under section 343, Criminal Procedure Code, the latter has no power to return the case to the former but is bound to dispose of it in one of the ways prescribed by that section.]

Kottur Hampannu, In re. ... (1922) I.L.R., 45 Mad., 846

..., ss. 366, 387, 433, 537—*Judgment—Irregularity—Acquittal—Revision—petition—Dismissal—Power of High Court to grant costs.* [The High Court will not ordinarily interfere in Revision at the instance of private parties with a Judgment of acquittal except when it is urgently demanded in the interests of public justice. Where in a sessions case the Sessions Judge at the end of the trial wrote a document headed judgment setting forth the findings of the assessors and adding his own finding agreeing with the assessors that the accused were not guilty and acquitted them and at a later date he wrote and prefixed to that document a fuller and more detailed judgment, it was held that though such a cause may be an error in procedure is a mere irregularity case by section 537 of the Code of Criminal Procedure. The High Court has no jurisdiction to grant cost in criminal cases except in those cases where the Code of Criminal Procedure makes express provision. The maxim, *expressio unius est exclusio alterius*, applied.]

Sankaralinga Mudaliar v. Narayana Mudaliar ... (1922) I.L.R., 45 Mad. (F.B.), 913

CUSTOM—Inheritance—Lubhai Muhammadans—Exclusion of females—Costs of appeal—Delay—Madras Civil Courts Act (III of 1873), sec. 16. [Having regard to the Madras Civil Courts Act, 1873, section 16, it is for those alleging among Muhammadans a custom of inheritance at variance with Muhammadan Law to prove by clear and unambiguous evidence an ancient and invariable custom. In the present case an alleged custom among Lubhai Muhammadans whereby females were excluded from inheritance was held not to have been established, the existence of the custom among that community having repeatedly been negatived by decisions of the Courts, and not being proved by the evidence in the case. Apart from section 16 above mentioned, weight could not be given to the consideration that the Lubhai community were recent converts from Hinduism, since it was not suggested that the community had elected to be governed by Hindu Law in its entirety. *Abdul Hussein Khan v. Sona Dero*, (1918) I.L.R., 45 Cal., 450 (P.C.); L.R., 45 I.A., 10, followed. Successful appellant deprived of costs of appeal on the ground of his delay in prosecuting the appeal.]

Muhammad Ibrahim Rowther v. Shaik Ibrahim Rowther (1922) I.L.R., 45 Mad. (P.C.), 308

DECREE—Execution more than a year after date of decree—Notice of sale—Omission—Judgment debtor—Irregularity—Illegality—Jurisdiction—Setting aside sale—Proof of loss:—See CIVIL PROCEDURE CODE ... 875

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-----, SEC. 3 (5)—Grant by a zamindar—Post settlement inam—Portion of a village—Grant of both varams on a permanent kattubadi—Whether grantee a landholder.] Held, by the Court (the CHIEF JUSTICE and DEVADOSS, J., dissenting), that where a zamindar makes a post settlement inam grant of a portion of a village with both varams on a permanent kattubadi the grantee is a landholder within the meaning of section 3 (5) of the Madras Estates Land Act. Brahmayya v. Achiraju (1922) I.L.R., 45 Mad. (F.B.), 716	
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EVIDENCE ACT (I OF 1872), SEC. 35 —Recital of relevant fact in judgment not inter parties, relevancy of.] A recital in a judgment not inter parties of a relevant fact is not admissible in evidence under section 35 of the Indian Evidence Act. Seethapathi Rao Dora v. Venkanna Dora (1922) I.L.R., 45 Mad. (F.B.), 332	
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GOVERNMENT OF INDIA ACT (5 AND 6 GEO. 5, CH. 61), SEC. 72—Ordinance of 1921 ss. 7, 16—Martial Law in "Administrative Areas"—Summary Court—If Court held outside "Administrative Area"—Offence within such area—Whether Court properly constituted—Powers of interference by High Court—Power of High Court to issue writ of Habeas Corpus to mufassal.] A "Summary Court constituted under section 6 of Ordinance II of 1921 promulgated by the Governor-General under section 72 of the Government of India Act is not a properly constituted Court if it sits outside the "Administrative Area" within which Martial Law has been proclaimed to try offences committed within such area. In such cases the High Court has power to interfere although by section 16 of the Ordinance all powers of interference with the decisions of "Summary Courts" appointed under the Ordinance have been prohibited. Judgment of KUMARASWAMI SASTRI, J., <i>In re Kuchunni Elaya Nayar</i>. (1922) I.L.R., 45 Mad., 14, approved. The High Court having succeeded to the powers of the Supreme Court has the power to issue writs of Habeas Corpus outside the Presidency Towns. <i>Ameer Khan, In the matter of</i>, (1870) 8 B.L.R., 392, and <i>In re Nataraja Iyer</i>, (1913) I.L.R., 36 Mad., 72 approved.	
<i>Govindan Nair, In re</i> (1922) I.L.R., 45 Mad. (F.B.), 922	
GUARDIAN AD LITEM—Minors—Ex parte decree against minor—Suit to set aside ex parte decree—Gross negligence of guardian in not defending suit, whether sufficient ground apart from fraud or collusion—Remedy by petition for review or petition to set aside ex parte decrees and remedy by suit, when available:—See MINOR—GUARDIAN AD LITEM	425
GUARDIANS AND WARDS ACT (IX OF 1890), SEC. 31—Alienation by guardian—Sanction of District Court—Validity of alienation—Effect of sanction on validity of alienation—Sanction only prima facie evidence of propriety of alienation—Minor's power to impeach transaction—Burden of proof—Proof of fraud on the part of purchaser, whether necessary.] Sanction of the District Court to an alienation of a minor's property by his guardian, under the Guardians and Wards Act, 1890, is only prima facie evidence that the transaction is a good one, but will not cure any inherent defect that may exist in it; and the minor may at any future time show that it was fraudulent or improper, and not for the benefit of the minor, but the burden of proof would be upon him to show that it was so. <i>Sikher Chand v. Dulputty Singh</i> (1880) I.L.R., 5 Cal., 363; and <i>Jugal Kishori Chowdhurani v. Anunda Lal Chowdhuri</i> (1896) I.L.R., 22 Cal., 545, followed.	
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HEADMASTER AND PUPIL—Unruly conduct of pupil—Power of headmaster to inflict moderate corporal punishment—Rule 59-A of Educational Rules, effect of.] It is within the powers of the head of a school to inflict moderate and reasonable punishment on a boy, such as a couple of smacks on the cheek, for correcting unruly conduct or breaches of discipline. The Educational Rules which provide that "corporal punishment shall not be inflicted except in a case of moral delinquency or flagrant insubordination and shall be limited to six cuts on the hand" do not prohibit or regulate the petty corrections such as that in question which are necessary for maintaining the ordinary discipline of a school.	
<i>Sankunni v. Swaminatha Pattar</i> (1922) I.L.R., 45 Mad., 548	
HINDU LAW—Adoption—Senior widow—Preferential right—Junior widow—Adoption by latter without asking senior widow to exercise her right of adoption—Relinquishment or waiver by senior widow, necessity for—Senior widow living apart from her husband for twenty-five years, whether disqualified to adopt—Prohibition by husband—Express or implied—Implied prohibition, when made out.] Under the Mitakshara law, the senior widow has a preferential right to adopt a son to her husband with the consent of his sapindas, and this rule applies to Sudras as well as to other classes. <i>Rajah Venkatappa Nayanam Bahadur v. Ranga Rao</i> (1916) I.L.R., 39 Mad., 772, followed. Unless the senior widow waives or relinquishes her preferential right and authorizes the junior widow to adopt, an adoption made by the latter with the consent of the husband's sapindas but without asking the senior widow to exercise her right of adoption, is invalid. From the mere fact that the senior widow was living apart from her husband for twenty-five years, she cannot be deemed to be a "dushta or nishidda," and so disqualified to exercise her preferential right to adopt. Though a prohibition by the husband against the senior widow's adoption may be implied and need not always be express, the implication must be clear and necessary, and it is not for the Court to embark on a speculation as to what the husband might have done during his lifetime or might have wished if the point was expressly mentioned to him before his death. <i>Lakshmi Bai v. Saraswati Bai</i> (1899) I.L.R., 23 Bom., 789, followed; <i>Dnyanoba v. Radhabai</i> (1894) 8 Bom. Printed Judgments, 9, distinguished.	
<i>Muthusami Naicken v. Pulavaratal</i> (1922) I.L.R., 45 Mad., 266	
Congenital blindness—Exclusion from inheritance—Whether rule obsolete.] Under Hindu Law a congenitally blind person is excluded from succession and this rule has not become obsolete. <i>Surayya v. Subbamma</i> , (1920) I.L.R., 43 Mad., 4, overruled.	
<i>Puduvai Nadar v. Pavanasa Nadar</i> (1922) I.L.R., 45 Mad. (F.B.), 949	
Husband's leprosy—Wife living apart, entitled to separate maintenance.] The wife of a Hindu who is suffering from virulent leprosy is entitled to live apart from him and claim separate maintenance.	
<i>Shinappaya v. Rajamma</i> (1922) I.L.R., 45 Mad., 812	
Inheritance—Mitakshara—Step-son of step-sister of the last male owner, whether an heir of the latter.] Under the Mitakshara Law, the step-son of the step-sister of a deceased male is not an heir of the latter.	
<i>Saminatha Chetty v. Angammal</i> (1922) I.L.R., 45 Mad., 257	

HINDU LAW—Joint family—Division of property not completed—Properties left in hands of different members—Suit for partition and account—Money received from debtors—Rents and profits—Limitation: See LIMITATION ACT (IX OF 1908), ARTS. 89, 120 ... 648

Joint family property—Rights under decrees—Minor—Agreement by karta releasing rights—Order in Council declaring agreement invalid against minor—Additions to joint family pendants lito—Effect of Order in Council.] Under decrees made in 1886 and 1897 in a suit brought in 1886, a father and his minor son (the appellant), who together constituted a Hindu joint family were entitled to recover a large sum from the first respondent. By a compromise agreement made in November 1897, the father purporting to act on behalf of himself and the appellant (but without the sanction of the Court), relinquished the claim under the decrees subject to the first respondent withdrawing an appeal which he had entered. In 1906 the appellant on attaining his majority brought a suit against his father and the first respondent, claiming that the compromise agreement was not binding upon him, and to recover under the decrees on behalf of the joint family consisting of his father and himself. Upon an appeal to the Privy Council in that suit an Order in Council was made in 1913 declaring that the agreement of November 1897 was not binding upon the present appellant, and that he ought to be remitted to his original rights under the decrees, and remanding the suit for the disposal of issues as to the share to which he was entitled. Meanwhile in 1907 and 1910, the joint family had been added to by the birth of two further sons to the appellant's father, and they were made parties after the remand. The High Court on appeal, treating the Order in Council as rendering the agreement of 1897 binding upon the father, decreed that the present appellant was entitled individually to a one-third share of a moiety. Held, that in the events which had happened the compromise must be regarded as having wholly failed to convey any of the joint estate, though different considerations might have arisen if the appellant had predeceased his father and no further members had been added to the joint family; that the first respondent was entitled to prosecute his appeal in the suit of 1886; and that whatever sum might ultimately be recovered therein would belong to the joint family if it still existed, but if dissolved then in individual shares to be fixed as at the date of the dissolution. In their Lordships' opinion the High Court having allowed the first respondent's appeal in the suit of 1886 to be restored, should not have stayed it pending the decision in the present appeal, since that left the Privy Council to consider hypothetical rights which ordinarily no English tribunal would do.

Venkata Row v. Tuljaram Row ... (1922) I.L.R., 45 Mad. (P.C.), 298

Mortgage by guardian for lending money to another to carry on trade not being ancestral trade on behalf of minor—Validity of mortgage—(Guardian ad Litem—Duty of guardian to plead invalidity of such mortgage:—See MINOR—GUARDIAN AD LITEM ... 425

Mortgage by widow—Suit on mortgages and compromise by widow selling mortgaged properties to mortgagee—Suit by reversioners—Onus of proving validity of compromise on alienee.] Where a Hindu widow who had mortgaged her husband's estate for a debt contracted by her was sued by the mortgagee and compromised the suit by purporting to make over the property to the mortgagee absolutely, Held, that the burden of proving that the compromise was valid and binding on the reversioners was on the mortgagee-purchaser. Kumarami Odayar v. Subramania Iyer, (1916) 31 M.L.J., 87, Kadakkara Nadam v. Nadakkannu Nadam, (1921) M.W.N., 342, and Srinivasa Aiyar v. Thiruvenguda Maistry, (1919) 10 L.W., 594, explained. The distinction between cases where the suit or claim against the widow arises out of a contract or transaction entered into by her husband with strangers, and those where it is in respect of a contract or transaction entered into by herself, pointed out.

Tirupatiraju v. Venkayya ... (1922) I.L.R., 45 Mad. (F.B.), 504

HINDU LAW—Partition—Manager—Liability to account—New Trade or business—Power of manager to commence new trade—Adult co-parcener—Duty of manager to consult adult co-parcener—Speculative business—Illegal business, carried on by manager—Loss—Liability of other co-parceners—Charity—Dedication of property—Document, whether necessary.] The manager of a joint Hindu family has no power to commence a new trade or business without the concurrence of the adult co-parceners living with him at the time; and such trade or business is not binding on them in the absence of evidence of their acquiescence. *Abdur Rahiman Kutti Haji v. Hussain Kunhi Haji* (1919) 37 M.L.J., 316, followed. It is not open to the managing co-parcener to enter into illegal transactions and to saddle the other co-parceners of the family with the loss arising therefrom, especially where it is not shown that the latter consented to it. In the absence of fraud, misappropriation or gross reckless waste by the manager, a co-parcener seeking partition is only entitled to an account of the assets of the family existing at the date of partition or at the date when, owing to a demand for partition, a severance of status has taken place; the manager must file an account of existing assets available for partition, but it is open to the other members to show that the expenditure which the manager says has been incurred has not in fact been incurred or not been incurred to the extent mentioned by him, or that more properties are available for partition than those disclosed by him. No document is necessary for the dedication of property to a charity. *Ramalingam Chetti v. Sivachidambura Chetty* (1919) I.L.R., 42 Mad., 440, referred to.

Tammireddi v. Gangireddi ... (1922) I.L.R., 45 Mad., 281

Partition—Marriage expenses, Provision for—Marriage after plaint but before decree—Gift to daughter out of joint property.] The institution of a suit for partition by a member of a joint Hindu family effects a severance of the joint status of the family, and a member of the family who is then unmarried is not entitled to have a provision made in the partition for his marriage expenses, although he marries before the decree in the suit is made. Assignment by a member of a joint Hindu family to his daughters of a sum of money and of a usufructuary mortgage held valid, both Courts in India having found that they were reasonable in the circumstances in which they were made.

Ramalinga Annavi v. Narayana Annavi ... (1922) I.L.R., 45 Mad. (P.C.), 489

Religious endowment—Dharmakarthas of temple—Trustee—Diversification of endowed property—Concoction of accounts—Removal of Dharmakarthas—Mirasi tenure.] When property proved to have originally been trust property is claimed by the trustee as his own, the onus is upon him to establish the legitimacy of his personal acquisition of it by the clearest and most unimpeachable evidence. Dharmakarthas of a Hindu temple who claimed as his own lands found to belong to the temple, and supported his claim by concocted accounts, removed. A Dharmakartha is no more than a manager, and his rights, apart perhaps from the question of personal support, are never higher than those of a mere trustee; in this respect he differs from a shebait or the head of mutt. *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami* (1904) I.L.R., 27 Mad., 435, approved. Consideration of the nature of mirasi tenure.

Srinivasa Chariar v. Eyalappa Mudaliar ... (1922) I.L.R., 45 Mad. (P.C.), 565

Sale by father or manager of a joint Hindu family—Sale, not for family necessity—Suit by co-parceners to set aside sale and recover possession from vendees—Co-parceners' right to recover entire lands—Right of vendees to insist on partition in that suit—Decree for possession of entire lands, leaving vendees to work out their rights in a separate suit for partition—Declaration of vendees' interest—Mesne profits from what date—Sale, void or voidable and capable of ratification—Civil Procedure Code (V of 1908), O. XX, r. 12—Remand by Appellate Court—Inherent power of Court—Civil Procedure Code, O. XLI, r. 23—Appeal—Preliminary decree—Duty of Appellate Court—

Inquiry as to mesne profits—Second Appeal, competency of.] Where a suit was instituted by the co-parceners of a joint Hindu family to set aside a sale of ancestral immovable property by their father or the manager of the family on the ground that the sale was not for family necessity, and to recover possession of the property from the vendees, and it was found that the sale was not binding on the plaintiffs. *Held*, that the plaintiffs were entitled to recover possession of the entire lands from the vendees; that the latter were not entitled as defendants to insist in this suit on the plaintiffs submitting to a partition either of the items sold to them or of the entire family property so as to give the vendees their alienor's share in the properties sold to them; that the vendees were entitled in this suit to a decree declaring that they are entitled to the share of their alienor, but that they should be left to work out their rights by a separate suit for partition; that a sale by a father or managing member of a joint family for alleged necessity will be good till avoided as it is open to the other co-parceners to affirm the transaction; and that the co-parceners are entitled to mesne profits not from the date of sale but from the date of their repudiation of the sale. *Deendayal Lal v. Jugdeep Narain Singh* (1878) I.L.R., 3 Cal., 198 (P.C.); and *Hardi Narain Sahu v. Buder Perakash Misser*, (1884) I.L.R., 10 Cal., 626 (P.C.), relied on; *Ramkishore Kedarmath v. Jainarayan Ramrachhpal*, (1918) I.L.R., 40 Cal., 966 (P.C.), explained. View of *Krishnaswami Aiyar, J.*, in *Kandasami Aari v. Somaskanda Ela Nidhi, Ltd.* (1912) I.L.R., 35 Mad., 177 dissented from; *Bhingu Nath Chaube v. Narasingh Tiwari*, (1917) I.L.R., 39 All., 61, followed. Where a suit was instituted for recovery of possession of certain lands with mesne profits and the Court of first instance after deciding on all the issues except as to the amount of mesne profits, dismissed the suit upholding the validity of the sale sought to be set aside in the suit, and on Appeal the lower Appellate Court held the sale to be invalid as against the plaintiffs, reversed the decree and remanded the suit to the former Court for disposal, on a Second Appeal being preferred by the defendants. *Held*, that the order of remand was not proper even though the Appellate Court might have inherent jurisdiction to remand in a proper case apart from the provisions of Order XXI, rule 23, Civil Procedure Code, but no appeal would lie against such an order; that, in suits for recovery of possession of lands with mesne profits, an Appellate Court should not remand the suit where it finds that the plaintiff is entitled to possession, but should pass a preliminary decree so far as possession is concerned, and direct an inquiry as to mesne profits in cases where the original Court had not dealt with the question, under Order XX, rule 12, Civil Procedure Code; that in this case the lower Appellate Court must be deemed to have passed a preliminary decree and the direction to ascertain mesne profits deemed to have been given under Order XX, rule 12, Civil Procedure Code; and that the Second Appeal was competent as against such preliminary decree. *Doraisami Aiyar v. Venkatarama Aiyar*, (1921) 13 L.W., 618; *Kumud Lal v. Ramani Mohan*, (1914) 10 C.L.J., 346; and *Kamini Devi v. Promotho Nath*, (1914) 20 C.L.J., 479, followed.

Subba Goundan v. Krishnamachari ... (1922) I.L.R., 45 Mad., 449

INAM GRANT—*Kudivaram*—Absence of presumption:—See *Lundford and tenant* ... 586

INCOME-TAX ACT (VII OF 1918)—*Zamindari of Singampatti*—Income derived from forests and fisheries—Liability to income-tax—Madras Regulation XXV of 1802, effect of.] Where the peshkash of a permanently settled estate was fixed in commutation, not only of the rentals of the cultivated lands but also of all income which might be derived from forests or fisheries, *held*, that both under the terms of the sanad and of section 1 of Regulation XXV of 1802, these incomes were exempt from further taxation by the Government, and section 3 of the Income-tax Act did not abrogate this exemption. *Quære*,—Whether the income from forests and fisheries would not be "agricultural" income within the meaning of section 4 of the Act, and, therefore, not chargeable to income-tax.

Chief Commissioner of Income-tax v. Zamindar of Singampatti ... (1922) I.L.R., 45 Mad., (F.B.), 518

INCOME-TAX ACT (VII OF 1918 AND XVII OF 1920), SEC. 2, SUB-SECTION 12-A—"Registered Firm"—Collectors' certificate—Income for prior year when firm not registered—Whether can be adjusted in year when certificate in force.] An adjustment can be made during a financial year in which the Collector's certificate of registration under section 2, sub-section 12-A, of the Indian Income-tax Act is in force in respect of the income of the firm for the previous year when the firm had not been so registered.

The Board of Revenue v. Hussain Meah Sahib & Co. ... (1922) I.L.R., 45, Mad. (F.B.), 977

... ss. 40, 17, 21 (3)—*Indian Penal Code (XLV of 1860)*, sec. 177—False verification—Presentation of petition—Jurisdiction of Court, whether where verification made or petition presented.] A person making a false verification in a statement under section 17 or 21 (3) of the Income-tax Act, 1918, can legally be tried under section 40 of the Act only by a Court having jurisdiction over the place where the verification was made and not by a Court having jurisdiction over the place where the petition was presented.

Mohideen Pakkiri Marakkayar In re ... (1922) I.L.R., 46 Mad., 839

INDIAN COMPANIES ACT (VI OF 1882), SCH. A, TABLE A—Articles of Association of a Limited Company—Transfer of shares to be effected by deed executed both by transferor and transferee—Transfer only by transferor, effect of, as against auction purchaser.] Where a transfer of shares in a Limited Company is required by law or by the Articles of Association of the Company to be made only by a deed executed both by the transferor and the transferee in the prescribed form, *Held*, that a deed of transfer executed by the transferor alone did not pass to the transferee the title to the shares and that an auction purchaser under a subsequent attachment and sale of the shares was entitled to be registered as owner in preference to the private purchaser.

Nagabhushanam v. Ramachandra Rao ... (1922) I.L.R., 45 Mad., 537

INDIAN EASEMENTS ACT (V OF 1882), SEC. 15—Right of way through another's house—Long user presumed to be as of right.] Where the plaintiff proved that his scavenger was cleaning his privy for the last 30 years and more by passing through the defendant's house. *Held*, that the presumption was that the user was of right, and that the plaintiff had acquired a right of way by long user, apart from section 15 of the Easements Act. There is nothing to prevent the acquisition of a right of way through a dwelling house. The presumption of right from long user is not in India a presumption *de jure* *de jure*, but is one which can be rebutted by proof of facts which are inconsistent with or militate against the inference.

Kunjammal v. Rathinam Pillai ... (1922) I.L.R., 45 Mad., 688

INDIAN PENAL CODE, SEC. 177—False verification—Presentation of petition—Jurisdiction of Court:—See **INCOME-TAX ACT** ... 839

... ss. 183, 465, 467, 109—Sanction to prosecute for offences—Suit withdrawn on the Original Side, High Court—Document not produced in suit—Produced under order of Court in sanction proceedings—Disclosure in affidavit, filing in Translator's office and allowing inspection, effect of—Actual production in suit—Prima facie case, not enough—Public interest—Prosecution, necessity for—Judicial discretion—Appeal—Criminal trial—Judgment—Letters patent clause (15), sub-sections (6) and (7) of sec. 195—Appeals ordinarily from Original Side to Division Bench, Appellate Side, High Court:—See **CRIMINAL PROCEDURE CODE** ... 928

INDIAN PENAL CODE (XLV OF 1860), ss. 79, 494—Bigamy—Muhammadan husband becoming Ahmadiyan, whether an apostate—Wife marrying again, whether guilty of bigamy—Good faith and mistake of law whether good defences.] The essential doctrine of the Muhammadan religion is that God

is only one and that Muhammad is His Prophet; hence Ahmediyans who also hold that belief are only a sect of Muhammadans, notwithstanding the fact that they differ from other Muhammadans in some other matters of religious belief. Hence on a Muhammadan becoming an Ahmediyans he does not become an apostate and his wife is guilty of bigamy if she marries another during his lifetime; *Hakim Khalil Ahmad v. Malik Israfil and Malik Israfil v. Hakim Khalil Ahmad*, (1917) 2 Pat., L.J., 108, referred to Good faith and mistake of law are no defences to a charge of bigamy. *The Queen v. Tolson*, (1889) 23 Q.B.D., 168, distinguished. The opinion of HOLMHOOD, J., in *Abdul Ghani v. Azizul Haq*, (1912) 1 L.R., 39 Cal., 409, dissented from. The High Court will entertain a revision against an acquittal even at the instance of a private party when the question is one of public importance involving the personal status of a large section of a community.

Narantakath Avullah v. Parakkal Mammu ... (1922) I.L.R., 45 Mad., 986

INDIAN TRUSTS ACT (II OF 1882), SEC. 96—See **CONTRACT ACT (IX OF 1872)**, SEC. 148 ... 173

INSOLVENCY COURT—Power to inquire into title and to deliver—Sale by Official Receiver of insolvent's property and obstruction to delivery :—See **PROVINCIAL INSOLVENCY ACT (V OF 1920)**, ss. 4, 5 and 56 ... 484

IRREGULARITY—Absence of notice to judgment-debtor—Omission to record reasons—Execution of decree more than a year old—Sale—Validity of—Setting aside—Proof of substantial loss—Illegality :—See **CIVIL PROCEDURE CODE** ... 875

JOINT HINDU FAMILY—Managing member—Purchasing property benami, whether on behalf of other members—Suit for partition—Maintainability of suit—Bar to suit—Right of benamidar :—See **CIVIL PROCEDURE CODE** ... 856

JUDGMENT—Irregularity—Acquittal—Revision petition—Dismissal—Power of High Court to grant costs—Criminal Procedure Code, ss. 366, 366, 433 and 537 :—See : **CRIMINAL PROCEDURE CODE** ... 918

JUDGMENT-DEBTOR—Absence of notice to—Execution of decree more than a year old—Omission to record reasons—Sale—Validity—Void or Voidable—Jurisdiction of Court—Irregularity—Illegality—Setting aside sale :—See **CIVIL PROCEDURE CODE** ... 875

JUDICIAL COMMITTEE—Practice—Valuation of Appeal—Certificate of High Court—Tender of patta—Previous decree—Construction of patta—Oodu crop—*Estates Land Act (Madras Act I of 1908)*, sec. 52, sub-sec. (3).] Rule 2 of rules contained in the Order in Council of April 10, 1838, whereby the certificate of a Court in India that the value in dispute in an Appeal to the Privy Council amounts to Rs. 10,000 and upwards shall be conclusive, remained in force until repealed by the Order in Council of February 9, 1920; in some cases before the Board it would appear that the rule of 1838 had been overlooked. The provision in section 52, sub-section (3) of the *Estates Land Act (Madras Act I of 1908)*, as to the remaining in force of pattas "decreed," is not confined to pattas decreed by any particular Court; it includes a decree of a Revenue Court in proceedings under *Madras Act VIII of 1865*. A patta provided that if contrary to its terms the tenant carried away the crop he should pay the specified melvaram paddy in respect of the total yield of paddy calculated at a certain average of crop, the kadappu and kar produce being payable by December 15 and the samba and pisanam by March 15. The tenant planted an oodu crop, that is, a crop sown together, one part of which takes three months and the other part six months to ripen and be reaped. Held, that the tenant having carried away the crop was liable to pay at the specified rate upon each portion of the oodu crop.

Radhakrishna Ayyar v. Sundaraswamier ... (1922) I.L.R., 45 Mad. (P.C.), 475

JURISDICTION—Consent—Criminal Rules of Practice, r. 16 (2)—Conservancy Clause :—See **TOWNS NUISANCE ACT** ... 848

Presentation of Petition—False verification—*Indian Penal Code*, sec. 177 :—See **INCOME-TAX ACT** ... 839

Sub-Magistrate—Submitting case—Subdivisional Magistrate returning the Case :—See **CRIMINAL PROCEDURE CODE** ... 846

Of Court to execute decree more than a year old—Omission to give notice—Record reasons—Sale—Validity of—Setting aside—Proof of loss—Irregularity—Illegality :—See **CIVIL PROCEDURE CODE** ... 875

Civil Courts—Suit to set aside sale—Sale held under provisions of *Madras Estates Land Act (I of 1908)*.] Civil Courts have jurisdiction to try a suit by a ryot to set aside a sale of his holding which was held under the provisions of Chapter VI of the *Madras Estates Land Act*.

Rajah of Ramanud v. Venkataramayyar ... (1922) I.L.R., 45 Mad. (F.B.), 890

Taxing officer—Reference—Appeal against a determination by a Judge of the High Court in its Original Civil Jurisdiction—Stamp leviable—Final order—Original Side Fees Rules, Appendix II, Article 36 :—See **COURT FEES ACT** ... 849

JURISDICTION OF COURT—Acquiescence of parties—Effect of order :—See **CIVIL PROCEDURE CODE (ACT V OF 1908)**, O. XXI, RR. 62 AND 63 ... 90

JURISDICTION OF JUDGE OF INSOLVENT COURT—Insolvency jurisdiction, whether original jurisdiction of a Civil Court :—See **PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909)**, SEC. 36 ... 81

LAND ACQUISITION ACT (I OF 1894), ss. 3, 9, 18, 24 (1) AND 25—Applicant—Person interested—Hindu widow—Claimant before acquiring officer—Surrender by widow to reversioner after award—Application by reversioner for reference to Civil Court—Claim by reversioner for larger amount of compensation than amount claimed by widow—Legal representative—Estoppel—Competency of Court to award larger amount—Purpose of acquisition—Element in valuation.] A reversioner to the estate of a Hindu widow who preferred a claim after notice under section 9 of the *Land Acquisition Act*, and surrendered her estate to the former after an award was passed by the acquiring officer, is a person interested in the compensation and is competent to be an applicant under section 18 of the Act. Under section 25 of the Act, claimant is estopped from getting more compensation from the Judge than what he claimed before the acquiring officer, and on the same principle his legal representatives would likewise be bound; but a reversioner to the estate of a Hindu widow is not her legal representative and is not bound by her acts on any principle of estoppel; consequently the Judge is not bound to limit his award, on the application of the reversioner, to the amount claimed by the widow before the acquiring officer. The purpose for which land has been acquired is an element for consideration in estimating its value, though under section 24 (1) of the Act the Court is precluded from taking into consideration the increase of its value likely to arise from the use to which it will be put.

Gopayya v. Deputy Collector, Tenali ... (1922) I.L.R., 45 Mad., 421

SEC. 31, SUB-SEC. (2)—*Res judicata*—Dispute as to title—Reference to Court—"In a former suit"—*Code of Civil Procedure (V of 1908)*, sec. 11.] Where under the *Land Acquisition Act (I of 1894)*, section 31, sub-section (2), a dispute as to the title to receive the compensation has been referred to the Court, a decree thereon not appealed from renders the question of title *res judicata* in a suit between the parties to the dispute, or those claiming under them, whether or not the decree is to be regarded as one "in a former suit" within the meaning

of section 11 of the Code of Civil Procedure, 1908. *Rangoon Botatoung Co. v. The Collector, Rangoon* (1913) I.L.R., 40 Cal., 21; L.R., 39 I.A., 197, explained and distinguished. *Balaram Bhramavata Ray v. Sham Sunder Narendra* (1896) I.L.R., 28 Cal., 526; and *Trinayani Dass v. Krishna Lal De* (1913) 17 C.W.N., 935, disapproved. *Hook v. Administrator-General of Bengal* (1921) I.L.R., 48 Cal., 499; L.R., 49 I.A., 187, followed.

Ramachandra Rao v. Ramachandra Rao (1922) I.L.R., 45 Mad. (P.C.), 320

LANDHOLDER—Grant by a Zamindar—Post settlement inam—Portion of a village—Grant of both varams on a permanent Kattubadi:—See ESTATES LAND ACT (MADRAS ACT I OF 1908), SEC. 8 (5) ... 716

LANDLORD AND TENANT—Occupancy right—Prescriptive right—Inam grant—*Kudivaram*—Absence of presumption—*Madras Estates Land Act (I of 1908)*.] The inamdar of a village granted as an inam in 1743 sued in 1904 to eject tenants of part of the lands after notice to quit. The inam grant provided that the grantees should "for ever have dominion over and enjoy the wet and dry lands, tops, wells, treasures, etc., found therein"; it did not in express terms grant both the kudivaram and melvaram rights, nor was it expressly confined to the melvaram right. The evidence showed that the tenants had been in possession and occupation since 1829, or earlier; that they had dealt with the lands as occupancy ryots, partitioning, transferring and mortgaging their holdings with the acquiescence of the inamdar; and that they had received from Government compensation for part of their holdings taken for public purposes. The trial Court and two Appellate Courts had found that the inamdar did not possess the kudivaram right in the lands. Held, that the rights of the parties had to be determined upon the facts, apart from any presumption as to the nature of the right granted in 1743; and that the tenants had established a prescriptive right of occupancy, and could not be ejected. It was not necessary to decide whether the *Madras Estates Land Act (I of 1908)*, the provisions of which were considered, applied where, as in the present cases, the Act was passed while the litigation was proceeding. *Suryanarayana v. Patanna* (1918) I.L.R., 41 Mad., 1012 (P.C.); L.R., 46 I.A., 209; *Venkata Sastrulu v. Sentharamudu* (1920) I.L.R., 48 Mad., 166 (P.C.); L.R., 46 I.A., 123; and *Seturathnam Aiyar v. Venkatachala Goundan* (1920) I.L.R., 43 Mad., 567 (P.C.); L.R., 47 I.A., 76, explained. *Muthu Goundan v. Perumal Iyer* (1921) I.L.R., 44 Mad., 588 (F.B.), disapproved.

Bisvaprasada Pandara Sannadhi v. Veerama Reddi ... (1922) I.L.R., 45 Mad. (P.O.), 586

LEGATEE—Application to continue suit—Mortgagee dying after preliminary decree—Will—Limitation:—See CIVIL PROCEDURE CODE ... 872

LIMITATION—Preliminary decree—Mortgagee dying after—Will—Legatee's application to continue suit:—See CIVIL PROCEDURE CODE ... 872

— Suit for possession—Alleged benami holding—Contract for "sale"—Construction—Specific performance—Judicial Committee practice—Mortgage between co-defendants—Reversal of decree for plaintiff—Order preserving mortgagee's rights—*Indian Limitation Act (IX of 1908)*, sch. I, art. 113.] A suit was brought in 1900 for possession of villages on payment of such sum as might be found due. The plaint alleged that the villages had been purchased by the first defendant in 1883 as benamidar for the plaintiff's father (deceased), and that in 1888 the first defendant had contracted to convey them to the plaintiff upon payment of a sum then found to be due. The contract of 1888 was expressed to be for a "Sale" of the villages to the plaintiff and, in the view of the Judicial Committee (reversing the High Court), its terms were consistent only with the first defendant being the legal and beneficial owner. Held, that whatever was the original nature of the purchase the suit must be regarded as one for specific performance of the contract of 1888, and that it was accordingly barred by the Indian

Limitation Act, 1908, schedule I, article 113. The first defendant had in 1894 and 1898 mortgaged one of the villages to the third defendant, and the decree of the High Court in favour of the plaintiff had provided for payment of the mortgages. The first defendant not opposing an order preserving the mortgagee's rights from being affected by the Limitation Act, the Judicial Committee, in allowing the first defendant's appeal, so determined.

Subbaraya Pillai v. Raja of Karvetnagar ... (1922) I.L.R., 45 Mad. (P.C.), 641

LIMITATION ACT (INDIAN) (IX OF 1908), ss. 4 TO 25:—See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 48 ... 785

... ss. 6, 8 AND 9—*Lunatic's estate sold by his wife, who was neither his committee nor natural guardian—Adverse possession for 12 years—Suit by reversioners—Limitation.*] A lunatic's wife who was neither his committee in lunacy nor his legal guardian sold his lands to the defendants in 1880. In 1882 the lunatic died and his widow who succeeded him as heir died in 1910. In a suit brought by the reversioners in 1917 for the recovery of the lands, it was contended on their behalf that the possession of the defendants could not be adverse to the lunatic, that upon his death it was adverse to his widow but not to the reversioners, and that the suit was, therefore, in time. Held, that adverse possession began in 1880 in the lunatic's lifetime, and that the suit was barred by limitation. It cannot be stated as a general proposition that there could be no adverse possession of property which belongs to a lunatic or minor during the continuance of the lunacy or minority. The question in each case has to be decided with reference to the anterior relationship between the person taking possession and the minor or lunatic and to whether any circumstances exist which would entitle the Court to hold that the person who entered into possession did so under circumstances which would in law make him only an agent or bailiff of the minor or lunatic. Under the Limitation Act, lunacy or minority does not by itself prevent time from running as against the lunatic or minor, although an extended period is provided in such cases.

Sectaramaraju v. Subbaraju ... (1922) I.L.R., 45 Mad., 861

... sec. 10—"Express trust," when created.] A benamidar is not an "express trustee" within the meaning of section 10 of the Limitation Act, and a claim against him for mesne profits by the real owner is not saved from the bar of limitation by that section.

Krishna Pattar v. Lakshmi ... (1922) I.L.R., 45 Mad., 415

... sec. 15 (1)—*Applicability of section—"Prescribed" in section 15, meaning of—"Period of limitation," meaning of—Strict and loose sense:—See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 49* ... 785

... sec. 19—*Acknowledgment—Previous statement when good as an acknowledgment.*] A statement by a person that he executed a hypothecation in favour of another cannot be construed as containing an implied acknowledgment of liability unless it is clear therefrom that he admitted that the debt was still subsisting or unless there was a clear necessity at the same time to mention the fact of discharge. *Venkata v. Parthasaradhi* (1893) I.L.R., 18 Mad., 220, followed. *Manirum Seth v. Seth Bupchand* (1906) I.L.R., 33 Cal., 1047 (P.C.), explained.

Kandasami Reddi v. Suppammal ... (1922) I.L.R., 45 Mad., 443

... Rule of High Court.—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. IX, R. 13 ... 629

... sch. I, art. 106:—See PARTNERSHIP ... 378

... sch. I, art. 113:—See LIMITATION ... 641

LIMITATION ACT (INDIAN) (IX OF 1908), ART. 11 :—See 'CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, RR. 62 AND 63 90

ARTS. 11, 13, 62—*Attachment before judgment of a debt due to defendant—Adjudication of the defendant as insolvent thereafter—Unsuccessful claim of Official Receiver to release debt from attachment—Suit by Official Receiver to contest order on his claim more than one year afterwards—Limitation.* A debt due to A from B was attached before judgment and A was thereafter adjudged an insolvent. The attached debt was paid into Court and the Official Receiver of A's estate applied to the Court for payment of the money to him and not to the attaching creditor, by virtue of section 34 of the Provincial Insolvency Act (III of 1907). The application was dismissed. More than a year after dismissal but within three years after payment to the attaching creditor the Official Receiver filed this suit to recover the money from the latter. *Held*, that the Official Receiver's application was not a claim petition within Order XXI, rules 58 to 63, and Order XXXVIII, rule 8, Civil Procedure Code, and the article of the Limitation Act applicable was 62 and not 11. *Held* further, that article 13 also was not applicable as the application was in a suit. *Shankar Sarup v. Mejo Mal* (1901) I.L.R., 28 All., 318 (P.C.), followed. *Held* further, by SPENCER, J., that the application was not one for rateable distribution.

Official Receiver, South Malabar v. Veeraraghavan Pattar ... (1922) I.L.R., 45 Mad., 70

ARTS. 11 AND 182—*Civil Procedure Code (V of 1908), O. XXI, r. 58—Claim petition—Decree for money—Attachment and sale of a tin-shed—Petitions by mortgagee of tin-shed to keep sale-proceeds in court and not to deliver tin-sheets after sale in right of his mortgage—Order dismissing petitions on the ground sales had already been concluded and property delivered—Suit by mortgagee to recover from the purchaser the amount due on his mortgage four years after orders—Bar of limitation.* Where a mortgagee of a tin-shed, which was attached and brought to sale in execution of a money-decree obtained by the defendant against the mortgagor, filed two petitions in the executing Court, one to keep the sale-proceeds in deposit in Court to meet his claim under his mortgage, and the other not to deliver the tin-sheets after sale, and, on both the petitions being dismissed on the ground that the sale had been already concluded, and the tin-sheets delivered to the defendant as the auction purchaser, instituted a suit to recover from the defendant the amount due on the mortgage, four years after the dates of the orders on the petitions, and the latter pleaded the bar of limitation. *Held*, that the petitions did not fall under Order XXI, rule 58, of the Civil Procedure Code; that article 11 of the Limitation Act did not apply, but that the suit fell under Article 132 of the Act, and was not barred. *Venkataramnam v. Ranganayakamma* (1918) I.L.R., 41 Mad., 985 (F.B.), distinguished; *Barhamdeo Prasad v. Tara Chand* (1914) I.L.R., 41 Cal., 658 (P.C.), applied.

Abdul Kadir v. Somasundaram Chettiar ... (1922) I.L.R., 45 Mad., 827

ARTS. 89, 120, 109, 127—*Joint Hindu family—Division of property not completed—Properties left in hands of the different members—Suit for partition and account—Money received from debtors—Rents and profits—Limitation.* Three brothers, members of a joint Hindu family, became separated. Arbitrators were appointed to divide the properties by metes and bounds, but only some of them were so divided, and the rest remained in the hands of the different members, who collected outstandings from debtors and rents from tenants. In a suit brought by one of the brothers against the others for partition and an account, *Held*, that the properties remaining undivided were held by the brothers as tenants-in-common, that the article of the Limitation Act governing the claim for an account and share of the moneys and rents and profits collected was not article 109 or 127; that article 62 was not applicable as a suit for money had and received would not lie by one tenant-in-common against

another who had received more than his share, the appropriate remedy in such a case being an action for an account, in which all just allowances could be made; that the article applicable was 120, unless from the facts of the case, it could be inferred that the person receiving the moneys and rents and profits acted as the agent of the others, in which case article 89 would apply. In either case, time would begin to run from the date when an account was demanded and refused.

Yerukola v. Yerukola ... (1922) I.L.R., 45 Mad., (F.B.), 648

LIMITATION ACT (INDIAN) (IX OF 1908), ARTS. 141 AND 142—*Adverse possession of lands—Successive trespassers in continuous possession—Suit by true owner after twelve years—Limitation.* Adverse enjoyment of immoveable property for over twelve years, whether by a single person or by several persons in succession even though they do not claim from one another provided it is continuous and without a break, bars by the true owner under article 142 of the Limitation Act. *Willis v. Earl Howe* (1893) 2 Ch., 545, followed. *Agency Company v. Short* (1888) 13 A.C., 793, explained.

Ramayya v. Kotamma ... (1922) I.L.R., 45 Mad., 370

ART. 182, CL. (5) AND EXPLANATION
I—*Transfer of part of decree—Execution application by transferee—Decree kept alive also for transferor.* An application for execution by a transferee of a part of a decree keeps, by virtue of clause (5) of article 182 of the Limitation Act, the decree alive so as to enable the transferor to further execute the decree. Explanation I to that article does not apply to a case where a decree originally passed in favour of one person has afterwards come to be owned by more persons than one in severalty.

Venkata Reddayya v. Yerakayya ... (1922) I.L.R., 45 Mad., 35

ART. 182, CL. (5)—*Judgment-debtor's petition to enter satisfaction of decree—Objection statement of decree-holder, whether step-in-aid, when no execution application pending—Suspension of limitation.* A statement filed by a decree-holder objecting to the judgment-debtor's application to enter up satisfaction of the decree is not a step-in-aid of execution, especially when no application for execution was then pending. *Umesh Chunder Dutta v. Soonder Narain Deo* (1889) I.L.R., 16 Cal., 747. *Raghunandan Pershad v. Bhugu Lall* (1890) I.L.R., 17 Cal., 268 and *Raghunandan Misser v. Kalydoot Misser* (1896) I.L.R., 23 Cal., 690, followed. An application to be a step-in-aid of execution should be one made in a pending execution application. RAMESAM, J.'s view in *Sankara Nainar Pillai v. Thangamma* (1922) I.L.R., 45 Mad., 202, dissented from. The time during which the judgment-debtor's application to enter satisfaction of the decree was pending cannot suspend the period of limitation for application for execution of the decree; *Nrityamoni Dassi v. Lakhan Chandra Sen* (1916) I.L.R., 43 Cal., 660, distinguished.

Kuppuswami Chettiar v. Rajagopala Aiyar ... (1922) I.L.R., 45 Mad., 466

ART. 182, CL. (5)—*Step in aid of execution, what is—Decree for redemption providing also for sale—Application by mortgagor for extension of time, whether step in aid, for application for sale.* An application by a mortgagor for extension of time to pay money due under a decree for redemption which also provided for sale in default, is a step in aid of execution, under article 182, clause (5) of the Limitation Act, in respect of a subsequent application for sale by him. An application to be a step in aid of execution need not be made in a pending execution.

Sankara Nainar v. Thangamma ... (1922) I.L.R., 45 Mad., 202

CL. 5—*Step in aid of execution—Execution of decrees—Decree of Mysore District Court—Transmission of decree to Madras High Court—Application for transmission, ordered by Mysore Chief Court after contest as to limitation—Execution petition filed in Madras High*

- Court after records, etc., received—*Flea of limitation, again raised by judgment-debtor—Res judicata—Foreign judgment—Civil Procedure Code (V of 1908), s. 13—Judgment of Mysore (Chief Court as to step in aid, whether conclusive—Bar of limitation—Order, whether a judicial or ministerial act.)* An application for transmission of a decree of 1911, passed by the District Court of Mysore, to the High Court of Madras on its Original Side for purposes of execution, was filed in the former Court in 1916 and was eventually ordered by the Chief Court of Mysore on 30th January 1919, after contest by the judgment-debtor. On an application for execution being filed in the Madras High Court on 8th January 1921, the judgment-debtor pleaded the bar of limitation. The decree-holder contended that the application for transmission of the decree from the Mysore Chief Court to the Madras High Court was an application in aid of execution and also relied on the bar of *res judicata*. Held, that the application for transmission of the decree from the Mysore Court to the Madras High Court, was an application to take a step in aid of execution of the decree so as to save the bar of limitation for the present application for execution; and that the application of 1921 was not barred. *Per* CHIEF JUSTICE—The validity of an application as a step in aid of execution, should be decided according to the law of the place where such an application was made, namely, in this case the Mysore law; and the foreign judgment of the Mysore Chief Court is *res judicata* under section 13 of the Civil Procedure Code. *Pierce Leslie v. Perumal*, (1917) I.L.R., 40 Mad., 1069 (F.B.), doubted. *Per* WALLACE, J.—The law of limitation applicable to an application for execution filed in a Court in British India is the British Indian Law; the decision of the Mysore Chief Court is not *res judicata* on the question of the previous application for transmission being a step in aid of execution; but under the British Indian Law, an application for transmission of the decree from the Mysore District Court to the Madras High Court is an application to take a step in aid of execution and consequently the present petition for execution is not barred by limitation.
- Sreenivasa Aiyangar v. Narayana Rao* ... (1922) I.L.R., 45 Mad., 1014
- LIS PENDENS**—Applicability of doctrine:—See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 52 ... 774
- LOAN**—Loan for illegal or immoral purpose—When not recoverable:—See PAPER CURRENCY ACT (II OF 1910), SEC. 26 ... 778
- MADRAS REGULATION ACT (XXV OF 1902), SEC. 1**:—See INCOME-TAX ACT (VII OF 1918) ... 518
- MAINTENANCE**—Hindu Law—Husband's leprosy—Wife living apart—Separate maintenance:—See HINDU LAW ... 812
- MALABAR LAW**—Santathi Brahmaswom tenure—Alienation by tenant—Whether landlord has right of re-entry.] In the case of lands in Malabar held on Santathi Brahmaswom tenure, the landlord has no right of re-entry on alienation of the land by the tenant.
- Ayyakutti v. Krishna Pattar* ... (1922) I.L.R., 45 Mad., (F.B.), 394
- MALICIOUS ATTACHMENT BEFORE JUDGMENT**—Steps taken to effect attachment but not completed—Suit for damages—Payment of amount mentioned in attachment—Defendants causing proceedings to be dropped—Necessity of proving favourable termination of proceedings.] In executing an order for attachment before judgment obtained by the defendant against the plaintiff, the Amin proceeded so far as to take out the plaintiff's cloths from the shelves of his shop and to measure them, when the plaintiff paid the amount mentioned in the warrant, and the defendant caused the warrant to be returned to the Court with an endorsement by him that the claim had been settled. In a suit for damages for malicious attachment, held (a) that the acts done were sufficient to entitle the plaintiff to sue, though there was no completed attachment: *Rama Ayyar v. Govinda Pillai* (1916) I.L.R., 39

Mad., 952, distinguished; and (b) that as the defendants themselves had caused the further proceedings in the suit to be dropped, it was not necessary for the plaintiff to show that those proceedings ended in his favour.

Nicholas v. Sivrama Ayyar ... (1922) I.L.R., 45 Mad., 527

MANAGER—Hindu Law—Liability to account—New trade or business—Power of manager to commence new trade—Adult co-parcener—Duty of manager to consult adult co-parcener—Speculative business—Illegal business, carried on by manager—Loss—Liability of other co-parceners—Charity—Dedication of property—Document, whether necessary:—See HINDU LAW—PARTITION ... 281

MANAGING MEMBER—Joint Hindu family—Purchasing property benami, whether on behalf of other members—Sale—Execution of decree—Suit for partition by other members—Maintainability of suit—Bar to suit—Right of benamidar:—See CIVIL PROCEDURE CODE ... 856

MARTIAL LAW—Offence committed within area—Arrest outside area—Legality of arrest—Summary Court appointed under Ordinance—Jurisdiction outside such area—Power of High Court to issue a writ of Habeas corpus—Section 16, Ordinance No. II of 1921.] The provisions of the Code of Criminal Procedure are not abrogated or suspended by the introduction of Martial Law and a police officer outside the Martial Law area has authority to arrest without warrant an offender who has committed a cognizable offence within such area. *Per* KUMARASWAMI SASTRI, J.—A summary Court appointed under the Martial Law Ordinance cannot try offences committed outside the Martial Law area or hold Court outside such area. The High Court has power, apart from section 491, Criminal Procedure Code, to issue a writ of Habeas corpus; and the ordinance No. II of 1921, section 16, which excludes the interference of other Courts does not refer to such general jurisdiction, and the High Court could issue such writ if the summary Court acted without jurisdiction.

Kochunni Klaya Nair, In re. ... (1922) I.L.R., 45 Mad., 14

MEMORANDUM OF APPEAL—Appeal against a determination by a Judge of the High Court in its Original Civil Jurisdiction—Reference by Taxing Officer—Jurisdiction—Stamp leviable—Final order—Original Side Fees Rules, Appendix II, Article 38:—See COURT FEES ACT ... 849

MEMORANDUM OF OBJECTIONS—Court-fee on Memorandum:—See COURT FEES ACT (VII OF 1870) ... 246

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an order and that until the Receiver refuses to do so no one else has the right to apply. <i>Hemraj Champa Lal v. Ramkishen Ram</i> , (1916) 2 Patna L.J., 101 at 107, followed.	PAGE 9
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WILL —Executor—Power of sale expressly given under will for discharging debts— Power of sale, whether includes power to mortgage—Mortgage executed by executor—Onus of proof as to reality of testatrix’s debts. Where by a will express power is given to the executor to sell the property to pay off debts, that power includes the power to mortgage, unless there be some reason to be gathered from the terms of the will itself why it should be excluded. <i>Haldenby v. Spofforth</i> (1889) 1 Boar., 390, applied; <i>Purna Chandra Bakshi</i> <i>v. Nobin Chandra Gangopadhyaya</i> (1903) 8 C.W.N., 362, followed. Where an executor has the power to mortgage for payment of debts, the mortgagee cannot be called upon to show the reality of the testator’s debts for payment of which the mortgage was executed. <i>Parthasarathy Naidu v. Mukundammal</i> ... (1922) I.L.R., 45 Mad., 867	
WITNESS —Statement by witness recorded by Magistrate—Evidence Act (I of 1872), sec. 157—Relevancy to corroborate statement before committing magis- trate:—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 164	766

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(MADRAS SERIES).

APPELLATE CIVIL—FULL BENCH.

*Before Sir William Ayling, Kt., Officiating Chief Justice,
Mr. Justice Kumaraswami Sastri and Mr. Justice Odgers.*

UNDE RAJAH RAJE RAJAH VELUGOTI SREE
GOVINDAKRISHNA YACHENDRULAVARU BAHADUR,
RAJAH OF VENKATAGIRI (PETITIONER), PLAINTIFF,

1921,
September
6 and 15.

v.

THATIKOLA SUBBIAH (RESPONDENT), DEFENDANT.*

*Survey and Boundaries Act (Madras Act IV of 1897), sec. 20 (3)
—“Tenant”—Whether grantee of a rent-free inam in a
zamindari included.*

The grantee of a rent-free inam in a zamindari is not a tenant within the meaning of section 20, clause (3), of the Madras Survey and Boundaries Act (IV of 1897).

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of W. CHAKRAPANI NAYUDU, District Munsif of Kanigiri, in Small Cause Suit No. 1051 of 1919.

The plaintiff is the Raja of Venkatagiri and the defendant owns an inam in the village of Basavupuram within the zamindari. This inam is a personal inam free of any rent. Recently, the village of Basavupuram, including defendant's lands was surveyed at plaintiff's

* Civil Revision Petition No. 517 of 1920.

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request. The plaintiff sued for the recovery of sums of money for road and railway-cess, and for survey charges in respect of the inam. The defendant did not really contest the payment of the road and railway-cess but contested the claim for survey charges on the grounds that he was not a tenant of the plaintiff and the latter was not therefore entitled to recover them, and also that the Civil Court had no jurisdiction to try the suit. The District Munsif held that he had no jurisdiction, and expressed the opinion that the defendant would not be liable in any event. The plaintiff filed a Civil Revision Petition which came on for hearing before SPENCER and RAMESAM, JJ., who made the following :

ORDER OF REFERENCE TO A FULL BENCH.

SPENCER, J.—The plaintiff is the Raja of Venkata-giri who sues to recover road and railway-cess and survey charges from an inamdar having an inam within his estate.

The District Munsif has given him a decree for the road and railway-cess and dismissed the suit in respect of the other item on the ground that it is cognizable by a Revenue Court only.

The Madras Survey and Boundaries Act (IV of 1897) provides for the recovery of a proportionate part of the cost of the surveys of estates from the occupants of the lands surveyed

Section 20, clause (3) declares

“The amount so apportioned shall be recoverable by the proprietor from the tenants concerned in the same manner as if it were an arrear of rent due by a tenant to his landlord.”

In interpreting the meaning of this clause the District Munsif has committed two errors. First, he states that this clause has the effect of creating the relationship of landholder and ryot between the zamindar or proprietor and the person from whom the amount is

recoverable. Secondly, he observes that arrears of rent due by a tenant to his landlord are clearly recoverable only by a Revenue Court.

The first statement imports the very technical significance of the word “ryot” as defined in the Madras Estates Land Act into the word “tenant” as used in the Survey and Boundaries Act and implies that the two words are synonymous.

A tenant ordinarily means a person who holds land under a landlord. But a ryot is a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying rent. “Rent” and “ryoti land” have each a special meaning which is defined in section 3, clauses (11) and (16), of the Madras Estates Land Act.

The Munsif’s second statement overlooks section 19 of that Act and ignores the fact that quit-rent, house-rent and many other forms of rent are recoverable in ordinary Civil Courts.

The respondent’s vakil has attempted to support the District Munsif’s judgment on other grounds.

He argues first that as the word “ryot” does not occur in section 77 (i) of the Madras Estates Land Act or in the last portion of section 3, clause (11) (a), which includes under the definition of rent “money recoverable under any enactment for the time being in force as if it were rent,” therefore it was intended to include such money from whomsoever it might be recoverable. I have no doubt that the words “by a ryot” in the beginning of clause (11) (a) governs the whole clause. If this was not the intention of the framers, I should expect to find in this clause something of the nature of a description of the class of persons from whom money payable as rent under other enactments is recoverable.

The next argument is that, as section 164, clause (3), of the Estates Land Act declares that when a survey

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is made and a record-of-rights is prepared under Chapter XI the survey shall be made under the Madras Survey and Boundaries Act, therefore the expenses are recoverable under the first named Act. The answer is that the preparation of a record-of-rights is something very different from a survey. Section 180 provides only for the recovery of the expenses of preparing a record-of-rights as if they were arrears of land revenue. It says nothing about the mode of recovering the cost of survey, which consequently is governed by the provisions of Chapter IV of the Survey and Boundaries Act.

The last argument is that as this inam is held free of any rent to be paid to the proprietor, therefore the inamdar is not liable to contribute any part of the costs of the survey.

For the purposes of this argument it is necessary to hold that a person who occupies land under a landholder free of all rent is not a "tenant."

In this connexion, it is noticeable that in the definition of "tenant" under the Local Boards Act (Madras Act V of 1884) all persons who occupy land under a landholder, whether they pay rent or not, are comprised—*vide* section 3, clause (xxvii), of Madras Act V of 1884. Also, in the Bengal Survey Act of 1875 it is specially provided in section 17 that rent-free lands are to be deemed to form a part of the tenure within the local boundaries of which they lie, although there is no such provision in the Madras Act. It is also worthy of notice that the Rent Recovery Act (VIII of 1865), which was the Act which governed the relation of landholders and tenants in this Presidency at the time when the Madras Survey and Boundaries Act was enacted in 1897, defined the term "tenant" as including all persons who were bound to pay rent to a landholder. But this definition was expressly qualified by the reservation that it was for the purpose of that Act only.

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I am of opinion that the word "tenant" in the Madras Survey and Boundaries Act has a wider significance resembling the definition in the Local Boards Act, and that it includes all occupants of land in a zamindari estate upon which peshkash is paid to the Government. I need only refer to the derivation of the word from the Latin *tenere* "to hold" and to the definitions in the dictionaries of Wharton and Webster of "tenant," "tenancy," "tenure" and "tenement." In *Lakshminarasimham Pantulu v. Sree Sree Ramachandra Maradaraaja Deo*(1) an intermediate landholder is spoken of as a tenure-holder, and a tenure-holder is a tenant in the widest sense of the word. Section 20 of the Act does not say that survey charges are to be collected by proprietors along with the rent, but it provides that they are recoverable as if they were arrears of rent. Thus it is no answer to the landlord's demand upon a tenant in his estate to pay an amount to which the law gives the semblance of rent to urge that he is not liable to pay rent in any other form.

In this view I think that the Munsif was wrong in declining to adjudicate on the claim for survey charges, and as there was no dispute in the trial Court as to the correctness of the amount claimed, that the plaintiff should be given a decree for the amount claimed by him under both heads and for costs thereon.

As my learned brother differs from me on the last point of law and as there is a conflict between the *Narayanamasami Reddi v. Osuru Reddi*(2) and *In re Karri Venkanna Patrudu*(3) upon the question whether the opinion of the senior Judge should prevail when the Judges composing a Bench hearing Civil Revision Petitions in the exercise of powers conferred by

(1) (1914) I.L.R., 37 Mad., 319. (2) (1902) I.L.R., 25 Mad., 548.

(3) (1915) 18 M.L.T., 591.

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section 115 of the Civil Procedure Code and 25 of Act IX of 1887 differ on a question of law, we refer under rule 2 (1) of the Appellate Side Rules, the question "whether the word tenant in section 20, clause (3), of Madras Act IV of 1897 includes the grantees of a rent-free inam in a zamindari?" for determination by a Full Bench.

RAMESAM, J.—This is a Revision Petition by the plaintiff against an order of the District Munsif of Kanigiri in a suit to recover road-cess, railway-cess, and survey charges from the defendant who owns an inam within the plaintiff's zamindari. The District Munsif gave a decree for the cesses but, holding that he had no jurisdiction over the claim relating to the survey charges, dismissed the plaintiff's suit. He also expressed an opinion, without recording it as a finding binding on the parties, that the plaintiff is not entitled to recover the survey charges.

It is common ground that the inam is a personal inam held free of any payment to the zamindar. Neither the petitioner nor the respondent is able to state the nature of the respondent's inam, i.e., whether it is an enfranchised inam or an inam included in the assets of the plaintiff's zamindari at the time of the permanent settlement. But, having regard to the fact that the plaintiff obtained a decree for road-cess and railway-cess—even though the inam is held free of rent—I think it must be an inam included in the zamindari. On this footing the case has been argued on both sides and I accordingly deal with it.

The plaint does not mention the specific ground on which the plaintiff claims to recover the survey charges. In the Court below, it was based on section 20 of Madras Act IV of 1897. Before us not only has this ground been reiterated but also the plaintiff relied on section 70 of the Contract Act. The latter contention

has not been raised in the Court below or even in the grounds of the petition. I am also of opinion that it is unsustainable. Considering the claim as based on section 20 of the Survey and Boundaries Act, the District Munsif held that the Estates Land Act bars the suit. Section 189 of the latter Act bars the jurisdiction of the Civil Courts if a suit or application lies under it in a Revenue Court for recovering the amount. Mr. Raghava Rao for the respondent contends that a suit lies under section 77 (i) of the Act (see item 8 of schedule A to the Act) to recover rent, which, as defined in section 3 (11) (a) includes "money recoverable under any enactment as if it was rent." Under section 20 of the Survey and Boundaries Act, the survey charges are recoverable from the tenant concerned, as if it was rent.

But, in this case, it cannot be said that the defendant is a tenant. Even assuming that the grantee, under an absolute grant, of an inam included in a zamindari is an intermediate landholder within the meaning of section 73 of the Local Boards Act (Madras Act V of 1884) as to which I feel some doubt, it is difficult to describe him as a tenant. The land having become his own, he does not hold it of or under the zamindar. It is significant that there is no section in the Madras Survey and Boundaries Act similar to section 17 of the Bengal Act of 1875.

In my opinion, therefore, the survey charges are not recoverable from the defendant as if it was rent within the meaning of section 3 (11) (a) of the Estates Land Act—apart from the consideration that the latter part of sub-clause (a), section 3 (11), should be construed *ejusdem generis* with the former part and covers only monies recoverable from a ryot, which certainly the defendant is not.

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The suit therefore lies in a Civil court. The reasoning involved in the above conclusion incidentally disposes of the merits of the plaintiff's claim, i.e., he is not entitled to recover. On this latter ground, the Revision Petition should be dismissed with costs.

My learned brother and myself differ in our opinion. There is a conflict between *Narayanasami Reddi v. Osuru Reddi*(1) and *In re Karri Venkanna Patrudu*(2) as to whether the section 98 of the Civil Procedure Code or clause 36 of the Letters Patent should apply. Under these circumstances, I agree to refer the question of law (as stated by my learned brother) to a Full Bench under rule 2 (1) of the Appellate Side Rules of Practice.

ON THIS REFERENCE—

B. O. Seshachala Ayyar for *A. Krishnaswami Ayyar* for petitioner.—The claim is for half the cost of the survey stones. Section 20 (1) speaks of apportionment "among the lands." It does not speak of persons. The incidence is the land. Reference was made to the definition of "tenant" in Stroud's Dictionary, Bengal Tenancy Act, and section 3, Madras Local Boards Act.

T. M. Ramaswami Ayyar for *Ch. Raghava Rao*.—The only Act to which we can turn is the Rent Recovery Act, section 1. In section 20, Survey and Boundaries Act, the word "tenant" is used in two places. In the latter it means one who is liable to pay rent. Statutes imposing pecuniary liability ought to be construed strictly.

AYLING,
OFFG. C.J.

AYLING, OFFG. C.J.—The question referred to us is: "Whether the word "tenant" in section 20, clause 3 of Madras Act IV of 1897, includes the grantees of a rent-free inam in a zamindari."

(1) (1902) I.L.R., 25 Mad., 548.

(2) (1915) 18 M.L.T., 591.

Clause (3) referred to runs thus :

"The amount so apportioned shall be recoverable by the proprietor from the tenants concerned in the same manner as if it were an arrear of rent due by a tenant to his landlord."

It will be seen that the clause contains the word "tenants" and "tenant." The reference speaks of "tenant"; but I feel no doubt that the word of which our interpretation is desired is the word "tenants" preceding the word "concerned."

On general principles I should much like to adopt SPENCER, J.'s interpretation. There is no reason why the holder of a rent-free inam should not contribute equally with his neighbour, a ryot paying rent, to the cost of the survey, which is for the benefit of both. And section 10, which governs the case of Government land and speaks of the registered holder, would apparently affect the inamdar equally with the ryot. But we have to interpret the section as it stands; and I am reluctantly forced to the other view.

It is not of much use referring to other Acts in which the term "tenant" is defined: we have not been referred to any Act in which the word "tenant" is used without special definition and in which it has been held to cover a person who is not liable to pay rent. Nor do I feel justified in placing much reliance on English definitions. What seems to me an insuperable obstacle to the acceptance of the broad interpretation favoured by SPENCER, J., is the occurrence of the word "tenant" near the end of the clause. Here, it clearly means a person who holds land subject to the payment of rent; and I find it impossible to hold that the legislature used the word "tenant" (or "tenants") in two different senses in the same clause and in such close juxtaposition.

No doubt the charges have to be apportioned, under clause (1) of the section among all the lands surveyed;

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but it does not follow that a share is recoverable in each case; and it is only clause (3) which makes it recoverable under the Act.

As the learned vakil for respondent points out, a provision of law for the recovery of money has to be strictly construed. I must answer the question in the negative, merely adding that it is worth consideration whether the Act should not be amended in this respect.

KUMARA-
SWAMI,
SASTRI, J.

KUMARASWAMI SASTRI, J.—I agree. The word “tenant” ordinarily means a person who holds lands or buildings of another in consideration of a premium paid or rent either in money, kind or service. So far as I am aware, this is the sense in which the term is used in both the Local and Imperial Acts. Wherever a different or extended meaning is intended, the legislature has taken care to define the word “tenant” so as to make it capable of including persons who in the popular sense would not be called tenants or who hold lands absolutely. For example, in the Local Boards Act (Madras Act V of 1884) “tenant” is defined as including

“all persons who whether personally or by an agent occupy land under a landholder or an intermediate landholder and whether or not they pay rent to such landholder or intermediate landholder, as the case may be.”

This is so far as I am aware, the only Madras Act where the word “tenant” is used in a wide sense so as to include persons not paying rent. In the Transfer of Property Act, the Rent Recovery Act and the Estates Land Act, tenancy implies the holding of land on payment of rent or premium.

I do not think it can be said that a grantee of a rent-free inam is a tenant of the zamindar. He is the owner for all practical purposes, and it will be doing violence to the plain meaning of the word “tenant” to say that he is a tenant of the owner of the estate.

I do not think that the English law as to land tenures affords much help in construing the word “tenant” in Indian enactments. Even an absolute owner of land is spoken of as a tenant in fee simple. It would, I think, lead to many anomalies, if we were to hold that every grantee of land in India is a tenant, and it is clear that the legislature in dealing with landlords and tenants did not ordinarily depart from the ordinary and popular meaning of the word “tenant.”

It has been argued that the survey of the estate by the zamindar under the provisions of the Survey and Boundaries Act benefited the inamdar just as much as the tenants and there is no reason for making the tenant liable to bear a share of the expense and not the inamdar. This is a good reason for the legislature making the inamdar liable by a definition similar to that in the Local Boards Act of 1884, which was before the legislature when it passed the Survey and Boundaries Act in 1897, or for a provision similar to the Bengal Survey Act of 1875 where rent-free lands are to be deemed to form part of the tenure within the local boundaries of which they are included. It is a rule of construction that ordinary terms and expressions are to be construed as they are understood in common language and that the obvious and popular meaning of the language should as a general rule be followed, and that statutes imposing a burden ought to be strictly construed. I do not think it is a sufficient reason to give the word “tenant” an extended sense simply because a person would otherwise escape a liability, especially when the legislature has in other enactments passed prior to the Surveys Act taken care to make such persons liable by using apt words. It is a question for the legislature whether the Act should not be amended.

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Turning to the section itself, clauses (1) and (2) provide for the apportionment among the lands, which have been surveyed, the whole or any specified portion of the cost of such survey and clause (3) enacts that

“the amount so apportioned shall be recoverable by the proprietor from the tenants concerned in the same manner as if it were an arrear of rent due by a tenant to his landlord.”

The object was to enable the landlord to take advantage of the remedies open to him for the recovery of rent and the clause contemplates cases where rent is payable by the party liable. The word “tenant” in the latter portion of the sentence means “a person who pays rent to the landlord” and there is no reason to give the word “tenant” occurring a few words before a different meaning.

I would answer this question referred to us in the negative.

ODGERS, J.

ODGERS, J.—I agree. The question referred to us is whether the word “tenant” in section 20 (3) of Madras Act IV of 1897 includes the grantee of a rent-free inam in a zamindari. The reference is the result of a difference of opinion between SPENCER and RAMESAM, JJ. The clause runs thus:

“The amount so apportioned shall be recoverable by the proprietor from the tenants concerned in the same manner as if it were an arrear of rent due by a tenant to his landlord.”

SPENCER, J., held that the word “tenant” in the clause in question had a wider meaning than “lessee” and corresponds to an occupier under any title on the analogy of the use of the word in English Law in combinations such as “tenant in fee,” “tenant for life,” “tenant for years,” “joint tenant,” etc. The learned Judge draws attention to the definition of “tenant” in the Local Boards Act, section 3 (xxvii), Madras Act V

of 1884, where it includes all persons who occupy land under a landholder or an intermediate landholder, and whether or not they pay rent to such landholder or intermediate landholder. Reference may also be made to sections 64 (ii) and 73 (third clause) of the same Act. It is, however, to be noted that section 3 begins thus:

“In this Act unless there is something repugnant to the subject or context;”

the definition is therefore confined to the Act. In the Bengal Survey Act (V of 1875), section 17, it is enacted that

“all lands held without payment of rent, not being entered on the Collector’s Register of revenue—free tenures of the district—shall, for the purposes of this Act, be deemed to form a part of the tenure within the local boundaries of which they may be included.”

This does not define “tenant” and restricts the above definition to the purposes of the Act. It does not appear to me that any positive inference can be drawn from the provisions of other Acts on distinct subjects. No instance occurs to me and none was quoted at the Bar of the use in Indian enactments of the word “tenant” in the English real property sense—a sense derived from the history of the development of tenure in the feudal law which gradually displaced the old allodial holdings. In this case, there is admittedly no relationship of landlord and tenant and it was not argued that the inamdar holds of or from the proprietor in any manner.

For the appellant, reliance was placed on the fact that the first two clauses of section 20 of Act IV of 1897 throw the incidence of the cost on the lands and not on the individual who is to pay and who is only referred to in the third clause. There seems no reason either in law or equity why a holder of a free inam should not for the purposes of the Act be exactly in the same position as a tenant paying rent, but we can only interpret the language of the

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legislature as we find it. On the other hand the use of the words "tenants" and "a tenant" within a line of each other in the same clause is pointed to as suggesting the improbability of the same word being used in two different meanings. It is possible of course to say that the latter use of the word is only illustrative of the manner in which the charge is to be recovered from the individual concerned; if so, the collocation is, to say the least, unfortunate, and in the absence of authority as to the use of the word "tenant" in Indian enactments in the English law sense, I must reluctantly hold that the word "tenants" is confined to those who pay rent to the proprietor. I would therefore answer the reference in the negative.

M.H.H.

APPELLATE CRIMINAL.

*Before Mr. Justice Spencer and Mr. Justice
Kumaraswami Sastri.*

KOCHUNNI ELAYA NAIR (PETITIONER).*

1921,
September
14, 16 and
19.

Martial Law—Offence committed within area—Arrest outside area—Legality of arrest—Summary Court appointed under Ordinance—Jurisdiction outside such area—Power of High Court to issue a writ of Habeas corpus—Section 16, Ordinance No. II of 1921.

The provisions of the Code of Criminal Procedure are not abrogated or suspended by the introduction of Martial Law and a police officer outside the Martial Law area has authority to arrest without warrant an offender who has committed a cognizable offence within such area.

Per KUMARASWAMI SASTRI, J.—A summary Court appointed under the Martial Law Ordinance cannot try offences committed outside the Martial Law area or hold Court outside such area. The High Court has power, apart from section 491, Criminal Procedure Code, to issue a writ of *Habeas corpus*; and the

* Criminal Miscellaneous Petition No. 409, etc., of 1921.

Ordinance No. II of 1921, section 16, which excludes the interference of other Courts does not refer to such general jurisdiction, and the High Court could issue such writ if the summary Court acted without jurisdiction.

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PETITIONS praying (1) for the issue of a writ of *Habeas corpus* calling upon G. BATTY, Summary Magistrate under the Martial Law Ordinance in South Malabar, to cause the body of the petitioner to be produced for determining the legality of his detention, (2) for the issue of a writ of *Certiorari* for the purpose of quashing the proceedings of G. BATTY, a Summary Magistrate under the Martial Law Ordinance in South Malabar, ordering the arrest and detention of the petitioner, (3) for the release of the petitioner on bail pending trial of offences, if any, against him.

These were petitions praying for writs of *Habeas corpus* and *Certiorari* and in the event of refusal of such writs for bail.

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

S. Srinivasa Ayyangar and P. Govinda Menon for the petitioner.—The High Court has jurisdiction to issue a writ of *Habeas corpus*. In England it is the King's Bench which has such jurisdiction. In India the Old Supreme Court had power and that power was transferred to the High Court by the Charter. Reference made to *In the matter of Ameer Khan*(1), and *Bugga v. The King-Emperor*(2).

The petitioner was arrested outside the Martial Law area for offences committed within the area by a Magistrate appointed under the Ordinance as a summary Court. The arrest was illegal and the Magistrate had no jurisdiction to order his detention. The summary Court cannot act outside the Martial Law area.

(1) (1870) 6 B.L.R., 392, 436.

(2) (1920) 47 I.A., 129.

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The ordinary police cannot arrest outside the area for offences committed within the area. The Criminal Procedure Code does not apply. Martial Law means ousting the ordinary law. The only clauses applicable are 2, 6, 9, 10 and 12 of the Ordinance. No provision is made for sending an offender back, if he has escaped out of the Martial Law area, nor is there any duty imposed on Courts to take notice of offences committed within the Martial Law area. Reference made to *Muhammad Yusuf-ud-din v. Queen Empress*(1), Clode's Military Law, 1874 Edition, page 189. Mr. BATTY was appointed under clause 6 of the Ordinance which gives power to constitute summary Courts "in any administrative area." It cannot have jurisdiction outside such area and as Palghat is not proclaimed to be within the Martial Law area he had no jurisdiction to order his detention.

The Public Prosecutor for the Crown.—I do not controvert the proposition that a writ of *Habeas corpus* can be issued by the High Court but I submit that in the circumstances of this case this Court will not interfere. A Magistrate empowered by the military authorities has remanded accused and he will be committed to the Special Tribunal which has been appointed to-day. Under the Criminal Procedure Code, section 549, the Civil authority has to return an offender who escapes from the military. No special section or power is required for the return of an offender escaping from Martial Law area. Reference made to *Encyclopædia of the Laws of England*, Vol. 13, page 196 and *Ex parte D. F. Marais*(2).

SPENCER, J.

SPENCER, J.—This is an application for the issue of a writ of *Habeas corpus* to cause the person of Kochunni

Elaya Nair to be brought up before the High Court for the purpose of determining the legality of his detention. The accompanying affidavit states that Kochunni Elaya Nair, the second Stanee of the Mannarghat Nair family, was arrested on September 3rd and imprisoned in the Palghat sub-jail. It is alleged that he had at the moment of arrest just arrived at his own residence situated within the limits of the Palghat municipality and that after some questions being put to him as to the Moplah outbreak at Mannarghat the Assistant Superintendent of Police directed the Inspector to take him to the sub-jail, that no warrant of arrest was shown to him and that he was not told anything about the offence with which he was charged. He was accordingly taken to the sub-jail, and on the 6th September an application for bail was put in before the Subdivisional Magistrate of Palghat and was summarily rejected. It is added that the taluk of Palghat, and the town of Palghat within which the petitioner's residence and the sub-jail are situated, are outside the Martial Law area.

The Public Prosecutor informs us that he is instructed by the District Magistrate of Malabar to say that the accused is charged with having committed offences under sections 121, 395, 431, 436 and 380, Indian Penal Code, and abetment of the same committed within the Martial Law area and that he will be sent up for trial by the Special Tribunal constituted under Ordinance No. II of 1921 of the Government of India, published in the *Gazette of India*, September 5, 1921.

Mr. S. Srinivasa Ayyangar on behalf of the petitioner contends (1) that the accused could not be legally arrested for an offence committed inside the Martial Law area when he was at the time of arrest at a place outside it and (2) that the Magistrate, Mr. BATTY, before whom he was brought and who refused to release him

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(1) (1898) I.L.R., 25 Cal., 20 (P.C.).

(2) [1902] A.C., 109.

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on bail was at Palghat, a place outside the Martial Law area, and had no jurisdiction to exercise his powers at that spot, seeing that clause (6) of Ordinance No. II of 1921, dated 26th August 1921, provides for the constitution of Summary Courts of criminal jurisdiction for the purposes of this ordinance in any administration area that may be proclaimed as a Martial Law area under clause (2). He argues that "in any administration area" means "within that area" and not "for that area."

The first point for which the learned vakil is contending is a very strange one. It amounts to this: that an offender has only to slip out of the Martial Law area to be immune from arrest and trial for acts done by him inside that area. The ordinary rule as to jurisdiction is that it is the area within which the offence is committed and not the place where the offender may be found that determines the Court which has jurisdiction to try the offence—see section 177 of the Code of Criminal Procedure. Section 54 of the Criminal Procedure Code authorizes any police officer to arrest without a warrant and without an order from a Magistrate a person who has been concerned in any cognizable offence, and the offences referred to by the Public Prosecutor or some of them, are cognizable offences. Section 58 authorizes a police officer, for the purpose of arresting without warrant any person whom he is authorized to arrest under this Chapter (V), to pursue such person into any place in British India. Section 60 directs a police officer making an arrest without warrant to take the person arrested without unnecessary delay before a Magistrate having jurisdiction in the case. There is no alteration of the law in this respect in consequence of the constitution of Martial Law Courts. The provisions of the Code of

Criminal Procedure are not abrogated or suspended by the introduction of Martial Law. On the contrary,

clause (12) and the other clauses of Ordinance No. II indicate that the Courts constituted under the ordinance will follow, as far as possible, the procedure laid down in the Code. Presumably the police will, as early as possible, take the petitioner into the Martial Law area and obtain the orders of a Court constituted under that ordinance. This they can do without any order of the nature of an extradition order, seeing that the whole of the Malabar district, a portion of British India, is under the administration of the British Government. It is for the petitioner's vakil to show that the police acted without jurisdiction in this instance, and as he has not succeeded in doing this, the first point raised by him fails.

I now proceed to deal with the second contention raised. The powers vested in this Court to issue Writs of *Habeas corpus* in the Presidency town are contained in section 491 of the Criminal Procedure Code. Analogous powers are given us by section 456 in respect of European British subjects in any part of our jurisdiction, whether in the city of Madras or in the mufassal. In *In re Nataraj Iyer*(1), SUNDARA AYYAR and SADASIYA AYYAR, JJ., expressed an opinion, following *In the matter of Ameer Khan*(2), that the High Court has by virtue of clause (8) of the Charter Act power to issue Writs of *Habeas corpus* even outside the city of Madras and in respect of all British subjects whatsoever. Assuming that those learned Judges were right in this view, if we attempt to issue a Writ of *Habeas corpus* in the present case we are confronted with clause (16) of Ordinance No. II of 1921, which declares that no Court shall have authority to make any order under section 491 of the Code of Criminal Procedure, or to revise any

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(1) (1913) I.L.R., 36 Mad., 72.

(2) (1870) 6 B.L.R., 392.

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order or sentence or to transfer any case from a Summary Court or have any jurisdiction of any kind in respect of any proceedings of the Summary Court. But Mr. Srinivasa Ayyangar contends that if a Magistrate vested with the powers of a Summary Court in a Martial Law area steps outside that area and attempts to exercise his functions outside the territorial jurisdiction assigned to him by the Ordinance, his acts will be illegal and subject to our control and revision. We understand that Mr. BATTY is the Subdivisional Magistrate of Palghat division and that he ordinarily exercises the powers of a First-class Magistrate in Palghat, which is outside the Martial Law area. If, then, the petitioner was brought before him by the police as being the nearest Magistrate referred to in section 167 of the Code of Criminal Procedure, he would, as Subdivisional Magistrate, have authority to authorize the detention of the accused in such custody as he might think fit for a term not exceeding 15 days; or, if he had no jurisdiction to try the case, he might order the accused to be forwarded to a Magistrate having such jurisdiction. If, on the other hand when the prisoner was brought before Mr. BATTY, he was purporting to act as a Court of summary jurisdiction constituted by the Martial Law Ordinance, what would be the proper order he should make upon an application being made to him? The proper course to be taken by a Magistrate who has no jurisdiction would be to decline jurisdiction and to reject the application on that ground. We must now see what is the illegal act which Mr. BATTY is alleged to have committed, according to the affidavit attached to the petition. This affidavit states that when an application for bail was put in before the Subdivisional Magistrate on 6th September, he summarily rejected application without even hearing the vakil. To summarily reject an application would

be the only course open to a Magistrate who finds he has no jurisdiction to deal with it; and in this view there was nothing illegal in the procedure of Mr. BATTY and no act committed by him with which we could interfere assuming that we have the power to do so. It is not stated in the affidavit that Mr. BATTY ordered the petitioner to be remanded to prison, but it is alleged that it was the Assistant Superintendent of Police who said "Better shove him in the Fort to-day" and directed the Inspector to take him there.

The result is that this point also fails and the application is dismissed.

There is a connected Criminal Miscellaneous Petition No. 410 of 1921, applying for the issue of a writ of *certiorari* which fails and must be dismissed for the same reasons.

As regards Criminal Miscellaneous Petition No. 411 of 1921 which is an application to release the petitioner on bail, the information that we have is that the petitioner is arrested in connexion with non-bailable offences. No further details are before us and in the absence of such details we would not in any case exercise a discretion in petitioner's favour. That petition also is dismissed.

KUMARASWAMI SASTRI, J.—This is an application for the issue of a Writ of *Habeas corpus* by the petitioner, who is charged with having committed offences under sections 121, 395, 431, 436 and 380 of the Indian Penal Code, alleged to have been committed by him within the area proclaimed to be under Martial Law. He was arrested by the police while he was in Palghat, a place outside the area, and was remanded to jail by Mr. BATTY (who is the Subdivisional Magistrate of the Palghat division and also a Magistrate invested with summary

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powers of trial under the Martial Law Ordinance under orders of the Military Commander, for the purpose of the petitioner being sent for trial before the Special Tribunal constituted under Ordinance No. II of 1921. The grounds urged on petitioner's behalf are (1) that the police had no power to arrest a person who commits an offence within the Martial Law area, but is found outside, (2) that the jurisdiction of Summary Courts, and of Magistrates empowered to try offences, conferred by Ordinance No. II of 1921, is purely territorial and that consequently Mr. BATTY who purported to act as a Martial Law Magistrate outside the Martial Law area was without jurisdiction, thus making the detention in jail illegal. It was also contended that the Special Tribunal constituted under Ordinance No. II would have no power to try offenders who are found outside the Martial Law area, even though the offences were committed within the area. I do not think it necessary to go into this question which is one to be decided by the Tribunal when the petitioner is placed before it for trial.

The power of the High Court, as an abstract question of law, to issue a Writ of *Habeas corpus* in the present case is not contested by the Public Prosecutor though he contends that the facts of the case will not justify the High Court in issuing the Writ. It has been held in *In re Nataraja Iyer*(1) and *In the matter of Amir Khan*(2), that the Court has jurisdiction, having inherited the power from the Supreme Court. This jurisdiction is apart from the power conferred by section 491 of the Code of Criminal Procedure and is in no way curtailed by the provisions of the section. The Martial Law Ordinance excludes powers conferred by section 491 and does not refer

(1) (1913) I.L.R., 36 Mad., 72.

(2) (1870) 6 B.L.R., 392.

to the general jurisdiction to issue the writ. Moreover, clause (16) cannot apply to cases where the acts of the Martial Law Magistrate are wholly without jurisdiction, for example, when he proceeds to places outside the Martial Law area and tries persons or passes sentences. It only applies to acts done within the jurisdiction and powers conferred by the Ordinance, however illegal or irregular such acts may be, and not to proceedings passed wholly without jurisdiction.

As regards the first contention, I do not see anything in the Martial Law Ordinance which prohibits the arrest of persons who commit offences inside the Martial Law area but escape outside. The Penal Code has not been abrogated within such areas and so far as the arrest of such offenders is concerned the provisions of the Code of Criminal Procedure will apply so far as the arrest outside is concerned. Section 54 of the Code of Criminal Procedure gives the police the power to arrest without a warrant a person who is charged with the offences with which the petitioner is charged and it seems to me that it makes no difference where the offence was committed so long as it was within British India. Section 60 directs that the person arrested should be produced without unnecessary delay before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station. Under section 167 a Magistrate, whether he has jurisdiction or not to try the case, can order detention of the accused in custody for a period not exceeding 15 days and if he has no jurisdiction to try the case he can order the accused to be taken to the Magistrate having jurisdiction. Mr. BATTY, as Subdivisional Magistrate, had power to remand the petitioner.

As regards the second objection it must be borne in mind that under clause (6) of the Ordinance it is only persons who are already Magistrates under the provisions

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of the Code of Criminal Procedure that are appointed to exercise the power of Summary Courts. It is a specific power conferred on one who had the other ordinary powers of a Magistrate. There can be little doubt that their powers to sit as Magistrates trying offenders brought before the Summary Courts for trial are purely territorial and that they cannot exercise their powers of trial outside the Martial Law area. Clause (2) provides that Martial Law shall be in force and the provisions of the Ordinances shall apply in the area specified in the schedule and such other area as the Governor-General in Council may by notification direct. Clause (3) refers to the administration of Martial Law in any area in which Martial Law is in force. Section 6 provides for the establishment of Summary Courts in any administrative area. Section 7 directs that no Summary Court shall try any offence unless such offence was committed in the administrative area in which the Court is constituted. These provisions make it clear that a Magistrate appointed under clause (6) cannot try offences committed outside the area or hold Court outside. There is however nothing in the Ordinance to show that as Magistrates appointed under the Code of Criminal Procedure, he cannot exercise the functions assigned to such Magistrates outside the area when the proceedings have not reached the stage of a trial but are only in the course of investigation preliminary to the offender being charged before a Magistrate. When a Divisional Magistrate is also appointed to try offences under clause (6), there is nothing to prevent his exercising the ordinary powers of a Magistrate outside the area and arresting or remanding persons who are charged with offences inside the Martial Law area with a view to their being brought to trial inside the area or before the Special Tribunal.

• Even if Mr. BATTY was technically wrong in acting in his capacity of Special Magistrate, I think the defect would only be an irregularity as his act would have been perfectly legal if he had acted as Subdivisional Magistrate. When a Magistrate vested with more than one power under one of which only he has power to order a remand purports to act in the exercise of another power which gives him no authority to do so the case is one of irregularity which can be cured by the amendment of the order, where there is no prejudice to the accused. It is not shown that the accused would be in a better position if Mr. BATTY had issued the order in his capacity of Subdivisional Magistrate.

In cases like the present, when the arrest itself is not illegal and the offences are not non-bailable, I do not think the High Court will be exercising a proper discretion in directing the issue of a Writ and directing the accused to be brought before it. Even assuming that the remand is irregular, there is nothing to prevent the police from arresting the accused the moment after his release is ordered and taking him before the nearest Magistrate and getting a remand. If it is brought to the notice of the Court that the Magistrate ordering the remand ought to have acted in one capacity rather than in another the proper course will be for the High Court to direct the Magistrate to remand the accused according to law.

There is also another reason why I do not think I ought to interfere at this stage. While the case was being argued the Government constituted the Special Tribunal before which the petitioner would be sent for trial. Clause (6), sub-clause (1) of Ordinance No. II of 1921, dispenses with the committal of the accused for trial and all that has to be done is for petitioner to be taken before it for trial. He can apply for bail to the Tribunal

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as it has all the powers of a Court of Sessions having original jurisdiction and as appeals from the Tribunal lie to the High Court he can move this Court if bail is wrongly refused. He has therefore an adequate remedy. I dismiss the petition for a *Habeas corpus*.

The petition for the issue of a writ of *certiorari* is not pressed and is dismissed.

I do not think that I ought, at this stage and on the scanty materials before me, to direct the release of the petitioner on bail, and I accordingly dismiss the petition without prejudice to his applying later on if he is so advised.

M.H.H.

APPELLATE CRIMINAL.

Before Mr. Justice Kumaraswami Sastri.

1921, September 28. THYARAMMAL (ACCUSED IN CALENDAR CASE NO. 7998 OF 1921 ON THE FILE OF THE HONORARY PRESIDENCY MAGISTRATE'S COURT, MADRAS).*

City Police Act (Madras Act III of 1888), sec. 71 (xi)—Petty bazaar—Obstructing a thoroughfare.

Section 71, clause (xi) of the Madras City Police Act covers cases of obstructing a thoroughfare in any manner, for example, by keeping a petty bazaar, and is not limited to obstruction caused by vehicles and animals. In the case of vehicles and animals the act and the obstruction caused by the act are sufficient to prove the offence. In other cases the fact of obstruction as well as the intention must be proved.

CASE referred for the orders of the High Court under section 432, Criminal Procedure Code, by the President of the Honorary Presidency Magistrate's Court, Egmore, Madras.

* Criminal Revision Case No. 374 of 1921 and Case Referred No. 43 of 1921.

The accused was charged with "causing obstruction by keeping a petty bazaar" on the side of the road. The Reference by the Bench was in these terms:

"We doubt if causing obstruction by keeping petty shops would come under the wording of clause (xi) of section 71 of the City Police Act. It is sought by the police to bring the guilt under the third part of the clause: 'or in any way wilfully obstructs or causes obstruction.' It will be seen that two things are essential, viz. (i) an intention and (ii) actual obstruction for this part of the clause. Intention has not been proved in this case. A comparison of clause (xi) of section 71 of the City Police Act with clauses (5) and (6) of the Town Nuisances Act will show that cases of this kind are not covered by clause (xi) of section 71 of the City Police Act. Clause (5) of the Town Nuisances Act is the same as clause (xi) of section 71 of the City Police Act. Clause (6) runs: 'whoever exposes goods for sale so as to cause obstruction.' The facts of this case come under the wording of the clause and we refer to the High Court under section 432, Criminal Procedure Code, the question whether clause (xi) of section 71 of the City Police Act covers cases which come under the wording of clause (6) of the Town Nuisances Act, in view of the similar wording of clause (xi) of section 71 of the City Police Act and clause (6) of the Town Nuisances Act."

The Public Prosecutor for the Crown.

KUMARASWAMI SASTRI, J.—I think clause (xi) of section 71 of the City Police Act covers a case of obstructing a thoroughfare in any manner and is not limited to obstruction caused by vehicles and animals. There is no reason to suppose that the legislature intended to permit all other kinds of obstruction and punish only obstructions by vehicles or animals. There is a semicolon

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before the sentence "or in any way wilfully obstructs, etc." In the case of obstruction by vehicles and animals there is no question of intention—the act and obstruction caused by the act are sufficient. In other cases intention is necessary to be proved in addition to the obstruction. These are questions of fact to be determined by the Magistrate. The fact that Act III of 1889 contains clause (6) to section 3 which deals with exposing goods for sale so as to cause obstruction which follows clause (5) which is similar in terms to clause (xi) of the City Police Act affords no guide to the interpretation of the City Police Act. Probably the legislature intended to place the matter beyond all doubt.

I am of opinion that the accused will be guilty of an offence under clause (xi) of section 71 of the City Police Act, if the requisite intention and the fact of obstruction are proved.

M.H.H.

APPELLATE CRIMINAL.

*Before Sir William Ayling, Kt., Officiating Chief
Justice and Mr. Justice Krishnaswami Rao.*

MAHAGANAM VENKATRAYAR, PETITIONER (COMPLAINANT),

1921,
July 21.

v.

KODI VENKATRAYAR AND FOUR OTHERS (RESPONDENTS),
ACCUSED.*

*Criminal Procedure Code (V of 1898), sec. 250—Complaint
frivolous or vexatious—Magistrate trying accused for lesser
offence whether acting illegally—Compensation.*

When a Magistrate tries an accused person for an offence under a less serious section of the Penal Code when really the offence falls under a more serious section, which is beyond his competence, his proceedings are not illegal; and an award of compensation made by him under section 250 of the Criminal Procedure Code is not illegal, although the offence would really be triable exclusively by a Court of Session.

King-Emperor v. Ayyar, (1901) I.L.R., 24 Mad., 675, applied.

PETITION under sections 435 and 439 of the Criminal Procedure Code, 1898, and section 107 of the Government of India Act, praying the High Court to revise the order passed by M. G. SYKES, Sessions Judge of North Arcot, in Criminal Revision Petition No. 18 of 1920, presented against the order of M. SUNDARARAJAN, First class Subdivisional Magistrate of Tiruvannāmalai, in Calendar Case No. 12 of 1920.

The material facts are set out in the Order.

S. E. Sankara Ayyar for *V. V. Devanadha Ayyangar* for petitioner.

T. Narasimha Ayyangar and *T. L. Venkatarama Ayyar* for respondents.

Public Prosecutor for the Crown.

* Criminal Revision Case No. 775 of 1920 (Criminal Revision Petition No. 648 of 1920).

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The Court made the following ORDER:—

In this case a compensation order under section 250, of the Code of Criminal Procedure, is attacked as illegal.

It is argued that the facts appearing in evidence constitute an offence under section 467 of the Indian Penal Code which is triable only by a Sessions Court, and that, in consequence, the Magistrate had no jurisdiction to act under section 250 of the Code of Criminal Procedure. In our opinion the offence disclosed was one under section 467; but the Magistrate undoubtedly regarded it as one under section 463 of the Indian Penal Code (which he had jurisdiction to try), and specifically refers to the latter section in his order. Does the former fact affect the legality of his order of compensation? We think not. The Magistrate undoubtedly proceeded under Chapter XXI of the Code of Criminal Procedure, and not under Chapter XIII and *King-Emperor v. Ayyan*(1) is clear authority for holding that if the case had ended in a conviction, that conviction would not be illegal merely because the offence committed really fell under a more serious section and was not one which the Magistrate was competent to try. Applying the line of reasoning adopted in that judgment to the present case, we think it must be held that as the Magistrate was not proceeding illegally in trying the accused for the lesser offence, he was not acting illegally in awarding compensation when he found the accusation to be frivolous or vexatious. Two cases have been cited for petitioner. Of these, *Emperor v. Ohhabo Dolsang*(2) is easily distinguishable, for in that case, the Magistrate was certainly acting under Chapter XVIII and passed his order of discharge under section 209. The other, *Het Ram v. Gunga Sahai*(3), is the decision of a single Judge and the

(1) (1901) I.L.R., 24 Mad., 675. (2) (1917) 19 Bom. L.R., 60.
(3) (1918) I.L.R., 40 All., 615.

judgment leaves it doubtful which offence the Magistrate conceived himself to be inquiring into. We do not think there are any grounds for interference; and we dismiss this petition.

M.H.H.

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INSOLVENCY JURISDICTION.

Before Mr. Justice Kumaraswami Sastri.

IN THE MATTER OF T.A. CHIDAMBARA CHETTY AND
OTHERS—INSOLVENTS.*

1920,
November 8

Presidency Towns Insolvency Act (III of 1909) sec. 38—Claim for kist—Application to Insolvent Court by Official Assignee against ryot for kist, whether competent—Jurisdiction of Judge of Insolvent Court—Insolvency jurisdiction, whether Original jurisdiction of a Civil Court—Madras Estates Land Act (I of 1908), sec. 189—Jurisdiction of Revenue Court.

The jurisdiction exercised by the High Court in insolvency is the Original Civil jurisdiction.

Section 38 of the Presidency Towns Insolvency Act, which provides for the determination by the Insolvency Court of all questions relating to debts due by third parties to the insolvent, cannot override the provisions of section 189 of the Madras Estates Land Act, which debars Civil Courts exercising Original jurisdiction from taking cognizance of any dispute or matter, in respect of which a suit or application might be made to a Revenue Court under that Act.

Consequently, the Official Assignee cannot apply to the Judge sitting in Insolvency for an order against a ryot for payment of kist due to the insolvent.

JUDGE's summons to show cause why certain sums of money due as kist should not be directed to be paid to the Official Assignee.

The material facts are set out in the Judgment.

R. N. Ayyangar for the Official Assignee.

N. Rajagopalan instructed by *A. Kandaswami* for the garnishee.

* Insolvency Petition No. 150 of 1916.

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KUMARASWAMI SASTRI, J.—These are garnishee summonses taken out by the Official Assignee claiming from the garnishees' kist due by them for various faslis from 1318 to 1328. Several defences were raised, one of them being that the Court has no jurisdiction, claims for rent in respect of estates being exclusively triable by Revenue Courts. Section 189 of the Estates Land Act enacts that no Civil Court in the exercise of its Original jurisdiction shall take cognizance of any dispute or matter in respect of which a suit or application might be brought or made before a Collector or Revenue Officer in respect of suits and applications specified in parts A and B of the schedule to the Act. A suit for rent is included in part A (item 8). If the present claim was by way of garnishee summons on the Original Side of the High Court it is clear that it would not lie but the question is whether a Judge exercising jurisdiction under the provisions of the Presidency Towns Insolvency Act is exercising Original jurisdiction. Section 4 of the Insolvency Act enacts that all matters in respect of which jurisdiction is given by the Act shall be ordinarily transacted and disposed of by or under the directions of one of the Judges of the Court whom the Chief Justice from time to time assigns as a Judge for that purpose. Section 8 (2) (b) directs that appeals from an order of any such Judge shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary Original civil jurisdiction of the High Court. Section 36, which deals with garnishee proceedings, provides that orders made against the garnishee shall be executed in the same manner as decrees for the payment of money or delivery of property under the Code of Civil Procedure, and section 37 gives the same power to issue commissions and letters of request as it has for the

examination of witnesses under the Code of Civil Procedure. Section 90 provides that in all proceedings under the Act, the Court shall have like powers and follow the like procedure as it has and follows in the exercise of its ordinary Original Civil jurisdiction. As pointed out by their Lordships of the Privy Council, in *In the matter of Candas Narrondas, Nivivahu v. C. A. Turner*(1), clauses (11) to (18) of the Royal Charter are a group of clauses headed Civil jurisdiction of the High Court. Clause (15) after stating that the Court for relief of Insolvent Debtors shall be held before one of the Judges of the High Court provides that

“the said High Court or any Judge thereof shall have and exercise within the Presidency of Madras, such powers and authority with respect to original and appellate jurisdictions and otherwise as are constituted by the law relating to insolvent debtors in India.”

The clause clearly speaks of Original jurisdiction of the Judge in insolvency. I am of opinion that the Judge sitting in the Insolvency Court exercises Original Civil jurisdiction. I do not think that the provisions of section 36 of the Insolvency Act which provides for the determination by the Insolvency Court of all questions relating to the debts due by third persons to the insolvent can override the provisions of section 189 of the Madras Estates Land Act, which is a special Act passed in the year 1903. The Presidency Towns Insolvency Act is a general Act passed in 1909, and the legislature must have been aware that so far as the Madras Presidency was concerned a special Act had ousted all Civil Courts of jurisdiction in respect of a particular class of cases. A general Act is to be construed as not repealing a particular one which is directed towards a special object or a special class of

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(1) (1889) I.L.R., 13 Bom., 520 (P.C.).

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objects [*Garnett v. Bradley* (1) and *Ex parte Payne* (2).] The local Government has, under the Government of India Act, power to repeal or alter any law passed by the Indian legislature and there is no question of *ultra vires*. The proprietors of estates within the meaning of the Estates Land Act all over the Presidency or tenants of such estates may become insolvents and it would lead to obvious difficulties if the Judge exercising insolvency jurisdiction should be the only authority who is to settle terms of pattas and muchilikas, determine rates of rent or questions of commutation or several other questions which the legislature expressly took out of the cognizance of Civil Courts, especially as the same reasons that dictated the policy as regards ordinary Civil Courts apply with equal force to Courts exercising insolvency jurisdiction.

I am of opinion that I have no jurisdiction to determine questions as to which the jurisdiction of Civil Courts is ousted by the Madras Estates Land Act and dismiss the petitions with costs. Taxed costs and Counsel in the first of the cases only.

K.R.

(1) (1874) 3 App. Cas., 944.

(2) (1849) 18 L.J. (Q.B.), 197.

APPELLATE CIVIL.

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

PUSARAPU VENKATA REDDAYYA (PLAINTIFF),
APPELLANT,

1921,
February 18.

v.

THORAM YARAKAYYA AND SEVENTEEN OTHERS
(DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), art. 182, clause (5) and explanation I—Transfer of part of decree—Execution application by transferee—Decree kept alive also for transferor.

An application for execution by a transferee of a part of a decree keeps, by virtue of clause (5) of article 182 of the Limitation Act, the decree alive so as to enable the transferor to further execute the decree. Explanation I to that article does not apply to a case where a decree originally passed in favour of one person has afterwards come to be owned by more persons than one in severalty.

SECOND APPEAL against the decree of J. J. COTTON, District Judge of Kistna at Masulipatam, in Appeal Suit No. 102 of 1915, preferred against the decree of V. C. MASCARENHAS, Subordinate Judge of Kistna at Ellore, in Original Suit No. 35 of 1913.

P. Somasundaram for appellant.

A. Krishnaswami Ayyar and *K. Satyanarayana Murti* for respondent.

The facts are set out in the Judgment.

SADASIVA AYYAR, J.—The plaintiff is the appellant before us in this Second Appeal. He brought the suit as the assignee of a mortgage bond executed by the first defendant in 1889 in favour of the twenty-ninth defendant's father. The validity of the assignment itself

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* Second Appeal No. 2405 of 1917.

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was questioned, but the District Judge was justified in rejecting that plea, as the assignor admitted the assignment.

The suit was brought for sale of the first defendant's rights in the mortgaged properties and the Subordinate Judge decreed the suit, the first defendant's interest being one-fourth share of the plaint properties as established in the preliminary decree for partition in a suit of 1897, brought by the first defendant as adopted son against the after-born natural son of his father. That decree for partition was dated January 1902 and it decreed partition of the immoveable properties in A and B schedules and of the moveables in C and D schedules to the plaint. The first defendant transferred that portion of the decree which related to the moveables in favour of one Seshamma and that transferee had kept alive at least her portion of the decree by successive applications till 19th April 1913, the present suit having been brought on the 23rd June 1913.

The District Judge dismissed the plaintiff's suit on the ground that the first defendant had lost all rights in the mortgaged properties, that is, the one-fourth share in the lands decreed to him under the partition decree (so far as the interests retained by him after assignment to Seshamma were concerned) by his not having made any application for the execution of that decree within the time prescribed by law. He further held that his rights were also barred by the adverse possession of the lands by his father's natural son.

This second ground of decision cannot be supported and is not relied on by the learned vakil for the respondent.

Then as regards the first ground, article 182 of the Limitation Act, clause 5, allows a decree-holder the right to execute his decree if within three years of the

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date of his application there had been a previous application in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree. Seshamma was recognized as a decree-holder and she had filed an application on 16th April 1913 for execution of a portion of the decree transferred to her and hence if clause (5) is construed according to the plain import of the language used in the clause, the first defendant was entitled on the date of this suit to apply for execution of the decree as regards the A and B schedule immoveable properties mentioned in the decree, and the learned District Judge's view that the first defendant's right to execute this decree had become barred seems therefore to be clearly erroneous. But it is contended that by reason of the first sentence in explanation (1) to article 182, the first defendant cannot treat the application of Seshamma as an application made in accordance with law to enure for the first defendant's benefit also. The first sentence is:

"Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause (5) of this article shall take effect in favour only of such of the said persons or their representatives as it may be made by."

This clause, it must be admitted, does not in terms apply to the present case because the decree was not passed severally in favour of more persons than one. I do not think it is permissible to restrict the provisions of clause (5) which are intended for the benefit of decree-holders by extending the words of the first sentence of explanation (1) to cases not falling within its exact language (as is sought to be done by the learned vakil for the respondent and as was sought to be done by the successor of the learned District Judge who decided the Appeal in the lower Court and submitted the findings

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which we had called for). The suggested extension implies that the legislature intended that not only where the decree was passed severally in favour of more persons than one, but also where the decree though passed only in favour of one, person was afterwards owned by more persons than one in severalty, owing to the conduct of the original single decree-holder or otherwise, the application mentioned in clause (5) should take effect in favour only of that person, among those who afterwards became entitled to own the decree, who made it. As I said, I am not prepared to so extend the effect of explanation I. My above view seems to be supported by *Ramasami v. Anda Pillai*(1) which is the judgment pronounced on review of *Ramasami v. Anda Pillai*(2).

In the result, the District Judge's decision is reversed and the decree of the Subordinate Judge restored with costs here and the lower Appellate Court. Time for redemption is extended by six months from this date.

SPENCER, J. SPENCER, J.—I agree.

N.R.

(1) (1891) I.L.R., 14 Mad., 252. (2) (1890) I.L.R., 13 Mad., 347.

APPELLATE CIVIL.

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

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BAHADUR, ZAMINDAR GARU OF NUZVID (FIRST
DEFENDANT), APPELLANT,

v.

LAKSHMINARAYANA (PLAINTIFF), RESPONDENT.*

Madras Estates Land Act (I of 1908), sec. 185—Mortgage of his holding by tenant—Subsequent relinquishment by tenant—Possession taken by landlord—Suit for sale by mortgagee—Impleading original mortgagor and not the landlord as party thereto—Decree—Sale in execution—Suit by purchaser to recover possession from the landlord—Right of purchaser to recover possession—Effect of relinquishment by the tenant—Right of tenant in the holding, whether extinguished—Conversion by landlord of ryoti land into kamatam or private land on relinquishment, whether competent.

A tenant of ryoti land, after executing a mortgage thereon, is competent to relinquish his holding to his landlord; and such relinquishment if accepted by the landlord, extinguishes the tenant's right in the holding, but does not affect the mortgagee's interest under his mortgage.

Where such mortgagee sued for sale on his mortgage subsequent to the relinquishment, impleading the tenant who was the mortgagor but not the landlord who was in possession of the lands after the relinquishment, and a decree was passed in the suit and the property was sold in execution therein,

Held, that the purchaser in such sale was not entitled to recover possession of the lands from the landlord as he had not been made a party to the mortgage suit.

[*Per SADASIVA AYYAR, J., NAPIER, J., contra.*] Where land was shown to have been once ryoti land, it could not be converted by the landlord into private or kamatam land, except under the circumstances specified in the proviso to section 185 of the Madras Estates Land Act.

* Second Appeal No. 1419 of 1919.

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Dictum of WALLIS, C.J., in the same case, approved by NAPIER, J.

SECOND APPEAL against the decree of S. RAGHAVA AYYANGAR, Subordinate Judge of Bezwada, in Appeal Suit No. 90 of 1918, preferred against the decree of S. R. KRISHNA AYYAR, Temporary District Munsif of Gannavaram at Bezwada, in Original Suit No. 251 of 1915.

The plaintiff is the auction-purchaser of the suit lands in a sale held in execution of a mortgage decree. The lands were originally in the holding of a tenant as ryoti land in the zamindari of Mirzapuram. The tenant (one P. Venkayya) had mortgaged the lands comprised in the holding in 1894. In 1897, he relinquished the holding to the zamindar who took possession and leased them back to the tenant as his kamatam lands for three years. Subsequently, the lands were again leased out as his private lands to another person, and were thereafter cultivated by the zamindar through his farm servants. In 1906, the mortgagee instituted a suit for sale on his mortgage and impleaded the original mortgagor and not the zamindar, who was in possession of the lands after relinquishment, as a party to the suit. A decree for sale was passed in the mortgagee's suit, and the hypotheca was sold in execution and purchased by the present plaintiff, who instituted the present suit in 1915 against the zamindar to recover possession of the lands. The zamindar (the first defendant) pleaded inter alia, that as he was not a party to the mortgagee's suit, the decree and sale were not binding on him, and that the lands had been validly converted into private or kamatam lands after the relinquishment in 1897. The District Munsif, who tried the suit, dismissed it. On appeal, the Subordinate

Judge reversed the decree and passed a decree in favour of the plaintiff. The first defendant preferred this Second Appeal.

T. Ramachandra Rao for appellant.

V. Ramadas and *T. M. Krishnaswami Ayyar* for respondent.

SADASIVA AYYAR, J.—The First defendant is the appellant. He is zamindar of the Mirzapuram Estate, and the plaintiff being the person who purchased a holding in the estate from the purchaser in a Court auction-sale held in 1909 in execution of the mortgage decree for sale passed in Original Suit No. 229 of 1906 on the file of the District Munsif's Court of Bezwada against the legal representatives of the original tenant of the holding (by name P. Venkayya), who had executed the mortgage deed in 1894. This suit was brought for possession of the lands comprised in the holding, as the first defendant's father (then zamindar) obstructed the plaintiff's enjoyment in 1910.

The first defendant pleaded (among other defences):

- (a) that the original tenant relinquished the land to the defendant's father in 1894 [see paragraph 2 of the written statement. At the trial, Fasli 1307 (or 1897-98) seems to have been mentioned as the date of the relinquishment];
- (b) that the land has been thereafter enjoyed by the zamindar as his home-farm land;
- (c) that the zamindar did not know of the mortgage of 1894 and was not impleaded in the Suit No. 229 of 1906 instituted long after the relinquishment (of 1897-8) and hence the first defendant was not bound by the decree and sale in execution in that suit.

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The District Munsif found (among other conclusions) that the lands were the home-farm lands of the first defendant owing to a "general relinquishment of all the lands in the suit village of Kesarapalli in fasli 1307" by all the ryots of that village and that the mortgage decree was not binding on the first defendant. He therefore dismissed the suit.

The Subordinate Judge on Appeal gave the following findings:

- (a) "It is clear in this case that the land was seri (ryoti) land and it was relinquished under the Estates Land Act; the land which was known to be seri land cannot be converted into kamatam land by the zamindar. I have no doubt that the land is seri land and not the kamatam land of the zamindar."
- (b) "The relinquishment by Venkayya cannot affect the mortgage created in 1894. I find therefore that the relinquishment by Venkayya (if any) will not affect the right of the mortgagee."

On these (and other) findings, the Subordinate Judge substantially decreed the plaintiff's suit. Hence this Second Appeal by the first defendant. Though several grounds are mentioned in the Memorandum of Second Appeal, the arguments urged before us by the learned vakil for the second appellant were confined to the contention that the lower (Appellate) Court entirely overlooked the fact that the zamindar was not a party to the mortgage suit (of 1906) (sixth ground of Appeal). The learned vakil did not seriously dispute the finding that the land had continued to be ryoti land but argued as follows (expanding, if I may say so, the above sixth ground of Appeal): (1) that the relinquishment of fasli

1307 by Venkayya made the zamindar the owner of the Kudivaram interest; (2) that the zamindar therefore was the proper person to be impleaded as defendant in the mortgage suit of 1906 and not Venkayya's legal representatives, the zamindar then representing the owner of the kudivaram right and the right of redemption; (3) that the decree passed and the Court auction-sale held behind the back of the zamindar did not bind him and could therefore be ignored by him and (4) that the plaintiff as Court auction-purchaser (in a suit to which the owner entitled then to possession was not made a party) could not claim larger rights than the original simple mortgagee who had no rights as such to possession; and hence the plaintiff's suit for possession ought to have been dismissed.

I think that the lower Appellate Court does seem to have ignored the fact that the zamindar was not a party to the suit of 1906. He was therefore clearly not bound by the decree and sale proceedings therein. On the other hand (as pointed out by the respondent's learned vakil) the lower Appellate Court has not given a definite finding whether the alleged relinquishment of fasli 1307 by P. Venkayya is true and legally valid. The judgment of the lower Appellate Court uses the phrase "relinquishment if any." Further, I am unable to understand the sentence in the judgment of the lower Appellate Court that the land "was relinquished under the Estates Land Act of 1908," as this Act came into force long after the date (1897-98) of the alleged relinquishment.

I find that the suit of 1906 seems to have been brought not against Pallagani Venkayya but against Pallagani Lakshmigadu, Pallagani Ramudu and Pallagani Sithayya (see Exhibit A1, sale certificate). If they were the undivided sons or male descendants of

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P. Venkayya, the question arises whether the alleged relinquishment of 1807 if made by P. Venkayya would bind them, if the kudivaram right was ancestral property. (This question was not argued before us).

Again, another legal question (which was argued) has to be considered, namely, whether the relinquishment was not required to be in writing to have legal validity (see section 12 of the old Rent Recovery Act, VIII of 1865) and if it was orally made, whether the circumstances mentioned in *Narasimma v. Lakshmana*(1), as validating an oral surrender existed in the case. [It is a matter for argument whether *Narasimma v. Lakshmana*(1), does not, if I may say so with respect, mix up the rights flowing to the landlord from abandonment of the holding by the tenant with the rights flowing from the surrender or relinquishment of the holding by the tenant to the landlord. I think that "abandonment" denotes an unilateral act which does not necessarily imply that the act has been or has to be brought to the notice of any other person, whereas an act of "relinquishment" or "surrender" implies that the act is brought to the notice of the landlord; see *Venkaresh Narayan Pai v. Krishnaji Arjun*(2) and *Balaji Sitaram Naik Salgarker v. Bhikaji Soyare Prabhu Kanolar*(3), *Dinabhandu v. Lokanathasami*(4), and *Mazhar Rai v. Ramyat Singh*(5)].

Yet another question has to be considered, namely, whether the surrender or relinquishment was of a right or interest worth over Rs. 100 and whether such a transaction if in writing required to be registered to give it validity (see section 17 of the Indian Registration Act), though the Rent Recovery Act (passed in 1865) merely required that it should be

(1) (1890) I.L.R., 13 Mad., 124. (2) (1884) I.L.R., 8 Bom., 160.
(3) (1884) I.L.R., 8 Bom., 164. (4) (1833) I.L.R., 6 Mad., 322 (F.B.)
(5) (1896) I.L.R., 13 All., 290.

in writing. A further question is whether a surrender or relinquishment which is legally valid makes the landlord the owner of a distinct kudivaram right in the land, or whether it merely extinguishes the kudivaram right [just as sub-section (2) of section 10 of the Madras Estates Land Act merely extinguishes the kudivaram right when tenant leaves no heir except the Government and does not vest any distinct positive right in the landlord]. See also section 8 (1) as to the nature of the right which a landlord obtains over a land in his estate when the tenant's interest is merged with the landlord's and *Venkatasastrulu v. Sitaramudu*(1), *Zamindar of Chellapalli v. Somaya*(2) and the Orders of Reference to the Full Bench in *Lakshmanaswami v. Venkatadri Appa Rao*(1). The extinguishment of the kudivaram right by merger or extinction of the tenant's natural heirs does not of course convert ryoti land into private land, and in a real sense "extinguishment" is only an abeyance of the right till it is revived by the grant of the land to a third person for rent by the landlord. If the landlord does not by the relinquishment of the tenant obtain for himself the tenant's distinct kudivaram right, it seems to follow that he could not also own what is called an equity of redemption in the kudivaram right where the tenant's right had been subjected to a mortgage before the relinquishment or surrender. A landholder as such has no right to redeem a mortgage created over the kudivaram right by his tenant, as he (the landlord) could not claim to be a person having any interest in or charge upon the property mortgaged (that is, the kudivaram right) and so fall under section 91, clause (a) of the Transfer of Property Act (unless rent had fallen into arrears,

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(1) (1915) I.L.R., 33 Mad., 831. (2) (1916) I.L.R., 33 Mad., 341.
(3) S.A. No. 1765 of 1918 (unreported).

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in which case he has a charge on the land for recovery of arrears under section 5 of the Act). The other clauses of section 91 are wholly inapplicable. Section 8 of the Madras Estates Land Act seems to prohibit a landholder from holding ryoti land at any time under any circumstances as if he owned the kudivaram right therein, except of course in the case of one of several co-sharer landholders. Section 10, clause (2), also makes it clear that even when the owner of the kudivaram right in a ryoti land died leaving no heirs except the Crown, though the Crown was by this Statute prevented from inheriting the tenant's right (as it was entitled to do before this Act came into force) the landlord did not inherit the right of the deceased tenant as a distinct kudivaram right, but the dead man's right was merely extinguished on his death and the landlord's right was only to induct any person he liked into the land as a tenant and that person would obtain the kudivaram right under section 6 of the Act.

I shall here refer to two matters which related to the course of the trial in the lower Courts. The appellant (first defendant) seems to have relied in those Courts on his contention that the land became his kamatam land by the relinquishment of 1897-98 and he seems not to have put forward, or at least pressed sufficiently, his contention that he became the owner of the equity of redemption by the relinquishment and was entitled to retain possession as such owner till his right was extinguished by a decree passed and execution proceedings taken in a suit to which he was himself made a party. That a mere relinquishment to the landlord cannot put an end to the mortgage already created by the tenant so as to prejudice the mortgagee's rights is now well established: see *Chhote Lal v. Sheopal Singh*(1) and *Ekambara Ayyar v. Meenatchi Ammal*(2).

(1) (1911) I.L.R., 33 All., 335, 349.

(2) (1904) I.L.R., 27 Mad., 401.

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The other matter referred to is that the Court of first instance did not settle the issues properly on the very complicated questions which I am considering and which were argued before us here. The only issue framed was the general one:

"Whether the suit land belongs to the plaintiff or his predecessor-in-title."

The third ground of Appeal to the lower Appellate Court was:

"The lower Court should have framed the most important issue in the suit regarding the relinquishment of the suit land in their favour pleaded by the defendants, as also with regard to the kamatam nature of the suit land as contended for by the defendants."

The lower Appellate Court also did not frame all the necessary questions for consideration and the second point framed by it was:

"Whether the land was relinquished and whether the relinquishment thereby gives the zamindar an absolute right in the land."

On that question, while it came to the conclusion that the zamindar did not get the absolute right in the land, it held that he acquired a right in the kudivaram subject to the prior mortgage, and it at once rushed to the conclusion that the decree and the sale proceedings in the suit of 1906 to which the zamindar was not made a party were also binding upon him and hence he could not retain possession. What definite right the zamindar got by the ryot's relinquishment (if true) has not been properly considered and decided by the lower Appellate Court.

The respondent's learned vakil (*Mr. Ramadas*) attempted to support the decree of the lower Appellate Court by raising the contention that the relinquishment itself to the landlord, if true, was wholly invalid, as it was made after the tenant had carved out a mortgage out of

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the tenancy right in favour of a stranger. He relied upon Sir BHASHYAM AYYANGAR, J.'s dictum in *Ekambara Ayyar v. Meenatchi Ammal*(1). The learned Judge was considering the proviso to section 12 of the old Rent Recovery Act of 1865, enacting that tenants shall be allowed to relinquish their lands at the end of the revenue year by a writing to be signed by them in the presence of witnesses or at any other time if the landlord is willing to accept the relinquishment. I might add here that in the corresponding section 149 of the Madras Estates Land Act, the words "by a writing to be signed in the presence of witnesses" does not appear, but section 150, clause (1), which speaks of the landholder refusing to receive a notice of the relinquishment given under section 149, and section 150, clause (2), which speaks of tender of such notice, clearly imply that the notice should be in writing, though it need not be attested by witnesses. The omission of the words "by notice in writing" in section 149 seems to be a clerical oversight on the part of the legislature. In connexion with the right of the tenant under the Rent Recovery Act of 1865 to relinquish the land even against the will of the landlord, the learned Judge (BHASHYAM AYYANGAR, J.) remarked:

"When the land relinquished is burdened with such an incumbrance, the relinquishment itself may be inoperative to terminate his liability as tenant to the landholder until the incumbrance ceases by effluxion of time or is otherwise discharged by the tenant; *Sham Das v. Batul Bibi*(2) and *Badri Prasad v. Sheodhian* (3)."

The learned Judge did not lay down that the relinquishment was void but he seems only to posit that the right and privilege to relinquish given by the Statute even against the will of the landlord cannot be exercised

so as to put an end to the tenancy, if the incumbrance created had not been extinguished before the relinquishment and the landlord refused to recognize the relinquishment owing to the incumbrancer's right to bring the holding to sale and his consequent right to give the purchaser at such sale a claim to repudiate the landlord's dealing with the relinquished holding by letting it to whomever the landlord chooses. I think that all that the learned Judge intended to lay down was that the relinquishment made under circumstances which would not enable the landlord to deal with the relinquished land in its entirety as an unencumbered holding need not be recognized by the landlord. Take a case, where the tenant has sub-let his holding for 20 years as he was entitled to do. His relinquishment of the land when 15 years of the sub-lease term had still to run and the sub-lessee was in possession could not be allowed to prejudice the landlord who ought not to be made to wait for 15 years to exercise his power to induct a new tenant. *Badri Prasad v. Sheodhian*(1) quoted by the learned Judge in support of his dictum lays down only that a sub-lease for a term of years granted by an occupancy tenant is not put an end to by a relinquishment to the landlord by the occupancy tenant. If the landlord chooses to waive his rights and to recognize the sub-lease (or even a mortgage) and to exercise the landlord's rights accruing under the relinquishment subject to the sub-lease or mortgage rights, I do not see that there is anything to prevent him from so recognizing the relinquishment. When the learned Judge says that the relinquishment may be inoperative to terminate the tenant's liability, it does not necessarily negative the conclusion that if the landlord consented to the

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(1) (1904) I.L.R., 27 Mad., 401, 408. (2) (1902) I.L.R., 24 All., 538.
(3) (1896) I.L.R., 18 All., 354.

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termination of the liability of the tenant, the liability may be put an end to notwithstanding the existence of an incumbrance or a sub-lease. In order to simplify matters, section 86 of the Bengal Tenancy Act while it says in sub-section (1),

“A ryot not bound by a lease or other agreement for a fixed period may at the end of any agricultural year surrender his holding”

adds in sub-section (6),

“When a holding is subject to an incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer.”

Then sub-section (7) says

“Save as is provided in the last foregoing section nothing in this section shall affect any arrangement by which a ryot and his landlord may arrange for the surrender of the whole or part of the holding.”

Thus, under sub-section (6) of section 86 of the Bengal Tenancy Act, the consents both of the landlord and the incumbrancer are necessary to make valid the surrender of a holding which is subject to an incumbrance secured by a registered instrument. But as section 149 of the Madras Estates Land Act contains no similar provisions, I do not think that it can be argued that the relinquishment itself is wholly invalid because it is subject to an incumbrance at the time of the relinquishment which is the contention put forward by Mr. Ramadas on the strength of the short *obiter dictum* of Sir BHASHYAM AYYANGAR, J., already quoted.

In the result, I am of opinion that this Second Appeal cannot be satisfactorily disposed of until some of the material questions arising in the case are definitely formulated and findings obtained from the lower Court on those questions, both parties being at liberty to adduce further evidence. Those questions are :

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1. Did Venkayya relinquish the lands to the zamindar? When did he do so? Did he relinquish it in the manner provided for by section 12 of the Rent Recovery Act (VIII of 1865)? Even if there were defects in the mode, time and character of the relinquishment, did the zamindar consent to the relinquishment and to the putting an end of the tenancy?

2. Was such a relinquishment binding on Venkayya and the undivided co-parceners, if any, of Venkayya's family? Was it made by a registered instrument? If not, was it invalid on that account?

3. Was the holding not Venkayya's ancestral property?

4. Who were the defendants in the suit (Original Suit No. 229 of 1906)? If they were the undivided co-parceners of Venkayya, was the relinquishment binding on them or had they consented to such relinquishment and had their interests in the holding been extinguished before they were made parties to the suit (Original Suit No. 229 of 1906)?

5. Was the late Raja the owner of the kudivaram right in the lands at the time of the suit of 1906 and had he by the relinquishment (supposing it is true and valid), or in any other mode, become the legal owner of the kudivaram and could he legally become such owner notwithstanding his status as zamindar? (The Court would have to consider the effect of the provisions of the Madras Estates Land Act already referred to in coming to a conclusion on this point):

(6) Was the zamindar entitled on the date of the suit of 1906 to redeem the mortgage created by Venkayya?

Findings should be submitted within six weeks from receipt of records in the lower Court and ten days are allowed for filing objections.

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NAPIER, J.—I agree with my learned brother that we must have findings on the issues settled by him, and reserve my opinion on the points of law until argument on the findings returned.

[In compliance with the above order, the Subordinate Judge of Bezwada submitted findings as follows:

On the first issue he found that Venkayya did relinquish the lands to the zamindar on 2nd February 1897; that the relinquishment was in writing but not attested as required by section 12 of the Madras Rent Recovery Act; but that the zamindar did consent to the relinquishment and put an end to the tenancy.

On the second issue, he held that the document was not registered but that it was not invalid on that account, and was binding on the tenant Venkayya and his coparceners.

On the third issue, he held that the lands were Venkayya's ancestral property.

On the fourth issue, he found that the undivided sons of Venkayya were parties to the mortgagee's suit, that they were minors at the time of relinquishment by Venkayya, but that the relinquishment was binding on them.

On the fifth issue, the learned Subordinate Judge held that the zamindar did not become the owner of the kudivaram right by reason of the relinquishment.

On the sixth issue, the Subordinate Judge found against the defendants, holding that the first defendant had not acquired the right to redeem the lands, though he had been in possession of the lands ever since the relinquishment and was in possession thereof at the date of suit.]

On receipt of the above findings the Second Appeal came on for hearing and their Lordships delivered the following JUDGMENTS:

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SADASIVA AYYAR, J.—The first defendant (appellant) is the Zamindar of Mirzapuram and the plaintiff (respondent) is the purchaser in the Court auction-sale of a certain cultivable land in the estate, the sale having been held in execution of a mortgage decree passed against one P. Venkayya who was the ryot-tenant of the land till 1897 the mortgage suit having been brought against him in 1906 when he had ceased to be the tenant of the land. In 1897, the said P. Venkayya abandoned the land and the zamindar took possession of it and yet as Venkayya was the original mortgagor (the mortgage deed being dated 1894) he was impleaded as the defendant in the mortgage suit of 1906 and the zamindar who was in possession was not impleaded. The plaintiff as the Court auction-purchaser brought this suit in 1915 in ejectment of the first defendant, the zamindar who is in possession of the land.

The lower Appellate Court held (1) that as the land was admittedly ryoti land till 1897, it could never become converted into private land, because, by the statute law, land which is ascertained to have been at one time, however remote, ryoti land could never become converted into kamatam land; (2) assuming even that ryoti land could be so converted by the zamindar into kamatam after relinquishment by the ryot, the mortgage created by the ryot before such relinquishment could not be affected in any way and the sale in execution of the decree obtained on the mortgage conferred on the purchaser at that sale the right to hold that land as ryoti land.

As regards the first point, it must be admitted that there is a strong body of judicial opinion in the decisions of this Court in support of the view that if a land is proved to have once been ryoti land, it could never be treated afterwards as having (by any dealings by the

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zamindar or by the tenant or by both) been converted into kamatam land except in the single case mentioned in the proviso to section 185 of the Madras Estates Land Act, namely, except where the landholder has, by his own servants or by hired labour with his own or hired stock, cultivated the land as private land for 12 years immediately before the commencement of the Act. In *Zamindar of Chellappalli v. Somaya*(1), that very learned Judge, SESHAGIRI AYYAR, J., has given reasons in pages 349, 350 and 351, in support of the above view. This view of SESHAGIRI AYYAR, J., seems to have been accepted by ABDUR RAHIM, J., and BURN, J., in *Sreemantha Raja Yarlagada Mallikarjuna Prasada Naidu v. Subbiah*(2). The learned Chief Justice however in *Zamindar of Chellappalli v. Somaya*(1) held the view that a ryoti land can be shown to have been converted into private land by evidence of other acts than the acts mentioned in the proviso to section 185 but added that such evidence should be "very clear and satisfactory." The learned Chief Justice held further in that particular case that the calling of the lands as kamatam and the letting of them out on terms negating occupancy right with a view to prevent the assertion of such right (even if such letting had gone on from 1875 till 1910) were insufficient to convert them into private lands, if such conduct of the zamindar could be held to have been merely colourable for the purpose of defeating the rights of the occupancy tenants. The inclination of my own view is to follow with respect the opinion of SESHAGIRI AYYAR, J. In the present case, as the cultivation by hired servants of the zamindar could not have begun prior to 12 years before July 1908 when the Madras Estates Land Act came into force (the abandonment having been only in

(1) (1916) I.L.R., 39 Mad., 341.

(2) (1920) 39 M.L.J., 277.

1897), the land must be deemed to have continued to be ryoti land.

On the other question, whether there has been a valid relinquishment, valid at least to the extent that the tenant lost all interest in the land relinquished, I have nothing to add to what my learned brother has said in the judgment prepared by him in this case.

The next question for consideration is whether if the relinquishing tenant had created a mortgage right over the kudivaram interest in the land before his abandonment and relinquishment, that mortgage interest also then came to an end. On principle, it is difficult to see how a person after having carved out an interest in favour of another for valuable consideration could destroy by his unilateral Act the interest so created in the other person's favour, that is, without the consent of the assignee of that interest. In *Ekambara Ayyar v. Meenatchi Ammal*(1), BHASHYAM AYYANGAR, J., says :

"It is unnecessary to consider and decide in this case the effect of a relinquishment under section 12," (Rent Recovery Act) "at the end of the revenue year of his holding by a ryotas it is not analogous to an ejectment on forfeiture. The operation of such relinquishment on mesne encumbrances created by the tenant may stand altogether on a different footing and the relinquishment itself when the land relinquished is burdened with such an incumbrance may be inoperative to terminate his liability as tenant to the landholder until the encumbrance ceases by effluxion of time or is otherwise discharged by the tenant (*Sham Das v. Batul Bili* (2) and *Badri Prasad v. Sheodhian*(3))." The learned Judge was evidently considering the case of a relinquishment which the landholder refused to accept, the refusal being based on the ground that a mortgage interest had already been created over the holding and

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(1) (1904) I.L.R., 27 Mad., 401, 408.

(2) (1902) I.L.R., 24 All., 538.

(3) (1896) I.L.R., 18 All., 354.

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the landlord could not let the land to another tenant free from that mortgage. The observation of the learned Judge rather shows that while on forfeiture for non-acceptance of patta, a mortgage interest created prior to the forfeiture failed [which was the direct decision in *Elkambara Ayyar v. Meenatchi Ammal*(1)] a mere relinquishment would not put an end to a prior mortgage.

Holding then that the mortgage of 1894 subsisted in favour of the mortgagee after the date of and notwithstanding the relinquishment of 1897, the question is in whom did the right to redeem vest on that relinquishment? It seems to me clear that it must vest in the person who became the owner of the kudivaram interest in the land on such relinquishment. In *Venkata Sastrulu v. Sitaramudu*(2) the question of the right of an inamdar in the lands in which he owned only a melwaram interest after the kudivaram owner abandoned or relinquished his kudivaram interest was considered by me. My conclusion was that a landholder though he owned the waste and abandoned lands in his village, in a certain sense, could not be considered to enjoy the kudivaram in the ordinary mode without direct contact, by the cultivation of the soil through his hired or farm servants. I further held that when a ryoti land is abandoned by a tenant, it might be legally permissible to state that the kudivaram thereupon became vested in a certain sense in the landholder because the landholder became vested with the right to grant the kudivaram right to any other person he liked after the abandonment by the former tenant of the said lands. I, however, added that the vesting of the kudivaram in that sense in the landholder till he granted it to a new tenant could

(1) (1904) I.L.R., 27 Mad., 401. (2) (1915) I.L.R., 38 Mad., 891.

not convert ryoti land into private land. Having further considered the matter I see no sufficient reason to change my above view, that the kudivaram in the abandoned holding might be deemed to become vested in the landholder for some legal purposes till the landholder inducted a new tenant into the land. It follows from what I have above stated that the mortgage suit which was brought in 1906 against a person who had ceased to be the owner of the right to redeem, namely, P. Venkayya, was wholly misconceived, that the zamindar, who was then the only person who could in a limited sense represent the kudivaram interest (though he may not be said to be its owner in its full sense) and who was therefore entitled to redeem the mortgage, was the proper party to have been impleaded as the defendant in the suit for sale by the mortgagee, and that as he was not made a party to that suit the decree for sale and the sale in execution held thereunder bound neither the lands nor the zamindar and that the plaintiff (purchaser in the Court auction-sale) could not therefore maintain the present suit for possession, having obtained no title to the kudivaram right by his purchase in the decree passed in the said misconceived suit. The Subordinate Judge's decree must therefore be reversed and that of the District Munsif restored with costs here and in the lower Appellate Court.

NAPIER, J.—The Rent Recovery Act of 1865, section 12, gives to a tenant a right to relinquish his holding, and I am clear that he cannot create an interest in his estate that will operate to destroy that right, but that all such interests are subject to such right. But in dealing with the facts of this case we have first to decide whether there was a valid relinquishment. The lower Appellate

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Court has found that there was no writing in the presence of witnesses as provided for in the first sentence of the proviso to section 12 of the Rent Recovery Act and we must accept that finding. He finds, however, that there was in fact a relinquishment accepted by the zamindar, and acted on by him and by Venkayya and his co-parceners, which amounts to an abandonment in pursuance of the relinquishment. In dealing with similar facts SHEPHERD, J., held, in *Narasimma v. Lakshmana*(1), that relinquishment, acceptance and abandonment operate to terminate the estate of a tenant, while MUTTUSWAMI AYYAR, J., went even further and held that a mutual contract from which a surrender in fact might reasonably be inferred was a valid relinquishment. I see no reason to differ from this ruling, given many years ago, and hold that there was a valid relinquishment.

The important question remains, however, what was the effect of that relinquishment and the subsequent dealings with the land by the landlord on the mortgage right of the original mortgagee in the hands of the present plaintiff suing in 1915. The plaintiff is the assignee of the auction purchaser of the land sold in execution of the mortgage decree in 1909 and claims as owner of the land to recover possession of it from the zamindar to whom it was relinquished. The relinquishment was in 1897. In the same year the zamindar purported to lease the land to the same tenant as kamatam for a term of three years. In 1900 it was leased to a stranger for five years as kamatam. In 1905 the land was cultivated by the landlord as private land. In 1906 the mortgagee brought his suit against the original mortgagor ignoring the zamindar who was in possession and the mortgagor's

(1) (1890) I.L.R., 13 Mad., 124.

interest was sold in 1909. On those facts, the first question seems to me to be, what became of the kudivaram interest after the relinquishment and on the lease as kamatam in the same year. It was decided in *Ekambara Ayyar v. Meenatchi Ammal*(1) that ejectment of a tenant by a landlord for refusal to accept a proper patta extinguished all mesne incumbrances just as forfeiture of a lease-hold interest extinguishes all incumbrances under section 115 of the Transfer of Property Act, though the Court is careful to point out (vide page 403) that a ryot with a right of occupancy is not a mere lease-holder, but the Court expressed no opinion as to the efficacy of a relinquishment under section 12 where mesne incumbrances have been created by the tenant. I have already expressed my opinion that the statutory right of relinquishment cannot be made inoperative, but the other question still remains. It was held by my learned brother in *Venkata Sastrulu v. Sitaramudu*(2), that on abandonment by a ryot with occupancy right, the kudivaram did not vest in the landlord in such a manner as necessarily to convert the land into private land (vide page 895) and in *Suryanarayana v. Patanna* (3) that surrender and abandonment were not a method by which the kudivaram interest can be acquired by virtue of the exception to section 8 of the Madras Estates Land Act. Agreeing with this view I would hold that the kudivaram right in this land was in abeyance until it came into existence again by admission of a new ryot, and continued in abeyance as long as the landlord did and could in accordance with law, treat the land as private land. Under section 6, sub-section (2), of the Madras Estates Land Act, if occupancy right

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(1) (1904) I.L.R., 27 Mad., 401.

(2) (1915) I.L.R., 38 Mad., 891. (3) (1915) I.L.R., 38 Mad., 608.

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land is surrendered after the Act and a tenant is admitted to possession within ten years of such surrender, he acquires a right of occupancy. That is to say, the kudivaram interest is revived in him irrespective of the fact that the land might have been cultivated by the landlord himself for nine years; but we have to consider the case of land which was treated as kamatam prior to the Act. It was held by SESHAGIRI AYYAR, J., as I understand the learned Judge, in *Venkata Sastrulu v. Sitaramudu*(1), and in *Zamindar of Chellappalli v. Somayya* (2), that except in the case specified in the proviso to section 185, no land can after the passing of the Madras Estates Land Act ever have been converted into private land because of the retrospective operation of section 8, sub-section (1), and that view has been pressed strongly on us. The learned Chief Justice has distinctly negatived it in the latter case and sitting with AYLING, J., had declined to accept it in *Chintam Reddi Sanyasi v. Sri Rojasagi Appala Narasimha Raja Garu*(3). I agree with the Chief Justice that the words "but shall hold it as a landholder" do not necessarily imply that it remains ryoti land and I am also of opinion that surrender is not an operation by which the entire interests become united "otherwise." I might add that where so large a proposition is contended for as that the conversion of occupancy land into private land since the permanent settlement is, since the Madras Estates Land Act, retrospectively inoperative, very definite language must be relied on, and the language used in this section falls far short of that requisite. In my opinion, the view expressed by SESHAGIRI AYYAR, J., in the two cases referred to should not be followed. I now turn to

(1) (1915) I.L.R., 38 Mad., 891. (2) (1916) I.L.R., 39 Mad., 341.
(3) (1914) M.W.N., 766.

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section 185. This land clearly does not come within the proviso to section 185. So, it is presumably not private land: but at the date of the suit in 1915 it was being cultivated by the landlord himself and had been so cultivated for ten years. Even at the date of the mortgage suit, the land was being cultivated by the landlord. It is found that the lands are surrounded by the kamatam lands of the zamindar and it is admitted that in 1897, eleven years prior to the passing of the Act they were let as kamatam lands and continued to be so let until 1905 when the landlord took them under personal cultivation. In my opinion it is now too late to contend successfully that the lands are not the private lands of the zamindar, whatever might have been the result if the mortgagee had brought his suit on his mortgage against his mortgagor in 1897 when the latter took the lands on lease in 1897 directly after his surrender. What would be the effect on the mortgage right if the lands ever became ryoti again is a question I do not propose to consider. I think it enough to say that the landlord not having been a party to the mortgage suit (I do not decide that he could have been made a party) is not bound by the decree and being himself in possession of his kamatam lands cannot be ejected. I would therefore dismiss this suit with costs throughout.

[This Second Appeal having been set down to be spoken to, the Court (SADASIVA AYYAR, J.) delivered the following JUDGMENT:]

When pronouncing judgment, we omitted by oversight to mention what we had resolved and expressed our intention to do during the course of the arguments, namely, to allow the Memorandum of Objections in respect of decreeing possession of item 2 with mesne

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profits (Rs. 36) against the defendants who are in possession thereof, and we intended that the suit was to be dismissed and the District Munsif's decree restored only as regards item No. 1. This omission in the judgment will be considered as supplied on the above lines and the Memorandum allowed to that extent. The District Munsif will, of course, be entitled to pass supplementary decree after inquiry as regards future mesne profits.

K.R.

APPELLATE CIVIL.

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

M. NAGARAJA (PLAINTIFF), APPELLANT,

v.

DEVARAJA KARNATHAYA BELLALA (DEFENDANT),
RESPONDENT.*

Pattam-holder in South Kanara—Kulur Bidu pattam—Pattam, whether a religious office—Appointment to office by villagers—Right of family of pattam-holder—Right of junior members to maintenance out of income of pattam lands—Stani and pattam-holder, distinction between.

The pattam of Kulur Bidu in South Kanara is a religious office, the holder of which is appointed by the villagers who are bound, in the first instance, to bestow it upon a member of the Aliyasantana family to which the last holder belonged, but in the absence of any such member can appoint anybody they please. Junior members of the family of the pattam-holder cannot claim maintenance out of the income of the pattam lands.

Stani and pattam-holder, compared.

APPEAL against the decree of T. JIVAJI RAO, Subordinate Judge of South Kanara, in O.S. No. 21 of 1917.

* Appeal No. 118 of 1920.

The material facts are set out in the Judgment.
B. Sitarama Rao for appellant.
K. Yegnanarayana Adiga for respondent.

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SADASIVA AYYAR, J.—The plaintiff is the appellant. He brought this suit for maintenance against his brother, the defendant, on the ground that both parties belonged to an Aliyasantana family and that the defendant was in possession of the family properties as yejaman of the family and failed to give him maintenance. The defendant contended that he was not in possession of any property as yejaman of the family but only of certain properties as the person appointed by the Kulur Magne community to the pattam of Kulur Bidu. The second issue raised was :

“Whether the suit properties belonged to the Aliyasantana family, of which the defendant is yejaman, or to Kulur Bidu pattam as alleged by the defendant.”

At the trial the plaintiff seems to have argued that, though the properties belonged to the Kulur Bidu pattam, the pattam itself belonged to the family and hence the properties also belonged to the family; and for this contention he relied upon the *Vyavasta Patra*, Exhibit A, dated 1899, executed between the defendant and the father of the plaintiff and of the defendant who was the previous pattamdar. This document, according to the plaintiff, made both the pattam and the property attached to it the family property of the plaintiff's mother's branch of their Aliyasantana family. This pattam right has to be conferred by the Maghava villagers, though they are bound by custom to bestow it upon a member of the Aliyasantana family to which the last holder belonged; and in the non-existence of any such member they can bestow it on anybody they like.

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This pattam is indeed in some respects analogous to the stanam in Malabar. But from the evidence it appears that it is not (like a stanam) a mere dignity to which no obligations or duties are attached. On the other hand the plaintiff himself in his evidence as plaintiff's witness No. 1 says:

"My father resigned the Kulur Bidu pattam, as he could not attend to the ceremonies there, the three ceremonies I have mentioned above;

then he says in another place:

"There are annual ceremonies to be performed by the pattam-holder—Mahalaya, Kambla and Puddarada mechi nema ;"

then he says as regards the "nema" ceremony:

"The nema ceremony lasts three days. All the Maghava people have to be invited for the ceremony."

It appears from the defence evidence that several other ceremonies, Ashtami, Vinayaka Chathurthi and others, have also to be performed by the pattam office-holder at some expense. The villagers who installed the pattam-holder in his office have to be invited and fed or at least given coconuts, according to the evidence. Thus, whereas the stani succeeds to the stanam by reason of his being the next eldest member of the family next to the deceased stani, that is not the case with this pattam dignity, which rather partakes of the nature of an office to which the villagers appoint a man after an elaborate ceremony and the duties of which office are defined and entail expense out of the income derived from the lands forming the emoluments of the office.

As I said, the plaintiff admits that his father resigned the office because he was unable to perform the duties attached to it. That was in 1894; and the defendant was appointed to the office at once during his father's lifetime.

The question is whether junior members of the family of the pattam-holder can claim maintenance out of the income of the pattam lands. As I said, the holder of a pattam is in a less advantageous position than the holder of a stanam so far as his rights are concerned in the properties attached to the pattam. So far as the holder of a stanam is concerned, he becomes out off for the time being from connexion with his main tarwad; the other members of his tarwad have no right whatever to or in the stanam properties. It seems to me that a fortiori the plaintiff cannot claim any interest in the pattam properties and it follows that he has no right to get maintenance out of the income of the properties. But it was argued that by reason of the arrangement, agreement or settlement under Exhibit A, dated 1899, the defendant became liable to treat these properties as his Aliasantana family properties and hence the plaintiff was entitled to claim maintenance out of their income. One answer advanced against this contention by Mr. Adiga (for the respondent) was that, as religious duties were attached to the office, the properties cannot lawfully be made the subject of any agreement by the holders of the office changing their nature so as to allow secular rights of maintenance to be claimed out of their income. ABDUR RAHIM, J., and myself in a case decided at the end of last year, *Neti Anjaneyulu v. Rice Mill Co., Tenali*(1), differed on the question whether the properties attached to the religious office can be attached and can form the subject of alienation by Court-sale or private sale provided the service continues to be performed and whether the alienation would be valid during the lifetime of the office-holder (judgment-debtor or alienor). The decision in that case has been appealed against under the Letters Patent.

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(1) C.M.S.A. 21 of 1920 (unreported).

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Assuming, however, that even though the office of pattam has religious duties attached to it, and the properties can be alienated so as to be effective during the lifetime of the office-holder, the next question is whether Exhibit A was intended to effect such an alienation. Mr. Adiga argued that it was not so intended even according to its terms, though the Subordinate Judge was of opinion that it was intended thereby to so convert the pattam property into family property. There is much to be said in favour of Mr. Adiga's contention, as the pattam and the properties are treated alike as intended to be held *in the joint family right of the heirs of the defendant according to the Aliyasantana law of inheritance in the branch of the defendant's mother*. It is difficult to believe that the pattam which belonged and could belong to one member of the family at a time was itself intended to be made the common property of the family. If so, the property attached to it, and which cannot be separated from it, could not have been intended to be enjoyed as family property, while the pattam can only be enjoyed by one member whom the Maghava villagers appoint to the office. Then the provision of the agreement, Exhibit A, that so far as the acquisitions out of the income are concerned they should be treated as family properties would be unnecessary, if the provisions in the former portion already set out was intended to convert the pattam and the properties into family properties. The true construction of Exhibit A on this point is, however, not free from difficulty. I shall consider the case, therefore, on the footing that Exhibit A was intended to convert the properties into Aliyasantana family properties and not merely to regulate the succession to the pattam so as to preserve it and the enjoyment of the attached properties in the Aliyasantana family. I shall here dispose of another minor

contention of the appellant that item 1 alone was attached to the pattam and that items 2 and 3 were not attached to the pattam. I think the matter is concluded against the appellant's contention by the very document, Exhibit A, which describes all the three properties as belonging to the pattam. Further, the same contention was raised by the junior members of the previous pattam office-holder in 1849 and was negatived: see Exhibits B and C.

Then we have to consider the question whether Exhibit A can be treated as an alienation by way of settlement or sale in favour of the family by the defendant. So far as sale is concerned, the consideration mentioned in Exhibit A has been found to be clearly fictitious, for the wife's family is not a party to the deed, as the plaintiff's and the defendant's father who professes to have entered into the transaction in the interests of his wife's family is not, according to law, a member of his wife's family at all. Secondly, taking it as an unilateral deed of settlement by the defendant in favour of his mother's Aliyasantana family, I think that there is sufficient internal evidence in the recitals of the document itself which support the evidence of the defendant that he executed the document not by his free will and consent but owing to the undue influence brought to bear upon him by his father.

I therefore agree with the lower Court's finding that this deed was not voluntarily executed by the defendant and that he could impeach its validity as a defendant.

In the result I would dismiss the Appeal with costs.

SPENCER, J.—The learned Subordinate Judge has found on the second issue that the suit properties appertained to the Kulur Bidu pattam and not to the Aliyasantana family of which the defendant is the yejman.

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In support of this finding he relies on a good deal of documentary and oral evidence to which we have been referred in the arguments in appeal. I have no doubt he was right in his conclusions that the properties appertained to the pattam.

The argument advanced for the appellant, that the pattam belongs to the family, is negatived by the previous history referred to in the lower Court's judgment and in the judgments in the litigations of 1851, Exhibits B, C and I. That history contains instances where the Maghava villagers have installed pattam-holders selected from the family of the last pattam-holder and failing lineal heirs in that family have appointed persons from outside the family.

The appellant relies on Exhibit A, a document signed by the defendant and his father at the time when the defendant succeeded to the office. Mr. B. Sitarama Rao argued that this agreement or settlement gave his client a good title at least for the lifetime of the defendant and that it was too late for the respondent to repudiate it as being executed under undue influence, as he did not set up such a case at the trial. The Subordinate Judge treated this Exhibit A as a purchase of membership in the pattam family and he held that it was invalid for want of consideration. The document itself is termed a deed of settlement. Whether it is an agreement or a family settlement, its purpose is clearly to appropriate for family purposes the property which belongs absolutely to the pattam and to alter the recognized custom of the trust under which the property had hitherto been enjoyed and managed. It states that "the extra immoveable and moveable properties belong to the self-acquisition of the pattam-holder and should be carried on under the joint permission of the family of those who acquired the same. It should not be

subjected to the power of the pattam-holder." In another place the defendant, and the persons who are his heirs, are declared to have a right of inheriting the property as joint heirs of all his rights and interests according to the Aliyasantana law. As the Subordinate Judge observed, this document evidences an intention on the part of the defendant's father to create rights to the pattam and properties in all his children and to convert the pattam properties into family properties. An appropriation for private purposes of properties attached to a religious office is clearly illegal and even a trustee who mortgages the trust property for his own purposes can subsequently as a trustee impeach the validity of the transaction and avoid the alienation in the interests of the trust, as was held in *Yasim Sahib v. Ekambara Aiyar*(1).

I am therefore of opinion that Exhibit A is not valid even for the lifetime of the defendant and that the defendant is not now estopped from repudiating the validity of that transaction. The lower Court's decision is right and the Appeal must be dismissed with costs.

K.R.

(1) (1919) 37 M.L.J., 698.

APPELLATE CIVIL.

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

OFFICIAL RECEIVER, SOUTH MALABAR
(PLAINTIFF), APPELLANT,

v.

VEERARAGHAVAN PATTAR AND TWO OTHERS
(DEFENDANTS), RESPONDENTS.*

1921,
May 11.

Limitation Act (IX of 1908), arts. 11, 18, 62—Attachment before judgment of a debt due to defendant—Adjudication of the defendant as insolvent thereafter—Unsuccessful claim of Official Receiver to release debt from attachment—Suit by Official Receiver to contest order on his claim more than one year afterwards—Limitation.

A debt due to A from B was attached before judgment and A was thereafter adjudged an insolvent. The attached debt was paid into Court, and the Official Receiver of A's estate applied to the Court for payment of the money to him and not to the attaching creditor, by virtue of section 34 of the Provincial Insolvency Act (III of 1907). The application was dismissed. More than a year after the dismissal, but within three years after payment to the attaching creditor, the Official Receiver filed this suit to recover the money from the latter.

Held, that the Official Receiver's application was not a claim petition within Order XXI, rules 58 to 63, and Order XXXVIII, rule 8, Civil Procedure Code, and the article of the Limitation Act applicable was 62 and not 11.

Held further, that article 18 also was not applicable as the application was in a suit. *Shankar Sarup v. Mejo Mal*, (1901) I.L.R., 23 All., 318 (P.C.), followed.

Held further, by SPENCER, J., that the application was not one for rateable distribution.

* Appeal No. 208 of 1920.

APPEAL against the decree of T. V. NARAYANAN NAYAR, Subordinate Judge of South Malabar at Palghat, in Original Suit No. 58 of 1918.

The plaintiff is the Official Receiver of the South Malabar district. The defendants in this suit, who had a claim against one Kader Mohidin Rowther and others, sued them in Original Suit No. 23 of 1912, and got an order attaching before judgment a debt due to Kader Mohidin from a third party. Kader Mohidin and others filed a suit (Original Suit No. 40 of 1912) against the third party for the recovery of the debt and the defendants in this suit were added as parties as attaching creditors. After decrees were passed in favour of the plaintiffs in both the suits, Kader Mohidin was adjudicated an insolvent and his estate became vested in the plaintiff as Official Receiver. The plaintiff then put in an application that the decree-debt due to Kader Mohidin which was paid into Court must be paid to him alone and not to the defendants (the attaching creditors). Rejecting the plaintiff's application and upholding the contention of the defendants that they were secured creditors, the Court ordered on 21st December 1915 the payment of the amount to the defendants.

In an Appeal filed against this order by the plaintiff the High Court held on 13th September 1917 that no appeal lay against the order and that his remedy was by suit. The plaintiff thereupon filed this suit on 29th November 1918 for recovery from the defendants of the amount so paid. The defendants pleaded inter alia that the suit having been filed more than a year after the order in December 1915 was barred by article 11 of the Limitation Act. The plaintiff contended that his application was under section 73 of the Civil Procedure Code. The Subordinate Judge held that the plaintiff's

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application was a claim petition under Order XXI, rule 58, Civil Procedure Code, and that his present suit was barred by article 11 of the Limitation Act. The plaintiff preferred this Appeal to the High Court.

T. R. Ramachandra Ayyar and *P. S. Narayanaswami Ayyar* for appellant.

A. Krishnaswami Ayyar, *P. V. Parameshwara Ayyar* and *C. S. Swaminathan* for respondents.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—The first question in this case is whether an application by an Official Receiver, to a Court which had attached the property of the insolvent at the instance of a creditor, praying that the property may be treated as property vested in the Official Receiver and as therefore not available to the attaching creditor to satisfy exclusively his claim under the decree, is a claim petition which falls within the class of claims and objections dealt with by Order XXI, rules 58 to 63, and under Order XXXVIII, rule 8 (claim preferred to property attached before judgment), or is an application *sui juris* not governed by those sections. In the case before us, the property was attached before judgment and the adjudication was after the attachment. It has now been settled in this Court by the Full Bench *Prasada Nayudu v. Virayya*(1), overruling the decision in *Ramanamma v. Kamaraju*(2), that, notwithstanding the very vague and wide terms of Order XXXVIII, rule 8, and notwithstanding that Order XXI, rule 63, has not been expressly extended to orders made on claim petitions preferred to properties attached before judgment, all the provisions of Order XXI, rules 58 to 63 (old sections 278 to 283), must be held to have been impliedly incorporated in the rules in Order XXXVIII relating to attachment before

judgment. If, therefore, the claim by the Official Receiver, in whom the insolvent's property has become vested after the attachment, does not fall within the class of claims governed by Order XXI, rules 58 to 63, it may be taken that it is not also a claim to be dealt with under Order XXXVIII, rule 8, where the attachment was before judgment.

If the property has vested in the Official Receiver before the attachment, I have no doubt that the claim made by him for the release of that property falls within Order XXI, rule 58, but if the adjudication is after the attachment, he cannot attack the attachment itself as having been invalid or improper on the date when it was effected. All that he could do is to contend on the strength of section 34, clause (1) of Act III of 1907 (section 51 of the Provincial Insolvency Act of 1920) and section 16, clause (2) (a) of Act III of 1907 that the decree-holder's right to proceed in execution against the attached property had come to an end on the date of the order of adjudication with effect from which date the property vests in the Official Receiver. As stated in *Gobind Das v. Karan Singh*(1) "Upon the adjudication in insolvency, the attachment ceased to have any effect. All the property of the insolvent vested in the Receiver."

Order XXI, rule 58, applies to a claim made on the ground that the property is not liable to attachment. Order XXI, rule 59, says :

"The claimant must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached."

Order XXI, rule 60, says that

"Where the Court is satisfied that the property was not,

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(1) (1918) I.L.R., 41 Mad., 849 (F.B.). (2) (1918) I.L.R., 41 Mad., 28.

(1) (1918) I.L.R., 40 All., 197.

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when attached, in the possession of the judgment-debtor, etc., the Court shall make an order releasing the property, etc.”

Order XXI, rule 61, says :

“Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor, etc., it shall disallow the claim.”

Then Order XXI, rule 63, is enacted making it necessary that a suit by the unsuccessful party has to be brought to nullify the order passed on a claim to which the previous rules apply, as that order is conclusive subject to the result of the suit. We have then article 11 of the Limitation Act which prescribes a period of one year for the suit contemplated in Order XXI, rule 63.

The Official Receiver in whom the property vested only after attachment cannot make a claim on the ground that the property was not liable to attachment on the date it was attached : he cannot adduce evidence to show that, at the date of the attachment, he had an interest in, or was possessed of, the property attached ; and the Court cannot in the language of Order XXI, rules 60 and 61, decide in favour of the Official Receiver on the ground that the “property was not, when attached” the judgment-debtor’s property, or decide against him on the ground that “at the time it was attached” it belonged to the judgment-debtor. In fact, the Official Receiver’s claim (when the vesting in him was after attachment) is a statutory claim which he is entitled to make under section 34 of the Provincial Insolvency Act (III of 1907), and not a claim based on the circumstances contemplated in Order XXI, rules 58 to 63. The claim of the Official Receiver should be dealt with therefore by the Court under its inherent powers under section 151 of the Civil Procedure Code and not under Order XXI. In *Ganga Din v. Khushali*(1) and in the

other cases cited, the question whether a claim by an Official Receiver in whom the property became vested after the date of attachment fell under sections 278 to 283 was not directly raised ; the Official Receiver himself seems to have filed his petition as one falling under those special sections of the Civil Procedure Code and the Court dealt with the cases on that footing and decided in favour of the Official Receiver even on that footing. But in this case, the Official Receiver is sought to be defeated by holding up article 11 of the Limitation Act as a defence against the suit brought by him on failure of his claim petition. I am clear, for the reasons above given, that his claim would not fall under the claim chapters of the Civil Procedure Code. The order dismissing his claim was not, therefore, one passed under those provisions, 60 or 61, and Order XXI, rule 63, therefore does not make the order passed against him “conclusive.” It follows that article 11 also does not apply. It was held by this Court in this very case on an Appeal from the order dismissing the Official Receiver’s claim that no appeal lay from the said order and that his remedy lay in a suit to obtain the money which remained in the attaching Court and which had become vested in him. If, in the meanwhile, the money has been paid over to the attaching decree-holder, the Official Receiver has got his Common Law remedy of recovering that money as money had and received by the decree-holder for the use of the Official Receiver, and the limitation for the suit is three years. As the money was paid to the decree-holder (first defendant) only in December 1915 and the present suit was brought in November 1918, the suit is clearly within time under article 62. It was, however, argued that though the one year’s limitation under article 11 may not apply, the one year’s limitation under article 13 might apply.

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(1) (1885) I.L.R., 7 All., 702.

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Article 13 relates to a suit to alter or set aside a decision or order of a Civil Court in any proceeding other than a suit. Assuming that the order of December 1915 against the Official Receiver has to be set aside, it was not an order in a proceeding other than a suit. *Shankar Sarup v. Mejo Mal*(1) clearly says that article 13 does not apply to proceedings in suits; in other words, it relates to orders passed in disputes which did not begin with the filing of a plaint in a suit, such as disputes initiated by applications under the Guardian and Wards Act, the Succession Certificate Act and so on; such applications and the proceedings connected with such applications being not proceedings in suits. Their Lordships, therefore, held that orders passed in miscellaneous applications in the course of execution proceedings (which are proceedings in suits) are not governed by article 13. I respectfully dissent from the observations in *Kishori Lal v. Kuber Singh*(2) holding that article 13 applies to orders made in proceedings in execution in a suit. The learned Judges of the Allahabad High Court construed the Privy Council decision in *Shankar Sarup v. Mejo Mal*(1) as based on the ground that an order for rateable distribution need not be set aside by a suit and therefore article 13 did not apply to a suit brought to enforce rights in contravention of that order. Their Lordships of the Privy Council however clearly say at page 323 that they "concur in the further observation made by the learned Judge in that case" (that is, *Vishnu Bhikoji Phadke v. Achut Jagunnath Chute*(3):

"That the application of the 13th article is also precluded by the fact that the order for distribution was a step in an execution proceeding and was therefore made in the suit in

(1) (1901) I.L.R., 23 All., 313 (P.C.). (2) (1911) I.L.R., 33 All., 93.
(3) (1891) I.L.R., 15 Bom., 438.

which the decree was made which was in process of execution. The order for distribution was thus an order in a suit.")

To set aside that order, therefore, a suit can be brought within 6 years under the general article 120 as it is not governed by article 13.

In the result, I would reverse the lower Court's judgment and give a decree for the plaintiff for Rs. 7,310 (claimed) with interest at 6 per cent per annum from 21st December 1915 till recovery and proportionate costs throughout on Rs. 8,600 in both Courts against the defendants. The Memorandum of Objections is dismissed.

SPENCER, J.—The plaintiff is the Official Receiver of South Malabar, and his suit having been dismissed as time barred he appeals. The lower Court held that article 11 of the 1st schedule to the Indian Limitation Act applied to this suit and that as it was not instituted within one year of the Subordinate Judge's order of December 21, 1915, it was out of time. There is no limitation for a Receiver in insolvency obtaining possession of the insolvent's property, which vests in him by section 18 of the Provincial Insolvency Act, at any time between the date of the making of an order of adjudication and the date of its being annulled.

Although the Bombay and Allahabad High Courts have treated applications to take possession of estates when made by Official Assignees and Administrators-General as being in substance claims under section 278 of the Civil Procedure Code of 1882, even though started by a Judge's summons or an ordinary motion, [*vide, Kashi Prasad v. Miller*(1), *Charles Agnew Turner v. Pestonji Farduaji*(2), *Sardarmal v. Aranvayal*

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(1) (1885) I.L.R., 7 All., 752.

(2) (1896) I.L.R., 20 Bom., 403.

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Sabhapathy(1) and *Bhaiji Bhimji v. The Administrator-General of Bombay*(2)] and although in this Court where the money was under attachment the Official Assignee's application has been termed in the note to the judgment a "claim petition" [*Kristnasawmy v. Official Assignee of Madras*(3)] yet as an Official Receiver is an officer of the Court, the semi-official act of this receiver in asking the Court to issue a cheque for the money of the insolvent deposited in Court bears little or no resemblance to the act of a stranger who prefers a claim to property attached in execution of a decree on the ground that such property is not liable to attachment. Ordinarily the intervention of the Court in aiding an Official Receiver in obtaining delivery of the insolvent's property would be undertaken in exercise of its powers under section 18 (3) or section 35 of the Provincial Insolvency Act (III of 1907). But the Official Receiver's application in this case was not made to a Court exercising insolvency jurisdiction but to the Sub-Court which had jurisdiction to deal with applications to execute the decree in Original Suit No. 23 of 1912 passed by the Temporary Sub-Court of Palghat. There was also an application by Rangam Pattar (first respondent here and Receiver in Original Suit No. 23 of 1912) to pay the money out to the plaintiffs in that suit and it came on for disposal simultaneously with the Official Receiver's application. Both applications were treated by the Subordinate Judge of Palghat and by this Court in appeal as miscellaneous petitions in execution and dealt with under section 47, Civil Procedure Code. In the lower Court it seems to have been contended in this suit that the Official Receiver's petition was an application for rateable distribution under section 73.

(1) (1897) I.L.R., 21 Bom., 205. (2) (1899) I.L.R., 23 Bom., 428.
(3) (1903) I.L.R., 26 Mad., 673.

I am of opinion that it was neither a claim to property attached under Order XXI, rule 58, nor an application for rateable distribution under section 73. The Official Receiver was therefore not bound to institute a suit within one year, and his suit is not barred under article 11 of the Limitation Act. Neither is it barred under article 13, seeing that the Subordinate Judge's order of December 21, 1915, was a proceeding in a suit.

This is the only point arising in the Appeal. As it must be found in the appellant's favour, the decree of the lower Court is set aside and the plaintiff will get a decree for the amount of Rs. 7,310 with interest at 6 per cent from December 21, 1915, the date when the cause of action arose, till realization and costs as stated in my learned brother's judgment in this and the lower Court.

N.B.

APPELLATE CIVIL.

*Before Sir William Ayling, Offg. Chief Justice, and
Mr. Justice Krishnaswami Rao.*

KUTHIRAVATTATH KONGASSERI MOKSHATH
THOTTAMMA *alias* AMMA NEITHIYAR (FIRST DEFENDANT),
APPELLANT,

1921,
July 27.

v.

C. S. SUBRAMANIYYAN AND ANOTHER (PLAINTIFF AND
THIRTY-SECOND DEFENDANT), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XXVI—Appointment of successive Commissioners for one valuation, legality of—Duty of Court on receipt of objections to a Commissioner's report.

Unless a Commissioner appointed under Order XXVI, Civil Procedure Code, has so totally misconceived his duties as to render

*Second Appeal No. 671 of 1919.

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MANIYAN. his report and valuation useless as a basis for decision, in which case his report should be superseded and a new Commissioner appointed, the duty of the Court, whenever a Commissioner's report is objected to, is to hear objections in open Court and to decide with the aid of such evidence as it may take whether the valuation should be varied and if so in what direction. Once a report is superseded it cannot thereafter be used as a basis for a valuation.

The practice in Malabar of appointing successive Commissioners, whenever objections are filed to their reports, deprecated.

SECOND APPEAL against the decree of ANANTANARAYANA AYYANGAR, Temporary Subordinate Judge of Palghat at Calicut, in Appeal Suit No. 309 of 1917, preferred against the decree of C. S. DEVARAJA AYYAR, District Munsif of Ottapalam, in Original Suit No. 399 of 1917.

The facts are set out in the Judgment.

S. Srinivasa Ayyangar and *O. Unikanda Menon* for appellant.

C. V. Ananta Krishna Ayyar, *P. V. Parameshwar Ayyar* and *O. R. Mahadev Ayyar* for respondent.

The Court delivered the following JUDGMENT:

The defendant had a mortgage in 1889 of certain properties belonging to the Cochin Government in British territory. Proposals for its renewal were made in the beginning of 1911. As the District Munsif points out in paragraph 14, "the purapad was collected, the demise was renewed, renewal fee was paid and accepted, kanom deed was written and executed on stamp paper supplied, by the tenant, and the kychit was prepared on a similar stamp paper." But there was no registered instrument. There can be little doubt that the first defendant objected to the new terms, though apparently the circar did not consider the door was closed for reconsideration. But eventually, the circar gave a melcharth to the plaintiff in 1913. He sues to redeem the old kanom of 1889.

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MANIYAN. The District Munsif held that the contract was complete and that the only course open to the circar was to have sued for specific performance to compel the first defendant to accept the mortgage with the new terms. The Subordinate Judge held that the contract was repudiated by the first defendant and that it gave her no right to resist possession.

Mr. Srinivasa Ayyangar contended before us that, as the plaintiff took with notice of the agreement of the first defendant, he was in a fiduciary position towards her and that therefore his suit should fail.

Reliance was placed on section 91 of the Trusts Act. This argument proceeded on the assumption that there was an enforceable contract. Even on this assumption, it seems to us that, as in the written statement she repudiated the contract, it is not open to the first defendant to plead that the plaintiff was a *quasi* trustee for her. This disposes of the main question argued.

Now comes the question relating to the appointment of three successive Commissioners by the first Court. As the procedure followed by the lower Court appeared to us to find no support in law, and as we were informed that the practice followed in this case is typical of what happens in valuing improvements in almost every Malabar suit, we think it desirable to express our emphatic disapproval of the course followed. What happened was apparently this: at first a Commissioner was appointed to make the valuation. His conclusions were objected to by both the parties. Thereupon, the first defendant asked for the appointment of a second Commissioner. The plaintiff consented to this course. Once again objections were raised to the report. A third Commissioner was appointed with the consent of the parties. He sent in his report and valuation. Again objections were raised. The Munsif then said that he preferred the valuation

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of the first Commissioner as he was a respectable vakil, and the Subordinate Judge has agreed with him.

This procedure seems to us to be wholly wrong. Ordinarily, when the report of a Commissioner is objected to, the Court should hear the objections in open Court and decide with the aid of such evidence as it may take whether the valuation should be varied and if so in what direction. This is the obvious duty of the Court. There may be cases in which the Commissioner had so totally misconceived duties as to render his report and valuation useless as a basis for a decision. In such cases, no doubt, a new Commissioner may be appointed. This would mean that the old report and valuation were superseded. But to regard the reports and valuations of the three Commissioners as available data from which the option of the District Munsif to choose any one of them is to be exercised is opposed to every principle governing Courts in such matters. It means that the Court abdicates its function of deciding the matter on hearing the objection and reserves to itself the privilege of selecting one of the reports as its decision.

It certainly encourages a haphazard and careless selection of Commissioners. It subjects parties to unnecessary and avoidable expense, and encumbers the records with useless papers. In our opinion this practice should be put an end to at once. We want it to be distinctly understood that the filing of objections to a report is no ground for appointing another Commissioner and that in all cases where a second Commissioner is appointed to do the same work, the reasons for adopting such a course must be recorded in writing to enable the appellate Court to see whether the judicial discretion has been properly exercised.

In the present case in law there is only one possible meaning that can be attached to the procedure followed.

It must be assumed that the Court regarded the work done by the first Commissioner to be so bad as to entail the rejection of his report, and that with the consent of the parties it appointed a second Commissioner. Similarly, it must be taken that the Court rejected the second valuation also and asked for a third valuation from another Commissioner to which the parties consented. In this view, the District Munsif was not justified in regarding the first valuation as still alive and in basing his judgment upon it. What he ought to have done is to hear objections to the third valuation and report in open Court and to decide whether any and if so what modification should be made in that report, taking evidence if necessary. We must now direct the Subordinate Judge to do this. He will pass a fresh award regarding the value of improvements claimed by the first defendant in the light of the above observations and submit fresh findings thereon to this Court in six weeks. Seven days for objections.

N.B.

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APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

1921,
August 10.

ANTHAYA HEGADE AND ANOTHER (DEFENDANTS),
APPELLANTS,

v.

MANJAIYA SHETTY (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (V of 1908), sec. 64—Attachment of debt—Raising of attachment after successful claim proceedings—Success of suit to contest order on claim—Payment of debt in the interval, validity of—Revival of attachment—Payment of debt to benamidar, validity of.

The raising of an attachment on the success of claim proceedings is only provisional and the attachment is revived on the success of the suit by the attaching decree holder—*Bonomali Rai v. Prosunno Narain Chowdhry*, (1896) I L.R., 28 Calc., 829, followed. Hence any payment made by a debtor to his creditor, though after the raising of the attachment of the debt, cannot prevail against the attaching decree-holder who eventually succeeds in his suit.

SECOND APPEAL against the decree of K. GOPALAN NAYAR, Acting Subordinate Judge of South Kanara, in Appeal Suit No. 117 of 1919 preferred against the decree of K. BALAJI RAO, District Munsif of Coondapoor, in Original Suit No. 465 of 1918.

The facts are set out in the Judgment:

B. Sitaram Rao for appellant.—The defendants were not parties to claim proceedings; *lis pendens* does not affect a person who is not a party: *Pethu Ayyar v. Sankaranarayana Pillai*(1). *Lis pendens* does not apply to moveables: *Govind Baba Gurjar v. Jijibai Sahab*(2), and *Puninthavelu Mudaliar v. Bhashyam Ayyangar*(3). A

* Second Appeal No. 700 of 1920.

(1) (1917) I.L.R., 40 Mad., 955. (2) (1912) I.L.R., 36 Bom., 189, 198.
(3) (1902) I.L.R., 25 Mad., 406, 422.

payment is not an alienation. Section 64, Civil Procedure Code, does not apply, as the attachment had been raised: *Patringa Koer v. Madhavan and Ram*(1). Even if attachment is subsequently revived, it does not matter. I am discharged by payment to the benamidar: *Singa Pillay v. Govinda Reddy*(2).

K. Yegnanarayana Adiga for respondent.—I am a third party. The payment cannot be said to have been bona fide. A payment to one having no authority to receive is no good. On success of suit, attachment revives and section 64, Civil Procedure Code, applies and one need not reattach: *Krishnappa Chetty v. Abdul Khader Sahib*(3), *Lalu Mulji Thakar v. Kashibai*(4), *Bonomali Rai v. Prosunno Narain Chowdhry*(5), *Ali Ahmad Khan v. Bansidhar*(6) and *Ram Chandra Marwari v. Mudeshwar Singh*(7).

The Court delivered the following JUDGMENT:

The question for our decision in this Second Appeal is whether the payment of the two instalments of the plaint bond made by the defendants to Rukmini Shettithi and Mahabala Hegade on 18th March 1914 and 17th February 1915, respectively, are valid against the plaintiff. The learned Subordinate Judge has found them to be not valid and has disallowed the plea of partial discharge based on them.

The bond sued on is a simple money bond payable by instalments and was executed by the defendants in the name of one Sinnappa Chetty. Now it has been found that Sinnappa Chetty was merely a name lender or benamidar for one Nagappa Hegade to whom the debt

(1) (1911) 14 C.L.J., 476.

(2) (1918) I.L.R., 41 Mad., 435.

(3) (1915) I.L.R., 38 Mad., 535.

(4) (1886) I.L.R., 10 Bom., 400, 407.

(5) (1896) I.L.R., 23 Calc., 829, 834.

(6) (1909) I.L.R., 51 All., 367.

(7) (1906) I.L.R., 33 Calc., 1158.

ANTHAYA was really due. One Sankayya got a decree against **MANJAIYA.** Nagappa in Original Suit No. 496 of 1909 and attached the plaint debt in execution of his decree in 1913. Before that, the bond had been assigned by Sinnappa to Rukmini and Mahabala who are the persons to whom the payments in question here were made by the defendants and who are the children of Nagappa. On the attachment being effected they preferred a claim under Order XXI, rule 58 of the Civil Procedure Code to the whole debt. Their claim was allowed and the attachment was withdrawn on 17th February 1914. Sankayya, the defeated decree creditor, then brought a suit against Nagappa, his judgment-debtor, and against Sinnappa Chetty and his assignees, Rukmini and Mahabala, and against the present defendants, the debtors under the bond, for a declaration that Sinnappa was a benamidar for Nagappa and so were his assignees and that he was entitled to attach the debt in execution of his decree. This suit was filed in April 1914. The suit was decreed in Sankayya's favour and the Appeal and Second Appeal against him failed and the debt due under the bond was sold in Court auction in 1918; whether there was a fresh attachment or not does not appear. The plaintiff purchased the debt in that auction and now sues for the whole amount due as it stood on the date of the original attachment.

It will be observed that the payments pleaded by the defendants were made the first one just after the original attachment was raised and before Sankayya's declaratory suit was filed, and the second when that suit was pending; both were made after the instalments fell due under the bond but after the date of the original attachment. Prima facie plaintiff is not entitled to recover more than what was due under the bond on the date of his purchase. But it is urged that these two payments

do not amount to a valid discharge against him on two grounds.

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It is first urged that the payments were made to two persons who had no right whatever to the money and so they could not amount to a valid discharge against Nagappa, whose rights plaintiff purchased, nor against the plaintiff. No doubt it has been found in Sankayya's declaratory suit that Rukmini and Mahabala had no rights in the suit bond, but that evidently means that they had no beneficial interest in it, for Sankayya's own case was that they took the assignment as benamidar for Nagappa and that in fact the assignment was made merely to change the benamidars. By the assignment Sinnappa transferred the bond debt to Nagappa's wife and child for Nagappa apparently at his own instance. The argument that a benamidar is a trustee and cannot transfer his trust to a third party does not apply to the facts here and is untenable. Taking Rukmini and Mahabala as benamidars for Nagappa, a payment to them will be good against him unless it was made after notice and objection by him. It has been laid down that a benamidar is entitled to sue in his own name both as regards simple bonds and as regards mortgage debts—see *Singa Pillay v. Govinda Reddy*(1), and the cases cited therein—and that the real owner need not be made a party. That being so, it follows that a payment made to the benamidar in discharge of the bond will bind the real owner if made without notice and objection by him. The learned Subordinate Judge says the payments in this case were not made *bona fide*, because the defendants knew the benami character of the assignment to Rukmini and Mahabala, but that fact will not interfere with the payment being good against Nagappa. Their

(1) (1918) I.L.R., 41 Mad., 435.

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MANJAIYA. knowledge by itself has no bearing on the validity of their payments as against him. There is no evidence that Nagappa required the defendants not to pay to them nor has he objected to such payments. It is more likely that the payments were made with his knowledge and connivance. The first objection therefore fails and must be overruled.

The next objection is that the payments were made after the debt had been already attached and were therefore void against all claims enforceable under the attachment under section 64 of the Civil Procedure Code, and as plaintiff's purchase was one in execution they are not valid against him. It is true that the payments were made only after the original attachment was raised by the order of Court when the claim of the assignees was allowed; but it is argued for the plaintiff that when Sankayya brought his suit under Order XXI, rule 63 of the Civil Procedure Code and got a declaration that the debt was attachable in execution of his decree and that his first attachment was a valid one, the original attachment was revived and any payment made after it to the judgment-debtor is invalidated by section 64 of the Civil Procedure Code; a payment to the judgment-debtor's benamidar being a payment for the former's benefit will no doubt stand on the same footing. In support of the contention that the attachment should be taken as revived and continuing in force all the time reliance is placed on *Ali Ahmad Khan v. Bonsidhar*(1), *Bonomali Rai v. Prosunno Narain Chowdhry*(2), *Ram Chandra Marwari v. Mudeshwar Singh*(3), and *Lalu Mulji Thakar v. Kashibai*(4). These authorities do lay down that the release from attachment on the claim

(1) (1909) I.L.R., 31 All., 367.

(2) (1896) I.L.R., 23 Calc., 829.

(3) (1906) I.L.R., 33 Calc., 1158.

(4) (1886) I.L.R., 10 Bom., 400, 407.

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We also think the fact that the defendants were not made parties to the claim makes no difference in this case. They were parties to the subsequent suit and, as we are inclined to think, the effect of the decree in that suit was to restore the attachment which had been provisionally removed, it must be taken to have been restored as against all parties affected by it or at any rate against all persons who were parties to the suit. It was also argued that there was a difference between debts and other properties on this point, because the mode of attachment of debts prescribed by Order XXI, rule 46, restricts the effect of the prohibition till the further orders of the Court are passed, whereas in the case of immoveables or other properties there is no such limitation. This difference is merely due to the nature

(1) (1896) I.L.R., 23 Calc., 829.

(2) (1911) 14 C.L.J., 476.

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of the property attached and it makes no difference in our opinion as to the effect of the attachment. When the attachment is taken as revived by the decree in the subsequent suit we must take it the order of release, which is as much a provisional order in the case of debt as in other cases is cancelled and any payment made under that order of release becomes void as section 64 comes into play. We must therefore allow plaintiff's second objection and hold that the two payments made in this case are not valid against him on that ground.

The decree of the Subordinate Judge is therefore right. The Second Appeal fails and is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1921,
September
1.

A. T. K. P. L. M. MUTHIAH CHETTY (PLAINTIFF),
APPELLANT,

v.

PALANIAPPA CHETTY AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXI, rr. 62 and 63—Limitation Act (IX of 1908), art. 11—Attachment before judgment—Order for attachment passed, no actual attachment made—Claim petition by mortgagee from judgment-debtor—Petition dismissed on merits—Subsequent suit by mortgagee to establish his right withdrawn after obtaining leave of Court to file another suit—Later suit for sale on mortgage more than one year after order on claim petition—Suit, whether barred by limitation—Claim petition in the absence of attachment, whether competent—Acquiescence of parties—Jurisdiction of Court—Effect of order.

* Appeal Suit No. 145 of 1917.

A mortgagee from a judgment-debtor filed a claim petition in respect of his hypotheca under Order XXI, rule 62, Civil Procedure Code, in execution proceedings in a suit in which the plaintiff had obtained a conditional order for attachment before judgment, but no attachment had ever been actually made. On the claim petition being dismissed on the merits, the mortgagee filed a suit to establish his right but withdrew it after obtaining leave of the Court to file another suit. More than a year after the order on his claim petition, he instituted a suit for sale on his mortgage against the auction purchasers in the execution sale in the previous suit and the mortgagors, who pleaded the bar of limitation under article 11 of the Limitation Act. It appeared that neither the Court nor the parties to the claim petition were aware of the absence of attachment in the previous suit.

Held, that the mortgagee having filed the claim petition as if the properties had been attached, and the decree-holders having acquiesced in the procedure adopted by him, the Court had jurisdiction to deal with his claim petition as one made under Order XXI, rule 62, Civil Procedure Code, and the order passed thereon was subject to the incidents specified in Order XXI, rule 68 of the Code;

and that the suit for sale fell under article 11 of the Limitation Act, and was barred by limitation.

APPEAL against the decree of K. A. KANNAN, Temporary Subordinate Judge of Sivaganga, in Original Suit No. 91 of 1915.

The plaintiff sued to recover the amount due on a mortgage bond (Exhibit E), dated 19th March 1910, executed by the widows of two partners, Muthu and Raman Chetty, as guardians of first to fourth defendants, their minor sons. Defendants 5 to 10 were some of the creditors of the deceased partners, who had sued and eventually obtained a money decree for about Rs. 30,000, interest and costs, and they had obtained at an early stage of their suit, on 14th March 1910, an order for attachment before judgment but no attachment was ever actually made in pursuance of the order. The mortgage to the plaintiff was executed, after the order

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for conditional attachment, for a consideration of Rs. 33,200, out of which Rs. 18,900 was due to himself and the balance was to be paid to four creditors of the firm. The defendants pleaded that the mortgage was a sham and fraudulent transaction entered into between the mortgagors and the plaintiff (a close relation) to defeat and defraud the other creditors (defendants 5 to 10 herein) of the firm. Subsequent to the attachment before judgment in the creditors' suit, the decree-holders therein obtained the issue of a sale proclamation. The mortgagee (plaintiff) preferred a claim petition, dated 20th March 1912, which was disallowed on 15th April 1912; and the sale was held and delivery made on 2nd January 1913. The mortgagee had brought a suit (Original Suit No. 56 of 1913) for a declaration that the sale should be subject to his mortgage right. He, however, withdrew that suit, having obtained leave of the Court to sue again, and he then brought the present suit for sale on his mortgage on 7th October 1915. The defendants pleaded on these facts that the suit was barred under article 11 of the Limitation Act. The Subordinate Judge, dismissed the suit, holding that the mortgage-bond was a nominal transaction unsupported by consideration and was brought about to defraud the creditors of the firm. The plaintiff preferred this Appeal.

C. S. Venkata Achariyar for appellant.—The view of the Lower Court that the mortgage was unsupported by consideration, was a sham and fraudulent transaction, is wholly unsupported by evidence. There was clear intention to create a mortgage: even putting the onus on the plaintiff, he has amply discharged it, and the rule of fraudulent preference does not apply apart from the Insolvency law. Section 53, Transfer of Property Act, does not prohibit preference of some creditors to others:

see *Musahar Sahu v. Lala Hakim Lal*(1). The suit is not barred by limitation; article 11, Limitation Act, does not apply, as there was in fact no attachment, and the proceedings under Order XXI, rule 62, are wholly without jurisdiction.

T. Ranga Achariyar and *E. Duraiswami Ayyar* for respondents.—There are several suspicious circumstances in the execution of the mortgage. It is at the least fraudulent under section 53 of the Transfer of Property Act. In any event the suit is barred by limitation under article 11 of the Limitation Act. The plaintiff is estopped from questioning the jurisdiction of the Court to entertain the claim proceedings, though there was no attachment in the case. It is not a case of inherent want of jurisdiction which cannot be cured by consent or acquiescence of parties. The order was passed under the Code. On the admission of parties as to the factum of attachment, the Court entertained the claim and passed the order. No fraud is alleged in the case. On a judicially assumed attachment the Court acted; and the Court had competent jurisdiction. The sale is valid; want of attachment is only an irregularity.

C. S. Venkata Achariyar in reply.—Order XXI, rules 58 to 63, Civil Procedure Code, apply only to cases of properties attached. Article 11, Limitation Act, applies only to cases falling under Order XXI, rule 63 of the Code. The Court has no jurisdiction to entertain a claim petition, where there is no attachment. The fact that both parties were under a mistake that there was an attachment does not give jurisdiction to the Court to proceed under Order XXI, rule 62: see *Joy Prokash Singh v. Abhey Kumar Chund*(2), *Bhar v. Raghunath*(3).

(1) (1916) I.L.R., 43 Cal., 521 (P.C.),

(2) (1897) 1 C.W.N., 701.

(3) (1906) I.L.R., 30 Bom., 229 at 235.

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Nusserwanjee Pestonjee v. Meer Mynodeen Khan Wullud Sudroodeen Khan Bhadur(1), *Sarjugsharan Lal v. Dukhit Mahato*(2), *Chintam Reddi Sanyasi v. Sri Rajasagi Appala Narasimha Raja Garu*(3) and Maxwell's Interpretation of Statutes, page 628. No suit to set aside the sale is necessary in this case. If there is no attachment, there is no claim enforceable under the attachment under Order XXI, rule 63, Civil Procedure Code. Just as no suit to establish the right under a claim petition is necessary, where an attachment has been set aside at the instance of another claimant or the decree-holder is paid otherwise, so also if there is no attachment there is no claim enforceable under the attachment. Where there is no jurisdiction in a Court in a matter, the mere fact that it was admitted by a party will not confer jurisdiction or estop him: see *Tukuram v. Hari*(4), *Jungheim, Hopkins & Co. v. Foukelmann*(5). Section 115, Indian Evidence Act, does not apply. Article 11, Limitation Act, does not apply as it refers to attached property. Even if the order is binding on the plaintiff and should be set aside, article 11, Limitation Act, does not apply; Order XXI, rule 63, does not specify any particular period of limitation; article 120 of the Act, giving six years, applies. The order of withdrawal with leave to sue again gives to the plaintiff a right of suit on his mortgage. The order is binding on the other side and they did not appeal against that order: see *Gollampalli Subbayya v. Shankara Venkataratnam*(6).

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OLDFIELD, J.—On the merits the question in this Appeal is whether Exhibit E, a hypothecation bond in

(1) (1897) 6 M.I.A., 134.

(3) (1917) M.W.N., 851.

(5) [1909] 2 K.B., 948.

(2) (1913) 17 C.W.N., 496.

(4) (1904) I.L.R., 28 Bom., 601 (F.B.).

(6) (1917) M.W.N., 851.

favour of plaintiff-appellant by the widows of two partners, Muthu and Raman Chetty, as guardians of first to fourth defendants, their minor sons, is without consideration and merely colourable or was executed in the words of section 53, Transfer of Property Act, with intent to defeat or delay creditors.

The undisputed circumstances are that Exhibit E hypothecates for its full value all the immoveable property of first to fourth defendants; that plaintiff is the brother of one executant, the widow of Muthiah Chetty; and that of the four other creditors of the firm, whose debts plaintiff was to pay as part of the consideration, one is a dayadi of plaintiff and a cousin of the widow of Raman Chetty and another is plaintiff's partner and nephew. Plaintiff had been an agent of the firm and knew that it had been declining in prosperity since the death of Raman Chetty in 1909. Exhibit E moreover was executed just after fifth to fifteenth defendants, the contesting respondents, other creditors of the firm, who eventually obtained a decree against it for a little over Rs. 30,000, interest, and costs had at an earlier stage in their suit obtained a conditional order of attachment before judgment, of which plaintiff and the creditors may be supposed to have been aware, although the attachment was never actually made and, it may be added, is not relied on as invalidating this alienation. On these facts there is no doubt that the lower Court was justified in imposing the burden of proof of the substantial character and good faith of Exhibit E on plaintiff.

That, however, did not entitle the lower Court to require him, as it has done in respect of the greater part of the consideration and on other parts of the case, to discharge that burden with unreasonable strictness or to criticise his attempts to do so perversely.

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[His Lordship then dealt with the evidence and concluded as follows:]

The conclusion must therefore be that consideration passed for Exhibit E except this small item of Rs. 1,800; and fifth to tenth defendants' case, that the document was a mere pretence and that there was no intention to create rights by means of it, must fail.

To turn to the application of section 53, Transfer of Property Act, there is no doubt no definite evidence of the existence of any creditor besides fifth to tenth defendants and those who have been paid by Exhibit E. The suspicions of the lower Court, based on the dates of the purchase of stamp papers and the 12 per cent rate of interest, which it thought oppressive, but which is in fact high but not exceptional, have not been shown to be well founded. We have then no doubt a transaction which exhausted the executants' assets for the sole benefit of some only of their creditors, including, it is true, three close relatives of whom one brought it about at a time of pressure on the estate. But, there being no question of insolvency, that is not sufficient. For, to follow the latest authority, *Musahar Sahu v. Lala Hakim Lal*(1), although Exhibit E prefers some creditors to others, it is not an instrument which removes property from the creditors to the benefit of the debtor and, after the foregoing findings, there is no ground for impeaching it in the fact that the fifth to tenth defendants, creditors, were losers by payment being made to a preferred creditor, the plaintiff. On the merits, therefore, plaintiff is entitled to succeed.

Fifth to tenth defendants have, however, resisted his claim on another ground. Reference has already been made to the fact that, although a conditional attachment

(1) (1916) I.L.R., 43 Cal., 521 (P.C.).

before judgment was ordered, none was actually made. This is said to have been due to delay in payment of fees. But neither plaintiff nor fifth to tenth defendants were, so far as appears, aware of the fact; and the latter proceeded, as though there had been an attachment, to obtain issue of a sale proclamation whilst the former, in Exhibit VI, claimed under Order XXI, rule 62, Civil Procedure Code, a declaration that the sale should be subject to Exhibit E. Thereon, without reference by the Court or the parties to the absence of an attachment, plaintiff's claim was disallowed under Exhibit VI (a) on 15th April 1912. A sale was held and delivery was given, as Exhibit VII shows, on 2nd January 1913. As to plaintiff's next step, the only information before us is given by his present plaint, that he brought Original Suit No. 56 of 1913 for a declaration that the sale should be subject to his mortgage right. Whether this suit was brought within one year of Exhibit VI (a) and whether plaintiff would have been advised to ask for leave to amend and include a prayer for other reliefs in it is not clear. But in any case he withdrew it, obtaining leave in Exhibit AA to sue again, and he then brought the present suit for recovery by sale on his mortgage on 7th October 1915. Fifth to tenth defendants contend that as this suit is brought one year after Exhibit VI (a) it is barred under article 11, schedule 1, Limitation Act, the rejection of the claim having become final under Order XXI, rule 63.

The suggestion that Exhibit AA is a recognition, binding on the lower or this Court of plaintiff's right to bring his present suit can be dismissed shortly, because such recognition is not entailed by the wording of that order and would not have been within the power of the Court which passed it. So also the lower Court's ground of decision that with reference to *Bhiku v.*

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Shujat Ali(1) and *Ganesh v. Damoo*(2), article 11 is not applicable to plaintiff's suit, brought to recover a debt on the security of the property, not to establish any right in it. For in the first of these cases the question was not of an ordinary claim petition, based like Exhibit VI on a mortgage, but of a petition to remove obstruction to delivery under section 335 of the Code then in force, corresponding with Order XXI, rules 100, 101; and there was nothing to bar the subsequent suit so far as it related to a different relief, the recovery of the sums due, which was asked for in the alternative and which the Court considered. The second authority relied on proceeded on the grounds, first, that the order in question was not on a claim, but was passed under section 287, corresponding with Order XXI, rule 66; and, next, that an order refusing to recognize a mortgage and continuing an attachment free from it is not one which must be displaced by the suit contemplated in article 11. But the latter conclusion is opposed to *Nemaganda v. Paresha*(3), which with all deference is not susceptible of the explanation proposed in the decision under consideration; and it is impossible to understand how an order disallowing *in toto* the mortgage right claimed is not as essentially an adverse order of the kind contemplated in Order XXI, rule 63, as one continuing the attachment subject to the mortgage instead of releasing it altogether.

The more serious argument for plaintiff is however that, as there was in fact no attachment, the claim proceedings were founded on a mistake of the Court and both parties and therefore had no legal effect or resulted at most in an order which may have been a

nullity, since it was not one contemplated by the Code, and was in any case not subject to Order XXI, rule 63 or article 11; and it is suggested further that, as plaintiff was induced by fifth to tenth defendants' misrepresentation, even if it was unintentional, to embark on this course of procedure, the latter cannot benefit by the prejudice which results from their own conduct. This suggestion, however, is untenable. Plaintiff, no doubt, may have inferred from the sale proclamation issued at fifth to tenth defendants' instance, which he mentioned in Exhibit VI, that there had been an attachment in the ordinary course. But there is no question of fraud on their part and, when it was open to him to verify his inference by enquiry and he failed to do so, the fault was his own. In consequence of this failure he thought himself entitled to choose the cheap and speedy remedy afforded by the claim procedure in preference to the ordinary suit, subject to no special limitation, by which alone he could otherwise have proceeded; and he presumably had regard to his own advantage in his choice. Fifth to tenth defendants' subsequent omission to plead that there was no attachment, was not an invitation to plaintiff to continue in the course he was taking, but merely an acquiescence in his doing so, by the consequences of which they would equally with him have been bound if the result on the merits had been against them. The fact is simply that, plaintiff having submitted his claim to the Court in circumstances which did not strictly authorize his doing so, and fifth to tenth defendants having waived an objection on which they might have relied, both gave an implied consent to the investigation proceeding.

The principle applicable to such cases was stated generally by BOWEN, L.J., in *Ex parte Pratt*(1) as being

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(1) (1902) I.L.R., 29 Calc., 25.

(2) (1916) 18 Bom. L.R., 782.

(3) (1898) I.L.R., 22 Bom., 640.

(1) (1884) 12 Q.B.D., 334.

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that no one has a right so to conduct himself before a tribunal, as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him to turn round and say "you have no jurisdiction." This no doubt is subject to exceptions, those with which we are at present concerned being, to adopt the description of them in *Pisani v. Attorney-General for Gibraltar*(1), that departures from ordinary practice by consent will not nullify the proceedings or divorce them from the ordinary incidents of procedure (in that case a right of appeal) "unless there is an attempt to give the Court a jurisdiction, which it does not possess, or something occurs, which is such a violent strain on its procedure that it puts it entirely out of its course." It was held accordingly in *Toronto Railway v. Toronto Corporation*(2), and *Deno Nath Batabyal v. Ndhor Chunder Sett*(3), that the parties' consent did not enable the Court to deal with issues outside the scope of its statutory powers; and in *Ex parte Pratt*(4) already referred to, *Ex parte May*(5) and *Vishnu Sakharam Nagarkar v. Krishnarao Malhar*(6), that, the opposite case, where jurisdiction over the subject matter exists, requiring only to be invoked in the right way, the party who invited or allowed the Court to exercise it in the wrong way cannot afterwards challenge the legality of the proceedings due to his own invitation or neglect. One instance of entire diversion of the Court's procedure from its course may be given, because it is significant in the present connexion. In *Joy Prokash Singh v. Abhoy Kumar Chund*(7), claim proceedings without a preceding attachment were treated as a nullity, not on any ground such

as plaintiff here relies on, but because the decree under execution was for sale on a mortgage and recognition of a claim would *pro tanto* have deprived the mortgagee of its effect otherwise than in the regular suit contemplated by the law.

It is clear that plaintiff's resort to the claim procedure in the present case is within neither of these classes of exceptions. For it did not result in any entire diversion of the course of procedure but only in the selection of one of two procedures which were available instead of the other, and there has been no attempt to give the Court a jurisdiction which it did not possess, since its general power to deal with claims is not disputed. It is urged on the latter point that reference to its general power is an insufficient ground of decision because that power is not general or inherent, but derived only from statutory provisions and must be exercised only in accordance with them; that is, in the event specified in Order XXI, rule 58(1), of an attachment having been made. But a similar objection was, it is to be observed, available in *Ex parte Pratt*(1), *Ex parte May*(2) and *Vishnu Sakharam Nagarkar v. Krishnarao Malhar*(3), already referred to, and the fact that statutory powers were in question was not considered. In *Angan Lal v. Gudaramal*(4), an order appropriate to a claim petition was no doubt set aside on the ground, among others, that there had been no attachment. But the facts there were peculiar, since there had been no submission by both parties to the Court following the claim procedure and the Court entered on it in disregard of the petitioners' averments. In fact, cases of mistake and acquiescence such as plaintiff's must be rare, since the

(1) (1874) L.R., 5 P.C., 516.

