

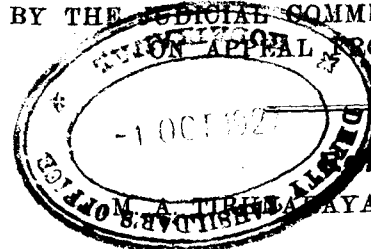


THE INDIAN LAW REPORTS

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



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JUDGES OF THE HIGH COURT.

1924.

1ST JANUARY TO 31ST DECEMBER.

CHIEF JUSTICE.

- The Honourable Sir WALTER GEORGE SALIS SCHWABE, *Kt.*, K.C.
(Barrister-at-Law). (*On leave for one month and two days from 31st January.*) (Resigned.)
- The Honourable Sir VICTOR MURRAY COUTTS-TROTTER, *Kt.*
(Barrister-at-Law). *From 11th February.* (*On leave from 7th July to 9th November.*)
- The Honourable Sir CHARLES GORDON SPENCER, *Kt.*, I.C.S.
(Barrister-at-Law). (*Officiating from 3rd January to 10th February and from 7th July to 8th November.*)

PUISNE JUDGES.

- The Honourable Sir WILLIAM BOCK AYLING, *Kt.*, I.C.S. (*On furlough from 9th July 1923.*) (Retired.)
- The Honourable Mr. FRANCIS DUPRE OLDFIELD, I.C.S. (*On furlough till 7th November.*) (Retired.)
- The Honourable Sir CHARLES GORDON SPENCER, *Kt.*, I.C.S.
(Barrister-at-Law). (*On other duty as Officiating Chief Justice from 3rd January to 10th February and from 7th July to 8th November.*)
- The Honourable Mr. VICTOR MURRAY COUTTS-TROTTER, M.A.
(Oxon), (Barrister-at-Law). (*On deputation as a member of the Bar Committee till 10th February.*)
- The Honourable Mr. WILLIAM WATKIN PHILLIPS, I.C.S.
(Barrister-at-Law). (*On furlough from 7th July to 26th October.*)
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- The Honourable Mr. C. KRISHNAN, M.A. (Barrister-at-Law).
Diwan Bahadur. (*On furlough from 7th July to 7th October.*)

- The Honourable Mr. V. RAMESAM, B.A., B.L.
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 The Honourable Mr. D. G. WALLER, I.C.S.
 The Honourable Mr. C. MADHAVAN NAYAR (Barrister-at-Law).
 (*Officiating from 10th March.*)
 The Honourable Mr. V. V. SRINIVASA AYYANGAR, B.A., B.L.
 (*Officiating from 7th July.*)
 The Honourable Mr. V. MASILAMANI PILLAI, Diwan Bahadur,
 B.A., B.L. (*Officiated till 8th February.*)
 The Honourable Mr. G. H. B. JACKSON, I.C.S. (*Officiated from 8th January to 25th March and from 7th July to 11th October.*)
 The Honourable Mr. H. D. C. REILLY, I.C.S. (*Officiated from 7th July to 3rd October.*)

(1924) I.L.R., 47 Mad.

TABLE OF CASES REPORTED

IN THIS VOLUME.

PRIVY COUNCIL.

	PAGE
Ayyareddi v. Gopalakrishnayya	190
Kodoth Ambu Nayar v. Secretary of State for India	572
Kondama Naicker v. Kandasami Goundar	181
Naina Pillai Marakayar v. Ramanathan Chettiar	337
Narasingerji v. Parthasaradhi Rayanam Garu	729
Vaidyanatha Ayyar v. Swaminatha Ayyar	884

APPELLATE CIVIL—FULL BENCH.

Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam Harbour	357
Acquisition	262
Best & Co., Ltd. v. Corporation of Madras	781
Doraivelu Mudaliar v. Natesa Gramani	896
Govinda Naidu v. Chengalroya Mudali	411
Kadirvelusami Nayagar v. The Eastern Development Corporation	824
Krishnamachariar v. Srirangammal	819
Manickam Pillai v. Bathummal	483
Meyyappa Chettiar v. Chidambaram Chettiar	360
Parthasaradhi Naidu v. Koteswara Rao	288
Rajagopala Ayyar v. Ramanujachariar	783
Sriramulu v. Lakshminarayana	774
Suyamprakasam v. Murugesu Pillai	813
Syed Oomer Sahib v. Gopaul	

APPELLATE CIVIL.

Aburubammal v. Official Assignee	215
Ammakanuu Ayi v. Murugayya	850
Ananthanarayana Ayyar v. Sankaranarayana Ayyar	673
Anglo-Persian Oil Company v. Panchapakasa Ayyar	164
Appanna v. Latchayya	250
— v. Venkatasami	203
Arsamma v. Moidin	160
Burrayya v. Ramayya	449
Doraswami v. Chidambaram Pillai	63

TABLE OF CASES REPORTED

	PAGE
Maulali v. Thaha Ummal	610
Fraser and Ross v. Krishnaswami Aiyer	47
Gopalakrishna Pillai v. Kunjithapatham Pillai	543
Guruvayya v. Venkatrathnam	893
Hajee Shakoo Gani v. Sabapathi Pillai	222
Jagannatha Rao v. Viswesam	621
Janoo Hassan Sait v. Mahamad Dhulin	877
Kalyani Pillai v. Thiruvenkadaswami Ayyangar	618
Kanniappa Mudali v. Raju Chettiar	605
Koyasan Koya Haji v. Secretary of State for India	927
Krishnaiya v. Ponnuswami Aiyar	398
Krishna Reddy v. Thanikaachala Mudali	136
Krishnasamy v. Changanalaya	171
Letchmana Chetty v. Subbiah Chetty	920
Mallayya v. Punnamma	476
Manikyamba v. Mallayya	943
Mohieswara Rao v. Durgamba	308
Narayanan Chetty v. Muthiah Chetty	692
Narayanasaami Chetty v. Vellayya Pillai	688
Palani v. Sethu	706
Palaniandi Chetti v. Adaikalam Chetti	459
Paramasiva Thevar v. Pulukaruppa Thevar	525
Ponnusami Aiyar v. Damodar Hunsraj	403
Rajarathna Naidu v. Ramachandra Naidu	948
Rajitagiripathy v. Bhavani Sankaram	641
Ramachari v. Krishnamachari	934
Ramakka v. Negasan	800
Ramappa Chettiar v. Ekambara Padayachi	651
Ramasami Reddi v. Marudai Reddi	453
Ranganatha Thathachariar v. Krishnaswami Thathachariar	139
Sankaranarayana v. Ramaswamiiah	39
Sankaranarayana Pillai v. Rajamani	462
Sanyasi Rao v. Venkata Rao	30
Sarvothama Rao v. Chairman, Municipal Council, Saidapet	585
Sattayya Padayachi v. Soundarathachi	812
Secretary of State v. Raghavachariar	861
Sellappa Goundan v. Masa Naiken	79
Sengoda Goundan v. Muthu Goundan	567
Sivasubramania v. Theethiappa	120
Sonachalam Pillai v. Kumaravelu Chettiar	816
Subba Rao v. Savarayudu	7
Sandara Ramanujam v. Sivalingam	160
Surayya v. Venkataratnam	176
Thimma Reddi v. Secretary of State	325
Ussan Kasim v. The Secretary of State for India	116
Vellayappa Chettiar v. Ramanathan Chettiar	446
Venkatanarayana Chetty v. Serugan Chetty	916

TABLE OF CASES REPORTED

	PAGE
Venkata Reddy v. Kunjappa Goundan	551
Venkatasubba Chettiar v. Sesha Ayyar	700
Venkateswarlu v. Lingayya	683
Yadavendra Bhattu v. Srinivasa Babhu	698

APPELLATE CIVIL—SPECIAL BENCH.

Board of Revenue v. Arunachalam Chettiar	197
_____ v. Miniswami Chetti	653
_____ v. Mylapore Fund	1
Commissioner of Income-tax v. Arunachalam Chettiar	660
Commissioner of Income-tax, The v. Binny & Co.	887
_____ v. Nedungadi Bank, Ltd., Calicut	667

APPELLATE CRIMINAL—FULL BENCH.

Theesthumalai Gounder v. King-Emperor	746
---------------------------------------	-----

APPELLATE CRIMINAL.

Appasami Mudaliar v. Emperor	442
Chinniah, <i>In re</i>	426
Govindan v. Krishnan	245
Kuppa Reddiar v. King-Emperor	846
Nataraja Pillai v. Rangaswami Pillai	56
_____ v. _____	884
Pallikudathan v. Budda Goundan	229
Public Prosecutor v. Varadarajulu Naidu	716
Punya Syamala, <i>In re</i>	381
Ramanathan Chettiar v. Subrahmanya Ayyar	722
Somadu v. King-Emperor	232
Soma Naidu, <i>In re</i>	428
Sreeramulu v. King-Emperor	61
Suryanarayana v. Ankineed Prasad Bahadur	718
Thimiah v. King-Emperor	914
Tirumala Reddi, <i>In re</i>	396
Vairavan Servai v. Emperor	438

INSOLVENCY JURISDICTION—FULL BENCH.

Sellamuthu Servai, <i>In re</i>	87
---------------------------------	----

TABLE OF CASES CITED

IN THIS VOLUME.

A

	PAGE
Aba v. Dhonda Bai. (1895) I.L.R., 19 Bom., 276	64, 72
Abbas Ali Chowdhry v. Illim Meah. (1870) 14 W.R. (Crl.), 46	59
Abdul Karim v. Islamunnissa Bibi. (1916) I.L.R., 38 All., 389	298
Abdul Rahman v. Amin Shariff. (1918) I.L.R., 45 Cal., 780	509, 515
Abdur Rashid v. The Sizing Materials Company, Limited. (1920) I.L.R., 42 All., 480	405
Abhi Misser v. Lachmi Narsin. (1900) I.L.R., 27 Cal., 566	749, 754, 760
Abiram Goswami v. Shyama Charan Nandi. (1909) I.L.R., 36 Cal., 1003 (P.C.); 36 I.A., 148	352
Administrator-General of Bengal, The v. The Land Acquisition Collector. (1907) 12 C.W.N., 241	859, 362, 365
Ahmad Thambi Marnicair v. Basava Maracayar. (1923) I.L.R., 46 Mad., 128	379
Alagappa Chettiar v. Chockalingam Chettiar. (1918) I.L.R., 41 Mad., 904 (F.B.)	881
Alderson v. White. (1858) 2 D.G. & J., 97	733
Amies v. Stevens. 1 Strange, 127; 93 E.R., 428	616
Amir Chand v. Bukshi Sheo Pershad Singh. (1907) I.L.R., 34 Cal., 13. ...	690
Ammami Ammal v. Ramasawmi Naidu. (1919) 37 M.L.J., 113	854
Amulyadhan Addy, In re. (1919) I.L.R., 46 Cal., 132	587, 602
Anakaran Kasmi v. Saidamadath Ayulla. (1879) I.L.R., 2 Mad., 79	699
Andrews v. Mitchell. [1905] A.C., 78	81
Annada Hait v. Khudiram Hait. (1914) 19 C.L.J., 532; 25 I.C., 558	208, 209, 214
Annada Prasad v. Upendra Nath Dey. (1922) 65 I.C., 18	787, 788, 791, 798
Appa v. Ranga. (1883) I.L.R., 6 Mad., 71	624
Appandai v. Srihari Joishi. (1893) I.L.R., 16 Mad., 451	258, 259
Appayya v. Rangayya. (1908) I.L.R., 8 Mad., 419 (F.B.)	691
Appireddi v. Appireddi. (1922) I.L.R., 45 Mad., 189	684
Arbitration between Gregson and Armstrong, Es An. (1894) 70 L.T., 106 ...	33
Arbutnot, D. v. Oolagappa Chetty. (1870) 5 M.H.C.B., 303	423
Ardejeri Rama Reddi v. Karpi Sivaga. (1913) M.W.N., 971	901, 912
Arjan Singh v. Gujri (1917) 42 I.C., 410	461
Armugham Chetty v. Muthu Koundan. (1919) I.L.R., 42 Mad., 711 (F.B.) 90, 101, 113 ...	481
Arunachalam Chetty v. Meyyappa Chetty. (1898) I.L.R., 21 Mad., 91	547
Arunachala Ayyar v. Subbaramiah. (1923) I.L.R., 46 Mad., 60	

	PAGE
Arunachalam Chetty v. Periasami Servai. (1921) I.L.R., 44 Mad., 902 (F.B.) 485, 486, 488. 489, 495, 501, 508, 509, 518, 520, 522	
Arunachalam Chetty v. Rangasawmy Pillai. (1915) I.L.R., 38 Mad., 922 (F.B.) 85	
Arunachalam Pillai v. Ponnuswamy. (1918) 35 M.L.J., 454 58	
Aseemoonnissa v. Ameeroonnissa. (1871) 15 W.R., 295 415, 423	
Ashby v. White Et Alios. Smith's Leading Cases, 266 591	
Aslatt v. Corporation of Southampton. (1881) 16 Ch. D., 143 589, 592, 601, 704, 705	
Ataul Huq v. The Chairman, Manikata Municipality. (1921) I.L.R., 48 Calc., 378 602	
Atchayya v. Sri Seetharamachandra Rao. (1916) I.L.R., 39 Mad., 195 (F.B.) 379	
Attorney-General v. Carlton Bank. [1899] 2 Q.B., 158 283	
_____ v. Esher Linoleum Company, Limited. [1901] 2 Ch., 647 119	
_____ v. The City of London. (1790) 3 Broc. C.O., 171; 1 Ves., 248 142	
Avalappa Naicker v. Murugappa Chettiar. (1913) I.L.R., 36 Mad., 825. 414	

B

Babu Das Narayan Singh v. Muhammad Yusuf. (1921) 61 I.C., 823 296, 530, 542	
Babu Ram v. Suid-un-nissa. (1913) I.L.R., 35 All., 499 693	
Baijnath Prasad Singh v. Tej Bali Singh. (1921) I.L.R., 43 All., 228 (P.C.) 413	
Baijnath Sabai v. Ramgut Singh. (1896) I.L.R., 23 Calc., 775 (P.C.); 23 I.A., 45 573	
Baikanta Nath Goswami v. Sita Nath Goswami. (1911) I.L.R., 38 Calc., 421 41	
Balabux v. Rukhnabai. (1903) I.L.R., 30 Calc., 725 570	
Balakrishna Mudaliar v. Raju Mudaliar. (1915) 27 I. C., 736 570	
Balakrishna Udayar v. Vasudeva Ayyar. (1917) I.L.R., 40 Mad., 793 (P.C.) 141, 143, 379	
Balkishen Das v. W. F. Legge. (1900) I.L.R., 22 All., 149 (P.C.); 27 I.A., 58 733, 734, 735, 738	
Balkrishna Daji v. The Collector, Bombay Suburban. (1923) I.L.R., 47 Bom., 699 359, 361, 364, 366	
Baluswami Aiyar v. Lakshmana Aiyar. (1921) I.L.R., 44 Mad., 605 (F.B.) 692, 693	
Balwant Singh v. R. Clancy. (1912) I.L.R., 34 All., 266 (P.C.) 466, 467, 473, 854	
Baneswar Prammanik v. Tarapada Bhattacharjee. (1917) 41 I.C., 872 787, 789	
Bangaru Ammal v. Vijayamachi Reddiar. (1899) I.L.R., 22 Mad., 175 309, 310	

	PAGE
Bank of New South Wales v. O'Connor. (1899) 14 App. Cas., 273 13	
Banuddin Sahib v. Arunachalam Mudali. (1914) M.L.J., 215 495, 501, 507, 508, 530, 531	
Bapu v. Bapu (1916) I.L.R., 39 Mad., 750 (F.B.) 386, 388, 392	
Bappu v. Annamalal Chettiar. (1923) 44 M.L.J., 226 692, 698, 698, 696, 697	
Barnes v. Addy. (1874) 9 Ch. App. 244 776, 778	
Barney, In re; Barney v. Barney. [1892] 2 Ch., 265 776, 779	
Basaweswaraswami v. The Bellary Municipal Council. (1915) I.L.R., 38 Mad., 6 720, 721	
Basharut-ulla v. Uma Churn Dutt. (1889) I.L.R., 16 Calc., 794 527	
Basiram Malo v. Kattayani Debi. (1911) I.L.R., 38 Calc., 448 512	
Baswantappa Sehidapa v. Ranu and Maikhana. (1885) I.L.R., 9 Bom., 86 76	
Bedford Charity (Masters, etc., of), In re. (1819) 2 Swans, 471; 36 E.R., 996 890	
Beni Prasad v. Lajja Ram. (1916) I.L.R., 38 All., 452 83	
_____ v. Narain Das. (1910) 5 I.C., 529 23, 24	
Benyon T. Coy., Ltd. v. Ogg. (1918) 7 Tax Cas., 125 199, 201	
Benzon, In re; Bower v. Chetwynd. [1914] 2 Ch., 98 123, 124, 129, 135	
Bepin Behary Bera v. Sasi Bhushan Datta. (1913) 18 C.W.N., 766 65, 72	
Best & Co. v. Deputy Collector of Madras. (1916) 20 M.L.T., 388 358, 361, 362, 363, 365	
Beti Maharani v. The Collector of Etawah. (1895) I.L.R., 17 All., 198 (P.C.) 646	
Bhagwan v. Krishnaji. (1920) 23 Bom. L.R., 997 698, 695	
Bhagwati Prasad v. Radha Kishen Sewak Pande. (1898) I.L.R., 15 All., 304 (P.C.) 853	
Bhairab Chandra Bose v. Anath Nath De. (1920) 57 I.C., 686 401	
Bhaishankar v. The Municipal Corporation of Bombay. (1907) I.L.R., 31 Bom., 604 588, 603	
Bhashyakarl Naidu v. Andalammal. (1918) M.W.N., 896 153	
Bhaskarappa v. The Collector of North Kanara. (1879) I.L.R., 3 Bom., 452 576	
Bhugwan Chander Kritirai v. Chundra Mala Gupta. (1902) I.L.R., 29 Calc., 773; 1 C.I. J., 97 488, 505, 506, 507	
Bijoy Gopal Mukerj, v. Krishna Mahishi Debi. (1907) I.L.R., 34 Calc., 329 (P.C.); 34 I.A., 87 189	
Bijraj Nopani v. Pura Sundary Dasee. (1915) I.L.R., 42 Calc., 56 (P.C.) 465, 472, 474 397	
Bilas Kunwar v. Dearaj Ranjit Singh. (1915) I.L.R., 37 All., 557 (P.C.) 363	
Bir Bhaddar Sewak v. Sarja Prasad. (1887) I.L.R., 9 All., 681 616	
Bishop v. Pentland. (1827) 7 B. & C., 219; 108 E.R., 705 70	
Biyyakka v. Fakira. (1889) I.L.R., 12 Mad., 211 299, 300	
Blanchenay v. Burt. (1848) 4 Q.B., 707; 114 E.R., 1084 653	
Board of Revenue v. Muniswami Chetty. (1924) I.L.R., 47 Mad., 653 (S.B.) 671	

	PAGE
Boddam, <i>Ex parte</i> . (1860) 2 De. G.F. and J., 625; 45 E.R., 763 ...	124, 128
Bouch v. Sproule. (1887) 12 App. Cas., 385 ...	838, 843, 845
Bourne v. Keane. [1919] A.C., 815 ...	489
Brahmayya v. Achiraju. (1922) I.L.R., 45 Mad., 716 (F.B.) ...	745
Branson v. Appasami. (1894) I.L.R., 17 Mad., 257 ...	782
Bristol Corporation v. John Aird & Co. [1913] A.C., 241 ...	165
British India Steam Navigation Co. v. Secretary of State for India. (1911) I.L.R., 38 Cal., 230 ...	359, 361, 362, 364
Brojendro Coomar Roy v. Madhub Chunder Ghose. (1888) I.L.R., 8 Cal., 343 ...	803
Bryant v. Bull. (1878) 10 Ch. D., 155 ...	54
Budesab v. Hanmanta. (1897) I.L.R., 21 Bom., 509 ...	210
Bull v. Bryant. (1878) 10 Ch. D., 153 ...	54
Burgess v. Morton. [1896] A.C., 138 ...	40, 41, 43
Byomkes v. Bhut Nath. (1921) 34 C.L.J., 489 ...	635

C

California Copper Syndicate Coy. v. Harris. (1904) 5 Tax Cas., 159 ...	198, 201
Cape Brandy Syndicate v. Inland Revenue Commissioners. [1921] 1 K.B., 64 ...	263, 272, 282, 283
----- [1921] 2 K.B., 403 ...	198
Carlisle and Silloth Golf Club v. Smith. [1912] 2 K.B., 177 ...	2
----- v. ----- [1913] 3 K.B., 75 ...	2, 6
Catharine Chalmers, The. (1875) 32 L.T. (N.S.), 847 ...	616
Chadha v. Emperor. (1916) 14 A.L.J., 851 ...	726
Chairman, The, Municipal Council, Srirangam v. Subba Pandithar. (1915) I.L.R., 33 Mad., 456 ...	719, 720, 721
Chaitan Patgosi Mahapatra v. Kunja Behari Patnaik. (1911) I.L.R., 38 Cal., 832 ...	254, 259
Chalavadi Kotiah v. Poloori Alimelammah. (1908) I.L.R., 31 Mad., 71 ...	179
Challenge, The, and Duc D'Aumale. [1904] Prob., 41 ...	879, 881
Chandi Pershad v. Abdur Rahman. (1895) I.L.R., 22 Cal., 131 ...	725
Chandra Deo Singh v. Mata Prasad. (1909) I.L.R., 31 All., 176 (F.B.) ...	104
Chandura Punnayyah v. Rangam Viranna. (1922) 42 M.L.J., 429 ...	32, 34
Charib-Ullah v. Khalak Singh. (1903) I.L.R., 25 All., 407 (P.C.) ...	465, 467, 472, 474
Chatterjee, H. D. v. L. B. Tribedi. (1921) 26 C.W.N., 78 ...	255, 260
Chengalroya Chetti v. Raghava Ramanuja Doss. (1919) 37 M.L.J., 100 ...	40, 41, 43, 45
Chet Ram v. Ram Singh. (1922) I.L.R., 44 All., 368 (P.C.) ...	88, 90, 97, 98, 101, 108, 110, 112, 114, 622
Chhattar Singh v. Tej Singh. (1921) I.L.R., 43 All., 104 ...	480, 785
Chidambaram Chetti v. Pichappa Chetty. (1907) I.L.R., 30 Mad., 248 ...	783
Chidambara Pillai v. Thiruvengadathiengar. (1897) 7 M.L.J., 1 ...	342

	PAGE
Chief Commissioner of Income-tax, The, Madras v. The Eastern Extension Australasia and China Telegraph Company, Ltd. (1921) I.L.R., 44 Mad., 489 (S.B.) ...	655, 670
Chinnappen Chetty v. The Secretary of State for India. (1919) I.L.R., 42 Mad., 239 (F.B.) ...	868
Chinnathambai Rowthan, <i>In re</i> . (1911) 12 Cr. L.J., 104 ...	716
Chinna Venkatasami Naicken v. Venkatasami Naicken. (1919) I.L.R., 42 Mad., 625 ...	41
Chinnu Pillai v. Venkatasamy Chettiar. (1917) I.L.R., 40 Mad., 77 ...	561
Choa Lal Dass v. Anant Pershad Mieser. (1898) I.L.R., 25 Cal., 233 ...	726
Chockalinga Pillai v. Vythealinga Pandara Sunnadhi. (1871) 6 M.H.C.R., 164 ...	343
Chunnil Jethabhai v. Dahyabhai Amulakh. (1908) I.L.R., 32 Bom., 14 (F.B.) ...	827, 831
Chutterpat Singh v. Bai Bahadur Saita Soomarimull. (1916) 20 C.W.N., 889 (F.B.) ...	645, 647
"City of Peking," The. (1888) 14 App. Cas., 40 ...	617
Clerical, Medical and General Life Assurance Society v. Carter. (1889) 22 Q.B.D., 444 ...	3
Colonial Bank v. Whinney. (1886) 11 App. Cas., 426 ...	217
Colonial Sugar Refining Company v. Irving. [1905] A.C., 369 ...	386, 831
Commissioner of Taxes v. Melbourne Trust, Limited. [1914] A.C., 1001 ...	201
Cooke, <i>In re</i> ; Winckley v. Winterton. [1922] 1 Ch., 292 ...	81
Corbett v. Hill. (1870) 9 Eq., 671 ...	720
Corcoran v. Gurney. (1853) 1 El. & Bl., 456 ...	616
Corporation of Calcutta v. Eastern Mortgage Agency Co., Ltd. (1898) I.L.R., 25 Cal., 483 ...	281
----- v. Standard Marine Insurance Company. (1895) I.L.R., 22 Cal., 581 ...	273, 285
Corporation of Ludlro, etc., v. Greenhouse and another. (1827) Bligh's (N.S.), 17 ...	890
County Hotel and Wine Company v. London and North-Western Railway. [1918] 2 K.B., 251 ...	782
Crosley, <i>In re</i> ; Munns v. Burn. (1887) 35 Ch. D., 266 ...	124
Curtis v. Curtis. (1789) 2 Bro. C.C., 620; 29 E.R., 342 ...	424

D

Dal Singh v. Pitam Singh. (1903) I.L.R., 25 All., 179 ...	23
Damodar v. Bhat Bhogilal. (1893) I.L.R., 22 Bom., 493 ...	146
Damodarbhat v. Bhogilal. (1900) I.L.R., 24 Bom., 45 ...	141, 145, 146
Danby v. Counts & Co. (1885) 29 Ch.D., 500 ...	879
Davis v. Barrett. (1851) 14 Beav., 542; 51 E.R., 394 ...	564
----- v. Garrett. (1830) 6 Bing., 716; 130 E.R., 1465 ...	616
David Beevi Ammal v. Radhakrishna Aiyar. (1923) 44 M.L.J., 309 ...	85
Daya Kishen v. Dharam Das. (1907) 4 A.L.J., 159 ...	86

	PAGE
Debi Bakhsh Singh v. Habib Shah. (1918) I.L.R., 35 All., 831 (P.C.) ...	178
Delta, The v. The Erminia Foscolo. (1876) 1 Prob. Div., 393 ...	879, 881
Deonandan Prasad Sing v. Janki Singh. (1920) 5 P.L.J., 314 ...	620
Deputy Collector, Calicut Division v. Aiyavu Pillay. (1911) 2 M.W.N., 367	359
DeSouza v. Coles. (1868) 3 M.H.C.R., 384 ...	187, 312, 323, 818
De Winton v. The Mayor of Brecon. (1860) 28 Beav., 200; 54 E.R., 342.	51
Dinabandhu v. Mashuda. (1912) 16 C.L.J., 818 ...	787
Dinobundhoo Nundee v. Keshub Chunder Ghose. (1865) 3 W.R. Mis., 25.	803
Dinobundhu Shaw Chowdhry v. Jogmaya Dasi. (1902) I.L.R., 29 Cal., 154 (P.C.); 29 I.A., 9 ...	195
Dobson v. Groves. (1844) 6 Q.B., 637; 115 E.R., 239 ...	31, 33, 37, 38, 809
Doraiswami v. Chidambaram Pillai. (1924) I.L.R., 47 Mad., 63 ...	521
Doraswami v. Chidambaram Pillai. (1924) I.L.R., 47 Mad., 63 ...	293, 294, 296, 301, 306, 531
Dormer v. Fortescue. (1744) 3 Atk., 124, 26 E.R., 875 ...	782
Dudgeon v. Pembroke. (1874) 9 Q.B., 581 ...	616
Duke of Buccleuch, The. [1892] Prob., 201 ...	54
Duraiswami Sastrial v. Venkatarama Iyer. (1911) 21 M.L.J., 1088 ...	926
Durpati Bibi v. Ramrach Pal. (1909) I.L.R., 31 All., 527 ...	488, 506, 518

E

Eda Punnayya v. Jangalu Rama Kotayya. (1920) M.W.N., 1 ...	787, 789
Ellis v. Torrington. [1920] 1 K.B., 399 ...	732
Elumalai Chetty v. Balakrishna Mudaliar. (1921) I.L.R., 44 Mad., 965...	402
Emperor v. Dwarka Kurmi. (1908) I.L.R., 28 All., 683 ...	238, 242
— v. Madan Mandal. (1914) I.L.R., 41 Cal., 663 ...	749, 755, 758, 760
Enamul Huq v. Ekramul Huq. (1898) I.L.R., 25 Cal., 294 ...	940
England, In re, Steward v. England. [1895] 2 Ch., 820 ...	424
Equitable Life Assurance Society of the United States v. Bishop. [1900] 1 Q.B., 177 ...	2, 5
Ezra v. The Secretary of State. (1903) I.L.R., 30 Cal., 86 ...	361
— v. The Secretary of State for India. (1905) I.L.R., 32 Cal., 605 (P.C.) ...	358, 359, 361, 362, 363, 366

F

Fakirchand Motichand v. Motichand Hurruckchand. (1883) I.L.R., 7 Bom., 488 ...	102
Fani v. Surendra. (1922) 35 C.L.J., 9 ...	298
Felaram Roy v. Bagalanaud Banerjee. (1910) 14 C.W.N., 895 ...	65
Fletcher v. Inglis. (1819) 2 B. & Ald., 315; 106 E.R., 882 ...	616
Friend v. Young. [1897] 2 Ch., 421 ...	879

G

	PAGE
Ganapathi Mudaliar v. Krishnama Achari. (1922) 43 M.L.J., 184 ...	295, 297, 528, 530, 532, 541
Ganes Narayan Singh v. Malida Koer. (1911) 13 C.L.J., 399 ...	36
Ganesha Row v. Tulja Ram Row. (1911) 21 M.L.J., 1093 ...	924, 926
Ganesha Row v. Tuljaram Row. (1913) I.L.R., 36 Mad., 295 (P.C.) ...	466, 923, 926
Gangabai v. Khashabai. (1899) I.L.R., 23 Bom., 719 ...	490
Ganu Singh v. Jangi Lal. (1899) I.L.R., 26 Cal., 531 ...	515
Garby v. Harris. (1852) 21 Ex., 160 ...	276
Gardner v. Lucas. (1878) 8 App. Cas., 582 ...	385
Gauranga Sahu v. Sudevi Mata. (1917) I.L.R., 40 Mad., 612 (F.B.) ...	885, 886, 895
General Rolling Stock Company, In re. (1872) 7 Ch. App., 646 ...	124
Gibbons, In the matter of. (1887) I.L.R., 14 Cal., 42 (F.B.) ...	430, 436
Gilbey v. Rush. [1906] 1 Ch., 11 ...	798
Girdharee Lal v. Kantoo Lal. (1875) 14 B.L.R., 187 (P.C.); 1 I.A., 321. ...	89, 90, 91, 99, 102, 105, 109, 622, 625, 626
Girish Chandra Basu v. Apurba Krishna Dass. (1894) I.L.R., 21 Cal., 940 (F.B.) ...	880
Glasgow Corporation Water Commissioners v. Miller. (1886) 2 Tax Cases, 131 ...	3, 6
Glegg v. Bromley. [1912] 3 K.B., 474 ...	782
Glendarroch, The. [1894] Prob., 226 ...	611
Gokal Chand v. Sanwal Das. (1920) I.L.R., 1 Lab., 438 ...	320
Gokaldas Gopaldas v. Purnamal Premnukhdas. (1884) I.L.R., 10 Cal., 1035 (P.C.); 11 I.A., 126 ...	195
Gones Chandra v. Banwari Lal. (1912) 18 C.L.J., 86 ...	495, 507, 508, 520, 521
Goodtitle v. Badtitle. 9 Dowl. Prac. Cas., 1009 ...	300
Gopal Chunder Chatterje v. Gunamoni Dasi. (1893) I.L.R., 20 Cal., 870 ...	72, 293, 390
Gopal Das v. Parmanand. (1921) 60 I.C., 512 ...	154, 158
Gopala Row v. Maria Susaya Pillai. (1907) I.L.R., 30 Mad., 274 ...	821
Gopikabai v. Dattatraya. (1900) I.L.R., 24 Bom., 386 ...	308, 310
Goverdhana Dass v. Veerasami Chetti. (1903) I.L.R., 26 Mad., 537 ...	560, 561
Grill v. General Iron Screw Collier Co. (1866) 1 C.P., 600 ...	616
Groves v. Administrator-General. (1899) I.L.R., 22 Mad. L.R., 119 ...	66, 71, 75
Gunjeshwar Kunwar v. Durga Prasad Singh. (1918) I.L.R., 45 Cal., 17 (P.C.); 44 I.A., 229 ...	184
Gur Narayan v. Sheolal Singh. (1919) I.L.R., 46 Cal., 566 (P.C.); 46 I.A., 1. ...	646, 897
Guradas Biswas v. Bhowanipore Zemindary Co., Ltd. (1921) 25 C.W.N., 972 ...	299

H

Hall, In re. (1888) 21 Q.B.D., 137 ...	27
Hanuman Prasad v. Muhammadt Ishaq. (1906) I.L.R., 28 All., 187 ...	787, 788

	PAGE
Hanwant Kashinath v. Ganesha Annaji. (1919) I.L.R., 43 Bom., 612 ...	92, 97, 107, 115
Hardwar Sing or Lall v. Khoga Ojha. (1898) I.L.R., 20 Calc., 870 ...	247
Hari Charan Gorait v. Girish Chandra Sadhukhan. (1911) I.L.R., 38 Calc., 68 ...	725
Hari Charan Kuar v. Kaula Rai. (1917) 2 P.L.J., 513 (F.B.) ...	693
Hari Das Pal v. Municipal Board, Lucknow. (1914) 22 I.C., 652 ...	359
Hari Gobind Adhikari v. Akhoy Kumar Mozumdar. (1899) I.L.R., 16 Calc., 364 ...	646
Hari Sing v. Kankinarah Co., Ltd. (1921) 34 C.L.J., 39 ...	31, 88
Harrison v. Wright. (1845) 13 M. & W., 816; 153 E.R., 342 ...	41
Harvey v. Shelton. (1844) 7 Beva., 455; 49 E.R., 1141 ...	31, 33, 36, 808
Hem Chunder Chunder v. Prankristo Chunder. (1876) I.L.R., 1 Calc., 403 ...	52
Hemraj Champa Lall v. Ramkishan Ram. (1917) 2 P.L.J., 101 ...	681
Het Ram v. Shadi Ram. (1918) I.L.R., 40 All., 407 (P.C.) ...	553, 559
Hira Singh v. Ghulam Qadir. (1918) 48 I.C., 399 ...	787
Hudson Bay Coy. v. Stevens. (1909) 5 Tax Cas., 424 ...	198, 201
Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonwerees (1856) 6 M.I.A., 393 ...	622, 625, 854
Hyatt, <i>In re</i> , Bowles v. Hyatt. (1888) 38 Ch. D., 609 ...	415, 416, 423
Hyde v. Johnson. (1836) 2 Bing. (N.C.), 776; 132 E.R., 299 ...	277

I

Indur Chunder Singh v. Radha Kishore Ghose. (1892) I.L.R., 19 Calc., 507 (P.C.) ...	777
Ingestre v. Attorney-General. (1914) 30 Law Quarterly Review, 153 ...	709
Inland Revenue Commissioners v. Blott Inland Revenue Commissioners v. Greenwood. [1921] 2 A.C., 171 ...	838, 840, 841, 844, 845
v. Blott Inland Revenue Commissioners v. Greenwood. [1920] 1 K.B., 114 ...	842
v. [1920] 2 K.B., 657 ...	843
v. Von Glehn. [1920] 2 K.B., 553 ...	655, 657
Inland Revenue, etc. v. Warnes & Co. [1919] 2 K.B., 444 ...	683
Ishar Das v. Latha Ram. (1921) 62 I.C., 924 ...	256
Ittiachan v. Velappan. (1885) I.L.R., 8 Mad., 484 (F.B.) ...	

J

Jagabandhu v. Haladhar. (1918) 27 C.L.J., 110 ...	951
Jagadamba Kumari v. Narsin Singh. (1922) 50 I.A., 1 ...	423, 424
Jagadish Bhattacharjee v. Bama Sundari Dasya. (1919) 23 C.W.N., 608 ...	65, 73
Jaganuatha Ayyangar v. Narayana Ayyangar. (1919) 52 I.C., 761 ...	683, 684
Jagat Chandra Mozumdar v. Queen-Empress. (1899) I.L.R., 26 Calc., 786 ...	725

	PAGE
James Morrison & Company, Limited v. Shaw Savill and Albion Company, Limited. [1916] 2 K.B., 783 ...	616
Jamnadas v. Gordhandas. (1896) 8 P.J. Bom. H.C., 615 ...	40, 45
Jamna Doss v. Sabapathy Chetty. (1913) I.L.R., 36 Mad., 188 ...	392
Janakirama Reddi v. Thiruvenkada Ramanaia Chari. (1907) 2 M.L.T., 94 ...	142
Jan Ali v. Ram Nath Mundal. (1882) I.L.R., 8 Calc., 32 ...	891
Jayarama Ayyar v. Vridhagiri Aiyar. (1921) I.L.R., 44 Mad., 85 ...	527
Jenks v. Turpin. (1888) 18 Q.B.D., 505 ...	426
Jhabba Lal v. Shib Charan Das. (1917) I.L.R., 39 All., 152 ...	678, 679, 680, 683
Jhanda Singh v. Wahib-ud-din. (1916) I.L.R., 38 All., 570 (P.C.); 43 I.A., 284 ...	733, 734, 735
Jogendra Nath Gossain v. Debendra Nath Gossain. (1899) I.L.R., 26 Calc., 127 ...	51
Jogi Das v. Ganga Ram. (1917) 21 C.W.N., 957 (P.C.) ...	91, 97, 115
Joseph Travers & Sons, Limited v. Cooper. [1915] 1 K.B., 73 ...	617
Judoonath Chuckerbutty v. Mr. James Tweedie. (1869) 11 W.R., 20 ...	854, 859
Jugdep Singh v. Habibullah Khan. (1907) 6 C.L.J., 612 ...	562
Justices of the Peace for Calcutta, The v. The Oriental Gas Company. (1872) 8 B.L.R., 433 ...	187, 188, 818

K

Kalianna Mudali v. Secretary of State. (1915) 31 I.O., 982 ...	863, 864, 865, 866, 871, 872, 875
Kalliani Amma v. Narayanan Nambiar. (1915) 28 M.L.J., 266 ...	206
Kalyan Singh v. Jagan Prasad. (1915) I.L.R., 37 All., 589 ...	645
Kamayya v. Ramamma. (1922) M.W.N., 176 ...	296
Kamayya v. Ramamma. (1922) 16 L.W., 934 ...	528, 529, 541
Kameswaramma v. Venkata Subba Row. (1915) I.L.R., 38 Mad., 1120 ...	622, 628, 629, 630, 631, 632
Kanatala Venkata Krishnama Charlu v. Kandala Perundevamma. (1920) 56 I.C., 593 ...	31
Kanayalal Bhoya v. Paramasukdoss. (1922) 16 L.W., 608 ...	137, 320
Kandasami Goundan v. Kuppu Mooppan. (1920) I.L.R., 43 Mad., 421 ...	92, 97
Kandukuri Mahalakshamma Garu v. The Secretary of State for India. (1911) I.L.R., 34 Mad., 295 ...	668
Kani Venkatareddi v. Chelluri Sathyanarayanamoorthi. (1921) 40 M.L.J., 473 ...	622, 623, 624, 631
Kanniappa Chettiar v. Ramachandraiyyar. (1924) 46 M.L.J., 417 ...	817, 818, 819
Kasturi Pillai v. Municipal Council, Erode. (1920) I.L.R., 43 Mad., 280 ...	359
Kavali Sankara Rao v. Ramakrishnayya. (1924) 46 M.L.J., 184 ...	475
Kearsley, <i>Ex parte</i> ; <i>In re</i> Genese. (1886) 17 Q.B.D., 1 ...	682
Kendall v. Hamilton. (1879) 4 App. Cas., 504 ...	852, 853

	PAGE
Keymer v. Visvanatham Reddi. (1917) I.L.R., 40 Mad., 112 (P.C.)	879, 880, 881
Khatizan v. Sonsiran Daulatram. (1920) I.L.R., 47 Calc., 1104	138
Khiarajmal v. Daim. (1905) I.L.R., 32 Calc., 296 (P.C.)	72, 73, 76, 298, 303, 792, 795
Khunni Lal v. Gobind Krishna Narain. (1911) I.L.R., 33 All., 356 (P.C.); 38 I.A., 87	758 185
Khushali Ram v. Bholar Mal. (1915) I.L.R., 37 All., 252	681, 683
King-Emperor, The v. Romesh Chandra Gubta. (1917) 22 C.W.N., 168.	435
King-Emperor v. Sakharan. (1902) I.L.R., 26 Bom., 50	247
— v. Bhut Nath Ghose. (1902) 7 C.W.N., 345	239
Kishan Prasad v. Har Narain Singh. (1911) I.L.R., 33 All., 272 (P.C.)	693
Kishen Chunder Ghose v. Ashoorun. (1863) 1 Marsh, 647	298, 303
Kishen Singh v. Chhajju Singh. (1923) I.L.R., 45 All., 90	99, 107, 108, 109, 115
Koilpillai Samban v. Sappanimuthu Samban. (1923) 17 L.W., 187	549
Krishna Aiyar v. Shamanna. (1912) 23 M.L.J., 610	693, 696, 697
Krishna Chandra Golder v. Mohesh Chandra Saha. (1905) 9 C.W.N., 584	635
Krishna Das Roy v. The Land Acquisition Collector of Pabna. (1911) 16 C.W.N., 327	359, 362, 365
Krishnaji Reddiar v. Mathuveera Reddiar. (1923) 44 M.L.J., 844	548
Krishnammal v. Krishna Iyengar. (1912) 23 M.L.J., 50 (F.B.)	364, 367
Krishnammal v. Soundararaja Aiyar. (1915) I.L.R., 38 Mad., 698	154, 158, 159
Krishna Mohun Basak v. Kunjo Behari Basak. (1881) 9 C.L.R., 1	804, 810
Krishna Pillai v. Rangasami Pillai. (1895) I.L.R., 18 Mad., 462	206, 213
Krishna Reddy v. Thanikaachala Mudali. (1923) 45 M.L.J., 153	320
Krishnasami v. Sundarappayyar. (1895) I.L.R., 18 Mad., 415	154, 155
Krishnasami Kona v. Ramasami Ayyar. (1899) I.L.R., 22 Mad., 519	622, 626, 627, 628, 629, 630
Krishnayya v. Unnissa Begam. (1892) I.L.R., 15 Mad., 399	68, 70, 75, 77
Kristnaswamy Mudaliar v. Official Assignee of Madras. (1903) I.L.R., 26 Mad., 673	488, 506
Kulasekara Naicker v. Jagadambal Ammal. (1919) I.L.R., 42 Mad., 352 (F.B.)	320
Kumarappa Chettiar v. Murugappa Chettiar. (1916) 36 I.C., 771	683, 684
Kunhammad Haji, In re. (1923) I.L.R., 46 Mad., 382	431, 433
Kuppuswami Aiyar, In re. (1916) I.L.R., 39 Mad., 561	436, 437
Kuppuswami Ayyangar v. Kamalammal. (1920) I.L.R., 43 Mad., 842	725
Kuppuswami Chettiar v. Rajagopala Aiyar. (1922) I.L.R., 45 Mad., 466	83, 85, 787 645

L

Lachmi Narain v. Sheonath Pandi. (1920) I.L.R., 42 All., 185	31, 33, 36
Lakshmana Aiyar v. Srinivasa Aiyar. (1898) 8 M.L.J., 64	622
Lakshmana Chettiar v. Govindarajulu Naidu. (1910) 8 M.L.T., 349	628

	PAGE
Lakshmanan v. Muttia. (1888) I.L.R., 11 Mad., 1	132
Lakshmanan Chetty v. Muthaya Chetty. (1921) 40 M.L.J., 126	562
Lakshmiah v. Narayanappa. (1918) 23 M.L.T., 387	871
Lakshmi Ammal v. Kadiresan Chettiar. (1921) 41 M.L.J., 198	163
Lakshminarasimha Somayagiyar v. Ramalingam Pillay. (1920) 39 M.L.J., 319	332, 588, 603
Lakshminarayana Tantri v. Ramachandra Tantri. (1918) 34 M.L.J., 71.	32, 34
Laldhari Singh v. Manager, Court of Wards, Bhabatpura Estate. (1911) 14 C.L.J., 639	950
Lalla Bhagun Pershad v. Holloway. (1885) I.L.R., 11 Calc., 393	950
Lalla Sheo Churn Lal v. Ramnandan Dobey. (1825) I.L.R., 22 Calc., 8.	31
Lancaster Banking Corporation, Ex parte; In re Westby. (1879) 10 Ch. D., 776	124, 134
Lane v. Sterne. (1862) 3 Giff., 629; 66 E.R., 559	51
Last v. London Assurance Corporation. (1885) 10 App. Cas., 438	5
Latifa Bi v. Mottai Ammal. (1923) I.L.R., 46 Mad., 836	816, 817, 818, 819
Laurie v. Douglas. (1846) 15 M. & W., 746; 153 E.R., 1052	616
Laxmipathaya v. Ramachandra. (1916) 31 M.L.J., 311	457
Leeds Benefit Building Society v. Mallandaine. [1897] 2 Q.B., 402	2, 3, 5
Leeds Permanent Benefit Building Society v. Mallandaine. (1897) 76 L.T., 650	2
Lennard's Carrying Company, Limited v. Asiatic Petroleum Company, Limited. [1915] A.C., 705	617
Leyland Shipping Company v. Norwich Union Fire Insurance Society. [1918] A.C., 350	616
Lingayya v. Chinna Narayana. (1918) I.L.R., 41 Mad., 169 (F.B.)	881
Lokasikhamani Mudaliar v. Phiagaroya Chettiar. (1917) M.W.N., 420	141, 142, 146
Lutchmeeput Singh v. Sadaulla Nushyo. (1883) I.L.R., 9 Calc., 698	118

M

Macrae v. Goodman. (1846) 5 M.P.C.C., 315	564
Madan Gopal v. Malawa Kam. (1922) 68 I.C., 777	827
Madan Mohan Singh v. Gaja Prasad Singh. (1911) 11 I.C., 228	153, 158
Madhava v. Narayana. (1886) I.L.R., 9 Mad., 244	210, 213
Madhavrao Waman v. Raghunath Venkatesh. (1923) I.L.R., 47 Bom., 798 (P.C.); 53 I.A., 255	354
Madhusudan Das Mohant v. Iswari Dayi Debi. (1921) I.L.R., 48 Calc., 341	98, 115
Madurai Pillai v. Muthu Chetty. (1915) I.L.R., 38 Mad., 823 (F.B.)	831
Mahadeo Prasad v. Bindeshri Prasad. (1903) I.L.R., 30 All., 137	463
Mahalakshmi v. Subborayadu. (1923) 17 L.W., 429	715
Muharaja of Bobbili v. Zamindar of Chundi. (1912) I.L.R., 35 Mad., 108.	414
Maharanees Shibessouree Debia v. Mothooranath Acharjo. (1869) 18 M.I.A., 270	352

	PAGE
Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh. (1912) I.L.R., 39 Calo., 527 (P.C.); 39 I.A., 68	195
Makundi v. Sarabaukh. (1884) I.L.R., 6 All., 417	854
Malkarjun v. Narhari. (1901) I.L.R., 25 Bom., 337 (P.C.)	64, 68, 69, 71, 72, 73, 75, 76, 77, 261, 294, 301, 302, 530, 793
Mallayya v. Punnamma. (1924) I.L.R., 47 Mad., 476	785
Manavala Goundan v. Kumarappa Reddy. (1907) I.L.R., 30 Mad., 328 ...	255
Manavikraman Ettan Thamburan v. Ammu. (1901) I.L.R., 24 Mad., 471 (F.B.)	211
Mani Mohan Mandal v. Ramtaran Mandal. (1916) I.L.R., 43 Calo., 148. ...	264, 275
Manindra Chandra Nandi v. Barada Kanta Chowdhry. (1903) I.L.R., 30 Calo., 112	715
Mani Singh Mandhata v. Nawab Bahadur of Murshidabad. (1919) I.L.R., 48 Calo., 694 (P.C.)	297
Mamu v. Kuttu. (1883) I.L.R., 6 Mad., 61	11
Mannu Lal v. Ghulam Abbas. (1910) I.L.R., 32 All., 297 (P.C.) ...	83
Mara v. Browne. [1896] 1 Ch., 199	776, 779
Mariappa Pillai v. Raman Chettiar. (1919) I.L.R., 42 Mad., 322 ...	678
Marina Veeraswamy v. Boyinapalli Venkatarayudu. (1920) 39 M.L.J., 225 (F.B.)	946, 947
Mathew v. Brise. (1851) 14 Beav., 341	776
Maung Kyin v. Ma Shwe La. (1918) I.L.R., 45 Calo., 320 (P.C.); 44 I.A., 236	733, 734, 735
Mayandi Chettiar v. Chokkalingam Pillay. (1904) I.L.R., 27 Mad., 291 (P.C.); 31 I.A., 83	341, 343, 354, 355
McMurdo, <i>In re</i> ; Penfield v. McMurdo. [1902] 2 Ch., 684	124, 128, 132
Mercantile Bank of India, The, Ltd., Madras v. The Official Assignee, Madras. (1916) I.L.R., 32 Mad., 250	217
Merchants Trading Co. v. Universal Marine Co. (1874) 19 Q.B., 581 ...	616
Midnapur Zamindari Company, Ltd. v. Naresb Narayan Roy. (1921) I.L.R., 48 Calo., 460 (P.C.)	457
Mir Sarwarjan v. Fakhr-ud-din Mahomed Chowdhuri. (1912) I.L.R., 39 Calo., 232 (P.C.)	692, 695, 697
Modhu Sudan Singh v. Rooke. (1898) I.L.R., 25 Calo., 1 (P.C.); 24 I.A., 164	184
Mohan Krishna Dar v. Har Prasad. (1917) 40 I.C., 2	784, 787, 798
Mohummud Buhadoor Khan v. The Collector of Bareilly (1874) 21 W.R., 318	831
Moore, <i>In re</i> ; Holmes v. Holmes. [1907] 2 Ch., 304	415, 417
Moore v. Flanagan and Wife. [1920] 1 K.B., 919	852, 853
Morel Brothers & Co., Limited v. Westmoreland (Earl of). [1904] A.C., 11	852
Morel Brothers & Co., Limited v. Westmoreland (Earl of). [1903] 1 K.B., 64	852, 853
Moro Baghunath v. Balaji Trimbak. (1899) I.L.R., 13 Bom., 45	566
Motilal v. Surajmal. (1906) I.L.R., 30 Bom., 167	405, 409

	PAGE
Mrs. Levina Ashton v. Madhabmoni Dasi. (1910) 14 O.W.N., 560 ...	50
Muhammad Askari v. Radhe Ram Singh (1900) I.L.R., 32 All., 307 ...	853
Muhammad Rowther v. Abdul Rehman Rowther. (1923) I.L.R., 46 Mad., 135	481
Muhammad Rustam Ali Khan v. Municipal Committee, Karnal. (1920) I.L.R., 1 Lah., 117 (P.C.)	119
Muhi-ud-din Ahmad Khan v. Majlis Rai. (1884) I.L.R., 6 All., 231 ...	153
Mullingar Rural District Council v. Rowles. (1912) 6 Tax Cases, 85 ...	8, 6
Mungul Pershad Dohit v. Grija Kant Lahiri. (1882) I.L.R., 8 Calo., 51 (P.C.)	645, 646, 648, 830
Municipal Board of Agra, The v. Asharfi Lal. (1922) I.L.R., 44 All., 202	591, 602
Murari v. Tayana. (1896) I.L.R., 20 Bom., 236	854, 859, 860
Murlidhar v. Pitambar Lal. (1922) I.L.R., 44 All., 525	83
Mussamat Jatti v. Banwari Lal. (1923) 45 M.L.J., 355	570
Mussumat Asima Beebee v. Sheikh Ahmudee. (1854) 9 S.D.A. (N.W.P.), 1	14, 25
Muthiah Chettiar v. Bava Sahib. (1914) 27 M.L.J., 605	297, 529, 531, 540
Muthu Korakkai Chetty v. Madar Ammal. (1920) I.L.R., 43 Mad., 185 (F.B.)	123
Muthukudam Pillai, <i>In re</i> . (1903) I.L.R., 26 Mad., 190	392, 393
Muthu Pillai v. Veda Vyasa Chariar. (1921) 60 I.C., 397	457, 635
Muthuswami Mudali v. Veeni Chetti. (1907) I.L.R., 30 Mad., 382 (F.B.) 886, 387, 888, 392	
Muthuswami Swamiar v. Somoo Kandiar. (1920) I.L.R., 43 Mad., 869 ...	469, 475
Muthu Veera Vandayan v. The Secretary of State for India in Council. (1906) I.L.R., 29 Mad., 461	867, 873
Muthuvelu Mudaliar v. Vythilinga Mudaliar. (1919) I.L.R., 42 Mad., 407 (F.B.)	733
Mutta Venkatachalapathy v. Pyinda Venkatachalapathy. (1912) 12 M.L.T., 579	206
Muttayan v. Zamindar of Sivagiri. (1883) I.L.R., 6 Mad., 1 (P.C.) ...	90, 423, 622, 626
Muttusubbia Chettiar v. Rangiaoundan. (1897) 7 M.L.J., 191	776
Mylappa Chettiar v. Aga Mirza Mohamad Shirazee. (1919) 37 M.L.J., 712, 405, 408, 409	

N

Nagalla Kotayya v. Nagalla Mallayya. (1910) M.W.N., 719	635
Naganna v. Venkata Krishnamma. (1896) 6 M.L.J., 86	635
Nand Lal Pal v. Naresb Chandra Deb. (1917) 41 I.C., 468	635
Nanomi Babuasin v. Modhun Mohun. (1856) I.L.R., 13 Calo., 21 (P.C.) ...	91, 95, 97, 98, 99, 106, 108, 110, 113
Narasimha Rao v. Rattamma. C.M.A. No. 316 of 1918 (unreported) ...	808, 810

	PAGE
Narayana Kothan v. Kaliyanasundaram Pillai. (1896) I.L.R., 19 Mad., 219	64, 66, 70
Narayana Row v. Venkatasubba Row. (1920) 38 M.L.J., 77 ..	697
Narendra v. Atul. (1918) 27 C.L.J., 605	537
Narendra Chandra Mandal v. Jogendra Narayan Roy. (1914) 19 C.W.N., 537	784, 787, 798
Narendra Nath Mitter v. Radha Charan Pal. (1919) I.L.R., 46 Calc., 119	587, 601
Narsingh Sahai v. Sheo Prasad. (1918) I.L.R., 40 All., 1 (F.B.)...	827, 831
Nasiruddin v. Bipra Das. (1918) 27 C.L.J., 538	527
Nataraja Mudaliar v. Municipal Council of Mayavaram. (1913) I.L.R., 36 Mad., 120	587, 588, 603
Nathe Khan v. Muhammad Khan. (1918) 46 I.C., 534	158
Nathu Valad Pandu v. Budhu Valad Bhika. (1894) I.L.R., 18 Bom., 537	159
National Telephone Company, Limited v. Postmaster-General. [1913] A.C., 546	141, 143, 373
Neelakandhan v. Ananthakrishna Ayyar. (1907) I.L.R., 20 Mad., 61 ...	155
Neelaveni v. Narayana Reddi. (1920) I.L.R., 43 Mad., 94 (F.B.) ...	174
Neelu Neithiar v. Subramania Moothan. (1920) 11 L.W., 59	290, 291, 296 528, 529, 541
New York Life Insurance Company v. Styles. (1889) 14 App. Cas., 381	2, 4, 5, 6, 7
Nicholas v. Asphar. (1897) I.L.R., 24 Calc., 216	711
Nidamarthi Mukkanti v. Thammana Ramayya. (1903) I.L.R., 26 Mad., 76	40, 41, 45
Nihal Singh v. Sewa Ram. (1916) I.L.R., 38 All., 292	158, 158
Nikka Mal v. Marwar Bank, Ltd. (1919) 52 I.C., 188	688, 684
Nilmani Ghatak v. Emperor. (1910) I.L.R., 37 Calc., 671	92
Nilmoni Singh Deo v. Taranath Mukerjee. (1888) I.L.R., 9 Calc., 295 (P.C.)	254, 259
Nilmony Singh Deo v. Biressur Banerjee. (1889) I.L.R., 16 Calc., 744 ...	527
Nimnagadda Peda Naganna, <i>In re</i> . (1915) 26 I.C., 355	41
Norway (owners of the) v. Ashburner. (1865) 3 Moore (N.S.), 245; 16 E.R., 92	611
Nouvion v. Freeman. (1890) 15 App. Cas., 1	879, 881

O

Official Assignee of Madras v. Ramachandra Ayyar. (1923) I.L.R., 46 Mad., 54	98, 102, 109
Official Receiver of Trichinopoly v. Somasundaram Chettiar. (1916) 30 M.L.J., 415	469, 475
Oodayanasamy Tevar v. Alagappa Chetty. (1904) 14 M.L.J., 342 ...	787
Oolagappa Chetti v. Hon. D. Arbuthnot. (1874) 1 I.A., 268	423, 424, 425
Oppenheim & Co. v. Mahomed Haneef. (1922) I.L.R., 45 Mad., 496 (P.C.)	879

P

	PAGE
Pahalwar Singh v. Jiwan Das (1920) I.L.R., 42 All., 109	693
Palaniammal v. Muthuvenkatachala Maniagarar. (1917) 33 M.L.J., 769 ...	570, 571
Palaniandi Pillai v. Papathi Ammal. (1914) M.W.N., 159	928
Palaniappa Chetti v. Annamalai Chetti. (1904) I.L.R., 27 Mad., 223 ...	388, 392
Palaniappa Chetty v. Devasikamony Pandara Sannadhi. (1917) I.L.R., 40 Mad., 709 (P.C.); 44 I.A., 147	352
Pallonji Shapurji Maistry v. Edward Vaughan Jordan. (1888) I.L.R., 13 Bom., 406	438, 505, 507
Panchalu Reddi v. Chinna Venkata Reddy. (1919) I.L.R., 42 Mad., 96 ...	389
Panchu Das v. Emperor. (1907) I.L.R., 34 Calc., 698	749, 754, 760
Pande Satdeo Narain v. Ramayan Tewari. (1923) I.L.R., 2 Patna 385 ...	788, 789, 792
Paramaswamy Aiyangar v. Alamelu Natchiar Ammal. (1919) I.L.R., 42 Mad., 76	254, 258
Parameswara Aiyar v. Land Acquisition Collector, Palghat. (1919) I.L.R., 42 Mad., 231	359, 361, 362, 363, 364, 365, 366
Parce Kunhammed, <i>in re</i> . (1903) I.L.R., 26 Mad., 116	392
Parshadi Lal v. Chunni Lal. (1884) I.L.R., 6 All., 142	133
Partab Singh v. Bhabti Singh. (1913) I.L.R., 35 All., 487 (P.C.) ...	787, 794, 795
Parthasarathi Ayyangar v. Doraisami Naiker. (1923) I.L.R., 46 Mad., 823	763, 766, 768, 769, 772, 773
Parthasarathy Pillai v. Thiruvengada Pillai. (1907) I.L.R., 30 Mad., 840 ...	893
Partington v. The Attorney-General. (1869) 4 E. and Ir. Appeals, 100	273
Patinhare Tarkatt Rama Mannadi v. Vellur Krishnan Menon. (1903) I.L.R., 26 Mad., 267	821
Payidanna v. Lakshminarasamma. (1915) I.L.R., 38 Mad., 1076	86, 297, 529
Peda Venkauna v. Sreenivasa Deekshatulu. (1918) I.L.R., 41 Mad., 136. 90, 97, 622, 624, 628, 630, 631	878, 879, 883
Pemberton v. Huges. [1899] 1 Ch., 781	364
Perianan Chetti v. Nagappa Mudaliar. (1907) I.L.R., 30 Mad., 32 ...	626
Periasami Mudaliar v. Seetharama Chettiar. (1904) I.L.R., 27 Mad., 243 (F.B.)	226
Phoolbas Koonwur v. Lalla Jogeshur Sahoy. (1876) I.L.R., 1 Calc., 226 (P.C.)	509
Pickering v. James. (1873) 8 C.P., 489	588, 591
Pierce Leslie v. Permal. (1917) I.L.R., 40 Mad., 1069 (F.B.)	645
Pisani v. Attorney-General for Gibraltar. (1874) L.R., 5 P.C., 516 ...	40, 43
Polemis and Furness Withy & Co., <i>In re</i> . [1921] 3 K.B., 580	617
Ponnambala Pillai v. Annamalai Chettiar. (1920) I.L.R., 43 Mad., 372 (F.B.)	28
Ponnappa Pillai v. Pappuvayyengar. (1882) I.L.R., 4 Mad., 1 (F.B.) ...	89, 622, 626
Ponnusamy Padayachi v. Karuppudayan. (1915) I.L.R., 38 Mad., 848 ...	901, 912
Poole v. Huskinson. (1843) 11 M. & W., 827; 152 E.R., 1039	119

	PAGE
Prasada Nayudu v. Virayya. (1918) I.L.R., 41 Mad., 849 ...	518
Prasad Row v. The Secretary of State for India. (1917) I.L.R., 40 Mad., 886 (P.C.) ...	868, 869
Prayag Doss Ji Varn, Mahant v. Tirumala Srirangacharlavaru. (1905) I.L.R., 28 Mad., 319 ...	141, 145, 148, 149
Premmoyi Choudhrani v. Preonath Dhur. (1896) I.L.R., 23 Calc., 636 ...	64, 72
President, District Board, Tanjore v. Kannuswami Thondaman. (1916) 35 I.C., 121 ...	901, 912, 913
President Lincoln, The. [1911] Prob., 248 ...	617
Price & Co. v. Union Lighterage Company. [1903] 1 K.B., 750; [1904] 1 K.B., 412 ...	617
Priestly v. Fernie. (1865) 3 H. & C., 977 ...	853
Pritchard v. Myor & Co. of Bangor. (1888) 13 App. Cas., 241 ...	601
Pryce v. Monmouthshire Canal and Railway Companies. (1879) 4 App. Cas., 197 ...	278
Public Prosecutor v. Raver Unithiri. (1914) 26 M.L.J., 511 ...	389
Puninthavelu Mudaliar v. Bhashyam Ayyangar. (1902) I.L.R., 25 Mad., 406 ...	217
Punnayyah v. Viranna. (1922) I.L.R., 45 Mad., 425 ...	84

Q

Queen-Empress v. Bana Panja. (1893) I.L.R., 17 Bom., 260 (F.B.) ...	754, 760
— v. Basappa. (1895) I.L.R., 18 Mad., 394 ...	247
— v. Bharmappa. (1889) I.L.R., 12 Mad., 123 ...	236, 239
— v. Bisheshar. (1887) I.L.R., 9 All., 645 ...	753, 755, 758, 759
— v. C. P. Fox. (1886) I.L.R., 10 Bom., 176 (F.B.) ...	430, 436
— v. Dorasami Ayyar. (1901) I.L.R., 24 Mad., 414 ...	239, 242
— v. Durga Charan. (1885) I.L.R., 7 All., 672 ...	436
— v. Ganga Din. (1900) I.L.R., 22 All., 118 ...	441
— v. Ganga Ram. (1894) I.L.R., 16 All., 136 (F.B.) ...	334
— v. Gharya. (1895) I.L.R., 19 Bom., 728 ...	238
— v. Jadub Das. (1900) I.L.R., 27 Calc., 295 ...	243, 244
— v. Jagan Singh. (1892) 12 A.W.N., 103 ...	726
— v. Jeochi. (1899) I.L.R., 21 All., 111 ...	238, 243
— v. Nageshappa. (1896) I.L.R., 20 Bom., 543 ...	725
— v. Nirmal Das. (1900) I.L.R., 22 All., 445 ...	238, 248
— v. Tangavelu Chetti. (1899) I.L.R., 22 Mad., 153 ...	915, 916
Queen, The v. Periannan. (1882) I.L.R., 4 Mad., 241 ...	231
Quinn v. Leathem. [1901] A.C., 495 ...	94

R

Radha Kishan v. The Collector of Jaunpur. (1901) I.L.R., 23 All., 220 (P.C.) ...	821, 823
Raghubar Dyal Sahu v. Bhikya Lal Misser. (1886) I.L.R., 12 Calc., 69.	83

	PAGE
Raghunath Das v. Sundar Das Khetri. (1915) I.L.R., 42 Calc., 72 (P.C.) ...	298, 294, 300, 305, 303, 307, 655
Raghunathji Tarachand v. The Bank of Bombay. (1910) I.L.R., 34 Bom., 72 ...	698
Ragunathaswamy Iyengar v. Gopaul Rao. (1921) 41 M.L.J., 547 ...	64, 65, 66, 68, 69, 73, 75, 76
Ragunathaswamy Iyengar v. Gopaul Rao. (1921) 41 M.L.J., 547 ...	294, 296, 306
Raja Brij Narain Rai v. Mangla Prasad Rai. (1924) 46 M.L.J., 28 (P.C.); 51 I.A., 129 ...	622, 629
Rajagopala Aiyar v. Sheik Davood Rowther. (1918) 34 M.L.J., 342 ...	699
Rajagopalan v. Subbarama Iyer. (1919) M.W.N., 356 ...	467
Rajah of Kalahasti v. Achigadu. (1907) I.L.R., 30 Mad., 454 ...	414
— v. Sree Mahant Prayag Dossjee Varu. (1916) 30 M.L.J., 391 ...	415, 418, 423
Rajah of Pittapur v. Venkata Subba Row. (1916) I.L.R., 39 Mad., 645.	830
Rajah Venkatappa Nayanam Varu v. Raja Thimma Nayanam Varu. (1914) 27 M.L.J., 656 ...	308, 310
Rajam Chetti v. Seshayya. (1895) I.L.R., 18 Mad., 236 (F.B.) ...	334
Rajammal v. Mahadeva Yogi. (1914) M.W.N., 717 ...	898
Raja of Ramnad v. Velusami Tevar. (1921) 40 M.L.J., 197 (P.C.) ...	646, 648
Raja Sri Sri Shiva Prasad Singh v. Beni Madhab Chowdhury. (1922) I.L.R., 1 Pat., 387 ...	414
Raj Bullub Shaha v. Gossain Dass Shaha. (1870) 13 W.R., 400 ...	298
Rajjab Ali v. Emperor. (1919) I.L.R., 46 Calc., 60 ...	430, 433
Ramachandra v. Shriniwas. (1922) I.L.R., 46 Bom., 467 ...	645
Ramachandra Aiyar, T. R. v. Parameswaran Unni. (1919) I.L.R., 42 Mad., 360 ...	885, 886, 891
Ramachandra Aiyar v. Sundaramurthi Mudali. (1894) 4 M.L.J., 9 ...	697
Ramachandra Padayachi v. Kondayya Chetti. (1901) I.L.R., 24 Mad., 555 ...	622, 627, 628, 629, 630, 631, 652
Ramajogayya v. Jagannadhan. (1919) I.L.R., 42 Mad., 185 (F.B.) ...	777
Rama Krishna Naidu v. Krishnaswami Naidu. (1919) 36 M.L.J., 641 ...	457
Ramana v. Babu. (1914) I.L.R., 37 Mad., 186 ...	831
Romanadham Sivayya v. Udatha Atchayya. (1913) M.W.N., 288 ...	926
Ramanathan Chettiar v. Kalimutku Pillai. (1914) I.L.R., 37 Mad., 163.	879, 880
— v. Muthiah Chetty. (1920) I.L.R., 43 Mad., 429 ...	775, 776, 780, 781, 782, 783
Ramanuja Jeer Swami v. Secretary of State. (1910) 7 M.L.T., 241 ...	646
Ramanuja Reddiar v. Rangaswami Aiyangar. (1908) 18 M.L.J., 51 ...	821
Ramasami v. Bagirathi. (1883) I.L.R., 6 Mad., 180 ...	66, 70, 71, 73, 75
Ramasami Goundan v. Kali Goundan. (1919) I.L.R., 42 Mad., 810 ...	258
Ramasami Nadan v. Ulaganatha Goundan. (1899) I.L.R., 22 Mad., 49 (F.B.) ...	90, 622, 626

	PAGE
Ramasamy Udayar v. Chakrapany Chettiar. (1907) 17 M.L.J., 488 ...	488, 506
Ramasawmy Chetty v. Madura Mill Company, Ltd. (1916) 1 M.W.N., 265 ...	691
Ramaswami Goundan v. Muthu Velappa Gounder. (1923) I.L.R., 46 Mad., 536; (1923) 44 M.L.J., 1 ...	880, 141, 143
Ramaswami Naicker v. Subbarayulu Naicker. (1916) 3 L.W., 158 ...	256, 260
Ramaswami Pillai v. Govindasami Naicker. (1919) I.L.R., 42 Mad., 319.	122, 123
Ramaswami Thevan v. King-Emperor. Crl. Appl. 1600 of 1922 (unreported) ...	850
Ramavenkatasubba Ayyar v. Subramania Chettiyar. S.A. No. 389 of 1914 (unreported) ...	537
Ramayya v. Krishnamurti. (1917) I.L.R., 40 Mad., 296 ...	950
Ramayya Chettiar v. Sappanimuthu Chettiar. A.S. No. 90 of 1921 (unreported) ...	775, 777, 778
Ram Chand v. Pitam Mal. (1888) I.L.R., 10 All., 506 ...	509, 515
Ram Chandra Marwari v. Rani Keshobati Kumari. (1909) L.R., 36 I.A., 85 ...	22
Ram Dhun Dhur v. Mohesh Chunder Chowdhry. (1883) I.L.R., 9 Calc., 406 ...	691
Ram Doss Lushkur v. Hureehur Mookerjee. (1875) 23 W.R., 86 ...	635
Rameshvar Singh v. Homeshvar Singh. (1921) 40 M.L.J., 1 (P.C.) ...	179
Ramesuri Dassee, In the matter of petition of. (1881) I.L.R., 6 Calc., 103 ...	299
Ranjiban v. Dhiku. (1912) 16 C.L.J., 264 ...	83
	780
Ram Kinkar v. Sthiti Ram. (1918) 27 C.L.J., 528 ...	294, 295, 527, 532, 537
Ramkrishna Dass Surrowji v. Surfunniessa Begum. (1881) I.L.R., 6 Calc., 129 (P.C.) ...	488, 500, 504
Ram Pershad Singh v. Lakhpatri Koer. (1903) I.L.R., 30 Calc., 231 (P.C.) ...	571
Ram Prasad v. Bhikari Das. (1904) I.L.R., 26 All., 464 ...	560
Ramsden & Co., W. v. Jacobs. [1922] 1 K.B., 640 ...	31
Ramsumran Prasad v. Shyam Kumari. (1922) I.L.R., 1 Pat. 741 (P.C.); 49 I.A., 342 ...	184
Rangappa Naik v. Kamti Naik. (1908) I.L.R., 31 Mad., 366 (F.B.) ...	91.
Ranga Rao, In re. (1912) 23 M.L.J., 371 ...	430, 433, 436
Rangasami Naidu v. Sundarajulu Naidu. (1916) 31 M.L.J., 472 ...	570, 571
Rangasamy Naicken v. Komarammal. (1903) I.L.R., 26 Mad., 484 ...	559
Rangaswami Chetti v. Thangavelu Chetti. (1919) I.L.R., 42 Mad., 637	645, 650
Rangayya Reddy v. Subramania Ayyar. (1917) I.L.R., 40 Mad., 365 (F.B.) ...	692, 693, 695
Rani Kanno Dai v. B. J. Laoy. (1897) I.L.R., 19 All., 235 ...	415, 423
Rao Bahadur Raoji v. Govind. (1897) 9 P.J. Bom. H.C., 271 ...	40, 45

	PAGE
Rashid-un-nisa v. Muhammad Ismail Khan. (1909) I.L.R., 31 All., 572 (P.O.) ...	83, 84, 86, 787, 794, 975
Bathna Naidu v. Aiyanaachariar. (1908) 18 M.L.J., 599 ...	622, 628, 630
Rati Ram v. Niadar. (1919) I.L.R., 41 All., 485 ...	926
Ratnam Ayyar v. Krishna Doss Vital Doss. (1898) I.L.R., 21 Mad., 494.	538
Rayarappan Namthar v. Malikandi Akekh Mayan. (1914) 26 M.L.J., 267, 66, 71, 73, 75, 527, 528, 530, 535	
Reazuddi v. The King-Emperor. (1912) 16 C.W.N., 1077 ...	749, 755, 756
	758, 760
Reddi Venkatasubbiah v. Tangtor Subbiah. (1915) M.W.N., 159 ...	493
Reg v. Manchester Justices. [1892] 1 Q.B., 571 ...	380
Rewa Mahton v. Ram Kishen Singh. (1887) I.L.R., 14 Calc., 18 (P.C.)	299, 302
Rhodes v. Swithenbank. (1889) 22 Q.B.D., 577 ...	31, 34
Richardson v. Methley School Board. [1893] 3 Ch., 510 ...	580, 592, 601, 704, 705
	123
Rokhia Bi v. Official Assignee, Madras. (1917) 37 I.C., 505 ...	
Romon Kissen Sett, In the matter of r. Hurrololl Sett. (1892) I.L.R., 19 Calc., 384 ...	32
Ross, Ex parte, In the matter of Coles. (1825) 2 G. & J., 46 and 330 ...	124, 129, 130, 134, 135
	73
Rubini Nandan Ghose v. Rajendra Nath Ghose. (1920) 61 I.C., 291 ...	
Rukhminibai v. Venkatesh. (1907) I.L.R., 31 Bom., 527 ...	26
Ruldu Singh v. Sanwal Singh. (1922) I.L.R., 3 Lah., 188 ...	320
Runchordas v. Parvatibhai. (1889) I.L.R., 28 Bom., 725 (P.C.) ...	888, 892

S

Sabapathy Chetty v. Ponnuswamy Chetty (1915) 28 I.C., 365 ...	467
Sabhapat Singh v. Abdul Gaffur. (1897) I.L.R., 24 Calc., 107 ...	587, 602
Sabir Hussain v. Emperor. (1921) 19 A.L.J., 487 ...	62
Sadogopa Ayyangar v. Sellammal. (1922) 43 M.L.J., 761 ...	950
Saharabi v. Ali (1922) 44 M.L.J., 141 ...	163
Sahdeo Pandey v. Ghasiram Gyawal. (1894) I.L.R., 21 Calc., 19 ..	299
Sahu Ram Chandra v. Bhup Singh. (1917) I.L.R., 39 All., 437 (P.C.); 44 I.A., 126 ...	90, 96, 67, 98, 100, 103, 104, 105, 107, 108, 110, 111, 112, 113, 114, 622, 629
	88, 91, 98
Sama Rao v. Vannajee Vapuji. (1923) I.L.R., 46 Mad., 64 ...	60
Sankaram Aiyar v. Sakkarappa Mudaliar. 2 Weir, 155 ...	210
Sankaran v. Periasami. (1890) I.L.R., 13 Mad., 467 ...	
Sankara Venkataratnam v. Sri Rajah Varadarajah Appa Rao. (1915) 29 M.L.J., 184 ...	900, 901, 903, 910, 912, 913
Saraswati Pattack v. The Land Acquisition Deputy Collector of Cham-paran. (1917) 2 P.L.J., 204 ...	862, 864, 866

	PAGE
Sarkies, Agent of the Official Assignee of the Insolvent Court of Calcutta v. Mussumat Bundho Baeo. (1869) 1 N.W. P.H.C.R., 81	488, 503, 513
Sartaj Kuari v. Deoraj Kuari. (1888) I.L.R., 10 All., 272 (P.C.)	423, 424
Sarvothama Rao v. Chairman, Municipal Council, Saidapet. (1924) I.L.R., 47 Mad., 585	704
Sathyabhama v. Kesavacharya. (1915) 20 M.L.J., 87	309
Satish Chandra Kanungoe v. Nishi Chandra Dutta. (1919) I.L.R., 46 Calc., 975	528, 530, 542
Satnarain Tewari v. Chowdhuri Sheobaran Singh. (1911) 14 C.L.J., 500	192
Satyabadi Behara v. Harabati. (1997) I.L.R., 34 Calc., 223	23, 24, 25
Satya Sri v. Kartik. (1912) 15 C.L.J., 227	353
Sayad Zain v. Kalabhai. (1899) I.L.R., 23 Bom., 752	41, 44
Scarf v. Jardine. (1882) 7 App Cas., 345	852, 853
Secretary of State for India, The v. Ambalavana Pandara Sannadhi. (1917) 33 M.L.J., 415	869, 870
Secretary of State for India v. Appa Rao. (1923) 45 M.L.J., 156	833
Secretary of State for India, The v. Assam. (1916) I.L.R., 39 Mad., 715 (F.B.)	931, 932
Secretary of State for India, The v. Dadi Reddi Nagiah. (1919) 9 L.W., 22	898
Secretary of State for India v. Janakiramayya. (1915) 29 M.L.J., 339	868, 870
Secretary of State v. Kalekhan. (1914) I.L.R., 37 Mad., 113	588
Secretary of State for India in Council, The v. Kasturi Reddi. (1903) I.L.R., 26 Mad., 268	867, 873
Secretary of State for India, The v. M. Krishnayya. (1905) I.L.R., 28 Mad., 257	576
Secretary of State for India in Council v. Luchmeswar Singh. (1889) I.L.R., 16 Calc., 223 (P.C.); 16 I.A., 16	344
Secretary of State v. Saminatha Kownden. (1914) I.L.R., 37 Mad., 25	635
Secretary of State for India v. Srinivasa Chariar. (1921) I.L.R., 44 Mad., 421 (P.C.); 48 I.A., 56	342
Secretary of State v. Venkatesalu Naidu. (1907) I.L.R., 30 Mad., 113	334, 335
Sectamma v. Krishnaswami Rao. (1916) 31 M.L.J., 240	206
Sennimalai Goundan v. Palani Goundan. (1916) 32 I.C., 975	826, 831
Seshagiri Rao v. Srinivasa Rao. (1920) I.L.R., 43 Mad., 313	295, 297, 304,
	527, 528, 531, 532, 536, 537
Sesha Naidu v. Periasami Odayar. (1921) I.L.R., 44 Mad., 951	214
Seturatnam Aiyer v. Venkatachela Goundan. (1920) I.L.R., 43 Mad., 567 (P.C.); 47 I.A., 76	342, 344
Sewdnt Roy v. Sree Canto Maity. (1906) I.L.R., 33 Calc., 639	488, 505, 506
	507, 518
Shahzadi Begam v. Muhammad Ibrahim. (1921) 19 A.L.J., 14	41
Shaikh Sajjad Husain v. Sakal Rai. (1923) I.L.R., 2 Patna, 7	787, 790, 798
Sham Dei v. Baljit Singh. (1910) I.L.R., 32 All., 119	561
Sham Sunder Lal v. Achhan Kunwar. (1899) I.L.R., 21 All., 71 (P.C.); 25 I.A., 183	184, 188
Shankar Dat Dube v. Radha Krishna. (1898) I.L.R., 20 All., 195	821

	PAGE
Shanmugam Chettiyar v. Alagia Numbia Pillai. (1882) 2 Weir, 475	485
Shaw v. Foster. (1872) 5 H.L., 321	400
Sheikh Ariatullah v. Sashi Bhusan Hazrah. (1919) 24 C.W.N., 73	527
Sheikh Galim v. Sadarjan Bibi. (1916) I.L.R., 43 Calc., 59	699, 700
Sheo Prasad v. Hira Lal. (1890) I.L.R., 12 All., 440 (F.B.)	64, 71, 72,
	78, 76
Shib Singh v. Sita Ram. (1891) I.L.R., 13 All., 76	646
Shivbai v. Yesoo. (1919) I.L.R., 43 Bom., 285	527, 532, 539
Shivlal Motilal v. Birdichand Jivraj. (1917) 19 Bom., L.R., 870	853
Shroof Sahib v. Raghunatha Sivaji. (1915) 29 I.C., 579	787, 789, 798
Shyam Mandal v. Satinath Banerjee. (1917) I.L.R., 44 Calc., 954	65, 293, 294,
	301, 396
Sidebotham, <i>Ex parte In re</i> Sidebotham. (1880) 14 Ch. D., 458	685
Sita Ahir v. Emperor. (1913) I.L.R., 40 Calc., 168	758, 760
Sitaramayya v. Gopalakrishnamma. (1920) I.L.R., 43 Mad., 57	299
Sivaprakasa Pandara Sannadhi v. Veerama Reddi. (1922) I.L.R., 45 Mad., 586 (P.C.); 47 I.A., 286	564, 566
Sivathi Odayan v. Ramasubbayyar. (1898) I.L.R., 21 Mad., 64	81
Sm. Toolsimony Dasee v. Sm. Sudevi Dasee. (1899) 3 C.W.N., 361	119
Smith v. Andrews. [1891] 2 Ch., 678	671
Smith v. Lion Brewery Company, Ltd. [1911] A.C., 150	206
Sonu Gurukkal v. Rangammal. (1871) 7 M.H.C.B., 13	173, 174, 175
Sonubai v. Shivajirao. (1921) I.L.R., 45 Bom., 648	830
Sree Krishna Doss v. Alumbi Ammal. (1913) I.L.R., 36 Mad., 108	649
Sreepada Brahmayya Pantulu v. Parasuramayya. (1902) 12 M.L.J., 348	644, 647
Sreepati Charan Chowdhury v. Shamaldhone Dutt. (1912) 15 C.L.J., 123	321
Srimantu Raja Yarlagadde Durga Prasada Nayudu v. Srimantu Raja Yarlagadde Mallikarjuna Prasad Nayudu. (1901) I.L.R., 24 Mad., 358	65, 298
Srinivasa Ayyangar v. Narayana Ayyangar. (1917) 33 M.L.J., 539	427
Srinivasa Chary v. Rex. (1892) 1 Weir, 917	565
Srinivasa Chariar v. Evalappa Mudaliar. (1922) I.L.R., 45 Mad., 565 (P.C.); 49 I.A., 237	341
Srinivasa Iyengar v. Ramaswami Chettiar. (1916) 29 M.L.J., 12 (F.B.).	320
Sripat Singh Dugar v. Prodyot Kumar Tagore. (1917) I.L.R., 44 Calc., 524 (P.C.)	89, 92, 95, 98,
	106, 108, 110
Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards. (1899) I.L.R., 22 Mad., 383 (P.C.)	424
Sri Rammanik v. Tincowri Rai. (1869) 13 W.R., F.B.R., 9; 4 B.L.R., 63 (F.B.)	488, 503, 511,
	512
Steinman & Co. v. Angier Line. [1891] 1 Q.B., 619	617
Stratford v. Ritson. (1846) 10 Beav., 25; 50 E.R., 490	424, 425
Strong & Co., Limited v. Woodfield. [1906] A.C., 448	655

	PAGE
Subba Aiyar v. Ramaswami Aiyangar. (1921) I.L.R., 44 Mad., 547 ...	470, 475
Subbarayan v. Natarajan. (1922) I.L.R., 45 Mad., 785 ...	123, 129
Subbasari v. Emperor. (1921) I.L.R., 44 Mad., 47 ...	389
Subbayya v. Madduletiah. (1907) 17 M.L.J., 462 ...	208
Subrahmaniam Ayyar v. Shaw, Wallace & Co., Madras. (1920) 38 M.L.J., 402 ...	97
Subramania v. Balasubramania. (1915) I.L.R., 38 Mad., 927 (F.B.) ...	691
Subramania Chetty v. Obidambara Mudali. (1921) 41 M.L.J., 459 ...	452
Subramania Nadan v. Ramaswami Nadan. (1913) 25 M.L.J., 563 ...	452
Subramanian Pattar v. Vembammal. (1904) 14 M.L.J., 339 ...	308, 310
Subramonian v. Lutchman. (1923) I.L.R., 50 Calc., 388 (P.C.) ...	400, 402
Subraya v. Nagappa. (1909) I.L.R., 33 Bom., 264 ...	89
Sudalaimuthu Kudumban v. Andi Reddiar. (1922) I.L.R., 45 Mad., 623 ...	829
Sukhi v. Ghulam Safdar Khan. (1921) I.L.R., 43 All., 469 (P.C.) ...	554, 558
Sundram v. The Queen. (1883) I.L.R., 6 Mad., 263 (F.B.) ...	58
Superintending Engineers, The, II Circle, Bezwada v. Chituri Ramakrishna. (1920) 39 M.L.J., 151 ...	588
Suraj Bansi Koer v. Sheo Persad Singh. (1880) I.L.R., 5 Calc., 148 (P.C.) ...	89, 92, 104, 622, 626
Surapa Raju v. Venkayya. (1915) M.W.N., 908 ...	467
Suraparaju v. Narasimham. (1914) 1 L.W., 932 ...	495, 507, 508, 520, 522
Surendra Chandra Ghose, <i>In re</i> . (1918) I.L.R., 45 Calc., 950 ...	587, 601
Surendra Nath Sarkar v. Atul Chandra Roy. (1907) I.L.R., 34 Calc., 892 ...	781
Suryanarajana v. Patanna. (1918) I.L.R., 41 Mad., 1012 (P.C.); 45 I.A., 209 ...	342, 345
Swaminatha Mudaliar v. Kumaraswami Chettiar. (1923) 44 M.L.J., 282 ...	141, 148
Swamirao v. The Collector of Dharwar. (1893) I.L.R., 17 Bom., 239 ...	31, 34
Swan Brewery Company, Limited v. Rex. [1914] A.C., 231 ...	838, 840

T

Tara Prasanna Bose v. Nilmoni Khan. (1914) I.L.R., 41 Calc., 418 ...	690
Tasker v. Shepherd. (1861) 6 H. & N., 575 ...	879
Temmakal v. Subbammal. (1864) 2 M.H.C.R., 47 ...	82
Thaikkottathil Kunheen, <i>In re</i> . (1923) 18 L.W., 946 ...	749, 751, 756, 758
Thakaria v. Puran Singh. (1922) 67 I.C., 589 ...	725
Thakur Din Ram v. Hari Das. (1912) I.L.R., 34 All., 482 (F.B.) ...	314, 315
Thakur Prasad v. Fakir-ullah. (1895) I.L.R., 17 All., 106 (P.C.) ...	54
Thakur Tajeswar Dutt v. Lakhna Prasad Singh. (1923) I.L.R., 2 Patna, 296 ...	785
Thirumal Reddy, <i>In re</i> . (1922) 30 M.L.T., 348 ...	850
Thiagaraja v. Giyana Sambandha Pandara Sannadhi. (1888) I.L.R., 11 Mad., 77 ...	343

	PAGE
Thomson v. Davenport. (1829) 9 B. & C., 78; 109 E.R., 80 ...	853
Thrunsooe, The. [1897] Prob., 301 ...	616
Tilakdhari Lal v. Khendan Lal. (1921) I.L.R., 48 Calc., 1 (P.C.) ...	562
Trevor v. Whitworth. (1887) 12 App. Cas., 409 ...	841
Try v. Try. (1851) 13 Beav., 422; 51 E.R., 163 ...	50
Tuljaram Row v. Alagappa Chettiar. (1912) I.L.R., 35 Mad., 1 (F.B.) ...	137, 138
	319, 320, 323

U

Umepati v. Masietulla. (1923) 37 O.L.J., 496 ...	787
Unni Koya v. Umma. (1912) I.L.R., 35 Mad., 622 ...	646
Usher's Wiltshire Brewery, Limited v. Bruce. [1915] A.C., 433 ...	671, 672

V

Vachali Rohini v. Kombi Aliassan. (1919) I.L.R., 42 Mad., 753 (F.B.) ...	298, 527, 528, 532, 538, 539, 541
Vaghoji v. Camaji. (1905) I.L.R., 29 Bom., 249 ...	137
Vaidhinadasamy Ayyar v. Somasundram Pillai. (1905) I.L.R., 28 Mad., 473 (F.B.) ...	950
Vairavan Chettiar v. Ramanathan Chettiar. (1921) 14 L.W., 701 ...	321
Vaitheswara Aiyer v. Srinivasa Raghava Iyengar. (1919) I.L.R., 42 Mad., 843 (F.B.) ...	646
Valli Ammal v. The Corporation of Madras. (1915) I.L.R., 38 Mad., 41 ...	587, 588, 603
Varada v. Krishnasami. (1883) I.L.R., 6 Mad., 117 ...	206
Varada Pillai v. Jeevarathnammal. (1920) I.L.R., 43 Mad., 244 (P.C.) ...	208, 209, 211, 212, 214
Veeraraghava Thatha Chariar v. Srinivasa Thatha Chariar. (1912) 28 M.L.J., 134 ...	141
Velayudham Pillai v. Perumal Naicker. (1915) 2 L.W., 1210 ...	854
Velayuthan v. Lakshmana. (1885) I.L.R., 8 Mad., 506 ...	163
Velliah Kone, <i>In re</i> . (1922) 43 M.L.J., 222 ...	238, 242
Velli Periya Mira v. Moidin Padsha. (1886) I.L.R., 9 Mad., 332 ...	253, 259
Vembu Iyer v. Srinivasa Iyengar. (1912) 23 M.L.J., 638 ...	776
Vemuri Seshanna, <i>In re</i> . (1903) I.L.R. 28 Mad., 421 ...	915
Venkamma v. Kristayya. Appeal No. 12 of 1920 (unreported) ...	308, 310
Venkanna v. Venkatakrishnayya. (1918) I.L.R., 41 Mad., 18 ...	697
Venkatanarasimha Naidu v. Suranna. (1894) I.L.R., 17 Mad., 298 ...	253, 259
Venkatarama Aiyar v. Janab V. Hamid Sultan Maracayar. (1923) 44 M.L.J., 161 ...	141, 143
Venkataramanachari v. Thirunarayanachari. (1915) 2 L.W., 212 ...	854
Venkataramnam v. Ranganayakamma. (1918) I.L.R., 41 Mad., 985 (F.B.) ...	163
Venkataram v. Narasimhayya. (1908) 4 M.L.T., 214 ...	231
Venkataram Naicken v. Ramanathan Chettyar. (1910) 8 M.L.T., 409 ...	565
Venkata Sastrulu v. Seetharamudu. (1920) I.L.R., 43 Mad., 166 (P.C.); 46 I.A., 123 ...	345

	PAGE
Venkatasubbiah v. Venkata Seehaiya. (1919) I.L.R., 42 Mad., 1 ... 485, 487, 488, 489, 491, 495, 497, 498, 508, 514, 520, 521, 522	
Venkatasubbiah v. Venkateswaralu. (1917) M.W.N. 816 ...	827
Venkatasuryanarayana v. Sivasankara Narayana. (1915) 17 M.L.T., 85.	635
Venkata Varatha Thatha Chariar v. Anantha Chariar. (1893) I.L.R., 16 Mad., 299 (P.C.) ...	184
Venkatesa Aiyangar v. Kamalammal. (1912) 22 M.L.J., 212 ...	313
Venkateswara Aiyar v. Ramana Nambudri. (1916) 3 L.W., 435 ...	697
Vidya Varathi Thirtha v. Balusami Ayyar. (1921) I.L.R., 44 Mad., 831 (P.C.); 48 I.A., 302 ...	352, 773
Viswanadha Reddi v. Keymer. (1916) I.L.R., 39 Mad., 95 ...	880
Viswanathan Chetty v. Somasundaram Chetty (1922) I.L.R., 45 Mad., 875 ...	293, 294, 296, 301, 305, 306, 307
Vyakunta Bapuji v. Government of Bombay. (1875) 12 Bom. H.C.R. (O.C.J.), 1 ...	573
Vyricherla Veerabhadraraju Bahadur v. Dasiraju Venkatachelapati. (1920) 67 I.C., 689 ...	898
Vythilinga Padayachi v. Ponnuswami Padayachi. (1921) 41 M.L.J., 78.	469, 475

W

Waghela Rajsanji v. Sheikh Masludin. (1887) I.L.R., 11 Bom., 551 (P.C.).	777
Walton v. Banke Behari Pershad Singh. (1903) I.L.R., 30 Calc., 1021 (P.C.) ...	83, 788, 789, 796
Walker v. Frobisher. (1801) 6 Ves. Jan., 70; 31 E.F., 943 ...	31, 88, 809
Ward & Co. v. Commissioner of Taxes. [1923] A.C., 145 ...	655, 657, 670
Watson & Company v. Sham Lal Mitter. (1888) I.L.R., 15 Calc., 8 (P.C.)	854, 859
Webb, In re; Ex parte Walter. (1876) 2 Ch. D., 326 ...	685
Weller v. Ker. (1866) L.R., 1 H.L.Sc. App., 11 ...	31
West Ham Union v. Edmonton Union. [1908] A.C., 1 ...	489
Wilson Sons & Co. v. Owners of Cargo per The "Xantho". (1887) 12 App. Cas., 503 ...	611

Y

Yelikepalli Venkaya v. Venkatramayya Apparao. (1917) 33 M.L.J., 757.	900, 901, 908, 910, 912, 913
Yuruva Venkata Reddy v. Maddi Veeranna. (1914) 23 I.C., 376 ...	208
Yusuf Sahib v. Durgi. (1907) I.L.R., 30 Mad., 447... ..	635

Z

Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devasthanams. (1909) I.L.R., 32 Mad., 429 ...	414
--	-----

GENERAL INDEX

FOR

1924.

	PAGE
ABATEMENT —Appeal against order appointing a guardian selected by arbitrators—Death of appellant pending appeal:—See "under GUARDIANS AND WARDS ACT (VIII OF 1890)" ...	459
ACCUSED —Refusing to plead—whether liable to a prosecution under section 179 of the Indian Penal Code:—See under "VILLAGE PANCHAYAT COURT" ...	396
ACTS:—	
1880—XLV:—See INDIAN PENAL CODE.	
1866—VII:—See THE MADRAS IRRIGATION CESS ACT (MADRAS).	
1870—VII:—See COURT FEES ACT.	
1872—I:—See INDIAN EVIDENCE ACT.	
1878—XI:—See INDIAN ARMS ACT.	
1882—IV:—See TRANSFER OF PROPERTY ACT.	
1884—V:—See LOCAL BOARDS ACT (MADRAS).	
1882—II:—See INDIAN TRUST ACT.	
1890—III:—See TOWNS NUISANCES ACT (MADRAS).	
1890—VIII:—See GUARDIANS AND WARDS ACT.	
1894—I:—See LAND ACQUISITION ACT.	
1894—VIII:—See INDIAN TARIFF ACT.	
1898—V:—See CRIMINAL PROCEDURE CODE.	
1899—IX:—See ARBITRATION ACT (INDIAN).	
1905—III:—See LAND ENCROACHMENT ACT (MADRAS).	
1907—III:—See PROVINCIAL INSOLVENCY ACT.	
1909—III:—See PRESIDENCY TOWNS INSOLVENCY ACT.	
1908—I:—See ESTATES LAND ACT (MADRAS).	
—V:—See CIVIL PROCEDURE CODE.	
—IX:—See LIMITATION ACT.	
—XVI:—See REGISTRATION ACT.	
1916—IV:—See INDIAN TARIFF AMENDED ACT.	
1918—VII:—See INCOME-TAX ACT (INDIAN).	
1919—IV:—See MADRAS CITY MUNICIPAL ACT (MADRAS).	
1920—II:—See VILLAGE PANCHAYAT ACT (MADRAS).	
—V:—See PROVINCIAL INSOLVENCY ACT.	
—XIV:—See LOCAL BOARDS ACT (MADRAS).	
—V:—See MADRAS DISTRICT MUNICIPALITIES ACT (MADRAS).	
1922—III:—See MADRAS CITY TENANTS' PROTECTION ACT (MADRAS).	
—XI:—See INCOME-TAX ACT.	

ACTS III AND IV, WILLIAM IV—JUDICIAL COMMITTEE ACT —See under "DECREE" ...	613
---	-----

ADVERSE POSSESSION of claimant after dismissal of his claim petition:—See under "CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXII, RS. 58 AND 63" ...	160
---	-----

ALIENATION :—See under "HINDU LAW" ...	181
---	-----

APPEAL—Order of a Judge on Original Side transferring a suit from District Court to the High Court—Appeal under clause 15 of the Letters Patent—Maintainability :—See under "LETTERS PATENT" ... 136

—Right of—Suit and decree for scheme of administration of a temple—Order of Court to fill up vacancy amongst trustees in accordance with scheme—Appealability of—Order not one in execution, nor between parties, within section 47, Civil Procedure Code—Order, a judicial order.] Where a plaint prayed only for the settlement of a scheme for the administration of a temple and a decree was passed settling a scheme which *inter alia* provided methods for the appointment of first set of trustees and for filling up future vacancies amongst the trustees *Held*, that after the framing of such a decree which granted the prayer in the plaint there was nothing more to be done by way of executing the decree. Hence an order by the Court directing the proper authorities under the scheme to fill up a vacancy amongst the trustees is not one passed in execution and is therefore not appealable though the order passed by the Judge is a judicial one and not one passed by him as a *persona designata*. Nor is the order passed one between the parties or their representatives within section 47, Civil Procedure Code.

Ranganatha Thathachariar v. Krishnaswami Thathachariar ... (1924) I.L.R., 47 Mad., 139

—Right of appeal, when parties agree to Court deciding a case like an arbitrator.] If parties agree to a Court proceeding without jurisdiction *extra cursum curiae*, i.e. (beyond the ordinary powers of a Court), the parties cannot thereafter appeal from the decision of the Court. But where the Court has jurisdiction over a cause, mere agreement between the parties that the Court may decide the cause disregarding rules of procedure and evidence without giving up a right of appeal either expressly or by necessary implication, does not deprive the parties of their right of appeal. *Pisani v. Attorney-General for Gibraltar*, (1874) L.R., 5 P.C., 518, *Burgess v. Morton*, [1896] A.C., 136, *Sayad Zuin v. Kalabhai*, (1899) I.L.R., 23 Bom., 752, followed. The reasoning in *Nidamarthi Mukkanti v. Thammans Ramayya* (1903) I.L.R., 28 Mad., 76 and *Chengalroya Chetti v. Raghava Ramunja Doss*, (1919) 37 M.L.J., 100, not followed.

Sankaranarayana v. Ramaswamiach ... (1924) I.L.R., 47 Mad., 39

—Against order of District Judge dismissing creditors' application to set aside an alienation—Leave to appeal, subsequently applied for—Limitation :—See under "PROVINCIAL INSOLVENCY ACT" ... 673

—Against order of single Judge refusing to stay execution—Maintainability :—See "LETTERS PATENT, CL. 15" ... 316

APPEALABILITY—Test of :—See under "SUIT" ... 639

"APPEARANCE" OF PLEADER—pleader stating 'no instructions' to Court :—See under "CIVIL PROCEDURE CODE, O. IX, R. 9." ... 819

APPLICATION FOR RESTORATION OF APPEAL—Appellant not aware of dismissal until after 30 days from dismissal—Delay, if excusable—Inherent jurisdiction, if applicable :—See under "CIVIL PROCEDURE CODE (V OF 1908), SEC. 115, O. XLI, RS. 17 AND 19" ... 171

ARBITRATION ACT, INDIAN (IX OF 1899), SEC. 19—Stay of legal proceedings—Considerations for Court before staying or refusing to stay—Discretion of Court and onus of proof.] The mere fact that the defendant, who was threatened with legal proceedings for breach of a contract containing an arbitration clause, did not, before the institution of the suit, insist on the arbitration clause but relied on it for the first time only in his written statement is no ground for not granting his application for stay of proceedings under section 20 of the Arbitration Act (IX of 1899). Under the section, the onus is on the plaintiff to show why the application for stay should not be granted and why the matter should not be referred to arbitration. It is a discretionary

matter with the Court to refuse to stay. Stay is generally refused where there are serious allegations of fraud or a novel or difficult points of law likely to be considered by the arbitrators fit to be referred to the Court. If the matter is a commercial one fit for decision of commercial men as arbitrators, the Court will stay the suit and send the matter for the arbitrators' decision as agreed upon. If the defendant's conduct has not actually estopped him from making the application for stay but his attitude has misled the plaintiff it might be a good ground for punishing him in costs. *Per KRISHNAM, J.*—The fact that the plaintiff has paid a heavy Court fee is no ground for not granting the stay.

Anglo-Persian Oil Company v. Panchapakesa Ayyar. (1924) I.L.R., 47 Mad., 164

ARBITRATION—Award—Reference by minor's guardian in term prejudicial to minor—Arbitrator's enquiry behind the back of parties—Misconduct of arbitrator—Invalidity of award within section 15, Schedule II, Civil Procedure Code.] A minor's mother and guardian consented to an arbitrator deciding the minor's claim to certain properties upon information and evidence however obtained by the arbitrator. The arbitrator acted on an admission from the minor's mother prejudicial to the minor, and on information obtained by him behind the back of the parties both before and after submission to the arbitration, none of which was reduced to writing. *Held*, that the guardian's consent amounted to a surrender of the minor's rights and that the arbitrator's eventual decision against the minor was vitiated by his misconduct and was "invalid" within section 15 of Schedule II, Civil Procedure Code, and was not binding on the minor. *Quare*, Whether if the parties were both *sui juris* the submission and the award would be valid?

Sanyasi Rao v. Venkata Rao ... (1924) I.L.R., 47 Mad., 30

ARBITRATOR, Court acting as, by agreement of parties—Appeal against the decision :—See "APPEAL" ... 39

ARREST BY CONSTABLE—Accused's right to know authority for arresting—Accused's knowledge of non-existence of authority—Right to resist arrest—Custody, unlawful—Prosecution under section 225-B, Indian Penal Code (Act XLV of 1860)—Prosecution must establish alleged authority.] A person, about to be arrested, is entitled to know under what power the constable is arresting him and, if he specifies a certain power which the person knows the constable has not got, he is entitled to object to such arrest and escape from custody, such custody not being a lawful one. For a charge of escaping from lawful custody, under section 225-B, Indian Penal Code (Act XLV of 1860), the prosecution must first establish that the constable who arrested the man had power to act under the specific authority that he claimed to have.

Appasami Mudaliar v. King Emperor ... (1924) I.L.R., 47 Mad., 442

ATTACHMENT BEFORE JUDGMENT—Applicability of O. XXI, r. 57 :—See "CIVIL PROCEDURE CODE" ... 483

—Claim petition filed by third party and allowed after decree—Suit by decree-holder—Decree obtained more than 3 years after first decree—Application for sale more than 3 years after decree :—See under "LIMITATION ACT, ARTS. 181 AND 182" ... 176

AWARD—Invalidity :—"See ARBITRATION" ... 30

BURDEN OF PROOF—Application for restitution of mesne profits—Inquiry before Commissioner :—See under "CIVIL PROCEDURE CODE, SEC. 2." ... 800

CASES :—

Abbas Ali Chowdhry v. Illim Meah (1870) 14 W.R. (Ori.), 46, followed ... 56

Amir Chand v. Bukshi Sheo Pershad Singh (1907) I.L.R., 34 Calc., 13, relied on ... 689

Anakaran Kasmi v. Saidamadath Avulla (1879) I.L.R., 2 Mad., 79 referred to ... 608

CASES—cont.

	PAGE
<i>Annada Hait v. Khudiram Hait</i> (1914) 19 C.L.J. 532; 25 I.C., 558, followed ...	304
<i>Appayya v. Rangayya</i> (1908) I.L.R., 31 Mad., 419 (F.B.), distinguished ...	689
<i>Arjan Sing v. Gujri</i> (1917) 42 I.C., 410, followed ...	459
<i>Arunachalam Chetty v. Mayyappa Chetty</i> (1898) I.L.R., 21 Mad., 91, followed ...	477
<i>Arunachalam Chetty v. Periasami Servai</i> (1921) I.L.R., 44, Mad., 902 (F.B.), followed ...	488
<i>Arunachalam Chetty v. Rangaswami Pillai</i> (1915) I.L.R., 38 Mad., 922 (F.B.) followed ...	80
<i>Arunachalam Pillai v. Ponnuswamy</i> (1918) 35 M.L.J., 454, not followed ...	56
<i>Arunachala Ayyar v. Subramiah</i> (1923) I.L.R., 46, Mad., 60, referred to ...	543
<i>Aslatt v. Corporation of Southampton</i> (1881) 16 Ch. D., 143, followed ...	586
<i>Aslatt v. Corporation of Southampton</i> (1881) 16 Ch. D., 143, referred to ...	701
<i>Attorney-General v. Esher Linoleum Company, Limited</i> (1901) 2 Ch., 647, followed ...	116
<i>Balabus v. Rukmabai</i> (1903) I.L.R., 30 Calc., 725 (P.C.), referred to ...	567
<i>Balkishen Das v. W. F. Legge</i> (1900) I.L.R., 22 All., 149 (P.C.), 27 I.A., 58, referred to ...	730
<i>Bapu v. Bapu</i> , (1916) I.L.R., 39 Mad., 750 (F.B.) referred to and explained.	384
<i>Basaweswaraswami v. The Bellary Municipal Council</i> (1915) I.L.R., 38 Mad., 6, explained ...	716
<i>Benyon, T. Coy., Ltd. v. Ogg</i> (1918) 7 Tax Cas., 125, applied ...	197
<i>Bhaskarappa v. The Collector of North Kanara</i> (1879) I.L.R., 3 Bom., 452, approved ...	573
<i>Bilas Kumwar v. Desraj Rajit Singh</i> (1915) I.L.R., 37 All., 557 (P.C.) relied on ...	898
<i>Board of Revenue v. Muniswami Chetti</i> (1924) I.L.R., 47 Mad., 658 (S.B.), distinguished ...	667
<i>Brahmayya v. Achiraju</i> (1922) I.L.R., 45 Mad., 716 (F.B.), distinguished ...	943
<i>Burgess v. Morton</i> [1896] A.G., 186, followed ...	39
<i>California Copper Syndicate Coy., Ltd. v. Harris</i> (1904) 5 Tax Cas., 159, applied ...	197
<i>Chairman. The Municipal Council, Srirangam v. Subba Pandithar</i> (1915) I.L.R., 38 Mad., 456, explained ...	716
<i>Chalapathi Kotiah v. Poloori Alimelamma</i> (1908) I.L.R., 31 Mad., 71, applied.	176
<i>Chengalroya Chetti v. Raghava Ramanuja Doss</i> (1919) 37 M.L.J., 100, not followed ...	39
<i>Chet Ram v. Ram Singh</i> (1922) I.L.R., 44 All., 398 (P.C.) ...	88
<i>Chhattar Singh v. Tej Singh</i> (1921) I.L.R., 48 All., 104, followed ...	476
<i>Chief Commissioner of Income-tax, Madras v. The Eastern Extension Australasia and China Telegraphic Company, Ltd.</i> (1921) I.L.R., 44 Mad., 489 (S.B.), distinguished ...	667
<i>Chinnathambi Rowthen, In re</i> (1911) 12 Cr. L.J., 104, followed ...	718
<i>Davud Beeves Ammal v. Radhakrishna Ayyar</i> (1923) 44 M.L.J., 309, followed ...	80
<i>Debi Baksh Singh v. Habib Shah</i> (1913) I.L.R., 35 All., 831 (P.C.), distinguished ...	172

CASES—cont.

<i>Deonandan Prasad Singh v. Janki Singh</i> (1920) 5 P.L.J., 314, referred to ...	618
<i>Doraswami v. Ohidambaram Pillai</i> (1924) I.L.R., 47 Mad., 63, commented on.	288
<i>Enamul Hug v. Ekramul Hug</i> (1898) I.L.R., 25 Calc., 294, followed ...	936
<i>Equitable Life Assurance Society of the United States v. Bishop</i> [1900], Q.B., 177, distinguished ...	1
<i>Ganesha Row v. Tuljaram Row</i> (1913) I.L.R., 36 Mad., 295 (P.C.), applied ...	921
<i>Gangabai v. Khashabai</i> (1889) I.L.R., 23 Bom., 719, distinguished ...	459
<i>Gibbons, In the matter of</i> (1887) I.L.R., 14 Calc., 42 (F.B.), followed ...	428
<i>Gleniaroch, The</i> [1894] Prob., 226, followed ...	610
<i>Gopal Das v. Parmanand</i> (1921) 60 I.C., 512, not followed ...	150
<i>Gur Narayan v. Sheolal Singh</i> (1919) I.L.R., 40 Calc., 566 (P.C.), followed ...	896
<i>Harvey v. Shelton</i> (1844) Beav., 455; 49 E.R., 1141, referred to ...	801
<i>Hemraj Champa Lal v. Ramakrishen Ram</i> (1917) 2 P.L.J., 101 ...	674
<i>Het Ram v. Shadi Ram</i> (1918) I.L.R., 40 All., 407 (P.C.), referred to ...	552
<i>Hudson Bay Coy. v. Stevens</i> (1909) 5 Tax Cas. 424, applied ...	197
<i>Ingestre v. Attorney-General</i> (1914) 30 Law Quarterly Review, 153, followed ...	706
<i>Inland Revenue Commissioners v. Blott; Inland Revenue Commissioners v. Greenwood</i> [1921] 2 A.C., 171, followed ...	837
<i>Inland Revenue Commissioner v. Warnes & Co.</i> [1919] 2 K.B., 414, followed.	653
<i>Ittiachan v. Velappan</i> (1885) I.L.R., 8 Mad., 484 (F.B.), relied on ...	251
<i>Jenks v. Turpin</i> (1884) 13 Q.B.D., 505, referred to ...	426
<i>Jogendra Nath Gossain v. Debendra Nath Gossain</i> (1899) I.L.R., 28 Calc., 127 distinguished ...	43
<i>Kalianna Mudali v. Secretary of State</i> (1915) 31 I.C., 982, distinguished ...	861
<i>Kameswaramma v. Venkata Subba Row</i> (1915) I.L.R., 38 Mad., 1120, followed ...	621
<i>Keymer v. Visvanatham Reddi</i> (1917) I.L.R., 40 Mad., 112 (P.C.), followed ..	878
<i>Koilpillai Samban v. Sappanimuthu Samban</i> (1923) 17 L.W., 187, referred to.	544
<i>Krishna Mohun Basak v. Kunjo Behari Basak</i> (1981) 9 C.L.R., 1, referred to.	800
<i>Kumarappa Chettiar v. Murugappa Chettiar</i> (1916) 36 I.C., 771, referred to.	674
<i>Kunhamad Haf, In re</i> (1923) I.L.R., 46 Mad., 382, followed ...	428
<i>Laldhari Singh v. Munager, Court of Wards, Bhabatpura Estate</i> (1911) 19 O.L.J., 639, followed ...	948
<i>Lakshminarasimha Somayagiyar v. Ramalinga Pillay</i> (1920) 39 M.L.J., 319, followed ...	325
<i>Latifa Bi v. Mottai Ammal</i> (1923) I.L.R., 46 Mad., 836 overruled ...	813
<i>Leads Benefit Building Society v. Mallandaine</i> [1897] 2 Q.B., 402, distinguished ...	1
<i>Latchmeeput Singh v. Sadaulla Nashyo</i> (1888) I.L.R., 9 Calc., 698, followed.	116
<i>Madan Mohan Singh v. Gufa Prasad Singh</i> (1911) 11 I.C., 228, not followed.	150
<i>Madhavrao Waman v. Raghunatha Venkatesh</i> , (1923), I.L.R., 47 Bom. 798 (P.C.); 50 L.A., 255, followed ...	338
<i>Mahadeo Prasad v. Bindeshri Prasad</i> (1908) I.L.R., 30 All., 187, followed ...	459
<i>Malkarjun v. Narhari</i> (1901) I.L.R., 25 Bom., 387 (P.C.), followed ...	63
<i>Malkarjun v. Narhari</i> (1901) I.L.R., 25 Bom., 387 (P.C.), explained ...	288

CASES—cont.

<i>Marina Veeraswamy v. Boyinapalli Venkatrayudu</i> (1920) 39 M.L.J., 225 (F.B.), applied	942
<i>Midnapur Zamindari Company, Limited v. Naresh Narayan Roy</i> (1921) I.L.R., 48 Calc., 460 (P.C.), followed	453
<i>Mrs. Levina Ashton v. Madhabmoni Dasi</i> (1910) 14 C.W.N., 530, followed ...	48
<i>Muhammad Rowther v. Abdul Rehman Rowther</i> (1923) I.L.R., 46 Mad., 135, followed	477
<i>Muhammad Rustam Ali Khan v. Municipal Committee, Karnal</i> (1920) I.L.R., 1 Lah., 117 (P.C.), followed	116
<i>Mungul Pershad Ditchit v. Grija Kant Lahiri</i> (1882) I.L.R., 8 Calc., 51 (P.C.), applied	642
<i>Mussamat Asima Beebee v. Sheikh Ahmudee</i> (1854) 9 S.D.A. (N.W.P.), 1, distinguished	8
<i>Mussamat Jatti v. Banwari Lal</i> (1923) 45 M.L.J., 355 (P.C.), referred to ...	567
<i>Muthiah Chettiar v. Bava Sahib</i> (1914) 27 M.L.J., 805, followed	525
<i>Muthuswami Mudali v. Veeni Chetti</i> (1907) I.L.R., 3 Mad., 382 (F.B.), referred to and explained	384
<i>Muthu Veera Vandayan v. The Secretary of State for India in Council</i> (1906) I.L.R., 29 Mad., 461, referred to	861
<i>Mylappa Chettiar v. Aga Mirza Mohamad Shirazee</i> (1919) 37 M.L.J., 712, distinguished	404
<i>Narasimha Rao v. Rattamma</i> , C.M.A. No. 316 of 1918 (unreported), followed.	308
<i>Neelaveni v. Narayana Reddi</i> (1920) I.L.R., 43 Mad., 94 (F.B.)	171
<i>New York Life Insurance Company v. Styles</i> (1889) 14 App. Cas., 381, followed	1
<i>Nicholas v. Asphar</i> (1887) I.L.R., 24 Calc., 216, dissented from	706
<i>Nidamarthi Mukkanti v. Thammana Ramayya</i> (1903) I.L.R., 26 Mad., 79, not followed	39
<i>Nihal Singh v. Siwaram</i> (1918) I.L.R., 38 All., 292, followed	160
<i>Oolagappa Chetti v. Hon. D. Arbuthnot</i> (1874) 1 I.A., 268, followed	411
<i>Palaniammal v. Muthuvenkatachala Maniagurur</i> (1917) 33 M.L.J., 759, referred to	567
<i>Parthasarathi Aiyangar v. Doraiswami Naicker</i> (1923) I.L.R., 46 Mad., 823, overruled	761
<i>Peda Venkanna v. Sreenivasa Deekshatalu</i> (1918) I.L.R., 41 Mad., 136, explained	621
<i>Pemberton v. Hughes</i> [1899] 1 Ch., 781, followed	878
<i>Pisani v. Attorney-General for Gibraltar</i> (1874) L.R., 5 P.C., 516, followed ...	39
<i>Poole v. Huskinson</i> (1843) 11 M. & W., 827; 152 E.R., 1039, followed	116
<i>Queen, The v. Periannan</i> (1882) I.L.R., 4 Mad., 241, not followed	229
<i>Queen-Empress v. Bisheshar</i> (1887) I.L.R., 9 All., 645, followed	747
<i>Queen-Empress v. Dorasami Ayyar</i> (1901) I.L.R., 24 Mad., 414, followed ...	233
<i>Queen-Empress v. C. P. Fox</i> (1886) I.L.R., 10 Bom., 176, followed	428
<i>Radha Kishan v. The Collector of Jampur</i> (1901) I.L.R., 23 All., 220 (P.O.), followed	819

CASES—cont.

<i>Raghunath Das v. Sundar Das Khatri</i> (1915) I.L.R., 42 Calc., 72 (P.O.), applied	288
<i>Ragunthaswamy Iyengar v. Gopaul Rao</i> (1921) 41 M.L.J., 547, not followed.	63
<i>Rajagopala Ayyar v. Sheikh Davood Rowther</i> (1918) 34 M.L.J., 342, referred to	698
<i>Raja of Ramnad v. Velusami Thevar</i> (1921) 40 M.L.J., 197 (P.C.), applied ...	642
<i>Ramachandra Aiyar, T. R. v. Parameswaran Unni</i> (1919) I.L.R., 42 Mad., 860 discussed	864
<i>Ramachandra Padayachi v. Kondayya Chetti</i> (1901) I.L.R., 24 Mad., 555, followed	621
<i>Ramanathan Chettiar v. Kalimuthu Pillai</i> (1914) I.L.R., 37 Mad., 163 referred to	877
<i>Ramanatham Chettiar v. Muthia Chetty</i> (1920) I.L.R., 48 Mad., 429, overruled	775
<i>Ramaswami Naicker v. Subbarayulu Naicker</i> (1916) 3 L.W., 158	251
<i>Ramaswami Thevan v. King-Emperor</i> Crl. Appl. of 1600 of 1922 (unreported), followed	846
<i>Ramaswamy Chetty v. Madura Mill Company, Ltd.</i> (1916) 1 M.W.N., 265, distinguished	689
<i>Ramayya v. Krishnamurti</i> (1917) I.L.R., 40 Mad., 296, distinguished	949
<i>Rameshwar Singh v. Homeshwar Singh</i> (1921) 40 M.L.J., 1 (P.C.), applied ...	176
<i>Rangasami Naidu v. Sundarajulu Naidu</i> (1916) 31 M.L.J., 472 referred to ...	567
<i>Rashid-Un-Nissu v. Muhammad Ismail Khan</i> (1909) I.L.R., 31 All., 572 (P.O.), relied on	79
<i>Ressuddi v. The King-Emperor</i> (1912) 16 C.W.N., 1077, dissented from ...	746
<i>Richardson v. Methley School Board</i> [1893] 3 Ch., 510, followed	586
<i>Sabir Husain v. Emperor</i> (1921) 19 A.L.J., 487, not followed	61
<i>Sadagopa Ayyangar v. Sellanmal</i> (1922) 43 M.L.J., 761, distinguished	948
<i>Sahu Ram Chandra v. Bhup Singh</i> (1917) I.L.R., 39 All., 437 (P.O.)	87
<i>Sankara Venkataratnam v. Sri Rajah Varadarajah Appa Rao</i> (1915) 29 M.L.J., 184, overruled	896
<i>Satya Sri v. Kartik</i> (1912) 15 C.L.J., 227, approved	338
<i>Sayad Zain v. Kalabhai</i> (1899) I.L.R., 23 Bom., 752, followed	39
<i>Scraf v. Jardine</i> (1882) 7 App. Cas., 345, distinguished	857
<i>Secretary of State for India, The v. Assan</i> (1916) I.L.R., 39 Mad., 725 (F.B.), distinguished	928
<i>Secretary of State for India in Council, The v. Kasturi Reddi</i> (1903) I.L.R., 26 Mad., 268, referred to	861
<i>Secretary of State for India, The v. Krishnayya</i> (1905) I.L.R., 28 Mad., 257, approved	573
<i>Secretary of State for India in Council v. Luchmeswar Singh</i> , (1889) I.L.R., 16 Calc., 228 (P.C.); 16 I.A., 16, followed	387
<i>Secretary of State v. Saminatha Koundan</i> (1914) I.L.R., 37 Mad., 25, distinguished	633
<i>Sennimalai Goundan v. Palani Goundan</i> (1916) 32 I.C., 975 followed	824
<i>Seshagiri Rao v. Srinivasa Rao</i> (1920) I.L.R., 43 Mad., 313, followed	288

CASES—cont.

PAGE

<i>Seturatnam Aiyar v. Venkatachala Goundan</i> (1920) I.L.R., 43 Mad., 567 (P.C.); 47 I.A., 76, followed ...	337
<i>Shaw v. Foster</i> (1872) 5 H.L., 321, followed ...	398
<i>Sheikh Galim v. Sadarjan Bibi</i> (1916) I.L.R., 43 Calc., 59, referred to ...	689
<i>Sheo Prasad v. Hira Lal</i> (1890) I.L.R., 12 All., 440 (F.B.), followed ...	63
<i>Sivathi Odayan v. Ramasubbayyar</i> (1898) I.L.R., 21 Mad., 64, followed ...	552
<i>Smith v. Lion Brewery Company, Ltd.</i> [1911] A.C., 150, followed ...	667
<i>Sonubai v. Shivajirao</i> (1921) I.L.R., 45 Bom., 648, dissented from ...	172
<i>Sreepada Brahmayya Pantulu v. Parakuramayya</i> (1902) 12 M.L.J., 348, followed ...	642
<i>Sreenivasachari v. Rex</i> . 1 Weir, 917, referred to ...	426
<i>Subramania v. Balasubramania</i> (1915) I.L.R., 38 Mad., 927 (F.B.), relied on ...	689
<i>Subramania Chetty v. Chidambara Mudali</i> (1921) 41 M.L.J., 459, followed ...	450
<i>Subramania Nadan v. Ramasami Nadan</i> (1918) 25 M.L.J., 563 followed ...	450
<i>Subramanian v. Lutchman</i> (1923) I.L.R., 50 Calc., 338 (P.C.), followed ...	398
<i>Sukhi v. Ghulam Safdar Khan</i> (1921) I.L.R., 43 All., 469 (P.O.), referred to ...	552
<i>Sundaram v. The Queen</i> (1883) I.L.R., 6 Mad., 203, followed ...	56
<i>Swan Brewery Company, Limited v. Rex</i> (1914) A.C., 231 distinguished ...	837
<i>Thakur Din Ram v. Hari Das</i> (1912) I.L.R., 34 All., 482 (F.B.), followed ...	312
<i>Thirumal Reddy In re</i> (1922) 30 M.L.T., 348, dissented from ...	846
<i>Tuljaram Rao v. Alagappa Chettiar</i> (1912) I.L.R., 35 Mad., 1 (F.B.), followed ...	136
<i>Tuljaram Rao v. Alagappa Chettiar</i> (1912) I.L.R., 35 Mad., 1 (F.B.), followed ...	316
<i>Usher's Wiltshire Brewery, Limited v. Bruse</i> [1915] A.C., 438 ...	667
<i>Vachali Rohini v. Kombi Aliassan</i> (1919) I.L.R., 42 Mad., 758 (F.B.), distinguished ...	525
<i>Vaidhinasamy Ayyar v. Somasundaram Pillai</i> (1905) I.L.R., 40 Mad., 296, distinguished ...	948
<i>Varada Pillai v. Jeevarathnammal</i> (1920) I.L.R., 43 Mad., 244 (F.C.), applied ...	204
<i>Velliah Kone In re</i> (1922) 43 M.L.J., 222, followed ...	233
<i>Venkamma v. Kristayya</i> , Appeal No. 12 of 1920 (unreported), followed ...	308
<i>Venkataratnam v. Ranganayakamma</i> (1918) I.L.R., 41 Mad., 985 (F.B.), applied ...	161
<i>Venkatasami v. Narasimhayya</i> (1908) 4 M.L.T., 214, referred to ...	229
<i>Venkatasubbiah v. Venkata Seshaiya</i> (1919) I.L.R., 42 Mad., 1, overruled ...	483
<i>Visvanathan Chetty v. Somasundaram Chetty</i> (1922) I.L.R., 45 Mad., 875, commented on ...	288
<i>Ward & Co. v. Commissioner of Taxes</i> [1923] A.C., 145, followed and distinguished ...	653, 667
<i>Yelikepalli Venkaya v. Venkatramayya Apparao</i> (1917) 33 M.L.J., 757, overruled ...	896
<i>Yusuf Sahib v. Durgi</i> (1907) I.L.R., 30 Mad., 447, referred to ...	633

PAGE

CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 2 (12) AND 141, O. XVIII, R. 1, AND O. XXVI, R. 10—Application for restitution of lands with mesne profits—Appointment of Commissioner—Inquiry—Burden of proof—Right to begin—Indian Evidence Act (1 of 1872), sec. 108—Information of persons, not called as witnesses, whether admissible—Local inspection by Commissioner—Report based on the same, crop experiment and information, whether legal.] Where a defendant applied for recovery of mesne profits from the plaintiff who had taken possession of certain lands in execution of a decree of the Original Court which was reversed on appeal, and the Court appointed a Commissioner to ascertain the amount of mesne profits, <i>Held</i> that, in the inquiry held by the Commissioner, the defendant was bound to let in his evidence in the first instance, and thereafter the plaintiff was entitled to let in her evidence, under the provisions of Order XVIII, rule 1, and section 141 of the Civil Procedure Code; that although, under section 106 of the Indian Evidence Act, the burden of proving the amount of mesne profits actually received is on the person receiving them, yet as regards the amount of mesne profits that might, with ordinary diligence, have been received by the person in occupation, the burden of proving it is on the person claiming it; <i>Krishna Mohun Basak v. Kunjo Behari Basak</i> (1881) 9 C.L.R., 1 referred to: and that the Commissioner was entitled to base his report on his local inspection and also upon the crop experiment conducted by him, but not on information obtained from certain persons whose evidence was not recorded by him under Order XXVI, rule 10, Civil Procedure Code, as information given by witnesses which was not reduced to writing was not legal evidence upon which the Court could decide. <i>Harvey v. Shelton</i> (1844) 7 Beav., 455; 49 E.R., 1141, referred to.	
<i>Ramakka v. Negasam</i> ... (1924) I.L.R., 47 Mad., 800	

SEC. 11, EXPL. 4, O. XXXII, R. 4

(iii) *Guardian ad litem—Consent of guardian—Consent in writing, unnecessary—Consent, whether can be inferred from circumstantial evidence—Suit on a promissory note executed by a guardian—Suit against minor represented by such guardian as guardian ad litem—Decree and sale in execution—Validity of—Res judicata.* Although under Order XXXII, rule 4 (iii), Civil Procedure Code, no person can be appointed guardian *ad litem* for a minor without his consent, there is nothing in the rule which requires that the consent should be expressed in writing; the consent may be inferred from circumstantial evidence. *Chhattar Singh v. Tej Singh* (1921) I.L.R., 43 All., 104, followed. Where a minor was sued on a promissory note executed by his maternal uncle, who had been appointed a guardian of the person of the minor under the Guardians and Wards Act and was also appointed guardian *ad litem* in the suit, it cannot be said that his interest was adverse to that of the minor, or that he would not have put forward a proper defence for the minor if there was one; consequently a decree obtained against the minor in such a suit and the sale of the minor's property in execution of such decree are not invalid. Where it appeared that a suit had been instituted on behalf of the minor by a next friend to set aside a sale in execution of a decree obtained against him in the above circumstances but the ground that the decree was invalid because the appointment of the guardian *ad litem* was improper had not been taken and the suit was dismissed, the same objection cannot be taken in a subsequent suit instituted on behalf of the minor to set aside the decree and sale. *Arunachalam Chetty v. Mayyappa Chetty* (1898) I.L.R., 21 Mad., 91, and *Muhammad Rowther v. Abdul Rehman Rowther* (1923) I.L.R., 46 Mad., 135, followed.

Mallayya v. Punnamma ... (1924) I.L.R., 4 Mad., 476

SEC. 11—*Res judicata—Finding of original Court on two issues—Suit in ejectment—Pleas—Occupancy right and want of notice to quit—Dismissal of suit—Decree confirmed on appeal and on second appeal on the ground of want of notice to quit—Subsequent suit in ejectment after due notice—Defendants setting up again occupancy right—Bar of res judicata.* In answer to a suit in ejectment filed against them, the defendants pleaded that they were entitled to occupancy rights in the land,

PAGE

that in any event, they were tenants from year to year and that, as notice to quit had not been given to them, the suit in ejectment was not maintainable. The District Munsif held, in that suit, that the defendants had no occupancy rights, that they were tenants from year to year, and that as notice to quit had not been given to them the suit was not maintainable, and he dismissed the suit. On appeal the lower Appellate Court affirmed the decree on the ground of want of notice to quit. On Second Appeal the High Court affirmed the decree on the same ground. The plaintiff, having subsequently given a proper notice to quit, instituted the present suit in ejectment; the defendants again set up occupancy rights; the plaintiff pleaded that the question of occupancy rights was *res judicata*. Held, that the question of occupancy rights of the defendants was not *res judicata* by reason of the decision in the previous suit. *Midnapur Zamindari Company, Ltd., v. Nares Narayana Roy* (1921) I.L.R., 48 Calo., 460 (P.C.), followed.

Ramaswami Reddi v. Marudai Reddi ... (1924) I.L.R., 47 Mad., 453

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 13 (d)—Foreign judgment—

Suit on, in British Indian Court—Ex-parte decree against defendant in a Ceylon Court—Agent appointed by defendant under a power-of-attorney, empowering latter to sue and defend suits on his behalf in all Courts in Ceylon—Submission to jurisdiction—Notice of suit served on agent—Agent putting in no appearance at all in Court—Ex parte decree, whether on the merits—Sufficiency of notice, whether can be raised in the suit in British Indian Court.] In a suit in a British Indian Court, on a foreign judgment of a Court in Ceylon, it appeared that the notice of suit to the defendant in the Ceylon Court was served on a person who was conducting business on the defendant's behalf in Ceylon and had been given by him a power-of-attorney under which the agent was empowered to sue in the Courts of Ceylon and to appear in any Court of Justice in Ceylon either as plaintiff or defendant; the agent did not put in any appearance at all in the suit in the Ceylon Court and the case was allowed to proceed *ex parte* and judgment was passed *ex parte* against the defendant. Held, that the defendant must be deemed to have submitted himself to the Jurisdiction of the foreign Court by reason of the execution of the power-of-attorney; *Ramanathan Chettiar v. Kalimuthu Pillai* (1914) I.L.R. 37 Mad., 163, referred to; that ordinarily a judgment delivered *ex parte* is deemed to be on the merits, and it is only when a defence has been raised and for some reason or another has not been adjudicated upon, that the decision can be said to be not upon the merits; and that the *ex parte* judgment in this case must be deemed to be one passed on the merits, as the defendant did not at all appear in the case. *Keymer v. Viswanatham Reddi* (1917) I.L.R., 40 Mad., 112 (P.C.), followed; that where a foreign Court had held service of notice of a suit sufficient, it must be taken to be correct in the absence of any evidence to the contrary; that if there was any irregularity in the service of notice, that point cannot be raised in the Courts in British India as a ground for questioning the validity of the foreign decree; *Pemberton v. Hughes* [1899] 1 Ch., 781, followed. But if it was distinctly proved that the person who was served was in no sense the defendant's agent at the time of the service and that consequently the defendant was unaware of the proceedings in the foreign Court, it might be an answer to the validity of the foreign judgment.

Janoo Hassan v. Mahamad Ohuthu ... (1924) I.L.R., 47 Mad., 877

SEC. 20 (e)—Jurisdiction—Cause of action in part—Contract for sale of goods between a firm in Calcutta and one in Madras—Contract made at Calcutta—Price payable in cash in Calcutta, and by hundis drawn in Calcutta by former firm on Madras firm payable in Madras—Negotiation of hundis in Calcutta—Suit by Madras firm in City Civil Court at Madras—Jurisdiction of Court.] A Madras firm entered into a contract at Calcutta with a Calcutta firm for sale by the latter of certain goods to be sent by rail to several places in the Madras Presidency, and the price was under the contract to be paid either in cash at Calcutta

or by hundis drawn in Calcutta by the Calcutta firm on the Madras firm which has bound to honour them on their being presented in Madras. The railway receipts were to be attached to the hundis and presented along with them. The Calcutta firm had negotiated the hundis and received the proceeds in Calcutta. The Madras firm instituted a suit in the City Civil Court at Madras to recover from the Calcutta firm moneys alleged to be overpaid on hundis presented for payment in Madras. The latter pleaded that the Madras Court had no jurisdiction to entertain the suit as no part of the cause of action arose in Madras. Held, that the cause of action in this suit arose at least in part in Madras, and that the Court had jurisdiction to try the suit. When the seller draws on the buyer hundis which under the contract the latter has to honour when presented to him, the payment cannot be considered to be made where the hundis are negotiated by the seller but only where the payment is actually made by the buyer on the hundis. *Mylappa Chettiar v. Aga Mirsa Mohamad Shirazee* (1919) 37 M.L.J., 712, distinguished.

Ponnusami Aiyar v. Damodar Hunsraj ... (1924) I.L.R., 47 Mad., 430

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 47—Application to set aside sale on grounds of irregularity and want of notice:—See "CIVIL PROCEDURE CODE, O. XXI, R. 22" ... 288

SEC. 47—Order of Court to fill up vacancy amongst trustees in accordance with decree in a scheme suit—Not an order between parties within sec. 47, Civil Procedure Code:—See under "APPEAL, RIGHT OF" ... 139

SEC. 52—Debt of propositus—Heir succeeding to debtor's lands—Income from lands accruing to heir—Liability to satisfy debts—Assets.] On the death of a debtor, the income accruing to his heir from landed property of which the debtor died possessed, is assets of the debtor in the hands of the heir, liable to satisfy his debts within the meaning of section 52, Civil Procedure Code. *Oolagappa Chetti v. Hon. D. Arbutnot* (1874) 1 I.A., 268, followed.

Kadivelusami Nayagar v. The Eastern Development Corporation (1924) I.L.R., 47 Mad. (F.B.), 411

SEC. 92—Persons having an interest in the trust, meaning of:—See under "HINDU LAW—RELIGIOUS ENDOWMENT" ... 884

SS. 94, 151 AND O. XXXIX, R. 2—Application for temporary injunction—Court's power to grant:—See under "MADRAS DISTRICT MUNICIPALITIES ACT" ... 700

SEC. 115, Government of India Act, sec. 107—Refusal by Collector to refer a case to the Court under sec. 18 of the Land Acquisition Act (I of 1894)—Power of High Court to revise order of refusal.] The High Court has no power under section 115 of the Code of Civil Procedure or under section 107 of the Government of India Act, to revise the order of a Collector, acting under the provisions of the Land Acquisition Act, refusing to make a reference to the Court under section 18 in a matter upon which he had passed an award. Though in refusing to refer, Collector was acting "judicially" he was not acting as a "Court" or as a Court subordinate to the High Court within section 115, Civil Procedure Code.

Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam Harbour Acquisition ... (1924) I.L.R., 47 Mad. (F.B.), 357

SEC. 115—Order of Board of Revenue dismissing appeal under section 171 of the Madras Estates Land Act—Revision—Madras Estates Land Act (I of 1908), secs. 166 (1), 168, 171 and 215—Order of Revenue Officer preparing preliminary Record-of-Rights—Appeal to Board of Revenue dismissed without hearing appellant or his wakil—Board of Revenue, whether a subordinate Civil Court—Jurisdiction of High Court to revise order of Revenue Board—Order under sec. 171, whether a proper case for revision by High Court.] Where an appeal, preferred to the Board of Revenue under section 171 of the Madras Estates Land Act against

an order of a Revenue officer passed under section 169 of the Act dismissing an objection petition filed against the preliminary Record-of-Rights prepared under Chapter XI of the Act, was dismissed by the Board without hearing the appellant or his vakil, and the appellant filed a Civil Revision Petition to the High Court under section 115 of the Civil Procedure Code to revise the order of dismissal of the Board of Revenue. *Held* that the High Court should decline to interfere in revision with the order of the Board of Revenue in this case because section 173 of the Act provides a separate remedy by suit in a Civil Court, and in such cases the High Court as a rule does not interfere in revision: *Ittiachan v. Velap:an* (1885) I.L.R., 8 Mad., 484 (F.B.), relied on. *Held* further (by SPENCER, J.), that the High Court should decline to interfere, because the Board of Revenue's order if not a judicial proceeding of a Court subordinate to the High Court, and also because the powers vested in the Board of Revenue to revise orders of Revenue Officers are powers of a revisional character as may be seen from section 172 and from the headnote to section 171 of the Act, and the exercise of revisional powers by two independent authorities would lead to inconvenient conflicts of jurisdictions; *Ramaswami Naicker v. Subbarayulu Naicker* (1916) 3 L.W., 158. *Held* by DEVADOSS, J., that the Board of Revenue, being a Civil Court when it acts judicially under section 171 or 172 or any other section of the Act, is subject to the revisional jurisdiction of the High Court.

Appanna v. Latchayya ... (1924) I.L.R., 47 Mad., 250

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 151, O. XLI, RRS. 17 AND 19—O. IX, rr. 8 and 13—Dismissal of appeal for default of appearance of appellant and his vakil—Vakil's non-appearance due to his attitude of non-co-operation—Appellant not aware of order until after 30 days from dismissal—Subsequent application for restoration—Limitation—Delay, if excusable—Inherent jurisdiction, whether applicable—Limitation Act (IX of 1908), art. 168 and sec. 5—Amendment by enactment or rule so as to apply sec. 5 to applications under O. XLI, rr. 17 and 19.] Where an appeal was dismissed for default of appearance of the appellant as well as of his vakil who did not appear to conduct the appeal in pursuance of his instructions by reason of the latter taking up the attitude of non-co-operation with the Courts, and the appellant came to know of the dismissal more than thirty days after the order, whereupon he took immediate steps to bring the matter before the Court and applied to set aside the order of dismissal of the appeal; *Held*, that where a Code declares the law on any matter specifically dealt with by it, the law must be ascertained by an interpretation of the language used by the legislature, for the essence of a Code is to be exhaustive on such matters; that Order XLI, rules 17 and 19 are exhaustive in respect of dismissals for default of appearance in appeals and setting aside of such dismissals, just as the provisions of Order IX, rules 8 and 13 are exhaustive in the case of suits, *Neelaveni v. Narayana Reddi* (1920) I.L.R., 43 Mad., 94 (F.B.); that the Court cannot act in such cases under section 151, Civil Procedure Code, or otherwise under its inherent powers, *Debi Bakhsh Singh v. Habib Shah* (1913) I.L.R., 35 All., 331 (P.C.), distinguished; *Sonubai v. Shirajirao* (1921) I.L.R., 45 Bom., 648, dissented from; and that an application to set aside an order of dismissal for default of appearance under Order XLI, rules 17 and 19, Civil Procedure Code, is governed by article 168 of the Limitation Act, and should be made within thirty days from the date of dismissal, and the Court has no power to excuse the delay in making the application.

Krishnasamy v. Chengalraya ... (1924) I.L.R., 47 Mad., 171

O. III, R. 4 (2)—Leave of Court to withdraw vakalat—Inferable from Court raising no objection—See under O. IX, R. 9 ...

O. IV, R. 1—Plaint presented on last day of limitation to judge at Club after office hours—Jurisdiction of Judge to receive.] On the last day of limitation and after the Judge had risen from Court for the day, a plaint was presented to him at 7-30 p.m. at his Club which he accepted by cancelling the stamp and initialling and dating it; *Held* that the Judge had jurisdiction to constitute

819

himself as the officer to receive plaints, that he could receive them at any time and place and that the suit was properly instituted within the meaning of Order IV, rule 1, Civil Procedure Code. *Thakur Din Ram v. Hari Das* (1912) I.L.R., 34 All., 482 (F.B.), followed.

Sattayya Padayachi v. Soundarathachi ... (1924) I.L.R., 47 Mad., 312

CIVIL PROCEDURE CODE (ACT V OF 1908), O. IX, R. 9 AND O. III, R. 4 (2)—“Appearance” of pleader—Pleader stating “no instructions” to Court—Withdrawal of vakalat with leave of Court.] *Held*, by the Full Bench:—When a pleader engaged in a case reports that he has no instructions, whether after he has asked for an adjournment and been refused or not, he must be deemed to have not appeared in the case thereafter, even if there be no formal withdrawal in writing of the vakalat—*Radha Kishan v. the Collector of Jaunpur* (1901) I.L.R., 23 All., 220 (P.O.) followed. *Held* further, that the Court must be deemed to have given its leave within the meaning of Order III, rule 4 (2), Civil Procedure Code, to the pleader to withdraw his vakalat when it does not object to such withdrawal.

Manickam Pillai v. Bathummal ... (1924) I.L.R., 47 Mad. (F.B.), 819

O. XI, R. 14—Inspection of documents—Right of party—Discretion of Court—Caution to be exercised by Court in ordering inspection—No legal right as of course—Public policy—Necessary proof of plaintiff's title—Who can be allowed inspection on behalf of party—Dismissed employee of defendant's firm, siding with plaintiff—Suit for partnership accounts—Partnership denied—Trade accounts when can be inspected—Employee, if and when can be allowed to inspect for plaintiff.] Where the plaintiff, alleging in the plaint that he was a partner in the defendant's firm and trade, sued for the taking of partnership accounts, and defendant denied the partnership in the written statement, specified therein several documents on which he intended to rely, and produced a large number of them into Court with a memorandum praying that the Court should not allow the plaintiff inspection of them without specific orders passed after hearing his objections, but the Court ordered that several of the documents might be inspected on behalf of the plaintiff by a dismissed employee of the defendant's firm on the plaintiff giving him a power-of-attorney and on his undertaking not to examine him as a witness in the case. On revision petitions being preferred by both sides against the orders. *Held*, that, under Order XI, rule 14, Civil Procedure Code, the mere production of documents by one party does not give an immediate and indefensible right of inspection to the other party; that the plaintiff cannot, unless and until he has established his partnership, be allowed to inspect any documents which do not bear on the question of partnership, and that, as regards those which do bear on it, the Court must hear the defendant's objections before it passes its order; if and when the plaintiff has established his partnership, the Court must consider if the plaintiff is entitled to inspect the trade accounts of the firm; *Held* further, that the Court is not justified in law in permitting a dismissed employee of the defendant's firm, who was siding with the plaintiff in this dispute and ill-disposed towards the defendant, to be the person to inspect the trade accounts on behalf of the plaintiff, before the latter had established his partnership, although the person might have a power-of-attorney from the plaintiff; but after the latter had established that he was a partner, the employee can be permitted to inspect on his behalf, as the employee would then have been as much the servant of the plaintiff as of the defendant; *Enamul Huq v. Ekramul Huq* (1898) I.L.R., 25 Cal., 294 followed. Caution to be exercised by the Court in permitting inspection of documents, pointed out.

Ramachari v. Krishnamachari ... (1924) I.L.R., 47 Mad., 985

O. XXI, R. 16, proviso 2—Transfer of decree—Mortgage-decree for sale against two or more persons—Transfer to one of them—Decree, whether executable by transferee against others—Decree for payment of money, meaning of.] The second proviso to Order XXI, rule 16 of the Civil Procedure Code (which enacts that

where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others) does not apply to mortgage decrees for sale, which are in essence decrees, not for the payment of money, but for the sale of property. *Laldhari Singh v. Manager, Court of Wards, Bhabatpura Estate* (1911) 14 C.L.J., 688, followed; *Vaidhinadasamy Ayyar v. Somasundaram Pillai* (1905) I.L.R., 28 Mad., 473 (F.B.), *Ramayya v. Krishnamurti* (1917) I.L.R., 40 Mad., 296, and *Sadogopa Ayyangar v. Sellammall*, (1922) 43 M.L.J., 761, distinguished.

Rajaratna Naidu v. Ramachandra Naidu ... (1924) I.L.R., 47 Mad., 248

CIVIL PROCEDURE CODE (ACT V OF 1908) O. XXI, R. 22—Decree more than a year old—Execution sale without notice to judgment-debtor—Sale, a nullity—Application to set aside sale—Article 181, Limitation Act (IX of 1908). Held by the Full Bench (1) that in a case where notice under Order XXI, rule 22, Civil Procedure Code, has not been issued and the omission is due not to the fact that sub-rule (2) of rule 22, has been applied, but to the fact that notice was not asked for, a sale held in execution is a nullity and not merely voidable but is void as against the person to whom notice should have been, but was not, issued; *Raghunath Das v. Sundar Das Khetri* (1915) I.L.R., 42 Cal., 72 (P.C.), applied. *Viswanathan Chetty v. Somasundaram Chetty* (1922) I.L.R., 45 Mad., 875, and *Doraswami v. Chidambaram Pillai* (1924) I.L.R., 47 Mad., 63, commented on. *Malkarjun v. Narhari* (1901) I.L.R., 25 Bom., 337 (P.C.), explained. Held further that though where a sale in execution is a nullity it has not got to be set aside, yet if a party files an application to have it set aside either under section 47, Civil Procedure Code, or otherwise, it is governed by article 181 of the Limitation Act and not by article 166. *Seshagiri Rao v. Srinivasa Rao* (1920) I.L.R., 43 Mad., 313, followed. Held, by the Division Bench, that an application to set aside a Court sale not only on the ground of irregularity in the sale, but also on the ground that no notice was given of the application for attachment and sale of the property, falls within section 47, Civil Procedure Code, and hence there is a Second Appeal.

Rajagopala Ayyar v. Ramanujachariar ... (1924) I.L.R., 47 Mad. (F.B.), 268

O. XXI, R. 22 (2)—Notice of Court sale to judgment-debtor—Death of judgment-debtor before sale and no notice to legal representatives—Sale not a nullity—Sale by Hindu widow of several properties to discharge usufructuary mortgage on some—Validity of, on reversioner. Where a judgment-debtor died after proclamation of sale, and his legal representatives were not brought on record before the sale actually took place. Held that the sale was not a nullity and was not liable to be set aside. *Malkarjun v. Narhari* (1901) I.L.R., 25 Bom., 337 (P.C.) and *Shao Prasad v. Hira Lal*, (1890) I.L.R., 12 All., 440 (F.B.), followed. *Ragunathswami Iyengar v. Gopaul Rao* (1921) 41 M.L.J., 547, not followed. Where a Hindu widow sold several items of property in order to discharge a usufructuary mortgage existing on only some of them, wherein the usufruct was stipulated to cover the interest due, Held that in the absence of any other necessity, the sale was not binding on the reversioner.

Doraswami v. Chidambaram Pillai ... (1924) I.L.R. 47 Mad., 63

O. XXI, R. 57—Attachment before judgment—Applicability of rule to such attachment. Held by the Full Bench (SCHWABE, C.J. and WALLACE, J., dissenting.) That "property attached in execution" in Order XXI, rule 57, Civil Procedure Code, includes property attached before judgment, when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale; hence, upon the dismissal of such an application for execution on account of the decree-holder's default in taking steps to enable the Court to proceed further with the execution, the

attachment ceases; *Arunachalam Chetty v. Periasami Servai* (1921) I.L.R., 44 Mad., 902 (F.B.), followed. *Venkatasubbiah v. Venkata Seshaiya* (1919) I.L.R., 42 Mad., 1, overruled.

Meyyappa Chettiar v. Chidambaram Chettiar (1924) I.L.R., 47, Mad. (F.B.), 483

CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, RR. 58 AND 63—Claim petition—Dismissal for delay—Order stating that the sale in execution will not affect claimant's rights, if any—Effect of the statement—No suit by claimant to establish his title—Suit by auction purchaser to eject claimant—Bar by the order—Adverse possession of claimant—Order, effect of, on possession. Where a claim petition was dismissed without investigation on the ground of delay but the order of dismissal added that the sale in execution would not affect the rights, if any of the petitioner, and the latter did not file a suit within one year to establish her title. Held, in a suit by the auction-purchaser, that the claimant ought to have sued, within one year of the order on her claim petition, to establish her right to the property, and as she did not bring such a suit, the order had become conclusive against her. *Venkataramnam v. Ranganayakamma* (1918) I.L.R., 41 Mad., 985 (F.B.), applied. Held further, that the rejection of the claim petition, which was not contested by suit, estopped the claimant from pleading adverse possession at the date of the order in a suit brought to eject the claimant.

Arsamma v. Moidin ... (1924) I.L.R., 47 Mad., 160

O. XXI, RR. 58 AND 63, SEC. 151, O. IX, R. 3, AND O. XLVII—Claim-petition—Dismissal for default—Application by petitioner to set aside dismissal for default—Competency of Court to entertain application—"Order shall be conclusive," used in rule 63, meaning of—Right of suit—Finality of order on claim petition, applicable to what orders. Where a claim-petition, preferred under Order XXI, rule 58, Civil Procedure Code, was dismissed for non-appearance of the petitioner, the Court is competent to entertain an application by the petitioner to set aside the dismissal for default and to restore the petition for disposal. The use of the words "the order shall be conclusive," in Order XXI, rule 63, does not take away the right of the party to apply to have the order of dismissal for default set aside.

Ramappa Chettiar v. Ekambaru Padayachi ... (1924) I.L.R., 47, Mad., 551

O. XXII, RR. 3 AND 11—Appeal against an order appointing a person selected by arbitrators as guardian—Death of appellant—Abatement of appeal:—See under "GUARDIANS AND WARDS ACT" ... 459

O. XXXII, R. 4 (3)—Consent of guardian ad litem—Express consent not necessary. Order XXXII, rule 4 (3), Civil Procedure Code, does not require that the consent of a person for his appointment as guardian ad litem should be express; it may be an implied one.

Sriramulu v. Lakshminarayana ... (1924) I.L.R., 47 Mad. (F.B.) 783

See also under "CIVIL PROCEDURE CODE, SEC. 11, EXPL. 4, O. XXXII, R. 4."

O. XXXIV, RR. 1 AND 5—Effect of amendment of sections 85 and 89 of the Transfer of Property Act:—See "MORTGAGE DECREE" ... 551

CLAIM PETITION—Dismissal for delay:—See under "CIVIL PROCEDURE CODE, O. XXI, RR. 58 AND 63" ... 160

COURT FEES ACT (VII OF 1872), SEC. 7, CLS. V (E) AND X (A)—Suits for the execution of a sale-deed of a house and for possession—Valuation. A suit to compel defendant to execute a sale-deed of a shop in pursuance of the agreement to sell it, is a suit for specific performance within section 7, clause X (a) of the Court Fees Act and does not become a suit for possession

as described in section 7, clause V (e), by reason of the addition of a prayer for possession. *Nihal Singh v. Sewa Ram* (1198) I.L.R., 38 All., 292, followed. *Malan Mohan Singh v. Gaja Prasad Singh*, (1911) 11 I.C., 228, and *Gopal Das v. Parmanand* (1921) 80 I.C., 512, not followed.

Sundara Ramanujam v. Sevalingam ... (1924) I.L.R., 47 Mad., 150

CRIMINAL CASE—Judgment, Court's power to alter it after signing—Accused not given opportunity to appear—Order enhancing sentence—Legality. The judgment in a criminal matter is final as soon as it is signed thereafter the Court is *functus officio* and has no power to revise or alter its decision. In the matter of *Gibbons* (1887) I.L.R., 14 Cal., 42 (F.B.). *Queen-Empress v. C. P. Fox* (1886) I.L.R., 10 Bom., 176 (F.B.). In re *Kunhammad Haji* (1923) I.L.R., 46 Mad., 382, followed; an order to the prejudice of an accused without affording him an opportunity of being heard as, for instance, where by mistake a case was posted on a day anterior to that fixed in the notice to the accused and the sentence was enhanced in his absence, is null and void *ab initio* as being one passed without jurisdiction. In re *Ranga Rao* (1912) 23 M.L.J., 371, referred to. The proper course in such a case is to proceed with the matter afresh after proper notice to the accused.

Soma Naidu, In re ... (1924) I.L.R., 47 Mad., 428

CRIMINAL PROCEDURE CODE (ACT V OF 1898) SEC 106—Accused convicted of assault—No breach of peace involved—Accused convicted and directed to execute bonds for keeping the peace—Validity of the order—meaning of "other offences" occurring in the section. Section 106 of the Criminal Procedure Code implies that offences against public tranquillity and the offence of assault involve a breach of the peace, and proof of mere commission of one of these offences is enough to make the provisions of the section applicable. The offences intended by the expression "other offences" occurring in the section, are those *ejusdem generis* with the offences against public tranquillity and of assault which are mentioned in the section. *Ramaswami Thevan v. King-Emperor*, Crl. Appl. 1600 of 1922 (unreported) followed; In re *Thirumal Reddy* (1922) 30 M.L.T., 348, dissented from.

Kuppu Reddiar v. King-Emperor ... (1924) I.L.R., 47 Mad., 846

SEC. 144—Order under, Disobedience of order—Sanction for prosecution—Proper appellate authority under sec. 195, Criminal Procedure Code to revoke sanction. A Subdivisional Magistrate passed an order under section 144, Criminal Procedure Code, prohibiting certain persons from interfering with a religious ceremony. On disobedience of that order he sanctioned their prosecution for an offence under section 188, Indian Penal Code; Held that the Magistrate was not, when passing the order under section 144, Criminal Procedure Code, acting as a "Court," within the meaning of clause (7) of section 195 of the Criminal Procedure Code, but was only acting as a public servant; hence the proper appellate authority to revoke the sanction was not the Sessions Court but the District Magistrate as provided by clause (6) of section 195. *Arunachalam Pillai v. Ponnusawmy* (1918) 35 M.L.J., 454, not followed. *Sundaram v. The Queen*, (1888) I.L.R., 6 Mad., 203 at 222 and *Abbas Ali Chowhry v. Ilkum Meah* (1879) 14 W.R. (Crl.), 46, followed.

Nataraja Pillai v. Rangaswami Pillai ... (1924) I.L.R., 47 Mad., 56

SEC. 145—Magistrate dropping proceedings, on being satisfied that no dispute existed—Evidence, if obligatory to record any—Sale-proceeds of crops on attached lands, disposal of. It is not obligatory for a Magistrate to take evidence before dropping proceedings under section 145, Criminal Procedure Code (Act V of 1898), if he is otherwise satisfied that no dispute likely to cause a breach of the peace existed. The persons who raised the crop standing on the lands attached, are entitled to the money realized by a sale of the crop, but it is

not illegal to order the money to be kept in Court until one of the parties obtains an order in his favour in a Civil Court. *Chinnathambi Rowtham*, In re, (1911) 12 Crl. L.J., 104, followed.

Suryanarayana v. Ankineed Prasad Bahadur ... (1924) I.L.R., 47 Mad., 713

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 195—Nature of application to High Court—Not an appeal—Effect of amendment of the section—Application to set aside order revoking sanction—Not maintainable. No right of appeal is provided for under section 195 of the Criminal Procedure Code (Act V of 1898), and an application to set aside an order revoking sanction does not lie after the amendment of the section by Act XVIII of 1923 as the amendment affects procedure and, as such, has retrospective effect. *Bapu v. Bapu*, (1916) I.L.R., 39 Mad., 750 (F.B.) and *Muthuswami Mudali v. Veeni Chetti*, (1907) I.L.R., 30 Mad., 382 (F.B.), referred to and explained.

Nataraja Pillai v. Rangaswami Pillai ... (1924) I.L.R., 47 Mad., 864

SEC. 195 (1)—Previous sanction of public servant concerned or some public servant to whom he is subordinate—False information to Village Magistrate—Sec. 182, Indian Penal Code—Sanction by Sub-Magistrate—Jurisdiction—Village Magistrate whether subordinate to Sub-Magistrate. A Village Magistrate is not subordinate to a Sub-Magistrate within the meaning of section 195 (1) of the Code of Criminal Procedure and therefore a Sub-Magistrate is not the proper authority to accord sanction for the prosecution, for an offence under section 182 of the Indian Penal Code, of a person who gave false information to a Village Magistrate. *The Queen v. Perianann*, (1882) I.L.R., 4 Mad., 241, not followed. *Venkatasami v. Narasimhaaya*, (1908) 4 M.L.T., 214, referred to.

Pallikudathan v. Budda Goundan ... (1924) I.L.R., 47 Mad., 229

SEC. 195, CL. (7)—Magistrate passing an order under sec. 144 of Criminal Procedure Code, not a "Court":—See CRIMINAL PROCEDURE CODE, SEC. 144 ... 56

SEC. 288—its scope and applicability—Nature of corroboration required—Statements made before committing Magistrate, partly rescinded from in Sessions Court. In a case and counter-case of rioting, witnesses for the prosecution in each case were mostly the accused in the other. In pursuance of a conspiracy to defeat the ends of justice and to save themselves, they retracted in the Sessions Court that portion of their previous statements, before the committing Magistrate, relating to the identity of their assailants; but in other respects there was a general agreement in the statements made by them before the two Courts. Held, in the circumstances of the case, that the Sessions Judge was justified in regarding the statements before the Committing Magistrate as substantive evidence and the trial under section 288 of the Code of Criminal Procedure and acting upon them in preference to the statements made before him, and that corroboration on the identical point on which the witnesses had resiled was not necessary. In re *Velliah Kone*, (1922) 43 M.L.J., 222, and *Queen-Empress v. Dorasami Ayyar*, (1901) I.L.R., 24 Mad., 414, followed. To admit, under section 288, the evidence given before the Committing Magistrate, the Sessions Judge must be satisfied, on judicial grounds, that the prior statement was true and that the evidence given before him was false.

Somadu v. King-Emperor ... (1924) I.L.R., 47 Mad., 232

SEC. 350—Evidence recorded by two successive Magistrates—Conviction by a third Magistrate, if valid. A conviction by a Magistrate, acting upon evidence recorded partly by one predecessor and partly by another is valid. Section 350 of the Code of Criminal Procedure (Act V of 1898) applies to the cases of a Magistrate acting upon evidence recorded by more than one Magistrate who afterwards ceased to exercise jurisdiction.

Govindan v. Krishnan ... (1924) I.L.R., 47 Mad., 245

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 423 (d)—*Appellate Court's power to order accused to repay complainant, court-fee—Court fees Act (Act VII of 1870), sec. 31—Order not an enhancement of sentence.* An order passed by an Appellate Court directing the accused under section 31 of the Court Fees Act (Act VII of 1870) to repay the complainant the court-fee paid on the complaint petition does not amount to an enhancement of the sentence but is only an incidental order which an Appellate Court can make, under section 423 (d) of the Code of Criminal Procedure (Act V of 1898), to bring the judgment into conformity with the law.

Thimiah v. King Emperor ... (1924) I.L.R., 47 Mad. 914

ss. 435, 438 AND 439—*Proceedings in a pending trial before Magistrate—High Court's power to interfere in revision.* The High Court has power, under sections 435, 438 and 439 of the Code of Criminal Procedure, to interfere in revision at any stage with the proceedings of a Magistrate in a pending trial.

Ramanatha Chettiyar v. Subrahmanya Ayyar ... (1924) I.L.R., 47 Mad., 722

SEC. 537—*Omissions from charge*:—See under "INDIAN PENAL CODE, SEC. 149" ... 746

DAMAGES—*Goods damaged during voyage—Perils of the sea*:—See under "SLIP" 610

DEBTS—*Liability of son's share for the father's debts*:—See under "HINDU LAW" 87

DEBTS OF FATHER—*Income derived by son after father's death, from lands belonging to the deceased—Liability to satisfy decree amount*:—See under **CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 52** ... 411

DECREE—*Declaration and consequential relief asked for—Consequential relief refused as right to declaration found against—Decree to embody result regarding declaration*:—See under "SUIT" ... 638

— *Execution—Appeal to His Majesty in Council against an order refusing execution of the decree—Death of some of the respondents pending appeal—Their legal representatives not brought on record—Order of Privy Council, after respondents were dead—Order of Privy Council, whether a nullity—III and IV, William IV (Judicial Committee Act), sec. 23—Effect of—Application to bring legal representatives of deceased respondents made more than three years after their death but within three years of the order of Privy Council—Bar of limitation—Limitation Act (IX of 1908), art. 18j.* Some of the respondents to an appeal before the Privy Council were dead and their legal representatives had not been brought on record when the appeal was heard and judgment was delivered by the Privy Council. The successful appellants applied to the Original Court for execution of the decree against the legal representatives who were sought to be added as parties to the execution proceedings more than three years from the death of the respondents but within three years of the order of the Privy Council. The legal representatives contended that the decree of the Privy Council was a nullity and that the application to implead them was barred by limitation. *Held*, that although some of the respondents in the appeal before the Privy Council were dead and their legal representatives had not been brought on record when the appeal was heard and judgment was delivered by the Privy Council, the decree against them was not a nullity by reason of the provisions of the Judicial Committee Act (III & IV, William IV, Chapter XLI), section 23; *Deonandan Prasad Singh v. Janki Singh*, (1920) 5 P.L.J., 814, referred to; that the application to bring on record the legal representatives of the deceased respondents, was not barred by limitation as the right to implead parties to a decree could not arise until the decree was passed, and that the application, being within three years of the decree of the Privy Council, was not barred under article 181, Limitation Act.

Kalyani Pillai v. Thiruvankadaswami Ayyangar ... (1924) I.L.R., 47 Mad., 618

DECREE—Execution—Limitation—Limitation Act (IX of 1903), sec. 15 and art. 182—*Transfer of decree—Application by transferee for execution—Application stayed by attachment of decree by plaintiff in another suit—Attachment before judgment—Subsequent application by attaching decree-holder for transmission of decree to another Court—Notice to judgment-debtor—Order for transfer passed—Plea of limitation not taken in that application—Subsequent application for execution—Plea of limitation, whether res judicata—Application by assignee of decree, whether a step in aid of execution—Stay of execution of decree by attachment before judgment, whether a stay under sec. 15, Limitation Act—Deduction of time.* A decree was passed on 27th March 1918; an application was made by certain transferees of the decree on 26th July 1919 for recognition of their transfer, and for execution; their petition was dismissed in consequence of an order of attachment passed on the same date and obtained before judgment in another suit filed by the first respondent against the original decree-holders; on 4th April 1922, the first respondent, who had obtained his decree on 22nd December 1921, applied for the transmission of the former decree from the Sub-Court which had passed it to the District Court for execution, and an order for transfer of the same was made after notice to the judgment debtors who did not object to the transfer on the ground that execution of the decree was then barred by limitation; on 26th April 1922, the first respondent applied for execution of the decree in the latter Court; on the judgment-debtors pleading the bar of limitation, *Held*, that, even in an application for transfer of the decree to another Court for execution, it is open to the judgment-debtor to plead limitation in bar of execution, and in fact he ought to do so; and if he omits to raise the plea and the order for transfer is made, he cannot raise the bar of limitation in a subsequent application for execution filed within three years of the previous application for transfer of the decree. *Mungul Pershad Ditch v. Gria Kant Lahiri*, (1882) I.L.R., 8 Cal., 51 (P.C.); and *Raja of Ramnad v. Velusami Thevar*, (1921) 40 M.L.J., 197 (P.C.), applied; that the application by the transferee-decree-holders for recognition of their transfer and for execution was a step in aid of execution of the decree, even though the right of the transferees had been negatived in subsequent proceedings; *Sreepada Brahmayya Pantulu v. Parasuramayya*, (1902) 12 M.L.J., 348, followed; that in the case of an attachment before judgment, of a decree, unlike the case of an attachment of a decree by a decree-holder or of a book-debt, the order of attachment absolutely prohibits the execution by anybody of the decree attached and amounts to an injunction within the terms of section 15 of the Limitation Act, and the decree-holder is entitled under that section to a deduction of the period during which the injunction was in force; and that consequently the present application for execution was not barred by limitation.

Rajitagiripathy v. Bhavani Sankaram ... (1924) I.L.R., 47 Mad., 641

DECREE FOR EJECTMENT:—See under "MADRAS CITY TENANTS PROTECTION ACT" ... 813

DEFAULT—*Of appearance of appellant and his Vakil—Dismissal of appeal*:—See under "CIVIL PROCEDURE CODE, O. IX, R. 9 AND O. III, R. 4 (2)".

DELAY—*Application for restoration of appeal—Appellant not aware of dismissal until after lapse of 30 days—Court's power to excuse delay*:—See under "CIVIL PROCEDURE CODE, SEC. 115 AND O. XLI, RR. 17 AND 18."

EASEMENT in favour of the Public, Acquisition of—Proof necessary—Acquisition of easement by public, not equivalent to acquisition by Government. To a suit by a private person against the Government for a declaration of his ownership of a land, the acquisition of an easement over it by the public is no defence. Though the public cannot acquire ownership of a land, it can acquire over it an easement or profits a prendre either by grant or by prescription; *Lutchmerput Singh v. Sacaulla Nushyo*, (1883) I.L.R., 9 Cal., 698, and *Attorney General v. Esher Linoleum Company, Limited* [1901] 2 Ch., 647, followed. If proof of an actual or lost grant is not available,

what is necessary to prove is not mere user but dedication to the public at large as distinguished from a section of it, inferable from long user. *Poole v. Huskinson*, (1843) 11 M. & W., 827 and *Muhammad Rustam Ali Khan v. Municipal Committee, Karnal*, (1920), 1 L.R., 1 Lah., 117 (P.C.), followed. Acquisition of an easement by the public is not equivalent to an acquisition by the Government.

Ussan Kasim v. The Secretary of State for India ... (1924) 1 L.R., 47 Mad., 118

ELECTION—Candidate's nomination paper wrongly rejected—Remedy:—See under "MADRAS DISTRICT MUNICIPALITIES ACT, SEC. 352" ... 585

— of a person as member of taluk board—Set aside by Government on the ground that such member is likely to bring administration into contempt—Notice to person affected, whether necessary—Order without notice whether invalid—Power of Government to make rules:—See under "MADRAS LOCAL BOARDS ACT (ACT V OF 1884)" ... 325

— of President, Taluk Board—Objection petition—Election Judge, whether persona designata or Court—Decision, how far final—High Court's power to revise:—See under "LOCAL BOARDS ACT" ... 369

— to Taluk Board—Application to set aside—Delay:—See under "MADRAS LOCAL BOARDS ACT" ... 548

— Rules:—See under "MADRAS DISTRICT MUNICIPALITIES ACT, 1920." ... 700

EQUITABLE MORTGAGE—Unregistered document evidencing the mortgage, admissibility of.] To ascertain whether an unregistered document creates an equitable mortgage, the test is whether it constitutes the bargain between the parties, i.e., whether it records a contemporaneous loan and deposit of title deeds or whether it merely records an already completed transaction of loan and deposit. It is only in the former case the document is inadmissible for want of registration. *Subramanian v. Lutchman*, (1923) 1 L.R., 50 Calc., 338 (P.C.) and *Shaw v. Foster*, (1872) 5 H.L., 321, followed.

Krishnaiya v. Ponnuswami Aiyar ... (1924) 1 L.R., 47 Mad., 398

ESTATES LAND ACT (MADRAS ACT I OF 1908), SEC. 3 (2) (d)—Occupancy rights—Onus of proof—Inam grant to temple—No presumption that the temple granted kudivaram right:—See under "LANDLORD AND TENANT." ... 887

— ss. 6, 8 AND 189—Suit in a Civil Court by holder of a darimella inam to eject a tenant—Plaintiff claiming to be owner of kudivaram before grant of melvaram to him—Plaintiff, whether landholder—Defendant, whether an occupancy tenant—Suit, whether maintainable in a Civil or Revenue Court—Jurisdiction, how determined.] Where the plaintiff, the holder of a darimella inam, alleging that his predecessor-in-title was the owner of the kudivaram in the lands before the melvaram was granted to him by the zamindar, sued in a Civil Court to recover possession of the lands from the defendants who were alleged to be in possession after the termination of an oral lease from him, but the latter pleaded that they were tenants with occupancy rights and that the Civil Court had no jurisdiction to entertain this suit. Held, that, if the plaintiff proved that his predecessor-in-title was already owner of the kudivaram before the melvaram interest was transferred to him by the zamindar, the plaintiff was not a landholder holding an estate or part thereof, and the Civil Court would have jurisdiction to entertain this suit: but if the plaintiff had no kudivaram interest at all and he became an inamdar solely by virtue of the grant of melvaram by the zamindar, then this suit would not be maintainable in a Civil Court but would lie only in a Revenue Court; *Marina Veeraswamy v. Boyinapalli Venkatrayudu*, (1920) 39 M.L.J., 225 (F.B.), applied and *Brahmayya v. Achiraju* (1922) 1 L.R., 45 Mad., 716 (F.B.), distinguished.

Manikyamba v. Melaya ... (1924) 1 L.R., 47 Mad., 942

ESTATES LAND ACT (MADRAS ACT I OF 1908), SEC. 153—Suit before Civil Courts to eject non-occupancy ryots on grounds not mentioned in the section, maintainability of.] Held by the Full Bench:—Section 153 of the Madras Estates Land Act is exhaustive of the grounds on which a non-occupancy ryot can be ejected by a suit before the Collector, but it does not oust the jurisdiction of the Civil Courts to entertain suits for ejecting such tenants on other legal grounds, e.g., (as in the present case) the expiry of the term of one year for which the tenant was let into possession under section 8 (4) of the Madras Estates Land Act by the landholder owning the kudivaram interest also. *Yelikepalli Venkaya v. Venkataramayya Appara*, (1917) 33 M.L.J., 757, and the decision of *OLDFIELD, J.*, in *Sankara Venkataratnam v. Sri Rajah Varadarajah Appa Rao*, (1915) 29 M.L.J., 184, overruled. Held, by the Division Bench (*PHILLIPS and VENKATASUBBA RAO, JJ.*) that not only benamidars in whose names immovable property is bought by others but also those to whom such property is nominally transferred by real owners, can maintain suits against strangers in respect of such property; *Gur Narayan v. Sheolal Singh* (1919) 1 L.R., 46 Calc., 566 (P.C.), followed.

Govinda Naidu v. Chengalroya Mudali ... (1924) 1 L.R., 47 Mad. (F.B.), 896

— SEC. 171—Appeal to Board of Revenue—Order of dismissal, if revisable by High Court:—See under "CIVIL PROCEDURE CODE" ... 250

ESTOPPEL—First suit against a person in the mistaken belief that the suit document was executed in his own capacity—Subsequent suit against the person on whose behalf the document was executed—No estoppel:—See under "SUIT" ... 850

EVIDENCE ACT (INDIAN) (1 OF 1872), SEC. 92—See under "MORTGAGE" ... 729

— SEC. 106—Information of persons not called as witnesses, admissibility of:—See under "CIVIL PROCEDURE CODE, SEC. 2" ... 800

— SEC. 112—Legitimacy—First marriage dissolved—Marriage of the woman with a second husband—Conception of child during first marriage—Birth of son after and during second marriage—Access of second husband during first marriage proved—Son, whether legitimate son of second husband or the first.] A woman married a person in September 1903; the marriage was dissolved in May 1904; she married another in June 1904; a son was born to her in September 1904 during the continuance of her marriage with her second husband. It appeared that the latter had access to her during her first marriage. In a suit by the son to recover the property of the second husband on his death, it was contended that the plaintiff was not the legitimate son of the second husband; Held, that the plaintiff was in law the legitimate son of the second husband of the woman, and was entitled to his properties. Under section 112 of the Indian Evidence Act, the child born in wedlock should be treated as the child of the father who was at the time of its birth the husband of the mother, unless it is shown that he had no access to the mother at the time of its conception quite irrespective of the question whether the mother was a married woman or not at the time of the conception. Section 112 of the Evidence Act refers to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child; the latter point of time has to be considered only to see whether the husband had not access to the mother. *Nicholas v. Asphar* (1897) 1 L.R., 24 Calc., 216, dissented from; *Ingestre v. Attorney-General* (1914) 30 Law Quarterly Review, 153, followed.

Palmi v. Sethu ... (1924) 1 L.R., 47 Mad., 706

EVIDENCE—Unregistered deed of mortgage for two hundred rupees—Admissible in evidence for showing character of mortgagee's possession:—See under "REGISTRATION ACT" ... 208

— Unregistered document evidencing equitable mortgage—Admissibility of:—See under "EQUITABLE MORTGAGE" ... 898

EXECUTION -- <i>Limitation Act (IX of 1908), sec. 15, art. 182--Application by transferee for execution</i> :--See under "DECREE"	618
EXECUTION OF DECREE -- <i>Attachment before judgment--Claim petition filed by third party and allowed after decree--Application for sale more than three years after decree</i> :--See under "LIMITATION ACT, ARTS. 181 AND 182" ...	176
----- <i>Receiver appointed in another suit, for the mortgaged properties--Leave of Court for executing decree, necessary</i> :--See under "SUIT FOR SALE"	47
EX-PARTE DECREE IN FOREIGN COURT -- <i>Defendants' authorized agent served with notice of suit, not appearing--ex-parte decree, whether on merits</i> :--See under "CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 13 (d)" ...	877
FOREIGN JUDGMENT -- <i>Suit on, in British Indian Court</i> :--See under "CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 13 (d)"	877
GOVERNMENT OF INDIA ACT (V & VI Geo. V, C. 61), SEC. 107 --See under "CIVIL PROCEDURE CODE, SEC. 115."	357
GUARDIAN -- <i>Power to borrow money for purchasing lands for minor</i> :--See under "MINOR"	449
----- <i>ad litem--Appointment of--Consent of guardian in writing, unnecessary</i> :--See under "CIVIL PROCEDURE CODE, SEC. 11"	453
----- <i>ad litem--Adverse interest</i> :--See under "MINORS"	79
----- <i>Appointment of--Consent to act, whether should be express or implied</i> :--See under "CIVIL PROCEDURE CODE, O. XXXII, B. 4 (3)" ...	783
GUARDIANS AND WARDS ACT (VIII OF 1890) -- <i>Application for appointment of guardian for a minor--Reference to arbitrators--Selection by arbitrators--Order of Court appointing applicant selected by arbitrators--Validity of appointment of person selected without Court's independent decision as to fitness--Appeal by counter-petitioner--Death of appellant pending appeal--Abatement of appeal--Son of appellant brought on record--Right of appellant's legal representative to prosecute appeal--Right to sue whether services--Civil Procedure Code (Act V of 1908), O. XXII, rr. 3 and 11.</i> An application under the Guardians and Wards Act for the appointment of a guardian to a minor was made by the maternal uncle of the minor; the application was opposed by his paternal uncle; the parties agreed to the selection of a person as guardian by certain arbitrators who chose the maternal uncle; the Judge accepted their choice and appointed him as guardian. The paternal uncle appealed and died during the pendency of the appeal. His son was brought on record as his legal representative and sought to prosecute the appeal. On objection being taken by the respondent that the appeal had abated, <i>Held</i> , that the appeal did not abate, and the legal representative of the appellant was entitled to prosecute the appeal; <i>Gangabai v. Khashabai</i> , (1889) I.L.R., 23 Bom., 719, distinguished; <i>Arjan Singh v. Guri</i> , (1917) 42 I.C., 410, followed; that the selection of a guardian could not be referred to arbitrators, as it was not a matter of private interest between parties, and as the law allowed a reference to arbitration only where all the parties interested agreed, whereas in a guardianship application the party most interested was the minor and he could not agree to a reference; <i>Mahadeo Prasad v. Bindeshri Prasad</i> , (1908) I.L.R., 30 All., 137, followed; and that, as the Judge did not arrive at an independent conclusion as to the fitness of the person for appointment as guardian, the order of appointment should be set aside. <i>Palaniyandi Chetti v. Adaikalam Chetti</i> (1924) I.L.R., 47 Mad., 459	
HINDU LAW -- <i>Alienation--Daughter's estate--Compromise of litigation--Mortgage by alien--Notice of defect of title--Reversioners rights--Indian Trust Act (II of 1882), ss. 89, 96.</i> The daughter of a deceased Hindu in the Madras Presidency succeeded to his property for a woman's estate. As	

part of a compromise of adverse claims, she transferred part of the land to M who induced her to transfer it to him without any belief that he had a valid claim. M mortgaged the land to the respondent, who had a notice that M acquired the property from the daughter under that compromise. The appellants, the next reversioners, sued for a declaration that the transfer was not valid beyond the lifetime of the daughter. The High Court held that under section 89 of the Indian Trusts Act, 1882, M was in the position of a quasi-trustee, and that the respondent's title was protected by section 96 of that Act. *Held* (1) that the above Act did not apply to the circumstances; and (2) that the respondent having notice that his mortgage took from one who had only a limited and conditional right of disposal and the compromise being invalid, and there being no proof of necessity or of inquiry as to the validity of the compromise, the appellants were entitled to the declaration claimed against the respondent.

Kondama Naicker v. Kandusami Goundar ... (1924) I.L.R., 47 Mad. (P.O.), 181

HINDU LAW--*Contract by a widow to receive a fixed maintenance undertaking not to claim more--Validity of.* A contract by a Hindu widow with her husband's co-parceners to receive a fixed maintenance per annum and not to claim any increase in future even in case of change of circumstances is a valid agreement binding upon the widow. *Venkamma v. Kristappa*, Appeal No. 12 of 1920 (unreported) and *Narasimha Rao v. Rattamma*, C.M.A. No. 316 of 1918 (unreported), followed.

Mahiswara Rao v. Durgamba (1924) I.L.R., 47 Mad., 308

-----*Debts incurred by guardian on behalf of minor for purchasing lands--Liability of heirs on minor's death* :--See under "MINOR"

-----*Father and son adjudicated insolvents--Sale by Official Receiver, of son's interest also--Validity* :--See under "PROVINCIAL INSOLVENCY ACT, ss. 16, 18, 20 and 23"

-----*Father's debts--Suit against father and minor son--Father appointed by Court guardian ad litem--Appointment whether proper and legal* :--See under "MINOR"

-----*Father's "antecedent" debts neither illegal nor immoral--Right of father to sell sons' shares also to discharge such debts--Father's insolvency--Right of Official Assignee to sell sons' shares.* A Hindu father who had incurred debts in his trade was adjudged an insolvent and his estate vested in the Official Assignee. *Held* by the Full Bench that in order to discharge such debts which were neither illegal nor immoral, the Official Assignee standing in the shoes of the father, could exercise father's right of selling the sons' share also in the ancestral estate. The view uniformly held by the Madras High Court that the father has this right, has not been upset by the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (1917) I.L.R., 39 All., 437 (P.C.); and *Chet Ram v. Ram Singh* (1922) I.L.R., 47 All., 388 (P.C.). It is not only completed sales of the entire family estate whether effected by private contract by the father or by Court auction in decrees against him that the sons are incompetent to question but they are equally incompetent to prevent the father or the Official Assignee who stands in the shoes of the father from selling their shares also in family estate for discharging such debts.

Sellamuthu Servai, In re (1924) I.L.R., 47 Mad. (F.B.), 87

-----*Partition omitting to provide for father's unsecured debts--Creditor's right to sue son after partition.* A bona fide partition between a Hindu and his son omitted to provide for an unsecured debt incurred by the father, not being for an illegal or immoral purpose. *Held*, that the creditor could, after the partition, sue the son also and recover the debt from the joint family properties allotted to the son in partition. *Ramachandra Padayachi v. Kondappa Chetti* (1901) I.L.R., 24 Mad., 555, and *Kameswaramma v. Venkata Subba Row* (1915) I.L.R., 88 Mad., 1120, followed. *Peda Venkanna v. Sreenivasa Deekshatulu* (1918) I.L.R., 41 Mad., 186, explained.

Jagannatha Rao v. Viswesam (1924) I.L.R., 47 Mad., 621

HINDU LAW—Partition—Suit by two minor sons for partition against their father—Compromise decree for partition and delivery of two-thirds share—Minor sons, whether thereby divided inter se—Presumption of division—Subsequent death of one of the minor sons—Right of surviving son to share of deceased son by survivorship.] Where some of the members of a joint Hindu family sued for partition and recovery of their shares from the other members of the family, the suit and the decree do not necessarily divide the plaintiffs *inter se*. *Mussamat Jatti v. Banwari Lal*, (1923) 45 M.L.J., 355 (P.C.); *Balabux v. Rukhmabai*, (1903) I.L.R., 30 Cal., 725 (P.C.); *Rangasami Naidu v. Sundarajulu Naidu*, (1916) 31 M.L.J., 472; and *Palaniammil v. Muthuvenkatachala Maniagarar*, (1917) 33 M.L.J., 759, referred to. Where two minor sons of a Hindu father instituted a suit for partition against their father, and a decree was passed on compromise for partition and delivery of two-thirds share to the minor plaintiffs, and a subsequent suit was instituted by the survivor of the two minors, on the death of one of them, to recover possession of the two-thirds share of the lands by division from his father and the other divided co-owners on the ground of subsequent trespass by his father, *Held*, that the minors had not become divided *inter se* by the previous suit or the decree; and that the plaintiff was entitled to the one-third share of his deceased brother by right of survivorship, and was entitled to recover the two-thirds share in the family properties as against his father and the other divided co-owners.

Sengoda Goundan v. Muthu Goundan ... (1924) I.L.R., 47 Mad., 567

Religious Endowment—Public Charity—Suit to remove trustees—“Persons having an interest in the trust,”—Founder’s descendants—Code of Civil Procedure (Act V of 1908), sec. 92.] The respondents were descendants in female lines of a Hindu who was the founder of a *chattram*; the evidence showed that the *chattram* was a public charity. With the consent of the Advocate-General, the respondents sued under section 92 of the Code of Civil Procedure to remove the trustees:—*Held*, that the respondents were “persons having an interest in the trust” within the meaning of section 92, and consequently were entitled to maintain the suit, even though they might never themselves make use of the *chattram*. *Held*, further, that the appointment of the first appellant as trustee was invalid since his appointer was professing to appoint a manager of property which he was falsely claiming to be his own, and was attempting to divert the income of the trust. *T. R. Ramachandra Aiyar v. Parameswarar Unni*, (1919) I.L.R., 42 Mad., 360, discussed.

Vaidyanatha Ayyar v. Swaminatha Ayyar ... (1924) I.L.R., 47 Mad. (P.C.), 884

Sale by widow, of several properties to discharge a usufructuary mortgage on some—Validity of:—See under “CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 22 (2)” ... 63

HINDU-WIDOW executing a mortgage in her own capacity and not as guardian of her alleged adopted son—Mortgagee’s assignee obtaining decree first against the widow—Subsequent suit against adopted son in possession of the property, alleging binding nature of the debt on the estate—No estoppel:—See under “SUIT.” ... 815

INCOME-TAX ACT, INDIAN (VII OF 1918), SEC. 3 (2) (viii)—Profits from business of casual nature—Question of fact.] It is a question of fact in each case whether certain stray transactions of a merchant are really part of his business so that the profits arising from them can be taxed as profits arising from his business. *Held* on the facts of the case that profits that accrued to a banker and money lender from certain stray speculative purchases and sales of dollars in the Straits Settlements were taxable as profits arising from his business and were not exempt from taxation as arising from occupation of a casual nature within the meaning of section 3

(2) (viii) of the Indian Income-tax Act, 1918; *California Copper Syndicate Coy., Ltd. v. Harris*, (1904) 5 Tax Cas., 159; *Hudson Bay Coy v. Stevens*, (1909) 5 Tax Cas., 424; and *Benyon T. Coy., Ltd. v. Ogg*, (1918) 7 Tax Cas., 125, applied.

Board of Revenue v. Arunachalam Chettiar ... (1924) I.L.R., 47 Mad. (S.B.), 197

INCOME-TAX ACT, INDIAN (VII OF 1918), SEC. 9—Registered Mutual Benefit Society—Borrowing and lending confined to members—Interest on loans, not taxable “profits” within section.] Where the capital of a mutual benefit society was made up solely of periodical investments by its members and the income of the society was mainly derived from interest earned on loans given solely to its members, every one of whom was by the rules eligible to take loans, *Held*, that such interest earned by the society from its own members was not taxable “profits” within section 9 of the Indian Income-tax Act VII of 1918 in spite of the fact that the society was registered under the Indian Companies Act and as such was for certain purposes a separate legal entity from its members. *New York Life Insurance Company v. Styles*, (1889) 14 App. Cas. 381, followed; *Equitable Life Assurance Society of the United States v. Bishop* [1900] 1 Q.B., 177, and *Leeds Benefit Building Society v. Mallandaine*, [1897] 2 Q.B., 402, distinguished. *Held further*: Interest derived by the society on occasional authorized deposits with outside banks of its unlent surplus was taxable.

Board of Revenue v. Mylapore Fund ... (1924) I.L.R., 47 Mad. (S.B.), 1

SEC. 9 (2) (ix)—A, trading on his own account and also as partner in a firm—Gain in one and loss in another—Right to set off loss against gain—Charges incurred to ascertain taxable profits—Right to deduct charges from income.] A, who traded on his own account held as part of his business a share in a firm consisting of himself and B, whose business was to deal in similar goods and was subsidiary to A’s. In a certain year A made a profit in his own business but sustained loss as a partner. *Held*, that in arriving at the taxable income of A for the year his loss as a partner could be set off against his gains in his own business. *Held further*, that in arriving at the taxable income of A for a particular year, charges and costs incurred by him in employing accountants and lawyers in connection with a dispute between him and the Government as to the amount of excess profits duty, payable by him for a previous year, could not be deducted from the gross income, since such charges and costs were not expenditure within the meaning of section 9 (2) (ix) of the Income-tax Act, VII of 1918, incurred solely for the purpose of earning such profits but were charges incurred after the profits were earned. *Inland Revenue Commissioners v. Warnes & Co.*, [1919] 2 K.B., 444, and *Ward & Co. v. Commissioner of Taxes*, [1923] A.C., 145, followed.

Board of Revenue v. Muniswami Chetty ... (1924) I.L.R., 47 Mad. (S.B.), 658

INCOME-TAX ACT (XI OF 1922)—Super-tax—Value of income—Company—Surplus accumulation of profits, not distributed among shareholders—Bonus shares issued to shareholders representing their share of profits—Liability of shareholders to income-tax or super-tax on such shares—Bonus shares, whether income.] Where the surplus accumulation of profits of a company, instead of being distributed among its shareholders, was capitalized under a special resolution of the company, and new shares were issued to the shareholders representing their shares in the accumulated surplus, *Held*, that the new shares were not taxable as income, and that the shareholders were not liable to super-tax on the value of the new shares issued to them. *Inland Revenue Commissioners v. Blott—Inland Revenue Commissioners v. Greenwood* [1921] 2 A.C., 171 (view of the majority of the House of Lords, followed); and *Swan Brewery Company, Limited v. Rea*, [1914] A.C., 281 (P.C.), distinguished.

Commissioner of Income-tax v. Binny & Co. ... (1924) I.L.R., 47 Mad. (S.B.), 837

SECS. 2, 6, 10 AND 24—Assesses carrying on trade individually and as partner of an unregistered firm—Gain in one and loss in another—Right to set off.] Where a person carries on two

different trades, one individually and the other as a member of an unregistered firm, he is, under the Income-tax Act XI of 1922, entitled to set off, for purposes of income-tax, the loss incurred by him in respect of the partnership trade against the profit made by him in his individual trade.

Commissioner of Income-tax v. Arunachalam Chettiar ... (1924) I.L.R., 47 Mad. (S.B.), 600

INCOME-TAX ACT, INDIAN (XI OF 1922), sec. 10 (2), cl. (9)—*Business allowance—Madras District Municipalities Act (V of 1920), sec. 92—Tax on companies—Assessment of income under the Income-tax Act—Tax on companies under the Municipalities Act, whether can be deducted as a business allowance under the Income tax Act.* Tax on companies levied under section 92 of the Madras District Municipalities Act (V of 1920) should be deducted as a business allowance under section 10 (2) of the Income-tax Act in assessing income under the latter Act. Tax on companies levied under the former Act is not an income or profession-tax but is a compulsory toll on trading companies without which they are not permitted to carry on their trade, and the payment of which is an expenditure incurred solely for the purpose of earning profits or gains. *Smith v. Lion Brewery Company*, [1911] A.C., 150, and *Jsher's Wiltshire Brewery, Limited v. Bruce*, [1915] A.C., 433, followed; *The Chief Commissioner of Income-tax, Madras v. The Eastern Extension Australasia and China Telegraph, Ltd.*, (1921) I.L.R., 44 Mad., 489, *Ward & Co. v. Commissioner of Taxes*, [1923] A.C., 145, and *Board of Revenue v. Muniswami Chetty*, (1924) I.L.R., 47 Mad., 653, distinguished.

Commissioner of Income-tax v. Nedungadi Bank, (1924) I.L.R., 47 Mad. (S.B.), 667

INDIAN ARMS ACT (XI OF 1878)—*Servant using, without licence, master's gun—sec. 13 of the Act, infringement of—Sec. 19 (e), conviction under.* A servant who uses for his own purpose a gun, in respect of which his master has a licence or has obtained an exemption, infringes the provisions of section 13 of the Indian Arms Act (XI of 1878) and is liable to conviction under section 19 (e).

Vairavan Servai v. King-Emperor ... (1924) I.L.R., 47 Mad., 438

INDIAN PENAL CODE (ACT XLV OF 1860), ss. 147 AND 323—*Conviction under sec. 160, alteration into—Whether permissible.* A conviction under sections 147 and 323, Indian Penal Code, cannot be altered on appeal into one under section 160, as the offences are different and it is not a case of convicting for a minor offence where the major offence is not proved. *Sabir Husain v. Emperor*, (1921) 19 A.L.J., 467, not followed.

Sreeramulu v. King-Emperor ... (1924) I.L.R., 47 Mad., 61

Code, sec. 537—*Liability of every member of an unlawful assembly for offence committed by any one of them.* Held, by the Full Bench, (a) that when a charge has been framed under sections 326 and 149, Indian Penal Code, a conviction under section 326 alone is not necessarily bad and (b) that the legality of the conviction depends upon the question whether the accused was materially prejudiced by any omissions in the charge. *Reazuddi v. The King-Emperor*, (1912) 18 O.W.N., 1077, dissented from. Obiter: Section 149, Indian Penal Code, creates no offence; it is merely declaratory of a principle of the common law; hence omission of that section from a charge does not make the charge illegal. *Queen-Empress v. Bisheshar*, (1887) I.L.R., 9 All., 645, followed.

Theethumalai Gounder v. King-Emperor ... (1924) I.L.R., 47 Mad. (F.B.), 746

sections 147 and 323 cannot be altered into a conviction under section 160, by Appellate Court:—See **INDIAN PENAL CODE**, ss. 147 AND 323 ... 61

Court—*Accused refusing to plead—Procedure:—See under "VILLAGE PANCHAYAT COURT"* ... 396

INDIAN PENAL CODE (ACT XLV OF 1860), sec. 225-B :—*See under "ARREST"* ... 442

INDIAN REGISTRATION ACT, s. 77—*Tender of tampered document for registration:—See under "SUIT."*

INDIAN TARIFF ACT (VIII OF 1894), sec. 10; AMENDED BY ACT IV OF 1916—"Duty," meaning of—*Voluntary payment, what is.* Increase or decrease of "duty" in section 10 of the Indian Tariff Act VIII of 1894, as amended by Act IV of 1916, means an increase or decrease arising not only from an alteration in the rate of duty payable but also from an alteration made in the tariff value. After A contracted to buy from B sugar coming by a certain named ship at a fixed price for a certain quantity, "ex-godown" there was a reduction of the tariff value of sugar, which reduced the amount of duty payable by the seller though the rate of duty payable was the same as before; Held (1) that the purchaser was entitled to the benefit of the reduction in the amount of duty paid and (2) that the payment of the price by the purchaser to the seller who would not part with the goods unless he was paid the contract price, was not a voluntary payment though not made under protest.

Hajee Shakoo Gani v. Sabapathi Pillai ... (1924) I.L.R., 47 Mad., 222

INDIAN TRUST ACT (II OF 1882), ss. 89, 96 :—*See "HINDU LAW—ALIENATION"* ... 181

INJUNCTION—*Application for temporary injunction to restrain elected councillor from sitting in Council—Jurisdiction:—See under "MADRAS DISTRICT MUNICIPALITIES ACT"* ... 700

INSOLVENCY—*Father adjudged insolvent—Right of the Official Assignee to sell son's shares:—See under "HINDU LAW"* ... 87

INSPECTION of documents—*Right of party—Discretion of Court:—See under "CIVIL PROCEDURE CODE, O. XI, R. 14"* ... 835

JUDGMENT—*Order of a single Judge transferring a case, if a judgment within meaning of cl. 15 of Letters Patent:—see under "Letters Patent"* ... 316

JUDGMENT IN CRIMINAL CASE—*Court's power to alter:—See under "CRIMINAL CASE"* ... 428

JURISDICTION—*Contract for sale of goods made at Calcutta—Price payable in cash in Calcutta and by hundis in Madras—Course of action:—See under "CIVIL PROCEDURE CODE"* ... 410

Suit in Munsif's Court for declaration that a decree, previously obtained in a Sub-Court, was invalid, whether competent:—See "MINOR" ... 79

JURISDICTION, SUBMISSION TO—*Power-of-attorney empowering attorney agent to sue and defend in all Courts—Notice of suit served on agent—Agent not putting appearance at all in Court—Whether submitted to jurisdiction:—See under "CIVIL PROCEDURE CODE (ACT V OF 1908), s. 13 (d)"* ... 877

JURISDICTION TO RECEIVE PLAINT, after office hours and outside office premises :—*See "CIVIL PROCEDURE CODE (V OF 1908), O. IV, R. 1"* ... 312

KUMRI LANDS—*South Kanara—Claim by wargdar against Government—Title of Government to forest tracts and old wastes—Permissive nature of kumri cultivation—Limitation Act (IX of 1908), Sch. I, art. 120.* There is an undoubted presumption that forest tracts and old wastes belong to the Government unless that presumption is displaced by positive evidence that the right in any particular tract or piece of land has been granted by the sovereign power, or adverse rights have consciously been allowed to grow up. The plaintiff as karnavan of a Nayar tarwad in South Kanara sued the Government for a declaration that certain kumri lands in the forests belonged to his tarwad. He based his claim upon (a) long enjoyment, as part of his *muli warge*, (b) acquisition by purchase and (c)

adverse possession in proprietary or warg right; he further alleged that the Government was estopped in that the lands had been acknowledged to be warg kumris and had been so registered. *Held*, on the facts, that the presumption had not been displaced, the enjoyment of the kumri lands being purely permissive, and that the suit failed. The plaintiff as licensee could not claim title only from possession without proof that the possession was adverse to the Government to its knowledge, and in any case the enjoyment had been for a period for less than the sixty years necessary to bar the Government by limitation. Although kumri lands are held by *wargdars* whose property is transferable and inheritable, there is no relation or analogy between kumri lands so held and ryotwari holdings. *Held*, further that the suit was barred by the Indian Limitation Act, 1908, Schedule I, article 120, which was the article applicable, since it was not commenced within six years of a definite rejection by the Government of the plaintiff's claim. *Bhaskarappa v. The Collector of North Kanara*, (1879) I.L.R., 3 Bom., 452 and *The Secretary of State for India v. Krishnayya*, (1905) I.L.R., 28 Mad., 257, approved.