(2) [1904] A.C., 809.

(4) (1884) 12 Q.B.D., 334.

(6) (1887) I.L.R., 11 Bom., 153.

(3) (1900) 4 C.W.N., 470.

(5) (1884) 12 Q.B.D., 497.

(7) (1897) 1 C.W.N., 701.

(1) (1884) 12 Q.B.D., 334.

(3) (1887) I.L.R., 11 Bom., 153.

(2) (1884) 12 Q.B.D., 497.

(4) (1888) I.L.R., 10 All., 479.

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 OLDFIELD, J. absence of an attachment will seldom be overlooked in the first instance or when evidence is adduced under rule 59. But in dealing with them it must be remembered that in accordance with *Sheodhyan v. Bholanath*(1) and *Sivakolundu Pillai v. Ganapathy Iyer*(2), the absence of an attachment will not make a Court sale illegal as between the parties to it and persons like plaintiff whose interest is affected by it; it is merely an irregularity, on account of which the sale can under Order XXI, rule 90, on proof of substantial injury be set aside on their application; and the reason is, as the former decision explains, that the object of attachment is only to bring the property under the control of the Court in order to prevent its alienation, the actual proclamation being the notice to the public that the sale is to take place. This is so in spite of the explicit reference to attachment in Order XXI, rule 64; and it is not necessary or possible to regard attachment, where it is similarly referred to in Order XXI, rule 58, as essential to the jurisdiction of the Court. For there also the existence or absence of a previous prohibition against alienation by the judgment-debtor cannot affect the Court's power to deal with the claims of those who like plaintiff, have notice from the proclamation that their rights are in peril; and accordingly, whether or no there has been an attachment, they are, if they submit the merits of their claims to the Court for investigation, equally persons against whom an order is passed, which under Order XXI, rule 63, will become final, if it is not displaced.

In these circumstances the conclusion must be that article 11, schedule 1, Limitation Act and Order XXI,

rule 63, apply. The Appeal must therefore be dismissed with costs of tenth to thirteenth respondents.

RAMESAM, J.—I agree and have nothing to add.

K.R.

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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

P. S. NARAYANA AYYAR (THIRD DEFENDANT), APPELLANT, 1921,
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BIYARI BIVI AND OTHERS (PLAINTIFF AND FIRST AND SECOND DEFENDANTS), RESPONDENTS.*

Muhammadian Law—Dower—Wife in possession of her husband's property during his life-time—Undivorced wife's right to lien during her husband's life-time—Civil Procedure Code (Act V of 1908), sec. 64—Attachment of judgment-debtor's property—Subsequent decree on award—Submission to arbitration by judgment-debtor and another—Decree on award affecting attached property—Transfer under decree whether void under sec. 64, Civil Procedure Code—Private transfer.

Under the Muhammadian Law, a wife, who has not been divorced from her husband, has, during his life-time, no lien for her unpaid dower over his property in her possession.

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

Where, subsequent to an attachment of property of a judgment-debtor, a decree was passed in accordance with an award made on a reference to arbitration submitted to by the judgment-debtor and another person, and it appeared that such submission, award and the decree thereon were not a collusive proceeding resorted to for investing a private arrangement with the appearance of a public adjudication.

* Appeal No. 184 of 1920.

(1) (1899) I.L.R., 21 All., 311.

(2) (1917) M.W.N., 89.

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Held, that the decree embodying the award was not a private transfer which could be treated as void under section 64, Civil Procedure Code.

Qurban Ali v. Ashraf Ali, (188) I.L.R., 4 All., 219 (F.B.); and *Kasi Viswanatham Chettiar v. Ramaswami Nadar*, (1918) 35 M.L.J., 441, referred to.

APPEAL against the decree of P. VENKATARAMA AYYAR, Temporary Subordinate Judge of Madura, in Original Suit No. 14 of 1918 (Original Suit No. 111 of 1917 on the file of the Court of the Subordinate Judge of Madura).

In execution of a money decree obtained by the first defendant against the second defendant, the suit properties were attached on 11th December 1914. A claim petition was put in by the plaintiff, who was the wife of the second defendant; the claim was disallowed and the plaintiff instituted the present suit against the above defendant as well as the auction-purchaser, the third defendant, for a declaration of her right to the property. The plaintiff claimed an interest in the property under a decree passed in accordance with an award on a reference to arbitration which was held at the instance of both herself and her husband in the matter of an agreement, Exhibit A-3 (30th May 1909), which was unregistered, in respect of her unpaid dower and other matters. The submission was under Exhibit J, dated 30th November 1915, the award being Exhibit J-1, dated 29th January 1916, and the decree in accordance therewith being J-3, dated 5th January 1917. The Subordinate Judge held that the plaintiff was entitled to a charge for two lakhs of rupees, in respect of her dower, over the suit properties under the decree passed on the award, and that the sale to the third defendant in execution of the first defendant's decree was subject to the said charge. The third defendant preferred this Appeal.

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The Advocate-General (C. P. Ramaswami Ayyar) and *K. Jagannatha Ayyar* for the appellant.—The attachment was prior to the submission to arbitration, the award and the decree in accordance with the award. The submission and the award are invalid against the claims enforceable under the attachment: see section 64, Civil Procedure Code. The contract, previous to the attachment, was one for sale; the arbitration and award were subsequent to the attachment. The award was to give a charge until the contract was performed. Even if a contract prior to attachment is not affected by the attachment, still a contract substituted for the original contract, that is, a charge in place of sale under the contract, is not protected by the supposed rule. *Kasi Viswanatham Chettiar v. Ramaswami Nadar* 1) is distinguishable, as the sale was in pursuance of the contract. The following cases were referred to and distinguished: *Qurban Ali v. Ashraf Ali* (2); *Chimiyappa Traragan v. Rama Ayyar* (3); *Obai Goundan v. Ramalinga Aiyar* (4); *Tuljaram v. Alagappa* (5); *Chandradaya v. Bhagaban* (6); *Venkata Reddi v. Yellappa Chetty* (7). There is no charge under Exhibit J-3 after possession is given to the plaintiff after paying off the lessee.

K. Raja Ayyar, *K. S. Vaikuntam Ayyar* and *M. Krishna Bharati* for respondent.—Attachment puts property in *custodia legis* and only private alienations by the judgment-debtor are prohibited by section 64, Civil Procedure Code. If contract is prior to attachment, performance of the contract after attachment is valid.

(1) (1918) 35 M.L.J., 441.

(2) (1882) I.L.R., 4 All., 219 (F.B.).

(3) (1921) I.L.R., 44 Mad., 232.

(4) (1898) 8 M.L.J., 256.

(5) (1911) 21 M.L.J., 1 (F.B.).

(6) (1916) 23 C.L.J., 125.

(7) (1917) 5 L.W., 234.

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If it is a sale under an award, it is *a fortiori* valid. If a sale is valid, a charge for the same amount is also valid. The award gives a charge for dower as under the Muhammadan Law: see *Beeju Bee v. Syed Moorthiya Saheb*(1); Mulla's Muhammadan Law, pages 154, 217, 218, 223 to 225. Wife has a lien for dower on her husband's property lawfully in her possession, even during his life-time.

There is no authority that the wife's lien for dower over her husband's property does not exist in her husband's life-time: see Tyabji's Muhammadan Law (Second Edition), pages 182, 187, page 193, paragraph 11, *Abi Duninsa Bibi v. Mahammad Fathi ud din*(2), *Meer Meher Ally v. Mussamat Amanee*(3), *Syed Imdad Hossein v. Musumat Hoseinee Buksh*(4), *Hamira Bibi v. Zubaida Bibi*(5), *Amanat-un-nissa v. Bashir-un-nissa*(6), *Reference under Act I of 1879*(7).

The decree should be construed in the light of the award: see *Raja Kumara Venkata Perumal Raja Bahadur v. Thatha Ramasamy Chetty*(8). An award is itself a judgment, and here there is further a decree of Court: the transaction effected by the award and decree is not a private transfer and is not hit at by section 64, Civil Procedure Code. The following cases show what are private alienations: *Anand Ohandra Pal v. Panchilal Sarma*(9); *Venкатasami Naidu v. Gurusami Aiyar*(10); *Raghunath Das v. Sundar Das Khatri*(11); *Pethu Ayyar v. Sankaranarayana Pillai*(12); *Sadayappa v. Ponnama*(13); *Laldas v. Bai Lala*(14); *Krishna Pattar v. Alamelu*

(1) (1920) I.L.R., 43 Mad., 214 (F.B.).

(3) (1869) 11 W.R., 212.

(5) (1916) I.L.R., 38 All., 581 (P.C.).

(7) (1895) I.L.R., 17 All., 211 (F.B.), 271.

(9) (1870) 5 B.L.R., 691 (F.B.).

(11) (1915) I.L.R., 42 Calc., 72 (P.C.).

(13) (1885) I.L.R., 8 Mad., 554.

(2) (1918) I.L.R., 41 Mad., 1026.

(4) (1870) 2 N.W.P. H.C.R., 327.

(6) (1895) I.L.R., 17 All., 77.

(8) (1912) I.L.R., 35 Mad., 75.

(10) (1920) 38 M.L.J., 441.

(12) (1917) I.L.R., 40 Mad., 955.

(14) (1909) 11 Bom. L.R., 20.

Ammal(1). Plaintiff is entitled to a charge; if sale under the award and decree is valid, a charge in place of sale is *a fortiori* valid.

K. Jagannadha Ayyar in reply.—Under the Muhammadan Law the respondent has no right to retain possession nor has she a lien on her husband's property during his life-time. There is no text of Muhammadan Law to that effect. Under the decree, she has no charge: the decree is clear and should not be construed by looking at the award: the decree is at variance with the award; decree ought to be and has not been amended. As the decree stands, the respondent has no charge for her dower.

The Court delivered the following JUDGMENT:—

The decision appealed against gives plaintiff a charge for two lakhs of rupees on the properties purchased by third defendant, appellant, at a sale held in execution of first defendant's money decree against second defendant, after the dismissal of plaintiff's claim.

The nature and extent of plaintiff's right over the properties depends on the effect of a series of transactions originating in the liability of second defendant, her husband, for mahar settled at £22,500 when their marriage took place in 1884. This liability is referred to in exhibits E and F and is not disputed before us, although those documents are not registered and may not effect the security for its satisfaction, to which they refer. This attempt to provide security was due to second defendant becoming indebted; and in 1909 he further gave Exhibit A, undertaking (1) to repay to plaintiff a loan taken for the discharge of his debts within five

(1) (1914) 16 M.L.T., 551.

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years from the income of the properties, which had fallen to him as his share under the partition, Exhibit G, and (2) to sell her at the end of five years those properties for two lakhs of the mahar debt or to give her possession thereof, apparently as security for that sum. This document also was unregistered and therefore was valid only as an agreement to sell. On this the loan was, as Exhibits H series and K show, advanced; but nothing was done in pursuance of the provision for sale or delivery and on 11th December 1914, the properties were attached by first defendant. Second defendant, however, in defiance of his obligations under Exhibit A and the attachment, gave a lease for three years, Exhibit B, for an advanced rent of Rs. 7,500 to P.W. 1 and another; and this was followed within two months by a reference on the part of plaintiff and second defendant to arbitrators of the differences, which, according to the muchilika, Exhibit J, had arisen between them, the arbitration ending in an award, Exhibit J-1, which was made a decree of Court, Exhibit J-3. It is with the effect of Exhibit J-3 that we are concerned, its terms being that (1) second defendant should within one month, execute a sale-deed conveying to plaintiff the properties referred to in Exhibit A or that in case of his default the Court should execute one on his behalf, (2) he should borrow Rs. 7,500 from plaintiff, repay the lessee under Exhibit B the amount received from him and then put plaintiff in possession of the properties which, until he did so, should be charged with two lakhs of rupees for her benefit, (3) he should repay the plaintiff within two years another amount already borrowed on pro-note.

In pursuance of this the lease Exhibit B was terminated and plaintiff alleges that she was put in possession of the properties, her claim was made and dismissed and third defendant purchased at the sale,

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which followed. In her suit plaintiff asked generally for a decree vacating the order on her claim and declaring that the properties were not liable to be sold. But the lower Court refused the latter relief on the ground that she had not perfected her right by obtaining a sale-deed; and it is not suggested on her behalf that this refusal was wrong. The question is only whether the lower Court was entitled to grant her a charge for two lakhs on the property.

The charge it allowed was not created by Exhibit A, which was unregistered, and therefore it must be supported, if at all, as created by Exhibit J-3. That decree was, however, passed after the attachment of the property; and it is argued with reference to section 64, Civil Procedure Code, that as the award, which it embodied, resulted from the consent of plaintiff and second defendant to a reference to arbitration, it must be regarded as a private transfer of the property attached or, consistently with plaintiff's case, of an interest in it and as void against third defendant's claim, which is enforceable under the attachment. It is not necessary to consider whether a decree embodying an award can be so regarded, in case it is proved that the reference to arbitration was collusive and the whole proceedings a device to invest a private arrangement between the parties with the appearance of a public adjudication. For the learned practitioners, who appear for third defendant, have expressly disclaimed any intention to attack the lower Court's finding that the contrary was the case. And then in accordance with *Qurban Ali v. Ashraf Ali*(1) and *Kasi Viswanatham Chettiar v. Ramaswami Nadar*(2), the former being a decision of a Full Bench and proceeding on general principles, not on any of the particular

(1) (1882) I.L.R., 4 All., 219 (F.B.).

(2) (1918) 35 M.L.J., 441.

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facts before the Court, we must hold that a decree such as Exhibit J-3, which embodies an award, is not a private transfer, which can be treated as void under section 64.

Plaintiff has, however, still to establish that the charge she is claiming is created by Exhibit J-3. The lower Court held that she did so on the ground that, as her claim to two lakhs, as part of her mahar, was in fact accompanied by possession of the suit properties, she had under Muhammadan Law a lien on them and a right to retain possession until that mahar debt was discharged. It referred in support of this to Mulla's Principles of Muhammadan Law, 4th Edition, 206, 207; and before us the dictum of SESHAGIRI AYYAR, J., in *Abi Dunimsa Bibi v. Mahammad Fathi ud din*(1) that "a Muhammadan wife has a lien over the property of her husband in her possession for unpaid dower," has been relied on. But this contention rests on a misapprehension, due perhaps to indiscriminate use by the learned author and the learned Judge just referred to of the term "wife" to denote both a divorced wife and a widow, since the law recognizes such a lien as that now claimed in both of these cases. We have not however been shown that the right of the wife to a lien before dissolution of her marriage is recognized by any authority; and in fact the context of the learned Judge's dictum with its references to "the estate of the deceased husband" and to two cases, in which only a widow's possession of such an estate was in question, shows that he had no such extension of this well-defined doctrine, as plaintiff requires, in mind. This failing, it is necessary to consider her claim, as it is put forward before us, with direct reference to the terms of Exhibit J-3.

(1) (1918) I.L.R., 41 Mad., 1026.

One term relied on provides that "defendant (here second defendant) shall, after paying the lessees and redeeming the lease, put the plaintiff in possession of the properties covered by it and till then the properties shall be under a mortgage charge for Rs. 2,00,000." This is the only provision for a charge and in fact the decree directs elsewhere as regards the mahar generally that plaintiff is entitled to it during second defendant's lifetime, only when he pays it of his own accord; and it is therefore on this term, if at all, that plaintiff can succeed. Read as it stands, it provides for a charge to continue only until plaintiff is given possession, as she was shortly after Exhibit J-3 was passed; and, if so, it had ceased to be operative before the present suit began and no claim to relief therein can be founded on it. Plaintiff, however, contends that the words "till then" cover, not only the contingency specified in their immediate context, but also the performance of the other obligation imposed on second defendant in the preceding portion of the decree, the execution within a month of a sale-deed, and further that this interpretation is in accordance with the award in the terms of which the decree is drawn up. The answer is firstly that the words "till then" can most naturally be read in connexion with the contingency, the transfer of possession, referred to in the distinct clause in which they stand, and that after that transfer, when plaintiff would be in enjoyment of the property, the right to a charge would be useless, since it would not assist her to obtain performance of second defendant's remaining obligation, the giving of a sale-deed, her remedy by execution being available. And secondly, although it is true, that for some purpose, which is obscure, Exhibit J-2, the award, provides in clause 9 (b) in accordance with plaintiff's contention for a charge "for a period extending from this day to the date of

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the completion of the said sale," we are not at liberty to import those words into a decree, which is easily intelligible in itself and without them, which was passed at plaintiff's own instance, against which she did not appeal and which had become final in its present form, before third defendant made his purchase.

The grounds, on which plaintiff claims a charge, being unsustainable, the appeal must be allowed and her suit must be dismissed with costs in both Courts.

Brightwell and Moresby, Solicitors for appellant.

K.R.

APPELLATE CIVIL—FULL BENCH.

*Before Sir William Ayling, Kt., Officiating Chief Justice,
Mr. Justice Oldfield, Mr. Justice Kumaraswami Sastri,
Mr. Justice Ramesam and Mr. Justice Odgers.*

• APPANNA PORICHA (FIRST DEFENDANT), APPELLANT,
v.

NARASINGA PORICHA AND OTHERS (PLAINTIFFS
AND DEFENDANTS 5 TO 37), RESPONDENTS.*

1921,
September,
9 and 30.

*Civil Procedure Code (Act V of 1908), sec. 92—Suit for accounts—
Suit by trustee of temple against co-trustee—Sanction of
Advocate-General whether necessary.*

A suit by a trustee of a public charitable or religious trust against a co-trustee for accounts does not fall within section 92 of the Code of Civil Procedure and may be brought without the sanction of the Advocate-General.

APPEAL against the judgment and decree of B. C. SMITH, District Judge of Ganjām, in Original Suit No. 6 of 1917.

This was a suit by the plaintiff to establish his rights as co-trustee of a mutt at Parlākimedi. He had been in exclusive possession since 1912, but some of the defendants were in possession of some of the mutt lands, had collected the rents of other mutt lands, and had not paid anything to him with the result that he had to pay the expenses of the mutt out of his own pockets. He sued for recovery of the money spent by him, for an account of the profits of the mutt lands, for a declaration that he was a co-trustee entitled to joint possession of the mutt lands and for joint possession of them, and for a scheme for the future management of the mutt. *Inter alia*, the defendants pleaded that the suit was bad for want of the

* Appeal No. 346 of 1918.

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sanction of the Advocate-General. The District Judge held that "the object of the suit was to remedy what the plaintiff regarded as an infringement of his private rights" and passed a decree directing accounts as well as granting the other reliefs prayed for by him. The defendants filed an Appeal to the High Court which came on for hearing before WALLIS, C.J., and KRISHNAN, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

This is an Appeal from the judgment of the District Judge of Ganjām in a suit brought by the plaintiff against the first defendant and other members of the Poricha family for a declaration that the plaintiff is entitled to joint possession of the suit temple lands and topos as a co-trustee and for a decree awarding him joint possession with the defendants. He also asks for an account of the profits of the temple lands and topos in the possession of the defendants and that they should be ordered to make over the amounts due from them for the use of the temple. He further asks that a scheme may be settled so as to provide a yearly turn for each of the seven branches of the family of the plaintiff and the defendants, and also prays for the recovery of a certain sum of money which he claims to have advanced for the use of the temple.

The main question in the case is whether the plaintiff has established his title as a co-trustee of the plaintiff temple. There is no doubt that the suit mutt or temple was founded by one Ramakrishna Poricha, of whom the plaintiff and the defendants are descendants, and it is equally clear that the affairs of the temple have been managed in the main for many years by Limmai Poricha, the father of the first defendant, who died in 1897, and since his death by the first defendant. The case for the

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first defendant is that by the usage of the institution the trusteeship descends to the eldest member of the eldest branch. The District Judge has held that this usage is not made out, and after hearing lengthy arguments and examining carefully both the oral and the documentary evidence in the case, we have come to the conclusion that there is no sufficient reason for differing from the District Judge's finding.

The key to the proper understanding of this case appears to be this, that the family have been discharging the duties of archakas of the suit mutt or temple, and as there are no other trustees, they are also the trustees of the temple, and have been, as proved by the evidence, largely living on *prasadam*s of paddy from the temple lands. When we examine all the inam deeds together, we find that one member of the family is entered as the *dowledar*, that is, the person whose name was inserted in the last *dowle* before the Inam Commission, and that the names of the enjoyers are given as Mutt Archakas in one case and as Adhikaris in other cases, and that in those Inam statements representatives of all the seven branches are named as being in enjoyment of the inam. There is also other very strong evidence. In Exhibit G (page 12), column 12, under the heading "Particulars of the present enjoyers," the entry is "performing the *archana* of Sri Swami, the members of the family referred to in Col. 6 have been enjoying the offerings jointly." This entry strongly supports the conclusion which we have come to that, they were really archakas who were also trustees and supported themselves out of these lands.

There is no doubt that the first defendant and his father have practically been left very largely in management of the suit lands. That is apparent even from the Inam records and if that evidence stood alone it might

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be sufficient to warrant us in holding that the usage of descent by primogeniture was established; but it does not stand alone. Not only are there these important entries in the Inam records but there is other evidence which shows the interference by the other branches of the family, which cannot be explained consistently with the trusteeship being vested in the first defendant solely. We refer to Exhibit F, which is a muchilika in 1833 taken from the tenants in the name of the members of all the branches; Exhibit IV in 1837 and Exhibit V in 1897 are purchases for the temple in the names of all the branches. This is very strong evidence indeed that the trust was really a joint one though the management was left very largely in the hands of one of the members.

Then we have in 1906 kist receipts, Exhibits IX series, and Exhibit A, a statement taken in the land acquisition proceedings in 1909 when they all put in a proposal that the compensation money should be used in purchasing lands for the mutt in the name of all. That again is a very strong recognition that all the property was owned by all of them jointly on trust. There is therefore no reason to interfere with the finding of the District Judge in that respect.

The District Judge has found that the plaintiff is entitled to recover a sum of Rs. 20 a year for expenses incurred on behalf of the temple. It is not disputed that the sum really spent was Rs. 60 a year and therefore the sum claimed by the plaintiff on this head must be recovered by him at the rate of Rs. 60 a year out of the trust property in the hands of the defendants.

There are numerous branches of this family, and one of the reliefs claimed by the plaintiff is the framing of a scheme for enjoyment in turns. We are disposed to think that he is not entitled to have such a scheme settled except in a suit instituted under section 92 of

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the Civil Procedure Code. The plaintiff also asks for joint possession of the trust properties, and as a trustee he is entitled to such joint possession, as held by this Court in *Meenakshi Achi v. Somasundaram Pillai* (1), and recently in *Kristnayya v. Guravayya* (2). He also asks that the defendants should render accounts of the profits of the temple lands in their possession and make over the amounts due from them for the use of the temple, that is to say, he asks for an account of the moveable property of the temple in the hands of the defendants, the other trustees, and the question is whether he is entitled to have such an account taken in a suit not instituted under section 92 of the Code of Civil Procedure.

On this point there seems to be some difference of opinion in this Court. On the one hand, according to the view expressed in the Appeal we have just referred to, that section is not intended to interfere with the rights of a hereditary trustee to possession and control of the trust property for the purpose of discharging the duties of a trustee which are imposed in the exercise of his trust. On the other hand, at least one of the judgments in *Venkatasubbamma v. Venkatarangam Chetty* (3) appears to proceed upon the view that in so far as a suit against a trustee prays for any of the reliefs specified in the first part of that section, the second part of the section forbids such a suit to be brought except under the section. The learned Judge admits that the hereditary trustee must lose his rights if such leave to sue under the section is refused, but is of opinion that this is what the legislature has deliberately enacted on larger grounds of policy. There is some indication of the

(1) (1921) I.L.R., 44 Mad., 205.

(2) Appeal Suit No. 388 of 1919 (unreported).

(3) (1916) 31 M.L.J., 280.

same opinion in *Subramania Pillai v. Krishnaswami Somayajiar* (1). The question of course depends upon the true interpretation of the second part of section 92—whether the terms of that section are so imperative as to prohibit any suit against a trustee in which any of the reliefs specified in the section are sought, even though those reliefs are sought, not in the larger interest of the public and the charity but merely for the purpose of vindicating the private rights of one of the trustees and of enabling him to discharge the duties and liabilities which are imposed upon him by his trust. It is ordinarily the duty of a trustee to get in the trust funds and to see that they are in proper state and custody and investment and therefore ordinarily a trustee would be entitled to sue for accounts against his co-trustee for the purpose of making him replace the trust funds and would be bound to institute such a suit. The question is whether the terms of the section are so imperative that they must be considered to prohibit him from instituting such a suit without the sanction of the Advocate-General or the Collector, under section 92 of the Code of Civil Procedure. This question is undoubtedly one of considerable importance, and it is also a question on which divergent views may be taken, and therefore we think that it is eminently a question which should be settled so far as this Court is concerned by the decision of a Full Bench. Before disposing of this case we have decided to refer to a Full Bench the question whether the plaintiff is precluded by the terms of section 92 of the Code of Civil Procedure from obtaining a decree for an account against the defendants (co-trustees) in this case.

The Memorandum of Objections filed by defendants 2 to 6, 8, 9 and 10 is dismissed with reference to the

(1) (1919) I.L.R., 42 Mad., 668.

occupancy rights claimed by them. The question of their costs is reserved.

ON THIS REFERENCE

G. Lakshmanan for *P. Narayanamurti* for appellant.—Section 92 prohibits the filing of any suit without the requisite sanction. The section is imperative and the test is, do any of the reliefs come within the scope of subsection (1). A right to joint management is a special and personal right. He can sue a co-trustee for joint management without sanction. But if he sues for past mismanagement or for an account the sanction is necessary. The sanction is a safeguard against the frivolous and vexatious filing of suits by anyone against trustees of public charitable trusts. Reference was made to *Venkataramana Ayyangar v. Kasturiranga Ayyangar* (1), *Swaminatha Pillai v. Sundaresa Pillai* (2), *Subramania Pillai v. Krishnaswamy Somayajiar* (3), *Vaikunta Pai v. Vittappa Shanbhaga* (4), *Sayad Husseinmian v. Collector of Kaira* (5), *Subramania Aiyar v. Venkatachala Vadhyar* (6), *Sangto v. Paras Ram* (7) and *Venku Chettiar v. Doraisami Chettiar* (8).

C. S. Venkata Achariyar with *K. Kamanna* for respondents.—Plaintiff is asking for joint possession of the moveable and immoveable properties of the mutt. The Court must discover what money is in the hands of the co-trustees which I am entitled to hold in joint possession. If the other contention is correct the scope of the section would be enlarged and no other persons than those mentioned in the section would have the right to sue. The rights of one co-trustee against another

(1) (1917) I.L.R., 40 Mad., 213 (F.B.), 216, 227, 230.

(2) (1921) 29 M.L.T., 267.

(3) (1919) I.L.R., 40 Mad., 667.

(4) Second Appeal No. 1935 of 1914 (unreported).

(5) (1897) I.L.R., 21 Bom., 48.

(6) (1916) M.W.N., 351.

(7) (1919) 49 I.C., 530.

(8) (1921) M.W.N., 439.

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co-trustee are not the same as that of the public against the trustee. Reference made to sections 26 and 48 of the Trusts Act, *Bapuji Jagannath v. Govindlal Kasanddas*(1), *Meenakshi Achi v. Somasundaram Pillai*(2), *Ali Hussain v. Mohamed Hussain*(3), *Rendall v. Blair*(4), *Miya Vali Ulla v. Sayad Bava Santi Miya*(5) and *Nilkanth v. Ramkrishna*(6).

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AYLING, OFFG. C.J.—I have had the advantage of perusing the judgment which my learned brother OLD-FIELD is about to pronounce. I agree with the views expressed therein and with the negative answer proposed by him to be given to the question referred to us: and I should not feel called upon to add anything, but for the judgment in *Swaminatha Pillai v. Sundaresa Pillai*(7), to which I was a party, which has been relied on by the learned vakil for appellant as supporting this contention.

The case is, of course, distinguishable from the one with which we are concerned. This is a case between co-trustees: that was a case in which a subordinate trustee was sued by a general trustee, who, as representing the general trust, was really a beneficiary under the subordinate trust, and was seeking, as such, to enforce fulfilment of the latter.

It was from this point of view and in reference to a suit of that character that the last paragraph of the judgment in that case was written: but was so worded as to suggest a more general application than I think we had in our minds. The argument addressed to us (and rejected) was apparently that every suit by a trustee—no matter of what nature or against whom directed—was

(1) (1916) I.L.R., 40 Bom., 439. (2) (1921) I.L.R., 44 Mad., 205.

(3) (1919) 52 I.C., 628. (4) (1890) 45 Ch.D., 139.

(5) (1898) I.L.R., 22 Bom., 496. (6) (1921) 23 Bom. L.R., 876.

(7) (1921) 29 M.L.T., 267.

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exempted from the provisions of section 92. This was also, I think, the proposition placed before the Bench in *Subramania Pillai v. Krishnaswami Somayajiar*(1) and dealt with by ABDUR RAHIM, J., in the last paragraph of his judgment.

The correctness of our decision on the facts of the case then before us is unnecessary to discuss. *Nellaiyappa Pillai v. Thangama Nachiar*(2) was an authority the other way: but one which did not bind us sitting as a Bench of three Judges in a Letters Patent Appeal. But I feel bound to say that on reconsideration and in the light of the argument now addressed to us, I do not think that the applicability of that judgment was affected by reason of the introduction of clause (2) of section 92. I agree with my brother OLD-FIELD's view of the intention and effect of the inclusion of that clause: and I may go so far as to say that if a case similar to *Swaminatha Pillai v. Sundaresa Pillai*(3) came before me again, I should like to hear the question of the applicability of section 92 re-argued, and should be prepared to reconsider my views.

I would answer the question referred to us in the negative.

OLD-FIELD, J.—The question for decision is in effect whether the plaintiff, suing as a trustee, is precluded in the absence of the sanction referred to in section 92 of the Civil Procedure Code from obtaining a decree for an account against his co-trustees, the defendants, in this suit. We, therefore, are not concerned with his right to the other reliefs he has asked for or in particular to the framing of a scheme.

(1) (1919) I.L.R., 42 Mad., 668. (2) (1898) I.L.R., 21 Mad., 406.

(3) (1921) 29 M.L.T., 267.

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It is argued on behalf of first defendant that such a sanction is essential, because, an account being specified in section 92 (1) (d) as one of the reliefs which can be claimed in a suit under the section, with reference to sub-section (2) no further reason need be required for holding that an account can be claimed only in a suit instituted in conformity with sub-section (1); and no doubt a literal reading of the reference in the former to "a suit claiming any of the reliefs" specified in the latter at first sight supports this conclusion. But neither it, nor the authorities relied on by first defendant, take account of the considerations which have been urged before us and which in my opinion must prevail: that the addition of sub-section (1) in 1908 was intended not to alter, but to make explicit the law as stated in sub-section (1) and section 539 of the previous Code: and that the law so stated did not affect the right of a trustee, as opposed to beneficiaries, to sue a co-trustee in discharge of his duty to his trust.

The authorities can be dealt with shortly.

Vaikunta Pai v. Vittappa Shanbhaga(1) was decided on a mere reference to sub-section (2) without discussion of its scope. *Sraminatha Pillai v. Sundaresa Pillai*(2) was a suit by a trustee and the Full Bench held, following the case next to be referred to, that the addition of sub-section (2) rendered the statement of the law in *Nellaiyappa Pillai v. Thangama Nachiar*(3) incorrect. Whether or no that was right, is immaterial for the present purpose, because those decisions were not between co-trustees, but between the trustee of a principal institution and the trustee of its subsidiary trust and the former may have been regarded as suing on

behalf of his institution and those interested in it. *Subrahmania Pillai v. Krishnaswami Somayajiar*(1) and *Venkatasubbamma v. Venkatarangam Chetty*(2) no doubt are based on the literal application of sub-section (2), for which first defendant contends. But, if the former can be regarded as really a suit against trustees for their removal (and I share the doubt expressed in *Nilkanth v. Ramkrishna*(3), whether it can be), there is nothing in it regarding the question now before us except a bare reference to the terms of the section and no consideration of the character of the plaintiffs as trustees and not beneficiaries. *Venkatasubbamma v. Venkatarangam Chetty*(2) is more important, because the judgment under appeal had negatived the necessity for a sanction on the ground now relied on by plaintiff. But one learned Judge said nothing on the point and the other, after referring to it, confined his attention, as defendants contend that we should do, to the bare description of the relief claimed and its identity with one of those enumerated in sub-section (1), without considering whether the section as a whole applies only to suits by beneficiaries or also to those brought by trustees. It is true that after doing so he referred to the inconvenience involved in compliance with the provisions of section 92 by a trustee, justifying it as not insuperable and as entailed by the general policy of the Legislature. But the necessity for such compliance might, if the Advocate-General would not move on a trustee's relation or would not consent to his suing, preclude his doing so altogether, and it would involve in any case the anomaly of his joining as co-plaintiff some second person possessing a more general interest than his own. With all deference,

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(1) Second Appeal No. 1935 of 1914 (unreported).
(2) (1921) 29 M.L.T., 267. (3) (1898) I.L.R., 21 Mad., 406.

(1) (1919) I.L.R., 42 Mad., 668.

(2) (1916) 31 M.L.J., 280.

(3) (1921) 23 Bom. L.R., 876.

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a construction which avoids those difficulties is, if otherwise legitimate, to be preferred; and the policy of the Legislature on the point is not clear enough to influence the decision in the direction proposed.

Neither of the learned Judges in *Venkatasubbamma v. Venkatarangam Chetty*(1) referred to the state of the law before 1908 or the extent to which it was then altered by the addition of sub-section (2). On the first point, first defendant relies on *Tricumdass Mulji v. Khimji Vullabhdass*(2), in which sanction under section 539 of the Code then in force was held essential for a suit between co-trustees. But the judgment lays no stress on the plaintiff's possession of that character; and the fact that it was founded on *Subbayya v. Krishna*(3), in which the plaintiffs were trustees, is not material, since in that case they did not rely on the fact or on any distinction between their rights and those of persons generally interested. That distinction was, however, relied on and considered in *Budree Das Mukim v. Chooni Lall Johurry*(4); and I would respectfully follow the elaborate judgment of WOODROFFE, J., therein, as it is, except on one point, a complete statement of the law on the question before us. He held, no doubt, that section 539 was not mandatory; but that is now immaterial, as the enactment of sub-section (2) has made it clear that sub-section (1) is so within its scope. Dealing, however, with its scope, he also held on full consideration of all the authorities (and it has not been shown that any direct dissent from his conclusions has since been expressed), that the suit contemplated in it is representative, two persons being enabled by it to sue on behalf of the public and sanction being required as a precaution

(1) (1916) 31 M.L.J., 280.

(3) (1891) I.L.R., 14 Mad., 186.

(2) (1892) I.L.R., 16 Bom., 626.

(4) (1906) I.L.R., 33 Calc., 789.

against wasteful litigation; he distinguished between the right of the public "to see that their alleged appointees have the management of the trust" (that being the point before him) and that of the plaintiffs "considered not as members of the public, but as trustees suing to enforce their own personal rights of management," and he made use of this distinction to hold that no question whether the section was mandatory really arose, because the suit before him, being by trustees, was not of the description referred to in it.

The question is next whether this authority has been deprived of effect by the enactment in 1908 of sub-section (2). The contrary has been held in the two suits by trustees against trespassers claiming the trusteeship, *Ayatunnessa Bibi v. Kulfu Kalifa*(1) and *Muhammad Abdul Majid Khan v. Ahmad Said Khan*(2), the distinction drawn by WOODROFFE, J., being expressly relied on in the latter. It was also approved lately in this Court, the parties all being trustees, by WALLIS, C.J., and myself in *Ulagappa Chetti v. Ramanath Chetti*(3), that decision having been followed by NAJIB and ODGERS, JJ., in *Venku Chettiar v. Doraisami Chettiar*(4); and a similar view would appear to have been taken, although without specific reference to *Budree Das Mukim v. Chooni Lall Johurry*(5), in *Ali Hussain v. Mohamed Hussain*(6). And these authorities moreover commend themselves, when regard is had as the ordinary rules of construction require, to the amended provision as a whole and the effect of the amendment. The argument of first defendant involves that the intention in enacting sub-section (2) was to make clear, not only the mandatory

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(1) (1914) I.L.R., 41 Calc., 749.

(2) (1913) I.L.R., 35 All., 459.

(3) Appeal No. 368 of 1919 (unreported).

(4) (1921) M.W.N., 439.

(5) (1906) I.L.R., 33 Calc., 789.

(6) (1919) 52 I.C., 628.

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character of section 539, but also, what (so far as we have been shown) had not been the subject of any marked conflict of decisions, the class of suits to which that section applied and, contrary to the ordinary interpretation of the expression "persons interested" and the clearly representative character of the procedure, to bring under it trustees as well as beneficiaries. This cannot be accepted. If the intention had been thus to abrogate the distinction between suits by these two classes, it is not to be supposed that it would have been effected by mere implication without the adoption of different wording in sub-section (1) and clearer wording of the new sub-section (2). The reference to reliefs in the latter cannot without undue violence be read as to reliefs in all suits relating to public trusts, by whomsoever instituted, and whether they are or are not suits of the kind dealt with in the main provision, sub-section (1), "suits by persons interested" and of similar nature to the others, provided for under the same heading in section 91. It may be that, as observed by WALLIS, C.J., and myself in the unreported case above referred to and by the Bombay High Court in *Nilkanth v. Ramkrishna*(1), the reliefs claimed by a trustee will in some instances be indistinguishable from those which can be claimed on behalf of the public. But it does not follow that the legislature intended, what is not distinctly expressed, that they should be claimed only subject to safeguards for the representative and responsible character of the proceedings, which would not be appropriate or necessary when a trustee is the plaintiff.

For the foregoing reasons I would answer the question referred in the negative.

(1) (1921) 23 Bom. L.R., 876.

KUMARASWAMI SASTRI, J.—I am of opinion that the question referred to us should be answered in the negative. The suit is by certain hereditary trustees against their hereditary co-trustees claiming various reliefs. The relief which is relevant to the question to be decided is the prayer that a decree be passed directing the defendants "to render account of the profits of the temple lands and topes in their possession and to make over the amounts due from them for the use of the temple."

Section 92 of the Code of Civil Procedure, 1908, re-enacts section 539 of the Code of 1882 with certain modifications, the most important of which is sub-section (2) which declares that

"Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

The main contention of Mr. Lakshmanan is that in dealing with the scope of section 92 the question is, not who are the plaintiffs or what is the relation between the plaintiffs and the defendants *inter se* but what is the nature of the relief sought, and that, if the suit relates to a public charitable trust and the reliefs or any of them fall within the class enumerated in clauses (a) to (h) of sub-section (1), no suit can be brought except by the Advocate-General or by two or more persons with his consent, even though the dispute be between the co-trustees *inter se* and relate to matters of internal management and control. I am unable to agree with this contention. The history of the legislation on this subject, and the evils which the legislature wanted to remedy, show that section 92 was only intended to govern suits by the public or by the Advocate-General for the vindication of the rights of the public in charitable trusts. I

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agree with the view taken by WOODROFFE, J., in *Budree Das Mukim v. Chooni Lall Johurry*(1), that section 539 only governs representative suits brought for the benefit of the public to enforce a public right in respect of an express or constructive trust and does not apply to suits brought by persons to remedy a particular infringement of their own individual right. The object of clause (2) was to set at rest the conflict of decisions as to whether the provisions of section 539 of the old Code were mandatory or merely permissive and enabling, and to this extent the decision of WOODROFFE, J., is affected by the enactment of section 92. I do not think it was intended to enlarge the scope of the section by taking away private rights of action. In *Ayatunnessa Bibi v. Kulfu Khalifa*(2) and *Muhammad Abdul Majid Khan v. Ahmad Said Khan*(3), which were decided after the passing of the Code of 1908, the view of WOODROFFE, J., was followed with approval. When a trustee has against his co-trustees rights which are personal, and quite distinct from the rights of the general public to require that public charities are properly performed, it is difficult to see why the sanction of the Advocate-General, or the joinder of another person who has no interest in the quarrel between the trustees, should be necessary. In the case of hereditary trustees, there is the additional consideration that the refusal of the Advocate-General to give leave, or of a stranger to join in the suit, would mean the practical denial of his hereditary rights as against his co-trustees. If the language of section 92 were plain and clearly involved such consequences, Courts would have no option but to apply the section, but I am of opinion that there is nothing in section 92 which compels us to adopt a

(1) (1906) I.L.R., 33 Cal., 789.

(2) (1914) I.L.R., 41 Cal., 749.

(3) (1918) I.L.R., 35 All., 459.

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construction leading to such results. I think two conditions have to be satisfied. The suit should be one for the vindication of the rights of the general public in the charitable trust, and the relief should be all or any of the reliefs enumerated in clauses (a) to (h) of sub-section (1).

There is a conflict of authority in this Court as regards the point now under reference. In *Venkataramgam Chetty v. Venkatasubbammah*(1), the question arose whether section 92, Civil Procedure Code, applied to a suit by reversioners who sued for a declaration that the widow had forfeited her right to the office of trustee to a charitable endowment by reason of her having alienated the office, for possession of the trust properties and, if necessary, for removal of the widow from the office of trustee. WALLIS, J., was of opinion that section 92 had no application to such a suit. After referring to that section, he observed :

“ Even so the scope of the section is to protect the rights of the public, and it is not aimed at the infringement of individual rights, and should not, if possible, be so construed as to deprive individuals whose rights have been infringed of their remedy. In WOODROFFE and AMER ALI's edition of the Code, page 350 (First Edition), the learned authors discuss the question and appear to be of opinion that such a case does not come within it and that if a general administration of the trust, which has included the removal of the trustee, is necessary to provide an efficient remedy for the infringement of the individual right in question, such general administration may be granted without regard to the provisions of the section.”

On Appeal, ABDUR RAHIM, Offg. C.J., and SESHAGIRI AYYAR, J., reversed the decision [*Venkatasubbamma v. Venkataramgam Chetty*(2)]. ABDUR RAHIM, Offg. C.J., in dealing with the contention, that the suit was mainly one for the assertion of a private right and therefore did not fall under section 92, was of opinion that

(1) (1913) 25 M.L.J., 373.

(2) (1916) 31 M.L.J., 280.

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"once there has been a breach of trust the right of the public to see that the trust is properly administered arises and that the policy of the legislature, as it is to be gathered from the wording of section 92 is that in such a case the suit has to be instituted under certain conditions."

The hardship to the reversioners was, in the opinion of the learned Judge, not sufficient to outweigh the fact that in the opinion of the legislature suits instituted in respect of breaches of trust should be only in conformity with the requirements of section 92. SESHAGIRI AYYAR, J., was of opinion that when a suit embraces any of the reliefs specified in clause (1) the effect of clause (2) was to bar any suit not brought in accordance with the section. In *Sulramania Pillai v. Krishnaswami Somayajiar*(1), it was held by ABDUR RAHIM and SPENCER, JJ., that suits by trustees for a declaration that the appointment of a co-trustee by the Devasthanam Committee was invalid fell within the scope of section 92. ABDUR RAHIM, J., was of opinion that the suit was in effect one in which the direction of the Court was necessary for the administration of a public trust within the meaning of the section and fell within clause (h), as it was "a relief cognate to removing a trustee." SPENCER, J., held that the suit was one to remove a trustee duly appointed by a body who were competent to make the appointment, and distinguished *Singara Chariar v. Krishnaswami Iyengar*(2), and the other cases cited, as having been decided prior to the addition of clause (a) of sub-section (1) and sub-section (2). In *Vaikunta Pai v. Vittappa Shanbhaga*(3), SADASIVA AYYAR and NAPIER, JJ., on a bare reference to the provisions of section 92 were of opinion that a suit for an account by a trustee against his co-trustees fell within the scope of section 92 and could

(1) (1919) I.L.R., 42 Mad., 668.

(2) (1909) 19 M.L.J., 513.

(3) Second Appeal No. 1935 of 1914.

only be brought in conformity with clause (1). A contrary view was taken by WALLIS, C.J., and OLDFIELD, J., in *Ulagappa Chetti v. Ramanath Chetty*(1), where hereditary trustees sued their co-trustees to recover immoveable properties and the sums that on taking an account may be due by defendants. WALLIS, C.J., observed:

"The question is not altogether free from difficulty but I think the correct principle is that this section 92 governs suits for the vindication of the rights of the public in public charitable trusts and has no application to suits for the vindication of the rights of management by hereditary trustees or to disputes between such trustees *inter se* as to their turns of management."

In *Vealku Chettiar v. Doraisami Chettiar*(2) NAPIER and ODGERS, JJ., held that a suit by a trustee against a person whom he alleges to have been dismissed for recovery of trust property and for an account was not governed by section 92. The learned Judges followed *Ulagappa Chetti v. Ramanath Chetty*(1), above referred to, on the view of WOODROFFE, J., in *Budree Das Mukim v. Chooni Lall Johurry*(3).

Strong reliance was placed by the appellant's *vakil* on *Saminatha Pillai v. Sundaresa Pillai*(4), where it was held that a suit by a trustee of a temple against the trustee of a kattalai, established in connexion with the temple, for an account was held to fall within the provisions of section 92. In that case certain properties were left to the defendant under his father's will upon trust, to apply the income for the *neivethiam* in the temple of which the plaintiff was the trustee. WALLIS, C.J., observed that

"where there are several trustees of different properties vested in them respectively, for the performance of various services in the temple, I do not think the main or general trustee

(1) Appeal No. 368 of 1919 (unreported).

(2) (1921) M.W.N., 439.

(3) (1906) I.L.R., 33 Calc., 789.

(4) (1921) 29 M.L.T., 267.

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has any right to sue otherwise than under section 92 of the Civil Procedure Code for the failure of one of the trustees to perform his trust. If he had such a separate cause of action, I should not be disposed to construe section 92 of the Civil Procedure Code as taking it away from him but I am not satisfied that he has any such right of action under the general law."

KRISHNAN, J., was of opinion that the suit as framed did not fall within section 92. Owing to this difference of opinion the case came on before a Bench of three Judges of which I was a member. I took the view that there was no contract between the plaintiff and defendant. The statement of the law by the Chief Justice as to independent trusts with different trustees, though for the benefit of the same beneficiary, was in my opinion correct, and the only question was whether the suit was governed by section 92. This case is therefore clearly distinguishable from the present one which is one between co-trustees. Reliance was placed by the appellant's vakil on the decision of PARSON, J., in *Tricumdas Mulji v. Khimji Vullabhdass*(1), where the learned Judge was of opinion that the provisions of section 539 of the Civil Procedure Code of 1832 were mandatory and that a suit by two trustees against two other trustees for their removal and for an account was governed by the section, the claim for an account falling within the words "decree granting such further or other relief as the nature of the case may require." This case, so far as I am aware, has not been followed and a contrary view was taken in *Miya Vuli Ulla v. Syed Bava Santi Miya*(2), where FARRAN, C.J., and HOSKING, J., held that a suit by a co-trustee for an account and recovery of his share did not fall within section 539, as the plaintiff's complaint merely was "that he claiming to be a co-trustee, has been excluded from a share in the management and in

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the profits of such management." In *Nilkanth v. Ramkrishna*(1), it was held that a suit for a declaration that the defendants were not properly appointed trustees of a temple and for an injunction did not fall under section 92, Civil Procedure Code. The learned Judges dissented from *Subramania Pillai v. Krishnaswami Somayajiar*(2). MACLEOD, C.J., observed :

"I do not think that merely because the suit concerns the question of the validity of the appointment of defendants 1 to 4 as trustees of the temple, and because it might on that account be considered that the suit is somewhat akin to suits which came within the provisions of section 92, that, therefore, we are to hold that the suit in the language of English lawyers is a suit that comes within the equity of the Statute."

Co-trustees are co-owners of trust properties and are in law entitled to be in joint possession of all trust properties whether it be in the form of immoveables, moveables, or cash. It would ordinarily render a trustee personally liable if he allowed the cash or moveables to be in the exclusive possession and management of a co-trustee and there was misappropriation. He is in law entitled to be in joint possession of the funds, even when the other trustee is carrying out the trust properly. Where moneys are in a co-trustee's hands an account would be necessary to ascertain his liability and the claim would, in a sense, be a suit for an account of trust moneys. I find it difficult to see why if a suit by a trustee against his co-trustees or strangers for joint or exclusive possession of immovable or moveable properties does not require sanction of the Advocate-General or the joinder of another person, the mere fact that money is claimed, to ascertain which an account will have to be taken, should fall under section 92. I think the words "directing accounts and inquiries" in clause (1) (d) of

(1) (1892) I.L.R., 16 Bom., 626. (2) (1898) I.L.R., 22 Bom., 496.

(1) (1921) 23 Bom. L.R., 876. (2) (1919) I.L.R., 42 Mad., 668.

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section 92 should be confined to suits by the Advocate-General, or by two or more persons with his consent, against all the trustees for an account of their management, and not one or more trustees against the others, as each trustee has a right to call upon the other to account to him for trust funds he has received, even though the other trustee commits no breach of trust.

I am of opinion that the decision of WOODROFFE, J., in *Budree Das Mukim v. Chooni Lall Johurry*(1), though under the old Code of Civil Procedure of 1882, is equally applicable to suits under section 92 of the Code of 1908 and that the addition of clause (2) has not the effect of taking away the private right of suit which trustees may have against each other or strangers. I would follow the view taken by WALLIS, J., in *Venkatarangam Chetty v. Venkatasubbammah*(2) and by the Chief Justice and OLD-FIELD, J., in *Ulagappa Chetti v. Ramanath Chetty*(3).

RAMESAM, J. RAMESAM, J.—I agree.

ODGERS, J. ODGERS, J.—I agree that we should answer the reference in the negative.

M.H.H.

(1) (1906) I.L.R., 33 Calc., 789.

(2) (1913) 25 M.L.J., 373.

(3) Appeal No. 368 of 1919.

APPELLATE CIVIL—FULL BENCH.

*Before Sir William Ayling, Kt., Officiating Chief Justice,
Mr. Justice Kumaraswami Sastri and Mr. Justice Odgers.*

A. MAHADEVA AYYAR (PLAINTIFF), PETITIONER,

v.

THE SOUTH INDIAN RAILWAY CO., THROUGH
ITS AGENT AND MANAGER AT TRICHINOPOLY
(DEFENDANT), RESPONDENT.*

*Indian Railway Companies Act (IX of 1890), ss. 77 and 140—
Notice of claim—Railway Administration—Agent or Manager—Power to depute.*

The notice of claim under section 77 of the Indian Railways Act for the loss, destruction or deterioration, of animals or goods must be served upon the Agent or Manager of the Railway, or upon any officer deputed by the Company or its Agent or Manager to receive such notice. It would be sufficient, however, if the Agent or Manager has somehow knowledge of the claim within the specified time.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of G. L. D'CRUZ, Subordinate Judge of Cochin, in Small Cause Suit No. 1 of 1919.

The suit was for a claim of Rs. 171-4-0, being the value of twenty cloths removed from one of two boxes consigned by petitioner. Notice of the claim was given to the District Traffic Superintendent, Cannanore, by registered letter. The defendant *inter alia* pleaded that this notice did not comply with the provisions of sections 77 and 140 of the Indian Railways Act and the suit was not maintainable. The Subordinate Judge agreeing with this contention dismissed the suit. Plaintiff thereupon

* Civil Revision Petition No. 1120 of 1919.

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preferred this Civil Revision Petition to the High Court, which came on for hearing before SADASIVA AYYAR and COURTS TROTTER, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

SADASIVA AYYAR, J.—The plaintiff (petitioner before us) sent his notice of claim for loss (of consigned goods) caused by the negligence of the Railway servants to the District Traffic Superintendent of the Railway, Cannanore, at the end of March 1918, the goods having been delivered for carriage in December 1917 and the cause of action also having arisen in December 1917. The suit was brought in January 1919. Section 77 of the Indian Railways Act says that a claimant against a Railway for compensation for loss should give notice of his claim to the Railway Administration “within six months from the date of the delivery of the goods for carriage by railway.” Section 140 states that “any notice . . . may be served . . . (a) by delivering the notice . . . to the Agent” in India (in the case of a Railway Administered by a Railway Company, which is the case here); “(b) by leaving it at his office; or (c) by forwarding it by post in a prepaid letter addressed to the Agent at his office and registered under Part III of the Indian Post Office Act, 1866.”

The South Indian Railway Company has an Agent in India whose office is in Trichinopoly. This Agent has, in practice, constituted the District Traffic Superintendent of Cannanore to be his deputy to deal with claims made against the Company in respect of the loss of goods. The question is whether the notice given to the District Traffic Superintendent (within the prescribed period of six months) by the plaintiff is sufficient notice to the Railway Administration under section 77 of the

Railways Act. In *Nadiar Chand Shaha v. Wood*(1), MITRA and CASPERSZ, JJ., dissent from the ruling of BADRUDIN TYABJI, J., in *East Indian Railway Company v. Jethmull*(2), and follow that of the Court of Appeal in that case (JENKINS, C.J. and CROWE, J.). The Bombay Appellate Court held that the fact that the Agent of the Railway Company knew of the claim of the plaintiff was not sufficient to enable the plaintiff to sustain his action, and that section 140 of the Act was not a mere enabling section, and that a notice in strict accordance with its provisions must be served before an action could be brought. They also dissented from the view of the Madras High Court in *Periannan Chetty v. South Indian Railway Co.*(3), which held that section 140 did not preclude the claimant from showing that the notice required by section 77 did in fact reach the Agent within the time limited, though not given in one of the modes prescribed by section 140.

(The finding in this case is that there is no satisfactory proof that the Agent was aware, within the prescribed period of six months, of the notice addressed to the District Traffic Superintendent of Cannanore.)

In *Woods v. Mehar Ali Bepari*(4), HOLMWOOD and SHARF-UD-DIN, JJ. [without referring to *Periannan Chetty v. South Indian Railway Co.*(3), or to any other case] held that if the Agent had full knowledge of the notice of the claim or even if he had not full knowledge but if the Traffic Manager usually settles such claims in exercise of the powers delegated to him by the Agent, notice of such claim to the Traffic Manager was sufficient. The learned Judges, however, if I may say so with respect, seem to have entertained some doubts about the

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(1) (1903) I.L.R., 35 Calc., 194. (2) (1902) I.L.R., 26 Bom., 669.

(3) (1899) I.L.R., 22 Mad., 137.

(4) (1908) 4 M.L.T., 427; s.c., 13 C.W.N., 24.

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soundness of their view on the point of law and so they add at the end :

"In any case in the exercise of our powers under section 25 of the Small Cause Courts Act we certainly are not disposed to pass any order in respect to this case which would have the effect of defeating the plaintiff's apparently just claim."

In *Martin & Co. v. Fakir Chand Sahu*(1) and in *Janaki Das v. The Bengal Nagpore Railway Co.*(2), *Nadiar Chand Shaha v. Wood*(3) was followed, and it was held that "may" in section 140 means "must"; thus differing from *Periannan Chetty v. South Indian Railway Co.*(4). In *Madras and Southern Mahratta Railway Company, Ltd. v. Bhimappa*(5), it was held that where a Railway Company (Madras and Southern Mahratta Railway Company, Limited) had made a rule that all applications for loss should be made to the nearest stationmaster and to the Traffic Manager at Dharwar and where that rule had been complied with by a claimant "it is not open to the Company to plead that the notice is insufficient." I take it that the learned Judges (BENSON and SANKARAN NAYAR, JJ.) meant that the Railway Company agreed with the public that a notice sent according to their rules to the Traffic Manager would be treated by them as the notice to the Agent prescribed by the Statute and that they are therefore estopped by their conduct from pleading that the notice did not reach the Agent. The learned Judges also follow *Periannan Chetty v. South Indian Railway Co.*(4), in the view that the notice given need not necessarily be in one of the three modes mentioned in section 140. In *Seshachalam Chetty v. Traffic Manager, His Highness the Nizam's Guaranteed State Railway Co., Ltd.*(6), SUNDARA AYYAR, J., said :

(1) (1910) 14 C.W.N., 888.

(3) (1903) I.L.R., 35 Cal., 194.

(5) (1912) 23 M.L.J., 511.

(2) (1911) 16 C.W.N., 356.

(4) (1911) I.L.R., 22 Mad., 137.

(6) (1913) I.L.R., 38 Mad., 65.

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"no doubt, it may be shown by evidence that some other officer of the Company had authority to receive the notice, either by showing that he was the person who according to the practice of the Company dealt with the claims of the particular character in question or that there were rules framed by the Railway Company authorizing him to receive the notice or in some other legal manner."

But these observations also were obiter.

In *Ram Gopal v. Agent Bombay Baroda and Central India Railway Company*(1), COLVIN, Judicial Commissioner adopts the opinion of HOLMWOOD and SHARFUD-DIN, JJ., in *Woods v. Mehar Ali Bepari*(2). His observations are as follow :

"I must say that the decision given by the Calcutta High Court in *Woods v. Mehar Ali Bepari*(2) appears eminently reasonable. It is really the business of the Traffic Manager to settle such claims and in the circumstances the notice to that official is a claim preferred to the 'Railway administration' under section 77 of the Railways Act. The Agent must be presumed to know what is going on in his subordinate offices, and the notice of claim to the Traffic Manager must be regarded as equivalent to notice to the Agent. It is not disputed that notice of claim was sent to the Traffic Manager within six months, and, so far as this matter goes, the case is not, in my opinion, liable to be thrown out."

This is the only case which supports all the contentions of the appellant in the present case, but it is to be remarked that it is the opinion of a single Judge of a Judicial Commissioner's Court, and the observations are (as appears from the later portion of the judgment) obiter. In *Agent East Indian Railway Co. v. Ajodhya Prasad*(3), the decision in *Woods v. Mehar Ali Bepari*(2) is considered and dissented from with the remark "that the decision was not in accord with the whole trend of modern authority in the Calcutta High Court and was inconsistent with the express and mandatory provisions

(1) (1912) 13 I.C., 297.

(2) (1908) 4 M.L.T., 427; s.c., 13 C.W.N., 24.

(3) (1919) 49 I.C., 498.

of the Railways Act" and had been treated in *Radha Kishen Chooni Lal v. The East Indian Railway Co* (1) as of very doubtful authority. Some English cases, including cases decided by the Privy Council and the House of Lords, interpreting provisions alleged to be similar to the provisions of the Railways Act under consideration were quoted before us; but I do not think that they afford much guidance [see *Union Steamship Company of New Zealand v. Melbourne Harbour Trust Commissioners* (2) and 8 and 9 Vic., C. 20, section 133 interpreted, in *Garton v. The Great Western Railway Co.* (3)]. I believe I have referred to and discussed the authorities in sufficient detail. I confess that I was at first inclined to follow what seems to me to be the preponderance of opinion among the Indian authorities and to hold that in this case the plaintiff had complied with the provisions of section 77 as regards notice to the Railway Administration by proving, at least, that the Agent had actual notice within six months. As my learned brother, however, thinks that in the interest of the mercantile public it is desirable that clear and authoritative pronouncements by a Full Bench are desirable on the questions involved, I agree that this case in its entirety might be referred to a Full Bench for decision and I hope that there will be pronouncements made on the following three points: (It may be that all the three points need not be pronounced upon for the decision, but they are so closely inter-connected with one another that I do not think that a pronouncement made on any of them can be considered irrelevant.)

(1) Where there is a well-known practice or where there is a rule made by the Company by which claims for loss are made to the District Traffic Superintendent

and are dealt with by him either in the first instance (in some cases) or finally (in others) is notice to the said official within six months sufficient compliance with the provisions of section 77 of the Railways Act, whether on the ground of estoppel or otherwise?

(2) Should the word "may" in section 140 of the Railways Act be construed as meaning "must"?

(3) If the Agent has somehow knowledge of the claim made against the Railway Company within six months, is the plaintiff entitled to maintain the suit?

COURTS TROTTER, J.—The plaintiff's claim is against the South Indian Railway Co. for damages for non-delivery of goods consigned by him for carriage by the Company. The Company rely upon sections 77 and 140 of the Indian Railways Act, as the only notice of loss was addressed not to the Agent but to the District Traffic Superintendent, Cannanore. There is no evidence to show that the notice in fact reached the Agent, nor is there evidence of any course of business by which it would automatically do so in such a case. The evidence on the contrary shows that, if a notice were sent to the Agent, he would forward it to the General Traffic Manager, who in his turn would pass it on to the District Traffic Superintendent. The outcome of it is that if the plaintiff had adopted the course which the Company contend to be the right one, the notice would have ultimately reached for effective consideration the very person to whom he addressed it in the first instance.

There are direct authorities against the plaintiff's contention. For example, *Agent East Indian Railway Co. v. Ajodhya Prasad* (1) and *Nadiar Chand Shaha v. Wood* (2). They are doubtless based on the leading case

(1) (1913) 19 C.W.N., 62.

(2) (1884) 9 App. Cas., 365.

(3) (1858) 27 L.J. (N.S.) Q.B., 375.

1) (1919) 49 I.C., 498

(2) (1908) I.L.B., 35 Calc., 194.

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in England, *Garton v. The Great Western Railway Co.*(1), a decision on 8 and 9 Vic., C. 20, section 138. On the other hand, there are decisions of this Court and others which appear to show that service on the Agent is not a condition precedent, and that effective service can be made on the Company by other means, e.g., *Woods v. Mehar Ali Bepari*(2), *Ram Gopal v. The Agent Bombay Baroda and Central India Railway Co.*(3), and *Madras and Southern Mahratta Railway Co., Ltd. v. Bhimappa*(4). *Periannan Chetti v. South Indian Railway Co.*(5) appears to support the position that it is not necessary that the notice should be addressed to the Agent, but also seems to point to the view that there must be evidence that ultimately it reached his hands—evidence which is not forthcoming in this case.

If the petition had been made by the Railway Company it would be dismissed for the reason given by PHILLIPS, J., in *Agent and Manager, South Indian Railway Co. v. Vengu Pattar*(6). But, here the petitioner is the consignor, and as the matter is one of general importance to persons who consign goods for carriage to Railway Companies in this country, and the authorities are conflicting, I think it best to refer the whole case for determination to a Full Bench. It does not appear to me to be necessary to formulate specific questions.

ON THIS REFERENCE

N. A. Krishna Ayyar for appellant.—

[OFFG. C.J.—Can the whole matter be referred to us as a Full Bench?]

Yes, under rule 2 of the Appellate Side Rules.

[OFFG. C.J.—Then we are a Bench disposing of the Petition?]

(1) (1858) 27 L.J. (N.S.) Q.B., 375.
(2) (1908) 4 M.L.T., 427; s.c., 13 C.W.N., 24.
(3) (1912) 13 I.C., 297. (4) (1912) 23 M.L.J., 511.
(5) (1899) I.L.R., 22 Mad., 137. (6) (1911) 21 M.L.J., 1061.

Yes. The Madras cases are in my favour. They say that “may” in section 77 is merely permissive and is not obligatory. Reference made to sections 77, 3 (6), 3 (5) and section 140. Nowhere is “Agent” defined in the Act.

[KUMARASWAMI SASTRI, J.—But for section 140 you would have to deliver the notice at the Head office of the Company which is in London. Section 140 is for the convenience of the public. Is there any evidence in this case to prove that it is customary to send such notices to any subordinate officer?]

Only the evidence of the goods clerk who says that the District Traffic Superintendent can settle claims up to a maximum of Rs. 100, that the consignees send their claims to him, and that that officer submits claims to the General Traffic Manager in the usual course of business. He also says that if claims are sent direct to the Agent or Manager the latter sends it on to the General Traffic Manager and he in turn transmits them to the District Traffic Superintendent. Reference was made to *Madras and Southern Mahratta Railway Co., Ltd. v. Bhimappa*(1), *Seshachallam Chetti v. Traffic Manager, His Highness the Nizam's Guaranteed State Railway Co., Ltd.*(2), and *Woods v. Mehar Ali Bepari*(3).

T. L. Venkatarama Ayyar for V. Viswanatha Sastri, for respondent, was not called upon.

AYLING, OFFG. C.J.—This is a Civil Revision Petition under section 25 of Act IX of 1837 in which we are asked to revise the order of the Subordinate Judge of Cochin dismissing Small Cause Suit No. 1 of 1919 on his file. The whole case has been referred, first by a

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(1) (1912) 23 M.L.J., 511. (2) (1913) I.L.R., 36 Mad., 65, 66.
(3) (1908) 4 M.L.T., 427; s.c., 13 C.W.N., 24.

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single Judge to a Divisional Bench, and then by that Bench to a Full Bench.

This suit was one for damages against the South Indian Railway Company for short delivery of goods: and it was dismissed for failure to notify plaintiff's claim within six months as required by section 77 of the Railways Act read with section 140. The former section says :

"A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the animals or goods for carriage by railway."

"Railway Administration" is defined in section 3 (6) of the Act as meaning the Railway Company itself: and clause (5) of the same section says that

"Railway Company includes any persons, whether incorporated or not, who are owners or lessees of a railway or parties to an agreement for working a railway."

Now the South Indian Railway Company is registered in England, and without some further provision the service of notices on such a body would be a matter of considerable difficulty and doubt. Such a provision is section 140, which is obviously intended for the benefit of the public to facilitate the service of notices. It runs thus :

"Any notice or other document required or authorized by this Act to be served on a railway administration may be served, in the case of a railway administered by the Government or a Native State, on the Manager and, in the case of a railway administered by a Railway Company, on the Agent in India of the Railway Company,

(a) By delivering the notice or other document to the Manager or Agent; or

(b) By leaving it at his office; or

(c) By forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered under Part III of the Indian Post Office Act, 1866."

The effect of the sections referred to above is to bar plaintiff's claim in this suit unless he can show that he has complied with the requirements of the law as regards service of notice of claim. Now, in the present case, it is not suggested that any written claim was preferred to the Railway Administration itself as defined above: or that any notice was addressed, much less served, as required by section 140, to the Agent of the South Indian Railway Company within the time allowed. The only notice which could be said to be served within six months was the original of Exhibit J, which was sent to the District Traffic Superintendent, Cannanore. The Subordinate Judge finds as a fact that it is not proved that the Agent was aware of this notice within the prescribed period; and, as one of the learned referring Judges puts it,

"There is no evidence to show that the notice in fact reached the Agent, nor is there evidence of any course of business by which it would automatically do so."

I have carefully examined the very meagre record in the case to see if there is any evidence from which it could be deduced that the power of the Agent to receive notices under section 140 had been delegated to the District Traffic Superintendent or that the Railway Company by its rules or course of conduct had held out to the public that notices might be given to such an officer instead of to the Agent, and thus estopped themselves from raising this technical defence. I can find none. There is merely the evidence of a goods clerk (Plaintiff's witness 1) to the effect that parties usually send their claims to the District Traffic Superintendent, who

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is empowered to settle them up to Rs. 100. (The present claim is for Rs. 171.) The rules of the Company are not in evidence: and no notification is referred to.

I can therefore find no ground for interference and would dismiss the Civil Revision Petition with costs.

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KUMARASWAMI SASTRI, J.—This Revision Petition arises out of a suit filed by the petitioner against the South Indian Railway Company to recover Rs. 171-4-0, the price of cloths consigned through the Railway Company and not delivered. Notice of the claim was addressed and sent to the District Traffic Superintendent, Cannanore. One of the defences raised was that the claim was unsustainable as notice was not sent to the Agent as required by section 140 of the Railways Act. The Subordinate Judge dismissed the suit on the ground of want of notice to the Agent within six months of the loss. He held that it had not been proved that the notice to the District Traffic Superintendent was by the rules of the Company equivalent to notice to the Agent. The petition originally came on before Courts TROTTER, J., who was of opinion that the defence was wholly without merit but that owing to the important questions of law raised it should be decided by a Bench. The petition came on before the learned Judge and SADASIVA AYYAR, J., who referred the case to a Full Bench. After referring to the conflicting authorities, SADASIVA AYYAR, J., formulated the following questions for consideration:

(1) Where there is a well-known practice or where there is a rule made by the Company by which claims for loss are made to the District Traffic Superintendent and are dealt with by him either in the first instance (in some cases) or finally (in others), is notice to the said official within six months sufficient

compliance with the provisions of section 77 of the Railways Act, whether on the ground of estoppel or otherwise?

(2) Should the word "may" in section 140 of the Railways Act be construed as meaning "must"?

(3) If the Agent has somehow knowledge of the claim made against the Railway Company within six months, is the plaintiff entitled to maintain the suit?

So far as the provisions of the Railways Act are concerned they require notice of claim to be given, and enable the party to give notice either to the Administration, which means the Railway Company itself at its Registered Office, or to the Agent or Manager in India. When notice is sent to the Registered Office or to the Agent in India, there is no difficulty. It would be sufficient compliance if, instead of sending the notice to the Agent, it is addressed to the Railway Company at its Registered Office.

On the question as to whether the provisions of section 140 would be sufficiently complied with if the notice is sent to an officer to whom the Agent or the Railway Company ask the public to submit all claims for loss or damage, or if the person to whom the notice has actually been sent sends it on or informs the Agent of its contents, within the prescribed period of six months, the authorities are conflicting. In *The Secretary of State for India in Council v. Dip Chand Poddar*(1) notice given to the Traffic Superintendent was held to be insufficient but that it was open to the party to show that the notice served on the Traffic Superintendent reached the Agent or Manager within six months from the date of the non-delivery of the goods. In *Woods v. Meher Ali Bepari*(2), HOLMWOOD and SHARF-UD-DIN, JJ., were of opinion that though notice of claim under section 77 of the Railways Act must be

(1) (1897) I.L.R., 24 Calc., 306.

(2) (1908) 4 M.L.T., 427; s.c., 13 O.W.N., 24.

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served on the Agent as provided by section 140, it does not require actual physical service but that it would be sufficient "if the findings of fact are such that it must be inferred that the Agent had full knowledge and notice of the claim." This case was followed in *Ram Gopal v. The Agent, Bombay Baroda and Central India Railway Co.*(1). In *Janaki Das v. The Bengal Nagpore Railway Company*(2) the notice was given to the Goods Superintendent to whom, under rule 57 of the Goods Tariff published by the Railway Company, written claims had to be made. This was held to be a sufficient compliance with the provisions of section 140 by the District Judge, but JENKINS, C.J., reversing the decision observed :

"the method of service permitted by this section has not been followed; nor has it been shown that the claim has been otherwise preferred to the railway administration so as to satisfy the requirements of section 77."

The Secretary of State for India in Council v. Dip Chand Poddar(3) and *Woods v. Meher Ali Bepari*(4) were not referred to. In the *East Indian Railway Company v. Ram Autar*(5), the notice was served on the Claims Superintendent, but there was no evidence that the Claims Superintendent was authorized by the Agent to receive such notices on his behalf. CHATTERJEE and BEACHCROFT, JJ., after referring to *Janaki Dass v. The Bengal Nagpore Railway Company*(2), *The East Indian Railway Company v. Babu Madho Lal*(6) and *Radhakishen Chooni Lal v. East Indian Railway Company*(7), and distinguishing *Woods v. Meher Ali Bepari*(4) on the ground that there was no finding that claims were usually referred by the Agent to the Claims

Superintendent or that the notice actually reached the Agent, observed :

"The law requires that the notice should be on the Agent and we think the notice must be on the Agent and whether a particular officer is authorized by the Agent to receive such notices on his behalf is a question of fact that must be decided on the evidence."

In *Kala Chand Shaha v. The Secretary of State for India*(1) it was held that a notice to the Traffic Manager was insufficient. It was found as a fact by the lower Court that notice of the claim was not brought before the Agent within six months. The learned Judges were inclined to the view that there could be no estoppel against the express provisions of sections 77 and 140 of the Railways Act. In *East Indian Railway Company v. Ramgati Ram*(2), STEPHEN and MULLICK, JJ., were of opinion that a notice served on the District Traffic Superintendent was not sufficient compliance with sections 77 and 140 of the Act and a similar view was taken in the *Agent, East Indian Railway Company v. Ajodhya Prasad*(3). In *Nadiar Chand Shaha v. Wood*(4), it was held that service of notice on the Traffic Manager was not a sufficient compliance with the provisions of the Act. MITRA and CASPERSZ, JJ., were of opinion that the word "may" in section 140 "means that, if a plaintiff is desirous of serving an effective notice of claim, the notice must be directed to the Manager or Agent, as the case may be," and dissented from *Perianan Chetty v. The South Indian Railway Company*(5). They refused to send the case down for a finding whether the Traffic Manager was authorized by the Agent to

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(1) (1912) 13 I.C., 297.

(2) (1911) 16 C.W.N., 356.

(3) (1897) I.L.R., 24 Calc., 306.

(4) (1908) 4 M.L.T., 427; s.c., 13 C.W.N., 24.

(5) (1915) 20 C.W.N., 696.

(6) (1913) 17 C.W.N., 1135.

(7) (1899) 19 C.W.N., 62.

(1) (1917) 21 C.W.N., 751.

(2) (1906) 19 C.L.J., 180.

(3) (1919) 49 I.C., 498.

(4) (1908) I.L.R., 35 Calc., 194.

(5) (1899) I.L.R., 22 Mad., 137.

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receive the notice as the question did not arise on the pleadings and no evidence was adduced on the point.

In the *Great Indian Peninsula Railway Company v. Chandra Bai*(1), STANLEY, C.J., and BURKITT, J., held that notice of a claim prescribed by section 77 may be given either to the Railway Administration as defined in section 3, sub-clause (6), or in any of the ways mentioned in section 140, and that in view of the express provisions of the sections, service on the General Traffic Manager was insufficient. There was no question in this case as to the Traffic Manager having been authorized by the Agent to receive such notices or of the notice having, as a matter of fact, been communicated to him in the usual course of official correspondence. This case was followed in *Great Indian Peninsula Railway Company v. Ganpat Rai*(2).

In *The East Indian Railway Company v. Jethmull*(3) the notice was served on the Traffic Manager. TYABJI, J., was of opinion that section 77 was only intended to protect the Company against stale claims and to compel persons to make their claims within a reasonable time so as to enable the Railway Company to make inquiries and, if satisfied, to pay the claims, that section 140 was only an enabling section and not exclusive and compulsory since notice on the Administration would be sufficient, and that as the General Traffic Manager was an important officer of his Company and the principal officer charged with the duty of investigating claims made against the Company, service on him was sufficient. It should be observed that the claim was against the Bombay, Baroda and Central India Railway Company and the East Indian Railway Company, and that notice was sent by the plaintiff to the Traffic

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Manager of the Bombay, Baroda and Central India Railway Company and no notice was sent directly to the East Indian Railway Company. The notice was, however, communicated by the former to the latter Company and this was held by the learned Judge to be sufficient. On appeal by the East Indian Railway Company, it was held by JENKINS, C.J., and CROWE, J., that the notice was insufficient to charge the East Indian Railway Company, as it was not shown that any claim was preferred direct to the East Indian Railway Company and the letters written by the Bombay, Baroda and Central India Railway Company did not amount to a notice on plaintiff's behalf. The learned Judges do not deal with the question whether the notice would be sufficient against the Bombay, Baroda and Central India Railway Company to whose Traffic Manager the notice was sent, nor is there any disapproval of the view taken by TYABJI, J., as to the sufficiency of the notice so far as the Bombay, Baroda and Central India Railway Company is concerned. This case was followed in *Bombay, Baroda and Central India Railway Company v. Saute Lal*(1). In *Great Indian Peninsula Railway Company v. Dewashi*(2) it was held by RUSSEL and BATTY, JJ., that delivery of the notice under section 140 must be in exact compliance of the terms of the section and must be delivered to the Agent at his office.

So far as the Madras High Court is concerned the authorities are uniform. In *Periannan Chetty v. The South Indian Railway Company*(3), it was held that notice to the Traffic Manager is good notice if it in fact reached the Agent within six months. SUBRAHMANYA AYYAR and BENSON, JJ., were of opinion that section 140 simply provided for one mode of service, the other being service

(1) (1906) I.L.R., 28 All., 552. (2) (1911) I.L.R., 33 All., 544.
(3) (1902) I.L.R., 26 Bom., 669.

(1) (1903) A.W.N., 235. (2) (1907) I.L.R., 31 Bom., 534.
(3) (1899) I.L.R., 22 Mad., 137.

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on the Railway Company at the Head Office in England and observe :

" We do not think that section 140 precludes a claimant from showing that the notice required by section 77 did, in fact, reach the Agent, within the limited time, though not in one of the modes prescribed by section 140. The case of the *Secretary of State for India in Council v. Dip Chand Podder*(1), to which the learned counsel for the Company has drawn our attention in connexion with another point, supports the view that we have taken as to the construction to be placed on section 140."

In the *Madras and Southern Mahratta Railway Company, Ltd. v. Bhimappa*(2), the notice of claim was served on the Traffic Manager under a rule made by the Railway Company that all applications for loss should be made to the nearest station master and the Traffic Manager, Dharwar. The learned Judges (BENSON, OFFG. C.J. and SANKARAN NAYAR, J.) followed *Periannan Chetty v. The South Indian Railway Company*(3) and observed that if a mode of service is prescribed by the Company, and is observed by the party claiming relief, it is not open to the Railway Company to plead that the notice is insufficient.

In *Seshachallam Chetty v. The Traffic Manager, His Highness the Nizam's Guaranteed State Railway Company, Limited*(4), it was held by SUNDARA AYYAR, J., that though the proper person on whom notice should be served is the Agent, it may be shown by evidence that some other officer of the Company had authority to receive the notice, either by showing that he was the person who, according to the practice of the Company, dealt with the claims of the particular character in question or that there were rules framed by the Railway Company authorizing him to receive the notice or in some other legal manner.

(1) (1897) I.L.R., 24 Calc., 306.

(3) (1899) I.L.R., 22 Mad., 137.

(2) (1912) 23 M.L.J., 511.

(4) (1913) I.L.R., 36 Mad., 65.

I do not think there is sufficient reason to dissent from the views taken by the Madras High Court in the decisions above referred to. So far as section 140 is concerned it is only an enabling provision and gives the party the option of serving the notice on the Agent or Manager of the Railway Company instead of on the Railway Administration at its Registered Office. Section 140 refers to three modes by which service may be effected, namely, (1) delivery of the notice to the Manager or Agent personally, (2) leaving it at his office, and (3) sending it by registered post. The second and third methods are not personal service, but a person is relieved from further liability if he leaves the notice at the Agent's office or sends it by registered post, even if the notice for some reason does not actually come into the Agent's hands. The object of the section is to see that the Company gets notice and there is no magic in the methods provided for by the section to see that it reaches him, if as a matter of fact the notice comes into his hands. Supposing the plaintiff adopts the method of sending the notice by post without registration and the Agent admits receipt of the notice which is otherwise valid, there is no reason for holding that non-registration is such a vital defect that it invalidates the notice. The Code of Civil Procedure provides for modes of service of summons and notices. I do not think it can be said that where a party without objection receives and admits receipt of the summons or notice, he can fail to appear and plead the mode by which he received the process as an excuse.

So far as notices of action are concerned, the substantial point is whether they reached the person to whom the law requires notice to be given; and the method by which he received it is a matter which is of comparative unimportance and a deviation from the methods

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prescribed in the section will, in my opinion, be only an irregularity. In *Union Steam Ship Company of New Zealand v. Melbourne Harbour Trust Commissioners*(1), SIR ROBERT COLLIER delivering the judgment of their Lordships of the Privy Council, observed :

“Some cases have been quoted for the purpose of showing that notices of action are not to be construed with extreme strictness, a rule to which their Lordships subscribe. Cases have been quoted in which notices of action have been upheld which would have been bad upon special demurrer or perhaps upon general demurrer; but those cases have no bearing on the present, where the notice of action is not in form or substance a compliance with the Act.”

In cases where a subordinate official sends on the notice to the Agent or informs him of its contents within six months, I think there is a substantial compliance with the requirements of the Act, the essential consideration being the question whether the Agent had notice of the claim so as to enable him to take steps for the protection of the interests of the Company. I am of opinion that *Woods v. Meher Ali Bepari*(2), *Periannan Chetty v. The South Indian Railway Company*(3), *Madras and Southern Mahratta Railway Company v. Bhimappa*(4) and *Seshachellam Chetti v. The Traffic Manager, the Nizam's Guaranteed State Railway Company*(5), were rightly decided, and would follow them in preference to the decisions that put a strict and literal interpretation on clauses (a), (b) and (c) of section 140.

There is nothing in the Act that prevents the Railway Administration or its Agent or Manager from deputing an officer to receive the notice required by sections 77 and 140 on its behalf. It is unlikely that the Agent or

Manager would attend personally to losses and in the ordinary course of business he would depute the Traffic Manager or District Traffic Superintendent to investigate into the matter and report to him. Instead of receiving the notice and passing it on to the officer concerned, the Agent or the Manager may, to save delay and official correspondence, require the party making the claim to send the notice to the person to whom the Agent would, in the ordinary course of business, pass it on. The object of section 77 being to give the Company prompt notice of the claim so as to prevent stale claims and to enable it to make prompt inquiry, there is no peculiar efficacy in its being addressed to the Agent, if the Company thinks it fit to ask the person complaining to address its claims to a subordinate official ordinarily dealing with such claims. I am unable to find any reason for the contention that an Agent cannot depute a subordinate officer of the Company to receive the notice, and as pointed out in *East Indian Railway Company v. Ram Autar*(1), the question whether a particular officer is authorized by the Agent to receive such notices on his behalf is a question of fact to be determined in each case. Agency may be proved either by direct evidence of authority, or by a course of conduct which in the opinion of the Court would justify the inference that the subordinate official was authorized by the Agent to receive notices on his behalf.

I would answer the first and third questions in the affirmative. As regards the second question, I think section 140 is an enabling provision and that the word “may” does not mean “must” so as to make other modes of service ineffectual even in cases where the notice has actually reached the Agent or where the

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(1) (1884) App. Cas., 365.

(2) (1908) 4 M.L.T., 427; s.c., 13 C.W.N., 24.

(3) (1899) I.L.R., 22 Mad., 137.

(4) (1912) 23 M.L.J., 511.

(5) (1913) I.L.R., 36 Mad., 65.

(1) (1915) 20 C.W.N., 696.

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contents of the notice have been communicated to him by the subordinate who receives the notice.

In the present case it is admitted that the notice was not sent to the Agent, and there is no evidence that the Agent had notice within the prescribed period. The Petition fails and is dismissed with costs.

ODGERS, J.

ODGERS, J.—I agree with the judgment just pronounced by my Lord and have nothing to add.

M.H.H.

INSOLVENCY JURISDICTION—ORIGINAL CIVIL

Before Mr. Justice Coutts Trotter.

V. SUBRAMANIA CHETTY AND M. KANAGARATNA

1921,
September 14 REDDY or V. SUBRAMANIA CHETTY & CO. (INSOLVENTS).*

Presidency Towns Insolvency Act (III of 1909), sec. 49 (1)—Government of India—Soap factory carried on for industrial instruction—Scope of statutory powers—Debt due by insolvent—Whether “a debt due to the Crown”—Priority of debt.

The conducting of a soap factory by way of education and demonstration to the people is not outside the scope of the powers of the Government of India. A debt due to such a concern by an insolvent is a debt due to the Crown and under section 49 (1) of the Presidency Towns Insolvency Act (III of 1909) is recoverable in full in priority to other debts of the insolvent.

NOTICE OF MOTION before the Insolvent Court for an order to reverse the decision of the Official Assignee in respect of a debt due to Government from the insolvents.

The Government of Madras were carrying on the Kerala Soap Institute at Calicut for demonstration

purposes and had supplied soap to the insolvents. They claimed the amount due to them in full and in priority to other debts on the ground that the receipts and charges of the institute were “credited to and met from the provincial revenues of the Government of Madras and as such the debt was due to the Crown.” The Official Assignee of Madras disallowed the claim to payment in full and priority, but admitted the claim to rank for dividend. Government thereupon took out a Notice of Motion to reverse that order.

The Advocate-General for petitioner.—The question here is, if the Government trades, is it only in the position of an ordinary trader or has it priority in the payment of debts out of an insolvent estate. One of the tests is does the debt when recovered fall into the State treasury. If it does, it is a Crown debt. In India there is no question of *writs of extent* or the nature of the debt due to the Crown and there is no distinction between debts due as a matter of record and specialty debts. Reference was made to Williams on Bankruptcy, pages 173 and 421, Bankruptcy Act of 1883, sections 40, 40(1) and 150, Bankruptcy Act of 1914, sections 33, 151, and the Presidency Towns Insolvency Act, section 49, and *In re Henley & Co.*(1), *New South Wales Taxation Commissioners v. Palmer*(2), *Ex parte Postmaster-General*, *In re Bonham*(3), *In re Galvin*(4), *Attorney General v. Leonard*(5), *In re Niblock*(6), *Secretary of State for India v. Bombay Landing and Shipping Co.*(7), *Judah v. Secretary of State for India*(8) and *Gayanoda Bala Dassee v. Butts Kristo Bairajee*(9).

IN THE
MATTER OF
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(1) (1878) 9 Ch. D., 469.

(2) [1907] A. C., 179.

(3) (1879) 10 Ch. D., 595.

(4) [1897] 1 I.R., 520.

(5) (1888) 38 Ch. D., 622.

(6) [1907] 2 I.R., 559.

(7) (1868) 5 Bom. H.C.R., 23.

(8) (1886) I.L.R., 12 Calc., 445.

(9) (1906) I.L.R., 33 Calc., 1040.

* Insolvency Petition No. 147 of 1920.

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V. Mockett for the respondent.—This is not a Crown debt, because it is a debt incurred in the course of trade and the Government of India has no right to trade except in so far as it is authorized by statute: *Re H. J. Webb & Co.*(1). The history of trade by the authorities governing India so far as this inquiry is concerned is as follows :

Charter of Elizabeth, December 31, 1600.—Monopoly of trade in the East Indies granted to the East India Company. This monopoly continued until 53 *Geo. III*, C. 155, 1813, which after reciting "the undoubted sovereignty of the Crown" grants the Indian possessions and revenues to the East India Company for a further term of 20 years, reserves to them the China and tea trades but throws open general trade to the ordinary traders subject to various restrictions and conditions.

3 and 4 William IV, C. 85, sections 3 and 4.—The Tea and China trade was taken away and the Company were required to close their commercial business and except for the purposes of Government were prohibited from trading.

Government of India Act, 1858.—The East India Company ceased to exist and their powers were transferred to the Government of India. The Government of India therefore has by Statute no greater rights to trade than had the East Indian Company at that period.

Subsequent legislation relating to the Government of India in 1915, 1916 and 1919 has not in any way added to these rights.

The Government of India has no right therefore to trade except for the purposes of Government and this factory is not in existence for that purpose: *Judah v. Secretary of State for India*(2). Nor can it be said that

(1) [1921] W.N., 241.

(2) (1885) I.L.R., 12 Calo., 445.

the revenue derived from the factory is "applied for the purposes of Government" within the meaning of the section 20, clause (1).

The control and management of railways by the Government is so clearly necessary for purposes of Government, *e.g.*, for the transport of troops and supplies in case of war or famine that special statutory authority is not required. Demonstration of the making of soap may be beneficial to subjects interested in that branch of industry, but this cannot be said to be for the purposes of Government. The existence of the Salt, Abkari and Opium Acts go to show that statutory authority was required before the Government could trade in these commodities.

The *Advocate-General* in reply.—The Crown has ancient rights to create monopolies: see Dicey's Constitutional Law, page 464, Anson's Law of the Constitution, page 179, (1911) 1 and 2 *Geo. V*, C. 26. *In re Behara*(1) 5 *Geo. V*, C. 8, 37; 5 and 6 *Geo. V*, C. 54, 82, 99 and 7 and 8 *Geo. V*, C. 45, 67; Madras Act 1 of 1816, Broom's Constitutional Law, pages 35, 236, 237 and 21 James 1 C. 3. In England, the Commons have to sanction all payments of money. There is no such sanction required in India. The statutes relating to the Indian Railways are for raising debentures to pay interest out of capital and the issuing and registering of shares in India: see Indian Railways Act, IX of 1890 and 53 *Vict.*, C. 6.

COUTTS TROTTER, J.—This is in substance an appeal against the refusal of the Official Assignee of Madras to allow the preferential claim of Government for the sum of Rs. 4,418-1-0 in priority to the claims of all other creditors in the insolvency of a firm trading

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(1) [1914] 2 I.R., 29.

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as M. Subramania Chetty & Co., as a Crown debt within the meaning of section 49 (1) (a) of the Presidency Towns Insolvency Act. I have had the benefit of a learned and instructive argument as to the nature and history of debts to the Crown both in England and in this country, and it is not out of disrespect to that argument but rather because of the assistance I derived from it that I give my judgment in a comparatively small compass. I do not intend to inquire into the history of writs of extent whether in chief or in aid. The curious will find much learning on the subject in *Ex parte Postmaster-General*. In *re Bonham*(1), and in the very erudite judgment of PALLIS, C.B., in *In re Galvin*(2). Where statute law intervenes, one ruling principle is that the Crown is not bound by a statute in which it is not specially mentioned. Another is that where the Crown comes into competition with other creditors in the case of debts of the same degree, the rights of the Crown must prevail: see *In re Henley & Co.*(3). These rules would be sufficient to determine that if this is a debt legally incurred to the Crown, it would have an undoubted priority at common law. I agree with GARTH, C.J., in *Judah v. Secretary of State for India*(4), that it is unnecessary to go into the history of the common law on the subject where we have the plain words of an Indian statute. But a much wider question is argued by counsel on behalf of the Official Assignee. His contention is that this is not a Crown debt, because the Crown had no power to enter into the transactions which resulted in the debt. He says that the transactions which resulted in the debt were—to use an expression familiar to lawyers though perhaps it is analogous

rather than directly appropriate—*ultra vires* of the Crown.

The facts are these. In 1919 Government took over the soap factory at Calicut now known as the Kerala Soap Institute. It was taken over and has been conducted by the Department of Industries, the object being to demonstrate that this industry can be carried on at a profit and to encourage the starting of similar factories by private enterprise. The net result has been that Government carried it on as an ordinary trading concern. Mr. Mockett's argument was that Government is not entitled to trade except in so far as it is authorized to do so by statute. The Government of India by 21 and 22 Vict., C. 106, inherited all the rights and privileges of the East India Company. It is quite plain that the power to trade other than for revenue purposes had been lost before that to the Company by 3 and 4 William IV, C. 85, section 4. That is a prohibition imposed on the Company itself quite distinct from the earlier prohibition imposed by 53 Geo. III, C. 155, on the individual servants of the Company from engaging in trade on their own account. It is therefore, I think, quite plain that Government could not carry on this factory by virtue of any power inherited from the East India Company.

But the Advocate-General bases his claim on a much wider ground, and contends that the Crown, that is, the Government of India, is entitled to trade in this country by virtue of the royal prerogative. At this point the analogy of England begins to fail for a variety of reasons. In the first place, the Crown, as the term is used by English lawyers, has a double meaning. It may mean the sovereign in person, and no one questions the right of His Majesty to engage as an individual in whatever trade he pleases, and no doubt, subject to technical

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(1) (1879) 10 Ch. D., 595.

(3) (1878) 9 Ch. D., 469.

(2) [1897] 1 I.R., 520.

(4) (1885) I.L.R., 12 Cal., 445.

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rules of English law as to varying degrees of debts such as specialty and simple contract debts, His Majesty as a trader would have preferential rights over other creditors, unless such rights were taken away by a statute in which the Crown was named. On the other hand, the Crown in constitutional law much more frequently means King, Lords and Commons, and the essence of the distinction is that, if the Crown in that sense were to trade, it would trade with public moneys and not merely with the private resources of the King. The Advocate-General admits that the Crown in that sense could not trade in England without statutory authority. He contends that that is so not because the prerogative would not cover the case but because the necessary funds from the public revenue could only be obtained by a vote of the House of Commons, the result being that while the right of the King, Lords and Commons to trade is within the prerogative, it cannot be exercised *de facto* unless the necessary capital were voted by an Act of Parliament. The next step in his argument is to posit that in India where the Crown is directly vested with the revenues of the country, it can, without the need of a parliamentary vote, apply the revenues of the country for purposes of trade by virtue of the prerogative. The prerogative may sufficiently be described, for my present purpose, as the discretionary power vested in the executive for which it does not need a parliamentary vote or statutory authority. On this view, Acts like the Telegraph and Telephone Acts would not be sources of Government's authority to conduct these businesses—for businesses they are—but merely a warrant to employ public moneys in their conduct. The immense mass of trading which the Government undertook during the war does not carry the matter any further, because it may all be said to have been legalised by Parliament

under the Defence of the Realm Act, 4 and 5 Geo. V, C. 29.

I do not think I can rely on the fact—it is an undoubted fact—that one of the reported cases in India, viz., *Secretary of State for India v. Bombay Landing and Shipping Company* (1), was a case of Government trading in the wider sense, because the point argued before me was not then taken, and clearly was not present to the mind of the Court. Nor do I think that *Judah v. Secretary of State for India* (2), is a case in point; for though the Government were clearly trading in the ordinarily accepted sense of the term, the trade was in opium, a recognized source of revenue, and therefore directly within the scope of 3 and 4 William IV C., 85. The same observation applies to the Government trading in the Salt and Abkari departments.

On the whole, I do not think I am called upon to decide the wide problem of constitutional law involved in these rival contentions. I cannot say that this is trading for purposes of revenue, because, although the profits of this undertaking (and it resulted in fact in a profit last year) are paid into the general exchequer and swell the Government revenue, the Advocate-General has frankly stated that the Government's purpose in this and similar undertakings, which I understand are conducted on a considerable scale in many fields of industry, is not to bring accretions to the revenue, but to serve by way of industrial instruction to the people of this country. I think that the claim of Government can be justified on the ground that, apart from any question of prerogative, the conduct of this industrial undertaking is justified by statutory authority. As I have already pointed out, the allocation of the revenues of India to particular purposes

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(1) (1868) 5 Bom. H.C.R., 23. (2) (1885) I.L.R., 12 Calc., 445.

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does not require anything in the nature of an express vote of a representative body. Nevertheless, it is regulated by one dominating statutory provision, namely, section 20 (1) of the Government of India Acts 1915 to 1919, 5 and 6 Geo. V, C. 61, 6 and 7, Geo. V, C. 37, and 9 and 10 Geo. V, C. 101. The words of the section are these :

"The revenues of India shall be received for and in the name of His Majesty, and shall, subject to the provisions of this Act, be applied for the purposes of the government of India alone."

Exactly to draw the line as to what falls within the strict purview of the phrase the "government" of the country and what lies outside it, would be an impossible task. To take an example ready to hand, many, if not most, of the Indian railways are conducted or subsidised by Government without specific statutory authority ; it would be startling to have to come to the conclusion that such an activity of Government was without warrant. Mr. Mockett shrank from pressing such a result and argued that although no doubt railways brought in much profit from the carriage of private passengers and the goods of private owners, yet their maintenance was essential to the Government by their facilities for rapid transport of Government officials and the police and military forces necessary to secure law and order throughout the country and that therefore they may be regarded as essential to the "purposes of the government of India," in the strictest sense. But he maintained that an experiment like the present, however benevolent and though wholly desirable for the benefit of the people, cannot be regarded as reasonably appertaining to the "government" of the country but rather to its improvement and education. I think there is much force in his argument, but with some hesitation

I think that in India at all events it ought not to prevail. In a country with a fully developed industrial life like England, I might feel constrained to give effect to it. But in a country like India where many industries suitable to its natural resources and its people have either not been started at all or are nascent and struggling, I think it would be a misfortune if a Judge were driven to say that the starting and encouraging of such industries by way of education and demonstration was not covered by the term the "government" of India. The Government of India after all has long been and must long be a paternal Government ; and in deciding what is within its legitimate scope, one can hardly lose sight of that outstanding consideration.

I therefore come to the conclusion that it is not outside the statutory powers of the Government of India to conduct a soap factory such as this, and it follows from what was said in the earlier part of this judgment that this claim was a Crown debt recoverable in full in preference to the claims of any other creditor.

That disposes of the point of law which I am called upon to decide. Perhaps I may be permitted respectfully to suggest that it would be well if such claims were not pressed in future by Government. The old theory of the priority of Crown debts was doubtless based on the personal pre-eminence of the Sovereign. The King was the King and obviously took precedence over the subject. Modern lawyers justify the rule on a different ground. The rights of the Crown mean in modern times the rights of the mass of the King's subjects, and on this ground it is said to be right and just that the claims of the community as a whole should prevail over those of individuals. But I venture to think that this reasoning is not applicable to the present case. In the first place, the commercial community which might

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otherwise welcome the attempts of Government to open up new avenues of trade and manufacture is very likely to be alarmed and alienated by the claim of Government to stand on a different footing to other traders. In the next place and this is much more important—it appears to me that the enforcing of claims such as this—must in the end defeat the very purpose that Government has in view. The object of the conduct of this concern, as explained to me by the Advocate-General, was to demonstrate that the natural resources of Malabar could be profitably used by private manufacturers and traders to start and carry on similar businesses, the Government as it were saying to the people “We have shown that this business can be carried on at a profit. Let this encourage you to put your capital into similar undertakings and hope for similar profits to those we have shown that we have made!”

The whole demonstration obviously breaks down if the traders can reply “You have only made profit, because you stood in a privileged position in which we cannot stand, by claiming priority of payment of your debts over those of all your business competitors.”

The Government Solicitor to be entitled to be paid his taxed costs on the Original Side scale by the Government.

Solicitors for the Crown : *H. Brightwell.*

Solicitors for Official Assignee : *King and Partridge.*

M.H.U.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

THE OFFICIAL RECEIVER OF COIMBATORE
DISTRICT AND ONE OTHER (PLAINTIFFS), APPELLANTS,

1921
October, 19.

v.

D. D. KANGA (DEFENDANT), RESPONDENT.*

Provincial Insolvency Act (III of 1907), sec. 20 (d)—Instituting suit—Leave of Court, whether necessary.

A suit filed by an Official Receiver cannot be dismissed on the ground that leave of the Court had not been obtained as required by section 20 (d) of the Provincial Insolvency Act. That is a matter between the Official Receiver and the Court, whose officer he is.

APPEAL from the decree of Mr. Justice PHILLIPS passed in the exercise of the Ordinary Civil Jurisdiction of the High Court of Madras in Civil Suit No. 719 of 1919.

The facts are set out in the judgments.

T. V. Gopalaswami Mudaliyar for appellants.

D. Chamier and *V. Mockett* for respondent.

SPENCER, J.—It is evident from paragraphs 15 and 16 of the affidavit that accompanied both Civil Miscellaneous Proceedings No. 2723 of 1919, the second appellant's petition for stay of the sale of the Insolvent's property, and Civil Miscellaneous Proceedings No. 2724 of 1919, the petition for a direction to be given to the Official Receiver, Coimbatore, to file a suit against the respondent in this Appeal for damages on account of his action in allowing the promissory note for Rs. 10,000 to become time barred, that the purpose of the latter

* Original Side Appeal No. 97 of 1920.

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petition, was to get a suit filed within October 27th, 1919, after which date a suit upon that cause of action would have been out of time.

Civil Miscellaneous Appeal No. 272 of 1919, wherein the order of the District Judge of Coimbatore directing the Official Receiver not to file a suit was appealed against, was not placed before ODGERS, J., for disposal, nor did that learned Judge purport to deal with the District Judge's order. I consider therefore that BAKEWELL, J., who dealt with an application for stay of proceedings in the suit pending the disposal of Civil Miscellaneous Appeal No. 272 of 1919, and PHILLIPS, J., who tried the suit, were right in regarding ODGERS, J.'s order as a provisional order subject to the result of the Civil Miscellaneous Appeal.

The learned Judges (OLDFIELD AND SESHAGIRI AYYAR, JJ.) who heard the Civil Miscellaneous Appeal observed that the order of ODGERS, J., was in force and that they could not interfere with it in the proceedings before them. They next went on to say that in these circumstances it would be useless to dispose of the Appeal and to dismiss it. Apparently they failed to notice that ODGERS, J., could not and did not set aside the District Judge's order, refusing leave to sue, an order that was passed by him as a Court exercising jurisdiction under the Provincial Insolvency Act—vide the expression "by leave of the Court" in section 20 of Act III of 1907, the enactment then in force, and the definition of "Court" in section 2 (1) (g).

They also seem to have overlooked the fact that the result of the Bench dismissing the Appeal would be to leave the District Judge's order prohibiting the Official Receiver from suing in full force and effect. I have no doubt that their intention was to give full effect to ODGERS, J.'s order and that this result might have

been attained by allowing the Appeal instead of dismissing it.

But no attempt has been made by the parties to get the order on the Civil Miscellaneous Appeal reviewed by the Bench that passed it, and so we are bound to give it the legal effect that it has, instead of being guided by what we may think the learned Judges intended to do.

On the second point, which is, that no leave was necessary for the institution of this suit, I am unable to follow the opinion of the learned Judge of the Court who tried this suit in treating the words "as hereinafter provided" in section 16 (2) (a) of Act III of 1907, as qualifying the word "rest." I think that they qualify the word "Receiver" that immediately precedes them, seeing that the following sections, 18 and 19, provide for two kinds of Receivers, one appointed by the Court for the particular insolvency and others appointed by the local Government for certain local areas. In the absence of a Receiver of either of these classes, the insolvent's property, upon an order of adjudication being made, vests in the Court.

Section 17 of the Presidency Towns Insolvency Act (Act III of 1909) which deals with the vesting of the insolvent's property in the Official Assignee, does not contain the words "as hereinafter provided." They were not needed because no doubt could arise as to the officer designated by the words "Official Assignee" an expression defined in section 2 (c) of that Act; whereas there is no definition in the Provincial Insolvency Act of the word "Receiver" till we come to section 18.

I think that the obtaining of leave is a matter between the Receiver and the Court whose officer he is, and that it is not a valid defence to the suit which a defendant can raise to say that leave of the Insolvency Court has not been obtained. I would follow the

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English Law as laid down in *Lee v. Sangster*(1) which although decided in 1857 appears from *In Re Branson Ex parte The Trustee*(2) to be still good law. As between the Court and the Official Receiver, there was no reason for withholding leave, as the assets of the insolvent's estate were not risked by the suit. The Official Receiver is not the sole plaintiff in the present suit, and it was made a condition precedent to the granting of leave by ODGERS, J., that the co-plaintiff who is the insolvent himself, should find security for Rs. 1,500 for the defendant's costs in the suit.

As appellants succeed on this point, the Appeal must be allowed and the suit is directed to be restored to file and disposed of according to law. The second appellant will get his costs of this Appeal. Costs of the suit will be provided in the final decree.

RAMESAM, J.—The suit out of which this Appeal arises was filed by two plaintiffs. The second plaintiff is an insolvent and the first plaintiff is the Official Receiver of the Coimbatore district, in whom the properties of the insolvent were vested under section 16 (2) (a) of the Provincial Insolvency Act (III of 1907). It was dismissed by our brother PHILLIPS, J., on the ground that it was not maintainable without leave of the Court and no leave had been obtained. The plaintiffs appeal.

The first point argued is that the judgment (dated 12th April 1920) of OLDFIELD and SESHAGIRI AYYAR, JJ., in Civil Miscellaneous Appeal No. 272 of 1919, on Appeal against the order of the District Judge of Coimbatore refusing to grant leave to the Official Receiver to file this suit is, or—what amounts to the same thing—should be construed as an order granting leave.

(1) (1857) 2 C.B. (N.S.), 1.

(2) [1914] 2 K.B., 701.

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In that judgment, their Lordships construe a previous order by ODGERS, J., (dated 24th October 1919) not as an interlocutory order intended to operate till the disposal of the Appeal, but as a permanent order which would remain in force after the disposal of the Appeal. This construction of the order of ODGERS, J., is binding on the parties and on us, even if we are inclined to take a different view of it. But this is not enough for the appellants. It was necessary that the order of the District Judge should have been modified by the High Court in Appeal. The learned vakil for the appellants contends that the order of their Lordships should be construed as an order adopting the order of ODGERS, J. If it were possible I would adopt such a construction. But I confess that the language of their Lordships "it would be useless to dispose of the Appeal and it is dismissed" presents considerable difficulties in my way. If it were necessary for us to dispose of the case on this point, I would adjourn the Appeal to enable the appellants to apply for a review of the order of OLDFIELD and SESHAGIRI AYYAR, JJ. But I do not further deal with this point, as I am clear the Appeal must be allowed on the second ground, viz., that the leave of the Court is not necessary for the maintainability of the suit.

Section 20 (d) of the Act authorizes the Receiver to institute a suit with "leave of the Court." The consequences of the want of leave are not stated. Similar provisions in other Acts have been construed as not being fatal to the maintainability of the suit, if leave is not obtained [vide *Cochrane v. Owen*(1) on 11 Vict., C. 21, section 29, the Insolvency Act formerly in force in the Presidency towns; *Lee v. Sangster*(2) on 12 and 13 Vict., C. 106, section 153 and *In Re Branson Ex parte The*

(1) (1864) 2 Hyde, 150.

(2) (1857) 2 C.B. (N.S.), 1; s.c., 140 E.B., 310.

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Trustee(1) on 46 and 47 Vict., C. 52. The reason given in these cases is that leave is a matter between the Court and the Official Receiver and the want of leave cannot be relied on by the defendants in a suit. The Official Receiver prosecutes the suit at his own risk in the matter of costs and cannot charge them on the insolvent's estate if he loses. It is said that these cases do not govern the matter before us as the vesting under Act III of 1907 is qualified, as section 16 (2) (a) provides that the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided. It is contended that the effect of the words "as hereinafter provided" is to make the vesting subject to the provisions of section 20 which provide for leave of the Court and that if leave of Court is not obtained, there is no vesting; whereas in the other enactments, the vesting was "absolute." But as my learned brother pointed out in the course of the arguments, the term "Receiver" does not occur in the prior sections of the Act—not even in section 2 containing definitions and occurs for the first time in section 16 without any explanation. The provisions for the appointment of Receivers and Official Receivers are contained in section 18 and section 19 and these words "as hereinafter provided" (following the word "Receiver") are intended to draw the attention of the reader to these sections and, in my opinion, have nothing to do with section 20. In the Presidency Towns Insolvency Act (III of 1909), section 2 (c) defines Official Assignee, section 17 directs that the property of the insolvent shall vest in the Official Assignee and section 68 provides for suits by the Official Assignee with the leave of the Court. The absence of the words "as hereinafter provided" in section 17 is due to the fact that the Official "Assignee" has been defined in section 2 (c) unlike

(1) (1914) 2 K.B., 701.

"Receiver" in Act III of 1907. In my opinion the words "as hereinafter provided" qualify "Receiver" and not the verb "shall vest"; and there is no distinction in principle between the policy of all these enactments. The language of section 153 of 12 and 13 Vict., C. 106, is stronger as it used the words "with the leave of the Court, first obtained, upon application to such Court *but not otherwise*." I do not see any reason why the cases above cited should not apply to the Act of 1907. The Appeal is therefore allowed, the decree of PHILLIPS, J., is reversed, and the case remanded to the Original Side for disposal according to law. The second appellant will have the costs of the Appeal. The costs of the first Court will abide the result.

Solicitors for respondents: *Short Bewes & Co.*

M.H.H.

APPELLATE CIVIL.

*Before Sir William Ayling, Kt., Officiating Chief Justice,
and Mr. Justice Odgers.*

KATTA RAMASAMI GUPTA (DEFENDANT), APPELLANT,

v.

KAMALAMMAL (PLAINTIFF), RESPONDENT.*

Contract Act (IX of 1872), sec. 148—Bailment—Gratuitous bailment of jewels—Bailee whether trustee for bailor—Indian Trusts Act (II of 1882), Chapter IX—Bona fide purchaser for consideration from bailee—Trusts Act (II of 1882), sec. 96, and Contract Act (IX of 1872), ss. 108, 178, whether purchaser protected by.

In a gratuitous bailment the bailee is not a trustee for the bailor, within the meaning of Chapter IX of the Indian Trusts Act.

* O.S.A. No. 7 of 1920.

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A purchaser in good faith and for consideration from such bailee is not protected by the provisions of section 98 of the Indian Trusts Act or section 108 or 173 of the Indian Contract Act.

APPEAL against the judgment and decree of Mr. Justice COURTS TROTTER passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 257 of 1919.

The facts are set out in the judgment.

G. Krishnaswami Ayyar for appellant.

C. Venkatasubbaramayya for respondent.

The Court delivered the following JUDGMENT:—

In this case the plaintiff lent certain jewels to one Meenakshi Ammal for the purpose, as the plaintiff says, of decking the latter's daughter for a prospective bridegroom. Meenakshi Ammal took the jewels and pledged them with Thangavelu Mudali and Chinnaswami Sah. The defendant after redeeming the jewels from the pledgees bought them from Meenakshi Ammal. The plaintiff brought the suit against the defendant for the recovery of the value of the jewels which was decreed to her. The defendant now appeals against this judgment.

Two points are raised on defendant's behalf, first, one of fact, that the sale to the defendant was with the consent of the plaintiff. We have examined the evidence with great care. It appears that the plaintiff, who is described as somewhat simple-minded, handed the jewels to Meenakshi Ammal without the knowledge of her husband but with the knowledge of one of her sons, a High Court vakil. Meenakshi Ammal, who was subsequently convicted in connexion with these jewels, contended that the jewels were given to her to sell or pledge in order to raise money for some theatrical business in which the plaintiff was interested. This story was, we think, quite

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rightly discredited as improbable by the Judge, and on the evidence it is to our minds perfectly clear that the plaintiff did, in fact, lend the jewels to Meenakshi Ammal for the purpose of decking her daughter and for no other. This gratuitous bailment, for such it is in law, took place in 1917. The pledge by Meenakshi Ammal and the subsequent purchase by the defendant took place some six or seven months afterwards, i.e., in June 1918. On the facts we are of opinion that the sale to the defendant was not with the plaintiff's consent.

The more serious defence is that the defendant was a purchaser for value without notice of any defect in the title of Meenakshi Ammal to these jewels and that he is therefore protected either as falling within the Trusts Act or secondly by the provisions of sections 108 and 173 of the Contract Act. To take the first of these; it was strenuously argued by Mr. G. Krishnaswami Ayyar on the defendant's behalf, that as Meenakshi Ammal was a bailee she was therefore a trustee: if not an express trustee at least as falling within Chapter IX of the Trusts Act, and that the defendant as purchaser from her was therefore protected by section 96 of the Trusts Act. Now, although a bailee may be in some respects in a fiduciary position as regards his bailor it is a very different thing from saying that a bailee is a trustee pure and simple. To begin with, the definition of a "trust" in section 3 of the Indian Act is that it is an obligation annexed to the ownership of property whereas a "bailment" is a contract where the ownership in the chattel bailed does not pass to the bailee, and the fact that fiduciary relationship may exist between the bailee and the bailor does not necessarily make the bailee a trustee within the meaning of the Trusts Act. Now, although a bailee may have sufficient interest in the property bailed to be able to maintain an action against

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a third person in respect of the property, still once the bailment is terminated owing to the tortious act of the bailee, there can be no doubt that the bailor is at once reinvested with the full ownership of the property bailed, and there is thus no bailment if the thing delivered is not to be specifically returned or accounted for, i.e., no bailment where the whole property is transferred. Now, with regard to Chapter IX of the Trusts Act, it is headed "of certain obligations in the nature of trusts." Of those obligations sections 81 to 86 are examples of what is known in the English law as "resulting trusts"; those from section 87 to section 94 are cases of "constructive trusts." There is no illustration appended to the sections nor has any authority been quoted to us to cause us to include bailment among the obligations set out in this Chapter. The contention seems to have been derived from the fact that in *In re Hallett's Estate*(1), THE SINGER, L. J., at page 722, says that

"the principles relating to the following of trust property are equally applicable to the case of a trustee, and to the case of factors, bailees, or other kinds of agents . . . wherever a specific chattel is entrusted by one man to another . . . then, either the chattel itself, or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time."

This extract from the judgment of the learned Lord Justice does not in our opinion, warrant the larger assumption that bailments are to be included in Chapter IX of the Trusts Act so as to afford the defendant in this case protection under section 96. Further, in Halsbury, Volume I, page 563, paragraph 1142, it is said:

"Further, where the bailee, by a wrongful dealing with the chattel, has determined the bailment, all third persons, however innocent, who purport in any way to deal with the property in the chattel, are guilty of conversion and liable to the bailor."

(1) (1880) 13 Ch. D., 696.

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This disposes of the first contention under this head.

Now, with regard to the sections of the Contract Act, the learned Judge below held that the defendant was not protected as, although he may have acted in good faith, he did not satisfy the second part of section 178, that the goods had not been obtained from their lawful owner by means of an offence or fraud. With regard to this we think with respect that it may have escaped the attention of the learned Judge that, although the bailment was in November, the pledge by Meenakshi Ammal did not take place till a very considerable length of time had elapsed. If she had represented to the plaintiff that the jewels were wanted for decking her daughter when all the time she intended to raise money on them by pledge, that would clearly be obtaining the goods by false pretences or criminal breach of trust within the meaning of section 410 of the Indian Penal Code. It is said for the plaintiff that illustration (a) to section 108 of the Contract Act covers this case. But we would point out that the illustration only applies to cases of theft. Here the jewels were obtained with the consent of the owner and the illustration does not apply. It may, however, be that Meenakshi Ammal did, in fact, borrow them for the purpose she stated, but that owing to the negligence of the plaintiff in recovering the jewels from her within a reasonable time afterwards she conceived the notion of converting the jewels to her own use. We cannot, therefore, say there is reliable evidence that the goods were obtained by fraud. It appears to us that this is a case of conversion like that in *Seshappier v. Subramania Chettiar*(1). Now, with regard to section 108, exception 1, the question turns on the meaning of the word "possession"—"when any person is, by the consent of the owner,

(1) (1917) I.L.R., 40 Mad., 675.

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in possession of any goods, etc.," and it is urged for the defendant that Meenakshi Ammal being in possession of these goods was able to pass the ownership of the goods to himself as he acted in good faith and there was nothing to show him that Meenakshi Ammal had no right to sell. The possession alluded to in exception 1 is of course the possession of a factor or an agent for sale. Section 178 contains very similar words, but omits the words "by consent of the owner" and "notwithstanding any instructions of the owner to the contrary." As Pollock points out in his commentary on the Contract Act the absence of those expressions in section 178 has no bearing on the section and does not warrant any inference that the word "possession" is used in a different sense to what it is in section 108. In fact, in *Naganada Davay v. Bappu Chettiar*(1), BODDAM, J., held that the possession in the two sections was similar. It may be remarked that in a note on *Naganada Davay v. Bappu Chettiar* (1), Pollock remarks :

"It is impossible to hold that the Act meant to authorize pledge in such a case; yet the hirer surely has possession and not bare custody. The language of the Act seems incautiously wide."

The cases cited to us seem clearly to show the nature of possession alluded to in the two sections, and from the authorities we can deduce no other inference than that the defendant is not protected in the present case. The earliest case *Greenwood v. Holquette*(2) was a case of a hire of a piano on the instalment system which was sold by the hirer and purchased by the defendant in good faith. It was held that section 108, exception 1, does not apply where there is only a qualified possession, e.g., that of a hirer, or where the possession is for a specific purpose. Such possession is of a different nature from

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the unqualified possession referred to in the exception to the section where the owner has power to give instructions. Again, in *Shankar Murtidhar v. Mohanlal Jaduram*(1), it was held that where detention is allowed for a limited purpose it is not within the exception, and that in the case of a gratuitous bailment of a chattel, the possession remains constructively with the owner. *Naganada Davay v. Bappu Chettiar*(2), alluded to above, was a case of a jewel hired to the defendant who pledged it with another the latter acting in good faith; Held that he was not protected by section 178 or 179 as the possession of the hirer was not that contemplated by section 178. *Seshappier v. Subramania Chettiar*(3), which was subsequently reversed in *Seshappier v. Subramaniam Chettiar*(4), turned on a question of evidence, i.e., as to whether the husband of the defendant was in fact an agent for sale or simply entrusted with a jewel to find a purchaser and settle the price in the presence of the plaintiff. SESHAGIRI AYYAR, J., who first tried the case held on the evidence that he was the latter. The learned Judges who heard the Letters Patent Appeal decided on the evidence that he was an agent for sale. This cannot affect the question of law involved in this case. It seems, therefore, clear on the authorities, and none were quoted *contra* that the defendant here cannot avail himself of either section 108 or section 178 of the Contract Act though he purchased the jewellery in good faith from Meenakshi Ammal, since she had only qualified possession and possession as we find on the evidence for a specific purpose, viz., that of decking her daughter for a bridegroom. We, therefore, affirm the decision of the learned trial Judge and dismiss the Appeal with costs.

M.H.H.

(1) (1887) I.L.R., 11 Bom., 704.

(2) (1904) I.L.R., 27 Mad., 424.

(3) (1915) I.L.R., 38 Mad., 783.

(4) (1917) I.L.R., 40 Mad., 673.

(1) (1904) I.L.R., 27 Mad., 424.

(2) (1873) 12 B. L.R., 42.

APPELLATE CIVIL.

Before Sir William Ayling, Kt., Officiating Chief Justice,
and Mr. Justice Odgers.

1921,
October,
8 and 13.

K. M. P. R. N. M. FIRM (PLAINTIFFS), APPELLANTS,

v.

P. T. THEPERUMAL CHETTY (DEFENDANT), RESPONDENT.*

*Contract Act (IX of 1872), sec. 62—Breach of original contract—
Substitution, rescission or alteration—English doctrine, whether applicable.*

There is nothing in section 62, Contract Act, to imply that the substitution, rescission or alteration of a contract, after its breach, must be supported by consideration. The English doctrine on the subject is not applicable to India.

Manohur Koyal v. Thakur Das Naskar, (1888) I.L.R., 15 Cal., 819, disapproved.

Observations of KUMARASWAMI SASTRI, J., in *Ramiah Bhayavatur v. Somasi Ambalam*, (1915) 29 M.L.J., 125, followed.

ON APPEAL from the judgment and decree of Mr. Justice KRISHNAN passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court of Madras in C.S. No. 284 of 1919.

The material facts are set out in the judgments.

G. Krishnaswami Ayyar for appellants.

Venkatasubba Rao and Radhakrishnayya and V. V. Devanatha Ayyangar for respondent.

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OFFG. C.J.

AYLING, OFFG. C.J.—The transaction out of which this suit arises took place in July 1918, a time when speculation in piece-goods was very brisk. Plaintiffs sold to defendant fourteen bales of bleached mull; the goods were lying at the time with Muruganatha

Chetty and Sons from whom plaintiffs had apparently themselves purchased them and whose shop was close to defendant's shop. Defendant in his turn sold the bales to one Amir Chund Idanmull giving him a delivery order on Muruganatha Chetty. Idanmull refused to take delivery of six out of the fourteen bales on the ground of unsoundness. Defendant complained to plaintiffs, who undertook to replace them by six sound bales, and induced defendant to take charge of the six bales left in Muruganathan's hands. This defendant did; but plaintiffs failed to exchange them for sound bales. Early in September prices fell heavily in consequence of the looting riots: and when plaintiffs subsequently offered to deliver six sound bales, defendant said it was too late. After some negotiation it was agreed that the sale contract in respect of these six bales should be cancelled. Plaintiffs took back three bales, but did not take delivery of the balance and now sue for the price of the whole quantity. The above is defendant's version which is spoken to in evidence and which the learned Trial Judge has found to be true. Plaintiffs deny any undertaking to replace the six bales, or agreement to cancel the sale in respect of them; and sue on the basis of a completed sale.

On a consideration of the evidence I have no hesitation in agreeing with the learned Trial Judge for the reasons given by him in accepting the defendant's story as to the circumstances in which he came to be in possession of the six bales, and as to the agreement to cancel the sale in respect of them. This would entail the dismissal of plaintiffs' claim for the price of the six bales, vide section 62 of the Indian Contract Act.

Appellants' vakils main argument before us has in fact been that section 62 has no application, because the agreement to cancel the sale as regards the six bales

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was made after the defendant had broken the contract by omission to pay for the goods delivered. For this proposition of law he relies on *Monohur Koyal v. Thakur Das Naskar*(1).

Mr. G. Krishnaswami Ayyar assures us that this argument was addressed to the learned Trial Judge, although there is no reference to it in the latter's judgment. It rests on the assumption that there was a breach of the contract before the agreement for cancellation and this is certainly neither found nor admitted, nor is it raised in any of the issues in the case. Before this plea of the plaintiffs could be admitted, the fact of breach would have to be decided in their favour; and we should have to call for a finding on a properly framed issue.

I do not think we are either called upon to do this or should be justified in so doing. The learned Judges in *Monohur Koyal v. Thakur Das Naskar*(1), undoubtedly lay down the proposition that the provisions of section 62 do not apply after there has been a breach of the original contract. But with all respect I fail to see any justification for this restriction of the operation of the section on the mere fact that it would otherwise contravene a somewhat technical rule of English Law. Section 63 was admittedly enacted in direct antagonism to English Law. Why should not section 62 be accepted at its face meaning in spite of a similar antagonism: I agree in this connexion with the remarks of KUMARASWAMI SASTRI, J., in *Ramiah Bhagavatar v. Somasi Ambalam*(2).

The present case at the time of the alleged cancellation was eminently one for amicable settlement. Plaintiffs were presumably urging that defendant had received goods according to contract and was bound to

pay for them. Defendant was similarly complaining that plaintiffs had neither delivered proper goods in the first instance nor replaced them within a reasonable time, as promised. Whether the six bales were as a matter of fact sound or unsound was a somewhat moot point depending on alleged defect in packing. In such circumstances it seems to me both reasonable and desirable that the parties should be allowed to cancel the contract as far as these bales are concerned. Section 62 on the face of it allows them to do so; and unless compelled by stronger authority or reasoning I see no reason to decline to give effect to it.

I therefore agree with the learned Trial Judge's rejection of plaintiffs' claim.

The only other point argued is as to costs in relation to the sum of Rs. 1,040, to which defendant admitted plaintiffs' claim and which defendant discharged out of Court. I see no reason to interfere with the Trial Judge's discretion as to awarding proportionate costs on this sum.

I would dismiss the Appeal with costs.

ODGERS, J.—This is a suit for the recovery of the balance of the price of fourteen bales of piece-goods sold by plaintiffs to defendant on 23rd July 1918. The defendant admitted by his written statement that a sum of Rs. 1,040-2-0 was due to the plaintiffs as balance of price of eight out of the fourteen bales and that as to the remaining six bales the contract had by mutual consent been rescinded. The plaintiffs had the fourteen bales in question with a firm called Muruganathan Chetty and the former gave the defendant a delivery order on that firm; the defendant endorsed the delivery order to one Amirchand Idanmull to whom he had in his turn sold the goods. The Chetty firm delivered the goods to

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(1) (1888) I.L.R., 15 Cal., 319.

(2) (1915) 29 M.L.J., 125.

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Idanmull, who rejected six of the fourteen bales as being unmerchantable as the packing was damaged. The defendant's case is that on Idanmull's rejection of the six bales, he, the defendant, complained to plaintiffs' agent, Satagopa Pillai, and the latter promised to take back the six bales and replace them by six others. This was in July. On or about 24th September Satagopa Pillai offered the new bales, but the price having dropped by that time, defendant refused them and he and Satagopa Pillai agreed that the latter should take back the bales and that the contract should be cancelled with reference to them. Some question has been raised on the fact that three of the bales remained with defendant after the date of the alleged cancellation, but this is in my opinion satisfactorily explained by the evidence of the defendants' witnesses Nos. 1 and 2. I have carefully considered the evidence and I have come to the conclusion that the finding of the learned Judge, that the cancellation alleged has been proved, is justified by the evidence. Satagopa Pillai, the plaintiffs' agent with whom the contract was made and who is said to have entered into the agreement cancelling the contract as to the six bales, was not called at the trial.

On Appeal, however, a point of law which does not seem to have been argued at the trial has been taken. It is said that the plaintiffs must succeed as the agreement to cancel is a mere *nudum pactum*, being without consideration and therefore illegal. It is said that section 62 of the Indian Contract Act which at first sight governs this case does not in fact do so as it has no application to substitution, rescission or alteration, after breach of the original contract. It is undoubtedly the English Law, arising from the evolution of the doctrine of consideration in that system, that a new contract after breach of the original one must be supported by consideration.

As EYRE, C.J., said in *Lynn v. Bruce*(1) :

" Accord executed is satisfaction ; accord executory is only substituting one cause of action in the room of another which might go on to any extent."

So an agreement to abandon a claim is said to be a mere *nudum pactum*. It will be remembered that in *Foakes v. Beer*(2), in which the necessity for fresh consideration was affirmed, Lord BLACKBURN went so far as to write an opinion dissenting from that of the majority of the Lords, but finding himself in the minority he did not deliver it.

This doctrine in fact applies only to executory contracts. I am not altogether satisfied that there has been a breach in this case. The fourteen bales were delivered and six were rejected, but there was as far as I can discover no time for delivery fixed by the contract, nor can I find any evidence that defendant treated the rejection by his purchaser as a breach of contract on the part of the plaintiffs. Defendant seemed to be perfectly satisfied with the assurance of plaintiffs' agent that fresh bales would be substituted in a few days time. I think there is something to be said for the view that the contract as regards the six bales was not executed, and that before execution or even before the time for performance the parties agreed to confine the operation of the original contract to eight bales only, i.e., they altered the original contract so as to include eight bales only. If this view is correct, there is of course no doubt that section 62 applies and the parties were at perfect liberty to do this. I assume, however, for the purpose of this judgment that this view is wrong and that there was a breach of the original contract to deliver fourteen bales and that the agreement to cancel the contract as to the

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(1) (1794) 2 Hy. & Bl., 317; s.c., 3 R.R., 381

(2) (1884) 9 App. Cas., 605.

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six bales was only arrived at after a breach of the original contract.

It is said that this doctrine of the English Law is embodied in section 62 and that the words "before breach" must be read into the section. Reliance is placed on *Monohur Koyal v. Thakur Das Naskar*(1), where it was held that section 62 is a legislative expression of the common law and its provisions do not apply to a case where there has been a breach of the original contract before the subsequent agreement is come to. There, the Court found as a fact that the plaintiffs did not intend to accept defendant's mere promise to pay cash and give a bond. He neither paid nor tendered the bond. Had the finding been that plaintiffs did so intend to accept these promises in satisfaction of the original contract, I gather the judgment would have proceeded on different lines. Why cannot we hold in the present case that the mutual arrangement to waive delivery on the one side and to waive payment on the other was a satisfaction of the original contract? As SUBRAHMANYA AYYAR, J., put it in *Davis v. Kundasawmi Mudali*(2):

"The former case (i.e., section 62) *ex hypothesi* necessarily implies consideration which is either the mutual renunciation of right or coupled with it the mutual undertaking of fresh obligations or the renunciation of some right on the one side and the undertaking of some obligation on the other, that forms the consequence of an agreement to rescind, substitute or alter mentioned in section 62."

It appears to me therefore that there is ground for saying that *Monohur Koyal v. Thakur Das Naskar*(1) is different from that before us, and that in the latter the mutual renunciation of right can be treated as satisfaction of the original contract. It appears, moreover, to me to be somewhat remarkable to hold that

section 62 imports the highly technical rule of English Law. If the section were only intended to apply before breach, why does it not say so? The form of the English plea (on which most of the old cases proceed), as set out in *Monohur Koyal v. Thakur Das Naskar*(1), was "that after the alleged contract and before any breach thereof, etc."

It seems on principle unreasonable to import into the plain words of the section a modification based on such technical grounds. Further, there is authority for saying that section 63 "not only modifies but is in direct antagonism to the law in England"—*Monohur Koyal v. Thakur Das Naskar*(1): see also *Davis v. Kundasawmi Mudali*(2), which holds that an agreement under section 63 does not require consideration to support it and where the English Law is considered. As SUBRAHMANYA AYYAR, J., said (page 402):

"Now the question arises whether the Indian Legislature intended to perpetuate such an unsatisfactory state of things in this country. I think that it did not, that in the Contract Act the doctrine of consideration was not extended to the regulation and restraining of the discharge of contract by agreement and that the Legislature laid down by section 63 a rule different from that of the English Law."

It is highly improbable that of these two sections, section 62 and section 63, the latter should constitute a clear modification of the English Law as to the requirement of consideration, while the former should be held (by implication and without any suggestion to that effect in the wording itself) to import the highly technical doctrine of accord and satisfaction. With great deference to the learned Judges who decided in 1888 *Monohur Koyal v. Thakur Das Naskar*(1), above referred to, I cannot think that there was any such intention

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(1) (1888) I.L.R., 15 Calc., 319.

(2) (1896) I.L.R., 19 Mad., 398.

(1) (1888) I.L.R., 15 Calc., 319, (2) (1896) I.L.R., 19 Mad., 398.

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Further, we have the Madras case *Ramiah Bhagavatar v. Somasi Ambalam*(1). Of the learned Judges, SESHAGIRI AYYAR and KUMARASWAMI SASTRI, JJ., who decided that case, the former was "not as at present advised prepared to dissent from *Monohur Koyal v. Thakur Das Naskar*(2)" but based his judgment on another ground. The latter distinctly disapproved of the doctrine in *Monohur Koyal v. Thakur Das Naskar*(2). He said:

"I do not think that Courts should engraft on the plain meaning of the provisions of Indian enactments, limitations founded on technical rules of English Law and pleading, especially in cases where such limitations are not suited to the conditions prevailing in this country."

With these observations I respectfully agree and following that learned Judge, I am prepared if necessary to dissent from *Monohur Koyal v. Thakur Das Naskar*(2) for the reasons I have set out above.

I agree with the order as to costs proposed by my Lord.

On all these grounds the judgment of the learned Judge must be confirmed and the Appeal dismissed with costs.

M.H.H.

(1) (1915) 29 M.L.J., 125.

(2) (1888) I.L.R., 15 Cal., 319.

APPELLATE CIVIL.

*Before Sir William Ayling, Kt., Officiating Chief Justice,
and Mr Justice Odgers.*

GONTU APPIREDDI (FIFTH RESPONDENT), APPELLANT,

1921,
September
14.

GONTU CHINNA APPIREDDI AND TEN OTHERS (PETITIONERS
1 TO 4 AND CREDITORS 3, 4, 6, 7 AND 8), RESPONDENTS.*

*Provincial Insolvency Act (V of 1920), ss. 6 (b), 7 and 53—
Creditor's petition for adjudicating debtor insolvent on account
of fraudulent alienation and to annul alienation—Order of
adjudication and annulment of alienation without Receiver's
application—Invalidity of.*

Being satisfied on inquiry as to the truth of a creditor's petition that a debtor committed an act of insolvency in that he alienated his properties with intent to defeat his creditors, a Judge not only adjudicated the debtor an insolvent but also annulled the alienation by the same order before appointing a Receiver.

Held that the order annulling the alienation was illegal, that it was for the Receiver to be appointed to apply for such an order and that until the Receiver refuses to do so no one else has the right to apply. *Hemraj Champa Lall v. Ramkishan Ram*, (1916) 2 Patna. L.J., 101 at 107, followed.

APPEAL against the order of F. A. COLERIDGE, District Judge of Guntūr, in Insolvency Petition No. 1 of 1919.

One Chandavaram Ramayya and his three undivided sons owed about Rs. 1,000 to two persons, Chinna Appi Reddi and Venkata Reddi. These creditors demanded payment by means of a registered notice on 26th September 1918, filed a suit on 15th November 1918 and on 19th November 1918 attached the debtors' properties before judgment. As the debtors sold

* Civil Miscellaneous Appeal No. 177 of 1920.

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some of these properties to one Gontu Appi Reddi by two sale-deeds, dated 6th November 1918 and 18th November 1918, the creditors filed on 20th December 1918 a petition under section 7 of the Provincial Insolvency Act (V of 1920) to declare the debtors insolvents and to have the sales annulled as fraudulent, alleging that the debtors committed an act of insolvency by the execution of these two sale-deeds. The debtors pleaded that no debt was due to the creditors and that the sales were bona fide and for consideration. On inquiry, the District Judge, who found against both these pleas, not only adjudicated the debtors insolvents but by the same order annulled the sales as fraudulent. By a subsequent order on the same day (i.e., on 13th March 1920) he appointed a Receiver for the debtors' properties. The purchaser preferred this Appeal.

V. Rama Doss for appellant.—The Court has no right to annul the sales merely on the petition of the creditors. Until the Receiver appointed, or to be appointed, in the proceeding refuses to act no one else has the right to apply for the annulment of the sale. The Receiver alone can apply under section 53 of the Provincial Insolvency Act; reference was made to sections 24 and 28 (2) of the Act, *Hemraj Champa Lall v. Ramkishan Ram*(1), *Kauleshar Ram v. Bhawan Prasad*(2), *Mariappa Pillai v. Raman Cheltiar*(3), and 15 Halsbury, page 89, paragraph 184. Proceedings under section 24 are only summary, while those under section 53 should be tried as regular suits: *Chunnoo Lal v. Lachman Sonar*(4). In this case a Receiver was appointed only after the annulment of the sales.

(1) (1916) 2 Patna L.J., 107.

(3) (1919) I.L.R., 42 Mad., 322.

(2) (1917) 42 I.C., 845.

(4) (1917) I.L.R., 39 All., 391.

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N. Rama Rao for the respondent.—The act of bankruptcy which entitled the creditors to present the petition was the fraudulent alienation. After an inquiry in the presence of the alienee, it is unnecessary to go through such an inquiry once again for the purpose of section 53 in the presence of the Receiver. Section 4 of the Provincial Insolvency Act is wide and must be deemed to empower the Court to annul a fraudulent alienation even in the absence of a Receiver: *Secretary of State for India v. Dadi Reddi Nagiah*(1). Until a Receiver is appointed under section 58 the property vests in the Court and any creditor can file a petition under section 53 and call for an enquiry: *Krushali Ram v. Bholar Mal*(2), *Nikka Mal v. Marwar Bank, Ltd.*(3).

The Court delivered the following JUDGMENT :

In this case two creditors of one Chandavaram Ramayya and his three undivided sons (respondents 1 to 4) petitioned (1) that they might be declared insolvents (2) that certain alienations made by respondents 1 to 4 in favour of the fifth respondent might be declared invalid and cancelled. The alienations took place about a month before the presentation of the petition which is dated 20th December 1918. The learned District Judge heard the petition on 13th March 1920 and in the same order not only adjudicated respondents 1 to 4 insolvents but declared the sale-deeds which witnessed the alienations cancelled. The act of insolvency alleged and proved against the respondents 1 to 4 was these alienations under section 6 (b) of the Provincial Insolvency Act (V of 1920), i.e., they were

(1) (1919) 36 M.L.J., 180, 183.

(2) (1915) I.L.R., 37 All., 252.

(3) (1919) 52 I.C., 188.

APPIREDDI v. APPIREDDI. held to be transfers with intent to defraud or delay creditors. The petition was presented under section 7 and the debtors were adjudicated under section 27 (i) which runs thus:

"If the Court does not dismiss the petition it shall make an order for adjudication."

There is of course no doubt that the learned District Judge was justified in making the order of adjudication but the question is was he right in going further and ordering the cancellation of the sale-deeds in the same order? He apparently held a detailed inquiry, to which the vendor was a party; whereas one would ordinarily expect that a much more summary procedure would in the first instance meet the case. The question is governed by section 53 of the Act which provides that such transfers as are therein specified "shall be voidable as against the Receiver and may be annulled by the Court." The section certainly contemplates action by the Receiver. It is true that at the time the order for cancellation was made the Receiver had not been appointed, but he was appointed later on the same day. In *Hemraj Champa Lall v. Ramkishan Ram*(1), it was held that until the Receiver refuses or declines to act no one else can do so, because he is the person to set the proceedings under section 36 (now section 53) in motion.

We are inclined to respectfully adopt this decision. The other cases cited can be shortly dealt with. In *Kauleshar Ram v. Bhawan Prasad*(2) the Allahabad High Court held that a proceeding to set aside a transfer should be taken in the name of the Receiver and that no proceeding should have been commenced (by the creditors) until after the appointment of a Receiver. It may well be that when the Receiver fails to move in

the matter a creditor may do so: *Nikka Mal v. Marwar Bank, Ltd.*(1). Even there, the Court held that in a case of fraudulent preference the Receiver should either apply or be a party to the application. The judgment in *Krushali Ram v. Bholar Mal*(2), does not deal with this question at all but simply with the jurisdiction of an Insolvency Court. There, the Judge had referred a creditor alleging a fictitious mortgage to a suit instead of enquiring into the question himself, as the Court held he was bound to do. It does not appear whether or not a Receiver had been appointed in that case. Section 4 of the Act which was quoted for the respondents is inserted for the purpose of putting an end to the conflict of decisions as to whether proceedings in the Insolvency Court constitute *res judicata* or not.

It appears to us that what authority there is all points one way, viz., that it is for the Receiver to take action under section 53 and not for the Court to do so on a petition for adjudication. We accordingly set aside that part of the District Judge's order which relates to the cancellation of the sale-deeds to the fifth respondent.

No costs in this Court.

N.R.

(1) (1919) 52 I.C., 186.

(2) (1915) I.L.R., 37 All., 252.

(1) (1916) 2 Patna L.J., 101 at p. 107.

(2) (1917) 42 I.C., 845.

APPELLATE—CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1921,
August 25. SHANMUKA NADAN, BY GUARDIAN SWARNAMMAL AND OTHERS
(PLAINTIFFS), APPELLANTS,

v.

ARUNACHELAM CHETTY AND OTHERS (SEVENTH DEFENDANT
AND OTHERS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O, I, rr. 3 and 10—Suit for partition—Money decree-holders, whether proper parties to the suit—Misjoinder of parties and causes of action—Plaint containing allegations that such decrees were not binding on plaintiffs—Order of lower Court, striking out names of decree-holders joined as defendants—Appeal—Revision.

Where in a partition suit the plaint contained allegations that money decrees obtained by certain creditors were not binding on the plaintiffs, the joinder of such decree-holders as defendants along with members of the family and their alienees, is proper under Order I, rule 3, Civil Procedure Code. *Tara Chand v. Reeb Ram* (1886) 3 M.H.C.R., 177, referred to

APPEAL against the order of C. R. VENKATESWARA AYYAR, Acting Subordinate Judge of Rāmnād at Madura, in Original Suit No. 90 of 1918.

This was a suit for partition in a joint Hindu family, instituted by plaintiffs 1 to 4, who are the minor sons of the first defendant, claiming four-fifths share of the family properties; the fifth plaintiff, the minor daughter of the first defendant, claimed an allowance for her marriage and maintenance, and the sixth plaintiff, the wife of the first defendant, claimed maintenance, and acted as the next friend of the other plaintiff; the second defendant was the mother of the first defendant; defendants 3 to 5 are vendees from the first defendant, and

the sixth defendant is a mortgagee from him. Defendants 7 to 18 were joined in the suit as they had obtained money-decrees on debts incurred by the first defendant; some of the defendants had obtained decrees against the first defendant alone, while the others had obtained decrees against him and the plaintiffs. Some of the decree-holders had attached family properties situate within the jurisdiction of the Sub-Court in which this suit was brought, although their decrees had been passed in a different Court. The defendants pleaded, *inter alia*, that the joinder of defendants 7 to 18 in their suit was improper and that the suit was bad for misjoinder of parties and cause of action. A preliminary issue was raised "whether defendants 7 to 18 are proper parties to this suit." The Subordinate Judge held that the defendants 7 to 18 were not proper parties to the suit, and that the suit was bad for misjoinder of parties and causes of action, and he passed an order declaring as above stated and awarding costs as payable by the plaintiffs. The plaint contained allegations to the effect that the first defendant had been leading an immoral life and had been wasting the family properties by selling and mortgaging them for immoral purposes, and that the decrees obtained by defendants 7 to 18 against him, or against him and the minor plaintiffs, with him as their guardian, were fraudulent and collusive and were based on debts incurred by him for immoral purposes, and that they were not binding on the plaintiffs. The plaintiffs preferred this Appeal against the order of the Subordinate Judge on the preliminary issue.

K. V. Venkatasubrahmanyam for respondents 1 to 6 took a preliminary objection that no Appeal lay against the order of the lower Court passed under Order I, rule 10, Civil Procedure Code. The order is not a decree under section 2, clause (11), nor an order appealable under

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Order XLIII, rule 1, Civil Procedure Code. In *Rama Rao v. The Raja of Pittapur*(1), the suit was dismissed not merely under Order I, rule 10, but the whole suit was dismissed on the ground that there was no cause of action.

K. Raja Ayyar, for appellant.—The order is a decree under section 2, Civil Procedure Code. This suit has really been dismissed as against defendants 7 to 18, though the suit goes on as against the other defendants. Here the plaintiffs ask for specific reliefs against defendants 7 to 18, which have been refused. The order is virtually a dismissal of the suit against them. The joinder of defendants 7 to 18 in this suit for partition is proper: see Rules of Practice (Mufassal), rules 226 to 229, which contemplate joinder of creditors. In a partition suit the joint family assets have to be ascertained and liabilities determined: see Trevelyan's Hindu Law, page 255, *Tara Uhand v. Reeb Ram*(2). Where a creditor of the family has obtained a decree against the joint family property or threatens to proceed against such property he should be joined as a defendant in the partition suit. The creditors are proper, if not necessary, parties. Just as a mortgagee-decree-holder of the joint family property is a necessary and proper party, so also is a money-decree-holder.

K. V. Venkatasubrahmanyam, for respondents 1 to 6.—The decrees were obtained against the first defendant and his sons (the plaintiffs); the ground of impeaching the decrees is not the liability or otherwise under the Hindu Law, but a ground of fraud, which is foreign to a partition suit. Debtors of the joint family cannot be joined in a partition suit: *Ramkrishna Aiyar v. Krishna Aiyar*(3). The cause of action in a partition suit against the first

defendant is different from the cause of action against defendants 7 to 18: see Order II, rules 3 and 4, Civil Procedure Code, and *Venkanua v. Sarayya*(1).

A. Krishnaswami, for respondents 7 and 8.—As regards creditors who have obtained decrees against father and sons, they cannot be joined in the suit. After all, this is a matter of discretion with the lower Court; the High Court cannot interfere in Revision: see Order II, rules 3 and 4, Civil Procedure Code, and *Rangayya Reddy v. Subramania Ayyar*(2).

Vinayaka Rao, for respondent 8.—Eighth defendant has a compromise decree, sanctioned by Court. Debt is extinguished by the decree. Rule of Practice No. 279 does not apply to decree-debt but only to ordinary contractual debt. Creditors ought not to be made parties, but only alienees. Rule 221 (Rules of Practice, Mufassal) applies to alienees and creditors, but Rule 225 only directs notice to creditors: see *Ramkrishna Aiyar v. Krishna Aiyar*(3).

The Court delivered the following JUDGMENT:

The decision under appeal was passed in a suit brought for partition by four minors against the first defendant their father, certain females whose positions it is not necessary to specify, and the seventh to eighteenth defendants, persons who held money decrees, some of them against the first defendant alone, others against the first defendant and the plaintiffs, all obtained on debts incurred by the first defendant. The decision of the lower Court is in terms that the suit is bad for misjoinder of causes of action and that defendants Nos. 7 to 18 are not proper parties. There is

(1) (1909) 19 M.L.J., 102. (2) (1917) I.L.R., 40 Mad. 361 (F.B.).
(3) (1909) 18 M.L.J., 85.

(1) (1918) I.L.R., 42 Mad., 219. (2) (1866) 3 M.H. C.R., 177.
(3) (1909) 18 M.L.J., 85.

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nothing else. The lower Court does not say that it removes them from the record; it does not say that the suit is dismissed as against them. But it is agreed before us and from the tenor of the remainder of the order it is clear that under Order 1, rule 10, the names of these defendants were struck out as being improperly joined.

It is objected that no Appeal lies against such a decision and certainly none is provided directly in the Code, and as the lower Court's decision, understood in the manner in which we understand it, is not a decree and is not a conclusive determination of the rights of the parties with regard to any of the matters in controversy and does not come within the definition of "decree" in section 2 (2), there can be no Appeal against it directly. In these circumstances the Appeal as such must fail.

In view, however, of the facts of the cases to which further reference will be made, we have felt it our duty to consider whether we should not interfere in the exercise of our powers of Revision. No doubt we should not be justified in such interference on the sole ground that the lower Court had made a mistake in law; but here we think that it has done more than that. For it has entirely misunderstood the nature of the judicial discretion, which it was called upon to exercise. This is clear, when reference is made to the grounds of its order; for it has held firstly that as on the authority of *Ramkrishna Aiyar v. Krishna Aiyar*(1) debtors to a family should not be made parties to a suit for partition, therefore creditors also should not. On the assumption that the decision cited is correct, the consequence in our opinion does not follow. Then secondly it has relied on the fact that none of the defendants Nos. 7 to 18 has any interest in

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the cause of action, which the plaintiffs have against any other of those defendants, as though that were sufficient to exclude the case from Order I, rule 3. The real question we have to decide is in fact whether Order I, rule 3, is applicable to such pleadings as those before us, and we first have to bear in mind what the lower Court appears to have entirely disregarded, that partition is the occasion for a comprehensive settlement of the extent of the family estate available for division and of the deductions which have to be made from that estate on account of family liabilities. This is clear with reference to the definition of the scope of partition suits to be gathered from rules 221, 223 and 234 of the Civil Rules of Practice. Next, another fact of which the lower Court has lost sight, is that the claims of all of these defendants have been subjected to objection in the plaint on general and similar grounds. In paragraph 7, there is the allegation that the first defendant, the father, has ruined himself in immoral ways by concubines and the use of intoxicants and for that purpose he has been wrongfully wasting the family properties. In paragraph 8, it is alleged that some of the alienations are fraudulent transactions brought about by the first defendant in collusion with defendants Nos. 3 to 18, who are his intimate friends in connexion with his immoral acts. And in paragraph 8 (a), reference is made to decrees obtained by the ninth and tenth defendants against the first defendant and by defendants Nos. 11 to 18 against the first defendant and the plaintiffs and there is an allegation that as the minor plaintiffs were not properly represented in the connected suits those decrees are fraudulent and cannot bind the said minors, and the debts claimed by the aforesaid persons are not genuine, and even if they were genuine were not contracted for family necessity or benefit but were contracted only for

(1) (1900) 18 M.L.J., 85.

the first defendant's immoral expenses. In these circumstances, it is clear that the attack on the debts apparently due to these defendants must proceed to a large extent, if not entirely, on one basis as against all of them. We think that the lower Court ought to have considered these aspects of the case; and having considered them, we think that Order I, rule 3, is applicable and that, if the lower Court had considered them, it would have been bound to apply Order I, rule 3. We may observe that the joinder of such pleas is in our experience usual in this Presidency. Certainly, it is entailed by compliance with the Rules of Practice already referred to, and the inadvisability of a partition suit being disposed of in the absence of creditors who might reopen the whole question on the morrow of a decision that certain debts and charges were not properly charged upon the whole family estate with the result that the same question would have to be tried twice over, with results probably discordant, is recognized in *Tara Chand v. Reeb Ram* (1).

Two other points have been suggested on behalf of one or other of the creditors. Firstly, it is urged that the suit offends against Order II, rule 4, because it is a suit in effect for the recovery of immoveable property and no other cause of action, such as is involved in the claim for the setting aside of the seventh to eighteenth defendants' decrees as collusive, should be joined with it. One possible answer is that these are claims in which the reliefs sought are based on the same cause of action and another possible answer is that in case the leave of the Court is asked for, as the wording of the rule implies that it can be asked for, that leave may be given. The other point taken was that the relief, consisting in

the setting aside of decrees of Court, could not be asked for in the present suit, which was filed in the Court of the Subordinate Judge of Rāmnād, because one at least of these decrees was obtained in the Tinnevely District Court, and in any case that decree could be set aside on the ground of fraud only by the Court in which it was passed. This was not considered or apparently put forward in the lower Court and it may be necessary for the lower Court to deal with it, after framing a proper issue on it. We do not wish to anticipate the conclusion which the lower Court may come to, and we will only point out that in some cases at least the defendants concerned have attached property within the jurisdiction of the Rāmnād Subordinate Judge's Court and it may be a question whether that Court will not in the circumstances be entitled to deal with the present claim in respect of the decrees under which those attachments have been made.

The result is that in the exercise of our powers of Revision we set aside the lower Court's order and direct it to proceed with the trial of the suit with defendants Nos. 7 to 18 as parties. Costs in this Court will be costs in the cause, and will be provided for in the decree to be passed by the lower Court. The costs will be calculated only on the scale appropriate to a Revision Petition.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice
Ramesam.

1921,
February
23.

SANKARA NAINAR PILLAI AND OTHERS (PETITIONERS'
LEGAL REPRESENTATIVES), APPELLANTS,

v.

PUTHIYA VEETIL THANGAMMA AND OTHERS
(RESPONDENTS), RESPONDENTS.*

Limitation Act (IX of 1908), art. 182, cl. 5—Step in aid of execution, what is—Decree for redemption providing also for sale—Application by mortgagor for extension of time, whether step in aid, for application for sale.

An application by a mortgagor for extension of time to pay money due under a decree for redemption which also provided for sale in default, is a step in aid of execution, under article 182, clause 5 of the Limitation Act, in respect of a subsequent application for sale by him.

An application to be a step in aid of execution need not be made in a pending execution.

APPEAL against the decree of K. A. KANNAN, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 49 of 1919 (Appeal Suit No. 173 of 1919 on the file of the District Court), preferred against the order of R. NAGESWARA AYYAR, Principal District Munsif of Calicut, in Execution Petition No. 102 of 1918 in Original Suit No. 794 of 1910.

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

T. R. Ramachandra Ayyar for appellants.

K. Kuttikrishnan Menon for respondents.

SPENCER, J.

SPENCER, J.—The decree that was passed by the District Munsif upon this suit for redemption, though styled a preliminary decree and passed under the Code

of Civil Procedure, 1908, provided for sale of the mortgaged properties if the money required for redemption was not paid by a certain date. There was thus no need for anyone to apply for an order for sale. But in a redemption suit, the decree-holder being the mortgagor, it has been held in *Govinda Taragan v. Veeran*(1), *Govinda Menon v. Kombunni Mannadiar*(2) and *Abdul Kadir v. Samipandia Tevar*(3) that he as well as the mortgagee has a right to execute the decree by applying for sale, and I think we should follow those decisions.

As regards the applications of 4th April 1916 and 23rd June 1916 for an extension of time for depositing the redemption money in Court, it may be conceded that they did not aid the particular form of execution which has ultimately been reached, but if they were bona fide they may well be said to have been in aid of that portion of the decree which related to redemption, and I think the decree must be treated as a whole and not split up into sections. This is the view taken in a recent decision, *Venkata Reddayya v. Yarakayya*(4) to which I was a party. If they were in any sense aids to execution they should be treated as steps in aid of execution.

In *Abdul Kader Rowther v. Krishnan Mulavai Nair*(5) SADASIVA AYYAR, J., observed that an application by the decree-holder to give time to the judgment-debtor merely as a matter of grace would be a step in retardation. In the present case the applicant though he was the decree-holder was the person who had to pay and he was applying for time not as a matter of grace to a judgment-debtor, but in order the better to enable himself to execute the decree, the execution of which

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(1) (1913) I.L.R., 36 Mad., 32. (2) C.M.S.A. No. 99 of 1915 (undreported)
(3) (1920) I.L.R., 43 Mad., 835. (4) (1922) I.L.R., 45 Mad., 35.

(5) (1915) I.L.R., 38 Mad., 695.

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would have been completed as soon as the redemption money was paid.

The Subordinate Judge in appeal made the comment on these applications that it could not be said that they were made in execution. The law only requires that they should be applications in accordance with law to the proper Court and they appear to have been that.

I therefore agree with my learned colleague that this Appeal should be allowed with costs in both Courts.

RAMESAM, J.

RAMESAM, J.—This is a matter arising in the execution of a decree for the redemption of a usufructuary mortgage in South Malabar. The final decree of the High Court, dated 16th October 1913, allowed three months' time for redemption. The three months expired on the 16th (not 15th) January 1914. In his present application, dated 22nd December 1917, the decree-holder (plaintiff) applied for sale.

It has been held in *Nani Nair v. Kandan Ashtamoorthi Nambudripad*(1) that in cases falling under the Malabar Tenants' Improvements Compensation Act, the provisions of Order XXXIV, Civil Procedure Code, are modified by section 6 of that Act in so far as they are inconsistent with the latter, and that under the local Act only one decree in redemption suits need be passed. This was also acted upon by the Subordinate Judge in an earlier stage of the proceedings of this case. In this view, the question decided in *Govinda Taragan v. Veeran*(2), in *Govinda Menon v. Kombunni Mannadiar*(3) and in *Abdul Kadir v. Samipandia Tevar*(4), whether a mortgagor who obtained a decree for redemption can apply for sale when no final decree is passed under Order XXXIV, rule 4, which enables the mortgagee

only to apply for the passing of a final decree, does not arise, though I may add that, if it arises, I am inclined to follow those decisions and do not share the doubts expressed by SESHAGIRI AYYAR, J., in the last of them.

But it has also been pointed out in *Nani Nair v. Kandan Ashtamoorthi Nambudripad*(1) that

"Provisions like directions for sale in default, allowing time to pay moneys declared as due and so on, not inconsistent with the Improvements Act and directed or allowed by the new Civil Procedure Code to be mentioned in a decree for redemption or ejectment can, of course, be mentioned in decrees passed in suits falling under the Compensation Act also."

It follows that the mortgagor is entitled to apply for extension of the time allowed to him in the decree for redemption. In this case, two such applications were filed by the decree-holder on 4th April 1916 and 23rd June 1916. The District Munsif held that they operated as steps in aid of execution and saved the present application from being barred by limitation. The Subordinate Judge reversed the order of the District Munsif on the ground that they were not in aid of the execution because (1) the applications were not made when any execution application was pending and it cannot be said that they were made in execution (which is true) and (2) they retard execution and do not aid it.

In my opinion there is no warrant for the view that an application to take a step in aid of execution should be made in execution, and no authority has been cited by the Subordinate Judge or the learned vakil for the respondent in its support.

On the second ground also, I am unable to agree with the learned Subordinate Judge. Ordinarily, it is the judgment-debtors that have to pay or do some act

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(1) (1918) M.W.N., p. 551.

(2) (1913) I.L.R., 36 Mad., 32.

(3) C.M.S.A. No. 99 of 1915 (unreported). (4) (1920) I.L.R., 43 Mad., 885

(1) (1918) M.W.N., 551, p. 553

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under decrees in order to avoid sale, and applications by them for extension of time retard execution and do not aid it. But it does not follow that, in redemption decrees and similar decrees, where the decree-holder has to pay before obtaining execution and asks for extension of the time allowed to him for payment, such application does not aid him though it may retard execution of the decree. It aids him in the execution of the portion of the decree relating to redemption which he cannot get without extension of the time : see *Pitam Singh v. Tota Singh*(1). As my learned brother observed in the course of the argument, late redemption is better than no redemption. It may be that those applications do not aid the particular kind of execution now sought, viz., sale which was a relief granted as an alternative to the relief of redemption. It is enough that they aid the decree-holder in the execution of some portion of the decree [*vide Kalidas Manchand v. Varjivan Rangji*(2)] especially when that was the primary object of the decree-holder, even though, in the events that happened, the decree-holder did not derive the assistance sought. In my opinion the proper test in deciding such a question is whether the step aids the execution. The other test, viz., whether it accelerates or retards execution [see *Kartick Nath Pandey v. Jagganath Ram Marwari*(3), *Abdul Kader Rowther v. Krishnan Malavai Nair*(4)] though in many cases it amounts to the same thing, may in some cases (such as this) turn out to be fallacious.

I would reverse the order of the Subordinate Judge and restore that of the District Munsif with costs here and in the lower Appellate Court.

N.R.

(1) (1907) I.L.R., 29 All., 301 at p. 302.
(2) (1891) I.L.R., 15 Bom., 245 note. (3) (1900) I.L.R., 27 Cal., 285.
(4) (1915) I.L.R., 38 Mad., 695.

PRIVY COUNCIL.*

SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT),

1921,
December
19.

v.

RAJA OF VIZIANAGRAM AND ANOTHER
(PLAINTIFFS).

[On Appeal from the High Court of Judicature
at Madras.]

Alluvion—Title by accretion—Gradual accession—"Slow and imperceptible", meaning of.

The recognition of title by alluvial accretion is largely governed by the fact that the accretion is due to the normal action of physical forces. In the English rule, namely, that it must be "gradual, slow and imperceptible," the two last words are only qualifications of the word "gradual," and that word with its qualifications only defines a test relative to the conditions to which it is applied. The actual rate of progress necessary to satisfy the rule when used in connexion with English rivers is not necessarily the same when applied to the rivers of India. In dealing with an alleged accretion due to alluvion in the Godāvari river in the Madras Presidency, it is therefore not necessary to determine whether the test to be applied is that of the English rule, or that laid down by Bengal Regulation XI of 1825, which refers merely to "gradual accession."

[Judgment of the High Court affirmed.]

APPEAL No. 11 of 1920 from a judgment and decree (15th November 1916), affirming a decree (17th September 1913) of the Temporary Subordinate Judge of Cocanada.

The suit was brought by the respondents against the appellant for a declaration of the title of the

*Present :—Lord BUCKMASTER, Lord CARSON, Sir JOHN EDGE and Mr. AMER ALI.

plaintiff-respondent, the Raja of Vizianagram, to an island in the Gōdāvari river, and for consequential relief. The river at the point in question was tidal and navigable, and the bed was the property of the Government. The case made by the respondents was that land had been added by alluvion to a lanka which had been held to be an accretion to the Raja's Zamindari lands, and that subsequently the land had, by action of the river, become an island. The appellant by his written statement pleaded, (1) that the lands in suit had been formed on the bed of a navigable river, and belonged to the Government, and (2) that even if the lands in suit had been formed contiguously with any lands belonging to the plaintiffs, and in such manner as to be governed by the law of accretion, they, nevertheless, belonged to the Government as a vertical accretion to the bed of the river.

The first two issues framed were as follows :

"(1) Whether the lanka to the west of the suit lands marked A in the plaintiff's plan belongs to plaintiff, on the ground of its being an accretion to Betaru lanka, or whether the said lanka as well as the suit lands form together an entire lanka and are defendant's property, on the ground of the said entire lanka having been formed in the bed of a navigable river without any connexion with any lands of the plaintiff ?

"(2) Whether the suit lands belong to plaintiff on the ground of their being accretions to, or a part of, the lanka to the west of those lands, or whether, even if they are accretions to the above lanka, they belong to defendant on the ground that they form a vertical accretion to the bed of the river ? "

The Temporary Subordinate Judge recorded findings in the affirmative on the first part of each of the above issues, and in the negative on the second part of each.

He made a decree as prayed for. On Appeal to the High Court, the learned Judges (AYLING and SRINIVASA AYYANGAR, JJ.) affirmed the findings of the trial Judge, and after considering the law of accretion in relation to the facts of the case, dismissed the Appeal. The Appeal is reported in I.L.R., 40 Mad., 1083.

There was no evidence at the trial that the accretion was perceptible, but it was contended in both Courts that upon the areas appearing from certain leases it must have been so, and in the High Court that it was not "gradual." Facts with regard to the accretions appear from the Judgment of SRINIVASA AYYANGAR, J., in the High Court.

De Gruyther, K.C., and *Kenworthy Brown*, for the appellant.—Having regard to the rate at which the land in suit was formed, as appearing from the documents, it did not become the property of the first respondent by accretion. There being no specific rule of law applicable in Madras, the rule of justice, equity and good conscience is to be applied ; that is to say, the English rule of law: *Waghela Rajsanji v. Shekh Masludin*(1). The rule in English law is well established, and is that a title by accretion is acquired only where the accretion is "gradual, slow and imperceptible": *Rea v. Lord Yarborough*(2), *Attorney-General of Southern Nigeria v. John Holt & Company (Liverpool)*(3). The accretion in this case did not comply with that test. Bengal Regulation XI of 1825 which refers to "gradual accession," even if applicable here, includes only cases of *incrementum latens*: *Nogender Chunder Ghose v. Mahomed Esof*(4). That was recognized also in *Lopez v. Muddun Mohun Thakoor*(5), although that case

(1). (1887) I.L.R., 11 Bom., 551 (P.C.), 561; L.R., 14 I.A., 89, 96.

(2) (1824) 3 B. & C., 91; affd. (1828) 2 Bli. (N.S.), 147.

(3) (1915) A.C., 589, 618.

(4) (1872) 10 B.L.R., 406 (P.C.).

(5) (1870) 13 M.I.A., 467.

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was decided on the different principle of re-formation in situ. There is no distinction between the principles applicable in England and in India, in each the progress must be imperceptibly slow. The High Court attached too much weight to the observations in *Srinath Roy v. Dinabandhu Sen*(1) which case was dealing with a different question.

[Reference was also made to *Harsuhal Singh v. Syud Lutf Ali Khan*(2), *Sri Balusu Ramalakshamma v. The Collector of the Gōdāvari District*(3), *Jaggot Singh v. Brij Nath Kunwar*(4), *Ritraj Koer v. Sarfaraz Kunwar*(5), *Rai Krishan Chandra v. Saidan Bibi*(6), and *Narendra Bahadur Singh v. Achhaibar Shukul*(7).]

Upjohn, K.C., Sir George Lowndes, K.C., and F. B. Raikes, for the respondents.—The question now argued is not open to the appellant. No issue was framed as to it, nor evidence called. But in any case the facts found show that this was a case of gradual accretion. The “gradual accession” test laid down in Bengal Regulation, XI of 1825, applies in Madras: *Sri Balusu Ramalakshamma v. The Collector of the Gōdāvari District*(3). Regulation merely embodied that which was the law equally in Madras and Bengal.

The true test, whether in England or in India, is that the accretion must be due to the ordinary action of the river; but alluvion which might be extraordinary in English rivers would be ordinary in the large rivers of India. That distinction is clearly laid down by the Board in *Srinath Roy's Case*(1), and is indicated in *Sri Balusu Ramalakshamma's Case*(3). The onus was on the appellant: *Haidar Khan v. Secretary of State for India*(8).

(1) (1915) I.L.R., 42 Cal., 469 (P.C.); L.R., 41 I.A., 221.

(2) (1874) L.R., 2 I.A., 28.

(3) (1899) I.L.R., 22 Mad., 464 (P.C.); L.R., 26 I.A., 107.

(4) (1900) I.L.R., 27 Cal., 768 (P.C.); L.R., 27 I.A., 81.

(5) (1905) I.L.R., 27 All., 655 (P.O.); L.R., 32 I.A., 165.

(6) (1906) I.L.R., 28 All., 255

(7) (1906) I.L.R., 28 All., 647.

(8) (1909) I.L.R., 36 Cal., 1 (P.O.), 17.

De Gruyther, K.C., in reply referred to *Secretary of State for India v. Kadirikutti*(1).

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The Judgment of their Lordships was delivered by

LORD CARSON.—The question in dispute in this action is as to the ownership of a certain lanka formed by alluvion in the bed of the river Gōdāvari. It consists at the present time of an island being surrounded on all sides by the river, and in extent consists of about 1,000 acres. At the place where this lanka is situated the Gōdāvari is both navigable and tidal, and it is not disputed that the bed of the river at that place belongs to the Government of India. The extent of the river and the operation of its currents in forming alluvial tracts during the flood season must be borne in mind with reference to questions arising in this case. A description of this river will be found in *Sri Balusu Ramalakshamma v. The Collector of the Gōdāvari District*(2).

LORD
CARSON.

The Maharaja of Vizianagram, the first respondent, has for some years been in possession of this property; the other respondent is a trustee of the Vizianagram estates.

The defendant (appellant), as representing the Government of India, treating the Maharaja and his tenants as being in unlawful occupation of the lands in question, proceeded to levy penal assessment in respect of them amounting to Rs. 9,029. This sum the Maharaja paid under protest and has brought the present action claiming a declaration of title to the said lands and repayment of this penal assessment.

The main questions raised by the pleadings and issues, and to which the evidence was directed in the trial Court before the Temporary Subordinate Judge,

(1) (1890) I.L.R., 36 Mad., 869.

(2) (1899) I.L.R., 22 Mad., 464 (P.C.); L.R., 26 I.A., 107.

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were whether the lanka in question was an accretion formed laterally as an adjunct to or in continuity with any lanka or other property belonging to the Maharaja and became his property, or was formed vertically as an island in the bed of the Gōdāvari and was therefore the property of the Government.

The Subordinate Judge before whom the action was tried held that the lanka in question was formed by alluvion in contiguity with the Maharaja's land and was subsequently separated therefrom by the river, and gave a decree for the respondents.

On Appeal the High Court of Judicature at Madras, on 15th November 1916, confirmed the decree of the lower Court and dismissed the Appeal, concurring with the finding of the Temporary Subordinate Judge that the land in dispute was formed as a lateral extension of the Maharaja's lanka, or at least of the site of his lanka.

There are therefore concurrent decisions upon this the main question raised, and their Lordships see no reason for dissenting from the conclusion arrived at. The further question, however, and indeed the main one argued on behalf of the appellant before this Board, was that even if the lands in question were accretions to lands of the Maharaja the process of accretion was not such as to give him title to them.

In dealing with the great rivers in India and comparing them with the rivers in this country, it is necessary to bear in mind the comparative rapidity with which formations and additions take place in the former.

It was claimed by the appellant's counsel that by the settled law of England, which he argued was the law applicable to Madras, land to be an accretion must be formed by gradual, slow and imperceptible degrees as

laid down in *Rea v. Lord Yarborough*(1) and other English authorities, and he alleged that the accretions in the present case were not formed by "gradual, slow and imperceptible degrees." On the other hand, the Board were referred to section 4 of Bengal Regulation, XI of 1825, the only requirement of which is that this accretion should be "gradual"—not that it should be slow or imperceptible. That Regulation was promulgated to be in force throughout the Provinces subject to the Presidency of Fort William, and did not apply to the Presidency of Madras. It has, however, been contended that this Regulation embodies the law of accretion as applicable generally to the rivers of India. Their Lordships do not find it necessary to decide whether the law as to accretions promulgated in the Bengal Regulation coincides with the law as to accretions in the Presidency of Madras or elsewhere in India, nor to discuss the exact meaning of the word "imperceptible" in the English rule, which provides that all accretions must be "gradual, slow and imperceptible"; for, assuming the applicability of the English rule, "slow" and "imperceptible" are only qualifications of the word "gradual," and this word with its qualifications only defines a test relative to the conditions to which it is applied. In other words, the actual rate of progress necessary to satisfy the rule when used in connexion with English rivers is not necessarily the same when applied to the rivers of India. The application of the rule is, in their Lordships' opinion, correctly laid down in the Judgment of Mr. Justice AYLING in the present case, when he says :

"It seems to me the recognition of title by alluvial accretion is largely governed by the fact that the latter is due to the

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(1) (1824) 3 B. & C., 91; affd. (1828) 2 Bl. (N.S.), 147.

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normal action of physical forces; and the different conditions of Indian and English rivers is such that what would be abnormal and almost miraculous in the latter is normal and common place in the former, as pointed out by their Lordships of the Privy Council in *Srinath Roy v. Dinabandhu Sen*(1)."

Their Lordships observe that neither in the plaint nor the defendant's written statement, or, what is still more important, in the issues as settled, is there any question raised as to the accretions being "gradual," "slow" or "imperceptible."

Further, in their Memorandum of Appeal to the High Court, the Government did not make the decision on this point a ground of objection. An examination of the evidence given before the trial Judge, shows that although several of the witnesses proved that the said lankas or parts of them "arose gradually" (page 219 of record), or increased "gradually" (page 229), or "gradually extended" (page 240), or "had been gradually growing in size" (page 282), no question challenging this evidence was put upon cross-examination, nor was any evidence given on behalf of the appellant to attempt to displace such evidence.

Some attempt was made to show by a comparison of farm leases and accounts of different years (which were put in evidence on behalf of the Maharaja to prove contiguity) that there must have been extensive accretions at a particular date, but such a comparison does not when examined show the contents of the lanka but only what land in the place was cultivated in each year.

Further, the judgment of Mr. Justice SRINIVASA AYYANGAR has pointed out that throughout the long dispute which has led to the present suit the Government had never suggested that the land in question "was not

(1) (1915) I.L.R., 42 Cal., 489 (P.C.); L.R., 41 I.A., 221.

an accretion in the sense of a gradual formation." Their Lordships doubt whether under these circumstances it is open to the appellant to raise the contention under consideration, but assuming that it is, their Lordships see no reason to doubt that, applying the principles already explained, the accretion must be held to have been "gradual, slow and imperceptible," and to be the property of the Maharaja. The order appealed against must therefore be confirmed, and this Appeal dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *Solicitor, India Office.*

Solicitor for respondent: *Douglas Grant.*

A.M.T.

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APPELLATE CRIMINAL.

Before Sir William Ayling, Officiating Chief Justice, on a difference of opinion between Mr. Justice Oldfield and Mr. Justice Krishnan.

KOMARAN AND ANOTHER (ACCUSED), PETITIONERS.*

Railways Act (IX of 1890), ss. 47 (1) (b); 109 (1), 101 (b), 42 (2) —Reservation of accommodation for a class—Obligation to obtain sanction—Unsanctioned rules—Punishment for infringement of reservation—Whether undue or unreasonable preference.

Per AYLING, Offg. C.J., and OLDFIELD, J.—A Railway Administration can reserve accommodation in accordance with its own views. A reservation for the accommodation of Anglo-Indians or any other class of passengers is not an undue or unreasonable preference in favour of any particular description of traffic in contravention of the provisions of section 42 (2) of the Indian Railways Act. Such reservation is "for the use of

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another passenger" within the meaning of section 109 (1) of the Act and any passenger not of such class, who having entered such compartment refuses to leave when requested to do so, is liable to punishment under that section. *Emperor v. Brijbasi Lal*, (1920) I.L.R., 42 All., 827, followed.

Further (KRISHNAN, J., dissenting), it is sufficient if the reservation has been effected by the orders of the Station Master and such person has been informed of it

PETITION under sections 435 and 439, Criminal Procedure Code, praying the High Court to revise the judgment of N. KELU NAYAR, Subdivisional Magistrate of Coimbatore, in Criminal Appeals Nos. 44 and 45 of 1920, preferred against the judgment of M. SUBBAYYA, Taluk Second-class Magistrate of Avanashi, in Calendar Case No. 115 of 1920.

The petitioners, Hindus, on May 2, 1920, travelled from Coonoor to Mēttupālaiyam by mail train. At Mēttupālaiyam they got into a third-class compartment reserved for Europeans and Anglo-Indians. The Station Master drew their attention to the fact of reservation and asked them to leave but they refused. First petitioner was also charged with having torn up the card attached to the compartment signifying the reservation. The Sub-Magistrate acquitted him of that charge but convicted the two petitioners under section 109 (1) of the Indian Railways Act and sentenced them to a fine of Rs. 5 each. On Appeal this was confirmed. The petitioners then filed this Revision.

A. C. Sampath Ayyangar for the petitioners.

The Public Prosecutor for the Crown.

OLDFIELD, J.

OLDFIELD, J.—We are asked to interfere in Revision with the conviction of accused for an offence punishable under section 109 (1) of Act IX of 1890 and their sentences, each to pay a fine of Rs. 5 or in default to suffer one week's simple imprisonment.

There was some dispute as to the facts in the lower Courts; but I take them as found, to be that on 2nd May 1920 accused, passengers at Mēttupālaiyam Station by the Madras Mail train, entered and persisted in remaining in a third-class compartment, to which a card had been attached, purporting over the initials only of the Senior Ticket Examiner to reserve it for Europeans and Anglo-Indians. The questions argued before us are (1) whether the attaching of such a card could effect a reservation at all, (2) whether a reservation for Europeans and Anglo-Indians is, in the words of section 109 (1), a reservation for the use of another passenger, (3) whether a reservation for those classes is with reference to section 42 (2) within the powers of the Railway and can be recognized by a Criminal Court.

The second of these questions raises the general point of construction, whether the reference in the section to reservation for another passenger covers reservation for a class. It cannot in my opinion be answered by direct reference to any portion of the Act, since there is no definition of the term "passenger" and it is not possible to define it, as we are asked to do, with reference to section 68, as

"a person who actually enters a railway carriage for the purpose of travelling,"

in view of its wider use in other sections, of which section 51 (e) with its mention of

"means of transport which may be required for the convenience of passengers . . . carried or to be carried"

is the clearest. Nor, with all respect, is it sufficient to rely on section 23, General Clauses Act (X of 1897), and the principle that the singular includes the plural, or on the analogy of reservation for a regiment or theatrical company referred to by WALSH, J., in *Emperor*

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v. Brijbasi Lal(1). For, in such cases, the reservation would, it is to be supposed, have been made in consequence of an application, on which the number and identity of the passengers would have been, at least approximately, ascertained. But that will not be the case as regards the class of Europeans or Anglo-Indian passengers, until they take their tickets or at least intimate their intention to travel; and it is significant that, as the Traffic Working Orders of the Railway produced by the Public Prosecutor show, reservation for the class now in question has to be made at the starting station of all long distance main line trains, whether or no passengers of that class are there, to provide for the contingency of their travelling from later stations. In the present case there is in fact the evidence of prosecution witness 1, the Station Master, that seven or eight Anglo-Indians were in the compartment when accused tried to enter; and, as there were in the present case actual passengers to benefit by the reservation, it may on that ground be held to be of the kind contemplated by section 109. We have however been asked to deal with the case on general considerations; and we have then to decide whether the reservation referred to in that section is one for an actual passenger or passengers or includes reservation for possible passengers also.

No relevant authority relating either to Railways or to general canons of interpretation has been cited; and here, as in connexion with the next branch of the defence argument, the decision must be based on the policy of the Statute as a whole as well as the terms of the particular provision under construction. The Railways Act, as its preamble states, is intended to consolidate, amend and add to the law relating to railways.

(1) (1920) I.L.R., 42 All., 327.

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But there are and, in view of the complexity of modern railway working, must be many things usually and properly done by a railway, for which no explicit legal provision is made. There is, for instance, no such provision for the maintenance of waiting rooms or refreshment rooms or, what is material for the present purpose, for any reservation of accommodation on trains, except in cases in which it is compulsory, for females under section 64 or infected persons under section 71 (3). It is true that under section 47 (1) (b) the Railway Company is to make general rules consistent with the Act for providing for the accommodation and convenience of passengers, which under clause (3) of the section shall take effect, if the sanction for them of the Governor-General in Council is obtained. But the object and result of making rules with such sanction is only to make their breach an offence punishable by the Courts. It is not obligatory to obtain that sanction, if the Railway sees its way to enforce the rule without it or a penalty is provided incidentally in some other portion of the Act; and the existence of such unsanctioned rules is recognized explicitly in section 101 (b); see also *Emperor v. Weir*(1). The considerations arising in connexion with section 42 (2) will be dealt with later; but, apart from them, the Company has, in the words of Lord HALSBURY in *Perth General Station Committee v. Ross*(2),

“an absolute right to regulate its own traffic in its own way, its own interest being the best security that its strict legal right to do so will not be abused.”

Generally, then, it is legitimate for it to exercise the power, its possession of which is recognized in section 109, to reserve accommodation in accordance with its own view, whether of the prospect of direct and immediate profit or of the wider considerations originating in its

(1) (1910) 8 I.C., 134.

(2) [1897] A.C., 479.

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desire to secure the general comfort of the public ; and in making a reservation for a class it must be supposed to have acted, as it is entitled to do, on one or other of these motives.

Reservation for a class, such as is in question in the present case, being legitimate, the only question is whether it can be enforced by the special procedure provided in section 109 or whether resort must be had to the more cumbrous methods afforded by the general law, a prosecution for criminal trespass or a suit for an injunction. And here the conclusion in favour of the legitimacy of reservations for a class is material. For as they are legitimate, there is no reason why the special remedy afforded by section 109 should not be regarded as available to enforce them equally with others, the mischief, the infringement of the Company's right to control its passenger traffic in its own way, being in all cases of reservation the same. In these circumstances, the conclusion must be that reservations for possible and actual passengers are equally contemplated by section 109 and that the compartment entered by accused in this case was reserved for another passenger within the meaning of that section.

The right of a Railway Company to regulate its own traffic in its own way is again material in connexion with the question whether that compartment had in fact been reserved at all. For the argument on accused's behalf is that it had not, inasmuch as under the Company's Traffic Working Orders, Nos. 58 (a) and 172 (a), reservation can be made only by affixture of a card signed by the Station Master, as though a Station Master had no powers to control traffic in his station independently of the existence of a rule, and only a reservation made in strict compliance with those orders need be recognized by the public. But, as the Station Master deposed, the

orders are not available to the public and they are not general rules, published under section 47, to which clause (6) of that section applies. They therefore in no way resemble a power-of-attorney, from which the Station Master's authority to deal with the public in this or any other matter is derived, but are merely the domestic code, which every organization, as large as the South Indian Railway, must formulate for the guidance of its employees. The Company may and doubtless does insist on adherence to them and in the matter now in question such adherence would secure a reasonable and convenient notice to the public of the fact of reservation. But they do not provide the only or an obligatory way of giving such notice ; and, when, as in the present case, it can be shown to have in fact been given and the reservation to have been effected by another method, there is no reason why the result of the adoption of that method should be disregarded. For the facts found are that, when accused had entered the compartment in defiance of the card initialled by the Senior Ticket Inspector purporting to reserve it, the Station Master told them that it was reserved and asked them to go elsewhere. So far as the right to reasonable notice of the reservation is concerned, the accused cannot find fault with this procedure, since they had clear notice from an authority whose competence in the matter is beyond dispute ; and, so far as the validity of the reservation thus effected is concerned, it is useless to consider whether the facts are within the principle of ratification as laid down in *Keighley, Maxted & Co. v. Durant*(1) when the clearer ground of decision is available, that the Station Master by what he said simultaneously reserved the compartment and informed the accused of the reservation. The objection

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(1) [1901] A.C., 240.

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that the reservation thus made and the notice of it to accused and other members of the public were oral instead of by a written card is unsustainable on the view which I take of the scope of the Traffic Working Orders, the only foundation on which accused's claim to notice of the latter description has been supported.

Two general objections have been taken by the learned Public Prosecutor to our dealing with the merits of accused's remaining contention, that based on section 42. He has urged first that they are debarred from it, because the taking of proceedings except as provided by the Act, for anything done or any omission made by the Railway in contravention of that or any other provision in Chapter V, is prohibited by section 41. It is a sufficient answer that accused, in alleging such contravention in defence in the lower Courts or prosecuting these revision proceedings on the basis of its occurrence, cannot be said to have taken proceedings. Next it is urged that the expression "traffic" in section 42 (2) can be and is used only in connexion with the conveyance of animals and goods and the fixing of charges therefor. But this is opposed to the definition of "traffic" in section 3 (11), as including "rolling-stock as well as passengers, animals and goods." I therefore turn at once to the contention, on which accused rely, that the reservation of accommodation for Anglo-Indians or any other class of passengers is an undue or unreasonable preference in favour of a particular description of traffic, which section 42 (2) forbids.

This contention was supported by no authority; and in fact the reason for treating these reservations as infringements of the section was put in two ways only, that compartments reserved for Anglo-Indians are frequently empty or almost empty, when other passengers suffer inconvenience owing to overcrowding in other

compartments, and that it is an unreasonable preference to allow Anglo-Indians access, not only to the compartments reserved for them, but also to the rest of the train to which ordinary passengers are restricted. These considerations must in the absence of any other suggested test be dealt with in the light of common experience; and they do not seem to me to correspond with any intention on the part of the Railway to give a preference. They cannot, it is to be observed, be connected with the distinct question whether the accommodation provided for ordinary passengers was in the accused's train, or is usually, sufficient or as generous as such passengers would desire. Then, firstly, the alleged inconvenience to other passengers is not necessarily the consequence of one compartment being reserved; nor, if it were not reserved, would it necessarily be available to provide them with increased accommodation. And secondly, there is no reason for supposing that Anglo-Indians contrary to their own convenience use the unreserved portion of a train in preference to that reserved for them to an extent, which affords a grievance of any substance. Special treatment of a class need not involve a preference in its favour or more than, in the words of PIGGOTT, J., in *Emperor v. Brijbasi Lal*(1) already referred to, "provision by the Railway for the accommodation and convenience of its passengers generally, taking a broad view of its practical effect;" and it has not been shown how any other consideration is in question here. It is in fact, as WALSH, J., said in his fuller judgment, "merely a case of providing for the general convenience of the travelling public, which has been left by the Legislature in India, as it has always been left by the Legislature in England . . . to the discretion of experienced Railway

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Administrators ; " and we must accept the exercise of that discretion as legitimate in the present case, in which the contrary has not been shewn. In my opinion therefore the argument based on section 42 (2) must be rejected.

No ground having been shown for interference in Revision, I would dismiss the Petition.

KRISHNAN, J.

KRISHNAN, J.—With all respect for my learned brother, I regret I am unable to concur with him in this case ; for I have come to the conclusion that the accused are entitled to be acquitted on the short ground that the third-class compartment in question is not proved to have been properly reserved for Europeans and Anglo-Indians as the prosecution alleged. It is conceded by the Station Master of Mettupalaiyam, prosecution witness 1, that the label that was on the carriage door was not the usual printed label issued by the Railway Company similar to Exhibit I, but was only a piece of paper on which was written " reserved for Europeans and Anglo-Indians " ; it did not bear his signature or initials. The initials on it " A.V.D. " were, he says, those of his ticket examiner. He also admitted in cross-examination, and other witnesses corroborated it, that there was no rule authorizing him to delegate the power of signing the label to the ticket examiner.

At the time this incident happened the rule was that the Station Master should sign or initial the reserve label as shown by the form of the card in Rule 172 (a) of the Traffic Working Orders then in force and by Exhibit I that is produced. The rule was changed in January this year so as to enable the senior ticket examiner to sign the label at stations where there are ticket examiners (see Rule 260 of the new rules); and Mettupalaiyam Station is one of those stations. But this change of rule does not affect the present case as the incident in

question took place in May 1920. It is thus clear that the compartment in question did not bear a proper label reserving it for Europeans and Anglo-Indians.

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The question then is are the accused liable to be punished under section 109, Indian Railways Act, for entering such a compartment and refusing to leave it when asked. I will assume in deciding it that the section applies to a case of reservation for a class of persons like Anglo-Indians and is not confined to cases of reservation for specific individuals. It seems to me that before a person can be punished under the section it must be shown that the compartment was properly reserved according to the railway rules. The Traffic Working Orders may not be issued to the public but the travelling public know what is done every day when compartments are reserved and I think a passenger, who knew the rule in force, was entitled to disregard a reserved label put upon a compartment unless it was properly authenticated by the initials or signature of the Station Master. The Station Master himself has to observe the formalities required by the rules before he can properly reserve a compartment, as his own authority to do so is given to him by the Railway Administration subject to the rules. It is said that because the Station Master himself in the present case told the accused that the compartment had been reserved they should have accepted his word for it. I am not satisfied that the accused were bound to accept his oral statement and act on it. In fact, as mentioned in the judgment of the appellate Magistrate's last paragraph, the accused objected that the slip attached to the compartment was not an " authorized document " and requested the railway officials to put an " authorized " one, but that was not done. I am not prepared to say in these circumstances that the accused were committing an offence under

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KRISHNAN, J. section 109 in continuing to remain in the compartment. Whether they have transgressed any other rule or section we need not consider.

It is true the lower Courts have found that the compartment was reserved but I am unable to treat their finding as one of fact and accept it; as they have not considered the question from the point of view I have adopted. I would reverse the conviction and direct the fines if paid to be refunded.

In the view I take it is not necessary to discuss the other questions dealt with by my learned brother and I express no opinion about them.

By Court.—As we differ, the case must be laid before the Chief Justice for orders as to its further disposal.

The case coming on for hearing before AYLING, Officiating Chief Justice, His Lordship made the following ORDER :

AYLING, OFFG. C.J.—The facts of this case and questions arising for decision have been fully set out in the judgment of my brother OLDFIELD : and it is unnecessary for me to recapitulate them. The case comes before me in consequence of a difference of opinion between the learned judges as to whether in this particular case, assuming the Railway Company to be legally entitled to reserve a third-class compartment for the use of Europeans and Anglo-Indians, the reservation had been properly effected so as to render the action of the petitioners punishable under section 109 of the Railways Act.

The questions involved in the Railway Company's general power of reservation have been exhaustively discussed by OLDFIELD, J., whose conclusion is identical with that arrived at by a Bench of the Allahabad High

Court in *Emperor v. Brijbasi Lal*(1) though in one respect, the scope of section 42 of the Railways Act, he has taken a different view. KRISHNAN, J., has expressed no opinion on this part of the case : and I am not altogether clear, whether with reference to the terms of section 429, Criminal Procedure Code, I am called upon to deal with it. I have however heard the matter fully argued by Mr. S. Srinivasa Ayyangar and by Mr. Ethiraj, who appeared for the Public Prosecutor : and as a result, I entirely agree with the conclusions arrived at by OLDFIELD, J., and feel it unnecessary to add anything to his reasoning.

Coming to the point of difference, it is really a very small one. There is no doubt that the usual method of reserving a compartment is by the affixment on both sides thereof of a printed card signed or initialled by the Station Master in a space provided for the purpose. In the present case two slips of paper were affixed bearing the words "reserved for Europeans and Anglo-Indians" and initialled by the ticket examiner. It is explained that this was due to the stock of cards having run out. The argument put forward for the petitioners is that this irregularity invalidates the reservation of the compartment, so that their action in ignoring it amounts to no offence.

I have not been referred to any rule from which I could say that a compartment can only be legally reserved by a label or notice signed or initialled by the Station Master. The only code of rules referred to is the Company's Traffic Working Orders, which are clearly intended for the guidance of the Company's servants, rather than for the information of the public. But even in this I find nothing to the effect indicated. Rule 174,

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which authorizes the reservation of third-class accommodation for Europeans and Anglo-Indians, says nothing as to the official by whose orders the accommodation is to be effected. It runs :

“ One third-class compartment only may be reserved by the long distance main-line trains and by the principal connecting trains on the branches and labelled as follows : ‘ For Europeans and Anglo-Indians.’ Guards and Station Masters should see that even when there are no Europeans or Anglo-Indians travelling others are not allowed to occupy the compartment.”

So far as this is concerned, the affixment of the paper labels spoken to in evidence would meet the requirements of the rule. The only other rule quoted is rule 172 (a) which runs thus :

“ When accommodation in any train is reserved, the Station Master who has to arrange for the accommodation will label the carriage or compartment on both sides and enter the number of the carriage or compartment and the class of accommodation provided in the Vehicle Way-bill with the stations from and to which they are so reserved, and the guard will be responsible for seeing that the accommodation is reserved accordingly.”

Now, it may perhaps be deduced from this that the reservation has been effected by orders of the Station Master only—but I can find nothing more. The direction that he should label the carriage or compartment, of course, does not imply that he must do so with his own hands or sign the label. The form given in the example to the rule refers not to the label, but to the entry in the Vehicle Way-bill, and in this connexion, my learned brother KRISHNAN, if I may say so with respect, appears to have been under a slight misapprehension. It is in evidence and apparently not disputed, that the labels were affixed to this carriage under the orders of the Station Master ; and that on being referred to he informed the petitioners that this was so. The most that can be said is that the reservation was not effected by

the affixment of the usual printed card—not that it was in contravention of the Company's rules.

I may add, though it is hardly material, that it is clear from first petitioner's own statement that this was not the essence of their objection : he says he objected to the unauthorized form of the label and requested the railway officials “ to put an authorized document (i.e., label) so that we could then test the right of reservation if necessary.” In other words the petitioners were prepared to remain in the compartment even if a printed label signed by the Station Master had been affixed, so as to test the Company's general right of reservation. This was, in fact, their object, as they frankly admit. They knew the reservation was under the Station Master's orders and they were anxious to have the irregularity, such as it was, remedied, so that there could be no chance of the Court, before which the resultant case would come, failing to determine the larger question.

In my opinion, it cannot be said that the procedure adopted in this case was such as to invalidate the reservation.

There are no grounds for interference and the Revision Petition must be dismissed.

• M.H.H.

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APPELLATE CRIMINAL.

*Before Mr. Justice Spencer and Mr. Justice
Kumaraswami Sastri.*

1921,
September
19.

TANGEDUPALLE PEDDA OBIGADU (SECOND ACCUSED),

v.

KING-EMPEROR.*

*Criminal Procedure Code (V of 1898), ss. 159, 164, 288, 364,
533—Magistrate—Inquiry under section 159—Confession by
accused—Not recorded in writing—Oral evidence of Magis-
trate, whether admissible.*

Under section 164, Criminal Procedure Code, it is not obligatory on a Magistrate holding an investigation or preliminary inquiry under section 159 of the Code to record in writing a confession made to him by an accused person and such confession may be proved by the oral testimony of the Magistrate.

TRIAL referred by A. FOTHERINGHAM, Sessions Judge of Cuddapah, for confirmation of the sentence of death passed upon the Second Accused in Case No. 10 of the Calendar for 1921, and Appeal filed by the said accused in the same case and Appeal filed by the Public Prosecutor against the acquittal of accused Nos. 1, 3, 4 and 5.

Second accused and four others were charged with the murder of one Kuppuswami Ayyangar, a Sub-Inspector of Police. This prisoner had been put up by the Sub-Inspector under one of the security sections and bound over and the Sub-Inspector had given evidence against him. The other four were accused in a theft case, and were all under remand. They were on their way to be tried at Pulivendla by the Deputy Magistrate when they had to pass his camp. They were detained there and examined by the Investigating Inspector and then by the Deputy Magistrate. The examination by the Magistrate was, as

the Sessions Judge put it, "informal and nothing was recorded: indeed the information about it is such that it appears he did not realize the essential difference between his conducting the examination himself and having it conducted by the Police Inspector in his presence." The other material facts are set out in the judgment of SPENCER, J. The Sessions Judge convicted second accused of the murder and sentenced him to be hanged by the neck subject to confirmation by the High Court but acquitted the other four accused. Against this acquittal the Public Prosecutor filed an Appeal.

S. Ranganatha Ayyar for the prisoner.

The Public Prosecutor for the Crown.

SPENCER, J.—In the Sessions Court five men of Yarla caste were tried for the murder of Kuppuswami Ayyangar, late Police Sub-Inspector of Chekrayapet, but the second accused alone was found guilty and convicted under section 302, Indian Penal Code. There is before us an Appeal preferred by Government against the acquittal of accused Nos. 1, 3 and 4, and the sentence of death passed on the second accused has come up for confirmation under section 374 of the Criminal Procedure Code. The case of the fifth accused is not before us.

It was proved by the deceased police officer's wife, prosecution witness 20, that she last saw her husband at 3 p.m. on February 20th, 1920, when he left his house at Kumarakalva for the police station at Chekrayapet saying he would return at night. It was proved by prosecution witnesses 12 and 13, constables of that station, that he worked in the station that day till 6 p.m., when he left for home. He was last seen alive by two Muhammadans, prosecution witnesses 17 and 18, near Gandikovur, a village which lies midway between Chekrayapet and Kumarakalva. About the same time a

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* Referred Trial No. 50 of 1921 and Criminal Appeals Nos. 307 and 377 of 1921.

blacksmith, prosecution witness 24, says he saw the fifth accused crossing the Papaghni river in the direction of Gandikovur and a man in white, who may have been the deceased (except for the fact that prosecution witness 18 says he was wearing a dark coat), descend into the river-bed from the Gandikovur side just as prosecution witness 24 was about to ascend by the separate path to Bojjireddivarapalli.

The evidence to connect the accused with the crime consists, first, of confessional statements which they each made in turn on April 12th, 1920, to the Deputy Magistrate of Royachoti, prosecution witness 2; secondly, of evidence of conduct in pointing out on April 13th certain human remains which one K. Pedda Chennugadu, who is not an accused or a witness in this trial, had shown on April 10th on the top of a hill called Erramatti Kanama, and some charred bones concealed in a cleft in the rock a furlong away which Chennugadu had not previously shown; thirdly, of evidence of conduct in showing a place in second accused's field from which the village munsif extracted a bundle containing the fragments of a watch which is proved conclusively to have belonged to the deceased Kuppuswami Ayyangar; and lastly, of the statement of prosecution witness 24 that the accused were seen in the neighbourhood of the place where the deceased was last seen alive and were shouting as if drunk, and the statement of prosecution witness 15, toddy shopkeeper at Kumarakalva, that he sold them toddy that evening.

The first question for decision is whether the oral evidence of the Deputy Magistrate is admissible to prove that the accused confessed to the crime of having drowned the Sub-Inspector in the river.

In his further examination this Magistrate has explained that he did not record these confessions under section 164, Criminal Procedure Code, as the section does

not make it obligatory that he should do so and he thought that if he wasted time on formalities the material objects might disappear in the meantime. He has not explained why he did not record these confessions either at Erramatti Kanama or after he and the accused returned to his camp. He says he was acting as a Magistrate but was not holding any trial or preliminary inquiry but was inquiring into the crime under section 159 under the directions of the District Magistrate. That is a section which authorizes Magistrates, who are empowered to take cognizance of offences upon a police report, to direct an investigation or to themselves proceed to hold a preliminary inquiry upon receiving a report of the commission of a cognizable offence or to depute a Subordinate Magistrate to do so. From the definitions in section 4 (l) and (k) it appears that "investigation" is a word confined to proceedings of the police or persons other than Magistrates and that "inquiry" is the word appropriate to the proceedings of Magistrates prior to trial.

The expression "preliminary inquiry" in section 159 appears to be used in a different sense from its use in section 288, where it refers to inquiries under Chapter XVIII, prior to commitment to the Sessions, which are held after the police investigation is complete, after a charge sheet is drawn up, and after the accused is forwarded under custody under section 170 to the Magistrate empowered to take cognizance of the case.

After a person is taken as an accused, it is made obligatory upon the Magistrate who examines him to record the whole of the questions put to him and the answers given by him, under section 364, Criminal Procedure Code. But statements, whether in the nature of information given by witnesses about a crime or admissions by persons who have taken part in a crime, if made during the course of an investigation before the

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commencement of a trial or inquiry are governed by section 164 and this section permits Magistrates to record the same without compelling them to do so.

In this case it does not appear that the Deputy Magistrate made any inquiry independently of the police or recorded any statements from the available witnesses. The police were conducting an investigation and collecting evidence of the crime. The Magistrate was watching the progress of their work of detection. Under such circumstances he was not bound by law to record in writing what was said to him.

The law is stated by BRANDT, J., in *Queen-Empress v. Viran*(1) thus :

"Evidence may be given of a confession provided that it be not excluded by an express provision of law, whether made to a private person, or to a Magistrate otherwise than in the course of an inquiry or other judicial proceeding; it may then be proved, and must be proved if at all, like any other fact."

In *Emperor v. Maruti Santu More*(2) SHAH, J., gave his reasons for thinking that in spite of the use of the expression "may record" in section 164 (1) it was the intention of the Legislature to make all confessions matters required by law to be reduced to the form of a document. He relied on the implied purpose of the section and on the terms and the existence of section 533; but HAYWARD, J., who sat with him, dissented from this view and observed, that

"if it was intended to make oral statements which would be relevant when made to private persons irrelevant when made to Magistrates, then there would surely have been express provision that such statements should not be proved except by writings duly recorded by Magistrates,"

and

"it would not have been left to mere implication from the provisions relating to the manner of proof of such writings

(1) (1886) I.L.R., 3 Mad., 224, 240.

(2) (1920) 54 I.C., 465.

when recorded by Magistrates under section 538 of the Criminal Procedure Code."

With due respect I am unable to adopt the view taken by SHAH, J., which is founded partly on theories as to implications to be drawn from certain sections, whereas the law is always precise in stating what "may" and what "shall" be done, and partly on four decisions of the Bombay High Court which became obsolete by the enactment of section 533 in the Code of 1882. In *Emperor v. Gulabu*(1) it was held that no evidence could be given of the terms of a confession of an accused person made to a Magistrate except the record, if any, made under section 364. That was a case in which it was found that the Tahsildar was actually conducting an inquiry as a Magistrate when the statement was made to him and therefore section 364 strictly applied. When no record at all had been made of Gulabu's statement in spite of the provision in section 364, that the whole of the examination of an accused including the questions put to him and every answer given by him shall be recorded in full, section 533 was inapplicable and no oral evidence could be admitted to prove what Gulabu said. It is quite plain that section 533 can only be invoked when there is some written record but that record is defective through some error in not strictly following the provisions of section 164 or section 364. The object, apparent from the words of the section, is to take such records out of the excluding provisions of section 91, Indian Evidence Act. *Queen-Empress v. Bhairab Chunder Chuckerbutty*(2), which has been cited for the defence, is not really helpful in considering the value of unrecorded confessions. It dealt with a case where statements were recorded by a

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(1) (1913) I.L.R., 35 All., 260.

(2) (1898) 2 C.W.N., 702.

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Magistrate in the course of an investigation under section 159 in the form provided by section 364 but without the certificate required by section 164, to the effect that they were made voluntarily.

I hold then that the oral statements of the Deputy Magistrate as to what the accused admitted in his presence are not inadmissible on account of his failure to record them in writing.

The next question is whether the confessions spoken to by the Deputy Magistrate were made voluntarily. Section 164 provides that a Magistrate should not record such a confession unless upon questioning the accused he has reason to believe that it was made voluntarily.

The Deputy Magistrate now deposes that these confessions were made voluntarily and that the accused said they were voluntary.

But the conditions under which they were given make it very doubtful whether he was right in his supposition. The accused did not come forward spontaneously. They were in police custody at the time, accused Nos. 1, 2, 3 and 5 being charged with theft of sheep and the fourth accused being put up for giving security for good behaviour. They were brought over from the police thana to the chattram where prosecution witness 2 was halting. The Police Inspector first put questions and then the Deputy Magistrate put questions to each accused in turn. K. Pedda Chennugadu had three days previously shown the Inspector the cave where the human remains were hidden. The accused repeated the process. First accused said that they drowned the Sub-Inspector at the instigation of Boya Reddi and Pedda Roshan who were looking on. It is possible that he may have had an idea that if he gave information against Boya Reddi and Pedda Roshan he would be taken as an approver like K. Pedda Chennugadu and would be let

off on the charge of theft of sheep. So also with the other accused. It is difficult to conceive that they all confessed to the murder without any threat or promise or other inducement.

In this case the guarantee that would be afforded by the Magistrate's certificate under section 164 (3), written at the time the confessions were made, is wanting owing to the course adopted of not recording what they said. There is moreover, some uncertainty as to what each accused said, as it is too much to suppose that the Deputy Magistrate carried in his head the actual words used by each accused during the year that elapsed between the date of the confessions and the date of his deposing in the Sessions Court. Without knowing the words in which the confessions of guilt were made it is impossible to judge of their genuineness from the language.

I hold, therefore, that the evidence as to the confessions must be excluded as I am not satisfied that they were voluntary.

Without them there is no proof that Kuppuswami Ayyangar was murdered or that the bones shown at Erramatti Kanama were his. The Public Prosecutor concedes that, if the confessions are left out, the rest of the evidence is not sufficient to sustain convictions of the accused.

The second accused is therefore acquitted, his conviction and sentence being set aside.

Criminal Appeal No. 377 of 1921 is dismissed.

KUMARASWAMI SASTRI, J.—I agree.

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APPELLATE CIVIL.

*Before Sir William Ayling, Officiating Chief Justice,
and Mr. Justice Odgers.*

1921,
October 24.

THE OFFICIAL ASSIGNEE OF MADRAS, APPELLANT,

v.

S. R. M. M. R. M. VALLIAPPA CHETTI AND ANOTHER,
RESPONDENTS.*

Presidency Towns Insolvency Act (III of 1909), ss. 52 (2) (c) and 57—Goods pledged—Possession with pledgee—Charge on equity of redemption—Goods in the order and disposition of the insolvent—Validity of charge—Transfer for consideration—Good faith.

An insolvent pledged certain goods with A and three weeks prior to the adjudication created a charge on the equity of redemption in favour of B, without the knowledge or consent of A or notice to him. On an application by the Official Assignee for a declaration that the charge in favour of B was not valid as the goods were "in the order and disposition of the insolvent" held that an equity of redemption is not "goods" within the mischief of section 52 (2) (c) of the Presidency Towns Insolvency Act.

A transfer from the insolvent for valuable consideration is protected under section 57 of the Act if the transferee has taken in good faith, that is, without knowledge of an act of bankruptcy committed by the insolvent.

AN APPEAL from the judgment and order of Mr. Justice KUMARASWAMI SASTRI passed in the exercise of the Ordinary Original Jurisdiction of the High Court, in Insolvency Petition No. 6 of 1919.

This was a notice of motion taken out by the Official Assignee "for an order that the letter, dated 21st December 1918, executed by the fourth insolvent" to the garnishees "may be declared fraudulent and void and inoperative against the Official Assignee." The facts

are set out in the judgment and the only portion of the Official Assignee's report which is material is as follows:

"The acts of Bankruptcy on which the Order of Adjudication proceeds are:

(a) that on 8th January 1919 the debtors expressed their inability to pay their debts in full at a meeting of the creditors held at the request of the debtors;

(b) that they are giving fraudulent preferences by transferring their stock in trade;

(c) that there is a warrant of arrest subsisting against them.

Among the fraudulent preferences is one, dated 10th December 1918. I therefore submit that the insolvency relates back to that date and the letter, dated 21st December 1918, is not binding on me."

The Advocate-General (C. P. Ramaswami Ayyar) for appellant.

A. Krishnaswami Ayyar and M. Subbaraya Ayyar for respondents.

ODGERS, J.—This is an Appeal from the judgment of ODGERS, J. KUMARASWAMI SASTRI, J., who disallowed the application of the Official Assignee to treat a certain letter of charge given by the firm of Appachi Chetti & Sons (who were adjudicated on 15th January 1919) to certain Nattukottai Chettis as (1) a fraudulent preference under section 59 of the Insolvency Act; (2) within the order and disposition portion of section 52 of the Insolvency Act; (3) as within section 55 of the Insolvency Act as being without consideration. The learned Judge found against the Official Assignee on all these points and he appeals. Certain bales were pledged in October 1918 by the insolvent firm to Egappa Chetti to whom the former owed Rs. 1,35,000. These bales were deposited with the pledgee and the validity of this pledge is in no way

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questioned by the learned Advocate-General who appeared for the Official Assignee. The question is as to the balance remaining after the pledgee has taken his debt out of the money realized by sale of the bales pledged to him. The insolvent purported to create a second charge in favour of two Nattukottai Chettis on the same bales by means of a certain letter set out in the judgment of the learned Judge. This letter is dated 21st December 1918, and runs as follows :

"As we have given the bales belonging to us, that is the goods mentioned in the list herewith given as security for Rs. 1,85,000 which is the principal due up to this date on the account of debit and credit transactions already carried on with T. T. Egappa Chetti of this place and the interest thereon, we shall sell the goods mentioned therein according to the bazaar price and pay the entire amount and the interest to the aforesaid Egappa Chettiyar and the goods which are likely to remain after fully discharging the amount due to him have been given by us as security for the balance of principal Rs. 12,800 and interest due by us to S. R. M. M. R. M. Valliappa Chettiyar out of you and for the principal Rs. 13,750 and interest due after deducting the amount paid in respect of the promissory note for Rs. 15,000 executed and given by one M.R.Ry. Muttukumara Chetti to K. M. L. Kumarappa Chettiyar. If the aforesaid bales are not sold and delay is caused we have given them to you as second security also. Until T. T. Egappa Chettiyar's debt and your vagairas' debt are discharged out of these bales we shall not take the money."

It is not contended by the learned Advocate-General that this letter does not create a valid charge, but it is said that owing to the power of sale having been left in the insolvents (we are not told if Egappa Chetti knew of or assented to this and we should think it extremely unlikely) by the letter of charge, the Nattukottai Chettis have allowed "goods" belonging to themselves to be in the possession, order or disposition of the insolvents, under such circumstances that the latter is the reputed

owner thereof. In other words, the second charge though the property of the Nattukottai Chettis is to be taken away from them and the value of it applied for the benefit of the general body of creditors.

The only point argued before us of the three set out above was (2). The first question therefore for decision is, premising that the insolvents only dealt with what was left after their pledge to Egappa, i.e., the equity of redemption, did the second charge-holders leave that equity of redemption at the disposal of the insolvents so as to incur forfeiture (for that is what it is) of their charge within the mischief of section 52 (2) (c). It was first contended by the Advocate-General that the matter might fall within section 52 (2) (a) also, as being property belonging to the insolvents but (a) includes only what really is the insolvents' property ; in this case, the value of the goods minus the value of the two charges created on it—in other words, the second equity of redemption which is in fact valueless to the Official Assignee who for any practical advantage to accrue must bring the case under clause (c) and thus recover the benefit of the second charge. The learned Advocate-General being thus confined to clause (c) it was necessary for him to argue that the equity of redemption disposed of by the insolvents by way of second charge but left at their disposal by the owners thereof was "goods" within the meaning of that clause. In support of this contention he first relied on section 76 of the Contract Act where in the chapter on sale of goods it is said "In this Chapter the word 'goods' means and includes every kind of moveable property." Reference was also made to two cases : *Franklin v. Neate*(1) where it was held that in spite of the pledge the pawner still has a property in the goods pledged, which property he can sell subject of course to

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(1) (1844) 13 M. & W., 481.

the "special property" (as it is called) vested in the pledgee. This is an undisputed proposition and does not carry the case further than to furnish legal authority for the insolvents to create a second charge on the pledged bales. The second case was *Ex-parte Roy Re Sillence*(1) where it was held that the bankrupt could not create a lien (as claimed by his creditor) over certain horses as the latter were not his. They were, however, in his order and disposition by consent of the true owner.

In my opinion this case is totally different from the present. It is not contended that the goods, or that the equity of redemption in the goods after they were pledged, did not belong to the insolvents and they were not at perfect liberty to deal with those goods or that equity of redemption as they pleased, subject to the pledgee's right. At most the case decides that the possession of a depositor claiming a lien is for the purposes of this clause the possession of the insolvents. On the other hand it has been held in *Greening v. Clark*(2), and *Webb v. Whinney*(3), that the possession of a pawnee is not the possession of the insolvent pawner. So also in *Lincoln Wagon and Engine Co. v. Mumford*(4), it was said by STEPHEN, J. :

"If one person deposits a chattel with another, and borrows money upon that chattel, it cannot be said that it is in the possession or apparent possession of the person creating such a charge upon it."

So much for the question of the respective rights of the pledger and pledgee in the goods pledged. I return to the question as to whether the equity of redemption in these goods pledged is itself included in the definition of "goods" in clause (c). Mr. Krishnaswami Ayyar for the respondents, points to the analogies in section 41 of the

(1) (1877) 7 Ch.D., 70.
(3) (1868) 13 L.T., 528.

(2) (1825) 4 R. & C., 316.
(4) (1879) 41 L.T., 655.

Transfer of Property Act and section 108 of the Contract Act. They are both instances of "holding out" by the true owner and he contends that the case under clause (c) is the same. There must, in the sections cited, be an express or implied representation by the true owner that the ostensible owner is authorized to deal with the land or goods, as the case may be. It is said the same applies here. It must be "goods," actual, tangible, concrete, things, not intangibles, such as an equity of redemption. It is clear that in Chapter IX on Bailment in the Contract Act "goods" must have this significance. In this connexion the proviso to the clause is important :

"Provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of clause (c)."

Thus debts of the specified character are expressly excepted from "things in action" which are not to be deemed "goods."

It has been held that shares and share certificates are not "goods": *Lalit v. Haridas*(1). The judgment of FRY, L.J., in *Colonial Bank v. Whinney*(2), contains a valuable *resumé* of the development of the law as to "things in action." The question there was whether shares in a Company were choses in possession or in action and he decided that shares are choses in action. The other Lords Justices decided the other way, but their decision, was reversed by the House of Lords in *Colonial Bank v. Whinney*(3), where at page 441, Lord FITZGERALD said :

"It seems to me, on a careful examination of the section and provision, that the intention of the legislature was to narrow very much the operation of the 'order and disposition' clause so as to confine it to such goods as might be in the order and disposition of the bankrupt, 'in his trade or business' and, save in the case of 'debts due to the bankrupt in the

(1) (1916) 24 C.L.J., 335. (2) (1885) 30 Ch.D., 261, 285.
(3) (1886) 11 App. Cases, 426.

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course of his trade or business' to exclude all those incorporeal rights which are not visible or tangible or capable of manual delivery or of actual enjoyment in possession, in its ordinary sense, and which, if denied, can be enforced only by action or suit."

This extract contains and supports the very position contended for by Mr. Ramaswami Ayyar and I see no reason to doubt its applicability to the clause in question which is taken word for word from section 44 of the Bankruptcy Act of 1883, corresponding to section 38 of the English Bankruptcy Act, 1914, on which the case of the *Colonial Bank v. Whinney*(1), was decided: see also on this point, *The Mercantile Bank of India, Ltd., Madras v. The Official Assignee, Madras*(2). These considerations seem to me to clearly conclude the matter on this point against the appellant and I have no hesitation in holding that an equity of redemption is not "goods" within the mischief of clause (c).

The learned Advocate-General, however argued another point. On 12th April 1920, the Official Assignee moved before the Judge in insolvency for an order declaring that a certain transfer of goods made on 12th December 1918 by these same insolvents in favour of A. R. A. Swaminatha Pillai was fraudulent and void under section 56 of the Presidency Towns Insolvency Act. This was dismissed on 30th July 1920, but was subsequently on 3rd May 1921 reversed on Appeal. The transfer was thus an Act of Insolvency under section 9 (1) (c) of the Act. It is contended that by the operation of section 51 (b) this act of insolvency must relate back to the 12th December 1918 and that as the second charge in this case was given on 21st December 1918 it is invalid as it is an attempted disposition of the insolvent's property after his property had become vested in the Official Assignee.

(1) (1886) 11 App. Cases, 426. (2) (1916) I.L.R., 39 Mad., 250, 262.

The answer to this contention is found in section 57 (c) which *inter alia* provides that any transfer by the insolvent for valuable consideration is valid (subject to the provisions of the Act as to the evidence of certain transfers, and preferences, as to which there is now no question in this case) provided that it takes place before the Order of Adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any Insolvency Petition by or against the debtor.

The rejoinder by the appellants to this is that bona fides is required under the section and reference is made to *The Mercantile Bank of India, Ltd., Madras v. The Official Assignee, Madras*(1). There, it was held that a creditor who entered into a transaction with his debtor with the knowledge that that debtor had committed an act of bankruptcy at the time the transaction was entered into cannot claim the benefits of section 57. Is there any such evidence here? I can find none nor was it contended that such existed. It is not disputed that the debt to the Chettis was an actual debt subsisting at the date of the second charge in their favour. The only way in which bona fides was raised was in so far as it was involved in the issue of fraudulent preference which was found against the Official Assignee by the learned Judge and not argued before us on Appeal. This point must therefore be also decided against the appellant.

The result is that the judgment of the learned Judge in Insolvency was right and must be affirmed and the Appeal dismissed with costs.

AYLING, OFFG. C.J.—I agree.

V. Varadaraju Mudaliyar, Attorney for appellant.

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(1) (1916) I.L.R., 39 Mad., 250, 262.

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*Before Mr. Justice Kumaraswami Sastri.*1921,
October 18.*In re. PORKODI ACHI (FIRST RESPONDENT).**

*Court Fees Act (VII of 1870)—Appeals—Court-fee payable—
Test—Relief on payment of specified sum—Ad valorem on
such sum.*

In cases of Appeals where the value of the subject matter of the Appeal can be determined the court-fee payable on the Memorandum of Appeal must be calculated on the value of the subject matter. The test is what is the value of the relief granted which is sought to be got rid of.

Where a decree grants relief on payment of a certain sum to the defendant the court-fee payable on a Memorandum of Appeal against so much of the decree as directs payment is *ad valorem* on the said sum irrespective of the nature of the suit.

REFERENCE under section 5 of the Court Fees Act by the Taxing Officer.

This was a reference by the Deputy Registrar, Appellate Side of the High Court (Mir Amir-ud-din) to the Taxing Officer (F. G. Butler), who referred it to the High Court under section 5 of the Court Fees Act as in his opinion "the matter is one not specifically provided for by the Act or its schedules and is not clearly covered by authority." The facts and contentions appear from the following extracts from the reference by the Deputy Registrar :

"This is a Memorandum of Objections in Second Appeal No. 22 of 1921, filed by the plaintiff, on which Court-fee of Rs. 10 only has been paid. The point for consideration is,

* Stamp Register No. 6108 of 1921.

what is the proper Court-fee payable . . . The facts in this case are as follows: The plaintiff impugned the validity of the sale of certain lands for Rs. 8,000 by her mother, and as next reversioner to the estate of her father brought a suit to recover possession of them. The Court of first instance dismissed the suit. Plaintiff appealed. The lower Appellate Court held, that the debts borrowed by the widow, to the extent of Rs. 3,881-4-0 which formed part of the consideration of the sale, were true, valid and binding on the estate and the reversioner, and decreed that the plaintiff was to have possession on condition of her paying that amount. The plaintiff by her Memorandum of Objections seeks to assail and set aside the condition imposed by the lower Appellate Court . . . and pays a Court-fee of Rs. 10 as though the subject matter of this cross objection is incapable of being estimated in money value. In this connexion it must be stated that the suit and the appeals have been valued under section 7 (v) (b) of the Court Fees Act, and the Court-fees, five times the Government revenue, have been rightly paid."

The learned vakil for the plaintiff contends that the Court-fee of Rs. 10 is sufficient, firstly, under schedule II, article 17 (iii) on the ground that the liability imposed by the decree is merely declaratory, and secondly, under schedule II, article 17 (vi) on the ground that the condition imposed is incapable of being estimated at a money value. In the alternative he contends that in any event section 7 (v) (b) covers the case and that he cannot be asked to pay more fee than he has paid for the institution of the suit.

The first contention is that the decree merely declares the liability of the plaintiff to pay a certain amount and get possession and it is sought to lend weight to this by stating that the decree for payment is not executable. But the clear words of the Act, namely, "to obtain a declaratory decree where no consequential relief is prayed for" do not lend support to such an argument. The substantial and only object of this cross objection is not

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to obtain any declaratory decree, the lower Appellate Court having already granted possession to the plaintiff, but to set aside the condition appealed against and to avoid the payment directed to be paid. . . . When the plaintiff seeks to set aside the condition which, in fact, amounts to the avoiding of the payment, she has to pay *ad valorem* on the amount declared by the decree to be payable. The fact that such liability is executable or not does not affect the question.

Supposing in a suit for foreclosure the Court directed, as a condition precedent to foreclosure, the redeeming of a prior mortgage by the payment of Rs. 5,000. What is the Court-fee payable on Appeal when the above condition is sought to be set aside? In *Baji Lal v. Gobardhan Singh*(1) it was held that the proper Court-fee was the *ad valorem* on the amount secured by the prior mortgage. In another case, *Jandhu Mal v. Hinmat*, which is unreported but which is referred to and followed in *Baji Lal v. Gobardhan Singh*(1), the appellant sought to get rid of the liability imposed on him by the decree, i.e., to pay off the prior mortgagee as a condition precedent to bringing the mortgaged property to sale. Held, that the appellant must pay *ad valorem* Court-fee. Again, in a suit for pre-emption supposing a decree was passed against the vendee-defendants and they appealed on the ground that they were entitled to receive from the plaintiff a larger sum than that found by the Court to be the purchase price, what is the Court-fee payable? In *Hafiz Ahmad v. Sobha Ram*(2) it was held that the Court-fee should be calculated *ad valorem* on the difference between the sale-price alleged by both sides. . . . These cases show that the proper Court-fee is the *ad valorem* on the amount in dispute.

(1) (1909) I.L.R., 31 All., 266.

(2) (1884) I.L.R., 6 All., 493.

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The next contention, that though the condition bears on the face of it a fixed figure, yet it is impossible of being assessed at a money value is self-contradictory and cannot be taken as seriously advanced. . . . The valuation of the condition is clearly determined by the amount payable and no other valuation seems possible. . . .

Coming to the last contention, that the stamp fee cannot be more than the amount paid for the institution of the suit and the Appeal in the lower Court and that her position when she has partially succeeded cannot be worse than if she had completely failed, it must be stated that it is impossible to evolve such a rule out of the provisions of the Court Fees Act. Section 7 (v) (b) is not applicable to a case like the present for the subject matter of this Memorandum is not possession of the land but only the removal of the condition. It is the payment that is assailed and the *ad valorem* must be paid on the amount found.

The Government Pleader (C. Madhavan Nayar) for Taxing Officer.

K. S. Venkataramani Ayyar for respondent.

KUMARASWAMI SASTRI, J.—The first respondent as daughter and reversioner filed a suit for a declaration that the sale-deed executed by the widow of the last male holder alienating the lands specified in the plaint was not binding on her, for delivery of possession by the defendants who claim under the vendee, for mesne profits, and for costs. The plaint contained an alternative prayer that should the Court find any amount payable to the defendants then possession be decreed with mesne profits on payment of the sum so found due by the

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plaintiff to the defendants. Various pleas were raised by the defendants who contended that the alienation by the widow was binding on the plaintiff. The District Munsif dismissed the plaintiff's suit as he was of opinion that the sale was binding on her. On Appeal the Subordinate Judge held that there was necessity only for a sum of Rs. 3,881-4-0 out of the consideration of Rs. 8,000 set out in the sale-deed, and decreed possession on payment of the sum of Rs. 3,881-4-0. Against this decree the defendants filed a Second Appeal and the plaintiff filed a Memorandum of Objections objecting to the decree of the Subordinate Judge so far as it directs her to pay Rs. 3,881-4-0 as a condition precedent to the recovery of possession. A stamp duty of Rs. 10 was paid on the Memorandum of Objections and the Registrar claims an *ad valorem* duty on the sum of Rs. 3,881-4-0 the liability to pay which is questioned in the Memorandum of Objections.

The suit as filed being one for possession and mesne profits fell within clause (v) of section 7 of the Court Fees Act, which relates to suits for possession of immoveable property and clause (1) which relates to suits for money, and the plaintiff paid a stamp duty of five times the kist payable on the lands and also on the amount claimed for mesne profits. The suit was valued at Rs. 2,300 and the Second Appeal is also valued at that figure.

There is no express provision in the Court Fees Act which covers a case like the present. The contentions of the respondent are (1) that the decree of the lower Appellate Court merely declares plaintiff's liability to pay a certain sum of money as a condition precedent to recovery of possession and that such decree is not executable by the defendants for whose benefit the payment is to be made ; (2) that the suit being one for

possession of immoveable property and mesne profits its nature is not changed into one for redemption merely by the fact that an unsustainable condition as to payment has been imposed by the Court ; (3) that the alternative prayer in the plaint as to payment of such sums as the Court may find to be due is not estimatable in money and falls under article 17, clause (vi) of schedule II ; (4) that in any event the stamp duty payable on the Memorandum of Objections cannot be more than the duty payable on the plaint, as it would be an anomaly if the party who fails entirely should have to pay less than a party who succeeds in part. The contention of the Registrar is that the stamp duty payable, in cases where a person is asked to pay a certain sum as a condition precedent to getting possession and disputes his liability, is on the amount which he disputes.

I do not think that the direction as to payment of a sum of money as a condition precedent to the recovery of possession makes the decree a declaratory decree simply because the defendant cannot execute the decree. The test is whether the plaintiff cannot execute it. As regards the contention that the alternative prayer is not estimatable in money, all that can be said is that the plaintiff reversioner cannot say when he filed the plaint what the defendants can prove to be binding on the plaintiff. Where the Court finds the amount that has to be paid by the plaintiff the amount is ascertained, and where the plaintiff wants to appeal against the decree the amount or value of the subject matter in dispute for the purposes of article 1 of schedule I is the amount which the plaintiff calls in question in the Memorandum of Appeal or Objections. The case is analogous to one of a suit for an account.

The objection that the suit for possession which falls under clause (v) of section 7 cannot in Appeal change its

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nature because a condition is annexed for payment of a sum of money which is disputed by the plaintiff presents more difficulty especially as there is no provision in the Court Fees Act governing such cases and there is a conflict of authority.

In *Reference under Court Fees Act*, section 5, (1) the question was what was the duty payable in a suit for ejectment where a tenant claimed compensation for improvements which were disallowed and the tenant appealed against the decree. It was held that the tenant was bound to pay stamp duty only on the value of the lands and not on the value of the improvements claimed and disallowed. SUBRAHMANYA AYYAR and BODDAM, JJ., were of opinion that the claim for improvements to the land was not the subject matter of the suit but was merely incidental to the decree for possession. The learned Judges also refer to the difficulty and inconvenience of ascertaining the fee payable in each case if a different view were adopted. With respect, it seems to me that in cases where the law annexes the liability to pay for improvements as a condition precedent to ejectment, the claim for improvements allowed by the lower Court and disputed in Appeal falls under schedule I, article 1. Whatever difficulties may exist in valuing it in the plaint there is no difficulty once the Court fixes the amount, and the party appeals against the liability to pay the amount and files a Memorandum of Objections. So far as appeals against decrees for compensation under the Malabar Tenancy Improvements Act are concerned, though the same considerations as urged in *Reference under Court Fees Act* (1870) (2) may be urged, stamp duty is paid on the amount

in dispute. This decision does not seem to have been followed. In *Sekharan v. Eacharan*(1), MUNRO and ABDUR RAHIM, JJ., were of opinion that though in a suit for redemption the stamp duty was by section 7, clause (ix) to be calculated according to the principal money expressed to be secured by the instrument of mortgage and the subject matter of the suit was the existence of the right to redeem, any question as to the amount payable as the condition of redemption being regarded merely as incidental to that right, yet where the right to redeem is not called in question in the Appeal and the only question is as to the amount payable the right to redeem cannot be said to be the subject matter in dispute in the Appeal memorandum but a definite amount payable, and that the case fell within article 1, schedule I, the court-fee being computed on the amount in dispute. In *References under Court Fees Act* (1870) (2), it was held, following *Nepal Rai v. Debi Prasad*(3), that section 7, clause (ix), of the Court Fees Act applied only to suits and not to Appeals and that in the case of Appeals, article 1 of schedule I applied, the Court-fee payable being on the value of the subject matter in dispute.

In *Hafiz Ahmed v. Sobha Ram*(4), it was held that in suits for pre-emption where the vendee-defendants appealed on the ground that they were entitled to receive a larger sum than that awarded by the Court and that plaintiffs had estopped themselves from asserting the right by refusing to purchase, Court-fee was payable under section 7, clause (vi) on the value of the property as computed in clause (v) but that when the question in Appeal relates solely to the amount to be paid by the pre-emptor, his right to pre-empt not being challenged, the proper

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(1) (1900) I.L.R., 23 Mad., 84.

(2) (1903) I.L.R., 29 Mad., 367.

(1) (1910) 20 M.L.J., 121.

(3) (1905) I.L.R., 27 All., 447.

(2) (1906) I.L.R., 29 Mad., 367.

(4) (1884) I.L.R., 6 All., 488.

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Court-fee was the amount calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and the other.

In *Nepal Rai v. Debi Prasad*(1), it was held that when an Appeal in a suit for redemption related solely to the amount payable the Court-fee payable on a Memorandum of Appeal was to be calculated according to the sum which the appellant claimed to have deducted from the decree, and not, as in the case of a suit for redemption according to the principal sum secured on the mortgage. STANLEY, C.J., after expressing his dissent from the view taken in *Pirbhu Narain Singh v. Sita Ram*(2) observed :

"It appears to me, upon a perusal of section 7 of the Court Fees Act and schedule I to that Act, that in a case such as the one before me the Court-fee is to be calculated on the value of the subject matter in dispute only. Section 7, sub-section (ix) provides that in suits against a mortgagee for the recovery of the mortgaged property the Court-fee is to be valued according to the principal money expressed to be secured by the instrument of mortgage. The section is confined to a suit apparently, and not to an Appeal. In schedule I to the Act we find that in the case of a plaint or Memorandum of Appeal not otherwise provided for in the Act except those mentioned in section 3 an *ad valorem* fee is payable at the rate mentioned in that schedule. In this schedule a Memorandum of Appeal is not mentioned. Therefore I take it, that if in the case of an Appeal, the value of the subject matter of the Appeal can be determined, as it has been in this case, the appellant is only bound to pay a Court-fee on the amount ascertained to be the value of the subject matter of the Appeal."

With these remarks I respectfully agree. This decision was followed in *Mahadeo Prasad v. Gorakh Prasad*(3) and *Baji Lal v. Gobardhan Singh*(4).

(1) (1905) I.L.R., 27 All., 447.
(3) (1908) I.L.R., 30 All., 547.

(2) (1891) I.L.R., 13 All., 94.
(4) (1909) I.L.R., 31 All., 265.

In *Basdeo v. Sri Kishu Gir*(1), it was held that when a plaintiff prayed for an unconditional decree for possession as against a defendant who set up a mortgage executed by plaintiff's predecessor and a decree was passed for possession on payment of a certain sum and the plaintiff appeals against that portion of the decree directing payment, he must pay *ad valorem* stamp duty on the amount in question. The learned Judges (CHAMIER, J.C., and EVANS, A.J.C.) dissented from *Jewahir Singh v. Rajendra Bahadur Singh*(2), and followed *Baji Lal v. Gobardhan Singh*(3). A similar view was taken in *Mata Badal Singh v. Jai Singh*(4). *Ragha Sah v. Wajid Ali*(5), no doubt supports the petitioner's contention but no reference is made to any authorities. The only reason given is that if that decree dismissed the plaintiff's suit for possession the fee payable would have been only five times the land revenue and that as it was more favourable it cannot be larger. The facts of the case are also peculiar. The plaintiff prayed for possession and the Court passed a decree for possession but allowed the defendant to redeem and the decree for possession was only if the defendants failed to redeem. *Rup Chand v. Patch Chand*(6), which was referred to, does not throw much light on the question. The plaintiff sued for possession as absolute owner and a decree was passed in his favour. On Appeal the Subordinate Judge gave a decree for possession but limited the duration to the lifetime of the plaintiff's vendor. Against this decree the plaintiff appealed. It was held that a stamp duty of Rs. 10 was sufficient. TUDBAL, J., observed

"As matters stand now plaintiff-appellant seems to me to be in the position of a person in possession of property who

(1) (1910) 5 I.C., 941.
(3) (1909) I.L.R., 31 All., 265.
(5) (1919) 50 I.C., 353.

(2) (1909) 2 I.C., 836.
(4) (1912) 15 I.C., 746.
(6) (1911) 8 A.L.J., 821.

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seeks to clear his title and to obtain a declaration that he has the full right of ownership to the property."

Treating the subject matter of the Appeal as one to get rid of the limitation imposed by the Subordinate Judge it is difficult to see how it can be valued.

In *Lukhun Chunder Ash v. Khoda Buksh Mondul*(1), where a decree was passed in favour of the plaintiff but the Court directed payment in three instalments and the plaintiff appealed against that portion of the decree, it was held that he was not bound to pay Court-fees on the sum decreed but on the difference between the amount claimed in the Court below and the sum of the present values of the three instalments payable on the dates mentioned in the decree. BANERJEE, J., observes:

"Now, having regard to the provisions of article 1, schedule I of the Court Fees Act, read with 16 of that Act, it is clear that an appellant is bound to pay a Court-fee on a Memorandum of Appeal from a decree which gives him only partial relief, upon the difference between the values of the reliefs he claims to be entitled to and that granted by the decree appealed against."

In *Kishan Dutt Misir v. Kasi Pandey*(2), it was held by COUTTS, J., following *Basdeo v. Sri Kishan Gir*(3), that when a decree awards possession on condition of the plaintiff paying the encumbrances on the property and the plaintiff appeals against that part of the decree, the Court-fee payable on the Memorandum of Appeal must be *ad valorem* on the value of the encumbrances.

The current of authority is clearly in favour of the view that the value of an Appeal is not in all cases the value of the suit as originally filed but the value of the relief granted by the decree which a party wishes to get rid of. In some cases the stamp duty may be more than

(1) (1892) I.L.R., 19 Calc., 272.

(2) (1920) 57 I.C., 481.

(3) (1910) 5 I.C., 941.

that paid on the plaint and in some cases it may be less, and in considering the effect of the provisions of section 7 of the Court Fees Act and of schedule I, I do not think that this is a consideration which is of much weight.

I am of opinion that the Memorandum of Objections should be stamped on the amount which the respondent was directed to pay and which she seeks to escape liability from. She will have three weeks from this date to pay the deficient stamp duty.

M.H.H.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

C. SAMINATHA CHETTY AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

ANGAMMAL AND THREE OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Inheritance—Mitakshara—Step-son of step-sister of the last male owner, whether an heir of the latter.

Under the Mitakshara Law, the step-son of the step-sister of a deceased male is not an heir of the latter.

APPEAL against the judgment and decree of KUMARASWAMI SASTRI, J., passed in the exercise of the Ordinary Original Jurisdiction of the High Court in Civil Suit No. 360 of 1919.

The material facts appear from the judgment of RAMESAM, J.

A. Krishnaswami Ayyar with V. C. Sesha Achariyar and N. K. Mohanarangam Pillai for appellant.—The

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plaintiffs are the step-sons of the step-sister of the last male owner of the suit properties. A step-sister is a sapinda of the deceased. The plaintiffs who are the step-sons of the step-sister are sapindas of the step-sister. Though the plaintiffs are not sapindas of the deceased, they are relatives of the deceased. They may or may not be bandhus of the deceased. They are relatives of the deceased as they are sapindas of the step-sister who is a sapinda of the deceased. The Madras High Court has recognized a class of relatives who are neither sagotra sapindas nor bandhus who are bhinnagotra sapindas. Sister is an heir under the Hindu Law administered in the Madras Presidency. She takes after male bandhus: see *Kutti Ammal v. Radakristna Aiyar*(1). There are classes of heirs other than sagotra sapindas or bandhus who are recognized as having rights of inheritance: see *Collector of Madura v. Moottoo Ramalinga Sathupathy*(2), *Kutti Ammal v. Radakristna Aiyar*(1), *Nallanna v. Ponnal*(3), *Chinnammal v. Venkatachala*(4), *Balamma v. Pullayya*(5), *Manu*, Chap. IX, pl. 193; *Setlur's Veeramitrodaya*, page 361; *Smriti Chandrika*, v. 2, 3, 4. *Step-mother* is treated as a mother for several purposes: *Damodardas Maniklal v. Uttam Ram Maniklal*(6), *Har Narain v. Bishambhar Nath*(7). *Step-sister's son* is an heir: *Subbaraya v. Kylasa*(8), *Rajah Venkata Narasimha Appa Rao Bahadur v. Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur*(9), *Venkatasubramanian Chetti v. Thayarammah*(10), *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(11). A new category of heirs has

(1) (1875) 8 M.H.C.R., 88.

(3) (1891) I.L.R., 14 Mad., 149.

(5) (1895) I.L.R., 18 Mad., 168.

(7) (1916) I.L.R., 38 All., 88.

(9) (1908) I.L.R., 31 Mad., 321.

(11) (1915) I.L.R., 42 Calc., 384 (P.C.), 418.

(2) (1868) 12 M.I.A., 397.

(4) (1892) I.L.R., 15 Mad., 421.

(6) (1893) I.L.R., 17 Bom., 271.

(8) (1892) I.L.R., 15 Mad., 300.

(10) (1892) I.L.R., 21 Mad., 363.

been recognized by several decisions. The plaintiffs are relatives of the deceased, though they are not sagotras or bandhus.

T. R. Venkatarama Sastri with *T. Ethiraj Mudaliyar*, *V. V. Srinivasa Ayyangar*, *A. Narasimha Acharya*, *S. Balasingam Satya Nadar* and *M. Sundara Ayyar* for respondents.—The plaintiffs are not heirs under the Hindu Law, because they are neither sagotra sapindas nor bandhus of the deceased. No new class of heirs has been recognized in the decided cases. The sister and other females have been let in as female bandhus only, not as a new class of heirs. They are let in as female bandhus who take after male bandhus. They are still consanguineous bandhus and are not a new class of relatives apart from sapindas or bandhus. Step-mother is a sapinda but not an heir. Brother's widow is not an heir: see *Seethai v. Nachiar*(1), *Balamma v. Pullayya*(2). Relations in a loose sense are not necessarily legal heirs.

RAMESAM, J.—The plaintiffs are the step-sons of the step-sister of the deceased and claim to succeed to his estate. Our learned brother *KUMARASWAMI SASTRI, J.* dismissed the suit, holding that plaintiffs are not heirs. The plaintiffs appeal. The only point for decision in Appeal is whether the step-son of a step-sister is an heir under the Hindu Law (according to Mitakshara) as administered in the Madras Presidency.

Mr. A. Krishnaswami Ayyar who appeared for the appellant started his case by saying (1) that the step-sister is a sapinda of the propositus and (2) that the plaintiffs are her sapindas. But he did not, and rightly,

(1) (1914) I.L.R., 37 Mad., 286.

(2) (1895) I.L.R., 18 Mad., 168.

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follow up these propositions by arguing that the plaintiffs are therefore sapindas of the propositus. Later on, he expressly disclaimed any intention to argue that the plaintiffs are bandhus (or bhinnagotra sapindas) of the deceased. On this portion of the case, it is sufficient to observe, that, in general, sapindaship involves descent from a common ancestor, the only exception to this principle being in the case of wives of male sapindas. If A and B (males) are sapindas of each other, the wives of A and B are sapindas. This follows from the definition of "sapinda" in the Achara Adhyaya of the Mitakshara (quoted in *Umaid Bahadur v. Udoi Chand*(1), *Babu Lal v. Nanku Ram*(2), *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(3), *Rajkumar Sarvadhikari* on Inheritance, pages 601-605; and West and Buhler, 4th Edition, page 114) but the sapinda relationship of such females except in the case of ancestors, such as mother, grandmother, etc., who came in among sagotra heirs has not served to bring them into the line of heirs; so that a step-mother: [*Mari v. Chinnammal*(4), *Seethai v. Nachiar*(5)], or a great-grandfather's great-grandson's widow [*Balamma v. Pullayya*(6)], is not an heir under the Mitakshara Law, except in Bombay: *Lullubhai Bupubhai v. Mankuvarbai*(7), *Rachava v. Kalingappa*(8), *Kashibai v. Moreshwar Raghunath*(9). Generally, there is no such principle of law as that if A and B, not descended from a common ancestor, are each a sapinda of C, A and B are sapindas of each other.

(1) (1881) I.L.R., 6 Cal., 119 (F.B.), 124, 125.
(2) (1895) I.L.R., 22 Cal., 339, 344.
(3) (1915) I.L.R., 42 Cal., 884 (P.C.), 407-410.
(4) (1885) I.L.R., 8 Mad., 107.
(5) (1914) I.L.R., 37 Mad., 286.
(6) (1895) I.L.R., 18 Mad., 168.
(7) (1878) I.L.R., 2 Bom., 388.
(8) (1892) I.L.R., 16 Bom., 716.
(9) (1911) I.L.R., 35 Bom., 389.

The arguments of the appellants are twofold. (1) A step-mother is regarded as the equivalent of a mother (Manu, IX, 183, see also Vishnu, XV, 41, and Vasishtha XVII, 11) for various purposes, (a) adoption, (b) sharing with sons in a partition, (c) inheritance to a woman's stridhan. In the first case, the principle is that adoption is to a father primarily and only in a secondary sense to his wife, so much so, that, except in the case of Prati-grihita mata or the wife who is actually associated with the husband in the ceremony of adoption [*Annapurni Nachiar v. Forbes*(1)], all the wives of an adopter are regarded as adoptive mothers (see Mayne, section 167). In the second case, the plural is used in the texts "wives" in Mitakshara, Chap. 1, section 2, clause (9) and mothers (matarau) in Smriti Chandrika, Chap. IV, section 14, citing Vishnu and inferring that "mother" includes "step-mother." In the third case, the right to succession to a woman's stridhanam of her step-son is based on special texts (e.g., Viramitrodaya, Chap. V, part 11, section 5). Anyhow it is clear that the argument may be carried too far. In the text of Brihaspati (quoted in Smriti Chandrika, Chapter IX, section 111, s. 36, Vyavahara Mayukha, Chapter IV, s. X, in Mandilik, page 98 and Viramitrodaya, Chapter V, part II, s. 14) certain other female relatives besides the step-mother are regarded as mothers. It is clear that the general principle stated in Manu, IX, 183, did not avail the step-mother to become an heir [*Mari v. Chinnammal*(2), *Seethai v. Nachiar*(3)] and cannot in general be relied on in questions of succession: *Annapurni Nachiar v. Forbes*(4), *Gangadhar Bogla v. Hira Lal Bogla*(5).

(1) (1900) I.L.R., 23 Mad., 1 (P.C.).
(2) (1885) I.L.R., 8 Mad., 107. (3) (1914) I.L.R., 37 Mad., 286.
(4) (1900) I.L.R., 23 Mad., 1 (P.C.), 9.
(5) (1916) I.L.R., 43 Cal., 944, 964.

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The second line of argument adopted by the appellants may be stated as follows: A certain number of females denied to be heirs outside Madras except in Bombay (and not yet recognized by the Privy Council even in Madras) have been held to be heirs by the Madras High Court, viz., sister [*Kutti Ammal v. Radhakristna Aiyar*(1)], *Lakshmanammal v. Tiruvengada*(2)], father's sister [*Narasimma v. Mangammal*(3)], *Chinnammal v. Venkatachala*(4)], son's daughter [*Nallanna v. Ponnal*(5)], daughter's daughter [*Ramappa Udayan v. Arumugath Udayan*(6)], *Rajah Venkata Narasimha Appa Rao Bahadur v. Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur*(7)], brother's daughter [*Venkatasubramanian Chetti v. Thayarammah*(8)], sister's daughter [*Sundarammal v. Rangasami Mudaliar*(9)] apparently with some hesitation (see page 198)]. These are not bandhus (I am here stating only the appellant's arguments). They cannot come in as "bandhus" for, if they do, as all bandhus are divided into atma bandhus, pitri bandhus and matri bandhus who take in the order of enumeration [see *Adit Narayan Singh v. Mahabir Prasad Tiwari*(10)], female atma bandhus should take precedence over male pitri and matri bandhus, and female pitri bandhus over male matri bandhus, whereas, according to the Madras High Court, these female heirs are postponed to all male bandhus. Therefore they come in as heirs only as relations after the bandhus. The plaintiffs are at least such relations. Reliance is placed on *Gridhari Lal Roy v. The Bengal Government*(11),

(1) (1875) 8 M.H.C.R., 88.

(3) (1890) I.L.R., 13 Mad., 10.

(5) (1891) I.L.R., 14 Mad., 149.

(7) (1905) I.L.R., 31 Mad., 321, 324.

(8) (1892) I.L.R., 15 Mad., 263.

(10) (1921) 40 M.L.J., 270 (P.C.); s.c. 48, I.A., 80.

(11) (1868) 12 M.I.A., 448, 467.

(2) (1882) I.L.R., 5 Mad., 241.

(4) (1892) I.L.R., 15 Mad., 421.

(6) (1894) I.L.R., 17 Mad., 182.

(9) (1895) I.L.R., 18 Mad., 198.

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where Sir JAMES COLVILLE, discussing the right of the maternal uncle and quoting a passage from Viramirodaya on the question, says, "if this be the correct reading, it would follow that even if the exclusion of maternal uncle and others not mentioned in the text relied upon by the respondent from the list of bandhus were established, they would still, as relations, be heirs" The next succeeding sentence of his Lordship repels the suggestion, if any, in the Viramirodaya that the maternal uncle is not a bandhu but a relation. The appellant's vakil also relies on *Sundarammal v. Rangasami Mudaliar*(1), where it is said that sister's daughters are not bandhus. In view of the other decisions above mentioned, in all of which such female heirs are regarded as bandhus, it must be admitted that the language of *Sundarammal v. Rangasami Mudaliar*(1) is not quite clear. All that was meant was they are not male bandhus. The case was so explained by SUBRAHMANYA AYYAR, J., in *Venkatasubramanian Chetti v. Thayarammah*(2). In *Lakshmanammal v. Tiruvengada*(3), even females who would be sagotra sapindas by birth, such as sister and son's daughter, are said to be only bandhus; for either they pass away into another gotra by marriage or are capable of so passing away: *Lakshmanammal v. Tiruvengada*(3). Incidentally it may be observed that the words "relations" "kinsmen," occurring in several of the English translations of the Sanskrit texts, correspond to "Bandhu" or "Sapinda" in the original, e.g., Mitakshara, Chap. 11, section VII (1) and the text of Apastamba, ii, 6, 14, 2 and 3 quoted in *Lakshmanammal v. Tiruvengada*(3), Manu, IX, 187 [BANERJEE, J.'s translation in *Babu*

(1) (1895) I.L.R., 18 Mad., 193, 198.

(2) (1892) I.L.R., 21 Mad., 263, 267.

(3) (1882) I.L.R., 5 Mad., 241.

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Lal v. Nanku Ram(1)]. As to the supposed difficulty in arranging the order of female and male bandhus, for which reliance is placed on *Adit Narayan Singh v. Mahabir Prasad Tiwari*(2), it is only sufficient to say that no case of female bandhus has yet come up before the Privy Council; their Lordships' observations in *Adit Narayan Singh v. Mahabir Prasad Tiwari*(2) were made with reference to male bandhus only and it is unnecessary now to speculate as to whether the Privy Council will recognize female bandhus and if they do, whether they will postpone them to all male bandhus or place the atma bandhus (male and female) before the pitri bandhus and similarly for pitri and matri bandhus. In this connexion, it must be remembered that Yagnavalkya's text, Chap. II, stanzas 135-136 (Mandlik, p. 220) mentions only bandhus between "gotrajas" and "pupil." The Mitakshara in commenting on this, does not purport to add any new class (Chap. II, sections VI and VII). When Mr. Mayne questioned the correctness of the Madras High Court's decision in *Kutti Ammal v. Radhakristna Aiyar*(3) on the ground that the High Court by that decision added a new class of heirs the High Court's reply in *Lakshmanammal v. Tiruvengada*(4) was that they did not but that they were construing the word "bandhu" in the Mitakshara (section VI) as not confined to males. All the decisions (above enumerated) proceed on this ground. The learned vakil for the appellants admitted before us that there is no case of a person who is not a sapinda (apart from pupil and teacher) being allowed to succeed as an heir. The Mitakshara, Chap. II, sections 3, 4 and *Lakshmanammal v. Tiruvengada*(4) show that propinquity of blood is still all important. I have therefore no hesitation in holding that the appellant is not an heir. The Appeal

(1) (1895) I.L.R., 22 Calo., 339. (2) (1921) 40 M.L.J., 270 (P.O.); 48 I.A., 86.
(3) (1875) 8 M.H.C.R., 88. (4) (1892) I.L.R., 5 Mad., 241.

fails and is dismissed with costs (proportionate to the respective interests of the respondents).

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SPENCER, J.—I am completely in accord with what my learned brother has said. There is manifestly no consanguinity between a man and his step-sister's stepson and there is no authority for holding that the latter is a bandhu. There is no class of relations coming in after the lines of gotraja sapindas and bandhus are exhausted. Colebrooke's translation of the Sanskrit word "adi" occurring in the Mitakshara as "as well as other relations" is a loose translation. It may be more correctly rendered as "the like" or "etc."

In *Lakshmanammal v. Tiruvengada* (1), the suggestion that *Kutti Ammal v. Radhakristna Aiyar*(2) was an authority for the existence of a class of heirs who, being relations are neither gotrajas nor bandhus was negatived by Sir CHARLES TURNER, C.J., and KINDERSLEY, J.

The Appeal is dismissed with costs proportionate to respondents' respective interests.

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(1) (1882) I.L.R., 5 Mad., 241.

(2) (1875) 8 M.H.C.R., 88.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

MUTHUSAMI NAICKEN (PLAINTIFF),

APPELLANT,

v.

PULAVARATAL AND THREE OTHERS (DEFENDANTS),

RESPONDENTS.*

Hindu Law—Adoption—Senior widow—Preferential right—Junior widow—Adoption by latter without asking senior widow to exercise her right of adoption—Relinquishment or waiver by senior widow, necessity for—Senior widow living apart from her husband for twenty-five years, whether disqualified to adopt—Prohibition by husband—Express or implied—Implied prohibition when made out.

Under the Mitakshara law, the senior widow has a preferential right to adopt a son to her husband with the consent of his sapindas, and this rule applies to Sudras as well as to other classes.

Rajah Venkatappa Nayanam Bahadur v. Renga Rao (1916) I.L.R., 39 Mad., 772, followed.

Unless the senior widow waives or relinquishes her preferential right and authorizes the junior widow to adopt, an adoption made by the latter with the consent of the husband's sapindas but without asking the senior widow to exercise her right of adoption, is invalid.

From the mere fact that the senior widow was living apart from her husband for twenty-five years, she cannot be deemed to be a "*dushta* or *nishidda*," and so disqualified to exercise her preferential right to adopt.

Though a prohibition by the husband against the senior widow's adoption may be implied and need not always be express, the implication must be clear and necessary, and it is not for the Court to embark on a speculation as to what the husband might have done during his lifetime or might have wished if the point was expressly mentioned to him before his death.

Lakshmibai v. Sarasvatibai (1899) I.L.R., 23 Bom., 789, followed; *Dnyanoba v. Radhabai* (1894) 8 Bom. Printed Judgments, 9, distinguished.

* Appeal Suit No. 149 of 1920.

APPEAL against the decree of K. S. LAKSHMINABASA AYYAR, the Subordinate Judge of Salem, in Original Suit No. 41 of 1919.

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The material facts appear from the judgment of SPENOER, J. The terms of the notice (Exhibit IV) referred to in the judgment were as follows:

"Letter written to Polavarathal, residing in Mattu street, Athoor, by Poorayi, wife of Ammasi Naikan, residing at Thedavoor.

As some people deny and object to the adoption made by the deceased Ammasi Naikan while he was alive, this letter is written to you to ascertain your views in respect of the permission given to me (to adopt Muthusami himself, son of Naga Naikan) by Karuppa Naikar who is the next reversioner to myself and to him (my husband), in order to confirm the adoption made by him (my husband) and for the salvation of his soul."

Mark of Poorayi Ammal, 23-11-17.

T. Ranga Achariyar for appellant.—The adoption of the plaintiff is true and valid. The adoption was made by the last male owner himself. Even if that adoption is not made out, the junior widow (third defendant) made the adoption with the consent of the nearest sapinda of her husband. The senior widow has no preferential right to adopt. The last male owner can adopt without associating any of his wives or with any of his wives as he may choose. The sapinda's consent supplies the want of the husband's authority. Just as the husband can choose any of his wives, the sapinda who gives his consent, can give his consent to any of the widows he likes. The senior widow has no absolute preferential right. It is subject to the discretion of the sapinda. Suppose the elder widow is unchaste, and the junior widow is chaste and applies to him for consent, is the reversioner bound to withhold his consent? The rule does not apply to Sudras, even if it is applicable to other castes.

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The senior widow (first defendant) was a discarded wife; she lived separately from her husband for more than twenty-five years during his life-time and did not perform his funeral or other ceremonies. Further, she was not present and in attendance on the husband and was not an "adushta" within the terms of Katyayana's text. In *Rajah Venkatappa Nayanim Bahadur v. Renga Rao*(1), the parties were not Sudras. A discarded wife has no preferential right of adoption. The injunction of the Smritis and other texts to associate the senior wife in religious ceremonies is only a moral injunction to the husband, and the latter may or may not follow them. These texts do not apply after his lifetime. Among Sudras, the rules do not apply, as adoption with Sudras is not a religious but a civil act: datta homum is not prescribed for adoption among Sudras: there is no religious ceremony for adoption among Sudras. Application by a widow and bona fide consent by the reversioner are all that is necessary among Sudras.

Prohibition by the husband of an adoption by the first defendant should be implied under the circumstances of this case. *The Ramnad case*(2) shows that there can be an implied prohibition.

Mitakshara, Chapter III, Slokas refers to association of the first wife in religious works: Katyayana says on this—"wife near or in attendance on him, and adushta (blameless)." The first defendant does not satisfy these conditions to claim a preferential right over the junior widow, who lived with the husband till he died and bore him children. Manu also says, regarding the duties of a wife that she must do sareerasirusha or personal attendance on the husband. The first defendant failed in this duty.

(1) (1916) I.L.R., 39 Mad., 772.

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

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The notice (Exhibit IV) given by the third defendant to the first defendant is sufficient. No answer was given to this notice by the latter. She must be deemed to have relinquished and waived her preferential right in favour of the third defendant. The sapinda's consent is a valid and bona fide consent.

* *S. Panchapagesa Sastri*, for third and fourth defendants, supported the adoption.

A. Krishnaswami Ayyar, for first and second respondents.—The preferential right of the senior widow to adopt is established by *Rajah Venkatappa Nayanim Bahadur v. Renga Rao*(1) and *Kakerla Chukkamma v. Kakerla Punnamma*(2). The law gives certain rights and privileges to the senior wife or widow which are recognized by decided cases, and they cannot be affected by the want of affection and misunderstanding between her and her husband: she is a preferential heir among her co-widows to succeed to the zamindari or to be the manager in a partible zamindari or other estate of her husband. She does not lose her status as first wife by living apart from her husband. "Satya" in the text of Katyayana means "in existence" and not "present near him."

There are no grounds for an implied prohibition against adoption by the first defendant. The husband cannot prohibit only one of his wives, he must either prohibit all or none at all. See as to limitations of doctrine of prohibition, *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*(3). In *The Ramnad case*(4) there was a disposition of all his property otherwise. Mere separate living is not sufficient evidence of

(1) (1916) I.L.R., 39 Mad., 772.

(2) (1915) 28 M.I.J., 72.

(3) (1899) I.L.R., 22 Mad., 398 (P.C.) at 408.

(4) (1868) 12 M.I.A., 397, 443.

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prohibition: see *Lakshmi Bai v. Sarasvatibai*(1). The notice (Exhibit IV) is bad in law and insufficient, because the junior widow got the consent of the reversioner to adopt and did not give an opportunity to the senior widow to get it.

Again, the consent of the second defendant, who is also a sapinda was not obtained and hence the adoption is not valid. Every near sapinda should have been consulted. The *Urlam case*(2) shows widows are sapindas; see also *Ramnada case*(3) and *Rajah Venkatappa Nayanim Bahadur v. Renga Rao*(4).

S. Panchapagesa Sastri, in reply.—The first defendant (senior widow) has not an absolute right to veto or make the adoption. The omission to reply to the notice (Exhibit IV) is tantamount to surrender of her preferential right. The consent of all sapindas is not required under the law: the consent of male sapindas (gnatis) and not of female sapindas is required: see *Viswasundara Row v. Somasundara Rao*(5), *Ganga Sahai v. Kesri* (6).

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SPENCER, J.—The plaintiff in this suit seeks for a declaration that he is the adopted son of the deceased Ammasi Naicken and is entitled to the properties mentioned in the schedule which belonged to Ammasi Naicken in his lifetime.

Ammasi Naicken died on the 13th of November 1915 of a carbuncle. It is alleged that, on the morning of the day when he died, he adopted the minor plaintiff, who is the son of the deceased's second wife's brother, and that he associated the second wife, who is third defendant, with him in the act of adoption. It may here

(1) (1899) I.L.R., 23 Bom., 789, 795. (2) (1918) I.L.R., 41 Mad., 898 (P.O.).
(3) (1868) 12 M.I.A., 397, 443. (4) (1916) I.L.R., 39 Mad., 772, 778.
(5) (1920) I.L.R., 43 Mad., 876. (6) (1915) I.L.R., 37 All., 545 (P.O.), 551.

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be stated that Ammasi Naicken left three wives, Pulavarthal, Sellayi and Poovayammal, and that the first wife has been living apart from him for about 25 years. As doubts were thrown upon the said adoption, it is alleged that the third defendant went through the ceremony of adopting the plaintiff a second time on the 3rd of December 1917. The Subordinate Judge found that the adoption alleged to have been made by Ammasi Naicken was not true and that the adoption made by the third defendant was true but not valid.

Two questions arise for decision, first, whether the first adoption was true in fact, and secondly, whether the second adoption was a valid adoption. On the first point I am of opinion that sufficient reason has not been shown for disturbing the finding of the Lower Court. The Subordinate Judge heard the witnesses deposing, and he has given good reasons for thinking that the deceased Ammasi Naicken did not adopt the plaintiff and that the evidence in favour of the adoption was unsatisfactory. There are several circumstances which throw suspicion upon the truth of the alleged adoption. One is that the deceased was very ill on the morning of the 13th of November and he died at 5 p.m. His third wife, the second defendant, says that he lost consciousness on Saturday morning and that he had no control over his tongue. The act of adoption is alleged to have been made at or about the time when the prayaschittam ceremony was performed and at that time it is apparent that he was in extremis. The statement of the second witness for the plaintiff that the deceased was sitting up leaning against the wall and that he embraced the plaintiff and delivered him into his wife's hands is very improbable. Then, although the adoption is alleged to have been made on the 13th of November 1915, the pouthivaras statement was sent in on the 1st of February 1916. This is signed

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by the karnam who was not present at the alleged adoption and not by the village munsif who says he was present. It contains a statement that the obsequies of the deceased were performed by Chenga Naicken, the deceased's elder brother's son, as the agent of the adopted son. This Chenga Naicken has not been examined as a witness to prove that he acted as an agent for the minor; nor has Karuppa Naicken who, according to P.W. 2, had come for the adoption and is the eldest surviving sapinda of Ammasi Naicken been examined as a witness. Then the effect of the adoption was to disinherit all the three widows and a daughter and to make a relation of his second wife succeed to the whole of the deceased's property. When we find the second wife, third defendant, propounding this adoption, it suggests that she does so because she is interested in getting the property for her family.

On the second point which is a question of law, the adoption on the 3rd of December 1917 is attacked on the ground that there was no authority received by the second wife, either in writing or orally, from her husband to perform this adoption and that during the lifetime of the senior wife, the senior wife has a preferential right to make adoptions. This has been established by *Rajah Venkatappa Nayanam Bahadur v. Renga Rao*(1), which followed a decision of SANKARAN NAYAR, J., and myself in *Kakerla Chukkamma v. Kakerla Punnamma*(2), and the Bombay and Calcutta High Courts have also held that the senior widow has a preferential right of adoption: see *Rakhmabai v. Radhabai*(3), *Dnyanu v. Tanu*(4) and *Ranjit Lal Karmakar v. Bijoy Krishna Karmakar*(5). The passage in the

(1) (1916) I.L.R., 39 Mad., 772.

(3) (1868) 5 Bom. H.C.R., 181, 192.

(2) (1915) 28 M.L.J., 72.

(4) (1920) I.L.R., 44 Bom., 508.

(5) (1912) I.L.R., 39 Cal., 582.

Mitakshara that treats of this topic has been translated in Major Basu's Yagnavalkya Smriti as follows:

"When a wife of the same class (as that of the husband) exists, then religious works are not to be performed by a wife who is not of the same class"

Upon this Katyayana comments:

• "Let him who has many wives employ one of equal class in the case of the sacrificial fire, and in attendance on himself; but if there be many such let him employ the eldest in those duties, provided she be blameless."

Now it is argued that the eldest wife, Pulavarthal, had been discarded by Ammasi Naicken and, therefore, she was not in attendance on her husband and not blameless. An attempt to prove that she was an adulterous wife entirely failed. We only know that she was living apart from her husband for about 25 years before his death. The question is whether such separation makes her incompetent to perform the act of adoption, and thus causes the capacity to make an adoption to devolve upon the second wife. The text of Katyayana seems to me to apply to a case of adoption performed during the lifetime of the adoptive father, when he speaks of a wife being in attendance on himself. It is doubtful whether the word "adushta" or blameless should be interpreted so as to exclude a woman who voluntarily lives separate from her husband without having been guilty of unchastity or misconduct. So far as the facts of the separation in this case are known, there is nothing to attribute blameworthiness to the elder wife. An adoption made by a widow without consulting the sapindas would be invalid for want of authorization from them, as it has been held that the consent of the sapindas supplies the want of the husband's authority. The other wives are sapindas, and it was necessary for third defendant to obtain their consent before any adoption could be made. In this case the

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third defendant sent a notice, Exhibit IV, to the senior wife in which she expressed her intention of confirming the adoption made by her husband and asked for an expression of her views in respect of the permission given by the next reversioner to her to adopt the plaintiff. When the senior wife has a preferential right of adoption, the proper course for a junior wife who wishes adoption to be made, would be to ask the senior wife to get the consent of the male sapindas to perform the adoption and to perform it herself. If she was unwilling to perform it herself it would then be soon enough to ask her to agree to the adoption ceremony being performed by the junior wife. Exhibit IV is not couched in such terms. It implies that Poovayammal was determined to carry out the ceremony of adoption without giving a chance to the senior wife to adopt a son to their husband. Under the circumstances of the present case, the absence of any relinquishment by the senior wife of her prior right of adoption invalidates the act performed by the junior wife. For these reasons, the second adoption cannot be supported as valid.

The result is that the Appeal is dismissed with costs. The Memorandum of Objections is not pressed and is dismissed.

RAMESAM, J. RAMESAM, J.—I agree. But I wish to add a few words. The first occasion on which the adoption of the plaintiff by the deceased Ammasi Naicken was asserted was in Exhibit A, dated the 31st January 1916, a petition by the second wife, the third defendant. This petition was filed nearly two months after the third wife sent Exhibit V and 17 days after the senior wife sent Exhibit G and was practically in reply to them. It seems to me that the delay was really due to the fact that the present

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adoption was concocted, in reply to the claims made by the other two widows, with the help of the village munsif and the karnam and the other male relations of the third defendant. It must be remembered in this connexion that the third defendant is the sister's daughter or niece of the fourth defendant who gives the consent. It is also significant that Vaidyanatha Ayyar, the family purohit, who is said to have been present at the adoption, does not support the plaintiff's case. I need not repeat the other reasons given by my learned brother and the Subordinate Judge, with which I agree.

Coming to the question of law the appellant's vakil argues that *Rajah Venkatappa Nayanim Bahadur v. Renga Rao*(1) ought to be reconsidered. For the reasons given by my learned brother, and also for the reasons given by the learned Judges who decided *Dnyanu v. Tanu*(2), where their Lordships say that an adoption with the consent of the sapinda in Madras is not on the same footing as an adoption in an undivided family with the consent of the manager, I do not think it necessary to doubt the correctness of the former decisions of this Court.

Then it is said that, assuming that the senior widow has a preferential right to adopt, the principle does not apply to Sudras, because no religious ceremonies are essential for an adoption in the case of Sudras, and *Puddo Kumaree Debee v. Juggut Kishore Acharjee*(3) is relied on. In the first place it may be mentioned that *Rajah Venkatappa Nayanim Bahadur v. Renga Rao*(1) was a case of Sudras, but the point was not expressly argued. It may be that, for the validity of an adoption

- among Sudras, Dattahomam is not necessary but this does not mean that an adoption is not a religious act.

(1) (1916) I.L.R., 39 Mad., 772 (2) (1923) I.L.R., 41 Bom., 508.
(3) (1880) I.L.R., 5 Cal., 815.

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Apart from this, as was pointed out by my learned brother and SANKARAN NAYAR, J., in *Kakerla Chukkamma v. Kakerla Punnamma*(1), the senior wife is the wife whom acts of duty concern, that is, "who officiates in acts of religion and so forth" (Colebrooke's Digest of Hindu Law, Book IV, Chapter 1, s. 51). This shows that the acts of duty in which a senior wife has got a preferential right need not necessarily be all religious duties. I therefore think that the principle is equally applicable to Sudras as well as to the other classes.

The next ground on which it is said that *Rajah Venkatappa Nayanim Bahadur v. Renga Rao*(2) does not apply to the present case is that in this case the senior wife was discarded. Verse 88 of Achara Adhyaya of Yagnavalkya was relied on in *Rajah Venkatappa Nayanim Bahadur v. Renga Rao*(2) as one of the reasons on which the preferential right of the senior widow is based. The translation of that verse as given in *Rajah Venkatappa Nayanim Bahadur v. Renga Rao*(2) runs thus: "When there is a wife of an equal class present, etc.," Some stress is laid by Mr. Ranga Achariyar, the learned vakil for the appellant, on the word "present" in this translation. The original Sanskrit is "satyam"; the meaning of "satya" is "being in existence" as opposed to death. The translation of this verse in Mandlik's Hindu Law at page 173, in Major Basu's Edition of Mitakshara referred to by my learned brother and the translation of Sir P. S. Sivaswami Ayyar, in 1 Madras Law Journal 282, all show that what is meant by "satyam" is "existing" and not "being present near" (as opposed to being absent elsewhere). The fact, therefore, that the senior wife in this case had been living elsewhere does not make the text of Yagnavalkya inapplicable. Again

the text of Yagnavalkya, the commentary of the Mitakshara on it, the verse of Katyayana and the text of Vishnu cited by Balambhatta in the gloss on the Mitakshara and also in Colebrooke's Digest, Book IV (the two latter Smritis use the word "Adushta") all these are merely injunctions addressed to the husband as to what he should do during his lifetime. It may be that the husband is at liberty to disobey those injunctions: vide *Annapurni Nachiar v. Forbes*(1). But those injunctions do not touch the relative rights of the widows after the husband's death. These verses clearly prove the superior position of the senior widow. Once such superior position is established her preferential right to adopt after his death follows as an inference. In this particular case the evidence, which merely shows that the senior widow was living apart from the husband for the last 25 years apparently on account of the second marriage of her husband, does not justify us in calling her a "dushta" or "nishiddha." As my learned brother pointed out the case of unchastity attempted to be made against her has failed. I think no credence can be given to the evidence of the sixth and ninth witnesses for the plaintiff.

The last ground argued by the appellant on this portion of the case is that a prohibition against her adopting must be implied from the facts of the case. It does not appear from the Subordinate Judge's judgment that any such point was raised in the Court below, but it is now said that the point was argued. Though no doubt, a prohibition may be implied and need not always be express, such prohibition must be by a clear and necessary implication, and it is not for the Courts to embark on speculations as to what the husband might have done during his lifetime or might have wished, if

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(1) (1915) 28 M.L.J., 72, 74.

(2) (1916) I.L.R., 39 Mad., 772.

(1) (1900) I.L.R., 23 Mad., 1 (P.C.).

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the point was expressly mentioned to him before his death. One may well say that, on the facts of this case, the husband, if he ever contemplated adopting during his lifetime, would not have associated the senior wife with him in such an adoption. One may perhaps also say that, if he had left a will expressly authorizing an adoption he would probably have not authorized the senior wife to adopt. But on the other hand, one may also say, that he not having done either of these things, was well content to allow the law to take its course as to what should happen after his death, and that in the absence of any express prohibition against the senior widow, he left her to exercise the right which she has according to the sastras on account of her status as the senior widow. I do not think it is proper for Courts to speculate on probabilities of this kind for the purpose of inferring an implied prohibition. If the husband was, however, anxious that the senior widow should never adopt for him, he might have left a will in which he might have stated that the senior widow should not adopt for him, in case his widows should contemplate adoption for him. In the absence of such an express prohibition from him or some equally clear indication of his intention, an implied prohibition cannot be inferred in this case. It was held in *Lakshmibai v. Sarasvatibai*(1) that a prohibition ought not to be inferred from the mere fact that the husband and wife were living apart. In the case relied on by the learned vakil for the appellant, *Dnyoba v. Radhabai*(2), the facts were much stronger; the wife was actually living in adultery with another man.

Coming to the third point argued in the case, that Exhibit IV is enough to satisfy the requirements of law

in connexion with the senior widow, I agree with my learned brother in thinking that it does not. We are not here concerned with a question of obtaining her assent merely as that of a sapinda. On the other hand, until the senior widow clearly gives up her right to adopt, the junior widow has no such right. The letter in which she states that she had obtained the assent of the sapinda and was merely asking the senior widow's views, followed by the silence of the latter, cannot be construed to mean that the senior widow has waived her preferential right and authorized the junior widow to adopt. Not until she does any act amounting to this can the right to adopt devolve on the junior widow. The facts in this case fall short of this.

One or two points have also been argued before us, namely, that the consent of the sapinda in Exhibit C is not a valid consent. The Subordinate Judge has found it to be so. But we think it unnecessary to express an opinion on this question in view of our finding with reference to the right of the senior widow not being waived. If it were necessary, I would agree with the appellant's contention, that there was no misrepresentation made to the sapinda merely because the third defendant was asserting a prior adoption by her husband. But I would hold that Exhibit C is not a valid consent, because instead of giving the authority as one necessary and proper in the circumstances of the family, which is what a sapinda ought to address himself to, he gives it in order to give effect to the wishes of the husband, thus believing in the alleged prior adoption by the husband which we have already found to be not proved.

I agree that the Appeal should be dismissed with costs. The Memorandum of Objections is dismissed.

K.B.

(1) (1899) I.L.R., 23 Bom., 789, 795.
(2) (1894) 8 Bom. Printed Judgments, 9.

MUTHUSAMI
NAICKEN
v.
PULA-
VARATAL.
RAMESAM, J.

APPELLATE CIVIL.

Before Sir William Ayling, Officiating Chief Justice, and
Mr. Justice Odgers.

1921,
November
15.

BALARAMA NAIDU AND TWO OTHERS (PLAINTIFFS),
APPELLANTS,

v.

SANGAN NAIDU AND FOUR OTHERS (DEFENDANTS),
RESPONDENTS.*

Court Fees Act (VII of 1870), art. 1, Schedule I—Final decree determining mesne profits under Order XX, rule 12 (2), Civil Procedure Code—Appeal—Court-fee in.

An order determining the amount of mesne profits payable, subsequent to the filing of a suit is a final decree within Order XX, rule 12 (2), Civil Procedure Code; and *ad valorem* Court-fee is chargeable under article 1 of Schedule I of the Court Fees Act calculated on the amount of mesne profits in dispute in Appeal.

CASE stated under section 5 of the Court Fees Act by the District Judge of Vizagapatam in Appeal Suit Nos. 107 and 105 of 1919 on his file (Execution Application No. 450 of 1919) in Original Suit No. 743 of 1914, on the file of the Court of the District Munsif, Pārvatipuram.

The appellants filed a suit against the respondent for partition of joint family properties. A decree was passed determining the shares of both the parties. By a subsequent order the Court of First Instance (District Munsif) determined the amount of mesne profits subsequent to the suit at Rs. 500 as payable by the defendant to the plaintiff. Both parties appealed against this decision to the District Court and each paid only As. 8 as Court-fee for his Appeal. The District Judge being of opinion that the Appeal was from a final decree passed under Order

* Referred Case No. 7 of 1920.

XX, rule 12 (2), Civil Procedure Code, and that the Court-fee payable was *ad valorem* on the amount in dispute in each Appeal, according to article 1, Schedule I, Court Fees Act, referred the question of Court-fees for the opinion of the High Court.

O. Madhavan Nayar for Government.

The parties were not represented.

The Court delivered the following JUDGMENT :

These appeals must be treated as appeals against a final decree under Order XX, rule 12 (2), of the Code of Civil Procedure and an *ad valorem* Court-fee must be charged under article 1 of Schedule I of the Court Fees Act calculated on the amount of mesne profits in dispute.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Kumaraswami
Sastri.

TADIBULLI TAMMIREDDI AND ANOTHER (DEFENDANTS NOS.
1 AND 2), APPELLANTS,

v.

TADIBULLI GANGIREDDI (PLAINTIFF), RESPONDENT.*

Hindu Law—Partition—Manager—Liability to account—New trade or business—Power of manager to commence new trade—Adult coparcener—Duty of manager to consult adult coparcener—Speculative business—Illegal business, carried on by manager—Loss—Liability of other coparceners—Charity—Dedication of property—Document, whether necessary.

The manager of a joint Hindu family has no power to commence a new trade or business without the concurrence of the

BALARAMA
NAIDU
v.
SANGAN
NAIDU.

1921,
November
30.

* Appeal No. 254 of 1920.

TAMMIREDDI v. GANGIREDDI. adult coparceners living at the time; and such trade or business is not binding on them in the absence of evidence of their acquiescence. *Abdur Rahiman Kutti Haji v. Hussain Kunhi Haji*, (1919) 37 M.L.J., 316, followed.

It is not open to the managing coparcener to enter into illegal transactions and to saddle the other coparceners of the family with the loss arising therefrom, especially where it is not shown that the latter consented to it.

In the absence of fraud, misappropriation or gross reckless waste by the manager, a coparcener seeking partition is only entitled to an account of the assets of the family existing at the date of partition or at the date when, owing to a demand for partition, a severance of status has taken place; the manager must file an account of existing assets available for partition, but it is open to the other members to show that the expenditure which the manager says has been incurred has not in fact been incurred or not been incurred to the extent mentioned by him, or that more properties are available for partition than those disclosed by him.

No document is necessary for the dedication of property to a charity. *Ramalingam Chetti v. Sivachidambara Chetty*, (1919) I.L.R., 42 Mad., 449, referred to.

APPEAL against the decree of N. BALARAMADAS PANTULU, the Principal Subordinate Judge of Cocanada, in Original Suit No. 85 of 1918.

The material facts appear from the judgment.

T. Ranga Achariyar, P. Somasundaram and P. Satyanarayana for appellants.—The first defendant is not liable to render accounts. The father was in management till his death and he carried on the opium trade. There was no fraud or misappropriation. The first defendant bona fide thought that the trade in opium was a profitable transaction. The father had already carried on the same trade and the first defendant only continued it. There was no suppression of accounts. They had been taken to the Magisterial Court and entries were kept in rough accounts which have been produced in Court. There was a valid dedication of the income of the mitta to the charity by the father of the first

defendant, and the income was credited and debited in the accounts for charity in his lifetime. There is no law requiring dedication to be in writing. The opium business is not illegal; it is not in violation of the Opium Act, section 9. Merely being a partner in opium business is not selling opium: see *Natla Epiraju v. Puran Achutha Rajajer*(1). The defendant appoints an agent. It is not prohibited: see *Kristnayya v. Guruvayya*(2). It was commenced as a family business. The dedication is not by the "will" of the plaintiff's grandfather but it is only evidence of previous dedication.

S. Srinivasa Ayyangar, D. Appa Rao, A. Krishnaswami Ayyar and C. Rama Rao for respondent.—The first defendant must furnish accounts as to what was the actual income and what was actually spent: see *Kristnayya v. Guruvayya*(2). We question the factum of the expenditure and not the propriety of it. The opium trade is not an ancestral trade. It was an unlawful transaction and the adult coparcener (plaintiff) was not consulted about it. He was living with the first defendant when it was commenced. There is no evidence that he knew of the business being carried on or that he acquiesced in it. He is not liable for the loss incurred in the opium business, started by the first defendant without plaintiff's concurrence.

The Court delivered the following JUDGMENT:

This Appeal arises out of a suit for partition filed by the respondent against the appellants. One Gangi Reddi died in May 1917 leaving a widow Subbamma (the third defendant). He had two sons, Thammayya and Bulli Tammi Reddi, the first defendant. The plaintiff is the son of Thammayya and the second defendant is the son of

(1) (1910) M.W.N., 549.

(2) (1921) 41 M.L.J., 508.

TAMMIREDDI
v.
GANGIREDDI. the first defendant. Plaintiff's father died in 1902. The plaintiff who attained majority in 1916 lived with the first defendant till about July 1919. The Subordinate Judge passed a decree for partition directing the first defendant to account for his management of the family properties from six months prior to the death of Gangi Reddi, i.e., from October 1916. He held that the business in opium carried on by the first defendant was his exclusive business and not joint family business, and that the plaintiff was not bound to bear any part of the loss incurred in that business. As regards the choultry founded by Gangi Reddi he held that there was no endowment in respect of the usufructuary mortgage in favour of Gangi Reddi relating to Chengondapalli Estate. He held that the first defendant did not make out his case that the jewels in his possession were his wife's jewels. As regards the second defendant and his sister, he allowed a sum of Rs. 2,000 and Rs. 1,000 mentioned in the will for the purpose of making jewels on the occasion of their marriages but did not fix the amount to be spent for their marriages. The Appeal relates to the above points and it is contended for the appellants that the decision of the Subordinate Judge is incorrect. As regards the accountability of the first defendant, the Subordinate Judge bases his decision on the ground that the first defendant had not been maintaining proper accounts for sometime prior to Gangi Reddi's death and that the plaintiff is consequently entitled to claim an account from October 1916. The case for the plaintiff as laid in the plaint is that the first defendant with the object of defrauding the plaintiff "showed differences in the accounts, reduced considerable amounts, and in order to deprive the plaintiff of a share, he converted a considerable amount as jewels worn by women and showed under *stridhanam*, and even though profit was derived in some transactions, he concealed the

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v.
GANGIREDDI. same and showed heavy loss, concealed some account books and has been conducting himself in such a way as to cause loss to this plaintiff in all ways," that the first defendant misappropriated the properties and that he has a right to demand the first defendant to furnish an account from the year 1902 when his father died. The Subordinate Judge has found that the charge as regards the jewels has not been made out and that the first defendant was not guilty of secreting any accounts. He, however, is of opinion that proper accounts were not maintained. As regards the accounts, it is admitted that the first defendant filed a criminal complaint against one Subbarayudu on the 24th of April 1917 of misappropriation of a sum of about Rs. 6,000. Exhibit R is the judgment of the Magistrate in that case. In connexion with that complaint a warrant was issued by the Magistrate and the account books of the family were seized and taken to the Police Court. The books were not returned till about October 1918. The plaintiff filed his plaint in December 1918 and a commissioner was appointed who made an inventory of all the account books in the family. After the seizure of the account books by the Police, the first defendant did not open regular account books but, according to the evidence, he was making entries on loose sheets of paper which were subsequently entered in the account books, Exhibits III, IV and V, filed in the suit. Exhibit V is the rough day book, Exhibit III is the fair day book and Exhibit IV is the ledger. These account books were not kept in the regular course of business from day to day and so far as the proof of any of the entries in these books is concerned, it is clear that these account books cannot have the same effect as account books kept from day to day in the regular course of business. The question, however, is whether the first defendant's not keeping the books from day to day can be said

TAMMIREDDI to be such misconduct as would make him accountable
GANGIREDDI during the period that the accounts run. It is not shown that any of the entries in these account books are wrong or that there has been any suppression of entries. It is explained for the first appellant that he expected the books in the Magistrate's Court to be returned soon, that he therefore thought he could continue the accounts in those books when they were returned and that during the interval he did not open regular account books. We do not think the mere fact that regular books were not kept would, in the absence of any evidence to show that the accounts now produced are false in any particular, render the first defendant accountable especially as the most serious charges made in the plaint as regards the suppression of account books, making of false entries in the account books and misappropriation of jewels, have not been made out. It is now well settled that, when an account has to be taken with a view to make a partition of joint family properties, the account is merely an inquiry into the existing assets and that the head of the family cannot in general be called upon to defend the propriety of his past transactions of the family except in cases of fraud, misappropriation or gross reckless waste. We need only refer to *Balakrishna Iyer v. Muthusami Iyer*(1), *Narayan Bin Babaji v. Nathaji Durgaji*(2), *Parmeshwar Dube v. Gobind Dube*(3), *Bhowani Prasad Shaha v. Juggernath Shaha*(4), and *Kristnayya v. Gurunayya*(5). All that a coparcener seeking partition is entitled to is an account of the properties which exist at the date of partition or at the date when, owing to a demand for partition, there has been a severance of status and accounts will have to be taken in so far

(1) (1909) I.L.R., 32 Mad., 271.

(2) (1904) I.L.R., 28 Bom., 201.

(3) (1916) I.L.R., 43 Cal., 459.

(4) (1909) 9 C.L.J., 133.

(5) (1921) 41 M.L.J., 508.

as they relate to the ascertainment of what the pro-
 perties in existence are. The manager of a joint
 family being the accounting party has to file an account
 as to the properties available for partition but, as pointed
 out in *Parmeshwar Dube v. Govind Dube*(1) and *Krist-
 nayya v. Gurunayya*(2), the other members of the
 family are not bound to accept the statement of the
 manager as to what the properties consist of and the
 inquiry directed by the Court should be conducted in the
 manner usually adopted to discover what in fact the
 property consists of and not what the manager says it is.
 In such a case it is open to the members of the family to
 show that expenditure which the manager says has been
 incurred has not been incurred or that the savings out of
 joint family funds have not been entered in the accounts.
 We are therefore of opinion that the direction of the
 Subordinate Judge that the first defendant is to account
 for the management from October 1916 cannot be
 supported. The direction ought to be that the first
 defendant should file an account of the properties existing
 and available for partition at the date of the plaint, the
 plaintiff being entitled to surcharge the accounts and
 to show that items of expenditure said to have been
 incurred were not, as a matter of fact, incurred or were
 not incurred to the extent mentioned in the accounts
 filed by the first defendant, or that more properties are
 available for partition than those mentioned in first
 defendant's accounts.

As regards the opium business which the first defend-
 ant carried on, it appears from the evidence that he
 entered into partnerships with those who got licences
 from Government to vend opium and that large amounts
 were spent by him for financing the business. Gangi-

(1) (1916) I.L.R., 43 Cal., 459.

(2) (1921) 41 M.L.J., 503.

TAMMIREDDI reddy, the grandfather of the plaintiff, died in 1917 and **GANGIREDDI** the case for the defendant and the evidence adduced by him is to the effect that, though he was bed-ridden for about six months before his death, he was giving instructions for the management of the family affairs and that the first defendant was transacting business after informing Gangireddi and getting his directions. An attempt was made by the first defendant to show that this opium business which he carried on was carried on with the consent and under the directions of Gangireddi: but this evidence has been rightly discredited by the Subordinate Judge. The evidence is that in 1901 and 1902 Gangireddi did business in opium but that he stopped that business and that, although he subsequently carried on extensive business in other directions, he did not do any business in opium. It is suggested that it was because he thought it was morally wrong to do so, but the probabilities are that he stopped business because, as the plaintiff's vakil contends, the business ended in a loss.

It is argued by Mr. Ranga Acharya, for the appellants, that the business in opium was being carried on by the relations of the plaintiff and the first defendant, that the first defendant as managing member of the family after making inquiries was satisfied that it was a profitable business and that he did the opium business bona fide and for the benefit of the family. The contention for the plaintiff is that the managing member of a family while he is entitled to carry on an ancestral business has no right to embark on a new and speculative venture, that the business would not bind the other members of the family, that in the present case the business which the first defendant entered into was illegal as it contravened the provisions of the Opium Act, and that the managing member who enters into unlawful transactions has no

right to saddle the family with the losses incurred therein. The business was commenced by the first defendant on the 26th of March 1917 as evidenced by Exhibit A, the deed of partnership between the first defendant and others. Gangireddi died in May 1917. The plaintiff had at that time attained majority and it is not suggested that he was taking any part in the management of the family affairs. He was a student before and, although he was living with the first defendant and his grandfather, Gangireddi, it is not shown that he was aware of the business that was being carried on in opium. The first defendant in his evidence admits that he did not consult the plaintiff before he began the business. The finding of the Subordinate Judge is that the first defendant was managing the family affairs for at least six months prior to the death of Gangireddi though the case for the first defendant is that Gangireddi was himself managing the family affairs till the date of his death. Even assuming that the first defendant was managing the family affairs at the date when the opium business began, we do not think he had power to commence a new business without the concurrence of the plaintiff who was an adult member of the family and living with him at the time. As between the members of a joint family *inter se*, whatever may be the powers of the manager as regards the minor members of the family, there is no authority for holding that he can start a new venture without the concurrence of the adult coparceners. His position cannot be better than that of a partner and whatever may be the rights of third persons dealing with the family, as between the members of the family *inter se* a new trade or business commenced by one member, even though he is the managing member, without consulting the adult coparceners would not bind them in the absence of evidence

TAMMIREDDI v. GANGIREDDI. of acquiescence. It is argued by Mr. Ranga Acharya that no new business can be carried on by the managing member unless he was given a discretion in the matter : but it seems to us that the remedy is obvious. He should get the consent of the adult coparceners. In the case of minor members, the position of the kartha is that while he has power to carry on an ancestral trade that has devolved on the joint family he cannot bind the minors by embarking on new ventures. In *D. Mc. Laren Morrison v. S. Verschoyle*(1), it was held that the kartha of a joint family possessing an ancestral business has an implied power to pledge the credit and property of the family, but only for the ordinary business of the family, and that he cannot do so for the purpose of embarking on a business which is not the ancestral business. The power of the manager to bind the family by embarking on a new business was considered by ABDUR RAHIM and SPENCER, JJ., in *K. K. Abdur Rahman Kutti Haji v. Hussain Kunhi Haji*(2), and it was held that the junior members of a Malabar tarwad are not liable for the debts contracted by the karnavan in the course of a trade carried on by him, unless it is shown either that the trade was a family business or that it was carried on by the karnavan with the consent of the junior members. So far as trading families are concerned, there is not much difference between the position of a karnavan in his relations with the junior members and that of a manager of a joint family under Mitakshara with his coparceners. We do not think that in the present case the trade carried on in opium by the first defendant is binding on the plaintiff who was an adult member at the time when it was commenced and who admittedly was not consulted about it and who,

on the evidence, is not shown to have acquiesced in the business or to have known that it was being carried on. The business was of a highly speculative character, the first defendant financing the various renters of opium in consideration of a share of the profits. According to the ledger, Exhibit IV, between February and December 1917 over Rs. 55,442 were advanced out of the family funds in respect of the opium business of 1917-18.

Turning to the legality of the opium business carried on by the first defendant, we are of opinion that the partnership entered into by him for 1917-18, as evidenced by Exhibit A, is not legal. The effect of the transaction was that the first defendant entered into a partnership with a number of people some of whom had obtained licences to sell opium, he agreeing to finance the business and retaining the control of the whole business in his own hands. One of the terms in the licence, Exhibit B, which is typical of the other licences, runs as follows :

"You shall not sell, relinquish or sub-lease to others your right to supply or sell opium without obtaining the previous sanction of the District Collector in that respect. Even after obtaining orders of the District Collector in the said respect, no agent shall be appointed to exercise any such right without previously obtaining the approval of the District Collector in regard to such appointment."

Exhibit A, which is the deed of partnership between the first defendant and some others who had obtained licences to vend opium, begins by stating that for the benefit of the first defendant and twelve others mentioned therein, five of them bid at the auction for the sale of opium in the villages mentioned in the schedule annexed thereto from the 1st of April 1917 to the 31st of March 1918, that it was agreed that the capital required for the business should be advanced by the first defendant

(1) (1901) 6 C.W.N., 429.

(2) (1919) 37 M.L.J., 316.

TAMMIREDDI
v.
GANGIREDDI. who should get interest at Re. 1-0-6 per cent per mensem and that each of the other partners was to deposit with the first defendant Rs. 125 for each share they had in the business, they getting similar interest. Clause 3 runs as follows :

" It is settled that Tadi Bulli Tammireddi (first defendant), out of us, should be writing all proper and necessary accounts such as chittas, ledgers, etc., for this joint business and that Bulli Tammireddi should appoint, as he pleases, proper persons for selling opium in the villages specified in the schedule annexed hereto according to Government rules and get the work done by them and that a monthly report clearly showing purchase of opium, sadar, sale, etc., should be made to Bulli Tammireddi once in a month from all stations and that the amount also should be sent (to him) then and there."

It was arranged that the profits should be divided into 64 shares and that the first defendant should get 20 shares and the others the various shares mentioned in the document. The effect of the transaction is that whereas under the licences the only persons who can deal in opium are the licensees, a partnership is formed which gives to persons, who are not licensees, an interest in the business, the shares being determined by the terms of the agreement. It is also clear that, as regards the vending of opium, clause 3 makes the first defendant, who is not a licensee under any of the licences, the sole person entitled to the right to appoint agents for the sale of opium. We are of opinion that the present case falls within the principle of *Nalam Padmanabham v. Sait Badrinadh Sarda*(1), where two persons who were farmers of opium revenue under the Government entered into a partnership with a third person by which they admitted him as a partner in the opium business, and it was held that the partnership agreement was void and

the suit not maintainable, as the effect of the agreement was to enable a person, who was not entitled to sell opium, to sell it and as it also amounted to a transfer to the person, who was not a licensee, of an interest in the business which was in violation of the conditions subject to which the licence was granted. We are of opinion that clause 3 of the agreement set out above gives the first defendant, who is not a licensee, a right to sell opium through his agents, and prevents the licensees from having any voice in the matter of the appointment of agents to sell opium.

As regards the trade for 1918-19, it is clear from Exhibit VII and the evidence of the first defendant that it was wholly illegal. The first defendant states that the persons who bid at the auction sale for that year and who were, under the Act, licensees for the vending of opium were merely *benamidars* for the first defendant and that the business was solely for the benefit of the first defendant, there being no partners in the business. Exhibit VII states that the persons who bid for the right to sell opium in 38 villages were merely *benamidars* and bid for the first defendant. The agreement proceeds as follows :

" Therefore you may lease out the said shops as you please and vend the opium. Because of the said shops standing in our names we shall always be ready to sign any papers you might require to be signed by us in connexion therewith for any purpose at your request. We shall not claim any remission whatever from you for the same. Further you shall yourself recover the profit or loss accruing from the trade of the said 38 shops as you please and we shall have nothing to do therewith."

As the partnership for 1917-18 was illegal and as the *benami* purchase by the first defendant in 1918-19 was also illegal, it is clear that the first defendant cannot make the other coparceners liable. It is not open to one coparcener to enter into illegal transactions and to

TAMMIREDDI saddle the other coparceners with the loss arising from
GANGIREDDI. them, especially where it is not shown that the other
coparceners consented to it.

It is argued by Mr. Ranga Acharya that, whatever may be the rights of third persons, as between coparceners themselves the first defendant cannot be called to account for the monies he spent on this business, because it will really be calling him to account for his past transactions. No authority has been cited for the proposition that the immunity of a manager to account for his past transactions entitles him to enter into illegal transactions and use joint family properties for the purpose. We think it will be gross misconduct sufficient to entitle the coparceners to require the managing member to bear the loss incurred in such transactions and to put back in the family any money that he may have taken out of the family for such transactions. Both on the ground that the business was unauthorized and that it was also illegal, we are of opinion that the decision of the Subordinate Judge is right. In taking an account of the joint family properties, the first defendant will pay the plaintiff one-half of the monies of the joint family which he has used for the opium business. The opium business for 1917-18 and 1918-19 will be treated as the sole separate property of the first defendant, he being entitled to the profits, if any, and liable to bear the loss.

As regards the choultry started by Gangireddi, there is little doubt on the evidence that it was started by him with approval of his two sons. In his deposition given on the 16th October 1903, Gangireddi states :

"I endowed a choultry at Samarlakota for Rs. 10,000. I gave a leasehold right of the annual value of Rs. 1,200 for 25 years for a chatram in my village. My son asked me to endow the chatram for lame and blind people with the interest accruing on Rs. 10,000 funded capital. I am going to do so hereafter."

In his second will, Exhibit Ia, dated the 13th day of May 1906, he states :

"From after my death, interest accruing on a sum of Rs. 10,000 shall be paid once a year for the *Dharma Chatram* (charity house) situate in Gollala Mamidada."

In his third will, Exhibit Ib, dated the 8th day of October 1913, he states that he advanced a loan to Muchilika Appalaraju and others of Chengondapalli and took a usufructuary mortgage of Chengondapalli and its hamlets which form a muttah and continues as follows :

"The net profits realized from the said muttah annually I have been giving away for the expenses of feeding, etc., of the choultry which I built in Gollala Mamidada and have been making credit and debit entries accordingly in the accounts also. So long as the said Chengondapalli muttah is in our possession according to the term, the net profits annually realized therefrom shall be paid for the expenses of the said choultry even after my death and Bulli Tammireddi shall look after the whole management needed for it. Besides this, the interest that may annually be realized on a sum of Rs. 10,000 out of my own funds shall either be spent to meet the expenses of the charity choultry at Gollala Mamidada once a year or shall be kept in deposit for the said purpose."

It appears from the accounts that the income from the muttah was utilized for the expenses of the choultry from the date of its opening. The evidence shows that there was a dedication of the income from the muttah for the purpose of the upkeep of the choultry and we see no reason to doubt the truth of the statement made by Gangireddi in his deposition given so early as 1903, already referred to, that he had already given the leasehold right he had in the muttah as an endowment for the choultry. The Subordinate Judge upholds the provision in the will regarding the setting apart of Rs. 10,000 as funded capital for the choultry but thinks that the dedication of the income from Chengondapalli muttah which is also referred to in the same will is not binding on the plaintiff. He observes :

TAMMIREDDI
v.
GANGIREDDI. "there is no doubt of the fact that in the Chongondapalli Khata the income was being shown as having been taken on to the account of the choultry in the account books maintained during the time of the late Gangireddi."

Relying on *Govinda Doss v. Raja Venkata Perumal*(1), he is of opinion that the mere fact that the income was used by Gangireddi is no ground for holding that there was a dedication of the corpus. It is, however, clear on the findings of the Subordinate Judge that Gangireddi and his sons were members of an undivided family and that the trade carried on by Gangireddi was a joint family business in which the father and the sons were interested. The will executed by Gangireddi by itself cannot bind the plaintiff but the contention for the appellants is not based on the will but on an anterior dedication by Gangireddi, and the will is only used as evidence of dedication. There seems to be no adequate reason for disbelieving the statement made by Gangireddi so long ago as 1903 that he had endowed the choultry with the income of Chongondapalli muttah, especially as the account books also support his statement. So far as the dedication is concerned, no document is necessary. We need only refer to *Pallayya v. Ramaswathammulu*(2) and *Ramalingam Chetti v. Sivachidambara Chetty*(3). We are of opinion that the income from Chongondapalli muttah was dedicated to the choultry and that it is not joint family property liable for partition.

The next question is as to the marriage expenses of the first defendant's son and daughter. So far as the daughter is concerned, the will of Gangireddi directs that a sum of Rs. 1,000 should be given for the purpose of making jewels for her. She is clearly entitled to the expenses of the marriage being provided for out

of the joint family funds and, having regard to the status of the family, we are of opinion that a sum of Rs. 3,000 should be set apart for the expenses of her marriage in addition to the sum of Rs. 1,000 provided for jewels. TAMMIREDDI.
GANGIREDDI.

As regards the marriage expenses of the second defendant, no claim was made in the written statement for any such provision. No issue was raised on the point. The only point raised was as to the setting apart of Rs. 2,000 for jewels to be made for the girl he might marry, as to which provision was made in Gangireddi's will. This has been allowed. The question as to the provision to be made for his marriage expenses was raised for the first time by Mr. Ranga Acharya during the course of his argument. Under these circumstances we are not prepared to go into the question and direct any provision to be made.

As regards the jewels which form the subject matter of the tenth issue and which are claimed by the first defendant, we think the Subordinate Judge was right in deciding against the first defendant. He set up the case that some jewels were pledged by strangers with the family and some were lent to the family by others. He offered to file a list stating which jewels were pledged and which jewels were lent but did not do so. It is not proved that the jewels are the jewels of the first defendant's wife, and we do not think that, having regard to the contentions raised by the first defendant, he should now be given an opportunity of adducing evidence that the jewels belong to his wife, a case which was never set up by him in the written statement or at the time of trial in the lower Court.

This disposes of all the points raised in Appeal. The decree of the lower Court will be modified in the light of the above observations. As the appellants have failed substantially they will pay respondent's costs.

K.R.

(1) (1914) 27 M.L.J., 195.

(2) (1903) 13 M.L.J., 384.

(3) (1919) I.L.R., 42 Mad., 440.

PRIVY COUNCIL.*

1921,
November 8.VENKATA ROW ALIAS GANESH ROW (SINCE DECEASED)
(PLAINTIFF),

v.

TULJARAM ROW AND OTHERS (DEFENDANTS)
(AND CONNECTED APPEALS)[On Appeal from the High Court of Judicature at
Madras.]*Hindu Law—Joint family property—Rights under decrees—
Minor—Agreement by karta releasing rights—Order in
Council declaring agreement invalid against minor—Additions
to joint family pendente lite—Effect of Order in Council.*

Under decrees made in 1896 and 1897 in a suit brought in 1886, a father and his minor son (the appellant), who together constituted a Hindu joint family, were entitled to recover a large sum from the first respondent. By a compromise agreement made in November 1897, the father purporting to act on behalf of himself and the appellant (but without the sanction of the Court), relinquished the claim under the decrees subject to the first respondent withdrawing an appeal which he had entered. In 1906 the appellant on attaining his majority brought a suit against his father and the first respondent, claiming that the compromise agreement was not binding upon him, and to recover under the decrees on behalf of the joint family consisting of his father and himself. Upon an appeal to the Privy Council in that suit an Order in Council was made in 1913 declaring that the agreement of November 1897 was not binding upon the present appellant, and that he ought to be remitted to his original rights under the decrees, and remanding the suit for the disposal of issues as to the share to which he was entitled. Meanwhile in 1907 and 1910, the joint family had been added to by the birth of two further sons to the appellant's father, and they were made parties after the remand. The High Court on appeal, treating the Order in Council as rendering the agreement of 1897 binding upon the father, decreed that the present appellant was entitled individually to a one-third share of a moiety.

* Present:—Lord BUCKMASTER, Sir JOHN EDGE, Mr. AMER ALI and Sir LAWRENCE JENKINS.

Held, that in the events which had happened the compromise must be regarded as having wholly failed to convey any of the joint estate, though different considerations might have arisen if the appellant had predeceased his father and no further members had been added to the joint family; that the first respondent was entitled to prosecute his appeal in the suit of 1886; and that whatever sum might ultimately be recovered therein would belong to the joint family if it still existed, but if dissolved then in individual shares to be fixed as at the date of the dissolution.

In their Lordships' opinion the High Court having allowed the first respondent's Appeal in the suit of 1886 to be restored, should not have stayed it pending the decision in the present appeal, since that left the Privy Council to consider hypothetical rights which ordinarily no English tribunal would do.

CONSOLIDATED APPEALS (Nos. 23 and 24 of 1919), being cross-appeals from a judgment and decree of the High Court (30th August 1916) varying a decree of WALLIS, J. (18th December 1913) made in Civil Suit No. 194 of 1906; and Appeal from an Order of the High Court (30th August 1916) made in Petition No. 2684 of 1914.

The consolidated Appeals arose out of a suit (Civil Suit No. 194 of 1906) brought by the present appellant in the High Court; the circumstances giving rise to the litigation appear from the judgment of the Judicial Committee, and are shortly stated in the headnote.

The Order in Council made upon the judgment of the Board delivered on 8th April 1913, in the previous Appeal in the suit [see *Ganesha Row v. Tuljaram Row* (1)], set aside the decrees made by the lower Courts and declared as follows, "that an agreement of compromise, dated 21st November 1897, and the satisfaction entered thereunder are not binding upon the appellant and that he ought to be remitted to his original rights under the decrees in Suit No. 266 of 1886 on the file of the said High Court; that the suit out of which this Appeal arises ought to be remitted to the said High Court in

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order that . . . issues Nos. 6 and 7 may be disposed of." The issues referred to were as follows :

(6) Is the plaintiff entitled to recover in any event more than a moiety of the amount sued for ?

(7) Is the plaintiff entitled to charge interest, and if so, at what rate ?

Of these issues No. 7 is not material to this report.

The suit was heard by WALLIS, J., who, on 18th December 1913, delivered a preliminary judgment. He held on issue No. 6 that the compromise was binding upon the half share of the fund to which Rajaram Row would have been entitled in 1897 if there had been a division between him and his son, the present appellant. He ordered that the two sons of Rajaram born in 1907 and 1910, the fact of whose birth was not before the Privy Council, should be joined, and he adjourned the further hearing. The two afterborn sons were accordingly joined, with Rajaram Row as their guardian *ad litem*, and were respondents 3 and 4 to the present Appeal. The case having been further argued the learned Judge on 24th March 1914, passed a decree in favour of the plaintiff, the present appellant, for a one-third share of a moiety of the fund.

Against this decree both Venkata Row and Tuljaram Row appealed. The former contended that he was entitled to recover the whole fund, the latter by his cross-appeal contending that Venkata Row was entitled only to a one-fourth share of a moiety of the fund. Tuljaram Row also filed a Petition (No. 2684 of 1914) praying to have his Appeal of 1897 from the decrees of 1896 and 1897 restored.

The Appeals and the Petition were heard together by the Officiating Chief Justice (ABDUR RAHIM, J.), and SESHAGIRI AYYAR, J., who delivered judgment on August 30, 1916.

The learned Judges dismissed the cross-appeal by Tuljaram Row. On the other hand they were of opinion that to give the plaintiff a decree for the whole amount would be opposed to the Order in Council made in 1913. They rejected the contention of Venkata Row that the half-share decreed was his separate property and that his two afterborn brothers had no share ; they considered that the declaration made by the Privy Council was not made in his favour individually, but as representing the joint undivided family. They rejected also his contention that the undivided status of the family had been disturbed by the agreement regarded as an alienation ; upon this point they relied upon previous decisions of the High Court, and pointed out that Venkata Row sued on behalf of the joint family. They varied the decree of WALLIS, J., so far as it related to the interest recoverable (see issue No. 7), but in other respects affirmed it. On the Petition they held that Tuljaram Row should have leave to restore his Appeal (No. 4 of 1897) for hearing, but by an order made on November 5, 1917, they directed that that Appeal be stayed pending the hearing of the present Appeal.

Venkata Row, the plaintiff-appellant, died in 1920, and was represented by his son. His father Rajaram Row died in 1915. It was stated in the course of the hearing of the present Appeal that the joint family had been dissolved in 1917.

De Gruyther, K.C., and *Kenworthy Brown*, for the representative of Venkata Row.—Venkata Row was entitled to recover in the suit the whole fund. He sued on behalf of the joint family, and by the Order in Council of 1913 was remitted to his original right apart from the compromise. The compromise cannot be treated as an alienation of half the estate. The principle by which in Madras effect in equity is given to an alienation of

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joint family property for consideration, *Manjaya v Shanmuga*(1), cannot be applied to a mere relinquishment of a debt. Moreover, the compromise did not purport to be an alienation of Rajaram's share, but an act on behalf of the joint family. If, however, the compromise operated as a conveyance of Rajaram's share, it could only do so by effecting a severance: *Ram Chunder Dutt v. Chunder Coomar Mundul*(2), *Naro Gopal v. Paraganda*(3), *Soundararajan v. Arunachalam Chetty*(4), *Hardi Narain Sahu v. Ruder Perakash Misser*(5). If there was a severance in 1897, Venkata Row is entitled to a share in which his afterborn brothers cannot participate.

Upjohn, K.C., and *Dube*, for respondents 3 and 4.—Tuljaram Row after the judgment of the Privy Council in 1913 petitioned to continue his Appeal of 1897. He thereby elected to treat the agreement as void. The compromise was entirely ineffective, and Venkata Row is entitled to recover on behalf of the joint family including these two respondents. It is stated that the family was divided in 1917; there was no division before that date.

C. D. Murray (Solicitor-General for Scotland), and *Ingram* for Tuljaram Row.—The Order in Council of 1913 declared the compromise not to be binding upon Venkata Row merely. It left it valid as a shield to Tuljaram against everybody else, including respondents 3 and 4. Rajaram Row had power in 1897 to bind his afterborn sons: Mayne, 8th edition, paragraph 342. If Venkata Row was entitled to recover the whole property he could take it only on the terms that it was burdened with an equity in favour of Tuljaram.

(1) (1915) I.L.R., 38 Mad., 684. (2) (1869) 13 M.L.A., 181, 198.
(3) (1917) I.L.R., 41 Bom., 347, 354. (4) (1916) I.L.R., 39 Mad., 159 (F.B.), 180.
(5) (1884) I.L.R., 10 Cal., 628 (P.C.); L.R., 11 I.A., 26.

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Upjohn, K.C., in reply.—The compromise could exist only as the act of the joint family, and was therefore wholly avoided by the Order of 1913. Rajaram did not enter into it as karta, and did not bind his afterborn sons. It cannot be regarded as a severance, because its terms are consistent only with the continued existence of the joint status.

* *De Gruyther, K.C.*, replied in the cross-appeal.

The JUDGMENT of their Lordships was delivered by Lord BUCKMASTER.—The real question for determination in these Appeals is as to the effect of a compromise entered into on 21st November 1897, between Rajaram Row, purporting to act both for himself and as guardian of his minor son Venkata Row, and Tuljaram Row. The compromise related to certain claims then existing between Rajaram Row and his son, as constituting a joint Hindu family, against Tuljaram Row, and it arose in this manner. Originally Venkata Row, together with his four sons, Ramachandra Row, Luchmana Row, Rajaram Row and Tuljaram Row, formed a joint Hindu family, governed by the Mitakshara law. Venkata Row died in 1871, survived by his sons, and in 1881 the joint family was dissolved, and a division of the joint estate took place, leaving the greater part of it in the hands and under the control of Tuljaram Row, who was the manager of the family. In 1886 a suit was brought by Atmaram, the son of Luchmana, against Tuljaram Row, for the purpose of ascertaining the extent of the family assets remaining in his hands, for the necessary accounts, partition, and other reliefs, and to this suit all the members of the family were parties. Two decrees were made in that suit, one on 21st October 1896, and the other on 17th August 1897, and by these orders Tuljaram Row was decreed as liable to pay to Rajaram Row and his branch of the family certain sums of rupees.

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The compromise to which reference has been made was a compromise of the rights possessed by Rajaram Row and his son under these decrees.

The compromise was a very simple matter. It consisted in releasing Tuljaram Row from all liability to make the payments which he had been ordered by the High Court to make, payments which were on the face of them considerable in extent; and the only consideration mentioned was that Tuljaram would agree not to prosecute an Appeal which he then had on foot against these orders. In other words, Rajaram Row, acting in his own interest and on behalf of his infant son, gave up and surrendered, without any further struggle, all the rights to which he was then entitled, together with his son, in the decrees of October 1896, and August 1897.

It is not surprising in these circumstances that on Venkata Row attaining his majority in 1906 he should have taken steps to challenge the validity of this compromise. A suit was accordingly instituted by him under the name of Ganesha Row against Tuljaram and Rajaram Row, seeking to recover the monies mentioned in the decrees as "the undivided son" of Rajaram Row. He failed both before the Judge of First Instance and in the Court of Appeal. The matter then came before the Judicial Committee—*Ganesha Row v. Tuljaram Row*(1)—and on 8th April, 1913, it was decided that the compromise did not bind, and could not bind, the infant, who ought to be remitted to his original rights under the decrees in the suits referred to, and the case was remitted to deal with the remaining issues on this footing.

Two further sons were born to Rajaram Row before the case came on for hearing on remand, and as they were also members of the joint family with their father

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and the plaintiff, they were added as defendants and are the third and fourth respondents in these Appeals. On behalf of the plaintiff it was argued that the compromise became wholly ineffectual by virtue of the order, as the family had never been divided, that consequently the new members of the family were entitled to their share and their rights could not be established if the compromise remained.

WALLIS, J., before whom the remitted issues were tried, decided that Ganesha could only be entitled to a half-share, but as the further members of the family had come into existence, namely, two further sons of Rajaram, he directed that they should be added as defendants, and on this being done he decreed that Ganesha and his two brothers were together entitled to a half-share of the monies with interest, in other words he gave Ganesha one-sixth of the whole. The judgment also dealt with other matters no longer material, and it gave rise to as many as four Appeals, of which it is only necessary to consider that of Ganesha, whose representatives are the present appellants. His Appeal failed because the High Court regarded the order of the Privy Council as rendering the compromise binding on Rajaram Row's then existing share, but, in fact, the order only declared the compromise was not binding on Ganesha Row, who was remitted to all his original rights under the compromised suits.

The appellants urge that in the events that have happened this entitles the whole family to share in the whole fund, as otherwise the rights of the appellants would have been seriously curtailed by the order which intended that they should be preserved.

Their Lordships think that this argument is well founded. The agreement of 21st November 1897 did not purport to be a release of individual rights or shares

(1) (1913) I.L.R., 36 Mad., 295 (P.C.), L.R., 40 I.A., 132.

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in the fund at all; it did not purport to effect any division of the joint family estate that then existed between Rajaram and his son in the subject matter of these decrees. On the contrary, what it purported to do was to release the whole of the debts that were then owing to the joint family, in consideration of Tuljaram not prosecuting his Appeals.

Now it has been held by this Board that that attempted arrangement failed so far as the infant was concerned; and, if it failed so far as the infant was concerned, their Lordships think that in the events that have happened it must also be regarded as failing wholly to convey any of the joint estate at all. They have arrived at that conclusion for these reasons. Rajaram Row, unless he was attempting to divide the joint family, could only deal with this property with the consent of his son or in his capacity as manager of the estate. In his capacity as manager of the estate he was only able to deal with it for certain limited purposes, and none of those purposes are, or can be, suggested as the consideration why these considerable sums were released. It follows, therefore, that the attempt to alienate, or to release, from the estate these substantial portions of the joint family property failed, and that there was no efficacy given to the arrangement that was then contemplated.

Their Lordships have expressly stated that this is their view of this agreement in the events that happened. It might possibly have been that different circumstances would have arisen if Venkata Row, the son, had predeceased his father, and there had been no further members of the joint Hindu family. In that case it is possible that the arrangement would have been one which Rajaram Row would have been unable to dispute; but those are not the circumstances that exist at the present

time. At the present time the joint family continues; the joint family finds that this is a portion of the joint family estate which has been improperly alienated, and which they are entitled to recover. It, of course, follows equally upon that that Tuljaram Row will be entitled to prosecute his Appeals, and their Lordships are a little astonished to find that, although liberty has been given to him to proceed, an order has been made which has restrained the prosecution of these Appeals until after the hearing of these Appeals by this Board. Were this matter ordinary English litigation, of course no tribunal here would consider hypothetical rights, the exact character and extent of which could only be ascertained after the hearing of other pending litigation; but unwillingness to let litigants, who have entrusted their disputes to the Board for determination, from a place so far distant as India, be disappointed in receiving judgment, has led their Lordships to disregard the ordinary rules that are followed in these matters, and to hear the Appeal, notwithstanding the fact that it is impossible to know the exact amount upon which it will operate.

In the result their Lordships will humbly advise His Majesty that the decrees of the High Court ought to be set aside, and that it ought to be declared that whatever sums may ultimately be recovered in respect of the monies that were ordered to be paid by the decrees of 21st October 1896, and 17th August 1897, referred to in the agreement of 21st November 1897, form part of the joint family estate which was constituted on 21st November 1897, by Rajaram Row and his son Venkata Row. If, on the other hand, that family has, as is stated, been dissolved, the declaration will be that the shares in the monies are to be fixed as at the date of its dissolution. As regards the further Appeal, Tuljaram

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Row is entitled to have the case remitted to the High Court to hear the appeal O.S.A. No. 4 of 1897, and to issue a revised decree in O.S. No. 266 of 1886, finally determining the sum, if any, that is due.

As regards the costs the respondent, Tuljaram Row, must pay one set between the appellants and the respondents, Ramachandra Row and Radha Bai.

Solicitor for appellant: *Douglas Grant*.

Solicitor for first respondent: *W. Graham Pole*.

Solicitor for other respondents: *H. S. L. Polak*.

A.M.T.

PRIVY COUNCIL.*

1922,
January 17.

MUHAMMAD IBRAHIM ROWTHER AND ANOTHER
(PLAINTIFF),

v.

SHAIKH IBRAHIM ROWTHER AND OTHERS
(DEFENDANTS).

[On Appeal from the High Court of Judicature at
Madras.]

Custom—Inheritance—Lubhai Muhammadans—Exclusion of females—Costs of Appeal—Delay—Madras Civil Courts Act (III of 1873), sec. 16.

Having regard to the Madras Civil Courts Act, 1873, section 16, it is for those alleging among Muhammadans a custom of inheritance at variance with Muhammadan Law to prove by clear and unambiguous evidence an ancient and invariable custom.

In the present case an alleged custom among Lubhai Muhammadans whereby females were excluded from inheritance was held not to have been established, the existence of the custom among that community having repeatedly been negatived by decisions of the Courts, and not being proved by the evidence in the case.

* Present:—Lord BUCKMASTER, Lord ATKINSON, Mr. AMER ALI and Sir LAWRENCE JENKINS.

Apart from section 16 above mentioned, weight could not be given to the consideration that the Lubhai community were recent converts from Hinduism, since it was not suggested that the community had elected to be governed by Hindu Law in its entirety.

Abdul Hussain Khan v. Sona Dero, (1918) I.L.R., 45 Calc., 450 (P.C.); L.R., 45 I.A., 10, followed.

• Successful appellant deprived of costs of Appeal on the ground of his delay in prosecuting the Appeal.

APPEAL No. 14 of 1918 from a judgment and decree (August 12, 1915) of the High Court reversing a decree of the Subordinate Judge of Coimbatore.

The parties were Lubhai Muhammadans of the Sunni sect residing in the Coimbatore district. The suit was brought by the appellants who claimed to recover their share according to the Muhammadan Law of the estate of one Muhammad Hussain Ravuttar, who died in 1904. The defence was that the parties were governed by a custom whereby females were excluded from inheriting. The facts of the case and the terms of the plea appear from the judgment of the Judicial Committee.

The Subordinate Judge of Coimbatore, who tried the case, held that the custom was not established.

On appeal to the High Court, that decision was reversed and the suit dismissed. The views of the learned Judges (Sir JOHN WALLIS, C.J., and SRINIVASA AYYANGAR, J.) appear shortly from the present judgment: and the Appeal to the High Court is reported in I.L.R. 39 Mad., 664.

Dube, for the appellant, referred to the Madras Civil Courts Act (III of 1872), section 16, *Mirabiri v. Vellayanna*(1) and *Abdul Hussain Khan v. Sona Dero*(2),

(1) (1885) I.L.R., 8 Mad., 464.

(2) (1918) I.L.R., 45 Calc., 450 (P.C.); L.R., 45 I.A., 10.

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and to the evidence in the record, and contended that the custom had not been established.

The respondents did not appear.

The JUDGMENT of their Lordships was delivered by Sir LAWRENCE JENKINS.—This is an Appeal from a decree, dated August 12, 1915, of the High Court at Madras reversing a decree of the Subordinate Judge of Coimbatore, dated 7th January 1914.

The litigants are Lubbai Muhammadans of the Sunni sect, and the contest is as to the devolution of the estate of Muhammad Hussain Ravuttar. He died in 1914 leaving a widow and three sons and also two daughters named Ponnuthayee and Sulaiha Bi.

Ponnuthayee died in September 1905, leaving a husband and a daughter. They are the plaintiffs in this suit. The defendants are the three sons of Muhammad Hussain Ravuttar, his widow and the two children of Sulaiha Bi who was dead at the institution of this suit.

The plaintiffs claim shares in Muhammad Hussain's estate as heirs of Ponnuthayee, and they are supported by the children of Sulaiha Bi, who make a similar claim as heirs of their mother. The contesting defendants are the three sons and their mother.

The decision of the rival claims depends upon whether the devolution of Muhammad Hussain's estate is governed by Muhammadan Law, as the plaintiffs contend, or by a rule of descent excluding females, as the contesting defendants maintain.

Though it is common ground that Muhammad Hussain and the litigants are Muhammadans, the contesting defendants seek to escape from the course of devolution which this would ordinarily involve by setting up what they describe as an immemorial custom and ancient usage.

In paragraphs 15, 16 and 17 of their written statement, they plead as follows :

"15. It has been the immemorial custom and ancient usage in the Muhammadan families in the district of Coimbatore in general and in families of these defendants and their relations in particular that they have followed the Hindu Law as regards the law of property and succession and partition. Only the male members are entitled to succeed to the properties of their ancestors, and females are excluded from inheritance when there are males. Besides, it is also the custom in the Muhammadan families to give some amount including jewels at the time of, or immediately after, marriage to the female members in lieu of their shares ; and consistently with that usage defendant's father gave jewels, cash and other moveables worth about Rs. 4,000, to the mother of the second plaintiff immediately after the marriage and the plaintiff's conduct in not adverting to this in the plaint is fraudulent.

"16. According to that immemorial custom and usage the plaintiffs have no right to claim a share in the share of Ponnuthayee Ammal while Ponnuthayee Ammal herself had no share.

"17. It has been the custom also in the family of the plaintiff."

On the settlement of issues the following (amongst others) were ordered to be tried :

"(1) Are parties to suit governed by Hindu Law and whether Ponnuthayee, mother of the second plaintiff, was not entitled to her share in the estate of her deceased father Muhammad Hussain Ravuttar ? "

"(8) Whether the custom set out in paragraph 15 of the written statement is true and valid, and if so, was the claim of Ponnuthayee satisfied in accordance therewith ? "

At the hearing, an additional issue was framed at the request of the contesting defendants which raised the

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question as to whether the suit was barred by an earlier decision. It calls for no discussion now as their Lordships see no reason to dissent from the concurrent determination of the lower Courts that this issue must be answered in the negative.

And thus the only question that remains for decision is as to this alleged custom or usage. The plea which professes to formulate it has been forcibly criticized by the learned Subordinate Judge in the course of his careful and discriminating judgment. He points out that in its wider assertion it is untenable, and even in its narrower form it is not established. He might even have gone further and pronounced the pleading bad.

In the result, he held that the devolution was governed by Muhammadan Law and declared the plaintiffs entitled to the shares claimed.

The defendants appealed, and to meet the criticism of the Subordinate Judge they narrowed the definition of the custom. The ninth ground is that

"the Court below ought to have found the custom at any rate as regards the Lubbai community residing in the villages mentioned in the written statement."

On Appeal the High Court reversed the decision of the Subordinate Judge and dismissed the suit. The learned Chief Justice, instead of treating the custom or usage as a matter for proof by the contesting defendants, held in effect that the Lubbai Muhammadans in that part of India at the date of their conversion from Hinduism to the Muhammadan faith, elected to retain the Hindu rule excluding women and that the real question in this suit was whether the plaintiffs had proved an abandonment of the Hindu rule of exclusion.

Viewing the evidence in this light the Chief Justice held the evidence, oral and documentary, sufficient to show that the defendants' family had adhered, with

perhaps most of the Lubbais of the neighbourhood, to the Hindu rule excluding the succession of females.

Mr. Justice SRINIVASA AYYANGAR was more guarded in his opinion. Citing a passage from the judgment in *Fanindra Deb Raikat v. Rajeswar Das*(1) as a guide to the standard of proof required, he regarded it as probable that

"many of the Lubbais being recent converts from Hinduism retained the mode of devolution of property according to Hindu usages even after their conversion."

He accordingly considered that the evidence to which he made special reference taken along with the evidence of the general prevalence of the practice was sufficient to prove the family custom set up.

But it is a misapprehension of the passage cited to treat it as a guide to the standard of proof in this case. There the question at issue was whether in the family then under discussion there was a legal power to adopt. Had its members been Hindus they would have been governed by Hindu Law and there would have been this power. But though they affected to be Hindus, that in fact was not their status: the utmost that could be said was that though the family had introduced many Hindu customs, they in fact were governed by family customs. Of such a family it was manifestly appropriate to remark that

"the question is not whether the general Hindu law is modified by a family custom forbidding adoption, but whether with respect to inheritance the family is governed by Hindu law, or by customs which do not allow an adopted son to inherit."

But such a comment can have no application to conditions as they exist in this case.

No doubt in *Abraham v. Abraham*(2), it is said that a convert upon his conversion may renounce the old law

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(1) (1885) I.L.R., 11 Cal., 463 (P.C.), 476; L.R., 12 I.A., 72, 81.

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

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by which he was bound as he has renounced his old religion, or if he thinks fit he may abide by the old law notwithstanding he has renounced his old religion. It is not, however, suggested in the present case that the Lubbais as a community have thought fit to abide by the entirety of their old law: the utmost that is said is that they, or some of them in a particular locality, have followed the Hindu Law, not in all respects, but in relation to property, succession and partition. In their essential characteristics, custom and an election to abide by the law of the old status differ fundamentally as sources of law, still, making every assumption in its favour, in the circumstances of this case, and on the record as it stands, there is no mode of proving this alleged election except by way of inference from actions and conduct that would establish a custom. So that along whatever line this case may be approached the custom must be established and the burden of proof of this is on the defendants.

Their Lordships have dealt with this aspect of the case at some length as it has evidently influenced the judgment of the High Court. But there is another aspect of it by which (in their Lordships' opinion) their decision must be guided.

It is enacted by the Madras Civil Courts Act, III of 1873, section 16, that all questions regarding inheritance, marriage, or any religious usage or institution shall be decided where the parties are Muhammadans by the Muhammadan Law or by custom having the force of law.

The litigants are Muhammadans to whom this Act applies; so that *prima facie* all questions as to succession among them must be decided according to Muhammadan Law. In India, however, custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Muhammadan Law governing the succession in a

particular community of Muhammadans. But the custom must be proved. The essentials of a custom or usage have been repeatedly defined, but it will suffice to refer to the recent decision of *Abdul Hussain Khan v. Soma Dero* (1), where the essentials of a legal custom or usage and the requisites of proof are fully discussed. The following passage from the judgment in *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar* (2) was cited as a correct and authoritative pronouncement of the law on these points:

"It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

Though the custom or usage as pleaded is open to objection, still their Lordships will not reject the defendants' contention on that ground, but will deal with the case as though the custom or usage had been pleaded in a form that was free from fault.

There is no suggestion on the record that the rule of exclusion, on which the contesting defendants rely, has been established by judicial decision in the sense, that this can be predicated of the rules of property and succession applicable to Khojas or Cutchi Memons in the Bombay Presidency. Therefore, it is necessary to examine the evidence to see whether it supports the rule of succession asserted by the contesting defendants.

This evidence is documentary and oral, and as the former is more important and more trustworthy, their Lordships will first deal with that.

(1) (1918) I.L.R., 45 Cal., 450 (P.C.); L.R., 45 I.A., 10.

(2) (1872) 14 M.I.A., 570.

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The documents on which the defendants rely as proving the usage, begin, in order of time, with a decree of the Madras High Court in Original Suit No. 5 of 1877, Exhibit XII, in which Mr. Justice INNES decided in its favour. There was, however, an Appeal from his decree which ended in a compromise, a circumstance which deprives his decision of much of its evidentiary value.

Moreover, in 1885, an Appellate Bench of the Court in *Mirabivi v. Vellayanna*(1), decided that the custom of exclusion in the case then before them had not been proved, and this decision has been recently approved by the Judicial Committee in *Abdul Hussain Khan v. Sona Dero*(2).

The next document in order of time is the judgment in Original Suit No. 22 of 1904, dated 26 February 1906, Exhibit III, where the custom was affirmed; but the decision in fact was based on that in Original Suit No. 5 of 1877, and has little or no independent value.

Then, reliance is placed on the judgment in Original Suit No. 755 of 1906, dated 26 September 1910, Exhibit IX. But it is open to the comment that the decision was influenced by that given in Original Suit No. 22 of 1904, as also was the judgment on appeal, Exhibit XVI. Thus on an examination of these documents it may fairly be said that the several judgments are substantially based on that pronounced in Original Suit No. 5 of 1877, which is open to the comment that has been made on its value.

The documentary evidence on which the plaintiffs rely starts with the judgment in *Mirabivi v. Vellayanna*(1). There, the High Court held, even in Second Appeal that there was no evidence to justify the finding of the lower Courts in favour of the custom, and this

decision, as already stated, has received the approval of this Board, in *Abdul Hussain Khan v. Sona Dero*(1).

Then there follows a series of documents, some negating the custom, others applying Muhammadan Law where the custom was not pleaded, and others proceeding on the assumption that it was Muhammadan Law that applied. In all these instances the parties before the Court were Lubbai Muhammadans. The first is a judgment of July 15, 1890, in Original Suit No. 85 of 1890, Exhibit L, followed by a judgment on Appeal in that suit, Exhibit M, in both of which the right of a female to succeed under Muhammadan Law is recognized.

On October 3, 1892, judgment was pronounced in Original Suit No. 373 of 1891, Exhibit C, where the rights of females were treated as governed by Muhammadan Law.

On January 23, 1893, a petition for a succession certificate, Exhibit F, was presented and female members of the family were made counter-petitioners as though the rights of the parties were governed by Muhammadan Law.

On August 2, 1897, the High Court passed a decree, Exhibit G, confirming the decree of the lower Appellate Court, with the result that the sisters' right to shares, according to Muhammadan Law, was established, though the custom had been pleaded.

On September 30, 1901, it was decided by the judgment in Original Suit No. 753 of 1900, Exhibit B, affirmed on Appeal by the judgment of the District Judge, Exhibit B1, that a female in a Lubbai Muhammadan family was entitled to a share. In this case, a custom was alleged that a woman is given by her family, at or about the time of her marriage, her share, or the equivalent of her share,

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(1) (1895) I.L.R., 8 Mad., 481.

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in the estate of her own family. The custom was negatived, though the District Judge seems to have thought that the appellants would have been entitled to more favourable consideration had they pleaded that they had retained the Hindu Law of inheritance and succession, instead of setting up a special custom at variance with the Muhammadan Law.

On June 5, 1903, a plaint in Original Suit No. 337 of 1903, Exhibit O, was presented in which it was taken for granted that the rights of a female were governed by Muhammadan Law.

On March 30, 1903, there was a judgment in Original Suit No. 238 of 1902, Exhibit R, which assumed a right to a share in a female, though it held that in the circumstances of the case the female's right was barred under Muhammadan Law.

The judgment, dated January 13, 1904, in Original Suit No. 36 of 1901, Exhibit H, and that, dated 4 December 1905, in Original Suit No. 34 of 1894, Exhibit N, proceed on the same assumption.

On October 18, 1906, and January 2, 1907, petitions for succession certificates, Exhibits K and P were presented by daughters, and on September 2, 1910, by a judgment in Original Suit No. 33 of 1908, Exhibit Q, the right of a widow and daughters to shares according to Muhammadan Law was affirmed.

It will thus be seen that over this series of years the rights of female members of the Lubbai Muhammadan community, under Muhammadan Law, have been repeatedly asserted and recognized, and that on three occasions the rule of exclusion, when pleaded, has been expressly negatived.

When this documentary evidence is contrasted with that adduced in support of the alleged rule of exclusion, it cannot be said that the custom or usage is supported

by clear and unambiguous evidence. On the contrary, so far as the weight of documentary evidence goes the preponderance is on the side of the plaintiffs.

Turning then to the oral evidence, their Lordships cannot find in it sufficient proof to support the defendants' plea.

The witnesses were all examined, before the Subordinate Judge, who made in his judgment a careful and critical examination of their evidence, with the result that he was unable to find the custom or usage proved, and their Lordships can see no sufficient reason for questioning his appreciation of the evidence. He evidently did not consider that the witnesses called by the contesting defendants held a position in the community entitling them to greater credit than those called by the plaintiffs, and this appears to their Lordships to be a just estimate of their worth.

There is a witness who holds an office that should have enabled him to speak with some measure of authority and that is P.W. 5, a Khazi of Pallapati, and the same may be said of P.W. 7, a Moulvi, but the Subordinate Judge evidently was not impressed by either of them. For what it may be worth, however, both assert that a Lubbai's estate is divided according to Muhammadan Law.

Looking then at the whole of the evidence, documentary and oral, their Lordships consider it falls far short of the standard of proof requisite to establish a custom or usage excluding females from succession.

It merits notice too that the custom as pleaded is not limited to the exclusion of females, but asserts as a part, or at any rate an accompaniment of it, that it is the custom to make a gift to female members at the time of or immediately after marriage in lieu of their shares; and it is alleged that consistently with that usage the

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defendants' father gave jewels, cash and other moveables, worth about Rs. 4,000 to the mother of the second plaintiff immediately after marriage.

This is negatived by the Subordinate Judge and from this conclusion the High Court express no dissent.

The result then is that their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside and the decree of the Subordinate Judge restored, with the variation that a day be fixed by the Court of first instance for the appointment of a Commissioner in lieu of February 7, 1914, and that the contesting defendants do pay to the plaintiffs their costs in the High Court.

Six years have elapsed since the date of the decree under appeal, and as no satisfactory explanation is given of this long delay there will be no order as to the costs of this Appeal.

Solicitors for appellants : *Barrow, Rogers and Nerill.*

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PRIVY COUNCIL.*

1922,
January 31.

T. B. RAMACHANDRA RAO AND ANOTHER (PLAINTIFF),

v.

A. N. S. RAMACHANDRA RAO AND OTHERS (DEFENDANTS).

[On Appeal from the High Court of Judicature at Madras.]

Land Acquisition Act (I of 1894), sec. 31, sub-sec. (2)—Res judicata—Dispute as to title—Reference to Court—"In a former suit"—Code of Civil Procedure (V of 1908), sec. 11.

Where under the Land Acquisition Act (I of 1894), section 31, sub-section (2), a dispute as to the title to receive the compensa-

* Present:—Lord BUCKMASTER, Lord ATKINSON, Lord CARSON, Mr. AMESLI and Sir LAWRENCE JENKINS.

tion has been referred to the Court, a decree thereon not appealed from renders the question of title *res judicata* in a suit between the parties to the dispute, or those claiming under them, whether or not the decree is to be regarded as one "in a former suit" within the meaning of section 11 of the Code of Civil Procedure, 1908.

Rangoon Botatoung Company v. The Collector, Rangoon, (1913) I.L.R., 40 Calc., 21; L.R., 39 I.A., 197, explained and distinguished. *Balaram Bhramavatur Ray v. Sham Sunder Narendra*, (1896) I.L.R., 23 Calc., 526; and *Trinayani Dassi v. Krishnalal De*, (1913) 17 C.W.N., 935, disapproved. *Hook v. Administrator-General of Bengal*, (1921) I.L.R., 48 Calc., 499; L.R., 48 I.A., 187, followed.

APPEAL No. 78 of 1920 from a judgment and decree (October 8, 1918) of the High Court, reversing a decree of the Additional Temporary Subordinate Judge of Tanjore.

The suit was brought by the appellants, the grandsons of one Ramajee Bavajee who died in 1858, to recover certain moveable and immoveable property from the respondents. The first respondent claimed title under a deed of settlement made in 1858 by Ramajee Bavajee in favour of his wife, Thulja Boyee, and under her will; the other respondents were in possession under the first respondent. The appellants by their plaint contended that under the deed of settlement Thulja Boyee had only a life interest in the property in suit, and further that her title as against the appellants was *res judicata* by reason of a decision in 1897 in certain land acquisition proceedings.

The facts of the case appear from the judgment of the Judicial Committee.

The trial judge made a decree in the plaintiffs' favour, holding that upon the true construction of the deed of settlement Thulja Boyee had only a life interest in the property. With regard to an issue framed as to *res judicata*, after reference to decisions of the High

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Court at Madras, he held that the extent of the interest taken by Thulja Boyee was res judicata by the decree of 1897 in the land acquisition proceedings, but only to the extent of the properties which were the subject of those proceedings.

An Appeal to the High Court and cross-objections were heard by WALLIS, C.J., and SESHAGIRI AYYAR, J. The Appeal is reported at I.L.R., 42 Mad., 283. The learned Judges held that Thulja Boyee took an absolute estate in the property and was competent to dispose of it by will. The question of res judicata was raised by the Memorandum of Appeal but not by the cross-objections which related to mesne profits and other matters, and would appear from the above report not to have been argued before the High Court. The only reference to it in the judgments is in that of SESHAGIRI AYYAR, J., who said: "A portion of the property in suit is governed by the decision of this Court (vide Exhibit A, i.e., the judgment of 1897). To that extent the defendants' claim is barred by res judicata." The question was raised by the appellants' case in the present Appeal.

De Gruyther, K.C., and *Narasimham* for the appellants.—Under the deed of settlement of 1858 Thulja Boyee took only a life interest. It is conceded that where property is conferred by a Hindu on a woman by a document using words apt to confer an absolute estate, the fact that the donee is a woman does not cut down the estate given: *Surajmani v. Rabi Nath Ojha*(1), *Bhaidas Shivdas v. Bai Gulab*(2), *Susiman Chowdhurain v. Shib Narayan Chowdhury*(3). It is, however, otherwise in the case of a simple gift by husband to wife. The authorities

(1) (1903) I.L.R., 30 All., 84 (P.O.); I.L.R., 35 I.A., 17.

(2) (1922) L.R., 49 I.A., 1.

(3) (1922) L.R., 49 I.A., 26.

show that in that case the wife does not take a heritable estate. The texts on this question are referred to in Mayne's Hindu Law, paragraph 664, and are set out in Sarkar's Vyavashtha Chandrika, Volume 2, page 510. There is on the question an absolute consensus of opinion in the authorities: *Koonjbehari Dhur v. Premchand Dutt*(1), *Atul Krishna Sircar v. Sanyasi Churn Sircar*(2), *Jamnia Das v. Ramautar Pande*(3), *Caralathathi Chumma Cunniah v. Cota Nammalwariah*(4), *Hirabai v. Lakshmibai*(5), *Motilal Mithalal v. The Advocate-General of Bombay*(6). Even if the effect of the gift was to confer a life estate, it did not give a right to alienate. Secondly, having regard to the decree made in 1897 in the land acquisition proceedings, the question of title was res judicata. The decision of the Board in *Rangoon Rotatoung Company v. The Collector, Rangoon*(7), is distinguishable. That case related merely to the amount of the award; it does not apply where under section 31, sub-section (2) of the Land Acquisition Act, 1894, a dispute as to title has been referred to the Court, as defined by section 3 (d). That view is supported by *Chowakaran Makki v. Vayyaprath Kunhi Kutti Ali*(8). *Mahadevi v. Neelamani*(9), there distinguished, was wrongly decided. The decree of 1897 was a decision as to title; it cannot be regarded as a res judicata only as to that part of the property compulsorily acquired: *Badar Bee v. Habib Merican Noordin*(10). Even if the decree of 1897 was not made "in a former suit" within the meaning of section 11 of the Code of Civil Procedure, 1908, the principle of

(1) (1880) I.L.R., 5 Cal., 684.

(2) (1905) I.L.R., 22 Cal., 1051.

(3) (1905) I.L.R., 27 All., 364.

(4) (1910) I.L.R., 33 Mad., 91.

(5) (1887) I.L.R., 11 Bom., 573, 578.

(6) (1911) I.L.R., 33 Bom., 279.

(7) (1913) I.L.R., 40 Cal., 21; s.c. L.R., 39 I.A., 197.

(8) (1908) I.L.R., 29 Mad., 173.

(9) (1897) I.L.R., 20 Mad., 269.

(10) (1909) A.C., 615 (P.C.).

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Hook v. Administrator-General of Bengal(1) applies. [Reference was also made to *Ram Kirpal v. Rup Kuari*(2), and *Sheoparsan Singh v. Ramnandan Prasad Singh*(3).]

[Their Lordships desired that the question of res judicata should first be argued.]

Dube for the first respondent.—The decision in 1897 did not operate as a res judicata, having regard to the nature of the jurisdiction then exercised. A consideration of the provisions of the Land Acquisition Act shows that the functions exercised under it are purely administrative. By section 31 the decision as to title forms part of the award, so that the judgment in *Rangoon Botatoung Company v. The Collector, Rangoon*(4) applies in the present case. The analogy of a verdict and judgment upon an inquisition under the English Lands Clauses Acts applies, and that does not operate as a res judicata: *Smith's Leading Cases*, 12th Edition, Volume II, page 812. *Mahadevi v. Neelamani*(5) is in point, and was rightly decided. The respondents are further supported by *Trinayani Dassi v. Krishnalal De*(6), *Balaram Bhramavatar Ray v. Sham Sunder Narendra*(7), *Dirgaj Deo v. Kali Charan Singh*(8), and *Mulambath Kunhammad v. Parakat Kathirikutti*(9).

[A reply was not called for.]

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The JUDGMENT of their Lordships was delivered by Lord BUCKMASTER.—On August 6, 1858, Ramajee Bavajee Pandit, who died on August 10, 1858, executed a deed of settlement of all his moveable and immoveable properties. It is prefaced by a statement that he had

- (1) (1921) I.L.R., 49 Cal., 499 (P.C.); I.R., 48 I.A., 187.
(2) (1934) I.L.R., 6 All., 263 (P.C.); I.R., 11 I.A., 37.
(3) (1916) I.L.R., 43 Cal., 694 (P.C.); I.R., 43 I.A., 91.
(4) (1913) I.L.R., 40 Cal., 21; s.c. I.R., 39 I.A., 197.
(5) (1897) I.L.R., 20 Mad., 269. (6) (1918) 17 C.W.N., 985.
(7) (1896) I.L.R., 23 Cal., 528. (8) (1907) I.L.R., 34 Cal., 466.
(9) (1916) 81 M.L.J., 827, 834.

adopted Panchapikes, the second son of Mahasubd Rajaram, and after various gifts and dispositions which are not material, it continued in these terms:

“Out of the remaining property, after deducting the above, my adopted son, to whom I have given the name of Bavajee Pandit, shall be entitled to and enjoy half of the property. Out of the remaining half of the property these two persons, namely (my) senior wife Sowbhagiavathy Kamatchi and junior wife Sowbhagiavathy Thulja shall take half and half.”

In 1894, 1 acre and 74 cents of the land so given, and then in the possession of Thulja Boyee, was acquired by the Government. The usual proceedings for determining the amount of compensation appear to have taken place, and no dispute arose as to the award, but a question did arise as between Ramajee Bavajee Pandit, the adopted son, and the widow as to the character and extent of the estate that she took under the will. If she took absolutely, the money could be divided forthwith; but if she took a limited interest, her share would have to be invested. It was consequently necessary that this dispute should be determined in order that the compensation monies should be properly dealt with. Section 31, sub-section (2), of the Land Acquisition Act, 1894, expressly contemplates this position, for after referring in sub-section (1) to the payment of the compensation by the Collector to the persons interested, sub-section (2) provides that:

“if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted.”

Section 18 does not define the Court; this is done by section 3 (d), which provides that a Court means a principal Civil Court of original jurisdiction, unless a special judicial officer within specified limits has been

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appointed to perform the functions of the Court under the Act. Section 32 further provides that when money has been deposited in Court under sub-section (2) of section 31, and it appears that the land in respect whereof the same was awarded belonged to any person who had no power to alienate it, the Court shall order the money to be invested as therein mentioned.

Now the dispute between Bavajee and the widow was plain upon the face of the document. It depended upon whether the deed had conferred an absolute heritable and alienable estate upon the widow, or whether she took either a limited Hindu widow's estate or a heritable estate which she was incapable of alienating. What the actual proceedings were that ensued between them is not plain, but they must have come before the District Court of Tanjore, for the grounds of appeal from the order of that Court are before their Lordships, and from these it appears that the District Judge had held that the widow had an absolute estate. From this decision Bavajee brought the appeal to the High Court of Judicature at Madras. Judgment was delivered by the High Court on the 13th July, 1897, by Sir ARTHUR COLLINS, C.J., and Mr. Justice SHEPHARD. Their judgment is short, and, as it throws considerable light upon the whole proceedings, it is desirable that it should be reproduced in full. It is as follows :

"The first question is what estate the widow Thulja Boyee took under . . . the gift of 1858. We cannot agree with the District Judge that the law is unsettled on the question of such gifts. There being no indication of intention to give a large estate, we must assume that the husband intended that a widow's estate only should pass. This being so it is quite clear that sections 31 and 32 of the Act apply. The order must be set aside as the parties are not agreed as to the mode in which the money should be invested. We must direct the District Judge to pass

orders under the provisions of section 32. Each party to bear his own costs of this Appeal."

On June 10, 1911, and again on January 11, 1916, Thulja Boyee executed wills and bequeathed all her moveable and immoveable properties to the first respondent; she died on April 2, 1916. The adopted son, Bavajee Ramajee Pandit, also died at a date subsequent to the decision of the High Court, but the exact time is not stated, nor is it material, and the present appellant and his brother Jeevanna Rao, now deceased, were his two sons. On July 12, 1916, they instituted the suit out of which these proceedings have arisen against the claimants under Thulja's will, alleging that she had only a limited estate under the deed of settlement, and that she had no power to dispose of the properties by will. The learned Subordinate Judge decided in their favour, but this decision was reversed by the High Court, from whose decree the present appeal has been brought. Both the judgments of the Subordinate Judge and the High Court depended upon the true effect of the deed of settlement, but for reasons which their Lordships will shortly explain, they do not think that this question was open to either of the Courts.

Their Lordships do not, therefore, propose to embark upon the consideration of what the effect of the deed of gift in favour of Thulja Boyee might be correctly determined to be, but as some misapprehension appears to exist as to the effect of certain decisions of the Board, and notably *Surajmani v. Rabi Nath Ojha* (1), their Lordships think it desirable to remove this doubt, lest error should creep into the administration of the law in India with regard to the rights of a Hindu widow. In the case referred to, when originally heard before the High Court,

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(1) (1908) I.L.R., 30 All., 84 (P.C.) ; L.R., 35 I.A., 17.

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Surajmani v. Rabi Nath(1) it had been stated that under the Hindu law in the case of a gift of immoveable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration. In that case, it is true that there is some comparison drawn between the gift to a widow and a gift to a person not under disability, but that was not the foundation of the decision, which depended entirely upon the wide meaning attributed to the words in which the gift to the widow was clothed. More recent decisions of this Board in *Sasiman Chowdhurain v. Shib Narayan Chowdhury*(2) and *Bhaidas Shivdas v. Bai Gulab* (3) do nothing but repeat this same proposition in other words. The importance of preventing confusion due to the contrasting of different phrases used in distinct cases to express the same idea has led their Lordships to make this explanation, but the points argued as to the effect of the gift in the present case are not now open to consideration, for in their Lordships' opinion the decision given on July 13, 1897, by the High Court at Madras is a clear and complete determination as between the parties to that suit and those claiming under them, which the present litigants cannot dispute.

It is urged on behalf of the respondents that the judgment cannot be so regarded because it arose out of proceedings under the Land Acquisition Act, 1894, and for the purpose of their arguments they rely upon the

(1) (1903) I.L.R., 25 All., 351.

(2) (1922) L.R., 49 I.A., 25.

(3) (1922) L.R., 49 I.A., 1.

case of *Rangoon Botatoung Company v. The Collector, Rangoon*(1). There appears to be some misapprehension in the Courts in India as to the effect of this authority which it is desirable should be removed. Under the Land Acquisition Act there are two perfectly separate and distinct forms of procedure contemplated. The first is that necessary for fixing the amount of the compensation and this is described as being an award. By section 54 an appeal from that award or of any part of the award is given to the High Court. *Rangoon Botatoung Company, v. The Collector, Rangoon*(1), decided that in those circumstances the appeal so given was the only one open to the parties, and that even if appealed against, the award still retained its characteristics and was incapable of further appeal. The argument which succeeded in that case emphasizes the distinction between an award and a decree, and the judgment mentions this in terms by stating that the appellants, although admitted to the High Court, could not have the right to carry an award made under an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its original jurisdiction. The manifest inconvenience that would attend any such proceeding is also pointed out, but neither this judgment, nor any other judgment of this Board affects the question of an Appeal on the totally different proceedings that arise when there is a dispute as between the persons claiming compensation involving, as it does in this case, a difficult question of title. When once the award as to the amount has become final, all questions as to fixing of compensation are then at an end; the duty of the Collector in case of dispute as to the relative rights of the persons together entitled to the money is to place the money

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under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be. That is exactly what occurred in the present case. How the proceedings were commenced is a matter that is not material provided that they were instituted in the manner that gave the Court jurisdiction, for they ended in a decree made by the High Court and appealable to this Board. It is true that in the case of *Trinayani Dassi v. Krishna Lal De*(1), following an earlier case, *Balaram Bhramavatar Ray v. Sham Sunder Narendra*(2), it was decided that an order under section 32 may appropriately be deemed as an integral part of the award made by the Court, but their Lordships regard this as a misapprehension as to the meaning of the award. The award as constituted by Statute is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the Collector has information, meaning thereby people whose interests are not in dispute, but from the moment when the sum has been deposited in Court under section 31, sub-section (2), the functions of the award have ceased; and all that is left is a dispute between interested people as to the extent of their interest. Such dispute forms no part of the award, and it would indeed be strange if a controversy between two people as to the nature of their respective interests in a piece of land should enjoy certain rights of appeal which would be wholly taken away when the piece of land was represented by a sum of money paid into Court. There has in the present case been a clear decision upon the very point now in dispute, which cannot be reopened. The High Court appear only to have regarded the matter as concluded to the extent of the compensation money,

(1) (1913) 17 C.W.N., 935.

(2) (1896) I.L.R., 23 Calo., 526.

but that is not the true view of what occurred, for as pointed out in *Badar Bee v. Habib Merican Noordin*(1), it is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision, no longer open to appeal, given by another Court having jurisdiction to try the second case. If the decision was wrong, it ought to have been appealed from in due time. Nor in such circumstances can the interested parties be heard to say that the value of the subject matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. If such a plea were admissible, there would be no finality in litigation. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute. It has been suggested that the decision was not in a former suit, but whether this were so or not makes no difference, for it has been recently pointed out by this Board, in *Hook v. Administrator-General of Bengal*(2), that the principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of the Code in this respect. Their Lordships will therefore humbly advise His Majesty that the decree appealed from be reversed, and the decree of the Subordinate Judge restored with costs here and in the Courts below.

Solicitor for appellant: *Douglas Grant*.

Solicitors for first respondent: *Barrow, Rogers and Nevill*.

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(1) (1909) A.C., 615 (P.C.)

(2) (1921) I.L.R., 48 Calo., 499; L.R., 48 I.A., 187.

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APPELLATE CIVIL—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Coutts Trotter and Mr. Justice
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1922,
January 5.

SEETHAPATI RAO DORA (PLAINTIFF), APPELLANT,

v.

VENKANNA DORA AND OTHERS (DEFENDANTS,
7 TO 14, 16, 17 AND 18), RESPONDENTS.*

*Evidence Act (I of 1872), Sec. 35—Recital of relevant fact
in judgment not inter partes, relevancy of.*

A recital in a judgment not *inter partes* of a relevant fact is not admissible in evidence under section 35 of the Indian Evidence Act.

SECOND APPEALS against the decrees of C. V. VISWANATHA SASTRI, Acting District Judge of Ganjām at Berhampur, in Appeal Suits Nos. 82 and 55 of 1918, respectively, preferred against the decree of T. KRISHNASWAMI NAYUDU, Temporary Subordinate Judge of Ganjām at Berhampur, in Original Suit No. 56 of 1916.

The necessary facts are stated in the Opinion of the Full Bench.

The Second Appeals came on for hearing before AYLING and ODGERS, JJ., who made the following :—

ORDER OF REFERENCE TO A FULL BENCH.

The only question argued before us in these Second Appeals is whether the Lower Appellate Court was right in treating as inadmissible in evidence a judgment in certain summary suits (Exhibit B). These suits were

not between the present parties or their predecessors-in-title and the only importance of the judgment consists in a recital therein that a certain R. Chendramma died on 3rd May 1904. There is nothing in the judgment to show on what this recital is based. The fact of Chendramma's death was undisputed and it may be that both sides agreed as to the date. But the date itself was immaterial for the suits turned on the simple question of whether Chendramma had, while alive, alienated her property to third parties so as to deprive the plaintiff in that suit of the right of succession. The date of R. Chendramma's death is relevant to the question of limitation raised in the present Second Appeals: and Mr. K. P. M. Menon, for appellant, contends that the recital in the judgment is admissible in evidence under section 35, Indian Evidence Act, as an entry in an official record made by a public servant in the discharge of his official duty.

The general rule as to the relevancy of judgments is contained in section 43, Indian Evidence Act. Respondents' vakil argues, relying on this section as well as on the ruling of the Calcutta High Court in *Kashi Nath Pal v. Jagat Kishore*(1), that recitals in a judgment not *inter partes* are not relevant. He has also drawn our attention to a recent case, *Ram Parkash Das v. Anand Das*(2), in which their Lordships of the Privy Council appear to take the same view. The passage referred to is at page 720 of the report and there has been some discussion before us of its meaning: but we understand their Lordships to say that a recital in the Magistrate's judgment of a relevant admission is not relevant evidence of the fact of that admission. If that be so, the same principle would cover the present case.

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(1) (1916) 20 C.W.N., 643.

(2) (1916) I.L.R., 43 Calc., 707 (P.C.).

* Second Appeals Nos. 383 and 384 of 1920.

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This is the view to which we incline, but Mr. Menon has pressed us with *Parbutty Dassi v. Purno Chunder Singh*(1), and three cases of this Court, *Byathamma v. Avulla*(2), *Thama v. Kondan*(3), and *Krishnasami Ayyangar v. Rajagopala Ayyangar*(4).

If the Calcutta case stood alone, we should feel no great difficulty. It is not binding on us; and its correctness has been doubted in subsequent decisions of the same Court [vide *Ram Sunder Gope Sikdar v. Haribala Dhubi*(5)]. It is moreover possible to distinguish it on the ground that the entry of an abstract of the pleadings in the decree in that case (which it was sought to put in evidence) was enjoined by specific circular orders binding on the Court which passed the decree. In our case, the only provision as to the contents of the judgment is that of section 68 of the Rent Recovery Act, which simply says that the judgment shall contain the reasons for the same. It would be difficult to bring this recital of date under the head of reasons for the judgment.

The decisions of our own Court, however, stand on a different footing; and even if it were possible to distinguish them we think the point is of such general importance that its decision by a Full Bench is desirable.

We find some difficulty in understanding *Byathamma v. Avulla*(2). The learned Judges say that *Parbutty Dassi v. Purno Chunder Singh*(1), applies and names section 35 as the section under which the entry is applicable, but the reasoning at the top of page 24 applies rather to section 13 and this is the section dealt with in the Madras case on which they rely; *Ramasami v. Appavu*(6).

(1) (1883) I.L.R., 9 Cal., 586.

(3) (1892) I.L.R., 15 Mad., 378.

(5) (1917) 37 I.C., 911.

(2) (1892) I.L.R., 15 Mad., 19.

(4) (1895) I.L.R., 18 Mad., 78.

(6) (1889) I.L.R., 12 Mad., 9.

The judgment in *Thama v. Kondan*(1), does not discuss the point but follows the earlier decision and states the recital of an admission in a judgment is relevant under section 35, i.e., to prove the admission. The judgment in *Krishnasami Ayyangar v. Rajagopala Ayyangar*(2) is to the same effect.

It has been suggested that the case of admission may be different from that of other relevant facts; but we can find no basis for such a distinction in section 35.

We therefore refer the following question for the decision of a Full Bench.

Is a recital in a judgment, not *inter partes*, of a relevant fact admissible in evidence under section 35, Indian Evidence Act?

ON THIS REFERENCE—

K. P. M. Menon, with *C. Sambasiva Rao*, for appellant.—The recital in the judgment is relevant. A judgment is a public record within the meaning of section 74 of the Evidence Act; a judge is a public servant and when he writes a judgment, he makes a public record; a statement in a judgment is therefore an entry made by a public servant in a public record, which, if it relates to a relevant fact, would be evidence under section 35, irrespective of whether the judgment in which the statement occurs is or is not between the same parties: see *Parbutty Dassi v. Purno Chunder Singh*(3), *Byathamma v. Avulla*(4), *Thama v. Kondan*(1), *Krishnasami Ayyangar v. Rajagopala Ayyangar*(2), *Lekraj Kuar v. Mahpal Singh*(5), and *Ram Parkash Das v. Anand Das*(6). The person who made the statement is dead; hence it is also admissible under section 32 (5):

(1) (1892) I.L.R., 15 Mad., 378.

(3) (1883) I.L.R., 9 Cal., 586.

(2) (1895) I.L.R., 18 Mad., 78.

(4) (1892) I.L.R., 15 Mal., 19.

(5) (1880) I.L.R., 5 Cal., 744 (P.C.), 754.

(6) (1916) I.L.R., 43 Cal., 707 (P.C.), 720.

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see *Chattan Raja v. Rama Varma*(1). Reference was made to Taylor on Evidence, Volume II, page 1114, paragraph 1546, and Amir Ali on Evidence, page 410.

C. S. Venkata Acharyar, with H. Suryanarayana, for respondents.—The judgment is not relevant. It is only such judgments as come within sections 40 to 43 of the Evidence Act that are relevant. Section 43 refers only to the existence of and not to the contents or recitals in judgments: *Subramanyan v. Paramaswaran*(2), *Gujju Lall v. Fatteh Lall*(3) and *Kashi Nath Pal v. Jagat Kishore Acharya Chowdhury*(4): *Parbutty Dassi v. Purno Chunder Singh*(5), is wrong and has been dissented from in later cases in Calcutta; the Madras cases which have followed it are also wrong: see *Ram Sunder Gope Sikdar v. Haribala Dhubi*(6), *Sunder Das v. Fatimul-ul-Nissa Begam*(7), *Satindra Kumar Choudhuri v. Krishna Kumari Choudhuri*(8). The recital will not be secondary evidence of what the witness stated: see section 63 of the Evidence Act and *Ram Ranjan Chakerbati v. Ram Narayan Singh*(9).

SCHWABE,
C.J.

SCHWABE, C.J.—In this case I had the opportunity of reading the judgment of KUMARASWAMI SASTRI, J., and I agree with him entirely.

COUTTS
TROTTER, J.

COUTTS TROTTER, J.—I agree.

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KUMARASWAMI SASTRI, J.—The question referred to us for determination is whether a recital in a judgment not *inter partes* of a relevant fact is admissible in evidence under section 35 of the Evidence Act. The suit was filed by the plaintiff-appellant to recover the

(1) (1915) 28 M.L.J., 669, 681.

(3) (1881) I.L.R., 6 Calc., 171 (P.C.).

(5) (1883) I.L.R., 9 Calc., 586.

(7) (1896) 1 C.W.N., 513.

(2) (1888) I.L.R., 11 Mad., 128.

(4) (1916) 20 C.W.N., 643.

(6) (1917) 37 I.C., 911.

(8) (1916) 36 I.C., 882.

(9) (1895) I.L.R., 22 Calc., 533, (P.C.), 541.

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immoveable properties specified in the plaint, on the ground that he purchased them from the reversionary heirs of one Adinarayana on whose death his mother Chendramma succeeded to a limited estate conferred on her by Hindu Law as mother of the last male owner. Chendramma alienated the properties and the suit to recover the properties from the alienees had to be filed within 12 years from the date of Chendramma's death, under article 141 of the Limitation Act (IX of 1908). As the defendant pleaded that the suit was barred by limitation, the date of Chendramma's death became material and the plaintiff alleged that she died on May 3, 1904, while the case for defendants was that she died in February 1904, and not in May 1904, and that the suit was barred as it was filed more than 12 years from February 1904. On Chendramma's death the father of the second defendant in this suit filed a suit in the Revenue Court against certain tenants for the purpose of acceptance of *pattas* and *muchilikas* under the Rent Recovery Act (VIII of 1865). The suit was dismissed, but in the judgment there is a statement made by the Judge that Chendramma died on May 3, 1904. The only evidence let in by the plaintiff as to the date of the death of Chendramma was the statement in the judgment which is filed as Exhibit B in the case. The Subordinate Judge was of opinion that this statement was relevant to prove the issue as to the date of the death of Chendramma and, acting upon it, he held that Chendramma died within 12 years before the date of the suit and that therefore it was not barred by limitation. On appeal, the District Judge was of opinion that the statement in a judgment not *inter partes* was not evidence. He believed the evidence of the defendants' witnesses and dismissed the plaintiff's suit as barred by limitation. In Second Appeal the point raised is that the recital of the date of death in the

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judgment was evidence under section 35 of the Evidence Act and that the District Judge was wrong in rejecting it as irrelevant. The contention of Mr. K. P. M. Menon for the appellant is that a judgment is a public record within the meaning of section 74 of the Evidence Act, that a Judge is a public servant, and when he writes a judgment he makes a public record and that a statement in a judgment is therefore an entry made by a public servant in a public record, which, if it relates to a relevant fact, would be evidence under section 35, irrespective of whether the judgment in which the statement occurs is or is not between the same parties. In support of his argument he refers to *Parbutty Dassi v. Purno Chunder Singh*(1), *Byathamma v. Avulla*(2), *Thama v. Kondan*(3), and *Krishnasami Ayyangar v. Rajagopala Ayyangar*(4). For the respondents it is contended that the relevancy of judgments is governed by sections 40 to 43 of the Evidence Act and that a judgment not *inter partes* is not evidence. Reference has been made to *Kashi Nath Pal v. Jagat Kishore*(5), and the observations of the Privy Council in *Ram Parkash Das v. Anand Das*(6). I am of opinion that section 35 has no application to judgments, and a judgment which would not be admissible under sections 40 to 43 of the Evidence Act would not become relevant merely because it contains a statement as to a fact which is in issue or relevant in a suit between persons who are not parties or privies. Sections 40 to 44 of the Evidence Act deal with the relevancy of judgments in Courts of justice. Section 40 enacts that the existence of any judgment, order or decree, which by law prevents any Court from taking

(1) (1883) I.L.R., 9 Calc., 586.

(3) (1892) I.L.R., 15 Mad., 378.

(5) (1916) 20 C.W.N. 643.

(2) (1892) I.L.R., 15 Mad., 19.

(4) (1895) I.L.R., 18 Mad., 73.

(6) (1916) I.L.R., 43 Calc., 707 (P.O.).

cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial. Section 41 deals with final judgments, orders and decrees, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, or what is known as judgments *in rem* and states that such judgments, orders or decrees, are conclusive proof of the matters specified in the section, and, by virtue of that section of the Act, evidence would not be allowed to disprove those matters. Section 42 refers to judgments relating to matters of a public nature relevant to the enquiry and states that such judgments, though evidence, are not conclusive proof of what they state, thus allowing evidence to be given to disprove facts found in the judgments. Section 43 states that

“judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree, is a fact in issue or is relevant under some other provision of this Act” (e.g., section 13).

Section 44 enables a party to show that any judgment, order or decree, which is relevant under sections 40, 41 or 42, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. It appears to me that these sections codify the law as to the admissibility of judgments in evidence. It is not suggested that under the provisions of these sections a judgment, unless it be a judgment *in rem*, would bind third parties who are not parties to the judgment or claim under those who are parties. Other judgments would be *res inter alios acta* and would not be admissible in evidence. The same is the law in England and I need only refer to *Natal Land, etc., Company v. Good*(1). Section 35 of the

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(1) (1868) L.R., 2 P.C., 121.

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Evidence Act which enacts that an entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duties, or by any other person in the performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact, deals with a distinctly separate class of cases, namely, entries made by public officials acting in the exercise of a statutory duty or power conferred by special enactments which regulate matters of public or *quasi public* interest. It would be straining the language of section 35 to hold that a Judge, when he writes a judgment, is making entries in a public or official book, register or record, and that every statement made in a judgment is an entry in such book, register or record. If section 35 is applicable to judgments and if the contention of Mr. Menon is accepted, the result will be that every judgment would be admissible in evidence to prove a relevant fact if it contains any statement as to a fact in issue or relevant fact, even though that judgment may be between persons who are total strangers to the litigation in which it is sought to be filed as evidence. I find it difficult to hold that the legislature, which in sections 40 to 44 has carefully defined the limits within which judgments are admissible in evidence, would have, in a previous section, practically nullified the provisions as to the relevancy of judgments by including judgments in the category of public or other official books, registers or records. I am unable to agree with the decisions relied on by Mr. Menon. In *Parbutty Dassi v. Purno Chander Singh*(1), the suit was for the possession of a fishery and the plaintiff wanted to let in evidence of an admission alleged to have been made by a predecessor-in-title of the

(1) (1883) I.L.R., 9 Cal., 586.

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defendants in the written statement in a former suit. This would be evidence under section 21 of the Evidence Act. The written statement was not forthcoming as it was destroyed and the only evidence of the admission was that contained in a decree in the former suit which began by giving a short statement of the pleadings in the suit. The rules of Court required every decree to contain an abstract of the pleadings. PRINSEP and O' KINEALY, JJ., held that the statement in the decree was evidence of the admission made under section 35 of the Evidence Act. The learned Judges begin by stating that the original containing the admission of the defendant's predecessor-in-title could not be produced as it was destroyed and that under a circular issued by the Sudder Court, it was the duty of the Court to enter in the decree an abstract of the pleadings, and they relied on section 35 as authority for the view that the admission sought to be proved can be proved by the abstract prefixed to the decree. At the end of the judgment, however, they go on to state that the admission in the decree would be binding only if the person who is alleged to have made the admission was the predecessor-in-title of the defendants and observe :

"Whether the defendants are bound by the statements of Rashmoni depends on the question whether Rashmoni was their predecessor-in-title ; and this point has not been decided by the Subordinate Judge. If he holds that defendants do not represent Rashmoni, neither the decree nor the admission can be admissible against them. On the other hand if he holds that the defendants do represent Rashmoni, then, in our opinion, so much of the decree as purports to give the statement of Rashmoni is admissible in the present case. The amount of weight to be given to such statement is a matter to be decided by the Court below."

Lekraj Kuar v. Mahpal Singh(1), to which the learned Judges refer, was a case not of a judgment but of a

(1) (1880) I.L.R., 5 Cal., 744 (P.C.).

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statement made in a settlement register, and their Lordships of the Privy Council were of opinion that being an entry in a register kept by a public servant under statutory authority, it was admissible under section 35 of the Evidence Act. It seems to me that if the learned Judges were of opinion that any statement made in a judgment would be a statement made by a public officer in a public record and would bring it under section 35, all the discussion as to the duty of the Judge to make an abstract of the pleadings in the decree, the destruction of the original pleadings containing the admission and as to its relevancy depending upon whether Rashmoni, the person who is alleged to have made the statement abstracted in the decree, was the predecessor-in-title of the defendants would be immaterial, as a statement recorded under the circumstances mentioned in section 35 would depend for its relevancy on the mere fact that it was made by a public servant in the discharge of his duty apart from the sources of his information or the relationship of the persons giving the information to the persons who were interested subsequently in the matter. The correctness of this decision was doubted in *Sunder Das v. Fatimul-ul-Nissa Begum*(1) and *Ram-Sunder Gope Sikdar v. Haribala Dhubi*(2). In *Byathanma v. Avulla*(3) the question was whether the parties were governed by *Makkattayam* or *Marumakkattayam* Law and it was sought to prove that in a previous claim petition to which a preceding *karnavan* was a party he acted in the capacity of a *karnavan*, thus showing that the parties were governed by the *Marumakkattayam* Law. The order of the District Munsif reciting the petition of the previous *karnavan* was sought to be put in to prove the allegation made by the previous *karnavan* and it was

(1) (1896) 1 C.W.N., 513.

(2) (1917) 37 I.C., 911.
(3) (1892) I.L.R., 15 Mad., 19.

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held on the authority of *Parbutty Dassi v. Purno Chunder Singh*(1), cited above, that it was admissible under section 35 of the Evidence Act. As pointed out by the learned referring Judges, the reasoning in this case would apply to section 13 rather than to section 35. *Ramasami v. Appavu*(2), which is referred to by the learned Judges, related to the relevancy of judgments under sections 13 and 42 of the Evidence Act and had nothing to do with section 35. *Thama v. Kondan*(3) cited above was a suit to redeem a *kanom*. The *kanom* document was lost and the judgment in a previous suit brought by a previous *Jenmi* to redeem the same *kanom* in which it is stated that defendants admitted their position as *kanomdars* was sought to be put in evidence. The learned Judges, following *Lekraj Kuar v. Mahpal Singh*(4) *Parbutty Dassi v. Purno Chunder Singh*(1), and *Thama v. Kondan*(3), cited above, held that the judgment was admissible and that the recital in a judgment of the admission of the relevant fact would be evidence of the *Jenmi's* title under section 35 of the Evidence Act. As the second suit to redeem was between the same parties as those to the first suit, it is difficult to see why recourse should be had to section 35 for the purpose of rendering the previous judgment admissible in evidence as the matter could well have been brought under sections 40 to 43 of the Evidence Act. Neither in this case nor in *Byathanma v. Avulla*(5) is there any discussion of the authorities and the Judges simply follow the decision in *Parbutty Dassi v. Purno Chunder Singh*(1) cited above. I think the correct principle has been laid down by MUKERJI, J., in *Kashi Nath Pal v. Jagat Kishore*(6), where the learned Judge held that

“Although a judgment not *inter partes* may be used in

(1) (1883) I.L.R., 9 Cal., 586.

(3) (1892) I.L.R., 15 Mad., 378.

(5) (1892) I.L.R., 15 Mad., 19.

(2) (1889) I.L.R., 12 Mad., 9.

(4) (1880) I.L.R., 5 Cal., 744 (P.O.).

(6) (1916) 20 C.W.N., 643.

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evidence in certain circumstances as a fact in issue, or as a relevant fact, or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties."

The judgment of the Privy Council in *Ram Parkash Das v. Anand Das*(1) cited above also makes it clear. The question there was whether a person was disqualified from being a *Mahant* by reason of his having been married. Evidence was sought to be let in of a recital in the judgment of a Magistrate of an admission of the marriage made in the course of proceedings before him. Their Lordships of the Privy Council held that the judgment was rightly rejected as not by itself evidence of the facts recorded therein. It is argued by Mr. Menon that what their Lordships rejected was not the judgment but a statement by one Hanuman Lal, made on oath, that the *Mahant* was married; but a reference to the passage in which the observation of their Lordships occurs makes it clear that they were referring to the judgment. It is unnecessary in this Reference to consider whether, if admissions made by parties to a suit or their predecessors-in-title are relevant and the originals containing the admissions are not forthcoming, secondary evidence of such admissions can be given by reference to extracts from judgments. The answer to the question will turn not on section 35 but with reference to the provisions of the Act relating to the relevancy of admissions and the sections relating to secondary evidence. On a consideration of the authorities and the provisions of the Evidence Act, I am clearly of opinion that section 35 would not render a judgment not *inter partes* evidence. I would answer the question referred to us in the negative.

N.R.

(1) (1916) I.L.R., 43 Cal., 707 (P.C.)

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri.
On a Reference under section 98(2), Civil Procedure Code, owing to a difference of opinion between Mr. Justice Krishnan and Mr. Justice Odgers.

P. RAMA PATTAR (PLAINTIFF), APPELLANT,

v.

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(DEFENDANTS), RESPONDENTS.*1921
October 13.

Indian Contract Act (IX of 1872), sec. 25 (3) — "Debt" contracted by a Hindu father for joint family—Son's promise to pay it after period of limitation—Liability of son—Meaning of "debt" in section 25 (3).

A debt contracted by a Hindu father for the benefit of the joint family is none the less a "debt" within section 25 (3) of the Indian Contract Act, binding on the son, because his liability to pay his father's debt is not personal but limited to the extent of the family assets. The son promising to pay such debt of the father after it is barred is personally liable to pay the whole of it.

SECOND APPEAL against the decree of V. P. RAO, District Judge of South Malabar, in Appeal Suit No. 473 of 1919, filed against the decree of V. KUNHIRAMAN NAYAR, Additional District Munsif of Palghat, in Original Suit No. 27 of 1919.

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

Plaintiff who got a decree in the Court of first instance but whose suit was dismissed by the Appellate Court filed this Second Appeal.

The case originally came before KRISHNAN and ODGERS, JJ., who delivered the following differing judgments:

* Second Appeal No. 1464 of 1920

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KRISHNAN, J.—The two acknowledgments made by defendants 1 and 2 in the account book, Exhibit B, are of no avail to save limitation against the joint family or against defendants 3 and 4, who were no parties to those acknowledgments. The District Judge has found on the evidence in this case that defendant 3, the father and managing member of the family, never ceased to be the manager, and never authorized any one else to act for him to manage and never held out any one as acting for him. This is a finding of fact which I think we must accept in Second Appeal. It was, however, contended that, even apart from any authority given by the third defendant, his son, the first defendant, was entitled under the Hindu Law to act as the manager of the family in the absence of his father in Burma and elsewhere. For this position, reliance was placed on *Mudit Narayan Singh v. Ranglal Singh*(1), and on the texts cited therein, particularly on that of Harita. The ruling itself is not applicable, as in that case it was found that the younger member had been put forward by his elders as the managing member. The text of Harita so far as it is relevant here (as translated by Setlur), says that if he (the manager) is remotely absent, the eldest son may manage the affairs of the family: see Setlur, page 217. The words "remotely absent" are vague in their import, and I think they cannot be construed so as to bring within their scope the case of a manager who, though absent from his home, was in correspondence with the junior members and was controlling the management, as the District Judge finds was the case here. No reliance was placed on this text in the lower Courts, and, therefore, the question has not been properly threshed out

(1) (1902) I.L.R., 29 Cal., 797.

on facts; it is, therefore, sufficient to say that plaintiff has not proved that the first defendant, the eldest son, had authority under the Hindu Law to bind the family by his acknowledgments.

The question still remains how far defendants 1 and 2 are liable on their promise to pay the amount due on 14th September 1913. I think they are liable. It is conceded that the words used therein clearly amount to a promissory note, for they say "we have hereby promised on signing this to give on demand Rs. 1,577-4-5, the balance amount, with interest at Re. 1 per cent from this day" and so on. Viewing this document as a promissory note, the executants of it must be held to be liable on it unless they prove that there was no consideration for it. This question should not be confused with the other question how far it was a valid acknowledgment against the family; I have already held that it was not, as the signatories were not authorized agents of the family to acknowledge. Taking it as a promissory note, does the evidence here establish that there was no consideration for it? The amount mentioned in it no doubt includes the sum of Rs. 1,084-5-6 and interest due by the father to the plaintiff on account of his dealings on behalf of the family and acknowledged by him to be correct in Exhibit A on 16th September 1907, or as much of it as has not been paid off. The dealings were subsequently carried on by defendants 1 and 2, professedly, no doubt, on behalf of the family and for themselves, for the account was changed into the names of defendants 1, 2 and 3 in the plaintiff's books. It is the result of these dealings taken with previous debts that amounted to Rs. 1,577 and odd included in the promissory note. Out of that sum, it is clear that both the defendants were personally liable for the items on the debit side in the account after the 16th September 1907

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when the father ceased to have dealings and they began the dealings; the credit items would be taken towards the old debt. The amount of it has not been ascertained, but it is apparently not very large. Though defendants 1 and 2 acted on behalf of the family in entering into those dealings, they would become personally liable for the amount on the finding that the family was not liable, as they had no power to act on its behalf. The bulk of the amount included in the promissory note was no doubt the old debt that the father incurred, with interest added to it as appears from the account. For that portion of the note amount, though first defendant was not originally personally liable and second defendant was not liable at all, the whole of it was admittedly binding on the family property including the first defendant's share in it; in other words, it was a debt realizable from first defendant's joint property. The note being executed thus for a sum partly realizable from his property and partly from his person, it seems to me there is full consideration for it so far as the first defendant is concerned. Even if we suppose the original family debt was not saved from limitation even as against defendants 1 and 2, by their acknowledgment of September 1910, the note would still be saved from being void against him under section 25 of the Contract Act, both because his personal liability for his own dealings, as to which there is proper consideration, remains unaffected by limitation and also because under section 25, clause (3), an agreement to pay a time-barred debt is sufficient to constitute a contract. It was argued that the liability of a member of a joint family to have his joint property sold for a debt contracted by the manager for a joint family purpose and binding on the joint family property is not an obligation that can be described as a "debt" within the meaning of section 25. No authority has been cited to

support this argument. No doubt it was ruled in *Narayan v. Veerappa*(1), that a son was not "jointly bound" with his father within the meaning of the Bankruptcy Law of Singapore; but that is not the question here at all. The question here is whether a liability to have one's joint property sold for a sum due is not a "debt" within the meaning of section 25, clause (3). I am inclined to think it is. The word "debt" does not necessarily imply an obligation created by the debtor himself as argued by Mr. Venkatarama Sastri; we have decree debts imposed by Courts, for example. "Debt" is defined as "a sum payable in respect of a liquidated money demand, recoverable by action;" see Stroud's Judicial Dictionary on page 471, second Edition, and the cases cited there. On this view there is no doubt that there was consideration for the promissory note, and it is enforceable against the first defendant. It is then equally enforceable against the second defendant, the other executant of it, as it is not necessary in law, that consideration should move to each executant separately to make the note binding on him or her. It is sufficient if there was consideration for the instrument as a whole for it to be enforceable against all executants. Furthermore, in this case there was some consideration moving to the second defendant herself for the note, viz., the amount due by her on the joint dealings of herself and her son after 1907; and inadequacy of consideration is not a ground for avoiding a contract; vide Explanation 2 of section 25 of the Contract Act.

I would therefore confirm the decree of the lower Appellate Court and dismiss the Second Appeal with costs as regards defendants 3 and 4 but allow the Appeal.

(1) (1917) I.L.B., 40 Mad., 581.

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and restore the Munsif's decree as regards defendants 1 and 2 with costs in this and the lower Appellate Courts.

ODGERS, J.

ODGERS, J.—This is a suit to recover money due on an account. The third defendant is the father of first and fourth defendants, and the manager of a Mitakshara joint Hindu family consisting of first and fourth defendants and himself. The second defendant is his wife, and mother of first and fourth defendants. The father (third defendant) had incurred debts for family necessity to plaintiff. He served a period of over three years imprisonment from 1903 or 1904. The dealings began in 1901. On 16th September 1907, while third defendant was in jail, accounts were adjusted and a balance struck by third defendant and plaintiff and acknowledged by the former (Exhibit A). Subsequently third defendant was released from jail, but did not return to his family; it appears that he was living in Rangoon. On 16th September 1910, second defendant and her son, first defendant, who had just then attained majority, signed the following statement: "Since the bar of limitation is approaching, etc."

Subsequently on 14th September 1913, the same two persons executed a promissory note to plaintiff in the following terms: "We have hereby, etc."

Two questions have been argued: (1) Do the above operate as valid acknowledgments in order to save limitation against defendant 3 as manager of the family? (2) Do the above operate in any event against defendant 2 and defendant 1 personally?

As to (1), reliance is first placed on a text of Harita (Setlur, page 217), where it is said:

"But if he (eldest member) be decayed, remotely absent or afflicted with disease, let the eldest son manage the affairs as he pleases."

also on *Mudit Narayan Singh v. Ranglal Singh*(1), where it was decided

"that a younger member of a Mitakshara family may deal with family property for family necessity whenever he is put forward to the outside world by the elder members as the managing member."

The finding of the lower Appellate Court is that defendant 3 never ceased at any time to be manager, and this finding is based on a voluminous correspondence carried on between the defendants with regard to family affairs while defendant 3 was absent. It is difficult to see how third defendant's absence in Rangoon can justly be said to make him "remotely absent" in modern days with all the conveniences of modern communication. It is equally difficult to see how defendant 1 was ever put forward to the outside world as managing member. I agree with the District Judge that mere payment of rents by defendants 1 and 2 is insufficient to show this.

Further, in *Patil Hari Premji v. Hakamchand*(2), it is laid down that temporary absence of the father conferred no legal authority on the son, if not authorized by the father, but assuming to act for him. The words in Exhibit B, "as per the instructions of the said Anantarama Pattar (defendant 3) and ourselves," are insufficient to import either of these elements, as they refer to the "amount expended by you (i.e., plaintiff) for our family necessities." It is further clear that under no circumstances could the wife, defendant 2, have any authority or power to act as manager so as to bind the joint family after her son, defendant 1, had attained his majority.

I am, therefore, of opinion that neither defendant 1 nor defendant 2 had any power or authority from

(1) (1902) I.L.R., 29 Cal., 797.

(2) (1884) I.L.R., 10 Bom., 363.

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defendant 3 to act as managers of the family, nor did defendant 3 ever cease to be the manager.

As to their personal liability, I must differ with reluctance from my learned brother. Reliance is placed on the fact that some new items of credit and debit appear in the accounts signed by defendants 1 and 2. The accounts settled by defendant 3 in 1907 was admittedly an account binding on the family for supplies for family purposes. In the absence of evidence to the contrary, it must be assumed that the new items of debit were of the same nature. In my opinion there was no extinction of the old debt and a novatio by which the plaintiff undertook to look to the credit of defendant 2 and defendant 1 alone. The account stood in the name of defendant 3 alone up to 1911, and plaintiff's case has always been that the debt is binding on the family. Defendant 2 was, as stated, not authorized either in law or in fact to bind the family; it seems, therefore, that there was no consideration for her signature in Exhibit B, and the fact that the second signature was to a promissory note would make no difference, considering the nature of the debt (which was not hers) and for which she was in no way personally liable, nor could she make herself so liable. As to defendant 1, is he a debtor within the meaning of sections 19—21 of the Limitation Act? If he had no authority to act as manager for his father, as I found above, he cannot be a duly authorized agent to sign for him as such [Cf. *Lakshmi Narain v. Durga Shankar*(1)]. Further, according to *Narayanan v. Veerappa*(2), a Hindu son is not jointly bound with his father to pay debts contracted by the father. For the reasons stated, the debts which defendant 1 bound himself to pay were the debts of the father contracted by the father.

(1) (1918) 17 I.C., 655.

(2) (1917) I.L.R., 40 Mad., 581.

The debts were not the debts of defendant 1. Further, the case does not fall within section 25 (3) Contract Act, as the son was not generally or specially authorized to sign for his father. For these reasons, I am of opinion that neither defendant 2 nor defendant 1 is personally liable.

On both the grounds raised in this Second Appeal, in my opinion, the Appeal must be dismissed with costs.

BY COURT.—As we have differed in our opinion on the questions whether there was consideration in law for the promissory note of date 14th September 1913 and executed by defendants 1 and 2 and whether it is binding on those defendants, we refer those questions under section 98, Civil Procedure Code, clause (2), proviso. for the opinion of a third Judge. The case will thereafter be posted again before us.

ON THIS REFERENCE—

C. V. Anantakrishna Ayyar for appellant.—A debt contracted by a Hindu father for family purposes is binding on his son; hence it is a debt payable by him also, although he may not be personally liable on it but is liable only to the extent of the family assets. Hence it is a “debt” within the meaning of section 25(3) of the Contract Act. Reference was made to Stroud's Judicial Dictionary for the definition of “debt” and to *The Official Assignee of Madras v. Palaniappa Chetty*(1) and *Chalamayya v. Varadayya*(2).

T. R. Venkatarama Sastri, with *C. V. Mahadeva Ayyar*, for the respondent.—“Debt” in section 25(3) means one contracted by one's self and not one arising under a pious obligation under Hindu Law. Son is not jointly liable for his father's debt: see *Narayanan v. Veerappa*(3).

(1) (1918) I.L.R., 41 Mad., 824.

(2) (1899) I.L.R., 22 Mad., 167.

(3) (1917) I.L.R., 40 Mad., 581.

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KUMARASWAMI SASTRI, J.—This Second Appeal comes before me owing to a difference of opinion between KRISHNAN and ODGERS, JJ., as to whether there was consideration in law for the promissory note dated the 14th of September 1913 executed by the first and second defendants and whether it is binding on those defendants.

The plaintiff is the brother of the second defendant. The second defendant is the mother of the first defendant. The third defendant is the father and the fourth defendant is another brother, who is a minor. It is admitted that defendants 1 to 4 are members of a joint Hindu family. There were dealings originally between the plaintiff and the third defendant. On September 16, 1907, when third defendant was in jail, there was a settlement of accounts at which a sum of Rs. 1,084-5-6 was found due by third defendant, and the third defendant affixed his signature to the duly stamped settlement, acknowledging the amount to be due. Dealings went on subsequently, the heading of the account being "C.V. Anantarama Pattar's (third defendant's) credit and debit account." In 1910, as the claim was about to be barred, the following entry was made in the account book on September 16, 1910:

"Since the bar of limitation is approaching, the said amount which was expended by you as per the instructions of the said Anantarama Pattar and ourselves for our family necessities and since the said Anantarama Pattar is absent from here, we hereby admit the said amount which we owe you as per this account."

This is signed by the first and second defendants. The dealings continued. They were mostly entries of receipts of paddy from the land, and small sums were also entered on the debit side. On September 14, 1913 accounts were settled and a sum of Rs. 1,577-4-5 was found due and the following entry was signed in the plaintiff's account books by the first and second defendants:

"We have hereby promised, on signing this, to give on demand Rs. 1,577-4-5, the balance amount, with interest thereon at Rupee one per cent from this date, due to you from us after adjusting the credit and debit account as per account executed by us on 16th September 1910, together with interest from 1st Kanni 1086 till date for the amount expended by you as per the instructions of my father Anantarama Pattar and ourselves for our necessities."

In the account book, Exhibit C, the heading is "Accounts concerning Anantarama Pattar, son of Venkata-rama Pattar, wife Lakshmi *alias* Ammu Ammal, and son Visvanatha Pattar."

Both the learned Judges who heard the Second Appeal are of opinion that, so far as the second acknowledgment of liability of September 16, 1910 is concerned, it does not save limitation as it was not proved that the first and second defendants had any authority to acknowledge the debt as the father was the managing member of the family. The question, however, remains as to the liability on the promissory note dated September 14, 1913. KRISHNAN, J., was of opinion that it was open to the first defendant to promise to pay a barred debt and that there was consideration for the note. ODGERS, J., was of opinion that the debt was not a debt of the first defendant but that of the father which had become barred and that there was no consideration for the note.

It is clear from the facts of the case that the defendants are members of an undivided family of which the father was the managing member. So far as the transactions are concerned, it is equally clear—and it is not disputed before me—that the debts were contracted for the benefit of the joint family and would be binding on the joint family properties. The first question is whether in the case of a joint family, the debts contracted by the managing member for the joint family can be said to be

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debts due by the other members of the family within the meaning of section 25 of the Indian Contract Act, which runs as follows :

“ An agreement made without consideration is void, unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.”

So far as the liability of the members of a joint family for the debts contracted by the managing member is concerned, I think it is clear that the debt is binding on them although in the enforcing of that debt they would not be personally liable, but only liable to the extent of the joint family properties in which they are interested. In *Chalamayya v. Varadayya*(1), SUBRAHMANYA AYYAR, J., after referring to cases where the other co-parceners were parties to the contract or had agreed to be bound by it or had ratified it, observed :

“ When however such is not the case, but the contract is of a character such as, under the law, to entitle the manager to enter into independently of the consent of the other members of the family, so as to bind them thereby, then it is clear that the scope of the manager's power is restricted to, and does not extend beyond, the family property.”

I may also refer to *The Official Assignee of Madras v. Palaniappa Chetty*(2), as to the liability of the members of a joint family. In such cases it is open to the creditor to sue all the co-parceners, and each of the co-parceners will be liable to pay the debt subject to the limitation that payment can be enforced only by having recourse to the joint family properties. A debt is none the less a debt because the remedies open to the creditor are circumscribed by the joint family assets. I can find no authority for the view that the debt contemplated by

(1) (1899) I.L.R., 22 Mad., 167.

(2) (1918) I.L.R., 41 Mad., 824.

section 25 of the Contract Act is a debt which can be enforced against the person and properties of the debtor. The test is whether at the time the promise to pay is made the person making the promise could have been sued for the recovery of the debt but for the law of limitation, however circumscribed the remedies for the recovery of the debt in execution may be owing to the personal law governing the debtor.

Reliance was placed by Mr. Venkatarama Sastri on *Narayanan v. Veerappa*(1), where it was held that a son was not “ jointly bound ” with his father to pay his debts within the meaning of clause (4), section 30, of the Straits Settlements Bankruptcy Ordinance. The question turned on the pious duty of the son to discharge his father's debts not illegal or immoral, and the learned Judges observed :

“ This liability as now developed is certainly not a joint liability, nor a joint and several liability as ordinarily understood in English law ; in fact it is difficult to bring it under any particular legal category of the English law.”

The facts of the present case are different. The debts were contracted for family necessity and benefit, and the claim is based not merely on the pious duty of the son to pay his father's debts not illegal or immoral, but on family necessity and benefit enjoyed by the members of the family.

So far as the first defendant is concerned, I am of opinion that the note is binding on him. As regards the second defendant, her mother, it is argued that when she signed the promissory note the whole of the sum of Rs. 1,230 found due at the settlement of 1910 was barred by limitation, and that as regards the subsequent items they consist of a few items of debit and mostly of items of credit from the income of the second defendant's

(1) (1917) I.L.R., 40 Mad., 581.

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lands; and that the credits are far in excess of the debits. This leaves her indebtedness practically the same as that of the previous settlement, the increase being due to interest. I have already given my reasons for holding that the first defendant is liable, and it appears both from the settlement of 1910 and 1913 that the second defendant was aware of the dealings and requested plaintiff to make the advances. The extent of the debits and credits subsequent to the settlement of 1910 is immaterial. It is not necessary that each of the executants of a promissory note should receive the consideration. When a promissory note is executed in respect of transactions which have gone on for some years and the items consist of advances which would be barred, and of subsequent dealings, I do not think the settlement can be impeached as to the items which would but for the settlement be barred, so long as there is no fraud or mistake. The statement in the promissory note is that the loans were made at the request of the second defendant, and she has not ventured to give evidence. Having regard to the fact that she owns lands which were managed by the plaintiff, the probabilities are that her signature to the pro-note and settlement was not taken as a mere matter of form, but that the plaintiff would not have made the advances but for her joining in the settlement. I am of opinion that the note is binding on her.

In the result, I agree with the conclusion arrived at by KRISHNAN, J., that the note is binding on the first and second defendants.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Kumaraswami Sastri.

SRI SRI SRI KANDAMANI DEVI (THIRD ACCUSED IN
SESSIONS CASE No. 2 OF 1922 ON THE FILE OF THE SESSIONS
COURT OF GANJAM), PETITIONER.*

1922,
January 27.

*Criminal Procedure Code (V of 1898), ss. 205, 353—Sessions
Judge—Personal attendance of accused—Power to dispense
with such attendance.*

A Sessions Judge has power to dispense with the personal attendance of an accused and allow him to appear by pleader during the Sessions trial.

Such a power may properly be exercised in favour of Pardanishin ladies at least until they are convicted.

PETITIONS under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of S. RANGANATHA MUDALIYAR, Sessions Judge of Ganjam, in Sessions Case No. 2 of 1922, and to dispense with the personal attendance of the petitioner.

The facts of the case are set out in the Order.

C. Sambasiva Rao for petitioner.

KUMARASWAMI SASTRI, J.—The third accused is a gosha lady and belongs to a respectable zamindar family of Gumsur. I am of opinion that the Sessions Judge has power to dispense with the personal attendance of the accused and permit her to appear by pleader during the Sessions trial. Section 205 of the Code of Criminal Procedure empowers a Magistrate to do so and section 353 of the Code of Criminal Procedure, which refers to the mode of recording evidence in trials, including Sessions trials, states that evidence shall be taken

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* Criminal Revision Case No. 98 of 1922 and Criminal Revision Petition No. 87 of 1922.

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in the presence of the accused except where personal attendance is dispensed with, in which case it shall be taken in the presence of his pleader. I do not think that there is anything in the Code to prevent the Sessions Judge from doing what a Magistrate is empowered to do as regards attendance by the accused and section 353 impliedly gives the power as Chapter XXIII, which relates to trials before High Courts and Courts of Session, is included in section 353. In *Emperor v. C. W. King*(1) it was held that the High Court has power under the provisions of section 353 of the Code of Criminal Procedure to dispense with the attendance of the accused during the Sessions trial. In *Raj Rajeshwari Debi v. The King-Emperor*(2), IMAN and CHAPMAN, JJ., directed pardanishin ladies to appear by pleader both in the Magistrate and Sessions Courts, subject to their having to appear in Court to hear sentence in case of conviction.

Having regard to the habits and customs of the country and the social stigma that attaches to gosha ladies breaking purda, I think it will be in the interests of justice that they should not be compelled to appear in public, at least until they are convicted.

On the merits, I think that, having regard to the nature of the evidence against the petitioner in the Committing Magistrate's Court, I will be exercising a proper discretion in allowing her to appear by pleader and dispensing with her personal attendance.

M.H.H.

(1) (1912) 14 Bom. L.R., 236.

(2) (1913) 17 C.W.N., 1248.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Devadoss.

SEETARAMARAJU (PLAINTIFF), APPELLANT,

1921,
December 16.

SUBBARAJU AND FOUR OTHERS (DEFENDANTS NOS. 2 TO 5 AND 1),
RESPONDENTS.*

Limitation Act (IX of 1908), ss. 6, 8 and 9—Lunatic's estate sold by his wife, who was neither his committee nor natural guardian—Adverse possession for 12 years—Suit by reversioners—Limitation.

A lunatic's wife who was neither his committee in lunacy nor his legal guardian sold his lands to the defendants in 1880. In 1882 the lunatic died and his widow who succeeded him as heir died in 1910. In a suit brought by the reversioners in 1917 for the recovery of the lands, it was contended on their behalf that the possession of the defendants could not be adverse to the lunatic, that upon his death it was adverse to his widow but not to the reversioners, and that the suit was, therefore, in time.

Held that adverse possession began in 1880, in the lunatic's life-time and that the suit was barred by limitation.

It cannot be stated as a general proposition that there could be no adverse possession of property which belongs to a lunatic or minor during the continuance of the lunacy or minority. The question in each case has to be decided with reference to the anterior relationship between the person taking possession and the minor or lunatic and to whether any circumstances exist which would entitle the Court to hold that the person who entered into possession did so under circumstances which would in law make him only an agent or bailiff of the minor or lunatic. Under the Limitation Act, lunacy or minority does not by itself prevent time from running as against the lunatic or minor, although an extended period is provided in such cases.

SECOND APPEAL against the decree of GANGADHARA SOMAYAJULU, Subordinate Judge of Ellore, in Appeal

* Second Appeal No. 1208 of 1920.

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Suit No. 137 of 1919, filed against the decree of U. VAMAN NAYAK, Additional District Munsif of Bhimavaram, in Original Suit No. 71 of 1917.

The facts are stated in the judgment.

P. Narayanamurti for appellant.—There can be no adverse possession of a lunatic's estate by the purchaser. The purchaser is a bailiff or trustee for the lunatic, bound to account to him for the rents and profits: see *Smyth v. Byrne*(1), *In Re Biss. Biss v. Biss*(2), *Wall v. Stanwick*(3).

P. R. Ganapati Ayyar for *V. Ramadoss*, with *K. Venkatarama Raju*, for the respondents.—Suit is barred by limitation. There can be adverse possession of a lunatic's estate. The purchaser was not a bailiff or trustee for the lunatic. Adverse possession began in 1880, the year of the sale. Sections 6, 8 and 9 of the Limitation Act govern the case. Reference was made to *Thomas v. Thomas*(4). The remarks of ROMER, L.J., in *In Re Biss. Biss v. Biss*(2) are obiter.

The Court delivered the following JUDGMENT :

This Appeal arises out of a suit filed by the plaintiff for a declaration that his vendor, the first defendant, was the nearest reversioner of the late Venkataraju and that the alienations of the immoveable properties mentioned in the plaint by Venkayya, the wife of Venkataraju, to the family of defendants Nos. 2 to 5 and that of defendants Nos. 6 to 11 are invalid and not binding on the plaintiff or the first defendant, for possession and mesne profits, which were assessed at Rs. 200 for the year 1913, and for subsequent mesne profits. Various pleas were raised by the defendants, the chief of which were that the first defendant was not the nearest reversioner of the late Venkataraju, that the

(1) (1914) 1 Ir. Rep., 53.
(3) (1887) 34 Ch. D., 768.

(2) [1903] 2 Ch., 40.
(4) (1855) 2 K. & J., 79.

sale-deed of 8th February 1913 in favour of the plaintiff was not bona fide and valid, that the alienations by the widow were for necessity and binding on the reversioners and that the suit was barred by limitation and *res judicata*. The District Munsif passed a decree in favour of the plaintiff but on Appeal the Subordinate Judge reversed the decree in so far as it related to item 1 in the plaint schedule and dismissed the plaintiff's suit. He held that Venkayya, the wife of Venkataraju, executed the sale-deed, dated 14th May 1880, on which the defendants relied and a copy of which was filed as Exhibit IX. He also held that the sale-deed was executed by her to discharge a debt due by her husband, that it bound her husband's reversioners, that the first defendant ratified the sale of the suit land by the wife of Venkataraju and that the suit was barred by limitation as the alienees from Venkayya had been enjoying the property from 1880 without interruption. The facts found are that during the life-time of her husband, Venkataraju, his wife Venkayya executed a sale-deed of the lands to Narasimharaju. Exhibit IX which is a copy of the deed, dated 14th May 1880, recites that Venkataraju borrowed Rs. 54-11-0 on 30th November 1877 and mortgaged the lands described in the document to him, that the amount due on the date of the sale-deed was Rs. 79-12-0, that Venkayya borrowed Rs. 10-4-0 to discharge other debts and that the land specified in the document was sold for Rs. 90. The deed winds up as follows :

"As my husband Venkataraju is not of a sound mind, I have to execute the said sale-deed. This is the jirayati sale-deed executed by me."

It is clear that so far as the sale is concerned Venkayya, who was neither the committee in lunacy nor the natural guardian of her husband Venkataraju who was alleged to be a lunatic, had no power

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to execute the sale-deed. Venkataraju died in 1882 and as the finding is that the alienees were put in possession on the date of the sale in 1880 they have been in possession under an invalid alienation by the wife of Venkataraju from 1880. Venkayya died in 1910 and the first defendant, who is found to be the reversioner, sold the property to the plaintiff in 1913. As the case is not one of an alienation by a widow, the suit does not fall under article 125 of the Limitation Act.