Kodoth Ambu Nayar v. Secretary of State for India ... (1924) I.L.R., 47 Mad. (P.C.), 572

LAND ACQUISITION ACT (I OF 1894)—Collector's refusal to refer to Court—Section 18—High Court's power to revise:—See under "CIVIL PROCEDURE CODE, SEC. 115" ... 357

LAND ENCROACHMENT ACT, MADRAS (III OF 1905), ss. 6 and 14—Explanation—Notices to quit—Encroachment on poramboke lands—Plaintiff's possession not disturbed after notice—Review—Dismissal—Order to vacate—Suit for declaration and injunction—Cause of action for suit—Limitation of six months—Plaintiff, deeming himself aggrieved—Plaintiff's right to elect by which proceedings he is aggrieved—Starting point of limitation.] Where a Deputy Collector on behalf of the Government issued to the plaintiff, under section 6 of the Land Encroachment Act (III of 1905), a notice to quit certain lands in his occupation but nothing further happened to oust him from possession, and the plaintiff filed a review petition before the Deputy Collector who dismissed it and issued an order to the plaintiff to vacate the lands, on a suit for declaration and injunction being instituted by the plaintiff against the Secretary of State, more than six months from the issue of the first notice to quit but within six months of the last order to vacate the lands, *Held*, that, assuming that the cases specified in the explanations to section 14 of the Land Encroachment Act are not exhaustive of the causes of action under the Act, the plaintiff was entitled to elect by which of the proceedings under the Act, he deems himself aggrieved so as to base it as a cause of action for a suit for declaration and injunction under the section; and that the plaintiff was entitled to found his cause of action for this suit, as he did, on the later order of the Deputy Collector to vacate the lands, and the suit was not barred by limitation. *The Secretary of State for India v. Assun* (1916) I.L.R., 39 Mad., 725, (F.B.), distinguished.

Koyasan Koya Haji v. Secretary of State for India ... (1924) I.L.R., 47 Mad., 927

LANDLORD AND TENANT—Right of occupancy—Onus of proof—Inam grant to temple—Kudivaram—Absence of presumption that permanent right granted by temple—Prescription—Madras Estate Land Act (Madras Act I of 1908), sec. 3 (2) (d).] The trustees of a Hindu temple, after giving notice to quit, sued to eject two tenants of lands in a village, the property of the temple. The defendants claimed that the village was an estate within the meaning of Madras Act I of 1908, and that they had a permanent right of occupancy both under that Act and apart from it. The village had been granted to the temple in 1723 by the Raja of Tanjore at a favourable assessment by a *sanad* confirming an earlier inam grant, and since the grant the land had been cultivated for the benefit of the temple by its tenants or servants. It was not shown that in 1723 there were any tenants having a permanent right of occupancy, and it appeared that as to part of the village the temple

had both the *kudivaram* and *melvaram*. In 1831 the tenants, describing themselves as "kudi-mirasdars," had given joint *muchilika* agreeing to cultivate and to pay to the temple rent described therein as "swami-bhogam." In a *paimash* account of 1829 the tenants were referred to as "ullar parakudis" and "alavada miras." *Held* (1) that the onus was upon the defendants to prove that they had a permanent right of occupancy. *Secretary of State for India in Council v. Luchmeswar Singh*, (1889) I.L.R., 18 Cal., 223 (P.C.); 18 I.A., 18, and *Seturatnam Aiyar v. Venkatachela Goundan*, (1920) I.L.R., 43 Mad., 567 (P.C.); 47 I.A., 76, followed; (2) that, having regard to the documents and the facts, the grant to the temple included both the *kudivaram* and the *melvaram* of the whole village, and that therefore it was not an "estate" within the definition in section 3 of the Madras Act I of 1908; (3) that the defendants had not permanent rights of occupancy. As no custom or grant conferring the right had been proved, it did not appear how the right could have been obtained save by a lost grant, which was not suggested. A grant of a permanent right by the shobait or trustees would have been in breach of duty, and therefore could not be presumed. *Satya Sri v. Kartik*, (1912) 15 C.L.J., 227, approved. The defendants being tenants could not obtain the right by prescription: *Madhavrao Waman v. Raghunath Venkatesh*, (1923) I.L.R., 47 Bom., 798 (P.C.); 50 I.A., 255, followed.

Nainapillai Marakayar v. Ramanathan Chettiar, (1924) I.L.R., 47 Mad. (P.C.), 337

LEGAL REPRESENTATIVES of deceased respondents not brought on record—Privy Council passed decrees after respondent's death—Decree not a nullity:—See under "DECREE" ... 618

LEGITIMACY—Child born after woman's second marriage—Conception while first marriage was subsisting:—See "EVIDENCE ACT," SEC. 112 ... 706

LETTERS PATENT, CL. 15—Decree of a Mufassal Court declaring plaintiff's right and restraining the defendants by an injunction—Appeal to High Court—Single Judge's order of refusal to stay execution—Appeal against refusal, maintainability of.] An order of a single Judge of the High Court refusing to stay execution of a decree of a Mufassal Court pending an appeal therefrom to the High Court is a "judgment" within the meaning of clause 15 of the Letters Patent and an appeal therefrom is maintainable under the clause. *Tuljaram Row v. Alagappa Chettiar*, (1912) I.L.R., 35 Mad., 1 (F.B.), followed. *Held*, further that the fact that, in addition to the grant of a perpetual injunction against the defendants, the decree granted also a declaration in favour of the plaintiffs is no ground for refusing to stay the execution of the injunction. Though in refusing to stay execution the Judge exercised a discretion, interference in appeal with the order is justifiable when the refusal is based upon a wrong view of the law that no stay of injunction could be granted in cases where there is also a declaration.

Sonachalam Pillai v. Kumaravelu Chettiar ... (1924) I.L.R., 47 Mad., 816

Order of Judge on Original Side of High Court transferring to High Court a suit from Chingleput District Court, whether "judgment"—Appeal against order, maintainability of.] An order of a Judge of the High Court sitting on the Original Side transferring to the High Court a suit from the District Court, Chingleput, is a "judgment" within article 15 of the Letters Patent and is therefore appealable. *Tuljaram Row v. Alagappa Chettiar* (1912) I.L.R., 35 Mad., 1 (F.B.), followed.

Krishna Reddy v. Thanikachala Mudali ... (1924) I.L.R., 47 Mad., 186

LICENCE FEE—Company with capital in foreign currency:—See under "MADRAS CITY MUNICIPAL ACT (IV OF 1919)" ... 262

LICENCE FOR GUN—Servant using master's gun without himself obtaining licence—Infringement of provisions of Arms Act:—See under "INDIAN ARMS ACT" ... 438

	PAGE
LIMITATION—Land Encroachment Act—Cause of action:—See under "LAND ENCROACHMENT ACT"	928
LIMITATION ACT (IX OF 1908)—Application to set aside a void sale—Article 181, applicability of:—See "CIVIL PROCEDURE CODE, O. XXI, R. 22"	293
SEC. I, ART. 120:— <i>See under "KUMRI LANDS"</i>	572
High Court rule applying s. 5 to applications under O. IX, r. 13, Civil Procedure Code, whether ultra vires.] Held by the Full Bench:—The rule framed by the High Court applying section 5 of the Limitation Act to applications under Order IX, rule 13 of Civil Procedure Code, is intra vires. <i>Sennimalai Gounden v. Palani Gounden</i> (1916) 32 I.C., 975, followed.	
<i>Krishnamachariar v. Srirangamal</i> ... (1924) I.L.R., 47 Mad. (F.B.), 824	
SEC. 7—Joint decree-holders—Minority of some of them—Father of minors acting as their next friend—Decree in favour of father and sons, with their father as next friend—Death of father after decree—No application for execution by father in his lifetime—First application by eldest son within three years of his attaining majority but more than three years after decree—Bar of limitation—Father, whether competent to give valid discharge under sec. 7—Civil Procedure Code (V of 1908), O. XXXII, r. 6—Time for filing application, when begins to run against joint decree-holders.] A Hindu father and his three minor sons represented by him as their next friend, obtained a joint decree on the 16th October 1913; the former died two months after decree without filing an application to execute it; the eldest son, who attained majority at the end of December 1914, applied for execution on the 3rd December 1917 within three years of his majority but more than three years after the decree. It was contended that this application was barred by limitation. Held, that as the father was the next friend of his minor sons in the suit and in the decree, he was not, during his lifetime, in a position to give a legal and valid discharge of the decree without leave of the Court obtained under Order XXXII, rule 6 of the Civil Procedure Code; <i>Ganesha Row v. Tuljaram Row</i> (1913) I.L.R., 36 Mad., 295 (P.C.), applied; that as the father was not competent to give a valid discharge during his lifetime, the time for making an application for execution of the decree did not begin to run as against any of the joint decree-holders until their respective disabilities had ceased, and the application was not barred by limitation.	
<i>Latchmana Chetty v. Subbiah Chetty</i> ... (1924) I.L.R., 47 Mad., 920	
SEC. 15 AND ART. 182—Application for transmission of decree to another Court—Plea of limitation not raised—Subsequent application for execution—Plea of limitation whether res judicata:—See under "DECREE"	618
ARTS. 166 AND 181—Application to set aside sale in execution of mortgage-decree—Application filed by judgment-debtor more than thirty days after date of sale—Bar—Proclamation of sale, not published in the village in which property sold was situated—Ground for setting aside sale—Illegality or material irregularity, as a ground for setting aside—Art. 166, when applicable.] An application by a judgment-debtor to set aside a sale held in execution of a mortgage-decree on the ground that the proclamation of sale was not published in the village in which the property was situate, falls under article 166 and not article 181 of the Limitation Act. <i>Muthiah Chettiar v. Bavu Sahib</i> (1914) 27 M.L.J., 605, followed; <i>Vachali Roheni v. Kombi Allasan</i> (1919) I.L.R., 42 Mad., 763 (F.B.), distinguished.	
<i>Paramasiva Thevar v. Pulukaruppa Thevar</i> ... (1924) I.L.R., 47 Mad., 525	
ART. 168 AND SEC. 5—Application to set aside dismissal for default—Delay if excusable:—See under "CIVIL PROCEDURE CODE, SEC. 151"	171

LIMITATION ACT (IX OF 1908), ARTS. 181 AND 182—Execution of decrees—Attachment before judgment—Claim petition filed by third party and allowed after decree—Suit by decree-holder to establish right to attach and sell property as that of judgment-debtor—Decree obtained more than three years after first decree—Application for sale more than three years after decree under execution—No prior application for execution—Bar of limitation.] Where certain properties of a judgment-debtor had been attached before judgment in a suit for money, and after decree a claim petition was put in by a third party and allowed, and the decree-holder consequently filed a suit to establish his right to sell the properties in execution and obtained a decree in his favour, an application by the decree-holder for the sale of the properties attached before judgment, filed on the date of the latter decree but more than three years from the decree under execution, was not barred by limitation, even though there was no prior application for execution of the decree after it was passed. The principle of revival of proceedings applicable to an application for sale of properties attached after decree under an application for execution, is equally applicable to applications for sale of properties attached before judgment. Article 181, and not article 182, Limitation Act, governs such cases. <i>Chalavadi Kottiah v. Poloori Alimel-umamah</i> (1908) I.L.R., 31 Mad., 71; and <i>Rameshvar Singh v. Homeshvar Singh</i> (1921) 40 M.L.J., 1 (P.C.), applied.	
<i>Surayya v. Venkataratnam</i> ... (1924) I.L.R., 47 Mad., 176	
ART. 181—Application to implead legal representatives:—See under "DECREE"	618
LOCAL BOARDS (MADRAS) ACT (V OF 1884), SS. 16 AND 144—Rules made by Government under sec. 144 (1)—Election of a person as member of Taluk Board—Election set aside by Government on the ground that such person is likely to bring the administration into contempt—Rules 33, cl. (e)—Notice to person affected, whether necessary—Inquiry—Forum—Power of Government to make rules regarding forum and method of inquiry—Rules therefor whether ultra vires—Order without notice, whether invalid—Natural justice—Suit in a Civil Court, whether maintainable.] Sections 16 and 144 of the Madras Local Boards Act (V of 1884), empower the Government to make rules regarding the determination of the validity of elections as well as rules prescribing the qualifications of a candidate for election; and the rules framed prescribing the forum and method of inquiry are not ultra vires, even though the rules were framed by the Government purporting to act only under section 144, sub-section (1) of the Act. Where power is given to make rules under an Act, the fact that the Government purports to act under one section of the Act rather than another is not a ground for holding the rules to be ultra vires. View of SPENCER, J., in <i>Lakshminarasimha Somayagiyar v. Ramalingam Pillay</i>, (1920) 39 M.L.J., 319, followed. The Local Boards being creations of a statute, and that statute having given power to the Government to frame rules for the purpose of working the Act, it is perfectly open to the Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the Act. Under rules 33 and 35 framed by the Government under the Local Boards Act, so far as they relate to objections to an election as a member of a Taluk Board on the ground mentioned in clause (e) of the former rule, viz., that the person is likely to bring the administration into contempt or that his being a member is dangerous to the public peace or order, the Collector is bound to refer the matter for the decision of the Government, and no inquiry by the Government, or notice to the person affected is contemplated.	
<i>Thinnam Reddy v. Secretary of State</i> ... I.L.R., 47 Mad., 325	
LOCAL BOARDS (MADRAS) ACT (XIV OF 1920)—Election rules, rule 4—Application to set aside an election to Taluk Board—Application made more than 14 days after date of election—Application to Court on re-opening day—Chalan obtained on that day—Money paid into Bank three days after—Delay of Treasury officer—Delay caused by accident—Negligence—Nunc pro tunc—Payment into Court, whether necessary—Civil Rules of Practice, rule	

131—*Effect of producing money in Court and obtaining chalan.*] An application to set aside an election as a member of a Taluk Board held on the 9th May 1922 was filed in the Sub-Court on the 17th July 1922 which was the date on which the Court re-opened after having been closed for summer recess from the 14th May 1922. The applicant brought the money required to be deposited in Court along with the application and applied for a chalan to pay it into the Bank as required by rule 131 of the Civil Rules of Practice. But the money could not be paid into the Bank on that day, owing to the absence of the Treasury officer who was to check the chalan before payment into the Bank. On the next day the applicant presented the chalan to the Treasury officer at 1-50 p.m. as he was delayed by an unforeseen carriage accident, and he could not get to the Bank to pay within time on that day, and had to pay and paid it only on the next day. On objection being taken by the respondent that the application was not validly made under the Election rules made under the Local Boards Act, *Held*, that a person is not guilty of negligence when he would in the ordinary course of things have arrived in time for payment and the delay was due to an accident which he could by no means have foreseen. *Arunachala Ayyar v. Subbaraniah* (1923) I.L.R., 46 Mad., 60, referred to; that the rule of law that nobody should be prejudiced by the acts of Courts or its officers is of universal application, and governs applications to set aside elections; it is not a question of excusing delay, but there is no delay at all; *Koilpilli Samban v. Sappanimuthu Samban*, (1913) 17 L.W., 187, referred to; that where a person, who is bound to pay money, produces it in Court and complies with the rule which requires him to take out a chalan and pay the money at a different place and there is a delay in the actual payment of the money into the Treasury or Bank owing to reasons beyond his control, the payment must be deemed to have been made on the date the money was produced and the chalan obtained in Court; and that the petition was validly presented under rule 5 at the Election rules made under the Local Boards Act.

Gopalakrishna Pillai v. Kunjithapatam Pillai ... (1924) I.L.R., 47 Mad., 543

LOCAL BOARDS (MADRAS) ACT (XIV OF 1920)—*Money due under a contract of lease of tolls—Section 221 of the Act, if recoverable under.*] The amount due under a contract of lease of the tolls due to a Local Board is not "any fee, toll, costs, compensation, damages, penalties, charges, expenses or other sums due to a Local Board" within the meaning of section 221 of the Madras Local Boards Act (Madras Act XIV of 1920) and is not recoverable under the warrant of a Magistrate. The words "other sums" in the section should be read *ejusdem generis* with what precedes them.

Punya Syamalo, In re. ... (1924) I.L.R., 47 Mad., 381

ss 55, 56, 57, 199 (2), (c)—*Rules issued by Local Government, Rules 1, 4 (3), 12 (2)—Election of President, Taluk Board—Petition objecting to election—Grounds of objection—Appointment of member of Taluk Board—Jurisdiction of Judge to decide validity of appointment of member of Taluk Board in an election petition—Powers of revision of High Court in election cases—Judge, whether persona designata or Court—Decisions of Election Judge, how far final—Temporary absence of President of District Board—Power of appointment of President, whether ceases—Devolution of powers in Vice-President.*] A District or Subordinate Judge, in deciding an election petition presented before him under the rules issued by the Local Government under the Local Boards Act, 1920, is acting not merely as a *persona designata*, but as a Court in the exercise of its ordinary jurisdiction extended for that purpose; consequently the High Court is competent to exercise its powers of revision over decisions in election petitions. The fact that the decisions of the Judge in election petitions are declared to be final by section 57 of the Local Boards Act, 1920, and the rules issued thereunder, does not preclude the High Court from exercising its powers of

revision under section 115 of the Civil Procedure Code in such cases. A District or Subordinate Judge, in dealing with a petition objecting to the election of a President of a Taluk Board, has no jurisdiction to decide whether the Local Government, or the President of a District or Taluk Board, as the case may be, have properly exercised their powers of appointment in nominating a person as a member of a Taluk Board; what he has jurisdiction to decide is whether a person so appointed is disqualified on the grounds specified in section 55 or 56 of the Local Boards Act, 1920. When a Judge, in deciding a petition objecting to the election of a President of a Taluk Board, goes into the question whether he had been duly appointed as a member of the Taluk Board, he acts wholly without jurisdiction, and the High Court can interfere in revision under section 115, clause (a) of the Civil Procedure Code. *Obiter*.—Mere absence for a few days of a President of a District Board from his district on a visit to another place does not necessarily vest in the Vice-President the power of appointing members of the Taluk Board. Where the President of a District Board, who had been temporarily absent from his district on a visit to Madras and had while at Madras appointed certain persons as members of the Taluk Board, on return to his district again signed the list of their names and directed it to be posted on the notice board of the District Board office as required by the Act, and it appeared that the Vice-President did not appoint any person during the former's absence *held* that the appointment made by the President was valid.

Parthasaradhi Naidu v. Koteswara Rao ... (1924) I.L.R., 47 Mad. (F.B.), 369

MADRAS ACT (VII OF 1865), SEC. 1, AND MADRAS ACT (III OF 1905), SEC. 2—*Water-cess—Ryotwari lands—Natural stream or channel passing through patta lands of a ryotwari pattadar—Channel, not separately demarcated as poramboke—Water taken by the ryot for irrigating dry lands—Right of Government to levy water-cess—Ryotwari patta, nature of.*] A natural stream or channel, which passes through the patta lands of a ryotwari pattadar, although it is not demarcated as poramboke, is the property of the Government; and if the ryot takes water from the channel to irrigate dry lands in his patta, the Government is entitled to levy water-cess therefor. *Kalianna Mudali v. Secretary of State* (1915) 31 I.C., 983, distinguished; a ryotwari patta is not a document of title or a deed of grant but is only a record of demand by Government that a certain amount is due as land revenue on a certain area. *The Secretary of State for India in Council v. Kasturi Reddi* (1903) I.L.R., 26 Mad., 288; *Muthu Veera Vandayan v. The Secretary of State for India in Council* (1906) I.L.R., 29 Mad., 461, referred to.

Secretary of State, The v. Raghavachariar ... (1924) I.L.R., 47 Mad., 861

MADRAS CITY MUNICIPAL ACT (IV OF 1919), SEC. 110 AND R. 7—*Company with capital in foreign currency—Liability to pay licence fee.*] *Held* that all incorporated companies transacting business in the City of Madras are liable to pay the licence fees mentioned in section 110 and rule 7 of the Taxation rules in schedule IV of the Madras City Municipal Act (IV of 1919), though their paid-up capital is in a currency other than that of British India.

Best & Co., Ltd. v. The Corporation of Madras. (1924) I.L.R., 47 Mad. (F.B.), 262

MADRAS CITY TENANTS' PROTECTION ACT (III OF 1922), SEC. 9—*Applicability of, to trustees of religious institutions.*] *Held*, by the Full Bench that section 9 of the Madras Act III of 1922 (Madras City Tenants' Protection Act) applied to landlords who held their lands as trustees of a religious or charitable institution. *Parthasaradhi Aiyangar v. Doraiswami Naicker*, (1923) I.L.R., 46 Mad., 823, overruled.

Doraiswami Mudaliar v. Natesa Gramani ... (1924) I.L.R., 47 Mad. (F.B.), 761

MADRAS CITY TENANTS' PROTECTION ACT (III OF 1922), SEC. 9--

*Tenant against whom a decree for ejectment had been passed but not executed on the date of the Act, whether entitled to apply under sec. 9.] Held, by the Full Bench.—A tenant against whom a decree in ejectment had been passed but not executed at the date of the commencement of the Madras City Tenants' Protection Act (III of 1922) is "a tenant against whom a suit in ejectment has been instituted" within the meaning of section 9 of the Act; hence he is entitled to apply under the section for an order directing the landlord to sell the land to him. *Latifa Bi v. Mottai Ammal* (1923) I.L.R., 46 Mad., 836, overruled.*

Syed Oomer Sahib v. Gopaul ... (1924) I.L.R., 47 Mad., (F.B.), 813

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), SEC. 92--Tax on companies—Whether can be deducted as a business allowance under the Income-tax Act:—See under "INCOME-TAX ACT" ... 667

SEC. 182—Notice to remove an obstruction to public street—Obstruction caused by something done on private property—Non-compliance with notice—Prosecution under sec. 313, whether maintainable—Scope of sec. 182.] Section 182 of the Madras District Municipalities Act (Madras Act V of 1920) does not empower municipalities to compulsorily acquire private property; its scope is limited to authorizing them, in public interest, to cause obstructions and encroachments to be removed. The owner of a private property is not liable to a prosecution under section 313 for non-compliance with a notice under section 182, if the obstruction is the result of something done upon his own private property. But if he has merely acquired a prescriptive title to a portion of the street covered by the obstruction he is bound to comply with the notice, and he is entitled to a reasonable compensation from the municipality. *The Chairman, Municipal Council, Sriangam v. Subba Pandithar*, (1915) I.L.R., 38 Mad., 456, and *Basavara- varaswami v. The Bellary Municipal Council*, (1915) I.L.R., 38 Mad., 6, explained.

Public Prosecutor v. Varadarajulu Naidu ... (1924) I.L.R., 47 Mad., 716

SEC. 303 (2) (b)—Election rules—Rule 6—Petition filed before District Judge to declare an election void—Application for interim injunction to restrain elected candidate from sitting in Council and exercising rights—Jurisdiction of Court to issue injunction—Civil Procedure Code (V of 1908), ss. 94, 151, and O. XXXIX, r. 2—Inherent powers.] The District Judge before whom a petition to declare void on election, presented under the rules framed under section 303 (2) (b) of the Madras District Municipalities Act (V of 1920), is pending, has no power to grant a temporary injunction restraining the elected candidate from taking his seat in the Municipal Council and exercising his powers as a councillor until the disposal of the petition. Rule 6 of the Election Rules does not empower the District Judge, while holding an inquiry into an election petition, to exercise the powers specified in section 94 or Order XXXIX, rule 2, Civil Procedure Code; nor does section 151 of the Code empower the Court to grant a temporary injunction pending disposal of the election petition. *Aslatt v. Corporation of Southampton*, (1881) 16 Ch.D., 143, referred to.

Venkatasubba Chettiar v. Sesha Aiyar ... (1924) I.L.R., 47 Mad., 700

SEC. 352—Proposed election—Wrong rejection of election papers—Remedies available according as elections held or not held—Returning Officer, whether a Judge—Right of suit—Suit against Chairman maintainability of—Specific Relief Act, sec. 42.] If a nomination paper of a certain candidate for a municipal election under the Madras District Municipalities Act (V of 1920) is wrongly rejected by the Chairman and there is only one rival candidate who is therefore declared by the Chairman to be duly elected, the remedy of

the disappointed candidate under the Act is to file an election petition as provided by the rules framed under the Act and not to file an ordinary civil suit. But if there be more than one rival candidate and the Chairman proposes to hold an election only as between them, the remedy of the person whose nomination had been rejected on a wrong interpretation of the rules is to apply to the Local Government under rule 31 of the Election Rules for an interpretation, such application to the Local Government being eligible not only at the instance of the Chairman but also of the candidate. But if the Local Government declines to give its interpretation for some reason or other, the candidate who has thus suffered a legal injury has a right of suit to restrain the holding of an election in which the Court can also grant in his favour a temporary injunction to avert the threatened election. In such a case an election petition after the election is not the only remedy. The Chairman when rejecting a nomination paper as a Returning Officer is acting in a judicial capacity and though no suit would, on account of section 352 of the Act, lie against him for such rejection, a suit to restrain him from holding the election accordingly is maintainable. *Aslatt v. Corporation of Southampton*, (1881) 16 Ch. D., 143, and *Richardson v. Methley School Board* (1893) 3 Ch., 510, followed.

Sarvothama Rao v. Chairman, Municipal Council, Saidapet ... (1924) I.L.R., 47 Mad., 585

MAINTENANCE—Widow contracting to receive a fixed amount, undertaking not to claim more—Validity:—See "HINDU LAW" ... 308

MESNE PROFITS—Burden of proving what might have been received—Indian Evidence Act, sec. 106:—See under "CIVIL PROCEDURE CODE, ss. 2 (12) AND 1441, O. XVIII, r. 1 AND O. XXVI, r. 10."

MINOR—Decree for specific performance:—See under "SPECIFIC PERFORMANCE," 602

Guardian ad litem—Adverse interest—Decree against minors, effect of—Suit against a Hindu father and his minor sons—Suit on mortgage bond executed by the father, not for an antecedent debt—Father appointed by Court as guardian ad litem—Appointment, whether proper and legal—Father's interest whether adverse to sons' interests—Decree and sale in execution of entire mortgaged property—Decree whether binding on sons' shares—Previous decree and sale in a Sub-Court—Subsequent suit to declare decree invalid, instituted in a District Munsif's Court, whether competent—Jurisdiction of latter Court—Right of purchaser to get father's share in this suit without being driven to a fresh suit.] A minor represented in a suit by a guardian ad litem whose interest is adverse to that of the minor, is not legally represented at all; *Rashid-un-nissa v. Muhammad Ismail Khan* (1909) I.L.R., 31 All., 572 (P.C.), relied on. In a suit for sale instituted in a Sub-Court against a Hindu father and his minor sons on a mortgage bond executed by the father, the father was appointed by the Court as guardian ad litem of his minor sons. A decree was passed against the entire mortgaged property which was sold in execution and purchased by the decree-holder. On a suit being instituted on behalf of the minor sons by their mother as their next friend in a District Munsif's Court against their father and the auction-purchaser, for a declaration that the decree and sale in the previous suit were invalid against them and their shares in the family property, *Held*, that the interest of the father was adverse to that of the minor sons, and that the appointment of the father as guardian was improper and illegal; that the decree and sale were consequently invalid so far as the shares of the minor sons were concerned; that the District Munsif's Court had jurisdiction to entertain the suit for a declaration that the decree passed by the Sub-Court was invalid; *Arunachalam Chetty v. Rangaswamy Pillai* (1915) I.L.R., 38 Mad., 922 (F.B.), followed; and that the purchaser was entitled to ask for partition without being driven to a fresh suit to secure at least the share of the father in the family properties; *Davud Bivi Ammal v. Radhakrishna Aiyar* (1923) 44 M.L.J., 809, followed.

Chellappa Goundan v. Masa Naiken ... (1924) I.L.R., 47 Mad., 79

MINOR—Guardian—Money borrowed by guardian on a promissory note for purchase of lands on behalf of minor—Absence of necessity—Lands purchased—Suit by lender against heirs of minor on his death—Minor's estate, liability for debt—Decree on liability of lands purchased—Right of lender to proceed against lands actually purchased with the money so advanced.] Where the guardian of minor borrowed money on a promissory note on behalf of his ward for the purpose of purchasing lands for the minor, and the lands were accordingly purchased therewith, but it appeared that there was no necessity either to borrow the money or to purchase the lands; on a suit being instituted by the lender to recover money on the promissory note against the heirs of the minor on his death, *Held*, that the guardian of a minor has no authority to involve the ward's estate in debt for the purpose of purchasing lands to be added to his estate: *Subramania Nadan v. Ramaswami Nadan*, (1913) 25 M.L.J., 563, and *Subramania Chetty v. Chidambara Mudali*, (1921) 41 M.L.J., 459, followed; that the debt so incurred was not binding on the minor's estate in the hands of his heirs; but that the plaintiff was entitled to have a decree against the lands actually purchased with the money advanced by him.

Burrayya v. Ramayya ... (1924) I.L.R., 47 Mad., 449

Reference to arbitration, by guardian in terms prejudicial to minor:—
See **ARBITRATION** ... 30

Suit by, against agent appointed by guardian—Maintainability of.] A minor can maintain a suit against an agent appointed by his guardian for the benefit of his estate (a) generally, as well as (b) in respect of properties received by the agent, and not accounted for to the guardian. *Ramanathan Chettiar v. Muthiah Chetty* (1920) I.L.R., 43 Mad., 423, overruled.

Suyamprakasam v. Murugisa Pillai ... (1924) I.L.R. 47 Mad., (F.B.), 774

Suit on promissory note executed by maternal uncle as guardian—Appointment of the same person as guardian ad litem—Decree and sale in execution:—See under "CIVIL PROCEDURE CODE, SEC. 11" ... 458

MORTGAGE-DECREE—Suit for sale on a mortgage—Parties—Non-joinder, Effect of—Purchaser of equity of redemption in part of the mortgage properties, not impleaded in the suit—Purchase of entire lands in auction—Purchaser in execution of mortgage-decree obstructed by purchaser in execution of money decree, in delivery of possession—Subsequent suit by purchaser for foreclosure or sale—Maintainability of subsequent suit—Mortgage right, whether extinguished as against persons, not parties to prior suit—Transfer of Property Act (IV of 1882), Secs. 85 and 89—Amendment of—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 1 and 5—Effect of amendments—Splitting of mortgage—Price of redemption—Decree amount—Interest—Notice to mortgagee of interest of person to be joined as party, whether necessary—Effect of notice on right to subsequent suit.] An auction-purchaser in execution of a mortgage decree in a suit for sale on a mortgage, to which a purchaser of a portion of the mortgaged property in execution of a money decree against one of the mortgagors was not joined as a party, is entitled to institute a subsequent suit for sale against the latter, the mortgagor and the mortgagee, whether or not the mortgagee had, at the time of the previous suit, notice of the interest of the latter purchaser who had not been joined as a party. The purchaser of the equity of redemption, who was not joined in the mortgagee's suit, is not affected by the decree in that suit, and is entitled to redeem on payment of the amount of that decree with interest thereon at the discretion of the Court, and on his omission to redeem by payment of such amount, the property purchased by him is liable to be sold for realizing the amount. The effect of the omission in Order XXXIV, rule 1, Civil Procedure Code of the proviso to section 85 of the Transfer of Property Act relating to the mortgagee having notice of the interest of the person who had to be joined as a party to the suit, and of the omission in Order XXXIV, rule 5, of the words in section 89 of the Act to the effect that on the passing of an order absolute for sale the defendant's right to redeem and the security shall

both be extinguished, is that the mortgage is kept alive for all purposes as regards persons having an interest but not made parties to the mortgagee's suit. Where the mortgagee purchases the whole of the mortgaged property, in execution of a decree in his suit on his mortgage without impleading a purchaser of the equity of redemption in a portion of the property, there is no splitting of the mortgage and the purchaser of the equity of redemption is liable to redeem his portion of the mortgaged lands only on payment of the entire decree amount with or without interest as the Court directs. *Sivathi Odayan v. Ramasubbayyar* (1898) I.L.R., 21 Mad., 64 followed; *Het Ram v. Shadi Ram* (1918) I.L.R., 40 All., 407 (P.C.); and *Sukhi v. Ghulam Sajdar Khan* (1921) I.L.R., 43 All., 469 (P.C.), referred to.

Venkat Reddy v. Kunjappa Goundan ... (1924) I.L.R., 47 Mad., 551

MORTGAGE—Decree for sale—Right of decree-holder to sell in execution any of the mortgaged properties—Subsequent vendee of one of the items, party to the suit—Mortgagee having a subsequent mortgage on other items—No suit on the second mortgage—Right of mortgage to apply for sale of only the item purchased by vendee—Decree silent as to order of sale of items—Right of vendee to object to order of sale in execution—Legal right or equitable discretion—Transfer of Property Act (IV of 1882), ss. 56 and 81.] Where a mortgagee obtained a decree for sale on his mortgage impleading as a defendant in the suit a subsequent vendee of one of the items mortgaged, and it appeared that the former had obtained a subsequent mortgage on the other items but did not sue on the later mortgage, and he applied in execution for sale of only the item purchased by the vendee, on objection being taken by the latter to the former seeking to sell only the item purchased by him, *held*, that the mortgagee was entitled to execute his decree against any of the mortgaged properties; *Amir Chand v. Bukshi Sheo Perhad Singh*, (1907) I.L.R., 34 Cal., 13, relied on; and that as the decree for sale was silent as to the order in which the items should be sold, the vendee who was a party to the suit had no legal right to demand in execution that they should be sold in any particular order; *Appayya v. Rangayya*, (1908) I.L.R., 31 Mad., 419 (F.B.) and *Ramaswamy Chetty v. Madura Mill Company, Ltd.*, (1916) 1 M.W.N., 265, distinguished. A mortgagee is not bound to sue on both his mortgages simultaneously, *Subramania v. Balasubramania*, (1915) I.L.R., 38 Mad., 927 (F.B.), relied on.

Narayanadasami Chetty v. Vellaya Pillai ... (1924) I.L.R., 47 Mad., 688

Non-payment by the mortgagee of part consideration due to the mortgagor—condition, not fulfilled by mortgagor—Assignment by mortgagor of the amount not paid—Suit by assignee to recover the amount from mortgagee, whether maintainable—Suit for damages, whether maintainable by assignee—Transfer of Property Act (IV of 1882), sec. 6 (e).] A suit to enforce an agreement to lend money on a mortgage is not maintainable. *Analaran Kasmi v. Saidamadath Avulla*, (1879), I.L.R., 2 Mad., 79; *Rajagopala Aiyar v. Sheikh Dawood Rowther*, (1918), 34 M.L.J., 342; and *Sheikh Galim v. Sadarjan Bibi*, (1916) I.L.R., 43 Cal., 59, referred to. Though it is open to the mortgagor to sue the mortgagee for damages for the breach of the agreement to lend money, a right to obtain damages cannot be transferred under section 6 (e) of the Transfer of Property Act; consequently an assignee from the mortgagor of a part of the consideration due for a mortgage, which was not paid by the mortgagee, is not entitled to recover it in a suit against the mortgagee.

Yadavendra Bhattu v. Srinivasa Babhu ... (1924) I.L.R., 47 Mad., 698

—Ostensible sale and agreement for repurchase—Intention—Evidence—Inadequacy of price—Construction of deeds—Indian Evidence Act (I of 1872), sec. 92—Transfer of Property Act (IV of 1882), sec. 58.] Two deeds of the same date were so phrased as to be ostensibly a sale of certain villages with an agreement for a resale and repurchase at the same price at a certain date. It appeared however that the price named, which was an amount

immediately required to prevent a sale under a decree, had been settled without bargaining; it was absurdly low, less even than what the property would have realized upon a public sale. A clause in one of the deeds indicated that time was not of the essence of the contract for repurchase, and there were other provisions which supported the view that a mortgage was intended. *Held*, that the transaction was a mortgage by conditional sale, and that purchasers upon a sale in execution had a right to redeem; that conclusion was arrived at without reference to oral evidence other than such as was held admissible in *Balkishen Das v. W. F. Legge* (1900) I.L.R., 22 All., 149 (P.C.); 27 I.A., 58. Their Lordships observed that, as at present advised, they must not be taken to subscribe to the view that there had been introduced into the law of India such a radical change in the law of evidence as was suggested in the High Court, a change which would have the effect of excluding from the class of mortgages by conditional sale, many transactions which before the Indian Evidence Act would have been held to be within that class.

Narasingerji v. Parthasarathi Rayanam Garu (1924) I.L.R., 47 Mad. (P.C.), 729

MORTGAGE—*Privy*—*Subrogation*—*Purchase of equity*—*Payment under mortgage decree*—*Mortgage including crops*—*Rights against later mortgages*—*Transfer of Property Act (IV of 1882), sec. 101.*] Land was subject to three simple mortgages, of which the second was on the crops as well as the land. A purchaser of the land subject to the three mortgages, and the respondents, who were assignees of his interest, paid to the second mortgagee money to save the crops from sales under a decree which he had obtained upon his mortgage. *Held*, that there being no covenant by the mortgagor to pay the third mortgage, the payments made to the second mortgagee were to be regarded as purchases *pro tanto* of the second mortgage, not as a discharge of it, the fact that the third mortgage did not include the crops not being material; and that accordingly the respondents were entitled in respect of the payments to priority over the third mortgagee.

Ayyareddi v. Gopalakrishnayya ... (1924) I.L.R., 47 Mad. (P.C.), 190

—*Right of part owner of equity of redemption to deposit whole mortgage amount*—*Liability of mortgagee remaining in possession after deposit*:—See "TRANSFER OF PROPERTY ACT" ... 7

NEGLIGENCE—*Goods entrusted for carriage, damaged during voyage*—*Suits for damages*—*Onus of proof*:—See under "SHIP" ... 810

OFFICIAL ASSIGNEE—*Right to sell son's shares for father's antecedent debts*—*father's insolvency*:—See under "HINDU LAW FATHER'S ANTECEDENT DEBTS" ... 87

OFFICIAL RECEIVER—*Duty to take action to set aside alienation, on indemnity by creditors*:—See under "PROVINCIAL INSOLVENCY ACT" ... 673

—*Mortgage decree*—*Claim petition presented to Official Receiver*—*Power to pass orders*—*Procedure to prevent sale*:—See under "PROVINCIAL INSOLVENCY ACT (V OF 1920)" ... 446

—*Implied appointment*—*Order adjudicating and "referring further proceedings to Official Receiver"*:—See under "PROVINCIAL INSOLVENCY ACT, ss. 16, 18, 20 AND 23" ... 482

—*Right to sell property free from encumbrance*:—See under "PROVINCIAL INSOLVENCY ACT, SEC. 16 (5)" ... 605

PARTITION—*Omission to provide for father's unsecured debts*—*Creditor's right to sue son*:—See under "HINDU LAW" ... 621

PARTITION SUIT—*More than one plaintiff*—*Whether effects partition inter se*:—See under "HINDU LAW—PARTITION" ... 567

PLAINT—*Presented out of office hours and outside office premises*—*Jurisdiction to receive*:—See "CIVIL PROCEDURE CODE (V OF 1908), O. IV, R. 1" ... 812

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SEC. 52 (2) (c)—*"True owner" and "Reputed owner," meaning of*—*Withdrawal of consent by "true owner" to continuance of possession "of reputed owner" by posting letter*—*Presumption of letter reaching its destination.*] "True owner" in section 52 (2) (c) of the Presidency Towns Insolvency Act (III of 1909) includes a pledgee, and where the pledgee allows the pledgor temporary or conditional use of the thing pledged, the pledgor then becomes the "reputed owner" thereof within the meaning of the section. If before the commencement of the insolvency of the pledgor the pledgee puts an end to the right of the pledgor to use the thing pledged by demanding its return according to agreement, the thing pledged cannot thereafter be said to be in his possession with the consent of the true owner so as to vest in the Official Assignee. A letter proved to have been posted to the proper address of a person must be presumed to have reached him in the absence of evidence to the contrary.

Aburubammal v. Official Assignee ... (1924) I.L.R., 47 Mad., 215

PRESUMPTION—*Letter posted to the proper address of a person*—*Absence of evidence that the letter did not reach its destination*—*Must be presumed that it reached him*:—See "PRESIDENCY TOWNS INSOLVENCY ACT" ... 215

PROSECUTION—*For escaping from lawful custody*:—See under "ARREST BY CONSTABLE" ... 412

—under sec. 313 of *District Municipalities Act*:—See under "MADRAS DISTRICT MUNICIPALITY ACT (V OF 1920)."

PROVINCIAL INSOLVENCY ACT (III OF 1907), ss. 16 (5) AND 31—*Encumbered property of insolvent*—*Right of Official Receiver to sell property free from encumbrance even with mortgagee's consent*—*Sale free from encumbrance*—*Unsuccessful attempt of mortgagee to get sale cancelled in insolvency jurisdiction*—*Suit to enforce mortgage*—*Estoppel.*] Under the Provincial Insolvency Act (III of 1907) only the property of the insolvent vests in the Official Receiver; the Act does not empower the latter to sell the former's estate free from encumbrance, even with the consent of the mortgagee. *Obiter*:—Such a consent could not be implied merely from the absence of a reply by the mortgagee to a letter of the Official Receiver stating that he would sell the property free of the mortgage in case he did not reply. *Held*, also that an unsuccessful attempt of the mortgagee in the insolvency jurisdiction to get cancelled the sale held by the Official Receiver free from encumbrance did not estop the mortgagee from thereafter filing a suit to enforce his mortgage.

Kanniappa Mudali v. Raju Chettiar ... (1924) I.L.R., 47 Mad., 605

—ss. 16, 18, 20 AND 23—*Order adjudicating a Hindu father and his minor son as insolvents, "referring further proceedings to Official Receiver"*—*Meaning of*—*Implied appointment of Official Receiver as Receiver*—*Sale by Receiver of son's interest also for debts binding on son*—*Validity of sale.*] On an act of insolvency by a Hindu father, the Court adjudicated as insolvents not only the father but also his minor sons and passed an order "Referring to the Official Receiver for further proceedings." *Held* that the order amounted to an appointment of the Official Receiver as Receiver to take charge of the estate and vested the estate of the insolvents in him. But even assuming that it was not so, the estate vested in the Court as Receiver under section 28 of the Provincial Insolvency Act as soon as the adjudication was made and the sale by the Official Receiver was valid under section 20 (e) of the Act as one effected by the agent of the Court and afterwards ratified by it. *Subba Aiyer v. Ramaswami Aiyangar* (1921) I.L.R., 44 Mad., 547, followed. *Held* also, that assuming that the order adjudicating the minor sons also as

insolvents was wrong and that their shares did not vest in the Official Receiver, yet a sale by him, purporting to be of the whole family estate of all the insolvents passed to the vendee the sons' shares also, since the Official Receiver who stood in the shoes of the father could have sold the sons' shares also for discharging the debts which were neither illegal nor immoral. *Bijraj Nopani v. Pura Sundary Dasce* (1915) I.L.R., 42 Calo., 58 (P.C.), *Charib-ul-lah v. Khalak Siny* (1903) I.L.R., 25 All., 407 (P.C.), followed.

Sankaranarayana Pillai v. Rajamani ... (1924) I.L.R., 47 Mad., 462

PROVINCIAL INSOLVENCY ACT (III OF 1907), ss. 24, 28, 39 AND 44—*Adjudication in insolvency and conditional discharge—Decree debt, not barred on date of adjudication—Application to Insolvency Court for recognition of decree debt after conditional discharge—Execution of decree barred on date of application—Admissibility of decree debt.* Under the Provincial Insolvency Act (III of 1907) any debt whose recovery was not barred by limitation on the date of the adjudication of the debtor as an insolvent can be proved in insolvency at any time even after a conditional order of discharge and until a final discharge is ordered. The facts that the debt is merged in a decree and more than 12 years had elapsed before the application to prove the same was made are immaterial if the decree debt was capable of execution on the date of the adjudication. *Held*, further that an adjudicated insolvent was entitled as a "person aggrieved" within section 46, clause (2) of Act III of 1907 to appeal against an order admitting a person as a creditor.

Sirasubramania v. Theethiappa ... (1924) I.L.R., 47 Mad., 120

SEC. 39 (4)—*Provincial Insolvency Rules, r. 21 (b)—Final dividend—Re-opening of declaration of final dividend and of order as to distribution—Right of creditor, whose claim was notified but not proved—Notice to such creditor—Nature of notice—Express notice—Notice by separate registered letter to each creditor—Absence of such notice, effect of.* Under section 39, clause (4) of the Provincial Insolvency Act (III of 1907), whenever a final dividend is to be declared, a creditor, whose claim has been notified but not proved, must have express notice that the Receiver is proceeding to declare a final dividend and that he would do so without regard to the claim of such creditor if he does not take care to prove in time; and under rule 21 (b) of the rules framed by the High Court under the Act, the notice under section 39 (4) of the Act should be in the form of a separate registered letter addressed to each creditor. As a particular form of notice is prescribed by the rules made under the statute, a strict compliance with the rule is necessary before the creditor's claim to share in the final dividend can be disallowed. Where therefore the notice required by the section and the rule was not given to such a creditor before a final dividend was declared and distribution ordered, he should, on application to the Court, be allowed to reopen the matter and should be given an opportunity of proving his debt within a time to be allowed by the Court.

Venkatanarayana Chetty v. Sevugan Chetty ... (1924) I.L.R., 47 Mad., 916

PROVINCIAL INSOLVENCY ACT (V OF 1920), ss. 4 AND 80—*Claim petition—Official Receiver—Mortgage-decree—Claim to mortgaged property preferred direct before Official Receiver—Power of Official Receiver to pass order—Power in such matter, whether delegated to Official Receiver to pass order—Power sale by Receiver—Application to be made direct to District Judge to take action under sec. 4 of the Act—Proceedings to set aside.* An Official Receiver in insolvency has no power to make any order on a claim petition filed before him, as it is not a power which has been delegated to him under section 80 of the Provincial Insolvency Act (V of 1920). If the claimant wants to prevent the sale by the Official Receiver of some property as belonging to the insolvent, he should apply to the District Judge direct to take action under section 4 of the Act. Consequently an order passed by

an Official Receiver allowing a claim petition filed directly before him and an order reversing it passed by the District Judge on appeal, were set aside by the High Court and the parties left in *status quo ante*.

Vellayappa Chettiar v. Ramanathan Chettiar ... (1924) I.L.R., 47 Mad., 446

PROVINCIAL INSOLVENCY ACT (V OF 1920), ss. 53, 54, 68, 73 AND 75—*Alienation by insolvent—Application by creditor to set aside—Refusal by Official Receiver to take action under section 53 or 54—Right of creditor to move District Court on refusal by Official Receiver—Remedies of creditor—Duty of Receiver to take action on indemnity by creditor—Appeal against order of District Judge dismissing application of creditor to take action—Creditor, whether a party "aggrieved" by order—Appeal without leave—Leave subsequently applied for—Limitation—Delay, excuse of.* There is no rule that the Official Receiver alone, and nobody else, can move the District Court to annul an alienation by the insolvent under section 53 or 54 of the Provincial Insolvency Act (V of 1920). A creditor can at any time during the pendency of the insolvency proceedings move the Court to take action under section 53 or 54 of the Act, if the Official Receiver has refused to move in the matter on the request of the creditor; and there is no period of limitation provided for such an application. *Hemraj Champa Lall v. Ramakrishnan Ram* (1917) 2 P.L.J., 101. Where the Official Receiver declines to take action, a creditor can apply to the Court to allow him to use the Official Receiver's name in order to recover the insolvent's property or to set aside a voluntary transfer or to avoid a fraudulent preference for the benefit of the creditors; and the requirements of the law are satisfied by making the Official Receiver a party to an application made by a creditor to take action under section 53 or 54 of the Act. Even though an appeal lies to the District Judge under section 68 of the Act against "any act or decision" of the Official Receiver, a mere refusal of the Official Receiver to take action under section 53 or 54 of the Act, cannot be deemed to be an "act" of the Receiver under section 68, against which a creditor is competent to prefer an appeal to the District Judge; but the creditor can move the Court, on refusal by the Official Receiver, to take action under the Act. The Official Receiver is bound to take action under the Act or prefer an appeal against an order of the District Judge, if the creditor indemnifies the Official Receiver against costs in the event of failure in such proceedings. A creditor, who is a party to an application under section 53 or 54 is one "aggrieved" by an order dismissing it within the terms of section 75 of the Act, and can appeal under that section. *Kumarappa Chettiar v. Murugappa Chettiar*, (1916) 36 I.C., 771, referred to. Where an appeal was preferred within time but without leave of Court under section 75, clause (3) of the Act, and an application for leave to appeal was filed after the period of limitation had expired, the appeal could not be held to be out of time, and even if it was out of time the delay could be excused by the Court under section 78 of the Act.

Ananthanarayana Ayyar v. Sankaranarayana Ayyar ... (1924) I.L.R., 47 Mad., 878

PURCHASER OF PROPERTY—*In execution of a decree against father and son for debts incurred by father—Decree against son subsequently set aside in appeal—Right of purchaser to get father's share without being driven to a fresh suit.—See "MINOR"* ... 79

RECEIVER IN A PARTITION SUIT—*Application for being made a party to execution proceedings in a mortgage suit.—See "SUIT FOR SALE"* ... 47

REGISTRATION ACT (XVI OF 1908), SEC. 49—*Usufructuary mortgage securing rupees two hundred—Unregistered deed—Mortgage put in possession in 1902—Suit for redemption in 1917—Defendants setting up independent title—Title by adverse possession—Unregistered deed, whether admissible to prove nature of possession and terms of the mortgage—Other evidence, whether admissible—Suit for redemption—Decree for possession on title, whether can be given.* In a suit instituted to recover certain lands on redemption of a

	PAGE
usufructuary mortgage for Rs. 200, purported to be created by an unregistered deed in 1902, the defendants (some of whom were legal representatives of the original mortgagee who had been put in possession under the deed, and the others were persons who got into possession within 12 years of the suit), set up an independent title in themselves and pleaded also that the deed was inadmissible in evidence and that the suit was barred by limitation. <i>Held</i> , that the deed, though unregistered, was admissible in evidence to show the character of the defendants' possession; that the defendants could be shown to have acquired only a limited interest as mortgagees by adverse possession; that, to prove the extent of the interest acquired by them by adverse possession, the terms of the mortgage asserted by them may be proved, and such proof cannot be regarded as an attempt to prove the unregistered mortgage or to adduce secondary evidence of it and the unregistered deed as well as other evidence was admissible for the purpose; <i>Varada Pillai v. Jeevarathnammal</i> , (1920) I.L.R., 43 Mad., 244 (P.C.), applied; that a suit to redeem is substantially a suit for possession, and that, even if defendants had not acquired any interest by adverse possession, the suit was maintainable as one for possession based on title. <i>Anuradha Hait v. Khudiram Hait</i> , (1914) 19 C.L.J., 532, followed. <i>Appanna v. Venkatasami</i> ... (1924) I.L.R., 47 Mad., 203	203
REGISTRATION ACT , sec. 77— <i>Tampered document tendered for Registration—</i> inquiry—Registrar's duty. <i>See under "SUIT"</i> ...	833
RES JUDICATA — <i>Finding of original Court on two issues—Suit in ejectment—Pleas—Occupancy right—Want of notice to quit—Dismissal of suit—Decree confirmed on appeal and on second appeal on the ground of want of notice to quit—Subsequent suit in ejectment after due notice—Defendants setting up plea of occupancy right again—Bar of res judicata. See under "CIVIL PROCEDURE CODE (ACT V OF 1908)"</i> ...	453
— <i>Suit on behalf of minor to set aside a sale in execution—Dismissal of—Subsequent suit to set aside decree on ground of guardian ad litem appointment improperly made—Maintainability:—See under "CIVIL PROCEDURE CODE, SEC. 11"</i> ...	453
RELIGIOUS ENDOWMENT — <i>See under "HINDU LAW."</i>	
REVISION — <i>High Court's power to interfere in pending proceedings:—See under "CODE OF CRIMINAL PROCEDURE, SEC. 435"</i> ...	722
RYOTWARI PATTA — <i>Its nature:—See "MADRAS ACT (VII OF 1865)"</i> ...	861
SALE — <i>By Hindu widow of several properties to discharge a usufructuary mortgage on some—Validity of:—See "CIVIL PROCEDURE CODE (ACT V OF 1908), O. 21, R. 22 (2)"</i> ...	63
— <i>By Official Receiver of son's interest for father's debts—Validity:—See "PROVINCIAL INSOLVENCY ACT, SS. 16, 18, 20 AND 23"</i> ...	462
— <i>Without bringing deceased judgment-debtor's legal representative on record, is not a nullity:—See "CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 22 (2)"</i> ...	63
SALE IN EXECUTION — <i>Notice not issued to concerned party—Sale void:—See "CIVIL PROCEDURE CODE (V OF 1908), O. XXI, R. 22"</i> ...	283
SALE IN EXECUTION OF MORTGAGE-DECREE — <i>Application to set aside—Limitation:—See "LIMITATION ACT"</i> ...	525

	PAGE
SALE — <i>Of properties after final decree in a mortgage suit—Receiver appointed by another Court in a partition suit between the mortgagors—Duty of decree-holder to apply to the latter Court for leave to execute the decree:—See "SUIT FOR SALE"</i> ...	47
SANCTION FOR PROSECUTION — <i>False information to Village Magistrate—Sanction by Sub-Magistrate, if can be granted:—See "CODE OF CRIMINAL PROCEDURE"</i> ...	229
— <i>for disobedience of an order under sec. 144, Criminal Procedure Code—Proper Appellate Authority to revoke sanction:—See "CRIMINAL PROCEDURE CODE, SEC. 144"</i> ...	56
SENTENCE, enhancement of — <i>Without opportunity to accused to appear:—See under "CRIMINAL CASE"</i> ...	428
SHIP — <i>Goods entrusted for carriage, damaged during voyage—Suit for damages—Onus of proof—Perils of the sea—Negligence.] In a suit for damages caused to the plaintiff's goods entrusted for carriage by the defendant's ship, it is for the defendant to plead and prove "perils of the sea." If he makes out a prima facie case, the plaintiff can rebut it by proving defendant's negligence; The Glendarroch [1894] Prob., 226, followed. The mere fact that the accident might have been avoided by greater foresight does not prove negligence.</i> <i>Eswali v. Thaha Ummal</i> ... (1924) I.L.R., 47 Mad., 610	
SPECIFIC PERFORMANCE — <i>Advantageous agreement to sell joint family lands by father and manager of the family—Suit for specific performance even against minor members of the family, maintainability of.] Where in return for balance due from a customer, a joint Hindu family of traders consisting of two brothers, the elder of whom had one major and two minor sons, had to purchase some lands from the customer at some loss and in order to reduce the loss the father and manager of the family agreed to sell the lands to the plaintiff at a certain price; Held that the plaintiff was entitled to enforce specific performance of the contract to sell against the minor members also.</i> <i>Narayanan Chetty v. Muthiah Chetty</i> ... (1924) I.L.R., 47 Mad., 692	692
SPECIFIC RELIEF ACT , sec. 42— <i>Suit against Municipal Chairman for wrongful rejection of election papers:—See under "MADRAS DISTRICT MUNICIPALITIES ACT, SEC. 352"</i> ...	585
STAY of execution of decree— <i>Discretion exercised a wrong view of Law—Appeal under Letters Patent:—See under "LETTERS PATENT, CL. 15."</i>	
STAY — <i>Of legal proceedings—Considerations for Court before staying or refusing to stay—Discretion of Court and onus of proof:—See under "ARBITRATION ACT (INDIAN)"</i> ...	164
SUIT — <i>Against Municipal Chairman—For wrongful rejection of election papers:—See under "MADRAS DISTRICT MUNICIPALITIES ACT, SEC. 352"</i> ...	585
— <i>On a cause of action against wrong person—Subsequent suit against the right person—No estoppel—Suit on a mortgage executed by a Hindu widow in her own capacity and not as guardian of her adopted son, but for purposes binding on estate—Adopted son's liability.] A judgment obtained against a person in the belief that he executed a document in his own right does not bar a subsequent suit against the rightful owner, when it is subsequently learnt that he executed it on the latter's behalf. A Hindu widow who was consistently denying an adoption alleged to have been made by her executed a mortgage of her husband's estate in her own capacity and not as guardian of the adopted son but chiefly for</i>	

purposes alleged to be binding on the estate. The mortgagee and his assignee knew of the denial and the assignee alleging that there was no adoption first sued the widow on the mortgage and got a mortgage decree against her. Then he sued the alleged adopted son on the mortgage and the decree, and prayed for a decree against him alleging that the debt was binding on the estate. *Held* (1) that the plaintiff was not, by reason of the previous suit against the widow, estopped from filing this suit against the adopted son, who claimed to be the owner of the estate; *Scarf v. Jardine* (1882) 7 App. Cas., 345, distinguished, and (2) that even if there be consideration and *bona fides*, the suit should be dismissed as the widow executed the mortgage only in her own capacity and not as guardian of the defendant.

Ammakannu v. Murugayya Odayar ... (1924) I.L.R., 47 Mad., 850

SUIT—By lessee for declaration of title and for other reliefs—Lessor, party defendant—Dismissal of suit by lower Courts, holding against title—Second appeal preferred by lessor, who was defendant—Competency of appeal—Right of appeal of defendant, where suit is dismissed—Decree to embody declaration—Effect of decree, without such embodiment, on right of appeal.] Where a suit has been dismissed, the true test for determining whether the defendant can appeal is to see not merely the form but the substance of the decree and judgment: and where the point decided adversely to the defendant, is directly and substantially in issue, and where in other proceedings the matter would be *res judicata*, it would be contrary to all principles of justice and equity to hold that the defendant is precluded from agitating the matter on appeal, merely because the suit was dismissed on some other ground. *Yusuf Sahib v. Durgi* (1907) I.L.R., 30 Mad., 447, referred to; and *Secretary of State v. Saminatha Kounden*, (1914) I.L.R., 37 Mad., 25, distinguished. In suits where declaration and consequential relief are sought and the consequential relief is refused because the Court is against the plaintiff's rights which he seeks to declare, the decree should formally embody the result as to the declaration; but even if it does not do so but simply dismisses the suit, the decree in substance is one where the declaration is refused. Where the plaintiff, who was the lessee of suit lands from the first defendant, sued for establishment of his title and for a declaration that the sale to the second defendant by the third defendant, who was the Official Receiver in insolvency of the first defendant's father, was inoperative as they had become divided long prior to the insolvency of the father and the suit lands had fallen to the son's share and the suit was dismissed by both the lower Courts holding against the partition, on a second appeal being preferred by the first defendant, *Held*, that the first defendant was competent to prefer the Second Appeal.

Venkateswarlu v. Lingayya ... (1924) I.L.R., 47 Mad., 638

—For sale—Final decree—Order for sale—Execution of decree by sale ordered—Partition suit in another Court between the mortgagors—Receiver appointed in such suit after final decree in mortgage suit—Application by Receiver after order for sale to the executing Court to be made a party—Leave of the latter Court for execution, necessity for—Duty of decree-holder to apply for leave—Duty of Court to make Receiver a party.] A mortgagee-decree holder is bound to apply to the Court appointing a Receiver of the mortgaged properties in another suit, for leave to execute his decree, and cannot proceed to sell the mortgaged property in execution of his decree without such leave. Where, after final decree had been passed and order for sale made by a Court in a suit for sale on a mortgage, a Receiver, appointed by another Court, subsequent to such decree, in a suit between the mortgagors for partition of their family properties including the mortgaged properties, applied to the former Court to be made a party to the execution proceedings, prior to sale, *Held*, that the Court should have made the Receiver a party to the execution proceedings. *Mrs. Lavina Ashton v. Madhabmoni Das*, (1910) 14 C.W.N., 560, followed. *Jogendra Nath Goswain v. Debendra Nath Goswain*, (1899) I.L.R., 28 Cal., 127, distinguished.

Fraser and Ross v. Krishnaswami Aiyer ... (1924) I.L.R., 47 Mad., 47

SUIT for specific performance against minor—Maintainability of:—See under "SPECIFIC PERFORMANCE" ... 602

SUIT UNDER SEC. 77 OF INDIAN REGISTRATION ACT—Tender of tampered document for registration—Scope of Registrar's inquiry before registration—Scope of Court's inquiry under sec. 77 after Registrar's refusal to register.] The duty of a Registrar, to whom a document which appears to have been tampered with after execution, is presented for registration by the claimant, is to ascertain whether it is actually in the state in which it was executed by the parties and not to go into a roving inquiry whether the document tendered represents the substance of the agreement between the parties; and the duty of the Court in which a suit is filed under section 77 of the Registration Act to have it registered after refusal by Registrar is exactly the same.

Guruvayya v. Venkatarathnam ... (1924) I.L.R., 47 Mad., 833

THE TOWNS NUISANCES ACT (MADRAS ACT III OF 1889), sec. 6—Common gaming house, meaning of.] A common gaming house is one into which a large number of persons are invited habitually to congregate for the purpose of gaming, and it makes no difference that its use is restricted to the subscribers and members of a club and it is not open to all persons desirous of using the same, *Jenks v. Turpin*, (1883) 13 Q.B.D., 505 and *Sreenivasachari v. Rex*, (1892) 1 Weir, 917, referred to.

Chinniah, In re ... (1924) I.L.R., 47 Mad., 420

TRANSFER OF PROPERTY ACT (IV OF 1882) sec. 6, (e)—Assignment of a right to obtain damages—Suit—Maintainability:—See under "MORTGAGE" ... 688

..., ss. 56 AND 81—Marshalling securities:—See under "MORTGAGE" ... 688

..., sec. 58:—See under "MORTGAGE" ... 720

..., ss. 83, 84, 76 (i), 72, 60 and 95—Deposit—Mortgagee in possession purchasing equity of redemption in some of the items of mortgaged property—Assignee of a portion of the equity of redemption—Right of part-owner of equity of redemption to deposit whole mortgage amount—Right to redeem whole—Right of mortgagee to retain possession of items purchased by him—Liability of mortgages remaining in possession after deposit—Liable for gross receipts, meaning of—Just allowances, such as Government revenue, etc., if can be deducted—Suit for redemption in such cases—Form of decree—Meane profits—Interest.] An assignee of a portion of the equity of redemption is entitled to deposit the whole of the mortgage debt under section 83 of the Transfer of Property Act, even though the mortgagee has purchased the equity of redemption in some of the mortgaged properties, and upon such deposit or tender he becomes entitled to all the mortgagee's rights, including his right to possession if he is a mortgagee in possession, of the whole of the mortgaged properties, including those purchased by the mortgagee. A mortgagee remaining in possession after a lawful tender or deposit, is no doubt liable to account for gross receipts from the mortgaged property, under section 76 (i) of the Act, but such mortgagee is entitled to all due allowances such as for payment of Government revenue, collection charges, and necessary repairs of the property, etc., subsequent to the tender or deposit, though he may not be entitled to the benefits of the special stipulations in the mortgage deed. *Mussamat Asima Beebee v. Sheikh Ahmedes* (1854) 9 S.D.A. (N.W.P.), 1, distinguished. Though the mortgagee in possession who had purchased the equity of redemption in some of the mortgaged properties has no right to retain possession after tender or deposit, and should be made accountable on that basis, yet in a suit for redemption, the convenient course would be for the Court to determine the amount of the mortgage debt for which the

items purchased by the mortgagee would be proportionately chargeable, and finally settle the questions arising between the parties by allowing the mortgagee to retain possession of them on payment of that proportionate amount.

Subba Rao v. Sarvarayudu ... (1924) I.L.R., 47 Mad., 7

TRANSFER OF PROPERTY (ACT IV OF 1882), SEC. 101:—*See* "MORTGAGE" 180

VAKALAT, WITHDRAWAL OF:—*See* "CIVIL PROCEDURE CODE, O. IX, r. 9" 316

VILLAGE PANCHAYAT COURT—*Accused refusing to plead—Sec. 179, Indian Penal Code (Act XLV of 1860), whether applicable—Procedure—Madras Village Panchayat Act (Madras Act II of 1920), rule 36—Provisions same as under Criminal Procedure Code (Act V of 1888).* An accused person is not bound to answer questions put to him by the Court and is therefore not liable to a prosecution under section 179 of the Indian Penal Code (Act XLV of 1860) for refusing to answer them. The procedure when an accused person declines to plead before a Village Panchayat Court, is laid down in rule 36 of the rules made under section 78 of the Madras Village Panchayat Act (Madras Act II of 1920), and is precisely the same as that provided for by the Criminal Procedure Code, in respect of other Courts.

Tirumala Reddi In re ... (1924) I.L.R., 47 Mad., 396

WATER CESS—*Ryotwari lands—Natural stream through ryotwari pattadar's lands—Government, whether entitled to levy water-cess:—See under "MADRAS ACT (VII OF 1865)"* ... 1861

THE INDIAN LAW REPORTS (MADRAS SERIES)

SPECIAL BENCH.

*Before Mr. Justice Ayling, Mr. Justice Coutts Trotter
and Mr. Justice Ramesam.*

BOARD OF REVENUE (REFERRING OFFICER),

1923,
March 29.

v.

THE MYLAPORE HINDU PERMANENT FUND,
LTD. (ASSEESSE).*

Indian Income-tax Act (VII of 1918), sec. 9—Registered Mutual Benefit Society—Borrowing and lending confined to members—Interest on loans, not taxable "profits" within section.

Where the capital of a mutual benefit society was made up solely of periodical investments by its members and the income of the society was mainly derived from interest earned on loans given solely to its members, every one of whom was by the rules eligible to take loans,

Held, that such interest earned by the society from its own members was not taxable "profits" within section 9 of the Indian Income-tax Act VII of 1918 in spite of the fact that the society was registered under the Indian Companies Act and as such was for certain purposes a separate legal entity from its members. *New York Life Insurance Coy. v. Styles* (1889) 14 A.C., 381, followed; *Equitable Life Assurance Society of the United States v. Bishop* (1900) 1 Q.B., 177, and *Leeds Benefit Building Society v. Mallandaine* (1897) 2 Q.B., 402, distinguished.

Held further: Interest derived by the society on occasional authorized deposits with outside banks of its unlent surplus was taxable.

* Referred Case No. 17 of 1921.

CASE stated by the Secretary, Board of Revenue, Income-tax, Madras, in his letter dated 6th October 1921 in Income-tax Appeal No. 2 of 1921-22 for a decision as to whether the whole of the earnings of the Mylapore Hindu Permanent Fund less actual expenses is taxable and whether any deduction is allowable as claimed by the Company.

The facts are given in the judgment.

A. Krishnaswami Ayyar (with N. Rama Rao and T. S. Srinivasa Rao) for assessee.—The Fund is a mutual benefit society; its capital is contributed only by its members; and it lends only to its members; it does not do any business with outsiders; it is not an association for profit; it cannot be taxed for what it earns as interest from its own members. *New York Life Insurance Company v. Styles*(1), *Carlisle and Silloth Golf Club v. Smith*(2), on appeal from *Carlisle and Silloth Golf Club v. Smith*(3).

Government Pleader (C. V. Anantakrishna Ayyar) for Government.—The society that is assessed is a different legal person from its members; it is an incorporated society; it carries on money lending business; its income by way of interest is taxable in spite of the facts that a portion of it is distributed as profits to its own members and its loans are confined only to its members; see *Equitable Life Assurance Society of the United States v. Bishop*(4), which has construed *New York Life Insurance Coy. v. Styles*(1), see also *Leeds Benefit Building Society v. Mallandaine*(5), on appeal from *Leeds Permanent Benefit Building Society v. Mallandaine*(6); Konstam on Income-tax, pages 179 and 5. *Glasgow*

(1) (1889) 14 A.O., 381.

(3) [1912] 2 K.B., 177.

(5) [1897] 2 Q.B., 402, 405, 410.

(2) [1913] 3 K.B., 75, 82.

(4) [1900] 1 Q.B., 177, 190.

(6) (1897) 76 L.T., 650, 654.

Corporation Water Commissioners v. Miller(1), *Mullingar Rural District Council v. Rowles*(2). This interest is income derived from business according to section 5 (4) and (6) of the Act and this income is not exempt from taxation. Compare the Co-operative Societies Act (II of 1912), section 28, which exempts only co-operative societies from taxation.

A. Krishnaswami Ayyar in reply; *Leeds Benefit Building Society v. Mallandaine*(3) is a case of taxing the "interest" and not "income"; see *Clerical, Medical and General Life Assurance Society v. Carter*(4).

The JUDGMENT of the Court was delivered by

RAMESAM, J.—This reference under section 51 of RAMESAM, J. Act VII of 1918 relates to the assessing of the Mylapore Hindu Permanent Fund for purposes of income-tax.

The fund was established in 1872, being registered under the Indian Companies Act of 1866. It then started with 11,904 shares and gradually increased the shares up to 119,047 shares. A shareholder subscribes one rupee per share per mensem and at the end of seven years draws 102½ rupees and then he ceases to be a shareholder (*qua* that share). The rate of interest works out at slightly less than 6¼ per cent at simple interest. The amount of Rs. 18½ thus earned on each share is described as the guaranteed rate of interest. Other rules reduce the rate earned in case of withdrawal within seven years. A shareholder has to pay interest on the subscription if not paid within the time prescribed by the rules. The Fund gives loans to the shareholders, divided into ordinary loans and special loans. Occasionally when there are large amounts not borrowed by the shareholders they

(1) (1886) 2 Tax Cases, 131, 140.

(3) [1897] 2 Q.B., 402.

1-A

(2) (1912) 6 Tax Cases, 85.

(4) (1889) 22 Q.B.D., 444.

BOARD OF
REVENUE
v.
Mylapore
Fund.
—
RAMESAM, J.

may be invested on fixed or current deposits in outside institutions such as the public Banks of Madras. The excess of interest earned by the Fund over the expenses of the institution and the interest earned by the shareholders is regarded as the profits of the Fund. One-eighth of this goes to the Reserve Fund, three-eighths (subject to a maximum of Rs. 5,000) is divided among the Directors and the rest is partly added to the Reserve Fund and partly distributed among the shareholders with reference to the number of the shares and the number of months during which they have held them (rule 85).

It is clear from the above summary of the rules of the Fund that the number of the so-called shareholders is fluctuating from time to time, the figure 119,047 representing only the maximum limit and that its earnings consist of (1) chiefly interest from the shareholders either on loans or on overdue subscriptions and (2) occasionally, interest from outside investments; so far as the second of these items is concerned it is conceded on both sides that the amount earned is liable to income-tax and the whole controversy centred on the first item. As to this item, it seems to me that the case is governed by *New York Life Insurance Company v. Styles*(1). The principle of that case is that income to be taxable must come in from outside and not from within. The fact that the Fund is a legal entity (for certain purposes) does not matter, for, in the language of Lord WATSON (p. 393-4)

“it represents the aggregate of its members,”

and the members are the participators of its profits and

“I do not think that their complete identity can be destroyed or even impaired by their incorporation.”

(1) (1889) 14 A.C., 381.

Last v. London Assurance Corporation(1), was distinguished by Lord BRAMWELL (p. 396) on the ground that the profits were made and meant to be made not from its own members but from those it dealt with. There were in that case two bodies, the shareholders and the assured. In *Styles'* case and in the case before us the persons dealt with and the participators are identical. To the same effect are Lord HERSCHEL's observations at p. 409 and Lord MACNAGHTEN's at p. 412 where he describes *Styles'* case as one where the business is a mutual undertaking pure and simple. In *Equitable Life Assurance Society of the United States v. Bishop*(2), the shareholders of the Company were entirely different people from the members of the mutual insurance body (VAUGHAN WILLIAMS, L.J., at p. 190).

The case of *Leeds Benefit Building Society v. Mallandaine*(3), was strongly relied on by the learned Government Pleader. The judgment of the Divisional Court is reported in 76 L.T.R., 650. The learned Judges (WILLES and GRANTHAM, JJ.), observed,

“the case of *New York Life Assurance Company v. Styles*(4) was not in point as the society is not a mutual society”

whereas that Insurance Company was (at p. 652). On appeal the whole argument turned on the application of *Olerical, Medical and General Life Assurance Society v. Carter*(5), and no reference was made to *Styles'* case either in the judgment of the Court of Appeal or the arguments before it and the decision of the Court of appeal is no authority on the point now discussed. In that case a benefit building society consisted of two classes of members (1) investors each of whom invested one or more sums of £100 and (2) borrowers who did not

BOARD OF
REVENUE
v.
Mylapore
Fund.
—
RAMESAM, J.

(1) (1885) 10 A.C., 438.

(2) [1900] 1 Q.B., 177.

(3) [1897] 2 Q.B., 402.

(4) (1889) 14 A.C., 381.

(5) (1889) 22 Q.B.D., 444.

BOARD OF
REVENUE
v.
MYLAPORE
FUND.

RAMESAM, J.

invest but borrowed from the society on shares or fifth parts of shares and paid 2s. 6d. per share or 6d. per fifth part of a share per week to the fund after the borrowing, this sum being intended to be a discharge of (1) the interest on the loan and (2) the principal. The resemblance between that case and the present one is in the fact that both the investors and the borrowers participate in the surplus and that the investors are like the shareholders in the present case but the difference consists in the fact that the borrowers are not like the shareholders and an investor can never be a borrower. It is obvious that the fact, that, while the investors only were the capitalists, the final participators consisted of the investors and borrowers, prevented its being a mutual company. If the real company in that case is regarded as consisting of the investors only, the income was earned from outsiders only and *Styles'* case (1), cannot apply. This must have been the view of the Divisional Court, the borrowers being regarded as outsiders. It is clear that their payments of 2s. 6d. per share or 6d. per fifth part of a share per week can bear no analogy to the sums of £100 contributed by the investors and the final participation of the borrowers in the profits was considered as a bait to them and as a reduction of the interest they pay and not to alter their position as outsiders. *Glasgow Corporation Water Commissioners v. Miller*(2), and *Mullingar Rural District Council v. Rowles*(3), relate to the supply of water by the Glasgow Corporation and the District Council of Mullingar and cannot help us in the present case. In *Carlisle and Silloth Golf Club v. Smith*(4), BUCKLEY, L.J., says at p. 82

(1) (1909) 14 A.C., 381.
(3) (1912) 6 Tax Cases, 85.

(2) (1886) 2 Tax Cases, 131.
(4) [1913] 3 K.B., 75.

"A man cannot make a loss or profit out of himself and that was the ground of the decision in *New York Life Insurance Company v. Styles*(1)."

I am therefore of opinion that all earnings of the Fund from within are governed by *Styles'* case and are not liable to be taxed.

The Government must pay the costs of this reference to the other side. Fee Rs. 250.

N.R.

BOARD OF
REVENUE
v.
MYLAPORE
FUND.

RAMESAM, J.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice
and Justice Krishnan.

TADEPALLI SUBBA RAO GARU AND OTHERS (DEFENDANTS),
APPELLANTS (IN BOTH APPEALS),

1921,
April 28.

"

SRI BALUSU BUCHI SARVARAYUDU AND OTHERS
(PLAINTIFF AND DEFENDANTS), RESPONDENTS (IN BOTH APPEALS).*

Transfer of Property Act (IV of 1882), ss. 83, 84, 76 (i), 72, 60 and 95—Deposit—Mortgagee in possession purchasing equity of redemption in some of the items of mortgaged property—Assignee of portion of the equity of redemption—Right of part-owner of equity of redemption to deposit whole mortgage amount—Right to redeem whole—Right of mortgagee to retain possession of items purchased by him—Liability of mortgagee remaining in possession after deposit—Liable for gross receipts, meaning of—Just allowances, such as Government revenue, etc., if can be deducted—Suit for redemption in such cases—Form of decree—Mesne profits—Interest.

An assignee of a portion of the equity of redemption is entitled to deposit the whole of the mortgage-debt under

(1) (1889) 14 A.C., 381.
* Appeals Nos. 352 of 1918 and 322 of 1919.

SUBBA RAO
v.
SARVA-
RAYUDU.

section 83 of the Transfer of Property Act, even though the mortgagee has purchased the equity of redemption in some of the mortgaged properties, and upon such deposit or tender, he becomes entitled to all the mortgagee's rights including his right to possession, if he is a mortgagee in possession, of the whole of the mortgaged properties, including those purchased by the mortgagee.

A mortgagee remaining in possession after a lawful tender or deposit, is no doubt liable to account for gross receipts from the mortgaged property, under section 76 (i) of the Act, but such mortgagee is entitled to all due allowances such as for payment of Government revenue, collection charges, and necessary repairs of the property, etc., subsequent to the tender or deposit, though he may not be entitled to the benefits of the special stipulations in the mortgage deed.

Mussamut Asima Beelee v. Sheikh Amudee (1854) 9 S.D.A. (N.W.P.), p. 1, distinguished.

Though the mortgagee in possession who had purchased the equity of redemption in some of the mortgaged properties has no right to retain possession after tender or deposit, and should be made accountable on that basis, yet in a suit for redemption, the convenient course would be for the Court to determine the amount of the mortgage debt for which the items purchased by the mortgagee would be proportionately chargeable, and finally settle the questions arising between the parties by allowing the mortgagee to retain possession of them on payment of that proportionate amount.

APPEALS against the decrees of A. VENKATARAMAYYA PANTULU, the additional Temporary Subordinate Judge of Rajahmundry, in Original Suit No. 4 of 1917.

These are two connected appeals arising out of the preliminary and final decrees, respectively, in a suit for redemption instituted by the plaintiff (first respondent) who was the purchaser of the equity of redemption in most of the items of the mortgaged properties. The suit mortgage was a usufructuary mortgage executed in 1896 by the late Ex-Nawab of Masulipatam for a lakh

of rupees in favour of one Tadepalli Purushotham, now deceased, who was the manager of the family of defendants 1 to 15, 18 to 34 and 38; the mortgagees who were put in possession were to enjoy the usufruct in lieu of interest. The plaintiff, who was the purchaser from some of the heirs of the mortgagor of one of the nine items of the mortgaged properties, deposited in Court the whole of the mortgage-money (Rupees one lakh) under section 83 of the Transfer of Property Act in April 1916, but the mortgagees refused to receive it unconditionally and be redeemed. The plaintiff thereupon brought this suit for redemption. The mortgagees had become owners of the equity of redemption in two of the items which were sold in Revenue auction for arrears of revenue due on certain other properties not included in the mortgage. The chief contentions were (1) whether the plaintiff was entitled to deposit the entire mortgage amount under section 83 of the Act and seek to redeem and get possession of the whole of the mortgaged property including the items purchased by the mortgagees, (2) whether the mortgagees, who continued in possession after deposit, were entitled to credit for payments of Government revenue, collection charges and cost of repairs incurred and met by them since the deposit. The Subordinate Judge, who tried the suit, held that the plaintiff was entitled to deposit the whole mortgage amount and recover possession of the whole property, that the mortgagees were liable to account for the gross receipts without allowance for just expenses and payments, such as for Government revenue, collection charges and repairs made after the deposit, and that the mortgagees should establish their claim for possession of the items purchased by them in another suit. He accordingly passed a preliminary and a final decree on this basis. The mortgagees preferred an appeal

SUBBA RAO
v.
SARVA-
RAYUDU.

SUBBA RAO
v.
SARVA-
RAYUDU.

against each of the decrees. The appeals came on for hearing in the first instance on 28th April 1921 before WALLIS, C.J., and KRISHNAN, J., who delivered the following judgments and called for findings as to the proportionate amount of mortgage debt chargeable on items 6 and 9 purchased by the mortgagees, the amount payable to the mortgagees for just allowances due to them for expenses incurred after the deposit, and the mesne profits due to the plaintiff on all the items since the date of deposit. In accordance with the judgment, the Subordinate Judge returned findings on the issues raised, and the appeals were again posted for final disposal before KRISHNAN and VENKATASUBBA RAO, JJ.

S. Srinivasa Ayyangar and V. Ramadoss for appellants.

T. Ramachandra Rao, A. Krishnaswami Ayyar, P. Somasundaram, G. Lakshmanan, P. Satyanarayana, A. Venkatachalam, M. S. Venkatrama Ayyar, N. Rama Rao and K. G. Babu Rao for respondents.

JUDGMENT.

WALLIS, C.J.

WALLIS, C.J.—These are appeals by the defendants from the preliminary decree and final decree in favour of the plaintiff against the defendants mortgagees who refused to restore the mortgaged property in spite of the mortgage debt having been deposited by the plaintiff under section 83 of the Transfer of Property Act. The plaintiff is the assignee of three-fourths of the mortgagor's interest in item 1 and the mortgagees are also found to have become the owners of the equity of redemption in parts of the mortgaged property which were sold for arrears of revenue which had accrued on other property not the subject of the mortgage belonging to the heirs of the deceased mortgagor. The plaintiff

impugned the revenue sales and also contended that the purchases were made *benami* for the mortgagors, but the Subordinate Judge found that the plaintiff had failed to establish his case on those points and I agree with my learned brother that in the argument on the Memorandum of Objections we have not been shown any sufficient reason for differing from him on this point. The case must therefore be dealt with on this footing.

The first question that arises is, whether the plaintiff is entitled, as the Subordinate Judge has found, to make a deposit of the whole mortgage debt notwithstanding that the mortgagees have become the owners of part of the mortgaged property. On this question, I think the plaintiff was entitled to do so under the provisions of the Transfer of Property Act. He was undoubtedly a person entitled under section 91 of the Transfer of Property Act to sue for redemption and consequently come within the words "or any other person entitled to institute such suit" in section 83 so as to entitle him to make a deposit under that section. These statutory rights are not taken away by the recognition in section 60 of the right of partial redemption where the mortgagee has become the owner of part of the mortgaged property. It was no doubt held in *Mamu v. Kuttu*(1) that where the mortgagee had acquired a part of the mortgaged property, the mortgagor could not even sue for redemption until he had obtained a decree for partition, but this decision was before the Transfer of Property Act and even then was of very questionable authority for reasons which will appear later.

In the present case the plaintiff tendered the whole amount of the mortgage debt without any proportionate reduction in respect of the part of the mortgaged

SUBBA RAO
v.
SARVA-
RAYUDU.
WALLIS, C.J.

(1) (1883) I.L.R., 6 Mad., 61.

SUBBA RAO
v.
SARVA-
RAYUDU.
—
WALLIS, C.J.

property purchased by the mortgagee. On the principle of the greater including the less, *omne majus continet in se minus*, the tender was good even if he were entitled to tender a lesser sum, but in my opinion he was not, as the amount of the proportionate reduction in the mortgage-debt had not been ascertained either by agreement or by the Court, and in these circumstances it cannot be said that there was any lesser sum which the plaintiff was entitled to tender or the mortgagees were bound to accept.

The effect of a lawful tender or deposit is to determine the mortgagee's rights (as distinguished from his liabilities under the mortgage) including his right to retain possession, and where one of several mortgagors redeems the mortgage, to transfer such right of possession to the redeeming mortgagor who is in turn entitled to retain it until redeemed by the other mortgagors. This is the principle embodied in section 95 which provides that,

"where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession."

This principle is in my opinion equally applicable to a case where part of the mortgaged property has been purchased by the mortgagee. In such a case the mortgagee's right to possession as mortgagee is equally determined by the tender or deposit and transferred to the redeeming mortgagor. The question as to the proper form of decree to be passed when he refuses to accept the tender will be considered later.

Another question which arises in these appeals is as to the extent of the liability of a mortgagee remaining in possession after a lawful tender or deposit, to account

for the gross receipts of the mortgaged property under section 76 (i). On this clause the Subordinate Judge has held that the mortgagees are not entitled to credit for amounts which they paid after the tender to meet the revenue demands on the mortgaged property, and for necessary repairs and collection charges, and the commentaries and one or two cases bear out this view, but in none of them has the clause been very fully considered. Such a rule would involve great hardship to a mortgagee who refused to accept the tender under a *bona fide* claim of right. It is often exceedingly difficult under the existing law to say whether a transaction amounts to a mortgage or a sale, and where it is ultimately found to be a mortgage, it would be very hard to refuse the mortgagee credit for all the necessary expenses incurred by him whilst contesting the right to redeem. As observed in argument, it would put him in a worse position than a trespasser, and there seems no need for so stringent a rule. There is nothing like it in England where a mortgagee who refuses to accept the tender may have to bear the costs of the suit for redemption necessitated by his refusal and also loss of interest from the date of the tender, a provision now embodied in section 84 of the Transfer of Property Act, *Bank of New South Wales v. O'Connor*(1). In the case of his being in possession such a mortgagee would also have to account for the gross profits; but there is no authority for saying that he would not be entitled to all due allowances. I do not think that clause (i) when properly understood imposes any larger liability than would be incurred by a mortgagee in England. All that it says is that he, that is, the mortgagee, must notwithstanding the provisions in the other clauses of this section

SUBBA RAO
v.
SARVA-
RAYUDU.
—
WALLIS, C.J.

(1) (1889) 14 A.C., 273.

SUBBA RAO
v.
SARVA-
RAYUDU.
—
WALLIS, C.J.

account for the gross receipts from the mortgaged property from the date of the tender or the earliest occasion when he could draw the money out of Court. He does so account in legal parlance when he brings the whole gross receipts into account, but the section does not say that when he brings the whole gross receipts into account he is not to have the benefit of the same allowances as a trespasser. If the legislature had intended to enact in this matter a novel rule of a drastic character I think they would have used clearer language and would at least have said "notwithstanding anything in section 72 as well as notwithstanding anything in the other provisions of section 76," because it is section 72 which deals with the credit side of a mortgagee's account and section 76 deals mainly with the debit side. Further, there is nothing in the history of the clause to suggest that they had any such intention. It is not to be found in the rules as to transfer of property appended to the Sixth Report of the Indian Law Commission, 1870, or in the Transfer of Property Bill based on those rules which was introduced in 1877, but was inserted by the Select Committee who re-drafted the bill with express reference to the case of *Mussumat Asima Beebee v. Sheik Ahmudee*(1), as cited in Macpherson on Mortgages which was then the accepted text-book on mortgages in India. It was there held that after a lawful tender a mortgagee continuing in possession was not entitled in accounting for the profits accruing subsequently to the tender to the benefit of the stipulations in the mortgage deed. The mortgage deed had made the mortgagor responsible for any balances due from farmers and cultivators of the land and contained other stipulations as to the way in which the profits should be estimated. The Court held that the

(1) (1854) 9 S.D.A. (N.W.P.), 1.

effect of the tender was to render the mortgage deed of no effect from the date of the tender and to put an end to the mortgagor's liability for the balances in question and observed :

SUBBA RAO
v.
SARVA-
RAYUDU.
—
WALLIS, C.J.

"Upon the same principle, the appellant is entitled to the benefit of the tender in the mode of calculating the claim, the proceeds of the estate being estimated according to the gross jamabandhi for 1252 fasli *without reference to the terms stipulated in the deed.*"

But for the words "notwithstanding the provisions in the other clauses of this section," clause (i) might be regarded as merely giving statutory effect to this decision. These words apparently were inserted in the clause *ex abundante cautela* to meet any possible contentions that might be based on the other clauses of the section and especially on clause (h) read with section 77. However this may be, they are not in my opinion sufficient, especially having regard to the omission of any reference to section 72, to put the mortgagee in accounting for the gross receipts of the property in a worse position than a trespasser; and I think the Subordinate Judge was wrong in disallowing the items claimed by the mortgagees on this head.

The Subordinate Judge has held that the plaintiff was entitled on the tender to take possession of the whole of the mortgaged properties, and has left the rights of the owners of the equity of redemption including the mortgagees to be adjusted in other proceedings. It is no doubt the practice in England to pass such redemption decrees subject to the rights of other persons interested. The appellants contended, in the lower Court and here, that the Subordinate Judge should have left them in possession of the items of mortgaged property purchased by them and allowed the plaintiff to

SUBBA RAO
v.
SARVA-
RAYUDU,
WALLIS, C.J.

redeem the remaining properties at a proportionate reduction instead of driving them to a fresh suit. It is of course true that the appellants had no right to retain possession after the tender and should be made accountable on that basis, but having regard to practical convenience and the scheme of the Transfer of Property Act I think the proper course in a case like this would have been to determine the amount of the mortgage debt for which the properties purchased by the appellants were liable and to have finally settled the questions arising between the parties so as to obviate the necessity for a fresh suit. I concur with the order proposed by my learned brother.

KRISHNAN, J.

KRISHNAN, J.—*In Appeal No. 352 of 1918.*—The suit from which this and the connected appeal arise was one brought to redeem an usufructuary mortgage executed in 1896 by the late Ex-Nawab of Masulipatam in favour of one Tadepalli Purushottam, now deceased, the then manager of the joint Hindu family of defendants 1 to 15, 18 to 34 and 38, for one lakh of rupees with the condition *inter alia* that the usufruct was to be taken in lieu of interest. The properties mortgaged consisted of 9 items. Plaintiff is the purchaser of a three-fourths share in item 1 subject to the mortgage. Defendants 16, 17 and 35 to 38 are stated to be assignees of the shares in the mortgage of two of the members of the mortgagee's family and defendants 39 to 53 are the heirs, or assignees from the heirs, of the original mortgagor the Nawab who died in 1898. Defendants 54 to 61 claim to be purchasers of the equity of redemption in some of the items mortgaged. These defendants 39 to 61 were added as parties as persons interested or claiming to be interested in the equity of redemption. The plaintiff deposited in Court the whole of

the mortgage money, Rupees one lakh, under section 83 of the Transfer of Property Act in April 1916 but the mortgagees refused to receive it unconditionally and be redeemed. Hence this suit. SUBBA RAO v. SARVAYUDU KRISHNAN, J.

The lower Court passed a preliminary decree for redemption in plaintiff's favour directing the mortgagees to take the money deposited in Court and to deliver up possession of all the 9 items to him; and it also directed that he was to get the rents and profits of the mortgaged properties from the date of suit to date of delivery or for 3 years whichever was the shorter period at a rate to be determined subsequently. Appeal No. 352 is the appeal against the decree, by the mortgagee; two memoranda of objections have also been filed against that decree one by the plaintiff and the other by two of the heirs of the late Nawab, challenging the finding of the learned Subordinate Judge that the equity of redemption of items 6 and 9 had been validly sold in Revenue sale and had passed from the mortgagors, but raising no other objections. A final decree was subsequently passed settling the amount of mesne profits which the defendants were to pay to the plaintiff, disallowing their claim to deduct the Government revenue paid and the charges said to have been incurred for repairs and for collection. The connected Appeal No. 222 is by the mortgagees against that final decree and plaintiff has filed a memo of objections in it claiming his costs which had been disallowed.

Several important questions have been raised in these appeals. It will, however, be convenient to dispose of the memoranda of objections in Appeal No. 352 first as they raise the question whether the finding that the equity of redemption became vested in part in the mortgagees is correct or not, as much of the argument in the case depends on it. There is no real dispute about the facts

SUBBA RAO
v.
SARVABAYUDU
KRISHNAN, J.

regarding it. Arrears of Government revenue became due by the mortgagor's heirs on certain properties belonging to them in the Cuddapah district. For the realization of these arrears the equity of redemption of items 6 and 9 was attached though they were situated in a different district and was sold in revenue sale and purchased, the latter by 54th defendant, a clerk of the mortgagees, and the former by the 55th defendant, his brother-in-law. The attempts of the mortgagor to get these sales set aside failed and the sales were confirmed. It is the mortgagor's case that these purchases were *benami* for the benefit of the mortgagees and it is contended that under section 90 of the Indian Trust Act the mortgagees should be treated as having made the purchases and as holding the properties for the benefit of the mortgagor. The argument, however, fails as it is not shown that the mortgagees availed themselves of their position as such in getting the properties sold or in buying them, even if we assume that the purchases by 54th and 55th defendants were really *benami* for them. The sale was not for arrears of revenue due on the mortgaged properties and the mortgagees were under no obligation to pay the revenue on the mortgagor's other properties. It cannot therefore be said that they committed any default in allowing the equity of redemption to be sold for such arrears. It was, however, urged that a sum of Rs. 2,500 had been left with the mortgagees by the mortgagor and that they should have paid the arrears out of it when the mortgaged properties were attached, to save them from being sold. But the evidence is that this money was left with the mortgagees for the express purpose of effecting repairs to the mortgaged properties and it could not therefore be properly used by them for paying any arrears of revenue. No other objection has been urged before us regarding these sales

and we must therefore accept the finding of the Subordinate Judge on issue 3 that the revenue sales are valid and binding on the mortgagor. The further plea that the purchases were *benami* for the mortgagor is not raised now and is not supported by any evidence. The memorandum of objections must therefore both be dismissed with costs.

Turning now to the Appeal No. 352 before us, the main points argued were those raised (1) in issues 1 and 2 and (2) in issue 8, namely, whether plaintiff is entitled to get possession of all the properties including items 6 and 9 on redemption and whether the payment into Court under section 83 of the Act was a valid deposit in law. Taking the first question first there can be no doubt that under section 60 of the Transfer of Property Act a person entitled to a share only of a mortgaged property cannot redeem his share only on payment of his proportionate share of the mortgage money except in the only case where the mortgagee or when there are more mortgagees than one, all of them has or have acquired in whole or in part the share of a mortgagor. In fact the rule is that a mortgage should be redeemed as a whole; the right to redeem in part is given to a mortgagor as a privilege in the exceptional case noted above to avoid multiplicity of suits and in none else. Now in the present case the plaintiff has sued to redeem the whole mortgage. I think he was bound to do so, for he could not take advantage of the exception, because the equity of redemption in items 6 and 9 is not shown to have passed to *all* the mortgagees as a body but only to some of them as shown by the Subordinate Judge in paragraphs 14 and 15 of his judgment. Plaintiff was therefore clearly entitled to redeem the whole mortgage. Nevertheless I agree with the learned Chief Justice that the more convenient course here is to decide in this case

SUBBA RAO
v.
SARVARAYUDU
KRISHNAN, J. itself, as all the parties are before us, the question how much of the mortgage money should be taken as proportionately chargeable on items 6 and 9 and to allow redemption of the rest of the items only on payment of that proportionate amount. This can be done without prejudice to plaintiff's claim to mesne profits and without deciding between the several persons entitled to the mortgagee's interest their rights *inter se*. I would therefore call for a finding on this question on fresh evidence.

On the next question as to the validity of the deposit in Court, I agree with the learned Chief Justice that under section 83 the right to deposit the mortgage money in Court is co-extensive with the right to institute a suit for redemption as is apparent from the wording of the section. A person who owns a share only of the equity of redemption is thus in my opinion as much entitled as a person owning the whole of it to take advantage of section 83 by depositing the amount due on the mortgage and as in this case I have held that the plaintiff is entitled to redeem the whole mortgage he was clearly entitled to deposit the whole mortgage money in Court as he did. In my opinion the section applies equally to cases where the mortgagee has obtained a share of the equity of redemption, for there is no limitation in its language. It is not necessary in this case to consider whether in such circumstances the mortgagor should deposit the whole mortgage amount due into Court, or only that portion of it which he would have to pay if he were taking advantage of the exception in the last clause of section 60; for the mortgagor in this case has paid the whole mortgage money. The objection that the plaintiff could not make a valid deposit, because he was only the owner of a share of the equity of redemption and because some of the mort-

gagees had also become entitled to a share in it, must thus be over-ruled.

SUBBA RAO
v.
SARVARAYUDU
KRISHNAN, J.

A further objection was raised that the deposit ceased to be a valid one when the plaintiff through his vakil opposed the application of the defendants under Exhibit IV to be paid the amount deposited and got it dismissed. If he improperly prevented the mortgagees from drawing out the money, the tender may become bad under section 84 of the Act, but what happened here was the defendants wanted to take the money without prejudice to certain contentions they were raising and they asked for an order of Court to that effect. This appears from Exhibit IV itself. Plaintiff objected to the Court making any such order, as, I think, he was perfectly entitled to do; he did not object, so far as I can see, to the money being drawn out by them and I do not think his action affected the validity of his tender in any way. I therefore agree that plaintiff is entitled to the advantages flowing from such a deposit. What those advantages are, in this case, form the subject of the connected Appeal No. 222 and I shall consider the question there.

In this appeal one further argument raised by the respondent remains to be considered. It was contended that because the defendants drew out the money deposited in Court after the decree of the Lower Court and pending the appeal to this Court, they must be taken to have acquiesced in that decree and their appeal is therefore incompetent. The facts bearing on this objection are not clear. Some of the money seems to have been taken away not by the defendants but by their attaching creditors and that can imply no acquiescence at all on defendants' part. Whatever they drew out themselves they seem to have drawn out in execution of the decree in this case. Execution of a decree has never

SUBBA RAO
v.
SARVANAYUDU
KRISHNAN, J.

been held to estop the decree-holder from appealing from it so far as it is against him.

Reliance was however placed by the learned vakil for the first respondent for his objection, on the ruling in *Ram Chandra Marwari v. Rani Keshobati Kumari*(1). On examining that case it will be found to be entirely distinguishable. Their Lordships were considering the effect under the second clause of section 83 of a withdrawal of money which had been deposited in Court in full discharge of the mortgage debt. There was no decree in that case prior to the withdrawal. The case reported in *Dal Singh v. Pitam Singh*(2), was also relied on. In that case no doubt the money was taken out of Court after the decree of the Appellate Court and pending a second appeal. The facts of that case, however, are not very clear, for in meeting the argument that the money should be deemed to have been taken out in execution of the redemption decree, the learned Judges say that the appellants as defendants against whom the decree for redemption had been passed, were not the parties to apply for execution and that in the application they made to have the money paid out it was distinctly stated that it was lying in deposit under section 83, Transfer of Property Act. In the present case there is a clear order in the decree that the defendants were to take out the money in Court and it would therefore seem to be distinguishable from the Allahabad case. Otherwise with all respect to the learned Judges I would have been unable to follow their ruling. Once a decree is passed settling the rights of parties on redemption, what is thereafter done should be referred to that decree. The payment of the mortgage-money can only be under that decree and not under section 83, Transfer

(1) (1909) L.R., 36 I.A., 85.

(2) (1903) I.L.R., 25 All., 179.

of Property Act, which no longer applies. This objection must also be over-ruled.

SUBBA RAO
v.
SARVANAYUDU
KRISHNAN, J.

Before disposing of this appeal it is necessary to call for a finding on the question "What are the proportionate amounts of the mortgage-debt chargeable upon item 6 and item 9?" The finding must be arrived at in the manner explained in *Ponnambala Pillai v. Annamalai Chettiar*(1). Fresh evidence will be allowed. Finding in two months after the re-opening. Objections 10 days.

Appeal No. 222 of 1919.—The question in this appeal turns on the meaning to be given to the expression "account for the gross receipts" in section 76(i) of the Transfer of Property Act. The mortgagees claimed to deduct from the rents received by them certain sums of money for (1) revenue paid to Government on the mortgaged properties, (2) repairs effected to them and (3) collection charges for collecting the rents and profits. The learned Subordinate Judge has disallowed the whole of these three items. It is contended in appeal that all these should be allowed in favour of the mortgagees.

As found in the connected appeal, the mortgage money was properly deposited in Court by the plaintiff under section 83 and if the mortgage was one which provided for a rate of interest, that interest would have ceased to run under section 84. But in this case we have a mortgage with possession with the condition that the usufruct was to be taken in lieu of interest; section 76(i) therefore applies. The Subordinate Judge construes the words "account for gross receipts" as meaning "account to the mortgagor for the total receipts from the mortgaged properties without any deductions whatsoever" and he relies on *Beni Prasad v. Narain Das*(2), *Satyabadi Behara v. Harabati*(3), and *Shephard*

(1) (1920) I.L.R., 48 Mad., 572 (F.B.).

(2) (1910) 5 I.C., 529.

(3) (1907) I.L.R., 34 Cal., 223.

SUBBA RAO and Brown's Commentary on the Transfer of Property Act. There is no authority cited by the commentators SARVAYUDU for their opinion; and there is nothing in *Satyabadi Behara v. Harabati*(1), which supports the Subordinate Judge's view. In the case in *Beni Prasad v. Narain Das*(2), no doubt collection charges were disallowed but there is no discussion of the meaning of the words in question, in the judgment. There is thus no real authority on the point.

To take the meaning that the Subordinate Judge has given to the words would, as pointed out by the learned Chief Justice, impose an unduly excessive burden upon a mortgagee in possession who fails to accept a valid tender or deposit. Section 84 imposes on the mortgagee in such circumstances, only the liability of interest ceasing to run; and in the case of a mortgagee in possession who takes his interest from the usufruct, the application of that rule would only result in his having to account for the whole of the usufruct without deducting anything for interest but it would not affect in any way his right to any other deductions he may be entitled to. Should we then construe the words of section 76(i) as imposing a much larger liability by taking away from him all rights of deduction? There is no reason why a mortgagee in possession should be treated by the legislature in a more stringent manner than any other mortgagee committing the same default. I think full effect can be given to the words "account for gross receipts" by holding that in the mortgage account to be made up for redemption, the mortgagor should be debited with the total receipts from the mortgaged property without reference to any covenants between the parties in the mortgage deed to take any particular amount as

representing such receipts or to appropriate anything for himself towards his interest or otherwise. The words will then have no bearing on the question of deductions claimed under the provisions of the statute. The history of the provision as set out by the learned Chief Justice shows that this is the proper meaning to be attached to them. The words were introduced for the first time by the Select Committee on the Transfer of Property Bill and their report shows that the provision was taken from the case of *Mussumat Asima Beebee v. Sheik Ahmudee*(1) reported in the Decisions of the Sudder Dewany Adawlat. In that case the tender by the mortgagor was found to be valid and legal and the question was what surplus profits alleged to have been realized by the mortgagees in possession, the mortgagor was entitled to. The learned Judges held that on the tender being made the conditions and stipulations in the deed in favour of the mortgagees ceased to be in force and therefore they were not entitled to interest thereafter and that they could not rely on an express stipulation in the deed which made the mortgagor answerable for balances due from farmers and cultivators from fasli 1252 and that the proceeds of the estate should be estimated according to the gross jamabhandi without reference to the terms stipulated for in the deed. They, however, allowed the mortgagees credit for collection expenses. It would thus seem that the term "gross receipts" has no reference to statutory deductions but only to the stipulations in the deed. A mortgagee in possession who wrongly refuses to accept a tender or deposit does not thereby become a trespasser and cease to be a mortgagee. See *Satyabadi Behara v. Harabati*(2) and *Rukhminibai v.*

(1) (1907) I.L.R., 34 Cal., 223.

(2) (1910) 5 I.C., 529.

(1) (1854) 9 S.D.A. (N.W.P.), 1.

(2) (1907) I.L.R., 34 Cal., 223, 228.

SUBBA RAO *Venkatesh*(1). The duties imposed on him by section 76
 v.
 SARVARAYUDU continue in force against him and it will be very strange
 KRISHNAN, J. to hold that though he is compelled by law to make
 certain payments such as the Government revenue, he
 is not to get them re-paid. I think the words in
 section 76 (i) do not necessitate such a construction and
 that they only mean that the mortgagor should be
 debited in the account with the total receipts from the
 mortgaged property without reference to the stipulations
 in the mortgagee's favour in the deed. If the mortgagee
 proves that he has made payments from the income
 validly under clauses (c) and (d), to that extent I would
 hold that he has accounted for the receipts. It seems to
 me that the words " notwithstanding the provisions in the
 other clauses of this section " have been added to clause (i)
 out of abundant caution as the learned Chief Justice
 has pointed out, to make it clear that the special rule in
 that clause is to prevail against the general rule embodi-
 ed in clause (h) which enables the mortgagee to appro-
 priate the receipts himself towards his interest and
 principal. They cannot be read as extending the scope
 of the words " account for gross receipts."

One other question has been raised on the construc-
 tion of section 76, clause (i), namely, that the mortgagees
 are liable only for the total receipts or in other words
 for the total amount of rents and profits actually
 collected by them and not for those left uncollected.
 Section 76 (i) no doubt speaks only of receipts and
 under that section it will be difficult to make the
 mortgagees liable for uncollected rents and profits as the
 Subordinate Judge has done. But section 76 (b)
 imposes on the mortgagees in possession the duty of
 collecting the rents and profits and the last clause of the

section makes them liable for any loss resulting from SUBBA RAO
 their failure to perform that duty. Their liability for SARVARAYUDU
 uncollected rents and profits extends therefore only to KRISHNAN, J.
 the extent to which it can be brought within those
 provisions and does not depend on section 76 (i). No
 doubt section 77 provides that clauses (b), (d), (g) and
 (h) of section 76 shall not apply to cases where by the
 contract between the parties the mortgagees are to take
 the receipts from the mortgaged property towards
 interest as was the covenant in the contract before us.
 But when on deposit of the mortgage money in Court
 that covenant ceased to be in force, the excepted clauses
 became applicable to the mortgagees.

We have now to consider what deductions the
 mortgagees are entitled to. As regards the Government
 revenue alleged to have been paid, it seems clear they
 were entitled to pay it under section 76 (c) and on the
 view I have taken, they are entitled to credit for it in
 the mortgage account. Collection charges were also
 properly incurred by them under section 72 (a) and they
 are entitled to credit for them also. The last item is the
 charge for repairs. This seems to stand on much the
 same footing. After the deposit was made in Court and
 the covenant for taking the usufruct for interest ceased
 to be in force, section 77 ceased to apply and section
 76(d) became applicable thereafter. The mortgagees
 were therefore entitled to pay the charges for any
 necessary repairs from the rents and profits and claim
 credit in the account.

No other question has been argued in this appeal.
 A fresh finding must be called for from the Subordinate
 Judge as to the proper amount payable by the mort-
 gagees to the plaintiff for the faslis in question and
 subsequent faslis so far as necessary in the light of the
 above observations. In taking the account items 6 and

(1) (1907) I.L.R., 31 Bom., 527.

SUBBA RAO v. SARVABAYUDU KRISHNAN, J. 9 will also be included. Fresh evidence may be taken and the finding returned at the same time as the finding in the connected appeal and 10 days will be allowed for objections as in that case.

The memorandum of objections as to costs will stand over for disposal with the appeal.

In pursuance of the order contained in the above judgment, the Subordinate Judge of Rajahmundry submitted a finding that the proportionate amount of the mortgage debt chargeable upon items 6 and 9 was Rs. 17,272 and, as to mesne profits due to the plaintiff, that he was entitled to mesne profits to the amount of Rs. 31,254 and odd on all the nine items of the mortgaged property.

[These appeals and the Memorandum of Objections in Appeal No. 222 of 1919 coming on for hearing after the return of the findings of the lower Court upon the issues referred for trial, the Court (KRISHNAN and VENKATASUBBA RAO, JJ.) accepted the findings of the Subordinate Judge, but the portion of the judgment dealing with the question of mesne profits on items 6 and 9 which were purchased by the mortgagee is omitted from this report. Their Lordships continued] :—

Now as regards items 6 and 9 it is contended before us that, some of the mortgagees having purchased the equity of redemption of those items, they are not bound to give the profits of those lands to the plaintiff. Some question was raised whether this point was not covered by our previous judgment but, assuming that we did not expressly decide the question though our observations would seem to indicate that we were rather inclined to think that the defendants would be liable for such profits, we have come to the same conclusion now and hold that the defendants are liable to make good to

the plaintiff the profits of these lands as well. The plaintiff had paid into Court one lakh of rupees, the total of the mortgage amount and the plaintiff was entitled therefore, as we have already held, to get possession of the whole of the lands, and of course he would have then been able to collect the profits of all the lands. It is only as a matter of convenience and concession to the defendants we have allowed them in this suit itself to retain items 6 and 9 on payment of the proportionate amount of the mortgage debt chargeable on those items. Strictly they were bound to hand over possession of the mortgaged properties on payment of the lakh of rupees into the Court. If they did not draw out the money it was their own fault. In those circumstances it is clear that the plaintiff is entitled to the profits on these items up to the date when the defendants pay back into Court the Rs. 17,000 and odd, the debt chargeable upon these two items.

[The subsequent portions of the judgment dealing with accounts and facts have not been reported.]

These are the objections raised by the defendants in this Court. The plaintiff has also filed objections claiming that he should be granted interest on the profits from the date of collection. We think he has not established that claim. After all, what he was entitled to under section 76, clause (i) of the Transfer of Property Act is the gross receipts by the mortgagees from the date when he had paid the money into Court. We could not construe that as meaning that interest is also payable upon the amounts collected.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice
Venkatasubba Rao.

1922.
October, 11.

SANYASI RAO, MINOR BY NEXT FRIEND ATCHAYYA
(DEFENDANT), APPELLANT,

v.

VENKATA RAO, MINOR BY GUARDIAN AD LITEM CHINNAYYA
(PLAINTIFF), RESPONDENT.*

Arbitration—Award—Reference by minor's guardian in terms prejudicial to minor—Arbitrator's enquiry behind the back of parties—Misconduct of arbitrator—Invalidity of award within section 15, Schedule II, Civil Procedure Code.

A minor's mother and guardian consented to an arbitrator deciding the minor's claim to certain properties upon information and evidence however obtained by the arbitrator. The arbitrator acted on an admission from the minor's mother prejudicial to the minor, and on information obtained by him behind the back of the parties both before and after submission to the arbitration, none of which was reduced to writing.

Held, that the guardian's consent amounted to a surrender of the minor's rights and that the arbitrator's eventual decision against the minor was vitiated by his misconduct and was "invalid" within section 15 of Schedule II, Civil Procedure Code, and was not binding on the minor.

Quaere, Whether if the parties were both *sui juris* the submission and the award would be valid?

APPEAL against the order of P. NARAYANA RAO NAYUDU, Subordinate Judge of Vizagapatam, in Original Suit No. 62 of 1919.

The facts are given in the judgment of VENKATASUBBA RAO, J.

A. Krishnaswami Ayyar (with V. Govindarajachar) for appellant.—Hearing by an arbitrator of one party's

witnesses behind the back of the other is opposed to natural justice so that an award based on such a procedure is liable to be set aside without any further proof that the arbitrator's decision was as a matter of fact influenced by evidence so taken. The real test is whether there was a possibility of his being influenced, not whether he was influenced. *Walker v. Forbisher*(1), *Dobson v. Groves*(2), *Harvey v. Shelton*(3), *Andrews v. Mitchell*(4), *W. Ramsden & Co. v. Jacobs*(5), *Hari Sing v. Kankinarah Co., Ltd.*(6) and *Sm. Toolsimony Dassee v. Sm. Sudevi Dassee*(7). An arbitrator's decision, of a matter referred to him, on his own information is illegal; *Lachmi Narain v. Sheonath Pandey*(8). Even if persons who are *sui juris* can enter into a reference with a covenant not to question the award on the ground of irregular procedure or on the ground of fraud or misconduct or otherwise, no guardian can validly make such a reference on behalf of his ward. It would be fettering the exercise of a fiduciary power and a covenant imposing such a fetter is invalid and illegal; *Weller v. Ker*(9) and *Cooke, in re, Winckley v. Winterton*(10). A guardian cannot validly do anything which is beyond the ordinary conduct of litigation. *Swamirao v. The Collector of Dharwar*(11), *Rhodes v. Swithenbank*(12). Consent of the guardian to such reference constitutes such gross negligence on the part of the guardian as would vitiate the subsequent proceedings. *Lalla Sheo Churn Lal v. Ramnadan Dobey*(13), *Kanatala Venkata Krishnama Charlu v. Kandala Perundevamma*(14),

SANYASI RAO
v.
VENKATA
RAO.

(1) (1801) 6 Ves. Jun., 70; 31 E.R., 94.

(2) (1844) 6 Q.B., 637 at 647; 115 E.R., 239.

(3) (1844) 7 Beav., 455.

(4) [1905] A.C., 78 at 80.

(5) [1922] 1 K.B., 640.

(6) (1921) 34 C.L.J., 39.

(7) (1899) 3 C.W.N., 361.

(8) (1920) I.L.R., 42 All., 185.

(9) (1866) L.R., 1 H.L.Sc. App. 11.

(10) (1922) 1 Ch., 292.

(11) (1893) I.L.R., 17 Bom., 299.

(12) (1889) 22 Q.B.D., 577.

(13) (1895) I.L.R., 22 Calc., 8.

(14) (1920) 58 I.C., 593.

* Civil Miscellaneous Appeal No. 438 of 1921.

SANTASI RAO
v.
VENKATA
RAO. *Lakshminarayana Tantri v. Ramachandra Tantri*(1) and
Chanduru Punmayyah v. Rangam Viranna(2).

B. Satyanarayana for the respondent.—A guardian can refer to arbitration any matter affecting his ward. *Temmaikal v. Subbammal*(3); *In the matter of Romon Kissen Sett v. Hurrololl Sett*(4). It is not shown how the reference has been detrimental to the interests of the minor appellant. It may be that the arbitrator refused to arbitrate except on such terms and conditions as are contained in this reference. There is some evidence that he did so refuse. Under the circumstances of the case it must be taken that the guardian acted properly in making the reference. What is or is not to the benefit of the minor would depend upon the circumstances of each case.

The appellant was not called upon to reply.

JUDGMENT.

SPENCER, J. SPENCER, J.—The plaintiff, a minor represented by his natural father, sued to establish that he was the adopted son of Chintalapudi Sanyasayya. The defendant who is the minor *aurasa* son of the said Sanyasayya, represented by his mother, opposes the suit. There was a reference to arbitration without the intervention of the Court. The defendant's mother agreed to the dispute being referred to be settled by a single arbitrator and in the muchilika that was drawn up she consented to be bound by and act according to the decision the arbitrator might give either on his own information or upon other information known in the village or by examining the witnesses of both parties should he think it necessary. The agreement to refer goes on

"We shall not, before you give a decision regarding the said disputes between us, cancel this muchilika executed by us,

(1) (1919) 34 M.L.J., 71.

(3) (1864) 2 M.H.C.B., 47.

(2) (1922) 42 M.L.J., 429.

(4) (1892) I.L.R., 19 Cal., 384.

by one of us alleging among others that you are doing injustice, or that you are partial and that your arbitration is not necessary and that you should not give decision. We shall agree to your decision itself as the final decision. We shall not contend for any reason and in any manner either in Courts or in any other places that your decision is not proper and that it cannot bind us."

The arbitrator admits that he enquired of witnesses behind the back of the parties and that he collected information and obtained an admission from the defendant's mother without noting them down in writing. The question is whether the minor defendant is bound by such a surrender by his guardian of his legal right that the witnesses should be examined in the presence of the parties and whether such procedure makes the award "otherwise invalid" within the meaning of section 15 of the second schedule, Civil Procedure Code.

The Subordinate Judge quotes *Lachmi Nurain v. Sheonath Pande*(1) and observes

"If the parties agreed that there was no need for him to take any evidence and that the arbitrator should decide the disputes between them on his own knowledge, no misconduct could be implied if he decided accordingly."

That is a perfectly sound proposition provided that the parties are *sui juris*. But the question here is whether it was a reasonable and prudent act on the part of the guardian of a minor thus to commit the interests of her ward into the absolute power of a single person whom she permits to follow a procedure opposed to natural justice. It is improper on the part of an arbitrator to get information from one side in the absence of the other or to utilize information not accessible to others—vide *Re an arbitration between Gregson and Armstrong*(2), *Harvey v. Shelton*(3) and *Dobson v. Groves*(4). The

(1) (1920) I.L.R., 42 All., 185. (2) (1894) 70 L.T., 108.

(3) (1844) 7 Beav. 455 at 462 (49 E. R., 1141).

(4) (1844) 6 Q.B., 227, 115 E. R., 239.

SANYASI RAO
v.
VENKATA
RAO.
—
SPENCER, J.

arbitrator examined by the Court admits that he acted thus and it also appears from the statement of plaintiff's guardian that the arbitrator acted on information obtained before the reference. I am of opinion that his procedure vitiated the award given in the present case and that the defendant's guardian could not waive her son's right to object to irregular procedure—vide *Swamirao v. The Collector of Dharwar*(1), which follows *Rhodes v. Swithenbank*(2). I would go further and characterize her conduct as gross negligence on the part of a guardian; and it has been held by this Court in *Lakshminarayana Tantri v. Ramachandra Tantri*(3), and *Chandur Punnayyah v. Rangam Viranna*(4), that gross negligence on the part of a next friend or guardian entitles a minor to impeach an award or a judgment passed against him. The appeal is allowed and the suit is dismissed. No costs.

VENKATA-
SUBBA RAO, J.

VENKATASUBBA RAO, J.:—The appellant attacks the judgment pronounced by the Subordinate Judge giving effect to an award made in favour of the plaintiff. The facts of the case may be very briefly stated. One Sanyasayya died leaving the defendant, his natural son, and his widow Ammanna, the mother of the defendant. The plaintiff claimed that he was adopted by Sanyasayya and stated that the defendant was born subsequent to the adoption and that Ammanna denied the adoption and refused to maintain the plaintiff. The disputes were then referred to the arbitration of a gentleman by name Boddu Appanna Doragaru and the submission was executed by the natural father of the plaintiff acting on behalf of the latter and by Ammanna acting on behalf of the defendant. The arbitrator was to decide whether the plaintiff was the adopted son of Sanyasayya and to

(1) (1893) I.L.R., 17 Bom., 229.

(2) (1889) 22 Q.B.D., 577.

(3) (1918) 34 M.L.J., 71.

(4) (1922) 42 M.L.J., 429.

what rights he was entitled. The arbitrator made an enquiry and passed an award declaring that the plaintiff was the adopted son of the deceased Sanyasayya and awarded to him a fifth share of the estate. The plaintiff then made an application under paragraph 20 of schedule 2 of the Civil Procedure Code that the award be filed in Court and the application was numbered and registered as a suit and the Subordinate Judge ordered the award to be filed and pronounced judgment according to the award. The defendant contended that the award was not binding upon him for the reason *inter alia* that the arbitrator examined witnesses in the absence of the parties and instituted private enquiries and passed his judgment upon information so obtained. The Subordinate Judge refers to this contention in the following passage in his judgment:

"The arbitrator does not pretend that he reduced the evidence of the witnesses he examined to writing nor did he examine them in the presence of the parties."

This conduct on the part of the arbitrator is justified by a reference to the terms of the submission. The part of the submission material for this purpose is as follows:—

"Therefore we have executed this Yeka Panchayat Muchilika agreeing to be bound by and act according to the decision you might give either on your own information or upon other information known in the village or by examining witnesses of us both parties should you think it necessary. We shall not, before you give a decision regarding the said disputes between us, cancel this muchilika executed by us alleging that you are doing injustice or that you are partial and that your arbitration is not necessary. We shall agree to your decision itself as the final decision."

The first question that arises is, apart from any covenants in the submission, is an arbitrator under the general law entitled to act on information received in the absence of the parties or on his own knowledge of

SANYASI RAO
v.
VENKATA
RAO.
—
VENKATA-
SUBBA RAO, J.

SANYASI RAO v. VENKATA RAO. SUBHA RAO, J. the facts in regard to the matters in issue between the parties ?

The law is perfectly clear on the point that an award based on such information or knowledge is invalid. In *Harvey v. Shelton*(1), an award was set aside on the ground that the arbitrator interviewed one party in the absence of the other. Lord LANGDALE, M. R., says

"In every case in which matters are litigated, you must attend to the representation made on both sides and you must not, in the administration of justice in whatever form whether in the regularly constituted courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge which means are not known to the other side."

The Master of the Rolls also observes :

"There is no proof, nor in such a case do I apprehend there could be proof, that the result to which Mr. Wakefield came was in any way prejudicial to Mr. Harvey."

Still the award was set aside on the ground that

"it is an ordinary principle in the administration of justice that no party can be allowed to use any means whatsoever to influence the mind of the Judge which means are not known to and capable of being resisted by the other party."

This view was acted upon in numerous other cases in England and was accepted in several decisions of the Indian High Courts. See *DayaKishen v. Dharam Das*(2), *Lachmi Narain v. Sheonath Pande*(3), *Ganes Narayan Singh v. Malida Koer*(4) and *Hari Singh v. Kankinarah Co., Ltd.*(5).

It is also settled that if the parties agree that the arbitrator shall decide the dispute on his own knowledge or that there is no need for him to take any evidence, no misconduct can be imputed. See *Lakchmi Narain v. Sheonath Pande*(3). Lord DENMAN, C.J., observes in

(1) (1844) 7 Beav. 455; 49 E.R., 1141. (2) (1907) 4 A. L.J., 159.

(3) (1920) I.L.R., 42 All., 185.

(4) (1911) 13 C. L.J., 399.

(5) (1921) 34 C.L.J., 89.

Dobson v. Groves(1), that no information ought to be received by the arbitrator in the absence of the parties unless the arbitrator has an express power reserved for that purpose or the parties agree that he shall exercise it. If the parties to this reference were *sui juris* the arbitrator would have been justified in acting as he did and his award would not be liable to be set aside on the ground of misconduct. But on behalf of the defendant who is a minor his mother and natural guardian consented to the terms contained in the reference and it cannot be held that the act of the mother is beneficial to the defendant. Such covenants are sometimes found in submissions executed by parties who are *sui juris*. But when a guardian is acting on behalf of a minor I do not think it can be said that in any case it will be in the interests of the minor for the guardian to consent to the arbitrator possessing such wide powers. However no special grounds have been shown to exist in this particular case which would justify the empowering of the arbitrator to depart from the usual rules of procedure indispensable to the impartial administration of justice.

There is one matter to which I must advert. It has been said that the arbitrator after making enquiries of other persons, interviewed the defendant's mother herself and that she admitted the plaintiff's adoption. In regard to this, it is necessary to point out that the arbitrator in his award does not refer to this incident and does not profess to base his judgment upon this admission. What the actual statement made by the mother, if any, was, there is no means of knowing because it has not been recorded. In what circumstance the admission was made we are not in a position to say.

(1) (1844) 6 Q.B., 637 (115 E.R., 239).

SANYASI RAO
v.
VENKATA
RAO.
—
VENKATA-
SUBHA RAO, J.

SANTASI RAO
v.
VENKATA
RAO.
—
VENKATA-
SUBBA RAO, J.

Whether the admission was qualified or absolute does not appear. Whether she admitted the factum of adoption or the validity of the adoption we have no means to find out. It must be remembered that the so-called admission is not a statement by one of the parties to the suit but only a statement made by the guardian of one of the parties. Such a statement could not be conclusive against the defendant as an admission. In any event, it is settled law that if evidence is improperly admitted the courts will not consider the question whether such evidence had or had not an effect upon the arbitrator's mind, and in this case the arbitrator having made private enquiries and obtained information, his award is thereby vitiated. In *Dobson v. Groves*(1), Lord DENMAN, C.J., observes :

"When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biassed, there is a sufficient objection."

In *Walker v. Forbisher*(2), the arbitrator swore that though he heard certain persons in the absence of one of the parties, the information had no effect upon his award. Lord Chancellor ELDON said :

"I believe him. He is a most respectable man. But I cannot from respect for any man do that which I cannot reconcile to general principles. A Judge must not take upon himself to say whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice but upon general principles it cannot be supported."

I am constrained for these reasons to set aside the award and allow the appeal. From the judgment of the Subordinate Judge it is clear that the arbitrator acted honestly and no prejudice or desire to do wrong

(1) (1844) 6 Q.B., 637 ; 115 E.R., 239. (2) (1801) 6 Ves. J., 70 ; 31 E.R., 943.

can be imputed to him. But nevertheless, the procedure adopted by him is illegal and his acts amount to legal misconduct and his award is therefore bad. I agree with the order proposed by my learned brother.

N.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Wallace.

SANKARANARAYANA PILLAI (PLAINTIFF),
APPELLANT,

v.

RAMASWAMIAH PILLAI AND THREE OTHERS (DEFENDANTS),
RESPONDENTS. *

Appeal—Right of appeal, when parties agree to Court deciding a case like an arbitrator.

If parties agree to a Court proceeding without jurisdiction *extra cursum curiae*, i.e. (beyond the ordinary powers of a Court) the parties cannot thereafter appeal from the decision of the Court. But where the Court has jurisdiction over a cause, mere agreement between the parties that the Court may decide the cause disregarding rules of procedure and evidence without giving up a right of appeal either expressly or by necessary implication, does not deprive the parties of their right of appeal. *Pisani v. Attorney-General for Gibraltar* (1874) L.R., 5 P.C., 516, *Burgess v. Morton*, (1896) A.C., 136, *Sayad Zain v. Kalabhai*, (1899) I.L.R., 23 Bom., 752, followed.

The reasoning in *Nidamarthi Mukkanti v. Thammana Ram-ayya* (1903) I.L.R., 26 Mad., 76 and *Chengalroya Chetty v. Raghava Ramanuja Doss*, (1919) 37 M.L.J., 100, not followed.

SECOND APPEAL against the decree of C. V. KRISHNASWAMI AYYAR, acting Subordinate Judge of Tuticorin, in Appeal Suit No. 58 of 1919, preferred against the decree of N. SUBRAHMANYA AYYAR, District Munsif of Srivaikuntam, in Original Suit No. 181 of 1917.

* Second Appeal No. 2046 of 1920.

SANTASI RAO
v.
VENKATA
RAO.
—
VENKATA-
SUBBA RAO, J.

1922
December 14

The facts appear from the judgment of his Lordship the Chief Justice.

K. S. Sankara Ayyar for *T. R. Venkatarama Sastri* for appellant.—The agreement in this case is merely that the Court may decide questions of fact for itself by a personal inspection of the locality without taking any evidence. There is no agreement either express or necessarily implied giving up the right of appeal which is an important right and which cannot be lightly presumed to have been given up. Where a Court has no jurisdiction over a cause but is asked by parties to decide it, the Court acts *extra cursum curiæ* [(i.e.,) outside its ordinary powers] as an arbitrator and in such cases there is no right of appeal; but where there is jurisdiction mere agreement that the Court may decide the cause disregarding formalities of procedure and evidence, as the parties are entitled to agree, without an abandonment of the right of appeal, the right of appeal is not taken away; *Pisani v. Attorney-General for Gibraltar*(1), *Burgess v. Morton*(2). Unless there is an agreement actually constituting the Court as an arbitrator, the decision of the Court is no award within the second Schedule of the Civil Procedure Code and the right of appeal exists. The reasoning to the contrary in *Nidamarthi Mukkanti v. Thammana Ramayya*(3) and *Chengalroya Chetty v. Rajhava Ramanuja Doss*(4) is wrong. Whether an agreement really gives up a right of appeal is a question of its construction; *Jamnadas v. Gordhandas*(5), *Rao Bahadur Raoji v. Govind*(6). An estoppel not to appeal cannot be founded from the wording of the agreement in this case which is the only agreement between the parties.

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

(3) (1903) I.L.R., 26 Mad., 76.

(5) (1896) 8 P. J. Bom. H. C., 616.

(2) (1896) A.C., 136.

(4) (1918) 37 M.L.J., 100.

(6) (1897) 9 P. J. Bom. H.C., 271.

K. R. Rangaswami Ayyangar for respondent:—When parties to a suit agree as in this case that the presiding Judge may adopt a special procedure in the trial of the case and that they will be bound by his decision they thereby constitute the Judge a quasi-arbitrator and the effect of such an agreement is to make the decision unappealable. This has always been the law in England from *Harrison v. Wright*(1) to *Burgess v. Morton*(2) which is the leading case; see *Halsbury*, volume 1, page 442; *Russel on Arbitration*, pages 35 and 36, *Redman*, page 47. This has been followed uniformly by all the Courts in India. See *Chengalroya Chetty v. Rajhava Ramanuja Doss*(3), *Chinna Venkatasami Naicken v. Venkatasami Naicken*(4), *Sayad Zain v. Kalabhai*(5), *Baikanta Nath Goswami v. Sita Nath Goswami*(6), *In re Nimmagadda Peda Naganna*(7), *Nidamarthi Mukkanti v. Thammana Ramayya*(8), and *Shahzadi Begam v. Muhammad Ibrahim*(9). Such a case is not strictly an actual reference to arbitration as provided for by the second schedule of Civil Procedure Code and the finality rests on the general principles of estoppel. Parties ought not to be allowed to invite the Court to go out of its way and adopt a special procedure for their benefit, and after agreeing to abide by its decision resile subsequently if they are dissatisfied with it. The agreement “to abide by the decision” is virtually an agreement not to appeal. Otherwise there is no meaning in it; *Shahzadi Begam v. Muhammad Ibrahim*(9). The addition or omission of the words “final” or “conclusive” cannot make any difference. Nor does it make any

(1) (1845) 13 M. and W., 816.

(3) (1919) 37 M.L.J., 100.

(5) (1899) I.L.R., 23 Bom., 752.

(7) (1915) 26 I.C., 355.

(2) [1896] A.C., 136.

(4) (1919) I.L.R., 42 Mad., 625.

(6) (1911) I.L.R., 38 Cal., 421.

(8) (1903) I.L.R., 26 Mad., 76.

(9) (1921) 19 A.L.J., 14.

SANKARA-
NARAYANA
v.
RAMA-
SWAMIAH.
—
SCHWABE,
C.J.

difference that the suit involved not only questions of fact but also questions of law.

JUDGMENT.

SCHWABE, C.J.—This case is of considerable importance because circumstances of a similar nature have been before the Courts on several occasions and they have given rise to some considerable divergence of opinion.

The facts are that a suit came before the District Munsif as to whether the defendants had unlawfully diverted some water from the land of the plaintiff and so injured his land. When the case came before the District Munsif certain plans and documents were put before him and then the plaintiff and some of the defendants agreed in writing and the pleader acting for the other defendants, I have no doubt, agreed to what appeared in writing that the learned Munsif should himself go and inspect the land. The terms of the agreement signed by the plaintiff and two of the defendants are contained in an affidavit which ran as follows:—

“We agree to the matter being decided according to the opinion which the Court might entertain on the aforesaid local inspection without going into any further evidence.”

The plaintiff endorsed on that affidavit an agreement to abide by any decision which the Court may arrive at after making a local inspection of the land and perusing certain plans and other records. The learned Munsif agreed to act on that agreement and went to the place some seven miles off two days later. The case was again before the Court when some documents were put in according to the plaintiff's statement and the judgment was given and a decree passed in the ordinary form of a decree.

The issues in the suit were issues of fact and issues of law. The learned Munsif found the facts in a certain way and in view of those facts gave a finding. In due course there was an appeal to the Subordinate Judge and he expressed his view that the learned Munsif was wrong in law. He held that no appeal lay to him by reason of the agreement referred to above. He purported to follow *Chengalroya Chetti v. Raghava Ramannuja Doss*(1) where a very similar agreement was held to result in the decree being not appealable on the grounds, as I understand it, that the decree was not a decree of a Judge as such but as an arbitrator. The law, as I understand it, is this. Where parties agree to a Court proceeding without jurisdiction *extra cursum curie*, as it has been put, the parties cannot appeal from the decision of the Court. The parties in fact may agree not to appeal from the decision of the Court and such agreement will be inferred from the fact that they agreed to the Court taking a course which is altogether outside the ordinary powers of the Court. But this does not apply to mere deviations from procedure if the Court has jurisdiction over the subject unless there is an attempt to give the Court a jurisdiction it does not possess, so that a Court of appeal cannot properly review the decision. Such deviations do not deprive either of the parties of the right of appeal; *Pisani v. Attorney-General for Gibraltar*(2); see also the decision of the House of Lords in *Burgess v. Morton*(3). So in these cases the question to be decided is whether an agreement between the parties does result in the Court assuming jurisdiction which otherwise it would not have or involves the Court in going so outside its ordinary course of procedure that

SANKARA-
NARAYANA
v.
RAMA-
SWAMIAH.
—
SCHWABE,
C.J.

(1) (1919) 37 M.L.J., 100.

(2) (1874) L.R., 5 P. C., 516.

(3) [1896] A.C., 136.

SANKARA-
NARAYANA
v.
RAMA-
SWAMIAH.SCHWABE,
C.J.

it is impossible for the Appellate Court properly to review its decision.

Further, the giving up of a right of appeal is giving up a very important right possessed by all litigants and in my judgment, such right of appeal can only be given up by a clear agreement. It may be that an agreement is in such terms that the Court will be driven to imply a term that the right of appeal was given up but a Court would not imply such a term unless it was driven to do so.

Turning to the agreement in this case, I can find nothing in it to show an intention to give up a right of appeal. I think it merely means that the parties agree to the evidence being taken in an irregular way or in an unusual way, viz., by the Munsif going to the place and seeing for himself what had happened and what was happening and not relying on what witnesses in Court told him had happened or was happening and the parties agreed to the case being decided in that way and to abide by the decision. If an appeal had been attempted on the ground that the learned Munsif took a wrong view of the facts, that his eyes have deceived him or that the procedure of dispensing with the evidence was irregular, I can well understand the argument that the parties had agreed not to take any such point, and indeed I think that would be right. But, I can find nothing in the words used to indicate that the parties intended to give up all rights of appeal on questions of law which might arise or did arise in the case. I do not think it is right to say that, even though there was an agreement of the kind indicated, the Court becomes an arbitrator, and in my judgment in order to make a Court arbitrator, there must be a clear agreement to that effect as indeed there was in *Sayad Zain v. Kalabhai* (1). A Court

(1) (1899) I.L.R., 23 Bom., 752.

SANKARA-
NARAYANA
v.
RAMA-
SWAMIAH.
—
SCHWABE,
C.J.

acting *extra cursum curiæ* has been said to act as quasi-arbitrator which may be a convenient expression but it does not involve an application of the second schedule to the Code of Civil Procedure which is applicable to arbitrators. Such agreement merely involves that the parties who agree expressly or impliedly not to appeal will not be allowed by the Court to appeal. I do not think it is necessary to go in detail into the cases that have been cited but would observe that it would follow from what I have said that I do not agree with the reasoning in *Nidamarthi Mukkanti v. Thammana Ramayya*(1) and *Chengalroya Chetti v. Raghava Ramanuja Doss* (2). It may be that the result of those decisions is correct. *Rao Bahadur Raoji v. Govind*(3) is a case where the agreement stated that the decision was to be final and conclusive. I do not think it is necessary to consider whether the mere inclusion of those words is sufficient, for in this case there are no words to that effect. In *Jamnadas v. Gordhandas*(4) where the words were,

“we are not going to produce evidence, and agree to the decision which the Court shall pass after inspection,”

it was held, and I think rightly, that the Munsif did not thereby become an arbitrator and that an appeal lay from his decision. In *Chengalroya Chetty v. Raghava Ramanuja Doss*(2), where the terms of the agreement were,

“we shall abide by any kind of decree passed by the Courts after a personal inspection of the place in dispute,”

it was held that the District Munsif acted thereafter as arbitrator and that he acted illegally and with material irregularity in accepting the position of an arbitrator as all the parties had not consented.

It follows from what I have said above that I do not agree with the finding that he acted as arbitrator, nor do

(1) (1903) I.L.R., 26 Mad., 76. (2) (1919) 37 M.L.J., 100.
(3) (1897) 9 P.J. Bom. H.C., 271. (4) (1896) 8 P.J. Bom. H.C., 615.

SANKARA-
NARAYANA
v.
RAMA-
SWAMIAH.

SCHWABE,
O.J.

WALLACE, J.

I agree that the agreement before the Court in this case amounted to an agreement that the Court should act *extra cursum curiæ*.

This appeal must be allowed with costs and the matter must go back to be disposed of on the merits.

WALLACE, J.—I agree. The respondent rests his case not on the footing that the District Munsif's decree was really an arbitration award but on the principle of estoppel. In order that there may be an estoppel prohibiting an appeal by either party, there must be an agreement implicit or explicit not to appeal. I think the words of the plaintiff's and respondents' own undertakings, read together as a contract, are enough to dispel any such idea, and to show that what the parties agreed to was nothing more than that the finality of the District Munsif's decision by which they agreed to abide was limited to the point which the District Munsif, in the absence of other evidence, was required to settle by personal inspection, that is, the point of fact necessary for the decision of the first issue, and the agreement went no further. Now it is open to the parties in an ordinary suit tried by the ordinary procedure to dispense with evidence, and it is open to the Judge on application by the parties to inspect the place, and what he sees on his inspection is evidence within the meaning of the Indian Evidence Act, on which he may decide issues in the suit and this and no more is what I conceive the original Court has in this case done. Hence I can see nothing in the agreement between the parties which puts the suit *extra cursum curiæ*.

I agree therefore that no estoppel exists except on the point of fact decided by the Munsif by his inspection of the ground. As to whether on the facts he found he came to a wrong decision on the law, I cannot see how there can be any estoppel of the right of appeal. If

there was no agreement not to appeal, there cannot possibly be any question of the appellant intentionally permitting the respondents to believe that he had waived that right, and to act according to that belief. I therefore agree in the order proposed by the learned Chief Justice.

SANKARA-
NARAYANA
v.
RAMA-
SWAMIAH.
WALLACE, J.

N.R.

APPELLATE CIVIL

Before Mr. Justice Devadoss.

FRASER AND ROSS (PETITIONERS), PETITIONERS,

v.

KRISHNASWAMI AIYER AND OTHERS (PLAINTIFFS
AND DEFENDANTS,) RESPONDENTS.*

1922
May, 5.

Suit for sale—Final decree—Order for sale—Execution of decree by sale ordered—Partition suit in another Court between the mortgagors—Receiver appointed in such suit after final decree in mortgage suit—Application by Receiver after order for sale to the executing Court to be made a party—Leave of the latter Court for execution, necessity for—Duty of decree-holder to apply for leave—Duty of Court to make Receiver a party.

A mortgagee-decree holder is bound to apply to the Court appointing a Receiver of the mortgaged properties in another suit, for leave to execute his decree, and cannot proceed to sell the mortgaged property in execution of his decree without such leave.

Where, after final decree had been passed and order for sale made by a Court in a suit for sale on a mortgage, a Receiver, appointed by another Court, subsequent to such decree, in a suit between the mortgagors for partition of their family properties including the mortgaged properties, applied to the former Court to be made a party to the execution proceedings, prior to sale ;

* Civil Revision Petition No. 323 of 1922.

FRASER AND
ROSS
v.
KRISHNA-
SWAMI
AIYER.

Held, that the Court should have made the Receiver a party to the execution proceedings.

Mrs. Levina Ashton v. Madhabmoni Dasi, (1910) 14 C.W.N., 560, followed.

Jogendranath Gossain v. Debendranath Gossain, (1899) I.L.R., 26 Calc., 127, distinguished.

PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the Order of V. R. KUPPUSWAMI AYYAR, Subordinate Judge of Mayavaram, in Execution Application No. 130 of 1922, in Execution Petition No. 182 of 1921, in Original Suit No. 111 of 1916, on the file of the Court of Subordinate Judge of Kumbakonam.

The first respondent instituted a suit for sale on his mortgage executed by the members of the family of respondents 2 to 12, in the Sub-Court of Kumbakonam in Original Suit No. 111 of 1916; the final decree was passed on 13th September 1920; and an order for sale was made on 7th November 1921. The sale was fixed for 30th January 1922 and was adjourned to 20th March 1922. Meantime, a suit for partition of their family properties including the mortgaged properties was instituted by some of the members of the family of the mortgagors against the others in the High Court in Civil Suit No. 655 of 1921, in which the petitioners were appointed by the Trial Judge on 27th January 1922 as Receivers of all the family properties, the order of the Trial Judge being confirmed by the Court of Appeal on 16th February 1922. On 20th March 1922, the Receivers applied to the Sub-Court of Mayavaram (before which the proceedings in execution were pending) to be made parties to the proceedings in Execution Petition No. 182 of 1921. The Subordinate Judge refused to make them parties and rejected their petition. The sale was proceeded with and concluded on 27th March 1922, the mortgaged property being sold for Rs. 1,10,000 to the thirteenth

FRASER AND
ROSS
v.
KRISHNA-
SWAMI
AIYER.

respondent herein. Against the order rejecting their petition, the Receivers preferred this Civil Revision Petition.

S. Doraiswami Ayyar for the petitioners.

T. R. Venkatarama Sastri, A. Krishnaswami Ayyar and *Sivaramakrishna Ayyar* for the respondents.

JUDGMENT.

This is an application under section 115, Civil Procedure Code, of the Receivers appointed by the High Court in Civil Suit No. 655 of 1921 to revise the order of the Subordinate Judge of Mayavaram refusing to make the petitioners parties to execution proceedings pending before him (Execution Application No. 130 of 1922). This petition came up for admission on 1st May 1922 with an application for stay of proceedings. As the contesting respondent appeared in Court and offered to take notice, I directed the petition to be heard on 3rd May 1922.

The facts of the case are that the plaintiff in Original Suit No. 111 of 1916 on the file of the Kumbakonam Subordinate Judge's Court obtained a decree on a simple mortgage bond against the members of the well-known Nadar family of Tanjore on 12th April 1917, and on 13th September 1920 a final decree was passed in the suit and on 7th November 1921 an order for sale was made. The sale was fixed for 30th January 1922 and it was adjourned to 20th March 1922. Disputes having arisen between the members of the family, Civil Suit No. 655 of 1921 was filed in the High Court for a partition of the family property. The present petitioners were appointed Receivers on 27th January 1922 and the order appointing them was appealed against and it came up before the Court of Appeal on 16th February 1922, and it is now

FRASER AND
ROSS
v.
KRISHNA-
SWAMI
AIYER.

settled that the Receivers should continue to be in possession of the properties. On 20th March 1922 the Receivers applied to the Mayavaram Sub-Court for being made parties to the execution proceedings and the Subordinate Judge declined to make them parties. The sale was proceeded with and was concluded on 27th March 1922 and the mortgaged property was sold for Rs. 1,10,000, to the thirteenth respondent hereto.

It is urged on behalf of the petitioners that the lower Court acted without jurisdiction in refusing to make them parties and as the properties of the Nadar family are all in the hands of the Receivers no sale could take place without their being on record. It is further argued that the Receivers could have paid off this debt or at least could have secured a better price for the properties which they value at Rs. 2,00,000—*vide* paragraph 12 of the affidavit. The property now brought to sale by the Subordinate Judge's Court of Mayavaram is one of the items of properties which are the subject-matter of the suit now pending before the High Court.

Mr. Doraiswami Ayyar who appears for the petitioners relies on *Mrs. Levina Ashton v. Madhabmoni Dasi*(1) and contends that it was the duty of the Court to make the Receivers parties to the execution proceedings. It may be taken as well settled law that there can be no attachment and sale of the property in the possession of a Receiver, in execution of a money decree without the leave of the Court appointing the Receiver. To quote the learned Judges of the Calcutta High Court :

"The general rule is well settled that property in the hands of a Receiver is exempt from judicial process, except of course to the extent permitted by the appointing Court. *Try v. Try*(2), *De Winton v. The Mayor of Brecon*(3) and *Lane v.*

(1) (1910) 14 C.W.N., 560.

(2) (1851) 13 Beav., 422; 51 E.R., 183.

(3) (1860) 28 Beav., 200; 54 E.R., 342.

FRASER AND
ROSS
v.
KRISHNA-
SWAMI
AIYER.

Sterne.(1) It has even been affirmed that though an attachment was levied on property before the appointment of the Receiver, it is within the sound discretion of the appointing Court to refuse to permit a sale of the property thereunder. On this principle it has been held that property in the hands of a Receiver, though subject to a paramount judgment, cannot be sold under execution without leave of Court. A purchaser of such property at an execution sale buys at his peril, and the sale may be cancelled upon an appropriate application to the execution Court."

It is unnecessary to examine the various authorities relied on by the learned Judges of the Calcutta High Court. The question here is whether a mortgagee-decree-holder is bound to apply to the Court appointing the Receiver for redress or whether he can proceed to sell the mortgaged property in execution of a decree for sale. The only authority that seems to support the contention of the respondent is the judgment of a single Judge of the Calcutta High Court reported in *Jogendra Nath Gossain v. Debendra Nath Gossain*(2). The facts of that case are that pending partition proceedings and after the appointment of the Receiver two of the co-sharers mortgaged their interest in the undivided properties. Some of the mortgaged properties being within the jurisdiction of the Alipore Court, the mortgagee instituted his suit in that Court and sought to bring to sale the particular properties mentioned in the rule, some of which were situated in Calcutta. The judgment-debtors, after obtaining several postponements of the sale for the purpose of paying off the judgment-creditor, applied to restrain the mortgagee from proceeding to a sale on the ground that to sell the mortgaged properties without the leave or sanction of the High Court would amount to contempt of Court. Mr. Justice SALE in discharging the rule observed as follows,

(1) (1862) 3 Giff., 629; 66 E.R., 559.

(2) (1899) I.L.R., 26 Calo., 127.

FRASER AND
ROSS
v.
KRISHNA-
SWAMI
AIYER

"This is not a case where the judgment-creditor is proceeding to execute his decree by attachment. This Court does not permit and will not recognize attachment of the properties in the hands of its Receiver, under process issued without sanction or leave by inferior Courts, the reason being that a proceeding by way of attachment is an interference with the possession of the Receiver. But as the element of interference with the possession of the Receiver is absent from the present case, there is no reason for restraining the sale. The case of *Hem Chunder Chunder v. Prankristo Chunder*(1), is distinguishable inasmuch as the judgment-creditor in that case if he had proceeded to execute his decree in the mufassal Court, could have done so only by way of attachment and sale. Under the Transfer of Property Act no attachment is necessary and the reason for the course adopted in the former case does not now exist."

The reasoning of the learned Judge is that as no attachment was necessary in a mortgage suit the sale could be proceeded with notwithstanding the fact that the property was in the possession of the Receivers. In that case only two of the co-sharers had mortgaged their interest. In the present case all the sharers were parties to the mortgage and all their properties are in the hands of the Receivers. Moreover the Receivers were appointed for the purpose of safeguarding the interests of all the parties to the suit and if an inferior Court is allowed to sell the property merely because there is a mortgage decree the object of appointing a Receiver in a partition suit would become infructuous, and it cannot be the policy of the law to allow the property to be sold by different Courts when that property is in the hands of a Receiver. The mere fact that there is a mortgage on the property would not take the case out of the general rule that no process can be permitted in respect of the properties in the hands of

(1) (1876) I.L.R., 1 Cal., 403.

FRASER AND
ROSS
v.
KRISHNA-
SWAMI
AIYER.

the Receiver without the sanction of the Court which appoints him. Moreover after attachment and sale the possession of the property sold cannot be obtained by an auction-purchaser without applying to the Court which appointed the Receiver. That being so, with very great respect to the learned Judge, it is difficult to follow the distinction which he makes between execution in respect of a simple money decree and execution in pursuance of a mortgage decree. The possession of the Receiver being the possession of the Court, no Court can interfere with that possession in any manner without the leave of that Court. The property being in *custodia legis* it would require very strong authority for holding that a mortgagee could set at naught the ordinary principle which prevents process being issued against the property in the hands of the Receiver, without the leave of the Court appointing him, simply because there is a mortgage in his favour. Mr. Venkatarama Sastri who appears for one of the members of the family relies upon various passages in Kerr on Receivers and High on Receivers, and it is unnecessary for me to refer to them. One passage from a well-known book is sufficient for the present purpose :

"Property in the possession of a Receiver is in the custody of the law and cannot be seized under writ of attachment of execution. It is in the discretion of the Court to refuse to permit a sale of the property in its possession under a judgment though the levy was made before the Receiver was appointed." Alderson on Receivers, page 229.

It is argued by Mr. Krishnaswami Ayyar who appears for the auction-purchaser that there is no provision of law for making the receiver a party to execution proceedings, and that Order I, rule 10, has no application to execution proceedings, that section 141 Civil Procedure Code, cannot help the petitioners on the principle of the

decision of the Privy Council in *Thakur Prasad v. Fakir-ullah*(1) and that section 146 can have no application to the present case. The fallacy of this argument lies in the assumption that the Receiver is a new party. When a Receiver is appointed by a Court he takes possession of the property on behalf of the Court and he is not a party in the sense in which Order I, rule 10, is understood. The Court having taken possession of the properties it appoints an officer to look after the properties on behalf of all the parties and a Receiver is not a legal representative of any party; nor is he a new party to the proceedings. But he represents all the parties for some purpose and his duty is that which is assigned to him by the Court. It is further contended by Mr. Krishnaswami Ayyar that the Receiver has to respect the orders made before his appointment and relies upon *Bryant v. Bull* and *Bull v. Bryant*(2). Vice-Chancellor BACON in delivering judgment says :

“The appointment of a receiver is a matter which does not concern mortgagees or prior incumbrancers, for a Receiver in the exercise of his authority will be obliged to respect former orders of the Court; and the prior incumbrancers will be at liberty to take such proceedings on behalf of their own interests as they may think fit so that that circumstance occasions no kind of difficulty.”

From this passage it cannot be inferred that a mortgagee can proceed with the execution of a decree in his favour without the leave of the Court appointing the Receiver. *The Duke of Buccleuch*(3) is quoted by Mr. Doraiswami Ayyar for the purpose of showing that the execution proceedings are a continuation of the suit and any party can be added at any stage of the proceedings. That case has no application to the present case as in that case assessment of damages was left over and until

the assessment of damages was completed it could not be said that the suit had come to a termination. But in this case the mortgage suit of the Kumbakonam Court had come to a termination when the final decree was passed and there was no more to be done in the suit. But, as I hold that the Receivers are not new parties to the suit, I think Order I, rule 10, does not stand in the way of their being made parties. Considering the fact that the very object of the appointment of the Receivers was to safeguard the interests of all the members of the family and to liquidate the debts in the best manner possible it was the duty of the Subordinate Judge of Mayavaram to have made them parties to the execution proceedings, for the sale itself is liable to be defeated for want of necessary parties and in any case possession of the properties sold by Court could not be obtained without the leave of the High Court which appointed the Receivers. Considering the complications that might arise hereafter, I consider that the Subordinate Judge acted with material irregularity in refusing to make the Receivers parties to the execution proceedings. I therefore set aside the order of the Subordinate Judge and direct him to make the Receivers parties to the execution proceedings and proceed according to law. I allow the petition with costs. The thirteenth respondent will pay the costs of this petition.

K.R.

(1) (1893) I.L.R., 17 All., 106.

(2) 10 Ch.D., 155.

(3) [1892] P. 201.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Ramesam.

NATARAJA PILLAI (PETITIONER), PETITIONER,

v.

RANGASWAMI PILLAI AND THREE OTHERS (COUNTER-
PETITIONERS), RESPONDENTS.*

Order under section 144, Criminal Procedure Code (V of 1898)
—Disobedience of order—Sanction for prosecution—Proper
appellate authority under section 195, Criminal Procedure
Code, to revoke sanction.

A Subdivisional Magistrate passed an order under section 144, Criminal Procedure Code, prohibiting certain persons from interfering with a religious ceremony. On disobedience of that order he sanctioned their prosecution for an offence under section 188, Indian Penal Code ;

Held that the Magistrate was not, when passing the order under section 144, Criminal Procedure Code, acting as a "Court," within the meaning of clause (7) of section 195 of the Criminal Procedure Code, but was only acting as a public servant ; hence the proper appellate authority to revoke the sanction was not the Sessions Court but the District Magistrate as provided by clause 6 of section 195. *Arunachallam Pillai v. Ponnuswamy*, (1918) 35 M.L.J., 454 not followed. *Sundaram v. The Queen*, (1883) 1 L.R., 6 Mad., 203 at 222 and *Abbas Ali Chowdhry v. Illim Meah* (1870) 14 W.R. (Crl.), 46 followed.

PETITION praying that in the circumstances stated therein the High Court will be pleased to set aside the order of J. I. SMITH, acting Sessions Judge of the West Tanjore Division, Tanjore, in Criminal Miscellaneous Petition No. 11 of 1922 setting aside the order of M. R. SANKARANARAYANA AYYAR, Subdivisional Magistrate of Tanjore, in his proceedings, dated the 8th December 1921, according sanction to prosecute the respondents herein for an offence under section 188, Indian Penal Code.

* Criminal Miscellaneous Petition No. 459 of 1922.

The facts are given in the judgment.

K. S. Jayarama Ayyar for the petitioner.

S. Subrahmanya Ayyar for the respondents.

The Public Prosecutor (J. C. Adam) on behalf of the Crown.

The Court delivered the following.

JUDGMENT.

The Subdivisional Magistrate, Tanjore, passed an order under section 144, Criminal Procedure Code, prohibiting certain persons (respondents before us) from interference with the performance of a certain religious ceremony. Respondents are said to have disobeyed this order : and the Subdivisional Magistrate thereupon sanctioned their prosecution for an offence under section 188, Indian Penal Code. The Sessions Judge, purporting to act under sub-section 6 of section 195 revoked his sanction.

We are now asked to revise his order : and the first ground taken is that, as the case falls under clause (a) of sub-section (1) of section 195, the power of revocation lay with the District Magistrate, not with the Sessions Judge, and that the latter's order was without jurisdiction.

The question has to be decided with reference to the provisions of sub-sections (6) and (7) of section 195. There is no doubt that, if the general principle of sub-section (6) is applied, the proper authority to revoke the sanction is the District Magistrate—vide section 17(1) and (5), Criminal Procedure Code. But it is contended that the Subdivisional Magistrate must be regarded as a "Court," when issuing an order under section 144 and (consequently) when sanctioning prosecution for breach of the same, and that it follows that the special test laid down in sub-section (7) for determining the

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI.

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI

subordination of "Courts" in this connection applies. If so, the proper authority to revoke is undeniably the Sessions Judge.

It is, we think, reasonable to hold that if the order under section 144 is passed by a person acting as a Court, that person must also be treated as a Court, when he sanctions prosecution for disobedience of the same. It is also possible that the "Public servant" referred to in sections 172 to 188, Indian Penal Code, might in certain circumstances be a "Court." Whether in the latter event, sub-section (7) should apply, or whether the application of that sub-section is confined to cases falling under clauses (b) and (c) of sub-section (1) seems to us doubtful. But we are inclined to hold that a Magistrate passing an order under section 144, Criminal Procedure Code, does so only as a "Public servant" and not as a "Court." We are aware that an opposite view has been taken by a bench of this Court in *Arunachallam Pillai v. Ponnuswamy*(1). We have carefully considered the judgment in that case which appears to proceed on the footing that an order under section 144 is an order of a Court. NAPIER, J. says such orders "have always been treated as judicial orders" which the learned judge appears to treat as identical with orders of a Court. With all respect we do not think this view is correct. A Full Bench of this Court in *Sundram v. The Queen*(2), a leading case on orders under this section, has specifically laid down that

"It should always be borne in mind that orders under section 518 of the Code of Criminal Procedure of 1872 corresponding with section 144 of the present Code are not judicial proceedings;"

(1) (1918) 35 M.L.J., 454.

(2) (1883) I.L.R., 6 Mad., 203 (F.B.)

and the same view has been taken by a Full Bench of the Calcutta High Court in *Abbas Ali Chowdhry v. Illim Meah*(1) of section 62 of the Code of 1861. That section has been elaborated, and its operation in some ways restricted in the corresponding sections of the subsequent Codes. But we find nothing in the changes which would render less applicable the considered opinions of the learned judges in that case.

This view seems to be supported by a consideration of section 144. This section merely empowers certain Magistrates to pass temporary orders in urgent cases. These orders need not be based on any record outside the Magistrate's own knowledge or observation; and it is not even necessary that the party against whom it is directed should first be given a chance of being heard. To take a simple instance, a Magistrate observing with his own eyes (without complaint or report) that certain property was in a condition imminently dangerous to human life, might immediately and without waiting to hear what any human being had to say, issue an order under this section and, provided his order was in writing, set out the material facts and was properly served, it would be a valid order, disobedience to which would be an offence under section 188, Indian Penal Code. The remedy of a party injuriously affected is to get it set aside under sub-section (4). Can such an order be treated as an order of a Court, or, to use another phrase, "a judicial order"? If not, is its nature altered because the Magistrate *may* hold an enquiry and record and consider evidence before issuing it?

Orders under section 145, Criminal Procedure Code, which must be preceded by an enquiry in the presence of parties who are entitled to adduce evidence, stand

(1) (1870) 14 W.R. (Ori.), 46.

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI.

on a different footing, though orders under both sections are withdrawn from the ordinary revisional jurisdiction of this Court—vide section 435 (3), Criminal Procedure Code.

In our opinion a Magistrate passing an order under section 144, Criminal Procedure Code, is not acting as a "Court," and sub-section (7) of section 195 is inapplicable to such a case.

In considering the intention of the legislature it may not be out of place to refer to the improbability that, while securing orders under section 144 from interference except by the successor of the Magistrate passing them or by some superior Magistrate (vide clause 4 quoted above), the Sessions Judge should have been given the power to render the order practically nugatory by declining to allow a prosecution for disobedience to it.

We would also refer to the judgment of a Bench of this Court reported in *Sankaram Aiyar v. Sakkarappa Mudaliyar*(1), in which the learned judges took a more extreme view than that we have expressed above, and held, in effect, that all sanction orders passed under clause (a) of sub-section (1) must be taken to be passed by a public servant who was not acting as a Court.

In our opinion the orders of the Sessions Judge must be held to be without jurisdiction, and accordingly set aside.

N.E.

(1) (1873) 2 Weir, 155.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan.

SREERAMULU AND FOUR OTHERS (ACCUSED), PETITIONERS,

1923,
September
7.

v.

THE KING-EMPEROR (RESPONDENT.)*

Indian Penal Code (Act XLV of 1860), ss. 147 and 323, Conviction under—Sec. 160, alteration into—Whether permissible.

A conviction under sections 147 and 323, Indian Penal Code, cannot be altered on appeal into one under section 160, as the offences are different and it is not a case of convicting for a minor offence where the major offence is not proved.

Sabir Husain v. Emperor (19 A.L.J., 487), not followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of B. V. SREENHARI RAO NAYUDU, Subdivisional Magistrate of Ellore Division, in Criminal Appeal No. 30 of 1922 against the judgment of C. KANAKACHALA RAO, Stationary Sub-Magistrate of Ellore, in Calendar Case No. 161 of 1922.

The material facts are set out in the judgment.

V. Suryanarayana for petitioners.

V. L. Ethiraj for the Public Prosecutor for the Crown.

JUDGMENT.

In this case five accused apply in revision to this Court to set aside their convictions by the appellate Magistrate under section 160, Indian Penal Code. They were originally convicted under sections 147 and 323, Indian Penal Code by the trying Magistrate but on appeal

* Criminal Revision Case No. 976 of 1922.

SREERAMULU
v.
KING
EMPEROR.

the Appellate Magistrate acquitted the first accused altogether and changed the conviction of the five accused under sections 147 and 323 Indian Penal Code, into one under section 160, Indian Penal Code, acquitting them of the offences which they were originally charged with. It seems quite clear to my mind that the charge under sections 147 and 323, Indian Penal Code, cannot be altered into one under section 160 without a proper charge being framed and the accused tried again on the latter charge. It is not a case where an accused charged for a major offence is convicted of a minor offence where the major offence is not proved. The offence under section 160, Indian Penal Code, is different from those under the sections under which the accused were originally charged, for under section 160 to establish an offence of affray it must be shown that the fight took place in a public place and that there was also a disturbance of the public peace. Neither of these facts are in evidence in this case. The Public Prosecutor has drawn my attention to a case in *Sabir Husain v. Emperor* (1) in which a learned Judge of the Allahabad High Court converted a conviction under sections 147 and 323, Indian Penal Code, into one under section 160 in revision. But in doing so, he does not seem to have considered the propriety of altering the conviction in that manner and whether it was right to do so without giving the accused an opportunity to meet the charge under section 160. No reasons are given and there is no discussion in the judgment as to whether such alteration could legally be made. The learned Judge thinking that on the evidence in the case an offence under section 160 was made out, convicted the accused under that section in revision. I am unable to follow the

(1) (1921) 19 A.L.J., 487.

precedent that has been so created. I am of opinion that the alteration of the charge under sections 147 and 323 Indian Penal Code, into one under section 160 is not justifiable in this case. The accused must, therefore, be acquitted of that charge. In the result all the accused succeed in revision. Their convictions and sentences must be set aside and the fines, if paid, refunded.

D.A.R.

SREERAMULU
v.
KING
EMPEROR.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

DORASWAMI AND THREE OTHERS (DEFENDANTS
3 AND 4, LEGAL REPRESENTATIVES OF SECOND DEFENDANT
AND 5), APPELLANTS,

v.

CHIDAMBARAM PILLAI AND FOUR OTHERS (PLAINTIFF
AND DEFENDANTS 6 AND 7, LEGAL REPRESENTATIVES OF
EIGHTH DEFENDANT), RESPONDENTS.*

*Order XXI, rule 22 (2) Civil Procedure Code (Act V of 1908)—
Notice of court sale to judgment-debtor—Death of judgment-debtor before sale and no notice to legal representatives—
Sale not a nullity—Sale by Hindu widow of several properties to discharge usufructuary mortgage on some—Validity of, on reversioner.*

Where a judgment-debtor died after proclamation of sale, and his legal representatives were not brought on record before the sale actually took place.

Held that the sale was not a nullity and was not liable to be set aside. *Malkarjun v. Narhari*, (1901) I.L.R., 25 Bom., 337 (P.C.) and *Sheo Prasad v. Hira Lal*, (1890) I.L.R., 12 All., 440 (F.B.) followed. *Ragunathaswamy Iyengar v. Gopaul Rao*, (1921) 41 M.L.J., 547 not followed.

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.

Where a Hindu widow sold several items of property in order to discharge a usufructuary mortgage existing on only some of them, wherein the usufruct was stipulated to cover the interest due,

Held that in the absence of any other necessity, the sale was not binding on the reversioner.

SECOND Appeal against the decree of C. R. VENKATESWARA AYYAR, Additional Subordinate Judge of Trichinopoly, in Appeal Suit No. 351 of 1920, preferred against the decree of P. VENKATARAMA AYYAR, District Munsif of Karur, in Original Suit No. 497 of 1916.

The facts are given in the judgment.

S. Srinivasa Ayyangar with *L. S. Viraraghava Ayyar* for appellants.—As the decree-holder had taken every necessary step before the sale, such as notice to the judgment-debtor of the intended sale, the Court sale is not a nullity for want of notice to the legal representative of the judgment-debtor. Want of notice is at best only an irregularity. The previous conflict of opinion on this point was set at rest by the decision of *Malkarjun v. Narhari*(1) and by express enactment of Order XXI, rule 2 (2) dispensing with the necessity of notice in cases like this. Hence the latest decision of the Madras High Court, viz., *Ragunathaswamy Iyengar v. Gopaul Rao*(2), which has simply followed all the previous decisions of this High Court is wrong. Even prior to *Malkarjun v. Narhari*(1), *Sheo Prasad v. Hira Lal*(3), *Premmoyi Choudhrani v. Preonath Dhur*(4), *Narayana Kothan v. Kaliasundaram Pillai*(5) and *JARDINE, J. in Aba v. Dhondubai*(6) upheld such sales, holding the want of notice to be only an irregularity. Later decisions to the same effect are *Bepin Behary Bera*

(1) (1901) I.L.R., 25 Bom., 337 (P.C.)

(3) (1890) I.L.R., 12 All., 440 (F.B.)

(5) (1896) I.L.R., 19 Mad., 219.

(2) (1921) 41 M.L.J., 547.

(4) (1896) I.L.R., 23 Calc., 636.

(6) (1895) I.L.R., 19 Bom., 276.

v. Sasi Bhushan Dattu(1), *Jagadish Bhattacharjee v. Bama Sundari Dasya*(2). As regards the private sale, as the major portion of the consideration is binding on the reversioner, the sale should not be annulled but must be upheld by asking the vendee to pay the balance; *Felaram Roy v. Bagalanand Banerjee*(3).

S. Muthiah Mudaliyar for respondents.—Want of notice makes the sale a nullity. This is the view both before and after the new Civil Procedure Code. He relied on *Ragunathaswamy Iyengar v. Gopaul Rao*(4) and the cases therein referred to, of Madras and other High Courts and also on *Shyam Mandal v. Satinath Banerjee*(5), *Raghunath Das v. Sundar Das Khetri*(6) and *Srinivasa Aiyangar v. Narayana Aiyangar*(7). He distinguished the cases quoted by the appellant. As for the private sale by the widow it should be annulled, as there was no necessity or pressure for it and as it was found to be fraudulent.

JUDGEMENT.

SPENCER, J.—This suit was brought by one of the reversioners to the estate of one Muruga Pillai for a declaration on behalf of himself and defendants 6 and 7 that the private sale of items 1 to 8 in the plaint schedule and the Court sale of items 9 to 11 during the lifetime of Muruga Pillai's widow (first defendant) are not binding beyond the lifetime of the widow, who died during the pendency of the appeal in the lower Appellate Court. The District Munsif dismissed the suit *in toto*.

In appeal the Additional Subordinate Judge held that the Court sale of items 9 to 11 was void and gave the plaintiff a decree accordingly. He held that the private sale of items 1 to 8 by the widow under Exhibit

(1) (1913) 18 C.W.N., 766.

(3) (1910) 14 C.W.N., 895.

(5) (1917) I.L.R., 44 Calc., 854.

(2) (1919) 23 C.W.N., 608.

(4) (1921) 41 M.L.J., 547.

(6) (1915) I.L.R., 42 Calc., 72 (P.C.)

(7) (1917) 33 M.L.J., 539.

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.
SPENCER, J.

B was binding on the reversioners to the extent of Rupees 1,000 only and made that amount a charge on these items excepting item 5 and half of item 8.

The learned Subordinate Judge's reason for holding the court sale to be void was that it took place on January 17th, 1916, after Muruga Pillai had died on December 16th, 1915, and that no representatives of the deceased owner were brought on the record. He was of opinion that the Court had no jurisdiction to sell the properties of a deceased person without any representatives being brought on the record and in support of this view he cited *Ramasami v. Bagirathi*(1), *Krishnayya v. Unnissa Begam*(2), *Groves v. Administrator-General*(3) and *Rayarappan Nambiar v. Malikandi Aketh Mayan*(4). Besides these cases there is a recent decision of a Bench of this Court in *Ragunathaswamy Iyengar v. Gopaul Rao*(5) in which, RAMESAM, J., in holding that a sale in execution carried out against a dead person (or "no person" as he says) was void and should be regarded as a nullity and had not got to be set aside, observed that it was

"opposed to all notions of justice to allow legal proceedings to be taken against an estate without there being some one on the record to represent the estate."

I presume that the learned Judge when he used these words had in his mind the principle of *audi alteram partem* which in *Narayana Kothan v. Kaliasundaram Pillai*(6) was spoken of as a principle which could not justifiably be disregarded except where it was necessary to do so in order to protect *bona fide* purchasers at Court sales. If any order is passed by an executing Court against a party without notice being given to him of the application which gave rise to the proceedings, I entirely agree that the party behind whose back such proceedings are

(1) (1883) I.L.R., 8 Mad., 180.
(3) (1899) I.L.R., 22 Mad., 119.
(5) (1921) 41 M.L.J., 547.

(2) (1902) I.L.R., 15 Mad., 399.
(4) (1914) 26 M.L.J., 267.
(6) (1896) I.L.R., 19 Mad., 219.

taken, will not be bound by the order. Further, if process is issued without the notice, which order XXI, rule 22, prescribes in cases where the judgment-debtor is dead or the decree is more than one year old, I consider that the want of notice might constitute a material irregularity entitling a person whose interests have been affected, to apply either under order XXI, rule 90, or by suit to have any sale of property that has been held upon the decree-holder's application set aside. But if the decree-holder has done all that the law requires him to do and if the judgment-debtor or one of the several judgment-debtors where there are more than one, happens to die during the course of the execution of the sale warrant, or, it may be, while the auctioneer is actually holding the auction, with due respect I fail to see how the sale is invalidated by the accident of the owner's death before the sale is completed. It has been suggested that as soon as a judgment-debtor dies his interest in the property passes to his legal representatives, and that the law nowhere permits the sale of a dead man's assets. On the other hand sections 50 and 53, Civil Procedure Code, speak of "the property of the deceased" and section 50 provides for decrees being executed against such property; it may not be accurate to speak of a dead man as owning property; it is well understood that in law there are estates of deceased persons. The definition of "legal representatives" in section 2, clause 11, Civil Procedure Code, speaks of such estates. So long as rule 22, clause 2, permits an executing Court to dispense with notice for reasons to be recorded, it is difficult to see how the issue of process without notice and without recording reasons would affect the jurisdiction of the Court or would be more than an irregularity. The operation of Order XXII, rule 4, which provides for the legal representatives of defendants who die during the pendency of a suit being

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.
SPENCER, J.

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.

SPENCER, J.

brought on the record has been excluded from execution proceedings. So a decree once passed does not become barred or incapable of being executed by reason of the death of a judgment-debtor, nor do execution proceedings abate owing to the failure of the decree-holder to bring the legal representatives of a judgment-debtor on the record. Order XXI, rule 22, is the only provision which deals with legal representatives of parties to decrees and that only applies to the commencement of execution proceedings. The legal representatives of judgment-debtors, who die during the course of the processes of Court being executed, are able to watch public sales without being personally served with notice. When the law only prescribes the issue of notice to them at the commencement of execution proceedings, they cannot claim as a matter of right, to have fresh notice if their representation of the deceased's estate commences during the progress of the carrying out of the processes of the Court, nor are they justified in treating such processes as invalid for want of jurisdiction on the part of the Court and its officers. In my opinion the view taken in *Ragunathaswamy Iyengar v. Gopaul Rao*(1) that a sale in execution carried out against a dead person is *per se* void is based on a fallacy, and I think we are bound to follow the judgment of the Privy Council in *Malkarjun v. Narhari*(2) in preference to the decision of a Bench of our own Court. Their Lordships distinctly say that a judicial sale is not a nullity if it is held without a notice being given to the proper legal representative of a deceased person. They observe that to treat such an error (that of serving with notice a person who did not legally represent the estate) as destroying the jurisdiction of the Court is calculated to introduce great confusion into the

(1) (1921) 41 M.L.J., 547.

(2) (1901) I.L.R., 25 Bom., 337 (P.C.).

administration of the law. They add that strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do. They point out that when a Court tries a suit without a debtor or his estate being subject to its decree it actually never possesses the jurisdiction which it purports to exercise, but it is a different matter when the Court has by its decrees established the debtor's liability and is in the process of working it out against his estate.

My learned brother RAMESAM, J., distinguished this case on the facts from those in *Ragunathaswamy Iyengar v. Gopaul Rao*(1). He observed that in *Malkarjun v. Narhari*(2) an application was made to bring the legal representatives of the deceased judgment-debtor on the record, the Court received the application and did issue notice to the party named as the heir. Only it issued notice to the wrong heir. But in the case before him he said that the procedure laid down by the Code was not followed. He does not state what procedure he means, but from what precedes he can only mean that general obligation of bringing some one on the record at every stage to represent the estate of the judgment-debtor. I have tried to show already by a reference to Order XXII, rules 4 and 12, Civil Procedure Code, that there is no statutory obligation of such a kind cast upon decree-holders during the processual stages of execution of their decrees. The above are my reasons for considering that the Subordinate Judge was wrong in reversing the decree of the District Munsif and that we should now restore the trial Court's decree so far as these items are concerned. But some of the reported decisions relied on by the Subordinate Judge and some quoted in the arguments in this Court remain to be noticed.

(1) (1921) 41 M.L.J., 547.

(2) (1901) I.L.R., 25 Bom., 337 (P.C.).

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI

SPENCER, J.

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.
SPENCER, J.

The judgment in *Ramasami v. Bagirathi*(1) is a very short one. The learned Judges do not say that the sale was a nullity, but they set it aside on the ground that the further process of sale could not legally issue without some representative of the deceased judgment-debtor being on the record. In revision they reversed the order of the Subordinate Court which confirmed a sale under section 312 of the Old Code (Order XXI, rule 92 of the present Code). It is not clear from the report whether the order for sale was passed behind the back of the legal representatives. If that was the case they naturally objected under section 311 to its legality.

Biyyakka v. Fakira(2) is an authority for the proposition that if a judgment-debtor dies between an order for possession being made under section 318, Civil Procedure Code (now Order XXI, rule 95) and being executed there is no necessity to bring his legal representatives on record between that date and the date of executing the order. This supports the view that I have taken, the difference being only in the nature of the decree to be executed.

In *Krishnayya v. Unnissa Begam*(3) the omission to bring legal representatives on the record is treated not as making the sale void but as being a material irregularity which the learned Judges say must necessarily cause substantial injury to the legal representative. Why this is necessary is not made clear.

In *Narayana Kothan v. Kalianasundaram Pillai*(4) the confirmation of a sale without notice to a judgment-debtor who had been declared insane after the decree and before the sale is treated as an irregularity but not as making the sale void. In *Groves v. Administrator-*

(1) (1883) I.L.R., 6 Mad., 180.

(3) (1892) I.L.R., 15 Mad., 399.

(2) (1889) I.L.R., 12 Mad., 211.

(4) (1896) I.L.R., 19 Mad., 219.

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.
SPENCER, J.

General(1) BODDAM, J., repeats the fallacy about the sale of a dead man's property passing no rights to the purchaser but in the result the sale was not treated as a nullity, but it was set aside in revision of an order passed in execution. *Rayarappan Nambiar v. Malikandi Aketh Mayan*(2) follows *Ramasami v. Bagirathi*(3) and *Groves v. Administrator-General*(1) and attempts to distinguish *Malkarjun v. Narhari*(4) as being a case of a *bona fide* purchaser. It is not clear whether there was an order for sale made in this case without notice to the legal representative of the deceased mortgagor. If an order of Court was made without notice to the party concerned, the decision may be right.

Sheo Prasad v. Hira Lal(5), the judgment of a Full Bench of five Judges (one dissenting), dissents from *Ramasami v. Bagirathi*(3) and refutes the theory that the death of a judgment-debtor would cause an attachment to abate or make it necessary for a judgment-creditor to take steps to keep the attachment alive. The observations of EDGAR, C.J., at page 446 are very pertinent to the present case. He says

"I do not find in the Code of Civil Procedure any provision requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment To hold otherwise would be to impose upon the purchaser at an execution sale under a decree, the necessity of ascertaining before he paid the purchase money whether the judgment-debtor was alive at the actual moment when the sale took place or the risk of losing the purchase money which he paid and the property in respect of the purchase of which that money was paid, and would in any event render it difficult for such a purchaser to maintain his title under his sale certificate if subsequently challenged by the legal representative of the deceased judgment-debtor, the exact date of whose death it might be impossible for the purchaser to ascertain or prove."

(1) (1899) I.L.R., 22 Mad., 119.

(3) (1883) I.L.R., 6 Mad., 180.

(2) (1914) 26 M.L.J., 267.

(4) (1901) I.L.R., 25 Bom., 337 (P.C.).

(5) (1890) I.L.R., 12 All., 440 (F.B.).

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.

SPENCER, J.

In *Aba v. Dhondubai*(1) one of the learned Judges, JARDINE, J., follows *Sheo Prasad v. Hira Lal*(2) and the other, RANADE, J., prefers the Madras view. This was prior to the Privy Council decision in *Malkarjun v. Narhari*(3) which settled the question.

Gopal Chunder Chatterjee v. Gunamoni Dasi(4) treats the issue of a notice to the legal representative of a deceased judgment-debtor as a condition precedent to the issue of a warrant of execution. This is the view about jurisdiction in execution matters which the Privy Council condemn as being calculated to introduce great confusion into the administration of the law.

Premmoyi Choudhrani v. Preonath Dhur(5) follows *Sheo Prasad v. Hira Lal*(2). The learned Judges observe that the omission to place on the record the heir of a judgment-debtor who died during the course of execution did not vitiate the sale but was at most an irregularity.

In *Khiarajmal v. Daim*(6) there was a sale of the estate of a deceased man which estate was not represented in the suit itself. This made the sale of property without jurisdiction and null and void. This is not an authority on the legal consequences of failure to get representation of a deceased judgment-debtor's estate in execution, but it belongs to the first class of cases described in *Malkarjun v. Narhari*(3) where a defendant does not come under the jurisdiction of the Court that tries the suit and passes the decree.

Bepin Behary Bera v. Sasi Bhushan Datta(7) is another case that follows *Sheo Prasad v. Hira Lal*(2) and *Malkarjun v. Narhari*(3). A sale held when the

(1) (1895) I.L.R., 19 Bom., 276.

(2) (1890) I.L.R., 12 All., 440 (F.B.).

(3) (1901) I.L.R., 25 Bom., 337 (P.C.).

(4) (1893) I.L.R., 20 Calc., 370.

(5) (1896) I.L.R., 23 Calc., 636.

(6) (1905) I.L.R., 32 Calc., 296 (P.C.).

(7) (1913) 18 C.W.N., 766.

court was aware of the death of one of the judgment-debtors was treated not as a nullity but as voidable at the instance of the persons affected. It again was followed in *Jagadish Bhattacharjee v. Bama Sundari Das*(1) where the judgment-debtor died after attachment but before the sale and the sale held without his legal representative being brought on the record was held to be not necessarily invalid but open to attack on the ground of irregularity.

In *Ruhini Nandan Ghose v. Rajendra Nath Ghose*(2) the principal defendant died before the preliminary decree was made absolute in a mortgage suit and his legal representative was not brought on the record. The High Court observed that the executing Court had no jurisdiction to sell the property and the decree or sale would be a nullity as against persons who were not properly represented and might be disregarded. The want of jurisdiction here was in the Court that tried the suit and not in the executing Court and therefore it was a radical defect like that which was in *Khiarajmal v. Daim*(3).

These decisions show that, apart from the Privy Council decision in *Malkarjun v. Narhari*(4) the balance of authority is in favour of the view taken in *Sheo Prasad v. Hira Lal*(5) and against that in *Ramasami v. Bagirathi*(6), *Rayarappan Nambiar v. Malikandi Aketh Mayan*(7) and *Ragunathaswami Iyengar v. Gopaul Rao*(8).

As regards items 1 to 8 excluding item 5 which was found by the District Munsif to belong to the 2nd defendant the Subordinate Judge found that the sale of these items was not for a proper price and that out of the sale price of Rs. 1,740 only Rs. 1,000 was received

(1) (1919) 23 C.W.N., 608.

(2) (1920) 61 I.C., 291.

(3) (1905) I.L.R., 32 Calc., 296 (P.C.).

(4) (1901) I.L.R., 25 Bom., 337 (P.C.).

(5) (1890) I.L.R., 12 All., 410 (F.B.).

(6) (1883) I.L.R., 6 Mad., 180.

(7) (1914) 26 M.L.J., 267.

(8) (1921) 41 M.L.J., 547.

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.

SPENCER, J.

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.
SPENCER, J. for purposes binding on the estate. I do not think that sales should be revised long after they have taken place on a mere estimate as to what price the property sold ought to have fetched. The mortgages on items 2, 3, 6, 7 were usufructuary and there was no necessity to sell items 1, 4, 5, 8 which were not encumbered in order to discharge usufructuary mortgages. When the mortgagee gets the usufruct of the land in lieu of interest the debt does not by lapse of time become an increased burden on the land, but if such mortgaged property is sold outright the reversioners are deprived of the chance of redeeming it. The sale of these items was evidently neither a prudent nor a *bona fide* transaction. The Second Appeal is dismissed as regards this part of the claim. Each side will pay and receive proportionate costs throughout. The memorandum of objections is not pressed and is dismissed with costs.

KRISHNAN, J. KRISHNAN, J.—This Second Appeal arises from a suit brought by a reversioner to have it declared that certain alienations of properties of one Muruga Pillai, the last male owner, after his death, are not binding on the reversioner. One of the sales so challenged is a Court sale of items 9 to 11 in execution of a decree obtained against Muruga Pillai. These items had been attached in execution of that decree and ordered to be sold by the Court and the proclamation for sale had been also issued during the lifetime of Muruga Pillai. Muruga Pillai seems to have died sometime thereafter and just before the auction sale actually took place; and no one had been added to the record as his legal representative. His widow the 1st defendant was the proper party to be so added. The second defendant who, though a reversioner himself, was not a party to that decree, purchased the properties in Court auction and he claims to be a *bona fide* purchaser for value and that claim has not been

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.
KRISHNAN, J. displaced by any finding of the lower Appellate Court. No applications under rule 89, 90, or 91, of Order XXI, Civil Procedure Code, having been made the sale was in due course confirmed under rule 92 and a sale certificate issued to the second defendant. The legal representative, the widow, has never challenged the validity of the sale but the reversioner, the plaintiff, contends that the sale was a nullity and was void because at the time it took place the estate was not represented by any one on the record. The Subordinate Judge has upheld his contention and declared the sale void, following *Ramasami v. Bagirathi*(1) *Krishnayya v. Unnissa Begam*(2) *Groves v. Administrator-General*(3) and *Rayarappan Nambiar v. Malikandi Aketh Mayan*(4). It may be mentioned that there is further a recent ruling of a bench of this Court in *Ragunathaswamy Iyengar v. Gopaul Rao*(5) in support of his view where it was held that

“a sale in execution carried out against a dead person (or no person) is void and should be regarded as a nullity and is not got to be set aside.”

This extreme view introduces a most serious uncertainty into Court sales and will tend to further dissuade bidders from coming forward in Court auctions, a result to be avoided if possible. As pointed out by my learned brother it does not seem to be in accord with the principles laid down by the Privy Council in *Malkarjun v. Narhari*(6) and we must of course follow the latter in preference to the decisions of our own court. In *Ragunathaswami Iyengar v. Gopaul Rao*(5) RAMESAM J., has tried to distinguish this case by confining its effect to its own facts; the principles laid down in that case do not however seem to me to be affected by the particular facts there. Their Lordships say that

(1) (1883) I.L.R., 8 Mad., 180.

(3) (1899) I.L.R., 22 Mad., 119.

(5) (1921) 41 M.L.J., 547.

(2) (1892) I.L.R., 15 Mad., 399.

(4) (1914) 26 M.L.J., 267.

(6) (1901) I.L.R., 25 Bom., 337 (P.O.).

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.

KRISHNAN, J.

"if the Court took proceedings wholly without jurisdiction the plaintiffs (the legal representatives) would remain unaffected by them but a decree had been made and partially though to a minute extent executed against Nagappa (the original debtor); and his estate was liable to make good the balance, and that to enforce this liability was within the jurisdiction of the Court."

Then they go on to distinguish the case of *Baswantapa Shidapa v. Ramu and Malkhana*(1) on the ground that the decree there was itself a nullity. They say that in that case

"neither the debtor nor his estate was ever made subject to the decree, the liability was never established and the process of execution had nothing to rest upon" and they point out that

"it is a different matter when the Court has by its decree established the debtor's liability and is in the process of working it out against the estate."

The case of *Khia Rajmal v. Daim*(2) relied on by RAMESAM, J., in *Ragunathaswamy Iyengar v. Gopaul Rao* (3) above cited is a similar case where the decree was itself void. Their Lordships proceed to say in *Malkarjun v. Narhari*(4) that

"it was necessary for the plaintiffs to set aside the sale and that the omission to serve notice on the proper legal representative was a serious irregularity."

Now under Order XXI, Rule 22, Civil Procedure Code, a proviso has been added enabling the Court in certain circumstances to dispense with such notice so that even the non-service of notice may not always be an irregularity. It is clear from *Malkarjun v. Narhari* (4) that when the Court has jurisdiction its sale cannot be treated as a nullity but can only be set aside, if at all, for irregularity. I am inclined to agree with the view of MAHOMOOD, J., in the Full Bench case in *Sheo Prasad v. Hira Lal*(5) that failure to add

(1) (1885) I.L.R., 9 Bom., 86.

(3) (1921) 41 M.L.J., 547.

(2) (1905) I.L.R., 32 Cal., 298 (P.C.).

(4) (1901) I.L.R., 25 Bom., 337 (P.C.).

(5) (1890) I.L.R., 12 All., 440 (F.B.).

the legal representative of a deceased judgment-debtor is only an irregularity and that to set aside a sale on the ground of irregularity it must be shown that it has led to substantial loss or injury, otherwise the sale must be supported more especially when the purchaser is a *bona fide* purchaser for value. I am unable to adopt the view in *Krishnayya v. Unnissa Begam*(1) that the failure to add the legal representative to the record is a material irregularity which necessarily leads to substantial injury. Such injury must be proved whether the sale is sought to be set aside by an application under Order XXI, Rule 90, or by suit.

That the failure to add the legal representative of the deceased judgment-debtor to the record after attachment is only an irregularity is the view accepted by the other High Courts and the weight of authority as my learned brother who has dealt with the authorities cited at length points out, is in favour of that view. I should have however in view of the Madras cases cited referred the point to a Full Bench, but the ruling of the Privy Council in *Malkarjun v. Narhari*(2) renders it unnecessary to do so.

Now in the case before us though the suit has been brought within one year as provided in article 12, it has not been established that any substantial injury has been caused by the failure to add the widow to the execution record. As already stated she does not dispute and she has never disputed the validity of the sale nor has she asserted that by not being added to the record she has been injured by losing any opportunity that she otherwise would have had for getting the sale set aside. For the above reasons I agree with my learned brother that the decree of the Sub-Judge must be reversed and that

(1) (1892) I.L.R., 15 Mad., 399.

(2) (1901) I.L.R., 25 Bom., 337 (P.C.).

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.

KRISHNAN, J.

DORASWAMI
v.
CHIDAM-
BARAM
PILLAI.

of the District Munsif restored with regard to items 9 to 11.

The next question is as regards items 1, 2, 3, 4, 5, 6, 7 and half of item 8. These items were sold by the widow to the second defendant for Rs. 1,000, Rs. 875 were due under a usufructuary mortgage by Muruga Pillai himself on items 2, 3, 6 and 7 and Rs. 125 were required for first defendant's maintenance. The Subordinate Judge finds that the consideration of Rs. 1,000 is binding on the estate. But he holds that the sale was fraudulent as it was for a very inadequate price, the properties being worth at least Rs. 1,740, at the time of the sale and as it was made by the widow very shortly after her husband's death and in favour of her brother's brother-in-law, the second defendant. There was no real necessity to sell all the 7 items to pay off a usufructuary mortgage on only 4 of them. I think therefore that the Subordinate Judge was right in setting aside the sale as fraudulent and giving the second defendant a charge for Rs. 1,000, on the properties. It was not argued that the sale should be upheld as the whole of the consideration for it under the sale-deed had been found to be for purposes binding on the estate; but it was only contended that the purchaser should be allowed to pay Rs. 740 more, the deficiency in the price to the reversioners and the sale should thereupon be affirmed. I do not think that that can be done as the sale is shown to be a fraudulent one; this is not the case of a sale being a proper sale, where a small portion of the consideration is shown to have been not binding on the reversioners.

I agree in dismissing the Second Appeal as regards these items and to the order of costs proposed by my learned brother and also the dismissal of the memorandum of objections with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Hughes.

SELLAPPA GOUNDAN (FIRST DEFENDANT—FIRST
RESPONDENT), APPELLANT,

1923,
July 24.

v.

MASA NAIKEN AND OTHERS (PLAINTIFFS AND SECOND
DEFENDANT—APPELLANTS AND SECOND RESPONDENT),
RESPONDENTS.*

Minors—Guardian ad litem—Adverse interest—Decree against minors, effect of—Suit against a Hindu father and his minor sons—Suit on mortgage bond executed by the father, not for an antecedent debt—Father appointed by Court as guardian ad litem—Appointment, whether proper and legal—Father's interest whether adverse to sons' interests—Decree and sale in execution of entire mortgaged property—Decree whether binding on sons' shares—Previous decree and sale in a Sub-Court—Subsequent suit to declare decree invalid, instituted in a District Munsif's Court, whether competent—Jurisdiction of latter Court—Right of purchaser to get father's share in this suit without being driven to a fresh suit.

A minor represented in a suit by a guardian *ad litem* whose interest is adverse to that of the minor, is not legally represented at all; *Rashid-Un-Nisa v. Muhammad Ismail Khan* (1909) I.L.R., 31 All., 572 (P.C.), relied on.

In a suit for sale instituted in a Sub-Court against a Hindu father and his minor sons on a mortgage bond executed by the father, the father was appointed by the Court as guardian *ad litem* of his minor sons. A decree was passed against the entire mortgaged property which was sold in execution and purchased by the decree-holder. On a suit being instituted on behalf of the minor sons by their mother as their next friend in a District Munsif's Court against their father and the auction purchaser, for a declaration that the decree and sale in the

* Second Appeal No. 368 of 1921.

SELLAPPA
GOUNDAN
v.
MAMA
NAIKEN.

previous suit were invalid against them and their shares in the family property,

Held, that the interest of the father was adverse to that of the minor sons, and that the appointment of the father as guardian was improper and illegal;

that the decree and sale were consequently invalid so far as the shares of the minor sons were concerned;

that the District Munsif's Court had jurisdiction to entertain the suit for a declaration that the decree passed by the Sub-Court was invalid; *Arunachelam Chetty v. Rangasami Pillai* (1915) I.L.R., 38 Mad., 922 (F.B.), followed; and

that the purchaser was entitled to ask for partition without being driven to a fresh suit to secure at least the share of the father in the family properties; *Davud Bivi Ammal v. Radhakrishna Aiyer* (1923) 44 M.L.J., 309, followed.

SECOND APPEAL against the decree of P. SUBBAYYA MUDALIYAR, the Subordinate Judge of Coimbatore, in Appeal Suit No. 80 of 1920, preferred against the decree of C. S. DEVARAJA AYYAR, the Additional District Munsif of Coimbatore, in Original Suit No. 552 of 1918.

The plaintiffs, who were the minor sons of the second defendant, instituted the present suit in the Additional District Munsif's Court of Coimbatore for a declaration that a decree passed in favour of the first defendant herein by the Subordinate Judge of Coimbatore in Original Suit No. 156 of 1915 against their father and themselves who were minors and represented by their father as their guardian *ad litem* in that suit, was invalid as against them, and that the subsequent sale in favour of the first defendant in execution of the decree was also invalid and did not operate on their shares in the family property. The previous suit was to recover money on a mortgage bond executed to the first defendant by the plaintiff's father; the bond was not for an antecedent debt but the amount was utilized, for purchase of new lands. The father was duly appointed by the Sub-Court as guardian *ad litem* for the minor sons who were co-defendants in that suit. It appeared that

the father had engaged a pleader for himself and his minor sons; but the pleader did not take, on behalf of the minor sons, the plea that the mortgage bond was not binding on them as it was not for an antecedent debt. The hypothecated family properties were sold in execution of the decree and the entire properties were purchased by the decree-holder who was the first defendant in the present suit. The District Munsif held that the previous decree was binding on the minor sons and dismissed the suit. On appeal the Subordinate Judge held that the minors were not properly represented in the previous suit, that the decree and sale were not binding on the minor sons, and that their shares in the mortgaged properties were not affected by the decree and sale, and he accordingly granted a declaration and an injunction in favour of the plaintiffs so far as they and their shares in the properties were concerned in the decree. The first defendant preferred this second appeal.

A. Krishnaswami Ayyar for appellant.

T. Narasimha Ayyangar for respondents.

JUDGMENT.

ODGERS, J.—This was a suit shortly for a declaration that the decree in Original Suit No. 156 of 1915 on the file of the Sub-Court of Coimbatore is not binding on the plaintiffs in this suit. The lower Appellate Court has found that the decree is not binding on the ground that the minor plaintiffs were not properly represented in that suit by their father as guardian *ad litem* as the interest of the latter was adverse to theirs. I think the lower Appellate Court further intended in paragraph 21 of the judgment to find that the guardian did not raise

SELLAPPA
GOUNDAN
v.
MAMA
NAIKEN.

ODGERS, J.

SELLAPPA
GOUNDAN
v.
MASA
NAIKEN.
ODGES, J.

the proper defences to the suit on the minors' behalf—thus imputing negligence to him in the conduct of the suit. The appeal is by the first defendant as purchaser in 1918 and the decree-holder in Original Suit No. 156 of 1915 and the plaintiffs are the sons of the second defendant. The suit, Original Suit No. 156 of 1915, was in respect of a mortgage (Exhibit C) and the money advanced was utilized for the purchase of new lands—this is admitted. The suit was brought in 1915 and the final decree (Exhibit E) was passed in February 1917. It is against the father and his minor sons (inter alia) and directs sale of the property and if necessary a personal decree against the father, the first defendant in that suit. The written statement of the first defendant (Exhibit B) settled by his vakil Mr. N. Ramaswami Iyer, alleges discharge and points as to payment of interest. The point made against defendant No. 1 is that he ought to have pleaded that the mortgage was not binding on the minors—not being for an antecedent debt. Leading up to the appointment of the father as guardian we have Exhibit F the plaintiff's affidavit asking for the appointment of the father and stating that he had no interest adverse to that of his minor sons. He was duly appointed by the Court. On 19th December 1915 the defendant on behalf of himself, and his minor sons, appointed vakil, Mr. N. Ramaswami Iyer to appear for him. The present suit was filed on 5th July 1918 by the minors through their mother, none of them having yet attained majority. Mr. A. Krishnaswami Iyer's first point for the appellant is that there was no disability on the part of the father and that even if he was not a proper person to be appointed on the ground of interest, his appointment was a mere irregularity. Some of the cases cited for appellant turn on the distinction as to whether the proceedings against the minors where their

guardians' interest is adverse are mere nullities or only voidable. (See per SADASIVA AYYAR, J., in Appeals Nos. 347 and 338 of 1919 (unreported) and *Kuppuswami Ayyangar v. Kamalammal*(1), *Mannu Lal v. Ghulam Abbas*(2). This distinction is without importance in the present case.

In Second Appeal No. 407 of 1919 to which my learned brother was a party it was held on the facts that there was no divergence of interest and in Second Appeal No. 1092 of 1918 to which he was also a party, it was held, relying on *Rashid-un-nisa v. Muhammad Ismail Khan*(3), that representation by a guardian whose interest is adverse is no representation at all. It is true that the Privy Council in *Walian v. Banke Behari Pershad Singh*(4) decided that defects in procedure are mere irregularities. In that case there was no formal order of appointment and neither the minors nor their mother were served with notice and in *Mannu Lal v. Ghulam Abbas*(2) the absence of an affidavit was held not sufficient to render the proceedings illegal and void. In *Beni Prasad v. Lajja Ram*(5) it was held that a decree against the minor properly represented cannot be set aside save on proof of fraud or collusion by the guardian. See also *Raghubar Dyal Sahu v. Bhikya Lal Misser*(6). Here in my opinion we have much more than a mere irregularity. It was improper and in fact illegal to appoint the father guardian at all. *Murlidhar v. Pitambar Lal*(7) and *Ramjiban v. Dhiku*(8). It was manifestly to his interest to throw as much of the burden of the mortgage debt as he could on the minors' shares and to exonerate his own share pro-

SELLAPPA
GOUNDAN
v.
MASA
NAIKEN.
ODGES, J.

(1) (1920) I.L.R., 43 Mad., 842. (2) (1910) I.L.R., 32 All., 287 (P.C.).

(3) (1909) I.L.R., 31 All., 572 (P.C.).

(4) (1903) I.L.R., 30 Cal., 1021 (P.C.).

(5) (1916) I.L.R., 38 All., 452.

(6) (1886) I.L.R., 12 Cal., 69.

(7) (1922) I.L.R., 44 All., 525.

(8) (1912) 16 C.L.J., 284.

SELLAPPA
GOUNDAN
v.
MASA
NAIKEN.
ODGERS, J.

portionately. It is difficult to imagine a case where one defendant's interest could be more adverse to that of another than the present case. The debt not being antecedent, and the money having been borrowed for the purpose of buying new lands, the defence that the minors' shares were not liable ought to have prevailed if it had been set up on their behalf. The father and his vakil must have known that this defence was open, and I am prepared to hold if necessary that the guardian showed gross negligence in not setting up this defence within the decision in *Punnayyah v. Viranna*(1). However a decision as to this may be unnecessary as I hold that the law goes to this length that a minor represented by a guardian whose interest is adverse is not legally represented at all. This is I think the result of the decision in *Rashid-un-nisa v. Muhammad Ismail Khan*(2) as followed in Second Appeal No. 1092 of 1918 (supra) in this Court. In the former case the Privy Council laid down that as the guardian *ad litem* had an adverse interest to that of the minor, the latter was never a party to the suit in the proper sense of the term. In that case the so-called guardian *ad litem* bought up the decrees obtained against the estate of his deceased brother, whose daughter he represented as guardian *ad litem*. He thus appeared as the representative of the debtor and as the sole creditor of the estate in his own right. Their Lordships thereupon held that the daughter was never represented at all. This disposes of the main point argued before us. There are two other points which may be briefly disposed of—

(1) That the District Munsif's Court had no jurisdiction to entertain the suit. Mr. A. Krishnasami Iyer admitted we were bound by the ruling in *Arunachalam*

(1) (1922) I.L.R., 45 Mad., 425.

(2) (1909) I.L.R., 31 All., 572 (P.C.).

Chetty v. Rangaswamy Pillai(1), but desired to keep the point open in the event of a further appeal.

(2) Appellant may ask for partition without being driven to a fresh suit in order to secure at least the share of the father, second defendant here, *Davud Beevi Ammal v. Radhakrishna Aiyar*(2). This is not resisted by Mr. T. Narasimha Ayyangar for respondents and will be decreed.

The appellant has failed on the main question raised before us and I would dismiss the appeal with costs. The decree of this Court will contain a provision to carry out the effect of the preceding paragraph of this judgment. The Civil Miscellaneous Appeal is therefore allowed but there will be no order as to costs.

HUGHES, J.—I agree. The interests of the father and the sons in Original Suit No. 156 of 1915 were divergent. A defence was open to the sons which was not open to the father and could not be pleaded by the father for himself, and the father would profit at the son's expense if that defence were not raised in the suit as in fact it was not. The question therefore is whether the decree passed in that suit, in which the father represented his sons as their guardian *ad litem* is a nullity so far as the sons are concerned and I think it is. In Second Appeal No. 407 of 1919 (unreported) there was as a matter of fact no adverse interest and that settled the question there. In the case in *Kuppuswami Ayyangar v. Kamalammal*(3) it is not clear that there was any adverse interest on the part of the mother. In Second Appeal No. 1092 of 1918, in the judgment to which I was a party, it was held that the appointment of a guardian whose interests were adverse, gives no legal representation at all and the decision obtained in such

SELLAPPA
GOUNDAN
v.
MASA
NAIKEN.
ODGERS, J.

HUGHES, J.

(1) (1915) I.L.R., 38 Mad., 922 (F.B.).

(2) (1923) 44 M.L.J., p. 309.

(3) (1920) I.L.R., 48 Mad., 842.

SELLAPPA
GOUNDAN
v.
MAHA
NAIKEN.
—
HUGHES, J.

proceedings is null and void. That decision is based on *Rashid-un-nisa v. Muhammad Ismail Khan*(1) Privy Council case. The effect of this decision in *Rashid-un-nisa v. Muhammad Ismail Khan*(1) was discussed in *Payidanna v. Lakshminarsamma*(2) and WALLIS, J. (as he then was), appears to have thought that a decree passed against a minor, not properly represented, was a nullity, whereas SADASIVA AYYAR, J., was of opinion that the Privy Council did not definitely decide whether the sales in that case were void or merely voidable.

In Second Appeal Nos. 347 and 348 of 1919 (unreported) SADASIVA AYYAR, J., expressed the opinion that the view taken in Second Appeal No. 1092 of 1918 (referred to above) was erroneous and NAPIER, J., agreed with him. But both the learned Judges in that case found that there was as a matter of fact no adverse interest on the part of the guardian appointed. So the further discussion was really unnecessary.

In the case in *Rashid-un-nisa v. Muhammad Ismail Khan*(1) in the application for execution Manladad was the real applicant and yet he was the guardian *ad litem* of the minor respondent. It was held that the minor was not a party to the proceedings in the proper sense of the term. It is true that Manladad was apparently not appointed guardian *ad litem* by the Court, but I do not think that affects the question. A plaintiff cannot represent a minor defendant as guardian *ad litem*. That is an extreme case. But the same disability exists to a less extent when the interests of a guardian are in other cases adverse to those of the minor.

In the present case the debt was not an antecedent debt and in the plaint it was alleged that the transaction was not binding while in the written statement there is

(1) (1909) I.L.R., 31 All., 572 (P.C.).

(2) (1915) I.L.R., 38 Mad., 1073.

SELLAPPA
GOUNDAN
v.
MAHA
NAIKEN.
—
HUGHES, J.

no allegation that there was any prior contract such as would make the debt antecedent, though it has been suggested in arguments before us that such a contention might possibly have been raised.

It is clear, therefore, as already stated, the interests of the father were adverse to those of his sons and the sons were not legally represented in the suit and the decree does not bind them, and this appeal fails; but provision may be made for the partition as this has been agreed to.

I agree with the order proposed in the last part of the judgment of my learned brother.

K.B.

INSOLVENCY JURISDICTION—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K.C.,
Chief Justice, Mr. Justice Coutts Trotter
and Mr. Justice Krishnan.*

*In re SELLAMUTHU SERVAI AND ANOTHER (INSOLVENTS),
RAMAIYA AND ANOTHER (PETITIONERS).**

1923
October 8.

Hindu Law—Father's "antecedent" debts neither illegal nor immoral—Right of father to sell sons' shares also to discharge such debts. Father's insolvency—Right of Official Assignee to sell sons' shares.

A Hindu father who had incurred debts in his trade was adjudged an insolvent and his estate vested in the Official Assignee.

Held by the Full Bench that in order to discharge such debts which were neither illegal nor immoral, the Official Assignee standing in the shoes of the father could exercise the father's right of selling the sons' shares also in the ancestral estate.

The view uniformly held by the Madras High Court that the father has this right has not been upset by the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (1917) I.L.R., 39 All., 437

* Petition No. 179 of 1921.

SELLAMUTHU
SERVAI,
In re.

(P.C.) and *Chet Ram v. Ram Singh* (1922) I.L.R., 44 All., 368 (P.C.). It is not only completed sales of the entire family estate whether effected by private contract by the father or by Court auction in decrees against him that the sons are incompetent to question but they are equally incompetent to prevent the father or the Official Assignee who stands in the shoes of the father from selling their shares also in the family estate for discharging such debts.

REFERENCE by Mr. Justice COUTTS TROTTER to a Full Bench for decision of the question of law mentioned in the following Order of Reference and arising out of the insolvency of certain persons adjudicated as insolvents in Petition No. 179 of 1921.

One Sellamuthu Servai and his brother Ratnaswami Servai who traded in camphor, grains, etc., and incurred losses thereby were adjudicated insolvents in 1921 and their estate vested in the Official Assignee, Madras. In order to discharge those debts the Official Assignee proposed to sell their sons' shares also in the family estate. The sons filed this application before the Court of Insolvency and prayed for an order restraining him from selling their shares. Pending disposal of the said petition the learned Judge (Mr. Justice Coutts Trotter) referred by the following Order to the Full Bench for decision, the question whether the Official Assignee who stood in the shoes of the petitioners' fathers could sell their sons' shares also for the discharge of such debts:—

ORDER OF REFERENCE.

COUTTS TROTTER, J.—I think I must refer these cases to a Bench under the provisions of O.S. Rules 180 and 177. The reason I do so is that if I were to decide it myself, I should be bound by the decision in *Sama Rao v. Vannajee Vapuji*(1) and I feel very grave doubts as to whether that decision is ultimately reconcilable with the judgment of the Privy Council in *Chet Ram v. Ram Singh*(2). It seems best in order to avoid multiplicity

(1) (1923) I.L.R., 43 M.L., 64. (2) (1922) I.L.R., 44 All. 338 (P.C.).

SELLAMUTHU
SERVAI,
In re.

of proceedings, to send the case at the outset to a tribunal invested with an authority which a single Judge does not possess.

It may perhaps be useful to indicate the nature of the difficulty which presses upon me. In the first place it is established by a long chain of decisions that in a Hindu joint family governed by Mitakshara Law all the members whether related as father and son or as brothers, etc., have equal proprietary rights in the joint family property. To this must be added the well-established rule that the manager has authority by virtue of his position as manager to alienate or pledge the family property as a whole for purposes of family necessity. In such a case, the consent of his co-parceners is implied by law and need not be proved. Further, where the manager is the *paterfamilias*, which is commonly the case, his dealings with the joint family property will be binding on his sons and grandsons if they were carried out in discharge of an antecedent debt of his own, irrespective of any question of necessity or benefit to the joint family. This really rests on the well-known doctrine of the "pious obligation," see e.g., *Girdharee Lall v. Kantoo Lall*(1); the reason is perhaps most clearly expressed by CHANDAVARKAR, J., in *Subraya v. Nagappa*(2). It would seem to follow that a creditor can bring the family property to a Court sale in execution of a decree against the manager-father, for he is only asking the Court to exercise the powers possessed by the manager-father himself. That again rests on a long series of Privy Council decisions of which I need only instance *Suraj Bunsu Koer v. Sheo Persad Singh*, (see especially p. 171)(3) and *Sripat Singh Dugar v. Prodyot Kumar Tagore*(4). These cases, as it seems to me, proceed upon the footing that the pious obligation subsists during the lifetime of the father and that accordingly the shares of the sons and grandsons can be alienated by the father or by the Court standing in his shoes, in discharge of his debts. The Madras Court at one time stood out for the stricter view that the pious obligation could only arise on the death of the father (see cases cited in Mayne's Hindu Law, 9th Edition, section 307). That was clearly over-ruled by the series of Privy Council cases beginning with *Girdharee Lall v. Kantoo Lall*(1) and the Madras Court accepted it in *Ponnappa Pillai v. Pappuvayyanganar*(5) subsequently approved by the Privy Council in *Muttayan v.*

(1) (1875) 14 B.L.R., 187 (P.C.) at p. 196.

(2) (1909) I.L.R., 33 B.C., 264.

(3) (1880) I.L.R., 5 Cal., 148. (P.C.).

(4) (1917) I.L.R., 44 Cal., 524 (P.C.).

(5) (1882) I.L.B., 4 Mad., 1 (F.B.).

SELLAMUTHU
SERVAL,
In re.

Zamindar of Sivagiri(1) and *Ramasami Nadan v. Ulaganatha Goundan*(2).

Then came the decision in *Sahu Ram Chandra v. Bhup Singh*(3) which, as I now understand it, re-established at any rate by implication the old doctrine of the Smritis that the pious obligation arose only after the death, physical or civil, of the father. The Madras High Court struggled to treat these portions of the judgment in *Sahu Ram's* case as *obiter dicta* (see *Peda Venkanna v. Sreenivasa Deekshatulu*(4) and *Armugham Chetty v. Muthu Koundan*(5)). It seems clear in the light of the decision in *Chet Ram v. Ram Singh*(6) that such a process is no longer possible, and that the tribunal which decides this matter must pronounce authoritatively whether the result is that a distinction must be drawn between completed sales, private or public, to which the earlier decisions of the Privy Council apparently apply, and proceedings merely destined to culminate in a sale, which equally appear to be governed by the latest pronouncements of the Board. I do not see much logic in the distinction, but it is the only way in which I myself am able to reconcile the decisions. However, I have only to state the problem and not to attempt a solution of it.

The cases will be put before my Lord the Chief Justice, who will nominate a Bench to hear them.

ON THIS REFERENCE BEFORE THE FULL BENCH.

M. A. Tirunarayanachari for the petitioners, i.e., the sons, argued as follows:—*Sahu Ram Chandra v. Bhup Singh*(3) and *Chet Ram v. Ram Singh*(6) have definitely established that during the father's lifetime the sons are under no pious obligation to discharge their father's debts. It follows that the father cannot sell or alienate their shares also in the family estate for such debts. *Girdharee Lall's* case(7), is based upon the doctrine of pious obligation, and that case and all the cases based upon it must now be considered bad law, as the foundation is shaken. These cases are explained in *Sahu Ram's* case and *Chet Ram's* case as cases where the sons'

(1) (1883) I.L.R., 8 Mad., 1 (P.O.) (2) (1899) I.L.R., 22 Mad., 49.
(3) (1917) I.L.R., 39 All., 437 (P.O.) (4) (1918) I.L.R., 41 Mad., 136.
(5) (1919) I.L.R., 42 Mad., 711 (F.B.). (6) (1922) I.L.R., 44 All., 368 (P.O.).
(7) (1875) 14 B.L.R., 187 (P.O.).

shares had passed by completed alienations into the hands of third parties (bona fide purchasers for consideration). But where property has not so passed, the principle of equity or estoppel or *factum valet* cannot be invoked.

If the father cannot alienate, the Official Assignee cannot be in a better position. Where the Privy Council decisions are inconsistent the later one prevails; see *Rangappa Naik v. Kamti Naik*(1). In *Chet Ram's* case the point decided was not merely whether a mortgage debt constituted an antecedent debt but the point was expressly taken by the appellants that the sons would be liable for a sum of Rs. 5,550 cash received by the father upon the sale which failed. This is referred to in the last paragraph of the judgment—"A separate and protracted argument was laid before the Board, etc.," and emphatically negatived. See also the notes of the arguments in the report of the case in the Indian Appeals. Counsel referred to *Jogi Das v. Ganga Ram*(2), *Sama Rao v. Vannajee Vapuji*(3), *Nanomi Babuasin v. Modhun Mohun*(4) and Mayne's Hindu Law, 9th Edition, page 410.

The Advocate-General (O. Madhavan Nair) for the Official Assignee. It has always been the law that the father can sell the sons' shares also for his 'antecedent' debts, neither immoral nor illegal and that the creditor had equally that right through process of Court. The theory of pious obligation had its origin in protecting the rights of third parties such as creditors; see *Girdharee Lall v. Kantoo Lall*(5), *Nanomi Babuasin v. Modhun Mohun*(4), *Sripat Singh Dugar v. Prodyot Kumar*

(1) (1908) I.L.R., 31 Mad., 386 (F.B.).
(2) (1917) 21 C.W.N., 957 (P.O.) (3) (1928) I.L.R., 46 Mad., 64.
(4) (1886) I.L.R., 13 Cal., 21 (P.O.) at 35.
(5) (1875) 14 B.L.R., 187 (P.O.).

SELLAMUTHU
SERVAL,
In re.

SELLAMUTHU
SERVAL,
In re.

Tagore(1), *Hanmant Kashinath v. Ganesh Annaji*(2) Mayne's Hindu Law, 9th Edition, page 424. *Kandasami Goundan v. Kuppu Mooppan*(3), *Nilmani Ghatak v. Emperor*(4) and the *Sudder Dewany Adawlat* case quoted at page 169 of *Suraj Bunsu Koer v. Sheo Persad Singh*(5). This right of the father and of the creditor are preserved by the two latest decisions of the Privy Council which only gave a definition of what is an "antecedent" debt and held that the father cannot sell his sons' shares for what is not an antecedent debt. If the father could sell, the Official Assignee also can.

M. A. Tirunarayanachari replied.

SCHWABE,
C.J.

SCHWABE, C.J.—The petitioners are the infant sons of two brothers who traded in partnership and became insolvent. They were in possession of joint family property to shares in which the sons had on birth become entitled.

The question raised in this insolvency petition is whether the sons' shares in the joint family property of a Hindu governed by the Mitakshara Law can be made liable during their fathers' lifetime to the fathers' debts other than *Avyavaharika*, that is, those tainted with illegality or immorality, for, the fathers having become insolvent, the Official Assignee claims to have recourse to the joint family property including, if necessary, the sons' undivided shares therein. He alleges that the fathers could themselves alienate the property and pay such debts and that he can exercise that right in the interests of the fathers' creditors.

There can be no doubt that this has been supposed to be in accordance with the Hindu Law for a very long

SELLAMUTHU
SERVAL,
In re.
—
SCHWABE,
C.J.

time past and that Indian Courts have acted upon this view so regularly and continuously that it has been accepted as a well-known principle of law, and that a very large number of titles to property, where there had been sales of joint property by a father's creditors, or by the Official Assignee on his insolvency, has been accepted as good and not in any way open to question.

We are now asked to say that all this is wrong, and that the son's obligation to pay his father's debts comes into operation only on his death and that the son's share in the joint family property is immune until such time, except when the debt was incurred by the father for the benefit of the family, that is to say, as agent acting within the scope of his authority. It is said that the principle on which the law has proceeded is that a son is under a pious obligation to pay his father's debts and so save his father's soul from the penalties which the Hindu religion recognizes as falling to the lot of those who leave this world with debts unpaid, and that it having been pointed out in two recent decisions of the Privy Council that as it cannot at any time be predicated with certainty that any one will die without himself having discharged his debts, that pious obligation cannot come into operation during the lifetime of the father, and it must follow that the son's share in the joint family property cannot during the father's lifetime in any way be made liable for the father's separate debts. Logical though this may be it is by no means a convincing argument. Once a proposition of law has been established and acted upon over a period of time, it is too late to uproot it by a re-examination of the *rationes decidendi* of the cases by which the proposition was first established, and a conclusion that those *rationes* were erroneous at the time and no longer bring conviction to the existing judicial mind. Further, the principles

(1) (1917) I.L.R., 44 Cal., 524 (P.C.) (2) (1919) I.L.R., 43 Bom., 612.
(3) (1920) I.L.R., 43 Mad., 421. (4) (1910) I.L.R., 37 Cal., 671.
(5) (1880) I.L.R., 5 Cal., 148. (P.C.).

SELLAMUTHU
SERVAL,
In re.
—
SCHWABE,
C.J.

enunciated by Lord HALSBURY in *Quinn v. Leathem*(1), are particularly apposite when trying to apply the rules of logic on a re-examination of the principles of the reported decisions on Hindu Law and their application to a particular set of circumstances. He stated them thus—

“There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decided. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code whereas every lawyer must acknowledge that the law is not always logical at all.”

If this matter were coming before us as a case of first impression and without the large mass of authority with which it is surrounded, I should inquire by an examination of the original texts of the Smritis and the Mitakshara and the commentaries thereon whether it appeared that a son's property was or was not liable for his father's debts during the father's lifetime. If I found that the answer to this question depended on pious obligation, I should wish to be satisfied whether that pious obligation was such that it only comes into operation on the father's death. On general principles a son's property cannot be taken to pay his father's debts and it would be necessary to show first that the Mitakshara makes some exception on account of which that general principle does not apply to Hindus, and then to discover how far that exception extends. I should on that inquiry soon come to a passage in Yajnavalkya which

(1) [1901] A.C., 495.

has been rendered, “If a father has gone abroad or is dead or is subdued by calamity, his debts shall be paid by his sons and grandsons,” (based on that passage the author of the Mitakshara lays down, “If a father without paying the debt which is due dies, or goes to a distant country, or is afflicted with an incurable disease and the like, then his debt must be paid by his sons and grandsons by reason of their sonship and grandsonship even if no assets of the father or the grandfather have been left,”) and later to a statement in Jagannatha which explains passages in Vishnu and Yajnavalkya which include the case of a father being wholly immersed in vice, as referring to a state of “combined insolvency and insolence.” The matter for consideration would be whether such expressions must not be taken to include a case of declared insolvency which view, if accepted, would be sufficient to determine the present case. But I think we are relieved from the burden of this inquiry because certain principles have been too long established for this Court, at any rate, to question them. In *Nanomi Babuasin v. Modhun Mohun*(1) Lord HOBHOUSE who delivered the opinion of the Board said

“Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.”

In 1916 in *Sripat Singh Dugar v. Prodyot Kumar Tagore*(2), Lord BUCKMASTER said :

“In every other event,” that is, except where the debt was incurred for illegal or immoral purposes, “it is open to the execution-creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone.”

(1) (1886) I.L.R., 13 Cal., 21 (P.C.) at 85.

(2) (1917) I.L.R., 44 Cal., 524 (P.C.).

SELLAMUTHU
SERVAL,
In re.
—
SCHWABE,
C.J.

SELLAMUTHU
SERVAI,
In re.
SCHWABE,
C.J.

Between those dates the principle has been acted upon by the Privy Council and all the Courts of India. It is true that in all the cases before the Privy Council the question arose as between the alienees of the family property and the sons or their representatives, but I can find no indication that those cases were decided, as has been suggested here, on the consideration of the rights of the alienees as *bona fide* purchasers for value without notice. Indian Courts have not understood those cases as being limited in that way, for they have applied the principle to cases of execution against the son's share in the family property and to the rights of the Official Assignee on the father's insolvency and even to determining the forms of decree in suits against the father when it is desired to make the son's share answerable for the decree.

In 1917 came the decision in *Sahu Ram Chandra v. Bhup Singh*(1). This case actually decided that the rule already established that an alienation by the father of family property can only bind the sons' interest in that property when the alienation was for the purpose of discharging an antecedent debt, must be limited in its application to cases where the antecedent debt was incurred wholly apart from the security of the joint family property. But their Lordships did state their view that the pious duty of a son to discharge his father's debts only arose on his father's death. It is to be observed that in that case the claim against the father for re-payment of the money due was long since barred by limitation, and that the Board was therefore not considering the question whether if a decree had been obtained in respect of that debt or the father had become insolvent, it was a debt for which the son's share in the family property could have been made liable. Further

(1) (1917) I.L.R., 39 All., 437 (P.C.).

in recognizing the principle that the father can alienate joint family property to secure payment of an antecedent debt, it would seem that the Board must have recognized that the son's share can be made in the father's lifetime liable to pay his father's debts although such debts were not incurred for the benefit of the family. Indeed in my view, this case is really an authority in favour of the Official Assignee, who is dealing with antecedent debts, for if the father can alienate the family property to pay those debts, it seems to follow that the Official Assignee standing in his shoes can do the same. Based, however, on the statement in this case that the pious obligation only arises on the death of the father, attempts were made all over India to raise once more the question which it was thought had been set at rest by *Nanomi Babuasin v. Modhun Mohun*(1), and to get a finding that in no case where the debt was not incurred on behalf of the family could the son's share be reached during the father's lifetime. These attempts failed—see, for instance, *Peda Venkanna v. Srinivasa Deekshatulu*(2), *Kandasami Goundan v. Kuppu Mooppan*(3), *Subramania Aiyar v. Shaw Wallace & Co.*, *Madras*(4) and *Hanmant Kashinath v. Ganesh Annaji*(5). *Sahu Ram Chandra v. Bhup Singh*(6) was followed by the Privy Council in *Jogi Das v. Ganga Ram*(7), where Lord HALDANE quoted it as authority for the proposition that the mere circumstance of a pious obligation did not validate the mortgage otherwise invalid. In 1922 in *Chet Ram v. Ram Singh*(8), it was held following *Sahu Ram Chandra v. Bhup Singh*(6), that the mortgage of the family property not being for an antecedent debt the mortgage and the subsequent sale of

SELLAMUTHU
SERVAI,
In re.
SCHWABE,
C.J.

(1) (1886) I.L.R., 13 Cal., 21. (P.C.).
(2) (1918) I.L.R., 41 Mad., 136. (3) (1920) I.L.R., 43 Mad., 421.
(4) (1920) 38 M.L.J., 402. (5) (1919) I.L.R., 43 Bom., 612.
(6) (1917) I.L.R., 39 All., 437 (P.C.). (7) (1917) 21 C.W.N., 957 (P.C.).
(8) (1922) I.L.R., 44 All., 368 (P.C.).

BELLAMUTHU
SERVAL,
In re.
—
SCHWABE,
C.J.

the equity of redemption did not bind the sons' or grandsons' shares in the family property and it was further held that the grandsons were not under a pious obligation to re-pay to the vendees of the equity as a condition of recovering the property the money received by their grandfather. Lord SHAW in delivering the opinion of the Board quoted with approval Lord HALDANE's interpretation of his, Lord SHAW's, judgment in *Sahu Ram Chandra v. Bhup Singh*(1) but he added:

"In the present case the doctrine" (that is, of pious obligation) "is invoked against grandsons and in the lifetime of sons. Nothing more need be said. The invocation of the doctrine entirely fails."

Based on this observation attempts once more have been made in all the Indian Courts to throw doubt on the principle established in *Nanomi Babuasin v. Modhun Mohun*(2), and, I think, opportunely re-stated in *Sripat Singh Dugar v. Prodyot Kumar Tagore*(3), by Lord BUCKMASTER. In Calcutta and Madras this has failed—see *Madhusudan Das Mohant v. Iswari Dayi Devi*(4), *Official Assignee of Madras v. Ramachandra Ayyar*(5) and *Sima Rao v. Vannajee Vapuji*(6).

By reason of the numerous cases pending in insolvency and otherwise, this petition has been referred to a Bench, and I have directed it to be heard by this Court as at present constituted. In my judgment, the cases of *Sahu Ram Chandra v. Bhup Singh*(1) and *Chet Ram v. Ram Singh*(7) were not intended to and did not alter the law as laid down in a long series of cases referred to above, and the Official Assignee is entitled to succeed on this petition. On this point, until the Privy Council has definitely otherwise decreed, the law in this

(1) (1917) I.L.R., 39 All., 437 (P.C.). (2) (1886) I.L.R., 13 Cal., 21 (P.C.).
(3) (1917) I.L.R., 44 Cal., 524 (P.C.). (4) (1921) I.L.R., 48 Cal., 341.
(5) (1923) I.L.R., 46 Mad., 54. (6) (1923) I.L.R., 46 Mad., 64.
(7) (1922) I.L.R., 44 All., 366 (P.C.).

Presidency must be considered to remain unaltered in this respect.

Since the argument in this case, a judgment of the Allahabad High Court in *Kishen Singh v. Ohhajju Singh*(1) has been published. In that case in a suit against a father and sons in respect of rent due under a lease to the father it was held that the lease was not taken for the benefit of the family, and was a speculative and risky transaction not binding on the family, and the sons were accordingly dismissed from the suit and a decree was given against the father alone, and in execution of that decree certain family property, which had been hypothecated by the father as security for payment of the rent due under the lease, was attached and the sons' interest therein was sought to be brought to sale in satisfaction of the decree. It was held that this could not be allowed and in my judgment, this decision is right in that the debt having been held to be *Avyavaharika* execution could not be allowed against the sons in any form, it being a debt for which they had expressly been found to be not liable and for which their property could not be made liable. But as I read the judgment it goes much further and indeed seems to accept as correct practically all the arguments which have been so clearly and ably addressed to us in this case by Mr. Tirunarayanachari. It seems to lay down definitely that the pious obligation of a Hindu son to pay his father's debt does not arise until after the death of the father and it treats the cases of *Sahu Ram* and *Chet Ram* as being authorities for this proposition and speaks of cases such as *Girdharee Lall v. Kantoo Lall*(2), and cases following *Nanomi's case*(3) as having their authority shaken by these later Privy Council decisions, and with those parts of the judgment,

BELLAMUTHU
SERVAL,
In re.
—
SCHWABE,
C.J.

(1) (1923) I.L.R., 45 All., 90. (2) (1875) 14 B.L.R., 187 (P.C.).
(3) (1886) I.L.R., 13 Cal., 21 (P.C.).

SELLAMUTHU
SERVAI,
In re.

SCHWABE,
C.J.

for the reasons given above, I do not agree. Where a suit having been brought on a mortgage by the father of family property in which his sons are joined as parties, it is held that the sons' shares are not liable on the ground that the debt was not an antecedent debt properly so called, and a further suit being brought in time against the father a decree is obtained on the personal covenant in the mortgage, or for the money lent, whether the sons' shares in the family property could nevertheless be taken in execution of the decree against the father is a point on which it is not necessary to express an opinion and I should not desire to do so without having the matter fully argued. It would no doubt be a curious and anomalous position if the sons' shares were not bound by the mortgage, but were liable to be taken in execution for the mortgage debt. But that is not a question which we are called upon to decide.

The petition will be referred back to the Insolvency Judge with these directions. He will deal with the costs.

COUTTS
TROTTER, J.

COUTTS TROTTER, J.—In the year 1917 the case of *Sahu Ram Chandra v. Bhup Singh*(1) was decided by the Privy Council. I set out the head note as it appears at page 126 of 44 Indian Appeals as clearly showing the propositions which the learned reporter conceived that case to establish. "The father of a joint Hindu family governed by the Mitakshara can only sell or mortgage the joint family property so as to bind his sons in two cases, namely, (1) where the alienation is for family necessity, (2) where the alienation is made to discharge a debt which (a) was antecedent to the alienation, (b) was incurred wholly apart from the security of the joint family property and (c) is not proved to have been incurred for

immoral purposes. Further during the father's life an alienation by him is effective only in the first case, since its validity in the second case rests upon the pious duty of the sons to discharge their father's debt, and that duty arises only upon his death." Asto the first main proposition there has never been any question, nor as to the proposition 2 (c). As regards the proposition 2(a) their Lordships refer to the conflict of authority which existed in India whether money paid in consideration of a mortgage of ancestral property effected by the father could be treated as being antecedent within the meaning of the rules and they hold that it could not and that the debt must not only be antecedent in time, but must be a dissociated and distinct transaction. The proposition 2 (b) may or may not have been new law when it was promulgated. But it is safe to say that it embodied a principle which was not present to the mind of the Indian Courts and had not been applied by them. A Full Bench of five Judges of this Court in *Armugam Chetty v. Muthu Koundan*(1), was so much impressed with the possible effect of the application of this principle upon existing titles that they treated that proposition as an *obiter dictum* and upheld a mortgage where the antecedent debt relied upon was a prior mortgage of the joint family estate independent in fact and prior in time to the mortgage sued upon. The decision of the Board in *Chet Ram v. Ram Singh*(2) re-affirmed the proposition and although they do not expressly overrule the decision of the Madras Full Bench, it was cited to them by Mr. De Gruyther in argument, and I cannot doubt that they must be taken to have disapproved of it. But we are really concerned in this case with the last proposition, namely, that the pious obligation, as it is commonly

SELLAMUTHU
SERVAI,
In re.

COUTTS
TROTTER, J.

(1) (1919) I.L.R., 42 Mad., 711 (F.B.).

(2) (1922) I.L.R., 44 All., 868 (P.C.).

(1) (1917) I.L.R., 39 All., 437 (P.C.).

SELLAMUTHU
SERVAL,
In re.
COUTTS
TROTTER, J.

called, of the sons to discharge their father's debts which the Hindu Law undoubtedly imposes upon them and grandsons, does not arise till the death of the father.

The difficulty which we are called upon to solve arises in this way. The Official Assignee seeks to alienate the joint family property of the family of which the insolvents were the managers including the assets of the minor sons in satisfaction of the debts of the insolvents so far as they are neither immoral nor illegal within the meaning of the rule. The minor sons seek by this motion to restrain him from doing so. It was decided by a Bench of this Court consisting of two members of the present Bench in *Official Assignee of Madras v. Ramachandra Ayyar*(1) that the Official Assignee, though it cannot be said that the shares of the minors actually vest in him, has nevertheless the same rights of disposition of the family property in satisfaction of the debts of the manager as the manager would himself have been entitled to exercise if he had not been adjudicated an insolvent. I think that we should follow that decision which was only a re-statement of the effect of a long series of decisions in India beginning with the well-known judgment of LATHAM, J., in *Fakirchand Motichand v. Motichand Hurruckchand*(2). Indeed I do not gather that the correctness of that decision was challenged in the lucid and able argument of Mr. Tirunarayanachari. His contention really is that on the true view of the authorities the father himself would not in the circumstances have the right to alienate these properties. There can be no doubt that a series of decisions of the Privy Council has established that a sale of the family property by the father to his creditor or

SELLAMUTHU
SERVAL,
In re.
COUTTS
TROTTER, J.

in execution levied by the father's creditor on the family property cannot be set aside by the sons. That has been interpreted by the High Courts of India to involve the further proposition that the sons are not only bound by the completed sale or execution proceedings when the property purports to have passed to the creditor, but cannot resist the steps taken by the creditor to bring about the transfer of the ownership of the property to himself. The cases are set out in the note c(1) at page 410, section 307, of the 9th edition of *Mayne on Hindu Law*. Mr. Tirunarayanachari's argument falls mainly under two heads. (1) He contends that all these decisions whether of the Privy Council or of the Indian Courts are based on the supposition that the pious obligation devolves upon the sons not only upon the death but during the lifetime of the father. It is only just to observe that the leading case of *Girdharee Lall v. Kantoo Lall*(1) undoubtedly appears to proceed on that footing. He contends that as the pious obligation has been authoritatively denied by the latest Privy Council decisions to exist during the father's lifetime, these cases are no longer to be regarded as binding where the father is alive. (2) He argued that even if the older decisions of the Privy Council which are set out at page 410 of *Mayne on Hindu Law* are binding, they are all cases where the property by alienation or execution had already come into the hands of the creditor and that the liability of the sons should be confined to such cases. He supports this by saying that *Sahu Ram Chandra v. Bhup Singh*(2) has given a new ground on which the liability of the sons can be supported in cases of a completed transfer and excluded in cases where the transfer is not

(1) (1923) I.L.R., 46 Mad., 54.

(2) (1883) I.L.R., 7 Bom., 438.

(1) (1875) 14 B.L.R., 187 (P.C.). (2) (1917) I.L.R., 39 All., 437 (P.C.).

SELLAMUTHU
SERVAI,
In re.
COURTS
TROTTER, J.

yet completed. He has been at a little difficulty to find a proper legal label for his position, speaking sometimes of an equity and sometimes of a doctrine in the nature of estoppel. However, let us turn to the passages in the judgment of the Board in *Sahu Ram Chandra v. Bhup Singh*(1) on which he relies. At page 132 the Board say this :

"They desire in the first place to make it clear that much if not all of the law on the subject has arisen from the necessity of protecting the rights of third persons, say the purchasers of the property who have taken their title for onerous consideration and in good faith "

and at page 133 is the following passage :

"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint family estate these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

Their Lordships then refer to the well-known summary of Sir JAMES COLVILE in *Suraj Bansi Koer v. Sheo Persad Singh*(2) which begins with the words, "where joint ancestral property has passed out of a joint family," words repeated by Sir JOHN STANLEY, C.J., in the case of *Chandradeo Singh v. Mata Prasad*(3). So far as I can ascertain, it is the fact that all the Privy Council cases do deal with executed sales and not with mere proceedings to enforce the creditors' rights. But it is difficult to see in principle what reason there can be for holding that such a distinction should be drawn. If a creditor can hold what he has got, it is difficult to see why his hand should be stayed in attempting to get it.

(1) (1917) I.L.R., 39 All., 437 (P.C.); 44 I.A., 126.
(2) (1890) I.L.R., 5 Cal., 148 (P.C.). (3) (1909) I.L.R., 31 All., 176.

SELLAMUTHU
SERVAI,
In re.
COURTS
TROTTER, J.

The argument that because the decision in *Sahu Ram Chandra v. Bhup Singh*(1) has removed the basis which underlies the earlier decisions of the Privy Council beginning with *Girdharee Lall v. Kantoo Lall*(2) therefore the decisions themselves are to be disregarded, is one that I confess does not appeal to me strongly. The last thing I look for in Hindu Law is logical consistency, compounded, as that law is, of ancient texts thousands of years old qualified and interpreted by a series of commentaries and by decisions of the Indian Courts and the Privy Council to temper and modify their application to the conditions of modern Indian life. It seems logically unanswerable to say that as the pious obligation of the son is based on the duty to remove his father from hell, that obligation cannot arise until the father by means of his death has reached hell. But the matter is not so simple as that, for Vishnu and Yajnavalkya as cited by Jagannatha both accept the father's becoming a sanyasi or being wholly immersed in vice or his suffering from incurable disease or being mad or being extremely aged (these last three qualifications come from Katyayana and Vrihaspati) as also giving rise to the son's liability to pay his father's debts. It is possible enough to say that the early authorities treat these conditions as equivalent to physical death, but at any rate the doctrine of actual residence in *put* is gone, and it may be that that is the solution of this difficulty, namely, that one is entitled to treat insolvency as equivalent to a kind of civil death of the father which would thereby invoke the pious obligation of the sons. It is worth remarking that Jagannatha in his comment on the phrase "immersed in vice" includes under that head a state of insolvency

(1) (1917) I.L.R., 39 All., 437 (P.C.). (2) (1875) 14 B.L.R., 187 (P.O.).

SELLAMUTHU
SERVAI,
In re.
COURTS
TROTTER, J.

and grandsons' shares in execution, the decree not having been appealed from. I conceive that the decision can be upheld on the ground that even supposing the decree to be wrong, as long as it stood, execution could not be sought on the footing that it was to be treated as a nullity in so far as it exonerated the sons and grandsons.

I respectfully agree with the High Court of Bombay that the only course open to a Court in this country is to follow the earlier decisions and hold that the father manager or the creditor or the Official Assignee standing in his shoes has the power to alienate joint family property in satisfaction of an antecedent debt of the father manager not tainted with illegality or immorality. If the Privy Council had thought that the earlier decisions of the Board and the mass of decisions of the Indian Courts which had been built upon them were erroneous or were to be restricted in the manner suggested in *Kishen Singh v. Ohhajju Singh*(1) they could easily have said so, as the whole subject was before them for review in *Sahu Ram Chandra v. Bhup Singh*(2) and *Chet Ram v. Ram Singh*(3). They would then have pointed out that the dicta of Lord HOBHOUSE and Lord BUCKMASTER in *Nanomi Babuasin v. Modhun Mohun*(4) and *Sripat Singh Dugar v. Prodyot Kumar Tagore*(5) respectively which entirely support the decisions in the Indian Courts down to *Sahu Ram Chandra v. Bhup Singh*(2) travelled outside their legitimate scope in the decisions involved. They have not done so and until we are given further guidance I think that our plain duty is to take it as a settled rule that the father during his lifetime and any one who during

(1) (1923) I.L.R., 45 All., 90.

(2) (1917) I.L.R., 39 All., 437 (P.C.).

(3) (1922) I.L.R., 44 All., 368 (P.C.). (4) (1886) I.L.R., 13 Calc., 21 (P.C.).

(5) (1917) I.L.R., 44 Calc., 524 (P.C.).

SELLAMUTHU
SERVAI,
In re.
COURTS
TROTTER, J.

his lifetime stands in his shoes can validly alienate the whole of the joint family property in satisfaction of antecedent debts not tainted with illegality or immorality and that it would be travelling outside our legitimate function to consider a rule so well established as abrogated because the supposed basis on which it rests has been disturbed by the more recent pronouncements of the Privy Council.

Since I wrote this judgment and submitted it to my Lord the Chief Justice, I have had the advantage of perusing his judgment and I desire to say that I respectfully agree with his observations on the case of *Kishen Singh v. Chhajju Singh* (1).

KRISHNAN, J.—In this case the question for our decision is whether the Official Assignee is entitled to sell the whole of the joint ancestral estate of an insolvent Hindu father including the shares of his sons, the parties being governed by the Mitakshara Law, in realizing the assets of the insolvent for distribution among the creditors. It is not disputed that if the father has the right to sell the whole joint estate to pay off his antecedent debts that power can be exercised by the Official Assignee. This was so decided recently by this Court in *Official Assignee of Madras v. Ramachandra Ayyar*(2). The question for our consideration then narrows itself into whether a Hindu father is entitled to alienate the joint ancestral estate of himself and his sons to pay off an antecedent debt of his. As pointed out by the learned Chief Justice, it has been taken as the settled law in this country that he could do so provided that the debt was not an illegal or immoral one, ever since the decisions of the Privy Council in *Girdharee Lall v. Kantoo Lall*(3) and in

(1) (1923) I.L.R., 45 All., 90.

(2) (1923) I.L.R., 46 Mad., 54.

(3) (1875) 14 B.L.R., 187 (P.C.).

SELLAMUTHU
SERVAI,
In re.
—
COUTTS
TROTTER, J.

and insolence in which the father has abandoned all attempt to satisfy his creditors. He does not of course use "insolvency" in the technical sense of a person who has been actually adjudicated by a Court of Law. If this enunciation of the Hindu Law is correct, it seems to me that it will apply *a fortiori* to a case where there had been such a formal adjudication.

The next observation I have to make is that there are at least two decisions of the Privy Council in which the son's liability was enforced during the lifetime of the father, although it is true that it was after the property had passed to the creditor. One was *Nanomi Babuasini v. Modhun Mohun*(1) and the other was *Sripat Singh Dugar v. Prodyot Kumar Tagore*(2). In each of these cases language was used which appears to imply that their Lordships who decided it had no intention of restricting the son's obligations to cases where property has actually passed. And in each case the decision contains statements which if they are correct law establish the liability of the sons in such a case as the present. In *Nanomi Babuasini v. Modhun Mohun*(1), Lord HOBHOUSE says this at page 35 :

"Destructive as it may be of the principle of the independent coparcenary rights in the sons, the decisions have for sometime established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditor's remedies for their debts if not tainted with immorality."

In *Sripat Singh Dugar v. Prodyot Kumar Tagore*(2) Lord BUCKMASTER says this at page 532 :

"In every other event" (that is, except where the debt was incurred for illegal or immoral purposes), "it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

(1) (1888) I.L.R. 13 Calc., 21 (P.C.). (2) (1917) I.L.R., 44 Calc., 524 (P.C.).

SELLAMUTHU
SERVAI
In re.
—
COUTTS
TROTTER, J.

It seems to me impossible to hold that these pronouncements mean that the creditor can hold the property against the sons if he has actually got it, but can be resisted in his attempts to take the legal steps necessary to get it. I have already said that I do not look for logic in Hindu Law, but I think that such a state of things is repugnant not merely to logic but to a sense of practical justice and convenience. I think that the matter is admirably put by SHAH, J., in *Hanmant Kashinath v. Ganesh Annaji*(1) at page 629.

"I am, therefore, of opinion that in the absence of a definite and explicit pronouncement on the point, this Court is bound in spite of the observations in *Sahu Ram Chandra v. Bhup Singh*(2) to follow the Indian decisions and the decisions of the Privy Council to which I have referred, and to hold that the decree-holder's right to proceed against the ancestral immoveable property in execution during the debtor's lifetime is co-extensive with the debtor's power to alienate it under the Mitakshara for the satisfaction of his antecedent debts not tainted with illegality or immorality."

Since the argument was concluded, our attention has been drawn to the case of *Kishen Singh v. Chhajju Singh*(3). And it is indisputable that the reasoning on which the judgment in that case proceeds is opposed to the conclusion and reasoning of SCOTT, C.J., and SHAH, J., in *Hanmant Kashinath v. Ganesh Annaji*(1) and in effect adopts the line of argument taken by Mr. Tirunarayanachari in this case before us. The actual decision can be distinguished on a very simple ground. The decree was passed in a suit in which the sons and grandsons had been made parties and the Court which passed the decree expressly exempted them and gave judgment against the father only. It was then sought notwithstanding the decree to bind the sons'

(1) (1919) I.L.R., 43 Bom., 612.

(2) (1917) I.L.R., 39 All., 437 (P.C.).

(3) (1923) I.L.R., 45 All., 90.

SELLAMUTHU
SERVAI,
In re.
KRISHNAN, J. *Nanomi Babuasin v. Modhun Mohun*(1) the latest ruling of the Privy Council on the point being in *Sripat Singh* before us that the recent decisions of the Privy Council in *Sahu Ram Chandra v. Bhup Singh*(3), followed in *Chet Ram v. Ram Singh*(4), have altered the law on the point and have abrogated the doctrine of the Hindu father's right to alienate the joint ancestral property of himself and of his sons to pay off a proper antecedent debt of his.

To decide this question we have to consider the cases of *Sahu Ram Chandra v. Bhup Singh*(3), and of *Chet Ram v. Ram Singh*(4), very carefully. Taking *Sahu Ram Chandra v. Bhup Singh*(3) first, that was a suit brought to enforce a mortgage given about 20 years prior to suit by one Bhup Singh to one Bhagirath for Rs. 200 paid in cash. Sahuram, the plaintiff, obtained the rights under that mortgage by paying off Bhagirathi's mortgage and sued Bhup Singh and his sons and grandsons and others to recover Rs. 15,000 by sale of the property mortgaged which consisted of joint ancestral properties belonging to Bhup Singh and his sons and grandsons. It was found by the lower Court that no legal necessity for the mortgage had been proved. Before the Privy Council it was argued, however, that even though legal necessity was not proved as there was no proof by the sons that the debt was of an illegal or immoral character, they had no defence to the suit as the father was entitled to mortgage the ancestral estate for an antecedent debt of his, quite apart from any legal necessity. The Privy Council had to consider then the scope of the doctrine of "antecedent debt" to see if it applied to the facts of the case and their Lordships held that a mortgage debt borrowed on the security of the ancestral property itself could not

(1) (1886) I.L.R., 13 Cal., 21 (P.C.). (2) (1917) I.L.R., 44 Cal., 524 (P.C.).
(3) (1917) I.L.R., 39 All., 437 (P.C.). (4) (1922) I.L.R., 44 All., 368 (P.C.).

be treated in any way as an antecedent debt within the meaning of that doctrine and they accordingly repelled the argument that the case was one to which the doctrine applied. They did not, however, say that the father could not sell or charge the joint ancestral estate where the debt was not only antecedently incurred by him, but incurred wholly apart from the security of the joint property. In fact if they were holding that the father could not sell the joint estate for an antecedent debt of his because the sons' pious duty arose only after the father's death, they would have said so in clear terms and there would have been no necessity to consider the scope of the rule of "antecedent debts." On the other hand their Lordships have in more than one place in their judgment stated that they make an exception in favour of the father's power to sell for an antecedent debt. Their Lordships on page 444 of *Sahu Ram Chandra v. Bhup Singh*(1), say this:—

"although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from a general and sound principle their Lordships are of opinion that the exception should not be extended and should be very carefully guarded."

Here they clearly recognize the existence of the rule of antecedent debts and do not in any way abrogate it as suggested. Again on page 447 their Lordships say:—

"In their Lordships' opinion these expressions which have been the subject of so much difference of legal opinion, do not give any connivance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available

(1) (1917) I.L.R., 39 All., 437 (P.C.).

SELLAMUTHU
SERVAI,
In re.
KRISHNAN, J.

SELLAMUTHU
SERVAL,
In re.
KRISHNAN, J.

by such joint estate. *The exception being allowed, as in the state of authorities it must be, it appears to their Lordships to apply, and to apply (only) to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him, but are joint family property.*"

I have quoted these passages at length to show that their Lordships expressly exempted from the purview of their decision the exceptional case of the father being able to alienate joint ancestral property of himself and his sons for a proper antecedent debt. How after such expressions of opinion by their Lordships themselves in their judgment the case could be treated as an authority for doing away with the doctrine of antecedent debt altogether, I entirely fail to see.

The main decision in *Sahu Ram Chandra v. Bhup Singh*(1), was that a mortgage of ancestral property could under no circumstances be treated as an antecedent debt to justify an alienation of ancestral property and that beyond the power given to the father by this doctrine to deal with the son's share in the joint estate neither the father nor his creditors could rely merely upon the general rule of the son's pious duty to pay his father's debt to have recourse to the son's share of the joint estate to pay the father's debt. These propositions were reaffirmed in *Chet Ram v. Ram Singh*(2) and any attempt like the one made by the Full Bench of this Court in *Armugham Chetty v. Muthu Koundan*(3) to treat the ruling of the Privy Council as an *obiter dictum* must be abandoned. I agree with COUTTS TROTTER, J., that that Full Bench decision must be treated as erroneous, for though it is not expressly overruled by the Privy Council it is clearly in conflict with their Lordships' view which has been re-affirmed in *Chet Ram's* case.

(1) (1917) I.L.R., 39 All., 437 (P.C.). (2) (1922) I.L.R., 44 All., 363 (P.C.).
(3) (1919) I.L.R., 42 Mad., 711 (F.B.).

SELLAMUTHU
SERVAL,
In re.
KRISHNAN, J.

The passage that has given trouble in dealing with the question before us is the one in *Sahu Ram Chandra v. Bhup Singh*(1), where their Lordships say that the pious obligation of the sons to pay off their father's debt cannot and does not arise till the death of the father. Now it is argued that the father's power to sell the ancestral estate including the shares of his sons for an antecedent debt and the creditors' right to have recourse to such estate for payment of his debt are founded upon the theory of the sons' pious obligation and if that pious obligation is treated as not arising during the father's lifetime the father cannot deal with the son's shares in the joint estate nor the creditor while the father is alive.

The doctrine of "antecedent debt" was no doubt evolved from the "pious obligation" theory, see *Nanomi Batwasin v. Modhun Mohun*(2), and that theory originally was that the son was under a duty to save his father's soul from the penalties prescribed by Hindu Sastras for a man who dies without paying off his debts. Such a duty would only arise after the father's death as the Privy Council justly point out. But the theory was extended at a very early stage even by the Hindu Smrithi writers themselves like Vishnu and Yajna-alkya to cases of persons who became *sanyasis* or suffered from incurable disease or went away to a foreign country and so forth. These are all cases where the pious obligation was taken to arise before the death of the debtor-father. Other restrictions and changes were introduced into the doctrine by the case-law of the country till it has now become crystallized as the doctrine of the "antecedent debt." That doctrine has become a definite and independent doctrine in Hindu Law which has been acted upon for many years and any

(1) (1917) I.L.R., 39 All., 437 (P.C.). (2) (1886) I.L.R., 13 Cal., 21. (P.C.).

SELLAMUTHU
SERVAL,
In re.
KRISHNAN, J. attempt to do away with it now by referring to its origin and arguing that its development was illogical can hardly be supported. In the paragraph referred to in *Sahu Ram Chandra v. Bhup Singh*(1), as I read it, the Privy Council was repelling the attempt to base a claim against the sons "merely" on account of their pious obligation to pay off their father's debt quite apart from any antecedent debt. Their Lordships use the word "merely" in that paragraph and again lower down use the same word when they say "accordingly the case founded merely upon pious obligation . . . fails." I understand their Lordships to refer in that paragraph to the attempt to enlarge the scope of the son's liability beyond the limits of the doctrine of "antecedent debt" by recourse to their pious duty as originally understood. Those observations, in my opinion, do not touch the doctrine of antecedent debt as otherwise the judgment will become self-contradictory.

Chet Ram v. Ram Singh(2) does not advance the position any further. It was a case of a sale by a father of ancestral estate being set aside. The mortgage which formed part of the consideration for the sale was according to their Lordships' view already expressed in *Sahu Ram Chandra v. Bhup Singh*(1) not an "antecedent debt." The balance of the sale price was paid in cash, that of course was not a debt at all. The sale, not being for proper legal necessity or for antecedent debts, necessarily failed. It was argued that where the sale failed, a debt arose, at least as regards the cash paid, which the father was bound to re-pay and that that constituted an antecedent debt for which the creditor could have recourse to the ancestral estate and were it not for the fact that their

(1) (1917) I.L.R., 39 All., 437 (P.C.). (2) (1922) I.L.R., 44 All., 368 (P.C.).

Lordships were abrogating the doctrine of antecedent debts they would have given a decree for that amount against the ancestral estate. This is not so; there was no debt at all in existence to apply the doctrine of antecedent debt, and the application of the doctrine of the sons' pious duty by itself to make the sons liable during their father's lifetime, their Lordships had repudiated; see also *Jogi Das v. Ganga Ram*(1).

The conclusions I have come to agree with the conclusions of the Calcutta and Bombay High Courts—see *Madhusudhan Das Mohant v. Iswari Dayi Debi*(2), and *Hanmant Kashinath v. Ganesh Annaaji*(3),—and are in accordance with the previous rulings of this Court cited by the learned Chief Justice in his judgment. Our attention was, however, drawn to a recent case in the Allahabad Court, *Kishen Singh v. Chhajju Singh*(4), which is in petitioner's favour. In that case it was decided at the trial of the suit itself that the sons and grandsons who were parties to the litigation and their estate were not liable for the suit debt. The question could then hardly be re-opened in execution. I, therefore, agree with the learned Chief Justice that the decision is right, but in so far as the views of the learned Judges are against the views I have expressed above I regret with all respect I am unable to follow them.

I have come to the conclusion that the Official Assignee can sell the joint ancestral estate of the insolvent and his sons to pay such of the debts of the insolvent which are not shown by the sons to be illegal or immoral debts and I agree to the order proposed by the learned Chief Justice.

N.R.

(1) (1917) 21 C.W.N., 957 (P.C.).
(3) (1919) I.L.R., 43 Bom., 612.

(2) (1921) 1 L.R., 48 Calc., 341.
(4) (1923) I.L.R., 45 All., 90.

SELLAMUTHU
SERVAL,
In re.
KRISHNAN, J.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1928,
February 8.

USSAN KASIM SAIT (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
REPRESENTED BY THE COLLECTOR OF SOUTH MALABAR AT
CALICUT (DEFENDANT), RESPONDENT.*

*Easement in favour of the public, acquisition of—Proof necessary
—Acquisition of easement by public, not equivalent to acquisition by Government.*

To a suit by a private person against the Government for a declaration of his ownership of a land, the acquisition of an easement over it by the public is no defence.

Though the public cannot acquire ownership of a land it can acquire over it an easement or profits *a prendre* either by grant or by prescription; *Lutchmeeput Singh v. Sadruulla Nushyo* (1883) I.L.R., 9 Cal., 698 and *Attorney-General v. Esher Linoleum Company, Limited* [1901] 2 Ch., 647, followed.

If proof of an actual or lost grant is not available what is necessary to prove is not mere user but dedication to the public at large as distinguished from a section of it, inferable from long user. *Poole v. Huskinson* (1843) 11 M. & W., 827, and *Muhammad Rustam Ali Khan v. Municipal Committee, Karnal* (1920) I.L.R., 1 Lah., 117 (P.C.), followed. Acquisition of an easement by the public is not equivalent to an acquisition by the Government.

SECOND APPEAL against the decree of G. H. B. JACKSON, District Judge of South Malabar, in Appeal Suit No. 901 of 1919 preferred against the decree of T. V. KRISHNAN NAYAR, Additional District Munsif of Tirur, in Original Suit No. 405 of 1917.

The facts are given in the Judgment.

The plaintiff, whose suit was dismissed by both the lower Courts, filed this Second Appeal.

* Second Appeal No. 2129 of 1920.

C. V. Anantakrishna Ayyar for appellant.

Government Pleader (C. Madhavan Nair) for respondent.

USSAN KASIM
v.
THE
SECRETARY
OF STATE FOR
INDIA.

The Court delivered the following

JUDGMENT:—

The property in dispute in this case is a small piece of a vacant ground outside the boundary wall of the plaintiff's premises, those premises having access to it and the adjoining road by a gate.

The suit by plaintiff is for a declaration of his right to the property outside his boundary wall. The Government registered the land as poramboke at the recent survey; and he claims it as his jenm property. Issues were framed as to the sustainability of the suit for mere declaration, the defendant, the Secretary of State, denying the plaintiff's possession, as to the ownership of the property, and as to the title set up by Government by adverse possession.

The first objection to the lower Appellate Court's judgment is that it contains no distinct finding as to title, its discussion of the evidence being confined to a conclusion that the measurements in the plaintiff's documents could not be accurate, although the question whether they could be trusted as to any part* of the disputed land was left open. If the measurements could not be trusted, the lower Appellate Court should have considered whether it could not act on the principle that title goes with possession and it should have decided whether the plaintiff had discharged the burden of proof which, in view of his failure to establish his alleged right in connexion with the survey, was, it is not disputed on him. That, however, matters comparatively little. For the lower Appellate Court has, in fact, found in favour of the defendant's possession and against that of the

USSAN KASIM
v.
THE
SECRETARY
OF STATE FOR
INDIA.

plaintiff in connexion with the plea of prescription; and it would presumably have, if it had looked at the case in the manner suggested, applied that finding to support a conclusion in favour of the defendant's title and also against the plaintiff's right to sue only for a declaration.

Its decision on prescription is based on findings that first the public has prescribed, and second, the defendant, Secretary of State, represents the public and can have the benefit of its prescription.

As regards the first of these points, the lower Appellate Court's treatment of the evidence is summary. It mentions only that the land has been used as a cart stand and that the public has occupied it freely, the plaintiff's user by taking goods to his gate-way being no more than any member of the public might have done. The case may really be stronger than appears from the judgment. In fact we have been shown evidence that there was once a pound on the site. But the stronger objections to the lower Appellate Court's findings are that, if the public can prescribe at all, a point which we shall return to, the lower Appellate Court has not referred to any evidence, that those who used the land did so on behalf of the public and not in their individual capacity or to any exclusion of the plaintiff, or anything inconsistent with the continuance of his ownership, subject to a right against him of the description referred to in section 2 (b) of the Easements Act V of 1882. And a right of that description is not what defendant claimed, and, if it were claimed, it could be no defence to the suit. These distinctions are exemplified by *Lutchmoeput Singh v. Sadaulla Nushyeo* (1) where, however, the form of the plaint prayer admitted of enquiry into the existence of such a right as a defence.

(1) (1883) I.L.R., 9 Cal., 698.

USSAN KASIM
v.
THE
SECRETARY
OF STATE FOR
INDIA.

In fact, however, the lower Appellate Court and the parties were wrong in considering the possibility of prescription by the public at all. For the public cannot prescribe. No doubt no authority as regards prescription by it for ownership has been produced. But the principle applicable to such prescription will be the same as that recognized in connexion with prescription for easements or profits *a prendre*. As regards prescription of the latter kind authority is clear; *Smith v. Andrews* (1); and *Attorney-General v. Elsher Linoleum Company, Limited* (2) and this position is assumed in the Indian case last mentioned. As was said in the second English case,

"it is necessary to remember that the thing to be established is dedication, not user."

What can be proved is that the public has acquired an easement or a profit *a prendre* by a grant, or dedication, actual, if direct evidence of one is available, or to be presumed in case such evidence is not; and in the latter alternative evidence of enjoyment will be relevant and may go far towards supporting the inference that a grant or dedication, which is lost, at some time was made. The lower Appellate Court must at the re-hearing, which we are about to direct, bear this in mind. It will also bear in mind the necessity for proof that the dedication, if any, was to the public at large, and not to any section of it. *Poole v. Huskinson* (3) and *Muhammad Rustam Ali Khan v. Municipal Committee, Karnal* (4).

There will still, however, be one more question for the lower Appellate Court to consider. In its judgment it has assumed that acquisition of a right by the public will be equivalent to its acquisition by the Secretary of State. That case was not put forward in the written

(1) [1891] 2 Ch., 678.

(2) [1901] 2 Ch., 647.

(3) (1848) 11 M. & W., 827; 152 E.R., 1089.

(4) (1920) I.L.R., 1 Lah., 117 (P.C.).

USSAN KASIM
v.
THE
SECRETARY
OF STATE FOR
INDIA.

statement, and its sustainability is not obvious. For we know that the public or a portion of it sometimes prescribes or attempts to prescribe against Government. The lower Appellate Court has given no particular reasons for this part of its decision, and at the re-hearing we must ask it to consider the matter more fully, if its other findings at the re-hearing render it necessary.

The lower Appellate Court has misconceived the law at every point. We set aside its decision and remand the appeal for re-admission and re-hearing in the light of the foregoing. Costs to date here and in the lower Appellate Court will be costs in the cause and will be provided for in its decree.

Stamp value on the appeal memorandum in this Court will be refunded on application.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

1923,
March 6.

SIVASUBRAMANIA PILLAI (FIRST RESPONDENT),
APPELLANT,

v.

THEETHIAPPA PILLAI AND TWO OTHERS (PETITIONERS AND
RESPONDENTS 2 AND 3), RESPONDENTS.*

Sections 24, 28, 39 and 44 of Provincial Insolvency Act (III of 1907)—Adjudication in insolvency and conditional discharge—Decree debt, not barred on date of adjudication—Application to Insolvency Court for recognition of decree debt after conditional discharge—Execution of decree barred on date of application—Admissibility of decree debt.

Under the Provincial Insolvency Act (III of 1907) any debt whose recovery was not barred by limitation on the date of the adjudication of the debtor as an insolvent can be proved in

* Civil Miscellaneous Appeal No. 106 of 1920.

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.

insolvency at any time even after a conditional order of discharge and until a final discharge is ordered. The facts that the debt is merged in a decree and more than 12 years had elapsed before the application to prove the same was made are immaterial if the decree debt was capable of execution on the date of the adjudication.

Held further that an adjudicated insolvent was entitled as a "person aggrieved" within section 46, clause (2) of Act III of 1907 to appeal against an order admitting a person as a creditor.

APPEAL against the order of E. PAKENHAM WALSH, District Judge of Tinnevely, in I.A. No. 488 of 1919 in I.P. No. 6 of 1909.

The following judgment of the Lower Court gives the facts of the case. Further facts appear from the judgment of OLDFIELD, J.

"The petitioner in this case is the creditor who obtained the decree in O.S. No. 181 of 1905 on the file of the District Munsif, Tinnevely. He had the judgment-debtor arrested in execution of the said decree and the latter thereupon put in I.P. No. 6 of 1909, mentioning in the schedule thereto, the applicant as the first creditor. The insolvent was given a conditional discharge by the order of this Court, dated 20th September 1913, the condition being that he should place at the disposal of the Court all the surplus of any property which he might subsequently acquire after taking Rs. 25 per mensem for the maintenance of himself and his family. The petitioner did not appear during these proceedings and prove his debt. The insolvent and one of the creditors now oppose on the grounds, (1) that the petition is barred by limitation being made after discharge, (2) that the debt is barred by limitation. I agree with the petitioner's contention that a conditional discharge of the sort passed in this case, is not an absolute discharge so as to make this application out of time under section 24 (3). In the present case, the insolvent's estate does not appear to have paid 8 annas in the rupee so that, a complete discharge could not have been granted. Moreover, there would have been no use in the Court ordering future assets to be put at its disposal if the discharge were absolute. There does not appear to have been any final dividend paid or notice of final dividend sent to the creditors. I hold that the application is not barred under section 24 (3). The debt itself also is clearly not time-barred as

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.

there is insolvent's written acknowledgment of it in 1910 at the time of his insolvency petition. *Ramaswami Pillai v. Govindasami Naicker*(1) is quoted by the respondents. The petitioner says that he has kept the decree alive by periodical application but the matter seems to me to be irrelevant. A debt which is valid and not time-barred at the date of adjudication is a debt provable under section 28 (1) of the Act and the only limitation to proving it, is an order of discharge. I have not to consider whether this debt would be time-barred or not in ordinary proceedings before a Court. Proof of the debt is allowed and as it is clearly proved, it is admitted. Petitioner will recover costs from both respondents (Rs. 5 in each case)."

The order of the lower Court making a conditional discharge on 28th day of September 1918 was as follows :

"A conditional discharge is granted subject to the condition that the petitioner places at the disposal of the Court all the surplus of any property which he may subsequently acquire after taking Rs. 25 a month for the maintenance of himself and his family."

The insolvent preferred this appeal to the High Court, against the order of the Lower Court including the petitioner as a creditor.

S. T. Srinivasagopala Acharya (with *Chidambaram* and *Marthandam Pillai*) took a preliminary objection that the insolvent had no right of appeal as an "aggrieved person" within section 46 (2) of Act III of 1907 as all his assets are vested in the Official Receiver for distribution to his creditors and he had no title or interest in the same.

K. V. Krishnaswami Ayyar (with *T. L. Venkatarama Ayyar* and *T. A. Ananta Ayyar*) for Appellants.—There is right of appeal for the insolvent as an "aggrieved person" as he will be eventually entitled to any surplus under section 41 of the Act.

On the merits:—The order of the lower Court is wrong in admitting proof of the petitioner's debt after

(1) (1919) I.L.R., 42 Mad., 319.

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.

the order of discharge ; section 24 (3). A conditional discharge is a discharge under the Act. See Rule 233 framed under the English Bankruptcy Act and quoted in *Williams on Bankruptcy*, 11th Edition, page 531 ; see also section 28 (2), and section 26 of the English Bankruptcy Act of 1914.

Secondly, this is not a "debt provable" under section 28 (1), of the Act. The debt has merged in the decree and the decree is more than 12 years old on the date of the application to prove it and the 12 years cannot, even if there be an acknowledgment, be extended ; see section 48, Civil Procedure Code, and *Subbarayan v. Natarajan* (1) ; and when once limitation begins to run it cannot be suspended ; *Muthu Korakkai Chetty v. Madar Ammal*(2). The form of proof required is that "the debt was and is due" on the date of application. Hence a barred debt or decree cannot be proved ; *Rokhia Bi v. Official Assignee, Madras*(3). The sections of the Limitation Act which in some cases extend or suspend the limitation, do not apply to proceedings under special Acts ; *Ramaswami Pillai v. Govindasami Naicker*(4), *Benson In re* ; *Bower v. Chetwynd*(5) and this application in insolvency is not a suit or other proceeding within section 16 (2) of the Act for which the Court could have given leave. A finding is necessary whether a final dividend has been declared or not as required by section 39, clause (4).

S. T. Srinivasagopala Acharya for first respondent.—It must be taken that there has been no final dividend yet. A debt is provable in insolvency so long as the insolvency Court holds assets and until a final dividend is declared and a final discharge is made ; see sections 24 (3) and 39 (3 and 4). The only limitations are that a

(1) (1922) I.L.R., 45 Mad., 785. (2) (1920) I.L.R., 43 Mad., 185 (F.B.).
(3) (1917) 37 I.C., 505. (4) (1919) I.L.R., 42 Mad., 319.

(5) [1914] 2 Ch., 68.

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.

late applicant will not be entitled to disturb dividends already declared and that the debt must be subsisting on the date of adjudication. *Ex-parte Boddam*(1), *McMurdo, in re*; *Penfield v. McMurdo*(2), *Ex-parte Lancaster Banking Corporation, In re Westby*(3), and *In re Crosley, Munns v. Burn*(4). Vol. II, Halsbury, paragraphs 380 and 394. The word "may" in section 24 (3) means "in a proper case." The debt in this case is one provable under section 23. This debt must be taken as one already proved, because it was in execution of this decree debt that the insolvent was arrested and because the insolvent included this decree debt in his schedule of debts; see section 25 of the Act. A conditional discharge is different from an absolute discharge; see section 44. Moreover in this case the insolvent has not complied with the conditions on which alone he obtained his conditional discharge. Limitation is suspended during the pendency of bankruptcy proceedings; see section 16 (2) of the Indian Act, and section 7 (i) of the English Act of 1914. If necessary, leave could be given under section 16 (2); *In re General Rolling Stock Company*(5). Section 48 of the Civil Procedure Code applies only to proceedings in execution and does not govern proceedings taken in insolvency Courts for payment of decree debts; see *Ex-parte Ross*(6) and other English cases above quoted. He distinguished *Benzon In re*; *Bower v. Chetwynd*(7) and other cases quoted by the appellant.

JUDGMENT.

OLDFIELD, J. OLDFIELD, J.—This insolvency originated in the arrest by first respondent of the insolvent, here appellant. On

- (1) (1860) 2 D. G. F. & J., 625; 45 E. R., 763.
 (2) [1902] 2 Ch., 684. (3) (1879) 10 Ch. D., 776.
 (4) (1887) 35 Ch. D., 266. (5) (1872) 7 Ch. App., 648.
 (6) (1825) 2 G. & J., 46 and 330. (7) [1914] 2 Ch., 68.

the latter's adjudication, however, only two creditors, now represented by other respondents, proved debts, the first respondent refraining from proving his, until after a dividend of less than half an anna had been distributed and about nine years had elapsed. Evidently what has led him now to tender proof of his debt under section 24 (3) of the Provincial Insolvency Act III of 1907 is that on the 20th September 1918 the lower Court granted the insolvent what is described as a conditional discharge, the condition being that he should, subject to his right to an allowance of Rs. 25 per month for maintenance of himself and his family, place at the disposal of the Court all property he might afterwards acquire. This discharge was granted on the application of the insolvent, based on the expectation that in case of his discharge his mother would relinquish a life estate, to which he was entitled in reversion, in his favour, and the appellant evidently thought it worth while to prove in order to obtain a share in these new assets. The lower Court held that he was entitled to do so notwithstanding that, the two points urged before it and here, his claim was made after the order of discharge of 20th September 1918 and that recovery of his debt would in proceedings other than insolvency be barred by limitation.

A preliminary objection has been taken to this Appeal by the respondent on the ground that he is not a "person aggrieved" within the meaning of section 46 (2) of the Act, because he has no interest in the distribution of assets, which have vested in the Official Receiver for his creditors, whoever they may be. But that is unsustainable. For under section 41 he will eventually be entitled to any surplus remaining, after the creditors, who have proved, have been satisfied, and will be deprived of such surplus if the proof of another creditor,

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.
OLDFIELD, J.

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.

OLDFIELD, J.

whose claim may diminish or exhaust it, is wrongly admitted. Another formal objection to the proceedings is that the Official Receiver has not, so far as appears, been a party to them at any stage. But, as all the creditors concerned have had notice of them, we simply note this irregularity and proceed.

First as regards the order of 20th September 1918, it is, we may observe, defective, because it contains no definite provision for or directions to the Official Receiver regarding the manner in which it is to be given effect; and it should probably have been framed with reference to section 44 (5), explicitly as imposing a condition and also suspending the discharge, until that condition had been fulfilled by the execution of the anticipated release in favour of the Official Receiver or otherwise for the benefit of the creditors. But its terms have already been stated and its meaning is clear. First, a point referred to by the lower Court, although in doubtful language, this order is consistent with the future declaration of a final dividend, since it contemplates the realization of further assets for distribution in one; and, it may be added, it is clear from the text of the order by which the insignificant dividend already distributed was declared, that it was not final. Next, the order of 20th September 1918 was not one of absolute discharge, for it was in terms conditional and expressly contemplated the continuance of the insolvent's disability to acquire property except for the benefit of his creditors and subject only to the reservation of a monthly income for himself and his family. Those terms are, as already stated, anomalous and it is doubtful what exact change in the insolvent's position they were intended to effect and whether they were intended to do or did more than release him from liability for his scheduled debts, those debts being made payable only from the property

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.

OLDFIELD, J.

which he was expected to acquire. Certainly, however, and this is the material point, there is nothing to indicate an intention on the part of the Court or other parties to the order to release such property from provable debts or to make any charge in respect of them except as regarded the liability of the insolvent himself. It is then impossible to accept the first argument for the insolvent (appellant) that this order constituted such a discharge, as is referred to in section 24 (3) as fixing the stage in the insolvency after which no more proofs, such as the respondent's, could be received.

That argument is moreover open to objection on the further ground that the reference to discharge in that section does not fix that stage. No doubt the section is at first sight explicit.

"Any creditor may at any time before the discharge of the insolvent tender proof of his debt."

But those words must be read in the light of section 39 (4) under which debts, if notified, as was the respondent's in the present case, can be proved until a final dividend is declared and the fact that it will in many cases be harsh and useless to postpone the grant of discharge until its declaration. For, although it may be impossible for the purpose of section 44 (3) (a) to ascertain the proportion between assets and liabilities at an early stage in the insolvency, it may be clear that the insufficiency of the former has arisen from causes, for which the insolvent is not responsible; and there will then be no reason for postponing his discharge, if he asks for it, as he can do under section 44 (1), at any time after the order of adjudication. We have not, it is worth observing, been shown that this reference to the right to prove before discharge corresponds with anything in the Presidency Towns Insolvency Act or English Law; and it is possible that it was worded

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.

OLDFIELD, J.

with reference to the description of debts provable under the Act in section 28 (1) as including those, to which the debtor becomes subject before his discharge by reason of obligations incurred before his adjudication. See section 46 (3), Presidency Towns Insolvency Act III of 1909 and section 30, 4 and 5 Geo. V, 59. In any case the general law of insolvency contemplates proof of debts at any time, so long as there are assets to be distributed and no injustice is done to other parties. *Ex parte Boddam*(1) and *McMurdo, In re, Penfield v. McMurdo*(2). We accordingly hold, as a fair construction and one which will reconcile the policy of the Act and section 39 (4) with section 24 (3) that the words we are concerned with in the latter are not restrictive, but, as VAUGHAN WILLIAMS, J., said, in the second of those decisions, of similar words, "as soon as may be after the making of a receiving order" in the Bankruptcy Act of 1883, Schedule II, rule 1, merely directory and

"non-compliance with them does not in any way deprive any creditor of his right or limit his right."

That contention failing, it is argued next that the respondent's debt is not provable, because it would be time-barred in other proceedings, or more definitely, because the decree, in which it is merged, would be unexecutable after the twelve years, which have elapsed since its date, under section 48, Civil Procedure Code. That twelve years elapsed between the respondent's decree and the presentation of his proof is no doubt true. But we are still of opinion that his debt is provable under section 28 (1) of the Act. The definition in that section of a provable debt contains no reference to the date, at which the proof is presented or to any date except that of the adjudication, when respondent's debt, embodied in the decree

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.

OLDFIELD, J.

which he had lately been executing, was certainly recoverable; and the view that the existence of the debt at the date of adjudication alone is material is in accordance with English authority on the similar provision of the English Law. The matter is dealt with generally in *Ex parte Ross, In the matter of Coles*(1), that decision, it may be observed, being unaffected by the facts that the debts in question had not, like respondent's debt, been merged in a decree and that they represented obligations which became enforceable only after the date of the adjudication, but before that of the discharge, the Indian and English definitions of provable debts alike including such liabilities. On the other side reliance has been placed on *Benson, In re; Bower v. Chetwynd*(2) and no doubt there reference was made to the principle that, if the statute begins to run, it continues, whatever happens, to do so; and that principle would be applicable in the case before us, because the twelve years' period available to respondent for execution of his decree had opened before appellant's petition was filed. But the principle was applied in the case then under disposal, only because that case was, what the case before us is not, one of an administration suit and not of insolvency. If the question had been of insolvency, *Ex parte Ross*(1) would, as the earlier part of the judgment shows, have been followed and it would have been held that a debt not barred at the commencement of the insolvency does not in and for the purpose of the insolvency become barred by lapse of time. Appellant has then relied on the decision in *Subbarayan v. Natarajan*(3) that section 48 contains an unqualified prohibition of execution of decrees over twelve years old. But the answer is that, when (as we hold) the respondent can prove for his decree debt in the insolvency, no

(1) (1825) 2 G. & J., 46 and 330.

(2) [1914] 2 Ch., 68.

(3) (1922) I.L.R., 45 Mad., 785.

(1) (1860) 2 De. G.F. & J., 625; 45 E.R., 763.

(2) [1902] 2 Ch., 684.

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.

question of his right to execute is raised. In these circumstances we must, following *Ex parte Ross*(1) hold that his debt is provable within the meaning of section 28 (1).

The result is that the Appeal fails and is dismissed with costs of legal representatives of first respondent.

VENKATA-
SUBBA RAO, J.

VENKATASUBBA RAO, J.—I agree and I would like to state my reason for the conclusion at which we have arrived.

It was first contended by Mr. K. V. Krishnaswami Ayyar for the insolvent-appellant that under section 24(3) of the Provincial Insolvency Act, 1907, a creditor would be bound to tender proof of his debt before the discharge of the insolvent and that, as in the present case, proof was submitted after the insolvent's discharge the creditor's application should not have been entertained. In the view I am taking, it is immaterial that the discharge in the present case was conditional. The relevant portion of section 24 (3) is as follows:

"any creditor of the insolvent may at any time before the discharge of the insolvent tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act and not entered in the schedule."

I am unable to interpret this provision as rendering it obligatory upon a creditor to submit proof before the discharge of the insolvent. Under section 44 a debtor may at any time after the order of adjudication apply for an order of discharge. There is nothing in the Act to prevent an order of discharge being passed at a very early date after the order of adjudication, and it seems to be inconsistent with the scheme of the Act to hold that a creditor who does not prove his debt before an order of discharge is deprived altogether of his remedy. I need only refer to section 39. Clauses 3 and 4 of that

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.
VENKATA-
SUBBA RAO, J.

section set forth the disabilities of the creditor guilty of laches in the matter of proving his debt. Clause 3 while giving him a certain right provides that he shall not be entitled to disturb any dividend declared previous to the proof of his debts. Clause 4 refers to a declaration for final dividend. It must be first observed that no inflexible rule is laid down as regards the point of time when a final dividend is to be declared. The clause only provides that when the receiver has realized all the property of the insolvent or so much thereof as can be realized without needlessly protracting the receivership, he shall declare a final dividend. The matter is largely one of discretion to be exercised by the Court. When a final dividend is to be declared in a particular case, will depend upon the circumstances of that case. It is next material to observe that the penalty prescribed for neglect or omission to prove a debt before making a final dividend is, that that dividend shall be declared without regard to the claim of the creditor who has failed to prove the debt. These are the provisions which limit or affect the right of a creditor who fails to tender proof of his debt before a specified point of time.

Mr. K. V. Krishnaswami Ayyar's second contention was, that if a creditor omits to prove his debt before the declaration of a final dividend he is barred from doing so. There is no warrant for this position in the sections to which I have referred. It is unnecessary to deal with this contention further than to say that this argument is entirely destructive of the first argument to which I have referred. According to the first contention based on section 24 (3), the discharge of the insolvent is the furthest point of time beyond which no debt can be proved, whereas the second contention fixes the declaration of a final dividend under sections 39 (4) as an event subsequent to which a proof of a debt cannot be tendered,

(1) (1825) 2 G. & J., 48 and 330.

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.
—
VENKATA-
SUBBA RAO, J.

In my opinion, neither of these arguments is sound. No limitation is fixed for the creditors to come in and prove their claims. This is the English rule, and we have been shown nothing to induce me to hold that under the Provincial Insolvency Act a different rule is intended.

Rule 1 of the second schedule to the English Bankruptcy Act, 1883, runs thus: "Every creditor shall prove his debt as soon as may be after the making of a receiving order." It will be noted that the word used is "shall." But in *McMurdo, In re; Penfield v. McMurdo*(1) VAUGHAN WILLIAMS, L.J., held at page 700 that the rule was

"merely a directory clause, a clause non-compliance with which does not in any way deprive any creditor of a right or limit his right."

He observed that in his experience of bankruptcy practice there never was any doubt as to the right of a creditor to come in and prove at any time during the administration. This rule was stated to be subject to certain conditions which are not material for the present purpose. See also Halsbury, Vol. 2, paragraphs 380 and 394.

No Indian cases were cited to us. But I find that in *Lakshmanan v. Muttia*(2) a Bench of this Court observed that it is open to a creditor at any time while the assets are undistributed to prove his debt and added

"this is the course in all bankruptcy and insolvency proceedings."

I am not quite clear how the statement in the judgment that even if a schedule had been framed it was still open to the creditor so long as assets were available to apply to be admitted on the schedule under section 352 of the Civil Procedure Code of 1882, is reconcilable with article 174 of the Limitation Act of 1877, which

(1) [1902] 2 Ch., 684.

(2) (1893) I.L.R., 11 Mad., 1.

prescribed for an application under section 353 of the said Code a period of 90 days from the date of the publication of the schedule. But I am referring to the case only for the purpose of showing that it was regarded as a settled doctrine that apart from any particular statute in bankruptcy proceedings no limitation was fixed for creditors to prove their debts. I may state that the Provincial Insolvency Act, III of 1907, repeals not only the provisions of the Civil Procedure Code relating to insolvency but also article 174 of the Limitation Act of 1877.

I also find that in *Parshadi Lal v. Chunni Lal* (1) a distinction was drawn between applications under section 353 of the Civil Procedure Code of 1882 governed in regard to limitation by article 174 prescribing a period of 90 days and application under section 352 to which article 178 prescribing a period of three years was held applicable. An argument based upon *Parshadi Lal v. Chunni Lal*(1) that an application by a creditor to prove his debt is governed by article 181 of the present Limitation Act, was not advanced before us, and possibly the omission to advance this argument was due to the fact that article 181 is held applicable only to applications under the Civil Procedure Code and that as at present the insolvency law is contained in the Insolvency Act and not in the Civil Procedure Code, article 181 can have no application.

The object underlying section 24 of the Provincial Insolvency Act is the same as that which underlies rule 1 of the second schedule to the English Bankruptcy Act, 1883, namely, to enjoin upon creditors to tender proof as early as possible, a course tending to convenience in the administration of the insolvent's estate; and the provision clearly does not enact a rule of limitation.

(1) (1884) I.L.R., 6 All., 142.

SIVASUBRA-
MANIA
v.
THEETHI-
APPA.
—
VENKATA-
SUBBA RAO, J.

SIVASUBRA-
MANIA
v.
THEERTHI-
APPA.
—
VENKATA-
SUBBA RAO, J.

I, therefore, hold as my learned brother has done that the creditor's application to prove his debt was not made beyond the time allowed by the law, and this ground of appeal consequently fails.

The next argument of Mr. K. V. Krishnaswami Ayyar was that the debt itself was barred, and as there was no subsisting debt there could be no proof of debt. In my opinion, this argument is also untenable. The creditor's debt was merged in a decree, and it was argued that under section 48, Civil Procedure Code, the decree became extinguished. This argument cannot be accepted, because section 48 deals only with execution and lays down that no order for the execution of the decree shall be made upon an application presented after the expiration of 12 years from certain dates, which however it is immaterial to specify for the present purpose.

Then the general argument remains that a barred debt cannot be proved in insolvency. I shall say nothing in regard to the question as to whether the pendency of insolvency proceedings does or does not save a debt from the bar of limitation. In the present case the debt is sought to be proved in the insolvency itself and no claim is based upon the debt in a separate proceeding. *Ex parte Ross, In the matter of Coles*(1) to which Mr. Srinivasagopalachari referred us, clearly held that in bankruptcy a debt did not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. The same view was taken in *Ex parte Lancaster Banking Corporation, In re Westby*(2), which was also relied on by the learned counsel. A very clear statement of the principle is contained in the following passage in the judgment of BACON, C.J., in that case:

(1) (1825) 2 G. & J., 46 and 330.

(2) (1879) 10 Ch.D., 776.

SIVASUBRA-
MANIA
v.
THEERTHI-
APPA.
—
VENKATA-
SUBBA RAO, J.

"When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the Statute of Limitations has no application at all to such a case, or to the principles by which it is governed."

The authority of these decisions has not in the slightest degree been shaken by *Benson, In re; Bower v. Chetwynd*(1). On the contrary the judgment in it while holding that the pendency of bankruptcy proceedings did not save a claim made in the course of an administration suit from being barred by the statute of limitations, carefully distinguished *Ex parte Ross, In the matter of Coles*(2) and other cases similar to it as being cases where the proof was in the bankruptcy itself. I cannot do better than quote the following passage at page 75 from the judgment:

"As to the second point, cases were quoted beginning with *Ex parte Ross*, 2 Gl. and J., 330, which show that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this there can be no doubt, but this is only in the bankruptcy."

The rule contained in section 28 (1) as regards debts provable under the Act is consistent with the rule deducible from the English cases. All debts to which the debtor is subject when he is adjudged an insolvent (quoting only the material portions) are debts provable under the Act. Under the section therefore it must be a debt to which the debtor was subject on the date of adjudication. If the debt was then subsisting, it is provable in insolvency.

On these grounds the second contention of the appellant also fails.

I, therefore, agree that the appeal should be dismissed with the costs of the legal representatives of the first respondent.

N.R.

(1) [1914] 2 Ch., 48.

(2) (1825) 2 G. & J., 46 and 330.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
and Mr. Justice Ramesam.

1923
March 7.

KRISHNA REDDY AND 4 OTHERS (PLAINTIFFS) APPELLANTS,
v.

THANIKACHALA MUDALI AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Clause 15 of the Letters Patent—Order of Judge on Original Side of High Court transferring to High Court a suit from Chingleput District Court, whether “judgment”—Appeal against order, maintainability of.

An order of a Judge of the High Court sitting on the Original Side transferring to the High Court a suit from the District Court, Chingleput, is a “judgment” within Article 15 of the Letters Patent and is therefore appealable. *Tuljaram Row v. Alagappa Chettiar*, (1912) I.L.R., 35 Mad., 1 (F.B.) followed.

APPEAL under clause (15) of the Letters Patent against the order passed by Mr. Justice KUMARASWAMI SASTRIYAR, in the exercise of the Extraordinary Original Civil Jurisdiction of this Court, dated 13th December 1922 in the matter of Original Suit No. 29 of 1922 on the file of the District Court of Chingleput.

The facts are given in the Judgment.

T. S. Ramaswami Ayyar and V. Sundaram Ayyar
for appellants.

V. Viswanatha Sastri for respondents.

JUDGMENT.

SCHWABE, C.J.—This is an Appeal from an order of the Judge sitting on the Original Side transferring a suit from the District Court of Chingleput to the High Court under clause (13) of the Letters Patent. As a preliminary point it is argued that no such Appeal lies on the ground that the order is not a judgment

* Letters Patent Appeal No. 3 of 1923.

within the meaning of clause (15) of the Letters Patent. In the recent case of *Kanayalal Bhoya v. Paramasuk Doss*(1), I stated that “I do not propose to attempt to add a further definition to those which have already been given in other cases.” (In my judgment in *Kanayalal Bhoya v. Paramasuk Doss*(1), the sentence “and the guiding principle is that a decision is a judgment which is given in an action.” should run “and the guiding principle is that a judgment is a decision which is given in an action.” It is my own fault and not the fault of the reporter). Definition after definition has been attempted of that word. A very narrow meaning was given to it by Sir RICHARD COUCH in *The Justices of the Peace for Calcutta v. The Oriental Gas Company* (2). A much wider definition was given by a Full Bench of this Court in *Tuljaram Row v. Alagappa Chettiar*(3) and it is enough for me to say that, in these matters, this Court is bound by the decision of its own Full Bench in that case. An attempt was made to give rules in that case which should be exhaustive of any matters that can come before this Court, and in my judgment, all we have to do now is to say whether the matter in question before us is excluded from or included in the class of judgments referred to there. I find that it was there held that the case of *DeSouza v. Coles*(4) in which it was held that the granting or refusing of leave to sue in this Court under clause (12) of the Letters Patent was a judgment in respect of which an appeal lay under clause (15) was rightly decided. This has also been held in *Vaghoji v. Camaji*(5). I can see no difference in principle between such an order and the order in this case. The learned

KRISHNA,
REDDY
v.
THANIKACHALA
MUDALI.
—
SCHWABE,
C.J.

(1) (1922) 16 L.W., 608. (2) (1872) 8 B.L.R., 433.
(3) (1912) I.L.R., 35 Mad., 1 (F.B.). (4) (1868) 8 M.H.C.R., 384.
(5) (1905) I.L.R., 29 Bom., 249.

KRISHNA
REDDY
v.
THANIKAI-
CHALA
MUDALI.
—
SCHWABE,
C.J.

Judge in this case by his order puts an end to the case as it now stands in Chingleput and confers a jurisdiction on this Court in respect of that particular case. In my judgment we are bound by the decision of the Full Bench of this Court referred to above and we hold that this is a matter which is appealable. The contrary view has been taken in *Khatizan v. Sonairam Daulatram*(1) where on this precise point, a Bench of the Calcutta High Court has held that no appeal lies, but that Bench has applied the reasoning of Sir RICHARD COUCH in his judgment in *The Justices of the Peace for Calcutta v. The Oriental Gas Company*(2) and the passage which they followed in that case is the passage which was expressly dissented from by the Full Bench of this Court in *Tuljaram Row v. Alagappa Chettiar*(3). The Calcutta High Court followed the earlier Calcutta decisions on this point, but this Court must follow its own Full Bench decision. It may be that some day this point may somehow get to the Privy Council and then, perhaps, we shall know, whether Madras or Calcutta is right. But for the present, all we can do is to hold that this Appeal lies. The preliminary point therefore fails.

Both parties state that, by consent, this Appeal has been settled on the terms that it should be dismissed without costs, the respondent undertaking to pay Rs. 100 to the appellants in respect of costs already incurred and also undertaking, if further Court-fee has to be paid by reason of the case having been transferred from Chingleput to Madras, to provide what may be necessary up to Rs. 100. C. M. P. No. 681 of 1923 for stay will also be dismissed.

RAMESAM, J. RAMESAM, J.—I agree.

N.R.

(1) (1920) I.L.R., 47 Cal., 1104.

(2) (1872) 8 B.L.R., 433.

(3) (1912) I.L.R., 35 Mad., 1 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice
Venkatasubba Rao.

RANGANATHA THATHACHARIAR (FIRST RESPONDENT),
APPELLANT,

v.

KRISHNASWAMI THATHACHARIAR AND NINE OTHERS
(PETITIONERS 1 TO 4, 2, 3, 5, 6, 7 AND 8TH RESPONDENTS),
RESPONDENTS.*

Appeal, right of—Suit and decree for scheme of administration of a temple—Order of Court to fill up vacancy amongst trustees in accordance with scheme—Appealability of—Order not one in execution, nor between parties, within section 47, Civil Procedure Code—Order, a judicial order.

Where a plaint prayed only for the settlement of a scheme for the administration of a temple and a decree was passed settling a scheme which *inter alia* provided methods for the appointment of the first set of trustees and for filling up the future vacancies amongst the trustees,

Held that after the framing of such a decree which granted the prayer in the plaint there was nothing more to be done by way of executing the decree. Hence an order by the Court directing the proper authorities under the scheme to fill up a vacancy amongst the trustees is not one passed in execution and is therefore not appealable, though the order passed by the Judge is a judicial one and not one passed by him as a *persona designata*.

Nor is the order passed one between the parties or their representatives within section 47, Civil Procedure Code.

APPEAL against the order of R. GOPALA RAO, Subordinate Judge of Chingleput, in M.P. No. 164 of 1921, in Original Suit No. 11 of 1907.

This was an appeal filed against the order of the Subordinate Judge of Chingleput, under the following

* Civil Miscellaneous Appeal No. 860 of 1922.

1923,
March 21.

RANGA-
NATHA
THATHA-
CHARIAR
v.
KRISHNA-
SWAMI
THATHA-
CHARIAR.

circumstances. Original Suit No. 11 of 1907 was filed in the District Court of Chingleput for settling a scheme for the administration of Sri Devarajaswami Temple at Conjeeveram. A decree was passed by the District Court settling a scheme which was afterwards amended by the High Court in Appeal Suit No. 212 of 1909. The decree so amended provided for the appointment (a) of the first set of trustees, (b) of a Board of supervision over the trustees, (c) for the method of filling up of any vacancy amongst the trustees by certain persons mentioned in the scheme, (d) for the appointment of a treasurer and (e) for the preparation of annual budgets. One of the trustees originally appointed was said to have resigned his place and this petition, now under appeal, was presented to the lower Court by some worshippers interested in the temple, to give directions for filling up the vacancy. The trustee who was alleged to have resigned opposed the petition on the ground that he did not really resign his place, that a letter of resignation which he had intended to send was not sent by him but was surreptitiously taken from him by somebody and sent to the Board of supervision and that, on knowing the same, he withdrew his so-called resignation. The Subordinate Judge held that the letter of resignation was really sent by the trustee, that the withdrawal was ineffectual as there was no provision in the scheme allowing the withdrawal and as it was sent more than a month after the resignation by which time the resigning trustee ceased to be a trustee according to the provisions of the scheme. As the remaining trustees did not fill up the vacancy within 3 months from the date of the resignation, the lower Court directed in accordance with the scheme, the Board of Supervision, to fill up the vacancy. Thereupon the trustee who was said to have resigned filed this appeal. The scheme framed by the High Court is fully

set out in *Veeraraghava Thatha Chariar v. Srinivasa Thatha Chariar* (1).

N. Chandrasekara Ayyar for respondent took a preliminary objection that no appeal lay against the order—(1) as the order was not one passed in execution, (2) as it was not one between parties to the suit and (3) as the order was passed by the Subordinate Judge not as a Court but as a *persona designata*.

C. Krishnamachari for appellant.—An appeal lies for the following reasons. The order is one passed in execution—see *Prayag Doss Ji Varu, Mahant v. Tirumala Srirangachariar* (2), *Damodarbhat v. Bhogilal* (3). He distinguished *Lokasikhamani Mudaliar v. Thiagaraya Chettiar* (4). Every time a vacancy occurs the decree is executable. Matters like this are treated in England as executable under the decree framing the scheme. See Tudor on Charities, page 379, and Lord Romilly's Act. The order must be deemed to be one passed between the parties to the suit, as other persons also can execute such decrees. See *Swaminatha Mudaliar v. Kumaraswami Chettiar* (5). The lower Court acted only as a Judge; *Ramaswami Goundan v. Muthu Velappa Gounder* (6), *Venkatarama Aiyar v. Janab V. Hamid Sultan Maracayar* (7), *National Telephone Company, Limited v. Postmaster-General* (8) and *Balakrishna Udayar v. Vasudeva Ayyar* (9).

N. Chandrasekara Ayyar for respondent.—As the prayer in the plaint was only for the settlement of a scheme and as that was granted by the decree there was nothing more for the plaintiff to execute and hence there is no appeal; see *Lokasikhamani Mudaliar v.*

RANGA-
NATHA
THATHA-
CHARIAR
v.
KRISHNA-
SWAMI
THATHA-
CHARIAR.

(1) (1912) 23 M.L.J., 134.

(3) (1900) I.L.R., 24 Bom., 45.

(5) (1923) 44 M.L.J., 282.

(7) (1923) 44 M.L.J., 161.

(2) (1905) I.L.R., 28 Mad., 319.

(4) (1917) M.W.N., 420.

(6) (1923) 44 M.L.J., 1.

(8) [1913] A.C., 546.

(9) (1917) I.L.R., 40 Mad., 793 (P.C.).

RANGA-
NATHA
THATHA-
CHARIAR
v.
KRISHNA-
SWAMI
THATHA-
CHARIAR.

Thiagaraya Othettiar (1), *Janakirama Reddi v. Thiruvankada Ramunuja Chari* (2). The trustees or other persons such as members of the Board of Supervision or the treasurer to be appointed under the scheme after it is framed can in no sense be regarded as parties to the original suit; nor can they be regarded as their representatives. He explained and distinguished the cases quoted by the appellant. Independently of Lord Romilly's Act, a scheme once framed can be modified in England by a new bill: see *Attorney-General v. The City of London* (3), and Tudor on Charities, page 198. The lower Court acted only as a *persona designata*.

OLDFIELD, J. OLDFIELD, J.—This appeal is against an order passed by the Subordinate Judge's Court, Chingleput, on a petition presented to it under clause (10) of the scheme sanctioned by the decree in A.S. No. 212 of 1909 (on the file of the High Court) for the management of one of the Conjeeveram temples. That petition was presented on the assumption that a vacancy had occurred among the trustees under the scheme and that as it has not been filled by either of the two agencies primarily responsible for filling it, the lower Court must in accordance with the scheme do so. The lower Court held after enquiry that—the point disputed before it—a vacancy had occurred, and directed that it should be filled in the manner provided by the rules framed by the High Court. No more need be said to show that there is no question of failure on the part of the lower Court to exercise jurisdiction or of interference with its action by way of revision. The question is then only of interference as we are asked to interfere in the exercise of our appellate powers and we have

(1) (1917) M.W.N., 420.

(2) (1907) 2 M.L.T., 94.

(3) (1790) 3 Bro. C.C., 171; 1 Ves., 243.

accordingly to decide whether an appeal against the lower Court's disposal lies, respondents contending that it does not.

That, it is conceded, depends first on whether the position of the District Court under the scheme, clause (10), is that of a *persona designata* and not of a Court which will, in case its order is appealable under any appropriate provision of law, be subject to our appellate jurisdiction. The test to be applied has been considered fully in a recent decision, *Ramaswami Goundan v. Muthu Velappa Goundar* (1), which was followed in *Venkatarama Aiyar v. Janab V. Hamid Sultan Maracayar* (2) and there is no necessity to add anything to that statement of the law, except that no distinction can be drawn between the interpretation of an Act, which was then in question and that of the scheme before us. There is accordingly first the consideration that as the procedure to be followed in the Court's exercise of the power conferred by the scheme is not specified therein, the applicability of its ordinary judicial procedure must be presumed and also, as follows from *National Telephone Company, Limited, v. Postmaster General* (3), of the law relating to appeals from its ordinary decisions. And next when in accordance with the course taken by the Privy Council in *Balakrishna Udayar v. Vasudeva Ayyar* (4) we refer to the position occupied by the Court under clauses of the scheme other than that now under construction, for instance, clauses (13), (48), and (61) and find that its functions thereunder are clearly judicial we must take the same view of the function with which we are now concerned.

If, however, the Court was in this matter acting judicially it is still as respondents contend necessary to

(1) (1923) 44 M.L.J., 1.
(3) [1913] A.C., 546.

(2) (1923) 44 M.L.J., 161.
(4) (1917) I.L.R., 40 Mad., 798 (P.C.).

RANGA-
NATHA
THATHA-
CHARIAR
v.

KRISHNA-
SWAMI
THATHA-
CHARIAR.

OLDFIELD, J.

RANGA-
NATHA
THATHA-
CHARIAR
v.
KRISHNA-
SWAMI
THATHA-
CHARIAR.

OLDFIELD, J.

see whether its order was one against which under the ordinary law an appeal will lie and that, it is not disputed, depends on whether its order was a "decree" within the meaning of section 2 (2) of the Code of Civil Procedure or more particularly whether it was the determination under section 47 of a question relating to the execution of a decree.

That it was so is alleged on the short ground that the order was passed to give effect to the scheme and that the scheme was prescribed in and is part of the decree. But first that takes no account of the requirement of the latter section that the question determined shall be one arising between the parties to the suit or their representatives. For, in the present case, of the parties to the lower Court's order some at least, respondents 5 to 8, were impleaded only in their capacity as members of the Board of Supervision, which was created only under the decree in O.S. No. 11 of 1907 and of them, 6, 7 and 8th respondents were certainly not parties in any sense and were not even connected with the community to which the plaintiffs therein belonged or with them, even in the representative capacity, in which they sued on behalf of the Thathachar family. And generally it is clear that this requirement of section 47 cannot be regarded as necessarily fulfilled by every Court's order made under the scheme, for it is obvious that this would not be so in the case of an order under clause (48) or clause (61) for the removal from office of a person, who until his appointment had had no connection with the institution and was a stranger to the suit.

There is, moreover, a further and equally substantial objection to the appellant's contention that the question determined by the lower Court does not relate to the execution of a decree. For the relief asked for in O.S. No. 11 of 1907 was simply the framing of a scheme; and,

RANGA-
NATHA
THATHA-
CHARIAR
v.
KRISHNA-
SWAMI
THATHA-
CHARIAR.

OLDFIELD, J.

when that had been done in the decree passed there was no further relief asked for or granted, in respect of which execution could be taken out. That having been the scope of the suit and the decree, there is no ground for the suggestion which in fact appellant's contention involves, that the decree anomalously must be regarded as executable in perpetuity on every occasion on which deviation from the scheme is alleged. True, the scheme provides for the Court's intervention on such occasions. But to assume that it will intervene by way of execution will be to beg the question in issue; and it is material that there is no such explicit provision for enforcement of the scheme in execution as was contemplated in a case to be referred to, *Prayag Doss Ji Varu, Mahant v. Tirumala Srirangacharlavaru* (1) the only provision for future control over the trust being general, in clause (64) for the making of rules by the District Court and in clause (65) for the modification by the High Court of the scheme itself.

It is useless, in view of the distinctive characteristics of the Indian law of religious endowments and Indian procedure relating to execution, to refer to English practice or decisions. Appellant relies first on the decision just referred to as enunciating the general principle that directions in a scheme can be enforced in execution by persons interested; but the preceding and succeeding contexts make it clear that the Court was really only formulating a provision in the scheme it was framing. *Damodarbhat v. Bhogilal* (2) referred to in the decision just noticed, is no doubt in appellant's favour to the extent that the Court was prepared to treat persons, who had been parties to the decree and who failed to submit accounts in accordance with the scheme prescribed in it,

(1) (1905) I.L.R., 28 Mad., 319.

(2) 1900) I.L.R., 24 Bom., 45.

RANGA-
NATHA
THATHA-
CHARIAR
v.
KRISHNA-
SWAMI
THATHA-
CHARIAR.

OLDFIELD, J.

as in contempt and to compel them to do so by imprisonment or attachment of their property. But this authority was merely mentioned and distinguished in *Lokasikhamani Mudaliar v. Thiagaroya Chettiar*(1) and it does not seem to have ever been followed. It is moreover material that in it as appears from *Damodar v. Bhat Bhogilal*(2) the taking of accounts was a relief asked for specifically in the suit and granted independently of the framing of a scheme in the Court of first instance, and as there is nothing to show that this part of the decree was altered in appeal, that fact may afford an explanation for the High Court's conclusion. Here when the relief asked for and granted was the scheme alone, there is no reason for holding that the further remedy provided in the scheme need or can be asked for in execution of the decree or that the order granting or refusing it is appealable as one passed under section 47.

On the ground that no appeal lies, the appeal must be dismissed with costs.

VENKATA-
SUBBA RAO,
J.

VENKATASUBBA RAO, J.—I entirely agree.

When a suit is instituted in the words of section 92, Civil Procedure Code, to obtain a decree settling a scheme and a decree is passed embodying a scheme the relief sought must so far as the suit is concerned, be regarded to have been finally given and there remains nothing to obtain by way of execution. In a suit for money the decree directs payment of it by the defendant to the plaintiff. To realize the money it may be necessary to execute the decree. Similarly in suits for specific moveables, for recovery of immoveable property, to enforce specific performance of a contract, etc., what is awarded by the decree has to be realized in execution. But where the relief asked is that a scheme may be

(1) (1917) M.W.N., 420.

(2) (1898) I.L.R., 22 Bom., 493.

settled by the decree and a scheme has been so settled by the decree, the plaintiffs have obtained all that they have asked and the scheme that is framed by the Court is similar in this respect to a scheme settled out of Court or a scheme contained in a will or an instrument which has made the dedication.

The argument that the application in question was an application in execution, was possible because the particular clause in the scheme under which the application was made, directed an application to the Court and the Court is defined in the scheme as either the Subordinate Court having jurisdiction over the temple or the District Court of Chingleput. But most of the clauses in the scheme make no reference to the Court at all. And can it be contended with any show of reason that the provisions of those clauses can be enforced in execution of the decree? For instance clause (25) of the scheme provides that the trustees shall annually before a certain date prepare a budget for the following year. In the preparation of the budget the trustees are directed to have regard to the custom of the institution. If the budget is not prepared or, in the preparation of it, the custom is disregarded, is the remedy to be by way of execution of the decree? The dereliction or non-compliance may occur fifty or hundred years after the passing of the decree. Clause (42) says that the treasurer shall not keep with him more than Rs. 200 in cash. If he disobeys this direction, how can it be enforced in execution? Clause (54) again provides that the opinion of the Board of Supervision shall be determined by the majority of its members. If the Board on any particular occasion gives effect to the view of the minority, I fail to see how the relief can be got in execution. Dealing with the last mentioned instances, it is obvious that neither the treasurer nor the members of the Board may

RANGA-
NATHA
THATHA-
CHARIAR
v.
KRISHNA-
SWAMI
THATHA-
CHARIAR.
—
VENKATA-
SUBBA RAO,
J.

RANGA-
NATHA
THATHA-
CHARIAR
v.
KRISHNA-
SWAMI
THATHA-
CHARIAR.
—
VENKATA-
RUBBA RAO,
J.

happen to be parties to the suit; most likely they may not. It is impossible to conceive how an execution application lies.

The Court to which the application in question was made happens to be the Court which has jurisdiction to execute the decree passed in the suit. But this is a mere accident. The scheme might have provided that the application was to be made to another Court, a Court not having jurisdiction to execute the decree. As a matter of fact, clause (63) of the scheme provides for an application to the High Court of Madras for disposal of surplus funds and similarly clause (65) contemplates an application also to the High Court for the modification of the scheme. Surely if such applications are made by no stretch of imagination can they be described as execution applications.

Now turning to authority, the only case which may seem to support the contention of the appellant is *Damodarbhat v. Bhogilal*(1). But I think it may be distinguished in the manner suggested by my learned brother; if however the case can be said to decide that a decree settling a scheme may be executed, I respectfully dissent from it. *Prayag Doss Ji Varu, Mahant v. Tirumala Srirangacharlavaru*(2) does no more than merely cite *Damodarbhat v. Bhogilal*(1). The question did not arise and the Court was merely concerned with the actual terms of the scheme to be sanctioned. Some reliance was next placed upon *Swaminatha Mudaliar v. Kumaraswami Chettiar*(3) decided by SPENCER, J. and myself. The question that arose was whether a decree could be executed by persons other than those on the record. In holding that it could be, we merely reproduced an observation occurring in the judgment in

(1) (1900) I.L.R., 24 Bom., 45.

(2) (1905) I.L.R., 28 Mad., 319.

(3) (1923) 44 M. L. J., 282.

Prayag Doss Ji Varu, Mahant v. Tirumala Srirangacharlavaru(1) to the effect that persons interested (that is other than those who are on the record) may enforce in execution the directions in a scheme. We were dealing with the question as to who could execute a decree and we held that persons not parties to the suit could also execute it. We were concerned only with the first words of the sentence quoted and we did not intend to decide (and of course there was no occasion for it) whether or not a scheme decree is capable of execution.

I also agree that the Court exercised its powers as a Court of law and not as a *persona designata*: but the appeal was filed and justified on the footing that the order related to execution and could be questioned in appeal under section 47, Civil Procedure Code, and we were not asked to interfere with the order in the exercise of our powers of revision or of superintendence.

With these observations, I agree that the appeal should be dismissed with costs.

N.B.

(1) (1905) I.L.R., 28 Mad., 319.

RANGA-
NATHA
THATHA-
CHARIAR
v.
KRISHNA-
SWAMI
THATHA-
CHARIAR.
—
VENKATA-
RUBBA RAO,
J.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice
Venkatasubba Rao.

1923,
April 19

SUNDARA RAMANUJAM NAIDU (PLAINTIFF),
PETITIONER,

v.

SIVALINGAM PILLAI AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

*Court Fees Act (IX of 1872) section 7, clauses v (e) and x (a)—
Suit for the execution of a sale-deed of a house and for
possession—Valuation.*

A suit to compel the defendant to execute a sale-deed of a shop in pursuance of an agreement to sell it, is a suit for specific performance within section 7, clause x (a), of the Court Fees Act and does not become a suit for possession as described in section 7, clause v (e), by reason of the addition of a prayer for possession. *Nihal Singh v. Sewa Ram*, (1916) I.L.R., 38 All., 292, followed. *Madan Mohan Singh v. Gaja Prosad Singh*, (1911) 11 I.C., 228, and *Gopal Das v. Paramanand*, (1921) 60 I.C., 512, not followed.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the decree of V. BASHYAM AYYANGAR, Subordinate Judge of Kumbakōnam, in Civil Miscellaneous Appeal No. 25 of 1920, preferred against the decree of K. SOURIRAJULU NAYUDU, District Munsif of Kumbakōnam, in Original Suit No. 241 of 1917.

The facts are given in the judgment of VENKATASUBBA RAO, J.

T. Narasimha Ayyangar with K. S. Desikan for petitioners.

A. Krishnaswami Ayyar with T. S. Ramaswami Ayyar and V. Sundaram Ayyar for respondents.

* Civil Revision Petition No. 255 of 1921.

The Court made the following Order :—

The question raised here is how suits for specific performance and for possession of the property agreed to be sold are to be valued for the purpose of jurisdiction. Before disposing of this question, we think it proper that we should have a finding from the Lower Appellate Court as to what exactly is the amount of consideration for the agreement Exhibit A. It is not stated in exact figures in the deed but has to be arrived at on an ascertainment and calculation of the items mentioned in it.

The finding will be submitted within two months from this date and seven days will be allowed for filing objections. Fresh evidence will be allowed on both sides.

In compliance with the above order, the Subordinate Judge of Kumbakōnam submitted the following

FINDING.

"My finding on the issue remitted by the High Court is that the consideration for Exhibit A is Rs. 2,265 made up of (i) principal Rs. 2,000, (ii) interest Rs. 159, and (iii) costs incurred in Court and miscellaneous expenses connected therewith Rs. 76."

On receipt of the above finding, the Court delivered the following

JUDGMENT.

KRISHNAN, J.—This Civil Revision Petition arises from KRISHNAN, J. a suit brought by plaintiff to enforce specific performance of a contract to sell a shop by directing the defendant to deliver a proper sale-deed to him on his paying the price into Court and for recovery of possession of the property. The question that arises for decision is what is the proper value of this suit for purposes of jurisdiction. Section 8 of the Suits Valuation Act makes the value for court fees and for jurisdiction the same in

SUNDARA
RAMANUJAM
v
SIVALINGAM.

SUNDARA
RAMANUJAM
v.
SIVALINGAM,
—
KRISHNAN, J.

such suits. We have therefore to see under what provision or provisions of the Court Fees Act the suit has to be valued. The District Munsif held that it was one for recovery of possession and should be valued under section 7, clause v (e) of the Act and as that value was over Rs. 3,000, the pecuniary limit of his jurisdiction, he returned the plaint to be presented to the proper Court. On appeal the Subordinate Judge upheld that view and hence the revision to us by the plaintiff.

Plaintiff contends that the suit falls under clause x (a) of section 7 and not under clause v at all. The defendant on the other hand argues that the suit falls under clause v (e) and its value is either the aggregate of the values computed under clauses v (e) and x (a) or at any rate is the value under clause v (e). Clause x (a) provides that in a suit for specific performance of a contract of sale the court-fee payable is "according to the amount of the consideration." Now the consideration stated in the document is "the sum total of the principal, interest, costs incurred and other miscellaneous expenses connected therewith." We called for a finding to ascertain how much these items totalled up to in cash and the finding is that it works out to Rs. 2,265. We accept that finding as one of fact; and it follows that if the suit is valued under clause x (a) alone it is within the Munsif's jurisdiction.

It seems to me that the suit clearly falls within the description of a suit for specific performance under clause x (a) and the addition of the prayer for possession makes no difference. The relief by way of giving possession arises from the relief granting the execution and delivery of the sale-deed, as without a registered sale-deed, title cannot be transferred under the Transfer of Property Act where the value is over Rs. 100; without the latter relief being granted, the former cannot:

see *Muhi-ud-din Ahmad Khan v. Majlis Rai*(1). Nevertheless both the rights, viz., the right to the sale-deed and the right to possession spring out of the same contract though one necessarily precedes the other. The delivery of possession is a part of the specific performance of a contract of sale unless the terms thereof show that the vendee was not under an obligation to deliver possession. The claim for delivery of possession is as much a part of specific performance as the claim for the payment of the price is, when the seller brings the suit for specific performance. In fact this Court has held in *Bhashyakarl Naidu v. Andalammal*(2) that a suit for the purchase price by itself is a suit for specific performance. It is clear from form 47, 1st Schedule, Appendix A of the Civil Procedure Code, that a prayer for possession is a proper prayer in a suit for specific performance without altering the character of the suit. It seems to me that this suit cannot be properly described as a suit for possession of property and brought under clause v of section 7 of the Court Fees Act simply because a prayer for a possession is added, any more than, for example, a suit for redemption of a usufructuary mortgage, wherein also there will be a prayer for possession, can be so described and brought under that clause.

Now, as regards the authorities cited before us, the case in *Nihal Singh v. Sewa Ram*(3), is a direct ruling on the point and is in favour of the view I am taking. On the other hand a ruling of the Calcutta Court in *Madan Mohan Singh v. Gaja Prosad Singh*(4), has an observation in it that the suit such as the one before us is in substance a suit for possession and must be valued as such. That view has been followed by the Lahore High Court in

SUNDARA
RAMANUJAM
v.
SIVALINGAM,
—
KRISHNAN, J.

(1) (1884) I.L.R., 6 All., 231.

(3) (1916) I.L.R., 38 All., 292.

(2) (1918) M.W.N., 896.

(4) (1911) 11 I.C., 228.

SUNDARA
RAMANUJAM
v.
SIVALINGAM.
—
KRISHNAN, J.

Gopal Das v. Paramanand(1), but the question has not been fully discussed in these cases and with great respect to the learned Judges, I regret I am unable to follow their view for the reasons I have given above.

It was strenuously contended by the learned vakil for the respondent that the view I am taking is opposed to the view taken in *Krishnammal v. Soundararaja Aiyar*(2), as to the nature of a suit for specific performance. That was a ruling under Order II, rule 2 of the Code of Civil Procedure and it was held there that the failure to ask for possession in the suit for specific performance did not bar a second suit for possession. This ruling is directly against the ruling in *Krishnasami v. Sundarappayyar*(3), but the point was not referred to a Full Bench. I do not think we need however settle this conflict of opinion as the ruling relied on has no direct bearing on the present case which is one under the Court Fees Act. The point there was whether a plaintiff suing for obtaining a proper sale-deed was entitled to make a claim for possession as a matter of right and the learned Judges held he was not, and that clause (2) of rule 2 therefore did not apply to him. Though it was conceded that such a plaintiff may be permitted to add such a prayer, it was held that it was not a claim that arose directly from the cause of action sued on and therefore the failure to make it did not entail the consequence stated in clause (2) of the rule. Whether this view be correct or not, the point in the suit before us is totally different. It is this—when the prayer for possession is allowed to be added, does the suit cease to be one for specific performance and become a suit for possession or combination of both suits under the Court Fees Act? I do not think so.

(1) (1921) 60 I.C., 512.

(2) (1915) I.L.R., 38 Mad., 698.

(3) (1895) I.L.R., 18 Mad., 415.

SUNDARA
RAMANUJAM
v.
SIVALINGAM.
—
KRISHNAN, J.

I have already given my reasons for holding that it cannot be treated as a suit for possession under the Court Fees Act. It follows of course that it could not be a combination of two suits either or of "two or more distinct subjects" to attract the application of section 17 of the Court Fees Act. The word "subject" is of a somewhat uncertain connotation and it was held to be "not capable of any precise definition" in *Neelakandhan v. Ananthakrishna Ayyar*(1). The case cited in *Krishnasami v. Sundarappayyar*(2), is no authority for saying that in a suit for specific performance and for possession court-fee should be paid on the aggregate value of the two prayers. Though perhaps that case seems to have assumed such a proposition, there is no discussion about it and the observation itself is an *obiter dictum* as the deficient court-fee had been paid. We cannot thus treat it as an authority on the point. No other case has been cited to support the same view.

I have come to the conclusion that the present suit is rightly valued under section 7, clause (x) (a) of the Court Fees Act and that it is within the jurisdiction of the Munsif. I therefore set aside the orders of both the lower Courts and direct the District Munsif to take the plaint on his file and dispose of the suit according to law. Defendant will pay plaintiff's costs in this and in the Lower Appellate Court. The costs in the first Court will abide and follow the result.

VENKATASUBBA RAO, J.—The point to be decided is whether the District Munsif's Court has jurisdiction to entertain the suit. The plaintiff prayed for a decree directing the defendant to execute a sale-deed in respect of the suit property and to deliver possession thereof. The defendant had agreed to execute a conveyance in

VENKATA-
SUBBA RAO, J.

(1) (1907) I.L.R., 30 Mad., 61.

(2) (1895) I.L.R., 18 Mad., 415.

SUNDARA
RAMANUJAM
v.
SIVALINGAM.
—
VENKATA-
SUBBA RAO, J.

favour of the plaintiff, and the suit was to enforce specific performance of this agreement. It has been found that the house is worth more than Rs. 3,000, but the consideration for the contract of sale amounts to Rs. 2,265. Is this a suit for specific performance falling under section 7, clause (x) of the Court-Fees Act, or is it a suit for possession to which section 7, clause (v) of the same Act applies? In the former case, the court-fee payable has to be computed *ad valorem* on the amount of the consideration (in this instance Rs. 2,265), and under section 8 of the Suits Valuation Act (Act VII of 1887), the same amount will determine also the Court which has jurisdiction to try the suit. On the other hand, if the suit is one for possession, the court-fee has to be computed under section 7 (v) (e) with reference to the market value of the house (more than Rs. 3,000), and under section 14 of the Madras Civil Courts Act, III of 1873, the forum will have to be determined with reference to that value. In short, if the suit is held to be a suit for specific performance of a contract of sale, the District Munsif's Court will have jurisdiction; if the suit is held to be a suit for possession, that Court will have no jurisdiction.

I am quite clear that the suit falls within section 7 (x) (a) of the Court Fees Act. The words used are "specific performance of a contract of sale." Specific performance does not consist merely of the execution of a sale-deed. A suit to obtain a sale-deed is not what is referred to in the said section, but it is a suit for specific performance of a contract of sale. The execution of a conveyance is only a part of the specific performance. If the vendor agrees to execute a conveyance as well as to deliver possession, it cannot be said that specific performance of the contract does not comprise both the execution of the sale-deed and delivery of possession.

In every contract of sale, unless the contrary appears, the vendor must be deemed to impliedly agree to give possession of the property to the purchaser. In a suit for specific performance the purchaser seeks to enforce the terms of his contract. The seller as much agrees to put the purchaser in possession as he agrees to execute a conveyance in his favour.

Then it is argued that, as the plaintiff also claims possession in the suit, the suit must be regarded as one for possession. But the specific provision relating to suits for specific performance excludes the applicability of the general provision relating to suits for possession. If the claim to possession is involved in the claim to specific performance, the suit will still remain one for specific performance and it must be dealt with only on that footing. A suit for redemption is, in effect, a suit for possession of the property but can it be contended that the provision applicable to such a suit is not the one dealing with suits for redemption, section 7, clause (ix), but the one dealing with suits for possession, section 7, clause (v)? I shall not use the words "principal" and ancillary. It is not strictly correct to say that, in a suit for specific performance of a contract, the execution of a conveyance is the principal relief and possession is secondary and ancillary. It is, indeed, difficult to say in the abstract that a certain relief is the primary relief claimed. I would prefer to rest my judgment on the ground that a suit for specific performance is, in its essence, different from a suit for possession, and the mere fact that possession is also claimed does not render the suit any the less a suit for specific performance.

I may observe that the agreement on which the suit is based, far from indicating an intention not to give possession, contains evidence of the fact that the parties intended that possession should be given.

SUNDARA
RAMANUJAM
v.
SIVALINGAM.
—
VENKATA-
SUBBA RAO, J.

SUNDARA
RAMANUJAM
v.
SIVALINGAM.
—
VENKATA-
SUBBA RAO, J.

The view taken in *Nihal Singh v. Sewa Ram*(1), a decision of a single Judge, supports my conclusion. In *Madan Mohan Singh v. Gaja Prosad Singh*(2), the Calcutta High Court took a different view; but there is no discussion of the principle, and we find merely a statement to the effect that a suit for specific performance is, in substance, a suit for possession. *Gopal Das v. Parmanand*(3) is a decision of a single Judge of the High Court of Lahore and it affords very little assistance, because in the judgment it is assumed that a sale had already taken place and, therefore, the suit could not possibly be regarded as one for specific performance of a contract to sell, though I must say with all respect, that it is far from clear how there could be a completed oral sale, the consideration being stated to be Rs. 4,250. *Nathu Khan v. Muhammad Khan*(4) is a case from the Punjab, and the learned Judge who decided it followed *Madan Mohan Singh v. Gaja Prosad Singh* (2), on the ground that he could not find any authority to the contrary, although his own inclination was the other way.

I hold that the suit is a suit for specific performance of a contract to sell.

Mr. Alladi Krishnaswami Ayyar, the learned Vakil for the defendant, very strongly relied upon *Krishnammal v. Soundararaja Aiyar*(5). It was held in it that a plaintiff, who had obtained in a previous suit a decree directing the defendant to execute a sale-deed, was not barred after obtaining the conveyance from instituting a fresh suit for the recovery of possession of the property covered by the conveyance. Order II, rule 2 of the Civil Procedure Code, omitting portions not relevant, runs thus:

(1) (1916) I.L.R., 38 All., 292.

(2) (1911) 11 I.C., 228.

(3) (1921) 60 I.C., 512.

(4) (1918, 46 I.C., 534.

(5) (1915) J.L.R., 38 Mad., 698.

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action; and when a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted."

The argument advanced is this: If a second suit for possession is not barred, it follows that, the right to possession does not arise out of the same cause of action; and if the right to possession does not arise out of the same cause of action, it is wrong to say that out of the same contract spring both the rights—the right to a sale-deed as well as the right to possession. But this argument ignores the fundamental difference to which reference is made in the judgment of TYABJI, J., in *Krishnammal v. Soundararaja Aiyar*(1), between a right to possession arising out of the contract to sell and the right to possession based upon the conveyance, a distinction also pointed out in the judgment of SARGENT, C.J., in *Nathu Valad Pandu v. Bhudu Valad Bhika*(2). If a plaintiff claims in the first suit only a conveyance and omits to ask for possession, a second suit for possession based upon the agreement may fail; but if the claim to possession in the second suit is based upon the conveyance obtained in pursuance of the decree in the first suit, the cause of action in the second suit is entirely different, and the first suit cannot operate as a bar. This is the effect of *Krishnammal v. Soundararaja Aiyar* (1), and *Nathu Valad Pandu v. Bhudu Valad Bhika*(2). It has been held that in the same suit there may be prayers both for execution of a conveyance and for possession. It has also been held that a second suit for possession is not barred by the previous suit in which a mere conveyance was claimed. I do not think that there is any inconsistency in the two sets of decisions.

SUNDARA
RAMANUJAM
v.
SIVALINGAM.
—
VENKATA-
SUBBA RAO, J.

(1) (1915) I.L.R., 38 Mad., 698.

(2) (1894) I.L.R., 18 Bom., 537.

SUNDARA
RAMANUJAM
v.
SIVALINGAM.
—
VENKATA-
SUBBA RAO, J.

The right to possession claimed in the second suit must be deemed to be the right based upon the conveyance and not arising out of the contract to sell. This is, in my view, the true principle and, judged in the light of it, the decisions are easily reconcilable, and the view I am taking is not opposed to the principle underlying these various decisions.

In the result I agree with the order proposed by my learned brother.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Hughes.

ARSAMMA (2ND DEFENDENT), APPELLANT,

v.

MOIDIN KUNHI BEARI AND ANOTHER
(PLAINTIFFS), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), O. XXI, rr. 58 and 63—
Claim Petition—Dismissal for delay—Order stating that the
sale in execution will not affect claimant's rights, if any—Effect
of the statement—No suit by claimant to establish his title—
Suit by auction purchaser to eject claimant—Bar by the
order—Adverse possession of claimant—Order, Effect of, on
possession.*

Where a claim petition was dismissed without investigation on the ground of delay but the order of dismissal added that the sale in execution would not affect the rights, if any, of the petitioner, and the latter did not file a suit within one year to establish her title,

* Second Appeal No. 267 of 1921.

ARSAMMA
v.
MOIDIN.

Held, in a suit by the auction-purchaser, that the claimant ought to have sued, within one year of the order on her claim petition, to establish her right to the property, and as she did not bring such a suit, the order had become conclusive against her. *Venkataratnam v. Ranganayakamma*, (1918) I.L.R., 41, Mad., 985 (F.B.), applied.

Held further, that the rejection of the claim petition, which was not contested by suit, estopped the claimant from pleading adverse possession at the date of the order in a suit brought to eject the claimant.

SECOND APPEAL against the decree of A. NARAYANA NAMBIYAR, Acting District Judge of South Kanara, in A.S. No. 148 of 1920, preferred against the decree of A. V. GOPALA RAO, District Munsif of Mangalore, in Original Suit No. 399 of 1918 on the file of the District Munsif's Court at Mangalore.

The material facts appear from the judgment.

B. Sitarama Rao for appellant.

K. Yegnanarayana Adiga for respondent.

JUDGMENT.

HUGHES, J.—The point to be decided now is whether the question of second defendant's title has been concluded against her by reason of the order passed in R.E.A. No. 243 of 1910 in R.E.P. No. 375 of 1910. HUGHES, J.

The suit property was attached in R.E.P. No. 375 of 1910 and the second defendant filed a claim petition (R.E.A. No. 243 of 1910) claiming right to the property. The order passed on that petition is Exhibit E and runs as follows :—

"There is no time to investigate into this claim. This petition is dismissed without investigation on the ground of delay. I may add that the sale will not affect the rights, if any, of this petitioner."

ARSAMMA
v.
MOIDIN.
—
HUGHES, J.

The plaintiff's contention is that as the second defendant did not file a suit within a year from the date of this order her right to the property is barred.

Now if the order had been merely, "This petition is dismissed without investigation on the ground of delay," the matter would have been quite simple. It would be covered exactly by the Full Bench case, *Venkataratnam v. Ranganayakamma*(1), where it was held that such an order was an order rejecting the claim, to which the provisions of Order XXI, Rule 63, will apply. The question is what is the effect of the added sentence "The sale will not affect the rights, if any, of this petitioner." Can it be said that when the order expressly declared that the sale would not affect the right of the petitioner, the order was one passed against the party?

The answer to this is, I think, to be found in the Full Bench case referred to. In that case the order that was under consideration was as follows:—

"As this petition was filed late, this claim is ordered to be notified to the intending bidders."

It was held that the order amounted to a rejection of the claim on the ground that it was filed too late. It was pointed out in the judgment of SESHAGIRI AYYAR, J., that

"When a claim is preferred, the usual prayer is that the attachment should be raised as the property does not belong to the judgment-debtor but belongs to the claimant. On the presentation of such a petition if the order is not that the property be released from attachment, it must be taken to be an order against the claimant,"

and further

"His right to raise the attachment must be deemed to have been negatived when the property was ordered to be sold without releasing it from attachment. Therefore an order on a

(1) (1918) I.L.R., 41 Mad., 985.

claim petition which expresses no final judgment upon the right put forward but simply directs the sale after notifying the claim is an order against the claimant."

ARSAMMA
v.
MOIDIN.
—
HUGHES, J.

In the present case the fact that the order wrongly stated that the petitioner's rights would not be affected does not help her. She asked for a release of the property from attachment and she sought to establish her right. She did not succeed. I think therefore, following the judgment of the Full Bench case as quoted *supra*, it must be held that the order was against her and it was her duty to proceed to assert her title by suit within one year.

The case of *Lakshmi Ammal v. Kadiresan Chettiar*(2) has been referred to, but that is not in point because in that case the attachment had terminated and the District Munsif had no authority to dispose of the petition of claim.

One other case has been quoted, the case of *Saharabi v. Ali*(3), but in that case the claimant's petition had not been dismissed and his claim to an undefined share in the property attached had not been negatived. In the present case the petition was dismissed and though it may be argued that the rider attached to the dismissal, to the effect that the order would not affect the claimant's right, means that that was not negatived, it is plain the right was not established and in the light of the observations in the Full Bench case the order was one against the party. I think therefore the District Judge was right in the view taken by him of the effect of the order on the claim petition. It has then been urged that the second defendant can still rely upon adverse possession, but the case of *Velayuthan v. Lakshmana*(3), is an authority for the position that the rejection of a claim, if not contested by suit, will estop

(1) (1921) 41 M.L.J., 198

(2) (1921) 41 M.L.J., 141.

(3) (1885) I.L.R., 8 Mad., 508.

ARSAMMA v. MOIDIN.
HUGHES, J. the claimant from pleading adverse possession at the date of the order in a suit brought to eject him. Since the date of the order, the possession has been insufficient to establish a title.

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

ODGERS, J. ODGERS, J.—I agree.

K.B.

APPELLATE CIVIL.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
and Mr. Justice Krishnan.*

1923,
August 20.

ANGLO-PERSIAN OIL COMPANY, LIMITED, MADRAS
(DEFENDANTS), APPELLANTS,

v.

P. S. PANCHAPAKESA AIYAR
(PLAINTIFF), RESPONDENT.*

Sec. 19—Indian Arbitration Act (IX of 1899)—Stay of legal proceedings—Considerations for Court before staying or refusing to stay—Discretion of Court and onus of proof.

The mere fact that the defendant who was threatened with legal proceedings for breach of a contract containing an arbitration clause did not, before the institution of the suit, insist on the arbitration clause but relied on it for the first time only in his written statement is no ground for not granting his application for stay of proceedings under section 20 of the Arbitration Act (IX of 1899). Under the section, the onus is on the plaintiff to show why the application for stay should not be granted and why the matter should not be referred to arbitration. It is a discretionary matter with the Court to refuse to stay. Stay is generally refused where there are serious allegations of fraud or a novel or difficult point of law likely to be considered by the arbitrators fit to be referred to the Court. If the matter is a commercial one fit for decision of commercial men as arbitrators,

the Court will stay the suit and send the matter for the arbitrators' decision as agreed upon. If the defendant's conduct has not actually estopped him from making the application for stay but his attitude has misled the plaintiff it might be a good ground for punishing him in costs.

Per KRISHNAN, J.—The fact that the plaintiff has paid a heavy Court fee is no ground for not granting the stay.

APPEAL from the judgment of KUMARASWAMI SASTRI, J., passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court on the Judge's summons filed on 6th April 1923 praying for an order directing stay of proceedings in Civil Suit No. 88 of 1923.

The facts appear from the judgment.

The defendant preferred this appeal.

V. Mockett for appellant.—The grounds on which the learned Judge has refused to stay are unsustainable in law. See section 19 of the Arbitration Act corresponding to section 4 of the English Arbitration Act. The intention to rely on the arbitration clause need not be disclosed before the suit is launched. It may be stated for the first time in the written statement.

S. Duraiswami Ayyar (with *P. S. Pan'hapagesa Ayyar*) for respondent.—Under section 19 the defendant has to show that he was always ready to refer to arbitration according to the contract. An arbitration clause does not by itself oust the jurisdiction of the Court if a dispute has arisen between the parties. After the institution of the suit the arbitrators are *functus officio*. Granting stay is a matter of discretion with the original and appellate Courts; no good reason has been shown by the defendants for stay; he referred to Russell on Arbitration, page 103, and *Bristol Corporation v. John Arid & Co.*(1). Stay should not be granted when a question of law is involved as in this case. Here the question

(1) [1913] A.C., 241.

* Original Side Appeal No. 59 of 1923.

ANGLO-
PERSIAN OIL
COMPANY
v.
PANCHAPA-
KESA Aiyar.

SCHWABE
C.J.

is one of construction of a document, which is a question of law.

JUDGMENT.

SCHWABE, C.J.—This is an interlocutory appeal from the order of KUMARASWAMI SASTRI, J., refusing to stay an action on an application made under the Arbitration Act, the suit being on a contract which contains an arbitration clause referring any question or dispute which may arise under the contract to two European merchants resident in Madras and in the event of their disagreeing to an umpire chosen by the arbitrators before commencing the reference.

The view expressed by the learned Judge in his judgment is that the defendants had been threatened with legal proceedings for a considerable time and had not then called the attention of the plaintiff to the arbitration clause or said that they were willing to refer to arbitration and objected to the litigation, and that it is a ground for refusing to stay on an application on the part of the defendants after the action was brought. I do not agree. There is no authority in support of the proposition which has been adduced before us and I am satisfied that the reason is that there is no such authority and I can see no ground on principle for so holding. The law provides that if there is a submission for a reference to arbitration, and a party chooses to bring his suit, the other party can then decide whether or not he will remain before the Court, which he indicates by taking some step in the action, or whether he will avail himself of his contractual rights to have the dispute referred to arbitration. If he had misled the plaintiff in some way into bringing the suit, it might be a good ground for punishing him in costs and if the misleading had been definite enough to amount to a particular statement that he would not apply to have the matter

referred to arbitration and would submit to the jurisdiction of the Court, it might be a good ground for punishing him in costs, and it might even amount to an estoppel, so as to prevent him from making an application thereafter. But I can see nothing of the kind in this case.

The question then remains as to whether or not this is a case where the discretion of the Court under section 19 of the Arbitration Act should be exercised in favour of the defendants by referring to arbitration or whether this is a case which should be kept before the Court. In that matter the learned Judge has not exercised any discretion; but on appeal, as we are disagreeing with the grounds which he has given, it is open to the unsuccessful party below to ask us to exercise the discretion which he could have asked the learned Judge to exercise there. We, therefore, consider it for ourselves. As I understand the principle in England and here, the Court, where there is a submission to arbitration, in order to refuse to stay the proceedings must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission, that is, really saying in other words that the *onus* is on the party resisting the application for stay to show some sufficient reason why in the particular case the parties should be relieved from the obligation which they have contracted, namely, that their case should go before arbitrators selected by them and not before the ordinary tribunals of the land. There are certain well-defined instances where a Court almost invariably refuses to stay, such as a case where there are serious allegations of fraud. There are cases where the point involved is a novel or difficult point of law which the Court is satisfied is bound to come back by way of a special case to it to decide or where it comes

ANGLO-
PERSIAN OIL
COMPANY
v.
PANCHAPA-
KESA Aiyar.
—
SCHWABE,
C.J.

ANGLO-
PERSIAN OIL
COMPANY
v.
PANCHAPA-
KESA AITAB.
—
SCHWABE,
O.J.

to the conclusion that the sending of the case to the arbitrators will involve a waste of time and expense.

Having considered this case, I am not satisfied that this is a case which it is not proper to refer to arbitration. From several aspects of the case, it is clear that evidence will have to be gone into unless the arbitrators are persons who have knowledge of their own so as to make it unnecessary to have the whole evidence before them. The actual point of construction as I understand it is not a point which seems in any way beyond the powers of a commercial man to grapple with. If, at any time, there is a really difficult point of law in which the opinion of the Court is required, there is ample provision in the Arbitration Act for taking the opinion of the Court.

In these circumstances, this order is wrong and the appeal must be allowed with costs here and the action stayed. The costs of the application before the learned Judge will follow the event of the arbitration. (Certified for counsel in the motion before the learned Judge.)

KRISHNAN, J. — This case is governed by section 19 of the Indian Arbitration Act, 1899. Under that section the Court should refer in accordance with the arbitration clause in the contract a case like this to arbitration unless it is satisfied that there is sufficient reason why it should not do so. The section puts the burden upon the person who seeks to get the stay refused to show good reasons for taking such action. The learned Judge in his judgment has given two reasons for refusing stay in this matter and for going on with the suit in Court. He says that there is no sufficient indication in the correspondence, nor even in the replies to the lawyer's notices threatening legal proceedings, that the defendants were ready and willing to have the matter arbitrated upon. Apparently this refers to the last clause of section 19 which lays down as one of the

conditions for the exercise of the discretion under the section that the applicant was at the time when the proceedings were commenced and thereafter, ready and willing to do all things necessary for the proper conduct of the arbitration. The mere fact that in the replies to letters sent by the opposite side threatening legal proceedings the defendant company did not write back to say "No, you cannot take legal proceedings against me" is no ground for holding that they were not ready and willing to submit to arbitration if it became necessary to do so. The plaintiff in this case never asked the defendant to nominate his arbitrators or do anything in connexion with the arbitration in this case. If he had done so and if the defendant had refused to agree, it might well be said that he was not ready and willing to do all things necessary for the proper conduct of the arbitration. I am unable to accept the learned Judge's view, that in this case there is any indication either in the correspondence or in the replies to the lawyer's notices that the defendant was not ready and willing to have an arbitration.

The other ground taken by the learned Judge is that already a heavy stamp fee has been paid for the case and that it would be a waste of money if the case is sent to arbitrators. That is a matter which the defendant could not have helped. If the plaintiff knowing full well that he was bound by the arbitration clause rushed into Court and spent money in court fee, that could not in any way affect the defendant's right to apply for stay under section 19, for all that he has to do under the section is to apply to the Court before filing his written statement to stay the suit. The expense of paying court fee would have been incurred already in every case; it cannot well be treated as a good ground for refusing to stay the case.

ANGLO-
PERSIAN OIL
COMPANY
v.
PANCHAPA-
KESA AITAB.
—
KRISHNAN, J.

ANGLO-
PERSIAN OIL
COMPANY
v.
PANCHAPPA-
KESA AYYAR.
—
KRISHNAN, J.

These are the two grounds upon which the learned Judge has based his order refusing the stay. The respondent before us has taken another ground as well in support of the order of the learned Judge. He contends that the question which has to be dealt with in the present dispute being the construction of a written contract between the parties, it is a matter more fit for the Court to dispose of, than for arbitrators and that therefore the Court should retain the case on its own file and not refer it to the arbitrators. As regards that point the learned Chief Justice has fully dealt with it and I need hardly go over the same grounds as I agree with him in what he said on the point. The learned Judge has not put the case on that ground at all so that we cannot say that he exercised his discretion on such a ground as that. We are, therefore, free to exercise our own discretion on this point and in exercising that discretion I am satisfied that this is a fit case for staying the action and for sending it to arbitrators as the construction of the document as well as the facts to be found in the case seem to be more fit for two European merchants who are familiar with oil contracts to deal with, than for the Court.

In these circumstances I agree with the learned Chief Justice that this appeal must be allowed and that the stay applied for should be ordered. I agree also as to the order about costs proposed by the learned Chief Justice.

N.R.

APPELLATE CIVIL.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
and Mr. Justice Waller.*

R. C. KRISHNASAMY NAIDU AND OTHERS (PETITIONERS—
PLAINTIFFS), APPELLANTS,

1923,
October 5.

v.

R. CHENGALRAYA NAIDU AND OTHERS (RESPONDENTS—
DEFENDANTS), RESPONDENTS*

Civil Procedure Code (V of 1908), sec. 151, O. XLI, rr. 17 and 19—O. IX, rr. 8 and 13—Dismissal of appeal for default of appearance of appellant and his vakil—Vakil's non-appearance due to his attitude of non-co-operation—Appellant not aware of order until after 30 days from dismissal—Subsequent application for restoration—Limitation—Delay, if excusable—Inherent jurisdiction, whether applicable—Limitation Act (IX of 1908), art. 168 and sec. 5—Amendment by enactment or rule so as to apply sec. 5 to applications under O. XLI, rr. 17 and 19.

Where an appeal was dismissed for default of appearance of the appellant as well as of his vakil who did not appear to conduct the appeal in pursuance of his instructions by reason of the latter taking up the attitude of non-co-operation with the Courts, and the appellant came to know of the dismissal more than thirty days after the order, whereupon he took immediate steps to bring the matter before the Court and applied to set aside the order of dismissal of the appeal;

Held, that where a Code declares the law on any matter specifically dealt with by it, the law must be ascertained by an interpretation of the language used by the legislature, for the essence of a Code is to be exhaustive on such matters;

that Order XLI, rules 17 and 19 are exhaustive in respect of dismissals for default of appearance in appeals and setting aside of such dismissals, just as the provisions of Order IX, rules 8 and 13 are exhaustive in the case of suits, *Neelaveni v. Narayana Reddi* (1920) I.L.R., 48 Mad., 94 (F.B.);

that the Court cannot act in such cases under section 151, Civil Procedure Code, or otherwise under its inherent powers,

* Appeal against Order No. 443 of 1923.

KRISHNA-
SAMY
v.
CHENGAL-
RAYA.

Debi Bakhsh Singh v. Habib Shah (1913) I.L.R., 35 All., 331 (P.C.) distinguished; *Sonubai v. Shivajirao* (1921) I.L.R., 45 Bom., 648, dissented from; and

that an application to set aside an order of dismissal for default of appearance under Order XLI, rules 17 and 19, Civil Procedure Code, is governed by article 168 of the Limitation Act, and should be made within thirty days from the date of dismissal, and the Court has no power to excuse the delay in making the application.

APPEAL against the order of the Subordinate Judge of Chittoor in Civil Miscellaneous Petition No. 52 of 1921 in Appeal Suit No. 48 of 1921.

The material facts appear from the judgment.

M. S. Vaidyanatha Ayyar for appellants.

O. P. Srinivasan for respondents.

JUDGMENT.

This is an appeal from an order of the Subordinate Judge of Chittoor, dated 23rd September 1921, refusing to set aside an order dismissing an appeal, dated 4th March 1921.

The facts are that the petitioner being the appellant in the appeal before the Court instructed a vakil to appear and conduct his appeal. We will assume on the evidence before the Court that this vakil did not appear on 4th March 1921 to conduct the appeal in pursuance of his instructions by reason of the vakil having taken up the attitude of non-co-operation with the Courts and we will also assume that the appellant did not come to know of the order of the Court dismissing his appeal until sometime after it was dismissed and that he took immediate steps on making the discovery to bring the matter before the Court. Assuming these facts to be correct, the appellant has suffered grave injustice, for his appeal, for no fault of his own, has never been heard, although it may be that he has a remedy against his vakil for negligence. Under Order XLI, rule 17 of the Civil Procedure Code,

KRISHNA-
SAMY
v.
CHENGAL-
RAYA.

"If on the day fixed the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed;"

and under rule 19 where the appeal is so dismissed,

"the appellant may apply to the Appellate Court for the re-admission of the appeal; and where it is proved that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit."

These rules provide a remedy in a case like the present for having the appeal re-admitted. But by article 168 of the Limitation Act, IX of 1908, an application for the re-admission of an appeal dismissed for want of prosecution must be brought within thirty days from the date of the dismissal. It, therefore, follows that, if the Court is confined to acting under Order XLI, rule 19, this application is "statute barred."

It is, however, contended that the Court has an inherent power under section 151, Civil Procedure Code, or otherwise, to reinstate an appeal under such circumstances. There are two authorities quoted in support of that proposition *Debi Bakhsh Singh v. Habib Shah* (1) and *Sonubai v. Shivajirao* (2). In the former, the Privy Council acted under section 151, Civil Procedure Code, in a case where a suit was dismissed for non-appearance, the plaintiff being dead and the Court being unaware of that fact, and their Lordships say,

"The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead or the ranking of death under the category of default does not seem to be very stateable."

Their Lordships, in effect, held that the Court had made a mistake in thinking that the plaintiff was alive, that the plaintiff or appellant could not be said to have

(1) (1913) I.L.R., 35 All., 331 (P.C.). (2) (1921) I.L.R., 45 Bom., 648.

KRISHNA-
SAMY
v.
CHENGAL-
RAYA.

not appeared or to have defaulted in appearing when he was no longer alive, that, therefore, that was a case to which the rules did not apply and that the Court, to do justice, could fall back on its inherent powers.

In *Sonubai v. Shivajirao*(1) the facts were that a pleader employed to conduct an appeal died and his death was communicated to the guardian *ad litem* of a minor and such guardian at the time being insane, took no steps and the appeal was dismissed for want of appearance. The Court held that it had an inherent power under section 151, Civil Procedure Code, to reinstate the appeal, thinking that the death of the pleader unknown, in fact, to the appellant was equivalent to the death of the plaintiff himself. If this case is rightly decided, we think that the assumed facts before us are as strong, for the non-appearance of the *vakil* due to his political attitude could not reasonably be imputed to his client. But the question as to when this Court can act under section 151 or otherwise under its inherent powers is a matter which has been fully considered in *Neelaveni v. Narayana Reddi*(2) and it can be stated thus :—Where a Code declares the law on any matter specifically dealt with, the law must be ascertained by an interpretation of the language used by the Legislature, for the essence of a Code is to be exhaustive on such matters. In that case, the Court held that Order 9, rules 8 and 13, were exhaustive in respect of cases where the plaintiff made default in appearance in a suit, and I think that we are bound to say that Order 41, rules 17 and 19, are equally exhaustive. The Privy Council case referred to above can be distinguished on the ground that there had been, in fact, no failure to appear because failure to appear cannot include the case

(1) (1921) I.L.R., 45 Bom., 648. (2) (1920) I.L.R., 43 Mad., 94. F.B.

KRISHNA-
SAMY
v.
CHENGAL-
RAYA.

of a man who is dead ; whereas in this case there has been a failure to appear by the *vakil* and, if it is held that, in such a case as this, the Court can act under its inherent powers, it would involve a finding that in every case of dismissal of an appeal or a suit by reason of the non-appearance of the *vakil*, the Court has inherent powers which it must exercise almost *ex debito justitiae* in favour of setting aside the order dismissing the suit or appeal. In our judgment, *Sonubai v. Shivajirao*(1) was wrongly decided. To hold otherwise in this case would be merely an evasion of the definite words of article 168 of the Limitation Act.

We regret that we have come to this conclusion because, in our view, it is not right that a party's suit or appeal should be irrevocably dismissed by non-appearance through no fault of his own, and again, through no fault of his own, by his not becoming aware of the dismissal for the short period of thirty days. The remedy for such injustice is not in our hands. Section 5 of the Limitation Act might have been made applicable by an enactment or rule to applications under rules 17 and 19, and, in our judgment, it is very desirable that this should be done. It will, however, not help the present appellant. We regret that this appeal must be dismissed. In view of the fact that the respondent did not bring the full facts before the Original Court at an early stage and has brought before us facts which we do not accept, we think that the right order as to costs will be that there will be no costs here or below.

K.R.

(1) (1921) I.L.R., 45 Bom., 648.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

1923,
October 2.

MANYAM SURAYYA (PETITIONER—DECREE-HOLDER),
APPELLANT,

v.

SUNKAVILLI VENKATARATNAM (SECOND DEFENDANT AND
COUNTER-PETITIONER), RESPONDENT.*

Limitation Act (IX of 1908), arts. 181 and 182—Execution of decree—Attachment before judgment—Claim petition filed by third party and allowed after decree—Suit by decree-holder to establish right to attach and sell property as that of judgment-debtor—Decree obtained more than three years after first decree—Application for sale more than three years after decree under execution—No prior application for execution—Bar of limitation.

Where certain properties of a judgment-debtor had been attached before judgment in a suit for money, and after decree a claim petition was put in by a third party and allowed, and the decree-holder consequently filed a suit to establish his right to sell the properties in execution and obtained a decree in his favour, an application by the decree-holder for the sale of the properties attached before judgment, filed on the date of the latter decree but more than three years from the decree under execution, was not barred by limitation, even though there was no prior application for execution of the decree after it was passed.

The principle of revival of proceedings applicable to an application for sale of properties attached after decree under an application for execution, is equally applicable to applications for sale of properties attached before judgment. Article 181, and not article 182, Limitation Act, governs such cases.

Chaluvadi Kotiah v. Poloori Alimelammah (1908) I.L.R., 31 Mad., 71; and *Rameshvar Singh v. Homeshwar Singh* (1921) 40 M.L.J., 1 (P.C.), applied.

APPEAL against the order of S. SUBBAYYA SASTRI, Additional Subordinate Judge of Rajahmundry, in Appeal

* Appeal against Appellate Order No. 56 of 1922.

Suit No. 117 of 1921, preferred against the order of R. NAGESWARA AYYAR, Principal District Munsif of Rajahmundry, in E.P. No. 738 of 1920 in O.S. No. 352 of 1917.

SURAYYA
v.
VENKATARATNAM.

The appellant obtained a decree for payment of money on a promissory note executed by the husband of the defendant; the decree was passed on 3rd September 1917 against the widow for the amount to be paid out of the property of her deceased husband in her hands. The plaintiff had obtained an attachment before judgment of certain properties as belonging to the deceased on 25th August 1917. Eight days after the date of the decree, one Peramma filed a claim petition in respect of the properties attached before judgment on 11th September 1917, which was allowed by an order dated 6th October 1917. Thereupon the appellant (decree-holder) filed a suit to contest the order which was decreed in his favour on 8th December 1920. On the same date, the decree-holder applied for sale of the properties attached before judgment. It appeared that no prior application for execution of the decree had been filed after the date of the first decree; it also appeared that the judgment-debtor was in possession of other properties belonging to her husband on the date of the first decree. On these facts the District Munsif held that the application for sale of attached properties was not barred by limitation on the ground that article 181 and not article 182 applied to the case, though an application to proceed in execution against other properties not attached might be barred by limitation. On appeal by the judgment-debtor's legal representative, the Subordinate Judge held that the application was barred in respect of the properties attached before judgment, and he accordingly reversed the order of the District Munsif and dismissed the petition

SURAYYA
v.
VENKATA-
RATNAM.

for execution. The decree-holder preferred this Civil Miscellaneous Second Appeal.

G. Lakshmanna and V. Viyyanna for appellant.

T. S. Raghunatha Rao for respondent.

JUDGMENT.

This case raises a question of limitation in execution proceedings. The appellant before us brought a suit against the widow of one Narayya on a promissory note executed by the said Narayya and while the suit was pending he obtained an order of attachment before judgment of certain properties belonging to Narayya in the hands of the widow. He then obtained a decree against the assets of Narayya in the hands of the widow. Eight days thereafter a claim petition seems to have been put in by one Peramma claiming those properties to be hers and to be not attachable for the debt of Narayya. That claim petition was allowed. Thereupon the decree-holder had to bring a suit to contest the order in the claim proceedings, and having brought the suit he finally succeeded in getting a decree only on the 8th December 1920 that the properties belonged to his judgment-debtor. In the meanwhile, it is true that he took no steps to execute the decree. He then put in the present application, which is now before us, on the very day, that is, the 8th December, when the decree in the second suit was passed in his favour, to bring to sale the properties he had already attached in the application before judgment. That application was allowed by the District Munsif to the extent of the properties which he found were actually attached by the order of attachment before judgment and was dismissed as regards the rest of the properties. The Subordinate Judge on appeal ruled that, even as regards the properties taken in attachment before judgment, the application was barred

by limitation as the application was made more than three years after the date of the decree.

The question thus before us is whether the view taken by the District Munsif that the present application is an application which could be treated as one for reviving the execution proceedings already commenced can be supported or not. It is clear from the authorities that, when an execution application is brought and properties are attached in execution of that application if any obstacle is placed in the way of the properties being sold and assets realized for the purpose of meeting the decree debt by the action of a third party putting in a claim petition and it becomes necessary for the decree-holder either to dispute the claim proceedings or to bring a suit to have the matter decided whether the properties are those of the judgment-debtor, his subsequent application to sell those properties is not governed by article 182 of the Limitation Act, but is in the nature of a revival of the original execution application and article 181 of the Limitation Act will apply. If we apply that principle to the present case, there can be no doubt that the District Munsif's view is correct and that the application by the appellant before us to sell the properties already attached is entirely within time. That this is the principle applicable as regards an execution application put in after the decree is not disputed by the other side because the authorities are all in favour of that view—vide *Chalavadi Kotiah v. Poloori Alimelammah*(1) and *Rameshwar Singh v. Homeshwar Singh*(2). It is, however, contended by the learned vakil for the respondent before us that that principle will not apply in the case of an attachment before judgment unless it had been followed by an application for

SURAYYA
v.
VENKATA-
RATNAM.

(1) (1908) I.L.R. 31 Mad. 71.

(2) (1921) 40 M.L.J., 1. (P.C.).

SURAYYA
v.
VENKATA-
BATNAM.

execution of the decree after the decree was passed. We are unable to accept that contention. Under the Code the attachment before judgment enures to the benefit of the decree-holder when the decree is passed so that it is no longer necessary to attach the property—vide Order XXXVIII, rule 11 of the Civil Procedure Code.

The principle applicable in the case of an application for execution after decree applies equally to the case of an attachment before judgment, because, after all, the position is exactly the same whether the attachment was before judgment or after the decree, when a man is prevented from getting the fruits of his decree because of somebody else's improper obstruction and his claim has been wrongly decided and he has been obliged to bring a second suit to put the matter right. We think that the principle clearly applies to the present case and, therefore, we hold that the application is not barred by limitation in this case.

In the result, we set aside the order of the Subordinate Judge and restore that of the District Munsif with costs here and in the Court below.

K.R.

PRIVY COUNCIL.*

OBALA KONDAMA NAICKER AYYAN AND ANOTHER
(PLAINTIFFS), APPELLANTS

1923,
November 13

v.

KANDASAMI GOUNDAR (DEFENDANT), RESPONDENT.

[On Appeal from the High Court at Madras.]

Hindu Law—Alienation—Daughter's estate—Compromise of litigation—Mortgage by alienee—Notice of defect of title—Reversioners' rights—Indian Trust Act (II of 1888), ss. 89, 96.

The daughter of a deceased Hindu in the Madras Presidency succeeded to his property for a woman's estate. As part of a compromise of adverse claims, she transferred part of the land to *M* who induced her to transfer it to him without any belief that he had a valid claim. *M* mortgaged the land to the respondent, who had notice that *M* acquired the property from the daughter under that compromise. The appellants, the next reversioners, sued for a declaration that the transfer was not valid beyond the lifetime of the daughter. The High Court held that under section 89 of the Indian Trusts Act, 1888, *M* was in the position of a quasi-trustee, and that the respondent's title was protected by section 96 of that Act.

Held (1) that the above Act did not apply to the circumstances; and

(2) that the respondent having notice that his mortgagor took from one who had only a limited and conditional right of disposal and the compromise being invalid, and there being no proof of necessity or of inquiry as to the validity of the compromise, the appellants were entitled to the declaration claimed against the respondent.

APPEAL (No. 2 of 1922) from a decree of the High Court (May 2, 1919) varying a decree of the Subordinate Judge of Madura (December 23, 1916).

The suit was brought by the appellants as next reversionary heirs to one Mayilchami, who died in 1901,

* Present.—Lord DUNEDIN, Lord PHILLIMORE, Sir JOHN EDGE, Mr. ABEEB ALI, and Sir LAWRENCE JENKINS.

KONDAMA
NAICKER
v.
KANDASAMI
GOUNDER.

for declarations that certain transfers of his property made by Aparanji Amman, Mayilchami's daughter and their mother, were void as against them. The transfers were made in connection with a compromise of claims to the property, the facts as to which appear from the judgment of the Judicial Committee. The particular transfer in question in the appeal was to one Mandalathipathi, who on July 2, 1910, had mortgaged the land transferred to him to the 4th defendant, the present respondent, for Rs. 10,000; a decree on the mortgage had been obtained in 1915. The mortgage deed stated that the land was held under a partition deed executed by Aparanji Amman under the compromise filed in O.S. No. 12 of 1902, being the suit which resulted in the compromise being made.

The Subordinate Judge of Madura, who tried the suit, found that the compromise under which the alienations purported to be made was not brought about by fraud or undue influence, and that it, and a partition made under it, were bona fide family arrangements binding upon the plaintiffs; and that the 4th defendant, the present respondent, having acquired mortgage rights for full consideration and without notice of any defect in the compromise and partition, his rights could not be affected even if the compromise was not binding upon the plaintiffs. He, accordingly, dismissed the suit.

Upon appeal to the High Court the learned Judges (Sir JOHN WALLIS, C.J. and SESHAGIRI AYYAR, J.) were of opinion that the Subordinate Judge had not properly considered the evidence in relation to the issue whether the compromise was bona fide, more especially the question whether Mayilchami and Mandalathipathi were divided. They accordingly directed that findings should be returned on these points.

KONDAMA
NAICKER
v.
KANDASAMI
GOUNDER.

On the remand, the suit came before a different Subordinate Judge who found that Mayilchami and Mandalathipathi were not joint, and that the latter could not have been in doubt as to that matter; and that the compromise and partition were not bona fide, and could not properly be called a family arrangement; but he found that the 4th defendant was not aware of any fraud in the compromise.

Upon the return of the findings to the High Court, the learned Judges held that the plaintiff's mother (the 1st defendant) must be taken to have entered into the compromise as representing the estate, and that she had acted bona fide; but in the circumstances found to exist they held that the compromise could not be upheld against the plaintiffs by the parties thereto. They considered, however, that the fourth defendant (the present respondent) had a valid defence to the suit on the ground that Mandalathipathi was in the position of a quasi-trustee having regard to section 89 of the Indian Trusts Act, 1888, and that the present respondent was a transferee from him in good faith and for consideration, and was protected by section 96. They further considered that he was a bona fide transferee for value without notice of any defect in his transferor's title.

In the result the decree was reversed, save so far as the suit against the present respondent had been dismissed.

De Gruyther, K.C., and Kenworthy Brown for the appellants.—The sections of the Trusts Act relied on in the High Court did not apply to the circumstances of the case. There are concurrent findings that the so-called compromise with Mandalathipathi does not bind the appellants. Section 38 of the Transfer of Property Act, 1882, was not relied on below, and does not apply, even if it would have applied to protect a person taking from Aparanji

KONDAMA
NAICKER
v.
KANDASAMI
GOUNDAR.

Amman without notice of her limited interest. The transfer being without necessity was wholly void as against the appellants as reversioners; *Sham Sundar Lal v. Achhan Kunwar* (1); though they might acquiesce in it as in *Modhu Sudan Singh v. Rooke* (2). But here the reversioners were strangers to the mortgage; it is therefore not material whether the respondent had notice of the defect in the mortgagor's title. But in any case the respondent had notice by the deed itself that his mortgagor derived his title from one with a limited interest, and that sufficed to fix him with notice under the Transfer of Property Act, 1882, section 3. Apart from the findings, the evidence shows that Mandalathipathi could have had no honest belief that he had any claim to part of the estate; consequently the so-called compromise with him was invalid: *Gunjeshwar Kunwar v. Durga Prasad Singh* (3).

Hon. Sir William Finlay, K.C., and *Narasimham* for the respondent.—The trial Judge found the facts, which were material, in favour of the respondent; the High Court had no power to require further findings or, at least there was no adequate reason for the remand; *Venkata Varatha Thatha Chariar v. Anantha Chariar* (4). But in any case there were concurrent findings that the respondent was not aware of any defect of title. The effect of the compromise was to vest the legal estate in Mandalathipathi, and the respondent being a purchaser for value without notice is protected even if the compromise was invalid. One who holds a Hindu widow's estate has power to compromise claims against the estate which she represents; *Ramsumran Prasad v. Shyam Kumari* (5). The

(1) (1896) I.L.R., 21 All., 71 (P.C.); 25 I.A., 183.

(2) (1898) I.L.R., 25 Calc., 1 (P.C.); 24 I.A., 164.

(3) (1918) I.L.R., 45 Calc., 17 (P.C.); 44 I.A., 229.

(4) (1893) I.L.R., 16 Mad., 209 (P.C.).

(5) (1922) I.L.R., 1 Pat., 741 (P.C.); 49 I.A., 342.

transfer under the compromise was not an alienation but a recognition of an antecedent title in Mandalathipathi: *Khunni Lal v. Gobind Krishna Narain* (1).

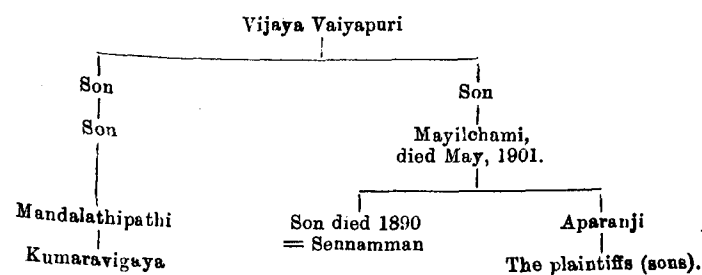
De Gruyther, K.C., replied.

The JUDGMENT of their Lordships was delivered by

Sir LAWRENCE JENKINS.—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 2nd May, 1919, which varied a decree of the Subordinate Judge of Madura, dated the 23rd December, 1916. The plaintiffs are the reversionary heirs of their maternal grandfather Mayilchami, who died in May, 1901, and was succeeded by his daughter, Aparanji Amman, the mother of the plaintiffs. The defendants are (among others) Aparanji Amman, Kumaravigaya, the son of the late Mandalathipathi, Sennamman Avargal, and Kandasami Goundar.

The purpose of the suit is to establish the plaintiffs' title as reversioners.

To explain this title it will be convenient to set out the following pedigree:—



On Mayilchami's death Sennamman commenced proceedings under the Criminal Procedure Code for possession of the estate of her father-in-law. Her application substantially failed. She then instituted a suit on the 14th February, 1902, against Aparanji and

(1) (1911) I.L.R., 38 All., 356 (P.C.); 38 I.A., 87.

KONDAMA
NAICKER
v.
KANDASAMI
GOUNDAR.

Sir
LAWRENCE
JENKINS.

KONDAMA
NAICKER
v.
KANDASAMI
GOUNDAR.

Sir
LAWRENCE
JENKINS.

Mandalathipathi, seeking to establish a will alleged by her to have been executed by Mayilchami and praying that possession should be given to her of one-third share of the property left by him.

Both the defendants to that suit filed written statements and the litigation closed with a compromise in 1903.

It provided that 10 kulies of the property therein described and a house should be delivered by the defendants to Sennamman. To this extent it was within the scope of the suit, and ultimately a decree was passed in accordance with this stipulation.

But the compromise also purported to define the rights of the defendants to that suit as between themselves. By clause 8 it provided that the properties described in the plaint (other than what was given to Sennamman) should be divided into moieties and that each of those defendants should take one. On the 23rd February, 1907, a partition deed was executed in accordance with the terms of the compromise. On the 2nd July, 1910, Mandalathipathi executed a mortgage on property taken by him under the compromise, to secure Rs. 10,000 advanced to him by the respondent Kandasami Goundar, and on the 7th January, 1915, a decree for Rs. 17,257 was passed on it in the mortgagee's favour.

The plaintiffs, as reversioners under their maternal grand-father, have instituted this suit on the 2nd March, 1915, seeking to establish the invalidity, as against them, of the respective titles claimed by Kumaravigaya, the son of Mandalathipathi, deceased, and by the mortgagee.

It has been held by the High Court, and their Lordships adopt the finding, that Mayilchami and Mandalathipathi were separate and not joint, and there can

be no doubt that this was known to Mandalathipathi at the time of the compromise.

But the compromise was based on the supposition that there was a question as to whether there had been a separation between the two lines of the family.

The High Court has further found that there is no evidence that Aparanji, with full knowledge that there was no truth in the claim put forward by Mandalathipathi, agreed to the compromise from ulterior motives and that there is not sufficient evidence to show that in assenting to the terms of the compromise she was not acting bona fide in the light of the circumstances then brought to her notice. Their Lordships do not dissent from this appreciation of the evidence. Aparanji at the time of the compromise stood in need of especial protection. She was a *purdanashin* lady recently widowed; the mother of infant sons, and, so far as the evidence discloses, without any adult male relation except Mandalathipathi to advise her.

But it was under his advice and influence that she acted in the litigation with Sennamman and in the compromise by which Mandalathipathi took, to the detriment of herself and her infant sons, the benefits to which, as he well knew, he had no honest claim.

In these circumstances the High Court rightly came to the conclusion that as against defendant No. 2, Mandalathipathi's son and heir, the plaintiffs established the invalidity of the compromise after their mother's death. From this part of their adjudication no appeal has been preferred, and the only contest now is with the mortgagee in whose favour the High Court decided.

The ground of this decision is that the mortgagee is a bona fide transferee for value, and so stands in a better position than his transferor, whose title was held to be bad.

KONDAMA
NAICKER
v.
KANDASAMI
GOUNDAR.

Sir
LAWRENCE
JENKINS.

KONDAMA
NAICKER
v.
KANDASAMI
GOUNDAR.
—
Sir
LAWRENCE
JENKINS.

The High Court appears to have thought that justification for this view was to be found in the provisions of the Trusts Act. In their Lordships' opinion this was erroneous: the Act has no direct relevance to the circumstances of this case, and it was properly realized in the argument here that if the High Court's conclusion can be supported it must be on other grounds.

It has thus been contended that the High Court acted without jurisdiction in remanding the case as it did, and that the true view of the facts is that taken by the first trial Judge. But though the High Court's procedure may invite criticism, this is of no importance in view of that Court's ultimate findings of fact which, as already indicated, their Lordships accept.

They therefore do not think it necessary to discuss further the propriety of the remand.

It is then contended that the plea of purchaser for value without notice assists the respondent.

But an initial difficulty in applying this doctrine is that on the face of the title the mortgagee had notice that his mortgagor took from one who only had a limited and conditional power of disposal. And so the inquiry comes back to this: what was the daughter's interest and power, bearing in mind that the case comes from the Madras Presidency? It is now settled beyond dispute that a daughter as heiress of her father takes a restricted interest similar to that taken by a widow with a similar power of disposal. This power is conditional; she can dispose of the inheritance for legal necessity, but it lies on the alienee to prove the existence of this necessity, and this is so even though the absence of necessity be not pleaded by the reversioner. Thus it was laid down in *Sham Sunder Lal v. Achhan Kunwar*(1). "In a suit like the present, on a bond made by a person with restricted power of alienation, the defendants are not

(1) (1899) I.L.R., 21 All., 71 (P.C.)

KONDAMA
NAICKER
v.
KANDASAMI
GOUNDAR.
—
Sir
LAWRENCE
JENKINS.

required to plead the absence of legal necessity for the borrowing. It is for the plaintiffs to allege and prove the circumstances which alone will give validity to the mortgage." And later it was said the "touchstone of the authority is necessity." It may be conceded that even though there may not be legal necessity in fact, the alienee would be equally protected if he honestly did all that was reasonable to satisfy himself that the required necessity existed.

But here there is no proof either of necessity or of inquiry validating the compromise.

The inheritance therefore was not transferred so as to bind the reversioners. On the contrary, the reversioners, on the mother's death, can treat it as a nullity without the intervention of any Court. *Bijoy Gopal Mukerji v. Kishna Mahishi Debi*(1).

Nor, in their Lordships' opinion, does it alter the position that the dealing with Mandalathipathi purported to be a compromise and an acknowledgment of an existing title. Even so, it was improperly induced and equally vitiated.

As against the reversioners in this case, it was not within the power of Mandalathipathi to transfer a larger legal title than he himself had, nor have the reversioners by any act or omission debarred themselves from insisting on this contention. It is true that the reversion is still an expectancy, but an expectant reversioner's right to sue for a declaration has statutory recognition, and for the purpose in hand it is legitimate to consider what their position would be on their mother's death in their lifetime. They would in that event have the immediate title without the intervention of any Court, and there would in their Lordships' view be no principle of justice,

(1) (1907) I.L.R., 34 Cal., 329 (P.C.); 84 I.A., 87.

KONDAMA
NAICKER
v.
KANDASAMI
GOUNDAR.

Sir
LAWRENCE
JENKINS.

equity or good conscience that would empower the Court to deprive them of that legal title or to impose any restriction in derogation of it.

Their Lordships therefore are unable to agree with the High Court's decision in the mortgagee's favour, and they will, accordingly, humbly advise His Majesty that the appeal be allowed, and that the decree of the High Court be varied so far as it dismissed the appeal as against the fourth defendant and ordered that the plaintiff should pay to the fourth defendant Rs. 621-12-6 for his costs, by directing in lieu thereof (a) that it be declared that the mortgage of the 2nd July 1910 and the decree thereon are inoperative against the plaintiffs beyond their mother's lifetime, and (b) that the fourth defendant pay to the plaintiffs their costs in the lower Courts so far as attributable to his claim against them, the amount of such costs to be assessed by the High Court. The fourth defendant must pay to the plaintiffs their costs of this appeal.

Solicitor for appellants: *Douglas Grant.*

Solicitor for respondent: *Edward Dalgado.*

A.M.T.

PRIVY COUNCIL.*

MALIREDDI AYYAREDDI (PLAINTIFF),
APPELLANT

and

GOPALAKRISHNAYYA AND ANOTHER (DEFENDANTS),
RESPONDENTS.

[On Appeal from the High Court at Madras.]

Mortgage—Privilege—Subrogation—Purchase of equity—Payment under mortgage decree—Mortgage including crops—Rights against later mortgagee—Transfer of Property Act (IV of 1882), s. 101.

* Present:—Lord DUNEDIN, Lord PHILLIMORE, Sir JOHN EDGE, and Mr. AMER ALI.

Land was subject to three simple mortgages, of which the second was on the crops as well as the land. A purchaser of the land subject to the three mortgages, and the respondents, who were assignees of his interest, paid to the second mortgagee money to save the crops from sales under a decree which he had obtained upon his mortgage.

Held that there being no covenant by the mortgagor to pay the third mortgage, the payments made to the second mortgagee were to be regarded as purchases *pro tanto* of the second mortgage, not as a discharge of it, the fact that the third mortgage did not include the crops not being material; and that accordingly the respondents were entitled in respect of the payments to priority over the third mortgagee.

APPEAL (No. 101 of 1921) from an order of the High Court (January 26, 1920) affirming an order of the Temporary Subordinate Judge at Masulipatam.

The appeals related to three simple mortgages, dated August 21, 1905, March 5, 1909, and October 20, 1909, respectively, made by the owners of certain lands in the Kistna district to different mortgagees. The first and third mortgages were upon the lands merely; the second mortgage, after detailing the lands, provided "these *seri* dry and wet lands, with the different kinds of crops produced every year in the said lands, are mortgaged for your debt."

In 1912 one Pingala Venkataramayya purchased the properties subject to the three mortgages, and in June 1917 he sold his interest to the respondents.

In the circumstances stated in the judgment of their Lordships, the respondents and their assignor had paid considerable sums to the second mortgagee under a decree obtained by him in November 1913 upon his mortgage, and that decree had been finally discharged in December 1917 by a payment by the respondents. The third mortgagee (the appellant) obtained a decree on his mortgage on January 3, 1916. The properties

AYYAREDDI
v.
GOPALA-
KRISHNAYYA.

1923
November 26

AYYAREDDI
v.
GOPALA-
KRISHNAYYA.

were sold under that decree, and after discharging the first mortgage there was a balance of Rs. 1,327 which was deposited in Court.

The present appeal arose in proceedings in execution of the decree of January 3, 1916.

The High Court (OLDFIELD and SESHAGIRI AYYAR, JJ.) had dismissed an appeal by the present appellant from an order whereby the balance in Court had been ordered to be paid to the respondents. The learned Judges were of opinion that the respondents were entitled to be subrogated to the rights of the second mortgagee, and rejected a contention that that right did not include sums paid to save the crops from sale.

Narasimham for the appellant.

Dube for the respondents.

Reference was made to the cases mentioned in the judgment, also to *Satnarain Tewari v. Chowdhuri Sheobaran Singh*(1).

The JUDGMENT of their Lordships was delivered by

Lord
PHILLIMORE.

LORD PHILLIMORE.—Certain Indian landowners within the Kistna district effected first, second and third mortgages on their property; the first and third being on the lands alone, the second on the crops also. They were afterwards sued to judgment by some creditors for ordinary debts, and their lands were sold in execution of the judgment but subject to the mortgages. The purchaser of the equity of redemption was one Pingala, who paid Rs. 1,000, and thereout the judgment debt was satisfied.

The second mortgagee then instituted his suit to enforce his mortgage, making the original mortgagors

AYYAREDDI
v.
GOPALA-
KRISHNAYYA.
—
Lord
PHILLIMORE.

the third mortgagee and Pingala, defendants; and having obtained judgment, he, from time to time, obtained orders for sale of the crops. In one case it would seem as if the crops were actually sold in execution; in others, Pingala, or the present respondents who bought Pingala's interests during the course of the proceedings, paid the second mortgagee sums of money and saved the crops from seizure. While this was going on, the third mortgagee, who is the present appellant, brought a suit, making the original mortgagors and Pingala parties; and in this suit the lands were sold out and out, freed and discharged from the mortgages. After payment of the amount due to the first mortgagee and the expenses of the sale and so forth, there remained in Court to the credit of the cause a sum of Rs. 1,327 with some annas and pies.

The respondents, the purchasers from Pingala, who had been added as supplemental defendants in the suit brought by the appellant, thereupon claimed to be subrogated to the second mortgagee, and in right of the latter, to receive this sum out of Court. They made this claim on July 22, 1918, for the following reasons: At the time of the decree in favour of the third mortgagee which was made on appeal by the High Court on February 13, 1917, there was still due to the second mortgagee the sum of Rs. 1,990. Now the decree of the High Court provided that Pingala or his assignees should be at liberty to pay the amount due under the decree obtained by the second mortgagee, and that by doing so, they would be relegated to the rights of that mortgagee. Accordingly the respondents paid Rs. 1,990 to the second mortgagee, and on December 20, 1917, full satisfaction by payment through the Court was recorded.

ATTYAREDDI
v.
GOPALA-
KRISHNAYYA.
—
Lord
PHILLIMORE.

The application of the respondents for the payment out of the money in Court was resisted by the appellant, who contended that when the owner of a property subject to several mortgages pays off a prior mortgage, he is not entitled to stand in the shoes of the prior mortgagee but is to be taken as clearing the property from prior incumbrances for the benefit of the later mortgagee.

Now quite apart from the general law on the subject, the decree of the High Court, from which there was no appeal, had provided that in respect of any payment made by the owner of the property to the second mortgagee, he should acquire the right of the second mortgagee. This would be sufficient for the determination of the question immediately in dispute, because the sum in Court, Rs. 1,327 odd, is less than the sum of Rs. 1,990 which the respondents paid to the second mortgagee when final satisfaction was entered. And accordingly the Subordinate Judge had no difficulty in deciding the immediate application in favour of the respondents.

From this decision the present appellant appealed to the High Court at Madras. This Court, in affirming the actual decision, went further and stated a principle in accordance with which the present respondents will not only be entitled to stand in the shoes of the second mortgagee in respect of Rs. 1,990, paid at the time of the final satisfaction, but also in respect of several payments that they or Pingala had made from time to time to save the crops from being seized. This question, as the Judges in the High Court rightly pointed out, was not determined by the previous decree of the High Court which only affected payments made subsequent to that decree.

It is therefore necessary to investigate matters a little more closely. It is now settled law that where in India there are several mortgages on a property, the

ATTYAREDDI
v.
GOPALA-
KRISHNAYYA.
—
Lord
PHILLIMORE.

owner of the property, subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt, but in this case there was no such personal covenant. It is further to be presumed, and indeed the Transfer of Property Act, section 101, so enacts, that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit.

So far, therefore, as Pingala or the respondents can be supposed to have bought the rights of the second mortgagee at the various times when they paid sums to him, so far they are entitled to stand in his shoes and claim priority over the present appellant, who is the third mortgagee. This could hardly be disputed by counsel for the appellant, having regard to the decisions of this Board. (*Gokaldas Gopaldas v. Purnamal Premeekhdas*, (1) *Dinubundhu Shaw Chowdhry v. Jogmaya Dasi* (2) and *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh* (3)). The point, however, on which he really relied arose under the peculiar conditions of the second mortgage, which was upon the crops as well as upon the land. He contended that sums paid to the second mortgagee to save the crops from seizure must be deemed to be sums paid in reduction of the second mortgage, and not purchases *pro tanto* of that mortgage.

Their Lordships fail to follow the contention. There was an incumbrance upon a composite security, land and crops. It became necessary for the owner subject to the

(1) (1884) I.L.R., 10 Cal., 1035 (P.C.); 11 I.A., 126.
(2) (1902) I.L.R., 29 Cal., 154 (P.C.); 29 J.A., 9.
(3) (1912) I.L.R., 39 Cal., 527 (P.C.); 39 I.A., 48.

ATTABEDDI
v.
GOPALA-
KRISHNAYYA.
—
LORD
PHILLIMORE.

incumbrance, to pay sums of money to the incumbrancer to prevent his enforcing his charge from time to time. The incumbrancer could sell his charge or portions of his charge to any one, and there is nothing in law or good sense to eliminate the owner of the property from the list of possible purchasers. It is to the benefit of the owner that the proceedings should be deemed to be a purchase and not a redemption, and no reason appears why it should not be assumed that he intended to act in the way most beneficial to himself.

If instead of the mortgage being on lands and crops it had been on three separate estates, and proceedings had been taken against one of them only, money paid to stave off such proceedings might certainly be considered to be purchase money and not redemption money. So in the case of these crops. Any sums paid by Pingala or the respondents to save the sale of crops should be deemed to be *pro tanto* purchases of the second mortgage. It is suggested by the appellant that the sum of Rs. 2,058 odd received in April, 1914, was not paid by Pingala but was the fruits of a sale in execution. If this should prove to be so, and there is nothing to qualify it, the present respondents would not in respect of that sum be entitled to stand in the shoes of the second mortgagee. But in all cases where they have paid the money, they are entitled to the benefit. *A fortiori* they are entitled to keep the order made in their favour by the Judge of the Subordinate Court and confirmed by the High Court, and to have the money in Court paid out to them.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *Edward Dalgado*.

Solicitor for respondents: *H. S. L. Polak*.

A.M.T.

SPECIAL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.O., Chief Justice
and Mr. Justice Coutts Trotter.

BOARD OF REVENUE, MADRAS, REFERRING OFFICER,

v.

R. M. A. R. M. ARUNACHALAM CHETTIAR, ASSESSEE.*

Indian Income-tax Act (VII of 1918), sec. 3 (2) (viii)—Profits from business of casual nature—Question of fact.

It is a question of fact in each case whether certain stray transactions of a merchant are really part of his business so that the profits arising from them can be taxed as profits arising from his business.

Held on the facts of the case that profits that accrued to a banker and money-lender from certain stray speculative purchases and sales of dollars in the Straits Settlements were taxable as profits arising from his business and were not exempt from taxation as arising from occupation of a casual nature within the meaning of section 3 (2) (viii) of the Indian Income-tax Act, 1918; *California Copper Syndicate Coy., Ltd. v. Harris*, (1904) 5 Tax Cases, 159; *Hudson Bay Coy. v. Stevens*, (1909) 5 Tax Cases, 424 and *T. Benyon Coy., Ltd. v. Ogg*, (1918) 7 Tax Cases, 125, applied.

CASE stated under section 51 (1) of the Income-tax Act VII of 1918 by S. WADSWORTH, Secretary, Board of Revenue, Land Revenue and Settlement (Income-tax), in Income-tax Appeal No. 316 and S.T.A. No. 64 of 1921-22 in his letter, dated 16th October 1922.

The facts appear from the opinion of the High Court. *A. Krishnaswami Ayyar* (with *M. Patanjali Sastri*) for assessee.—These profits are not taxable, having been earned from transactions of a casual nature and not having been earned in the course of business; see section 3 (2) (viii) of the Indian Income-tax Act of 1918. The

* Referred Case No. 20 of 1922.

BOARD OF
REVENUE
v.
ARUNA-
CHALAM
CHETTIAR.

assessee did not carry on any business in the Straits Settlements and he had closed all his business there before this transaction which was only of a stray and speculative character. It is not usual for Nattukkottai Chetties to speculate in dollars or other foreign currency. Neither the bigness of the amount nor the number of occasions affects the question. See *Hudson Bay Coy. v. Stevens*(1).

Government Pleader (C. V. Anantakrishna Ayyar) for the Crown.—The facts show that these transactions were not casual but were in the course of the assessee's business as a banker and money-lender. The number of occasions on which money was sent from here to Penang and *vice versa* confirms this. Hence the profits were not casual but arose from business; see *T. Benyon Coy., Ltd. v. Ogg*(2) and *Cape Brandy Syndicate v. Inland Revenue Commissioners*(3) and *California Copper Syndicate Coy., Ltd. v. Harris*(4).

JUDGMENT.

SCHWABE,
C.J.

SCHWABE, C.J.—The assessee is a Nattukkottai Chetti carrying on business in Madras and elsewhere as banker and money-lender. In the year of assessment, he remitted from Madras sums aggregating over 4 lakhs of rupees to Penang, such sums being invested there in Straits Settlements dollars, and ultimately reconverted into rupees and remitted back to Madras. The remittances were made on eight occasions within a period of four months in 1919 and the retransfer to Madras was on thirteen occasions covering a period of four months from the end of 1920 to the beginning of 1921. Owing to the fluctuations in exchange, which varied between 83 and 175 rupees per 100 dollars, the assessee made a

(1) (1909) 5 Tax Cases, 424 at 435.

(8) [1921] 2 K.B., 403.

(2) (1918) 7 Tax Cases, 125.

(4) (1904) 5 Tax Cases, 159.

BOARD OF
REVENUE
v.
ARUNA-
CHALAM
CHETTIAR.
—
SCHWABE,
C.J.

profit of a considerable amount on the transactions. He has been assessed to income-tax on that profit, and the question referred to this Court is whether he has been correctly assessed. Under section 51 (1) of the Income-tax Act which was then in force, any question which has arisen with reference to the interpretation of any of the provisions of this Act may be referred to the High Court. This section probably gives wider powers than section 66 of the Indian Income-tax Act of 1922, the consolidating Act now in force, which limits the reference to the High Court to questions of law. It is not, however, necessary to consider the exact meaning of the words of these sections because, the facts having been found, the question whether or not they bring the income within the reach of any particular section of the Act is a question of law.

Section 3 of the Act applies to all income from whatever source it is derived, if it accrues, or arises, or is received in British India. Certain exceptions are set forth in section 3 (2) and among those exceptions is to be found

“viii. Any receipts not being receipts arising from business or the exercise of a profession, vocation, or occupation which are of a casual and non-recurring nature.”

By the combined effect of sections 5 and 9 income derived from business is chargeable to income-tax in respect of the profits of any business carried on by the assessee. In the United Kingdom, income-tax is payable on the balance of profits or gains derived from carrying on a trade or business. I can find no distinction in this matter between the laws of the two countries. The English Acts have not got the exception in so many terms of receipts of a casual and non-recurring nature; but, as, by the words of section 3 (2) (viii) of the Indian Act, receipts of a casual and non-recurring nature are

BOARD OF
REVENUE
v.
ARUNA-
CHALAM
CHETTIAR.
—
SCHWABE,
C.J.

only exempted when they are not receipts arising from business, the question to be considered both in India and England is whether a particular receipt is properly brought into account or omitted in arriving at the profits of a business. If the transactions are business transactions and result in a profit or loss made in the carrying on of the business, they must be brought into account; otherwise not. The questions which have arisen for decision have been whether particular transactions form part of a business carried on by the assessee. They need not be part of some already established business, but they must together form a business. If the transactions form part of the ordinary business of the assessee, the profits or losses on them must, of course, be brought into account. But where they are outside the scope of the ordinary business of the assessee, it is often a difficult question to decide whether or not they are to be treated subject to income-tax. Profits may be made by the realization of security or by the sale of land or moveable property and in the case of one man they may be merely successful realizations of assets or alterations of investment while in the case of another man they may form part of the income of a business. To give a simple illustration a Barrister might buy a picture and at a later date when the works of the particular artist were in demand, sell that picture and realize a profit. No income-tax would be payable on this profit. If a picture dealer bought a picture and on the same events happening sold it at a profit, that profit would be a profit earned in his business and would be liable to income-tax. So, too, profits made on isolated speculations are not liable to income-tax, but those made in speculation of a similar kind as part of a business would be liable. A difficult question may, however, arise as to whether the transactions are of such frequency as to amount to

carrying on a business. The distinction is well illustrated by the cases of *California Copper Syndicate Coy., Ltd.*, v. *Harris*(1) and *Hudson Bay Coy. v. Stevens*(2). In the former a company was formed for the purpose of acquiring and reselling mining property and also for working such property. It acquired and worked various properties and then resold the whole at a profit and it was held that such profit was liable to income-tax and Lord Justice CLARK MACDONALD in the course of his judgment subsequently approved by the Privy Council in *Commissioner of Taxes v. Melbourne Trust, Limited*(3) said;

“The question to be determined being, is the sum of gain that has been made a mere enhancement of value by realizing a security or is it a gain made in an operation of business in carrying out a scheme for profit-making.”

In the latter, a company received by grant from the Crown as consideration for surrender of their Charter, large tracts of land and then proceeded over a period of time to sell that land in small lots and it was held that the profits made on these sales were not liable to income-tax, the sales being merely realizations of assets, the company not carrying on a trade in buying and selling lands. In *T. Benyon Coy., Ltd. v. Ogg*(4) a company whose ordinary business was that of coal merchants, insurance brokers and agents of colliery companies purchased on its own account as a speculation 250 Railway coal trucks and subsequently got rid of them at a profit. It was held that the profit was made in the operation of the company's business. It was pointed out by SPANKEY, J., that though in most cases an isolated transaction does not fall to be chargeable, it

BOARD OF
REVENUE
v.
ARUNA-
CHALAM
CHETTIAR.
—
SCHWABE,
C.J.

(1) (1904) 5 Tax Cases, 159.

(3) [1914] A.C., 1001.

(2) (1909) 5 Tax Cases, 424.

(4) (1918) 7 Tax Cases, 135.

was not possible to say that the mere fact that it was an isolated transaction at once takes it out of the category of chargeable profits and it was necessary to look at the number of waggons bought, the amount invested and how they were sold, and, in fact, to look at the whole circumstances to say whether the assessee had embarked on the purchase of Railway waggons as part of his business.

Turning to the facts of this case, the assessee was a dealer in money and had by reason of his dealings with the Straits Settlements, facilities at hand for dealings in exchange between Madras and the Straits Settlements. He had at Penang agents, themselves bankers, who were in the habit of collecting for him outstandings in his money-lending business, and as and when required remitting them to India and in that process converting dollars into rupees. During the periods in question in this case, he got regular information by letter and cable from those agents as to the movements of exchange in the Straits Settlements. He sent large sums of money extending over a period of four months. At first the market went against him and he sent increasing quantities of rupees, no doubt, with a view to averaging the cost of the dollars. The dollars were by arrangement with the agents left on deposit carrying interest, a fact not in itself conclusive, and when he got them back, by reason of the increase in the value of the rupee he was able to realize by degrees an increasing profit. Taking all these facts into consideration, I think that the right inference to be drawn is that in this case these dealings in exchange had become part of the assessee's banking business, and I think too that even looked at apart from his ordinary business, he did not enter into these transactions as an isolated investment of capital or speculation but as a business of a dealer in exchange.

On these grounds, I hold that the decision of the Commissioner is correct. The assessee must pay the cost of this reference.

COUTTS TROTTER, J.—I agree.

N.B.

APPELLATE CIVIL.

*Before Mr. Justice Ramesam (on a difference of opinion
between Justices Spencer and Venkatasubba Rao).*

NADAPENA APPANNA AND OTHERS (DEFENDANTS),
APPELLANTS,

1923,
August 21.

v.

SARIPILLI VENKATASAMI AND OTHERS
(PLAINTIFFS), RESPONDENTS.*

Registration Act (XVI of 1908), s. 49—Usufructuary mortgage securing rupees two hundred—Unregistered deed—Mortgagee put in possession in 1902—Suit for redemption in 1917—Defendants setting up independent title—Title by adverse possession—Unregistered deed, whether admissible to prove nature of possession and terms of the mortgage—Other evidence, whether admissible—Suit for redemption—Decree for possession on title, whether can be given.

In a suit instituted to recover certain lands on redemption of a usufructuary mortgage for Rs. 200, purported to be created by an unregistered deed in 1902, the defendants (some of whom were legal representatives of the original mortgagee who had been put in possession under the deed, and the others were persons who got into possession within 12 years of the suit), set up an independent title in themselves and pleaded also that the deed was inadmissible in evidence and that the suit was barred by limitation.

Held, that the deed, though unregistered, was admissible in evidence to show the character of the defendants' possession; that the defendants could be shown to have acquired only a limited interest as mortgagees by adverse possession; that, to prove the extent of the interest acquired by them by adverse

* Appeal against Order No. 56 of 1921.

APPANNA
v.
VENKATASAMI possession, the terms of the mortgage asserted by them may be proved, and such proof cannot be regarded as an attempt to prove the unregistered mortgage or to adduce secondary evidence of it, and the unregistered deed as well as other evidence was admissible for the purpose; *Varada Pillai v. Jeevarathnammal*, (1920) I.L.R., 43 Mad., 244 (P.C.), applied;

that a suit to redeem is substantially a suit for possession, and that, even if defendants had not acquired any interest by adverse possession, the suit was maintainable as one for possession based on title; *Annada Hait v. Khudiram Hait*, (1914) 19 C.L.J., 532, followed.

APPEAL against the order of the Court of the Subordinate Judge of Vizagapatam in Appeal Suit No. 35 of 1920 (Appeal Suit No. 408 of 1917, District Court), preferred against the decree of the District Munsif of Vizianagaram in Original Suit No. 607 of 1917.

This is a suit to recover possession of the suit lands on redemption of a usufructuary mortgage which was purported to be created under an unregistered deed executed in 1902 in favour of the husband of the first defendant who was put in possession of the lands under the document. The suit was brought in 1917 to recover the lands from the defendants 1 to 4, who were the legal representatives of the original mortgagee, being his widow and undivided brothers, and from the defendants 5 to 8, who were relations of the mortgagee and got into possession of the lands within 12 years of the suit. The defendants set up an independent and absolute title to the lands, denied the mortgage and the title of the plaintiffs, and pleaded that the unregistered mortgage deed was not admissible in evidence and could not form the basis of the suit, and that the suit for redemption was not sustainable as one in ejectment on title, and that the suit was barred by limitation. The District Munsif raised a preliminary issue, "whether the suit lay on an unregistered mortgage bond, and whether the suit was in

time," and held that the suit was not maintainable on the bond, and that it was barred by limitation. On appeal by the plaintiffs, the lower appellate Court held that the unregistered mortgage bond was admissible in evidence and accordingly reversed and remanded the case for trial after framing proper issues. Against this order of remand, the defendants preferred a Civil Miscellaneous Appeal to the High Court. The case came on for hearing before SPENCER and VENKATASUBBA RAO, JJ., who differed in opinion and referred the case to a third Judge. The judgments of SPENCER and VENKATASUBBA RAO, JJ., were as follows:—

SPENCER, J.—The plaintiffs sued to enforce in this suit the terms of a usufructuary mortgage deed praying in their plaint for a decree for redemption and alleging that plaintiffs 1 to 5 had mortgaged the suit property to the deceased husband of first defendant who was the brother of defendants 5 to 8. SPENCER, J.

The defendants did not admit the existence of any mortgage. The plaintiff did not set up a title to eject the defendants otherwise.

The mortgage deed produced, being unregistered, could not under section 49 of the Indian Registration Act be admitted as evidence of plaintiff's right to redeem. The Subordinate Judge was of opinion that it could be looked at for the collateral purpose of showing the nature of defendants' possession. But no question arises as to the nature of that possession until the plaintiffs first show that they have a right to recover possession. The purpose for which they wish to have the document admitted is not a collateral purpose, but the direct purpose of proving the basis of their title.