It is contended by Mr. Narayanamurti, for the appellant, that as Venkataraju was insane at the date of the sale by his wife and died insane, there could be no adverse possession against Venkataraju and that at his death adverse possession could only commence against his widow, in which case the reversioner would not be barred. The question is whether adverse possession can commence to run against a person who is insane. In *Smyth v. Byrne*(1) it was held that a person entering on the lands of a lunatic with notice of lunacy and of the rights of the lunatic becomes a bailiff in respect of the lunatic's estate in the lands and that where the lands are held by the lunatic under a contract of tenancy and a new letting is subsequently made to the person so entering such new letting will be deemed a graft on the old tenancy. O'BRIEN, L.C., observed that the same principle should be applied to lunatics as is applied to minors and that it was a well-known rule that if under certain circumstances a person enters upon a minor's property he becomes clothed with such a fiduciary relationship towards the minor that he cannot acquire the minor's estate for his own benefit. The facts of the case were that the plaintiff was certified to be of unsound mind and that shortly afterwards his sister came to live on his farm and took over the working

(1) (1914) 1 Ir. Rep., 53.

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and management, and before the expiration of the lease a fresh lease was entered into in favour of his sister. On these facts the Judges were of opinion that the sister was only a bailiff, the new letting being deemed only a graft on the old tenancy. In *In Re Biss. Biss v. Biss*(1), the question arose as to whether the renewal of a lease was to be treated as for the benefit of the old lessors. ROMER, L.J., in the course of his judgment observed :

"I now proceed to consider the cases with reference to the position of the person obtaining the renewal. The cases where the person has clearly occupied a fiduciary position in the matter including an executor, administrator, trustee or agent need not be dwelt upon, as they present no difficulty. I need only remark in passing that it must not be forgotten that if a stranger enters into possession of an infant's property he is to be regarded as acting as a bailiff or agent for the infant in respect of that property."

The learned Judge then proceeded to consider cases where the person renewing the lease did not clearly occupy a fiduciary position.

It is argued by Mr. Narayanamurti on the strength of the observations of ROMER, L.J., that, in the case of infants, strangers entering into possession should be deemed to be bailiffs or agents for the infants and on the strength of the observations of O'BRIEN, L.C., in *Smyth v. Byrne*(2), that the position of infants and that of lunatics is the same and that there could be no adverse possession by the purchaser from Venkayya as Venkataraju, the husband of Venkayya, was a lunatic at the date of the purchase.

For the respondents it is contended that the question as to whether possession by a stranger should be deemed to be adverse or not is dependant on the facts of each case, and that where there is no antecedent relationship between the person who enters into

(1) [1903] 2 Ch., 40.

(2) (1914) 1 Ir. Rep., 53.

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possession and the minor or lunatic such as would in equity fasten on the person so entering into possession a trust, actual or constructive, there is no reason why possession by the stranger adverse to the minor or lunatic should not give him absolute title after the expiration of the statutory period. It is pointed out that in the case of *Smyth v. Byrne*(1) the person who got a renewal of the lease was the sister who was living with the lunatic and that the observations of ROMER, L.J., in *In Re Biss. Biss v. Biss*(2) are only obiter as it was held in that case that no circumstances existed which would in law render the renewal a graft on the old tenancy. In *Wall v. Stanwick*(3) a widow to whom certain property was bequeathed during her life or widowhood with remainder to her infant children married again but continued to reside in and managed the property and received rents and profits and maintained the children throughout. One of the children married during minority and after some time ceased to be maintained out of the rents and profits. A suit was filed against the mother for an account. It was held that, although her second marriage divested her estate, the mother was in possession as bailiff for the infant children, and not as guardian by nurture or by leave of her children or as a trespasser and that she was therefore liable to account. KEKEWICH, J., observed :

" But Mrs. Stanwick continued in physical occupation of the Masons' Arms and in receipt of the rents and profits of the cottages. In what character? Guardianship by nurture (suggested by the defence) would not confer the rights required to justify the mother's acts, nor will any other specific guardianship suffice to explain the occupation and receipt of rents and profits from first to last, and it would be difficult and inconvenient to treat the character as changed from time to time, especially as some of the children have all along been and still are

infants. It will, I think, be safer and more correct to treat the widow as having occupied and received rents and profits as the bailiff of her infant children. Not only is this character known to the law, but it is presumed to exist wherever circumstances require it, that is, wherever it is proper to make a man accountable for the rents and profits of an infant's estate and he cannot be shown to have been in possession in some other character. This is fully explained by Vice-Chancellor Wood in *Thomas v. Thomas*(1) and by the late Master of the Rolls in *Howard v. Earl of Shrewsbury*(2) where the old cases on the subject are cited. Having regard to the strictures on the plaintiffs' pleadings it is not unimportant to observe that such a bailiff occupies a fiduciary position, so that he may properly be styled a trustee, as a testamentary guardian may be (see *Mathew v. Brise*(3) where the Statute of Limitations was held inapplicable on this ground). He is accountable because he fills that character, that is, because he is in possession not on his own behalf but as agent for some other person."

In *Thomas v. Thomas*(1) it was held that where a father entered upon the estate of his infant children the presumption was that he entered as their guardian and bailiff and that limitation would not begin to run against the children until they attained 21.

Sir W. PAGE WOOD, V.C., in delivering judgment observed :

" I do not accede to the argument that, because an infant can treat any stranger who has entered upon his land as his bailiff for the purpose of enforcing an account of the rents and profits received by such stranger, it, therefore, follows that the infant may in all cases treat such stranger as a bailiff, for the purpose of escaping from the effect of the Statute of Limitations. I think that it is open to considerable argument, especially as that Statute provides that ten years only shall be allowed after the termination of the disability of infancy for the person who has attained majority to assert his rights, a provision which, it has been justly observed, must be rendered altogether nugatory, if

(1) (1855) 2 K. & J., 79.

(2) (1874) L.R., 17 Eq., 378, 397.

(3) (1851) 14 Beav., 341.

(1) (1914) 1 Ir. Rep., 53.

(2) [1903] 2 Ch., 40.

(3) (1887) 34 Ch. D., 763.

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SUBBARAJU. it be held that in every case where a stranger enters upon an infant's estate he enters as bailiff because if that were so time would not begin to run against the infant until he attained 21."

After referring to the principle that possession is never considered adverse if it can be referred to a lawful title, he held that the entry on the property by the father who was the natural guardian and was maintaining them would be held to be an entry on their behalf and as their guardian, and was totally different from the case of a mere stranger entering upon the property under similar circumstances.

We do not think it can be stated as a general proposition that there could be no adverse possession of property which belongs to a lunatic or minor during the continuance of the lunacy or minority of the owner. The question has in each case to be decided with reference to the anterior relationship between the person taking possession and the minor or lunatic, and to whether any circumstances exist which would entitle the Court to hold that the person who entered into possession did so under circumstances which would in law make him only an agent or bailiff of the minor or lunatic. The scheme of the Limitation Act shows that though time begins to run against minors and lunatics an extended period of limitation is given. Section 6 provides that where a person entitled to institute a suit or make an application for the execution of a decree is at the time from which the period of limitation is to be reckoned, a minor, or insane or an idiot, he may institute the suit or make the application within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule to the Act, and that where the disability continued up to the death of such person his legal representative may institute the suit or make the application

within the same period after the death as would otherwise have been allowed from the time so prescribed ; and where the legal representative is also under disability at the date of the death he will have the same privileges as are conferred by clauses 1 and 2 to section 6. Section 8 provides that the period within which any suit must be instituted or application made will not be extended to more than three years from the cessation of the disability or the death of the person affected thereby. Section 9 provides that when once time has begun to run no subsequent disability or inability to sue stops it. Article 144 provides a period of 12 years from the date when the possession becomes adverse to the plaintiff. It seems to us from the provisions of the Limitation Act that lunacy or minority would not by itself prevent limitation from running as against a lunatic or minor and that in cases where it is clear that the person entering into possession was under no duty to the lunatic or minor and entered into possession for his own benefit and in assertion of a title hostile to that of the lunatic or minor, limitation would begin to run from the date when he so took possession though the lunatic would be entitled to file a suit within three years from the date when his disability ceases. If he died a lunatic, then the suit could be instituted by his legal representatives. In the present case, even assuming that Venkataraju died a lunatic, time began to run from the date of the sale-deed and a suit to recover possession of the property should have been filed by the widow. The fact that she had only a limited widow's estate in her husband's property would not prevent limitation from running : for, a Hindu widow is the legal representative of her husband and she is the person who on the death of the lunatic would be entitled to sue as representing the estate. The fact that she herself was the vendor would not prevent limitation from running.

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We are of opinion that in the present case time began to run from 14th May 1880, the date of the sale-deed, as there are no circumstances to suggest that the vendee entered into possession for the benefit of the deceased Venkataraju.

The Second Appeal therefore fails and is dismissed with costs.

N.B.

APPELLATE CIVIL.

Before Mr. Justice *Kumaraswami Sastri* and Mr. Justice *Devadoss*.

1921,
December 22.

RAMAYYA (PLAINTIFF), APPELLANT,

v.

KOTAMMA AND SIX OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), Arts. 141 and 142—Adverse possession of lands—Successive trespassers in continuous possession—Suit by true owner after twelve years—Limitation.

Adverse enjoyment of immoveable property for over twelve years, whether by a single person or by several persons in succession, even though they do not claim from one another, provided it is continuous and without a break, bars the true owner under article 142 of the Limitation Act.

Willis v. Earl Howe (1893) 2 Ch., 545, followed.

Agency Company v. Short (1888) 13 A.C., 793, explained.

SECOND APPEAL against the decree of F. A. COLERIDGE, District Judge of Guntūr, in Appeal Suit No. 40 of 1918, preferred against the decree of S. VENKATA SUBBA RAO, Subordinate Judge of Guntūr, in Original Suit No. 6 of 1917.

The facts are set out in the judgment.

* Second Appeal No. 1806 of 1920.

P. Narayanamurti, with *K. Kamanna*, for appellants.—The suit is in time as it was brought within 12 years from the date of the surrender in favour of sixth and seventh defendants. The suit property is property which Mallabattudu died possessed of. The reversioners can come in within twelve years after the surrender. Though adverse possession began during the life-time of Mallabattudu, his title to the properties is not extinguished inasmuch as the donee, his grandson, died before he prescribed for a period of twelve years. On the death of the donee the title reverted back to the donor, that is, the last male holder. After the donee's death his legal heir did not continue in possession but it passed to the donee's brothers and after their death to the widow of the last surviving brother. Punnayya's possession cannot be tacked on to that of his brothers as the latter are not his legal heirs. The possession of the brothers is adverse to the daughters of the last male holder, Mallabattudu, and after their death the reversioners will have twelve years' period. Article 141 of the Limitation Act applies to the facts of the case. *Ramachandra Balwant v. Balaji Ganesh*(1) is on all fours. Successive trespassers cannot tack on their possession unless one claims through the other, even though there is no break in the continuity of their possession. Plaintiffs are in time even if article 144 is applied: *Ramachandra Balwant v. Balaji Ganesh*(1), *Ram Lakhan Rai v. Gajadhar Rai*(2), *Agency Company v. Short*(3), *Lala Bharub Chandra Karpur v. Lalit Mohun Singh*(4), *Kaliaperumal Keerudayan v. Chidambaran Thanjiran*(5), *Chandrodaya Bhattacharjee v. Chandra-kala*(6).

(1) (1921) I.L.R., 45 Bom., 570.

(3) (1888) 13 App. Cas., 798.

(5) (1916) 29 I.C., 10.

(2) (1911) I.L.R., 33 All., 224.

(4) (1886) I.L.R., 12 Cal., 197.

(6) (1919) 49 I.C., 751.

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T. M. Krishnaswami Ayyar for T. V. Venkatarama Ayyar, with T. V. Ramanatha Ayyar, for respondent.— Last male holder, Mallabattudu, gave up or discontinued possession and therefore time began to run against his estate from the date of such dispossession. His legal heir, that is the daughter, did not bring a suit within twelve years. Article 142 applies to the case and the plaintiff's suit is barred: *Mohendra Nath v. Shamsunnessa*(1). Article 141 applies only to a case where the last male holder was in possession of the properties at his death. Successive trespassers can tack on if there is no break in the continuity of their possession: *Willis v. Earl Howe*(2).

The Court delivered the following JUDGMENT:

This Appeal arises out of a suit filed by the plaintiff as purchaser from the reversionary heirs of one Mallabattudu to recover possession of the properties specified in the plaint and the question is whether the suit is barred by limitation.

Mallabattudu, the last male holder of the properties, died in 1889, leaving two daughters, Ramamma and Govindamma. Ramamma died in 1914 and Govindamma, who is the fifth defendant, surrendered her estate to her sons who are the sixth and seventh defendants. They sold their rights to the plaintiff in this suit. The findings are that Mallabattudu, about two years before his death, made an oral gift of the suit properties to his grandson, Punnayya, the son of his daughter Ramamma, that the properties were managed by Subbarayadu, the elder brother of Punnayya as Punnayya was a minor, that Punnayya died in 1894 during minority, that the properties were thereafter enjoyed by Punnayya's brothers, Subbarayadu and two others, that Subbarayadu was the last

surviving member of Punnayya's family and that on Subbarayadu's death the properties were sold by Subbarayadu's daughters to the third defendant. It is argued for the appellant that as the gift to Punnayya was oral it was invalid, that consequently Punnayya was in possession as trespasser, that on Punnayya's death his heir would be his mother, that, as Subbarayadu continued in possession, Subbarayadu's possession was also that of a trespasser, that, as neither Subbarayadu nor Punnayya completed adverse possession of twelve years, they could not tack on the possession of one to the other and that the plaintiff claiming through the nearest reversioner is not barred. The contention for the respondents is that there was no break in the possession so as to revest the properties in the rightful owner, that Punnayya and Subbarayadu cannot be treated as successive trespassers and that, in any event, the real owner having been out of possession for over twelve years the suit is barred by limitation.

It is clear in the present case that as Mallabattudu himself gave up possession, the case would not fall under article 141 of the Limitation Act as that article applies to cases where the last full owner was in possession at the time of his death. As pointed out by MOOKERJEE, J., in *Mohendra Nath v. Shamsunnessa*(1) time begins to run against the last full owner if he himself was dispossessed and the operation of the Law of Limitation would not be arrested by the fact that on his death he was succeeded by his widow, daughter or mother, as the cause of action cannot be prolonged by the mere transfer of title. We are of opinion that article 142 of the Limitation Act applies to the facts of the present case. It is clear from the findings that Mallabattudu, when he made a gift of the

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(1) (1915) 21 C.L.J., 157, 164.

(2) [1893] 2 Ch., 545.

(1) (1914) 21 C.L.J., 157, 164.

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properties to his grandson and transferred the patta in his name, discontinued his possession. Discontinuance of possession has been explained by FRY, J., in *Rains v. Buerton*(1) as taking place where the person in possession goes out and is followed into possession by another person. In all cases where the person who was in possession at one time and discontinued possession or was dispossessed seeks to eject a person in possession he has to show that he was in possession within 12 years before the suit. We need only refer to *Secretary of State for India v. Krishna Moni Gupta*(2). We do not think that on the facts of the present case it can be said that there have been independent trespasses by successive persons so as to give the plaintiff twelve years against each successive trespasser. Mr. Narayanamurti has referred us to *Agency Company v. Short*(3) as authority for the proposition that in cases of successive trespassers the limitation ceases to run against the lawful owner of land after an intruder has relinquished his possession. Lord MACNAGHTEN after dealing with the contention that, if the statute once commenced to run, it would not stop except by the owner going into possession and so getting, as it were, a new departure, observes :

"Their Lordships are unable to concur in this view. They are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make any entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession

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of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant. There is not, in their Lordships' opinion, any analogy between the case supposed and the case of successive disabilities mentioned in the statute. There the statute 'continues to run' because there is a person in possession in whose favour it is running."

This case does not help him as it is not shown in the present case that anybody gave up possession which was taken up by a fresh trespasser. It is argued by Mr. Narayanamurti that on the death of Punnayya it must be taken that there was an interruption in the possession and that there was an interval between Punnayya's death and Subbarayadu's taking possession in his own right however minute the interval may be and that except in the case of succession or devolution all other cases would fall within the principle enunciated in *Agency Company v. Short*(1). We do not think that there is anything in the case to support this extreme contention. In *Willis v. Earl Howe*(2) a person trespassed upon property and another alleging himself to be his brother when he was not his brother continued the trespass. It was argued that they must be treated as separate trespassers as they were not brothers. KAY, L.J., observed :

"It was suggested in reply that, as the alleged brother was not really the brother of George, his taking possession formed a new departure, and that statute would begin to run from that entry, and that the previous possession of George was not material. The effect of that would be that if a series of occupiers, not claiming under one another, kept out the real owner for 100 years, time would only run against him from the moment when the last of such occupiers entered into possession.

(1) (1880) 14 Ch. D., 537.

(2) (1902) I.L.R., 29 Calo., 518.

(3) (1898) 18 App. Cas., 793.

(1) (1888) 13 App. Cas., 793.

(2) [1893] 2 Ch., 545.

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I am of opinion that this is not the law. A continuous adverse possession for the statutory period, though by a succession of persons not claiming under one another, does, in my opinion, bar the true owner. I desired to consider the case to which I referred during this part of the argument, but which was not then before the Court, *Agency Company v. Short*(1). In that case there had been an adverse possession of land for some time short of the statutory period which was then abandoned, and the land left vacant, and after the statutory period had elapsed, but within 20 years before the plaintiffs' action, the defendant, or his predecessor in-title, took possession. The law is thus stated in the language of Lord MACNAGHTEN (*already set out above*). These observations were made in a case in which, as I have already noticed, the defendant or his predecessors had not been in possession for the statutory period. If this defence could prevail, it would be enough for a man who entered the day before the action was brought to say that the true owner had left the possession vacant for more than 12 years. But it was not meant that if the possession had not been vacant, but some one or other had been in adverse possession during the twelve years, such possession would not bar the true owner, unless all such occupants could show a title derived from one another."

The law is thus stated in Dart on Vendors and Purchasers, Vol. I, seventh Edition, page 474 :

"In order that the title of the true owner may be barred by the adverse possession of a trespasser, or a series of trespassers, the possession by them must be continuous, and so long as it is continuous it is immaterial whether they claim through one another or independently : but if a period of time should elapse, however short, after the abandonment of one trespasser who has not been in possession for the full statutory period and the entry of another, the title of the true owner is, as from the time of such abandonment, restored to him without any entry or act done on his part, for the statute does not apply to a case of a want of actual possession by the true owner, but only to cases where the owner is out of possession and another is in possession for the prescribed time."

(1) (1888) 13 App. Cas., 798.

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It is no doubt true that on the death of Punnayya during minority his mother would be his heir. But it appears from the facts of the present case that Punnayya and his brother Subbarayadu and the other brothers were undivided and that their mother was living with them. Subbarayadu would therefore be the presumptive reversioner on the death of the mother and it is clear from the documents filed that Punnayya's mother was a consenting party to Subbarayadu enjoying the properties after Punnayya's death. She was living with them and raised no objection. Under these circumstances we find it difficult to hold that there was a fresh trespass by Subbarayadu after the death of Punnayya. There was continuity of possession, the person holding possession being the next presumptive heir of the deceased. As the plaintiff has not proved that he or his predecessor-in-title was in possession of the properties within twelve years before the date of the suit, we are of opinion that the suit is barred and was rightly dismissed.

The Second Appeal fails and is dismissed with costs.

N.B.

PRIVY COUNCIL.*

1922,
March 9.GOPALA CHETTY, SINCE DECEASED, AND ANOTHER
(DEFENDANTS), APPELLANTS,

v.

VIJAYARAGHAVACHARIAR (PLAINTIFF), RESPONDENT.

[On appeal from the High Court of Judicature
at Madras.]*Partnership—Limitation—Dissolution—Assets received by Partner—Right to sue for Share—Taking accounts—Indian Limitation Act (XI of 1908), Sch. I, art. 106—Indian Contract Act (IX of 1872), s. 265.*

If a partnership has been dissolved and accounts have been wound up, the mutual rights and obligations of the partners therein being discharged, and an asset which has been forgotten or treated as valueless afterwards falls in, it ought to be divided between the partners in proportion to their shares in the partnership. But if no account has been taken, the proper remedy of a partner in respect of an asset so received is to have an account taken; if his right to sue for an account is barred by limitation, he cannot sue the partner who has received the asset for a share of it.

Merwanji Hormusji v. Rustomji Burjorji (1882) I.L.R., 6 Bom., 628; *Sokkanadha Vannimundar v. Sokkanadha Vannimundar* (1905) I.L.R., 28 Mad., 344, and decisions following them, disapproved.

Observations in *Knox v. Gye* (1871) L.R., 5 H.L., 656, explained.

APPEAL (No. 128 of 1920) from a judgment and decree (November 19th, 1918) of the High Court in its appellate jurisdiction, affirming an interim decree of that Court in its Original Civil Jurisdiction.

The respondent as plaintiff in a former suit against the appellant had claimed an account of a partnership which had subsisted between them. By a decree made

by a Judge of the High Court on February 25th, 1915, that suit was dismissed on the ground that the partnership had been dissolved in April, 1910, and that consequently the suit was barred by the Indian Limitation Act (XI of 1908), Schedule I, article 106. On April 30th, 1915, the respondent brought the present suit in which he alleged that certain specific sums had been received by the appellants on the partnership account, and claimed his partnership share. The items were set out in the schedule to the plaint, and were stated to have been received at various dates all of which were before the date of the decree, and the majority before the previous suit was instituted. The facts are more fully stated in the judgment of the Judicial Committee.

The trial Judge, KUMARASWAMI SASTRI, J., made an interim decree declaring that the plaintiff was entitled to a fourth share in such items contained in the schedule as had been received by the defendants, with interest, and referring the suit to chambers to take an account, with a direction that if on taking a general account of the dealings of the partnership any sum was due by the plaintiff it should be set off against his share of the sums so received and interest.

An Appeal was heard by Sir JOHN WALLIS, C.J., and NAPIER, J., and the decree of the trial Judge was affirmed, subject to a slight variation as to the interest to be recovered. The learned Judges said that they were not prepared to go behind the previous decisions of the Madras Court hereinafter mentioned. They said "the decisions would appear to proceed upon the view that the receipt of assets by a former partner after dissolution gives rise to a fresh cause of action, otherwise it would be quite impossible to distinguish *Knox v. Gye*(1)."

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* Present :—Viscount HALDANE, Lord PHILLIMORE and Mr. AMER ALI.

(1) (1871) L.R., 5 H.L., 656.

Sir George Lowndes, K.C. and A. M. Talbot for the surviving appellant.—The suit was not maintainable. It would not have been so even if the previous suit had not been brought and dismissed. The only right of action which the Indian Contract Act gives a partner in respect of his share of profits is that given by section 265, namely to have an account taken and the surplus amounts, if any, distributed. That agrees with the English law of partnership, both at common law and in equity: *Richardson v. The Bank of England*(1), *Marshall v. Maclure*(2), *Lindley on Partnership*, 8th edition, page 402. The Indian Contract Act is exhaustive as to matters with which it deals: *Mohori Bibee v. Dharmodas Ghose*(3). In the present case the High Court followed its earlier decisions in *Sokkanadha Vannimundar v. Sokkanadha Vannimundar*(4), *Thiruvengada Mudaliar v. Sadagopa Mudaliar*(5) and *China Kondian v. Narasappa Naidu*(6). Those decisions all followed *Merwanji Hormusji v. Rustomji Burjorji*(7) in which an erroneous view was taken of dicta of the House of Lords in *Knox v. Gye*(8). The true effect of those dicta is merely that if a general account has been taken and adjusted, the executor of a deceased partner can recover from a surviving partner in respect of an asset which the latter has since got in. Apart from those dicta, which do not apply here, the decision is in the appellants' favour. *Merwanji Hormusji v. Rustomji Burjorji*(7) was based on observations of GREEN, J., in *Dayal Jairaj v. Khatar Ladha*(9). It was, however, overlooked that in that case it was expressly held that the transaction on which the plaintiff based his claim to contribution was wholly outside the partnership, and that the claim

(1) (1888) 4 My. & Cr., 165, 171; s.c., 41 E.R., 65.
(2) (1885) 10 App. Cas., 325, 334.

(3) (1903) I.L.R., 30 Cal., 539 (P.C.), 548; 30 I.A., 115, 125.

(4) (1905) I.L.R., 28 Mad., 344. (5) (1911) I.L.R., 34 Mad., 112.

(6) (1914) 26 M.L.J., 221. (7) (1882) I.L.R., 8 Bom., 628.

(8) (1871) L.R., 5 H.L., 656. (9) (1875) 12 B.H.C.R., 107.

and judgment were founded on *Sedgwick v. Daniell*(1). The judgment in *Merwanji Hormusji v. Rustomji Burjorji*(2) was adversely criticised, though followed, by CANDY, J., in *Rivett-Carnac v. Goculdas Sobhanmull*(3). On Appeal the decision of CANDY, J., was affirmed(4) on a different ground and upon Appeal to the Privy Council, *Bhagwandas v. Rivett-Carnac*(5), the present question did not arise. In *Nehal Devi v. Kishore Chand*(6) the Punjab Court declined to follow *Merwanji Hormusji v. Rustomji Burjorji*(2). But even if the Indian decisions relied on below were rightly decided they do not apply in this case, because here the plaintiff had already brought a suit for an account, and that suit had been dismissed. All the payments in respect of which the present suit was brought were made at dates earlier than the judgment in the previous suit. The claim was therefore barred by *res judicata*; for that purpose the date of the judgment is the material date: *Vinayak v. Dattatraya*(7). The payment gave rise to no new cause of action for the reasons already advanced; that view was specifically stated in *Knox v. Gye*(8). The present suit was, therefore, also barred both by Order II, rule 2, and by the Indian Limitation Act, 1908, Schedule I, article 106.

Parikh for the respondent.—In the case of an Indian partnership, a partner can sue to recover his share of a specific partnership debt paid to another partner, subject to the defendant's right to have a general account taken. That rule is established in India by the series of cases dating from 1875 already referred to, and is part of the partnership law of India. The rule being established in

(1) (1857) 2 H. & N., 319.

(2) (1882) I.L.R., 8 Bom., 628.

(3) (1898) I.L.R., 20 Bom., 15.

(4) *Ibid.*, at p. 39.

(5) (1899) I.L.R., 23 Bom., 544 (P.C.), L.R., 26 I.A., 32.

(6) (1910) XLV P.R., 273, 298.

(7) (1902) I.L.R., 26 Bom., 661, 668.

(8) (1871) L.R., 5 H.L., 656, 673, 687.

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India, it should not be interfered with unless it conflicts with justice, equity and good conscience, which is not the case. Further, it is a rule of procedure rather than law, and is therefore less open to alteration on grounds founded upon the law or practice in England. The present suit was in the nature of an action for money had and received, and arose out of a partner's obligation to account enacted by sections 258 and 263 of the Indian Contract Act. In England actions of an analogous kind have been maintained: Lindley on Partnership, 8th edition, pages 628 to 630. The actual decision in *Knox v. Gye*(1) depended upon the effect of the section of the Statute of Limitations there considered. The plaintiff in that case was seeking a general account, and the observations of Lords HATHERLEY, COLONSAY, and CHELMSFORD show that if the plaintiff had framed his action suitably he would have recovered. Those observations strongly support the respondent's claim. The fact that the claim is not by the representative of a deceased partner makes no difference in India, because under section 45 of the Indian Contract Act one partner can give a good discharge for a debt received after the dissolution and before winding-up. The real decision in the case decided by the Punjab Court turned on considerations different from the present. Order II, rule 2, is not a bar, because the receipt of the sums gave rise to a new cause of action.

Sir George Lowndes, K.C., in reply.—The rule of justice, equity and good conscience is the rule of English law unless it conflicts with Indian conditions; *Waghela Rajsangji v. Sheikh Masudin*(2). There is no such conflict here for the Indian law of partnership is founded entirely upon the English law.

(1) (1871) L.L., 5 H.L., 658, 673, 687.

(2) (1887) L.R., 14 I.A., 89, 96

The JUDGMENT of their Lordships was delivered by Lord PHILLIMORE.—About the year 1908 a partnership was formed between Narasimhachariar, the respondent Vijayaraghavachariar, the appellant Gopala now deceased and the appellant Ethirajulu, who for the purposes of this Appeal also represents the first appellant. Narasimhachariar having died in 1911, a suit was filed on 15th November, 1913, in the High Court at Madras by his adopted son against the respondent and the two appellants, praying for partnership accounts, and payment to him of his adopted father's share. The plaintiff in this suit was, in some manner not now important to consider, settled with, and retired from the suit and by an order of the High Court the respondent was transposed from his position as defendant and became plaintiff, continuing the suit against the other defendants, the present appellants.

The suit came on for hearing before a Judge of the High Court on 26th February, 1915, when it was found that the partnership had been dissolved before the death of Narasimhachariar, namely in April, 1910, and that therefore the suit was barred by article 106 of Schedule I of the Indian Limitation Act, 1908, which provides that a suit for accounts and a share of the profits of a dissolved partnership must be brought within three years of the date of dissolution. The respondent did not appeal. But on 30th April of the same year he launched a second suit against the present appellants, which is now in question before their Lordships.

In this suit, after setting out the proceedings in the previous suit and admitting that he had become disentitled to claim a general account and the payment to him of what might be found due and payable on the taking of a general account, he said that the sum of Rs. 18,842 had been received by the appellants in various

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payments on various dates from debtors to the old firm, and he claimed his quarter share in this total sum. The appellants put in a written statement in which they denied that they had received any assets of the firm, said that if the accounts were to be taken the respondent would be found to be indebted to the firm, pleaded the Indian Limitation Act, and that the suit was barred by *res judicata* and certain other defences. The suit was tried before KUMARASWAMI SASTRI, J., who gave judgment on the 27th March, 1916, deciding the bulk of the issues in favour of plaintiff, now respondent, and giving him a declaration that he was entitled to a quarter share of the amount claimed and ordering an account to be taken with a view to showing whether there was any set off in respect of sums which might be due from the respondent to the appellants. By the schedule to the decree it appeared that approximately Rs. 11,000 of the sum claimed had been received before the institution of the first suit, and the whole of the balance before the decree in the first suit. The learned Judge held that though a general partnership account was barred by the Indian Limitation Act and by the decision in the first suit, there was nevertheless a right in a partner to sue his other partners for his share of the assets of the partnership, for which the period of limitation would be six years and not three; and that, therefore, the second suit had been brought in time. The learned Judge came to this conclusion on the authority of certain cases decided in the High Court of Madras, following earlier decisions in the High Court of Bombay.

The present appellants appealed to the High Court in its appellate jurisdiction. The Appeal came on before Sir JOHN WALLIS, C.J., and NAPIER, J., and was dismissed, the learned Judges saying that they were not prepared to go behind three Madras decisions to the effect that a

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cause of action arises from the receipt, after dissolution, of partnership assets by a former partner.

They observed that these decisions appeared to proceed upon the view that the receipt of assets by a former partner after dissolution gives rise to a fresh cause of action. Otherwise, as they said, it would be quite impossible to distinguish the decision in *Knox v. Gye*(1.) It is from this dismissal that the present Appeal is brought.

Though in the opinion of the Appellate Judges the case of *Knox v. Gye*(1), unless it can be distinguished, would destroy the case of the respondent, it so happens that it is upon a reading of certain passages in the speeches of the noble Lords who took part in that judgment that the series of cases in the Bombay and Madras High Courts, upon the authority of which judgment has been given for the respondent, proceed. It is, therefore, important to begin the consideration of the law with a careful analysis of that case.

Gye was lessee of the Covent Garden Theatre and for the purpose of the concern obtained in 1853 a considerable sum of money from one Thistlethwayte on terms of partnership. Thistlethwayte died in 1854 making Knox his executor. Knox in the second bill which he filed (which was the one that came under consideration in the House of Lords) contended that thereafter he and Gye continued the partnership. In 1854 negotiations were entered into with one Hughes for the temporary use of Her Majesty's Theatre, and a sum of £5,000 was paid to Hughes in advance for this purpose. Hughes did not carry out his share of the bargain. Gye sued him for the £5,000 and recovered judgment, but not succeeding in getting the money, he ultimately

(1) (1871) L.R., 5 H.L., 656.

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accepted, in 1862, the sum of £2,500 by way of compromise. In 1856, the Covent Garden Theatre was burnt down and Gye took the Lyceum Theatre. In October, 1864, Knox filed the bill against Gye, praying for accounts from the date of the original advance by Thistlethwayte, for the winding up of the alleged partnership between Gye and Thistlethwayte, that Knox might have his share of the sum advanced by Thistlethwayte, including a share of the money recovered or which ought to have been recovered from Hughes, and a share of the profits of the partnership. The answer set up by Gye in substance pleaded that Thistlethwayte's share was confined to the business of the old theatre, the whole capital of which was lost by the fire; that Knox was not entitled to any accounts; that his rights if any arose at law and not in equity; and that whichever way they arose, the Statute of Limitation was a good answer.

The Vice-Chancellor, Sir WILLIAM PAGE WOOD, made a decree in favour of Knox, being of opinion that the Statute of Limitation did not apply, either as regards the money received from Hughes, which he treated as an equitable claim enforceable in equity, or as regards the share of Thistlethwayte in the partnership, the Statute being prevented from applying to that part of the claim because of the fiduciary relation between Thistlethwayte and Gye, and by the fact that the money recovered from Hughes was received within six years before the institution of the suit.

On Appeal the Lord CHANCELLOR, Lord CHELMSFORD, reversed this decree. When the case came on for hearing before the House of Lords, the House was composed of Sir WILLIAM PAGE WOOD, now become Lord HATHERLEY and Lord CHANCELLOR, Lord CHELMSFORD and Lords WESTBURY and COLONSAY. At the close of the appellant's case the House was of opinion that the partnership

never extended to the Lyceum business, and counsel for the respondent were directed to confine themselves to the argument upon the Statute of Limitation. It was apparently considered that if the Statute of Limitation was to be applied, the right of Knox accrued in December, 1854, upon the death of Thistlethwayte, the partnership being dissolved by his death, and that the bill not being filed till 1864 was out of time; and with the possible exception of Lord HATHERLEY, the noble and learned Lords who composed the House held that the receipt of money from Hughes more than six years after the partnership was dissolved did not take the case out of the operation of the Statute. If, therefore, the Statute was to be applied it constituted a good defence. The matter then remaining for decision was whether this was a case where equity followed the law, and consequently the relief was barred. This was so held, Lord HATHERLEY dissenting, and the suit was accordingly dismissed.

Now it will be observed that the sum of £2,500 was received within the statutory period, and its receipt was the receipt by Gye of a partnership asset.

The case would seem, therefore, to be in point, and (the suit having been dismissed) adverse to the present respondent. But as the suit was one for a general account and not merely or even by way of addition to recover Knox's share of the sum received from Hughes, and as there are in the speeches of the noble and learned Lords some passages where a case like the present is put by way of hypothesis, the decision in *Knox v. Gye*(1), need not be taken for the purposes of the present judgment as laying down a final determination of the law on this point.

Nevertheless the observations in that case when carefully considered do not warrant the construction

(1) (1871) L.R., 5 H.L., 656.

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which has been put upon them by some of the Courts in India, but on the contrary warrant the conclusion to which independently of authority a little clear thinking leads.

Lord HATHERLEY, for the purposes of his observations, takes the case of a partnership dissolved by death and an account being taken "that everything which could be ascertained had been then ascertained and adjusted, that the account was complete and that releases were given"—releases which as he says "could only go to the extent of the claim that then existed against the surviving partner." He assumes that in that case an asset for which no allowance has been made falls in and is received by the surviving ex-partner; and he holds that in such a case the executor of the deceased ex-partner could claim his share.

Lord COLONSAY with a similar train of thought speaks of a sum of money "unexpectedly recovered."

Lord CHELMSFORD says :

"It was said that upon payment of the debt by Hughes a new right had accrued to the appellant. But the right to sue for what? The answer must be for an account. But that he was entitled to all along, and the account must have included this very debt of Hughes, the receipt of which is supposed to have created a new right to an account."

It is true that there is later on in his speech some rather vague language which may have led to his having been supposed to take the view that even when partnership accounts cannot be taken a suit may be brought for a specific item; but the whole tenor of his reasoning shows that he is contemplating the circumstances supposed by Lords HATHERLEY and COLONSAY. Lord WESTBURY's language is striking—he is not contemplating this particular case, but discussing the effect of the Statute of Limitation. He says :—

"It will be asked whether the bar by statute can be greater

than a release between the parties. In the answer to that question the nature of the release must be required to be stated. If on an account stated a release is given, the release will be limited to that account, and will not bar the right of an executor to have an account of subsequent receipts. But if the release be of the right to an account altogether, then the release will be exactly equivalent to the bar here created by the statute and will bar all right whatever to claim the benefit of any subsequent receipt by the accounting party."

The rule of law then is the following :

If a partnership has been dissolved and the accounts have been wound up and each partner has paid what he has to contribute to the debts of the partnership and received his share of the profits, the mutual rights and obligations having been thus all discharged, and then it turns out afterwards that there was some item to the credit of the partnership which was either forgotten or treated as valueless by reason of the supposed insolvency of the debtor or for any other cause, which item afterwards becomes of value and falls in, it ought to be divided between the partners in proportion to their shares in the original partnership. There is no reason why one should have it more than the other.

The case will not often occur. If the debt is incurred to the firm and both the ex-partners are alive the debtor can only safely pay upon the receipt of both, for the agency of each for the other has ceased with the dissolution of partnership, and both receiving and being in possession each can insist upon his proper share.

Lord HATHERLEY points out the most probable occasion when it would arise, namely, when one of the partners is dead and the debt has accrued at law to the surviving partner who thus becomes solely possessed of the former partnership item; and he says that in such a case the executors of the deceased ex-partner would have a right

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to recover their testator's share from the ex-partner who has received the whole. It is not so certain that this particular case would arise in India by reason of the provisions of section 45 of the Indian Contract Act, upon which section apparently different decisions have been given in the several High Courts in India. (See Sir F. Pollock's work on the Indian Contract Act, Second Edition, page 235.) It is, however, possible to conceive of other cases in which this principle might have to be applied. A partner might contract really for the partnership, but apparently as sole principal and in that capacity be the sole recipient of a partnership item.

At any rate, in all cases where for any reason it did occur that after the dissolution and complete winding up of a partnership an asset which had not been taken into account fell in, it ought to be divided between the ex-partners or their representatives according to their shares in the former partnership.

If on the other hand no accounts have been taken and there is no constat that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken; and if it is too late to have recourse to that remedy, then it is also too late to claim a share in an item as part of the partnership assets, and the plaintiff does not prove, and cannot prove that upon the due taking of the accounts he would be entitled to that share. It might well be the case that one of the reasons why no final balancing of accounts took place was that A owed the partnership so much money that it was anticipated that B would hereafter receive a particular item which would operate substantially to balance the claim.

The principle above set forth being reasonably clear and intelligible, it remains for their Lordships to discuss certain decisions in the Indian Courts.

The first case on this matter was *Dayal Jairaj v. Khataw Latha*(1), decided in the year 1875. The Judgment in that case rested upon other and incontrovertible grounds, but there were *obiter dicta* in the course of the judgment which no doubt would help the present respondent. These *obiter dicta* were relied upon by LATHAM, J., in *Merwanji Hormusji v. Rustomji Burjorji*(2), decided in the year 1882. That decision is no doubt in point and in favour of the respondent; but it is to be observed that it was largely based upon the *obiter dicta* in the previous case.

The third Bombay case was *Rivett-Carnac v. Goculdas Sobhanmall*(3). CANDY, J., sitting as a single Judge in the first Court criticized the previous Bombay decisions, but said that he was bound by them. Accordingly he held that though a claim for a general partnership account was barred by limitation a claim for a share of moneys received by the partnership within the period of limitation was not barred; that the plaintiff was entitled to recover Hemabai's and Gokuldas' shares of the said money; and that the second defendant was entitled to set off against this his share of certain moneys received by the plaintiff as part of the assets of the said partnership. The High Court in appeal held that the respondent's claim to an account of the partnership dealings was not barred by limitation because under section 17 of the Limitation Act (Act XV of 1877) when a person, who, if living, would have a right to sue, has died, the period of limitation is to be computed from the time when there is a legal representative of such person capable of instituting the necessary suit, and gave the plaintiff a decree for the assets which he claimed. The case came on appeal to

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(1) (1875) 12 B.H.C.R., 97.

(2) (1882) I.L.R., 6 Bom., 628.

(3) (1895) I.L.R., 20 Bom., 15.

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Her Majesty in Council in 1898, and is reported as *Bhagwandas v. Rivett-Carnac*(1). This Board agreed with the decision of the High Court that the claim was not barred by the Limitation Act, but their Lordships thought that the decree given by the High Court was too wide, and directed an account to be taken of the partnership transactions. They made no observations on the particular point now under consideration, and the case may be left out of consideration except to the extent to which it embodies the criticisms of CANDY, J.

Their Lordships now turn to the Madras cases. In *Sokkanadha Vannimundar v. Sokkanadha Vannimundar*(2), decided on appeal by the High Court in 1904, the decision in *Merwanji Hormusji v. Rustomji Burjorji*(3), was followed as an authority, and reasons were superadded why in the opinion of the learned Judges it was right. One passage may usefully be quoted :

“Even on principle it would seem that this conclusion is the better one, for why should the fact that a suit for a general account is no longer maintainable be used to secure to some of the partners exclusively the benefit of realization of assets made under circumstances which raise no question of limitation with reference to a claim strictly confined to a share of what was realized. Of course, to allow such a claim to be maintained without the defendant being at liberty to go into the whole accounts and if possible defeat the plaintiff's claim by showing that the net balance is against the plaintiff would be quite unjust. The view we follow avoids such undesirable results while it secures to all the partners their fair and proper shares in assets with reference to which no question of lapse of time is capable of being raised under the law.”

With great deference this reasoning begs the question. How is it to be known that some of the partners would exclusively benefit by the realization of assets

which come in after dissolution? To meet this objection the learned Judges assume that accounts may be taken and that they have done enough for the ex-partner who is sued in saying that he may have the accounts taken. But if the policy of the law be that after the period of limitation no accounts shall be taken, for the excellent reason that materials for taking such accounts may have disappeared, it is not legitimate to say to the person sued, “Either pay on the footing that accounts have been taken which we know have not been taken and on the footing that all matters have been squared up between you and your partner when we have no knowledge that there has been any such squaring up, or submit to that taking of accounts against which the legislature has protected you.”

Thiruvengada Mudaliar v. Sadagopa Mudaliar(1), also referred to in the judgment of the High Court in the case now under Appeal may be taken to be to the same effect.

On the other hand, the Chief Court of the Punjab has expressed its inability to follow these cases, *Nehal Devi v. Kishore Chand*(2).

Their Lordships have no information as to the matter having come before the High Court of Calcutta.

These decisions having been thus analysed appear to rest upon some *obiter dicta* which do not purport to express Indian Law, but are the result of the construction which some learned Judges have put upon the decision of the House of Lords in *Knox v. Gye*(3), and inferences drawn from that decision, and except for the reasoning upon which their Lordships have already commented in *Sokkanadha Vannimundar v. Sokkanadha Vannimundar*(4), to have no other basis. As their Lordships have

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(1) (1899) I.L.R., 23 Bom., 544 (P.C.), L.R., 26 I.A., 632.
(2) (1905) I.L.R., 28 Mad., 344. (3) (1882) I.L.R., 6 Bom., 628.

(1) (1911) I.L.R., 34 Mad., 112.
(3) (1871) L.R., 5 H.L., 656.

(2) (1910) XLV P.R., 273, 298.
(4) (1905) I.L.R., 28 Mad., 344.

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already pointed out, the *obiter dicta* in the Bombay High Court are founded upon a misapprehension of what took place in *Knox v. Gye*(1).

The present case is a striking illustration of the mischief which might result from following the conclusion at which the learned Judges in the Court of Appeal have arrived. The very items for which the respondent is now suing were actually items which would have come into the account on his claim against the appellants for a partnership account in the suit in which he failed.

As their Lordships have arrived at this conclusion, it is unnecessary to consider the further point raised on behalf of the appellants that the dismissal of the previous suit constituted the bar of *res judicata*.

Their Lordships will humbly recommend His Majesty that the Appeal be allowed and that the suit be dismissed and that the appellants have their costs here and below.

Solicitor for appellants: *Douglas Grant*.

Solicitor for respondent: *John Josselyn*.

A.M.T.

APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.O., Chief Justice, Mr. Justice Oldfield, Mr. Justice Phillips, Mr. Justice Devadoss, and Mr. Justice Venkatasubba Rao.

P. AYYAKUTTI alias VENKATACHALAM PATTAR
(SECOND PLAINTIFF), APPELLANT,

v.

P. S. KRISHNA PATTAR AND SIX OTHERS (DEFENDANTS 1, 3,
4 AND LEGAL REPRESENTATIVES OF SECOND, FIFTH AND SIXTH
DEFENDANTS), RESPONDENTS.*

Malabar Law—Santathi Brahmaswom tenure—Alienation by tenant—Whether landlord has right of re-entry.

(1) (1871) L.R., 5 H.L., 656.

* Second Appeals Nos. 367 and 268 of 1918.

In the case of lands in Malabar held on Santathi Brahmaswom tenure, the landlord has no right of re-entry on alienation of the land by the tenant.

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SECOND APPEALS against the revised decrees of K. A. KANNAN, Temporary Subordinate Judge of Palghat at Calicut, in Appeal Suits Nos. 770 and 771 of 1913 respectively, preferred against the decrees of A. V. RATNAVELU PILLAI, District Munsif of Alattur, in Original Suits Nos. 172 and 171 of 1912 respectively.

In Original Suit No. 172 of 1912 the plaint set forth that the plaint lands belonged in jenm to the Erimayur Cherikal of the first plaintiff's stanom and were demised to Sundaram Pattar deceased of the first defendant's family by the then Eralpad Raja on the understanding that he paid 63 paras of paddy every year to the Vadakunatam Devaswom for the performance of the usha puja in that Kshetram and 4 paras to the Erimayur Cherikal besides the revenue due to Government and that he should also pay Purushandaram. In accordance with these terms Sundaram Pattar as well as first defendant had been in possession of the suit lands and acted up to the terms of the contract till 1071 (Malabar year). In 1072 they alienated the lands against the condition of the demise thereby rendering themselves liable to surrender the lands and plaintiffs sued for possession with arrears of rent. The Munsif dismissed the suit on the ground that the melcharth granted by first plaintiff to second plaintiff was not bona fide and valid. The Subordinate Judge agreed with the District Munsif and dismissed the suit. Second plaintiff filed a Second Appeal to the High Court, which came on for hearing before OLDFIELD and SESHAGIRI AYYAR, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

As appears from the language used by the learned Judges, the decision in *Zamorin of Calicut v. Unikat*

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Karnavan Samu Nair(1) is in conflict with that in *Achutha Menon v. Sankara Nair*(2). In those cases the tenure in question was Karamkari and nothing depended on any obligation in connexion with it to perform service. In the present cases the tenure is Santathi Brahmaswom, but it is admitted by Mr. Madhavan Nayar that in them also there is no question of service and that the incidents of the Karamkari tenure will be applicable. In these circumstances we think it necessary to have the conflict between the two decisions above referred to resolved; and we therefore refer to a Full Bench the question whether land held on the Karamkari or Santathi Brahmaswom tenure is liable to forfeiture on alienation.

Their Lordships Sir JOHN WALLIS, Chief Justice, Mr. Justice ABDUL RAHIM, Mr. Justice OLDFIELD, Mr. Justice SADASIVA AYYAR and Mr. Justice COUTTS TROTTER delivered the following OPINION:

WALLIS, C.J.—Speaking for myself I do not as at present advised differ from the judgment prepared by SADASIVA AYYAR, J., but in view of the importance of this question, the conflict between *Achutha Menon v. Sankara Nair*(2) and *Zamorin of Calicut v. Unikat Karnavan Samu Nair*(1) and the fact that the members of the Bench are not in agreement on all points I think that it will be better before disposing finally of the reference to call for a finding from the Subordinate Court as to whether in 1859 and 1867, the dates mentioned in the revised judgment of the Subordinate Judge lands granted on the tenures known as Santathi Brahmaswom and Adimayavana were inalienable as between the grantor and the grantee; and if so, whether on alienation by the grantee, the grantor was entitled to resume the lands and re-enter. Fresh evidence may be taken. The finding will

(1) (1920) 38 M.L.J., 275.

(2) (1913) I.L.R., 38 Mad., 380.

be submitted by the Subordinate Judge of Ottappalam within 6 months, and 10 days will be allowed for filing objections.

Mr. Justice ABDUL RAHIM who has left the Court concurred in these questions.

OLDFIELD, J.—I agree with the terms of the reference proposed and reserve further observations.

COUTTS TROTTER, J.—I agree and like OLDFIELD, J., wish to reserve any expression of opinion at present.

SADASIVA AYYAR, J.—The question before the Full Bench is whether land held on the Karamkari or the Santathi Brahmaswom tenure is liable to forfeiture and resumption on alienation by the tenant.

The referring order shows that Mr. Madhavan Nayar for the appellant admitted (and properly admitted) that a lessee holding lands either under the Karamkari tenure or under the Santathi Brahmaswom tenure is under no obligation to perform any service to his landlord.

To avoid confusion I would here remark that the question before us has very little to do with the incidents of service tenures. Service tenures, that is, involving performance of future service connected with enjoyment of lands are usually of two kinds: (1) where the income of the land enjoyed is intended to be the emolument of the service and the land is enjoyed by the servant merely in order that the income thereof might be received by him as emoluments; (2) where the lands themselves have been granted to be owned by the tenant, the tenant being merely obliged to perform some service by himself or by a deputy, the income being enjoyed by the grantee in his status as owner thereof. The decisions dealing with the question of the distinction between these two classes of service tenures are in my

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opinion irrelevant for the decision of this case. The decision in 29 Travancore Law Reports, 25, quoted by Mr. Anantakrishna Ayyar, related to a permanent tenure burdened with an obligation of *velam* service in a temple once a month, that service being one for the performance of which proper and adequate provision could be made through a deputy. That case and similar cases which held that lands held on service tenure of that kind are alienable, the alienee being merely bound to make provision for the performance of the service, are not helpful for the decision of the question before us. *Durgadut Singh v. Rameshwar Singh*(1), quoted for the respondent has also no relevancy as it related to the alienability of land granted for the maintenance (on Babuana grant) of a junior male member and his descendants in a Raj family, *the lands having been granted with the incidents of an impartible tenure and there being no incident of inalienability attached to impartible tenures except by statute law in some provinces.*

I have had the advantage of studying the valuable opinion prepared in this case by Mr. Justice SESHAGIRI AYYAR, and I might at once state that I respectfully agree throughout with that opinion. As the question however is of far-reaching importance I might be permitted to add something in my own language, though I understand that that opinion might be attached to the report of this case(2).

The historical tradition is that the Nambudiri Brahmans had the jenm or birth right in the ownership of the soil of the whole of the Malabar lands, the tradition being that the country itself was created for the Brahmans. The land revenue given to the Ruler was

considered merely as remuneration given by the jenm (or birth right) owners of the land for the protection afforded by him; it was a "Kavali" or "protection" tax. The Rajas of Malabar (the Zamorin having been at one time their chief) and members of Royal families (many of them being stanees) had jenmam rights in what are called "cherikal" lands. The Devastanam were granted jenmam rights in Devaswom lands. The Rajahkanmar (ruling Princes) had the right to require military assistance and contributions for military necessities from the two other classes of jenmis, viz., "Nambudris and Dewaswoms." We might take it that these three abovementioned persons and institutions were the only three classes of landlords who were for a long time considered to be entitled to be jenmis or owners in fee simple of lands in Malabar. Ordinary Nayar families were attached to one or other members of the three classes of jenmis and looked upon them as their Feudal Liege Lords. A jenmi even when in distress would not part with the entire ownership in any of his jenmam lands and he always resorted to Kanom and other expedients, and desperately clung to the last shadow of his jenmam rights.

Putting aside then, the tenure of a person who had been granted lands out of a portion of whose income provision could be properly made for the performance of periodical services (especially temple services) through deputies, the incident of inalienability and the right of the landlord to forfeit and to resume on alienation were attached to the other permanent tenures in Malabar created by jenmis on favourable rents (usually very favourable rents), according to the opinion of all the authorities who have considered the matter. The Sadar Court came to that conclusion after two years' inquiry in 1856 and the Cochin and Travancore Manuals state

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(1) (1909) I.L.R., 36 Cal., 943.

(2) Note.—The opinion is not attached to the report.

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the same. Mr. Justice BENSON and Mr. Justice SUNDARA AYYAR, whose knowledge of Malabar tenures was profound, were of the same opinion in *Achuta Menon v. Sankara Nair*(1). The laboured attempt of Mr. Anantakrishna Ayyar to argue that *Achuta Menon v. Sankara Nair*(1), was based on the express terms of the particular document of lease failed in my opinion, the terms prohibiting alienation relied upon being merely the statement by way of excessive caution of what was already involved in the name and nature of the created tenure. The incident of inalienability and liability to forfeiture on alienation with the right of re-entry in the landlord are attached to these tenures not by usage (which implies the gradual growth as the result of convenience or practice in mercantile and similar transactions, the growth being spread over a long period of time, or being confined to particular trades or localities or families or institutions) but by the immemorial law of Malabar, a law more analogous to the immemorial Marummakkattayam law prevailing in the West Coast in the matter of inheritance and succession than to mercantile and other usages or to ordinary customary law. Such law may, of course, be also called custom or customary law. It may be that the word "usage" is also not wholly inappropriate, but I should like the latter word to be confined to practices which the parties in certain particular places or engaged in particular trades or business are presumed to have in view when entering into certain classes of contracts and with reference to which the terms of such classes of contracts have to be ascertained and to the usages governing the succession to the trusteeship of particular local temples or local mutts or governing particular families and so on, and not to fairly widespread rules governing tenures and legal

(1) (1909) I.L.R., 36 Mad., 360.

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rights with reference to which well known and defined nomenclatures have been immemorially employed. To all perpetual leases of the lands now under consideration, namely, Anubhavam, Adimayavana, Santathi Brahmaswom and Karamkari were attached these conditions against alienation, the dignity and status of the grantee and his family or the dignity and status of the grantor and his family (or both) having been considered to be closely bound up with such conditions. Section 10 of the Transfer of Property Act allows a landlord who has leased his property even for a term of years to insert a condition for the benefit of the landlord restraining the lessee from alienating the lease right on pain of forfeiture and resumption. I do not therefore see anything against public policy or anything unreasonable in the condition attached to these ancient tenures granted permanently as a matter of favour by the landlord (who was usually the manager of an illom, a kovilagam or a Dewaswom with limited powers of alienation) the condition, namely, that no alienation should be made by the lessee on penalty of forfeiture and reversion to the landlord.

These grants though against the pecuniary interests of the grantor whether stanom or Devaswom or Karnavan and illom have been recognized by Courts [see *Mana Vikraman v. Sundaran Pattar*(1)], because they were customary and they added to the dignity of the family or Devaswom or stanom and also because there was this right reserved of resumption on alienation or on failure of heirs in the grantee's family, and hence there was a chance of reversion to the grantor's illom or Devaswom or Kovilagam. The Courts have therefore allowed such onerous tenures of a permanent character to be created by illoms, stanees and by Dewaswoms, so as to be binding upon succeeding karnavans, Urallars and stanees. To

(1) (1882) I.L.R., 4 Mad., 148.

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hold that the above ancient law governing these tenures prohibiting alienation on pain of forfeiture and reversion has been abrogated by custom or usage would require in my opinion proof of an almost conclusive character extending over several decades and accepted as law by the landlord and I am very doubtful whether such a custom even if it could be proved, involving as it does injury to the rights of religious trusts like Devaswoms, would be legally valid. The law applicable to these ancient tenures can of course be changed by Statute. If it could be changed by the growth and establishment of a contrary custom, the establishment of that custom should not be treated as proved except on very conclusive evidence, Courts usually holding that evidence to establish an alleged new custom contrary to what has been recognized as an old established custom should be much more cogent than even the proof considered usually necessary to establish a custom contrary to general law. That there is no Statute changing the law of these tenures is admitted. As regards the creation of a subsequent contrary customary law, there is nothing except the opinion of the Bench which decided *Zamorin of Calicut v. Unikat Karnavan Samu Nair*(1), and the evidence adduced in that case. But in that case the learned judges held, not that the old law attaching well-known incidents to these tenures had been changed by subsequent custom, but that there never was any law or custom attaching such incidents to these tenures. In expressing that opinion, they (if I may say so with great respect) not only went against the law till then settled, but even against the opinion of the Judge of the Lower Court (in that case) who held that till 1896 the custom (or what I would rather call the law) attaching the incident of inalienability was clearly established and did

(1) (1920) 38 M.L.J., 275.

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prevail. As regards cases of alienation after 1896, the lower Appellate Court in that case said that subsequent to that year, in a particular area called Manhalur Cherikal there have been a number of instances of alienations "evidencing the growth of a usage which has effected a breach in the wall of custom and that so far as this Cherikal is concerned, one of the prime requisites of custom, its continuity and concordance is not established in this case by the plaintiff." In fact, the Subordinate Judge's view was that there was a custom "but it had 'fallen into desuetude' after 1896 and that there have been inroads into that custom so as to shake its continuity and uniformity and that the process is going on."

The learned Judges who decided *Zamorin of Calicut v. Unikat Karnavan Samu Nair*(1), threw the onus of proving the custom of inalienability even before 1896 on the landlord and, in my opinion, with the greatest respect, they were in error in doing so. So far as "usage" after 1896 is concerned, the fact that many lands held on such tenures have been alienated after that date and that in some cases the landlord accepted rents from the alienees (it may have been on payment of a consideration for such recognition) cannot be accepted as proving a valid custom superseding the ancient law without further and cogent proof that the landlords had notice of the alienations and accepted the position that such alienations did not give them the legal right to resume the lands. Without proving such a consciousness on the part of the landlords, that the immemorial law had been superseded by a newly established custom, mere evidence of alienations by tenants is of very little value. I find on going through the printed papers in that case that two important witnesses therein, namely, one Mr. T. V. Venkateswara Ayyar, a practising

(1) (1920) 38 M.L.J., 275.

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vakil of 40 years' standing, and one Mr. Kelu Eradi, also possessing very great experience, gave evidence that in their opinion the old immemorial law of inalienability persisted up to the date of their giving evidence. That the jenmi landlord's rights have been attempted to be encroached upon during two or three decades past by all kinds of tenure holders under them is well known, but such attempts cannot be said to have established a new custom changing the old law as regards the tenures in question. The rather sustained attempt on the part of all kinds of tenants during 20 or 25 years past may have been partly the natural result of the oppressive conduct of many Malabar jenmis in the matter of the grant of melcharths over the heads of tenants of long standing, and it was probably also due to the change of general attitude on the part of tenants towards jenmis, an attitude which was formerly (even in the case of kanom tenants) that of a social inferior to an acknowledged social superior, but is no longer so in most cases, a fairly large proportion of kanomdars and other tenure holders and assignees from such tenure holders being in recent times recruited from influential legal practitioners, Government servants and business men, who of course cannot look upon themselves as holding a position of undue dependence on their landlords in the matter of dealings with the land held by them.

In a recent Privy Council case, *Rao Kishore Singh v. Musammatt Gahenabai*(1), the Judicial Commissioner's Court had held as regards an old family custom of inheritance varying from the ordinary Hindu Law (which custom stands on a distinctly inferior position to the custom of inalienability of the tenures under consideration) that that family custom though once existing and operative had ceased to be so, "either because the

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primitive condition out of which it sprung had ceased to exist and therefore *cessat ratio cessat lex*" or "because owing to the improvement in education and the spread of socialistic opinions consequent thereon, the custom has been so gradually but steadily and persistently encroached upon that it has, as it were, been eaten away and has ceased to be observed or applied. . . ." But their Lordships of the Privy Council observe (page 740) that "where a custom has up to quite recent times outlived 'the condition of things which gave it birth' the principle embodied in the expression, *cessat ratio cessat lex*, does not apply." The Judicial Commissioner's Court had further observed that "the advance of socialism in the family due to education and the evanescence of all real authority in the head" and the assertion of a right on the part of a younger member of the family to what used to be granted to him "as a favour" might change the family custom of inheritance long prevailing. Their Lordships say as regards the above reasoning: "It is unnecessary for their Lordships to determine whether this reasoning would be sound as applied to any case," thus indicating grave doubts as to the soundness of such reasoning. The family custom in that case was a matter of a few centuries, whereas the law of the tenures in this case is one which had prevailed for at least ten centuries before the date (1896) referred to in the judgment in *Zamorin of Calicut v. Unikat Karnavan Samu Nair*(1). Their Lordships of the Privy Council while indicating the trend of their opinion decided on the facts of that case that the old family custom had not been changed, notwithstanding that in January 1865 the members of the family including the head of the family had acted in a manner which contravened the family custom and that the junior

(1) (1920) 33 M.L.J., 275.

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members in the family for several generations had enjoyed properties and other allowances independently of the head of the family to which they respectively belonged and notwithstanding that the Government had made settlements in 1865 with the head of the family and a junior member which purported to create rights which cannot be claimed according to the family custom. If the transactions, dating about 60 years before the suit was filed, contravening the family custom, could not be held to destroy that custom, I think it follows *a fortiori* that a general territorial custom which remained in force for several centuries could not have been abrogated on the date this suit was brought. The defendants' written statements in the present suit do not admit the existence of the custom at any time and its abrogation by a contrary custom which has invariably prevailed afterwards but deny vaguely that the tenures are inalienable. I would therefore answer the reference (following Mr. Justice SESHAGIRI AYYAR's opinion) that lands held under the Karamkari or Santathi Brahmaswom tenure are liable to be forfeited on alienation if no valid contract to the contrary binding on the grantor or his successors is established, and that the lands held thereunder can be resumed by the grantor or his successors and re-entered upon the alienation by the tenant without the landlord's consent.

[In compliance with this Order the Subordinate Judge submitted an affirmative finding on both parts of the following issue :

"Whether in 1859 and 1867 . . . the lands granted on the tenures known as 'Santathi Brahmaswom' and 'Adimayavana' were inalienable between the grantor and grantee and if so whether on alienation by the grantee, the grantor was entitled to resume the lands and re-enter?"

On receipt of the findings the appeals were set down for hearing before their Lordships the Chief Justice,

Mr. Justice OLDFIELD, Mr. Justice PHILLIPS, Mr. Justice DEVADOSS and Mr. Justice VENKATASUBBA RAO.]

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ON THIS REFERENCE

A. Krishnaswami Ayyar for appellant.—I am the landlord's assignee. I contend that respondent, a perpetual lessee, has alienated his lands and is liable to ejectment as the tenure is liable to forfeiture under Malabar Law. In Malabar the jenmi, the proprietor, is the land owner. He only leases out his lands. The tenures known as Adimayavana, Karamkari, Santathi Brahmaswom, Anubhavam, are all perpetual leases to endure for the grantee and his heirs. The legal incidents in all are the same. A rent is reserved and the leases are to run in the grantee's family without alienation : see Moore's Malabar Law and Custom, page 195. In the present case the holder for the time-being alienated the lands and so the landlord can determine the tenure. The question now is what was the custom in 1859 and 1867, the dates of the leases in question. It is established by judicial decisions beginning with the Sadar Courts that these tenures are inalienable. This is a territorial custom or law peculiar to Malabar : see also Logan's Manual of Malabar Law, paragraph 18.

[CHIEF JUSTICE.—If there is no custom, in accordance with the English Law you cannot eject.]

Yes ; if it is a territorial custom it cannot be put an end to except by Statute ; a family custom can be put an end to by the *consensus* of opinion of the majority of the family : see Halsbury's Laws of England, Vol. 10, Sections 422, 460, *Rajkishen Singh v. Ramjoy Surma Mozoomdar*(1), *Hammerton v. Honey*(2). If in 1860 this custom of inalienability was in existence it must be

(1) (1876) I.L.R., 1 Cal., 186 (P.C.), 195.

(2) (1876) 24 W.R., 603, 604 (English).

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read into the body of the contract. It is as if in terms I had a right of re-entry.

[CHIEF JUSTICE.—Provided the custom is not changed.]

No; a change could not have been in the contemplation of parties. By the use of the words Santathi Brahmaswom it was understood by the parties that the landlord could not eject so long as there were descendants of the grantee and the tenant could not alienate and if alienated the tenure is liable to forfeiture: see the Cochin Manual, page 302, and the Report of the Commissioners in the Cochin State, page 33.

C. V. Anantakrishna Ayyar for respondents.—The language of the Instrument in *Achutha Menon v. Sankara Nair*(1) is quite different from that in this case. So *Achutha Menon v. Sankara Nair*(1) does not apply. Karamkari and Adima tenures are not inalienable by custom in South Malabar and resumability does not follow from inalienability: see *Venkatagiri Pattar v. Zamorin of Calicut*(2), Wigram, Graeme's Glossary, Moore's Malabar Law and Custom and the Malabar District Gazetteer. In this case not a single instance of ejectment has been proved. The plaintiff has failed to prove that at any time forfeiture on alienation was the rule. Reference made to Sadar Court Proceedings, Appendix XIV, Turner's Report. It has not the weight of a judicial decision *Kopasan v. Shamu*(3). There is nothing in the definition given by TURNER, C.J., to suggest that the Santathi Brahmaswom tenure is inalienable. The other tenures are defined as inalienable. Wigram says "it is said to be inalienable," but there is a singular absence of judicial authority.—Moore does not say anything more than Wigram. The present plaintiff's predecessor filed a suit for recovering

(1) (1913) I.L.R., 36 Mad., 390.

(2) (1917) M.W.N., 419.

(3) (1884) I.L.R., 7 Mad., 440.

this identical property. He asserted that on alienation he was entitled to forfeit. No issue even was taken as to this custom and this point of forfeiture on alienation was not pressed.

A. Krishnaswami Ayyar in reply.—

(Chief Justice.—As at present advised the evidence seems to be against you.) But I rely upon a special custom of inalienability. I submit that these perpetual leases are not alienable. I am not setting up a custom contrary to the established law. Inalienability is the normal rule. On the British occupation of Malabar the Government with a view to investigate the incidents of tenures in Malabar formed a committee and various reports have been submitted.

Reference was also made to *Zamorin of Calicut v. Unikat Karnavan Samu Nair*(1), *Udipi Seshagiri v. Seshamma*(2), *Manivikrama v. Rama Pattar*(3), *Rajah of Ramnad v. Solimalai Mooppa*(4), *Raja Rameswar Nath Singh v. Haralal Singh*(5), and *Thakur Kapilnauth Sahi Deo v. The Government*(6).

SCHWABE, C.J.—This is a case of importance and of some difficulty. It has been very fully and ably argued before us and I think we are in a position to give our opinion without reserving it further.

The matter has been referred to the Full Bench by reason of a difference of opinion among the Judges who had to consider the same matter before. In *Achutha Menon v. Sankaran Nair*(7), BENSON and SUNDARA AYYAR, JJ., took the view that in holdings of the nature in question in this case there was no right of alienation

(1) (1920) 38 M.L.J., 275.

(2) (1920) I.L.R., 43 Mad., 503.

(3) (1897) I.L.R., 20 Mad., 275.

(4) S.A., 257 of 1917 (unreported).

(5) (1868) 1 B.L.R., 170.

(6) (1874) 22 W.R., 17.

(7) (1913) I.L.R., 36 Mad., 380.

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and that on alienation the landlord had a right to re-enter. The wording of the document in that case differs from the wording in this case in that it expressly forbids alienation, but the judgment does not go on that ground alone but also on the ground that alienation necessarily involves a right on the part of the landlord to re-enter. The other case is *Zamorin of Calicut v. Unikat Karnavan Samu Nair*(1). That case came before AYLING and KRISHNAN, JJ., and was sent back by them for further inquiry as to the alleged custom. After further inquiry it was held by them that such grants did not involve forfeiture on alienation. In that case the grant was of a somewhat different character and of a more recent date.

The question to be decided in this case is whether a grant of land as a Santhathi Brahmawom to be held by the grantee "for all time without power of surrendering and without being dispossessed," or possibly "without vacating" instead of "without power of surrendering" is inalienable, and if inalienable, whether there is a right of re-entry in the landlord on alienation. The question whether such a grant is alienable or not is one which it is unnecessary for us to decide if we come to the conclusion that on alienation the landlord has not the remedy of re-entry, because in this case the question is whether the tenant having made the alienation, the landlord can re-enter. I am not prepared myself to say on the materials at present before us whether alienation is or is not forbidden by the grant or by custom. The question whether it is forbidden by the grant turns on the translation of words which might mean "without power of surrendering" and might also mean "without vacating." Whether there is a custom in regard to

such grants against alienation is a difficult question and there is undoubtedly evidence before the Court that such a custom exists. Whether that evidence is sufficient is a different matter, on which I do not desire to express an opinion. It has also been pressed upon us that, if there is such a custom, it is a custom which has become part of the common law of Malabar and as such is fixed and cannot be altered by any means, except by Statute. I am not prepared to assent to that proposition and I think that it is a matter which would require very careful consideration. But in the view that I take of this case it is not necessary to express a definite opinion on that point.

This matter came before this Court and was referred back to the Subordinate Judge to ascertain whether this alleged custom against alienability and in favour of forfeiture on alienation existed or not and we have his report before us. He has found that at the date of this grant, i.e., 1860, there was a custom against alienation and a custom in favour of the landlord's power of re-entry upon alienation. This is a question of mixed law and fact. As far as the facts are concerned I think we are bound by his finding of fact, provided of course there was some evidence to support that finding; but whether taking those facts as found by him, they amount to sufficient evidence of custom is a question of law,—a question on which it is open to us to review his decision and to express our own views. The facts as found by him are very fully set out in his findings and report and his decision is based on two lines of evidence; first, the written evidence from books in the nature of text-books, reports and so on; the other, the oral testimony given before him. Taking first the text-books and other documentary evidence on which it is clear he mainly bases his view, these books on examination do not in

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my view show that at any time it was part of the common law of Malabar that a landlord was entitled to the forfeiture of such a grant as this on alienation by the tenant. Reliance was mainly placed on the reports of proceedings of the Sudder Court, which are added as an appendix to the notes on the draft of the Bill relating to Malabar Land Tenures by Sir CHARLES TURNER, Chief Justice of this Court, published in 1885. The report of the proceedings of the Sudder Court referring to tenures of this description states that they are inalienable. It is not stated in very clear language, and as regards one particular kind of tenure the statement is only contained as a side note; but the Sudder Court proceedings do not state that there was any right of re-entry on alienation. Sir CHARLES TURNER himself, in his report, in dealing with the particular tenure here in dispute does not even set out the law against alienation, though it would look on an examination of his report that this is only a case of his having omitted to mention it, but there is not one word in his report as regards any right of re-entry. The next document we are referred to and which is earlier in date is Mr. Graeme's Glossary, which, on examination, shows nothing of that kind. We are then referred to the works of Mr. WIGRAM and Mr. MOORE. These gentlemen were both Judges in Malabar and had ample opportunity of knowing what the custom was and what the practice was in Malabar at about the same time as Sir CHARLES TURNER was making his report, and it is a very remarkable thing, if the custom alleged in this case really did exist, that neither of these gentlemen seems to have heard of it, for both state that this kind of tenure is inalienable, and both suggest that if the matter came before the Court it would very possibly refuse to hold that the grant was resumable. I refer particularly to a passage at page 143 of Mr. Wigram's book. He says:

“There is a singular absence of Judicial authority in respect of these grants, and it is doubtful how far in the present day the Courts would recognize the grantor's power of resumption.”

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That seems to be dealing with the power of resumption on failure of heirs in the grantee's family, which he had mentioned above, and does not seem to refer to a supposed power of re-entry on breach of the condition against alienation. It is remarkable, in my view, that these two writers should have been silent on a matter so important if it was so certain as to become a part of the law of Malabar. Next, there is a statement in the Cochin Manual, which is a more recent publication, that in Cochin where we are told that the tenure is the same as in Malabar, there is a custom against alienation and for forfeiture on alienation. We do not think that this is a statement which we can act upon in arriving at a conclusion whether such an alleged custom exists in Malabar. The result is that, in my view, the documentary evidence of the kind I have indicated, far from supporting the alleged custom contains nothing which can be regarded as any evidence of its existence.

Passing to the verbal evidence and accepting the view of the Subordinate Judge of the accuracy of the testimony of the two learned vakils who appeared as witnesses before him, in my judgment that testimony does not provide nearly sufficient facts on which to say that there is a definite settled custom to the effect contended for. They only gave their opinions, and for purposes of opinion we have apparently before us as much material as they had except such recollection as they had of cases which they had been connected with. Their opinions are quite clearly based for the most part on the same documentary evidence as we have just been considering, and which, in my view, does not contain the statements as to the custom which the witnesses

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thought it contained. The rest of their evidence is their recollection of cases in which they had been engaged. I cannot think that the Subordinate Judge attached great importance to this part of their evidence, because they were dealing with cases which would be on record and the proper way to prove which would be by production of the records, and not by mere statements of the vakil engaged in the case to the effect that he remembered a case in which he had been engaged in which there was such and such a thing decided. A search has been made and no one has been able to produce any record of a case which has decided this point. We are unable to say, for we have not before us the records of those cases, whether the facts of those cases were the same as the facts in this case. We do not know what evidence was given of custom in those cases and what the grounds of decision in those cases were; and if those cases did decide anything of the kind, that in itself would not be such evidence of custom as would be enough to establish a definite custom within the meaning of the recognized rules.

Therefore, I have come to the conclusion that neither in the written evidence nor in the oral evidence was there enough to establish a custom in favour of a right of re-entry of a landlord of such tenure, on alienation by the tenant.

OLDFIELD, J. OLDFIELD, J.—I agree.

PHILLIPS, J. PHILLIPS, J.—I agree and add that I am not now expressing any opinion on the other question which was referred to the Subordinate Judge, viz., the question as to alienability.

DEVADOSS, J. DEVADOSS, J.—I agree.

VENKATASUBBA RAO, J.—I agree.

M.H.H.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

KRISHNA PATTAR AND ANOTHER (DEFENDANTS 1 AND 2),
APPELLANTS,

1921,
November 15.

v.

LAKSHMI AND FIVE OTHERS (PLAINTIFFS AND DEFENDANTS 3 TO 7),
RESPONDENTS.*

Limitation Act (IX of 1908), sec. 10—"Express trust," when created.

A benamidar is not an "express trustee" within the meaning of section 10 of the Limitation Act, and a claim against him for mesne profits by the real owner is not saved from the bar of limitation by that section.

SECOND APPEAL against the decree of V. P. RAO, District Judge of South Malabar, in Appeal Suit No. 407 of 1918, preferred against the decree of T. V. NARAYANAN NAYAR, Subordinate Judge of Palghat in Original Suit No. 79 of 1916.

The facts are set out in the judgment.

The defendants preferred this Second Appeal.

C. V. Anantakrishna Ayyar for appellants.—There is no express trust created by the sale-deed. The conditions necessary for the creation of an express trust are wanting: see sections 3, 5, 6 and 7 of the Trusts Act. If at all, there is only an implied trust as understood by the Trusts Act. Section 10 of the Limitation Act does not apply to implied trusts: see *Raja of Rāmnād v. Ponnusami Tevar*(1). *Gur Narayan v. Sheolal Singh*(2) shows that a benamidar is not a trustee but only an agent.

T. R. Venkatarama Sastri, with C. V. Mahadeva Ayyar, for the respondent.—This is a case of express trust

* Second Appeal 1485 of 1920.

(1) (1921) I.L.R., 44 Mad., 277.

(2) (1919) I.L.R., 43 Cal., 566 (P.C.).

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created by the vendors and not a case of mere agency. Reference was made to *Soar v. Ashwell*(1), *Rocheffoucauld v. Boustead*(2), *Burdick v. Garrick*(3), *Lyell v. Kennedy*(4), *Bhurabhai v. Dai Ruzmani*(5), *Sethu v. Krishna*(6). On the legal position of a benamidar reference was made to *Kuthaperumal Rajali v. The Secretary of State for India*(7). Where one man has possession of another's property the legal character in which he holds it is determined by his *animus*: see *Varada Pillai v. Jeeravarathnammal*(8). The defendants acted as trustees.

The Court delivered the following JUDGMENT:

This Second Appeal arises from a suit brought by the plaintiff to recover certain lands with mesne profits for 25 years. No objection was raised by the defendants to the plaintiff's claim for the lands and they have been decreed to her and there is no appeal about them. But as regards the profits, defendants denied their liability and pleaded limitation. To avoid the plea of limitation plaintiff's case was that defendants 1 and 2 were holding the lands and collecting the profits as her trustees and she relied on section 10 of the Limitation Act.

The Subordinate Judge who tried the case held that no express trust was made out, that defendants were only constructive trustees, and that three years' limitation was applicable to the claim for profits, apparently under Article 109. He further held that, as pleaded by the second defendant, the profits for the last 9 years had been accounted for to the plaintiff, and dismissed her claim in toto for past profits. The District Judge reversed that decree, holding that an express trust was made out and that section 10 applied, and that even if it did not, the

(1) [1893] 2 Q.B., 390.

(3) (1870) 5 Ch. App., 233.

(5) (1908) I.L.R., 32 Bom., 394.

(7) (1907) 1 L.R., 30 Mad., 245.

(2) [1897] 1 Ch., 196.

(4) (1889) 14 App. Cas., 437.

(6) (1891) I.L.R., 14 Mad., 61.

(8) (1920) I.L.R., 43 Mad., 244 (P.C.).

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defendants were plaintiff's agents in law, and under Article 89 the plaintiff's claim was in time as the demand for accounts was only made just prior to the suit. He gave a decree as sued for, without passing a preliminary decree for accounts under Order XX, rule 16, Civil Procedure Code, and without taking any notice of the plea that the profits had been accounted for. Defendants 1 and 2 have appealed to us.

The first question for decision is whether an express trust is made out or not, as it is material to decide it in considering the application of section 10. The only facts from which we are asked to find an express trust are these: The plaintiff lands were purchased with plaintiff's money and, in the sale-deed taken by defendants 1 and 2 in their own names, there is a recital that the purchase was on behalf of the plaintiff. Defendants were receiving the rent of the lands subsequently and it is the second defendant's case that he gave credit to the plaintiff for them in the accounts. From these facts it is difficult to infer the existence of an express trust or of anything other than a constructive trust. To create a trust with reference to immoveable property the Indian Trusts Act (II of 1882) which applies to this case requires a registered instrument signed by the author of the trust or the trustee, where no question of a will or of fraud arises, and there must be a clear indication of an intention to create a trust: see sections 5 and 6 of the Act. The only registered instrument we have in the case is Exhibit 1, the sale-deed. It is signed only by the vendors and cannot therefore be used to support a case of express trust by declaration by defendants 1 and 2, nor can it be relied on to show that the vendors created the trust, as was argued before us, because there is nothing to show that they intended to create any trust. The words in Exhibit 1 do not support any such contention; in fact,

after reciting that the purchase was on behalf of the plaintiff, Exhibit 1 goes on to say that the lands should be enjoyed by the plaintiff and her heirs ; it says nothing about defendants managing the lands and paying over the profits to the plaintiff. It is extremely improbable that strangers like the vendors under Exhibit 1 would intend to create any trust for plaintiff. Though no doubt it is possible to take a conveyance in the form of a deed of trust, there is nothing to show that that was done here. Exhibit 1 is an ordinary deed of benami purchase which recites its benami character. To constitute a benami purchase, it is not necessary, as the District Judge thinks, that there should be anything secret about it ; and unless it is intended for a fraudulent purpose there is no reason why the deed should not disclose the character of the transaction.

There is a further difficulty in holding that Exhibit 1 amounts to a trust created by the vendors, as one of them is a minor who cannot create a valid trust under section 7 of the Act.

It was next argued by the plaintiff's vakil that even if defendants 1 and 2 were not made express trustees at the outset, they must be held to have become such, because they acted as trustees for over two years and they cannot be heard to aver the contrary. It is difficult to see how any question of adverse possession or estoppel arises. A sufficient answer to the argument is that the defendants at no time did anything to change their legal position with reference to these lands. As constructive trustees they would be bound to account for the profits under section 95 of the Act, and their doing so cannot make them express trustees ; and they did nothing else.

The learned vakil for the plaintiff cited some English cases : *Soar v. Ashwell* (1), *Rochefoucauld v. Boustead* (2),

(1) [1893] 2 Q.B., 390.

(2) [1897] 1 Ch., 196.

Burdick v. Garrick (1) and *Lyell v. Kennedy* (2), as showing that the term "express trustee" in English Law included not only persons expressly appointed trustees but also persons standing in various fiduciary relations who were incapable of pleading limitation. In the first case cited, a Solicitor acting for the trustees and holding trust moneys in his hands was held to be in the position of an express trustee and he was not allowed to plead limitation. Lord Justice BOWEN enumerates the cases where such extension of the term "express trustee" has been made in England but the defendants here fall under none of those categories. It is doubtful how far such extensions can be considered to be cases of express trustees in this country, for as remarked by the learned Chief Justice in *Rajah of Rāmnād v. Ponnusami Thevar* (3) the Indian Trusts Act which governs us restricts the scope of the term "trustee" more closely than in England and considers constructive and resulting trusts as not trusts but as obligations in the nature of trusts (see Chapter IX).

The case of *Rochefoucauld v. Boustead* (4), cited above, was the case of an express trust created by certain letters, and it was held that it satisfied the Statute of Frauds, but that even if it were otherwise, parol evidence could be allowed to make up the deficiency in proof in spite of section 7 of the Statute, on the ground that the Statute should not be allowed to be used to perpetrate a fraud, the defendant there claiming the property as his own. No such case arises here, and the two other English cases cited are equally beside the point here. The case of *Bhurabhai v. Bai Rummam* (5) refers to a sum of money to create a trust with reference to which a registered instrument was not necessary. It is thus

(1) (1870) 5 Ch. App., 233.

(2) (1889) 14 App. Cas., 437.

(3) (1921) I.L.R., 44 Mad., 277.

(4) [1897], 1 Ch., 196.

(5) (1908) I.L.R., 32 Bom., 894.

distinguishable from the present case and it is unnecessary for us to consider whether we should follow it or not.

For the above reasons it seems to us that the contention that there was an express trust in this case must be rejected. The case is one of a constructive trust or of an obligation in the nature of a trust, as the Trusts Act calls it, falling under Chapter IX. Now, section 10 of the Limitation Act has never been held to apply to such cases. It is true that in section 10 the term "express trustee" is not used in the section itself but only in the marginal note, but the language of the section referring as it does to "persons in whom property has become vested in trust for any specific purpose" is explicit enough to show that it refers only to express trustees. It is not contended before us that it would cover the case of a constructive trustee. The plea that section 10 saves limitation in the present case must therefore be rejected.

The District Judge has also held that the case of express trust failing, the parties may be looked upon as holding the position of principal and agent and Article 89 may be applied, in which case he thinks the suit is in time because the account was demanded and refused only shortly before suit. He overlooks the fact that there is another starting point for limitation under the Act, viz., the termination of the agency, and it has been argued before us that if there was any agency, created in the case it was terminated long prior to the suit and the claim for profits would be barred under that article and that the defendants were not able to show it because no plea of agency was set up in the case. It is clear from the pleadings that no such case was set up by the plaintiff; there was no issue about it and there was no reference to it in the first Court. In these circumstances the question of agency should not have been allowed to be raised in the appellate Court for the first time. To

allow it now will require a fresh trial on facts, and we are therefore of opinion that the plea should be excluded from consideration.

In the result we must hold that the bar by limitation is a proper plea in the case with regard to the profits claimed. It is not necessary to decide whether the 3 years' rule or the 6 years' rule applies to it, as in either case the plaintiff fails as the finding by the Subordinate Judge that profits for the last 9 years have been accounted for has not been displaced by the District Judge and we have not been addressed any argument about it.

In the result, the decree of the lower appellate Court must be reversed and the decree of the first Court restored with appellants' costs here and in the Court below to be paid by the plaintiff.

N.R.

APPELLATE CIVIL.

*Before Mr. Justice Spencer and Mr. Justice
Kumaraswami Sastri.*

GATTINENI PEDDA GOPAYYA AND 2 OTHERS (CLAIMANTS),
APPELLANTS,

1921,
November 16.

v.

THE DEPUTY COLLECTOR OF TENALI (REFERRING
OFFICER), RESPONDENT.*

Land Acquisition Act (I of 1894), secs. 3, 9, 18, 24 (1) and 25—Applicant—Person interested—Hindu widow—Claimant before acquiring officer—Surrender by widow to reversioner after award—Application by reversioner for reference to Civil Court—Claim by reversioner for larger amount of compensation than amount claimed by widow—Legal representative—Estoppel—Competency of Court to award larger amount—Purpose of acquisition—Element in valuation.

* Appeal No. 284 of 1920

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v.
DEPUTY
COLLECTOR,
TENALI.

A reversioner to the estate of a Hindu widow who preferred a claim after notice under section 9 of the Land Acquisition Act, and surrendered her estate to the former after an award was passed by the acquiring officer, is a person interested in the compensation and is competent to be an applicant under section 18 of the Act.

Under section 25 of the Act, claimant is estopped from getting more compensation from the Judge than what he claimed before the acquiring officer, and on the same principle his legal representatives would likewise be bound; but a reversioner to the estate of a Hindu widow is not her legal representative and is not bound by her acts on any principle of estoppel; consequently the Judge is not bound to limit his award, on the application of the reversioner, to the amount claimed by the widow before the acquiring officer.

The purpose for which land has been acquired is an element for consideration in estimating its value, though under section 24(1) of the Act the Court is precluded from taking into consideration the increase of its value *likely to arise* from the use to which it will be put.

APPEAL against the award of F. A. COLERIDGE, District Judge, Guntūr, in Original Petition No. 35 of 1918.

At the time of acquisition of the lands in question under the Land Acquisition Act, the property belonged to a Hindu widow Durgamma, and she filed a claim petition, dated 31st July 1917, before the acquiring officer (Special Deputy Collector of Tenali), and prayed therein that she might be awarded Rs. 1,400 per acre for the extent of lands taken from her. The Deputy Collector passed an award on the 11th August 1917, granting compensation at the rate of Rs. 1,200 an acre. The appellants, who were the reversioners to the estate owned by Durgamma as a Hindu widow, obtained a surrender of her estate in their favour on 5th October 1917, and subsequently filed a petition under section 18 of the Land Acquisition Act, objecting to the amount awarded by the officer and asking for a reference to the District Court for determination of the amount of compensation. They claimed compensation at Rs. 2-8-0 a

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square yard for the lands taken up. The District Judge, held that the reversioners were not entitled to claim more compensation than had been claimed by the widow before the acquiring officer, and awarded at the rate of Rs. 1,400 an acre, although he was of opinion that the lands were so valuable as to deserve a larger amount of compensation. The reversioners, who were the applicants before the Judge, preferred this Appeal.

V. Viswantha Sastri for appellants.—The widow did not act bona fide on behalf of the estate in the land acquisition proceedings. The reversioners do not claim from the widow: they are not her legal representatives. Section 25 of the Land Acquisition Act is no bar to their getting the proper amount of compensation due for the lands. The lands were acquired for extension of house-sites in the village.

Government Pleader (C. Madhavan Nayar) for respondent.—The reversioners have no right to come in and object to the amount awarded in the land acquisition proceedings, where the estate was fully and bona fide represented by the widow who held an estate in possession: see *Lachmeswar Singh v. Chairman, Darbhanga Municipality* (1). Though the widow cannot alienate in favour of the Government, she can hand over possession under the Land Acquisition Act as in the above case.

The Court delivered the following JUDGMENT:

The acquiring officer awarded compensation at the rate of Rs. 1,200 an acre. The widow Durgamma to whom the northern part of survey No. 575 belonged at the time claimed at the rate of Rs. 1,400 an acre. After she had surrendered the estate to her husband's reversioners they claimed Rs. 2-8-0 a square yard, but the District Judge held that he was precluded by section

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25 (1) of Act I of 1894 from awarding a higher amount than that claimed by the widow. In Appeal, the reversioners ask to be compensated at the rate of Rs. 1-8-0 a square yard.

Upon the question of law we are of opinion that section 25 was designed with the purpose of holding claimants to their own bargains and of preventing demands being increased at every stage from the Collector to the High Court. The word "applicant" in this section, is used to describe the person who puts in a written application under section 18 for having his objection to the Collector's award referred for determination by a Civil Court. He is not necessarily identical with the person who makes a claim after notice under section 9. All that section 18 requires is that he should be a person interested who has not accepted the award, and a "person interested" is defined in section 3 as including every person claiming an interest in the compensation to be made on account of the acquisition. Under section 25 claimants are estopped from getting more from the Judge than what they claimed before the Collector, and on the same principle their legal representatives would no doubt be bound. But although a widow represents her deceased husband's estate for certain purposes and has limited powers of disposal over it, the reversioners are not her legal representatives nor are they bound by her acts on any principle of estoppel. The Judge, therefore, should not have considered his award as limited to the amount claimed before the acquiring officer.

On the question of fact, which is what is the market rate which the plots acquired would fetch at a fair computation, we are of opinion that 8 annas a square yard which is the rate awarded by the District Judge is too low. This land, though hitherto used for wet

cultivation, is surrounded on all sides by lands which have been built upon and it will be suitable for building sites as soon as the level has been raised. In fact the purpose for which it has been acquired is the extension of the village site and this is an element for consideration in estimating its value, though under section 24 (1) the Court is precluded from taking into consideration the increase of its value likely to arise from the use to which it will be put.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

CHUNDURU PUNNAYYAH AND OTHERS (DEFENDANTS),
APPELLANTS,

v.

RAJAM VIRANNA AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

Minor—Guardian ad litem—Ex parte decree against minor—Suit to set aside ex parte decree—Gross negligence of guardian in not defending suit, whether sufficient ground apart from fraud or collusion—Remedy by petition for review or petition to set aside ex parte decree and remedy by suit, when available—Hindu Law—Mortgage by guardian for lending money to another to carry on trade not being ancestral trade on behalf of minor—Validity of mortgage—Duty of guardian to plead invalidity of such mortgage.

A person, who had been impleaded as a minor defendant represented by a guardian ad litem in a suit in which a decree was passed ex parte against him, can institute a suit to set aside the decree on the ground of *gross negligence*, apart from fraud or collusion, of the guardian ad litem in not defending the suit properly on his behalf.

* Appeal No. 314 of 1919.

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v.
DEPUTY
COLLECTOR,
TENALI.

1921,
December 5.

PUNNAYYAH v. VIRANNA. *Beni Prasad v. Lajja Ram*, (1916) I.L.R., 38 All., 452, and *Raghubar Dyal Sahu v. Bhikya Lal Misser*, (1886) I.L.R., 12 Calc., 69, dissented from; *Gotipatti Subban v. Gotipatti Narasamma*, (1914) 27 M.L.J., 486, followed.

Mere omission of a guardian to appear at the trial would not amount to gross negligence, if there was no good ground of defence to put forward on the minor's behalf; but it would be gross negligence not to defend the suit if there was a valid defence available.

A mortgage by a guardian of the immoveable property of a minor for the purpose of lending money to another for carrying on a trade that was not ancestral on behalf of the minor, is *prima facie* not a transaction for the benefit of the minor, and in a suit on the mortgage the guardian ad litem might have resisted the suit on that ground, and his conduct in not defending the suit is, in the absence of any reason to the contrary, grossly negligent.

APPEAL against the decree of V. BASHYAM AYYANGAR, Third Temporary Subordinate Judge of Guntūr, in Original Suit No. 6 of 1918.

The material facts are set out in the judgment.

C. Sambasiva Rao and V. Lakshminarayana for appellants.

P. Narayanamurti for respondents.

The Court delivered the following JUDGMENT:

In this case the plaintiffs sued to have a final decree in a mortgage suit set aside in spite of their having been represented in the suit. The mortgage-deed (Exhibit X) was executed by their mother representing them as their guardian in 1900, a year after the death of their father, and thereby a tiled house and site were mortgaged for a sum of Rs. 300 to meet domestic expenses and to provide money for their uncle Galib to carry on cloth trade on their behalf. In the suit that followed they were represented by the Head Clerk of the District Munsif's Court, Guntūr, who suffered a mortgage decree to be passed against them ex parte. It is argued that as they

PUNNAYYAH v. VIRANNA. did not appeal or apply to have the ex parte decree set aside or file a review petition, the decree has become final and they cannot avoid it without proof of fraud or collusion. Reliance has been placed on an observation of RICHARDS, C.J., and MUHAMMAD RAFIQ, J., in *Beni Prasad v. Lajja Ram*(1) that in a case where a guardian has merely conducted the case of a minor with gross negligence it is open to a minor to seek relief by way of review of judgment, but that if a decree has been obtained against a minor properly made a party and properly represented, the plaintiff can only succeed in setting aside such a decree in a separate suit upon proof of fraud and collusion. The learned Judges quoted the words of FIELD, J., in *Raghubar Dyal Sahu v. Bhikya Lal Misser*(2). But in the Allahabad case it was found as a fact that even negligence had not been established, and in the Calcutta case, while recognizing that in England gross laches would give an infant a legal right to reopen an action by a new bill and that the procedure in this country was different, the learned Judge was of opinion that fraud or collusion must be proved and that nothing less would suffice. From this opinion we must with due respect express our dissent. The Bombay and Calcutta High Courts in *Hanmantapa v. Jivubai*(3) and in *Lalla Sheochurn Lal v. Ramnandan Dobey*(4) have put fraud and negligence of a guardian on the same footing; and in this Court, in *Gotipatti Subban v. Gotipatti Narasamma*(5), SANKARA NAYAR, J., and SPENCER, J., held that a minor was not bound by a decree passed against him in a suit where his guardian showed gross negligence as by not setting up a good defence of which he must have been aware, and our

(1) (1916) I.L.R., 38 All., 452.

(3) (1900) I.L.R., 24 Bom., 547, 552.

(2) (1886) I.L.R., 12 Calc., 69 to 76.

(4) (1896) I.L.R., 22 Calc., 8.

(5) (1914) 27 M.L.J., 486.

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v.
VIRANNA. decision was followed by KRISHNAN, J., in *Ayya Nadan v. Thenammal*(1). Neglect by a guardian to plead past payment or to object to a personal decree being passed against minors was held in *Grish Chunder Mookerjee v. Miller*(2) to be gross misconduct amounting to fraud. In *Parmeshwari Parshad Narayan Singh v. Sheo Dutt Rai*(3) an attempt was made to define the sort of negligence on the part of the next friend of a minor that would enable the minor to impeach a decree to which he was a party. It must be such negligence as leads to the loss of a right which might have been successfully asserted if the suit had been defended with due care. For instance, a mere omission on the part of a guardian to appear at the trial would not amount to gross negligence if there was no good ground of defence to put forward on the minor's behalf, but it would be gross negligence not to defend the suit if there was a valid defence available. If an application for review would be an ineffectual remedy a plaintiff should not be denied the only effectual remedy open to him namely a fresh suit [see *Dabee Dutt Sahoo v. Subodra Bibee*(4) and *Trevelyan on Minors* 286 and 287]. A minor is entitled to have a next friend who is diligent and will protect his interests [vide *Re Hoghton, Hoghton v. Fiddey*(5)]. In the present case it would be futile to refer the plaintiff to a review application or a petition under Order IX, rule 13, Civil Procedure Code, as the time for such remedies has expired long ago.

We hold then that the plaintiffs are entitled to maintain this suit if the Court is satisfied that their guardian ad litem seriously neglected their interests. It must have been patent to any intelligent person with an elementary knowledge of Hindu Law that a mortgage of immoveable

(1) (1920) 11 L.W., 289.

(2) (1878) 3 C.L.R., 17.

(3) (1907) 6 C.L.J., 443.

(4) 25 W.R., 449.

(5) (1874) L.R., 18 Eq., 573.

property for the purpose of lending money to a maternal uncle for a trade that was not ancestral was prima facie not a transaction for the benefit of the minors and that the suit might have been resisted upon that simple ground.

The Head Clerk who acted as their guardian has not been examined and asked questions to elicit whether his inaction could from any point of view be justified.

His conduct in not defending the suit was in the absence of any reason to the contrary grossly negligent.

The Subordinate Judge's finding that the mortgage in question does not bind the plaintiffs is correct and the Appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

NALLAKA VENKATASAMI AND OTHERS (DEFENDANTS),
APPELLANTS,

v.

RAJAM VIRANNA AND ANOTHER (PLAINTIFFS) RESPONDENTS.*

Guardians and Wards Act, (IX of 1890), s. 31—Alienation by guardian—Sanction of District Court—Validity of alienation—Effect of sanction on validity of alienation—Sanction only prima facie evidence of propriety of alienation—Minor's power to impeach transaction—Burden of proof—Proof of fraud on the part of purchaser, whether necessary.

Sanction of the District Court to an alienation of a minor's property by his guardian, under the Guardians and Wards Act, 1890, is only prima facie evidence that the transaction is a good one, but will not cure any inherent defect that may exist in it; and the minor may at any future time show that it was

*Appeal No. 276 of 1919.

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v.
VIRANNA.

fraudulent or improper, and not for the benefit of the minor, but the burden of proof would be upon him to show that it was so.

Sikher Chand v. Dulputty Singh, (1880) I.L.R., 5 Calc., 363; and *Jugul Kishori Chowdhurani v. Anunda Lal Chowdhuri*, (1895) I.L.R., 22 Calc., 545, followed.

APPEAL against the judgment and decree of V. BHASHYAM AYYANGAR, Third Temporary Subordinate Judge of Guntūr, in Original Suit No. 6 of 1918.

The material facts are set out in the judgment.

C. Sambasiva Rao and *V. Lakshminarayana* for appellants.

P. Narayanamurti and *K. Kamanna* for respondents.

SPENCER, J. — This suit was brought by the plaintiffs to set aside alienations made during their minority by their guardian and the Appeal relates to item 10 of schedule A. This property was mortgaged under Exhibit IX-B in 1901 by the plaintiffs' mother after the death of their father in 1899. In 1908 the plaintiffs' maternal uncle, Panakalu, who had been appointed as Guardian of the minors under the Guardians and Wards Act, applied to the District Court for permission to sell a portion of the property to discharge the mortgage and obtained sanction on 24th February 1908. The mortgage, according to the recital in the mortgage document, was for the purpose of borrowing Rs. 600 for the marriage of the plaintiffs. These boys were then aged 3 and 6 years respectively. One of them was married 15 years later and the other is still unmarried. As pointed out by the Subordinate Judge, the recital as to the purpose for which the money was borrowed was obviously false. The sale-deed, Exhibit IX, in favour of the 39th defendant, of 9 acres for Rs. 1,500 was dated 1st April 1908. The purchaser took a transfer of the mortgage on 26th March and five days after his sale he sold the same

property under Exhibit IX-A to the 41st defendant for Rs. 1,800 having previously received an advance on the 29th March before he got the transfer in his own name. The 39th defendant was a gumasta to the plaintiff's guardian Panakalu. The above circumstances are enough to cast a great deal of suspicion on the transaction, and to suggest the existence of a conspiracy between the guardian and his gumasta and the purchaser from that gumasta to defraud the minors. There are no reasons to treat 41st defendant as a bona fide purchaser having no knowledge of the defects of the previous sale. But in Appeal it has been urged that the sanction of the Court under the Guardians and Wards Act will give a good title to the purchaser. The Court's sanction however was not given according to the requirements of the law and it is in itself not free from suspicion. The affidavit presented by the guardian to the District Court Exhibit IX-E contains an incorrect statement that the mortgage bore interest at Rs. 1-9-0 compound interest whereas the truth was that interest was due at the rate of Rs. 1-5-0 and in default interest was to be calculated upon interest at the same rate. D. W. 10 deposes that the land sold under Exhibit IX was not worth more than the price for which it was sold, but this witness is evidently interested as he admits that he is related to the 39th defendant and was living in his house during his education period.

Now as to the effect of the sanction of the District Court given to the guardian to sell the minors' property, it has to be noted in the first place that the District Judge's order has not complied with section 31(2) as it did not recite the necessity for the sale but simply ran thus :

" In the circumstances the sale of 9 acres in full satisfaction of the mortgage debt is sanctioned."

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In my opinion the District Judge's sanction will not cure inherent defects that may exist in a sale by a guardian. The effect of the sanction accorded by Courts in such cases has been considered in *Sikher Chand v. Dulputty Singh*(1), and *Jugul Kishori Chowdhurani v. Anunda Lal Chowdhuri*(2). The learned Judges of the Calcutta High Court held that sanction was prima facie evidence that the transaction was a good one but that the minor may at any future time show that it was fraudulent or improper. Where the evidence on both sides is before us, there is nothing to prevent the Court from coming to the conclusion that the sale was an improper one and not for the benefit of the minor, though the burden of proof in the first instance lies upon the person seeking to set aside the alienation. There is ample evidence for concluding that the sale in this case was not for purposes binding upon the minors. The plaintiffs are entitled to have it set aside in the suit and the Subordinate Judge's finding that it does not bind them must be upheld and the Appeal dismissed with costs.

RAMESAM, J.

RAMESAM, J.—I agree with my learned brother and the Subordinate Judge with reference to the conclusion on the facts.

On the question of law argued by the learned counsel for the appellants I wish to add a few words. I think that the true rule as to the effect of the sanction of the District Court authorizing an alienation by the guardian of the minors is stated in *Sikher Chand v. Dulputty Singh*(1). At page 370, PRINSEP J. says :

"The fact that the District Judge on the application and representation of a guardian under section 18, Act XI, of 1858,

may have sanctioned an alienation, cannot in my opinion, affect the present cases, except in so far as it may rightly be considered as a general rule to throw the onus on the plaintiff to show that the alienations were improperly made contrary to the usual rule requiring the purchaser to establish the validity of the alienations or that he acted with due care and caution after making such inquiry as an honest and prudent man would make."

At page 381, GARTH, C.J., says :

"If the Court upon the materials and information brought before it by the guardian makes an order for sale I think that a purchaser who buys in good faith under that order acquires a good title to the property sold, unless the minor or those claiming under him can show at some future date that the sale was fraudulent and improper."

Again at page 388, GARTH, C.J., adds :

"But then I also consider that as the sales took place under the order of the Civil Court, the onus lies on the plaintiffs to make out a prima facie case, such as she has alleged in her plaint, of fraud or illegality, and to show that the debt or sum of money which formed the consideration for the sale in each case was one for which the minor was not responsible "

These observations are quoted with approval and followed in *Jugul Kishori Chowdhurani v. Anunda Lal Chowdhuri*(1).

It is contended before us that *Akhil Chandra Saha v. Girish Chandra Saha*(2), lays down a different rule namely that it is necessary to bring fraud home to the purchaser in order to impeach the transaction. I do not, understand *Akhil Chandra Saha v. Girish Chandra Saha*(2) as laying down a general rule that fraud should be made out. It may be observed that *Akhil Chandra Saha v. Girish Chandra Saha*(2), and *Gangapershad Sahu v. Maharani Bibi*(3), relate to sanction of the

(1) (1880) I.L.R., 5 Cal., 363.

(2) (1895) I.L.R., 22 Cal., 515, 550.

(1) (1895) I.L.R., 22 Cal., 515, 543.

(2) (1917) 21 O.W.N., 834.

(3) (1895) I.L.R., 11 Cal., 370 (P.C.).

VENKATASAMI
v.
VIRANNA.
RAMESAM, J. Court for the raising of loans by mortgage whereas the present case and *Sikher Chand v. Dulputty Singh* (1), relate to sales. To give effect to the policy of the legislature in section 31 of the Guardians and Wards Act, I think it is enough to hold as in *Sikher Chand v. Dulputty Singh*(1), that the burden of proof is shifted to the plaintiff, and that it is not necessary to say that fraud has to be made out on the part of the purchaser to impeach the transaction.

I agree that the Appeal should be dismissed with costs.

K. R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Venkatasubba Rao.

1921,
December
7.
S. R. M. S. T. R. M. RAMASWAMI CHETTIAR THROUGH
HIS AUTHORIZED AGENT KUPPANNA IYENGAR
(RESPONDENT) APPELLANT,

v.

T. S. RAMASWAMI IYENGAR AND ANOTHER (OFFICIAL
RECEIVER AND PETITIONER), RESPONDENTS.*

*Provincial Insolvency Act (V of 1920), ss. 4, 5 and 56—Sale by
Official Receiver of insolvent's property and obstruction to
delivery—Power of Insolvency Court to inquire into title and
to deliver.*

Under sections 4, 5 and 56 of the Provincial Insolvency Act (V of 1920) a Court of Insolvency can inquire into disputed title and order delivery of an insolvent's property to a purchaser thereof from the Official Receiver, removing the obstruction of a third party; *Narasimhaya v. Veeraraghavulu*, (1918) I.L.R., 41 Mad., 440, *Maddipoti Peramma v. Gandrapu Krishnayya*, (1918) 8 L.W., 186 and *Official Receiver, Tinnevely v. Sankaralinga Mudaliar*, (1921) I.L.R., 44 Mad., 524, distinguished.

(1) (1890) I.L.R., 5 Cal., 363.
* Appeal against Order No. 295 of 1920.

APPEAL against the order of P. C. LOBO, Acting District Judge of Madura, in Miscellaneous Petition No. 178 of 1920, in Insolvency Petition No. 3 of 1917.

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After an order vesting an insolvent's properties in the Official Receiver, the Receiver sold one of the properties to the appellant and ordered delivery of the same. When the appellant wanted to take possession, the insolvent's son resisted on the ground that his interest in the property did not vest in the Official Receiver and that the purchase was benami for him. He applied to the Official Receiver to review his order of delivery. The Official Receiver while refusing to reconsider his order placed the matter before the District Judge. The District Judge being of opinion that after the sale the Official Receiver had no power to put the purchaser in possession and that a Court of Insolvency had no jurisdiction to deliver possession of properties except to a person having a decree of Court for possession or an order of a Court declaring him to be a purchaser in a Court auction, cancelled the Official Receiver's order for delivery and directed the insolvent's son to file regular suit to establish his right to possession. Against that order the purchaser filed this appeal.

T. M. Krishnaswami Ayyar for *A. Krishnaswami Ayyar* with *M. Subbaraya Ayyar*, for appellant.—The Insolvency Court has jurisdiction to order delivery: see sections 4, 5, 22, 56 and 66. Section 4 is new and has been enacted for such purposes. Section 7 of the Presidency Towns Insolvency Act is similar to section 4 and it has been construed to give such power: *Nilmony Choudhury v. Durga Charan Chowdhury*(1) and *'Abdul Khader v. The Official Assignee of Madras*(2). The procedure prescribed in the

(1) (1918) 22 C.W.N., 704.

(2) (1917) I.L.R., 40 Mad., 810.

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Civil Procedure Code applies. A Court of Insolvency can decide questions of title; see *Naginal Chunal v. The Official Assignee*(1). Section 69 of the English Bankruptcy Act of 1869 corresponding to section 4 has been construed to give such power to an Insolvency Court: *Ex parte Anderson v. In re Anderson*(2), Williams on Bankruptcy, pages 375, 377. A Court can give auxiliary aids to its own Receivers appointed under the Civil Procedure Code: *Minatoonnassa Bibee v. Khatoonnessa Bibee*(3), *Bansidhar v. Khargjit*(4). Reference was made to *Ramalingam Pillai v. Official Receiver, Trichinopoly*(5) and *Narasimhaya v. Veeraraghavulu*(6) and the cases following it were distinguished as being under the old Act (III of 1907).

K. V. Krishnaswami Ayyar for respondents—Section 4 does not confer any new right on Insolvency Court. Under it the Insolvency Court can only decide questions but cannot deliver property. When a Receiver is appointed by Court he can be given possession by Court under section 14 of the Provincial Insolvency Act. But if he sells property that vested in him to a third party the Insolvency Court cannot give possession to the third party. Here the son says that the father's debt was illegal and immoral and that the sale does not pass his interest. The insolvent's right alone, i.e., the father's right alone, vests in the Official Receiver and the son's right is paramount to that right; and it cannot be delivered. Reliance was placed on *Narasimhaya v. Veeraraghavulu*(6), *Maddipoti Peramma v. Gandrapu Krishnayya*(7) and *Official Receiver, Tinnevely v. Sankaralinga Mudaliar*(8).

T. M. Krishnaswami Ayyar replied.

- (1) (1911) I.L.R., 35 Bom., 473, 475. (2) (1870) 5 Ch., App. 473, 479, 480.
(3) (1894) I.L.R., 21 Cal., 479. (4) (1915) I.L.R., 37 All., 65.
(5) (1921) 41 M.L.J., 211. (6) (1913) I.L.R., 41 Mad., 440.
(7) (1918) 8 L.W., 136, 138. (8) (1921) I.L.R., 41 Mad., 524.

The Court delivered the following JUDGMENT:

This Appeal in effect raises the question whether a purchaser from the Official Receiver of a property of the insolvent whom the Receiver represents, can obtain an order from the Insolvency Court for delivery of possession of the property where his application is resisted by a third party.

This Appeal has been argued before us on the footing that the rights of the parties are governed by the provisions of the Provincial Insolvency Act, Act V of 1920. It is necessary to examine carefully the terms of sections 4, 5 and 56 of this Act. By section 56 (3) it is provided that

"Where the Court appoints a receiver, it may remove the person, in whose possession or custody any such property as aforesaid is, from the possession or custody thereof.

"Provided that nothing in this section shall be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove."

This section clearly applies to the case of a receiver applying for the removal of an obstructor from the possession of the property claimed to be the property of the insolvent. It is also clear that, for the purpose of determining the right of the receiver as against the obstructor to the possession of the property, the Court can hold an inquiry under this section.

There is no section in the old Provincial Insolvency Act, Act III of 1907, corresponding to section 4 of the present Act. There were conflicting decisions in regard to the power of the Court to deal with the claims of third parties against the insolvent and it was to set at rest the doubt that existed upon the subject that section 4 was introduced into the present Act. It will be seen that very wide powers are given to the Court under section 4: the Court may decide any question which it

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may deem it expedient or necessary to decide for the purpose of doing complete justice or making complete distribution of property. Sub-section (2) refers, in terms, to the claims between the debtor and the debtor's estate on the one hand and all claimants against him or it on the other hand. It is also to be noted that a discretion is given to the Court to decide the question in the Insolvency proceedings and that it is not binding upon the Insolvency Court to decide under this section every claim which is brought up before it.

Passing to section 5, it makes provision, *inter alia*, for effect being given to the orders and decrees passed by the Insolvency Court. Under these sections does the purchaser from the Official Receiver have the right to apply to the Court for being put in possession of the property purchased by him? The District Judge disallowed the applications on the ground that the Court cannot issue a delivery warrant on the application of a stranger to the proceedings. Clause (3) of section 56 is not limited to the case of an application by the Receiver and the terms of the clause are general. Why should we restrict the operation of this clause to applications by the Receiver himself? The learned Vakil for the respondent asks us, virtually, to introduce into the section the words "on the application of the Receiver." In our opinion there is no justification for refusing to give to the words of clause (3), of section 56, their natural meaning and for restricting the scope of the clause.

It has also been contended before us for the respondent that the Insolvency Court is not vested with powers to execute the orders except to the limited extent of being enabled to execute orders in favour of the Receivers appointed under the Act. If it is conceded that there is an executing machinery that is available to the Receiver, we fail to see on what principle this

machinery cannot be availed of by a purchaser from the Receiver. The execution of any order made by the Court under section 56 or section 4 will be regulated by the terms of section 5. For instance, if an order for a warrant of possession is made in favour of the Receiver or of a purchaser from him, the method of executing the warrant under section 5 will be the same as that prescribed for the execution of a warrant issued by the Court in the exercise of Original Civil Jurisdiction. The Legislature having invested the Insolvency Courts with extensive powers under section 4, it would be, in our opinion, anomalous to hold that the Courts are powerless to give effect to their judgments or orders. The terms of sections 4, 5 and 56 do not suggest that any such limitation is intended. We are, therefore, unable to accept the contention of the learned vakil for the respondent that the auction purchaser cannot, under the provisions of the Insolvency Act of 1920, apply to the Insolvency Court for a warrant of possession.

Several cases were relied on by the respondent. The first case cited by him is *Narasimhaya v. Veeraraghavulu* (1). Certain property alleged to belong to an insolvent was sold by the Receiver and the purchaser while attempting to take possession was obstructed by the appellants who claimed to be in possession as owners. The District Judge purporting to act under section 47 of Act III of 1907 ordered possession to be given to the purchaser. The High Court held that the District Judge had no jurisdiction to pass such an order. ABDUR RAHIM, J., at page 441, says :

"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 claimed by third persons."

(1) (1918) I.L.R., 41 Mad., 440.

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The Courts have now power to decide questions of title under section 4 of Act V of 1920, and the reasoning given in this judgment would not, therefore, apply to an application made under the present Act. The judgment proceeds upon the ground that section 47 of Act III of 1907 which corresponds to section 5 of the present Act did not apply because there was no decree, and a sale by the Receiver was not a sale in execution of a decree. We are of opinion that the Court has the power not only to make an order in favour of the purchaser but also to give full effect to it. We fail to see that there is anything in the terms of section 47 which fettered the power of the Court because the sale happened to be a sale made by a Receiver and not a sale made in pursuance of a decree. However, it is sufficient to say that this is a decision under the old Act and that it is distinguishable on that ground, especially in view of the enlarged powers possessed by the Court under the present Act.

We have no doubt that the Insolvency Court under Act V of 1920 has ample power to deal with questions arising between the estate of an insolvent and a third party. Section 4 is modelled on section 7 of the Presidency Towns Insolvency Act, III of 1909. Under this corresponding provision of the Presidency Towns Insolvency Act it has been held that the Court is vested with jurisdiction to deal with questions arising between the Official Assignee and third parties. This point was expressly decided in *Official Assignee of Madras v. Vedavalli Ammal*(1). BAKEWELL, J., sitting in the Insolvency Court held that, although, under the old Act, 11 and 12 Vict., Ch. 21, the Insolvency Court had a discretion to exercise jurisdiction over third parties, Act III of 1909 effected a change in the law and that

(1) (1916) 4 L.W., 425.

the jurisdiction was curtailed. This view was not accepted by the Appellate Court. The provisions of section 4 of the present Provincial Insolvency Act are if anything, wider than the terms of section 7 of the Presidency Towns Insolvency Act, III of 1909. We have therefore no hesitation in holding that the insolvency Court has plenary powers to deal with the claims of third parties under the provisions of the present Provincial Insolvency Act.

The next case cited to us is *Maddipoti Peramma v. Gandrapu Krishnayya*(1). BAKEWELL, J., took the view that under section 18 (3) of Act III of 1907, the Court had power to remove a person in possession of property of the insolvent from possession, but that the power was not intended to provide for the determination of questions of title as between the insolvent and third parties. KRISHNAN, J., took the opposite view on this matter. But they agreed in holding that an order passed by the District Judge, on the application by a purchaser of the insolvent's property from the Official Receiver, directing the third party claiming title to deliver possession of the property to the purchaser, was without jurisdiction. The observations we made in regard to *Narasimhaya v. Veeraraghavulu*(2) apply to this case also and we are prepared to hold that this case being a decision under the old Act, does not stand in the way of our deciding in favour of the rights contended for on behalf of the purchaser from the Receiver.

We have been referred to *Official Receiver, Tinnevely v. Sankaralinga Mudaliar*(3) which is also a case decided under the old Act III, of 1907. The observations of SESHAGIRI AYYAR, J., at page 532 that "section 4 of the present Act should not be regarded as if for the first

(1) (1918) 8 L. W., 186.

(2) (1919) I.L.R., 41 Mad., 440.

(3) (1921) I.L.R., 44 Mad., 524.

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time a new power had been conferred" are obiter, and it is unnecessary to discuss this point.

We may observe that in the present case an application was also made by the Official Receiver to the District Court asking for possession of the property. He applied that the auction purchaser might be put in possession of the property on his behalf. The learned District Judge was of opinion that, under section 18 (3) of the old Act the Official Receiver having ceased to be the owner could not apply. It is unnecessary to decide the question whether, after parting with his interest, the Official Receiver can apply, because, as stated above we are of opinion that the application on behalf of the auction purchaser would lie to the Insolvency Court and that the District Judge was in error in refusing to entertain the application.

We would also like to refer to *Minatoonnassa Bibee v. Khatoonnassa Bibee*(1) where it was held by SALE, J., that "a purchaser at a Receiver's sale had a right to obtain the assistance of the Court in obtaining possession." No doubt, the Receiver referred to here was a Receiver appointed in a suit. At page 482 reference is made to an order made by the Calcutta High Court in an administration suit in which the Receiver appointed in the suit was directed to sell and upon the application of the purchaser an order was made directing possession to be given to the purchaser. In the Judgment are given several instances of similar orders made by the Calcutta High Court in the exercise of its Original Civil Jurisdiction. We think that there is no distinction in principle in this respect between a purchaser from a Receiver appointed in a suit and a purchaser from a Receiver appointed in regard to an insolvent's property.

(1) (1894) I.L.R., 21 Cal., 479.

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The District Judge in the present case on account of the view he took of his powers, refused to deal with the merits of the claim of the obstructor who is the son of the insolvent and who put forward certain contentions. We set aside the order of the District Judge and remand the application to be disposed of by him according to law in the light of the observations contained in this judgment.

Costs of this Appeal will abide the result.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Venkatasubba Rao.

KANDASAMI REDDI AND OTHERS (DEFENDANTS 1 TO 5 AND 7 TO 11), APPELLANTS,

1921,
December 7.

v. •

SUPPAMMAL AND ANOTHER (PLAINTIFFS) RESPONDENTS.*

*Limitation Act (IX of 1908), sec. 19—Acknowledgment—
Previous statement when good as an acknowledgment.*

A statement by a person that he executed a hypothecation in favour of another cannot be construed as containing an implied acknowledgment of liability unless it is clear therefrom that he admitted that the debt was still subsisting or unless there was a clear necessity at the same time to mention the fact of discharge. *Venkata v. Parthasaradhi*, (1893) I.L.R., 16 Mad., 220 followed, *Maniram Seth v. Seth Rupchand*, (1906) I.L.R., 33 Calc., 1047 (P.C.), explained.

APPEAL against the order of remand of C. R. VENKATESWARA AYYAR, Acting Subordinate Judge of Rāmnād at Madura, in Appeal Suit No. 80 of 1919 (Appeal No. 280 of 1919 on the file of the Rāmnād District Court), preferred against the decree of M. SUBRAHMANYA AYYAR,

* Appeal against Order No. 138 of 1920.

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District Munsif of Satur, in Original Suit No. 527 of 1916.

The facts are set out in the Judgment.

K. V. Sesha Ayyangar for appellant.—Before a statement can be relied on as an acknowledgment of liability, it must be clear therefrom that there is an admission that the liability is subsisting on the date of acknowledgment. There is no such admission derivable from the statement in this case. It was unnecessary to make a further statement in the plaint in 1912 that the debt was later on discharged. I rely on *Venkata v. Parthasaradhi*(1).

F. S. Vaz for the respondent.—If the admission in 1912 is that there was a debt in 1907 without mentioning that it was later on discharged, that is a good acknowledgment. I rely on *Maniram Seth v. Seth Rupchand*(2), *Ranganayakalu Aiya v. Subbayan*(3), *Sheikh Mahomed v. Jamaluddin Mahomed*(4), *Subharama Aiyar v. Veerabadra Pillai*(5), *Guru Ch. Saha v. Surendra Krista Ray Chowdry*(6).

K. V. Sesha Ayyangar in reply argued that the acknowledgment must show on its face that the liability was admitted to be existing and cited *Maniram Seth v. Seth Rupchand*(2), *Hingan Lal v. Mansa Ram*(7), *Andiappa Chetty v. Alasinga Naidu*(8), *Ramamurthy v. Gopayya*(9), *Ram Khelwan Mahto v. Nanhoo Singh*(10).

AYLING, J.

AYLING, J.—The sole question for our determination is one of limitation. Plaintiffs sue on a mortgage bond (Exhibit A), dated 11th November 1907; and it is admitted that the suit is time-barred unless a certain passage in a plaint, Exhibit B, filed by the

(1) (1893) I.L.R., 16 Mad., 220.

(3) (1909) 5 M.L.T., 71.

(5) (1921) 41 M.L.J., 217.

(7) (1396) I.L.R., 18 All., 384.

(9) (1917) I.L.R., 40 Mad., 701.

(2) (1906) I.L.R., 33 Cal., 1047 (P.C.).

(4) (1908) 10 Bom. L.R., 385.

(6) (1913) 19 C.W.N., 263.

(8) (1913) I.L.R., 38 Mad., 68.

(10) (1907) 6 C.L.J., 514.

defendants (appellants before us) against plaintiffs (Original Suit No. 1011 of 1912) can be relied on as an acknowledgment of liability under section 19 of the Indian Limitation Act, 1908. The passage runs thus:

"7. The first plaintiff and his brother the second plaintiff, namely, Suppa Reddy, jointly executed to him (first defendant) on the said date an hypothecation deed for Rs. 200 after deducting the sums paid towards the said othi amount of Rs. 275. Along with the said deed, the deed of othi executed in the year 1888 and the othi deed of 1907 were also given to the first defendant."

First plaintiff and second plaintiff referred to were respectively defendants 1 and 2 in the suit before us and the first defendant was the present second plaintiff. It is admitted that the hypothecation deed referred to is Exhibit A on which the present suit is based. The question is whether this passage should be construed as an implied acknowledgment of liability under Exhibit A, i.e., an acknowledgment that, at the time the plaint, Exhibit B, was presented, Exhibit A was still undischarged. That this is the test to be applied is clear from the section itself. "Liability" can only signify present liability at the time of acknowledgment; and this is clearly laid down in *Venkata v. Parthasaradhi*(1). Mr. Vaz, who argued the case for respondents, suggested that the effect of the latter judgment had been largely affected, if not altogether destroyed by the Privy Council judgment in *Maniram Seth v. Seth Rupchand*(2) and by the later cases based thereon. This does not seem to be so. It is not suggested that the acknowledgment need be express, and the cases relied on are useful as throwing light on the circumstances in which it should be inferred that the liability is subsisting. But that is all. The express

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(1) (1893) I.L.R., 16 Mad., 220.

(2) (1907) I.L.R., 33 Cal., 1047 (P.C.)

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admission in Exhibit B is merely that the present defendants 1 and 2 executed the suit mortgage on 11th November 1907, and handed it over to second plaintiff with the earlier possessory mortgages of which it was the subject. Are the circumstances such that we can infer that the defendants meant to imply that Exhibit A was still outstanding?

Mr. Vaz has argued that this inference is a necessary legal inference from the simple fact that in reciting the fact of execution defendants do not say that the documents had been discharged. This contention we cannot admit. There is certainly nothing in the Privy Council judgment in *Maniram Seth v. Seth Rupchand*(1), to support it. In that case, there was an admission, dated 20th September 1899, by the defendant that at the time of the death of plaintiff's father (6th October 1898) there were open accounts between them. The exact passage ran:

"The applicant Rup Chand Nanabhai is a big Mahajan of Burhanput paying Rs. 106 as income-tax. For the last five years he had open and current accounts with the deceased. The alleged indebtedness does not affect his right to apply for probate."

Their Lordships say in page 1059:

"The first sentence shows that there were open accounts at the death of Motiram. If nothing further is alleged, the natural presumption is that they continued unsettled at the time the statement was made."

It is this latter sentence in the judgment that is made the basis of the argument. I can see no ground whatever for holding that their Lordships were considering anything but the circumstances of that case or intended to lay down any rule of legal inference. The presumption in that case was very strong. The defendant was dealing with an allegation that he owed money to the estate for administration of which he had been

appointed trustee and should therefore be refused probate. He admitted that up to the time of the death of the testator there were open and current accounts between them; and added in effect, that even if the balance was against him this was no sufficient ground for refusing to allow him to administer the estate, seeing that he was himself a wealthy man. That is the meaning of the paragraph quoted taken as a whole. If defendant had been in a position to say that the account had been settled between 6th October 1898 and 20th September 1899, he would certainly have said so; for this would have been a much better answer to plaintiff's objection. As he did not say so, the inference that the accounts still remained unsettled is natural and obvious.

I cannot extract from this judgment any rule of law that an admission of past liability unaccompanied by an allegation of discharge should in all cases be interpreted as an admission of subsisting liability; and with all respect, I feel bound to differ from the view of MILLER, J. in *Ranganayakalu Aiyar v. Subbayan*(1) that this was intended. No such view was taken as far as I can see by the learned Judges in *Subharama Aiyar v. Veerabhadra Pillai*(2). They are at pains to set out the facts of the case before them. And NAPIER, J., distinctly says:

"It may not necessarily always be that deduction to be drawn."

In fact, as stated in *Andiappa Chetty v. Alasinga Naidu*(3),

"each case must be treated on its own merits."

From the language used and the circumstances in which the acknowledgment is made, it must be decided whether it amounts to an implied acknowledgment of subsisting liability. *Hingam Lal v. Mansa Ram*(4) may

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(1) (1907) 5 M.L.T., 71.

(2) (1921) 41 M.L.J., 217.

(3) (1913) I.L.R., 36 Mad., 68.

(4) (1906) I.L.B., 18 All., 381.

(1) (1906) I.L.R., 33 Cal., 1047 P.C.)

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be referred to as a somewhat similar case in which the Court declined to draw the inference desired by the party wishing to save limitation.

We must therefore look to the facts before us. And here I think the District Munsif was right in holding that no acknowledgment of subsisting liability is to be implied. It is pointed out that the question of whether Exhibit A had or had not been discharged was entirely immaterial in Original Suit No. 1011 of 1912, which was a suit to enforce specific performance of a contract to sell. The execution of Exhibit A appears to have been mentioned simply for the purpose of explaining how the othi deeds came to be in the hands of the defendants in that case; and where the discharge of a document is entirely irrelevant to the purpose for which the statement is made, no adverse inference can be drawn from the failure to allege discharge. It may not be irrelevant to note that when examined as a witness in the same suit first defendant deposed that Exhibit A had been discharged.

We must therefore hold that Exhibit B is not an acknowledgment which will save limitation. We must therefore set aside the order of the Subordinate Judge and restore that of the District Munsif with costs in this and the lower Appellate Court.

VENKATA-
SUBBA RAO, J.

VENKATASUBBA RAO, J.—I agree.

N.R.

APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Devadoss.*

SUBBA GOUNDAN AND ANOTHER — (DEFENDANTS),
APPELLANTS,

1921
December 14

v.

KRISHNAMACHARI AND OTHERS — (PLAINTIFFS)
RESPONDENTS.*

Hindu Law—Sale by father or manager of a joint Hindu family—Sale, not for family necessity—Suit by co-parceners to set aside sale and recover possession from vendees—Co-parceners' right to recover entire lands—Right of vendees to insist on partition in that suit—Decree for possession of entire lands, leaving vendees to work out their rights in a separate suit for partition—Declaration of vendee's interest—Mesne profits from what date—Sale, void or voidable and capable of ratification—Civil Procedure Code (V of 1908), O. XX, r. 12—Remand by Appellate Court—Inherent power of Court—Civil Procedure Code, O. XLI, r. 23—Appeal—Preliminary decree—Duty of Appellate Court—Inquiry as to mesne profits—Second Appeal, competency of.

Where a suit was instituted by the co-parceners of a joint Hindu family to set aside a sale of ancestral immoveable property by their father or the manager of the family on the ground that the sale was not for family necessity, and to recover possession of the property from the vendees, and it was found that the sale was not binding on the plaintiffs.

Held, that the plaintiffs were entitled to recover possession of the entire lands from the vendees; that the latter were not entitled as defendants to insist in this suit on the plaintiffs submitting to a partition either of the items sold to them or of the entire family property so as to give the vendees their alienor's share in the properties sold to them; that the vendees were entitled in this suit to a decree declaring that they are entitled to the share of their alienor, but that they should be left to work out their rights by a separate suit for partition; that a sale by

* Second Appeal No. 1249 of 1920.

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a father or managing member of a joint family for alleged necessity will be good till avoided as it is open to the other co-parceners to affirm the transaction; and that the co-parceners are entitled to mesne profits not from the date of sale but from the date of their repudiation of the sale.

Deendayal Lal v. Jugdeep Narain Singh, (1878) I.L.R., 3 Calc., 198 (P.C.), and *Harli Narain Sahu v. Ruder Perakash Misser*, (1884) I.L.R., 10 Calc., 626 (P.C.), relied on; *Ramkishore Kedarnath v. Jainarayan Ramrachhpal*, (1913) I.L.R., 40 Calc., 966 (P.C.), explained.

View of KRISHNASWAMI AYYAR, J., in *Kandasami Asari v. Somaskanda Ela Nidhi Ltd.*, (1912) I.L.R., 35 Mad., 177, dissented from; *Bhirgu Nath Chaube v. Narsingh Tiwari*, (1917) I.L.R., 39 All., 61, followed.

Where a suit was instituted for recovery of possession of certain lands with mesne profits and the Court of first instance after deciding on all the issues except as to the amount of mesne profits, dismissed the suit upholding the validity of the sale sought to be set aside in the suit, and on Appeal the lower Appellate Court held the sale to be invalid as against the plaintiffs, reversed the decree and remanded the suit to the former Court for disposal, on a Second Appeal being preferred by the defendants.

Held, that the order of remand was not proper even though the Appellate Court might have inherent jurisdiction to remand in a proper case apart from the provisions of Order XLI, rule 23, Civil Procedure Code, but no Appeal would lie against such an order;

that, in suits for recovery of possession of lands with mesne profits, an Appellate Court should not remand the suit where it finds that the plaintiff is entitled to possession, but should pass a preliminary decree so far as possession is concerned, and direct an inquiry as to mesne profits in cases where the Original Court had not dealt with the question, under Order XX, rule 12, Civil Procedure Code;

that in this case the lower Appellate Court must be deemed to have passed a preliminary decree and the direction to ascertain mesne profits deemed to have been given under Order XX, rule 12, Civil Procedure Code; and that the Second Appeal was competent as against such preliminary decree.

Doraisami Aiyar v. Venkatarama Aiyar, (1920) 13 L.W., 618; *Kumud Lal v. Ramani Mohon*, (1914) 19 C.L.J., 346; and *Kamini Debi v. Promotho Nath*, (1914) 20 C.L.J., 476, followed.

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SECOND APPEAL against the decree of T. M. FRENCH, Additional Subordinate Judge of Coimbatore, in Appeal No. 56 of 1920 (Appeal Suit No. 59 of 1920, District Court, Coimbatore), preferred against the decree of V. K. KRISHNAN NAMBIYAR, District Munsif of Tiruppur, in Original Suit No. 726 of 1918 (Original Suit No. 34 of 1918, on the file of the District Munsif's Court, Coimbatore).

The material facts are set out in the judgment.

A. Krishnaswami Ayyar and *S. Subrahmanya Ayyar* for appellants.

T. M. Krishnaswami Ayyar for respondents.

The Court delivered the following JUDGMENT :

Defendants are the appellants. This Appeal arises out of a suit filed by the plaintiffs to recover possession of the properties claimed in the plaint on the ground that the sale of the properties by their father to the defendants is not valid and binding on the plaintiffs, and for the recovery of past and future mesne profits. The case for the plaintiffs was that the land specified in the plaint and other properties belonged to their grandfather, that on a family partition the plaint properties fell to the share of their father, that he without any necessity sold the plaint properties to the defendants for a low price, that the sale was not binding on them and that they are under Hindu law entitled to recover possession of the properties from the purchasers. The defendants put the plaintiff to the proof that he was born at the date of the sale and contended that the sale by the plaintiff's father was to discharge antecedent debts and for other family purposes, that the consideration was adequate, that the lands were subsequently improved by them, and that the suit filed for a declaration alone without asking for setting aside the sale was not

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maintainable, nor was the suit claiming possession without requiring a general partition and without impleading the other co-parceners. It was pleaded that the suit was barred by limitation, that the plaintiffs were not entitled to mesne profits, and that the mesne profits claimed were excessive. Various issues, seven in number, were settled on these pleadings and the District Munsif in an exhaustive judgment has dealt with the several issues. He found that the plaintiff was born at the date of the alienation, that the alienation was for valid purposes and was binding on the plaintiffs, that the plaintiffs were not entitled to any mesne profits, that the suit was not barred by limitation, that the claim for improvements was exaggerated, that the only amount which the defendants would be entitled to was Rs. 40, that the suit as framed was maintainable as the plaintiffs were not bound to set aside the sale-deed, and that as regards possession they were entitled to recover possession of the properties sold leaving it to the purchasers to file a suit for partition in respect of the plaintiffs' father's share, if so minded. In the result the District Munsif dismissed the plaintiff's suit. On Appeal the Subordinate Judge stated that the only points for decision were :

- (1) Was the plaint mentioned alienation binding on the plaintiffs and to what extent?
- (2) What mesne profits if any were the plaintiffs entitled to, and
- (3) Were the defendants entitled to any and what compensation for improvements?

No objection seems to have been taken before him as regards the legal questions as to the maintainability of the suit or to the bar of limitation; and he held that the sale was not binding on the plaintiffs so far as their share of the plaint properties was concerned and that the defendants would have to bring a separate suit for

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partition, the plaintiffs being on the authorities entitled to recover possession of the entire property. As regards mesne profits he held that the plaintiffs were entitled to mesne profits and that the suit would have to go back to the District Munsif for ascertaining the amount due to them. As regards improvements, he confirmed the finding of the District Munsif that only a sum of Rs. 40 was due to the defendants for improvements. He allowed the Appeal with costs, reversed the decree of the District Munsif and remanded the suit to the District Munsif's Court for ascertaining the amount of mesne profits due to the plaintiffs, and directed the District Munsif to pass a decree in favour of the plaintiffs in the light of the above findings. Against this decree the defendants appeal.

A preliminary objection is taken that no Appeal lies as the order of remand was not passed under Order XLI, rule 23, Civil Procedure Code, but was passed by virtue of the inherent power of the Court to order a remand apart from the provisions of that rule. There can be little doubt that if the order was simply an order of remand not falling within Order XLI, rule 23, it is not appealable under Order XLIII as sub-clause (u) only refers to an order under rule 23 of Order XLI, remanding a case. It is contended for the appellants that the decree of the Subordinate Judge is in effect a preliminary decree and that consequently although it is in form a decree remanding the suit it is appealable as a preliminary decree. We think that as the Subordinate Judge has decided that the alienation is not binding on the plaintiffs there was nothing for the District Munsif to do on remand and the decree is in effect a preliminary decree which has been wrongly drawn up as a decree remanding the whole suit. We think that the Subordinate Judge was wrong in reversing the decree of the District Munsif and remanding the entire suit for disposal.

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It is clear that the present case does not fall within Order XLI, rule 23, of the Civil Procedure Code, which provides for the remand of cases by the Appellate Court. This rule provides that "where the Court from whose decree an Appeal is preferred has disposed of the suit on a preliminary point and the decree is reversed in Appeal, the Appellate Court may, if it thinks fit, by order, remand the case and may further direct what issue or issues shall be tried in the case so remanded. . . ."

In the present case the District Munsif did not dispose of the suit on a preliminary point but tried all the issues and has given findings on all of them. The only thing he did not do was to ascertain the amount of mesne profits which would be due to the plaintiffs. In cases of suits to recover possession of immoveable property, rule 12 of Order XX provides that where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree (a) for the possession of the property, (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits, (c) directing an inquiry as to rent or mesne profits from the institution of the suit until (i) the delivery of possession to the decree-holder, (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or (iii) the expiration of three years from the date of the decree whichever event first occurs. It provides that where an inquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry. This rule therefore clearly contemplates the passing of a final decree as regards possession of the property and the amount which is payable as mesne profits or the passing of a preliminary decree for possession

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of the property and directing an account to be taken of the mesne profits and the passing of a final decree as regards mesne profits after the ascertainment. Turning to the definition of decree in the Civil Procedure Code, section 2, clause (2), defines a decree as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. The explanation to that section is to the effect that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final. Having regard to the definition of decree and to the provisions of Order XX, rule 12, it seems to us that the proper course which ought to have been adopted by the Subordinate Judge when he found that the plaintiffs were entitled to possession of the properties was to have passed a preliminary decree directing the defendants to deliver possession to the plaintiffs and to have directed the District Munsif to make the necessary inquiries as regards mesne profits provided for by Order XX, rule 12.

It has been argued by the respondents that the powers of remand conferred by the Code are not confined to the provisions of Order XLI, rule 23, and that apart from the Code the Court has inherent power to remand a suit and that the Subordinate Judge having exercised that inherent power the High Court has no power to interfere. There can be little doubt that, so far as the powers of remand are concerned, the powers conferred by Order XLI, rule 23, are not exhaustive. There are cases where, though the suit is not disposed of on a preliminary point, yet owing to an improper or defective

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inquiry in the lower Court where for example relevant documents are not admitted or material witnesses have not been examined and the Appellate Court is not in a position to adjudicate finally upon the matters in dispute, the inherent jurisdiction to do justice between the parties has been invoked. The Civil Procedure Code of 1908 has expressly enacted section 151 in order to help the Court in doing justice to the parties in cases where there is no express provision in the Code ; but the inherent power under section 151 can only be exercised in cases where, to use the words of the section, it is necessary to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. A remand to a lower Court implies that something has to be done by the lower Court in relation to the matter remanded to it. In the present case it is difficult to see what the lower Court can do as regards possession of the property. The finding of the lower Appellate Court has left nothing to be done as regards the claim for possession and it is idle to remand the case, in so far as the claim to possession is concerned, to the lower Court, as all that it can do is to pass a decree for possession, a step which was within the competence of the Appellate Court to take. In cases falling within Order XX, rule 12, we think the proper course for the Appellate Court to take is not to remand the suit where it finds that a person is entitled to possession but to pass a preliminary decree so far as possession is concerned and direct an inquiry as to the mesne profits, in cases where the lower Court has not dealt with the question. The course adopted by the Subordinate Judge leads to the anomaly that there will be a fresh decree passed by the Lower Court and that it will be necessary to appeal against that decree, including the decree for possession, again to the Subordinate Judge who would be precluded on previous findings from going

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into the question of possession and to compel the party if he wants to appeal from the decree giving possession to file an infructuous appeal to the lower Appellate Court before the question can be agitated in the High Court in Second Appeal. This we think is a procedure which apart from its cumbrousness and expense is not warranted by the provisions of the Code. We think that where an Appellate Court can pass a preliminary decree it is its duty to do so, and that a remand as to matters which can be the subject matter of the preliminary decree is not warranted. It is contended by Mr. T. M. Krishnaswami Ayyar for the respondent that where several items of immoveable properties are concerned, difficulty would arise where the Subordinate Judge deals with only one or two items and that in such cases it would lead to difficulties if a preliminary decree is passed as regards those items and the suit remanded as regards the rest. In such cases we are of opinion that the various items of immoveable properties should for the purpose of Order XX, rule 12, be regarded as one subject matter for adjudication and that the Court is not bound to pass a preliminary decree for possession as regards each item. In *Kamini Debi v. Promotho Nath*(1) it was held that if a decision of the Appellate Court in reality amounts to a preliminary decree within the meaning of the definition of decree in the Civil Procedure Code and in cases falling within Order XX, rules 12 to 18 of the Civil Procedure Code, the mere omission on the part of the Court to embody its effect in a formal expression in the form of a preliminary decree will not negative the right of the party affected to prefer an appeal. A similar view was taken in *Kumud Lal v. Ramani Mohan*(2). In *Sidhanath Dhonddev v. Ganesh Govind*(3) it was held that where the

(1) (1914) 20 C.L.J., 476.

(2) (1914) 19 C.L.J., 346.

(3) (1913) I.L.R., 37 Bom., 60.

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decision of a Court on certain issues conclusively determined the rights of the parties regarding some matters in controversy so far as that Court was concerned, it was the duty of the Court to draw up a preliminary decree so as to enable the party aggrieved to appeal. Sir BASIL SCOTT, C.J., and BEAMAN, J., held that the Subordinate Judge, in declining to draw up a preliminary decree committed a material irregularity in the exercise of his jurisdiction, entitling the High Court to interfere under section 115, Civil Procedure Code, and observed :

"The decision of the issues to which we have referred conclusively determined the rights of parties regarding some matters in controversy so far as his Court was concerned, the decision on each of those issues, therefore, was sufficient to constitute a preliminary decree. The defendant has a right to appeal from a decision of the Court amounting to a preliminary decree, but he can only appeal if the decree is existent in a formal shape. This we decided in *Bai Divali v. Shah Vishnav Manordas*(1). It is the duty of the Court, where it is applied to after the passing of a preliminary decree, to have the decree drawn up so as to enable the party aggrieved to appeal."

The High Court directed the lower Court to draw up a preliminary decree upon the questions decided. We do not think that in the present case it is necessary to send the case down for the Subordinate Judge to draw up a proper decree and to put the parties to the delay and expense involved in what we consider to be a purely formal matter. Now that the Second Appeal has been filed we think, following the views taken in *Doraisami Aiyar v. Venkatarama Aiyar*(2), *Kumud Lal v. Ramani Mohan*(3) and *Kamini Debi v. Promotho Nath*(4), it is open to us to treat the decree of the lower Court as a decree which in substance is a preliminary one and to allow the appellants to argue their Appeal on the footing that

though the form of the decree of the Appellate Court is wrong, it is in substance a decree adjudicating finally the rights of the parties as regards the immoveable properties and is thus appealable as a preliminary decree. We overrule the preliminary objection of the respondents.

Turning to the merits of the Appeal, three points have been taken before us ; (1) that the Subordinate Judge was wrong in holding that the alienation was not binding on the plaintiffs, (2) that, as the alienation was good to the extent of the father's share, the lower Court, instead of decreeing possession and leaving the defendants to a separate suit for partition, should, in this suit at their instance, have decreed a partition and put the plaintiffs in possession of half the share and the defendants in possession of the remaining half and (3) that mesne profits ought not to have been awarded.

As regards the first point we think that the finding of the Subordinate Judge is conclusive and that it is not open to us in Second Appeal to go behind it. The Subordinate Judge finds that there was no necessity for the alienation and that there were no *bona fide* inquiries made by the defendants. There is therefore a clear finding of fact.

As regards the second contention, it is argued by Mr. Krishnaswami Ayyar that it is open to a purchaser in a suit for possession by a co-parcener, on the ground of the invalidity of the alienation and in cases where the alienation is not impeached to the extent of the father's share, to require the plaintiff at his option either to consent to a partition of the specific items conveyed and to get possession of his share after partition by metes and bounds or to require a general partition of all the joint family properties so that the purchaser need not be driven to a separate suit. The right of a co-parcener to require an alienee to deliver possession of the entire joint family

(1) (1910) I.L.B., 34 Bom., 182.

(3) (1914) 19 C.L.J., 346.

(2) (1920) 13 L.W., 618.

(4) (1914) 20 C.L.J., 476.

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property in cases where the alienation is not binding on the plaintiff is clear and the current of authority has been simply to declare the interests of the purchaser and to leave the purchaser to a separate suit for partition, if he wants to work out his interests. So far as the co-parcener is concerned, it is open to him to accept the alienation as valid and seek a partition with the purchaser of the only properties in which the purchaser is interested: vide *Subramania Chettiar v. Padmanabha Chettiar*(1) and *Iburamsa Rowthan v. Theruvankatasami Naick*(2). A purchaser, however, cannot sue for a partition of the item sold to him and obtain an allotment by metes and bounds of his vendor's share in that portion of the property but is bound to file a suit for a general partition (vide *Venkatarama v. Meera Lubhai*(3) and *Palani Konan v. Masakonon*(4), though it has now been settled by the decision of the Full Bench in *Chinnai Pillai v. Kalimuthu Chetti*(5) that there is no fluctuation in the share to which an alienee is entitled, his share being the share of the vendor at the date of the alienation subject of course to the equities in favour of the other members of the family against the transferor). It has also been settled that a vendee from a co-parcener is not a tenant in common with the other members. The view taken by SUNDARA AYYAR and BENSON, JJ., in *Subba Row v. Ananthanarayana Aiyar*(6) has not been followed in *Maharaja of Bobbili v. Venkataramanjulu Naidu*(7) and *Manjaya v. Shanmuga*(8) and in *Kota Balabhadra Patro v. Khetra Doss*(9). A purchaser has only an equity as against the other members of the co-parcenary to work out his interests by a suit for a general partition. In cases where possession

- (1) (1896) I.L.R., 19 Mad., 267. (2) (1911) I.L.R., 34 Mad., 269.
(3) (1890) I.L.R., 13 Mad., 275. (4) (1897) I.L.R., 20 Mad., 243.
(5) (1912) I.L.R., 35 Mad., 47 (F.B.) (6) (1912) 23 M.L.J., 64.
(7) (1916) I.L.R., 39 Mad., 265. (8) (1915) I.L.R., 38 Mad., 684.
(9) (1916) 31 M.L.J., 275.

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of the property is claimed by a co-parcener on the ground of the invalidity of the alienation as against him the current of authority is to decree possession and simply declare the right of the purchaser to a partition. In *Deendyal Lal v. Jugdeep Narain Singh*(1), their Lordships of the Privy Council, while directing possession of the property sold in execution of a decree to be given back to the co-parceners, added a declaration that the appellant as purchaser in execution sale acquired the share and interest of the judgment-debtor in that property and was entitled to take proceedings to have that share ascertained. In *Suraj Bansi Koer v. Sheopersad Singh*(2) their Lordships of the Privy Council gave possession to the co-parceners who sued to set aside the sale in execution of a decree in respect of a debt which did not bind them but declared :

"that by virtue of the execution sale to them the respondents acquire only the one undivided third share in the eight anna share of Mouza Bissumbhurpore in the pleadings mentioned which formerly belonged to Adit Sahai with such power of ascertaining the extent of such third part or share by means of a partition as Adit Sahai possessed in his lifetime ; and ordering that the appellants be confirmed in the possession of Mouza Bissumbhurpore subject to such proceedings as the respondents may take in order to enforce their rights above declared."

In *Hardi Narain Sahu v. Ruder Perakash Misser*(3) it was held that where joint family property is sold in execution of a decree to satisfy a claim against a co-parcener personally, all that the purchaser acquires is merely the right of the judgment-debtor to compel a partition against the other co-sharers. The High Court, when the case came before it on appeal, added the necessary party and effected a partition of the property. Their Lordships in referring to this observed :

- (1) (1878) I.L.R., 3 Cal., 198 (P.C.). (2) (1880) I.L.R., 5 Cal., 148 (P.C.).
(3) (1884) I.L.R., 10 Cal., 626 (P.C.).

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"According to the judgment of their Lordships in Deendyal's case, the decree, which ought properly to have been made, would have been that the plaintiff, the first respondent, should recover possession of the whole of the property, with a declaration that the appellant, as purchaser at the execution sale, had acquired the share and interest of Shib Perakash Misser, and was entitled to take proceedings to have it ascertained by partition. So that, in fact, the appellant has got a decree more favourable to himself than he was entitled to. He retains possession of one-third, instead of being turned out of the possession of the whole and left to demand a partition. Their Lordships, therefore, think that there is no ground for altering the decree of the High Court, although it may have gone beyond what was necessary or proper. The decree is not strictly right, but the appellant does not suffer by that. He gets all that he would be entitled to if a partition were made."

It is clear from the above observations that their Lordships were of opinion that the only right which the purchaser had in such cases was to obtain a declaration which would entitle him in a separate suit for partition to work out his interests. In *Manjaya v. Shanmuga*(1) it was held that where a co-parcener alienates his share in certain specific family property the alienee does not acquire any interest in that property but only an equity to enforce his rights in a suit for partition and to have the property alienated set apart for the alienor's share if possible, and that he is not therefore entitled to sue for partition and allotment to him of his share of the property alienated, nor has he a right to possession and to a status as a tenant in common. In *Pandu Vithoji v. Goma Ramji*(2) it was held that, in a suit by a co-parcener to recover possession of property conveyed without any necessity, joint possession cannot be given to the purchaser but that he is merely entitled to a declaration that he has acquired the interest of the vendor whatever

that may be in the particular property and a direction that he be left to recover that interest by separate suit for partition in which all necessary parties and properties should be joined. The learned Judges have followed the course taken by the Privy Council in *Deendyal Lal v. Jugdeep Narain Singh*(1) and *Hardi Narain Sahu v. Ruder Perakash Misser*(2).

Reliance was placed by Mr. Krishnaswami Ayyar on *Ramkishore Kedarnath v. Jainarayan Ramrachhpal*(3), which was a suit by the members of a joint family to set aside their father's alienation of ancestral property. The respondents in that case objected *inter alia* to the form of the suit, which they contended should have been for partition. The suit was decided in the lower Court without any evidence and on the allegations in the plaint and written statement. Their Lordships of the Privy Council in holding that the plaintiffs would in the absence of any other defence be entitled to succeed went on to observe as follows :

"With respect to the form of the suit, it was rightly pointed out by the learned counsel for the appellants that to deny any relief except in a suit for partition would be to deny the right of relief altogether, since the basis of their claim is that they are still entitled to the estate as a joint undivided estate, and desire to enjoy it as such. It may well be, however, that, as between Kedarnath and Jainarayan, the latter may be entitled to insist that he stands in the shoes of the former as to the share which would come to Kedarnath upon a partition ; and that the Court, if that position were established, would itself, at Jainarayan's instance, decree a partition as between the plaintiffs on the one hand and Kedarnath on the other. Their Lordships think that on the present pleadings it is open to Jainarayan to set up such a case, but express no opinion as to its validity either in law or fact."

(1) (1878) I.L.R., 3 Cal., 198 (P.C.). (2) (1884) I.L.R., 10 Cal., 626 (P.C.).
(3) (1913) I.L.R., 40 Cal., 966 (P.C.).

(1) (1915) I.L.R., 38 Mad., 684.

(2) (1919) I.L.R., 43 Bom., 472.

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Their Lordships therefore remanded the case for trial

"with a declaration that it is competent for the Court, in the event of the respondent Jainarayan failing in his other defences, to make the whole or any part of the relief granted to the plaintiffs conditional on their assenting to a partition so far as regards Kedarnath's interests in the estate, so as to give effect to any right to which the respondent may be entitled claiming through Kedarnath."

It is argued that these observations show that the Privy Council upheld the right of an alienee from a member of a joint family to require that a partition should be effected in a suit filed at the instance of the co-parcener without the necessity of a separate suit being filed. We do not think that this is the effect of the observations. Their Lordships were dealing with a case where the suit was disposed of on a preliminary question. This contention was never raised before them and they guard themselves by stating that though it may be open to the defendant to raise that point they express no opinion as to its validity either in law or fact. We do not think that their Lordships intended to overrule the plain dictum in *Hardi Narain Sahu v. Ruder Perlash Misser*(1), where they held that relief by way of partition was not open to the purchaser in a suit by a co-parcener. SADASIVA AYYAR, J., in *Subbaiya Mudaliar v. Tulasi Mudaliar*(2), was of opinion that their Lordships of the Privy Council did not decide the point in *Ramkishore Kedarnath v. Jainarayan Ramrachhpal*(3), and guarded themselves against any idea that they expressed any opinion as to the validity of the contention either in law or in fact.

Having regard to the provisions of the Civil Procedure Code which do not allow any wide rights of counter-

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claim, it is difficult to see how a suit by the plaintiffs for possession and mesne profits can be converted at the instance of the defendants into one for a general partition which would involve the presence of other parties and an inquiry into the debts and liabilities of the family. If the claim of the defendants is to be treated as a cross suit, and if the written statement is to be stamped as a plaint in such cross suit claiming a general partition, there is no reason why the defendants should not file their own suit for a general partition and work out any decree which they may obtain in the decree in the suit by the co-parcener. There is no special advantage in the defendant's doing in their written statement what they could easily do in a plaint filed by them. It is open to them as soon as a co-parcener files a suit for possession to file a suit for partition, and where proper grounds exist the Court would try the suits together so as to afford relief to all parties. On the point of view of hardship we think that the hardship would be greater if a simple suit for possession which the co-parcener is in law entitled to file in cases of invalid alienations is converted into an elaborate inquiry as to a general partition of the family.

We are of opinion that the defendants are not in this suit entitled to a partition either of the specific item conveyed or of the joint family properties generally.

As regards the claim for mesne profits we do not see any reason for mesne profits being allowed before the suit. The alienation by the father to the extent of his share will be good. In the case of sales by a father or managing member of the joint family for alleged necessity, we think the sale will be good till avoided, as it is open to the other co-parceners to affirm the transaction. The position of such a purchaser cannot be worse than that of a purchaser from a widow

(1) (1884) I.L.R., 10 Cal., 626. (P.O.). (2) (1914) 1 L.W., 65, 76.
(3) (1913) I.L.R., 40 Cal., 966 (P.O.).

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without legal necessity, in whose case it has been held that the sale is good till repudiated by the reversioners. We respectfully dissent from the view taken by KRISHNASWAMI AYYAR, J., in *Kandasami Asari v. Somaskanda Ela Nidhi, Ltd.*(1), that a sale without necessity is incapable of ratification by the other co-parceners. Following *Bhirgu Nath Chaube v. Narsingh Tiwari*(2), we think the claim for mesne profits should be limited to the period from the date of suit as there was no repudiation before the suit. There will be a declaration that the defendants are entitled to the half share of the vendor which they will be at liberty to work out by a suit for partition. The decree of the Subordinate Judge will be modified accordingly.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice
Venkatasubba Rao.

KUPPUSWAMI CHETTIAR (PETITIONER—PLAINTIFF),
APPELLANT,

v.

RAJAGOPALA AIYAR (RESPONDENT—DEFENDANT),
RESPONDENT.*

Limitation Act (IX of 1908), article 182 (5)—Judgment-debtor's petition to enter satisfaction of decree—Objection statement of decree-holder, whether step in aid, when no execution application pending—Suspension of limitation.

A statement filed by a decree-holder objecting to the judgment-debtor's application to enter up satisfaction of the

(1) (1912) I.L.R., 35 Mad., 177.

(2) (1917) I.L.R., 89 All., 61.

* Appeal Against Appellate Order No. 12 of 1921.

decree is not a step in aid of execution, especially when no application for execution was then pending. *Umesh Chunder Dutta v. Soonder Narain Deo* (1889) I.L.R., 16 Calc., 747. *Raghunandun Pershad v. Bhugoo Lall* (1890) I.L.R., 17 Calc., 268 and *Raghunandun Misser v. Kallgdut Misser* (1896) I.L.R., 23 Calc., 690, followed.

An application to be a step in aid of execution should be one made in a pending execution application. RAMESAM, J.'s view in *Sankara Nainar Pillai v. Thangamma* (1922) I.L.R., 45 Mad., 202, dissented from.

The time during which the judgment-debtor's application to enter satisfaction of the decree was pending cannot suspend the period of limitation for application for execution of the decree: *Nrityamoni Dassi v. Lakhan Chandra Sen* (1916) I.L.R., 43 Calc., 660, distinguished.

APPEAL against the order of B. SUBBA RAO, Subordinate Judge of Tanjore, in Appeal Suit No. 92 of 1920 (Appeal Suit No. 117 of 1920 on the file of the District Court, Tanjore) preferred against the order of S. K. RAMASWAMI SOMAYAJIYAR, Acting District Munsif of Tiruvadi, in Execution Petition No. 368 of 1919 in Original Suit No. 174 of 1916.

The facts are set out in the judgment. The decree-holder whose application for execution was dismissed by both the lower Courts as barred by limitation preferred this appeal to the High Court.

T. M. Krishnaswami Ayyar for appellant.—Exhibit E is a step in aid of execution: *Dharanamma v. Subba*(1), *Abdul Kader Rowther v. Krishnan Malaval Nair*(2), *Lakhi Chand v. Pear Chand*(3), *Masilamani Mudaliar v. Sethuswami Ayyar*(4), *Bacharaj Nyahalchand v. Babaji Tukaram*(5), *Laxmiram Lallubhai v. Balashankar Veniram*(6).

An application to be a step in aid of execution need not be made in a pending execution application: *Sankara*

(1) (1884) I.L.R., 7 Mad., 306.

(2) (1915) I.L.R., 38 Mad., 695, 697.

(3) (1917) 89 I.C., 106.

(4) (1918) I.L.R., 41 Mad., 251.

(5) (1914) I.L.R., 38 Bom., 47.

(6) (1915) I.L.R., 39 Bom., 20.

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Nainar Pillai v. Thangamma(1). The time during which Execution Application No. 16 of 1918 was pending suspends limitation: *Hemendra Mohon Khasnobis v. Dharaninath Chanda Roy*(2), *Lakhan Chunder Sen v. Madhu Sudan Sen*(3), *Nrityamoni Dass v. Lakhan Chandra Sen*(4). *Muthu Korakkai Chetti v. Madar Ammal*(5) is distinguishable.

S. Subrahmanya Ayyar for the respondent.—Exhibit E is not a step in aid: *Sreenivasa Chariar v. Ponnusawmy Nadar*(6), *Brij Nath Sahai Singh v. Hari Charan Ray*(7), *Umesh Chunder Dutta v. Soonder Narain Deo*(8), *Raghumandun Pershad v. Bhugoo Lall*(9), *Raghumandun Misser v. Kallgudt Misser*(10). An application to be a step in aid must be made in a pending execution application. There can be no suspension of limitation apart from the Limitation Act: *Muthu Korakkai Chetti v. Madar Ammal*(5).

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AYLING, J.—The sole question for disposal in this appeal is one of limitation. Appellant is the decree-holder in Original Suit No. 174 of 1916 on the file of the District Munsif of Tiruvadi and the Appeal arises out of his Execution Petition No. 368 of 1919 filed on 8th October 1919. The decree is dated 2nd May 1916; and the only prior execution petition presented by appellant was dismissed on 7th September 1916. The present application is admittedly timebarred, unless appellant can claim a new starting point for limitation under Article 182 (5) of the Indian Limitation Act by showing that he applied within three years of the prior

execution petition “to take some step in aid of execution.” There are two petitions [Exhibits E and F and a plaint in another suit (Exhibit C) which, as appellant contends, should be regarded as such applications]. I shall deal with them in order beginning with Exhibit E.

On 3rd January 1918 the judgment-debtor (respondent) filed a petition, Execution Application No. 16 of 1918, for entering satisfaction of the decree, which he claimed to have discharged. On this appellant filed a “counter-statement,” Exhibit E, dated 1st February 1918, denying receipt of the decree amount, and asking that the petition should be dismissed. (It was eventually dismissed on 16th August 1918 owing to respondent’s default).

It is argued that the entry of satisfaction asked for by respondent would have effectively prevented the execution of the decree and that for this reason the counter-statement, Exhibit E, should be treated as an application to take a step in aid of execution of the decree.

The argument really amounts to this: that any application which, if successful, would facilitate execution or prevent an obstacle being raised to the execution of a decree, whether an application for execution is pending or not, should be treated as coming within the words quoted. Such a construction seems to me altogether unwarranted and to fail to give effect to the words of the article. The article classes together an application for execution and an application to take some step in aid of execution: and the latter words appear to be intended to cover an application which is not an initial application for execution, but is an application to take some step to advance an execution proceeding, which is already pending, e.g., application to bring to sale properties already under attachment.

(1) (1922) I.L.R., 45 Mad., 202.

(2) (1920) 25 C.W.N., 376, 378.

(3) (1908) I.L.R., 35 Cal., 209, 218.

(4) (1916) I.L.R., 43 Cal., 660 (P.C.).

(5) (1920) I.L.R., 43 Mad., 185 (F.B.).

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(6) (1905) I.L.R., 28 Mad., 40.

(7) (1918) 48 I.C., 187.

(8) (1889) I.L.R., 16 Cal., 747.

(9) (1890) I.L.R., 17 Cal., 268.

(10) (1896) I.L.R., 23 Cal., 690.

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The petition, Exhibit E, may tend to prevent the Court placing an obstacle in the way of future execution of the decree : but it does not ask the Court to take any step in aid of execution. Supposing it to be successful, execution of the decree is not further advanced than it was before the petition was presented.

This is the view which has been consistently taken by the Calcutta High Court [vide *Umesh Chunder Dutta v. Soonder Narain Deo*(1), *Raghunandun Pershad v. Bhugoo Lall*(2) and *Raghunandun Misser v. Kallgdut Misser*(3)] and it is one in which I respectfully concur, as based on the only natural interpretation of the article.

We have been referred by the learned Vakils on both sides to numerous other cases in which the interpretation of this article has been in question. Some of these call for consideration ; but I propose to at once eliminate the class which deals with applications made in the course of a pending execution petition, of which *Abdul Kader Rowther v. Krishnan Malaval Nair*(4) is a fair example, dealing with an application by the decree-holder for adjournment of execution proceedings in order to enable him to produce further evidence. Which of such applications should be treated as falling within the article has become a very difficult question to decide, if effect is to be given to all the views expressed in the different judgments. It seems to me, if I may say so with respect, that in some cases the Courts in their anxiety to prevent decree-holders being deprived of the fruits of their decrees by the "technical" plea of limitation have stretched the article to such a point that it has become difficult for the most experienced lawyer (to say nothing of layman) to say when many decrees will become time-barred. In a matter like limitation

(1) (1889) I.L.R., 16 Cal., 747.
(3) (1896) I.L.R., 23 Cal., 690.

(2) (1890) I.L.R., 17 Cal., 268.
(4) (1915) I.L.R., 38 Mad., 695, 697.

certainty is the first desideratum : it matters comparatively little whether a decree-holder is allowed 3 years or 10 to execute his decree as long as he knows for certain when the time allowed him will come to an end.

But whatever case may be made out for an application made in connexion with a pending execution petition as one for taking a step in aid or furtherance of it, an application made at a time when no execution petition is pending stands on an obviously different footing. A man cannot be said to take some step in aid of a petition which has not been initiated.

The main case relied on by appellant is *Laxmiram Lallubhai v. Balashankar Veniram*(1), in which it was held that an appeal against an order adjudging the judgment-debtor an insolvent was a step in aid of execution. As a matter of fact in that case an execution petition filed by the objector apparently was pending at any rate at the time the insolvency petition was filed : but apart from this it seems to me, with all respect, that the reasoning of the learned Judges does not justify such an extension of the article, and I observe that they expressly say they do not seek to lay down any general principle, and desire to confine their judgment to the unusual facts before them.

In the other case, *Sankara Nainar Pillai v. Than-gamma*(2), RAMESAM, J., certainly says there is no warrant for the view that an application to take a step in aid of execution should be made "in execution," meaning apparently while an execution is pending. But he gives no reasons and does not discuss the point : and, with all respect, I feel compelled to dissent.

I must therefore hold that the counter-petition, Exhibit E, is not an application to take a step in aid of execution.

(1) (1915) I.L.R., 39 Bom., 20.

(2) (1922) I.L.R., 45 Mad., 202.

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Exhibits F and C may be more briefly disposed of. Exhibit F is merely a petition by both parties to hear Execution Application No. 16 of 1918 along with another suit between the parties (Original Suit No. 452 of 1917) : and it is conceded that if Exhibit E cannot be relied on to save limitation, Exhibit F stands in no better position.

Nor does Exhibit C. This is the plaint filed by appellant in the last-mentioned suit seeking to set aside a settlement deed executed by respondent in respect of certain immovable properties as void under section 53 of the Transfer of Property Act. The present execution petition is for attachment and sale of moveable property, to which that suit had no application. I cannot see how by any stretch of reasoning the presentation of this plaint could be treated as an application to take a step in aid of execution of the decree in Original Suit No. 174 of 1916.

An alternative contention put forward by appellant is that he is entitled to ask that the time during which Execution Application No. 16 of 1918 was pending should not be counted against him. This plea does not profess to be based on anything in the Limitation Act, but reliance is placed on the decision of a Bench of three Judges of the Calcutta High Court: *Lakhan Chunder Sen v. Madhu Sudan Sen*(1), approved on appeal to the Privy Council in *Nrityamoni Dassi v. Lakhan Chandra Sen*(2), in which it appears to have been held that the relaxations of the ordinary law of limitation provided in the Limitation Act are not exhaustive and that in the case then under consideration the plaintiffs were entitled to count in their favour the period during which they were precluded from bringing their suit by reason of the existence of a decree in a previous suit which

(1) (1908) I.L.R., 35 Calc., 209, 218. (2) (1916) I.L.R., 43 Calc., 660 (P.C.), 668.

covered the same matter. The authority on the first point may be allowed : but in considering whether any concession should be allowed to the appellant before us, the difference in the facts of the two cases deprives the decision of all force. In that case stress was laid on the fact that the prior decree

"so long as it stood undischarged was susceptible of execution at the hands of the present appellants (plaintiffs) and whilst that decree existed it was not open to them in the circumstances to institute a fresh suit for the attainment of the very object which had been successfully attained by them in the previous suit."

For this reason, because the plaintiff's right to bring the action was absolutely suspended as long as the prior decree remained in force, this period was not allowed to count against him for purposes of limitation.

In the present case no such consideration arises. The pendency of Execution Application No. 16 of 1918 was no bar to the institution of execution proceedings by appellant. He may have deemed it good policy not to start fresh proceedings until Execution Application No. 16 of 1918 was disposed of (which happened on 16th August 1918) but that is a very different matter. If relief against limitation is to be allowed in cases not provided for in the Limitation Act, surely this should only be done in cases where justice and equity clearly require it. It is not so here.

Our attention was also drawn to *Muthu Korakkai Chetty v. Madar Ammal*(1). The decision in that case turned on a construction of article 180, Limitation Act, with which we have no concern : but the principle of "suspension" and the question of whether the Privy Council intended to lay down any rule as to the exhaustiveness of the exemptions contained in the

(1) (1920) I.L.R., 43 Mad., 185. (F.B.)

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Limitation Act were no doubt discussed and were in fact the points raised in the reference. It is sufficient to say that the judgments of all the learned Judges except SADASIVA AYYAR, J., tend against appellant's contention: and that none of them militate against the view I have expressed above, viz., that even if it is open to us to allow a suspension of time not provided for in the Limitation Act, there is no justification for doing so here.

I would dismiss the Appeal with costs.

VENKATASUBBA RAO, J.:—I agree.

M.R.

PRIVY COUNCIL.*

RADHAKRISHNA AYYAR AND ANOTHER (DEFENDANTS),
APPELLANTS,

1922,
 March 14.

v.

***SUNDARASWAMIER (PLAINTIFF), RESPONDENT.**

[On Appeal from the High Court at Madras.]

Judicial Committee—Practice—Valuation of Appeal—Certificate of High Court—Tender of patta—Previous decree—Construction of patta—Oodu crop—Estates Land Act (Madras Act I of 1908), sec. 52, sub-sec. (3).

Rule 2 of rules contained in the Order in Council of April 10, 1838, whereby the certificate of a Court in India that the value in a dispute in an Appeal to the Privy Council amounts to Rs. 10,000 and upwards shall be conclusive, remained in force until repealed by the Order in Council of February 9, 1920; in some cases before the Board it would appear that the rule of 1838 had been overlooked.

The provision in section 52, sub-section (3) of the Estates Land Act (Madras Act I of 1908), as to the remaining in force of pattas "decreed," is not confined to pattas decreed by any particular Court; it includes a decree of a Revenue Court in proceedings under Madras Act VIII of 1865.

A patta provided that if contrary to its terms the tenant carried away the crop he should pay the specified melvaram paddy in respect of the total yield of paddy calculated at a certain average of crop, the kadappu and kar produce being payable by December 15 and the samba and pisanam by March 15. The tenant planted an oodu crop, that is, a crop sown together, one part of which takes three months and the other part six months to ripen and be reaped.

Held that the tenant having carried away the crop was liable to pay at the specified rate upon each portion of the oodu crop.

APPEAL (No. 112 of 1918) from a judgment and decree of the High Court (November 14, 1916) varying a decree

* Present:—Viscount CAVE, Lord SHAW, Sir JOHN EDGE and Mr. AMERU ALL.

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of the District Judge of Tanjore pronounced on appeal from the Revenue Divisional Officer of Kumbakōnam.

The suit was brought in the Revenue Court under the Madras Estates Land Act (I of 1908), section 77, to recover arrears of rent of certain inam lands. The plaintiff (represented by the present respondent) was Receiver in a partition suit of family property including the inam lands which were an "estate" as defined by that Act. The defendants were occupancy ryots in whom the kudivaram interest in the land vested. The claim was for rent said to have accrued in accordance with a patta tendered in respect of faslis 1318, 1319 and 1320. The defendants had rejected the patta and contended that a less sum, which they paid into Court, was due. The inamdar in proceedings under the Rent Recovery Act (Madras Act VIII of 1865) had obtained decrees in former years enforcing the pattas in the form now tendered. The last of these decrees was made by the Divisional Officer in April 1904. The material terms of the patta appear from the judgment of their Lordships.

The District Judge and the High Court (OLDFIELD and PHILLIPS, JJ.) held that the patta in the terms of that previously decreed was in force under section 52, sub-section (3) of the Estates Land Act (Madras Act I of 1908), but the two Courts had arrived at different results on the construction of the patta.

The present Appeal originally came on for hearing in December 1920, and was then dismissed on the ground that the certificate for leave to appeal was insufficient [See *Radhakrishna Ayyar v. Swaminatha Ayyar*(1)]. Subsequently a certificate which had not been included in the record was produced, and by an order made on

(1) (1921) I.L.R., 44 Mad, 203 (P.C.); L.R., 48 I.A., 81.

June 3, 1921, the Appeal was restored to the list upon terms. The terms of the new certificate appear in the judgment.

De Gruyther, K.C., and *Parikh* for respondent.—The Appeal is not competent under sections 109 and 110 of the Code of Civil Procedure, 1908. The amount of rent claimed was under Rs. 4,500 and the value of the subject-matter was clearly under Rs. 10,000. The certificate was wrongly given and the Appeal is not competent: *Banarsi Prasad v. Kashi Krishna Narain*(1), *Radha Krishn Das v. Rai Krishn Chand*(2).

Sir George Lowndes, K.C., and *Kenworthy Brown* for the appellants.—The subject-matter was Rs. 10,000 and upwards. The valuation of the Appeal does not wholly depend upon the sum claimed: *Gooroopersad Khoond v. Juggutchunder*(3). In the present case the decree settled the rent payable annually, so that the capitalized value is to be considered. Further, under Rule 2 of the Order in Council of 1838 the certificate of the High Court is conclusive of the value. That Order was operative until repealed by the Order of 1920, which was made after this Appeal was entered.

De Gruyther, K.C., in reply.—The Rules in the Order in Council of 1838 were made under, and as to Appeals under, 3 and 4 Will. 4, C. 41; they do not apply to Appeals which now are made under and subject to the Code of Civil Procedure. In *Radha Kumar v. Reoti Singh*(4), the Board held that a certificate of valuation was wrongly made and refused to hear the Appeal.

Their Lordships desired to hear the Appeal, the question of competency being reserved.

Sir George Lowndes, K.C., and *Kenworthy Brown* for the appellants.—The appellants are not bound by the previous

(1) (1900) I.L.R., 23 All., 227 (P.C.); L.R., 28 I.A., 11

(2) (1901) I.L.R., 23 All., 415 (P.C.); L.R., 28 I.A., 182.

(3) (1860) 8 M.I.A., 136.

(4) (1916) I.L.R., 33 All., 488 (P.C.); L.R., 43 I.A., 187.

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patta under section 53, sub-section (3) of the Madras Estates Land Act, 1908. That sub-section does not refer to pattas decreed, as these were, under Madras Act VIII of 1865. The Act of 1908 entirely altered the relation of landlord and tenant in Madras. The Act of 1865 by section 11 made the rent depend upon agreement, express or implied. The Act of 1908 introduced other considerations, its keynote being sections 27, 28 and 29; section 74 too was new. "Decreed" in section 52 means decreed as fair and equitable, having regard to the provisions of the Act. Here, the tenants had by agreement for many years paid at a lower rent than that now claimed. If the patta is binding the rent now claimed was a penalty and as such was not recoverable under section 77 of the Act of 1865. [Reference was made to *Rajah of Pittapuram v. Jonnalagadda Venkata-subba Rao*(1), *Parthasarathi Appa Row v. Chevandra Venkata Narasayya*(2).]

De Gruyther, K.C., and *Parikh* for the respondent.—Both Courts rightly held that "decreed" in section 52, sub-section (3), includes a decree of the Revenue Court under the Act of 1865. There is no reason why the plain terms of the sub-section should be limited. Pattas and muchilkas under the Act of 1865 do not give rise to a contract, but are evidence of the terms of a pre-existing tenancy: *Shannuga Mudaly v. Balnati Kuppu Chetty*(3). The question is whether the patta tendered properly represents the terms of the holding. With regard to this class of tenant the Act of 1908 made no material difference. What was claimed was not a penalty but the rent payable in the circumstances. [On the construction of the patta reference was made to *Wilson's Glossary* q.v. "samba," "kadappu."]

(1) (1915) M.W.N., 813.

(2) (1910) I.L.B., 33 M.L., 177 (P.O.); L.R., 37 I.A., 110.

(3) (1902) I.L.B., 25 Mad., 618 (F.B.), 621.

Sir George Lowndes, K.C., replied.

The JUDGMENT of their Lordships was delivered by Lord SHAW.—This is an Appeal against a decree of the High Court of Judicature at Madras, dated 14th November 1916. It varied a decree of the District Judge of Tanjore, dated 18th January 1915. The suit between the parties was brought in the Revenue Court of Kumbakōnam under the Estates Land Act (Madras Act I of 1908), section 77. The claim of the plaintiff was for rent said to have accrued and to be due by the defendants in respect of their holdings, in accordance with the terms of a patta which will be afterwards noted. No further reference is required to the various stages of the litigation.

A preliminary question, however, is raised as to whether the Appeal is competent. It is pointed out by the respondent, who makes the objection, that the rent sued for amounted to Rs. 4,560, being rent for three years in arrear. The respondent accordingly contends that it sufficiently appears that the amount or value of the subject-matter of the suit is not Rs. 10,000, as required by sections 109 and 110 of the Code of Civil Procedure, 1908; and upon the case reaching this Board their Lordships, on 3rd December 1920, held that the certificate *quoad* value was at least ambiguous, and that such certificates "ought to be given in such a form that it is impossible to mistake their meaning on their face."

The only order then before the Board was in these terms:

"It is hereby certified that as regards the value of the subject-matter and the nature of the question involved, the case fulfils the requirements of sections 109 and 110 of the Code of Civil Procedure, and that the case is a fit one for appeal to His Majesty in Council,"

And upon that the previous judgment of the Board proceeded. It now appears, however, that the above was

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not the only order, and that the parties had failed to bring up the order embracing the actual certificate and granted on the same day.

It is admitted by both parties that there did exist in the proceedings an order of 21st September 1917 in the following terms :

"We hold that the subject-matter is of a value greater than Rs. 10,000, with reference to *Gooroopersud Khoond v. Juggut-chunder*(1), and that a substantial question of law is involved. We therefore certify that the case is a fit one for appeal to His Majesty in Council with reference to sections 109 and 110 of the Civil Procedure Code."

In their Lordships' opinion, this certificate is sufficiently clear, and is not open to the objections under which the former certificate under argument before the Board stood condemned.

The point, however, which still remains, is whether that certificate must be accepted by the Board as conclusive, the actual sum in figures which is sued for being what it is, and so much smaller than Rs. 10,000.

The ruling provision as to certificates of value was No. 2 of the schedule to the Order in Council of 10th April 1838. It is to the following effect :

"That in all cases in which any of such Courts shall admit an appeal to Her Majesty, her heirs and successors in Council, it shall specially certify on the proceedings that the value of the matter in dispute in such appeal amounts to the sum of 10,000 Company's rupees or upwards, which certificate shall be deemed conclusive of the fact, and not be liable to be questioned on such appeal by any party to the suit appealed."

It is admitted that at the date of the Appeal this Order was in operation, and it accordingly governs the case ; and, so far as the Board is concerned, it concludes the question of competency *quoad* value. In some of the

cases which have occurred, it would rather appear as if the provisions of this Order had been left out of view.

On a date subsequent to the filing of this Appeal, namely, 9th February 1920, the Order was repealed by an Order in Council, passed by His Majesty on the date mentioned. While, however, in cases subsequent to that date, the value of the subject-matter of the Appeal is not concluded by the certificate of the Court below, their Lordships desire to make these two observations :—In the first place, the sum of money actually at stake may not represent the true value. The proceeding may, in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit [*Banarsi Prasad v. Kashi Krishna Narain*(1)]. The Courts below may accordingly with propriety, as was done in this case, make the necessary certificate. In the second place, whether they did so or not, while their Lordships would, of course, be free, if greater value in the sense mentioned were established, to proceed with the Appeal, yet they will always naturally and very greatly defer, on a subject of this nature, to the certificate given by the High Court.

The objection to the competency of the Appeal is accordingly repelled.

Their Lordships proceed to the merits of the Appeal.

The original plaintiff in the suit was a Receiver appointed by the Court and the plaintiff-respondent is his successor and represents the proprietors of an inam village called Kadiramangalam. It is matter of admission that the appellants are occupancy ryots of certain

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(1) (1900) I.L.R., 28 All., 227 (P.C.); L.R., 28 I.A., 11.

(1) (1860) 8 M.I.A., 166.

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of the village lands, having the permanency of tenure and the other rights attaching to that position under the law of Madras. Their Lordships desire to make it clear that nothing that has passed between these litigants during the long course of years, in which the law has been so frequently invoked, constitutes a derogation from the status, privileges, rights and obligations of parties under the Madras Land Act. The provisions, for instance, of Chapter 5 of the Act as to the payment of arrears of rent and the appraisalment and division of produce, as also those of Chapter 4, dealing with pattas and muchilkas, can be appealed to and are plainly applicable.

In particular, it should be noted that Chapter 4 of the Act, as is specially provided for by section 50, applies to all ryots with a permanent right of occupancy, and by section 52 accordingly pattas and muchilkas may be exchanged for periods of one or more revenue years; but no landholder shall be bound to tender, and no ryot to accept, a patta for a period of more than one revenue year. It appeared to be maintained for the appellants that payments made during the course of twenty years should form the lines and limits of the ryots' obligations for all time. Setting aside the manifest contradiction by this of the actual relations of these parties, the Board has, in view of the argument, thought it right to express its opinion that the statutory rights and obligations of parties have not been thus impinged upon. Past practice may, of course, have its weight as one of the elements which are considered in fixing under the Act what are the fair and equitable conditions of a particular patta [*Parthasarathi Appa Row v. Chevendra Venkata Narasayya*(1)].

(1) (1910) I.L.R., 33 Mad., 177 (P.C.); L.R., 37 I.A., 110.

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Under the Madras Estates Act I of 1908, the inamdar, on 28th October 1908, tendered a patta for fasli 1318 to the tenants and demanded from them a muchilka, but the tenants refused to accept the patta, or to execute a muchilka. Pattas, in identical terms having been also offered and refused, and no muchilkas having been executed for the two following years, faslis 1319 and 1320, the suit was instituted on 15th December 1911. It resulted in a decree for Rs. 4,367-7-3.

It may be stated that it was admitted that there had been numerous suits and numerous decrees in which the rights of the inamdar had been determined in accordance with pattas substantially, if not entirely, in the same terms as those tendered in the present suit. The plaint correctly states: "Pattas were tendered for the under-mentioned occupancy right lands in the enjoyment of the defendants for faslis 1318, 1319 and 1320, duly according to custom and in conformity with the previous judgments, by the first defendant in Original Suit No. 61 of 1904, who was managing during the said faslis."

In 1902, the inamdar had sued and on the 19th April, 1904, the Divisional Officer pronounced judgment in the plaintiff's favour, and he expressed himself thus:

"I consider that the dispute between the parties relating to the suit fasli is identical with those decided in the previous faslis in the judgments referred to above, and that no special pleas or circumstances are urged with reference to the suit fasli for any fresh adjudication."

Their Lordships pause to say that they may repeat in terms this dictum which was pronounced eighteen years ago. It is a truly deplorable circumstance that judicial time should have been occupied and the substance of parties wasted by litigation over a further period of eighteen years, for settling practically the same point. The careful provisions made by legislation for the steady protection from year to year of the rights of occupancy

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ryots on the one hand, and inamdars and other landlords on the other, have been put on one side and fruitless and repeated litigations have been indulged in.

But in the judgment referred to, the Divisional Officer proceeds :

" I therefore find that the previous judgments are *res judicata* in these suits as they have gone fully into the question of custom relating to the different stipulations in the patta."

However natural it may have been to treat the position thus, their Lordships cannot sustain on legal grounds the plea of *res judicata* here suggested. In the language of the High Court :

" The answer is that the general doctrine of *res judicata* is not in question, but the application of the special rule stated in section 52 (3), Estates Land Act, under which muchilkas decreed for any revenue year remain in force until the beginning of the year, for which fresh ones are exchanged or decreed, and that there is no reason for restricting the scope of the general reference to muchilkas decreed to those decreed by any particular description of Court."

With this view the Board is in full agreement.

The inamdar having again tendered pattas in terms of section 54 and the other relative sections, and the tenants having, notwithstanding previous decrees, again refused to accept the terms or to grant muchilkas, and the terms of the pattas having been entirely approved by the Collector, the present suit had to be brought. The pattas tendered are in terms of previous pattas upon which judgment and decree was passed. It stands to reason, and it is in accordance with sections 27 and 28, that the old rent thus decreed shall continue, until reduced or enhanced by special applications under the Statute. No such applications have been made. All that remains in the case is the correct interpretation of the pattas.

The argument presented to the Board involved the construction of the two clauses, 1 and 8. These clauses are as follows :

" 1. Out of the 32 *pangus* in the aforesaid village, the lands comprised in the $\frac{3}{4}$ *pangu* which is in your enjoyment, viz., *Ayan* nanja of the extent of 2 Velis 3 Mahs 4 Kulis and 13 cents and *padugai punja* nanja of the extent of 5 Mahs 33 Kulis and 59 cents; in all, nanja of the extent of 2 Velis 8 Mahs 43 Kulis and 8 cents, you shall cultivate at the proper seasons fertilizing them in all ways ; harvest the crops that are grown, after the same have been estimated by our agents in the presence of (our) agents and others and under their orders and supervision, leaving the stubbles as is the practice with the Government *Amani* lands ; stock in heaps on the threshing-floor the residue of the total yield of paddy that is left after paying the reapers' wages at the rate of $\frac{1}{4}$ marakkal per kalam and the *Thalayari Suvandiram* paddy payable at the threshing-floor at the rate of 1 marakkal per 15 kalams ; and after the harvesting has been completed, you shall apportion in heaps our *Melvaram* due at the rate of 60 kalams for 100 kalams of paddy in the case of *Ayan* nanja and at the rate of 57 kalams for 100 kalams in the case of *Padugai punja* nanja under the Sudder Court decree in Suit No. 68 of 1847 and in acknowledgment of our having received the *Melvaram* paddy obtain a receipt from our agents."

" 8. Even if the aforesaid nanja lands be not cultivated at the proper seasons, even if they be cultivated negligently, if they be allowed to lie fallow without being cultivated, even if damage of crops be caused by failure to harvest the crops at the right time, even if the yield be carried away, either without acting in accordance with the conditions specified in paragraph 1 herein, or without division of varam, and even if nanja land be filled up (and raised in level) and *punja* cultivation made thereon, you shall pay at the rate specified in paragraph 1 herein our *melvaram* paddy in respect of the total yield of paddy calculated at an average of 170 kalams and 4 marakkals per *veli* of nanja, the *kadappu* and *kar* produce being payable within the 15th of December, and the *samba* and *pisanam* produce by the 15th March."

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What had happened in the present case was that during the fasli years in question, the tenants in contravention of the terms of these pattas had carried away the yield, without any of the proceedings with regard to the apportionment, in heaps, of the melvaram due to the landlord, having taken place.

The obligations under clause 1 having thus not been complied with, clause 8 came into operation, which applied to various contingencies, including the following: "If the yield be carried away . . . without acting in accordance with the conditions specified in paragraph 1." In that contingency "you shall pay at the rate specified in paragraph 1 herein our melvaram paddy in respect of the total yield of paddy calculated at an average of 170 kalams and 4 marakkals per veli of nanja, the kadappu and kar produce being payable within 15th December, and the samba and pisanam produce by 15th March."

The question is: In this stipulation, what is the meaning of the expression "the total yield of paddy"; and in particular what is the application of the stipulation to the case of an oodu crop, that is, a crop sown together, one part of which takes only three months to ripen and be reaped, and another part of which takes eight months to ripen and be reaped? Is the return as to "the total yield of paddy" satisfied by payment of 170 kalams for the total yield of one of the portions? The appellants maintain that it is.

It is well to have clearly in view what is the practice with regard to such a paddy crop. It is thus described in Mr. Hemingway's work on Tanjore in the *Madras District Gazetteer*, p. 93:

"It has become usual in a good many places to mix a *kuruvai* and a *samba* crop on what is called the *udu* or *ottadai* system of cultivation. The species of *samba* used is the *ottadai* paddy, an eight months' crop from which the name of the system is

derived. The amount of *kuruvai* used in this combination exceeds the *samba* largely, sometimes by as much as five to one. *Ottadai* is generally sown in the first-crop season. The more quickly matured variety is harvested first, and the ryot thereby secures a return for his labour both at the *kuruvai* and the *samba* harvests. The two kinds of grain are mixed in the seed beds and the seedlings are planted indiscriminately."

The appellant's counsel forcibly maintain that the payment of 170 kalams was a penal provision, and that, therefore, that provision ought to be most strictly construed.

It must not be forgotten that even in regard to penal provisions with a strict construction, no construction is open to a Court of Law which is in violation of what that Court considers to be the true meaning of the provision. That is a sound general principle.

But the Board, having considered the argument upon the clause, are of opinion that the rent of 170 kalams was not a penal rent, but was a substituted rent. The true rent, had the tenants complied with their obligations, would have been a percentage of the yield: but were the harvest to be bodily carried away, it was necessary to provide for such a case, and this was done by clause 8 which imposed no penalty as such, but simply set forth a figure which, upon the whole, might be reckoned a reasonable pactional substitute for the actual percentage, which, owing to the tenants' conduct, had been rendered unascertainable.

Is, however, the stipulation applicable to the whole harvest of a mixed crop reaped at separate times, or is it applicable only to the first harvesting? "You shall pay," says clause 8, "at the rate specified in paragraph 1 in respect of the total yield of paddy calculated at an average of 170 kalams": but then it is added that the early rice (*kadappu kar*) produce is payable in December

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and the samba, which is the late harvest produce, is payable in March. Putting that alongside of the subsequent obligation which was, under clause 1, "to stock in heaps on the threshing-floor the residue of the *total yield of paddy*" (the same phrase as is used in clause 8), their Lordships have no doubt that the substituted rent applied to the yield of each portion of the crop, exactly as the setting aside on the threshing-floor was applicable to each portion. They are of opinion that the High Court has come to a correct conclusion upon this topic.

Their Lordships desire to add that a question of straw, insignificant in amount, was not argued, the very proper arrangement of both parties at the Bar being that that would stand or fall with the judgment of the Court below.

Their Lordships will humbly advise His Majesty that the Appeal be refused with costs.

Solicitor for appellants: *Douglas Grant.*

Solicitors for respondent: *Chapman-Walker and Shephard.*

PRIVY COUNCIL.*

RAMALINGA ANNAVI AND ANOTHER (DEFENDANTS),
APPELLANTS,

1922,
March 7.

v.

NARAYANA ANNAVI AND OTHERS (PLAINTIFFS),
RESPONDENTS.

[AND CONNECTED APPEAL.]

[On Appeal from the High Court of Judicature at
Madras.]

*Hindu Law—Partition—Marriage expenses, provision for—
Marriage after plaint but before decree—Gift to daughter
out of joint property.*

The institution of a suit for partition by a member of a joint Hindu family effects a severance of the joint status of the family, and a member of the family who is then unmarried is not entitled to have a provision made in the partition for his marriage expenses, although he marries before the decree in the suit is made.

Assignments by a member of a joint Hindu family to his daughters of a sum of money and of a usufructuary mortgage held valid, both Courts in India having found that they were reasonable in the circumstances in which they were made.

CONSOLIDATED APPEALS (Nos. 150 and 151 of 1919 from a judgment and decree, 19th April 1915) of the High Court, varying a decree of the Subordinate Judge of Tinnevely.

The Consolidated Appeals arose out of a suit brought by Narayana Annavi, and his two minor sons, for partition of the property of a joint Hindu (Mitakshara) family consisting of themselves and of Ramalinga, Ramakrishna, and Krishna Annavi, the last three named with others being defendants. Narayana was the son of

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Lakshmivaraha (deceased); Ramalinga was the son; and the other two named defendants were grandsons of Ramalinga (deceased), the brother of Lakshmivaraha.

Both Courts in India had rejected the defendant's contention that in 1895 there had been a division of the joint status of the family. At that date certain sums due to a money-lending business carried on by the joint family had been divided. The Subordinate Judge found that there had then been a complete winding up of the family money-lending business. The High Court found that the division of property which then took place comprised only three particular items, and that the residue of the family property remained to be partitioned in the suit. The question as to the true effect of the transaction of 1895 depended upon the evidence and a report of that part of the case is not called for.

Two subsidiary questions arose. The first was as to the validity of gifts made by Lakshmivaraha (deceased) to his daughter Ponnu Ammal. On the division in 1895, Lakshmivaraha was allotted a sum of Rs. 8,300 due to the family business from a debtor, who gave him a promissory note for Rs. 3,300 and, by his directions, gave a note for Rs. 5,000 to Ponnu Ammal. In 1898 these notes were secured by usufructuary mortgages. In 1908, Lakshmivaraha assigned to Ponnu Ammal by deed the mortgage for Rs. 3,300 in his favour, together with a small house. The deed gave the reasons for the transaction as follows: "As you are my only daughter, as from the time of your mother's death up to this date you alone have been protecting me properly, as I did not give you jewels and ornaments such as would be in keeping with my rank, as I did not at all give you the funds of your mother which were with me, I have, with sound understanding and full consent, conveyed to you by means of this deed of settlement the properties

specified in the schedules." The value of the plaintiffs' claim in the suit was put at over a lakh of rupees.

The second question arose upon a claim of the plaintiffs that the marriage expenses of plaintiffs 2 and 3, the sons of Narayana (plaintiff 1) should be provided for. At the date when the suit was brought neither of the sons was married, but the elder married before the decree was made. The expenses of the marriage of defendant 1, who was in the same degree as plaintiffs 2 and 3, had been met out of the joint family property.

The Subordinate Judge held that any claim to the Rs. 5,000 given to Ponnu Ammal was barred by limitation, and that the gift to her in 1908 was valid as stridhan. He referred to *Smulararamayya v. Sitamma*(1) in support of his view on that point, and said that the gift could not be considered unreasonable in the circumstances of the case. He rejected the claim to marriage expenses, saying:

"I can find no authority in support of the plaintiffs' contention on this point; it is true that in the case of brothers, the eldest brother is bound to perform the necessary samskaras from the common funds for his younger brothers, but that is not the case here."

On appeal to the High Court the learned Judges (SANKARAN NAYAR and OLDFIELD, JJ.) affirmed the decision of the Subordinate Judge as to the properties transferred to Ponnu Ammal. They further considered that the transaction could not be treated as a mere gift, as Ponnu Ammal was living with and looking after her father. They held that the marriage expenses of plaintiff 2 should be provided for, as in their view the severance of the joint status took place only when the decree was made. They rejected the claim of plaintiff 3, who was unmarried at the date of the decree, declining to follow *Srinivasa Iyengar v. Thiruvengadathaiyengar*(2), since in

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(1) (1912) I.L.R., 35 Mad., 628. (2) (1915) I.L.R., 38 Mad., 556 (F.B.)

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their view marriage was not obligatory, and the anticipatory provision of funds for marriages was not enjoined by the texts or a convenient practice. The appeal to the High Court is reported in *Narayana v. Ramlinga*(1) and a pedigree will be found there.

The first of the present Appeals was by defendants 1 and 6, namely, Ramalinga Annayi and his widowed mother; and the second by plaintiffs 1, 2 and 3, namely, Narayana Annayi and his two sons, of whom the elder had attained his majority. The arguments are here reported only so far as they related to the two subsidiary questions above referred to.

Sir George Lowndes, K.C., and *Dube* for the appellants in the first Appeal, contended on the evidence that in 1895 there had been either a complete severance, or in any case a partition of the whole of the property connected with the family money-lending business.

Dunne, K.C., and *Kenworthy Brown* for the respondents (appellants in the second Appeal).—The gifts to Ponnu Ammal were invalid, having regard to the facts that the father had co-parceners, and that the gift was not out of income. Each of those considerations was expressly made a ground of the decision in *Pachoo v. Mankorebai*(2), which was affirmed by the Board in *Pachoo v. Mankorebai*(3). The gift being of a considerable portion of the joint property was invalid: *Kamakshi Ammal v. Chakrapany Chettiar*(4). The High Court in the present case followed its decision in *Sundaramayya v. Sitamma*(5), but that decision is not supported by the authorities and is distinguishable. *Churaman Sahu v. Gopi Sahu*(6), which was there relied on, related to a gift by a widow, who necessarily had no co-parceners;

(1) (1916) I.L.R., 39 Mad., 587.

(2) (1905) I.L.R., 29 Bom., 51.

(3) (1907) I.L.R., 31 Bom., 373 (U.C.); L.R., 34 I.A., 107.

(4) (1907) I.L.R., 30 Mad., 452.

(5) (1912) I.L.R., 35 Mad., 628.

(6) (1910) I.L.R., 37 Cal., 1.

further, that gift was a marriage gift. Secondly, the marriage expenses of both Narayana's sons should have been provided for. *Srinivasa Iyengar v. Thiruvengadathaiyengar*(1), which the High Court declined to follow, was subsequently followed in *Gopalam v. Venkataraghavulu*(2), the decision in the present case being dissented from. [Reference was also made to *Jairam v. Nathu*(3).]

De Gruyther, K.C., and *Narasimham* for the defendant.—Ramakrishna admitted the validity of the gifts to Ponnu Ammal. With regard to the marriage expenses, the joint status of the family was determined by a notice served by Narayana on the other members in July 1909; at latest it was terminated by the bringing of the present suit: *Girja Bai v. Sadashiv Dhundiraj*(4). Neither son being then married the expenses should not be allowed. In *Srinivasa Iyengar v. Thiruvengadathaiyengar*(1), SADASIVA AYYAR, J., held that marriage in the case of a male member was not an obligatory samskara for which provision should be made; SUNDARA AYYAR, J., came to the opposite conclusion. Upon a reference to SPENCER, J., the allowance of marriage expenses was upheld, but as being in accordance with modern conditions rather than strict Hindu Law. In *Gopalam v. Venkataraghavulu*(2), a case of partition between brothers, the last-named decision was adopted, but apparently merely as being in accordance with the practice in Madras. It is submitted that the judgment of SADASIVA AYYAR, J., above referred to expressed the true view according to Hindu Law. There is no other authority than those mentioned which supports the allowance of expenses for prospective marriages, and the practice would give rise to inconvenient complications.

(1) (1915) I.L.R., 38 Mad., 556 (F.B.). (2) (1917) I.L.R., 40 Mad., 632, 639.

(3) (1907) I.L.R., 31 Bom., 51.

(4) (1916) I.L.R., 43 Cal., 1031 (P.C.); L.R., 43 I.A., 155.

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The decision of the Full Bench in *Kameswara Sastri v. Veeracharu*(1) was merely that where it was reasonably necessary for a karta to borrow money for the purpose of the marriage of a member, an alienation of the joint family property binds the family.

Parikh for Ponnu Ammal was not called upon.

Sir George Lowndes, K.C., replied on the evidence.

MR. AMEER
ALI.

The JUDGMENT of their Lordships was delivered by Mr. AMEER ALI.—These two consolidated Appeals from a decree of the High Court of Madras arise out of a suit which was brought by the plaintiffs in the Court of the Subordinate Judge of Tinnevely on 31st January 1910, for a decree for partition in respect of certain moveable and immoveable properties together with outstandings of a money-lending business, on the allegation that they and the defendants 1, 2 and 3 formed members of a joint undivided Mitakshara family.

[The judgment dealt very fully with the evidence as to the effect of the transactions of 1895, their Lordships coming to the conclusion that the view of the Subordinate Judge was right and that that of the High Court could not be sustained; the two questions above referred to were then dealt with as follows.]

There remain now the two questions, one relating to the validity of the two gifts made by Lakshmivaraha to the fourth defendant, Ponnu Ammal. The first is an assignment of Rs. 5,000 out of the money which fell to the share of Lakshmivaraha due from the Thiruvaduthurai Mutt. This was done at the instance of Lakshmivaraha. The other is an assignment of a usufructuary mortgage held by him. In the aggregate the two sums amount to Rs. 8,000. The father has

(1) (1911) I.L.R., 34 Mad., 422.

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undoubtedly the power under the Hindu Law of making, within reasonable limits, gifts of moveable property to a daughter. In one case, the Board upheld the gift of a small share of immoveable property on the ground that it was not shown to be unreasonable. In the present case, the gifts relate to sums of money. The only question is whether they were reasonable. Both the Courts in India have answered the question in the affirmative and their Lordships have no materials or ground to hold otherwise.

Regarding the prayer for the allotment upon partition of Rs. 2,000 for the marriages of plaintiffs 2 and 3, the High Court disallowed the claim in respect of the prospective marriage, but allowed it for the expenses of the marriage that took place before the decree in the first Court, on the ground that the joint family status was not dissevered until the decree for partition, and that the joint family liability continued until then. This view is opposed to the law laid down in *Girja Bai v. Sadashiv Dhundiraj*(1) where it was held expressly, that under the law of the Mitakshara, to which the parties in the present case are subject, an unambiguous and definite intimation of intention on the part of one member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which, until then, he had held in jointness. This intention was clearly intimated to the co-parceners when the plaintiff Narayana served on them the notice on 30th July 1909. That notice effected a separation so far as his branch of the family was concerned, and no obligation rested on the joint family in respect of his sons' marriages. The decree of the Subordinate Judge dismissing the claim was therefore correct.

(1) (1916) I.L.R., 43 Cal., 1031 (P.C.); L.R., 43 I.A., 151, 155.

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[After dealing with another small question not material to this report, and the costs, the judgment concluded.]

Their Lordships will accordingly humbly advise His Majesty to set aside the decree of the High Court and restore the decree of the Subordinate Judge, subject to the above variation, with the above directions as to costs.

Solicitors for appellants (defendants 1 and 6):
Chapman-Walker & Shephard.

Solicitors for respondents (plaintiffs 1, 2 and 3):
Barrow, Rogers Nevill.

Solicitor for respondent (defendant 2): *Douglas Grant.*

Solicitor for respondent (defendant 4): *E. Dalgado.*

PRIVY COUNCIL.*

1323.
March 7.

L. OPPENHEIM AND COMPANY (PLAINTIFFS),

v.

MAHOMED HANEEF, SINCE DECEASED (DEFENDANT).

[On Appeal from the High Court of Judicature at
Madras.]

Arbitration—Award—Submission to arbitration—Suit in India on award—Defence of irregularity in arbitration—Judgment by default in England—Suing on judgment in India—Code of Civil Procedure (Act V of 1908), s. 13—Arbitration Act, 1889 (52 and 53, Vict., c. 49), sec. 11.

In a suit in India upon an award made upon a submission to arbitration which provided that the arbitration was to take place in London and in accordance with English law and procedure, irregularity or misconduct in arriving at the award is not a defence; the award can be set aside on those grounds only by

* Present:—Viscount CAYE, Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE and Mr. AMER ALI.

motion under the (English) Arbitration Act, 1889, and within the time limited by Order LXIV, rule 14 of the Rules of the Supreme Court (England).

Thornburn v. Barnes, (1867) L.R. 2 C.P., 334 approved and followed.

A judgment on the award obtained in England by default cannot be sued on in India, since it is not a judgment "on the merits" within section 13 of the Code of Civil Procedure (Act V of 1908).

Keymer v. Visvanatham Reddi, (1917) I.L.R., 40 Mad., 112 (P.C.); L.R., 44 I.A., 6, followed.

Quære whether where a judgment is obtained in England the award is merged in it, a contention not raised in the present case.

APPEAL (No. 31 of 1920) from a judgment and decree (November 6, 1918) of the High Court in its appellate jurisdiction, reversing a decree of the Court in its Original Civil Jurisdiction.

The suit which gave rise to the Appeal was brought in the High Court at Madras by the appellants, merchants carrying on business in London, against the respondent, a merchant at Madras. Among other causes of action the appellants sued upon an award in their favour made under a submission to "arbitration in London in the usual manner," contained in a contract of sale made between the parties. To that cause of action the respondent pleaded that the award was not binding upon him, as no notice had been given him by the arbitrator that he was proceeding to arbitrate. The facts are more fully stated in the judgment of the Judicial Committee.

The trial Judge (COURTIS TROTTER, J.) made a decree for the amount awarded, holding that under the submission the arbitration was to be governed by the law applicable to arbitrations in England, and that upon the authority of *Thornburn v. Barnes*(1) the defence could not be raised in the suit. On appeal the decision was reversed by Sir JOHN WALLIS, C.J., and NAPIER, J.

(1) (1867) L.R., 2 C.P., 334.

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The learned Chief Justice (with whose judgment NAPIER, J., agreed) was of opinion that the rule in England, that misconduct in making an award was not a good plea to an action on the award, did not apply in India, since there there is no distinction between law and equity and any grounds for equitable relief could be raised as a defence. They referred to three decisions of the Courts in India mentioned in the argument for the appellants, and concluded by saying that the English doctrine on which the above rule rested was of a highly technical character and could not, in their opinion, be imported into India under the terms of justice, equity or good conscience.

De Gruyther, K.C., and Harold Morris, K.C., for the appellants.—The alleged irregularity was not a defence to the suit upon the award. The contract provided for “arbitration in London in the usual manner.” It was clearly the intention of the parties that their rights under that part of the contract should be governed by the law prevailing in England, and consequently that law applied: *Hamlyn & Co. v. Talisker Distillery*(1). It is well established in English law that in an action upon an award, irregularity or misconduct in the arbitration proceedings is not a defence: *Thorburn v. Barnes*(2). The award can be set aside if these grounds are established upon motion under section 11 of the Arbitration Act, 1889; that was the only course available in this case, if the validity of the award was to be attacked. *Bindessuri Pershad Singh v. Jankee Pershad Singh*(3), *Surjan Raot v. Bhikari Raot*(4) and *Ghellaibhai Atmaram v. Nandubai*(5) were cases as to arbitrations in India, and do not apply where the parties

have by their contract submitted to arbitration in England. The appellate Court in the present case thought that the English rule was of a technical character, and not within justice, equity, and good conscience. It is, however, submitted that the parties having, by the law which they have agreed is to apply, a good remedy, they are fairly and reasonably limited to that remedy. [Reference was also made to the Code of Civil Procedure, 1882, sections 520, 521 and 525; and the Code of Civil Procedure, 1908, sections 20 and 21.]

The respondent's representatives did not appear.

The JUDGMENT of their Lordships was delivered by Viscount CAVE.—This is an Appeal from a decree of the High Court of Judicature at Madras, in the exercise of its appellate jurisdiction, allowing an appeal from a decree made by COUTTS TROTTER, J., in the exercise of the Ordinary Original Civil Jurisdiction of the same Court.

The appellants are merchants carrying on business in London, and the original respondent (who has died during the pendency of this Appeal and is represented by the present respondents) was a merchant carrying on business in Madras.

By a contract in writing made in London and dated 23rd October 1913, the appellants bought from the respondent 20,000 tanned Madras sheep skins of a specified quality to be shipped to the appellants in London. The contract contained the following clause:—“Any differences arising out of this contract, failing amicable adjustment, to be submitted to arbitration in London in the usual manner, and the award of such arbitration to be final and binding on both buyer and seller.”

Certain skins were shipped to London, and the appellants paid to the respondent £1,495 15s. 4d. in respect of those skins. When the skins arrived in London,

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(1) [1894] A.C. 202, 207.

(2) (1887) L.R., 2 C.P., 884.

(3) (1889) I.L.R., 16 Cal., 482.

(4) (1894) I.L.R., 21 Cal., 218 (F.B.).

(5) (1896) I.L.R., 20 Bom., 238.

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the appellants alleged that they were of inferior quality and refused to accept delivery. They were ultimately sold, with the consent of the respondent, at the price of £1,242 10s. 0d, thus leaving a deficiency of £253 5s. 4d, which the appellants demanded from the respondent and which the respondent refused to pay. Thereupon the appellants, in pursuance of the arbitration clause contained in the contract and of the English Arbitration Act, appointed Mr. R. H. Pringle as arbitrator on their behalf in the difference which had arisen, and caused the respondent to be served at Madras with a notice, dated 3rd February 1916, whereby they informed him of the appointment of Mr. Pringle and required him, within seven days from the service of the notice, to name to the appellants or their agents in Madras an arbitrator to act on their behalf in London in the matter of the difference which had arisen, the notice stating that otherwise the difference would stand referred to Mr. Pringle alone as sole arbitrator. The respondent refused to appoint an arbitrator to act on his behalf or to take part in the arbitration; and thereupon Mr. Pringle, at the request of the appellants, proceeded with the arbitration. He gave no opportunity to either party to appear and give evidence before him, but, having read the contract and correspondence and inspected the skins, he made his award in writing, dated 11th July 1916, and thereby awarded that the respondent should pay to the appellants the sum of £258 5s. 9d., with interest and costs.

On 15th July 1916, the appellants brought an action in the King's Bench Division of the High Court of Justice in England, for the amount payable under the award, and, the writ of summons having been served by leave upon the respondent at Madras and no appearance having been entered, the appellants, on 28th November 1916, recovered judgment against the respondent for the

sum of £286 2s. 9d., being the amount of the award with some interest and costs.

The appellants then brought the suit out of which this Appeal arises against the respondent in the High Court of Judicature at Madras, claiming the sum of £286 2s. 9d., due under the judgment of the King's Bench Division, or in the alternative £263 10s. 9d., being the amount of the award and costs, with interest, or as a further alternative £253 5s. 4d., being the loss on the contract. The respondent pleaded (among other pleas which are not now material) that the judgment of the High Court of Justice in London was not binding upon him, as it was not given on the merits, that the claim under the contract was barred by limitation, and as to the award, that it was not binding upon him, as no notice was given to him by the arbitrator that he was proceeding to arbitrate.

The suit was heard by COURTS TROTTER, J., who held that, having regard to the decision of this Board in *Keymer v. Visvanatham Reddi*(1), the action upon the judgment could not be maintained, as the judgment had been entered in default of appearance and the action had not been tried upon its merits, and that the claim under the contract was statute-barred. This part of the judgment has not been challenged and need not be further referred to. With regard to the award, the learned Judge in a lucid judgment held that the plea of want of notice could not be raised by defence in the suit. After observing that the grievance of the respondent was more imaginary than real, the award having been made by a commercial man who took the commercial documents with which he was familiar and saw the goods and gave his opinion on

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(1) (1917) I.L.R., 40 Mad., 112 (P.C.); L.R., 44 I.A., 6.

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the spot, he added that if the objection could have been raised in the proceedings he would have felt constrained to give effect to it. But he referred to *Thornburn v. Barnes*(1) as a complete authority for the proposition that according to the English Law any objection relating to an irregularity in bringing an award into existence must be taken by motion under the Arbitration Act, 1889, to set aside or remit the award, and if not so taken could not be raised by way of defence to an action on the award. He therefore held that the defence that the award was tainted with irregularity by the fact that the respondent had not had an opportunity of being present at the arbitration was not open to him in the suit. An application having been made by counsel for the respondent to treat the written statement as an application to the Court at Madras to set aside the award, the learned Judge held that he had no jurisdiction to entertain such an application, adding: "How a judge in Madras is supposed to have jurisdiction to upset an award made by an arbitrator in London passes my comprehension, and it is perfectly clear that the Court which is given jurisdiction by the English Act is the English Court."

He added that even if he had had jurisdiction, he would have declined to exercise it.

Against this judgment an Appeal was brought and was allowed by the Appellate Division, the learned Judges of that Division holding that the rule in *Thornburn v. Barnes*(1) did not apply in India. Thereupon the present Appeal was brought.

In their Lordships' opinion COUTTS TROTTER, J., came to the right decision and this Appeal should succeed. The contract of 23rd October 1913 was made and was

to be performed in England; and the arbitration clause provided for an arbitration which was to take place in London and in accordance with English law and procedure. Under that law, by which both parties agreed to be bound, any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator must be taken by motion to set aside or remit the award, and if not so taken cannot be pleaded in answer to an action on the award. In the present case no such motion was made within the time limited by Order LXIV, rule 14, of the Rules of the Supreme Court, England, or at all, and accordingly the award became as fully binding on both parties as if it had been incorporated in the contract. No doubt any defence going to the root of the award—for instance, that the arbitrator had no jurisdiction or that the matter was tainted with fraud—could have been pleaded in the suit; but a defence on the ground of irregularity not appearing on the face of the award was excluded by the law by which both parties had agreed to be bound.

On this view of the case the Indian Law as to arbitration is irrelevant, and their Lordships accordingly express no opinion on the question whether if the arbitration had taken place in India the defence on the ground of irregularity could have been pleaded. It is plain that the Indian Court could not set aside an English award on that ground.

In order to prevent misconception, it appears desirable to add that it was not pleaded or contended at any stage of the proceedings that the award had merged in the English judgment, and accordingly their Lordships do not deal with that point.

For the above reasons their Lordships will humbly advise His Majesty that this Appeal should be allowed, and that the order of COUTTS TROTTER, J., should be

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(1) (1867) L.B., 2 C.P., 384.

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restored, the respondents to pay the costs in both Courts in India and the costs of this Appeal.

Solicitors for appellants: *Morris, Veasey & Co.*

APPELLATE CIVIL—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Coutts Trotter and Mr. Justice
Kumaraswami Sastri.*

1921,
December 21. TIRUPATIRAJU AND TWO OTHERS (DEFENDANTS TWO TO FOUR),
APPELLANTS,

v.

VENKAYYA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Mortgage by widow—Suit on mortgage and compromise by widow selling mortgaged properties to mortgagees—Suit by reversioners—Onus of proving validity of compromise on alienee.

Where a Hindu widow who had mortgaged her husband's estate for a debt contracted by her was sued by the mortgagees and compromised the suit by purporting to make over the property to the mortgagees absolutely,

Held, that the burden of proving that the compromise was valid and binding on the reversioners was on the mortgagee purchaser. *Kumarasami Odayar v. Subramania Iyer*, (1916) 31 M.L.J., 87 and *Kadakkari Nadan v. Nadukkannu Nadan*, (1921) M.W.N., 342 and *Srinivasa Aiyar v. Thiruvengada Maistry*, (1919) 10 L.W., 594, explained. The distinction between cases where the suit or claim against the widow arises out of a contract or transaction entered into by her husband with strangers, and those where it is in respect of a contract or transaction entered into by herself, pointed out.

SECOND APPEAL against the decree of N. BALARAMA DAS, Subordinate Judge of Cceanada, in Appeal Suit No. 26

* Second Appeal No. 115 of 1921.

of 1920, presented against the decree of V. PURNAYYA, Additional District Munsif of Cocanada, in Original Suit No. 102 of 1919.

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This was a suit by the daughter of a deceased Hindu to redeem a usufructuary mortgage made by him. The defendants (mortgagees) pleaded that the deceased's widow borrowed Rs. 200 from the defendants and hypothecated to them the same property and that when sued on the hypothecation she compromised the suit by making over the property to the defendants absolutely. The Court of first instance upheld the defendant's pleas and dismissed the suit. But on appeal by the defendants, the Subordinate Judge held that the burden of proving that the compromise and the sale were valid and binding on the reversioners was on the defendants; and that, as they had failed to discharge the burden, he allowed redemption, reversed the decree of the first Court and remanded the suit for disposal after trying other undecided issues, e.g., whether any improvements were effected by the defendants. Thereupon the defendants preferred this Second Appeal to the High Court, which was heard by KRISHNAN and ODGERS, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH :

The facts necessary for this Reference are briefly these: One Davuluri Swami, who was the original owner of the plaint properties, mortgaged them usufructually to the first defendant in 1887 for Rs. 171-8-0 and died soon after. On his death, his estate passed into the hands of his widow Sathemma. In 1891 she executed a deed of simple mortgage for Rs. 200 in favour of the same person, the first defendant, as a second mortgage on the same properties with some addition. In 1901 she was sued by the first defendant for recovery

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of the money due on the second mortgage by sale of the mortgaged properties, presumably subject to the first mortgage. This suit, Original Suit No. 564 of 1901, was compromised by the widow with the first defendant and it was arranged thereby that the first defendant was to take the properties as sold to him outright in settlement of his claim. The widow thereafter went away to Rangoon and has not been heard of since for many years. The present suit is by the Swami's daughter, the first plaintiff, and an assignee of a half share of her properties, the second plaintiff, and they sue on the footing that the widow is dead and the reversion has fallen in to the first plaintiff, to redeem the usufructuary mortgage granted by the Swami, ignoring the compromise decree and the second mortgage executed by the widow. The defendants set up the compromise in answer to the suit and an issue was framed whether it was binding on the first plaintiff.

On that issue the Subordinate Judge held that the burden of proof was on the defendants, the alienees, to prove that the mortgage debt and the compromise were binding on the reversioner, and, finding that they had not established it on the evidence, he set aside the compromise and the sale under it and allowed redemption to the plaintiffs. The learned vakil for the appellants contends that this view of the burden of proof is opposed to *Kumarasami Odayar v. Subramania Iyer*(1), and *Kadakkarai Nadan v. Nadakkannu Nadan*(2). But on the other side *Srinivasa Aiyar v. Thiruvengada Maistry*(3) is cited in support of it. The two sets of rulings seem to be directly contradictory on this point, the one expressly dissenting from the view taken in the other. In these circumstances we think it right that the question should

(1) (1916) 31 M.L.J., 87.

(2) (1921) M.W.N., 342.

(3) (1919) 10 L.W., 594.

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be authoritatively settled by a Full Bench. As all the authorities bearing on the question are cited and discussed in the above rulings it is not necessary to refer to them in detail again.

We therefore refer to the Full Bench the following questions :—

- (1) Which of the two views taken in the above rulings as to the burden of proof is the correct one? and
- (2) On whom was the burden of proof in the present case?

ON THIS REFERENCE

A. *Krishnaswami Ayyar* for appellants.—A widow represents the estate and has power to compromise a litigation *bona fide*. After the compromise decree, necessity for alienation need not be proved and the onus is on those attacking it to prove fraud, collusion, coercion, etc.: see *Kadakkarai Nadan v. Nadakkannu Nadan*(1), *Kumarasami Odayar v. Subramania Iyer*(2).

[Court.—The questions are (1) in what capacity the widow alienated and (2) in what capacity she compromised the litigation?]

Where a widow alienates, the presumption is that she alienates in her representative capacity, especially where the purpose is such as to bind the inheritance: *Jugul Kishore v. Jotendro Mohun Tagore*(3). As to the validity of a compromise decree, see *The Great North West Central Railway v. Charlebois*(4), *Risal Singh v. Balwant Singh*(5), *Hari Nath Chatterjee v. Mothurmohun Goswami*(6), *Subbammal v. Avudalyammal*(7), *Bai Kanku v. Bai Jadav*(8) and *Regella Jogayya v. Nimushakavi Venkataratnamma*(9).

(1) (1921) M.W.N., 342.

(2) (1916) 31 M.L.J., 87.

(3) (1884) I.L.R., 10 Cal., 985 (P.C.), 991.

(4) [1899] A.C., 114.

(5) (1918) I.L.R., 40 All., 598 (P.C.).

(6) (1894) I.L.R., 21 Cal., 8 (P.O.).

(7) (1907) I.L.R., 30 Mad., 3.

(8) (1919) I.L.R., 48 Bom., 969.

(9) (1910) I.L.R., 38 Mad., 492.

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P. Somasundaram for respondent.—There is no conflict between the cases quoted in the Order of Reference. A supervening decree does not improve the position. It is no better than a contract. Here, the contract, the litigation and her compromise, were all in her personal capacity and not in her representative capacity; in such cases the reversioners are not bound: see Mayne's Hindu Law, page 896, paragraph 641. In most of the cases quoted by the appellant, the debt was incurred by the husband: *Baijun Doobey v. Brij Bhookun Lall Awusti*(1), *Bhogaraju Venkatrama Jogiraju v. Adleppalli Seshayya*(2), *Kambinayani Timmaji v. Kambinayani Subbaraju*(3), *Khunni Lal v. Gobind Krishna Narain*(4), *Kanhaiya Lal v. Kishori Lal*(5). A consent decree is no better than a contract: *Wentworth v. Bullen*(6), *The Great North West Central Railway v. Charlebois*(7).

A. Krishnaswami Ayyar in reply.—*Bhogaraju Venkatrama Jogiraju v. Adleppalli Seshayya*(2) is wrong in some portions. It is not necessary that the suit should be pursued to the end in order that the litigation might bind the estate.

[*COUTTS TROTTER, J.*, referred to *Mohendra Nath v. Shamsunnessa*(8). The Chief Justice referred to *Rajalakshmi Dasee v. Katayani Dasee*(9).

A. Krishnaswami Ayyar also referred to *Musammath Hiran Bibi v. Musammath Sohan Bibi*(10), and *Rajendrunath Mitra v. Nibaran Chandra*(11).]

- (1) (1876) I.L.R., 1 Cal., 133 (P.C.). (2) (1912) I.L.R., 35 Mad., 590, 595.
 (3) (1910) I.L.R., 33 Mad., 473. (4) (1911) I.L.R., 33 All., 356 (P.C.), 307.
 (5) (1916) I.L.R., 38 All., 679. (6) (1829) 9 B. & C., 840.
 (7) [1899] A.C., 114. (8) (1915) 21 C.L.J., 157, 168.
 (9) (1911) I.L.R., 38 Cal., 689, 678.
 (10) (1915) 23 C.L.J., 82, 89. (11) (1921) 25 C.W.N., 859.

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SCHWABE, C.J.—By the Hindu Law, a widow in possession of property inherited from her husband has a life interest with power to alienate for necessities. The reversioners are protected by the rule that if she does alienate, the onus is on the alienee to show that the alienation was, in fact, for necessities. In this case, the widow Sathemma inherited from her husband Davuluri Swami certain properties, then the subject of a mortgage to the first defendant by the husband. She executed a second mortgage for Rs. 200, which, it is recited in the deed, was advanced for payment of the debts of the husband to the first defendant and for maintenance of the widow. The widow having died, the plaintiffs, the reversioners, wish to redeem the first mortgage. The first defendant's answer to this claim is that a suit was brought in 1901 by the first defendant against the widow to recover the money due on the second mortgage and that the suit was compromised by the widow agreeing that the first defendant should take the property absolutely, as if sold to him, in settlement of his claim.

It is admitted that apart from the compromise decree the onus would be on the defendant to show that the second mortgage was, in fact, for necessities. It is also admitted that, if the widow had sold the property to the first defendant at the date of the compromise, the onus would have been on him to show that the sale was for necessary purposes. But it is contended that the widow in her representative capacity as manager of the property, had power to compromise the suit, and that it must be taken that she compromised the suit in that capacity, and that, in the absence of evidence adduced by the reversioners to the contrary, she must be taken to have acted properly in so doing.

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The result would be somewhat startling for it follows that the whole protection, which the law gives to reversioners in respect of dealings by the widow and which the reversioners had before the compromise, can be taken away by a further act of the very person against whom it is the policy of the Hindu Law to protect, which act in itself amounts to a further alienation.

It is said that there are authorities on this point and it is by reason of their supposed conflict that this case is referred to the Full Bench. I can myself find no such conflict in the cases which are quoted in the Order of Reference. There are two cases, *Kumarasami Odayar v. Subramania Iyer*(1), and *Kadakkurrai Nadan v. Nadakkannu Nadan*(2), which decided that a compromise by a widow of a suit relating to the property inherited from her husband is binding on the reversioners. In both these cases she was sued in her representative capacity as representing the estate, and it may well be that she in that representative capacity can bind the estate by a compromise. I am not giving any decision upon that point, which we can deal with when it arises. At present, I see no reason to dissent from the view expressed in either of those two cases. But in the present case she was not, in fact, sued in her representative capacity. She was sued as a mortgagor on the second mortgage that is, to enforce a contract made by her, and she compromised that suit by purporting to make over the property to the mortgagee absolutely. This, in my judgment, she cannot do except subject to the rule stated above for the protection of the reversioners. If she could, it would be open to her to adopt simple means for avoiding the rule which is made for the protection of the reversioners. All that she would have to do would be

(1) (1916) 31 M.L.J., 87.

(2) (1921) M.W.N., 342.

first to mortgage and then, if the plaintiff sued on the mortgage, to compromise by alienation. Thus the whole protection which the Hindu Law has given to reversioners under similar circumstances would be taken away because she went through the formality of compromising an action instead of taking the more simple course of selling the property in her capacity as widow. That this is not permitted is clear from *Srinivasa Aiyar v. Thiruvengada Maistry*(1), and, if that case is rightly decided the question in this case must be answered by saying that the onus is on the mortgagee. I confess that, for my part, after listening with care to the arguments which have been addressed to us on either side, I entirely agree with what is said in that judgment. I also entirely agree with the remarks of MOOKERJEE, J., in *Rajlakshmi Dasee v. Katyayani Dasee*(2), and those of MAHMOOD, J., in *Santkumar v. Deo Saran*(3). They seem to me entirely right in principle. It may be that some of the remarks made in these judgments go a little further than was necessary for the decision of those cases. I want to guard myself from being taken to express the view that in no case can a widow compromise a suit and thereby bind the reversioners. I am quite clear that there are cases in which she can do so. But what I do hold is that in an action against the widow on a contract made by the widow, a compromise by which she makes over the estate stands on no different footing from a conveyance by her of the property. In the two cases quoted in the Order of Reference I find that at any rate the original contract was not made by the widow, and I find that it is quite clear that the widow had been sued in her representative capacity and, therefore, I think that those cases should not be regarded as conflicting with *Srinivasa Aiyar v.*

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(1) (1919) 10 L.W., 594.

(2) (1911) I.L.R., 38 Cal., 639.

(3) (1888) I.L.R., 8 All., 365.

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Thiruvengada Maistry(1), and the cases there quoted. If they do conflict, I prefer the decision in the latter case. It follows from what I have said that the answer to question (2), is that, in the present case, the burden of proof is upon the defendant.

The other question "which of the two views taken in the above rulings as to the burden of proof is the correct one" is a question which, speaking for myself, I decline to answer. The use of the words "two views taken in the above rulings" is certainly open to comment. The ruling in the cases referred to so far from taking two views are, I think, consistent with each other, and, for that reason, it seems to me to be a question to which no answer is required. I should like to take this opportunity of pointing out that, in my judgment, the Order of Reference to a Full Bench should not ask hypothetical questions or ask the Full Bench, so to speak, to give a dissertation on general principles of law but to do what is quite enough for any Judge to do, to answer the question which directly arises in the case before the Court.

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COUTTS TROTTER, J.—I am of the same opinion, and have little to add. With great respect to the learned Judges who referred the case, I do not think there is any necessary conflict between the decided cases. I quite assent to the principle that where a widow represents the estate it would be unreasonable to deny her the same discretion to avoid useless litigation as would be vested undeniably in a male manager. But I think that that must be subject to this qualification—which exists in the present case—that where the obligation sought to be enforced against the estate is one of her own creation,

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she stands in exactly the same position with regard to the justification of the compromise as she does with regard to that of her original contract, and is clothed with no higher authority and no less degree of responsibility by the accident that she has superadded to her character of a widow in possession that of a litigant. To hold otherwise, it seems to me, would be nothing less than an abrogation of common sense. I think, that the rule that a widow as representing the estate can effectually settle claims arising out of the acts of others, is a salutary one—*ut sit finis litium*. But to give her the same power in relation to her own acts would be to make her, as it were, a judge in her own cause: she is not solely concerned with her duty to the estate, as may be supposed in the former case, but is obviously liable to a bias in favour of attempting to validate her own act. Such a conclusion would obviously deprive the reversioners of the very protection which the Hindu Law endeavours to give them; and would unquestionably lead to endless collusive compromises, as the present one may well have been. I do not think that such a conclusion has even the superficial merit claimed for it, that on its face it is a logical deduction from the fact that she has a discretion as to settling claims which do not arise out of her own acts.

In the view I have taken of this case, I agree with my Lord that it is not necessary for us to answer the first question propounded, as I think the answer to the second resolves the supposed conflict between the authorities.

KUMARASWAMI SASTRI, J.—On the facts of this case I am of opinion that the onus lies on the alienees to prove that the compromise decree is binding on the reversioners. In considering the question as to whether a compromise arrived at by the widow is binding on the reversioners, the main consideration is whether the suit or claim against

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the widow is a suit or claim arising out of a contract or transaction entered into by her husband with strangers who claim against the estate or whether the suit is upon a contract or transaction which is entered into by the widow herself. In the former case there can be little doubt that she represents the estate and a *bona fide* compromise by her would bind the reversioners. In the latter case there is always the question as to whether she acted in her individual capacity or whether she acted as representing the estate. This question has to be solved, in cases where the suit proceeds to trial, by the evidence adduced in the case and the findings on the issues. A mere allegation by the plaintiff that the widow acted for the estate, or a mere assertion by her that she so acted, would not by itself show that she acted in her representative capacity or that the decree is binding on the reversioners. It has been held in numerous cases that where her husband's property is sold in execution of a decree against her and the question as to the quantum of interest conveyed under the decree passed against her is raised, it has to be determined by the nature of the claim, the evidence adduced, and the findings in the case. As pointed out by their Lordships of the Privy Council in *Jugul Kishore v. Jotendro Mohun Tagore*(1), if the suit is simply on a personal claim against the widow, then a sale in execution will merely pass the widow's qualified interest and the reversionary interest will not be bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or on a cause of action which is not a mere personal cause of action against the widow, the whole estate will pass. I may also refer to *Kiranbala Debi v. Kali Charan Singha*(2), *Trilochan v. Bakkeswar*(3) and *Veerabadra Aiyar v.*

(1) (1884) I.L.R., 10 Cal., 985 (P.C.).

(2) (1916) 32 I.O., 587.

(3) (1912) 15 C.L.J., 423.

Marudaga Nachiar(1). Where there are findings of fact as to the claim, it is easy to determine with reference to the proceedings how she acted and how far the decree will bind the reversioners; but in cases where there are no findings and where we have to rest merely on the allegation of the plaintiff or of the widow, it seems to me difficult to hold that because an allegation is made by one side or the other, the reversioners ought to be bound by the consent decree passed in the suit by the alienee against the widow. In cases where a person wants to bind the estate on a personal contract or transaction by the widow, he invariably alleges that what she did was for the benefit of the estate and is binding on the reversioners, and in cases where the widow deals with the estate and borrows monies for her personal use, allegations are made of necessity to show the binding nature of the debt on the reversioners. It seems to me that in cases of compromise where the suit is on a contract by the widow, or in cases where the cause of action is personal to her, she cannot, by simply consenting to a decree, make that which can only bind her life interest, if the matter rested merely on a contract or conveyance, bar the reversioners. If there was no decree, the onus would clearly be on the alienee to show necessity, and the recitals in the document would not by themselves prove necessity. In *Brij Lal v. Inda Kunwar*(2), their Lordships of the Privy Council observed, at page 193 :

"The onus of supporting a sale from a Hindu widow is undoubtedly on the purchaser. In the present case the appellant has adduced no evidence to prove such legal necessity as would bind the husband's estate. He has relied simply on the recitals in the schedule attached to the sale deed. Recitals in mortgages, or deeds of sale, with regard to the existence of necessity for the

(1) (1911) I.L.R., 34 Mad., 188.

(2) (1914) I.L.R., 36 All., 187.

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alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence *aliunde*."

It is clear that a widow cannot do what is beyond her legal powers by simply going to Court and filing a compromise petition or consenting to a decree. I need only refer to *The Great North West Central Railway Co. v. Charlebois*(1). It is also clear that the widow's action in alienating her husband's estate for her private debt or for a purpose which under Hindu Law would not amount to necessity is beyond her powers, and she cannot take advantage of her representative capacity to validate a purely personal transaction. The interposition of a decree by consent would not, in my opinion, make any difference as to the onus of proof in such cases. Where the pleadings show that both the plaintiff and the widow asserted that the alienation was for purposes binding on the reversioners, there can be no substantial dispute as to the legality of the act of the widow as binding on the reversioners so as to make the legality of her act a point substantially in issue and a fair subject of compromise. As pointed out by their Lordships of the Privy Council in *Kunni Lal v. Gobind Krishna Narain*(2), the true test to apply to a transaction which is challenged by reversioners as an alienation not binding on them is whether the alienee derives title from the holder of the limited interest or life tenant. If the claim is based on an alienation by the widow or on a contract by her, the onus must be on the alienee to show that circumstances existed which entitled her to transfer her limited estate. I agree with the view taken in *Bhogaraju Venkatrama Jogiraju v. Addepalli Seshayya*(3) and *Srinivasa Aiyar v. Thiruvengada Maistry*(4), that a decree

(1) [1899] A.C., 114.

(3) (1912) I.L.R., 35 Mad., 560.

(2) (1911) I.L.R., 33 All., 366.

(4) (1919) 10 L.W., 594.

passed against the holder of a woman's estate on compromise between her and her creditor would be binding on the reversioners only in cases where the contract of compromise itself entered into by her would bind them. *Kumarasami Odayar v. Subramania Iyer*(1) and *Kadalakkarai Nadan v. Nadakkannu Nadan*(2), referred to by the learned Referring Judges, were not cases of a contract entered into by a widow alienating property and a compromise by her. *Kumarasami Odayar v. Subramania Iyer*(1) was a case where the last male holder purchased two items of property in a Court-sale. They were claimed by the fourth defendant by virtue of a private sale to him. A suit filed by the fourth defendant was dismissed in the first Court and in the District Court. A compromise was entered into by the widow when the case was in the High Court. *Kadalakkarai Nadan v. Nadakkannu Nadan*(2) was a suit by a daughter to question an alienation made by her mother and the suit was compromised. There are no doubt observations in these cases which suggest that the compromise would be binding irrespective of whether the suit was simply on a personal claim against the widow in respect of the estate or on a cause of action which is not a mere personal cause of action against the widow; and if the learned Judges intended to decide that the compromise was binding in all cases, I would respectfully dissent from them.

My answer to the reference is that the burden of proof lies on the alienees in the present case.

N.B.

(1) (1916) 31 M.L.J., 87.

(2) (1921) M.W.N., 342.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ayling, Mr. Justice Coutts Trotter and
Mr. Justice Ramesam.

1922,
February 21.

THE CHIEF COMMISSIONER OF INCOME-TAX,
MADRAS (REFERRING OFFICER),

v.

ZAMINDAR OF SINGAMPATTI (ASSEESSE).*

*Income-tax Act (VII of 1918)—Zamindari of Singampatti—
Income derived from forests and fisheries—Liability to
income-tax—Madras Regulation XXV of 1802, effect of.*

Where the peshkash of a permanently-settled estate was fixed in commutation, not only of the rentals of the cultivated lands but also of all income which might be derived from forests or fisheries, held, that both under the terms of the sanad and of section 1 of Regulation XXV of 1802, these incomes were exempt from further taxation by the Government, and section 3 of the Income-tax Act did not abrogate this exemption.

Quære.—Whether the income from forests and fisheries would not be “agricultural” income within the meaning of section 4 of the Act, and, therefore, not chargeable to income-tax.

CASE referred for the decision of the High Court under section 51 of Act VII of 1918 by the Secretary to the Chief Commissioner of Income-tax, Madras.

The material portions of the Letter of Reference are as follows :

(2) The Collector of Tinnevely assessed the Zamindar of Singampatti for the year 1920-21 on an income of Rs. 65,080 of which Rs. 63,750 was derived from forests and fisheries within his estate. The Zamindar has appealed to the Board against the assessment and claims that income from forests and fisheries in a permanently-settled estate is exempt from income-tax.

(3) His contentions are (a) that the forests have been included in the zamin lands on which he has to pay peshkash, (b) that under clause (8) of the sanad granted to him no increase of the jumma or peshkash can ever be made under any circumstances and that tax levied on the income from the produce of forests within the zamindari is in effect an addition to the peshkash and therefore contrary to the terms of the sanad, and (c) that forest produce is of the nature of agricultural produce and that income derived from it is income derived from agriculture which is exempt from tax.

(4) The sanad granted to the Zamindar under the Permanent Settlement Regulation, 1802, specifies only the name of the three villages comprising the zamindari. It does not state that the forests or the hills referred to are included in the zamindari lands on which the peshkash to be paid to Government is fixed but it is pointed out on behalf of the Zamindar that the Privy Council have held in another connexion (vide I.L.R., 15 Madras, 101 to 111) that the tract of hills and forest near the zamindari are included in the sanad. There is nothing to show that in settling the peshkash of the zamin these hills and forests were taken into account as alleged.

Clause (8) of the sanad runs as follows: “Nor any increase of the fixed jumma be ever made under whatever charges or improvements your interests or your pleasure may lead you to introduce into the zamindari.” The clause merely gives protection to the Zamindar from any enhancement of the fixed peshkash in case of subsequent improvements in the estate. On the other hand clause (4) of the sanad which enumerates the heads of revenue that the fixed jumma shall be exclusive of refers to ‘personal and professional taxes’ in the category and in the concluding portion of the clause the power to add to or abolish the items of revenue under any of these heads is distinctly reserved to Government.

Income-tax is essentially of the nature of a tax on a person, and it does not seem in the circumstances that it can be construed to be an addition to peshkash. In regard to the third contention of the Zamindar, the statement of receipts and expenditure filed by him show that the greater portion of the income is derived from sale of coupes, minor forest produce, sale of poles, etc., and the expenditure is mostly on establishment,

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travelling allowance and cutting of timber and to a small extent on plantation and sadalwar and printing charges. None of the items of expenses seems to be on agriculture proper.

(5) The question for decision is whether the income from this source falls under any of the exceptions mentioned in section 2 (1) (a) and (b) (1) of the Income-tax Act, 1918. Sub-clauses (a) and (b) apply to the same source of income from agriculture, although one refers to rent or revenue and the other to the direct practice of agriculture and the section is practically the same as section 5 (1) of the old Act II of 1886. It was held under the old Act that income derived by Zamindars from the produce of forests or jungle lands was not exempt as it was not income derived from lands used for agriculture. This has been the practice followed by the Board and in support of the position reference may be made to the discussions in I.L.R., 24 Madras, 421. Mr. Justice BHASHYAM AYYANGAR in discussing the meaning of agriculture stated that the primary meaning of agriculture is the cultivation of the ground "with the object of raising grain and other field crops for men and beasts and that in the more general sense it meant the cultivation of the ground for the purpose of procuring vegetables and fruits for men and beasts, including gardening or horticulture and the raising or feeding of cattle and other stock." And Mr. Justice SHEPPARD said that one "who planted and maintained trees for firewood or other such purposes" would not be called an agriculturist. The High Court in short held that the word "agriculture" includes the cultivation and the tillage of land for crops, grass, orchards and fruit trees, but does not include forestry.

(6) It seems from the above that forestry in all its branches, for example, quarrying stones or gravel, cannot be said to be agriculture and that the mere fact that forest land is susceptible of being used for agricultural purposes or that some of its produce is of the nature of agricultural produce is not enough to justify exemption; section 2 (1) refers to actual agriculture and the question will have to be decided on the merits in each case. As the question is of importance and as the assessee desires the decision of the High Court on it, I am asked to request that the case may be placed before the High Court and their decision communicated.

L. A. Govindaraghava Ayyar for assessee.—I contend
(a) that by the terms of the sanad the items in respect of which income-tax is sought to be assessed are exempt. They were considered at time of settling the peshkash.
(b) It is agricultural produce and as such exempt from income-tax.

(a) Reference was made to the various clauses of the sanad. The sanad provides that the revenue is not to be increased on any account or under any circumstances. Section 1 of Regulation XXV of 1802 was practically repeated in clause (2) of the sanad. The Income-tax Act has not repealed the Regulation. The later enactment does not set aside the earlier enactment unless it specifically does so: *Associated Newspapers, Limited v. City of London Corporation*(1), *Pole-Carew v. Gaddock*(2). The principle of construction is well set out in Maxwell on the Interpretation of Statutes, page 313.

(b) The Act does not define agriculture. 10 Ed. VII, Chapter 8 defines "agriculture." Reference made to Webster's Dictionary. In England income from land is assessed. In India agricultural land pays tax in the way of kist. At the time of settlement all potential increase in the revenue was considered. Fisheries also come within the definition "agriculture." When land passes to me fisheries thereon also pass to me. Land includes water and water includes the fish therein. Fisheries are therefore also granted to me under the sanad.

The Government Pleader (C. Madharan Nayar) for Referring Officer.—Section 3 of the Income-tax Act applies to all incomes from whatever source derived. The only question for determination is whether the income from forests and fisheries falls under section 2 (1) (a) or

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(1) [1916] 2 A.C., 429.

(2) [1920] 3 K.B., 109.

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2 (1) (b) of the Act. The primary meaning of agriculture is culture of the land: Murray's Dictionary. Felled timber is not included: *Murugesu Chetti v. Chin-nathambi Goundan*(1). See also *Raja of Venkatagiri v. Ayyapareddi*(2), *Inland Revenue Commissioners v. William Ransom & Son*(3). Only cultivable land was taken into account in fixing the peshkash: see Montgomery's Report.

The Court delivered the following OPINION:

This reference arises out of the assessment of income-tax under Act VII of 1918 of the income derived by the Zamindar of Singampatti from forests and fisheries within the ambit of his zamindari. The assessee objects to the assessment (1) on the ground that the income is agricultural income within the meaning of section 4 of the Act and, therefore, not chargeable to income-tax; (2) that the assessment is illegal as contravening the terms of his permanent sanad for the zamindari and the provisions of Regulation XXV of 1802.

It is convenient to consider first the effect of the sanad, a copy of which has been filed before us, and the terms of the Regulation. The sanad is a lengthy document largely reproducing the language of the Regulation under which it was granted. Its general effect is this—in view of the bad effect of fluctuations in the assessment of land revenue, both in obstructing the development of the country and diminishing the security of property, the British Government has resolved “to fix for ever a moderate assessment of public revenue on the lands” held by Zamindars and others; and to that end has fixed the permanent annual jumma (total demand) of the Singampatti zamindari at 2,300 star pagodas. Clause (4) of the sanad says:

(1) (1901) I.L.R., 24 Mad., 421. (2) (1915) I.L.R., 38 Mad., 738, 741.
(3) [1918] 2 K.B., 709.

“This permanent assessment of the land on your zamindari is exclusive of the revenue derived from the manufacture and sale of salt and saltpetre, exclusive of the sayer or duties of every description, whether by sea or land, the entire administration of which the Government reserves to itself; exclusive of the abkari or tax on the sale of spirituous liquors, and intoxication drugs; exclusive of the excise which is or may be levied on commodities or articles of consumption; exclusive of all taxes personal and professional, as well as of those from markets, fair and bazaar; exclusive of Lakshiraj lands (lands exempt from payment of public revenue) and of all other alienated lands paying a small quit rent (which quit rent unchangeable by you, is included in the assets of your zamindari) and exclusive of all lands and Russooms heretofore appropriated to the support of Police establishment. The Government reserves to itself the entire exercise of its discretion in continuing or abolishing temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads above stated.”

A later clause (No. 8) provides that no increase of the fixed jumma shall ever be made, whatever changes or improvements the grantee's interest or pleasure may lead him to introduce into the zamindari.

This is the grant under which the zamindari has been held since 1802. A dispute at one time arose as to whether it included the forest tracts with which we are now concerned, or only covered the villages and cultivated lands situated on the plains and contiguous thereto. This dispute was settled by the judgment of this Court in *Sivasubramanya v. Secretary of State for India*(1) confirmed on appeal by the Privy Council in the *Secretary of State for India in Council v. Nellakutti Siva Subramania Tevar*(2), and it was decided that the forest tracts also were included in the zamindari held under the sanad and that the latter was not confined to the plain

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(1) (1886) I.L.R., 9 Mad., 285.

(2) (1892) I.L.R., 15 Mad., 101.

villages and cultivated tracts. The learned Government Pleader has however argued that the peshkash was calculated on the rental of cultivated lands actually received by the Zamindar at the time of the grant, and that no allowance was made for profits to be made out of forests and fisheries. He would have us therefore hold that income from such sources was not included in the jumma, which was commuted into a fixed peshkash, and is therefore assessable to tax apparently under any designation.

Admittedly there is no record of the basis of calculation of the peshkash for this zamindari. It is quite possible that only the rentals of cultivated lands were taken into account, receipts from other sources being at that time so small as to be negligible. But even assuming this to be so, it does not follow that the neglected items were not included in the commutation. On the contrary, it seems to us they must be held to be covered by the permanent annual jumma of the zamindari. But, in simple language, the effect of the document seems to be that, subject to the payment of the peshkash and the various demands referred to in clause (4), the zamindari is given to the zamindar to make what he can out of it (the possibilities of improvements and developments being distinctly contemplated) free of all further demands from Government. If it had been intended to exclude profits from forests and fisheries, such profits would surely have been mentioned in clause (4) along with such items as salt, sayar, abkārī, excise and markets. We may add that if the Government Pleader's contention is correct, then apart from the claim to ownership of the forests, which was first put forward by Government in 1865 and finally negatived by the Privy Council decision in 1891, it was at any time open to Government to add to the peshkash a direct cess on the forests, without having recourse to

the indirect medium of the Income-tax Act. As far as appears, there has never been any question of doing this.

It was argued that "Income-tax" is covered by the fifth item in clause (4) ("all taxes personal and professional"). We do not think this argument can be accepted. The last sentence in the clause shows that as regards clause (4) the Government had in mind items of taxation then in force; and income-tax is of much later intention. Exactly what imposts were had in mind under this head we are not in a position to say; but the allocation of the words "personal" and "professional" seems to suggest taxes on individuals by reason of their status (caste or calling). Power to levy a tax in the shape of a percentage on income derived from the zamindari itself would apply to the rental of cultivated lands just as well as to income from forests and would render entirely nugatory the guarantee of fixity of demand, which was the keynote of the Government's policy.

We can only conclude therefore that the peshkash was fixed in commutation, not only of the rentals of cultivated lands but also of all income which might be derived from forests or fisheries; and the sanad and Regulation alike make it clear that these incomes in the lands of the Zamindar were exempted from further taxation by the Government.

For the explicit nature of the exemption we may quote the words of section 1 of the Regulation, which recites that Government has resolved "to fix for ever a moderate assessment of public revenue on such lands, the amount of which shall never be liable to be increased under any circumstances"; and these words are reproduced in clause (2) of the sanad with the immaterial substitution of the word "change" for "increase."

That this exemption applies to taxes which might be imposed thereafter, as well as to taxes in force at the time

of the sanad, is clear from the judgment of the House of Lords in *Associated Newspapers, Limited v. City of London Corporation*(1), and it is no less clear from the same judgment that although it is competent to the legislature to withdraw or modify such an exemption by subsequent enactment, this can only be done expressly and not in general terms or by implication. For the latter proposition we may also refer to Maxwell on Interpretation of Statutes (6th Edition) Chapter VII, section 3.

There is nothing in the Income-tax Act to indicate that the attention of its framers was ever drawn to Regulation XXV of 1802; and we find it impossible to treat as a legal and effective abrogation of the exemption the words of section 3:

"Save as hereinafter provided, this Act shall apply to all income from whatever source it is derived, if it accrues or arises or is received in British India, or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India."

In our opinion the assessee's objection based on the terms of the sanad is sound and must prevail.

It is therefore not necessary to determine whether income from forests and fisheries comes under the definition of "agricultural." At first glance it may seem difficult to include either, and especially the fishery income. It may however be pointed out that a reference to Murray's and Webster's dictionaries shows that the word "Agriculture," while sometimes used in the narrow sense of the art or science of cultivating the ground, is also used in a much wider sense so as to include even "forestry," according to Webster. In which sense it was used by the framers of the Income-tax Act would be a matter for determination and to this end it would not be out of place to consider the probable reason for the

(1) [1916] 2 A.C., 439.

exemption of agricultural income from income-tax. No other reason is suggested than the equity of exempting from further burden income which had already paid toll to the State in the shape of land revenue. This applies equally whether the land is liable to ryotwari assessment, or whether Government demands have been permanently commuted as in the case of a permanently-settled estate. Logically, the exemption from further burden should apply to both; and it would seem that it ought to cover all sources of income which had been commuted under a permanent settlement.

We would answer the Reference by saying that the income from forests and fisheries in the Singampatti zamindari is not liable to income-tax.

M. H. H.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

JOSEPH NICHOLAS (PLAINTIFF), APPELLANT,

v.

SIVARAMA AYYAR AND ANOTHER (DEFENDANTS),
RESPONDENTS*

Malicious attachment before judgment—Steps taken to effect attachment but not completed—Suit for damages—Payment of amount mentioned in attachment—Defendants causing proceedings to be dropped—Necessity of proving favourable termination of proceedings.

In executing an order for attachment before judgment obtained by the defendant against the plaintiff, the Amin proceeded so far as to take out the plaintiff's cloths from the shelves of his shop and to measure them, when the plaintiff paid

* Appeal Suit No. 67 of 1920.

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the amount mentioned in the warrant, and the defendant caused the warrant to be returned to the Court with an endorsement by him that the claim had been settled.

In a suit for damages for malicious attachment, held (a) that the acts done were sufficient to entitle the plaintiff to sue, though there was no completed attachment: *Rama Ayyar v. Govinda Pillai*(1) distinguished; and (b) that as the defendants themselves had caused the further proceedings in the suit to be dropped, it was not necessary for the plaintiff to show that those proceedings ended in his favour.

APPEAL against the decree of K. A. KRISHNAN, Sub-ordinate Judge of South Malabar at Calicut, in Original Suit No. 9 of 1919.

The facts are stated in the judgment. Plaintiff, whose suit was dismissed by the lower Court, preferred this Appeal to the High Court.

O. Madhavan Nayar, with *A. V. K. Krishna Menon*, for the appellant.—The defendants' conduct in procuring the attachment was malicious. Reference was made to various acts to show malice. Plaintiff had lost his credit and reputation owing to defendants' conduct. Defendants' false affidavit in support of attachment before judgment shows his malice. To entitle the plaintiff to damages, it is not necessary that the attachment should be completely effected. *Rama Ayyar v. Govinda Pillai*(1) is wrong in some portions. As the defendants themselves caused the further proceedings to be dropped, the suit could not go on and it is not necessary for the plaintiff to show that the proceedings in the suit terminated in his favour: see *Gilding v. Eyre*(2) and *Steward v. Gromett*(3). Counsel then referred to the evidence to show what damages should be given.

C. V. Ananthakrishna Ayyar, with *T. S. Anantarama Ayyar*, for the respondents.—There was no malice on the part of the defendants. The circumstances

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in which the plaintiff was placed, and his previous conduct in dealing with his properties justified the procuring of the attachment. The plaintiff is not entitled to any damages, as the attachment was not completed and as he has not shown that the suit ended in his favour. Reference was made to *Rama Ayyar v. Govinda Pillai*(1). Plaintiff had no credit in the market and any damage to him was not owing to the defendants' conduct. The evidence shows that plaintiff was not entitled to any damages.

The Court delivered the following JUDGMENT:

This Appeal is against the lower Court's dismissal of the plaintiff's suit for damages in connexion with the defendants' application for attachment before judgment. The facts are that the attachment before judgment was ordered by the District Munsif of Calicut on 10th February 1919 and that first defendant accompanied by an Amin proceeded to the plaintiff's shop. The lower Court has dealt at considerable length with what happened there. It is not necessary to repeat its observations on the evidence. We need only say that there is a preponderance of evidence, including that of an European sergeant, whom we have no reason for distrusting, to the effect that the Amin proceeded so far as to take out the plaintiff's cloths from the shelves of his shop and began to measure them, when the plaintiff who had heard by then of what had happened paid the amount of the claim. We therefore reject the defendants' case on this point, that nothing was done towards making the attachment at all. It is in respect of this action of the defendants and the Amin at their instance that plaintiff claims damages.

(1) (1916) 1 L.R., 39 Mad., 952.

(2) (1861) 10 C.B. (N.S.), 592.

(3) (1859) 7 C.B. (N.S.), 191.

(1) (1916) 1 L.R., 39 Mad., 952.

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No doubt, there was not, in our opinion, a completed attachment by seizure of any of the plaintiff's property; but that is not material. For the claim, as stated in the plaint, is generally in respect of the acts done and not expressly or exclusively in respect of a completed attachment; and there is in our opinion no doubt that the plaintiff may be entitled to compensation, even though the attachment was not completed, if, notwithstanding that he sustained injury by what was actually done. No authority has been adduced by the defendants to show that a completed attachment is necessary. In *Rama Ayyar v. Govinda Pillai*(1) it was held that a mere procuring of an order for attachment before judgment did not afford a cause of action for damages. Without expressing any opinion as to the correctness of certain parts of that decision, we can distinguish it from the facts now before us on the ground that they included several acts of the defendants and the Amin, by which injury to the plaintiff has, as we shall show, been established.

That being our conclusion as to the actual occurrence in respect of which the plaintiff claims, we have now to see whether he has established what according to the authorities he must establish, that the defendants acted maliciously and without reasonable and probable cause. Certain heads of proof of this were attempted at the trial; for instance, the plaintiff's refusal to sell to the defendants a pony and jutka, the institution by the defendants of the suit in which this attachment was made in a Court which would not ordinarily exercise jurisdiction over the plaintiff and lastly the fact that the plaintiff had borrowed from Nedungadi Bank at 12 per cent interest instead of continuing to borrow from the defendants as he had done in the past. In this Court

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the pony transaction has not been relied on. It is not shown that the defendants' choice of the Court in which they brought their suit was in any way unreasonable. The plaintiff's resort to the Nedungadi Bank instead of to the defendants for a loan is explained by the admitted fact that the defendants had refused to advance him more than they had already done. In these circumstances, these items of evidence are useless to establish malice.

This part of the plaintiff's case is however far better supported with reference to Exhibit XV, filed by the first defendant in order to obtain the conditional attachment with which we are concerned, since the allegations in it are in our opinion not merely unfounded, but such as he could not have possibly supposed himself entitled to make. The absence of reasonable and probable cause for taking legal action in execution or otherwise is, as was decided by the Court of Appeal, in *Brown v. Hawkes*(1), some evidence from which malice may be inferred; and we may say at once that in this case with reference to the surrounding circumstances we are prepared to infer it therefrom. The defendants were proceeding under Order XXXVIII, rule 5, Civil Procedure Code, and under that provision they had to satisfy the Court that the defendant with intent to obstruct or delay the execution of the decree that might be passed against him was about to dispose of the whole or any part of his property. That being the only matter which they could legally present to the consideration of the Court to obtain the order which they desired, it is useless for Mr. Anantakrishna Ayyar on their behalf to represent to us that there were other facts available to them on which their application might have been founded, and as to the truth of which there can be no doubt. We

(1) (1916) I.L.R., 39 Mad., 952.

(1) [1891] 2 Q.B., 718.

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must confine ourselves to what they in fact had to submit to the Court. We find in paragraph 2 of Exhibit XV, that the first defendant said

"that the defendant becoming aware of the fact that the aforesaid plaint was being prepared, with the intention of defrauding the creditors executed (to amend the Court translation in accordance with the agreement of the practitioners before us) documents in respect of the properties belonging to him in the name of his wife and others and borrowed large amounts from the Nedungadi Bank on mortgage of his properties. If the defendant receives money and appropriates the same and alienates the properties as aforesaid, there will be no remedy whatever to realize the amount in respect of the decree that may be passed against him."

The substantial allegation here, on which the Court was asked to act, was that the plaintiff on becoming aware of the fact that the plaint was being prepared executed documents in respect of the properties belonging to him in the name of his wife. The only matter relied on by Mr. Anantakrishna Ayyar as in any degree supporting this statement, as it stands, is that the plaintiff had in 1916 purchased some property in his wife's name and that he had subsequently paid for improvements to it. The only admissible evidence of payment for improvements to the property is given by plaintiff himself, other evidence being admittedly hearsay. The sixth witness for the defendants no doubt speaks to the purchase of property by the plaintiff in his wife's name, and it may be true that he did so or that even though he purchased the property in his wife's name, it was intended to be at his own disposal. That, however, is absolutely immaterial, because the charge, in consequence of which the Court was asked to pass the order of attachment, was that he had done this in consequence of his knowledge that the plaint in the suit was being prepared. The plaint in the suit was according to Exhibit II, and that is the earliest

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evidence we have on the point, being prepared on 8th June 1918; that is long after the only purchase in the plaintiff's wife's name, of which we have any information. In these circumstances, there is nothing to justify the allegation in Exhibit XV and it was, as the plaintiff must have known, clearly untrue. There is also a statement in Exhibit XV, that plaintiff in consequence of his knowledge of the preparation of the plaint executed documents in respect of his properties in the names of others also, although there is no evidence whatever and no sort of attempt has been made to justify this. In these circumstances, our finding must be that the affidavit on which the defendants obtained the order of attachment was not merely given in a material particular without reasonable or probable cause but was also known to him to be without any justification at all.

As throwing light on the defendants' conduct, there are further their relations with the plaintiff. The defendants appear to have lent money to the plaintiff for some time and to have been quite unsuccessful in obtaining repayment thereof. It is unnecessary to go through the details which appear in the oral evidence and from correspondence. It is clear that the plaintiff was living from hand to mouth, and not paying debts until he had no alternative but to do so, and that the defendants had shown very considerable forbearance. The crisis was evidently reached just before the suit was brought, because the plaintiff succeeded in borrowing from the Nedungadi Bank already referred to at 12 per cent the sum of Rs. 15,000 and he even promised to use a portion of this in repaying the defendants. The situation then was that the defendants, having no alternative, brought their suit and that they knew that there was in the plaintiff's hands a means by which they could get satisfaction of their debt, if they could only secure it. It is

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a fair presumption, which there is nothing to rebut, that the defendants actually did what they did in order to secure for the satisfaction of their own debt the money of which the plaintiff had become possessed. Taking that as their motive, and having regard also to the unjustifiable character of the allegations in the affidavit, we have no hesitation in finding, differing on this point from the lower Court, that they acted not merely without reasonable and probable cause for setting the law in motion, but also maliciously.

Before dealing with the question of damages, we consider an argument advanced by Mr. Anantakrishna Ayyar, that the plaintiff had no cause of action, because he did not allege in his plaint that the proceeding, by which he was aggrieved, had ended in his favour and because it never in fact did so end. The facts are that the proceeding or the application for and the lower Court's conditional order of attachment under Order XXXVIII, rule 5, came to an end, as the plaintiff paid the amount of the defendants' claim and the warrant was returned to the Court with the endorsement by the first defendant that "the matter of the plaint having now been settled, there is no necessity for attachment." It does not appear from the record what happened to the suit, but, as the amount of the defendants had been paid, it either has been or should have been dismissed. As regards the failure to mention the result of the proceedings in the plaint, it need only be said that no objection was taken with reference to it at the trial and that, if such an objection were pressed before us in Appeal, we should meet it by allowing an amendment. As regards the more substantial objection that the proceedings are not shown to have terminated in plaintiff's favour and that they could not be regarded as having so terminated so long as the order for conditional attachment was not discharged at his instance

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or otherwise, we observe first that it would be quite useless for him to obtain such a discharge when his creditor himself had informed the Court, as he did by the endorsement on Exhibit XVI and elsewhere, that the attachment need not be proceeded with, because the matter had been settled. On the broad question whether the termination of the proceedings in the plaintiff's favour is essential, there is no doubt abundant authority that it is so; but such authority is applicable only to cases in which a distinct termination in favour of one party or other is possible, and not to a case such as that before us, in which the proceedings cannot end by their nature in any judicial disposal and in fact have been terminated by an act of the first defendant himself. In support of this distinction we were referred to *Gilding v. Eyre*(1), and *Steward v. Gromett*(2). In the former of these cases the facts were very similar to the present and the Court dealt particularly with one feature of the case, the abandonment of the proceedings by the creditor in consequence of the payment which the debtor-plaintiff made in order to obtain his release from arrest, holding that nothing arose in favour of the defendant from it. In these circumstances, the argument founded on the absence of the termination of the proceedings in the plaintiff's favour must fail.

We have now to settle what damages we shall award. Reference has already been made to the state of the plaintiff's credit and we need not deal with it in greater detail. It is clear that he found it most difficult to obtain funds at any reasonable rate of interest, that there had been other claims against him in the Courts, that he had lost his credit with the defendants at least and that it was possible for him to borrow elsewhere only at 12 per cent. There is practically no evidence of value as to any

(1) (1861) 10 C.B. (N.S.), 592.

(2) (1859) 7 C.B. (N.S.), 191.

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detriment to his credit or position generally, owing to the defendants' action. He himself says that customers did not resort to his shop; but it is not possible to connect the falling off in his retail cloth trade with the state of his credit. He says again and has adduced some evidence that the subscribers to a Chit Fund which he was conducting began to default after this occurrence. The Chit Fund has five hundred subscribers, and it is not in our experience unusual for a proportion of the subscribers to such Chit Funds to default. It is not shown by any evidence which we can accept that the default of some fifty subscribers in the present case is due to what happened on 10th February 1919. If it had been so, it should have been easy for the plaintiff to adduce much better evidence by calling some of the defaulting subscribers or producing accounts of the Chit, and he has not done either. Lastly, there is the evidence of an apparently respectable gentleman, fifth witness for the plaintiff that the plaintiff's credit had suffered. He, however, gave no details and his general assurances do not seem to us of any affirmative value. In these circumstances we are unable to accept the plaintiff's claim for the large sum of Rs. 5,250 as damages. At the same time we are not prepared to grant only contemptuous damages. The facts are that the plaintiff was put to annoyance, and no doubt to some extent to dishonour, by this public employment of coercive processes without legitimate necessity and without justification. We think that, in the circumstances, Rs. 50 will be a sufficient compensation for such mental pain and loss of reputation as he may have sustained. We therefore allow the Appeal, set aside the lower Court's decree and grant the plaintiff a decree for Rs. 50 with costs thereon throughout. The plaintiff will pay the defendants their costs throughout, not on the whole amount in respect of which the suit was filed, but in the circumstances of the case on Rs. 1,500.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Devadoss.

NAGABHUSHANAM AND FOUR OTHERS (PLAINTIFFS),
APPELLANTS,

v.

RAMACHANDRA RAO AND THREE OTHERS (DEFENDANTS
1, 2, 4 AND 5), RESPONDENTS.*

1922,
January, 24.

Indian Companies Act (VI of 1882), Sch. A, Table A—Articles of Association of a Limited Company—Transfer of shares to be effected by deed executed both by transferor and transferee—Transfer only by transferor, effect of, as against auction purchaser.

Where a transfer of shares in a Limited Company is required by law or by the articles of Association of the Company to be made only by a deed executed both by the transferor and the transferee in the prescribed form,

Held, that a deed of transfer executed by the transferor alone did not pass to the transferee the title to the shares and that an auction-purchaser under a subsequent attachment and sale of the shares was entitled to be registered as owner in preference to the private purchaser.

SECOND APPEAL against the decree of J.J. COTTON, District Judge of Kistna at Masulipatam, in Appeal Suti No. 240 of 1918, preferred against the decree of K. KRISHNAMA ACHARIYAR, Temporary Subordinate Judge of Masulipatam, in Original Suit No. 63 of 1917.

The following is the statement of facts taken from the judgment of KUMARASWAMI SASTRI, J. :

"One Venkatasubba Rao owned shares in Sri Krishna Cotton Press Co., Ltd., Guntur, Sri Krishna Jute and Cotton Mills Co., Ltd., Ellore, Bezwada Tripurasundari Cotton Press Co., Ltd., Bezwada and Sri Krishna Rice Mill Co., at

* Second Appeal No. 1626 of 1919.

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Masulipatam. He was indebted to Thadipalli Venkatanarayana and in consideration of the money due to him he executed a deed of transfer, Exhibit L, dated 20th April 1912, whereby he transferred the shares mentioned in that document for a sum of Rs. 8,000. The deed is in the usual form and is signed by Venkatasubba Rao alone. Notice was given of this assignment to the various Companies whose shares were transferred, but the transferee was not registered as a shareholder owing to objection being taken as to the form of the transfer not complying with the articles of association and owing to prohibitory orders having been received by the Companies in respect of the shares. It appears that after the sale and before notice to the Companies these shares were attached by prohibitory orders in execution of decrees against the transferor and they were subsequently sold in execution and purchased by strangers."

The private purchaser of the shares under the deed of assignment brought this suit for a declaration of his right to the shares and of the invalidity of the attachment and sale thereof by the Court. The defendant, viz., the auction purchaser, pleaded that his purchase alone was valid and that the assignment to the plaintiff did not confer on the plaintiff any valid title to the shares. The Court of first instance, viz., the Subordinate Judge, allowed the suit. On appeal by the defendants the District Judge reversed the same and dismissed the suit. Thereupon the plaintiff preferred this Second Appeal to the High Court.

P. Narayanamurti for appellants.—The articles of association are not mandatory but only directory. It is not necessary to observe the prescribed form. Both in law and in equity an assignment by the owner alone is sufficient to make the transferee the owner of the shares. The articles in this case give absolute right to have the transferee's name registered on such a transfer. Of two persons who are both unregistered transferees, the prior in date prevails: 5, Halsbury's Laws of England,

pages 191, 197, *Moore v. North Western Bank*(1). Even without a transfer deed a pledge of the shares is good. Earlier pledge prevails: *Bradford Banking Company v. Briggs*(2).

T. M. Krishnaswami Ayyar, with *T. S. Raghunatha Rao* and *Y. Suryanarayana*, for respondents.—The shares can be transferred only in the manner prescribed by law. Table A, clause (8), and articles of the Indian Companies Act (VI of 1882) govern this case. They prescribed that these shares can be transferred only by a deed of transfer executed by both the parties. A transfer in such legally prescribed method alone is effectual to pass the title in the shares: *Young v. Mayor of Royal Leamington Spa*(3), *The Liverpool Borough Bank v. Turner*(4), *McEuen v. West London Wharves and Warehouses Company*(5), *Kurri Veerareddi v. Kurri Rapireddi*(6), *Ramanathan v. Ranganathan*(7), *Bhavan Mulji v. Karasji Jehangir Jasawala*(8), *Maxwell on Interpretation of Statutes*, Sixth Edition, page 650, *Torkington v. Magee*(9) and section 137 of the Transfer of Property Act. Where there has been an attachment of the shares, the Civil Procedure Code prohibits the officers of the Company from transferring the shares to any one but the purchaser under the attachment. Until the private transfer is registered in the books of the Company, the private transferee is not the owner of the shares. Though there is a discretion in the officers of the Company to register a private transferee, the Company has no option in registering a Court purchaser especially when he had done all that he had to

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(1) [1891] 2 Ch., 599.

(2) (1887) 12 A.C., 29.

(3) (1883) 8 App. Cas., 517.

(4) (1860) 2 De. G. & J., 502; s.c., 45 E. R., 715.

(5) (1871) 6 Ch. Ap., 655, 663. (6) (1906) I.L.R., 29 Mad., 336 (F.B.), 349.

(7) (1917) I.L.R., 40 Mad., 1134, 1169

(8) (1878) I.L.R., 2 Bom., 542.

(9) [1902] 2 K.B., 427, 430.

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do by way of informing the Company of his purchase in Court auction : *Société Générale de Paris v. Walker*(1).

KUMARASWAMI SASTRI, J.—These Appeals relate to the validity of the transfer of certain shares in Limited Companies governed by the Indian Companies Act.

[His Lordship after stating the facts recited above continued as follows :]

The competition is between the auction purchasers at the Court sales and the transferee under the deed of assignment, Exhibit L.

As regards the shares held in limited companies, it is important to consider the provisions of the Civil Procedure Code as regards the attachment and sale of shares held by judgment-debtors in Companies governed by the Indian Companies Act. Order XXI, rule 46, enacts that in the case of a share in the capital of a Corporation attachment shall be made by a written order prohibiting the person in whose name the share may be standing from transferring the same or receiving any dividend thereon and a copy of the order being sent to the proper officer of the Corporation. Rule 76 provides that where the property to be sold is a share in a Corporation the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument of share through a broker. Rule 79, clause (3), provides that where the property sold is a share in a Corporation the delivery thereof shall be made by a written order of the Court prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary, or other proper officer of the Corporation from permitting any such transfer or making any

(1) (1885) 11 App. Cas., 20, 28 and 29.

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such payment to any person except the purchaser. Rule 80 provides that where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a Corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document, or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party. In the present case the shares were attached by prohibitory orders in form required by the Code and they were sold and necessary notice was given to the companies concerned. So far therefore as the Court purchasers are concerned, it is clear that the provisions of the law necessary to transfer the shares to them have been complied with; the only formality remaining is the actual transfer of the shares in their names in the Companies' books. Both under the Companies Act and under the Articles of Association of the various Companies the Directors have a discretion to transfer the shares in the names of the auction purchasers. It is argued by Mr. Krishnaswami Ayyar that when there is a Court sale and a purchase under it, there is no discretion left for the Directors and that they are bound to transfer the shares. It is argued by Mr. Narayanamurti, for the other side, that there is nothing in the Companies Act or the Articles of Association to make any difference between private sales and sales in execution of decrees, the necessity for the sanction of the Directors being to prevent undesirable persons or debtors of the Company from getting transfers of shares. The reason applies with equal force to private or Court purchasers. We agree with the view taken in *Manilal Brijlal v. The Gordhan Spinning and Manufacturing Co.*(1), that

(1) (1917) I.L.R., 41 Bom., 76.

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there is still a discretion in the Directors to recognize or not purchasers in execution of decrees. So far as the transferee from the share-holder under Exhibit L is concerned, it is clear that the document of transfer does not conform with the provisions of the Companies Act or with the Articles of Association of the Companies. The present case is governed by the Companies Act of 1882 and by the Articles of Association of the various Companies. It is clear that both under the Act and the Articles of Association the instrument or transfer of the shares of the Company has to be executed both by the transferor and transferee and in the form prescribed. So far as the transferee is concerned the form contains a statement by the transferee that he agrees to take the shares subject to the condition on which the vendor himself holds the shares. The Act also provides that the transferor shall be deemed to remain the holder of the shares until the name of the transferee is entered in the Companies' registers (see Table A, First Schedule). Section 44 of the Companies Act of 1882 enacts that the share or other interest of any members in a Company share is moveable property capable of being transferred in manner provided by the regulations of a Company. As observed by CHANNELL, J., in *Torkington v. Magee*(1), shares which can only be transferred in manner provided for in the Companies Act are not choses in action. Section 137 of the Transfer of Property Act excepts shares in Companies from the Chapter dealing with transfers of actionable claim. Section 26 of the English Act of 1866 requires that the deed of transfer should be executed by the transferor and transferee, and duly entered in the register of transfers, while Article 18 of Table A of the English Companies Act of 1908

makes a slight alteration and directs that the instrument of transfer should be executed both by the transferor and transferee, and states that the transferor shall be deemed to remain the holder of the share until the name of the transferee shall be entered in the register. So that, both under the English and Indian law the deed of transfer has to be executed both by the transferor and transferee. The question therefore is whether a deed not complying with the terms of the Act, and the Articles of Association, is valid to transfer shares as against a person who has acquired the right to them by a Court-sale in manner required by the provisions of the Civil Procedure Code. The contention for the Court purchaser is that where the law prescribes a mode of transfer, that is the only mode which is capable of passing property and that any other mode, although it may as between the transferor and transferee give him a right to complete his purchase by compelling the transferor to execute the necessary transfer as required by the Act, will not avail against third parties. For the private transferee it is contended that his acquiring an equitable title is good, not only against the transferor but against third persons also. We are of opinion that the contention of the Court purchaser is well founded and that where the law prescribes a mode of transfer compliance with that mode is necessary before property can pass so as to confer title against third persons. In *McEuen v. West London Wharves and Warehouses Company*(1), where there was a transfer of shares but not in manner required by Act of Parliament, it was held that the transfer of those shares in any other form would at least amount to an equitable contract and that, even if the Company act upon the transfer and receive payments from the person

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(1) (1871) 6 Ch. Ap., 665.

(1) [1902] 2 K.B., 427.

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who entered into that equitable contract and issue documents and treat him as a share-holder, it would not have the effect of making him a real share-holder. Sir GEORGE MELLISH, L.J., observed :

"If a share-holder in a company whose shares by Act of Parliament can only be transferred by deed and by an alteration in the register, thinks fit to sell them in another way, which can only make an equitable contract at most and the Company so far act upon it that they receive payments from the person who has entered into that equitable contract and perhaps issue documents treating him as their share-holder and calling him their share-holder does that have the effect of making him the real share-holder? Now, it is obvious that if we were to hold that it had that effect, the consequence would be that the provisions of the Act of Parliament that shares can only be transferred by deed would be entirely eluded; and any person who examined the register whether a creditor who wished to know who the share-holders were in the company or a share-holder who wished to know who his company share-holders were, would be entirely deceived. None of the numerous cases cited appear to me to establish the proposition that, when a person has once become a legal share-holder, he can be freed from his liability to pay the calls, simply by showing that he has made a contract which is void at law, but possibly may amount to an assignment in equity, and that the company to a certain extent has adopted that contract."

In *Moore v. North Western Bank*(1) where the competition was between two persons claiming title to shares registered in the name of a third person in a Company ROMER, J., observed :

"As between two persons claiming title to shares in a company like this, which are registered in the name of a third party, priority of title prevails unless the claimant second in point of time can show that as between himself and the company, before the company received notice of the claim of the first claimant he, the second claimant has acquired the full status of a share-holder or at any rate that all

formalities have been complied with and that nothing more than some purely ministerial act remains to be done by the company, which as between the company and the second claimant the company could not have refused to do forthwith; so that as between himself and the company he may be said to have acquired, in the words of Lord SELBORNE, a present absolute unconditional right to have the transfer registered before the company was informed of the existence of a better title. For that proposition the case of *Société Générale de Paris v. Walker* (1) and *Roots v. Williamson*(2) are sufficient authorities and I need not refer to the cases cited by the defendants in argument which were decided previously to *Société Générale de Paris v. Walker*(3)."

This case has been followed in *R. D. Sethna v. National Bank of India*(3), and the principle applied to the facts of that case. *Société Générale de Paris v. Walker* (1) is also a case of competition between two transferees neither of whom were registered in the books of the Company, and it was held that the person who had a prior equitable title was entitled to preference. Lord SELBORNE after observing that a merely inchoate title by an unregistered transfer would not for the purpose of the case be equivalent to a legal estate in the shares and be sufficient to give priority against a prior transferee who had given notice of the prior equitable title to the Company so as to compel the Company to register the shares in the name of the applicant observed as follows :

"If indeed all necessary conditions had been fulfilled to give the transferee as between himself and the Company, a present absolute unconditional right to have the transfer registered before the Company was informed of the existence of a better title, the case might be different," and on the facts of the case he held that no such right was acquired by the subsequent transferee so as to give him priority. Where the law prescribes a mode of

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(1) (1885) 11 App. Cas., 20.

(2) (1888) 38 Ch. D., 485.

(3) (1912) I.L.R., 36 Bom., 334.

(1) [1891] 2 Ch., 599.

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transfer any transfer otherwise than by the manner prescribed by law will not confer a valid title. So far as the Madras High Court is concerned it has set its face against what may be called the equitable construction of Statutes. In *Kurri Veerareddi v. Kurri Bapireddi*(1), it was held that the provisions of section 54 of the Transfer of Property Act which provides for the mode of transfer of immoveable property are imperative and that Courts would not be justified in disregarding them on equitable grounds. This decision was followed by another Full Bench of this Court in *Ramanathan v. Ranganathan*(2), where the observations of the Privy Council in *East Indian Railway Company v. Changai Khan*(3), and *Venkayamma Rao v. Appa Rao*(4), are explained as not overruling the principle laid down in *Kurri Veerareddi v. Kurri Bapireddi*(1). Though a different view has been taken in Calcutta and Bombay in *Akbar Fakir v. Intail Sayal*(5), *Syamkisor De v. Dines Chandra Bhattacharyya*(6) and *Bapu Apaji v. Kashinath Sadoba*(7), the decision of our High Court is binding on us and we do not think we can hold that a transfer otherwise than as is provided by the Companies Act and the Articles of Association can be valid. Treating the right of the private transferee therefore as merely a right in equity to compel the vendor to execute a proper conveyance and the transaction evidenced by the transfer as merely an agreement to convey capable of being perfected into an absolute conveyance by complying with the rules laid down in the Companies Act and the Articles of Association, the question is whether he has any priority over the auction purchaser in a Court sale who has given notice

(1) (1908) I.L.R., 29 Mad., 836 (F.B.). (2) (1917) I.L.R., 40 Mad., 1184.
(3) (1915) I.L.R., 42 Cal., 888.
(4) (1916) I.L.R., 39 Mad., 509 (P.C.).
(5) (1915) 29 I.C., 707. (6) (1919) 31 C.L.J., 75.
(7) (1917) I.L.R., 41 Bom., 438 (F.B.).

to the Company of his purchase. We do not think he has any such priority.

As regards purchasers in Court sales where the sale is confirmed and the provisions of the Act are complied with there is nothing further to be done by the transferee or by the Court. When an order is issued under sub-clause (3), rule 79, Order XXI, Civil Procedure Code, the Company acting through the Secretary or proper officer could not make a transfer of the shares to anybody else. It has either to recognize the transfer or refuse to recognize it. Form 34 of Appendix E of the Civil Procedure Code is the prohibitory order contemplated in rule 79, clause (3). It is addressed to the Secretary of the Company and recites the fact of the purchase by the auction purchaser of the shares specified in the order and prohibits the Company from making any transfer of the shares to any person except the purchaser, or from receiving any dividend thereon, or from permitting any transfer, or from making any payments to any person except the purchaser. It is issued under the seal of the Court and signed by the Judge.

We do not think that on the confirmation of the sale and the issue of the order any further steps are required to be taken by the Code. There is no provision in the Code which requires the execution of any further documents by the Court. In the view we take of the case the Court purchaser in the present case has taken all the necessary steps and brought matters to a stage where all that remains is for the Company to signify or withhold its assent and he is therefore entitled to priority over the transferee from the share-holder who has not got an assignment in manner required by law and is merely in the position of a person who holds an equitable contract. In Second Appeal No. 1719 there is the further fact that the Court purchaser applied for the

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registration of the transfer and got his transfer recognized by the Company.

Second Appeals Nos. 1719 and 1773 of 1919 are allowed with costs throughout and Second Appeal No. 1626 of 1919 is dismissed with costs of second defendant throughout.

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DEVADOSS, J.—I agree.

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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

SANKUNNI (DEFENDANT), APPELLANT,

v.

SWAMINATHA PATTAR (PLAINTIFF), RESPONDENT. *

Headmaster and pupil—Unruly conduct of pupil—Power of headmaster to inflict moderate corporal punishment—Rule 59A of Educational Rules, effect of.

It is within the powers of the head of a school to inflict moderate and reasonable punishment on a boy, such as a couple of smacks on the cheek, for correcting unruly conduct or breaches of discipline.

The Educational Rules which provide that "corporal punishment shall not be inflicted except in a case of moral delinquency or flagrant insubordination and shall be limited to six outs on the hand" do not prohibit or regulate the petty corrections such as that in question which are necessary for maintaining the ordinary discipline of a school.

APPEAL against the decree of C. V. KRISHNASWAMI AYYAR, Subordinate Judge of South Malabar at Palghat, in Original Suit No. 18 of 1918.

* Appeal Suit No. 158 of 1920.

The facts are stated in the judgment. The defendant preferred this Appeal.

C. Madhavan Nayar, with D. A. Krishna Variar, for appellant.—A teacher can inflict such punishment on his students as their father can. The Educational Rules do not limit the usual power of the head of an institution to inflict moderate corporal punishment for unruly conduct. Reference was made to *Mansell v. Griffin*(1), where a similar rule was in question and the cases quoted therein: *Regina v. Hoplin*(2), *Fitzgerald v. Northcote*(3), *Hutt v. Governors of Hailebury College*(4), Halsbury's Laws of England, Volume 17, page 107, Volume 27, page 876, Volume 12, page 17, Schouler's Domestic Relations, 5th Edition, section 244, Eversley's Domestic Relations, 3rd Edition, pages 509 and 510. The limitation is that the punishment must be reasonable in the circumstances and must not be the result of malice or whim or likely to cause danger to life or limb. The evidence shows that the student was unruly in his behaviour, that the punishment was necessary, bona fide and moderate. In any event defendant should not have been asked to pay half of plaintiff's costs.

A. Krishnaswami Ayyar, with N. Rama Ayyar, for respondent.—A teacher cannot inflict all the punishments which a father can. Even if he can, there was no justifying occasion for the punishment. The boy was not responsible for the disturbance in the school. He was not solely responsible for it and he was punished for the misconduct of others. Rule 59-A of the Educational Rules indicates when and in what manner punishments can be inflicted. The cases quoted by the appellant explained.

OLDFIELD, J.—Personal matters and allegations of ulterior motive have entered unduly into the pleadings

(1) [1908] 1 K.B., 160.

(3) (1865) 4 F. & F., 656.

(2) (1860) 2 F. & F., 202.

(4) (1887) 4 T.L.R., 623.

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in and conduct of this case in the lower Court. But the facts and the considerations with which we are concerned for the purpose of this Appeal, can be stated with very little reference to them. The defendant, Principal of what at the date in question was the Victoria College, but is now a Government College at Palghat, appeals against a decree awarding to plaintiff, a pupil in the High School attached thereto, Rs. 150 as damages for an assault. At the trial two questions were raised, on which very little has been said here. For it is not seriously disputed that defendant had on the occasion in question the powers, ordinarily exercised by the headmaster of the school, to inflict corporal punishment or that he is not proved to have done more than he himself admits, given plaintiff "two smacks" with his hand on his cheek. We are asked to hold either that in the circumstances of the case the infliction of this chastisement was within defendant's powers and he is not liable for damages at all, or that, if he is so liable, the damages awarded are excessive; and also that the award to the plaintiff of half the costs of the suit is unsustainable. The Memorandum, so far as it has been pressed by plaintiff, is against the award of damages as inadequate and will be dealt with the Appeal.

The circumstances, as alleged by plaintiff, are that on 15th March 1918, the last day of the current term at the end of the last working period, the students including plaintiff in Form IV B demonstrated their satisfaction by clapping their hands in a manner, which we believe to be usual in Indian schools and which according to the evidence was usual at Palghat. The demonstration however in the opinion of defendant, who was in the corridor, went beyond what was permissible and on going to the class room he found plaintiff in his place near the door with two other boys shaking a reversible desk,

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which, already according to the evidence, was in a rickety condition. The other two boys ran away, but plaintiff went on shaking the desk, and defendant then inflicted the "two smacks" already referred to, saying "what do you mean? clear out." The account, which we are asked on plaintiff's behalf to accept, is that this violence was used unreasonably to check a mere display of school-boy high spirits, which was sanctioned by custom; and that, if defendant, as he says, before taking action, called to the class "stop that," plaintiff could not and did not hear him. On the last point, as on others of detail, clear evidence, on which a distinct conclusion can be reached, is not and is not likely to be forthcoming, since events followed each other quickly and some at least of the witnesses were excited. But there is, on the other hand, clear support for what defendant's account generally entails, that the line between mere exuberance and rowdyism was transgressed and that a substantial breach of discipline was in question.

Defendant, a teacher of twenty-three years' experience, who has reached the head of his profession and to whom nothing resembling malice is now imputed, deposed that there was a tremendous noise due not only to clapping of hands, but also to drumming on the desks, hooting, whistling and shrieking; and the addition of these gave the whole thing the appearance of rowdyism. He was so impressed by this as the climax of other similar incidents that he issued a circular, Exhibit B, to his staff on the subject that afternoon. He is clear that plaintiff was deliberately attempting to damage the desk he was sitting at by shaking it, and the necessity for his at once stopping an act of thoughtless mischief to school property is easily intelligible. For his evidence corroborated by that of the headmaster, C.W.1, who saw the desk shortly after, is that one screw belonging to it at least was

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wanting and one was without a nut; and such shaking would presumably loosen its parts still further. 2 to 5 defendant's witnesses, other masters in classes adjacent to plaintiff's, speak to an exceptional uproar there, the former referring to shouting, shrieking, and whistling. Plaintiff is, as his statements regarding other occurrences show, an untrustworthy witness. The evidence of 6 and 7 plaintiff's witnesses, his classmates, is not of value, if only because one of them is closely connected with the prime-mover against defendant in the disputes which have recently occurred over the management of the college, and the other is plaintiff's relative. The other persons, referred to in the plaint as having been present, were not named or called. Third witness for plaintiff is the master who was taking the class at the time. He says that the noise, consisting in clapping, was not exceptional. But he left the room, apparently while it was in progress, and was, he admits at once, reprimanded by defendant for allowing it; he was on probation and his service was terminated by defendant; in the circumstances no weight can be given to his statements. The evidence standing thus, the conclusion must be that defendant's case is substantially correct and that there was a breach of discipline, which deserved and which it was his duty to repress by punishment. If any answer is needed to the contention, which found favour with the lower Court, that plaintiff should not have been made to suffer for a disturbance to which he is not proved to have actually contributed, there is the fact, spoken to by defendant alone, but which there is no good reason for doubting, that he was shaking the desk and was therefore joining in the rowdy demonstration which was going on.

There is, so far as we have been shown, no Indian authority as to the amount or nature of physical force

which a schoolmaster in inflicting punishment is entitled to use. But there is, subject to one reservation to be referred to later, no dispute that the general rule laid down by the English Courts in *Regina v. Hopley*(1), *Fitzgerald v. Northcote*(2), and other more recent cases, including *Hutt v. Hailebury College Governors*(3), must be applied, that the master as the delegate of the parent may for the purpose of correction inflict moderate and reasonable corporal punishment. Care may no doubt be necessary in the application of this general principle in this country, in which this delegated authority must be exercised by persons so dissimilar in status as a pial schoolmaster and the defendant; and Courts will no doubt not fail to insist on a close scrutiny of the severity of the chastisement inflicted and its justification. But in the present case there is no difficulty. For the "two smacks," which alone have been established, were probably the *minimum* which a boy like plaintiff, aged fourteen, would have felt. They caused no injury requiring medical attention or even which made plaintiff cry out or disabled him from going home at once. The references by his father, fifth witness for plaintiff, to his illness for three days after the occurrence and his subsequent attack of fever and smallpox are grotesque. The real reason why importance was attached to what happened is no doubt that given by ninth witness for plaintiff, that "it was a case of a Brahman being beaten by a Thiyya and it would have been different, if the man who beat was a Brahman."

It is impossible to find with reference to general principle, and we understand that, if general principle alone had been in question, the lower Court would not have found that defendant exceeded his powers.

(1) (1860) 2 F. & F., 202.

(2) (1865) 4 F. & F., 656.

(3) (1888) 4 T. L.R., 623.

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Reliance however has been placed by plaintiff, and the lower Court has based its decision mainly, on rule 59-A of the Madras Educational Rules, 1918, or the similar rule in the rules of 1901, which was actually in force at the date in question. These rules embody notifications approved by Government and are, it is not disputed, binding on institutions, such as the Palghat College, which receive Government aid. Rule 59-A provides that corporal punishment shall not be inflicted except in a case of moral delinquency or flagrant insubordination and shall be limited to six cuts on the hand, to be administered only in accordance with a specified procedure, with the details of which we are not concerned. This rule resembles closely the regulation considered in *Mansell v. Griffin*(1), although the question there was not only of the character of the punishment authorized, but also and principally of the right of an assistant mistress to inflict it instead of the headmaster in the regulation. On that point in the words of PHILLIMORE, J.,

“if the regulations were known to the parents, this would no doubt give rise to a strong argument to show that the parent had only delegated to the underteacher that authority which the rules of the school give.”

A similar argument was in fact relied on in this case at the trial, but not here; and it was rejected by the lower Court for the sufficient reason that the rule was never pleaded, that plaintiff's guardian was not proved to have known of or acted on it, and that as it could at any time have been altered or cancelled by Government, it cannot create between parent or student and the master any direct obligation. The rule was however also relied on by the lower Court and is relied on here as evidence of the kind and quantity of corporal punishment, which is sanctioned in such a school by custom and professional

(1) [1908] 1 K.B., 160.

opinion and which therefore the Court should regard as reasonable.

It may at once be observed that acceptance of this argument will be of no material assistance to plaintiff. For if his complaint is only that he received “two smacks” on his cheek instead of the minimum permitted by the rule, a cut with a cane on his hand, there can, with all respect for the opinion of his learned *vakil* to the contrary, be no difficulty in comparing the relative severity of these punishments; and his sole grievance consisting in the informality of the procedure employed, although the pain inflicted was less, an award of only nominal damages will be entailed. But in fact rule 59-A is not applicable at all, as either prohibiting or regulating the petty corrections, such as that now in question, without which the ordinary discipline of a school cannot be maintained and which must be given immediately, if they are to be effective, this appearing from the references in it to moral delinquency and flagrant insubordination and the specific instances given of the former. In *Mansell v. Griffin*(1), although (as already stated) the question was primarily of the person who had authority to punish, the similar regulation then in question was read as not exhaustive of the occasions on which corporal punishment could be employed or the methods of its employment, other methods consisting in interference with the liberty of the subject being specified as legitimate in less serious cases, and the principle applicable to infliction of blows being referred to as the same. There the findings with reference to the regulation were, as they would have to be here if only the rules were in question, that the method of chastisement was improper, although the chastisement actually inflicted was moderate and not so hurtful as that authorized,

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and that the defendant exceeded her authority. Yet it was held that those findings were not inconsistent with a refusal of damages and that notwithstanding the Regulation it was enough for the teacher to be able to say: "The punishment I inflicted was moderate and it was such as is usual in the school and such as the parent might expect that the child would receive if it did wrong."

That, and not anything included in the rule, being the test to be applied to the master's action, it is sufficient for the present purpose, that, although actual instances of these petty chastisements must from the nature of the case be few and evidence regarding them difficult to obtain, since neither students nor masters will be willing to admit that recourse to them was ever necessary, there is clear evidence that such recourse has on occasion taken place at Palghat and is not regarded as improper by persons in plaintiff's social position. Thus it is important that eighth and ninth witnesses for plaintiff, his caste-men, admitted having been beaten for petty faults by their teachers without suffering in reputation, the latter, as already stated, distinguishing plaintiff's case with reference to the caste of defendant; and defendant speaks to having given blows on boys' cheeks himself on other occasions and he and C.W. I to a former Principal of the college having done so. There is accordingly enough to show what common knowledge would support, that the punishment plaintiff complains of was such as a parent might expect his child to receive. The conclusion must be that defendant was entitled to inflict it and is not liable because he did so.

It is only necessary to add that in any event it would have been impossible to sustain the Lower Court's use of its discretion to award to plaintiff half the costs of the suit. For, whilst it recognized that his allegations of fact

opinion and which therefore the Court should regard as reasonable.

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It is only necessary to add that in any event it would have been impossible to sustain the Lower Court's use of its discretion to award to plaintiff half the costs of the suit. For, whilst it recognized that his allegations of fact

were greatly exaggerated and that a decree could be given for only Rs. 150 out of Rs. 5,250 claimed, it lost sight of the fact that the claim at the latter figure was inflated to an extent which, neither the desire to obtain a right of appeal on the facts to this Court nor the caste prejudice already referred to, could excuse. The reason given for imposing liability for half the costs on defendant, that he failed in one line of defence on issue IV, although he succeeded on another, is unconvincing; and we cannot subscribe generally or without reference to the conduct of the parties to the principle which the Lower Court professes to have followed that an award of costs on the amount disallowed should not be given, if the result is "to sweep away" the whole damages decreed.

The Appeal is allowed; the suit being dismissed with costs throughout; the Memorandum of Objections is dismissed with costs.

VENKATASUBBA RAO, J.—This Appeal raises three questions:

- (1) What is the extent of the right possessed by a schoolmaster to inflict punishment on his pupil?
- (2) Is the punishment actually inflicted by the defendant upon the plaintiff justified?
- (3) If the punishment is not justified or has been exercised unreasonably, to what damages is the plaintiff entitled?

According to the law of England the authority of the schoolmaster is, while it exists, the same as that of the parent. It is stated that the parental authority is delegated to the schoolmaster and that the schoolmaster represents the parent for purposes of correction. This proposition is borne out by ample authority [see *Regina v. Hopley*(1) and *Fitzgerald v. Northcote*(2), Halsbury's

1) (1860) 2 F. & F., 202.

(2) (1865) 4 F. & F., 665.

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Laws of England, Volume 27, page 876, Volume 12, page 124 and Volume 17, page 107].

VENKATA-SUBBA RAO, J. The power of the English father over his children the ancient Roman laws the father had the power of life and death over his children. But this doctrine of paternal authority was gradually relaxed, though it was never under the Roman Law, wholly abandoned. The Common Law however gives the parent only a moderate degree of authority over his child's person and the parental chastisement must be moderate and must be exercised in a reasonable manner, and if the parent exceeds the bounds of moderation and inflicts cruel and merciless punishment he is liable to be punished [see Schouler's Domestic Relations, 5th Edition, section 244, and Ever-sley on the Law of Domestic Relations, 3rd Edition, pages 509 and 510].

It follows therefore that for purposes of correction the schoolmaster may inflict a moderate and reasonable corporal punishment. COCKBURN, C.J., says in *Regina v. Hopley*(1), above referred to :

"If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree or if it be protracted beyond the child's powers of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life or limb, in all such cases the punishment is excessive, the violence is unlawful."

With reference to these principles I shall proceed to examine whether in this case the defendant exceeded the bounds of moderation in inflicting punishment upon the plaintiff. The Subordinate Judge has found that the plaintiff's version of the injury inflicted upon him is grossly exaggerated and that the defendant gave the plaintiff two smacks on his cheek. The defendant's justification is founded upon a breach of the discipline of

the school and I am prepared to accept the defendant's account of the incident. According to him on the day in question he heard a loud noise coming from the long hall of the school and on turning to go over to the long hall he found the teacher of the Fourth Form A coming towards him. The defendant asked him whether that noise came from his class and rebuked the teacher for having come away without checking the boys. Then he went over to the Fourth Form A class, asked the boys who had gone out into the verandah to go back into their class, and the defendant told them that what they did was rowdyism and that they ought not to repeat it. Then he found that there was a light clapping of hands in Form V-B. He did not mind it. He objected to rowdyism but not to merry making. Immediately after there was a tremendous sound from IV-B due to clapping of hands, "drumming on the desk," hooting, whistling, shrieking. He paused for about a minute and then went over to the room of IV-B. Plaintiff and two other boys were seen shaking a reversible desk. But the other two boys ran away and the plaintiff looking at him continued the shaking of the desk. This is in effect the evidence of the defendant; and he deposes that the plaintiff behaved like a rowdy by shaking the desk and that the defendant apprehended damage to the desk, which by the way was already in a damaged condition. The headmaster was examined as a Court witness; and he states that about an hour after this incident the defendant told him that in IV-B class there was a good deal of rowdyism characterized by shrieking, hooting, whistling and shaking of the desk, and that the plaintiff was seen by the defendant in the act of shaking the desk and raising it up and down and thus creating a great deal of noise, and that the defendant thereupon gave him two smacks on the cheek.

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Though the plaintiff did not admit that he shook the desk and stated that he merely clapped his hands, the seventh witness examined on the plaintiff's side, a classmate of the plaintiff, admitted that the boys clapped their hands and drummed on the desk, "and that the plaintiff also along with the rest of the class did both these acts"; and the sixth witness for the plaintiff, another classmate of his, also admitted that on that date there was extra noise. The version of the defendant is also borne out by the probabilities of the case. He says that on the 14th March 1918, i.e., the day previous to the occurrence in question; he asked the headmaster to check the beginnings of the disorder of the kind mentioned above, that the headmaster in obedience to his order went on the 14th to the classes concerned and spoke to the boys, and that on the 15th, after the incident, he issued a circular which is filed and marked as Exhibit B in the case. The circular states that the defendant had been noticing during the two days, the 14th and the 15th, "the most perfect rowdyism prevailing in class rooms at the end of certain lessons. . . clapping of hands, whistling, shrieking, etc., which no master who has any idea of discipline would tolerate."

In these circumstances was the defendant justified in giving two smacks on the cheek of the plaintiff? I have carefully examined the evidence and I find that it is nowhere stated that the plaintiff suffered undue pain or any injury on account of this beating. No doubt the plaintiff stated that in addition to the smacking on the cheek, the defendant assaulted him brutally and that as a result of the merciless and cruel assault the plaintiff suffered bodily pain. When the defendant filed his written statement the plaintiff knew that the defendant admitted that he had given only two smacks on the cheek, but that he had denied the rest of the assault.

It is significant that no attempt was made to elicit from the plaintiff the extent of the suffering he underwent on account of the punishment which the defendant admitted he had inflicted upon the plaintiff. It is also noticeable that the defendant himself was not cross-examined as regards the nature of the smacking with a view to establish that it was excessive or violent. The defendant says that he considered it a quite trifling matter and that in the circumstances he felt he was justified in inflicting these two smacks. I find it therefore difficult to hold that the defendant exceeded the bounds of moderation or that the punishment inflicted by him was unreasonable.

Mr. Krishnaswami Ayyar who appeared for the plaintiff stated that he would not contend that rule 59-A of the Madras Educational Rules is binding upon the defendant. Rule 59-A runs as follows:

"Corporal punishment shall not be inflicted in schools except in a case of moral delinquency such as deliberate lying, obscenity of word or act, or flagrant insubordination, and then it shall be limited to six cuts on hand and be administered only by or under the supervision of the headmaster. The headmaster shall record in a register every case in which corporal punishment has been inflicted specifying the name, class and age of the pupil, the date, nature of the offence and the amount of punishment."

The learned vakil admitted that the relations of the plaintiff and the defendant would be governed by the rules of the Common Law, and that the defendant as Principal had power to inflict corporal punishment, and that the only question was whether the punishment inflicted was reasonable and moderate. It is therefore not necessary to discuss the binding nature of the Madras Educational Rules or the reasonableness of the punishment with reference to the said rules. He however argued that the rule 59-A is indicative of what is reasonable punishment. I am clearly of the opinion that

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this contention is untenable. As a matter of fact the rules are silent as regards the punishment to be inflicted in cases of offences other than the offences dealt with under the rule. Does it follow then that in cases not covered by this rule corporal punishment cannot be inflicted at all? or if it can be, the master is always bound to strike the pupil on the hand? If this argument is sound, the schoolmaster would not be justified in inflicting any corporal punishment whatsoever, however light it may be, unless the corporal punishment consists of strokes on the hand. It may well be that in the schoolmaster's opinion the caning of the pupil on the hand is too severe a punishment for the offence of which the pupil is guilty, but if the doctrine contended for is correct, the schoolmaster will be bound never to depart from this form of punishment. Cases also may be conceived where caning a pupil by striking him on the hand would not be proper or desirable, as where the pupil may be suffering from some disease or infirmity in the hand, or for some other similar reason the pupil is unable to stand such punishment. In *Mansel v. Griffin*(1), PHILLIMORE, J., makes the following observations:

"It is, I suppose, false imprisonment to keep a child locked up in a class room, or even to order it to stop, under penalties, in a room for a longer period than the ordinary school time without lawful authority. Could it be said that a teacher who kept a child back during play hours to learn over and say his lesson again, or who directed a child to stand up and kept him standing perhaps for an hour, subjecting him thus to fatigue and to the derision of all his classmates, or who put upon him a dunce's cap, as was frequently done in earlier days in the case of stupid or backward children—could it be said that such a teacher would be liable in an action for trespass to the person? The cases I have instanced are not cases of the infliction of blows, but they are cases of interference with the liberty of the

(1) [1908] 1 K.B., 180.

subject, and it seems to me that the principle must be the same for all these cases."

I may observe that the schoolmaster cannot escape liability merely on the ground that chastisement administered to the pupil has not left on the pupil's body any marks of violence or injury. Cases are not uncommon in this country of punishments of extremely grotesque character being inflicted involving danger to life or limb of the pupil or resulting in a state of prostration on the part of the pupil, and the Courts will certainly discountenance resort by the schoolmaster to such barbarous and inhuman forms of correction. The question whether the punishment inflicted is moderate and reasonable is a question of fact but the Courts will consider, in the words of COCKBURN, C.J., already referred to, whether the punishment administered was immoderate and excessive in its nature or degree, and I may add that if it was immoderate and excessive either in its nature or degree the punishment ceases to be reasonable. Mr. Eversley in his "Law of Domestic Relations" says that the right of the parent of chastisement is jealously watched by the Courts and if the parent exceeds the bounds of moderation and inflicts cruel punishment upon the child he may be severely punished. I may observe that, if this is true in the case of a parent, it is much more necessary that in the case of a schoolmaster this right should be closely watched by the Courts.

In *Fitzgerald v. Northcote*(1), cited above, COCKBURN, C.J., while stating that on the one hand it is for the general benefit of the society and of its youth that the authority of those charged with the care of scholastic establishment should be maintained, observes:

"on the other hand it is of equal importance that it should not be exercised arbitrarily."

(1) (1866) 4 F. & F., 656.

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I have considered the circumstances that led to the administering of the correction in this case and the evidence relating to the nature and degree of the punishment inflicted and I am of opinion that the punishment was neither immoderate nor unreasonable. The plaintiff had admitted that the Principal bore no ill-will or malice towards him but on the other hand had given the plaintiff good advice on previous occasions. To use the words of COCKBURN, C.J., again, the punishment was not administered for the gratification of passion or of rage. In these circumstances I hold that the plaintiff is not entitled to any damage and I agree with the judgment that has been delivered by my learned brother.

N.R.

PRIVY COUNCIL.*

T. P. SRINIVASA CHARIAR, SINCE DECEASED (PLAINTIFF),

1922,
April 6.

v.

C. N. EVALAPPA MUDALIAR (DEFENDANT).

[On Appeal from the High Court of Judicature at
Madras.]

Hindu Law—Religious endowments—Dharmakarthas of temple—Trustee—Diversion of endowed property—Concoction of accounts—Removal of dharmakarthas—Mirasi tenure.

When property proved to have originally been trust property is claimed by the trustee as his own, the onus is upon him to establish the legitimacy of his personal acquisition of it by the clearest and most unimpeachable evidence.

Dharmakarthas of a Hindu temple who claimed as his own lands found to belong to the temple, and supported his claim by concocted accounts, removed.

A dharmakartha is no more than a manager, and his rights, apart perhaps from the question of personal support, are never higher than those of a mere trustee; in this respect he differs from a shebait or the head of a mutt.

Vidyapurna Tirtha Swami v. Vidyantidhi Tirtha Swami (1904)
I.L.R., 27 Mad., 485, approved.

Consideration of the nature of mirasi tenure.

APPEAL (No. 24 of 1919) from a judgment and decree of the High Court (March 6, 1917) varying a decree of the District Judge of Chingleput.

The suit was instituted by the appellant and another, under section 92 of the Code of Civil Procedure, against the respondent, who was hereditary dharmakartha of a Hindu temple at Madavilagam in the neighbourhood of the City of Madras. The plaintiffs prayed for accounts, and for the defendant's removal from his trusteeship, on the grounds that he and his ancestors had converted to

* Present :—Viscount CAVE, Lord SHAW, Sir JOHN EDGE and Mr. AMES ALL.

their own use certain lands forming part of the endowment, that he had failed to keep proper accounts, and had mala fide altered the ceremonies of the temple.

The respondent by his written statement claimed the lands referred to, and denied the other allegations.

The District Judge, who tried the case, found that the title of the temple to the lands in question was not established, the records filed raising only a suspicion that the lands had originally belonged to the temple. But he found that the respondent had fabricated accounts for the purpose of the suit and that his conduct as to alteration of the temple ceremonies was not bona fide but was probably due to spite against the appellant and his friends. For these reasons he ordered that the respondent should be removed from being trustee and that a scheme should be submitted.

The Appeal to the High Court and cross-objections were heard by Sir JOHN WALLIS, C.J., and SESHAGIRI AYYAR, J., who passed a decree declaring that four of the items of property claimed were temple property, but they reversed that part of the decree of the District Judge which removed the respondent from the trusteeship. The learned Chief Justice (with whose judgment SESHAGIRI AYYAR, J., agreed) said :

"It is of course impossible at this distance of time to say exactly how it was that these properties passed from the temple into the hands of the trustee's family and the case may undoubtedly appear to be one of suspicion. But we cannot say, at this distance of time and in view of this long enjoyment, that the title of the temple has been sufficiently established in the present suit as to the great bulk of those properties, that is to say, in respect of those properties which, in the paimash, are not entered as temple properties. Where we find in the paimash properties entered as temple properties, that is sufficient to throw the onus on to the trustee of showing how these properties ceased to belong to the temple."

The four items of property above referred to appeared, however, to have been treated by the respondent and his predecessors as temple property, and the onus was upon him to show how he acquired a beneficial interest ; that onus he had not discharged. As to the removal of the respondent the Chief Justice said that in claiming the temple properties for his own he had done nothing more than assert rights which his ancestors had asserted ; he did not think this a ground for his removal. As to the other grounds though the learned Judges concurred with the District Court in thinking that the defendant had concocted the accounts for the purposes of the suit, and that his conduct in putting them forward and supporting them by his evidence as a witness was deserving of the severest reprehension, yet as they thought that he had spent on the temple more money than he had received from what had been proved to be the temple properties, and as they thought his alterations of the ritual were within his discretion as a trustee, they set aside the order for his removal.

Sir George Lowndes, K.C., and E. B. Raikes, for the appellant.—Referred to *Peary Mohan Mukerji v. Monohar Mukerji*(1), and *Tudor on Charitable Trusts*, 1889 edition, page 194, as to the removal of a trustee for wilful breach ; to *Lupton v. White*(2) as to the presumption against a trustee who mixes trust property with his own property ; and as to ' mirasi ' tenure, to the *Chingleput Manual*, 1879, pages 202, 258, 288, 300, 301, and to the *Fifth Report (Place's Report)*, volume 3, page 159.

De Gruyther, K.C., Kenworthy Brown and Palat, for the respondent.—Referred to the first case above mentioned, *Peary Mohan Mukerji v. Monohar Mukerji*(1),

(1) (1921) I.L.R., 48 Cal., 1019 (P.C.) ; L.R., 48 I.A., 258.
(2) (1908) 15 Ves., 432, 436.

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to *Vidya Varuthi v. Balusami Ayyar*(1), and *Prosunno Kumari Debya v. Golab Chand Baboo*(2); as to "mirasi" tenure they referred to the *Mirasi Papers*, 1862, *passim*, and more particularly to pages 261, 365.

The JUDGMENT of their Lordships was delivered by Lord SHAW.—This is an Appeal against the judgment and decree of the High Court of Judicature at Madras, dated 6th March 1917, which varied a decree of the District Judge of Chingleput, dated 11th December 1914.

The suit was instituted by the present appellant and another, under the Civil Procedure Code, section 92. The prayer of the plaint was for an account of the respondent's management of a temple in the district of Chingleput since his assumption of office, and that he "be made accountable for all losses occasioned to this temple by his breaches of trust, for his removal from office, and for the settlement of a scheme for the management of the devastanam and its properties." Incidentally, the judgment for accounts made in the suit has raised a question of complexity and importance as to the ownership of lands of considerable extent and value. The issue upon that topic is the principal one raised in this Appeal. It is whether those lands belonged to the temple or are the private property of the respondent, who, in point of fact, is its dharmakartha or hereditary trustee.

The grounds for the removal of the respondent from the position of dharmakartha have been added to by the conduct of the respondent in the course of the suit, and now include not only misfeasance and breach of trust, but the proved falsification of the temple accounts.

(1) (1921) I.L.R., 41 Mad., 831 (P.C.); L.R., 48 I.A., 302, 311.
(2) (1875) L.R., 2 I.A., 146, 157.

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This question of removal from the position of trustee will be afterwards dealt with, but it may here be mentioned that the former question, viz., the question of the true ownership of the temple properties, so keenly contested by the respondent, has not only to be determined on its merits, but may turn out to have a bearing upon the question of his removal from office.

The case is very involved, and their Lordships have to acknowledge the care which has been manifested with regard to it in the Courts below, and in particular the elaborate investigations of the history of this property made by the District Judge.

As it is desirable that the Board should endeavour to exclude from this judgment all such details as might obscure the question of principle dealt with, it may be well to consider the respective positions of parties in the clear language adopted by the District Judge. His narrative of the plaintiffs' case is this:

"2. The plaintiffs allege that they are the *tirtham mirasidars* and *ubhayakars* of the said temple, that the defendant is its trustee, that its management since 1842, when the Government handed over the same, has been in the family of the defendant, that the endowments to the temple consist of *meras* from Government, income from lands, and contribution from *ubhayakars*, that the administration of the temple by the defendant has been unsatisfactory and that he is guilty of various acts of misfeasance, malfeasance, nonfeasance, breach of trust and neglect of duty. The instances of misconduct are set forth in paragraph 9 of the plaint, the main item being with reference to the lands wet and dry and *manyams* described in A (1) to A (8) schedules of the plaint which it is alleged belong to the temple, and the defendant is charged with misappropriation of the income from them without bringing the same into the temple accounts, and it is alleged that these accounts are not regularly and correctly kept."

His narrative of the defendant's case is as follows:

"3. The defendant contends that he is the hereditary trustee of the temple and that his ancestors were the trustees even before

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the Government assumed management thereof, and denies that he is guilty of any act of misfeasance, etc., alleged in the plaint. He further states that the plaintiff temple never owned or enjoyed any of plaintiff A1 or A2 schedule lands, that item 1 of A3 schedule is enjoyed by the temple, and that, in item 2 of A8 schedule and in the first seven items of A5 schedule, the melwaram right alone belongs to the temple, that lands in A1, A2, A7, A8 were always exclusively owned and enjoyed by the defendant and his ancestors as their absolute property. The defendant further states that all the incomes arising from the lands belonging to the temple have been regularly entered in the temple accounts and duly accounted for, that the said income is not sufficient for the upkeep of the temple, and that the defendant has been meeting the deficit from his private funds, and that the accounts filed in Court were regularly maintained by the temple karnams."

These statements show broadly and correctly the attitude of the parties to this litigation.

The temple in question is an endowment or institution for the worship of the God Vishnu. It is dedicated to a saint or incarnation called Tirumushi Alwar. The temple lands are at Madavilagam and other villages in the district of Chingleput, in the vicinity of the city of Madras. As the plaintiff in head 3 of the plaint avers:

"There is a public Vishnu temple at Madavilagam, a hamlet of Tirumushi, in Poonamallee division, Saidapet taluk, dedicated to Sri Jagannatha Perumal and Tirumushi Alwar."

That, in point of fact, a temple did exist there from ancient times, and that it was in possession of certain endowments in the shape of lands, seems to be undoubted.

The Board has had a reference to various historical authorities upon the subject of the Chingleput district, and upon the mirasi tenure therein. These records are voluminous. It is too much to expect that anything definite can be obtained prior to the devastation of the district by Hyder Ali in the latter half of the eighteenth

century. The most valuable document is the Fifth Report of the Select Committee on the affairs of the East India Company of the year 1812. Says the Report:

"The jaghir (Chingleput) appears to have been obtained in the years 1760 and 1763, from the Nabob of Arcot, in return for the services rendered him and his father, by the Company. . . . The jaghir was twice invaded by Hyder Ali; in 1768, and in the war of 1780, when he entered it with fire and sword. On the termination of the latter war, in 1784, hardly any other signs were left in many parts of the country of its having been inhabited by human beings, than the bones of the bodies that had been massacred, or the naked walls of the houses, choultries, and temples, which had been burnt. To the havoc of war, succeeded the affliction of famine; and the emigrations arising from these successive calamities, nearly depopulated the district.

"The system of management in the jaghir, while it was reuted by the Nabob, was of the same oppressive and unjust character, which marked the administration of affairs in his own territory, the Carnatic."

A period of no little confusion ensued, even after the Company. Government assumed the jaghir in the years previous to 1780, the confusion being much relieved in 1794 when the country was placed under the management of Mr. Lionel Place, who continued as administrator until 1798, and whose Final Report respecting the jaghir is dated 6th June 1799. Mr. Place's views with regard to mirasi are stated to have undergone a material change, and in the language of the Report:

"He had become convinced that the mirasidar had an undoubted hereditary property in the soil; that he derived this right originally from the Sovereign to whom he acknowledged obedience, and the rendering of a stated proportion of the produce, as the tenure by which he held it; that he sold, mortgaged, gave away, and left his lands to his posterity."

It would not elucidate the points at issue in this suit to enter further into the development, historically, of the

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adjustments of the rights regarding the land and its tenure and cultivation. The following excerpt, however, may be made from Mr. Place's Final Report:

"702. The following definition, therefore, of *meerassee*, or property in land, seems to be deducible from the discussions that have passed on it.

"703. That it is a right to the use and substance of the soil, vested in the present proprietor, his heirs and successors, so long as he does or can cultivate it, and pays the dues of Government, and is obedient to its authority; and that when he does not, or cannot, cultivate his lands, when he withholds the dues of Government, or is disobedient to its authority, such part as he neglects, or in the latter case the whole, *escheats* to Government, who may confer it on whom it pleases."

These excerpts have been given because the fact has been acknowledged that the village, afterwards referred to, with the lands in suit in the present case, is held under the mirasi tenure. Nor, secondly, is it disputed that Vishnu as a juristic entity, and, as such, owner of the temple dedicated to and appearing under the following names: Sri Jagannatha Perumal and Tirumushi Alwar, can according to law, and must if it accord with fact, be reckoned as a mirasidar holding a village mirasi. The point in the case is: Was the property in suit held under mirasi tenure by this mirasidar in the interests of the institution and worshippers of Vishnu attached to it, or was it held by the respondent personally?

The respondent founds, and strongly founds, upon the state of the records of this property as for the year 1825. He maintains that there is sufficient indication from this record that the property in suit had wholly belonged, not to the temple as part of its endowments, but to Evalappa, his grandfather, as his own personal property.

The date of the origin of this temple is not apparently now ascertainable, but the first broad and fundamental

fact appearing from the record founded upon is that in 1825 *de facto* such a temple did exist; secondly, that the institution was at that date managed by a dharma-kartha; and thirdly, that it was the owner of some lands. What were those lands; and, in particular, did they include those in suit in the present case? On that point the singularity of the position is that it appears to be, and that very rightly, assumed in the judgment of the Courts below, that originally that temple did own the lands, but that the state of affairs crystallized in the paimash of 1825 left it at least doubtful whether some change had not been effected under which a personal acquisition by the dharmakartha had taken place.

And it is the fact, with regard to the large majority of the items composing the village lands, that the plots and portions are set out in detail in the name of Evalappa Mudali, without describing him as trustee, and without giving any indication contrary to that of personal ownership. It is this circumstance upon which the respondent in the Appeal strongly relies.

It may be said of the 1825 paimash or record, taken as a whole, that it does involve certain self-contradictions which contribute to leaving the point at issue in considerable doubt.

It will serve no useful purpose to load this opinion with details, although all these details have been carefully considered. It may suffice to say as follows: The Paimash Jariff Taram chitta for Madavilagam village, dated the 31st August 1825, forms the Exhibit A, and its headings and general preliminary statements must be attended to. It states the "persons who were present at the Jariff," mentioning by name the Government Officer. Then follows this entry: "Alwar temple village miras." This appears to describe in general terms the ownership by the temple of all the

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village miras. Then there appears this entry: "Appa-swami Mudali and Arunachala Mudali, gumasthas of Evalappa Mudali, dharmakartha of the aforesaid temple—total, two persons." Up to this point it seems plain enough that the lands are owned by the temple, and that Evalappa is its dharmakartha. When the specific entries begin there occur the following "remarks": "Village Miras—Sri Tirumushi Alwar," and a little further down, No. 1 Miras "Tirumushi Alwar Devastanam Dharmakartha Nattu Evalappa Mudali." Then still another: "Alwar mantapam tope, No. 1 Miras Tirumushi Alwar Devastanam." Up to this point the doubt as to the lands being temple lands—it being admitted that they are part of the village miras—has not arisen. When these items came to be entered, the column of remarks shows "village miras," and by far the most important of the entries are those referring to the miras itself, viz., "No. 1 Miras," and one of the most important pieces of the property is a tope or grove, which is entered as punja, and in the remarks is stated to be Alwar mantapam tope. So far all is clear.

The confusion arises, however, from another document Exhibit A1, called "Register of lands as per paimash or mamul account." It is to be observed that in it again occurs "No. 1 Village Miras. Tirumushi Alwar," and in No. 83, "No. 1 Miras Tirumushi Alwar Devastanam," there being added the words "Dharmakartha Nattu Evalappa Mudali."

While this is so, the remarkable thing is that all the other entries, with perhaps one or two exceptions, are stated to be "No. 1 Patta. Evalappa Mudali," with no indication that those particular items are temple lands or that Evalappa holds them as dharmakartha. This fact, and practically this fact alone, forms the foundation of the respondent's claim that he is personal owner of these

numerous items. The inconsistency of this with the other entries above referred to is unexplained, and in particular it is unexplained how property originally temple property ever came into his private ownership. No express grant is produced; no legal authority for a conversion so singular is suggested.

In these circumstances their Lordships are not prepared to say that if the records had stopped here they would have agreed with the judgments of the Courts below, and would have attributed the entries opposite Evalappa's own name as entries certiorating private property. It is unlikely; but for the reasons to be hereafter stated it is not necessary to decide the question.

Let it be assumed, however, that the point of ownership stands doubtful upon the 1825 records. To such a situation it is conceivable that the observation of the learned Chief Justice would apply. He says:

"It is of course impossible at this distance of time to say exactly how it was that these properties passed from the temple into the hands of the trustee's family and the case may undoubtedly appear to be one of suspicion. But we cannot say, at this distance of time and in view of this long enjoyment, that the title of the temple has been sufficiently established in the present suit as to the great bulk of those properties, that is to say, in respect of those properties which, in the paimash, are not entered as temple properties. Where we find in the paimash properties entered as temple properties, that is sufficient to throw the *onus* on to the trustee of showing how these properties ceased to belong to the temple."

Their Lordships must dissent entirely from the view that where the discoverable origins of property show it to be trust property the onus of establishing that it must have illegitimately come into the trustee's own right rests upon the beneficiaries. Upon the contrary, the onus is, and is heavily, upon the trustee to show by the clearest and most unimpeachable evidence the legitimacy

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of his personal acquisition. Even upon the records of 1825 their Lordships would have inclined to this view.

But the records did not end here. In their Lordships' opinion it is necessary in a case of this kind to view the records, transactions and proceedings, as a whole. And in their view the greatest weight must be attached to the elaborate proceedings of 1876, and in particular to the Survey and Settlement Register of the village of Madavilagam. That Register contains 169 items, including among other particulars an identification, so far as possible, of each item with the old number or name of fields, and in particular the extent and assessment of each plot of land in the whole list. The register is signed by Major C. J. Stuart, Acting Deputy Director of Revenue Settlement, and is dated from the Revenue Settlement Office. It cannot be too clearly premised, however, that the Board would not hold any such record to be conclusive evidence of ownership; but, upon the other hand, their Lordships cannot be blind to the importance of such a document which appears *de facto* to have settled the bounds of the possessions of these plots for a period of thirty-five years—that is to say, from 1876 to 1910. This is especially important in any case where the personal as against the trust claim is supported also, and alone, by a reference to an earlier record of a similar character, marred as that record happens to be by the contradictions to which reference has been made.

It is, however, unnecessary, it may again be said, to enter into details. But the facts as to the 1876 records are outstanding and make the position much clearer. Evalappa had been succeeded by Varadappa, and numerous cases, including those in which in 1825 the entries of the owner had only been the name of Evalappa

Mudaliar, with nothing added thereto, now appear with the point as to the character of the ownership cleared up.

The survey is headed "Descriptive Memoir of Madavilagam of the Saidapet taluk." Extracts from it form Exhibit B of the present proceedings. Their Lordships have, however, seen a print of the descriptive memoir itself, bearing the signature of "Major Stuart, Acting Deputy Director of Revenue Settlement." The following entries are important:

"*Mirasi tenure*.—As the Government have recognized the mirasidar's claim to a percentage fee (*swatantram*) on the taram assessment, the following arrangements are made for its future collection and payment."

This entry speaks for itself. The tenure was mirasi tenure, and there was one mirasidar. Then occurs the following:

"The fee is fixed at 2 annas in the rupee of assessment of both dry and wet lands for which the lands are divided into (I) *pangu*, (II) *dharkast* and (III) *waste*."

The word "*Pangu*" refers to the original cultivated land—that is to say, land cultivated by persons or a person, or institution, belonging to the village. "*Dharkast*" refers to lands granted by the Government for cultivation not by villagers, but by outsiders. "*Waste*" refers to jungle or uncultivated land.

The main point to be kept in view is the form of the entries of the lands, the issue as to which is whether they are temple lands, or are private property or *pangu* lands. The importance, accordingly, of special reference to *pangu* lands is clear. That entry is as follows:

"*Pangu lands*.—This is an *ekabogam* village and the lands have hitherto been held by one *pattadar*. The fee registered against these lands is at present a mere matter of account and need not be collected, as the mirasidar himself holds the lands. But if these lands hereafter become waste by relinquishment and are taken up again by a stranger, they will be

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chargeable with the fee, plus the taram assessment, and the fee thus collected will be payable to the mirasidar."

The village is spoken of as 'an ekabogam village. "Ekabogam" according to Wilson's Glossary is :

"The possession or tenure of village land by one person or family without any co-sharer. The appellation is continued in some instances where other parties have been admitted to hold portions under the original tenure as long as that remains unaltered."

It is stated that the lands have been hitherto held by one pattadar, and that the mirasidar himself holds the lands. The extreme importance of this entry arises from the events which had taken place in and about the early sixties of last century.

It seems fairly plain that by the middle of the nineteenth century various demands were being made to obtain a statement of the rights of mirasidars in this part of India. In the volume named "Chingleput, late Madras district," compiled under the orders of the Madras Government by Mr. Charles Stewart Crole, the position is thus described :

"In 1834 it began to induct outsiders into the permanent possession of lands, and issued pattas to such persons. In 1859 it compelled the mirasidars to declare once for all the extent of their individual holdings, and proceeded to issue pattas accordingly, which it at first styled mirasi pattas. In the same and following years it warned mirasidars that they would have to pay the assessment on all lands in their holdings, whether they cultivated or not, and limited by new rules, which have since increased in stringency, the occasions on which, and then only as a matter of grace, remissions would be given. In 1863 the Government directed the abolition of the words 'Mirasi patta' and 'Pāyikāri patta,' which had previously appeared as a heading on those documents in order to distinguish mirasi from ordinary tenure, and it ordered the 'name of the Pattadar' merely to be inserted, thus distinctly proclaiming that it would no longer recognize any difference in tenure."

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This historical circumstance gave great weight to the settlement and survey, about to be referred to, made in the year 1876. It is in particular noticeable that a special column of pattadars, with a demand for their names, appears in the return, and that this coincides with the acknowledgment of the mirasi tenure. The application of this to the situation of the village, whose ownership is in suit, will be immediately seen. It would rather appear that no public document of anything like equivalent value to that of the report of 1876, with regard to the details of any properties which were at once mirasi and patta, had ever been previously issued.

It is accordingly of special importance to know who was the mirasidar holding a patta, and therefore pattadar of those particular lands in suit. Appended to each entry of grants of land in the village is a column headed "Pattadar's Name and No." It cannot be seriously disputed that the patta was No. 1 patta.

Who, then, was the holder of these lands, occupying the position at once of mirasidar and pattadar No. 1? Item by item the entries under "Pattadar's Name and No." are "Nattu Varadappa Mudaliar, Trustee of Tirumushi Alwar Pagoda." The entries are repeated and repeated in the same sense. And, in short, there is here an official affirmation that these lands are temple lands; that they are held in No. 1 patta; and that the trustee of the temple is Varadappa.

It would accordingly appear to be clear that this official document, which it cannot be doubted was prepared after minute inspection and enquiries on the spot, sets at rest any doubt as between private and temple ownership, and clearly affirms the latter. Varadappa was not the private owner; he was the dharmakārtha or trustee. It, however, must be admitted that although

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this was the official view, the record does not commit Varadappa himself to such an affirmation or admission.

Most fortunately, however, there are elements of probation existing, applicable to the regime of Varadappa, which greatly help to clear this difficulty away. These instances may be given :

(1) On the 8th February 1888, Varadappa brought a suit against the Government in regard to certain lands and trees, which he alleged he was debarred from cultivating. He desired a declaration to establish his right "to the said property as absolute owner thereof." It is, however, an entire mistake to reckon this an assertion of private ownership, because Varadappa describes himself as plaintiff and as dharmakartha of the temple at Madavilagam village, and the first three statements of his plaint are as follows :

"1. The village No. 137, viz., Madavilagam and all its miras appertain to, and form portion of the endowments of the temple of Tirumushi Alwar situated in the said village, Poonamallee Division, Saidapet taluk, Chingleput district.

"2. The plaintiff above named is the hereditary dharmakartha of the said devastanam.

"3 Plaintiff's ancestors have, from time out of mind, been enjoying the lands under numbers described below by building choultry, cultivating the soil and raising a tope, etc., paying revenue to the Government for the said lands."

As mirasidar and as trustee of the temple his grievance against the Government was that he was not allowed to extend the rights which he asserted over certain further lands and trees, and accordingly the suit was substantially for the purpose of enabling that extension to be made, presumably for temple purposes, and accompanied with the assertion that—*quoad* the temple—the village of Madavilagam "and all its miras" were the endowments of the temple of which Varadappa was the dharmakartha.

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(2) A statement signed by "Nattu Varadappa Mudaliar, dharmakartha," and made before the Deputy Tahsildar, Poonamallee division, is also produced. This statement refers to the paimash of 1876, and is to the effect that the entire village is the ekabogam village of the temple, viz., of Tirumushi Alwar; that he, Varadappa, is the dharmakartha of the temple; and he goes on to state: "Whenever anyone wants to build a house on vacant lands other than the land on which houses have been in existence from time immemorial in the village nattam of this village, it is usual for me to grant lands to such persons, and to get deeds executed therefor."

(3) This was quite true, and various deeds of that character are referred to in the proceedings—that is to say, they are called rental agreement deeds, and are addressed to Varadappa, as on the 27th March 1876, and signed "Nattu Varadappa Mudaliar, Dharmakartha of Tirumushi Alwar Devastanam"; or, as in that of the 7th March 1904, after Varadappa's death, to Evalappa the second, his son, thus named: "S. Nattu Evalappa Mudaliar Avargal, son of S. Nattu Varadappa Mudaliar, Shrotriyamdar, Kondaikatti Vellala, Vaishnavite, mirasidar of the village of Madavilagam as well as dharmakartha of Tirumushi Alwar devastanam."

It is of importance to observe that Varadappa is named and names himself the dharmakartha. This is in truth the legal equipollent to trustee. The position of dharmakartha is not that of a shebait of a religious institution, or of the head of a mutt. These functionaries have a much higher right with larger power of disposal and administration, and they have a personal interest of a beneficial character.

In the very learned judgments delivered in *Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami*(1),

(1) (1904) I.L.R., 27 Mad., 435.

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the distinction between those functionaries is explained. But a dharmakartha is literally and no more than the manager of a charity, and his rights, apart it may be in certain circumstances from the question of personal support, are never in a higher legal category than that of a mere trustee.

The details need not further be entered upon as to these deeds which appear to be numerous, and to assert clearly the fiduciary position in which Varadappa and even his successor, the present respondent, stand. They are, by no means confined to a period subsequent to Major Stuart's report in 1876; one, for instance, is dated the 22nd January 1870, executed to Varadappa as "Dharmakartha of Tirumushi Devasthanam," and describes Madavilagam as "the miras village of the said Alwar." In fact, there are documents extending over a period of about forty years, all framed on that footing, a footing which negatives private but affirms temple ownership. Their Lordships do not doubt that that was a public fact in 1876, when the report was made; and the subsequent transactions in the life of Varadappa, and even of his successor, the present respondent, confirm that view. This was plainly the state of affairs when, on Varadappa's death, the respondent succeeded him as hereditary dharmakartha.

A separate argument involving some detail was submitted with regard to the topes, or groves, belonging to the temple, on which their Lordships will only say that after full investigation they are convinced the topes in suit have been sufficiently traced to temple ownership.

The doubts, accordingly, which would have warranted the line of judgment indicated from the opinion of the High Court, above cited, have now disappeared. In the opinion of the Board the properties in suit are established to be temple properties. The statements

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and records made in the year 1910 do not substantially bring any fresh light on the situation. It must, of course, be plain that it would require circumstances unique to warrant the transfer or transformation of those endowment lands into the private property of the trustee. There is, in fact, nothing of the sort. In the present suit the respondent's right and title as personal owner have been successfully challenged, and the lands in question must, all of them, be restored as endowments of the temple.

In case it should be thought to have been omitted, their Lordships merely further observe on this head that during the period extending from 1825 there were clearly established several items of the property in dispute which could be identified as still remaining as temple lands. To these items there were added, in the course of discussion, several further items which were traced from Register to Register, and clearly and separately identified as temple lands by name, and freed from the doubt as to the personal ownership of the former mirasidar, Evalappa. They, too, have been claimed by the respondent as his own, and this is a notable circumstance. These facts might have proved obstacles to the learned Judges of the High Court in forming their conclusion and assisted in removing any doubt which they felt; but the view which has been taken by their Lordships of the larger issue, namely, of the effect of the 1876 Register on the transactions to which Varadappa was a party, affects the whole of the lands in suit, and makes it unnecessary to deal with the individual items referred to.

It will now be seen how serious is the position of the respondent as a claimant for the continuance of the trusteeship of this temple and its endowments. The doubts in the minds of the Courts below, on the subject of his

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being allowed to continue in office, are sufficiently plain. But when it is now decided that the whole of this litigation has substantially been occupied by an unfounded assertion, supported by the concoction of accounts—an assertion by the trustee of private ownership in himself and a powerful resistance to the recovery of these properties for the trust which he administers—it does not appear to their Lordships to be open to them, on any sound principles either of administration or of law, to permit the continuance of the respondent in the office of dharmakarthā.

The conduct of the respondent, even in the course of the present suit, has been sufficiently grave to be thus noted by the Judges below. Says the District Court Judge :

“ My finding is that the Exhibits K series were got up for the purpose of this suit, and that they have been proved to contain false entries in many instances.”

In the High Court the pronouncement was quite as strong. The learned Chief Justice observes :

“ The District Judge has found that the defendant failed to keep proper accounts and that the accounts which he has brought into Court in this case were written up for the purposes of this case. We have ourselves examined the accounts, and we regret to say that there are very serious reasons for believing that that has been the case and that the accounts have been largely written up for the purposes of this case.”

Their Lordships have considerable doubt as to whether any litigant found to have been guilty of seriously reprehensible conduct of this description could ever have been retained in the office of dharmakarthā. The worshippers of the temple, the true beneficiaries in the endowments, are entitled, at least in regard to the trusteeship thereto, as also is a Court of law before whom such delinquencies are established, to insist upon the first step towards trustworthiness in administration being

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taken by the removal of the trustee. Most unhappily the guarantee for that trustworthiness has been destroyed. Although the Board very willingly admits that much allowance must be made for the inaccuracy of karnams, and of other officials who may have been anxious to fortify the trustee's personal rights by methods which were unwarranted, the respondent must, however, stand answerable for such conduct.

Their Lordships do not doubt that, if the High Court had been of the opinion now delivered with regard to the merits of the suit, the trustee would have been removed from office. The Board desires that in the remit, which their Lordships will humbly recommend to His Majesty to make, the High Court shall select as trustee a person or persons of such sufficient standing in the district as will enable the transfer from the respondent of the property to be effectively made, and the administration thereof purely for the purpose of the endowment effectively secured.

The scheme drawn up in the District Court and referred to in the proceedings of the High Court, would appear to be not unsuitable for the case, but these two fundamental alterations must be taken into account. In the first place the list of endowments must, of course, be enlarged to suit the affirmation as to the extent of the temple property made in the plaint and here affirmed, and secondly a new and independent trustee will be nominated to administer the scheme.

Their Lordships will humbly advise His Majesty to remit the case accordingly to the High Court, with a finding that the properties in suit belong to the endowments of the temple ; that the respondent as dharmakarthā and trustee thereof be removed from office ; that a scheme be framed for trust administration under a new trustee ; and that the judgment of the High Court of

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6th March 1917, except as regards costs, be recalled, and that the respondent do pay the costs of this Appeal.

Solicitor for appellant: *Douglas Grant*.

Solicitor for respondent: *T. L. Wilson & Co.*

A.M.T.

PRIVY COUNCIL.*

1922,
May 15.

CHIDAMBARA SIVAPRAKASA PANDARA
SANNADHIGAL (PLAINTIFF),

v.

VEERAMA REDDI (DEFENDANT) [AND CONNECTED
APPEAL].

[On Appeal from the High Court of Judicature at
Madras.]

*Landlord and tenant—Occupancy right—Prescriptive right—
Inam grant—Kudivaram—Absence of presumption—Madras
Estates Land Act (I of 1908).*

The inamdar of a village granted as an inam in 1743 sued in 1904 to eject tenants of part of the lands after notice to quit. The inam grant provided that the grantee should "for ever have dominion over and enjoy the wet and dry lands, tope, wells, treasures, etc., found therein"; it did not in express terms grant both the kudivaram and melvaram rights, nor was it expressly confined to the melvaram right. The evidence showed that the tenants had been in possession and occupation since 1829, or earlier; that they had dealt with the lands as occupancy ryots, partitioning, transferring and mortgaging their holdings with the acquiescence of the inamdar; and that they had received from Government compensation for part of their holdings taken for public purposes. The trial Court and two Appellate Courts had found that the inamdar did not possess the kudivaram right in the lands.

Held, that the rights of the parties had to be determined upon the facts, apart from any presumption as to the nature of the right granted in 1743; and that the tenants had established a prescriptive right of occupancy, and could not be ejected.

* Present: Viscount CAYE, Lord SHAW, Sir JOHN EDGE and Mr. AMER ALI.

It was not necessary to decide whether the Madras Estates Land Act (I of 1908), the provisions of which were considered, applied where, as in the present cases, the Act was passed while the litigation was proceeding.

Suryanarayana v. Patanna (1918) I.L.R., 41 Mad., 1012 (P.C.); L.R., 45 I.A., 209, *Venka'a Sastrulu v. Sestharamudu* (1920) I.L.R., 43 Mad., 166 (P.C.); L.R., 46 I.A., 123, and *Sethu-ratnam Aiyar v. Venkatachela Goundan* (1920) I.L.R., 43 Mad., 567 (P.C.); L.R., 47 I.A., 76, explained. *Muthu Gounden v. Perumal Iyen* (1921) I.L.R., 44 Mad., 588 (F.B.), disapproved.

CONSOLIDATED APPEAL (No. 38 of 1920), by special leave, from a judgment and five decrees of the High Court (August 17, 1915) affirming four and reversing one decree of the District Judge of Trichinopoly (October 28, 1908), who had affirmed three and revised two decrees of the District Munsif.

The five suits which gave rise to the present consolidated Appeal were instituted in 1904 by the appellant in the of Court the District Munsif to eject the defendants from lands occupied by them respectively in the village of Karappudayanpatti. The plaint alleged that the defendants were tenants from year to year whose tenancies had been determined by notices. The appellant was head of the Thurayam Mutt, and in that capacity held the village under an inam grant of 1743. The defendants pleaded that they had permanent rights of occupancy.

The terms of the inam grant of 1743, the effect of the evidence, and the course of the proceedings in the lower Courts, fully appear from the judgment of the Judicial Committee.

The (Madras) Estates Land Act (I of 1908) was passed after the trial but before the hearing in the first Appellate Court.

Special leave to appeal was granted, the suits being test suits.

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De Gruyther, K.C., and Kenworthy Brown for the appellant.

Dunne, K.C., and Dube for the respondents.

The arguments were mainly directed to the question of the burden of proof, the effect of the evidence, and of the findings in the lower Courts. Reference was made to *Suryanarayana v. Patunna*(1), *Venkata Sastrulu v. Seetharamudu*(2), *Seturatnam Aiyar v. Venkatachela Goundan*(3), *Mayandi Chettiayar v. Chokkalingam Pillay*(4); and as to the jurisdiction in a Second Appeal, to *Durga Chowdhurani v. Jewahir Singh Chowdhri*(5).

Viscount CAVÉ referred to *Waterpark v. Fennell*(6), and *Corporation of Hastings v. Ivall*(7).

The JUDGMENT of their Lordships was delivered by

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MR. AMEER ALI.—These several consolidated appeals arise out of five suits brought by the plaintiff on 27th July 1904, in the Court of the District Munsif of Kulittalai in the Madras Presidency, in his capacity of head of a mutt, to eject the defendants from the lands in their occupation in the village of Karappudayanpatti, which he alleged belonged to his mutt. The defendants in the suit are cultivating tenants holding separate lands unconnected with each other. Accordingly, separate suits were brought against them.

The plaintiff's case is that in the year 1743 the palegar of Turaiyur, who owned the estate within which the village is situated, granted to the head of the mutt at the time the village in question; and that since then the

- (1) (1918) I.L.R., 41 Mad., 1012 (P.C.); L.R., 45 I.A., 209.
- (2) (1920) I.L.R., 48 Mad., 166 (P.C.); L.R., 46 I.A., 123.
- (3) (1920) I.L.R., 48 Mad., 567 (P.O.); L.R., 47 I.A., 76.
- (4) (1904) I.L.R., 27 Mad., 291 (P.C.); L.R., 31 I.A., 83.
- (5) (1891) I.L.R., 18 Cal., 23 (P.C.); L.R., 17 I.A., 122.
- (6) (1859) 7 H.L.C., 650.
- (7) (1874) L.R., 19 Eq., 558.

successive holders of the office have been in possession and enjoyment not only of the right to the receipt of the dues payable by the tenants to the landlord, usually called in the Madras Presidency the *melvaram*, but also of the right to the actual occupancy of the lands technically called the *kudivaram*.

The five suits that were brought in the Munsif's Court were numbered 676, 677, 720, 721 and 722 of 1904. In Suit No. 676 the plaintiff alleged that the particular tenant, for whose ejectment he was suing, held the land in dispute under a *muchalka* executed by the defendant's predecessor on 18th June 1880, by which he bound himself to surrender the land in his occupation on failure to pay rent. In Suit No. 720 the plaintiff's action related to two items of land, in respect of which he alleged that the defendant's father had executed two *muchalkas* on 19th April 1894, and 2nd June 1894, respectively. With regard to Suits Nos. 721 and 722, the plaintiff's suit rests on his general allegation that as under the grant he is entitled to both the rights he claimed in the land—viz., the right to receive the rent as well as the right to occupy the lands—he was entitled to eject the defendants, who were tenants at will. In Suit No. 722 he appears to have also set up an oral lease. In Suit No. 677 the plaintiff relied upon a *muchalka* executed on 24th July 1893, by the defendant's brother.

The defendants in all the cases denied the right of the plaintiff to eject them from the lands in their occupation and under their cultivation; they alleged that he was only entitled to the *melvaram* and not to the *kudivaram*, and that they and their predecessors had held their lands from time immemorial and possessed and exercised the full rights of occupancy tenants to the knowledge of, and with the acquiescence of, the plaintiff and his predecessors. They further charged that the *muchalkas*

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produced and relied upon by the plaintiff were fabricated documents concocted for the purpose of destroying their old and hereditary right in the lands in their occupation.

Upon these allegations the parties went to trial. The District Munsif framed two principal issues, which were common to all the cases, viz. :

(1) Whether the plaintiff is entitled to the plaintiff land [that is, the land in suit] itself or only to the *tirwa* (rent) thereon? (2) Is the defendant entitled to the occupancy right in the land by custom and prescription?

The other issues related to the genuineness of the *muchalkas* and the amount of rent, etc.

The first two issues being common to all the suits, by consent of parties the five actions were tried together, and, as the trial Judge states at the beginning of his judgment, the whole evidence was adduced in Suit No. 676, and was "used as evidence in all the connected suits."

The inam grant on which the plaintiff's claim rests, after reciting by whom and to whom the gift is made, proceeds thus :

"The village gifted to our Swami out of our several villages is Karappudayanpatti, to the north of Uppiliyapuram, east of Vayirichettipalaiyam, south of Kottapatti and west of Sokkapuram. As we have gifted it most willingly to the Swami, you shall for ever have dominion over and enjoy the wet and dry lands, tope, well, betel garden, etc., water, tree, stone, treasures, etc., found therein and live happily. Further, what we command to be done for the gurupooja day is this. We command that gurupooja shall be conducted by collecting at the rate of 4 measures of grain per plough in respect of *agraharam*, *sarvamaniyam*, *umbalam*, etc., including wet and dry lands in the whole of our Turaiyur State. You shall accordingly conduct gurupooja every year and shall not omit to collect at the rate of 4 measures of grain in respect of dry and wet lands also in the whole of Turaiyur State. You shall enjoy the whole of Karappudayanpatti

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village. Further, you shall, as ordered by our predecessors, receive always *mahamai* and allowance of rice and money for extra expenses. The *audeenam* shall, in continuous succession, have dominion over and enjoy for ever, the village, gurupooja kattalai, rice allowance, etc. He who helps this charity by thought, word or deed, will be blessed with happiness and live long in the same manner as one who establishes temples of several crosses of *Sivalingams* in such holy places as Benares, Chidambaram, Tiruvālūr, Arunachalam, Srikalahasti, Conjee, Kalugugundram, Kumbakonam, Ramēswaram, etc."

The grant was recognized by the inam authorities in 1865. But the inam proceedings furnish no indication regarding the extent of the rights covered by it.

Both sides in support of their respective contentions produced a mass of evidence, which the District Munsif, in a singularly well-balanced and exhaustive judgment, has analyzed with great industry. He held on the evidence that the defendants had proved they had been in occupation of their respective lands from very early times, and had been dealing with them as lands in which they had full occupancy rights, that they had been selling, mortgaging, making improvements, and that when any portion of the same was taken up for public purposes, they had claimed and received compensation from Government. He held further that the plaintiff had utterly failed to show that the defendants had been let into possession by his predecessors or by himself, or to rebut the testimony they had produced in establishment of their right of occupancy. His main judgment is in Suit No. 676. He also found that the documents the plaintiff had produced in support of his claim, together with the *muchalkas* on which he relied in the three cases, had been fabricated with the object of destroying the tenants' right in their lands. He accordingly dismissed the five suits save and except as regards certain claims for rent.

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The plaintiff appealed to the District Court of Trichinopoly against the District Munsif's decrees, and these appeals were numbered as follows : Appeal No. 39 of 1908 (Suit No. 676) ; Appeal No. 41 of 1908 (Suit No. 720) ; Appeal No. 42 of 1908 (Suit No. 721) ; Appeal No. 43 of 1908 (Suit No. 722) ; Appeal No. 40 of 1908 (Suit No. 677). It is necessary to give the numbers of the Appeals as well as of the Suits, in view of the complication that enters into the determination of the cases owing to the course the proceedings took in the subsequent stages.

In Appeal No. 39 (Suit No. 676) the officiating District Judge, Mr. THORNTON, dismissed the Appeal on the ground "that he did not consider the plaintiff had established he was entitled to both the *varams* in all the cultivated lands in the village, nor had he proved the terms of their tenancy." In Appeal No. 40 (Suit No. 677), in which the plaintiff had put forward a *muchalka* (numbered in the Munsif's Court as Exhibit O) the District Judge set aside the decree, and in reversal of the Munsif's order made a decree in favour of the plaintiff for ejectment of the tenant. In Appeal No. 41 (Suit No. 720) he agreed with the Munsif as to the item covered by *muchalka* O-1, and accordingly dismissed the plaintiff's Appeal with respect to that item, but he differed from the Munsif as to the item covered by *muchalka* O-2, and accordingly decreed ejectment in respect thereof. In Appeals Nos. 42 and 43 (Suits Nos. 721 and 722) he affirmed the Munsif's decrees.

Both parties appealed to the High Court against the decree, which operated severally against them. By the time the Appeals reached the High Court, the Madras Estates Land Act (I of 1908) had come into force, and accordingly the defendant, against whom a decree for ejectment had been made by the officiating District Judge and who was appellant in Second Appeal No. 544 of 1909

filed, on 27th September 1910, an additional ground of appeal against his order.

All these Second Appeals came on for hearing before the High Court on the 14th August 1911, but in view of the provisions of section 6 of Act I of 1908 and the contentions of the parties, the learned Judges considered it necessary to obtain from the officiating District Judge a finding on the following point :

"Whether the grant to the plaintiff was of the land revenue or of the *kudivaram* also? Opinions have no doubt been expressed in the judgments of the lower Courts on the point, but the question was never tried with reference to section 6 of the Madras Estates Land Act."

Section 6 will be referred to later on.

The cases accordingly went back to the officiating District Judge, who returned the Appeals to the High Court with the following "finding" :

"But it seems to me that, seeing that the inam grant purports to grant all the land in the village absolutely to the plaintiff's predecessor-in-title, and that the plaintiff is admittedly entitled to both *varams* in 70 *cawnies* while there are no tenants on 77 of the remaining 185 *cawnies* in the village, the burden lies on the defendants to show that their predecessors-in-title were cultivating tenants at the time of the grant (*see also China Nagadu v. Konchi Venkatasubbayya*(1)) and that in the absence of proof of this, there can be no presumption that there were any cultivating tenants in the village at the date of the grant, or that the zamindar was not the owner of both *varams* in the land comprised in the grant. My finding on the issue sent down with reference to s. 6 of the Madras Estates Land Act therefore is that the grant to the plaintiff was an absolute grant of all the land in the village, and was not a grant of the land revenue alone to a person not owning the *kudivaram* thereof."

On the return of this "finding" to the High Court, the learned Judges considered it neither satisfactory nor

(1) (1910) M.W.N., 639.

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sufficient. They express their views in the following terms :

"The learned District Judge has not, so far as it appears to us, considered all this mass of evidence, and he seems to have based his conclusion on the language of Exhibit 'A' and on certain presumptions which, according to him, arise from the facts that the plaintiff is admittedly entitled to both *varams* in 70 *cawnies* of land in the village and that about 77 other *cawnies* are waste. He throws the burden on the defendants to prove that their predecessors-in-title were cultivating tenants at the time of the grant. We are not disposed to express any opinion on the question of presumptions, because, as a matter of fact, there is considerable evidence upon which the points in issue can be decided one way or the other. But we wish to point out that there is no burden on the defendants to show that their predecessors-in-title were cultivating tenants at the time of the grant. If they succeed in showing that at the time of the grant the land was in the occupation of cultivating tenants, that might be sufficient to raise a presumption in their favour. We would therefore ask the District Judge to return a fresh finding, on the issue remitted to him, and he will also return a finding on the second issue in the case, namely, "Is the defendant entitled to the occupancy right in the land by custom or by prescription?"

The officiating District Judge does not appear to have applied his mind to the determination of the question involved in the second issue. It was now expressly and clearly brought to his notice.

On the return of the cases to the officiating District Judge, that officer, even with the fresh evidence the plaintiff was allowed to produce, found himself unable to come to any definite conclusion. The end of his judgment shows that he was not clear at all in his mind as to the conclusion to be derived from the evidence, and he expressed his difficulty in the following words :

"I do not see therefore how it is possible to say whether the grant to the plaintiff was of land revenue or of *kudivaram* also."

With these remarks the Appeals were re-submitted to the High Court.

Upon the return of the Appeals to the High Court the learned Judges again found that neither had the evidence been properly considered, nor had the issue to which the attention of the officiating District Judge had been expressly called been determined ; and they expressed their view as follows :

"We are not disposed to express any opinion on the question of presumption *because as a matter of fact there is considerable evidence upon which the issue can be decided one way or the other.*

"The finding again submitted by the District Judge after this remand order does not at all show that the District Judge addressed himself seriously to a consideration of the mass of evidence considered by the District Munsif. The Judge says he is "in a position of some difficulty," and in a short paragraph (paragraph 3 of the finding paper) says that it is not possible to say one way or the other on that point. We are unable to accept the findings and we request the present District Judge to submit fresh findings on the two issues mentioned in the second remand order after detailed consideration of the evidence and with reference to the above remarks, irrespective of the question of onus and presumption."

The case had accordingly to be remitted once more to the District Court for a proper finding. By that time the permanent incumbent of the office, Mr. HARDING, seems to have resumed work. He considered the case on the evidence irrespective of any presumption, and on 30th September 1914, embodied his conclusions into definite findings of fact as required by the High Court. He found on the evidence, in agreement with the District Munsif, that the defendant tenants had been in occupation of the lands for a very long time, that they had been dealing with their holdings and the lands in their occupation as tenants entitled to occupancy rights, that they had been transferring their holdings, partitioning

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the same among themselves, making improvements on the land, receiving compensation for land taken up from their holdings by Government; and that the plaintiff had not only utterly failed to rebut the inference arising from those facts, but had fabricated the documents with which he came to support his claim.

He accordingly returned the Appeals with the finding as follows :

"11. It is unnecessary to say more. A zamindar could only gift the *melvaram* of occupied and both *varams* of unoccupied lands, and we find in actual fact that the holdings and dealings have been as they must be if that supposition is correct. From 1829 onwards, the ryots or tenants in many cases have partitioned their properties or sold them to Government or to one another, and plaintiff has accepted these things from 1870 onwards at any rate. Plaintiff now holds *kudivaram* rights in many lands not by his grant but by some subsequent acquisitions. But he never held it in suit lands which are neither *pannai* nor waste, and in 1901 he was found by the Deputy Collector to be illegally taking possession of lands and this was upheld by the High Court. He is no doubt trying to get the *kudivaram* of the whole village, but his claim thereto is entirely baseless. I find that the grant was of the *melvaram* only of occupied lands and of both *varams* of unoccupied lands. Defendants or their predecessors have always had the occupancy rights in their holdings, and were not affected by the gift from the zamindar to the inamdar."

The learned Judges of the High Court, upon the return of the above finding, held as follows :

"It must be conceded in favour of the plaintiff that we expected the learned District Judge to discuss the evidence at somewhat greater length than he has done, we having indicated in our remand order that the District Munsif had devoted about 85 paragraphs to the consideration of that evidence, and that we required to be reasonably satisfied that the conclusions of the learned District Judge are arrived at after a careful consideration of the whole evidence.

"But we do not think that we are entitled to hold that full consideration has not been bestowed by the District Judge on the whole evidence before he arrived at the findings now submitted by him, and we therefore accept the same.

"The result is that Second Appeals Nos. 515 to 518 will stand dismissed with costs, while Second Appeal No. 544 of 1909 will be allowed with costs in this and in the lower Appellate Court."

From these decrees the plaintiff has now appealed to His Majesty in Council, and it is contended on his behalf that the High Court acted without jurisdiction in remitting the Appeals to the District Judge for a proper finding. The argument proceeds on the same misapprehension of the law, as was pointed out by the Board in *Seturatnam Aiyar v. Venkatachela Goundan*(1). It is to be observed that the Indian legislature, in its anxiety to prevent the High Court from being inundated with Second Appeals in trifling matters, has provided in section 100 of the Civil Procedure Code that such Appeals shall lie to the High Court only on the following grounds :

"(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely :—(a) the decision being contrary to law or to some usage having the force of law, (b) the decision having failed to determine some material issue of law or usage having the force of law, and (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

At the same time, in order to avoid gross miscarriage of justice resulting from the omission by the lower Appellate Court to determine any issue of fact

(1) (1920) I.L.R., 48 Mad., 567 (P.C.) ; L.R., 47 I.A., 76.

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or to come to a definite conclusion on a set of facts, it has made two distinct provisions. By section 103 the High Court itself is vested with the power when the evidence on the record is sufficient, to determine any issue of fact necessary for the disposal of the Appeal, but not determined by the lower Appellate Court. By rule 25, Order XLI, it is further provided :

"Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required ;

"And such Court shall proceed to try such issues and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor."

The High Court had thus the power of determining the issue left undetermined by the Officiating District Judge on the evidence on the record, or of remitting the case to the lower Court for a finding on that issue, with liberty to the parties to adduce additional evidence if they chose to do so. The learned Judges of the High Court chose the latter, which, under the law, was fully within their competence. The case was remitted three times because the Officiating District Judge in the first instance misunderstood the order of the High Court, and in the second instance expressed himself as unable to come to a definite conclusion. The High Court did not in the present case, as in *Seturatnam Aiyar v. Venkatachela Goundan* (1), remand it under Order XLI, rule 23, of the Civil Procedure Code, but under rule 25. The remarks that follow in the judgment in *Seturatnam*

(1) (1920) I.L.R., 43 Mad., 567 (P.O.) ; L.R., 47 I.A., 76.

Aiyar's case explain the reason why the remand in that case, as in the present, became necessary. "In the opinion of the learned Judges of the High Court," say their Lordships, "the District Judge had omitted to determine a question of fact which appeared to them essential to the right decision of the suit on the merits ; he had failed to consider whether, apart from the particular contract to which his attention was exclusively directed, there was evidence on which to hold that from their inception the holdings of the defendants were permanent or in the nature of occupancy rights."

As already observed, the Madras Act I of 1908 had come into force on the 1st July of that year, whilst the appeals in these cases were pending before the High Court. In view of the plaintiff's contentions, which have travelled over a wide range, and also of the question relating to the grant, it becomes necessary to examine briefly the provisions of the Statute. The preamble states the object of the enactment in the following words :

"Whereas it is expedient to amend and declare the law relating to the holding of land in estates in the Presidency of Madras ; It is hereby enacted as follows, etc."

Section 3, sub-section (2), defines the expression "estate" in the Act to include

"(a) Any village of which the land revenue alone has been granted in inam to a person not owning the *kudivaram* thereof provided that the grant has been made, confirmed or recognized, by the British Government, or any separate part of such village."

Section 3 gives a definition of the words "private land" as meaning the "domain or home-farm land" [expressions borrowed from English Law] of a landholder, by whatever designation known, such as *kambattam*, *khas*, *sir* or *pannai*. It defines the words "ryot" and "occupancy ryot," and declares "ryoti land" to mean

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"cultivable land in an estate other than private land." This definition includes other varieties of land to which no specific reference is necessary.

It also defines "old waste" as meaning any land in the estate which, not being private land,

"(1) has at the time of letting by the landholder been owned and possessed by him or his predecessors in title for a continuous period of not less than ten years and has continuously remained uncultivated during the time, such period being either after or partly before and partly after the passing of this Act, or within twenty years before the passing of this Act, or

(2) has at the time of any letting by the landholder after the passing of this Act remained without any occupancy rights being held therein at any time within a continuous period of not less than ten years immediately prior to such letting."

Section 8 deals with what is called "the merger of occupancy right." It declares:

(1) Whenever before or after the commencement of this Act the entire interests of the landholder and the occupancy ryot in any land in the holding have become united by transfer, succession or otherwise in the same person, such person shall have no right to hold the land as a ryot but shall hold it as a landholder; but nothing in this sub-section shall prejudicially affect the rights of any third person."

And clause (3) provides:

"The merger of the occupancy right under sub-sections (1) and (2) shall not have the effect of converting ryoti land into private land."

Section 10, clause 1, declares that "all rights of occupancy shall be heritable, and shall be transferable by sale, gift or otherwise." Clause 2 provides:

"If a ryot dies intestate in respect of a right of occupancy and without leaving any heirs except the Crown, his right of occupancy shall be extinguished, but the land in respect of which he had such right of occupancy shall not cease to be ryoti land."

Section 13 declares the right of the occupancy ryot to make improvements on the land in his occupation or "in respect of his holding."

Coming now to section 6, clause (1), it runs thus:

"Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land not being old waste situated in the estate of such landholder shall have a permanent right of occupancy in his holding; but nothing contained in this sub-section shall affect any permanent right of occupancy that may have been acquired in land which was old waste before the commencement of this Act."

Chapter XII of the Act deals with the landlord's private land. Section 181 provides that nothing in the previous sections will confer a right of occupancy in the landlord's "private lands," but that nothing in that section shall prevent a landholder from converting his private land into ryoti land. Chapter XIV provides that no contract between the landlord and a ryot shall take away the right of an occupancy ryot, or limit his right to use the land as provided by law.

In declaring the rights of the occupancy ryots and emphasizing the distinction between the landlord's "private lands" and "the ryoti" lands, the new Act affirmed the old customary law that had always been recognized by the British administration. Apart from rules relating to procedure and the jurisdiction of the Revenue Courts, it created one new right in order to settle the constant disputes between landlords and tenants which had been going on for nearly a century; it gave occupancy rights to all ryots in occupation of lands within an "estate" at the time of the passing of the Act. It also gave some security to non-occupancy ryots in the enjoyment of their lands. In other respects, generally speaking, it declared and gave statutory recognition to existing rights and status. One important feature of the

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Act is worthy of note : it throws into relief the component parts which, from immemorial times, go to constitute a village ; *first*, the lands in the direct cultivation of the proprietor (called by various names) ; *second*, lands occupied by tenants or ryots ; and *third*, old waste lands over which by custom the landlord possessed certain specific rights now crystallized in the Statute. These remarks do not apply to ryotwari tracts in the direct possession of Government which are let out to *mirasidars* or hereditary ryots for purposes of cultivation.

The existence in a village of *pamalai* lands, in which the tenant cannot acquire occupancy rights except by contract, connotes the existence of lands in which he can acquire such rights by prescription.

In the present case the grant itself does not convey in express terms the *kudivaram* to the grantee. Nor does the term *inam*, an Arabic word meaning "a reward" give any indication of the intention of the donor, even if he had the right to bestow it on the donee. *Prima facie* a zamindar or poligar is a rent-receiver ; or, to use the language of section 4 of Act I of 1908, he has the right to collect the rent from his tenants. *Prima facie*, his right of direct possession of the lands is confined to his "private lands" and the old waste land ; it does not extend to "ryoti land."

The place of the cultivating ryots in the agricultural economy of Southern India is thus described in a Proceeding of the Board of Revenue of Fort St. George (Madras), dated 5th January 1818* :

"The universally distinguishing character, as well as the chief privilege of this class of people, is their exclusive right to the hereditary possession and usufruct of the soil, so long as they render a certain portion of the produce of the land, in kind or money, as public revenue ; and whether rendered in service,

* MS. copy of the India Office.

in money, or in kind, and whether paid to rajas, jaghirdars, zamindars, poligars, mootahdars, shrotriyamdars, inamdars or Government officers, such as tahsildars, amildars, amins, or tannadars, the payments which have always been made by the ryot are universally termed and considered the dues of the Government."

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It has been urged on behalf of the plaintiff that the onus was wrongly placed upon him, and in support of this contention the judgments of this Board in *Suryanarayana v. Patanna*(1) and in *Venkata Sastrulu v. Seetharamudu*(2), were relied upon.

In the first case the grant appears to have been made somewhere in the fourteenth century of the Christian era, and it was conclusively proved, on behalf of the plaintiff in that suit, that he and his predecessors had since then been in actual occupation of the lands, extending over centuries ; they had further produced documents showing they had been actually cultivating the land. It was also established from the Inam Register that the grant not only included the revenue but also the soil. The Munsif had found on these facts in favour of the plaintiff, but his judgment was reversed by the District Judge, whose decree was affirmed on Second Appeal by the High Court. The Board upon a review of the facts established in the case declared that it could not under the above circumstances be assumed that the grant was only a grant of the king's share in the produce of the soil, and did not include the *kudivaram*. It was a presumption which was certainly not warranted by the facts of the case.

In the subsequent case of *Venkata Sastrulu v. Seetharamudu*(2), it was again found upon the evidence that the grant included the *kudivaram*. Their Lordships say in their judgment, delivered by Viscount CAVE :

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.) ; L.R., 45 I.A., 209.

(2) (1920) I.L.R., 48 Mad., 166 (P.C.) ; L.R., 46 I.A., 123.

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"There is not in any of the documents above referred to any trace of a claim by any person other than the inamdar to a permanent right of occupancy; and the fact that by the terms of the grant the grantee is desired to cultivate the lands, and that he is referred to as residing in the village, tend to show that no such right existed in any other person. . . . And when the subsequent history of the estate comes to be examined, it is found to be wholly inconsistent with the existence of any permanent occupancy rights. Tenancies have been continually granted by the inamdars for short periods and at variable rents. When tenancy lands were compulsorily acquired by Government and compensation was paid to the aghaharamdar, no claim to compensation was put forward by the tenants. In the year 1904 all the tenants formally relinquished their lands to the plaintiff and put them in his possession, and from that date until tenancies were granted in the year 1907 the property remained vacant."

In view of those facts the Board overruled the objection that the Civil Court had no jurisdiction to entertain the suit, and that under the provisions of section 189 of the Act the Revenue Courts only had the power to deal with the matter. In dealing with the judgments of the District Judge and of the High Court, their Lordships observed that the two Appellate Courts in India had acted on a supposed presumption of law, that an inam grant of a village, particularly if made to a Brahman, is *prima facie* a grant of the *melvaram* right only and does not include the *kudicaram*, and they pointed out that in the previous case, already referred to, it was held that no such presumption exists. And then they add:

"Each case must therefore be considered on its own facts; and in order to ascertain the effect of the grant in the present case, resort must be had to the terms of the grant itself and to the whole circumstances as far as they can now be ascertained."

The question came up again for consideration before the Board in the subsequent case of *Seturatnam Aiyar*

v. *Venkatachela Gounden*(1), to which reference has been made before. That was a suit for ejectment by a mirasidar against the tenants in occupation of the lands in a village granted to him many years ago. As already observed, the mirasidar is himself a cultivating ryot, and the land which is granted to him is for purpose of cultivation in a ryotwari tract. The defendants contested the claim for ejectment, and alleged that they possessed occupancy rights. A considerable body of evidence was produced on both sides. The District Munsif dismissed the suits, holding that the defendants had established their prescriptive occupancy rights in the lands in their occupation and under their cultivation. The Munsif found that the plaintiff's claim to eject the defendants from the lands in actual cultivation was "barred," but decreed the claim in respect of the pasture land. The decree of the District Munsif was set aside by the District Judge, as he considered the question for consideration in the case was "whether the defendants had shown that the plaintiff or his predecessor-in-title had contracted that the right of tenancy should be changed into a right of permanent occupancy." And his conclusion was that "in those circumstances I think it clear that the defendants have not established any contract on the part of the plaintiff or his predecessor-in-title to convey to them a right of permanent occupancy," and he had accordingly decreed the plaintiff's claim for possession of the suit lands. On the Appeal of the defendants, the High Court set aside the decision of the District Judge and remitted the case for a finding on the real point involved in the determination of the case. The learned Judges considered that the question which the District Judge had to consider was whether "on the

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(1) (1920) I.L.R., 48 Mad., 587 (P.C.); L.R., 47 I.A., 76.

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admitted and undoubted facts of the cases, and the evidence of both sides, the defendants held the lands in their possession as tenants from year to year or as persons having a right of permanent occupancy." On the return of his finding the learned Judges of the High Court found that he had omitted to consider the question that had been remitted to him. The following remarks are pertinent to the present case. The learned Judges observed :

"The District Judge in his order submitting his findings had, notwithstanding the caution given by the High Court, again assumed that the defendants' original right was that of tenants from year to year, and that it lay on them to prove an express or implied contract by which the right of tenancy from year to year was changed into a right of permanent occupancy."

Without, however, remitting the matter for a proper finding, the High Court proceeded themselves to determine, upon the evidence on the record, the issue. To use the words of Sir LAWRENCE JENKINS, who delivered the judgment of the Board :

"If and so far as this was an issue of fact—a point on which it is not necessary to express a definite opinion in the circumstances of this case—the Court had power to deal with it under section 103 of the Civil Procedure Code, 1908."

The conclusion of the High Court was that the defendants had established occupancy rights in the land they held ; and this Board affirmed its decree.

It will be noticed that neither in the case of *Suryanarayana v. Patanna*(1), nor in *Seturatnam Aiyar v. Venkatachela Gounden*(2), is there a suggestion of a presumption in favour of the inamdar or pattadar on the one side or of the ryot on the other. It was further distinctly pointed out in *Venkata Sastrulu v. Soetharamadu*(3), that

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.) ; L.R., 45 I.A., 209.
(2) (1920) I.L.R., 43 Mad., 567 (P.C.) ; L.R., 47 I.A., 76.
(3) (1920) I.L.R., 43 Mad., 106 (P.C.) ; L.R., 45 I.A., 123.

"Each case must, therefore, be considered on its own facts ; and in order to ascertain the effect of the grant in the present case [that is the case with which the Board was dealing] resort must be had to the terms of the grant itself and to the whole circumstances so far as they can now be ascertained."

A Full Bench of the Madras High Court, however, has in a recent case [*Muthu Gounden v. Perumal Iyen*(1)], held that underlying the exposition of their Lordships such an initial presumption is to be inferred. Their Lordships cannot help observing that in drawing this inference the learned Judges are clearly in error. Each case must be dealt with upon its own facts, with special regard to the evidence and circumstances therein.

When the entire evidence on both sides is once before the Court the debate as to onus is purely academical. On this point they desire to associate themselves with the observation of the Board in *Seturatnam Aiyar v. Venkatachela Gounden*(2) :

"The controversy had passed the stage at which discussion as to the burden of proof was pertinent ; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them."

Dealing now with the facts of the present case, there is first the grant in favour of the plaintiff-appellant, the terms of which have already been set out. It does not in express terms grant to the inamdar both rights, *melvaram* and *kudivaram*. It speaks of other villages held by the grantor which it might be inferred from the document were occupied by tenants, nor does it expressly say that only the *melvaram* right was granted to the donee. The defendants contended that they had been from time immemorial in possession of their holdings. They alleged they had been transferring their holdings, whole or in part, from time to time ; that the

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(1) (1921) I.L.R., 44 Mad., 588 (F.B.)

(2) (1920) I.L.R., 43 Mad., 567 (P.C.) ; L.R., 47 I.A., 76.

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lands had descended to their heirs in succession, and the descendants of the transferees were in possession; that they had partitioned the holdings amongst themselves; that they had made improvements, sunk wells and erected buildings thereon for husbandry and dwelling purposes, and have received compensation when any portion of their holdings were taken by Government for public purposes. Under the circumstances it became essential to have the evidence on both sides in support of the propositions they advanced, and to draw therefrom the right inference. Both sides, as already stated, produced a volume of evidence. The District Munsif considered it in the most exhaustive manner. He found that the village that had been granted to the plaintiff covered three classes of lands; one was in his own possession and cultivation, another was waste or pasturage, and the third was in the occupation of tenants. He found also that the plaintiff had for a number of years been fabricating evidence to defeat the rights of the tenants, and had in the course of the trial suppressed material evidence. He found, further, that the defendants had fully established their contentions, that they had been in possession and occupation from before 1829 at least; they had dealt with those lands as occupancy ryots, partitioning their holdings, transferring and mortgaging them with the knowledge and acquiescence of the plaintiff and his agents; and that they had, in fact, received compensation for lands taken up by Government for part of their holding which had been acquired for public purposes. From these facts and circumstances he drew the inference that the defendants had fully established their prescriptive rights of occupancy, and accordingly dismissed the suits by the plaintiff. His conclusion amounts to this, that, assuming that the onus was on the defendants, they had fully discharged it.

The Officiating Judge, Mr. THORNTON, on appeal, was apparently bewildered by the volume of decided cases, often inconsistent with each other, of his own High Court, and, therefore, unable to come to a definite conclusion on the facts as established by evidence; he accordingly dealt with the Appeals, principally, on the basis of onus and presumption.

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A part of his judgment in Suit No. 676 (Appeal No. 139 of 1908) throws light on some of the salient facts of the case:

"9. I do not think the mere circumstance that the plaintiff admittedly enjoys both *varams* in the whole of the wet land considering the very small proportion this bears to land under cultivation in the village, is by any means a conclusive argument in his favour. A proprietor almost invariably has some *pannai* land, and there is no reason why in the case of the plaintiff village the wet land granted to the plaintiff should not have been the zamindar's *pannai* at the time of the grant. The village consists of 255 *cawnies*, of which 22 *cawnies* are *poramboke* and 55 *cawnies* waste, and even including the land for which *muchilkas* have been executed on the terms of a year to year tenancy, the plaintiff is not shown to have both *varams* in more than about 70 *cawnies* of the cultivable lands. As the District Munsif points out, the plaintiff's predecessor-in-title cannot have obtained greater rights from the zamindar in respect of the tenants who were in possession at the time of the copper-plate grant than he enjoyed himself, and it is not suggested that the Turayur zamindar owned both *varams* in other villages in his *zamin*, nor is there anything to show that he was entitled to greater rights in the plaintiff village than in other villages. Nor can the existence of *muchilkas* for about 16 *cawnies*, of which 4 *cawnies* are described in the plaintiff's *adangal* as *Mattam Sontham*, offer any evidence as to plaintiff's rights in other lands in the village. The *muchilkas* are almost all dated after 1893, and little value can attach to documents which came into existence long after the dispute about occupancy right had arisen.

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" 10. I do not think the defendants can properly be described as *purakkudis*, as contemplated in *Thiagaraja v. Gityana Sambandha Pandar* (1), for both in the present case and in the connected cases, with the exception of the tenant who cultivates the land included in the Registers of Uppiliapuram village, the tenants are all residents of the neighbouring village of Koppampatti, of which the plaint village is shown to form part in the Settlement Register of 1896. Again, though the rates of rent may be higher in the plaint village than in neighbouring villages, now it is clear from the Inam Register of 1864 that the rates were fixed at the average rate prevailing in the neighbouring villages. . . . I do not consider the plaintiff has established he is entitled to both *varams* in all the cultivated lands in the village, and as he has not proved what the terms of the tenancy are under which the defendants have cultivated the plaint land, I dismiss the Appeal with costs throughout."

In his consideration of the muchilkas which he, differing from the Munsif, considered to be genuine, he gave little attention to the reasons the lower Court had assigned for considering them to be fabricated. In these circumstances the High Court deemed it necessary to call upon the Officiating District Judge to record another finding on the evidence. The case had to go back twice for the purpose, and in the result Mr. THORNTON expressed himself unable to come to any definite conclusion. The High Court were compelled to send down the case again, and it was then taken up by the permanent incumbent, who came to a definite conclusion upon the evidence on the record, and that finding has been affirmed by the High Court.

The case has now been before three Courts in India, and all the Courts have come to the conclusion upon a full consideration of the evidence and all the circumstances that the plaintiff does not possess the *kudivaram* which he claimed against the defendants, in respect of

the lands in their occupation. The defendants have shown conclusively how they have been dealing with the property for at least a hundred years. They have also shown (and the Munsif has dealt with the subject most exhaustively) that they had received compensation from the Government for lands taken out of their holdings for public purposes. The plaintiff's evidence has been found to be mostly false or fabricated. In this view of the case their Lordships do not consider it necessary to express any opinion as to whether Act I of 1908 applied to rights in litigation at the time of the passing of the Act. The defendants clearly acquired their occupancy rights by prescription long before the Statute came into force.

Under these circumstances their Lordships think that the conclusion of the High Court is correct, and that these consolidated Appeals should be dismissed. In accordance with the terms under which special leave to appeal was granted, the appellant will pay the respondents' costs as between solicitor and client. Their Lordships will therefore humbly advise His Majesty accordingly.

Solicitor for appellant: *Douglas Grant*.

Solicitors for respondents: *Chapman-Walker & Shephard*.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., Chief Justice,
Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami
Sastri.

1922,
January 6.

MADAM PILLAI (SECOND DEFENDANT), APPELLANT,

v.

BADRAKALI AMMAL AND ANOTHER (PLAINTIFF AND FIRST
DEFENDANT), RESPONDENTS.*

*Transfer of Property Act (IV of 1882) ss. 9, 54, 118, 128—Land
more than hundred rupees in value—Transfer by husband to
wife for enjoyment during her lifetime in discharge of
future maintenance, whether required to be in writing.*

A transfer of land by a husband to his wife to be enjoyed by
her during her lifetime in discharge of future maintenance is
not a gift or sale and may be made without writing.

SECOND APPEAL against the decree of U. GOVINDAN NAYAR,
Acting Subordinate Judge of Tuticorin, in A. S. No. 33
of 1919 preferred against the decree of A. VERGHESE,
District Munsif of Tuticorin, in O.S. No. 114 of 1918.

Plaintiff, the first wife of the first defendant, sued
for a declaration that the sale of the suit lands to second
defendant by first defendant was invalid on the ground
that the first defendant had made an oral transfer of
the lands in her favour in discharge of her claim for
future maintenance.

The Second Appeal came on for hearing before
OLDFIELD and RAMESAM, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The second defendant, here appellant, relies on a sale-
deed of the suit land from first defendant. Plaintiff,
the first wife of first defendant, has obtained a declara-
tion that the sale to second defendant is invalid, so far

as it affects her right to enjoy the land during her life,
on a finding by the lower Courts that she is doing so
under an oral transfer of that right by first defendant
with a condition against alienation by him during her
enjoyment. The finding that this transfer was made
is one of fact and we must accept it. The Second Appeal
has been argued on the ground that under the Transfer
of Property Act an oral transfer of this kind is in-
effective. The decision of the lower Appellate Court
has been supported on the grounds that, even if the oral
transfer is ineffective, plaintiff has prescribed for a right
to possession by her adverse holding for about seventeen
years and that, second defendant's sale having to his
knowledge been intended to defeat plaintiff's main-
tenance right, that right must under section 39 of the
Transfer of Property Act be enforced against him by
keeping her in possession.

Neither of the considerations relied on by plaintiff
affords an immediate ground of decision. For the lower
Appellate Court has found only that she had possession
on the date of her plaint, not that she had it for the
previous period necessary for prescription; and a
remand for proper consideration of the plea of prescrip-
tion would be necessary. The argument from section
39 assumes that her right to maintenance can be identi-
fied with her right to the enjoyment of the suit land,
whereas the validity of the transfer to her of that land
in lieu of maintenance is the point in dispute.

We have therefore to decide whether this oral
transfer of land, admittedly of over Rs. 100 value, is
valid. The questions raised are of general importance
and, as we are referring the matter, we attempt no
further discussion or citation of authorities than is
sufficient to indicate its difficulty. In argument before
us neither party has contended that the transfer to

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plaintiff is a lease; and the suggestions that it is a gift or a family settlement or compromise can be dismissed shortly, the former because her abandonment of her right to claim maintenance is a consideration within the meaning of section 2 (d) of the Indian Contract Act, the latter because the arrangement is not put forward as an acknowledgment of existing rights or otherwise than as a creation of new ones. Second defendant argues that the transfer is a sale or exchange, which under sections 54 and 118 of the Transfer of Property Act can be made only in writing; plaintiff, that it can be made without writing under section 9 because the case is not one in which a writing is expressly required.

One obstacle to the application of either section 54 or 118 is that in the present case the transfer is on the one side of the right to enjoy only for the transferee's life and this may be inconsistent with the references to transfer of ownership in the former and of ownership of a thing in the latter. For in the absence of definitions of "ownership" and of "a thing" it is a question whether the transfer of less than an absolute and permanent right is contemplated by either section. We have been shown no authority on this point or on the kindred objection to the application of section 118 to the consideration proceeding in the present case from the transferee, that the abandonment of a right to maintenance is not the ownership of a thing. Further it can hardly be said that the abandonment of a right against a person is a transfer to him of that right; and, if it could be, a right to future maintenance is, it has been held, not a thing which can be the subject of transfer or assignment [*Narbadabai v. Mahadeo Narayan*(1) and *Palikandy Mammad v. Krishnan Nair*(2)]. The difficulty in connexion with section 54

(1) (1881) I.L.R., 5 Bom., 89.

(2) (1917) I.L.R., 40 Mad., 303.

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is that a price, or promise of a price, is essential and that plaintiff's abandonment of her right to future maintenance, which has never been assessed or valued is not a price or the promise of one because a price must, according to authority [*Queen-Empress v. Appavu*(1), and *Volkart Brothers v. Vettivelu Nadan*(2)] be money. We have been asked to disregard this with reference to the judgment of SADASIVA AYYAR, J., in *Ariyaputhira v. Muthukomaraswami*(3), and his dictum that

"If two persons mentally fix the value of the exchanged things in current coin and then exchange them as of equal value, they might be held to effect sales and to pay prices (the word 'not' being apparently interpolated in the Report) and not merely to effect an exchange."

It is possible that this was not enunciated as a general principle, but only with reference to cases such as that before the learned Judge, in which the data for the mental process he assumed, in the shape of information as to completed transactions, were available. But the supposition of such a process can hardly be made in cases of the kind now in question, in which the calculation of the amount depends on an estimate of an unascertained periodical liability for an uncertain time, and we have to assume not only a mental fixing of the total due by each party, but some sort of sympathetic agreement between them on the same figure, in the absence of which there could be no contract.

In the circumstances we refer for the opinion of the Full Bench the question whether a transfer of land of the value of more than Rs. 100 by a husband to his wife to be enjoyed by the latter during her lifetime in discharge of her claim to future maintenance can be made without writing.

(1) (1886) I.L.R., 9 Mad., 141.

(2) (1888) I.L.R., 11 Mad., 459.

(3) (1914) I.L.R., 37 Mad., 423.

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ON THIS REFERENCE—

K. V. Krishnaswami Ayyar and *T. R. Venkatarama Sastri* for appellant.—I contend that such a transfer requires writing. It is a gift and as such requires writing and registration. The other side contends it is a family settlement or compromise. So long as husband is living the wife has no claim to separate maintenance.

[C.J.—She has an inchoate right to maintenance and is entitled to maintenance after his death.]

Reference made to *Ariyaputhira v. Muthukomaraswami*(1), *Sm. Rajlukhy Dabee v. Bhootnath Mookerjee*(2).

B. Sitarama Rao and *A. Swaminatha Ayyar* for the respondent.

SCHWABE,
C.J.

SCHWABE, C.J.—The question referred to us in this case is “whether a transfer of land of the value of more than Rs. 100 by a husband to his wife to be enjoyed by the latter during her life-time in discharge of her claim to future maintenance can be made without writing.”

It was argued first that such an agreement was a gift, because it was said that such a bargain was illegal and, therefore, without consideration: but it had to be admitted that, if the bargain was to receive the land in discharge of the claim to future maintenance, there was nothing illegal at all; and it is not necessary to say anything further on the subject of gift. By the transfer of Property Act, section 9 “A transfer of property may be made without writing in every case in which a writing is not expressly required by law” and, therefore, one has to look at the rest of the Act to see whether writing has been expressly required by law for such a transaction as this. Apart from the question of gift, the only sections which it is claimed could apply are sections 54 and 118. Section 54 relates to sales, a sale being defined

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“as a transfer of ownership in exchange for price paid or promised.” In this case one has to consider whether there was a price paid or promised by the transferee. Now “price” has a well defined meaning. It means money, but not necessarily money handed over in current coin at the time but includes money which might be already due, or might be payable in the future. I think the law is well expressed in the commentaries on the Transfer of Property Act by Shephard and Brown, page 175. “‘Price’ includes money only, for if the thing given in exchange for land consists of goods and not money, there is no sale but an exchange. A transfer not made in exchange for a money consideration, e.g., a transfer made in pursuance of a compromise of a family dispute, would not be a sale, and might be altogether outside the provisions of the Act.” There being, in my view, no price paid or promised in this case, the transaction was not a sale. We are referred on this point to *Ariyaputhira v. Muthukomaraswami*(1) and to certain observations of SADASIVA AYYAR, J., therein, in which apparently he would extend “price” so as to cover all cases where articles are exchanged, one against the other, provided that the parties went through the mental process of fixing in their own minds the value of the articles to be exchanged. I must say that I think that that was going beyond anything that one can find in the Act. It seems to me that those observations were quite unnecessary for the decision which was arrived at in that case, and I confess that I cannot agree that the mental process gone through of valuing in one’s mind the different articles to be exchanged can possibly turn an exchange transaction into a sale.

(1) (1914) I.L.R., 37 Mad., 423.

(1) (1914) I.L.R., 37 Mad., 423.

(2) (1900) 4 C.W.N., 488, 489.

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The remaining section is section 118 which deals with "exchanges." By that section "Exchange" is defined as follows: "where two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an Exchange." In this transaction the husband transfers the land or the right to use the land during her lifetime to the wife and the wife gives up her right to future maintenance. It seems to me that there are two reasons why this transaction cannot be an exchange within that definition. First of all, the husband does not transfer the ownership of the land, and secondly, the wife does not transfer the ownership of anything. She does not purport to transfer anything to her husband, nor had she anything, within the meaning of that section, which she could transfer.

On these grounds the answer to the question referred to us is in the affirmative.

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TROTTER, J.

COUTTS TROTTER, J.—I agree. When we are construing a word like "price," we are dealing with a word which is by its inherent nature a likely subject of controversy, and I turned out of curiosity to the Oxford English Dictionary and found this quotation from Adam Smith's *Wealth of Nations*—1776: "The real price of everything, what everything really costs to the man who wants to acquire it, is the toil and trouble of acquiring it. Labour was the first price, the original purchase money that was paid for all things." But it seems to me that the answer is to be found in what I said during the course of the argument, that a trained English lawyer would never use the word "price," unless it be to connote something other than the perfectly familiar phrase "valuable consideration," which would naturally occur to his mind; and it seems to me that the whole of Mr.

Krishnaswami Ayyar's ingenious argument comes to this: that we are to construe price as meaning the familiar term "valuable consideration." I think that the word "price" was put into the section to connote something different and something more limited, that is, money.

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KUMARASWAMI SASTRI, J.—I agree with my Lord and would only add that even if the transaction is treated as a settlement of family disputes, there is nothing in Hindu Law requiring it to be in writing. Partition can under Hindu Law be made without any document, and a settlement cannot be in a worse position.

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It is argued that the transaction must be viewed as a gift of immoveable property, as under Hindu Law an agreement by a husband to provide for the future maintenance of his wife is invalid; and there being no legal and valid consideration for the transfer, it is in effect a gift. I see nothing illegal in Hindu Law for a husband to make provision for the future maintenance of his wife. It is very often a very proper thing to do. Even assuming that the agreement to provide for future maintenance is invalid under Hindu Law, the transaction will not amount to a gift. It will be invalid not for want of writing and registration but because it is incompetent for the parties to enter into the transaction because of the personal law by which they are governed.

M.B.H.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., Chief Justice,
Mr. Justice Coutts Trotter and Mr. Justice
Kumaraswami Sastri.

NETI ANJANEYALU (PETITIONER-DEFENDANT),
APPELLANT,

v.

SRI VENUGOPALA RICE MILL, LIMITED, TENALI
(RESPONDENT-PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), sec. 6 (h)—Swastivachakam Service Inam—Attachment in execution—Validity—Opposed to public policy and to the nature of the interest.

Lands held on Swastivachakam service tenure are not subject to attachment in execution of a decree, as the sale of such lands is opposed to public policy and the nature of the interest affected.

Pakkiam Pillay v. Seetharama Vadhyar, (1904) 14 M.L.J., 134, *Govinda Goundar v. Ramien*, (1914) 25 I.C., 600, *Venkatarama Charlu v. Krishnamma Charlu*, (1911) 12 I.C., 710, approved.

LETTERS PATENT APPEAL against the judgment of ABDUR RAHIM, J., in Appeal against the Order of K. KRISHNAMA ACHARIYAR, District Judge of Guntūr, in Appeal Suit No. 119 of 1918, preferred against the Order of A. S. KRISHNASWAMI AYYAR, Temporary Subordinate Judge of Guntūr, in I.A. No. 1667 of 1917, in Original Suit No. 48 of 1917.

The respondent decree-holder attached the lands in dispute in execution of a decree against the appellant and the latter applied for their release on the ground that they were burdened with Swastivachakam service and therefore inalienable. Both the Subordinate Judge and the District Judge held that they were subject to

attachment. Appellant filed a Civil Miscellaneous Appeal to the High Court, which came on for hearing before ABDUR RAHIM and SADASIYA AYYAR, JJ. As ABDUR RAHIM, J., agreed with the District Judge while SADASIYA AYYAR, J., did not, the Appeal was dismissed under section 98 of the Civil Procedure Code. Against this, the appellant preferred a Letters Patent Appeal.

Oh. Raghava Rao for appellant.—I contend that the land is not liable to attachment. It is a right to personal service and within the proviso to section 60, clause (f), Civil Procedure Code. The section is broad enough to include any property which is subject to service. The land burdened with service is inalienable. It is a property falling within the meaning of section 6 (d) of the Transfer of Property Act and as such not transferable. It being subject to service, it is restricted in its enjoyment to the owner personally. It is also a public office and as such comes within the restriction of section 6 (h). Moreover, the nature of the interest is personal. It is also an implied term of the grant that the property will not be alienated. Under the orders of the Board of Revenue the Government are entitled to forfeit the grant on alienation. It is a hereditary office meant to be enjoyed by a certain family only. Reference was made to Woodroffe and Ameer Ali's Civil Procedure Code, 1902 Edition, 300, 301, *Srimati Mallika Dasi v. Ratanmani Chakervarti*(1), *Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutti*(2), *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(3), *Narasimma Thatha Acharya v. Anantha Bhatta*(4), *Durga Bibi v. Chanchal Ram*(5), *Pakkiam Pillay v. Seetharama Vadhyar*(6), *Ramayya v.*

(1) (1897) 1 C.W.N., 493.

(2) (1876) I.L.R., 1 Mad., 235 (P.C.), 245.

(3) (1900) I.L.R., 23 Mad., 271 (P.C.), 279.

(4) (1882) I.L.R., 4 Mad., 391.

(5) (1881) I.L.R., 4 All., 61.

(6) (1904) 14 M.L.J., 134.

* Letters Patent Appeal No. 10 of 1920.

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Dhara Satchi(1), *Venkatarama Charlu v. Krishnamma Charlu*(2), *Govinda Goundar v. Ramien*(3), *Rajah Nilmonnee Singh Deo v. Kashee Mahtoon*(4), *Lottikar v. Wagle*(5). The last has not been followed anywhere else. It is referred to in *Minakshisundaram Pillai v. Chockalinga Royer*(6).

Reference was also made to Board's Standing Order, 54.

K. Kamanna and P. Narayanamurti for respondent.—Reference made to preamble of the Act. The Transfer of Property Act relates only to the transfer of property and not to the act of a Court in attaching a property and selling it in execution. It is one thing to say a man may not alienate but another to say a Court may not attach. Reference made to *Golak Nath Roy Chowdhry v. Mathura Nath Roy Chowdhry*(7).

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SCHWABE, C.J.—In this case an inam was granted by a zamindar to the ancestor of the petitioner on terms that he should do Swastivachakam service in a temple and he and his family should enjoy the inam so long as they did this service. In 1860 the Inam Commissioner confirmed the grant "to be continued so long as the service was performed." This appears from the extract from the Inam Register produced before us. The total area of the land comprised was about 10 acres, the produce or revenue from which would be not more than sufficient to provide a living for the inamdar for the time being.

A judgment having been obtained by the respondent against the present inamdar he applied to attach the land comprised in the inam in execution and he desires

- (1) (1913) 25 M.L.J., 686, 686.
(2) (1911) 12 I.C., 710; L.R., 2 M.W.N., 478.
(3) (1914) 25 I.C., 600. (4) (1876) 25 W.R., 206.
(5) (1882, I.L.R., 8 Bom., 596. (6) (1905) 15 M.L.J., 10.
(7) (1893) I.L.R., 20 Cal., 273

the Court to sell it to satisfy the judgment debt. On behalf of the inamdar it is contended that so long as the services are rendered, the land is not saleable in execution. Now, it is clear law, that the Court can only sell in execution property which the judgment-debtor can lawfully alienate, and the question to be decided is whether an inamdar can sell the property. It is argued on his behalf that it cannot be attached under section 60 of the Code of Civil Procedure and is inalienable under section 6 of the Transfer of Property Act. Section 60 of the Code of Civil Procedure forbids the attachment of a right of personal service. In my judgment what is sought to be attached in this case is the land, and not the right of personal service, and therefore that section has no application. Section 6, sub-clause (d), of the Transfer of Property Act, includes among the properties that cannot be transferred "an interest in property restricted in its enjoyment to the owner personally." It is certainly arguable that this property is restricted in its enjoyment to the owner personally—"owner" meaning the inamdar for the time being. Although I think that is arguable, and it may be that this inam is covered by these words, I prefer to base my decision on another sub-section of the same section. Sub-section (f) provides that "a public office cannot be transferred nor can the salary of a public officer." I do not think that this sub-section applies. Sub-section (h) provides that "no transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872," that is, which appears to the Court to be contrary to public policy. The latter portion has been incorporated in this sub-section by a later Statute. In my judgment the sale of such property is opposed to the

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nature of the interest affected and also is contrary to public policy. The right to enjoy the property is as long as the inamdar renders services in the performance of which the public have an interest. If the inamdar sold the property it is obvious that he would in all probability no longer perform the services; and further, it is quite opposed to the nature of his interest and duty (namely, that he should enjoy the produce of the land as salary for the public services he has to render) that he should sell it or alienate it, leaving himself without the means of subsistence and without further interest in the place or in the performance of the services. It is also to be observed that, if the property were sold, the purchaser would get no title of any value, for at any moment the property might revert to the zamindar or the Government, as the case may be, when the inamdar ceases to render such services. Further, under Order LIV (1) of the Standing Orders of the Board of Revenue the Government can resume possession of a charitable or religious inam immediately on alienation.

The view that I am taking is supported by authority. In *Pakkiam Pillay v. Seetharama Vadhyar*(1), BENSON and BHASHYAM AYYANGAR, JJ., held that any alienation of land which is held by a person as an emolument attached to a spiritual office in a village is void against the rightful holder. In *Govinda Goundar v. Ramien*(2), which was heard by Sir JOHN WALLIS, C.J., and SESHAGIRI AYYAR, J., it was held that a service inam is land which the owner is incompetent to alienate within the meaning of sections 31 (2) and 32 (1) of the Land Acquisition Act. It is true that a different Statute was in question but the principle underlying that case

(1) (1904) 14 M.L.J. 134.

(2) (1914) 25 I.C., 600.

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seems to be the same as in this. In *Venkataranga Charlu v. Krishnamma Charlu*(1), a case of a sale in execution, ABDUR RAHIM and AYLING, JJ., held that an inamdar of land for services similar to this cannot alienate it. We sent for the record of that case and found that the point had been raised and decided before the District Munsif and the District Judge. The point was also one of the grounds of Appeal when the case came up before the High Court, and it must be taken on those facts, that the point was considered and decided by the Court that heard the Appeal. It is to be observed that one of the learned Judges in that case is the Judge who in this case takes the opposite view; presumably his attention was not called to his previous decision in *Venkataranga Charlu v. Krishnamma Charlu*(1). In *Rajah Nilmonnee Singh Deo v. Kashee Mahtoon*(2), it was held by MITTER, J., that a service tenure can be sold in execution of a decree for the arrears of its own rent provided that the service due from the holder be of a private kind, and personal to the plaintiff, but not where the service is of a public kind as in the case of a police jaghir. That lays down a proposition that land burdened with the performance of a service of a public nature is inalienable. In my judgment this land was burdened with the performance of a service which is of a public nature.

In *Vusa Chandrakantam v. Vusa Subbarayudu*(3), it was held that an inamdar can alienate for his lifetime and in *Midnapore Zamindari Company v. Appayasami Naicker*(4), it was held by Sir JOHN WALLIS, C.J., and SPENCER, J., that a palayam, which is the holding of land for military services, was inalienable by the

(1) (1911) 12 I.C., 710; (1911) L.R., 2 M.W.N., 473.

(2) (1876) 25 W.R., 205.

(3) (1914) 16 M.L.T., 347.

(4) (1918) I.L.R., 41 Mad., 749.

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common law beyond the life-time of the holder and while he rendered service.

Now the question whether or not the inamdar could alienate this land during his lifetime while he rendered service does not really arise directly here, because the present application is for sale of the land out and out; but, as the execution creditor would have a right, if such land is alienable for such period, to sell for that period if he could do so, I think it right that I should express my views on that subject. Those cases may be distinguishable; *Midnapore Zamindari Company v. Appayasami Naicker*(1), on the ground that it was a different kind of inam; *Vusa Chandrakantam v. Vusa Subbarayudu*(2), on the ground that it means that the inamdar can let the property during the time that he is rendering the services. If that is the meaning I should find nothing objectionable in those decisions, for I can see nothing contrary to the interest of the inamdar and nothing contrary to public policy in the letting by the inamdar of the land, so that although the land is cultivated by someone else, he provides for himself what was intended he should have, namely a subsistence out of the land. This he would get in the shape of rent which answers the purpose just as well as obtaining profits from the actual cultivation of the land. But if those cases mean that he can sell out and out for the period of time during which he lives and renders services, I do not agree with them, because such an alienation would in my view be quite contrary to public policy for the reasons I have already given.

We were referred to a case, *Jotlikar v. Wagle*(3). This case was relied on by ABDUR RAHIM, J., in the Court below in this case as an authority in favour of the

view that he took that such land as is comprised in this inam could be alienated. Now that case was heard by the Subordinate Judge and Assistant Sessions Judge before the passing of the Transfer of Property Act, 1882, and it is to be observed that the Transfer of Property Act was not made applicable to Bombay until 1893 and therefore when the case came up before the High Court, the Transfer of Property Act did not apply. That case turned on the interpretation of Bombay Act II of 1863 and we need not here consider whether the Court there took the right or the wrong view; but it is an error to think that in that case it was held that under the Transfer of Property Act, the interest of an inamdar to be enjoyed during his lifetime and while he renders services can be attached in execution and sold, or that that case is an authority for the proposition advanced on behalf of the creditor in this case. The points raised in this case were not, and indeed could not be argued in that case.