I do not for an instant wish to question the proposition that if one party to a suit sets up a title based on

APPANNA
v.
VENKATASAMI

APPANNA
v.
VENKATASAMI
SPENCER, J. adverse possession, his opponent may show by means of of an unregistered mortgage deed that the nature of the possession was permissive.

There is the high authority of the Privy Council in *Varada Pillai v. Jeevarathanmmal*(1) for holding that an unregistered document which could not be used as evidence of a transaction requiring registration, such as a gift, may yet be looked at as explaining the nature and character of a person's possession.

But a plaintiff who sues for redemption on the strength of an unregistered mortgage deed can never succeed, because for obtaining a decree to redeem it is necessary to prove the terms of the mortgage, and they cannot be proved by any other evidence than the document itself. This is the effect of sections 17 and 49 of the Indian Registration Act read with section 91 of the Indian Evidence Act. If we were to allow unregistered documents to be used as evidence of title by a mere device of pleading, we should be defeating the purpose of the Act. [Vide *Varada v. Krishnasami*(2).] Even if the defendants were to admit in their written statements that the relations between themselves were those of mortgagors and mortgagees, the plaintiffs could not on the strength of that admission be given a decree for redemption, as for redemption they must further prove what sum is due; see *Krishna Pillai v. Rangasami Pillai*(3), *Mutta Venkatachalapathy v. Pyinda Venkatachalapathy*(4), *Seetamma v. Krishnaswami Rao*(5), *Kalliani Amma v. Narayanan Nambiar*(6) and *Somu Gurukkal v. Rangammal*(7). In *Annada Hait v. Khudiram Hait*(8), the plaintiff proved a title paramount

(1) (1920) I.L.R., 43 Mad., 244, (P.C.)

(3) (1895) I.L.R., 18 Mad., 462.

(5) (1916) 31 M.L.J., 240.

(7) (1871) 7 M.B.C.B., 13.

(2) (1883) I.L.R., 6 Mad., 117.

(4) (1912) 12 M.L.T., 579.

(6) (1915) 28 M.L.J., 266.

(8) (1914) 19 C.L.J., 532.

to the land, and the defendant while admitting possession under a usufructuary mortgage took the objection that being a verbal mortgage it was void. The decision was that of a single Judge. The learned Judges who heard the Letters Patent Appeal give no reasons for their decision. In the present suit the defendants deny the plaintiff's mortgage and set up an independent title and the plaintiffs have not applied to amend the plaint so as to convert the suit into one to recover possession on their title as owners. Even if they now applied to amend their plaint so as to make it a suit on a different cause of action, I do not think we could properly permit this to be done (see Second Appeal No. 880 of 1912).

In these circumstances the appeal in my opinion should be allowed and the suit dismissed with costs throughout. But as my learned brother is in favour of dismissing the appeal we refer the question on which we differ to a third Judge under section 98 of the Code of Civil Procedure.

VENKATASUBBA RAO, J.—The suit is brought for redemption. The plaintiffs allege that they were the owners of the property, that they executed about 15 years previous to the suit a usufructuary mortgage deed in favour of the defendants' predecessor in title, that the latter was put in possession of the property which continues to be in possession of the defendants, that the mortgage deed was not registered and that the defendants refused to receive the amount due and deliver possession of the property to the plaintiffs. As is usual in such a plaint, the prayer is for possession of the property, the plaintiffs offering to pay the amount due on the footing of the mortgage.

The defendants in effect claim that the property is theirs and deny the existence of the mortgage. The District Munsif dismissed the suit holding on a

APPANNA
v.
VENKATASAMI
SPENCER, J.

VENKATA-
SUBBA RAO, J.

APPANNA
v.
VENKATASAMI
—
VENKATA-
SUBBA RAO, J.

preliminary issue framed that the suit does not lie on an unregistered mortgage bond. He pronounced judgment on the 10th November 1917, and relying on *Subbayya v. Madduleiah*(1) and *Yuruva Venkata Reddy v. Maddi Veeranna*(2) overruled the contention on behalf of the plaintiffs that the mortgage deed may be referred to, to explain the nature and character of the possession held by the defendants. The Subordinate Judge reversed the decision of the District Munsif and remanded the suit for disposal in accordance with law. His judgment is dated 26th August 1920, and as by that time the Judicial Committee of the Privy Council in *Varada Pillai v. Jeevarathnammal*(3) had decided that an unregistered deed of gift could be admitted in evidence for the purpose of ascertaining the character of the possession of the alleged donee, the Subordinate Judge following the decision came to the conclusion that the unregistered bond was admissible for the limited purpose stated and observed as follows:—

“When once the document proves the nature of the defendants’ possession to be that of the mortgagees they cannot prescribe for an absolute title but they can prescribe for mortgagee’s rights after the lapse of 12 years from the date of the deed.”

The suit being for redemption of a usufructuary mortgage, it is in substance a suit for possession of the property. The fact that the plaintiff while asking for possession has offered to pay the amount due on the mortgage to the defendant, does not render it any the less a suit for the possession of the property. What the plaintiff has to do in the suit is to prove his title. Having proved it he may rely upon the mortgage deed itself to show that the defendants have not acquired a title by adverse possession. I may observe that the

(1) (1907) 17 M.L.J., 469.

(2) (1914) 23 I.C., 376.

(3) (1920) I.L.R., 43 Mad., 244 (P.C.).

title of the plaintiff to the property has not been determined, the case having been disposed of on a preliminary point. The plaintiff may adduce evidence to prove his ownership to the property. As a piece of evidence he may even rely upon an admission of his title, if any, made by the mortgagees in the unregistered deed in question. It is not necessary to pursue this matter further because when the plaintiff proves his title, it will be for the defendants to make out their claim to the property. If they succeed in showing that they have been holding the property asserting the title of mortgagees for over the statutory period, they will then have shown that they have acquired by adverse possession the limited interest of mortgagees in the property in question.

It has been contended on behalf of the defendants that to take this view, will be tantamount to permitting the plaintiffs to convert their suit from one of redemption into one of possession. This argument is untenable. The precise point was raised and determined in *Annada Hait v. Khudiram Hait*(1). The case was first decided by HARRINGTON, J., and his judgment was approved in Letters Patent Appeal by Sir LAWRENCE JENKINS, C.J., and MOOKERJEE, J. The following observation in the judgment of HARRINGTON, J., disposes of the argument advanced before us on this point on behalf of the defendants:—

“The argument that has been addressed to us is that if the plaintiff is given possession in this suit, it would be substantially altering the character of the suit. I do not agree with this. It appears to me that a suit for possession on redeeming a usufructuary mortgage is in substance a suit for possession of the land. If the plaintiff establishes his title and the only answer the defendant has is that the mortgage is void in point of law, still nevertheless the plaintiff would be entitled to get

(1) (1914) 19 C.L.J., 532.

APPANNA
v.
VENKATASAMI

the land, because the defendant on his own showing has no title to detain possession of the land."

VENKATA-
SUBBA RAO, J.

The next argument that the defendants' learned vakil advanced before us is that the suit is to enforce the terms of the mortgage deed which was unregistered, and that as the mortgage cannot be proved, the suit must fail. It is perfectly true that a mortgage over immovable property to secure a sum of Rs. 100 or upwards cannot be created by an unregistered deed. It follows that a mortgagee, to whom possession has not been transferred, suing for sale of the mortgaged property cannot establish his right by relying upon an unregistered mortgage deed and his suit will necessarily be dismissed, but, where there is a transfer of possession, other considerations will arise. The interest which a man can acquire by adverse possession may be limited by the nature of his possession; and adverse possession of a limited interest for the statutory period is a good plea to a suit in ejectment to the extent of that interest. In *Madhava v. Narayana*(1), it was held that the kanomdars who held the land under an invalid kanom for more than 12 years acquired by adverse possession the limited interest for which they prescribed. Again in *Sankaran v. Periasami*(2), it was held,

"that the payment of poruppu did not prevent the possession of the defendants from being adverse to the plaintiff, as the possession of a limited interest in immovable property may be as much adverse for the purpose of barring a suit for the determination of that limited interest as is the adverse possession of a complete interest in the property, to bar a suit for the whole property."

In *Budesab v. Hanmanta*(3), the two Madras cases referred to above were cited with approval, and it was held that a tenant may, after the statutory period,

(1) (1886) I.L.R., 9 Mad., 244.

(2) (1890) I.L.R., 13 Mad., 467.

(3) (1897) I.L.R., 21 Bom., 509.

acquire the right of perpetual tenancy. It was pointed out that under article 144 of Act XV of 1877 a suit for possession of immovable property or any interest therein is barred after the lapse of 12 years from the time when the possession of the defendant becomes adverse to the plaintiff and that in a suit in ejectment it is the tenant's interest in possession of the tenant that the landlord seeks to recover.

I may also refer to *Manavikraman Ettan Thamburan v. Ammu*(1), which, I think, has a very material bearing on the present case. In 1864, A mortgaged certain lands to B for Rs. 750. In 1881, B professing to act as the absolute owner, mortgaged the same lands to C for Rs. 5,000 and C enjoyed possession of the lands for a period exceeding 12 years from the date of his mortgage. A then instituted a suit for redemption. It was held that A was bound to redeem C's mortgage before he could recover his possession of the property, on the ground that C's mortgage which, but for the law of limitation, would have been invalid as against A, had become good by C's possession for 12 years.

From these authorities it is clear that the defendant in the present case can acquire the title of a mortgagee by adverse possession for the statutory period. The deed of mortgage being invalid, it confers upon him no right, and it cannot be relied upon as the source of the mortgagee's title. On the contrary, his right is based solely upon the fact that he has been in adverse possession of the limited interest for the statutory period. Under the decision of the Privy Council in *Varada Pillai v. Jeevarathnammal*(2), the mortgage deed may be referred to for ascertaining the character of his possession. It may be referred to for determining the quantum of

(1) (1901) I.L.R., 24 Mad., 471 (F.B.).

(2) (1920) I.L.R., 43 Mad., 244 (P.C.).

APPANNA
v.
VENKATASAMI

VENKATA-
SUBBA RAO, J.

APPANNA
v.
VENKATASAMI
VENKATA-
SUBBA RAO, J.

interest for which the defendants prescribed claiming as mortgagees. When it is said that a mortgagee's interest may be prescribed for, the statement implies that the mortgagee's interest is definite and precise. If the question is, has a person prescribed for a mortgagee's interest in respect of Rs. 100 or Rs. 10,000, the document may be looked at for ascertaining the quantum of interest which the adverse possessor has been claiming or has prescribed for.

This case is the converse of *Varada Pillai v. Jeevarathnammal*(1). In the latter the defendant who claimed title by adverse possession sought to rely upon the unregistered documents referred to in that case for proving the character and nature of his possession. In this case it is the plaintiff that desires to prove, by referring to the unregistered deed, that the defendants' possession has not been adverse. Again in the Privy Council case the defendant wanted to make out his adverse possession of, and title to, the property by relying upon the unregistered documents. In the present case, the plaintiff seeks to disprove the allegation of adverse possession on the part of the defendant by relying upon the deed which has not been registered. In principle the two cases are identical.

As regards the defendants' right to be paid the amount of the mortgage no difficulty does however arise in the present case as the plaintiff has admitted that an amount is due to the defendant on the footing of the mortgage and offers to pay it.

I am therefore of the opinion that the judgment of the Subordinate Judge is correct and that the order of remand must stand.

(1) (1920) I.L.R., 43 Mad., 244 (P.C.).

The case came on reference before RAMESAM, J. APPANNA
v.
VENKATASAMI

ON THIS REFERENCE :

Y. Suryanarayana for appellants.

P. Narayanamurthi for respondents.

JUDGMENT.

RAMESAM, J.—The facts are stated by my learned RAMESAM, J. brothers. It is sufficient to add that defendants 1 to 4 represent the original mortgagee who is dead and defendants 5 to 8 are their relations and friends who got into possession of the suit property within 12 years prior to suit.

It is true that the unregistered deed of mortgage mentioned in the plaint is inadmissible in evidence to prove the mortgage. It is also true that a mortgage of immovable property to secure a sum of Rs. 100 or upwards cannot be created otherwise than by a registered deed. There is therefore no mortgage of 1902 to redeem.

But it does not follow that there was not, at the date of plaint, the relation of mortgagor and mortgagee between the plaintiff and defendants 1 to 4. It is a too narrow reading of the plaint which is a bare narration of the facts, to construe it as seeking to redeem only a mortgage of 1902 and no other. The decision in *Krishna Pillai v. Rangasami Pillai*(1) does not apply. If the defendants who remained in possession for 15 years prescribed for and acquired the interest of a mortgagee by adverse possession, the relation between the plaintiff and the defendants is that of a mortgagor and mortgagee. The limited interest of a mortgagee may be acquired by adverse possession [*Madhava v. Narayana*(2)]. To prove the extent of interest acquired by the defendants by adverse possession, the terms of the mortgage

(1) (1895) I.L.R., 18 Mad., 482. (2) (1886) I.L.R., 9 Mad., 244.

APPANNA
v.
VENKATASAMI
RAMESAM, J. asserted by them have to be and may be proved. Such proof cannot be regarded as an attempt to prove the mortgage of 1902 or to adduce secondary evidence of the terms of the unregistered deed of mortgage; for the asserted mortgage need not necessarily be (though very often it will be) identical with the mortgage attempted to be created by means of the unregistered deed of mortgage.

The case has not been tried. One cannot now know what evidence the plaintiffs are going to adduce to prove the mortgage acquired by the defendants by adverse possession. The unregistered deed of mortgage (which ought to be in the defendants' possession), if forthcoming, can be admitted in evidence to show the character of the defendants' possession. *Varada Pillai v. Jeevarathnammal*(1). It cannot be assumed at this stage that no other evidence will be forthcoming.

Even if the defendants acquired no mortgage or other limited interest by adverse possession, the plaintiffs can succeed if they are able to prove their title. It cannot be said that the character of the suit is changed. In the first place, even as the suit is framed, it is a suit for possession based on title, as against defendants 5 to 8 and the suit is not a suit for mere redemption. But apart from this, I agree with the decision in *Annada Hait v. Khudiram Hait*(2), where it was held that a suit to redeem a usufructuary mortgage is substantially a suit for possession. [See also *Sesha Naidu v. Periasami Odayar*(3).]

I agree with VENKATASUBBA RAO, J., that the appeal must be dismissed. Costs of the High Court to abide the result.

K.R.

(1) (1920) I.L.R., 43 Mad., 244 (P.C.). (2) (1914) 19 C.L.J., 532.
(3) (1921) I.L.R., 44 Mad., 951.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief
Justice, and Mr. Justice Krishnan.

ABURUBAMMAL (DEFENDANT AND GARNISHEE),
APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS (PLAINTIFF),
RESPONDENT.*

Presidency Towns Insolvency Act (III of 1909), sec. 52 (2) (c)—
"True owner" and "Reputed owner," meaning of—*Withdrawal of consent by "true owner" to continuance of possession of "reputed owner" by posting letter—Presumption of letter reaching its destination.*

"True owner" in section 52 (2) (c) of the Presidency Towns Insolvency Act (III of 1909) includes a pledgee, and where the pledgee allows the pledgor temporary or conditional use of the thing pledged, the pledgor then becomes the "reputed owner" thereof within the meaning of the section. If before the commencement of the insolvency of the pledgor the pledgee puts an end to the right of the pledgor to use the thing pledged by demanding its return according to agreement, the thing pledged cannot thereafter be said to be in his possession with the consent of the true owner so as to vest in the Official Assignee. A letter proved to have been posted to the proper address of a person must be presumed to have reached him in the absence of evidence to the contrary.

APPEAL from the order, dated 11th September 1922, passed by Mr. Justice COUTTS TROTTER in the exercise of the insolvency jurisdiction of the High Court in Insolvency Petition No. 100 of 1922, in the matter of C. Cunnayappa Mudali, an insolvent.

The facts are given in the judgment.

K. Ramanath Shenai and K. Sanjiva Kamath for
appellant.

R. N. Aiyengar for respondent.

* Original Side Appeal No. 111 of 1922.

1923,
August 21st,
28rd and
27th.

JUDGMENT.

ABURUBAM-
MAL
v.
OFFICIAL
ASSIGNEE.
—
SCHWABE,
C.J.

SCHWABE, C.J.—By an agreement in writing, dated the 2nd August 1921, the insolvent purported to give to the garnishee his motor-car as security for an advance by her to him of Rs. 3,000. It was a term of the agreement that the insolvent should have the right to use the car and should keep it in good order, and deliver it up on demand. He also agreed that, if he exercised any acts of ownership over the car, he should be criminally liable, a stipulation which can have no effect in law.

The other relevant facts are that the loan was also secured by a joint promissory note of the insolvent and another, renewed on 9th November 1921, to the end of January 1922, and that by a letter, dated 10th February 1922, from her Vakil, she demanded from the insolvent under threat of criminal proceedings that the car should be returned to her. The commencement of the insolvency was in May 1922.

On these facts it is contended by the Official Assignee that he is entitled to the car free from any charge in favour of the garnishee as being at the commencement of the insolvency, with the consent of the true owner, in the possession, order and disposition of the insolvent in his trade or business, and therefore under section 52 (2) (c) of the Presidency Towns Insolvency Act, the property of the insolvent, divisible amongst his creditors; and it has been so held by *COTTES TROTTER, J.*

Now the legal owner of the property throughout was the insolvent, but the garnishee was the owner of an equitable interest in the property. It has been held on the true interpretation of section 52 and of the same words in the English Bankruptcy Acts, that the words

ABURUBAM-
MAL
v.
OFFICIAL
ASSIGNEE.
—
SCHWABE,
C.J.

“true owner” include the owner of an equitable interest, and that there can also be a reputed owner of that interest and that reputed owner can be the insolvent himself, that is, the legal owner of the property. See *The Mercantile Bank of India, Ltd., Madras v. The Official Assignee, Madras*(1), following the judgment of *BHASHYAM AYYANGAR, J.*, in *Puninthavelu Mudaliar v. Bhashyam Ayyangar*(2), and see the English cases set out in *Williams on Bankruptcy*, 12th Edition, at page 217. In *Colonial Bank v. Whinney*(3), it was held that where there was an equitable mortgage of shares by the deposit of the share-certificates and a blank transfer, the registered shareholder remaining the legal owner, the depositor got an equitable interest, and that another person could be the reputed owner of that equitable interest.

The result is that in this case the garnishee must be taken to be the true owner of the equitable interest in this car conferred by the agreement of 2nd August, referred to above; but the car being left in the possession of the insolvent with power to use it to all appearance as though it were his own he had become the reputed owner. But it is essential for the section to apply that he should at the commencement of the insolvency be the reputed owner with the consent of the true owner. Now the question is whether the true owner was at that time consenting or not to the reputation of ownership to the reputed owner and that is a question of fact. In this case the letter of 10th February 1922 is in very plain language:

“Under instructions from Mrs. Aburubammal I call upon you to forthwith return the car which has been given as security for the amount you have borrowed from her and which you have

(1) (1916) I.L.R., 39 Mad., 250.

(2) (1902) I.L.R., 25 Mad., 406.

(3) (1886) 11 App. Cas., 426.

ABURUBAM-
MAL
v.
OFFICIAL
ASSIGNEE,
—
SCHWABE,
C.J.

taken promising to return when demanded. You have not returned the car when demanded by her. Please take notice that, if the car is not sent at once, criminal proceedings will at once be instituted against you."

I should infer from the terms of that letter that there had been a previous demand made verbally by the garnishee herself. But, however that may be, there is in this letter a very definite demand for the return of the car. The evidence is that that letter was posted, and it is quite clear that it was so posted because a certificate from the Post office to that effect is produced before the Court. It is suggested by the learned Judge that it is possible that that letter was not delivered to the insolvent and that it is possible that, although not delivered, it did not come back to the Dead Letter Office, through what the learned Judge speaks of as the vagaries of the Madras post: but the insolvent was called as a witness and he did not deny the receipt of that letter, though it is true he was not asked whether he had received it or not; and I fail to see how the learned Judge was justified in coming to the conclusion on that evidence that it had not been received, because the presumption is that a letter which is proved to be posted and posted to the right address is in fact received by the recipient. Speaking entirely for myself, I have always looked upon, and shall always look upon with the gravest suspicion the evidence of a man who comes to Court and says that he has not received the really important letters in the case, because although it is possible, I should require something more before I should be ready to find that the ordinary course of events has been departed from in so convenient a way. I must therefore find that that letter was in fact received.

If it was received there can be no doubt in my mind that there was a determination of the consent of the true owner at that date. I should add that in my view

ABURUBAM-
MAL
v.
OFFICIAL
ASSIGNEE,
—
SCHWABE,
C.J.

even if that letter was not received I should incline to the view that the consent was proved to have been determined by the instructions to the vakil to send that letter and the sending of that letter by him. It is possible that after that date the consent was in some way renewed and I confess that I should like to have a very much more clear explanation than I have got why nothing was done in the matter between February 10, and May. The garnishee gives evidence, and a considerable body of evidence, that she took most active steps thereafter to take possession of the motor car and to deal with it as her own, but that evidence is not believed and we are not in a position to do anything else than to accept the learned Judge's view, that it was not acceptable evidence. But he does not hold that after February 10, there was any act by her showing consent to further possession by the insolvent, nor do I think we ought so to find. If the insolvent had come into Court and stated, "I got that letter but after that date the lady came to see me and she said, 'very well, go on using the car while I find a purchaser'" or something of that kind, that would be sufficient to say that this letter was not a final and conclusive withdrawal of consent. But I can find nothing at all in the evidence to amount to anything of that kind. That being so, I think we must take that letter demanding the return of the car under threat of criminal proceedings if not complied with, as a sufficient determination of the garnishee's consent.

In these circumstances this appeal must be allowed. In the ordinary course an order would be made directing the return of the car by the Official Assignee to the garnishee, he of course, if so advised, being entitled to redeem it, as representing the insolvent, on payment of Rs. 3,000 and interest thereon at the promissory note

ABURUBAM-
MAL
v.
OFFICIAL
ASSIGNEE.
—
SCHWABE,
C.J.

rate and costs. We are, however, informed, that the Official Assignee has spent money on the car during the time in which it has been in his possession on repairs or improvements and that it is still worth less than Rs. 3,000. He is, therefore entitled to a first charge for what he has spent on the car. Probably the best course to adopt would be that he sells the car and deducts from the sale price the amount spent by him on repairs and hands over the balance to the garnishee who will be entitled to prove as an unsecured creditor for any balance due to her. If the garnishee desires the car it is open to her to pay the amount spent by the Official Assignee on repairs and improvements of the car and have the car. She must have her costs here and below. She must elect which course she will adopt within 14 days of the Official Assignee informing her of the amount of his expenditure. There will be liberty to apply.

KRISHNAN, J. KRISHNAN, J.—It is clear from the authorities that have been noticed in the judgment of the learned Chief Justice that in section 52 (2) (c) the words “true owner” include the owner of an equitable charge like the one which the garnishee has over the motor car in this case. It is also clear that the person who is really the owner of the car can be a reputed owner of the equitable charge, and that section 52 (2) (c) will apply to such a case as that. But there is another term in the section which has to be considered before we can apply it to the facts of this case, and that is that the car should have been in the possession of the reputed owner, in this case the insolvent, with the consent and permission of the true owner, viz., the garnishee, at the date of the insolvency. By the letter of February 10, 1922, that has been referred to by the learned Chief Justice, it was clearly intended to put an end to the

ABURUBAM-
MAL
v.
OFFICIAL
ASSIGNEE.
—
KRISHNAN, J.

consent which the garnishee had originally given to the insolvent keeping possession of his car, and that that letter was posted to the right address there can be no doubt, because there is the certificate of posting produced, and the presumption in law is that the letter reached the hands of the addressee, who is the insolvent in this case. The insolvent, when called as a witness did not deny the receipt of the letter, neither side having put the point to him, thus the presumption remains, and we must take it, that the letter reached the hands of the insolvent before the date of the insolvency. That of course determines the original consent that had been given by the garnishee, the true owner. I do not propose to express any opinion on the question whether, when such a withdrawal of consent is not communicated to the person from whom the consent is withdrawn, such withdrawal will be effective or not, for that is a more difficult question to decide and it does not require decision in this case. I am in agreement with the learned Chief Justice that the letter was actually received by the insolvent, and that being so, the one essential condition of the section that the reputed owner must at the commencement of the insolvency have had possession or disposition of the article in question with the consent and permission of the true owner fails. If section 52 (2) (c) does not apply, then it is quite clear that there is no other ground on which the Official Assignee can be allowed to take this car free from the charge created by the insolvent. I therefore agree to the order proposed by the learned Chief Justice in this case.

Attorney for respondent—V. Varadaraja Mudaliyar.

N.E.

APPELLATE CIVIL.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief
Justice, and Mr. Justice Krishnan.*

HAJEE SHAKOO GANI (DEFENDANT), APPELLANT,

v.

T. S. SABAPATHI PILLAI (PLAINTIFF), RESPONDENT.*

*Indian Tariff Act (VIII of 1894), section 10, amended by Act IV
of 1916, "Duty" meaning of—Voluntary payment, what is.*

Increase or decrease of "duty" in section 10 of the Indian Tariff Act VIII of 1894, as amended by Act IV of 1916, means an increase or decrease arising not only from an alteration in the rate of duty payable but also from an alteration made in the tariff value.

After A contracted to buy from B sugar coming by a certain named ship at a fixed price for a certain quantity, "ex-godown" there was a reduction of the tariff value of sugar, which reduced the amount of duty payable by the seller though the rate of duty payable was the same as before ;

Held (1) that the purchaser was entitled to the benefit of the reduction in the amount of duty paid and (2) that the payment of the price by the purchaser to the seller who would not part with the goods unless he was paid the contract price, was not a voluntary payment though not made under protest.

APPEAL from the decree and judgment, dated 14th August 1923, of Mr. Justice COUTTS TROTTER, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C.S. No. 109 of 1923.

The facts are given in the judgment.

A. Krishnasawmi Ayyar with S. Duraisawmi Ayyar
and T. Thyagaraja Ayyar for appellant.

V. V. Srinivasa Ayyangar for respondent.

JUDGMENT.

SCHWABE, C.J.—This case, which is a test case, raises an interesting question as to the true meaning of

section 10 of the Tariff Act now in force, Act VIII of 1894, as amended by Act IV of 1916.

The facts of the case are quite simple. The plaintiff entered into a contract in December 1922, for the purchase by him from the defendant of certain Java sugar to arrive by a named ship due somewhere about the end of the year at a price working out at about Rs. 20 a cwt. "ex-godown." At the time of the contract, duty was payable on sugar at 25 per cent on what is known as the "tariff value." This tariff value is fixed annually in practice, though by this statute, section 3 (2) "the Governor-General in Council may, by notification, fix, for the purpose of levying duties, the tariff values of any articles enumerated in the Schedules," and no time is fixed for the issuing of such notifications. In this case the tariff value had, in fact, been fixed about a year previously at Rs. 26-4-0 and it is accepted in this case that the method used by the Governor-General in Council in fixing tariff values is to take at the date when they are fixed the average of the market prices ruling during the previous twelve months ending in September, and the practice being to bring the new tariff valuation into operation from the beginning of January. In this case, when the goods arrived there had been a notification of an alteration of the tariff valuation of sugar by reducing it from Rs. 26-4-0 to Rs. 16-4-0, the rate of duty payable remaining the same at 25 per cent. The effect was that the actual duty paid in respect of these goods was Rs. 2-8-0 per cwt. less than it would have been if the old tariff value had remained in force. As the sale was ex-godown, the result, of course, was that the seller paid so much less duty, while the buyer would have to pay to the seller a fixed price which included duty, and the seller would be, if his contention referred to hereafter is right, Rs. 2-8-0 per cwt., better off than

HAJEE
SHAKOO GANI
v.
SABAPATHI
PILLAI.
—
SCHWABE,
C.J.

1923,
September
11 and 12.

SCHWABE,
C.J.

* Original Side Appeal No. 87 of 1923.

HAJEE
SHAKOO GANI
v.
SARAPATHI
PILLAI.
—
SCHWABE,
C.J.

he would have been if the delivery had taken place before the alteration of the tariff value. The Tariff Act makes provision by section 10 the object of which is to protect parties to contracts for future delivery of goods from having to pay more duty than in fact is current at the time of delivery, or being able to escape the payment of such duty. The principle no doubt is, that merchants dealing in commodities may be quite willing to take the risk of a rise and fall in the market price of the commodity between the contract date and delivery date as being a matter which is their business, but merchants are not, as a rule, prepared to take the risk of the sudden alteration of prices of the commodities in which they deal by reason of the Act of the Legislature in imposing, increasing, reducing or remitting the duties payable in respect of those commodities.

Section 10 runs,

"In the event of any duty of customs or excise on any article being imposed, increased, decreased or remitted after the making of any contract for the sale of such article without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such article duty paid where duty was chargeable at that time—(2) if such imposition or increase so takes effect that the duty or increased duty as the case may be, is paid, the seller may add so much to the contract price as will be equivalent to the duty or increase of duty, and (b) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the purchaser may deduct so much from the contract price as will be equivalent to the decrease of duty, or remitted duty."

It is argued on behalf of the seller that the word "duty" in the first part of this section refers to "rate of duty" and rate of duty only and that, for the purpose of seeing whether that section applies or not, we are not entitled to look at an alteration of the tariff value. It is argued that tariff value is merely a convenient way of arriving at the market value, that, where *ad valorem*

duty is imposed, it has to be paid on the market value, and that the buyer or the seller, as the case may be, takes the risk of the rise or fall in the tariff value in the same way as he takes the risk of the rise and fall of market value in cases where there is no tariff value. I confess that, at first sight, I was much impressed with the argument in favour of that construction, but on a close examination of the statute and particularly looking at the history of this section, I have come to the conclusion that the contention is not right. In the Tariff Act of 1894 before amendment, this clause, i.e., section 10 was contained, and there was power then under section 22 of the Sea Customs Act, which was then in operation, for the Governor-General in Council from time to time by notification to fix, for the purpose of levying tariff duty, the value of goods, and in Schedule II to that Act one finds that, in the case of many articles including sugar, there was a tariff valuation in the second column and a rate of duty in the third column; so that at that time, in order to ascertain the duty payable, one had to take the tariff valuation fixed by the statute itself and take the rate per cent on that tariff valuation also so fixed; and indeed, that was the way of ascertaining the duty payable in most of the dutiable goods in the schedule to that Act. It seems to me that the duty payable depends just as much on tariff valuation as on the rate of duty. The tariff valuation is not the real value; in fact, it is agreed that it is based on a value of an entirely different period, namely, the preceding year, and the legislature has chosen to say, in effect, that the duty payable shall be, e.g., 5 per cent per cwt, a cwt. being taken to be of the hypothetical value, whatever the real value may be, of Rs. 10. The rate of duty payable per cwt. is to be

HAJEE
SHAKOO GANI
v.
SARAPATHI
PILLAI.
—
SCHWABE,
C.J.

HAJEE
SHAKOO GANI
SABAPATHI
PILLAI.
—
SCHWABE,
O.J.

ascertained and it could only be ascertained by working out that sum, and it seems to me that, if the Governor-General in Council makes an alteration of the tariff valuation, he is acting with the power of legislature delegated to him for this purpose and the position is exactly the same as if a new statute or a new schedule was brought in by the legislature to alter the tariff valuation fixed in the original schedule by increasing or decreasing it; and, in such a case, I think it would be very difficult to argue that there has not been an increase or decrease, as the case may be, in the duty payable. The Act of 1916 brought into the Tariff Act the power of the Governor-General in Council to fix the tariff values and at the same time altered the form of the schedule by substituting for tariff value merely a unit, or the words "*ad valorem*." As far as sugar was concerned, it became 25 per cent "*ad valorem*"; but, by reason of the amendment to section 3 referred to above, that meant, as there was a tariff value in existence, the same thing, namely, 25 per cent of the tariff value. I can find no reason for supposing that it was the intention of the legislature in any way to alter the rights of contracting parties under section 10 and I think they remain as before. In my view the word "Duty" in that section must refer to the amount payable and arrived at by taking into account (a) the tariff value and (b) the rate of duty. It is to be observed that in the later part of that section what can be recovered is the duty paid and that cannot be arrived at without taking into account the tariff value. This anomaly does remain that after the making of a contract, in cases where there is no tariff value and there is a fluctuation in the market price, the duty in fact, that is payable will be more or less according as the market price has risen or fallen, and on a contract *ex-godown* such as this the effect

HAJEE
SHAKOO GANI
v.
SABAPATHI
PILLAI.
—
SCHWABE,
O.J.

would be that, on a fall in the market price, the seller if he can show that the market price has fallen, would get the benefit for himself really at the expense of his purchaser. But that results from the fact that the legislature in section 10 is only contemplating things that follow from the acts of Government. The words are "being imposed, increased, decreased or remitted" showing quite clearly that it considered only the imposition or alteration of duty by Government, leaving it to the parties in cases where duty is payable on real market value, to make their own arrangements by their contracts. It is not uninteresting to observe that section 10 of the Tariff Act is based on section 20 of the English Customs Consolidation Act of 1876, the existing version of which is to be found in the Finance Act, 1901, section 10. It was perhaps not a very happy idea in drafting the Indian Statute to take the section bodily from the English Act, when the method of levying customs in England and in India is totally dissimilar; for in England there is no duty payable on tariff value or, indeed on any value, real or otherwise. The duties, as far as I know, are all imposed there by weight or measure, and the sort of question that has arisen in this case and as far as I know has arisen for the first time in this case, could not have arisen in England. Section 10 might, in my judgment, have been made much clearer, so that this question could not have arisen. Giving the best consideration I can to the words themselves, I have come to the conclusion that the plaintiff in this case is right.

A second point was taken, namely, that this was a voluntary payment and, therefore, cannot be recovered back. The learned Judge has found on the evidence before him and there was ample evidence to support the finding that the plaintiff had to pay the full contract amount, in order to get the goods, though he asked to

HAJEE
SHAKOO GANI
v.
SABAPATHI
PILLAI.
—
SCHWABE,
O.J.

be allowed to clear the goods on payment of an amount less than the contract price by reason of the alteration in the tariff valuation, but that the defendant had refused and insisted, as a condition of getting the goods, on his paying the full amount. On these facts, it is quite clear law that that amounts to money obtained by duress. It is common in such cases and advisable to pay in terms under protest, in which case no question can arise. But the principle of law does not depend on the protest being made or not—that is merely evidence of the fact that an excess demand was made and that the plaintiff meant to retain his rights to claim back the excess. But the real question to consider is whether or not it was a voluntary payment, or whether it was a payment extorted by the other party using, no doubt, as he thought legitimately, his hold over the goods to make the plaintiff pay what the defendant considered it was his right to have, but it cannot be said, under these circumstances, that the payment was a voluntary payment. That being so, as the defendant was wrong in his contention, as we hold in this case, he must repay to the plaintiff the amount claimed, that is to say, the amount of over-payment as money had and received to the use of the plaintiff.

KRISHNAN, J.

The appeal is, therefore, dismissed with costs.

KRISHNAN, J.—I entirely agree that this appeal fails. The judgment of the learned trial Judge is right and it must be upheld on both the points that have been taken before us. As the learned Chief Justice has dealt with the questions fully in his judgment, I think it is unnecessary to add anything of my own in the case. I, therefore, content myself by saying that I agree to the order proposed by the learned Chief Justice.

N.B.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan and Mr. Justice Wallace.

PALLIKUDATHAN ALIAS SAMUDI GOUNDAN
(PETITIONER), PETITIONER,*

1923,
August 7.

v.

BUDDA GOUNDAN (1ST COUNTER-PETITIONER), RESPONDENT.

Code of Criminal Procedure (Act V of 1898)—Section 195 (1)—Previous sanction of public servant concerned or some public servant to whom he is subordinate—False information to Village Magistrate—Section 182, Indian Penal Code—sanction by Sub-Magistrate—Jurisdiction—Village Magistrate, whether subordinate to Sub-Magistrate.

A Village Magistrate is not subordinate to a Sub-Magistrate within the meaning of section 195 (1) of the Code of Criminal Procedure and therefore a Sub-Magistrate is not the proper authority to accord sanction for the prosecution, for an offence under section 182 of the Indian Penal Code, of a person who gave false information to a Village Magistrate.

The Queen v. Periannan, (1882) I.L.R., 4 Mad., 241, not followed.

Venkatasami v. Narasimhayya, (1908) 4 M.L.T., 214, referred to.

PETITION praying that in the circumstances stated therein the High Court will be pleased to set aside the order, dated the 30th September 1922, of U. RAMA RAO, District Magistrate, Salem, in Criminal Miscellaneous Case No. 64 of 1922 revoking the sanction granted by M. A. KUTTALINGAM PILLAI, the Stationary Second-class Magistrate of Harur, in Miscellaneous Case No. 5 of 1922 for the prosecution of the respondent.

Petitioner applied to the Stationary Sub-Magistrate of Harur for sanction to prosecute the counter-petitioner for offences under sections 193 and 211 of the

* Criminal Miscellaneous Petition No. 105 of 1923.

PALLI-
KUDATHAN
v.
BUDDA
GOUNDAN.

Indian Penal Code, alleging that he had launched against him a false complaint of house-breaking and theft in a building, and gave false evidence to secure his conviction for offences under sections 457 and 380 of the Indian Penal Code, and that the complaint was thrown out as being a false one. The case before the Sub-Magistrate was the result of a report made to the Village Magistrate by the counter-petitioner.

The Sub-Magistrate held that the report to the Village Magistrate amounted to false information given to a public servant with a view to induce him to exercise his lawful powers to the injury or annoyance of some person and that it therefore constituted an offence under section 182 of the Indian Penal Code. He also held that the counter-petitioner gave false evidence in a judicial proceeding in support of his false complaint and that therefore there was a *prima facie* case against him under section 193 of the Indian Penal Code. He accordingly gave the petitioner sanction to prosecute the counter-petitioner for offences under sections 182 and 193 of the Indian Penal Code. On an application for revocation of the sanction the District Magistrate of Salem held that the order in respect of an offence under section 182 had been made without jurisdiction as the sanction should be that of the public servant concerned or some public servant to whom he was subordinate and that the Village Magistrate was not subordinate to the Stationary Sub-Magistrate. In respect of the alleged offence under section 193, he held that no *prima facie* case was made out and he accordingly revoked the sanction. The petitioner applied to the High Court to set aside this order.

K. V. Sesha Ayyangar for the petitioner.

T. M. Krishnaswami Ayyar for the respondent.

The Court delivered the following

JUDGMENT.

This is an application to this Court for the grant of sanction to prosecute the counter-petitioner under sections 182 and 193, Indian Penal Code. Originally the application was made to the Sub-Magistrate under sections 193 and 211, Indian Penal Code, but the Sub-Magistrate, finding that no charge was made against the counter-petitioner by the petitioner converted the application into one under section 182, Indian Penal Code, and proceeded to grant sanction under that section and section 193 for giving false evidence before him. On appeal to the District Magistrate the order granting sanction under both the sections of the Indian Penal Code was revoked. The petitioner comes here and claims that we should give that sanction now.

Taking section 182 first it is quite clear that the Sub-Magistrate had no authority whatever to grant any sanction in this matter because he was not the public servant to whom the information concerned was given. It was given to the Village Magistrate. It is contended before us that the Sub-Magistrate should be taken as a superior authority to the Village Magistrate under section 195, Criminal Procedure Code, and the ruling in *The Queen v. Periannan*(1) is relied on for the purpose; but we are unable to concur with that ruling. It was not followed by this Court in the case in *Venkatasami v. Narasimhayya*(2). The learned pleader for the petitioner was not able to explain how the Village Magistrate could be taken to be subject to the authority of the Sub-Magistrate as a public servant.

It was also argued that we cannot go into the question ourselves because the District Magistrate who

PALLI-
KUDATHAN
v.
BUDDA
GOUNDAN.

(1) (1882) I.L.R., 4 Mad., 241.

(2) (1908) 4 M.L.T., 214.

PALLI-
KUDATHAN
v.
BUNDA
GOUNDAN.

revoked the sanction did so in his capacity as the executive head of the district and that he is not subject, in his capacity as such public servant, to our control. But it is unnecessary to decide this point, for we think that no sanction could properly have been given by the Sub-Magistrate and the revocation of that sanction under section 182, Indian Penal Code, is therefore right. The application so far as it refers to section 193 should have been made to the Sessions Judge and not to us because that sanction was granted by the Sub-Magistrate as a Court and the appeal lay under section 195 to the District Magistrate and from his order the application should have been made to the Sessions Judge. Such an application not having been made, we decline to interfere in the matter. If so advised the petitioner may make his application to the Sessions Judge.

The petition is therefore dismissed.

D.A.R.

APPELLATE CRIMINAL.

Before Mr. Justice Odgers and Mr. Justice Wallace.

BACHULA PEDA SOMADU AND OTHERS (ACCUSED)
APPELLANTS,

v.

KING-EMPEROR. *

Code of Criminal Procedure (Act V of 1898)—Statements made before committing Magistrate, partly resiled from in Sessions Court—sec. 288, its scope and applicability—Nature of corroboration required.

In a case and counter case of rioting, witnesses for the prosecution in each case were mostly the accused in the other.

* Criminal Appeals No. 39 and 40 of 1923.

SOMADU
v.
KING-
EMPEROR.

In pursuance of a conspiracy to defeat the ends of justice and to save themselves, they retracted in the Sessions Court that portion of their previous statements, before the committing Magistrate, relating to the identity of their assailants; but in other respects there was a general agreement in the statements made by them before the two Courts.

Held, in the circumstances of the case, that the Sessions Judge was justified in regarding the statements before the Committing Magistrate as substantive evidence at the trial under section 288 of the Code of Criminal Procedure and acting upon them in preference to the statements made before him, and that corroboration on the identical point on which the witnesses had resiled was not necessary. *In re Velliah Kone*, (1922) 43 M.L.J., 222, and *Queen-Empress v. Dorasami Ayar*, (1901) 1 L.R. 24 Mad., 414, followed.

To admit, under section 288, the evidence given before the committing Magistrate, the Sessions Judge must be satisfied, on judicial grounds, that the prior statement was true and that the evidence given before him was false.

APPEALS under section 410 of the Code of Criminal Procedure against the orders of L. H. ARNDT, Acting Sessions Judge of the Gōdāvari division at Rajahmundry, in Cases Nos. 52 and 51 of the calendar for 1922, respectively.

The facts necessary for this report are set out in the Judgment.

G. Lakshmanan, K. Venkataramaraju and V. Viyyanna,
Vakils for the appellants.

Public Prosecutor on behalf of the Crown.

JUDGMENT.

ODGERS, J.—Taking Criminal Appeal No. 40 first, in this case 8 of the 24 accused were convicted by the acting Sessions Judge of Gōdāvari division, as to accused 2 and 4 to 8 under section 147, as to accused 1 under sections 326, 324 and 148 and as to accused 3 under sections 324 and 148. The riot in which these persons are held to have taken part was a fight between the

ODGERS, J.

SOMADU
v.
KING-
EMPEROR.
—
ODGERS, J.

Panchamas of Voolapalli and the Panchamas of Biccavole, a village close by, and it took place about midday on 12th April 1922 at the boundary between the two villages. The story of the beginning of the fight is told by P.W. 2, whose credibility there is not the least reason to doubt. He is an Inspector of Co-operative Societies and, when on tour from Biccavole on the day in question, 9th accused told him that the Biccavole and Voolapalli Panchamas had quarrels and that the Voolapalli people were going to Biccavole to settle the quarrel. It appears that some Voolapalli men had married Biccavole wives and had refused to fetch them away to their houses. P.W. 2 was asked to mediate. He agreed, but thought it would be better if he had some support and went to fetch the schoolmaster, P.W. 9. He left the two parties of Panchamas, one on each side of the boundary. There was a panchayat formed, but according to the evidence of P.W. 2 a Biccavole man whistled and this was a signal for a general fight between the two factions. P.W. 2, seeing a fight was imminent, went away. He says there were about 70 of the Voolapalli people and about 30 or 40 of the Biccavole people. He saw no weapons in the hands of either party. P.W. 9 does not give any useful evidence as he, seeing the two factions sitting opposite each other on the boundary, apprehended that there would be a fight and ran away. That there was a fight cannot be disputed. The learned Sessions Judge held that accused 1 and 3 were the leaders of the Voolapalli party and that the fight was entirely due to their action.

The other case, Criminal Appeal No. 39, is a case in which certain members of the Biccavole party, accused 1, 3, 10, 11 and 22 there have been convicted, as to accused 1 and 3 under sections 148 and 324 and as to accused 10, 11 and 22 under section 147. The accused in case

SOMADU
v.
KING-
EMPEROR.
—
ODGERS, J.

No. 39 are most of the witnesses in the other case, Criminal Appeal No. 40. Mr. Lakshmananna who appeared for the accused in criminal appeal No. 39 pleaded self-defence largely, I think, on the ground that the learned Sessions Judge, possibly rather inaccurately, says "there is a certain element of self-defence to be considered," though he adds that the doctrine is not, in a rioting case, to be discussed when the question is whether a man is guilty or innocent of the offence of rioting. It is admitted that there is no evidence of self-defence on the record. The statements of the prosecution witnesses in Criminal Appeal No. 40 were relied on but were not put in at the trial. It does not seem to me that the defence of self-defence which must be specific and individual in every case can be relied on here where there is good evidence to hold that there was a general fight between these two parties. The plea in 39 is that the Biccavole party went to the panchayat peacefully and they got the worst of it and that the Voolapalli party were the aggressors. There is no evidence of this whatever. In fact what little evidence there is (of P.W. 2) seems to show that the Biccavole party who are the accused in 39 began the fight as one of their numbers sounded a whistle which was the signal for the general engagement.

The case would present no subject of interest were it not for the fact that the witnesses in both the cases partly resiled in the Sessions Court from their statements made before the committing Magistrate. For instance, to take one example from the record in Criminal Appeal No. 40, P.W. 4 before the committing Magistrate's Court distinctly stated that the first accused cut him on his right wrist with a sword stick. Third accused with a sword stick hit him on the shoulder, seventh accused hit him with a stick on his back. In the Sessions Court he

SOMADU
v.
KING-
EMPEROR.
—
ODGERS, J.

admits there was a fight and that he was injured on his right wrist and that it was caused with a knife, but he could not say who gave him the blow. He says the police forced him to tell the Magistrate that the seventh accused hit him on the back with a stick, and that he did not see the first accused strike anybody. To take another example, P.W. 5 in the Magistrate's Court says that the first accused stabbed him with a knife on his left palm. In the Sessions Court he said he received a knife cut on the palm of his left hand. He did not notice who gave him the blow. When he was examined by the committing Magistrate he says he was confused. P.W. 6 says there was a fight, but he does not know how it arose and that some one gave him a blow on the back with a knife. Before the committing Magistrate he said that the first accused chased him and cut him with a knife on the back. In the Sessions Court he said that the police compelled him to implicate some one and that was why he said that the accused had struck him on the back with a knife. P.W. 7 said in the Sessions Court he received no injuries that day and that he went to the hospital to get the wound attended to, which is obviously false (*of* Exhibit G). P.W. 8 said in the Sessions Court that he received three injuries of which two were caused with a knife and the other with a stick. He cannot say who struck him. In the committing Magistrate's Court he said the accused 1, 7 and 6 hit him with knives. He also says that the police frightened him. The same unwillingness in the Sessions Court to name the man who injured each witness is to be observed in Criminal Appeal No. 39. It will be tedious to go through the whole of the depositions, but from what I have quoted above it will be gathered that the witnesses on the whole admit there was a fight. Most of them admit they were injured but when it comes to naming

SOMADU
v.
KING-
EMPEROR.
—
ODGERS, J.

the person who injured them they say they do not know. There is in my opinion ground for thinking that these two villagers have now composed their quarrel and that it was a condition of the settlement that none of them should inculcate the other when it came to the trial. On the best consideration that I can give to the facts of the case it appears to us that the Sessions Judge was perfectly justified, subject to what will be said hereafter, in relying on the statements before the committing Magistrate under section 288, Criminal Procedure Code, and in believing those statements in preference to the statements made by the witnesses in the Sessions Court when they profess ignorance of their assailants.

The allegations made in the Sessions Court as will be seen are two: (1) that the witnesses were confused when they made their statements before the Magistrate and (2) that they were made under compulsion by the police. But the learned Sessions Judge has found that there could have been no confusion in their minds over three months after the occurrence as they were examined by the Magistrate in August whereas the occurrence was in April, and that the police compulsion, if it existed, would be just as strong in the Sessions Court, as it was when they were examined. The Sessions Judge therefore finds that these two allegations were entirely unfounded. This is the reason given by him for preferring the evidence under section 288. But it is objected before us that the learned Sessions Judge was wrong and that the evidence under section 288 ought not, under the circumstances, to have been believed by him, as there is no material corroboration of these statements. Several cases were quoted to us on this subject and I might premise by referring to a case to which I

SOMADU
v.
KING-
EMPEROR.
—
ODGERS, J.

was a party reported in *In re Velliah Kone* (1) where it was held that the effect of section 288 is to place the deposition of a witness before the committing Magistrate on exactly the same footing with the deposition in the Sessions Court and that it is a testimony within the meaning of section 157 of the Evidence Act. The learned vakils for the defence in this case quoted before us *Queen-Empress v. Jeochi*(2) and *Queen-Empress v. Nirmal Das*(3). *Queen-Empress v. Jeochi* (2) is to the effect that conviction cannot be based solely on the evidence before the Magistrate there being no other evidence to corroborate it. In *Queen-Empress v. Nirmal Das*(3) it was said "It is difficult to conceive that any responsible tribunal should permit the conviction of a person upon such evidence (i.e., section 238), if it stood by itself." In a later case in the same Court *Emperor v. Dwarka Kurmi* (4) in which one of the Judges was the Judge who, sitting alone, decided *Queen-Empress v. Jeochi*(2) it was held that when admitted the statements under section 288 are exactly on the same footing as all the other evidence in the case, its value being of course a question for the tribunal which has to decide the case on the evidence. Two cases of our own Court were relied on *Queen-Empress v. Bharmappa*(5) which was a case of a retracted confession corroborated by depositions under section 288, the statements made before the Magistrate being retracted in the Sessions. It is really an example of what the Bombay High Court calls in *Queen-Empress v. Gharya* (6) "the Madras practice of requiring corroboration of a retracted confession" and which it may be noticed the Bombay High Court does not

(1) (1922) 43 M.L.J., 222.
(3) (1900) I.L.R., 22 All. 445.
(5) (1839) I.L.R., 12 Mad., 123.

(2) (1899) I.L.R., 21 All. 111.
(4) (1906) I.L.R., 28 All. 683.
(6) (1895) I.L.R., 19 Bom., 723.

follow. In *Queen-Empress v. Bharmappa*(1) the learned Judges held the depositions read under section 288 and retracted at the trial are not by themselves material corroboration of a retracted confession. But in *Queen-Empress v. Dorasami Ayyar*(2) it was held that under section 288 the Court is not restricted to using the evidence before the committing Magistrate only for the purpose of contradicting the witness at the trial. The section was intended to enable a Court to read the previous evidence as substantive evidence at the trial where for the purposes of justice the adoption of such a course is found necessary by the Judge. The only other case that is necessary to notice is the one cited in *King-Emperor v. Bhut Nath Ghose*(3). In that particular case it was held that the Sessions Judge did not exercise a proper discretion in acting on the statements under section 288. It is perfectly clear from the later Madras ruling cited above that, in a case like the present where you clearly have a conspiracy to suppress the names of assailants in the Sessions Court but you have corroboration of the statements made under section 288 in all material respects except this, the Sessions Judge was perfectly justified, in order to attain the ends of justice, in regarding the statements under section 288 as substantive evidence at the trial. The contention on behalf of the accused that there must be corroboration on the very point on which the witnesses have resiled is clearly in my opinion wrong. If this is necessary, then I cannot see any scope for the statements under section 288. In my opinion all that the earlier cases come to is that where you have two equally balanced stories, one story in the Sessions Court and the second the story

SOMADU
v.
KING-
EMPEROR.
—
ODGERS, J.

(1) (1889) I.L.R., 12 Mad. 123. (2) (1901) I.L.R., 24 Mad., 414.
(3) (1902) 7 C. W. N., 345.

SOMADU
v.
KING-
EMPEROR.
—
ODGERS, J.

as told before the committing Magistrate, it is as a matter of discretion unsafe to prefer the latter rather than the former. That is a case of an equal balance of evidence. When there is nothing to show the preponderance of one over the other that may be a perfectly good doctrine. Whereas here you have got general agreement in the two stories the only difference being in the name of the actual assailant of each witness, and such a doctrine is clearly untenable. It therefore seems to me that the legal point fails.

With regard to the facts of the two cases I am of opinion that they have been fairly found by the Sessions Judge on evidence which was available for him to consider and I am not disposed to differ from his findings. The first accused in Criminal Appeal 40 has been given consecutive sentences amounting to three years and the third accused 1½ years. It is suggested that these are unduly severe. It must be pointed out that this was a serious riot in the course of which one man of the Biccavole party died as the result of injuries received. On consideration I am unable to see any reason to remit any part of the sentences. I would confirm the convictions and sentences and dismiss the appeals in each case.

WALLACE, J. WALLACE, J.—I agree with my learned brother for the reasons given by him that these appeals should be dismissed.

I wish to say something on the point of law raised in these two cases. It is quite clear from a comparison of the depositions in the Sessions Court of each set of witnesses in these two cases with their depositions in the committing Court that each eye-witness supported his general account of the fight in every point except that of identifying particular assailants and that each, with one accord, in the Sessions Court professed his inability to make any such identification of assailants. None of

SOMADU
v.
KING-
EMPEROR.
—
WALLACE, J.

them goes so far as to give a categorical denial of his former statement that such and such an accused person committed such and such an act, but all say merely that they cannot identify particular assailants or that they do not remember who they were. When it is noted that in S.C. No. 51 of 1922, 13 out of the 14 eye-witnesses are accused in S.C. No. 52 and that in S.C. No. 52 8 out of the 9 eye-witnesses are accused in S.C. No. 51, the conclusion cannot easily be resisted that between the hearing in the committing Court and the hearing in the Sessions Court both parties came to a mutual agreement that each would not in the Sessions Court identify as assailants the members of the other party. Such a conclusion could only be rebutted if there are strong grounds for thinking that the identification evidence in the committing Court was due to some coercion or undue influence and that it was so has been argued before us. It is true that in S.C. No. 51 seven out of the fourteen eye-witnesses say that police pressure to identify particular assailants was put on them, but three others of these witnesses merely say their identification in the committing Court was due to a confusion of mind, while the other four give no reason at all. In S.C. No. 52 only one eye-witness out of the nine complains of police pressure and the rest give no reason. The theory of police pressure is untenable, since that would have been tightened and not relaxed when the case came to Sessions. It is further very significant that in the Sessions Court in both the cases only two out of the twenty-three eye-witnesses were cross-examined at all and these two were only asked a few unimportant questions. The defence pleaders in each case evidently were aware from the beginning of the hearing of the cases there that no eye-witness was going to identify any of the accused and therefore it was not worth while cross-examining even

SOMADU
v.
KING-
EMPEROR.
—
WALLACE, J.

on the general features of the fight. The common sense conclusion is that in order to save one another the members of each party had agreed not to identify their assailants in the Sessions Court, that is, they entered into a concerted conspiracy to defeat the ends of justice.

2. That being the reasonable deduction from the facts we have to decide whether in such circumstances the lower Court was justified in law in admitting under section 288, Criminal Procedure Code, and using as substantive evidence against the accused in each case the evidence of identification given in the committing Court, such evidence of identification being lacking in the depositions given before it. It is hardly necessary to emphasise here that, once a Court has admitted on behalf of the prosecution evidence under section 288, the depositions so admitted are just as much evidence for the prosecution in the case as the depositions recorded for the prosecution in the Sessions Court. There is nothing in section 288 which indicates that there is any difference in the probative value of the former when compared with the latter. See *In Re Velliah Kone*(1), *Empercr v. Dwarka Kurmi*(2) and *Queen-Empress v. Dorasami Ayyar*(3). Whether the Court is justified in admitting under section 288, with mechanical regularity, depositions given in the committing Court of any and every witness who retracts in the Sessions Court is a question to which I shall come later.

3. We have been referred in argument at the Bar to various cases from which it is sought to deduce a general proposition that a conviction by a Sessions Court based wholly on depositions admitted under section 288 is bad in law. We have not been referred to any ruling

(1) (1922) 43, M.L.J., 222.

(2) (1903) I.L.R., 28 All. 683.

(3) (1901) I.L.R., 24, Mad., 414.

SOMADU
v.
KING-
EMPEROR.
—
WALLACE, J.

which lays down any such broad proposition. The broad principle to be observed clearly is that where witnesses are so careless of the truth as to abandon readily on oath what they have previously sworn on oath, their statements on any point should not be accepted without great caution and sound judicial reason for accepting as true anything they have said. Sometimes this principle has been interpreted in particular cases to mean that sound judicial reasons are absent unless there is independent corroboration on material particulars; see *Queen-Empress v. Jadub Das*(1), *Queen-Empress v. Jeochi*(2) and *Queen-Empress v. Nirmal Das*(3). That that is a rule of practice and not a rule of law may be readily seen by taking the extreme case of a conviction based on the uncorroborated evidence of an accomplice, which conviction is not bad in law.

4. An automatic test for the credibility of witnesses is not one that can be stated or ought to be stated in statutory terms. The test cannot be mechanical but emerges for each case from the circumstances and probabilities of that case and is the net result of the effect of these on the mind of the Judge trying the case. In cases where witnesses have retracted in the Sessions Court their statements before the committing Court, the proper test is "are there reasonable grounds, grounds sufficient to satisfy a judicial mind, for holding that the former statements are false and the latter are true?" Such grounds might be corroboration by other witnesses but need not necessarily be so. Each case must rest on its own evidence.

5. In my view, however, such grounds must be found by the trying Court and put forward by it, as the lower Court has done, as a reason for the admission against the

(1) (1900) I.L.R., 27 Cal., 295.

(2) (1899) I.L.R., 21 All., 111.

(3) (1900) I.L.R., 22 All., 445.

SOMADU
v.
KING-
EMPEROR.
—
WALLACE, J.

accused of former statements under section 288, Criminal Procedure Code, that is, unless the Sessions Court is satisfied that there are judicial grounds for holding that the retraction in the Sessions Court is false testimony and that the statements in the committing Court are true testimony, it ought not to admit on behalf of the prosecution these latter statements under section 288 at all. And here I would follow the principle laid down in *Queen-Empress v. Jadub Das*(1) in so far as it lays down that such statements are not to be mechanically placed on the record without some sufficient grounds for admission as I have indicated. The Court must be satisfied first that "there is something to show the truth of the former statement."

6. The cases which usually arise are where a few witnesses who speak in the committing Court to having seen the commission of a crime deny in the Sessions Court their whole story and allege that they did not see the commission of the crime at all; and in most of such cases it would be a sound conclusion that the evidence in neither Court is reliable, unless there is some outside corroboration of the witnesses in the committing Court. But the present cases are very different from these. Here is a large body of evidence in the Sessions Court to support the main story of the fight as given in the committing Court up to the point of the identification of the assailants. Then the witnesses retract, being themselves accused in the counter-case and expecting the benefit of a similar retraction of the eye-witnesses in the case in which they themselves are accused; and, as I have said, there is no other reasonable explanation for their retraction on that sole point than that they came to a compact with the other side that the other side

(1) (1900) I.L.R., 27 Cal., 295.

SOMADU
v.
KING-
EMPEROR
—
WALLACE, J.

would similarly exonerate them in the Sessions Court. It is impossible to resist the conclusion that their retraction on the one point of identification in the Sessions Court is a perjury designed to defeat justice and that the true evidence is that which they gave in the committing Court. In these cases, therefore, I find no difficulty in agreeing with the lower Court as to which are the reliable depositions; and on its conclusion on that point which was a judicial one, that Court was perfectly competent to act. I agree, therefore, that the learned Sessions Judge was amply justified in the circumstances of these cases in accepting as true and using the evidence of identification of assailants given in the committing Court by the eye-witnesses, and cannot accept the argument put forward before us that the conviction based on that evidence is bad or unjustifiable in law.

D.A.R.

APPELLATE CRIMINAL.

Before Mr. Justice Odgers and Mr. Justice Hughes.

GOVINDAN NAIR AND OTHERS (ACCUSED), PETITIONERS,

v.

KUTHASERI KUNHI KRISHNAN NAIR (COMPLAINANT),
RESPONDENT.*

*Code of Criminal Procedure (Act V of 1898), section 350—
Evidence recorded by two successive Magistrates—Conviction
by a third Magistrate, if valid.*

A conviction by a Magistrate, acting upon evidence recorded partly by one predecessor and partly by another is valid. Section 350 of the Code of Criminal Procedure (Act V of 1898) applies to the case of a Magistrate acting upon evidence recorded by more than one Magistrate who afterwards ceased to exercise jurisdiction.

1923,
September
6.

* Criminal Revision Case No. 263 of 1922.

ON under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the judgment, dated 28th September 1922 of C. K. MATHIAH, Personal Assistant First-class Magistrate of Calicut in Criminal Appeal No. 17 of 1922 against the judgment of T. A. GOVINDA AYYAR, Second-class Magistrate of Tirur in Calendar Case No. 10 of 1922.

The petitioners were charged with criminal trespass under section 447, Indian Penal Code (Act XLV of 1860).

Mr. Sesha Sastri, Second-class Magistrate of Tirur.

He recorded evidence for the prosecution and afterwards transferred. His successor Mr. Gangadhar Ayyar, who recorded evidence for the defence, was transferred. Mr. Govinda Ayyar who succeeded him examined the accused, acting upon the evidence recorded by his two predecessors, and sentenced them to pay a fine of Rs. 130, out of which he awarded a compensation of Rs. 50 to the complainant. On appeal the said conviction and sentence were confirmed. The petitioners filed this Criminal Revision Petition to the High Court, and, for the first time, questioned the jurisdiction of the Magistrate to act upon evidence recorded by two predecessors.

Krishna Nambissan for the petitioners.—Section 350 of the Code of Criminal Procedure has no application where the evidence was previously recorded by only one Magistrate. The section contemplates action by a Magistrate upon evidence partly recorded by only one predecessor, and not by more than one. Hence the word “second” is used in proviso (a) of section 350. The Code does not provide for more than one Magistrate trying a case.

Ethiraj for the Public Prosecutor.—The word “second” in the proviso has reference only to a Magistrate where the previous Magistrate ceases to exercise

jurisdiction. “Second” means second or next to the Magistrate who has ceased to exercise jurisdiction. GOVINDAN
v.
KRISHNAN.

T. Richmond and *K. P. Raman Menon* for the respondents.

JUDGMENT.

ODGERS, J.—In this revision case an apparently novel point is raised. A complaint was laid for trespass against the accused on the 10th June 1922, the alleged trespass having occurred on the 3rd June 1922 before a Magistrate called Mr. Sesha Sastri who heard the prosecution evidence and was then transferred. He was succeeded by Mr. Gangadhara Ayyar who heard the defence evidence and was then transferred. Judgment was delivered on the 11th September 1922 by Mr. Govinda Ayyar, Second-class Magistrate. The appeal was heard by the Personal Assistant First-class Magistrate who confirmed the conviction arrived at by Mr. Govinda Ayyar. In this Court the learned vakil for the accused raises the point that section 350 of the Code of Criminal Procedure is confined to two Magistrates, so that the judgment by the third Magistrate, Mr. Govinda Ayyar, is without jurisdiction and the conviction is therefore illegal. The learned vakil quoted cases which however do not apply to the question before us. In *King-Emperor v. Sakharan Pandurang*(1), it was held that section 350 applies only to Magistrates. *Hardwar Singh or Lall v. Khaga Ojha*(2), followed in *Queen-Empress v. Basappa*(3), had reference to Honorary Magistrates of which one was not sitting the whole time during which the case was heard. Section 350 runs as follows:—

“Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an

(1) (1902) I.L.R., 26 Bom., 50.

(2) (1892) I.L.R., 20 Cal., 870.

(3) (1895) I.L.R., 18 Mad., 394.

GOVINDAN
v.
KRISHNAN.
ODGERS, J.

enquiry or trial, ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may resummon the witnesses and recommence the enquiry or trial." Then follow the provisos.

In the body of the section the words "the Magistrate so succeeding may act on the evidence so recorded by his predecessor" do not seem to restrict that "Magistrate" to the second. The learned vakil however relies on proviso (a) which runs "In any trial the accused may, when the second Magistrate commences his proceedings, demand, etc.," and it is on the use of the words "second Magistrate" in the proviso that he found his contention that the "second" has to be restricted to a single occurrence of one Magistrate succeeding another. On consideration, I think, the principle of law clearly is that the judicial officer who hears the evidence shall pronounce the judgment. Owing to circumstances in this country this is often impossible to carry out. Hence the necessity for section 350, Criminal Procedure Code. Now, once the principle is departed from, it appears to me not to matter how often you depart from it. For instance the second Magistrate is authorized to act on the evidence recorded by the first though he has not seen and heard the witnesses. There seems on principle to be no objection, once this is allowed, to a third Magistrate acting on the evidence recorded by the first. Section 350 (a) applies at the time when the succeeding Magistrate begins to exercise jurisdiction, that is, every time another Magistrate takes cognizance of a matter which has been begun or continued by his predecessor. It is thus not incorrect to say that a third

GOVINDAN
v.
KRISHNAN.
ODGERS, J.

Magistrate may be regarded as the second from the point of view of the succeeding Magistrate No. 2 in whose case section 350 (a) has already been applied when he (No. 2) commenced to take cognizance of the case. So every time a Magistrate takes cognizance of a case the section is applied and is so to speak finished with before there can be any question of its reapplication. Then, when the third Magistrate appears, he is the "second" with regard to No. 2 and that section is again applied to give him cognizance of a matter continued by his predecessor. It may be noted in this case there is no question of a further Magistrate taking evidence. That was done by the first two. The third Magistrate merely delivered the judgment. In principle, I am of opinion, this makes no difference. The preliminary objection thus fails. It may be stated that the accused did not apply for a *de novo* trial, but applied for a *de novo* argument which was granted. The point of jurisdiction was not taken on appeal to the lower Appellate Court.

On the merits there is very little to say. The two lower Courts have declared that the property delivered to the complainant did include the property on which the alleged trespass took place. I am not prepared to say sitting in revision that the lower Courts were without jurisdiction in coming to that conclusion.

The Criminal Revision Case must be dismissed.

HUGHES, J.—The accused were found guilty under HUGHES, J. section 447, Indian Penal Code, and the conviction was confirmed on appeal. They have filed this revision petition and the first ground is that the Sub-Magistrate who convicted them had no jurisdiction to convict them on the evidence wholly recorded by his two predecessors without a *de novo* trial.

It is doubtful whether in framing section 350, Criminal Procedure Code, the possibility of a case being dealt

GOVINDAN
v.
KRISHNAN.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the judgment, dated 28th September 1922, of C. K. MATHIAH, Personal Assistant First-class Magistrate of Calicut in Criminal Appeal No. 17 of 1922 presented against the judgment of T. A. GOVINDA AYYAR, Second-class Magistrate of Tirur in Calendar Case No. 94 of 1922.

The petitioners were charged with criminal trespass under section 447, Indian Penal Code (Act XLV of 1860) before Mr. Sesha Sastri, Second-class Magistrate of Tirur. He recorded evidence for the prosecution and was afterwards transferred. His successor Mr. Gangadhara Ayyar, who recorded evidence for the defence, was also transferred. Mr. Govinda Ayyar who succeeded him convicted the accused, acting upon the evidence recorded by his two predecessors, and sentenced them to pay a fine of Rs. 130, out of which he awarded a compensation of Rs. 50 to the complainant. On appeal the said conviction and sentence were confirmed. The petitioners preferred this Criminal Revision Petition to the High Court and, for the first time, questioned the jurisdiction of the Magistrate to act upon evidence recorded by two of his predecessors.

T. Krishna Nambissan for the petitioners.—Section 350 of the Code of Criminal Procedure has no application where the evidence was previously recorded by more than one Magistrate. The section contemplates a conviction by a Magistrate upon evidence partly recorded by only one predecessor, and not by more than one. That is why the word “second” is used in proviso (a) to the section. The Code does not provide for more than two Magistrates trying a case.

V. L. Ethiraj for the Public Prosecutor.—The word “second” in the proviso has reference only to a stage where the previous Magistrate ceases to exercise

GOVINDAN
v.
KRISHNAN.

jurisdiction. “Second” means second or next to the Magistrate who has ceased to exercise jurisdiction.

T. Richmond and *K. P. Raman Menon* for the respondents.

JUDGMENT.

ODGERS, J.—In this revision case an apparently novel point is raised. A complaint was laid for trespass against the accused on the 10th June 1922, the alleged trespass having occurred on the 3rd June 1922 before a Magistrate called Mr. Sesha Sastri who heard the prosecution evidence and was then transferred. He was succeeded by Mr. Gangadhara Ayyar who heard the defence evidence and was then transferred. Judgment was delivered on the 11th September 1922 by Mr. Govinda Ayyar, Second-class Magistrate. The appeal was heard by the Personal Assistant First-class Magistrate who confirmed the conviction arrived at by Mr. Govinda Ayyar. In this Court the learned vakil for the accused raises the point that section 350 of the Code of Criminal Procedure is confined to two Magistrates, so that the judgment by the third Magistrate, Mr. Govinda Ayyar, is without jurisdiction and the conviction is therefore illegal. The learned vakil quoted cases which however do not apply to the question before us. In *King-Emperor v. Sakharan Pandurang*(1), it was held that section 350 applies only to Magistrates. *Hardwar Singh or Lall v. Khega Ojha*(2), followed in *Queen-Empress v. Basappa*(3), had reference to Honorary Magistrates of which one was not sitting the whole time during which the case was heard. Section 350 runs as follows:—

“Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an

ODGERS, J.

(1) (1902) I.L.B., 26 Bom., 50. (2) (1893) I.L.R., 20 Cal., 870.
(3) (1895) I.L.R., 18 Mad., 394.

GOVINDAN
v.
KRISHNAN.
ODGERS, J.

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GOVINDAN
v.
KRISHNAN.
ODGERS, J.

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It is doubtful whether in framing section 350, Criminal Procedure Code, the possibility of a case being dealt

GOVINDAN
v.
KRISHNAN.
HUGHES, J.

with by more than two successive Magistrates was contemplated. On principle if a second Magistrate can act on the evidence recorded wholly or partly by his predecessor and partly by himself there seems to be no reason why a third Magistrate should not act on evidence recorded by his predecessors.

However that may be, as this is a petition in revision, the High Court is not bound to interfere since the accused were not prejudiced and there has been no failure of justice. They did not ask for a *de novo* trial and the point was not taken in the appeal.

There is no force in the other grounds urged for revision. I agree that the petition must be dismissed.

D.A.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Devadoss.

BURLA APPANNA AND OTHERS (PETITIONERS),
PETITIONERS—PETITIONERS,

v.

ANALA LATCHAYYA AND OTHERS (COUNTER-
PETITIONERS), RESPONDENTS—RESPONDENTS *

Civil Procedure Code (V of 1908), section 115—Order of Board of Revenue dismissing appeal under section 171 of the Madras Estates Land Act—Revision—Madras Estates Land Act (I of 1908), sections 166 (1), 168, 171 and 215—Order of Revenue Officer preparing preliminary Record of Rights—Appeal to Board of Revenue dismissed without hearing appellant or his vakil—Board of Revenue, whether a subordinate Civil Court—Jurisdiction of High Court to revise order of Revenue Board—Order under section 171, whether a proper case for revision by High Court.

Where an appeal, preferred to the Board of Revenue under section 171 of the Madras Estates Land Act against an order of a Revenue Officer passed under section 169 of the Act dismissing an objection petition filed against the preliminary Record of

Civil Revision Petition No. 882 of 1921.

APPANNA
v.
LATCHAYYA.

Rights prepared under Chapter XI of the Act, was dismissed by the Board without hearing the appellant or his vakil, and the appellant filed a Civil Revision Petition to the High Court under section 115 of the Civil Procedure Code to revise the order of dismissal of the Board of Revenue.

Held that the High Court should decline to interfere in revision with the order of the Board of Revenue in this case because section 173 of the Act provides a separate remedy by suit in a Civil Court, and in such cases the High Court as a rule does not interfere in revision: *Ittiachan v. Velappan*, (1885) I.L.R., 8 Mad., 484 (F.B.), relied on.

Held further (by SPENCER, J.) that the High Court should decline to interfere, because the Board of Revenue's order is not a judicial proceeding of a Court subordinate to the High Court, and also because the powers vested in the Board of Revenue to revise orders of Revenue Officers are powers of a revisional character as may be seen from section 172 and from the head-note to section 171 of the Act, and the exercise of revisional powers by two independent authorities would lead to inconvenient conflicts of jurisdictions; *Ramaswami Naicker v. Subbarayulu Naicker*, (1916) 3 L.W., 158.

Held by DEVADOSS, J., that the Board of Revenue, being a Civil Court when it acts judicially under section 171 or 172 or any other section of the Act, is subject to the revisional jurisdiction of the High Court.

PETITION under section 115 of the Civil Procedure Code, filed in the High Court to revise the order of the Board of Revenue in Miscellaneous Case No. 1936, passed on the proceedings of the Revenue Officer of Ganjam in O.P. No. 48 of 1921.

The petitioners, who were the Inamdars of certain lands which were alleged to constitute a minor inam in Haripuram village in Mandasa Estate, filed an objection petition under section 166 (1) of the Madras Estates Land Act against the preliminary Record of Rights prepared by the Revenue Settlement Officer under Chapter XI of the Act. The petitioners contended that the lands forming the inam did not form part of the Mandasa Estate, that the Revenue Officer had no jurisdiction to Make a survey and prepare a Record of Rights under the

APPANNA
v.
LATCHAYYA.

Act, and that the Record of Rights was incorrect in stating that the tenants had occupancy rights in their holdings. The Revenue Officer overruled their contentions and dismissed their objection petition. The petitioners preferred an appeal against this order to the Board of Revenue under section 171 of the Act. The Board dismissed the appeal, after perusing the petition of appeal which had been submitted by a vakil and apparently without hearing the petitioners or their vakil. The order of the Board was as follows:—"The Board considers that no case has been made out for a revision of the record. The petition is accordingly dismissed." Against this order the petitioners preferred this Civil Revision Petition to the High Court under section 115 of the Civil Procedure Code.

B. Jagannadha Doss for petitioners.

Respondents were not represented.

JUDGMENT.

SPENCER, J.—This is an application to the High Court to revise under section 115, Civil Procedure Code, the proceedings of the Board of Revenue acting in the exercise of the powers vested in it by rule 21 of the rules made by the Local Government under section 215 of the Madras Estates Land Act, whereby the Board was constituted an appellate authority under section 171 for the purpose of hearing appeals from decisions of Revenue Officers passed under section 169 in the chapter relating to Record of Rights in Act I of 1908. It is alleged that the Board of Revenue acted illegally in the exercise of its jurisdiction by dismissing the petitioner's appeal without hearing him in person or by vakil.

It is a question whether the High Court can and should in the circumstances of this case exercise its

revisional powers under the Civil Procedure Code. At the hearing of this petition the respondents were not represented. We have not therefore had the advantage of hearing arguments on both sides of this difficult question.

Under the Rent Recovery Law in force in Madras before Madras Act I of 1908 became law, judgments and orders of Revenue Courts were specially exempted from revision by any higher authority (vide section 76 of Act VIII of 1865) and *Velli Periya Mira v. Moidin Padsha* (1), *Appandai v. Srihari Joishi* (2) and *Venkatanarasimha Naidu v. Suranna* (3).

By section 192 of the Madras Estates Land Act, section 622 of the Code of Civil Procedure of 1882 (corresponding to section 115 of the Code of 1908) has been made applicable to all suits, appeals and other proceedings of the Madras Estates Land Act, and under section 115 the High Court has power to revise the decision of any Court subordinate to it when no right of appeal is provided. The question thus arises whether the Board of Revenue is a Court subordinate to the High Court for the purpose of this section. Section 3 of the Civil Procedure Code defines what subordination of Courts means. The Board of Revenue is not included in this definition. Neither does it answer the test of subordination in section 195 (7) of the Criminal Procedure Code, as appeals do not ordinarily lie to the High Court from its decisions. Nor is the Board of Revenue one of the Civil Courts over which the High Court exercises control by virtue of section 27 of the Madras Civil Courts Act. It is evident that, when Civil Courts are mentioned in sections 172, 173, 179 and 189 of the Estates Land Act, Courts which have

APPANNA
v.
LATCHAYYA.
SPENCER, J.

(1) (1886) I.L.R., 9 Mad., 332. (2) (1898) I.L.R., 16 Mad., 451.
(3) (1894) I.L.R., 17 Mad., 298.

APPANNA
v.
LATCHAYYA.
SPENCER, J.

power to try all sorts of civil suits are designated, as distinguished from Revenue Courts which only have jurisdiction over the suits and applications detailed in the schedule to the Act. But the Privy Council has held in *Nilmoni Singh Deo v. Taranath Mukerjee*(1) that Rent Courts passing decrees for rent under the Bengal Rent Act are Civil Courts for the purpose of the Civil Procedure Code of 1859; and under clause 16 of the Letters Patent all the Civil Courts in the Presidency have been subordinated to the High Court. Following this ruling the Calcutta High Court interfered in revision with the order of a Deputy Collector passed in execution of a decree under the Rent Act, see *Chaitan Patgosi Mahapatra v. Kunja Behari Patnaik*(2).

From this it follows that Collectors and other Revenue Officers trying suits enumerated under 21 heads in Part A of the schedule or disposing of applications described in Part B are Revenue Courts in all cases where an appeal is provided to the District Court, and are also inferior Civil Courts within the meaning of section 3 of the Civil Procedure Code, because the High Court hears Second Appeals from the decrees of the District Court passed in appeals from such Courts' decisions and can revise the District Courts' proceedings in cases where no Second Appeal is provided. It has already been held in this Court in *Paramaswamy Aiyangar v. Alamelu Natchiar Ammal*(3) that the High Court can revise an order made by a Revenue Court in the course of trying a suit for rent. Further, these Courts are subject to the superintendence of the High Court by virtue of the Letters Patent.

It does not however follow that the Board of Revenue when discharging the functions vested in it by the

APPANNA
v.
LATCHAYYA.
SPENCER, J.

Government notification No. 159 of April 5th, 1910, is a Court exercising Judicial functions.

As an example it could not be contended for a moment that decisions of the Board of Revenue under sections 18 and 23 of Madras Act III of 1895, on appeal from orders made by Collectors upon claims to hereditary village offices, are open to revision by the High Court under section 115, Civil Procedure Code, even if there were no specific provision in these sections as to the finality of the decisions. Section 21 of that Act like section 189 of Act I of 1908, bars the original jurisdiction of Civil Courts. Again, we have been shown no authority for the theory that the Board of Revenue, when proceeding under sections 171, 172 and 205 of the Madras Estates Land Act, is subordinate to the High Court. As an instance of the limitation of the High Court's powers of interference under section 115, I would cite the ruling in *Manavala Goundan v. Kumarappa Reddy*(1), that the High Court cannot interfere in revision with the proceedings of a District Registrar. *Chatterjee v. Tribedi*(2) is distinguishable by the fact that, under the rules framed under the Calcutta Rent Act, a Rent Controller has been constituted a Court of civil jurisdiction. I am of opinion that we should decline to interfere with the order of the Board of Revenue in this case for three reasons. First because the Board of Revenue's order is not a judicial proceeding of a Court subordinate to the High Court; secondly because the powers vested in the Board of Revenue to revise settlement orders of Revenue Officers are powers of a revisional character, as may be seen from section 172 and from the head note to section 171 and the exercise of revisional powers by two independent

(1) (1883) I.L.R., 9 Calc., 295 (P.C.). (2) (1911) I.L.R., 38 Calc., 832.
(3) (1919) I.L.R., 42 Mad., 76.

(1) (1907) I.L.R., 30 Mad., 326. (2) (1921) 26 C.W.N., 78.

APPANNA
v.
LATCHAYYA.
SPENCER, J. authorities would lead to inconvenient conflicts of jurisdictions (vide *Ramaswami Naicker v. Subbarayulu Naicker* (1)); thirdly, because section 173 provides a separate remedy by suit in a Civil Court and because this Court has held in *Ittiachan v. Velappan*(2), that where that is the case there is no power of revision.

The petition is for these reasons dismissed without costs.

DEVADOSS J. DEVADOSS, J.—This is an application under section 115, Civil Procedure Code, to revise the order of the Board of Revenue, Madras, passed on a petition of appeal presented by the petitioner against the proceedings of the Revenue Officer who prepared a Record of Rights for Haripuram village in the Mandasa Estate, Ganjām district, under section 166 (1) of the Madras Estates Land Act, 1908. The petitioner appealed to the Board of Revenue, Madras, under section 171 of the said Act, and his petition of appeal was dismissed by the Board of Revenue without hearing him. It is this order of dismissal that is sought to be revised. Though the respondents are not represented here, it is but fair to observe that Mr. Jagannatha Doss who appears for the petitioner has brought to our notice all the cases *pro* and *con* which bear on the points raised by him.

Before considering whether this is a fit case for exercising revisional powers it is necessary to see whether there is revisional jurisdiction in the High Court over orders passed by the Board of Revenue under chapter XI of the Madras Estates Land Act. Mr. Jagannatha Doss puts forward three contentions, (1) the Letters Patent of the High Court classify all Courts into criminal and civil, and therefore, a Revenue Court is included in the expression Civil Court and the High Court has, therefore, jurisdiction over the Revenue

(1) (1916) 3 L. W., 158.

(2) (1885) I.L.R., 8 Mad. 484 (F.B.).

Courts, (2) the Board of Revenue in exercising jurisdiction under Chapter XI of the Estates Land Act, is a Civil Court and therefore, is subject to the revisional jurisdiction of the High Court, and (3) section 192 of the Madras Estates Land Act makes the Civil Procedure Code applicable to proceedings under the Act and, therefore, the High Court has appellate jurisdiction over the decision of the Board of Revenue.

The first point is not supportable on any authority. It is a fallacy to say that because the Letters Patent do not specifically refer to Revenue Courts, therefore they are included in the expression Civil Court. To use the term "Court" with regard to Revenue Officers is a misnomer, but where they exercise judicial functions by virtue of the provisions of any enactment, they may be termed Courts. The appellate and revisional powers of the High Court may be sought in section 15 of 24 and 25 Vic., Ch. 104, now section 107 of 5 and 6 Geo. V, Ch. 61 and section 16 of the Letters Patent. It cannot be successfully contended that the Board of Revenue as such is a Court exercising judicial functions subject to the appellate jurisdiction of the High Court.

The next point is that the Board of Revenue exercises judicial functions when it decides appeals under section 171 of the Madras Estates Land Act, and therefore, is subject to the revisional jurisdiction of the High Court. Under Chapter XI of the Estates Land Act, a survey may be made and a Record of Rights may be prepared by a Revenue Officer in respect of an estate or a portion of an estate in certain cases specified in section 164 and an appeal is provided against a record of such rights; and section 172 gives power to the Board of Revenue to direct the revision of any Record of Rights or any portion of a Record of Rights. Does the Board of Revenue

APPANNA
v.
LATCHAYYA.
DEVADOSS, J.

APPANNA
v.
LATCHAYYA.
DEVADOSS, J.

become a Civil Court by reason of its hearing an appeal from the order of the Revenue Officer? Section 192 of the Act makes the Civil Procedure Code except certain sections applicable to proceedings under the Act. The Board of Revenue, being governed in its proceeding under the Madras Estates Land Act by the Civil Procedure Code becomes a Civil Court for the purposes of the Act. It is urged, that by section 16 of the Letters Patent, all Civil Courts in the Presidency are subject to the superintendence of the High Court and the Board of Revenue being a Civil Court when it acts under the Madras Estates Land Act, is subject to its revisional jurisdiction. If the Board of Revenue is a Civil Court for any purpose, however limited, so far as that purpose is concerned, it is subject to the jurisdiction of the High Court. The Estates Land Act does not give a right of appeal to the High Court from the orders of the Board of Revenue. The cases relied on by Mr. Jagannatha Doss do not help him materially. In *Paramaswamy Aiyangar v. Alamelu Natchiar Ammal*(1), it was held that the High Court was competent to revise the order of the Revenue Court under section 115, Civil Procedure Code, which is made applicable to proceedings in Revenue Courts by section 192 of the Madras Estates Land Act. In another case, *Ramasami Goundan v. Kali Goundan*(2) reported in the same volume, the same Bench which decided the case of *Paramaswamy Aiyangar v. Alamelu Natchiar Ammal* (1), held that the revision petition to the High Court was competent, because section 192 of the Madras Estates Land Act rendered section 115 of the Civil Procedure Code applicable to all suits, appeals and other proceedings under the Act even though section 205 thereof gave a power of

(1) (1919) I.L.R., 42 Mad., 76.

(2) (1919) I.L.R., 42 Mad., 310.

APPANNA
v.
LATCHAYYA.
DEVADOSS, J.

revision to the Board of Revenue and the District Collector; but where the petitioner had previously applied to the revenue authorities and failed, the High Court would decline to exercise its discretionary power in revision, unless it was imperatively called upon to do so to prevent miscarriage of justice. In *Nilmoni Singh Deo v. Taranath Mukerjee* (1), the High Court interfered in revision with the orders of the Deputy Commissioner transferring a decree for rent made by one Court to another. The learned Judges observe at page 297 "If the orders complained of are passed without jurisdiction, we think we have the power to interfere under section 15 of the Act of Parliament constituting this Court." Their Lordships of the Privy Council entirely agree with the view taken by the High Court of their own jurisdiction (vide also *Chaitan Patgosi Mahapatra v. Kunja Behari Patnaik*(2)). The Madras cases lay down that the High Court could interfere in revision with the orders of the Collector under the Madras Estates Land Act, and the cases decided by the Calcutta High Court recognize the jurisdiction of the High Court to interfere in revision with orders passed by the Revenue Courts under the Bengal Rent Recovery Act X of 1859. It was uniformly held under the Madras Rent Recovery Act, VIII of 1865, that the High Court had no jurisdiction to revise the order of Revenue Court under section 622 of the old Code, now section 115 of the present Code (vide *Velli Periya Mira v. Moidin Padsha*(3), *Appandai v. Srihari Joishi*(4), and *Venkata-narasimha Naidu v. Suranna* (5)). The present Estates Land Act has removed the bar placed upon the revisional jurisdiction of the High Court by section 76 of Act VIII

(1) (1884) I.L.R., 9 Cal., 295 (P.C.). (2) (1911) I.L.R., 38 Cal., 832.

(3) (1886) I.L.R., 9 Mad., 332.

(4) (1898) I.L.R., 16 Mad., 451.

(5) (1894) I.L.R., 17 Mad., 298.

of 1865 (vide *Ramaswami Naicker v. Subbarayulu Naicker* (1).) Section 205 of the Madras Estates Land Act gives revisional powers to the Board of Revenue and Collectors, and it cannot be said that it has denied the same to the High Court. The Act specifically provides for appeals to the District Court in certain cases from the decisions of Collectors and it follows that under section 100, Civil Procedure Code, a second appeal will lie in proper cases, and the provisions of section 115 will, therefore, apply to cases where an appeal would be incompetent. In *Chatterjee v. Tribedi*(2), the Calcutta High Court held that it had jurisdiction to interfere with the order of the Rent Collector's Court under section 107 of the Government of India Act on the ground that the rules framed by the Local Government under section 23 of the Calcutta Rent Act, lay down that in all proceedings before them under the Act, the Collector and the President of the Tribunal shall have all the powers possessed by a Civil Court for the trial of suits. See also Rule 4 which says that in making inquiries under the Act, the Controller or the President of the Tribunal shall follow, as nearly as may be, the procedure laid down in the Code of Civil Procedure for the regular trial of suits, the substance only of the evidence being recorded as in appealable cases. The question that is not free from difficulty is this. Is the Board of Revenue when it exercises jurisdiction under the Madras Estates Land Act, a Court from which appeals lie to the High Court or a Court subject to its superintendence? The subordination of Courts is determined, according to the Criminal Procedure Code, section 195, by the fact that appeals ordinarily lie from one Court to another. So far as I am aware, in no case does an appeal lie to the High Court

(1) (1916) 3 L.W., 158.

(2) (1921) 26 C.W.N., 78.

from the decision of the Board of Revenue. Section 15 of 24 and 25 Vic., Ch. 104 and Article 16 of the Letters Patent have been construed as giving jurisdiction to the High Court over all the Civil Courts of the Presidency. If that construction is correct it necessarily follows that the Board of Revenue, being a Civil Court when it acts judicially under section 171 or 172 or any other section of the Madras Estates Land Act, is subject to the revisional jurisdiction of the High Court.

It is unnecessary to consider the third point in the view that I have expressed on the second point. Section 173 of the Madras Estates Land Act gives a remedy to a person, aggrieved by an entry in a settlement record prepared under sections 168 to 171 or by omission to settle a rent, by way of suit in a Court. As a rule, the High Court does not interfere in revision with decrees or orders of subordinate Courts when the party aggrieved has another remedy by way of appeal, suit or otherwise. On this ground the petition fails and is dismissed.

K.R.

CIVIL REFERENCE—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K.O., Chief Justice,
Mr. Justice Coutts Trotter and Mr. Justice Ramesam.*

1923,
October 19.

BEST & Co., LTD., AGENTS OF THE NOBEL'S EXPLOSIVE Co., LTD.,
APPELLANTS,

v.

THE CORPORATION OF MADRAS, RESPONDENT.*

Section 110 and Rule 7 of the Madras City Municipal Act (IV of 1919)—Company with capital in foreign currency—Liability to pay licence fee.

Held that all incorporated companies transacting business in the City of Madras are liable to pay the licence fees mentioned in section 110 and rule 7 of the Taxation rules in schedule IV of the Madras City Municipal Act (IV of 1919), though their paid-up capital is in a currency other than that of British India.

CASE stated under rule 17, schedule IV of the Madras City Municipal Act IV of 1919 in M.T. Appeal No. 4 of 1922 on the file of the Court of Small Causes at Madras.

The facts and the relevant sections and rules are given in the judgment of DEVADOSS, J.

The case coming on for hearing on the 11th July 1923 the Court (SPENCER and DEVADOSS, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

SPENCER, J. SPENCER, J.—I have perused the judgment of my learned brother and I regret that I am unable to agree with his conclusions.

I agree with the opinion of the learned Chief Judge of the Court of Small Causes that Madras Act IV of 1919 does not either expressly or by implication confer on the Commissioner of the Corporation power to determine the value in the currency of British India of any sum expressed in any currency other than

* Referred Case No. 1 of 1923.

that of British India and that under rule 7 he can only impose assessment under section 110 in respect of those companies the paid-up capital of which is expressed in rupees. In this view the first two questions of the case stated for the opinion of the High Court under rule 17 of schedule IV will have to be answered in the negative and it becomes unnecessary to express an opinion on the third question.

On three points I am constrained to differ from my learned brother. In the first place I do not consider that it is legitimate for us to hazard a conjecture as to what the legislature may have intended when they framed the Act and the rules in this manner. For it probably did not occur to anybody at the time that some day a difficulty might arise from the omission to provide means for converting capital stated in foreign currency into rupees; and, as ROWLATT, J., observed in *Cape Brandy Syndicate v. Inland Revenue Commissioners*(1), "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Next it has been suggested that the Commissioner in a particular case might estimate whether the capital of a foreign company would, if calculated in rupees, amount to more than twenty lakhs of rupees or less than one, and that it would always be open to the company to show that his estimate was wrong. But if the rate of exchange is not fixed and if the date when the calculation is to be made is not given, with a varying exchange, who is to say whether the Commissioner was right or wrong? In cases on the border line a company might be liable to taxation on one day and not liable the next day.

Then, lastly, my learned brother finds that section 110 is very clear, and, if I understand him rightly, he thinks that the Madras City Municipal Act as compared with the Madras District Municipalities Act gains in clearness by the omission in the City Act to define the meaning of "Company" in the definition clauses. I do not appreciate the suggestion that the omission to define a technical expression makes the

BEST & Co.,
LTD.,
v.
THE
CORPORATION
OF MADRAS.
SPENCER, J.

(1) [1921] 1 K.B., 64.

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
SPENCER, J.

matter more clear. But I agree that the important question here is to decide what is meant by the words in section 110 "every incorporated company transacting business within the city." In the absence of any definition, I do not see why we should not give the word "Company" the same meaning as it has in the Indian Companies Act, section 2 (2), viz., a company formed and registered under that Act or an existing company. Section 15 of that Act provides for the registration of companies and section 23 for the certifying of incorporation; and it is, therefore, only reasonable to suppose that by an "incorporated company" in section 110 of Madras Act IV of 1919 a company registered under section 15 of the Indian Companies Act and incorporated under section 23 is intended. Section 253 declares what companies are authorized to be registered. Section 277 deals with the requirements of the Act as to companies established outside British India which proceed to establish a place of business within British India. As under section 22 only the Registrar of a province, in which the registered office of the company is situated, can register a company and as the schedules to the Act apply only to companies whose capital is in rupees, I conceive that a Registrar would find considerable difficulty, if not inability, in dealing with the application for registration of a company whose registered office was not in India and whose capital was not stated in rupees.

By section 20 of the Indian Stamp Act the legislature provided that *ad valorem* duty expressed in a foreign currency should be calculated according to the current rate of exchange on the day of the date of the instrument. But the Indian Companies Act and the Madras City Municipal Act contain no provision for converting foreign currencies into rupees. If the machinery for conversion of currency is lacking, it becomes impossible to say what the provisions of the Act including the schedules (for the rules must always be read in conjunction with the body of an Act, see *Mani Mohan Mandal v. Ramtaran Mandal*(1)), mean when they speak of rupees in relation to companies whose capital is not expressed in rupees.

I am, therefore, of opinion that the Indian Companies Act and the Madras City Municipal Act cannot be applied to

(1) (1916) I.L.B., 43 Calo., 148.

companies which have not a place of business situate in British India, as they cannot get themselves registered in British India until they open a place of business in this country, and so they cannot become "incorporated companies" within the meaning of section 110 of Act IV of 1919.

Mr. Aingar conceded that, as "persons" include "companies" under section 3, clause (39), of the General Clauses Act, such companies are liable to pay taxes under section 111. Therefore, the result of my conclusion will not be that they will escape making any contribution whatever to the revenues of the Corporation, and the equity of the claim made by the assessed company has thus no bearing on the decision of the question that has been raised and referred to us.

DEVADOSS, J.—The Chief Judge of the Small Cause Court, Madras, has submitted the following questions of law for the opinion of the High Court:—

1. Whether or not incorporated companies, which transact business in the City of Madras and whose paid-up capital is in a currency other than that of British India, are liable to be assessed to the tax on companies under section 110 and rule 7 of the Taxation rules in schedule IV of the Madras City Municipal Act, 1919?

2. Does the proviso to rule 7 apply to all companies transacting business within the city irrespective of their capital being in British Indian currency or any other currency?

3. What is the meaning of the expressions "gross income," and "gross income received in or from the city" in the proviso to rule 7? Does the latter expression include income arising out of business transacted outside Madras, the proceeds whereof are transmitted to and received by the agents of the incorporated company in Madras where they have their head office?

This reference arises out of an appeal presented by Messrs. Best & Co., Agents of the Nobel's Explosives Company, Limited, against the levy of companies' tax by the Commissioner of the Madras Corporation on the grounds—

(1) that the paid-up capital of the Nobel's Explosives Company, Limited, being in sterling and not in rupees, the scale of assessment under rule 7 of schedule IV of the Act does not apply and the company is not therefore liable to the tax on

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
SPENCER, J.

BEST & Co., LTD. v. THE CORPORATION OF MADRAS.
DEVADOSS, J.

companies under the aforesaid rule; (2) if contrary to the above contention it is held that the company can be assessed under rule 7, this assessment can be made under the proviso to that rule and the proper assessment to be imposed for the half-year in question is Rs. 25 only as the gross annual income of the company did not exceed Rs. 5,000.

The learned Chief Judge held that the Nobel's Explosives Company, Limited, was not liable to be assessed under section 110 and rule 7 of schedule IV and allowed the appeal. He is "of opinion that the power to determine the value in the currency of British India of any sum expressed in any currency other than that of British India has not either expressly or by implication been conferred on the Commissioner, and that under rule 7, the Commissioner can impose assessment in respect of those companies only, the paid-up capital of which is expressed in rupees."

The first question submitted for the opinion of the High Court has been argued at considerable length. The contention of Messrs. Best & Co., Agents of Nobel's Explosives Company, Limited, is that only companies whose share capital is expressed in terms of Indian currency are liable to assessment under rule 7 of schedule IV of the Madras City Municipal Act and the Nobel's Explosives Company, Limited, being an English Company whose share capital is expressed in terms of British currency, cannot be brought within the operation of rule 7 of schedule IV. The Nobel's Explosives Company, Limited, has a paid-up capital of £2,793,412. It was incorporated in England and it carries on a world-wide business. The question is whether an English Company such as the Nobel's Explosives Company, Limited, is not liable to be assessed under the Madras City Municipal Act, section 110, by reason of its share capital being expressed in terms of English Currency and not in terms of the currency in India. Section 110 is under the heading "Tax on Companies" and is in the following terms:—

"Every incorporated company transacting business within the city for profit, or as a benefit society shall pay by way of licence fee, in addition to any other licence fee that may be leviable under this Act, a half-yearly tax on its paid-up capital on the scale shown in the taxation rules in schedule IV; but in

no case exceeding one thousand rupees, if, and as soon as, it has transacted business in the city for the period prescribed in section 113.

Explanation.—Whenever a company has an office, agent or firm to represent it for purpose of transacting business in the city, such company shall be deemed to transact business in the city and such office, agent or firm shall be liable for the tax in respect of the company's business, whether or not such office, agent or firm has power to make binding contracts on behalf of the company."

Rule 7 of schedule IV is headed "Part 2—Assessment of Companies—section 110" and is in the following terms:—

"Companies shall be assessed by the Commissioner on the following scale." It has two sub-headings, "paid-up capital" and "half-yearly tax," then another heading, "lakhs of rupees" and a scale.

	RS.
A. More than twenty	1,000
B. More than ten, less than twenty...	500
C. More than five, less than ten ...	250
D. More than three, less than five ...	150
etc., etc.	
G. Less than one	30

There is also a proviso to the effect: "Provided that any company, the head office or a branch or principal office of which is not in the city and which shows that its gross income, received in or from the city, has not in the year immediately preceding the year of taxation exceeded,

(a) Rs. 25,000—shall pay only Rs. 125.

(b) Rs. 15,000—shall pay only Rs. 75.

(c) Rs. 5,000—shall pay only Rs. 25.

It has been conceded, and I think very rightly, by Mr. R. N. Aingar, who appeared for Messrs. Best & Co., that, if section 110 stood alone, Nobel's Explosives Company, Limited, would be liable to pay the tax on companies, but he contended that inasmuch as rule 7 referred only to paid-up capital in lakhs of rupees, the scope of section 110 had been narrowed by rule 7. He further contended that there was no provision in the Act for converting capital expressed in terms of foreign currency into the British Indian currency such as that contained

BEST & Co., LTD.
v.
THE CORPORATION OF MADRAS.
DEVADOSS, J.

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
DEVADOSS, J.

in section 20 of the Stamp Act, and it must therefore be taken that the legislature intended that only companies whose capital was expressed in rupees should be assessed. He further contended that it would be very inconvenient to assess companies under rule 7, when the exchange is fluctuating as it is now, and a German Company with a capital of two million Marks may, at the present rate of exchange, not have a capital of more than a few rupees.

The real question is whether a company not registered in British India and whose capital is not expressed in terms of Indian currency is outside the scope of section 110. Section 110 is very clear in its terms. It makes every incorporated company transacting business within the city for profit, or as a benefit society, liable to pay, by way of licence fee, a half-yearly tax on its paid-up capital on the scale shown in schedule IV. The scope of section 110 being wide and the provisions being so clear, can it be said that the scope of that section has been narrowed by rule 7? Rule 7 does not contain any expression to the effect that the paid-up capital should be in rupees. All that it says is that if the paid-up capital is more than twenty lakhs, a certain amount of tax is payable and if it is more than ten and less than twenty, a certain other amount is payable and it gives a scale. Can it be said that Nobel's Explosives Company, Limited, has not got a capital of twenty lakhs of rupees? The Commissioner has authority to assess the tax and in his opinion, if a company has a capital of more than twenty lakhs, that company is liable to pay a certain amount half yearly. Any foreign company, whose capital in foreign currency is known, can be easily said to possess a capital of more than twenty lakhs or less than twenty lakhs or any other sum. Looking at the history of this legislation it cannot be reasonably contended that the legislature intended only to assess companies registered in India. In the Madras City Municipal Act of 1884, provision was made for levying professional tax in section 103 in these terms: "If the Commissioners determine to levy tax on arts, professions, trades and callings (not being a military profession or calling), and on offices or appointments, every person, who within the city exercises any one or more of the arts, professions, trades or callings, or holds any one or more

of the offices or appointments, specified in schedule A, shall pay in respect thereof the sum specified in the said schedule as payable by persons of the class in which such person is placed." The relevant portion of schedule A is as follows:—"Joint stock companies and other companies carrying on any trade or business having gain for its object, or as benefit societies, and the capital of which exceeds twenty lakhs of rupees . . . 500 rupees." In the Madras City Municipal Act of 1904, section 115 was enacted for the levy of taxes and tolls. Section 120 of that Act was in the following terms:—"If the Corporation determine to levy the tax specified under clause A of section 115, every person, who within the city exercises any profession, art, trade or calling or holds any office or appointment bringing him within one or more of the classes of persons specified in schedule V, shall pay the sum specified in the said schedule as payable by persons of the class in which such person is placed." In schedule V (A), the wording of the Act of 1884 was reproduced. In the present Act, the same wording is used with a slight modification. Instead of repeating under the headings of A, B, C, etc., the provisions as to companies, an abbreviated form is introduced with a heading "lakhs of rupees" and the abbreviated forms, more than twenty, more than ten and less than twenty, more than five and less than ten, etc. It is clear from this that the legislature did not intend to alter the law as it stood, both under the Act of 1884 and under the Act of 1904. It is to be remembered in this connexion that the tax on companies levied by the Corporation seems to have been paid without demur, and it is only now that objection is raised against the assessment under section 110 and rule 7 of the present Act. Though the conduct of the assessee does not estop them from, or stand in the way of, raising a legal objection, yet it shows how both the Corporation and the companies understood the provisions of the Acts of 1884 and 1904. It is true that if the amount of tax be small, the companies may not take the trouble of objecting to the assessment. But where the half-yearly tax is such a large sum as rupees one thousand, the companies naturally try to escape taxation if they could.

Under the District Municipalities Act, companies not registered in British India or in the British Dominions are not liable

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
DEVADOSS, J.

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
DEVADOSS, J.

to pay the companies' tax. The provisions of that Act are different from those of the Madras City Municipal Act. In the District Municipalities Act of 1884, tax on arts, professions, trades and callings was levied by reason of the provisions contained in section 53. Schedule A, class I, begins thus:—

"Every person holding any office or appointment, public or private, or employed in any capacity, whose pay, salary or pension amounts to Rs. 2,000 a month or upwards, and every person, falling under any of the following denominations, whose income is estimated to amount to Rs. 2,000 a month or upwards, carrying on business as a company, etc., etc." The word "company" is defined in the Act as meaning "a company registered under the Indian Companies Act, 1882, or under the Acts of Parliament, known under the collective title of the Companies Acts, or incorporated by an Act of Parliament or of the Governor-General in Council, or by Royal Charter or Letters Patent." This Act was amended by Act III of 1897. The Amendment Act made no change in the law as regards professional tax. The Madras District Municipalities Act of 1920 was passed to consolidate and amend the law relating to District Municipalities. Section 92 of the Act is in these terms: "If the Chairman publishes a notification under section 80 that a companies' tax shall be levied, every company transacting business within the municipality for profit or as a benefit society shall, after the date specified in the said notification, pay a half-yearly tax on its paid-up capital, on the scale shown in schedule IV, if, and as soon as it has transacted business in the municipality for the period laid down in section 95." Schedule IV, Rule 16 has the heading of "Assessment of companies." Companies shall be assessed by the Chairman on the following scale:—

Paid-up capital.

Half-yearly tax.

A. More than ten lakhs of rupees

Rs.

250

and the wording is almost similar to the wording in the Madras City Municipality Act of 1919. In section 92 of the Act the expression is "every company transacting business" and the word "company" is defined as meaning "a company registered under the Indian Companies Act, 1913, or under the Acts of

Parliament known under the collective title of the Companies Acts or incorporated by an Act of Parliament, or of the Governor-General in Council or by a Royal Charter, or Letters Patent." It is quite clear, therefore, that companies which do not come within the definition of the wording, as given in the Act, are not liable to pay tax on companies. It has been held by KUMARASWAMI SASTRI, J., in C.S. Nos. 796 and 1055 of 1921, that companies like the Singer Sewing Machine Company and the Standard Oil Company of New York are not liable to assessment under section 92 of the District Municipalities Act in respect of business carried on within the limits of a municipality. In the Madras City Municipal Act, there is no definition of company, and as section 110 speaks only of Incorporated Company transacting business within the city, I think that the intention of the Legislature is quite clear, and that is to bring within the operation of section 110 all Incorporated Companies transacting business within the city whether they be incorporated in British India or in the British Isles or anywhere else. The conditions necessary are, they should be incorporated and they should transact business within the city for profit or as a benefit society and should carry on business as required by section 113, in order to make them liable to the tax on companies. When section 110 is so clear in its terms, can it be said that its scope has been narrowed by implication only by reason of the expression "lakhs of rupees" being used as regards the paid-up capital in rule 7. The Commissioner is empowered to tax companies and he has to determine what the capital of a company is. I do not think that there is any insuperable difficulty in the Commissioner arriving at a satisfactory decision as regards the amount of the capital of a company in rupees when that capital is expressed not in terms of Indian currency but of English or foreign currency. Considering the wide margin that is given in the rule, it is not right to hold that companies which have not got a capital expressed in Indian currency are outside the scope of rule 7. Suppose a company is formed and registered in Travancore and its capital is expressed in the currency of the State, viz., *Chakrams*, or a company is formed and registered in the Native State of Hyderabad and its capital is expressed in terms of *Sicca* rupees, could not the Commissioner

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
DEVADOSS, J.

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
DEVADOSS, J.

easily ascertain whether such a company carrying on business in the city of Madras has or has not a capital of more than twenty lakhs or less than ten lakhs of rupees or any other sum? It is urged that the Madras City Municipal Act is a taxing statute and should be construed strictly. It is a well-established principle of construction that all penal statutes, statutes which impose a penalty, and taxing statutes should be construed strictly:—that is, where it is not quite clear that a subject is liable to a tax or penalty, he should not be made liable by any extended or loose construction of the statute. But this principle does not stand in the way of considering whether a taxing statute embraces within its operation certain classes of persons. Mr. Aingar referred to the observations of ROWLATT, J., in *Cape Brandy Syndicate v. Inland Revenue Commissioners*(1), “It is urged by Sir WILLIAM FINLAY that in a Taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.” Applying the observations of the learned Judge to the present case, can it be said that an incorporated company carrying on business within the city of Madras does not come within the operation of section 110 and rule 7? What is there in the rule to indicate either expressly or impliedly that the expression “incorporated company” should be held to mean incorporated only in British India? The words of the statute are clear and when there is nothing in it to imply an intendment to exclude any person or class coming within the clear language of the section, it would be doing violence to that language by importing something not warranted by anything in it or in any other portion of the enactment. The mere fact that the liability of the companies’ tax is on its having a capital of certain number of lakhs is no justification for holding that the company should have its capital expressed in terms of Indian currency.

(1) [1921] 1 K.B., 64.

In Corporation of Calcutta v. Standard Marine Insurance Company(1), an argument was put forward that a company not registered in British India was not liable to be assessed. The learned Advocate-General of the day, Sir CHARLES PAUL, urged this argument:—“In the second schedule the words used are, ‘the paid-up capital of which amounts to 10 lakhs of rupees or upwards.’ The word ‘amounts’ has been advisedly used. It means ‘is equivalent to.’ Companies with capital in foreign coin are intended to be included.” But the point was not decided and it is urged that the Bengal Act was subsequently amended by the introduction of the words “equivalent to.” In my view it is unnecessary to use the words “equivalent to,” for all that the rule says is that if the capital is more than twenty lakhs, a certain amount is payable, and if less than twenty lakhs of rupees, some other amount is payable. The case of *Partington v. The Attorney-General*(2) was relied upon by Mr. Aingar in support of his contention. The observations of Lord CAIRNS as to the interpretation of fiscal statutes is entitled to the greatest weight. “I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.” A careful perusal of the judgment in the case shows that the House of Lords upheld the contention of the Crown that if two administrations are taken out, stamp duty is payable in respect of both. The facts of the case are: One Mary Shard died intestate in England in 1819. No one appeared to administer her estate and Mr. Maule, the then Solicitor to the Treasury, took out

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
DEVADOSS, J.

(1) (1895) I.L.R., 22 Cal., 582.

(2) (1869) L.R., 4 H.L., 100.

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
DEVADOSS, J.

letters of administration for that purpose. The next of kin to the deceased was Mrs. Isabel Cook, the wife of Mr. Ellis Cook, both of whom had always been domiciled in the United States. Mrs. Isabel Cook died in 1825. She had not taken out letters of administration to Mrs. Shard. Her husband died in 1830. After his death his children applied to Mr. Partington, to take proceedings against the Solicitor to the Treasury, to recover from him property which had belonged to Mr. Shard and which they claimed under their mother. Mr. Partington took out separate letters of administration to the estate. . . first of Ellis Cook and then of Isabel Cook. Each grant was dated on the 22nd July 1855 and the form of each was as follows:—"We do grant full power and authority to you to administer and faithfully dispose of the said goods, etc., which belong to his estate." In the grant relating to the mother's estate the concluding words were "For the use, etc., of James Cook now residing in Vermont in North America, one of the natural and lawful children of the said Isabel Cook deceased, etc., etc." Mr. Partington then instituted a suit in the Chancery against Mr. Reynolds (who had in the meantime succeeded Mr. Maule as Solicitor to the Treasury) and the Court having found James Cook to be the next of kin declared Mr. Reynolds to be chargeable with the principal sums of the assets. The Commissioners of Inland Revenue claimed that stamp duty should be calculated on a value including all accretions from the death of Isabel Cook to the date of the administration, namely, the 23rd July 1855, and also claimed that the grant of the administration for the effects of the late Ellis Cook, who survived his wife, should be stamped at the same rate. The Court of Exchequer Chamber held that duty was payable in respect of both the estates. The House of Lords affirmed the judgment of the Court of Exchequer Chamber, that when two administrations were granted stamp duty was payable on both. Whether the devolution of the estate of one deceased person has been reduced to possession or not, when administration is sought for the estate of a person, on whom some other estate has devolved, stamp duty is payable on the values of the estate of the person who died intestate, as well as for the administration of the estate of the person on whom the previous estate devolved, though he had not taken out letters of administration.

Their Lordships construed the provision of the statute strictly and upon the strict construction both the estates were held liable to pay stamp duty. Lord CHELMSFORD agreed with the Lord CHANCELLOR in the order proposed and observed, "With respect to the liability to the full duty upon both the administrations taken out by the appellant, it was admitted by his learned counsel that if the question had arisen with respect to subjects of this country, no doubt would have existed as to the double duty being payable. But it was contended that as Isabel Cook and her husband Ellis Cook were domiciled Americans, it was not necessary to take out administration to Ellis Cook in order to obtain administration to Isabel Cook; that the husband was not an interested party; that the wife's administrator might give a sufficient receipt and discharge; and that the whole of the duty of the administrator was to remit the money received by him, under the administration, to America to be distributed there to the person entitled. I must confess my inability to follow this reasoning, or to understand how the question of domicile can enter into the consideration of the grant of letters of administration in this country."

Mani Mohan Mandal v. Ramtaran Mandal(1) was relied upon as authority for the contention that rule 7 controlled the scope of section 110. In that case, the question was whether a Court had the power of remand not expressly given to it under Order 41, rule 23, of the Civil Procedure Code. Section 107 begins thus: "Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power (a) to determine a case finally and, (b) to remand a case, etc." "As prescribed" means as prescribed by the rules to be framed hereunder. Under Order 41, rule 23, the power to remand a case is limited. Sir LAWRENCE JENKINS makes the following observations at page 152:—"The body of the Code is fundamental and is unalterable except by the legislature; the rules are concerned with details and machinery and can be more readily altered. Thus it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms, but it has to be read in

(1) (1916) I.L.R., 43 Cal., 148.

conjunction with the more particular provisions of the rules." Section 110 of the Madras City Municipal Act is not subject to the rules prescribed under that rule or any other provisions of the Act. It simply says that the tax shall be on the scale shown in the taxation rule in schedule IV. The liability to pay tax is imposed by section 110; the amount of the tax is to be determined according to the scale given in the schedule. So, the rules in schedule IV cannot take away the liability to pay the tax and a reasonable construction should be placed both upon section 110 and upon rule 7 in order to avoid a construction which is repugnant to the object of the section and the rule.

As a good deal of argument has been addressed to us upon the construction of taxing statutes, I shall deal briefly with a few cases, which bear out the point. In Maxwell's Interpretation of Statutes, 6th Edn., there is this passage at page 410: "When one section enacted that if the Plaintiff recovered a sum 'not exceeding' £5, he should have no costs, and another, that if he recovered 'less than' £5 and the judge certified, he should have his costs, the literal meaning of the last clause leaving it inoperative where the sum recovered was exactly £5, it was held to avoid imputing so incongruous and improbable an intention to the legislature, that the words 'less than' should be read as equivalent to 'not exceeding', the general principle being that Acts of Parliament should be construed with a candid mind and with an intention to understand them—*Garby v. Harris*(1)." At page 420 there is this following passage: "So, the XXXV, Geo. III, c. 101, Sec. 2, which empowered Justices to suspend in case of sickness the order of removal of any pauper who should be 'brought before them for the purpose of being removed,' was construed as 'authorizing such suspension without the actual bringing up of the pauper before the Justices: as the literal construction would have defeated the humane object of the enactment." In these cases the Court departed from the strict language of the enactment in order to give full effect to the intention of the legislature as expressed in the section and in order to avoid absurd construction, or to prevent anything which is against humane practice.

(1) (1862) L.J., 21 Ex., 160.

I have referred to these cases only for the purpose of showing that the Court is not debarred from giving a reasonable construction to a statute. I am not overlooking the principle that taxing statutes should not receive an equitable construction. In Halsbury's Laws of England, Vol. 27, page 148, the law is summed up thus:—"It is the duty of Judges to give fair and full effect to statutes without regard to the particular consequence in the special case and not to indulge in conjecture as to what Parliament would have done if a particular case had been presented to its notice, for it may be presumed that the framers of a statute contemplated matters of ordinary occurrence."

It has been urged that there is no provision in the Act for converting the foreign currency into Indian currency as is contained in the Stamp Act, as the legislature did not intend to tax companies whose capital is not in rupees. By section 20 of the Stamp Act an arbitrary date is fixed for conversion of foreign currency into Indian currency. The Stamp Act imposes an *ad valorem* duty on certain classes of documents and it is necessary to calculate the duty as exactly as could be done, and for that purpose, the legislature has fixed a certain date for such calculation. Under the Madras City Municipal Act, section 113, the tax becomes payable if the company carries on business for 60 days, and on the expiry of the 60th day the tax could be demanded, and the Commissioner could after that date assess the company under section 110, rule 7. It is not likely that there could be any great fluctuations in the course of a month or two, and the extraordinary conditions prevailing in Germany and in Austria now, should not be taken to be the ordinary conditions prevailing in the exchange market. Owing to extraordinary circumstances the mark has depreciated very much and similarly the Austrian and Russian currency. But till two years ago, there were not such abnormal conditions prevailing and there would be no hardship if there is a slight fluctuation in the value of the foreign currency in relation to the Indian currency, between the dates on which the company becomes liable to pay the tax and the date on which it is assessed. In *Hyde v. Johnson*(1), the facts were "The Plaintiff in order to

(1) (1836) 2 Bing (N.C.) 776; 132 E.R., 299.

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
DEVADOSS, J.

recover a debt barred by the statute of limitation, offered in evidence at the trial before the Under-Sheriff a letter written by the defendant's wife, in her husband's name at his request, offering to pay the debt by instalments and sent by him to the plaintiff. The evidence was objected to as not signed by the party 'chargeable thereby' within the meaning of 9 Geo. IV, C. 14, Sec. I." TINDAL, C. J., upheld the contention and observed as follows:—"The question turns entirely on the construction of the statute and it amounts in other words to this: does the Statute 9, Geo. IV, C. 14, extend to a writing signed by an agent of the party or is it confined in terms to a writing 'signed by the party chargeable thereby?' Looking at the words of the statute, it is confined in terms to a writing 'signed by the party chargeable thereby.' . . . Some inconveniences have been pressed, in the course of the argument, upon our attention in cases where a total inability of parties to sign may exist; but the nature of the signature which is necessary to comply with the requisites of the statute is such as to make it almost impossible to suppose a case in which a party could not make such a signature as would satisfy the statute. And after all, in construing a statute we must not look to cases of very rare and singular occurrence but to those of every day experience, and whatever may be the consequence, we must interpret the statute according to the plain import of the language employed in it." In *In Re Hall*(1) CAVE, J., observes with regard to section 19 of the Patents, Designs and Trade Marks Act of 1883 "I am unable to see in what way our interpretation of the language of the section can work injustice. A very strong case of injustice arising from giving the language of an Act of Parliament its natural meaning must be made out, before the Court will construe a section in a way contrary to the natural meaning of the language used; and it will be no injustice if the result of our decision be to deprive the person who infringes a patent, of the right to set up a defence which does not go to the merits."

Earl Cairns gives the reason for a strict construction of taxing Acts in the following terms in *Pryce v. Monmouthshire Canal and Railway Companies*(2):—"My Lords, the cases

(1) (1838) 21 Q.B.D., 137.

(2) (1879) 4 App. Cas., 197.

which have decided that taxing Acts are to be construed with strictness and that no payment is to be exacted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that, inasmuch as there was not any *a priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the tax-payer and the taxing authority, no reasoning founded upon any supposed relationship of the tax-payer and the taxing authority could be brought to bear upon the construction of the Act, and therefore the tax-payer had a right to stand upon a literal construction of the words used, whatever may be the consequence." It is contended by Mr. Duraiswami Ayyangar, on behalf of the Corporation, that for the privilege of trading within the city, the tax is payable. It is unnecessary to consider whether the amenities of the city are a sufficient *quid pro quo* for the tax payable by the company. In this connexion it may be instructive to see how American Courts construe legislation of this kind. "In America, Revenue Laws are not regarded as penal laws in the sense that it requires them to be construed with strictness in favour of the Defendant. They are regarded rather in their remedial character as intended to prevent fraud, suppress public wrong and promote public good and so construed as to most effectually accomplish those objects;" Maxwell's Interpretation of Statutes, 6th Edn., page 509. Without subscribing to the doctrine embodied in the above passage, I think a reasonable construction should always be adopted without straining the language either in favour of one party or the other.

An argument has been advanced by Mr. Aingar that the Registrar of Joint Stock Companies would refuse to register the memorandum of a company in which the capital is expressed in terms not of British Indian currency, but of some other currency, on the ground that there is no machinery by which he could convert the foreign currency into Indian currency and that the forms appended to the Act contain words and expressions which are applicable only to the Indian currency. Whether the Registrar would refuse to register a company whose share capital is expressed in a foreign currency or not is a question which need not be considered here.

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
DEVADOSS, J.

In the year 1884, there could not have been many companies registered under the Indian Companies Act trading within the city of Madras and the legislature could not be said to have overlooked the fact that there were a number of English and American companies trading within the city of Madras, and that it intended that the scope of the enactment in 1884 should be limited to the Indian companies only. Considering the long time that has elapsed since the Act of 1884 was passed, and considering the fact that no attempt was ever made so far as it was brought to our notice, to dispute the liability of the company to pay companies' tax, is it reasonable to suppose that the intention of the legislature was not to tax all incorporated companies? The inconvenience that may be felt in one or two cases, in converting foreign currency into Indian currency for the purpose of assessment, need not stand in the way of a reasonable construction of the statute. There may be companies incorporated according to the law of Brazil or Japan or any other country, but if it is an incorporated company, it is liable to pay the tax if it comes within one of the classes mentioned in rule 7. It is always open to the company to show that the estimate of the Commissioner is wrong, and there is an appeal provided to the Standing Committee against the decision of the Commissioner. I think the legislature used the expression "incorporated company" in section 110 of the Act advisedly, while it used the word "company" in the corresponding provision of the District Municipalities Act, 1920. In the City of Madras Municipal Act, 1884, and in the Madras City Municipal Act, 1904, the expression used is "Joint Stock Companies and other Companies." In the District Municipalities Acts of 1884, of 1897, and of 1920 the Legislature used the word "company" in the Act and gave a definition to it. To uphold the contention of Messrs. Best & Co., would be to impute to the legislature an intention to tax companies incorporated in England if they carry on business within the limits of any Municipality in the mufassal and not to tax them if they carry on business in the city. Surely such an intention cannot be imputed to the legislature when it is remembered that more British and Foreign companies carry on business in the city than in any Municipality in the mufassal.

After an anxious consideration of the question, I am of opinion that an Incorporated Company, in order to be liable to taxation under section 110 and rule 7 of the Madras City Municipal Act, need not have its capital expressed in terms of the Indian currency and that all incorporated companies are liable to assessment under section 110 and rule 7. In the view I hold, it is unnecessary to express an opinion as regards points 2 and 3.

The Court.—As we have come to different conclusions and the matter falls within rule 2, clause (3) (a) of the Appellate Side Rules, we refer the first of the questions referred to us to a Full Bench for decision.

ON THIS REFERENCE,

P. Duraiswami Ayyangar for the Corporation.—That which imposes liability is section 110 of the Act and not rule 7, which merely fixes the rate. Under section 110 all incorporated companies whether having their capital in Indian currency or foreign currency are taxable. Rule 7 does not say that in order to be taxable the capital of the company must be in rupees. This licence fee is payable for the privilege of carrying on business within the city; see *Corporation of Calcutta v. Eastern Mortgage Agency Co., Ltd.*(1). The words "more than" and "less than" in rule 7 are intended to provide for fluctuations of capital according to fluctuations in exchange. That is the intention of the Act which must be respected; Maxwell's Interpretation of Statutes, 6th edition, pages 406 and 407. Even if there be bad drafting, that ought not to result in defeating the real intention of the statute.

Nugent Grant (with *R. N. Aingar*) for the assessee.—Section 110 and rule 7 must be read together. According to rule 7 only companies having a rupee capital are liable to pay licence fee and not companies like this

(1) (1898) I.L.R., 25 Cal., 483.

BEST & CO.,
LTD.
v.
THE
CORPORATION
OF MADRAS.

with capital in a foreign currency. A taxing statute should be interpreted strictly and no intention other than that actually expressed in the statute can be presumed; see Beale's Interpretation of Statutes, 2nd edition, page 436 and *Cape Brandy Syndicate v. Inland Revenue Commissioners*(1).

OPINION.

SCHWABE,
C.J.

SCHWABE, C.J.—The question for decision is whether an English company, with sterling capital, is liable to assessment under the heading "Tax on Companies" under the Madras City Municipal Act, IV of 1919. This depends on the proper interpretation of section 110 and of rule (7) of Schedule IV which must be read together. That section runs:

"Every incorporated company transacting business within the city for profit . . . shall pay by way of licence fee . . . a half-yearly tax on its paid-up capital on the scale shown in the taxation rules in Schedule IV but in no case exceeding rupees one thousand, if and as soon as it has transacted business in the city for the period prescribed in section 113."

Turning to rule (7) of Schedule IV, it runs:

"Companies shall be assessed by the Commissioner on the following scale:—

Paid-up capital—lakhs of rupees.	Half-yearly tax.
	RS.
A. More than twenty	1,000
B. More than ten, less than twenty	500
etcetera."	

That has been slightly amended by the Madras Act VII of 1922, which substituted "twenty and more than twenty" and "Ten and more than ten" for the words under (A) and (B), the object being to bring in to tax companies whose capital was exactly twenty or ten lakhs which might have been excluded by the use of the words "more than" and "less than."

(1) [1921] 1 K.B., 64.

BEST & CO.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
—
SCHWABE,
C.J.

The principle of construction to be applied to taxing statutes is that, if the words of the statute are capable of two otherwise equally apposite constructions, the construction to be adopted is that in favour of the taxpayer: but, to ascertain whether the two possible constructions are equally apposite, the ordinary rules of construction of statutes are to be applied. As pointed out by ROWLATT, J. in *Cape Brandy Syndicate v. Inland Revenue Commissioners*(1), the maxim that clear words are necessary in order to tax the subject does not mean, as often contended,

"that words are to be unduly restricted against the taxing authority. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

That was enunciating no new principle, and I think the matter was clearly stated by LORD RUSSELL, C.J., in *Attorney-General v. Carlton Bank*(2), when he said,

"I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the legislature as that intention is to be gathered from the language employed, having regard to the context in connexion with which it is employed. The Court must no doubt ascertain the subject-matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the legislature has said."

Now, in this case, we have to see what was the intention of the legislature to be deduced from the words

(1) [1921] 1 K.B., 64.

(2) [1899] 2 Q.B., 158.

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
—
SCHWABE,
C.J.

used and the surrounding circumstances. The Act purports to impose a tax on every incorporated company (which words it is admitted includes English companies) carrying on business within the city, and in terms imposes on its paid-up capital a tax on the scale shown in the rules in the schedule. So far the language clearly indicates an intention to tax all incorporated companies. Turning to the rule in the schedule, we find that the company has to pay licence fee at a varying rate in rupees according as its capital is more or less in lakhs of rupees, or, in cases where the capital is an exact amount reckoned in lakhs, then, by the amended Act, on that amount. It is contended that that limits the application of the tax to companies whose capital is in shares of a rupee denomination. I do not think that that is the plain meaning of the words of the statute, or the proper interpretation to be put upon those words, even though they are capable of bearing that construction. I think it is merely stating the scale in the terms of the currency of this country and I see no difficulty at all in answering the question, how many lakhs of rupees is the capital of an English company with a capital, say, of a million pounds sterling? Given the rate of exchange, it merely provides a simple sum in arithmetic. I entirely fail to see how, in stating the scale by reference to the capital in the currency of the taxing country, it can be properly construed to exclude all companies whose nominal capital is usually expressed in the currency of some other country. I am not sure that there would be anything illegal or impossible in an Indian company registering itself under the Act with its capital in pounds or francs, and if it could do so, it would, under the construction contended for, escape the tax. If it had been intended by the legislature to tax only Indian companies with a rupee denomination of capital, the

BEST & Co.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
—
SCHWABE,
C.J.

natural place for such limitation would have been in the section itself and the words would have been "Every Incorporated Company with a capital in rupees, etc.," or at the very least, if such exclusion was intended, one would expect to find it when it is not in the section, then in the schedule by a definite explanation or proviso that companies with capital denominated in foreign currency should not be liable to the tax. Nor is it, in my view, an irrelevant consideration that the construction contended for would involve the intention of the legislature having been to give a preference in trade to foreign over local companies: if it has done so by clear words, that consideration might be irrelevant: but in my view, so far from being clear in that direction, the words used are capable of, and indeed properly bear, the opposite construction.

The answer to the question referred to us must be in the affirmative and the company is liable to be assessed to the tax.

COUTTS TROTTER, J.—I do not think anybody could have any doubt as to what was the intention of the section and the rule which we are asked to construe. To my mind, to hold that the legislative body which passed this Act could have intended to discriminate against indigenous companies in favour of foreign companies, because that would be the inevitable result of the construction contended for, is one that is incapable of argument. Mr. Grant has, I think, very wisely put his case upon the ground that the draftsman of the Act, owing to his carelessness, had in fact defeated the intention of the framers of the Act. How great that carelessness was it is almost impossible to imagine. There was a case in *Corporation of Calcutta v. Standard Marine Insurance Company*(1), which was under the

COUTTS
TROTTER, J.

BEST & CO.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
—
COURTS
TROTTER, J.

Calcutta Municipality Act of 1888, in which exactly the same point was argued, though not decided, as has been raised before us. That was in 1895, and in 1899 a new Act was passed for the Calcutta Municipality and in that Act, *ex majori cautela*, words were inserted to prevent the opportunity for an argument, such as we have heard today. That the draftsman of the Madras Act should not have taken the trouble to cast a glance over the Acts of other big Municipalities before he set his hand to his task, is to my mind almost incredible; but so it appears to be and we are therefore left with a problem, which ought never to have arisen had the Act been drafted with reasonable care. I do not accede to Mr. Grant's arguments, because I think that the utmost that you find is the absence, so to speak, of a table for the commutation of foreign coinage into the coinage of the country, and it seems to me that that failure is not enough to defeat the plain intention of the governing section 110, because it appears to me that the Act might well contemplate that any taxing authority in any country can always, by a not very difficult feat, turn the coinage of one country into the terms of the coinage of the country where the Act is passed and where the tax is received. It appears to me therefore that, just as I should be prepared to hold in England that where an Act expresses the capital in pounds, a French company with capital in francs could be assessed, so here in India, where the rupee is the standard basis, the taxing authorities are not prevented, in the absence of an express provision to the contrary, from performing the feat of converting the coinage into different terms. I may add that, having regard to the rates of exchange as they have been in later years, it is almost inconceivable to imagine an Act fixing anything in the nature of a table except by reference to some

BEST & CO.,
LTD.
v.
THE
CORPORATION
OF MADRAS.
—
COURTS
TROTTER, J.

date on which the rate of exchange is to be fixed. It appears to me that it is quite clear that the Act supplies that omission by giving a definite date, the date at which the tax falls due. For the purpose of rule 7 of Schedule IV, I take it that the rate of exchange at the date when the tax falls due must be taken into consideration. I may add that I entirely sympathize with the grievance of the company with regard to the method of imposing the tax, for a more unjust method of taxing than to tax a company upon the whole of its subscribed capital in every place where it carries on trade is, to my mind, difficult to imagine. It is really a very great hardship but one that can only be set right by the legislature. I may add that, though there is a mitigation of the hardship in part by the maxima fixed by rule (7) nevertheless those maxima do not apply to a very large class of cases as Mr. Grant has pointed out.

I agree with the answer proposed by my Lord.

RAMESAM, J.—I agree with the judgments just pronounced and that the answer to the question referred to us must be in the affirmative.

King and Partridge—Solicitors for the appellants.

N.R.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Waller.*

1923,
November 6. RAJAGOPALA AYYAR, MINOR, BY GUARDIAN
RAMACHANDRA AYYAR (PETITIONER—THIRD DEFENDANT),
(APPELLANT)

v.

RAMANUJACHARIAR AND ANOTHER (COUNTER-PETITIONER—
PURCHASER AND DECREE-HOLDER—(RESPONDENTS).*

*Order XXI, rule 22, Civil Procedure Code (V of 1908)—Decree
more than a year old—Execution sale without notice to judg-
ment debtor—Sale, a nullity—Application to set aside sale—
Article 181, Limitation Act (IX of 1918).*

Held by the Full Bench (1) that in a case where notice under Order XXI, rule 22, Civil Procedure Code, has not been issued and the omission is due not to the fact that sub-rule (2) of rule 22, has been applied, but to the fact that notice was not asked for, a sale held in execution is a nullity and not merely voidable but is void as against the person to whom notice should have been, but was not, issued; *Raghunath Das v. Sundar Das Khatri*, (1915) I.L.R., 42 Cal., 72 (P.C.), applied. *Viswanathan Chetty v. Somasundaram Chetty*, (1922) I.L.R., 45 Mad., 875, and *Doraswami v. Chitambaram Pillai*, (1924) I.L.R., 47 Mad., 68 commented on. *Malkarjunn v. Narhari*, (1901) I.L.R., 25 Bom., 337 (P.C.) explained.

Held further, that though where a sale in execution is a nullity it has not got to be set aside, yet if a party files an application to have it set aside either under section 47, Civil Procedure Code, or otherwise, it is governed by article 181 of the Limitation Act and not by article 166. *Seshagiri Rao v. Srinivasa Rao*, (1920) I.L.R., 43 Mad., 313, followed.

Held, by the Division Bench, that an application to set aside a Court sale not only on the ground of irregularity in the sale, but also on the ground that no notice was given of the application for attachment and sale of the property, falls within section 47, Civil Procedure Code, and hence there is a Second Appeal.

* Appeal against Appellate Order No. 45 of 1922.

APPEAL against the order of C. V. VISWANATHA SASTRI, District Judge of East Tanjore, at Negapatam, in Civil Miscellaneous Appeal No. 81 of 1921, preferred against the order of V. S. NARAYANA AYYAR, Subordinate Judge of Negapatam, in Miscellaneous Application No. 278 of 1921 (in Original Suit No. 13 of 1916 on the file of the Temporary Subordinate Judge's Court at Tanjore).

One Ramaswami Ayyar who was the absolute owner of the properties in question died towards the end of 1915, leaving a will by which he bequeathed some of his lands in favour of his widow to be enjoyed by her during her lifetime and to be enjoyed thereafter by his daughter's son, the petitioner, a minor, as absolute owner. He bequeathed his other properties in favour of his two daughters. After Ramaswami Ayyar's death, his daughter-in-law (a widow) brought a suit for maintenance against her mother-in-law, the first daughter of Ramaswami Ayyar, and against the petitioner (third defendant) who was the son of a deceased daughter and obtained a decree in 1917 for maintenance at Rs. 120, a year, and for arrears of maintenance by which the lands bequeathed in favour of Ramaswami Ayyar's widow and his grandson as abovementioned, were charged with the payment of maintenance. In execution of this decree the plaintiff applied in 1920 for execution by sale of the properties charged and caused notice of the application for sale to be sent only to the first defendant and not to the third defendant. The property was sold in April 1920 and the sale was confirmed in July 1920. In February 1921 the petitioner applied to have the sale set aside. The Subordinate Judge allowed the petition. On appeal the District Judge reversed the order of the Subordinate Judge and dismissed the petition on the ground that the only person that was entitled to notice was the person in

RAJAGOPALA
AYYAR
v.
RAMANUJA-
CHARIAR.

RAJAGOPALA
 AYYAR
 v.
 RAMANUJA-
 CHARIAR.

possession, i.e., first defendant. The third defendant preferred this Second Appeal against the purchaser and decree-holder.

ORDER :—

SCHWABE,
 C.J.

SCHWABE, C. J.—A preliminary point is taken that no Second Appeal lies because it is said that this is an appeal on a petition based on there being a material irregularity in publishing or conducting the sale within the meaning of Order XXI, rule 90, that the order made under rule 92 setting aside the sale, was an order made by reason of that material irregularity or fraud, and that as no Second Appeal lies from orders made under rule 92, there can be no Second Appeal here. The answer is that it may be perfectly true as regards part of the appeal, but one of the grounds on which the appellant relies is that no notice was given of the application for attachment and order for the sale of the property, and that that comes under section 47 of the Civil Procedure Code, and is therefore appealable as a decree.

The only direct authority on the point is the judgment of OLDFIELD and SESHAGIRI AYYAR, JJ., in *Neelu Neithiar v. Subramania Moothan*(1), where, under somewhat similar circumstances which were not really so strong as this, because the failure to give notice was at a later stage, they held that, where an application is made which is partly covered by rule 90 of Order XXI and partly not so covered, although the order purports to have been made under rule 92 of Order XXI, a Second Appeal will lie.

There are dicta in other cases to the effect that, where there is absence of notice, there is a remedy under Order XXI, rule 90 or section 311 of the Old Civil

(1) (1920) 11 L.W., 59.

RAJAGOPALA
 AYYAR
 v.
 RAMANUJA-
 CHARIAR.
 —
 SCHWABE,
 C.J.

Procedure Code which corresponds with it, particularly in the decision of the Privy Council in *Malkarjun v. Narhari*(1), but, on looking carefully into that case, we note that this point was in no way before the Privy Council; but apart, I think that the decision in *Neelu Neithiar v. Subramania Moothan*(2) is an authority, and I should myself come to the same conclusion as was come to in that case, because looking at the words of Order XXI, rule 90, they appear to me perfectly plain. What is being dealt with there is a material irregularity or fraud in publishing or conducting a sale; and I cannot bring my mind to the view that the failure to give notice of the application for leave to attach and sell is an irregularity in publishing or conducting the sale. It seems to me that it is really a contradiction in terms. There is no sale to publish or conduct until after leave of the Court has been obtained (a) to attach the property and (b) to sell.

Whether or not that failure to give notice is an illegality, is a matter which is entirely irrelevant for the present purpose because it is only certain kinds of irregularities that are covered by Order XXI, rule 90. If the omission in this case was any other kind of irregularity, whether it renders the whole sale a nullity or not, it is not brought within the wording of that rule. The preliminary point fails and this appeal must proceed.

WALLER, J.—I agree that a Second Appeal will lie. WALLER, J.

This Appeal against Appellate Order No. 45 of 1922, coming on for hearing again on Monday, Tuesday, the 24th and 25th days of September 1923, the Court (SCHWABE, C.J. and WALLER, J.) made the following Order of Reference to a Full Bench :—

(1) (1901) I.L.R., 25 Bom., 337.(P.C.)

(2) (1920) 11 L.W., 59.

ORDER.

RAJAGOPAL
 AYYAR
 v.
 RAMANUJA-
 CHARIAR.

The question in this case is as to the validity of a sale held in execution of a decree for maintenance. Appellant was the 3rd defendant in the suit. The contesting respondent is the purchaser in execution. The Sub-Judge found that the sale was invalid as notice of execution under Order XXI, rule 22, had not been issued to 3rd defendant and that the application was in time under article 181 of the Limitation Act. Finding, further, that the property had been sold for considerably less than its proper value, he proceeded to set aside the sale under Order XXI, rule 90. The District Judge, on the other hand, was of opinion that notice to 3rd defendant was unnecessary, that the sale was not invalid and that the application was barred by limitation, presumably under article 166 of the Limitation Act. He added that there was no allegation of fraud or collusion against 1st defendant. Had he said that no fraud or collusion had been proved, he would have been more accurate. There were certainly allegations—no doubt, of a vague description—of fraud and collusion against 1st defendant and the plaintiff in the suit. Nothing, however, was alleged against the auction-purchaser, though it is now suggested that he was a party to the fraud, as a result of which the property was sold for less than its proper value. There is no evidence of any collusion between these persons.

The auction-purchaser is not connected with the 1st defendant's family. It is not at all probable that the plaintiff and 1st defendant, who were on opposite sides in the suit, would have colluded together. Plaintiff had no interest whatever in getting the land sold for a low price. Her interest, if she had any, lay in the opposite direction. Nor is it apparent why 1st defendant should have

conspired to bring to sale only that part of the property in which she had a life estate.

The evidence as to the alleged inadequacy of price is not very satisfactory but we accept the finding of the Subordinate Judge that the sale was in fact at an undervalue.

The finding that there was no fraud or collusion does not end the matter. The next question is whether the sale, as against 3rd defendant's interest, is invalid or not. Third defendant had undoubtedly a vested interest in the property sold and a notice should have gone to him under Order XXI, rule 22. It has been held in *Gopal Chander Chatterjee v. Gunamoni Dasi*(1) that the omission to give such a notice renders the sale void. This decision has been approved by the Privy Council in *Raghunath Das v. Sundar Das Khetri*(2), and followed in *Shyam Mandal v. Satinath Banerjee*(3). The last case has been dissented from in *Viswanathan Chetty v. Somasundaram Chetty*(4), where it has been decided that the non-issue of notice under Order XXI, rule 22, is a mere irregularity and not an illegality affecting the jurisdiction of the Court to execute the decree. The Judges refused to follow the Privy Council ruling on the ground that it was passed under the old Civil Procedure Code which had in it no provision corresponding to the present sub-rule (2) of rule 22. The ruling in *Shyam Mandal v. Satinath Banerjee*(3), they dismissed with the remark that it had not considered the effect of sub-rule (2). In *Doraswami v. Chidambaram Pillai*(5), SPENCER, J., arrived at the same conclusion.

"So long" he said "as rule 22, clause (2) permits an executing Court to dispense with notice for reasons to be recorded, it is difficult to see how the issue of process without

RAJAGOPALA
 AYYAR
 v.
 RAMANUJA-
 CHARIAR.

(1) (1893) I.L.R., 20 Cal., 370.
 (2) (1916) I.L.R., 42 Cal., 72 (P.O.). (3) (1917) I.L.R., 44 Cal., 954.
 (4) (1922) I.L.R., 45 Mad., 875. (5) (1924) I.L.R., 47 Mad., 63.

RAJAGOPALA
 AYYAR
 v.
 RAMANUJA-
 CHARIAR.

notice and without recording reasons would affect the jurisdiction of the Court or would be more than an irregularity."

We think that the decision in *Shyam Mandal v. Satinath Banerjee*(1) is correct and that the ruling in *Viswanathan Chetty v. Somasundaram Chetty*(2) has been too widely expressed. It may well be that, where an application has been made under sub-rule (2) and the conditions contemplated by that sub-rule exist, the non-issue of notice without the recording of reasons would be a mere irregularity. But we are of opinion that when, as here, it is not even suggested that the conditions required by sub-rule (2) existed or were under the consideration of the Court, the Privy Council ruling in *Raghunath Das v. Sundar Das Khetri*(3) should be followed. The ruling reported in *Malkarjun v. Narhari*(4) is not an authority to the contrary; for in that case, notice was issued on a particular person under the direction of the Court but it was subsequently held that that direction was wrong and this, the Privy Council considered to be no more than an irregularity, which rendered the sale not void, but voidable. In another case, *Ram Kinkar v. Sthiti Ram*(5) the Privy Council decision was followed. The Code applicable to it was no doubt, that of 1882, but the opinion was clearly expressed that the law had not been altered by Order XXI, rule 22, of the present Code. The ruling referred to above, *Doraswami v. Ohidambaram Pillai*(6), expressly dissents from *Ragunathaswamy Iyengar v. Gopaul Rao*(7). In view of the conflicting opinion on the point, we think that the best course is to refer for the decision of a Full Bench, the following question:—

(1) (1917) I.L.R., 44 Cal., 954.

(3) (1915) I.L.R., 42 Cal., 72 (P.C.).

(5) (1918) 27 C.L.J., 525.

(2) (1922) I.L.R., 45 Mad., 875.

(4) (1901) I.L.R., 25 Bom., 337 (P.C.).

(6) (1924) I.L.R., 47 Mad., 63.

(7) (1921) 41 M.L.J., 547.

RAJAGOPALA
 AYYAR
 v.
 RAMANUJA-
 CHARIAR.

Whether, in a case where notice under Order XXI, rule 22, has not been issued and the omission is due not to the fact that sub-rule (2) has been applied, but to the fact that notice was not asked for, a sale held in execution is void or merely voidable, as against the person to whom notice should have been, but was not, issued?

If the answer to the question above propounded is that the sale is void as against the third Defendant, a further question arises—that of limitation, i.e., whether the article of the Limitation Act applicable is 166 or 181, or some other and if so which article. On this point again, there is a considerable divergence of opinion. In *Seshagiri Rao v. Srinivasa Rao*(1) it has been held that, when a sale is absolutely void for want of jurisdiction, the article applicable is article 181. The same conclusion was arrived at in *Ram Kinkar v. Sthiti Ram*(2). Both of these decisions have been dissented from by OLDFIELD and VENKATASUBBA RAO, JJ., in *Ganapathi Mudaliar v. Krishnamachari*(3) (where also a sale was impugned as void), the first on the ground that the decision was supported by reference to an unreported case and not by any independent reasoning and the second on the ground that the relevant part of the judgment was *obiter*. As to the Madras case, the *ratio decidendi*—which the Judges possibly considered too obvious to require statement—doubtless was that a void sale need not be set aside. In the Calcutta Law Journal Case the decision, it is true, ultimately rested on section 13 of the Limitation Act, but the question of the article of limitation applicable did arise directly in the suit and we think that the decision on it can scarcely be dismissed as *obiter*.

(1) (1920) I.L.R., 48 Mad., 313.

(2) (1918) 27 C.L.J., 528.

(3) (1922) 43 M.L.J., 184.

RAJAGOPALA
 AYYAR
 v.
 RAMANUJA-
 CHARIAR.

Another case is *Babu Das Narayan Singh v. Muhammad Yusuf*(1); but there it was held that what had occurred was a mere irregularity and that the Court had jurisdiction to sell. In other words, the decision was that the sale was voidable and not void. It was, no doubt, that article 166 governed all applications, "on whatever grounds," to have an execution sale set aside, but that is not to say that the same article applies to cases where the sale is void and need not be set aside at all.

In a Madras case *Kamayya v. Ramamma*(2), it was held that article 166 governed all applications, under section 47, Civil Procedure Code, to set aside sales on the ground either of illegality or irregularity. In another Madras case *Neelu Neithiar v. Subramania Moothan*(3), it was a notice under Order XXI, rule 66, that was in question. The decision was that article 181 did not apply. There is, however, in the course of the Judgment a reference to the issue of the notice required by Order XXI, rule 22, as being a condition precedent to the validity of any execution proceedings. One of the Judges was a party to the decision in *Viswanathan Chetty v. Somasundaram Chetty*(4).

In *Ragunathaswamy Iyengar v. Gopaul Rao*(5), the Judgment in which OLDFIELD, J., concurred was delivered by RAMESAM, J., who laid down that where an execution sale is void, it need not be set aside. The question of limitation did not arise, but, if it had, presumably the decision would have been that article 166 did not apply. This decision was dissented from in *Doraiswami v. Chidambaram Pillai*(6), by SPENCER and KRISHNAN, JJ. In A.A.O. No. 74 of 1922, SPENCER and

(1) (1921) 61 I.C., 823.
 (3) (1920) 11 L.W., 59.
 (5) (1921) 41 M.L.J., 547.

(2) (1922) M.W.N., 176.
 (4) (1922) I.L.R., 45 Mad., 875.
 (6) (1924) I.L.R., 47 Mad., 63.

RAJAGOPALA
 AYYAR
 v.
 RAMANUJA-
 CHARIAR.

DEVADOSS, JJ., dissented from *Seshagiri Rao v. Srinivasa Rao*(1), and followed *Ganapathi Mudaliar v. Krishnamachari*(2). In A.A.O. No. 77 of 1921, SPENCER, J., did not decide the question of limitation. VENKATASUBBA RAO, J., held that the sale in question is void. He held further that the application then under consideration was, in substance, one to declare that the sale was inoperative and that therefore article 166 could not govern it.

We need refer to only two more Madras cases. In one of them *Muthiah Chettiar v. Bava Sahib*(3), OLDFIELD and TYABJI, JJ., disagreed as to the applicability of article 166; OLDFIELD, J., was of opinion that the application, though it may have been made under section 47, Civil Procedure Code, was essentially one to set aside a sale and was therefore barred under article 166. In the other, *Papidanna v. Lakshminarasamma*(4), the question we are now considering did not arise. SADASIVA AYYAR, J., however, did refer to it. His opinion was that, if the application he was dealing with was one to set aside the sale as distinguished from one for a declaration of the invalidity of the sale as against the applicant's rights, it was barred by limitation under article 166.

Only one other decision need be mentioned—that in *Mani Singh Mandhata v. Nawab Bahadur of Murshadabad*(5), which is in favour of the view that article 166 governs all applications under section 47, Civil Procedure Code. As the correctness of the decision in *Seshagiri Rao v. Srinivasa Rao*(1) has been doubted, we think that the question should be referred to a Full Bench for final decision. Essentially the question is this—where a sale in execution is void against a particular person, is it a necessary part of his remedy that he should ask to

(1) (1920) I.L.R., 48 Mad., 313.
 (3) (1914) 27 M.L.J., 605.

(2) (1922) 43 M.L.J., 184.
 (4) (1916) I.L.R., 38 Mad., 1076.
 (5) (1914) I.L.R., 46 Cal., 694 (P.C.).

RAJAGOPALA
 AYYAR
 v.
 RAMANUJA-
 CHARIAR.

have the sale set aside? If the answer is in the affirmative, then probably article 166 applies. If on the other hand, he need not get the sale set aside but his application can be treated as one for a declaration that the sale is void as against him, article 181 would seem to govern the case. The question we would refer to the Full Bench is this :—

Where a sale in execution is void as against a party and he applies for relief under section 47, Civil Procedure Code, or otherwise, what is the period of limitation that governs his application?

ON THIS REFERENCE—

V. Ramaswami Ayyar (with *K. Rajah Ayyar*) for appellant.—As the decree is more than a year old, it is essential that notice to the petitioner (the judgment-debtor) under Order XXI, rule 22, Civil Procedure Code, should issue. A sale held without such notice is one without jurisdiction and is a nullity. Reliance was placed on the cases quoted in favour of this view in the Order of Reference and on *Raj Bullub Shaha v. Gossain Dass Shaha*(1), *Srinivasa Aiyangar v. Narayana Aiyangar*(2) and *Fani v. Surendra*(3). A void sale need not be set aside, but if any application is made to set it aside it is governed by article 181 and not article 166. Reliance was placed on the cases quoted in the Order of Reference in favour of this view and on *Vachali Rohini v. Kombi Aliassan*(4), *Abdul Karim v. Islamunnissa Bibi*(5), *Khizarajmal v. Daim*(6) and *Kishen Chunder Ghose v. Ashoorun*(7), quoted in the last case.

K. S. Krishnaswami Ayyangar for *T. Narasimha Ayyangar* (with *N. S. Rangaswami Ayyangar*) for

(1) (1870) 13 W.R., 400.

(3) (1922) 85 C.L.J., 9.

(5) (1916) I.L.R., 38 All., 339.

(2) (1917) 33 M.L.J., 539.

(4) (1919) I.L.R., 42 Mad., 753 (F.B.).

(6) (1905) I.L.R., 32 Calc., 296 (P.C.).

(7) (1863) 1 Marsh, 647.

RAJAGOPALA
 AYYAR
 v.
 RAMANUJA-
 CHARIAR.

respondent.—Non-issue of notice under Order XXI, rule 22, does not vitiate a sale. It is only an irregularity. Reliance was placed on the cases quoted in favour of this view in the Order of Reference and on *Rewa Mahton v. Ram Kishen Singh*(1), *Sitaramayya v. Gopalakrishnamma*(2), *Blanchenay v. Burt*(3) and *Freeman on Void Judicial sales*, page 97. Possibly want of notice to a legal representative against whom execution is applied for may vitiate a sale as against him as he is a stranger to the decree and has to be newly brought on record. It is not Order XXI, rule 22, that gives jurisdiction against the legal representative but section 50 under which notice has to go to him before execution can be ordered against him. Hence cases holding that execution sales without notice to legal representatives are a nullity are not to the point. Even if the sale is void, article 166 will apply as being the specific article.

V. Ramaswami Ayyar in reply.—Absence of notice whether under clause (a) or (b) of Order XXI, rule 22, must result in the sale becoming a nullity; there cannot be any difference between the two cases in the result; See *In the matter of the petition of Ramessuri Dasee*(4), *Sahdeo Pandey v. Ghasiram Gyawal*(5), *Gurudas Biswas v. Bhowanipore Zamindary Co., Ltd.*(6).

OPINION :—

SCHWABE, C.J.—If this matter were free from authority I should incline to the view that non-compliance with the provisions of Order XXI, rule 22, was a material irregularity, and not an illegality which would make the subsequent sale a nullity. In England there was a rule of Common Law that judgments after the lapse of a year and a day could not be executed unless an

(1) (1887) I.L.R., 14 Calc., 18 (P.O.). (2) (1920) I.L.R., 43 Mad., 57.

(3) (1843) 4 Q.B., 707; 114 E.R., 1034. (4) (1881) I.L.R., 6 Calc., 103.

(5) (1894) I.L.R., 21 Calc., 19.

(6) (1921) 25 C.W.N., 972.

RAJAGOPALA
AYYAR
v.
RAMANUJA-
CHARIAR.
—
SCHWABE,
C.J.

order for what was known as a *scire facias* was first obtained. There are authorities to the effect that the disregard of that rule rendered a subsequent sale in execution voidable and not void *Blanchenay v. Burt*(1), and *Goodtitle v. Badtitle*(2); and the same rule applies in America—see Freeman on Void Judicial Sales, page 97. But in my judgment there are authorities here to the contrary which preclude such a view being taken here. In *Gopal Chunder Chatterjee v. Gunamoni Dasi*(3), their Lordships of the Calcutta High Court laid down that a notice under section 248 of the Code of Civil Procedure of 1882 was necessary in order that the Court should obtain jurisdiction to sell a property by way of execution as against the legal personal representative of the deceased judgment-debtor. In *Raghunath Das v. Sundar Das Khetri*(4) the judgment-debtor had become an insolvent and a sale in execution took place without proper notice under the same section, and their Lordships of the Privy Council held that the sale was a nullity. In the case before us no notice has been given of execution proceedings to the infant petitioners although a year had elapsed since the decree, but I can see no difference in principle between the position of legal representatives of a deceased judgment-debtor, or the Official Assignee of the judgment-debtor's estate, and that of a party to the suit, who has not himself been served with notice of an application for execution, more than a year after the decree and is ignorant thereof. The provision for notice in the two cases, of legal representatives, and of parties when more than one year has elapsed, is contained in the same rule, Order XXI, rule 22, which is in the same terms as section 248 of the Civil Procedure Code of 1882, and I do not think that

(1) (1843) 4 Q.B., 707.

(3) (1893) I.L.R., 20 Cal., 370.

(2) 9 Dowling, Prac. Cas., 1009.

(4) (1915) I.L.R., 42 Cal., 72 (P.C.).

RAJAGOPALA
AYYAR
v.
RAMANUJA-
CHARIAR.
—
SCHWABE,
C.J.

it is possible to hold that in one case failure to give notice is a mere irregularity while in the other it results in the Court having no jurisdiction to sell at all. In *Shyam Mandal v. Satinath Banerjee*(1), MOOKERJEE and CUMING, JJ., held that a proper notice under Order XXI, rule 22, after the lapse of one year from the decree, was the very foundation of the jurisdiction itself, and that failure to give it rendered a sale inoperative even as against a stranger. It is right to point out that in that case an application was made to prevent the confirmation of the sale before it was completed and no question of limitation arose, but the grounds of the decision are quite clear and, unless we disagree with them, they are conclusive of this point. In *Viswanathan Chetty v. Somasundaran Chetty*(2), a bench of this Court held that the non-issue of notice under Order XXI, rule 22, was a mere irregularity, and not an illegality affecting the jurisdiction of the Court to execute the decree, and in *Doraswami v. Chidambaram Pillai*(3), SPENCER, J., took the same view; and KRISHNAN, J., stated that he would have been in favour of referring the matter to a Full Bench but for the decision of the Privy Council in *Malkarjun v. Narhari*(4), which he considered, rendered it unnecessary to do so. The ground on which the Privy Council cases referred to above were sought to be distinguished from this case, was that Order XXI, rule 22 differed from section 248 of the Civil Procedure Code of 1882, in that Order XXI, rule 22, provides that the Court can issue process in execution without issuing the prescribed notice, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice, while there was no such

(1) (1917) I.L.R., 44 Cal., 954.

(3) (1924) I.L.R., 47 Mad., 63.

(2) (1922) I.L.R., 45 Mad., 575.

(4) (1901) I.L.R., 25 Bom., 337 (P.C.).

RAJAGOPALA
AYYAR
v.
RAMANUJA-
CHARIAR.
—
SCHWABE,
C.J.

provision in the Code of 1882; and that as there is now discretion in the Court to excuse the notice it follows that the failure to give such notice must be a mere irregularity. I am not able to follow this reasoning. I do not appreciate how the failure to give such notice can have any different effect under the new Code to what it had under the old Code, merely because the new Code provides that in certain cases the Court can dispense with the notice. In my judgment the only effect of this sub-section is to give the Court jurisdiction in certain cases in which without it the Court would have none. *Malkarjun v. Narhari*(1), is not an authority to the contrary, for in that case notice was served on a person whom the Court had ordered to be treated as the legal representative of a deceased party and who, it was subsequently held, was not the proper legal representative and the Privy Council held that this was a mere irregularity as the Court was acting within its jurisdiction, though wrongly. *Rewa Mahton v. Ram Kishen Singh*(2) was relied upon as an authority against this view. In that case there were cross decrees in separate suits and execution was ordered on one of them without taking into account the other, although it was provided by section 243 of the Code of 1877, now Order XXI, rule 18, that execution can only issue for the balance if any between the two decrees, and it was held by the Privy Council that this was an irregularity and did not render the sale void. Their Lordships held that the Court had jurisdiction to sell, and that the purchaser was no more bound to enquire into the correctness of the order for execution than into the correctness of the judgment upon which the execution was issued. This is an illustration of a case where the Court was

RAJAGOPALA
AYYAR
v.
RAMANUJA-
CHARIAR.
—
SCHWABE,
C.J.

acting within its jurisdiction on the proper interpretation of the section of the Code applicable, and does not assist in arriving at the proper interpretation of another section. It follows that the answer to the question referred is that the sale is void.

The other question referred is, what is the period of limitation that governs an application for relief where the property has been sold in execution and that sale is void? If the application is an application under the Code of Civil Procedure to set aside a sale in execution of a decree, the article of the Limitation Act of 1908, applicable is 166 and the period of limitation is 30 days from the date of the sale. If not, the application is one for which no period of limitation is provided elsewhere and it will be governed by article 181, the period of limitation being three years from the date when the right to apply accrued. Lord DAVEY delivering the judgment of their Lordships of the Privy Council in *Rhiarajmal v. Daim*(1)—a case where the Court had sold without jurisdiction the property of persons who were not parties to the proceeding or properly represented on the record—said

“As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. If authority be desired for these elementary propositions it may be found in the judgment of Sir BARNES PEACOCK in *Kishen Chunder Ghose v. Ashoorun*(2).”

That is direct authority for the proposition that in such a case it is not necessary to apply to the Court to set aside the sale. If it is possible for the petitioner in this case to proceed without applying to set aside the sale he could avoid the harsh limitation imposed by article 166. In my judgment he can do so. He could,

(1) (1901) I.L.R., 25 Bom., 337 (P.C.). (2) (1887) I.L.R., 14 Cal., 18 (P.C.).

(1) (1905) I.L.R., 32 Cal., 296 (P.C.).

(2) (1868) 1 Marsh, 647.

RAJAGOPALA
 AYYAR
 v.
 RAMANUJA-
 CHARIAR.
 ———
 SCHWABE,
 C.J.

but for the provisions of section 47 of the Civil Procedure Code of 1908, bring a suit for possession of the property sold, and the purchaser would not be able to rely upon the Court sale as a defence, because that sale is a nullity and the Privy Council has held that it is not necessary to take any steps to set it aside. By reason of section 47, all questions arising between parties to the suit relating to execution ought to be determined by the Court executing the decree, and not by a separate suit, and it has been held that the fact that a Court purchaser is a necessary party would not prevent the application of this rule. But this is only a question of procedure and the Court may treat the proceeding under this section as a suit subject to any objection as to limitation. It is unnecessary to consider whether the effect of this is that the period of limitation to be applied is the period provided by the Limitation Act in respect of applications or that provided in respect of suits. If the former, the period of limitation will be three years under article 181 and if the latter, the twelve years provided in the case of suits to recover possession of immoveable property. I cannot agree with the view that all applications under section 47 are governed by article 166; nor do I think that the statements in cases to that effect are more than *obiter dicta*; the intention being to express the view, with which I agree, that if an application is an application to set aside a sale in execution of a decree it matters not whether the application is made under section 47 or under Order XXI, rule 90. *Seshagiri Rao v. Srinivasa Rao*(1) is a direct authority for the proposition that when a sale is absolutely void for want of jurisdiction the article applicable is article 181, and in my judgment, in view of the decisions of the Privy Council referred to above, that case was rightly decided.

(1) (1920) I.L.R., 43 Mad., 813.

RAJAGOPALA
 AYYAR
 v.
 RAMANUJA-
 CHARIAR.
 ———
 SCHWABE,
 C.J.

The petitioner is the guardian of infants who were properly before the Court as defendants in the original suit, and their interest in the property was liable to be sold in execution in satisfaction of the decree, and they can only be permitted to recover possession of the property on payment to the purchaser of what he has paid, together with interest thereon at 6 per cent, less any amount he may have received for mesne profits, and in the absence of agreement, this petition must go back to the Court of first instance to ascertain the amount and fix the date of payment and make the necessary order for carrying out this direction. In view of the fact that the petitioner chose to frame his application under Order XXI, rule 90, and to make unfounded charges of fraud against the respondent, there will be no costs here or below.

RAMESAM, J.—The facts of the case and questions referred to the Full Bench are stated in the Order of Reference.

The first question is—whether the sale is void, no notice having been issued under Order XXI, rule 22. Three possible views may be taken on the effect of want of notice under Order XXI, rule 22 of the new Code—

(1) The want of notice is only an irregularity—This is the view taken by OLDFIELD, J., in *Viswanathan Chetty v. Somasundaram Chetty*(1), and I agreed with his judgment.

(2) The sale is void—This is the decision of the Privy Council under the old Code in *Raghunath Das v. Sundar Das Khetri*(2), and it may be said that the addition of clause (2) in the new Code does not make any difference when the mind of the Court was not applied to the need for notice.

(1) (1922) I.L.R., 45 Mad., 875. (2) (1915) I.L.B., 42 Cal., 72 (P.C.).

RAJAGOPALA
AYYARv.
RAMANUJA-
CHARIAR.

RAMESAM, J.

(3) An intermediate view may be taken, viz., if the case is one to which clause (a) of sub-section (1) of rule 22 applies, then the want of notice is merely an irregularity; and if clause (b) applies, the sale is void for want of notice. In this way *Raghunath Das v. Sundar Das Khetri*(1) may be distinguished.

Now, I confess there is something to be said in favour of each of these views. All that can be said in favour of (1) has been said by OLDFIELD, J., in *Viswanathan Chetty v. Somasundaram Chetty*(2) (with which I agreed) and by SPENCER, J., in *Doraswami v. Chidambaram Pillai*(3).

Incidentally I may point out that the point does not strictly arise in *Doraswami v. Chidambaram Pillai*(3). There, the sale took place on 17th January 1916. The judgment-debtor died on 16th December 1915. The application for attachment and for sale must have been ordered and the proclamation of sale must have been settled before his death. It does not appear that an application for execution had to be made or was made after his death, and if there was none, it cannot be said that Order XXI, rule 22, was violated. If the sale in that case was void, it must be only on the ground that the judicial proceeding after the death of the judgment-debtor, and without bringing any legal representative on the record, was void, as held by OLDFIELD, J., and me in *Ragunathaswamy Iyengar v. Gopaul Rao*(4) but SPENCER and KRISHNAN, JJ., dissented from this view. In the judgment of my Lord, my Lord has given reasons against adopting the reasons of the decision in *Viswanathan Chetty v. Somasundaram Chetty*(2) and of SPENCER, J., in *Doraswami v. Chidambaram Pillai*(3).

(2) The second view adopted in *Shyam Mandal v. Satinath Banerji*(5) (dissented from by SPENCER, J., in *Doraswami v. Chidambaram Pillai*(3) is

(1) (1915) I.L.R., 42 Calo., 72 (P.C.). (2) (1922) I.L.R., 45 Mad., 875.

(3) (1924) I.L.R., 47 Mad., 63. (4) (1921) 41 M.L.J., 547.

(5) (1917) I.L.R., 44 Calo., 964.

RAJAGOPALA
AYYARv.
RAMANUJA-
CHARIAR.

RAMESAM, J.

supported by the judgment of the Privy Council in *Raghunath Das v. Sundar Das Khetri*(1) and now by my Lord the Chief Justice. I understand that my brother WALLER, J., also agrees with this view.

(3) The third view was urged before OLDFIELD, J., and myself and was rejected by us in *Viswanathan Chetty v. Somasundaram Chetty*(2). As my Lord now points out, there is something to be said in its favour, but the language of the Judicial Committee which does not make any distinction between clause (a) and clause (b) of section 248 of the old Code (corresponding to Order XLI, rule 22 of the present Code) prevents us from accepting it.

With no strong inclination in favour of any one of the three views stated above, and in order that our judgment may be unanimous, I would formally drop the conclusion I adopted in *Viswanathan Chetty v. Somasundaram Chetty*(2) and agree with my Lord and WALLER, J., on the first question referred to the Full Bench.

The second question referred to the Full Bench presents no difficulty. Once we are agreed that *Raghunath Das v. Sundar Das Khetri*(1) applies, that case is conclusive that the sale has not got to be set aside. Only if it has to be set aside, article 166 applies. If not, article 181, when the matter arises under section 47 or article 144 when the question arises in a suit (as in *Raghunath Das v. Sundar Das Khetri*(1)) would apply. I agree with my Lord's proposed answer to the second question and with the further order as to mesne profits and costs.

WALLER, J.—I agree entirely with the judgment of the learned Chief Justice and have nothing to add to it.

N.R.

(1) (1915) I.L.R., 42 Calo., 72.

(2) (1922) I.L.R., 45 Mad., 875.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice
Venkatasubba Rao.

1923,
October 17. MOHIESWARA RAO, MINOR BY GUARDIAN RANGAMMA
AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

AYYADEVARA DURGAMBA ALIAS MAHALAKSH-
MAMMA (PLAINTIFF), RESPONDENT.*

*Hindu Law—Contract by a widow to receive a fixed maintenance
undertaking not to claim more—Validity of.*

A contract by a Hindu widow with her husband's co-parceners to receive a fixed maintenance per annum and not claim any increase in future even in case of change of circumstances is a valid agreement binding upon the widow. *Venkamma v. Kristayya*, Appeal No. 12 of 1920 and *Narasimha Rao v. Rattamma*, C.M. A. No. 316 of 1918 followed.

APPEAL against the decree of K. SAMBASIVA RAO, Subordinate Judge of Bezwada, in Original Suit No. 34 of 1919.

The facts are given in the Judgment.

P. Narayanamurthi for V. Suryanarayana for appellants.—A contract by a Hindu widow agreeing to receive a certain maintenance and not to claim anything higher in the future is valid and binding upon her. *Subramanian Pattar v. Vembammal*(1), *Venkamma v. Kristayya*(2) *Narasimha Rao v. Rattamma*(3).

V. Ramdoss and N. Rama Rao for respondents. Such an agreement is invalid and not binding upon the widow. See *Gopikabai v. Dattatraya*(4), *Rajah Venkatappa Nayanim Varu v. Rajah Thimma Nayanim Varu*(5), *Bangaru*

* Appeal No. 68 of 1921.

(1) (1904) 14 M.L.J., 339.

(2) Appeal No. 12 of 1920 (Unreported).

(3) C.M.A. No. 316 of 1918 (Unreported). (4) (1900) I.L.R., 24 Bom., 386.

(5) (1914) 27 M.L.J., 656.

Vijayamachi Reddiar(1), *Sathyabhama v. Kesavacharya*(2) MOHIESWARA
RAO
v.
DURGAMBA.
Moreover the agreement is not binding for want of a
corresponding obligation on the other side not to ask for
a reduction of maintenance even on a change of circum-
stances in the future.

JUDGMENT:—

In this case the plaintiff is the widow of the deceased brother of the first defendant's father and she brought this suit for maintenance and obtained a decree. The defendants now appeal.

When the plaintiff brought her suit originally she ignored the existence of certain documents executed in 1913, Exhibits II and IV, whereby her right to maintenance was fixed at Rs. 75 per annum but after the written statement was filed she amended her plaint and alleged that these documents were not binding on her and that she was entitled to maintenance at a higher rate. The Subordinate Judge found that the documents of 1913 were not obtained by undue influence and that the plaintiff had executed her counterpart with full knowledge of its contents and effect; but he held that the stipulation in that document that she would not claim any higher rate of maintenance in the future was not binding on her apparently because the first defendant's father had not similarly undertaken that he would never claim a right to reduce the rate of her maintenance. On this ground he held that the plaintiff was not bound by her agreement.

The argument advanced by Mr. Ramdoss on behalf of the respondent is that in no circumstances can a Hindu widow enter into a valid agreement agreeing to relinquish her right to claim enhanced maintenance in future;

(1) (1899) I.L.R., 22 Mad., 175.

(2) (1915) 29 M.L.J., 87.

MOHIESWARA
RAO
v.
DURGAMBA.

but we have been referred by the learned vakil for the appellant to cases of this Court in which the right of a widow to relinquish her right to enhanced maintenance in the future has been recognized, and in two unreported cases *Venkamma v. Kristayya*(1) *Narasimha Rao v. Ratnamma*(2), it has been definitely held that an agreement by a widow not to claim enhanced maintenance is a binding agreement and must be enforced. The case in *Subramanian Patter v. Vembammal*(3) is not a direct authority, because in that case there was only an agreement to receive maintenance at a certain rate for life and it was there held that that did not amount to a release of the widow's right to increased maintenance in the future; but it is clear from the judgment that the learned Judges recognized the possibility of a widow releasing her right, such a release being binding upon her. As against this Mr. Ramdoss has referred us to several cases, not one of which is exactly in point, but which go to show that an agreement or a decree for maintenance at a specific rate is always subject to alteration in the future if the circumstances of the family necessitate such a change—vide *Gopikabai v. Dattatraya*(4), *Rajah Venkatappa Nayanam Varu v. Raja Thimma Nayanam Varu*(5) and *Bangaru Ammal v. Vijayamachi Reddiar*(6). They undoubtedly recognize the fact that an agreement to receive maintenance at a particular rate is not binding for all time; but none of them is authority for holding that, when the agreement goes further and binds the widow not to claim a higher rate even in changed circumstances, it is not binding on her. The cases we have already referred to, cited by the appellant, are authority to the contrary and we entirely

(1) Appeal No. 12 of 1920 (unreported).

(2) A.A.O. No. 316 of 1918 (unreported). (3) (1904) 14 M.L.J., 339.

(4) (1900) I.L.R., 24 Bom., 386. (5) (1914) 27 M.L.J., 656.

(6) (1899) I.L.R., 22 Mad., 175.

MOHIESWARA
RAO
v.
DURGAMBA.

agree with the views therein expressed. In that view, these documents Exhibits II and IV are binding on the plaintiff and she is not entitled to any higher maintenance.

It was then sought to support the decree of the lower Court on the ground that the finding, that Exhibits II and IV were executed with the plaintiff's knowledge of their contents and effect, was wrong. The argument put forward here was that the plaintiff being a woman had not had the opportunity of extraneous advice and that she had been induced by her brother-in-law, the first defendant's father, to execute these deeds. In the first place, that was not her case in the plaint where she alleged that she was deceived into putting her signature to some documents of the contents of which she had no idea and in her evidence she also stated that it was only after the written statement in this suit was filed that she understood that the maintenance deed was in existence. In the evidence as put forward the only thing that appears, even if we believe the witnesses, is that neither the plaintiff's father nor her brother were present when the maintenance deed was executed; but it is admitted that one Virabhadra Ayya, who is closely connected with the plaintiff's uncle and manages his estate, not only attested the document but identified the plaintiff at the Registration office. On this evidence we think that the Subordinate Judge's conclusion is perfectly right.

It is then urged for the respondent that she ought to be given a right of residence because that was not expressly released in the documents executed by her and it is contended that the right of residence is a separate right from that of maintenance. Without our deciding that point, however, the first defendant has agreed that the plaintiff should be allowed a room which is to be built on a site adjoining the family house in Nandigama or her residence. Therefore while allowing the appeal

MOHESWARA
RAO
v.
DURGAMBA.

and setting aside the decree of the lower Court, we give a direction that the plaintiff be given one room to be built as above.

The respondent will pay the appellants' costs throughout.

N.R.

APPELLATE CIVIL.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Coutts Trotter and Mr. Justice Ramesam.*

1923,
October 24.

SATTAYYA PADAYACHI AND SIX OTHERS (APPELLANTS
AND DEFENDANTS NOS. 1 AND 3 TO 5 AND 7 TO 9),
APPELLANTS,

v.

SOUNDARATHACHI (RESPONDENT, PLAINTIFF),
RESPONDENT.*

*Order 4, rule 1, Civil Procedure Code (V of 1908)—Plaint presented
on last day of limitation to Judge at Club after office hours—
Jurisdiction of Judge to receive.*

On the last day of limitation and after the Judge had risen from Court for the day, a plaint was presented to him at 7-30 p.m. at his Club which he accepted by cancelling the stamp and initialling and dating it;

Held that the Judge had jurisdiction to constitute himself as the officer to receive plaints, that he could receive them at any time and place and that the suit was properly instituted within the meaning of Order 4, rule 1, Civil Procedure Code. *Thakur Din Ram v. Hari Das* (1912) I.L.R., 34 All., 482 (F.B.) followed.

APPEAL under clause 15 of the Letters Patent against the judgment of Mr. Justice VENKATASUBBA RAO in Appeal

* Letters Patent Appeal No. 9 of 1923.

SATTAYYA
PADAYACHI
v.
SOUNDARATHACHI.

Against Order No. 226 of 1922 preferred against the order of the District Court of East Tanjore at Negapatam in Appeal Suit No. 1 of 1922 preferred against the decree in Original Suit No. 11 of 1921 on the file of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram.

In this case a plaint was presented by a vakil on the last day of limitation to the Subordinate Judge of Mayavaram after the Judge had risen from Court for the day, at 7-30 p.m. at his Club. The Judge received the plaint, cancelled the stamp, initialled it and also put the date of presentation. Upholding the defendant's objection that the suit was not properly instituted, the successor of the Subordinate Judge rejected the plaint and dismissed the suit. On appeal the District Judge held that the suit was properly instituted and reversing the decree, remanded the suit for disposal on the merits.

On appeal to the High Court, by the defendant, OLD-FIELD, J., held that the suit was not properly instituted, while VENKATASUBBA RAO, J., held that it was. Thereupon the defendants preferred this appeal under clause 15 of the Letters Patent.

K. Bashyam Ayyangar (with *K. Narasimha Ayyangar*) for appellants.—The suit was not properly instituted. The Judge when he received the plaint at the Club was not sitting as a Court nor was he the officer constituted to receive plaints within the wording of Order 4, rule 1, Civil Procedure Code. There is nothing to show that the Judge accepted it as a proper presentation.

[Court.—What is the meaning of the Judge cancelling the stamp, and putting his initials and dating it?]

That simply proves the fact of presentation. Vide observations in *Venkatesa Aiyangar v. Kamalammal*(1)

SATTAYYA
PADAYACHI
v.
SOUNDA-
RATHACHI.

which are in my favour. The facts of *Thakur Din Ram v. Hari Das*(1) are different from the facts of this case.

S. Ramaswami Ayyar for *T. V. Muthukrishna Ayyar* for respondent was not called upon.

SCHWABE,
C.J.

SCHWABE, C.J.—This is an appeal under the Letters Patent, *OLDFIELD AND VENKATASUBBA RAO, JJ.*, having differed in Appeal Against Order No. 226 of 1922.

The point is a very short one. The Judge of a Court in the mufassal, having risen for the day, went to his Club. At his Club he was approached by a vakil who asked him to receive a plaint, it being the last day for the expiration of the period of limitation. The learned Judge accepted the plaint and cancelled the stamp on it by writing upon it the words “presented to me by” giving the name of the vakil “at 7-30 p.m.” and signed and dated it. It is argued that nevertheless the suit is barred, because it has not been instituted within the period of limitation. Section 3 of the Limitation Act runs thus:—

“Subject to the provisions contained in sections 4 to 25 (inclusive) every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by the first schedule, shall be dismissed.”

It is argued that the suit was not instituted on that day. Now turning to the Code of Civil Procedure, Order IV, rule 1 provides that

“Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf”.

The Judge of the Court could appoint himself or any one else as the officer to whom a particular plaint was to be presented. There is nothing in the rule to show that the presentation must be within office hours or must be to the officer appointed at the Court or at any

particular place and I see no reason at all why, if a Judge so chooses, he should not constitute himself the officer to receive the particular plaint at any place that he chooses. It is a matter which is not without authority, for precisely the same circumstances arose in *Thakur Din Ram v. Hari Das*(1). In that case the memorandum of appeal was presented to the District Judge at his private residence after office hours and he accepted it taking the precaution to state that it would be admitted subject to his having got the power to do so. The Full Bench of Allahabad held that he had the power. The Division Bench here differs, *OLDFIELD, J.*, stating that the ruling in *Thakur Din Ram v. Hari Das*(1) had no application to Madras, because, although in Allahabad it might be the custom for Judges to be approached outside courts, in his experience it has not been so in Madras. *VENKATASUBBA RAO, J.*, on the other hand gave instances of the numerous kinds of applications to his knowledge that had been made to Judges in Madras when away from the Court and outside ordinary office hours.

I agree with the Full Bench decision in *Thakur Din Ram v. Hari Das*(1) and I see no reason at all to say that the same principle should not be applied in Madras. The appeal will be dismissed with costs.

COUTTS TROTTER, J.—I am of the same opinion. I think that what pressed *OLDFIELD, J.*, was the idea that, if you state that a Judge may receive plaints in this way out of office hours, you are committed to the further proposition that he must. With great respect to the learned Judge, I think that that is a fallacy. I think that it is in the discretion of the Judge to act as he did in this case, or refuse to do so; and, if the thing became a nuisance, I have no doubt that Judges would refuse to

SATTAYYA
PADAYACHI
v.
SOUNDA
RATHACHI.
—
SCHWABE,
C.J.

COUTTS
TROTTER, J.

SATTAYYA
PADAYACHI
v.
SOUNDARATHACHI.

oblige litigants by taking documents in this way. I should like it to be understood that, so far as I am personally concerned, any such application would be received by me with great disfavour.

RAMESAM, J. RAMESAM, J.—I agree with the judgments just delivered.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Waller.

1928,
November 16.

SONACHALAM PILLAI AND NINE OTHERS (APPELLANTS AND PETITIONERS), APPELLANTS,

v.

KUMARAVELU CHETTIAR AND SIX OTHERS (RESPONDENTS)
RESPONDENTS.*

Clause 15 of the Letters Patent—Decree of a Mufassal Court declaring plaintiffs' right and restraining the defendants by an injunction—Appeal to High Court—Single Judge's refusal to stay execution—Appeal against refusal, maintainability of.

An order of a single Judge of the High Court refusing to stay execution of a decree of a Mufassal Court pending an appeal therefrom to the High Court is a "judgment" within the meaning of clause 15 of the Letters Patent and an appeal therefrom is maintainable under the clause. *Tuljaram Row v. Alagappa Chettiar* (1912) I.L.R., 35 Mad., 1 (F.B.), followed.

Held further that the fact that, in addition to the grant of a perpetual injunction against the defendants, the decree granted also a declaration in favour of the plaintiffs is no ground for refusing to stay the execution of the injunction.

Though in refusing to stay execution the Judge exercised a discretion, interference in appeal with the order is justifiable when the refusal is based upon a wrong view of the law that no stay of injunction could be granted in cases where there is also a declaration.

* Letters Patent Appeal No. 20 of 1923.

APPEAL under clause 15 of the Letters Patent against the Order, dated 17th October 1923, of Mr. Justice WALLACE in Civil Miscellaneous Petition No. 1963 of 1923, in Appeal No. 232 of 1923 preferred to the High Court against the decree of the Subordinate Judge of Tuticorin in Original Suit No. 2 of 1920.

The facts are given in the Judgment.

Advocate-General (C. Madhavan Nayar) with T. R. Venkatrama Sastri, T. Nallivasam Pillai and K. S. Sankara Ayyar for (petitioners) appellants.

T. R. Ramachandra Ayyar with T. L. Venkatarama Ayyar and V. Sambandham Chetti for respondents.

ORDER.

KRISHNAN, J.—This is an appeal under clause 15 of the Letters Patent against the Order of WALLACE, J., sitting as a single Judge in the Admission Court, refusing to stay execution of the decree in O.S. No. 2 of 1920 on the file of the Subordinate Judge's Court of Tuticorin, pending disposal of appeal No. 232 of 1923 which has been filed against that decree and which has been admitted and is now pending in this Court. The suit was brought by certain Vaniyars of Tiruchendur in the Tinnevely district for a declaration that they were entitled to enter the well-known temple there and go up to the figure of the Nandi in front of the inner shrine, and for an injunction to restrain the trustees and others from preventing them from doing so. The suit was decreed by the Subordinate Judge in their favour, and against that decree appeal No. 232 of 1923 has, as already stated, been filed in this Court by the trustees and others.

An application was made to WALLACE, J., for stay of execution of the decree pending the disposal of the

SONACHALAM
PILLAI
v.
KUMARAVELU
CHETTIAR.

SONACHALAM
PILLAI
v.
KUMARA-
VELU
CHETTIAR.
—
KRISHNAN, J.

appeal and, that having been refused, this present appeal is filed against that order.

A preliminary objection is taken to the appeal on the ground that no appeal lies under clause 15 of the Letters Patent against an order refusing to stay the execution of a decree. The decision of this question turns on the meaning to be given to the word "judgment" in clause 15 of the Letters Patent. There is nothing in the Letters Patent itself to enable one to say what the exact meaning of the term "judgment" is and what orders would be covered by that term. The word "judgment" is defined in section 2 of the Code of Civil Procedure as meaning "the statement given by the Judge of the grounds of a decree or order" passed by him. As this definition is intended for the construction of the word "judgment" as used in the Code of Civil Procedure only, it obviously cannot be applied to the word as used in the Letters Patent. The meaning of the word "judgment" in the Letters Patent has been, however, the subject matter of consideration in several reported cases. The earliest one which has been brought to our notice is the case of *Desouza v. Coles*(1), where at page 387, BITTLESTON, J., laid down that

"It must be held to have the more general meaning of any decision or determination affecting the rights or the interest of any suitor or applicant."

It was again defined by COUCH, C.J., in the leading judgment on the point in Calcutta in *The Justices of the Peace for Calcutta v. The Oriental Gas Company*(2), as being

"a decision, whether final, or preliminary, or interlocutory which affects the merits of the question between the parties by determining some right or liability,"

(1) (1868) 3 M.H.C.B., 384.

(2) (1872) 8 B.L.B., 433.

and this definition was approved of by MARKBY, J. Since then, the meaning of the term has again been considered by a Full Bench of the Madras High Court in *Tuljaram Row v. Alagappa Chettiar*(1). There, the then learned Chief Justice, Sir ARNOLD WHITE, was of opinion that the definition given by BITTLESTON, J., went too far and that the one given by the Calcutta High Court was too narrow, and he himself laid down the test to be applied to decide whether any particular order amounted to a judgment or not within the meaning of the Letters Patent, as follows, at page 7 :—

"The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause."

And he added

"An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

Following this latter part of the definition as to what is not a judgment, he held in the particular case before him, which was one of an appeal against an order refusing to frame an issue, that no appeal lay, and that view was adopted by the Full Bench. KRISHNASWAMI AYYAR, J., who sat with the learned Chief Justice, also agreed with the view taken by him as to the meaning of the word "judgment" and with the order proposed by him; AYLING, J., the third Judge in the Full Bench, merely contented himself by saying that he agreed that the answer to the question, referred for disposal, should be in the negative.

(1) (1912) I.L.B., 35 Mad., 1 (F.B.)

SONACHALAM
PILLAI
v.
KUMARA-
VELU
CHETTIAR.
—
KRISHNAN, J.

SONACHALAM
PILLAI
v.
KUMARA-
VELU
CHETTIAR.
—
KRISHNAN, J.

He did not discuss the question as to what amounted to a judgment at all. This ruling has been since accepted by this Court as correctly laying down the meaning of the word "judgment," and has been cited and followed in several subsequent decisions; see, for example, the cases in *Srinivasa Iyengar v. Ramasawmi Chettiar*(1), *Kulasekara Naicker v. Jagadambal Ammal*(2), *Kanayalal Bhoja v. Paramasukdoss*(3), and *Krishna Reddy v. Thanikachala Mudali*(4). It has been brought to our notice that the same view has been accepted and followed by the Lahore High Court in *Gokal Chand v. Sanwal Das*(5), which, it may be noted, was an appeal against a refusal to stay the execution of a decree, and also in *Ruldu Singh v. Sanwal Singh*(6), where the learned Chief Justice of the Lahore High Court has considered the authorities and has adopted the view of the Madras High Court as to the meaning of the word "judgment" in *Tuljaram Row v. Alagappa Chettiar*(7). The learned Chief Justice elaborately discussed all the cases on the point and, as his judgment has been followed, as stated above, by this High Court since then, I think it only right that we should adopt the same definition. In explaining his meaning, the learned Chief Justice has referred to a number of instances in which he thought an appeal would lie, and one of the instances he mentions in his judgment is an order refusing a stay of execution. He says at page 8

"I should be prepared to hold that an appeal lay from an order refusing a stay of execution"; and he has resiled from his view to the contrary in *Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada*

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| (1) (1915) 29 M.L.J., 12 (F.B.) | (2) (1919) I.L.R., 42 Mad., 352 (F.B.) |
| (3) (1922) 16 L.W., 608. | (4) (1923) 45 M.L.J., 153. |
| (5) (1920) I.L.R., 1 Lah., 348. | (6) (1922) I.L.R., 3 Lah., 188. |
| (7) (1912) I.L.R., 35 Mad., 1 (F.B.) | |

SONACHALAM
PILLAI
v.
KUMARA-
VELU
CHETTIAR.
—
KRISHNAN, J.

Nayadu(1), to which he was a party. No doubt, when the learned Chief Justice said that an appeal lay from an order refusing a stay of execution, in the Full Bench case, his observation was, in a sense, in the nature of an *obiter dictum*; nevertheless we are bound to follow it and we cannot treat the case *Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(1), as good law. The case *Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(1), as pointed out to us, has been followed in *Vairavan Chettiar v. Ramanathan Chettiar*(2) by another Bench of this Court, but in that case there is no discussion whatever on the point in issue as that case merely follows *Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(1), and if I am right in thinking that *Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(1), is no longer good law, *Vairavan Chettiar v. Ramanathan Chettiar*(2), cannot be accepted as good law.

On the respondents' side, besides the two cases, *Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(1), and *Vairavan Chettiar v. Ramanathan Chettiar*(2), above referred to, our attention was drawn to a number of unreported Letters Patent Appeals, namely, Nos. 24 of 1918, 15 of 1922, 38 of 1921 and 7 of 1923 and it was contended that it was the practice of this Court not to allow Letters Patent Appeals against orders such as the one before us. But all those cases, on a reference to them, will be found to be cases where stay of proceedings in the lower Court was refused; they did not deal with stay of execution at all. Those cases

(1) (1901) I.L.R., 24 Mad., 358.

(2) (1921) 14 L.W., 701.

SONACHALAM
PILLAI
v.
KUMARA-
VELU.
CHETTIAR.

KRISHNAN, J.

stand on a different footing altogether, for they fall under the second part of the definition of the Chief Justice quoted above, namely, that

“an adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent.”

In Letters Patent Appeal No. 7 of 1923, the appeal was against an order refusing an *interim* injunction. The learned Judges held an appeal lay. I have, therefore, come to the conclusion that the preliminary objection cannot stand and must be overruled, as an appeal lies under the Letters Patent against the order of a single Judge refusing stay of execution pending the disposal of an appeal or second appeal in this Court.

On the merits I quite recognize that the learned Judge of this Court having exercised his discretion in refusing to stay execution, we should not interfere with such exercise of discretion unless there are strong grounds for it. But in this particular case, unfortunately, the learned Judge seems to have been led to the passing of the order that he made, by his view that there being a declaration of the rights of the Vaniyars in the judgment of the lower Court, he could not interfere with the injunction which formed part of the decree. I am unable to adopt this view, for, if it is adopted, in all cases in which a consequential relief is granted along with the declaration, it would be impossible to stay execution. It seems to me that the issue of the injunction ordered by the lower Court in the decree could be stayed by itself, and, whatever rights the decree might have declared, it would not enable the parties to enter the temple and go to the place where they want to go to. I am, therefore, of opinion that the fact of there being a declaration is no bar to this Court staying the execution of the decree.

On the merits, I think that this is a case in which we should grant a stay with some modification of the order of the lower Court pending the disposal of the appeal here. On the one hand, the Vaniyars are anxious to enter the temple, see the deity and perform their worship, and it will be a great hardship to prevent them altogether from doing so, pending the appeal which may last for some time in this Court. On the other hand, there may be a good deal of truth in what the appellants say, viz., that, if the respondents are allowed to enter the temple and go up to the Nandi, the temple will be desecrated and they will have to perform the ceremony of purification at considerable expense, if they succeed in the appeal. I have, therefore, come to the conclusion that the respondents may be allowed to go up from the east to the *dhwajasthambham* in the temple just inside the *gopuram* wherefrom they may have a view of the idol and perform their religious worship there, but that they should not be allowed to go further pending the disposal of the appeal.

I would, therefore, order a modified stay of execution by directing the appellants not to prevent the respondents from going up to the *dhwajasthambham* at times of worship and also directing them to let the respondents have a view of the idol when such worship takes place. The order of the lower Court will be stayed with that reservation.

In the circumstances, I think the proper order as to costs is to direct each party to bear his own costs of the Letters Patent Appeal and of the petition for stay.

WALLER, J.—I agree that we should follow *Tuljaram Row v. Alagappa Chettiar*(1). Were the question still open to argument, I should myself be inclined to adopt the view of BITTLESTON, J., in *Desouza v. Coles*(2), that it is

SONACHALAM
PILLAI
v.
KUMARA-
VELU
CHETTIAR.
KRISHNAN, J.

WALLER, J.

(1) (1912) I.L.R., 35 Mad., 1. (F.B.) (2) (1868) 3 M.H.C.R., 384.

SONACHALAM
PILLAI
v.
KUMARA-
VELU
CHETTIAR.

WALLER, J.

"impossible to prescribe any limits to the right of appeal founded on the nature of the order or decree appealed against."

The word 'judgment' in section 15 of the Letters Patent includes decrees and orders. Judgment is defined in HALSBURY as

"any decision given by a Court on a question or questions at issue between the parties to a proceeding properly before the Court."

In the Civil Procedure Code an "order" is described as the formal expression of any decision of a Civil Court which is not a decree. This description is wide enough to cover all decisions of any kind *inter partes*, and so the Code has provided that only certain orders can be appealed against.

The word "judgment" as employed in section 15 of the Letters Patent is a very general term. The statute does not define it or limit its operation in any way. I venture to doubt whether we are entitled to define it or limit its operation by judicial interpretation. What has been achieved by that process is an *a priori* classification of interlocutory orders into interlocutory orders proper and interlocutory orders which amount to judgments. I think that all orders passed after contest *inter partes* are judgments within the meaning of section 15 of the Letters Patent and that, if it be desired to limit the right of appeal against certain orders, the proper method of achieving that end is by providing, as has been done in the Civil Procedure Code, that only certain orders can be appealed against.

I agree with my learned brother that the fact that part of the decree is declaratory is no bar to a stay of execution being granted. I understand that the parties are willing to accept a stay on the terms indicated. I therefore concur in the order of my learned brother.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Waller.

KONA THIMMA REDDI (PLAINTIFF—APPELLANT),
APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL

REPRESENTED BY THE COLLECTOR OF ANANTAPUR

(DEFENDANT—RESPONDENT), RESPONDENT.*

Madras Local Boards Act (V of 1884), sections 16 and 144—Rules made by Government under Section 144 (1)—Election of a person as member of Taluk Board—Election set aside by Government on the ground that such person is likely to bring the administration into contempt—Rule 33, clause (e)—Notice to person affected, whether necessary—Inquiry—Forum—Power of Government to make rules regarding forum and method of inquiry—Rules therefor, whether ultra vires—Order without notice, whether invalid—Natural Justice—Suit in a Civil Court, whether maintainable.

Sections 16 and 144 of the Madras Local Boards Act (V of 1884), empower the Government to make rules regarding the determination of the validity of elections, as well as rules prescribing the qualifications of a candidate for election; and the rules framed prescribing the forum and method of inquiry are not *ultra vires*, even though the rules were framed by the Government purporting to act only under section 144, subsection (1) of the Act.

Where power is given to make rules under an Act, the fact that the Government purports to act under one section of the Act rather than another is not a ground for holding the rules to be *ultra vires* in View of SPENCER, J., *Lakshminarasimha Somayagiyar v. Ramalingam Pillay*, (1920) 39 M.L.J., 319, followed.

The Local Boards being creations of a statute, and that statute having given power to the Government to frame rules for the purpose of working the Act, it is perfectly open to the Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the Act.

* Second Appeal No. 361 of 1921.

THIMMA
REDDI
v.
SECRETARY
OF STATE.

Under rules 33 and 35 framed by the Government under the Local Boards Act, so far as they relate to objections to an election as a member of a Taluk Board on the ground mentioned in clause (e) of the former rule, viz., that the person is likely to bring the administration into contempt or that his being a member is dangerous to the public peace or order, the Collector is bound to refer the matter for the decision of the Government, and no inquiry by the Government or notice to the person affected is contemplated.

SECOND APPEAL against the decree of G. G. SOMAYAJULU, District Judge of Anantapur, in Appeal Suit No. 63 of 1920, preferred against the decree of the District Munsif of Gooty in Original Suit No. 750 of 1916.

This suit was instituted by the plaintiff against the Secretary of State for India in Council for a declaration that the order of the Government cancelling the election of the plaintiff as a member of the Taluk Board of Gooty was *ultra vires* and void, and that the election subsequently held and the appointment of another person as the successful candidate in the fresh election were also invalid, for a mandatory injunction directing his name to be published in the *Fort St. George Gazette* as duly elected, for an injunction prohibiting or cancelling the publication of the name of the other person as validly elected, and for damages. The plaintiff alleged that he was duly elected, but that the unsuccessful candidate, one T. S., filed an objection petition against the election before the Collector and the Government passed an order cancelling the plaintiff's election and ordering a fresh election on the ground that the plaintiff's presence in the Taluk Board as a member would bring the Local Fund Administration into contempt. The plaintiff further alleged that no notice was given to him either by the Collector or the Government before the latter passed the order, that no inquiry was held and that the rules framed by the Government as to the forum and mode of inquiry under which the Government acted were *ultra vires*, and

THIMMA
REDDI
v.
SECRETARY
OF STATE.

that the procedure was invalid as opposed to principles of natural justice. He further contended that the ground for cancellation of his election was not well founded as he was a respectable man and he set out his character and qualifications. The defendant pleaded that the rules in question were not *ultra vires*, that the Governor in Council was not bound to give notice to the plaintiff, that the Government made such inquiry as it thought fit into the truth or otherwise of the allegations in the objection petition, and came to the conclusion that the plaintiff was likely to bring the Local Fund Administration into contempt, that the discretion vested in the Government was absolute and that the plaintiff had no right to question the same in any Civil Court. The District Munsif dismissed the suit, and his decree was confirmed on appeal by the District Judge. The plaintiff preferred this Second Appeal.

T. Richmond for appellant.

C. V. Anantakrishna Ayyar (the Government Pleader) for respondent.

JUDGMENT.

This appeal arises out of a suit filed by the plaintiff against the Secretary of State for India in Council for a declaration that the Government Order cancelling his election to the Gooty Taluk Board is *ultra vires* and illegal and does not affect the validity of his election, for a mandatory injunction directing his name to be published in the *Fort St. George Gazette* as duly elected, for an injunction prohibiting the Government from publishing the name of his rival candidate Subba Rao and for the recovery of Rs. 100 as damages. No evidence has been adduced in the suit. The election in question was held on the 13th of November 1915. It is not disputed that the plaintiff obtained the majority of votes, that the

THIMMA
REDDI
v.
SECRETARY
OF STATE.

defeated candidate Subba Rao put in an objection petition and that the Government set aside the election of the plaintiff and ordered a fresh election on the ground that the plaintiff's presence in the Taluk Board as a member would bring the Local Fund Administration into contempt. This order of the Government is questioned by the plaintiff on two grounds. The first is that the rules under which the Government purported to act are *ultra vires* and that consequently he is not affected by the order, and secondly that, even if the rules are *intra vires*, there was no inquiry by the Government into the matter, that he was not given an opportunity of showing cause against the allegations made by the rival candidate and that on the merits it could not be said that his presence in the Taluk Board could have the undesirable consequences referred to by the Government as a ground for invalidating his election. He sets out his qualifications in the plaint.

The defence by the Secretary of State for India in Council was that the rules framed by the Government were valid, that under the rules the Government was not bound to give any notice to the plaintiff, that the discretion vested in the Government was absolute and unquestionable by a Civil Court and that the Government having made such inquiry as it thought fit and having come to the conclusion that it came, it was not open to the plaintiff to question the validity of its act. The Government denies that the plaintiff is entitled to any damages.

Two points were argued by Mr. Richmond before us, in Second Appeal. The first was that the rules were *ultra vires* and the second was that the whole proceedings were vitiated by the fact that no notice was given to the plaintiff who consequently had no opportunity to show cause against the objections raised by his rival candidate,

a violation of the elementary principles of natural justice, which, without more, would invalidate the proceedings.

As regards the first point, section 16 of the Local Boards Act runs as follows:—

“The other members of the Taluk Board may be (a) either wholly appointed by the Governor in Council, or (b) partly so appointed and partly appointed by election by the members of the panchayats in the taluk from among their own number or by the tax-payers and inhabitants of the taluk, subject to such rules and conditions as may from time to time be prescribed by the Governor in Council.”

Section 144 of the Act provides that “the Governor in Council may, from time to time, frame forms for any proceedings for which he considers that a form should be provided, and make rules consistent with this Act (1) as to the qualifications of electors and of candidates for appointment by election and as to the method and time of election of elective presidents, vice-presidents and members of local boards; (1-a) as to the qualifications of electors and of candidates for appointment as members of a panchayat by election and the method and time of appointment of members of a panchayat by election in regard to the following matters.” Then follow a number of matters specified in sub-clauses (a) to (f), (f) being “any other matters regarding the system of representation and of election.” The Government have framed rules which purport to have been made under sub-section (1) of section 144 of the Local Boards Act and directed that the rules should come into operation on the 1st of January 1916. Rule 33 provides that the validity of any election may be questioned by a petition put in before the Collector of the District or the Divisional Officer within fifteen days after the result of the election has been declared, by any candidate who has not withdrawn or by not less than ten persons

THIMMA
REDDI
v.
SECRETARY
OF STATE.

THIMMA
REDDI
v.
SECRETARY
OF STATE.

who have voted at the election, on any of the grounds mentioned therein. Ground (e) which is the only material ground necessary to be considered for purposes of this appeal runs as follows :—

“That the person whose election is questioned is likely to bring the Local Fund Administration into contempt or that his being a member of the Taluk Board is dangerous to the public peace or order.”

It provides that the Governor in Council or the Collector may act *suo motu* and take action on any facts affecting the validity of an election which may be brought to his notice whether by a petition by a rival candidate or otherwise. Rule 35 which is material for the consideration of the objection raised by Mr. Richmond runs as follows :—

“Objections to the validity of an election on the ground specified in rule 33 (e) (i.e., that the person whose election is questioned is likely to bring the Local Fund Administration into contempt or that his being a member of the Taluk Board is dangerous to the public peace or order) and objections on the ground of disqualification under rule 9 (d) and all cases which involve an interpretation of the rules shall be referred by the Collector for the decision of the Government. In all other cases of objection under rule 33, an inquiry shall be held by the Collector or at his discretion by the Divisional Officer, at which the contending parties shall have an opportunity of appearing in person or by representative, and orders shall be passed on the result of the inquiry by the Collector who may, at his discretion, dismiss the petition or, if he finds the election invalid, either order a new election or declare that the candidate who obtained the next highest number of votes to the candidate or candidates disqualified or found not to have been validly elected, has been duly elected. Provided that before declaring such next candidate to have been duly elected, the Collector shall notify his intention to do so to the other candidates and the petitioners who have impugned the election and shall consider any objections which may be lodged by them in writing within ten days

from the date of such notice. No appeal shall lie against the orders of the Collector passed under this rule.”

It is therefore clear from the rules that so far as the objection that the person elected is likely to bring the Local Fund Administration into contempt is concerned, no notice to the person affected and no inquiry are contemplated by the rules, the reason very probably being that an inquiry into the nature of the ground referred to in clause (e) is not desirable in the public interests. It is contended by Mr. Richmond that the right of a person who is duly elected to a public office is a right which he is entitled to vindicate in a Civil Court and that it is not open to the Government, by rules framed under the Act, to create a forum and thus deprive the person elected of his ordinary legal remedies. It is also contended that as the rules purport to be framed under sub-section (1) of section 144 of the Local Boards Act, they could only embrace the subject specified in that clause as the matters to be dealt with by the rules and as none of those matters relate to inquiries into disputed elections, they cannot be relied on by the Government for the purpose now in question. We are unable to agree with either of these contentions. The Local Boards being creations of statute and that statute having given power to the Government to frame rules for the purpose of working the Act, we think it is perfectly open to the Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the provisions of the Act. The Government in passing the Local Boards Act has not taken away any rights which had previously vested in the public and it is difficult to see how it can be said that restrictions could not be imposed by the Government acting on the rule-making power conferred by an enactment which creates new rights, so long as the rules are not repugnant to

THIMMA
REDDI
v.
SECRETARY
OF STATE.

THIMMA
REDDI
v.
SECRETARY
OF STATE.

any of the provisions of the Act, nor do we think that, if power is given by the Act to make rules, the fact that the Government purports to make rules under one section rather than another would be a ground for holding that the rules are *ultra vires*.

In *Lakshminarasimha Somayagiyar v. Ramalingam Pillay* (1) the question arose as to whether under the Local Boards Act the Governor in Council has power to make rules ousting the jurisdiction of Civil Courts as to objections to the validity of elections. SADASIVA AYYAR, J., was inclined to the view that the Governor in Council had no power to make rules and that the rules framed by the Government were invalid. The learned Judge was of opinion that section 16 was too vague and that, as the rules were not made under section 16, but only under section 144 (1) which merely deals with the power to make rules as to the qualifications of the electors and of candidates for appointment by election and as to the method and time of election of elective presidents, vice-presidents and members of local boards, the power constituting a special tribunal to inquire into the validity of elections was not conferred by section 144 (1) under which the present rules purport to be framed. SPENCER, J., was of opinion that the rules were valid and that sections 16 and 144 gave the Government power to frame rules relating to the adjudication of disputes as regards the validity of elections. After referring to sections 16 and 144, the learned Judge observes as follows :—

“ But in any case I think that the words ‘ any other matters regarding the system of representation and of election ’ illustrate what is meant in clause (1) by the words ‘ method of election ’ of members of Local Boards. I think these words are wide

(1) (1920) 39 M.L.J., 319.

enough to cover the power of making rules to provide for the whole scheme of election and for the conduct of inquiries into complaints and objections to elections held or about to be held as well as to objections to the list of voters.”

We agree with the view taken by SPENCER, J.

The question as to the validity of the rules framed under the District Municipalities Act arose for determination in more than one case. The District Municipalities Act contains provisions analogous to those in the Local Boards Act with regard to the matter in question. Sub-clauses 1 to 6 of section 250 (1) (a) of the District Municipalities Act correspond to sub-clauses (a) to (f) of section 144 (1-a) of the Local Boards Act and give power to the Government to make rules with reference to the matters specified in that section. Section 10 of the District Municipalities Act also contemplates the power of the Government to make rules. Rules were framed under the powers conferred by the District Municipalities Act. Rules 34 and 35 provide for cases of disputes as regards the validity of elections, and rule 35 (d) which is one of the grounds for setting aside an election, is that the person is likely to bring the Municipal administration into contempt or that his being a municipal Councillor is dangerous to the public peace or order. Rule 36 provides that in cases falling under rule 35 (d) orders should be passed by the Government and not by the Collector. In *Secretary of State for India v. Appa Rao* (1) the question arose as to the power of Government to frame rules under the District Municipalities Act. KRISHNAN, J., was, of opinion that the fact that the Government purported to frame rules under one sub-clause which did not refer to the matter rather than another which did so refer would not make the rules *ultra vires* and observed as follows :—

THIMMA
REDDI
v.
SECRETARY
OF STATE.

(1) (1923) 45 M.L.J., 156.

"Before a rule framed by a rule-making authority is declared *ultra vires*, the Court must be satisfied not only that it had no power to act under the power under which it purported to act, but also that it had no power at all under any law to so act. If power can be found elsewhere from the section quoted, the rules will be referred to that power and held not to be *ultra vires*."

The learned Judge referred to *Rajam Chetti v. Seshayya* (1), *Queen-Empress v. Ganga Ram* (2) and Halsbury, Vol. 27, page 146. In *Secretary of State for India v. Venkatesalu Naidu* (3), the question arose as to the validity of the rules framed under section 250 (1) of the District Municipalities Act 4 of 1884 as amended by Act 3 of 1897. Rules were framed under section 250 as regards the power of the Government to veto the election of a person if, before his election, he is convicted of an offence which, in the opinion of the Governor in Council, disqualifies him from being a councillor. The plaintiff who was the respondent in the appeal was elected as a Municipal Councillor but the Government set aside the election on the ground that he was guilty of such an offence as unfits him to be a Municipal Councillor. The District Judge found that some of the rules framed under the Act were *ultra vires*. Referring to the contention that section 250 (1) (a) does not provide for a rule of the nature of rule 35 (1) (b) framed under it, MILLER, J., observed as follows:—

"I am not prepared to decide that that is so, for it is not clear to me that section 250, clause (1) (a) (i), (vi) or (vii) would not cover the case. But even if it be so, the rule may be attributed to the power given by section 10 to prescribe conditions; and if the power is there, the rule is good though it purports to have been made under a different section."

The learned Judge held that the rule was not *ultra vires* and illegal. WALLIS, J., was also of the same

opinion. We think that sections 16 and 144 read together give power to the Government to make rules when an election is contested and also to frame rules declaring the qualifications required of a person before he is validly elected and that the rules framed by the Government are not *ultra vires*.

Turning to the next question that the appellant was not given an opportunity to be heard before the Government passed orders, it is clear from the rules we have already referred to, that no inquiry is contemplated. Rule 35 states that objections to the validity of an election on the ground specified in rule 33 (e), and objections on the ground of disqualification under rule 9 (d) and all cases which involve an interpretation of the rules shall be referred by the Collector for the decision of the Government which shall be final, and that in all other cases of objection under rule 33 an inquiry shall be held by the Collector, etc. It is clear therefore that no inquiry is necessary. If the rule is valid, it seems to us that the Government has power to declare what shall be the nature and scope of the inquiry. Reference was made to the *Secretary of State for India v. Venkatesalu Naidu* (1), already referred to, where it was held that an inquiry was necessary before an election can be invalidated under rules 35 and 36 framed under the District Municipalities Act. But rule 35 requires an inquiry and the decision therefore cannot have any application to cases where no inquiry is required. We may point out that the Local Boards Act provides for inquiries whenever the Government thinks it necessary that the person affected ought to have notice, for example, section 24, clause (3) provides for the removal of a president, vice-president or member of a taluk board

(1) (1895) I.L.R., 18 Mad., 236 (F.B.).

(2) (1894) I.L.R., 16 All., 136 (F.B.). (3) (1907) I.L.R., 30 Mad., 113

(1) (1907) I.L.R., 30 Mad., 113.

THIMMA
REDDI
v.
SECRETARY
OF STATE.

whose continuance in office is, in the opinion of the Government, dangerous to public peace or order or likely to bring the administration of the local board into contempt. But clause (2) states that when action is proposed to be taken in that matter no order shall be passed without giving an opportunity of explanation to the president, vice-president or member concerned.

We are therefore of opinion that both the objections taken fail. It is not necessary to consider the further question whether an action for damages would lie against the Secretary of State for India assuming that the rules framed by the Government were *ultra vires*. In the result the second appeal fails and is dismissed with costs.

K. R.

PRIVY COUNCIL.*

NAINAPILLAI MARAKAYAR, SINCE DECEASED, AND
OTHERS (DEFENDANTS), APPELLANTS,

v.

RAMANATHAN CHETTIAR AND OTHERS (PLAINTIFFS),
RESPONDENTS
(AND CONNECTED APPEAL).

[On Appeal from the High Court of Judicature
at Madras.]

Landlord and tenant—Right of occupancy—Onus of proof—Inam grant to temple—Kudivaram—Absence of presumption that permanent right granted by temple—Prescription—Madras Estates Land Act (Madras Act I of 1908), sec. 3 (2) (d).

The trustees of a Hindu temple, after giving notice to quit, sued to eject two tenants of lands in a village, the property of the temple. The defendants claimed that the village was an estate within the meaning of Madras Act I of 1908, and that they had a permanent right of occupancy both under that Act and apart from it. The village had been granted to the temple in 1723 by the Raja of Tanjore at a favourable assessment by a *sanad* confirming an earlier inam grant, and since the grant the land had been cultivated for the benefit of the temple by its tenants or servants. It was not shown that in 1723 there were any tenants having a permanent right of occupancy, and it appeared that as to part of the village the temple had both the *kudivaram* and *melvaram*. In 1831 the tenants, describing themselves as "kudi-mirasdars," had given a joint *muchilika* agreeing to cultivate and to pay to the temple rent described therein as "swamibhogam." In a *paimash* account of 1829 the tenants were referred to as "ullur parakudis" and "ulavadai miras."

Held (1) that the onus was upon the defendants to prove that they had a permanent right of occupancy. *Secretary of State for India in Council v. Luchmeswar Singh*, (1889) I.L.R., 16 Cal., 223 (P.C.); 16 I.A., 16, and *Seturatnam Aiyer v. Venkatachela Goundan*, (1920) I.L.R., 43 Mad., 567 (P.C.); 47 I.A., 76, followed;

* Present:—Lord SHAW, Lord CARSON, Sir JOHN EDGE, Mr. AMER ALI and Sir LAWRENCE JENKINS.

NAINAPILLAI
MARAKATAYAR
v.
RAMANATHAN
CHETTIAR.

(2) that, having regard to the documents and the facts, the grant to the temple included both the *kudivaram* and the *melvaram* of the whole village, and that therefore it was not an "estate" within the definition in section 3 of the Madras Act I of 1908;

(3) that the defendants had not permanent rights of occupancy. As no custom or grant conferring the right had been proved, it did not appear how the right could have been obtained save by a lost grant, which was not suggested. A grant of a permanent right by the shebait or trustees would have been in breach of duty, and therefore could not be presumed. *Satya Sri v. Kartik*, (1912) 15 C.L.J., 227, approved.

The defendants being tenants could not obtain the right by prescription: *Madhavrao Waman v. Raghunath Venkatesh*, (1923) I.L.R., 47 Bom., 798 (P.C.); 50 I.A., 255, followed.

CONSOLIDATED APPEAL (No. 46 of 1922) by special leave, from two decrees (December 22, 1916) of the High Court, affirming two decrees (April 24, 1914) of the Subordinate Judge of Tanjore.

The respondents, who were trustees of a Hindu temple in Tanjore, brought two suits to eject, after notice, the appellants, tenants in the inam village of Mangal, which formed part of the endowed property of the temple. The defences of the appellants were on two grounds. First, that the village was an "estate" within the meaning of section 3 (2) (d) of the Madras Estates Land Act (Madras Act I of 1908), and, accordingly, that under that Act they had a permanent right of occupancy, and the jurisdiction of the Civil Court was excluded. Secondly, that they had that right apart from the Act.

The decision of the issues relating to both defences depended to a great extent upon documents in which occurred vernacular terms the meaning of which, as used in Tanjore, was obscure. The facts and the terms of the sanad of 1723, by which the Mahratta King of Tanjore, in confirmation of an earlier inam grant, had granted the village to the temple at a favourable assessment (*rokkaguthakai*) appear from the judgment of the

Judicial Committee, as also the terms of an official memorandum of 1724 with regard to the grant, and of a register of *rokkaguthakai* lands made in 1809. In addition to those documents there was a *muchilika* of 1831 (referred to in the judgment), which purported to be executed "by us, the undersigned kudi mirasidars of the *rokkaguthakai* village of Mangal belonging to" the temple. By it the signatories agreed to cultivate "from next fasli 1241 on lease," and to make payments, described as "swamibhogam," to the temple at certain rates, so long as the land should continue in their possession. An agreement between all the villagers signed in fasli 1241 stated that "having made ourselves responsible to sirkar for the guthakai of our village . . . we shall impose upon ourselves *vari* according to the current fasli 1241"; they were to sell the *melvaram* of other lands which were being cultivated by *parakudis* and out of the proceeds and "the collections made by imposition of *vari* under this karai arrangement" pay the *vari* to the sirkar; . . . "we shall act as stated above for fasli 1241, and for fasli 1242 we shall make *aruthikarai* (karai with definite shares) of the entire lands."

There was also a *paimash* account of fasli 1238 (1829) in which the tenants were referred to as "ullur parakudis" and "ulavadai miras"; by their signatures, some of the tenants described themselves as "ulavadai kudi-miras," some as "kudi-miras."

The Subordinate Judge of Tanjore who tried the case found that the temple owned both the *melvaram* and the *kudivaram* interest in the village, and that accordingly it was not an "estate" within the meaning of Madras Act I of 1908. After considering at length the authorities and the facts of the case, he found also that the defendants had not acquired permanent rights of

NAINAPILLAI
MARAKATAYAR
v.
RAMANATHAN
CHETTIAR.

NAINAPILLAI
MARAKATAYAR
v.
RAMANATHAN
OHETTIAR.

occupancy by prescription, and that the suits were not barred by limitation. Decrees for ejectment, accordingly, were made.

On appeal to the High Court (SADASIVA AYYAR and NAPIER, JJ.) the decrees were affirmed.

SADASIVA AYYAR, J., with whose judgment NAPIER, J., agreed, stated that without going into the question of the burden of proof, he was clearly satisfied that the evidence supported the contention of the plaintiffs. In the course of his judgment, the learned Judge said that the words "parakudi" or "asalur parakudi" and "kasa-vargam" implied no permanent connexion with the village; "ullur parakudis" might have permanent residential rights in the houses where they lived, and in respect of them they might be called "kudi mirasidars." He stated that he did not think that much importance could be attached to the varying descriptions, "ullur parakudi," "ulavadai miras" and occasionally "kudi mirasi," which the tenants adopted in the *paimash* accounts. Referring to the *muchilika* of 1831 he said that although the tenants described themselves in it as "kudi mirasidars," only one had so signed, and in the *arzi* sent by the Tahsildar to the Collector with the document, they were referred to merely as "kudis" or cultivators. With regard to the word "swamibhogam," which was applied in the *muchilika* (Exhibit A) and other documents to the payment to be made to the temple, he said:

"The word 'swamibhogam' has got a settled meaning in Tanjore and the Chingleput district. Wilson, in his Glossary says, 'swamibhogam in the Tamil country means the share of the produce or rent which is paid to the *mirasidar* or hereditary proprietor by the tenant-cultivator holding the land in farm for a fixed period.' I think the use of the word *swamibhogam* in Exhibit A is almost conclusive as to the full proprietorship of both the *melvaram* and *kudivaram* rights in the temple."

The decrees for ejectment accordingly were affirmed.

Sir George Lowndes, K.C., and *Narasimham* for the appellants.—The evidence showed that the tenants had permanent rights of occupancy. Continuously since the *muchilika* of 1831 the tenants had been recognized as having permanent rights; they frequently made alienations of their interests without objection, which is inconsistent with their being merely tenants from year to year. The decision of the Board in *Siva-prakasa Pandara Sannadhi v. Veerama Reddi*(1) is conclusive in the appellants' favour. The defendants' predecessors are referred to in the *muchilika* of 1831 as "kudi mirasidars"; that term shows that they had permanent and hereditary rights; see Wilson's Glossary, pages 299, 324; *Srinivasa Chariar v. Eovalappa Mudaliar*(2). The agreement of 1831 shows that the land was cultivated on "karai" system, the temporary shares being then turned into "aruthikarai" or permanent holding. *Karaidars* are almost certainly *mirasidars* and persons with permanent rights; Baden Powell's Land System of British India, Volume 3, pages 115, 118; Tanjore District Manual, 1883, page 397. The High Court was mistaken in supposing that the term "swamibhogam" necessarily indicated that the temple had both rights: see Baden Powell, Volume 3, page 120. The fact that the temple had the *kudivaram* in part of the village does not show that they have that right in the whole. *Mayandi Ohettiayar v. Ohokkalingam Pillay*(3) is distinguishable. In that case although the tenants had described themselves in the documents as "ulavadai mirasidars" they had always been

NAINAPILLAI
MARAKATAYAR
v.
RAMANATHAN
OHETTIAR.

(1) (1922) I.L.R., 45 Mad., 586 (P.C.); 47 I.A., 286.

(2) (1922) I.L.R., 45 Mad., 565 (P.C.); 49 I.A., 237.

(3) (1904) I.L.R., 27 Mad., 391 (P.C.); 31 I.A., 83.

NAINAPILLAI
MARAKATAY
v.
RAMANATHAN
CHETTIAR.

officially described merely as "parakudis"; in this case the tenants were described in the body of the *paimash* account as "ullur parakudis" and "ulavadai miras." Those terms show that they had permanent rights: see Fifth Report, Volume 2 (Madras Edition), page 87, and Glossary s.v. "paracoody ool."

[Reference was made also to *Suryanarayana v. Patanna*(1), *Seturatnam Aiyer v. Venkatachela Goundan*(2) and *The Secretary of State for India v. Srinivasa Chariar*(3).]

De Gruyther, K.O., and *Kenworthy Brown* for the respondents.—The concurrent findings that the defendants had not permanent rights of occupancy were in accordance with the evidence. In the Madras Presidency there are two classes of lands, namely, (1) ryoti lands, in which the ryots hold direct from Government, and are mirasidars or owners, and (2) non-ryoti lands held by Zamindars and inamdars. In Madras there are no occupancy tenants in the same sense as in Bengal. The tenants here were not described as "mirasidars" in any documents; they were not so described because the temple trustees were *mirasidars*. No case was made of grant to the tenants or of custom; the question therefore is, what was the effect of the grant of 1723, it not being proved that there were any tenants at that time? If the grant was only of the *melvaram*, where was the *kudivaram* right? The village being *ekabhogam*, i.e., there being only one mirasidar, the *kara'idars* were not *mirasidars*; see *Chidambara Pillai v. Thiruvengadathien-gar*(4). The use of the term "swamibhogam" shows that the temple was proprietor of the soil: see Wilson's

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.); 45 I.A., 209.
(2) (1920) I.L.R., 43 Mad., 567 (P.C.); 47 I.A., 76.
(3) (1921) I.L.R., 44 Mad., 421 (P.C.); 48 I.A., 56.
(4) (1897) 7 M.L.J., 1.

Glossary, page 496, Fifth Report (Madras Edition, 1883), Volume 2, pages 84 to 86. The passage in *Baden Powell*, relied on, is a misreading of the Fifth Report. The terms of the *muchilika* of 1831 even more strongly negative proprietary rights in the tenants than the document in *Mayandi Chettiay v. Chokkalingam Pillay*(1). By that decision *Chockalinga Pillai v. Vythealinga Pundara Sunnadhy*(2) and *Thiagaraja v. Giyana Sambandha Pandara Sannadhi*(3), upon which the respondents rely, were approved. Decisions of the Board clearly show that the onus was upon the defendants.

Sir George Lowndes, K.C., replied.

The JUDGMENT of their Lordships was delivered by

Sir JOHN EDGE.—These are two consolidated appeals by defendants, or their representatives, from decrees, dated 22nd December 1916, of the High Court at Madras, which dismissed two appeals from decrees, dated 24th April 1914, which the Subordinate Judge of Tanjore had made, in Original Suits Nos. 40 and 42 of 1913, in favour of the plaintiffs for the ejectment of the defendants from lands, including groves, in Tanjore and for mesne profits.

The plaintiffs in each of the suits were five of the six trustees of the Mantrapureeswaraswami temple in Kovilur, in Tanjore. That temple will hereafter be referred to as "the temple." The sixth trustee, who was made a defendant in each suit, did not interfere in the conduct of the suits. It will be understood that when later in this judgment the defendants are referred to, the reference is to the defendants other than the sixth trustee.

NAINAPILLAI
MARAKATAY
v.
RAMANATHAN
CHETTIAR.

Sir
JOHN EDGE.

(1) (1904) I.L.R., 27 Mad., 291 (P.C.); 31 I.A., 83.
(2) (1871) 6 M.H.C.B., 184. (3) (1888) I.L.R., 11 Mad., 77.

NAINAPILLAI
MARAKAYARv.
RAMANATHAN
CHETTIAR.Sir
JOHN EDGE.

The lands in respect of which a decree of ejectment has been made in each suit are part of the village of Mangal in Tanjore, and are part of the endowed property of the temple. It is not disputed that the defendants were tenants of the temple of lands to which the suits relate, nor is it now disputed that they received notices to quit. The defendants admit that the *melvaram* rights in the property in question are vested in the temple, but their case is that the *kudivaram* rights in that property are vested in them and never were vested in the temple, and they claim that they have permanent rights of occupancy in the lands, under section 6 of Madras Act I of 1908, and also independently of that Act.

It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant. In *Secretary of State for India in Council v. Luchmeswar Singh*(1) it was held that the onus of proving that they had a permanent right of occupancy in lands was upon the defendants, who alleged it as a defence to a suit by their landlord to eject them, and that proof of long occupation at a fixed rent did not satisfy that onus; and in *Seturatnam Aiyer v. Venkatachela Goundan*(2) in a suit by their landlords for the ejectment of the defendants from lands in a *ryotwari* district in Madras, the giving of notice to quit not being disputed, it was held that the onus of proving that the defendants had rights of permanent occupancy was upon them.

A permanent right of occupancy in land in India is a right, subject to certain conditions, of a tenant to hold the land permanently which he occupies. It is a

(1) (1889) I.L.R., 16 Cal., 223 (P.C.); 16 I.A., 16.
(2) (1920) I.L.R., 43 Mad., 567 (P.C.); 47 I.A., 76.

NAINAPILLAI
MARAKAYARv.
RAMANATHAN
CHETTIAR.Sir
JOHN EDGE.

heritable right, and in some places it possibly may be transferable by the tenant to a stranger. That permanent right of occupancy can only be obtained by a tenant by custom, or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of the Legislature. No custom by which the defendants could have obtained a right of permanent occupancy is alleged or proved in these suits.

Their Lordships will first consider whether the defendants have proved that they have rights of permanent occupancy under Madras Act I of 1908 in the lands in suit, and then whether they have proved that they have, otherwise than under that Act, rights of permanent occupancy in the lands.

Unless the endowed lands of the temple in the village of Mangal constitute an "estate" within the meaning of that term in Madras Act I of 1908, that Act does not apply to them, and the defendants are not tenants with a right of permanent occupancy under section 6 of the Act. An "estate" is defined by section 3 of the Act, which, so far as it is material in this case, is as follows:—

"In this Act, unless there is something repugnant in the subject or context:—(2) "Estate" means (d) any village of which the land revenue alone has been granted in *inam* to a person not owning the *kulivaram* thereof, provided that the grant has been made, confirmed, or recognized by the British Government, or any separated part of such village; "

The term "*kudivaram*" is not defined in the Act, but, as was explained by the Board in *Suryanarayana v. Patanna*(1), "*kudivaram*" is a Tamil word which signifies a cultivator's share in the produce of land as distinguished from the landlord's share in the produce of the land received by him as rent, which is sometimes designated as "*melvaram*." See also *Venkata Sasthulu v. Seetharamudu*(2), where it was mentioned by

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.); 45 I.A., 209.

(2) (1920) I.L.R., 43 Mad., 166 (P.C.); 46 I.A., 123.

NAINAPILLAI
MARAKAYAR
v.
RAMANATHAN
CHETTIAR.
—
Sir
JOHN EDGE.

the Board that the “kudivaram” or “kudivaram interest,” as it is called in section 8 of the Act, is in fact a species of tenant right or right of permanent occupancy.

It is the plaintiffs’ case that the village of Mangal including the *melvaram* and *kudivaram* rights in it, was at some time before 1723 granted as an endowment to the temple by the then Raja of Tanjore, subject to a yearly payment in cash to the Raja, part of which he remitted to the temple as an allowance for the maintaining of *pooja* at the temple. The grant, or *sanad*, has been lost. The Raja of 1723 had recalled the grant, but had continued the cash allowance to the temple. In 1723 the managers of the temple complained to the then Raja of Tanjore that the allowance in cash was insufficient to maintain *pooja* at the temple, and thereupon the Raja granted to the temple a *sanad* which as translated is as follows:—

“Rokha Dafter Karkoon. Ta: (Taluq) Kovil Kottay. . . (illegible) Kadooramh. On Thursday thirtieth Vaisak Bahoolam Sobhankruth Samvatsar, Soorsan year Arba Isarin Muyu Alph (1124), at Vedarania on the auspicious occasion of the solar eclipse, Tilai Naik Bhandari, residing at Vedarania came before — and made a representation as follows: ‘That the mohin (allowance)—account of the Divani (Government Treasury) for *pooja* worship of the Devastan Kovil Kottay is very insufficient, that Nakshi Gootga (Rokkaguthakai) village was being carried on for the Devastan from the beginning and thereby daily worship, special worship, and car-festivals used to be performed. Has been made Sanjayath. For this reason, God’s worship and oochavams are not being performed as before and car-oochavams and special oochavams have remained unperformed. Hence, His Highness will be graciously pleased to permit to be carried on as before the nakshi gootaga village for the God and for this purpose an order should be issued.’ To this effect he made a petition. Thereupon, His Highness being pleased by way of favour has ordered the Nakshi Gootaga (village) to be carried on and has approved of the berij (assessment). This permission is dated . . . (torn) Ramjan. From the year aforesaid the nakshi gootaga (rokkaguthakai) of the

Manje Mangal village including the nanja and punja lands has been given (to) Sri Buddhipradeswara Swami (of) Kovil Kottay on the annual (payment) of chakras 125—the previous gootaga (lease amount) being 100, one hundred chakras and the present increase being chakras 25—in all, chakras one hundred and twenty-five. Out of this (amount), let credit be given for chakras 72, seventy-two per year for the Mohin—Divani’s (Government’s) mohin (allowance) for worship out of the gootaga (lease amount) and let the balance be credited in the divani (treasury) from time to time. Matters should be conducted in this way from year to year. Let a copy be taken and let the original sanad be returned to the shanik. Pa Hoo Pa . . . (illegible) Hajrat Rajesri Siv Row Narsing Row Peshway. Prepared, date 1 . . . (illegible).

“Commenced.”

The grantee of the *sanad* is the temple, and the village which in the *sanad* of 1723 is described as the *nakshi gootga* (rokkaguthakai) village is beyond doubt the village of Mangal. *Rokkaguthaghei*, another spelling of the vernacular word *Rokkaguthakai*, means, according to the Manual of the District of Tanjore, an “assessment, also fixed at favourable rates, either from favour or as an inducement to reclaim waste.” (*See* p. 487 of *A Manual of the District of Tanjore*, compiled under the orders of Government, printed at Madras in 1883.)

In 1724 an official memorandum was sent to the State officer of Kadaramban which mentioned the petition upon which the *sanad* of 1723 was granted and continued thus:—

“An *arzi* was therefore submitted praying that Sahib Avargal would be pleased to pass orders for continuing the *rokkaguthakai* village as before and thereupon an order was passed accordingly for treating Mangalam village inclusive of *nanja* and *punja* as Rokkaguthakai village for Sri Buddhipradeswaraswami of Kovilkottai, for 125 Pons per annum. *Beriz* fixed therefor is as follows:—Previous *guthakai*, 100 Pons; increase now made, 25 Pons; total, 125 Pons. It was granted for this sum. Out of this sum, 72 Pons, being the annual allotment made for the Sirkar *pooja* mohini, shall be remitted, and the balance of *beriz* credited to the Sirkar. This shall be

NAINAPILLAI
MARAKAYAR
v.
RAMANATHAN
CHETTIAR.
—
Sir
JOHN EDGE.

NAINAPILLAI
MARAKATAYAR
v.RAMANATHAN
CHETTIAR.Sir
JOHN EDGE.

followed every year. The original *sanad* shall be returned to the Stanikar after taking a copy thereof.

“(By order of Huzur.)

“Seal of M.R.Ry. Hazarath Siva Rao Narasinga Rao Peishwa.”

There can be no doubt that the *sanad* of 1723 was granted; the only question as to it is, what does it mean?

That *sanad* of 1723, in their Lordships' opinion, purports to re-grant to the temple all the lands of the village of Mangal as a religious endowment of the temple subject to the assessment mentioned in it, and the effect of that re-grant was to pass to the temple all the *melvaram* and the *kudivaram* rights in the village. The temple had, obviously, been deriving from the village, under the original *sanad*, an income sufficient for the maintenance of *pooja* worship at the temple, and it must have obtained that income from the cultivation of the village lands either by its servants or by its tenants but there is nothing in the *sanad* of 1723 to suggest that there was in 1723 any tenant of lands in the village who had any right of permanent occupancy in them. There is no proof that in 1723 there was any tenant of lands in the village who had any right of permanent occupancy in them. The village was in 1723 of that class of villages which in Tanjore were known as *ekabhogam* villages, or villages of which the sole occupancy right was vested in one individual—in Mangal, the temple—to distinguish them from *arudikarai* villages, which were held by a number of individuals in separate shares, and from *samudayam* or *pasunkarai* villages, which were held in common. (As to the three classes of villages, see page 405 of the *Manual of the District of Tanjore*).

At some time between 1749 and 1799 the Tanjore territory in which the village of Mangal is situate came, by cession from the Raja of Tanjore or by

conquest, under the control of the East India Company, and in 1809 a register of lands in the village of Mangal was made by Mr. Cotton as the Collector of the district. The following is an extract from his register of *rokkaguthakai* lands:—

NAINAPILLAI
MARAKATAYAR
v.
RAMANATHAN
CHETTIAR.Sir
JOHN EDGE.

"Nature of the sanad."	Names of the grantors.	Names of the original grantees.	Name of the present possessor.	Relationship of the pre- sent possessor to the original grantee.	Date of the original sanad.	Names of the villages or portions of vil- lages comprised in the grant.	Nature and extent of the land so granted.	Amount of the revenue.	
								Nanja, punja and bagayat.	Total.
(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	
Dafter roghah direct- ing that the village Maagalam be held every year by Mun- derapureeswara- swami Covil in Covilecotoy, liable to the fixed annual money rent of 125 chakrams and spec- ifying that Tillai- nayaga Pandaram at Vedaraniam has on the day of sun eclipse represented that the mohini hitherto allowed by the Sirkar to the said pagoda is very small, that it had formerly enjoyed that <i>rokkaguthakai</i> village which afforded them the means of perform- ing its daily and coach ceremonies, etc., which being since resumed under amani, the performance of these ceremonies ceased and that as he therefore requests the restoration of the said village, it is now accordingly made over to the said pagoda liable to the increased annual rent of 125 chas. instead of the 100 formerly levied thereon and that after deducting from the said 125 chas. the mohini of 72 chas. allowed by the Sirkar, the remainder is to be payable by the said pagoda.	Unknown.	Munderapureeswaraswami Covil.	Munderapureeswaraswami Covil.	This village is enjoyed by the said pagoda ever since this roghah was granted.	Of Arban Glesarson Mynlut—Date—(illegible) in this sanad.	The village Mangalam in Mannargudi taluk, (is) consisting of 10 velis of nanja and 15 velis of punja as mentioned in the palace account, but the said pagoda actually enjoys velis 37, M. 3 and G. 12½ of nanja. Velis 43, M. 4, and G. 62½ of punja, and velis 16, M. 11, and G. 15 of poramboke, composing the whole of that village.	RS. A. P. 10 0 0 Nanja.	Total bagayat. RS. A. P. 25 0 0	RS. 125

(Signed) J. COTTON,
Collector."

NAINAPILLAI
MABAKAYAR
v.
RAMANATHAN
CHETTIAR.
—
Sir
JOHN EDGE.

The entry in column 4 shows that the village had been originally granted to the temple, and the entries in columns 5 and 6 show that, according to the Collector's information, the village had been enjoyed by the temple from the time of the original grant down to the time when he made the register in 1809. The entries in columns 2 and 8 show that, according to the Collector's information and belief, all the lands of the village had been granted to the temple. Their Lordships regard the entries in the register of 1809, relating to the village of Mangal, as valuable as showing what, on the information which he had obtained, the Collector believed to be the title to the village of Mangal and to all the lands in that village.

In the *paimash*, or survey account, for fasli 1226 (1816 or 1817), the person then in the enjoyment of the total *nunja* (wet land), *punja* (dry land), tope and *manai* garden, of the village of Mangal, was stated to be the temple, and the enjoyment was stated to be *rokka-guthakai ekabhogam*. In the *paimash* for fasli 1238 (1829), the village of Mangal was described as a *rokka-guthakai miras ekabhogam* village, which meant that it was a *rokkaguthakai* village and that all the lands in the village were the property of one proprietor.

It is stated in the judgment of the High Court—and it must be assumed, correctly—that 21 *velis* of the wet land of the village of Mangal were cultivated by the temple by its servants and with its own ploughs, before 1820, and that in those 21 *velis* of the endowed lands the temple then owned both the *melvaram* interest and the *kudivaram* interest, and the defendants were unable to explain how it happened that the temple could have owned the *kudivaram* interest in 21 *velis* only of the endowed lands.

It was proved that in 1833 a small area of the waste lands of the village of Mangal was acquired by the

NAINAPILLAI
MABAKAYAR
v.
RAMANATHAN
CHETTIAR.
—
Sir
JOHN EDGE.

Government under the Land Acquisition Act, and that no part of the compensation paid for those waste lands was claimed by any person except the temple, and that to the temple was paid all the compensation awarded under that Act. From that fact it may be concluded that the grant of the lands in the village in 1723 included the waste lands of the village, if there could be any doubt that all the lands of the village of Mangal were granted by the *sanad* of 1723 to the temple as an endowment.

Their Lordships find that the *melvaram* and the *kudivaram* interests in the lands of the village of Mangal were at some time before 1723 granted by a Raja of Tanjore, and re-granted in 1723 by the then Raja of Tanjore, to the temple, and consequently, that the lands in suit are not an "estate" within the meaning of Act I of 1908, and that the defendants did not obtain any rights of permanent occupancy under that Act.

It remains to be considered whether the defendants have proved that they, or those through whom they claim title as occupiers of the lands in suit, obtained at any time a right of permanent occupancy in the lands. No grant of a right of permanent occupancy has been produced. But the defendants asked the Courts below, and now ask their Lordships, to presume that they or those through whom they claim, were tenants of those lands in suit with a right of permanent occupancy in them. It does not appear that in 1723, or in 1809 or in 1816 or in 1829, there were any tenants of lands in the village who had a right of permanent occupancy in the endowed lands of the temple. As Act I of 1908 does not apply in this case, and as there is no proof of any custom conferring on tenants of lands of the village any right of permanent occupancy, and as no grant of a

352 THE INDIAN LAW REPORTS [VOL. XLVII]

NAINAPILLAI
MARAKATAR
v.
RAMANATHAN
CHETTIAR.
—
Sir
JOHN EDGE

right of permanent occupancy has been produced or even alleged, it is not apparent how a right of permanent occupancy could have been obtained by the defendants or by any predecessor in title of theirs, except by a lost grant or grants, and that is not even suggested.

A public temple, such as is the temple in this case, is a religious institution, and is recognized in law as a juridical person, but it can act only through persons who have authority to act for it, and they can act for the temple only within the scope of their authority. The position of the *shebait*, the manager or the trustees of a temple, is, so far as their power to deal with the endowed lands of the temple is concerned, analogous to the position of a *mahant* of a *mutt* to deal with the endowed lands of a *mutt*. They can doubtless sell or mortgage the endowed lands of the temple if there is an actual, special, and unavoidable necessity of the temple to do so, but that necessity would have to be proved by those who alleged that it existed. Except in a case of such unavoidable necessity the *shebait*, the managers or the trustees of a temple, or the *mahant* of a *mutt*, have no power to sell or mortgage the endowed property in their custody, and obviously they have no right to impair the endowed property by creating or granting in favour of any one rights of permanent occupancy in the endowed lands. The law on this subject is well established: see *Maharanees Shitessouree Debia v. Mothooranath Acharjo*(1), *Abhiram Goswami v. Shyama Charam Nandi*(2), *Palaniappa Chetty v. Deivasikamony Pandara Sannalhi*(3), *Vidya Varuthi Thirtha v. Balusami Ayyar*(4). In the case of a *shebait*, a grant by him, in

violation of his duty, of an interest in endowed lands, which he has not authority as *shebait* to make, may possibly under some circumstances be good as against himself by way of estoppel, but is not binding upon his successors.

NAINAPILLAI
MARAKATAR
v.
RAMANATHAN
CHETTIAR.
—
Sir
JOHN EDGE.

In *Satya Sri v. Kartik*(1), which came before the High Court at Calcutta in second appeal in a suit to eject the defendants from *debutter* lands, which the lower Appellate Court had dismissed on a presumption that the defendants had a permanent tenancy in the lands, Sir LAWRENCE JENKINS, C.J., and CHATTERJEE, J., said that the decree appealed from rested not on direct proof but on presumption, and that it would seem that the property there in question was *debutter*, and remanded the suit so that it might be ascertained if that property was *debutter* when the tenancy commenced, holding, rightly, that:—

“The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes its regularity; it cannot be made in favour of that which offends legal principles.”

They further rightly said:—

“If it was *debutter* at the time the tenancy originated, then this would affect the applicability of the presumption, for, to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in a *shebait*, and is not therefore presumable.”

In the present case there was nothing proved, or even attempted to be proved, from which it could be inferred that the tenure of tenants of the lands in suit, or of any lands in the endowed property of the temple, had originally been a tenure of permanent occupancy

(1) (1869) 13 M.I.A., 270.

(2) (1909) I.L.R., 36 Cal., 1003 (P.C.); 36 I.A., 148.

(3) (1917) I.L.R., 40 Mad., 709 (P.C.); 44 I.A., 147.

(4) (1921) I.L.R., 44 Mad., 831 (P.C.); 48 I.A., 302.

(1) (1912) 15 C.L.J., 227.

NAINAPILLAI
MARAKAYAR
v.
RAMANATHAN
CHETTIAR.
—
SIR
JOHN EDGE.

or any higher tenure than that of a tenancy at will. Between 1820 and 1830 some of the endowed lands in the village of Mangal were let by the temple for cultivation on short leases of from one to five years; such leases were granted to the highest bidders. In 1831 some of the tenants of the temple's endowed lands, apparently all of them, agreed amongst themselves to cultivate jointly the endowed lands of which they were tenants, and they executed and delivered to the Collector, who was then the manager of the temple and its endowments, a *muchalka* by which they took the endowed lands for a term from *fasli* 1241. That *muchalka* is absolutely inconsistent with any of the tenants having then any right of permanent occupancy in any of the endowed lands of the temple and with their believing that they had any right of permanent occupancy in any of the temple's lands. In 1870 Sir C. H. SCOTLAND, C.J., held that when a tenancy in the Presidency of Madras commenced under a terminable contract there was nothing to prevent the landlord from ejecting the tenant at the end of the term from the lands which had been let to him. See also *Mayandi Chettiyar v. Chokkalingam Pillay*(1).

One of the reasons for these consolidated appeals as stated in the case for the appellants is :

"4. Because the appellants have acquired permanent occupancy right by prescription."

No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands. (See *Madhavrao Waman v. Raghunath Venkatesh*(2) decided by the Judicial Committee on the 10th July 1923.)

Another reason for these consolidated appeals as stated in the case for the appellants is :

"5. Because the respondents having allowed and recognized the alienations made by the predecessors of the appellants, are now estopped from denying that they have permanent rights of occupancy."

The appellants' case, that they have permanent rights of occupancy, was not argued on the ground of an estoppel, for there is no estoppel on the evidence in the case, but on the ground that it must be presumed, from matters which will be presently referred to, that the defendants, or those through whom they claim titles as tenants, had at some time acquired rights of permanent occupancy in the lands in suit.

In the very able argument which was addressed to their Lordships in support of these consolidated appeals it was contended that their Lordships ought to presume that the defendants, or those through whom they claim, had acquired, at some time, rights of permanent occupancy in the lands in suit, from the fact that in some receipts given by servants of the temple, tenants of endowed lands in the village were described as "kudimiras." Their Lordships are not certain what in Tanjore "kudimiras" means. No doubt by itself "miras" generally means a proprietor of some kind, and "kudi" by itself appears to mean a house, a village, a town, an inhabitant, or a tribe. "Kudimiras" in those receipts may have been a description of the tenant as the proprietor of a house in the *abadi* of the village, or it may have been a misdescription. It appears from one *paimash* that there were men who were described as "kudimiras" in respect of their interests in houses in the *abadi* of the village. In the case already cited *Mayandi Chettiyar v. Chokkalingam Pillay*(1), the Board declined to act on a vernacular descriptive term of parties in that case, which the Board considered as being of uncertain meaning. The particular descriptive term

NAINAPILLAI
MARAKAYAR
v.
RAMANATHAN
CHETTIAR.
—
SIR
JOHN EDGE.

(1) (1904) I.L.R., 27 Mad., 291 (P.C.); 31 I.A., 83.
(2) (1923) I.L.R., 47 Bom., 798 (P.C.); 50 I.A., 255.

(1) (1904) I.L.R., 27 Mad., 291 (P.C.); 31 I.A., 83.

NAINAPILLAI
MARAKAYAR
v.
RAMANATHAN
CHETTIAR.
—
Sir
JOHN EDGE.

was "ulavadai mirasidar." The appeal in that case related to lands in Tanjore. Also, in support of the argument that their Lordships ought to presume that the defendants had a right of permanent occupancy in the endowed lands, many other documents and papers were relied upon as showing that tenants of the endowed lands had, to the knowledge of officials of the temple, sold or mortgaged such interests as they had in endowed lands of the village of Mangal. Their Lordships are unable to make any such presumption. Such a presumption would mean that some managers or trustees of the temple had violated their duty to the temple. It has not been proved that there ever were any lands in the village in which, by grant or custom, there was any right of a tenant to a permanent occupancy, and the only presumption which their Lordships can make in the cases of such sales and mortgages is that it was to the interests of the temple that the ordinary cultivators of the temple lands should be solvent persons, and not persons who were compelled to sell or mortgage such interest as they had in temple lands in order to raise money.

All the documents and papers, from which their Lordships have been asked by the counsel for the defendants to presume that the defendants had rights of permanent occupancy in the lands in suit, were before Mr. G. KODANDA RAMANUJULU, the Subordinate Judge who tried the suits, and, on the appeals, before SADASIVA AYYAR, J., who wrote the judgment of the High Court, with which NAPIER, J., concurred. All those learned Judges were, from their local knowledge, in a better position than their Lordships are to correctly appreciate the meaning of the vernacular terms in use in the Tamil country of Tanjore in reference to interests in lands, and all those learned Judges, in carefully considered and exhaustive judgments, found, to state briefly their

findings, that the endowed property of the temple, of which the lands in question formed part, was not an "estate" within the meaning of Madras Act I of 1908, and that the defendants were not, under that Act or otherwise, tenants with a right of permanent occupancy.

The appellants having failed to prove that they or any of them had any right of permanent occupancy in any of the lands in suit, their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitor for appellants :—*Douglas Grant.*

Solicitor for respondents :—*T. L. Wilson & Co.*

A.M.T.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K. C., Chief Justice,
Mr. Justice Phillips and Mr. Justice Ramesam.*

1928,
November 20.

ABDUL SATTAR SAHIB (APPLICANT),
PETITIONER

v.

THE SPECIAL DEPUTY COLLECTOR, VIZAGAPATAM
HARBOUR ACQUISITION, AND OTHERS,
RESPONDENTS.*

Section 115, Civil Procedure Code (V of 1908)—Sec. 107, Government of India Act—Refusal by Collector to refer a case to the Court under section 18 of the Land Acquisition Act (I of 1894)—Power of High Court to revise order of refusal.

The High Court has no power under section 115 of the Code of Civil Procedure or under section 107 of the Government of India Act, to revise the order of a Collector, acting under the provisions of the Land Acquisition Act, refusing to make a reference to the Court under section 18 in a matter upon which he had passed an award. Though in so refusing to refer, the Collector was acting "judicially," he was not acting as a

* Civil Revision Petition No. 683 of 1922.

ABDUL
SATTAR
SAHIB
v.
SPECIAL
DEPUTY
COLLECTOR,
VIZAGAPATAM
HARBOUR
ACQUISITION.

"Court" or as a Court subordinate to the High Court within section 115, Civil Procedure Code.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the decision of V. SITARAMAYYA, Special Deputy Collector, Vizagapatam Harbour Acquisition, in respect of the land acquisition of Survey No. 1 of Vizagapatam swamp.

The Petition came on before SPENCER and ODGERS, JJ., who made the following

ORDER OF REFERENCE TO THE FULL BENCH.

SPENCER, J.—This is an application under section 115 of the Code of Civil Procedure asking us to revise the proceedings of an officer acting as Collector under the Land Acquisition Act (Act I of 1894) wherein he refused to make reference under section 18 to the District Court in a matter upon which he had passed an award under section 11.

The first question is whether a remedy lies by way of a revision petition. In *Best & Co. v. Deputy Collector of Madras*(1) it was observed by a Bench of this Court that the proceedings under the Land Acquisition Act until the matter came before the Land Acquisition Judge were not judicial proceedings and that the proper remedy of a person dissatisfied with the Collector's order was to sue under section 45 of the Specific Relief Act for an order of *mandamus* and not to file a revision petition. This decision professed to be based on the ruling of the Privy Council in *Ezra v. Secretary of State for India*(2) confirming the opinion of the Calcutta High Court reported at page 619, that the proceedings resulting in the award were administrative and not judicial. So too

(1) (1916) 20 M.L.T., 368.
(2) (1905) I.L.R., 32 Cal., 605 (P.C.).

ABDUL
SATTAR
SAHIB
v.
SPECIAL
DEPUTY
COLLECTOR,
VIZAGAPATAM
HARBOUR
ACQUISITION.

in *Kasturi Pillai v. Municipal Council, Erode*(1) it was observed that the Collector in making his award was not acting judicially. It has however been decided by another Bench of this Court in *Parameswara Aiyar v. Land Acquisition Collector, Palghat*(2) that the Collector's proceedings under Part III of the Act dismissing an application for a reference to the Court regarding his award are judicial proceedings and are subject to revision and I am not prepared to dissent from this view seeing that it is quite consistent with what the Judicial Committee said in *Ezra v. Secretary of State for India*(3). In *The Administrator-General of Bengal v. The Land Acquisition Collector*(4) and in *Krishna Das Roy v. The Land Acquisition Collector of Pabna* (5) the Calcutta High Court took a similar view to that of this Court in *Parameswara Aiyar v. Land Acquisition Collector, Palghat* (2). *The Administrator-General of Bengal v. The Land Acquisition Collector*(4) was followed by another Court in *Hari Das Pal v. Municipal Board, Lucknow*(6). In *British India Steam Navigation Co. v. Secretary of State for India*(7) the learned Judges refrained from deciding this point. *The Deputy Collector, Calicut Division v. Aiyaru Pillay*(8) merely decides that Government need not be made a party to a reference under section 18. There can be no doubt that Government is not a "claimant" or "person interested" in such proceedings. In *Balkrishna Daji v. The Collector, Bombay Suburban*(9) two learned Judges of the Bombay High Court expressed their dissent from the view taken by this Court in *Parameswara Aiyar v. Land Acquisition Collector, Palghat*(2) but as they have not, in my opinion, met the reasoning of the Madras Judges, I

(1) (1920) I.L.R., 43 Mad., 280. (2) (1919) I.L.R., 42 Mad., 281.
(3) (1905) I.L.R., 32 Cal., 605 (P.C.).
(4) (1907) 12 C.W.N., 241. (5) (1911) 16 C.W.N., 327.
(6) (1914) 22 I.C., 652. (7) (1911) I.L.R., 33 Cal., 280.
(8) (1911) 2 M.W.N., 367. (9) (1923) I.L.R., 47 Bom., 699.

ABDUL
SATTAR
SAHIB
v.
SPECIAL
DEPUTY
COLLECTOR,
VIZAGAPATAM
HARBOUR
ACQUISITION.

prefer to adhere to the opinions expressed in this Court and in Calcutta to the effect that a Collector proceeding under section 18 of the Act is performing a judicial function and as such is subject to the extraordinary jurisdiction of the High Court.

In Bombay the doubt is expressed whether a Collector acting under sections 18 and 19 is a Court and, even if he is so, whether he can be said to be subordinate to the High Court.

But if, as KRISHNAN, J., observed, the proceedings under these sections are really part and parcel of the final award by the Judge under section 26 of the same chapter, there can be no difficulty in finding from section 54 of this Act and section 3 of the Code of Civil Procedure that they are proceedings of a Court subordinate to the High Court.

My learned brother desires to have the question of jurisdiction referred for the opinion of a Full Bench. For my part I should be content to follow the decision of this Court reported in the authorized reports seeing that it is the most recent pronouncement of this Court and it was made after a full consideration of the earlier cases and is not inconsistent with the judgment of the Privy Council. But as my learned brother is of opinion that the question should be referred and I admit that there is considerable conflict of judicial opinion on the point, I agree to the reference in the terms proposed by him.

ODGERS, J.—In this Revision Petition the first point raised is whether this Court has power to revise the proceedings of an officer acting as Collector under the Land Acquisition Act, refusing to make a reference under section 18 of the Act after making an award under section 11.

The question has not been decided uniformly by the Courts in India and there are authorities both ways.

In *Best & Co. v. Deputy Collector of Madras*(1), ABDUR RAHIM, OFFG., C.J., and SESHAGIRI AYYAR, J., agreed with the opinion of MUKERJEE, J., in *British India Steam Navigation Co. v. Secretary of State for India* (2) and held that this Court could not revise an order of reference made by the Land Acquisition Collector. In *British India Steam Navigation Co. v. Secretary of State for India*(2) the learned Judges held (page 241) that the Collector, when he holds an enquiry and makes an award under section 11, is not a Court and is undoubtedly not a Court subject to the appellate jurisdiction of the High Court. They relied on *Ezra v. Secretary of State*(3), [afterwards in the Privy Council, in *Ezra v. Secretary of State for India*(4)]. In *Ezra v. Secretary of State*(3) it was held that the Collector in making his award is not a judicial officer. The Privy Council held that the proceedings resulting in an award by the Collector were administrative and not judicial and that if a judicial ascertainment of value is desired by the owner he can obtain it by requiring the matter to be referred by the Collector to the Court.

There is also the case in *Balkrishna Daji v. The Collector, Bombay Suburban*(5), where MACLEOD, C.J., and CRUMP, J., held that the refusal of the Collector to refer is not an order of a Court and not as such subject to the High Court's powers under section 115 of the Civil Procedure Code. They expressly dissented from *Parameswara Aiyar v. Land Acquisition Collector, Palghat*(6) (to which reference will be made immediately) and held that the remedy was by way of suit as the High Court

ABDUL
SATTAR
SAHIB
v.
SPECIAL
DEPUTY
COLLECTOR,
VIZAGAPATAM
HARBOUR.
ACQUISITION.

(1) (1916) 20 M.L.T., 388.

(3) (1908) I.L.R., 80 Cal., 36.

(5) (1923) I.L.R., 47 Bom., 699.

(2) (1911) I.L.R., 38 Cal., 280.

(4) (1905) I.L.R., 32 Cal., 605 (P.C.).

(6) (1919) I.L.R., 42 Mad., 281.

ABDUL
SATTAR
SAHIB
v.
SPECIAL
DEPUTY
COLLECTOR,
VIZAGAPATAM
HARBOUR
ACQUISITION.

has not been given power to interfere with the proceedings of the Collector.

On the other side we have *Parameswara Aiyar v. Land Acquisition Collector, Palghat*(1) (AYLING and KRISHNAN, JJ.). The learned Judges there base their decision on the view that there is material distinction between Parts II and III of the Act and that in rejecting an application under section 19 (which falls within Part III) the Collector acts judicially and his order is subject to revision by the High Court. They were pressed apparently by the fact that unless such an order was open to revision it was not clear what remedy a person aggrieved by it possesses. The Judges examined the cases *Best & Co. v. Deputy Collector of Madras*(2), and also *Ezra v. Secretary of State for India*(3), and *British India Steam Navigation Co. v. Secretary of State for India* (4), and as they point out the two latter cases practically go no further than saying that proceedings resulting in the award are administrative and not judicial. In *The Administrator-General of Bengal v. The Land Acquisition Collector*(5), the Calcutta High Court held that the Collector rejecting an application made under section 18 (1) of the Land Acquisition Act acts judicially and his order is subject to revision. They based their ruling on the distinction between the Collector's functions under Parts II and III of the Act. *Krishna Das Roy v. The Land Acquisition Collector of Pabna*(6) follows this decision. This view has also been adopted in the Patna High Court (*Saraswathi Pattack v. The Land Acquisition Deputy Collector of Champaran*(7)).

Although I am inclined to agree with the view expressed in *Parameswara Aiyar v. The Land Acquisi-*

tion Collector, *Palghat*(1), yet I feel that, in the conflicting state of the authorities, the law on this point should be settled. It may perhaps be alleged against the latter Madras view that there is no authority in the wording of the Land Acquisition Act itself for drawing a distinction between the functions of the Collector under Parts II and III of the Act. The distinction appears to me to be necessary though it seems somewhat forced and artificial. We therefore decide to refer to a Full Bench this question :—

“Has the High Court power under section 115, Civil Procedure Code, or under section 107 of the Government of India Act to revise the order of a Collector acting under the provisions of the Land Acquisition Act, 1894, refusing to refer to the Court an application under section 18 of the same Act by a person interested, requiring him to refer the matter for the determination of the Court?”

ON THIS REFERENCE :—

Government Pleader (*C. V. Anantakrishna Ayyar*) for the Government.—The order of refusal cannot be revised by the High Court either under section 115, Civil Procedure Code, or under section 107, Government of India Act. The enquiry by the Collector is not a judicial enquiry but only an administrative one; see *Ezra v. Secretary of State for India*(2). Hence if he refuses to refer the case to the Court there is no power to compel him to refer. Sections 45 and 50 of the Specific Relief Act have taken away the power of the High Court to issue *mandamus* to mufassal Courts, even if we assume the Collector to be a Court: *Best & Co. v. Deputy Collector of Madras*(3); secondly even if the Collector be supposed to be exercising judicial functions,

ABDUL
SATTAR
SAHIB
v.
SPECIAL
DEPUTY
COLLECTOR,
VIZAGAPATAM
HARBOUR
ACQUISITION.

(1) (1919) I L.R., 42 Mad., 231.

(2) (1916) 20 M.L.T., 388.

(3) (1905) I.L.R., 32 Cal., 605 (P.C.).

(4) (1911) I.L.R., 38 Cal., 230.

(5) (1907) 12 C.W.N., 241.

(6) (1911) 16 C.W.N., 327.

(7) (1917) 2 P.L.J., 204.

(1) (1919) I.L.R., 42 Mad., 231.

(2) (1905) I.L.R., 32 Cal., 605 (P.C.).

(3) (1916) 20 M.L.T., 388.

ABDUL
SATTAR
SAHIB
v.
SPECIAL
DEPUTY
COLLECTOR,
VIZAGAPATAM
HARBOUR
ACQUISITION.

he is not a Court, much less is he a Court subordinate to the High Court: *Balkrishna Daji v. The Collector, Bombay Suburban*(1); compare *Krishnammal v. Krishna Iyengar*(2), *Perianan Chetti v. Nagappa Mudaliar*(3). He referred to the definitions of "Court" in section 3 of the Civil Procedure and in the Land Acquisition Act and to *British India Steam Navigation Co. v. Secretary of State for India*(4), *Saraswati Pattack v. The Land Acquisition Deputy Collector of Champaran*(5). The case *Parameswara Aiyar v. Land Acquisition Collector, Palghat*(6), is wrong.

T. Richmond (with *V. Rajagopalachari*) for the respondent argued that a revision lay and relied on *Parameswara Aiyar v. Land Acquisition Collector, Palghat*(6).

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—This is a reference to a Full Bench under the following circumstances. The officer acting as Collector under the Land Acquisition Act I of 1894 decided, in the first instance, that certain land to be acquired by the Government for harbour purposes was Government land and that, therefore, no compensation was payable to anybody.

Being dissatisfied with that decision or advice, one of the persons claiming to be interested in the land in effect asked the Collector under section 18 of the Land Acquisition Act to refer the matter to the District Judge. That application was refused on the ground that the land being Government land, there was no right to compensation and that the Land Acquisition Act had no application at all. A revision petition was then brought to this Court to revise that order and a preliminary

objection was taken that this Court has no revisional powers over such orders. There is a considerable conflict of authority on the point and the matter has accordingly been referred to a Full Bench.

The only power of revision this Court has got is under section 115 of the Code of Civil Procedure. By the terms of that section a High Court can revise any decision made in any case by any Court subordinate to such High Court, and in which no appeal lies thereto. It is argued first of all, on behalf of the Crown, that the Collector exercising his functions under section 18 is not acting judicially; secondly, that he is not acting as a Court; and thirdly, that, if he is acting as a Court, he is not a Court subordinate to the High Court. The authorities on the point are in an unsatisfactory condition, for in Madras there is the decision of a Bench in *Best & Co. v. Deputy Collector of Madras*(1), in which it was held that proceedings in the nature of *mandamus* under section 45 of the Specific Relief Act lay, because, and only because, this Court had no revisional powers in the matter; consequently the revision petition in that case was dismissed and an application under section 45 of the Specific Relief Act was allowed. The matter came before this Court again in *Parameswara Aiyar v. Land Acquisition Collector, Palghat*(2) where AYLING and KRISHNAN, J.J., having considered the earlier Madras case, differed from the conclusion to which it came and held that the proceedings were those of a Court subordinate to the High Court and granted the revision petition. In so doing, they were following two cases in Calcutta: *The Administrator-General of Bengal v. The Land Acquisition Collector*(3) and *Krishna Das Roy v. The Land Acquisition Collector of Pabna*(4). The same

ABDUL
SATTAR
SAHIB
v.
SPECIAL
DEPUTY
COLLECTOR,
VIZAGAPATAM
HARBOUR
ACQUISITION.
—
SCHWABE,
C.J.

(1) (1923) I.L.R., 47 Bom., 699.

(3) (1907) I.L.R., 30 Mad., 32.

(5) (1917) 2 P. L.J., 204.

(2) (1912) 23 M.L.J., 50 (F.B.).

(4) (1911) I.L.R., 38 Cal., 280.

(6) (1919) I.L.R., 42 Mad., 231.

(1) (1918) 20 M.L.T., 388.

(3) (1907) 12 C.W.N., 241.

(2) (1919) I.L.R., 42 Mad., 231.

(4) (1911) 16 C.W.N., 327.

ABDUL
SATTAR
SAHIB
v.
SPECIAL
DEPUTY
COLLECTOR,
VIZAGAPATAM
HARBOUR
ACQUISITION.
—
SCHWABE,
C.J.

result has been arrived at by the Patna High Court in *Saraswati Pattack v. The Land Acquisition Deputy Collector of Champaran*(1). Later, the matter came before a Bench in Bombay in *Balkrishna Daji v. The Collector, Bombay Suburban*(2) and having considered all these previous cases, the Bombay Court came to the conclusion that *Parameswara Aiyar v. Land Acquisition Collector, Palghat*(3) was wrongly decided, and that there was no power of revision. With that conflict of authority we have to make up our own minds on the point.

In *Ezra v. Secretary of State for India*(4) the Privy Council has decided that the Collector, exercising functions under the Land Acquisition Act down to the point when he gives what is called his award, is acting only in an advisory capacity and is not exercising any judicial function at all, but in these later cases, which I have referred to, it is pointed out, and I think correctly pointed out, that when he acts under Part III of which section 18 forms part, he is acting in a different capacity, because he has there to decide certain things; he has to send the case to the District Court if certain provisions in that section have been complied with, one of which is the question of time, that is to say, he has to decide whether the application is barred or not and in doing so, in my judgment, he acts judicially.

But the further question arises whether he acts as a Court. I think it is quite possible for persons to be given judicial functions or functions which they have to exercise judicially without their being made Courts properly so called, and I think a very clear instance is the case of registration authorities who have to decide whether or not they will accept registration of certain documents; and it has been held by a Full Bench of

this Court in *Krishnammal v. Krishna Iyengar*(1) that in respect of a refusal of registration by a registration officer no revision petition lies to this Court because he is not a Court at all. I doubt if the Collector sits as a Court.

Further, the question arises, assuming that the Collector is a Court, is he a Court subordinate to the High Court within the meaning of section 115 of the Code of Civil Procedure? In my judgment, he is not. There is no power of appeal from his decision to any one, either to the District Court or to this Court. There is nothing in the Act to show that he is, in the true sense of the word in any way subordinate to the High Court. As far as Madras is concerned, the Courts recognized are those Courts, which are referred to in various statutes, such as the Madras Civil Courts Act. His Court, if a Court at all must be a Civil Court. The Civil Courts are enumerated in the Civil Courts Act, and the Court of the Collector sitting under the Land Acquisition Act finds no place in that enumeration. On the whole, I think I must come to the conclusion that, even if the Collector, exercising his functions under section 19, although those functions are, as I have pointed out, judicial functions, is a Court, he is not a Court subordinate to the High Court. Therefore no revision lies to this Court.

I think, however, it is right to add, that as far as one can see without having had the point argued before us, it should seem that the Collector was wholly wrong in the course that he took on this occasion. He himself had decided that it was Crown land. If he was wrong in that decision, then the applicant had a right to have his case heard on his claim for compensation. When he is asked to refer that matter—so I understand it—to the Court for a decision, that is to say to the District

ABDUL
SATTAR
SAHIB
v.
SPECIAL
DEPUTY
COLLECTOR,
VIZAGAPATAM
HARBOUR
ACQUISITION.
—
SCHWABE,
C.J.

(1) (1917) 2 P.L.J., 204.

(2) (1923) I.L.R., 47 Bom., 699.

(3) (1919) I.L.R., 42 Mad., 231.

(4) (1905) I.L.R., 32 Cal., 605 (P.C.).

(1) (1912) 23 M.L.J., 50.

ABDUL
SATTAR
SAHIB
v.
SPECIAL
DEPUTY
COLLECTOR,
VIZAGAPATAM
HARBOUR
ACQUISITION.
—
SCHWABE,
C.J.

Court, he bases his refusal on his own previous decision that the land was Crown land, and assumes that, because he has decided that, that decision is final and conclusive and the party is not allowed under the Act to have that matter gone into by a Court, it being worthy of observation that, in so deciding, he was not acting judicially at all, because he was then at a stage of the proceedings when, according to the Privy Council decision referred to above, he was merely acting in an advisory capacity. It is not for us to say what the proper remedy is, whether he should move the Government to direct the Collector to do his duty, or whether he can take any and what form of proceedings to have his case heard, if he has a case which deserves to be heard.

The answer to the question referred to us is that the High Court has no power under section 115 of the Code of Civil Procedure, or under section 107 of the Government of India Act, to revise the order of a Collector acting under the provisions of the Land Acquisition Act refusing to refer to the Court an application under section 18 of the same Act by a person interested requiring him to refer the matter for the determination of the Court. As the preliminary point is one going to the root of the whole matter, it is unnecessary for this case to go back to the Referring Bench and we dismiss this petition with costs.

PHILLIPS, J. PHILLIPS, J.—I agree.

RAMESAM, J. RAMESAM, J.—I agree. I would only add that it is desirable that the Act should be amended so as to give a remedy to the subject in respect of possible arbitrary acts of Land Acquisition Officers in declining to refer under section 18 and not to leave them to depend upon the action of the Government in advising their officers.

SCHWABE, C.J. SCHWABE, C.J.—I agree with the observation just made by my brother Ramesam.

N.R.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Waller.*

KOKKU PARTHASARADHI NAIDU GARU
(FIRST RESPONDENT), PETITIONER,

1923,
November
12.

v.

CHINTLACHERVU KOTESWARA RAO GARU AND
ANOTHER (PETITIONER AND SECOND RESPONDENT), RESPONDENTS.*

*Local Boards Act (XIV of 1920), ss. 55, 56, 57, 199 (2) (c)—
Rules issued by Local Government, Rules 1, 4 (3), 12 (2)—
Election of President, Taluk Board—Petition objecting to
election—Grounds of objection—Appointment of member of
Taluk Board—Jurisdiction of Judge to decide validity of
appointment of member of Taluk Board in an election peti-
tion—Powers of revision of High Court in election cases—
Judge, whether persona designata or Court—Decisions of
Election Judge, how far final—Temporary absence of President
of District Board—Power of appointment of President,
whether ceases—Devolution of powers in Vice-President.*

A District or Subordinate Judge, in deciding an election petition presented before him under the rules issued by the Local Government under the Local Boards Act, 1920, is acting not merely as a *persona designata*, but as a Court in the exercise of its ordinary jurisdiction extended for that purpose; consequently the High Court is competent to exercise its powers of revision over decisions in election petitions.

The fact that the decisions of the Judge in election petitions are declared to be final by section 57 of the Local Boards Act, 1920, and the rules issued thereunder, does not preclude the High Court from exercising its powers of revision under section 115 of the Civil Procedure Code in such cases.

A District or Subordinate Judge, in dealing with a petition objecting to the election of a President of a Taluk Board, has no jurisdiction to decide whether the Local Government, or the President of a District or Taluk Board, as the case may be, have properly exercised their powers of appointment in nominating a person as a member of a Taluk Board; what he has

* Civil Revision Petition No. 17 of 1923.

PARTHA-
SARADHI
NAIDU
v.
KOTESWARA
RAO.

jurisdiction to decide is whether a person so appointed is disqualified on the grounds specified in section 55 or 56 of the Local Boards Act, 1920.

When a Judge, in deciding a petition objecting to the election of a President of a Taluk Board, goes into the question whether he had been duly appointed as a member of the Taluk Board, he acts wholly without jurisdiction, and the High Court can interfere in revision under section 115, clause (a) of the Civil Procedure Code.

Obiter.—Mere absence for a few days of a President of a District Board from his district on a visit to another place does not necessarily vest in the Vice-President the power of appointing members of the Taluk Board.

Where the President of a District Board, who had been temporarily absent from his district on a visit to Madras and had while at Madras appointed certain persons as members of the Taluk Board on return to his district, again signed the list of their names and directed it to be posted on the notice board of the District Board office as required by the Act, and it appeared that the Vice-President did not appoint any person during the former's absence, *held* that the appointment made by the President was valid.

PETITION under section 115, Civil Procedure Code, and section 107 of the Government of India Act, praying the High Court to revise the order of K. S. MENON, the District Judge of Guntūr, in Original Petition No. 82 of 1922.

In this case, the petitioner in the High Court, one Kokku Parthasaradhi Naidu, had been elected as President of the Narasaraopet Taluk Board at an election held on the 20th October 1920. The first respondent one C. Koteswara Rao, who was the unsuccessful rival candidate, filed a petition objecting to the election of the President. The objection was filed under Rule 1 of the rules issued by Local Government under the Local Boards Act, 1920, and was on the ground that the election was void, as the appointment of the petitioner Parthasaradhi Naidu as a Taluk Board member was invalid, the appointment having been made by the

PARTHA-
SARADHI
NAIDU
v.
KOTESWARA
RAO.

President of the District Board (the second respondent) during his temporary absence from his district on a visit to Madras. It was contended that by reason of the temporary absence of the President the power of appointing members of the Taluk Board had become vested in the Vice-President of the District Board and the appointment by the President and the publication of the same in the *Fort St. George Gazette* on 25th September 1922 were invalid. It appeared that the President returned to Guntūr and again signed the list of appointments of members of the Taluk Board, including the name of the petitioner, on the 29th September 1922 and had it published by posting it on the notice board of the District Board office on the same date. The learned District Judge held that the appointment of the petitioner (Parthasaradhi Naidu) should be deemed to have been made by the President of the District Board, on the 25th September 1922, during his absence at Madras, and that it was invalid under the Act. He therefore declared that the election of the petitioner, as President of the Taluk Board, was void, and directed a fresh election to be made for the office of the President of the Taluk Board. Against this order, the petitioner preferred this Civil Revision Petition to the High Court.

V. Ramadoss (with Ch. Raghava Rao) for respondent, raised a preliminary objection that the order of the District Judge was not revisable by the High Court under section 115, Civil Procedure Code, as the Judge was not acting as a Court but was acting only as a *persona designata*. He referred to section 199 and rules 11, 12, 6 and 7 of the Local Boards Act. If he was acting as a Court, rule 6, which is a special rule prescribing the procedure for the trial of suits, is unnecessary since the Court can invoke section 141, Civil Procedure Code. The order is not revisable also for the

PARTHA-
SARADHI
NAIDU
v.
KOTESWARA
RAO.

reason that rules have declared the decision of the District Judge to be final. The order of the District Judge is right on the merits as the petitioner before the High Court was not properly appointed as a member of the Taluk Board by the President of the District Board and even if it is legally wrong it cannot be interfered with in revision as there is no want of jurisdiction.

C. V. Anantakrishna Ayyar for District Board (with *Dr. Swaminathan* for the petitioner) contended that the District Judge acted only as a *Court* and that his order was therefore revisable. In various sections and rules under the Act he is described only as a Court. If by a wrong construction of a section or rule a Court usurps jurisdiction which it has not, its order is revisable. The meaning of the rule that his order is "final" is that it is not appealable. A revision is not prohibited. On the merits, the appointment of the petitioner as a member of the Taluk Board was legal and proper on both the occasions and even if he was not legally appointed that is not one of the grounds mentioned in sections 56 and 57 of the Act on which alone an election held can be set aside. His appointment as a member once made can be set aside only under separate proceedings specially taken for that purpose, e.g., *quo warranto*.

JUDGMENT.

SCHWABE,
C.J.

SCHWABE, C.J.—This is an application for the revision of the decision of the District Judge acting under the powers conferred upon him by the rules framed under the Madras Local Boards Act of 1920. By Rule 1 of the rules issued by the Local Government under the powers conferred on them by section 199.(2) (c),

"No election of a member or of a President of a District, Taluk, or Union Board shall be called in question except by an election petition, presented in accordance with these rules, to the District or Subordinate Judge having jurisdiction."

PARTHA-
SARADHI
NAIDU
v.
KOTESWARA
RAO.
—
SCHWABE,
C.J.

A preliminary point is taken that this Court has no power of revision, under section 115 of the Code of Civil Procedure, over the decision of a District or Subordinate Judge when acting under that rule. That depends on whether the Judges therein referred to are acting as Courts, or acting merely as *personæ designatæ*, that is to say, persons selected to act in the matter in their private capacity and not in their capacity as Judges. There has been considerable conflict of opinion on this point since the coming into force of this Act, and I do not think that the decisions that have been given on the matter are of great assistance to us in arriving at the proper conclusion, and we have to look at the Act and the rules and the law as it stands. The law is, I think, quite definitely established by the decision in *National Telephone Company, Limited v. Postmaster-General*(1), in the words of Lord PARKER at page 562, that

"where by statute matters are referred to the determination of a Court of Record with no further provision, the necessary implication is, I think, that the Court will determine the matters, as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same."

If this matter had been referred to the District Court or Subordinate Judge's Court in terms, in my judgment, no question could arise, because, following the words of the judgment just quoted the matter would be determined by the Court as a Court, it being given jurisdiction for this particular purpose, and all the incidents which include the incident of being liable to revision must follow, although no appeal would lie in this particular case because an appeal has been expressly precluded, for by section 57 (2) of the Act, and by the rules, this "decision is to be final." But as the word

(1) [1913] A.C., 546.

PARTHA-
SARADHI
NAIDU
v.
KOTESWARA
RAO.
—
SCHWABE,
C.J.

"Judge" is used and not the word "Court," one has to look carefully to see whether the word "Judge" was used of him in his capacity as Judge or in his personal capacity, and I think great light is thrown upon this by two other rules. Rule 12 (2) of the rules for election refers to "an election or other competent Court" and it is quite clear that it is there referring to a Court of a District Judge or Subordinate Judge; and, by Rule 4 (3) of the rules for the conduct of inquiries, power is given to the District or Subordinate Judge in certain cases "to direct any Court subordinate to him to hold the inquiry." I find it impossible to hold that a reference to a Judge with power to refer to a Court subordinate to him can mean anything else than reference to a Judge sitting as a Judge in the exercise of his ordinary jurisdiction extended for that purpose. For these reasons, in my judgment, the power of revision lies.

It is further argued that the fact that the decision of this Judge is, by section 57 of the Act and by the rules, final, precludes any revision. There is really no authority adduced in support of that proposition and, in my judgment, it would be quite contrary to the whole object and intention of section 115 of the Code of Civil Procedure so to hold. That section only applies where there is no appeal. I know of no better way of directing that there shall be no appeal than by the legislature stating that the decision of a particular Court shall be final. It is the ordinary mode of expression used for the purpose in much of the legislation in England on which this legislation is founded; and, where the whole object of revision is to prevent a Court, from which there is no appeal, acting contrary to its jurisdiction, a finding that it is the law that, because the words used are "the decision shall be final," a Court, ordinarily subject to the

revisional powers of this Court, should be permitted to act wholly without jurisdiction without the aggrieved party being entitled to any remedy, would in my judgment be untenable, and that would be the effect of deciding this second point in favour of the contention put forward.

On these grounds, in my judgment, this Court has revisional power and the preliminary point fails.

The petitioner was duly elected President of the Narasaraopet Taluk Board. A petition was subsequently filed before the District Judge of Guntūr for a declaration that this election may be declared void and annulled and that the petitioner, one Chintalacheruvu Kotiswara Rao, a defeated candidate in the election, should be declared to be duly elected. The District Judge found that the petitioner had not been properly appointed a member of the Taluk Board and was, therefore, not eligible for election to the presidentship of that Board, and the matter comes before us on a petition for revision of that order.

It is contended, on the one side, that the decision of the District Judge was wrong and that this is a case for the exercise by the High Court of its revisional powers under section 115, Civil Procedure Code, and, on the other side, that the decision of the District Judge is right, and that, even if it was wrong, his order is not a proper subject-matter for revision.

The powers of a District Judge in the matter of election petitions are contained in section 57 of the Madras Local Boards Act of 1920, and in the "Rules for the conduct of inquiries and the decision of disputes relating to elections" issued by the Local Government under their powers in that behalf under section 199 of the Act. By section 57, the Judge has power to determine whether an appointed member is disqualified

PARTHA-
SARADHI
NAIDU
v.
KOTESWARA
RAO.
—
SCHWABE,
C.J.

PARTHA-
SARADHI
NAIDU
v.
KOTSWARA
RAO,
—
SCHWABE,
C.J.

under section 55 or section 56 by reason of the various grounds set out in those sections such as insanity, bankruptcy, being interested in contracts with a Local Board and the like, none of which are alleged in this case. The petitioner had been appointed by the President of the District Board purporting to act under section 9 of the Act. By the rules above referred to, save as provided in section 57, no election of a member or a president can be called in question except by an election petition presented to the District or Subordinate Judge. This rule is somewhat obscure. I understand it to mean that, apart from the powers under section 57, a petition to the District or Subordinate Judge is the only way of questioning the election. But I can find nothing either in the section or the rules giving powers to a District or Subordinate Judge to question the appointment of a nominated member such as the petitioner, except on the specified ground, namely, disqualification under sections 56 and 57. At the time of his election as president, he, the petitioner, was *de facto* a member of the Board and as such eligible for election to the presidentship. It is not suggested that there was any irregularity in the election, but what is suggested is that he was not eligible for election because he was not properly appointed a member by the President of the District Board. Now the appointments of members other than elected members are in certain cases in the hands of the Local Government, in certain cases in the hands of the President of the District Board and in certain cases in the hands of the President of the Taluk Board under section 9 of the Act, and I can find nothing in the Act to suggest that a District or Subordinate Judge is intended to have any jurisdiction to decide whether the Local Government or the President of the District or Taluk Board, as the case may be, properly exercised their power of appointment. What he has

PARTHA-
SARADHI
NAIDU
v.
KOTSWARA
RAO,
—
SCHWABE,
C.J.

jurisdiction to decide is whether a person so appointed is disqualified under section 55 or 56 and nothing else, and, in my judgment, on a petition dealing with an election to presidentship, he cannot go into the question whether a particular candidate was duly appointed a member of the Board. Therefore, in my judgment, the District Judge in this case was acting wholly without jurisdiction in investigating that question and giving his decision upon it, and the matter, therefore, comes directly under section 115 (a) of the Civil Procedure Code. If it is desired to question the appointment of a member, it is probably open to question it in court by proceedings in the nature of *quo warranto*.

Assuming that the District Judge had power to inquire into this matter, whether it can be said that the High Court has power to revise his order under section 115 (c) is a very difficult question and one upon which I do not think it necessary or advisable to express any opinion or to add one more to the many judgments dealing with what does come under that section and what does not; nor do I consider it necessary for the decision of this case to go into the question whether the District Judge was right or wrong in the decision to which he came. But as the matter has been fully argued before us and as it is of considerable importance, I think it desirable that we should express our opinion, *obiter* though it may be.

The facts are that the President of the District Board while temporarily in Madras prepared and signed a list of his appointments including therein the petitioner, and sent a copy of that to the *Fort St. George Gazette*. The District Judge held that, by reason of section 23 (2) of the Madras Local Boards Act, the appointments thus made were void. That section enacts that "during the temporary absence or incapacity of the President of a

PARTHA-
SARADHI
NAIDU
v.
KOTESWARA
RAO.
—
SCHWABE,
C.J.

District or Taluk Board, the President's function shall devolve on the Vice-President." By section 25 "the exercise of these powers by the Vice-President shall be subject to such restrictions, limitations and conditions as may be laid down by the President and shall also be subject to his control and revision." I do not think that the mere absence for a few days of the President from his district on a visit to Madras necessarily vests in the Vice-President the power of appointing members of the Board. But even if it did, the fact in this case is that the Vice-President did not make any appointment and the President returned to his district, and signed again in his district the list of appointments of these members and directed it to be posted on the board where, and not in the *Fort St. George Gazette*, it had, by the Act, to be posted. This was a perfectly proper exercise of the President's powers of appointment and, in my judgment, there was nothing wrong with the appointment of the petitioner at all.

It follows that this petition must be allowed, and the order of the District Judge must be set aside. The first respondent must pay costs throughout, including the costs of the second respondent.

RAMESAM, J. RAMESAM, J.—I agree with my Lord's conclusion in the judgment delivered that, in the light of the rules made under the Act, the District Judge must be considered to be a Court and that, notwithstanding the use of the word "final" in section 57, a Revision Petition lies to this Court.

The next question is whether there is any question of jurisdiction or material irregularity within the meaning of section 115, Civil Procedure Code. It is not suggested that the District Judge acted with material irregularity in the exercise of his jurisdiction. As to jurisdiction, I think, one must start with the principles laid down by

the Privy Council in *Balakrishna Udayar v. Vasudeva Ayyar*(1). "The section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the questions of jurisdiction is not involved." It follows that an error of law leading to an erroneous order only, does not justify our interference. An error of law leading to the exercise of a jurisdiction which did not exist or to the failure to exercise a jurisdiction which did exist, justifies such interference, see *Atchayya v. Sri Seetharamachandra Rao*(2). It must be remembered that every error of law cannot be regarded as the exercise of a jurisdiction which does not exist merely because, but for such error, the order of the Court would have been different; otherwise, all erroneous decisions can be modified or revised in revision. I agree with the observations of my brother WALLACE, J., in *Ahmad Thambi Maraicair v. Basava Maracayar*(3).

Applying these principles, it follows that, where a District Judge, who has jurisdiction to enquire into an election petition under the rules made under the Local Boards Act, 1920, passes, as the result of his enquiry, an erroneous order based on an erroneous construction of the sections of the Act or the rules, the order cannot be interfered with in revision; and it cannot be said in such a case, that, on account of his error of law, the District Judge exercised a jurisdiction which did not exist or failed to exercise a jurisdiction which existed. For instance when he held erroneously that the appointment of a member or President was void, it cannot be said merely by reason of such error that there was an erroneous assumption of jurisdiction. I do not think

PARTHA-
SARADHI
NAIDU
v.
KOTESWARA
RAO.
—
RAMESAM, J.

(1) (1917) I.L.R., 40 Mad., 793 (P.O.). (2) (1916) I.L.R., 39 Mad., 195 (F.B.).
(3) (1923) I.L.R., 46 Mad., 123.

PARTHA-
SARADHI
NAIDU
v.
KOTESWARA
RAO.
—
RAMESAN, J.

that the observations of CHANNELL, J., in *Reg. v. Manchester Justices*(1) help us in the application of section 115. It is true that these observations have been quoted and applied by my brother KRISHNAN, J., in *Ramaswami Goundan v. Muthu Velappa Gounder*(2). I am unable to agree with all the observations in that case. I also observe that, in that case, the ground of material irregularity was also available.

In the present case before us, I agree with my Lord the Chief Justice, in holding that the District Judge acted without jurisdiction. Under section 57 he had jurisdiction to enquire into the validity of the appointment of a member only if it is questioned on the ground that he was disqualified under sections 55 and 56. No such ground was alleged or proved and the District Judge had no jurisdiction to enquire into the election petition. We have not here a case of his holding that he had jurisdiction to enquire by an erroneous construction of some section or rule of law. He merely enquired into a petition in which no ground, such as is mentioned in the section, was alleged.

I agree with the order proposed by my Lord.

WALLER, J.

WALLER, J.—On the first point I agree that the Judge referred to in Rule I is not a *persona designata*. Rule IV (3) is, I think, conclusive. A Judge acting as *persona designata* has no Court subordinate to him. I agree also that the description of his decision as final, means no more than that there is no appeal against it. It does not mean that a decision made without jurisdiction is not open to revision under section 115, Civil Procedure Code.

It seems to me clear that, in this case, the Judge had no jurisdiction to decide what he did decide. Petitioner was an appointed member of the Board and his

(1) [1899] 1 Q.B., 571.

(2) (1923) I.L.R., 46 Mad., 536.

PARTHA-
SARADHI
NAIDU
v.
KOTESWARA
RAO.
—
WALLER, J.

appointment could be questioned before the Judge only with reference to sections 55 and 56 of the Act. It could certainly not be questioned in a proceeding of this kind. The Act, no doubt, provides that the President shall be elected from among the members of the Board, but that provision does not give the judge jurisdiction on an election petition to consider whether the members have or have not been properly appointed. He cannot disqualify them save on grounds that are not applicable here. The result, in the present instance, was the petitioner remained an appointed member of the Board, although the Judge had set aside his election as President on the ground that he had not been properly appointed a member. On the last point I agree that the petitioner was properly appointed and concur in the order allowing the petition and as to costs.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

1923,
September
19.

PUNYA SYAMALO (DEFENDANT IN MISCELLANEOUS
CASE NO. 44 OF 1922 ON THE FILE OF THE TOWN
SUB-MAGISTRATE OF BERHAMPUR).*

Local Boards Act (Madras Act XIV of 1920)—Money due under a contract of lease of tolls—Sec 221 of the Act, if recoverable under.

The amount due under a contract of lease of the tolls due to a Local Board is not "any fee, toll, costs, compensation, damages, penalties, charges, expenses or other sums due to a Local Board" within the meaning of section 221 of the Madras Local Boards Act (Madras Act XIV of 1920) and is not recoverable under the warrant of a Magistrate.

The words "other sums" in the section should be read *ejusdem generis* with what precedes them.

* Criminal Revision Case No. 222 of 1923.

PUNTA
SYAMALO,
In re.

CASE referred for the orders of the High Court, under section 438, Code of Criminal Procedure, by H. D. C. REILLY, Sessions Judge of Ganjām at Berhampur, in his letter Dis. No. 883, dated 15th March 1923.

The facts are given in the following Order of Reference by the Sessions Judge:—

The President of the Ganjām District Board leased to the petitioner the right to collect tolls at a certain toll-gate during the financial year 1921-22, on the petitioner agreeing to pay Rs. 4,450 in certain instalments. Petitioner being in arrears with his payments, an official of the District Board applied to the Town Sub-Magistrate of Berhampur to recover Rs. 1,112-8-0 with interest from the petitioner under section 221 of the Madras Local Boards Act, 1920. The Magistrate found that Rs. 612 was due from the petitioner and, purporting to proceed under section 221 of the Act, ordered the petitioner to pay that amount to the District Board with interest at 8 per cent, the rate of interest provided in the contract being 12 per cent. Petitioner prays that the case may be reported to the High Court for revision.

Petitioner's main contention is that the case is not covered by section 221 of the Act and that the Magistrate acted without jurisdiction. In that, I think, he is correct. Section 221 of the Act provides that "in default of payment of any fee, toll, costs, compensation, damages, penalties, charges, expenses or other sums due to a Local Board under, or by virtue of this Act, the same may be recovered under the warrant of the Magistrate." These words do not appear to include a sum due to a Local Board under a contract. The respondent's vakil does not contend that the section would apply to the recovery of rent due from a tenant on land leased to him by a local board, or of money due to a local board under a contract unconnected with the collection of any tax or toll levied by the board. But he contends that, because the District Board is empowered under section 75 of the Act to levy tolls, and under section 106 to lease out the right to collect them, any sum which a toll-contractor or lessee agrees to pay to the board for that right, is a sum due to the board "under or by virtue of the Act" within

PUNTA
SYAMALO,
In re.

the meaning of section 221. That contention appears to me unsound. The fees, tolls, costs, etc., mentioned in section 221 are all amounts which the member of the public concerned is bound to pay under orders made by virtue of the Act irrespective of his own wishes or consent. A sum due to the board from a party to a contract with it is not *ejusdem generis* with such fees, tolls, costs, etc., and cannot by any proper interpretation be brought within the words "other sums" in that section. Moreover, an amount due to the board under a contract cannot be said to be due to it under, or by virtue of the Act merely because the contract relates to the collection from the public of sums which, under the Act, the board can require the public to pay, or the contract is one into which the Act permits the board to enter. But for his contract the board would have no claim on the petitioner for the amount in question, and it is not by virtue of the Act but by virtue of his contract that he is liable for it. In my opinion section 221 of the Act does not apply to the case and the Magistrate's order is illegal.

In his explanation the Magistrate suggests that in making his order he was not acting as a Criminal Court, from which it would follow that I have no power to examine his proceedings under section 435, Code of Criminal Procedure, or to report the case to the High Court for revision under section 438, Code of Criminal Procedure. But in view of the decision of the High Court in Criminal Revision Case No. 427 of 1922, the respondent's vakil does not press that point. The case will be reported to the High Court for revision.

V. L. Ethiraj for the Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.

We think the reasons stated in the Order of the learned Sessions Judge are correct and we accept the same. The amount due under a contract of lease though of the toll cannot be treated as falling within the words of section 221 of the Local Boards Act. The words "other sums" in the section should be read *ejusdem*

PUNYA
STAMALO,
IN RE.

generis with what precedes them. Then again the sum in question here, is not payable "under or by virtue of this Act," but is payable under the contract between the parties. Section 106 has no bearing on this question; it merely authorizes the leasing out of the tolls but does not make the money payable under the contract of lease, money payable under the Act.

We, therefore, set aside the order of the Town Sub-Magistrate of Berhampur in M.C. No. 44 of 1922 as made without jurisdiction.

D.A.R.

APPELLATE CRIMINAL.

1923,
December 3.

Before Mr. Justice Odgers and Mr. Justice Wallace.

NATARAJA PILLAI, PETITIONER,

v.

RANGASWAMY PILLAI AND THREE OTHERS, RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), sec. 195—Nature of application to High Court—Not an appeal—Effect of amendment of the section—Application to set aside order revoking sanction—Not maintainable.

No right of appeal is provided for under section 195 of the Criminal Procedure Code (Act V of 1898), and an application to set aside an order revoking sanction does not lie after the amendment of the section by Act XVIII of 1923 as the amendment affects procedure and, as such, has retrospective effect.

Bapu v. Bapu, (1916) I.L.R., 39 Mad., 750 (F.B.) and *Muthuswami Mudali v. Veeni Chetti*, (1907) I.L.R., 30 Mad., 382 (F.B.), referred to and explained.

PETITION praying the High Court to set aside the order, dated 24th April 1923, of S. N. V. RAJACHARI, Additional District Magistrate, Tanjore, in Criminal Miscellaneous Petition No. 17 of 1923, revoking the sanction accorded for the prosecution of the respondents

* Criminal Miscellaneous Petition No. 374 of 1923.

by the order of M. R. SANKARANARAYANA AYYAR, Sub-divisional Magistrate, Tanjore, in M.C. No. 48 of 1921.

NATARAJA
PILLAI
v.
RANGASWAMY
PILLAI.

The facts are given in the judgment.

K. S. Jayarama Ayyar for petitioner.

A. V. Viswanatha Ayyar for respondents 1 to 3.

V. L. Ethiraj for the Public Prosecutor.

JUDGMENT.

ODGERS, J.—This is an application to set aside the order of the Additional District Magistrate of Tanjore wherein he revoked the sanction to prosecute the respondents, granted by the Subdivisional Magistrate of Tanjore. The application is under section 195 of the Criminal Procedure Code which has been amended by Act XVIII of 1923. The old section allowed the application to be made by a private party. This has now been abolished by the amended section and no Court can take cognizance of any offence punishable under sections 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, etc., or of the Court when such offence is alleged to have been committed in, or in relation to, any proceeding in that Court. Mr. A. V. Viswanatha Sastriyar, who appears for the respondents, takes more than one preliminary objection. We have only heard him so far on one, and that is the question whether sanction proceedings can now be entertained under the Criminal Procedure Code as amended. Mr. Viswanatha Sastriyar maintains that this is not an appeal under section 195, Criminal Procedure Code, and that the amendment of that section has effected an alteration in procedure. Now it is settled law that new procedure affects bygone transactions, and alterations in procedure are always retrospective [*Gardner v. Lucas*(1)]

ODGERS, J.

(1) (1873) 3 App. Cas., 582 at 603.

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI.
—
ODGERS, J.

It is conceded by Mr. K. S. Jayarama Ayyar for the petitioner that if this is a matter of procedure, the contention of the other side is correct. Mr. Jayarama Ayyar, however, contends that there is a right of appeal given under section 195, Criminal Procedure Code itself, and that this section is self-contained and independent of, or additional to, any other right of appeal given by the Code. If this is an appeal, then the right of appeal inhered in the parties at the time the original application for sanction was made, which was on or before the 8th December 1921, for it is clear law that you cannot deprive a suitor of a right in a pending action of an appeal to a superior tribunal which belonged to him as of right [*Colonial Sugar Refining Company v. Irving*(1)] so that, if this is an appeal, we can hear the petition; if this is not an appeal, but a mere matter of procedure, then, alterations in procedure being retrospective, we are not at liberty to entertain it. That this is not an appeal under the ordinary appellate chapters of the Code, chapters 31 and 32, is clear from the ruling in *Bapu v. Bapu*(2). That was a decision of the Full Bench where the Court said they were not prepared to dissent from the conclusion arrived at by the Full Bench, in *Muthuswami Mudali v. Veeni Chetti*(3). They added

"We think, however, the power conferred upon this Court by section 195 (6), Criminal Procedure Code, is not a part of the appellate and revisional jurisdiction of this Court conferred by Chapters 31 and 32 of the Code of Criminal Procedure."

It is a special power conferred by section 195 (6), Criminal Procedure Code. They decided that when the Judges are equally divided on a question under section 195 the matter is governed by section 36 of the Letters Patent and not by section 429 or 439 of the Criminal

(1) [1905] A.C., 389.

(2) (1916) I.L.R., 39 Mad., 750 (F.B.).

(3) (1907) I.L.R., 30 Mad., 382 (F.B.).

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI.
—
ODGERS, J.

Procedure Code. The bearing of this case on the present case will be considered in a moment. Meantime it is instructive to refer to the opinions of the referring Judges because, in the first instance, there were differing judgments and also an order of reference to the Full Bench in all of which the matter was considered in some detail. SUNDARA AYYAR, J., in his first opinion held that clauses 6 and 7 of section 195, Criminal Procedure Code, do not provide in terms that an appeal lies from an order granting or refusing sanction, nor does Chapter 31, relating to appeals, provide that an appeal shall lie from such an order, that the power of the superior Court under those clauses is similar to what it possesses in appeals and that the same may be said of the powers of the High Court in proceedings in revision. As to the language of section 429, Criminal Procedure Code, the learned Judge was of opinion that the language referring to the powers of a Court of appeal under section 195, Criminal Procedure Code, was employed,

"only because it is the Court to which an appeal lies from the decisions of the Court granting the sanction that has got power to revoke a sanction or to give a sanction refused by an inferior Court."

SPENCER, J., also held that there was no rule of law which subjects applications made under the special provisions of section 195, Criminal Procedure Code, to the periods of limitation contained in the Limitation Act. The learned Judges, therefore, in their first judgments both concurred that an application under section 195 (6), Criminal Procedure Code, cannot strictly be regarded as an appeal. To come to the Full Bench Decision in *Muthuswami Mudali v. Veeni Chetti*(1) that case decided that the right of appeal conferred by section 195 (6),

(1) (1907) I.L.R., 30 Mad., 382 (F.B.).

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI.
ODGERS, J.

Criminal Procedure Code, as read with sub-clause 7, is not restricted to a right of appeal to the appellate Court to which the Court of first instance is immediately subordinate. It also decided that a revocation of a sanction is a refusal of a sanction in the same way as an order confirming a grant of a sanction is a giving of a sanction for the purposes of the section. *Muthuswami Mudali v. Veeni Chetti*(1) followed *Palaniappa Chetti v. Annamalai Chetti*(2) where it was held that under sub-section (6) a petition by way of appeal lies to the High Court in every case in which a Civil or Criminal Court, subordinate to it within the meaning of sub-section 9 (a), gives or refuses a sanction, whether in respect of an offence committed before it or in respect of one committed before a Court subordinate to it and in the latter case whether it gives a sanction refused by the subordinate Court, or revokes a sanction accorded by such Court. In all these three cases it is to be noted that the main question before the Court was, put shortly whether there was one right of appeal or more than one and what *Palaniappa Chetti v. Annamalai Chetti*(2) and *Muthuswami Mudali v. Veeni Chetti*(1) decided is that in such a case there is more than one right of appeal. This is the point on which *Bapu v. Bapu*(3) confirmed 30 Madras. As stated above 39 Madras went further and held that the power conferred by section 195 (6), Criminal Procedure Code, is not part of the appellate and revisional jurisdiction conferred by Chapters XXXI and XXXII, Criminal Procedure Code. Section 404, Criminal Procedure Code, says that "no appeal shall lie from any judgment or order except as provided for by this Code." It is therefore necessary in my opinion to find a distinct and definite right of appeal given by section 195,

(1) (1907) I.L.R., 30 Mad., 382 (F.B.). (2) (1904) I.L.R., 27 Mad., 228.
(3) (1916) I.L.R., 39 Mad., 750 (F.B.).

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI.
ODGERS, J.

Criminal Procedure Code itself, before it can be assumed that any such right of appeal exists. Now sub-section 6 says that "any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate, etc." The wording itself seems to point to an original refusal or an original grant by the High Court as a superior authority itself. SADASIVA AYYAR, J., in *Panchalu Reddi v. Chinna Venkata Reddy*(1) at page 100 says that the power given by section 195 (b) of the Criminal Procedure Code to the superior "authority" is a specific statutory power. Though it is usual to call the application to the superior authority a petition of appeal, the learned Judge doubted whether it could be called an appeal. And in *Subbasari v. Emperor*(2) the same learned Judge was inclined to hold that the application to the appellate Court to revoke or grant a sanction, granted or refused, is not an appeal, but an original application. In *Public Prosecutor v. Raver Unnithiri*(3) it was said that a confirmation of sanction by the appellate Court is equivalent to a fresh grant of sanction by the Court. No doubt, section 439, Criminal Procedure Code, in speaking of the High Court's powers of revision, confers on the Court any of the powers conferred on a Court of appeal by sections 195, etc. But I am of opinion, which I think is supported by authority quoted above, that the "Court of appeal" referred to is only a designation of the superior authority to which application for revocation or grant is to be made. Further, it will be noted that section 429, Criminal Procedure Code, which provides for a difference of opinion between Judges composing the Court of appeal, is not confined to appeals under Chapter XXXI, whereas

(1) (1919) I.L.R., 42 Mad., 96.
(2) (1921) I.L.R., 44 Mad., 47.
(3) (1914) 26 M.L.J., 511.

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI.
—
ONGERS, J.

section 428 (1), Criminal Procedure Code, deals with appeals under "this Chapter." This distinction is important in relation to the decision in 39 Madras which held that clause 36 of the Letters Patent applied, and not section 429, Criminal Procedure Code, on a difference of opinion between the Judges composing the superior Court to which application is made under section 195 (6), Criminal Procedure Code. Further I am of opinion that the alterations made by the amendments to the Code are merely alterations of procedure. Prosecutions for various offences committed in relation to proceedings before public servants or Courts are still punishable, but those proceedings are to be initiated on complaints either of the public servants or the Courts concerned themselves, and not on the application for sanction to prosecute by a private party. The public servant or Courts will still generally be set in motion by the party aggrieved though of course it will be open to either to take proceedings *suo motu*.

For these reasons I am of opinion that no appeal is provided for in the Code under section 195, Criminal Procedure Code, and further that the amendments made affect only procedure. We have, therefore, since the amendment, no power to entertain this petition, which must be dismissed.

WALLACE, J.—This is a petition to set aside an order of the Additional District Magistrate, Tanjore, revoking the sanction granted by the Subdivisional Magistrate, Tanjore, for the prosecution of the respondents for an offence under section 188, Criminal Procedure Code.

A preliminary legal point is raised by the respondents, namely, that, since the new amended Criminal Procedure Code has abolished such sanctions and since that is now the law in force in this case, this petition does not lie. The petitioner rejoins that the right to

move this Court for sanction is of the nature of a substantive right, such as a right of appeal, which cannot be taken away by any alteration of the processual law. I think the respondent's contention must be upheld for two reasons: first that there is no substantive right now taken away; and the right conferred by the old section 195 (6) of the Criminal Procedure Code is not a right in the nature of a right of appeal. And secondly, to comply with the petitioner's request and grant a sanction now, would be a futile proceeding, since no Court can now take cognizance of complaints under any such sanction.

To take the first point, the substantive right which the petitioner possesses is the right of setting up a criminal prosecution in train against a party who has committed a breach of an order under section 144, Criminal Procedure Code. The necessary preliminary, under the old section 195 (1), to such a prosecution was the obtaining by the party of a sanction, or the presentation of a complaint by a public servant named therein. Now the method of proceeding by first obtaining a sanction has been abolished. Clearly, the change is a change in the processual law and does not deprive the petitioner of his substantive right to set the criminal law in motion. The petitioner still has a method under the new procedure for setting the law in motion, since he may apply to the public servant, or any authority to whom that public servant is subordinate, to present a complaint.

Such an application as is now before us is not defined anywhere in the old Criminal Procedure Code as an appeal, nor do any provisions of Chapter XXXI extend to it. The petitioner points out that under section 439, old Criminal Procedure Code, it was laid down that the High Court may in proceeding under

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI.
—
WALLACE, J.

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI.
WALLACE, J.

that section exercise any of the rights conferred on "a Court of appeal" by sections 195, etc., which seems to imply that section 195 confers some powers of the nature of appellate powers on a superior Court and the omission of section 195 in the new section 439 emphasises the fact that the phrase "Court of appeal" as hitherto used had reference to the powers conferred on Courts in the matter of sanctions now abolished. However, the question whether in taking proceedings under the old section 195 (6), this Court is a Court of appeal has been fully discussed in the Full Bench case of this Court reported in *Bapu v. Bapu*(1) which lays down that the power exercised under the old section 195 (6) is neither an appellate nor a revisional power but a special power. The previous rulings of this Court which used the words "appeal" and "appellate Court" with reference to these powers, for example, *In re Paree Kunhammed*(2), *In re Muthukudam Pillai*(3), *Palaniappa Chetti v. Annamalai Chetti*(4), *Muthuswami Mudali v. Veeni Chetti*(5), *Jamna Doss v. Sabapathy Chetty*(6) must therefore be taken to have been using these words loosely and not with strict technical accuracy. Section 439 also indicates plainly enough that the powers of this Court as a Court of appeal under the old section 195 (6) are to be found in that section alone and are limited to the terms of that section. It is significant that there was no other section which laid down that the powers of the High Court under the old section 195 (6), Criminal Procedure Code, consisted of any of the powers which were under the old sections 423, 426, 427 and 428, the other sections quoted in section 439, conferred on it. Another significant fact is that nowhere was any period of

(1) (1916) I.L.R., 39 Mad., 750 (F.B.).

(3) (1903) I.L.R., 28 Mad., 190.

(5) (1907) I.L.R., 30 Mad., 382 (F.B.).

(2) (1903) I.L.R., 26 Mad., 116.

(4) (1904) I.L.R., 27 Mad., 223.

(6) (1913) I.L.R., 36 Mad., 133.

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI.
WALLACE, J.

limitation fixed for petitions under section 195 (6), whereas a regular right of appeal has always a defined period fixed within which it must be exercised. Old section 195 (6), to my mind, indicates that in a case like the present, the power of the Court as a "Court of appeal," to adopt the phraseology of old section 439, is limited to granting a sanction refused by the lower appellate Court, which sanction is a fresh sanction and is not a revival or resuscitation of the original sanction granted by the original Court which had been revoked by the lower appellate Court. No reported case controverting this view has been quoted to us. There is no reported case in this Presidency, so far as I know, which, e.g., lays down that when a sanction has been granted and revoked and again granted, the six months are to date from the date of the original grant as if that had been resuscitated. The case reported in *In re Muthukudam Pillai*(1) is not in point, as there the original sanction had never been interfered with.

The same result will be obtained by considering the matter from another point of view. Assuming, without deciding, petitioner's contention that for the purposes of a petition under old section 195 (6) the District Magistrate as a public servant is, within the meaning of section 195 (1), subordinate to this Court, it is clear that petitioner might have applied, in the first instance, in this Court for the sanction he now seeks. It follows that his right to move this Court does not depend on there being in existence an order against him against which he can "appeal." Such right as was given him by the section was a right to apply to this Court for a sanction, irrespective of what had happened to similar applications in any Court subordinate to this Court.

(1) (1903) I.L.R., 28 Mad., 196.

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI.

WALLACE, J.

For the above reasons I hold that petitioner's right to apply for a sanction is purely a matter of processual law and not a right of the nature of a right of appeal.

As to the second point, it rests on petitioner's contention that the grant of sanction by this Court will restore the sanction of the original Court so as to enable the prosecution already instituted on that sanction to continue from where it left off when the sanction was revoked; that is, in his view, the revocation of sanction has not destroyed the sanction but merely held it in abeyance if, and while, an appeal is pending. The petitioner goes further and contends that, since the Criminal Procedure Code does not contemplate a case once begun ending merely because a requisite sanction had not been obtained or because the sanction on which it was instituted has been revoked, no subsequent discovery of absence of sanction, or revocation of sanction can interfere with its jurisdiction. Such a position I must hold to be untenable, since it would imply that the right to have a sanction revoked would be quite futile, if a complaint based on a sanction had already been put in, since on this theory any subsequent revocation would not affect the jurisdiction of the Court to proceed with the trial of the complaint already filed. The petitioner appeals to section 537 of the Criminal Procedure Code for his position; but it does not really help him since that section has no application to cases under trial when it is discovered that no sanction exists or that the sanction given has been revoked. Obviously the Court has power to discharge or acquit an accused person of a charge which requires previous sanction if, in the course of the trial and before judgment is pronounced, it is brought to its notice that no sanction has been obtained, and I can see no difference between such a case and a case where the sanction on which the trial is proceeding

has been set aside during the trial. Revocation of a sanction must have some legal effect and can only imply, to my mind, that the prosecution started under the sanction can proceed no further and has come to an end.

NATARAJA
PILLAI
v.
RANGASWAMI
PILLAI.
WALLACE, J.

For reasons already given, I have held that the petitioner can now ask, and is now asking, this Court only to grant a fresh sanction and that this is not a petition of appeal against, or a petition to revise, any order of the lower Court, and, for reasons now given, hold that the original sanction given has, by the revocation, been swept away for ever and cannot be revived by any order on this petition.

The new Criminal Procedure Code has abolished the right to present such a petition and this petition must be heard under the existing processual law. That law now forbids any prosecution being instituted merely upon a sanction granted to a private party. It follows, then, that even if this Court does grant the petitioner the sanction that he seeks, such a sanction would be of no avail for instituting any prosecution; and this is an additional reason for refusing to grant the petitioner the sanction which he seeks, since to grant it would be a merely empty formal proceeding of no use whatever to the petitioner.

As I have already pointed out, the petitioner is not left without a remedy, since it is still open to him to move the authority to whom the Additional District Magistrate is subordinate within the meaning of section 195 (1) to present a complaint on which the respondents may be prosecuted for their disobedience of the order passed by the original public servant.

I therefore agree that the petitioner's petition is not maintainable and must be dismissed.

D.A.R.

APPELLATE CRIMINAL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice and Mr. Justice Waller.

S. TIRUMALA REDDI (ACCUSED IN CALENDAR CASE NO. 215 OF 1923, ON THE FILE OF THE COURT OF THE SECOND CLASS MAGISTRATE OF GUDIYATTAM).*

Village Panchayat Court—Accused refusing to plead—section 179, Indian Penal Code (Act XLV of 1860) whether applicable—Procedure—Madras Village Panchayat Act (Madras Act II of 1920), rule 36—Provisions same as under Criminal Procedure Code (Act V of 1898).

An accused person is not bound to answer questions put to him by the Court and is therefore not liable to a prosecution under section 179 of the Indian Penal Code (Act XLV of 1860) for refusing to answer them. The procedure when an accused person declines to plead before a Village Panchayat Court, is laid down in rule 36 of the rules made under section 78 of the Madras Village Panchayat Act (Madras Act II of 1920), and is precisely the same as that provided for by the Criminal Procedure Code, in respect of other Courts.

CASE referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by J. C. MOLONY, District Magistrate of North Arcot, Vellore, in his letter, dated 14th May 1923.

The facts are stated in the Judgment.

V. L. Ethiraj, on behalf of the Public Prosecutor, for the Crown.

JUDGMENT.

SCHWABE, C.J.—This is a reference by the District Magistrate of North Arcot, under section 438 of the Code of Criminal Procedure, in relation to a conviction by the Sub-Magistrate of Gudiyattam of one Tirumala Reddi under section 179 of the Indian Penal Code, he being fined Rs. 10, in default seven days' simple imprisonment.

* Criminal Revision Case No. 355 of 1923.

The facts appear to be that the accused had been summoned for some offence before the Village Panchayat Court at Kandiapadu, he being charged with instigation to beat. On being charged before that Court, he said he would not make any reply and remained silent. The Panchayat Court thereupon sanctioned the prosecution of the accused under section 179 of the Indian Penal Code. Section 179 runs

“Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished.”

The procedure before the Panchayat Court is governed by the Madras Act II of 1920 and the rules made in pursuance of section 78 of that Act. The rules have been published and are to be found in Government Order No. 572 of 1920, dated the 2nd of March 1920, published in the *Fort St. George Gazette*. By rule 36

“If the accused pleads not guilty or declines to plead, the Court shall proceed to examine the complainant, if any, the witnesses for the prosecution and the witnesses of the accused.”

Those rules make the procedure of this Bench Court precisely the same in respect of the pleading of the accused as the provisions of the Criminal Procedure Code which apply to other Courts in this country. As far as this matter is concerned, they come to this, that an accused is not bound to answer any question put to him at all and can, if he likes, decline to plead, and, if he declines to plead, the case goes on just the same. In my judgment, section 179 of the Indian Penal Code has nothing whatever to do with the conduct of accused persons in Court. What they have to do and what they have not to do is provided by the Code of Criminal Procedure, where it applies, and by the rules governing a Panchayat Court where they apply. This conviction of the accused under section 179

In re
TIRUMALA
REDDI.
—
SCHWABE,
C.J.

APPELLATE CRIMINAL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice and Mr. Justice Waller.

1923,
October 4.

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The facts are stated in the Judgment.

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JUDGMENT.

SCHWABE,
C. J.

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The facts appear to be that the accused had been summoned for some offence before the Village Panchayat Court at Kandiapedu, he being charged with instigation to beat. On being charged before that Court, he said he would not make any reply and remained silent. The Panchayat Court thereupon sanctioned the prosecution of the accused under section 179 of the Indian Penal Code. Section 179 runs

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In re
TIRUMALA
REDDI.
—
SCHWABE,
C.J.

In re
TIRUMALA
REDDI.
SCHWABE,
C.J.

of the Indian Penal Code was entirely wrong. No offence under that section has been committed. The order of conviction must, therefore, be set aside and the fine, if paid, must be refunded.

Panchayat Courts have got ample powers to deal with such cases. They can simply go on with the case. Having heard the evidence, if they choose to convict, their conviction will be perfectly in order, although the accused has failed to plead and although the accused by his demeanour has been contemptuous of the Court which has been trying him.

WALLER, J. WALLER, J.—I agree to the order proposed. It is quite clear that section 179 of the Indian Penal Code has no application to a refusal to plead to a charge.

D.A.R.

APPELLATE CIVIL.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
and Mr. Justice Ramesam.*

VELAMAKANYA KRISHNAIYA (APPELLANT),

v.

PONNUSWAMI AIYAR AND ANOTHER (RESPONDENTS).*

Equitable mortgage—Unregistered document evidencing the mortgage, admissibility of.

To ascertain whether an unregistered document creates an equitable mortgage, the test is whether it constitutes the bargain between the parties, i.e., whether it records a contemporaneous loan and deposit of title-deeds or whether it merely records an already completed transaction of loan and deposit. It is only in the former case the document is inadmissible for want of registration. *Subramonian v. Lutchman*, (1923) I.L.R., 50 Cal., 338 (P.C.) and *Shaw v. Foster*, (1872) 5 H.L., 321, followed.

ON APPEAL from the Judgment of the Hon'ble Mr. Justice PHILLIPS, dated 3rd March 1922, passed in the exercise of

* Original Side Appeal No. 54 of 1922.

the ordinary original civil jurisdiction of this Court in Original Suit No. 348 of 1920.

The facts are given in the Judgment.

V. Radhakrishnayya for the appellant.

H. Rama Rao for the respondent.

JUDGMENT.

SCHWABE, C.J.—This is an appeal from the judgment of PHILLIPS, J., in which he decided that a loan made to the defendant by the plaintiffs' firm secured by promissory notes and by deposit of title-deeds was secured by a valid equitable mortgage. The facts of the case are that the defendant was a servant in a certain firm and had borrowed from time to time monies from that firm secured by promissory notes and by deposit of title-deeds of his house. The firm dissolved and the plaintiffs' firm took over the assets and liabilities of the firm and continued the defendant in their employment. Shortly after the taking over of the firm they made an advance of Rs. 500 to the defendant and took a promissory note from him for the outstanding amount of his indebtedness to the old firm plus Rs. 500 and at a later date they made further advances to him, some secured by promissory notes. About the time of the advance of Rs. 500 the document Exhibit B was executed by the defendant and it runs thus :

"Collateral security letter in respect of a house executed in favour of Messrs. Peruru Viswanadham and Koneti Desikacharyulu Company of Madras. As you have this day obtained an assignment of the sum of Rs. 1,945 due by me to Messrs. Peruru Viswanadham & Co., the same being the sum of principal and interest due, I have this day executed a pro-note in your favour for this sum and the sum of Rs. 500 taken to-day, i.e., the total of Rs. 2,445; so let it be known that for that I have retained with you as collateral security my document of the Collector's certificate No. 815 in respect of my house bearing door No. 11 in Tiruvattiswaranpet, Madras."

KRISHNAIYA
v
PONNUSWAMI
AIYAR.

SCHWABE,
C.J.

KRISHNAIYA
v.
PONNUSWAMI
AIYAR.
—
SCHWABE,
C.J.

This, I understand from my learned brother, is a more accurate translation than that printed in the documents. The defendant says that that document is in itself an equitable mortgage of his house and, as it has not been registered, it cannot be given in evidence.

The law on the subject has on several occasions been said to be quite clear, but the application of the law, as far as I can see, has not been easy. The Privy Council in *Subramonian v. Lutchman*(1) applying the principles laid down by Lord CAIRNS in the leading case of *Shaw v. Foster*(2) said

“the test is, did the document constitute the bargain between the parties or was it merely the record of an already completed transaction.”

If it constitutes the bargain, then, on the well-known rule that, where contracts are reduced to writing, you cannot give parol evidence of their contents, in order to prove the mortgage, the plaintiff would have to attempt to put in as evidence the document, and, if it is a mortgage document, he would be precluded from so doing, by the Transfer of Property Act and under the Registration Act. The question in each case, which it is difficult to decide, is whether or not the document does constitute the bargain or is merely a record of a completed transaction; and I think that when one looks at the cases, the easiest guide is the question whether or not the money was paid before the making of the document, because if the money is handed over contemporaneously with, or in exchange for, the document or after the document it will be very difficult to establish that the document did not contain the terms of the bargain between the parties. In order to arrive at the true facts in respect of that question, I think that the first thing to do is to look at the document itself. In many

(1) (1923) I.L.R., 50 Calc., 338 (P.C.).

(2) (1872) 5 H.L., 321.

cases, it will appear from the document that the document is handed over before any advance is made; in some cases it will appear from the document that the document comes into existence in reference to a prior advance as for instance, where an advance is secured by a promissory note and the document giving equitable mortgage of the property as security is dated at a later date than the time of the advance; and, as a general rule, the terms of the document itself are a better guide to the truth than the verbal evidence given afterwards by persons either trying to escape from the liability or to establish it. The terms of the document are to the effect that the matter had already been completed, and I do not think that this document was made to create a charge. I think it was merely recording the charge which had already been created, and I think it can be said that there was here a completed contract of mortgage before the letter was passed, so distinguishing it from *Bhairab Chandra Bose v. Anath Nath De*(1) where, on the terms of the document there and from the surrounding circumstances, it was held that it could not be said that there had been a completed contract before the letter was passed. I rely mainly on the past tense used in the letter. It says that the promisor has executed the promissory note and that he has taken a sum of Rs. 500 and he purports to inform the new firm that he has left with them his documents as collateral security. I think on the whole it is merely recording the facts for their information and, of course, in order to provide them with strong evidence if necessary, and not making the bargain by the letter.

The oral evidence is not satisfactory. The defendant himself does not make good on his evidence the case for which he is contending. The evidence called by the

KRISHNAIYA
v.
PONNUSWAMI
AIYAR.
—
SCHWABE,
C.J.

(1) (1920) 57 I.C., 686.

KRISHNAIA
v.
PONNUSAMI
AIYAR.
—
SCHWABE,
C.J.

plaintiff is not satisfactory because it is that of a *gumasta* who knew very little about the facts and that of a partner of the firm who, though he gives some strong evidence from which it could be inferred that the bargain had been in fact completed before this document, does not pretend to have been present or to be able to give definite first hand evidence of the facts.

On the whole, I must come to the conclusion that the learned Judge is right. I should add that, in his judgment, he expressed the view that, even if this document did contain the terms of the contract made, it would be possible for the plaintiffs to prove their equitable mortgage by proving the fact of the deposit of the title-deeds with them. In so holding, he was following the decision in *Elumalai Chetty v. Balakrishna Mudaliar*(1) which, I think, in view of the later decision of the Privy Council in *Subramonian v. Lutchman*(2), can no longer be taken to be the law.

The appeal must be dismissed with costs. The Receivers may take their costs from the estate in the first instance. Six months' time is allowed for redemption.

RAMESAM, J.—I would add that the translation of Exhibit B even in the first sentence is not strictly accurate. It ought to run "As I have this day got novated in your favour the sum of Rs. 1,945, etc." The Telugu is "Avala" which means novation and not assignment. If the plaintiffs' firm are assignees from the old firm, strictly the assignment would have to be by a registered instrument. But no such difficulty arises. I agree with my Lord's judgment.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Waller.

1923,
November 23.

1. PONNUSAMI AIYAR AND NARAYANASAMI
AIYAR, 2. G. KUPPUSAMI NAIDU & Co.
(PLAINTIFFS), APPELLANTS,

v.

DAMODAR HUNSRAJ (DEFENDANT), RESPONDENT.*

Civil Procedure Code (V of 1908), sec. 20 (e)—Jurisdiction—Cause of action in part—Contract for sale of goods between a firm in Calcutta and one in Madras—Contract made at Calcutta—Price payable in cash in Calcutta, and by hundis drawn in Calcutta by former firm on Madras firm payable in Madras—Negotiation of hundis in Calcutta—Suit by Madras firm in City Civil Court at Madras—Jurisdiction of Court.

A Madras firm entered into a contract at Calcutta with a Calcutta firm for sale by the latter of certain goods to be sent by rail to several places in the Madras Presidency, and the price was under the contract to be paid either in cash at Calcutta or by hundis drawn in Calcutta by the Calcutta firm on the Madras firm which was bound to honour them on their being presented in Madras. The railway receipts were to be attached to the hundies and presented along with them. The Calcutta firm had negotiated the hundis and received the proceeds in Calcutta. The Madras firm instituted a suit in the City Civil Court at Madras to recover from the Calcutta firm moneys alleged to be overpaid on hundis presented for payment in Madras. The latter pleaded that the Madras Court had no jurisdiction to entertain the suit as no part of the cause of action arose in Madras.

Held, that the cause of action in this suit arose at least in part in Madras, and that the Court had jurisdiction to try the suit.

When the seller draws on the buyer hundis which under the contract the latter has to honour when presented to him, the payment cannot be considered to be made where the hundis

(1) (1921) I.L.R., 44 Mad., 965.

(2) (1923) I.L.R., 50 Cal., 338 (P.C.).

* Civil Miscellaneous Appeal No. 57 of 1922.

PONNUSAMI
AIYAR
v.
DAMODAR
HUNRAJ.

are negotiated by the seller but only where the payment is actually made by the buyer on the *hundis*. *Mylappa Chettiar v. Aga Mirza Mohamed Shirazee*, (1919) 37 M.L.J., 712, distinguished.

APPEAL against the order of the City Civil Court of Madras in Original Suit No. 530 of 1920.

The plaintiffs are Receivers appointed to collect the outstandings due to the firm of G. Kuppusami Naidu & Co., which carried on business in rice and other commodities in Madras. The defendants are merchants whose permanent residence and place of business are in Calcutta. The Madras firm (Kuppusami & Co.) and defendants entered into a contract in Calcutta under which the latter agreed to sell rice to the former from time to time as per their orders; the rice was to be sent by rail to various places in the Madras Presidency as intimated by the former. The price was payable in cash in Calcutta or by *hundis* drawn by the defendants on the Madras firm in Madras, to be honoured and paid by the Madras firm on presentment for payment in Madras. Under the contract, the defendants were to annex the Railway receipts to the *hundis* and present the same to the firm in Madras, along with the *hundis*. The Calcutta firm negotiated in Calcutta their *hundis* on the Madras firm, to hundi merchants in Calcutta who paid the indorsers in cash and collected the amount due on the *hundis* from the Madras firm at Madras. The plaintiffs instituted this suit in the City Civil Court at Madras to recover from the defendants certain money said to be overpayments made by the Madras firm in honouring *hundis* drawn by the Calcutta firm for larger amounts than was due to them. The defendants contended that the City Civil Court at Madras had no jurisdiction to entertain the suit, as no part of the cause of action arose in Madras. The City Civil Judge upheld the defendants' contention, and holding that the

PONNUSAMI
AIYAR
v.
DAMODAR
HUNRAJ.

City Civil Court had no jurisdiction to entertain the suit, returned the plaint for presentation to the proper Court. The plaintiffs preferred this appeal.

M. A. Tirunarayanachari for appellants.—The Madras City Civil Court has jurisdiction to entertain the suit. The cause of action arose partly in Madras. The *hundis* had to be paid eventually in Madras. The fact that the Calcutta firm negotiated them in Calcutta and got paid there does not affect the question. The indorsee was not an agent of the Madras firm, see *Abdur Rashid v. The Sizing Materials Company, Limited*(1). The case of *Mylappa Chettiar v. Aga Mirza Mohamad Shirazee*(2) is distinguishable, as there the Bank which paid the *hundis* at Mandalay was held to be the agent of the Madras Bank who acted as the agent of the consignees at Negapatam. Here the hundi merchants were not the agents of the Madras firm at all.

N. Chandrasekhara Ayyar for the respondent argued contra and relied on the course of dealings and payments in Calcutta, and also referred to *Mylappa Chettiar v. Aga Mirza Mohamad Shirazee*(2) and *Motilal v. Surajmal*(3).

The JUDGMENT of the Court was delivered by

KRISHNAN, J.—This is an appeal against an order of the learned City Civil Judge returning the plaint in O.S. No. 530 of 1920 on his file to be presented to the proper Court. The learned Judge held that no part of the cause of action arose within his jurisdiction and therefore passed that order. The suit was brought by the Receivers on behalf of a firm in Madras called Kuppusami Naidu & Co., against the defendants, a firm carrying on business in Calcutta, for

(1) (1920) I.L.R., 42 All., 489.

(2) (1919) 37 M.L.J., 712.

(3) (1906) I.L.R., 30 Bom., 167.

PONNUSAMI
AIYAR
v.
DAMODAR
HUNSEAJ.
KRISHNAN, J.

a certain sum of money which, they claimed, had been overpaid to the defendants' firm. Among the pleas raised by the defendants' firm, one was that the Court in Madras had no jurisdiction to try the suit and that the suit was properly triable only by the Court in Calcutta where they carried on business and where, according to them, the whole cause of action arose.

It is not denied that the defendants do not reside, or carry on business, or work for gain in Madras, but the plaintiffs rely entirely for their contention that the suit lies here on the ground that part of the cause of action arose within the jurisdiction of the Madras Court. Under section 20(c) of the Code of Civil Procedure a suit can be brought where the cause of action arises at least in part, and the question we have to decide is whether the cause of action in this suit has arisen at least in part in Madras.

Kuppusami Naidu & Co. had dealings with the Calcutta firm and the way in which the dealings were carried on was that on the orders of Kuppusami Naidu & Co., the Calcutta firm was to send by rail rice to several places all over the Presidency named by the Madras firm (plaintiffs). The contract was made in Calcutta; but the arrangement as regards payments, as stated by the defendants' firm itself in their written statement, was that the money was to be paid either in cash in Calcutta or by *hundis* drawn by defendants in Calcutta on the plaintiffs' firm in Madras. The learned City Civil Judge held that this arrangement about payment was an arrangement which was tantamount to payment in Calcutta itself; but we are unable to agree with the learned Judge on the point. When a firm outside Madras draws *hundis* on a firm in Madras which under the contract the Madras firm has to honour and pay when presented to them in Madras, the payment

cannot be considered to be made when the *hundi* is negotiated by the firm outside Madras but only when the payment is actually made by the firm in Madras on the *hundi*. Negotiation of the *hundi* is only a provisional method of realising money from persons who are willing to accept the *hundi* for a small profit and to take the trouble of presenting the *hundi* to the drawee and recovering the money from him. If the *hundi* is dishonoured, the endorsee will of course have recourse to the payee of the *hundi* who had endorsed it over to him. So that the receiving of the money from an endorsee cannot be treated as payment towards the contract. The payment becomes complete only when the buyer, in this case the Madras firm, actually makes payment on the *hundi*, and such payment is clearly a payment made in Madras. It is true that, in the first three instances, the money was actually paid by the Madras firm through an agent of theirs in Calcutta to the defendant; but that arrangement does not seem to have been persisted in and subsequent payments were all made by the system of the Calcutta firm drawing *hundis* in their own favour and endorsing them to some *hundi* broker and obtaining money from him and that broker taking the trouble of presenting the *hundis* to the Madras firm and receiving payment. It may also be mentioned that one other arrangement about the payment was that payment was to be made only on the delivery of the railway receipts. These railway receipts were to be attached to the *hundis* and presented to Kuppusami Naidu & Co., in Madras along with the *hundis* when payments of the *hundis* were demanded from them; so that the presentation of the railway receipt in Madras was also a part of the performance of the contract, and was a necessary condition to be performed before money could be demanded from the Madras firm.

PONNUSAMI
AIYAR
v.
DAMODAR
HUNSEAJ.
KRISHNAN, J.

PONNUSAMI
AIYAR
v.
DAMODAR
HUNRAJ.

KRISHNAN, J. In these circumstances it seems to us clear that a part of the cause of action must be held to have arisen in Madras both as regards the presentation of the railway receipts and as regards the payment of *hundis*; and it would follow that the City Civil Court had jurisdiction to try the suit, under section 20(c) of the Civil Procedure Code.

The learned City Civil Judge has relied upon a case reported in *Mylappa Chettiar v. Aga Mirza Mohamad Shirazee*(1), which he thinks is a case on all fours with the present one, but there is a fundamental difference between that case and the present one which the learned Judge has overlooked. There, although payment was by *hundis*, the arrangement was that the *hundi* was to be drawn and presented to the National Bank of Mandalay along with the bill of lading taken in the name of the consignor himself; it was to be endorsed over to the branch of the National Bank at Mandalay and handed over along with the *hundi* to them; they were to make payment of the amount claimed to the consignor at Mandalay. The learned Judges find as a fact in that case that the National Bank was merely acting as the agent of the Madras Bank who were themselves only the agents of the consignee at Negapatam and, when the bill of lading was endorsed over to the National Bank and received by that Bank and money was paid to meet the *hundi* drawn on the bank, the transaction was complete so far as the consignor was concerned as the National Bank was found to have been acting merely as agents of the Negapatam merchant. It was on that ground that the learned Judges in that case held that the payment should be taken to be one made in Mandalay and not in Negapatam and that, so far as payment

(1) (1919) 37 M.L.J., 712.

was concerned, the cause of action did not arise in Negapatam, but in Mandalay. Here, as we have already stated, all that the Calcutta firm did was to draw the *hundi* on the Madras firm and discount it in the manner usual among merchants with some exchange bank or firm which took *hundis* on discount, without being freed from the liability of having to repay the money paid in case the *hundi* is dishonoured. The Calcutta firm was entitled to discount the *hundi* with whomsoever it pleased. There is no evidence that Nandaramdas Atmaram, the firm which actually negotiated these *hundis* for the Calcutta firm, were acting as agents of the Madras merchants at all. This case is therefore very clearly distinguishable from the case in *Mylappa Chettiar v. Aga Mirza Mohamad Shirazee*(1).

The Bombay case referred to by the learned Judge, *Motilal v. Surajmal*(2), is a case where the principles are no doubt stated by TYABJI, J., but according to those principles if the payment has to be made at a particular place, part of the cause of action will arise there.

It will be further noticed that the main claim in this suit is really for the amount that had been overpaid by Kuppusami Naidu & Co., to the defendant company. That payment was actually made in Madras. The *hundi* having been drawn for a larger sum than the Calcutta firm was entitled to draw it for, was presented in Madras and to save it from being dishonoured the Madras firm paid the excess amount here in Madras, and it is mainly for that amount that the present suit is brought.

It is therefore clear to us that the cause of action did arise in Madras and that the plaint should not have

(1) (1919) 37 M.L.J., 712.

(2) (1906) I.L.R., 30 Bom., 167.

PONNUSAMI
AIYAR
v.
DAMODAR
HUNRAJ
KRISHNAN, J. been returned for being presented to another Court but that the learned Judge should have tried the suit himself. We therefore set aside the order of the learned Judge and direct him to take the plaint on to his file and dispose of the case according to law.

As regards costs, the respondent will pay the appellants costs in this Court. All costs in the lower Court will be disposed of by the City Civil Judge in his final judgment.

K.R.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
Mr. Justice Coutts Trotter and Mr. Justice Ramesam.*

KADIRVELUSAMI NAYAGAR (PETITIONER), APPELLANT,

v.

THE EASTERN DEVELOPMENT CORPORATION,
LTD., LONDON (RESPONDENT—ASSIGNEE DECREE-
HOLDER), RESPONDENT.*

1923,
October 24.

*Civil Procedure Code (V of 1908), sec. 52—Debt of propositus—
Heir succeeding to debtor's lands—Income from lands
accruing to heir—Liability to satisfy debts—Assets.*

On the death of a debtor, the income accruing to his heir from landed property of which the debtor died possessed, is assets of the debtor in the hands of the heir, liable to satisfy his debts within the meaning of section 52, Civil Procedure Code. *Oolagappa Chetty v. Hon. D. Arbuthnot* (1874) 1 I.A., 268, followed.

APPEALS against the orders of P.C. LOBO, Acting District Judge of Madura, in E.A. Nos. 274 and 619 of 1917 in E.P. No. 5 of 1918 and E.P. No. 4 of 1915, respectively, in Original Suit No. 65 of 1897 on the file of the Court of the Subordinate Judge of Tinnevely.

The facts are given in the following Order of Reference to a Full Bench, made by OLDFIELD and VENKATASUBBA RAO, JJ., on 27th day of April 1922:—

OLDFIELD, J.—The essential facts in these appeals lie in a small compass. The decree in Original Suit No. 65 of 1897 on the file of the Subordinate Judge's Court, Tinnevely, was for the recovery of the amount due on a usufructuary mortgage by sale of the impartible zamindari of Gantamanayakkanur. The Zamindar, against whom the decree was passed, died and was succeeded by his son sixth defendant, the present appellant, in 1908, before any of the proceedings to be referred to. They began with an abortive attempt to recover by sale and the

* Appeals against Orders Nos. 5 and 86 of 1921.

KADIRVELU-
SAMI
NAYAGAR
v.
THE EASTERN
DEVELOP-
MENT
CORPORATION.

appointment of a Receiver to collect the profits and credit them against the decree. The respondent Company then became solely entitled to execute it and at a sale, confirmed on 8th September 1914, purchased the zamindari, taking delivery in January 1915, and the Receiver was then discharged. On 25th March 1915, a personal decree for the balance still due was passed by the lower Court against sixth defendant. That decree was set aside, as passed without jurisdiction. But previously on 24th April 1915 another Receiver had been appointed to collect certain rents and profits outstanding for the years 1910—1913, after appellant became Zamindar, but before the sale, and it is the right to the amount collected by him, which is now in dispute. After the personal decree was set aside by this Court, another personal decree was obtained in the Subordinate Judge's Court, Tinnevely, and was transferred to the lower Court for execution by recovery of the balance due from this fund. Appellant in E.A. No. 619 of 1917 asks for restitution of a portion of it, which was paid out to respondent, under the first personal decree, since set aside, and in E.A. No. 274 of 1919, he claims the balance still with the Receiver against the respondent's attachment. The lower Court in the orders under appeal dismissed these applications.

In the lower Court the claim was also to certain properties said to have been bought in by the Receiver at Court sales in the course of his recovery of the rents. But here it is not disputed that these purchases were made by him, not as Receiver but in the capacity, which he also held, of Manager of the zamindari under the respondent Company; and therefore nothing more need be said of that part of the claim. The claim to the fund is the sole matter now in dispute; and it has been argued, it is material, only with reference to the question whether the fund should be recorded as liable in the hands of respondent for the deceased Zamindar's judgment-debt and the personal decree obtained against respondent as his legal representative, no objection having been made to the assumption that the realizations by the Receiver were made on sixth defendant's behalf, as though he had received them directly.

The provisions of law in question are sections 52 and 53 of the Civil Procedure Code, the former being relevant in case

appellant claims the zamindari and therefore the fund, which accrued from it, by survivorship and it is to be deemed to be property liable in his hands under Hindu Law for the payment of the debt of his deceased father; the latter in case he claims it by heirship. The point is that, if respondent can proceed in execution against the fund at all, a question to which I return, different objections to his doing so are relied on according to the nature of appellant's right to the estate. For it is urged that, if he took the estate by survivorship, the fund, its income, nevertheless reached his hands as his absolute property and was not subsequently merged by him in it by any course of dealing; and it therefore is not liable as part of his share of joint property for his father's debt. If, on the other hand, the estate was his inheritance and was liable for the last owner's debt in his hands the question raised is whether its subsequent income would not also be so, as an accretion to it. Before dealing with these questions I observe that no issue was joined and no evidence was given in the lower Court as to the nature of his succession; and no suggestion was made and no finding was recorded as to any conduct by him indicative of an intention to merge these profits, which in the first instance were certainly separate property, in the zamindari and, if the zamindari was family property, to impress them with that character. On the latter point the only possible conclusion is no doubt in the negative. For he never obtained the profits, which were with the Receiver from their realization, and had no opportunity of treating them as possessing one character rather than the other. The former also is not material. For, if the zamindari is ancestral or family property, I still hold that the fact is relevant only for the purpose of determining the person entitled to succeed to it, not the nature of his rights in it on succession, which will in any case be a right to it as separate property with the full power of enjoyment and alienation, which has been recognized fully by authority. It will serve no useful purpose to state my reasons for this conclusion at any length, since I can add nothing to the enumeration of authorities at the date of decision of the Privy Council in *Bajinath Prasad Singh v. Tej Bali Singh* (1), in Mayne's Hindu Law and Usage, 9th Edition, 796, except that

KADIRVELU-
SAMI
NAYAGAR
v.
THE EASTERN
DEVELOP-
MENT
CORPORATION.

(1) (1921) I.L.R., 43 All., 228 (P.C.).

KADIRVELU-
SAMI
NAVAGAR
v.
THE EASTERN
DEVELOP-
MENT
CORPORATION. this decision seems to me in no degree to entail the conclusion reached in *Raja Sri Sri Shiva Prasad Singh v. Beni Madhab Chowdhury*(1), or to displace that reached by this High Court in *Rajah of Kalahasti v. Achigadu*(2), *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devasthanams*(3), *Maharaja of Bobbili v. Zamindar of Chundi*(4), and *Avalappa Naicker v. Murugappa Chettiar*(5).

On the basis, however, that the zamindari is separate property inherited by appellant and that therefore only section 52 need be considered, two questions of some difficulty and importance have been raised, which should, we think, be laid before a Full Bench. The first is whether in such a case not only the inherited property is liable for the debts of its deceased owner but also the profits, such as the fund at present in dispute, which have accrued from it after his death; and the second whether clause 1 of section 52 authorizes execution against a deceased's property in the hands of his legal representative in this extended sense and by any method other than that actually specified in it, attachment and sale. The first question is one of substantive right, the second one of procedure and construction, its importance being that, if it must be answered in the negative and if respondent's attachment cannot in consequence of the nature of the property be followed by a sale, that attachment was not authorized by the section and can be no obstacle to appellant's claim.

On the first of these questions there is no doubt the clear principle that the deceased's assets are liable for his debts. But it is argued on behalf of appellant that the assets include only what is available during deceased's lifetime and can be described as accruing to him, not what may become realizable only after his death. On the other hand, the contrary is argued in accordance with general principle as supported by English authority and with the Statute Law of India regulating the distribution of estates by executors or administrators. As regards the former, it seems clear that in England goods which have accrued by increase since the death of a testator are assets, this having

been so always in respect of personal property—vide Williams on Executors, 11th Edition, 1272; and, although real property became assets only in consequence of a course of legislation ending with the Land Transfer Act (60 and 61 Victoria, Ch. 65), there has never been any doubt that so far as it is assets, its profits also are liable as assets, because they are accretions to it; *In re Hyatt, Bowles v. Hyatt*(1) explained in *In re Moore, Holmes v. Holmes*(2). In India, the Succession Act (X of 1865) and the Probate and Administration Act (V of 1881) no doubt contain no general provision as to accretions, but they are dealt with in connexion with specific legacies and in connexion with the residue in sections 309 and 310 of the former and 128 and 129 of the latter and under other sections of both Acts they are liable subject to the other rules laid down for the distribution of the estate equally with property, with which they are connected. It is true that there is nothing in the latter Act regarding accretions to the estate of an intestate Hindu and their liability in the hands of an administrator for his debts. But it may fairly be contended that their liability will be the same, whether there is or is not a will and further whether or no the estate is distributed by an administrator appointed by the Court. This reference to the Statute Law, which is not directly applicable to the fund in dispute, is of course relevant only as indicating that the English Law as to accretions has been adopted in India; but even such an indication is important, when very little authority regarding them and their liability for debts has been adduced. For only two decisions, which are really in point have been cited, and in one *Aseemoonnissa v. Ameeroonnissa*(3) the liability is maintained but without any discussion. So also it was negatived in *Rani Kanno Dai v. B. J. Lacy*(4), the portion of the judgment at present material being, however, *obiter*, since the right to execute against accretions was then negatived also by an agreement with the heir. In *Rajah of Kalahasti v. Sree Mahant Prayag Dossjee Varu*(5), however, the creditor's right to proceed against accretions was recognized on full consideration, the case last mentioned being distinguished and *In re Hyatt*,

KADIRVELU-
SAMI
NAVAGAR
v.
THE EASTERN
DEVELOP-
MENT
CORPORATION.

(1) (1922) I.L.R., 1 Patna, 387.
(2) (1907) I.L.R., 30 Mad., 454. (3) (1909) I.L.R., 32 Mad., 429.
(4) (1912) I.L.R., 35 Mad., 108. (5) (1913) I.L.R., 36 Mad., 325.

(1) (1888) 38 Ch. D., 609. (2) [1907] 2 Ch., 304.
(3) (1871) 15 W.R., 285. (4) (1897) I.L.R., 19 All., 235.
(5) (1916) 30 M.L.J., 391.

Bowles v. Hyatt(1) being referred to. There is certainly very little authority on a question, which, it might be supposed, would have been raised and decided in all the Presidencies. But we have been shown no reason for refusing to follow the decision of this Court just cited, and I should have been prepared to decide in accordance with English Law and the rule to be deduced from Indian Statutes that accretions are liable, if it were not advisable, to leave the matter open for determination in connexion with the further question now to be stated.

On the assumption that the conclusion just suggested is correct, we have next the facts that section 51 of the Civil Procedure Code in terms authorizes execution only by attachment and sale and that this method of execution is not applicable to a fund, such as that now in dispute. Execution by attachment and sale is applicable only to the descriptions of property, to which that method of execution is applied in Order XXI and this fund is not one of them, since other methods of realization are provided, when money in the hands of a third person is concerned. No doubt a debt due to the judgment-debtor may be attached and sold under Order XXI, rules 46 (1) (a), and 79 (3). But, although the fund in the hands of the Receiver may be payable to the appellant or to respondent, if he can claim it any other way, for instance in administration proceedings, it is not a debt due to the former for money had and received or otherwise, when it reached and is being retained by the Receiver (in spite of the invalidity of his appointment) in consequence of and subject to the orders of the Court and on its behalf. The case in fact is covered, as regards attachment by rule 52 and as regards further proceedings by the reference to the further orders of the executing Court therein; and if the reference to attachment and sale in section 52 is to be read literally, the respondent's claim based on the application of that section must be rejected. This, it may be observed, refers directly to the portion of the fund, which is still with the Receiver. As regards the portion already paid to respondent, restitution of which is asked for in E.A. No. 619 of 1917 it may be pointed out that it was in fact paid out on the order of the Court and without execution by sale.

(1) (1888) 38 Ch. D., 609.

The question is then whether the limitation to attachment and sale of the methods of execution open to decree-holders, such as respondents, which a strict construction of section 52 entails, should be sustained. It is true that a reason for such limitation is difficult to conjecture, particularly in view of the general reference to execution without specification of any method in section 50, dealing with decrees obtained against the deceased himself and only to be enforced against his representatives. Against this, however, it may be suggested that the intention of the legislature was to restrict execution against the deceased's property to cases in which liability is clear and identifiable, moveable or immoveable items of it are available for sale, insisting in accordance with some principle corresponding with that of the Administration of Estates Act (3 and 4, William IV, Ch. 104) on the creditor obtaining an administration judgment in others—vide *In re Moore, Holmes v. Holmes*(1), already referred to. That Act, it may be pointed out, did not deal with claims such as those covered by section 50, which had not become merged in a judgment before the testator's death and which were left to be recovered in India, as they were recoverable in England, by ordinary execution,—vide Williams on Executors, 11th Edition I, 778. And the use in the Code of the expression "property" instead of "assets of the deceased" may be consistent with this view; for, the latter term has been in use in India since the Succession Act of 1865 and it is possible that the former, replacing the term "estate" in the Code of 1882, may have been deliberately preferred in order to avoid the implications, which a reference to "assets" would have entailed.

All these, however, is conjectural; and the actual wording of the section is the firmer ground for a conclusion. Respondent contends that a free construction is made necessary by the inconvenience, if not the absurdity, of the result of adherence to the wording as it stands and that for "attachment and sale" we should read "attachment or attachment and sale" or else that the sentence should run simply "it may be executed against any such property," the words "attachment and sale"

(1) [1907] 2 Ch., 804.

KADIVVELU-
RAMI
NAYAGAR
v.
THE EASTERN
DEVELOP-
MENT
CORPORATION.

being merely a generic reference to execution procedure other than that relating to arrest. But it may be doubted whether the inconvenience or absurdity involved by a literal construction is great enough to justify these violent suggestions. As regards the first, more would still be required in the present and other cases, since attachment alone would not be sufficient to give the decree-holder his remedy and a reference to his obtaining the further orders of the Court would be required—vide Order XXI, rules 52 and 53; and provision for equitable execution by the appointment of a Receiver under Order XI, rule 1, would still be wanting. As regards the second, it is true that the enumeration in section 51 of methods of execution specifies, apart from the residuary item (e) and the appointment of a Receiver as item (d), only attachment and sale, item (b), as an available method of recovering under a money decree from the property of the judgment-debtor. But, if section 51 is read in the light of Order XXI, it cannot be regarded as exhaustive and, as it was first enacted in any form in the present Code, it cannot control the interpretation of section 52, which is almost identical with section 232 of the Code previously in force. Neither suggestion is in any degree probalilized by the context and the improbability that the legislature through oversight excluded the remedy appropriate in certain cases is really all that respondent can rely on.

As observed already in connexion with another portion of the case, there is very little authority regarding the liability of a fund such as that now in dispute and there is not likely to be more regarding the way in which that liability can be enforced. In *Rajah of Kalahasti v. Sree Mahant Prayag Dassjee Varu* (1), already referred to, the latter question did not arise, as execution was being taken against the legal representative's own property under section 52 (2); and no decision dealing with that question in connexion with other descriptions of property for which sale is not the appropriate method of execution, has been shown us. My learned brother is, I understand, more inclined than I am to a construction of section 52, such as respondent contends for; and it is advisable that the rights

(1) (1916) 30 M.L.J., 291.

of decree-holders against the property of a deceased person in the hands of his legal representative should be clearly defined. We therefore refer for the decision of a Full Bench the questions above stated.

VENKATASUBHA RAO, J.—As my learned brother has very fully dealt with the questions raised, I shall in a few words state what my own view on the point is. Subsequent to the passing of the decree against the Zamindar he died and was succeeded by his son, the appellant before us. The respondent Company assignee-decree-holder executed the decree and purchased the zamindari at a sale confirmed on 8th August 1914 and took delivery thereof in January 1915. On 5th March 1915 a personal decree for the balance due was passed against the appellant, and on 24th April 1915 a Receiver was appointed to collect rents and profits outstanding for the faslis 1321 to 1323 (1911 to 1913), that is, for the period between the death of the previous Zamindar and the sale referred to above. The personal decree was, however, set aside on 5th March 1917 as passed without jurisdiction and another personal decree was obtained on 24th September 1917. The following items of property were attached on 6th March 1918:—“(1) Amounts due under decrees in rent suits obtained by the Receiver, (2) arrears of rent due to the judgment-debtor for faslis 1321 to 1323.” The learned District Judge observes, “The real dispute relates to the outstandings of the estate, in the shape of rents and mesne profits for the faslis 1321 to 1323, whether decreed or not and whether realized or not.” The lower Court upheld the right of the respondent to the items attached.

Two questions were argued before us, one relating to mere procedure and the other to substantive rights of the parties.

Dealing first with the question of procedure raised, I find it difficult to understand how on the facts stated by the District Judge the points urged by the learned vakil for the appellant arise at all. His contention is this: under section 52 of the Civil Procedure Code, when a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased the decree may be executed by the attachment and sale of any such property. The personal decree in execution of which the

KADIVVELU-
RAMI
NAYAGAR
v.
THE EASTERN
DEVELOP-
MENT
CORPORATION.

KADIRVELU-SAMI NATAGAR v. THE EASTERN DEVELOPMENT CORPORATION. Receiver was appointed having been subsequently set aside, the appointment of the Receiver was void and any amounts realized by him or decrees obtained by him should be regarded as monies in his hands or decrees obtained by him not in his character of Receiver but as an utter stranger. But I do not find it stated that the Receiver was in possession of any monies at all. But whatever the true facts may be, the assumption underlying the argument is that under section 52, there cannot be an attachment of property unless the property can be sold in execution. Turning to the words of the section the argument is put in this way: "The decree may be executed by the attachment and sale of the property." If the property against which execution is taken out happens to be property which cannot under the Code be sold subsequent to the attachment, the attachment cannot be effected at all. I assume that there is such property in the hands of the Receiver. For instance, if he had cash or currency notes, the property may be attached but it cannot be sold. In that event, is there immunity in the case of cash or currency notes on the mere ground that when attached there cannot be a sale under the provisions of the Code? Order XXI, rule 56, provides that when the property attached is coin or currency notes the Court may direct that such coin or notes be paid over to the decree-holder. Thus the plaintiff obtains satisfaction of the decree without having to sell the property attached. To take another similar instance, under Order XXI, rule 58, when the property attached is a decree, the creditor who has attached the decree may proceed to execute the attached decree and the net proceeds may be applied in satisfaction of the decree sought to be executed. If the argument of the appellant is correct, if a debtor dies leaving assets in the shape of decrees obtained by him or ready cash, they will not be available to his creditors for the mere reason that the assets left happen to be in that shape. One would expect that if a debtor died leaving cash and there was no question of the cash having been secreted or otherwise disposed of, the creditor would be most easily enabled to obtain satisfaction of his debt. There would be no need to go through the lengthy execution proceedings which should be had if the assets left happened to consist, say, of immoveable property. But the contention curiously is

that in that very event the creditor is without a remedy. What are the further implications of this position? If a decree is passed against a legal representative of a deceased person the decree-holder can never ask for appointment of a Receiver in execution. Section 51 clearly lays down that one of the methods of executing a decree is by appointing a Receiver. Order XL, section 1, enacts that the Court may appoint a Receiver of any property whether before or after decree. If a decree is obtained against a debtor in his life-time, a Receiver may be appointed in execution to realize the debts due to the debtor; but if a decree is obtained after his death against his legal representative, such a course is not open to the decree-holder; and that is the argument, and I need hardly say that this leads to an absurdity. Order XXI, rule 46, provides that in the case of a debt not secured by a negotiable instrument the attachment shall be made by a written order prohibiting the creditor from recovering the debt and the debtor from making payments thereof and that a debtor so prohibited may pay the amount of his debt into Court and that such payment shall discharge him effectually. If the contention of the appellant is correct, the debt attached must be sold and the debtor cannot pay the amount into Court. Even if the debtor offers to pay the amount into Court, it is beyond the power of the Court to receive it, but the debt must be sold. I cannot believe that the legislature intended that such absurd consequences should ensue.

In my opinion the words "attachment and sale," in section 52 must not be literally construed, as a too literal interpretation leads to inconvenience and absurdity. Section 50 refers to execution of the decree where judgment-debtor dies after the decree but before the decree is satisfied. Section 52 contemplates proceedings in execution when the decree is passed against the legal representative himself. The object of the two sections seems to be to enact that the property of the deceased debtor shall alone be liable. Section 51 provides various methods of execution and when any of those methods is appropriate, it is not the scope of section 52 to exclude that particular method. The words used are inapt but the construction which I am inclined to adopt seems to be the only reasonable construction.

KADIRVELU-SAMI NATAGAR v. THE EASTERN DEVELOPMENT CORPORATION.

Next dealing with the contention of substantive rights raised, my learned brother has dealt with it at considerable length and it will serve no useful purpose to once again discuss the various English authorities that were cited before us. The result of the authorities appears to be that in England the income is treated as assets for the purpose of payment of debts. Is there any reason for refusing to give effect to this rule in India? I see none. I shall first take the case of a man dying leaving property which his successor inherits. Why should the successor in such a case be treated differently in India and be held not to be under an obligation to pay the deceased's debts out of the income of the property in his hands? The heir or successor may, if he chooses, sell the property immediately after the debtor's death. In that event he gets no income whatsoever from the property. Or the heir may derive income from the property and pay debts from and out of the income. If the income so derived is sufficient for the payment in full of the debts, the corpus remains in the hands of the heir and it will remain at his absolute disposal. But if the heir chooses to derive an income and the corpus itself is not sufficient to pay the debts, I fail to see why the income should not be available to the creditors. That is to say, there is no reason why a successor who postpones the sale of the corpus or defers the payment of the debts should be in a better position than one who the moment after the deceased's death disposes of the property or discharges the debts. In the case of a son liable to pay out of joint family property his father's debts there is even greater reason to apply the rule. The son is liable under the Hindu Law to pay the debts not only out of his father's share of the property but also out of his own share. How then can he be heard to say that the income from the property is not liable?

Turning to the case of an impartible estate, I find that it is difficult to distinguish it for this purpose from the case of an ordinary partible estate. Whether in the hands of the father it was self-acquired property or joint family property and whatever the rule of succession applicable may be, I cannot imagine how the case of an impartible estate can be put on a different footing for this purpose from any other kind of property. The argument that accretions are the absolute property of the successor

does not in the least touch the question. They may be the son's absolute property in one sense. But they are not necessarily his absolute property in the sense that they are not available to the father's creditors to the extent they are required for the discharge of his father's debts.

In the result, I agree in the Order of Reference proposed by my learned brother.

ON THIS REFERENCE—

K. V. Sessa Ayyangar for appellant.—The income that accrued to the son after the father's death is his own and not assets of the father; hence section 52 cannot apply; and section 53 must be read as interpreting section 52; *Jagadamba Kumari v. Narain Singh*(1), *Mayne's Hindu Law*, pages 359 and 444, and *Rani Kanno Dai v. B. J. Lacy*(2). The English Law as to liability of heirs for father's debt does not apply, because an impartible zamindari devolves upon the son not as heir of the father but as survivor. The view that income is liable to satisfy the debt, as held in *Aseemooninssa v. Ameeroonnissa*(3), *Rajah of Kalahasti v. Sree Mahant Prayag Dossjee Varu*(4), *In re Hyatt, Bowles v. Hyatt*(5), is wrong.

A. Krishnaswami Ayyar (with *C. A. Seshagiri Sastri*) for respondent.—The mortgage decree is against the zamindari and assets of the deceased. The zamin and its income devolve upon the son only as assets of the father and the future income is liable to satisfy the father's debts; see *Oolagappa Chetty v. Hon. D. Arbuthnot*(6), *D. Arbuthnot v. Oolagappa Chetty*(7), *Muttayyan v. Zamindar of Sivagiri*(8). Impartible estate is the absolute property of the holder; *Sartaj Kuari v.*

(1) (1922) 50 I.A., 1.
(3) (1871) 15 W.R., 285.
(5) (1888) 38 Ch.D., 609.
(7) (1870) 5 M.H.C.R., 303.

(2) (1897) I.L.R., 19 All., 235.
(4) (1916) 30 M.L.J., 391.
(6) (1874) 1 I.A., 268.
(8) (1888) I.L.R., 6 Mad., 1 (P.C.).

KADIRVELU-SAMI NAYAGAR v. THE EASTERN DEVELOPMENT CORPORATION. *Deoraj Kuari*(1) and *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(2); see also section 203 of Civil Procedure Code of 1859; *Jagadamba Kumari v. Narain Singh*(3) does not deal with the question of liability of future income but with the descent of such income. Liability of the income must follow the liability of the corpus; and this is the law in England; *Curtis v. Curtis*(4), *Stratford v. Ritson*(5). The future income is capable of attachment and sale within the meaning of sections 52 and 53.

K. V. Sesha Ayyangar in reply.—As regards English practice, *In re England*, *Steward v. England*(6) is in my favour. In *Oolagappa Chetty v. Hon. D. Arbuthnot*(7) the question was as to the liability of the zamin itself and not of the future income.

JUDGMENT.

SCHWABE, C.J.—This reference ought not to have been made to this Bench. The two Judges who heard the matter were agreed, and I see no reasons for adding anything to their statements on the points on which they were agreed.

The first point is quite a simple one, whether, under section 52 of the Civil Procedure Code, the income of landed property which has passed from one zamindar to the next, the property being an impartible Raj, is liable to execution for the debts of the deceased zamindar, that is to say, in this case, the father of the appellant. *Oolagappa Chetty v. Hon. D. Arbuthnot*(7) is a direct authority for the proposition that the income of such property is liable. The English Law is perfectly plain, and to the same effect, as laid down in a long

(1) (1888) I.L.R., 10 All., 272 (P.C.). (2) (1890) I.L.R., 22 Mad., 383 (P.C.).
 (3) (1922) 50 I.A., 1. (4) (1789) 2 Bro., C.C., 620; 29 E.R., 342.
 (5) (1846) 10 Beav., 25; 50 E.R., 490.
 (6) [1895] 2 Ch., 820. (7) (1874) 1 I.A., 268.

series of cases relating to the income from realty which has descended to the heir-at-law. *Stratford v. Ritson*(1) is a good instance, in which it was held that the income of such real property is liable for the debts of the deceased as his assets in the hands of his heir, though it is not to be taken until the corpus is exhausted.

There is a further point raised by the reference as to whether the money, income, accrued since the late Zamindar's death, which has come into the hands of the new Zamindar, can be attached and sold. It can be attached, and it is unnecessary to sell it. The Code has made ample provision for execution upon the money belonging to a deceased person in the hands of another. There was no necessity to refer that point, nor do I think it necessary to say anything about it.

The appeals are dismissed with costs.

COUTTS TROTTER, J.—I think that this case is covered by the decision in *Oolagappa Chetty v. Hon. D. Arbuthnot*(2) and I venture to put in my respectful protest against the reasoning on which this case was referred to this Bench. My brother OLDFIELD says:

"It is advisable that the rights of decree-holders against the property of a deceased person in the hands of his legal representative should be clearly defined."

Personally I protest against a Bench being called upon to define generally the rights of decree-holders and I entirely decline to do so. It is enough to say that this case is covered by *Oolagappa Chetty v. Hon. D. Arbuthnot*(2) and this appeal should be dismissed with costs.

RAMESAM, J.—I agree.

N. R.

RAMESAM, J.

(1) (1846) 10 Beav., 25.

(2) (1874) 1 I.A., 268.

APPELLATE CRIMINAL.

Before Mr. Justice Venkatasubba Rao.

1923,
November 28.CHINNIAH *alias* KRISHNASWAMY NAIDU

(FIRST ACCUSED), PETITIONER.*

*The Towns Nuisances Act (Madras Act III of 1889), sec. 6—
Common gaming house, meaning of.*

A common gaming house is one in which a large number of persons are invited habitually to congregate for the purpose of gaming, and it makes no difference that its use is restricted to the subscribers and members of a club and it is not open to all persons desirous of using the same.

Jenks v. Turpin, 13 Q.B.D., 505 and *Sreenivasachari v. Rex*, 1 Weir, 917, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the First-class Bench of Magistrates of Chittoor Town, in Bench Case No. 69 of 1923.

V. Viswanatha Sastri for the petitioner.

K. N. Ganapathi for the Public Prosecutor on behalf of the Crown.

JUDGMENT.

The offence with which the accused is charged is that of keeping a common gaming house, punishable under section 6 of Madras Act III of 1889. A common gaming house is defined thus in 15 Halsbury 217: "It is one in which a large number of persons are invited habitually to congregate for the purpose of gaming." In *Jenks v. Turpin*(1), HAWKINS, J., says "Neither do I think it makes any difference that the use of the house and the gaming therein was limited to the subscribers and members of the club, and that it was not open to all persons who might be desirous of using the same. If this could be set up as a defence to an indictment, any

indictment for keeping a common gaming-house might be defeated." I am willing to accept this statement of the law and I do not think that this is at variance with that contained in *Srinivasa Chary v. Rex*(1), where the learned Judges, Sir ARTHUR COLLINS, C.J. and PARKER, J., observe "In the absence of any technical definition, the term 'common gaming house' must at least imply that the house was one used as a place of public resort." They do not say what a place of public resort is and, in the circumstances, I am not prepared to hold that the definition given in the Madras case is necessarily opposed to that given in the English case and in Halsbury.

The next question is, has the evidence in this case established that the accused keeps a gaming house in this sense? P.W. 3, a dismissed and disreputable police constable, no doubt says, "The accused is the owner of the house. The accused collects the pool for himself for every 'rung' or 'run' for the use of his house and for the cost of the cards. The accused benefits up to Rs. 12 a day, never less than Rs. 5." It is extremely unsafe to act upon the uncorroborated testimony of a witness of this sort. He admits that he was himself taking part in the game and then turned an informer at the request of the Police. The only independent witness who speaks to the transaction from personal knowledge is P.W. 4 and he hopelessly contradicts P.W. 3, because according to the former the accused was himself a player and he took money from the pool whenever he happened to be the winner. P.W. 4's station in life is not such as to inspire confidence and I am not prepared therefore to act upon evidence of this kind and convict the accused.

* Criminal Revision Case No. 382 of 1923.

(1) (1894) 13 Q.B.D., 505.

(1) 1 Weir, 917.

CHINNIAH,
In re.

It is somewhat remarkable that the Police should have attempted to prove a case of this nature by such worthless evidence, when according to them, it is a notorious fact that the accused keeps a common gaming house, several persons have from time to time complained and the gaming house has been kept for about ten years previous to the prosecution.

In the circumstances I set aside the conviction and direct the fine, if it has been collected, to be refunded to the accused. The order as to confiscation is also set aside.

D.A.R.

APPELLATE CRIMINAL.

Before Mr. Justice Odgers and Mr. Justice Wallace.

1923,
December 7.

TADI SOMA NAIDU AND ANOTHER (ACCUSED 1 AND 3).*

Criminal Case—Judgment, High Court's power to alter after signing—Accused not given opportunity to appear—Order enhancing sentence—Legality.

The Judgment of the High Court in a criminal matter is final as soon as it is signed and thereafter the Court is *functus officio* and has no power to revise or alter its decision. *In the matter of Gibbons*, (1887) I.L.R., 14 Cal., 42 (F.B.), *Queen-Empress v. C. P. Fox*, (1886) I.L.R., 10 Bom., 176 (F.B.), *In re Kunhammad Haji*, (1923) I.L.R., 46 Mad., 382, followed.

An order to the prejudice of an accused without affording him an opportunity of being heard as, for instance, where by mistake a case was posted on a day anterior to that fixed in the notice to the accused and the sentence was enhanced in his absence, is null and void *ab initio*, as being one passed without jurisdiction. *In re Ranga Rao*, (1912) 23 M.L.J., 371, referred to. The proper course in such a case is to proceed with the matter afresh after proper notice to the accused.

CASE taken up by the High Court under section 435, Criminal Procedure Code, for revising the order of

* Criminal Revision Case No. 208 of 1923.

C. G. MACKAY, Sessions Judge of Vizagapatam, passed in Criminal Appeal No. 23 of 1922 (Calendar Case No. 3 of 1922 on the file of the First-class Magistrate, Yellamanchili.)

SOMA NAIDU
In re.

The Public Prosecutor (J. U. Adam) on behalf of the Crown.

V. L. Ethiraj, counsel for accused 1 and 3.

T. S. Anantarama Ayyar, vakil for the first accused.

JUDGMENT.

ODGERS, J.—In this case accused 1 and 3 were convicted by the first-class Magistrate of Yellamanchili, of forgery for the purpose of cheating (section 468, Indian Penal Code) and sentenced to imprisonment till the rising of the Court—also first accused was ordered to pay a fine of Rs. 300 with three months' rigorous imprisonment in default, and third accused was fined Rs. 150 with two months' rigorous imprisonment in default. On appeal, the Sessions Judge of Vizagapatam confirmed the convictions and sentences. The case was taken up in revision by DEVADOSS, J., on the ground that the Magistrate had no jurisdiction to try the case. The case came on for hearing on 27th September 1923 before KRISHNAN, J., who held that the conviction was correct but enhanced the sentences on each accused to six months' rigorous imprisonment retaining the sentences of fine. Mr. T. S. Anantaraman, Vakil for first accused stated he had no instructions and first accused did not appear in person. Third accused appeared neither in person nor by pleader. On 25th October 1923, KRISHNAN, J., vacated his previous order, no doubt, because he found it had been passed without jurisdiction, and directed the case to be posted later, on the question of enhancement. The case therefore, came on before WALLER, J., on 8th

SOMA NAIDU,
In re.
ODGERS, J.

November 1923 who referred it to a Bench as the Public Prosecutor proposed to argue that KRISHNAN, J., had no power to vacate his order, and the question has accordingly been argued before us on that point, and also on section 439, Criminal Procedure Code. The Judgment of this Court in a Criminal matter, as soon as it is signed, is final and the Court is *functus officio* as soon as that is done. Thereafter there is no power to revise or alter that decision. Vide *In the matter of Gibbons*(1), *Queen-Empress v. C. P. Fox*(2) and *In re Ranga Rao*(3) where it was held that the High Court has no power to review an order made in the exercise of its revisional jurisdiction. The old section ran as follows:—

“No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in sections 395 and 484 or to correct a clerical error.”

PETHERAM, C.J., in *In the matter of Gibbons*(1) said:

“Inasmuch as it is not shown to us that, before the passing of this section, any power of revision existed in the High Court, that section did not, in my opinion, create any such power.”

The new section runs as follows:—

“Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal charter, by the Letters Patent of such High Court, no Court when it has signed its judgment, shall alter or review the same, except to correct a clerical error.”

It has not been argued that the amendment has changed the scope or effect of the section, and it is not shown that any such power is reserved to this High Court by its Letters Patent. In *Rajjab Ali v. Emperor*(4) in which the Full Bench Ruling *In the matter of Gibbons*(1) was followed, there occurs the remark (at page 63),

“The result of the decisions of this Court subsequent to the Full Bench case seems to be this: that where a case is

SOMA NAIDU,
In re.
ODGERS, J.

disposed of merely for default of appearance or where an order is passed to the prejudice of an accused person and by mistake or inadvertence no opportunity has been given to him to be heard in his defence such an order is not one to which the ruling in the Full Bench case applies.”

In *In re Kunhammad Haji*(1) it was held that neither section 364 nor section 439 of the Code of Criminal Procedure empowers the High Court to revise or review the judgment of one or more of its Judges in a Criminal appeal or revision. The learned Judges (OLDFIELD and DEVADOSS, JJ.), in a very careful judgment examined all the case law on the point and held as above set out. It appears to me, therefore, that KRISHNAN, J., had no power to revise his order of 27th September 1923 and that his order of 25th October 1923 must be treated as a nullity.

We have therefore to consider the next question under section 439. Mr. Ethiraj, for the accused, contends that the order of enhancement of 27th September 1923 was passed without jurisdiction as his clients had no opportunity of being heard as required by sub-section (2) of section 439. The question is whether we have power to come to any conclusion with regard to the order of enhancement or whether we should thereby be falling into the very error I have just pointed out, as we have no power to revise the same. As pointed out, the accused did not appear. Mr. Anantaraman, for first accused, asked for an adjournment which was refused. He thereupon reported no instructions, as he was only retained on the question taken up by DEVADOSS, J. It does not appear from the order of KRISHNAN, J., of 25th October 1923, that the learned Judge purported to vacate his order on this ground, that is, the non-appearance of the accused. But we are informed that that was

(1) (1887) I.L.R., 14 Calo., 42 (F.B.) at page 47.

(2) (1886) I.L.R., 10 Bom., 176 (F.B.). (3) (1912) 23 M.L.J., 371.

(4) (1919) I.L.R., 46 Calo., 80.

(1) (1923) I.L.R., 46 Mad., 382.

SOMA NAIDU,
In re.
ODGERS, J.

so and there is no reason to doubt that this consideration induced the learned Judge to make the order of 25th October 1923. The question is not as to our power to revise the order of KRISHNAN, J., but whether we have power to take any action as to the order of enhancement; if KRISHNAN, J.'s order is one he had power to make, we cannot do so; if on the other hand, it is an order he had no power to make by reason of the language of section 439 (2), Criminal Procedure Code, then it seems to me that we are authorized to deal with the question. We are not revising KRISHNAN, J.'s judgment but considering our own powers of acting on the petition before us. The language of the sub-section is mandatory and is clearly enacted as an exception to section 440. It appears to me therefore that, if the accused had no opportunity of being heard, this being clearly an order to his prejudice, more than an irregularity occurred, and that there is authority for holding that an order so passed was passed without jurisdiction. The facts appear as follows:—

On 14th September 1923 the accused received notice to show cause against enhancement on 17th September 1923. The case did not come on, on that day, but on 27th September 1923. On 28th September 1923, accused received a second notice, dated 20th September 1923, fixing 8th October 1923 for the hearing of the case. A day or two after 28th September 1923 the accused's vakil at Vizagapatam received a letter from Mr. T. S. Anantarama Ayyar informing him that the case had been disposed of on 27th September 1923. The office posted the case apparently as soon as a return to the first notice was made, but while the second notice was outstanding. I have no hesitation in saying that the accused must have been embarrassed by this procedure and I hold that they had no reasonable opportunity

under these circumstances of being heard. The authority for the proposition that an order passed in such circumstances is without jurisdiction is to be found in the passage from *Rajjab Ali v. Emperor*(1) already quoted. Further, the learned Judges in *In re Ranga Rao*(2) say, following 7 Madras High Court Reports, Appendix XXIX, that where a criminal appeal has been rejected and accused's pleader had not a reasonable opportunity of being heard, the Court could restore a case to its file. They continue:

"We have no doubt that this is correct, for the language of section 421 required a reasonable opportunity to be given and if such reasonable opportunity is not given, the Court has no jurisdiction to dismiss the appeal."

In *In re Kunhammad Haji*(3) OLDFIELD, J., assumes that reasonable notice under section 420 is a condition precedent to the exercise of the Court's jurisdiction and that, that condition not being fulfilled, there was no previous valid adjudication to bar a hearing on the merits, which is exactly the case here. DEVADOSS, J., in the same case doubts the validity of *In re Ranga Rao*(2) on the ground that the Court is not entitled to dismiss a criminal revision petition for default but should dispose of it on the merits. The High Court in that case dismissed the petition to restore a criminal revision petition dismissed for default. Neither of the learned Judges in 46 Madras, says that the passage quoted above from *In re Ranga Rao*(2) is a misstatement of the law. I must therefore hold that there is no bar to this matter of enhancement being heard on the merits. I would, however, add one thing. The learned Public Prosecutor has pressed upon us that if we come to this conclusion,

SOMA NAIDU,
In re.
ODGERS, J.

(1) (1919) 1 L.R., 46 Cal., 60.

(2) (1912) 28 M.L.J., 371.

(3) (1923) I.L.R., 46 Mad., 382.

SOMA NAIDU, *In re.*
ODGERS, J. it will open a wide door* to revision in criminal matters and that it may be applied to any manner of error. I think there is no such danger. This case is exceptional in its circumstances and has been brought about by the practice of the office in posting a case in the list in accordance with one notice, while there is another and subsequent notice for a different date outstanding. As stated above, we are in no way reviewing or revising any order of KRISHNAN, J., but simply deciding that there was no previous valid adjudication to bar a hearing on the merits. There must be fresh notice to the accused and the case will come up afresh for disposal on the question of enhancement of sentences.

WALLACE, J. WALLACE, J.—The question before us, as I conceive it, is whether this Criminal Revision Case taken up *suo motu* by this Court calling on the accused to show cause against enhancement of punishment, has already been disposed of finally by this Court by the order of KRISHNAN, J., dated 27th September 1923, or whether it is *res integra*.

It is not a question of whether the present Bench can sit in revision over either of the orders of KRISHNAN, J., but whether either or both of these order is *ab initio* null and void as being made without jurisdiction, and for the purpose of deciding that question, and for no other purpose, it is necessary for us here to consider the legal effect, if any, of these two orders.

To take the first order of 27th September 1923, it was admittedly passed without hearing the accused, and I think we must take it that the accused had had no reasonable opportunity of being heard since KRISHNAN, J., thought it necessary later on, in the interests of justice, by means of a second order, dated 25th October 1923, to vacate his order imposing enhanced punishment. It appears that the accused were served with a notice of

the revision case first on 14th September 1923 in the Vizagapatam district for a hearing at Madras on 17th September 1923, and that a fresh notice was sent to them fixing 8th October 1923 for hearing, which was served on them there again on 28th September 1923, and that in the meantime the case was posted for hearing in this Court on 27th September 1923 and heard. A pleader, who had appeared for them earlier in the case before the question of enhancing the punishment was taken up *suo motu*, appeared on 27th September 1923 on seeing the case posted on the notice board. He was not instructed to argue the question of enhanced punishment on behalf of the accused and he therefore only prayed for an adjournment which was refused. In these circumstances I think it clear that the provision in section 439 (2) of the Criminal Procedure Code that “no order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence” had not been followed in this case.

The next point is whether such failure *ipso facto* rendered the order passed on 27th September 1923 null and void. We have been referred by the accused's counsel to several rulings. In *Shanmugam Chettiar v. Alagia Nambia Pillai*(1), this High Court set aside an order of a lower Appellate Court disposing of an appeal on the date previous to the date fixed for hearing on the ground that such a proceeding was a material error in procedure. It is not stated, however, that the order of the lower Appellate Court was *ab initio* null and void. In *The King-Emperor v. Romesh Chandra Gupta*(2), the High Court of Calcutta, having first held that section 439 (2) had been sufficiently

SOMA NAIDU,
In re.
WALLACE, J.

(1) 2 Weir, 475.

(2) (1917) 22 C.W.N., 168.

SOMA NAIDU,
In re.
WALLACE, J.

complied with when the District Magistrate, before referring the question of enhanced punishment to the High Court, had heard the accused, and after itself enhancing the punishment accordingly, subsequently reviewed its own order and set it aside on changing its mind and holding that the accused had a right of being heard before the High Court itself. The Court also did not treat its first order as null and void but "reviewed" it, as it says. With respect, I doubt very much the correctness of this decision since it appears to me that section 369 of the Criminal Procedure Code, as interpreted by that and other High Courts, does not confer on a High Court any power of review on the ground that its former view was wrong. See, for example, *Queen-Empress v. Durga Charan*(1), *Queen-Empress v. C. P. Fox*(2), *In the matter of Gibbons*(3) and *In re Kunhammad Haji*(4). Nor does any other Statute or Letters Patent give it such a power. The Judges in the Calcutta Weekly Notes case seem to me clearly to have overlooked or brushed aside the fact that they had no power to review their first order. In *In re Ranga Rao*(5) a Bench of this Court was asked to review its order dismissing for default a Criminal Revision Petition by a party against an order of the Sessions Judge ordering his re-trial, and it was held that no party coming up in revision can claim such a right. It is pointed out to us that in that case the Bench approved of an earlier ruling of this Court in which it was held that, where an appeal had been rejected under section 421 of the Criminal Procedure Code without the appellant's pleader being heard (or more correctly without the appellant or his pleader having had an opportunity of being heard) the Court could restore it

(1) (1885) I.L.R., 7 All., 672.

(2) (1886) I.L.R., 10 Bom., 176 (F.B.).

(3) (1887) I.L.R., 14 Cal., 42 (F.B.). (4) (1923) I.L.R., 46 Mad., 382.

(5) (1912) 23 M.L.J., 371.

to file, and this was explained to be a right inherent in section 421 itself, because that section implies that such reasonable opportunity must be given before the Court has jurisdiction to dispose of the appeal. In spite of some looseness of language, if I may use that expression with respect, in the concluding portion of that judgment implying that, in British India, Courts have no power whatever to restore criminal cases to file since there is no statutory provision for such a course, I think the *ratio decidendi* of that decision is that a High Court has, as a rule, no power to review its order in revision, because the power to revise is purely a discretionary power regarding the exercise of which no party has a right to be heard at all, but that where a party has a legal right to be heard and yet has not been given the opportunity of being heard the Court can and could restore the case to file. Under what statutory power it so restored it is by no means made clear in that judgment. Obviously section 439 (2) gives to an accused person a right of audience similar to that given by the proviso to section 421 (1) and it would seem reasonable that if the failure by the Court to observe the latter provision somehow creates a right in the Court to restore the case to file so ought a similar failure to observe the former provision. The only difficulty is, where is that right to be found? It is clearly, as already indicated, not a right of review of judgment. Can it then reasonably be held that disregard of such a nature of the provisions of the Code deprives the Court of its jurisdiction so that its order is null and void? That is I think the view underlying *In re Ranga Rao*. It is also the view taken, *obiter* no doubt, by OLDFIELD, J., in *In re Kunhammad Haji*(1) and I think, with respect, that it is a sound judicial view, and that a reasonable opportunity for the accused

SOMA NAIDU
In re.
WALLACE, J.

(1) (1923) I.L.R., 46 Mad., 382 at p. 369.

SOMA NAIDU, to be heard is an essential condition precedent to the exercise of jurisdiction under section 439, when the Court is considering the question of enhancing the punishment inflicted on him.

I am of opinion, then, that the conditions laid down by law as precedent and requisite to the hearing of this case, not having been observed, the Court acted without jurisdiction, and its order is therefore void *ab initio*; and on this ground, and on this alone, I would base my decision. I would therefore hold that the first order of KRISHNAN, J., was without jurisdiction and therefore void. The question of the second order is therefore immaterial and the passing of it was unnecessary. It follows that this High Court has not yet pronounced a valid legal judgment in this Criminal Revision case and it is therefore open to this Court to hear the case on the merits.

D.A.R.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan and Mr. Justice Waller.

VAIRAVAN SERVAI (ACCUSED), PETITIONER

v.

KING-EMPEROR.*

Indian Arms Act (XI of 1878)—Servant using, without licence, master's gun—Section 13 of the Act, infringement of—Section 19 (e), conviction under.

A servant who uses for his own purpose a gun, in respect of which his master has a licence or has obtained an exemption, infringes the provisions of section 13 of the Indian Arms Act (XI of 1878) and is liable to conviction under section 19 (e).

* Criminal Revision Case No. 644 of 1923.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order, dated 2nd March 1923, of H. S. SHIELD, District Magistrate of Rāmnād at Madura, in D. Dis. No. 1347 of 1923 (C.C. No. 86 of 1922 on the file of T. S. JAMBUNATHA AYYAR, Subdivisional First-class Magistrate of Devakottai).

The facts appear from the judgment.

M. Patanjali Sastri and C. S. Rama Rao Sahib for petitioner.

The Public Prosecutor (J. C. Adam) on behalf of the Crown.

The JUDGMENT of the Court was delivered by

KRISHNAN, J.—This is an application made to this Court to revise the conviction of the accused, one Vairavan Servai, under section 19 (e) of the Arms Act, as he was found carrying a loaded gun in contravention of the provisions of section 13 of the same Act which runs thus.—

"No person shall go armed with any arms except under a licence and to the extent and in the manner provided thereby."

What happened in this case was that the accused Vairavan Servai was found armed with a loaded gun trying to shoot game in the forest. When he was asked for an explanation he said that his master Mr. Delhi Batcha Thevar owned the gun, that he was carrying it for him and that his master was somewhere in the neighbourhood, but, when he was asked to fetch his master, he was unable to do so; in fact his master was nowhere near. The finding is that he was using the gun for his own purposes.

It has been urged before us that Mr. Delhi Batcha Thevar is a person exempted under the rules framed under the Arms Act published in the *Fort St. George Gazette* of January 13, 1920, and that, as a retainer

VAIRAVAN
SERVAI
v.
KING-
EMPEROR.

VAIRAVAN
SERVAI
v.
KING-
EMPEROR.

KRISHNAN, J.

or servant of Delhi Batcha Thevar, the accused was also entitled to carry the gun and he has therefore committed no offence by doing so. In the first place, we are not sure whether the accused's master is entitled to claim exemption under clause 11 in the list of exempted persons as a landholder, as the learned vakil argues. To make sure of it, it would be necessary to call for an express finding on that point. But we will assume, for the purposes of this case, without deciding the question, that Mr. Delhi Batcha Thevar is an exempted person. The question then really is whether the accused, as a servant of Mr. Delhi Batcha Thevar, is entitled to contend that, because his master is an exempted person, he has not infringed the Act. We do not think his contention is correct, for, on the findings in this case, he was not carrying the gun for his master at all but he was using the gun himself for his own purposes in the forest for shooting game. We do not think there is anything in the wording of section 19 (e) of the Act which would justify us in going so far as to say that any person, who has got a licence or who is exempted from taking out a licence, is entitled to allow any servant of his to use the gun for the latter's own purposes.

We need not refer to all the authorities that have been cited to us, for, except the case in *Madho Lal v. The Emperor*(1), the other cases turn upon the facts of those cases. It has been held in that case that, where an accused, a servant, was found using a gun lent to him by his master who had a licence, and using it for his own purposes, his act was an infringement of the provisions of section 19, clause (f) of the Arms Act. Clause (e) of the section is very similar to clause (f). We agree with that ruling of the Calcutta High Court;

(1) (1908) 13 C.W.N., 124.

that case has considered the previous cases including *Queen-Empress v. Ganga Din*(1). We think it will be an unjustifiable extension of the Act to hold that a person having a licence can allow any servant of his to do what he likes with his gun, as the learned vakil for the accused argues before us. If the servant carries the gun for purposes of his master or in the presence of his master, that may not be an offence under the Act; but to go further, we think, will be going against the terms of the Act. We think that, in this case, there was a clear infringement of the provisions of clause (e) of section 19 of the Act by the accused, and that therefore he is guilty of the offence that has been found proved against him by the lower Courts.

The question, however, remains as to what the punishment should be and whether the gun which has been ordered to be confiscated should be confiscated. It would seem from the correspondence that Mr. Delhi Batcha Thevar was rather misled by certain letters of the District Magistrate, particularly Exhibit I, in thinking that he was entitled to allow his gun to be used by his servant, Vairavan Servai, the accused in this case, whose name he gave to the District Magistrate in Exhibit V; apparently he and his servant honestly believed that they were doing nothing wrong in allowing the servant to take the gun and use it as was done in this case. We therefore think that the order of confiscation should not be enforced; we set aside the order of confiscation of the gun in this case. We consider, however, that the fine of Rs. 30 in the circumstances of this case is not an excessive sentence and we confirm the fine. Subject to the above modification as to confiscation we dismiss the petition.

D.A.E.

(1) (1900) I.L.R., 22 All., 118.

VAIRAVAN
SERVAI
v.
KING-
EMPEROR.

KRISHNAN, J.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan.

1924,
February 7.APPASAMI MUDALIAR AND TWO OTHERS (ACCUSED),
PETITIONERS

v.

KING-EMPEROR.*

Arrest by constable—Accused's right to know authority for arrest—Accused's knowledge of non-existence of authority—Right to resist arrest—custody, unlawful—Prosecution under section 225-B, Indian Penal Code (Act XLV of 1860)—Prosecution must establish alleged authority.

A person, about to be arrested, is entitled to know under what power the constable is arresting him and, if he specifies a certain power which the person knows the constable has not got, he is entitled to object to such arrest and escape from custody, such custody not being a lawful one.

For a charge of escaping from lawful custody, under section 225-B, Indian Penal Code (Act XLV of 1860), the prosecution must first establish that the constable who arrested the man had power to act under the specific authority that he claimed to have.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the judgment of F. L. BRIGSTOCKE, Joint Magistrate, Hosūr, in Criminal Appeal No. 13 of 1923 preferred against the judgment of S. PITCHAI PILLAI, Sub-Magistrate of Denkanikota, in C.C. No. 142 of 1922.

The facts are set out in the judgment.

V. L. Ethiraj, counsel for petitioners.

Public Prosecutor (J. C. Adam) on behalf of the Crown.

JUDGMENT.

In this case, the three petitioners before me have been convicted under section 225-B of the Indian Penal Code

* Criminal Revision Case No. 715 of 1923.

and sentenced to various fines by the Sub-Magistrate of Denkanikota, and their conviction has been confirmed by the Joint Magistrate of Hosūr.

The prosecution case is that certain constables were sent to the village of Ullugurukki on the 29th May 1922 and P.W. 1, a constable, arrested the first accused and took him by his hand. Then, it is said, the accused asked him why he arrested him and that the constable told him that he was arresting him under section 54 of the Criminal Procedure Code. The accused seems to have resisted this arrest on the ground that he was not liable to be arrested under section 54, Criminal Procedure Code. The constable who arrested him had no warrant for his arrest. Accused 2 and 3, who are the sons of the first accused, also seem to have taken part in resisting the arrest. All the same, all the three accused were arrested by the constable and taken to the police station. The charge under section 225-B is on the ground that the father tried to escape from custody after he was arrested and that the sons helped him to do so. Section 225-B requires that the custody from which a man tries to escape must be a lawful custody; he must have been lawfully arrested and detained; then only he is liable to conviction under section 225-B. It is not denied in this case that the constable had no power to arrest the first accused under section 54, Criminal Procedure Code. When the prosecution found its weakness after the case was almost nearly over in the lower Court, they changed the case and contended that the first accused was arrested under section 55 (c) and that the arrest was legal.

The question that arises before me is whether, when a constable goes and arrests a man and tells him under what authority he is arresting him, when that authority is not a lawful authority, can the man arrested be

APPASAMI
MUDALIAR
v.
KING-
EMPEROR.

APPASAMI
MUDALIAR
v.
KING-
EMPEROR.

convicted and punished under section 225-B for resisting such arrest although the constable might have authority to arrest him under some other provision of law? For the purpose of deciding the point, I will assume that, if the arrest had been under section 55 (c) it would have been a lawful arrest. This is a question which I shall consider presently. I have come to the conclusion that when a constable arrests a man and tells him expressly that he is doing so under a particular authority which he claims to have to arrest him, and if such arrest is resisted, it will be for the prosecution afterwards to establish that the constable who arrested the man had power to act under the authority that he claimed to have. It is not sufficient for the prosecution afterwards to say that the constable had authority under some other provision of law. I think, any man who is being arrested has a right to ask the officer arresting him to show him what power he has to do so. If the arrest is under a warrant, it has been held that the man arrested is entitled to ask that the warrant be shown to him to see that he is being properly arrested and that when the warrant is not shown to him and the arrest is made such an arrest will not be a legal arrest. A man is entitled to know when a constable is arresting him, under what power he is acting and if he (the constable) states that he acts under a certain power which the man knows he has not got, I am not prepared to say that he is not entitled to object to such arrest and to escape from custody when he is arrested. So far as section 54 is concerned, no attempt has been made before me to justify the arrest, and it seems to me that on that ground this petition ought to succeed.

Apart from it, even under section 55 (c) I am not satisfied that the prosecution has proved that the constable had authority to arrest the man. That clause

APPASAMI
MUDALIAR
v.
KING-
EMPEROR.

says, "Any person who is by repute an habitual offender, house-breaker or thief or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or, in order to the committing of extortion, habitually puts or attempts to put persons in fear of injury," may be arrested by an officer in charge of a Police station. There is nothing before me to show that there was any ground for taking action under section 55 (c) by the police in this case. The officer, who ordered his arrest and gave evidence as C.W. 1, only says that he had reason to suspect that the first accused was concerned in several offences. He does not say anything about his being reputed to be a habitual robber, or house-breaker; at the time he gave evidence the prosecution case was that the arrest was made under section 54 and not under section 55 (c); so that his evidence does not relate to a case under section 55 (c) at all.

In these circumstances, it seems to me that the arrest of the first accused cannot be considered to have been a lawful arrest and his attempt to escape from custody would not fall under section 225-B, Indian Penal Code. He must therefore be acquitted, and as a result of his acquittal, accused 2 and 3 must also be acquitted. The fines, if paid, will be refunded to them.

D.A.R.

APPELLATE CIVIL.

1923,
October 15.*Before Mr. Justice Krishnan and Mr. Justice Waller.*SAVANNA V. A. R. VELLAYAPPA CHETTIAR
(RESPONDENT), APPELLANT,

v.

M. L. M. RAMANATHAN CHETTIAR (APPELLANT),
RESPONDENT.*

Provincial Insolvency Act (V of 1920), ss. 4 and 80—Claim petition—Official Receiver—Mortgage-decree—Claim to mortgaged property preferred direct before Official Receiver—Power of Official Receiver to pass order—Power in such matter, whether delegated to Official Receiver—Procedure to prevent sale by Receiver—Application to be made direct to District Judge to take action under section 4 of the Act—Proceedings to set aside.

An Official Receiver in insolvency has no power to make any order on a claim petition filed before him, as it is not a power which has been delegated to him under section 80 of the Provincial Insolvency Act (V of 1920).

If the claimant wants to prevent the sale by the Official Receiver of some property as belonging to the insolvent, he should apply to the District Judge direct to take action under section 4 of the Act.