It follows that in my judgment this Appeal must be allowed with costs throughout.

COUTTS TROTTER, J.—I am of the same opinion and I think that the result that my Lord has come to is consistent with the current of decisions in this Court. There are no doubt decisions of this Court which say that an inamdar of this character can alienate by way of lease his inam property for a period. I believe in one decision to which I was a party, *Kupparaju Venkatasubiah v. Murugula Sheik Silar Sahib*(1), it is said to the extent of his lifetime. Of course, then, it would be limited to the period during which he is willing to perform the services in respect of which he enjoys the

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(1) (1918) I.L.R., 41 Mad., 749.

(2) (1914) 18 M.L.T., 347.

(3) (1882) I.L.R., 6 Bom., 596.

(1) (1916) 19 M.L.T., 144

ANJANEYALU inam; but I should like to point out that although it may be that he is entitled to grant a leasehold of the property during the period of his enjoyment, it by no means follows that it would not be contrary to public policy that the right he has to create such a leasehold estate should be sold under the orders of Court, because then the result might be attained that the inamdar would have left upon his hands the burden of the service without continuing to enjoy the revenue of the property which was provided to keep him in sufficient comfort to be able to perform the services for which it was granted. I agree that the Appeal must be allowed with costs throughout.

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KUMARASWAMI SASTRI, J.—I agree.

M.H.H.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

1922,
February 23.

SUDALAIMUTHU KUDUMBAN (DEFENDANT—
PETITIONER), PETITIONER,

v.

ANDI REDDIAR (PLAINTIFF—RESPONDENT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Provincial Small Cause Courts Act (IX of 1887), sec. 17 (1), proviso—Small Cause Suit—Ex parte decree—Setting aside of—Application within time—Payment of full amount under sec. 17 (1), proviso, after time limited—Delay, whether can be excused—Limitation Act (IX of 1908)—Rules of High Court.

Order IX, rule 13, Civil Procedure Code, is applicable to suits in Provincial Small Cause Courts, as the order has not

* Civil Revision Petition No. 414 of 1922.

been excluded from application to such Courts by section 7 or Order L of the Code.

Section 5 of the Limitation Act relating to the power of Court to excuse delay in making applications, which has been extended by a Rule of the High Court to applications under Order IX, rule 13, Civil Procedure Code, applies also to applications to set aside ex parte decrees in Provincial Small Cause Courts.

The payment, required to be made along with the petition to set aside an ex parte decree in a Small Cause Suit under the proviso to section 17 (1) of the Provincial Small Cause Courts Act, is an element required in order to the completeness of the petition, and the delay in making the payment can be excused under section 5 of the Limitation Act, as delay in filing the completed petition.

Assan Mohamed Sahib v. Rahim Sahib (1920) I.L.R., 43 Mad., 579 (F.B.), referred to.

PETITION under sections 25 of Act IX of 1887 and 107 of the Government of India Act praying the High Court to revise the order of C. V. KRISHNASWAMI AYYAR, Acting Subordinate Judge of Tuticorin, in Execution Application No. 448 of 1920 and Interlocutory Application No. 850 of 1920 in Small Cause Suit No. 299 of 1920.

The petitioner, who was a defendant in a suit decreed ex parte, applied to the Court of the Subordinate Judge on its Small Cause side, to set aside the ex parte decree passed against him. He alleged in the petition that he became aware of the suit and the decree only a fortnight before he filed the petition, dated 30th July 1920. The amount paid into Court under section 17 (1) of the Provincial Small Cause Courts Act was not the entire decree amount but was short by annas eight, which was subsequently paid into Court, on objection being taken by the plaintiff, more than thirty days from the date of the filing of the petition. The plaintiff objected that the Court had no jurisdiction to receive the amount after the due date and had no power to excuse the delay in making the payment directed by the Act. The Subordinate

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Judge held that there was no power to excuse the delay in paying the full decree amount and dismissed the petition to set aside the ex parte decree. The defendant preferred this Civil Revision Petition.

T. Nallasivam Pillai and G. R. Sivaramakrishna Ayyar for petitioner.—The new Civil Procedure Code, Order IX, rule 13, clause 2, applies, and the delay can be excused under Rule (2) passed by the High Court extending section 5, Limitation Act. The Subordinate Judge held that he would excuse the delay in payment of annas eight which was a slip of the clerk of the *vakil*.

Chidambaram and Marthandam for respondent.—The new clause [Order IX, rule 13 (2)] does not apply. Section 17, Provincial Small Cause Courts Act, does not permit the application of any other than section 108 of the old Code of Civil Procedure (Act XIV of 1882). The corresponding Order of the new Code without the new clause alone will be applicable under the General Clauses Act; section 158, Civil Procedure Code cannot make the new clause in Order IX, rule 13, applicable. The extension of section 5, Limitation Act, to petitions under Order IX, rule 13, will not apply to cases of Small Cause Suits. In any event the extension of section 5, Limitation Act, to applications under Order IX, rule 13, will not apply to payment made out of time under the proviso to section 17 (1), Provincial Small Cause Courts Act.

The Court delivered the following JUDGMENT:

This is a petition asking us to revise the order of the Subordinate Judge of Tuticorin, refusing to set aside an ex parte decree passed in a Small Cause Suit. The petitioner alleges that he came to know of the decree, which had been passed on 31st March 1920, only about two weeks before he filed his petition, on 30th July

1920. Unfortunately owing, as the lower Court has found, solely to a mistake of his pleader's gumasta, he did not pay with his petition the whole of the decree amount. On the other side objecting that his payment was deficient, he, however, made good the deficiency. But he did so after the time of 30 days from the date of his knowledge of the decree, within which his petition would have been in time. The question then was whether the Court could excuse the delay under section 5 of the Limitation Act. It has refused to do so, and we have been asked to revise its order of refusal.

The lower Court has dealt with the matter at considerable length, although it is really in our opinion very simple. We do not propose to follow the lower Court through its over elaborate discussion. Shortly, its difficulty was that section 5 has been made applicable by an order of this High Court to petitions under Order IX, rule 13, but it has not been made applicable to payments under the proviso to section 17 (1) of the Provincial Small Cause Courts Act. This, however, can, in our opinion, easily be met. There was, of course, no difficulty under the former Code. Section 17 (1) of the Small Cause Courts Act makes the chapters and the sections of the Code specified in the second schedule thereof the procedure to be followed in Courts of Small Causes in all suits and in all proceedings arising out of such suits, subject, of course, so far as section 108 of the previous Code was concerned, to the proviso already referred to. The Code now in force no doubt does not reproduce the schedule of the former Code; but that is clearly because the legislature took another course and embodied the contents of the schedule in substantive provisions of the Code itself. For, there is firstly the general application of the Code to all Courts subject to the superintendence of the High Court. There is next, section 7, which

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specifies certain substantive provisions of the Code as not applicable to Small Cause Courts, and Small Cause Order 50, which excepts certain Orders. Neither section 7, however, nor Order 50, excepts Order IX (1). It is, therefore, clear that Order IX will be applicable to the case before us. This is sufficient to displace one argument, which has been suggested, that the section taken with the second schedule of the former Code, and section 158 of the present Code cannot be read as applying the provisions of the present Code, in so far as they differ from those of the former Code. Section 5 of the Limitation Act having been applied to Order IX, it will be none the less applicable to the procedure under that Order, when that procedure takes place in a Court of Small Causes.

It is then, however, argued that the payment required by the proviso to section 17 (1) must be considered as independent of the petition for setting aside a decree passed ex parte and that section 5 cannot be applied to the making of that payment as justifying the Court in excusing the delay in making it. The answer is that the payment is directed only in connexion with the filing of a petition under Order IX, rule 13, and is as much an element required in order to the completeness of such a petition as any other portion of it, for instance the stamp or verification; and this view of the payment referred to in the proviso to section 17 (1) is entirely consistent with the tenor of the judgment of the Full Bench of this Court in *Assan Mohamed Sahib v. Rahim Sahib* (1).

The result is that the order under revision cannot be sustained on the grounds given by the lower Court. The lower Court has already placed on record its opinion that, if discretion to excuse the delay in making the

payment were vested in it, this would be a case, in which that discretion might properly be exercised; and we see no reason for dissent on that point.

The remaining question is accordingly whether the petitioner did, as he alleges in paragraph 3 of his affidavit, come to know of the passing of the decree against him only about two weeks before his petition was filed. On that point the lower Court has recorded no evidence and there is no finding. We must set aside the lower Court's order and remand the petitions for readmission and disposal in the light of the foregoing after enquiry as to whether the petitioner's statement just referred to is true. Costs to date will be costs in the cause and will be provided for in the order to be passed by the lower Court.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Devadoss.

KUNJAMMAL AND THREE OTHERS (APPELLANTS—
DEFENDANTS), APPELLANTS,

1921,
December 12.

v

RATHINAM PILLAI (PLAINTIFF), RESPONDENT.*

Indian Easements Act (V of 1882), sec. 15—Right of way through another's house—Long user presumed to be as of right.

Where the plaintiff proved that his scavenger was cleaning his privy for the last 30 years and more by passing through the defendants' house,

Held, that the presumption was that the user was of right, and that the plaintiff had acquired a right of way by long user, apart from section 15 of the Easements Act.

* Second Appeal No. 1892 of 1920.

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There is nothing to prevent the acquisition of a right of way through a dwelling house.

The presumption of right from long user is not in India a presumption *de jure et de jure*, but is one which can be rebutted by proof of facts which are inconsistent with or militate against the inference.

SECOND APPEAL against the decree of C. R. VENKATESWARA AYYAR, Additional Subordinate Judge of Trichinopoly, in Appeal Suit No. 344. of 1920 (Appeal Suit No. 172 of 1920 on the file of the District Court, Trichinopoly), preferred against the decree of R. S. SANKARA AYYAR, District Munsif, Trichinopoly, in Original Suit No. 171 of 1918.

The facts are set out in the judgment.

The defendants against whom both the lower Courts granted an injunction preferred this Second Appeal to the High Court.

K. Rajah Ayyar and R. Ganapati Ayyar for appellant.

S. Krishnamurti for respondent.

The Court delivered the following JUDGMENT:

This Appeal arises out of a suit by the plaintiff for a permanent injunction restraining the defendants from obstructing the scavenger from passing through the defendants' house and cleaning the plaintiff's privy. The case for the plaintiff is that the scavengers have been cleaning his privy for over 60 years by going through the defendants' doorway marked in the plan, crossing the defendants' privy and then passing by a doorway in the wall to the plaintiff's privy which is adjacent and cleaning it. The first defendant's case was that the right was never exercised. The District Munsif found that the plaintiff's privy was cleaned for over 30 to 40 years by the scavenger passing through the defendants' house as alleged in the plaint and that

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he was not obstructed before October 1917. The suit was filed on the 19th of March 1918. On Appeal the Subordinate Judge concurred with the findings of the District Munsif and dismissed the appeal.

It is contended in Second Appeal that section 15 of the Easements Act cannot apply to easements like the present one, that there was no allegation that the right claimed was exercised as a matter of right and to the knowledge of the defendant and that there can be no right in law to a right of way through a dwelling house.

Section 15 of the Easements Act deals with the requisites necessary to acquire a right under the Act but, as pointed out by their Lordships of the Privy Council in *Rajrup Koer v. Abul Hossein*(1), other titles and modes of acquiring easements are not excluded or interfered with.

It is argued that in the present case all that both the lower Courts have found is that the privy was cleaned by the scavenger entering through defendants' doorway from between 30 to 40 years but that it has not been shown that this was done as a matter of right and that there is no presumption in such cases that the exercise was of right.

The plaintiff in paragraph 4 of the plaint states that scavengers have had access to the privy in his house through the doorway of the defendants for the past 60 years, and in paragraph 5 it is alleged that owing to misunderstandings between the parties the defendants with a view to prevent the scavenger from cleaning the privy "have locked up the door D on their side, and are obstructing and annoying the plaintiff in various ways contrary to his rights, and that the defendants have no right whatever to prevent the scavengers."

(1) (1881) I.L.R., 6 Cal., 894 (P.C.).

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Paragraph 6 states that the wrongful acts of the defendants have caused a great deal of trouble and loss to the plaintiff and are also likely to give rise to various civil and criminal proceedings and that defendants should be restrained by an injunction. So far therefore as the plaint is concerned, not only is it not alleged that the user was permissive but the allegations show that plaintiff claims it as of right.

The defendants deny that the scavengers passed through their house in order to clean the plaintiff's privy and state that even if the user were true it could not have been as of right.

Four witnesses were examined for the defendants but their evidence is to the effect that the right claimed was never exercised. There is no suggestion of any licence given by the defendants or their predecessors-in-title to the scavenger cleaning plaintiff's privy by entering through their house.

In the case of long enjoyment of the right claimed, a legal origin should, as observed by Lord HERSCHELL in *Philipps v. Halliday*(1), be presumed when there has been a long continued assertion of a right if such a legal origin were possible and the Court will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title. The presumption of a lost grant in such cases, has been recognized in the leading case of *Goodman v. Saltash Corporation*(2). Circumstances, however, should exist which would render the drawing of the presumption reasonable in law and probable in fact, but, as pointed out by FARWELL, J., in *Mercer v. Denne*(3), not only would Courts be slow to draw an inference of fact which would defeat a legal right which has been

(1) [1891] A.C., 228.

(2) [1904] 2 Ch., 534.

(3) (1882) 7 App. Cas., 683.

exercised for a very long period unless such inference is irresistible but will presume everything that is reasonably possible to presume in favour of such a right.

Where user is proved, the presumption is that it is of right till the contrary is proved. Gale in his valuable treatise on Easements observes:

"The effect of the user would be destroyed if it were shown that it took place by the express permission of the owner of the servient tenement for in such a case the user would not have been had with the intention of acquiring or exercising a right. The presumption, however, is that a party enjoying an easement acted under a claim of right until the contrary is shown." (Page 222, 9th Edition.)

In *Campbell v. Wilson*(1), it was held that where there was no evidence to show that the way over another's land had been used by permission such user over 20 years exercised adversely and under a claim of right was sufficient to enable the jury to raise the presumption of a grant. In *Saminatha Mudaly v. Velu Mudaly*(2), WALLIS, C.J., observed:

"On the other hand the user of the plaintiffs may be presumed to be as of right and to have a lawful origin, and if a lawful origin of the plaintiff's right can be suggested such an origin can be presumed."

It has been argued for the appellant that the presumption in favour of the exercise being as of right rather than licence does not apply to India, and reference has been made to the cases referred to below.

In *Shaikh Khoda Buksh v. Shaikh Tajuddin*(3), BANERJEE, J., was of opinion that it would not be safe to follow the rule of English Law without qualification. He was of opinion that as section 26 of the Limitation Act requires the user to be as of right, the onus will be on the plaintiff to prove it and that having regard to the habits of the people of the country it would not be

(1) (1803) 3 East., 294; 102 E.R., 610.

(2) (1916) 4 L.W., 128.

(3) (1903) 8 C.W.N., 359.

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right to draw the same inference from mere user as would be proper and legitimate in a case arising in England. The learned Judge quotes with approval the following passage in *Mitra on Limitation* :—

"The nature and character of the servient land, the friendship or relationship between the servient and dominant owners and the circumstances under which the user had taken place may induce the Court to hold that the user was not "as of right" although there is no direct proof that the enjoyment was had with the permission of the servient owner."

In *Meser Mullick v. Hafizuddi Mullick*(1), PIGOT and RAMPINI, JJ., were of opinion that in questions regarding a right of way the Court should consider the character of the ground, the space for which the right is claimed, the relations between the parties and the circumstances under which the user took place.

In *Saminatha Mudaly v. Velu Mudaly*(2), PHILLIPS, J., while referring with approval to the dictum of Lord HERSCHELL on *Phillips v. Halliday*(3), and to the rule laid down by Gale, was disposed to draw a difference between a right of way and a right to water. Referring to the observations of BANERJEE, J., in *Shaikh Khoda Buksh v. Shaikh Tajuddin*(4), the learned judge observes :

"No doubt, as was remarked by BANERJEE, J., in *Shaikh Khoda Buksh v. Shaikh Tajuddin*(4), that in this country it would not be right to draw the same inference from user as in England but his remarks had reference to a right of way, in respect of which I agree that the observation has considerable force ; but rights to water stand on a different footing, for in this country they are very highly valued and a licence for the use of water gratis is by no means common."

We do not think it can be said that rights of way into and through a private dwelling house in this country are not as highly valued as rights to water.

(1) (1911) 13 C.L.J., 216.
(2) [1891] A.C., 228.

(3) (1916) 4 L.W., 128.
(4) (1908) 8 C.W.N., 269.

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In *Muthu Gounden v. Anantha Gounden*(1), which related to a right of way, it was found that the plaintiff and his predecessors-in-title were using the path for over 20 years, that though there were objections more than 2 years before suit actual user did not cease till a fence was put up a few days prior to suit. It was held by SADASIVA AYYAR and BAKEWELL, JJ., that the plaintiff was entitled to succeed both under the Easements Act and under the general law. SADASIVA AYYAR, J., held that :

"When open enjoyment has taken place for a long term of years title by prescription was acquired independently of the Statute and a suit to establish that right can be brought within 12 years after the obstruction."

We do not think that the cases cited by the appellant's vakil establish that no presumption should be raised by user and that in this country enjoyment of a right of way should be presumed to be by licence till the contrary is proved. All that they decide is that there are conditions and circumstances to be taken note of in this country before the Court can come to the conclusion that the exercise of a right of way can be held to have been as of right. What the circumstances are which militate against the user being exercised as of right must like any other fact be pleaded, and it is for the Court to consider whether having regard to the existence of all or some of the conditions and considerations referred to by BANERJEE, J., a reasonable presumption can be drawn as to the exercise being of right. The presumption of right from long user is not in this country a presumption *de jures et de jure*. It only starts a party with a presumption in his favour which can be rebutted by proof of facts which are inconsistent with or which militate against the inference which in

(1) (1915) 29 M.L.J., 685.

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the absence of evidence by the defendant would entitle plaintiff to a decree.

It has been argued that there can be no right of way through another person's house. No authority has been cited in support of this proposition. Having regard to the fact that in towns houses without compounds or backyards are contiguous to each other and that very often access through another house may be the only way by which scavengers can have access, it is difficult to see why no right of way can be acquired. The right to use a kitchen of a neighbouring house for washing has been recognized in England (Gale on Easements, page 28). It is no doubt true that the use should not go beyond what is reasonably required for the enjoyment of the dominant tenement but this does not mean that the right itself cannot be acquired where its user may be irksome. All that Mr. Rajah Ayyar was able to urge was the trouble his clients will be put to in having to keep the door of their house open.

We are of opinion that the decrees of the lower Courts are right and dismiss the Second Appeal with costs.

N.B.

PRIVY COUNCIL.*

SUBBARAYA PILLAI (SINCE DECEASED) AND OTHERS
(PLAINTIFFS),

1922,
May 21.

v.

RAJA OF KARVETNAGAR (PLAINTIFF) AND OTHERS
(DEFENDANTS).

[On Appeal from the High Court of Judicature
at Madras.]

Limitation—Suit for possession—Alleged benami holding—Contract for “sale”—Construction—Specific performance—Judicial Committee practice—Mortgage between co-defendants—Reversal of decree for plaintiff—Order preserving mortgagee's rights—Indian Limitation Act (IX of 1908), Sch. I, art. 113.

A suit was brought in 1900 for possession of villages on payment of such sum as might be found due. The plaintiff alleged that the villages had been purchased by the first defendant in 1883 as benamidar for the plaintiff's father (deceased), and that in 1888 the first defendant had contracted to convey them to the plaintiff upon payment of a sum then found to be due. The contract of 1888 was expressed to be for a “sale” of the villages to the plaintiff and, in the view of the Judicial Committee (reversing the High Court, its terms were consistent only with the first defendant being the legal and beneficial owner.

Held, that whatever was the original nature of the purchase, the suit must be regarded as one for specific performance of the contract of 1888, and that it was accordingly barred by the Indian Limitation Act, 1908, Schedule I, article 113.

The first defendant had in 1894 and 1898 mortgaged one of the villages to the third defendant, and the decree of the High Court in favour of the plaintiff had provided for payment of the mortgage. The first defendant not opposing an order preserving the mortgagee's rights from being affected by the Limitation Act, the Judicial Committee, in allowing the first defendant's appeal, so determined.

* Present: Lord PHILLIMORE, Lord CARSON and Sir JOHN EDGE.

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APPEAL (No. 22 of 1919) from a judgment and decree of the High Court (January 14, 1916) reversing a decree of the Subordinate Judge of North Arcot.

The suit was instituted on August 24, 1900, by the Court of Wards on behalf of the first respondent to obtain possession of five villages in circumstances stated in the judgment of the Judicial Committee. The plaintiff alleged that the villages had been sold in 1883 under a decree against the plaintiff's father, and had been purchased by the first defendant as agent for, and at the request of, the plaintiff's father, and that by an agreement in writing made on August 25, 1888, the first defendant had agreed to convey them to the plaintiff upon Rs. 99,568, the sum then found to be due, being paid or secured by mortgage. The plaintiff claimed a declaration of title, and possession upon payment of, or execution of a mortgage for, such sum as should be found due on taking accounts. The other defendants were mortgagees under mortgages executed by the first defendant; the plaintiff was willing that provision should be made for their discharge if they were valid, which he denied. The defendants denied that the first defendant was a trustee, and contended that the rights of the parties were governed by the agreement of 1888, and that any suit for specific performance of that agreement was barred by limitation; the mortgagee defendants also pleaded that they were bona fide purchasers for value. The mortgages to the third defendant were made in 1894 and 1898.

The terms of the agreement of August 25, 1888, sufficiently appear from the judgment.

The Subordinate Judge held that the rights of the parties depended upon that agreement. In his view, it did not constitute a charge upon the property, and the

remedy of the plaintiff was for specific performance, and that remedy was barred by limitation.

On Appeal the learned Judges of the High Court (Sir S. SUBRAHMANYA AYYAR, Officiating C.J., BENSON and BHASHYAM AYYANGAR, JJ.) agreed that the legal relation of the parties was settled and determined by the agreement of 1888, but held that the agreement proceeded on the footing that the plaintiff was the beneficial owner, the word "sale" being used in the sense of a conveyance by a legal to a beneficial owner. They held therefore that the suit was really one by a beneficial owner for possession on payment of such sums as were due, and consequently was not barred as it would have been if it were for specific performance of the contract of 1888. They remitted the case for further findings, and after certain further proceedings the High Court delivered its final judgment. A formal decree was passed which settled the amounts due by the plaintiff to the first respondent, and by the first defendant to the other defendants, and provided for payment of the mortgages out of the sum to be paid by the plaintiff (defendant No. 5, being found to be a bona fide purchaser, in full; the other mortgagee defendants, being found not to be so, proportionately), for a conveyance to the plaintiff on payment, and for a sale if the plaintiff failed to make payment.

De Gruyther, K.C., and *Dube* for the appellants.—The plaintiff is precluded from asserting any title, legal or equitable, to the villages by section 317 of the Code of Civil Procedure, 1882. The plaintiff's claim, if any, is for specific performance of the agreement of 1888, and that claim is barred by the Indian Limitation Act, 1908, Schedule I, article 113. The agreement, upon its true construction, was one for the sale of the villages; its terms are consistent only with the first defendant being the beneficial owner. If this Appeal succeeds the

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appellants do not oppose the making of an order preserving the rights of defendant No. 3 as a mortgagee.

Parikh for respondents Nos. 8, 9, 10, being the legal representatives of defendant No. 3.—These respondents are concerned only with the preservation of their rights as mortgagees. An order should be made to preserve the rights of this defendant from being barred; the delay in enforcing them not being due to any fault or laches.

The other respondents did not appear.

LORD
CARSON.

The JUDGMENT of the Judicial Committee was delivered by

LORD CARSON.—In this suit the present Raja of Karvetnagar seeks to recover possession from the defendants of certain villages on payment of such sum, if any, as may be found due.

Both the Subordinate Judge of North Arcot and the Judges of the High Court of Judicature at Madras were in agreement that the legal relation between the plaintiff and the first defendant is settled and determined by a contract in relation to the said villages entered into on August 25, 1888, between Sri Maharajulangaru, the plaintiff's father, and the first defendant, Saravana Pillai, who was the first defendant, is now dead, but is represented in this Appeal. The remaining defendants claimed to be bona fide purchasers for value from the first defendant without notice of any claim by the plaintiff. The Subordinate Judge held that upon the construction of the said contract Saravana Pillai was the owner of the villages, and agreed to sell the same to the plaintiff for a consideration of Rs. 99,568-15-6, to be paid or secured as stated in the fifth paragraph of the said contract of August 25, 1888. The High Court, on the other hand, held that upon the true construction of the contract the

plaintiff was the beneficial owner of the villages and Saravana Pillai only the legal owner, and that in the matter of pecuniary obligations incurred by Saravana Pillai in connexion with the purchase of the villages, and in the matter of the other money dealings between him and the plaintiff, there was found due from the plaintiff a sum of Rs. 99,568-15-6 in settlement of accounts. It is admitted in the judgments of the High Court that if the said contract were a contract for sale the suit would essentially be one for the specific performance of a contract, and in that case it would be clearly barred under article 113 of the Indian Limitation Act. It is well to bear in mind that the terms of that article relate to any contract.

On the view taken by the High Court of the contract, however, it was held that the suit is really one for the possession of immovable property by a beneficial owner thereof against the legal owner on payment, if necessary, of such sum if any, as may be found due; that the execution of a conveyance by the first defendant to the plaintiff was not essential, and is unnecessary if he gets a decree for the recovery of the villages as beneficial owner.

The villages in question originally belonged to the plaintiff's late father—the then Raja of Karvetnagar. They were sold in 1883 in Court auction in Original Suit No. 5 of 1879, and purchased by the first defendant as stated in the contract. It is alleged by the plaintiff that this purchase was made on behalf of the plaintiff's father, that a part of the purchase money was paid out of his funds and the balance obtained from one Krishnama Chari, to whom the villages appear to have been sold by the first defendant, subject to a condition of reconveyance on payment of a stipulated sum. A suit to compel such reconveyance was instituted

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in the High Court at Madras, and on October 16, 1889, a decree directing reconveyance was made. In pursuance thereof a conveyance was duly executed on February 7, 1890, and since that date the first defendant had until he died been in possession of the villages, acting as the absolute owner thereof. The contract of August 25, 1888, was entered into during the pending of the original suit. It recites briefly the facts above stated and refers to the pendency of the said suit, and then proceeds as follows :

" Under these circumstances, under the order of Sri Maharajulangu the accounts were looked into in their presence in respect of items due to the said Saravana Pillai relating to the said villages, and also relating to all money transactions between Saravana Pillai and Sri Maharajulangu. On looking into the accounts, the amount found due to the said Saravana Pillai was Rs. 99,568-15-6. Saravana Pillai consented to receive this sum of rupees, etc., and sell the aforesaid villages to Sri Maharajulangu."

Whatever may have been the original nature of the purchase by Saravana Pillai, or the arrangements entered into to raise the purchase money, this contract was a settlement of questions of account in relation to the said villages and other matters, and under the terms of it Saravana Pillai is treated as the legal and beneficial owner. The second clause of the contract further strengthens this construction. It provides that as soon as Saravana Pillai obtains a decree in the suit already referred to (which, as pointed out, he did obtain), he should sell the villages to Maharajulangu, and the said Maharajulangu should purchase the same for the sum of Rs. 99,568-15-6. " He should not sell to others without the consent of the Maharajulangu "—a provision which would be meaningless unless he was the legal and beneficial owner. The fifth clause of the agreement provides for payment of interest on the purchase money until paid, and that until the principal

and interest are paid the Maharajulangu should mortgage the villages " which Saravana Pillai has consented to sell, or other villages, etc."—properties which are acceptable to Saravana Pillai as security for the said principal and interest—and execute a document therefor. The plaintiff took no further action in the terms of the said contract. In the year 1899 his estate was taken under the management of the Court of Wards, and this suit was instituted by the manager appointed by the Court of Wards on August 24, 1900. Before instituting this suit, it is to be observed that on August 23, 1900, the acting Secretary to the Court of Wards, by a notice in writing, called upon the first defendant to execute a conveyance of the villages to him on behalf of the plaintiff and to tender a mortgage for execution by him on behalf of the plaintiff.

Their Lordships agree with the Subordinate Judge that no charge is created by the contract over the villages in question, and that the plaintiff had no right to recover possession of the property absolutely or conditionally on his executing a mortgage deed or making a payment to the first defendant.

The suit, therefore, becomes one for the specific performance of a contract which is barred by the section of the Limitation Act already referred to.

This Board are, for the reasons stated, of opinion that this Appeal should be allowed and the judgment of the Subordinate Judge restored, and that the appellants should have their costs in the Courts below and of the Appeal.

It is unnecessary, having regard to this conclusion, to consider the case of the respondents, the legal representatives of defendant No. 3—for whom Mr. Parikh appeared—further than to say that it was agreed in the course of the argument by Mr. De Gruyther, counsel on behalf of the appellants, that the interests of Mr.

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Parikh's clients should not be affected by any question of any Statutes of Limitation which might be raised in answer to their claim, owing to the delay which has been occasioned by the institution and the carrying out of the proceedings in this suit, and their Lordships so determine.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *John Josselyn*.

Solicitors for respondents 8, 9 and 10: *Barrow, Rogers and Nevill*.

A.M.T.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., Chief Justice,
Mr. Justice Ayling, Mr. Justice Coutts Trotter, Mr. Justice
Kumaraswami Sastri and Mr. Justice Devadoss.*

1922,
January 12.

YERUKOLA alias PENTA JOGULU (DEAD) AND OTHERS
(PLAINTIFF'S LEGAL REPRESENTATIVES), APPELLANTS,

v.

YERUKOLA alias PENTA TATAYYA AND SIX OTHERS
(DEFENDANTS 1 TO 3 AND 5 TO 8), RESPONDENTS.*

Limitation Act (IX of 1908) arts. 89, 120, 109, 127—Joint Hindu family—Division of property not completed—Properties left in the hands of the different members—Suit for partition and account—Money received from debtors—Rents and profits—Limitation.

Three brothers, members of a joint Hindu family, became separated. Arbitrators were appointed to divide the properties by metes and bounds, but only some of them were so divided, and the rest remained in the hands of the different members, who collected outstandings from debtors and rents from tenants. In a suit brought by one of the brothers against the others for partition and an account,

Held that the properties remaining undivided were held by the brothers as tenants-in-common, that the article of the

* Appeal No. 367 of 1918.

Limitation Act governing the claim for an account and share of the moneys and rents and profits collected was not article 109 or 127; that article 62 was not applicable, as a suit for money had and received would not lie by one tenant-in-common against another who had received more than his share, the appropriate remedy in such a case being an action for an account, in which all just allowances could be made;

that the article applicable was 120, unless from the facts of the case, it could be inferred that the person receiving the moneys and rents and profits acted as the agent of the others, in which case article 89 would apply.

In either case, time would begin to run from the date when an account was demanded and refused.

APPEAL and Memorandum of Objections against the judgment and decree of B. C. SMITH, District Judge of Ganjām at Berhampur, in Original Suit No. 10 of 1918.

The facts are fully stated in the Opinion.

The Appeal was heard by WALLIS, C.J., and OLDFIELD, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH:

Plaintiff-appellant, his brothers Dalayya (deceased before suit) and fourth defendant with the other defendants, sons and grandsons of the two last mentioned, until 1905 constituted a joint family. It is not disputed that in that year they separated, appointing arbitrators who in fact divided some of the family properties according to the lists, Exhibits A series; but owing to disputes the partition was not completed and in 1917 plaintiff brought this suit for the division of the remaining properties, which during the interval had been enjoyed by one or other of the parties under a tenancy-in-common. The Appeal has been argued against two of the substantial provisions in the lower Court's decree and also against its disallowance of various items on their merits and with reference to limitation. The Memorandum of defendants Nos. 1 to 3, 5 to 7 also relates to particular items. That of eighth defendant is not pressed.

Plaintiff objects first to the award under issue 9 of

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jyestabhagam or an extra share to 1 to 3 defendants, as descendants of Dalayya, the eldest member of the joint family. Such an award is not authorized by Hindu Law as administered in this Presidency: *Rajangam Ayyar v. Rajangam Ayyar*(1), *Venkata Reddi v. Kuppa Reddi*(2). Nor can we agree that the evidence establishes any custom of sufficiently certain character to be binding on the parties. In fact the lower Court's allowance of 2½ per cent of the value of the property available for division did not correspond with the evidence of any witness and was merely arbitrary. The provision for jyestabhagam must therefore be omitted from the decree.

Next the lower Court gave the fourth defendant and his branch credit for the expenditure incurred since the severance of interests in 1905 on the marriages of three of his children and to be incurred on the marriage of a fourth in the future. The texts authorizing the making of provision at partition for subsequent marriages are cited in *Srinivasa Iyengar v. Thiruvengadathaiyengar*(3). But neither they nor that decision contemplate such provision for the marriages of any but the brothers, who are parties to the division; and *Gopalam v. Venkataraghavulu*(4) and *Jairam v. Nathu*(5) are distinct authorities against the extension of this concession to persons who are not in the same degree of relationship as those who have been married at the family expense. The decree must therefore be modified on this point.

The objections taken by plaintiff and defendants Nos. 1 to 3 and 5 to 7 to the lower Court's findings on the merits of various items can be disallowed at once for the reasons given in its judgment except in the cases to be referred to. The first of these, to follow the order

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of the judgment, is item 2 in schedule F, paddy due to the family on a bond of 1905. The existence of the debt is not disputed. The evidence that it was collected by Dalayya is hearsay and, if it was not collected, it must in the ordinary course have become barred. It is not plaintiff's case that it did so through the negligence of Dalayya. In these circumstances this item must be disallowed and first to third and fifth to seventh defendants' memorandum must be allowed in respect of it.

The lower Court would but for its finding on limitation have allowed Rs. 725 on account of item 11, F schedule. It has not noticed that further realization of Rs. 214-9-7 less Rs. 2 expenditure is shown in Exhibit XXVII(a). Rupees 937-9-7 should therefore have been shown as available for division under this item.

Item 14 of the same schedule was claimed as representing the amount due from Chelluri Dalappa on Exhibits VI, VII and VIII, two bonds and a promissory note, dated 1885, 1887 and 1890. The main question is whether this liability was, as defendants say, discharged before Exhibit Y(1) in 1909 by a payment to plaintiff or is still subsisting and is represented by the whole or part of the debts secured by the mortgages, Exhibits W series, in favour of Dalayya and by the land transferred to him under Exhibit U. The recital in Exhibit Y(1) shows that this debt was unpaid in 1905, and the same recital is the only evidence of its payment to plaintiff, none of the Chelluri family being called and no receipt by plaintiff being in evidence. There is nothing in the shape of vouchers or accounts to show how any debt to Dalayya, which could have been represented by Exhibit Y(1), was incurred; and the very general recital therein that it was the settlement of an account relating to previous promissory notes and cadjan items for marriage and household expenses, festivals and

(1) (1920) 32 M.L.J., 382.

(2) (1918) 8 L.W., 400.

(3) (1918) I.L.R., 38 Mad., 556.

(4) (1917) I.L.R., 46 Mad., 632.

(5) (1907) I.L.R., 31 Rom., 54.

YERUKOLA v. YERUKOLA. kist, carries the matter no further. That Exhibit Y(1) is registered, although no special reason for its being so has been given, suggests that it was executed for use as evidence against plaintiff shortly after, as Exhibit XL shows, he had been exerting himself to recover another large debt due to the family. The lower Court was therefore justified in treating Exhibit Y(1) as substituted for Exhibits VI, VII and VIII and the subsequent documents, Exhibits U and W series, the connexion of which with Exhibit Y(1) is not disputed, as property liable for partition, at least so far as they represent the debt evidenced by Exhibit Y(1). The Memorandum of Objections on this item must therefore be dismissed. The Appeal is against the lower Court's conclusion that only Exhibit W series is available as assets of the family; and, as we cannot follow its statement that plaintiff's claim against the property bought under Exhibit U is time-barred, the Appeal must be allowed in respect of it.

As regards the profits for fasli 1317 of a lease, which are part of item 8, schedule G, plaintiff's claim to a share is disputed on the ground that he has not paid his share of the rent. The answer is that he can be debited with it in the account.

As regards the amount of the profits, the lower Court's estimate based on the amount of rent is more probable than that supported by defendants' evidence and must be accepted.

As regards item 6 of G schedule and other items not specifically referred to, we agree with the lower Court for the reasons it has given.

As regards the properties of A schedule lands, the lower Court's decree and judgment are not clear. If they mean that plaintiff received Rs. 288-8-0 for each of the years, that is, it is admitted, wrong, Rs. 288-8-0 being the profits for three years.

As regards limitation, it was not contended that the suit was barred as to lands which before division were joint family property, but as regards money and receipt of profits from the lands held in common the District Judge has held that the suit was governed by articles 62 and 109, respectively, and the decree has been passed on this basis. For the plaintiff-appellant, it has been contended that as regards these items the suit is governed either by article 127 or article 120. Article 127 is for a share of property which is the property of a joint family at the date of suit, and appears to be in terms inapplicable to property which by reason of a division prior to suit has ceased to be the property of a joint family and is held by the members of the family as tenants-in-common. It was so held by one of us in *Kumarappa Chettiar v. Saminatha Chettiar*(1), though *Seshagiri Ayyar, J.*, the other learned Judge, reserved his opinion. This ruling appears to be in accordance with the language of the article and with the decisions of the other High Courts and we see no reason to differ from it.

Assuming that article 127 is inapplicable, the next question is whether, as regards money, article 62 should be applied as contended for the respondents or article 120 as contended for the appellants. Article 62 has been held applicable in *Arunachala v. Ramasamy*(2), *Tellis v. Saldanha*(3) and *Vaidyanatha Aiyar v. Aiyasamy Aiyar*(4), which latter case was followed in *Avancha Lakshminarasamma v. Avancha Lakshamma*(5) and *Segu Ohidambaramma v. Segu Balayya*(6), and the same view was taken in *Mahomed Wahib v. Mahomed Ameer*(7),

(1) (1919) I.L.R., 42 Mad., 431.

(2) (1883) I.L.R., 6 Mad., 402.

(3) (1887) I.L.R., 10 Mad., 69.

(4) (1909) I.L.R., 32 Mad., 191.

(5) (1913) 14 M.L.T., 325.

(6) (1911) 2 M.W.N., 467.

(7) (1905) I.L.R., 32 Cal., 527.

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YERUKOLA. where the decisions are reviewed by MOOKERJEE, J., who has also dealt with the rights of tenants-in-common in other respects in *Mahesh Narain v. Nowbat Pathak*(1). The cases mentioned were all cases in which money had been recovered by one of several persons interested therein as tenants-in-common, which appears to be the position of the members of a Hindu family after partition in respect of money which was left undivided. On the other hand, article 120 has been held applicable in similar cases in *Khadarsa Hajee Bappu v. Puthen Veettil Ayissa Ummah*(2), *Marian Beeviammal v. Kadir Meera Sahib Taragan*(3), *Abdul Rahiman v. Pathummal Rivi*(4) and *Segu Chidambaramma v. Segu Balayya*(5) and *Madar v. Kader Moideen*(6) and *Subba Rao v. Rama Rao*(7) and we have also been referred to *Muhammad Habibullah Khan v. Safdar Husain Khan*(8) and *Farsotam Rao Tantis v. Radha Bai*(9), a decision of RICHARDS, C.J., and BANERJEE, J., with which, as at present advised, we are disposed to agree. We find some difficulty in reconciling these decisions. Article 62 deals with suits for money received by the defendant for the plaintiff's use and applies to the well-known class of suits for money had and received. It has been expressly held in England that one tenant-in-common cannot maintain an action for money had and received against his co-tenant, his remedy being an action for account to recover what the defendant has received in excess of his share: *Thomas v. Thomas*(10). HARRINGTON, J., in *Mahomed Wahib v. Mahomed Ameri*(11), has explained this decision as proceeding merely on the ground that in

England a suit for an account was prescribed in such cases by the Statute of Anne. But, as explained in *Freeman on Co-tenancy*, paragraph 274, the object of that Statute was to remedy a defect in the common law which left tenants-in-common without a remedy and to give the parties a remedy in the common law Courts which till then they had to seek in equity; the gist of the new statutory action for an account being not that the defendant had received part of the common property but that he had received more than his share, just as in the case of partnership one partner cannot sue another for a share of a partnership debt collected by him but only for what may be found due on taking the partnership accounts. See also 2 Blackstone's Commentaries, page 194, where it is observed that "by the common law no tenant-in-common was liable to account with his companion for embezzling the profits of the estate; though, if one actually turns the other out of possession, an action of ejectment will lie against him."

As regards profits, article 109, which the District Judge has applied, is in terms inapplicable, as it applies to suits "for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant," and it appears to be well settled that a receipt of profits by one of several tenants-in-common is not wrongful. In *Mahomed Riasat Ali v. Hasin Bannu*(1), where article 109 was held applicable, there was no question of receipt of profits by a co-sharer, as the widow had established her right to the possession of the whole of her deceased husband's estate for her life. If article 109 is inapplicable, the only choice is between article 120 and article 62, and, if article 120 be held applicable the question will still arise as to whether

(1) (1906) I.L.R., 32 Calo., 537.

(3) (1915) 29 I.C., 275.

(5) (1911) 2 M.W.N., 167.

(7) (1917) I.L.R., 40 Mad., 291.

(9) (1915) 28 I.C., 53.

(2) (1911) I.L.R., 31 Mad., 511 (F.B.).

(4) (1916) 30 M.L.J., 104.

(6) (1916) I.L.R., 39 Mad., 54.

(8) (1885) I.L.R., 7 All., 25.

(10) (1850) 5 Ex., 28.

(11) (1905) I.L.R., 32 Calo., 527.

(1) (1894) I.L.R., 21 Calo., 157 (P.C.).

YERUKOLA v. YERUKOLA. the right to sue is to be deemed to accrue on the receipt of the profits or when an account is asked for and refused. In view of the conflict of decisions, we have decided to refer to a Full Bench the question, "what are the articles applicable to the claims for money and mesne profits in the present suit?"

ON THIS REFERENCE—

C. S. Venkata Achariyar and M. Suryanarayana, for appellants.—With regard to the debts, the District Judge has relied on article 62 of the Limitation Act, and with regard to mesne profits, on article 109, and has held that plaintiff's claim for more than three years is barred. I contend that the proper article is article 127, or 120 of the Limitation Act. This is a suit for partition of family property. There is no article in the Limitation Act governing such a suit.

[COUTTS TROTTER, J.—Is a suit, after partition, for division by metes and bounds a suit for partition?]

Yes. The property must have been joint family property; it need not necessarily be joint family property at time of suit. Articles 62 and 109 have no applicability. The three brothers being tenants-in-common there can be no wrongful receiving and so article 109 cannot apply. Article 62 applies only to money. Here paddy was received.

[KUMARASWAMI SASTRI, J.—When one co-tenant collects on behalf of all, why should he not be treated as an agent. Is it not implied agency? Why should article 89 not apply?]

It would apply where he was not setting up a claim against his co-tenants. In *Subba Rao v. Rama Rao*(1) it was held that article 120 applied.

[CHIEF JUSTICE.—That is direct authority in your favour that article 120 applies?]

(1) (1917) I L.R., 40 Mad., 291, 295.

YERUKOLA v. YERUKOLA. Yes and they do not consider article 89 and the question of agency. Reference was also made to *Khadarsa Hajee Bappu v. Puthen Veettil Ajissa Ummah*(1), *Madar v. Kader Moideen*(2), *Robert Watson & Co., Ltd. v. Ram Chand Dutt*(3), *Abdul Rahiman v. Pathummal Bivi*(4), *Marian Beeviammal v. Kadir Meera Sahib Taragan*(5), *Umardaraz Ali Khan v. Wilayat Ali Khan*(6), *Parsotam Rao Tantia v. Radha Bai*(7), *Venkata Reddi v. Kuppu Reddi*(8). Property which has been collected is the same as property in their possession: *Ganesh Dutt Thakoor v. Jewach Thakoorain*(9).

P. Narayanamurti for respondent.—No agency can be implied on the facts of this case. Article 62 applies and not article 89 or 120. Reference made to *Arunachela v. Ramasamy*(10), *Tellis v. Saldanha*(11), *Vaidyanatha Aiyar v. Aiyasamy Aiyar*(12), *Avancha Lakshminarasamma v. Avancha Lakshamma*(13), *Segu Chidambaramma v. Segu Balayya*(14), *Ramalagu Servai v. Solai Servai*(15), *Sankunni v. Govinda*(16), *Banoo Tewary v. Doona Tewary*(17). After division each brother is entitled to a third on collection. They are not co-tenants, and each brother is entitled to ask for his share without asking for a general partition. There is no manager after division of status and there is no co-parcenary.

[DEVADOSS, J.—If your proposition is correct there might be as many suits as there are items of property?]

Yes.

(1) (1911) I L.R., 34 Mad., 511 (F.B.).

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| (2) (1916) I.L.R., 39 Mad., 54. | (3) (1896) I.L.R., 23 Calc., 799. |
| (4) (1916) 39 M.L.J., 104. | (5) (1915) 39 I.C., 275. |
| (6) (1897) I.L.R., 19 All., 169. | (7) (1915) I.L.R., 37 All., 318. |
| (8) (1921) 13 L.W., 260. | (9) (1904) I.L.R., 31 Calc., 262 (P.C.). |
| (10) (1883) I.L.R., 6 Mad., 402. | (11) (1887) I.L.R., 10 Mad., 69. |
| (12) (1909) I.L.R., 32 Mad., 191. | (13) (1913) 14 M.L.T., 325. |
| (14) (1911) 2 M.W.N., 467, 471. | (15) (1921) 41 M.L.J., 274. |
| (16) (1914) I.L.R., 37 Mad., 381. | (17) (1897) I.L.R., 24 Calc., 309, 315. |

YERUKOLA v. YERUKOLA. [CHIEF JUSTICE.—What do you say is the position of these persons in law after division?]

Co-owners.

[CHIEF JUSTICE.—One co-owner cannot bring an action against another in common law for money had and received.]

In *Weber Ali v. Gaddai Behari*(1) the principle of money had and received was applied to an action by one of two co-obligors of a bond. See also *Syad Lutf Ali Khan v. Mussamat Afzalunissa Begum*(2), *John v. Dodwell and Company*(3), *Binode Lal v. Preo Nath*(4), *Kundun Lal v. Bansi Dhar*(5), *Arunachela v. Ramasamy*(6), *Dalip Singh v. Tulshi Ram*(7), *Masih-ud-din v. Imtiaz-un-nissa*(8), *Amina Bibi v. Najm-un-nissa Bibi*(9), *Abdul Ghaffar v. Nur Jahan Begam*(10).

WARR,
J.J.

SCHWABE, C.J.—The question referred to the Full Bench is: What are the articles of the Limitation Act of 1908 applicable to certain money and profits received by two brothers or their representatives under the following circumstances? Three brothers had been members of an undivided joint Hindu family. In 1905 they separated and appointed arbitrators to divide the ancestral property. Before division was complete, disputes arose and the properties remaining undivided were left in the hands of different members of the family, until in 1917 this suit was brought for partition and for account. It is found, and no doubt correctly, that the properties remaining undivided were held

during the period in question under a tenancy in common. Money was received from debtors in respect of debts which were owned in common, and rents and profits partly in money and partly in kind were received in respect of lands also owned in common. When asked to account for and pay the shares of the other co-owners, the defendants set up the Limitation Act in answer, and there being a conflict of judicial views on the subject, it is for us to decide which article in the schedule of the Act applies.

The articles relied upon by those who claim to keep what they have received were articles 62 and 109, whereas plaintiff relied on article 120 or 127.

I agree that articles 109 and 127 have no application on the grounds stated in the Order of Reference.

Article 62 relates to suits for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. These are technical terms of the Law of England used to cover a great variety of cases in which it can be said that the defendant has received money which really belongs to the plaintiff. There is, however, one case in which that form of action would not lie in England and that is by one tenant-in-common against another who has received more than his share. In fact, in such a case until the passing of the Statute 4 Anne, ch. 16, sec. 27, no action would lie at all and by that Statute an action was permitted but only for an account. In *Thomas v. Thomas*(1), one of two tenants in common of some lands alleged that the other alone had received all the rents arising from those lands and he brought his action for money had and received. It was held by the Court of Exchequer (the judgment of the Court being delivered by

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(1) (1878) 3 C.L.R., 188.
(2) [1918] A.C., 568, 570.
(3) (1890) I.L.R., 8 All., 170.
(7) (1897) 7 A.W.N., 100.
(9) (1915) I.L.R., 37 All., 322.

(3) (1871) 9 B.L.R., 348 (P.O.).
(4) (1917) 40 I.C., 172.
(6) (1888) I.L.R., 6 Mad., 402.
(8) (1915) I.L.R., 37 All., 40.
(10) (1915) I.L.R., 37 All., 424.

(1) (1850) 5 Ex., 28.

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that very eminent Judge, PARKE, B.) that no such action lay, the reason being that the rents remained undivided and no one tenant-in-common was entitled to any specific part and further the collecting tenant-in-common would be entitled to all just allowances which could not be given in that form of action; but could be given in an action for an account which under the Statute was permitted. It is worth observing that in *Mahomed Wahib v. Mahomed Ameer*(1), in which it was held that article 62 applied to a case somewhat similar but in my view distinguishable from this, HARRINGTON, J., states that the ground of decision in *Thomas v. Thomas*(2) was that the plaintiff was bound to pursue his remedy for an account under 4 Anne, ch. 16, which in my view is not correct, while MOOKERJEE, J., states the ground of the decision correctly but gives no effect to it. This, in my judgment, is in itself a sufficient ground for holding that article 62 has no application to this case, it being quite impossible to say that any particular debt or rent or profit, or any part of either, was received for the use of any particular tenant-in-common. Indeed, on partition any of the debts or rents or profits might be awarded in toto to any of the tenants-in-common, and further, in this case each of the tenants-in-common was collecting part of the common properties or the income from it and no doubt incurring expense in so doing. An action for an account would be appropriate; an action for money had and received would, in my judgment, be quite inappropriate. This view was taken in *Subba Rao v. Rama Rao*(3), in which it was held that article 120 and not article 62 applied in similar circumstances.

There are a large number of cases in the High Courts of India which decided in favour of article 62

(1) (1906) I.L.R., 32 Cal., 527.

(2) (1850) 5 Ex., 28.

(3) (1917) I.L.R., 40 Mad., 291.

as against article 120. Some are distinguishable. With those that are not, I do not agree. Of the Madras cases, the earliest is *Arunachela v. Ramasamy*(1), and this case has been treated in later cases as an authority for holding that article 62 applied to moneys collected by one of several tenants-in-common. It did not so decide, for, in that case a debt had been collected by one of two brothers, each of whom was entitled to a third of the debt: but this was after partition and the debt had on partition been divided. The collecting brother had no authority or right to collect his brother's one-third share and it was a specific sum which the brother was alone entitled to and for which an action for money had and received would properly lie. *Tellis v. Saldanha*(2), *Vaidyanatha Aiyar v. Aiyasamy Aiyar*(3), *Ramalagu Servai v. Solai Servai*(4), *Segu Chidambaramma v. Segu Balayya*(5), *Avancha Lakshminarasamma v. Avancha Lakshamma*(6), *Binode Lal v. Preo Nath*(7), purported to follow *Arunachela v. Ramasamy*(1), but they really extended the doctrine to cases like the present. To the same effect are *Banoo Tewary v. Doonoo Tewary*(8), *Mahomed Wahib v. Mahomed Ameer*(9), *Kundun Lal v. Bansi Dhar*(10), *Thakur Prasad v. Partab*(11), *Masih-uddin v. Imtiaz-un-nissa*(12), *Amina Bibi v. Najm-un-nissa Bibi*(13), *Abdul Ghaffar v. Nur Jahan Begam*(14). On the other hand, the contrary has been held in *Abdul Rahiman v. Pathummal Bivi*(15), following *Marian Beevi-ammal v. Kadir Meera Sahib Taragan*(16), *Sabba Rao v.*

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(1) (1883) I.L.R., 6 Mad., 402.

(2) (1887) I.L.R., 10 Mad., 69.

(3) (1909) I.L.R., 32 Mad., 191.

(4) (1921) 41 M.L.J., 274.

(5) (1911) 2 M.W.N., 467.

(6) (1918) 14 M.L.T., 325.

(7) (1917) 40 I.C., 178.

(8) (1897) I.L.R., 24 Cal., 309.

(9) (1906) I.L.R., 32 Cal., 527.

(10) (1880) I.L.R., 3 All., 170.

(11) (1884) I.L.R., 6 All., 442.

(12) (1915) I.L.R., 37 All., 40.

(13) (1915) I.L.R., 37 All., 233.

(14) (1915) I.L.R., 37 All., 434.

(15) (1916) I.L.R., 30 M.L.J., 104.

(16) (1915) 23 I.C., 275.

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Rama Rao(1), *Umardaraz Ali Khan v. Wilayat Ali Khan*(2), *Parsotam Rao Tantia v. Radha Bai*(3), *Venkata Reddi v. Kuppu Reddi*(4), *Gabu v. Zipru*(5). All these cases decided against article 62 and, excepting the last, in favour of article 120. In *Subba Rao v. Rama Rao*(1), and *Venkata Reddi v. Kuppu Reddi*(4), it was held that article 62 does not apply to transactions in which the defendant is not under a mere duty to hand over the moneys which he has received but has other duties as well in respect of it. Without going through all these cases in detail, for the reasons stated above, I prefer the latter series of cases—in which it was held that article 62 did not apply—to the former, in which it was held that it did.

Holding as I do that article 62 has no application, it follows that article 120, which applies to suits for which no period of limitation is provided elsewhere in the schedule, would apply unless there is some other article applicable. In my judgment, article 89 has to be taken into account. This article applies to suits by a principal against his agent for moveable property received by the latter and not accounted for, and the period of limitation is three years from the time when the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates. The reference to us is wide enough to cover this question. But it has not been considered in the Court below or by the Referring Bench and I doubt whether we have really sufficient materials before us upon which to decide whether it applies or not. I think, however, that it is desirable to say something about it, and leave it to the Referring Bench to decide whether,

(1) (1917) I.L.R., 40 Mad., 391.

(2) (1915) I.L.R., 37 All., 312.

(5) (1921) I.L.R., 48 Bom., 312.

(3) (1897) I.L.R., 19 All., 169.

(4) (1921) 12 L.W., 390.

on the facts which are before it, it applies in this case or not. If the facts be that these moneys and rents and profits were received, with the consent of all concerned, by the various persons in possession pending final settlement by division, I think that, in the absence of evidence to the contrary, each of such persons should be considered as receiving as agent for himself and his co-owners; he would have authority express or implied to receive and would be acting upon that authority on behalf of the co-owners and not on his own behalf adversely to them. We were referred to two letters, Exhibits III and M (pages 66 and 68 of the documents paper), and to passages in the judgment of the District Judge which seem to indicate that all the moneys, rents and profits, were collected in fact on behalf of the co-owners, and it would, in my view, be very difficult indeed for a person collecting undivided parts of an estate in this manner to say that he was acting otherwise than for the benefit of himself and other co-owners. In *Bamoo Tewary v. Doona Tewary*(1), on facts similar to these, it was held that the defendant was acting on behalf of other co-sharers as their agent in the realization of their shares, and in a recent case, in *Gabu v. Zipru*(2), where an elder brother after partition by agreement with his brothers realized parts of the estate, it was held that he acted as agent and that article 89 applied. With this judgment I fully agree. That case differs from this only in that there was in that case an express agreement that the elder brother should realize and divide among the three brothers, while in this case there is no such agreement. But such an agreement can be implied as well as express, and in the absence of evidence to the contrary,

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(1) (1897) I.L.R., 24 Calc., 309.

(2) (1921) I.L.R., 45 Bom., 313.

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in my judgment where one brother collects the assets of an estate of which he and the other brothers are co-owners, the natural inference is that he is acting as agent for himself and the other co-sharers and not on his own account.

I therefore answer the question submitted by holding that articles 62, 109 and 127 have no application and that article 120 applies only if, applying the principles above enunciated, it is held on the facts that article 89 does not apply.

The question raised in the Order of Reference is in these words: "If article 120 be held applicable, the question will still arise as to whether the right to sue is to be deemed to accrue on the receipt of the profits or when an account is called for and refused." I am rather doubtful whether that question is referred to the Full Bench for decision, though I am inclined to construe the Order of Reference as intending so to do. However that may be, I think that, as the matter is before us, it is desirable that we should express our views upon it. The question turns on the words of article 120: "Suit for which no period of limitation is provided elsewhere in this schedule, time from which period begins to run, when the right to sue accrues." In my judgment and I have the support of the authority already referred to, *Marian Beeviammal v. Kadir Meera Sahib Taragan*(1) the right to sue arises in this kind of case when there is a demand and refusal for an account, or, it could be put as, when there is, in fact, an ouster. It really follows from what I have already said that there is no cause of action on the mere receipt by one of the brothers of any particular amount, and it is clear to my mind that the period of limitation cannot run until the cause of action

arises. That cause of action does not come into being until, at any rate, there is something done which shows that the man who got the money into his possession is holding it adversely to the plaintiff. If article 89 is held to apply, the same result would follow—when, during the continuance of the agency, the account is demanded and refused, or when the agency terminates if no such demand is made.

AYLING, J.—I agree.

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COUTTS TROTTER, J.—I also agree.

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TROTTER, J.

KUMARASWAMI SASTRI, J.—This reference arises out of a suit for partition. The plaintiff, the deceased Dalayya (the father of defendants 1 to 3) and the 4th defendant were brothers. The 5th defendant is the son of the 1st defendant. The 6th and 7th defendants are the sons of the 2nd defendant. The 8th defendant is the son of the 4th defendant, who died pending suit leaving the 8th defendant his legal representative. The family was joint and undivided and owned movable and immovable properties; but in 1905 disputes arose between the members, and the plaintiff and his brothers divided some of the family outstandings, moveables and houses. Being unable to effect an amicable partition of the remaining properties they submitted their disputes to arbitration. The arbitrators divided some of the moveable properties and prepared lists showing the division effected by them but did not proceed further. The result was that there was a partial partition and a large portion of the joint properties was not divided. Some of the properties remained in the possession of the plaintiff and some in the possession of the defendants, while some lands were still enjoyed by all the parties in

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common. The case for the plaintiff is that he is entitled to a third share in the joint family properties moveable and immoveable shown in the schedules to the plaint. The reliefs which the plaintiff asks for are : (1) a partition by metes and bounds of the immoveable properties specified in the plaint schedules, (2) an account of the moveables yet remaining undivided and the division of them into three equal shares, and (3) payment of a specific sum of Rs. 6,150 which he alleges to be due under an arrangement. The account which he asks of the moveables includes, according to the plaintiff, the outstandings due to the family and the amounts collected by the defendants who, according to the plaintiff, have to account for and pay him one-third of the collections. Various defences were raised but it is only necessary to consider the plea of limitation as regards the amounts collected by the defendants. The District Judge in dealing with the question of limitation held that the plaintiff's claim to money is governed by article 62 and the claim to mesne profits by article 109. As the period of limitation under these articles is three years from the date when the money or profits were received, the plaintiff's action in respect thereof would be barred if those articles apply. The plaintiff appealed. His contention was that the case falls either under article 127 or article 120. In view of the conflict of authorities, WALLIS, C.J., and OLDFIELD, J., have referred to a Full Bench the question "What are the articles applicable to the claims for money and mesne profits in the present suit?"

The facts contained in the pleadings, which I have set out above, show that this is a suit by a member of a Hindu family, some of the properties of which have been actually divided by metes and bounds and the rest of which are in the possession of the various members who

have become divided in status though the properties have not been divided by metes and bounds or apportioned among the various members in proportion to their respective shares. The plaintiff in prayer (b) in the plaint wants a decree "directing that an account be taken of moveables yet remaining undivided as per schedules F, G and H, and to direct that the same be divided into three equal shares, and that plaintiff be awarded one share thereof from the defendants" and in prayer (d) wants a decree "directing defendants to pay costs of this suit with subsequent profits in respect of lands in possession of defendants till date of delivery, and interest on the value of moveables from date of plaint to date of realization." I am of opinion that the proper article to be applied to a claim like the present is article 120.

I shall first deal with article 109 which provides for a suit to recover the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant and fixes three years as the period of limitation, the starting point being the date on which the profits are received. It seems to me to be clear that the receipt of profits by one of several tenants-in-common cannot be said to be wrongful. The receipt of rents or profits from tenants or persons in occupation of lands held in common is one of the ordinary modes of enjoyment of property, and it cannot be said that a tenant-in-common is not entitled to receive the rents due. In *Watson and Company v. Ramchund Dutt*(1), one co-sharer was in actual occupation of a portion of joint property and was cultivating it as if it was his separate property. Another co-sharer wanted to enter upon the same land

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and cultivate it for himself. Their Lordships of the Privy Council held that the co-sharer who was cultivating the land was entitled to protect himself by the profitable use of the land in good husbandry and that the other co-sharer was only entitled to receive his share of the profits. The matter came up again before the High Court as regards the period of limitation which governs such cases, and in *Robert Watson & Co., Ltd. v. Ram Chand Dutt*(1) it was held that the proper article to be applied was article 120. It seems to me that, if the cultivation of land by one co-sharer in the ordinary course to the exclusion of the other co-sharers is not wrongful, the receipt by him of the rents and profits from persons who are bound to pay the same cannot become wrongful so as to attract the provisions of article 109.

It was argued for the appellant that article 127 would apply to cases like the present. Article 127 provides a period of 12 years for a suit by a person excluded from joint family property to enforce a right to share therein, the period starting from the date when the exclusion becomes known to the plaintiff. It is clear from the pleadings in the present case that at the date of the suit the members of the family were not members of a joint Hindu family in the ordinary sense of the term. The effect of the partial partition of certain properties, and the reference to arbitration as regards the properties undivided, as well as the conduct of the parties subsequently, show clearly that they had become divided in status. At the date of the suit the plaintiff was not a member of a joint family. It is argued for the appellant that article 127 should be read as if the words "joint family property" meant property which at one

time was joint family property and ought not to be confined to cases where the property, is joint family property at the date of the suit but to property in which the plaintiff has a share and which is not divided by metes and bounds. No authority has been cited in support of such a construction of the plain terms of the article. I agree with the learned referring Judges that article 127 is inapplicable to cases where at the date of the suit the property has ceased to be joint family property and is held by the sharers as tenants-in-common. This view is in accordance with *Amme Raham v. Zia Ahmad*(1), *Sultan Begam v. Debi Prasad*(2), where it was held by a Full Bench that the word "joint" in article 127 has a settled and well-defined meaning and could not be used as descriptive of property held in common, with *Banoo Tewary v. Doona Tewary*(3), where the learned Judges held that article 127 presupposing the existence of some joint family and proceeding upon the hypothesis that there is a joint family provides for the remedy of a member who is excluded, and has no application to cases where there was disruption of the status of jointness, and with *Bhavrao v. Rakhmin*(4). The only other articles that could have any application are articles 62 and 120. Before dealing with the applicability of these articles, I think it is necessary to consider the position in Hindu Law of persons situated like the present plaintiff. Till the decision of the Privy Council in *Suraj Narain v. Iqbal Narain*(5), the current of authority was that in order to effect a separation of status there must be an agreement, express or implied, between all the co-parceners. *Sudarsanam Maistri v. Narasimhulu Maistri*(6) deals with this question at great length. It has,

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(1) (1891) I.L.R., 18 All., 282 (F.B.). (2) (1908) I.L.R., 30 All., 324 (F.B.).
(3) (1897) I.L.R., 24 Cal., 309. (4) (1899) I.L.R., 23 Bom., 187 (F.B.).
(5) (1913) I.L.R., 35 All., 80 (P.C.). (6) (1902) I.L.R., 25 Mad., 149.

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however, now been settled by the decision of their Lordships of the Privy Council in *Suraj Narain v. Iqbal Narain*(1) and *Girja Bai v. Sadashiv Dhundiraj*(2), that a separation of status is created by a clear and unambiguous expression of the determination of one member to become divided. On such a declaration, the rights and liabilities of the parties are no longer those of a joint Hindu family but have to be determined on the footing that they are not joint tenants but tenants-in-common. This, however, does not by itself change the nature of the suit to be brought for the working out of the rights of such members. The rule of Hindu Law that a member of a joint family cannot, except in certain specific circumstances, sue for a partial partition is applicable to cases where the joint family has been disrupted by severance of status between the various members. It is clear that if a member of a Hindu family seeks to recover his share of any particular item of property he will be met with the plea that the suit is bad, and that he ought to file a suit for a partition of all the available properties, in order that all the equities may be adjusted between the various parties. Each member will have to bring into the hotch-pot the properties in his possession, and an account will have to be taken, at least from the date when the joint family became divided in status, of the rents and profits of the joint family properties received by any member and which are liable to be brought into the hotch-pot. Until the properties are actually divided, it cannot be predicated that any particular item of property would fall to any particular member of the joint family, nor can it be said that any particular member of the joint family has a right to insist that each item of property shall be broken up into as many shares as there are sharers and

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that he should get a particular share of each item. As far as possible, in suits for partition, entire items of family property will be allotted to the members if it can be done without any prejudice to the rights of the others. It may thus well be that where a co-sharer has received the whole or portion of the monies due on a debt due to the family that particular item might be allotted to the member who has so received, or in taking accounts it may well be that one co-parcener who lays claim to a particular item has overdrawn his share and is not entitled to any portion of the family property. Under these circumstances, if a co-parcener should file a suit for a specific share in an outstanding recovered, he will be met with the reply that not only is the suit for that share not maintainable but that the liability of the parties should be adjusted with reference to the taking of the general accounts. It is difficult to see how in such cases article 62 can be applied. As pointed out in *Augustinus v. Nerincka*(1), where no specific sum is claimed but an account is asked for, the action is not a mere common law action to recover monies had and received and a plaintiff may in a proper case claim an account of the monies due to him. If a separate suit for partition cannot, except in certain specified cases, be brought for each item recovered, I think the only equitable course is to treat the cause of action in respect of a partition of family property as single and indivisible and to apply the same period of limitation as regards moveable property, including outstandings collected. A distinction ought to be drawn between cases where the suit is one for a partition of joint family properties one of the items for partition being the collections made by one or the other of the members of rent or outstandings due to

(1) (1913) I.L.R., 35 All., 80 (P.C.). (2) (1916) I.L.R., 43 Cal., 1081 (P.C.).

(1) (1881) 16 Ch. D., 12.

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the family and cases where no account is necessary owing to the only item for division being property held in common. For example, if nothing more appears than that a debt is due to two or more persons jointly and one has collected it, the only question is whether the collection was made and the shares being ascertained there is no necessity to take an account. On the other hand, in cases where a partition has to be effected of properties that were once held as joint tenants and subsequently as tenants-in-common the accountability of each member being an essential element in the consideration of the division of shares, it would lead to injustice if in taking accounts each member is allowed to keep whatever he collected three years prior to the suit. In *Subba Rao v. Rama Rao*(1), it is pointed out that article 62 of the Limitation Act can only apply to cases where a definite sum of money has been received by the defendant and which the law says he must hold for the use of the plaintiff and that it is not applicable to cases where the defendant is asked to account for monies and where the person collecting is entitled to just allowances. The learned Judges refer to various cases and point out that in cases where article 62 was applied there was no question of rendering an account. In *Mahammad Habibullah Khan v. Safdar Husain Khan*(2), the learned Judges on the authority of *Gurudas Pyne v. Ram Narain Sahu*(3), applied article 120 and held that article 62 of the Limitation Act does not apply to cases of an equitable claim against a trustee liable to account, in which the relief sought is to have an account taken of the trust properties and to recover what might be due—as the form in which the suit is brought is not that of

(1) (1917) I.L.R., 40 Mad., 291.

(2) (1885) I.L.R., 7 All., 25.

(3) (1884) I.L.R., 10 Cal., 860 (P.C.).

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an action for money had and received for the plaintiff's use, this form of suit not affording a sufficient relief. In *Khadersa Hajee Bappu v. Puthen Veettil Ayissa Ummah*(1), it was held by a Full Bench that a suit for partition of property left by a Muhammadan intestate was governed by article 120 as regards moveables and article 144 as regards immoveables. In *Robert Watson & Co., Ltd. v. Ram Chand Dutt*(2), it was held that a suit by one of several joint tenants to recover compensation for the use and occupation by some of the joint tenants of part of the joint lands to the exclusion of the other joint tenants is governed by article 120. In *Abdul Rahiman v. Pathummal Bivi*(3), it was held that in a suit for partition by a Muhammadan lady against her co-heirs, a claim for the amount of a mortgage debt due to the deceased intestate collected by the defendants was governed by article 120 and not article 62. In *Marian Beeviammal v. Kadir Meera Sahib Taragan*(4), a suit was filed by a Muhammadan lady for a share of her husband's property 23 years after her husband's death. She wanted to recover one-eighth share of the sum of Rs. 28,000, which was cash left by her husband. The suit was dismissed by the Subordinate Judge as being barred. On appeal it was held that the proper article to apply was article 120. The learned Judges observe :

“The defendants having taken possession of the property as tenants-in-common, they must be deemed to have been in possession of such property on behalf of themselves and of the plaintiff and it lies on them to show that so far as the plaintiff is concerned, the character of their possession was changed six years before the date of their suit. The judgment of the Judicial Committee in *Corea v. Appuhamy*(5) would show that

(1) (1911) I.L.R., 34 Mad., 511 (F.B.). (2) (1896) I.L.R., 23 Cal., 79.

(3) (1916) 30 M.L.J., 104.

(4) (1915) 29 I.C., 275.

(5) [1912] A.C., 230.

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mere intention on their part is not enough to change the character of that possession."

In *Ganesh Dutt Thakoor v. Jewach Thakoorain*(1), the suit was one for a partition of moveable and immoveable properties. An issue was raised as to whether the suit was barred by limitation as regards the moveable properties and the Subordinate Judge dismissed the suit as regards moveables, on the ground that it was filed after the lapse of three years from the date when according to the plaintiff the cause of action arose. The High Court held that no portion of the plaintiff's claim was barred and this view was upheld by the Privy Council. Though their Lordships of the Privy Council did not discuss the particular article under which a suit for partition would lie, it is clear that they dissented from the view that the three years' rule was applicable to cases of partition where the claim is *inter alia* for the recovery of the plaintiff's share in the bond debts and decrees realized by the defendant. In *Umaridaraz Ali Khan v. Wilayat Ali Khan*(2), it was held that a suit brought by some of the heirs to recover from the widow of a deceased Muhammadan a sum of money realized by her on account of a mortgage debt due to the deceased was governed by article 120 of the second schedule to the Indian Limitation Act. In *Venkata Reddi v. Kappu Reddi*(3), article 120 was applied to a suit for partition as regards the income derived from the joint properties. WALLIS, C.J., observed:

"The next question is with regard to the period of limitation, within which the plaintiff is entitled to recover the income from the defendants, in respect of the portions of the properties which ought to have fallen to his share, but which were enjoyed by them. It has been contended that the case is

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governed by article 62 which applies to a suit, i.e., for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. The scope of this article in cases like the present has been considered in *Subba Rao v. Rama Rao*(1), where it has been pointed out that it does not apply to transactions in which the defendant is not under a mere duty to hand over the money which he had received, but has other duties as well in respect of it."

In *Parsotam Rao Tuntia v. Radha Bai*(2), where property was owned by three brothers as tenants-in-common and the rents were received by one of them as if he was the kartha of the family, it was held that a suit by a widow of one of the members to recover from the manager her husband's share of money received by him as manager but owned by all the members of the family in equal shares was not a suit for money had and received but was one to which article 120 of the Limitation Act applied. RICHARDS, C.J., and BANERJI, J., observed:

"Reading, however, the plaint as a whole, and having regard to the nature of the evidence and the defence, we think that the suit was in reality a suit for partition of the moveable and immoveable property which had been held by the three brothers and in which the plaintiff's husband had a third share" and held that article 120 was applicable to a suit of that kind.

Many of the cases cited by Mr. Narayanamurti, for the respondents, are cases where the claim was not for a partition between the members of a joint family which had become separate in status and in which an account was necessary to be taken to establish the liability of the various members to each other. *Mahomed Wahib v. Mahomed Ameer*(3) was a suit to recover the share of the plaintiff in respect of his zurpeshgi leases the income

(1) (1904) I.L.R., 31 Calo., 262 (P.C.). (2) (1907) I.L.R., 19 All., 169.
(3) (1931) 13 L.W., 260.

(1) (1917) I.L.R., 40 Mad., 291. (2) (1915) I.L.R., 37 All., 218.
(3) (1905) I.L.R., 32 Calo., 527.

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of which the defendant had recovered from the lessees. *Ramalagu Servai v. Solai Servai*(1) was not a suit for partition but a suit to recover a debt which one member of a Hindu family, which had become divided, had collected and had not paid over to the other. *Sankunni v. Govinda*(2) was a case where the karnavan of a Malabar tarwad sued a junior for the recovery of a sum of tarwad money received by the latter and not paid over to the Karnavan. As no partition is possible in the case of Malabar tarwads and as the junior member had no right to receive the monies when the Karnavan was in management, the case was a simple one of money received by one member who did not pay it to the rightful person. *Syad Lutf Ali Khan v. Mussamat Afzalunissa Begum*(3) also related to the recovery of the plaintiff's 10/24ths share of a sum of Rs. 2,00,000, paid by a debtor in respect of a debt due to the joint family, and the only question was whether the claim was barred by limitation and there was no question of accountability or partition of joint family property. *Weber Ali v. Gaddai Behari*(4), was a case where one of two decree-holders without the knowledge of the other decree-holder transferred the decree to another person who executed the decree and recovered the money, and it was held that, if there was any cause of action against the transferee, it would be for money had and received and the suit would be governed by article 60 of the Limitation Act of 1871 which corresponds to article 62 of the present Act. *Binode Lal v. Preo Nath*(5) was a case where one of several co-sharer landlords filed a suit for arrears of rent and made the other co-sharers party defendants along with the tenants and prayed that, if the co-sharers

(1) (1921) 41 M.L.J., 274.

(2) (1914) 1 L.R., 37 Mad., 381.

(3) (1871) 9 B.L.R., 348.

(4) (1878) 2 C.L.R., 165.

(5) (1917) 40 I.C., 178.

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had received the rents, the plaintiff should be paid his portion. It was found that the rent was paid by the tenants to the landlord defendants and the question was whether the suit was barred. It was held that article 62 applied to such a case even though the defendants when they received the money did not intend to pay it to the plaintiff. *Thakur Prasad v. Partab*(1) was a suit by one of two divided members of a joint Hindu family for the recovery of a specific amount, being his share of a decree debt due to the family which the defendant had realised. *Dalip Singh v. Tulshi Ram*(2) was a case where certain property was purchased by a person in his own name but for the benefit of himself and another. The purchaser refused to account for the profits and a suit was filed against him. It was held that the transaction in that case created the defendant a trustee for the plaintiff and that the money received by the defendant which he was bound to pay over to his *cestuis que trust* was money received for the use of the *cestuis que trust* and fell under article 62 and not article 109 of the Limitation Act. It is unnecessary to consider how far this decision is right, having regard to the finding that the defendant was a trustee for the plaintiff and to the applicability of section 10 of the Limitation Act to such cases. *Abdul Ghaffar v. Nur Jahan Begam*(3) was a case where a Muhammadan obtained a succession certificate to realise the debts of his deceased uncle and recovered some of them. A suit was filed by the widow of his co-heir for an account of the sums he collected on the authority of the succession certificate and for the recovery of her husband's share, and it was held that article 62 was applicable to that

(1) (1884) 1 L.R., 6 All., 442. (2) (1887) 7 A.W.N., 100.

(3) (1915) 1 L.R., 37 All., 434.

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case. With all respect I do not agree with the learned Judges in their attempt to distinguish this case from *Umardaraz Ali Khan v. Wilayat Ali Khan*(1) and *Mahomed Riasat Ali v. Hasin Banu*(2) and if it is authority for holding that in suits for partition and account article 62 is applicable, I would respectfully dissent from it. I find it difficult to see how a case where one of the heirs takes charge of the cash left by the deceased and does not pay over the share of the others can be distinguished from a case where the heir receives money from a debtor, and in *Mahomed Riasat Ali v. Hasin Banu*(2) their Lordships of the Privy Council held that as regards monies taken possession of by one heir the suit was not barred at the expiry of three years. Treating it as a suit for partition, the decision in the same volume at page 318 which I have already referred to would apply. In *Mash-ul-din v. Imtiaz-un-nissa*(3) it was held that where, pending arbitration in respect of the distribution of the estate of a deceased person amongst his heirs, the estate was by their consent put in charge of a third party who was to realise the assets and pay the debts, a suit by one of the heirs to recover from such person her share was a suit for money had and received and was governed by article 62 of the Limitation Act. This decision is in direct conflict with *Subba Rao v. Rama Rao*(4). *Lakshpat Pandey v. Jang Bahadur Pandey*(5) was a suit to recover the share of a person who was entitled to it out of the monies collected in respect of certain bonds which stood in the name of the defendants or some of them and in which he was a co-sharer. It was held that article 62 was applicable. This was not a case where there was any claim

for partition or any account was asked for. *Dulabh Vahuji v. Bansidharrai*(1) was a case where a person who was entitled to a share in a *deshpande vatan* sued to recover monies collected by his co-sharer, and it was held that article 62 of the Limitation Act applied.

The only case which so far as I can see really touches the question is *Vaidyanatha Aiyar v. Aiyasamy Aiyar*(2), where there was a partial partition between the members of a Hindu family. The greater portion of the properties had been divided and the parties subsequently continued to live separately. It was held that in such a case, where the members of the joint family had become divided in status, no member had a right on behalf of the others to recover any debt due to the family and where it was so recovered it was not joint family property so as to attract the provisions of article 127 of the Limitation Act, the article applicable in such cases being article 62. It was also held that the principle that the possession of one tenant-in-common is to be deemed possession of all and limitation begins to run only after the exclusion of any tenant-in-common or adverse possession is set up, would not apply in the case of joint families after a complete separation in status. The latter proposition can hardly be good law having regard *Kumarappa Chettiar v. Saminatha Chettiar*(3). It is difficult to see how a mere separation in status could by itself make possession by one member hostile to the other, or by itself amount to ouster. As regards the applicability of article 62, the learned Judges do not discuss the cases there referred to, where article 120 has been applied to claims for partition. Of the cases referred to by the learned Judges, *Arunachala v. Ramasamy*(4) was not a suit for partition but a suit to recover a specific share

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(1) (1887) I.L.R., 19 All., 169.

(2) (1894) I.L.R., 21 Cal., 157 (P.C.).

(3) (1915) I.L.R., 37 All., 40.

(4) (1917) I.L.R., 40 Mad., 291.

(5) (1917) 40 I.O., 37.

(1) (1885) I.L.R., 9 Bom., 111.

(2) (1909) I.L.R., 32 Mad., 191.

(3) (1919) I.L.R., 42 Mad., 431.

(4) (1883) I.L.R., 6 Mad., 402.

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Reference has been made to the English Law that a tenant-in-common cannot maintain an action for money had and received against his co-tenant. Prior to the Statute, 4 and 5 Anne, ch. 16, which gave a right of action by a suit for an account by one joint tenant or a tenant-in-common against the other of the rents and profits received in excess of his share there was no remedy at common law. In *Thomas v. Thomas*(5), it was held that one tenant-in-common of real property cannot maintain an action for money had and received against his co-tenant, his remedy being by an action of account under the 4 Anne, ch. 16, sec. 27. So far as I can see, this decision has not been dissented from and an action for money had and received would not lie in England. This rule has not been applied to cases between joint tenants in India. The only case, where so far as I can see, the English doctrine was considered is *Mahomed Wahib v. Mahomed Ameer*(6),

where HARRINGTON, J., in meeting the contention that one tenant-in-common cannot maintain an action for money had and received against his co-tenant was of opinion that the ground of decision in *Thomas v. Thomas*(1) was that the plaintiff was bound to pursue his statutory remedy for account under 4 Anne, ch. 16, sec. 27. MOOKERJEE, J., simply stated that under English law one tenant-in-common cannot recover in a suit for an account for money had and received against another who has received more than his share of the profits, and referred to the Statute 4 Anne, ch. 16, sec. 27, and *Thomas v. Thomas*(1). He decided that article 62 of the Limitation Act applied. His view evidently was that the rule was not applicable to India. The referring Judges were inclined to the view that this principle is equally applicable to cases arising in India. The decisions in India I have referred to assume that a tenant-in-common has a right of action for money had and received against his co-tenant, and it is argued that as Courts in India are not bound by the technical rules and procedure in England but have to administer justice on broad principles of equity and good conscience in cases where there is no statutory enactment relating to a particular subject, and as there is nothing against equity or good conscience in one co-sharer suing to recover monies received by another in excess of his share without the necessity of having to take the cumbersome procedure of filing a suit for an account, Courts in India ought not to apply the rule in *Thomas v. Thomas*(1) that an action will not lie except for an account as between tenants-in-common. It is unnecessary to determine this wide question as I am of opinion that in suits for partition between members of a joint and undivided Hindu family who have become subsequently

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(1) (1884) I.L.R., 6 All., 412.

(3) (1887) I.L.R. 10 Mad., 69.

(5) (1880) 5 Ex., 28.

(2) (1897) I.L.R., 24 Cal., 309.

(4) (1880) I.L.R., 8 All., 170.

(6) (1905) I.L.R., 32 Cal., 527.

(1) (1880) 5 Ex., 28.

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divided in status, the plaintiff being entitled to ask for an account and the relative rights and obligations of the parties being dependent on the taking of the account which would include not only the properties movable and immoveable in the possession of each member but also the assets of the family, including the outstandings and rents and profits collected, the action for partition and the reliefs claimed in it cannot be brought under article 62 of the Limitation Act. Even in cases where article 62 has been applied, it seems to me that Courts have not given sufficient weight to article 89 of the Limitation Act. In cases of receipt by one member of a joint family, though divided in status, of sums due to the family, it may well be that the person making the collection is acting on behalf of the other members and it need not necessarily be assumed that because there was a division of status there is necessarily a dishonest intention on the part of the person who is collecting the outstandings to appropriate the money to himself. Very often the receipt of rents is by the person who, when the family was joint and before separation in status, was the managing member of the family. In cases where the properties of the joint family stand in the names of different members, the receipt is very often by the person in whose name the particular item stands. Sometimes, when the members of the family live in different places the receipt is by the person who resides at the place where the debtor happens to be or which is most convenient for collection. In all these cases, the mere fact that a member declares his intention to separate does not amount to notice to the debtors not to pay. Except in cases where one member of the joint family has given notice to the other member or members not to receive monies due to his co-sharers, and has informed the debtors not to pay, I do not think the collection by one of the co-sharers

necessarily imports an intention on his part to appropriate the monies collected to his own use and not distribute them among the sharers when demanded. The mere fact that the person receiving the money was not expressly authorized after the division in status to collect it would not affect his liability as agent. I may in this connexion refer to the decision of the House of Lords in *Lyell v. Kennedy*(1), where it was held that the collection of rents by a person on behalf of another, though unauthorized, may be ratified by the true owner, and that such ratification may be expressed by a suit brought for an account within a reasonable time. *Gabu v. Zipru*(2) was a case where the learned Judges applied article 89. They dissented, and in my view rightly, from *Banoo Tewary v. Doona Tewary*(3), where the learned Judges applied article 62 in spite of their holding that the defendant was acting on behalf of his co-sharers as their agent in receiving their share of the monies. It seems to me that, in cases where the suit is not one for partition after the taking of an account, the question may still arise whether or not the defendant acted as the agent, express or implied, of the plaintiff in making the collections and, if so, it seems to me that the proper article to apply will be 89 and not 62.

My answer to the Reference is that in a suit for partition where a claim is made for an account being taken of the moveable properties, outstandings and collections, made by the various members in respect of properties in which the parties were once joint but who subsequently became separate in status the proper article to apply is article 120. The period of limitation will run from the demand of the share by the plaintiff or

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(1) (1889) 14 App. Cas., 487.

(2) (1921) I.L.R., 45 Bom., 318.

(3) (1897) I.L.R., 24 Calc., 809.

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refusal by defendant. The receipt by the co-tenant is not wrongful and consequently his possession cannot be wrongful till he refuses to deliver the share of the co-tenant he has received or set up a hostile title to the knowledge of the co-sharer. The observations I have referred to in *Marian Beeviammal v. Kadir Meera Sahib Taragan*(1), support this view. I may also refer to *Abdul Rahiman v. Pathummal Bivi*(2) where *Marian Beeviammal v. Kadir Meera Sahib Taragan*(1) is approved of and followed.

DEVADOSS, J. DEVADOSS, J.—The question referred for the opinion of the Full Bench is :

“ what are the articles applicable to the claims for money and mesne profits in the present suit ? ”

In order to understand the question fully it is necessary to set out a few facts. The plaintiff, his brothers Dalayya and fourth defendant, with sons and grandsons, constituted a Hindu joint family till 1905. In that year, the plaintiff and his brothers became separate in interest and divided some of the family properties. Other properties remained undivided owing to disputes between the brothers till 1917, when the plaintiff brought the present suit for the division of the remaining properties. No question of limitation arises as regards the immoveable properties. As regards outstandings and mesne profits, the defendants contend that the plaintiff's claim for his share of outstandings realized by them is barred by limitation under article 62 and as regards mesne profits his claim is barred under article 109 of schedule I of the Limitation Act of 1908. The plaintiff's contention is that, as regards his share of outstandings collected, article 120 of the Limitation Act applies and as regards mesne profits article 127

applies. It is strongly contended before us by Mr. YERUKOLA v. YERUKOLA. Narayanamurti for the respondents that the proper article to apply to the case of outstandings collected is DEVADOSS, J. article 62 of the Limitation Act.

Column I of article 62 reads : “ For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.” This article is taken from the well-known form of action for money had and received. What averments are necessary to sustain the action can be seen from the following passage from Bullen and Leake's Precedents of Pleadings, page 257 (6th Edition) :

“ In actions for money received to the plaintiff's use, the statement of claim should in all cases state clearly by way of particulars or otherwise, the facts relied on as showing that the money was received to the use of the plaintiff.”

I shall first examine the cases relied on by Mr. Narayanamurti in support of his contention. In *Arunachala v. Ramasamy*(1), it was held that article 62 applied to the plaintiff's claim to a specific debt due to the family said to have been collected by the father after a decree for partition. In the decree for partition there was a declaration that the plaintiff was entitled to a third share of the specific debt and the plaintiff did not choose to give the debtor notice that he was entitled to a third share of the debt. It was contended that section 10 of the Limitation Act applied to the facts of the case and that the father was a trustee for the sons. The Court held that the father was not a trustee and that the plaintiff's claim was barred under article 62 of the Limitation Act. That decision can have no application to the present case, as the facts therein are different from the facts here. In the present case, there was no decision by arbitrators or a decree of Court that plaintiff

(1) (1888) I.L.R., 6 Mad., 402.

(1) (1915) 29 I.C., 275.

(2) (1916) 30 M.L.J., 104.

YERUKOLA v. YERUKOLA. ^{D.} was entitled to a third of any specific item. When ^{DEVADOSS, J.} Dalayya collected the outstandings due to the family he collected what was due to the whole family and not any amount specifically due to the plaintiff either as a whole or in part. In the next case *Tellis v. Saldanha*(1), the Court held co-parcenership and the right of survivorship, which are incidents peculiar to Hindu law, have no application to the members of a Christian family, and if one member of such family collects rent to which two or more members of such family are entitled, the claim for a portion of the rent is barred after 3 years under article 62 of the Limitation Act. In this case there is no question of agency and the mere fact that two persons are members of a family would not make one the agent of the other. In the case of a joint Hindu family, there is a managing member who contracts in his own name for the family and transacts all the affairs of the family and the other members cannot question his acts except by a suit for partition. In the present state of the law, a mere unequivocal unilateral declaration of intention would bring about a division of status and that by itself would not take away the power of the managing member to manage the affairs of the family in the interests of all its members till there is an actual division of the property. *Tellis v. Saldanha*(1) is not an authority for the contention that article 62 should be held to be applicable to the facts of the present case.

Vaidyanatha Aiyar v. Aiyasamy Aiyar(2) is a direct authority for the respondents' contention. The learned Judges observe, at page 198 :

"After the division in status of the members of a family one of them does not represent the others. He is not bound by the dealings of the others with reference to any property in

YERUKOLA v. YERUKOLA. ^{DEVADOSS, J.} which a person may be interested. Thus, after 1892 no member of the family can recover the debt or any portion of the debt that may be payable to the other members. Their right against any debtor would stand unaffected by any payment to him and if any member as a joint creditor recovers the debt he becomes liable immediately to pay over the share of his joint creditor to him. This also explains the case of *Ginesh Dutt Thakoor v. Jewach Thakoorain*(1). There, as expressly stated by their Lordships, it was not the case of either party that there was a partial separation or a separation in respect of certain properties only, and the debts therefore realized by the brothers were realized on account of their family; the only question was whether one of the brothers, as whose representative his widow claimed a partition, was separated in interest or continued an unseparated member. There was no claim advanced by any one of the members to the debts realized, to the exclusion of the other members of the family. In the case before us, as already pointed out, the debts were not recovered or realized by the first defendant or any of the other brothers as the representative of the family or on behalf of the other members as well. We are, therefore, of opinion that article 62 applies."

It is difficult to see how article 62 would apply to such a case. The article refers only to cases where money was received by defendant for the plaintiff's use. After division in status till outstandings are collected, and divided or allocated to the various members of the family, each may collect what he could and an account will have to be taken at the time of actual division. In no sense can one member of a family, divided in status, but holding property to be allocated or divided, be said to collect or manage on behalf of any other, unless there is an agreement implied or express to that effect or at least conduct indicating an intention to act as agent. Where one or some of the outstandings belonging to a once joint family

(1) (1887) I.L.R., 10 Mad., 69.

(2) (1909) I.L.R., 32 Mad., 191.

(1) (1904) I.L.R., 31 Cal., 262 (P.C.).

YERUKOLA v. YERUKOLA. DEVADOSS, J. is collected by a person after the members cease to be joint in status it cannot be predicated that such collection was made for the use of a member other than the person collecting. The matter would be different if any particular outstanding is ear-marked wholly or in part to any member, and if another collects that whole or part, it can be presumed that the person collecting it did so for the use of the person to whom it was ear-marked. This, I think, is the principle in *Arunachala v. Ramasamy*(1). It would be overlooking the clear words of article 62, and the history of the action for money had and received, to apply the article to the facts brought out in evidence in *Vaidyanatha Aiyar v. Aiyasamy Aiyar*(2). The words of the articles of the Limitation Act have to be construed strictly, and with the greatest possible respect to the learned Judges who decided *Vaidyanatha Aiyar v. Aiyasamy Aiyar*(2), I venture to state that article 62 should not have been held applicable to the facts of that case.

The next case relied on by Mr. Narayanamurti is *Avancha Lakshminarasamma v. Avancha Lakshamma*(3), wherein it was held that article 62 applied to a case where two brothers jointly advanced a sum of Rs. 1,600 on mortgage and one of the brothers realized the mortgage amount without the knowledge of the other. Mr. Justice SADASIVA AYYAR observes, at page 326 :

"In *Sankunni v. Govinda*(4), BENSON and myself held that article 120 should be applied only as a last resort in case no other article is applicable, that article 62, relating to money had and received for the use of the plaintiff was intended to cover all cases where plaintiff claims money which the defendant has received but which *ex æquo et bono* the defendant ought to refund to plaintiff, and that the action

for money had and received is a very extensive and beneficial remedy. I think the case of *Segu Chidambaramma v. Segu Ballayya*(1), decided by ABDUR RAHIM and SPENCER, JJ., established that such a suit as the present will be governed by article 62. The suit in that case was one by the plaintiff for his share of rent realized by the defendant after partition between the parties."

In *Sankunni v. Govinda*(2) (the decision relied on by SADASIVA AYYAR, J.) the junior member of a Malabar Tarwad withheld from the Karnavan certain tarwad money which he had collected, and a suit by the Karnavan was held to be governed by article 62. The learned Judges say :

"As observed in Blackstone's Commentaries, Vol. III, page 162, an action lies when one has had and received money belonging to another, without any valuable consideration given on the receiver's part : for the law construes *this to be money had and received for the use of the owner only*; and implies that the person so receiving promised and undertook to account for it to the true proprietor. And, if he unjustly detains it, an action on the case lies against him for breach of such implied promise and undertaking; and he will be made to repair the owner in damages, equivalent to what he has detained in such violation of his promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex æquo et bono* he ought to refund."

Evidently the learned Judges have overlooked the basis of the action for money had and received, that defendant has collected or is in possession of money that rightfully belongs to the plaintiff and to which the defendant is not entitled, and that the circumstances in evidence justify the inference that the defendant collected it or is in possession of it for the plaintiff's use.

(1) (1888) I.L.R., 6 Mad., 402.
(3) (1913) 14 M.L.T., 325.

(2) (1909) I.L.R., 32 Mad., 191.
(4) (1914) I.L.R., 37 Mad., 38.

(1) (1911) 2 M.W.N., 467.

(2) (1914) I.L.R., 37 Mad., 381; (1911) M.W.N., 487.

YERUKOLA v. YERUKOLA. It is not necessary to examine in detail *Ramalagu Servai v. Solai Servai*(1), which simply follows *Arunachala v. Devadoss, J. Ramasamy*(2) and *Vaidyanath Aiyar v. Aiyasamy Aiyar*(3). In *Banoo Tewary v. Doona Tewary*(4), a Bench of the Calcutta High Court held that a suit by some members of a joint Hindu family who had separated against the other members of the family who collected the family outstandings was governed by article 62. The plaintiffs contended that article 127 applied and the defendant contended that article 62 applied. The learned Judges held that article 127 could not apply as it presupposed "the existence of a joint family, and proceeding upon the hypothesis that there is a joint family it provides that when any member of such joint family is excluded from the enjoyment of the joint property or any portion thereof the period of limitation shall run from the date when the exclusion comes to his knowledge. But, when there has been a disruption of the status of jointness, it is difficult to conceive that it could have been the intention of the legislature that the same provision should apply. The case of the plaintiffs is, that everything was divided, the family became separate, and only those debts were left undivided which were not ripe for realization. They were to be divided of course when they were realized. In such a state of circumstances, it does not appear to us that article 127 would apply." They held that the proper article to apply was 62. But with great respect to the learned Judges it is difficult to understand what follows after the passage quoted above, viz. :

"The defendant was acting on behalf of other co-sharers merely as their agent in the realization of their shares in these moneys, and we think therefore that the case is subject to

(1) (1921) 41 M.L.J., 274.

(3) (1909) 1 L.R., 82 Mad., 191.

(2) (1863) 1 L.R., 8 Mad., 402.

(4) (1897) 1 L.R., 24 Cal., 309.

3 years' limitation, and that the claim of the plaintiffs so far as the items Nos. 1, 2, 3, 4 and 6 are concerned, is barred, as they were realized more than three years before the institution of the suit." YERUKOLA v. YERUKOLA. DEVADOSS, J.

If the defendants acted as agents of the plaintiffs and other sharers, the proper article to apply was 89. From the report of the case it does not appear that plaintiff sought to bring his case under article 89 or 120 of the Limitation Act.

The facts in *Mahomed Wahib v. Mahomed Ameer*(1) are that *B* received from *C* money due on two deeds of mortgage. *A*, who was entitled to a share of the money, instituted a suit for recovering his share from *B* more than 3 years after the receipt of the money by *B*. Held that the money was received by *B* for *A*'s use and that therefore the suit was governed by article 62 and not by article 120. The lower Courts found that the money was not received for plaintiff's use, and following *Nund Lall Bose v. Meeragboo Mahomed*(2), held that article 62 did not apply. The learned Judges dissented from the view expressed in *Tekait Chooramun Singh v. Durraraj Roy*(3), quoted with approval the passage from Blackstone's Commentaries already extracted and decided that the money was received for plaintiff's use because the defendant unjustly detained it for his own benefit.

Mr. Justice HARRINGTON refers to *Thomas v. Thomas*(4) and says :

"that case lays down that one tenant-in-common of real property cannot maintain an action for money had and received against his co-tenant. But the ground of that decision was that the plaintiff was bound to pursue his statutory remedy for account under 4 Anne, Chapter 16, section 27. So it does not affect the present case."

(1) (1905) 1 L.R., 32 Cal., 527.

(3) (1880) 1 L.R., 5 Cal., 57.

(2) (1890) 1 L.R., 5 alc., 597.

(4) (1850) 5 Ex., 28.

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DEVADOSS, J. With the greatest respect, I may observe that *Thomas v. Thomas*(1) has not been correctly understood by the learned Judge. By the common law, a tenant in common could not bring an action against his companion for money had and received. PARKE, B., in delivering judgment in *Thomas v. Thomas*(1) said:

"It is expressly laid down that no action of account lay by the common law by one tenant in common against his companion, for taking more than his share of the profits, unless where he had constituted him his bailiff to receive them. Now this want of remedy by the common law was provided for by the Statute 4 Anne, ch. 16, section 27, which enables one tenant-in-common to maintain an action of account against the other as bailiff for receiving more than his due share or proportion, in which case, however, he is entitled to all the rights and indemnities of a receiver, and consequently would be able to show that the money had been lost without his fault; whereas, in an action for money received to the use of another, the defendant is liable for the money absolutely. It is clear, therefore, that the statute of Anne only gives an action of account, in which the receiver would be entitled to all just allowances; and if so, that this action for money had and received will not lie."

In an action for money had and received the defendant is not entitled to deduct the cost of collections, Court expenses, and other charges incidental to collection. Can it be contended here that the plaintiff is absolutely entitled to a third of the amount collected without any deduction for expenses incurred in collecting it? It is obvious the English action for money had and received could not apply to a case like the present. The Statute of Anne gave a new remedy not available under the common law, and not as thought by HARRINGTON, J., that the Statute restricted the remedy available under the common law.

(1) (1850) 5 Ex., 28.

In *Kundun Lal v. Bansi Dhar*(1), a Bench of the Allahabad High Court held that a claim by one heir of a deceased person against another for a share of the money realized by the latter was barred under article 62:

"the suit being for money payable by defendant to the plaintiff for money received by the defendant for plaintiff's use. The receipt by the defendant was in law a receipt to the use of the plaintiff to whom the sum in deposit rightfully belonged."

If the said sum in deposit or any portion of it was ear-marked for the plaintiff, the decision would be in accord with *Arnachala v. Ramasamy*(2). The learned Judges who decided *Umardaraz Ali Khan v. Wilayat Ali Khan*(3) observe:

"we should have followed it (referring to *Kundun Lal v. Bansi Dhar*(1), had it not been for the ruling of the Privy Council in the case of *Mahomed Riasat Ali v. Husin Banu*(4). In that case the plaintiff, as the widow of the deceased owner, claimed among other properties certain cash and deposit money received and appropriated by her husband's brother, but their lordships held that for a suit of this description there was no article in the schedule which was clearly applicable, and therefore article 120 governed the case."

The ruling in *Amina Bibi v. Najm-un-nissa Bibi*(5), that article 62 applied to the case of some heirs of a deceased Muhammadan suing other heirs for their share of a mortgage amount collected by the latter, was upon the peculiar facts of the case:

"The plaintiff's right to a fourth share in the money in suit has not at any time been disputed. On the contrary, it has always been openly admitted by the defendants, who, in the execution proceedings, when they objected to the plaintiff being brought on the record as a decree-holder, stated that they would pay to the plaintiff her one-fourth share in the amount recovered

(1) (1880) I.L.R., 3 All., 170.

(2) (1883) I.L.R., 6 Mad., 402.

(3) (1897) I.L.R., 19 All., 169.

(4) (1894) I.L.R., 21 Calc., 159.

(5) (1915) I.L.R., 37 All., 233.

YERUKOLA v. YERUKOLA. from the judgment-debtor after deduction of costs. When the amount of the decretal debt was set off in part against the amount of the defendant's bid at the auction, this was done as a matter of convenience, and it was as if the defendants Nos. 1 to 3 had paid in the amount of their bid and had then with defendants Nos. 4 to 6 recovered the amount due under the decree, and we have no hesitation on the facts of the suit before us, in holding that article 62 applies. The money was recovered by the defendants for the plaintiff's use. The decision in *Mahomed Wahib v. Mahomed Ameer*(1) supports us."

There is a distinct finding in this case that defendants undertook to pay to the plaintiff one-fourth share of the amount recovered, and this ruling can have no application to the case before us. In *Abdul Ghaffar v. Nur Jahan Begam*(2) the defendant recovered money belonging to his deceased uncle, and the suit by the widow of the defendant's brother, who died subsequent to the uncle's death, was held barred under article 62. The defendant collected money, half of which belonged to his brother and it may be said he did so for his brother. If he denied the right of the brother to the money or set up a right in himself, it cannot be said that he collected the money for the use of his brother. In *Dulabh Vahnji v. Bansidharrai*(3) there was a declaratory decree of plaintiff's title and his suit against his co-sharer in a *deshpande Vatan* who was bound by the decree to recover arrears was held to be a suit for money had and received and was governed by article 62. In this case also the plaintiff's right to a share of the specific debt was undisputed and on the evidence the collection was held to be for the use of the brother.

I shall now deal with the cases in which article 120 of the Limitation Act has been held to be the proper article applicable to the cases of collection of outstandings

or management of property by one interested in the outstandings or property along with others. In *Parasotam Rao Tantia v. Radha Bai*(1), the facts were : Three brothers who had been living with their father as a joint Hindu family obtained under the will of their father, in whose hands it was separate property, a considerable amount of moveable and immoveable property. The property so bequeathed was divided by the will into three lots; but the legatees still continued to live as a joint Hindu family and the property was managed for a series of years by one member of the family acting as if he were the *karta* of a joint Hindu family. RICHARDS, C.J., and BANERJI, J., observe at page 322 :

"we have already pointed out that the property was managed by one member of the family. He appears to have received the rents and profits of the immoveable property and to have invested and dealt with their money, making investments in the ordinary course of business. When he received the money from Government in redemption of the debentures he still received it in his capacity of manager. When we speak of a manager we do not mean the managing member of a joint Hindu family, but the individual to whom this particular family entrusted the management of their affairs. In this view we think that the suit was a suit governed by article 120."

It is quite clear from the judgment that the manager who managed the affairs of the family did so for the benefit of not any particular member but of the whole family. It would be most inequitable if, after collection, the manager is allowed to say that he collected it for A's or B's use and a claim by A or B for his share should be brought within three years after collection. If the manager acted as the agent of the others, article 89 would apply if not article 120, as there is no other article

(1) (1905) I.L.R., 32 Cal., 527.

(2) (1915) I.L.R., 37 All., 434.

(3) (1885) I.L.R., 9 Bom., 111.

(1) (1915) I.L.R., 37 All., 318.

YERUKOLA v. Rama Rao(1) the facts were: The plaintiff and the defendant were co-sharers in a jaghir of which the latter was appointed by the Government as manager. The former sued the latter in a District Munsif's Court for his share of the net income due for the year 1912, but the plaint was returned for presentation to a Court having jurisdiction. The plaintiff did not re-present the plaint in any Court, but instituted the present suit in 1913 in the District Court for an account and recovery of his share of income due for the years 1905 to 1907. The Court held that the suit was one for an account which was governed by article 120 and not article 62. SRINIVASA AYYANGAR, J., observes at page 295:

"The plaintiff cannot claim a share in each individual collection nor can he claim any particular sum at the time of collection from the defendant. All that he is entitled to is an account technically so called. Whether that account is to be rendered once a year or when demanded makes no difference. The plaintiff is not entitled to a particular sum from the defendant at the moment he has received it. The article of limitation governing the suit is not therefore article 62."

If the plaintiff was entitled to any particular sum or any portion thereof, the principle in *Arumachala v. Ramasamy*(2) would be applicable. As observed by the learned Judge, the plaintiff was not entitled to any particular sum and therefore article 62 could not apply to the case. In *Khadern Hajee Bappu v. Puthen Veetil Ayissa Ummah*(3) it was held that

"in the case of a Muhammadan dying intestate the estate is at once vested in the heirs as tenants-in-common and there is no one charged by law with its distribution . . . We think the answer to the question referred must be that article 144 is

applicable when the property is immovable and article 120 when it is movable property."

In *Madar v. Kader Moideen*(1) the plaintiffs, who were co-owners of the suit house with the defendants, sued for possession of their half share of the house after partition and for recovery of arrears of rent and rent subsequent to the suit. Both the lower Courts decreed partition and possession of a moiety of the house and rent for six years before suit, under article 120 of the Limitation Act. The defendants bought the undivided moiety of the house from the father of the plaintiffs Nos. 1 to 7 and later in the same year executed a lease to him in respect of the other moiety for a period of three years. The lease expired in 1899 and since that time the defendants had been in possession of the whole house without executing any fresh lease to the plaintiffs or paying them rent. The learned Judges observe, at page 56:

"The decision of the question whether articles 110, 115 or 120 is to be applied to this case depends in our opinion on the answer to the question whether the relationship between the parties after the expiry of the lease in 1899 was based on a contract, expressed or implied. Articles 110 and 115 both presuppose the existence of such a contract. If the suit is in reality a suit for rent or for damages for use and occupation, then articles 110 or 115 may apply, but if not, then the remaining article 120 would be properly applied . . . The respondents' possession after 1899 may reasonably be referred to their rights as co-owners and in that view the decision in *Robert Watson & Co., Ltd. v. Kam Chand Dutt*(2) was in our opinion rightly applied to the case, notwithstanding the difference in the facts which has been referred to above."

The facts of the case in *Abdul Rahiman v. Pathummal Bivi*(3) were:

(1) (1917) I.L.R., 40 Mad., 291.

(2) (1888) I.L.R., 6 Mad., 402.

(3) (1911) I.L.R., 34 Mad., 511 (F.B.).

(1) (1918) I.L.R., 39 Mad., 54.

(2) (1866) I.L.R., 23 Cal., 799.

(3) (1916) 30 M.L.J., 104.

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"One of the two suits was brought by two sisters against their two step-brothers and their mother for partition of the property of their father (including the accretions to the said properties) and the other suit was by the mother of the plaintiffs in the first suit against her said step-sons (the same defendants Nos. 1 and 2) for her share. The father died in February 1898 and these suits were brought in July 1911."

SADASIVA AYYAR and NAPIER, JJ., held that article 120 governed the claim as regards movables. SANKARAN NAYAR and OLDFIELD, JJ., decided in *Marian Beeviammal v. Kadir Meera Sahib Taragan*(1) that the heirs of a deceased Muhammadan take as tenants-in-common and the right of one heir to a share will not become barred unless and until the other heirs set up an adverse right to the knowledge of that heir, and that article 120 applied to the case:

"The defendants having taken possession of the property as *tenants-in-common* they must be deemed to have been in possession of such property on behalf of themselves and of the plaintiff and it lies on them to say that so far as the plaintiff is concerned the character of their possession was changed six years before the date of the suit."

If I may say so, article 120 has been rightly held to govern the case. It was held in *Umardaraz Ali Khan v. Wila-yat Ali Khan*(2) that a suit brought by the other heirs to recover from the widow of a deceased Muhammadan a sum of money said to have been realized by her on account of a mortgage-debt due to her deceased husband was governed by article 120 of the Limitation Act. In *Venkata Reddi v. Kuppu Reddi*(3) the facts were that in a partition between Hindu co-parceners, one of whom was a minor represented by his mother, it was arranged that the senior co-parcener and the minor should enjoy their share of the property jointly. The minor sued to

re-open the partition and to recover from the said senior co-parcener's sons the income from the portion of the properties which ought to have fallen to his share but which were enjoyed by them more than three years after the deed of partition. The learned Chief Justice observes, at page 261:

"It has been contended that the case is governed by article 62, which applies to a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. The scope of this article in cases like the present has been considered in *Subba Rao v. Rama Rao*(1), where it has been pointed out that it does not apply to transactions in which the defendant is not under a mere duty to hand over the money which he had received, but has other duties as well in respect of it. The facts of this case are for this purpose that under Exhibit U it was arranged that the senior co-parcener and the minor should enjoy their share of the property jointly and apparently believing that they continued joint, the defendant's father managed the property which fell under Exhibit U to him and to the plaintiff. As manager it was his duty, not merely to account for the money received, but to pay the kist and the other expenses as well as to maintain the minor; and what sum the defendants should be ordered to pay can only be determined by taking an account. I entirely agree with the decision in *Subba Rao v. Rama Rao*(1) that article 62 does not extend to such transactions. It is admitted that if this is so, the only other article applicable is article 120; and therefore the suit is not barred."

It is quite clear from the language of article 62 that it cannot apply to the facts of the present case. The cases like *Arunachala v. Ramasamy*(2), where article 62 has been held applicable, can be explained on the ground that the plaintiff was entitled to the whole or part of a specific debt and the defendant when he collected it must have intended to collect it for the plaintiff's use. But where there are several outstandings belonging to a Hindu

(1) (1915) 29 I.C., 275.

(2) (1897) I.L.R., 19 All., 109.

(3) (1921) 13 L.W., 260.

(1) (1917) I.L.R., 40 Mad., 291.

(2) (1888) I.L.R., 6 Mad., 402.

YERUKOLA v. YERUKOLA.
DEVADOSS, J. joint family consisting of, say *A*, *B*, *C* and *D*, if *A*, after they became divided in status, collected any outstanding could it be said that he collected it for the use of *B* and not of *C* and *D*. Each member might probably collect what he could especially where they fall out, and an account will have to be taken of the various collections after deducting the cost of collection, incidental charges, etc.

The plaintiff in this case does not contend that he is entitled to the whole or portion of any specific outstanding and he does not claim his share without a deduction for the cost of collection.

Article 89 of the Limitation Act would be applicable if the facts warrant an inference that by agreement, express or implied, Dalayya collected the outstandings. If Dalayya and the fourth defendant acted as agents for the whole family, impliedly or expressly, they cannot set up article 62 as a bar to the plaintiff's suit and they are bound to render an account, within three years of demand for such amount. In *Gabu v. Zipru*(1) the facts were: Plaintiff and his two brothers lived jointly. They divided their immovable estate in 1893, but kept joint certain cash securities as they were all in the name of the elder brother, Ramsingh. At the time of the partition it was orally agreed that Ramsingh should realize the securities and divide the proceeds among the three brothers. Ramsingh did not divide the proceeds nor gave any account. He died on 6th January 1914. Thereafter plaintiff demanded an account from Ramsingh's son, but he having refused, filed a suit for an account on 3rd January 1917. Both the lower Courts dismissed the suit as being barred under article 62. The Bombay High Court disagreeing with *Banoo Tewary v. Doona*

Tewary(1) held that the suit was governed by article 89. MACLEOD, C.J., observes, at page 316 : YERUKOLA v. YERUKOLA.

"The lower Court has relied on the decision in *Banoo Tewary v. Doona Tewary*(1). That was a very similar case to this. The learned Judges applied article 62 of the Indian Limitation Act, although they said that the defendant was acting on behalf of his co-sharers as their agent in realizing their share in these monies. With all due respect it seems difficult to see why article 62 was applied and not article 89. In a case of this description, the other sharers would not be expected to know when the debts were recovered by the members of the family entrusted with their recovery and it would seem to me very unequitable to hold that time was running against them from the time the monies were received, when they could not tell on what dates they had been received and could not be aware that the managing member was intending to hold those monies against them."

It is for the Division Bench trying the Appeal to see whether the facts on record would warrant such an inference. If the facts would not warrant the inference that Dalayya acted as agent for the plaintiff, then the only article applicable is 120, there being no specific article applicable to such a case as the present. The principle deducible from the decisions discussed above is: If *A* collects what belongs to *B* knowing that it belongs to *B*, he is absolutely liable to *B* for the amount collected without deduction for expenses, charges, etc., and loss by theft cannot be pleaded in bar of *B*'s claim. *A* has no duty to collect *B*'s money and being a volunteer cannot claim an account. Where *A* and *B* are jointly entitled to a specific sum, if *A* collects the whole without being *B*'s agent, implied or express, there is a presumption that he does so for *B*'s use and article 62 would apply. Where *A* and *B* are entitled to several outstandings and *A* collects some and *B* collects the others before they are allocated to *A* or *B*, neither *A* nor

(1) (1921) I.L.R., 45 Bom., 313.

(1) (1897) I.L.R., 24 Cal., 309.

YERUKOLA B can be said to collect for the other's use and a suit for
YERUKOLA. account is the proper form of sanction and article 62
DEVADOSE, J. would not apply.

In the case of the income of the immovable property in the suit, the proper article to be applied is article 120.

It is not necessary for the present purpose to examine the law relating to tenants-in-common. The position of the members of a Hindu joint family, after division in status and before division of property by metes and bounds or allocation or collection of outstandings, is not the same in all cases. Each case will depend upon the intention and conduct of the members.

My answer to the question referred to the Full Bench is, Article 62 of the Limitation Act does not apply to the claim of the plaintiff in the present case. Article 89 would apply if Dalayya or the fourth defendant acted as plaintiff's agent, implied or expressed. If the facts do not warrant the finding of agency on the part of Dalayya or the fourth defendant, the proper article to apply to the facts of the case is 120 of the Limitation Act.

Time begins to run from the time of demand and refusal, or from the time when the defendant asserted a hostile title to the knowledge of the plaintiff.

M.H.H.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Krishnan.

SUNDARESAN CHETTIAR (PLAINTIFF), APPELLANT,

v.

VISWANADA PANDARA SANNADHI AND ANOTHER,
RESPONDENTS (DEFENDANTS AND SUPPLEMENTAL APPELLANT
IN THE LOWER APPELLATE COURT). *

1922,
March 14.

Religious endowment—Trustee of a temple borrowing for temple purposes without creating a charge—Decree charging temple funds, legality of—Civil Procedure Code (V of 1908), O. XXII, rr. 3, 10—Amendments and new pleas—Discretion of Court in allowing.

A trustee of a temple borrowed monies for purposes of the temple, promising to repay the same out of temple funds but did not create a charge thereon;

Held that in addition to a personal decree for the amount borrowed, the creditor was entitled to a decree charging the temple funds: *Lakshmindrathirtha Swamiar v. Raghavendra Rao*, (1920) I.L.R., 43 Mad., 795, followed. *Swaminatha Aiyar v. Srinivasa Aiyar*, (1916) 32 M.L.J., 259, *Strickland v. Symons*, (1884) 26 Ch.D., 245, and *In re Johnson*. *Shearman v. Robinson* (1880) 15 Ch.D., 548, distinguished.

In cases falling under rule 10 of Order XXII, Civil Procedure Code, the Court has a wider discretion than in cases falling under rule 3, to allow amendments and new pleas to be raised to avoid multiplicity of suits, provided the character of the suit is not thereby changed and the opposite party is not prejudiced: *Venkatarama Rao v. Venkatalingama Nayanam*, (1922) 15 L.W., 72, distinguished.

SECOND APPEAL against the decree of E. H. WALLACE, the District Judge of Tanjore, in Appeal Suit No. 232 of 1918, preferred against the decree of P. S. SETHA AYYAR, the Subordinate Judge of Mayavaram, in Original Suit No. 67 of 1915.

* Second Appeal No. 913 of 1920.

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The facts are set out in the judgment.

Plaintiff preferred this Second Appeal.

T. V. Muthukrishna Ayyar and *N. Muttuswami Ayyar*
for appellant.

S. Ranganadha Ayyar for respondent.

KRISHNAN, J. KRISHNAN, J.—This Second Appeal arises from a suit brought by the plaintiff against the late Pandara Sannadhi of Vedaranniyam Devasthanam for money due on a bond executed by him to plaintiff's deceased grand-uncle. Plaintiff claimed a decree against the defendant personally and against the trust funds, as he alleged that the money was borrowed for devasthanam purposes. The defendant raised several pleas which are not material now but did not set up any plea that the debt was not binding on the devasthanam properties.

The Subordinate Judge decreed the suit as brought in plaintiff's favour and gave him a decree for payment by the defendant personally and out of the temple funds. The Pandara Sannadhi appealed and, besides raising objections to the findings of the trial Court, pleaded that he was not in any event personally liable. He did not specifically object to the liability cast on the temple properties. Pending this Appeal the Pandara Sannadhi was removed from office in another suit and the contesting second respondent before us was appointed Receiver of the temple properties. He was added as party appellant on his own motion, and he asked leave of the Court to file a new ground of appeal, viz., that the temple funds were in any event not liable for the bond amount. Leave was given on condition that the point was to be argued as a pure question of law, whether in the absence of an express charge on the temple property for the bond amount such property could be made liable. No

question of fact was to be raised and it was to be conceded that the borrowing was for temple necessity and within the powers of the trustee, and that by the contract of borrowing itself it was arranged that the debt was to be paid from the trust funds. These conditions were accepted and the new ground was allowed to be raised. There is no question now before us whether these conditions should have been insisted on; having accepted them, it is not open to the Receiver now to go back upon what he did, and ask for a trial on facts on the point. For the purpose of this Second Appeal, we must take the point set out above as the basis of our decision, even though it is not very clear from the terms of the bond that the repayment of the whole debt was to be made from the temple funds.

The learned District Judge has held that whatever the nature of the debt and of the contract regarding it might be, no decree could be given against the trust property because no express charge had been created on that property by the trustee, and he relies on *Swaminatha Aiyar v. Srinivasa Aiyar*(1) as the authority for his view. It is urged by the appellant plaintiff that this view is not right.

Before considering that point, it is necessary to consider the objection that the lower appellate Court should not have allowed the new plea to be raised in Appeal by the Receiver who had been added as the legal representative of the Pandara Sannadhi when it had not been raised in the suit or in the grounds of Appeal by the latter. In support of this contention *Venkatarama Row v. Venkatalingama Navanim*(2) is relied on. That was a case under Order XXII, Rule 3, Civil Procedure Code. It was no doubt ruled there

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(1) (1917) 32 M.L.J., 259.

(2) (1922) 15 L.W., 72.

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that a legal representative could only ask for such amendment as the deceased, or the person whose representative he is, could have asked for. It is not necessary to express an opinion whether this rule should be strictly followed in all cases under Rule 3 or whether there is not a discretion left in the Court to allow further amendments; for it may be pointed out that the present case is one where an institution is represented at different stages of the suit by different representatives, one not claiming under the other and the rule applicable is Rule 10 of Order XXII and not Rule 3. In such a case the Court must be held to have a wider discretion to allow amendments and new pleas to avoid multiplicity of suits, provided the character of the suit is not changed and the opposite side is not prejudiced and the trial embarrassed. Such difficulties do not arise here.

But even if we assume that the rule laid down in the case cited strictly applied to the present case, the leave to raise the new plea under the conditions insisted on was not improperly given; for it was open to the Court to allow the Pandara Sannadhi himself to raise such a plea on Appeal as a pure question of law. The objection therefore fails and must be overruled.

Turning now to the main question argued, whether in the absence of an express charge on the temple properties a decree could be given against such properties or not, it seems to me the learned District Judge's view that it could not be given is not correct on the facts of this case. He has based his judgment entirely on *Swaminatha Aiyar v. Srinivasa Aiyar*(1) which I am inclined to think is not properly applicable here. In that case, though the debtor was a trustee and the loan was intended and utilized for the benefit of the trust the only contract between him and the lender was

contained in a promissory note pledging only his personal credit for the debt. The learned Judges say that he (the creditor) did not obtain any charge on the property but only a promise on the part of the debtor to repay the debt. In other words, no obligation had been imposed on the trust funds either by contract or by deed of charge. They do not, however, consider the position where a trustee acting within his powers of borrowing for necessary purposes of the trust has created by his contract a right of resort to the trust funds for repayment of the debt, which is the case before us. The English cases cited, *Strickland v. Symons*(1) and *In re Johnson. Shearman v. Robinson*(2), the observations in which are relied on by the learned Judges, do not seem to be in point here. The first was a case where a trustee carried on the business of a lunatic asylum when the marriage settlement which created the trust only authorized the sale of it for the benefit of the wife and children of the settlor. He had borrowed moneys for the business but the carrying on of the business itself was unauthorized. The trustee therefore could not have validly borrowed on the credit of the trust funds and had not purported to do so. In such a case, as the Lord Chancellor, the Earl of Selborne, points out,

"There is no principle or authority for saying that if a trustee makes himself personally liable for goods the creditor thereby obtains a lien on the trust property."

There was in that case

"no dedication or application of the trust property to trade purposes and no provision that the business was to be carried on by the trustee"

as the Lord Chancellor says. These observations obviously do not apply to a case like the present where the head of a temple having to carry on, in the proper

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(1) (1917) 32 M.L.J., 259.

(1) (1884) 26 Ch.D., 245.

(2) (1890) 15, Ch.D., 548.

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discharge of the duties of his office, the worship in the temple, finds himself without the necessary funds to do so and borrows with an express stipulation that the creditor should be repaid from the temple properties. The second case referred to by the learned Judges *In re Johnson*. *Shearman v. Robinson*(1) was one of an executor under the will of a trader, who was directed to carry on the trade employing a specific portion of the estate for the purpose. He had incurred debts in the course of that trade and for trade purposes. It was not disputed that he, the executor, was personally liable for those debts, the argument being only that as he was entitled to be indemnified from the estate of the testator ear-marked for the trade, the creditors could also have direct recourse to such assets for payment of their debts. JESSEL, M.R., held that the creditors were only entitled to stand in the place of the executor, as the debts were created on his personal responsibility, and claim payment from such assets only when the executor himself is not in default and is entitled to the indemnity. This is the principle of subrogation which obviously cannot be availed of without reference to the state of the account between the trustee and the *cestui que trust*. That case again seems to have no bearing on the case before us.

On the other hand, there is a recent decision of this Court in *Lakshmindrathirtha Swamiar v. Raghavendra Rao*(2) which is in point. There, as here, the debt was incurred by a Pandara Sannadhi, the head of a Mutt, who is necessarily a sanyasi, and for purposes binding on the mutt. There was no charge on the mutt properties. It was nevertheless held that those properties could be held liable for the debt. There was no evidence there that the debt was borrowed on the credit

of the mutt properties as we should take it there is in the present case; the learned Judges, however, presumed it from the fact that the trustee was a sanyasi. It is not necessary to decide whether we should follow them in raising that presumption, for here we have proof that it was arranged that the debt was to be met from the mutt funds. But it is an authority for holding that for a debt properly borrowed on the credit of mutt funds mutt properties can be made liable and to that extent I am prepared to follow it, though I should not be taken as concurring in all the observations of the learned Judges.

We have again *Srimath Daivasikamani Pandarasannadhi v. Noor Mahomed Routhan*(1) where a decree was given against mutt properties for the price of articles purchased by the matadhipati for the use of the mutt. There was no question raised there that the purchases were on the personal credit of the matadhipati, on the other hand I think it was assumed that the purchases were on the credit of the mutt funds. The learned Judges refused to follow the rule as to executors, and pointed out that the powers of a trustee or manager of a temple in borrowing were similar to those of a guardian of an infant heir, following the observations of the Privy Council in *Konwar Doorganath Roy v. Ramchander Sen*(2). A debt incurred for the purpose of carrying on the worship in the temple is clearly for a necessary purpose and is in my opinion recoverable from the temple funds. Though doubt has been thrown on the correctness of *Srimath Daivasikamani Pandarasannadhi v. Noor Mahomed Routhan*(1) in *Swaminatha Aiyar v. Srinivasa Aiyar*(3), above cited, it has been followed by SPENCER, J., in *Lakshmindra*

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(1) (1880) 15 Ch.D., 543.

(2) (1920) 1 L.R., 42 Mad., 795.

(1) (1908) 1 L.R., 31 Mad., 47.

(2) (1876) 4 L.A., 52.

(3) (1917) 82 M.L.J., 259.

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Thirtha Swamiar v. Raghavendra Rao(1) and I am also inclined to follow it where the debt is not incurred purely on the personal liability of the debtor.

For the above reasons I would set aside the decree of the District Judge and restore that of the Subordinate Judge with costs here and in the Court below payable out of the temple funds.

AYLING, J.—I agree.

N.B.

APPELLATE CIVIL

Before Mr. Justice Spencer and Mr. Justice Ramesam.

1922,
March
1917

PANADAI PATHAN AND ANOTHER DEFENDANTS 2 AND 6),
APPELLANTS,

v.

RAMASAMI CHETTI AND THREE OTHERS (PLAINTIFFS AND
DEFENDANTS 7, 8 AND 4), RESPONDENTS.*

*Transfer of Property Act (IV of 1882), ss 107 and 117—
"Agriculture," meaning of—Leasing land for growing
casuarina, whether for agricultural purpose.*

A lease of land for growing casuarina trees is a lease for an agricultural purpose within the meaning of section 117 of the Transfer of Property Act and does not therefore require a registered instrument for its creation.

"Agriculture" does not connote tilling the soil for raising food products alone but means cultivation of the soil for any useful purpose. *Murugesu Chetti v. Chinnathambi Goundan*, (1901) I.L.R., 24 Mad., 421, explained.

APPEAL against Order of Remand passed by C. S. MAHADEVA AYYAR, in Appeal Suit No. 31 of 1921, on the file of

the Subordinate Judge's Court of Cuddalore, against the decree of T. SUNDARAM AYYAR, in Original Suit No. 23 of 1918 on the file of the District Munsif's Court of Cuddalore.

Defendants 1 and 2, owners of a certain land, orally leased it to defendants 3 and 4 in 1910 on the understanding that the latter should plant casuarina trees thereon and that at the end of seven years the trees should be cut and shared by each party half and half. Defendants 3 and 4 mortgaged their right in the trees in 1912 to the plaintiff who brought a suit in 1917 against defendants 1 to 4 to enforce his mortgage. On defendants' 1 and 2 denying the lease and claiming title paramount to the mortgage, they were exonerated from the suit and a decree was passed in favour of the plaintiff against defendants 3 and 4 alone. Thereafter, the plaintiff brought this suit in 1918 for a declaration that the defendants 3 and 4 were entitled to half the trees and for an injunction to restrain defendants 1 and 2 from cutting the trees for their sole benefit. Defendants 3 and 4 supported the plaintiff while defendants 1 and 2 denied the lease and also pleaded that the lease was invalid for want of a registered document to evidence the same. The Court of first instance held that the lease was invalid for want of a registered instrument and dismissed the suit. On appeal by the plaintiff the Subordinate Judge held that the lease was for an agricultural purpose within the meaning of section 117 of the Transfer of Property Act and did not therefore require a registered deed. He accordingly reversed the decree of the District Munsif and remanded the suit for disposal on the merits. Defendants 1 and 2 preferred this Appeal to the High Court.

K. S. Krishnaswami Aiyangar and N. K. Thirumala Achariyar for appellants.

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(1) (1920) I.L.R., 43 Mad., 795.

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T. R. Srinivasa Ayyangar for respondents.

SPENCER, J.

SPENCER, J.—I feel no doubt that the Subordinate Judge was right in treating a lease of lands for growing casuarina trees to be used for fuel as a lease for agricultural purposes within the meaning of section 117 of the Transfer of Property Act.

With due deference, while accepting that the case was rightly decided, I am unable to follow the opinion of BHASHYAM AYYANGAR, J., in *Murugesu Chetti v. Chinnathambi Goundan* (1), that the word "agriculture" in its more general sense comprehends the raising of vegetables, fruits and other garden products as food for man and beast, if the learned Judge intended thereby to limit it to the raising of food products. For to so restrict the word would be to exclude flower, indigo, cotton, jute, flax tobacco and other such cultivation. For the purposes of that particular case, which related to a lease of betel gardens, considering the policy of favouring agriculture, upon finding that they produced a form of food, the connexion between agriculture and the production of food may have seemed important, but such a limitation is not supported by the definition of agriculture in the Oxford Dictionary which is: "the science and art of cultivating the soil, tillage, husbandry, farming (in the widest sense)". This dictionary notes that a meaning restricted to tillage is rare. In Bouvier's Law Dictionary "agriculture" is defined as the cultivation of the soil for food products or any other useful or valuable growths of the field or garden.

Anderson's Dictionary of Law quoted by the learned Judge is not available for verifying whether the growing of other than food crops was intended by the author to be excluded.

(1) (1901) I.L.R., 24 Mad., 421.

SHEPHARD, J., who sat with BHASHYAM AYYANGAR, J., conceded that the earlier decision, *Kunhayen Haji v. Mayan* (1), to which he was a party, which decided that the lease of a coffee garden was not an agricultural lease, was wrong.

I am equally unable, with respect, to agree with the narrow definition of SADASIVA AYYAR, J., in *Seshayya v. Rajah of Pittapur* (2), and *Rajah of Venkatagiri v. Ayyaparedi* (3), that agriculture means the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc., though the decision may be perfectly sound so far as they excluded pasture lands from "ryoti land" for the purpose of the Madras Estates Land Act.

The learned Judge's definition would exclude sugarcane, indigo, tea, flower, tobacco and betel cultivation from agriculture.

In my opinion agriculture connotes the raising of useful or valuable products which derive nutriment from the soil with the aid of human skill and labour; and thus it will include horticulture, arboriculture and silviculture in all cases where the growth of trees is effected by the expenditure of human care and attention in such operations as those of ploughing, sowing, planting, pruning, manuring, watering, protecting, etc.

The Civil Miscellaneous Appeal is dismissed with costs.

RAMESAM, J.—In *Murugesu Chetti v. Chinnathambi Goundan* (4), it was held that a lease of a land for growing a betel nut garden was for an agricultural purpose. In the course of the judgment it was observed by BHASHYAM AYYANGAR, J., that the term "agriculture" was

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(1) (1894) I.L.R., 17 Mad., 98.
(2) (1915) I.L.R., 38 Mad., 738

(2) (1916) 3 L.W., 485.
(4) (1907) I.L.R., 24 Mad., 421.

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used in its more general sense as "comprehending the raising of vegetables, fruits and other garden products, as food for man and beast." The learned Judge's observations were intended to bring the betel gardens under the term "agriculture" and not to exclude something which was not food for man or beast. The definitions in Webster's Dictionary and Oxford Dictionary show that the term has a still more general sense than the general sense he referred to, but it was unnecessary for his purpose to consider it. In Bouvier's Law Dictionary the term is defined as "the cultivation of soil for food products or any other useful or valuable growths of the field or garden, etc." Wharton's Law Lexicon adopts the definition of "agriculture" in 8 Edw. VII, c. 36, as including "horticulture, forestry and the use of land for any purpose of husbandry, etc." In 10 Edw. VII, c. 8, s. 41, it was defined so as to include the use of land as "meadow or pasture land or orchard or osier or woodland, or for market gardens, nursery grounds or allotments, etc." In 57 and 58, Vict., c. 30, s. 22, the term "agricultural property" was defined so as to include agricultural land, pasture and woodland, etc. In *Jagdish Chunder Sanyal v. Lal Mohan Poddar*(1), the definition of Webster was approved and two American cases were also mentioned as having followed that definition, though it is not clear for what purpose. To give a narrower interpretation to the term and to confine it to the raising of products used as food for man and beast will exclude all cultivation of fibrous plants such as cotton, jute and linen and all plants used for dyeing purposes, such as indigo, etc., and all timber trees, and flowering plants. I do not think this is the intention of the Act. The rearing of a casuarina plantation requires some preparation of the ground and

(1) (1911) 13 C.L.J., 318, 324.

subsequent care by watering the plants. The cases in the Estates Lands Act, *Rajah of Venkatagiri v. Ayyapareddi*(1), *Seshayya v. Rajah of Pittapur*(2), turn on the special policy of the Act [see section 6 (4)] and cannot help us here. In *Devaraja Naicken v. Ammani Ammal*(3), the point was not argued, being conceded by the learned vakil, and with great deference I think that the learned Judges misconstrued the judgment of SHEPHERD, J., in *Murugesu Chetti v. Chinnathambi Goundan*(4). I am therefore of opinion that a lease for seven years for a casuarina plantation is an agricultural lease within the meaning of section 117 of the Transfer of Property Act and is therefore not governed by section 107 of the Act. The Appeal therefore fails and is dismissed with costs.

N.R.

(1) (1915) I.L.R., 38 Mad., 788.
(3) (1915) 3 L.W., 319.

(2) (1916) 3 L.W., 485.
(4) (1901) I.L.R., 24 Mad., 421.

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APPELLATE CIVIL—FULL BENCH.

*Before Sir Walter Salis Schwabe, K.C., Chief Justice,
Mr. Justice Oldfield, Mr. Justice Phillips,
Mr. Justice Deradoss and Mr. Justice
Venkatasubba Rao.*

1922,
March 22.

JURUGUMILLI BRAHMAYYA (MINOR), BY MOTHER AND
NEXT FRIEND, RAJESWARAMMA (PLAINTIFF),
APPELLANT,

v.

CHELLAGHALI ACHIRAJU (DEFENDANT),
RESPONDENT.*

*Estates Land Act (Madras Act I of 1908), sec. 3 (5)—Grant by
a zamindar—Post settlement inam—Portion of a village—
Grant of both varams on a permanent kattubadi—Whether
grantee a landholder.*

Held, by the Court (the CHIEF JUSTICE and DEVADOSS, J.,
dissenting), that where a zamindar makes a post-settlement
inam grant of a portion of a village with both varams on a
permanent kattubadi the grantee is a landholder within the
meaning of section 3 (5) of the Madras Estates Land Act.

APPEAL against the decree of K. KRISHNAMA ACHARIYAR,
Temporary Subordinate Judge of Cocanada, in Appeal
Suit No. 41 of 1919, preferred against the decree of
P. RAJAGOPALA ACHARYA, District Munsif of Peddāpuram,
in Original Suit No. 437 of 1917.

The Raja of Pithāpuram, on 7th February 1875,
executed and granted a patta, Exhibit A, to one
Tharupa Dorappa of part of the inam known as
Penkilapati Seri owned by the Raja in the proprietary
village of Viraraghavapuram of Kolanka, Pithāpuram

Division. The material portion of the patta is as
follows:

"As you have proved yourself worthy of Devanam's
(Raja's) favour and as you have been rendering service
properly the said land . . . has been assigned to you from
the ensuing fasli 1285 with a kist of Rs. 58 fixed thereon,
Rs. 100 having been struck off out of the previously existing
kist of Rs. 158. So, bringing that land to profit as you please,
you shall peacefully and hereditarily be enjoying the same,
paying the said kist of Rs. 58 every year . . . Taxes levi-
able by the circar (Government) on this land shall be paid by
you alone."

Dorappa sold this land to plaintiff's father in 1903,
on condition of his paying the (pannulu) taxes in respect
of the "inam land" to the Raja of Pithāpuram. The
plaintiff sought to recover possession of the land on the
ground that the defendant is a tenant holding over even
after the expiry of a lease granted to him. The District
Munsif gave judgment in plaintiff's favour. Defendant
appealed, and the Subordinate Judge held that plaintiff
being a landholder within the meaning of the Madras
Estates Land Act a Civil Court had no jurisdiction to
entertain the suit. Against this the plaintiff preferred
a Second Appeal, which came on for hearing before
AYLING, Offg. C.J., and ODGEES, J., who made the
following

ORDER OF REFERENCE TO A FULL BENCH.

AYLING, Offg. C.J.—The only question argued
before us is whether the plaintiff is a landholder within
the definition of section 3 (5) of the Madras Estates
Land Act. He is a transferee from one T. Dorappa to
whom the suit land was granted by the Zamindar of
Pithāpuram in 1875 by Exhibit A. According to plaintiff
this was a lease on favourable terms to a jirayati tenant.
According to defendant it was a grant in inam. I have
carefully considered the terms of Exhibit A, and have

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ACHIRAJU. come to the conclusion that in spite of the reference to "oist" and payment of the same in four annual instalments, the document must be construed as an inam grant on a kattubadi of Rs. 58. The reasons assigned for the grant "as you have proved yourself worthy of the Raja's favour and have been rendering service properly" tend strongly to this conclusion: and it is stated that the land shall be enjoyed "peacefully and hereditarily" and it is spoken of as "assigned" not "leased." There is also no reference to exchange of pattas and muchilikas. The evidence of the grantee (P.W. 2) tends to the same view.

If this be so, I should hold following the judgment of COUTTS TROTTER, J., and myself in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(1), that plaintiff is a landholder and can only sue in a Revenue Court; and that the Lower Court is right.

The view we took in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(1), was, however, dissented from by my learned brother and SPENCER, J., in *Bhupatiraju v. Venkataratnam*(2) and as the point is one which must frequently arise, it is desirable to have it finally determined.

I would therefore refer the following question to a Full Bench:

"Where a zamindar makes a post settlement inam grant of a portion of a village with both varams on a permanent kattubadi, is the grantee a landholder within the meaning of section 3 (5) of the Madras Estates Land Act?"

I do not set out the various decisions bearing on the matter as they are to be found in the judgments in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(1) and *Bhupatiraju v. Venkataratnam*(2).

ODGERS, J.—The facts have been set out by my Lord and I need not repeat them. As to the nature of the grant, I agree with my Lord. For some reasons I wish it had been possible for me to hold that Exhibit A amounted only to the grant of a lease at a favourable rent, but I think the terms of the grant must be construed as against this view. The fact that it was a grant in recognition of past services, the use of the words "assigned" and "hereditarily be enjoying the same" appear to me to connote a grant in inam.

Being a grant in inam, the question arises whether the grantee is a landholder within section 3 (5) of the Madras Estates Land Act. A case which was, I think, indistinguishable from the present, was heard by my brother SPENCER, J., and myself (Civil Revision Petitions Nos. 1090 and 1091 of 1918) and decided in February this year. There I adopted the view in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(1) taken by the minority—WALLIS, C.J., on the original hearing, and KUMARASWAMI SASTRI, J., on the Letters Patent Appeal, as to the meaning of the Act and came to the conclusion with them that the legislature had excluded minor inamdars from the definition of landholders. It is true that in that decision I inclined to the opinion that no melvaram right was, in fact, granted by the terms of the documents in that case, but I based my decision on the assumption of a grant of both the varams. The case was argued at great length. I set out my reasons in some detail with reference to the authorities and with regret I cannot see my way to revising my view at the present time. In that view I had the misfortune to differ from the view taken by my Lord, in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(1), in the Letters

(1) (1921) I.L.R., 44 Mad., 677.

(1) (1921) I.L.R., 44 Mad., 677.

(2) (1921) 41 M.L.J., 512.

BRAHMAYYA Patent Appeal; I have therefore the misfortune to differ
ACHIRAJU. from him here also. In view of the fact that the point has not been authoritatively decided I agree that the matter should be referred to a Full Bench and I agree in the Order of Reference as stated by my Lord.

ON THIS REFERENCE

B. Satyanarayana for appellant.—The question is whether a post settlement minor inamdar is a landholder within the meaning of the Estates Land Act. I contend that he is not: see *Bhupatiraju v. Venkataratnam*(1), *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(2). Reference made to the Preamble of the Act and to section 3. This latter is the most important part of the Act and the remainder really deals with the procedure to be adopted. All the Judges are agreed that an inam is not an "estate." The Act does not purport to define an "inam." Wilson in his Glossary gives the meaning of the word as a gift by a superior to his inferior. Reference made to section 3, clauses (5), (11) and (15) of the Act. Section 6 confers rights of occupancy on ryots, and sections 77 and 189 take away the jurisdiction of Civil Courts. A minor inam is part of an estate geographically so called, but not part of an "estate" as defined by section 3 of the Act. It cannot be brought under any of the clauses (a) to (e) of section 3 (2). If the holding does not come under the definition of "estate" it will not come under the definition of "part of an estate." Again, I am the holder of a parcel of the estate but not the owner. The zamindar is the owner and if I fail to pay the rent he can sue me and recover it. He cannot eject me but he can recover the rent. All the Judges of this Court have held that a minor inamdar is not an owner:

(1) (1921) 41 M.L.J., 512.

(2) (1921) I.L.R., 44 Mad., 677.

Gadadhara Das Bavaji v. Suryanarayana Patnaik(1), *Maharaja of Vizianagaram v. The Collector of Vizagapatam*(2). **BRAHMAYYA**
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[CHIEF JUSTICE.—Is there any law in this country by which by the mere fact that you are the owner of the land you become entitled to a certain share?

Yes. Section 4 of the Estates Land Act.]

"Melvaram" is a hypothetical right to a share of the produce. It is a thing which can be regulated by contract. It is a changing quantity.

[OLDFIELD, J.—Melvaram and kudivaram apply to the zamindar and his grantee, not to the grantee and his sub-tenant.]

[PHILLIPS, J.—In this case is the sum of Rs. 58 rent within the meaning of the Act?

If this case is to be brought within the four corners of the Act, I would be the ryot and the zamindar the landholder, and then what I would pay to the zamindar would be rent, and my relationship with the zamindar would be governed by the Act. But the relationship with my tenant is not governed by the Act and the rent he pays me is not rent within the meaning of the Act: *Marina Veeraswamy v. Bajinapalli Venkatarayudu*(3), *Suryanarayana v. Appa Rau*(4), *Vencataswara Yettiappah Naicker v. Alagoo Moottoo Servagaren*(5).]

V. Ramadass and *V. Viyanna* for respondent.—The land in dispute is situated in Pithapuram estate. I cannot agree with my friend that the moment it was granted as an inam it ceased to form part of an "estate."

(1) (1921) I.L.R., 44 Mad., 677. (2) (1915) I.L.R., 38 Mad., 1129.
 (3) (1920) 39 M.L.J., 225. (4) (1923) I.L.R., 16 Mad., 40.
 (5) (1861) 8 M.L.A., 327 (P.O.).

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ACHIRAJU. The Pithāpuram Zamindar pays the peshkash for it and it is part of the Pithapuram zamindari. The inam is not separately registered. Any portion of an "estate" granted as an inam still forms part and parcel of the estate unless separately registered. Separate registration is essential. This is not an estate within the provisions of clause (d) of section 3 (2). It is only a holding in an estate and not an estate by itself—the estate being the Pithāpuram zamindari. Clause (e) relates to a grant out of an "estate" falling under clauses (a), (b) and (c) of section 3 (2). Clause (d) relates to matters independent of clauses (a), (b) and (c): *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(1).

There is a distinction between minor estates carved out of a permanent settled estate and minor estates not so carved out. "Landholder" has been defined in the act as "a holder of land in an estate or part thereof." Part means only a geographical or physical part. If a zamindar makes a gift of 10 acres to another then the grantee is the owner of that part and section 8 of the Act says that the zamindar may so give, sell or alienate. If the part is separately registered it becomes an estate by itself. If a portion of a village is granted without any reservation of rent the grantee is a landholder: *Chipurapalli Appayya v. Sri Raja Ramachandra Raju*(2). Even when the grantee pays a small rent charge, but all the rights of the zamindar are parted with, the grantee is absolute owner. The test is: "has the zamindar parted with the ownership of the land." The mere liability of the zamindar to pay peshkash does not make him owner unless he retains some rights of property in the grant. It is the inamdar who enjoys the whole benefit of the land and his only liability is to pay the sum of Rs. 58

(1) (1921) I.L.R., 44 Mad., 677.

(2) (1914) 27 M.L.J., 490.

as kattubadi. The word "under-tenure" includes mokhasa, lease, etc., something carved out of an estate under different conditions: Baden Powell, Volume III, page 139. In Madras it is customary to speak of a tenure subject to a small payment, e.g., quit-rent, as a freehold. Such a man is surely an owner. Similarly, if a person is granted an inam subject to a fixed quit-rent, he is the owner with all proprietary rights in the part estate: *Virabhadrayya v. Sonti Venkanna*(1), Halsbury's Laws of England, Volume XXIV. A mere lessee is not an owner of land; but an inamdar stands on a different footing under the Act. If the right to collect the rent accrues to a transferee the latter becomes a landholder: *Venkanna v. Sri Raja Rama Rao*(2). Rent does not necessarily imply that there is a tenant on the land. The policy of the Act is that if the kudivaram and melvaram are both in one person, he is to be considered to be a landholder. There is really one exception to his: section 8. See also *Zamindar of Sanivarappet v. Zamindar of South Vallur*(3), *Parthasaradhi Appa Rao v. Bommadevara Satyanarayana*(4), *Chellayya v. Zamin-darini of Jeggampeta*(5), *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(6). In *Bhupatiraju v. Venkata-ratnam*(7), the grant was considered as a lease. The deed was construed as such because it contained the word "patta." Throughout it was assumed he was a ryot. The whole question is whether he is a ryot.

(1) (1913) 24 M.L.J., 859 at 669. (2) (1915) I.L.R., 38 Mad., 1155.

(3) (1916) I.L.R., 39 Mad., 944.

(4) (1919) I.L.R., 42 Mad., 355 at 359 (P.C.).

(5) S.A. 1169 of 1917 (unreported). (6) (1921) I.L.R., 44 Mad., 677.

(7) (1921) 41 M.L.J., 512.

Reference was also made to *Tungala Mallanna v. Gottumakkala Ramaraju*(1), *Duddampudi Venkatrayudu v. Bikkina Subbarayulu*(2) and to sections 108, 129 and 200 of the Act.

Satyanarayana in reply.—The definition as it stands does not bring me within the meaning of “landholder” as defined in clause (5). Quit-rent is different from kattubadi. Reservation of rent is different from quit-rent: *Abhiram Goswami v. Shyama Charan Nandi*(3). A landholder can go to the Revenue Court only under the Act.

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C.J.

SCHWABE, C.J.—The question referred to the Full Bench is,

“Where a zamindar makes a post-settlement inam grant of a portion of a village with both varams on a permanent kattubadi, is the grantee a landholder within the meaning of section 3 (5) of the Madras Estates Land Act?”

It is not part of the duty of the Full Bench to answer hypothetical questions; and this question must be read, in the light of the facts of the case, to mean “where a zamindar makes a post-settlement inam grant of a portion of a village on the terms of the document of February 7th, 1875, Exhibit A, is the grantee a landholder within the meaning of section 3 (5) of the Madras Estates Land Act?” By that document the zamindar of Pithāpuram assigned to the grantee a portion of the village with a cist of Rs. 58 in perpetuity and to be used as the grantee pleased. Before that date there had been a grant to another for a term on a cist of Rs. 158. Rs. 100 was stated in the document to be struck off as the grantee

proved himself worthy of the Raja's favour and had been rendering services properly. It is not clear to me that by this document the zamindar granted both varams. The words “melvaram” and “kudivaram” seem to be properly used for a landlord's and tenant's share of the produce of land, and it also seems that these terms are, in their strict meaning, only properly applicable when the one bears a proportion to the other. The payment by the tenant of a fixed rent or cist is inconsistent with any such proportionate division; and I venture to doubt if the terms are properly applicable at all when a fixed rent is payable. They are, however, loosely used to represent the landlord's and the tenant's interests in the land, but this also must be qualified by adding the word *hypothetical*, because, if there is a fixed rent, it would seem that that is not necessarily the melvaram. In such a case, the melvaram is said to be the proportionate amount the landlord would receive according to the custom of the locality, if he, in fact, was receiving a proportion. Similarly, I am told that the kudivaram is not what the tenant gets in fact, but what he would, by the custom of the locality, get. It is, however, said that in a case where there is a fixed rent, only if the rent payable is the full rental value, it is properly described as melvaram and the tenant's right is only then properly called kudivaram. This can hardly be correct, because *ex hypothesi* the melvaram, properly so called, is a proportionate amount and cannot be fixed; for a sum which in a full year may represent properly the proportion, in a lean year would not. It is to be observed that the word “melvaram” is not used in the Statute and the word “kudivaram” is used only once and then without definition. Whatever may be the proper interpretation of the word “melvaram,” I cannot see that it can in this case be said to have been granted by the document. It was

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(1) (1914) M.W.N., 345, s.c., 28 I.C., 531. (2) (1918) 8 L.W., 510.
(3) (1909) I.L.R., 36 Cal., 1003 (P.C.).

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argued that, if Rs. 158 had been fixed as the rent, then the melvaram would not have been granted at all; but that as a rebate of the rent was granted in consideration of past services, it must be taken that the melvaram was granted to the tenant. I could understand the argument that a part of it must then have been granted, but I do not follow the argument that it was granted as a whole. Therefore I do not think the question as framed really arises.

The question to be decided turns on the definition of "landholder" in section 3 (5). In section 3 (2) there is a definition of *estate* and the definition does not include a portion of a village. A "landholder" is defined as a "person owning an *estate* or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner." The effect of the Act is to oust the jurisdiction of the Courts in respect of many matters between landholders and the actual cultivators; and it is a well-known canon of construction that there is a strong leaning against construing a Statute as ousting or restricting the jurisdiction of the ordinary Courts, and it follows that, if there are two meanings which could equally well be given to a Statute, by one of which the jurisdiction is ousted and by the other not, the construction to be adopted is the latter. There has been so great a difference of opinion among the Judges who have had to construe this Act that it is difficult to say that the section does not bear either of the two meanings, and it would be sufficient to rest my judgment on the ground that this section is open to both the constructions. But, in my judgment, the grantee of this property is not a person "owning an estate or part thereof." I think that the land is part of an estate, but, in my judgment, the grantee or, as he is called, "minor inamdar" does not

own the estate but holds it in perpetuity for the payment of what is properly described as a fixed rent. Further, it is not at all clear that the zamindar has parted with all rights in the land other than that of receiving this fixed rent; for instance, the right to minerals probably remains in the zamindar. *Owner* is not a word of art but an expression in common use. I think if the question were put, "who is the owner of the land,—the zamindar or inamdar?", the answer would be, "the zamindar." In taking the view that such an inamdar is not a person owning the estate, I am supported by nearly all the Judges before whom this point had come. In *Gailadhara Das Bavaji v. Suryanarayana Patnaik*(1) at page 685, AYLING, J., who has taken the opposite view to that which I am taking, puts it clearly thus:

"As regards the definition of 'landholder,' it may be conceded at once that, so long as the zamindar reserves to himself a quit-rent, the inamdar cannot be regarded as the owner of the lands in the ordinary legal meaning of the term."

The question remains whether this inamdar is a person entitled to collect the rent of this portion of the estate by virtue of any transfer from the owner. In my view, these words were introduced in order to bring in quite a different class of persons, such as, purchasers of part of an estate, mortgagees and what are called farmers of the whole or portions of an estate, and, in my judgment, were not aimed at persons in the position of this grantee at all. I do not think it correct to say that this grantee is entitled to collect rent by virtue of any transfer. If there is any rent collected from any one else, it is not by virtue of the transfer but by virtue of some lease or other disposition of the property made by the inamdar himself. It follows, in my judgment, that the answer to

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(1) (1921) I.L.R., 44 Mad., 677.

BRAMAYYA the question referred to the Full Bench read as, as I
ACHIRAJU. have stated above, it should be read, is in the negative.

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OLDFIELD, J.

OLDFIELD, J.—The question referred is difficult and the considerations arising are evenly balanced. I regret therefore that I cannot follow my Lord in adopting the presumption against a construction of the Statute, which would oust the jurisdiction of the Civil Courts, as in any material degree a basis for the decision. For the matter in issue is not only plaintiff's right to sue in one Court or another, although it is true that it is before us in that form. Our conclusion will determine further whether section 6, Estates Land Act, regulates his relation with defendant, his tenant; and, if we hold that plaintiff is a landholder, defendant will be able to plead that he has a permanent right of occupancy in the land.

The question referred is set out in the judgment just delivered; and with all respect I am unable to deal with it in any form other than that, in which it is stated in the Order of Reference. For, we are empowered by Appellate Side Rule 3 to express our opinion only on the question referred, the one alternative authorized being, what has not been suggested to us, a final decision of the case with or without rejection of the finding, on which the referring Judges were agreed and which they were competent to reach. In fact I feel no difficulty in connexion with the wording of the Reference, since the use in it of the expression "both varams" is unambiguous in its context. For, whatever meaning may in other connexions be assignable to the terms "varam," "melvaram" and "kudivaram," the meaning attached to "both varams" by the referring Judges is clear. It is that expressed by one of them in one of the decisions with which we are concerned:

"When we say that the grant was of both varams, we merely mean that the rights of the grantee were not limited by the necessity of respecting the rights of any person possessed of the kudivaram at the time of the grant."

Gadadhara Das Bavaji v. Suryanarayana Patnaik(1). Shortly a grant of both varams is a grant of the fullest right, which can be conceived as vested in the grantor.

The grant of both varams, which is the subject of the Reference, is however further qualified by its description as a grant by way of inam. The normal incidents of the inam tenure have, so far as we have been shown, never been the subject of any exhaustive judicial definition and in the conflict of authorities, with reference to which this case comes before us, attention is directed almost exclusively to one of those incidents, the liability of the inamdar to the grantor for quit-rent. That liability was relied on in argument here and by WALLIS, C.J.; and KUMARASWAMI SASTRI, J., in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(1), and SPENCER and ODGERS, JJ., in *Bhupatiraju v. Venkataratnam*(2); and it is material, not only with reference to the question of ownership, but also because there can be only one occupancy right and therefore only one landholder and one ryot in respect of the same land, within the definition of the latter terms in section 3 (5) and (15); and, if the quit-rent payable by the inamdar to the grantor is rent, they, not (as defendant contends) the inamdar and his tenant, will be the landholder and ryot.

Of the cases cited in the judgments above referred to, *Venkataswara Yettiapah Naicker v. Alagoo Moottoo Servagaren*(3), *Maharaja of Vizianagaram v. The Collector of Vizagapatam*(4) and *Kshetrabaro Bissoyi v. Sobhanapuram Harikristna Naidu*(5), none seems to me,

(1) (1921) I.L.R., 44 Mad., 677.
(3) (1881) 8 M.I.A., 327 (P.C.).

(2) (1921) 41 M.L.J., 512.

(4) (1915) I.L.R., 38 Mad., 1128.

(5) (1910) I.L.R., 38 Mad., 340.

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BRAHMATTA with all respect, relevant to the question of ownership; **ACHIRAJU**, since the first and second do not deal with a grantee's rights generally, but only with his right to separate registration under a special Act in order to establishment of his separate responsibility for his share of the peshkash, the Judicial Committee in the first statedly restricting the effect of the language it used; and the third decided with reference to Madras Act III of 1895 only that the permanent lease of a service inam was not a transfer of ownership, not anything as to the character of the inam itself. And they are of no greater assistance with reference to the character of an inam quit-rent. For the grant in the first is described as a perpetual lease; in the third discussion of the incidents of the inam lease was unnecessary; and in the second, although an inam with a quit-rent was in question and they are referred to as a perpetual lease and a favourable rent in the judgment, the distinction, with which we are now concerned, would not have affected the conclusion.

That distinction has been recognized by authority and can be traced in the history of the law. In *Suryanarayana v. Appa Rau*(1), relied on by SPENCER, J., in the judgment above cited, it was no doubt held generally that an inamdar was the tenant of his grantor for the purpose of Act VIII of 1865, the law then in force. But in *Lakshminarayana Pantulu v. Venkatrayanam*(2) the decision was that inamdars, who are not cultivating tenants, are not subject to the ordinary obligation of tenants, to exchange patta and muchilka. These decisions were, however, superseded on the passing of the present Estates Land Act, in which by section 3 (11) (c), rent was defined as including for the purpose of various

sections and without distinction between different descriptions of inamdar "quit-rent, jodi, poruppu and the like, payable by an inamdar as such to the landholder"; and the fact that it was then thought necessary to include quit-rent in the definition by specific reference indicates an intention that it should not be regarded as rent in the ordinary sense or with reference to section 3 (5) and (15) or section 6, but in order only to make the remedies available against the inamdar, which the specified sections provide. Lastly, by the amending Act of 1909, which was given retrospective effect, section 3 (11) (c) was expunged; and the proper construction of the change is in my opinion, not that the content of the substantive definition of rent was, without alteration in its terms, enlarged, but only that the right to the remedies, conceded by the law in its original form, was withdrawn. Consistently with this view SPENCER and KRISHNAN, JJ., held in *Venkatasubramaniam v. Rajah of Venkatagiri*(1), with reference to the application of section 61, that quit-rent is not rent, as defined in section 3 (11) in its present form. Quit-rent and rent alike can be expressed only in money; and the former is not necessarily merely the latter reduced. The right of the grantor to it may not be identifiable with any known to modern English tenancy law and the use of the term "quit-rent" in this connexion may be obsolete in England; but an analogy with it may be found in the quit-rent payable on an English estate in fee simple on the commutation of an original liability for service. (William's Law of Real Property, 22nd Edition, pp. 55, 58.) The law standing thus, the liability of the inamdar for quit-rent need not be regarded as inconsistent with his character as a landholder under the Act.

(1) (1898) I.L.R., 16 Mad., 40.

(2) (1898) I.L.R., 21 Mad., 116 (F.B.).

(1) (1920) 11 L.W., 523.

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There are ordinarily, however, it was not disputed at the hearing, other incidents of the tenure which are equally important, the inability of the grantee to alienate inconsistently with the terms of the grant and the right of the grantor to re-enter consistently with them; that is, in the case of a personal inam such as we are concerned with at present, on failure of heirs to the grantee or in the case of a service inam in default in the performance of service. On the question whether in the case before us there is such a right of re-entry the referring Judges are silent. But, if the Reference does relate to inam subject to these incidents, there may be some reason in a country in which estates subject to reversionary right, such as a Hindu widow's, are common, for regarding the ownership contemplated in section 3 (5) as comprehensive and as unaffected by the rights of re-entry or reversion above referred to. It is, however, unnecessary to pursue these considerations; because I have come to the conclusion that an inamdar with both varams of a part of a village is in any case a landholder under section 3 (5), because he is a person entitled at least to "collect the rent by virtue of a transfer from the owner or his predecessor in title."

That such an inam grant confers rights in the property granted short only of ownership, including the right to enjoy it in every ordinary way, either directly or through other persons admitted as tenants was not disputed before us and has not been doubted in any previous decision. Such a grant would therefore ordinarily carry with it the right to collect rent from tenants after their admission; and I accordingly deal next with the special considerations, on which plaintiff's argument has mainly turned and which arise from the facts that his grant is of both varams and of a part only of the estate. Those considerations are, as I understand

them, that the legislature has by section 3 (2) (d) refused to apply the Act to villages outside the large estates specified in section 3 (2) (a), (b), (c), where the grant consists of both varams, in pursuance of a principle, which must be followed in the construction of other provisions including section 3 (5) and (11) and cannot be abandoned on the ground that a part only of a village is in question. With all respect, the answer to this is firstly, that the recognition of any such principle by the legislature cannot be inferred from the materials available, when it could easily have been expressed and when in fact, as WALLIS, C.J., admitted in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(1), the treatment of a large class of cases in section 3 (2) (e) is irreconcilable with it. Mere conjecture (and nothing more definite has been offered us regarding the nature of the inams contemplated by the draftsman in section 3 (2) (d) and the reasons for his apparent failure to place minor and major inams of the same description on the same footing) can serve no useful purpose. The language, with which we are directly concerned, that of section 3 (2), is unambiguous and nothing in it gives affirmative support to the construction, by which it is proposed to correct it. Such support is, however, it is urged, to be found in section 3 (5), because the words "by virtue of any transfer from the owner" restrict its application to transferees under mortgages with possession or other documents, which confer directly the right to collect rents and exclude grantees of both varams. But such a construction has not been justified by reference to use of similar words in a similar sense in other Statutes; and it is not in my opinion possible to hold that the very general language employed

(1) (1921) I.L.B., 44 Mad., 677.

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OLDFIELD, J. was intended to impose a restriction, which could have been, but was not, expressed, or is in any degree inapplicable to grantees, whose grants are transfers from the owner, entitling them to enjoy the land, firstly by admitting and subsequently by collecting rent from those, who are to carry on the cultivation. SPENCER, J., in *Bhupatiraju v. Venkataratnam*(1), was pressed by the anomaly involved in regarding the transferee as collecting rents from himself, although AYLING, J., in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(2), opined that it would be pedantry to speak of his doing so. If I may expand the meaning of the latter, it is that no necessity to speak of his doing so can arise, because there can be no question of the application of the Act at the time, when the kudivaram is granted or until tenants have actually been admitted. Taking this view, I hold in accordance with the current of authority referred to by SADASIVA AYYAR, J., in his judgment in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(2), that the latter portion of section 3 (5) is applicable to grantees, such as plaintiff, because they are entitled to collect the rents of a portion of an estate as defined in section 3 (2) (a).

It remains to refer to two other provisions of the Act, the explanations to section 6 and the exception to section 8, relied on by KUMARASWAMI SASTRI, J., in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(2), as preventing an inamdar, who has acquired an interest in the kudivaram, from losing his right therein by the grant of permanent tenancy to his sub-tenants, the learned Judge adding that

"it was never the intention of the legislature that persons who acquired rights of permanent occupancy or who acquired them by virtue of the inam grant, should lose the benefit, simply because they get an interest in the melvaram as well."

(1) (1921) 41 M.L.J., 512.

(2) (1921) I.L.R., 44 Mad., 677.

These sections and the explanations of them are undoubtedly difficult of construction; and it is a question whether the explanations to the former and the first clause of the latter can be reconciled. (*Muthu Reddi v. Muthu Venkatapathi Reddi*(1)). But with all deference, the exception to section 8 is not now and was not in the case before the learned Judge in question, because section 3 (2) (d) was not and is not applicable, and the only other provision dealing with the simultaneous acquisition of the rights of the landholder and occupancy ryot is section 8 (1), under which the person acquiring these rights is to hold as a landholder. On the other hand, if it is permissible to refer to the policy of the Act as collected from these sections, the result of such reference is clearly against plaintiff. For under section 8 (3) the merger of the occupancy right under sub-section (1), sub-section (2), not being at present in question, is not to have the effect of converting ryoti land into "home farm land"; and it is evident that the refusal to recognize a grantee of both varams as a landholder would enable the zamindar, the original owner of the estate, to convert all available vacant land into land to which the provisions of section 6 would be inapplicable and which would be indistinguishable from "home farm land," by transferring both varams to persons under his control. It is no doubt no conclusive reason for refusing to give a particular interpretation to a Statute, that such interpretation would facilitate evasion of its provisions. But it is at least reason for hesitation before that interpretation is adopted.

For these reasons, I would answer the Reference in the affirmative, holding that the grantee is at least entitled to collect the rent of a portion of an estate within the meaning of the latter part of section 3 (5).

(1) (1916) 31 M.L.J., 354.

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PHILLIPS, J. PHILLIPS, J.—The question that has been referred to us is as follows :

“Where a zamindar makes a post-settlement inam grant of a portion of a village with both varams on a permanent kattubadi, is the grantee a landholder within the meaning of section 3, clause (5) of the Madras Estates Land Act ?”

Before referring this question, the two learned Judges who referred it considered the language of the grant and decided that it was not a permanent lease on a favourable rent and that it was a grant in inam with both varams of the land. In fact ODGERS, J., says

“For some reasons, I wish it had been possible for me to hold that Exhibit A amounted only to the grant of a lease at a favourable rent, but I think the terms of the grant must be construed against this view.”

It is, in my opinion, somewhat questionable whether it is open to this Bench to disregard this finding of the referring Judges as they had already determined the point themselves. Assuming, however, that it is open to us to do so, I must agree with them that the grant is not a permanent lease. The grant admittedly is of ryoti land within the zamindari of Pithapuram which is an estate within the meaning of section 3, clause 2 (a), of the Madras Estates Land Act. A quit-rent was imposed upon the grantee, and it is contended that this is in fact a rent reserved to the owner and that the grant is merely a permanent lease on favourable terms. I think it is clear that quit-rent is not rent within the meaning of the Estates Land Act. Under the Act as originally passed “rent” included *Jodi*, *Kattubadi*, *Poruppu* and the like payable by the inamdar as such to the landholder and these terms are equivalent to the English word “quit-rent”. This provision was omitted by virtue of the Amending Act of 1909, and now rent does not in terms include payment such as these. This amendment of the Act seems to me to exclude such payments from the

definition of rent. Even in English Law, it is recognized that an estate in fee simple may be liable to pay quit-rent (*vide* Williams on Real Property, page 55) and in this country, I think, it must be recognized that grants in inam are not really in the nature of leaseholds. There are various kinds, sometimes granted free of any payment such as *sarvamanyam*, sometimes on payment of half assessment such as *ardhamanyam* and sometimes an arbitrary sum is fixed for payment, or it may be that services are to be rendered. “Inam” in itself means a gift. Inam tenure appears to me to be in the nature of a “grant” varying in its terms. We see that under the Enfranchized Inams Act of 1862, the Government surrendered its reversionary rights to the inamdars in consideration of an equivalent annual quit-rent, and I do not think that an enfranchized inam can be deemed to be a mere leasehold estate. The question as to the nature of the estate held by the inamdar, I will consider in dealing with the definition of “landholder.” It is not contended that the holding with which we have to deal is one within the meaning of section 3 (2) of the Estates Land Act ; but the contention for the respondent is that it forms part of an estate within the meaning of clause 5 of that section. I do not think much purpose will be served in interpreting its language by any reference to the intention of the legislature, for that is not by any means clear from the Act itself and we see that in many instances it is very difficult to reconcile the language of one section with another, for instance, section 6 (explanation) and section 8 (1). It is suggested that the definition of “estate” is more important than the definition of “landholder.” When the legislature framed its definition of “estate” it meant to include all the lands with which the Act was meant to deal. According to the preamble, the Act is one to amend and declare the law

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relating to the holding of land in estates in the Presidency of Madras. It cannot be disputed that it deals with holdings of lands situated within an estate and not merely with holdings of complete estates. The person mainly dealt with under the Act is what is called a ryot, and he is a person who holds for the purpose of agriculture ryoti land in an estate. I do not therefore think that we must attach more importance to the definition of "estate" than to the definition of "landholder" with whom and with whose relations to his tenants the Act is mainly concerned. When we come to the definition of "landholder," we find that it means a person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title. The appellant inamdar in this case is certainly not a person owning an estate within the definition of section 3, clause 2, and it is argued that he is not the owner of part thereof. The lands which were granted to the inamdar in this case were admittedly ryoti lands in a permanently settled estate and undoubtedly form geographically a part of the estate. The question turns therefore upon the meaning of the word "owning." In construing this section, WALLIS, C.J., in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(1), was of opinion that when and so long as a full owner in making a grant reserves an interest to himself, as by way of rent, he and his successors continue to be owners, no matter how insignificant may be the interest he reserves to himself. He relies on *Maharaja of Vizianagaram v. The Collector of Vizagapatam*(2), to which he himself was a party. That case was concerned with a deed granting a *mokhasa patta*, and it was held that the grant did not

(1) (1921) I.L.R., 44 Mad., 677.

(2) (1916) I.L.R., 38 Mad., 1128.

amount to transfer of ownership so as to enable the grantee to have his lands separately registered under Act I of 1876. In that case reliance was placed on the decision of the Privy Council in *Vencataswara Yettiapah Naicker v. Alagoo Moottoo Servagaren* (1), but the Privy Council were dealing with a case of permanent lease and also the question of registry. The question really, in my opinion, is whether the word "owning" under clause 5, must necessarily mean owner of every conceivable right in the estate, or whether the present inamdar to whom a grant of the land was made subject to a payment of quit-rent to the zamindar can be deemed to be owner. In two cases recently decided by the Privy Council, *Suryanarayana v. Patanna*(2), and *Venkata Sastrulu v. Seetharamudu*(3), it was held that a grant in inam, in the absence of any restrictions, must be deemed to be grant of the land itself subject to the existing rights of occupancy. In the latter case their Lordships considered the question whether the grant was a grant of the land revenue alone to a person not having permanent right of occupancy, or whether it vested in the grantee the whole proprietary interest in the property, and they came to the conclusion that the inam grant carried with it not the land revenue alone but the whole proprietary interest in the property. These two cases were no doubt cases where the grant was made free of any payment; but I do not think that reservation of payment to the grantor can alter the nature of what is granted. In the present case the land is assigned to the grantee who is to bring the land to profit as he pleases, and peacefully and hereditarily enjoy the same, the only reservation being that a "cist",

(1) (1861) 8 M.I.A., 327. (P.O.).

(2) (1918) I.L.R., 41 Mad., 1012 (P.C.).

(3) (1920) I.L.R., 43 Mad., 169. (P.O.).

as it is called, of Rs. 58 is fixed thereon. There is no doubt in this case that it was not a grant merely of the *melvaram*. for admittedly it was a grant also of the *kudivaram* or tenant's interest in the land, and I am prepared to hold that it was a grant of the zamindar's proprietary interest. It may also be argued that the zamindar himself is not the absolute owner; for we see, under Regulations 25 and 31 of 1802, that the right of the ruling power to the estate was set out and by Regulation 25 of 1802, permanent grants were made to zamindars, but the Government reserved an annual payment to itself which in such cases is termed *peshkash*. The Government did reserve something to itself, and if we apply the argument that any interest reserved by the owner prevents the grantee from obtaining ownership, it follows that the zamindar himself has not full right of ownership. In construing the word "owning," therefore, I do not think that we can say that it means the ultimate owner who has reserved even the smallest right for himself. What, I take it, must be reserved is not a mere payment but some actual interest in the land itself. In the present case, quit-rent cannot be recovered by the zamindar under the summary provisions of Act 1 of 1908, and although it may be called a charge upon the land, it does not, in my opinion, amount to an interest in the land. I may also refer to the case of *Virabhadrayya v. Sonti Venkanna*(1), where it was held that the ownership vested in the Aghaharamdar and that only the right to payment of annual jodi was reserved to the zamindar. If I am right in this contention, it is unnecessary to decide the further question as to whether the appellant comes within the meaning of the second part of the definition of "landholder," namely,

a person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner. It is not suggested that in this case there has been any actual transfer of the right to collect rent, and that is not what the section says. It depends on whether, by virtue of any transfer from the owner, the transferee is entitled to collect the whole or any portion of the rents of the estate. No doubt the definition of rent is "whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture." Importance has been attached to the use of the word "his" before "estate," but it appears to me that this is rather straining the meaning of the section. It is not denied that a mortgagee in possession would be a person entitled to collect the rents and would be a "landholder" within the meaning of the Act. It cannot be said that he has a right to collect the rents of his own estate. The right to collect rent is a right to collect rent which but for the transfer would be payable to the landholder in his (landholder's) estate. We see that rent is whatever is lawfully payable for the use or occupation of land. Before this present grant was made, the landholder was collecting the rents on this land which is ryoti land. Under section 4 of the Act, a landholder is entitled to collect rent in respect of all ryoti land in the occupation of a ryot. Under section 27, if a question arises as to the amount of rent payable by a ryot, he shall be presumed, until the contrary is shown, to hold at the same rate and under the same conditions as in the last preceding revenue year. Under section 28, in all proceedings under this Act, the rent or rate of rent for the time being lawfully payable by a ryot shall be presumed to be fair and equitable. The Act therefore contemplates the existence of lawful rent payable on all

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(1) (1918) 24 M.L.J., 659.

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PHILLIPS, J. ryoti lands—and this implies the right of the landholder to collect such rent. If, however, he transfers the land this transfer carries with it the right to collect rent from any tenants then on the land or who may subsequently be admitted; therefore by virtue of the transfer the grantee obtains the right to collect the rent on a part of his (the landholder's) estate. In the present case the grantee being entitled to both varams, he is entitled to admit tenants to possession and to collect from them rent, which rent would previously have been payable to the grantor. I would therefore hold that the appellant does come within the definition of "landholder" under the Act.

If I am wrong in my interpretation of the word "owning" in this clause, it would follow that the holder of the estate defined in clause 2 (e) would not be a landholder within the meaning of the Act. This is recognized by WALLIS, C.J., in his judgment, and he gets over the difficulty by saying that such estate holder must be recognized to be a landholder for purposes of the Act, not because he comes within the definition as owning an estate but because it would be repugnant to the subject or context to apply the strict definition of landholder to such cases. The difficulty is obviated by my interpretation of "owning." Prior to the passing of Act I of 1908, Act VIII of 1865 was applicable to estates. Under that Act minor inamdars were definitely declared to be landholders. Until 1908 therefore the appellant in this case would have been deemed to be a landholder, and in the new Act he is not specifically excluded. If he is not a landholder he must be a ryot, for admittedly he was granted a permanent right of occupancy. The definition of a "ryot" is "a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the

landholder the rent which is legally due upon it." It has been held consistently that an inamdar is not a tenant for many purposes [vide *Lakshminarayana Pantulu v. Venkatrayanam*(1), *Lakshminarasimham Pantulu v. Sree Sree Ramachandra Mardaraja Deo*(2), and *Rajah of Venkatagiri v. Subbiah*(3)]. There are also very many provisions in this Act which cannot be applied to the appellant if he is a ryot. For instance, under section 26 (3), the rent now payable by him could be enhanced by the successor of his grantor and the zamindar can apply the provisions of the Act for compelling the payment of the quit-rent; but it is not seriously argued that these provisions are applicable in the case of appellant. Therefore the only other alternative is that the appellant and his holding are not at all governed by the Act, and that the land granted to the appellant is withdrawn from the provisions of the Estates Land Act. It is admitted that the land was ryoti land when the grant was made, and I think it would be necessary for the appellant to show very clearly that, that land had altered its character by being given by the landholder to the present grantee. The policy of the Act is apparently to treat land which has once been "ryoti" as always "ryoti." The estate holder has no right to convert it into his own private land, for there are many incidents attaching to the occupation of "ryoti" land which do not apply to the occupation of other lands, the landholder being very much restricted in his dealings with the former. I should therefore need very strong evidence that the landholder can alter the nature of a ryoti land within his estate by making a grant of it to a dependant or other person on favourable terms. I

(1) (1898) I.L.R., 21 Mad., 116 (P.C.). (2) (1914) I.L.R., 37 Mad., 219.
(3) (1921) 41 M.L.J., 530 (F.B.).

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PHILLIPS, J. do not think that it is necessary, in the view I hold, to discuss this question at greater length, and I only deal with the point because it is not irrelevant to consider whether there is any other position than that of landholder, which appellant can hold to obtain a result by a process of exclusion.

I would therefore answer the question in the affirmative, and I do so the more readily because it is in accordance with the earliest decisions of this Court, and I think that, in cases of ambiguity like this, the principle of "*stare decisis*" is of importance, and that any change should be left to the legislature if it so thinks fit.

DEVADOSS, J. The question referred to the Full Bench is

"where a zamindar makes a post-settlement inam grant of a portion of a village with both varams on a permanent kattabadi, is the grantee a landholder within the meaning of section 3 (5) of the Madras Estates Land Act?"

The appeal in which this question arose is against the decree of the Temporary Subordinate Judge of Cocanada, who reversed the decree of the District Munsif of Peddāpuram, holding that the post settlement minor inamdar, popularly known as Darmila inamdar, was a landholder, and that the Civil Court had no jurisdiction to entertain a suit instituted by him to recover possession of the land with mesne profits from a tenant holding over after the expiry of the lease. In order to decide this question—Is post-settlement minor inamdar a landholder or not?—the object and scope of the Estates Land Act has to be considered.

The Act was the outcome of agitation against the ruinous litigations that went on for years, on account of

the unsettled nature of the tenures in zamindaris in this Presidency. The zamindar in almost all cases tried to make out that the tenants were merely tenants at will, while the latter contended that they were permanent tenants not liable to be evicted at the will of the zamindar. In order to remedy the evil some changes were deemed necessary, and the most important of them was the introduction of the principle that the tenants, occupying what is known as ryoti land in proprietary estates on the date of the passing of the Act, acquired by virtue of section 6 of the Act occupancy right in the holding. It can be gathered from the general scope of the Act that it was the intention of the legislature to give permanency of tenure to tenants. Under the old Act VIII of 1865, the definition of the term "landholder" included "inamdars." The question whether minor inamdars come within the purview of the present Act is not free from difficulty. It is agreed on all hands that a minor inamdar is not an estate holder within the meaning of section 3 (2) of the Act. The difference of opinion is only as regards his being a landholder or not within the meaning of section 3 (5). My answer is he is not. Without taking into consideration the policy of the Act, or the circumstances which led to the passing of the Act, it is abundantly clear from the definition of the word "estate" in section 3 (2), that the legislature intended to exclude minor inams from the operation of the Act. The word "estate" is elaborately and clearly defined in section 3 (2) as follows:—

'Estate' means

(a) any permanently settled estate or temporarily settled zamindari;

(b) any portion of such permanently settled estate or temporarily settled zamindari which is separately registered in the office of the Collector;

(c) any unsettled palaiyam or jagir;

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(d) any village of which the land-revenue alone has been granted in inam to person not owning the kudivaram thereof provided that the grant has been made, confirmed, or recognized by the British Government, or any separated part of such village;

(e) any portion consisting of one or more villages of any of the estates specified above in clauses (a), (b) and (c) which is held on a permanent under-tenure.

Clause (d) makes it quite clear that in order to bring the inams within the operation of the Act the following conditions are necessary: (1) it must be a village; a whole village or a separated part of such village; (2) land revenue alone should have been granted as inam; (3) that the grantee was not the owner of the kudivaram at the time of the grant; (4) the grant is recognized or confirmed by the Government. The minor inam does not fulfil any of these conditions.

It is argued that the legislature in enacting clause 5 overlooked the definition of estate in clause 2. Is it likely that the legislature which took care to exclude minor inams from clause 2 (d) of section 3, would have framed the definition of "landholder" in such a way as to include within its ambit minor inams? It is contended that the legislature is capable of such lapses, but such an argument cannot hold good with regard to the Estates Land Act. It is a well-known principle of interpretation of Statutes that the sections of an enactment should be construed, as far as possible, so as not to make the provisions of the enactment inconsistent with one another. That construction should be adopted which would make the enactment a reasonable and workable one. The term 'landholder' is defined thus:

"Landholder means a person owning an estate or part thereof, and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title or of any order of a competent Court or of any provision of law."

That is, the landholder is one owning (1) an estate (2) or part of an estate (3) or entitled to collect the rents of the whole or any portion of the estate. There cannot be a part of an estate unless the whole is an estate. It is urged that a minor inam situated within the ambit of a zamindari is part of an estate. The fallacy of the argument lies in this. It is not the physical situation that is contemplated by the section. If that was so it may, with equal reason, be contended that every ryot's holding is part of an estate, for it is situated within the zamindari. The word "estate" does not mean land but all the rights, liabilities and duties attaching to or incidental to certain classes of tenure as defined by section 3 (2). The words "part of an estate" have been put into the definition of landholder so as to include the transferee of a portion of the estate either by operation of law or by act of parties. An inamdar is not a transferee of the whole or any portion of the estate. A minor inamdar pays some amount to the zamindar which amount is variously termed *jodi*, *kattubadi*, *poruppu*, *quit-rent*, etc. The transfer from the owner contemplated by the clause is not a transfer of a fraction of the rent of each holding, but of the whole rent of an estate or a portion of the estate. A minor inamdar therefore does not come within the last part of clause (5).

In this connexion it is necessary to consider some other provisions of the Act in order to see that the term landholder was not intended to include a minor inamdar. Section 6 introduces a radical change in favour of the tenant. Under Madras Act VIII of 1865, the tenant was not given any occupancy right which he did not previously possess. In almost every case before the Courts the tenants contended that they had occupancy rights and the zamindar or estate holder that they were only tenants at will. By section 6 all persons in

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occupation of ryoti land on the date of the passing of the Act or who were let into occupation by the landholder after the passing of the Act became occupancy tenants. The minor inamdar in most cases is possessed only of a few acres of land and it could not have been the intention of the legislature to deprive him of the tenant's rights the moment he let in somebody to cultivate the land. Most of the minor inams are to Brahmans or to people of other classes who are not tillers of the soil, and the construction of the Act so as to include them within the operation of section 6 would not only work a great hardship but would be repugnant to several other provisions of the Act. When land was granted as inam, the obvious intention of the grantor was to enable the grantee to enjoy the produce of the land. The contention that the zamindar by granting an inam on a favourable tenure makes the grantee a landholder is repugnant to the idea of the grant of the land to the inamdar. By explanation to section 6, a person owning kudivaram right does not lose it by subsequently holding the land as landholder. If a zamindar grants as inam kudivaram right to a person and subsequently by another document grants a melvaram right or a portion of it, the inamdar does not lose his kudivaram right. If the grant is made by the same document, it is said that the inamdar does not acquire thereby the kudivaram right. Such a construction is repugnant to the terms of the grant and is unreasonable. The exception to section 8 gives a clue to the interpretation of clauses (2) and (5) of section 3 of the Act. In the case of an inamdar coming under clause (2) (d) of section 3, the acquisition by him of the kudivaram right in any land either before or after the passing of the Act makes such land cease to be a part of the estate. If the inamdar is the grantee of both the varams he is not an estate holder. If he is the grantee of the

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melvaram alone and he subsequently acquires kudivaram right also the land in respect of which he has both the varams ceases to be part of the estate. If that be the intention of the legislature as is apparent from the sections, is it reasonable to contend that the legislature framed the definition of landholder so as to include a minor inam within its purview? No doubt we have to see what the words of clause (5) of section 3 import, but in interpreting that clause we have to give it such meaning as is consistent with what follows and what precedes it. If two constructions are possible, that construction should be adopted which would not conflict with the meaning of what precedes and what follows. This is also consistent with the general scheme of the enactment. In *Colquhoun v. Brooks*(1) Lord HERSCHELL says:

"It is beyond dispute too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to show that the particular provision ought not to be construed as it would be, if considered alone and apart from the rest of the Act."

In the course of the answer to a question submitted to the Judges of the King's Bench by the House of Lords, BEST, C.J., observes:

"The intent of the legislature is not to be collected from any particular expression but from a general view of the whole of an Act of Parliament" [*Anon*] (2).

How Statutes should be construed is put succinctly by Lord HALDANE in *Inland Revenue Commissioners v. Herbert*(3):

"My Lords, in approaching the controversy as to the meaning of these sections, I think it worth while to recall a

(1) (1889) 14 App. Cas., 493, 566.

(2) (1825) 3 Bing., 193, 196.

(3) [1913] A.C., 326 at p. 332.

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DEVADOSS, J. principle which must always be borne in mind in construing Acts of Parliament, and particularly legislation of a novel kind. The duty of a Court of law is simply to take the statute it has to construe as it stands, and to construe its words according to their natural significance. While reference may be made to the state of the law, and the material facts and events with which it is apparent that Parliament was dealing, it is not admissible to speculate on the probable opinions and motives of those who framed the legislation, excepting in so far as these appear from the language of the statute. That language must indeed be read as a whole. If the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if they could be taken by themselves. But subject to this, the words must be given their natural meaning, unless to do so would lead to a result which is so absurd that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated."

BLACKBURN, J. (afterwards Lord BLACKBURN) observes in *Rein v. Lane*(1) :

"It is, I apprehend, in accordance with the general rule of construction in every case, that you are not only to look at the words, but you are to look at the context, the collocation, and the object of such words relating to such a matter, and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under such circumstances."

The principle that ought to guide the Court in construing Statutes is clearly laid down by COLERIDGE, J., in *In the matter of the Parish of St. Pancras*(2) :

"It is, in my opinion, so important for the Court, in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language, in order to meet either an alleged convenience, or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation

of a section which is within its words but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute ; and also that to adhere to the literal interpretation is to decide inconsistently with other and over-ruling provisions of the same statute. When the evidence amounts to this, the Court may properly act upon it ; for, the object of all rules of construction being to ascertain the meaning of the language used, and it being unreasonable to impute to the legislature inconsistent intents upon the same general subject matter, what it has clearly said in one part must be the best evidence of what it has intended to say in the other ; and, if the clear language be in accordance with the plain policy and purview of the whole statute, there is the strongest reason for believing that the interpretation of a particular part inconsistently with that, is a wrong interpretation. The Court must apply in such a case the same rules which it would use in construing the limitations of a deed : it must look to the whole context, and endeavour to give effect to all the provisions, enlarging or restraining, if need be for that purpose, the literal interpretation of any particular part."

Again, Lord SELBORNE lays down the rule thus :

"The more literal construction ought not to prevail, if it is opposed to the intentions of the legislature, as apparent by the statute and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated." *Caledonian Railway Company v. North British Railway Company*(1).

In discussing the effect of section 23 of the Bankruptcy Act of 1869, Earl CAIRNS says :

"It is said that the 23rd section of the Act of 1869 produces this result, and I admit freely that the section seems to me capable of that construction. No doubt, if you read it literally it does seem to provide that, 'when any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, the trustee may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property

(1) (1867) L.R., 2 Q.B., 144 at p. 151.

(2) (1887) 6 Ad. & El., 1.

(1)(1881) 6 App. Cas., 114 at p. 122.

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disclaimed shall, if the same is a lease, be deemed to have been surrendered on the same date—the date of the order of adjudication.’ It says, ‘shall be deemed to have been surrendered,’ it does not say ‘shall be surrendered,’ but there shall be a statutory fiction gone through, the result of which is that the lease shall be deemed to have been surrendered on that date. It is possible that that may mean that to all intents and purposes, as between all persons, persons actually concerned in the bankruptcy and those not so concerned, it shall be a surrendered lease and shall be altogether out of the case. But, on the other hand, is that the only interpretation? For that purpose your Lordships, I think, must consider what the object of this provision is. Why is it that there is this statutory fiction introduced? The section obviously is not one which has been prepared with much care or skill, or which shows indeed that the persons who were preparing it had fully present to their minds the various cases with which they had to deal. But is this necessarily the only construction of which the Act admits? I say that we must look to what the purpose is. Now I take it that the purpose of this section, and indeed the purpose of the whole statute, is in the first place to clear and discharge the bankrupt in cases where it is proper that he should be discharged from liability; in the next place to facilitate as early as possible the distribution of the property which is to be divided among the creditors and the winding up of the bankruptcy; and in the third place, to protect the trustee from any liability to which he might be subject and to which he ought not to be subject beyond what is necessary for the purpose of accomplishing the two prior objects. If therefore the statute can admit of any construction limited to these particular objects, we must consider whether that is not a construction preferable to the first to which I have referred. The first construction requires us, if the section is taken literally, to do that for which there is no motive, and as to which there can be no explanation given, that is to say, to destroy the rights and property of third persons, without accomplishing any beneficial object whatever for the purpose of the bankruptcy. . . . Where there are two constructions, the one of which will do, as it seems to me, great and unnecessary injustice and the other of which will avoid that injustice, and will keep

exactly within the purpose for which the statute was passed, it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions.” *Arthur Hill v. East and West India Dock Co.*(1).

I have stated the principles of construction of statutes at some length, in order to show what the duty of the Court is in interpreting the provisions of an enactment, which are either not quite clear or which are opposed to other provisions as well as to the general scheme and policy of the Act as gathered from the Act itself. A literal interpretation of the term landholder so as to include minor inamdar is opposed to the clear intention of the legislature, as can be gathered from the definition of the word “estate” and the provisions of sections 6 and 8 of the Act. The only interpretation consistent with the provisions of the rest of the Act is the one adopted by WALLIS, C.J., in his judgment in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(2). It is unnecessary to examine in detail all the cases on the point. There is considerable authority for the position that a post settlement minor inamdar is not covered by the Estates Land Act and there is equally considerable authority against that position. I propose to deal only with the earliest and the latest of the authorities for the contention that such inams are within the purview of the Act. In *Appalanarasimhulu v. Sanyasi*(3), SUNDARA AYYAR and SADASIVA AYYAR, JJ., held that a Darmila inamdar was a landholder within the meaning of section 3 (5) of the Estates Land Act, though the inam may not be an estate under section 3 (2). It appears from the judgment that what was granted as inam in that case was only a portion of the melvaram right and not the kudivaram as well. The learned Judges observe at page 35:

(1) (1884) 9 A.C., 448 at pp. 454, 455 and 456.

(2) (1921) I.L.R., 44 Mad., 677.

(3) (1915) I.L.R., 38 Mad., 22.

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"The plaintiff is undoubtedly a person entitled to collect rents of a portion of the estate of Sangam Valasa as an under-tenure-holder. If he is liable to pay kattubadi to the zamindar, he is a person holding under him and entitled to collect the rents of a portion of the zamindari as a lessee or a usufructuary mortgagee of the whole or portion of the zamindari. The definition of landholder clearly includes every person entitled to collect rents of any portion of an estate by virtue of any transfer. The plaintiffs by reason of the transfer of the lands in question from the zamindar as an under-tenure are persons entitled to collect the rent of the land."

It is plain from the reasoning of the learned Judges if there was no rent to be collected at the time of the grant, in other words, if there was no tenant on the land having an occupancy right, it may be presumed that they would not have held that the inamdar was a landholder. The definition of rent in clause (11) of section 3 makes it apparent that there should be at least two persons, the person entitled to receive it and another bound to pay it. When the inam is of land in which no one has an occupancy right, what is granted is the kudivaram right plus a portion of the melvaram right. It would be doing violence to the language to say that an inamdar who gets vacant land occupies a dual position, that of a kudivaramdar and melvaramdar. Can it be said that the kudivaram right could never be his because the inam includes a portion of the rent or melvaram? Who is the owner of the kudi right when the inamdar cultivates the land himself? Can it be contended that the moment he asks any one to cultivate it, because he could not do it himself, the right which was, as it were, dangling in the air pounces upon the cultivator and clothes him with the rights of an occupancy tenant by virtue of section 6? When a minor inam is of land, I am strongly of opinion that the grantor does confer upon the grantee the kudivaram right and foregoes a portion of his melvaram right.

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The grantee owning the kudivaram right can never lose it by his acquiring a portion of the melvaram right. The view taken by the learned Judges has been followed in several cases. This view is dissented from in several cases which it is unnecessary for my purpose to examine at length. It is sufficient to deal with the Full Bench case of *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(1), where the majority of the Full Bench held that where a Darmila inamdar is a grantee of both varams he is a landholder within the meaning of section 3 (5). AYLING, J., says at page 687 :

"We must assume that at the time of the inam grant, the lands were either lying waste or were cultivated by a (mere) tenant at will—in any case there was no one in possession whose occupation could not be terminated at the pleasure of the zamindar or his grantee. What was the effect of the grant? It seems to me, it was to place the inamdar in the same position as his grantor, subject only to the liability to pay quit-rent which prevented him from being viewed as an owner of an estate. . . . In fact when we say that the grant was of both varams we merely mean that the rights of the grantee in respect of the land were not limited by the necessity of respecting the rights of any person possessed of the kudivaram at the time of the grant."

With the greatest possible respect I am unable to agree with this view. When a grant is made of both varams, the grantee becomes possessed of both and he cannot be divested of what vests in him by his letting some one into possession of the land. The land does not lose the character of ryoti land, but the inamdar is a ryot himself with the right to pay not the full melvaram but something in lieu of it according to the terms of the grant. The fallacy underlying the argument is the assumption that by the grant of inam the zamindar

(1) (1921) I.L.R., 44 Mad., 677.

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DEVADOSS, J. transfers his right to the inamdar in respect of the land granted. If you look at the grant as one of land itself the assumption becomes groundless. The learned Judge was evidently pressed by the authority of the decisions referred to by him at page 686 which perhaps made him take the view he did. Would it be reasonable to say that the legislature intended to keep out of the purview of the Act inams consisting of one or more villages when both varams are granted, but not inams of only a portion of a village though the grant is of both varams? After the decision of the Full Bench reported in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(1), a bench of this Court consisting of **SPENCER** and **ODGERS, JJ.**, held in *Bhupatiraju v. Venkataratnam*(2), that a minor inamdar possessing kudivaram as well as melvaram right was not a landholder within the meaning of section 3 (5). As my view is the same as that of **WALLIS, C.J.**, and **KUMARASWAMI SASTRI, J.**, in *Gadadhara Das Bavaji v. Suryanarayana Patnaik*(1), and that of **SPENCER** and **ODGERS, JJ.**, in *Bhupatiraju v. Venkataratnam*(2), I do not think it necessary to examine their arguments in detail.

It has been argued by Mr. Ramadoss that, if an inam is a grant of melvaram at a favourable rate, it is liable to be determined under section 26 on the death of the grantor. The inams stand on a different footing from the tenancies created under section 26. The inam is a gift for charitable, religious or other good purpose, or for past services, and therefore the provisions of section 26 do not apply to inams. No doubt an inam grant might be challenged by the successor of the grantor if the law governing the grantor and the successor permits such a course. It is unnecessary to decide the question

(1) (1921) I.L.R., 44 Mad., 677.

(2) (1921) 41 M.L.J., 512.

raised by Mr. Satyanarayana, whether a minor inamdar is a ryot within the meaning of section 3 (15), and whether the jodi or kattubadi he pays is rent within clause (11) of section 3. On a full consideration of the cases as well as the relevant provisions of the Act, I come to the conclusion that where a zamindar makes a post-settlement inam grant of a portion of a village with both varams on a permanent kattubadi, the grantee is not a landholder within the meaning of section 3 (5) of the Madras Estates Land Act.

I therefore answer the question referred to the Full Bench in the negative.

VENKATASUBBA RAO, J.—Before dealing with the question that has been referred to us, I would at the outset notice a difficulty which has been suggested in the argument. Under the terms of the grant in question, a cist of Rs. 58 is payable to the zamindar of Pittapur. If this cist is the equivalent of the landlord's share of the produce, it is said that the grant was not of both the varams; if it falls short of the full value, the grant was at the most of kudivaram and of only a part of the melvaram. In any event, it is argued the grant was not of both the varams. It is sufficient to say in answer to this argument that the terms of the Reference preclude our entering into a discussion of it because the learned Judges who have referred the matter have framed the question in the following terms:

"Where a zamindar makes a post-settlement inam grant of a portion of a village with both varams on a permanent kattubadi, is the grantee a landholder within the meaning of section 3 (5) of the Madras Estates Land Act?"

It has been argued on behalf of the appellant (the inamdar) that in coming to a conclusion we should not favour a construction which would oust the jurisdiction

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of the ordinary Courts of the land. The question before us is, however, not merely one of the Civil Courts possessing or not possessing jurisdiction. But our decision would affect the rights of the inamdar and his tenants because, if we should hold that the Estates Land Act is applicable as between inamdar and his tenants, the latter would have occupancy rights, whereas if we should adopt the opposite view, the tenants would not possess such rights.