Consequently an order passed by an Official Receiver allowing a claim petition filed directly before him and an order reversing it passed by the District Judge on appeal, were set aside by the High Court and the parties left in *status quo ante*.

APPEAL against the order of T. V. NARAYANAN NAYAR, District Judge of Ramnad, in Civil Miscellaneous Petition No. 832 of 1920 presented against the order of the Official Receiver in M.P. No. 126 of 1920 in I.P. No. 9 of 1919.

The respondent (Ramanathan Chettiar) obtained a mortgage-decree against a person who was subsequently adjudicated an insolvent, and the Official Receiver

assumed jurisdiction over his properties. While the latter was taking steps to realize the assets, a third party (the appellant, Vellayappa Chetty) claimed some of the properties covered by the mortgage-decree as his and denied the right of the insolvent to such properties, and he preferred a claim petition (M.P. No. 126 of 1922), before the Official Receiver. The claim was inquired into by the Official Receiver and allowed by him. Against that order the mortgagee (decree-holder) filed a petition before the District Judge under section 68 of the Provincial Insolvency Act (V of 1920). The learned Judge held that no claim petition could be preferred before the Official Receiver in respect of property included in a mortgage-decree, any more than in a Civil Court, and set aside the order of the Official Receiver; but the form of the order drawn up was as follows:—

“it is ordered that the order of the Official Receiver be and the same is hereby set aside and that the claim petition M.P. No. 126 of 1920 do stand dismissed.”

The claimant preferred this Miscellaneous Appeal to the High Court against the order of the District Judge under section 75, clause (2) of the Provincial Insolvency Act V of 1920.

B. Sitarama Rao and S. R. Muttuswami Ayyar for appellant.

M. Patanjali Sastri and C. S. Rama Rao Sahib for the respondent.

JUDGMENT.

This appeal is from an insolvency proceeding before the District Judge of Madura. The Official Receiver seems to have made an attempt to sell certain properties, to which the appellant before us put forward a claim that such properties belonged to him and not to the insolvent and should not be sold. These properties were

VELLAYAPPA
CHETTIAR
v.
RAMANATHAN
CHETTIAR.

* Appeal against Order No. 261 of 1922.

VELLAYAPPA
CHETTIAR
v.
RAMANATHAN
CHETTIAR.

included in a mortgage-decree obtained by the respondent against the insolvent. Strangely enough, the Official Receiver thought that he had power to dispose of a claim petition like that and thinking that a prima facie title had been made out by the claimant, he passed an order releasing the properties from sale, holding that the properties belonged to the claimant. On this the mortgagee (decree-holder), conceiving that he was somehow or other aggrieved by the order put in an appeal to the District Judge. The District Judge thereupon came to the conclusion, and rightly in our opinion, that the secured creditor, the mortgagee (decree-holder), was not in any way bound by any proceedings taken by the Official Receiver in this matter. But he thought at the same time that the effect of the order, if allowed to stand, would be to deprive the secured creditor of his right of sale which conclusion we are unable to follow. The secured creditor undoubtedly was not at all affected by the order of the Official Receiver. On that the District Judge proceeded to allow the appeal petition before him and set aside the order of the Official Receiver without deciding whether the property actually belonged to the claimant or to the insolvent. The form of the order which was drawn up proceeded further and it declared that the claim petition put in by the claimant do stand dismissed. The effect of that order if left standing must necessarily be that the property should be treated as the insolvent's and not as the claimant's, a position which the District Judge did not arrive at in his judgment.

We think that the whole of the proceedings is misconceived. In the first place, the Official Receiver had no power to make any order in a claim petition. It is not a power which has been delegated to him under section 80 of the Provincial Insolvency Act V of 1920. If the claimant wanted to prevent the sale of the

VELLAYAPPA
CHETTIAR
v.
RAMANATHAN
CHETTIAR.

properties as belonging to the insolvent, he should have applied to the District Judge direct to take action under section 4 of the Act. He did not do so. That being so, we must set aside all the proceedings in the lower Court and leave the parties in *status quo ante*. The claimant if he finds that the Official Receiver either at his own instance or at the instance of any creditor proposes to sell the properties which he claims to be his, may, if so advised, apply to the District Judge under section 4 of the Act for a proper order to be passed.

We, therefore, allow the appeal and set aside all the proceedings in the lower Court and direct each party to bear his own costs.

K. R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

JELADI BURRAYYA, MINOR BY GUARDIAN HANUMAYAMMA
AND OTHERS (DEFENDANTS NOS. 2 TO 5), APPELLANTS,

1923
September,
28.

v.

PONDURI RAMAYYA AND OTHERS (FIRST DEFENDANT AND
PLAINTIFF), RESPONDENTS.*

Minor—Guardian—Money borrowed by guardian on a promissory note for purchase of lands on behalf of minor—Absence of necessity—Lands purchased—Suit by lender against heirs of minor on his death—Minor's estate, liability for debt—Decree on liability of lands purchased—Right of lender to proceed against lands actually purchased with the money so advanced.

Where the guardian of a minor borrowed money on a promissory note on behalf of his ward for the purpose of purchasing

* Second Appeal No. 724 of 1922.

BURRAYYA
v.
RAMAYYA. lands for the minor, and the lands were accordingly purchased therewith, but it appeared that there was no necessity either to borrow the money or to purchase the lands; on a suit being instituted by the lender to recover money on the promissory note against the heirs of the minor on his death;

Held, that the guardian of a minor had no authority to involve the ward's estate in debt for the purpose of purchasing lands to be added to his estate: *Subramania Nadan v. Ramasami Nadan*, (1913) 25 M.L.J., 563; and *Subramania Chetty v. Chidambaram Mudali*, (1921) 41 M.L.J., 459, followed;

that the debt so incurred was not binding on the minor's estate in the hands of his heirs;

but that the plaintiff was entitled to have a decree against the lands actually purchased with the money advanced by him.

SECOND APPEAL against the decree of K. S. MENON, the District Judge of Guntūr, in Appeal Suit No. 81 of 1921, preferred against the decree of K. S. V. ROWJI, the Additional District Munsif of Guntūr, in Original Suit No. 369 of 1920.

The first defendant, who acted as the guardian of one minor Tirupatayya, borrowed some money on a promissory note executed by him as guardian for the purpose of purchasing lands to be added to the minor's estate. The lands were accordingly purchased with the amount so borrowed. The minor died and defendants Nos. 2 to 5 were his heirs and succeeded to his estate on the minor's death on 15th October 1918. The lender instituted the present suit to recover the amount due on the promissory note against the guardian, who was impleaded as the first defendant and the heirs of the deceased minor who were impleaded as defendants Nos. 2 to 5. The latter pleaded, *inter alia*, that there was no necessity to borrow the suit amount or to buy the suit lands for the minor, and that the estate of the minor in their hands was not liable for the debt. The District Munsif held that the minor's estate was liable for the debt and passed a decree

BURRAYYA
v.
RAMAYYA. "that the plaintiff do recover from the assets of deceased minor in the hands of the defendants." On appeal by defendants Nos. 2 to 5, the District Judge confirmed the decree and dismissed the appeal. The defendants Nos. 2 to 5 preferred this second appeal.

B. Somayya for appellants.

V. Ramadoss and *V. Krishna Mohan* for respondents.

JUDGMENT.

In this case defendants Nos. 2 to 5 are the appellants. They are the heirs-at-law of one minor Tirupatayya who died sometime ago. The plaintiff brings this suit for recovering from the first defendant personally and from the minor's estate in the hands of defendants Nos. 2 to 5 the amount due under the promissory note, Exhibit A, which is a renewal of Exhibits A-1 and A-2. It is found by the learned District Judge that the money due under the promissory note was borrowed for the purpose of paying the purchase money for certain lands which the guardian of the minor purchased for him. The question we have to decide is whether the money so borrowed for purchasing lands—we will assume that the purchase was for the benefit of the minor—constitutes a debt really binding on the estate of the minor. There can be no doubt that there was no necessity to borrow this money at all, nor to buy the lands. The District Judge has found that there was no necessity so to borrow; but he seems to have thought that, as it might be for the benefit of the minor, the minor's estate would be liable. We are unable to agree with this proposition. The guardian had no right whatever to involve the ward's estate in debt for the purpose of purchasing lands to be added to his estate. It has been so decided in this Court in several cases—vide *Subramania Nadan v.*

BURRAYA v. RAMAYYA. *Ramasami Nadan*(1) and *Subramania Chetty v. Chidambaram Mudali*(2). We must, therefore, hold that the debt in this case due under the promissory note sued upon is not binding on the minor's estate or the heirs of the minor, and the decree passed against the minor's estate in the hands of his heirs must be set aside. All that the plaintiff is justly entitled to is to have a decree against the lands actually purchased with the money advanced by him. There will, therefore, be a decree in favour of the plaintiff only against the lands covered by Exhibit I, the purchase deed, to pay the purchase-money under which the promissory note amount was borrowed. The lower Court has refused a personal decree against the first defendant. There is no appeal against that portion of the decree and, therefore, we cannot pass any orders against the first defendant in this appeal.

As regards costs, the right order to pass in this case is to give defendants Nos. 2 to 5 their full costs throughout, the plaintiff paying such costs. As between the plaintiff and the first defendant, there will be no order as to costs in the Second Appeal.

K.R.

(1) (1913) 25 M.L.J., 563.

(2) (1921) 41 M.L.J., 459.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Waller. 1923
November 9.

RAMASAMI REDDI (PLAINTIFF), APPELLANT

v.

THALAWASAL MARUDAI REDDI AND OTHERS
(DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908) sec. 11—Res judicata—Finding of original Court on two issues—Suit in ejectment—Pleas—Occupancy right—Want of notice to quit—Dismissal of suit—Decree confirmed on appeal and on second appeal on the ground of want of notice to quit—Subsequent suit in ejectment after due notice—Defendants setting up again occupancy right—Bar of Res judicata.

In answer to a suit in ejectment filed against them, the defendants pleaded that they were entitled to occupancy rights in the land, that in any event they were tenants from year to year and that, as notice to quit had not been given to them, the suit in ejectment was not maintainable. The District Munsif held, in that suit, that the defendants had no occupancy rights, that they were tenants from year to year, and that as notice to quit had not been given to them, the suit was not maintainable, and he dismissed the suit. On appeal the lower Appellate Court affirmed the decree on the ground of want of notice to quit. On Second Appeal the High Court affirmed the decree on the same ground. The plaintiff, having subsequently given a proper notice to quit, instituted the present suit in ejectment; the defendants again set up occupancy rights; the plaintiff pleaded that the question of occupancy rights was *res judicata*.

Held, that the question of occupancy rights of the defendants was not *res judicata* by reason of the decision in the previous suit.

Midnapur Zamindari Company, Ltd v. Naresb Narayan Roy, (1921) I.L.R., 48 Cal., 460 (P.C.), followed.

APPEAL against the Order of S. RAGHAVA AYYANGAR, Subordinate Judge of Trichinopoly in Appeal Suit No.

* Appeal against Order No. 406 of 1922.

RAMASAMI
REDDI
v.
MARUDAI
REDDI.

33 of 1922, preferred against the decree of T. ANANTHA ACHARI, District Munsif of Karur, in Original Suit No. 485 of 1919.

The plaintiff brought this suit to recover possession of certain lands which were sold in Revenue auction in 1900 and purchased by one Krishna Ayyar who sold them to the plaintiff in 1901. The plaintiff had previously instituted a suit (O.S. No. 883 of 1902 on the file of District Munsif's Court of Kulittalai) for recovery of the same lands from the present defendants 1 and 2, who sold them in their turn to defendants Nos. 4 and 5 in the present suit. In the previous suit the defendants contended that the Revenue sale was invalid, that they had occupancy right in the lands and that the plaintiff could not recover possession. The District Munsif held in that suit that the defendants had no occupancy right, that the Revenue sale was valid, that the defendants were tenants from year to year, and that as such tenants they were entitled to notice to quit, and he dismissed the suit on the ground that no notice to quit had been given. On appeal in that suit the District Judge did not go into the question of occupancy right but held that a tenancy from year to year was not such an encumbrance as could be avoided under section 42 of the Madras Revenue Recovery Act (II of 1864), that there was a tenancy from year to year and that a notice to quit was necessary. There was a second appeal in which the High Court held that

"The yearly tenancy found to exist in this case is not an encumbrance within the meaning of section 42 of the Madras Act II of 1864"

and dismissed the second appeal. The plaintiff subsequently gave notice to quit and brought the present suit. The defendants again raised the plea of occupancy right as well as the plea of limitation.

RAMASAMI
REDDI
v.
MARUDAI
REDDI.

The plaintiff contended that the plea of occupancy right was barred by the rule of *res judicata*. The District Munsif upheld the plea of *res judicata*, and, holding that the suit was not barred by limitation, decreed the plaintiffs' suit; on appeal by the defendants, the Subordinate Judge held that the question of occupancy right was not *res judicata*, and that the question of limitation should be decided only after taking evidence, and he consequently reversed the decree and remanded the case for trial on all the issues except that of *res judicata*. The plaintiff preferred this appeal to the High Court.

M. S. Vaidyanatha Ayyar for appellant.

S. T. Srinivasagopalachari for respondents.

JUDGMENT.

This is an appeal against an order of remand by the Subordinate Judge of Trichinopoly in a suit brought by the plaintiff for ejectment of the defendants from the plaintiff properties. The defendants pleaded, *inter alia*, that they had a right of occupancy in the land and that they could not be ejected. This plea, it was urged by the plaintiff, was *res judicata* between the parties and could not in consequence be raised by the defendants. The Munsif gave effect to the plea and took no evidence on the question of occupancy right. The Subordinate Judge has reversed his judgment and has held that the plea of *res judicata* is not well founded, and, having also held on another preliminary issue on the question of limitation that that issue should be found upon only after evidence was taken in the case, has remitted the suit to be tried by the Munsif after taking such evidence.

The main question argued before us is the question of *res judicata* and that question arises in this way.

RAMASAMI
REDDI
v.
MARUDAI
REDDI.

The plaintiff, as the transferee from the purchaser of the land in a revenue auction sale, brought a suit, O.S. No. 883 of 1902, for the purpose of ejecting the present defendants Nos. 1 to 3 and of recovering possession of the property on the strength of his title thereby obtained. In that suit these defendants had pleaded that they had a right of occupancy and therefore they were not liable to be ejected, but they raised another plea in the alternative, namely that, in the event of their not establishing their right of permanent occupancy, they were at least tenants and were entitled to notice to quit before they were ejected and that therefore the plaintiff's suit should fail. The other pleas raised in that suit need not be referred to at present. When the suit came on for trial the District Munsif held against the defendants and in favour of the plaintiff that the defendants had failed to establish a right of permanent occupancy. He held however at the same time that they had a right of a yearly tenancy in the plaintiff's property and that as no notice to quit was given by the plaintiff, the plaintiff should fail and he therefore dismissed the suit. The defendants, having succeeded in the suit before the District Munsif, naturally filed no appeal, but the plaintiff filed an appeal to the District Court. The District Court did not actually go into the question of the permanent occupancy, for it held that even if a permanent occupancy right was not established, the defendants should be held to be yearly tenants and that such a tenancy was not an encumbrance which could be wiped off by a revenue auction sale and therefore the plaintiff could not succeed without giving a proper notice to quit and, as he had not given such notice, it dismissed the appeal. There was a second appeal by the plaintiff to this Court and this Court accepting the District Judge's finding considered that,

RAMASAMI
REDDI
v.
MARUDAI
REDDI.

on the finding that there was at least an yearly tenancy in the matter and no notice to quit was given, Act II of 1864 did not destroy that right, and dismissed the second appeal. Now it is the finding of the District Munsif in that suit that the defendants had no right of permanent occupancy that is pleaded as *res judicata* in the present suit.

There are two authorities, which have been referred to by the Munsif and by the learned vakil for the appellant which support the contention that when a Court comes to a definite conclusion on an issue and gives a finding on that issue that issue would be *res judicata* even if the decree in the case is not based on that issue. The cases relied on are *Muthu Pillai v. Veda Vijaya Chariar*(1) and *Ram Krishna Naidu v. Krishnaswami Naidu*(2). There is a case, however, which has been referred to by the Subordinate Judge which is in conflict with this case; see *Laxmipathaya v. Ramachandra*(3) where a question very similar to this was decided in favour of the parties pleading that there was no *res judicata*. We need not, however, consider these cases for we think that the matter has been settled by the Privy Council in the decision quoted by the Subordinate Judge, *Midnapur Zamindari Company, Ltd. v. Naresh Narayan Roy*(4). In that case the defendant had pleaded a right of permanent occupancy and he also pleaded that, as he had a right of renewal, the suit was premature. The first Court had found that he had no right of occupancy but held that the suit was premature and dismissed the suit against him. The plaintiff had filed an appeal but the defendant had also filed a cross appeal contesting the finding on the question of the permanent occupancy right, and the High Court dismissed the plaintiff's

(1) (1920) 12 L.W. 277.

(3) (1916) 31 M.L.J., 311.

(2) (1919) 36 M.L.J., 611.

(4) (1921) 1 L.R., 48 Calo. 460 (P.C.).

RAMASAMI
REDDI
v.
MARUDAI
REDDI.

appeal holding that the suit was premature, and further gave a finding also on the question of the permanent occupancy right set up by the defendant in his cross appeal that no such right was proved. In spite of a cross appeal having been filed, the Privy Council held in the subsequent suit where it was pleaded that the question of the right of occupancy was *res judicata* between the same parties that it was not so. Their Lordships say at page 467 of the report

"Their Lordships do not consider that this will found an actual plea of *res judicata*, for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them."

That case exactly covers the present case. Here there was no necessity really to find on the question of permanent occupancy set up by the defendant, for even if the Court had assumed that he had no such occupancy right the result would have been the same; a tenancy from year to year would result and that would require a notice to quit to put an end to it.

In view of this ruling of the Privy Council we need not resolve the conflict between the different cases cited in Madras. We think that we are bound to follow the Privy Council ruling, and following that ruling we hold that the Subordinate Judge is right in deciding that the plea of *res judicata* is not well founded in this case.

As regards the question of limitation we think the Subordinate Judge is right in saying that the question must be decided after taking evidence and should not be decided without any evidence at all.

In the result the Civil Miscellaneous Appeal fails and it is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Waller.

PALANIANDI CHETTI (1st RESPONDENT'S LEGAL
REPRESENTATIVE), APPELLANT,

1923.
November 9.

v.

ADAIKALAM CHETTI AND ANOTHER (PETITIONER AND
2ND RESPONDENT), RESPONDENTS.*

Guardians and Wards Act (IX of 1890)—Application for appointment of guardian for a minor—Reference to arbitrators—Selection by arbitrators—Order of Court appointing applicant selected by arbitrators—Validity of appointment of person selected without Court's independent decision as to fitness—Appeal by counter-petitioner—Death of appellant pending appeal—Abatement of appeal—Son of appellant brought on record—Right of appellant's legal representative to prosecute appeal—Right to sue, whether survives—Civil Procedure Code (Act V of 1908), O. 22, rules 3 and 11.

An application under the Guardians and Wards Act for the appointment of a guardian to a minor was made by the maternal uncle of the minor; the application was opposed by his paternal uncle; the parties agreed to the selection of a person as guardian by certain arbitrators who chose the maternal uncle; the Judge accepted their choice and appointed him as guardian. The paternal uncle appealed and died during the pendency of the appeal. His son was brought on record as his legal representative and sought to prosecute the appeal. On objection being taken by the respondent that the appeal had abated,

Held, that the appeal did not abate, and the legal representative of the appellant was entitled to prosecute the appeal; *Gangabai v. Khashabai*, (1889) I.L.R., 23 Bom., 719, distinguished; *Arjan Singh v. Gujri*, (1917) 42 I.C., 410, followed;

that the selection of a guardian could not be referred to arbitrators, as it was not a matter of private interest between parties, and as the law allowed a reference to arbitration only where all the parties interested agreed, whereas in a guardianship application the party most interested was the minor and he could not agree to a reference; *Mahadeo Prasad v. Bindeshri Prasad*, (1908) I.L.R., 30 All., 187, followed; and that, as the Judge did

* Appeal against Order No. 422 of 1922.

PALANIANDI CHETTI v. ADAIKALAM CHETTI.

not arrive at an independent conclusion as to the fitness of the person for appointment as guardian, the order of appointment should be set aside.

APPEAL against the order of J. I. SMITH, I.C.S., District Judge of West Tanjore, in Original Petition No. 87 of 1920.

The material facts appear from the Judgment.

V. P. Veeraraghavan for K. Bushyam Aiyangar for appellant.

S. G. Rangaramanujam and K. Sankara Sastri for respondents.

JUDGMENT.

WALLER, J.—This is an appeal against an order of the District Judge, West Tanjore, appointing one Adaikalam Chetti as guardian of his minor nephew. Adaikalam Chetti was the applicant in the guardianship petition, which was opposed by Sami Chetti, the minor's paternal uncle. The latter appealed, but died during the pendency of the appeal. His son was brought on record as his legal representative and seeks to prosecute the appeal. Objection is taken that the right to sue does not survive and that the appeal has abated.

The objection is based on the decision reported in *Gangabai v. Khashabai*(1). The facts of that case were, however, very different from those with which we are now concerned. The appellant there relied on a personal appointment as guardian under a will, and her brother, after her death, applied for leave to prosecute her appeal. It was held that a claim based on a personal trust did not survive. As PARSONS, C.J., observed

"It cannot be said that the right to sue, which in this case must be construed to mean the right to make the objection which Ganga Bai made, survived."

RANADE, J., also pointed out that the brother could not succeed as he claimed no right under the will.

On the other side has been cited a decision of a single Judge of the Punjab Chief Court, who allowed the son of a deceased appellant to prosecute an appeal of this kind; *Arjan Singh v. Gujri*(1). In that case the appellant had asked to be appointed guardian as a reversioner. In the present case Sami Chetti opposed the application of the minor's maternal uncle on the ground of his own superior claim as the undivided senior paternal uncle. I see no reason why in the language of PARSONS, C.J., the right to make that objection should not be held to have survived in favour of his legal representative. A guardianship application is, after all, not a suit inter parties. It is a proceeding designed to satisfy the Court that it is for the welfare of a minor that a guardian should be appointed and as to the most suitable person for appointment. The application may be made by (among others) any relative or friend of the minor and the Judge may issue notice of it not only to certain specified persons, but also to any other persons to whom, in his opinion, special notice should be given. The welfare of the minor is the paramount consideration and it would, I think, be most unfortunate to hold that an appeal against an unsuitable or illegal appointment abated on the death of one of the persons who has received special notice of the application. Here the nearest male relation had filed an appeal objecting to the appointment and I think that the right to make that objection survives to his legal representative. I therefore overrule the preliminary objection.

On the merits it appears that the parties agreed that the selection of the guardian should be left to certain arbitrators who chose Adaikalam Chetti. Their choice seems to have been accepted by the Judge. In *Mahadeo*

PALANIANDI CHETTI v. ADAIKALAM CHETTI.
WALLER, J.

(1) (1899) I L.R., 23 Bom., 719.

(1) (1917) 42 I.C., 410.

PALANIANDI
CHETTI
v.
ADAIKALAM
CHETTI.

WALLER, J.

Prasad v. Bindeshri Prasad(1), it has been held that such a matter, which is not of private interest between parties, cannot be settled by a reference to arbitrators. This ruling I respectfully follow. The law allows a reference to arbitrators where all the parties interested agree that the subject of difference between them shall be so referred. In a guardianship application the party most interested is the minor and he cannot agree to a reference. There is nothing on record to show that the Judge arrived at any independent conclusion as to Adaikalam Chetti's fitness for appointment. Under the circumstances, I think that his order must be set aside and that he must be directed to dispose of the application afresh. I do this with great reluctance. It is quite likely that Adaikalam Chetti is the proper person to be appointed and this litigation has been going on since March 1920. As appellant agreed to the reference, there will be no order as to costs.

KRISHNAN, J.

KRISHNAN, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

1923,
November
21.

SANKARANARAYANA PILLAI AND OTHERS (DEFENDANTS),
APPELLANTS

v.

RAJAMANI alias GURUSAMY NADAR AND OTHERS
(PLAINTIFFS AND DEFENDANTS), RESPONDENTS.*

Sections 16, 18, 20 and 23 of Provincial Insolvency Act (III of 1937)—Order adjudicating a Hindu father and his minor son as insolvents "referring further proceedings to Official

(1) (1908) I.L.R., 30 All., p. 137

* Appeal Nos. 216 and 272 of 1921.

Receiver"—Meaning of—Implied appointment of Official Receiver as Receiver—Sale by Receiver of son's interest also for debts binding on son—Validity of sale.

SANKARA-
NARAYANA
PILLAI
v.
RAJAMANI.

On an act of insolvency by a Hindu father, the Court adjudicated as insolvents not only the father but also his minor sons and passed an order "Referred to the Official Receiver for further proceedings."

Held that the order amounted to an appointment of the Official Receiver as Receiver to take charge of the estate and vested the estate of the insolvents in him.

But even assuming that it was not so, the estate vested in the Court as Receiver under section 23 of the Provincial Insolvency Act as soon as the adjudication was made and the sale by the Official Receiver was valid under section 20 (e) of the Act as one effected by the agent of the Court and afterwards ratified by it. *Subba Aiyar v. Ramiswami Aiyangar* (1921) I.L.R., 44 Mad., 547, followed.

Held also, assuming that the order adjudicating the minor sons also as insolvents was wrong and that their shares did not vest in the Official Receiver, yet a sale by him, purporting to be of the whole family estate of all the insolvents, passed to the vendee the sons' shares also, since the Official Receiver who stood in the shoes of the father could have sold the sons' shares also for discharging the debts which were neither illegal nor immoral. *Bijraj Nopani v. Pura Sundary Dasee* (1915) I.L.R., 42 Cal., 56 (P.C.), *Charib-ullah v. Khalak Singh* (1903) I.L.R., 25 All., 407 (P.C.), followed.

APPEALS against the decree of the Additional Subordinate Judge of Tinnevely in Original Suit No. 9 of 1920.

The facts are given in the judgment.

T. R. Venkatarama Sastri and T. L. Venkatarama Aiyar for appellants.

A. Krishnaswami Aiyar for respondents.

JUDGMENT.

PHILLIPS, J.—The plaintiffs in this suit are the sons of defendants 1 and 2 and in 1912 defendants 1 and 2 and third defendant who were carrying on business

SANKARA-
NARAYANA
PILLAI
v.
RAJAMANI.
PHILLIPS, J.

together were adjudicated insolvents, and at the same time the plaintiffs who were made parties to the insolvency petition were also adjudicated. The family property of defendants 1 and 2 were sold by the Official Receiver and now the plaintiffs bring this suit to recover their $\frac{4}{5}$ ths share in that property on the ground that they were wrongly adjudicated insolvents and that, consequently, the sale of their property by the Official Receiver was void as against them.

Assuming that the plaintiffs who were then minors were wrongly adjudicated insolvents, the question remains whether the sales effected by the Official Receiver did or did not pass their interest in the family property.

The sale is objected to on two grounds, firstly, that the Official Receiver purported to sell the share of the plaintiffs and, not having authority to do so as their adjudication was illegal, the property did not pass; and, secondly, it is contended that the property of the insolvents did not vest in the Official Receiver. The Subordinate Judge has decided the second point against the plaintiffs but has found on the first point that the Official Receiver purported to sell the plaintiffs' share as well as the shares of their fathers, defendants 1 and 2, and that, as he had no right to sell the minors' shares, the sale is not binding upon them. On referring to the sale-deeds Exhibits XVI, XXII, XXVIII, XXX, etc., we find that the Official Receiver sold the properties belonging to defendants 1 to 3 and the plaintiffs. In several of the sale-deeds there is also a recital that these persons had all been adjudicated insolvents, and it is these documents that the Subordinate Judge has interpreted as constituting a sale of the minors' rights in the property separately from the rights of those legally adjudicated insolvents. The appellants, however,

SANKARA-
NARAYANA
PILLAI
v.
RAJAMANI.
PHILLIPS, J.

rely on two cases decided by the Privy Council, namely, *Bijraj Nopani v. Pura Sundary Dasee*(1) and *Charib-ullah v. Khalak Singh*(2). The former was a case of a sale wherein the vendor purported to sell certain property as the beneficial owner. As a matter of fact, he was not entitled to the property as beneficial owner, but, as an executor, he had full title to the property and it was held that, inasmuch as he purported to pass the whole of the property and had power to do so as executor, the title passed, it being held that

"the plain legal interpretation of the deed should not be allowed to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution."

Applying this principle to the present case, we find that the Official Receiver had power to sell not only the share of the adult insolvents but had also vested in him the power of these insolvents as fathers to sell their sons' interest in the property for the payment of antecedent debts. The Official Receiver had, therefore, power to sell the shares of the plaintiffs as well as of the fathers. The recital in the deed is that the property belonging to all the members of the family is sold and there is no specific recital that the shares of the various persons are sold separately. It is, therefore, difficult to read into the document any intention to sell the shares separately, and, in accordance with the principle of *Bijraj Nopani v. Pura Sundary Dasee*(1) it must be held that the property which purported to be sold and which actually was vested in the Official Receiver would pass to the vendees, and that property includes the shares of the sons. The second case *Charib-ullah v. Khalak Singh*(2), is a case where the

(1) (1915) I.L.R., 42 Cal., 56 (P.C.). (2) (1903) I.L.R., 25 All., 407 (P.C.).

SANKARANA-
RAYANA
PILLAI
v.
RAJAMANI.
PHILLIPS, J.

manager of a family mortgaged, in conjunction with another major member of the family and a minor represented by his mother as guardian, the whole family property. Although it was held that the mother as guardian of the minor could not make a mortgage of the minors' property without the sanction of the Court which was not obtained, it was held that the managing member had power to sell the whole property for the benefit of the family, and that, therefore, the whole of the property passed. Here, again, although the minor's interest purported to be conveyed, and the minor through his guardian was a party to the document yet as the manager had the right to dispose of the minor's interest also, the minor's interest was deemed to have been mortgaged. On the authority of these two decisions, I think it is clear that the sale-deeds executed by the Official Receiver had the effect of passing the interest of the minors but it is argued for the respondents that there are other cases of the Privy Council which take a contrary view, namely *Balwant Singh v. R. Clancy*(1) and *Ganesha Row v. Tuljaram Row*(2), but both these cases are distinguishable. In the former case there was a specific statement in the sale-deeds that the vendor was the only sharer in the property and he did not in any way purport to dispose of the rights of his brother who was subsequently found to be entitled to a share. The document was explicit and referred only to the interest of the actual vendor. In the second case a father and his son entered into a compromise of a suit, the father purporting to act as guardian of the son. It was there held that, as the father had not obtained the permission of the Court to enter into the compromise, the compromise was not

SANKARA-
NARAYANA
PILLAI
v.
RAJAMANI,
PHILLIPS, J.

binding on the son, and the plea that the father could have entered into the compromise in his personal capacity and thereby made it binding on his minor son was not accepted, although the case in which the minor is represented by some other person as guardian was expressly left open, possibly with reference to the decision in *Charib-ullah v. Khalak Singh*(1). On the ground therefore that the compromise was entered into by the father not only on his own behalf but on behalf of his son, and that he had not obtained the permission of the Court, the compromise was held not to be binding under section 462, Civil Procedure Code. I am, therefore, of opinion that the sales by the Official Receiver which purported to sell the whole property belonging to the family had the effect of passing the whole property, for the right of disposing of the whole property had become vested in the Official Receiver, and he must be deemed to have sold that right. I may also refer to two decisions of this Court in support of this conclusion, *Surapa Raju v. Venkayya*(2) and *Rajagopalan v. Subbarama Iyer*(3). Another case relied on by the appellants, *Sabapathy Chetty v. Ponnusawmy Chetty*(4), is apparently in conflict with the Privy Council decision in *Balwant Singh v. R. Clancy*(5), but it is unnecessary to discuss that question here. It has been repeatedly decided that the power of a father to dispose of his sons' share does vest in the Official Receiver when the father becomes insolvent, and there was nothing in Mr. Krishnaswami Ayyar's argument of sufficient force to induce me to reopen the question. In view of this finding, the plaintiff's suit would have to be dismissed; but Mr. A. Krishnaswami Ayyar seeks to support the

(1) (1912) I.L.R., 34 All., 296 (P.C.). (2) (1913) I.L.R., 36 Mad., 295 (P.C.).

(1) (1903) I.L.R., 25 All., 407 (P.C.).

(2) (1915) M.W.N., 908.

(3) (1919) M.W.N., 356.

(4) (1915) 28 I.C., 365.

(5) (1912) I.L.R., 34 All., 296 (P.C.).

**SANKARANA-
RAYANA
PILLAI
v.
RAJAMANI**
PHILLIPS, J.

decree on the ground that the decision of the Subordinate Judge that the property of the insolvents had become vested in the Official Receiver is wrong. The order of the District Judge on the insolvency petition was as follows—"Petitioner 1 examined. No opposition. Adjudication order passed. Referred to Official Receiver for further proceedings . . ." It is now contended that this order does not amount to the appointment of a Receiver under section 18 (1) of the Provincial Insolvency Act and that, consequently, the property did not vest in the Official Receiver. That section runs as follows:—

"The Court may at the time of the order of adjudication, or at any time afterwards, appoint a Receiver for the property of the insolvent, and such property shall thereupon vest in such Receiver."

It has been held in several cases in this Court that an appointment order is necessary and that the property does not vest in the Official Receiver without such order, but I would hold that even if this proposition is conceded it does not help the respondents because there is an order of appointment in this case. Under section 19 (1),

"the Local Government may appoint such persons as it thinks fit (to be called Official Receivers) to be Receivers under this Act."

In the present case such a Receiver had been appointed by the Local Government for the district of Tinnevely and it appears to me that the Court, having passed an order of adjudication and referred the insolvency petition to the Official Receiver for further proceedings, must have intended to appoint and be deemed to have appointed the gentleman called "Official Receiver" as the Receiver in this particular insolvency. I am not prepared to hold, as contended by Mr. Krishnaswami Ayyar, that the proceedings in the

District Judge's order must be read as meaning judicial proceedings only, his argument being that the reference was merely a reference to the Official Receiver to exercise the powers which could be delegated to him under section 52 of the Act. No such limitation is found in the order itself and therefore the order "Referred for further proceedings" is only intelligible in the view that the case was referred to the person who had been appointed Receiver under the Act, with the intention that he should act as Receiver in this particular case and the order amounts to an order of appointment. It is quite clear that the Court, the Official Receiver and all the parties acted under the impression that a Receiver had been appointed and that the insolvents' property vested in him. This order was in 1912 and even when this suit was brought in 1918 it was recited in the plaint that the property vested in the Official Receiver, and it was only during the course of the trial that the question was raised by the plaintiffs apparently upon a perusal of the order of the District Judge and of a subsequent formal order passed by him in 1916 appointing the Official Receiver as Receiver for the property of the insolvents in this case. This subsequent order was not passed by the same Judge who passed the original order and cannot affect in any way the meaning of the former order. The cases relied upon, namely, *Official Receiver of Trichinopoly v. Somasundaram Chettiar*(1), *Muthuswami Swamiar v. Somoo Kandiar*(2) and *Vythilinga Padayachi v. Ponnuswami Padayachi*(3), are cases in which no order of appointment had been made. The petitions of the insolvents having been sent to the Official Receiver before adjudication, such an

**SANKARA
NARAYANA
PILLAI
v.
RAJAMANI**
PHILLIPS, J.

(1) (1916) 30 M.L.J., 415.

(2) (1920) I.L.R., 43 Mad., 869.

(3) (1921) 41 M.L.J., 78.

SANKARA-
NARAYANA
PILLAI
v.
RAJAMANI.
PHILLIPS, J.

order passed before adjudication could hardly be interpreted as an order passed at the time, or after adjudication, under section 18 (1). Those cases are therefore of little value in the present case in the view that I take of the District Judge's order of 1912 which was passed at the time of adjudication. There is another case reported in *Subba Aiyar v. Ramaswami Aiyangar*(1), in which it was held that, although there had been no order appointing a Receiver, yet the acts done by the Official Receiver in administering the estate would be deemed to be acts done as agent of the Court, such acts being subsequently ratified and, therefore, valid. It is suggested that the decision in *Subba Aiyar v. Ramaswami Aiyangar*(1), is not right, because at the time the order of agency was passed the property had not vested in the Court; but whether or not this is a valid objection, the same objection cannot be taken in the present case because by the order of adjudication the property became vested in the Court. Accepting this case as an authority for the proposition that the Official Receiver could act as agent, it is clear that the subsequent ratification by the Court would make the proceedings valid. I would, therefore, hold that the property of the major insolvents was vested in the Official Receiver at the date of sale and, consequently, the sales are effective either as acts of the Receiver properly appointed, or as the agent of the Court.

Several other pleas were raised by the plaintiffs, such as the immoral nature of the debts incurred by their fathers, the fraud practised by the Official Receiver in administering the estate, and collusion between him and the creditors. These points have been found against the plaintiff in the Lower Court although there are several remarks in the judgment which go to

SANKARA-
NARAYANA
PILLAI
v.
RAJAMANI.
PHILLIPS, J.

show that the learned Subordinate Judge thought that there was a good deal of force in the contentions but it is now conceded by Mr. Krishnaswami Ayyar that he can point to nothing in the evidence to substantiate these pleas of immorality or fraud. I may add that the fraud was not specifically pleaded, nor was an issue taken thereupon, and it would hardly be fair to allow fraud to be proved without specific allegation thereof.

As the result of the above, the appeals are allowed and the plaintiffs' suit dismissed with costs throughout.

VENKATASUBBA RAO, J.—I agree.

VENKATA-
SUBBA RAO, J.

Mr. T. R. Venkatarama Sastri, the learned Vakil for the appellant assumed, without admitting, that the adjudication of the minor plaintiffs as insolvents was illegal, and the appeal was argued on this footing. The first question that arises is under the conveyances from the Official Assignee does the entire property pass to the alienees or does the interest only of the adult co-parceners pass? The learned Subordinate Judge has found that the debts of the first and second defendants were not incurred for illegal or immoral purposes and it is now a settled rule that the Official Receiver can exercise the right of the father to dispose of the sons' interest in ancestral immoveable estate for the payment of the father's debts not tainted with illegality or immorality. The sale-deeds filed in the case show that the Official Receiver purported to convey his entire interest in the properties in question. It is no doubt true that he professed to act as the assignee of the adult as well as the minor insolvents and that he did not purport to exercise the power possessed by a Hindu father to dispose of his son's interest, for causes which are recognized as just and proper. But all the same, I think, in the circumstances, the alienees acquired the right and title of the Official Receiver which he possessed in every capacity.

(1) (1921) I.L.R., 44 Mad., 547.

SANKARA-
NARAYANA
PILLAI
v.
RAJAMANI.
—
VENKATA-
SUBBA RAO, J.

In *Bijraj Nopani v. Pura Sundary Dasee*(1), it was held that the title vested in an executor passed under the deed by which he purported to convey all his right and title in the property sold although he did not expressly state in it, that he was conveying the property in his capacity as executor. Their Lordships observe

"The deed states plainly that whatever right or title the vendors possess is to go to support the conveyance, and it is a settled rule that the meaning of a deed is to be decided by the language used, interpreted in its natural sense."

This principle was also recognised in *Charibul-lah v. Khalak Singh*(2). One of the three brothers constituting an undivided Mitakshara family was a minor, and his mother as his guardian executed the mortgage deed along with the two adult brothers. It was found that the mother was incompetent to act as the minor's guardian but their Lordships held that the mortgage must be considered to be a mortgage by the family entered into by its *karta* and could, so far as the mortgage was found to have been made for the benefit of the family and for legal necessity, be enforced against all the members.

The true principle deducible from these cases seems to be this. The first question that arises is did the executant purport to pass the whole property? The next question is, was he in a position to validly convey it? If the two questions are answered in the affirmative, the third question arises, is there anything in the deed to repel the presumption that he intended to convey the title he possessed in every capacity? Judged by this test, there can be no doubt that the alienees before us acquired the interest of the fathers as well as of the sons in the properties conveyed by the Official Receiver.

Mr. Alladi Krishnaswami Ayyar, the learned *vakil* for the respondent, contended that the interest of the

sons did not pass and relied upon *Balwant Singh v. R. Clancy*(1). The ancestral family in that case consisted of Sheoraj Singh and Maharaj Singh. The former was the sole mortgagor and by the deed of mortgage, after declaring that he was the absolute owner and that there was no sharer in the property, he purported to mortgage it. Maharaj Singh was not a mortgagor and he was made a party to the deed in order that the fact of his having signed it might afford evidence that he had assented to the taking of the loan and the granting of the mortgage by Sheoraj Singh. Their Lordships found as a fact that Maharaj Singh was a minor on the date of the mortgage and held that as the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh the mortgage deed did not affect the latter, or his interest in the estate.

This decision is not opposed to the two cases already cited, for in it the essential elements I have referred to are wanting. Sheoraj Singh obtained the loan in his assumed position of the absolute owner of the estate and not as the manager of the joint Hindu family. There was an implied denial by him of his possessing any capacity which is consistent with the recognition of the minor's title and while he denied the minor's right he could not be held to have conveyed the estate on behalf of the minor. In the circumstances it was unnecessary to find whether Sheoraj Singh was in a position to validly convey the property and accordingly although the High Court gave a finding that he was not, the Judicial Committee did not consider it necessary to deal with that question.

I am of the opinion that the present case comes within the principle enunciated and acted upon in *Bijraj*

SANKARA-
NARAYANA
PILLAI
v.
RAJAMANI.
—
VENKATA-
SUBBA RAO, J.

(1) (1915) I.L.R., 42 Cal., 56 (P.C.). (2) (1903) I.L.R., 25 All., 407 (P.C.).

(1) (1912) I.L.R., 34 All., 296 (P.C.).

SANKARA-
NARAYANA
PILLAI
v.
RAJAMANI.

Nopani v. Pura Sundary Dasee(1), and *Charib-ullah v. Khalak Singh*(2), and that our decision on this point must therefore be in favour of the appellant.

VENKATA-
SUBBA RAO, J.

I now proceed to deal with the next argument of Mr. A. Krishnaswami Ayyar that the properties did not vest in the Official Receiver. Section 18 (1) of the Provincial Insolvency Act, III of 1907, runs thus—

“The Court may, at the time of the order of adjudication, or any time afterwards, appoint a Receiver for the property of the insolvent, and such property shall thereupon vest in such Receiver.”

On the 29th November 1912, the District Judge made the following order:—“Adjudication order passed. Referred to Official Receiver for further proceedings.” The argument is that the Court did not appoint a Receiver for the property of the insolvent and that therefore it did not vest in the Receiver. I do not think this argument is sound. No set form of words is prescribed to make the appointment of Receiver. In this case the order directs the Official Receiver to take further proceedings. Section 20 of the Act sets out some of the proceedings he was to take. It says that the Receiver shall realize the property of the debtor and for that purpose may perform certain acts. These proceedings the Official Receiver could not take unless he was the Receiver of the estate. The order, by implication, therefore appoints the Official Receiver, the Receiver for the property of the insolvent. The parties, the Court, the Receiver himself and strangers to the estate understood the order in this sense. That the plaintiffs also understood it in the same way is apparent from their plaint. Mr. Krishnaswami Ayyar contends that the word “proceedings” means “judicial

(1) (1915) I.L.R., 42 Cal., 56 (P.C.).

(2) (1903) I.L.R., 25 All., 407 (P.O.).

proceedings” and that the order is to be construed as directing the Receiver to exercise the jurisdiction delegated to him under section 52 of the Act. But I am unable to accede to this contention. The word “Proceedings” does not occur in section 52 whereas it occurs in section 20, and in the latter section the proceedings contemplated have reference to the administration of the insolvent's estate. This being my construction of the order in question, the cases relied upon by the learned vakil namely, *Official Receiver of Trichinopoly v. Somasundaram Chettiar*(1), *Muthuswami Swamiar v. Somoo Kandiar*(2), *Vythilinga Padayachi v. Ponnuswami Padayachi*(3), and *Kavali Sankara Rao v. Ramakrishnayya*(4) are distinguishable.

There is yet another ground on which the sales by the Official Receiver may be upheld. Under section 16 (2) (a), on the making of an order of adjudication the property of the insolvents vests in the Court and under section 23 where no Receiver is appointed the Court has the rights of Receiver. Section 20 provides that the Receiver shall realize the property of the debtor and for that purpose may sell any property of the insolvent. Clause (e) of the same section says that the Receiver may appoint an agent to take any proceedings. Reading the order in question in the light of the above sections, it is obvious that in any event the Official Receiver was empowered by the Court as its agent to sell the properties, and the sales effected by him are valid in this view. This was in effect what was held in *Subba Aiyer v. Ramaswami Aiyangar*(5), and I am prepared to follow it: On this point also, therefore, the respondent fails.

SANKARA-
NARAYANA
PILLAI
v.
RAJAMANI.
VENKATA-
SUBBA
RAO, J.

(1) (1916) 30 M.L.J., 415.

(3) (1921) 41 M.L.J., 78.

(2) (1920) I.L.R., 43 Mad., 866.

(4) (1923) 46 M.L.J., 184.

(5) (1921) I.L.R., 44 Mad., 547.

SANKARA-
NARAYANA
PILLAI
v.
RAJAMANI.

In the result I agree with the order proposed by my learned brother.

By the Court.—The memorandum of objections in Appeal No. 216 of 1921 is dismissed. There will be no costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Waller.

1922,
November 22.

YEZZU MALLAYYA (FIRST DEFENDANT), APPELLANT

v.

TULLURI PUNNAMMA, MINOR BY NEXT FRIEND,
PUNNAYYA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Sec. 11, Expl. 4, O. XXXII, r. 4 (iii)—Guardian ad litem—Consent of guardian—Consent in writing, unnecessary—Consent, whether can be inferred from circumstantial evidence—Suit on a promissory note executed by a guardian—Suit against minor represented by such guardian as guardian ad litem—Decree and sale in execution—Validity of—Res judicata.

Although under Order XXXII, rule 4 (iii), Civil Procedure Code, no person can be appointed guardian ad litem for a minor without his consent, there is nothing in the rule which requires that the consent should be expressed in writing; the consent may be inferred from circumstantial evidence.

Ohhattar Singh v. Tej Singh, (1921) I.L.R., 48 All., 104, followed.

Where a minor was sued on a promissory note executed by his maternal uncle, who had been appointed a guardian of the person of the minor under the Guardians and Wards Act and was also appointed guardian ad litem in the suit, it cannot be

said that his interest was adverse to that of the minor, or that he would not have put forward a proper defence for the minor if there was one; consequently a decree obtained against the minor in such suit and the sale of the minor's property in execution of such decree are not invalid.

Where it appeared that a suit had been instituted on behalf of a minor by a next friend to set aside a sale in execution of a decree obtained against him in the above circumstances, but the ground that the decree was invalid because the appointment of the guardian ad litem was improper had not been taken and the suit was dismissed, the same objection cannot be taken in a subsequent suit instituted on behalf of the minor to set aside the decree and sale. *Arunachalam Chetty v. Mayyappa Chetty*, (1898) I.L.R., 21 Mad., 91, and *Muhammad v. Abdul Rehman Rowther*, (1923) I.L.R., 46 Mad., 135, followed.

SECOND APPEALS against the decree of K. S. MENON, District Judge of Guntūr, in Appeal Suit No. 157 of 1921, preferred against the decree of M. H. ISPAHANI, Principal District Munsif of Guntūr in Original Suit No. 414 of 1919.

These two connected Second Appeals arise out of a decree of the District Judge in an appeal in a suit which was instituted on behalf of a minor represented by a next friend for a declaration that a previous decree in O.S. No. 187 of 1917 obtained against the minor as defendant therein, was fraudulent, collusive and invalid, that it was not binding on the minor plaintiff and that the sale of the minor's property in execution of that decree was likewise invalid, for the issue of a permanent injunction against the present first defendant (who was the decree-holder therein) restraining him from executing the decree and for other reliefs. The former decree was impeached principally on the ground that the minor plaintiff (who was the defendant in O.S. No. 187 of 1917) was not properly and validly represented by a guardian ad litem, inasmuch as the guardian had not given his consent in writing, and as he had himself executed the note sued on in that suit. The other facts

MALLAYYA
v.
PUNNAMMA.

* Second Appeals Nos. 836 and 850 of 1922.

MALLAYYA
v.
PUNNAMMA.

appear from the judgment. The District Munsif dismissed the suit. On appeal the District Judge held that the decree in O.S. No. 187 of 1917 was void but upheld the execution sale. The plaintiff and the first defendant filed separate second appeals.

B. Somayya for appellant.

B. Satyanarayana for respondent.

The JUDGMENT of the Court was delivered by

*KRISHNAN, J.

KRISHNAN, J.—These are Second Appeals which arise in a suit brought on behalf of a minor by his next friend for setting aside the decree in O.S. No. 187 of 1917 obtained against that minor with the present second defendant as his guardian for a certain sum of money due on a promissory note, and also for the setting aside of a sale in execution of that decree, in which the third defendant became the purchaser of certain properties belonging to the minor. The learned District Judge has declared the decree to be invalid, but he has upheld the sale in execution of that decree, and in consequence the plaintiff has appealed in S.A. No. 850 of 1922 and the decreeholder in O.S. No. 187 of 1917 has appealed in S.A. No. 836 of 1922. Both the Second Appeals have been heard together.

Now, the first question we have to consider is whether the decree in O.S. No. 187 of 1917 should be treated as null and void and not binding against the minor. The only reason urged before us for holding so is that the consent of the second defendant who was appointed as guardian ad litem of the minor, was not obtained beforehand and that therefore his appointment should be treated as a nullity and the suit should be looked upon as having been decreed against the minor without his being properly represented on record. The learned District Judge has no doubt found in the minor's favour

on this point. But after considering the point carefully, we are unable to agree with him.

MALLAYYA
v.
PUNNAMMA.

The second defendant was appointed in 1913 as the guardian of the person of the minor under the Guardians and Wards Act. The suit No. 187 was brought in 1917, that is, at a time when the second defendant was the certificated guardian of the minor. Notice was issued to the second defendant before he was appointed guardian and the notice was in these terms: "Take notice hereby that Yezzu Mallayya, the plaintiff in the above-mentioned suit (O.S. No. 187 of 1917) has presented an application to this Court praying that a guardian ad litem for the minor may be appointed and that after receipt by you of the notice of application in the matter of the said minor, you or any friend of the minor be appointed as such before 14th March 1917 the date fixed; and that, in default, the Court shall appoint a separate person as guardian of the minor for purposes of the suit." That notice was served on the defendant personally and it bears an endorsement in these terms: "On 27th February 1917 the Court peon having come to the village of Thadikonda and given me, the guardian of the defendant mentioned in this order, a copy of the notice of application for appointment of a guardian for the minor, herewith attached, I have received the same. (Signed) Konagalla Venkatasubbarayudu (that is, the second defendant)." It is not disputed that this notice was served on the second defendant personally. On the date fixed for the appointment of the guardian, the second defendant no doubt did not appear, and the learned District Munsif evidently holding that the second defendant was willing to act as guardian, appointed him as guardian of the minor for the suit. He notes "Served—absent—appointed." Now, it is contended that, unless there is an express consent on

KRISHNAN

MALLAYYA
v.
PUNNAMMA.
KRISHNAN, J. record by the person proposed as guardian that he would act as guardian, his appointment as guardian is illegal and the case should be treated as if no guardian had been appointed for the minor. We are unable to accept this argument. All that Order XXXII, Rule 4 (iii) says is that no person without his consent shall be appointed guardian for the suit. No doubt the consent of the person is wanted, but there is nothing in the rule which requires that that consent should be expressed in writing. The consent may be inferred from circumstantial evidence, and in this case, we think the circumstances are such that we are justified in holding that the second defendant did in fact consent to be the guardian of the minor for the suit. He was, as already pointed out, appointed guardian of the person of the minor under the Guardians and Wards Act, and under clause (ii), Rule 4 of Order XXXII he was the person who ought to be appointed as guardian for the suit unless the Court considered, for reasons which have to be recorded, that it was for the minor's welfare that another person should be appointed. There is nothing here to show that there was any reason for thinking that another person should be appointed for the minor's welfare. That consent can be inferred from circumstances is clear from the ruling in *Chhattar Singh v. Tej Singh*(1), which we respectfully follow. In these circumstances we must reject the argument that the minor was not properly represented in the previous suit. It is also suggested that, as the second defendant was the person who executed the promissory note, he had an interest that was adverse to the minor; but in the particular case he was not a party himself, he not having been sued but only the minor, and there is no

(1) (1921) I.L.R., 48 All., 104.

MALLAYYA
v.
PUNNAMMA.
KRISHNAN, J. reason to suppose that the maternal uncle of the minor would not have put forward a proper defence for the minor if there was one. No guardian is bound to waste the minor's money in trying to defend a suit in which the defence will not succeed. The conclusion we have, therefore, come to is that the decree itself cannot be set aside. It is not proved on the minor's side that she has been in any way prejudiced by the course that the proceedings took or that there has been any fraud or gross negligence on the part of her guardian. This finding is sufficient to dispose of S.A. No. 836, but there is still another ground why the minor is bound by this decree and that is the ground of *res judicata*. The minor's present next friend had brought a suit, O.S. No. 79 of 1920, to set aside the sale that was held in execution of this very decree and it would certainly have been a proper ground to take in that suit that the decree was itself null and void, so that the sale would also be null and void; but no such plea was put forward. The suit was dismissed against the minor both in the first Court and in appeal. We think the ground that is put forward at present, viz., that the minor was not properly represented in the suit in which the decree was passed, was a ground that might and ought to have been put forward in the previous suit, and that not having been done, the decision in the previous suit constitutes the question *res judicata* under explanation 4 of section 11 of the Civil Procedure Code. As authority for this proposition we may refer to the case in *Arunachalam Chetty v. Mayyappa Chetty*(1) and *Muhammad Rowther v. Abdul Rehman Rowther*(2). On this ground also the plaintiff's claim to set aside the decree fails.

We must, therefore, allow S.A. No. 836 of 1922 with costs throughout, and set aside the decree of the Lower

(1) (1908) I.L.R., 21 Mad., 91.

(2) (1928) I.L.R., 46 Mad., 185.

MALLAYYA Appellate Court in so far as it holds that the decree in
PUNNAMMA. O.S. No. 187 of 1917 is invalid.

KRISHNAN, J. S.A. No. 850 of 1922 will fail in this view. We have already held that there was nothing illegal and invalid in the decree under which the sale took place, and, therefore, there is no ground for holding that the sale in pursuance of that decree was in any way affected by illegality or was void. We agree with the District Judge in his view that the plaintiff's claim is affected by res judicata as regards the sale also. S.A. No. 850 of 1922 must, therefore, be dismissed with costs.

K.B.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K.O., Chief Justice,
Mr. Justice Coutts Trotter, Mr. Justice Ramesam,
Mr. Justice Wallace and Mr. Justice Waller.*

MEYYAPPA CHETTIAR (COUNTER-PETITIONER),
PETITIONER,

1923,
December
17,

v.

CHIDAMBARAM CHETTIAR (PETITIONER),
RESPONDENT.*

Civil Procedure Code (V of 1908), O. XXI, r. 57—Attachment before judgment—Applicability of rule to such attachment.

Held by the Full Bench (SCHWABE, C.J. and WALLACE, J., dissenting) that "property attached in execution" in Order XXI, rule 57, Civil Procedure Code, includes property attached before judgment, when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale; hence, upon the dismissal of such an application for execution on account of the decree-holder's default in taking steps to enable the Court to proceed further with the execution, the attachment ceases; Arunachalam Chetty v. Periasami Servai (1921) I.L.R., 44 Mad., 902 (F.B.), followed. Venkatasubbiah v. Venkata Seshaiya (1919) I.L.R., 42 Mad., 1, overruled.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of P. RAMA RAO, Acting Subordinate Judge of Rāmnād at Madura, in E.A. No. 285 of 1920 in E.P. No. 142 of 1920 (in Original Suit No. 124 of 1914 on the file of the Temporary Sub-Court, Rāmnād).

The facts are given in the Judgment of SCHWABE, C.J.

This petition coming on for hearing on Tuesday, the 6th day of March 1923, the Court (RAMESAM, J.) made the following

* Civil Revision Petition, No. 796 of 1921.

MALLAYYA
v.
PUNNAMMA.
KRISHNAN, J.

record by the person proposed as guardian that he would act as guardian, his appointment as guardian is illegal and the case should be treated as if no guardian had been appointed for the minor. We are unable to accept this argument. All that Order XXXII, Rule 4 (iii) says is that no person without his consent shall be appointed guardian for the suit. No doubt the consent of the person is wanted, but there is nothing in the rule which requires that that consent should be expressed in writing. The consent may be inferred from circumstantial evidence, and in this case, we think the circumstances are such that we are justified in holding that the second defendant did in fact consent to be the guardian of the minor for the suit. He was, as already pointed out, appointed guardian of the person of the minor under the Guardians and Wards Act, and under clause (ii), Rule 4 of Order XXXII he was the person who ought to be appointed as guardian for the suit unless the Court considered, for reasons which have to be recorded, that it was for the minor's welfare that another person should be appointed. There is nothing here to show that there was any reason for thinking that another person should be appointed for the minor's welfare. That consent can be inferred from circumstances is clear from the ruling in *Chhattar Singh v. Tej Singh*(1), which we respectfully follow. In these circumstances we must reject the argument that the minor was not properly represented in the previous suit. It is also suggested that, as the second defendant was the person who executed the promissory note, he had an interest that was adverse to the minor; but in the particular case he was not a party himself, he not having been sued but only the minor, and there is no

(1) (1921) I.L.R., 48 All., 104.

MALLAYYA
v.
PUNNAMMA.
KRISHNAN, J.

reason to suppose that the maternal uncle of the minor would not have put forward a proper defence for the minor if there was one. No guardian is bound to waste the minor's money in trying to defend a suit in which the defence will not succeed. The conclusion we have, therefore, come to is that the decree itself cannot be set aside. It is not proved on the minor's side that she has been in any way prejudiced by the course that the proceedings took or that there has been any fraud or gross negligence on the part of her guardian. This finding is sufficient to dispose of S.A. No. 836, but there is still another ground why the minor is bound by this decree and that is the ground of *res judicata*. The minor's present next friend had brought a suit, O.S. No. 79 of 1920, to set aside the sale that was held in execution of this very decree and it would certainly have been a proper ground to take in that suit that the decree was itself null and void, so that the sale would also be null and void; but no such plea was put forward. The suit was dismissed against the minor both in the first Court and in appeal. We think the ground that is put forward at present, viz., that the minor was not properly represented in the suit in which the decree was passed, was a ground that might and ought to have been put forward in the previous suit, and that not having been done, the decision in the previous suit constitutes the question *res judicata* under explanation 4 of section 11 of the Civil Procedure Code. As authority for this proposition we may refer to the case in *Arunachalam Chetty v. Mayyappa Chetty*(1) and *Muhammad Rowther v. Abdul Rehman Rowther*(2). On this ground also the plaintiff's claim to set aside the decree fails.

We must, therefore, allow S.A. No. 836 of 1922 with costs throughout, and set aside the decree of the Lower

(1) (1898) I.L.R., 21 Mad., 91.

(2) (1923) I.L.R., 46 Mad., 135.

MEYYAPPA
CHETTIAR
v.
CHIDAMBAR
RAM
CHETTIAR.

ORDER OF REFERENCE TO A DIVISIONAL BENCH.

The facts are not fully stated by the Subordinate Judge. They are as follows:—

The respondent in the High Court (petitioner in the Court below) filed O.S. No. 153 of 1914 in the Subordinate Judge's Court of Rāmnād, and in I.A. No. 592 of 1914 obtained an order for attachment before judgment of sixteen items of properties belonging to the defendant. The properties were attached on 20th November 1914. The suit was then transferred to the Additional Subordinate Judge's Court and was numbered as O.S. No. 124 of 1914. A decree was passed on 22nd February 1915. By the order on E.A. No. 4 of 1916 the decree was transferred for execution to the Subordinate Judge's Court of Rāmnād. The decree-holder then filed E.P. No. 183 of 1916 and notice was issued to the defendant. The petition was dismissed on 19th September 1916 as the petitioner did not file an encumbrance certificate. The filing and dismissal of E.P. No. 183 of 1916 is not mentioned by the Subordinate Judge. As, under Order XXXVIII, rule 11, Civil Procedure Code, a re-attachment is unnecessary, it must be that E.P. No. 183 of 1916 was filed on the basis of the attachment before judgment. If Order XXI, rule 57, Civil Procedure Code, applies to such attachments, the effect of the dismissal of E.P. No. 183 of 1916 is that the attachment ceased. Then E.P. No. 123 of 1918 was filed on 19th July 1918 and the properties were again attached, but on 29th April 1919 the petition was dismissed as batta was not paid for items 13 to 96 and as there were no bidders for items 1 to 12. E.P. No. 136 of 1919 was then filed. The properties were again attached on 19th July 1920. As there were no bidders at the sale the petition was struck off and the attachment of 19th July 1920 was kept alive for

MEYYAPPA
CHETTIAR
v.
CHIDAMBAR
RAM
CHETTIAR.

four months. The next petition for execution was filed on 12th October 1920 within the four months allowed.

The petitioner in the High Court first obtained a decree against the same defendant *ex parte*. The defendant applied to set aside the *ex parte* decree and it was set aside on condition of his giving security. The sixteen items in question were given as security on 15th March 1915. If the attachment before judgment made by the respondent is subsisting, and if the execution petition of 12th October 1920 is filed in pursuance of that attachment, the security will be subject to that attachment and cannot prevail against the rights worked out in that execution. In this view, the lower Court's order would be right.

But it seems to me firstly that the attachment before judgment is not subsisting. The lower Court relied on *Venkatasubbiah v. Venkata Seshaiya*(1), where it was held that Order XXI, rule 57, Civil Procedure Code, does not apply to attachments before judgments. But it seems to me that the decision in *Venkatasubbiah v. Venkata Seshaiya*(1) requires re-consideration after the Full Bench decision in *Arunachalam Chetty v. Periasami Servai*(2). According to the reasoning of the latter case, when an application for execution is filed on the basis of attachment before judgment, the attachment before judgment must be deemed to be an attachment in execution of a decree. If so, Order XXI, rule 57, applies. This conclusion seems to be reasonable. This is the view taken by the respondent himself when he obtained re-attachments in 1918 and 1920. Secondly, it is true that the security cannot prevail against all rights pursuable under the old attachment. The last execution petition was based on the attachment of 1920.

(1) (1919) I.L.R., 42 Mad., 1. (2) (1921) I.L.R., 44 Mad., 902 (F.B.).

MEYYAPPA
CHETTIAR
v.
CHIDAMBAR
RAM
CHETTIAR.

If so, the security is not subject to any rights. (See my judgment referring the case to a Full Bench in Appeal No. 36 of 1920.)

I therefore refer this revision petition to a Division Bench for disposal.

This petition coming on for hearing on Thursday, the 12th day of July 1923, in pursuance of the above order, the Court (SPENCER and DEVADOSS, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

SPENCER, J.—The question for decision is how the provisions of Order XXI, rule 57, are to be reconciled with those of Order XXXVIII, rule 11, Civil Procedure Code.

One method is to understand Order XXXVIII, rule 11, as applying only to the first execution taken against property attached before judgment. Another is to treat the attachment mentioned in Order XXI, rule 57, as not including attachment before judgment, which will then continue until the decree is satisfied. Consistently with my judgment in *Arunachalam Chetty v. Periasami Serrai*(1), I prefer the former view, and this seems to be the opinion of RAMESAM, J., as he observes in his reference to the Divisional Bench that the conclusion that an attachment before judgment should be deemed to be an attachment in execution of a decree is reasonable, and he further adds that the security in this case was not subject to any rights arising out of the attachment of 1920, thus implying that the attachment before judgment was not kept alive for the purpose of subsequent attachments after the first attachment after the passing of the decree had ceased owing to the dismissal of the execution petition.

(1) (1921) I.L.R., 44 Mad., 902 (F.B.).

MEYYAPPA
CHETTIAR
v.
CHIDAMBAR
RAM
CHETTIAR.

I think that the words "the attachment" in Order XXI, rule 57, mean the attachment in execution in which the attachment before judgment became merged by virtue of Order XXXVIII, rule 11, i.e., the first attachment after the passing of the decree.

But it has been held by a Bench of this Court in *Venkatasubbiah v. Venkata Seshaiya*(1), that an attachment before judgment does not cease to have effect because of the dismissal of subsequent applications for execution for default of prosecution, and this decision is not consistent with the above view.

The question, however, is not an easy one for decision and it is important that it should be decided finally as it is likely to arise in other execution petitions. We refer the question whether the attachment before judgment in this case was subsisting after the dismissal of E.P. No. 183 of 1916 on 19th September 1916, to a Full Bench.

DEVADOSS, J.—I agree to the reference as the question is not one free from difficulty though I am of opinion that *Venkatasubbiah v. Venkata Seshaiya*(1) has been rightly decided.

This petition coming on for hearing on Monday and Wednesday, the 22nd and 24th days of October 1923 in pursuance of the Order of Reference to a Full Bench, the Full Bench made the following

ORDER.

We propose to call on the Court of the Subordinate Judge of Rāmnād at Madura to produce to this Court the execution records in O.S. No. 124 of 1914. Further consideration of this reference will be adjourned pending receipt of those papers.

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

MEYVAPPA
CHETTIAR
v.
CHIDAMBARA
RAM
CHETTIAR.

The petition coming on for hearing on Tuesday, the 6th day of November 1923, after receipt of the records in O.S. No. 124 of 1914,

K. V. Krishnaswami Ayyar (with K. Balasubrahmaniam Ayyar) for petitioner, argued:—An attachment before judgment is really an attachment in execution and becomes so especially after an application for execution is made after the passing of a decree in the suit. The rules in Order XXXVIII, Civil Procedure Code, do not make an attachment before judgment substantially different from an attachment in execution. Hence Order XXI, rule 57, applies to attachments before judgment. Before Order XXI, rule 57, was newly enacted in the Code of 1908, courts held that the effect of default in prosecuting an execution application was the same as regards both kinds of attachments. Since 1908 there has not been any long line of cases so as to constitute *stare decisis*. *Venkatasubbiah v. Venkata Seshaiya*(1) and the decisions which it follows are wrong. The reasoning in *Arunachalam Chetty v. Periasami Servai*(2) applies to this case. Reference was made to *Sri Rammanik v. Tincowri Rai*(3), *Sarkies, Agent of the Official Assignee of the Insolvent Court of Calcutta v. Mussumat Bundho Bae* 4), *Ramkrishna Das Surrowji v. Surfunnisa Begum*(5), *Pallonji Shapurji Mistry v. Edward Vaughan Jordan*(6), *Bhugwan Chunder Kritiratna v. Chundra Mala Gupta*(7), *Sewdut Roy v. Sree Canto Maity*(8), *Durpati Bibi v. Ramrach Pal*(9), *Ramasamy Udayar v. Chakrapanu Chettiar*(10), *Kristnasamy Mudaliar v. Official Assignee of Madras*(11). “Has been attached in

(1) (1909) I.L.R., 4 Mad., 1.

(2) (1921) I.L.R., 44 Mad., 902 (F.B.).

(3) (1869) 13 W.R. (F.B.), 9; 4 B.L.R., 68 (F.B.).

(4) (1869) 1 N.W.P.H.C.R., 81.

(5) (1881) I.L.R., 8 Calc., 129.

(6) (1888) I.L.R., 12 Bom., 400.

(7) (1902) I.L.R., 29 Calc., 773.

(8) (1906) I.L.R., 33 Calc., 632.

(9) (1909) I.L.R., 31 All., 527.

(10) (1907) 17 M.L.J., 488.

(11) (1908) I.L.R., 26 Mad., 678.

execution” in Order XXI, rule 57, means “has been in a state of attachment in execution.”

C. V. Anantakrishna Ayyar (with A. Swaminatha Ayyar) for respondent.—The two attachments are essentially different. He referred to the rules in Order XXXVIII, and the forms in the appendix to the Civil Procedure Code relating to both kinds of attachments. Order XXI, rule 57, was newly enacted in the Code of 1908 and its language does not literally cover the case of an attachment before judgment; hence it does not apply to such attachments. He relied on *Venkatasubbiah v. Venkata Seshaiya*(1). *Arunachalam Chetty v. Periasami Servai*(2) and the other cases quoted by the petitioner do not deal with this point. Order XXXVIII, rule 9, specifically provides when an attachment before judgment can be withdrawn. Rights spring up on an attachment before judgment and when Order XXI, rule 57, which is a penal provision, has not expressly taken away those rights they cannot be deemed to have been impliedly taken away by it; Maxwell on Interpretation of Statutes, 6th Edition, page 465; *West Ham Union v. Edmonton Union*(3), *Bourne v. Keane*(4). This is a matter of procedure in which previous decisions should be followed.

OPINION.

SCHWABE, C.J.—The respondent obtained an order for attachment before judgment of certain immoveable property of the judgment-debtor. The petitioner having obtained a decree *ex parte* against the same judgment-debtor, it was set aside on the latter's application on security being given to the petitioner, and as security, a charge was given over the property attached

MEYVAPPA
CHETTIAR
v.
CHIDAMBARA
RAM
CHETTIAR.

SCHWABE,
C.J.

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

(3) [1908] A.O., 1.

(2) (1921) I.L.R., 44 Mad., 902 (F.B.).

(4) [1919] A.O., 815.

MEYYAPPA
CHETTIAR
v.
CHIDAMBAR
RAM
CHETTIAR.
—
SCHWABE,
C.J.

by the respondent. In due course the respondent obtained a decree as also did the petitioner, and there were other decrees against the same judgment-debtor by other persons. The respondent took out an execution petition in 1916, which came before the Court on several occasions, being adjourned from time to time for the respondent to file the necessary papers, which included an encumbrance certificate. These papers not having been produced, the petition was on the 29th of August 1916 adjourned to the 19th September next for filing the papers, and on that date, the papers not having been filed, the petition was dismissed. Subsequently, the respondent attempted again to bring the property to sale, but this was objected to by the petitioner on the ground that the dismissal of the execution petition in September 1916 put an end to the attachment before judgment, and that therefore the petitioner's security over the property prevailed over the claim of the respondent and the other judgment-creditors, who would but for this security given to the petitioner be entitled to rateable distribution under the rules. The Subordinate Judge has decided against this view and has ordered rateable distribution. The petitioner has brought this Civil Revision Petition, which was ultimately referred to this Full Bench.

The question to be decided is whether the words "property attached in execution" in Order XXI, rule 57, include "property attached before judgment," when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale; for, if so, by the words of that rule, upon the dismissal of the application for execution by reason of the decree-holder's default rendering the Court unable to proceed further with the application for

execution, the attachment ceases. It was argued before us that there has been no default within the meaning of the rule. But it would seem clear that the Court required papers to enable it to proceed further with the application for execution, and the hearing was adjourned to enable the respondent to file the necessary papers, and it was dismissed because he failed to do so, and I think that that amounts to a dismissal by reason of the decree-holder's default within the meaning of the rule.

But there remains the important question whether, when the attachment is an attachment before judgment, the effect of the dismissal is to put an end to that attachment. The penalty imposed by rule 57 is very serious indeed, and, if it applies to an attachment before judgment, the effect of the dismissal of the application would be to give the petitioner, who took his security after the attachment, precedence over the respondent and all the other decree-holders who would otherwise be entitled to rateable distribution; and I cannot believe that so serious a penalty would have been imposed for what may have been the negligence of a vakil or delay caused by some difficulty in obtaining the necessary papers; and I have little doubt that the Court dismissing the petition had not the least idea that the effect of such a dismissal would be to impose such a penalty. Indeed the law had by that time been declared in *Venkatasubbiah v. Venkata Seshaiya* (1), to be that the dismissal of an application for execution for default had no effect upon attachments before judgment. Although the obvious injustice in this particular case of holding that the attachment before judgment ceases is not a proper matter for consideration, yet the serious injustice that may follow generally on deciding in one way, and

MEYYAPPA
CHETTIAR
v.
CHIDAMBAR
RAM
CHETTIAR.
—
SCHWABE,
C.J.

(1) (1918) I.L.R., 42 Mad., 1.

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
SCHWABE,
C.J.

the fact that third parties' interests may be affected without their having an opportunity to intervene, are legitimate considerations in arriving at the true interpretation of the rule, if the rule is open to alternative constructions. The rule is a penal one and the principle that is applicable is that the matter in question must be brought within the operation of the rule in express terms, or at least by necessary implication. Now, in terms, the rule applies to property attached in execution, and that expression does not include property attached before judgment. But it is argued that property which has been attached before judgment becomes property attached in execution, and ceases to be property attached before judgment, once proceedings are taken to bring that property to sale in execution. But I can find nothing in the Code to justify that view. It is true that, where property has been attached before judgment under Order XXXVIII, rule 11, no fresh attachment is necessary after decree for the purpose of selling the property. But that, in my judgment, does no more than provide that in such a case there need be no attachment in execution, and that the Court, having by reason of the attachment before judgment got control over the property, can proceed with the sale. In other words, what the Code permits is that the attachment before judgment can be used, in order to enable the Court to hand over possession of the property to the purchaser at Court auction. Attachment before judgment and attachment in execution are essentially different.

There is nothing remarkable in there being a penalty imposed for failure to proceed expeditiously in the case of property attached since decree, without a similar penalty being imposed when the property is attached before judgment, because the penalty would be much more serious in the latter case. It would involve the letting

in of all alienations subsequent to the attachment to the exclusion of all other decree-holders, and there is nothing unusual in such alienation by way of security for some other claimant as in this case or otherwise, the alienee taking only the risk of the particular creditor who has attached before judgment, subsequently obtaining a decree which is not otherwise satisfied: whereas in the case of attachment after decree an alienation between the attachment and dismissal of the execution petition is most improbable, and at the worst such dismissal enables the judgment-debtor to alienate before the decree-holder can re-attach, and, although there have been cases where that has been attempted, such as *Reddi Venkatasubbiah v. Tanglor Subbiah*(1), and *Venkiteswarayyan v. Asvatha Narayan*(2), it is not unaccompanied by risk as was demonstrated in those two cases. It is clear from a comparison of Order XXXVIII with Order XXI that the framers of the Code considered what provisions of Order XXI should be applied to attachment before judgment, and I see no reason at all to suppose that it was intended to impose this penalty in cases of attachment before judgment. If it had been intended, it could have been done quite simply by adding the words "or attachment before judgment" in Order XXI, rule 57. Attachment before judgment is one of the headings of Order XXXVIII, which contains a Code dealing with that form of attachment, which differs in many features from attachment in execution dealt with under Order XXI. For instance, the provisions of rules 7 and 9 of Order XXXVIII have no application to attachments in execution; and rule 12, dealing with agricultural produce, differs materially from rule 74 of Order XXI dealing with the same subject; rule 7

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
SCHWABE,
C.J.

(1) (1915) M.W.N., 159.

(2) (1923) 45 M.L.J., 315.

MEYYAPPA
CHETTIAR
v.
CHIDAMBRA-
RAM
CHETTIAR.
—
SCHWABE,
C.J.

provides that the manner of attachment in the two cases shall be the same and rule 8 applies the rules of Order XXI relating to the investigation of claims to cases of attachment before judgment, and thereby clearly indicates that the Code looks upon the two attachments as being different things. Much reliance is placed by the petitioner on rule 11; but, as I have pointed out, all that the rule says is that, where property has been attached before judgment, and it is desired to execute the decree upon it, it will not be necessary to go through the formality of re-attaching the property, and it does not say that the original attachment before judgment shall become or be deemed to be an attachment in execution, which words, in my judgment, would be necessary to make it an attachment in execution within the meaning of Order XXI, rule 57, or to make one form of attachment merge inextricably in the other. Further, it is worth noticing that the statutory forms in the Appendix for the two forms of attachment are quite different, for, by Form No. 7 of Appendix F, the order made for attachment before judgment is addressed to the bailiff and directs him to hold the property until the further order of the Court, while the form of the order for attachment in execution in Appendix E, 24, is addressed to the party, and is in the nature of a prohibition to him from transferring or charging the property until the further order of the Court.

If the matter were *res integra*, I should without hesitation be prepared to hold that the attachment before judgment lasts until the Court puts an end to it by an order to that effect, or until it is otherwise brought to an end by reason of any of the provisions of Order XXXVIII, but that it cannot by implication

be brought to an end by an order under Order XXI, rule 57.

Turning to the authorities, the point came directly for decision in *Venkatasubbiah v. Venkata Seshaiya*(1), and in *Gones Chandra v. Banwari Lal*(2). Both in Calcutta and Madras it has been held under precisely similar circumstances to those of this case that the attachment before judgment is not affected by the dismissal of an application under Order XXI, rule 57. The Madras case purported to follow the Calcutta case and also two other decisions in *Banuddin Sahib v. Arunachala Mudali*(3) and *Suraparaju v. Narasimham*(4). Neither of the two latter cases are authorities directly in point although they contain weighty *dicta* in favour of the view expressed in *Venkatasubbiah v. Venkata Seshaiya*(1) being correct. The principle has now been accepted by all the text books and I think it correct to say that, since the passing of the Code of 1908, which for the first time introduced the provisions of Order XXI, rule 57, this has been the accepted view. I do not however think that the time has been long enough or the number of decisions sufficient—though probably the ruling has been followed in many unreported cases in the mufassal and here—to constitute a *curies curiae*, and so relieve us from having to decide the point, though the fact of its having been accepted as correct fortifies my conviction as to the true meaning of the rule. On the other hand there is a Full Bench decision in *Arunachalam Chetty v. Periasami Serrai*(5), which is relied upon by the petitioner, and is no doubt responsible for this attempt to upset the existing practice. That case requires careful examination. The question actually

MEYYAPPA
CHETTIAR
v.
CHIDAMBRA-
RAM
CHETTIAR.
—
SCHWABE,
C.J.

(1) (1919) I.L.R., 42 Mad., 1. (2) (1912) 16 C.L.J., 86.
(3) (1914) 26 M.L.J., 215. (4) (1914) 1 L.W., 932.
(5) (1921) I.L.R., 44 Mad., 902 (F.B.).

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
SCHWABE,
C.J.

before the Court was as to which article of the Limitation Act applied to suits by a person against whom an order had been made on a claim preferred to property attached before judgment—such claim being made after an order for sale made in execution. Article 11 of the Limitation Act imposes a limitation of one year from the date of the order for suits by a person against whom an order has been made on a claim preferred to property attached in execution. The Court held that that article applied to cases where the claim was preferred to property attached before judgment if the claim was preferred after an order for sale in execution.

WALLIS, C.J., with whom OLDFIELD, KUMARASWAMI SASTRI and RAMESAM, JJ., agreed, stated that the property attached before judgment does not become property attached in execution upon the passing of a decree for the plaintiff either within the meaning of article 11 or under Order XXI, rule 57, and that Order XXXVIII, rule 11, merely enables the decreeholder to apply for execution without a fresh attachment. But he held that where an order for sale was obtained, that order proceeds on the footing that the property is to be considered as attached in execution by virtue of Order XXXVIII, rule 11, and that a claim put in after the order may properly be regarded as a claim to property attached in execution of the decree and therefore within article 11 of the Limitation Act. It is to be observed that this change which the Court held occurs in the nature of the attachment only comes into operation according to this judgment when an order for sale is obtained. It does not hold that this change occurs either on obtaining a decree or on making an attempt to obtain an order for sale by issuing an execution petition. The case is therefore not any authority in favour of the present contention, because in this case

there has not been any order for sale. It may be if there had been such an order that the position would be different. This judgment points out the anomalous result that if a claim is made to property attached before judgment up to the order of sale, a suit by the party affected is barred in six years, whereas, if it is made after the order of sale, it is barred in one year, and suggests that the anomaly should be put right by legislation. Emphasis was placed in the judgment on the fact that, before the limitation provisions in such cases were removed from the Code of Civil Procedure and put into the Limitation Act in 1908, there was express provision that the limitation period of one year should apply both in the case of claims to property attached in execution and to property attached before judgment, and it was thought that the Legislature could not have intended in the process of removing a section from the Code of Civil Procedure to the Limitation Act to extend the limitation period. The Court, however, was driven to the conclusion that it had done so, but confined the extension within the narrowest possible limits. No such consideration applies to this case, as the penal provision of Order XXI, rule 57, in question was, when enacted, entirely new. It is not without interest that the Court treated the meaning of Order XXI, rule 57, as not germane to the matter then in issue and that *Venkatasubbiah v. Venkata Seshaiya*(1) and the cases there quoted were not even mentioned in argument. SPENCER, J., delivered a separate judgment in which he says that, if a decree is passed and an attempt is made to execute it, what was an attachment before judgment becomes in effect an attachment in execution of a decree because Order XXXVIII, rule 11,

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
SCHWABE,
C.J.

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

MEYYAPPA
CHETTIAR
v.
CHIDAMBARAM
CHETTIAR.
—
SCHWABE,
C.J.

declares that no re-attachment is necessary and, later on, he says he finds no difficulty in classing a claim put in after the properties were brought to sale in execution proceedings under the heading of "Claims preferred to property attached in execution of a decree," and he declined to express an opinion on the hypothetical case of a claim put in to property attached before judgment before the decree and the commencement of the execution proceedings. I doubt if he meant by his judgment to go further than the rest of the Court, and to extend the principle enunciated by them to claims made where there was a decree but no execution proceedings, or to claims made after execution proceedings had been commenced. If he did so intend, his observations were *obiter* and I prefer the judgment of the rest of the Court, which in my judgment strained the language of the article in question in going even as far as it did. However this may be, I find nothing in that judgment when carefully examined which militates against the view expressed in *Venkatasubbiah v. Venkata Seshaiya*(1) which, I think, was rightly decided. As there has been no order for sale in this case, and nothing but an abortive attempt to obtain one, and for that purpose to make use of an existing attachment, it is not necessary here to decide what the position would be after an order for sale had been obtained. I can find nothing in the rule to make the failure to proceed expeditiously with the execution petition involve the loss of all rights acquired by the attachment before judgment. I would answer the question in the affirmative.

COURTS
TROTTER, J.

COURTS TROTTER, J.—I regret that I am unable to agree. In matters of procedure it is obviously desirable that this Court, indeed, all the Courts of the country,

should, as far as possible, speak with one voice. But in this matter we start with the situation that there are conflicting decisions of the various Courts of India and, as my Lord has said, it is not possible to contend that there is such a course of decisions either of this Court or of other Courts which would justify the attitude that, for the sake of uniformity, a result should be acquiesced in even although one thought it logically unjustifiable. I conceive that our business is to say, without reference to previous decisions, what we think to be the true interpretation of the provisions of the Code relating to the subject-matter of this reference.

The point for our decision is a very short one, namely, whether a party who has obtained an attachment before judgment and has subsequently had his execution petition dismissed for want of due diligence in presenting the necessary papers to the Court loses the priority that he had enjoyed by reason of his attachment before judgment. If he has lost it, he has lost it by reason of the provisions of Order XXI, rule 57, which runs as follows :

"Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall" (among other powers) "dismiss the application."

The Court in fact dismissed the application in this case. Then follow the words

"Upon the dismissal of such application the attachment shall cease."

By Order XXXVIII, rule 11, it is provided as follows:—

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

MEYYAPPA
CHETTIAR
v.
CHIDAMBARAM
CHETTIAR.
—
COURTS
TROTTER, J.

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

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
COUTTS
TROTTER, J.

The whole point here is whether Order XXI, rule 57, operates on an attachment which had been obtained before judgment or is to be confined to an attachment first sought and obtained after decree and in execution of that decree. It is well settled that attachment creates no title in the decree-holder or the prospective decree-holder as the case may be. It is merely a process whereby the Court puts its hand on the property attached and keeps it in *custodia legis* until something else happens. It appears to me that Order XXXVIII, rule 11, provides that, when property has been attached before judgment, it remains attached when in due course after judgment the decree-holder applies for execution of his decree. It has resolved doubts alluded to in *Ramkrishna Das Surrowji v. Surfunnissa Begum*(1), as to whether after decree it might not be necessary for the attaching creditor to re-attach the property and it provides in terms that the property shall remain attached upon an application for execution of the decree. I am unable to see that there is any difference in *rerum natura* between an attachment before judgment and an attachment in execution of decree except that the one is prospective and, after the condition is fulfilled which brings it into active operation, namely, the obtaining of a decree, confers a priority in time. But an attachment before judgment is not a remedy of a kind higher than, or different from, an attachment applied for and obtained for the first time in execution of a decree already passed. Language is used in some of the cases which might suggest that the mere passing of a decree converts an attachment before judgment into an attachment in execution. I do not adopt that view for the reasons pointed out by WALLIS, C.J., in *Arunachalum Chetty v.*

(1) (1881) I.L.R., 6 Calc., 129 (P.C.).

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
COUTTS
TROTTER, J.

Periasami Servai(1). The reasoning appears to be this—and I respectfully regard it as perfectly sound—that a decree-holder need not proceed in execution unless he chooses to do so, and it would therefore be absurd to say that an attachment is an attachment in execution when there is no execution. The turning point comes in my opinion when the decree-holder by filing an execution petition has shown that he means to execute his decree; and I am myself unable to escape from what seems to me the logical conclusion that, when he has elected to proceed in execution, an attachment which he has obtained and on which he must necessarily base his petition and demand for sale, becomes automatically an attachment in execution. That seems to me to underlie the reasoning of the Judges in the Full Bench case to which I have referred, particularly of SPENCER, J., with whom I find myself in complete accord. I think it is also implied in the reasoning of the judgment in *Banuddin Sahib v. Arunachala Mudali*(2). I confess I am not impressed by the argument that Order XXI, rule 57, is a penal enactment which takes away rights which would otherwise exist and must therefore be construed *verbatim et liberatim*. No common law rights are here involved. The whole position of the decree-holder and all his rights are alike the creatures of a bundle of statute-made provisions. The statute punishes lack of diligence on the part of the decree-holder. I am unable to see any logical reason why lack of diligence should be punished only if he has attached the property after decree but excused if he attached it before decree. Nor do I think that the grammatical construction of Order XXI, rule 57, can really bear the construction sought to be put on it. The words are

(1) (1921) I.L.R., 44 Mad., 902 (F.B.). (2) (1914) 26 M.L.J., 215.

MEYAPP
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
COURTS
TROTTER, J.

"where any property has been attached in execution of a decree." That I construe as meaning "where any property has been in a state of attachment in execution of a decree" and not confined to cases where the first act of attachment was made subsequently to the decree. To put it in the technical language of grammar, I regard "has been attached" as a perfect and not an aorist tense. In my opinion, when a decree-holder having obtained his decree takes out an execution petition, he has, in effect, elected to take the benefit of Order XXXVIII, rule 11, and asks the Court to treat his attachment henceforth as an attachment in execution of the decree which he is seeking to execute. When he has made that election it seems to me that his attachment thereupon becomes subject to those requirements of diligence laid down by Order XXI, rule 57. I cannot assent to the view that attachment before judgment and attachment in execution are two such wholly different things as to make any provision applicable in express terms to the one in no event applicable to the other; because, in my view, as soon as a decree-holder applies for execution on the strength of the attachment that he has obtained before judgment and which he seeks after judgment to use as validating the sale for which he is applying, he thereby by his own act asks the Court to treat his attachment as being an attachment in execution. I would therefore answer the question propounded in the negative.

RAMESAM, J.

RAMESAM, J.—The facts of the case were stated by me in the order referring the case to a Bench of two Judges and need not be repeated.

The question referred to the Full Bench is—

"whether the attachment before judgment in this case was subsisting after the dismissal of E.P. No. 183 of 1916 on the 19th September 1916."

The decision turns upon (1) whether Order XXI, rule 57, ever applies to attachments before judgment? and (2) if it does, under what conditions? The two questions are connected and will be discussed together.

They turn on the construction of the words "attached in execution of a decree" in Order XXI, rule 57. If an attachment before judgment can ever become or be converted into an attachment in execution, the rule applies to an attachment before judgment after it is so converted into an attachment in execution. If such conversion is impossible, it does not.

In the Code of 1859, there was no provision corresponding to Order XXXVIII, rule 11, of the present Code. There was a conflict of opinion on the necessity of a re-attachment by a decree-holder who had obtained an attachment before judgment and who desired execution of his decree.

In Calcutta, it was held that attachment before judgment and attachment in execution were so entirely different in their nature that one cannot subserve the purposes of the other and it was necessary for such a decree-holder to reattach the property for purposes of execution—*Sri Rammanik v. Tincowri Rai*(1). The High Court of North-West Provinces took a different view. PEARSON and TURNER, JJ., in *Sarkies, Agent of the Official Assignee of the Insolvent Court of Calcutta v. Mussumat Bundho Bae*(2), said

"Furthermore, there is in our judgment no difference between the effect of attachment obtained before, and attachment obtained after decree. It is true that in the former case the plaintiff can only obtain an order for the attachment of specified property, whereas in the latter the decree-holder may obtain a general order for the attachment of the property of the judgment-

MEYAPP
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
RAMESAM, J.

(1) (1869) 13 W.R. (F.B.), 9; 4 B.L.R., 63 (F.B.).

(2) (1869) 1 N.W.P.H.C.R., Vol. 1, 81 at pages 96 and 97.

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.

RAMESAM, J.

debtor, wherever it may be found; but the reason for this difference is to be found in the grounds on which the Court is authorized to grant attachment before judgment, that is to say, the probability of the disposal of the property, or its removal out of the jurisdiction of the Court. In both processes the orders directing attachment are to be carried out under the provisions of section 233 and the following sections; in both the claims of the third parties are to be similarly investigated under sections 246 and 247; and to both apply the prohibitions contained in section 240, which prohibitions we hold to embrace all the consequences resulting from attachment, whether the order be made before or after judgment. When property has been attached by actual seizure or written order, any private alienation thereof, whether by sale, gift, or otherwise, is null and void."

The legislature differing from the Calcutta view, and adopting the Allahabad view, enacted a section in the Code of 1877 similar to Order XXXVIII, rule 11, making a re-attachment unnecessary and the attachment before judgment available for purposes of execution. It is true that after the Code of 1877 was passed, the Privy Council held on the Code of 1859, that the attachment before judgment continues and cannot be regarded as abandoned by the then practice of re-attachment *Ramkrishna Das Surrowji v. Surfunnissa Begum*(1), but this is immaterial.

Now, Order XXI, rule 11, provides that one of the modes in which the assistance of the Court in execution is required is "by the attachment and sale, or by the sale without attachment, of any property." Sale without attachment is permissible only in a decree for sale. Therefore, in a decree for money, there must be an attachment in execution preceding the sale. In a case where there has been an attachment before judgment and no re-attachment (pursuant to the provision of Order

(1) (1881) I.L.R., 6 Cal., 129 (P.C.).

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.

RAMESAM, J.

XXXVIII, rule 11) where is the attachment in execution preceding the sale as required by Order XXI, rule 11? The answer is that the attachment before judgment is such attachment in execution, having passed into the latter. In my opinion, the effect of Order XXXVIII, rule 11, is, though it does not say so in so many words, that the attachment before judgment becomes an attachment in execution when it is definitely sought to be made available for execution. This is the view taken in the Indian Courts and by the text-writers up to 1911. In *Pallonji Shapurji Mistry v. Edward Vaughan Jordan*(1), SCOTT, J., referring to section 490 of the Code of 1882 (corresponding to Order XXXVIII, rule 11) said (at page 405):

"The attachment before judgment enures and becomes an attachment in execution. That is the effect of the section."

This was followed in *Sewdut Roy v. Sree Canto Maity*(2) by WOODROFFE, J., who said,

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

In *Bhugwan Chunder Kritiratna v. Chundra Mala Gupta*(3), GHOSE and BRETT, JJ., held with reference to section 285 of the old Code (corresponding to section 63 of the present Code) which contains the words "under attachment in execution of a decree," that the section applies to attachments before judgments also. Messrs. Amir Ali and Woodroffe in their first edition of the Civil Procedure Code at page 1156 say:

"He must apply for execution just like any other creditor."

(In the footnote to this sentence, the decisions in *Pallonji Shapurji Mistry v. Edward Vaughan Jordan*(1),

(1) (1888) I.L.R., 12 Bom., 400. (2) (1903) I.L.R., 33 Cal., 639.
(3) (1902) I.L.R., 29 Cal., 773.

MEYYAPPA
CHETTIAR
v.
CHIDAMBARAM
CHETTIAR.
—
RAMESAM, J.

and *Sewdut Roy v. Sree Canto Maity*(1), were cited without any disapproval.)

"This is now made clear by the words 'upon an application for execution of such decree.' Where, however, an application for execution is made, by the terms of this rule, no application for attachment is necessary, the attachment before judgment *enuring and becoming upon and by virtue of the application for execution*, an attachment in execution."

In the footnote they refer to *Bhugwan Chunder Kritiratna v. Chundra Mala Gupta*(2), and add, "In this respect, the law is now settled, etc." In *Durpati Bibi v. Ramrach Pal*(3), BANERJI and TUDBALL, JJ., say,

"So that, after the passing of the decree, the attachment already made was to be deemed to be an attachment in execution of the decree."

In *Ramasamy Udayar v. Chakrapany Chettiar*(4), there were two attachments before judgment in two Courts and section 285 was applied to them as in *Bhugwan Chunder Kritiratna v. Chundra Mala Gupta*(2). SUBRAHMANYA AYYAR, J., said :

"The effect of section 490, Civil Procedure Code, is to put a person attaching before judgment in the same position as if he had attached after decree, if a decree is passed in his favour."

In *Kristnaswamy Mudaliar v. Official Assignee of Madras*(5), (a decision of three Judges), the learned Judges, after stating that section 490 of the Civil Procedure Code provides that no reattachment is necessary, add :

"The case, therefore, stands upon the same footing as if the creditor had obtained his decree and had afterwards obtained an order of attachment."

Thus, it is clear that the construction contended for by the petitioner has always been accepted up to 1911.

(1) (1906) I.L.R., 23 Cal., 639. (2) (1902) I.L.R., 29 Cal., 773.
(3) (1909) I.L.R., 31 All., 527. (4) (1907) 17 M.L.J., 488.
(5) (1903) I.L.R., 28 Mad., 678.

The first note of dissent from this view was struck in *Gones Chandra v. Banwari Lal*(1). The learned Judges (one of whom was Sir CECIL BRETT) dissent from *Pallonji Shapurji Mistry v. Edward Vaughan Jordan*(2) and *Sewdut Roy v. Sree Canto Maity*(3). The decision in *Bhugwan Chunder Kritiratna v. Chundra Mala Gupta*(4) (in which BRETT, J., was one of the Judges) was not referred to, nor is the closely connected question, the possibility of the conversion of an attachment before judgment into one in execution, discussed. This decision was referred to in *Banuddin Sahib v. Arunachala Mudali*(5), where their Lordships say :

"The other contention of the appellant, namely, that . . . the present decree-holder converted the attachment before judgment into an attachment in execution is not sustainable. Such conversion can take place only if the decree-holder applies for sale of all the properties in execution of his own decree. Whether such conversion will take place even in such a case may be questioned on the authority of *Gones Chandra v. Banwari Lal*(1), but it is unnecessary to decide that question for the purposes of this case."

This decision far from being an authority in favour of the respondent is, as the expression of an opinion, against him. It is true the last sentence above quoted leaves the point before us open. But the immediately preceding sentence indicates the view that the attachment before judgment will be converted into one in execution on the application of the decree-holder for sale. The next case supposed to be in favour of the respondent is *Suraparaju v. Narasimham*(6). It does not appear from the facts that any application for execution was dismissed for default. There was no reference either in the argument or in the judgment to Order XXI,

(1) (1912) 16 C.L.J., 86.
(2) (1906) I.L.R., 33 Cal., 689.
(5) (1914) 26 M.L.J., 215.

(2) (1888) I.L.R., 12 Bom., 400.
(4) (1902) I.L.R., 29 Cal., 773.
(6) (1914) 1 L.W., 932.

MEYYAPPA
CHETTIAR
v.
CHIDAMBARAM
CHETTIAR.
—
RAMESAM, J.

MEYVAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
RAMESAM, J.

rule 57, or to the cases above discussed. The next decision relied on by the respondent is *Venkatasubbiah v. Venkata Seshaiya*(1). It purports to be based on *Gones Chandra v. Banwari Lal*(2), *Banuddin Sahib v. Arunachala Mudali*(3) and *Suraparaju v. Narasimham*(4). The last two decisions are scarcely authorities for it. So that, we have, as against the decisions and opinions that prevailed from 1869 up to 1911, two decisions in 1912 and 1918 in favour of the respondent. In this state of the authorities we got the decision in *Arunachalam Chetty v. Periasami Servai*(5); here the question arose with reference to the words "attached in execution of a decree" in article 11 of the Limitation Act. A Full Bench of five Judges held that, after an order for sale was passed after the decree, an attachment before judgment becomes an attachment in execution. WALLIS, C.J., said referring to Order XXXVIII, rule 11:

"This provision does not, in my opinion, enable us to say that property attached before judgment becomes property attached in execution of a decree upon the mere passing of a decree for the plaintiff either within the meaning of article 11 of the Limitation Act or Order XXI, rule 57, already mentioned, as execution may never be applied for, but merely enables the decree-holder to apply for execution by sale of the attached property without a fresh attachment. Where, however, as in the present case, there is an order in execution for the sale of the attached property, that order appears to me to proceed upon the footing that the property is to be considered as attached in execution by virtue of rule 11, etc."

This was concurred in by three other Judges (of whom I was one). SPENCER, J., though he may be regarded as going further than the others, certainly agreed with them to the extent that, at least after the order for sale, the attachment before judgment becomes one in execution.

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

(2) (1912) 16 C.L.J., 86.

(3) (1914) 23 M.L.J., 215.

(4) (1914) 1 L.W., 932.

(5) (1921) I.L.R., 44 Mad., 902 (F.B.).

MEYVAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
RAMESAM, J.

The judgment is therefore an unanimous judgment of five Judges laying down that an attachment before judgment may be converted into an attachment in execution of a decree and is binding on this Court; and when we remember that the Limitation Act and Civil Procedure Code are allied general Acts (first passed together in 1859, again in 1877 and again in 1908) and ought to be construed consistently (see *Phoolbas Koonwur v. Lalla Jogeshur Sahoy*(1), and *Arunachalam Chetty v. Periasami Servai*(2)), it is seen that it will be a great anomaly without any justification if the same expression is construed in one way in section 63 of the Civil Procedure Code and article 11 of the Limitation Act and in another way for Order XXI, rule 57, of the Civil Procedure Code. If the character of an attachment before judgment is such that its conversion into an attachment in execution is impossible, such impossibility exists equally for the purpose of section 63, Civil Procedure Code, and article 11 of the Limitation Act as for Order XXI, rule 57. Unless there is a clear indication to the contrary in one or more of these provisions, the possibility of such conversion equally applies to all and I see no reason to depart from *Arunachalam Chetty v. Periasami Servai*(2), which definitely established the possibility of such conversion.

I do not feel it necessary to discuss the interpretation of Order XXXVIII, rule 9. I agree with the decisions in *Ram Chand v. Fitam Mal*(3) and *Aldul Rahman v. Amin Sharif*(4), that when a suit is dismissed the attachment before judgment terminates without an order of the Court. But even if the opposite view is the correct view, I do not think this has any bearing

(1) (1876) I.L.R., 1 Calc., 226 (P.C.).

(2) (1921) I.L.R., 44 Mad., 902.

(3) (1888) I.L.R., 10 All., 506.

(4) (1918) I.L.R., 45 Calc., 780.

MEYYAPPA
CHETTIAR
v.
CHIDAMBAM
RAM
CHETTIAR.
—
RAMESAM, J.

on the construction of Order XXI, rule 57. While Order XXXVIII, rule 9, provides for one mode of terminating an attachment before judgment, it is not the only mode and it does not stand in the way of construing Order XXI, rule 57, as providing another.

Nor do I think any assistance can be derived from the Form 7 in appendix F of the Code. Appendix E, form 24, which also seems to imply that a further order of the Court is necessary to put an end to the custody of the Court in an attachment after judgment, may seem to be inconsistent with Order XXI, rule 57. I think the true view is that the forms have nothing to do with the rights of parties but only deal with the relation of the Court to its subordinate officers who carry out its orders.

It is said that, if the petitioner's contention is correct, Order XXXVIII, rule 8, would be unnecessary in the face of Order XXI, rule 58, but the same may be said of Order XXXVIII, rule 11. It may be some of those rules are not absolutely necessary but have been enacted as a matter of abundant caution.

It may be that, of the various opinions in the decisions, cited by me above and with which I agree, some are *obiter dicta* while others are necessary for the decision. It may be that in some of them the exact period of time when the attachment before judgment was converted into an attachment in execution had not to be and was not considered.

In the case before us, as soon as the application (E.P. No. 183 of 1916) mentioning an attachment before judgment and praying for sale, was filed, the Court passed the following order on 6th May 1916: "Copy of attachment warrant and the order making the said attachment absolute to be produced." These papers were produced on 11th July 1916. The

MEYYAPPA
CHETTIAR
v.
CHIDAMBAM
RAM
CHETTIAR.
—
RAMESAM, J.

Court being satisfied that there was such an attachment as to justify the prayer for sale (as required by Order XXI, rule 11), passed the next order on the application on 11th July 1916. In this order, the Court, apparently acting under Order XXI, rule 22, directed notice to the defendant as the decree was more than one year old. This is a definite acceptance by the Court of the application as a proper application for sale and a statement of its willingness to pass further orders on it unless the defendant can show cause. The defendant was served on 29th July 1916. On 8th August, the Court passed an order directing the sale-papers to be filed. By "sale-papers" were meant drafts of the proclamation, encumbrance certificate, etc., as required by rule 148 of the Civil Rules of Practice. If the papers were filed, the sale would have been ordered; but, as they were not filed, the application was dismissed. In my opinion, after the Court was satisfied that there was such an attachment on the properties sought to be sold as to satisfy the requirements of Order XXI, rule 11, and when it passed the next order on the footing that there was an attachment which serves all the purposes of an attachment in execution, i.e., on 11th July 1916, the attachment before judgment had become converted into one in execution.

I will now refer to certain general considerations apart from decisions, which are supposed to be against this view. First it is said that an attachment before judgment is, in its nature, so essentially different from an attachment in execution, that it can be never converted into the latter. This was the view taken in *Sri Rammanik v. Tincowri Rai*(1), but in my opinion, the legislature abandoned it when the section in the Code

(1) (1899) 13 W.R. (F.B.), 9; 4 B.L.R., 63 (F.B.).

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
RAMESAN, J.

of 1877 corresponding to Order XXXVIII, rule 11, was enacted.

It is true that there are some differences between an order for attachment before judgment and an order for attachment in execution, namely,

(1) The former was made before judgment and the latter after judgment.

(2) An order for attachment before judgment is made only after giving the defendant notice to show cause why it should not be made. No such notice is given before an order of attachment after judgment. The reason for this difference is the absence of a decree in the former case.

As a corollary following from this, if security is given by defendant the Court does not pass an order of attachment before judgment, and any attachment already effected will be withdrawn. To the extent that these are considered as very important differences, I do not agree with *Basiram Malo v. Kattayajani Debi*(1), which relies on the obsolete decision of *Sri Rammanik v. Tinconeri Rai*(2).

Order XXXVIII, rule 12, is another difference due to the anticipating nature of an attachment before judgment.

But do these differences make the attachment before judgment so entirely different in character, from one after judgment that one can never pass into the other? I am of opinion it is not. In my view, the attachment before judgment and that after judgment are identical in their essential features. Each is effected by a prohibitory order. The purpose of both is the same. The consequences of both are the same. All alienations by the judgment-debtors are void against claims enforceable

in pursuance of the attachment. Neither has got the character of a charge. It is thus seen that, so far as they vacate or affect rights, they are substantially identical in character (vide *Sarkies, Agent of the Official Assignee of the Insolvent Court of Calcutta v. Mussumat Bundoo Baee*(1). Just as the effect of two attachments of the same property in execution of the same decree (the second one being effected in forgetfulness of the first) is merely that the property is under attachment, the first attachment merging in the second, similarly the effect of an attachment before judgment followed by a redundant re-attachment after judgment is merely that the property is under attachment. In such cases it is meaningless to say that the property is under two attachments. It is still more meaningless to say that one attachment is dropped but another subsists. All the earlier attachments, in all such cases, merge into the last. Where there are several attachments, it is not that every attachment has an individuality of its own but the property is under a state of attachment.

Secondly, it is said that other creditors who obtained no attachments of their own but who might share rateably in the amount that may be realized by the respondent, lose their chance if the respondent's attachment is held to have been extinguished under Order XXI, rule 57, and this is a great hardship. I do not see any hardship in this. Such creditors have no rights against the property—none, certainly, that ought to prevail against the appellant and if they have a chance of sharing rateably with the respondent under section 73, it seems to me to be a piece of good luck which they little deserve to have, dependent on the diligence with which the respondent pursued his attachment. They are no more unlucky when the attachment terminates

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
RAMESAN, J.

(1) (1911) I.L.R., 38 Calo., 448.

(2) (1869) 13 W.R., (F.B.), 9; 4 B.L.R., 63 (F.B.)

(1) (1869) 1 N.W.P.H.C.R. at pages 96 and 97 already quoted.

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
WALLACE, J.

under Order XXI, rule 57, than in the case when the judgment-debtor pays off the attaching creditor or gives some other property as security for the debt of the attaching creditor and the attachment is withdrawn under Order XXXVIII, rule 9. The hardship is exactly the same as when we have, instead of the first attachment before judgment, an attachment after judgment. I do not think that instances of creditors sharing rateably in the fruits of the attachment before judgment are more numerous than in cases of attachment after judgment. Finally, I do not think such remote considerations of hardship on other creditors can have any place in the construction of Order XXI, rule 57, especially as I am not able to conceive of any argument based on hardship which does not equally apply to attachments after judgment. I am not able to see any reason why the legislature should create a smaller standard of diligence for judgment-creditors who had obtained an attachment before judgment, than those who did not, in working out execution of the decree.

I would overrule *Venkaṭasubbiah v. Venkata Seshaiya*(1), agree with SPENCER, J., in the order of reference, and answer the question referred to us by saying that the attachment is not subsisting.

WALLACE, J. WALLACE, J.—I agree with the decision of the learned Chief Justice and will, as there is a divergence of opinion in the Full Bench, give my own reasons.

The respondent in this case obtained an attachment before judgment in O.S. No. 153 of 1914 on the file of the Court of the Subordinate Judge, Rāmnād, his attachment being obtained on 20th November 1914. He obtained a decree in the Temporary Subordinate Judge's Court, Rāmnād, to which his suit had been transferred on 22nd February 1915, which decree was

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

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
WALLACE, J.

sent for execution to the Court of the Subordinate Judge of Rāmnād. He filed an execution petition, 183 of 1916, which was dismissed on 19th September 1916 apparently because he had committed default by failing to file an encumbrance certificate within time. The petitioner before us had, in O.S. No. 108 of 1914, obtained an *ex parte* decree against the same judgment-debtor but that *ex parte* decree was set aside on the judgment-debtor giving security on 15th March 1915, the security being given on the same property which the respondent had attached before judgment. The question for decision is whether, on the dismissal of the respondent's execution petition 183 of 1916, the attachment before judgment ceased or whether that attachment endured and thus takes precedence of the security given on the same property in favour of the petitioner.

2. Taking Order XXXVIII, Civil Procedure Code, as it stands, it seems to me clear from the wording of rule 9 that an attachment before judgment only comes to an end by a formal order of the Court withdrawing it. This is, in my opinion, the correct way of interpreting rule 9, which applies to cases where the security demanded has been furnished, or where the suit has been dismissed. Rule 6 (2) clinches this interpretation. It requires that even in the case of a conditional attachment before judgment, a formal order of withdrawal is necessary to raise the attachment. Much more must it be necessary for raising a final attachment, into which the conditional attachment has been converted. No doubt the rulings in *Ram Chand v. Pitam Mal*(1) and *Abdul Rahman v. Amin Sharif*(2) are contrary to this view, but, for reasons given, I must disagree with them. When the suit has not been dismissed, but

(1) (1888) I.L.R., 10 All., 506.

(2) (1918) I.L.R., 45 Cal., 780.

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
WALLACE, J.

decreed, it goes without saying (again taking Order XXXVIII as it stands) that the attachment continues, until it is withdrawn by the Court, so long as execution of the decree is not barred. Rule 11 makes that quite clear. See also *Ganu Singh v. Jangi Lal*(1).

3. Respondent obtained a decree in his suit. Hence, so far as Order XXXVIII goes, his attachment before judgment has not come to an end, since there is on record no formal order of withdrawal of the attachment by the Court. It can only have come to an end, if there is some other provision of the Civil Procedure Code, which has caused it to cease. Petitioner's contention is that Order XXI, rule 57, is such a provision; and that is really the only argument in his case. The whole point is:—Does the phrase “property attached in execution” in Order XXI, rule 57, include “property attached before judgment,” when that attachment is utilized, by force of Order XXXVIII, rule 11, for an execution.

4. Petitioner's contention appears to me open to several objections. In the first place, an attachment before judgment is not *ejusdem generis* with an ordinary attachment in execution. To effect the former, the Court must, besides issuing, as required by Order XXXVIII, rule 7, the usual prohibitory order to the judgment-debtor and the public generally, under form E-24 of the first schedule, also issue a special order in form F-7 to its bailiff to attach the property and keep it “under safe and secure custody until the further order of the Court.” This clearly implies that the order under form F-7 remains in force until it is withdrawn by a further order. It seems to me very difficult to hold that that further order is lying *perdu* in Order XXI, rule 57,

and must be deemed to have been passed, when the execution application is dismissed under that rule. It is true that form E-24 also uses the same phrase and implies a further order also. On this I can only say that it is inconsistent with rule 57, the inconsistency probably being due to the omission to notice the full effect of rule 57, when it was newly introduced into the Civil Procedure Code of 1908. I find it difficult to hold that in passing this new rule the legislature intended to abolish the “further order of the Court” required by form F-7, a form not coming under Order XXI at all, or to abrogate the clear provisions of Order XXXVIII, which had been in force substantially since 1859 at least. Rule 57 of Order XXI is of a penal nature and should therefore be construed strictly. One is not entitled to conclude that rights previously enjoyed by parties have been taken away by a new provision in a Code, unless that provision in clear terms or by necessary implication involves such a conclusion.

5. Secondly, rule 57 appears as a rule in an order devoted to execution of decrees and orders, and in my view it should therefore be confined to such attachments as are dealt with in the order itself and not applied to attachments effected outside that order. It has been argued that the phrase “property attached in execution” should mean “property in a state of attachment in the course of the execution of the decree.” I think the more natural interpretation is simply that the phrase is to apply to such attachment in execution as is described earlier in the same order—vide Order XXI, rule 11, etc. The following rule 58 uses exactly the same phrase. Yet that rule does not apply automatically to property the attachment of which occurred before judgment. A special rule under Order XXXVIII, viz., rule 8, was enacted to make it applicable. There is

MAYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
WALLACE, J.

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
WALLACE, J.

nothing in rule 8 to indicate that it is confined to claims against an attachment before judgment, only until the judgment has ripened through a decree into an execution. The test for the application of rule 8, as I read it, is not "Has execution been taken out," but "at what stage of the case was the property attached." Order XXXVIII, rule 8, incorporates, so to speak, rule 58 of Order XXI—vide *Prasada Nayudu v. Virayya*(1). There is no corresponding rule in Order XXXVIII incorporating Order XXI, rule 57, in it, and no rule from which one is entitled to infer that an attachment before judgment *becomes*, when execution is taken out, on the strength of that, an attachment in execution.

6. No doubt there is one ruling which loosely uses the word "*becomes*" and to that case our attention was directed in arguments, viz., *Sewdut Roy v. Sree Canto Maity*(2). In *Durpati Bibi v. Ramrach Pal*(3) the language used is that an attachment before judgment shall after a judgment "be deemed to be an attachment in execution of the decree." The fact that the attachment before judgment is useful chiefly for the purpose of a subsequent sale in execution will not, to my mind, convert every attachment into an attachment in execution.

7. The petitioner relies strongly upon the ruling reported in *Arunachalam Chetty v. Periasami Servai*(4) which laid down that article 11 of the Indian Limitation Act, which deals with the question of the limitation period for an order on a claim petition preferred to "property attached in execution of a decree," applies to an order on a claim petition preferred to property attached before judgment after an order for sale in

execution had been passed. Three points have to be noted with reference to this case; first, that it was a case of a claim made *after* decree, *after* an application for execution had been put in and *after* an order for sale in execution had been passed; secondly, that section 246 of the old Civil Procedure Code of 1859, which the Judges held to be the *fons et origo* of article 11 of the Indian Limitation Act, applied expressly in terms to an attachment before judgment as well as to an attachment in execution; and thirdly, that they were oppressed by the facts that, despite the provisions of the old Code, the legislature had provided no special period of limitation at all for claims to property attached before judgment, and that, unless "the whole object of the summary claim procedure" was to be "frustrated," a briefer period of limitation than that in article 120 had to be found somewhere. The learned Chief Justice and the other learned Judges, who adopted his judgment in that case, considered that they "should not be justified in laying down generally that property attached before judgment is attached in execution of a decree" and they distinctly held that Order XXI, rule 57, threw no light on the point that had been then argued before them. I do not think this ruling goes further than to say that a claim put in after an order in execution for sale following upon an attachment before judgment "may properly be regarded as a claim to property attached in execution of a decree within the meaning of article 11" of the Limitation Act. It cannot, therefore, be construed to lay down that in all instances where the phrase "property attached in execution" occurs in any statute, it covers cases of property attached before judgment as soon as execution is taken out on the decree arising out of that judgment; it must, in my opinion, in view of the compulsion, if it may be so called, exercised over their

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
WALLACE, J.

(1) (1918) I.L.R., 41 Mad., 849.

(3) (1909) I.L.R., 31 All., 527.

(2) (1906) I.L.R., 33 Cal., 839.

(4) (1921) I.L.R., 44 Mad., 902.

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
WALLACE, J.

Lordships' minds by the omissions of the legislature, be strictly confined to what it lays down. I cannot, therefore, read into it a reversal of the decision in *Venkatasubbiah v. Venkata Seshaiya*(1). That is a direct authority in favour of the respondent in this case, to which one of the learned Judges in *Arunachalam Chetty v. Periasami Servai*(2) was a party, and other direct authorities quoted therein are *Gones Chandra v. Banwari Lal*(3) and *Banuddin Sahib v. Arunachala Mudali*(4) and another case, which indirectly is in favour of the respondent, viz., *Suraparaju v. Narasimham*(5).

8. General considerations of equity, such as, for example, whether third parties relying, for purposes of rateable distribution, on an attachment before judgment by some one else are entitled to be in any better position than third parties relying on some one else's attachment after judgment, or whether a party defaulting in the prosecution of his execution application ought to be in a better position because he has attached before judgment than if he had attached after judgment, do not, I feel, assist me much in the decision of this case. I think the decision must be based on an interpretation of the express provisions of the Code and on a consideration of the rights conferred by prior Civil Procedure Codes before Order XXI, rule 57, was passed at all. These last were perfectly clear and included the anomalies just mentioned, and the new Civil Procedure Code has left them as they were before.

9. I would, therefore, in answer to the reference, say that Order XXI, rule 57, does not apply to cases where the attachment is an attachment before judgment.

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

(2) (1921) I.L.R., 44 Mad., 902.

(3) (1912) 18 C.L.J., 86.

(4) (1914) 26 M.L.J., 215.

(5) (1914) 1 L.W. 932.

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
WALLER, J.

WALLER, J.—I think that the question referred to us should be answered in the negative. Order XXXVIII, rule 11, provides that, where there has been an attachment before judgment, a decree-holder, in order to execute the decree, must make an application for execution, but need not re-attach. This is the only privilege he is given and I do not consider that it was intended to carry with it exemption from the penalty that awaits negligence on the part of attaching decree-holders in general. After he has made his application, he becomes subject to the provisions of Order XXI. I agree that Order XXXVIII contains the whole law in regard to attachment before judgment as such, but am not prepared to concede that attachment before judgment and attachment in execution are two entirely separate and distinct processes.

There is authority on both sides. In *Venkatasubbiah v. Venkata Seshaiya*(1) it was held that Order XXI, rule 57, had no application to attachments before judgment. The Judges followed one Calcutta and two Madras decisions on the point. The Calcutta case *Gones Chandra v. Banwari Lal*(2) is certainly a direct authority in support of their view. One of the Madras cases *Banuddin Sahib v. Arunachala Mudali*(3) is—if anything—an authority for the opposite view. What it actually decided was that an attachment before judgment did not cease to exist because an application for the arrest of the judgment-debtor had been dismissed for default. That is not in point here. Incidentally, however, the opinion was expressed that an attachment before judgment was converted into an attachment in execution where the decree-holder applied in execution for sale of the attached property. At the same time, a doubt was

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

(2) (1912) 18 C.L.J., 86.

(3) (1914) 26 M.L.J., 215.

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
WALLER, J.

raised, with reference to the Calcutta decision, whether the opinion was correct, a doubt which the Judges expressly refrained from solving. The last case *Suraparaju v. Narasimham*(1) is not very clear. Apparently an execution application had been dismissed. If it was dismissed for default, the decision is a direct authority in support of *Venkatasubbiah v. Venkata Seshaiya*(2). On the other side—apart from dicta in certain cases—there is *Arunachalam Chetty v. Periasami Servai*(3). In that case property had been attached before judgment, a decree had been passed and an order for sale had been granted in execution. The question the Court had to decide was whether the words “property attached in execution of a decree” in article 11 of the Limitation Act covered an attachment before judgment. The Full Bench decided that they did. The main judgment was delivered by WALLIS, C.J., with whom all the other Judges concurred. SPENCER, J., delivered a separate judgment which—as I understand it—went no further than that of the Chief Justice. It must be conceded that the particular instance with which the Court was concerned was one in which sale had actually been ordered; but I cannot agree that that fact affects the principle of the decision. An order for sale pre-supposes and is based on an existing attachment. It does not itself create the attachment. If therefore an attachment before judgment becomes at any stage an attachment in execution, it must, in my view, be at the stage where an application to execute has been made and admitted under Order XXI, rule 17. And that I conceive to be the principle laid down by the Full Bench. I may add that, in the present case, sale papers had been called for which is usually done after attachment has been ordered. I am

(1) (1914) 1 L.W., 932.

(2) (1919) I.L.R., 42 Mad., 1.

(3) (1921) I.L.R., 44 Mad., 902 (F.B.).

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
—
WALLER, J.

unable to see how a subsequent order for sale would have altered the position. WALLIS, C.J., explicitly stated that he was considering both cases, that is, those “in which the claim . . . is put in after decree or even, as in the present instance, after sale had been ordered in execution.” Further on he observed :

“ This provision (Order XXXVIII, rule 11) does not, in my opinion, enable us to say that property attached before judgment becomes property attached in execution of a decree upon the mere passing of a decree either within the meaning of article 11 of the Limitation Act or of Order XXI, rule 57, as execution may never be applied for.”

This sentence seems to me to indicate (a) that he was considering the meaning of the phrase under discussion both in article 11 of the Limitation Act and in Order XXI, rule 57, and (b) that he was of opinion that nothing more was necessary to convert an attachment before judgment into an attachment in execution than an application to execute. The order for sale he regarded as “proceeding on the footing that the property had to be considered as having been attached in execution by virtue of rule 11.”

The reference to rule 11 which requires an application to execute (and such an application would, but for the proviso in the rule itself, be for attachment as well as sale) is to my mind conclusive proof that he considered that the attachment changed its character from the time of the application to execute. And that was the view taken by SPENCER, J.; WALLIS, C.J., no doubt remarked that Order XXI, rule 57, threw no light on the question he was considering. Nor did it. He was considering the meaning of a certain expression in article 11 of the Limitation Act which was practically identical in terms with a phrase in Order XXI, rule 57, but found that the context in which the latter stood gave him no assistance in interpreting the former.

MEYYAPPA
CHETTIAR
v.
CHIDAMBA-
RAM
CHETTIAR.
WALLER, J.

As I have already pointed out, the quotation given above with its reference to "within the meaning of order XXI, rule 57" shows that he was considering that rule as well as article 11. I see no reason to doubt that he and the other Judges would have been prepared, had it been necessary, to answer the question referred to us in the negative. Indeed, I do not see how such an answer can be avoided. When once it has been found that, for one purpose, an application to execute converts an attachment before judgment into an attachment in execution, the conclusion is, to my mind, inevitable that the conversion operates for all purposes. Following what I believe to be the principle laid down by the Full Bench, I hold that, in this case, the property had been attached in execution within the meaning of rule 57 and that the attachment ceased when the application for execution had been dismissed for default.

I may add that the same question has since been argued before me with reference to section 9 of the Presidency Towns Insolvency Act. Under that section, an act of insolvency is committed where any part of a man's property has been attached in execution of a decree for over 21 days. It would, in my opinion, be anomalous to hold that an attachment before judgment takes the judgment-debtor out of the section, even though execution had been proceeding against his property for more than the prescribed period.

THE COURT.—By a majority the question will be answered in the negative.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Devadoss.

PARAMASIVA THEVAR (SIXTH DEFENDANT), APPELLANT,

1523,
August 29.

v.

PULUKARUPPA THEVAR AND OTHERS (PLAINTIFF
AND DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), arts. 166 and 181—Application to set aside sale in execution of mortgage-decree—Application filed by judgment-debtor more than thirty days after date of sale—Bar—Proclamation of sale, not published in the village in which property sold was situate—Ground for setting aside sale—Illegality or material irregularity, as a ground for setting aside—Art. 166, when applicable.

An application by a judgment-debtor to set aside a sale held in execution of a mortgage-decree on the ground that the proclamation of sale was not published in the village in which the property was situate, falls under article 166 and not article 181 of the Limitation Act.

Muthiah Chettiar v. Bava Sahib (1914) 27 M.L.J., 605, followed; *Vachali Rohini v. Kombi Aliassan* (1919) I.L.R., 42 Mad., 753 (F.B.), distinguished.

APPEAL against the order of J. K. LANCASHIRE, Acting District Judge of Tinnevely, in A.S. No. 371 of 1920, preferred against the order of C. V. KRISHNASWAMI AYYAR, Subordinate Judge of Tuticorin, in E.P. No. 49 of 1920 in O.S. No. 101 of 1916.

In execution of a decree on a mortgage the decree-holder brought to sale an item of property situate in Rajagiri village in Sivagiri Zamindari and purchased it himself on the 21st November 1919. The appellant who was the sixth defendant in the suit, filed a petition on 17th January 1920 to set aside the sale on the ground that the decree-holder fraudulently brought the property

* Civil Miscellaneous Second Appeal No. 74 of 1922.

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.

to sale without a proper publication of the sale proclamation in the village of Rajagiri in which the property was situate, and purchased the same himself for a low price. The petition was filed more than thirty days from the date of sale; it was alleged in the petition that the appellant became aware of the sale only a week before the date of the petition. The Subordinate Judge held that there was material irregularity in the publication of the sale proclamation, that article 166, Limitation Act, applied, and that the application to set aside the sale was barred by limitation. On appeal, the learned District Judge agreed with the Sub-Judge that the application was barred under article 166 of the Limitation Act, and dismissed the appeal. The sixth defendant preferred this Civil Miscellaneous Second Appeal.

A. Krishnaswami Ayyar and *K. Balasubrahmanya Ayyar* for appellant.

T. Ranga Achariyar for respondents, took a preliminary objection that no second appeal lay to the High Court against the order of the District Judge in this case. Order XLIII, rule, (j), provides for an appeal against an order passed under Order XXI, rule 90, Civil Procedure Code. This is an order passed by the Subordinate Judge in an application under Order XXI, rule 90, Civil Procedure Code. Though there may be allegations of fraud, the petition is under Order XXI, rule 90, which includes cases of fraud. Section 2 prevents such orders from being decrees. The matter does not fall under section 47, Civil Procedure Code. There is only one appeal against the order of the Subordinate Judge to the District Judge in this case; there is no right of second appeal.

A. Krishnaswami Ayyar for appellant.—The preliminary objection depends on the decision of the question whether there was an illegality or mere irregularity in the

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR

case, i.e., whether section 47 or Order XXI, rule 90, applies to the allegations made in this petition. In the case of illegality the appellant need not show loss. Though there may be fraud, still there may be illegality in addition to fraud. Here there was no publication at all in the village in which the item of property sold was situate. Publication in the village is a statutory requisite, and non-compliance with it amounts to an illegality and not to a mere irregularity falling under Order XXI, rule 90, Civil Procedure Code—See *Jayarama Ayyar v. Vridhagiri Aiyar*(1), *Basharut-ulla v. Uma Churn Dutt*(2) and *Nilmony Singh Deo v. Biressur Banerjee*(3). Where the vitiating circumstance is an illegality, the fact that fraud brought about the illegality, does not reduce it to an irregularity under Order XXI, rule 90.

As to the question of limitation, article 166 of the Limitation Act does not apply, if the petition did not fall under Order XXI, rule 90, Civil Procedure Code.

As the appellant was a party to the suit, he can apply only under section 47 of the Code; and article 181, Limitation Act, will apply: see *Rayarappan Nambiar v. Malikandi Aketh Mayan*(4), *Seshagiri Rao v. Srinivasa Rao*(5), *Sheikh Ariatullah v. Sashi Bhusan Hazrah*(6), and *Ram Kinkar v. Sthiti Ram*(7). There is a conflict of authority on this point in this and other High Courts. The case is concluded by the decision of the Full Bench in *Vachali Rohini v. Kombi Aliassan*(8) and *Shivbai v. Yesoo*(9).

T. Ranga Achariyar for respondents.—As regards the question of limitation: article 166, Limitation Act, applies to all applications to set aside sales in execution; article 181 does not apply as it is only a residuary

(1) (1921) I.L.R., 41 Mad., 35.

(2) (1889) I.L.R., 16 Calc., 794.

(3) (1889) I.L.R., 16 Calc., 744.

(4) (1914) 26 M.L.J., 267.

(5) (1920) I.L.R., 48 Mad., 313.

(6) (1919) 24 C.W.N., 73.

(7) (1918) 27 C.L.J., 528.

(8) (1919) I.L.R., 42 Mad., 753 (F.B.).

(9) (1919) I.L.R., 48 Bom., 285.

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.

article ; article 166 applies to all applications under the Civil Procedure Code, whether under section 47 or Order XXI, rule 90 : see *Ganapathi Mudaliar v. Krishnamachari*(1) and *Kamayya v. Ramamma*(2). The case of *Seshagiri Rao v. Srinivasa Rao*(3) is distinguishable, as the applicant there was not a party to the decree and was a stranger to the execution proceedings. The case of *Rayarappan Nambiar v. Malikundi Aketh Mayan* (4) is also distinguishable as it was not a case of setting aside a sale but paying the decree amount, ignoring the sale as void for want of notice. The decision of the Full Bench in *Vuchali Rohini v. Kombi Aliassan* (5) is distinguishable as it is based on the language of article 165, which shows that it can refer only to applications by strangers under Order XXI, rule 90, and not by parties to the suit or judgment-debtors, see *Neelu Neithiar v. Subramania Moothan*(6), which so distinguishes the Full Bench case. While the language of article 165 is restricted, that of article 166 is not : see *Satish Chandra Kanungoe v. Nishi Chandra Dutta*(7).

SPENCER, J.

SPENCER, J.—This appeal is concerned with an application to set aside a Court sale of mortgaged property which took place on November 21st, 1919. It was filed by the sixth defendant on January 17th, 1920, more than thirty days after the date of the sale and was rejected by the Subordinate Judge as being out of time. The learned District Judge confirmed his order.

It is now contended that the omission to publish the sale in Rayagiri, which is the village where the land is situated, was not a mere irregularity but an illegality, that the petition, though treated by the Subordinate Judge in his judgment as an application under Order

(1) (1922) 43 M.L.J., 184.

(3) (1920) I.L.R., 43 Mad., 313.

(5) (1919) I.L.R., 42 Mad., 753 (F.B.).

(2) (1922) 18 L.W., 934.

(4) (1914) 26 M.L.J., 287.

(6) (1920) 11 L.W., 59.

(7) (1919) I.L.R., 46 Cal., 975.

XXI, rule 90, of the Code of Civil Procedure, was properly (as it purported to be) one under section 47 and that the limitation period in such cases is three years under article 181 of the first schedule of the Limitation Act.

Assuming that the publication of the sale notice in Sivagiri, the parent village to which the suit land belongs according to the plaint and the mortgage-deed, and the failure to publish it in Rayagiri was something more than a material irregularity in publishing the sale, we have to see whether a party to the suit who asks to have the sale set aside has thirty days under article 166 or three years under article 181 to come in with his application.

It is clear that article 181 is a residuary article which can only be applied if no other article dealing with applications, under the Code of Civil Procedure, is applicable.

Whether the ground for seeking to set aside the sale in this case is the commission of an irregularity or an illegality, and whether section 47 or Order XXI, rule 90, is the appropriate provision of law to be entered at the head of the petition, it is undoubtedly an application under the Code of Civil Procedure to set aside a sale in execution of a decree and thus falls within the definition in article 166.

There is so much authority for the view that article 166 applies to all such cases that it hardly needs demonstration that the residuary article 181 cannot be applied.

By 'authority' I have in mind the cases in *Neelu Neithiar v. Subramania Moothan*(1), *Kamayya v. Ramamma*(2), *Payidanna v. Lakshminarasamma*(3) (See the Judgment of SADASIVA AYYAR, J.), *Muthiah Chettiar*

(1) (1920) 11 L.W., 59.

(2) (1922) 18 L.W., 934.

(3) (1915) I.L.R., 38 Mad., 1076.

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.
—
SPENCER, J.

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.
—
SPENCER, J.

v. *Bara Sahib*(1), *Ganapathi Mudaliar v. Krishnama-chari*(2), *Satish Chandra Kanungoe v. Nishi Chandra Dutta*(3) and *Babu Das Narayan Singh v. Muhammad Yusuf*(4). Unfortunately so long as contrary decisions remain in the Law Reports without being overruled it is possible to found argument upon them. It has therefore become necessary to examine the cases which lend support to the argument that article 181 is appropriate.

It is not uncommon to hear a sale described as a nullity if there is an illegality affecting the jurisdiction of the executing Court, and illegalities are commonly supposed to take applications to have sales set aside out of the scope of Order XXI, rule 90.

Ever since the Privy Council in *Malkarjun v. Narhari*(5), distinguished between a total absence of jurisdiction and an erroneous working out of a valid decree against an estate after its owner's liability is established, there should be no room for misconception. But unfortunately it is not uncommon to hear the expression "nullity" indiscriminately applied to sales by Court, as if by that magical word the Statute of Limitations was abolished. If in the present instance the sale was a nullity, there was no need for the appellant to apply to have it set aside under section 47 or Order XXI, rule 90. He could simply ignore it so long as his possession was not disturbed.

Rayarappan Nambiar v. Malikandi Aketh Mayan(6) is one of the cases in which a sale was held to be a nullity. It is one of those rare instances where a person applies to be brought on the record as a defendant in execution. The decree-holder when executing the decree after the death of the mortgagor judgment-debtor

(1) (1914) 27 M.L.J., 605.

(3) (1919) I.L.R., 46 Cal., 975.

(5) (1901) I.L.R., 25 Bom., 337 (P.C.).

(2) (1922) 43 M.L.J., 184.

(4) 1921) 61 I.C., 823.

(6) (1914) 28 M.L.J., 287.

failed to bring the mortgagor's legal representatives on the record. So his representative, having got himself placed on the record, applied to the Court to record satisfaction of the decree and incidentally to set aside the sale held behind his back.

The learned Judges may have felt themselves justified by the circumstances of the case in adopting the somewhat unusual procedure, but with due deference I am unable to agree with their opinion that the sale was a nullity. It is unnecessary to repeat the reasons for my opinion which I expressed at some length in *Doraiswami v. Chidambaram Pillai*(1), that a sale does not necessarily become a nullity in consequence of a judgment-debtor being dead and his legal representatives not being on the record when it takes place.

The next case is *Seshagiri Rao v. Srinivasa Rao*(2) (*SESHAGIRI AYYAR and MOORE, JJ.*). The persons who applied to have the Court-sale set aside were parties to the suit who had been exonerated, but they had no notice of the execution proceedings. The learned Judges recognized the fact that under the explanation to section 47 a defendant who had been exonerated would yet be a party to the suit. Yet they attempt to distinguish *Muthiah Chettiar v. Bara Sahib*(3), where it was held that article 166 governed applications under section 47 to set aside sales, on the ground that the application in that case was by a judgment-debtor. If the explanation to section 47 means anything, this is no distinction at all. There is no provision in the Code for persons who are not parties making an application with reference to a Court-sale except Order XXI, rule 89, which requires persons interested to make a deposit before the confirmation of the sale, that is, within 30 days of its

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.
—
SPENCER, J.

(1) (1924) I.L.R., 47 Mad., 68. (2) (1920) I.L.R., 43 Mad., 312.
(3) (1914) 27 M. L. J., 605.

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.
—
SPENCER, J.

taking place, rule 90 which is available to persons entitled to rateable distribution besides persons having an interest in the property sold, and rule 100 which requires persons dispossessed by a purchaser in execution of a decree to come to Court within 30 days of their dispossession. Strangers to the decree must under article 12 file a suit within one year of the confirmation of the sale; or, if there has been fraud, then under article 95 within three years of their becoming aware of it.

I respectfully agree with the observation of OLDFIELD, J., in *Ganapathi Mudaliar v. Krishnamachari*(1), as to the soundness of the reasons given in *Seshagiri Rao v. Srinivasa Rao*(2), for applying article 181 to the facts of that case.

The case of *Shivbai v. Yesoo*(3), quoted by MOORE, J., was one in which an *ex parte* decree had first to be set aside before the *ex parte* defendant could ask to set aside the sale. She might have obtained an interim injunction against the execution of the decree or she might have asked the Court to excuse the delay occupied in getting the *ex parte* order set aside. No definite reasons for holding article 166 inapplicable are given in the judgment except that it would work hardship in the circumstances of that case. *Ram Kinkar v. Sthiti Ram*(4), was a case, under section 18, Limitation Act, of fraudulent suppression of process. MOOKERJEE, J.'s reasons for applying article 181 are not explained.

Lastly there is the Full Bench case of *Vachali Rohini v. Kombi Aliassan*(5). This is an authority upon the scope of article 165, not of article 166, and its applicability to applications made by judgment-debtors under section 47. On the same analogy it is argued

(1) (1922) 43 M.L.J., 184.

(2) (1919) I.L.R., 43 Bom., 235.

(3) (1919) I.L.R., 42 Mad., 759.

(4) (1920) I.L.R., 43 Mad., 313.

(5) (1918) 27 C.L.J., 528.

that article 166 should only be applied to applications made by persons who are not judgment-debtors. But the ratio decidendi of the Full Bench decision was a comparison of the language of section 230 of the Code of Civil Procedure of 1859 and that of articles 158 and 165 in the Limitation Acts of 1871 and 1908. The scope of article 166 must depend on quite different considerations, viz., the wide language of the article itself and the change in language between section 244 and section 47 of the Codes of 1882 and 1908 and between sections 311 of the old Code and Order XXI, rule 90, of the new Code.

The Full Bench had before them a case in which a judgment-debtor complained that in executing a decree for possession more property had been delivered to the decree-holder than what the decree authorized.

Without doubting the correctness of the decision that such a complaint would be governed by article 181 of the Limitation Act, we may consistently hold that the application before us which is one by a judgment-debtor to set aside a sale is covered by article 166.

My learned brother agrees with me. The appeal is therefore dismissed with costs.

DEVADOSS, J.—This second appeal arises out of an application under section 47 of the Civil Procedure Code to set aside a sale held in execution of a decree on the ground of fraud and illegality in publishing and conducting it. The Subordinate Judge of Tuticorin held that the fraud alleged was not proved, that the sale was vitiated by material irregularity as regards item 1, that the property was undersold in consequence, and that the application was barred by limitation. On appeal, the District Judge of Tinnevely held that the sale was not a nullity and that the application was barred by limitation under article 166 of the Limitation Act.

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.
—
SPENCER, J.

534 THE INDIAN LAW REPORTS [VOL. XLVII]

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.
—
DEVADOSS, J.

The sixth defendant has preferred this appeal, and the sons of the decree-holder who was also auction-purchaser are respondents 1 and 2. Mr. T. Ranga Achariyar who appears for the respondents raises a preliminary objection that no second appeal lies as the application was made under Order XXI, rule 90, Civil Procedure Code, and only one appeal is provided by Order XLIII, rule I(j), against orders under Order XXI, rule 90. Mr. A. Krishnaswami Ayyar, for the appellant, contends that there was illegality in the conduct of the sale and the application was made under section 47, Civil Procedure Code, and not under Order XXI, rule 90, inasmuch as there was no publication of the sale in the village in which the property is situate as required by law, and that such an omission is not merely an irregularity but is an illegality and where illegality is brought about by fraud or otherwise, the application to set aside a sale falls under section 47, Civil Procedure Code, and a second appeal therefore lies. It is unnecessary to decide this point in the view that I take of the question of limitation involved in the case.

The sale was on 21st November 1919 and the application to set it aside was made on 17th January 1920. Article 166 of the Limitation Act gives a period of 30 days to set aside a sale in execution of a decree. The contention of the appellant is that article 181 which allows a period of 3 years applies to the case and the application is therefore in time. It is argued that the words "under the same Code" in article 166 should be taken to apply only to applications specifically provided for by the Civil Procedure Code and not to applications under the general section 47. The article is in these terms:

"Under the same Code, to set aside a sale in execution of a decree—30 days—the date of the sale."

The wording of the article includes all applications made under the Code to set aside a sale, and unless there are very strong grounds for holding that it was meant to apply only to applications specifically provided for by the Code under Order XXI, rules 89, 90 or 91, there is no warrant for departing from the plain meaning of the words of the article. It is a well-known principle of construction that where there is a specific article of limitation applicable to a suit or application, the residuary article should not be applied unless the application or suit cannot be brought within the clear wording of the specific article. The appellant relies on the following cases in support of his contention. In *Rayarappan Nambiar v. Malikandi Aketh Mayan* (1) a mortgagee brought a suit on his mortgage and impleaded the puisne mortgagee as a defendant. The puisne mortgagee died after the decree, and the plaintiff brought the mortgaged property to sale without bringing the legal representatives of the puisne mortgagee on record and without giving them notice and bought it himself; the legal representatives of the puisne mortgagee applied to set aside the sale on payment to the plaintiff auction-purchaser the amount due under the decree. The High Court held that the application was not barred by limitation as the sale was a nullity so far as the appellants were concerned and the application was clearly not barred. The application to set aside the sale could not have been entertained and the redemption of the prior mortgage could not have been ordered till the appellants were placed on record as the legal representatives of the puisne mortgagee; an application under rule 89 cannot be entertained as long as an application under rule 90 is pending. Rule 89 (2) specifically lays down, "where a

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.
—
DEVADOSS, J.

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.
—
DEVADOSH, J.

person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule." The puisne mortgagee was entitled to redeem the prior mortgage and as his legal representatives were not on record when the sale took place, they applied for relief as soon as they came to know of the sale of the mortgaged property and therefore article 166 was held not to apply to a case of that kind. Even if article 166 should have been held applicable to that case, the judgment could be supported on the ground that the appellants had no knowledge of the sale and they could not have come in therefore within the 30 days provided for by the article. In *Seshagiri Rao v. Srinivasa Rao*(1) the plaintiff brought a suit for maintenance against 12 defendants. Defendants 9 to 12 belonged to a divided branch of the family, and their shares were exonerated, and a decree was passed against defendants 1 to 8 with a charge on certain items belonging to them. The plaintiff executed the decree and certain items of property were brought to sale in execution as if they belonged to defendants 1 to 8 and were purchased by a person not a party to the decree. One year and seven months after, the plaintiffs who were defendants 9 to 12 filed a suit to set aside the sale so far as their shares were concerned. The District Munsif dismissed the suit as being barred by section 47, Civil Procedure Code. On Second Appeal the High Court remanded the suit to the District Munsif for disposal as a proceeding under section 47. The District Munsif and the District Judge held that the application was barred by limitation. The High Court held that article 181 was applicable to the case

(1) (1920) I.L.R., 43 Mad., 313.

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.
—
DEVADOSH, J.

and that the application was not barred. The learned Judges (SESHAGIRI AYYAR and MOORE, JJ.) observed at page 315: "If an execution sale is a nullity (i.e., is made without jurisdiction or is *void ab initio*), article 166 has in our view no application and the residuary article 181 should be applied. We are justified in our conclusion by the decision in *Ramavenkatasubba Ayyar v. Subramania Chettiyar*(1) (unreported)." With very great respect I am unable to follow the reasoning of the learned Judges. The appellants were parties according to the explanation to section 47 which was expressly enacted to set at rest the conflict of view that prevailed with regard to the parties to a suit but were not parties to the decree and they were bound to pursue the remedy as provided for by the Code. The judgment can, however, be supported on the ground that the appellants were not parties to the execution proceedings and they applied to set aside the sale as soon as they became aware of the sale and the period of limitation had to be calculated from the time when they came to know of the sale. In the present case the appellant was a party to the decree and the finding is that notice of sale was served upon him. The facts in *Seshagiri Rao v. Srinivasa Rao*(2) being different from those of the present case, that decision has no application to the latter. In *Ram Kinkar v. Sthiti Ram*(3) it was held by the Calcutta High Court that omission to issue notice to the judgment-debtor was an illegality and that was a sufficient ground for setting aside the sale and that article 181 applied to the application in that case.

It is difficult to follow the reasoning that if there is illegality in publishing or in conducting the sale, article

(1) Second Appeal No. 389 of 1914.

(2) (1920) I.L.R., 43 Mad., 313.

(3) (1918) 27 C.L.J., 528.

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.
—
DEVADOSS, J.

181 applies and if there is fraud or irregularity article 166 applies. Order XXI, rule 90, enables a decree-holder or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale to apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it. If a party is prevented by fraud from knowing of the sale, such fraud will prevent limitation running against him, or where he is kept out of the knowledge of the illegality by means of fraud, he may contend reasonably that by means of fraud he was prevented from knowing or having the means of knowledge of the illegality and therefore limitation should count against him only from the time when he discovered the illegality. Section 18 of the Limitation Act would apply to such a case. Therefore there is no reason why when there is a specific article such as 166 governing certain applications, the aid of the residuary article should be invoked to help a party who could justify his application as being within time by virtue of section 18 of the Limitation Act. It is urged that the reasoning adopted in a decision reported in *Vachali Rohini v. Kombi Aliassan*(1) with regard to article 165 should be applied to article 166. In that case it was held by a Full Bench that where a judgment-debtor was dispossessed of immoveable property the article applicable to an application by him for restoration of possession was 181. The learned Judges in the course of the judgment relied on the fact that Order XXI, rule 100, applies only to a stranger to the decree seeking for restoration of possession and not to a judgment-debtor seeking a similar remedy. They expressly overruled the decision in *Ratnam Ayyar v. Krishna Doss Vittal Doss*(2) which decided that article 165 was the proper

(1) (1919) I.L.R., 42 Mad., 753 (F.B.). (2) (1898) I.L.R., 21 Mad., 494.

PARAMASIVA
THEVAR
v.
PULU-
KARUPPA
THEVAR.
—
DEVADOSS, J.

article to be applied to an application by a judgment-debtor who was dispossessed of immoveable property for restoration of possession. The decision in *Vachali Rohini v. Kombi Aliassan*(1) being the decision of a Full Bench, no purpose would be gained by expressing doubts as to its soundness. But I may be permitted to observe that the result of the decision is that a stranger to the decree and execution proceedings if dispossessed of immoveable property has to apply within 30 days under Order XXI, rule 100, whereas a judgment-debtor has three years under article 181 of the Limitation Act to make a similar application by claiming the benefit of section 47, Civil Procedure Code. Whether the legislature intended such a result is neither necessary nor profitable to enquire. In *Shivbai v. Yesoo*(2) the facts were that in 1906 an *ex parte* decree was passed against the defendant in execution of which the defendant's house was sold and purchased by the plaintiff decree-holder in 1910. The *ex parte* decree was subsequently set aside. But at the re-trial, a decree was again passed in plaintiff's favour in 1914. In the meanwhile the defendant applied to have the sale of the house set aside. With regard to limitation HAYWARD, J., observed :

"It was also suggested that the application ought to be regarded as time barred under article 166 of the schedule to the Limitation Act. But this article appears to be hardly applicable to the facts of this particular case. The cause of action accrued upon setting aside the *ex parte* decree in 1914 and taking that as the date from which limitation ran, the application would clearly be within the time under the provisions of article 181 of the schedule to the Limitation Act."

In that case the right to apply to have the sale set aside arose only on the *ex parte* decree being set aside. The Court could very well have held that article 166

(1) (1919) I.L.R., 42 Mad., 753 (F.B.). (2) (1919) I.L.R., 48 Bom., 235.

PARAMASIVA
THEVAR
v.
POLU-
KARUPPA
THEVAR.
—
DEVADOSS, J.

applied and that the delay should in the circumstances be excused under section 5 of the Limitation Act, and if there was fraud under section 18 of the Limitation Act. If article 181 of the Limitation Act is the proper article applicable to such a case, the question arises from what date should limitation be held to run against the applicant. Granting he has three years, under article 164 time begins to run from the date of the decree or where the summons was not duly served, when the applicant has knowledge of the decree. If no summons was served and the defendant came to know of the passing of the decree more than three years after it was passed, his remedy to have the decree set aside is not barred till he comes to know of the passing of the decree. The learned Judges did not say from what date time would begin to run against a person who seeks to set aside a sale on the ground that he was not aware of the passing of the decree. With due respect, I think the proper course in such a case is to excuse the delay as the defendant was kept out of the knowledge of the passing of the decree or had no means of knowing of the passing of the decree and therefore he could not have made an application to have the sale set aside within 30 days of the sale and therefore the delay in making the application should be excused. None of the cases to which I have already referred have any direct bearing upon the present case.

In *Muthiah Chettiar v. Bava Sahib*(1) it was held that the application to set aside a sale under section 47, Civil Procedure Code, was governed by article 166 of the Limitation Act. With reference to the question of limitation OLDFIELD, J., observed at page 607 :

"It is not disputed that his petition was presented too late, if it was one under rule 90. If however it was under section 47 it is urged that article 181, Schedule II of the Limitation Act

(1) (1914) 27 M.L.J., 805.

applied and he was in time, the special article 166 covering only applications under rules 89 and 90. This restriction of article 166 corresponds with nothing in its wording, which is absolutely general; and the attempt to impose it has been supported by reference to the fact that the article was substituted for articles 163 and 172 in the prior Act of 1877, which related only to applications under sections 310-A and 311 of the Code then in force. It is stated that this is borne out by the statement of reasons and objects connected with the present Act. But it has not been shown how reference to such a statement is a legitimate or necessary aid to the interpretation of a provision the language of which is clear. The first respondent's application, though it may have been made under section 47, was one to set aside a sale, and under article 166 it must be held to have been out of time."

With the reasoning of the learned Judge I fully concur. In *Neelu Neithiar v. Subramania Moothan*(1) it was held that article 166 was the proper article applicable to an application to set aside a sale. The learned Judges observe at page 62 :

"It is then contended that, as the petitioners were parties to the litigation, the article of Schedule I of the Limitation Act to be applied is No. 181, not No. 166. This is contended, with reference to the recent decision of the Full Bench (now reported in *Vachali Rohini v. Kombi Aliassan*(2)). But that decision dealt with a claim to apply article 165; and we do not think that its application and that of article 166 stand on the same footing or can be dealt with on similar considerations. We have not been shown reasons for restricting the very comprehensive wording of the latter to exclude the present case."

Another Bench of this Court held the same view in a case reported in *Kamayya v. Ramamma*(3). In *Ganapathi Mudaliar v. Krishnamachari*(4) it was held that article 166 of the Limitation Act was the proper article to apply

(1) (1920) 11 L.W., 59.

(3) (1922) 16 L.W., 934.

(2) (1919) I.L.R., 42 Mad., 753 (F.B.).

(4) (1922) 43 M.L.J., 184.

PARAMASIVA
THEVAR
v.
POLU-
KARUPPA
THEVAR.
—
DEVADOSS, J.

PARAMASIVA
THEVAR
v.
PULU-
KURUPPA
THEVAR.
—
DEVADOS, J.

to the application to set aside the execution sale, whatever its nature, whether it fell under section 47, Civil Procedure Code, or under Order XXI, rule 90. The learned Judges observe at page 189 :

"The wording of article 166 is unrestricted and we do not consider that we are at liberty to impose restrictions, which nothing in it suggests. It, no doubt covers, only applications under the Code ; but that is immaterial, as in the present case the controversy is between the parties and an application instead of a suit, is authorized by section 47. We therefore hold that article 166 of Act IX of 1908 is applicable."

The same view has been held in *Satish Chandra Kanungo v. Nishichandra Dutta*(1). There also the learned Judges refused to uphold a contention that article 166 should be restricted to cases falling under Order XXI, rules 89 and 90. They observe at page 977 :

"It is argued for the appellant that article 181 of the Limitation Act applies and not article 166. There appears to be no good reason for limiting the scope of article 166 to applications under Order 21, rules 89, 90 and 91 of the Civil Procedure Code. The article is perfectly general in its terms and refers to an application under the Code to set aside a sale in execution of a decree."

The same view was held by the Patna High Court—vide *Babu Das Narayan Singh v. Muhammad Yusuf*(2). Following these decisions I hold that this application is barred by limitation under article 166 of the Limitation Act. The appeal therefore fails and is dismissed with costs.

K.R.

(1) (1919) I.L.R., 46 Cal., 975.

(2) (1921) 61 I.C., 823.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri.

R. GOPALAKRISHNA PILLAI (PETITIONER), PETITIONER,

1923,
September 10

v.

KUNJITHAPATAM PILLAI AND THREE OTHERS
(RESPONDENTS), RESPONDENTS.*

Madras Local Boards Act (XIV of 1926)—Election Rules, rule 4—Application to set aside an election to Taluk Board—Application made more than 14 days after date of election—Application to Court on re-opening day—Chelan obtained on that day—Money paid into Bank three days after—Delay of Treasury officer—Delay caused by accident—Negligence—Nunc pro tunc—Payment into Court, whether necessary—Civil Rules of Practice, rule 131—Effect of producing money in Court and obtaining chelan.

An application to set aside an election as a member of a Taluk Board held on the 9th May 1922 was filed in the Sub-Court on the 17th July 1922 which was the date on which the Court re-opened after having been closed for summer recess from the 14th May 1922. The applicant brought the money required to be deposited in Court along with the application and applied for a chelan to pay it into the Bank as required by rule 131 of the Civil Rules of Practice. But the money could not be paid into the Bank on that day, owing to the absence of the Treasury officer who was to check the chelan before payment into the Bank. On the next day the applicant presented the chelan to the Treasury officer at 1-50 p.m. as he was delayed by an unforeseen carriage accident, and he could not get to the Bank to pay within time on that day, and had to pay and paid it only on the next day. On objection being taken by the respondent that the application was not validly made under the Election Rules made under the Local Boards Act,

Held, that a person is not guilty of negligence when he would in the ordinary course of things have arrived in time for payment and the delay was due to an accident which he could by no means have foreseen. *Arunachala Ayyar v. Subbaramiah* (1923) I.L.R., 46 Mad., 60, referred to ;

* Civil Revision Petition No. 907 of 1923.

GOPALA-
KRISHNA
PILLAI
v.
KUNJITHA-
PATAM
PILLAI.

that the rule of law that nobody should be prejudiced by the acts of Courts or its officers is of universal application, and governs applications to set aside elections; it is not a question of excusing delay, but there is no delay at all; *Koilpillai Samban v. Sappanimuthu Samban*, (1923) 17 L.W., 187, referred to; that where a person, who is bound to pay money, produces it in Court and complies with the rule which requires him to take out a chelan and pay the money at a different place and there is a delay in the actual payment of the money into the Treasury or Bank owing to reasons beyond his control, the payment must be deemed to have been made on the date the money was produced and the chelan obtained in Court;

and that the petition was validly presented under rule 4 of the Election Rules made under the Local Boards Act.

PETITION under section 115 of the Civil Procedure Code and section 107 of the Government of India Act to revise the order of C. S. MAHADEVA AYYAR, Subordinate Judge of Cuddalore, in Original Petition No. 10 of 1922.

The first, second and third respondents were elected as members of the Taluk Board in an election held on the 11th May 1922. The petitioner filed an objection petition in the Subordinate Judge's Court of Chingleput on the 17th July 1922, which was the day on which the Court re-opened after it had remained closed for the summer recess from the 14th May 1922. The petitioner had brought with him to Court the sum of Rs. 200, which was required to be deposited along with the petition under the rules made by the Government under the Local Boards Act, 1920. The petitioner applied for and obtained a chelan for payment of the amount into the Branch of the Imperial Bank at Cuddalore; the chelan was issued by the Court only at about 5 minutes to 3 p.m. on that day, and was at once taken to the Treasury officer, who had to check and pass it before payment into the Bank. The Treasury officer was not in his place and the chelan could not be passed on that day; on the next day owing to a carriage accident the petitioner took the

GOPALA-
KRISHNA
PILLAI
v.
KUNJITHA-
PATAM
PILLAI.

money and chelan to the Treasury officer at 1-40 p.m., the chelan was checked and delivered to the party at 2-40 p.m., and the person taking the money and chelan arrived at the Bank (which was at a distance of 2½ miles) at 5 minutes after 3 p.m., when the Bank was closed for receipt of money; and the money was paid only on the next day. The respondents objected that the petition was not validly presented in the lower Court as required by the rules as the amount was not paid on the date of filing the petition, and as the amount was not actually deposited in the Court or even tendered to the Subordinate Judge so as to satisfy the rules made under the Local Boards Act, and further that the petitioner was guilty of negligence in making the payment and that the delay could not be excused. The Subordinate Judge upheld the objection that there was negligence with regard to the conduct of the petitioner on the 18th May, and dismissed the petition as incompetent. The petitioner preferred this Civil Revision Petition to the High Court.

T. R. Ramachandra Ayyar and *S. Ramaswami Ayyar* for petitioner.

S. Muthiah Mudaliyar and *C. Padmanabha Ayyangar* for respondents.

JUDGMENT.

After stating the facts, his Lordship proceeded:—Rule 131 of the Civil Rules of Practice requires a person desirous of paying money into Court to bring into Court a lodgment schedule in the form prescribed by the rules, containing the various particulars mentioned therein. Thereupon an order for lodgment and counterfoil receipt are to be issued to the payer. Rule 132 states that the payer shall deliver the money and the order and the counterfoil receipt to the Bank or Treasury officer mentioned therein who is to retain the order and return the receipt duly signed by him

to the payer, which receipt the payer should return to the Court. Rule 133 provides that if the Bank or the treasury is closed, the money may, with the leave of the Judge, be paid to the officer of the Court and the officer of the Court will send it to the Bank the next day. As the Bank was open at the time of the presentation of the petition, the vakil, in pursuance of the Rules of Practice, obtained a lodgment schedule. The Judge on receipt of the petition passed an order for the issue of chelans and chelans were issued on that day. As there is a branch of the Imperial Bank of India at Cuddalore, the chelans issued by the Court had to be taken to the officer in charge of the treasury, checked by him and then taken to the branch of the Imperial Bank. The chelans were issued at about 5 minutes to 3 and they were taken at once to the treasury, but the Treasury officer was not there. As the Bank would not receive the money after 3 o'clock it was impossible to pay the money into the Bank on that day. The money was returned to the vakil for the petitioner. He and the members of his family were then staying at Tiruvendipuram about four miles from the Court-house and the Treasury office and he took the money with him in order that it may be paid the next morning. The money was sent the next day from Tiruvendipuram to the Treasury officer with the chelans and the Treasury officer returned the chelans at about 2-40. As the Bank was about 2½ miles from the Treasury office, the person taking the chelans and the money to the Bank arrived at the Bank at 5 minutes after 3, but the Bank would not receive the money and it was therefore paid the next day. On the 18th the person taking the money to the Treasury officer went in a jutka. There was an accident to the horse and it was therefore about 1-50 p.m. when the person reached the Treasury office. There would have been, however, ample time to have

gone to the Bank if the Treasury officer had not taken nearly an hour to return the chelans to the person who brought the money. The Subordinate Judge is of opinion that so far as the 17th is concerned the delay was unavoidable but thinks that the delay on the 18th has not been properly explained.

There can be little doubt that if there was no accident to the horse, there would not have been a delay of five minutes on the 18th and that the money would have been received by the Bank. The trouble was that owing to the delay the person who had the money reached the Bank at 3-5 while according to the rules of the Bank no money would be received after 3 p.m. I do not think that the view taken by the Subordinate Judge is correct. It is not reasonable to hold that a person is guilty of negligence when he would, in the ordinary course of things, have arrived in time for payment and the delay of five minutes was due to an accident which he could by no means have foreseen. In this connexion I need only refer to the judgment of the Chief Justice in *Arunachela Ayyar v. Subbaramiah*(1). The learned Chief Justice observes :

"The question to be considered by the Court is not whether by some human possibility, being wise after the event, he could not have got there in time and once the Court is satisfied, as was the fact in this case, that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court, in my judgment, to set aside the judgment, making, in proper cases, the delinquent man in costs."

It is no argument to say that where a man leaves in time and would in the ordinary course have reached the Bank in time, he would in spite of the accident have reached before the Bank was closed if he had started earlier, or if the jutka horse had run faster. The question remains

(1) (1923) I.L.R., 46 Mad., 60.

GOPALA-
KRISHNA
PILLAI
v.
KUNJITHA-
PATAM
PILLAI.

for consideration is whether even in cases where there is no negligence and where the applicant has complied with the rules, the application should be dismissed because the money was not paid into Court with the application whatever the reason may be.

Rule 4 of the Election Rules framed by the Government under the Madras Local Boards Act enacts that the amount should be deposited at the time of the presentation of the petition and that if it was not deposited the petition should be dismissed. The contention of the respondents is that in such cases the money should be paid in and that even if the chelans had been taken and the money paid into the Bank a few minutes later, the petition would still have to be dismissed as the presentation of the petition and the payment of the money were not simultaneous. This construction, so far as I can see, has nowhere been placed on the rules. In *Krishnaji Reddiar v. Muthuveera Reddiar*(1), KRISHNAN, J., though he held that no question would arise as to the Court excusing the delay the provision in the rule being mandatory, took the view that if the failure to pay the money was due to any action taken by the Court, the petition would be proper. The Rules of Practice are binding on all Civil Courts and where the rules provide that a chelan must be obtained and money paid into the Bank, unless at the time of making the application to receive the money the Bank is closed, it is difficult to see how the Court could receive the money in violation of the Rules of Practice which have the force of law and are binding on all Civil Courts. The Subordinate Judge in paragraph 12 of his judgment observes that the vakil was perfectly justified in putting in a lodgment schedule and taking out the chelan without

(1) (1928) 44 M.L.J., 344.

GOPALA-
KRISHNA
PILLAI
v.
KUNJITHA-
PATAM
PILLAI.

tendering the money to the Judge. It cannot therefore be said that the petition ought to be dismissed because the money was not paid in cash. It is argued that although the vakil produced the money before the Judge he did not formally ask the Judge to receive the money; but it seems to me that no object would be gained by making a request which under the Rules of Practice the Judge is bound to refuse. I am of opinion that where a person who is bound to pay money produces the money in Court and complies with the rule which requires him to take out a chelan and pay the money at a different place and there is a delay in the actual payment of the money into the Treasury or Bank owing to reasons beyond the control of the person making the payment, the payment must be deemed to have been made on the date the money is produced and the chelan obtained. To hold otherwise would be to penalise a party for events beyond his control. In *Koillpillai Samban v. Sappanimuthu Samban*(1), which was a case under section 17 of the Provincial Small Cause Courts Act, the provisions of which have been held to be mandatory, RAMESAM, J., observes as follows:—

“I hold that when the party has applied for a chelan and the delay in issuing the chelan is the delay of the officers of the Court and after the issue of the chelan he deposited the money immediately, the maxim *nunc pro tunc* applies and the application for chelan (in such circumstances) is equivalent to deposit.”

With these remarks I entirely agree. Whether the payment is to be made under the Small Cause Courts Act or under the Election Rules it will, in my opinion, be contrary to all principles of justice to require a man to comply with the rules which insist on the taking out of a chelan and paying the money to a different officer and then to dismiss the application on the ground that

(1) (1928) 17 L.W., 187.

GOPALA-
KRISHNA
PILLAI
v.
KUNJITHA-
PATAM
PILLAI.

the money ought to have been paid to the Judge himself or to hold that the payment to the officer contemplated by the rules would not be equivalent to the compliance with the rules where the delay in payment is entirely due to causes beyond the control of the person taking out the chelan. The Subordinate Judge finds that if the money had been paid on the 18th of July, i.e., the next day, the delay would have been justified, but he thinks that because it was not paid on the 18th owing to the accident which happened to the jutka which caused the person making the payment to be five minutes late in the Bank, there was no ground for excusing the payment the very next day. I have already given my reasons for holding that the accident was one which the person could not have foreseen and that there was no negligence on the part of the person making the payment.

It has been argued that the provision of section 5 of the Limitation Act would not apply and that consequently the Court has no power to excuse the delay. The question is not one of excusing any delay. The question is whether in the present case the rule of law that nobody should be prejudiced by the acts of the Court or of its officers is one of universal application. It does not depend upon any of the provisions of the Limitation Act and this rule is applied to cases under Order XXI, rule 89, of the Civil Procedure Code, to set aside sales on depositing the money into Court.

In the result, I set aside the order of the Subordinate Judge and direct him to restore the petitions to his file and dispose of them according to law. The respondents will pay the petitioners their costs of these petitions in this Court.

K.B.

APPELLATE CIVIL.

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

VENKAT REDDY (FOURTH DEFENDANT), APPELLANT,

1923,
October 25.

v.

KUNJAPPA GOUNDAN AND FOUR OTHERS (PLAINTIFF AND
DEFENDANTS 1, 2, 3 AND 5), RESPONDENTS.*

Mortgage-decree—Suit for sale on a mortgage—Parties—Non-joinder, effect of—Purchaser of equity of redemption in part of the mortgaged properties, not impleaded in the suit—Purchase of entire lands in auction—Purchaser in execution of mortgage decree obstructed by purchaser in execution of money decree, in delivery of possession—Subsequent suit by purchaser for foreclosure or sale—Maintainability of subsequent suit—Mortgage right, whether extinguished as against persons, not parties to prior suit—Transfer of Property Act (IV of 1882), ss. 85 and 89—Amendment of—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 1 and 5—Effect of amendments—Splitting of mortgage—Price of redemption—Decree amount—Interest—Notice to mortgagee of interest of person to be joined as party, whether necessary—Effect of notice on right to subsequent suit.

An auction purchaser in execution of a mortgage decree in a suit for sale on a mortgage, to which the purchaser of a portion of the mortgaged property in execution of a money decree against one of the mortgagors was not joined as a party, is entitled to institute a subsequent suit for sale against the latter, the mortgagor and the mortgagee, whether or not the mortgagee had, at the time of the previous suit, notice of the interest of the latter purchaser who had not been joined as a party.

The purchaser of the equity of redemption, who was not joined in the mortgagee's suit, is not affected by the decree in that suit, and is entitled to redeem on payment of the amount

* Second Appeal No. 1046 of 1922.

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

of that decree with interest thereon at the discretion of the Court; and on his omission to redeem by payment of such amount, the property purchased by him is liable to be sold for realizing the amount.

The effect of the omission in Order XXXIV, rule 1, Civil Procedure Code, of the proviso to section 85 of the Transfer of Property Act relating to the mortgagee having notice of the interest of the person who had to be joined as a party to the suit, and of the omission in Order XXXIV, rule 5, of the words in section 89 of the Act to the effect that on the passing of an order absolute for sale the defendant's right to redeem and the security shall both be extinguished, is that the mortgage is kept alive for all purposes as regards persons having an interest but not made parties to the mortgagee's suit.

Where the mortgagee purchases the whole of the mortgaged property in execution of a decree in his suit on his mortgage without impleading a purchaser of the equity of redemption in a portion of the property, there is no splitting of the mortgage and the purchaser of the equity of redemption is liable to redeem his portion of the mortgaged lands only on payment of the entire decree amount with or without interest as the Court directs.

Sivathi Odayan v. Ramasubbayyar (1898) I.L.R., 21 Mad., 64, followed; *Het Ram v. Shadi Ram* (1918) I.L.R., 40 All., 497 (P.C.) and *Sukhi v. Gulam Safdar Khan* (1921) I.L.R., 48 All., 469 (P.C.), referred to.

SECOND APPEAL against the decree of S. RANGANADHA MUDALIYAR, Subordinate Judge of Vellore, in A.S. No. 72 of 1921 preferred against the decree of S. VARADACHARI, District Munsif of Tiruppattur, in Original Suit No. 381 of 1919.

The material facts appear from the judgment. The District Munsif passed a decree for sale of the lands which had been purchased by the fourth defendant in execution of a money decree in O.S. No. 233 of 1914 and had been put in his possession in 1915 prior to the mortgagee's suit (O.S. No. 156 of 1917). It appeared that the mortgagee was aware of the fourth defendant's interest and yet did not implead him in his suit. The

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

District Munsif held that the fourth defendant should pay as the price of redemption the principal and interest as specified in the bond together with subsequent interest at 6 per cent from the date fixed for payment, and that on default the lands in the possession of the fourth defendant should be sold for realizing such amount. On appeal the Subordinate Judge confirmed the decree and dismissed the appeal. The fourth defendant preferred this second appeal.

Somayya for appellant.—The plaintiff is not entitled to recover possession on foreclosure or sue for sale once again in a second suit on the same mortgage. The mortgage had been extinguished by the previous sale in execution. See *Het Ram v. Shadi Ram*(1). The mortgagee had notice of the interest of the fourth defendant (appellant) before he instituted his suit. The proviso to section 85 of the Transfer of Property Act bars a subsequent suit if the mortgagee had notice of, and yet did not implead, the person having interest to redeem. In any event the fourth defendant is not bound to pay the whole decree amount as the price for redemption of a portion of the hypotheca purchased by him.

Patanjali Sastri for respondent.—The second suit for foreclosure or sale is not barred in law, against a person who was not a party to the previous suit. The decision of the Privy Council in *Het Ram v. Shadi Ram*(1) is under the old law contained in the Transfer of Property Act, sections 85 and 89. Those sections have been amended and the proviso as to notice and extinction of security have been omitted in Order XXXIV, rules 1 and 5, Civil Procedure Code, respectively. The decision of the Privy Council in *Het Ram v. Shadi Ram*(1) is not applicable to the present

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

case. Moreover that decision of Privy Council has been explained in the later decision of the Board in *Sukhi v. Ghulam Sajdar Khan*(1).

The fourth defendant is bound to pay the entire decree amount in the previous suit together with subsequent interest at 6 per cent from date of that decree at least, if not the amount at the contract rate until date of this suit.

JUDGMENT.

The fourth defendant is the appellant. The suit as originally framed was one for foreclosing a mortgage executed by the first defendant and the father of the second and third defendants on the 3rd of April 1914 in favour of the fifth defendant. The fourth defendant was the auction purchaser of one-half of the properties mortgaged in execution of a money decree obtained against the father of the second and third defendants. He was not made a party to the suit on the mortgage. A decree was passed in the mortgage suit (O.S. No. 156 of 1917 filed by the fifth defendant) on the 5th of October 1917 for Rs. 723-7-9 with costs and future interest. The plaintiff became the purchaser of the properties in execution of the mortgage decree for Rs. 757 on the 3rd of July 1918. When he attempted to take possession of the properties, the fourth defendant resisted the claim in so far as the half share of defendants two and three was concerned and the plaintiff was referred to a suit. He then filed the present suit out of which this second appeal arises.

The prayers in the plaint are that the plaintiff's rights as auction purchaser may be declared; that the fourth defendant may be directed to pay the plaintiff the balance of the mortgage debt and interest from the date

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

of the mortgage up to the date of the plaintiff's sale which he says amounts to Rs. 867-8-0 with future interest and then to redeem the plaintiff's properties, that in the event of the properties not being redeemed, the fourth defendant should be deemed to have lost his equity of redemption and that on the happening of such an event the fourth defendant should be directed to deliver possession of the properties to the plaintiff. A prayer was subsequently added asking for a sale of the properties if they are not redeemed and possession given and for the recovery of any balance from the defendants.

The first defendant filed a written statement pleading that he is not in possession of the plaintiff's properties, that he never obstructed the plaintiff from taking possession and that there is no cause of action against him. Defendants 2 and 3 filed no written statements. The fourth defendant filed a written statement pleading *inter alia* that his father bought one-half share in the plaintiff's properties in Court sale and was put in possession, that his father was and after his death he, the fourth defendant, is in lawful possession, that the plaintiff and his mother-in-law (the mortgagee) had notice, that, although they had notice, the plaintiff in O.S. No. 156 of 1917 when she sued on the mortgage did not implead the fourth defendant as a party, that the decree in that suit does not bind the fourth defendant, that when a final decree was passed in the mortgage suit the mortgage became extinguished and no cause of action exists as on the mortgage, that he never obstructed the plaintiff from taking possession of the properties, that a suit for foreclosure would not lie as the mortgage was a simple mortgage, that the plaintiff does not derive any rights under the mortgage he being simply an auction purchaser in a Court sale and not a party to the original mortgage, that even assuming that the fourth defendant has to

(1) (1921) I.L.R., 48 All., 400 (P.O.).

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

redeem he is not bound to redeem the whole mortgage, that the persons whose share he bought were divided from the first defendant and they received only Rs. 100 out of the mortgage money and that he is only bound to pay Rs. 100 and not the whole amount due on the mortgage, if he should be directed to redeem the property. On the amendment of the plaint by adding a prayer for sale, an additional written statement was filed by the fourth defendant pleading that the plaintiff had no right to bring the properties to sale, that his claim for such a relief was barred by limitation, that the mortgage was discharged before the date of the suit and that there was no mortgage on which any decree could be passed.

The District Munsif passed the usual mortgage decree for sale in favour of the plaintiff for Rs. 1,041-13-7 with costs and further interest. An appeal was filed by the fourth defendant against this decree which was dismissed by the Subordinate Judge.

The two questions arising for determination in the Second Appeal are whether the plaintiff, who is only an auction purchaser in execution of a mortgage decree, can sue on the original mortgage either for foreclosure or sale and if so whether he can recover the whole amount due on the mortgage or only the difference between the amount for which he purchased the properties and the value of the property which is in the possession of the fourth defendant, he having admittedly got possession of the other half of the properties.

There can be little doubt on the facts that, the original mortgagee not having made the fourth defendant a party to the mortgage suit, the right of the fourth defendant to redeem would not be extinguished and the fourth defendant would have all the remedies open to him which he would have had if he had been made a

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

party. It is contended by the appellant that the plaintiff in the mortgage suit, who had notice of the fourth defendant's rights, not having joined him but having elected to proceed to sell the properties in his absence and to obtain a final decree against the original mortgagors for any balance, cannot now proceed as regards the property in the possession of the fourth defendant who claims as the son of the auction purchaser in execution of a money decree against defendants 2 and 3 who admittedly were entitled to a half share in the properties. We do not think that this contention is sound. Order XXXIV, rule 1, of the Civil Procedure Code, enacts that subject to the provisions of the Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. It does not give the consequences of the failure to join and we think that in such cases the only effect would be that the person not joined would not be affected by any decree that may be passed and would be entitled to enforce such rights as he might have had against the original mortgagor and the mortgagee or the auction purchaser in execution of a decree obtained by the mortgagee without joining the other encumbrancers or persons entitled to the property.

In dealing with this question it should be remembered that section 85 of the Transfer of Property Act contained a proviso that the plaintiff should have notice of the interest of the persons whom the section says he ought to join. But sections 85 to 90 were repealed by and incorporated in Order XXXIV of the Civil Procedure Code. Order XXXIV, rule 1, which corresponds to section 85 does not contain any proviso but simply states that subject to the provisions of the Code all persons having an interest either in the

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. Section 89 of the Act which prescribed the procedure to be followed when the defendant fails to pay the amount due into Court enacted that the plaintiff may apply to the Court for an order absolute for sale of the mortgaged property and proceeded as follows:—

“And the Court shall then pass an order that such property or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section 88: and thereupon the defendant's right to redeem and the security shall both be extinguished.”

This section has been re-enacted as Order XXXIV, rule 5, of the Code and the words in section 89 of the Transfer of Property Act to the effect that the defendants' right to redeem and the security shall both be extinguished on an order absolute being passed are omitted and consequently the mortgage is kept alive for all purposes as regards persons having an interest but not made parties to the mortgage suit.

It is difficult to see how a second suit against a person not impleaded in the previous suit would be barred under any of the provisions of the Civil Procedure Code. It is no doubt true that the first mortgagee who had notice of a puisne encumbrance could have impleaded that puisne encumbrancer in the suit on the first mortgage but the failure to do so would not necessarily bar the second suit against the puisne encumbrancer unless there is anything in the Code barring such a suit. The cause of auction is not the same as in the previous suit nor would the points to be decided necessarily be the same.

In *Sukhi v. Ghulam Safdar Khan*(1) their Lordships of the Privy Council held that the rights of a puisne

(1) (1921) I.L.R., 43 All., 469 (P.C.).

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

mortgagee not made a party to a previous suit on the mortgage to enforce the security are not affected by the fact that a prior mortgagee obtains a decree for sale on his mortgage and brings the property to sale in execution. They also held that if a puisne mortgagee files a suit on his own mortgage, the auction purchaser in execution sale in a suit on a prior mortgage can use the prior mortgage right as a shield and claim payment of the amount due under the prior mortgage decree as a condition of a decree for sale in favour of the puisne mortgagee and pointed out the change effected by Order XXXIV, rules 3 and 5 of the Code, which do not re-enact the last portion of section 89 of the Transfer of Property Act and distinguished the case of *Het Ram v. Shadi Ram*(1) on the ground that that decision proceeded on section 89 of the Transfer of Property Act. It is therefore unnecessary to consider the decisions cited by the appellant's *vakil* which were based on the view that on the making of an order absolute on a mortgage decree the mortgage is extinguished. It has been held that a mortgagee not made a party to a suit by another mortgagee can file a separate suit on his own mortgage. In *Rangasami Naiken v. Komarammal*(2) the property was first mortgaged to the plaintiff and then to the third defendant in the suit. The plaintiff brought a suit on his mortgage without making the third defendant a party and obtained a decree and the share of the first defendant was sold in Court auction and purchased by the plaintiff who filed a suit for partition and for the recovery of the first defendant's share. The third defendant contended that he was entitled to redeem the plaintiff and it was held that the plaintiff was not entitled to possession without redeeming the third defendant and that it was

(1) (1918) I.L.R., 40 All., 407 (P.C.). (2) (1903) I.L.R., 26 Mad., 494.

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

immaterial whether the plaintiff's failure to join the third defendant as a party to the previous suit was wilful or due to ignorance. In *Goverdhana Doss v. Veerasami Chetti*(1) reported at page 537 of the same volume the plaintiffs who had the first and second mortgages of the same property sued their mortgagors, obtained a decree, brought the property to sale and purchased it. They did not make the third mortgagee a party to that suit. The plaintiffs then filed a suit against the mortgagors and the third mortgagee and prayed that the third defendant might be decreed to pay them the amount due under their decree and that, in default, it be declared that he is debarred of his right to redeem the prior mortgage, and that he be ordered to surrender possession of the property to the plaintiffs. It was held that the right of the third mortgagee was not affected either by the decree or the sale, that the only effect of the sale was to transfer to the purchaser the equity of redemption of the mortgagor and that the only right which the third mortgagee could exercise was that which he could have claimed to exercise if he had been a party to the suit on the prior mortgage, namely, the right to redeem that mortgage with the view of enforcing his own mortgage. In *Ram Prasad v. Bhikari Das*(2), which was a case of a stranger purchaser, property subject to a mortgage was sold by auction in execution of a simple money decree and the purchasers were put in possession. A suit was then filed by the mortgagee for sale on his mortgage without making the previous auction purchasers as parties and a decree was obtained in execution of which the property was again sold and purchased by a third party. It was held in a suit by the purchaser at the sale held in execution of the mortgage decree

(1) (1903) I.L.R., 26 Mad., 537.

(2) (1904) I.L.R., 26 All., 464.

VENKAT-
REDDY
v.
KUNJAPPA
GOUNDAN,

claiming payment of the amount due under the mortgage or in default possession of the mortgaged property that the person who purchased the property in execution of the money decree must be allowed to redeem on payment of what was found due on the mortgage at the time the mortgage decree was passed and that if the payment was not made within the time fixed the plaintiff was entitled to a decree for foreclosure and possession of the property. *Goverdhana Doss v. Veerasami Chetti*(1) was cited with approval. In *Sham Dei v. Baljit Singh*(2) a prior mortgagee brought the whole of the mortgaged property to sale without impleading a subsequent mortgagee of a portion and purchased the property himself. The subsequent mortgagee brought a suit in respect of the portion mortgaged to him without impleading the prior mortgagee and became the purchaser of the portion. The prior mortgagee who was unable to get possession from the subsequent mortgagee filed a suit to bring the property to sale for the realization of the unrecovered balance of the original mortgage money. It was held that a suit was maintainable by him and was not barred either by section 13 or 43 of the Civil Procedure Code, 1882.

In *Chinnu Pillai v. Venkatasamy Chettiar*(3) SRINIVASA AYYANGAR, J., after an exhaustive review of the authorities observed as follows :—

“ If the view which I have set forth is correct, in the case where the first mortgagee had omitted to make the second mortgagee a party, and proceeded to sale, the purchaser whether himself or another, can bring a fresh suit for sale making the second mortgagee a party ; or he can as a defendant when the second mortgagee institutes a suit for sale, insist on a sale of the property free of his mortgage, or if he had not proceeded to sale before the second mortgagee's sale, he can, though not

(1) (1903) I.L.R., 26 Mad., 537.

(2) (1910) I.L.R., 32 All., 119.

(3) (1917) I.L.R., 40 Mad., 77.

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

made a party, get the necessary relief by applying for sale free of encumbrances in the second mortgagee's suit."

Reference was made to the observations of SADASIVA AYYAR, J., in *Lakshmanan Chetty v. Muthayya Chetty*(1) where the learned Judge after referring to *Jugdeep Singh v. Habibullah Khan*(2) observes that he was inclined to hold.

"that where the first mortgagee had notice of a second mortgage (which he must be presumed to have where the second mortgage is registered) and where he omits to make the second mortgagee a party as he was bound to do under section 85 of the Transfer of Property Act and Order XXXIV, rule 1, of the present Civil Procedure Code, he ought not to be allowed to bring a second suit for sale against the second mortgagee with or without the addition as party of the original mortgagor against whom he had already obtained a decree, simply because he finds his first decree valueless against the second mortgagee and is confronted with difficulties owing to the second mortgagee's putting forward his rights. It is however unnecessary to pursue this point further for the decision of this case."

These observations are obiter, and we may point out that the recent decision of the Privy Council in *Tilakdhari Lal v. Khendan Lal*(3) has now settled the law that registration is not notice. We have already pointed out the difference in words between section 85 of the Transfer of Property Act and Order XXXIV, rule 1, of the Civil Procedure Code. In view of the decisions which we have referred to above, we do not think that a second suit would be barred. The result of the authorities is where a mortgagee makes all the necessary persons parties and obtains a decree and sells the mortgaged property, the purchaser acquires the equity of redemption of the mortgagor and the property is sold free from the mortgage rights of the mortgagee in the working out of which rights the property is sold and the purchaser is entitled, if necessity arises, to take advantage

(1) (1921) 40 M.L.J., 126.

(2) (1907) 6 C.L.J., 612.

(3) (1921) I.L.R., 48 Cal., 1 (P.C.).

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

of the lien which the mortgagee had and use it as a shield against the claims of third persons. Where the owner of the equity of redemption is not made a party, it still remains in him and different considerations would arise.

This being the state of the law as regards puisne and subsequent encumbrancers, the question arises as to what the rights of a purchaser in a Court sale are where the purchaser purchases the items of property mortgaged in execution of a decree to which a prior purchaser in execution of a simple money decree obtained after the mortgage of a portion of the mortgaged property has not been made a party. Where the purchaser in execution of a mortgage decree has purchased the property for an amount equal to or more than the amount due on the mortgage, the mortgagee who receives the purchase money is fully satisfied and has no further claims on the mortgage which is discharged and it can only be kept alive for purposes of being used as a shield against the claims of third persons.

So far as the present plaintiff is concerned he is a purchaser in Court sale in execution of a mortgage decree and the price paid by him was sufficient to discharge the mortgage debt. The purchase by the fourth defendant was subsequent to the mortgage and in execution of a simple money decree. If he had been made a party he would have no right except the right to redeem the mortgage and if he did not do so, the sale in execution of the mortgage decree would have conveyed his interest also in the property. As we are of opinion that it is open to the purchaser as the assignee in law of the rights of the original mortgagee by virtue of his purchase in Court sale to institute a second suit as against persons who were not parties to the prior suit, it is clear that he has got the same rights as the

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

original mortgagee would have had if he had filed a suit and the defendant cannot be in a better position than he would have been if he had been made a party to the original mortgage decree in execution of which the property was sold.

The next question is as to the amount payable by the fourth defendant. In *Sivathi Ottayan v. Ramasubbayyar*(1) three items of property were mortgaged to a person for Rs. 5,000. Two of the items were sold and the proceeds applied towards the discharge of the mortgage. The third item was sold for Rs. 990, but the money was not paid towards the discharge of the mortgage and the person to whom the third item was sold transferred his right to the defendants in that suit. The original mortgagee filed a suit on the mortgage without making the transferees of the third item as parties. A decree was passed as regards the third item for Rs. 1,050, the amount then due on the mortgage against the original mortgagor and the intermediate transferees and the land was sold and purchased by the plaintiff for Rs. 270. The purchaser filed a suit for possession of the property against the defendants who were entitled to the third item of property. It was held that the defendants who were not parties to the previous suit were entitled to redeem on payment not of Rs. 270 the amount for which the plaintiff purchased the item of property in dispute but of Rs. 1,050 the amount due under the decree. SUBRAHMANYA AYYAR and BENSON, JJ., after referring to Fisher on Mortgages, 5th Edition, section 1734, *Davis v. Barrett*(2) and *Macrae v. Goodman*(3) held that a person who was not made a party to a previous litigation on a mortgage was bound to pay not merely the sum actually paid by the auction

(1) (1898, I.L.R., 21 Mad., 64.

(2) (1851) 14 Beav., 524.

(3) (1848) 5 M.P.C.C., 315.

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

purchaser at the Court sale in execution of the decree in the previous suit but the amount actually due and payable on the mortgage so far as that item was concerned.

It is contended for the appellant that section 60 of the Transfer of Property Act applies to the present case and that the appellant is entitled to redeem the property purchased by him in Court sale in execution of the money decree on payment of the proportionate amount as the item sold to him was liable to contribute rateably to the debt secured by the mortgage. Reference has been made to *Venkatasami Naicken v. Ramanathan Chettyar*(1). In that case some items of property were mortgaged and the mortgagee in execution of the mortgage decree purchased four items himself. Before the date of the mortgage decree one of the items purchased by the mortgagee was sold by the mortgagor to the appellant in that case who was not made a party to the suit brought by the mortgagee. It was held that the mortgagee must be taken to have split up his security and precluded himself from objecting to an apportionment, that the appellant was entitled to redeem his own share only on payment of the proportionate amount which the item sold to him was liable to contribute rateably to the debt secured by the mortgage, and that the mortgagee was entitled to interest according to the mortgage deed and not according to the decree. The learned Judges treated the sale in execution of the mortgage decree as valid and observed as follows:—

“Treating the sale then as valid, the mortgagee has acquired by purchase the interest of the mortgagor in some of the items and there is no doubt that he must be taken to have split up his security and precluded himself from objecting to an apportionment. It was then contended that the appellant must at

(1) (1910) 8 M.L.T., 409.

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

least pay the proportionate share of the debt chargeable on the items other than those which he has purchased. When the mortgagee has split up his security and precluded himself from objecting to an apportionment, we are of opinion that he is not entitled to insist upon the appellant redeeming more than his own share on payment of the proportionate amount which item No. 4 (purchased by the appellant) is liable to contribute rateably to the debt secured by the mortgage. The words of section 60 of the Transfer of Property Act are in favour of the view."

Reference has also been made to *Moro Raghunath v. Balaji Trimbak*(1). In this case the plaintiff purchased part of the lands comprised in his mortgage in execution of the mortgage decree obtained by him. The other parts of the land were in possession of third persons and were purchased by them. The contention raised was that the plaintiff having purchased part of the lands comprised in the mortgage could not seek to burden the remaining lands included in the mortgage with the whole of the mortgage debt but that only a proportionate part of the debt must be satisfied. This contention was upheld. These cases are distinguishable as in the present case the mortgagee purchased in execution of his decree all the items of property mortgaged and has done nothing which would indicate an intention of splitting up his security. We think that the present case falls within the ruling in *Sivathi Odayan v. Ramasubbayyar*(2) above referred to.

As regards the amount payable it will be the amount of the decree in execution of which the property was purchased by the present plaintiff.

As regards the interest, the plaintiff has been in possession of one-half of the property as to which no objection has been taken. The whole difficulty has arisen out of the plaintiff's default in not making the

(1) (1889) I.L.R., 13 Bom., 45.

(2) (1898) I.L.R., 21 Mad., 64.

VENKAT
REDDY
v.
KUNJAPPA
GOUNDAN.

fourth defendant a party to the original mortgage suit. We do not think that this is a case where interest ought to be allowed.

The decree of the Lower Court will be modified accordingly. The parties will pay and receive proportionate costs. No personal decree. Time six months.

K.R.

APPELLATE CIVIL.

Before Mr. Charles Gordon Spencer, Officiating Chief Justice and Mr. Justice Kumaraswami Sastri.

SENGODA GOUNDAN (FIRST DEFENDANT), APPELLANT,

v.

MUTHU GOUNDAN (MINOR), BY NEXT FRIEND KOMARAVELU GOUNDAN AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 TO 5), RESPONDENTS.*

1924,
January 29.

Hindu Law—Partition—Suit by two minor sons for partition against their father—Compromise decree for partition and delivery of two-thirds share—Minor sons, whether thereby divided inter se—Presumption of division—Subsequent death of one of the minor sons—Right of surviving son to share of deceased son by survivorship.

Where some of the members of a joint Hindu family sued for partition and recovery of their shares from the other members of the family, the suit and the decree do not necessarily divide the plaintiffs *inter se*.

Mussamat Jatti v. Banwari Lal, (1923) 45 M.L.J., 355 (P.C.); *Balabux v. Rukhmabai*, (1903) I.L.R., 30 Calc., 725 (P.C.); *Rangusami Naidu v. Sundarajulu Naidu*, (1916) 31 M.L.J., 472; and *Palaniammal v. Muthuvenkatachala Maniagarar*, (1917) 33 M.L.J., 759, referred to.

Where two minor sons of a Hindu father instituted a suit for partition against their father, and a decree was passed on compromise for partition and delivery of two-thirds share to the minor plaintiffs, and a subsequent suit was instituted by the

* Second Appeal No. 767 of 1922.

SENGODA
GOUNDAN
v.
MUTHU
GOUNDAN.

survivor of the two minors, on the death of one of them, to recover possession of the two-thirds share of the lands by division from his father and the other divided co-owners on the ground of subsequent trespass by his father,

Held, that the minors had not become divided *inter se* by the previous suit or the decree ;

and that the plaintiff was entitled to the one-third share of his deceased brother by right of survivorship, and was entitled to recover the two-thirds share in the family properties as against his father and the other divided co-owners.

SECOND APPEAL against the decree of E. H. WALLACE, the District Judge of Salem, in Appeal Suit No. 45 of 1921, preferred against the decree of T. K. GOVINDA AYYAR, the District Munsif of Nāmakkal, in Original Suit No. 1269 of 1918.

The plaintiff, who was a minor son of the first defendant, had instituted a previous suit (Original Suit No. 1936 of 1915) along with his brother who was also a minor and now deceased, represented by a common next friend, for partition and delivery of possession of their two-thirds share in the family lands from their father, the first defendant. The suit ended in a compromise decree for partition and delivery of a two-thirds share in all the family lands against their father. The parties stated that they had effected a division of the properties as per compromise petition. While the minors were in enjoyment of their shares through their next friend, the elder brother died a minor and unmarried. The surviving minor brother instituted the present suit to recover possession of the two-thirds share in the lands of which he was in enjoyment and alleged that his father subsequently trespassed on the entire two-thirds share and that some of the items of the lands were not divided from the lands belonging to the other co-owners who had been already divided from the first defendant. The first defendant contended, *inter alia*, that the minor sons (who were both

SENGODA
GOUNDAN
v.
MUTHU
GOUNDAN.

plaintiffs in the previous suit) must be deemed to have become divided *inter se* by the institution of and decree in the previous suit, and that consequently the present surviving minor brother was not entitled to the one-third share of the deceased minor brother, to which the first defendant claimed to succeed by inheritance. The lower Courts decreed the entire two-thirds share in favour of the plaintiff. The first defendant preferred this Second Appeal.

T. M. Krishnaswami Ayyar for appellant.

T. Rangachariar and V. Venkataravada Ayyangar for respondents.

JUDGMENT.

SPENCER, OFFG. C.J.—This suit is for partition and the question argued before us relates to the plaintiff's claim to succeed to the share of his deceased minor brother by right of survivorship. There was a previous suit by the plaintiff and his brother, both being minors represented by a next friend, for partition, which ended in a compromise decree Exhibit A, dated 24th November 1915. It has been argued before us that, when two persons ask for a partition, it should be implied that they intend to get divided from each other as well as from the joint family to which they belong. Nothing can be gathered from the fact that in the former suit the two minor plaintiffs combined to ask for a partition as to their intention to become divided *inter se*. The right to obtain a partition, though personal, happened to be common to both the plaintiffs and common questions of law and fact arise out of their suing. The mere fact that there was one trial and one decree in the former suit was a consequence of procedure applicable to persons suing under the same cause of action rather than conduct showing an intention to become separated *inter se*.

SPENCER,
OFFG. C.J.

SENGODA
GOUNDAN
v.
MUTHU
GOUNDAN.
SPENCER,
OFFG. C.J.

In *Mussamat Jatti v. Bamwari Lal*(1) the Privy Council quoted a former decision by that body, *Balubus v. Rukhmabai*(2) in which Lord DAVEY remarked that there was no presumption when a co-parcener separates from others that the latter remained united. The agreement to remain united must be proved like any other fact. The Privy Council did not say that there was no presumption in such a case that the other co-parceners became divided, as it was not necessary to do so for that decision. But it seems to me that such is the case. In *Rangasami Naidu v. Sundarajulu Naidu*(3) it was held that the separation of one member of a co-parcenary was not necessarily a separation of the remaining members, and in *Palaniammal v. Muthuvenkatachala Maniagarar*(4), Sir JOHN WALLIS, C.J., and my learned brother held that, if a partition takes place under a decree of Court, the effect of the decree on the remaining co-parceners must be determined by the terms of the decree or by the scope of the suit. I think that SADASIVA AYYAR, J., went too far in *Balakrishna Mudaliar v. Raju Mudaliar*(5), in observing that there was a presumption that, when one of several co-parceners has become divided, the others also have become divided in status. The Privy Council decisions to which he referred do not support such a proposition.

If the effect of the former decree is to be determined by the terms of it, we find from Exhibit A that in the former suit both the plaintiff and his brother had the same next friend to represent them and the decree speaks of their two-thirds share, not of their properties as two shares, each representing one-third of the whole. There was no order that their two-thirds share should

(1) (1923) 45 M.L.J., 355.

(2) (1903) I.L.R., 30 Cal., 725.

(3) (1916) 31 M.L.J., 472.

(4) (1917) 33 M.L.J., 759.

(5) (1195) 27 I.C., 736.

SENGODA
GOUNDAN
v.
MUTHU
GOUNDAN.
SPENCER,
OFFG. C.J.

be divided into separate shares, and no authority has been shown for a guardian of two undivided minors dividing their status so as to make them lose their rights of survivorship to each other. The District Judge observes that the plaintiff and his brother did not sue for division *inter se* and that the decree does not divide their shares, and he formed a conclusion from their conduct that they remained undivided, agreeing with the first Court on that point. I see no reason to interfere with that finding on any point of law. I would, therefore, confirm the decree of the Lower Appellate Court, and, as the other grounds of Second Appeal are untenable and have not been seriously pressed, this Second Appeal must be dismissed with costs.