The appellant relies upon section 3, sub-section (2) and contends that the inam in question does not fall within any of the clauses enumerated in the sub-section and therefore it is not an "estate." On this point there has been a consensus of judicial opinion. Section 3 (2) (e) which relates to inams in permanently settled or other estates deals with what are known as major inams and the inam with which we are concerned being less than a village, section 3 (2) (e) does not apply to it. The minor inams, therefore, not coming within the purview of this definition, it is argued that the Estates Land Act is not applicable and that the tenants of the inamdar do not have permanent occupancy rights. The difficulty, however, arises on account of the fact that the term "landholder" is defined in section 3 (5) so as to bring in minor inamdars within the operation of the Act. On the exact construction of the sub-section defining "landholder" there has been no doubt a divergence of opinion and to it I shall presently refer. But, to my mind, the inconsistency that exists between the two sub-sections, sub-section (2) defining the word "estate" and sub-section (5) defining the term "landholder" is the source of the difficulty and has been the reason for the conflict of views that have been expressed upon the subject. If it were possible to interpret the two sub-sections in such a manner as to lead to no inconsistency, that would be no

doubt the proper course to follow. But it seems to me impossible to adopt a construction which will not lead to conflict. The question is not, therefore, what is the construction that is possible that will reconcile the provisions of the two sub-sections? but the question is, inconsistency being admitted, to which sub-section will the Courts attach greater importance in deciding this matter? In other words, is it to be assumed that the legislature has by inadvertence omitted to include this description of land in what purports to be an exhaustive definition of "estate," or are we to assume that in framing the definition of "landholder" words have been employed to connote the very opposite of the plain meaning of the words used? On a careful consideration, I am inclined to the view that it would be giving effect to the intention of the legislature to hold that the definition of "landholder" covers the case of inamdars of the description we are dealing with. It is said that the intention of the legislature should be gathered from the whole Act and that a construction of a particular section inconsistent with the plain policy and purview of the whole Statute should be rejected. But we have not been referred to any sections which indicate clearly the intention of the legislature not to treat minor inamdars as landholders. This rule of construction is in the present case therefore of little practical value.

There is no warrant for the position that the legislature has intended to exclude from the operation of the Act the class of minor inamdars on the ground that they hold, or are entitled to, both the varams.

Section 8 enacts the rule that, "where the interest of the landholder and the occupancy right had become united in the same person, such person shall hold the land as a landholder and not as a ryot." This points to the fact that an individual who is the owner of both the

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varams may be a landholder and the land which he holds may be ryoti land. In other words, this section provides that ryoti land shall not lose its character by the holder of it happening to own both the varams. By way of exception to this rule, it is provided that in the case of land coming within section 3 (2) (d) the merger of the two varams will deprive the land of its character of an estate.

Let me next turn to the explanation to section 6, which provides that "a person having a right of occupancy in land does not lose it by subsequently becoming interested in the land as landholder or by subsequently holding the land in ijara or farm." Does not this imply that but for this provision the merger of both the varams in the same individual would have the effect of investing him with the character of "landholder"? and explanation to section 6 is therefore properly treated as a further exception to the general rule laid down in section 8.

Section 3 (2) (e), which is said to deal with major inams in estates, contemplates the inam being an estate notwithstanding the fact that melvaram alone has not been granted to the inamdar. The contrast between 3 (2) (d) and 3 (2) (e) is indeed very marked because under the former clause the land dealt with by it becomes an estate where only melvaram has been granted, whereas the latter clause does not contain any such limitation and under it the fact that the grantee enjoys both the varams does not any the less make the land an estate.

I have examined these provisions with a view to find out, if possible, if the legislature has indicated its intention to refuse to attach the incidents of ryoti land to land when both the varams are held by the same individual. These provisions seem, on the contrary, to

point to a desire on the part of the legislature to guard against the character of ryoti lands being permitted to be changed and tenants being deprived of their occupancy rights.

Turning to the definition of the word "landholder," it seems to me that an inamdar of the description in question falls within the first as well as the second portion of the definition. It is said that the land of which the inam consists is not a part of the estate under section 3 (5). The terms of the Reference assume that the land in question is within a zamindari. If physically the land is within a zamindari, I fail to see how the land is not part of an estate. Would it be argued that a purchaser of a part of the estate does not come within the definition on the ground that though the part he purchased is geographically within the limits of the estate it is still not a part thereof? I am unable to accept this contention.

It is said by Sir JOHN WALLIS, C.J., in *Gadadhara v. Das Bavaji v. Suryanarayana Patnaik*(1), that an inamdar is not "a person owning an estate or part thereof." The reason for adopting that view is said to be that the inamdar pays a kattubadi or cist to the zamindar who as he reserves to himself an interest in the land in making the grant, must be deemed to be the full owner. With great respect, it seems to me that this argument ignores that the zamindar himself is liable to pay revenue to the Government and he is none the less by reason of that fact a landholder. To hold that an inamdar is not a landholder would be to deprive the inamdars dealt with under section 3 (2) (d) and section 3 (2) (e) of the rights of landholders, and it would be strange to hold that their lands are estates, but that they

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have not the rights of landholders under the Act. This difficulty was felt by WALLIS, C.J., and he explains that the inamdar under section 3 (2) (d) or 3 (2) (e) must be held to be a landholder for the purpose of the Act, but that is "not because he comes within the definition as owning an estate but because it would be repugnant to the subject or context to apply the strict definition of 'landholder' to such cases." I agree with SADASIYA AYYAR, J., that a minor inamdar does own his inam lands in the same sense in which an inamdar under section 3 (2) (d) or section 3 (2) (e) does.

Under the second part of the definition an inamdar would be a landholder if he is a "person entitled to collect the rents" of . . . "any portion of the estate by virtue of any transfer from the owner." Minor inamdar seems to be clearly such a person. He is entitled to collect the rents of his portion of the estate by virtue of the grant to him by the zamindar. Sir JOHN WALLIS, C.J., finds difficulty in adopting this construction because rent is defined in section 3 (11) as "whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate." "His estate" means the estate of the landholder mentioned in the clause, and as the estate is not the inamdar's estate rents referred to in the definition of landholder do not include payments by tenants to an inamdar for the use and occupation of land in an estate which is the estate of the superior landholder. This argument seems, with all respect, to involve a fallacy. If this view be correct, a mortgagee of a part of a zamindari would not for a similar reason be a landholder because the rents he is entitled to collect are not rents of a portion of his estate. But none would deny that a mortgagee would be a landholder under the second part of the definition. I would respectfully adopt the criticism of AYLING, J., of this view

and say "that the rent which the inamdar is entitled to collect by virtue of his inam grant is identical with the rent which is lawfully payable to the zamindar before the grant." KUMARASWAMI SASTRI, J., in the case already referred to expresses the view that "the definition of 'landholder' in section 3 (5) can only be invoked, if at all, when the transfer of the melvaram is to a person who does not own the kudivaram which is in somebody else." Does it mean that a mortgagee of a part of the zamindari which part is ryoti land and is not in the occupation of tenants at the time of the mortgage cannot be treated as "landholder" as defined by the Act? Can it be said that a mortgagee of such a part cannot sue his tenants for recovery of rents by virtue of the transfer or that the tenants admitted to possession of ryoti land subsequent to the transfer do not acquire occupancy rights? With all deference, I am unable to agree with the view contained in the passage quoted above.

I have so far endeavoured to show that, on a strict construction of the definition of landholder, the inamdars of the class in question come within the definition, and also to show that to adopt this view is not opposed to the general scheme of the Act or to the policy of the legislature as expressed in the other sections of the Act.

In contending for the other construction it has been argued that the legislature has indicated its intention to treat inam as an estate when only melvaram has been granted to the inamdar and section 3 (2) (d) has been relied upon in support of this argument. The observations of WALLIS, C.J., in the case already referred to, no doubt lend some support to this argument. It seems to me, however, that no useful purpose can be served by drawing any inference from section 3 (2) (d) in the face of section 3 (2) (e) which refers to inams within estates as the legislature has carefully omitted

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the limitation which finds a place in 3 (2) (d) with the result that in the case of inams within estates the inamdar may possess both melvaram and kudivaram.

The view I am inclined to take, it is suggested, will lead to an anomaly. If the zamindar parts first with his kudivaram right in favour of an individual and on the next day grants to the same individual the melvaram, it is said the grantee will not be a landholder and any tenants he may admit to the possession of the land will not acquire rights of occupancy. It is then asked, does the grantee become a landholder if both the varams are granted simultaneously instead of as in the case supposed on two successive days? The anomaly becomes more marked by supposing the case of a zamindar who grants a plot to his elder daughter on condition that she should pay, say Rs. 100 which represents the full value of the melvaram, and who at the same time grants another plot to his younger daughter fixing the amount to be paid, say at Rs. 90 which *ex hypothesi* is an amount less than the equivalent of the landholder's share. Is the grantee, it is asked, in the former case a ryot, whereas in the latter a landholder? At one stage in the course of the argument, I confess that sensible of the difficulties arising from either of the answers that could be given to the question referred to us, I myself suggested these illustrations, but I am satisfied that the view to which I have given expression on the question referred to us is the correct one. In the cases abovementioned the Courts will probably deal with the question as one of intention and will no doubt prevent the evasion of the law by ascertaining the real nature of the transaction and what in effect it amounts to.

I shall examine these illustrations a little more closely. It is said that because the first daughter grantee, is not a landholder therefore the second daughter

grantee, is not also a landholder. Let us suppose that the zamindar makes a third grant subject to the payment to him of a cist of Rs. 10, would the grantee be a landholder? The answer, if the argument I am dealing with is correct, would be that the grantee is not a landholder. Let us then take the case of a grant without any reservation of rent; would it be contended that the grantee is still not a landholder? Instead of a part of the land being granted as gift, free of rent, let us suppose that a part has been sold outright to a purchaser for a fixed sum of money; would the contention still be that the purchaser is not a landholder? So far at any rate, as the last two cases are concerned, the transferee taking under a gift or a purchase would be a landholder under the definition of the term, because each of them is a person owning a part of the estate. It is, therefore, unsafe to seek to ascertain the legal principle applicable from a discussion of the illustrations of the nature referred to.

It may not be irrelevant to refer to another consideration. If the proposition that a minor inamdar is not a landholder is correct, the zamindars will be enabled to grant ryoti land in small parcels to their favourites or dependants, who, as a result of the grant, will enjoy higher rights than their grantors themselves had; for, the tenants of the inamdars are denied occupancy rights whereas if the zamindars had admitted previous to the grant, tenants to possession, the latter would have permanent rights of occupancy.

For these reasons, I would answer the reference in the affirmative holding that the grantee is a landholder within the meaning of section 3 (5) of the Madras Estates Land Act.

The Court.—As the majority of the Court takes that view, the answer of the Court to the question referred is in the affirmative.

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APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

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v.

KING-EMPEROR.

Criminal Procedure Code (V of 1898), sec. 164—Statement by witness, recorded by Magistrate—Evidence Act (I of 1872), sec. 157—Relevancy to corroborate statement before Committing Magistrate.

A statement by a witness recorded by a Magistrate under section 164 of the Criminal Procedure Code is admissible in evidence to corroborate the statement made by that witness before the Committing Magistrate and from which statement he resiles in the Sessions Court.

Emperor v. Akbar Badoo, I.L.R., 34 Bom., 399, dissented from; 2 Weir's Cr. Rulings, 821, followed.

TRIAL referred by J. K. LANCASHIRE, Acting Sessions Judge of Tinnevely, for confirmation of the sentence of death passed on the said prisoner.

The prisoner also appealed against the conviction and sentence. The facts are set out in the judgment of Mr. Justice AYLING.

C. Narasimha Achariyar for prisoner.

The Public Prosecutor for the Crown.

AYLING, J. AYLING, J.—Accused in this case has been convicted of the murder of an old woman named Pichi and sentenced to death.

The prosecution case is as follows:—Deceased was a relation of accused, and on her husband's death came to live in his house, bringing with her a sum of Rs. 200, which she lent him to pay off a mortgage. Subsequently

disputes arose, and she wanted her money back, and moved into a small hut close to accused where she lived by herself. So far there is no dispute.

According to the defence, accused managed to pay off the debt to deceased by selling his wife's jewels. According to the prosecution, he did not; and the wrangling continued culminating in a furious quarrel on the night of December 29th. Even after bed time, deceased continued to abuse accused from her hut, and at last, the man infuriated beyond endurance went out and throttled her. He then tied her body in a sack with some heavy stones, and at about daybreak carried it to a well about 150 yards away and threw it in. There the body was found four days later, and accused was arrested.

The above facts are practically all contained in two statements recorded by the Sub-Magistrate from accused's wife, Subbammal, prosecution witness 2, the first Exhibit D, under section 164, Criminal Procedure Code, on 4th January 1922, and the second, Exhibit C, in the course of the committal enquiry a week later. These statements, if accepted, leave no possible room for doubt as to the commission of the murder by the accused. Subbammal did not actually see the murder; but she deposes to her husband going to deceased's hut, to hearing the latter's cries and the sounds of blows, to her husband's returning and fetching a gunny bag and rope, and threatening her to make her keep quiet. She subsequently fled to her mother's house, and stayed there. In the Sessions Court, she resiled from the most important part of the above story, and swore that her husband did not leave the house, and that her earlier statements were enforced by police ill-treatment. Her deposition before the Committing Magistrate, Exhibit C, was therefore treated as evidence under section 288,

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* Referred Trial No. 16 of 1922 and Criminal Appeal No. 133 of 1922.

Criminal Procedure Code, and the case turns very largely on whether it can safely be accepted as true.

A preliminary point of some importance has been raised as to whether the first statement, Exhibit D, is relevant under section 157, Indian Evidence Act, to corroborate the deposition, Exhibit C. It is not disputed that Exhibit D is a statement which would be admissible under the terms of the section to corroborate a statement to the same effect, if made in the witness-box in the Sessions Court; but it is argued for appellant that deposition before the Committing Magistrate is not testimony within the meaning of section 157, and that the latter section will not apply to the present case.

The authority for this view is the judgment in *Emperor v. Akbar Baloo*(1), in which the learned Judges certainly ruled that "previous statements may be used to corroborate or contradict statements made *at the trial*: not to corroborate statements made prior to the trial." In the latter category they included a statement made, as in the present case, in the course of the committal enquiry.

No reasons are given; and no other case has been quoted to us in which the same view has been taken.

With all respect, it seems to me to be wrong. I know of no reason why the word "testimony" in section 157, Indian Evidence Act, should be given this artificial limitation: and the object and effect of section 288, Criminal Procedure Code, seems to me to be to place the deposition in the committal enquiry on exactly the same footing as the deposition in the Sessions Court; of course such a statement would be accepted with great caution

(1) (1910) I.L.R., 34 Bom., 309.

like every statement of a person who has changed his story at different stages. But it is evidence in the case; and it is equally in the discretion of the Sessions Judge to believe it and act on it in preference to the deposition in his own Court, as it would be to believe and act on the latter, in preference to a contradictory statement before the Committing Magistrate—vide judgment of AIKMAN, J., in *Emperor v. Dwarka Kurmi*(1), and also *Queen Empress v. Dorasami Ayyar*(2).

If this is so, then the credibility of the statement in the Committing Magistrate's Court must be considered and tested in exactly the same way as one made in the Sessions Court; and it is of the utmost importance to know how it compares with statements made soon after the event, or before a competent authority. No one will deny that apart from any rule of law comparison with a statement recorded in the circumstances in which Exhibit D was taken affords a very valuable test of the truth of any later statement.

My view is not unsupported by authority; vide a case reported in 2 Weir, 821, where COLLINS, C.J., and BENSON, J., held that a statement of a witness made at the inquest could be used to corroborate her statement in the committal enquiry, although she entirely resiled from the latter in the Sessions Court.

I therefore hold that Exhibit D is admissible under section 157, Indian Evidence Act, to corroborate Exhibit C.

For this purpose it is not without importance that the two statements substantially agree; and perusal of either leaves in my mind a strong impression of naturalness and truth. I should be prepared to accept Exhibit C without Exhibit D; but I am confirmed in this view by

(1) (1906) I.L.R., 28 All., 688.

(2) (1901) I.L.R., 24 Mad., 414

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the fact that the young woman told the same story at the earliest opportunity. Exhibit D was of course taken on the day after the inquest; but she herself admits, and it is not disputed, that she gave the same story at the inquest itself.

She now seeks to explain that these statements were enforced and tutored. At one passage she says that the police took her to the choultry, took off her clothes and ill-treated her. At another she says that they threatened to take off her cloth and disgrace her. I do not wish to emphasize this discrepancy; but there is nothing to support the idea that anything of the kind occurred, and it is impossible to believe that the very detailed and natural story which the witness told was obtained in this way. I may also refer to the evidence of one of the panchayatdars, prosecution witness 6, a respectable and disinterested man worth half a lakh of rupees.

I do not believe the story of ill-treatment, and on the other hand the action of the witness in resiling to save her husband is quite natural.

I think in the circumstances, a sentence of transportation for life is sufficient, and I would commute the sentence accordingly.

ODGERS, J.—I have had the advantage of perusing the judgment just now delivered in which the facts are fully set out. There is no doubt to my mind that the conviction of the accused is right, if the statements of Subbammal, the wife of the accused, and Chinnammal, in the Magistrate's Court can be accepted in preference to their statements before the Sessions Judge, and this is the only point with which I purpose to deal. Subbammal, in Exhibits C and C-1 before the Sub-Magistrate, clearly speaks to the abuse of her husband by Pichi and to the fact that he went inside her house, dealt her two

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blows and she cried out "He has caught hold of the throat and is killing," and she also speaks to the fact of the gunny bag in which the corpse was tied up as belonging to her house. Subbammal said exactly the same thing in Exhibit D before the investigating officer. She adds that her husband actually went towards the west carrying a gunny bag on his head, which is corroborated by a witness, prosecution witness 4, against whom nothing has been suggested. The statements of Chinnammal are not quite so consistent. In her statement before the investigating officer she says that the deceased went inside the house of Pichi whom she heard crying out at midnight; "He is pressing my throat and killing me." Before the Committing Magistrate she repeats that statement, but there seems to be some doubt as to whether she was in or outside the house when she heard the cry. The question is: Can the statements before the Committing Magistrate be accepted in preference to those before the Sessions Judge from the fact that the former are corroborated by statements made before the investigating officer? Section 288 of the Criminal Procedure Code clearly says that the evidence taken before the Committing Magistrate may, in the discretion of the Judge, be treated as evidence in the case, if such witness is examined, and there is abundant authority, it seems to me, for holding that this evidence once admitted at the discretion of the Judge stands on exactly the same footing as any other evidence in the case; see *Reg. v. Arjun Megha and Mana Jeesa*(1), *Emperor v. Dwarka Kurmi*(2) and *Queen-Empress v. Duraiswami Ayyar*(3). It was not argued before us that the Sessions Judge had exercised his discretion wrongly, or that he should not have admitted in evidence the statements made before

(1) (1874) 11 Bom. H.C.R., 281.

(2) (1906) I.L.R., 28 All., 682.

(3) (1901) I.L.R., 24 Mad., 414.

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the Committing Magistrate. Further, the police were examined to disprove any allegation of pressure by them.

Section 157 of the Evidence Act says that

"in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

There is an authority in *Emperor v. Akbar Badoo*(1) to the effect that only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157; previous statements might be used to corroborate or contradict the statements made at the trial, not to corroborate statements made prior to the trial. With all respect, it seems to me that under section 288, Criminal Procedure Code, and the authorities quoted above to the effect that once admitted evidence before the Committing Magistrate stands exactly on the same level as any other evidence in the case, it cannot be said that any previous statement taken before the competent investigating authority cannot be used to corroborate the statements made before the Committing Magistrate which is made by section 288 part of the evidence at the trial. No authority is quoted for the proposition laid down by the Bombay High Court; and in view of the fact that the object of enacting section 157 of the Evidence Act proceeded upon the principle that consistency is a ground for belief in the witness's veracity, contrary to the English rule, this statement of the law cannot be supported. The view I venture to take finds support in a case reported in 2 Weir's Criminal Rulings, 821, of our own Court, where COLLINS, C.J., and BENSON, J., held that a statement

(1) (1910) I.L.R., 34 Bom., 399.

made at the inquest could only be used to corroborate or to contradict a subsequent statement of the witness admissible as evidence. They go on:

"The only use the prosecution could make of her statement at the inquest would be to partially corroborate her statement to the Magistrate; but when that statement is itself unworthy of credit, it cannot be materially strengthened by showing that the witness had previously made a statement partly in agreement and partly in direct and material disagreement with it."

The learned Judges would therefore appear to be clearly of opinion that the statement made at the inquest might be used to corroborate the subsequent statement of the witness admissible as evidence, such as a deposition before the Committing Magistrate which is admissible as evidence under the circumstances detailed in section 288, Criminal Procedure Code. I, therefore, think that the statements, Exhibits C and C-1 and F, corroborated as they are by their previous statements before the investigating officer, are to be preferred to the evidence given by the witnesses before the Sessions Court, especially when we reflect that one of the witnesses is the accused's own wife. As to the other considerations arising on the facts of this case I have had the advantage of considering the judgment just pronounced, and I agree with the conclusions arrived at and with the reduction of the sentence.

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APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter and
Mr. Justice Ramesam.

N. RAMAKRISHNA MUDALI (PLAINTIFF), APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS AND OTHERS
(DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 52—Mortgage with power to sell—Suit for redemption—Sale by mortgagee—Lis pendens—Applicability of doctrine—Assignment of mortgage—Assignment of power of sale—Sale by assignee—Validity—Transfer of Property Act (IV of 1882), sec. 69—Power to sell exercised—Indebtedness as to part only—Validity of sale—Damages.

A private sale by a mortgagee in exercise of a power conferred by the mortgage-deed is not affected by the doctrine of *lis pendens* embodied in section 52 of the Transfer of Property Act and is valid, though made during the pendency of a redemption suit filed by the mortgagor.

A mortgagee who has such power may assign it with the mortgage to a third person and the latter can validly exercise it.

Where such power is exercised in part as to an indebtedness which it did not in truth cover the sale is not invalidated but the mortgagor is entitled to damages under section 69 of the Transfer of Property Act if he can prove that he has been damnified.

APPEAL against the decree and judgment of PAUL APPASWAMI, Acting City Civil Judge, Madras, in O.S. No. 296 of 1919 on the file of the City Civil Court, Madras.

The facts are set out in the Judgment.

Balasubramania Mudaliyar for A. Krishnaswami Ayyar for appellant.

K. Krishnamachariar, W. Kothandaramiah, N. Visvanatha Ayyar, and V. Chelamiah for respondents.

* City Civil Court Appeal No. 20 of 1920.

The JUDGMENT of the Court was delivered by
COUTTS TROTTER, J.—The plaintiff in this case in 1904 executed a mortgage in favour of the Mylapore Benefit Fund to secure a loan of Rs. 1,500. The mortgage conferred a power upon the mortgagee to sell the property, on failure by the mortgagor to carry out the terms as to repayment and so forth. In 1910 the Fund was pressing for repayment and the plaintiff was not able to repay. Thereupon the Fund announced its intention of selling the property. Just before the sale the plaintiff was enabled to produce one Devasikamani Chetty who stepped into the breach, paid off the Fund and took over the security. Devasikamani Chetty, further more, made a new advance of, I think, Rs. 800 over the original consideration of Rs. 1,500 to the plaintiff and secured that by a further equitable mortgage by deposit of title-deeds of the same property that was covered by the original mortgage to the Mylapore Fund. Devasikamani Chetty fared no better than the Fund; because he, in his turn, could get no repayment. So he sub-mortgaged the property to the second defendant in this case who ultimately, purporting to act in exercise of the power of sale conferred under the document, sold it to the present fourth defendant. The plaintiff now brings this suit for redemption of the property and that suit has been dismissed by the learned Judge in the Court below. Hence the Appeal to us.

On behalf of the plaintiff several points have been raised, with the most important of which I will briefly deal. The first argument is based upon section 52 of the Transfer of Property Act and was this; that as the plaintiff had started this suit for redemption before the sale to the fourth defendant, the sale fell under the doctrine of *lis pendens* and, by virtue of the provisions of section 52 of the Act, no rights could be conferred under it. It

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has been held in a series of cases in the Bombay High Court that the doctrine embodied in section 52 of the Transfer of Property Act has no application whatever to a mortgagor who has given under that mortgage an express power of sale and that he cannot, by starting a suit—perhaps a perfectly hopeless suit for redemption—derogate from that which he has in express terms conferred upon the mortgagee by the instrument, namely, the power of sale. It appears to us that that is the only logical result that can be arrived at, and we agree with the view of the Bombay High Court that to hold otherwise would simply be to tear up the instrument which contains the contract agreed upon between the parties.

The next argument that was put forward was: that by the assignment the power of sale in the mortgage was not conveyed, and authorities were cited to the effect that a mere assignment of the mortgage does not inevitably carry with it the power of sale arising from certain eventualities. It is sufficient to say that having examined the words of the assignment here we are quite clear that they are not only wide enough to convey the power of sale but were expressly designed to do so.

Then it is said that the power of sale, in any event, can only be exercised by the party to the original instrument and not by somebody claiming under him. This part of the argument, we think, was founded on a fallacy engendered by an attempt to apply the case of *In re Rumney v. Smith*(1), where it was held that, on a transfer and upon the true construction of the deed considered in that case, it was not intended that any one but the original contracting party should have the right to exercise the power of sale. That may very well have been in that case, and it may be that that intention was

disclosed and could be inferred from the deed and from the known circumstances. But in this case there was an express provision in the mortgage that all the rights and powers conferred by it should be exercisable by the assign of the mortgagee and, therefore, the whole analogy of *In re Rumney v. Smith*(1) fails to apply from the outset.

Finally, an argument was put forward which was based upon section 69 of the Transfer of Property Act. It appears that this property was brought to sale under the power not only for the original debt of Rs. 1,500 and interest covered by the mortgage originally given to the Mylapore Fund but also in respect of the subsequent indebtedness of Rs. 800 created by the loan of Deva-sikamani Chetty secured only by an equitable mortgage by deposit of title-deeds and obviously not covered by the power of sale; and it was suggested that, as the power of sale has been exercised in part as to the indebtedness which it did not in truth cover, the whole sale should be set aside. It appears to us that that point is covered both by the Act itself and by the authorities. By section 69 it is enacted as follows:—

“When a sale has been made in professed exercise of such a power” (that is the power of sale in the given instrument) “the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

That remedy is available to this plaintiff if he can show that he has been in any way damnified by the exercise of this power. That is the section and it is in

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accordance with the settled line of decisions of the English Chancery Courts on the subject, and we need only refer to a judgment of Sir GEORGE JESSEL, M.R., in *Dicker v. Angerstein*(1), where the sale was held good, even though it was proved that the security had actually been satisfied. A similar doctrine has been acted upon in this Court in *Madras Deposit and Benefit Society v. Passanha*(2).

We, therefore, are of opinion that all the points taken by the plaintiff and very clearly put in an interesting argument, when examined, fail to stand the test of criticism and that the learned Judge was right in dismissing the plaintiff's suit.

The Appeal fails and must be dismissed with costs, one set.

M.H.H.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Devadoss.

1922,
March 2.

NATARAJULU NAICKER (SECOND DEFENDANT), APPELLANT,

v.

SUBRAMANIAN CHETTIAR AND NINE OTHERS (PLAINTIFFS
AND DEFENDANTS, NOS. 1, 3 AND 4), RESPONDENTS.*

Paper Currency Act (II of 1910), sect. 26—Promissory note payable to bearer forming consideration for hypothecation—Enforceability of hypothecation—Admissibility in evidence of promissory notes payable to bearer—Loan for illegal or immoral purpose when not recoverable.

Though promissory notes payable to bearer are unenforceable according to section 26 of the Paper Currency Act, a hypothecation bond whose consideration is made up of the prior liability evidenced by such notes is enforceable.

(1) (1876) 3 Ch. D., 600.

(2) (1888) I.L.R., 11 Mad., 201.

* Appeal No 183 of 1919.

Ayyasami Pillai v. Guruswami Naicken, (1916) 3 L.W., 463 and *Nataraja Naicken v. Ayyasawmi Pillai*, (1916) 32 M.L.J., 354, followed.

A promissory note payable to bearer is admissible in evidence.

It is only when a person lends money with the knowledge and object that it may be applied to an illegal or immoral purpose that he cannot recover it and not when he merely hands it over to the absolute control of the borrower and the borrower afterwards employs it illegally or immorally; *Pearce v. Brooks*, (1866) 1 Ex., 213, followed.

APPEAL against the decree of V. DANDAPANI PILLAI in Original Suit No. 86 of 1917 on the file of the Subordinate Judge's Court, Madura.

The second defendant preferred this Appeal.

The facts are given in the Judgment.

L. A. Govindaraghava Ayyar for appellant.

T. R. Ramachandra Ayyar, *K. Aravamudu Ayyangar* and *S. R. Muttuswami Ayyar* for respondents.

JUDGMENT.—The decrees from which the second defendant's legal representative appeals, the second defendant having since died, were passed in suits brought by three plaintiffs to enforce by the sale of the mortgaged properties two hypothecation bonds executed by first defendant, the elder brother of second defendant in a joint Hindu family managed by the younger brother, second defendant.

The principal of the hypothecation deed concerned in Appeal No. 331 is Rs. 1,250 and the principal of the hypothecation deed concerned in Appeal No. 183 is Rs. 7,500.

The first defendant after sowing his wild oats and hopelessly encumbering his half share of the ancestral estate in doing so, proceeded to convey his interest in the family properties to his brother for Rs. 35,000 by means of an unregistered sale-deed in consideration of

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second defendant's undertaking to discharge the first defendant's debts; but as he neglected to complete it, second defendant had to compel specific performance of his contract by means of a suit, and got a sale-deed executed by the court on behalf of first defendant in favour of the second defendant in the present suits.

At the trial the defence of both brothers to these suits was that the hypothecation bonds were not fully supported by consideration, only Rs. 500 having passed for the bond of Rs. 1,250 and only Rs. 2,880 for the bond of Rs. 7,500, and that even the smaller amounts of which payment was admitted were paid for being spent for immoral purposes. It was also contended that the rate of interest secured by these bonds was penal and should be relieved against.

The learned Subordinate Judge found that the bonds were fully supported by lawful consideration and gave the plaintiffs decrees accordingly. He found the interest to be penal, and in one case reduced the rate from 30 per cent per annum compound interest on default of payment of the principal sum which bore simple interest at 24 per cent, to 25½ per cent simple interest, and in the other case from 21 per cent compound interest on default of payment of the principal which bore simple interest at 18 per cent, to 19½ per cent simple interest.

At the trial and at the hearing of the Appeals, a special case was attempted to be made out of the fact that on the date when the bond for Rs. 7,500 was executed a promissory note for Rs. 1,000 principal and interest thereon was thereby discharged, a sale-deed of and for a price of Rs. 1,500 was executed by the second plaintiff in favour of Vijayalakshmi, a dancing girl of Palni who was the first defendant's concubine, and that according to the endorsement on the promissory note, Rs. 1,222 of the proceeds of the sale went towards the

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discharge of the promissory note drawn in favour of second plaintiff's brother-in-law Rajanan *alias* Subbayya Chetty. The suggestion is that in order that first defendant might fulfil his obligation to the purchaser on account of his co-habitation with her, the money-lending plaintiff sold land belonging to him and by that means increased the indebtedness to himself of the spendthrift whose estate he coveted. It is, therefore, argued on the analogy of *Pannichand v. Nanoo Sanker Tawker*(1) and of *Cannan v. Bryce*(2) and other English cases that the whole transaction under which the plaintiff lent money to the first defendant was tainted with immorality and so is not enforceable.

But there is no allegation, much less proof, that the land which was the subject of the sale-deed was given to Vijayalakshmi as a reward for concubinage, or that the money borrowed by first defendant went to compensate second plaintiff for the loss of the land, although both brothers, first and second defendants, were examined as defence witnesses and might have stated the fact if it was true. Nor were the first and second plaintiffs cross-examined when they were in the witness box as to the application of the sale-proceeds. Everything has been left to be inferred from the circumstances, that Vijayalakshmi was the name of one of the girls taken by first defendant to Madras for the Christmas festivities, that he admittedly lived with them there for one week, that Vijayalakshmi's house is in Palni where also second and third plaintiffs live, and that she bought a house from the second plaintiff on the same date that the two plaintiffs lent money under a hypothecation bond to the first defendant. The cash paid under that bond to Rajanan Chetty actually fell short of the price paid for the land,

(1) (1908) 18 M.L.J., 456.

(2) (1819) 3 B. and Ald., 179.

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if the recitals are true. This is the only item to which the appellant's vakil has been able to point as savouring of immorality. As regards the rest of the money borrowed by first defendant, it has been left to be deduced from mere suspicion that first defendant spent it on immoral objects with the connivance of the plaintiffs. There is no evidence that it was part of the contract between the parties that the money should be so applied. In *Pearce v. Brooks*(1) POLLOCK, C. B., referring to *Cannan v. Bryce*(2) distinguished between cases where money is lent with the knowledge and object that it should be applied to an illegal purpose and cases where the lender merely hands it over into the absolute control of the borrower and the borrower afterwards employs it illegally. The doctrine *ex turpi causa non oritur actio* is expressed in section 23 of the Indian Contract Act, which declares that the consideration or object of an agreement is lawful unless the Court regards it as immoral or opposed to public policy, and under section 10 it is necessary that both the consideration and the object should be lawful for an agreement to become a binding contract. The recitals of the promissory notes and the hypothecation bonds afford no indication that the moneys were borrowed with the immediate object of being spent upon prostitution. The lower Court has found (and we think rightly found) that the first defendant was a man of reckless and extravagant habits, who had no regard for money, and who spent it in an extravagant fashion, and that he was in all probability keeping company with dancing girls. But, as the learned Subordinate Judge observes, there is no proof that the plaintiffs joined the first defendant in his reckless ways, or that they knew that he was spending the money that he borrowed from

them for immoral purposes, and that with that knowledge they made the advances. The first defendant was not a minor nor a man who had recently attained majority, and there is no issue or finding that he was under the undue influence of the plaintiffs. The defence thus failed to make out a case that any part of the lending was vitiated by immorality. As to the extent to which the suit mortgages were supported by consideration, the recitals in the documents are borne out by entries in the plaintiffs' ledger and day book. Defendants' second witness deposed that the first defendant admitted having received consideration for one document, Exhibit A, and plaintiffs' second witness spoke to consideration having passed for the other document, Exhibit E, and the Sub-Judge believed him. Plaintiffs' witness No. 5, who wrote both A and E, stated that consideration was paid to the first defendant for both documents. The first defendant prevaricated and repeatedly contradicted himself, first saying that Rs. 1,000 were paid for Exhibit A and then denying it. He says he received only Rs. 2,500 for Exhibit E, though he signed for Rs. 7,500. He states that when he asked for the remaining Rs. 5,000 the plaintiffs took him to an arrack shop and made him drunk. Yet he raised no objection to the document being registered, and in his written statement he did not advance the plea that he was intoxicated and incapable of knowing what he was doing at the time of execution of the suit document.

Such being the state of the evidence the lower Court's finding on the first issue that the bonds are fully supported by consideration must stand undisturbed.

The next attack on the plaintiffs' case is based on the fact that the form of the promissory notes Exhibits B, C, F, F-1, G, G-2, H and H-1 offends against section 26 of the Paper Currency Act II of 1910 in that they are made payable to bearer on demand. This is an illegality

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(1) (1866) 1 Ex., 213.

(2) (1819) 3 B. and Ald., 179.

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which the law makes punishable as an offence. This Court has held in *Chidambaram Chettiar v. Ayyaswami Thevan*(1), and *Nachimuthu Chetty v. Audiappa Pillai*(2), that promissory notes in that prohibited form are not enforceable at law, and suits cannot be maintained on them as such. It is argued that as these promissory notes which are forbidden by law form the greater part of the consideration for the suit hypothecation bonds, the consideration for the bonds is unlawful and consequently the bonds are void agreements.

But the real consideration for the hypothecation bonds is the first defendant's indebtedness ascertained upon settlement of accounts, of which the promissory notes are evidence and the liability for the debts will remain even if the notes are unenforceable. See *Ayyasami Pillai v. Guruswami Naicken*(3), *Shanmuganatha Chettiar v. Srinivasa Ayyar*(4) and *Nataraja Naicken v. Ayyasami Pillai*(5). There is no provision of law making promissory notes in a prohibited form inadmissible in evidence, as there is in respect of unregistered documents under section 49 of the Indian Registration Act, or in respect of unstamped documents under section 35 of the Indian Stamp Act. We have therefore held in *Nachimuthu Chetty v. Audiappa Pillai*(2), that they are admissible in evidence as acknowledgments. For these reasons, the suits which are on the hypothecation bonds will not fail on account of the prohibited form of the promissory notes which they discharged.

The last objection as to the rate of interest remains to be disposed of. In the absence of a finding that there was undue influence, the original rate of interest

(1) (1917) I.L.R., 40 Mad., 585.

(2) (1917) M.W.N., 778.

(3) (1916) 3 L.W., 463.

(4) (1917) I.L.R., 40 Mad., 727.

(5) (1917) 32 M.L.J., 354.

cannot be reopened. Vide *Ponmusami Naicken v. Nadi-muthu Chetti*(1) and *Aziz Khan v. Dani Chand*(2). The rates to which the Subordinate Judge has reduced the interest payable in default appear to be fair and reasonable and we think we should not interfere with them.

In the result both Appeals are dismissed with costs. Time for redemption is extended to a date six months from to-day.

N. R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

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ACHI (FOURTH DEFENDANT), (APPELLANT),

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v.

MINOR NATARAJAN AND TWO OTHERS, BY
GUARDIAN GOUBI ACHI (ASSIGNEE DECREE-HOLDER'S
LEGAL REPRESENTATIVES), (RESPONDENTS).*

Civil Procedure Code (Act V of 1908), sec. 48—Limitation Act (IX of 1908), sec. 15 (1)—Execution of decrees, more than twelve years old—Execution stayed by injunction or order of Court—Application made after 12 years—Computation of time—Deduction of time occupied by stay of execution—Applicability of section 15 (1) of Limitation Act—"Prescribed" in section 15, meaning of—"Period of limitation," meaning of—Limitation Act, sections 4 to 25, whether applicable to section 48 of Civil Procedure Code.

Section 48 of the Civil Procedure Code contains an unqualified prohibition (subject to exceptions contained in clause (2)

(1) (1917) 33 M.L.J., 302.

(2) (1918) 23 C.W.N., 130 (P.C.).

* Appeal against Appellate Order No. 53 of 1921.

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NATARAJAN. thereof) against execution of certain kinds of decrees more than twelve years old and is not controlled by section 15 (1) of the Limitation Act, 1908; hence an application for execution of such a decree stayed by an injunction or order of Court, filed after twelve years from the date of the decree, cannot be saved from the bar under section 48 of the Code by excluding under section 15 (1) of the Act the time during which execution was stayed.

Per SPENCER, J.—The word “prescribed” used in section 15 of the Limitation Act, means prescribed by the first schedule to the Act, though the words “in the Schedule” do not occur in the section as in sections 2 and 6 of the Act. *Gorinda v. Umrao Singh*, (1920) 54 I.C., 279, followed.

Per RAMESAM, J.—The provisions of the Limitation Act are intended to govern the Civil Procedure Code which is a general Act; and it cannot therefore be laid down as a rule that sections 4 to 25 of the Act do not apply to the Code. *Phoolbus Koonwar v. Lalla Jogeswar Sahoy*, (1876) I.L.R., 1 Cal., 226 (P.C.), followed.

The period mentioned in section 48, Civil Procedure Code, is not a period of limitation in the strict sense; and consequently section 15 (1), Limitation Act, is not applicable to it.

APPEAL against the order of R. NARAYANA AYYAR, District Judge of Tanjore, in Appeal Suit No. 568 of 1919, preferred against the order of A. NARAYANA PANTULU, Subordinate Judge of Māyavaram, in E.P.R. No. 56 of 1917 (in Original Suit No. 10 of 1904, on the file of the Sub-Court of Kumbakōnam).

This Civil Miscellaneous Second Appeal arises out of an application for execution of a decree passed by the Subordinate Judge of Kumbakōnam in Original Suit No. 10 of 1904 on the file of his Court. The decree was passed on the 7th September 1904 in favour of the original plaintiff against the first defendant for payment of a sum of money, the second defendant therein being exonerated from the suit. The original plaintiff assigned

the decree to one R, who in turn assigned it over to M, who was the petitioner in the original Court. The petitioner applied for execution of the decree against the properties of the first defendant who was dead and was represented by his mother as his legal representative. The legal representative of the second defendant (the latter having died) applied to be made a party to the execution petition, alleging that he had an interest in the property as reversioner of the first defendant. The Subordinate Judge allowed him to come in. But on appeal by the assignee-decree-holder, the application of the second defendant's legal representative was dismissed by the District Judge. But on further appeal to the High Court, the order of the District Judge was reversed and that of the Subordinate Judge restored. During the pendency of the appeal in the District Court, the execution of the decree was stayed by that Court, viz., from the date of the order of stay of execution, 4th August 1913, to the date of disposal of the appeal, 24th February 1914. The present application for execution was filed on the 4th March 1917, that is, more than 12 years from the date of the decree (7th September 1904). The counter-petitioner (second defendant's legal representative, impleaded as fourth defendant) pleaded, *inter alia*, that the present application for execution was barred as it was filed more than 12 years from the date of the decree, and relied on the provisions of section 48, Civil Procedure Code. The decree-holder contended that the time during which the execution of the decree was stayed by the order of the District Judge, viz., the period from 4th August 1913 to 24th February 1914, should be deducted in his favour under section 15 of the Limitation Act, and that if that was deducted, the petition was not barred. The Subordinate Judge upheld this contention and directed execution. On appeal by

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A. Krishnaswami Ayyar (with him N. Muttuswami Ayyar) for appellant.—The application for execution is barred by the twelve years' rule laid down in section 48, Civil Procedure Code. Section 48, Civil Procedure Code, is not controlled by section 15, Limitation Act. Section 48 gives the total life of a decree, not a period of limitation as under article 182 of the Limitation Act. Section 15, Limitation Act, does not apply by reason of the language of the section. There are two points arising from the language of section 15: (1) Is it prescribed under the Act? (2) Is 12 years under section 48, Civil Procedure Code, a period of Limitation? The word "prescribed" used in section 15 means prescribed by the first Schedule to the Limitation Act. Section 3 of the Act is the enacting section and is introductory to sections 4 to 25, and lays down how the latter are to be used. Section 3 contains the expression prescribed by the Schedule of the Limitation Act, and by no other law. "Prescribed" is used in the Limitation Act as meaning prescribed by Schedule 1 of the Act. That is the sense, in which "prescribed" is used in the Act though the words "by the schedule" are not always added in every section: In section 6, the context required the express use of the phrase "by the schedule"; there was a special reason for repeating it in section 6. There is direct authority that section 15 of the Limitation Act does not govern section 48 of the Civil Procedure

Code. See *Jurawan Pasi v. Mahabir Dhar Dube*(1) SUBBARAYA
Govinda v. Umrao Singh(2), *Ramana v. Babu*(3). The NATARAJAN
observations in *Kumara Venkata Perumal v. Velayuda Reddi*(4) are only obiter. See *Shiann Karan v. The Collector of Benares*(5), *Shidaya Virbhadraya v. Satappa Bharmappa*(6) and *Dayaram v. Lazman*(7). Section 29, Limitation Act, expressly says special or local law is not affected or altered by the provisions of the Act. Special law does not mean a special enactment. If a general law enacts a special period of limitation, it is a special provision of limitation and is therefore a special law within section 29, Limitation Act. Simply because limitation finds a place in the general law of Civil Procedure Code, the provision does not become general law. See *Narasimha Deo Garu v. Krishnachendra Deo Garu*(8).

T. V. Muttukrishna Ayyar for respondent.—The general rules of the Limitation Act are applicable to all suits, etc., unless they fall under a special or local law under section 29. "Prescribed" is not defined in section 2 which is the definition section of the Limitation Act. The Legislature has expressly defined "prescribed" in section 2, clause (16), of the Civil Procedure Code for the purposes of the Code, but not defined it under the Act. In some sections of the Act "prescribed by the Schedules" are used. If the appellant's contention is correct, section 29 is unnecessary. Section 3 simply says in particular cases falling under the Schedule to the Act, Courts are bound to dismiss them, subject to the provisions of sections 4 to 25. It does not say in cases not falling under the schedules, Sections 4 to 25 are not to be applied to them.

(1) (1918) I.L.R., 40 All., 198 at 203.
(3) (1914) I.L.R., 37 Mad., 186.
(5) (1920) I.L.R., 42 All., 118.
(7) (1911) 13 Bom. L.R., 281.

(2) (1920) 54 I.C., 279.
(4) (1914) 27 M.L.J., 25.
(6) (1918) I.L.R., 42 Bom., 367.
(8) (1919) 10 L.W., 156.

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NATARAJAN. Article 181, Limitation Act, shows that section 48 prescribes a period of limitation. "Prescribed" occurs in sections 12, 13, 14, 15, 16, 19 and 22, and "prescribed by Schedule" occurs in sections 3 and 6.

Ramana v. Babu(1) only holds section 6 (minority section) will not affect section 48, Civil Procedure Code; applicability of other sections of the Act are left open. Civil Procedure Code is not a special or local law within section 29, Limitation Act. Privy Council in *Phoolbas Koonwur v. Lalla Jogeshur Sahoy*(2) holds that the Civil Procedure Code is not a special but general law and is followed in *Kumara Venkata Perumal v. Velayuda Reddi*(3). Reference was made to *Peary Mohan Aich v. Arunda Charan Biswas*(4) *Moro Sadashiv v. Visaji Raghunathji*(5) *Srinivasa Ayyangar v. Secretary of State*(6) and *Baranashi v. Bhabadeb*(7).

[RAMESAM, J.—Does section 19, Limitation Act, apply to section 48, Civil Procedure Code?]

T. V. Muttukrishna Ayyar.—Yes; the period of twelve years will be extended by acknowledgment under section 19 of the Act. In any event on general principles, the provisions of section 15 (1) of the Act should be applied to cases falling under section 48, Civil Procedure Code.

A. Krishnaswami Ayyar, in reply.—The decision in *Mahanth Krishna Dayal Gir v. Musst Sakina Bibi*(8), holds that section 19 of the Limitation Act does not apply to section 48, Civil Procedure Code. Section 29 of the Act is only a proviso to other sections. From the proviso, the application of the enactment portion (section 3) cannot be

(1) (1914) I.L.R., 37 Mad., 186.

(8) (1914) 27 M.L.J., 35.

(5) (1892) I.L.R., 16 Bom., 536.

(7) (1921) 34 C.L.J., 167.

(2) (1876) I.L.R., 1 Cal., 226.

(4) (1891) I.L.R., 18 Cal., 631.

(6) (1915) I.L.R., 38 Mad., 92.

(8) (1915) 20 C.W.N., 952.

extended to other cases, *West Derby Union v. Metropolitan Life Assurance Society*(1).

General principles of the Limitation Act were held not applicable to the six months' time allowed for petition to appeal to the Privy Council under the former Civil Procedure Code. See *Thurairojah v. Jainilabdeen Rowthan*(2), *Veeranima v. Abbiah*(3) and *Kullayappa v. Lakshmipathi*(4).

SPENCER, J.—In disposing of an execution petition the Sub-Court of Mayavaram in an Order passed on 9th April 1919, which the District Judge of Tanjore confirmed on Appeal, extended the period of twelve years; after which section 48, Civil Procedure Code, declares that no order for the execution of a decree shall be made upon any fresh application. This twelve years' period has been extended by the executing Court by the addition of a period equal to that during which a stay of execution of the decree was once obtained by an order of Court in 1913.

I am of opinion that this is not permissible by law, and that section 48, Civil Procedure Code, which contains an unqualified prohibition against execution of decrees more than twelve years old, is not controlled by section 15 of the Indian Limitation Act.

Section 15 of that Act speaks of the computation of periods of limitation with reference to the periods prescribed in the Schedule to the Act. Though the words "in the Schedule" do not occur in this section or in section 19, as they do in sections 3 and 6, the word "prescribed" can in applying the Act to suits under the general law refer to nothing else. This is the meaning

(1) (1897) A.C., 647.

(2) (1895) I.L.R., 18 Mad., 484.

(3) (1895) I.L.R., 18 Mad., 99.

(4) (1889) I.L.R., 12 Mad., 467 (471).

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given by this Court to the section in *Narasimha Deo Garu v. Krishnachendra Deo Garu*(1) and by the Allahabad High Court in *Jurawan Pasi v. Muhabir Dhar Dube*(2) as explained by *Shiann Karan v. The Collector of Benares*(3). I am aware that article 181 of the Schedule speaks of section 48, Civil Procedure Code, as providing "a period of limitation." But section 48 has nothing to do with the periods of limitation prescribed in the Schedule to the Limitation Act and has no connexion with the process of computation of time according to the nature of the cause of action in particular suits. For, as may be seen by its position in a Code of Procedure in the part that is headed "execution," it enacts a rule of procedure for all executing Courts. The effect of that rule is to put an absolute term of twelve years on the right of decree-holders to apply to execute their decrees. See the observations of JWAHA PRASAD, J., in *Mahanth Krishna Dayal Gir v. Musst Sakina Bibi*(4). The only exceptions to the absolute term fixed by the section are those mentioned in proviso 2 to the section itself. The precise question which we have to decide is, considering its importance, singularly barren of authority, but there is one reported case in *Govinda v. Umrao Singh*(5), which accords with the view which in my judgment is most reasonable. In *Kumara Venkata Perumal v. Velayuda Reddi*(6) SADASIVA AYYAR, J., was inclined to hold that the general provisions of the Limitation Act relating to exclusion of time governed the provision in section 48 of the Civil Procedure Code; but the learned Chief Justice did not pronounce an opinion on this point of law, as he refused on the facts of that case to extend the time, without deciding whether it would be legal to do so.

(1) (1919) 10 L.W., 156 at pp. 156 and 167.

(2) (1918) L.L.R., 40 All., 198.

(3) (1920) I.L.R., 42 All., 118.

(4) (1916) 20 O.W.N., 952.

(5) (1920) 54 I.C., 279.

(6) (1914) 27 M.L.J., 25.

On the other hand the decision in *Ramana v. Babu*(1) is opposed to the opinion of SADASIVA AYYAR, J.

Reference has been made in the arguments on both sides to section 29, Limitation Act.

I consider that this section does not affect the matter one way or the other. It relates to special or local laws which contain special provisions of their own for the limitation of certain proceedings taken to obtain reliefs provided therein. It does not include the Civil Procedure Code in its scope.

The Appeal is allowed with costs throughout and the execution petition is dismissed as out of time.

RAMESAM, J.—The point for decision in this case is, whether in computing the period of twelve years in section 48 of the Civil Procedure Code, section 15 (1) of the Limitation Act can be applied. The question has been ably and exhaustively argued by the vakils on either side. I confess I find considerable difficulty in coming to a conclusion.

The first point argued for the appellant is that the sections of the Limitation Act 4 to 25 apply only to periods prescribed in the Schedule to the Act. He contends that this is the natural construction that follows on reading the sections from section 3 onwards. As a matter of drafting, it was found unnecessary to repeat in the later sections, the words "by the first Schedule" after "prescribed" as they were mentioned in section 3 and their repetition in each section would be awkward. They are expressly repeated in section 6, as reference had to be made to the third column. When confronted with the question—"what is the need for section 29, if his contention is right?"—his suggestion is that there may

(1) (1914) I.L.R., 37 Mad., 186.

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be suits to which the Limitation Act may apply though the suits may be occasioned by proceedings under special Acts (e.g., declaratory suits occasioned by proceedings under Madras Act IV of 1897 or suits necessitated by proceedings under Madras Act III of 1905) and in such cases both the Acts may apparently apply, and to remove the conflict, section 29 has been enacted. He explains the decision in *Lingayya v. Ohinna Narayana*(1) where the learned Judges give an independent meaning to the word "affect" (apart from the word "alter" in section 29) as referring to the operation of sections 4 to 25, by saying that neither the arguments nor the judgments dealt with sections 4 to 25 in themselves and they proceeded on the assumption that these sections may apply to other Acts and were confined to a consideration of section 29 only. Seeing that the word "affect" was not in the Act of 1871 and was specially introduced in the Act of 1877 and continued in the present Act, I find it difficult to accept the last explanation. The argument of the appellant, with reference to the construction of the word "prescribed" in sections 4 to 25, is supported by *Jurawan Pasi v. Mahabir Dhar Dube*(2) and *Shiann Karan v. The Collector of Benares*(3), but by no other cases. Even if I am inclined to accept it, I cannot, as I feel bound by the decision of the Privy Council in *Phoolbas Koonwur v. Lalla Jogeshur Sahoy*(4) where it was held that the provisions of the Limitation Act were intended to govern the Civil Procedure Code which was a general Act. The fact that the Acts considered in that case were the Acts of 1859 makes no difference. Nor does the consideration that, so far as the disability of minority is concerned, section 6 of the Limitation Act must now be confined to

(1) (1918) I.L.R., 41 Mad., 169 (F.B.). (2) (1918) I.L.R., 40 All., 198.
(3) (1920) I.L.R., 43 All., 118 at p. 124. (4) (1876) I.L.R., 1 Cal., 226 (P.C.).

the Limitation Act only [see *Prem Nath Tiwari v. Chatarpal Man Tiwari*(1), *Ramana v. Babu*(2) and *Moro Sadashiv v. Visaji Raghunathji*(3)] afford a ground for distinguishing *Phoolbas Koonwur v. Lalla Jogeshur Sahoy*(4); for, these rulings are based on the particular language of section 6. The principle of *Phoolbas Koonwur v. Lalla Jogeshur Sahoy*(4), viz., that the Civil Procedure Code is a general law and hence periods of limitation in it are governed by the Limitation Act, was followed in *Peary Mohun Aich v. Arunda Charan Biswas*(5) and was approved of by SADASIVA AYYAR, J., in *Ramana v. Babu*(2); (though not necessary for the decision) and so far I agree with them. But this agreement with SADASIVA AYYAR, J., in *Ramana v. Babu*(2) (which was a case on section 48) does not necessarily imply the conclusion that the provisions of the Limitation Act apply to section 48 of the Civil Procedure Code, as I shall presently show. I must therefore negative the first contention of Mr. Krishnaswami Ayyar that sections 4 to 25 of the Limitation Act do not apply to the Civil Procedure Code.

The second point argued by him is that the period of twelve years is not a period of limitation within the meaning of section 15 of the Act. What is meant by a period of limitation? In the first place it probably does not include mere periods of extension, such as the period of two years under section 31 of the Limitation Act, [*Dayaram v. Laxman*(6)], and the period of three years referred to in section 3 of the Limitation Act [*Narasimha Deo Garu v. Krishnachandra Deo Garu*(7) which is an authority only for this proposition]. Also it is obvious that the phrase "period of limitation" can be used in two

(1) (1915) I.L.R., 37 All., 688. (2) (1914) I.L.R., 37 Mad., 186.
(3) (1892) I.L.R., 16 Bom., 526. (4) (1876) I.L.R., 1 Cal., 226 (P.C.).
(5) (1891) I.L.R., 18 Cal., 631. (6) (1911) 18 Bom. L.R., 284.
(7) (1919) 10 L.W., 156.

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RAMESAM, J. senses, (1) a strict and (2) a loose sense. In the strict sense it means, such a period that a proceeding to which it is sought to be applied will be in time if filed within the period and beyond time if filed after it. It has a double characteristic. Most periods of limitation, e.g., all those mentioned in the Schedule of the Limitation Act, in many special and local laws, and the periods of fifteen days in Order XXI, rule 84, and thirty days in Order XXI, rule 89 of the Civil Procedure Code, and even the periods of two years in section 15 of the Easements Act, are periods of limitation in this sense. But the period in section 48 of Civil Procedure Code is not a period of limitation in this sense. For, an application for execution of a decree (of the kind mentioned in section 48) will in general not be in time if filed within twelve years. It will be out of time unless it is within three years from any of the dates mentioned in the third column of article 182. To an application for execution of a decree article 182 has first to be applied, and if it is found not wanting when tested by article 182, then section 48, Civil Procedure Code will operate as a further test. It is in the nature of a strict period of limitation that it is capable of extension by the general sections of the Limitation Act, particularly by sections 19 and 20, to an indefinite extent; and in the case of application for execution, the period in article 182 is capable of extension to an indefinite extent also by the use of the various provisions in the third column of article 182. It is upon such an extension that section 48, Civil Procedure Code acts as a check. Its operation is secondary in the sense that it operates on the working out of article 182. So viewed, it is a period of limitation in a looser sense; and it is clear that when the legislature described the period in section 48 as a period of limitation in article 181 of the Limitation Act it is only the looser sense that was

intended. It is not that certain kinds of applications were dealt with by article 182 and certain others by section 48 of the Civil Procedure Code, which is the impression produced by a too literal reading of the word "or" in articles 181 and 182. I confess that I do not see what purpose was served by the mention of section 48, Civil Procedure Code, in articles 181 and 182; for all applications governed by section 48 are applications for execution falling within article 182 and it would be enough in article 181 to stop with "elsewhere in this Schedule" without mentioning section 48 of Civil Procedure Code. Again article 182 produces the impression that section 48, Civil Procedure Code, must be first applied and then article 182. But we know this to be not so. I find it difficult to conceive of a case where the result will be different if all reference to section 48, Civil Procedure Code, is omitted in articles 181 and 182 altogether. Be that as it may, it is clear that article 181 refers only to the looser sense of the phrase "period of limitation."

Having arrived at this conclusion, we have next to see in what sense it is used in section 15 of the Limitation Act. On this question, one has to find the sense in which it is used, as best as he can. It may be, that it is used in the looser sense in section 11 (3) of third Schedule of the Civil Procedure Code [*Shiam Karan v. The Collector of Benares*(1)] and in section 48 of the Deccan Agriculturists Relief Act [*Shidaya Virabhadraya v. Satappa Bharmappa*(2) and *Dayaram v. Laxman*(3)], but these cases cannot help us for the sections 5 and 7 to 25 of the Limitation Act. In those sections, it seems to have been used in the stricter sense, [*Jurawan Pasi v. Mahabir Dhar*

(1) (1920) I.L.R., 42 All., 118 at p. 124.

(2) (1918) I.L.R., 42 Bom., 867.

(3) (1911) 13 Bom. L.R., 284.

SUBBAYYAN Dube(1)]. In *Mahantta Krishna Dayal Gir v. Musst Sakina Natarajan. Bibi*(2) it was held that section 19 of the Limitation Act does not apply to the period in section 48 of the Civil Procedure Code. CHAMIER, C.J., does not give any special reason. JWALA PRASAD, J., says section 48 is a rule of procedure. I do not agree with him if he meant to say that the period in section 48 is not a period of limitation at all. For the legislature has described it as a period of limitation in article 181, *Shiam Karan v. The Collector of Benares*(3), but I think he meant to say that it is not such a period in the stricter sense. This aspect was not discussed by SADASIVA AYYAR, J., in *Ramana v. Babu*(4). I therefore agree with my learned brother that the Appeal should be allowed.

In this view it is unnecessary to discuss the third contention of the appellant that section 15 (1) cannot help him as the stay order in this case was obtained by himself, *Maharaja Kesho Prasado Singh Bahadur v. Harban Lal*(5).

I concur in the order of my learned brother.

K.R.

(1) (1918) I.L.R., 40 All., 198 at p. 208.

(2) (1915) 20 C.W.N., 952.

(3) (1920) I.L.R., 43 All., 118 at p. 124.

(4) (1914) I.L.R., 37 Mad., 186. (5) (1920) 55 I.O., 85.

APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter and
Mr. Justice Ramesam.

JORAVARMULL CHAMPALAL (AUCTION PURCHASER),
APPELLANT,

1922,
March 27.

v.

JEYGOPALDAS GHANSHAMDAS BY HIS AGENT MUGDUTH
AND TWO OTHERS (PLAINTIFF AND DEFENDANTS 1 AND 2),
RESPONDENTS.*

Auction—Bid—Bid withdrawn before fall of hammer—Bid an offer—Whether it can be withdrawn before acceptance.

A bid at a Court auction sale is merely an offer which can be withdrawn at any time before it is accepted, and the lot knocked down to the bidder.

ON APPEAL from the Order of Mr. JUSTICE KUMARASWAMI SASTRI made in an application by plaintiff for declaring the appellant herein an auction purchaser at the sale held in execution of the decree in Civil Suit No. 1108 of 1917, on the file of the High Court of Judicature at Bombay and transferred to this Court for execution.

The facts are set out in the Judgment.

T. R. Ramachandra Ayyar and V. Radhakrishnayya for appellant.

A. Krishnaswami Ayyar and N. Rama Ayyar for respondents.

The JUDGMENT of the Court was delivered by

COUTTS TROTTER, J.—This case gives rise to a point of law which has been considered from various aspects both in England and in this country. The facts are these : The appellant in this Court went to an auction and made a bid

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of Rs. 29,200, which turned out to be the highest bid that was made, but before the property was knocked down he seems to have discovered that there was a mortgage on the property subject to which the sale was being conducted. It is not suggested that there had been a concealment about this, but merely that in point of fact it did come to the knowledge of the appellant only a few minutes after he made this bid and before the hammer fell. As soon as it did come to his knowledge he attempted—I say “attempted” because it was not given effect to—to retract his bid, but the auctioneer would not have it and knocked the property down to him for the figure that he had bid, and it is now sought, on behalf of the owner of the property, to enforce that bid against him and the learned Judge has found in favour of that contention.

There is a good deal of authority on this matter and there is authority which, on the face of it, appears to be quite clear. The first case I propose to refer to is the case of *Payne v. Cave*(1), where the auction was one with the usual condition that the highest bidder should be the purchaser. There exactly the same thing happened; a bid was made but before the hammer fell it was retracted and the Court in giving judgment expressed itself as follows:

“The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer which was not done here till the defendant had retracted. An auction is not unaptly called a *locus poenitentiae*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed.”

(1) (1789) 3 Term Rep., 148.

After that was decided, Lord St. Leonards in his Treatise on Vendors and Purchasers writing in the light of that case says this:

“A condition that no person shall retract his bidding was originally suggested to me by the case of *Payne v. Cave*(1), and it has now become a common condition. But I always thought it one that could not be enforced.”

Of course Lord St. Leonards at the time he wrote these words was not Lord St. Leonards but Sir Edward Sugden, and no doubt numberless particulars and conditions of sale were settled by him, and what he says amounts to this—when I have put in a condition against a bidder being allowed to withdraw his bid, I have always been of opinion myself that it was waste paper.

The next case in which the matter is referred to is *Jones v. Nanney*(2). There is very little to say about the actual decision, but it is relied upon by the respondent in this case because of an interpolation on page 99 of some observations made by Wood, B., on the first argument; he threw out the suggestion that the solution of the whole matter might be sought not in the ordinary rules as to offer and acceptance but in the doctrine embodied in section 17 of the Statute of Frauds.

The next case which I wish to refer to is *Freer v. Rimmer*(3), which was before SHADWELL, V.C. There an estate was put up for sale under a decree and the estate was subject to a mortgage and the mortgagee through his solicitor consented to the sale. When the sale took place the solicitor of that very mortgagee attended the sale and made what turned out to be the highest bid. He then purported to withdraw it before the hammer fell but it was sought to hold him

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(1) (1789) 3 Term Rep., 148.

(2) (1824) 13 Price, 76.

(3) (1844) 14 Sim., 391.

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on behalf of his client to the contract. The report is very meagre and it is very difficult to make out exactly on what ground the case proceeded. There was a condition there that no bidding should be retracted, so that the very situation Sir Edward Sugden had sought to emphasise had arisen. But all that we are told is this: "The Vice-Chancellor refused the motion with costs," that was a motion to declare that the sale was not binding on the mortgagee—

"on the ground that, as the estate had been sold with the mortgagee's consent, his solicitor ought not to be allowed to defeat the sale."

I feel very great difficulty in grasping what precisely is meant by this. I do not for a moment presume to say that the decision was wrong, but it seems to me that it hinted at some kind of doctrine, whether of estoppel or refusing a person approbation and reprobation in the same breath, which is not clearly outlined in the report and I see that most of the Judges who dealt with this case have felt a difficulty about it. In no event can it be, as appeared to be suggested by the learned trial Judge, an authority for the proposition that in such a matter as this there is a difference between a Court sale and a private sale. Apparently, in one passage the learned Judge seems to think that this case establishes such a distinction. The matter is a question of the law of contract and nothing else, and it cannot matter whether the sale is by a Court or by a private auctioneer.

I now come to the case which, if I may say so, has given rise to all these difficulties and that is the very well-known and admittedly very unsatisfactory case of *Warlow v. Harrison*(1). It was unsatisfactory for many

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reasons. In the first place, it ended in nothing, because the plaintiff was given an opportunity to amend his plaint which he in the end never did, and the three learned Judges, MARTIN, B., BYLES, J., and WATSON, B., gave a decision based on one ground, whereas WILLES, J., and BRAMWELL, B., two of the greatest masters of the common law preferred to rest their judgment on a totally different ground, although they did not go the length of dissenting from the ground taken by the other learned Judges. The facts in that case were these: A mare was put up for sale and advertised to be sold "without reserve." The plaintiff bid for the horse and was the highest bidder of the lay public, as I may call it. But the owner of the horse, to save the horse from going at that price, made a bid and the horse was knocked down to him for 61 guineas which was one guinea more than the plaintiff's bid and thereupon the latter brought his action against the auctioneer. The three learned Judges I have referred to, MARTIN, B., BYLES, J., and WATSON, B., came to the conclusion that they could found themselves upon what they supposed to have been decided in *Denton v. Great Northern Railway Co.*(1). It is to be observed that, whether Denton's case was rightly decided or not (and a very great number of eminent members of the profession have held very strong opinions that it was not) even taking it as it is, it turned out in the end to be a decision founded by the learned Judges not on contract but on tort. The Court in *Warlow v. Harrison*(2) basing itself on that found that, owing to the contract that the horse should be sold "without reserve," there was a binding contract when the last open bid was given; that is to say, they held that a

(1) [1859] 1 El. and El., 309.

(1) [1856] 5 E. & B., 860.

(2) [1859] 1 El. and El., 309.

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bid at an auction is not a mere offer which can be revoked before acceptance but really clinched the bargain owing to the clause that the highest bidder should get the property. The other two learned Judges preferred to put it on a much narrower ground, one which we are not concerned with in this case at all, namely, that by putting up the horse "without reserve," the defendant, the auctioneer, held himself out as having authority to conduct the sale on those terms, namely, "without reserve." That, obviously, he had failed to do and it was a matter which might well sound in damages to the plaintiff, but it would not make him as upon the other view the actual purchaser and owner of the horse.

After *Warlow v. Harrison*(1) there is a series of cases which discuss the problem raised by it. In *Harris v. Nickerson*(2) a gentleman went off to Bury St. Edmunds to attend a sale of certain brewing materials, plant and office furniture. He went to buy the furniture, if he could get it, and when he got to the auction the things he wanted to buy were not put up to auction at all and were withdrawn, and he brought a suit to recover damages for his loss of time and his travelling expenses. The Court held that no such action would lie because the suit was such as might lie in the case of everybody who attended the sale for cab hire and travelling expenses; and Lord Blackburn—and that is the real interest in the case—says this:

"As to the cases cited: In the case of *Warlow v. Harrison*(1) the opinion of the majority of the Judges in the Exchequer Chamber appears to have been that an action would lie for not knocking down the lot to the highest bona fide bidder when the sale was advertised as without reserve: in such a case it may be that there is a contract to sell to the highest bidder, and that if

the owner bids there is a breach of the contract; there is very plausible ground at all events for saying, as the majority of the Court thought, that the auctioneer warrants that he has power to sell without reserve. In the present case unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn or be liable to an action, we cannot hold the defendant liable."

I feel the interest of that passage is as being a very clear indication that that very learned and eminent judge, Lord BLACKBURN, was not by any means satisfied that the first ground of decision in *Warlow v. Harrison*(1) was rightly decided but preferred to rest himself on the ground taken by BRAMWELL, B., and WILLES, J.

I now come to more recent cases and the first I propose to refer to is *Johnston v. Boyes*(2), a decision of COZENS-HARDY, J., sitting alone. That was a case which came to nothing, because the plaintiff's case failed on the ground that he was not a bona fide bidder at all, as he was a pauper from whom no auctioneer would accept a cheque in payment of the deposit. But the learned judge was prepared to deal with the case on the footing that if a property is to be sold on the terms contained in a printed form then the person who makes a bid may be taken to have accepted the offer in terms of those conditions, and in coming to that conclusion he based himself on *Warlow v. Harrison*(1), and also on *Carlill v. Carbolic Smoke Ball Co.*(3). With the greatest respect to so eminent a judge, I do not think that Carlill's case has really any bearing on a matter of this kind because, notwithstanding that there was an offer on the part of the defendant Company, the only matter under discussion was whether what the plaintiff in that case, Mr. Carlill,

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(1) [1859] 1 El. and El., 309.

(2) [1873] L.R., 8 Q.B., 286.

(1) [1859] 1 El. and El., 309.

(2) [1899] 2 Ch., 73.

(3) [1892] 2 Q.B., 484.

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did, amounted or did not amount to an acceptance of that offer, and there was no question as to which was offer and which acceptance, which is the whole point in this case. The point is, is the person who bids at such an auction making an offer or is he accepting an offer which is outstanding before him?

The next case is *McManus v. Fortescue*(1), decided by COLLINS, M.R., COZENS-HARDY, L.J., who had been a party to the judgment in *Johnston v. Boyes*(2), which I have just referred to, and FLETCHER MOULTON, L.J. That was a case of sale by auction subject to reserve, and by a slip the auctioneer knocked down the property to the plaintiff at a figure lower than the reserve price. The court held that everything that happened was subject to the condition that the reserve price should be reached and that as the purported sale took place before the reserve price was reached it conferred no rights upon the purchaser; and the Master of the Rolls alluded to an earlier case, *Rainbow v. Howkins*(3). That was another case of a slip by an auctioneer putting up a pony on which a reserve price had been put and stating by mistake that the sale was without reserve: and a suit was brought for delivery of the pony or for damages for breach of warranty of authority to sell without reserve. The learned judges held that no case could possibly lie on the sale, because there was no memorandum of the purchase that would satisfy the requirements of the Statute of Frauds. As regards the claim for damages for breach of warranty, they held that there was no breach of warranty because the principal would have been bound by the action of his agent, the auctioneer, in knocking down the hammer; and that even had the

(1) [1907] 2 K.B., 1.

(2) [1899] 2 Ch., 73.

(3) [1904] 2 K.B., 322.

principal been sued, the same difficulty would have arisen, namely, the mistake of the agent, but as the principal would have been bound, there was no breach of warranty of authority. But in referring to that case, COLLINS, M.R., says this:

"With regard to the case of *Rainbow v. Howkins*(1), which has been cited in support of the plaintiff's case, in my opinion it does not conflict with anything that I have said. I do not think the decision is an authority in support of the plaintiff's case, but if it could be so treated I should desire to consider further whether it can be supported. In the view I take of this matter the decision of the learned Judge was right and the appeal should be dismissed."

Then COZENS-HARDY, L.J., points out the distinction between *Warlow v. Harrison*(2) on the lines of which *McManus v. Fortescue*(3), the case before them, was launched and the latter and says that in the latter case the contract was subject to the reserve and that contract had never been broken and that consequently the plaintiff could have no cause of action.

I now desire to refer to two decisions of this Court. One of them is *Agra Bank v. Hamlin*(4). That was again a case of a withdrawn bid and the learned Judges decided that the buyer had a *locus pœnitentiæ* until the actual fall of the hammer. It is quite true that MUTTUSWAMI AYYAR, J., alluded to the fact that there was no condition provided in the conditions of sale, that the bidders should not withdraw their bids, but the other learned Judge, BEST, J., does not put it on that ground; and the decision proceeded on the broad principle that a bidding at an auction is merely an offer which can be retracted until it is accepted. Then finally, there is a recent decision, *Raja of*

(1) [1904] 2 K.B., 322.
(3) [1907] 2 K.B., 1.(2) (1859) 1 El. and El., 809.
(4) (1891) I.L.R., 14 Mad., 285.

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Bobbili v. Suryanarayana Rao(1), a decision of OLDFIELD and SESHAGIRI AYYAR, JJ., which emphatically repeats the proposition derivable from the earlier cases that a bid at an auction is merely a proposal which is not binding until it is accepted. In that case the auction was adjourned and the person who made the bid died before the auction was resumed; and it was held that the last bid he had made was not one which was binding upon his estate because it had not been accepted.

Mr. A. Krishnaswami Ayyar in the course of his interesting argument craved in aid the cases which relate to the exercise of options, of which the most familiar are *Denton v. Great Northern Railway Co.*(2) and *Burton v. Great Northern Railway Co.*(3). But we do not think that the analogy is sufficiently close to give us very much assistance. What was really decided in those cases is this, that a person who undertakes to supply a Railway with goods as ordered during a certain period is really making a continuous offer; the moment the Railway gives an order for the supply of goods at the specified rate, *pro tanto* there is a fixed and definite enforceable contract, but until such a specification is made the thing merely remains an offer which can be withdrawn by the person who makes it. In any event, the Railway Company could always write and say: "We do not intend to give any further orders under this document," and against such action there could be no remedy at all. It appears to us that it only introduces confusion into matters of this kind to talk about a unilateral contract. Take the option cases. They do not mean that one person is bound and not the other and that

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consideration has passed or is expected to pass from one side only to the other, for that would be like the case of *Cooke v. Oxley*(1). It is perfectly true that if a person agrees to keep an offer open and is paid for doing so, it is a perfectly valid agreement to keep the offer open. On the other hand, in the option cases, there is no consideration to prevent the person who made the offer from withdrawing it. In such cases there are really two contracts; there is the main contract if it comes to birth, and there is the preliminary collateral contract to ensure, in return for additional consideration, that the offer to enter into the main contract shall remain open and that the door shall not be closed for the time delimited in the agreement. In *Cooke v. Oxley*(1) there was no consideration. The contract was proposed; the person to whom it was proposed promised that he would keep his offer open to a certain hour of the day, and before that he sold to somebody else; there was no independent consideration whatever which could be referred to a promise to keep the contract open. In the case of the latter kind of option it will be seen that part of the consideration for the option must be supposed to be the entry into the original contract. It is very clearly put by the House of Lords in the well-known case of *Helby v. Matthews*(2). That was a case of a hire purchase agreement. The point on which the case turned was the applicability of section 9 of the Factors Act, 1889, which gave the power of conferring title into the hands of a person who satisfied the definition of the Act of being "a person having agreed to buy goods." The person in question, one Brewster, took a piano on a hire purchase agreement, which has become so familiar since that date, on

(1) (1919) L.L.R., 42 Mad., 776.

(2) (1856) 5 El. & Bl., 860.

(3) (1854) 9 Exch., 607.

(1) (1790) 3 Term R.p., 668.

(2) [1895] A.C., 471.

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the terms that he paid so much a month, that he could terminate the hiring by delivering up the piano at any time, but that when and if he had paid a specified number of instalments within a certain period of time, as from that date it would become his absolute property. What happened was that before he became the owner he pledged it with a pawn broker as security for an advance. The question was whether the hirers were entitled to take the piano away from the pawn broker or the pawn broker could set up a right to be protected under section 9 of the Factors Act. It was held that the pawn broker was not protected because the pledgor was not a person who had "agreed to buy goods." All he had done was to enter into a contract whereby it was within his power to buy the piano if he liked to buy it but which did not bind him to do so. Lord HERSCHELL says this :

"I cannot think that an agreement to buy, 'if he does not change his mind,' is any agreement to buy at all in the eye of the law. If it rests with me to do or not to do a certain thing at a future time, according to the then state of my mind, I cannot be said to have contracted to do it. It appears to me that the contract in question was in reality a contract of hiring and not in name or pretence only."

But the analogy of the option cases is very faint and its only value is as showing this: that you can have the legal right to get something done for you, or given to you, or handed over to you, at your option at a future date, and that such an agreement can be so drawn up as to be perfectly valid and binding. All we are concerned with in this case is to determine whether the bid in auction is to be regarded as the acceptance of the general offer made by the auctioneer, as Mr. Krishnaswami Ayyar would have it, or whether it is merely an offer which it is for the auctioneer as the agent of the vendor, to accept by knocking the property

down. It seems to us that the very word "bid" or "bidder" is indicative of a person who is making an offer rather than concluding an arrangement. But apart from that, we think it is quite clear that to take any other view leads to such a complexity of artificial reasoning that it is clearly indicative that the conclusion is not sound. Mr. Krishnaswami Ayyar was faced with this difficulty, that if I bid Rs. 20 and that is called an acceptance and a contract and if another man bids Rs. 25 the next moment it is another acceptance and another contract, and he had to admit that on this tortuous reasoning it is a contract subject to the condition that what is a good contract at one moment becomes entirely void immediately after. Taking what is to our mind, the plain common-sense view, we think that a person who bids at an auction thereby does not conclude a contract but states an offer by which, until he withdraws it himself, he may be liable for the amount of his bid. But on the other hand we think that like all other offers it is subject to the ordinary incidents of law that, until it is accepted it is open to the offeror to withdraw it and render it as if it had not been made.

We think that the conclusion come to by the learned Judge is not warranted by the authorities or on principle, and we must allow the Appeal with taxed costs throughout.

M.H.H.

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APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice
Venkatasubba Rao.

H. SHINAPPAYA (DEFENDANT), APPELLANT,

v.

RAJAMMA alias PADMAVATHI (PLAINTIFF), RESPONDENT.*

*Hindu Law—Husband's leprosy—Wife living apart, entitled to
separate maintenance.*

The wife of a Hindu who is suffering from virulent leprosy is entitled to live apart from him and claim separate maintenance.

SECOND APPEAL against the decree of K. GOPALAN NAYAR, Subordinate Judge of South Kanara, in Appeal Suit No. 61 of 1921 (Appeal Suit No. 304 of 1920 on the file of the District Court), preferred against the decree of S. NARASINGA RAO, District Munsif of Mangalore, in Original Suit No. 356 of 1919.

Plaintiff instituted this suit to recover from the defendant, her husband, personally and by the sale of plaintiff mentioned properties, Rs. 274 due on account of maintenance for 6 years prior to the suit (1913 to 1919). The defendant pleaded that he was willing to maintain his wife in his house, and that she was not entitled to live away from him and to claim maintenance. The plaintiff answered that since 1913 the defendant was suffering from virulent leprosy, that she was therefore obliged to live separately from him from that year and that the defendant unjustly refused to give her maintenance.

Both the lower Courts found the facts as stated by the plaintiff and gave a decree to her as prayed for. The defendant preferred this Second Appeal.

* Second Appeal No. 1214 of 1921.

K. Yegnanarayana Adiga for appellant.—The leprosy was not of a virulent form. Even if it be, it does not entitle the wife to claim separate maintenance. There is no decided case or text actually covering the point. *Bai Premkuvar v. Bhika Kallianji*(1) is only an authority for the position, that leprosy is a good defence to a claim for restitution of conjugal rights. The duty of the wife is to live with her husband, especially when he needs her care most. Right to claim maintenance rests upon her duty to live with the husband. When her duty ceases her right also ceases. The passage in Manu, chapter 9, section 79, is not against me. *Binda v. Kaunsilia*(2). Moreover in this case the wife deserted her husband long before the attack of leprosy, and her claim is not good, and she now urges it as a pretext for not living with him. If husband's leprosy is a good cause for separate maintenance, a leprous wife also can claim it. It would be inequitable to award maintenance against a leper who has no property.

B. Sitarama Rao for respondent.—The lower Courts have found that leprosy was of a virulent type; that is a question of fact. Though there is no decided case, text-writers treat leprosy as a ground for claiming maintenance; Battacharya's Hindu Law, 2nd Edition, page 405; Strange's Hindu Law, Vol. I, page 47; Culluca's Gloss on Manu printed in Colebrooke's Digest, Vol. II, page 128; Gour's Hindu Code, page 266. According to defendant's own admission, leprosy began before his wife left him.

SPENCER, J.—This suit was brought by a wife to recover arrears of maintenance from a leprous husband. Defendant appeals.

(1) (1868) 5 Bom. H.O.R. (A.C.J.), 209.

(2) (1891) 1 I.L.R., 13 All., 126.

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SPENCER, J. Two of the grounds raised in the arguments, namely (1) that the defendant's leprosy was not of a virulent form, and (2) that the plaintiff having originally deserted her husband without any justifying cause cannot make his disease a pretext for demanding maintenance whilst continuing to live apart from him, may be disposed of briefly by observing (1) that it has been found by the Subordinate Judge upon the defendant's admission that the disease has now assumed a virulent form, and that finding being on a question of fact is final; (2) that plaintiff having begun to live separately in 1908 and the defendant having, when examined in 1919, admitted that his leprosy commenced 10 years ago, the existence of the husband's disease and the wife's going away to live separately are sufficiently connected in point of time to justify the inference that the separation was occasioned by the disease, although there was no medical certificate as to the existence of leprosy earlier than December 1913.

On the substantial point of law, which is whether a wife is entitled to get maintenance from her husband when she declines to live with him on account of his being a leper, our attention has not been called to any reported cases in which the point has been directly decided. In *Bai Premkuvar v. Bhika Kallianji* (1) it was held that the fact that a Hindu husband was suffering from a loathsome disease, such as leprosy, was a good defence to his suit for the restitution of conjugal rights. It seems to follow that, if a leprous husband cannot enforce cohabitation upon an unwilling wife, he equally cannot make his disease a defence to her suit for maintenance so long as he has means to maintain her.

(1) (1888) 5 Bom. H.C.R. (A.C.J.), 309.

In Manu IX, 79 the passage occurs :

"She who is averse from a mad husband or one afflicted with such maladies as punish crimes should not be stripped of her property."

I believe, I am right in thinking that leprosy is ordinarily regarded in this country as a punishment for sins committed in this or some previous existence, and that this is the explanation of the allusion to punishment.

If then a wife is not to be penalized by depriving her of her Stridhanam for her refusal to live with a husband who is suffering from a loathsome disease, it is equally impossible to conceive that the ancient law-givers intended that she should be allowed to starve for an act which no code of humanity or morality would condemn.

Granting that desertion by the wife is a good defence to a wife's suit for maintenance, it by no means follows that such a defence can be pleaded irrespective of the wife's counter plea that her separation from her husband was for good and sufficient cause. The lower Courts were therefore right in giving the plaintiff a decree. The Second Appeal fails and is dismissed with costs.

VENKATASUBBA RAO, J.—Is a wife entitled to claim separate maintenance from her husband on the ground that the latter is afflicted with leprosy? We have not been referred to any reported case on this subject, and the point has to be decided with reference to general principles and the texts of Hindu Law bearing upon it.

It has been laid down that a wife can live apart from her husband for a justifiable cause. From time to time the Courts have had to consider whether in certain circumstances the wife is entitled to demand separate maintenance; and though, according to the decisions, certain causes have been held to be justifiable causes, the Courts have not made an exhaustive enumeration of such grounds.

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A similar question presented itself for determination of the Courts in suits by the husband for restitution of conjugal rights, and it was held that it was open to the wife to resist the suit by relying upon the defence that the husband was afflicted with a loathsome disease such as leprosy or syphilis. *Bai Premkuvar v. Bhika Kallianji*(1). It seems to me reasonable to hold that the grounds which would be available to a wife to defeat a suit for restitution would also entitle her to live apart from her husband and claim separate maintenance. But it has been argued on behalf of the appellant (husband) that, while the Courts may properly refuse assistance to a husband who seeks restitution, they should not enable a wife who chooses to live separately to get maintenance; in other words, if the husband who is suffering from leprosy or is afflicted with a similar malady seeks the aid of the court to compel his wife to live with him, the Courts must withhold that aid; similarly, if a wife forgetful of her duties to her husband deserts him when her services are most needed, the Courts must not enable her to get separate maintenance from the husband who has been wronged.

I am unable to accept this contention. The wife may no doubt acquire great spiritual benefit by a life of renunciation and sacrifice. But the Courts can only determine the legal relations between the parties, and in doing so cannot take note of exalted spiritual notions. Nor can the Courts of law prescribe rules to regulate conceptions of duty and it would be futile to attempt any enumeration of duties incumbent upon a wife. To give effect to the appellant's argument would amount to a refusal of maintenance to a starving wife on the ground of her desertion of her husband, who, it is admitted, is

disqualified to insist upon having the society of his wife. This result is opposed not only to Hindu sentiment and public opinion but contravenes the original authorities on the subject.

Manu says—

“But she who is averse from a mad husband or a deadly sinner or a eunuch or one without manly strength or one afflicted with such maladies as punish crimes must neither be deserted nor be stripped of her property.”

Cullukabhatta explains the text thus :

“But she who attends not a husband whose mind is alienated by the effect of air or other constitutional element, or a deadly sinner as described in the 11th Chapter or unmanned or destitute of manly strength (from an obstruction of the seminal juices or the like) or degraded because he is afflicted with leprosy or similar disease must not be deserted nor deprived of her property.”

Reference in the text of Manu to deprivation of wife's property will become intelligible if the two following rules are read in this connexion :—

(1) “For a whole year let a husband bear with his wife who treats him with aversion; but after a year let him deprive her of her separate property and cease to cohabit with her.”

(2) “She who neglects her lord though addicted to gaming, fond of spirituous liquors, or diseased must be deserted for 8 months and deprived of her ornaments and household furniture.”

An attempt to reconcile the text of Manu quoted above “But she who is averse . . . property” with the following text “A husband who is not an out-caste should not be forsaken by a woman desirous of happiness in another world” has led to the words “aversion from a husband” being interpreted as “want of due attention” not “absolute desertion.” But the latter text only enjoins a moral duty and does not create a legal obligation. I do not think it is proper to maintain the distinction between diligent attention and absolute

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desertion (see the above texts collected in Colebrooke's Digest, Vol. 2, pages 128 and 129).

Battacharya while enumerating the circumstances which entitle a wife to demand separate maintenance mentions the aforesaid text of Manu and refers to the causes specified therein as justifiable causes. See Battacharya's Hindu Law, 2nd Edition, page 405.

Strange's Hindu Law at page 47, Vol. 1, contains the following passage :

"Other causes as well as infidelity operating to disappoint the primary object of marriage, lead to separation: such as confirmed barrenness in the woman and corporal imbecility in the man, with loathsome or incurable disease in either."

The text of Devala lays down—

"The husband may be forsaken by his wife if he be an abandoned sinner or an heretical mendicant or impotent or decrepit or afflicted with phthisis or if he have been long absent in a foreign country." Colebrooke's Digest, Vol. II, page 164.

Mr. Justice MAHMOOD in the judgment in *Binda v. Kaunsilia*(1), makes certain observations in regard to the inclusion of insanity in the list of justifiable grounds and comes to the conclusion that insanity is not a legal ground. The learned Judge also expresses approval of the view that the word "aversion" is to be interpreted to mean want of due attention. With great respect, I cannot agree with either of the views referred to above adopted by Mr. Justice MAHMOOD. Reliance has been placed by the appellant upon the following passage from Mayne—

"If she quits him of her own accord either without cause or on account of such ordinary quarrels as are incidental in married life in general she can set up no claim to a separate maintenance. Nothing will justify her in leaving her home except such violence as renders it unsafe for her to continue there or such

continued ill-usage as would be termed cruelty by any English Matrimonial Court."

It cannot be said that the enumeration of causes in this passage is exhaustive. It takes no account of the grounds mentioned both by Manu and Devala.

I am therefore of the opinion that, the existence of leprosy in the husband entitles the wife to live separately from the husband and demand maintenance.

The finding on the nature of the disease is contained in the following passage in the judgment of the District Munsif :

"Even the defendant admits that his leprosy commenced 10 years ago and that it appeared on his right leg and afterwards his left leg, that at the time of previous suit both the legs were somewhat affected and even the fingers of his hand were affected, that some of his fingers are contracted and swollen, that there were sores in his leg sometime back, and that they were in a putrid condition and pus was coming out."

There is therefore no force in the contention that the defendant's leprosy was not of a virulent form.

It has been argued that, if the wife abandons the husband without a justifiable cause and the husband subsequently becomes a victim to a disease like leprosy, the wife cannot take advantage of such a cause and claim maintenance. This argument raises a very interesting question. But it is unnecessary to decide it here on account of the finding that the wife abandoned the husband in about 1908, a point of time when the defendant according to his own admission was suffering from leprosy.

It is admitted also that the husband is possessed of property and that the maintenance awarded is not excessive. The District Munsif says "what is claimed is just the bare maintenance which is absolutely necessary for a woman to keep body and soul together." Whether a decree can be passed against a leprous husband

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RAO, J. who owns no property is not a question that arises for determination. It may be a legitimate argument that a husband who cannot earn an income for his own maintenance on account of his being a leper should not be compelled to find means for the support of a wife who deserts him. But in view of the finding mentioned above this question does not arise and no decision need be given upon it.

In the result I agree with my learned brother in holding that the Second Appeal fails and must be dismissed with costs.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1922,
September 6.

MADURA MUTHU VANNIAN AND SIX OTHERS—ACCUSED.*

*Criminal Procedure Code (Act V of 1898), ss. 256, 342 and 537—
Warrant cases—Examination of accused before charge
framed—Omission to examine by Magistrate after further
cross-examination of Prosecution witnesses—Irregularity—
Illegality.*

In warrant cases accused must be examined after the further cross-examination of prosecution witnesses even though he has been examined before the charge was framed. Failure to so examine an accused is not a mere irregularity such as is contemplated in section 537 but an illegality which vitiates the trial.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by A. J. KING, Additional District Magistrate, Tanjore.

* Criminal Revision Case No. 187 of 1922.

The facts are set out in the judgment.

Public Prosecutor, J. C. Adam, for the Crown.

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OLDFIELD, J.—This reference, made by the Additional District Magistrate, Tanjore, at the instance of the accused in Calendar Case No. 365 of 1920 on the file of the Stationary Sub-Magistrate, Tanjore, raises two questions (1) whether the latter's procedure in examining the accused in this, a warrant case, only before charge was framed and not also after the prosecution witnesses had been recalled for further cross-examination under section 256 (1), Criminal Procedure Code, was correct; (2) if it was not, whether there was an illegality vitiating the trial or an irregularity, on account of which we can in the exercise of our discretion refuse to interfere in revision.

The accused are not represented before us. But we have had the advantage of a very full and careful argument from the learned Public Prosecutor. The first provision relating to the examination of the accused in a warrant case is section 253, Criminal Procedure Code, which provides that he shall be discharged, "if, upon taking all the evidence referred to in section 252" that is the evidence of the prosecution witnesses "and making such examination (if any) of the accused as the Magistrate thinks necessary" he finds that no case has been made out which would warrant a consideration and section 254 directs in the contrary even the framing of a charge and section 255 the taking of the accused's plea. But, as the words "if any" and "as he thinks necessary" show the examination at the stage depends on the option of the Magistrate; and to ascertain at

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what stage an examination is obligatory, we must turn to section 342, one of the general provisions relating to inquiries and trials under which "the Court shall for the purpose aforesaid" (of enabling the accused to explain any circumstances appearing in the evidence against him) "question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." It is on this provision that accused's contention is founded, their argument being that they were entitled to be questioned, after the examination of the witnesses had been completed by their further cross-examination after charge.

It has been suggested before us that, as section 253 (1) makes no explicit reference to cross-examination before the charge and the first such reference to it occurs in section 256 (1) the stage, at which it should ordinarily take place, is after a charge has been framed. But this is unsustainable, because the wording of section 253 is identical with that of the corresponding section of the Code of 1882, in which there was no provision for further cross-examination similar to that in the present section 256; and it is unnecessary to assume that the insertion of that provision was intended to alter the meaning of a section, which was left unchanged. The better and the sufficient ground for acceptance of accused's contention is that the examination of a witness cannot be regarded as completed until the last stage at which the law authorize its continuance has been passed. This, as explained in *Mitarjit Singh v. Emperor*(1), is as easily reconcilable with the

description of the course of a witness's examination in section 137, Indian Evidence Act, as any other supplementary cross-examination, which the Court may for special cause allow.

We have however to deal with the ambiguity involved in the specification in section 256 (1) of the stage before which the further cross-examination is to take place as "before the accused is called on to enter on his defence," because that may most simply and easily be understood as equivalent to "before the framing of the charge." The use of the same words in section 289 in connexion with the essentially different procedure at a sessions trial suggests no solution of the difficulty. It is true that in sections 255 and 256 (1) the various stages, (1) the recording of the charge, (2) the taking of accused's plea, (3) the recalling of the prosecution witnesses and their further cross-examination, (4) the accused's entry on his defence, are distinctly stated in that order. But it may be doubted whether the restriction of the accused's defence to the last stage and to the taking of the evidence he adduces corresponds with any exact or consistent use of language. For, it is difficult to see how his statement of his case to the Court or the further cross-examination by him of the prosecution witnesses on his own responsibility and for his own benefit, can be regarded, as the argument of the accused before us requires, as part, not of his defence, but of the prosecution case; and that argument cannot be reconciled with the ordinary view of the framing of a charge, as a decisive stage in the case, because it amounts to a recognition (sometimes with important consequences as to the grant of bail)

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(1) (1921) 63 I.C., 825.

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that *prima facie* the commission of an offence has been established; and because, on a charge being framed, the proceedings are, as was held in *Sriramulu v. Veerasalingam*(1), transformed from an "inquiry" into a "trial" and in the words of WALLIS, J., in *Narayana-swamy Naidu v. Emperor*(2), "the accused is charged and called on to answer." I add that the general mufassal practice, as I gather it from recollection and such records as have come before me in this Court, is to examine the accused only once, before charge is framed and to frame the charge only after the prosecution witnesses have first been cross-examined or offered for cross-examination, although the learned Public Prosecutor assures us that it is framed in many cases in the Presidency Magistrate's Courts after the examination-in-chief of some of the prosecution witnesses.

But, although these implications of the accused's contention may entail anomaly or inconvenience, they are not grounds for disregard of the language of the Code already referred to, by which that contention is supported and which the Legislature has chosen to employ. Section 256 took its present form by an amendment originated in Select Committee, when further cross-examination after charge was allowed on the re-enactment of the Code in 1898. In the Code of 1882 the words "the accused shall, at any time whilst he is making his defence, be allowed to recall and re-cross-examine any witness for the prosecution present in the Court or its precincts" which contain the only recognition then allowed of the right of further cross-

(1) (1915) I.L.R., 38 Mad., 555.

(2) (1909) I.L.R., 32 Mad., 220.

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examination, indicated clearly that its exercise was a part of the defence; and it is possible that, when the amendment was drafted, its effect on the interpretation of other provisions relating to warrant case procedure was not noticed. But, whatever our opinion, as to the result, we are not at liberty to give effect to it, when the conclusion entailed by the words used is clear. I add that, whether or no an examination of the accused at the stage they now contend for will be of any particular service to them or the administration of justice, it will seldom increase the Magistrate's work or delay the trial to any appreciable extent. On the first question stated above the decision must be that the Magistrate's procedure was incorrect.

The second question is whether the trial before him was vitiated by his error or whether in dealing with the case in Revision we can exercise our discretion. On principle it is impossible to distinguish between cases of breach of the duty to examine the accused, as it has hitherto been recognized before charge framed and, as it must now be recognized, after; and, if the accused is equally entitled to an opportunity of stating his case to the Court at either of those stages, the failure to allow him to do so at either must have the same effect on the validity of the trial. The accused's right to state his case, at whatever stage the law permits him to do so, is in my opinion fundamental and cannot be regarded as a mere error, omission or irregularity such as is contemplated in section 537 (a). There is little authority on the point. But *Mahomed Hossain v. Emperor*(1), and *Mitarjit Singh v. Emperor*(2), already

(1) (1914) I.L.R., 41 Calc., 743.

(2) (1941) 63 I.C., 825.

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cited are in accordance with this view whilst *Mir Tilawan v. King-Emperor*(1), is distinguishable, because there, although the accused were not examined, they filed written statements which could be treated as equivalent to their examination. Taking this view, I would set aside the accused's convictions. The District Magistrate states that the case is not of importance and that the sentences of imprisonment have been undergone. It is therefore unnecessary to order a retrial. But, as the convictions are set aside, the fines which also formed part of the sentences must, if levied, be refunded.

RAMESAM, J.

RAMESAM, J.—I agree.

K.U.L.

(1) (1922) I.L.R., 1 Patna, 13.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice.
(Reference under section 98, Civil Procedure Code, on difference of opinion between Mr. Justice Spencer and Mr. Justice Krishnan.)

ABDUL KADIR SAHIB (DEFENDANT), APPELLANT,

1922.
May 8.

v.

U. T. M. SOMASUNDARAM CHETTIAR (PLAINTIFF),
RESPONDENT.*

Limitation Act (IX of 1908), Arts. 11 and 132—Civil Procedure Code (V of 1908), O. XXI, r. 58—Claim petition—Decree for money—Attachment and sale of a tin-shed—Petitions by mortgagee of tin-shed to keep sale proceeds in Court and not to deliver tin-sheets after sale in right of his mortgage—Order dismissing petitions on the ground sales had already been concluded and property delivered—Suit by mortgagee to recover from the purchaser the amount due on his mortgage, four years after orders—Bar of limitation.

Where a mortgagee of a tin-shed, which was attached and brought to sale in execution of a money-decree obtained by the defendant against the mortgagor, filed two petitions in the executing Court, one to keep the sale proceeds in deposit in Court to meet his claim under his mortgage, and the other not to deliver the tin-sheets after sale, and, on both the petitions being dismissed on the ground that the sale had been already concluded and the tin-sheets delivered to the defendant as the auction purchaser, instituted a suit to recover from the defendant the amount due on the mortgage, four years after the dates of the orders on the petitions, and the latter pleaded the bar of limitation.

Held, that the petitions did not fall under Order XXI, rule 58 of the Civil Procedure Code; that Article 11 of the Limitation Act did not apply, but that the suit fell under Article 132 of the Act, and was not barred. *Venkataratnam v.*

* Second Appeal No. 893 of 1920.

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Ranganayakamma, (1918) I.L.R., 41 Mad., 985 (F.B.), distinguished; *Barhamdeo Prasad v. Tara Chand*, (1914) I.L.R., 41 Cal., 658 (P.C.), applied.

SECOND APPEAL against the decree of L. G. MOORE, District Judge of Madura, in Appeal Suit No. 331 of 1919, preferred against the decree of K. S. GOPALARATNAM AYYAR, Principal District Munsif, in Original Suit No. 571 of 1917.

One Lakshmanan Servai constructed a tin-shed on a site rented by him from Abdul Kadir Sahib the defendant in the present suit. The latter filed Original Suit No. 460 of 1908 in the District Munsif's Court of Madura against the former to recover possession of the site after removal of the shed by Lakshmanan Servai and for damages. He obtained a decree, attached the tin-shed and brought it to sale on 20th November 1913. The sale was held and a sum of Rs. 750 and odd was realized and set off against the decree. Lakshmanan Servai had, however, executed a mortgage deed on 18th July 1912 for Rs. 1,000 in favour of Somasundaram Chetti, securing two items of property one of which was the tin-shed. On 20th November 1913, the mortgagee (Somasundaram Chetti) filed a petition in the executing Court praying that the sale proceeds should be kept in deposit in Court, and another petition on 21st November 1913, praying that the tin-sheets should not be handed over to the purchaser. Abdul Kadir Sahib was the purchaser of the tin-sheets in Court auction and he was permitted to set off the sale price against the amount due under his decree. The terms of the first petition, and order thereon passed on 21st November 1913, are set out in the judgment of KRISHNAN, J.

In the other petition filed on 21st November 1913, the petitioner prayed that the decree-holder might be ordered not to remove the tin-sheets sold to him and the order thereon, dated 24th November 1913, was as

follows: "The moveables seem to have been already handed over. The petition is therefore dismissed."

The mortgagee realized a portion of the mortgage debt by the purchase of the other item of property mortgaged to him from the Official Receiver in whom the properties of Lakshmanan Servai had vested. He then filed the present suit to recover the balance of the mortgage-debt from Abdul Kadir Sahib who had purchased the tin-sheets and set off the sale proceeds against his decree-debt as already stated. The suit was filed on 19th December 1917. The defendant pleaded that the suit was barred by limitation under Articles 11, 39, 48 or 49 of the Limitation Act. The District Munsif held that none of the articles applied, that the suit was not barred by limitation, and decreed the suit, directing the defendant to pay the sum of Rs. 756 and odd with interest. On appeal by the defendant, the District Judge confirmed the decree and dismissed the Appeal. The defendant preferred this Second Appeal. The Second Appeal was heard by SPENCER and KRISHNAN, JJ., who differed in opinion on the question of limitation and referred the case to a third Judge under section 98 of the Civil Procedure Code in the following judgments:

SPENCER, J.—The respondent brought this suit to enforce the terms of a simple mortgage against a person whom he alleged to be in possession of the proceeds of the property secured to him under his mortgage.

The question to be decided in the Second Appeal is whether the suit is time-barred by reason of Article 11 of the 1st Schedule of the Limitation Act, or otherwise. By Article 11, a person who prefers a claim or makes an objection to the attachment of property attached in execution of a decree must, if an order is passed under the Code of Civil Procedure against him after investigation of his claim, institute a suit under Order XXI, rule 68, within one year to establish the right which he claims to the property in dispute. If the Court declines to investigate the claim on the ground that it has been designedly or unnecessarily

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delayed and dismisses it under the proviso to Order XXI, rule 58, the claimant still has only one year to institute his suit. That is the effect of the Full Bench decision in *Venkataratnam v. Ranganayakamma*(1). The respondent's father on 20th and 21st November 1913 put in two petitions in the District Munsif's Court which was executing the appellant's money decree by sale of a tin-shed standing on the property mortgaged to the petitioner. In one he asked that the sale proceeds of the tin-sheets should be kept in Court deposit, and in the other he asked that the moveable properties belonging to the judgment-debtor should be ordered not to be removed pending further orders of the Court. The Court's order on the first was that the sale had been already concluded and the decree-holder who purchased the articles sold had set off the amount against his decree. The order on the second petition was that the moveables had been already handed over. Both petitions were dismissed.

Now both applications must be taken to have been made on the strength of the respondent's mortgage right, as the existence of the simple mortgage in favour of petitioner's agent is mentioned in each case in the petition or in the accompanying affidavit. But there was no prayer to have the mortgage right investigated, and the Court seems to have considered it unnecessary to investigate it. The orders on the petitions indicate that the Court declined to adjudicate upon the petitioner's claim. There is no doubt that the principal reason that influenced the Court in dismissing the petitions was that it was too late to interfere after the property had ceased to be in *custodia legis*. But this is not the same thing as saying that the Court considered that the claim or objection had been designedly or unnecessarily delayed. It dismissed the petitions as there was no object in keeping them pending. It did not expressly state that they were dismissed for delay under the proviso to Order XXI, rule 58—nor have the orders been understood as passed under that proviso in the District Munsif's Court where they were passed.

Seeing that rule 58 lays down that the Court to which a claim or objection is made "shall proceed to investigate" it unless it acts under the proviso, it may be held that it is the duty of the

Court to go into every claim that is not dismissed for intentional or unnecessary delay. That in fact was the view of WALLIS, C.J., in *Ramaswami Chettiar v. Mallappa Reddiar*(1). It follows that if a Court does not take either of these two alternative courses the order that it passes is not an order against the claimant and does not cause limitation to run against him.

The decisions in *Munisami Reddi v. Arunachala Reddi*(2), *Koyyana Chittemma v. Doosy Gavaramma*(3) and *Sarala Subba Rau v. Kamsala Timmayya*(4), which laid down that there must be an investigation into the merits of the claim to make the one year's period of limitation applicable were passed under the Code of the Civil Procedure of 1882 and may not be considered as altogether good law under the altered language of the present Code according to the interpretation placed upon it in the Full Bench decision in *Venkataratnam v. Ranganayakamma*(5). The decision of Mr. Justice GREAVES in *Panchu Muchi v. Bhuto Muchi*(6) that Article 11 has no application to a consent order made without investigation of the claim conflicts with the judgment of a Bench of this Court in *Venkatarama Aiyer v. Narayana Aiyer*(7) which expressed an opinion that even an order passed with the consent of a claimant might nevertheless be against him.

But the decision in *Ponaka Balarami Reddi v. Hazi Mahomed Abdul*(8), *Ayya Pattar v. Attapurath Manakkal Karnavan*(9) and *Lakshmi Ammal v. Kadiresan Chettiar*(10) are instances of orders being passed which did not distinctly negative claims made under Order XXI, rule 58, and this Court held in those cases that the claimant was not bound to institute a suit under rule 63 to have the order in question set aside. The two former were decisions under the present Code of Civil Procedure and the two latter were subsequent to the Full Bench ruling in *Venkataram v. Ranganayakamma*(5).

Velu Padayachi v. Arumugam Pillai(11) was a plain case of a mortgage claim being dismissed under the proviso to rule 58

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(1)(1918) I.L.R., 41 Mad., 985 (F.B.).

(1) (1920) I.L.R., 43 Mad., 760 at p. 772 (F.B.). (2) (1895) I.L.R., 18 Mad., 285.
(3) (1906) I.L.R., 29 Mad., 225. (4) (1903) I.L.R., 31 Mad., 5.
(5) (1918) I.L.R., 41 Mad., 985 (F.B.). (6) (1919) 50 I.C., 649.
(7) (1915) M.W.N., 237. (8) (1914) 26 M.L.J., 499.
(9) (1919) M.W.N., 805. (10) (1921) 41 M.L.J., 198.
(11) (1920) 38 M.L.J., 397.

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as being too late owing to the claimant's delay, and the same may be said of *Lakshumanan Chettiar v. Parasivan Pillai*(1) which it followed.

I am therefore of opinion that the present suit was not barred by Article 11 of the Limitation Act. It is clear from the Privy Council decision in *Berhamdeo Prasad v. Tara Chand*(2), which dismissed an Appeal against a Full Bench decision of the Calcutta High Court in *Berhamdeo Pershad v. Tara Chand*(3), that where property which represented the security for a mortgage has been converted into money, the article applicable to a suit upon the mortgage is Article 182 under which the plaintiff has 12 years to follow up the proceeds in the hands of the defendants.

The present suit accordingly is in time and I consider that the Second Appeal should be dismissed with costs. As my learned brother differs from me we refer under section 98 of the Code of Civil Procedure the question of law whether the suit is barred by limitation for decision by a third Judge.

KRISHNAN, J.—The question for decision in this Second Appeal is one of limitation. Plaintiff sues to recover the balance due to him on a simple mortgage bond executed to him by one Lakshumanan Servai, from the defendant on the ground that one of the mortgaged properties, a "tin-shed," was pulled down by him and sold in Court auction and the sale proceeds were taken by him without recognizing the mortgage on it. Defendant had obtained a decree for possession of the land on which the shed had been built by Servai, after removal of the superstructure and also for payment of a certain sum of money. He obtained possession of the land after pulling down the shed and converting it into tin-sheets and attached the latter in execution of the money portion of his decree. He also seems to have obtained permission to bid at the auction and to set off his decree against the purchase money. When the sale was about to take place, the plaintiff's father put in a petition to Court on the day of the sale and the point whether the plaintiff is or is not barred by limitation under Article 11 of the Act depends upon the nature of that petition and of the order thereon.

(1) (1919) 37 M.L.J., 159.

(2) (1914) I.L.R., 11 Calc., 664 (P.C.).

(3) (1906) I.L.R., 33 Calc., 92.

The petition is a short one and is as follows :—

"(1) The articles that are going to be sold in this suit belong to this petitioner under hypothecation.

(2) The plaintiff herein has taken the leave of the Court to bid for the properties in auction and he is attempting to appropriate the proceeds himself. If he does so, this petitioner will not be in a position to realize his amount. The leave obtained is not also valid.

I therefore pray that the sale proceeds are not taken by the plaintiff and that the same be held in Court deposit."

The order on it was only passed the next day; it says "sale is concluded already and decree-holder set off the decree amount—Dismissed."

There was some question raised whether the petition itself was not filed after the sale had been concluded, in which case it was argued it should be treated as a nullity. But that does not seem to be so; the opening sentence of the petition shows that the sale had not taken place at the time.

The petition did not cite the provision of law under which it was put in. But it seems to me clear that it was in the nature of a claim to the attached property which was going to be sold outright; it was based upon the plaintiff's mortgage right over it which had not been recognized in the proclamation as the sale was not stated to be subject to any encumbrance. Though the plaintiff's father did not ask the sale to be stopped, or to be held subject to his mortgage right, his petition certainly put in issue his mortgage right as against the decree-holder and if notice of the petition had gone to the latter that right would have been investigated by the Court. Whether on proof of the claim the Court would have acted under Order XXI, rule 62, or allowed a lien to the mortgagee on the sale proceeds as prayed for is, it seems to me, immaterial in considering the nature of the petition filed. I am of opinion that the petition was one under Order XXI, rule 58, there being no other provision under which it could have been filed and when the Court dismissed it, and refused to recognize any rights in the plaintiff as mortgagee on the ground that the petitioner had come too late, it acted under the proviso to rule 58 and its order was one against the plaintiff and he was bound to bring a suit under rule 63 within one year from its date if he

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wanted to assert his mortgage right on the property sold in the decree-holder—auction-purchaser's hands.

We are not concerned with the question whether the order on the petition was right or wrong but only as to whether it was against the claimant or not. It is now settled by the Full Bench in *Venkataratnam v. Ranganayakamma*(1) that an order refusing to investigate a claim on the ground of delay is an order against the claimant and Article 11 of the Limitation Act applies. Following that ruling I would hold that the present suit brought about four years after the order on the claim petition is barred by limitation.

Reliance was placed for the respondent on the recent ruling of my learned brother and RAMESAM, J., in *Lakshmi Ammal v. Kadiresan Chettiay*(2), but that ruling has no application to the present case. That was an order passed by a Court which had no jurisdiction and it was further held by my learned brother that the order in the case was not against the claimant as the sale was actually stopped. Here the sale was completed without any recognition of the claimant's mortgage right and the sale proceeds were allowed to be taken by the decree-holder in spite of his petition to retain them in Court. The two cases are thus quite dissimilar.

With all respect to my learned brother I am inclined to hold that the suit is barred by limitation under Article 11 and I would allow the Second Appeal and dismiss the suit with costs throughout. But as we are differing on the question of law raised in this case I agree to the order proposed by my learned brother.

In pursuance of the Order of Reference the Second Appeal came on for hearing before the learned Chief Justice.

ON REFERENCE—

K. V. Krishnaswami Ayyar for appellant.—The suit is barred by limitation under Article 11 of the Limitation Act, because the suit has been instituted more than one year after the order was passed on the plaintiff's claim

petitions filed by him in the executing Court. The petitions are in effect claim petitions put in on the footing of mortgage right. Any order passed on those petitions, though not after investigation, falls under Order XXI, rules 58 and 63, Civil Procedure Code, and consequently falls under Article 11 of the Limitation Act. See *Venkataratnam v. Ranganayakamma*(1); again Article 29, Limitation Act, will apply, for the plaintiff sues only for compensation for a wrongful act of conversion by sale, and the suit is barred.

K. Bashyam for respondent was not called upon.

JUDGMENT.

SCHWABE, C.J.—This Second Appeal is referred to me by reason of a difference of opinion between SPENCER and KRISHNAN, JJ., the referring Bench. The question referred is whether the suit is barred by limitation.

The first article of the Schedule to the Limitation Act which is relied upon is Article 11. The effect of that article is that, where an order is made under the Civil Procedure Code, 1908, on a claim preferred, or objection made, to the attachment of property in execution of a decree, the limitation is one year from the date of the order. The facts of this case are these: Property which was mortgaged to the present plaintiff was seized in execution by the present defendant and brought to sale. The sale was advertised to take place on the 20th of November 1913. On that day an application was filed on behalf of the plaintiff asking that the proceeds of the sale which was about to take place should be held in Court, because he claimed they belonged to him under hypothecation. I have very considerable doubt whether, in fact, that was filed before or after the actual sale and I am rather inclined to the view that it was filed after

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(1) (1918) I.L.R., 41 Mad., 885 (F.B.).

(1) (1918) I.L.R., 41 Mad., 985 (F.B.)

(2) (1921) 41 M.L.J., 198.

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the sale, because when the matter came before the Court next day the Court said that the sale was already concluded and the decree-holder had got his amount and dismissed the application. It is difficult to understand how the Court could have done that if the petition was in time, and I am told that under Order XXI it is the recognized practice that you are too late altogether if you take your proceeding after the sale has taken place. If the petition was out of time it is quite easy to understand the order of the District Munsif. Otherwise it is very difficult to understand how the District Munsif came to make that order. But however that may be, one thing, to my mind, is quite clear that the District Munsif dismissed that application not on the ground of delay or anything of that kind, but on the ground, that he had no jurisdiction to hear it. He says: "The sale has taken place, I cannot hear this"—that is how I interpret the order that he has made, and it is quite clear that he did not hear it. He did not consider the question whether or not there was a mortgage or whether or not the present plaintiff was entitled to the property or the proceeds of the sale. It was never considered at all. That being so, in my judgment, there is no order on a claim preferred within the meaning of the Limitation Act and no order within the words of rule 63, Order XXI, on a claim or objection preferred against the present plaintiff. Rightly or wrongly, in my view, the District Munsif simply said, "I will not hear you." It is argued, however, that, notwithstanding that, I am bound by the decision of the Full Bench of this Court in *Venkataratnam v. Ranganayakamma*(1), to hold that this was an order coming within the rules and Article 11 of the Limitation Act. I do not

read that case to decide anything of the kind. What that case did was to take an order which was made by the District Munsif and referred to as Exhibit V which I have sent for and examined, and treat that order as a refusal of the application on the ground that there had been *laches* or delay which brought the matter under the proviso to Order XXI, rule 58, which is in these terms:

"Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed,"

and the Full Bench held, and held only, that where a decision is given on the ground that the matter has been designedly or unnecessarily delayed, that is a decision and an order against the applicant under Order XXI, rule 63, to which Article 11 applies. I think this is quite clear from the judgment of the learned Chief Justice and SESHAGIRI AYYAR, J. The latter says

"The language of Order XXI, rule 63, leaves little room for doubt that all orders which negative the right set up by the claimant or the decree-holder are within the rule."

Assuming that to be rightly decided, it does not affect this case, because there is no order, in my judgment, in this case negating the rights set up by the claimant. It follows that I agree with SPENCER, J., that this suit is not barred under Article 11 of the Limitation Act.

Another point was taken and I have held that it is covered by the terms of the reference though I confess I have very grave doubt on that subject because SPENCER, J., decided it one way and KRISHNAN, J., said nothing about it at all; but I accept what I am told, that he, having said nothing about it, might have been going to differ about it, and it was unnecessary for his decision to say anything about it at all, in the view he took of the case on the other point, and that on its being

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(1) (1918) I.L.R., 41 Mad., 985 (F.B.).

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pointed out to the Court, the Court answered, "Well, your point is covered by the Order of Reference." Therefore, I think it is right that I should deal with the matter and save the parties from further expense and further hearing. On this matter too I agree with SPENCER, J. I think the matter is really concluded by the decision of the Privy Council in *Barhamdeo Prasad v. Tara Chand*(1). It would indeed be a singular thing if a person in possession of mortgaged property, by going through the form of a sale by Court auction to himself, got the mortgaged property in fact, but also by reason of the sale got the money, and were enabled to say when attacked by the mortgagee,

"I have not got the mortgaged property at all; I have got some money and the article barring suits for money had and received is the article that applies; and I escape from liability and can retain both the money and the property."

But the learned vakil argues,

"you cannot sue for the money but only for the property; and if you sue for the property, you cannot succeed in this action but you must bring another."

In *Barhamdeo Prasad v. Tara Chand*(1), it was held that proceeds of mortgaged property for the purpose of the Limitation Act are to be treated as within the meaning of Article 132 of the Schedule to the Limitation Act. An action to enforce payment of money charged upon immoveable property, says the Privy Council, is within the meaning of Article 132. This is really an action to enforce payment of money charged upon the property. The money was charged on the property. The defendant has got the property and I cannot see how by himself converting the property into money he could bring into play articles of the Limitation Act other than

(1) (1914) I.L.R., 41 Cal., 654 (P.C.).

those which would apply if he had not converted it into money.

I, therefore, answer the question of the referring Bench by saying that the suit is not barred by limitation. I, therefore, hold that this Appeal must be dismissed with costs.

K.R.

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APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

MOHIDEEN PAKKIRI MARAKKAYAR (ACCUSED),
PETITIONER.*

1922,
July 17.

Income-Tax Act (VII of 1918), ss. 40, 17, 21 (3)—Indian Penal Code (XLV of 1860), sec. 177—False verification—Presentation of petition—Jurisdiction of Court, whether where verification made or petition presented.

A person making a false verification in a statement under section 17 or 21 (3) of the Income-tax Act, 1918, can legally be tried under section 40 of the Act only by a Court having jurisdiction over the place where the verification was made and not by a Court having jurisdiction over the place where the petition was presented.

PETITION under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of N. KELU NAYAR, Sub-Divisional First-Class Magistrate of Devakottai, in Calendar Case No. 79 of 1921.

The facts are set out in the judgment.

O. S. Venkata Achariyar and M. S. Ramanuja Ayyan-
gar for petitioner.

Public Prosecutor for the Crown.

* Criminal Revision Case No. 12 of 1922.

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MOHIDDEEN
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JUDGMENT.

We are asked in this revision case to interfere with an order passed by the First Class Sub Divisional Magistrate of Devakottai division disallowing the objection of the petitioner in a criminal case.

The case was instituted on a complaint by the Income-tax Assistant Tahsildar of Devakottai. In that complaint, the accused was charged under section 177, Indian Penal Code, within the meaning of section 40 of the Income-tax Act VII of 1918. The facts set out are that the accused verified a petition which he afterwards presented to the Revenue Divisional Officer under section 21 of the Income-tax Act. That verification was made at Kottaiapatnam in the Tanjore district. But the last sentence of the complaint states that the offence was committed at the place where the return was received by the Revenue Divisional Officer, Devakottai, within the lower Court's jurisdiction.

It must be borne in mind that the complaint is statedly of an offence punishable under section 177, Indian Penal Code, within the meaning of section 40 of the Income-tax Act. We are therefore concerned with the wording of the latter section and have to deal with it as it stands. Section 40 of the Income-tax Act says that, if a person makes a statement in a verification mentioned in section 17 or section 21 (3) which is false and which he either knows or believes to be false or does not believe to be true, he shall be deemed to have committed the offence described in section 177 of the Indian Penal Code. Where then did the petitioner make the statement in his verification? According to the complaint he made it in Devakottai. The learned Public Prosecutor, however, has argued that with reference to section 179, Criminal Procedure Code, the offence constituted by the verification will be triable,

not only where the verification was effected, but also where any consequence thereof ensued, and that some sort of consequence must be held to have ensued where the verified petition was received by the authorities. We have not been able to understand from the learned Public Prosecutor what is the exact consequence to which he refers. For, the receipt of the petition can in no sense be the consequence of its verification, since the verification would go no way towards putting the petition in transit from one place to the other. In *In re. Rambilas*(1), it was held in effect that the consequence contemplated in section 179 must be an essential part of the offence charged. That requirement is not fulfilled in the case before us. It has been suggested that an absurdity will be entailed by the petitioner's construction of section 40. For on that construction, any person who verified a petition would be punishable, even though no use of the petition were made and it never left his possession. We think that any such anomaly is sufficiently excluded by the reference to sections 17 and 21 (3) in section 40. Taking this view we must hold that the charge can legally be tried only by the Court having jurisdiction over Kottaiapatnam, Tanjore district, the place where the verification of the petition took place.

We therefore direct the lower Court to return the complaint to the complainant for presentation to the Court having jurisdiction.

M.H.H.

(1) (1915) I.L.R., 38 Mad., 639.

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APPELLATE CRIMINAL.

Before Mr. Justice Krishnan.

JAYARAMULU NAIDU AND ANOTHER, PETITIONERS.*

Abkari Act (Madras Act I of 1886), sec. 55 (a)—Possession of liquor—Licence.

The word "possession" in section 55 (a) of the Madras Abkari Act does not mean constructive possession but actual possession.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107, Government of India Act, praying the High Court to revise the judgment of H. E. L. D'SENA, Subdivisional Magistrate, Chingleput, in Criminal Appeal No. 33 of 1921.

The facts are set out in the judgment.

E. Vinayaka Rao, vakil for the petitioners.

The Public Prosecutor for the Crown.

JUDGMENT.

This Revision Case is filed by accused 2 and 3 only, in Calendar Case No. 152 of 1921 on the file of the Third-class Magistrate of Uttiramerur. They have been convicted under section 55, clause (a) of Act I of 1886, the Madras Abkari Act, for being in possession of liquor without a proper licence obtained for the purpose. The first accused has not come up here at all. It is argued on behalf of accused 2 and 3 that there is no evidence on record to show that they were in possession of the liquor. The finding of the lower Court is that the liquor was found in a cattle shed which belonged to accused 2 and 3 in which the first accused was selling the liquor. When the authorities came up on the scene, the first accused seems to have locked up this shed and bolted, and the door of the shed had to be broken

* Criminal Revision Case No. 104 of 1922.

open to get access into it. The lower Court, no doubt, holds that the second and third accused should also be considered to have been in possession of the liquor, because they were the owners of the shed; but I think this finding cannot be accepted, for in section 55 (a) the word "possession," I think, does not mean constructive possession but actual possession. It is only people who are actually in possession of contraband liquor without licence that can be punished under the section. In the circumstances of the case there is no clear evidence that accused 2 and 3 had anything to do with the liquor and the only point against them is that they were the owners of the cattle shed, which, I think is not sufficient to justify a conviction as regards them.

The conviction will therefore be set aside as regards accused 2 and 3 and the fines, if paid, will be refunded.

K.U.L.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan.

RAMASAMI CHETTY (COMPLAINANT), PETITIONER,

v.

MUTHUVELU MUDALI AND TWO OTHERS (ACCUSED),
RESPONDENTS.*

Towns Nuisances Act (Madras Act III of 1889), sec. 3 (12)—Criminal Rules of Practice, r. 16 (2)—"Conservancy clauses of Police Acts"—Bench of Magistrates—Jurisdiction—Consent.

A complainant who invoked the jurisdiction of a Court is not prevented from questioning it in Revision. A Court cannot get jurisdiction, if it had not any in law, merely because parties invoke it.

* Criminal Revision Case No. 263 of 1922.

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Bench Magistrates have jurisdiction to try offences under section 3 of the Madras Towns Nuisances Act as those offences fall under the classification "Offences under Municipal Acts and the conservancy clauses of Police Acts" in rule 16 (2) of the Criminal Rules of Practice.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Bench of Magistrates at Cuddalore, South Arcot District, in Summary Trial No. 1027 of 1921.

The facts are briefly these: On a complaint brought by one R, the accused were tried by the Bench Magistrates at Cuddalore, South Arcot, for an offence under section 3 (12) of the Madras Towns Nuisances Act, and were acquitted. The complainant preferred this Criminal Revision Case to the High Court and contended that the order of acquittal should be set aside on the ground that the Bench had no jurisdiction to try the offence.

T. R. Srinivasa Ayyangar, vakil for the petitioner.

M. Patanjali Sastri, vakil for the respondents.

Public Prosecutor for the Crown.

JUDGMENT.

This is a revision petition by the complainant against the acquittal of the accused by the Bench Magistrate of South Arcot. The ground taken is that the Bench had no jurisdiction to try an offence under section 3, clause 12 of Act III of 1889. Curiously enough, the objection is taken by the complainant himself who invoked the jurisdiction of the Bench. This does not, however, prevent him from doing so in Revision; for a Court cannot get jurisdiction, if it had not any in law, merely because complainant invoked its jurisdiction.

On the question of jurisdiction it is argued that the Bench had jurisdiction only to try offences under

sections 5, 6 and 7 named in rule 1, clause 5 (e) of the rules framed by the Government for the guidance of Bench Magistrates under section 16 of the Code of Criminal Procedure. The answer to this argument is that section 3 is not mentioned in clause 5 (e), because it falls under the earlier clause (2) as an offence against the conservancy clauses of a Police Act punishable only with fine or with imprisonment for a term not exceeding one month. Though section 3 is in the Towns Nuisances Act, section 11 of that Act directs that the section is to be read with and forms part of Act XXIV of 1859, the Police Act. It was ruled in *Queen-Empress v. Oolaganadan*(1), that all the clauses in section 48 of the Police Act fell within the term "conservancy clause." Section 3 (12) of the Towns Nuisances Act is practically the same as clause 6 and part of clause 7 of section 48 of the Police Act. That case is therefore an authority for holding that an offence under section 3 (12) of the Act III of 1889 falls within clause 2, rule 1 of the rules for the guidance of Bench Magistrates and the Magistrates had jurisdiction to dispose of the present case.

The petition fails and is dismissed.

K.U.L.

(1) (1890) I.L.R., 18 Mad., 142.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1922,
September 6

KOTTUR HAMPANNA AND TWELVE OTHERS, ACCUSED.*

Criminal Procedure Code (Act V of 1898), sec. 346—Sub-Magistrate—Submitting a case—Sub-Divisional Magistrate—Returning the case—Jurisdiction.

When a Sub-Magistrate submits a case to a Sub-Divisional Magistrate under section 346, Criminal Procedure Code, the latter has no power to return the case to the former but is bound to dispose of it in one of the ways prescribed by that section.

CASE referred for the orders of the High Court by D. G. WALLER, Sessions Judge, Bellary.

The facts of the case are set out in the Judgment.

The Public Prosecutor for the Crown.

The JUDGMENT of the Court was delivered by

OLDFIELD, J.

OLDFIELD, J.—The Sessions Judge, Bellary, has referred a committal by the Sub-Magistrate, Adōni, in Preliminary Register No. 6 of 1921 as illegal in the following circumstances. The case apparently was charged in the first instance before the Sub-Magistrate under section 395, Indian Penal Code. When the evidence was taken the Sub-Magistrate entertained some doubt as to whether that section applied or whether the proper sections were not sections 148 and 427, Indian Penal Code. He therefore submitted the case to the First-class Sub-Divisional Magistrate under section 346, Criminal Procedure Code, he apparently not being a Magistrate of the first class competent to try an offence under section 148, Indian Penal Code. The Sub-Divisional Magistrate returned the records to him with an order, of which we may at once and quite apart from the legal objection to it, express our strong disapproval.

* Criminal Miscellaneous Petition No. 220 of 1922.

The order runs as follows:—"The Sub-Divisional Magistrate declines to transfer the case to the file of another Sub-Magistrate." This is a distinct point into which we need not enter. He then, however, says, "As regards the section under which the offence, if proved, is likely to fall, the Sub-Magistrate is requested to study the commentary carefully under section 379 of the Indian Penal Code." This sort of elusive advice to a Sub-Magistrate from a superior is worse than useless; and moreover, by returning the case for disposal to him the Sub-Divisional Magistrate failed in his own plain duty. For, under section 346, Criminal Procedure Code, the duty of the Sub-Divisional Magistrate is clearly stated as being

"either, if so empowered, to try the case referred to him himself or to refer it to any Magistrate subordinate to him having jurisdiction, or to commit the accused for trial."

It may be urged that the Sub-Magistrate, who sent up the case, was subordinate to the Sub-Divisional Magistrate and that this order was in effect a reference to him. If so, the reference should have been made explicitly and with some distinct indication of what action the Sub-Magistrate was to take, not with an obscure injunction, which could afford no real guidance. But further, there is authority, with which we respectfully agree, in *Queen-Empress v. Fakira*(1) and *Queen-Empress v. Purshotam*(2), that a superior Magistrate cannot simply return a case to the subordinate Magistrate, from whom it comes, but must refer it to some other Magistrate or dispose of it himself.

In these circumstances, the committal by the Sub-Magistrate must be held illegal, inasmuch as his jurisdiction was determined when he submitted the case under

(1) (1890) Ratanlal's Unreported Cases, 499.

(2) (1891) Ratanlal's Unreported Cases, 554.

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section 346, Criminal Procedure Code, and was not revived by the subsequent order of return to him.

We cannot part with the case without inviting the District Magistrate's attention to the fact that the inquiry began on 2nd July 1921 and that the accused were committed for trial only on 15th March 1922. A small portion of this long pendency is, no doubt, due to a change in Magistrates, apparently between the hearings of 13th February 1922 and 2nd March 1922, but practically no part of it need be ascribed to the reference to the Sub-Divisional Magistrate under section 346, Criminal Procedure Code. The numerous hearings, which were tolerated, seem to have been due to bad posting, and to the failure to secure the presence of witnesses and to take their evidence, when they were present, without substantial adjournments. We hope that the District Magistrate will give his attention to these unfortunate proceedings.

The record is returned. The case must go to the First-class Sub-Divisional Magistrate in order that he may deal with it in any one of the ways permitted by section 346, Criminal Procedure Code, either by trying it himself or committing the accused for trial or, if he thinks fit, by referring it to any Magistrate subordinate to him having jurisdiction, that is, as we understand it, jurisdiction to try the offence which, in the opinion of the Magistrate making a reference under section 346, Criminal Procedure Code, appears to have been committed.

K.U.L.

APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter.

H. MAHOMED ISHACK SAHIB, APPELLANT,

1922,
March 10.

v.

MAHOMED MOIDEEN AND ANOTHER, RESPONDENTS.*

Court Fees Act (VII of 1870), ss. 3 and 5—Charter Act 23 and 24 Vict., Ch. 104, s. 15—High Court's power to make rules for imposition of court fees on Original Side—Memorandum of Appeal against order of Judge on Original Side—Reference by Taxing Officer—Jurisdiction—Stamp leviable—Final order—Original Side Fees Rules, Appendix II, Article 36.

The High Court can make rules for the imposition and collection of court fees in proceedings on the Original Side of the Court, by virtue of the power to make regulations for its procedure conferred by section 15 of the Charter Act. Such fees are fees payable to the clerks and officers of the Court within the meaning of section 3 of the Court Fees Act, and a dispute regarding the same falls within section 5 of that Act.

The court fee leviable on a Memorandum of Appeal against a final order passed by a single Judge sitting on the Original Side is Rs. 100 under Article 36 of the said Appendix.

REFERENCE under section 5 of the Court Fees Act in an Appeal preferred against the order of Mr. Justice PHILLIPS passed in the exercise of the ordinary Original Civil Jurisdiction of the High Court in Original Petition No. 117 of 1912.

An application was made to PHILLIPS, J., on the ordinary Original Side of the High Court to set aside an order, dated 3rd May 1921, appointing one Mahomed Ishack Sahib, guardian of the person and property of Muhammad Hussain Sahib, a minor. His Lordship set aside the order as prayed for, and appointed C. Abdur Rahiman Sahib, guardian of the property during the

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minority of Muhammad Hussain Sahib, and appointed Mahomed Moideen, the guardian of his person. Against this order Mahommed Ishack Sahib appealed.

The Memorandum of Appeal was stamped by the vakil for appellant with a stamp of Rs. 100. The office were of opinion that the proper fee leviable was Rs. 150 on the ground that it was a final judgment. The matter was referred to the Chief Justice who directed the matter to be heard by His Lordship Mr. Justice COUTTS TROTTER.

K. Raja Ayyar for the appellant.

The Advocate-General (C. P. Ramaswami Ayyar) on behalf of Government.

JUDGMENT.

COUTTS
TROTTER, J.

COUTTS TROTTER, J.—This matter has been referred to me by the Chief Justice purporting to act under the provisions of section 5 of the Court Fees Act VII of 1870. That section runs as follows: "When any difference arises between the officer whose duty it is to see that any fee is paid under this chapter and any suitor or attorney as to the necessity of paying a fee or the amount thereof, the question shall be referred to the Taxing Officer, except when the question is, in his opinion one of general importance, in which case he shall refer it to the final decision of the Chief Justice or of such Judge as the Chief Justice shall appoint on this behalf." I have given the material words.

The question arose out of an appeal from a determination of my brother PHILLIPS, J. I need not say more about its nature for my purpose, and the contention of the applicant (the would-be appellant) was that the sum payable by him to file his Memorandum of Appeal was Rs. 100 under Article 36 of Appendix II to the Original Side rules which draws up a list of Court fees to be levied by the Registrar, High Court. The

contention of the Registrar was that the proper fee was Rs. 150 on the footing that this was a Memorandum of Appeal from a final judgment.

Objection is taken that the supposed jurisdiction under section 5 of the Court Fees Act does not exist, and that I am not competent to go into this matter. It arises in this way. In the mufassal Courts, ad valorem fees are levied and Statutes regulate the amount of fees including this Court Fees Act in question which has a long Schedule of ad valorem fees to be paid in various cases. It is conceded that the Schedules and subsidiary parts of the other chapters of the Court Fees Act have no application to the High Court in the exercise of its ordinary Civil Jurisdiction. Section 4 cannot apply, because that is in terms confined to the extraordinary Original Civil Jurisdiction, that is to say, cases transferred by the High Courts and other cases. Therefore this Memorandum of Appeal is clearly not within the purview of section 4. The learned Advocate-General says nor is it within the purview of section 3, and the way he puts it, as I understand it, is this. He says it is not a fee payable for the time being to the clerks and officers of the High Courts established by Letters Patent by virtue of the power conferred by 24 and 25 Victoria, Chapter 104, section 15. That section is a very long one defining certain powers of the Chartered High Courts and the material portion of it is as follows:

"Each of the High Courts established under this Act shall have power to make and issue general rules for regulating the practice and proceedings of such Courts . . . and also to settle tables of fees to be allowed to the Sheriffs, Attorneys and all clerks and officers of Courts."

It is said by the Advocate-General that the words of section 3 of the Court Fees Act must be controlled by reference to section 15 of the High Courts Charter Act. I entirely agree, and the only question

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which arises is to what extent the true construction of that Act narrows the apparent scope of the Court Fees Act. It is, I think, reasonably clear that that part of section 15 of the High Courts Charter Act which speaks of settling fees to be allowed to Sheriffs, Attorneys, and all clerks and officers of the Court will not cover this case because, as the Advocate-General pointed out, section 8 of the Court Fees Act clearly points to the fee which is to be taken by the officer as a perquisite, as until recent years we all know they were. Therefore the fee payable for the time being to all clerks and officers of the High Court under section 8 of the Court Fees Act cannot be covered by those words of the High Courts Charter Act. It has always been maintained that the power under which fees are levied on the Original Side of the High Court was derived from the general powers to issue general rules for regulating the practice and procedure of the Courts. It is argued, and I think it is rightly argued, that the power to make regulations for procedure necessarily includes imposition of fees and the collection of them, and the Court can collect the fees only through its proper officers. If that be right, then the fee leviable on an appeal is the fee payable for the time being to the officers of the High Court by virtue of the High Courts Charter Act directly.

Now, it is said that there are two obstacles to that. The first is that no fee is paid but only a document is presented with a stamp of certain value on it. The second is that the money is not paid to the officers but is paid to the Crown. I think it is clearly a fallacious argument and one that the Act obviously deals with; because by section 25 of the Act, all fees referred to in section 8, or chargeable under the Court Fees Act should be collected by stamps. In my opinion, when a person tenders a stamped document to the Registrar of this

Court and asks him to enter his appeal, it is clear that he is, within the meaning of this Act, paying a fee to an officer of the High Court, and in taking that fee, the High Court is acting by virtue of the general powers conferred upon it by section 15 of the High Courts Charter Act.

I am therefore of opinion that it is my duty to try this question on the merits and I must overrule the preliminary objection that under this Statute I have no jurisdiction to try it.

I now come to the merits. What I have to decide is whether this is a Memorandum of Appeal from a final judgment (Article 35) or whether it is a Memorandum of Appeal from any other judgment or order (Article 36). There can be no doubt, I take it, that without going into the cases which were cited, no one would describe in ordinary language this, that we have here, as anything but an order. It lacks all the characteristics of a judgment which were pointed out in cases such as *Ex parte Ohinery*(1), and *Onslow v. Commissioners of Inland Revenue*(2), and many other cases that have been cited; and the proceedings in which it was passed lack all the characteristics of an action or suit. If any one were asked whether this was a judgment or order, he would certainly say it is an order. Equally I think there is no doubt, and again I think it unnecessary for me to refer to cases cited, that this if tested by the distinction as to whether it was final or interlocutory, would be classed as final. So that I put the two cross lines of division side by side and to the question whether this is a judgment or an order, the answer that I give unhesitatingly is, it is an order: I then ask myself, is it final or interlocutory? I find that it decides finally the rights of the parties as to the matters which arise for

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(1) (1884) 12 Q.B.D., 342.

(2) (1890) 25 Q.B.D., 465.

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determination. Therefore I say it is final. It is therefore a final order.

Now, says Mr. Advocate-General, by section 15 of the Letters Patent, the right of appeal is given only in the case of a judgment of one Judge of the Court or of the Division Bench and that no right of appeal is given against orders, except one or two that are specially excepted and which are quite different from the Order in question in this case. It may of course have been the intention of the framers of the Letters Patent that there should be no appeal in the case of an order of a single Judge to two of his brother Judges. I think that question is altogether outside the scope of this reference to me, and goes to the merits of the appeal. I express no opinion on it; I merely assume for the purposes of the present point that an appeal lies; it will be open on the hearing of the appeal to argue otherwise. The question to be solved here is what is the amount of fees that has to be paid on a Memorandum of Appeal and not whether an appeal lies or not. That is a matter which will arise in other proceedings in this Court.

I now look to the Articles in Appendix II of the Original Side rules. I am asked to construe them in this way. I am asked to say that *per incuriam* the draftsman of Article No. 35 omitted to add the words "or order" after "final judgment" and I am asked to come to that result by this method of construction, namely, that in "appeal from any other judgment or order" in Article 36, the adjective "other" governs not merely "judgment" but also "order"; then thereupon arises the irresistible inference that as an "other order" must be distinguished from the one that has gone before that, there must be appended to the word "judgment" in Article 35, by implication, the words "or order" meaning "or final order." We have now a complete distinction between a

"final judgment" and "order" namely, if it is a final judgment the fee payable on it is Rs. 150 and if it is an interlocutory or non-final judgment or order, it is to be Rs. 100. I cannot put any such unnatural construction upon the words and I think I must take the Articles as meaning that an appeal against a final judgment should be taxed with a fee of Rs. 150 and an appeal against something else which is obviously of much less importance and much less likely to involve a prolonged inquiry, namely, appeals against interlocutory judgments or orders whether final or interlocutory should be taxed with a fee of Rs. 100. This seems to be perfectly intelligible and I have no doubt as to what the framers intended, although as regards the right of appeal, I am personally not in the least affected by the argument that if they had looked at section 15 of the Letters Patent, they would have seen that they were creating the difficulty which I am now asked to solve. I think that the Articles are quite plain and that it would be improper for me to try to make them harmonise with the older versions of the Articles which deal with this case. The Articles are apparently plain and they make a distinction between a final judgment on the one hand and an interlocutory judgment or an order which is not a judgment on the other.

I must therefore answer this reference by saying that in my opinion, the fee payable on the Memorandum of Appeal is Rs. 100. The excess fee paid Rs. 50 must be refunded.

The Government Solicitor on behalf of Government.

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APPELLATE CIVIL.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
and Mr. Justice Coutts Trotter.*

1922,
April 21.

NATARAJA MUDALIYAR (SIXTH DEFENDANT), APPELLANT,

v.

D. P. RAMASAMI MUDALIAR AND OTHERS (PLAINTIFFS
AND DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 66—Old Code (Act XIV of 1882), s. 317—Benami sale—Execution—Sale—Managing member of a joint Hindu family—Purchase of property in the name of another—Suit for partition by other members of the family in respect of such property—Maintainability of suit—Bar of suit—Act of managing member in buying benami, whether on behalf of other members—Right of benamidar.

Where in a sale held in execution of a decree the manager of a joint Hindu family purchased property, benami in the name of another person, using family funds for the purpose, and some of the other members of the family instituted a suit for partition of the property as joint family property against the other members and the benamidar,

Held, that section 66 of the Civil Procedure Code, 1908, was no bar to the plaintiffs' recovering their share in the property in the partition suit.

The managing member buying property in the name of another person, using family funds for that purpose, cannot be properly said to buy benami on behalf of the other members of the family, under section 66 of the Code, as he is doing something wholly wrong in putting the benamidar in a position, if so minded, to set up a claim in derogation of the claims of the joint family.

The language of section 317 of the old Code (Act XIV of 1882) is wider than that of section 66 of the new Code (Act V of 1908).

Suraj Narain v. Ratan Lal, (1918) I.L.R., 40 All., 159 (P.C.), distinguished as a decision under the old Code; *Bajinath v. Bishen Devi*, (1921) 19 A.L.J., 787, dissented from.

APPEAL against the judgment and decree of KUMARASWAMI SASTRI, J., in the exercise of the ordinary Original Civil Jurisdiction in Civil Suit No. 226 of 1918.

This is a suit for partition and recovery of possession of the plaintiffs' share in the suit property, which was a house. The father of the first plaintiff had obtained a decree for money against the original owner of the property and in the auction sale held in execution of the decree, the father of the first plaintiff, who was the managing member of the joint family of the plaintiffs and the defendants other than the sixth, had purchased the property benami in the name of the sixth defendant, and had used family funds for that purpose. He did not obtain the leave of the Court to purchase in auction, though he was the decree-holder. After the death of his father, the first plaintiff and his sons, the second and third plaintiffs, instituted the present suit for partition of the suit property against the other members of the family as well as the benamidar who was the sixth defendant. The latter pleaded that he was himself the real purchaser and that, if he was a benamidar for the first plaintiff's father, the suit was barred under section 66 of the Civil Procedure Code. The learned Judge (KUMARASWAMI SASTRI, J.) held that the sixth defendant was only a benamidar, and that section 66 of the Code was no bar to the plaintiffs' recovering their shares in the property as joint family property, and decreed that the plaintiffs were entitled to recover their one-fourth (and not one-third as claimed in the plaint) share in the suit property. The sixth defendant appealed against the decree.

A. Viswanatha Ayyar for appellant.—The first plaintiff is the son and second and third plaintiffs are

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the grandsons of Arunachalam, who is said to have purchased the property benami in the name of the sixth defendant. The grandfather was the managing member of the family. The sale was made in July 1907, before the new Act came into force. The old Code (Act XIV of 1882) is applicable. When a manager of a joint Hindu family purchases property in the name of another person, he purchases benami on behalf of all the members. The nominal purchaser is a benamidar for all the coparceners. The family and not the manager alone is the real owner and the benami is on behalf of all the members. The plaint itself admits that the *benami* was on behalf of the family, and not on behalf of the manager alone. The benami transaction is not alleged to have been made fraudulently by the manager, i.e., to defraud the other members which may stand on a different footing. This case is governed by the ruling of the Privy Council in *Suraj Narain v. Ratan Lal*(1). The argument and judgment in the above case shows that the old Code (Act XIV of 1882), section 317 and not the new Code of 1908, would apply when the sale was held before 1909, though the suit was brought after the new Code came into force. The ruling in *Bajinath Das v. Bishen Devi*(2), is under the new Code and supports the appellant. The ruling of the Privy Council in *Bodh Singh Doodhoooria v. Gunesh Chunder Sen*(3), was under the old Code and the sale was in the name of a member of the family to defraud the other members, but the ruling of the Privy Council in *Suraj Narain v. Ratan Lal*(1) was given in a case where the benami purchase was in the name of a stranger, as in this case. So the latter and not the former ruling governs this case. The ruling in *Natesa Ayyar v. Venkataramayyan*(4) applies

(1) (1918) I.L.R., 40 All., 159 (P.C.), s.c., 44 I.A., 201 (2) (1921) 19 A.L.J., 787.
(3) (1878) 12 B.L.R., 317 (P.C.). (4) (1883) I.L.R., 6 Mad., 135.

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only where the manager fraudulently puts property in the name of a benamidar so as to defraud a family and does not apply to a case where the manager bona fide enters into a benami transaction. *Rama Kurup v. Sridevi*(1), supports the appellant; *Minakshi Ammal v. Kalianarama Rayer*(2) and *Krishna Aiyar v. Ragha-vaiyan*(3), simply follow the decision in *Natesa Ayyar v. Venkataramayyan*(4). The first plaintiff actively assisted in bringing about and supporting the benami transaction and must be taken to be a party to the benami transaction. The proviso to section 66 does not apply to this case.

S. Krishnama Achariyar with P. R. Ramakrishna Ayyar, V. Chellamiah and N. Viswanatha Ayyar for respondents relied on the Madras rulings from *Natesa Ayyar v. Venkataramayyan*(4) onwards and on *Bodh Singh Doodhoooria v. Gunesh Chunder Sen*(5) and distinguished *Suraj Narain v. Ratan Lal*(6) as under the old Code.

JUDGMENT.

SCHWABE, C.J.—The first plaintiff's father having a decree against the owners of some house property in Madras, brought that property to sale in execution. Without obtaining the leave of the Court to bid, he bought it himself using for that purpose the joint family money, and in order to conceal this fraud on the Court, he bought it in the name of the sixth defendant. This is the case of the plaintiffs and of some of the defendants. That has been found by the learned Judge who saw the witnesses and examined the facts obviously with the greatest care, to be the truth and I can find no ground for interfering with that finding of fact.

The first plaintiff with his sons, the second and the third plaintiffs, joining as defendants the other members

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(1) (1893) I.L.R., 16 Mad., 290. (2) (1897) I.L.R., 20 Mad., 349.
(3) (1899) 9 M.L.J., 298. (4) (1883) I.L.R., 6 Mad., 135.
(5) (1878) 12 B.L.R., 317 (P.C.). (6) (1918) I.L.R., 40 All., 159 (P.C.).

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of the joint family has brought this suit for partition, and he claims that part of the joint family property to be brought in and divided in the partition consists of this house property standing in the name of the sixth defendant, and he brings in the sixth defendant to have that case decided. The sixth defendant resists that claim setting up, firstly, as a fact that the plaintiff's case is not true at all, that he never was a benamidar or nominee of the first plaintiff's father—which, as I have pointed out, has not been accepted as the fact, and secondly, he says that, in law although he is not entitled to this property, it is not open to the plaintiffs in this case to recover it from him by reason of section 66 of the Code of Civil Procedure, 1908; and it is on the proper interpretation of that section, and that section only, that this case must turn.

Before the passing of that section there was in existence section 317 of the Civil Procedure Code of 1882. The terms of that section were,

"No suit shall be maintained against the certified purchaser (which means the certified purchaser who has purchased the property at Court auction) on the ground that the purchase was made on behalf of any other person or on behalf of some one through whom such other person claims "

There was very soon a conflict of authorities as to the meaning of that section and I think it may be stated that the Madras view, established first of all in *Natesa Ayyar v. Venkatramayyan*(1) and followed in *Krishna Aiyar v. Raghavaiyan*(2) and *Minakshi Ammal v. Kaliyana Rama Rayer*(3) was that there was nothing in that section to prevent a member of a joint family from recovering the property which had been bought out of the joint family money in the name of some person benami at a Court

(1) (1883) I.L.R., 6 Mad., 135.

(2) (1899) 9 M.L.J., 298.

(3) (1897) I.L.R., 20 Mad., 240.

auction by the managing member of the family, he himself being the decree-holder. A different view was taken in Allahabad, and the matter came before the Privy Council in *Suraj Narain v. Ratan Lal*(1). In that case there is no doubt that the Privy Council supported the view contrary to the view taken in Madras, though it is worth observing that there seems to have been very little discussion on the matter and the Madras cases do not seem to have been cited. If, however, the matter stood there, I should find great difficulty in distinguishing that case as was done by the learned Judge below; but that case was tried when the Civil Procedure Code of 1882 was in operation and it is a decision under section 317 of that Code. After that case, or rather after the first hearing of the case, section 66 of the Civil Procedure Code of 1908 was introduced, and that altered the law very materially, because now the only prohibition is contained in these words:

"No suit shall be maintained against any person, claiming title under a purchase certified by the Court in such manner as may be prescribed, on the grounds that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

The obvious alteration is that now the penal provision is confined to purchases on behalf of a plaintiff or persons through whom he claims, whereas before it was wide enough, on one interpretation of it, to cover purchases on behalf of any other person. I should think that that alteration was made because, on what I may call the Allahabad interpretation, there might be an injustice. For it would follow that infants, whose father using the infants' property entered into such a transaction would be deprived, though perfectly innocent themselves, of their family property, and that it would

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(1) (1918) I.L.R., 40 All., 150 (P.J.); s.c., 44 I.A., 201.

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remain in the hands of a benamidar. It was therefore desirable that the inability to enforce rights should be restricted to the person who was guilty of the act, which was looked upon as an illegal act. It is argued in this case that the purchase was made on behalf of the plaintiff and that the real meaning of that clause is that if a managing member makes a purchase and for that purpose uses the money of the family, he is making that purchase on behalf of all the members of the family. Unless I were driven to an interpretation which would have the results which, as I have already stated, in my view, it was the desire to prevent, I should be very loath to come to such a conclusion; but, in my judgment, it is quite unnecessary, because I do not think that a managing member buying property using family funds for that purpose can be properly said, within the meaning of that section, to buy on behalf of other members of the family. He is doing something wholly wrong. It cannot be right for him to take the family money and put it into property in such circumstances that, if the man who lends his name chooses to behave in the way that this sixth defendant has behaved, the family would be deprived of the property. I can see no distinction between the case of a co-parcener and the case of a partner. Where partnership money is used for a benami transaction of that kind, it would follow, if the interpretation suggested of the section is right, that the innocent partner would lose his property. In my judgment that is not the meaning of the section.

The learned Judge also relies on the proviso to that section, and there is a great deal to be said in favour of his interpretation of the proviso, but in the view that I have expressed of the section itself, it is unnecessary to decide anything in respect of the proviso. I am aware that in coming to this conclusion I am taking a different

view to that taken in *Bairnath Das v. Bishen Devi*(1). It is enough to say that I do not agree with that decision or with the reasoning on which it is based. I think the Court in that case gave much too wide a meaning to the words in section 66 (1) "made on behalf of the plaintiff."

Therefore in my judgment this appeal fails and must be dismissed with costs. This is a proper case for two sets of costs to be allowed, one for the plaintiffs and the other for defendants 7 to 9, the reason being that the interests of some of the infant defendants might have been quite different to the interests of the plaintiffs, and on one head of the argument which has been addressed to us, was different.

COUTTS TROTTER, J.—I am of the same opinion. It was established by the case of *Bodh Singh Doodhooia v. Gunesh Chunder Sen*(2) that the sections of the Code which were designed to punish a person who puts his property in the name of the benamidar were not to be applied to the case where one member of a joint family gets property in his name and the rest of the family seek to enforce their rights against that property standing in his name. The words of the Privy Council (at page 330) were these:

"Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindu family, who by the operation of law and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition however made by a member of the family in his sole name, if made by the use of the family funds. It is obvious that under Hindu Law it is natural and appropriate to regard a member of a family as being in possession on behalf of the family so that possession would enure to the family as a whole rather than to him in the character of benamidar or

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(1) (1921) 19 A.L.J., 787.

(2) (1873) 12 B.L.R., 817 (P.C.).

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nominee which is quite alien to the conception of the relation of one member of a Hindu family to another."

Further their Lordships held in that case that the section of the old Code did not apply to a case where the alleged benamidar was himself a member of the undivided family.

The next case is where the person put in as benamidar was not a member of the undivided family but a nominee chosen by the head of the family, and the question arose whether the Code prohibited the members of the undivided family not concerned in the transaction from asserting their rights in the property or whether they were precluded from doing so by the section. In this Presidency, the cases in my opinion, with one possible exception, have shown a consistent course of decision. It began with the case of *Natesa Ayyar v. Venkatram-ayyan*(1) and *Krishna Aiyar v. Raghavaiyan*(2). There is a dictum, for it has been analysed by other Courts and in my opinion rightly pronounced to be nothing more, in *Rama Kurup v. Sridevi*(3), which seems to go the other way. But, on the whole, the current of decisions in this Court has been uniform that the proposition which the case in *Bodh Singh Doodhooia v. Gunesh Chunder Sen*(4), laid down where the property stood in the name of a member of the family, was equally applicable when the nominee was a stranger, provided that members of the family were merely seeking to enforce their claim to what they alleged to be the undivided family property or the proceeds of the money belonging to the undivided family. It cannot be denied that there is in the Allahabad Court a direct decision the other way, in the case of *Baijnath Das v. Bishen Devi*(5).

(1) (1888) I.L.R., 6 Mad., 185.

(2) (1899) 9 M.L.J., 298.

(3) (1898) I.L.R., 16 Mad., 290.

(4) (1878) 12 B.L.R., 817 (P.O.).

(5) (1921) 19 A.L.J., 787.

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which has been referred to by my Lord. The reasoning is not difficult to follow. The property is put in the name of the benamidar, both in the Allahabad case and in the case before us, by the managing member of the family, and it is said that that is the act, under the Hindu Law, of the whole family and therefore the prohibition, which undoubtedly would extend to the managing member himself who carried out the transaction, must equally apply to the whole of the family on whose behalf he acts or purports to act. The answer appears to me to be that, whatever the rule may have been under the section of the old Code, under the section of the present Code 66 (1) that result does not follow. In my opinion, the plaintiff in this suit and in similar suits is not seeking to enforce rights against the benamidar as his trustee, but he is following into the hands of the benamidar whose position as a trustee he *ipso facto* repudiates, a portion of the proceeds of what he alleges and has proved to be the ancestral estate in which he has a share and of which he is entitled to partition and severance of his own share. I am therefore of opinion that it cannot be said that the purchase at the sale of this property was a purchase made on behalf of the plaintiff. The managing member when he put in a benamidar knew that he was disobeying the Court, knew that he was putting the benamidar in a position to set up claims in derogation of the rights of his own family and of his co-parceners and, in such circumstances, it seems impossible to say that the purchase was made on behalf of this plaintiff within the meaning of section 66 (1) of the Code.

There only remains the difficulty created by a stray sentence in *Suraj Narain v. Ratan Lal*(1). It is suggested by my brother KUMARASWAMI SASTRI, J., that it may

(1) (1918) I.L.R., 40 All., 159 (P.O.); s.c., 44 I.A., 201.

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be that the items of property in question may have been in the same category as the other properties, namely gifts made to the son-in-law not as a benefaction to be held for the donor but as an advancement in life by way of gift. However, that does not appear from the report and I think the simplest method of dealing with that is to say, as my Lord has said, that the Allahabad case is dealing with a situation governed by the words of the old Code and that the differentiation in wording effected by the new Code is sufficient to distinguish the observation of their Lordships in that case and to make it not applicable to the present case.

With regard to the two other points that were argued as to the complicity of the first plaintiff in the transaction itself, the material put forward in support of that, to my mind, is quite unsubstantial. It amounts to no more than that he recorded the transaction in the family account books and it does not in the least follow that he appreciated exactly what was done, much less that he took an active and consenting part in it.

Finally, it was argued that not only was the first plaintiff completely aware of what was done but that in truth the sixth defendant was not a benamidar at all and he was never intended to be, but he was the real purchaser and had an independent right to the properties put up at Court auction. With regard to that, the learned Judge who heard all the witnesses and discussed and weighed their evidence very carefully has come to the conclusion, with which I entirely agree, that there is no evidence worth the name to support the suggestion that the sixth defendant had an independent right over these properties.

I agree that the appeal fails and that it must be dismissed with costs.

K.R.

APPELLATE—CIVIL.

*Before Sir Walter Salis Schwabe, Kt., K.O., Chief Justice,
and Mr. Justice Wallace.*

K. M. PARTHASARATHY NAIDU AND OTHERS (PLAINTIFFS),
APPELLANTS,

1922,
July 26.

v.

P. MUKUNDAMMAL (DEFENDANT), RESPONDENT.*

Will—Executor—Power of sale expressly given under will for discharging debts—Power of sale, whether includes power to mortgage—Mortgage executed by executor—Onus of proof as to reality of testatrix's debts.

Where by a will express power is given to the executor to sell the property to pay off debts, that power includes the power to mortgage, unless there be some reason to be gathered from the terms of the will itself why it should be excluded.

Haldenby v. Spofforth (1829) 1 Beavan, 390, applied; *Purna Chandra Bakshi v. Nabin Chandra Gangopadhyaya* (1903) 8 C.W.N., 362, followed.

Where an executor has the power to mortgage for payment of debts, the mortgagee cannot be called upon to show the reality of the testator's debts for payment of which the mortgage was executed.

APPEAL against the judgment and decree of COURTS TROTTER, J., passed in the exercise of the ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 273 of 1920.

The plaintiffs brought a suit to enforce two mortgages, one executed by one Kuppammal and the other by her son Ramanjulu as executor of her will for the purpose of discharging the debts incurred by the testatrix. The will gave an express power of sale to the

* Original Side Appeal No. 90 of 1921.

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executor for discharging the debts of the testatrix. The material terms of the will were as follows :

" . . . I appoint my son Poodi Ramanjulu Naidu as executor to manage after my lifetime all my immoveable and moveable properties which I got by stridhanam and have been enjoying. The abovesaid executor shall take possession of my immoveable and moveable properties, sell such of my immoveable and moveable properties as the executor wishes for the debts due by me to people, pay off the debts, properly manage the remaining immoveable and moveable properties, be paying to my daughter-in-law Mukundammal the remaining income after deducting the necessary taxes, etc., from the income received and if they get issue, give all these properties to them equally without difference between the male and female issue. In case there be no such issue they should make an adoption. The whole of my property should go to the adopted son. If not, any advisable charity shall after the death of these two persons be performed with these properties in Sri Parthasarathi Temple, Triplicane."

The learned Trial Judge (COUTTS TROTTER, J.) gave a decree in respect of the mortgage executed by the testatrix but in respect of the other mortgage held that the executor had no power *under the will* to execute a mortgage to raise funds for the discharge of the testatrix's debts, that express power for sale being given under the will, the power to mortgage for such purpose was excluded and that therefore the mortgage was invalid. Against the decree in respect of the latter mortgage, the plaintiffs preferred this appeal.

T. L. Venkatarama Ayyar for the appellant.—Under section 90 of the Probate and Administration Act, an executor has absolute powers to sell or mortgage subject only to any restriction in the will. Express mention of the power to sell does not, by implication, prohibit the power to mortgage. The power to mortgage is not inconsistent with the power to sell, and is indeed necessarily implied in the latter, because mortgage is only a conditional

sale. See *Mills v. Banks*(1). *Haldenby v. Spofforth*(2) was a case of a direction for *conversion* of the estate, and a mortgage could not answer that purpose. But where, as here, the object of the testator is the *preservation* of the estate after payment of the debts, a power to sell is only one mode, and it is not a restriction on other modes. See *Ball v. Harris*(3), *Purna Chandra Bakshi v. Nobin Chandra Gangopadhyaya*(4).

T. Ethiraja Mudaliyar for respondent.—A prohibition under section 90 of the Probate and Administration Act need not be express. It can be implied and the express mention of the power of sale excludes the power to mortgage. See *Kanti Chandra Chattopadhyaya v. Kristo Churn Acharjee*(5), *Satis Chandra Chaturdhurin v. Jnanada Sundari Chawdhurani*(6), *Jugmohandas v. Pallonjee*(7).

JUDGMENT

SCHWABE, C.J.—In this case the mortgagees brought a suit to enforce the mortgage. The mortgage was executed by an executor under a will. That will gave the executor express power to sell any part of the estate, moveable or immoveable as the executor might wish, for purposes of paying off debts. It was contended before the learned Judge that, this power being an express power of sale, he had no power to mortgage. The learned Judge with regret came to the conclusion that that was the proper construction of the will and that he was bound by *Haldenby v. Spofforth*(2) and Indian cases following that case so to hold. On a careful examination of that case, so far from being authority in favour of the proposition that the executor with power of sale cannot mortgage, it is in my judgment direct authority for the

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(1) (1724) 3 P. Wms., 1.

(3) (1839) 4 My. and Cr., 264.

(5) (1899) 3 C.W.N., 515.

(2) (1839) 1 Beav., 390.

(4) (1903) 8 C.W.N., 362.

(6) (1909) 1 I.C., 364.

(7) (1898) I.L.R., 22 Bom., 1.

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proposition that he can, except in cases, such as the case there, where a prohibition against mortgage can be inferred. The Master of the Rolls, Lord Langdale, referring to the case of *Mills v. Banks*(1), said this:—

“ Lord Maclesfield also observed that the Court had decreed that the trusts declared concerning the term empowered the trustees to sell the premises and a power to sell implied a power to mortgage which was a conditional sale. This I conceive to mean, that where it is intended to preserve the estate, there, under a direction for sale, a mortgage will sufficiently answer the purpose.”

The facts of *Haldenby v. Spofforth*(2) were that the direction there was not to preserve the estate but to convert the whole estate into money. Turning to the authorities in this country it is sufficient to quote *Purna Chandra Bakshi v. Nobin Chandra Gangopadhya*(3), which is a direct authority for the proposition that, where by a will power is given to sell the property to pay off debts, that power includes the power to mortgage. By section 90 of the Probate and Administration Act, 1881, the power of an executor to dispose of immoveable property is subject to any restrictions which may be imposed by the will. But in my judgment the power of sale is not a restriction imposed by the will, and the power of mortgage, so far from being inconsistent with it, is, as pointed out in the English case, included in it unless there be some reason to be gathered from the terms of the will itself why it should be excluded.

We are then asked to remand the case so that further evidence may be given. The learned Judge held, as I understand his judgment, that the onus was on the defendant to show, if it was open to him to show, that there were no debts and that the executor was not

mortgaging for the purpose of paying off debts. No evidence of that kind was tendered and it is therefore unnecessary to consider whether, if it had been tendered, it would have been admissible. In my judgment it was a perfectly proper ruling that it was not upon the mortgagee to prove as part of his case that the executor with power of sale was acting properly in effecting the mortgage. On those grounds, I think, the judgment must be reversed and judgment must be entered for the plaintiffs as prayed for with costs here and below.

WALLACE, J.—I agree. I just wish to say a few words on the second point. I agree with the Trial Judge that, where an executor has the power to mortgage, the mortgagees cannot be called upon to show the reality of the testator's debts for which their money was borrowed and, as the defendant here merely does not admit that there were debts other than the mortgage debt of 24th February 1918 and does not assert that there were no other debts, there seems to be no sound ground for remand for proof of the reality of the debts for which the mortgage was taken. I agree that the second mortgage is binding on the defendant.

K.B.

(1) (1724) 2 P. Wms. 1.

(2) (1839) 1 Beav., 390.

(3) (1908) 8 C.W.N., 362.

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APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice
Venkatasubba Rao.

1921,
December
6.

DAKOJU SUBBARAYUDU (COUNTER-PETITIONER), APPELLANT,

v.

MUSTI RAMADASU (PETITIONER), RESPONDENT.*

*Civil Procedure Code (V of 1908), O. XXII, rs. 3 and 10—
Mortgagee dying after preliminary decree leaving a will—
Legatee's application to continue suit—Limitation.*

A mortgagee who had obtained a preliminary decree for sale died leaving a will bequeathing the mortgage decree to A.

Held that A was his "legal representative" within Order XXII, rule 3, Civil Procedure Code, that the "right to sue" continued up to obtaining a final decree and that an application by A to bring himself on record as legal representative must be filed within the time allowed for applications under rule 3 and not rule 10 of Order XXII, Civil Procedure Code. *Bhugwan Das Khettry v. Nilakanta Ganguli* (1904) 9 C.W.N., 171, distinguished.

APPEAL against the order of N. BALARAMDAS, Subordinate Judge of Cocanada, in Appeal Suit No. 37 of 1919, preferred against the order of P. NARAYANA RAO NAYUDU Garu, District Munsif of Cocanada, in E.A. No. 1528 of 1919, in Original Suit No. 392 of 1907, on the file of the Court of the District Munsif of Peddapur.

The facts are given in the Judgment.

C. Rama Rao for appellant.—The respondent is a legatee and as such is a legal representative within the meaning of Order XXII, rule 3. A mortgage suit continues until a final decree is obtained. Order XXII, rule 10, does not apply.

G. Lakshmanna for respondent.—Rule 10 applies. Rule 3 does not apply. The words "right to sue" to be

found in rule 3 cannot apply to stages after the passing of a preliminary decree for sale. See *Bhugwan Das Khettry v. Nilakanta Ganguli*(1).

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The JUDGMENT of the Court was delivered by

AYLING, J.—In this suit one Venkamma sued on a mortgage and obtained a preliminary decree. Subsequent to this she died on 28th April 1916, leaving a will by which the present petitioner claims to be entitled to succeed to her interests in the mortgage. The preliminary decree was passed on 30th March 1916 and the period for redemption expired on 30th July 1916. No action was taken by the petitioner till 26th March 1919, when he filed the present petition asking to be brought on record as the legal representative of Venkamma and to be given a final decree. The question is whether the application should be dismissed as time-barred.

The District Munsif held that it should on the ground that the suit has abated under Order XXII, rule 3. The Subordinate Judge on Appeal held that rule 10 of the same order applied and that the application was not time-barred. In our opinion the District Munsif is right and the Subordinate Judge wrong. Rule 10 of Order XXII admittedly only applies to cases which do not fall under the preceding rules of the same Order and the matter therefore turns on whether the case falls under rule 3. This runs as follows (omitting superfluous words):—

"Where a sole plaintiff dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Where within the time limited by law no application is made under sub rule 1, the suit shall abate."

(1) (1904) 9 C.W.N., 171.

* Appeal against Order No. 34 of 1921.

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—
ATLING, J.

It seems to us that every one of these words applies to the present case. The plaintiff died after obtaining a preliminary decree and the respondent must contend that the right to sue survived to him: otherwise he has no locus standi in the matter at all. The right to sue obviously from the terms of the rule includes the right to proceed with the suit until the latter terminates, and in the case of a mortgage suit, where a preliminary decree and a final decree are both necessary, the right to sue must include the right to obtain a final decree after the passing of a preliminary decree. The case therefore clearly falls within the purview of the section, and, as the plaintiff admittedly did not apply to be made a party as provided in sub-rule (1) within the time allowed, the suit must be held to have abated under sub-rule (2).

We have been referred on respondent's behalf to the judgment in *Bhugwan Das Khetry v. Nilakanta Ganguli*(1). The facts of the case are distinguishable in that there a final decree had been passed and we need only say that, if any of the remarks in the judgment were intended to conflict with the view of the applicability of the rules which we have just enunciated, we must respectfully dissent from them.

We must therefore set aside the order of the Subordinate Judge and direct the dismissal of the application with costs throughout.

N.B.

(1) 1904) 9 C.W.N., 171.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

KASI VISWANATHAN CHETTY (PETITIONER), APPELLANT,

v.

A. S. P. L. S. SOMASUNDARAM CHETTY AND OTHERS
(RESPONDENTS), RESPONDENTS.*

1921,
December
20.

Civil Procedure Code (V of 1908), O. XXI, r. 22 (1) and (2)—Execution of decree, more than a year after date of decree—Omission to give notice to judgment-debtor—Omission of Court to record reasons for not issuing notice—Sale—Validity of—Void or voidable—Jurisdiction of Court to execute decree—Material irregularity or illegality affecting jurisdiction of Court—Proof of substantial loss for setting aside sale.

Omission to issue notice to the judgment-debtor under Order XXI, rule 22 (1), Civil Procedure Code, is only a material irregularity in procedure and not an illegality affecting the jurisdiction of the Court in executing the decree.

The provision in Order XXI, rule 22, sub-rule (2), requiring the Court to record reasons for not issuing notice under sub-rule (1), is only directory, and the omission to record reasons will not invalidate the proceedings in execution.

Where therefore a sale was held in execution of a decree on an application for execution made more than a year after the date of the decree but the Court did not issue notice under Order XXI, rule 22, sub-rule (1), nor record reasons for not doing so under sub-rule (2) of the same rule,

Held, that there was only a material irregularity in procedure and that the sale could not be set aside in the absence of proof of substantial loss by reason of such irregularity.

APPEAL against the order of L. R. ANANTANARAYANA AYYAR, Temporary Subordinate Judge of Sivaganga, in Execution Application No. 117 of 1919 (Execution Petition No. 1100 of 1918) in C.R. Suit No. 474 of 1910 on the file of the Chief Court of Lower Burma.

* Appeal against Order No. 119 of 1920.

VISWA-
NATHAN
CHETTY
v.
SOMA-
SUNDARAM
CHETTY.

This Appeal arises out of an order in an application filed by the judgment-debtors to set aside a sale held in execution of a decree passed on the 8th August 1912 by the Lower Burma Chief Court. The decree-holders applied to that Court in 1914 for transmission of the decree to the District Court of Rāmnād and it was accordingly transferred by an order, dated 4th May 1914. But notice under Order XXI, rule 22, sub-rule (1), was not issued to the judgment-debtor before the Lower Burma Chief Court passed its order. The District Court of Rāmnād in its turn transferred the decree for execution to the Sub-Court of Rāmnād; the decree-holders applied to this Court for execution on 9th July 1914; though some properties were attached, no sale took place, but the decree-holders received rateable distribution in proceeds realized by another decree-holder in execution of his decree. On 5th March 1918, the decree-holders applied to the Rāmnād Sub-Court for transfer of the decree to the Rāmnād District Court and the latter Court directed the Sivaganga Sub-Court to attach certain properties on an application made to it by the decree-holders on 18th March 1918. The attachment was made by the Sivaganga Sub-Court, but no sale was held as an encumbrance certificate was not filed by the decree-holders; subsequently on 12th November 1918, the decree-holders applied to the latter Court for sale of the properties attached. Sale proclamation was settled on 7th January 1919, and the property (a house) was sold to a stranger on 3rd April 1919. The judgment-debtors filed the present application to set aside the sale, contending, inter alia, that the proceedings were void as there was no notice of the execution proceedings either in the Lower Burma Chief Court or in the British Indian Courts. The lower Court dismissed the application. The first defendant preferred this Appeal.

VISWA-
NATHAN
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CHETTY.

A. Viswanatha Ayyar for appellant.—The sale is void. There was no notice of execution proceedings to the judgment-debtor in any Court. The lower Courts had no jurisdiction to execute the decree without notice under Order XXI, rule 22, sub-rule (1), Civil Procedure Code. See *Raghunatha Das v. Sundar Das Khetri*(1). The omission to record reasons for not giving notice is fatal. The Judge exercised no discretion in not issuing notice, because he was not asked by the decree-holder to issue execution without notice to judgment-debtor. Leave to sue, if given, will give jurisdiction to a Court in a certain class of suits, otherwise the Court has no jurisdiction in such cases.

A. Krishnaswami Ayyar, K. Raja Ayyar and V. Ramaswami Ayyar for respondents.—The judgment-debtor had notice of the execution proceedings by the notice affixed to his house. He had knowledge of execution proceedings at the settlement of the sale proclamation; there had also been two rateable distributions. The objection was not taken at the time of proclamation and so there was waiver.

There is no want of jurisdiction by the non-issue of notice; there is at the most only a material irregularity, which can be waived, and there is no proof of substantial loss by the sale. Both under the old Code and the new Code, absence of notice to judgment-debtor is not on the same footing as absence of notice to his legal representatives. Even though absence of notice to the legal representatives may cause want of jurisdiction, want of notice to judgment-debtor is only an irregularity of procedure. See *Maxwell on Interpretation of Statutes*, 6th Edition, page 680. Even though the Court did not record reasons for not issuing notice, there is no want of jurisdiction. See *Gopal Singh v. Jhakri Rai*(2).

(1) (1915) I.L.R., 42 Cal., 72 (P.O.). (2) (1886) I.L.R., 12 Cal., 37.

JUDGMENT.

VISWA-
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CHETTY.

This Appeal is against an order refusing to set aside a sale in execution of a money decree against the appellant first defendant and other members of his family.

The lower Court was asked to set aside the sale on several grounds. Only one argument has been attempted here, that the sale is bad for want of notice to appellant as required by Order XXI, rule 22, Civil Procedure Code. The necessary facts are that a decree passed on 8th August 1912 by the Chief Court of Lower Burma was transmitted to the Rāmnād District Court in May 1914 and thence to the Rāmnād Sub-Court. It was returned to the Rāmnād District Court; the application for execution there was treated as one for transfer to the lower Court, Sivaganga Sub-Court, and the decree and execution petition, by a possibly lax procedure to which however no objection is taken at present, were transferred accordingly. In the lower Court the present proceedings followed. It is admitted by the respondent that there was no notice of the proceedings in the Lower Burma Chief Court, and no notice of other proceedings has been proved. The question is whether this renders them and in particular the latest proceedings in the lower Court, invalid. Is there an illegality established or merely an irregularity? In the latter event the Appeal must fail, because the lower Court has found in its judgment, paragraph 27, that the price realized was not inadequate and that finding against substantial loss to the appellant has not been attacked.

An attempt has been made to argue that absence of notice can be justified with reference to rule 22, clause (1) proviso, because rateable distribution was once allowed in the Rāmnād Sub-Court by an order adverse to the appellant on 20th February 1916 and although

that order was set aside by the High Court, rateable distribution was again allowed by the Coimbatore District Court on 16th January 1917. But these adverse orders are not within one year of the present application for execution contemplated by the proviso. For the present application (Execution Petition Application No. 1100 of 1918) was presented on 12th November 1918. It was for sale after a previous application for sale had become inoperative owing to the respondent's failure to produce an encumbrance certificate and had been dismissed, the attachment being maintained. Much less are these orders within the one year, if on the view most favourable to the respondent, the date of presentation of the original application for execution in the Rāmnād District Court is taken as 9th April 1918.

Next it is suggested that the appellant's objection to the absence of notice must be regarded as waived by him, because he was served with notice of the settlement of sale proclamation in the present proceedings and did not appear and take objection to the validity of those proceedings up to that stage. We agree with the finding that there was service in accordance with Order V, rule 17, on the appellant since the evidence is clear that there was affixture, during his temporary absence on his house where his wife was living and we agree that this was rightly declared sufficient. It may, however, be doubtful whether the argument based on a waiver can be sustained if illegality affecting the jurisdiction of the Court and not irregularity is in question. We therefore have to decide between the two, which of them is established. That is the substantial issue before us.

The answer proposed by the respondent is that illegality is not established in view of sub-rule (2) of rule 22, the contention being that that sub-rule is applicable none the less, because the Court did not record its reasons

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for dispensing with the issue of notice, the provision for such record being directory not mandatory.

The appellant relies on authorities that notice is essential. Some of these the respondents distinguish on the ground that they relate to cases in which notice is necessary not because of the lapse of one year since the passing of the decree and the last application for execution, but because devolution of interest has occurred. That distinction, however, is negatived by the absence of anything in the rule to support it, the same language being used as applicable to both classes of cases. The real ground of distinction to be drawn seems to us to be between the cases under the former Code and under this, there being nothing in the former Code corresponding with sub-rule (2) now under consideration. The cases accordingly under the former Code to which we have been referred, *Gopal Chunder Chatterjee v. Gunamoni Dasi*(1), *Gurudas Biswas v. Bhowanipore Zamindari Co., Ltd.*(2) and *Raghunath Das v. Sundar Das Khetri*(3), must be dismissed from consideration. In the cases decided under the present Code in *Shyam Mandal v. Satinath Banerjee*(4), *Ram Kinhar v. Sthiti Ram*(5), no mention was made of the sub-rule (2), and in *Srinivasa Aiyangar v. Narayana Aiyangar*(6), although it was mentioned, there was no full discussion of its implications. On the other hand *Blanchenay v. Burt*(7), relied on by the respondent deals with English procedure in 1843 and is not of assistance. In *Mahomed Meera Rowther v. Kadir Meera Rowther*(8), the Court at least doubted whether omission of the notice would be more than an irregularity with reference to sub-rule (2).

(1) (1898) I.L.R., 20 Calo., 870.

(3) (1915) I.L.R., 42 Calo., 72 (P.C.).

(5) (1918) 27 O.L.J., 528.

(7) (1843) 4 Q.B., 707.

(2) (1921) 25 O.W.N., 972.

(4) (1917) I.L.R., 44 Calo., 954.

(6) (1917) 40 I.C., 670.

(8) (1914) M.W.N., 68.

Turning to principle, there is good reason for holding that no illegality is in question when once, even conditionally, the issue of notice is made by sub-rule (2) discretionary. Notice may under sub-rule (2) be omitted at the discretion of the Court. It may further be pointed out, with reference to the application of the sub-rule for failure to record reasons, that such application is consistent only with the directory character of the provision since it imposes a duty on the Court, which the party interested in its performance has no means of enforcing and as to the performance of which he has indeed no means at the time of satisfying himself. We have been referred to other cases in the Indian authorities in which the Court is required to record its reasons before using its powers. In *Gopal Singh v. Jhakri Rai*(1), its obligation to do so before admitting evidence on appeal and in *Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakkal*(2), a similar obligation before passing a preliminary order under section 145, Criminal Procedure Code, are considered. In both these cases it was held that the omission to record reasons did not deprive the Court of jurisdiction, the provision of law being merely directory. In *Kanchan Mandar v. Kamala Prosad*(3), the direction to record reasons before granting a review and in *Yacoob v. Adamson*(4), the duty of the Presidency Magistrate to give reasons before convicting are dealt with. In these two cases it was held that the omission invalidated the proceedings; but the language used indicates that, if the matter had been considered on its merits and if the superior Court had been able to satisfy itself of the propriety of the lower Court's action the conclusion would have been different. In these circumstances we hold that the provision in sub-

(1) (1886) I.L.R., 12 Calo., 87.

(3) (1915) 29 I.C., 734.

(2) (1918) I.L.R., 36 Mad., 275.

(4) (1886) I.L.R., 13 Calc., 273.

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rule (2) requiring the Court to record its reasons is only directory, and that failure to issue a notice in the present case was not necessarily fatal to the validity of the proceedings. It would of course ordinarily be open to the appellant to ask us to consider the Court's use of its discretion on its merits. But firstly there is, as already observed, the finding of the lower Court that no substantial loss resulted against which nothing has been said, and secondly it is not difficult with reference to the facts mentioned in paragraph 24 of the lower Court's judgment, to infer the reasons on which it acted.

The result is that the Appeal fails and is dismissed with costs.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1922,
March 23.

MUHAMMAD ALIAS BAVA (FIFTH DEFENDANT), APPELLANT
AND PETITIONER,

v.

MANAVIKRAMA AND THIRTEEN OTHERS (PLAINTIFFS AND
DEFENDANTS NOS. 1 TO 4 AND NOS. 6 TO 18), RESPONDENTS.*

*Civil Procedure Code (V of 1908), O. XLI, r. 17—Absence of
appellant at hearing—Pleader instructed only to ask for
adjournment—Withdrawal of pleader on refusal of adjourn-
ment—Court dismissing appeal on merits, legality of.*

Where the pleader of an appellant who was absent represented to the Court at the hearing of the Appeal that he had instructions only to apply for an adjournment and withdrew from the appeal when the adjournment was refused.

Held that the Court had thereafter no jurisdiction to dismiss the Appeal on the merits, but should have dismissed it for "default" both of the party and of his pleader within the meaning of Order 41, rule 17, Civil Procedure Code; *Satish*

* Second Appeal No. 1409 of 1920 and Civil Revision Petition No. 682 of 1920.

Chandra Mukerjee v. Ahara Prasad Mukerjee (1907) I.L.R., 34 Cal., 403 (F.B.), followed. *Patinhare Tarkatt Rama Mannadi v. Vellur Krishnan Menon* (1903) I.L.R., 26 Mad., 267, explained.

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SECOND Appeal against and Revision Petition praying the High Court to revise the decree of T. V. NARAYANA NAYAR, in Appeal Suit No. 72 of 1919, on the file of the Subordinate Judge's Court of South Malabar at Palghat, preferred against the decree of T. V. KRISHNAN NAYAR in Original Suit No. 354 of 1917, on the file of Additional District Munsif of Tirur.

The facts are given in the judgment of the High Court.

K. P. M. Menon for appellant.

D. A. Krishna Varaiar for O. Madhavan Nayar and
K. P. Ramakrishna Ayyar for respondents.

JUDGMENT.

AYLING, J.—Appellant (and petitioner before us) was the fifth defendant in Original Suit No. 354 of 1917 on the file of the Court of the Additional District Munsif of Tirur, which was decreed in favour of plaintiff. He preferred an appeal which was posted for disposal before the Subordinate Judge of Palghat on 10th February 1920. On that date, as appears from the record, appellant was not present but a vakil Mr. V. Sivarama Panikkar holding vakalat from him was present in Court and applied for an adjournment (M.P. No. 378 of 1920). This was refused. As far as I can gather, he seems to have then simply informed the Court that, as he had no instructions or papers, he could not argue the appeal and to have taken no further part in the proceedings. In these circumstances the Subordinate Judge instead of at once dismissing the appeal for default under Order XLI, rule 17, considered the evidence bearing on appellant's claim with reference to his appeal memo. (I use his own words) and dismissed the appeal with costs.

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Mr. K. P. M. Menon contends that it was not competent to the Court to inquire into the merits of the case in the absence of appellant and his pleader; but only to deal with it under Order XLI, rule 17, against an order under which he would have right of application for re-admission under rule 19.

I think in the circumstances set out above, we cannot distinguish the case from one in which the appellant was absent and entirely unrepresented. To all intents and purposes he was unrepresented, for it is clear that Mr. Sivarama Panikkar was only instructed to apply for an adjournment and was in no position to proceed to argue the merits of the appeal. As appears from the order on M.P. No. 378 of 1920, he had not studied the appeal and had been given no papers. The case is precisely similar to that in *Satish Chandra Mukerjee v. Ahara Prasad Mukerjee*(1) in which a Full Bench of the Calcutta High Court held that the party must be deemed to be unrepresented.

Our attention was drawn to a case of this Court *Patinhare Tarkatt Rama Mannadi v. Vellur Krishnan Menon*(2) in which in somewhat similar circumstances a Bench of this Court held that the Court was bound to write a judgment and apparently to dispose of the appeal on its merits. The effect of this case has been discussed at page 414 of the report of the Calcutta Case; and it has been treated as merely a pronouncement as to the correct course to be adopted where it is found as a fact that there was no default. The judgment starts off by saying that in that case there was no default, and lays stress on the fact that the vakil did not withdraw from the case. I think we are justified in declining to treat it as an authority on what constitutes default; and I observe

(1) (1907) I.L.R., 34 Cal., 403 at 414 (F.B.).
(2) (1908) I.L.R., 35 Mad., 207.

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that in a later case *Venkatarama Aiyar v. Nataraja Aiyar*(1), another Bench of this Court has held, without reference to it, that where the vakil was not instructed to argue the case but only to apply for an adjournment there was no appearance.

Proceeding then on the footing that appellant was unrepresented, was it competent to the Subordinate Judge to go into the merits of the case?

It seems to be clear law that under the Codes preceding the present Code an Appellate Court in such circumstances had no power to go into the merits:—Vide *Mohesh Chunder Bose v. Thakoor Dass Gossamee*(2) quoted with approval in *Satish Chandra Mukerjee v. Ahara Prasad Mukerjee*(3).

For respondent it is contended that the law is different under the present Code, because the wording of section 556 of the old Code “shall be dismissed” has been changed in Order XLI, rule 17, into “the Court may make an order that the appeal be dismissed.” The question is whether this change of language was intended to throw open the door to a course which the Courts had held under the preceding enactment to be undesirable apart from its legality—vide *Mohesh Chunder Bose v. Thakoor Dass Gossamee*(2).

It is quite possible to give effect to the change from “shall” to “may” without going to this length. Under the old Code, the Court apparently had no power to adjourn the appeal in order to give the absent appellant a further opportunity to put in an appearance. Under the present Code that course is certainly open to it; and I can see no reason why this latitude should not have been the object of the change.

(1) (1918) 24 M.L.J., 235.

(2) (1878) 20 W.R., 425.
(3) (1907) I.L.R., 34 Cal., 403 (F.B.).

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The objections to allowing an appeal to be rejected on its merits without hearing the appellant remain the same as when Sir RICHARD COUCH wrote his judgment in *Mohesh Chunder Bose v. Thakoor Dass Gossamee*(1), and it seems to me that to allow it might expose an appellant to a prejudice which could hardly have been contemplated. What remedy is open to an appellant who has been unavoidably prevented from appearing at the hearing, but whose appeal has been gone into and decided against him on its merits? If the Court's order is not to be treated as one under Order XLI, rule 17, rule 19 which provides for readmission can have no application. The only possible remedy for such an appellant that is suggested is an application for review. But it is by no means clear that such an application would lie in view of the provisions of Order XLVII, rule 1 : and in any case it could only be entertained by the same Judge as dismissed the appeal. Moreover, there would be no appeal against the rejection of the application for review, such as is provided for in the case of an application under Order XLI, rule 19.

There is very little authority on this point, probably because it is most unusual for an Appellate Court to go into the merits of an appeal liable to be dismissed for default. We have only been referred to two decisions, each by a single Judge of the Patna High Court, one on each side. These are *Mangar Singh v. Bharat Prasad*(2) and *Daulat Singh v. Sirinivas Prasad Singh*(3). Neither, if I may say so with respect, contains much discussion of the point.

For the reasons above indicated I think the Subordinate Judge had no power to go into the merits of the appeal as he has done in this case.

(1) (1878) 20 W.R., 425.

(2) (1919) 51 L.C., 46.

(3) (1920) 57 L.C., 76.

The last point for determination is what order we should pass in the matter. It has been suggested on the authority of the Calcutta Cases quoted above, that we must treat the order as one passed under Order XLI, rule 17, and refer the appellant-petitioner to his remedy under rule 19. It is by no means certain that after this lapse of time that remedy would be effective. The time for application under rule 19 (one month) has of course long expired and it is doubtful whether, if an application were filed now, either sections 5 or 14 of the Limitation Act would enable a Court to excuse the delay. We think we are not precluded from taking another course. The order of the Subordinate Judge is on the face of it an order dictated by a consideration of the merits of the case and as we hold, an illegal order. Such consideration of the merits would be irrelevant to an order under Order XLI, rule 17. We therefore set aside the order of the Subordinate Judge, dated 10th February 1920, as *ultra vires* and direct him to restore the appeal to file and dispose of it according to law. Costs in this Court will be costs in the cause.

ODGERS, J.—The question in this appeal is whether the Subordinate Judge was right in discussing the case on its merits and dismissing it thereon instead of merely passing an order of dismissal of the appeal for default under Order XLI, rule 17. This would entitle the unsuccessful appellant to apply for readmission of the appeal under rule 19 of the same Order. In this case the appeal was not argued as the appellant had given no instructions to his vakil though the appeal is said to have come on "in the presence of Mr. V. Sivarama Panikkar, vakil, for the appellant." The vakil was therefore certainly present and I must assume that he informed the Judge (as appears from the judgment)

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that he had no instructions and could not proceed further. In *Satish Chandra Mukerjee v. Ahara Prasad Mukerjee*(1) a Full Bench of the Calcutta High Court held that an application by a pleader who is instructed to apply for an adjournment which is refused is not an appearance within the meaning of the Civil Procedure Code and that a dismissal in such cases is for default. In *Venkatarama Aiyar v. Nataraja Aiyar*(2) it was held there was no appearance where the pleader only applied for an adjournment. In *Patinhare Tarkatt Rama Mannadi v. Vellur Krishnan Menon*(3) the pleader for appellants appeared and asked for an adjournment which was refused. He did not withdraw from the case. It was held by the High Court that the Judge was bound to write a judgment and could not dismiss the case for default. This appears to me to be an entirely different case and is not applicable to the facts of the case before us as the Court there held there had been an appearance. In *Mangar Singh v. Bharat Prasad*(4) a single Judge of the Patna High Court held that where a pleader intimates he has no instructions, the proper course is to dismiss for default. In *Daulat Singh v. Sirinivas Prasad Singh*(5) a single Judge of the same High Court held that when appellant fails to appear, the Court has power to decide on the merits. The earlier case is not referred to and in neither of these Patna cases are any convincing reasons for the decision given. With respect, I do not think they carry the matter further and I think it must be taken that an appellant represented by a pleader who says he has no instructions and cannot proceed has not appeared. Under section 556 of the Code of 1882 the

Court was bound to dismiss an appeal if the appellant did not attend; the word used in Order XLI, rule 17, is "may." Does this mean that the Court may decide the case on the merits? If it does, the decision if against the appellant is only open to review under Order XLVII, rule 1, and the only clause applicable would be "any other sufficient" reason. I think it very doubtful if the Court would apply this clause, in which case the appellant who (or whose pleader) might have some quite legitimate ground for failing to appear at the hearing of the appeal would be left without remedy, there being no appeal from a refusal to review. In my opinion it cannot be said that the word "may" was inserted in the present Code in order to bring about these serious consequences; but more likely in order that the Court might exercise its discretion whether or not to dismiss the appeal forthwith if the appellant or his pleader for one reason or other was not present when the appeal was called on, and therefore does not mean that the Court is entitled to decide the case on the merits under such circumstances. The point is apparently almost a novel one, and naturally so as it would only be rarely that a Judge under such circumstances would feel called upon to deal with the case on its merits which under the present circumstances the Subordinate Judge was not entitled to do. I therefore think that the judgment of the Subordinate Judge must be treated as one without jurisdiction.

I agree with the order proposed by my Lord.

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(1) (1907) I.L.R., 24 Cal., 403 (P.C.). (2) (1912) 24 M.L.J., 235.
(3) (1908) I.L.R., 26 Mad., 267. (4) (1919) 61 I.C., 46.
(5) (1920) 57 I.C., 75.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Waller Salis Schwabe, Kt., K.O., Chief Justice,
Mr. Justice Oldfield and Mr. Justice Coultas Trotter.*

1922,
March 13.

RAJARAJESWARA SETHUPATHI ALIAS MUTHURAMA-
LINGA SETHUPATHI AVARGAL, RAJA OF RAMNAD
THROUGH HIS AUTHORIZED AGENT RAO SAHIB
S. THIRUMALAI AYYANGAR, DEWAN OF RAMNAD
(DEFENDANT), APPELLANT,

MINOR VENKATARAMAIYER BY HIS NEXT FRIEND
SUNDARAMMAL AND OTHERS (PLAINTIFFS), RESPONDENTS.*

*Jurisdiction—Civil Courts—Suit to set aside sale—Sale held under
provisions of Madras Estates Land Act (I of 1908).*

Civil Courts have jurisdiction to try a suit by a ryot to set aside a sale of his holding which was held under the provisions of Chapter VI of the Madras Estates Land Act.

SECOND APPEAL against the decree of P. S. SITARAM AYYAR, Temporary Subordinate Judge of Ramnad at Madura, in Appeal Suit No. 17 of 1918, preferred against the decree of T. K. SUBBA AYYAR, District Munsif of Sattur, in Original Suit No. 334 of 1914.

The facts are set out in the Order of Reference. The Second Appeal came on for hearing before KUMARASWAMI SASTRI and DEVADOSS, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

This appeal arises out of a suit filed by the respondents to set aside a revenue sale at the instance of the appellant, the Zamindar, who claimed that arrears of rent were due by the respondents, his tenants, and brought the holding to sale under the provisions of Chapter VI of the Madras Estates Land Act. Various

contentions were raised; but for the purposes of this Second Appeal, it is only necessary to refer to the contentions raised by the tenants that no notice was served on them as required by section 112 of the Act and to that of the landlord that the Civil Court has no jurisdiction to entertain the suit.

As regards the first contention, it is admitted that there was no personal service of the notice required by section 112. The finding is that the respondents (tenants) were residing in Madura and that there was nothing to prevent service on them. Section 112 requires service to be effected by delivering a copy to the defaulter, or to his authorized agent, or to some adult male member of the family at his usual place of abode, and it is only if such service cannot be effected that substituted service either by affixture "on some conspicuous part of the last known residence, if he has any within 10 miles of the holding, or on some conspicuous part of the holding" is allowed.

It is a well established rule that, when the law requires service of notice or process, it should wherever possible be personal. There is nothing in the Estates Land Act which requires the tenants to reside in the village where their holding is; and it is difficult to construe the clause in section 112 enabling the landlord to affix the notice on some conspicuous part of the last known residence, if he has any within 10 miles of the holding, should he be unable to effect personal service, to mean that a tenant is bound to reside within 10 miles of his holding and that should he reside outside the ambit personal service is unnecessary.

When the Act wishes to relieve the landlord from the duty of serving a tenant who resides several miles away from his holding, it expressly provides for it. For example, section 78 of the Act which provides for notice of

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distrain states that notice is to be served on the tenant by delivering a copy to him or to some adult male member of his family at his usual place of abode, *provided that it is in the neighbourhood to which the distress refers*, or to his authorized agent, or when such service cannot be effected, by affixing a copy of the notice on some conspicuous part of the land to which it refers. Comparing section 78 with section 112, it is clear that where in the case of distrain and sale of moveables the law relieves the landlord of the necessity of personal service in cases of tenants who do not reside in the neighbourhood of the holding, it requires personal service wherever the tenant may reside in cases where the holding itself is to be sold for non-payment of arrears. This difference in the wording of sections 78 and 112 is all the more significant when it is remembered that the Madras High Court in construing section 39 of the Rent Recovery Act of 1865 held in *Oliver v. Anantharamayyan*(1), that the service of the notice required under section 39 of the Rent Recovery Act of 1865 by affixture on the land was sufficient where the tenant was residing in foreign territory, as they were of opinion that the words "the usual place of abode" seemed to denote that it was contemplated that the notice would ordinarily be served upon the tenant himself, or his relations or his authorized agents in the neighbourhood of the land in respect of which the patta was tendered; and it could not have been intended that the landlord would go personally, or send an agent to the foreign territory to tender the notice. The legislature in section 78, clause 2, provides that personal service is necessary only if the defaulter resides in the neighbourhood of the land to which the distress refers, and that if there is no such residence a copy of

the notice may be affixed on some conspicuous part of the land. In providing for the sales of tenure itself the legislature omitted the words in section 78 as to any residence in the neighbourhood. It is doubtful how far any presumed intention of the legislature or any hardship that may exist would be a valid reason for overriding the plain provisions of a section. But having regard to the difference in the wording of sections 78 and 112, we do not think we can in construing section 112 import any such consideration as weighed with the Judges who decided *Oliver v. Anantharamayyan*(1). It is not suggested in the present case that there would have been any difficulty in serving the tenants who were residing in Madura only a few miles from the holding, and there is no reason for not complying with the provisions of section 112 which direct that the Collector shall cause service to be effected by delivering a copy to the defaulter, or to his authorized agent, or to some adult male member of his family at his usual place of abode, and it makes the other mode of service valid only if such service cannot be effected. In *Kumud Nath Roy Chowdhury v. Jotindra Nath Chowdhury*(2), it was held that substituted service under Order V, rule 17, of Civil Procedure Code, can only be justified when it is shown that proper efforts were made to find the defendant, and serve him at his residence; and that though the defendant had an ancestral family house, affixture on the door of that house was not justified in law where the defendant was living and working in a different district for some years. We are of opinion that the service in this case does not comply with the provisions of section 112.

On the second question as to the jurisdiction of Civil Courts to entertain suits to set aside sales, the authorities

(1) (1895) I.L.R., 18 Mad., 30.

(2) (1911) I.L.R., 38 Cal., 394.

(1) (1895) I.L.R., 18 Mad., 30.

are conflicting. The right of suit is not denied. Section 189 of the Madras Estates Land Act enacts that "a Collector or other Revenue Officer specially authorized under the Act shall hear and determine as a Revenue Court all suits and applications of the nature specified in Parts A and B of the Schedule, and no Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which such suit or application might be brought or made." The present suit is one for a declaration that the Revenue sale held at the instance of the appellant and the purchase by him at such a sale of the holding of the respondents are fraudulent and invalid and not binding on the plaintiffs (respondents), for setting aside the auction sale, for a declaration that the respondents possessed occupancy right in the land and the appellant had no such right, and for an injunction restraining the appellant from ejecting the respondents from the land. So far as Parts A and B of the Schedule to the Act are concerned, the only clause relating to sales under section 112 is No. 12 of Part A which relates to suits to contest the right of sale of holdings, and it provides 30 days within which a suit could be filed from the date of service of notice on the defaulter requiring him to pay the amount due, or to file a suit contesting the right of sale. It is clear that this clause only refers to suits instituted before the sale is held contesting the right of the landlord to bring the property to sale. It cannot, on the plain meaning of the clause, refer to suits instituted after the sale, and the period of limitation and the time from which it begins to run could have no application to such suits. The Act is silent as to where the suit is to be filed when the sale has taken place and the plaintiff wants to set aside the sale. It is well settled that Civil Courts have jurisdiction in all cases where they would have had jurisdiction prior

to the Estates Land Act, except so far as that jurisdiction is expressly or by necessary implication taken away by the provisions of section 189. In *Chidambaram Pillai v. Muthammal*(1), it was held by AYLING, J., that a suit for a declaration that the sale of a holding under section 111 and the subsequent sections of the Madras Estates Land Act was void, was maintainable in a Civil Court. The learned Judge observed

"It seems clear that a suit of this nature is maintainable in a Civil Court, in the absence of any statutory bar—vide *Doraisami Pillai v. Muthusamy Mooppan*(2), and *Zamindar of Ettayapuram v. Sankarappa Reddiar*(3). Respondent relies on section 189 of the Estates Land Act. This makes it clear that a suit for damages sustained in consequence of the alleged illegality would lie in a Revenue and not in a Civil Court which is also specifically laid down in section 213 (3). But a suit for declaration like the present one is not one of those set forth in the Schedule to the Act. It may seem anomalous to give the jurisdiction to award damages for the illegality to the Revenue Court which ordered the sale, and the jurisdiction of setting it aside to the civil tribunal. But if the view taken by the lower Court is correct, then in spite of the mandatory directions of section 115, an order of a Collector for sale which was passed without jurisdiction must stand and cannot be questioned; for, admittedly, no suit to set aside the sale will lie in a Revenue Court."

In *Gouse Mohideen Sahib v. Muthialu Chettiar and another*(4), it was held by SADASIVA AYYAR and SPENCER, JJ., that section 189 of the Estates Land Act does not take away the right to bring a suit in the Civil Courts to set aside a sale on the ground of fraud. The learned Judges observe

"The argument of the appellant's (first defendant's) learned vakil that section 189 of the Estates Land Act takes away the right to bring a suit in the Civil Courts to set aside a sale on the ground of fraud cannot be accepted. It only takes away the

(1) (1915) I.L.R., 38 Mad., 1042.
(3) (1904) I.L.R., 27 Mad., 483 (F.B.).

(2) (1904) I.L.R., 27 Mad., 94.
(4) (1914) M.W.N., 55.

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right to apply to the Civil Courts under section 181 of the Estates Land Act to set aside the sale in accordance with the provisions of that section."

In *Jagannadha Charyulu v. Satyanarayana Varaprasada Rao*(1), it was held by SPENCER and KRISHNAN, JJ., following *Chidambaram Pillai v. Muthammal*(2) and *Gouse Mohideen Sahib v. Muthialu Chettiar*(3), that a suit by the purchaser of a holding at a sale held under the provisions of Chapter VI of the Madras Estates Land Act for a declaration that the order of the Deputy Collector setting aside the sale was *ultra vires* and void lay in a Civil Court and not in a Revenue Court. A contrary view was taken in *Ramnathan v. Ramaswami*(4), where it was held that section 189 and clause 12 of Part A of the Schedule to the Madras Estates Land Act precluded a Civil Court from taking cognizance of a suit by a ryot to recover possession of a holding sold under the Madras Estates Land Act for non-payment of rent, on the ground that the landholder had no right to sell the holding on the ground that clause 12 is not confined to a suit to question an intended sale of the holding. But that clause and section 189 preclude Civil Courts from taking cognizance of any dispute in respect of which a suit might be brought before a Collector, and that it was not likely that the legislature would allow the validity of a sale to be impeached after the sale while prohibiting a suit for a declaration that no valid sale could be effected. The learned Judges distinguish *Gouse Mohideen Sahib v. Muthialu Chettiar*(3), on the ground that the sale was sought to be set aside on the ground of fraud. With all respect, it seems to us that if there is a right to set aside a sale which has been effected by a Revenue Court on the ground that the conditions requisite to give the

(1) (1920) I.L.R., 48 Mad., 351.

(3) (1914) M.W.N., 55.

(2) (1915) I.L.R., 38 Mad., 1042.

(4) (1916) I.L.R., 39 Mad., 60.

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landlord a right to bring the property to sale have not been complied with, the question as to the forum has to be determined by the express words of section 189 and clause 12 of Part A to the Schedule, and that we are not at liberty to speculate as to what the intention of the legislature was. It is also difficult to see how the allegation of fraud will take away the jurisdiction of Revenue Courts, if the Estates Land Act conferred the jurisdiction to set aside sales on Revenue Courts. The decision in *Chidambaram Pillai v. Muthammal*(1) has not been referred to by the learned Judges. In *Irulappan Servai v. Veerappan*(2) there are observations of the Officiating Chief Justice and ODGERS, J., which support the view that section 189 of the Estates Land Act bars the jurisdiction of Civil Courts to entertain suits to declare that a Revenue sale is invalid.

Having regard to this conflict of authority and to the importance of the question we refer the following question for the decision of a Full Bench :

"Has a Civil Court jurisdiction to entertain a suit by a ryot to set aside a sale of his holding which was held under the provisions of Chapter VI of the Madras Estates Land Act ?"

O. V. Anantakrishna Ayyar and *S. Sundararaja Ayyangar* for the appellant.—When once there has been a sale of a holding under the Estates Land Act, fraud apart, there cannot be a suit in a Civil Court to set it aside. Under the Estates Land Act the landholder has three remedies to recover rent. (1) Bring a suit for arrears of rent. The Revenue Courts are substituted for the Civil Courts. (2) Distrain movables. Damages are allowed against the person responsible for any wrongful act. (3) Bring the holding to sale. This is a special

(1) (1915) I.L.R., 38 M.d., 1042.

(2) Second Appeal 1563 of 1920.

procedure allowed by the Act. The landholder is given a lien. The only relief is damages.

[C.J.—Do you go so far as to say that even if no rent was due or no notice was given the sale would give good title?

Yes. If the landholder wishes to sell he gives notice and the tenant gives notice that he will file a suit.]

[C.J.—But if there is no notice by the landholder?

Even then, the Court will have no jurisdiction to set aside the sale? The tenant has a claim for damages under section 213 of the Estates Land Act.]

[C.J.—What section takes such a case out of the jurisdiction of the Civil Courts? See section 213 (2).

Sub-section (3) to section 189 and clause 12 of Part A of the Schedule.]

K. Jaganatha Ayyar for respondents was not called upon.

The OPINION of the Court was delivered by

SCHWABE, C.J.—The question referred to the Full Bench is

“Has a Civil Court jurisdiction to entertain a suit by a ryot to set aside a sale of his holding which was held under the provisions of Chapter VI of the Madras Estates Land Act?”

It is found as a fact in this case for the purpose of the reference that no notice was given to the ryot by the landholder of his intention to sell. The sale was therefore illegal, and Civil Courts of this country have a right to set aside illegal sales, unless there is some statutory provision to prevent them from doing so. It is, therefore, necessary to look at the Madras Estates Land Act of 1908 to see if the Civil Courts are precluded from setting aside such a sale. Under section 213

“Any person deeming himself aggrieved by any proceedings taken under colour of this Act . . . shall be at liberty to seek redress by filing a suit for damages before the Collector” and then sub-section 2 says

“This section shall not be deemed to bar any right of action in a Civil Court in any case not taken out of its jurisdiction by this Act.”

In order to ascertain what cases are taken out of the jurisdiction of the Civil Courts by the Act, one has to look at section 189. Under section 189, suits and applications of the nature specified in Parts A and B of the Schedule can be brought before the Revenue Court, and are taken out of the jurisdiction of the Civil Courts expressly. Turning to the Schedule, the only article in the Schedule which it is suggested could apply is article 12, Part A, where among the suits triable by a Collector are included suits under section 112 of the Act to contest the right of sale of a holding, and then that article gives a limit of thirty days in which to commence that suit from the date of the service of the notice on the defaulter; and looking at section 112, the landholder who has to avail himself of the powers of sale has to give notice in writing to the defaulter, that notice having to be given in a particular way and to contain certain particulars, and has to inform the defaulter, if he does not pay the amount or file a suit within that time, the property will be sold. That is the suit and the only suit which is referred to in article 12, Part A of the Schedule, namely, a suit by the ryot within thirty days of the service on him of the notice to contest the right of sale. This suit is nothing of the kind. This is a suit by the ryot, who says that his property has been unlawfully sold and there is nothing in the Act or in the Schedules of the Act to take away the jurisdiction of the Civil Courts to try such suits.

That being so, the answer to the question referred to us must be in the affirmative.

M.H.H.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Oldfield and Mr. Justice Coutts Trotter.*

MALAYATH VEETIL RAMAN NAYAR AND OTHERS
(DEFENDANTS) APPELLANTS,

v.

KRISHNAN NAMBU DRIPAD (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), ss. 105 and 107, O. XLI, r. 23, and O. XLIII, r. 1 (u)—Preliminary point—Construction of grant—Evidence disallowed—Remand by lower appellate Court for taking evidence and disposal—Appeal against order of remand, whether competent.

A preliminary point under Order XLI, rule 23 of the Civil Procedure Code, is any point the decision of which avoids the necessity for the full hearing of the suit.

Such points comprise not only points like limitation, jurisdiction and res judicata, but also points such as, that evidence tendered was not admissible, or that there was no case for the defendant to answer, or that there was no proof of publication in a libel suit. In all these cases the points are preliminary to the final disposal of the suit.

Where, therefore, a District Munsif held that the true construction of a service grant was clear, and that evidence of the consideration for the grant and of whether services were in fact rendered or not, was irrelevant; but on appeal the lower Appellate Court held that such evidence was relevant, and remanded the case to the original Court for disposal according to law.

Held, that the lower Appellate Court was competent to pass the order of remand under section 107 and Order XLI, rule 23, Civil Procedure Code, and that there was a right of appeal against that order under Order XLIII, rule 1 (u) of the Code.

APPEAL against the order of M. NARASINGA RAO, Subordinate Judge at Palghat, in Appeal No. 99 of 1919, preferred

* Appeal against Order No. 351 of 1920.

against the judgment of K. R. KRISHNASWAMI AYYANGAR, District Munsif of Palghat, in Original Suit No. 199 of 1916.

The plaintiff instituted this suit to redeem a kanom alleged to have been executed by his predecessor in title in favour of the defendants' tarwad and to recover possession on payment of the kanom amount due to the defendants on a kanom deed and marupat dated 16th March 1890. The defendants pleaded that they had an Adimayavana Avakasam right on the said lands that such right was a perpetual and irredeemable one, and that the plaintiff was not entitled to recover possession on redemption. The plaintiff contended that the lands were in any event held on service tenure, that services were not rendered by the defendants, and that he was consequently entitled to resume the lands on account of forfeiture for non-performance by the defendants of the services. The District Munsif held that, on the true construction of the kanom deed and kychit and recitals therein, the defendants had an Adimayavana Avakasam right; and, as there was no allegation in the plaint as to forfeiture by defendants for non-performance of services, and as the document was clear and unambiguous, that the plaintiff was not entitled to let in evidence as to the consideration for the grant and forfeiture by non-performance of services. He accordingly decreed only payment by the defendants of a certain amount for arrears of rent due to the plaintiff, and dismissed the rest of the claim relating to recovery of possession of the lands on redemption. On appeal by the plaintiff, the Subordinate Judge held that the principal question was whether the Adimayavana grant should be held to be attached to the land itself, or to a portion of the profits of the land, whether it was granted for past or future services, or for both, or as a mark of favour, whether such services

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were ever performed and were discontinued by the defendants, and that evidence on these points was admissible to explain them as the documents were silent as to them. He accordingly reversed the decree of the District Munsif and remanded the suit for disposal in accordance with law in the light of the observations in his judgment. Against this order of remand, the defendants preferred a Civil Miscellaneous Appeal to the High Court under section 105 (2) and Order XLIII, rule I, clause (u) of the Civil Procedure Code. On this appeal coming on for hearing before OLDFIELD and VENKATASUBBA RAO, JJ., a preliminary objection was taken by the respondent, that no appeal lay under Order XLIII, rule 1 (u), as the appeal in the lower Appellate Court was not remanded by that Court on a preliminary point under Order XLI, rule 23, Civil Procedure Code and that it could not be appealed against under Order XLIII, Civil Procedure Code. The learned Judges referred the question to a Full Bench.

ORDER OF REFERENCE TO A FULL BENCH.

There is preliminary objection in this case to the hearing of the appeal that no appeal lies against the order before us. That order is one of remand. But it cannot be contended that it was passed in consequence of any error on the part of the trial Court on a preliminary point. It is accordingly urged by Mr. Anantakrishna Ayyar for the respondent that it must be taken to have been passed not under Order XLI, rule 23 of the Code of Civil Procedure, but in the exercise of the inherent power of the Court recognized in section 151, and that it therefore cannot be displaced in appeal or in proceedings in revision. We add that we have considered whether it would be our duty in any case to treat the appeal as a revision petition and use our revisional powers on the appellants' behalf.

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The first question that arises then is whether the lower Court's order setting aside the District Munsif's decree and remanding the case for re-trial in the light of its own observations is an exercise of any power recognized by section 151. Mr. Anantakrishna Ayyar, in support of his contention that it is so, has relied mainly on a series of decisions in this Court beginning with *Anthappa Chetty v. Ramanathan Chetty*(1). It is unnecessary for us to refer to later decisions in the same sense in detail, since they add nothing to the considerations then relied on and since in fact all the decisions of this Court are based ultimately on *Ghuznavi v. The Allahabad Bank, Limited*(2).

To deal with the arguments which have been placed before us on the provisions of the Code, we find a general provision relating to the Court's powers in appeal in section 107. Under that section, the Appellate Court shall have power to determine the case finally, to remand the case, to frame issues and refer them for trial and to take additional evidence. Those powers are stated to be exercised subject to such conditions and limitations as may be prescribed. That can only be taken as referring to the conditions and limitations, which were prescribed by rules under the Code or might be so prescribed in future. The only rule relating to remands is Order XLI, rule 23, restricting them to cases in which the suit has been disposed of upon a preliminary point. Those are the provisions of the Code and the rules dealing directly with orders of remand, and they do not, in our opinion, authorize the order of remand in such a case as the present, where no preliminary point arose. In *Ghuznavi v. The Allahabad Bank, Limited*(2), already referred to, the restriction in section 107 to conditions

(1) (1919) 87 M.L.J., 536.

(2) (1917) I.L.R., 44 Cal., 929 (F.B.).

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and limitations on the powers conferred does not appear to have attracted attention. There, however, as here, stress was laid on the fact that in the present Code there is nothing corresponding to section 564 of the Code of 1882 and section 352 of Act VIII of 1859, the inference suggested being that the present rule relating to remand was not intended to be exhaustive. With all respect we find some difficulty in following that argument. For we doubt whether the mere omission of a restrictive provision can enlarge the scope of any provision, which in itself is clearly worded. It may be added that the existence of an inherent power can usually be established most easily by reference to precedents for its recognition and to instances in which it has been exercised; but such instances must necessarily be inconclusive, if they have occurred in defiance of a distinct provision of law, unless indeed that cannot be attributed to mere mistake and their justification with reference to the alleged inherent power is explicitly stated. Such instances, if they are to be conclusive, must be looked for before the enactment of any such distinct provision; that is, before the Code of 1859. It is needless to say that no instance of the exercise of this alleged inherent power prior to that year has been adduced.

The course of authority in this Court has been that in *Seshan Pattar v. Seshan Pattar*(1), an order in many respects resembling that now before us was set aside as not justified by the Court's powers. In *Ramachandra Joshi v. Hazi Kassim*(2), however, a contrary opinion prevailed, as it has done recently in *Kuppalan v. Kunjivalli*(3). The objection to the last mentioned decision is that no reference was made in it to *Seshan Pattar v.*

(1) (1900) I.L.R., 28 Mad., 447. (2) (1898) I.L.R., 16 Mad., 207.
(3) (1911) 9 M.L.T., 373.

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Seshan Pattar(1), and to the former that the effect of section 564 at its date was not considered. *Jambulayya v. Rajamma*(2), is another decision relied on in *Anthappa Chetty v. Ramanathan Chetty*(3), as supporting the statement that rightly or wrongly the lower Courts have been instructed by this Court that they have an inherent power to remand, and it is no doubt justified by some expressions in it. These expressions, however, include no reference to *Seshan Pattar v. Seshan Pattar*(1), and the case was plainly one of error on a preliminary point of procedure, the learned Judges holding that the decision before them was based on no evidence and that there had been no regular hearing. In these circumstances it is not clear that there is any course of authority in this Presidency, which entails adherence to the principles laid down in *Anthappa Chetty v. Ramanathan Chetty*(3), or *Ghuznavi v. The Allahabad Bank, Limited*(4).

As regards general considerations, we are not satisfied with the general recognition of an inherent power such as is alleged.

On the second question raised by Mr. Ananthakrishna Ayyar, whether this Court can revise an exercise by a lower Court of its inherent powers, there is again some conflict of authority. In *Sheik Muhammad Maracayar v. Rangasawmi Naidu*(5), it was held that there is such power of revision. On the other hand the last sentence of the judgment in *Vijayaraghava Reddi v. Komarappa Reddi*(6), implies that there is one; and effect has been given to that view by the learned Judges in *Pakran v. Chathukutti Nayar*(7), *Ramasawmi Naidu v. Murugan Moopan*(8). The issue on this point is shortly,

(1) (1900) I.L.R., 28 Mad., 447. (2) (1913) I.L.R., 36 Mad., 492.
(3) (1919) 37 M.L.J., 586. (4) (1917) I.L.R., 44 Calc., 929 (F.B.).
(5) (1922) 18 L.W., 515. (6) (1912) 22 M.L.J., 409.
(7) C.R.P.N. 229 of 1921 (unreported).
(8) C.R.P.N. 492 of 1921 (unreported).

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as stated in *Sheik Muhammad Maracayar v. Rangasawmi Naidu* (1), whether an order of remand in such a case should be treated as improper, in the sense that the Appellate Court should in the exercise of its discretion have taken the course indicated in Order XLI, rule 27 or illegal in the sense that it had no jurisdiction to pass it; and the basis of the decisions on the one side appears to be that no order at all passed in the exercise of the inherent jurisdiction is liable to revision, on the other that such orders are liable to revision in cases, in which it cannot be shown that the ends of justice might not have been secured with equal ease by some other method of disposal authorized by the Code. It does not seem necessary for our present purpose to offer any discussion of the different considerations on either side.

On the questions thus raised there is a conflict of authority, and they also are in our opinion of general importance. We therefore refer them for the opinion of a Full Bench in the following terms:

(1) Is the order under appeal one which the lower Appellate Court was competent to pass in the exercise of its inherent powers under section 151, Civil Procedure Code, or otherwise?

(2) If the order was passed in the exercise of the lower Appellate Court's inherent powers, can this Court interfere with it in revision?

O. S. Swaminathan for appellant.

O. V. Anantakrishna Ayyar for respondent.

OPINION.

SCHWABE, C.J.—The District Munsif held in this suit that the true construction of a service grant was clear and that evidence of the consideration for that

grant and of whether services were in fact rendered or not was irrelevant. On appeal, the Subordinate Judge took a different view of the construction of the grant and held that such evidence was relevant. He accordingly remanded the case with that direction to be determined according to law. On appeal to the High Court from that order of remand a preliminary objection is taken that no appeal lies, and it was also contended that the Subordinate Judge had no power to remand the case. The High Court has referred those matters for determination to a Full Bench. The questions are of general interest as they raise points of procedure which have frequently arisen and have resulted in a conflict of judicial decision.

The right of appeal is by section 104 of the Civil Procedure Code, 1908, expressly limited to cases enunciated in that section or expressly provided for by the rules.

The rule giving a right of appeal is Order XLIII which includes as appealable an order under Order XII, rule 23, remanding a case.

The power to remand is given by section 107 which gives power to all Appellate Courts to remand a case subject to such conditions and limitations as may be prescribed. That no doubt means prescribed by rules. The only rule dealing with remand is Order XLI, rule 23, which is in the following terms:

“Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case.”

It has been held in several cases, and most recently by a majority of a Full Bench in *Calcutta Ghuznavi v. The Allahabad Bank, Limited*(1), that this rule is a limitation

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(1) (1932) 16 L.W., 515.

(1) (1917) I.L.R., 44 Cal., 929 (F.B.).

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on the exercise of the powers of remand under section 107; I venture to doubt if this is correct, but in the view I take of this case, it is not necessary for the decision, nor do I think it was necessary for the proper decision of any of those cases. Feeling, apparently, that in a case like the present which it was supposed was not covered by rule 23, that there ought to be a power to remand, the Full Bench in the Calcutta case referred to above, and Judges in various cases here and elsewhere have held that there is an inherent power in the Court under section 151 to remand, and in other cases it has been held that there is power under section 99. Further as no appeal is provided for from orders made under the inherent power of the Court, resort has been had to the powers of the High Court in revision.

In my view, section 99 has no application, and if I agreed that rule 23 limited the power to remand to cases within its terms, I should not readily accede to the proposition that where the Code expressly limits the power of a Court, there can co-exist an inherent power in that Court to disregard that limitation.

The remanding of cases or, as it is there called, the granting of a new trial, is of every day occurrence in England in any case where, by reason of the Appellate Court reversing the decision of the trial Court, there remain matters still to be decided in the suit, and it would be remarkable if the Code and rules here did not give similar powers, for the absence of such powers would involve the result that in such cases it would be necessary for the Appellate Court to retain the suit before it and remit issues to be determined by the trial Court and so take away from the trial Court its proper function of giving judgment in the first instance. Further if there was no appeal, the whole of the time and money spent on the proceedings on remission would be wasted, if it

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ultimately turned out that the trial Court had been right in the first instance. But in my judgment none of these results follow because on the true construction of rule 23 all Appellate Courts have power to remand in almost every case where such a power is required.

The question turns on the meaning of the words "preliminary point" in that rule. In my judgment the only meaning that can be properly given to these words in this context is any point the decision of which avoids the necessity for the full hearing of the suit. There are many instances of such points such as, that a suit is barred by limitation; that the Court has no jurisdiction, e.g., under the Estates Land Act; that evidence tendered was not admissible; that on the plaintiff's evidence there is no case for the defendant to answer; in a libel suit, that there is no proof of publication. In all these cases, if the decision is held to be wrong, the case remains to be decided on what is sometimes referred to as the merits of the case. The points are preliminary to the final disposal of the case. In my judgment the first two of the appeals reported in *Anthappa Chetty v. Ramanathan Chetty*(1) were wrongly decided, for the points were preliminary points. In one it was held that a settlement with an agent bound his principal, and so the rights as between the two principals, if this decision was wrong, were left undecided; in the other, evidence was improperly excluded, and so the case was disposed of without being fully heard.

In *Kuppelan v. Kunjuvalli*(2), an action on a will, it was held that the will was a forgery and therefore the questions in the case assuming the will to be genuine were not decided. In *Jambulayya v. Rajamma*(3) the trial Judge held a receipt was a settlement of a suit out

(1) (1919) 37 M.L.J., 530.

(2) (1911) 1 M.W.N., 199.

(3) (1913) I.L.R., 36 Mad., 492.

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of Court, and therefore did not hear the suit on its merits at all. These are all, in my judgment, instances of decisions on preliminary points and in none of those cases was it necessary to resort to the inherent powers of the Court.

The words "preliminary point" occur in section 562 of the Civil Procedure Code of 1882 which corresponded to the present Order 41, rule 23, and are interpreted in the same manner as I interpreted them above by MAHMOOD, J., in *Ram Narain v. Bhawanidin*(1), at page 32, where he lays down that the words are not confined to such legal points only as may be pleaded in bar of suit, but comprehend all such points as may have prevented the Court from disposing of the case on the merits, whether such points are pure questions of law or pure questions of fact; and he gives as an instance a mortgage suit in which it is held that the plaintiff is not a son and heir of the mortgagor and therefore the suit is dismissed without entering into the merits of the various pleas relating to the mortgage. The same view is expressed in *Muhammad Allahdad Khan v. Muhammad Ismail Khan*(2), at page 322 by EDGE, C.J., and on page 343 by MAHMOOD, J. The same view is expressed in different words in *Ramachandra Joishi v. Hazi Kassim*(3), by MUTTUSWAMI AYYAR and BEST, JJ., and also by SESHAGIRI AYYAR and ODGERS, JJ., in *Anthappa Chetty v. Ramanathan Chetty*(4), though, as I have stated in my view, they misunderstood or misapplied the principle enunciated.

It was in my judgment wrongly admitted before the referring Bench that the point was not a preliminary one. My answer to the first question is that the lower Appellate Court was competent to pass the order under

(1) (1887) I.L.R., 9 All., 29 (footnote). (2) (1888) I.L.R., 10 All., 289.
(3) (1898) I.L.R., 16 Mad., 207. (4) (1919) 37 M.L.J., 536.

section 107 and Order XLI, rule 23. There is a right of appeal from that order under Order XLIII and therefore the second question does not arise.

OLDFIELD, J.—The first of the questions referred was framed, as the order of reference shows, to obtain a decision as to the existence and extent of the alleged inherent power of the Appellate Courts to remand, and in particular as to the correctness of the unrestricted recognition of that power in *Ghuznavi v. The Allahabad Bank, Limited*(1), and *Anthappa Chetty v. Ramanathan Chetty*(2).

With all respect, I am not prepared to assume that Appellate Courts in India have inherently, or in virtue of section 107, Civil Procedure Code, any such general power to order a new trial as is conferred in Order XXXIX under the English Judicature Act. For, here, there is never any question of the parties' right to the finding of a jury on issues of fact, which can be obtained only in the Court of first instance; and there is reason, when the litigant has once reached the Appellate Court and the stage of a general consideration of the evidence, against authorizing that Court to abandon control over the case and leave it to take its chance of an early trial in competition with others of later institution. It is, however, unnecessary to pursue this assumption further, or to consider whether it is reconcilable with the provisions of section 107 and Order XLI under the Code, because I agree that rule 23 of that Order covers the case before us, if the word "preliminary" in it receives its proper interpretation.

It was alleged, and not disputed, before the referring Judges that the point, on which the case had been decided by the Court of first instance, was a preliminary one. But it was then, it is not disputed, supposed that a

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(1) (1917) I.L.R., 44 Cal., 929 (F.B.).

(2) (1919) 37 M.L.J., 536.

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preliminary point must be one independent of the merits. That supposition might have been consistent in some degree with the reference to remand in section 562 in the Code of 1882, as for the purpose of "investigating", and in the amended Code of 1888 as for the purpose of "determining" the suit on its merits; and there was also the omission from the section in the latter of the description contained in the former of the disposal on a preliminary point, as "excluding any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties." But, whatever the implication of this wording, there is nothing corresponding to it in the present Code or the order under it; and there is therefore no reason for treating only those points as "preliminary", which, like pleas of *res judicata* or jurisdiction, are strictly independent of the merits. The decisions in *Ram Narain v. Bhawanidin*(1), and *Muhammad Allahdad Khan v. Muhammad Ismail Khan*(2), were given on the Code of 1882 and before the omission above mentioned. But I respectfully follow my Lord in adopting at least the portion of them referred to by him, as a correct statement of the law as it now stands, and concur in the opinion he proposes.

COUTTS
TROTTER, J.

COUTTS TROTTER, J.—I agree with my Lord that this is a preliminary point, which I take to mean a point which, when decided in the way in which it is in fact decided, determines the result of the suit, and discharges the Court from the duty of trying all or some of the other issues in the case. If this conclusion be correct, it renders it unnecessary to go into the wider questions raised in the argument. I concur in the answers propounded.

K.R.

(1) (1887) I.L.R., 9 All., 29 (foot note). (2) (1888) I.L.R., 10 All., 289.

APPELLATE CRIMINAL—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Oldfield and Mr. Justice Coutts Trotter.*

A. T. SANKARALINGA MUDALIAR (PETITIONER)

v.

NARAYANA MUDALIAR AND THREE OTHERS (ACCUSED IN
S.C. No. 70 OF 1921 ON THE FILE OF THE SESSIONS COURT,
TINNEVELLY DISTRICT).*

1922,
April 25.

*Criminal Procedure Code (V of 1898), ss. 366, 367, 433, 537—
Judgment—Irregularity—Acquittal—Revision petition—Dis-
missal—Power of High Court to grant costs.*

The High Court will not ordinarily interfere in Revision at the instance of private parties with a judgment of acquittal except when it is urgently demanded in the interests of public justice.

Where in a sessions case, the Sessions Judge at the end of the trial wrote a document headed "Judgment" setting forth the findings of the assessors and adding his own finding agreeing with the assessors that the accused were not guilty and acquitted them and on a later date he wrote and prefixed to that document a fuller and detailed judgment, it was held that though such a course may be an error in procedure it is a mere irregularity cured by section 537 of the Code of Criminal Procedure. The High Court has no jurisdiction to grant costs in criminal cases except in those cases where the Code of Criminal Procedure makes express provision. The maxim, *expressio unius est exclusio alterius*, applied.

PETITION under sections 435 and 439 of the Criminal Procedure Code, 1898, to revise the judgment and order of J. K. LANCASHIRE, Acting Sessions Judge of Tinnevely Division, in S.C. No. 70 of 1921.

The accused were committed on a charge of murder. After a trial lasting for three weeks the Sessions Judge "left certain specific questions to the assessors. The assessors agreed that the accused were not guilty and

* Criminal Revision Case No. 26 of 1922.

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in answer to a specific question, they agreed that certain witnesses were not worthy of belief." He then "wrote a document headed 'Judgment' setting forth the findings of the assessors and adding his own finding agreeing with the assessors that the accused were not guilty and acquitted them. At a later date he wrote and prefixed to that judgment a full reasoned judgment dealing with the various points raised, the classes of witnesses and the reasons he had for disbelieving those witnesses." Against that acquittal a Revision Petition was filed and it was argued for the petitioner that there was no compliance with the provisions of sections 366 and 367 of the Code of Criminal Procedure and that a re-trial ought to be ordered. It was argued on the other side that the High Court would not ordinarily interfere with an acquittal on the petition of a private person, when the Crown had not chosen to appeal against it. It was also urged that the procedure followed by the Sessions Judge was a mere irregularity which was cured by section 537 of the Code of Criminal Procedure and that the order of acquittal ought not to be set aside on the ground of mere irregularity.

Another question that was raised was whether, in case a Criminal Revision is dismissed, the Court could grant costs to the respondents. Their Lordships delivered the following Order.

K. P. M. Menon for *T. Richmond* with *Ohidambaram* and *Marthandam* for petitioner.

Nugent Grant, *T. Ranga Achariyar*, *T. Sriranga Achariyar* with *S. Ramaswami* for accused.

The Public Prosecutor for the Crown.

SCHWABE,
C.J.

SCHWABE, C.J.—This is a criminal revision petition against the acquittal of the accused on a charge of murder, in a case tried by the Sessions Judge of Tinnevely. The ground and the only ground on which we

are asked to order a re-trial is that the learned Judge did not deliver in court his full reasons for acquitting the accused. At the end of a three weeks' trial he left certain specific questions to the assessors. The assessors agreed that the accused were not guilty and in answer to a specific question, they agreed that certain witnesses for the prosecution, who were the principal witnesses, were not worthy of belief. The Acting Sessions Judge then wrote a document headed "Judgment" setting forth the findings of the assessors and adding his own finding agreeing with the assessors that the accused were not guilty and they were acquitted. At a later date he wrote and prefixed to that judgment a full reasoned judgment dealing with the various points raised, the classes of witnesses and the reasons he had for believing or disbelieving those witnesses. It is argued that that is not complying with the terms of sections 366 and 367 of the Code of Criminal Procedure. Under section 367 a judgment is to be written by the Judge containing the point or points for determination, the decision thereon and the reasons for the decision, and the same section, sub-section (4) dealing with acquittals says,

"If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty."

Now, the judgment that was delivered in Court complied with section 367(4), because it stated, by a reference back to the question to the assessors, the offence and directed that the accused be set at liberty. Whether that is a sufficient compliance with section 366 or 367 is a difficult question. There is a dictum in *Queen-Empress v. Hargobind Singh*(1), that it is not. The correctness of that dictum has certainly been questioned in *Tilak Chandra Sarkar v. Baisagomoff*(2). I do not think it is

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(1) (1892) I.L.R., 14 All., 242.

(2) (1896) I.L.R., 23 Cal., 502.

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necessary in this case to express any view on that matter; because, under section 537 of the Code of Criminal Procedure, no finding of a Court is to be reversed on account of any error, omission or irregularity in various matters including a judgment. In my view, assuming that the method adopted by the learned Judge in this case is not a full compliance with sections 366 and 367, it is a mere irregularity and in my judgment, it is not open to us to set aside the acquittal on that ground alone. But this case gives rise to another interesting question, namely, the powers in revision of this Court of setting aside this acquittal. Where there is an appeal by the Public Prosecutor or the Crown from an acquittal, the Court sets its face against revision; but where a Private Prosecutor, having no power to appeal, comes to the Court in revision it is certainly open to the Court to hear him. But it has now been laid down in a long series of cases what, on that sort of application, should be the guiding principle to be acted upon by the Court and I think it is very clearly stated in *Fanjdar Thakur v. Kashi Chowdhury*(1), by JENKINS, C.J. There he reviewed the practice of all the High Courts in India on this point and summarized his conclusions in these words:

"I am not prepared to say the Court has no jurisdiction to interfere on revision with an acquittal, but I hold it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice. This view does not leave an aggrieved complainant without remedy; it would always be open to him to move the Government to appeal under section 417, and this appears to me the course that should be followed"

that is to say that the private prosecutor can, if he likes, move the Government to appeal. In this case the

(1) (1915) I.L.R., 42 Calo., 612.

representative of the Government has told us that having considered the matter the Government would not appeal. But if he cannot get redress that way, he can come before this Court on revision; but then the principle is that it is only to be granted "where it is urgently demanded in the interests of public justice." Applying that to this case, how can it be said that it is urgently necessary in the interests of public justice that this acquittal should be set aside? The case lasted three weeks; it was tried out fully; the assessors were unanimous; the Judge was satisfied with their finding and acquitted the accused with, no doubt, a desire to prevent either this charge being kept longer over the heads of persons who were in his view not guilty and whom he was going to acquit, or perhaps in order to avoid the necessity of letting them out on bail to come back again thereafter to hear their fate. He took the course, which on the face of it seems an eminently reasonable one, of telling the men that they were acquitted, in fact he gave his full reasons for the acquittal at another time and it ended there. Now how it can be suggested that his having done that can amount to an urgent demand in the interests of public justice that the acquittal should be set aside, I cannot see. On these grounds, I think this petition should be dismissed. As regards the question of costs the case will be adjourned to to-morrow.

OLDFIELD, J.—I agree and have nothing to add.

OLDFIELD, J.

COUTTS TROTTER, J.—I agree and only wish to add this, that I am satisfied that this is a case in which we have a discretion and we need not interfere unless we choose, and speaking for myself, I cannot agree to the course suggested, namely, that people who have been tried for their lives for a month and acquitted should be

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made to undergo a re-trial at the instance of a private prosecutor when the Government would not come forward and urge such a case in the Court of Appeal.

ORDER.

SCHWABE,
C.J.

SCHWABE, C.J.—We reserved this case for further consideration on the question whether there is power in this Court to grant costs on a revision petition brought not by the Crown but by a private prosecutor against an acquittal, which petition has failed. If there were power, it is a case in which I speaking for myself, would gladly grant costs, because as I have expressed in my judgment on the main point in this case, I think this is a petition which ought never to have been brought, and it is undoubtedly hard that persons, who have been tried for their lives and acquitted, should be put to much further expense on frivolous grounds. However, we have to consider whether this Court has power or not and we have listened to very interesting arguments on both sides on the question. A Court may have inherent power to grant costs. That is clear from a judgment in the House of Lords in *Guardians of West Ham Union v. Churchwardens, etc., of St. Matthew Bethnal Green*(1), where the House of Lords held that they had inherent power to grant costs, and in *In re Bombay Civil Fund Act, 1882; Pringle v. Secretary of State for India*(2), where COTTON and BOWER, L.JJ., state clearly their view that they had an inherent power to grant costs in that matter which came before them, although there was no statutory provision enabling them to grant the costs. But in my view, the exercise of that inherent power must be always restricted and limited to this that if the power of granting costs by the Court in that kind of proceeding is provided for in some way by statute, the

(1) [1896] A.C., 477.

(2) (1889) 40 Ch. D., 238.

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Court cannot, by invoking its inherent powers, extend the powers which have been granted to it by the statute. Now in this matter we sit in revision in criminal cases first under the Letters Patent and being constituted under the Letters Patent have powers given to us as a Court to hear criminal appeals and revision petitions by the Criminal Procedure Code of 1898. That Code does provide in several instances for the payment of costs. Unlike the Code of Civil Procedure, it has no general clause providing for costs in every case. The section providing for costs are, among others, 148, 433, 488, 526 and 545. The one, and I think the only one, that it is necessary to look into carefully is section 433, because there in a particular form of proceeding before the High Court in criminal cases there is an express provision that the High Court may direct by whom the costs of a reference shall be paid. The other sections are specific instances where power to grant costs is given, such as in maintenance proceedings by a wife and in proceedings to recover stolen property. Having got those instances in which specific power is given to grant costs, in my judgment, the maxim *expressio unius est exclusio alterius* applies; where in specific instances a statute gives a Court power to grant costs and the same statute gives the Court whole criminal jurisdiction, I think the proper rule of interpretation is that expressed in the maxim I have just quoted, with the result that as the Code gives a specific right of granting costs, it excludes any other right of granting costs. There is some authority to the same effect in the three cases which have been quoted to us, *Nallapparaju Venkataramaraju v. Medisetti Achayya*(1), *Mahomed Dustagir Sahib v. Mahomed Karimudeen*(2), and *Queen-Empress v. Yamana Rao*(3), all of them cases in

(1) (1910) 33 I.C., 824.

(2) (1889) 2 Weir, 196.

(3) (1901) 1 I.L.R., 24 Mad., 305.

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which this Court has refused to grant costs on the ground that it had no power to do so in criminal cases, and with those judgments I agree. It is true that the Privy Council has frequently exercised the power of granting costs in criminal cases but the Privy Council was given that power by a statute and so the fact that the Privy Council exercised that power under the statute does not in any way help in the solution of the question whether this Court has inherent power or not. On those grounds, I think this petition must be dismissed, but there will be no order as to costs.

OLDFIELD, J. — I agree.

COUTTS
TROTTER, J.

COUTTS TROTTER, J.—I am of the same opinion. It seems to me perfectly clear that we have no express statutory authority to grant costs generally in criminal matters and moreover, as my Lord has pointed out, where the Code intends to confer the power of granting costs, it does so in terms. But then it is said that apart from any question of the Code, the Court has an inherent jurisdiction to put matters right as between those who seek its aid by the granting of costs. The Courts of Equity in England always asserted their possession of such jurisdiction and constantly used it as is pointed out in the judgment of Lord Chancellor Hardwicke in *Corporation of Burford v. Lenthall*(1). The Common Law Courts did not attempt to assert their possession of such an inherent jurisdiction and it was often emphatically denied at any rate by equity lawyers, but the House of Lords in *Guardians of West Ham Union v. Churchwardens, etc., of St. Matthew Bethnal Green*(2), undoubtedly laid down that as and by virtue of its position as the highest Court in the land and not by any devolution

(1) (1743) 2 Atk., 550.

(2) [1893] A.C., 477.

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of powers from Courts of equity they had jurisdiction to deal with costs in cases whether arising on the equity or the common law side of the Court. But I think that the main reason why it is not possible for this Court to adopt that line of reasoning and take upon itself the awarding of costs in criminal cases is this—revision is not an inherent power of this or any other Courts; the whole machinery of revision is a creature of statute and has to be found within the four walls of the Code of Criminal Procedure and so far as criminal cases are concerned I do not see how we can possess an inherent power in ourselves to supplement that purely statutory machinery by assuming to ourselves the power of supplementing it by the awarding of costs. I, therefore, am of the opinion that we have no power to do what is asked. It is for the legislature to consider whether the power of revision in cases of the kind that we have seen in these proceedings has not outlived its usefulness, or at any rate, whether it should not be safeguarded by the arming of Courts with the power, at least in cases where revisional proceedings are taken by private prosecutors and not by the Crown, of mulcting them in proper cases by the award of costs.

M.H.H.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

1922,
May 4

ERADA PADINHAREDIL GOVINDAN NAIR
AND ANOTHER (ACCUSED), PETITIONERS.*

Government of India Act (5 and 6 Geo. 5, ch. 61), sec. 72—Ordinance II of 1921, ss. 7, 16—Martial Law in "Administrative Areas"—Summary Court—Court held outside "Administrative Area"—Offence within such area—Whether Court properly constituted—Powers of interference by High Court—Power of High Court to issue writ of Habeas Corpus to mufassal.

A "Summary Court" constituted under section 6 of Ordinance II of 1921 promulgated by the Governor-General under section 72 of the Government of India Act is not a properly constituted Court if it sits outside the "Administrative Area" within which Martial Law has been proclaimed to try offences committed within such area.

In such cases the High Court has power to interfere although by section 16 of the Ordinance all powers of interference with the decisions of "Summary Courts" appointed under the Ordinance has been prohibited.

Judgment of KUMARASWAMI SASTRI, J., *In re Kochunni Elaya Nayar*, (1922) I.L.R., 45 Mad., 14, approved.

The High Court having succeeded to the powers of the Supreme Court has the power to issue writs of *Habeas Corpus* outside the Presidency Towns.

Ameer Khan, *In the matter of*, (1870) 6 B.L.R., 392, and *In re Nataraja Iyer*, (1918) I.L.R., 86 Mad., 72, approved.

PETITION under section 107, Government of India Act, praying the High Court to issue a writ of *Habeas Corpus* to the Jailor, Camp Jail, Bellary, to bring the bodies of the accused to the High Court to ascertain the legality or otherwise of their detention.

The facts are set out in the Order.

K. P. M. Menon and P. Govinda Menon for petitioners.
The Public Prosecutor for the Crown.

* Criminal Miscellaneous Petition No. 81 of 1922.

The Court issued the following Writ :—

SCHWABE, C.J.—In this case we are of opinion that the writ of *Habeas Corpus* must go. The matter is urgent, and therefore we propose to direct the writ to go. The matter is also an important one, and it is desirable that our reasons should be put in writing and delivered in the form of a formal judgment hereafter. But, meanwhile the order of the Court will be that a writ do issue addressed to the Jailor, Bellary Camp Jail, to this effect :—

We command you that you have in the High Court of Judicature at Madras, immediately after the receipt of this our writ, the bodies of Erada Padinharedil Govindan Nair and Erada Padinharedil Raman Nair being taken and detained under your custody, as is said, together with the day and cause of their being taken detained by whatsoever names they may be called therein, to undergo and receive all and singular such matters and things as our said Court shall then and there consider of concerning them in this behalf, and have you there then this our writ.

Later the ORDER of their Lordships was delivered by SCHWABE, C.J.—This is a petition for a writ of *Habeas Corpus* by two persons undergoing a sentence of 18 months for alleged participation in the Moplah rebellion. They were charged with rioting under section 147, Indian Penal Code, an offence cognizable by the ordinary Courts. It was alleged that they had assisted the rebels in destroying a bridge. This they admitted, but stated that they were compelled to do so under threat of death. They alleged, owing to the trial being summary and taking place away from the scene of action and far from their homes they were not in a position to substantiate this defence by evidence which they could have called

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if the trial had taken place under the ordinary law and in its proper place.

It is admitted that they were tried by a summary Magistrate appointed under Ordinance II of 1921 who held his Court at a place outside the area in which Martial Law was proclaimed, the alleged offence having been committed inside such area. Acting under the powers conferred by section 72 of the Government of India Act this Ordinance was made and promulgated by the Governor-General. By it Martial Law was put in force in certain areas called "Administration Areas," and by section 6 Summary Courts of criminal jurisdiction might be constituted in any administration area with summary powers of trial of certain minor offences connected with the rebellion. The Military Commander had power to direct cases to be tried by Summary Courts and to distribute the work among such Courts. By section 7 no Summary Court can try any offence unless committed in the administration area in which such Court is established. Except as so provided, the ordinary Criminal Courts continued their functions.

From the decision of such Summary Courts there is no appeal, and further by section 16 of the Ordinance all powers of interference with such decision by writ of *Habeas Corpus* or otherwise is prohibited. It follows that if the Court that tried the petitioners was a properly constituted Court under the Ordinance we have no power to interfere. But in our judgment this was not a Court properly constituted under the Ordinance, for we can find no right at all to hold a Summary Court except in the Martial Law area, and by the words of the Ordinance, the jurisdiction of these Courts is local. Outside the area the ordinary rules of law prevail, and there is nothing in the Ordinance to prevent this Court interfering with the decision of any Court outside the area

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purporting to exercise a criminal jurisdiction which it does not possess. That this is the proper construction of the Ordinance seems to have been recognized by the Government of India after these convictions by section 10 of the Ordinance No. V of 1921 promulgated on November 11, 1921. By that section it was enacted

"Notwithstanding anything contained in any law for the time being in force, the local Government may, by general or special order, appoint places outside the area in which Martial Law is in force at which any Summary Court, constituted under the Martial Law Ordinance, 1921, or special Magistrate may sit for the trial of offences."

It follows that the conviction of the petitioners was illegal and that there is no jurisdiction for their detention in prison. This view was also expressed by KUMARASWAMI SASTRI, J., *In re Kochunni Elaya Nair*(1), a case in which it was not necessary for the decision, but we think the law was correctly laid down by that learned Judge.

The question remains, and has been fully argued before us, whether this Court has any power to interfere by the issue of a writ of *Habeas Corpus* to the Jailor of the jail in this Presidency in which the petitioners are confined.

The law can be stated to be that in every part of the British Empire every person has a right to be protected from illegal imprisonment by the issue of the prerogative writ of *Habeas Corpus*. The King's Bench in England exercised the power of issuing such writs throughout the British Empire until the statute known as the Habeas Corpus Act, 25 and 26 Vic., C. 20, was passed. By that act the powers of the King's Bench are limited to England and such places outside England which have no local Court competent to exercise the

(1) (1922) 1 L.R., 45 Mad, 14.

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power. It follows that these petitioners must have a right to such a writ, and it is a matter of absolute right, either from a Court in this country, if there be one competent to grant it, or from the Court of King's Bench sitting in London. In our judgment it is fully established that this Court has all necessary powers and is competent to grant the writ. That it has such or other similar powers in the Presidency Town of Madras is clear from section 491, Criminal Procedure Code. But that Code makes no provision for the exercise of that power in the mufassal. This Court has, however, succeeded under the High Courts of Judicature in India Act, 24 and 25 Vic., C. 104, and the Letters Patent issued thereunder to all the powers of the Supreme Court of Madras; and that Supreme Court had by its Charter of 1800, article 8, given to it the powers over

"all the Territories which now are, or hereafter may be, subject to or dependent upon, the Government of Madras aforesaid; and to have such jurisdiction and authority as our justices of our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain called England as far as circumstances will admit."

These words give to the Supreme Court the right usually exercised by the King's Bench in England of issuing the writ of *Habeas Corpus*.

This was definitely decided in the analogous Calcutta case of *Ameer Khan, In the matter of*(1), in the able and illuminating judgment of NORMAN, J., approved and followed in this Court in *In re Nataraja Ayer*(2).

It has been contended on behalf of the Crown by Mr. Adam in his very able argument that, as the Criminal Procedure Code in sections 491 and 456 makes provision for the exercise of similar powers in Madras and for the granting of such writs in the case of British subjects in

(1) (1870) 6 B.L.R., 392.

(2) (1918) I.L.R., 86 Mad., 72

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all parts of India, it must be taken to have been the intention of the legislature to confine the powers of this Court to such cases and that the power to issue the writ in the mufassal which had been established in *Ameer Khan, In the matter of*(1), must be taken to have been impliedly taken away. In our judgment this is not sound for three reasons. In the first place, section 491 merely substitutes or adds for the Presidency Towns a different form of procedure less cumbersome than the granting of the writ of *Habeas Corpus*; while section 456 was necessary because in certain parts of India there was no High Court established by Charter, and as there was no Court in this country which could grant a writ of *Habeas Corpus* even to a European British subject in these parts it was thought necessary to give that power, and such power was given by that section. Secondly, the right which had been established was a substantive right and it could hardly have been the intention of the legislature to take that right away by making rules of procedure or giving adjective rights for the exercise of similar powers. It is the sort of case where it can be fairly argued that if the legislature intended to take away such an important right from the subject it must use plain and unambiguous language. Thirdly, to adopt such a construction of the Criminal Procedure Code would lead to this absurdity, namely that a European unlawfully imprisoned would have the right to obtain the writ in this Court while an Indian subject would have to go to the King's Bench in London for his remedy; and there is a sound rule that where one possible construction leads to an absurdity and another does not, the latter is to be preferred.

In our judgment, this Court has the power to issue this writ and in this case it is its duty to do so.

(1) (1870) 6 B.L.R., 392.

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In obedience to the writ issued by this Court the prisoners having been brought before this Court, they are discharged.

M.H.H.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

1922,
May 5.

K. V. MUNISAMY MUDALIAR (RESPONDENT), APPELLANT,

v.

RAJARATNAM PILLAI AND OTHERS (PETITIONERS),
RESPONDENTS.*

Criminal Procedure Code (Act V of 1908), sec. 195 (b) and (c), sub-sections (6) and (7)—Sanction to prosecute for offences under ss. 193, 465, 467, 474 and 109, Indian Penal Code—Suit withdrawn on the original side, High Court—Document, not produced in suit—Produced under order of Court in sanction proceedings—Disclosure in affidavit, filing in Translator's office and allowing inspection, effect of—Actual production in suit, necessary—Prima facie case, not enough—Public interest—Prosecution, necessity for—Judicial discretion—Appeal—Criminal trial—Judgment—Letters Patent, clause (15), sub-sections (6) and (7) of sec. 195—Appeals ordinarily from original side to Division Bench, Appellate Side, High Court.

After the withdrawal of a suit on the original side of a High Court before trial, the learned Judge granted sanction for the prosecution of the plaintiff for offences under sections 193, 465, 467, 474 and 109 of the Indian Penal Code. It appeared that the document, in respect of which the offences were alleged to have been committed, was not produced in Court in the suit but was disclosed in an affidavit filed therein and inspection thereof allowed to the other side, that it was filed in the office of the Translator of the High Court

for translation, and that it was produced in Court in the sanction proceedings under an order of the Judge. On an appeal being preferred by the plaintiff against the order granting sanction, a preliminary objection was taken to the maintainability of the appeal.

Held, that an appeal lay under section 195, sub-sections (6) and (7) of the Criminal Procedure Code to the Division Bench of the Appellate Side of the High Court hearing appeals from a single Judge on the Original Side of the High Court, as appeals ordinarily lie from a single Judge on the Original Side to the Division Bench on the Appellate Side, of the High Court;

That, under section 195 (c), Criminal Procedure Code, sanction for prosecution for offences under sections 465, 467 and 474, Indian Penal Code, cannot be granted by a Court unless the document in connexion with which the offences are alleged to have been committed *had been actually produced in Court* in the suit in which the offences were said to have been committed, if indeed sanction was necessary in respect of an offence under section 474, Indian Penal Code;

That neither the disclosure of the document in the affidavit, permitting its inspection, filing it in the Translator's office, nor its production under order of Court in the sanction proceedings, amounted to producing or giving in evidence in the suit, and that the granting of sanction under section 195 (c), Criminal Procedure Code, was illegal and the sanction should be revoked;

That the granting of sanction in respect of an offence under section 193, Indian Penal Code, falls under section 195 (b), Criminal Procedure Code, and a Court granting sanction thereunder should exercise a judicial discretion, and the exercise of the Court's discretion will be judicial, only if it considered whether, with reference to the evidence available and the other circumstances, a prosecution was desirable in the public interest, and not if it merely satisfied itself that a *prima facie* case had been made out; and as the learned Judge had not exercised his discretion as required by law, the appellate Court was competent to consider all the facts and to revoke the sanction, as the prosecution was vindictive and coercive and not in the public interest.

APPEAL from the judgment and order of PHILLIPS, J., granting sanction to prosecute the appellant (plaintiff) in the exercise of the Ordinary Original Civil jurisdiction in Civil Suit No. 522 of 1920.

The appellant occupied shops as respondents' tenant.

* Original Side Appeal No. 25 of 1922.

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The latter gave him notice to quit and moved for his ejectment in the Presidency Small Cause Court under section 41 of the Presidency Small Cause Courts Act. The appellant thereupon sued for damages for trespass under section 47 of the Act in the Original Side of the High Court and set up in the plaint that he was in possession under an agreement entered into by the respondents to lease the premises to him for five years for a consideration of Rs. 1,000, part of which he alleged was actually advanced by him to them. He filed an affidavit of documents in the course of the suit in which he disclosed that he was in possession of an account book in proof of his payment. It also appeared that the plaintiff allowed inspection of the document to the respondents in his vakil's chambers. Further the plaintiff filed the document in the office of the Translator of the High Court, Original Side, for translation of the same under rule 93 of the High Court, Original Side rules. The plaintiff subsequently withdrew the suit before the trial began. Thereupon the respondents applied to the learned trial Judge for sanction to prosecute the appellant for offences under sections 193, 465, 467, 474 and 109, of the Indian Penal Code. The learned Judge in the course of the sanction proceedings ordered the appellant to produce the account book, which the appellant did. The appellant contended that there was no production of the document in the suit and that no sanction could be granted for offences under sections 465, 467 and 474, as there was no production of document as required by section 195 (c), Criminal Procedure Code. As regards sanction for offence under section 193, Indian Penal Code, he contended that there was no prima facie case made out and prosecution was due to vindictive motives. The learned Judge overruled his contentions and granted the sanction applied for.

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The counter-petitioner (plaintiff) preferred this appeal against the order of PHILLIPS, J.

The respondents raised a preliminary objection that no appeal lay against the order of a learned Judge of the High Court on its Original Side, granting sanction under section 195, Criminal Procedure Code. The learned Advocate-General for the respondent argued the preliminary objection as follows :—

The Advocate-General (with him *N. Swaminatha Ayyar*) for respondents.—There are three points to be considered in connexion with the right of appeal. There is no appeal because (1) it is an order in the exercise of a criminal jurisdiction, (2) it is not a judgment under the Letters Patent clause, (3) it is not from one Court subordinate to another Court under section 195, sub-sections (6) and (7). Firstly, as to criminal jurisdiction, the preliminary objection arises out of the amendment of the Letters Patent, made on 11th March 1919. The revised Letters Patent mentions “orders made in the exercise of criminal jurisdiction” and not “order or sentence passed or made in a criminal trial,” as under the previous Letters Patent. The sanction was granted in the exercise of criminal jurisdiction. See *Provincial Cinematograph Theatres, Ltd. v. Newcastle-upon-Tyne Profiteering Committee*(1), *Clifford and O’Sullivan*(2); what is criminal matter, see *Ex-parte Alice Woodhall*(3), *Ex-parte Schofield*(4), *Seaman v. Burley*(5), *Attorney-General v. Bradlaugh*(6), *Bholanath Khenra v. Purna Chandra Banerjee*(7), *Hussaina Beari v. King-Emperor*(8), and *Ramjas v. Mahadeo Prasad*(9).

(1) (1921) 37 T.L.R., 799.

(2) [1921] 2 A.C., 570 (580)

(3) (1888) 20 Q.B.D., 833.

(4) [1891] 2 Q.B.D., 428.

(5) [1896] 2 Q.B., 344.

(6) (1885) 14 Q.B.D., 667.

(7) (1920) 25 C.W.N., 661.

(8) (1920) I.L.R., 43 Mad., 443.

(9) (1917) I.L.R., 39 All., 147.

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Secondly the order is not a judgment within the Letters Patent.

Thirdly if appeal is to be under section 195, sub-sections (6) and (7), then the sub-sections (6) and (7) will not apply to this case, as the Appellate Side is not a different Court from the Original Side. See *Jamna Das v. Sabapathy Chetty*(1). In section 195, sub-section (7), "That is to say" should not be construed as "for example" but as exhausting the class of cases comprised under sub-section (6).

Nugent Grant for appellant, was not called upon to reply. Their Lordships delivered the following

JUDGMENT on the preliminary point:

SCHWABE, C.J.

SCHWABE, C.J.—The question raised by the preliminary point taken in this Appeal is whether an appeal lies to the Division Bench of the Appellate Side hearing appeals from the Original Side of the High Court of Madras from an Order of a single Judge sitting on the Original Side giving, under section 195, Criminal Procedure Code, sanction for prosecution in respect of an alleged offence committed in relation to proceedings before him. It has been fully argued before us by the learned Advocate-General that no such appeal lies on three grounds, first, that under the Letters Patent, clause (15), no appeal lies to the High Court from the decision of a Judge of that Court in the exercise of criminal jurisdiction and that this is a matter in the exercise of criminal jurisdiction; secondly, that under the same clause no appeal lies from anything at all except judgments and that the order sanctioning this prosecution is not a judgment. On both these points there would be some conflict of authorities, but not having heard the other side on this point, we cannot give any

(1) (1911) 10 M.L.T., 278.

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decision upon that. But, I think it right to say that my present view is that the Advocate-General is right on both points, that this is a matter in the exercise of criminal jurisdiction and that the order is not a judgment. The third point is that under section 195, Criminal Procedure Code, apart altogether from the Letters Patent, there is no right of appeal, the right of appeal being confined to what is given by that section. Under section 195 (1) (b) no prosecution can take place under certain sections of the Indian Penal Code, including the sections in question in this case without the previous sanction or on the complaint of the Court in which the proceedings took place or of some other Court to which such Court is subordinate. For the purposes of that sub-section it is not necessary to consider whether the Court which gives the sanction is subordinate to this Bench or not because sanction can be given by such Court itself. Such Court having given the sanction it is immaterial whether this Bench could or could not give similar sanction.

• When it comes to the question of appeal, the matter is dealt with by sub-sections (6) and (7). Sub-section (6) says :

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

The power to give sanction under the various clauses of this section and sub-section is given to various persons as well as to Courts, and sub-section (6), when it deals with the authority to which the authority giving or refusing the sanction is subordinate, is dealing with persons other than Courts who have the power under the section to give sanction as well as with Courts. The position of Courts giving sanction is dealt with also in sub-section (7) and that is in these words :

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

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Pausing there, I read that to mean that for the purpose of saying whether a Court can revoke an order made, we have to see whether that Court is the Court to which appeals ordinarily lie from the Court which made the order. Now, appeals ordinarily lie to a Division Bench of the Appellate Side of this Court from a Judge sitting alone on the Original Side, and therefore the power of this Court to revoke, if my interpretation is correct, is given by that sub-section.

Some little difficulty is introduced by the addition of the words to that sub-section—"that is to say" (a) where appeals lie to more than one Court, (b) where appeals lie to a civil as well as to a revenue Court, and (c) where no appeal lies, certain rules are provided prescribing to which Court the first Court is deemed to be subordinate. In my view, the words, "that is to say" are not comprehensive at all. They are merely illustrating and to some extent limiting the words that go before, and the true way of reading that section is that the power to revoke is granted to the Court which ordinarily hears appeals from the Court sanctioning but as there may be difficulty in applying that rule, where two Courts have ordinarily the function of hearing appeals or where no Court has that function provision is made by the rest of the section for those cases. If it were a question whether the Judge sitting on the Original Side is subordinate to this Bench within the meaning of sub-section (6), as at present advised, I incline to the view that he is properly described as subordinate; but I particularly wish not to commit myself on that matter for I think it unnecessary for the decision of this case. I think it is sufficient to base my judgment on the

words of sub-sections (6) and (7) and to say that by reason of what I think is the proper interpretation of those sub-sections the preliminary point fails.

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OLDFIELD, J.—I agree.

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COUTTS TROTTER, J.—I agree and only desire to add that I am not to be taken as expressing any opinion at all as to the validity of the points taken by the learned Advocate-General, under the Letters Patent, but I think it is clear that on a reasonable construction of section 195 (1) of the Criminal Procedure Code, we have the power, I will not say, of hearing appeals but of revoking the sanction given by the learned Judge. In my opinion all that is necessary to say is that a single Judge sitting on the Original Side and sanctioning or refusing sanction under this sub-section is subordinate to a Bench of this Court for the purpose and in the sense of sub-section (6) as explained by sub-section (7). I wish to guard myself from expressing any opinion as to whether such a Judge is subordinate to a Bench of this Court in any other sense and for the purpose of any other section or any other Act. The first part of sub-section (7) is plain to my mind but some difficulty is created by the use in that sub-section of the words "that is to say" which looks as if it is introducing an exhaustive enumeration of all the possible cases that could arise under the first part of sub-section (7). I am satisfied that these words are mere inartistic draftsmanship and mean no more than if the draftsman had said "in particular" and that he used the words to introduce illustrations in the manner so common in Indian legislation. To my mind the words of sub-section (7) are absolutely clear "every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie." It

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seems to me impossible to hold that a Division Bench of this Court can be held to be other than a Court to which appeals from a single Judge sitting as a Judge of first instance on the Original Side ordinarily lie.

I am therefore of opinion that we are empowered to entertain this application to revoke the sanction granted by the learned Judge.

The case was then heard on the merits.

Nugent Grant for appellant.—The account book was not filed in Court in the suit. Only the defendant had inspection outside Court in the vakil's Chambers. It was disclosed in the affidavit of documents. It was filed for purposes of translation in the office of the Translator of the High Court under the Original Side rules. But these things do not amount to production or giving it in evidence in Court. Under section 195 (1) clause (e), it must be produced or given in evidence in the suit. The suit closed after the withdrawal. The learned Judge had no jurisdiction to order production of the document in sanction proceedings. In any event it is not production in the suit. No sanction is necessary or can be given for offence under section 474, Indian Penal Code, the production must be before the Court in the suit. No distinction is drawn by the learned Judge between section 195 (1) (b) and (c). No *prima facie* case is made out. The plaintiff obtained a better title to his lease under others and withdrew the suit. The defendant wanted to wreak vengeance upon him, and sanction was applied for out of vindictiveness and not in the public interest. The learned Judge did not exercise a judicial discretion as required by law.

K. P. M. Menon for respondents.—The account book was produced in Court, though not given in evidence; production before the Translator under rule 93 of the rules of High Court, Original Side, for translation, is

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production in Court, though it was not given in evidence. A *prima facie* case is enough for granting sanction.

Nugent Grant in reply.—The exercise of discretion by the learned Judge was not judicial or on right principles. It was based on fallacies and on erroneous view of facts that the document was produced in Court. The appellate Court should exercise an independent discretion on the facts on correct principles. Reasonable probability of conviction should be established before sanction is granted. See *Jadu Nandan Singh v. Emperor* (1).

There must at least be a *prima facie* case, though that may not be enough for giving sanction. No jury can reasonably convict the accused in this case.

SCHWABE, C.J.—I have had the opportunity of reading the judgments of my learned brothers who are more familiar with the practice of this Court than I am and with those judgments in general I agree. I have little to add.

I think it should be made clear that the fact this Court sanctions a prosecution is no intimation to the Magistrate that this Court thinks that there is a case to go to a jury, or that he thereby is in any way relieved from his duty of considering whether the accused ought to be committed for trial or not. This view is not at all inconsistent with the duty of this Court to refuse sanction, if it is clearly of opinion, on the evidence before it, that no reasonable jury should convict.

There is one matter in the judgment of my brother COUTTS TROTTER, J., on which I wish to reserve the expression of my view until the matter directly arises, namely, whether the learned Judge was justified in ordering the document in question to be brought into Court on the application for sanction, and I must not be

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taken as expressing assent of the view that, in so doing, he was acting without jurisdiction.

On the question of costs, this case might involve the consideration of the vexed question whether it is a criminal or civil matter and whether there is power to grant costs. Under all the circumstances of this case, we think that it is not necessary to consider that question as, in our view, it is a case in which each party should bear his own costs.

OLDFIELD, J. OLDFIELD, J.—This application is for the revocation of a sanction granted by PHILLIPS, J., under section 195, Criminal Procedure Code, for the prosecution of petitioner for offences punishable under sections 193, 465, 467, 474 and 109, Indian Penal Code.

Petitioner occupied shops as respondents' tenant. They gave him notice to quit and moved for his ejectment under section 41, Presidency Small Cause Courts Act. He sued for damages under section 47, obtaining a stay of the ejectment proceedings, and in his suit set up an agreement to lease to him for a term of five years in consideration of a payment of Rs. 1,000, pleading that certain sums aggregating Rs. 265 were actually paid to respondents through sixth respondent towards this amount. In his affidavit of documents he mentioned an account book, on one page of which payments to sixth defendant are shown, consistently with the statement in his plaint; and, after his suit had been withdrawn before the trial began, his prosecution was sanctioned, as stated above, on respondents' application with reference to this book.

The provision, under which sanction was granted in respect of the offences under sections 465, 467 and 474, Indian Penal Code, is section 195 (1) (c), Criminal Procedure Code; and it is urged first that this provision

is inapplicable, because the book was neither "produced" nor "given in evidence" as it requires. It is not contended that the book was given in evidence, but only that it was produced, because it was mentioned in petitioner's affidavit or in the alternative because it was filed in the Court—Translator's office for translation in accordance with the rules. But the affidavit, which is in the ordinary form merely discloses the documents in petitioner's possession relating to the matters in issue; and neither it nor the filing in the Translator's office amounts to what is required, actual production in Court. In fact the learned Judge relied on neither, as constituting production. What he relied on, as the reference in the last sentence of his order to "the account book which has now been filed" shows, was that petitioner filed it, not in the suit, but after its termination, on being required to do so by the Court on the application of respondents, dated 9th December 1921, in the course of the proceedings, in which the sanction was given. With all respect, the proceeding, in which sanction was asked for, was distinct from the suit, the proceeding, to which petitioner was a party and in which he was alleged to have committed those offences; and his production of the account book in the former cannot be regarded as the production in the latter, which section 195 (1) (c) requires. The learned Judge in these circumstances had no right to give and respondents no duty to obtain sanction in respect of the offences under sections 465, 467 and 474, Indian Penal Code, if indeed sanction need be given in respect of the last mentioned.

This is material, because we have further to deal only with the remaining offence specified in the learned Judge's order that punishable under section 193; and there is nothing in the order to show that any difference between the considerations arising under section 195 (1)

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OLDFIELD, J. (b), Criminal Procedure Code, and those under section 195 (1) (c) was present to the learned Judge's mind or influenced the judicial use of his discretion. That the relevant considerations are different is clear. For under the former provision the offence may be alleged as committed, not only in but more remotely "only in relation to" a proceeding, whilst under the latter it must be committed "in respect of a document produced or given in evidence"; that is in connexion with a trial, which has begun and therefore in direct and public prejudice to the reputation of the Court and its administration of justice. Here and in other cases under section 195 (i) (b), when no question of such prejudice can arise, the exercise of the Court's discretion will be judicial, only if it considers whether with reference to the evidence available and the other circumstances a prosecution is desirable in the public interest, and not, if it merely satisfies itself, as the learned Judge statedly did in the order before us, that "a prima facie case has been made out."

The latter is the view of the Court's duty and of the test to be applied by the appellate Court advocated on behalf of respondents; and the judgment of NAPIER, J., in *Kristnamma v. Chitturi Chinna Perajju*(1) and that of the High Court of Calcutta in *In re an Attorney*(2) are relied on as generally in accordance with it. But it is difficult to deduce from them or other authorities cited, *Palaniappa Chettiar v. Ramaswami Chettiar*(3) and *In re Hajee Mahomed Habibulla Badsha Sahib*(4) any such rigid general rule as respondents contend for and necessarily so, since such decisions are naturally worded with reference to the circumstances of the cases under disposal and give prominence to the considerations

(1) (1913) 17 M.L.T., 18.
(3) (1917) 32 M.L.J., 54.

(2) (1914) I.L.R., 41 Cal., 446.
(4) (1920) I.L.R., 48 Mad., 1.

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which assumed importance in them. I accordingly restrict myself to a statement of what I believe to be the law on the points at present material and in doing so aim rather at a general adherence to the effect of the authorities than a detailed reconciliation of the apparent differences between them.

Firstly, the duty of the Court granting sanction is discharged, if it exercises a judicial discretion; and similarly the duty of the appellate Court, if it satisfies itself whether such a discretion has been exercised. The former Court must therefore be required, whatever the extent to which the investigation undertaken for its own satisfaction has been carried, to put on record sufficient to demonstrate to the latter that its exercise of discretion has been judicial; and it is undesirable in fairness to the accused that it should be more. In case it does less, the appellate Court will have no choice but to follow the course indicated in the judgment of AYLING, J., in *Palaniappa Chettiar v. Ramaswami Chettiar*(1), with which I am in general agreement, and to ascertain the necessary facts for itself and base its conclusions on them.

In the next place it may be said at least that the Court cannot be regarded as having exercised a judicial discretion in granting sanction when it has satisfied itself only that a prima facie case has been made out, if by that is meant only that formal evidence of the ingredients of the offence is available, without reference to defects which may deprive that evidence wholly or to a material extent of value. For, apart from the considerations to be referred to and the interest of the accused, it will promote the mischief deprecated by COTTS TROTTER, J., in *In re Hajee Mahomed Habibulla*

(1) (1917) 32 M.L.J., 54.

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OLDFIELD, J. referred to, even "a fair chance of success."

There remains the more difficult class of cases, of which on the assumption most favourable to respondents the case before us is one and in which there is some evidence deserving consideration at a trial; and of course the requisites for the case of a judicial discretion in connexion with them can be indicated only in the most general terms. But it is here that the prospect of further proceedings serving any public purpose, on which all the authorities insist, becomes material. It is so, with all deference to the opinion of SESHAGIRI AYYAR, J., in *Palaniappa Ohettiar v. Ramaswami Ohettiar*(2) not wholly or principally out of respect for the rights of the accused or the liberty of the subject. For if that were the justification for the sanction procedure, there would be no reason for applying it only to cases, in which the offence is alleged in relation to legal proceedings, and for maintaining the ordinary rights of the complainant in connexion with those offences, when they are not alleged as so related. That procedure is necessary, as AYLING, J., observed, in order "to avoid the risk of frivolous or vexatious charges designed, not to vindicate justice, but to harass and annoy the person against whom they are directed," since "without some such safeguard the criminal Courts of this country would be flooded with useless prosecutions." Unless this has been borne in mind, the Court's use of its discretion cannot be regarded as judicial; and it follows that, the remoter the prospect of any public purpose being served the greater the degree to which the Court should insist on convincing evidence in support of the charge.

(1) (1920) I.L.R., 43 Mad., 1.

(2) (1917) 32 M.L.J., 54.

In the present case it is sufficient that, whilst the evidence against petitioner, with which the order before us is exclusively concerned, is at least of no special strength, no prospect of a prosecution serving any public purpose whatever is disclosed by the record. In fact the petitioner's conduct, if respondent's case is accepted, secured him no advantage, since his suit was withdrawn before his alleged forged document could be used. It appears from the latter's affidavit, to which the learned Judge has not referred, that petitioner gave evidence in respondents' family quarrel, as we were told by their learned Counsel, three years back with the result that two of them were imprisoned and that they still intend to dispute the new title, under which he now claims the property, for which he sued. In these circumstances the prosecution contemplated by respondents can only be regarded as vindictive and coercive; and the evidence is too weak to justify the grant of sanction for it.

I would allow the appeal and revoke the sanction.

COUTTS TROTTER, J.—The plaintiff brought a suit in which he alleged that he had an option to an extension of his lease of the suit premises for five years on payment of an advance of Rs. 1,000 and in paragraph 5 of his plaint he set out certain sums which he alleged he had paid towards the Rs. 1,000 ranging in date from the 12th of April to the 22nd of July 1920. In his affidavit of documents he included a rough chitta book which was said to contain an entry recording the payment of these sums, in all Rs. 265, which entry was alleged to be signed by the sixth defendant. He did not produce the rough chitta book for inspection by the opposite party for a considerable time and only did so in the end under an order of the Court. When the suit came on for trial it was withdrawn, the plaintiff having meanwhile got what

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he wanted by attornment to persons who he was satisfied would give him a better title than the defendants. After the withdrawal of the suit an order was made upon the plaintiff by the learned Judge to produce this chitta book in connexion with an application for sanction to prosecute him, under various sections of the Indian Penal Code, the allegation being that the material entries in the rough chitta book were fabricated for the purpose of manufacturing false evidence, and only came into existence after the signature of the sixth defendant had been obtained.

I do not wish to go into the facts in detail, for they are really not material to the point which we have to decide. It is sufficient to say that, in my opinion, this is a case in which no jury would be *likely* to convict on the materials which were before the learned Judge, although it is clear that there was some evidence which, if put before a jury and accepted by them, would *justify* a conviction, in other words, there appears to be what is called a *prima facie* case. The questions which I consider to be important in this case relate to the general position first of a Court whose sanction is sought for a prosecution and secondly of an appellate tribunal on an appeal from the order granting or refusing sanction passed by the Court below.

In my opinion, entirely different considerations arise when a Court grants a sanction and when it refuses it. In *In re Hajee Mahomed Habibulla Badsha Sahib*(1), I expressed an opinion, to which I adhere, as to the considerations proper to guide a Court in granting a sanction and the inference proper to be drawn from the granting of such a sanction. The Code provides for the granting of sanction as a preliminary not merely to

trial but, in many cases, to the taking of the case before a Magistrate who has jurisdiction either to commit for trial to a higher tribunal or to refuse to do so. It is to my mind, vital that it should be recognized that a Court, in sanctioning a prosecution arising out of facts which have come before it during the trial of a civil case, should not be supposed to be discharging that which is the task of the committing Magistrate at a later stage and usurping his functions by explicitly or tacitly pronouncing that there is a *prima facie* case. I adhere to the view that such a conception of the functions of the sanctioning Judge, would turn what is intended to be an additional safeguard to accused persons into a weapon prejudicial to their interests. I do not think that a Court which allows sanction does more than say that, on the materials before it, it is not apparent that a prosecution would be against the public interest or a mere indulgence of private spite. On the other hand, a Court which refuses sanction, to my mind, does no more than express the opinion that the public interest would not be served by such a prosecution and it is not, as I conceive the matter, debarred from acting upon that view even where there is a strong *prima facie* case. It is apparent that if this be the true conception of the functions of a Court on an application made for sanction they are of such a nature as necessarily to invest that Court with a very wide discretion and one with the exercise of which an Appellate Court should be extremely slow to interfere. The trial Judge is vested with the functions of granting or refusing sanction precisely because he has had the parties and witnesses before him and has the best opportunity of judging whether such a prosecution would serve any useful public purpose or not.

The sanction granted in this case was for a prosecution for offences punishable under three substantive

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sections of the Penal Code, sections 193, 467 and 474, the other two sections cited being ancillary. Section 474 has been given up because it is clear that no sanction is required for that, and where no sanction is required it is obviously proper that none should be sought for or granted. Section 467—forgery of a document purporting to be a receipt—does require sanction under section 195 (1) (c) of the Criminal Procedure Code when such offence has been committed by a party to any proceeding in any Court in respect of a document “produced or given in evidence in such proceeding.” In this case the document was not produced or given in evidence, on the construction of those words that I think to be the right one, in the civil suit at all. Inspection of it was given to the opposite side, but it was not before the Court until after the civil proceedings had terminated and the plaintiff had withdrawn his suit. “Produced or given in evidence,” to my mind, can only mean “tendered or admitted” in the course of the civil proceedings which ended with their withdrawal. I confine the expression “Civil Proceedings,” for my present purpose, to the actual trial of the suit up to the point when it was withdrawn without expressing any opinion on the debated question whether the subsequent sanction proceedings are in their nature civil or criminal. But the offence under section 193 stands on a different footing, for the offence defined by that section is that of fabricating false evidence for the purpose of being used in a stage of a judicial proceeding and actual production or tender of the document to the Court is not a necessary ingredient of the offence. This, therefore, falls under section 195 (i) (b) of the Code of Criminal Procedure and is not obnoxious to the objection formulated to the other charges. I must, therefore, consider whether there is any good ground for refusing the sanction which the learned Judge in his discretion

has granted. I think that there are two such grounds; the first is that, in my opinion, the whole proceedings were vitiated by the learned Judge ordering the plaintiff to produce the document for the sole purpose of considering whether or no a prosecution should be launched upon it. That was an order which I consider that the learned Judge had no jurisdiction to make and one which is absolutely repugnant to all those fundamental notions of fairness to a person accused or about to be accused of a criminal offence which lie at the root of the Criminal Law of England and of India alike. He was never warned as to his position, nor was it intimated to him what the consequences of producing the document might be. In my opinion, the plaintiff could have disobeyed that order with impunity and the fact that, from ignorance of his rights, he did not disobey it does not affect its irregularity. But there is an even more serious objection which appears on the face of the learned judge's order. As I have pointed out, it is no necessary ingredient of an offence under section 193 of the Penal Code, that the evidence alleged to be fabricated should actually be produced in the antecedent judicial proceedings; but no one can doubt that, in considering the advisability of sanctioning a prosecution, its production or non-production in Court is a circumstance to which the learned Judge might attach very considerable importance, in weighing that which I have held to be the sole question properly before him, viz., whether it was against the public interest to allow criminal proceedings to be instituted. It is clear that, at the time he passed this order the learned Judge was under the impression that the impugned document had been filed in the course of the civil proceedings and entirely overlooked the consideration that the document was only produced on his own order after the civil proceedings in the strict

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sense had terminated. To my mind, that misapprehension must have vitiated the learned Judge's exercise of the discretion he undoubtedly possessed, and leaves us free, on a knowledge of the true facts, to differ from his view. Where it is shown that the learned Judge exercised his discretion on a mistaken view of the facts it appears to me that he may be treated as not having exercised a judicial discretion at all, and that the appellate tribunal may be considered as thereby invested with an unfettered discretion to act on the true facts. Viewing the case in that light, it appears to me that no useful purpose would be served by allowing this prosecution; not only because I think that no jury would convict on the materials before us but also because I think it is clear that this prosecution was one which was projected not to satisfy the requirements of public justice, but to find an outlet for the anger of the defendants at being thwarted in their desire to get possession of this property.

I think that the Appeal should be allowed.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Oldfield and Mr. Justice Coutts Trotter.*

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v.

PAVANASA NADAR AND 8 OTHERS (PLAINTIFF AND
DEFENDANTS 1 AND 3 TO 9), RESPONDENTS.*

1922,
April 25.

*Hindu Law—Congenital blindness—Exclusion from inheritance—
Whether rule obsolete.*

Under Hindu Law a congenitally blind person is excluded from succession and this rule has not become obsolete.

Surayya v. Subbamma, (1920) I.L.R., 43 Mad., 4, overruled.

SECOND APPEAL against the decree of R. S. SANKARA AYYAR, Additional Subordinate Judge of Tinnevely, in Appeal Suit No. 120 of 1920, preferred against the decree of judgment of R. SATYAMURTI AYYAR, Acting District Munsif of Ambāsamudram, in Original Suit No. 633 of 1917.

Kannakku Nadan had four sons, viz., Plaintiff, 9th defendant in this suit, Subbiah Nadan and Ulugamuthu Nadan. He became divided from plaintiff and lived with his other three sons. The 9th defendant was a "Nir-indriya," afflicted with congenital blindness. In 1905 Kannakku Nadan sold the suit property to 1st defendant who in turn sold it to defendants 2 and 3 in 1915. In 1917 the 3rd defendant sold his share of the lands to 2nd defendant who thus became entitled to the whole properties. Plaintiff alleged that the sale by Kannakku Nadan was benami to 1st defendant, his son-in-law, and that 1st and 3rd defendants have colluded to defraud plaintiff of his rights. He therefore sued for a declaration that the suit properties belong to him and for

* Second Appeal No. 2024 of 1920.

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possession. The District Munsif held that the sale was not colourable and dismissed the suit. On Appeal the Subordinate Judge held that no title was conveyed to 1st defendant under the sale-deed and decreed the suit. Against this decree 2nd defendant filed this Second Appeal. One of the grounds of appeal was that "the Subordinate Judge has failed to observe that while the 9th defendant is alive the plaintiff is completely out of Court." The Second Appeal came on for hearing before AYLING and KRISHNAN, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

KRISHNAN, J.—This Second Appeal raises an important question of Hindu Law, namely, whether a person born blind loses thereby his right to share in the inheritance which he would otherwise have.

Plaintiff is suing to recover a property for which his father, Kannakku Nadan now deceased, had executed a sale-deed in favour of his son-in-law, the 1st defendant, on the ground that the sale was not a real transaction but only a nominal one not intended to pass the title. Plaintiff had become divided from his father long prior to the sale and he would have no claim to his father's properties if any of the latter's undivided sons were alive and entitled to succeed to the father. The only undivided son now alive is the 9th defendant, but the plaintiff's case is that as he was admittedly born blind he could not take the inheritance under the Hindu Law and he was thus out of the way. Plaintiff had alleged this plea in his plaint and it had not been traversed by the defendants in their written statements and no issue had been framed on it. The point is, however, taken before us that the rule of Hindu Law relied on has become obsolete and is no longer in force on the strength

of the ruling in *Surayya v. Subbamma*(1), which no doubt fully supports the contention.

The learned vakil for the 1st respondent contends firstly that the point should not be allowed to be taken for the first time in Second Appeal and secondly that the ruling itself is one that should be reconsidered. The first objection, I am inclined to think, should not be upheld as the question raised is a pure question of law and requires no other fact than the one stated by the plaintiff himself in his plaint, viz., that the 9th defendant is an undivided son of his father though congenitally blind. We must therefore, I think, allow the point to be raised but on terms as to costs, etc., to avoid any prejudice to the plaintiff.

The second objection is a more difficult one; but I am inclined to think that the question should be settled by a Full Bench. The learned Judges who decided the case in *Surayya v. Subbamma*(1) admit that a rule of Hindu Law existed as enunciated by Manu and by subsequent text writers excluding Jatyandhas or congenitally blind persons from the inheritance. A number of cases have proceeded on the footing that the rule was still in force. In fact WESTROPP, C.J., in *Murariji Gokuldas v. Parvatibai*(2), in his very learned judgment took considerable pains to show that the rule did not apply to persons who had become blind after birth, which his Lordship need hardly have done if this rule itself had become obsolete. In the recent judgment of the Privy Council in *Gunjeshwar Kunwar v. Durga Prashad Singh*(3), after quoting the following passage from Sarvadhikari's Hindu Law of Inheritance.

"Blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after

(1) (1920) I.L.R., 48 Mad., 4.

(2) (1876) I.L.R., 1 Bom., 177.

(3) (1918) I.L.R., 45 Cal., 17 (P.O.); s.c. 44, I.A., 290.

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birth is not a ground of disqualification. Incurable blindness, if not congenital, is not such an affliction as, under the Hindu Law, excludes a Hindu from the inheritance."

Their Lordships say that the above is the true rule. They thus affirm the rule as well its limitation as in force. This ruling is not referred to in *Surayya v. Subbamma*(1) and that weakens the latter's authority considerably. To hold any part of a rule obsolete it is not sufficient to show that any other part of it has become obsolete but it must be shown that the particular part of it in question has been abandoned in practice by the communities governed by it sufficiently long ago as to justify an inference that it has been abrogated. On the other hand, in the present case it was frankly admitted by the learned vakil for the 2nd defendant that the general consciousness of the Hindus was that the rule continued in force and that was the very reason he gave why his client did not raise any contention about it when the plaintiff asserted it in the plaint. In fact nobody seems to have thought that the rule was obsolete till the judgment in the Madras case was published.

Much of the learned Judges' arguments in the case, if correct, would apply with equal force to make all the other grounds of disqualification stated in the rule also obsolete, but when the ruling was quoted to the learned Judges in *Muthusami Gurukkal v. Meenammal*(2), they declined to apply its principle to a case of insanity with regard to which they considered the rule to be still a "living principle." Again in the judgment of this Court reported in *Sambasivam Pillai v. Secretary of State for India*(3), the learned Judges have thrown doubt on

(1) (1920) I.L.R., 43 Mad., 4.

(2) (1920) I.L.R., 43 Mad., 464.

(3) (1921) I.L.R., 44 Mad., 704 at p. 712.

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the correctness of the ruling in *Surayya v. Subbamma*(1), more particularly my learned brother ODGERS, J.

With all respect to the learned Judges in the 43 Madras case, I think their decision requires further consideration; and as I am proposing a reference to the Full Bench I will not deal with the point in further detail or express a definite opinion on it.

It may be mentioned in conclusion that the appellant also took exception to the finding of the Subordinate Judge that the sale to the 1st defendant was a nominal transaction and our attention was drawn to the ruling in *Ranga Ayyar v. Srinivasa Ayyangar*(2), to show that the question can be considered in Second Appeal. That, however, was a case where the sale was to the vendor's own wife and daughter, and their Lordships held that in those circumstances his possession of the property and of the sale-deed and the non-transfer of the patta and absence of consideration were matters of no evidentiary value, and as no motive was proved for executing a nominal sale-deed they considered that the sale was a real one. That case proceeded on its own special circumstances, and the finding was set aside really on the ground that there was no evidence to support it. In the present case there is a considerable body of evidence referred to by the Subordinate Judge in support of his finding and I think we must accept his conclusion.

Before disposing of the case I would refer to the Full Bench the following question:

"Is a Hindu who is congenitally blind thereby excluded from the inheritance or has the rule become obsolete?"

AYLING, J.—I should be willing to follow the decision in *Surayya v. Subbamma*(1) but, in view of the doubts

(1) (1920) I.L.R., 43 Mad., 4.

(2) (1896) I.L.R., 21 Mad., 56.

expressed by my learned brother, I assent to the reference proposed by him.

I agree with him as regards the finding as to the nominal nature of the transaction.

ON THIS REFERENCE

S. Ramaswami Ayyar with *E. Sankara Ayyar* for appellant.—The real point is whether your Lordships are prepared to treat all the disqualifying circumstances enumerated in the Mitakshara as binding on the Courts to-day. I base my arguments on three considerations: (1) the disqualifying circumstances are more advisory than mandatory. They are mere moral or religious prohibitions not legal mandates. (2) The texts do not take away the right of succession from the person. It resides in them but they cannot claim their particular share. (3) These rules are not meant to apply to such castes as that of the Nadars *Radhamohun v. Hardai Bibi*(1).

(1) The rule of exclusion is taken from Manu: Mitakshara, Chap. 2, sec. 10, see Colebrooke's translation. A blind man is there named as one of the persons who are disqualified from inheriting. It does not say that blindness to disqualify must be congenital. The grounds of exclusion in Mitakshara are merely precepts of moral obligation and are not binding on Courts like statutory enactments. They can at most be regarded as evidence regarding the custom of the country. Usages have been changing, and that is specially mentioned by Vignaneswara as his justification for writing a new commentary. The provision relating to disqualification of the blind in the Yajnavalkya is quoted as it is by Visvarupa: Ghose, Vol. II, page 16. But at the same time he appends a further statement regarding the usage as it existed during his time and never mentions the blind

(1) (1899) I.L.R., 23 Mad., 398 (P.O.).

as disqualified. He makes no attempt at reconciling the text with the usage. It follows, therefore, that exclusion from inheritance, if ever it was a custom, had already fallen into disuse by the time of Visvarupa. Colebrooke's Digest, Vol. II, page 422, gives Gautama's text relating to the rules of exclusion from inheritance but does not mention the blind as disqualified; and there are several Smriti writers and commentators who do not exclude the blind from inheritance. It is one of the practices of Hindu Law writers to enunciate obsolete rules of law as if they still continued to be law. Even Mitakshara enumerates 8 kinds of marriages and 12 kinds of sons. This in spite of the fact that several of these had ceased to exist by that time. Again, an only son or an eldest son it is enjoined by both *Vasishta* and *Yajnavalkya* should not be given or taken in adoption. How far these precepts embody a rule of law was considered in *Radhamohun v. Hardai Bibi*(1). Chap. 1, section 1, paragraph 27, Mitakshara, gives sons control over ancestral property as well as over the self-acquisitions of the father. The Privy Council in *Balwant Singh v. Rani Kishori*(2) have laid down that he has no control over the latter. The precise question never was decided in High Court or Privy Council except in *Surayya v. Subbamma*(3). Reference made to the judgment of WESTROPP, C.J., in *Murarji Gokuldas v. Parvatibai*(4), Colebrooke's translation, and the Mitakshara and to *Saraswati Vilasa*.

Gunjeshwar Kunwar v. Durga Prashad Singh(5). This case holds that supervening blindness is not a ground of disqualification. It is no authority for the converse that congenital blindness is such a disqualification.

(1) (1899) I.L.R., 22 Mad., 398 (P.O.). (2) (1898) I.L.R., 20 All., 285 (P.O.).
(3) (1920) I.L.R., 43 Mad., 4. (4) (1876) I.L.R., 1 Bom., 177.
(5) (1918) I.L.R., 45 Cal., 17 (P.O.); s.c. 44, I.A., 299.

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Further this decision does not bind the Madras Court. Strangely enough this case is not referred to in *Surayya v. Subbamma*(1). The grounds of exclusion in the Mitakshara are very wide and it is doubtful how far these rules are followed: *Kayarohana Pathan v. Subbaraya Thevan*(2), *Venkata Subba Rao v. Purushottam*(3), *Alagappa Chettiar v. Subramania Pandia Thevar*(4), *Vedanayaga Mudaliar v. Vedammal*(5), *Tirumamagal Ammal v. Ramaswami Ayyangar*(6), *Kelka Pershad v. Budree Sah*(7), *Vedammal v. Vedanayaga Mudaliar*(8) and *Muthusami Gurukkal v. Meenammal*(9).

That the rules of exclusion mentioned by the text writers are mere moral precepts is seen also from an examination of the theory of succession adopted in Mitakshara by Vignaneswara. Blood relationship and not a capacity to render spiritual benefits is accepted by Mitakshara as the foundation of the right to succeed. The theory of exclusion from inheritance in the Mitakshara being based on ceremonial incompetence is inconsistent with the scheme of inheritance which is based admittedly on consanguinity or blood relationship. Nor are these disqualifications permanent disabilities as is clear from the fact that many of them can be cured by expiation and penance: Mayne, page 830.

(2) This principle of exclusion does not apply to survivorship but only to cases of partition. The word used in Yajnavalkya, "without share," ought not to be extended beyond what the text writers say. In his chapter on exclusion there is nothing about ownership by birth. Under the Mitakshara a man gets ownership by birth. Chapter I, Mitakshara (Colebrooke) deals with

(1) (1920) I.L.R., 48 Mad., 4. (2) (1915) I.L.R., 38 Mad., 250.
(3) (1908) I.L.R., 26 Mad., 138. (4) (1914) 26 M.L.J., 509.
(5) (1904) I.L.R., 27 Mad., 591, 598. (6) (1883) 1 M.H.C.B., 214.
(7) (1871) 8 N.W.P.H.C.B., 267, 270. (8) (1908) I.L.R., 31 Mad., 100.
(9) (1920) I.L.R., 48 Mad., 484.

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partition as the mode of taking property by sons. The rule does not prevent disqualified persons from taking any part of the ancestral property by birth. The meaning of the chapter on exclusion is that prohibition is only to "share-taking" but not to share-enjoying. The issue of the disqualified person is said to take "from their father's share," "in the pretensions of the father." This impliedly recognizes a right to share existing in the disqualified parent. Again the theory that the disqualified person gets his share when the disqualification is removed is inexplicable if he had no share at all. In some cases it has been stated that the sons who are not disqualified are in a sense trustees of those who are disqualified and who are really share-enjoyers. Here the blind man, the 9th defendant, was the sole surviving co-parcener. Smriti Chandrika, Chapter V, rules 32 and 33 recognizes the title of the disqualified persons to share though they are not entitled to claim it by a partition.

T. R. Venkatrama Sastri with *K. S. Ramabhadra Ayyar* for first respondent.—It is too late in the day to dispute the validity of Mitakshara, Chap. II, section 10 as rules of law. It excludes right by birth if there is congenital blindness. In placitum 6 the author says that once the property has become absolute, he does not intend to deprive him of it: see also Chap. I, section 10, placitum 1.

[CHIEF JUSTICE.—If a man is born sane and then becomes insane what are his rights.

If the other co-parceners die he will take by survivorship. If by partition he will get no property.]

Appellant's argument that a congenitally blind man is a member of the co-parcenary all the time is not correct. All that can be said is that he is a member of the family and a potential member of the co-parcenary.

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By virtue of the former he becomes entitled to maintenance, and not being a member of the co-parcenary is not entitled to a share. The case of the congenitally blind being cured of blindness is specially provided for in Mitakshara, Chap. II, section 10, placitum 7. They become co-parceners by virtue of a special provision of law and as from the date of the cure. *Krishna v. Sami*(1) decides that the son of a disqualified man born after partition may reopen the partition and that an estate that has become vested may be divested. The removal of the disqualification I submit must be treated in the same manner as a new birth. In Bengal and Bombay a different view prevails: see Mayne, pages 657 and 658. Reference was also made to *Krishna v. Sami*(1), *Muthusami Gurukkal v. Meenammal*(2), *Abilakh Bhagot Bhekhi Mahto*(3) and *Rama Rao v. Rajah of Pittapur*(4). Visvarupa, pages 14 and 15, paragraph 27, mentions the disqualified persons and discusses the theory underlying the disqualification. The author concludes that it is futile to try to assign a reason to the rules but says they should be observed as they are rules. Mitakshara is of paramount power in India except in Bengal and Guzarat.

The share-taking referred to in *Sarasvati Vilasa* (Foulkes translation), placitum 148 is the possibility of their transmitting their share to sons born to them and not to their taking a share: *Krishna v. Sami*(1). The argument in *Sarasvati Vilasa* comes to this: at a partition the disqualified person gets no share. But his son takes a share. The father though he does not take a share physically he takes a share in the sense that just

as he is capable of transmitting family blood (if he is marriageable) he can serve a means of the share passing to his issue. If the disqualified person cannot for any reason marry and thus is incapable of transmitting heritable blood, he cannot take a share at all. Hence the disqualified person takes a share only in a fictitious sense. He is "a taker of a share" in the sense that he is "a transmitter of a share." It is only to explain how he transmits that the author says the disqualified person "takes"—not in the ordinary sense that he has a right to take and enjoy as well as other members of a co-parcenary. Explaining *Sarasvati Vilasa* in this way all authors are agreed that disqualified persons don't take at all—this agreeing with the Mitakshara. All text writers have treated this text of the Mitakshara as living. Sir THOMAS STRANGE, C.J., writing about 1830, says that these disqualifications are recognized in Hindu Law though to him they appear harsh. Ellis, Colebrooke and Strange (junior) agree with this view. Because some of the grounds with regard to certain disqualifications (e.g., lameness, dumbness, etc.), have become unworkable is no reason why the other disqualifications not so affected should also be classed in that class. Sarvadhikari says that the Mitakshara states the true Hindu Law. Trevelyan (1912) is of the same view. Mayne includes blindness as a disqualification. SADASIYA AYYAR, J., in *Surayya v. Subbamma*(1), after dealing with the grounds spiritual and temporal for the exclusion of certain persons examines cases of blindness and says that incapacity is the reason of the disqualification and the reason failing the law disappears with it.

[CHIEF JUSTICE.—Is there any authority for the position that with the reason for a rule of law ceasing to exist the rule itself ceases to exist?

(1) (1886) I.L.R., 9 Mad., 64 (F.D.).

(3) (1895) I.L.R., 22 Cal., 864.

(2) (1930) I.L.R., 48 Mad., 464.

(4) (1918) I.L.R., 41 Mad., 778 (P.C.).

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No. The tenure of Gavelkind has not ceased to exist.]

S. Ramaswami Ayyar in reply.—SESHAGIRI AYYAR, J., in *Soundarajan v. Arunachalam Chetty*(1) lays down the correct rule of interpretation. Antiquated rules of Hindu Law ought not to be thrust upon the people. Rules ought under the circumstances to be interpreted liberally. Mitakshara ought not therefore to be construed as if it were a statute.

OPINION.

SCHWABE,
C.J.

SCHWABE, C.J.—The question referred to the Full Bench is

“Is a Hindu who is congenitally blind thereby excluded from the inheritance, or has the rule become obsolete?”

In *Surayya v. Subbamma*(2) SADASIVA AYYAR and NAPIER, JJ., answered this question by saying that the rule had become obsolete. This case having been tried before that decision was known, the point was not taken at the trial or on first appeal; but the appellant was allowed to raise the point by the Referring Bench. This Court was told in the course of the arguments that it is alleged that the man in question is not, in fact, congenitally blind and it will be for the Referring Bench to consider hereafter whether that matter is one which is now proper to be enquired into. For the purpose of this reference we must assume that he was congenitally blind and treat this case as, in effect, an appeal from *Surayya v. Subbamma*(2).

It is argued that under the Hindu Law, a congenitally blind man never was excluded from inheritance

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and secondly that, if there was a rule or custom to that effect, it has now become obsolete and is no longer law. It has long been established that in this Presidency the most authoritative statement of, what I may call, the Hindu Common Law is to be found in the Mitakshara, a commentary by Vignaneswara on the institutes of Yajnavalkya published about A.D. 1080. In Chap. II, section 10 the author quotes the text of Yajnavalkya as follows:—

“An impotent person or outcaste and his sons, one lame, a mad man, an idiot, a blind man, and person afflicted with an incurable disease, and others (similarly disqualified) must be maintained, excluding them however, from participation.”

It is made clear by reference to the whole chapter that the author is here dealing with exclusion from the inheritance. I think the law as stated by him amounts to this:—A man born blind does not become on birth entitled to a share in the family property, and, therefore, he gets no share at a subsequent partition; nor, if he is the sole surviving member of that family, does he acquire the property by right of survivorship; he is not, however, excluded altogether from an interest in the property because he is himself entitled to be maintained, and can transmit to his sons his full share in the property. But it is argued first that these directions are merely precepts or advice and not statements of law. It is true that there are precepts given in the Mitakshara which either by reason of the words in which they are couched or by reason of the nature of the matter dealt with, have been held to be mere moral precepts, but I can find no such reason for holding that the statement of the exclusion of a blind man from the inheritance is anything but a statement of a rule of law. It is further argued that this statement of the law in the Mitakshara is a statement of the law as it had been in the past and

(1) (1916) I.L.R., 39 Mad., 136 (F.B.). (2) (1920) I.L.R., 43 Mad., 4.

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not as it then was; and for this, reliance is placed on the writings of Visvarupa which were discovered in Malabar some few years ago. He is stated to have lived shortly before the author of the Mitakshara. He gives the same text from Yajnavalkya and in commenting on the text, without any suggestion that it is other than law, a passage occurs which has been translated as follows:—

"The blind and the rest, who are not outcastes, however, have a right to the grandfather's estate. Such is the custom." We have been referred to the Sanskrit and I have no doubt that the words which have been translated as "have a right to the grandfather's estate," would be more properly translated as "have an interest in the ancestral property" and refer to what follows immediately, namely, the right to maintenance and the right to transmit referred to above. In my judgment, when properly understood, there is no difference at all between the rules in question as stated in the Mitakshara and as published by Visvarupa, assuming that the published version is genuine.

The next question is whether, assuming a blind man's exclusion to have been the law at the date of the Mitakshara, it has since become obsolete. This, in my judgment, is a question of fact. A law does not cease to be operative because it is out of keeping with the times. A law does not become obsolete because it is an anachronism or because it is antiquated or because the reason why it originally became the law, would be no reason for the introduction of such a law at the present time. To hold the contrary, in my judgment, would be an entire misunderstanding of the meaning of the legal maxim *cessat ratio cessat lex* which is relied upon in support of the contrary contention. If authority were required for this proposition, it is to be found clearly

stated by their Lordships of the Privy Council in *Rao Kishore Singh v. Mussamat Gahenabai*(1) in the following words:—

"Their Lordships therefore are of opinion that the principle embodied in the expression *cessat ratio cessat lex* does not apply where the custom outlives the condition of things which gave it birth."

In *Surayya v. Subbamma*(2) SADASIVA AYYAR, J., dealing with the matter now under consideration says, "I need not say that a rule becomes obsolete when the reason of the rule disappears through change of circumstances and environments in the society which was governed by that rule," and NAPIER, J., at page 31, agreeing with that judgment says that owing to improved methods of education there is no reason why such a disqualification should still continue and that it was open to the Court to enunciate this rule by declaring the law to be obsolete. In my view, this involves a fundamental error in considering the question and vitiates the whole of the judgments in that case. In considering whether the custom has become obsolete in the sense of its having ceased to exist, the fact that it is an anachronism may be a proper matter to be taken into consideration, if there were evidence both ways, in weighing that evidence but otherwise it is of no importance. In this case, in my judgment, the evidence is all in favour of the custom having continued. There is no oral evidence before the Court and no statement of any text writer or any judgment to which our attention has been called that this custom has become obsolete in the sense of its having been discontinued. The only semblance of evidence that the rule has become obsolete is to be found in Steele's "Law and Customs of Hindoo Castes,"

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(1) (1919) 37 M.L.J., 562 at p. 574 (P.O.).

(2) (1920) I.L.R., 48 Mad., 4 at p. 11.

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published in 1826, at page 224 where he states that as a result of inquiry among about 100 castes about Poona, it was the practice in 72 of them that "blind persons" may take their share if married and if they have a family. Assuming this to be evidence, it is probably only an attempt to state the law as to the transmissibility of a share through the blind man. But even if it be as stated that in 72 castes in that district, the law had been modified by custom, it is of no value as establishing a custom to admit the blind man to a share in this Presidency.

Reliance was placed on a passage in Sarasvati Vilasa, a digest published by a king about A.D. 1510, which has been recognized by this Court as of authority. The passage relied on occurs in section 149 and has been translated as "those who are born blind, and those who are born deaf, the pair thus mentioned, though a share certainly belongs to them, are to be nourished and cherished, notwithstanding their being endowed with a share, because they are marriageable." The translation to this effect was adopted by the Full Bench of this Court in 1886 in *Krishna v. Sami*(1). With great submission I venture to doubt if that translation is correct and whether the word translated as "share" would not be more correctly translated as "interest." But whether that is so or not, a careful examination of sections 149 to 167 shows that the author is quoting as law the passage from Yajnavalkya and passages from some other writers to the like effect excluding the born blind from the inheritance without suggesting that the law is otherwise or that it is obsolete. If the proper translation of the passage is to the effect that the born blind take a share, I think it is to be explained, as it was in the case referred

(1) (1886) I.L.R., 9 Mad., 64 (F.B.).

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to above in the judgment of Sir CHARLES TURNER, C.J., as meaning "that there are classes who, though they may be unable to be relieved of their disqualification, are capable of transmitting heritable blood. Their right to share in the family wealth is latent or may come into existence at a future date as it does in the case of the after born son. When it comes into existence either in the person of the formerly disqualified heir or of his son, it is to be recognized. If capable of transmitting heritable blood, they are share-takers though not at the time share-enjoyers." In fact in this passage the Sarasvati Vilasa is using the expression "take a share" to explain that though disqualified, such persons have a latent right which will become effective on the disqualification being removed, and can be transmitted. In my judgment, there is nothing in this to show that this law was then regarded as obsolete.

The evidence on the other side is overwhelming. Taking it in the order of date, one finds this law or custom stated as existing in Madana Parijata about the end of twelfth century, in Vivada Ratnakara about A.D. 1350, Dayabhaga about A.D. 1400, Vivada Chintamani about A.D. 1450, Daya Tattva about A.D. 1500, Mayukha about A.D. 1600, Dattaka Chandrika about A.D. 1600, Viramitrodaya about A.D. 1625 and Dayakrama Sangraha about A.D. 1700. These are all texts of recognized authority and they all give the rule without any suggestion that it is no longer law.

Coming to the more modern writers, Sir W. Macnaghten writing in 1829, and Sir THOMAS STRANGE, Chief Justice of Madras, writing in 1830, state that the blind are excluded. The latter's son, a Judge of the Sudder Court writing in 1856 says the same. Mr. Mayne in his well-known book of Hindu Law states it to be the law.

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In 1862 in *Tirumamagal Ammal v. Ramasami Ayyangar*(1), a case of idiocy, STRANGE and HOLLOWAY, JJ., quote this part of the Mitakshara as being the law current in Madras. In 1864, *Kalidas Das v. Krishan Chandra Das*(2), came before a Bench of five Judges of Calcutta presided over by Sir BARNES PEACOCK, C.J. In that case a man who was born blind was in 1832 in fact excluded from the inheritance to his father. He married and had a son in 1858. The passages in the Mitakshara and the Dayabhaga which are to the same effect were fully discussed and the whole argument and judgment proceeded on the basis that a person born blind was himself excluded. No one then present had apparently any idea that the rule was obsolete. In 1876 in *Murarji Gokuldas v. Parvatibai*(3), WESTROPP, C.J., with SARJENT, J., agreeing, fully discussed the text of Yajnavalkya and the Mitakshara commentaries on it and the texts of the other Rishis on the subject and held that the rule is confined to the congenitally blind and does not extend to those who become blind. It was not suggested that the rule had become obsolete. In 1885, in *Krishna v. Sami*(4), quoted above, there was no suggestion that the rule had become obsolete. Finally in 1917, the Privy Council in *Gunjeshwar Kunwar v. Durga Prashad Singh*(5), states the rule of the exclusion of the blind as an existing rule of law but confines the application to the congenitally blind.

It is impossible to believe that a custom to disregard the established rule, which it would be necessary to prove in order to show that it had become obsolete, existed without any of these Judges, or practitioners in these cases being aware of the fact. There is in my judgment ample evidence of the rule, and no evidence of such a

(1) (1862) 1 M.H.C.R., 214.

(2) (1876) I.L.R., 1 Bom., 177.

(3) (1918) I.L.R., 45 Cal., 17 (P.O.); S.C., 44 I.A., 299.

(4) (1889) 2 B.L.R., 103 (F.B.).

(5) (1896) I.L.R., 9 Mad., 64 (F.B.).

custom to disregard it, as would be necessary to make the rule obsolete as a rule of law. It follows that the answer to the question must be that a Hindu who is congenitally blind is excluded from the inheritance and that the rule has not become obsolete.

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OLDFIELD, J.—I agree and, having had the advantage of reading the judgment which COUTTS TROTTER, J., is about to deliver, desire further to associate myself with his observations on the commentary of Visvarupa and the principle underlying them.

COUTTS TROTTER, J.—The short point raised by this case is whether or not it is a rule of Hindu Law that a congenitally blind member of an undivided Hindu family is to be excluded from inheritance or whether if such a rule existed, it has become obsolete. SADASIVA AYYAR, J., admits that such a rule once existed, but has held it to be obsolete. KRISHNAN, J., holds it to be an existing and positive rule of law.

It must not be forgotten that the Hindu Law is the result of many ingredients. In the first place, we have the Smritis or records of the pronouncements of Rishis, (Saints) among whom stands paramount Manu. We do not possess the original text of Manu and the version we have is placed by modern scholars as dating from about 200 B.C. but there is no doubt that a treatise known as the Laws of Manu in different recensions existed from many centuries before the date of our version. Next in authority to Manu of the Smritis is Yajnavalkya and the commentary on his work known as the Mitakshara written by Vignaneswara stands as the governing authority for this part of India: and it is an accepted principle that the Mitakshara is final where it is unambiguous, and that recourse is to be had to the Smritis

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only where the Mitakshara is silent or obscure. The third element is that of custom, the importance of which was emphasised by Mr. Mayne when he entitled his book "Hindu Law and Usage." Since the British occupation of India another element has been added, that of judicial decisions of the Indian Courts and of the Privy Council on appeal from them. The rulings of the Privy Council are final and it is only in cases not covered by such rulings that recourse need be had to other sources.

The position with regard to the present question is that there is no express ruling of a Court of Law which says, in terms, that a congenitally blind man is excluded from inheritance. There are cases which definitely decide that blindness which is not congenital but is traumatic or supervenes on disease does not exclude. There are many cases which assume, without expressly deciding, that congenital blindness does exclude. That position is now challenged and it devolves upon us to say how the law on the subject stands in India at this day.

That which we call the Hindu Law, is composed of many incongruous elements—I am speaking now, of its substance, and not of the sources in which it is to be sought. It primarily lays down rules of law, which must be treated as of practical applicability to the India of to-day. Such rules there are in abundance, but they are interspersed with mandatory precepts which have been treated by commentators and Judges as being merely of religious or moral force but which cannot govern the rights and duties of a member of a Hindu family with the force of a positive rule of law. I may refer in this connexion to the words of the Judicial Committee in *Balwant Singh v. Rani Kishori*(1).

"All these old text books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In his preface to his valuable work on Hindu Law, Sir W. Macnaghten says: 'It by no means follows that because an act has been prohibited it should therefore be considered as illegal. The distinction between the *Vinculum juris* and the *Vinculum pudoris* is not always discernible.' (Hindu Law, Principles and Precedents, page 6 of the preliminary remarks.) He illustrates this position by the example of the very subject of the present discussion. It is, as their Lordships think, the most remarkable inference that the passage in section 1 belongs to the former class of precepts, and those of sections 4 and 5 to the latter."

It was argued in this case that the rule which excludes a blind man from inheritance was something other than a rule of positive law. It seems to me that that position is wholly untenable and that such a principle of exclusion can only belong to the domain of positive law, and not to that of either religion or morality. If it is not a rule of law, it must be meaningless. The only colour to the argument is derived from the fact that both Manu and Mitakshara, to which for the moment I shall confine myself, include within the ambit of their prohibition, persons with disqualifications which are obviously based on moral grounds and on grounds which it would be impossible for a Court of Law to pronounce upon. The text of Manu is as follows:—

"Eunuchs and outcastes, persons born blind or deaf, mad men, idiots, the dumb and such as have lost the use of a limb are excluded from a share of the heritage," Chap. IX, section 201.

The relevant section of the Mitakshara is section 10 of Chap. II. There the writer is commenting not directly on the text of Manu as we have it but on

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the text of Yajnavalkya in section 160 which runs as follows :—

"An impotent person or outcaste and his issue, one lame, a mad man, an idiot, a blind man and a person afflicted with an incurable disease as well as others (similarly disqualified) must be maintained, excluding them from participation."

Placitum 3 of section 10 explains this as follows :—

"Under the term 'others' are comprehended one who has entered into another order (i.e., has become an ascetic) an enemy to his father, a sinner in an inferior degree and a person deaf, dumb or wanting an organ." Thus Vasishta says : "They who have entered into another order are debarred from share,"

Narada also declares,

"An enemy to his father, an outcaste, an impotent person, and one who is addicted to vice, take no share of the inheritance even though they be legitimate; much less, if they be sons of the wife by an appointed kinsman. Manu likewise ordains, 'Impotent persons and outcastes are excluded from a share of the heritage and so are persons born blind and deaf, as well as mad men, idiots, the dumb and those who have lost a sense or a limb.'"

This section incorporates quotations from Narada and Vasishta and produces categories of persons, who, in a Court of Law nowadays would not be held disqualified from inheritance. They are brought under the text of Yajnavalkya who adds the Sanskrit word "Adya" translated by Colebrooke as "as well as others;" its literal meaning being "and the like" or practically, "etc., etc." Under cover of the latitude afforded by this expression placitum 3 brings in such intangible persons as "an enemy to his father" and "one who is addicted to vice"—disqualifications so vague, it is clear, that no Court of Law could now assert their validity. I do not think it right to say that these grounds of exclusion are obsolete or that they were originally intended to be moral rather than legal obligations: but rather

that they are of so nebulous a character that they could never have been enforceable at any time when the enunciation of the rights of inheritance passed from the hands of family mediators or village panchayatdars to anything which can be dignified by the name of "Court of Law."

I do not think that any useful purpose would be served by inquiring into the meaning of such terms as "Nirindriya" or "Pangu." They do not seem to me to assist the present discussion and I think it is probable that legislation will abolish the exclusion from inheritance based on these terms before the Courts are called upon to determine their exact meaning. Similarly I think it unnecessary to discuss whether Yajnavalkya meant anything more by using the word "Andha" than what Manu meant by "Jathyandha". "Jati" comes from the same root as the Greek Gignomai, Genos, etc., and Latin "Genus." It is, I think, clear that both Manu and the Mitakshara explicitly lay down the rule of law that at least a "Jathyandha" is excluded from inheritance and that the only way to escape from this is to do what SADASIVA AYYAR, J., has done and say boldly.

"It is not a subsisting rule of law. It has become obsolete and abrogated."

In any system of law other than the Hindu Law, it would be almost a contradiction in terms to predicate of any proposition of law that it is obsolete. In the Hindu Law it is a possible state of things and it has been admitted to exist with regard to many maxims which cannot be treated as of merely moral or religious obligation. I need only instance the kinds of marriages and the classes of sons enumerated in the ancient writings and also the various rules for marriages between persons of different castes. There is a consensus of opinion that there are only two forms of marriages and

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only two classes of sons now existing and intermarriages between persons of different castes have in practice long ceased to exist. It is not now possible to trace the steps by which this state of things came about, but it may be said generally, that, in the days when the Sudder Court had recourse to the opinions of the Pandits, the latter felt themselves quite free to say with regard to any rule of law that, in practice, it was regarded as obsolete and the Courts felt themselves equally free to act on such opinions. There is good evidence to show that, in the early days, the Pandits responded to some extent to the advance of popular sentiment and consciousness and stigmatized as obsolete, rules and practices which, though enshrined in the early writings, did not accord with the sentiments of the people. The time has now gone by when this process was possible and if there is anything dignified by the name "Rule of Law" enshrined in the Mitakshara, it can only be abrogated by positive evidence of custom to disregard it. It is not pretended that there is any such evidence of custom with regard to the exclusion of the congenitally blind and no such evidence was attempted to be produced in this case. No doubt, Mitakshara, Chap. II, section 10, placitum 7 provides for the removal of the disqualification on the removal by medicaments or other means of the physical disability, and it is doubtless true that modern surgery can restore eyesight to many, who in the days of the Mitakshara would have been blind for life. SADASIVA AYYAR, J., does not so much have regard to this consideration, as to the view that the texts are based on a primitive idea that blindness was either a visitation of God for some sin in a past existence or was an indication of mental incapacity to deal with practical affairs. Justly regarding these ideas as out of consonance with modern knowledge and feeling, he deduces the conclusion that the rule is therefore to

be considered as *ipso facto* abrogated. To my mind, before allowing a mandate such as I conceive this to be, to be disregarded, it must either be proved by evidence to be actually disregarded in practice at the present time, and as I have already said there is no such evidence in this case—or it must be shown by an examination of the smritis and commentaries to have been obsolete at the time they were written, and that the authors thereof merely repeated parrot-like the words of Manu and the Mitakshara as a maxim dignified by antiquity but not corresponding to the practice obtaining at the time either of the Mitakshara or of their own compilations. If it could be shown that commentators earlier than the Mitakshara had used language meaning or implying that the rule in this respect was obsolete, that might be a legitimate ground for the conclusion that the Mitakshara was merely repeating the words of Manu without inquiring whether the rule survived in force when the Mitakshara was written. If a commentator later than the Mitakshara used similar language, that might lead to a legitimate inference that, though in force at the date of the Mitakshara, the rule had subsequently become obsolete. It is argued that there is one of each suggested class of authorities, Visvarupa of the first and Sarasvati Vilasa of the second. For practical purposes we may take Yajnavalkya as dating approximately A.D. 350, the Mitakshara as about A.D. 1000, Visvarupa as about A.D. 800 and the Sarasvati Vilasa as about A.D. 1500. There are some authorities who think that the Sarasvati Vilasa was of an earlier date, but in any event it is substantially later than the Mitakshara.

I shall deal first with Visvarupa. The existing text is inscribed on a cadjan found at Calicut in the late seventies and was translated by Mr. S. Sitaram Sastri. I am totally unable to ascertain that any competent

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scholar has scrutinized its claims to be regarded as what it purports to be either from the point of view of paleographical, linguistic or historical standards. This is not a critical country and the moment it was produced, it was held at once to be what it purported to be and has apparently passed as such without question since. That such discoveries very often fail to stand the slightest critical test will be seen by any one who has the curiosity to peruse page 12 of Mr. Burnell's preface to the Vyavahara Nirnaya where he exposes the imposture of a treatise which had been readily accepted as a genuine record of the customs of South Kanara passing under the name of Aliyasantana Kattu Kattale. I do not profess to have any beyond general grounds for questioning the authenticity of this single text of Visvarupa. I content myself with saying that I decline to act upon it until its pretensions have been scrutinized by some competent critic of Sanskrit texts.

It runs as follows (page 15) :

"The blind and the rest, who are not outcaste, however, have a right to the grandfather's estate. Such is the custom."

It is apparent that the author treats the mandate which he quotes as a mere moral maxim, opposed to the rule of law which he considers to be established by his text and if the expression "grandfather's estate" means no more than "ancestral estate," the text of Visvarupa need mean no more than that of the Mitakshara, and the right may be a mere right to maintenance or at most a capacity to transmit heritable blood.

With regard to the Sarasvati Vilasa, the first observation to be made is that made by the learned Chief Justice in the course of the argument that, if the author wished to say that the text of the Mitakshara on this point was obsolete, he could perfectly well have said so in terms. Further in any event the true explanation of

the passage in the Sarasvati Vilasa is to my mind undoubtedly that given by TURNER, C.J., in *Krishna v. Sami*(1), where he points out that the distinction which is being drawn is not that between those who are capable and those who are incapable of inheriting, but between those who are *share-takers* in the sense that they are persons capable of transmitting heritable blood though they may not themselves be able to enjoy the heritage owing to their disqualifications, and *share-enjoyers* who are not merely capable of transmitting heritable blood but also of enjoying their shares themselves in their life-time.

As against these two very doubtful texts there is a mass of authority which is all the other way, which recognizes to the full the exclusion of the blind in the sense of the congenitally blind and accepts the statement of the law contained in the Mitakshara. I will enumerate these texts (most of which are to be found in Setlur's collection) with their approximate dates :

Madana Parijata	...	...	1100	A.D.
Smriti Chandrika	...	...	13th	century.
Vivada Ratnakara	...	...	1300	A.D.
Dayavibhaga of Madhava	...	...	1400	"
Dayabhaga of Jimutavahana	...	...	1400	"
Vivada Chintamani	...	...	1450	"
Daya Tattva	...	...	1500	"
Viramitrodaya	...	...	1620	"
Dayakrama Sangraha	...	...	1750	"

and Jagannadha's Digest for what it is worth. Writers of modern text-books on Hindu Law also treat the rule as subsisting,—Sir Thomas Strange in 1830, T. L. Strange in 1856, Mayne in 1878, Sarvadhikari in 1880 and Trevelyan in 1890. It is quite true that no express decision exists to the effect that a man blind from birth cannot

(1) (1886) I.L.B., 9 Mad., 64 (F.B.).

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inherit but there are several decisions that assume it, culminating in the pronouncement of the Privy Council in *Gunjeshwar Kunwar v. Durga Prashad Singh*(1).

The only other matter which I need deal with is the argument that the rule of exclusion in the Mitakshara applies only to those who take by succession and not to those who take by survivorship. The answer to this is that Chap. II, section 10, placitum 1, begins with the statement that the rule of exclusion propounds an exception to *dayagrahana* (taking of daya) by the sons, widows and other heirs and the reunited members and this by necessary implication refers one back to the definition of *daya* in the beginning of Chap. I. *Daya* apparently means property considered in the light of something which in the natural course of events will pass from one person to another and includes both *Apratibandha daya* and *Sapratibandha daya* (unobstructed heritage and obstructed heritage) the former passing by survivorship to the sons, etc., and the latter passing by succession to widows and other heirs. This is the reference to *Vibhaga* or partition in placita 6 and 7, and placitum 8. also shows that the word *dayagrahana* includes within its scope both property which passes by survivorship and that which passes by succession.

For these reasons I am of opinion that it must be regarded as an unabrogated rule of Hindu Law that a congenitally blind person is excluded from succession and that it cannot be described as obsolete in any other sense than that of being repugnant to more modern and more enlightened ideas than those which prevailed at the time of the smritis and the commentators. It can of course be repealed by the Legislature and we are informed that a Bill to that effect is now before the Legislative Assembly, the author of which was once a

(1) (1918) I.L.R., 45 Cal., 17 (P.C.); s.c., 44 I.A., 299.

Judge of this Court. But until that step is taken and the proposal passes into law, I feel constrained to say that the Courts of this country have no option but to enforce the rule with whatever reluctance and with whatever consciousness of its repugnance to the present sentiments of the Hindu people.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

SECRETARY TO THE BOARD OF REVENUE
(INCOME-TAX), REFERRING OFFICER,

1922,
April 25.

v.

MAHOMED SHERIFF HUSSAIN MEAH SAHIR & Co.,
ASSESSEE.*

Income-tax Act (VII of 1918 and XVII of 1920), sec. 2, sub-section 12-A—"Registered Firm"—Collector's certificate—Income for prior year when firm not registered—Whether can be adjusted in year when certificate in force.

An adjustment can be made during a financial year in which the Collector's certificate of registration under section 2, sub-section 12-A, of the Indian Income-tax Act is in force in respect of the income of the firm for the previous year when the firm had not been so registered.

CASE stated under section 51 of Act VII of 1918 and section 6 of Act XIX of 1920 by the Secretary to the Board of Revenue (Income-tax), Madras.

The following are the material portions of the Letter of Reference from the Secretary to the Board of Revenue:—

* * * * *

"2. Under the Super-tax Act (XIX of 1920) a registered firm is not liable to super-tax. Under the rules framed by the

* Referred Case No. 1 of 1922.

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Madras Government for the registration of firms an assessee has to make an application to the Collector for registration not later than a date fixed by the Collector and the certificate of registration granted by the Collector should be renewed from year to year. Such registration has effect up to the end of the financial year in which the certificate is granted or renewed. Under these rules the appellants, Messrs. Mahomed Sheriff Hussain Meah Sahib & Co., first applied to the Collector of Madras to register their firm on 30th March 1921. The last date prescribed by the Collector for such applications for the financial year 1920-21 was 20th December 1920. The Collector registered the appellant firm with effect from 1st April 1921, that is for the official year 1921-22. The Collector assessed them to super-tax for the year 1920-21 as they were not a registered firm in that year. The appellants appealed against this assessment to the Board of Revenue requesting that they should be treated as a registered firm for the year 1920-21 but this the Board declined to do.

3. In the year 1921-22 the Collector adjusted the super-tax assessment under section 19 of the Income-tax Act (VII of 1918) and section 6 of the Super-tax Act (XIX of 1920) but did not assess them to super-tax for the year 1921-22 as they were a registered firm for that year. The appellants have appealed to the Board contending that no adjustment could be made in the year 1921-22 in which the certificate of registration was in force, and have requested a reference to the High Court on this question.

4. Under section 19 of the Income-tax Act, the assessment on every assessee made under section 14 of the Act in any year should be adjusted in the following year or, in certain circumstances in the same year, when the actual income of that year is known. This adjustment must be made whether the assessee has assessable income or not in the following year or, on the motion of the assessee's representative in interest, even when the assessee dies after the assessment (commonly called the "provisional assessment") is made. The Act does not provide the total refund of the tax paid "provisionally" in the previous year simply because the assessee has ceased to exist before the adjustment is made. In the

present case the appellants' firm was an assessee under the Super-tax Act (to which section 19 of the Income-tax Act applies) in 1920-21 though it ceased to be an assessee in the year 1921-22 by reason of their registration, and the tax paid by them in 1920-21 has to be adjusted and the balance payable to them or recoverable from them on adjustment has to be paid or recovered in the year of adjustment. The tax claimed on adjustment is not in respect of the year in which they were registered. It relates to the income of the year in which they were still unregistered. If it had so happened that the firm was entitled to a refund on adjustment, appellants would probably have been much aggrieved had they been refused the refund on the ground that no adjustment could be made in respect of a registered firm.

5. The Board feels no doubt that the appellants' claim is inadmissible, but as they have requested a reference and the policy of Government as indicated by the new Income-tax Bill is not to withhold such references, the Board submits the case for the decision of the Honourable Judges."

Government Pleader for the Crown.

D. Chamier for assessee.

JUDGMENT.

SCHWABE, C.J.—This reference, under section 51 of the Income-tax Act and section 6 of the Super-tax Act now in force, is as to "whether an adjustment can be made during a financial year in which the Collector's certificate of registration under section 12-A is in force in respect of the income of a firm for the previous year in which the firm was not registered." In my judgment it clearly can. The whole scheme of income-tax and super-tax in this country is based on the principle that the tax is assessed at the beginning of the year on an anticipated income and is paid in anticipation on the assessment; but when the year is over and the actual earnings have been discovered, there is not a fresh assessment but an adjustment. As far as super-tax is

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concerned, a registered firm is exempt from super-tax as a firm, although the partners are personally liable for super-tax, if their separate incomes are large enough to bring the provisions of the Super-tax Act into operation against them.

In the year 1920-21 this firm of Messrs. Mahomed Sheriff Hussain Meah Sahib & Co., through carelessness or for some other reason which I am not able to appreciate, having made its return for the assessment purposes at Rs. 90,000 omitted to get registered in time to take advantage of the exemption granted to registered firms. At the end of the year or the beginning of the next year in due course there was an adjustment, because it turned out that the profits were Rs. 1,37,000 instead of Rs. 90,000. It is contested that adjustment cannot be made because under section 19 of the Income-tax Act, VII of 1918.

"When the Collector has, in any year after the commencement of this Act for which income-tax is leviable, ascertained the total income actually received"

is said to mean in any year in which super-tax is leviable, and it is argued that, as this firm was registered in the following year, i.e., 1921-22, and therefore escaped from super-tax that year, the Collector has no power to call for an adjustment for the preceding year. In my judgment, that is an entire misinterpretation of the section. The section simply means that, if at the end of the year it is found that the amount at which the income was assessed has been either exceeded or reduced, there is a right and a duty to deal with the matter accordingly. For the year in question this firm was not registered, and not being registered they must be dealt with on an adjustment in the same way in which they were dealt with on assessment, and the amount on which they have to pay is the amount

actually earned in 1920-21 and not the anticipated earnings for the year.

It follows that the answer to the question is in the affirmative.

The costs of the reference shall be paid by the assessee, and such costs shall include the Government Pleader's fee. The Taxing Officer will fix a reasonable fee under the terms of rule 38 of the Appellate Side Fee Rules which is in these words:

"In cases in which the subject matter of the claim does not admit of valuation, the Court, or in the case of the High Court, the Taxing Officer, shall fix a reasonable fee, regard being had to the time occupied in the preparation and hearing of the case and the nature of the questions raised therein as also to the minima fees prescribed by rule 31."

It cannot be right that there should be a fixed amount payable to the Government Pleader as fee in respect of a case which may last a week and may take days for preparation, and that the same fixed amount should be payable in respect of a case like this which cannot take very long to read and prepare for argument, and it cannot be right that the assessee who has a small case is to pay an unnecessarily large fee to the relief of an assessee who has a large case.

OLDFIELD, J.—I agree.

OLDFIELD, J.

COUTTS TROTTER, J.—I agree.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Outts Trotter and Mr. Justice
Kumaraswami Sastri.

1922,
Aug. 28.

PENDURTI JOSEPH (PETITIONER), PETITIONER,

v.

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|----------------------------------|----------------------------------|
| 1. PENDURTI RAMAMMA (RESPONDENT) | } RESPONDENT,
CO-RESPONDENT.* |
| 2. HOYI GURUVULU (CO-RESPONDENT) | |

Divorce—Indian Divorce Act (IV of 1869), sec. 7—Petition by husband for divorce on the ground of adultery of wife—One of the adulterers, not made a co-respondent—Evidence of husband or wife alone, whether sufficient—Corroboration, necessity for—Nature of corroboration—Joinder of known adulterer as co-respondent—Settled principles and rules of practice of English Matrimonial Court, application of, in India.

By section 7 of the Indian Divorce Act (IV of 1869), in all suits and proceedings under the Act, the High Courts and the District Courts shall act and give relief on principles and rules which, in their opinion, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

There is a definite established practice in the Court for Divorce and Matrimonial Causes in England which should be followed in India that the evidence of the husband or the wife alone is never to be accepted without corroboration either by witnesses or at least by strong surrounding circumstances.

Another rule in the English Courts, which should be followed in India, is that where charges of adultery are made against a known person, that man must be made a co-respondent unless the Judge shall otherwise direct.

CASE referred by T. S. TYAGARAJA AYYAR, the District Judge of Gōdāvari at Rajahmundry, for confirmation by the High Court under section 17 of the Indian Divorce

Act (IV of 1869) of the decree *nisi* passed in Original Suit No. 36 of 1920.

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The petitioner instituted the present suit for divorce under the Indian Divorce Act (IV of 1869) in the District Court of Gōdāvari against his wife the first respondent, on the ground of adultery alleged to have been committed by her with one T. Jivaratnam who was not joined as a party to the suit, and with another person who was joined as a co-respondent in this suit. The defendants remained *exparte* in the lower Court. There was only formal evidence of marriage and the evidence of the plaintiff (the husband) as to the alleged adultery of the wife with the persons known and named by him. In the absence of other evidence to the contrary, the learned District Judge accepted the evidence of the husband and granted a decree *nisi*, subject to confirmation by the High Court under section 17 of the Act. The case came on reference to the High Court for confirmation of the decree *nisi* under section 17 of the Act.

JUDGMENT.

SCHWABE, C.J.—This is an application to confirm a decree for divorce given by the District Court of Gōdāvari. It involves questions of considerable importance, and questions our views upon which it is most desirable should become public property. The suit was a simple one. The petitioner claimed divorce from his wife on the ground, as shown in his petition, of adultery with two persons, the first a man called T. Jivaratnam who is not cited as a co-respondent in the suit and the second Beyi Guruvulu who is cited as a co-respondent in the suit. The co-respondent did not appear and the evidence, except the formal proof of the marriage, consisted entirely of the evidence of the petitioner, and that evidence was a statement that two weeks after the

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marriage the respondent was found by him to be in adultery with one Jivaratnam, and that she admitted her guilt before the elders of his church.

As regards the second case against the respondent, his evidence was that the co-respondent contracted intimacy while she was at Pithapuram and that she is now living at Bezwada with this co-respondent. Further he produced a letter in which she said that he could marry any girl whom he liked according to his pleasure and added "this is the deed of relinquishment caused to be written and given with my freewill."

By section 7 of the Indian Divorce Act of 1869—

"The High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being, acts and gives relief."

In this case the learned Judge expressed the view that, as she was *ex parte* and he saw no reason to disbelieve the petitioner's evidence, a decree should be granted. That is absolutely contrary to the principles and rules on which the Court of Divorce and Matrimonial Causes in England acts. There is a definite established practice there that the evidence of the husband or the wife alone is never to be accepted without corroboration either by witnesses or at least by strong surrounding circumstances, and the reason for that rule is that, but for it, there would be nothing easier than a collusive divorce, there would be no necessity for the respondent to appear and the petitioner need only go into the witness-box and say that the respondent committed adultery. In this case there was no corroboration of any kind. I doubt if there was any evidence of adultery, because what the petitioner said was that he discovered that she was committing adultery. He says that she is living in the

house with the named co-respondent. He does not say how he knows or whether it is hearsay, or give any facts. It must be understood that it is absolutely essential that there should be corroboration.

• Secondly there is a rule in England that where charges of adultery are made against a known person, that man must be made a co-respondent unless the Judge shall otherwise direct. It has been put in the shape of a rule in English Divorce Rules No. 4—

"A husband filing a petition for dissolution of marriage on the ground of alleged adultery, the alleged adulterers shall be made co-respondents in the cause, unless the Judge Ordinary shall otherwise direct."

Under that provision, if the name is unknown the Judge can dispense with that co-respondent. In this case the first alleged act of adultery is with a known man. He is not added as a co-respondent nor is there any application to the Court for dispensing with his being made a co-respondent. The result is that we cannot confirm this decree.

As regards the evidence in respect of Jivaratnam, he "not having been a party to the suit, that evidence ought not to have been admitted. As regards the evidence against the co-respondent there is no corroboration as I have pointed out. That corroboration in a case of this kind can in all probability easily be obtained. It is only necessary for some one who knows the respondents by sight to give evidence that he has been to the place where it is alleged that she is living in adultery with the co-respondent and that he has seen them living together under conditions that lead to presumption that they are guilty. If there is no person available such as a relative of the petitioner who knows her by sight, the petitioner himself must go with somebody else, e.g., the local police, and identify the person living with the co-respondent as being his wife.

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The proper course in this case is to set aside this decree and remand the case to the District Court so as to enable the petitioner to adduce corroborative evidence in respect of the charge against the co-respondent or if so advised, and he finds that course necessary, to join the other alleged adulterer as a co-respondent and adduce evidence in respect of that act of adultery.

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COUTTS TROTTER, J.—I am of the same opinion. This difficulty arises because people do not take the trouble in this country to get up divorce cases properly and do not appreciate that the Courts of this country are bound of themselves to guard against the possibility of collusive litigants; I agree that this case should be retried in the way suggested by my Lord.

KUMARA-
SWAMI
SASTRI, J.

KUMARASWAMI SASTRI, J.—I agree with my Lord the Chief Justice.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice
Krishnan.

NARANTAKATH AVULLAH (COMPLAINANT),
PETITIONER,

v.

PARAKKAL MAMMU AND FOUR OTHERS (ACCUSED),
RESPONDENTS.*

*Indian Penal Code (XLV of 1860), ss. 79, 494—Bigamy—
Muhammadan husband becoming Ahmediyan, whether an
apostate—Wife marrying again, whether guilty of bigamy
—Good faith and mistake of law whether good defences.*

The essential doctrine of the Muhammadan religion is that God is only one and that Muhammad is His Prophet; hence

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Ahmediyans who also hold that belief are only a sect of Muhammadans, notwithstanding the fact that they differ from other Muhammadans in some other matters of religious belief. Hence on a Muhammadan becoming an Ahmediyan he does not become an apostate and his wife is guilty of bigamy if she marries another during his lifetime; *Hakim Khalil Ahmad v. Malik Israfi and Malik Israfil v. Hakim Khalil Ahmad* (1917) 2 Patna L.J., 108, referred to.

Good faith and mistake of law are no defences to a charge of bigamy. *The Queen v. Tolson* (1889) 23 Q.B.D., 168, distinguished. The opinion of HOLMWOOD, J., in *Abdul Ghani v. Azizul Huq* (1912) I.L.R., 39 Calc., 409, dissented from.

The High Court will entertain a revision against an acquittal even at the instance of a private party when the question is one of public importance involving the personal status of a large section of a community.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of V. P. Row, Sessions Judge of North Malabar Division, in Case No. 12 of the calendar for 1920.

The complainant preferred this Revision Petition against the acquittal of the accused.

The facts are given in the judgment of KRISHNAN, J.

Zafrulla Khan of the Lahore Bar and *M. C. Parthasarathi Ayyangar* and *P. V. Venugopala Ayyar* for petitioner. This revision though against acquittal is competent as it affects the status of a big sect of Muhammadans. Ahmediyans are only a sect of Muhammadans. Their religion does not differ in essential particulars from Muhammadanism. The essential doctrine of Muhammadanism is the belief that God is one and that Muhammad is His Prophet. The other differences between the two sects are not vital; see *Hakim Khalil Ahmad v. Malik Israfi and Malik Israfil v. Hakim Khalil Ahmad* (1), *Maula Baksh v. Amir-ud-din* (2), *Amir Ali's Muhammadan Law*, Vol. II, pages 36, 111 and 112; Tyabji's

(1) (1917) 2 Patna L.J., 108

(2) (1920) I L.R., 1 Lahore, 317.

* Criminal Revision Case No. 366 of 1921.

Muhammadan Law, page 57. Abdur Rahim's Muhammadan Jurisprudence, pages 253, 249. Wilson's Anglo-Muhammadan Law, page 9; *Ata Ullah v. Azim Ullah*(1); *Abdul Razak v. Aga Mahomed Jaffer Bindanim*(2). Believing in good faith that the husband became an apostate by turning an Ahmediyan is no defence to the charge of bigamy. *Reg v. Sambhu Raghu*(3), *Emperor v. Bai Ganga*(4), *Mst Nandi v. The Crown*(5), Gour's Penal Law, Vol. II, page 2248. He distinguished *Abdul Ghani v. Azizul Huq*(6).

Public Prosecutor (J. C. Adam) for the Government remained neutral.

C. Madhavan Nayar for accused.—Revision against acquittal is incompetent except in matters of grave public importance. The accused is not guilty since she acted in good faith, after taking expert opinion from competent Muhammadan religious teachers; see section 79, Penal Code. Ahmediyan faith is different from Muhammadanism. The one differs from the other in at least six important particulars and is inconsistent with it.

[The six particulars are noted in Mr. Justice KRISHNAN's judgment.]

JUDGMENT.

JLDFIELD, J.

OLDFIELD, J.—We are asked to revise the acquittal of the fifth respondent on a charge of bigamy punishable under section 494, Indian Penal Code, and of the other respondents on subsidiary charges. The petitioner is the complainant who prosecuted as fifth respondent's husband; and the Public Prosecutor who has had notice, has under instructions taken no part in the proceedings. We should not ordinarily proceed at the instance of a private party in revision of an acquittal; and we do so

(1) (1890) I.L.R., 12 All., 494 (F.B.). (2) (1894) I.L.R., 21 Cal., 666 (P.O.).
(3) (1870) I.L.R., 1 Bom., 347. (4) (1917) 12 Bom. L.R., 56.
(5) (1920) I.L.R., 1 Lahore, 440, 442. (6) (1912) I.L.R., 39 Cal., 409.

here only because we are satisfied that a question of public importance relating to the personal status of a substantial part of the Muslim community is raised.

* The question is whether petitioner's adherence to Ahmediyan tenets made him a *murtad* or apostate from Muhammadanism. If it did, it had, it is not disputed, the effect of dissolving his admitted marriage with fifth respondent; and such dissolution prior to her remarriage with third respondent is her first and principal defence to the charge. The reply attempted is that Adamadiyas are merely a sect of Muhammadans, their divergences from ordinary Muhammadanism not involving abandonment of that creed or making them schismatics. Some objection has been taken to our entering on this controversy in revision, by petitioner on the ground that it is purely one of fact since only his religious views and their orthodoxy are in question, and by respondents on the ground that it relates only to degrees of orthodoxy which the Court has no business to estimate. But although I feel the difficulty involved in an attempt to deal with matters, with which I am necessarily unfamiliar and although I appreciate the improbability that our decision can commend itself to those with whom personal associations and devotional sentiment must weigh more than the materials on which we have to proceed, the issue cannot be avoided. For it is one of mixed law and fact inasmuch as it relates substantially and ultimately to the personal status, which petitioner's religious views determine and to say that only degrees of orthodoxy are in dispute is to beg the question whether the Ahmediyans' deviation from Islam is such as entails abandonment of any essential thereof.

* The lower Court has attempted very little by way of direct ascertainment whether that deviation does so, its conclusion appearing really to rest on the finding that

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the Ahmediyas are regarded as apostates by orthodox Muhammadans and the principle that

“what the doctrine and faith preached in the Koran are is to be decided, not according to the interpretation put on it by individual persons, but according to the interpretation generally accepted and adopted by Mussalmans as a whole.”

And this test, *securus judicat orbis* may in appropriate circumstances have its value. But to apply it fairly, we must make sure that the judgment relied on is really general and had been reached by the community as a whole and that it has been reached after due deliberation and the passing of sufficient time for the disappearance of the prejudice which new beliefs must always incur. Ahmed, whom the Ahmediyas follow, died, we were told, in the Punjab in 1908; and in the fifteen years, which have passed, it is difficult to suppose that Islam or even Islam in India can have come to any mature conclusion on his teachings. In fact it has not been shown that it has done so. For, of 4th, 6th and 7th defence witnesses whose evidence alone is relied on, the first is the son of the Government Kazi of Madras, who was formerly an Assistant Kazi and Arabic Professor in a private Madrassa in this city and describes himself as now chief priest in a district in the Nizam's Dominions, whilst the other two are a kazi and a *musaliar* or religious leader in Malabar. The evidence of the second attracts suspicion to the extent of his acquaintance with Ahmed's writings and the third said that there was “no one in the Muhammadan world, whose opinion on religious matters was binding on the conscience of Mussalmans.” These persons are not shown and do not appear to have more than a local influence and reputation; and there is nothing before us except their assertions, in some instances of doubtful value. In the question propounded to the

father of D.W. 4. in the fatwa Exhibit I, “Religious decrees of learned men of Arabia and India” declaring Ahmed and his followers apostates, are referred to; but none is specified either in the question or answer, and none was produced at the trial. In these circumstances it has not been established that the Muslim community either generally or in India has reached any decision which we can regard as conclusive.

This failing, discussion has turned on the character of the divergences between the teaching of Ahmed and the orthodox creed. The former are enumerated, it is not disputed, correctly by the lower Court. But as regards the latter the parties are at variance, petitioner contending that the formula “There is one God and Muhammad is His Prophet” is exhaustive; respondents contending that we must take account of other doctrines sanctioned by the Koran or other authorities. Petitioner in support of his contention relies on the judgment of MAHMOOD, J., in *Queen-Empress v. Ramzan*(1), those of EDGE, C.J., and MAHMOOD, J. in *Ata-Ullah v. Azim-Ullah*(2), and on *Maula Baksh v. Amir-ud-din*(3), as showing that monotheism and belief in Muhammad as God's prophet are the only essentials. But it is clear that the question in those cases was only between one sect and another or the general body of Muhammadans as to the right to worship in a mosque or the validity of a wakf, not as it is here, between orthodoxy and alleged schism. To decide between them, something more is evidently required than the bare formula referred to above. For, the latter portion of it cannot be taken as requiring a belief only in the history or legend of Muhammad without reference to the acceptance of his message and ascertainment of its terms and of the

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(1) (1835) L.L.R., 7 All., 481 (F.B.). (2) (1890) 1 L.R., 12 All., 494.
(3) (1920) L.L.R., 1 Lahore, 317.

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legitimacy of the constructions placed on them later, of which in fact in the case of the Ahmediyas respondents complain. The materials for a conclusion which the parties have provided are the evidence of the witnesses already mentioned, the fatwa Exhibit I, a book M.O. I, "The claims and teachings of Ahmed" and a pamphlet M.O. V, "What distinguishes Ahamedees from non-Ahamedees." No reliance was placed before us on the works exhibited as M.O's. II, III, IV.

It is first to be observed that the Ahmediyas statedly at least, emphasize their adherence to the Islamic formula. In M.O. V, Ahmed's principles are stated in his own words, beginning :

"We are Muslims by the Grace of God ; Mustafa, the Holy Prophet of Arabia is our leader and guide. The wine of our spiritual knowledge is from the cup of the Book of God, which is called the Koran. Every Prophethood has found its culmination in that Messenger of God, whose name is Muhammad. The revelation and inspiration that we receive have not been granted us independently, but it is through him that we have received this gift ;"

and the pamphlet goes on like the manifestations of other religious developments, to state the distinctive features of Ahmed's teaching as a return to the early fervour of the recipients of the original revelation, an abandonment of wordly affairs and political greatness for the earlier and more spiritual methods of propagating the faith and an eradication of the errors, into which Moslems from time to time have fallen. And similarly in M.O. I, the first chapter maintains Monotheism and the supremacy of the Koran and there are (page 106), extracts from the latter under headings

"The Almighty God declares that Islam is the perfect and chosen religion." "The Almighty God commands every soul to follow no other religion than Islam"; and "Muhammad is the Prophet of God for all the nations of the world."

The form moreover to be signed on initiation (page 104) runs

"I bear witness that there is no God but Allah. He is one, having no partner, and Muhammad is the servant and Messenger of God."

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All this would seem to involve a plenary acceptance of Muhammadanism and in fact the respondents' objection is to the Ahmediyan additions to it and their alleged inconsistency with it. But I have in my opinion been shown no distinct authority as to which doctrines of Islam are regarded as fundamental or the extent to which additions to them, deviations from them or inconsistencies with them are permitted. Seventh defence witness no doubt said generally that any Mussalman who took away from, added to, or tampered with the Koran was a *murtad* and 4th defence witness, that among sects the differences were not in matters of faith, but in ritual; and there is also the judgment of MAHMOOD, J., in *Queen-Empress v. Ramzan*(1), in this sense. But 4th defence witness also explained his description of some sects as *murtads* on the ground that their deviations from the teaching of the Koran were on fundamental points, refusing however to regard the Shi'as' disbelief in the first three Caliphs as a deviation from the faith at all. That private judgment and analogical deduction are in appropriate circumstances and to a greater or less extent, legitimate methods of ascertaining the law is recognized in the text books ; (Amir Ali's Muhammadan Law, Vol. II, pages 11 to 14, Abdur Rahim's Muhammadan Jurisprudence 25); and we have not been shown how they are not also legitimate in theology so long as fundamental principles are maintained and the question is only of the development, to which

(1) (1885) I.L.B., 7 All., 481 (F.B.).

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every creed must be subject, so long as it retains life and growth and adapts itself to altered conditions. This in fact is enough to justify the Ahmediyans in their faith in the six alleged deviations from orthodoxy as enumerated by the lower Court. For their abandonment of the sword for peaceful argument as the method of propagation of Islam has been inevitable since the cessation of militant conditions and the permeation by Muhammadans of countries to whose law they owe allegiance; and their refusal to acknowledge the spiritual supremacy of the Sultan of Turkey cannot, if only for chronological reasons, be fundamental.

The remaining four points of divergence referred to by the lower Court are set out in its judgment, the evidence and Exhibit I, unfortunately in very general language, which was not made more specific before us. But they amount, as I understand them, to assertions that Muhammad and other earlier recognized prophets, for instance Jesus Christ, have not been the sole channels of communication between God and Man; that others, for instance Buddha, Rama and Krishna have been bearers of the divine message; and that the last of such messengers was Ahmed himself who is to be identified with the prophet "who will come after me and whose name will be Ahmed" referred to in Koranic verse quoted in Exhibit I; and there is also imputed to the Ahmediyans a novel doctrine that Jesus Christ is still dead and buried and not in heaven. As regards this doctrine it is sufficient that it is presented in Exhibit V (page 49) the only source of information available, as founded on the interpretation of the Koran and tradition and that it has not been shown how rejection of any dogma, which is fundamental or affects the position and supremacy of Muhammad or has been defined by any final or general authority is involved.

As regards the remaining points, it is obvious and the references in the latter part of 4th defence witness's evidence indicate that much must depend on the sense, in which the expressions used by Ahmed are understood and the significance of his teaching as a whole. If, for instance, he did (and we have not been referred to any particular passage) speak of Krishna and Rama as heavenly messengers or avatars, the corrective is given in the far less definite claim at page 160 in Exhibit V.

"I do not say it to please anybody, but God has revealed to me that Krishna and Rama were also righteous servants of God and had true connexion with Him;"

and if he did identify himself with the Promised Messiah, he explained at page 143 that

"the perfect follower of God's revelation cannot be called an independent prophet, for this is a disrespect towards the prophethood of Muhammad"

and in the note on page 144 that

"no prophet, who is also a law-giver, can appear after the Holy prophet, even from among his followers. For this door is completely closed."

That Ahmed identified himself with the Ahmed whose advent is foretold in the verse above referred to, can involve no unorthodoxy, much less rejection of any fundamental tenet, unless what we have not been shown, all speculation as to the fulfilment of Koranic prophecy is forbidden; and the quotation in Exhibit I from the Alamgiri Fatwa must be inconclusive in the absence of information as to its context or the method, by which its author would have reconciled it with the Koranic text. Reference has been made to the extent to which Ahmed statedly accepted and proceeded from the fundamental tenets of Islam. It was then for respondents to show that his additions to and divergences from them involve their abandonment; and it is not possible on the

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In these circumstances and for this reason the petition is dismissed.

*KRISHNAN, J.—This is a Criminal Revision Petition filed by the complainant against the order of acquittal, by the learned Sessions Judge of North Malabar, of the accused, in Sessions Case No. 12 of 1922, of whom the 5th accused a Mopla woman was charged with bigamy under s. 494, Indian Penal Code, and the rest with abetment thereof. The Sessions Judge found that the 5th accused was lawfully married to the complainant but that he subsequently joined the new sect of Ahmediyans and that thereupon after obtaining the opinions of certain Muhammadan theologians that his act amounted to apostacy and severed the marriage tie, she married a second time the third accused in the case. She had also pleaded that the complainant had actually divorced her but that plea was found against by the judge and has not been renewed before us. On these findings the question to be decided was whether her second marriage amounted to bigamy and that depended on the further question whether the act of an orthodox Muhammadan in joining the Ahmediyan sect amounted to apostacy under Muhammadan law or not; for it is conceded on both sides that one of the recognized consequences of apostacy by a Muhammadan is to sever his marriage tie with his wife. All the authorities are agreed on that point. The learned Sessions Judge has upheld the contention of the accused that her husband did become an apostate by joining the Ahmediyans. He has also held that even if that view was wrong, the woman acted with due care and caution and bona fide believed that her first marriage had come to an end in law and that she was free to marry again and therefore she was not guilty as there was an absence of *mens rea* or guilty

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materials before us to hold that they do so. It is satisfactory that a similar conclusion was reached in *Hakim Khalil Ahmad v. Malik Israfi and Malik Israfil v. Hakim Khalil Ahmad*(1). It follows that petitioner is not a *murtad* and his marriage with 5th respondent is subsisting.

This conclusion makes it necessary to consider the further defence accepted in the alternative by the lower Court that the respondents are entitled to acquittal, because they acted without *mens rea* and in the honest belief that the marriage was dissolved. This is unsustainable. For there is not really any question here of the doctrine of *mens rea* or of the application of section 79, Indian Penal Code, since the respondents acted under a mistake of law or under a mistake of mixed law and facts; *The Queen v. Tolson*(2) being distinguishable on that ground. I am with all respect unable to follow the authority relied on by the lower Court, the judgment of HOLMWOOD, J., in *Abdul Ghani v. Azizul Huq*(3) and must hold that, whatever weight the good faith of respondents might deserve, if the proper sentence to impose were in question, it is irrelevant to their liability to conviction.

The case however is before us in revision and with reference to the last clause of s. 489, Criminal Procedure Code, the only course open to us is to order a retrial. Mr. Zafrullah Khan for petitioner does not ask us to take this course, since he desires only to obtain an authoritative settlement of the questions argued. Further proceedings are in my opinion unnecessary since respondents acted in a mistaken but honest belief as to the law and only nominal sentences would be the result.

(1) (1917) 2 Patna L.J., 108.

(2) (1889) 23 Q.B.D., 168.

(3) (1912) I.L.R., 39 Cal., 409.

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intention. He thus acquitted all the accused on those two grounds and we have to consider in revision the correctness of his views on the two points.

Before doing so it is necessary to mention that a preliminary objection was taken by the learned counsel for the accused to our hearing the petition on the ground that no revision lies against an order of acquittal. It cannot however be said that the High Court has no power to interfere in revision with an order of acquittal for there is no such restriction in the sections of the Criminal Procedure Code which deal with our powers in revision (sections 435 and 439). On the other hand clause (4) of s. 439 contemplates orders of acquittal being revised, for it lays down a restriction on what the High Court can do on such a revision. It enacts that the Court cannot convert a finding of acquittal into one of conviction. This Court, however, as a matter of sound and recognized practice has always refused to revise orders of acquittal at the instance of private parties except in very exceptional cases. This, however, is in my opinion one of those exceptional cases as it raises two important questions of law, one of them of great interest to the new and growing class of Ahmediyans and to the Muhammadans in general, and the decision of the case turns entirely upon the decision of those two points of law and not on any appreciation of evidence. In these circumstances we have decided to overrule the objection.

Turning now to the question of apostacy raised, it is undoubtedly a question of Muhammadan theology to say that deviation from the recognized doctrines of Muhammadanism would amount to apostacy; but as civil rights and legal status of parties are based on its decision, we must decide it ourselves. The accused has called three witnesses of the orthodox party who assert themselves to be men learned in Muhammadan theology

and who say that the adoption by a Muhammadan of the tenets of Gulam Ahmed Mirza the founder of the sect of Ahmediyans amounts to apostacy under that law; but we cannot accept their opinion as settling the question as argued for the accused, particularly as they are interested as orthodox Muhammadans in denouncing the members of the new sect as unbelievers and as they have not given satisfactory reasons for their opinions. As pointed out by Sir ABDUR RAHIM in his Muhammadan Jurisprudence, page 250, some people are too prone to charge others with unbelief and treat them as heretics. But the correct law is that when heretical doctrines are opposed to clear and indisputable texts they would amount to unbelief and not otherwise. Consensus of opinion as a source of law or the doctrine of *Ijma* is not universally recognized among Muhammadans; but even if we take consensus of opinion as a proper source of law there has not been, as pointed out by my learned brother, such a lapse of time since the founding of the new sect of Ahmediyans as to have developed any such general consensus of opinion regarding the status of its members. We must therefore consider the doctrines of Ahmediyans and see whether their adoption by Muhammadans would amount to heresy and make them apostates or *murtads* and put them outside the pale of Muhammadanism. It may be observed that in doing this we must take the doctrines as propounded by Ahmed himself and accepted by his followers and not the distorted version of them as given by their opponents. It is accepted by the complainant that the Ahmediya doctrines are correctly stated in a small pamphlet by Mr. Sher Ali, B.A., and published by Sadr Anjuman Ahmediyya of Qadian, Punjab, entitled "What distinguishes Ahmadees from Non-Ahmadees" filed as an exhibit in this case. M.O. 5. The creed of Ahmed is

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set out in it on pages 2 and 3. It begins by saying

"We are Muslims by the Grace of God; Mustapha (the Holy Prophet of Arabia) is our leader and guide. The wine of our spiritual knowledge is from the cup of the Book of God which is called the Quran."

A perusal of what is stated in the pamphlet shows clearly that the Ahmediyans subscribe to the *Kalma* that there is no God but one God and Muhammad is His prophet, and unreservedly accept the prophethood of Muhammad and the supreme authority of the Quran. In fact it would seem that they differ from the orthodox Muhammadans only in some six points which are set out in the pamphlet and also by the learned Judge in his judgment.

They are briefly stated as follows:—

1. While both parties believe that God has been speaking to his prophets in the past the Non-Ahmadees hold that Muhammad was the last prophet with whom God spoke and since then He has not spoken to and will not speak to any until the end of time. The Ahmadees on the other hand believe that God continues to hold communion with His holy servants now as in the past.

2. While both sides accept that Muhammad was Khatamun-Nabiyyin (the seal of the Prophets) they differ as to its interpretation. Ahmadees say that it means that no new prophet can arise except as a follower of Muhammad and bearing his seal and not that no new prophet can arise at all as the Non-Ahmadees hold.

3. Ahmadees admit into the list of prophets before Muhammad world-teachers such as Zoroaster, Budha, Krishna and Ramachandra and this they say is according to the Koran but Non-Ahmadees refuse to acknowledge them as prophets. Of course the Ahmadees hold that Ahmed was himself a prophet of God but unlike the earlier prophets he got his prophethood through Muhammad who was made a prophet-maker by God.

4. Ahmadees believe that Jesus Christ was actually crucified, but he did not die on the cross. He came out alive and went to Kashmir and died and is buried there. Whereas

the Non-Ahmadees hold that Jesus was bodily carried away to heaven by God before crucifixion. The Ahmadees think that the prophecy of the second advent of Jesus is to be fulfilled not by Jesus coming back in person but by his spirit entering another man and they believe this has been fulfilled by the advent of Ahmed himself.

5. While the Non-Ahmadees believe that the promised Mahdi will carry on a holy war or Jihad and spread Islam by the sword, Ahmadees repudiate this doctrine and hold the promised Mahdi and the Messiah are the same and that he will spread Islam by arguments and heavenly signs and not by violence. They accept Ahmed as that Messiah.

6. Ahmadees deny the claim of the Sultan of Turkey to the Caliphate and hold that every Muslim is bound to remain loyal to the Government under which he lives and which protects him.

These are said to be the main differences. I agree with my learned brother in thinking that these differences are not sufficient to justify us in holding that the Ahmadees are not Muhammadans but apostates. As already stated they accept the *Kalma*, the prophethood of Muhammad and the authority of the Quran. These undoubtedly are the essential conditions for a person to be a Muhammadan and they are complied with by the Ahmadees; that would seem to make them Moslems governed by the Muhammadan Law. Sir Ameer Ali says in his book on Muhammadan Law, 4th Edition, Vol. II, page 36, that

"Any person who professes the religion of Islam, in other words, accepts the unity of God and the prophetic character of Muhammad is a Moslem and is subject to the Mussalman Law. So long as the individual pronounces the *Kalma* of *Tauhid*, the *Oredo* of Islam, it is not necessary for him or her to observe any of the rites and ceremonies or to believe in particular doctrines which imply Imam or belief"

and again on page 112

"Every person who acknowledges the Divine Unity and the messengership of the Arabian prophet is regarded as within the pale of Islam; nothing more is required."

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To the same effect is the opinion of Sir ABDUR RAHIM in his Muhammadan Jurisprudence, page 249, where he says the Islamic faith consists in acknowledging the authority of one God the Law-giver and the truth of Muhammad's mission as his prophet. Similar expressions of opinion are found in the judgment of MAHMOOD J., in *Queen-Empress v. Ramzan*(1), and in *Ata-Ullah v. Azim-Ullah*(2), which was a case relating to the sect of Wahabis; though the decisions in those cases referred to worship in a mosque, they are of value to show how eminent Muhammadan lawyers have looked upon the question as to who are Muhammadans. Besides these cases the learned counsel for the petitioner has brought to our notice one recent decision in which the very question raised before us as to the status of Ahmadees seems to have been raised, viz., the case of *Hakim Khalil Ahmad v. Malik Israfi and Malik Israfi v. Hakim Khalil Ahmad*(3). It was expressly ruled there that the sect known as Ahmadees are Muhammadans notwithstanding their pronounced dissent on several important matters of doctrine from the orthodox Muhammadan faith. In view of these authorities which I accept, it follows that a Muhammadan does not become an apostate by merely accepting the doctrines of Ahmadees. The Ahmediyans are in my view only a reformed sect of Muhammadans.

If we examine the six points of difference set out above between the Ahmadees and the Non-Ahmadees none of them seem to refer to any essential principles of Muhammadanism or to conflict with the Quran. The point that has been most pressed before us is that Ahmed having set himself up as a prophet has by that very act become an apostate and his followers as followers of an apostate are also apostates. No authority has been cited

(1) (1885) I.L.R., 7 All., 461 (F.B.). (2) (1890) I.L.R., 12 All., 494 (F.B.).
(3) (1917) 2 Patna L.J., 108.

for this contention. We cannot act on what D.W. 4 says in his answer (Exhibit I) is stated in the Fatwa Alamgiri. The original passage has not been shown to us nor has it been shown that it applies to a case like the present where the prophethood of Muhammad is unreservedly accepted.

For the above reasons I have come to the conclusion that the complainant never became an apostate and that his marriage with the 5th accused was subsisting at the time of her second marriage. We have now to consider whether the plea of good faith and absence of *mens rea* is established in the case and is a proper defence to the charge. It is said that the accused acted in good faith because she obtained the opinion of D.W. 4 and others that she was entitled to re-marry and her learned counsel has relied on *The Queen v. Tolson*(1), and on s. 79 of the Indian Penal Code. Now in this matter I think we must be guided more by the wording of the section of the Code than by the English Law. Section 79 only excuses a person who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing the act in question. So far as I can see there is no question of fact on which the 5th accused made any mistake. It was purely one of law whether the fact of her husband becoming an Ahmadee made him an apostate in law and severed her marriage tie. Her acting on the opinion of others is thus no answer to the charge against her though, as observed by my learned brother, it may be considered in mitigation of sentence. The English case cited is distinguishable on the ground that there the mistake was one of fact. The opinion of HOLMWOOD, J., in *Abdul Ghani v. Azizul Huq*(2), relied on by the Sessions Judge

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cannot with all respect be accepted as an authority, as the learned Judge has not discussed the question or referred to any authority and has not noticed the difference between the effect of a mistake of law and of a mistake of fact. SHERFUDDIN, J., who sat with him put the case on the ground that the marriage which was broken by the husband becoming a Christian could not be held to be subsisting during the period of *iddut* when the second marriage was contracted and therefore no charge for bigamy would lie. On the other hand it has been held in Bombay in *Reg v. Sambhu Raghu*(1), and again in *Emperor v. Bai Ganga*(2), that believing in good faith that the accused was justified in re-marrying is not a defence to a charge of bigamy but can be considered only in mitigation of sentence. This same view has been taken in Punjab: (see *Mst. Nandi v. The Crown*(3)). I hold therefore that the 2nd ground of defence of the accused also fails. In the result the acquittal must be set aside but in the circumstances of this case I agree that it is not necessary to order a retrial.

N.R.

(1) (1876) I.L.R., 1 Bom., 347, 352. (2) (1917) 19 Bom. L.R., 56, 60.
(3) (1920) I.L.R., 1 Lahore, 440.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
and Mr. Justice Wallace.

ACHUTHA NAIDU (PLAINTIFF), APPELLANT,

v.

MESSES. OAKLEY BOWDEN & CO. AND ANOTHER
(DEFENDANTS), RESPONDENTS.*

1922,
July, 26.

Contract Act (IX of 1872), ss. 215, 17, 19—Principal and agent—Dishonest concealment—Dealing disadvantageously to principal—Repudiation by principal—Difference between English and Indian Law.

By the law of England, if an agent without disclosing that he is the person dealing, himself enters into a contract with his principal the latter on discovering the fact can have the transaction set aside and it is immaterial whether there has been fraud or not or whether the transaction is advantageous or otherwise to the principal. Under section 215 of the Indian Contract Act, to set aside such a transaction the agent should have dishonestly concealed a material fact or the dealing should have been in fact to the disadvantage of the principal.

Per SCHWABE, C. J.—The fact that the plaintiff was a mere dummy is a dishonest concealment of a material fact. The general rules as to fraud which are contained in sections 17 and 19 of the Contract Act are made applicable to principal and agent by section 215 of the Act.

Per WALLACE, J.—Mere concealment of the fact that the agent is dealing in the business of the agency on his own account is not itself dishonest.

ON APPEAL from the judgment of COUTTS TROTTER, J., passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 651 of 1919.

The following are material extracts from the judgment of COUTTS TROTTER, J.:—

“Messrs. Oakley Bowden & Co., were the Madras agents of a concern trading as the ‘Shoranur Tile Works.’ Messrs. Oakley

* Original Side Appeal No. 44 of 1921.

Bowden had a dubash named Balakrishna Mudaliar and in 1916 Balakrishna Mudaliar introduced one Achuta Naidu, the plaintiff in this case, as a suitable person to act as a contractor in the retail disposal of a very large quantity of tiles and a contract was entered into between Messrs. Oakley Bowden & Co., on the one hand, and Achuta Naidu on the other, for the delivery by them to him of five lakhs of Mangalore tiles over a period of 14 months. . . .

Now, the first point that was raised was that this was not a contract with the plaintiff at all and that he could not sue on it. I do not propose to go at length through the various pieces of evidence on that point. I think it is abundantly clear from all the documents in the case and the whole history of it and from the extremely unsatisfactory and evasive nature of the evidence given in the box both by the plaintiff and by Balakrishna Mudaliar that the plaintiff was a mere dummy and that the real person who was taking the benefit of the contract was Balakrishna Mudaliar himself. The evidence is that he supervised the whole of the books kept by Achuta Naidu in connexion with the business, that he made entries in his own name, that he actually countersigned delivery orders, that he allowed his clerk Chockalingam, who, I think, was also in the pay of Messrs. Oakley Bowden to assist in the management of the business and in the keeping of accounts, and that he kept the whole of the profits, as they were made, to himself. There is also an entry in one of the books, more than one I think, which contains a record of the plaintiff being paid a month's salary of Rs. 20 by Balakrishna Mudaliar. To my mind, the whole business of Achuta Naidu was a fraud and a sham and the real person behind it and the real person who ran it was Balakrishna Mudaliar, the dubash. I may just finish the history of the case. Subsequently it was discovered by Messrs. Oakley Bowden that the person who was really trading with them was the dubash. Thereupon they instantly dismissed him and put an end to this contract. Out of that arises this suit, which is a suit for damages by the plaintiff for non-delivery of the tiles due under the contract. . . .

Achuta Naidu was, a man of straw. He had some small business at Tiruttani where he apparently met Balakrishna

Mudaliar. The latter brought him up to Madras and got him a job in Messrs. Hoe & Co., at Rs. 15 a month and then from this job in Messrs. Hoe & Co., at Rs. 15 a month he suddenly appears as a contractor for the disposal of large quantities of tiles without a shred of capital behind him. At first blush it is very plausible to say, as Mr. Grant did say, that had Messrs. Oakley Bowden known that this man had no capital and was a man of no substance at all, they would not have entered into this contract with him. But when one went into it and saw the way in which the business was transacted, I think there is absolutely nothing in that. It is obvious that these tiles had been sold out in very small quantities, that they were sold retail in smaller quantities and that the money so paid was handed back to Messrs. Oakley Bowden with the exception of the margin of profit which the contractor got for himself. He was really more a disposing channel than anything else and that part of the case, I think, is completely gone when one knows that the previous contractor was a person very much of the same type as Achuta Naidu.

There is however, a much more serious contention which I have to deal with on the part of the defendants and it is this. They say *here is a contract which purports to be with a stranger, but which, in reality, was, had they known it, with their own dubash, and they ask me to say that, in law, it vitiates the contract.*"

His Lordship referred to the English Law and to section 215 of the Contract Act. Referring to illustration (a) to the section his Lordship continued :

"Now, it is perfectly obvious from that illustration that what was contemplated as a material fact must be a material fact other than the mere fact that the real contracting party was the agent of the principal and, therefore, so far as the section goes, I must hold that there are cases in India where the fact that the agent is the real contracting party, the real undisclosed principal, does not, of itself, entitle the principal to repudiate. If the matter ended there, that would completely establish the plaintiff's case, because it is not suggested here, as I understand, that the defendants are in a position to prove the concealment of any material fact other than the personality of the undisclosed

principal, nor are they able to say that they have been in any particular way damnified by reason of the true facts of the case.

But the matter is put in another way. It is quite clear from Messrs. Oakley Bowden's subsequent conduct that had they known that Achuta Naidu was a mere mask for their own dubash Balakrishna Mudaliar, they would not have touched this contract. They dismissed him not merely from this particular business in connexion with the Shoranur Tile Works, but they dismissed him out and out at a moment's notice as their dubash for all purposes, and also put an end to this contract. That seems to me to show conclusively that they regarded this as a matter of gravity and as one which they would not tolerate. It is clear that difficulties might arise in connexion with the contract where it would be essential that their own dubash would be able to serve them with an undivided mind and an undivided allegiance. Moreover, that that was necessary in this case is shown by the fact that, when the defendants, rightly or wrongly, justifiably or unjustifiably, tried to get out of this contract if they could, Balakrishna Mudaliar was reduced to such a desperate expedient as sending a lying telegram by a clerk and posting it to him to say that Achuta Naidu, the plaintiff, could not be found or that he was at some place where he was not. What does all that point to? It obviously points to this that it was thought essential by the persons concerned to keep from Messrs. Oakley Bowden the knowledge of who the real principal was and it also shows, to my mind, conclusively the mischief of the thing and the sanity of the English rule which has been tampered with in the Indian Contract Act, section 215, that such a state of things is obviously intolerable unless it is done with the permission of the principal.

His Lordship cited *Smith v. Wheatercroft*(1), *Boulton v. Jones*(2), *Gordon v. Street*(3), *Said v. Butt*(4) and continued :—

"The principle of those cases is that, where the personality of the contracting party is material and can be supposed to have been an element weighing in the mind of the person with whom the contract was made, the deceit or fraud as to the true identity of the undisclosed principal vitiates the contract and

entitles the other party to it to repudiate it, within a reasonable time, of knowing the true facts. This rule is entirely independent of the relation of principal and Agent; it is a general principle of the law of contract. Of course, whether or no the personality of the contracting party in the given case would weigh is a question of fact which I have to determine, and, for the reasons I have given, I have no doubt whatever that, had Messrs. Oakley Bowden known that the undisclosed principal was Balakrishna Mudaliar himself, they would not have entered into this contract, and that would entitle them to repudiate it. I cannot put it better than by quoting the questions and answers put to the jury in *Gordon v. Street*(1):—

Q.—(1) Did the plaintiff intentionally conceal from the defendant that he was Isaac Gordon to induce him (the defendant) to borrow money of him as if from another, and, if so was the defendant so induced?

A.—Yes.

Q.—(2) Did he—i.e., Isaac Gordon—do so fraudulently?

A.—Yes.

Q.—(3) Did the defendant contract with Addison believing him to be a money-lender of that name?

A.—Yes.

Q.—(4) Did the defendant repudiate the contract so soon as, or within a reasonable time after, he discovered that Addison was really Gordon?

A.—The defendant repudiated the contract within a reasonable time after he knew he could do so.

Mutatis Mutandis all these questions may be put in this case and, in my opinion, they may, and must, be answered in exactly the same way. I, therefore, hold that the fraud of representing Achutha Naidu to be the real contracting party here, when, in truth, and in fact, the contract was with the dubash, was a fraudulent representation which vitiated the contract, and entitled the defendants to set it aside."

Advocate-General and O. T. Govindan Nambiyar for appellants.

C. Sydney Smith for the first Respondent and V. Radhakrishnayya for second respondent.

(1) [1899] 2 Q.B., 641.

(1) (1878) 9 Ch. D., 223.
(3) [1899] 2 Q.B., 641.

(2) (1857) 2 H. & N., 564.
(4) [1920] 3 K.B., 497.

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SCHWABE,
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The Court delivered the following JUDGMENT:—
SCHWABE, C.J.—This is an appeal from the judgment of Mr. Justice COUTTS TROTTER in which he found that a certain contract for the purchase of tiles could be repudiated by the defendants. The facts appear fully from his judgment and may be stated shortly thus:—The plaintiff entered into a contract with the first defendants who were themselves agents for the second defendants for the supply over a period of a large number of tiles at a fixed price. Plaintiff in fact was a man of straw and was a mere alias of or dummy contractor for Balakrishna Mudaliar, the dubash of the first defendants. It was well known to that dubash and it must be taken to have been within the knowledge of the plaintiff that no such contract would have been entered into by the first defendants if they had known the true facts. The first defendant has sworn that he would not have made such a contract and the reasons are obvious. It is difficult to imagine anything more undesirable for persons handling the whole output of tiles of a certain manufacture than that their dubash and local agent should have a large running contract for these tiles, the effect of which would make him a competitor with his own principals in the market which it was his duty to exploit for the benefit of his principals and not for the benefit of himself. The act of this dubash and the plaintiff was on the facts found, in my judgment, a fraudulent conspiracy. On discovery of this fraud the defendants refused to carry out the contract any further, the contract having been partly performed; and an action was brought by the plaintiff for damages for loss. He alleges that he suffered by reason of this repudiation. The defence to that action is fraud. Defendants say they were induced by the fraud mentioned above to enter into the contract.

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Having been induced to enter into the contract by fraud, they can, according to law, repudiate the contract on discovering the fraud. The learned Judge has held that that contract was induced by fraud and has given judgment for the defendants on that ground alone, pointing out and giving English authority for the proposition that a fraud as to the identity of the contracting party is as much a fraud as any other fraud; and with that part of his judgment I entirely agree. And it would be unnecessary to say anything further but for the fact that points were argued under the Indian Contract Act and decided in favour of the plaintiff by the learned Judge and that I do not agree with his finding on that part of the case. The point shortly taken is that section 215 protects this particular fraudulent agent. Section 215 is in the following words:—

“If an agent deals on his own account in the business of the agency without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction if the case shows either that any material fact has been dishonestly concealed from him by the agent or that the dealings of the agent have been disadvantageous to him.”

It is argued that that section contains the whole law in this country in relation to dealings between agents and their principals and that the law there stated is different to the law of England. I agree that the law as there stated is different to the law of England. By the law of England, if an agent, without disclosing the fact, that he is the person dealing, himself deals with his principal, the principal on discovering that fact can have the transaction set aside, and it is wholly immaterial whether the transaction is advantageous or disadvantageous to the principal and it is wholly immaterial whether there has been fraud or not. The law on the subject in England is very strict indeed,

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the view being that the Court will not allow a man in a fiduciary capacity to put himself in a position in which his interest might be adverse to the interest of his principal. He may have the best intentions in the world but the law of England requires more, requires that a man in a fiduciary capacity should not be subject even to the temptation of taking advantage of his position. The law here as stated in section 215, in order to set aside such a transaction, does require either that the agent should have concealed a material fact dishonestly or that the dealing should have been in fact to the disadvantage of the principal. In my judgment—and here is where I differ from the trial Judge—in this case both these conditions were fulfilled. A fact was dishonestly concealed by the agent and that fact was the fact that the plaintiff was a mere dummy for the first defendant and I am unable to accede to the very able argument of the Advocate-General that that is not the sort of dishonesty contemplated by this section. On the contrary, in my judgment those words in section 215 are put there expressly to keep applicable to the case of principal and agent the general rules as to fraud which appear in sections 17 and 19 of the Act. Further, in my judgment this action of the plaintiff and of the dubash must necessarily have been disadvantageous to the principal. The dubash had many duties to perform for his principals and to have such a running contract for a period of time between himself and his principals without their knowing that it was their dubash's contract must inevitably and constantly put the dubash into a position where his duty and his interest must conflict. Further, the mere fact that there was this large quantity of tiles to be given to the dubash under the contract which he was not going to use for building but was going to retail must have an effect on the market. It may and indeed must be to the disadvantage

of his principal who wished to handle that market. It follows that this appeal must be dismissed. We allow two sets of costs.

• I wish to add that I am not satisfied that, even if section 215 would afford any answer to the dubash if he had brought an action and this plea was put in issue as defence, a similar benefit would accrue to the plaintiff who was not in fact agent for either of the defendants.

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WALLACE, J.—I agree. I just wish to give shortly, WALLACE, J. in my own words why I do not agree with the interpretation which the learned Advocate-General wishes us to put on section 215 of the Contract Act. He asks us to say that the "material fact" the dishonest concealment of which by the agent enables the principal to repudiate, is a fact other than the agent's dealing in the business of the agency on his own account. This implies that the agent would be entitled not only to conceal, but also to dishonestly conceal, that fact. I am confident that the section cannot be so interpreted. It no doubt differs from the English law in that under section 215 mere concealment of the fact that the agent is dealing in the business of the agency on his own account is not in itself dishonest, and will not of itself enable the principal to repudiate; and that position in my opinion is indicated by illustration (a) to the section. But, where the concealment has been dishonest I am confident that such dishonesty is not rendered lawful by this section, but carries with it the usual effect of dishonesty or fraud upon the contract and renders it voidable. I am clear that the section cannot be used to render lawful actual dishonesty on the part of an agent. Whether in any particular case the concealment of this material fact was dishonest of course has to be decided on the facts of the case itself. So that the sole question in this appeal, I think, is whether the concealment by

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Balakrishna Mudaliar that he and the plaintiff Achutha Naidu were the same person was dishonest. I think that the action of Balakrishna Mudaliar (which has not been defended by the learned Advocate-General before us), as set forth by the learned Judge in his judgment, and the evidence and the subsequent conduct of Oakley Bowden show that the concealment in this case was dishonest. The agent concealed from his principal the fact that he was dealing himself in the business of the agency, in order to obtain for himself a wrongful gain, that is to say, a gain which he knew he would not have got had he disclosed the fact honestly to his principal. I agree therefore that the appeal should be dismissed with two sets of costs.

SHORT BEWES & Co., solicitors for appellant.

GRANT & GREATORREX, solicitors for 1st respondent.

M.H.H.

APPELLATE—CIVIL.

Before Sir Walter Salis Schwabe, K.C., Chief Justice,
and Mr. Justice Wallace.

P. R. SREENIVASA AYYANGAR (JUDGMENT-DEBTOR),
APPELLANT

v.

S. L. NARAYANA RAO (ASSIGNEE-DECREE-HOLDER),
RESPONDENT.*

Limitation Act (IX of 1908), art. 182, cl. 5—Step in aid of execution—Execution of decree—Decree of Mysore District Court—Transmission of decree to Madras High Court—Application for transmission, ordered by Mysore Chief Court after contest as to limitation—Execution petition filed in Madras High Court after records, etc., received—Plea of limitation, again raised by judgment-debtor—Res judicata—Foreign judgment—Civil Procedure Code (V of 1908), s. 13—Judgment of Mysore Chief Court as to step in aid, whether conclusive—Bar of limitation—Order, whether a judicial or ministerial act.

* Original Side Appeal No. 40 of 1921.

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An application for transmission of a decree of 1911, passed by the District Court of Mysore, to the High Court of Madras on its Original Side for purposes of execution, was filed in the former Court in 1916 and was eventually ordered by the Chief Court of Mysore on 30th January 1919, after contest by the judgment-debtor. On an application for execution being filed in the Madras High Court on 8th January 1921, the judgment-debtor pleaded the bar of limitation. The decree-holder contended that the application for transmission of the decree from the Mysore Chief Court to the Madras High Court was an application in aid of execution and also relied on the bar of *res judicata*.

Held, that the application for transmission of the decree from the Mysore Court to the Madras High Court, was an application to take a step in aid of execution of the decree so as to save the bar of limitation for the present application for execution; and that the application of 1921 was not barred.

Per CHIEF JUSTICE—The validity of an application as a step in aid of execution, should be decided according to the law of the place where such application was made, namely, in this case, the Mysore law; and the foreign judgment of the Mysore Chief Court is *res judicata* under section 13 of the Civil Procedure Code.

Pierce Leslie v. Perumal, (1917) I.L.R., 40 Mad., 1069 (F.B.), doubted.

Per WALLACE, J.—The law of limitation applicable to an application for execution filed in a Court in British India is the British Indian Law; the decision of the Mysore Chief Court is not *res judicata* on the question of the previous application for transmission being a step in aid of execution; but under the British Indian Law, an application for transmission of the decree from the Mysore District Court to the Madras High Court is an application to take a step in aid of execution and consequently the present petition for execution is not barred by limitation.

APPEAL from the order of KUMARASWAMI SASTRI, J., in the exercise of the ordinary Original Civil Jurisdiction of High Court in execution of the decree of the District Court of Mysore in Civil Suit No. 3 of 1909-10.

The appeal arises out of an application for execution of a decree, dated 19th June 1911, passed by the District Court of Mysore and transmitted by that Court for purposes of execution to the Original Side of the High

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Court of Madras at the instance of the respondent who was the assignee of the decree which was one for costs. On 14th October 1912, the respondent applied to the District Court of Mysore to recognize the assignment and to transmit the decree for execution originally to the Madras Court of Small Causes, which was done. That Court was eventually moved to re-transmit the decree as it was beyond its pecuniary jurisdiction to execute, and the records were returned in 1914 to the Mysore District Court and was received by the latter Court on 9th April 1914. On the 9th December 1916, the petitioner applied to the District Court to transmit the decree to the Madras High Court. This application was dismissed as there was an attachment on the decree. The attachment was subsequently raised, and on the 15th March 1918, application was again made to the District Court to transmit the decree to the Madras High Court. This application was dismissed by the District Court, but on appeal to the Mysore Chief Court, the petition was granted after contest, and transmission of the decree with the necessary certificate of non-satisfaction and other records was ordered by the latter Court on the 21st July 1920. Thereupon the decree-holder filed the present application for execution of the decree on the original side of the Madras High Court on 8th January 1921. The judgment-debtor, who had contested the applications before the Mysore District Court and the Chief Court, again raised the objection that the application for execution was barred by limitation. The decree-holder contended that the question was *res judicata* in his favour by reason of the foreign judgment passed by the Mysore Chief Court on this very question of limitation, which was a bar to a fresh decision in this Court under section 18 of the Civil Procedure Code. The learned Trial Judge over-ruled the contentions of the judgment-debtor and

directed execution. The judgment-debtor preferred this appeal.

A. Krishnaswami Ayyar and S. Duraiswami Ayyar for appellant.—The application to the Mysore District Court for transmission of the decree to the Madras High Court is not a step in aid of execution of the decree in the British Indian Court. See the ruling in the F.B. case of *Pierce Leslie v. Perumal*(1). This Full Bench of the Madras High Court has interpreted "step in aid" under article 182, clause 5, differently from the Full Bench of the Mysore Chief Court. The language of the two articles of the Limitation Acts of Mysore and British India is the same; the Mysore interpretation is not to be followed in preference to the Madras interpretation, even as regards the ascertainment of the Mysore law. See *Diecy's Conflict of Laws* (2nd Edn.), page 708. All rules of procedure (including rules of limitation) should be those of *lex fori*. *Nabibhai Vazirbhai v. Dayabhai Amulakh*(2). The decision "as to step in aid" of the Mysore Chief Court is not *res judicata* or a bar under section 13, Civil Procedure Code. There was no judicial order but only a ministerial order; the adjudication under such circumstances is not binding as *res judicata*. No Court subject to one legislative authority can really send a decree for execution. There is no provision under the Civil Procedure Code of British India or Mysore regarding compulsory execution by transfer of decree. The matter depends on comity of nations.

L. S. Viraraghava Ayyar for respondent.—The decision of the Chief Court is *res judicata*, section 13, Civil Procedure Code, applies. See section 44, Indian Evidence Act. The Mysore Court was asked to decide and did decide that the application was not barred. Even

(1) (1917) I.L.R., 40 Mad., 1089 (F.B.). (2) (1918) I.L.R., 40 Bom., 504.

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under the Madras Law, the application is not barred. The Full Bench decision in *Pierce Leslie v. Perumal*(1), is erroneous. See *Janardan Govind v. Narayan Krishnaji*(2), *Prabhulingappa v. Gurunath Balaji*(3).

S. Duraiswami in reply.—The limitation has got to be decided under article 182, Limitation Act. The Mysore Chief Court had no jurisdiction to pass a judicial order as to limitation, but it is only a ministerial order under international law or comity.

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SCHWABE, C.J.—This appeal is from an order of KUMARASWAMI SASTRI, J., granting an application to execute a decree for costs of the District Court of Mysore. The judgment-debtor objected on the ground that it was barred by limitation. The facts so far as they are relevant are that the original decree was dated June 19th, 1911, and that in 1912 and 1914 attempts were made to execute the decree through the Small Cause Court, Madras, which failed through want of jurisdiction of that Court and ended in about April 1914 by the sending back of the papers in the case by the Small Cause Court to the District Court of Mysore. In December 1916 an application was made to the District Court of Mysore to transmit the decree to the Madras High Court which failed owing to there being an attachment on the decree. A further application of the same nature was made on March 15th, 1918, which application was dismissed by the Mysore District Court on January 30th, 1919, but granted on appeal by the Chief Court of Mysore on July 21st, 1920.

In pursuance of that order, a certified copy of the decree has been transmitted to this Court, and the application in this case is for leave to execute that decree. The

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period of limitation in such cases is provided by article 182, clause 5 of the Limitation Act of 1908 under which the time from which the period of limitation begins to run is the date of applying in accordance with law to the proper Court for execution or to take some steps in aid of the execution of the decree. It is common ground in this case that if the applications to the Mysore Court of 1916 and 1918 are steps in aid of execution, this application is in time, whereas, if they are not steps in aid of execution, this application is barred by limitation. The application of the 15th March 1918 to the District Court and the subsequent appeal were attended and argued by both the parties and the point was then raised and fully argued that the application to transmit the papers with a view to obtaining execution by this Court is not a step in aid of execution of the decree, and the Full Bench of the Chief Court of Mysore (vide Mysore Chief Court Reports, Vol. 25, page 289), decided that it was according to the law of Mysore a step in aid of execution. The law of limitation contained in clause 5, article 182 of the Mysore Act is identical with clause 5, article 182 of the Indian Limitation Act. The difficulty arises owing to the fact that a converse case of the transmission of papers from this Court to a Native State for the purpose of obtaining the assistance of the Court of that Native State in executing a decree of a Court in this Presidency came before a Full Bench of this Court in *Pierce Leslie v. Perumal*(1), and it was there held that such a step was not a step in aid of execution. We therefore have the anomalous position that in interpreting statutes in identical terms, the Chief Court of Mysore has held that an application to transmit the papers in a Mysore case to this Court is a step in aid of execution,

(1) (1917) I.L.R., 40 Mad., 1069 (F.B.). (2) (1918) I.L.R., 42 Bom., 420.
(3) (1921) I.L.R., 45 Bom., 453.

(1) (1917) 40 Mad., 1069 (F.B.).

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while this Court has held that the application to transmit the papers in a Madras case to Travancore is not a step in aid of execution. The question to be considered is according to what system of law, the step taken is or is not a step in aid of execution, and in my judgment the law to be considered is that of the place where the application is made which will generally also be the place of origin of the decree and I think that clause 5 of the Article 182 of the Indian Limitation Act must be read to mean

"to take some step which, according to the law of the place where the application therein referred to has to be made, is a step in aid of execution."

It follows that it is the law of Mysore that has to be considered. By section 13 of the Civil Procedure Code, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties. There has in this case been a foreign judgment on this matter directly adjudicated upon between the same parties, namely, that according to the law of Mysore this is a step in aid of execution and I think that under that section it is not open, whatever this Court might have said in such cases, to an unsuccessful party to the application in Mysore to contend here that the law of Mysore is otherwise. I should add that I do not agree with the contention addressed to us that the order applied for in Mysore was on an application for the mere performance of a ministerial act, it was an application to the Court in its judicial capacity and the Court's order was a judgment. Further, apart from this section, there is in this case a decision to this effect by the highest Court in Mysore. In my judgment the fact that a Full Bench of this Court holds that the law in British India is otherwise is not a sufficient ground for this Court to hold that the Chief Court of Mysore has inter-

preted the Mysore statute wrongly although the statutes are in identical terms. It follows that, as the step is to be a step which according to the law of Mysore is a step in aid, in my judgment, we are bound to hold that this application to transmit the papers here was a step in aid of the execution of the decree.

I desire to add this that the question whether a similar application to transmit the papers would have been a step in aid if made in British India, in the view that I have expressed, does not arise for decision. If it did I should feel myself bound by the decision of the Full Bench of this Court in *Pierce Leslie v. Perumal*(1). I must, however, not be taken to agree with that decision. It has been strongly disapproved of by a Divisional Bench in *Janardan Govind v. Narayana Krishnaji*(2). The point has been argued before us and the inclination of my mind is to agree with the Bombay decision and not with that of the Full Bench of Madras, and if the same point arises again, I should wish to have it reconsidered by a Full Bench. For the reasons given above the appeal must be dismissed with costs.

WALLACE, J.—The District Court of Mysore has transmitted to this Court, at the request of the respondent for purposes of execution in this Court a decree of that Court in which he is the assignee-decree-holder, a certificate of non-satisfaction and a copy of the decree and previous execution orders. There is in force a reciprocal working arrangement between the Courts in the Madras Presidency and those in Mysore State under which a decree obtained in one locality may be executed in the other on application by the decree-holder, provided he has arranged with the Court of the former locality to

(1) (1917) I.L.R., 40 Mad., 1099 (F.B.). (2) (1918) I.L.R., 42 Bom., 420.

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preted the Mysore statute wrongly although the statutes are in identical terms. It follows that, as the step is to be a step which according to the law of Mysore is a step in aid, in my judgment, we are bound to hold that this application to transmit the papers here was a step in aid of the execution of the decree.

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(1) (1917) I.L.R., 40 Mad., 1039 (F.B.). (2) (1918) I.L.R., 42 Bom., 420.

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transmit to the latter a copy of the decree, a certificate of non-satisfaction, and copies of previous orders in execution. It was contended before the District Court of Mysore by the present appellant, the judgment-debtor, that the execution was time-barred. He succeeded in that Court but in the Chief Court to which he took the matter in appeal he failed. Now the respondent seeks to execute his decree in British India. The appellant urges the same ground, namely, that the execution is time-barred. The point on which, for the purposes of this appeal, the discussion of the question of limitation arose was whether the application to the District Court of Mysore, dated 9th December 1916, continued by a further application dated 15th March 1918 to transmit the decree to this Court was or was not a step in aid of execution. That Court and the Chief Court of Mysore on appeal held that it was and that execution was not time-barred. The appellant invites us to hold that it was not a step in aid of execution and therefore the decree is time-barred. That is his stand-point and the only one which he has taken in this appeal.

Three points arise; first of all, whether the judgment of the Chief Court is *res judicata* and binding on the appellant by force of section 13 of the Civil Procedure Code, secondly whether, if not, this Court can give an independent finding on that point, and thirdly whether, if it can, the application was or was not a step in aid.

On the first point there is a preliminary contention of the appellant that the District Court of Mysore was acting without jurisdiction or rather extra judicially, in transmitting the decree papers to this Court and that therefore section 13 of the Civil Procedure Code will not apply. To that I do not agree. It was essential for that Court before transmitting the papers to satisfy itself that the decree was subsisting and executable, and that

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the case was a fit one for obliging the decree-holder. Further, in sending the papers it presumably divested itself of any further powers of executing the decree itself. Such acts of the Court are undoubtedly judicial and within its jurisdiction. The District Court in transmitting the documents, was acting under order XXI, rule 6 of its own Civil Procedure Code, vide its order dated 15th December 1920. Section 13, Civil Procedure Code, will then apply to the judgment of the Chief Court which was clearly an adjudication that, according to Mysore Law, the application was a step in aid and therefore the execution in Mysore was not time-barred. The adjudication cannot, however, be stretched to mean that, according to British Law, execution is in time. The judgment is only *res judicata* so far as it goes and no further, and I do not think it can be interpreted as deciding once and for all so as to make the matter *res judicata* that a proper step in aid within the meaning of article 182 of the Indian Limitation Act, was taken on 9th December 1916 and that the respondent cannot now be retrograded in that respect. If the application before us now has to be dealt with under article 182 of the Indian Limitation Act, as to which I feel no doubt, that article is to be applied as it stands, unless there is some bar apart from it which stands in the way of that application. The Chief Courts' order in my view is not such a bar since it only lays down that, in the territory within the jurisdiction of that Court, the application was not barred. I therefore answer the first point accordingly.

As to point 2 it is really already answered. On this point I uphold the appellant's contention that, when such an application comes before a British India Court, that Court is entitled to consider, and indeed is bound to consider, whether it is time-barred under the law of British India and to come to an independent conclusion.

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If it finds that the law of British India declares that the application is time-barred it will refuse to take steps in execution of the decree. This is the principle laid down in *Nabibhai Vazirbhai v. Dayabhai Amulakh*(1), and by OLDFIELD, J., in *Pierce Leslie v. Perumal*(2). That is to say the *lex fori* governs all such cases and each Court must execute under its own laws. The respondent cannot therefore ask a British India Court to execute this decree if under British India Law the execution of it is time-barred. That is my answer to point 2.

As to point 3, I have now to decide whether as a matter of fact the application is time-barred, that is, whether the application of 9th December 1916 was a step in aid of execution or not within the meaning of article 182 of the Indian Limitation Act. In limine the appellant contends that the Full Bench decision in *Pierce Leslie v. Perumal*(2), concludes the matter, but there I cannot agree with him. That decision laid down that an application to a British India Court to transmit to a foreign Court such execution papers as are required to enable it to execute the decree is not a step in aid of execution within the meaning of article 182 and it proceeds on the principle that, there being no legal provision for reciprocity by which British India Courts can send their decrees for execution to a foreign Court and vice versa, but only an arrangement of comity by which either Court will, when asked, send the necessary papers to the other in order to assist execution, such despatch of papers is not a step in aid of execution.

WALLIS, C.J., however goes further and lays down that no application for execution arising under a foreign law in a foreign state can be an application under article 182 for the purposes of executing a British India decree,

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i.e., a British India Court must in fact in executing a British India decree rule these out of Court altogether. OLDFIELD, J., decides the case on another footing, viz., that there is a general uncertainty as to whether a foreign Court will, in carrying out execution of a British India decree, conform to the law under which the transmitting British India Court does the act of transmitting the papers. But the Full Bench judgment does not deal with the converse case or lay down that an application to a foreign Court to transmit papers to assist execution of a foreign decree in British India is not a step in aid of execution under article 182, and I conceive that it is open to us to come to our own conclusion on this point. To lay down that an application to a foreign Court to ~~execute~~ its own decree cannot be a step in aid of execution under article 182, of the Indian Limitation Act would be to stultify the whole reciprocal arrangement for assisting in the execution of decrees which has been mentioned above, since it will follow that no execution of a foreign decree could be obtained in a British India Court after the expiry of three years from the date of the decree; for, however many execution applications may have kept it alive in its own State, none of those would keep it alive in British India, since they would not be applications for or steps in aid of execution under article 182. This position seems to me to be a very difficult one to maintain. The essence of the comity arrangement which is described and relied on in *Janardan Govind v. Narayan Krishnaji*(1), is that each reciprocating Court will recognize the other's proceedings, so that if one Court has laid down that at a particular date the decree was not time-barred, the other shall not lay down that on that same date it was time-barred. When the foreign Court

(1) (1918) I.L.R., 42 Bom., 420.

(1) (1916) I.L.R., 40 Bom., 504. (2) (1917) I.L.R., 40 Mad., 1089 (O.B.).

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WALLACE, J.

has laid down that an application such as the present to transmit the documents to British India was at the time it was made, a proper step in aid of execution I think it would be wrong for the British India Court to hold, when called on to execute that foreign decree, that application was not, at the time it was made, a perfectly legal step in aid within the meaning of article 182, of the Indian Limitation Act. The present case is clearly distinguishable from *Nabibhai Vazirbhai v. Dayabhai Amulakh*(1). There was no ruling there of a foreign Court on the matter which came before the British India Court. I therefore conclude that the Full Bench case of *Pierce Leslie v. Perumal*(2), does not compel us in applying article 182 of the Indian Limitation Act to hold that the application in the Mysore Court, which was a proper step in aid under Mysore Law, was not a step in aid of execution within the meaning of that article. That is when we have to consider the interpretation of that article with reference to execution of a foreign decree, we have to consider not whether the application would have been a step in aid in British India with reference to the execution of a British India decree, but whether the application having reference to a foreign decree and having been brought in the proper foreign Court, was a step in aid under the law of that Court; and, if it was, as it was, such a step in aid, it satisfies article 182. The conclusion then is plain that the present application is a step in aid and therefore the execution of the decree is not time-barred. I therefore agree that this appeal be dismissed with costs.

K.R.

(1) 1917 I.L.R., 40 Bom., 504 (1917) I.L.R., 40 Mad., 1089 (F.B.)