The Memorandum of Objections, which relates to mesne profits anterior to the date of the institution of the suit, is dismissed with costs.

KUMARASWAMI SASTRI, J.—I agree with my Lord. I think there is no authority for holding that, where two members of a joint family sue for partition, it necessarily divides them *inter se*. The observations of the Privy Council in *Ram Pershad Singh v. Lakhpati Koer*(1), and the decisions of this Court in *Rangasami Naidu v. Sundarajulu Naidu*(2), and *Palaniammal v. Muthuvenkatachala Maniagarar*(3) are clearly against that contention.

KUMARA-
SWAMI
SASTRI, J.

K.B.

(1) (1903) I.L.R., 30 Cal., 231 (P.C.).

(2) (1916) 31 M.L.J., 472.

(3) (1917) 33 M.L.J., 759.

PRIVY COUNCIL.*

1924,
April 7.

KODOTH AMBU NAYAR (PLAINTIFF), APPELLANT,

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), RESPONDENT.[On Appeal from the High Court of Judicature at
Madras.]*Kumri lands—South Kanara—Claim by wargdar against Government—Title of Government to forest tracts and old wastes—Permissive nature of kumri cultivation—Limitation Act (IX of 1908), Sch. I, art. 120.*

There is an undoubted presumption that forest tracts and old wastes belong to the Government unless that presumption is displaced by positive evidence that the right in any particular tract or piece of land has been granted by the sovereign power, or adverse rights have consciously been allowed to grow up.

The plaintiff as karnavan of a Nayar tarwad in South Kanara sued the Government for a declaration that certain kumri lands in the forests belonged to his tarwad. He based his claim upon (a) long enjoyment, as part of his *muli wargs*, (b) acquisition by purchase and (c) adverse possession in proprietary or warg right; he further alleged that the Government was estopped in that the lands had been acknowledged to be warg kumris and had been so registered.

Held, on the facts, that the presumption had not been displaced, the enjoyment of the kumri lands being purely permissive, and that the suit failed. The plaintiff as licensee could not claim title only from possession without proof that the possession was adverse to the Government to its knowledge, and in any case the enjoyment had been for a period far less than the sixty years necessary to bar the Government by limitation.

Although kumri lands are held by *wargdars* whose property is transferable and inheritable, there is no relation or analogy between kumri lands so held and ryotwari holdings.

* Present: Lord SHAW, Lord BLANESBURGH, Sir JOHN EDGE, Mr. AMER ALI and Sir LAWRENCE JENKINS.

Held, further that the suit was barred by the Indian Limitation Act, 1908, Schedule I, article 120, which was the article applicable, since it was not commenced within six years of a definite rejection by the Government of the plaintiff's claim. *Bhaskurappa v. The Collector of North Kanara*, (1879) I.L.R., 8 Bom., 452 and *The Secretary of State for India v. Krishnayya*, (1905) I.L.R., 28 Mad., 257, approved.

APPEAL (No. 53 of 1923) from a judgment and decree (December 11, 1919) of the High Court affirming a decree of the District Judge of South Kanara (August 3, 1917) which affirmed a decree of the Subordinate Judge.

The questions for determination in the appeal were (1) whether the appellant was entitled to a declaration against the respondent that certain kumri lands in South Kanara belonged to his tarwad, and that the respondent was bound to issue to him pattas in respect thereof, and (2) whether the suit was barred by limitation.

The facts appear from the judgment of the Judicial Committee.

The trial Judge, the Subordinate Judge of South Kanara, passed a decree dismissing the suit, and that decree was affirmed by the District Judge. An appeal to the High Court was dismissed after further findings had been called for and submitted.

De Gruyther, K.O. and *Narasimham* for the appellant.

Dunne, K.O. and *Kenworthy Brown* for the respondent.

Reference was made by the appellant's counsel to *Vyakunta Bapuji v. Government of Bombay*(1), and to the *Manual of South Kanara District* (1894), Vol. I, pp. 123, 209, as well as to the two decisions as to kumri lands referred to in the judgment; also to *Baijnath Sahai v. Ramgut Singh*(2) and Act I of 1877,

(1) (1875) 12 Bom. H.O. (O.C.J.), 1.

(2) (1896) I.L.R., 23 Cal., 775 (P.C.); 23 I.A., 45.

KODOTH
AMBU NAYAR
v.
SECRETARY
OF STATE FOR
INDIA.

section 42, as to when time began to run against the appellant.

The JUDGMENT of their Lordships was delivered by

MR. AMEER
ALI.

MR. AMEER ALI.—This appeal arises out of a suit brought by the plaintiff in the Court of the Subordinate Judge of South Kanara on the 25th November, 1913, as the Karnavan, or Manager, of a Nayar tarwad against the Secretary of State for India in Council for a declaration that certain lands situated in the forest tracts in the Kasaragod taluk belong exclusively to his tarwad, and for an injunction restraining the defendant from dealing in any manner with the said lands to the prejudice of the rights and possession of the plaintiff's tarwad.

Their Lordships will have to refer more specifically in the course of their judgment to the allegations in the plaint, but it is sufficient at this stage to indicate the scope of the suit. The defendant denied the title which the plaintiff put forward; and the Subordinate Judge found that the plaintiff had totally failed to establish the grounds on which he based his claim, and accordingly dismissed the suit. The plaintiff preferred an appeal to the District Judge who came to the same conclusion as the Court of first instance and accordingly affirmed the decree of the Subordinate Judge, dismissing the suit. There was a second appeal by the plaintiff from the decree of the District Judge to the High Court of Judicature at Madras which, apparently being of opinion that the District Judge had not sufficiently considered the evidence of possession adduced on the plaintiff's behalf, remanded the case for a fresh finding.

When the case came before the District Judge the second time he again examined the evidence thoroughly, almost meticulously, and came to the conclusion, as on

the previous occasion, that the plaintiff had utterly failed to establish the three propositions on which he based his claim: firstly, long possession; secondly, prescription; and thirdly, recognition by the defendant of the tarwad's title working as an estoppel. He also found in concurrence with the Court of first instance that the suit was barred under the Statute of Limitation. If the suit is barred by limitation on the question of title would not arise. But it appears to their Lordships that it will be more satisfactory to the parties that they should express their opinion on the question of title, before dealing with the question of limitation.

The case then went back to the High Court and the learned Judges accepted, on the 29th January, 1920, the findings of the District Judge and dismissed the suit. The present appeal is from this decree of the High Court.

In order to explain the nature of the present litigation and the contentions advanced on the plaintiff's behalf before the Board, it is necessary to describe as concisely as possible the character of the lands in respect of which the claim is made and how these lands have been dealt with until now. The district of South Kanara lies to the north of Malabar and to the west of Mysore and Coorg; in the north lies North Kanara and on the west the Arabian Sea. The whole district at a short distance from the sea is covered with immemorial forests. Mr. Sturrock, who was Collector of South Kanara in the eighties, describes the country thus in his Manual of the South Kanara District (at page 13):

"South Kanara is essentially a forest district. The slopes of the western ghats from north to south clothed with dense forests of magnificent timber and the forest growths, stimulated by the heavy rainfall, approach within a few miles of the coast."

KODOTH
AMBU NAYAR
v.
SECRETARY
OF STATE FOR
INDIA.
—
MR. AMEER
ALI.

KODOTH
AMBU NAYAR
v.
SECRETARY
OF STATE FOR
INDIA.
—
MR. AMEER
ALI.

The lands in suit are situated south of the Chandra-giri river, and, as already stated, in the Kasaragod taluk, formerly Bekal taluk. In the low lands below the forest ridges there lie the farms and holdings of the ryots, which are called "*wargs*." It appears from the record that the *wargs* the ryots hold in their own right are called "*muli wargs*." These ryots and farmers, it appears, are in the habit of going upon the forest lands, clearing a part of the jungle and raising a temporary crop on it. After the crop is reaped, this patch is abandoned and some other part is taken up. For the privilege, they have been paying a small fee to the Government. These patches are called "*kumries*," and the lands so desultorily cultivated are designated in the proceedings relating to the subject as "*kumri* lands." The *wargs* do not constitute a farm or an estate of a compact character, the component parts often lying apart from each other. The plaintiff's case is that he has a number of *kumri* lands in the forest, attached to the various plots or *wargs* which he holds and he claims that his *tarwad* has acquired an absolute title to these lands, partly by long possession, partly by adverse possession against the defendant, and partly by purchase and usufructuary mortgages. He also claims that the Government recognized his title and are now estopped from denying it.

The first question, then, that emerges from these allegations, is what is the nature of the forest tract, and secondly, what are the incidents of the *kumri* lands. It has been held in two cases, *Bhaskarappa v. The Collector of North Kanara*(1), and *The Secretary of State for India v. M. Krishnayya*(2), one decided by the Bombay High Court from North Kanara under not dissimilar conditions,

(1) (1879) I.L.R., 3 Bom., 452.

(2) (1905) I.L.R., 28 Mad., 257.

the other decided by the High Court of Madras from South Kanara, in both of which the identical question arising in the present appeal was involved, that the Government had an absolute title to all the forest tracts which belonged absolutely to the Crown. Their Lordships consider it would answer no useful purpose to travel, as they have been invited to do, in the regions of ancient history. Whatever may have been the custom in ancient India, or under Muhammadan rule, what they have to see is how these lands were treated since the British acquired this part of the country. Ever since 1800, when South Kanara was conquered from Tippu Sultan, the Muhammadan ruler of Mysore, the British Government, in a series of documents which have been carefully examined in the cases referred to above, asserted and exercised their right in the forests. Their Lordships desire to refer only to two of these documents. On the 23rd of May, 1860, by a resolution of the Government of Madras (in the Revenue Department) it definitely pronounced in favour of checking the practice of *kumri* cultivation. Among the reports on which it rested its decision was a communication from the Conservator of Forests, dated 17th August 1859, in which he calls attention to what he describes as "the chief evils of this rude system of culture," viz.—

"the destruction of valuable timber, at present urgently required for ship-building and railways, and rendering of land unfit for coffee cultivation."

This document also speaks of the method of cultivation in vogue on *kumri* lands. There were other proceedings which similarly show that the Government claimed to exercise an absolute right in respect of these immemorial forest and waste lands, and constantly asserted its title. But the matter was clinched in 1884 when the Governor in Council passed an order, dated

KODOTH
AMBU NAYAR
v.
SECRETARY
OF STATE FOR
INDIA.
—
MR. AMEER
ALI.

KODOTH
AMBU NAYAR
v.
SECRETARY
OF STATE FOR
INDIA.
—
MR. AMEER
ALI.

29th August 1883, finally stopping the right of the neighbouring farmers and ryots to go upon the forest lands for the purpose of clearing patches by destroying the trees, in order to cultivate crops on the clearings. The document is so important that it should be quoted in full.

After referring to the report with which it was concerned, it goes on as follows:—

"2. To survey and demarcate the lands in which kumri is now cut and impose upon it an acreage rate of assessment—which under the Board's proposal is to confer complete rights of dealing with the land and with the wood growing thereon—would in the opinion of His Excellency in Council tend to compromise the right of Government to deal with the lands as may seem advisable hereafter and to create notions of proprietary right in the wargdars which does not in fact exist. Forest settlement will probably not be undertaken for years in South Kanara and the forest officers cannot possibly indicate at present lands which will be wanted for reservation. Mr. Sturrock's proposed survey would doubtless cost more than he estimates and would probably be far from accurate when finished.

"3. His Excellency in Council accordingly directs that existing arrangements and restrictions (which are in fact those prescribed in G.O., 24th October 1861, No. 2032) in respect of kumri cultivation in question, shall continue, with the exception of a charge of a rate of one rupee an acre on extent actually felled. In lieu of this the Collector is authorized to compound the demand at his discretion for an annual payment, not exceeding seven times the shist and shamil in the case of a wargdar kumri, and in the case of other permitted kumri, of such amount as may seem to him just with reference to past average charges. At the same time a register should be prepared recording as accurately as possible the boundaries and descriptive particulars of the tracts within which each wargdar is allowed to cut kumri; and during the felling season, the revenue and forest subordinates should be on the alert to prevent felling outside

the authorized limits, in virgin forests and in jungle of twelve years' growth.

"4. Under the above arrangement no measurement need be made in the current season, and no orders are required on the second of the proceedings above read."

Pursuant to this order rules were framed for the regulation of kumri cultivation, which also are important and should be set out in full—

"1. The cultivation of kumri is strictly prohibited in—

1. Virgin forests.
2. Cardamom and pepper forests.
3. Forests which have not been kumried for 12 years or upwards.
4. All forests outside the tracts recognized as kumries attached to wargs.

"2. All parties contravening rule 1 will be criminally prosecuted.

"3. A Register will be prepared recording as accurately as possible the boundaries and descriptive particulars of the tracts within which each wargdar is allowed to cut kumri. In the preparation of this register care will be taken to exclude all tracts falling under rule 1.

"4. Every Potal in whose village there is warg kumri will report on the 1st April of each year whether the provisions of rule 1 have been strictly observed in the annual fellings and all Revenue and Forest Officers will take every opportunity of checking the correctness of these reports, and otherwise assisting the prevention of felling outside the authorized limits.

"5. Assessment will be collected at a fixed annual amount, irrespective of the annual clearings which will be left to the discretion of the wargdar concerned, subject to the provisions of rule 1.

"6. Nothing in the above rules shall be held to preclude Government from taking up for reservation under the provisions of the Madras Forest Act, 1882, any land now occupied for kumri."

In accordance with the rules, notices were issued by the Tahsildar apparently on all the wargdars who were

KODOTH
AMBU NAYAR
v.
SECRETARY
OF STATE FOR
INDIA.
—
MR. AMEER
ALI.

KODOTH
AMBU NAYAR
v.
SECRETARY
OF STATE FOR
INDIA.
—
Mr. AMEER
ALI.

in the habit of entering the forest and making *kumri* cultivation. About the same time a register was opened (Exhibit F) showing the details of the boundaries, etc., of the *kumri* lands with regard to which permits had been issued previous to the Government Order. It shows to the *wargdars*, who had been in the habit of promiscuously entering the forests and making clearings, the exact limits which they were permitted to enter for raising temporary crops.

It is quite clear from these records that throughout, wherever *kumri* cultivation was allowed, it was permissive. The people who cultivated these patches of land had to pay a fee for the permits which they obtained for purposes of cultivation and nothing more than these fees were entered in the registers, but they do not indicate any right in the persons who paid fees for the permits.

The right of the Government has been carefully examined and precisely set forth in the two judgments to which reference has already been made. Their Lordships, therefore, do not think it necessary to discuss further the question, beyond expressing their general concurrence with the conclusions arrived at by the learned Judges of the two High Courts, namely, that there is an undoubted presumption that forest tracts and old wastes belong to the Government unless that presumption is displaced by positive evidence that the right has, in any particular tract or piece of land, been granted by the sovereign power to any individual or bodies of individuals; or rights have been consciously allowed to grow up adversely to the Government.

Bearing this principle in mind their Lordships have to examine what evidence the plaintiff has adduced in this case to establish the right he claims. The grounds on which he bases the claim of his *tarwad* are set out

in paragraphs 4, 5 and 6 of the plaint. In paragraph 4 he says as follows:—

“That the properties particularized in the annexed schedule are ancient *warg kumries* situated in the village of Panathadi and Bedadka in Kasaragod taluk (formerly Bekal taluk) and lying to the south of the Chandragiri river.”

Paragraphs 5 and 6 are in these terms:—

“That the plaint *kumries* belong to the plaintiff's *tarwad*, some as portions of their ancient *muli wargs*, some on right of purchase from their original proprietors, some, though acquired in the first instance on mortgages from previous *wargdars*, now belong to the *tarwad* on *muli* right acquired by prescription and a few on mortgage right.”

“That the plaint *kumries* have been in the exclusive possession and enjoyment of the plaintiff and his predecessors in interest for more than a century in their own proprietary or *warg* right.”

In other words he bases his title to the plots of land in respect of which the suit is brought on long enjoyment as parts of his *muli wargs*; secondly, on rights acquired by purchase and mortgage; and thirdly, on adverse and exclusive possession for more than a century in proprietary or *warg* right. In paragraph 9 of the plaint he puts forward a claim by estoppel against the Government: his statement is to the effect that the lands in suit have been acknowledged to be *warg kumries* and included as such in the register of Government *kumries*. The onus of establishing these allegations rests on him.

The last contention requires some explanation. It appears that the Government, for the purpose of clearing the undergrowth in the forests, have been in the habit of allowing the forest tribes who sparsely inhabited the forest to make clearances, and grow such cereals as they were capable of. These primitive tribes cultivated certain spots, reaped the crop and then moved off to some other patches of land. These apparently were called Government *kumries*. The Government also

KODOTH
AMBU NAYAR
v.
SECRETARY
OF STATE FOR
INDIA.
—
Mr. AMEER
ALI.

KODOTH
AMBU NAYAR
v.
SECRETARY
OF STATE FOR
INDIA.
—
MR. AMREB
ALI.

allowed some of the neighbouring *wargdars* to take the leaf manures from the forest and clear the undergrowth for the desultory cultivation, called *kumri*. These apparently are designated *warg kumries*. In all these cases, dealings with forest lands appear to have been by distinct permission of the Government. Has the plaintiff been able to show either old possession of the *kumri* lands, which he says have become attached to his *warg*s by long enjoyment, or has he been able to show that he has acquired a right by adverse possession to the exclusion of the Government? Both the Subordinate Judge as well as the District Judge, whose judgments on appeal on questions of fact, properly and regularly arrived at, are conclusive, have held, upon a careful examination of the evidence, that the plaintiff has failed to establish a continuous enjoyment beyond 35 or 40 years from the date of the suit. The period of limitation against the Government is 60 years. Assuming that a licensee can convert a permissive occupation into an absolute title by long possession, the period of possession proved by the tarwad falls short of the period of prescription. Their Lordships think that a licensee cannot claim title only from possession, however long, unless it is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence. The plaintiff produced no evidence to show that the Government either acquiesced in his exclusive possession or did, in fact, evince that consciously they acquiesced in the tarwad's adverse possession.

Apart from this, the Courts in India, who were Judges of fact, have held that the boundaries which the plaintiff has set up are unidentifiable. As regards title by transfer, they have found that in no case has the knowledge been brought home to the officers of

Government that any of these lands were sold or mortgaged with their consent.

As regards a grant emanating from the Government, there is absolutely no evidence. No patta has been produced showing a grant by the Government. The inference is inevitable that the plaintiff possessed no such patta.

The order of the 23rd May 1860, No. 830, made clear the position in which the people who were licensed to enter the forests for the purpose of desultory cultivation, stood in relation to the Government. Paragraph 8 of this order runs as follows:—

“The Board give their decided opinion against the validity of any claim to proprietary rights in forest, based on the entry of ‘*kumri sist*’ in the patta or the account of any estate. They regard it as simply a rent or farm of the privilege of cutting *kumri* in the tract in question; the continuance of which must depend on the pleasure of the Government. The facts detailed in their proceedings seem fully to bear out this view.”

In the proceedings of the Board of Revenue, dated 24th July 1860, the Government's rights as regards the *wargdar kumries* are placed on the same basis as the Sirkar or Government *kumries*:—

“The Board understand the Government proposal to raise the rate of assessment on the *kumri* cultivation of the Bekal taluk, to apply to ‘*wargdar kumri*’ so called, as well as to Sirkar *kumri* as the Government do not admit that the rights of the former are in any way superior to those of the latter, or that the entry of that item, among others in the *warg*, originally denoted anything more than that the *wargdar* was also the temporary renter of certain jungle farms or privileges, which the Sirkar was competent to modify or discontinue at will; and it is solely as an act of grace that in the Bekal taluk the *wargdar*, whose *warg* includes the item, is in consequence of the more systematic nature of the cultivation still to be recognized as the party with whom Government have to deal for the

KODOTH
AMBU NAYAR
v.
SECRETARY
OF STATE FOR
INDIA.
—
MR. AMREB
ALI.

KODOTH
AMBU NAYAR
v.
SECRETARY
OF STATE FOR
INDIA.
—
MR. AMER
ALI.

realization of the assessment, which elsewhere will be made directly with the *kumri* ryots."

On behalf of the appellant an argument was put forward before the Board which does not appear to have been advanced in any of the Courts in India. Their Lordships do not desire to rule out summarily on that ground the contention which has been so strongly urged before them. It is contended that the incidents attached to these *wargdar kumries* stand on the same footing as *ryotwari* holdings. The chief ground on which this analogy appears to be founded, as learned Counsel admitted, were two facts, namely,* that the *wargdar* possessed in these *kumri* lands a heritable and transferable interest.

In order to prevent future confusion their Lordships desire to say that there is absolutely no relation or analogy between the nature of these *kumri* lands and *ryotwari* holdings. The latter belong to a totally different category of tenures. *Ryotwari* holdings relate to arable lands for fixed periods—ordinarily 30 years—and are subject to periodical surveys and assessments. No inference, therefore, can be derived from the fact that *kumri* lands, cultivated on the *kumri* system, were held by *wargdars* whose property is transferable and heritable.

Coming now to the question of limitation it appears that in 1903 the Government officials marked off the lands in suit and issued to the plaintiff as the *karnavan* of his *tarwad*, what is called a rough *patta*, showing the lands to which Government admitted his right to obtain a grant subject to the usual conditions. The plaintiff preferred objections to the exclusion from the rough *patta* of the lands in suit. His objections were definitely rejected in 1905.

The present suit to set aside that order and to obtain a declaration of his right was not brought until 1913. Article 120 of the first schedule of the Limitation Act (IX of 1908) applied to this case. It provides that the period of limitation for a suit "for which no period of limitation is provided elsewhere in this schedule" shall be six years. No period of limitation is specifically provided elsewhere for the assertion of a claim of this kind. Their Lordships think that the lower Courts rightly applied article 120 to this suit.

On the whole their Lordships are of opinion that the appeal fails and should be dismissed with costs and they will so humbly advise His Majesty.

Solicitor for appellant :—*Douglas Grant*.

Solicitor for respondent :—*Solicitor, India Office*.

A.M.T.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
and Mr. Justice Wallace.

SARVOTHAMA RAO (RESPONDENT, PETITIONER), PETITIONER, 1923,
January 11.

v.

THE CHAIRMAN, MUNICIPAL COUNCIL, SAIDAPET
(PETITIONER, RESPONDENT), RESPONDENT.*

Madras District Municipalities Act (V of 1920), sec. 352—Proposed election—Wrong rejection of election papers—Remedies available according as elections held or not held—Returning Officer, whether a Judge—Right of suit—Suit against Chairman, maintainability of—Specific Relief Act, sec. 42.

If a nomination paper of a certain candidate for a municipal election under the Madras District Municipalities Act (V of 1920)

* Civil Revision Petitions Nos. 705, 758 and 828 of 1922.

KODOTH
AMBU NAYAR
v.
SECRETARY
OF STATE FOR
INDIA.
—
MR. AMER
ALI.

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.

is wrongly rejected by the Chairman and there is only one rival candidate who is therefore declared by the Chairman to be duly elected, the remedy of the disappointed candidate under the Act is to file an election petition as provided by the rules framed under the Act and not to file an ordinary civil suit. But if there be more than one rival candidate and the Chairman proposes to hold an election only as between them, the remedy of the person whose nomination had been rejected on a wrong interpretation of the rules is to apply to the Local Government under rule 31 of the Election Rules, for an interpretation, such application to the Local Government being eligible not only at the instance of the Chairman but also of the candidate. But if the Local Government declines to give its interpretation for some reason or other, the candidate who has thus suffered a legal injury has a right of suit to restrain the holding of an election in which the Court can also grant in his favour a temporary injunction to avert the threatened election. In such a case an election petition after the election is not the only remedy.

The Chairman when rejecting a nomination paper as a Returning Officer is acting in a judicial capacity and though no suit would, on account of section 352 of the Act, lie against him for such rejection, a suit to restrain him from holding the election accordingly is maintainable. *Aslatt v. Corporation of Southampton* (1881) 16 Ch. D., 143, and *Richardson v. Methley School Board* [1893] 3 Ch., 510, followed.

PETITIONS Nos. 758 and 828 of 1922 under section 115 of Act (V of 1908) and Petition No. 705 of 1922 under section 115 of Act (V of 1908) and section 107 of the Government of India Act praying the High Court to revise the order of F. A. COLERIDGE, District Judge of Chingleput, in Miscellaneous Appeals Nos. 37, 38 and 39 of 1922 preferred against the order of S. R. KRISHNA AYYAR, District Munsif of Poonamallee, in M. P. Nos. 856, 857 and 858 of 1922, in Original Suits Nos. 454, 461 and 462 of 1922.

The facts are given in the judgment of the Chief Justice.

M. S. Venkatarama Ayyar with A. K. Madhava Rao for petitioners.—The rules framed under the District

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.

Municipalities Act do not require that the nomination paper should contain the name of the ward nor do they require that the mark of the nominating voter should be attested. Hence the rejection of the nomination papers by the Chairman is illegal. In deciding whether a nomination paper complies with the rules or not, the Chairman merely exercises a ministerial function.

The candidate would be seriously prejudiced if the election were to be held without him. The remedy by way of an election petition after the election is over is wholly inadequate. Where the election has not yet been held, the rejected candidate has a right of suit to stop the election by an injunction and can claim that the election must be held including him also as a candidate. The right to vote and the right to stand for election are rights enforceable under sections 42 and 45 of the Specific Relief Act. *Sabhapat Singh v. Abdul Gaffur* (1), *Nataraja Mudaliar v. Municipal Council of Mayavaram* (2). An order in the nature of *mandamus* has been granted in such cases. See *In re Surendra Chandra Ghose* (3), *Narendra Nath Mitter v. Radha Charan Pal* (4) and *In re Amulyadhan Addy* (5).

[CHIEF JUSTICE.—That is a special remedy available only in the High Court and not open to *mufassal* litigants.]

Section 352 of the Municipal Act has no application and the burden of proving *bona fides* is upon the Chairman. Rule 31 which gives the Local Government right to interpret the rules does not take away the right of suit in Civil Courts, (see *Valli Ammal v. The Corporation of Madras* (6), *Lakshminarasimha Somayagiyar v.*

(1) (1897) I.L.R., 24 Cal., 107. (2) (1913) I.L.R., 38 Mad., 120.
(3) (1913) I.L.R., 45 Cal., 950. (4) (1919) I.L.R., 46 Cal., 119.
(5) (1918) I.L.R., 46 Cal., 138. (6) (1915) I.L.R., 38 Mad., 41.

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.

Ramalingam Pillay(1),) especially where the Government declines to interpret.

K. S. Krishnaswami Ayyangar with *T. M. Kasturi* for respondent.—If after the rejection of a candidate there is only one other rival candidate and he is declared elected the remedy of the defeated candidate is that given by the rules, viz., an election petition before the tribunal specially constituted by the Act. Where a special tribunal has been created to deal with infringements of a right created by a Statute, the jurisdiction of the ordinary Civil Court is ousted. See *Bhaishankar v. The Municipal Corporation of Bombay*(2), *Nataraja Mudaliar v. Municipal Council of Mayavaram*(3). He explained *Valli Ammal v. The Corporation of Madras*(4), and *Lakshminarasimha Somayagiyar v. Ramalingam Pillay*(1). Where after rejection of one candidate, there is more than one candidate left, the election has to be held. Section 352 of the Madras District Municipalities Act takes away the right of suit and protects the Chairman against all actions at the instance of any aggrieved voter or candidate, especially if there was no want of good faith on his part, which must be specially pleaded. The Chairman acts in a judicial capacity in interpreting the rules; *Pickering v. James*(5). No distinction ought to be made between actions for damages and those for injunction—compare section 80, Civil Procedure Code. *Secretary of State v. Kalekhan*(6), *The Superintending Engineer, II Circle, Bezvada v. Chituri Ramakrishna*(7). Otherwise the protection given to honest public officers will not be real. In England and in the Presidency towns the matter is

(1) (1920) 39 M.L.J., 819.

(3) (1913) I.L.R., 36 Mad., 120.

(5) (1873) 8 C.P., 489.

(2) (1907) I.L.R., 31 Bom., 604.

(4) (1915) I.L.R., 38 Mad., 41.

(6) (1914) I.L.R., 37 Mad., 113.

(7) (1920) 39 M.L.J., 151.

ordinarily brought before the Courts by proceedings in the nature of *mandamus* or *quo warranto*. For those places there is no such statutory protection as is given to the mufassal by section 352 of the Act.* The English and Calcutta cases are distinguishable on this ground.

The remedy in the mufassal for the aggrieved candidate is to apply to the Local Government under rule 31 or to wait for the election to be over and then to file an election petition. No serious injury is involved in such a construction. The right to be elected is not a common law right, at any rate in this country and if the Statute does not give a remedy by suit, there can be no hardship. If the Government decline to consider the matter in spite of an application under rule 31, there is an omission as to further remedy, which omission cannot give the civil courts any jurisdiction which they did not possess before.

M. S. Venkatarama Ayyar in reply.—An injunction can be granted; see *Aslatt v. Corporation of Southampton* (1), *Richardson v. Methley School Board*(2).

JUDGMENT.

SCHWABE, C.J.—These are civil revision petitions in three suits all arising out of the municipal elections for Saidapet. The first Civil Revision Petition No. 705 is in a suit which asks for a declaration that a nomination paper put in on behalf of the plaintiff as a candidate for election as a Municipal Councillor was wrongly rejected by the Chairman of the Council, the defendant, and for an injunction to restrain him from holding an election without the plaintiff as a duly nominated candidate, and also to compel him to hold an election with the plaintiff as a candidate.

(1) (1881) 16 Ch. D., 143.

(2) [1898] 3 Ch., 510.

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.

SCHWABE,
C.J.

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.
—
SCHWABE,
C.J.

The other two Civil Revision Petitions Nos. 758 and 828 are in suits by two persons, whose nomination papers were also rejected, against two other candidates, who being the only other candidates for the wards in question, were by the rules deemed to have been elected when these nomination papers were rejected. The claim in the suits is for an injunction to restrain these persons from acting as councillors and also against the Chairman, who is made a party for this purpose, to restrain him from holding a meeting of the Council as now constituted for the purpose of electing a new Chairman.

In the first case and in one of the others the rejection of the nomination papers was on the ground that it did not give the number of the ward for which the candidates desired to stand and in the other case on the ground that the thumb mark of the seconder of the candidate had not been attested.

The District Munsif of Poonamallee granted interim injunctions in all three cases. The District Judge on appeal dissolved them all.

I am clear that the rejection of the nomination papers was not in law justified in any of the three cases, and that all three plaintiffs ought to have been treated as duly nominated.

In the two latter suits I am, however, of opinion that the injunctions ought not to have been granted, because the plaintiffs in them disclosed no cause of action against the defendants. The successful candidates have done nothing wrong. They have simply found themselves elected and therefore, as their duty is, propose to take their seats. Nor do I think that any Court can properly be asked to grant an injunction restraining the Chairman from holding a meeting of the Council as at present constituted. It is open to these plaintiffs to proceed by election petitions. In my judgment, there being no

cause of action against the defendants in these two suits, there can be no ground for granting an injunction.

Turning now to Civil Revision Petition No. 705 of 1922, if a man entitled to vote or to be a candidate at an election is wrongfully deprived of that right, an action for damages lies against the person so depriving him. This was established in England in *Ashby v. White* (1) which case has since been uniformly followed, and in my judgment this is also the law of this country as was stated in *The Municipal Board of Agra v. Asharfi Lal* (2). But this statement requires qualification, for, if the act by which the right is interfered with is an act done in a judicial capacity, then the rule applies that no action lies unless the act is done maliciously, which in this context really means dishonestly—see *Pickering v. James* (3), particularly the judgment of BRETT, J., at page 509. In this case the Chairman was acting in a judicial capacity in rejecting these nominations and it is not alleged that he acted dishonestly and therefore no action would lie for damages against him. But there may still be a cause of action of a different nature, not in respect of the Chairman's past acts, but to prevent by injunction the carrying out of any threatened action by him, which would have the effect of illegally interfering with the plaintiff's rights; and in my judgment this is such a case. The Chairman has unlawfully rejected the plaintiff's nomination paper and he has announced his intention of holding an election for ward No. 5 without permitting the plaintiff to be a candidate.

I do not think that the law is such that the plaintiff must wait until the election is held and then bring

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.
—
SCHWABE,
C.J.

(1) Smith's Leading Cases, 12th Edn., Vol. I, p. 286.
(2) (1922) I.L.R., 44 All., 202. (3) (1878) 8 C.P., 489.

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.
—
SCHWABE,
C.J.

an election petition, which is bound to succeed, nor indeed would that remedy give him all that he is entitled to, because after the election petition had succeeded there would have to be fresh nominations and there might be other candidates in the field that he would not now have to meet, to say nothing of the trouble and expense that he would necessarily be put to. There is ample authority to support this view. In *Aslatt v. Corporation of Southampton*(1) where it was proposed to hold an election of an alderman of a borough in the place of the plaintiff, who it was wrongly alleged had vacated his seat, the Court of Chancery interfered by an injunction forbidding the holding of the election. In *Richardson v. Methley School Board*(2) that Court granted an injunction to prevent the holding of an election for the post of schoolmaster in place of the plaintiff, who was wrongly alleged to be disqualified for the office, and it was laid down that where there is a legal right which can be asserted in law or equity a Court of Equity can grant an injunction in protection of that right. I have no doubt that this Court possesses the same powers under the Specific Relief Act, 1877, and in my judgment this is a case for exercising them. Reliance is placed by the defendant on section 352 of the Madras District Municipalities Act, 1920, which protects the Chairman from suits in respect of acts done in his official capacity, but in my judgment there is nothing in that section to preclude a suit being brought to restrain him from doing a threatened wrongful act to the detriment of another. It is also contended that no action lies, because the decision of the Chairman is final and conclusive. I can find nothing in the rules to make it so. Under rule 31 if any question arises as to the interpretation of the rules,

(1) (1881) 16 Ch. D., 143.

(2) [1898] 3 Ch., 510

otherwise than in connexion with an election inquiry, the question shall be referred to the Local Government, whose decision shall be final. The plaintiff tried to refer the question of the rejection of his nomination, which was a question of the interpretation of the rules, to the Local Government, but the Local Government declined jurisdiction in the matter on the grounds, as they inform us through the Government Solicitor, that the matter had not been referred to them by the Chairman or otherwise officially, and that the matter was already *sub judice*. The result is that there has been no conclusive ruling on the point and it is open to us to decide the matter.

I venture to express a hope that it may be possible for the Local Government acting under section 36 of the Act to cancel the rejection of this nomination by the Chairman and direct the election to be held with the plaintiff as a candidate. They will no doubt also consider whether any action can be taken in the other two cases so as to avoid the necessity of an election petition.

The defendant must pay the costs of proceedings for injunction before the District Munsif and before the District Judge and of this petition No. 705. The plaintiffs in the other two suits must pay the costs of these petitions Nos. 758 and 828.

WALLACE, J.—These petitions are all petitions to restore the order of the District Munsif granting temporary injunctions pending disposal of the petitioners' suits. Certain general features are common to all and with these I shall first deal.

The nomination papers of the three petitioners as candidates for the municipal election were declared invalid by the Chairman. In two cases there was only one other candidate, who was declared duly elected, and in the other case the election has not yet been held. All

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.
—
SCHWABE,
C.J.

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.

WALLACE, J.

the three candidates are suing for declarations that their nominations were proper, and that they were entitled to stand. The original Court by injunction has in the former two cases restrained the duly elected candidates from sitting, and in the latter case, Civil Revision Petition No. 705 of 1922 before us, has restrained the holding of an election. The District Judge on appeal dissolved all the three injunctions and we are now asked to restore them pending disposal of the petitioners' suits, framed to restore to them the right to stand as a candidate of which they have been deprived.

The main contention of the respondents in all the cases is that the suits themselves will not lie and therefore no injunctions can be granted. The District Munsif in his final order granting injunctions avoided deciding that question. It would have been better if he had decided the suits and the injunction petitions together. It is impossible in deciding the propriety of these injunctions to avoid deciding on the maintainability of the suits.

The petitioners' chief contention is that the suits are maintainable under section 42 of the Specific Relief Act, as being suits by persons entitled to a legal character for the declaration of their title. That the general right of being nominated to stand as a candidate for a municipal election is a legal character cannot, I think, admit of doubt, but before it follows that section 42 will give a right of suit, we have to note that this legal character is itself the creation of a specific statute, the District Municipalities Act V of 1920, and that it is settled law that where a statute itself sets up a proper tribunal for trying cases of the infringement of the right to such a legal character and that tribunal has functioned judicially, the Civil Court will have no jurisdiction. So that we have to examine firstly, what is the nature of

the infringement of the right complained of; secondly, is there a tribunal appointed by the Act or the rules under it to deal judicially or quasi-judicially with such an infringement; and thirdly, if there is one, has it functioned?

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.
WALLACE, J.

As I conceive the position, no one is denying the petitioners' general right to be nominated to stand as candidates in this or in other elections, provided that their nomination papers are in proper form. No one, least of all the Chairman, is concerned to deny that the petitioners were entitled to stand, if their interpretation of the rules is correct and if their nomination papers were in proper form, and no one, least of all the petitioners, is concerned to deny that they were not entitled to stand if the Chairman's interpretation of the rules is correct and their nomination papers were not in proper form.

Therefore the only question of substance that the suits really raise is whether or not the petitioners' nomination papers were in proper form, that is, whether the rules on this matter have been properly followed. No allegation of bad faith is made against the Chairman, and there is no contention that he deliberately misinterpreted or disobeyed perfectly clear rules with the object of depriving any one of his lawful rights. Hence, we must take it that the Chairman honestly considered that he was conforming to the rules when he rejected the three nominations. The position then is this: that the Chairman in good faith, although mistakenly, in my opinion, held the meaning of the rules to be in one way while the petitioners hold it to be another. The real point at issue and the point which the District Munsif who has to try the suits must decide, therefore, is merely whether the rules have been properly interpreted, and according as his interpretation inclines towards the petitioner's view or the Chairman's view, the petitioners will or will not

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.

WALLACE, J.

have a cause of action. If the petitioners get a decision of the proper authority, whose decision is final in this matter, interpreting the rules in the manner for which they contend, their rights will be once for all restored.

Is the Civil Court then the final authority for that purpose and will a civil suit lie, which in essence is merely calling upon the Civil Court to interpret these rules regarding the nomination of candidates for election? I think that the answer would ordinarily be in the negative for the short reason that as I read the rules, another tribunal is set up for that very purpose. Rule 31 of the election rules clearly lays down that

"if any question arises as to the interpretation of these rules otherwise than in connexion with an election enquiry, the question shall be referred to the Local Government whose decision shall be final,"

that is, the Local Government which drafted the rules, is the final arbiter for deciding what the rules mean, and the Civil Court cannot ordinarily be asked to decide whether the Local Government's interpretation of its own rules is right or wrong.

There is, however, in one of these cases, Civil Revision Petition No. 705, this peculiar feature, which was disclosed to us only towards the close of the argument before us, namely that the petitioner had, after the unfavourable ruling of the Chairman, made a reference to the Local Government and asked it to interpret the rules and revise the Chairman's order and permit his nomination, and that the Government's answer was that it declined to interfere. The answer is before us and on its face it is not clear on what grounds the Government declined to interfere, but the letter also before us produced by the Government Solicitor on 18th December 1922 makes it clear that the refusal to interfere was on the ground that the Local Government had no

jurisdiction, Government apparently holding that, while a reference can be made in such a case under rule 31, it cannot be made by a private party, but only by the Chairman. I am myself unable to read rule 31 so, and, so long as it is read so, so long will an aggrieved candidate be driven for his remedy to the cumbrous method of a civil suit and an injunction. The net result however is that the Government conceived that it had no jurisdiction and therefore declined to function as the judicial or quasi-judicial tribunal it was intended to be, because it thought that the case had not been properly brought before it.

Now, if this tribunal had functioned in this case and given a decision, whether right or wrong in the opinion of the Civil Court is immaterial, I am clear that the Civil Court would have no jurisdiction and the remedy provided by the Statute would have been used and exhausted and its decision on the matter would be final. But where the proper tribunal has declined jurisdiction and the aggrieved party is thus bereft of his statutory and constitutional remedy, it is the province of the Civil Court, as a Court of Equity, to fill the vacuum created and to exercise the jurisdiction which the proper tribunal has failed to exercise.

It cannot be admitted that the fiat of the Chairman in the matter of interpretation of the rules is absolutely final, and that he can by his mere order prevent a candidate from standing for election; such a principle is not deducible from the Act or the rules. The rules not only do not say so, but provide a method of appeal or revision from such an order. Self-Government has not progressed so far in the direction of autocracy. If Government then misinterprets its own rules as giving it no jurisdiction so as to take away from the aggrieved party the remedy provided by the rules,

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.

WALLACE, J.

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.
WALLACE, J.

and thus, in effect, declares that it never intended itself to have jurisdiction, then the Civil Court must take it either that the Statute does not oust the jurisdiction of the Civil Court or that the Government, nevertheless had jurisdiction but refused to exercise it. In the latter case the Civil Court may legitimately be called on to interfere in order to decide whether a particular authority has or has not jurisdiction in a particular matter, and, if that authority has jurisdiction but refused to exercise it, then to exercise it itself, and not to leave the aggrieved party without any remedy. In other words, the ordinary jurisdiction of a Civil Court may, in the first instance, be barred by a Statute or Rule setting up another authority, but when that Statute or Rule is not obeyed and that other authority refuses to function, then the bar is removed, and there is nothing to prevent the Civil Court itself functioning.

The attitude of the Government in declining jurisdiction in this case is difficult to understand. In other cognate matters a definite tribunal has been set up by it, which automatically ousts the jurisdiction of the Civil Court. In the case of an elector wrongfully excluded from electoral roll, the rules under the Act provide for the decision of the case by a Special Tribunal. In the case of malpractices or irregular procedure at an election, the rules provide for an election petition being brought before the District Court or a Sub-Court. It is difficult therefore to believe that the Government intended to leave without remedy a candidate whose nomination was improperly rejected by the Chairman, and I am fortified by this in my opinion that the Government in this case wrongly declined to exercise a jurisdiction which was intended to be exercised by it.

In Civil Revision Petition No. 705 of 1922 therefore I am satisfied that the tribunal was then really set

up but refused to function, and such refusal is the direct source for the petitioner's cause of action and the basis for the maintainability of his suit. On that ground the suit out of which that civil revision petition has sprung is *prima facie* maintainable.

I shall now deal with three points urged by the respondents against the maintainability of that suit and the other two suits. The first is section 352 of the District Municipalities Act. That is a bar to suits only in respect of acts done, but the real grievance in Civil Revision Petition No. 705 of 1922 is not that the Chairman rejected the nomination but that he intends to hold an election without allowing petitioner to stand, that is that the Chairman is threatening to do wrong. Section 352 is no bar to such a suit. But it will, I conceive, be a bar to the other two suits from which Civil Revision Petitions Nos. 758 and 828 have sprung, since in my view, the election in those cases has been held, there being no difference between a case where a contest has taken place and a case where a contest has not taken place. If a candidate has been returned as elected the election is over and has been held. Therefore in these two cases the suits are to set aside acts done and not acts threatened. I am not at present, however, very sure of the correctness of this opinion and prefer to decide the fate of these two suits on the next ground of objection.

This ground is that all the three suits are barred because the petitioners have their remedy by way of election petitions. In the case of Civil Revision Petitions Nos. 758 and 828 I am clear that this is a good objection. Elections have been held and there is a tribunal set up by the rules for the decision of petitions to set aside election, a tribunal whose decision under the rules is final. The Statute itself therefore provides

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.
WALLACE, J.

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.
WALLACE, J.

the remedy and the statutory tribunal has not refused jurisdiction. The ordinary Civil Courts therefore have at present no jurisdiction. In my opinion for this reason also these two suits are not maintainable in the Civil Court.

But as regards Civil Revision Petition No. 705 of 1922 the position differs radically. The election has yet to be held and I am quite clear that any post-election remedy is wholly inadequate to afford the relief which the petitioner seeks, namely, that this election, now published, be stayed, until it can be held with himself as a candidate. It is no consolation to tell him that he can stand for some other election. It is no remedy to tell him that he must let the election go on and then have it set aside by petition and have a fresh election ordered. The fresh election may be under altogether different conditions and may bring forward an array of fresh candidates. The petitioner can only have his proper relief if the proposed election without him is stayed until his rejected nomination is restored, and hence an injunction staying this election was absolutely necessary, unless the relief asked for was to be denied him altogether *in limine*. In most cases of this kind no doubt there will be difficulty for the aggrieved party to get in his suit in time before the threatened wrong is committed; but when he has succeeded in so doing, the Court cannot stultify itself by allowing the wrong which it is asked to prevent to be actually consummated while it is engaged in trying the suit.

The third ground of objection relates more to the grant of the injunction in Civil Revision Petition No. 705 of 1922 than to the suits themselves and that is, that this Court or any other cannot, by injunction, compel the Chairman to do what he has no longer any power to do, it being urged that the Chairman has no power under the

rules to revise or cancel his own orders, and must now automatically proceed to hold an election. I am not impressed by this argument. It is tantamount to saying that the Chairman has no power to set right an admitted wrong. I should hesitate to draw any such conclusion, and, in any case, the Chairman can apply for the intervention of the Local Government which under section 36 of the Act has ample powers to set right any blunder or mistake.

The cases quoted before us do not appear to me to affect these conclusions. Both sides have quoted freely from English Law, mostly from cases of *mandamus* and *quo warranto*, which clearly lays down that a returning officer is acting judicially in deciding on the validity of a nomination paper, and that, in respect of such judicial act, no suit for damages can be maintained against him. That is a different question. *Pritchard v. Mayor, etc., of Bangor*(1), is a case in which the Civil Court claimed jurisdiction to interfere with the order of the returning officer disqualifying a candidate as passed without jurisdiction and proceeded itself to decide on the validity of an election. That also was a case of *mandamus*. The only English cases really helpful are *Aslatt v. Corporation of Southampton*(2), and *Richardson v. Methley School Board*(3), which follows on the former, in which injunctions similar to those now in controversy were granted in actions for an injunction by a Court of Equity, there injunctions being granted under section 25 of the Judicature Act, 1873.

As regards Indian cases, apart from cases such as *In re Surendra Chandra Ghose*(4), and *Narendra Nath Mitter v. Radha Charan Pal*(5) and *Amulyadhan Addy*,

(1) (1888) 13 App. Cas., 241.
(3) [1898] 3 Ch., 510.

(2) (1881) 16 Ch. D., 148.
(4) (1918) I.L.R., 45 Cal., 950.
(5) (1919) I.L.R., 46 Cal., 119.

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.
WALLACE, J.

SARVOTTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.
WALLACE, J.

In re(1), founded on mandamus, the case *ni Sabhapat Singh v. Abdul Gaffur*(2), is one in which it was declared generally that a suit by a candidate in a mufassal election will lie for a declaration of his right to vote and to stand as a candidate, and that he was duly elected. It proceeded partly on the consideration of a saving clause in section 15 of the Bengal Municipal Act III of 1894, which, it was held, must be read into the previous Act of 1884, and partly on the ground that, if no such suit lay, there will be no way of upholding and maintaining such civic rights in the mufassal. The grounds for this decision seem open to question since the rules under the Act of 1884 evidently provided for an election petition before the District Magistrate and the ratio decidendi would imply that section 42 of the Specific Relief Act will support such a suit in the mufassal, though it cannot be called in aid in the Presidency Town, because section 45 of the Act, which was called in aid in that case and has so often been called in aid in similar cases in Calcutta, implies, by force of clause (d), that there is no other remedy and therefore no remedy under section 42. I do not think that that case is of very much assistance. In *Ataul Huq v. The Chairman, Manicktola Municipality* (3), the question of jurisdiction was dealt with in a very summary manner, the want of jurisdiction not being seriously pressed, probably in consequence of the earlier ruling in *Sabhapat Singh v. Abdul Gaffur*(2).

In *The Municipal Board of Agra v. Asharfi Lal*(4) the suit was for damages for wrongful refusal to enter the voter's name on the electoral roll, and it may be noted that in that case the party had had his name already entered on the electoral roll by the District Magistrate before he came into Court, so that it does not

(1) (1919) I.L.R., 46 Cal., 182.
(3) (1921) I.L.R., 48 Cal., 378.

(2) (1897) I.L.R., 24 Cal., 107.
(4) (1922) I.L.R., 44 All., 202.

help us to decide whether in Allahabad a suit for entry on the electoral roll or a similar relief will lie.

Coming to the Madras cases, *Nataraja Mudaliar v. Municipal Council of Mayavaram*(1) relying on *Bhaishankar v. The Municipal Corporation of Bombay*(2) declares that a civil suit will not lie to set aside an order of the Collector (who was the tribunal designated under the rules under Act IV of 1884 to pronounce finally on the validity or the invalidity of an election), declaring an election invalid, when an enquiry has been held by him. That decision is clear that a Civil Court cannot, as it were, sit in appeal over a tribunal appointed by Government to decide such a question finally. No doubt the learned Judges in that case say that a suit would lie to declare that the plaintiff was a person qualified to vote and stand as a candidate and that is so far an authority for the position that such a suit is not under all circumstances wholly unmaintainable. The case in *Valli Ammal v. The Corporation of Madras*(3) proceeds on the general principle that the legislature would not have intended the word "final" in a particular section of the Municipal Act to be so interpreted as to leave the Municipal Council to be a final Judge in its own cause. The principle is applicable to the present case, and in so far as it declares the jurisdiction of the Civil Court to prevent such a wrong, it is in point.

The case in *Lakshminarasimha Somayagiyar v. Ramalingam Pillay*(4) was sufficiently decided by one learned Judge on the ground that the particular rules of the Local Boards Act which he was considering were ultra vires and could not therefore oust the jurisdiction of the Civil Court, but he also held that the rules in that

(1) (1913) I.L.R., 36 Mad., 120.
(3) (1915) I.L.R., 38 Mad., 41.

(2) (1907) I.L.R., 31 Bom., 604.
(4) (1920) 39 M.L.J., 319.

SARVOTTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.
WALLACE, J.

SARVOTHAMA
RAO
v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SAIDAPET.
WALLACE, J. out.

particular case, if valid, would oust that jurisdiction. The other learned Judge concurred in the latter opinion. This case does not deal with the particular difficulty here, which is occasioned by the rules not being carried

I therefore agree that the correct principle is that when a duly constituted tribunal has refused to try the question of the right of a party to the legal character of one entitled to be nominated to stand as candidate for an election, and there is no other remedy available, the ordinary Civil Court has jurisdiction to entertain a suit for that relief and the right to grant a proper temporary injunction retaining matters in *status quo ante* until the suit is tried. Civil Revision Petition No. 705 of 1923 is exactly such a case, and the injunction granted by the original Court was therefore a proper one. In the other two cases, the election has been held and the petitioners have a remedy not yet employed or exhausted namely by way of election petition, and, therefore, their suits are at the least premature, and, in my view, at present unmaintainable. The injunctions granted in those cases cannot therefore be upheld. In Civil Revision Petition No. 705 of 1922 the order of the District Judge should therefore be reversed and the injunction granted by the District Munsif restored. The other two civil revision petitions should be dismissed.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

KANNIAPPA MUDALI AND TWO OTHERS (NINTH
DEPENDANT AND LEGAL REPRESENTATIVES OF THE
TENTH DEFENDANT), APPELLANTS,

1924,
January 9.

v.

P. V. RAJU CHETTIAR AND TEN OTHERS
(RESPONDENT AND PLAINTIFFS), RESPONDENTS.*

*Provincial Insolvency Act (III of 1907), ss. 16 (5) and 31—
Encumbered property of insolvent—Right of Official Receiver
to sell property free from encumbrance even with mortgagee's
consent—Sale free from encumbrance—Unsuccessful attempt
of mortgagees to get sale cancelled in insolvency jurisdiction—
Suit to enforce mortgage—Estoppel.*

Under the Provincial Insolvency Act (III of 1907) only the property of the insolvent vests in the Official Receiver; the Act does not empower the latter to sell the former's estate free from encumbrance, even with the consent of the mortgagee.

Obiter—Such a consent could not be implied merely from the absence of a reply by the mortgagee to a letter of the Official Receiver stating that he would sell the property free of the mortgage in case he did not reply.

Held also that an unsuccessful attempt of the mortgagee in the insolvency jurisdiction to get cancelled the sale held by the Official Receiver free from encumbrance did not estop the mortgagee from thereafter filing a suit to enforce his mortgage.

APPEAL against the decree of M. S. ANANTA PATTAR, Acting Subordinate Judge of Vellore, in Original Suit No. 34 of 1918.

The facts are given in the judgment.

A. Krishnaswami Ayyar and B. C. Seshachala Ayyar
for the appellants.

A. Viswanatha Ayyar for the respondents.

* Appeal No. 51 of 1921.

KANNIAPPA
MUDALI
v.
RAJU
CHETTIAR.

RAMESAM, J.

The JUDGMENT of the Court was delivered by RAMESAM, J.—In this case the ninth defendant and the legal representatives of the tenth defendant are the appellants. Respondents 1 to 3 are the plaintiffs. The suit was brought for recovery of the principal and interest due on a mortgage bond executed by the husband of the second defendant and defendants 1 and 6. The defence was that the plaintiffs were not entitled to maintain the suit on account of certain proceedings in insolvency.

The further facts necessary to be stated for understanding this defence are that the sixth defendant became insolvent and his properties were vested in the Official Receiver, Chittoor. On the 16th August 1915 the Official Receiver gave a notice to the mortgagees in which he stated that he proposed to sell the properties of the insolvent by public auction free from their mortgage with the same charge to them on the sale-proceeds as they might have on the properties and called upon them to consent to the proposal. He added that, in case they did not intimate to the contrary before a certain date, he would take it that they had consented to the above proposal. Incidentally it may be mentioned that the original notice is not exhibited in the case and all that has been exhibited is an office copy. This office copy contains blanks in all important places where dates and amounts have to be mentioned, in particular the date before which a reply was expected is not in the document and is also a blank. This notice was received, as appears from the acknowledgment Exhibit I (a), on the 26th August 1915, but there was no reply by the mortgagees to the notice. The Official Receiver proclaimed the sale of the properties and the proclamation is dated the 16th December 1915. It was signed by the Official Receiver as Official Receiver and was issued from his office. It

KANNIAPPA
MUDALI
v.
RAJU
CHETTIAR.

RAMESAM, J.

mentions that the entire right of the insolvent was intended to be sold and also mentions that the property was to be sold free from encumbrances; and this particular mortgage was intended to be mentioned there, but was described incorrectly, but we do not think that very much turns on the incorrectness of the description of the mortgage. The property was then purchased by defendants 9 and 10 who are now represented by the appellants. On the 22nd February 1916 the mortgagees applied to the District Judge for cancellation of the sale on the ground that the notice was not served upon them, that the price realized was not adequate, that the sale was held at a time when there was plague prevailing, and the petition also implies that they did not consent to the sale. The matter came up to the High Court and it was held that the petition was out of time and the petition was dismissed on that ground. The mortgagees then brought the present suit.

On these facts it is contended by the appellants that the present suit does not lie, that the former sale is binding on the mortgagees. Under the Provincial Insolvency Act III of 1907 only the property of the insolvent vests in the Official Receiver. The Act contains no provisions for selling the whole property free from all encumbrances even with the consent of mortgagees. Section 16 (5) says, that

“Nothing in the section shall affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.”

Section 31 contains some provisions according to which a secured creditor may after realizing his security prove for the balance, or he may relinquish his security and prove for the whole of his debt like any other unsecured creditor, or he may prove for the difference between his debt and the estimated value of the property

KANNIAPPA
MUDALI
v.
RAJU
CHETTIAR.
RAMESAM, J.

where the estimated value is less than that of his debt. Here, it cannot be said that the mortgagees have relinquished their security. Therefore none of the provisions of section 31 applies. It cannot be said that the Official Receiver was a person with certain limited powers and the silence of the mortgagees in not replying to the notice amounted to such a consent as would justify the receiver to sell the properties. Mr. Krishnaswami Ayyar, the learned vakil for the appellants, then argued that, apart from any limited powers under the Act, the Official Receiver at least stands in the position of a mortgagor, and any mortgagor can sell the mortgaged property with the consent of the mortgagee. But it seems to us that a sale by mortgagor without a relinquishment by the mortgagee, but merely with the consent of the mortgagee expressed in an unregistered document, cannot be valid unless the facts amount to an authorization of the mortgagor to sell on the mortgagee's behalf or to an agreement by the mortgagee to accept such sum as may be realized in the sale in discharge of his debt. In the present case, it is very difficult to make all these implications on account of the mere silence of the mortgagees when they received the notice Exhibit I. There is no doubt that the Official Receiver and the purchasers thought that the Official Receiver was authorized to sell under the Act and had limited powers of sale. I find it difficult to accept the contention for the appellants that the plaintiffs are estopped by the proceedings in insolvency. Nor can it be said that the plaintiffs chose one remedy, namely, of applying to set aside the sale in the insolvency jurisdiction and that, therefore, they are precluded from their legitimate remedy. They chose the wrong remedy and they never got a relief. They never got any relief when they applied in the Insolvency Court.

We think that the judgment of the Court below is right and that this appeal must be dismissed with costs of respondents 1 to 3.

Now, as regards the memorandum of objections, the learned Subordinate Judge has committed a clerical error in paragraph 22 of his judgment where the figure ought to be Rs. 2,500 instead of Rs. 2,800. The amount due to the plaintiffs will be amended accordingly.

With reference to the interest, the judgment is right, but the decree directs that it should be calculated at 6 per cent from the date of the decree. This should be altered into "at the contract rate up to the date fixed for payment and 6 per cent thereafter."

Clause 3 of the decree will also be deleted as the purchasers will be liable for costs personally and for the balance of any unrealized debt the plaintiffs-respondents can prove in insolvency.

The respondents 1 to 3 will be entitled to the costs of the memorandum of objections.

N.B.

KANNIAPPA
MUDALI
v.
RAJU
CHETTIAR.
RAMESAM, J.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

1924,
January 24.

ESUFALI MAHAMMEDBHOY ALLIBHOY AND 2 OTHERS
(PLAINTIFFS), APPELLANTS

v.

A. K. THAHA UMMAL AND 4 OTHERS (DEFENDANTS 2 TO 6),
RESPONDENTS.*

Ship—Goods entrusted for carriage, damaged during voyage—Suit for damages—Onus of proof—Perils of the sea—Negligence.

In a suit for damage caused to the plaintiff's goods entrusted for carriage by the defendant's ship, it is for the defendant to plead and prove "perils of the sea." If he makes out a *prima facie* case, the plaintiff can rebut it by proving defendant's negligence; *The Glendarroch* [1894] Prob., 226, followed.

The mere fact that the accident might have been avoided by greater foresight does not prove negligence.

APPEAL against the decree of K. S. KOTHANDARAMA AYYAR, Acting Subordinate Judge of Tuticorin, in Original Suit No. 6 of 1918.

The facts are given in the judgment.

The plaintiffs, whose suit for damages was dismissed, preferred this appeal.

T. R. Venkatarama Sastri and K. S. Sankara Ayyar for appellants.

S. Srinivasa Ayyangar with K. V. Sesha Ayyangar and K. R. Rangasami Ayyangar for respondents.

The JUDGMENT of the Court was delivered by

RAMESAM, J.

RAMESAM, J.—This is a suit for damages to plaintiffs' goods consigned on defendants' schooner *Sahul Hameed*. The schooner left Colombo on 25th August 1917 and arrived at Tuticorin on 28th August with 250

cases of safety matches entrusted by plaintiff to the master. The goods were landed on the 30th in a damaged condition. On a certificate of survey (Exhibit C) by Secretary of the Local Chamber of Commerce, the goods were sold by auction on 30th October 1917 (Exhibit G) and realized Rs. 3,142 (Exhibit D). The market value is alleged to be Rs. 31,750. The suit is for the difference.

Exhibit II is the bill of lading issued by the defendants' agent. It contains the usual exemption clause—

"The act of God, King's enemies, fire and all and every other dangers, accidents of the seas, rivers and navigation of whatever nature or kind so ever excepted."

Though there has been considerable argument on the question of burden of proof and several cases have been cited before us, the matter seems to be clearly settled in the present state of authorities. It is for the defendant to plead and prove "perils of the sea." If he makes out a *prima facie* case, the plaintiff can rebut it by proving defendants' negligence. (See the judgment of Court of Appeal in *The Glendarroch*(1). *ESHER*, M.R., at page 232, explains certain expressions of Lord *HERSCHELL* in *Wilson Sons & Co. v. Owners of cargo per the Xantho*(2). See also *Norway (Owners of the) v. Ashburner*(3). *Scrutton on Charter Parties* (10th Edition), article 79, note 1 and article 83, note at page 298, *Carver on Carriage by Sea*, section 87.)

We have therefore to see what the facts alleged and proved are. The defendants claim that the damage to the goods was on account of a peril of the sea, i.e., that there was a strong wind on the night of the 29th and the ship was driven away from the place where she anchored at first towards the south. The wind then changed its

ESUFALI
&
THAHA
UMMAL.
—
RAMESAM, J.

* Appeal No. 63 of 1921.

(1) [1894] Prob., 226.

(2) (1887) 12 App. Cas., 508.

(3) (1895) 3 Moore N.S., 245; 16 E.R., 92.

ESUFALI
v.
TRAHA
UMMAL.
—
RAMESAM, J

direction with the result that the schooner swung round and sat on her anchor causing a hole on her portside. The vessel stranded and at 6 a.m. there was 5 feet of water in the hold. The cases of safety matches were damaged by the sea water. The plaintiff denies any change in the position of the ship and alleges negligence on the part of the Master in anchoring in shallow water.

Before discussing the evidence on these allegations, I may observe that the Subordinate Judge found on the second issue that the liability of the defendants as carriers continued till the 30th and on the ninth issue he found against their allegation that the Master was ready and anxious to deliver the goods on the 29th. It is on this footing that the appeal has been argued before us.

I will now discuss the evidence as to what happened on the 28th and 29th.

First.—The weather on the 29th. P.W. 1 says that no signal of high and violent wind was given on that day. But this evidence is useless as it is proved by D.W. 1, the Port Officer, that no observation was taken during night. The extract from the log book (Exhibit K) also shows that no entries were made for the night. D.W. 1 says that he recollects that the weather on the 29th was unsettled. We see no reason to reject this evidence. D.W. 3, the owner of another schooner *M.S. Hydrose* which was also anchored in the harbour that night—(See Exhibit IX. This is also admitted by P.W. 2)—says that there was high wind. D.W. 4 who was tandal of that schooner says there were violent winds from 2 a.m. up to 3 or 3–30 a.m. But D.W. 5 says that there was not strong wind but only average wind. On the whole, it seems to me that there was some rough weather in the night though it is possible D.W. 4 was exaggerating. It might not have amounted to a storm or a cyclone.

ESUFALI
v.
TRAHA
UMMAL.
—
RAMESAM, J.

The next question is where did the schooner first anchor and did it move to another place further south on account of the wind. The coast here runs from north to south. A little to the south of the port and harbour there is an island called Hare Island on which there is a lighthouse. During night, lights were prohibited as the war was then going on. On account of the island the contours of equal depth near it recede towards the east and further from the coast. The form of the coast is as shown below . . . (Vide any map with sea depths.)

If a ship, anchoring due east of the port at a proper depth, drifts towards the south, parallel to the coast, the water would be getting shallower on account of the nearness of the island.

On the 30th the ship was found in 7 feet of water (ebb). This is conceded by all the witnesses (vide also Exhibit E). According to P.W. 2 she was then 2 or 3 miles away from the pier and the other schooner was about half a mile to the north in 10 or 12 feet of water. He was not asked as to where the ship anchored on the 28th—a curious omission—nor was P.W. 4 questioned on this matter. P.W. 1 says that she was standing on the 28th at a point one mile from the beach. The distance given by P.W. 1 for the 28th and that by P.W. 2 for the 30th suggest that the ship changed its situation. The evidence for plaintiffs throws no further light either way. D.W. 3 says that the suit schooner was east of his own schooner (which it may be remarked was in 10 feet or 12 feet of water according to P.W. 2) by half a mile. To the same effect is D.W. 4, but his evidence is not intelligible being too briefly recorded. D.W. 3 says that she had moved on the morning of the 30th quarter furlong off. D.W. 5 says that the ship had moved about 4 or 5 furlongs towards the shore on the southern side. D.W. 6 says that it had moved half a mile from its

ESUFALI
v.
THANA
UMMAL,
—
RAMESAM, J.

original place which must have been at 9 feet (ebb). He also says that it was 2 or $2\frac{1}{2}$ miles away from the shore on the 28th and that he noticed its changed situation with reference to a buoy quarter mile off. He appears to be disinterested and his evidence seems to me the most reliable. Taking all this evidence I am inclined to think that the other schooner was $1\frac{1}{2}$ miles east of the port probably in 10 feet high water or 8 feet (ebb); the suit schooner was half a mile further east, i.e., 2 miles from the shore and that she must have been in 9 feet (ebb). It may be that D.W. 2 slightly exaggerated when he said he anchored in 12 feet (high water) in Exhibit III. The place where the schooners were anchored was the usual place for them. Here it must be remembered that the difference in the tonnage between the two schooners is only 14 tons (Exhibit IX) and half a mile towards the east is a proper distance between the two. The draught of the suit schooner aft is 7 feet (Exhibit X) and it is unlikely that on the 28th it anchored in 7 feet of water (ebb). It must have moved towards the south parallel to the coast thus getting into shallow water. A slight gale causing such change or even a wreck in the native craft is not uncommon (see also D.W. 5). The only difficulty in the case is caused by the reports of D.W. 1—Exhibit X and Exhibit N—where he expresses his opinion that, from the beginning, she must have been in 7 feet of water. I have already observed that this is unlikely. His first report (Exhibit N, dated 4th September 1917) shows that the holding ground where the ship was said to have been first anchored was not good. He then says that the evidence is not conclusive so far as the vessel's dragging of the anchor is concerned. Probably he had not all the evidence we now have before us and his conclusion is therefore not decisive. He repeated it in the second

ESUFALI
v.
THANA
UMMAL,
—
RAMESAM, J.

report (Exhibit X, dated 8th September 1917). The learned vakil for the appellant drew our attention to Exhibit V—a protest made by the Master on the 30th August. This is in English, a language not known to the Master. That he relied on a change of situation on the 4th September appears from Exhibit N and he mentioned it expressly in his later protest (Exhibit III, dated 7th September 1917). It may be that the scribe of Exhibit V omitted part of what was mentioned to him. Anyhow it must have been prepared in a hurry and the omission of the change in the position of the vessel in that document is not conclusive (in the face of the other evidence) to show that the explanation of the master was an afterthought of the 4th September. I have not relied on the evidence of D.W. 2 as it may be said to be interested. I therefore find that the ship dragged its anchor and moved towards the south from its original position (8 feet ebb and 10 feet flow) to the later position (7 feet ebb). If it was fully loaded, 8 feet (ebb) of water could not be enough, but with its actual load, it was sufficient. (See D.W. 5.)

The next question is whether the facts so proved amount to a peril of the sea. If the vessel had anchored from the beginning in 7 feet of water one may say it was sheer carelessness but on the facts proved it cannot be described as negligence. It may be that if the vessel had anchored in deeper water further off towards the east, it would not have stranded even if it drifted towards the south on account of the wind. The mere fact that the accident might have been avoided by greater foresight does not make it negligence. The difference between ordinary perils and extraordinary perils suggested in Story on Bailments (section 512) has not been accepted by the authorities (Carver, section 87). The peril need not be extraordinary in the sense that the cause must be

ESUPALI
v.
THANA
UMMAL.
—
RAMESAM, J.

uncommon. It is true that negligence does not save the defendants' liability [WILLIS, J., in *Grill v. General Iron Screw Collier Co.*(1)]. But if reasonable care is taken, the perils of the sea, while not including the effects of mere ordinary wear and tear, will include the consequences of any kind of accident ending in damage by sea water (Abbot on Merchant Shipping, page 612, citing *Fletcher v. Inglis*(2), Scrutton, article 83, *Corcoran v. Gurney*(3), *Laurie v. Douglas*(4), *The Thrumscoe*(5), *The Catharine Chalmers*(6). *Bishop v. Pentland*(7) where a rope broke, *Merchants Trading Co. v. Universal Marine Co.* (LUSH, J.) unreported but cited in *Dudgeon v. Pembroke*(8).

In *Amies v. Stevens*(9) a sudden gust of wind was held to make all the difference. On the question of what is a proximate cause the latest decision in *Leyland Shipping Company v. Norwich Union Fire Insurance Society*(10) especially the judgment of Lord SHAW of Dunfermline may be referred to.

The appellants pointed out that while the other schooner had 3 or 4 anchors (P.W. 3), it does not appear that the suit schooner had more than one. I do not think this matters. She had 15 fathoms of cable (Exhibit N). The crew had put out more chain to prevent the dragging but without success (Exhibit X). Some of the cases relied on by the learned vakil for the appellants *Davis v. Garrett*(11) and *James Morrison & Co., Limited v. Shaw Savill and Albion Company, Limited*(12) are cases

(1) (1866) 1 C.P., 600.

(2) (1819) 2 B. & Ald., 315.

(3) (1853) 1 E. & B., 456.

(4) (1846) 15 M. & W., 746; 153 E.R., 1052.

(5) [1897] Prob., 301.

(6) (1875) 32 L.T.N.S., 847.

(7) (1827) 7 B. & C., 219; 108 E.R., 705.

(8) (1874) 9 Q.B., 581, at p. 596. (9) (1874) 1 Strange, 127; 93 E.R., 428.

(10) [1918] A.C., 350.

(11) (1830) 6 Bing., 716; 180 E.R., 1466.

(12) [1916] 2 K.B., 788.

of deviation. In *Joseph Travers & Sons, Limited v. Cooper* (1) clear negligence in leaving the barge unattended at night was proved and then it was for the defendant to show that the loss was not caused by the negligence. Negligence was also proved in *Price & Co. v. Union Lighterage Company*(2) and in *Polemis and Furness, Withy & Co., In re*(3). *Steinman & Co. v. Angier Line*(4) was a case of theft by the men in ship's service. The cases of *The City of Peking*(5) and *The President Lincoln*(6) are cases of collision and negligence where negligence was held to be the initial cause. In *Lennard's Carrying Company, Limited v. Asiatic Petroleum Company, Limited*(7) the vessel was unseaworthy and the owners did not discharge the onus that lay on them.

We think the defendants have not been guilty of negligence and have proved a peril of the sea. In view of this finding we have not heard arguments on the question of damages.

The appeal must be dismissed with costs.

N.B.

(1) [1915] 1 K.B., 78.

(2) [1903] 1 K.B., 750; on appeal [1904] 1 K.B., 412.

(3) [1921] 3 K.B., 580.

(4) [1891] 1 Q.B., 619.

(5) (1888) 14 App. Cas., 40.

(6) [1911] Prob., 248.

(7) [1915] A.C., 705.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Odgers.

1924,
February 12.

KALYANI PILLAI AND OTHERS, DEFENDANTS (RESPONDENTS),
APPELLANTS,

v.

THIRUVENKADASWAMI AYYANGAR AND ANOTHER,
PLAINTIFFS, PETITIONERS (RESPONDENT).*

Decree—Execution—Appeal to His Majesty in Council against an order refusing execution of the decree—Death of some of the respondents pending appeal—Their legal representatives not brought on record—Order of Privy Council, after respondents were dead—Order of Privy Council, whether a nullity—III and IV, William IV (Judicial Committee Act), sec. 23—Effect of—Application to bring legal representatives of deceased respondents made more than three years after their death but within three years of the order of Privy Council—Bar of limitation—Limitation Act (IX of 1908), art. 181.

Some of the respondents to an appeal before the Privy Council were dead and their legal representatives had not been brought on record when the appeal was heard and judgment was delivered by the Privy Council. The successful appellants applied to the Original Court for execution of the decree against the legal representatives who were sought to be added as parties to the execution proceedings more than three years from the death of the respondents but within three years of the order of the Privy Council. The legal representatives contended that the decree of the Privy Council was a nullity and that the application to implead them was barred by limitation.

Held, that although some of the respondents in the appeal before the Privy Council were dead and their legal representatives had not been brought on record when the appeal was heard and judgment was delivered by the Privy Council, the decree against them was not a nullity by reason of the provisions of the Judicial Committee Act (III and IV, William IV, Chapter XLI), section 23; *Deonandan Prasad Singh v. Janki Singh*, (1920) 5 P.L.J., 314, referred to;

* Appeal against order No. 61 of 1923.

that the application to bring on record the legal representatives of the deceased respondents, was not barred by limitation as the right to implead parties to a decree could not arise until the decree was passed, and that the application, being within three years of the decree of the Privy Council, was not barred under Article 181, Limitation Act.

APPEAL against the order of A. P. P. SALDANHA, Subordinate Judge of Tanjore, in E. P. No. 279 of 1905 in Original Suit No. 4 of 1884 on the file of the Sub-Court of Kumbakōnam.

In Original Suit No. 4 of 1884 on the file of the Sub-Court of Kumbakōnam, the plaintiffs who were trustees of a temple had obtained a decree for possession and for mesne profits against a number of defendants. Their petition for execution of the decree was dismissed by the Subordinate Judge and his judgment was affirmed on appeal by the High Court on the ground that the application for execution was not legally preferred by the decree-holders as the Vakil appointed by their agent was not legally authorized to represent them in the proceedings under the Code. On appeal being preferred by the decree-holders against the order of the High Court, the Privy Council reversed the order and directed that the lower Courts should proceed with the execution of the decree. The order of the Privy Council was passed on 27th May 1921. The appellants applied to the High Court on 29th September 1921 for transmission of the order of His Majesty in Council to the lower Court, and applied in the lower Court to implead the legal representatives of certain deceased respondents on 9th December 1921 and on later dates. It was found that some of the respondents had died in 1913, 1916 and 1917, i.e., before the decision of the Privy Council. The legal representatives contended that the decision of the Privy Council was under the circumstances a nullity, that the application to bring them in

KALYANI
PILLAI
v.
THIRU-
VENKADA-
SWAMI
AYYANGAR.

KALYANI
PILLAI
v.
THIRU-
VENKADA-
SWAMI
AYYANGAR.

as legal representatives was barred by limitation as more than three years had elapsed from the dates of the death of the respondents, and further that the execution of the decree was also barred as more than twelve years had elapsed from the date of the decree. The Subordinate Judge overruled all these contentions and ordered execution of the decree. The defendants preferred this appeal.

T. R. Ramachandra Ayyar and S. Srinivasa Ayyar for appellants.

V. N. Venkatavarada Chariar for respondents.

The JUDGMENT of the Court was delivered by

PHILLIPS, J.

PHILLIPS, J.—Objection is taken by appellants to the execution of a decree of the Privy Council. It is first contended that, as three of the respondents were dead when the appeal was heard and judgment was pronounced, the decree against them is a nullity. Section 23 of William IV, Ch. 41, however, cures the defect in the judgment, for it enacts that the order shall have full force and effect notwithstanding the death of any of the parties interested therein. Vide *Deonandan Prasad Singh v. Janki Singh* (1). The deceased respondents must therefore be considered as parties to the decree notwithstanding their death before it was passed.

It is next urged that the application to bring on record their legal representatives is barred by limitation, being made more than three years after their death; but article 181 of the Limitation Act gives three years from the date when the right to apply accrued. The right to implead parties to a decree cannot arise until the decree is passed. This objection must therefore fail.

(1) (1920) 5 P.L.J., 314.

The further argument that the Privy Council failed to consider another objection to the execution petition on the score of limitation, ignores the fact that the Privy Council decree orders execution to proceed and the executing Court cannot go behind the decree.

The appeal is accordingly dismissed with costs.

K.R.

KALYANI
PILLAI
v.
THIRU-
VENKADA-
SWAMI
AYYANGAR.
PHILLIPS, J.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

1924,
February, 11.

JAGANNATHA RAO AND FOUR OTHERS (DEFENDANTS),
APPELLANTS,

v.

VISWESAM (PLAINTIFF), RESPONDENT.*

Hindu Law—Partition omitting to provide for father's unsecured debts—Creditor's right to sue son after partition.

A bona fide partition between a Hindu and his son omitted to provide for an unsecured debt incurred by the father, not being for an illegal or immoral purpose..

Held, that the creditor could after the partition, sue the son also and recover the debt from the joint family properties allotted to the son in partition. *Ramachandra Padayachi v. Kondayya Chetti* (1901) I.L.R., 24 Mad., 555, and *Kameswaramma v. Venkata Subba Row* (1915) I.L.R., 38 Mad., 1120, followed. *Peda Venkanna v. Sreenivasa Deekshatulu* (1918) I.L.R., 41 Mad., 136, explained.

APPEAL against the decree of T. S. TYAGARAJA AYYAR, District Judge of Gōdāvari at Rajahmundry, in Original Suit No. 10 of 1920.

The facts are given in the judgment.

N. Rama Rao for appellant.—The partition was bona fide. After partition the sons are not liable for the personal debts of the father contracted before

* Appeal No. 175 of 1921.

JAGANNATHA
RAO
v.
VISWESAM.

partition; *Peda Venkanna v. Sreenivasa Deekshatulu*(1), *Kani Venkatareddi v. Chelluri Sathyanarayanamoorthi*(2), *Krishnasami Konan v. Ramasami Ayyar*(3), *Rathna Naidu v. Aiyanaachariar*(4), *Saku Rama Chandra v. Bhup Singh*(5) and *Chet Ram v. Ram Singh*(6), Trevelyan's Hindu Law, Second edition, page 308.

T. S. Raghunatha Rao and V. Viyantha for respondent.—The partition is not bona fide. Even if it be bona fide the sons are liable for all debts of the father which are neither illegal nor immoral and which are not provided for in the partition. The creditor can enforce his right against any portion of the family properties; *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(7), *Girdharee Lall v. Kantoo Lall*(8), *Suraj Bansi Koer v. Sheo Persad Singh*(9), *Ponnappa Pillai v. Pappuvayyanganar*(10), *Muttayan v. Zamindar of Sivagiri*(11), *Ramasami Nadan v. Ulaganatha Goundan*(12), *Ramachandra Padayachi v. Kondayya Chetti*(13), *Kameswaramma v. Venkata Subba Row*(14), *Lakshmana Aiyar v. Srinivasa Aiyar*(15) and *Raja Brij Narain Rai v. Mangla Prasad Rai*(16), Mayne's Hindu Law, Ninth edition, page 411, Gour's Hindu Law, section 118. The other cases quoted by the appellant have only held that the father has no right to alienate the son's shares after partition and so they are not to the point.

JUDGMENT.

RAMESAM, J.

RAMESAM, J.—Suit by the plaintiff to recover (1) a sum of Rs. 2,500 deposited with first defendant on 6th

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| (1) (1919) I.L.R., 41 Mad., 136. | (2) (1921) 40 M.L.J., 473. |
| (3) (1899) I.L.R., 22 Mad., 519. | (4) (1908) 18 M.L.J., 599. |
| (5) (1917) I.L.R., 39 All., 437 (P.C.). | (6) (1922) I.L.R., 44 All., 368 (P.C.). |
| (7) (1856) 6 M.I.A., 393. | (8) (1874) 1 I.A., 321. |
| (9) (1880) I.L.R., 5 Calc., 149 (P.C.). | (10) (1882) I.L.R., 4 Mad., 1 (F.B.). |
| (11) (1883) I.L.R., 6 Mad., 1 (P.C.). | (12) (1899) I.L.R., 22 Mad., 49 (F.B.). |
| (13) (1901) I.L.R., 24 Mad., 555. | (14) (1915) I.L.R., 38 Mad., 1120. |
| (15) (1898) 8 M.L.J., 64. | (16) (1924) 46 M.L.J., 28 (P.C.). |

July 1917 and (2) a sum of Rs. 350 payable to plaintiff for money paid for the first defendant. The defendants 2 to 5 are the sons of first defendant who formed with him members of a joint family up to 1918. In that year a suit was filed by the present second defendant against his father and brothers for partition. No written statement was filed and the suit was compromised and a decree was passed in terms of the compromise on 23rd January 1920. Under the compromise, provision was made for paying off most of the debts contracted by the first defendant but not the suit debt. No specific properties were allotted to the first defendant and it was arranged that a maintenance of Rs. 30 should be paid to him every month. The present suit was filed on 6th July 1920 and the defendants 2 to 5 are sought to be made liable with reference to the shares in their hands of what had been prior to 1920 joint family property. The defendants denied the genuineness of the debts. The District Judge found that the debts were true. He had doubts about the bona fides of the partition, but on the ground that under the compromise it was agreed that all the debts of the first defendant were agreed to be paid by all the defendants, decreed the suit. All the defendants appealed. The first defendant died during the pendency of the appeal. With the construction of the terms of the compromise by the District Judge, we are not able to agree.

The other appellants do not question the correctness of the finding that the debts are true. Nor do they say that the debts are illegal or immoral. They contend that the sons are not liable for the father's debt (not charged on the property) after partition and rely on *Kani Venkatareddi v. Chelluri Sathyanarayanamoorthi*(1).

(1) (1921) 40 M.L.J., 473.

JAGANNATHA
RAO
v.
VISWESAM.
—
RAMESAM, J.

JAGANNATHA
RAO
v.
VISWESAM,
—
RAMESAM, J.

following *Peda Venkanna v. Sreenivasa Deekshatulu*(1). The respondent replies that the partition is not bona fide within the meaning of the exception recognized in these cases and if the partition is held bona fide, he contends that *Kani Venkatareddi v. Chelluri Sathyanarayana-moorthi*(2) is incorrectly decided and as to *Peda Venkanna v. Sreenivasa Deekshatulu*(1), while conceding that the actual decision is correct, in so far as it rests on any ground other than the ground that the pro-note in that case was renewed by the father after partition, such ground is not correctly decided.

We are of opinion that the partition by the decree of 1920 was bona fide in the sense that the intention was to really divide the status of the parties; it is probably also bona fide though the matter has not been fully gone into, in the sense that there has been no unequal allotment of properties if we regard all the debts as debts of first defendant only, i.e., that his share, minus all the debts would have been much less than what he actually got, viz., an annuity of Rs. 360 and we come to this conclusion in spite of the fact that there has been no division by metes and bounds and the decision in *Appa v. Ranga*(3) is doubtful, if it meant to decide that the family continues joint in cases where there is a relinquishment by the father subject to a maintenance. It is not bona fide only in the sense that provision was not made for all the debts of first defendant, not illegal and immoral (Ghose's Hindu Law, Vol. 1, page 438) out of the whole joint family properties from which they would have been recoverable if there had been no partition and debts like the plaintiff's will be defeated if it is held that the defendants 2 to 5 are not liable. As it is doubtful whether the exception

mentioned in the cases uses the expression "bona fide" in this sense, we had to consider the question of the correctness of the decisions relied on.

It may be that, under the primitive Hindu Law, a son is under a pious duty to discharge his father's debts irrespective of the devolution, on him, of any kind of property. But the decisions have established the principle that a son is not liable unless the self-acquired property of the father or property which had been joint between them has devolved upon the son. For the purposes of this case, it is not necessary to go further behind the case of *Girdharee Lall v. Kantoo Lall*(1). At page 331, their Lordships quote from KNIGHT BRUCE, L.J., in *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(2),

"Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu Law the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate whether ancestral or acquired by the creator of the debt" and say

"That is an authority to show that ancestral property which descends to a father under the Mitakshara Law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquired an interest by birth, is liable to the father's debts."

At page 334, effect was given to these observations in *Muddun Thakoor v. Kantoo Lall*(1) in favour of a creditor in execution. While the Calcutta High Court gave full effect in a case from Bengal

JAGANNATHA
RAO
v.
VISWESAM,
—
RAMESAM, J.

(1) (1918) I.L.R., 41 Mad., 136.

(2) (1921) 40 M.L.J., 473.

(3) (1883) I.L.R., 8 Mad., 71.

(1) (1874) 1 I.A., 321.

(2) (1856) 6 M.I.A., 393.

JAGANNATHA
RAO
v.
VISWESAM.
—
RAMESAM, J.

in *Suraj Bunsu Koer v. Sheo Persad Singh*(1), the Madras High Court at first did not, on the ground that the decision in *Girdharee Lall v. Kantoo Lall*(2) cannot apply to Madras where a member of a joint family has a right to alienate his share (unlike Bengal) and there is no need for the equitable right, recognized in favour of the executing creditor in *Girdharee Lall v. Kantoo Lall*(2). The creditor carried the case to the Privy Council [*Muttayan v. Zamindar of Sivagiri*(3)]. Meanwhile a Full Bench of the Madras High Court in *Ponnappa Pillai v. Pappuvayyanganar*(4) (MUTTUSWAMI AYYAR, J., who decided the earlier case and INNES, J., dissenting) held that the decision in *Girdharee Lall v. Kantoo Lall*(2) applied to Madras equally. The Privy Council in *Muttayan v. Zamindar of Sivagiri*(3), while deciding the case on another point, pointed out that there was no ground for not applying the decision in *Girdharee Lall v. Kantoo Lall*(2) to Madras. In *Ramasami Nadan v. Ulaganatha Goundan*(5), a Full Bench held that the liability of the father and son was co-extensive and the cause of action against the son arose simultaneously with that against the father though it must be added that the son cannot be sued alone during the father's life.—*Periasami Mudaliar v. Seetharama Chettiar*(6). In *Krishnasami Konan v. Ramasami Ayyar*(7) the question arose whether in execution of a decree obtained against the father alone, the share of the son in the joint family property allotted to him in a partition can be seized in execution. The District Judge (afterwards MILLER, J.) held

"when the separation is before the suit as in this case, I think the creditor is bound to make parties all those whose

(1) (1889) I.L.R., 5 Cal., 148 (P.C.). (2) (1874) 1 I.A., 321.
(3) (1883) I.L.R., 6 Mad., 1 (P.C.). (4) (1882) I.L.R., 4 Mad., 1 (F.B.)
(5) (1899) I.L.R., 22 Mad., 49 (F.B.). (6) (1904) I.L.R., 27 Mad., 243 (F.B.).
(7) (1899) I.L.R., 22 Mad., 519.

interests he wishes to bind by his decree. The property is, from the date of separation, the son's property in which the father has no interest, and though the son may be liable to pay the debt, his liability must be enforced in a suit against himself "

JAGANNATHA
RAO
v.
VISWESAM.
—
RAMESAM, J.

Incidentally it may be observed that the son's share, even after partition, may be, and is spoken of in this and other cases as ancestral property and even joint property (in the sense that it represents what had been joint property). It is indeed ancestral property in the hands of the son as against his own sons. The High Court said

"The principle upon which the son cannot object to ancestral property being seized in execution for an unsecured personal debt of the father is that the father, under the Hindu Law is entitled to sell on account of such debt the whole of the ancestral estate. This necessarily implies that at the time the property is seized, it remains the undivided estate of the father and son Ergo, property taken by the son in partition cannot be seized on account of such unsecured personal debt of the father, even though the debt had been incurred before the partition. Of course if the partition had been made with a view to defraud or delay creditors it would be otherwise, but no such case is made out here."

This is the first case which considered the effect of a partition.

The whole decision and the exception in case of a *mala fide* partition relate to the seizure in execution of a decree to which the son was not a party. In *Ramachandra Padayachi v. Kondayya Chetti*(1) the sons were parties to the suit and it was held (BHASHYAMA AYYANGAR, J., being one of the Judges) that the son was liable to the extent of the family property which had come to him under the partition. *Krishnasami Konan v. Ramasami Ayyar*(2) was thus distinguished at page 557 :—

(1) (1901) I.L.R., 24 Mad., 555.

(2) (1899) I.L.R., 22 Mad., 51

JAGANNATHA
RAO
v.
VISWESAM.
—
RAMESAN, J.

"In that case the suit was brought after partition against the father alone and the point decided was that property taken by a son under a partition effected before the suit could not be seized in execution of a decree obtained against the father only in such suit. The case turned on the plaintiff's rights in execution not as here on the question whether the plaintiff is entitled to judgment as against the son."

The next case is *Kameswaramma v. Venkata Subba Row*(1) (WALLIS, C.J., and OLDFIELD, J.). In my opinion the reasoning in this case is conclusive against the appellants. The learned Judges say

"I think it is also clear that plaintiff as a Hindu son is liable for the debt to the extent of the joint family property which came to his hands at partition—*Ramachandra Padayachi v. Kondayya Chetti*(2)".

They quote the sentence I already quoted from *Krishnasami Konan v. Ramasami Ayyar*(3) and say

"This necessarily implies that at the time the property is attached, it remains the undivided property of the father and son. The same view has been taken under very similar circumstances [(MILLER and KRISHNASWAMI AYYAR, JJ.) in *Lakshmana Chettiar v. Govindarajulu Naidu*(4)]; see also *Rathna Naidu v. Aiyannachariar*(5). . . . At the date of execution the property now in question had ceased to be joint family property and the cases referred to on the other side are cases in which the property remained joint and so subject to alienation by the father in satisfaction of the debt."

Incidentally it may be mentioned that the case in *Rathna Naidu v. Aiyannachariar*(5) is one where the father mortgaged his son's share after partition. Obviously he has no such power and the case cannot help the point under discussion. Now comes the case in *Peda Venkanna v. Sreenivasa Deekshatulu*(6). The point elaborately argued in that case and also elaborately

(1) (1915) I.L.R., 38 Mad., 1120.

(3) (1899) I.L.R., 22 Mad., 519.

(5) (1908) 18 M.L.J., 599.

(2) (1901) I.L.R., 24 Mad., 555.

(4) (1910) 8 M.L.T., 349.

(6) (1918) I.L.R., 41 Mad., 136.

discussed is whether *Sahu Ram Chandra v. Bhup Singh*(1) effected any change in the law relating to the son's liability, a point which, after giving rise to Full Bench decisions in this Court, is set at rest by Lord DUNEDIN's judgment in *Raja Brij Narain Rai v. Mangla Prasad Rai*(2) (a judgment of a Full Board of the Privy Council). While deciding that it did not, WALLIS, C.J., said

"This Court has held in a series of cases that as the effect of partition is to put an end to the father's right to sell the son's share for an antecedent debt, it also puts an end to the creditor's right to bring the son's share to sale during his lifetime, at any rate when the partition has not been effected to defeat and delay creditors: *Krishnasami Konan v. Ramasami Ayyar*(3) and *Kameswaramma v. Venkata Subba Row*(4)"

Having regard to the expression "to bring the son's share to sale" and to the fact that *Kameswaramma v. Venkata Subba Row*(4) was cited in support of his Lordship's proposition and without any qualification or disapproval, it is impossible to say, solely because, lower down the page, his Lordship used the expression "to say nothing of the further ground, etc." that his Lordship impliedly intended to overrule his own opinion in *Kameswaramma v. Venkata Subba Row*(4) following *Ramachandra Padayachi v. Kondayya Chetti*(5). KUMARASWAMI SASTRI, J., begins by saying he agrees with the judgment of the Chief Justice on the narrower ground

"that a son is not after partition liable to be proceeded against in respect of a personal debt incurred by the father before partition."

If "proceeded against" meant "proceeded against in execution" there is no difficulty in accepting the statement but if it meant, as it was intended to mean, "proceeded against in suit" it is not justified, I say with

(1) (1917) I.L.R., 39 All., 437 (P.C.).

(3) (1899) I.L.R., 22 Mad., 519.

(5) (1901) I.L.R., 24 Mad., 555.

(2) (1924) 46 M.L.J., 23 (P.C.).

(4) (1915) I.L.R., 38 Mad., 1120.

JAGANNATHA
RAO
v.
VISWESAM.
—
RAMESAN, J.

JAGANNATHA
RAO
v.
VISWESAM.
—
RAMESAM, J.

great deference to my learned brother, by WALLIS, C.J.'s expression "to say nothing of the further ground" and by imputing to it a significance inconsistent with the earlier statement of the law following *Kameswaramma v. Venkata Subba Row*(1). His Lordship then reviews the cases at page 143. It is difficult to see how it can be said that *Rathna Naidu v. Aiyannachariar*(2) followed *Krishnasami Konan v. Ramasami Ayyar*(3). He then distinguishes *Ramachandra Padayachi v. Kondayya Chetti*(4) by saying that

"the debt sued on arose out of a joint family business carried on by the father and son before partition and the liability of the son rested . . . on contract entered into in respect of a joint family trade to the extent of the joint family assets, etc."

I am not able to follow the distinction. If the son was a party to the contract, he is liable not only as to the joint family property but even as to his self-acquired property and unless he is a minor, he is liable to be arrested. In other words, he is personally liable and there is no question of Hindu Law in the case. If he was not a party, his liability rests only on the Hindu Law relating to son's liability on the contracts of a father or manager. Suppose the family trade is not ancestral trade but a new trade started by the father and cannot therefore be said to be for justifiable necessity. Can it be said that *Ramachandra Padayachi v. Kondayya Chetti*(4) does not apply to such a case. No such distinction was made in *Kameswaramma v. Venkata Subba Row*(1) which is not the case of a family trade. He then refers to the renewal of the note by the father. In my opinion the case in *Peda Venkanna v. Sreenivasa Deekshatulu*(5) is correctly decided so far as it rests on the ground that the note sued on was renewed by the father

(1) (1915) I.L.R., 38 Mad., 1120.

(2) (1908) 18 M.L.J., 599.

(3) (1899) I.L.R., 22 Mad., 519.

(4) (1901) I.L.R., 24 Mad., 555.

(5) (1918) I.L.R., 41 Mad., 186.

JAGANNATHA
RAO
v.
VISWESAM.
—
RAMESAM, J.

after partition. WALLIS, C.J., did not intend to overrule *Kameswaramma v. Venkata Subba Row*(1) and *Ramachandra Padayachi v. Kondayya Chetti*(2) or even to distinguish *Ramachandra Padayachi v. Kondayya Chetti*(2) in the manner suggested by KUMARASWAMI SASTRI, J. In these circumstances, we cannot accept the decision in *Kani Venkatarreddi v. Chelluri Sathyanarayanamoorthi*(3) as binding on us as it rests solely on the ground that the matter was concluded by *Peda Venkanna v. Sreenivasa Deekshatulu*(4). Our brother OLDFIELD, J., who was also a party to *Kameswaramma v. Venkata Subba Row*(1), made no reference to it in the later case and gave no additional reasons. ABDUR RAHIM, J., simply said that all the cases were considered in *Peda Venkanna v. Sreenivasa Deekshatulu*(4). We are also referred to an unreported decision in A. S. 419 of 1918 by ABDUR RAHIM and PHILLIPS, J.J. It purports to follow *Peda Venkanna v. Sreenivasa Deekshatulu*(4) and concurs with KUMARASWAMI SASTRI, J., in his distinction of *Ramachandra Padayachi v. Kondayya Chetti*(2). I have already dealt with this. This case does not add to the other cases. We are of opinion that *Ramachandra Padayachi v. Kondayya Chetti*(2) and *Kameswaramma v. Venkata Subba Row*(1) were not overruled and following them, we hold that a son in possession of property which had been joint and which fell to his share in partition is liable in a suit brought after partition (impleading the son also) for the father's debts incurred before the partition and not illegal and immoral (see also Strange's Hindu Law, Vol. I, page 191).

We do not think it necessary to refer the question to a Full Bench. On this ground, the appeal is dismissed with costs.

(1) (1915) I.L.R., 38 Mad., 1120.

(2) (1901) I.L.R., 24 Mad., 555.

(3) (1921) 40 M.L.J., 473.

(4) (1920) I.L.R., 41 Mad., 136.

JAGANNATHA
RAO
v.
VISWESAM.
—
JACKSON, J.

JACKSON, J.—I agree. The point is correctly appreciated in Dr. Gour's Hindu Code, section 118, paragraph 311, with reference to *Ramachandra Padayachi v. Kondayya Chetti*(1) and *Kameswaramma v. Venkata Subba Row*(2): "On separation the son . . . is liable for debts incurred before partition." But in Trevelyan's Hindu Law, 2nd Edition, page 308, the point is not stated so clearly. "A creditor cannot enforce the payment of the debt of the father against property which has been allotted on partition to the son." This would be correct if "enforce in execution" is meant and not correct if it also includes "enforce by suit."

In Mayne's Hindu Law, 9th Edition, page 411, it is stated

"Where the son is joined in a suit against the father this is for the purpose of enabling the Court to exercise the power of the father to sell family property in discharge of his debts not being illegal or immoral and to prevent the son from questioning the nature of the debt in execution proceedings against the property. After partition, of course, the son holds the share which is allotted to him free from any such liability."

If "any such liability" be taken to mean attachment in execution proceedings, the passage presents no difficulty, but if the words mean free from any liability for such debts the statement seems to go too far.

N.R.

(1) (1901) I.L.R., 24 Mad., 555. (2) (1915) I.L.R., 38 Mad., 1120.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri.

NIMMAGADDA VENKATESWARLU (FIRST DEFENDANT),
APPELLANT,

1924,
February
13.

v

BODAPATI LINGAYYA AND TWO OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 2 AND 4), RESPONDENTS.*

Suit by lessee for declaration of title and for other reliefs—Lessor party defendant—Dismissal of suit by lower Courts, holding against title—Second appeal preferred by lessor, who was defendant—Competency of appeal—Right of appeal of defendant, where suit is dismissed—Decree to embody declaration—Effect of decree, without such embodiment, on right of appeal.

Where a suit has been dismissed, the true test for determining whether the defendant can appeal is to see not merely the form but the substance of the decree and judgment: and where the point decided adversely to the defendant, is directly and substantially in issue, and where in other proceedings the matter would be *res judicata*, it would be contrary to all principles of justice and equity to hold that the defendant is precluded from agitating the matter on appeal, merely because the suit was dismissed on some other ground.

Yusuf Sahib v. Durgi, (1907) I.L.R., 30 Mad., 447, referred to; and *Secretary of State v. Saminatha Kounden*, (1914) I.L.R., 37 Mad., 25, distinguished.

In suits where declaration and consequential relief are sought and the consequential relief is refused because the Court is against the plaintiff's rights which he seeks to declare, the decree should formally embody the result as to the declaration; but even if it does not do so but simply dismisses the suit, the decree in substance is one where the declaration is refused.

Where the plaintiff, who was the lessee of suit lands from the first defendant, sued for establishment of his title and for a declaration that the sale to the second defendant by the third defendant, who was the Official Receiver in insolvency of the first defendant's father, was inoperative as they had become divided long prior to the insolvency of the father and the suit

VENKATES-
WARLU
v.
LINGAYYA

lands had fallen to the son's share, and the suit was dismissed by both the lower Courts holding against the partition, on a second appeal being preferred by the first defendant,

Held, that the first defendant was competent to prefer the second appeal.

SECOND APPEAL against the decree of A. S. KRISHNASWAMI AYYAR, the Subordinate Judge of Bapatla, in Appeal Suit No. 116 of 1920 (Appeal Suit No. 417 of 1920, District Court of Guntūr) preferred against the decree of the Court of District Munsif of Ongole in Original Suit No. 477 of 1916.

The material facts appear from the Judgment.

B. Somayya for appellant.

K. Krishnaswami Ayyangar for respondent.

JUDGMENT.

The first defendant is the appellant. The plaintiff is a lessee from the first defendant under a cowle (Exhibit F), dated the 29th day of February 1916. The document is a lease for 11 years of the immovable property in dispute which it is alleged fell to the share of the first defendant in pursuance of a partition entered into in the year 1898. The first defendant's father became an insolvent and the Official Receiver sold the property and the second defendant purchased the same. As the partition was long before the insolvency, it is contended that the sale by the Official Receiver passed no property to the second defendant. Both the District Munsif and the Subordinate Judge held against the alleged partition and dismissed the plaintiff's suit.

The present second appeal is not by the plaintiff but by the first defendant, and a preliminary objection is taken that, as both the lower Courts dismissed the plaintiff's suit with costs against the first defendant, the second appeal by him is not competent, as there can

VENKATES-
WARLU
v.
LINGAYYA.

be no appeal against a mere finding. Reference has been made to *Ram Doss Lushkur v. Hureehur Mookerjee*(1), *Venkatasuryanarayana v. Sivasankara Narayana*(2), *Naganna v. Venkata Krishnamma*(3), *Nand Lal Pal v. Naresh Chander Deb*(4), *Muthu Pillai v. Veda Vysa Charariar*(5), *Byomkes v. Bhut Nath*(6), and *Secretary of State v. Saminatha Kownden*(7).

For the appellant it is contended that the first defendant being a lessor and his title being in dispute, the decree, though it nominally dismissed the suit of the lessee, dismissed it on the ground that the first defendant the lessor had no title, that, as between the first and the other defendants, the question at issue was whether the first defendant had any title to the property, that the matter would be *res judicata* between co-defendants and that consequently the first defendant is entitled to appeal. Reference is made to *Krishna Chandra Goldar v. Mohesh Chandra Saha*(8), *Yusuf Sahib v. Durgi*(9) and *Nagalla Kotayya v. Nagalla Mallayya*(10).

In *Yusuf Sahib v. Durgi*(9) it was held, following the decision of WOODROFFE, J., in *Krishna Chandra Goldar v. Mohesh Chandra Saha*(8), that where a decision dismissing a suit is in fact wholly against the defendant, such defendant can appeal against it. The decision in *Secretary of State v. Saminatha Kownden*(7), which was quoted, was simply to the effect that a judgment dismissing a suit would not give a right of appeal merely because there was an adverse finding on a point which is not directly and substantially in issue between the parties and which would not act as *res judicata* between co-defendants in other proceedings.

(1) (1875) 23 W.R., 86.

(3) (1896) 6 M.L.J., 88.

(5) (1921) 60 I.C., 397.

(7) (1914) I.L.R., 37 Mad., 25.

(9) (1907) I.L.R., 30 Mad., 447.

(2) (1915) 17 M.L.T., 85.

(4) (1917) 41 I.C., 468.

(6) (1921) 34 C.L.J., 489.

(8) (1905) 9 W.N., 584.

(10) (1910) M.W.N., 719.

VENKATES-
WARLU
v.
LINGAYYA.

I think the true test in cases of this kind is to see not merely the form but the substance of the decree and judgment. Where the point adversely decided to the defendant is directly and substantially in issue and where in other proceedings the matter would be *res judicata*, I think it would be contrary to all principles of justice and equity to hold that he is precluded from agitating the matter in appeal merely because the suit was decided in his favour on some other ground.

In the present case it is clear that the question as to whether the first defendant was divided or not from his father long before the insolvency of his father would be *res judicata* in subsequent proceedings between the Official Receiver and his assignee and the first defendant. I am therefore of opinion that the first defendant is entitled to appeal. I think that in suits where declaration and consequential relief are sought and the consequential relief is refused because the Court is against the plaintiff's rights which he seeks to declare, it would be better if the decree formally embodied the result of the declaration; but even if it does not do so but simply dismisses the suit, the decree in substance is one where the declaration is refused.

It is argued for the appellant that the question as to the factum and bona fides of the partition alleged in the plaint is *res judicata* by reason of the proceedings in suit No. 175 of 1908 on the file of the District Munsif of Ongole, which was filed by the next friend of the first defendant against the first defendant's father and certain attaching creditors and the question in issue was whether the partition now set up was valid. The District Munsif held that the partition was *bona fide* and valid and decreed the plaintiff's suit. Exhibit A is a copy of the judgment of the District Munsif. This judgment was confirmed in appeal by the District Judge

VENKATES-
WARLU
v.
LINGAYYA.

of Guntūr. Exhibit B is a copy of the judgment of the District Judge. A second appeal was filed in the High Court but it was dismissed by Justice SANKARAN NAYAR. A Letters Patent Appeal which was filed was also dismissed by MILLER and SADASIVA AYYAR, JJ., as appears from Exhibit C. It is argued that long before the Insolvency Proceedings the issue as to the partition being *bona fide* or not was decided in favour of the first defendant and against his father (the insolvent), and that consequently the Official Receiver in the Insolvency Proceedings, which were subsequent to the above decision, and the second defendant the purchaser cannot be in a better position than the insolvent. I agree with this contention and hold that the question as to whether the first defendant and his father were divided or undivided is *res judicata*. There were later suits which it is alleged by the respondents' vakil, took away any effect which Suit No. 175 of 1908 gave rise to.

Suit No. 905 of 1912 on the file of the District Munsif of Ongole was by the mother of the present first defendant and the wife of the insolvent. The first defendant in that suit was an attaching creditor, the second defendant was the husband of the plaintiff and the third defendant a lessee from her. An issue was raised as to the partition as between the second defendant and his son as it was alleged that the plaintiff got the suit property for her maintenance. It was held that there was no arrangement as pleaded by the plaintiff settling the suit property on her at the partition between the second defendant and his son. The judgment in that suit is marked as Exhibit II. It was not necessary to decide in that suit whether the partition was *bona fide* as the claim of the plaintiff was based on an oral arrangement contemporaneous with the partition giving her the property in dispute. Suit No. 299 of 1917 on the file of

VENKATES-
WARLU
v.
LINGAYYA

the Principal District Munsif's Court of Bezwada which was transferred to the Additional District Munsif's Court of Bezwada and numbered there as suit No. 19 of 1919 was filed by the present first defendant against his father and the other members of his family to establish his exclusive right to certain lands. The first defendant's father was the ninth defendant in that suit. It was alleged by the plaintiff in that suit that there was a partition between him and his father the ninth defendant. It appears from paragraph 9 of the judgment which has been filed as Exhibit V that a subsidiary issue was raised as to whether the partition alleged by the plaintiff was true. The District Munsif held that there was no *bona fide* partition and that the alleged partition was merely a cloak to be used against subsequent transferees from plaintiff's father.

The suit was filed in 1917 while the insolvency petition of the first defendant's father was in 1912. The Official Receiver was not a party. The lease to the present plaintiff was on the 9th February 1916 and the sale by the Official Receiver to the second defendant herein was on the 16th September 1916. Neither the plaintiff nor the second and third defendants herein were parties to the litigation of 1917 and it is clear that the findings in that suit are not *res judicata* against them. The only party to that suit who is a party to these proceedings is the present appellant. It is true that the appellant's father was the ninth defendant in the suit, but he had become insolvent long before and all his properties had vested in the Official Receiver. If the decision in the suit of 1917 was that the partition was *bona fide* it would be open to the Official Receiver and his vendee to plead that it is not binding on them as they were not parties. I find it difficult to see how they can now say that the decision being the other way renders

VENKATES-
WARLU
v.
LINGAYYA.

the question *res judicata* so far as the first defendant is concerned. After the lease by the first defendant and after the insolvency of his father they ceased to have an interest in the property sufficient to make them represent the alienees.

It seems to me, however, that the finding of both the District Munsif and the Subordinate Judge that it has not been shown that the land in dispute fell to the share of the first defendant at the partition or was in the possession or enjoyment of the first defendant is a finding of fact which cannot now be questioned. Even assuming that there was a partition, the plaintiff who seeks for a declaration that the lease to him is valid and binding on the defendants has to show that the lands which were leased to him by the first defendant fell to the share of the first defendant and that they were in the possession and enjoyment of his lessor. So far as the litigation in Suit No. 175 of 1908 was concerned, it did not decide that the lands now in dispute fell to the share of the first defendant who was the plaintiff in that suit. All that it decided was that there was a partition and that the land in question in that suit fell to the share of the plaintiff. Strong reliance was placed upon a registered letter, Exhibit K, dated the 19th of August 1898 and it is argued that that letter shows that there was a partition at which the suit land fell to the share of the first defendant. This letter was not filed in the previous suits or proceedings, and both the District Munsif and Subordinate Judge do not place any reliance on the letter. The District Munsif in his judgment observes :

"The letter, Exhibit K, which is now filed in this Court has not been filed in the previous suits and no grounds are now alleged for the non-filing of the same in those suits. I cannot attach much weight to the letter as evidencing partition. After all, the partition appears to me to be a cloak to be used against the alienees from first defendant's father."

VENKATES-
WARLU
v.
LINGAYYA.

The Subordinate Judge says in appeal with reference to Exhibit K :

"The preservation of that letter and the production of it by the first defendant's father proves beyond the shadow of a doubt that the alleged partition was a bogus affair and that the first defendant's father brought into existence letters like Exhibit K to serve as evidence to defraud his alienees and creditors."

Both the lower courts having refused to attach any weight to Exhibit K as evidence of the fact that at the partition in the year 1898 the suit land fell to the share of the first defendant, I do not see how I can in Second Appeal reverse these findings of fact. It is also found that the first defendant was not in possession and enjoyment. The plaintiff before he can succeed in this suit has to show not only that there was a partition but at the partition the properties in dispute were allotted to the share of the first defendant and that they were in his possession and enjoyment. As he has not done so, the suit was rightly dismissed. The Second Appeal fails and is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Odgers.

1924,
February
22.

KALEPALLI RAJITAGIRIPATHY (FIRST RESPONDENT),

APPELLANT,

v.

KALEPALLI BHAVANI SANKARAM (PETITIONER),

AND

KALEPALLI KUMARASAMY (SECOND RESPONDENT),

RESPONDENTS.*

Decree—Execution—Limitation—Limitation Act (IX of 1908), s. 15 and art. 182—Transfer of decree—Application by transferee for execution—Application stayed by attachment of decree by plaintiff in another suit—Attachment before judgment—Subsequent application by attaching decree-holder for transmission of decree to another Court—Notice to judgment-debtor—Order for transfer passed—Plea of limitation not taken in that application—Subsequent application for execution—Plea of limitation, whether res judicata—Application by assignee of decree, whether a step in aid of execution—Stay of execution of decree by attachment before judgment, whether a stay under section 15, Limitation Act—Deduction of time.

A decree was passed on 27th March 1918; an application was made by certain transferees of the decree on 26th July 1919 for recognition of their transfer, and for execution; their petition was dismissed in consequence of an order of attachment passed on the same date and obtained before judgment in another suit filed by the first respondent against the original decree-holders; on 4th April 1922, the first respondent, who had obtained his decree on 22nd December 1921, applied for the transmission of the former decree from the Sub-Court which had passed it to the District Court for execution, and an order for transfer of the same was made after notice to the judgment-debtors who did not object to the transfer on the ground that execution of the decree was then barred by limitation; on 26th April 1922, the first respondent applied for

* Civil Miscellaneous Appeal No. 60 of 1923.

RAJITAGIRI-
PATHY
v.
BHAVANI
SANKARAM.

execution of the decree in the latter Court; on the judgment-debtors pleading the bar of limitation,

Held, that, even in an application for transfer of the decree to another Court for execution, it is open to the judgment-debtor to plead limitation in bar of execution, and in fact he ought to do so; and if he omits to raise the plea and the order for transfer is made, he cannot raise the bar of limitation in a subsequent application for execution filed within three years of the previous application for transfer of the decree.

Mungul Perahad Dichit v. Grija Kant Lahiri (1882) I.L.R., 8 Calc., 51 (P.C.); and *Raja of Ramnad v. Velusami Thevar*, (1921) 40 M.L.J., 197 (P.C.), applied;

that the application by the transferee-decree-holders for recognition of their transfer and for execution was a step in aid of execution of the decree, even though the right of the transferees had been negatived in subsequent proceedings; *Sreepada Brahmayya Pantulu v. Parasuramayya*, (1902) 12 M.L.J., 348, followed; that in the case of an attachment before judgment, of a decree, unlike the case of an attachment of a decree by a decree-holder or of a book-debt, the order of attachment absolutely prohibits the execution by anybody of the decree attached and amounts to an injunction within the terms of section 15 of the Limitation Act, and the decree-holder is entitled under that section to a deduction of the period during which the injunction was in force; and that consequently the present application for execution was not barred by limitation.

APPEAL against the order of P. C. LOBO, the District Judge of Kistna, in Execution Petition No. 60 of 1922 in Original Suit No. 66 of 1913 on the file of the Court of the Subordinate Judge of Masulipatam.

In Original Suit No. 66 of 1913 on the file of the Sub-Court, Masulipatam, a decree was passed for payment of money and other reliefs in favour of the plaintiff and fourteenth defendant therein, and the decree was affirmed on appeal on the 27th March 1918. The decree-holders therein transferred their decrees in favour of their wives, and the latter applied on 26th July 1919 to the Sub-Court for recognition of their transfer and for execution of the decree. On the same

RAJITAGIRI-
PATHY
v.
BHAVANI
SANKARAM.

date, at the instance of one Bavani Sankaram, the present first respondent, who had filed a suit (Original Suit No. 372 of 1919 on the file of District Munsif's Court, Masulipatam) against the original decree-holders, the District Munsif issued a prohibitory order to the Sub-Court for attachment of its decree; and the attachment was made on 28th July 1919 before judgment in the suit in the Munsif's Court; in consequence of this attachment, the application of the transferee-decree-holders filed in the Sub-Court was dismissed without inquiry into the merits of the transfer and without issuing notices to the judgment-debtors and original decree-holders. The District Munsif passed a decree on 22nd December 1921 in favour of the plaintiff in Original Suit No. 372 of 1919 against the original decree-holders in the Sub-Court suit. The first respondent, who had obtained his decree in Original Suit No. 372 of 1919 and had attached the decree in Original Suit No. 66 of 1913 before judgment as already stated, applied in Original Suit No. 66 of 1913 on 4th April 1922, for transfer of the Sub-Court decree to the District Court for purposes of execution of the said decree; and the decree was transmitted to the District Court after notice under Order XXI, rule 22, had been issued to the judgment-debtors, who are the present appellant and second respondent in the High Court. The judgment-debtors did not take, in answer to the petition for transfer of the decree, the plea that an application for the execution of the decree was barred by limitation and the Court passed the order for transfer of the decree, without considering the question of limitation. After the order had been passed by the Sub-Court the attaching decree-holder (first respondent) made the present application to the District Court for execution of the decree on the 26th April 1922. The judgment-debtor pleaded

RAJITAGIRI-
PATHY
v.
BHAYANI
SANKARAM.

the bar of limitation. The District Judge held that the application was not barred by limitation on two grounds, viz., (1) that the question whether the execution application was not barred was *res judicata* by reason of the order of the Sub-Court on the previous application for transmission of the decree to the District Court, and (2) that the previous application by the transferees of the decree for recognition of their transfer and for execution, was a valid application in accordance with law and was a step in aid of execution of the decree. He overruled the other grounds relied on by the decree-holder, viz., that the time during which the decree was stayed by reason of the attachment should be deducted under section 15 of the Limitation Act, as well as the ground that a notice was issued on a previous application for execution filed by the first respondent before he obtained his decree in Original Suit No. 372 of 1919. The first defendant preferred this appeal.

T. Ramachandra Rao for Appellant.—The question of limitation is not *res judicata* by reason of the order on the application for transmission of the decree. All that is necessary to be inquired into in such an application is whether the decree is not satisfied and such like matters. The question of limitation and executability of the decree need not be gone into at that stage. Though the judgment-debtor might have raised the question of limitation, he is not bound to raise it at that stage. Explanation 4 to section 11, Civil Procedure Code, which is a rule of constructive *res judicata*, is not applicable to execution proceedings. The decision in *Sreepati Charan Chowdhury v. Shamaldhone Dutt*(1) shows that it is not permissible to the judgment-debtor to raise in such an application the plea of limitation in bar of execution. An application for transmission of decree

(1) (1912) 15 C.L.J., 123.

RAJITAGIRI-
PATHY
v.
BHAYANI
SANKARAM.

is not an application for execution. See also *Chutterpat Singh v. Rai Bahadur Saita Soomarimull*(1). This case is approved in *Pierce Leslie v. Perumal*(2). Notice under Order XXI, rule 22, should be issued by the executing Court, and not by the Court transmitting the decree. Assuming the transmitting Court is competent to decide, it is not bound to decide the question of limitation. Constructive *res judicata* is not applicable to execution proceedings. See *Kalyan Singh v. Jagan Prasad*(3) and *Ramchandra v. Shriniwas*(4). The decision of the Privy Council in *Mungul Pershad Dichit v. Grija Kant Lahiri*(5) is distinguishable as there both the petitions were petitions for execution. 2nd point. The application of the assignee-decree-holders is not a step in aid of execution, because there was no pending application for execution. See *Kuppuswami Chettiar v. Rajagopala Aiyar*(6).

P. Somasundaram for respondent.—The application for execution of the assignee-decree-holder operates as a step in aid of execution. The application of assignees on 26th July 1919 is a step in aid of execution. See *Ramanuja Jeer Swami v. Secretary of State*(7). Section 15, Limitation Act, applies. The decree-holder is entitled to deduction of time from 28th July 1919 (the date of attachment of decree) to 22nd December 1921, (date of decree obtained by the first respondent in Original Suit No. 372 of 1919). Under Order XXXVII, rule 7, the attachment before judgment operates as a stay of execution. See Order XXI, rule 53, and Form 223, Appendix C, Civil Procedure Code.

The case in *Rangaswami Ohetti v. Thangavelu Chetti*(8) is distinguishable, as it is a case of attachment

(1) (1916) 20 O.W.N., 889 (F.B.).
(3) (1915) I.L.R., 37 All., 589.
(5) (1882) I.L.R., 8 Cal., 51 (P.C.).
(7) (1910) 7 M.L.T., 241.

(2) (1917) I.L.R., 40 Mad., 1069 (F.B.).
(4) (1922) I.L.R., 46 Bom., 467.
(6) (1922) I.L.R., 45 Mad., 466.
(8) (1919) I.L.R., 42 Mad., 687.

RAJITAGIRI-
PATHY
v.
BHAVANI
SANKARAM.

of a simple debt. Attachment in such a case does not prevent a suit. There is a distinction between attachment of a debt and of a decree. *Shib Singh v. Sita Ram* (1) and *Beti Maharani v. The Collector of Etawah* (2) are cases of attachment of debts. *Unni Koya v. Umma* (3).

T. Ramachandra Rao in reply.—The decisions of the Privy Council in *Mungul Pershad Dichit v. Grija Kant Lahiri* (4) and in *Raja of Ramnad v. Velusami Tevar* (5) are not applicable to the present case, as they were cases in which the previous application was one for execution, but not so in the present case.

The application by assignees of the decree is not valid as a step in aid of execution, because the assignment was held to be invalid in execution proceedings and in suit. Benamidar cannot execute the decree. See *Hari Gobind Adhikari v. Akhoy Kumar Mozumdar* (6) [*Somasundaram* for appellant referred to *Vaitheswara Aiyer v. Srinivasa Raghava Iyengar* (7) and to *Gur Narayan v. Sheo Lal Singh* (8) as laying down that a benamidar is competent to execute a decree].

JUDGMENT.

This appeal relates to the execution of a decree dated 27th March 1918. On 26th July 1919 the transferee-decree-holders applied for recognition of their transfer and for execution. However in consequence of an attachment of the decree, this petition was dismissed. The next petition was put in on 4th April 1922 asking for the transmission of the decree to the District Court for execution, and on 26th April 1922 the present execution petition was filed. It was contended that the present petition was barred by limitation, but four grounds were

(1) (1891) I.L.R., 13 All., 76.

(3) (1912) I.L.R., 35 Mad., 622.

(5) (1921) 40 M.L.J., 197 (P.C.).

(7) (1919) I.L.R., 42 Mad., 343 (F.B.).

(2) (1895) I.L.R., 17 All., 198 (P.C.).

(4) (1852) I.L.R., 8 Cal., 51 (P.C.).

(6) (1889) I.L.R., 18 Cal., 364.

(8) (1918) 46 I.A., 1.

urged by the decree-holder for allowing execution. The District Judge has held that two of these grounds were valid and has ordered execution to proceed. Now, this appeal is filed by the first defendant, the judgment-debtor.

The first ground taken is that the plea of limitation is *res judicata* by reason of the order on the application of 4th April 1922 directing the transmission of the decree to the District Court. It has been held in the Calcutta Court in *Sreepati Charan Chowdhury v. Shamaldhone Dutt* (1) and in *Chutterpat Singh v. Rai Bahadur Saita Soomarimull* (2), that, when an order for transmission of the decree is made, no question of limitation is decided and therefore such an order does not amount to *res judicata* on the question of limitation. In fact, in the former case, *MUKERJEE, J.*, held that the judgment-debtor could not at that stage possibly contend that the decree was barred by limitation; but, apparently no notice was issued to the judgment-debtor under section 248 of the Code of Civil Procedure: the Court held further that, even though notice under section 248 is issued, it is not competent for a judgment-debtor at that stage to contend that the decree ought not to be transferred because an application for execution thereof is likely to prove infructuous as being barred by limitation. In the judgment no authority is given for this proposition of law and possibly it is based upon the rules of the Calcutta High Court, which do not require the issue of a notice to the judgment-debtor in an application for transmission of the decree. On the other hand, in Madras, under rule 161 (3) of the Civil Rules of Practice, a notice should be issued and a notice was accordingly issued in this case. It is now urged for the respondent that the judgment-

RAJITAGIRI-
PATHY
v.
BHAVANI
SANKARAM.

(1) (1912) 15 C.L.J., 123.

(2) (1916) 20 C.W.N., 889 (F.B.).

RAJITAGIRI-
PATHY
v.
BHAVANI
SANKARAM.

debtor had an opportunity of appearing and pleading that the application was barred by limitation, and it would seem that, when there was that opportunity, section 11 explanation (iv), would be applicable and that the question would be *res judicata* because it was one which might and ought to have been put forward to show that the decree was not one that could be executed. In fact in *Mungul Pershad Dicit v. Grija Kant Lahiri*(1), it was held that, where an execution petition was barred by limitation but execution had been ordered to proceed, it was not open to the judgment-debtor in a subsequent application to plead that the former application was barred by limitation. Similarly in *Raja of Ramnad v. Velusami Tenar*(2) the Privy Council held that, when an assignee of a decree applied to be brought on the record and to have the decree executed, execution was allowed although the judgment-debtor had raised the plea that execution was barred by limitation. In the order allowing execution the plea of limitation was not dealt with specifically, but it was held that in a subsequent application the plea of limitation could not be urged, for it must be deemed to have been decided in the order on the former application. In that case the plea was raised in the first proceedings, but their Lordships remark in the judgment (at page 200), "It was not only competent to the present respondents to bring the plea forward on that occasion but it was incumbent on them to do so if they proposed to rely on it. No appeal was brought from the order then made and therefore it was not competent for the Subordinate Judge to admit the plea on the subsequent proceedings." It would appear from this that, even in an application for transfer of a decree it is open to the judgment-debtor to plead limitation and

RAJITAGIRI-
PATHY
v.
BHAVANI
SANKARAM.

in fact he ought to do so. If the decree is barred by limitation, the transfer of it to another Court is a mere infructuous proceeding which ought not to be taken and, therefore, if a valid plea of limitation is available, it should be urged in order to prevent multiplicity of proceedings. In this view we think that the District Judge's order in the present case was correct.

The second ground on which the District Judge allowed execution is that the petition put in on 26th July 1919 was a step in aid of execution, and, being less than three years before the present application, the latter is not barred. The application of 26th July 1919 was one put in by the transferee-decree-holders to recognize the transfer and to execute the decree in certain methods specified in the petition. The petition was dismissed because execution of the decree had been stayed and it appears that in subsequent proceedings the right of those transferee-decree-holders has been negatived. At the time the application was made they were transferee-decree-holders by assignment from the original decree-holders and as such the proper persons to execute the decree; it was held in *Sreepada Brahmayya Pantulu v. Parasuramayya*(1) that such an application as this would have the effect of saving the bar of limitation. The transfer in that case was effected by a decree of Court, whereas in the present case the transfer is effected by an assignment by the parties, but this cannot affect the question whether the application was one made in accordance with law. Until the assignment had been held to be invalid, the transferees were the persons who had title to execute the decree. On this ground also we think the District Judge was right.

(1) (1882) I.L.R., 8 Cal., 51 (P.C.). (2) (1921) 40 M.L.J., 197 (P.C.).

(1) (1902) 12 M.L.J., 348.

RAJITAGIRI-
PATHY
v.
BHAVANI
SANKARAM.

The District Judge has rejected the third ground, namely, that limitation is saved under section 15 of the Limitation Act and he has based his decision on *Rangaswami Chetti v. Thangavelu Chetti*(1). In that case, however, the attachment was of a book-debt and it is clear that an attachment of a book-debt does not operate as an injunction within the meaning of section 15 of the Limitation Act. When a decree is attached the form of attachment is given in Appendix E, forms Nos. 22 and 23, and, in accordance with those forms, there would not really be any injunction against execution, for the attaching decree-holder can execute the decree himself; but, in the present case the attachment was not by a decree-holder, but it was an attachment before judgment, and consequently the order issued by the Court attaching the decree absolutely prohibited the execution of the decree by anybody, as will be seen by a reference to the attachment order. This order clearly amounts to an injunction and it is not denied that, if the period during which that injunction was in force be deducted, the present application would be within time.

For all these reasons we think that the present petition is not barred by limitation and therefore dismiss this appeal with costs.

K.R.

(1) (1919) I.L.R., 42 Mad., 637.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

RAMAPPA CHETTIAR AND ANOTHER (PLAINTIFFS—
RESPONDENTS), PETITIONERS,

1924,
February 26.

EKAMBARA PADAYACHI (CLAIM PETITIONER),
RESPONDENT.*

Civil Procedure Code (V of 1908), O. XXI, rr. 58 and 63, sec. 151, O. IX, r. 3, and O. XLVII—Claim-petition—Dismissal for default—Application by petitioner to set aside dismissal for default—Competency of Court to entertain application—"Order shall be conclusive," used in rule 63, meaning of—Right of suit—Finality of order on claim-petition, applicable to what orders.

Where a claim-petition, preferred under Order XXI, rule 58, Civil Procedure Code, was dismissed for non-appearance of the petitioner, the Court is competent to entertain an application by the petitioner to set aside the dismissal for default and to restore the petition for disposal.

The use of the words, "the order shall be conclusive," in Order XXI, rule 63, does not take away the right of the party to apply to have the order of dismissal for default set aside.

PETITION under section 25 of Act IX of 1887 to revise the order of N. SUNDARAM AYYAR, Judge of the Court of Small Causes, at Kumbakonam, in I.A. No. 1245 of 1922 in Small Cause Suit No. 3060 of 1922.

The material facts appear from the Judgment

K. S. Jayarama Ayyar for petitioner.

K. S. Desikan for respondent.

JUDGMENT.

A claim was preferred under Order XXI, rule 58, Civil Procedure Code, and it was dismissed on account

* Civil Revision Petition No. 843 of 1922.

RAMAPPA
CHETTIAR
v.
EKAMBARA
PADAYACHI.

of the non-appearance of the claimant. On his application the Subordinate Judge restored the petition. The present revision petitions have been filed challenging the correctness of this order.

Order XXI, rule 63, provides that the party against whom an order is made may institute a suit, but subject to the result of such suit the order shall be conclusive. It is said that the words "*the order shall be conclusive*" have the effect of precluding an application of this kind being entertained. No authority bearing directly on the point has been cited and I am not prepared to accede to this contention. If the Legislature had intended to lay down such a rule I should have expected to find very clear language employed to indicate that intention. The words in my opinion do not take away the right of the party to have the order of dismissal for default set aside. Full effect can be given to the words "*the order shall be conclusive*" by holding that an adjudication finally made after the setting aside of the dismissal, is conclusive subject to the result of the suit mentioned in the rule.

The revision petitions are accordingly dismissed with costs, half of the vakil's fee in the first and half in the second is allowed.

K.R.

SPECIAL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
and Mr. Justice Coutts Trotter.

BOARD OF REVENUE, REFERRING OFFICER,

v.

MUNISWAMI CHETTI AND SONS (ASSEESSES).*

Indian Income-tax Act (VII of 1918), sec. 9 (2) (ix)—A trading on his own account and also as partner in a firm—Gain in one and loss in another—Right to set off loss against gain—Charges incurred to ascertain taxable profits—Right to deduct charges from income.

A who traded on his own account held as part of his business a share in a firm consisting of himself and B, whose business was to deal in similar goods and was subsidiary to A's. In a certain year A made a profit in his own business but sustained loss as a partner.

Held, that in arriving at the taxable income of A for the year his loss as a partner could be set off against his gains in his own business.

Held further, that in arriving at the taxable income of A for a particular year, charges and costs incurred by him in employing accountants and lawyers in connexion with a dispute between him and the Government as to the amount of excess profits duty payable by him for a previous year, could not be deducted from the gross income, since such charges and costs were not expenditure within the meaning of section 9 (2) (ix) of the Income-tax Act, VII of 1918, incurred solely for the purpose of earning such profits but were charges incurred after the profits were earned. *Inland Revenue Commissioners v. Warnes & Co.*, [1919] 2 K.B., 444, and *Ward & Co. v. Commissioner of Taxes* [1923] A.C., 145, followed.

CASE stated under section 51 (1) of the Income-tax Act, VII of 1918, by the Secretary, Board of Revenue, Madras.

The facts appear from the Opinion of the High Court.

R. N. Aingar with O. T. Govindan Nambiyar for assessee.—On the first question:—If one person carries

1923,
February
22, and
August 28.

* Referred Case No. 19 of 1922.

BOARD OF
REVENUE
v.
MUNISWAMI
CHETTI.

on two businesses, loss in one can be set off against gain in the other. Both are his *businesses* and income from both must be treated as from one and the same source, viz., "business" for purposes of income-tax. He is only one "assessee" within the meaning of the Income-tax Act though carrying on two businesses, one in his individual capacity and the other as partner. Profits from "any business" in section 9 (1) (B) of the Act, means profits from one or many businesses. He referred to Konstram's Law of Income-tax, page 173, and rule 13 of Schedule D of the English Income-tax Act of 1918. Though there is no specific provision in the Indian Act on this point, the definitions of "assessee," "income" and "business" in the Act make this clear. On the second question:—Section 20 of the Excess Profits Duty Act (X of 1919) allows a deduction of such duty when paid, from assessable income for purposes of income-tax. Hence all charges incurred by the assessee in proving to the Government by engaging accountants and lawyers as to what exactly was his income for purposes of Excess Profits Duty Act and Income-tax Act must be deducted from gross income as being proper charges.

Government Pleader (C. V. Anantakrishna Ayyar) for the Crown.—On the first question:—Losses in one business cannot be set off against gains in another. If there is a loss in one business that business cannot be taxed, but that fact cannot have the result of reducing the taxable income of the other business, for the Act allows set off only in certain cases and this is not one of them. Moreover if one trades both in his individual capacity and also as a partner of a firm he has two separate entities. Also if the businesses are distinct and not connected with each other there cannot be a set off. On the second question:—Charges and costs cannot be

BOARD OF
REVENUE
v.
MUNISWAMI
CHETTI.

deducted as they are not expenditure incurred for earning the profit and as they were incurred after the profits were earned; see section 9 (2) (ix); see *Inland Revenue Commissioners v. Warnes & Co.*(1) and *Ward & Co. v. Commissioner of Taxes*(2), *Strong & Co., Limited v. Woodfield*(3), *Inland Revenue Commissioners v. Von Glehn*(4). Moreover Excess Profits Duty Act applied only for one year and allowed deduction of such duty paid only in adjustments made before 31st March 1920 and as in this case the adjustment was made in later years (i.e.) 1921–1922 the payment cannot be deducted; see *The Chief Commissioner of Income-tax, Madras v. The Eastern Extension Australasia and China Telegraph Co., Ltd.*(5).

JUDGMENT.

SCHWABE, C.J.—This case is referred under the Income-tax Act by the Board of Revenue for the opinion of the High Court. The question relates to the assessment for income-tax of the firm known as B. Muniswami Chetti and Sons and there are two distinct points referred.

SCHWABE,
C.J.

(i) B. Muniswami Chetti and Sons carry on a business in piece-goods, the partners in the firm being B. Damodaram Chetty and P. V. Ramanujam Chetty, Damodaram Chetty having a much larger share. On the facts as now found it is clear that that firm engaged in business with other partners in two other firms, one called the Carnatic Import Company and the other B. Damodaram Chetty & Co., whose business were of an allied character in that they dealt in goods similar to those dealt in by Muniswami Chetti and Sons. B. Muniswami Chetti and Sons had a much larger share in those

(1) [1919] 2 K.B., 444.

(2) [1923] A.C., 145.

(3) [1906] A.C., 448.

(4) [1920] 2 K.B., 553.

(5) [1921] I.L.B., 44 Mad., 489.

BOARD OF
REVENUE
v.
MUNISWAMI
CHETTI.
—
SCHWABE,
C.J.

other two firms there being in each case a partner with a small share to encourage him to take a real interest in the management of the business. In the year of assessment B. Muniswami Chetti and Sons made a profit and the other two firms made a loss. B. Muniswami Chetti and Sons claim that they are entitled, for the purpose of assessment, to set off their share of the loss in the other two firms against the profit made in their own firm. The Crown contends, on the other hand, that they must be treated separately and must pay income-tax on the profit of their firm, and that the only effect of the loss of the other two firms would be that these firms would not have to pay income-tax. In our judgment, the determination of this question depends upon whether it is a fact that the business of B. Muniswami Chetti and Sons is being carried on in part by engaging with partners in the other firms. Where the subsidiary business engaged in is connected with the main business, and is a proper employment of the assessee's capital or labour, it is, in my judgment for the purpose of assessment, to be treated as part of the business of the firm. If the firm in one branch makes a loss, that loss may be set off against the profits made in its head office or other branches. Applying that test to this case I think it is clear that the contention of the assessee is right and that B. Muniswami Chetti and Sons are entitled to have their assessment arrived at by taking into account the loss made by them in the other two firms.

(ii) They claim also in arriving at their profits for the tax year, 1921-1922, to deduct certain expenditure incurred by them (a) in employing accountants and lawyers in the matter of dispute between them and the Government as to the amount of excess profits duty payable by them for the year ending March 1920, the year in which the Excess Profits Duty Act applied and

BOARD OF
REVENUE
v.
MUNISWAMI
CHETTI.
—
SCHWABE,
C.J.

(b) similar expenses incurred by them in arriving at the income on which income-tax assessment was made or was to be made. These expenses are perfectly proper expenditure by the company of the company's money, but whether they can be brought into account in arriving at the proper assessment of the income-tax must depend upon the construction of section 9 (2) (ix) of the Income-tax Act of 1918 which runs as follows :—

“Such profits shall be computed after making the following allowances, in respect of sums paid, namely, in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits.”

In my judgment these monies were expended not for the purpose of earning profits at all but for the purpose of, in one case, protecting profits from Government's claim to income-tax and in other cases of getting back from Government the excess profits duty claimed by or paid to the Government in respect of some past period. The words of this rule are much the same as the words of the rule in Schedule D of the Income-tax Act of 1918 in England and of the rule in the Income-tax Act current in New Zealand, and there have been cases both in England, and in the Privy Council on appeal from New Zealand which indicate the view of the English Courts which is to the effect that these and similar words are to be construed strictly, by ascertaining whether or not the expenditure was for the sole purpose of earning profits. So the amount paid to the Government in the nature of a fine arising out of a matter connected with the business and costs incurred in resisting the imposition of such fine were held in *Inland Revenue Commissioners v. Warnes & Co.*(1) not to be charges that could be deducted. In *Ward & Co. v. Commissioner of Taxes*(2) their Lordships of the Privy Council held that no deduction could be made for

(1) [1919] 2 K.B., 444.

(2) [1922] A.O., 145.

BOARD OF
REVENUE
v.
MUNISWAMI
CHETTI.
—
SCHWABE,
C.J.

monies spent by a company in printing and distributing literature directed against prohibition, which expenditure was admitted to be in the interest of the preservation of the assessee's trade. We were referred to the Excess Profits Duty Act, X of 1919, section 20, and it was suggested that because the amount of the excess profits duty is to be allowed as a deduction in respect of the profits of a business for the purpose of income-tax therefore the costs of arriving at the excess profits duty must also be so allowed. It is clear on an examination of the section that this has got to be for a specified year and does not apply to any later year; nor do I think that apart from that limitation the fact that the excess profits duty is by statute allowed to be deducted would make the costs of arriving at the excess profits duty also a deduction. If the statute had desired to make it so, it would have been quite simple to have stated that the excess profits duty and any money expended in arriving at the right amount of excess profits duty shall be a deduction for the purpose of income-tax. The section does not say so and I see no reason why it should be implied.

I have come to the conclusion that on the first point the contention of the assessee is right and on the second wrong.

The first point is the main and the more important point and I think that the assessee must have his costs of this reference except in so far as they have been increased by adding a claim on the second point. Costs in this case will be taxed on the Original Side scale.

I think that it would be desirable at some future time on a suitable occasion with the assistance of the Vakils' Association, if they choose to assist in this matter, to consider the question of the taxation of costs, with a view to framing some rule or establishing some definite practice in such matters.

COUTTS TROTTER, J.—Now that we have unambiguous findings, I do not entertain the slightest doubt about the first point which seems to me almost too plain for discussion. Indeed when Mr. Ananthakrishna Ayyar came to develop the argument, it was clear that the only way in which he could contend for the claim made by Government was by arguing that under section 9 (1) of the Income-tax Act of 1918 the profits of any business carried on by him, that is, the assessee, have to be expanded into profits of any business carried on by him solely so as to exclude any business that he may carry on in conjunction with others. Here we have a company part of whose business is to hold a share in a separate business. It takes this share in the course of its own business and it receives whatever profit it receives or loses whatever it loses in the course of its own business.

With regard to the second point, I feel more doubt. The section occurs in many Acts of many countries and Mr. Justice ROWLATT, a Judge of great experience and learning in revenue matters, has frankly said that he does not see his way to give a general definition of the true construction of the section but that he is content to say about each case as it comes along whether in his view it falls within the section. This seems to me a difficult case, more difficult than the one which that learned Judge had to deal with. I do not think that the expenses incurred here can be said, in any sense that a plain man would understand, to be correctly described as expenditure incurred for the purpose of earning profits. It seems to me that the expenditure was incurred after the profits had been earned. That appears to be sufficient to take the case out of the section.

I agree to the order as to costs.

N.R.

BOARD OF
REVENUE
v.
MUNISWAMI
CHETTI.
—
COUTTS
TROTTER, J.

SPECIAL BENCH.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief
Justice, and Mr. Justice Waller.*

THE COMMISSIONER OF INCOME-TAX, MADRAS,
REFERRING OFFICER,

v.

M. AR. AR. ARUNACHELAM CHETTIAR (RESPONDENT).*

Income-tax Act (XI of 1922), ss. 2, 6, 10 and 24—Assessee carrying on trade individually and as partner of an unregistered firm—Gain in one and loss in another—Right to set off.

Where a person carries on two different trades, one individually and the other as a member of an unregistered firm, he is, under the Income-tax Act, XI of 1922, entitled to set off, for purposes of income-tax, the loss incurred by him in respect of the partnership trade against the profit made by him in his individual trade.

CASE stated under section 66 (2) of the Income-tax Act, XI of 1922, for the decision of the High Court on the following question of law arising in assessing the respondent herein, viz., M. Ar. Ar. Arunachelam Chettiar, for the year 1922-23.

The facts appear from the following reference made by the Commissioner of Income-tax to the High Court:—

“Under section 66 (2) of the Income-tax Act, XI of 1922, I have the honour to refer for the decision of the Hon’ble the Judges of the High Court the following question of law which has arisen in assessing the individual mentioned above for the year 1922-23:—

“Where a person carries on two different trades, one individually and the other as a member of an unregistered firm, is he entitled to set off the loss incurred by him in respect of the partnership trade against the profit made by him in his individual trade.”

2. “The essential facts of the case are—

“The assessee owns property and carries on money-lending and other businesses such as a bell-metal factory on his own

account. He was also a partner in two unregistered firms, one carrying on business at Dharmapuri and the other sugar and rice trade at Calcutta. From his individual property and trade he had a taxable income of Rs. 1,01,004 after allowing for the loss he suffered in his own Calcutta money-lending transactions and in the Bell-Metal Factory at Chatrawadi. To this taxable income, Rs. 22,100, being share of income from other partnerships and from dividends, was added to arrive at the appropriate rate. The partnership business at Dharmapuri and the sugar and rice trade at Calcutta resulted in a loss and the assessee claimed that his share of the loss Rs. 478 at Dharmapuri and Rs. 13,950 from the sugar and rice trade at Calcutta should be set off against his profits from other sources. The Income-tax Officer declined to do so, as the firms which suffered loss were unregistered, and his decision was upheld on appeal.

3. “Under section 66 (2) the assessee has applied for a reference to the High Court on the question of law as stated in paragraph 1. I agree that the question of law does arise and refer the question.

4. “In my opinion the set off claimed is not admissible. Under section 24 (1) of the Act an assessee is entitled to set off a loss under any of the heads mentioned in section 6 against his income, profits or gains under any other head. Sub-section (2) of section 24 provides for the case of a registered firm and entitles a partner in such a firm to set off his share of the firm’s loss against his individual profits from other sources. On the principle ‘*inclusio unius exclusio alterius*’ the terms of section 24 (2) operate to render inadmissible the loss now claimed. Throughout the Income-tax Act the unregistered firm is treated as an entity of which no account is taken so far as the partners are concerned except that (i) if the profits of the firm are less than Rs. 2,000 and the firm is accordingly not assessed, the amount received by each individual partner is assessable to income-tax under section 14 (2) (b), (ii) any income received from an unregistered firm assessed to tax and so not assessed in the hands of the individual partner is taken into account for the partner’s personal rate and (iii) where the profits and gains of an unregistered firm have not been assessed to super-tax, super-tax will be leviable, if the need arises, on the partner’s share in the hands of that partner under

COMMISSIONER OF
INCOME-TAX
v.
ARUNACHELAM
CHETTIAR.

1923,
October
4 and 12.

* Referred Case No. 6 of 1923.

COMMISSIONER OF
INCOME-TAX
v.
ARUNA-
CHELAM
CHETTIAR.

the proviso to section 55. Thus section 24 (1), so far as an unregistered firm is concerned, only applies when the unregistered firm has income, profits or gains under one or more of the heads mentioned in section 6 and sustains a loss under another, in which case the loss can be set off against the income, profits or gains. But if the unregistered firm sustains a loss, that loss falls on the firm as an entity and cannot be taken by the individual partner against any income, profits or gains received by him personally. It is contended by the assessee in his application under section 66 (2) that 'section 24 applies only to a case where there are several heads of income and not to a case where the losses and profits are sought to be set off against each other in respect of the same category and that under section 10 he is entitled to set off the loss against the profits of various businesses whether the firm is registered or unregistered.' The words of section 10 are 'the tax shall be payable by an assessee under the head "business" in respect of the profits or gains of any business carried on by him.' In the case of the businesses at Dharmapuri and the sugar and rice trade at Calcutta, the present petitioner is not the assessee. The assessee in each case is the unregistered firm, an entirely different entity. Further, the present assessee does not carry on the business at Dharmapuri and the sugar and rice trade at Calcutta. These businesses are carried on by the two different firms. Under section 10, therefore, were it not for the special provision of section 24 (2) which, as already mentioned, does not apply to an unregistered firm, a loss suffered in one business could only be set off against the profits made in another, if the two businesses were carried on by the same person."

A. Krishnaswami Ayyar with V. Rajagopala Ayyar for the assessee.

Government Pleader (C. V. Anantakrishna Ayyar) for the Crown.

The arguments urged on both sides were the same as on the first question in Referred Case No. 19 of 1922 (for which see *ante*, page 653).

In addition, the Government Pleader argued that as the firm was an unregistered firm no set off can be

allowed under section 24 of the Income-tax Act; while A. Krishnaswami Ayyar for the assessee argued *contra*.

COMMISSIONER OF
INCOME-TAX
v.
ARUNA-
CHELAM
CHETTIAR.
—
SCHWABE,
C.J.

JUDGMENT.

SCHWABE, C.J.—The question referred is

"Where a person carries on two different trades—one individually and the other as a member of an unregistered firm, is he entitled to set off (that is, for income-tax purposes) the loss incurred by him in respect of the partnership trade against the profits made by him in his individual trade?"

The facts are that the assessee has an income from trade profits in two distinct and separate businesses of his own and from other property, has made losses in other businesses of his own, and also has incurred losses in two distinct businesses in which he is a partner and which businesses are not registered.

The question for decision is a difficult one, the difficulty arising from the wording of the Income-tax Act. If our decision is not in accordance with the real intention of the legislature, it is for the legislature to make that intention clear hereafter. The relevant sections for consideration are 6, 10 and 24, and the difficulty is to ascertain the proper interpretation of the two latter. Section 6 is merely a division into heads of the different sources of income, one being "Business" concluding with a general head of "Other Sources." Section 10 defines and elaborates the profits and gains covered by the heading "Business." The tax is payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him. "Assessee" is defined in section 2 as "a person by whom income-tax is payable." No mention is made in section 10 of partnerships registered or unregistered, and, although it is the practice to assess firms as such, I can find nothing to justify the argument that each partner in a firm is not an assessee for he is a person by whom

COMMISSIONER OF
INCOME-TAX
v.
ARUNA-
CHELAM
CHETTIAR.
—
SCHWABE,
C.J.

the income-tax is payable, nor can I find anything to justify the argument that this assessee, being a partner, is not a person carrying on the business in question. I am therefore prepared to hold that the present assessee is an assessee in respect of the profits and gains of the business which he carries on in partnership.

The next question that arises is, where an assessee carries on two distinct businesses, is he entitled to set off the loss on one against the profits of the other? The Crown has argued before us to the contrary, but it is to be observed that this is not the view taken by the Commissioner. Indeed, he states that such set off has been allowed in respect of the separate businesses of the assessee which he carried on alone, namely, his money-lending business and his Bell-Metal Factory, and it would from the reference seem to be his view that, if the partnerships had been registered, such set off would be allowable also in respect of the losses of the partnership businesses.

The Crown's argument is based on the words of section 10, which refers to "the profits of any business," and would have us construe "any" as "each" and not as "each and every." Counsel points to the English Income-tax Act which under Schedule D makes chargeable to income-tax the profits and gains from any trade, and then by special rule, namely, rule 15 of the rules applicable to cases I and II (case I being tax in respect of trade) provides that the losses of one business can be set off against the profits of another. This re-enacts section 101 of the Income-tax Act of 1842. It is argued that, if such a section was necessary in England, it follows that its omission here shows that it was not intended to allow such set off here. I have already pointed out that that is not the view of the Commissioner, and if it were the intention of the statutes it would

COMMISSIONER OF
INCOME-TAX
v.
ARUNA-
CHELAM
CHETTIAR.
—
SCHWABE,
C.J.

indeed be anomalous; for by section 24 (1) set off is allowed between the different heads of income, so that a trade loss can be set off against a professional gain, or interest on securities—a privilege not allowed in England, while an adjustment of profit and loss between different businesses incurred by the same person would be allowable in England and not here, although the arguments in favour of such allowance are at least as strong as those in favour of those governed by section 24. What it is desired to tax is a man's total net income, and it would be most unjust to tax him on a profit on one business when, in fact owing to losses on the other, he has a less or even no income at all. I do not believe that this was the intention of the Act, and I doubt whether rule 15 in the English Act was necessary, except to make clear the intention of the legislature; and, in my judgment looking at the Indian Act alone, the words "any business" being open to either construction, I must take that construction which, looking at the whole Act, I think, is the more rational, and must construe "any" to mean "each and every." It follows that an assessee is entitled to set off profits in one business against losses in another. And for this purpose I can find no distinction between what an assessee earns alone and what he earns in partnership. It is argued by the Commissioner that a partnership is, for income-tax purposes, an entity; but it is not an entity known to the law; it is not a separate entity like a company limited by shares; its name is merely a convenient method of describing its partners, each of whom is jointly and severally liable for its debts, and, for income-tax purposes, it is a convenient body to assess, as the partners carry on the trade together and keep books in which the partnership transactions are entered and earn together profits or make losses. It is to be observed that,

COMMISSIONER OF
INCOME-TAX
v.
ARUNACHELAM
CHETTIAR.
—
SCHWABE,
C.J.

for this purpose, no distinction can be made between registered and unregistered firms, for whether a firm is a legal entity or not does not depend on registration.

It is then argued that section 24 shows an intention that such set off is not to be allowed in the case of unregistered firms. But section 24 (1) is dealing with something quite different, namely, the allowance of set off between different heads mentioned in section 6, and not the allowance of set off between different businesses coming under one head. Section 24 (2) again dealing with set off between different heads allows the partners of a registered firm, where that firm has made a loss under one head, and has not sufficient income under another head, to avail themselves of this set off, to use the loss to set off against their own individual incomes arising under other heads. Whether this must be taken by implication to prevent such set off in the case of partners of an unregistered firm is a difficult question which does not arise here, as the present assessee desires to set off his partnership loss against a loss of his own under the same head, that is "business" and not under a different head. I do not think that we should be justified in inferring from this section the intention of the legislature to prevent any sort of set off by a partner of an unregistered firm against his own trade losses.

It follows that the answer to the question is in the affirmative. The assessee is entitled to his costs.

WALLER, J.

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

N.R.

SPECIAL BENCH.

Before Mr. Victor Murray Coutts Trotter, Chief
Justice, and Mr. Justice Wallace.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
REFERRING OFFICER,

1924,
March 21.

v.

THE NEDUNGADI BANK, LTD., CALICUT, BY ITS
SECRETARY, RESPONDENT.*

Income-tax Act (XI of 1922), sec. 10 (2), cl. (9)—Business allowance—Madras District Municipalities Act (V of 1920), sec. 92—Tax on companies—Assessment of income under the Income-tax Act—Tax on companies under the Municipalities Act, whether can be deducted as a business allowance under the Income-tax Act.

Tax on companies levied under section 92 of the Madras District Municipalities Act (V of 1920) should be deducted as a business allowance under section 10 (2) of the Income-tax Act in assessing income under the latter Act.

Tax on companies levied under the former Act is not an income or profession tax but is a compulsory toll on trading companies without which they are not permitted to carry on their trade, and the payment of which is an expenditure incurred solely for the purpose of earning profits or gains.

Smith v. Lion Brewery Company, [1911] A.C., 150, and *Usher's Wiltshire Brewery, Limited v. Bruce* [1915] A.C., 433, followed; *The Chief Commissioner of Income-tax, Madras v. The Eastern Extension Australasia and China Telegraph Co. (Ltd.)* (1921) I.L.R., 44 Mad., 489, *Ward & Co. v. Commissioner of Taxes*, [1923] A.C., 145, and *Board of Revenue v. Muniswami Chetti* (1924) I.L.R., 47 Mad., 653, distinguished.

CASE stated under section 66 (2) of the Income-tax Act by the Commissioner of Income-tax, Madras, for the decision of the question

"Whether the company's tax levied under section 92 of the Madras District Municipalities Act (V of 1920) must be

* Referred Case No. 10 of 1923.

deducted as a business allowance under section 10 (2) of the Income-tax Act."

The material facts appear from the memorandum of the Income-tax Commissioner sent up with his letter of reference to the High Court. The material portion of the memorandum of reference was to the following effect:—

The Collector and Income-tax officer, Malabar, assessed the Nedungadi Bank (Ltd.) during the current financial year on its income earned in the year 1922-23. He calculated that income to be Rs. 79,721. The Bank has its head office at Calicut and branches in various other towns. It therefore fell within the scope of the section 92 of the Madras District Municipalities Act (V of 1920) and was assessed to a municipal tax of Rs. 1,928 under that Act. The Bank claims that an allowance equal to this amount of the tax should be granted under section 10 (2) (ix), of the Indian Income-tax Act, 1922. The Income-tax officer held that any municipal taxation allowed must fall within the terms of section 10 (2) (viii) of the Indian Income-tax Act, 1922, and that the expenditure was not incurred solely for the purpose of earning the profits or gains of the business. He accordingly disallowed the claim. The point was raised on appeal before the Commissioner and was also disallowed. The assessee is dissatisfied with this decision and has claimed a reference on the following terms:—"Whether the Company's tax levied under section 92 of the Madras District Municipalities Act (V of 1920), must be deducted as a business allowance under section 10 (2) of the Income-tax Act. The point in issue is the interpretation of clause (ix) of sub-section (2) of section 10 of the Indian Income-tax Act and is admittedly a point of law. The point is referred accordingly for the decision of the High Court." The Commissioner was of opinion, inter alia, that the only municipal tax that could be deducted as an allowance under the Income-tax Act was that specified in section 10 (2), clause (viii), and was limited to the municipal taxes in respect of such part of the premises of a business as was used for the purpose of the business, that the company's tax, not levied in respect of business premises, could not fall under clause

(viii), that the company's tax in question was not "an expenditure solely incurred for the purpose of earning such profits or gains" within the terms of clause (ix) of section 10 (2) of the Income-tax Act, and that consequently the deduction claimed by the company (Bank) should not be allowed under the Act.

The Government Pleader (C. V. Anantakrishna Ayyar) for the Referring Officer.

T. V. Muttukrishna Ayyar and S. Chinnaswami for the respondent.

JUDGMENT.

1. This is a reference under section 66 (2) of the Income-tax Act, and the question for decision is whether tax on companies levied under section 92 of the Madras District Municipalities Act, V of 1920, may be deducted as a business allowance under section 10 (2), clause (9), of the Income-tax Act. According to section 92 of the District Municipalities Act, under notification of the Chairman every company transacting business within the municipality for profit shall pay a half-yearly tax known as "Tax on Companies" on the scale shown in Schedule IV, provided it has transacted business for more than 60 days in the half-year. Section 16 of Schedule IV lays down the method of assessment, from which it is clear that the assessment is made on the paid-up capital of the company, although in certain cases if the head office or a branch or principal office of the company is not in the municipality, and it is able to show certain figures of gross income, the tax on the paid-up capital is to some extent reduced. The penalty for non-payment of this tax is set out in section 30 and subsequent sections of Schedule IV. It appears quite clear that this is a tax or a toll, not on profits or on income or on profession, since it is based not on the amount of profit or salary earned, but on the paid-up

capital. It is, therefore, in no sense, an income or profession tax. It is a compulsory toll on such trading companies without which they are not permitted to carry on their trade for more than 60 days in any half-year. It is not strictly a licence fee, but it is nearer in analogy to that than it is to an income-tax.

2. That being the nature of the tax or toll levied, the question is whether it is a species of expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning profits or gains. It is clearly not in the nature of capital expenditure, since it is not met out of capital and does not diminish the capital. Is it then an expenditure for any other purpose than for the purpose of earning profits or gains? We are of opinion that it is not. It is not a tax on profits or income but a necessary condition precedent to any earning of profits. It is an impost without paying which the firm cannot trade within the municipality.

3. Arguments by analogy from the fact that income-tax may not be deducted in calculating the income assessable to Indian income-tax are not of any help in this case, since this is in no sense an income-tax. The case quoted by the Government Pleader, viz., *The Chief Commissioner of Income-tax, Madras v. The Eastern Extension Australasia and China Telegraph Co., Ltd.*(1), is therefore of no assistance. Another case quoted by him appears to us equally not in point. It is *Ward & Co. v. Commissioner of Taxes*(2). There it was held that money spent by a brewery company in printing and distributing anti-prohibition literature was not "expenditure exclusively incurred in the production of the assessable income," and therefore

(1) (1921) I.L.R., 44 Mad., 489.

(2) [1923] A.C., 145.

the company was not entitled to make the deduction, the ground of the decision being that such expenditure was not incurred in the production of the assessable income but was expended with a view to influencing public opinion against taking a step which would have partly destroyed the earning of profit. In the case in *Board of Revenue v. Muniswami Chetti*(1), a Bench of this Court, to which one of us was a party, held that expenses for legal advice in a dispute between Government and the assessee regarding excess profits duty and in drawing up an income-tax return, could not be legitimately deducted. This case also does not seem to us to assist the decision of the present case. The only useful cases quoted before us are two English cases, *Smith v. Lion Brewery Company, Limited*(2) and *Usher's Wiltshire Brewery, Limited v. Bruce*(3), both of which support the assessee. These were cases decided under the English Income-tax Act of 1842 where a phrase not dissimilar to the phrase which we are now seeking to interpret had to be interpreted, namely, "Money wholly and exclusively laid out or expended for the purposes of such trade." In the former case a brewery company had, in order to extend their business, acquired certain licensed houses which they let out to tenants who covenanted to retail the company's beer. By thus becoming landlords of those licensed premises the company had to pay a statutory levy imposed by the Licensing Act of 1904, section 3, and the question was whether such payment could legitimately be deducted in the estimate of the balance of profits and gains. The House of Lords which consisted of four learned Lords was equally divided and the decision of the Court of Appeal in favour of allowing the deduction was

(1) (1924) I.L.R., 47 Mad. 653.

(2) [1911] A.C., 150.

(3) [1915] A.C., 433.

COMMISSIONER OF
INCOME-TAX
v.
NEDUNGADI
BANK.

affirmed. One of the learned Judges, the EARL OF HALSBURY, in that case lays down as a deciding factor in the case that a person engaging in such a business "must, if he carries on that business, pay this tax; it is the Act of the Legislature which makes him pay it, and it is not a thing that is open to his own will or option." Another learned Judge, Lord ATKINSON, called it a compulsory levy and described it as an impost which "must necessarily be paid in order to set up the system which is found to be vital to their trade prospects to set up." In the second case, *Usher's Wiltshire Brewery Company, Limited v. Bruce*(1), all the five learned Judges composing the House followed the former case. That case is even stronger in the assessee's favour than the 1911 Appeal Cases case. It was another instance of a brewery company acquiring and letting licensed houses to tied tenants, and it was there laid down that even expenses in respect of premiums on fire insurances over these houses and premium on insurance against the loss of their licences for the sale of liquor were legitimate deductions in arriving at the assessable income. These were both cases of expenses, properly though voluntarily, incurred in the extension of the trade. The companies thought it necessary for the extension of their trade that they should become themselves the landlords of the retailing houses and thereby subjected themselves to the compulsory compensation levy. The present case seems to us an even stronger one. The payment of the compulsory levy to the municipality by way of the tax on companies is not merely for the purpose of extension of trade but is a condition precedent to the exercise of the trade at all within the municipal boundaries.

(1) [1915] A.C., 433.

COMMISSIONER OF
INCOME-TAX
v.
NEDUNGADI
BANK.

4. We are, therefore, clear that the payment of companies' tax compulsorily levied on this company by the municipality is wholly and exclusively for purposes of the trade and that the object which that payment accomplishes is the same. The answer to the Reference, therefore, is that the expenditure is incurred solely for the purpose of earning profits and gains, and we answer accordingly.

5. Costs of the Reference will be taxed as on the Original Side. The assessee will get his costs from Government.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Devadoss.

PANNAI ANANTHANARAYANA AYYAR (FIRST PETITIONER), APPELLANT,

v.

SANKARANARAYANA AYYAR AND OTHERS (SECOND PETITIONER AND RESPONDENTS), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), ss. 53, 54, 68 and 75—Alienation by insolvent—Application by creditor to set aside—Refusal by Official Receiver to take action under section 53 or 54—Right of creditor to move District Court on refusal by Official Receiver—Remedies of creditor—Duty of Receiver to take action on indemnity by creditor—Appeal against order of District Judge dismissing application of creditor to take action—Creditor, whether a party "aggrieved" by order—Appeal without leave—Leave, subsequently applied for—Limitation—Delay, excuse of.

There is no rule that the Official Receiver alone, and nobody else, can move the District Court to annul an alienation by the insolvent under section 53 or 54 of the Provincial Insolvency Act (V of 1920).

* Appeal against Order No. 90 of 1922.

1923,
August 13.

ANANTHA-
NARAYANA
AYYAR
v.
SANKARA-
NARAYANA
AYYAR.

A creditor can at any time during the pendency of the insolvency proceedings move the Court to take action under section 53 or 54 of the Act, if the Official Receiver has refused to move in the matter on the request of the creditor; and there is no period of limitation provided for such an application. *Hemraj Champa Lal v. Ramakrishnan Ram* (1917) 2 P.L.J., 101.

Where the Official Receiver declines to take action, a creditor can apply to the Court to allow him to use the Official Receiver's name in order to recover the insolvent's property or to set aside a voluntary transfer or to avoid a fraudulent preference for the benefit of the creditors; and the requirements of the law are satisfied by making the Official Receiver a party to an application made by a creditor to take action under section 53 or 54 of the Act.

Even though an appeal lies to the District Judge under section 68 of the Act against "any act or decision" of the Official Receiver, a mere refusal of the Official Receiver to take action under section 53 or 54 of the Act, cannot be deemed to be an "act" of the Receiver under section 68, against which a creditor is competent to prefer an appeal to the District Judge; but the creditor can move the Court, on refusal by the Official Receiver, to take action under the Act.

The Official Receiver is bound to take action under the Act or prefer an appeal against an order of the District Judge, if the creditor indemnifies the Official Receiver against costs in the event of failure in such proceedings.

A creditor, who is a party to an application under section 53 or 54, is one "aggrieved" by an order dismissing it within the terms of section 75 of the Act, and can appeal under that section. *Kumarappa Chettiar v. Murugappa Chettiar*, (1916) 36 I.C., 771, referred to.

Where an appeal was preferred within time but without leave of Court under section 75, clause (3) of the Act, and an application for leave to appeal was filed after the period of limitation had expired, the appeal could not be held to be out of time, and even if it was out of time the delay could be excused by the Court under section 78 of the Act.

APPEAL against the order of J. K. LANCASHIRE, District Judge of Tinnevely, in Original Petition No. 220 of 1920.

ANANTHA-
NARAYANA
AYYAR
v.
SANKARA-
NARAYANA
AYYAR.

In this case the third respondent, one Padmanabha Sastri, was adjudicated an insolvent by an order of the District Judge of Tinnevely, passed in Insolvency Petition No. 12 of 1919, filed in that Court on 7th July 1919 by the appellant and another creditor as petitioning creditors. In their petition for adjudication they had alleged that a mortgage bond executed by the insolvent in favour of one Sankaranarayana Ayyar (the second respondent herein) within three months of that petition on the 28th April 1919, was fraudulent and void. The Official Receiver (4th respondent herein) did not take action for annulling the transaction, but caused the sale of the hypothecated property free of the mortgage, and paid the mortgagee in full out of the sale-proceeds and reserved only the balance for the creditors of the insolvent, who received a dividend of four annas in the rupee out of the balance of the above sale as well as out of the sale-proceeds of other properties. The petitioning creditors filed a petition (O.P. No. 220 of 1920) on the 1st December 1920, in the District Court, impleading the mortgagee, insolvent and the Official Receiver as respondents, and prayed that the Court might declare the mortgage document fraudulent and void under sections 53 and 54 of the Provincial Insolvency Act (V of 1920). The mortgagee contended, *inter alia*, that the Official Receiver had already admitted his claim as valid on 19th March 1920, that the properties were sold on 16th April 1920, and the Official Receiver ordered payment to him on 30th August 1920, that the creditors had received dividends on 19th October 1920, that the Official Receiver only can apply under sections 53 and 54 of the Act, and that the present petition to the District Court filed on 1st December 1920 was barred by limitation under section 68 of the Act, as the application was virtually an appeal

ANANTHA-
NARAYANA
Ayyar
v.
SANKARA-
NARAYANA
Ayyar.

against an act of the Official Receiver which could be filed only within twenty-one days of the act complained of. The District Judge upheld the above contentions and dismissed, on 18th October 1921, the petition before him as barred by limitation. The first petitioning creditor preferred this appeal to the High Court under section 75, clause (2) of the Act within time but did not file an application for leave to appeal under section 75, clause (3), along with the appeal, but filed such an application long subsequent to the time limited for filing the appeal. The mortgagee, who was impleaded as one of the respondents along with the Official Receiver and others, took a preliminary objection that the creditor could not appeal, as he was not an "aggrieved" party within section 75 of the Act. The same respondent raised also the contention that the appeal was not properly filed, and was barred by limitation as no leave was obtained within time for filing an appeal. He also raised the other contentions raised in the lower Court.

P. N. Appuswami Ayyar and *P. V. Krishnaswami Ayyar* for appellant.

K. V. Krishnaswami Ayyar and *T. L. Venkatarama Ayyar* for respondents.

The Court delivered the following

JUDGMENT.

The appellant is one of the two petitioning creditors who applied to the District Court of Tinnevely in I.P. No. 12 of 1919 to have the third respondent in this Court adjudicated an insolvent. One of the allegations in the petition was that the hypothecation in favour of the second respondent was in fraud of creditors. The Official Receiver, Tinnevely, who is fourth respondent, sold the hypotheca free of encumbrance and paid the second respondent in full. The petitioning creditors

ANANTHA-
NARAYANA
Ayyar
v.
SANKARA-
NARAYANA
Ayyar.

applied to the District Court, Tinnevely, to have the hypothecation declared void under sections 53 and 54 of Act V of 1920. The District Judge held that the application was an appeal against the act of the Official Receiver under section 68 of the Act and dismissed it with costs as being barred by limitation, it not having been presented within twenty-one days of the order of the Receiver. This appeal is against the judgment of the District Judge.

The Appeal came on for hearing on 1st August 1923, when the appellant's vakil, Mr. P. V. Krishnaswami Ayyar, asked for time to file an application for leave to appeal under section 75, clause (3). Time was granted and the application for leave to appeal was filed on 6th August 1923. Mr. K. V. Krishnaswami Ayyar objected to leave being granted as the affidavit on behalf of the appellant was not satisfactory and he further contended that, even if leave was granted, the appeal would be out of time as it was presented on 10th January 1922 without obtaining leave. As the new Provincial Insolvency Act came into force only in 1920 and as the Insolvency Law is not well understood in the mufassal, we deemed it proper to grant leave under section 75, clause (3), to file an appeal against the District Judge's order. The appeal as presented under section 75 (2) having been presented in time, there is no substance in the objection that the appeal is, under section 75 (3), out of time. Even if it is, section 78, which is a new provision not contained in the old Act, empowers the Court to excuse delay in the presentation of an appeal or application. This being a fit case for excusing delay, the appeal was heard on the merits after excusing the delay.

Mr. K. V. Krishnaswami Ayyar raised a preliminary objection that no appeal lay to this Court as the

ANANTHA-
NARAYANA
ATTAR
v.
SANKARA-
NARAYANA
ATTAR.

application to the lower Court was under section 68 of the Provincial Insolvency Act of 1920 and as it was not open to a creditor to move the Court for an order under section 53 or 54 of the Act against an alienee or a creditor, and he relied on *Mariappa Pillai v. Raman Chettiyyar*(1) and *Jhabba Lal v. Shib Charan Das*(2). The application to the District Court was not made under section 68, as is clear from a perusal of the petition. It follows that the District Judge was wrong in treating it as out of time under the section. The question for consideration is, can a creditor move the Court under section 53 or 54 of the Act? None of the decisions relied on by him go to the length of holding that a creditor could not move the Court at all to set aside a voluntary transfer, or to avoid a fraudulent preference whatever the circumstances might be. The main point decided in *Mariappa Pillai v. Raman Chettiyyar*(1) was

"No Court has the jurisdiction to annul, as such, a transfer amounting to a fraudulent preference, or a voluntary transfer made within two years of the adjudication, except a Court exercising insolvency jurisdiction in proceedings which have been instituted to declare the debtor, who made the transfer, an insolvent by a petition duly presented under the Act."

In the course of the judgment there is an observation that

"It is the Official Receiver who must set the Court in motion to annul a transfer under section 36 or 37."

This observation has to be read in connexion with the facts of that case. It was neither laid down, nor intended to be laid down, in that case that, under no circumstances, could a creditor move the Court for an order under section 53 or 54 of the Provincial Insolvency Act of 1920.

(1) (1919) I.L.R., 42 Mad., 322. (2) (1917) I.L.R., 39 All., 152.

ANANTHA-
NARAYANA
ATTAR
v.
SANKARA-
NARAYANA
ATTAR.

In *Jhabba Lal v. Shib Charan Das*(1) the petitioning creditor applied to the Insolvency Court for attachment of a certain property as being that of the insolvent. It did not appear that he had ever moved the Receiver to take steps for attaching the property. The Court granted the application and directed the Receiver to attach the property which was done. The sons of the insolvent claimed the property as their own. The Court allowed part of the claim. Both the creditor and the sons appealed to the High Court. WALSH, J., observes at page 155:

"Creditors have a right to prove for their own claims, a right to supply the Receiver with information relating to claims which the insolvent's estate may have against other persons; and they have a right to bring the Receiver's conduct and decisions before the Court if he declines to act or neglects his duties, but they have no legal interests in the insolvent's estate and no title to represent it. If they want the Receiver to litigate the question, they can supply him with funds or indemnify him against the costs in the event of failure, if he is unable to proceed for want of funds; but it would be contrary to the whole scheme of the Insolvency Act, if any one out of a large number of creditors was at liberty to start all kinds of questions and set the law in motion independently of the Receiver. The proper course, if a creditor is desirous of supporting the Receiver and securing a decision in his favour, is to attend the Court to watch the proceedings, or obtain the permission of the Court to intervene as *amicus curiae*."

The learned Judge observed that, if the Receiver declined to move in the matter, the proper course for the creditor was to apply to the Court under section 22 of Act III of 1907. Section 22, now section 68, gives a right of appeal to a person aggrieved by any act or decision of the Receiver. The word "act" must be understood in its ordinary sense. It cannot mean a mere omission or

(1) (1917) I.L.R., 39 All., 152.

ANANTHA-
NARAYANA
ATTAR
v.
SANKARA-
NARAYANA
ATTAR.

refusal to take steps at the request of a creditor. It is not defined in this Act. The General Clauses Act defines the word "act" as including illegal omissions when it is used with reference to an offence or a civil wrong. A mere refusal of the Official Receiver to take action at the request of a creditor cannot therefore be called an "act" of the Official Receiver as contemplated by section 68 of the Act. It would be a different matter, if, after hearing the parties, he passes an order that the transaction is a valid one. What he does then would amount to a decision against which there is an appeal provided. Section 68 contemplates acts of the Official Receiver, such as selling the property of the insolvent, taking possession of property, and decisions on creditors' proofs of debt, either admitting them or rejecting them. The whole tenor of section 68 is against the view of the learned Judge that a creditor's only remedy against the refusal of the Official Receiver to take action under section 53 or 54 of the Act is by way of appeal under section 68. A creditor can at any time during the pendency of the insolvency proceedings move the Court under section 53 or 54 on the ground that the Official Receiver has refused to move in the matter, as there is no period of limitation provided for such an application. It may be seen from the recital of the facts in *Jhabba Lal v. Shib Charan Das*(1) that what the creditor did in that case was to go over the head of the Receiver and apply to the Court to attach property claimed by persons who were not parties to the Insolvency proceedings. The creditor's application was not described as one under section 53 or 54. The Insolvency Court exercised powers of taking possession of property similar to those conferred by section 56 (3). There is

(1) (1917) I.L.R., 39 All., 162.

ANANTHA-
NARAYANA
ATTAR
v.
SANKARA-
NARAYANA
ATTAR.

an earlier decision of the same Court in *Khushhali Ram v. Bholar Mal*(1) to the effect that one creditor can impeach the validity of another creditor's debt and that the Judge is bound to enquire into his petition. The earlier case is not overruled in the later one and must therefore be regarded as representing the prevailing law in the United Provinces.

It is no doubt the policy of the Insolvency law to prevent a scramble among creditors to avoid a multiplicity of actions and to have the insolvent's estate wound up with the best possible expedition, and with the least amount of expense, in the interests of the creditors as well as of the insolvent. The jurisdiction of the Court to make an order under section 53 or 54 of the Act, on a proper consideration of the facts, no matter who moves the Court, is not restricted by any of the provisions of the Provincial Insolvency Act. Any order made under section 53 or 54 enures for the benefit of all creditors and not merely for the benefit of any particular creditor. There is no rule that the Official Receiver alone should move in the matter, and the provisions of sections 53 or 54 do not support the contention that the Official Receiver alone and nobody else can move in the matter. The sections lay down in what circumstances transfers and preferences shall be deemed void against the Official Receiver. It was held by the Patna High Court in *Hemraj Champa Lal v. Ramkishan Ram*(2), that

"What was contemplated by the procedure provided for by this statute was that the Receiver was the person to impeach any fraudulent transfer or conveyance by the insolvent of his property. If the Receiver refuses to do so, then it would be open to any creditor to apply to the Judge for leave to institute a proceeding under section 86 on his own behalf and on behalf of

(1) (1915) I.L.R., 37 All., 262.

(2) (1917) 2 P.L.J., 101.

ANANTHA-
NARAYANA
AYYAR
v.
SANKARA-
NARAYANA
AYYAR.

other creditors. But until the Receiver refuses or declines to act, no one else can do so, because he is the person to set the proceeding under section 36 in motion."

In *Ex parte Kearsley : In re Genese*(1), CAVE, J., laid down the course to be pursued by a creditor if the trustee refused to act:—

"Now the proper course for creditors, if the trustee refuses to act or to allow his name to be used, is for them to come to the Court and apply for leave to use the name of the trustee on giving him an indemnity against costs. On such an application the Court will consider the nature of the proposed proceedings, and if satisfied that there are *prima facie* grounds for allowing the creditors to proceed, will grant the application."

See also Williams on Bankruptcy, 10th edition, p. 373. The practice in English Bankruptcy Courts appears to all intents and purposes to be the same as in India. The petition of the appellant in this case is in substance, such an application. The petitioners alleged that the Official Receiver not only failed to move the Court to set aside the alienation in question, but also that he acted against the interest of the creditors. In the absence of any rule framed under the Act in regard to this matter when an Official Receiver declines to assert his rights, a creditor can apply to the Court to allow him to use the Official Receiver's name in order to recover the insolvent's property, or set aside a voluntary transfer, or to avoid a fraudulent preference for the benefit of the creditors. In this case, the requirements of the law have been satisfied by making the Official Receiver a party to the application and the respondent's contention fails.

It is next contended that no appeal lies against the order of the lower Court, as the appellant is not a person aggrieved by the order and reliance is placed in

(1) (1886) 17 Q.B.D., 1.

ANANTHA-
NARAYANA
AYYAR
v.
SANKARA-
NARAYANA
AYYAR.

support of this contention upon *Jhabba Lal v. Shib Charan Das*(1) and *Ishar Das v. Ladha Ram*(2). In *Jhabba Lal v. Shib Charan Das*(1), the Court held that the appellant was not a proper party to the application and he could not appeal against the order except in the event of an order for costs being made against him which ought not to have been made and he was not a person aggrieved under section 46 of the old Act. In *Ishar Das v. Ladha Ram*(2) the Lahore High Court followed the decision in *Jhabba Lal v. Shib Charan Das*(1). In *Kumarappa Chettiar v. Murugappa Chettiar*(3), OLDFIELD and KRISHNAN, JJ., held that a creditor was a person aggrieved by an order in favour of another creditor in a proceeding under section 36 of the Provincial Insolvency Act, III of 1907, to which the Official Receiver, the appellant, and the other creditor were parties. This decision was followed by OLDFIELD and SESHAGIRI AYYAR, JJ., in another decision in *Jagannatha Ayyangar v. Narayana Ayyangar*(4). We see no reason why we should not follow these decisions of our Court and hold that a creditor can appeal when he is a party to the decision appealed against. In *Nikka Mal v. Marwar Bank, Ltd.*(5) a creditor applied to have a sale by the insolvent declared null and void against the Official Receiver. Though his attention was called to the matter by the Court the Official Receiver took no action. It was held that the Court under the circumstances

"had power to entertain the application and further that it was the duty of the Court to judicially enquire into the matter when it was brought to its notice. This view is strongly supported by the decision in *Khushali Ram v. Bholar Mal*(6) already referred to."

(1) (1917) I.L.R., 39 All., 152.
(8) (1916) 36 I.C., 771.
(5) (1919) 52 I.O., 128.

(3) (1921) 62 I.C., 524.
(4) (1919) 52 I.C., 761.
(6) (1915) I.L.R., 37 All., 252.

ANANTHA-
NARAYANA
AYYAR
v.
SANKARA-
NARAYANA
AYYAR.

In *Appireddi v. Appireddi*(1), AYLING, Offg.C.J., and ODGERS, J., refer to *Nikka Mal v. Marwar Bank, Ltd.*(2), and remark, with reference to an application to set aside a transfer,

"It may well be that, when the Receiver fails to move in the matter, a creditor may do so."

In the face of these authorities it cannot be contended successfully that a creditor can never apply to the Court under section 53 or 54 of the Provincial Insolvency Act when the Official Receiver refuses to act, but it is urged that a creditor is not a person aggrieved by the order of the lower Court, even though it be held that he could move the lower Court for an order under either of the sections. If he could move the lower Court to set aside a transfer or to avoid a preference under section 53 or 54 he cannot be said to be a person not aggrieved by the order of the lower Court passed against him. In *Kumarappa Chettiar v. Murugappa Chettiar*(3), a Bench of this Court held that

"any appeal against an order passed under sections 36 and 37 of the Provincial Insolvency Act need not necessarily be presented by the Official Receiver, but may be presented by a creditor of the insolvent."

This was again decided in *Jagannatha Ayyangar v. Narayana Ayyangar*(4). We do not rest our decision that an appeal lies in this case upon the slender ground that there is an order for costs against the appellant though that is sufficient to dispose of the respondent's objection. If the Official Receiver refuses to move the Court under section 53 or 54 even though a creditor offers to indemnify him against costs in the event of an adverse order against him, such creditor can apply to the Court to permit him to use the Official Receiver's

(1) (1922) I.L.R., 45 Mad., 189.
(3) (1916) 36 I.C., 771.

(2) (1910) 52 I.C., 188.
(4) (1919) 52 I.C., 761.

ANANTHA-
NARAYANA
AYYAR
v.
SANKARA-
NARAYANA
AYYAR.

name or make him a party to the proceedings and may move for an order under section 53 or 54 and if the order is against him, if the Official Receiver refuses to appeal notwithstanding the offer of indemnity against costs, the creditor can appeal against the order and may make the Official Receiver a party to the appeal. In this case the learned Judge declined to hear the case on the merits and the appellant suffered a legal grievance and, therefore, has a right of appeal. In the well-known case of *Ex parte Sidebotham, In re Sidebotham*(1) JAMES, L.J., in the course of his judgment, referred to the case of *In re Webb, Ex parte Walter*(2), in which it was held that a creditor, who had not been heard before the Registrar on the question of the registration of liquidation resolutions, was entitled to appeal from the Registrar's order, because the question of registration or non-registration of such resolutions was one which affected the interests of all the creditors.

We hold the respondent's contention that no appeal lies in this case to be untenable. In his deposition in the District Court the appellant alleged that he asked the Official Receiver to take proceedings under sections 53 and 54 of the Act and that the Official Receiver promised to do so but failed to take any action. The Official Receiver did not go into the witness box and deny the first petitioner's statement that he informed the Official Receiver about the suit transaction. He contented himself with denying it in his Memorandum of 11th October 1921. The District Judge has not found the first petitioner's statement to be untrue but he remarks in paragraph 8 of his Judgment:—

"It is worthy of note that the condition of sale that the property was to be sold free of encumbrance and subject to discharge of the amount due to the first respondent out of the

(1) (1880) 14 Ch. D., 458.

(2) (1876) 2 Ch. D., 326.

ANANTHA-
NARAYANA
AYYAR
v.
SANKARA-
NARAYANA
AYYAR.

sale-proceeds was only announced to the bidders on the day of the sale and before the sale commenced and was not mentioned either in the sale notice (Exhibit IV (a) posted on the notice board of the Official Receiver's office, nor in the brief notice of sale sent by post card to creditors (Exhibits II, IV, etc.)"

The mortgage is one of four alienations made at or about the same time and within three months of the presentation of the petition for adjudication of the third respondent as an insolvent, one of which was set aside by the Court, one was given up by the mortgagee and one was not registered and, therefore, invalid. Any expression of opinion on the evidence might prejudice the trial of the case by the lower Court, but it is sufficient to say that there is a case for enquiry on the merits. It is urged for the respondent that a notice was sent to the appellant as well as to the other creditors and that he did not take steps in time to have the hypothecation in question set aside. It would not be proper to express any opinion on the conduct of the Official Receiver as he is not before us, but the memorandum put in on his behalf shows that he has not correctly understood what his duty is in matters of this kind. When a creditor challenges an alienation or a payment as being in fraud of creditors, it is the Official Receiver's duty to give notice to such creditor and ask him to substantiate his allegation. In this case the allegation that the hypothecation in question was a fraudulent one was made in the petition presented for adjudication of the third respondent as an insolvent. A general notice, which is sent as soon as a person is adjudicated an insolvent, asking the creditors to prove their claims, is not such a notice as should be given to a creditor who impeaches a particular transaction of the insolvent as being in fraud of creditors. The Official Receiver should fix a date for enquiring into the *bona fides* of particular transactions of the insolvent and should give notice to such creditors as

ANANTHA-
NARAYANA
AYYAR
v.
SANKARA-
NARAYANA
AYYAR.

have already informed him of the nature of the transaction and should also give notice to others to appear before him and state their objections, if any, to the alienations or alleged fraudulent preferences by the insolvent. He should examine the insolvent as regards the transactions which have come to his knowledge and the substance of his examination should be reduced to writing and the statements of the creditors and witnesses whom they produce in support of their allegations should also be reduced to writing. If he finds that a certain alienation or other transaction is in fraud of creditors he should himself move to have it set aside by a Court. But if he is not satisfied that such is the case and if a creditor is willing to indemnify him against cost in the event of failure, it is his duty to move the Court for setting aside the alienation or other transaction as being in fraud of creditors. He should not in such cases express his own opinion as to the nature of the transaction but should place before the Court such evidence as the creditor is prepared to produce, for the finding of the Court may differ from that of the Official Receiver, and a trial before the Court will bring out many facts which perhaps the Official Receiver may not be able to get at, and in the event of an adverse decision of the District Court, if a creditor is willing to indemnify him for the costs of an appeal against the order of the Court, the Official Receiver should prefer an appeal after taking security for costs. The Official Receiver should not consider it the duty of creditors alone to bring to his knowledge the nature of any doubtful transaction, but it is his duty to enquire into the nature of every transaction which *prima facie* does not appear to be proper and *bona fide* and valid. In cases where the transaction is within three months, he should enquire fully into the matter before satisfying himself that it is above board,

ANANTHA-
NARAYANA
AYYAR
v.
SANKARA-
NARAYANA
AYYAR.

and, in such cases, it is his duty to call upon the creditors to appear before him on a date fixed for the purpose to prove their allegations against the *bona fides* of the transaction. The Official Receiver should give every facility to the creditors to impugn the transactions of the insolvent which are ostensibly within three months of the insolvency.

The order of the District Judge is set aside and he is directed to restore the petition to file and dispose of it according to law.

The appellant's cost of this appeal will be borne by the second respondent.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Odgers.

NARAYANASAMI CHETTY (PETITIONER), APPELLANT,

v.

VELLAYA PILLAI (SECOND COUNTER-PETITIONER),
RESPONDENT.*

Mortgage—Decree for sale—Right of decree-holder to sell in execution any of the mortgaged properties—Subsequent vendee of one of the items, party to the suit—Mortgagee having a subsequent mortgage on other items—No suit on the second mortgage—Right of mortgagee to apply for sale of only the item purchased by vendee—Decree silent as to order of sale of items—Right of vendee to object to order of sale in execution—Legal right or Equitable discretion—Transfer of Property Act (IV of 1882), ss. 56 and 81.

Where a mortgagee obtained a decree for sale on his mortgage impleading as a defendant in the suit a subsequent vendee of one of the items mortgaged, and it appeared that the former had obtained a subsequent mortgage on the other items but did not sue on the later mortgage, and he applied in execution for sale of only the item purchased by the vendee, on objection

being taken by the latter to the former seeking to sell only the item purchased by him ;

Held, that the mortgagee was entitled to execute his decree against any of the mortgaged properties ; *Amir Chand v. Bukshi Sheo Pershad Singh*, (1907) I.L.R., 34 Calc., 13, relied on ; and

that as the decree for sale was silent as to the order in which the items should be sold, the vendee who was a party to the suit had no legal right to demand in execution that they should be sold in any particular order ; *Appayya v. Rangayya*, (1908) I.L.R., 31 Mad., 419 (F.B.) and *Ramasawmy Chetty v. Madura Mill Company, Ltd.* (1916), 1 M.W.N., 265, distinguished.

A mortgagee is not bound to sue on both his mortgages simultaneously ; *Subramania v. Balasubramania*, (1915) I.L.R., 38 Mad., 927 (F.B.), relied on.

APPEAL against the order of the Court of the Subordinate Judge, Nellore, in Appeal No. 120 of 1921, preferred against the order of the District Munsif, Tiruvannamalai, in Execution Petition No. 798 of 1919 in Original Suit No. 273 of 1918.

The appellant was the decree-holder in a suit for sale on a mortgage executed on 19th May 1916 by the first defendant in favour of the assignor of the plaintiff. The second defendant was a vendee of item 2 of the mortgaged properties from the first defendant by a sale-deed executed subsequent to the suit mortgage. The plaintiff had obtained a second mortgage on the items other than the second item sold to the second defendant, but did not institute a suit on the latter mortgage simultaneously with the first suit or subsequent thereto. A preliminary decree was passed for sale of the mortgaged properties without specifying any order in which the items should be sold ; and a final decree was likewise passed for sale of the mortgaged properties or sufficient portion thereof. The decree-holder applied for execution of the decree by sale of only the second item of the mortgaged properties which had been purchased by the second defendant. The latter raised the objection in execution proceedings that the execution petition for

NARAYANA-
SAMI
CHETTY
v.
VELLAYA
PILLAI.

1922,
September
12.

* Civil Miscellaneous Second Appeal No. 46 of 1922.

NARAYANA-
SAMI
CHETTY
v.
VELLAYA
PILLAI.

sale of the second item only should not be granted, that the other items not sold to him, which had been mortgaged to the plaintiff, under both the mortgages should be sold first and that if any balance of decree amount was payable, the second item might be sold, that the plaintiff ought to have sued on his second mortgage also, that in law and equity the second item should not be sold before the other items mortgaged subsequently to the plaintiff had been sold.

The District Munsif and the Subordinate Judge, on appeal, allowed the vendee's objections to prevail and dismissed the execution petition. The decree-holder preferred this Civil Miscellaneous Second Appeal.

K. V. Ramachandra Ayyar for appellant.

C. Padmanabha Ayyangar and *T. D. Srinivasachariar* for respondents.

The Court delivered the following

JUDGMENT.

The District Munsif's action in dismissing the mortgagee-decree-holder's execution petition because he sought to bring only the second item to sale cannot be supported. A decree-holder is entitled to execute his decree against any of the mortgaged properties [vide *Amir Chand v. Bukshi Sheo Pershad Singh*(1)].

Admittedly the respondent has no right to have the properties marshalled under section 81 of the Transfer of Property Act; nor has he as against the mortgagee the right that section 56 of the Act gives to a buyer against a seller when more properties than one are subject to a common charge. In *Tara Prasanna Bose v. Nilmoni Kahn*(2) which was a case falling under that section, the mortgagee had foreclosed and was therefore treated as representing the seller.

(1) (1907) I.L.R., 34 Cal., 13.

(2) (1914) I.L.R., 41 Cal., 418.

NARAYANA-
SAMI
CHETTY
v.
VELLAYA
PILLAI.

Nor is it alleged that the present is any case of fraud on the part of the mortgagee. The respondent as second defendant was a party to the suit and he did not at the time of the trial ask the Court to direct in the decree that the properties should be sold in any particular order.

Appayya v. Rangayya(1) and *Ram Dhan Dhan v. Mohesh Chunder Chowdhry*(2) relate to the equitable discretion that Courts possess to direct at the time of deciding the suit in what order the mortgaged items shall be sold.

As the decree in this case is silent on the point the respondent has no legal right to demand that the decree-holder should execute his decree in any particular manner to suit the individual judgment-debtor.

Ramasawmy Chetty v. Madura Mill Company, Ltd.(3) is a case of marshalling. There is an observation of SRINIVASA AYYANGAR, J., that the Court has a discretion even at the time of execution to direct that, if the sale of one item would be sufficient to satisfy the decree, that item should be sold first. This observation is not applicable to the facts of the present case.

The learned Sub-Judge remarked that it was the mortgagee's fault that he did not sue on both his mortgages simultaneously. But in our opinion he was not bound to do so [vide *Subramania v. Balasubramania*(4)].

We reverse the orders of the lower Courts and direct the District Munsif to restore the petition to file and to pass orders for execution of the decree in the light of the foregoing remarks.

Costs in the District Munsif's Court and in this Court will be borne by the respondent.

K.R.

(1) (1908) I.L.R., 31 Mad., 419 (F.B.). (2) (1893) I.L.R., 9 Cal., 406.

(3) (1916) 1 M.W.N., 265.

(4) (1915) I.L.R., 38 Mad., 227 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

NARAYANAN CHETTY AND TWO OTHERS (DEFENDANTS
2, 3 AND 4), APPELLANTS,

v.

MUTHIAH CHETTY AND FOUR OTHERS (PLAINTIFFS 1 TO 4
AND FIRST DEFENDANT), RESPONDENTS.*

Specific performance—Advantageous agreement to sell joint family lands by father and manager of the family—Suit for specific performance even against minor members of the family, maintainability of.

Where in return for balance due from a customer, a joint Hindu family of traders consisting of two brothers, the elder of whom had one major and two minor sons, had to purchase some lands from the customer at some loss and in order to reduce the loss the father and manager of the family agreed to sell the lands to the plaintiff at a certain price;

Held that the plaintiff was entitled to enforce specific performance of the contract to sell against the minor members also.

APPEALS against the decrees of K. A. KANNAN, Acting Subordinate Judge of Sivaganga, in Original Suits Nos. 84 of 1915 and 90 of 1914.

The facts are given in the Judgment of RAMESAM, J.

A. Krishnaswami Ayyar (with T. V. Muttukrishna Ayyar and N. Muthuswami Ayyar) for appellants.—There cannot be any specific performance against a minor. No necessity or benefit to the family is proved so as to bind minor coparcener. *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*(1), *Rangayya Reddy v. Subramania Ayyar*(2), *Baluswami Aiyar v. Lakshmana Aiyar*(3) and *Bappu v. Annamalai Chettiar*(4):

* Appeals Nos. 25 and 26 of 1917.

(1) (1912) I.L.R., 39 Calo., 232 (P.C.). (2) (1917) I.L.R., 40 Mad., 365 (F.B.).
(3) (1921) I.L.R., 44 Mad., 605 (F.B.). (4) (1923) 44 M.L.J., 226.

S. Srinivasa Ayyangar (with K. Raja Ayyar and R. Srinivasa Ayyangar) for respondents.—*Rangayya Reddy v. Subramania Ayyar*(1), *Baluswami Aiyar v. Lakshmana Aiyar*(2), *Bappu v. Annamalai Chettiar*(3) are really in my favour. Section 27 (c) of Specific Relief Act can be applied even against minor coparceners where the manager's contract to alienate is necessary or beneficial for the family and it can be enforced, even after the death of the person who contracted just as against ordinary legal representatives; *Hari Charan Kaur v. Kaula Rai*(4), *Bhagwan v. Krishnaji*(5), *Krishna Aiyar v. Shamanna*(6), *Babu Ram v. Said-un-nissia*(7). In trading families, trading purpose is family purpose; hence minors also are bound. All powers incidental to business are vested in the manager. *Raghunathji Tarachand v. The Bank of Bombay*(8), *Pahalwan Singh v. Jiwan Das*(9) *Kishan Prasad v. Har Narain Singh*(10).

RAMESAM, J.—Appeal No. 25 of 1917:—

RAMESAM, J.

This appeal arises out of a suit for specific performance of an agreement to sell. The Subordinate Judge decreed the suit. The defendants appeal.

Narayana Chetti, father of fourth defendant, and his younger brother, Muthiah Chetti, father of defendants 1 to 3, were carrying on business at Rangoon under the style of M. P. M. Rm. In the course of the business one Veerappa Chettiar of the Pl. R. M. Firm became indebted to the firm to the extent of Rs. 3,000 but was unable to pay the debt. The second plaintiff advised the agent (Alagappa) of the defendants through P.W. 6 of the connected suit O.S. No. 90 of 1914

(1) (1917) I.L.R., 40 Mad., 365 (F.B.). (2) (1923) 44 M.L.J., 226.
(3) (1921) I.L.R., 44 Mad., 605 (F.B.). (4) (1920) 22 Bom. L.R., 997.
(5) (1917) 2 P.L.J., 513 (F.B.). (6) (1918) I.L.R., 35 All., 499.
(7) (1912) 23 M.L.J., 610. (8) (1920) I.L.R., 42 All., 109.
(9) (1910) I.L.R., 34 Bom., 72. (10) (1911) I.L.R., 38 All., 272 (P.C.).

NARAYANAN
CHETTY
v.
MUTHIAH
CHETTY.

RAMESAM, J.

(examined on commission at Rangoon) to buy the suit site and that he (the second plaintiff) would "take it off him afterwards," so that defendants' firm who are not in need of the site need not lose interest (vide Exhibit G-2). The defendant's father purchased the site for Rs. 5,000 the consideration consisting partly of cash and partly of the debt due by Veerappa (Exhibit A). Before it could be reconveyed to plaintiffs, it was found that, out of Veerappa's two brothers, while one attested the sale deed, the other, Murugappa Chetti, was disputing the validity of the sale. The plaintiffs and defendants' father discussed the best method of satisfying him and ultimately (vide Exhibit G-1) the plaintiffs paid Rs. 1,000 to buy him off and obtained a release deed (Exhibit D) at Rangoon. Meanwhile, before the payment and execution of Exhibit D were known to the parties, the defendants' father executed Exhibit C in favour of plaintiffs. The document has been proved to be genuine. All the evidence, oral and documentary, supports it. The plaintiffs agreed to pay Rs. 4,500 besides the Rs. 1,000 paid to Murugappa for executing Exhibit D. They issued a Hundi (Exhibit C) and it was cashed (Exhibits F and K). The incorrect date in Exhibit F (an account book of the defendants) cannot affect the plaintiff's case.

Thus, the plaintiffs have proved the suit agreement, the payment of consideration and that the transaction was beneficial to the defendants' firm who were anxious to part with the site to the plaintiffs who, by offering to purchase, diminished the defendants' loss. Assuming that the proper price of the site at the time was Rs. 5,000, the defendants, if they wanted to keep the site, would have had to pay Rs. 1,000 to Murugappa. The plaintiffs by intervening and paying Rs. 5,500 (i.e., Rs. 1,000 to Murugappa and Rs. 4,500 to the defendants'

firm) reduced the defendants' loss from Rs. 1,000 to Rs. 500. In this sense, it was beneficial to the family of the defendants who were a trading firm in need of money rather than the suit property which was not situate in the defendants' village.

The point strongly pressed by the vakil for the appellants is that, the defendants 2 and 3 being minors, there can be no decree for specific performance against them. There is no general rule that no decree for specific performance can be passed against minors. For instance, in the simplest and obvious case where a contract is entered into by a Hindu in respect of property which is not joint family property and the property devolved by inheritance on heirs, some or all of whom are minors, it cannot be contended that no decree for specific performance can be made and this is conceded by the appellant. The next case is where a Hindu, who is a member of a joint family, enters into a contract to sell his own share and dies and the property descends by survivorship to other members of the family some or all of whom may be minors. In *Bhagwan v. Krishnaji*(1) it was held that it can be enforced against the undivided sons of the deceased. I think this decision is not in conflict with the opinions of WALLIS, C.J., and SADASIVA AYYAR, J., in *Rangayya Reddy v. Subramania Ayyar*(2) nor with the actual decision in *Rappu v. Annamalai Chettiar*(3) which is not a case of a member contracting to sell his own share. If the point arises for decision, I would perhaps hold that *Bhagwan v. Krishnaji*(1) was correctly decided on grounds which need not be stated. The case when the contract is made on behalf of a minor or minors is settled by the decision in *Mir Sarwarjan v. Fakhrudin Mahomed Chowdhuri*(4). Mr. Srinivasa Ayyangar

(1) (1920) 22 Bom. L.R., 997.

(3) (1923) 44 M.L.J., 226.

(2) (1917) I.L.R., 40 Mad., 365 (F.B.).

(4) (1912) I.L.R., 39 Cal., 232 (P.C.).

NARAYANAN
CHETTY
v.
MUTHIAH
CHETTY.

RAMESAM, J.

NARAYANAN
CHETTY
v.
MUTHIAH
CHETTY.
—
RAMESAM, J.

contends that, all that the Judicial Committee decided was that such a contract cannot be specifically enforced only when it was not for purposes of necessity binding on the minors and the contract in that case which was one for the purchase of immoveable property was not for the benefit of the minors. I cannot agree with this narrow interpretation of the decision. Their Lordships say at page 237 :—

“They are, however, of opinion that it is not within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property.”

There is no reference here to “necessity” nor is any distinction drawn between a contract being merely “advantageous” to a minor as opposed to its being for necessary purposes binding on the minor, though, earlier in the judgment, their Lordships accept the assumption “that the purchase was an advantageous purchase for the minor.” I think this decision also covers the case where a joint family consists of minors only and therefore has no manager, and a guardian of all the minors who is, *ex hypothesi*, not manager, not being a member of the family but is merely their guardian, enters into a contract on behalf of some or all of the minors, whatever the nature of the contract may be.

The present case is where the contract is entered into by the manager of a family on behalf of the whole family for purposes binding on the family. The decision in *Bappu v. Annamalai Chettiar*(1) does not help the appellant, for the contract in that case was not for purposes binding on the family and the remarks at page 228 are against him. The remarks in *Krishna Aiyar v. Shamanna*(2) are against the appellant and in favour of the

(1) (1923) 44 M.L.J., 226.

(2) (1912) 23 M.L.J., 610.

NARAYANAN
CHETTY
v.
MUTHIAH
CHETTY
—
RAMESAM, J.

respondents. The observations in both these cases are *obiter* not being necessary for the decisions. In *Narayana Row v. Venkatasubba Row*(1), SPENCER, J., conceded that a contract made by a manager on behalf of the family may be enforced against the manager and where it is for the benefit of the family, the completed contract will certainly bind the minor members. Should the accident of the death of the manager before the completion in such a case make any difference? Where a contract is by a manager on behalf of a family, and for the benefit of the family and the manager dies, it can be enforced against the survivors when they are all majors; *Venkateswara Aiyar v. Raman Nambudri*(2). Should it make any difference that some of the survivors are minors, and does the case in *Mir Sarwarjan v. Fakhrudin Mahomed Chowdhuri*(3) support such a distinction? The matter is *res integra* and I am inclined to answer the above queries in the negative. I agree with PHILLIPS, J.'s remarks in *Bappu v. Annamalai Chettiar*(4) where he refers with approval to *Ramachandra Aiyar v. Sundaramurthi Mudali*(5) and the *obiter dicta* in *Krishna Aiyar v. Shamanna*(6). The result is, we are of opinion that a decree for specific performance may be passed against the minor defendants 2 and 3. The pleadings and the allegations in I.A. No. 728 of 1914 (in O.S. No. 90 of 1914) show that fourth defendant is not divided from defendants 1 to 3 and no separate argument can be adduced for him.

The suit is not barred by limitation as it does not appear that the specific performance of the contract was refused more than three years prior to suit; *Venkanna v. Venkatakrishnayya*(7). The words “on demand” in

(1) (1920) 38 M.L.J., 77.

(2) (1916) 3 L.W., 435.

(3) (1912) I.L.R., 39 Cal., 232 (P.C.).

(4) (1923) 44 M.L.J., 226 at p. 228.

(5) (1894) 4 M.L.J., 9.

(6) (1912) 23 M.L.J., 610.

(7) (1918) I.L.R., 41 Mad., 18.

NARAYANAN
CHETTY
v.
MUTHIAH
CHETTY.

Exhibit C show, in a case like this, that the cause of action arises only after request (see 19 Halsbury, section 65, page 43).

RAMESAM, J. The result is the appeal fails and is dismissed with costs. It is conceded that A.S. No. 26 of 1917 follows. It is also dismissed with costs.

JACKSON, J. JACKSON, J.—I agree.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

1924,
February 19.

YADAVENDRA BHATTU (PLAINTIFF), APPELLANT,

v.

SRINIVASA BABHU AND OTHERS (DEFENDANTS NOS. 1 TO 3),
RESPONDENTS.*

Mortgage—Non-payment by the mortgagee of part consideration due to the mortgagor—Condition, not fulfilled by mortgagor—Assignment by mortgagor of the amount not paid—Suit by assignee to recover the amount from mortgagee, whether maintainable—Suit for damages, whether maintainable by assignee—Transfer of Property Act (IV of 1882), sec. 6 (e).

A suit to enforce an agreement to lend money on a mortgage is not maintainable.

Anakaran Kasmi v. Saidamadath Avulla, (1879) I.L.R., 79 Mad., 79; *Rajagopala Aiyar v. Sheik Davood Rowther*, (1918) 34 M.L.J., 342; and *Sheikh Galim v. Sadarjan Bibi*, (1916) I.L.R., 43 Cal., 59, referred to.

Though it is open to the mortgagor to sue the mortgagee for damages for the breach of the agreement to lend money, a right to obtain damages cannot be transferred under section 6 (e) of the Transfer of Property Act; consequently an assignee from the mortgagor of a part of the consideration due for a mortgage, which was not paid by the mortgagee, is not entitled to recover it in a suit against the mortgagee.

* Second Appeal No. 988 of 1921.

SECOND APPEAL against the decree of A. NARAYANAN NAMBIYAR, Acting District Judge of South Kanara, in A.S. No. 239 of 1920 against the decree of P. NARAYANA MENON, District Munsif of Karkal, in Original Suit No. 317 of 1919.

The material facts appear from the Judgment.

B. Sitarama Rao for appellant.

K. Yegnanarayana Adiga and K. P. Sarvothama Rao, for respondents.

JUDGMENT.

The second defendant executed a mortgage in favour of the first defendant. Out of the consideration, a small balance was not paid. The plaintiff sues for the recovery of that balance on the strength of an assignment made by the third defendant who himself had obtained a similar assignment from the second defendant. The first defendant pleaded that the balance was payable only on the performance of a certain condition. The lower Appellate Court has clearly found that the second defendant made default and that the condition was not fulfilled. On this finding, the plaintiff can have no decree. Apart from this circumstance it is perfectly clear on the authorities cited, *Anakaran Kasmi v. Saidamadath Avulla*(1), *Rajagopala Aiyar v. Sheik Davood Rowther*(2) and *Sheikh Galim v. Sadarjan Bibi*(3), that the present suit is a suit to enforce an agreement to lend money on a mortgage and that such a suit does not lie. In *Anakaran Kasmi v. Saidamadath Avulla*(1), this is what the learned Judges say:

"The Court ought not to make a decree for specific performance of an agreement to lend money on mortgage. Plaintiffs may obtain compensation or damages in a properly framed suit

(1) (1879) I.L.R., 2 Mad., 79.

(2) (1918) 34 M.L.J., 342.

(3) (1916) I.L.R., 43 Cal., 59.

YADAVENDRA BHATTU
v.
SRINIVASA BABHU.

against the defendant for breach of his contract or they may redeem the mortgage on payment of the sum due."

The English cases on the point are referred to in *Sheikh Galim v. Sadarjan Bibi*(1).

It was open to the mortgagor to sue the mortgagee for damages, but a right to obtain damages cannot be transferred—see section 6 (e) of the Transfer of Property Act.

The Second Appeal therefore fails and is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Jackson.

1924,
March 6.

VENKATASUBBA CHETTIAR (RESPONDENT), PETITIONER,

v.

SESHA AIYAR (PETITIONER), RESPONDENT.*

Madras District Municipalities Act (V of 1920), sec. 303 (2) (b)—Election rules—Rule 6—Petition filed before District Judge to declare an election void—Application for interim injunction to restrain elected candidate from sitting in council and exercising rights—Jurisdiction of Court to issue injunction—Civil Procedure Code (V of 1908), ss. 94, 151 and O. XXXIX, r. 2—Inherent powers.

The District Judge before whom a petition to declare void an election, presented under the rules framed under section 303 (2)(b) of the Madras District Municipalities Act (V of 1920), is pending, has no power to grant a temporary injunction restraining the elected candidate from taking his seat in the Municipal Council and exercising his powers as a councillor until the disposal of the petition.

Rule 6 of the Election Rules does not empower the District Judge, while holding an inquiry into an election petition, to

* Civil Revision Petitions Nos. 808 and 809 of 1922.
(1) (1916) I.L.R., 43 Cal., 59.

exercise the powers specified in section 94 or Order XXXIX, rule 2, Civil Procedure Code; nor does section 151 of the Code empower the Court to grant a temporary injunction pending disposal of the election petition.

Aslatt v. Corporation of Southampton (1881), 16 Ch. D., 143, referred to.

PETITION under section 115, Civil Procedure Code, and section 107 of the Government of India Act to revise the order of A. S. BALASUBRAHMANYA AYYAR, District Judge of Trichinopoly, in I.A. No. 625 of 1922 and I.A. No. 630 of 1922 in Original Petition No. 147 of 1922.

The material facts appear from the Judgment.

Dr. S. Swaminathan for petitioner.

T. R. Venkatarama Sastri and *K. S. Sankara Ayyar* for respondent.

JUDGMENT.

This is a petition under section 115 of Act V of 1908 and section 107 of the Government of India Act.

Petitioner and respondent were the only two candidates at the election held on 22nd September 1922 for the appointment of a councillor to represent the 12th Ward of the Trichinopoly Municipality. The petitioner was declared duly elected and respondent filed a petition before the District Judge of Trichinopoly under the rules framed in accordance with section 303 (2) (b), Madras Act V of 1920. While the inquiry into this petition was pending, the respondent applied in I.A. No. 625 of 1922 purporting to be under sections 94, 141 and 151 and Order XXXIX, rule 2, of the Code of Civil Procedure, that the present petitioner be restrained by a temporary injunction from taking his seat in the Municipal Council until the disposal of the petition. In his order on this application, dated 30th October 1922, the District Judge restrained the petitioner by an interim injunction from taking his seat in the council. Hence this revision petition.

VENKATA-
SUBBA
CHETTIAR
v.
SESHA
AIYAR.

The question for determination is whether the District Judge had jurisdiction to pass such an injunction. Rule 1 of the Rules for the decision of disputes as to the validity of an election lays down that no election held under the Madras District Municipalities Act shall be called in question except by an election petition presented in accordance with these rules. Under rule 6 "Every election petition shall be inquired into by the Judge as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code, 1908, to the trial of suits."

It is argued for the petitioner that "the procedure applicable to the trial of suits" cannot include the power to pass an interim injunction; while on behalf of respondent it is contended that rule 6 does convey such power and in any case the District Judge has a residuary power which enables him to take such action under the Code as may seem proper during the course of the inquiry.

It is to be noted that the application of Civil Procedure Code to these inquiries is definitely restricted in rule 6 to the trial of suits. Had the Government intended that the Judge in an election inquiry should have the same powers as he has in the exercise of his original jurisdiction this presumably would have been stated in terms. In this connexion rule 6 may be compared with section 5 of the Provincial Insolvency Act where full powers are conferred upon the Insolvency Court; and the differences in the wording of the respective clauses is significant. An interim injunction can only be within the jurisdiction of the Judge holding an inquiry into an election petition if that injunction is for the purposes of, and in furtherance of, the trial which he is conducting. But a temporary injunction under Order XXXIX, rule 2, is not necessarily for the purposes of the trial. Section 94, Civil Procedure Code, out

of which Order XXXIX arises, is framed generally in order to prevent the ends of justice from being defeated, and then, under Order XXXIX, rule 2, "In any suit for restraining the defendant from committing . . . an injury the plaintiff may apply to the Court for a temporary injunction to restrain the defendant from committing the injury."

An injunction restraining an elected candidate from taking his seat may be in the ends of justice, assuming that there is *prima facie* ground for holding his election to have been so irregular that any act consequential upon that election is a fraud upon the defeated candidate, but such an injunction in no way affects the conduct of the trial. A Court which issues such an injunction is really proceeding as if it were seised of the case in the ordinary exercise of its civil jurisdiction, and not as a Court inquiring under special rules into the validity of an election. And under rule 1 an election can only be called into question by a petition presented under the rules. When the party is specially proscribed from invoking the Civil Courts in the ordinary exercise of their judicial functions, I can see no warrant for a Court importing into the inquiry its ordinary civil powers of its own motion. And, of course, if a Court cannot act under section 94 and Order XXXIX, section 151 does not extend its powers. The learned District Judge has justified his Order in I.A. No. 630 of 1922 on the ground that it is better that a councillor, whose qualifications for his office are questioned, does not take part in an election (i.e., does not sit as councillor and vote for the election of chairman) as that may lead to questions about the validity of the election. Had the disqualification in question been one falling within the provisions of section 50 there could be no such difficulty because it is expressly provided in section 51, clause (3), that,

VENKATA-
SUBBA
CHETTIAR
v.
SESHA
AIYAR.

VENKATA-
SUBBA
CHETTIAR
v.
SESHA
AIYAR.

pending the decision of the District Judge after inquiry into the alleged disqualification, *the councillor shall be deemed to be qualified*. By parity of reasoning I think that the councillor whose election is impugned on account of alleged irregularities, may also be deemed to be qualified pending the Judge's decision.

The rules under section 302 (2) (b) do not contain a provision similar to that in section 51, but in rule 13 it is laid down that when an election is declared void the seat of the returned candidate shall be deemed to be vacant from the date of the Judge's order, which implies that up to the date of the Judge's order the unseated councillor shall be deemed to have been qualified.

Therefore I find no reason to hold that Government must necessarily have intended that a power of granting interim injunctions should vest in the Judge inquiring under rule 6. The English decisions to which my attention has been directed, *Aslatt v. Corporation of Southampton*(1) and *Richardson v. Methley School Board*(2), establish that the Court of Chancery has exercised this power of granting injunctions, but I do not think it is denied that in the exercise of their ordinary judicial functions the Indian Courts acting under Order XXXIX, rule 2, can exercise this power; cf. *Sarvothama Rao v. Chairman, Municipal Council, Saidapet*(3). The question is whether this power has been carried into the special rules for election inquiries, and in this connexion the English cases are valuable chiefly as showing that such powers should be exercised with the greatest discrimination. In *Aslatt v. Corporation of Southampton*(1) the Corporation was restrained from declaring the office held by the plaintiff void. Here it may be noted, *the status quo* was preserved by the interim order of the Court which is

(1) (1881) 16 Ch. D., 143.

(2) [1893] 3 Ch., 510.

(3) (1924) I.L.R., 47 Mad., 585.

very different from temporarily unseating an elected candidate.

In the course of that ruling, JESSEL, M.R., observes (page 148) that the mere fact that some proceeding was being taken to test a right to continue in an office was never considered a ground for interfering by injunction; because the old Court of Chancery never interfered if a legal right only was in question. The Judicature Act, 1873, conferred upon Courts the right of granting injunctions, but as a general rule the Court only interferes when there is some question of property, though there may be interference even when personal status is the only thing in question.

This case is considered in *Richardson v. Methley School Board*(1), where certain doubts in respect of *Aslatt v. Corporation of Southampton*(2) are discussed, but the Court concludes by granting a similar injunction. That the Court of Chancery has exercised this power is no warrant for assuming that it was meant to be included by Government within the provisions of rule 6, and it is not disputed that Indian Courts', in the exercise of their ordinary functions under the Civil Procedure Code, would have such power of granting injunction. I find that the District Judge acted without jurisdiction in granting an interim injunction by his order on I.A. No. 625 of 1922, dated 30th October 1922, and order that it may be cancelled. Respondent will pay the costs to the petitioner.

The District Judge, after hearing the present petitioner, reaffirmed the interim injunction in his order of 3rd November 1922, and that order is sought to be revised in C.R.P. No. 809 of 1922 which must also be allowed on the same grounds but without costs.

K.R.

(1) [1893] 3 Ch., 510.

(2) (1881) 16 Ch. D., 143.

VENKATA-
SUBBA
CHETTIAR
v.
SESHA
AIYAR.

APPELLATE CIVIL.

Before Mr. Justice Krishnan.

1924,
March 7.

PALANI alias THIRUMAL THEVAN, MINOR BY NEXT FRIEND
PECHI AMMAL (PLAINTIFF), APPELLANT,

v.

SETHU AND THREE OTHERS (DEFENDANTS 1 TO 4),
RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 112—Legitimacy—First marriage dissolved—Marriage of the woman with a second husband—Conception of child during first marriage—Birth of son after and during second marriage—Access of second husband during first marriage proved—Son, whether legitimate son of second husband or the first.

A woman married a person in September 1903; the marriage was dissolved in May 1904; she married another in June 1904; a son was born to her in September 1904 during the continuance of her marriage with her second husband. It appeared that the latter had access to her during her first marriage. In a suit by the son to recover the property of the second husband on his death, it was contended that the plaintiff was not the legitimate son of the second husband;

Held, that the plaintiff was in law the legitimate son of the second husband of the woman, and was entitled to his properties. Under section 112 of the Indian Evidence Act, the child born in wedlock should be treated as the child of the father who was at the time of its birth, the husband of the mother, unless it is shown that he had no access to the mother at the time of its conception, quite irrespective of the question whether the mother was a married woman or not at the time of the conception.

Section 112 of the Evidence Act refers to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child; the latter point of time has to be considered only to see whether the husband had not access to the mother.

Nicholas v. Asphar (1897) I.L.R., 24 Cal., 216, dissented from; *Ingestre v. Attorney-General* (1914), 30 Law Quarterly Review, 153, followed.

* Second Appeal No. 1115 of 1921.

SECOND APPEAL against the decree of B. RAMA RAO, the Subordinate Judge of Madura, in Appeal Suit No. 40 of 1920, preferred against the decree of P. T. JAGANNATHA CHARIYAR, First Additional District Munsif of Madura in Original Suit No. 124 of 1919 (Original Suit No. 23 of 1918 on the file of the Court of Principal District Munsif of Madura).

The material facts appear from the Judgment.

K. V. Krishnaswami Ayyar for appellant.

C. V. Anantakrishna Ayyar, P. S. Narayanaswami Ayyar and P. S. Ramachandra Ayyar for respondents.

JUDGMENT.

In this case an interesting question arises for decision regarding the legitimacy of the plaintiff. The plaintiff's mother, Pechi Ammal, was first married to one Subrahmanya Thevan in September or October 1903. That marriage, it is found, was dissolved in May or June 1904, and then she married again one Thirumeni Thevan in June or July 1904. The plaintiff was born to her in September 1904. These are the findings of fact by the lower Courts.

The question that has to be decided is whether on these facts the plaintiff is to be treated as the legitimate son of Thirumeni Thevan and is entitled to a share of his properties as the District Munsif has held, or whether he is not the son of Thirumeni Thevan but the legitimate son of Subrahmanya Thevan as the Subordinate Judge seems to consider. Pechi Ammal's marriage with Subrahmanya Thevan did not prove to be a happy one. Thirumeni Thevan seems to have conceived a great regard for her and was a rival for her affections from the very commencement. Subrahmanya Thevan and Pechi Ammal seem to have quarrelled with each other and she left his protection, and there was a criminal case in which

PALANI
v.
SETHU.

PALANI
v.
SETHU.

Subrahmanya Thevan charged Thirumeni Thevan and others that his wife had been enticed away by Thirumeni Thevan for the purpose of illicit sexual intercourse with her. In that case, however, the accused were discharged; thereupon Subrahmanya Thevan divorced his wife. The District Munsif has held that Thirumeni Thevan is really the father of the plaintiff and that he had access to Pechi at the time the child was begotten even though she was the wife of Subrahmanya Thevan. He also refers to evidence which shows that Thirumeni Thevan treated the young boy as his own son till his death in April 1917.

The question whether the plaintiff is to be treated as the legitimate son of Thirumeni Thevan or not seems to me to depend entirely upon the language of section 112 of the Evidence Act, which lays down the rule which really governs this case. That section says that:

“the fact that a person is born during the continuance of a valid marriage between his mother and a man,”

(leaving out unnecessary words):

“shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”

In this case the plaintiff was born during the continuance of a valid marriage between his mother and Thirumeni Thevan. The section is very clear, and unless non-access of Thirumeni Thevan to her is proved at the time when the plaintiff could have been begotten, he must necessarily be treated as the legitimate son of Thirumeni Thevan, for the section says that the fact of birth must be taken as conclusive proof of the son's legitimacy. A married woman might have many paramours, but the child born to her must be treated under section 112 as the legitimate son of her husband,

PALANI
v.
SETHU.

and the fact that she has paramours is of no account whatsoever unless her husband, if he disputes the paternity of the child, is able to show that he had no access to her at the time of conception. The fact that other people had also access is not material in considering the legitimacy of the child. That is the rule framed by the legislature in section 112 and we must follow that rule in dealing with questions of legitimacy. The difficulty that arises in this case is from the fact that at the time conception must have taken place the plaintiff's mother was the lawful wife of Subrahmanya Thevan. The Subordinate Judge seems to think that because she was Subrahmanya Thevan's lawful wife it must necessarily be presumed that Thirumeni Thevan had no access to her. I am not prepared to adopt such a presumption particularly in this case where the evidence points the other way, as the District Munsif has clearly explained. There is absolutely no evidence as to non-access of Thirumeni Thevan at the time the child was begotten. Applying section 112, the question raised in this case must be answered in favour of the Munsif's view that the plaintiff is the legitimate son of Thirumeni Thevan. The mistake made by the Subordinate Judge is in failing to notice that section 112 refers to the point of time of the birth of the child as the deciding factor and not to the time of the conception of that child. The point of time of the conception of the child has to be considered only to see whether the husband had not access to the mother. If he had access, then the child that is born must be treated as the child of the father. A case, *Ingestre v. Attorney-General*(1), seems to have been recently decided in the same way in England where a question exactly similar to this arose. I have

(1) (1914) 30 Law Quarterly Review, 153.

not been able to refer to the case itself, for it seems to have been reported only in the Times newspaper. But the case is referred to in a learned article in 30 Law Quarterly Review which deals with this question. The conclusion which the writer of that article comes to is that the decision makes it clear that the rule in modern English Law is that birth in wedlock makes a child legitimate and the only ground for disputing its pater-nity is to show that the father had no access to the mother at the time the child was begotten, and no other exception is allowed. That seems to be clearly the English Law. Section 112 of the Evidence Act is really based upon the English rule, and its language clearly supports the view I am taking that the child born in wedlock should be treated as the child of the father who was then the husband of the mother, unless it is shown that he had no access to the mother at the time of conception, quite irrespective of the question whether the mother was a married woman or not. It is quite true that if the plaintiff had been born within 280 days after the dissolution of the marriage of his mother with Subrahmanya Thevan and if she had not been married by the time of his birth, the section would have made him the legitimate son of Subrahmanya Thevan. But those are not the facts here. The fact here is that the mother was married again before the child was born and applying the rule of section 112 we must necessarily hold that the child is the legitimate son of the second husband. The rule may be somewhat artificial and may not always correspond with actualities in nature. But it is necessary to have a rule like this to avoid unnecessary disputes as to the legitimacy of children and the rule must be worked according to its terms.

The Subordinate Judge has relied upon a case in *Nicholas v. Asphar*(1). There the learned Judge no doubt held in somewhat similar circumstances that the child should be treated as the legitimate child of the first husband during the subsistence of whose marriage the child was conceived. With very great respect to the learned Judge who tried the case it seems to me that he overlooks the exact language of section 112 when he says at page 222 that

"there is no evidence of want of access, and section 112 of the Evidence Act, in the absence of such evidence, regards the presumption of legitimacy arising from conception during a valid subsisting marriage as conclusive."

In section 112 there is no reference to conception in the first part of it. The presumption of legitimacy arises from birth and not from conception unless, as already stated, it can be shown by proof of non-access that conception could not have resulted from the connexion of the husband with the wife.

In the view I am taking I do not think the second point dealt with by the Subordinate Judge, that the child was the result of Pechi's adulterous sexual intercourse with Thirumeni Thevan and therefore he is not entitled to inherit to him can be supported either, for the section excludes any such allegation or proof. The section says that I should take it as conclusively proved that plaintiff is his legitimate son and the question whether the original connexion was adulterous or not does not arise. Treating the plaintiff as the legitimate son of Thirumeni Thevan he is entitled to a share in his property. Considering that Thirumeni Thevan was treating the plaintiff all along as his own son, and that he knew perfectly well when he married Pechi Ammal that she was a pregnant woman and yet took no

(1) (1897) I.L.R., 24 Calo., 216.

PALANI
v.
SETHU.

objection himself to the parentage of the child and considering that in all possibility Thirumeni Thevan is the real father of the child, I am glad I have been able to arrive at a conclusion in favour of the plaintiff's right to inherit to him. The parties are Maravars; and divorces and second marriage of women are quite common among them and a man is allowed to marry more than one wife. There is thus no difficulty of the second marriage with Thirumeni Thevan being invalid or illegal.

The Subordinate Judge in paragraph 13 of his judgment states that since the law presumes chastity of a married woman it is impossible to hold that Thirumeni could have had access to Pechi Ammal. It seems to me that the latter statement of his goes too far. Whether there be a presumption or not, that a married woman is chaste, a presumption for which no authority has been quoted, it is clear that in the circumstances of this case Pechi Ammal was not chaste. She seems to have had connexion with Thirumeni Thevan while she was the wife of Subrahmanya Thevan and that was probably the reason for her divorce. The question whether he had access or had no access is a question to be decided on the evidence and on the facts proved and not on any presumptions. It was suggested that I should call for a finding from the Subordinate Judge on the question of Thirumeni's access to Pechi, but in the state of evidence which has been fully discussed by the District Munsif I think his finding is correct and it is not necessary to send the case down for a fresh finding as I can myself find the fact under section 103 of the Civil Procedure Code. There is good reason to find that he had access to the woman at the time the child was begotten. The decree of the lower Appellate Court is reversed and that of the District Munsif is restored with costs here and in the lower Appellate Court.

K.B.

APPELLATE CRIMINAL.

*Before Mr. Justice Spencer.*GOTHIPATI SURYANARAYANA (PETITIONER), PETITIONER, 1924,
February 19.

v.

SREE RAJAH ANKINEED PRASAD BAHADUR
AND 21 OTHERS (RESPONDENTS), COUNTER-PETITIONERS.*

Criminal Procedure Code (Act V of 1898), sec. 145—Magistrate dropping proceedings, on being satisfied that no dispute existed—Evidence, if obligatory to record any—Sale-proceeds of crops on attached lands, disposal of.

It is not obligatory for a Magistrate to take evidence before dropping proceedings under section 145, Criminal Procedure Code (Act V of 1898), if he is otherwise satisfied that no dispute likely to cause a breach of the peace existed.

The persons who raised the crop standing on the lands attached, are entitled to the money realized by a sale of the crop but it is not illegal to order the money to be kept in Court until one of the parties obtains an order in his favour in a Civil Court. *Chinnathambi Rowthan, In re.*, (1911) 12 Crl. L.J., 104, followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of J. HUSSAIN, Subdivisional Magistrate of Bandar, dated 2nd August 1922, in Miscellaneous Case No. 42 of 1921.

The facts of this case are as follows:—There was a dispute between the counter-petitioner and his niece, as regards the ownership of certain lands. The petitioner, who had obtained from the latter a lease of the lands for one year and raised a crop thereon, applied to the Magistrate for orders under section 144, Criminal Procedure Code, alleging that the counter-petitioner was obstructing him from harvesting the crop. With the

* Criminal Revision Case No. 206 of 1923.

714 THE INDIAN LAW REPORTS [VOL. XLVII]

SURYA-
NARAYANA
v.
ANKINEED
PRASAD
BAHADUR.

consent of the parties the Magistrate converted the inquiry into one under section 145, Criminal Procedure Code. The lands were attached and a receiver was appointed with directions to sell the crop and deposit the sale-proceeds in the sub-treasury. By the time the Magistrate could start his inquiry into the matter the petitioner's lease expired, and the counter-petitioner and his niece, the disputes between them having been amicably settled, applied to the Magistrate to drop the inquiry. The petitioner contended that the Magistrate had no power to drop the proceedings but should go on with the inquiry. The Subdivisional Magistrate held that he had power to drop the inquiry as he had been satisfied that no dispute existed in respect of the lands and accordingly dropped the inquiry and ordered that the sale-proceeds deposited in Court should be continued to be so kept until the parties established their rights to the same in a Civil Court. Against this the petitioner preferred this Revision Petition.

K. Venkatarama Raju for petitioner.

V. Ramadoss for counter-petitioners.

JUDGMENT.

An objection has been taken that the Magistrate acted illegally in dropping proceedings under section 145, Criminal Procedure Code, on being satisfied that no dispute likely to cause a breach of the peace existed.

It is argued that he was bound to record the evidence of the witnesses of the petitioner, who might have shown by evidence that a dispute still existed, and that he should not have acted on the petition of the niece of the Zamindar who stated that she had compromised the matter in dispute between herself and the Zamindar who is the first counter-petitioner.

SURYA-
NARAYANA
v.
ANKINEED
PRASAD
BAHADUR.

In *Manindra Chandra Nandi v. Barada Kanta Chowdhry*(1) it was held that, whatever the source of the Magistrate's information, he might act upon it if he was satisfied that the state of things, which alone would have given him jurisdiction to proceed with the inquiry, no longer existed, and in another case in the same volume at page 161 it was pointed out that section 145 (5) gives even third parties who are interested in the land a right of intervening and showing that no dispute existed. When the Magistrate is able to act on a police report or other information in starting proceedings under section 145, I do not see why he should not stay further proceedings on similar information without being obliged to record such evidence as the parties may produce with the same formality as he would have done, if he had gone on with his inquiry instead of dropping it. The petitioner cannot complain that he had no opportunity of showing cause against the order that was made, as the Magistrate's order contains a full discussion of his power to drop proceedings at any stage. I decline to interfere with the order of the Magistrate on this point.

As regards the money deposited in Court, it appears that the deposits made by bidders at the sale of the right to cultivate the disputed lands in fasli 1332 were ordered to be returned to them. That was a proper order, as the sale was cancelled in consequence of these proceedings. The main order speaks of some other money deposited in Court. This may be the sale-proceeds of crops that were standing on the lands when the lands were attached. If so, that money might have been ordered to be restored to the persons who raised the crops, as was done in *Mahalakshmi v. Subbarayadu*(2).

(1) (1908) I.L.R., 30 Calc., 112.

(2) (1923) 17 L.W., 429.

SURYA-
NARAYANA
v.
ANKINEED
PRASAD
BAHADUR.

But there is authority in *In re Chinnathambi Rowthan*(1), for the orders passed in this case, viz., that the money should be kept in deposit in the Court until one party or the other obtained an order in its favour. I shall therefore allow the order to stand.

The Criminal Revision Petitions are dismissed with costs.

D.A.B.

APPELLATE CRIMINAL.

Before Mr. Justice Venkatasubba Rao.

THE PUBLIC PROSECUTOR, APPELLANTS,

v.

VARADARAJULU NAIDU (ACCUSED), RESPONDENT.*

Madras District Municipalities Act (Madras Act V of 1920), sec. 182—Notice to remove an obstruction to public street—Obstruction caused by something done on private property—Non-compliance with notice—Prosecution under sec. 313, whether maintainable—Scope of sec. 182.

Section 182 of the Madras District Municipalities Act (Madras Act V of 1920) does not empower municipalities to compulsorily acquire private property; its scope is limited to authorizing them, in public interest, to cause obstructions and encroachments to be removed. The owner of a private property is not liable to a prosecution under section 313 for non-compliance with a notice under section 182, if the obstruction is the result of something done upon his own private property. But if he has merely acquired a prescriptive title to a portion of the street covered by the obstruction he is bound to comply with the notice, and he is entitled to a reasonable compensation from the municipality.

The Chairman, Municipal Council, Srirangam v. Subba Pandithar, (1915) I.L.R., 38 Mad., 456, and *Basaweswaraswami v. The Bellary Municipal Council*, (1915) I.L.R., 38 Mad., 6, explained.

* Criminal Appeal No. 1032 of 1923.
(1) (1911) 12 C.L.J., 104.

APPEAL under section 417 of the Code of Criminal Procedure (Act V of 1898), against the acquittal of the aforesaid accused by the Court of the Second-class Bench of Magistrates of Salem.

The facts necessary for this report are set out in the Judgment.

The Public Prosecutor for the appellant.

T. M. Krishnaswami Ayyar for the accused respondent.

PUBLIC
PROSECUTOR
v.
VARADA-
RAJULU
NAIDU.

JUDGMENT.

This is an appeal by the Public Prosecutor against an order of acquittal made in the following circumstances. The accused respondent was directed under section 182 of the Madras District Municipalities Act, 1920, by the Chairman of the Salem Municipal Council to remove an encroachment, it having been alleged that a compound wall built by the accused in front of his house encroached upon a public street. The accused refused to comply with the order on the ground that there was no encroachment and thereupon he was prosecuted under section 313 by the Municipal Council for having failed to comply with the requisition lawfully made in pursuance of the provisions of the Act. The accused was tried by a Bench of Magistrates and they found that the wall was not built upon a part of the public street, that the portion occupied by the wall never formed a part of the street and that it, therefore, was no encroachment. On this finding of fact the order of acquittal was clearly justified. It is, however, faintly suggested by the learned Public Prosecutor that section 182 gives the Municipal Council power of compulsory acquisition, that is to say, that although the wall in question was not built upon any part of a public street still the municipality could call upon the accused

PUBLIC
PROSECUTOR
v.
VARADA-
RAJULU
NAIDU.

to remove the wall and, on his failing to do so, get him convicted, and that the relief to which the accused would be entitled is compensation mentioned in the section.

Section 182, so far as it is relevant for the present purpose, is as follows:—

"The Chairman may by notice require the owner of any premises to remove or alter any projection, encroachment or obstruction situated against or in front of such premises and in or over any street.

"2. If the owner . . . of the premises proves that any such projection, encroachment or obstruction has existed for a period sufficient under the law of limitation to give any person a prescriptive title thereto or . . . the Municipal Council shall make reasonable compensation to every person who suffers damage by the removal or alteration of the same."

It is quite obvious that the object of the section is not to empower the Municipality to compulsorily acquire a private property, but its scope is limited to authorizing the municipal body in public interest to cause obstructions and encroachments to be removed.

I have no hesitation in rejecting the argument as utterly untenable. Indeed the learned Public Prosecutor was quite conscious of the weakness of his contention and merely desired to have a ruling upon the point.

There is, however, another portion of the judgment of the Magistrates which calls for more serious consideration. I have said that they gave a finding that no part of the wall was built upon any portion of the public street. The Magistrates, however, proceeded to say that if the wall constituted an encroachment, the accused has been in possession of that part of the street which was encroached upon for over the statutory period and that therefore the action of the Municipality was not justified.

PUBLIC
PROSECUTOR
v.
VARADA-
RAJULU
NAIDU.

In this, the Magistrates were clearly wrong. The decision is in the teeth of the express words of the section which enacts that if the owner succeeds in proving that the encroachment has existed for a period sufficient under the law of limitation to give him a prescriptive title thereto, he is all the same bound to comply with that order, but in that event he will be entitled to a reasonable compensation from the Municipal Council.

Mr. T. M. Krishnaswami Ayyar, the learned vakil for the accused, relied upon *The Chairman, Municipal Council, Srirangam v. Subba Pandithar*(1). The learned Judges held in it that if the owner acquires title by adverse possession to the site occupied by the encroachment or obstruction, the whole of such space ceases to be a street and what was originally an encroachment can no longer be described as such and that therefore the Municipality will not be justified in requiring its removal. But it must be remembered that this is a decision on section 168 of the repealed Act IV of 1884. It runs thus:—

1. "The Municipal Council may cause any projection, encroachment or obstruction made against or in front of any building or land in any public street to be removed or altered as they think fit.

2. "The Municipal Council shall give notice of such intended removal or alteration to the owner or occupier of the building or land against or in front of which such projection, encroachment or obstruction has been made, thirty days before such alteration or removal is begun.

3. If such projection, encroachment or obstruction shall have been lawfully made the Municipal Council shall make reasonable compensation to every person who suffers damage by such removal or alteration."

Whatever doubts may be entertained in regard to the old section they have been removed by the very clear and express language of the section in the New

PUBLIC
PROSECUTOR
v.
VARADA-
RAJULU
NAIDU.

Act. For the purposes of the present section what is once an encroachment or an obstruction always remains so. If it is proved that the portion on which the encroachment exists was once a street the right of the Municipality follows as a necessary result. I am therefore of the opinion that *The Chairman, Municipal Council, Srirangam v. Subba Pandithar*(1) is not an authority that bears on the present question. The learned Public Prosecutor relied upon *Basaweswaraswami v. The Bellary Municipal Council*(2) as establishing the proposition the very reverse of what was held in the last mentioned case. SADASIVA AYYAR, J., was a party to both the decisions and though in the later judgment he was at pains to reconcile it with his earlier judgment, it seems to me that the cases are irreconcilable. In *Basaweswaraswami v. The Bellary Municipal Council*(2) the question arose with reference to a projection overhanging a street. In the later case *The Chairman, Municipal Council, Srirangam v. Subba Pandithar*(1) the projection rested on the soil of the street itself. In either case by adverse possession the title of the possessor becomes complete. When the projection overhangs the street, he acquires title to the space occupied by the projection. Where the projection on the other hand rests upon the soil, he acquires title to the site on which the obstruction stands.

Corbett v. Hill(3) is a useful and instructive case. The plaintiff and the defendant in it were owners of two contiguous houses. One of the first floor rooms in the plaintiff's house projected over the ground-site of the defendant's house. The defendant proceeded to erect a building over the said room belonging to the plaintiff and protruding over the site of the

(1) (1915) I.L.R., 38 Mad., 458.

(2) (1915) I.L.R., 38 Mad., 6.

(3) (1870) 9 Eq., 671.

PUBLIC
PROSECUTOR
v.
VARADA-
RAJULU
NAIDU.

defendant's house. The question was whether the space over the projecting room belonged to the plaintiff or the defendant. The learned Vice-Chancellor Sir W. M. JAMES held that it belonged to the defendant. He says that the ordinary rule of law is that whoever has got the *solum*—whoever has got the site—is the owner of everything up to the sky and down to the centre of the earth. But that presumption of law is rebutted by the fact that other adjoining tenements protrude themselves over the site. Then the question arises, is the owner of the soil deprived of the entire right including the right upwards and downwards as is defined horizontally by a section of the protrusion, or is he deprived of that portion only as is included between the ceiling of the room at the top and the floor at the bottom? The protrusion, the learned Vice-Chancellor answers, does not carry with it anything above it or anything below. The owner of the site remains the owner of everything else, that is the vertical column of air, in other words, the space above and below the protrusion or the projection overhanging the site.

Applying this principle to the facts of *Basaweswaraswami v. The Bellary Municipal Council*(1) the owner acquired by adverse possession title to the space covered by the projection and to that extent the street lost its character of a street and similarly in *The Chairman, Municipal Council, Srirangam v. Subba Pandithar*(2) the owner acquired title to the site on which the projection rested and that part of the site ceased to be a street. In *Basaweswaraswami v. The Bellary Municipal Council*(1) the learned Judges SUNDARA AYYAR and SADASIVA AYYAR, JJ., decided in favour of the Municipality and in *The Chairman, Municipal Council, Srirangam v. Subba Pandithar*(2) the learned Judges

(1) (1915) I.L.R., 38 Mad., 6.

(2) (1915) I.L.R., 38 Mad., 458.

PUBLIC
PROSECUTOR
v.
VARADA-
RAJULU
NAIDU.

SADASIVA AYYAR and TYABJI, JJ., decided against the Municipality. With all respect it seems to me that the decisions in the two cases are at variance with each other.

But for my present purpose it is unnecessary to pursue this point. We are now governed by an altogether new Act and the words in the section in question leave no room for doubt. I therefore hold that the decision of the Bench of Magistrates on the second question is wrong.

The order of acquittal was, however, rightly passed and in the result the appeal fails.

I would like to add that it is extremely undesirable that cases of this description involving difficult questions of fact or of law should be directed to be tried by a Bench of Honorary Magistrates. They cannot ordinarily be expected to deal satisfactorily with the questions that are involved in such cases and I have had not a little amount of difficulty in understanding the judgment in the present case.

D.A.R.

APPELLATE CRIMINAL.

Before Mr. Justice Venkatasubba Rao.

RAMANATHAN CHETTIYAR (ACCUSED), PETITIONER,

v.

K. SIVARAMA SUBRAHMANYA AYYAR (COMPLAINANT),
RESPONDENT. *

Code of Criminal Procedure (Act V of 1898), ss. 435, 438 and 439—Proceedings in a pending trial before Magistrate—High Court's power to interfere in revision.

The High Court has power, under sections 435, 438 and 439 of the Code of Criminal Procedure, to interfere in revision at any stage with the proceedings of a Magistrate in a pending trial.

* Criminal Revision Case No. 186 of 1924.

PETITION under sections 435 and 439 of the Code of Criminal Procedure and section 107 of the Government of India Act praying the High Court to revise the order of T. SRINIVASA AYYANGAR, Second-class Magistrate of Sivaganga, in Calendar Case No. 236 of 1923.

The facts necessary for this report are set out in the Judgment.

C. S. Venkata Achariyar for the petitioner.

S. Muthiah Mudaliyar for the respondent.

Public Prosecutor on behalf of the Crown.

JUDGMENT.

The accused was charged with misappropriation of paddy worth about Rs. 200. Summons was issued to him and he now moves the High Court and asks that the proceedings before the Magistrate should be quashed.

The learned Public Prosecutor has contended that the High Court has no power to interfere with the proceedings of a Magistrate in a pending trial. Whether this contention is correct depends upon the interpretation of sections 435, 438 and 439 of the Criminal Procedure Code.

Under section 435 the High Court is empowered to call for and examine the record of any proceedings before any inferior Criminal Court, situate within the local limits of its jurisdiction, for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court. The section thus does not deal merely with "finding, sentence or order" but with proceedings generally and the power of the High Court extends to calling for and examining the record of any proceedings for the

RAMANATHAN
CHETTIYAR
v.
SUBRAH-
MANYA
AYYAR.

1924,
March 27.

RAMANATHAN
CHETTIYAR
v.
SUBRAH-
MANYA
AIYAR.

purpose of satisfying itself as to the regularity of such proceedings.

Under section 438, the Sessions Judge or District Magistrate may, on examining the record of any proceedings, report for the orders of the High Court the result of such examination.

Then comes section 439. It provides that in the case of any proceeding, the record of which has been called for by the High Court or which otherwise comes to its knowledge, it may, in its discretion, exercise any of the powers conferred on a Court of Appeal by certain sections of the Code. The learned Public Prosecutor contends that none of the sections specified in section 439 gives the High Court power to set aside or quash proceedings in a pending suit. The answer is simple. The sections dealing with the powers of a Court of Appeal necessarily deal with those orders only from which under the Code there is an appeal provided. With reference to such orders, the sections lay down the powers of a Court of Appeal. *Ex hypothesi* the revisional powers of the High Court are invoked when no right of appeal exists, and, although in some cases the High Court may, by exercising the powers conferred on a Court of Appeal, be able to correct an error, it does not follow, having regard to the variety of orders or proceedings which it may be called on to revise or deal with in its revisional jurisdiction, that it can, by exercising those powers only, redress a wrong or do complete justice. In other words, section 439 does not say that the High Court shall exercise only those powers that are conferred on a Court of Appeal, but on the other hand it enacts that among the powers possessed by the High Court are the powers conferred on an Appellate Court. The sections dealing with the powers of an Appellate Court necessarily describe and define the

powers of the Court with reference to orders that are appealable. The legislature in enumerating the powers of the Court of Appeal had before its mind only a certain class of orders and in the very nature of things that enumeration cannot be found complete or exhaustive when the Court is called on to deal with orders of a different kind, orders not in the contemplation of the legislature when it was defining the powers of a Court of Appeal.

I am therefore of the opinion, on a construction of the sections of the Code, that the High Court has power at any stage to quash or set aside proceedings.

The authorities on the point support this view; indeed there is not a single reported case which supports the contention of the learned Public Prosecutor.

The circumstances which will justify the interference of the High Court have not been and cannot be laid down with precision. While the Judges repeatedly held that only when exceptional grounds exist the High Court ought to interfere, the decided cases show that no hard and fast rule can be laid down but that when in the interests of justice the High Court's intervention became necessary, it was not refused.

In *Chandi Pershad v. Abdur Rahman*(1), *Jagat Chandra Mozumdar v. Queen-Empress*(2) and *In re Kuppuswami Aiyar*(3) the High Court quashed proceedings after a charge had been framed.

In *Hari Charan Gorait v. Girish Chandra Sadhukhan*(4), *Queen-Empress v. Nageshappa*(5) and *Thakaria v. Puran Singh*(6) the High Court interfered upon the issue of summons to the accused.

(1) (1895) I.L.R., 22 Cal., 391.
(3) (1916) I.L.R., 39 Mad., 561.
(5) (1898) I.L.R., 20 Bom., 548.

(2) (1899) I.L.R., 26 Cal., 786.
(4) (1911) I.L.R., 38 Cal., 68.
(6) (1922) 87 I.C., 589.

RAMANATHAN
CHETTIYAR
v.
SUBRAH-
MANYA
AIYAR.

RAMANATHAN
CHETTIYAR
v.
SUBRAH-
MANYA
AYYAR.

In *Queen Empress v. Jagan Singh*(1) and in *Chadha v. Emperor*(2) the High Court's intervention was sought for setting aside proceedings even at an earlier stage. The orders which the Court was requested to revise were to show cause why sanction should not be accorded for prosecution for forgery and perjury respectively.

Oho Lal Dass v. Anant Pershad Misser(3) is an instance where the High Court refused to exercise this power. But the learned Judges even there observed that the High Court undoubtedly had the power to interfere in any case and at any stage of it.

In some of the cases mentioned above, the proceedings were set aside on the ground that the facts alleged did not in law constitute the offence with which the accused had been charged. In other cases, evidence was examined and probabilities were discussed and the High Court set aside the proceedings on the ground that it was not in the interests of justice that the proceedings should be allowed to continue.

In the four Calcutta cases and the Bombay case the decision in each was that of a Bench of two Judges.

The view I have taken of the sections of the Code is thus borne out by the authorities to which I have referred.

The question then remains to be decided with reference to the facts of the present case:—Is the interference of the High Court justified? There is a *Kattalai* attached to the Madura Devasthanam known as Nagappa Chetti *Kattalai*. The family of the accused had made the endowment. In 1915 a suit was filed for the settlement of a scheme in respect of this *Kattalai*. In 1917, Venkatachallam Chetty, the brother of the

RAMANATHAN
CHETTIYAR
v.
SUBRAH-
MANYA
AYYAR.

accused, filed a suit for partition of the family property and management of the villages that formed the subject of the endowment. In February 1921 the High Court finally decided in the partition suit that the accused was to be a trustee of the *Kattalai* and, immediately after, he got possession. In the other suit, the suit brought to settle a scheme, a scheme was settled on the 5th August 1921 and by it the trustee (the accused) was directed to submit yearly accounts, which were to be duly audited, and the balance in the trustee's hand was to be paid to the Manager of the Madura Devasthanam. The complainant is one Alagappa Chetty, the Receiver appointed in respect of that Devasthanam. It is alleged that after the accused obtained exclusive possession of the property he passed two receipts to tenants, dated the 20th of March 1921 and 26th of March 1921, showing that a certain amount of paddy was received by him but that the account books maintained for the *Kattalai* show that the quantity of paddy received was much less. The difference is worth about Rs. 200 and odd and the charge is that the accused misappropriated paddy worth this amount.

In accordance with the decree settling the scheme, the accounts for the *fasli*, corresponding to 1921, were filed by the accused. The auditor went through the accounts and submitted his report to the Court. Objections were filed to the report both by the accused and Alagappa Chetty. On the 6th of March 1923 the Subordinate Judge made an order in effect disallowing the objections of Alagappa Chetty in regard to the alleged difference in the quantity of the paddy referred to above. Alagappa Chetty has filed no appeal against that order. But the accused himself has filed one challenging it in so far as it was against him. While this appeal was pending, on 3rd December 1923 Alagappa

(1) (1892) 12 A.W.N., 103.

(2) (1916) 14 A.L.J., 851.

(3) (1898) I.L.R., 25 Cal., 233.

RAMANATHAN
CHETTIYAR
v.
SUBRAH-
MANYA
AIYAR.

Chetty gets a clerk of his to file the complaint and the summons was issued on 12th December 1923.

Mr. C. S. Venkatachari for the accused has contended that the complaint was malicious and that the order of the Subordinate Judge was in his favour and with a view merely to harass his client the Receiver got the present complaint filed on account of private misunderstandings and spite. There are several proceedings before the High Court now which clearly show that Alagappa Chetty and the accused are on inimical terms and it is extremely probable that Alagappa Chetty is actuated by personal motives and that the prosecution has not been launched in the public interest. The receipts were given in March 1921. The Subordinate Judge's order was made in March 1923 and it is about nine months subsequent to it that the complaint was filed. It was open to Alagappa Chetty to place all the materials he could before the Subordinate Judge and he now pretends that he did not do so. His vakil says that although on this particular point the order of the Subordinate Judge was against him, he may be able to support the order generally in the appeal that is pending by showing that his client is entitled to this particular amount which has been disallowed by the Subordinate Judge. Thus the matter is still in controversy between the parties in the Civil Courts and these facts lead to the inference that the prosecution is not *bona fide*. But the allegations made in the complaint if proved will constitute the offence of misappropriation. The materials on which either side may rely have not been placed before me and I am not in a position to say that the complaint is false. It may be that the motive of the complainant in preferring the charge may be bad, but it does not follow that the proceedings for that reason should be quashed. I am not therefore prepared in the

present case to set aside the proceedings wholly, but I think it is pre-eminently a case where the proceedings should be stayed pending the disposal of the appeal before the High Court (A.A.O. No. 314 of 1923) from the order of the Subordinate Judge. I accordingly make an order staying the proceedings pending the appeal. At this stage no further order will be necessary.

D.A.R.

PRIVY COUNCIL.*

NARASINGERJI JYANAGERJI (SINCE DECEASED)
(DEFENDANT), APPELLANT,

v.

PANUGANTI PARTHASARADHI RAYANAM GARU AND
OTHERS (PLAINTIFFS), RESPONDENTS.

[On Appeal from the High Court at Madras.]

*Mortgage—Ostensible sale and agreement for repurchase—
Intention—Evidence—Inadequacy of price—Construction of
deeds—Indian Evidence Act (I of 1872), sec. 92—Transfer of
Property Act (IV of 1882), sec. 58.*

Two deeds of the same date were so phrased as to be ostensibly a sale of certain villages with an agreement for a resale and repurchase at the same price at a certain date. It appeared however that the price named, which was an amount immediately required to prevent a sale under a decree, had been settled without bargaining; it was absurdly low, less even than what the property would have realized upon a public sale. A clause in one of the deeds indicated that time was not of the essence of

* Present: Lord ATKINSON, Lord SHAW, Lord BLANESBURGH, Sir JOHN EDGE and Mr. AMER ALI.

RAMANATHAN
CHETTIYAR
v.
SUBRAH-
MANYA
AIYAR.

1924,
19th June

NARA-
SINGERJI
v.
PARTHA-
SARADHI
RAYANAM
GARU.

the contract for repurchase, and there were other provisions which supported the view that a mortgage was intended.

Held, that the transaction was a mortgage by conditional sale, and that purchasers upon a sale in execution had a right to redeem; that conclusion was arrived at without reference to oral evidence other than such as was held admissible in *Balkishen Das v. W. F. Legge* (1900) I.L.R., 22 All., 149 (P.C.); 27 I.A., 58.

Their Lordships observed that, as at present advised, they must not be taken to subscribe to the view that there had been introduced into the law of India such a radical change in the law of evidence as was suggested in the High Court, a change which would have the effect of excluding from the class of mortgages by conditional sale, many transactions which before the Indian Evidence Act would have been held to be within that class.

APPEAL (No. 47 of 1922) from a decree of the High Court (24th February 1921) modifying a decree of the Subordinate Judge of Nellore.

The suit was brought by the respondents and related to certain villages in the zamindari of Kālahasti which were dealt with by two deeds executed by the Raja of Kālahasti upon 4th August 1908. The first deed recited that in order to prevent a sale of the property under a decree the Raja (who was described as "the vendor") had "agreed to convey by private sale the said villages for Rs. 6,00,000," and conveyed them to the appellant subject to conditions and reservations of which those material to the present judgment are therein set out. The second deed was described as an agreement for a reconveyance of the villages to the Raja (referred to as "the purchaser") and provided:

"The vendor agrees to sell, and the purchaser to purchase, the villages mentioned in the conveyance, for Rs. 6,00,000, the said sum to be paid by the purchaser to the vendor on 31st August 1913, or 31st August 1914, and not earlier."

NARA-
SINGERJI
v.
PARTHA-
SARADHI
RAYANAM
GARU.

The deed contained material provisions which are stated in the judgment of the Judicial Committee.

In 1914 the villages were brought to sale under a decree, and in February 1915 they were knocked down to the respondents to whom a sale certificate was issued. Meanwhile, namely, on 31st August 1914, the Raja (as was found by both Courts in India) tendered to the appellant the Rs. 6,00,000.

In August 1915, the respondents brought the present suit against the appellant, joining the Raja as a defendant. By their plaint they contended that the transaction was a mortgage by conditional sale and that they were entitled to redeem: alternatively, that if the transaction was a sale they as assignees had a right to a reconveyance upon payment.

The present appellant by his written statement denied that the transaction was a mortgage, and denied that any tender had been made; he also contended that the rights of the Raja were not capable of assignment and that the plaintiffs were not entitled to sue.

The Subordinate Judge found that the property was of the value of 15 or 16 lakhs. Having regard mainly to that fact, and to the circumstance that no bargaining as to the amount had taken place, he held that the transaction amounted to a mortgage. He accordingly made a decree for redemption; and subsequently, the money having been paid into Court by the plaintiffs, he made a final decree under Order XXXIV, rule 8.

Upon appeal to the High Court, the learned Judges (WALLIS, C.J., and OLDFIELD, J.) modified the decree by ordering a reconveyance with payment by the first defendant of mesne profits from 1st July 1914, until possession was given, and that the plaintiffs should pay to the first defendant interest upon Rs. 6,00,000 at 6 per cent

NARA-
SINGERJI
v.
PARTHA-
SARADHI
RAYANAM
GARU.

per annum from 1st September 1914, until 5th March 1919, the date of the deposit of the money in Court. The learned Judges were of opinion that, having regard to the provisions of the deed, the transaction was a sale with a collateral agreement for repurchase though they agreed with the findings of fact of the trial Judge as to the inadequacy of price. They rejected a contention that the plaintiffs had purchased merely a right to sue which by section 6 of the Transfer of Property Act was incapable of transfer. Upon that point they applied the tests laid down by PARKER, J., in *Glegg v. Bromley*(1), cited with approval in *County Hotel and Wine Company v. London and North-Western Railway*(2) and *Ellis v. Torrington*(3), namely, whether the subject-matter of the assignment was property with an incidental right to its recovery, or was a bare right to bring an action either in law or in equity. Reference was also made to section 23 of the Specific Relief Act on this point.

The learned CHIEF JUSTICE in the course of his judgment, after expressing his agreement with the findings of fact on which the trial Judge held that the transaction was a mortgage, said :—

“If we are at liberty to apply the decisions of Courts of Equity in England, I think that these findings would support the inference that the conveyance, Exhibit X, was originally intended as a security for money and must be treated as a mortgage. As observed by the learned Editor of Coke on Littleton 204 (b) in a note which is cited by Story ‘If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him; if he was not let into immediate possession of the estate; if, instead of receiving the rents for his own benefit, he accounted for them to the grantor, and only retained the amount of the interest; or if the expense of preparing the deed

(1) [1912] 8 K.B., 474.

(2) [1918] 2 K.B., 251.

(3) [1920] 1 K.B., 399.

was borne by the grantor, each of these circumstances has been considered by the Court as tending to prove that the conveyance was merely pignoratitious.’ I do not think the decisions referred to in support of these propositions are inconsistent with the later decision in *Alderson v. White*(1), but it has been held by the Privy Council, as regards transactions which no doubt arose before the Transfer of Property Act, that these equitable decisions are inapplicable in India: *Balkishen Das v. W. F. Legge*(2), where their Lordships, after referring to the provisions of section 92 of the Indian Evidence Act, observed that cases such as these ‘must be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the documents is related to existing facts.’ This ruling which was followed in *Jhanda Singh v. Wahid-ud-din*(3), and has been approved in *Maung Kyin v. Ma Shwe La*(4), which, however, was not a case of sale-deed and agreement to reconvey, clearly refers to the language of proviso 1 to section 92 of the Indian Evidence Act, and the surrounding circumstances referred to in that proviso are circumstances which enable the Court to ascertain and give effect to the full intention of the parties as expressed in the document itself, and evidence of surrounding circumstances is not admissible under the proviso for the purpose of contradicting the terms of the document. Following these decisions this Court has recently held in *Muthuvelu Mudaliar v. Vythilinga Mudaliar*(5), that, although section 58 of the Transfer of Property Act recognizes mortgages by conditional sale where the mortgagor ostensibly sells the mortgaged property on condition that on payment of the mortgage money on a certain date the buyer shall transfer the property to the seller, the section has not the effect of raising a presumption that a sale with an agreement to reconvey is a mortgage; and having regard to the decisions just cited I think we are precluded from holding this transaction to be a mortgage

NARA-
SINGERJI
v.
PARTHA-
SARADHI
RAYANAM
GARU.

(1) (1858) 2 D.G. & J., 97.

(2) (1900) I.L.R., 22 All., 149 (P.C.); 27 I.A., 58.

(3) (1916) I.L.R., 38 All., 570 (P.C.); 43 I.A., 284.

(4) (1918) I.L.R., 45 Calc., 320 (P.C.); 44 I.A., 236.

(5) (1919) I.L.R., 42 Mad., 407 (F.B.).

NARA-
SINGERJI
v.
PARTHA-
SARADHI
RAYANAM
GARU.

unless it appears on the face of the documents read in the light of the surrounding circumstances that it was the intention of the parties that it should be a mortgage. A strict application of this rule may have the effect of excluding most of these transactions from the class of mortgages by conditional sale, but on the other hand it will have the effect of putting an end to the uncertainty in which these transactions have been involved and the litigation to which they have given rise. This appears to me to be the only alternative if we are precluded from treating transactions of this kind as mortgages on the ground on which I think the Courts of Equity formerly proceeded that it would be inequitable to give effect to them as sales."

Olauson, K.C., and *Narasimham* for the appellant.—The transaction was rightly held to be a sale with a right to repurchase. The right remaining in the Raja was not transferable or attachable in execution.

[Their Lordships directed that the question whether the transaction was a mortgage or a sale should first be argued by both parties.]

The deeds on their face amount to a sale with a collateral agreement for a resale; no extrinsic evidence was admissible to alter their legal effect: *Balkishen Das v. W. F. Legge*(1), *Jhanda Singh v. Wahid-ud-din*(2) and *Maung Kyin v. Ma Shwe La*(3). The transaction was not a mortgage within section 58 (c) of the Transfer of Property Act, 1882, because it was not shown to be a case in which "a mortgagor ostensibly sells." By section 58 (c) a transaction is a "mortgage" only if it is a giving of security for money advanced by way of loan. That the transaction was of that character must be established by evidence admissible having regard to section 92 of the Indian Evidence Act. The transaction

(1) (1900) I.L.R., 22 All., 149 (P.C.); 27 I.A., 53.
(2) (1916) I.L.R., 38 All., 570 (P.C.); 43 I.A., 284.
(3) (1918) I.L.R., 45 Cal., 320 (P.C.); 44 I.A., 236.

NARA-
SINGERJI
v.
PARTHA-
SARADHI
RAYANAM
GARU.

was purposely given the form of a sale as that afforded greater protection from executions.

Upjohn, K.C., and *Kenworthy Brown* for the respondents.—The transaction was a mortgage by conditional sale as appears from a consideration of its provisions and the circumstances in which it was entered into. Further, section 58 (c) of the Transfer of Property Act provides that a document which ostensibly is a sale may be a mortgage. That a document of that character is really a mortgage can be shown only by extrinsic evidence. Such evidence does not contradict the document because the section recognizes that a document of that form may be a mortgage under the Act. The effect of section 58 (c) has never been considered by the Board. *Balkishen Das v. W. F. Legge*(1) and *Jhanda Singh v. Wahid-ud-din*(2), both related to documents executed before the passing of the Act, and *Maung Kyin v. Ma Shwe La*(3) was not a case of a collateral agreement to repurchase. Even upon a strict application of the rule in *Balkishen Das v. W. F. Legge*(1), evidence of the inadequacy of the price was admissible and indicated that the transaction was a mortgage.

Olauson, K.C., in reply.—A document is not within section 58 (c) unless its terms allow that the relationship of borrower and lender exists. The principles laid down in *Balkishen Das v. W. F. Legge*(1), as to the decision in equity not applying, were expressly approved and followed in *Maung Kyin v. Ma Shwe La*(3).

The JUDGMENT of their Lordships was delivered by

Lord BLANESBURGH.—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 24th of February 1921, modifying a decree

Lord
BLANES-
BURGH.

(1) (1900) I.L.R., 22 All., 149 (P.C.); 27 I.A., 53.
(2) (1916) I.L.R., 38 All., 570 (P.C.); 43 I.A., 284.
(3) (1918) I.L.R., 45 Cal., 320 (P.C.); 44 I.A., 236.

NARA-
SINGERJI
v.
PARTHA-
SABADHI
RAYANAM
GARU.
—
Lord
BLANES-
BURGH.

of the Subordinate Judge of Nellore, dated the 5th of October 1918, and made in Original Suit No. 1 of 1917.

Issues raised by the appellant necessitated in the Courts below, and particularly in the Court of the Subordinate Judge*, whose judgment, their Lordships would at once observe, is conspicuous for its ability, care and completeness, a prolonged investigation and examination of conflicting evidence. Concurrent findings against the appellant on every issue of fact raised by him have, however, greatly narrowed the ambit of the dispute as presented to the Board, and no more than two questions—difficult and important questions it is true—have survived for discussion before their Lordships.

Of these one only has so far been argued. But it raises the fundamental dispute between the parties, which may be described as an issue as to the true nature of the transaction of the 4th of August 1908, between the appellant and the late Raja of Kālahasti (now represented by the respondents his assignees) as a result of which the properties in suit passed to the appellant. The transaction is evidenced by two documents referred to throughout the proceedings as Exhibits X and U. Did it effect, as contended for by the respondents, merely a mortgage by conditional sale of the properties in suit, or was it, as contended by the appellant, an absolute sale of these properties to himself, with an agreement on his part to reconvey on the strict performance by the Raja of certain defined conditions?

In this suit the respondents, who, as already indicated, had succeeded as auction purchasers to the outstanding rights in the properties of the Raja, claimed to redeem them on the footing that the transaction in question was a mortgage. Alternatively, they claimed

to have the properties reconveyed to them upon payment of the purchase price on the ground, that if contrary to their main contention, the transaction did amount to an out and out sale, the conditions entitling the Raja to a reconveyance had been all complied with by him, and in his shoes they now stood.

In the Trial Court, the respondents succeeded on their main case. In the Court of Appeal they succeeded on their alternative case. The learned Subordinate Judge held that the transaction amounted to a mortgage by conditional sale. The High Court on appeal felt themselves constrained upon the authorities to hold that, in view of the terms of Exhibits X and U, the transaction must be held to have been an absolute sale of the properties to the appellant. But they found also, agreeing in this with the learned Subordinate Judge, that the conditions entitling the Raja to a reconveyance on that footing had been performed and that the respondents, as his successors in interest, were entitled to have the properties assured to them on payment of the prescribed price.

From that order of the High Court, the present appeal is brought. Mr. Clauson for the appellant did not ask their Lordships to review the conclusion of the High Court that all the conditions entitling the Raja to a reconveyance had been performed. That conclusion—strenuously contested in the Courts below—now rested on concurrent findings of fact which he could not before the Board seek to displace. The appellant's sole ground of appeal, indeed, was that the right to a reconveyance reserved by Exhibit U was personal to the Raja and did not pass to any assignee. As, however, the appellant's views on this matter raised very difficult questions of law, and as counsel recognized that no success with them would avail him anything if the

NARA-
SINGERJI
v.
PARTHA-
SABADHI
RAYANAM
GARU.
—
Lord
BLANES-
BURGH.

* Mr. K. Sundram Chettiar—Ed.

NARA-
SINGERJI
v.
PARTHA-
SABADHI
RAYANAM
GARU.
—
Lord
BLANES-
BURGH.

respondents were to establish before the Board, as they had done before the Subordinate Judge, that the transaction with the appellant did in truth amount to a mortgage, Mr. Clauson, with the approval of the Board, confined his argument to that question, on the understanding that, if their Lordships ultimately accepted upon it, the view in his favour taken by the High Court, the substantive issue raised by the appellant in his appeal would become the subject of subsequent discussion before the Board.

In accordance with that arrangement, the vital question, whether the transaction in question did or did not amount to a mortgage, has been fully argued before their Lordships, and with that problem alone they now propose to deal.

It seems to their Lordships that they can dispose of the present case with no reference to any oral evidence, other than that of surrounding circumstances such as in Lord DAVEY's words in *Balkishen Das v. W. F. Legge*(1) is clearly required to show in what manner the language of the documents was related to existing facts.

To a consideration of these circumstances their Lordships now proceed.

The Raja of Kālahasti—party to the transaction in question—succeeded in 1905 to the Taluk of Pamur. The taluk consisted of 223 villages, and at the succession of the Raja it was in a state of the utmost embarrassment.

It had been for some time in the hands of the Court of Wards, but earlier in the same year that Court had handed it back to the Raja's nephew and predecessor. The property was heavily encumbered. It was subject to a mortgage of the 20th of June 1893, in favour of

Raja Venugopal, who in 1899 had obtained a mortgage decree in respect of his debt amounting then to about 6 lakhs. In March, 1908, in pursuance of his decree, he had proceeded to a court sale of 27 villages, part of the taluk, and had realized thereby a sum of about 3½ lakhs but that price was being challenged by the Raja for inadequacy, and inadequate it seems to have been. Nor was the decree-holder content with his partial realization, and his purpose was to bring the remaining 196 villages to sale for the balance of his debt which, with interest, then amounted to nearly 6 lakhs, and he had actually obtained an order fixing that sale for the 8th of August 1908.

Such was the position when the transaction now in question was entered into. It was carried out four days earlier—on the 4th of August 1908. Six lakhs were required by the Raja to avert a court sale. The appellant, a rich money-lender of Allahabad, provided that sum. It was provided after very slight, if any, inquiry. The transaction, whatever it was properly called, was not the result either of any bargaining as to the value of the property conveyed or as to the price to be paid. The six lakhs were required and they were found. That was all.

That sum had no relation to the value of the 196 villages comprised in the deed of assurance. On this matter the Board are in full agreement with both Courts below. As the learned CHIEF JUSTICE points out, the 27 villages had in previous March fetched as much as Rs. 3,46,000 and that price was being challenged for inadequacy. There was no evidence and no reason to suppose that the 27 villages differed materially from the 196 villages still remaining unsold, still less that they differed to such an extent as to make the value of these 27 villages equal to two-thirds of the value of the 196.

NARA-
SINGERJI
v.
PARTHA-
SABADHI
RAYANAM
GARU.
—
Lord
BLANES-
BURGH.

(1) (1900) I.L.R., 22 All., 149 (P.C.); 27 I.A., 58.

NARA-
SINGERJI
v
PARTHA-
SABADHI
BAYANAM
GARU.
—
Lord
BLANES-
BURGH.

The evidence as to the gross income of the 196 villages led to the same conclusion. It was the view of the learned Subordinate Judge that the value of these 196 villages amounted in 1908 to 15 or 16 lakhs at the least. The learned CHIEF JUSTICE had no hesitation in concurring so far in that view as to hold that in August, 1908 six lakhs would have been a most grossly inadequate price and much less than could have been realized by private sale or even by a court sale. Their Lordships have examined the evidence on this subject for themselves and they are in entire agreement with the learned CHIEF JUSTICE as to its result. And that is sufficient. They desire to add, however, that had it been necessary they would have been prepared to endorse in its entirety the finding of the learned Subordinate Judge on this point.

Thus informed of the circumstances surrounding the execution of X and U, their Lordships are now in a position to examine these documents so as to ascertain from their provisions and necessary implications the real nature of the transaction to which they give effect.

Exhibit X, described as an indenture made by way of conveyance,—their Lordships will refer to it as the conveyance—describes the Raja as vendor and the appellant as purchaser. It begins with a recital of the title of the Raja to the 196 villages in question; it goes on to recite the mortgage of June 1893; the decree for sale and the sale of the 27 villages; and the fact that the remaining villages are proclaimed for sale on the 8th of August then current. The final recital is as follows:—

“And whereas the vendor has, in order to prevent the property being sold in public auction and realizing much less than what they are actually worth, agreed to convey by private sale the said villages to the said purchaser for Rs. 6,00,000.”

Their Lordships will return to this recital in due course. The conveyance then witnesses that in consideration of Rs. 5,60,445 paid to the decree-holder in satisfaction of his debt and Rs. 39,554-7-0 paid to the vendor, the vendor as beneficial owner grants and conveys the properties, “subject to the conditions and reservations mentioned below,” to the purchaser, “his heirs, executors, administrators and assigns in fee simple absolutely.” Then follow covenants for right to convey, quiet enjoyment, and further assurance and for indemnifying the purchaser, etc.,

“against all losses, damages, expenses, claims and liabilities whatsoever, if any, which he or they may pay, sustain, incur, or be put to by reason or in respect of the purchase thereof.”

The principal conditions and reservations are—

1. All rents are to belong to, and be enjoyed by, the purchaser as from 1st July 1908.

2. The vendor reserves to himself the sole right to the minerals and mineral rights including marble in the villages and the right

“to repurchase the said villages as per the agreement of this day’s date executed by the purchaser to the vendor, the said right to be exercised only on or after the 31st August 1912, and on or before the 31st August 1914, and to be in strict accordance with the terms set forth in the document above referred to.”

In Exhibit U, the agreement just referred to, the appellant appears as vendor and the Raja as purchaser. It is expressed to be made for the reconveyance of the 196 villages specified in the schedule attached to the conveyance, and clause 1 provides that

“The vendor agrees to sell, and the purchaser to purchase, the villages mentioned in the conveyance for Rs. 6,00,000, the said sum to be paid by the purchaser to the vendor on the 31st August 1912, the 31st August 1913, or the 31st August 1914, and not earlier.”

NARA-
SINGERJI
v
PARTHA-
SABADHI
BAYANAM
GARU.
—
Lord
BLANES-
BURGH.

NARA-
SINGERJI
v.
PARTHA-
SARADHI
RAYANAM
GARU.
—
Lord
BLANES-
BURGH.

By clause 2 the vendor is to execute a deed of sale in favour of the purchaser as soon thereafter as the said sum of Rs. 6,00,000 is paid to the vendor, and the vendor is to be entitled solely to the possession and enjoyment of the villages . . . till such sum is paid and a conveyance in due form executed.

By clause 3 it is provided that if the purchaser fails to pay the amount mentioned in clause 2 *before* the 31st August 1914, as above mentioned, the purchaser shall lose all his right of repurchase and that agreement shall then cease to be operative and valid. In case the purchaser pays to the vendor the said sum of Rs. 6,00,000 on the 31st August 1912, 1913 or 1914, as above set forth, and a conveyance in due form is executed, the purchaser is to become entitled to all the rents and profits derivable from the villages as from the 1st day of July 1912, 1913 or 1914, respectively.

Clause 4 is very important. Its terms are these—

“If after the date of this agreement and before the sale deed is executed, the Government take up any portion of the land hereunder agreed to be conveyed, under the Land Acquisition Act and award compensation therefor any compensation so awarded shall, unless Government otherwise expressly provides, be deemed to be equivalent to 20 years’ rent of the land acquired, and the vendor and the purchaser shall be entitled each to his proportionate share of the purchase money. The share of the money due to the purchaser being, if need be, given credit for towards the sale price of Rs. 6,00,000 already mentioned and agreed upon.”

Their Lordships do not conceal from themselves the fact that the transaction as phrased in these documents is ostensibly a sale, with a right of repurchase in the vendor. This appearance, indeed, is laboriously maintained. The words of conveyance needlessly iterate the description of an absolute interest, and the rights of

repurchase bear the appearance of rights in relation to the exercise of which time is of the essence.

But a closer examination of the documents discloses their real character. Take, for example, the final recital of the conveyance to which reference has already been made. What is its true implication? A consideration of the facts known to both parties makes it, their Lordships think, reasonably plain. The parties knew two things quite well. First, that 6 lakhs was an absurd purchase price. Secondly, that even at public auction the properties could be expected to realize a larger sum than that. What then was the implication? Surely that the transaction in which they were engaging was not a sale but a loan. For, notice how that principle is worked out. The Raja has not only an option to repurchase. He is put under an obligation to buy if the appellant thinks fit to require him so to do. The appellant’s 6 lakhs can be recovered by him if he chooses to sue upon the Raja’s contract to repurchase, he remaining in possession and enjoyment of the rents and profits of the properties until that price is paid.

Again, is time of the essence of the exercise by the Raja of his rights in this matter? Clause 4 of the agreement already set forth indicates to their Lordships that it is not. That clause seems also to be clear enough although it describes an arrangement very unusual in character. The clause is providing for the possibility of the appellant being compulsorily expropriated by Government from some part of the property in suit, and the receipt by him of the compensation in respect thereof. The compensation is to be treated as the equivalent of 20 years’ rent; it is to be treated as belonging to the appellant and the Raja according to what would have been their rights *inter se* to possession of the expropriated lands during these years; the money is to be received

NARA-
SINGERJI
v.
PARTHA-
SARADHI
RAYANAM
GARU.
—
Lord
BLANES-
BURGH.

NARA-
SINGERJI
v.
PARTHA-
SABADHI
RAYANAM
GARU.
—
Lord
BLANES-
BURGH.

by the appellant as being in possession, but *if need be*—these are the critical words—credit is to be given to the Raja for his share by a deduction from the 6 lakhs otherwise payable by him on repurchase.

These words show that in certain circumstances such credit will not be his. But what must these circumstances be? They can only be a repurchase more than 20 years after the expropriation. But if time was of the essence for such repurchase it could in no circumstances be postponed beyond six years from the date of the conveyance. Clearly, therefore, and within the intendment of the documents themselves time is not of the essence in this matter; and so soon as that is established all pretence for holding this ostensible sale and repurchase to be anything else than a mortgage by conditional sale disappears, and its establishment reinforces several other considerations leading to the same conclusion such as the reservation of the right in the conveyance itself; the reservation of minerals which is directed, in their Lordships' view, to a restriction on the appellant's usufructuary privileges; the strange covenant of indemnity and the inconsistent and almost unintelligible provisions as to the actual time limited for the exercise of the Raja's so-called right of repurchase. When all these provisions of the documents are viewed in the light of the surrounding circumstances, the inference is, in their Lordships' view, irresistible that here a mortgage and a mortgage only was in the direct contemplation and intention of both parties to the transaction.

Such was the conclusion of the Subordinate Judge. Such was apparently the belief of the learned Judges of the High Court, but they felt themselves precluded from giving effect to that belief by their hesitation to attribute, what their Lordships hold to be their real result,

to the considerations emerging from the terms of the documents to which attention has here been drawn.

In these circumstances, their Lordships find it unnecessary to deal with the numerous authorities upon this subject which they have examined. The case in their view is abundantly clear. They would only observe before parting with it that, as at present advised, they must not be taken to subscribe to the view that there has been introduced into the law of India such a radical change in the laws of evidence as is suggested by the learned Chief Justice, a change which would have the effect of excluding from the class of mortgages by conditional sale many transactions which before the Evidence Act would have been held to be within that class.

The present case with the shifts and devices, to which the appellant resorted, to deprive the respondents of all their rights in the property, if the character of a mortgage could not be attached to the transaction, shows how serious such a conclusion would be.

Without most careful consideration, their Lordships would hesitate to accept a view which would bear so hardly on many mortgagors expressing their contracts of borrowing in long accepted Indian forms.

The respondents, in their Lordships' judgment, are entitled to a redemption decree. They are chargeable with interest at the rate of 6 per cent per annum from the 1st of September 1914, down to the date when the six lakhs were paid into Court. The appellant will be entitled to the interest earned by that sum since it was so paid in.

On the other hand, the appellant must account to the respondents for mesne profits of the properties as from the 1st of July 1914, until actual delivery of

NARA-
SINGERJI
v.
PARTHA-
SABADHI
RAYANAM
GARU.
—
Lord
BLANES-
BURGH.

NARA-
SINGREJI
v.
PARTHA-
SARADHI
RAYANAM
GARU.

Lord
BLANES-
BURGH.

possession to the respondents. The order of the High Court should be discharged and with these variations the decree of the learned Subordinate Judge should, in their Lordships' opinion, be restored. .

Their Lordships will humbly advise His Majesty accordingly.

The appellant must pay all the costs of the respondents in the High Court and their costs of this appeal.

Solicitor for appellant :—*H. S. L. Polak.*

Solicitor for respondents :—*Douglas Grant.*

A.M.T.

APPELLATE CRIMINAL—FULL BENCH.

*Before Mr. Justice Spencer, Mr. Justice Krishnan
and Mr. Justice Ramesam.*

THEETHUMALAI GOUNDER AND OTHERS (ACCUSED
1, 4, 6, 7, 12, 13, 15, 16 and 18), APPELLANTS,

v.

KING-EMPEROR.*

Sec. 149, Indian Penal Code—Sec. 537, Criminal Procedure Code—Liability of every member of an unlawful assembly for offence committed by any one of them.

Held by the Full Bench (a) that when a charge has been framed under sections 326 and 149, Indian Penal Code, a conviction under section 326 alone is not necessarily bad and (b) that the legality of the conviction depends upon the question whether the accused was materially prejudiced by any omission in the charge. *Reazuddi v. The King-Emperor* (1912) 16 C.W.N., 1077, dissented from.

Obiter: Section 149, Indian Penal Code, creates no offence; it is merely declaratory of a principle of the common law;

* Criminal Appeal No. 1045 of 1923.

hence omission of that section from a charge does not make the charge illegal. *Queen-Empress v. Bisheshar* (1887) I.L.R., 9 All., 645, followed.

APPEAL against the order of J. K. LANCASHIRE, Sessions Judge of the Tinnevely Division, in Case No. 55 of the Calendar for 1923. The facts are given in the Order of Reference by PHILLIPS, J.

This Appeal coming on for hearing on Tuesday and Wednesday, the 18th and 19th days of March 1924, the Court dismissing the Appeal so far as accused 4, 7, 12, 13, 15, 16 and 18 were concerned, made the following ORDER OF REFERENCE to a Full Bench as regards accused 1 and 6.

PHILLIPS, J.—In this case the appellants who were accused 1, 4, 6, 7, 12, 13, 15, 16 and 18 were charged under sections 148, 326 and 302, Indian Penal Code, read with section 149, Indian Penal Code. Accused 4, 7, 12, 13, 15, 16 and 18 were found guilty of rioting under section 147, and accused 1 and 6 were found guilty under sections 148 and 326, Indian Penal Code.

It appears that there was a dispute between the accused party and the party of prosecution sixth witness about some land. Prosecution sixth witness has filed suits with reference to this land and obtained an injunction restraining the persons under whom the accused claim from interfering with his enjoyment of the land. The prosecution case is that when some of the prosecution sixth witness's men were watching the land, the accused came and began harvesting the crop. Prosecution sixth witness and others then went and remonstrated and apparently beyond remonstrating did nothing else before they were attacked by the accused. The first accused broke the arm of prosecution seventh witness and the sixth accused injured one Mappillaiswami Naick, who subsequently died of his injuries. These facts are not

THEETHU-
MALAI
GOUNDER
v.
KING-
EMPEROR.

1924,
April 24.

disputed in Appeal but the conviction is questioned on grounds of law.

So far as the conviction of the seven accused under section 147 is concerned, it is urged that the Sessions Judge has not found that prosecution sixth witness was in possession of the land and that, consequently, there is no finding to justify the conviction for rioting, but it appears that there had been an order enjoining the accused not to interfere with the possession of prosecution sixth witness. When, therefore, they entered upon the land and began cutting the crop, they were doing an unlawful act in contravention of the orders of the Civil Court. It is possible that, if the prosecution witnesses had then attacked them, they would have been entitled to defend themselves and that injuries caused by them might be so justified; but the prosecution witnesses merely remonstrated with them, which they were perfectly entitled to do, and, consequently, the use of force towards these witnesses in prosecution of the common object of retaining the land which was in itself an unlawful object, undoubtedly constituted them into an unlawful assembly. Guilty of rioting so far as these accused are concerned, their convictions are right and must be confirmed and the Appeal dismissed.

Accused 1 and 6 have been convicted under section 148 and 326, Indian Penal Code, and, while it is not disputed that the convictions under section 148 are correct, it is argued that the convictions under section 326 cannot stand, because the charge against them was under section 326 read with section 149, and that, therefore, the convictions under section 326 alone are bad. This is undoubtedly the view of the Calcutta High Court which has always treated the so-called offence under section 149 as distinct from the substantive offence and I may

refer to *Abhi Misser v. Lachmi Narain*(1), *Panchu Das v. Emperor*(2), *Emperor v. Madan Mandal*(3) and *Reazuddi v. The King-Emperor*(4). In all these cases it was held that, when the charge had been made under section 325 read with section 149, there could be no conviction under section 325 alone, the two being distinct offences which must be charged separately. As a matter of fact, in each of these cases it was found that no rioting took place and, consequently, no conviction could possibly be had by reason of section 149, for that necessarily implies a riot; but apart from this, those cases are certainly authority for Mr. Ethiraj's contention that the present conviction of accused 1 and 6 under section 326 is wrong. There would appear to be no reported cases of this Court, until one reported very recently, viz., *Thaikkottathil Kunheen, In re*(5), and apparently the Judges in that case do treat the two offences as distinct; but, although WALLACE, J., in his judgment says that section 223, Criminal Procedure Code, which prescribes that there should be a separate charge for each distinct offence, was not followed, yet he does not hold that that in itself vitiates the conviction, for he treats it as a defect which may or may not occasion a failure of justice and, no doubt, in the case which he was considering, the omission of section 149, which was the question under consideration then, was likely to prejudice the accused and, on that ground, the conviction was set aside. Similarly RAMESAM, J., seems to consider the offence under section 149 as a separate offence, but does not definitely deal with the point and also relies on the omission of section 149 as being a serious defect prejudicial to the accused. This decision was

(1) (1900) I.L.R., 27 Cal., 566.

(2) (1907) I.L.R., 34 Cal., 698.

(3) (1914) I.L.R., 41 Cal., 662.

(4) (1912) 16 O.W.N., 1077.

(5) (1928) 18 L.W., 946.

THEETHU-
MALAI
GOUNDER
v.
KING-
EMPEROR.

considered by this same Bench in a very recent case, Criminal Appeal No. 1364 of 1922, in which we held that, where the charge was sufficiently clear, the mere omission of section 149 from the charge was not sufficient to vitiate the conviction for the substantive offence. With all respect to the learned Judges of the Calcutta High Court, I find it difficult to understand how an offence is created under section 149. That section reads as follows :

“ If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence is a member of the same assembly, is guilty of that offence.”

That is to say, it does not define any particular offence but says that, if a particular offence is committed by any member of an unlawful assembly, other members of that assembly are guilty of the same offence if certain conditions laid down in the section are complied with ; for instance, if grievous hurt is committed by one member under certain conditions, the other members of the unlawful assembly are also guilty of grievous hurt. The offence is grievous hurt and whether it is charged under section 325 or under section 325 and 149, the offence is the same and the punishment provided is the same. Section 149 merely provides that certain circumstances short of the actual commission of grievous hurt are sufficient to prove that a person is guilty of that offence. If the charge gives notice to the accused that the provisions of section 149 will be taken into account—and it must be presumed that he knows those provisions, as every one is deemed to know the law—then the mere omission of the number of the section would not prejudice him, and, in my opinion, would

THEETHU-
MALAI
GOUNDER
v.
KING-
EMPEROR.

not entitle him to an acquittal. This case, however, is the converse of that and it is urged that none of the accused have been charged with the offence under section 326, because they have only been charged under sections 326 and 149, but to admit this would be to admit that they are two separate offences, one under section 326 and one under sections 326 and 149 ; but, as I have pointed out above, this does not seem to be so. It is possible that by framing a charge under section 149, the accused persons might be prejudiced if, for instance, the actual offence under section 326 was said to have been committed by some one not under trial, in which case the attention of the accused would be directed to showing either that they were not members of the unlawful assembly, or that this person who committed the offence was not a member of that assembly ; but in a case like the present where 18 persons are accused and each one is charged with the offence under section 326—and it is the prosecution case, which is known to the accused, that the offence under section 326 was committed by one or more among the accused charged—it does not seem to me to prejudice the accused in any way in their defence. Their defence must always be either that there was no unlawful assembly or that the offence of grievous hurt was not committed ; and, if it is proved that it was committed by one or more accused, whether the conviction is under section 326 alone or under section 325 by reason of the provisions of section 149, seems to me immaterial ; but as the view of the Calcutta High Court has some support in *Thaikkottathil Kunheen, In re*(1), I think it is advisable that the following question should be referred to a Full Bench : (1) “ When a charge omits section 149, Indian Penal Code, and the conviction is based upon the provisions of that section, is

(1) (1923) 18 L.W., 946.

that conviction necessarily bad, or does it depend on whether the accused has or has not been materially prejudiced by the omission? (2) When a charge has been framed under sections 326 and 149, Indian Penal Code, is a conviction under section 326, Indian Penal Code, necessarily bad, or does this also depend on whether the accused has or has not been materially prejudiced by the form of the charge?"

ODGERS, J.—In this case 18 accused were originally charged and accused Nos. 2, 3, 5, 8, 9, 10, 11, 14 and 17 were acquitted. Of the remaining nine all but two were convicted of rioting under section 147. Accused 1 and 6 were found guilty of rioting armed with deadly weapons and voluntarily causing grievous hurt with deadly weapons under sections 148 and 326. There has practically been no argument on the merits and this can be disposed of very shortly.

The accused were found to belong to a party which went to harvest a certain field, the title to which has been a matter of dispute, and the occurrence in question took place when the accused went on the 14th February 1923, to harvest the cholam crop growing thereon. Prosecution witnesses 6 to 11 received injuries. One Mappillaiswami Nayak received an injury to his arm from which he died on the 23rd February and Ramaswami Naick, P.W. 7, also sustained injuries necessitating amputation of his arm. It appears that in September 1922 injunctions were obtained against the 6th accused and 3rd accused and certain women who claimed a portion of the land in dispute. The injunction petition was posted for hearing on the 15th February and it was the day before that the occurrence in question took place.

It is suggested that the evidence of P.Ws. 6 to 12 is all interested, but I find no reason to question the

conclusion come to by the learned Sessions Judge on the facts. It may be, as the learned Judge remarks, that the issue of the injunction would not confer possession, but the accused have to justify the infliction of grievous hurt which resulted in death in defence of their possession and this they have failed to do. The convictions under section 147 are clearly correct and need no further examination.

The interest however in this appeal centres round the legal point raised by Mr. Ethiraj on behalf of the accused 1 and 6 who were, as stated, convicted under sections 148 and 326. Mr. Ethiraj contends that this is illegal, because the charge was under sections 148 and 326 read with section 149, Indian Penal Code, and it is contended that a charge under section 326 made applicable by reason of section 149 will not sustain a conviction under section 326 *simpliciter*. In the first place I am not convinced that the charge is necessarily only section 326 plus section 149. It runs " . . . armed yourself with deadly weapons and committed rioting (that is section 148) and caused grievous hurt by dangerous weapons (that is section 326) and you did commit murder by intentionally causing the death of, etc., (that is section 302) and thereby committed offences punishable under sections 148, 326 and 302 of the Indian Penal Code read with section 149, Indian Penal Code." The question largely turns on whether or not section 149 constitutes a distinct offence or not. It has been laid down in *Queen-Empress v. Bisheshar*(1), that section 149 creates no offence but is merely declaratory of a principle of the common law which has for a long time prevailed in England, and that the object of the section is to make it clear that an

(1) (1887) I.L.R., 9 All., 645.

THIRUTHU-
MALAI
GOUNDER
v.
KING-
EMPEROR.

accused who comes within that section cannot put forward as a defence that it was not his hand that caused the hurt committed in prosecution of the common object. In that case the appellants were convicted under section 147 of rioting, and under section 325 of voluntarily causing grievous hurt. It is noticeable that in this and other earlier cases, section 149 does not seem to have been specifically charged. The appellants in the Allahabad case were sentenced separately for their convictions under section 147 and section 325. It was held that these sentences were legal. In *Queen-Empress v. Bana Punja*(1), a Full Bench of the Bombay High Court held that it was legal to pass two sentences, one for rioting and the other for hurt, where a person is convicted of rioting and hurt and the conviction for hurt depends on the application of section 149. There again the charges were under sections 147, 148 and 326 without any reference to section 149. To turn to the Calcutta cases—in *Abhi Misser v. Lachmi Narain*(2), it was held that the accused could not be properly convicted under section 325 by the application of section 149, where it has not been found that these persons or any of them were members of an unlawful assembly. This would seem perfectly obvious in the case of persons who have been acquitted of rioting. Therefore it seems to me to have no bearing on the present case. In *Panchu Das v. Emperor*(3), at page 703 it was held that the conviction under section 325 was illegal on the ground that no such charge was ever framed, and that the accused had not been called upon to meet such a charge. The appellants there were tried under sections 147, 304, 325 and 323 read with section

(1) (1893) I.L.R., 17 Bom., 260 (F.B.). (2) (1900) I.L.R., 27 Cal., 566.
(3) (1907) I.L.R., 34 Cal., 696.

149, and they were convicted under section 325 alone, and the learned Judges add,

"If the evidence showed that the accused or any of them inflicted hurt or grievous hurt with their own hands, . . . additional counts of charge for those offences should have been added in the Sessions Court."

They also held that the offence of causing grievous hurt is not minor to, or included in, a charge under section 325 read with section 149. In *Emperor v. Madan Mandal*(1), the accused were charged under sections 148, 304, read with section 109 and section 326 read with section 149. The jury found them guilty under section 326 *simpliciter*. The jury returned a verdict of acquittal under section 148 apparently owing to the admitted misdirection of the learned Judge. It was held that the verdict of the jury convicting the accused under section 326 was practically a judgment of acquittal inasmuch as there was no charge under that section independently. In this, the case in *Reazuddi v. The King-Emperor*(2) was followed where the result of the Calcutta rulings is summed up as the learned Judges say,

"it is now settled law that when a person is charged by implication under section 149, he cannot be convicted of the substantive offence."

If this statement of the law is to be accepted as correct, and if I am wrong in my suggestion that the charge here as framed does not charge section 326 *simpliciter*, it follows that the convictions under consideration are illegal. With deference I think the Calcutta decisions are wrong in that they erect section 149 into a distinct offence thus directly refuting the view set out in *Queen-Empress v. Bisheshar*(3) (*supra*).

(1) (1914) I.L.R., 41 Cal., 662. (2) (1912) 16 C.W.N., 1077.
(3) (1887) I.L.R., 9 All., 645.

THIRUTHU-
MALAI
GOUNDER
v.
KING-
EMPEROR.

THESTU.
MALAI
GOUNDER
v.
KING-
EMPEROR.

My learned brother and myself dealt with this point though not exhaustively in Criminal Appeal No. 1364 of 1922. There, for reasons given, we held that the accused could not be prejudiced by the omission to name section 149, the charge having been set out *in extenso*. We had however to consider the only Madras case, as far as I can discover, on the point, viz., *Thaikkottathil Kunhaen, In re*(1), decided by RAMESAM and WALLACE, JJ. There the petitioners were convicted under section 143, Indian Penal Code, and section 126 of the Railways Act. It was contended that the convictions were correct if considered as under section 126 of the Railways Act read with section 149, Indian Penal Code. The latter section was neither charged nor referred to in the Lower Court and on that ground, following the decision of OLDFIELD and DEVADOSS, JJ., RAMESAM, J., held the conviction under section 126, Railways Act, bad, as having prejudiced the accused.

WALLACE, J., though holding that section 149 does not create in itself any offence, held it was essential that the accused should have had notice that what they had to meet was a charge that they were members of unlawful assembly which in prosecution of its common object committed an offence under section 126, Railways Act. The learned Judge speaks of the "substantive offence" (as do the learned Judges of the Calcutta Court in *Rcazuddi v. The King-Emperor*(2), in contradistinction to section 149—which lays down that every member of an unlawful assembly may if *an offence* is committed under certain circumstances be guilty of that offence.

WALLACE, J., therefore held that section 223, Criminal Procedure Code, had not been complied with and that the accused had been prejudiced thereby. He added that

(1) (1923) 18 L.W., 246.

(2) (1912) 16 C.W.N., 1077.

if section 149, Indian Penal Code, is relied on, it should be stated and named in the charge. I have had the advantage of reading the judgment just delivered by my learned brother and I share his views for doubting if in a case like the present there could be any real prejudice to the accused, assuming he has here been charged under sections 326 and 149 and not also under section 326 *simpliciter*.

For the reasons stated by him I also think an authoritative ruling on this point is very desirable. It has arisen at least three times within the last eight months and apparently twice before that, viz., in Referred Trial No. 85 of 1922 and Criminal Revision Case No. 662 of 1921. There may also be other instances which have not been brought to my notice. I agree to the terms of reference proposed by my learned brother.

ON THIS REFERENCE

Public Prosecutor (J. O. Adam).—Section 149 of Indian Penal Code is mentioned in the charge; hence the first question referred does not arise. Mention of section 149 in the charge is a surplusage as section 148 is mentioned and there cannot therefore be any prejudice. Moreover it is not legally necessary to mention section 149 separately in a charge, for that section by itself does not create any substantive offence; see section 40. A separate charge is necessary under section 233, Criminal Procedure Code, only in case of substantive offences. Section 149 is only an amplification of the principle embodied in section 34, Indian Penal Code, which section is never mentioned separately in any charge. Every member of an unlawful assembly is guilty for the acts of the other members. He relied

THESTU.
MALAI
GOUNDER
v.
KING-
EMPEROR.

THIRUTHU-
MALAI
GOUNDER
v.
KING-
EMPEROR.

on *Queen-Empress v. Bisheshar*(1) and argued that *Emperor v. Madan Mandal*(2) and *Reazuddi v. The King-Emperor*(3) are wrong. He distinguished the other cases quoted in the Order of Reference.

V. L. Ethiraj (with *T. Krishna Nambisan*) for the accused.—The first question does not arise as section 149 is mentioned in the charge. I am not arguing that convictions under sections 147 and 148 are wrong as they are also mentioned in the charge. As I am charged of having caused grievous hurt only by having been a member of an unlawful assembly under section 149, I cannot be convicted under section 326 alone when I am acquitted under section 149; see *Reazuddi v. The King-Emperor*(3), *Emperor v. Madan Mandal*(2), *Thaikkottathil Kunheen, In re*(4) and *Sita Ahir v. Emperor* (5). Even the name of the person to whom I am supposed to have constructively caused hurt is not mentioned in the charge. I am certainly prejudiced by that omission in the charge; see section 535, Criminal Procedure Code.

OPINION.

SPENCER, J.

SPENCER, J.—The questions referred to us are—(1) when a charge omits section 149, Indian Penal Code, and the conviction is based on the provisions of that section, is that conviction necessarily bad, or does it depend on whether the accused has or has not been materially prejudiced by the omission? (2) When a charge has been framed under sections 326 and 149, Indian Penal Code, is a conviction under section 326, Indian Penal Code, necessarily bad, or does this also depend on whether the accused has or has not been materially prejudiced by the form of the charge?

(1) (1887) I.L.R., 9 All., 648.

(2) (1914) I.L.R., 41 Cal., 662.

(3) (1912) 18 C.W.N., 1077.

(4) (1923) 18 L.W., 946.

(5) (1913) I.L.R., 40 Cal., 168.

The charge in the present case runs as follows:—
“That you, on or about the 14th February 1923 at 2 p.m. at Sekkarakudi with a view to enforce the right to the punjai land S. No. 1162 of Sekkarakudi village, armed yourselves with deadly weapons and committed rioting and caused grievous hurt by dangerous weapons, and that you did commit murder by intentionally causing the death of Subramania Mappilaswami Naick and thereby committed offences punishable under sections 148, 326 and 302 of the Indian Penal Code, with section 149, Indian Penal Code, and within the cognizance of the Court of Session of Tinnevely division, and I hereby direct that you be tried by the said Court on the said charge.”

It is clear that the charge in the case does not omit section 149 and thus the first question referred to us does not directly arise on the facts.

We agree with the statement of EDGE, C.J., in *Queen-Empress v. Bisheshar*(1), that section 149 creates no offence, but is, like section 34, merely declaratory of a principle of the common law, and its object is to make it clear that an accused who comes within that section cannot put forward as a defence that it was not his hand which inflicted the grievous hurt. We do not think that SCHWABE, C.J., intended to lay down any contrary principle in C.R.C. No. 662 of 1921. Section 40, Indian Penal Code, defines “offence” as a thing made punishable under the Code or under any special or local law, as defined in the Code. A person could not be tried and sentenced under section 149 alone, as no punishment is provided by the section. Therefore the omission of section 149 from a charge does not create an illegality by reason of section 233, Criminal Procedure Code, which provides that for every distinct offence of which any person is accused there shall be a separate charge.

(1) (1887) I.L.R., 9 All., 648.

THIRUTHU-
MALAI
GOUNDER
v.
KING-
EMPEROR.
SPENCER, J.

THEETHU-
MALAI
GOUNDER
v.
KING-
EMPEROR.
SPENCER, J.

To answer the first parts of both the questions referred to us in the affirmative would be to overlook section 537, Criminal Procedure Code, which deals with omissions from charges.

The learned Judges who decided *Reazuddi v. The King-Emperor*(1), and *Emperor v. Madan Mandal*(2), do not appear to have considered the effect of section 537 upon omissions from the charge. In *Sita Ahir v. Emperor* (3), it was considered when a charge for a substantive offence under section 323 was omitted. We do not agree with the general statement in the first of these decisions that it is

“now settled law that when a person is charged by implication under section 149, he cannot be convicted of the substantive offence.”

We think that when a person is charged with being a member of an unlawful assembly, one of the members of which caused grievous hurt in pursuance of the common object, there is no necessary implication that that particular member is not himself. *Emperor v. Madan Mandal*(2) was a clear case of misdirection to a jury which came before the High Court in consequence of a reference under section 307, Criminal Procedure Code; *Panchu Das v. Emperor*(4) was another case of misdirection. *Queen-Empress v. Bana Punja*(5) and *Abhi Misser v. Lachmi Narain*(6) dealt with the legality of punishments for combined offences rather than with failures of justice caused by the omission to frame the necessary charges. The legality of the sentences passed in the present case is not before us.

In the present instance the name of the person to whom grievous hurt was caused (Raghurama Naidu alias

(1) (1912) 16 C.W.N., 1077.

(3) (1913) I.L.R., 40 Cal., 169.

(5) (1893) I.L.R., 17 Bom., 260 (F.B.).

(2) (1914) I.L.R., 41 Cal., 662.

(4) (1907) I.L.R., 34 Cal., 698.

(6) (1900) I.L.R., 27 Cal., 568.

Ramaswami Naicker, prosecution witness 7), is not mentioned in the charge.

Whether this omission, or the omission to charge accused 1 and 6 separately with the offence under section 326, if in the present case there was such an omission (which ODGERS, J., doubts), prejudiced those accused in their defence is a matter which the Bench which hears the appeal must deal with. It is not a part of the reference to the Full Bench. We answer the first part of second question in the negative and the second part in the affirmative.

KRISHNAN, J.—I agree.

• RAMESAM, J.—I agree.

THEETHU-
MALAI
GOUNDER.
v.
KING-
EMPEROR.
SPENCER, J.

KRISHNAN, J.

RAMESAM, J.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Victor Murray Coutts Trotter, Chief Justice,
Mr. Justice Ramesam and Mr. Justice Wallace.

DORAIVELU MUDALIAR (PLAINTIFF), APPELLANT,

1924,
April 7.

v.

NATESA GRAMANI AND THREE OTHERS (DEFENDANTS
1, 5, 6, AND 7), RESPONDENTS.*

*Madras Act III of 1922 (Madras City Tenants' Protection Act)
s. 9, applicability of, to trustees of religious institutions.*

Held, by the Full Bench that section 9 of the Madras Act III of 1922 (Madras City Tenants' Protection Act) applies to landlords who hold their lands as trustees of a religious or charitable institution. Parthasarathi Aiyangar v. Doraiswami Naicker (1923) I.L.R., 46 Mad., 823, overruled.

APPEAL against the decree of PAUL APPASWAMI, City Civil Judge, Madras, in Original Suit No. 475 of 1921.

* City Civil Court Appeal No. 40 of 1922.

DORAIVELU
MUDALIAR
v.
NATESA
GRAMANI.

The facts are given in the Order of Reference by PHILLIPS, J.

The plaintiff, the trustee, preferred this appeal.

This appeal coming on for hearing on Monday, the 18th day of February 1924, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH :—

PHILLIPS, J.—This is an appeal against an order under section 9 of the Madras City Tenants' Protection Act, Act No. III of 1922, by which the tenant in this suit has been allowed to purchase the land on which he has built a superstructure at a price fixed by the Court.

There are a large number of connected suits and the question at issue is one that involves the rights of a large number of tenants in Madras City, i.e., whether Act III of 1922 applies to temple trustees who are landlords of land in the City of Madras. The appellant is the trustee of the Apparswami temple and in the appeal he has raised certain minor pleas which have no great force. In the first place, it is pleaded that the agreement to purchase the land at a price to be fixed by the Court was made before the Act had come into force and that the agreement was not an agreement to abide by the terms of the Act but was only an agreement to have a commissioner appointed for valuing the land. It is clear, however, that the agreement was really more than a mere agreement to have the land valued, for unless the landlord had agreed to accept the provisions of section 9 of the Act, no purpose could have been served by having the land valued. It is clear that he did consent to the particular procedure being adopted and he is now bound by that agreement unless it is void for other reasons. There is also no force in the contention that a written application should have been presented

DORAIVELU
MUDALIAR
v.
NATESA
GRAMANI.

under section 9. The Act does not specifically provide for a written application, nor have we any proof that no such written application was filed.

The main point on which the appellant relies is the plea that the Act does not apply to trustees of temples and in this he is supported by the judgment in *Parthasarathi Aiyangar v. Doraisawmi Naicker*(1) which clearly is in his favour. I have had the advantage of reading my learned brother's judgment and with all respect I think with him that that decision is open to question. It is a matter of some importance, for this Act was passed

"for the protection of tenants in Madras who had constructed buildings on others' lands in the hope that they would not be evicted so long as they paid a fair rent for the land,"

and we are given to understand that, if the ruling in *Parthasarathi Aiyangar v. Doraisawmi Naicker*(1) is correct, a very large number of tenants who hold under temple trustees will be deprived of the benefits of the Act; and unless it is necessary to hold that an Act which was expressly designed for their benefit has failed in securing its object, I would be inclined to hold otherwise, notwithstanding that an opinion has been expressed to the contrary. I, therefore, agree that the question ought to be referred for the decision of a Full Bench. The arguments of SPENCER and VENKATASUBBA RAO, JJ., proceed mainly on an interpretation of the explanation to section 9 which runs as follows :—

" 'Land' means the interest of the landlord in the land and all other interests which he can convey under any power ;"

and they have come to the conclusion that a trustee has no power to convey the land except for the benefit of the institution or for necessity. With all respect, it appears to me that this explanation cannot bear this interpretation. The explanation relates to the word

(1) (1922) I.L.R., 46 Mad., 828.

DORAIYERU
MUDALIAR
v.
NATHA
GRAMANI.

"land" as used in section 9 alone, because in section 2 (2) there is another definition of "land." In section 9 we find the following sentences containing the word "land":—

"the landlord shall be directed to sell the land for a price to be fixed by the Court"

"the Court shall fix the price . . . of the land. . . ."

On payment of the price the Court shall pass a final order directing the conveyance of the land by the landlord."

In all these instances, the word "land" is used with reference to what is to be sold to the tenant and conveyed by the landlord, and, in my opinion, the explanation is inserted to provide that the whole of the interest of the landlord shall be conveyed to the tenant, not merely his own interest but any other interest which he can convey under any power. For instance, the interest of the manager of an undivided Hindu family extends only to his own share in the property, but under the Hindu law he has the disposing power over the shares of the other members. Or, again, a landlord who had not an absolute estate might by means of a power of attorney or other deed so empowering him have the right to convey further interests in the land. If that is so, I think that it would be difficult to justify the arguments in the reported case. The power of a temple trustee to alienate temple property is undoubtedly limited, but it is well recognized that, under certain circumstances and for certain purposes, he can alienate the land, one of those purposes being necessity. When, therefore, the legislature has determined in the interests of the State that a landlord may be compelled to sell his land to a longstanding tenant in order to avoid gross injustice to that tenant, it is difficult to see how this direction does not impose a necessity on a trustee, who is also a landlord, to alienate the land. It can hardly

DORAIYERU
MUDALIAR
v.
NATHA
GRAMANI.

be said, nor do I think that it would be contended, that the Act is *ultra vires* of the legislature and, if it is not *ultra vires*, the legislature has imposed this necessity on temple trustees. It is not as if this was the only instance in which the legislature had compelled trustees to alienate trust property. Under the Land Acquisition Act, such land can be acquired by Government on payment of the proper compensation. There are clauses in that Act which to a certain extent safeguard the interests of the trust by providing that the compensation money shall be invested for the trust; but the mere fact that the present Act has failed to provide a similar procedure, viz., a procedure whereby the possibility of criminal misappropriation by the trustee will be lessened, cannot be taken as conclusively showing that the Act was not meant to apply to temple trustees. There is really no reason to presume that, when a temple trustee obtains possession of cash in lieu of land, he will at once proceed to misappropriate it; he can spend it on the purposes of the trust, or he can invest it so as to secure the income from the fund for the benefit of the trust, and I fail to see how any argument that this Act III of 1922 does not apply to temple trustees can be supported by the analogy of the Land Acquisition Act. The Judges of the former Bench were both agreed that temple trustees come within the definition of "landlord" in section 2 (3) of the Act and with that opinion I respectfully agree; but neither my learned brother nor I agree with the further conclusion that the Act is not applicable to temple trustees.

I think that it is necessary that the following question should be determined by a Full Bench; and in view of the fact that a number of cases are pending in which this question is at issue, I respectfully urge that the matter be considered at an early date. The

DORAIVELU
MUDALIAR
v.
NATESA
GRAMANI.

question is, "Does the Madras Act III of 1922 apply to landlords who hold their land as trustees of a religious institution?"

ODGERS, J.—The suit from which this appeal arises was in ejectment by the trustee of the Apparswami temple, Mylapore, against a tenant who had erected a superstructure on the temple land. The suit was brought, we are informed, while the Bill which became the Madras City Tenants' Protection Act (Act III of 1922) was under discussion in the Legislative Council. The Bill was passed and while the Governor's assent to it was awaited, the City Civil Court Judge entertained an application by the tenants—(there were many suits of which this is one)—to proceed under the Act to enable the tenants to acquire their holdings from their landlord, the trustee of the temple. Commissioners were appointed by consent of all parties and on their report the City Civil Judge made his award, after the Bill had become law. The trustee had previously in C. S. No. 194 of 1921 been authorized by the Original Side of this Court to sell certain lands including those in question at certain prices. The prices awarded by the City Civil Judge are somewhat lower than those fixed by the Original Side. In appeal the point is taken that the Act does not apply to a trustee of a religious endowment at all. Reliance is placed on the decision of SPENCER and VENKATASUBBA RAO, JJ., in *Parthasarathi Aiyangar v. Doraiswami Naicker*(1). That was a reference by a different Judge of the City Civil Court to the High Court and the question referred was

"whether a tenant in occupation of trust lands belonging to a temple or mosque can enforce a compulsory sale under section 9 of the Madras City Tenants' Protection Act and require the temple or mosque to deliver the land to him on a valuation to be made by the Court."

(1) (1923) I.L.R., 46 Mad., 823.

DORAIVELU
MUDALIAR
v.
NATESA
GRAMANI.

Both the learned Judges held that the trustees of religious endowments fell within the definition of landlord in section 2 (3) of the Act; but the difficulty they felt was in construing the explanation to section 9. It runs as follows:—

" 'Land' means the interest of the landlord in the land and all other interests which he can convey under any power."

They were of opinion that the words "under any power" must be applied to the limited power of a trustee of temple property to alienate, e.g., only for necessity or for the benefit of the institution. The learned Judges set out to enquire as to the interests which such a trustee can convey under any power, i.e., to examine the case law in support of their hypothesis that the power of alienation is limited. With great deference I think they were wrong.

The explanation is as to what is meant by the expression "land" in section 9 only. The word occurs in the first sub-section twice "the landlord shall be directed to sell the land" and "the Court shall fix the price according to the market value of the land." In sub-section (3) it occurs once "the Court shall pass a final order directing the conveyance of the land." The explanation then follows. As I read it, the meaning of the explanation is that the landlord thus conveys not only his own interests in the land but any other interests which he has power to convey. Power is used in its legal sense as in "power of attorney," "power of sale," "power of appointment." The landlord in other words is to convey every kind of right or interest he has in the property whether in his own right or by rights conferred upon him. It therefore seems to me that a discussion as to the limited rights of alienation by trustees is wholly inapplicable to the wording of this explanation. Further

DORAIVELU
MUDALIYAR
v.
NATESA
GRAMANI.

in default of any express words or implication to the contrary in a settlement or trust deed, a trustee will take the whole legal estate and I have no doubt that in this case the legal estate is in the trustee of the temple. I have already said that it was held in *Parthasarathi Aiyangar v. Doraisawmi Naicker*(1) that a trustee falls within section 2 (3) and with that opinion I respectfully agree. It seems to me therefore with great respect that to hold that a tenant under a temple or other religious endowment cannot enforce a sale of land to him under section 9 of Act III of 1922 is wrong and I agree that in this difference of opinion the question should be referred to a Full Bench and I also agree as to the terms of the reference as set out by my learned brother.

ON THIS REFERENCE

V. Sivapriakasa Mudaliyar (with *O. V. Mahadeva Ayyar*) for appellant.—It is true that the word “landlord” in Madras Act III of 1922 will include ordinary trustees; but it cannot apply to a trustee of a religious or charitable institution; for he cannot sell such trust lands under the common law, except for necessity; section 9, explanation, applies to him; *Parthasarathi Aiyangar v. Doraisawmi Naicker*(1).

[C.J.—Section 3 shows the intention of the Act. But for the Act, the trustee need not pay any compensation to the tenant who wishes to quit.]

That is because a temple trustee can buy lands for the temple but cannot sell temple lands.

[COURT.—Except on “necessity” he cannot even purchase and the Act gives one instance of “necessity” to sell.]

“Necessity” must be considered with reference to the trust and not with reference to an Act. Temple

(1) (1923) I.L.R., 46 Mad., 823.

DORAIVELU
MUDALIYAR
v.
NATESA
GRAMANI.

lands can be acquired by others only in certain methods, e.g., under the Land Acquisition Act and by proceedings under section 92, Civil Procedure Code. When the Act has not expressly said so, we cannot imply that proprietary rights of temples would be lost when the tenant wanted the land. For interpreting “land” we can look only to section 9.

N. Chandrasekhara Ayyar for *K. B. Ranganatha Ayyar* for respondent.—This is a remedial statute intended to benefit tenants of all kinds of lands. The definitions of “tenant” and “landlord” in the Act include tenants of temple lands and trustees of temple lands. A remedial statute should be given an extended and liberal meaning; see Maxwell on Statutes, 6th Edition, page 141. The preamble to the Act shows the intention to benefit such tenants. When the intention is clear we should not import other considerations, such as, whether ordinarily temple trustees cannot sell temple lands.

OPINION.

COUTTS TROTTER, C.J.—This is a reference made by PHILLIPS, J., and ODGERS, J., obviously because they were not satisfied with the correctness of the decision of another Bench of this Court consisting of SPENCER and VENKATASUBBA RAO, JJ., in *Parthasarathi Aiyangar v. Doraisawmi Naicker*(1).

The short point referred to us is, does the Madras Act III of 1922 apply to landlords who hold their land as trustees of a religious institution? The wording of the reference is not very definite, because it is conceded on all hands that the term “landlord” as defined in the Act must cover persons who are landlords by virtue of their capacity as trustees of trust lands with power to let them to tenants. The real point is as to whether the

(1) (1923) I.L.R., 46 Mad., 823.

DORAIVELU
MUDALIAR
v.
NATESA
GRAMANI.
—
COUTTS
TROTTER, C.J.

provisions of section 9 of the Madras Act III of 1922 apply to landlords who are trust landlords by virtue of being trustees of religious or charitable institutions.

The Act is a very unhappily drafted one and it is quite clear to us that any reasonable draftsman must have foreseen that a question such as the one we have now to determine was certain to arise and should have provided for it. However, he has not done so here in express terms and it remains to be seen whether, on the one hand, he has done so by necessary implication or on the other hand there are considerations outside the Act which compel us to say that it does not apply to landlords in the position of trustees.

The preamble to the Act is this:

"Whereas it is necessary to give protection to tenants who in many parts of the city of Madras have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent for the land . . . it is hereby enacted as follows."

Then follows the body of the Act. In section 2, sub-section (3) occurs the following definition of "Landlord":—

"Landlord" means any person owning any land and includes every person entitled to collect the rent of the whole or any portion of the land, whether on his own account or on behalf of or for the benefit of any other person."

(I am only reading the material words.) Then by section 3, it is enacted that

"Every tenant shall on ejectment be entitled to be paid as compensation the value of any building, which may have been erected by him, by any of his predecessors in interest or by any person not in occupation at the time of the ejectment who derived title from either of them and for which compensation has not already been paid."

and that

"A tenant who is entitled to compensation for the value of any building shall also be paid the value of trees which may have been planted by him on the land."

To pause for a moment. It seems difficult to suppose that the Act could possibly have meant to exclude from the scope of this section a tenant who holds under a trustee or trustees of a trust or charitable endowment. The tenant has put up his building on somebody else's land and that somebody else on ejecting him is going to get the benefit of the tenant's work, and it is enacted in perfectly general language that in such cases the tenant shall have the benefit of his labour in the form of money compensation. It is said in this case that a landlord who is a trustee cannot deal with the trust lands unless it be for the benefit of the trust or for purposes necessary to the trust or endowment. Exactly the same line of reasoning would apply to the compensation provided for by section 3. It is of no benefit to the trust to pay out part of the trust funds whether income or capital, by way of compensation to eject a tenant, but it is a mere act of justice required to be done by the policy of the Act. Now I pass on to the section which is really material in this case, section 9. Sub-section (1) of that section begins thus:—

"Any tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted"

And then provision is made in it that such a tenant shall have power to apply to the Court for an order for the sale of the land on conditions approved by the Court with the object of putting him in the position of a purchaser of his holding. The words are: "Any tenant who is entitled to compensation under section 3." *Prima facie* that would include all tenants who have put up buildings on their landlords' land whether those landlords are owners of the land or trustees of it. It is said that it is not so, because of the explanation appended to that section. I have always noticed in Indian statutes

DORAIVELU
MUDALIAR
v.
NATESA
GRAMANI.
—
COUTTS
TROTTER, C.J.

DORAIVELU
MUDALIAR
v.
NATESA
GRAMANI.
COUTTS
TROTTER, C.J.

that, when any doubt is raised as to the construction of a section of an Act, it is usually raised by what is somewhat disappointingly called the explanation. So here, the explanation is

"'Land' means the interest of the landlord in the land and all other interests which he can convey under any power."

It is said that this landlord, being a trustee for a charitable or religious endowment, has no interest of his own to convey and can only convey the trust property or the trust land under conditions defined by the Hindu law which I may summarize as being practically equivalent to a necessity arising out of the circumstances and the position of the trust at the moment; and it is on that ground that the decision in *Parthasarathi Aiyangar v. Doraisawmi Naicker*(1) proceeded. But it seems to me that it is wrong to seek to control a statute which is obviously intended to overrule the ordinary law, by general considerations imported from the Hindu law or what is called the common law of India. A trustee landlord can convey the interest of the trust in certain given circumstances. Two of those circumstances have been already referred to,—necessity and benefit for the trust,—and I think there is added a further one by this new Act III of 1922, namely, when a tenant has been in possession of the land and has put up a superstructure on the land and to eject whom would be in certain circumstances plainly inequitable without compensation, and in other circumstances, such as the one contemplated by the section would be inequitable without giving him an opportunity of acquiring the land for himself on payment. That consideration appears to dispose of this case.

We cannot accede to the contrary opinion of SPENCER and VENKATASUBBA, RAO, JJ., in *Parthasarathi Aiyangar*

(1) (1923) I.L.R., 46 Mad., 823.

v. *Doraisawmi Naicker*(1) and must answer the reference, not in the form of a direct answer to the question put but by saying that in our opinion section 9 of the Madras Act III of 1922 applies to landlords who hold their land as trustees of a religious institution.

DORAIVELU
MUDALIAR
v.
NATESA
GRAMANI.
COUTTS
TROTTER, C.J.

RAMESAM, J.

RAMESAM, J.—I agree.

I think that the matter can also be put in a different way. Both in the case before us and in the case in *Parthasarathi Aiyangar v. Doraisawmi Naicker*(1), the plaintiffs were really the idols in the temple and their Lordships of the Judicial Committee remarked in *Vidya Varuthi v. Balusami Ayyar*(2), that, under the Hindu law, the image of a deity of the Hindu Pantheon is, as has been aptly called, "a juristic entity" vested with the capacity of receiving gifts and holding property. The landlord of the suit land is undoubtedly the idol of the temple within the definition of the term "landlord" in section 2, sub-section (3). That being so, there is no difficulty in applying the explanation to section 9 to the suit land. The explanation to section 9 consists of two parts. The first part refers to the interest of the landlord in the land, and the second to all other interests which he can convey under any power. The object of the second clause is to add to the first clause and not to cut it down. If any land falls under the explanation of the term as given in the first clause, one need not go to the second clause. In this case the suit land is the land belonging to the landlord, that is, the idol in the temple represented by the trustee.

I agree with the answer proposed by my Lord.

WALLACE, J.—I fully agree with all that has been said by the learned Chief Justice, and I should just like

(1) (1923) I.L.R., 46 Mad., 823.

(2) (1921) I.L.R., 44 Mad., 881 (P.C.).

DORAIVELU
MUDALIAR
v.NATESA
GRAMANI.

WALLACE, J.

to put my view in another form. If we take the procedure which is laid down in section 9, we find that any tenant, i.e., by definition "any tenant of land, liable to pay rent on it" not excluding a tenant of land owned by a trust, is entitled to move the Court for an order that his landlord shall be directed to sell the land. It is admitted that the trustee of trust lands comes within the definition of the term "landlord." When the Court has made that order and not earlier, as I conceive it, can a trustee landlord come in to object that such an order cannot be valid because he is not entitled in law to sell the land or to alienate it permanently except for necessity. To that the Court rejoins that the order itself has just provided the necessity required and it seems to me that on that the objection of the trustee landlord must vanish, as it cannot be argued that such an order of the Court directing him to sell the land is not a necessity justifying his conveyance of the land. In this view there seems to me nothing in the Act from which one may reasonably conclude that it was not intended to apply to a trustee landlord.

N.B.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Victor Murray Coutts Trotter, Chief Justice,
Mr. Justice Ramesam, and Mr. Justice Wallace.*

1924,
April, 9.

MINOR SUYAMPRAKASAM ALIAS MINATCHISUNDARAM
BY NEXT FRIEND VALLI AMMAI ACHI (PLAINTIFF),
APPELLANT,

v.

MURUGESA PILLAI (DEFENDANT), RESPONDENT.*

Minor, suit by, against agent appointed by guardian—Maintainability of.

* Appeal No. 218 of 1921.

A minor can maintain a suit against an agent appointed by his guardian for the benefit of his estate (a) generally, as well as (b) in respect of properties received by the agent, and not accounted for to the guardian. *Ramanathan Chettiar v. Muthiah Chetty*, (1920) I.L.R., 48 Mad., 429, overruled.

APPEAL against the decree of C. S. MAHADEVA AYYAR, Subordinate Judge of Cuddalore, in Original Suit No. 13 of 1919.

The facts are given in the Order of Reference of RAMESAM, J.

The plaintiff whose suit was dismissed preferred this Appeal.

This Appeal coming on for hearing on Friday and Monday, the 18th and 21st days of January 1924, and having stood over for consideration, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH:—

RAMESAM, J.—In this case the plaintiff, being minor by his mother and next friend, sued the defendant (his maternal uncle) for an account of his management, generally, of the plaintiff's estate from October 1910 to March 1916 and, in particular, of certain items of moveables (paddy and outstandings). The Subordinate Judge dismissed the suit, following *Ramanathan Chettiar v. Muthiah Chetty*(1).

The plaint does not expressly say that the defendant was appointed as agent by plaintiff's mother nor have we in this case any power of attorney, as in *Ramanathan Chettiar v. Muthiah Chetty*(1) and in *Ramayya Chettiar v. Sappanimuthu Chettiar*(2). The plaint was filed prior to the decision in *Ramanathan Chettiar v. Muthiah Chetty*(1) and it cannot be said that it was cleverly worded with a view to evade that decision. The allegations are loose and general, equally

(1) (1920) I.L.R., 48 Mad., 429.

(2) A.S. No. 60 of 1921 (unreported).

SUYAM-
PRAKASAM
v.
MURUGESA
PILLAI.

SUYAM-
PRAKASAM
v.
MURUGESA
PILLAI.

consistent with the defendant being regarded as an agent appointed by the plaintiff's guardian as well as with the defendant being a mere intermeddler and the guardian passively acquiescing and remaining content with the defendant's promises of accounting. I do not think the allegations in paragraph 3, sub-paragraphs (2) and (3), necessarily amount to an allegation that defendant is an agent. At the same time it must be conceded that all the allegations will cover and are consistent with a case of agency. The defendant denied agency. But the Subordinate Judge without inquiring into the fact of agency and on the allegations in the plaint, held that the suit was not maintainable.

I find several difficulties in applying *Ramanathan Chettiar v. Muthiah Chetty*(1) to this case. First, the English cases *Barnes v. Addy*(2), *In re Barney*; *Barney v. Barney*(3), *Mara v. Browne*(4) are all cases where the defendants had dealings with trustees and the *cestuis que trustent* sued to make them liable. The defendants were not dealing with guardians. Now I do not think the legal position of a guardian is identical with that of a trustee. It may be readily conceded that, for several purposes, their positions are analogous (vide section 88 of the Indian Trusts Act) and we may speak of guardians who hold a fiduciary position, loosely as trustees. I do not think the statement of ROMILLY, M.R., in *Mathew v. Brise*(5) amounts to more than this. In *Muthusubbia Chettiar v. Rangigoundan*(6) it has been held that the powers of a guardian are less extensive than those of a trustee although the soundness of such a wide proposition has been doubted in *Vembu Iyer v. Srinivasa Iyengar*(7). The latter case suggests that the position

(1) (1920) I.L.R., 48 Mad., 429.

(3) [1892] 2 Ch., 265.

(5) (1851) 14 Beav., 341.

(2) (1874) 9 Ch. App., 244.

(4) [1896] 1 Ch., 199.

(6) (1897) 7 M.L.J., 191.

(7) (1912) 23 M.L.J., 688.

SUYAM-
PRAKASAM
v.
MURUGESA
PILLAI.

of a guardian is in some respects wider than that of a trustee (see the judgment of MASILAMANI PILLAI, J., in *Ramayya Chettiar v. Sappanimuthu Chettiar*(1). Whatever may be the position of guardians in English law, it is impossible to bring a guardian under the definition of "trusts" and "trustee" in the Indian Trusts Act. If every guardian is a trustee, the legislature might have easily said so. The fundamental difference is that the legal estate vests in the trustee, but does not vest in the guardian. The *cestui que trust* if *sui juris* may require the trustee to convey the estate to him (section 56 of the Trusts Act), but until this is done the estate vests in the trustee. No such conveyance has to be executed by the guardian to his ward on his attaining majority.

There is no law prohibiting a guardian from entering into contracts on behalf of his ward. When such contracts are entered, they are not void. When they are not completely executed, the question of enforcing them against minors in Courts will be decided with reference to the test how far they are binding on the minors. In so far as such contracts impose a mere personal liability on the minor, they may not be enforced, [*Waghela Rajsanji v. Shekh Masludin*(2), *Indur Chunder Singh v. Radha Kishore Ghose*(3)] and there may be difficulties in giving effect to them [*Ramajogayya v. Jagannadham*(4)]. But these difficulties need not trouble a Court in cases where all that remains is something to be enforced on behalf of and for the benefit of the minor; see MASILAMANI PILLAI, J.'s judgment in *Ramayya Chettiar v. Sappanimuthu Chettiar*(1). Mr. Sitarama Rao, the learned vakil for the respondent, suggested

(1) A.S. No. 80 of 1921 (unreported).

(3) (1892) I.L.R., 19 Cal., 507 (P.O.).

(2) (1887) I.L.R., 11 Bom., 551 (P.O.).

(4) (1919) I.L.R., 42 Mad., 183 (F.B.).

that in such a case the minor may sue on the principle that the general rule that only parties to a contract can sue does not apply where a benefit is reserved under or arises out of the contract in favour of a third person in such circumstances as to amount to a trust (vide Pollock on Contracts, 9th Edition, pages 222-223). This suggestion leads me to doubt the soundness of applying the English decisions to a case of a guardian. If the contract entered into by the guardian was made on behalf of the minor and the unexecuted part of it relates not to a liability but to a right of the minor, I do not see why the minor cannot sue on a contract of agency just as he can on any other contract. Even PHILLIPS, J., who differed from MASILAMANI PILLAI, J. [in *Ramayya Chettiar v. Sappanimuthu Chettiar*(1)], does not seem to question such a proposition. On the terms of the power-of-attorney in that case, he held that the contract of agency in it was not created on behalf of the minor but personal to the principal.

Secondly, Lord SELBOURNE's judgment in *Barnes v. Addy*(2) indicates an exception to the main principle he was laying down:—

"Unless those agents receive and become chargeable with some part of the trust property or unless they assist with a knowledge in a dishonest and fraudulent design on the part of the trustees" (at page 251).

When we examine the facts in the English cases this aspect of the matter seems to become important. In *Barnes v. Addy*(2) the two solicitors (Mr. Duffield and Mr. Preston) were sought to be made liable on the ground that Mr. Duffield prepared the deed of appointment of Barnes as sole trustee and the deed of indemnity and introduced Addy to a broker for the purpose

(1) A.S. No. 90 of 1921 (unreported).

(2) (1874) 9 Ch. App., 244.

of selling out some of the stock to pay some amounts to which the trust estate was liable and that Mr. Preston settled the deed of indemnity on behalf of Mrs. Barnes. These acts were alleged to amount to a fraud on the part of the solicitors. In *In re Barney; Barney v. Barney*(1) the widow of the testator acting as executrix decided to carry on the husband's business, but this amounted to a breach of trust. Two friends assisted her by initialling all cheques issued by her on the bankers with whom the funds were invested, it being understood that the cheques were not to be honoured without their initials. On this ground they were sought to be made liable. In *Mara v. Browne*(2) the defendants were acting solely as solicitors.

NORTH, J., held that Hugh Browne was

"a principal in the matter and was not a mere agent for persons under whose lawful directions he was acting."

The Court of Appeal reversed this Judgment (SMITH, L.J., being more guarded in his opinion on one point in the case).

In the first two cases, the defendants did not get possession of any part of the trust property. They were sought to be made responsible solely for their acts in advising and co-operating with the trustees. In the third case though Hugh Browne came into possession of the trust funds, he carried out the directions of the trustee. I am far from saying that an agent (of the guardian) lawfully entering into possession of the property under the directions of the guardian and carrying out all the directions of the guardian should be liable to the ward solely on the ground that the acts of the guardian were in excess of his powers and therefore the agent's entry is tortious. In such a case the agent ought not to be liable. But when the agent has not

(1) [1892] 2 Ch., 265.

(2) [1896] 1 Ch., 199.

SUYAM-
PRAKASAM
v.
MURUGESA
PILLAI

carried out the directions of the guardian and has not accounted for property that came into his possession, I do not see why, while those acts may give rise to an obligation *ex contractu*, there should not be also an obligation *ex delicto* making him liable to the ward if property is actually received. That the same act, while giving rise to relations *ex contractu* between A and B may also give rise to relations *ex delicto* between B and C is a common conception known to law. In all such cases no doubt it is necessary for the protection of the defendant from a multiplicity of actions that the guardian also should be a party. In *Ramanathan Chettiar v. Muthiah Chetty*(1) and in *Ramayya Chettiar v. Sappanimuthu Chettiar*(2) the guardian was not a party and this fact was relied on as a ground of decision by ABDUR RAHIM, J., in the former case and PHILLIPS, J., in the latter. Again I do not see why, in such a case, if the fact that the estate was that of a minor was known to the defendant, the minor's action should not be held to lie on the principle of the exception (I have stated already) to the rule that only the parties to a contract can sue. When property is received for the purpose of being dealt with for the benefit of the ward and has not been accounted for to the guardian, I do not see why the facts do not amount to a trust in favour of the ward and the ward should not be entitled to sue. In the present case, though the frame of the suit is one for accounting, the allegations disclose that considerable items of property have come to the hands of the defendant. I do not know if that was the case in *Ramanathan Chettiar v. Muthiah Chetty*(1). But if it was alleged that some properties came to the hands of the defendants in that case, I doubt the correctness of that decision. It seems to me a large and

(1) (1920) I.L.R., 43 Mad., 429. (2) A.S. No. 90 of 1921 (unreported).

SUYAM-
PRAKASAM
v.
MURUGESA
PILLAI.

dangerous extension of the English cases to apply them to cases of guardian's agents who have received properties and have not accounted for them even to the guardian. The position is so anomalous that it has only to be stated—a guardian deals with an agent on behalf of the minor's estate but cannot sue to enforce the agent's liabilities on the minor's behalf, but should sue in his own right though he has no rights *ex hypothesi* and the minor cannot sue.

For all these reasons, I am inclined to doubt the correctness of the decision in *Ramanathan Chettiar v. Muthiah Chetty*(1). Even if it is not entirely erroneous it requires to be limited. I would therefore refer to a Full Bench the question whether a minor cannot maintain a suit against an agent appointed by the guardian for the benefit of the minor's estate (a) generally and (b) at least in respect of properties received by the agent and not accounted for to the guardian.

JACKSON, J.—I agree.

ON THIS REFERENCE

S. Varada Achariyar for appellant.—As it is the guardian who appointed the agent that now sues the agent, the suit is maintainable; *Surendra Nath Sarkar v. Atul Chandra Roy*(2). *Ramanathan Chettiar v. Muthiah Chetty*(1) is distinguishable on the facts. Even otherwise some of the observations therein are open to objection, especially in view of English authorities. See Simpson on Infants, page 99.

T. V. Gopalaswami Mudaliyar for respondent.—The suit should have been filed by the mother in her personal capacity, and not as guardian. There is no direct contractual relationship between a minor and the agent.

(1) (1920) I.L.R., 43 Mad., 429.

(2) (1907) I.L.R., 34 Cal., 892.

SUTAM-
PRAKASAM
v.
MURUGESA
PILLAI.

Ramanathan Chettiar v. Muthiah Chetty(1) is right. See also *Chidambaram Chetti v. Pichappa Chetty*(2) and *Branson v. Appasami*(3). If the law be otherwise, the agent may be sued twice.

OPINION.

COUTTS
TROTTER, C.J.

COUTTS TROTTER, C.J.—The question referred to us is “whether a minor cannot maintain a suit against an agent appointed by the guardian for the benefit of the minor’s estate (a) generally and (b) at least in respect of properties received by the agent and not accounted for to the guardian.”

The reference was really necessitated—I do not gather that the learned Judges had much doubt about the point themselves—by the decision of a Bench of this Court in *Ramanathan Chettiar v. Muthiah Chetty*(1) which, in my opinion, applied itself to the wrong angle of view in looking at these matters. It is not a question of trustee *de-son-tort*; it is a question of a contract made by a minor with an agent to manage his property and a contract which no one can suggest is void though it may be voidable at the instance of the minor. It may be that the minor cannot be sued upon it; but here the minor is seeking to enforce his rights of property against a person who has undoubtedly had control of his estate and whom it is sought to make accountable for the estate and its funds which have passed into his hands. The English rule is perfectly clear; it has been clear, ever since the case of *Dormer v. Fortescue*(4), decided as early as 1744 by Lord HARDWICKE, that in a position of this kind, the minor is entitled to call upon the agent to account.

(1) (1920) I.L.R., 43 Mad., 429. (2) (1907) I.L.R., 30 Mad., 243.
(3) (1894) I.L.R., 17 Mad., 257. (4) (1744) 3 Atk., 124; 26 E.R., 876.

SUTAM-
PRAKASAM
v.
MURUGESA
PILLAI.
COUTTS
TROTTER,
C.J.

I do not wish to say more, because my learned brother RAMESAM in the Order of Reference has given his reasons for believing that *Ramanathan Chettiar v. Muthiah Chetty*(1) is wrongly decided and can no longer be regarded as good law, and I am entirely of the same opinion. I think that this reference must be answered in the affirmative as regards both (a) and (b).

RAMESAM, J.—I agree.

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

RAMESAM, J.,
WALLACE, J.

N.B.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Victor Murray Coutts Trotter, Chief Justice,
Mr. Justice Ramesam and Mr. Justice Wallace.

VASIREDDI SRIRAMULU (FIRST DEFENDANT), APPELLANT,

1924,
April 9.

v.

PUTCHA LAKSHMINARAYANA (PLAINTIFF),
RESPONDENT.*

Civil Procedure Code, O. XXXII, r. 4 (3)—Consent of guardian
ad litem—Express consent not necessary.

Order XXXII, rule 4 (3), Civil Procedure Code, does not require that the consent of a person for his appointment as guardian *ad litem* should be express; it may be an implied one.

APPEAL preferred against the decree of B. VENKATESWAR RAO, Second Additional Subordinate Judge of Guntūr, in Original Suit No. 72 of 1919.

The facts are given in the Order of Reference by PHILLIPS, J.

The Subordinate Judge gave a decree for the plaintiff holding on the preliminary issue that there was no express or implied consent of the guardian to act as

(1) (1920) I.L.R., 43 Mad., 429.
* Appeal No. 101 of 1921.

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

guardian-ad litem in the previous suit and that the decree against plaintiff was therefore a nullity.

This Appeal coming on for hearing on Friday, the 30th November, and Monday, the 3rd December 1923, and the case having stood over for consideration the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

PHILLIPS, J.—The plaintiff brings this suit for a declaration that the decree obtained against him by the first defendant in O.S. No. 72 of 1916 in the Temporary Sub-Court, Guntūr, is not valid and binding on him. This decree was passed against the plaintiff when he was a minor, and he was represented in that suit by his natural father as guardian. It has in many cases been held that unless a guardian *ad litem* consents to his appointment as such, the appointment is invalid. This is based on the assumption that the provision of Order XXXII, rule 4 (3), that “no person shall without his consent be appointed guardian for the suit” is mandatory. In many of these decisions in referring to the consent of the guardian, the words “express consent” have been used, and it is argued that the consent of the guardian must be “express” and cannot be implied; but although this word “express” has been repeatedly used, as in *Narendra Chandra Mandal v. Jogendra Narayan Roy*(1) and *Mohan Krishna Dar v. Har Prasad*(2), the question as to whether the consent should be express or implied was not under consideration, and certainly the wording of clause (3) does not contain the word “express.” As it is stated “that no person shall without his consent be appointed guardian” it appears to me clear that the appointment may be made when the person does consent; and unless it is otherwise

(1) (1914) 19 C.W.N., 537.

(2) (1917) 40 I.C., 2.

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

provided a consent may always be express or implied, and consequently there appears to be no provision in rule 4 (3) that the consent must be express. In fact, in *Mallayya v. Punnamma*(1), it was held that the consent might be implied. It was also held in *Chhattar Singh v. Tej Singh*(2) and *Thakur Tajeswar Dutt v. Lakkan Prasad Singh*(3), that the consent may be implied, in fact, in the latter case it was held that where the certificated guardian, the mother of the minor, was served with notice that it was proposed to appoint her the guardian *ad litem* of her son and no objection was taken by the mother, the Court might properly assume that the mother had no objection to the proposed appointment, and that she in fact consented thereto. Taking it, therefore, that an implied consent is sufficient we have to decide whether in the present case there was such a consent. The plaintiff was an adopted son and his adoptive mother was acting as his guardian; but the plaintiff, in O.S. No. 72 of 1916, put in a petition for the appointment of the natural father as guardian on the ground that the natural father had filed a guardian petition in the District Court stating that the adoptive mother was not acting properly on behalf of the minor and requesting that she might be removed from guardianship. Notice was accordingly taken out to the natural father, and after two attempts, it was served personally upon him. The notice reads as follows:—

“The plain tiff has filed a petition stating that you have no interest adverse to that of the said minor and requesting that you may be appointed guardian for conducting the suit proceedings; so, you should appear either in person or through a vakil and inform if you have any objection to being appointed guardian.”

(1) (1924) I.L.R., 47 Mad., 476.

(2) (1921) I.L.R., 43 All., 104.

(3) (1923) I.L.R., 2 Patna, 296.

SERAMULU
v.
LAKSHMI-
NARAYANA.

The return on this notice was as follows:—

"The defendant mentioned in this order being a minor his natural father and guardian has affixed his signature and received a copy of the notice in Guntur village on 7th September 1916";

and there is another endorsement signed by the natural father, namely,

"As this order was shown to me, the guardian-defendant mentioned in this order in Guntur village on 7th September 1916 and a copy of the notice to minor sent with it was given to me, I have received it."

The proposed guardian did not appear in Court and allowed the proceedings to be conducted *ex parte*. Considering the fact that this natural father had applied to the District Court to be appointed guardian of the minor and for the removal of his adoptive mother from her guardianship it is clear that he was acting in the interests of his natural son; and when he received this notice calling upon him to take any objection that he had to his appointment as guardian and he failed to appear in Court, it may be taken that he did consent to such appointment, but had no case to present to the Court. I would from these circumstances infer that the father consented to his appointment as guardian and consequently the decree obtained against the minor, who was properly represented in the suit, is *prima facie* binding on him.

As my learned brother is not prepared to hold that the guardian has been appointed with his consent, it becomes necessary to consider the further question whether the decree obtained against the minor is invalid because he was not properly represented in the proceedings. It has been held in many cases that, where a guardian has not consented to his appointment as such, the minor is not properly represented and the decree is a nullity so far as he is concerned. This view has been

consistently held in Calcutta—vide *Dinabandhu v. Mashuda*(1), *Annada Prasad v. Upendra Nath Dey*(2), *Umapati v. Masiyetulla*(3), *Baneswar Pramanik v. Tara-pada Bhattacharjee*(4) and *Narendra Chandru Mandal v. Jogendra Narayan Roy*(5). The same view is taken in the Allahabad Court in *Hanuman Prasad v. Muhammad Ishaq*(6), in the Patna Court in *Mohan Krishna Dar v. Har Prasad*(7), and *Shaikh Sajjad Husain v. Sakal Rai*(8), and in the Punjab Court in *Hira Singh v. Ghulam Qadir*(9). The same view has been taken in this Court in an unreported case, L.P.A. No. 3 of 1913, and also in *Shroof Sahib v. Raghunatha Sivaji*(10) and *Eda Punnayya v. Jangalu Rama Kotayya*(11). A different view was, however, taken in *Oodayanasamy Tevar v. Alagappa Chetty*(12), and in *Kuppuswami Ayyangar v. Kamalammal*(13). The question has been considered by the Privy Council. But I do not consider that the two cases cited for reference, viz., *Rashid-un-nisa v. Muhammad Ismail Khan*(14) and *Partab Singh v. Bhabuti Singh*(15) are applicable to the present case. In the former case a married woman was appointed guardian and in law such an appointment could not be recognized and consequently the minor was deemed to be unrepresented. In the second case it was found that the guardian had been appointed fraudulently and on that ground it was held that there was no proper representation.

The leading case on the point is the decision of the Privy Council in *Walian v. Banke Behari Pershad*

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| (1) (1912) 16 C.L.J., 318. | (2) (1922) 65 I.C., 18. |
| (3) (1923) 37 C.L.J., 496. | (4) (1917) 41 I.C., 872. |
| (5) (1914) 19 C.W.N., 537. | (6) (1906) I.L.R., 28 All., 137. |
| (7) (1917) 40 I.C., 2. | (8) (1923) I.L.R., 2 Pat., 7. |
| (9) (1918) 48 I.C., 399. | (10) (1915) 29 I.C., 579. |
| (11) (1920) M.W.N., 1. | (12) (1904) 14 M.L.J., 342. |
| (13) (1920) I.L.R., 48 Mad., 842. | (14) (1909) I.L.R., 31 All., 572 (P.C.). |
| (15) (1913) I.L.R., 35 All., 487 (P.C.). | |

SERAMULU
v.
LAKSHMI-
NARAYANA.

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

Singh(1), where it was held that, although no formal order appointing the mother as guardian had been drawn up, the minors were effectively represented in the suit. It appears that, in that case, the mother was described as guardian in the plaint and also in the decree but that the record contained no formal order of appointment. The mother did not appear in Court and an *ex parte* decree was passed. This would seem to be conclusive on the point, but this case has been distinguished in the Calcutta Court on the ground that in that case the mother actually represented the minor in the proceedings and therefore it was a proper representation. This distinction appears to have been drawn owing to an erroneous view of the facts and I would point out that at least in one case *Annada Prasad v. Upendra Nath Dey*(2), MUKERJEE, J., remarked that in *Walian v. Banke Behari Pershad Singh*(1), the mother who had been proposed as guardian for the minor son "had entered appearance and acted throughout the trial of the suit." This does not appear to be a correct statement of the facts of that case, and a similar mistake has been made in *Hanuman Prasad v. Muhammad Ishaq*(3), where it is remarked that the mother in *Banke Behari's* case(1) did appear in Court and the same mistake appears to underlie several of the other decisions. This has been pointed out by DAS, J., in a very recent case in the Patna High Court reported in *Pande Satdeo Narain v. Ramayan Tewari*(4), where, after a very carefully reasoned judgment he comes to the conclusion that where, on the face of the record, a person qualified to act as the guardian appears as a guardian of the minor for the suit, the Court has no power in another suit brought for the purpose of impeaching the validity of

(1) (1908) I.L.R., 30 Cal., 1021 (P.C.). (2) (1922) 65 I.C., 18.

(3) (1906) I.L.R., 28 All., 137.

(4) (1923) I.L.R., 2 Patna, 335.

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

the decree to examine the evidence in order to see whether notices under Order XXXII, rule 3 (4), were in fact, served, or whether the person nominated as guardian did consent to act as guardian or whether the Court did expressly appoint such person as the guardian for the suit, unless it is shown that the defect in following the rules has affected the merits of the case; but, where the record on the face of it shows that the minor was not represented by a guardian for the suit or was represented by a guardian disqualified under the express provisions of the statute from acting as guardian, the position is the same as if the minor was not a party to the suit. In this case the lower Court, acting on the decisions in *Eda Punnayya v. Janyalu Rama Kotayya*(1), *Shroof Sahib v. Raghunatha Sivaji*(2), and *Baneswar Pramanik v. Tarapada Bhattacharjee*(3), has held that, inasmuch as the guardian's consent was not obtained, the decree against the minor was a nullity, and consequently has not determined the further issue as to whether the guardian in that suit was guilty of gross and culpable negligence.

As I have pointed out, there is abundant authority to support this finding, but, inasmuch as there is authority to the contrary and I personally respectfully agree with DAS, J., in his judgment and consider that a number of decisions to the contrary are based on a misinterpretation of *Walian v. Banke Behari Pershad Singh*(4), I think it is advisable that the question should be considered by a Full Bench of this Court. The whole question and all the authorities have been most elaborately discussed in DAS, J.'s judgment in *Pande Satdeo Narain v. Ramayan Tewari*(5), and therefore it seems to be unnecessary in a mere reference to traverse

(1) (1920) M.W.N., 1.

(2) (1915) 99 I.C., 579.

(3) (1917) 41 I.C., 872.

(4) (1908) I.L.R., 30 Cal., 1021 (P.C.). (5) (1923) I.L.R., 2 Patna, 335.

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

the same ground again. I would only say that I respectfully agree with the conclusions arrived at by DAS, J., and I think considerable weight must be attached to the judgment, for in it he has resiled from the earlier view taken by him in *Shaikh Sajjad Husain v. Sakal Rai*(1). I would therefore refer the following questions for the opinion of the Full Bench:—

1. Whether, where a person has been appointed guardian *ad litem* for a minor but his consent to such appointment has not been obtained, the decree is a nullity or whether it is merely voidable on good ground being shown therefor?
2. Whether the consent of a guardian to his appointment as such must be express or may be implied?

VENKATASUBBA RAO, J.—Two questions arise in this Appeal. First, whether the appointment of a guardian *ad litem* may be validly made without his express consent. Secondly, whether a decree passed without a guardian *ad litem* on the record who has consented to act is a nullity or is merely voidable.

In regard to the first question, the terms of Order XXXII, rule 4, Code of Civil Procedure, must be considered. Clause (3) says:

“No person shall without his consent be appointed guardian for the suit.”

Clause (4) is to the effect that where there is no other person fit and willing to act as guardian, the Court may appoint any of its officers to be such guardian.

The contention that the words “without his consent” are equivalent to “against his will” seems to me utterly unsound, and I reject it without further discussion.

Then it is said that consent need not be express but may be implied. I am not prepared to accept this view.

(1) (1928) I.L.R., 2 Patna, 7.

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

In considering whether a person is willing to act under clause (4), is the Court to act merely upon inference from circumstances? or again is the Court to take evidence regarding the state of mind of the proposed guardian and is the duty cast upon the Court of finding as a fact that the guardian is willing to act although he has not expressed his willingness? In my opinion, it was not the intention of the legislature that the Court should in each individual case, upon a careful scrutiny of facts and circumstances, come to the conclusion that the proposed guardian is willing to act. The usefulness of the rule contained in clause (3) will be greatly diminished by adopting any such construction. The question whether the guardian has consented or not will generally not arise when the guardian subsequently appears and does any act on behalf of the minor. Therefore, whether consent could be implied, has very often to be determined with reference to the facts existing at or before the appointment. I find it difficult to imagine the nature of the evidence that can be given either to support or repel the inference that there was consent. Is the fate of a case involving large issues to depend upon the determination of a question of fact on evidence necessarily interested and very often perjured, adduced as is inevitable in a large majority of cases, after a long lapse of time from the date of the appointment? The reason of the thing and the language of the section alike demand that consent to be valid must be express. There is abundant authority for this position and it is sufficient to refer to the judgment of MUKERJEE and PANTON, JJ., in *Annada Prasad v. Upendra Nath Dey*(1). The learned Judges refused to give effect to the rule of implied consent even when the guardian

(1) (1922) 65 I.C., 18.

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

proposed happened to be a certificated guardian on whom there was a duty cast in law to safeguard the interests of the minor.

I shall now deal with the second question. When there is no guardian *ad litem* on the record who has consented to act, is the decree obtained null and void or is it voidable on proof of prejudice having accrued to the minor defendant? The preponderance of authority is, in my view, in favour of the position that the decree is a nullity. In *Pande Satdeo Narain v. Ramayan Tewari*(1), DAS, J., in a very long judgment, attempts to show that the balance of authority is the other way. But with great respect I am unable to agree with him. I shall first refer to *Khiarajmal v. Daim*(2). The facts are complicated and are very clearly stated by the Lords of the Judicial Committee and I shall not recapitulate them. The facts, however, so far as they are relevant to the question under consideration, are extremely simple. One Naurez died leaving a widow and four children including a son Amirbaksh. Suit No. 372 of 1879 was instituted *inter alia* against Amirbaksh described as a "minor aged about 14 years, legal representative of Naurez, deceased, by his guardian, his uncle Alahnavaz." Again Suit No. 160 of 1878 was also filed against "Naurez, deceased, by his legal representative, Amirbaksh, by his guardian his uncle Alahnavaz." Two questions arose. Firstly, whether the estate of Naurez was sufficiently represented when only one out of the five heirs was impleaded in the suit. Secondly, what was the effect of the decrees passed so far as the share of Amirbaksh was concerned?

The full import of the Privy Council judgment will become evident if, while reading it, these two points are kept distinctly in view.

(1) (1928) I.L.R., 2 Patna, 385. (2) (1905) I.L.R., 82 Calo., 296 (P.O.).

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

"Amirbaksh was of course one of the heirs of Naurez but in no other sense his legal representative. It is not pretended that Alahnavaz was in any legal sense or in fact his guardian or was ever appointed his guardian *ad litem*. It is, however, contended by the appellants that Naurez's heirs are bound by the proceedings in both the suits and that his share of the property whatever it was, was effectually sold in the suit No. 160 of 1878 or at any rate that the share of Amirbaksh himself passed by the sale" (see page 313).

Then their Lordships overrule the contention that the Naurez's estate was sufficiently represented by one of his heirs Amirbaksh; and in this connexion they distinguish *Malkarjun v. Narhari*(1) and they equally clearly negative the second contention that Amirbaksh was duly represented on the record by his guardian Alahnavaz.

Now, let me reproduce another passage from the judgment:

"In suits Nos. 372 of 1879 and 160 of 1878, the Judge seems to have accepted without question the statement on the record that Amirbaksh was the legal representative of Naurez and Alahnavaz was his guardian and never applied his mind to the matter . . . Their Lordships think that the estate of Naurez was not represented in law or in fact in either of the suits and the sale of his property was therefore without jurisdiction and null and void. Nor can they hold that the share of Amirbaksh himself in his estate was bound."

It is obvious that their Lordships were dealing with two distinct and independent points and I find it impossible to agree with Mr. Justice DAS that the Judicial Committee was not dealing with the second question. The learned Judge has been at great pains to analyse the facts, but with the greatest respect it appears to me that he has overlooked a very essential point in the judgment of the Privy Council.

It may be useful to refer to another passage in the judgment of the Judicial Committee:

(1) (1905) I.L.R., 25 Bom., 337 (P.O.).

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

"Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in execution of them. But, on the other hand, the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside" (page 312).

I shall next deal with another case considered by DAS, J., *Rashid-un-nisa v. Muhammad Ismail Khan*(1). In some proceedings the minor in that case was represented by her sister who acted as guardian *ad litem* and in certain other proceedings by an uncle by name Maula Dad. Their Lordships held that so far as the sister was concerned, she was a married woman and therefore disqualified from being appointed guardian and in regard to Maula Dad, they held that his interest was obviously adverse to that of the minor and he was therefore disqualified. They decided that the minor was not a party to the proceedings and the execution sales were null and void.

I shall now proceed to consider the third case referred to by DAS, J., *Partab Singh v. Bhabuti Singh*(2). In the judgment of the Privy Council, reference is made to two suits, but for the present purpose it is sufficient to notice the facts connected with one of them, that is, the suit brought by Bhabuti Singh on 26th June 1899. The minors Pertab and Abharan Singh were added as defendants to that suit. They were described as being under the guardianship of Hari Pershad. No order appointing Hari Pershad as a guardian for the minors was applied for or was made. The result was that the minors were not in law represented in the suit in question. Their Lordships observe:

(1) (1909) I.L.R., 31 All., 572 (P.C.). (2) (1913) I.L.R., 35 All., 487 (P.C.).

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

"As Hari Pershad had not been appointed guardian for the suit for the minors Pertab Singh and Abharan Singh, they were in law unrepresented and the decree will not bind them."

There was another ground to support the same conclusion, but it is not at present material.

What do these three cases establish? In *Khivrajmal v. Daim*(1) the name of Alahnavaz appeared on the record and he was described as the guardian of Amirbaksh, the minor. Similarly in *Partab Singh v. Bhabuti Singh*(2) Hari Pershad was described on the record as the guardian of the minors, Pertab and Abharan. In neither case was the appointment of the guardian *ad litem* made by the Court. In *Rashid-un-nisa v. Muhammad Ismail Khan*(3) the sister and the uncle were appointed guardians *ad litem* but they were incompetent to act. In all the three cases, the Judicial Committee held that there was no representation of the minor at all and that the decrees or sales as the case might be were null and void. On the principle underlying these decisions, a decree obtained against a minor for whom a guardian was appointed without his consent would be equally ineffectual and be likewise a nullity.

I am glad to find that this is the law, for otherwise the interests of minors will be gravely imperilled. Hundreds of persons may be competent to act as guardians of a minor defendant, but if any of them is appointed without his consent merely because the plaintiff in the suit chooses to propose his name, does it follow that the man so appointed is either under a legal or moral duty to safeguard the minor's interests? The proposed guardian not having consented, he cannot be made liable for any injury sustained by the minor, nor is he likely to be under any sense of personal responsibility in the matter. Mr. Justice DAS distinguishes the

(1) (1905) I.L.R., 32 Cal., 296 (P.C.). (2) (1913) I.L.R., 35 All., 487 (P.C.).
(3) (1909) I.L.R., 31 All., 572 (P.C.).

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

three decisions to which I have referred and finds support for his conclusion in *Walian v. Banke Behari Pershad Singh*(1). I fail to see how this case is an authority for his position. The Subordinate Judge held that although no formal order appointing the mother to be the guardian *ad litem* of the infants has been drawn up, the Court must be deemed to have sanctioned the appointment and that the want of a formal order was at most an irregularity (see page 1030). The High Court disagreeing with the Subordinate Judge considered that there was nothing from which they could presume that the Court had sanctioned expressly or impliedly the appointment of the minors' mother as their guardian (see page 1031). The Judicial Committee observes :

"Their Lordships are unable to concur in the conclusion at which the learned Judges arrived. The present plaintiffs were substantially sued in the former suit, and the alleged fraud has been negatived. It appears to their Lordships that they (the present plaintiffs) were effectively represented in that suit by their mother, and with the sanction of the Court."

They then proceed to say that one of the defects which can be pointed out is that no formal order appointing the mother of the plaintiffs is shown to have been drawn up. In the result, they hold that the defects of procedure alleged were at most irregularities which could not invalidate the proceedings in the absence of proof of prejudice having accrued to the infants. There can be no doubt about the facts. *There was an appointment by the Court of a guardian ad litem. The order of the appointment was not, however, shown to have been formally drawn up.* This was considered in the nature of an irregularity and there is nothing in the judgment to warrant the view that if there was no representation, the decree would not have been treated as void.

(1) (1908) I.L.R., 30 Cal., 1021 (P.C.).

Mr. Justice DAS is at pains to establish that the mother did not in fact act for the minors at any stage of the suit and that some learned Judges in India were under a misapprehension on this point. It seems to me that this question whether the mother did or did not in fact act for the minors is of no importance, because the judgment of the Privy Council is based on two facts, viz., (1) that there was a proper appointment and (2) that there was no formal order of appointment: and as the defect was held to be a mere irregularity the Judicial Committee proceeded to consider whether any prejudice resulted to the infants.

I am therefore of the opinion that a decree passed against a minor defendant where there is no consent on the part of the guardian *ad litem* to act as such is null and void, and it is unnecessary to set it aside in separate proceedings.

Coming to the facts of the case on hand, even if consent can in law be implied, I am of the opinion that the fact that over the signature of the proposed guardian *ad litem*, the endorsement appears containing the words "guardian—defendant" proves nothing, for it only means that the description in the endorsement was made to conform to the description in the notice, and it is not uncommon for persons to merely reproduce the words constituting the description when they are making an endorsement of this nature, without accepting the truth of the description. I agree to the questions, as stated by my learned brother, being referred for the decision of a Full Bench.

ON THIS REFERENCE

T. Ramachandra Rao for respondent.—The consent must be express; otherwise all sorts of difficulties will arise, several years after. Order XXXII, rule 4 (3), is mandatory. He relied on *Annada Prasad v. Upendra*

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

SRIRAMULU
v.
LAKSHMI-
NARAYANA.

Nath Dey(1), *Mohan Krishna Dar v. Har Prasad*(2),
Shaikh Sajjad Husain v. Sakal Rai(3), *Narendra*
Chandra Mandal v. Jogendra Narayan Roy(4), *Shroof*
Sahib v. Raghunatha Sivaji(5).

A. Krishnaswami Ayyar, following, argued that the rule was new and that there must be some overt act showing previous consent, though it need not be express; *Gilbey v. Rush*(6). Mere silence is not consent.

S. Varada Achariyar (with *K. Rama Rao*) for appellant was not called upon.

OPINION.

COUTTS
TROTTER,
C.J.

COUTTS TROTTER, C.J.—In this case, two questions have been referred to us by the Divisional Bench; the first is, “whether, where a person has been appointed guardian *ad litem* for a minor but his consent to such appointment has not been obtained, the decree is a nullity, or whether it is merely voidable on good ground being shown therefor?” The second question is, “whether the consent of a guardian to his appointment as such must be express or may be implied?”

In the view we take of this matter, the answer we propose to the second question must end in a reference back to the Divisional Bench which may render the first of these questions purely academic and one which need not arise for the determination of the suit. The words of the statute are contained in Order XXXII, rule 4, clause (3):—“No person shall without his consent be appointed guardian for the suit,” and we are asked to say whether that consent can be implied or whether it must be express. There are cases that have been cited to us in which the learned Judges speak of express consent, but I do not think that before this reference arose, the

(1) (1922) 65 I.C., 18.
(3) (1923) I.L.R., 2 Pat., 7.
(5) (1915) 29 I.C., 574.

(2) (1917) 40 I.C., 2 at 11.
(4) (1914) 19 C.W.N., 537.
(6) [1906] 1 Ch., 11 at 22.

SRIRAMULU
v.
LAKSHMI-
NARAYANA.
COUTTS
TROTTER,
C.J.

learned Judges who used the language which has been cited were really deliberately applying their minds to the question as to whether consent must under the statute be express. The statute does not contain the word “express,” and I fail to see how Courts have a right to put into the statute a word which is not there. Consent is a question of fact. A person may have consented and there may be no direct evidence of it. The evidence may be inferential, indirect and circumstantial and, as my brother WALLACE put it, it is purely a question of evidence. We are unaware of any rule of evidence which says that this simple question of fact—aye or nay, did this person consent to act—is to be decided by any different laws of evidence from those which guide Courts, in arriving at the determination of all questions of fact. Is the evidence before the Court sufficient to enable it to say with confidence, “we hold here on the evidence that there was consent by this man that he would act as guardian”? We therefore think that the case must go back with the expression of our opinion that the answer to the second question referred to us is that the consent need not be express. It is quite true that the two learned Judges who formed the Divisional Bench gave an indication of what their finding would be on the question of fact; but as they both approached it under the shadow of this supposed rule of law, it seems to us that it is better that they should reconsider the question under our direction and come to an express finding on the question as to whether there was a consent to be inferred from the evidence available to them or not. That is a matter for them and not for us.

RAMESAM, J.—I agree.

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

RAMESAM, J.
WALLACE, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice
Venkatasubba Rao.

RAMAKKA (COUNTER-PETITIONER), APPELLANT,

v.

V. NEGASAM (PETITIONER—4TH DEFENDANT),
RESPONDENT.*

Civil Procedure Code (Act V of 1908), ss. 2 (12) and 141, O. XVIII, r. 1, and O. XXVI, r. 10—Application for restitution of lands with mesne profits—Appointment of Commissioner—Inquiry—Burden of proof—Right to begin—Indian Evidence Act (I of 1872), sec. 106—Information of persons, not called as witnesses, whether admissible—Local inspection by Commissioner—Report based on same, crop experiment and information, whether legal.

Where a defendant applied for recovery of mesne profits from the plaintiff who had taken possession of certain lands in execution of a decree of the original Court which was reversed on appeal, and the Court appointed a Commissioner to ascertain the amount of mesne profits,

Held that, in the inquiry held by the Commissioner, the defendant was bound to let in his evidence in the first instance, and thereafter the plaintiff was entitled to let in her evidence, under the provisions of Order XVIII, rule 1, and section 141 of the Civil Procedure Code ;

that although, under section 106 of the Indian Evidence Act, the burden of proving the amount of mesne profits actually received is on the person receiving them, yet as regards the amount of mesne profits that might, with ordinary diligence, have been received by the person in occupation, the burden of proving it is on the person claiming it ; *Krishna Mohun Basak v. Kunjo Behari Basak* (1881) 9 C.L.R., 1, referred to ;

and that the Commissioner was entitled to base his report on his local inspection and also upon the crop experiment

RAMAKKA
v.
NEGASAM.

conducted by him, but not on information obtained from certain persons whose evidence was not recorded by him under Order XXVI, rule 10, Civil Procedure Code, as information given by witnesses which was not reduced to writing was not legal evidence upon which the Court could decide. *Harvey v. Shelton*, (1844) 7 Beav., 455 ; 49 E.R., 1141, referred to.

APPEAL against the order of A. J. CURGENVEN, District Judge of Anantapur, in Interlocutory Application No. 95 of 1920 in Original Suit No. 31 of 1912 on the file of the District Court of Bellary.

This appeal arises out of an application by the fourth defendant for recovery of mesne profits on certain lands which had been taken over by the plaintiff under the decree of the first Court which was reversed on appeal. The mesne profits related to the period between the date of the original decree and the decision of the appeal therefrom. The lower Court appointed a Commissioner to ascertain the amount of mesne profits due from the plaintiff. The Commissioner, in the course of his inquiry, directed the plaintiff to adduce her evidence in the first instance. The plaintiff refused to do so, and the defendant let in his evidence and closed his case ; thereupon the plaintiff applied to the Commissioner to allow her to adduce her evidence ; the Commissioner refused her request, and submitted his preliminary report to the Court on 15th November 1920. The plaintiff applied to the District Court in I.A. No. 49 of 1921, to direct the Commissioner to record her evidence. The District Judge passed an order on that petition on 22nd March 1921, holding that the Commissioner was right in his view that the plaintiff was bound to adduce her evidence first and, on her refusal to do so, she was not entitled to adduce it at a later stage ; he also held that the Commissioner was right in refusing to allow her to cross-examine the fourth defendant on his previous statement in writing without production of the document

* Appeal against Order No. 411 of 1921.

RAMAKKA
v.
NEGASAM.

and he dismissed the petition. Against the final order of the District Judge on the Original Petition (I.A. No. 95 of 1920), the plaintiff preferred this Miscellaneous Appeal to the High Court. The other irregularities in procedure appear from the judgments.

L. A. Govindaraghava Ayyar for appellant.

B. Somayya for respondent.

JUDGMENT.

SPENCER, J.

SPENCER, J.—This was an application by the fourth defendant for mesne profits on the extent of land in the enjoyment of the plaintiff between the date of the decree in the first Court and the decision of the appeal. The matter was referred by the District Judge to a Commissioner to ascertain the amount of mesne profits due. The Commissioner directed the plaintiff to adduce her evidence first, on the ground that she had been in possession of the property and was thus in the best position to state how much profit she had obtained. The plaintiff's pleader refused to open his case, upon which the petitioner's witnesses were examined and the case was closed. Meanwhile, the counter-petitioner (plaintiff) applied to the District Court to direct the Commissioner to record her evidence. The District Judge in an order on the interlocutory application decided that the Commissioner was right and refused the counter-petitioner's request.

The questions now before us are (1) whether the District Judge was right in giving the petitioner mesne profits upon 15 acres 42 cents of wet land and (2) whether he was right in not allowing the appellant an opportunity to adduce her evidence. As regards the extent of the land, the plaintiff's pleader relies on an admission made by the fourth defendant in another suit,

RAMAKKA
v.
NEGASAM.
SPENCER, J.

O.S. No. 393 of 1916, that she (plaintiff) was only in possession of 8 acres 47 cents, and he argues that the petitioner is not entitled to get mesne profits on a larger extent than what he admitted that she was in possession of. The circumstances under which the statement was made in the other suit have not been proved. The Judge relied on the extent as given in the delivery warrant and I think he was right in doing so.

On the second point, I am of opinion that the Commissioner and the District Judge were in error in requiring the plaintiff to open her case. Order XVIII, rule 1, Civil Procedure Code, which is applicable to miscellaneous proceedings through section 141, lays down that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff. In a case like the present, where the fourth defendant is the person claiming mesne profits, he is in the position of a plaintiff, as it is his petition that is the foundation of the proceedings and, if he adduces no evidence at all, no mesne profits can be awarded to him. Section 2, clause (12) defines mesne profits as those profits which a person in wrongful possession of such property actually received or might, with ordinary diligence, have received. The profit which a person actually received is a matter within the peculiar knowledge of that person and, under section 106 of the Evidence Act, the burden of proving the amounts actually received will lie on the person who received them; but the burden of proving the profits that the person in occupation might have received will lie on the person who claims them. The cases cited for the respondent, *Brojendro Coomar Roy v. Madhub Chunder Ghose*(1) and *Dinobundhoo Nundee v. Keshub Chunder Ghose*(2), do not go further than to show

(1) (1882) I.L.R., 8 Cal., 343.

(2) (1865) 3 W.R. Mis., 25.

RAMAKKA
v.
NEGASAM.
SPENCER, J.

that it lies on the person who actually received mesne profits to show how much he received. These two cases are not authorities for saying that it is for the person in occupation to prove what mesne profits should be awarded, which is a very different thing. In *Krishna Mohun Basak v. Kunjo Behari Basak*(1), it was observed that there may be cases in which the defendants in a suit for mesne profits may properly be called upon to produce their accounts and to give information upon facts within their special knowledge, but that, under the provisions of section 179, Civil Procedure Code of 1879, which corresponds to Order XVIII, rule 1, the right to begin was with the plaintiff and the appellant's contention that it was for the defendant to begin was not entitled to any consideration.

The counter-petitioner applied to the District Judge to be allowed to examine her witnesses and this application was refused. As the case cannot be satisfactorily disposed of without hearing the evidence on both sides, I think it is necessary that we should send the case back to the District Judge and ask him to record such evidence as the counter-petitioner may produce on her side and such further evidence as the petitioner may adduce on the same points.

Another error into which the Commissioner has fallen which has been referred to in the course of argument is the fact that he obtained information from certain persons whose evidence was not recorded by him. The Judge considered that this information was admissible. I am of opinion that the Commissioner was entitled to base his report on his local inspection and also upon the crop experiment conducted by him, but that any evidence that he took should have been recorded in

RAMAKKA
v.
NEGASAM.
SPENCER, J.

writing. Order XXVI, rule 10, requires that he should reduce to writing the evidence taken by him. Information given by witnesses which is not reduced to writing is not legal evidence upon which the Court can decide. If either of the parties desires to have the benefit of the statements of those persons from whom the Commissioner obtained information, they should now cite them as witnesses; otherwise, the District Judge should come to a conclusion on the rest of the evidence before him without any reference to such unrecorded statements. The District Judge is directed to return his revised findings within three months. Ten days for objections.

VENKATASUBBA RAO, J.—I agree and I wish to add a few words. The plaintiff filed a suit for the recovery of certain property and obtained judgment. In pursuance of it she took possession of 15 acres and 42 cents of wet land with which we are mainly concerned. In appeal the judgment was reversed and the fourth defendant now seeks restitution of mesne profits. I may note that the fourth defendant by way of restitution already obtained 15 acres of wet land from the plaintiff. There is no need to refer to the dry land claimed so far as this judgment is concerned. The first question that had to be decided by the lower Court was whether mesne profits were to be given in respect of 15 acres of wet land or merely in respect of 8 acres which the plaintiff said was the extent of the land she had taken possession of from the fourth defendant. The lower Court, having regard to the plaint, the decree, the execution proceedings and the delivery warrant, came to the conclusion that the plaintiff was accountable for mesne profits in respect of 15 acres of wet land. The matter was fully dealt with by the District Judge and it is sufficient to say that the lower Court rightly allowed mesne profits in respect of 15 acres and odd so far as the wet land is concerned.

VENKATA-
SUBBA RAO, J.

RAMAKKA
v.
NEGASAM.
VENKATA-
SUBBA
RAO, J.

The next question is, what is the proper amount of mesne profits? The District Judge referred the matter of the ascertainment of the mesne profits to a Commissioner. This is what the District Judge says in his preliminary order—

“Under Order XXVI, rule 9, Civil Procedure Code, I resolve to appoint a Commissioner to make a local investigation and ascertain the amount of mesne profits which may be awarded to the fourth defendant on the abovementioned extent of land comprised in the items specified in paragraph 2 *supra* after examining witnesses and receiving any documentary evidence which the parties may produce before him.”

When the enquiry was taken up by the Commissioner, the plaintiff contended that the fourth defendant should begin and adduce evidence on the ground that the burden was upon him to make out what the mesne profits allowable to him were. The Commissioner ruled that the plaintiff was the party who was to begin, thus implying that the burden of proof was upon the plaintiff. The plaintiff's vakil declined to call evidence objecting to the ruling and allowed the fourth defendant to examine his witnesses. The latter's case was closed on 13th February 1921 when the plaintiff apparently made an application to be allowed to examine her witnesses at that stage. The Commissioner refused the request. Thereupon, on the 16th February 1921, the plaintiff applied to the District Court to be allowed to examine her own witnesses and the District Judge decided that the ruling of the Commissioner was right and rejected the plaintiff's application. Before I deal with the objection that relates to this, I may advert to certain other matters that transpired before the Commissioner himself.

The plaintiff desired to cross-examine the fourth defendant with reference to a certain allegation made in the latter's written statement in another proceeding.

The Commissioner disallowed the plaintiff's request and on application by the plaintiff to the District Judge, the order of the Commissioner was confirmed.

Exception is taken to the report of the Commissioner on another ground. Under the impression that he could gather information by instituting enquiries regarding the correct amount of mesne profits and act upon such information, he interviewed several ryots and others and collected their opinion and based his conclusions *inter alia* upon the information so obtained.

Next it is said that the Commissioner conducted certain experiments. He had the crop harvested. He confined himself to two small plots of land, and on the results obtained, he based his calculation in regard to the whole land. It has been argued before us that the Commissioner was wrong in adopting this procedure.

I shall deal shortly with these objections. In regard to the last objection it seems to be untenable. It has been pointed out that the two plots were selected out of the entire lands and it has not been shown that the yielding capacity of the other portions which are adjacent to the plots selected is different.

In regard to the objection that the Commissioner was wrong in refusing to allow the plaintiff to cross-examine the fourth defendant in respect of a statement made by the latter in a previous proceeding, the objection must be upheld. Under section 145 of the Evidence Act a witness may be cross-examined as to previous statement made by him in writing without such writing being shown to him or being proved. Only if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The Commissioner refused to allow cross-examination on the ground that the document

RAMAKKA
v.
NEGASAM.
VENKATA-
SUBBA
RAO, J.

RAMAKKA
V.
NEGASAM.
—
VENKATA-
SUBBA
RAO, J.

which contained the previous statement was not produced. The plaintiff was entitled to cross-examine the fourth defendant in regard to his previous statement without showing the latter the document. Only if it became necessary to contradict the fourth defendant, his attention should be called to the writing. The Commissioner acted clearly wrongly in this respect. On another ground the Commissioner's order is sought to be justified. It is said that, when the preliminary order was passed, the Court refused to attach any weight to the fourth defendant's previous statement, and, for that reason, the Commissioner also was justified in refusing to allow questions to be asked in regard to it.

This position is entirely wrong. The Court when passing the preliminary order declined to make any inference from the previous statement as regards the extent of the land in the fourth defendant's possession. The writing was sought to be used before the Commissioner for altogether a different purpose, the purpose being to ascertain the probable yield.

The contention that the Commissioner was not justified in obtaining information in the absence of the parties must be upheld. The Court is not entitled to act on information received in the absence of the parties, nor can it base its judgment on its own knowledge of the facts. The law on this subject is well settled. Lord LANGDALE, M.R., observes in *Harvey v. Shelton*(1)—

"In every case in which matters are litigated, you must attend to the representation made on both sides, and you must not, in the administration of justice, in whatever *forum*, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decision of the Judge, which means are not known to the other side."

(1) (1844) 7 Beav., 455; 49 E.R., 1141.

RAMAKKA
V.
NEGASAM.
—
VENKATA-
SUBBA
RAO, J.

To say that the Commissioner could have come to the same conclusion on the other material before him is no answer. If the case is brought within the general principle that the Judge's mind may, by a possibility, have been biassed, there is a sufficient objection. See *Dobson v. Groves*(1) and *Walker v. Frobisher*(2).

The only other point that remains to be dealt with has reference to the objection that the ruling of the Commissioner in regard to the right to begin is wrong. The District Judge expressed the opinion that the ruling was correct. The fourth defendant claims in this proceeding mesne profits from the plaintiff. Section 2, clause (12) of the Civil Procedure Code, defines mesne profits thus:

"Mesne profits of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom."

It will be seen that mesne profits are not merely profits which a person in wrongful possession has actually received. The argument therefore that the amount of profits actually received is within the knowledge of the person in possession and that therefore the latter should in the first instance give evidence is clearly untenable. In a suit for mesne profits the burden is always held to be on the plaintiff to prove the amount. This is the recognized practice. The proceeding before us is really in the nature of a suit for mesne profits. No ground has been shown why this practice should be departed from. The Commissioner's ruling that the plaintiff should begin is tantamount to a decision that the burden of proof is upon the plaintiff. From the nature of the controversy, what the parties were disputing about was not in regard to the right to begin

(1) (1844) 6 Q.B.R., 637. (2) (1801) 6 Ves. Jun., 70; 21 E.R., 943.

RAMAKKA
v.
NEGASAM.
—
VENKATA-
SUBBA
RAO, J.

but the duty to begin. I am of the opinion that the fourth defendant was bound to adduce evidence in the first instance regarding the amount of mesne profits. (See *Krishna Mohun Basak v. Kunjo Behari Basak*(1).)

I therefore hold that the Commissioner as well as the District Judge were wrong in regard to this matter.

Now that we have decided that the ruling is incorrect, what follows? It has been contended on behalf of the fourth defendant that the plaintiff's *vakil* having refused to adduce evidence when he was called upon to do so, he should not be allowed an opportunity to examine his witnesses. This contention I am unable to understand. When the Commissioner gave a ruling, the plaintiff took a risk in refusing to accept it. But what is the extent of the risk that she took? She took the risk of the ruling of the Commissioner being ultimately pronounced to be correct. If it should be held to be correct by the final tribunal, the plaintiff not having examined her witnesses when she ought to have done so she would of course be completely debarred from adducing any evidence whatsoever. But this is the only risk that the plaintiff took. Immediately the fourth defendant's case was closed, the plaintiff's *vakil* made an application that he should be allowed to let in evidence. The effect of our decision is that the plaintiff should give evidence only after the fourth defendant had closed his case. It therefore follows that the plaintiff should be allowed to examine her witnesses at the close of the fourth defendant's case. The following passage from Taylor on Evidence, Vol. 1, page 291, section 388, has been relied upon by the fourth defendant :—

“The question respecting the right to begin is a matter of practice and regulation upon which the presiding Judge

(1) (1881) 9 C.L.R., 1.

RAMAKKA
v.
NEGASAM.
—
VENKATA-
SUBBA
RAO, J.

must exercise his discretion ; and the Court will not interfere with his decision unless it be clearly proved, not only that the ruling on this point was manifestly wrong, but that it has occasioned substantial injustice.”

This passage would certainly be of assistance to the fourth defendant, if the plaintiff accepting the ruling of the Commissioner had given evidence in the first instance. In that case the Court, although it came to the conclusion that the ruling was incorrect, would not ordinarily interfere with the final decision in the suit. But here the plaintiff did not accept the ruling and refused to examine the witnesses before the fourth defendant gave evidence. In the circumstances, the passage relied upon has no bearing. I have disposed of all the objections taken to the procedure adopted by the Commissioner. I am of the opinion that it is clearly necessary to have another finding in regard to the amount of mesne profits.

I agree with the order that has been proposed by my learned brother.

In compliance with the order contained in the above judgment, the District Judge of Anantapur submitted a finding that a sum of Rs. 1,128-3-8 was due to the petitioner (fourth defendant) from the counter-petitioner (plaintiff).

On receipt of the above finding, their Lordships delivered the following

JUDGMENT :—

The District Judge's finding is based mainly upon the lease-deeds executed in respect of the lands upon which mesne profits accrued during the years that the defendant was out of possession. We have heard no

RAMAKKA
v.
NEGASAM.
—
VENKATA-
SUBBA
RAO, J.

good reasons for doubting the genuineness of these documents, and if they are genuine they afford the best possible evidence of the amount of profits.

The counter-petitioner does not press her objections as to interest. We accept the District Judge's findings.

Civil Miscellaneous Appeal No. 411 of 1921 is allowed. Each side to pay and receive proportionate costs.

K.B.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Victor Murray Coutts Trotter, Chief Justice,
Mr. Justice Ramesam and Mr. Justice Wallace.*

SYED OOMER SAHIB (RESPONDENT—PLAINTIFF),
PETITIONER,

1924,
April 7.

v.

GOPAUL (APPLICANT—DEFENDANT), RESPONDENT.*

*Madras City Tenants' Protection Act (III of 1922), sec. 9—
Tenant against whom a decree for ejectment had been passed
but not executed on the date of the Act, whether entitled to
apply under sec. 9.*

*Held, by the Full Bench :—A tenant against whom a decree
in ejectment had been passed but not executed at the date of
the commencement of the Madras City Tenants' Protection Act
(III of 1922) is "a tenant against whom a suit in ejectment has
been instituted" within the meaning of section 9 of the Act ;
hence he is entitled to apply under the section for an order
directing the landlord to sell the land to him. Latifa Bi v.
Mottai Ammal (1928) I.L.R., 46 Mad., 836, overruled.*

PETITION under section 115 of Act V of 1908, pray-
ing the High Court to revise the order of K. PANDALAI,
Small Cause Judge of Madras, in Miscellaneous Petition
No. 170 of 1922, in Ejectment Suit No. 125 of 1921.
The facts are given in the Order of Reference of
JACKSON, J.

This petition coming on for hearing on Tuesday, the
26th day of February 1924, the Court (JACKSON, J.)
made the following

ORDER OF REFERENCE TO A FULL BENCH.

Defendant in Ejectment Suit No. 125 of 1921,
Court of Small Causes, Madras, applied under section 9

* Civil Revision Petition No. 21 of 1923.

SYED OOMER
SAHIB
v.
GOPAUL.

of the Madras City Tenants' Protection Act, III of 1922, for an order directing plaintiff to sell the land in the suit. The lower Court ordered accordingly and plaintiff seeks to revise its order.

The point for determination is whether at the date when the Act came into force, defendant could be described in the words of section 9, as

"a tenant against whom a suit in ejectment has been instituted."

He was undoubtedly a tenant and plaintiff had instituted an ejectment suit against him in 1921. In November 1921 an order was made by consent by which the defendant was to vacate by January 1922, but the order remained unexecuted when the Act came into force. Plaintiff contends that this order terminated the suit so far as section 9 is concerned, and defendant maintains that it did not. I think that the plain reading of the section clearly supports the defendant. He is a tenant against whom a suit has been instituted, and whether that suit has been decreed or not, it can still be described as instituted. The second portion of the sentence in section 9 may make this still clearer :

"against whom a suit has been instituted or proceeding under section 41, Presidency Small Cause Courts Act, 1882, taken."

If a landlord has applied under section 41, and the Court has proceeded to grant an order to a bailiff, the tenant is none the less one against whom the landlord has taken proceedings under section 41. He is not one against whom the landlord has not taken proceedings because there happens to be a bailiff's order ; nor is the tenant one against whom a suit has not been instituted because there happens to be a decree. A decree as defined in section 2 (2), Civil Procedure Code, conclusively

determines the rights of the parties with regard to all matters in controversy in the suit. But such conclusive determination is not opposed to the ordinary sense of the word "institute." "Institute" means (Oxford Concise Dictionary) "establish, found, set on foot"; the original Latin meaning being "set up," and of course an institution is essentially something that has been established. No doubt in the Civil Procedure Code (Order IV, rule 1) "institute" is treated as synonymous with "commence" but it has never to my knowledge been used as entirely excluding the idea of completion. One cannot say that "instituted" essentially means "begun but not completed." Section 9 really provides that any tenant whose ejectment was contemplated, but who was not ejected at the time when the Act came into force, can enjoy its benefit. Apart from the language, there would be no sense in discriminating between suits in which decrees had and suits in which decrees had not been passed. The important point was whether the tenant had or had not been ejected.

The petitioner seeks to fortify this finding by arguments based on the other portions of section 9, but I am not sure that they have much weight. There is a provision that the tenant may apply to the Court fifteen days after the service on him of summons, and this, it is argued, must refer to suits pending at the time of the Act coming into force. But if the section had no retrospective effect at all, and only referred to suits filed after the Act, there would necessarily be summons, and this passage may well be confined to such summonses.

So too in regard to sub-clause (3)

"any decree that may have been passed but which has not been executed, shall be vacated."

SYED OOMER
SAHIB
v.
GOPAUL.

SYED OMER
SAHIB
v.
GOPAUL.

This again could apply to suits filed after the passing of the Act. A tenant who is defendant in such a suit may have applied under sub-clause (1), have made default and had his application dismissed under sub-clause (2), may then have had the suit decreed against him, may have had his default excused, may have paid the price under sub-clause (3) and the decree which was passed but held in abeyance shall then be vacated. Therefore, I do not think that the mention of "decree" in sub-clause (3) necessarily implies that suits decreed, but not executed are referred to in sub-clause (1); but since I find on other grounds that such suits are undoubtedly within the terms of sub-clause (1), probably the decrees in such suits are those which were mainly in view when sub-clause (3) was drafted.

Accordingly I should find no difficulty in supporting the judgment now sought to be revised; only my attention has been called to the ruling in *Latifa Bi v. Mottai Ammal*(1):—

"The general frame of the Act including section 10, makes it clear that section 9 was not intended to enable tenants to apply for sale of the land to them under this section after the ejectment suit to which they were parties, had been decreed."

Section 10 lays down that in cases of compensation for tenants' buildings and trees (sections 4, 5) and in cases of fixing a reasonable rent (sections 6, 8) if at the time of the Act coming into force, suits in regard to such matters are pending, or are decreed but are awaiting execution, the Act may nevertheless be applied.

There is no mention of section 9, and therefore it has been held that the Act was intended to apply retrospectively only to such cases as are described in section 10.

(1) (1923) I.L.R., 46 Mad., 836.

SYED OMER
SAHIB
v.
GOPAUL.

But if section 10 were intended to be a general clause covering every case, the cases contemplated in section 9 even as interpreted in this ruling would certainly be mentioned under the first alternative in section 10 "which are pending." The section would run "sections 4, 5, 6, 8 and 9 shall apply to suits . . . which are pending and in which decrees have not been passed, and sections 4, 5, 6 and 8 to suits which are pending and in which decrees have been passed but not executed." The more probable explanation seems to be that section 9 is a code in itself; and is not in any way affected by section 10. I should have hesitated to put forward this view in face of the clear ruling in *Latifa Bi v. Mottai Ammal*(1) but I see that this has been held by SCHWABE, C.J., in a case hitherto unreported—C.C.C.A. Nos. 51—57 of 1921, 17th December 1923 [since reported, see *Kanniappa Chettiar v. Ramachandraiyyar*(2)].

In these circumstances, I refer the case to the Hon'ble the Chief Justice for reference to a Full Bench.

The point for reference is whether a tenant against whom a decree has been passed but not executed is a tenant entitled to apply for sale under section 9, Madras City Tenants' Protection Act, III of 1922.

ON THIS REFERENCE

K. V. Sessa Ayyangar (with *R. V. Seshagiri Rao*) for petitioner.—The Act is not expressly or by implication retrospective. Section 9 of the Act, under which the tenant applies, gives the right only to such tenants as against whom "a suit in ejectment has been instituted," i.e., tenants in pending cases and not those against whom a decree in ejectment had been passed. In such cases the suit must be deemed to have terminated. Section 4

(1) (1923) I.L.R., 46 Mad., 836.

(2) (1924) 46 M.L.J., 407.

SYED OOMER
SAHIB
v.
GOPAUL.

gives an option to a landlord while no such option is given in section 9; and section 9 cannot be applied so as to take away proprietary rights. I rely on *Latifa Bi v. Mottai Ammal*(1). *Kanniappa Chettiar v. Ramachandraiyyar*(2) is distinguishable as a pending case. All the sections of the Act must be read together and not section 9 alone. Section 9 must be construed with reference to section 10. At any rate clause (3) of section 9 is ambiguous.

T. L. Venkatarama Ayyar (with *P. Sankaranarayana*) for respondent was not called upon.

OPINION.

COUTTS
TROTTER,
C.J.

COUTTS TROTTER, C.J.—In this case (Civil Revision Petition No. 21 of 1923) the defendant in Ejectment Suit No. 125 of 1921 in the Small Cause Court applied under section 9 of the Madras Act III of 1922 for an order directing the plaintiff to sell the land in the suit. The sole question is whether at the time the Act came into force the defendant can be described as “a tenant against whom a suit in ejectment has been instituted.” It is not contended that those words can bear the extreme meaning that any tenant against whom a suit in ejectment had ever been instituted—a suit which might have been brought to a completion by execution and ejectment—is within these words of section 9; but it is contended that it applies to a case where the suit in ejectment has resulted in judgment but has not been executed or completed by the process of ejectment. It seems to me that that contention is right and that the tenant intended by the section is a person who is threatened with ejectment as the result of legal proceedings instituted against him but has not, in pursuance of those proceedings, been

(1) (1923) I.L.R., 46 Mad., 886.

(2) (1924) 46 M.L.J., 407.

actually ejected. It seems to me immaterial whether or no the proceedings resulted in a decree which might lead, but has not led, to an actual ejectment of the tenant. This is in accordance with the view expressed by the late Chief Justice and my brother WALLACE in [*Kanniappa Chettiar v. Ramachandraiyyar*(1)] and I agree with them in thinking that the case of *Latifa Bi v. Mottai Ammal*(2) was wrongly decided. The answer to the reference will therefore be in the affirmative.

RAMESAM, J.—I agree.

WALLACE, J.—I agree.

N.B.

RAMESAM, J.

WALLACE, J.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Victor Murray Coutts Trotter, Chief Justice,
Mr. Justice Ramesam and Mr. Justice Wallace.*

MANICKAM PILLAI (SIXTH DEFENDANT), PETITIONER,

v.

MAHUDUM BATHUMMAL AND SIX OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 TO 5 AND 7), RESPONDENTS.*

Civil Procedure Code, O. IX, r. 9, and O. III, r. 4 (2)—“Appearance” of pleader—Pleader stating “no instructions” to Court—Withdrawal of vakalat with leave of Court.

Held, by the Full Bench :—When a pleader engaged in a case reports that he has no instructions, whether after he has asked for an adjournment and been refused or not, he must be deemed not to have appeared in the case thereafter, even if there be no formal withdrawal in writing of the vakalat—*Radha Kishan v. The Collector of Jaunpur*, (1901) I.L.R., 23 All., 220 (P.C.), followed.

Held further, that the Court must be deemed to have given its leave within the meaning of Order III, rule 4 (2), Civil Procedure Code, to the pleader to withdraw his vakalat when it does not object to such withdrawal.

(1) (1924) 46 M.L.J., 407.

(2) (1923) I.L.R., 46 Mad., 886.

* Civil Revision Petition No. 899 of 1922.

SYED OOMER
SAHIB
v.
GOPAUL.
—
COUTTS
TROTTER,
C.J.

1924,
April 11.

MANICKAM
PILLAI
v.
BATHUMMAL.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the Order of C. V. KRISHNASWAMI AYYAR, Subordinate Judge of Tuticorin, in Interlocutory Application No. 558 of 1922 in Original Suit No. 16 of 1921. This petition was referred to a Full Bench by the CHIEF JUSTICE at the suggestion of WALLACE, J.

In this case which was a suit for recovery of Rs. 10,000 based on accounts, the plaintiff's pleader appeared in Court on the day fixed for the hearing of the case and asked for an adjournment. On the adjournment being refused, he took from the Court the plaint which he had drawn and signed and endorsed on it as follows:—

"I have no instructions except to apply for an adjournment.

(Signed) A. V. KRISHNASWAMI AYYAR,

Vakil for the Plaintiff (16th April 1922)."

Then the suit was dismissed with the costs of such defendants as appeared in the case. Thereupon on an application under Order IX, rule 9, Civil Procedure Code, to set aside the order of dismissal for default, the Court held that though the allegations in the affidavit were not sufficient to excuse the default, the suit might be restored to file as a matter of grace as the plaintiff was a woman and as the value of the suit was Rs. 10,000. The Court accordingly set aside the dismissal for default on payment of costs to the defendant and restored the suit to file. Against this order the defendant preferred this Civil Revision Petition to the High Court, which was, as stated before, referred to a Full Bench.

ON THIS REFERENCE

P. V. Krishnaswami Ayyar for petitioner.—So long as the vakalat is not withdrawn, the vakil must be

deemed to be acting for the client and the plaintiff must be deemed to have "appeared" through him. Reference was made to section 2 (15), definition of "pleader," and Order III, rule 4 (2), Order V, rule 1 (2) (b), Order IX, rule 9, and Order XVII, rules 2 and 3, Civil Procedure Code. The pleader did not withdraw from the case and no leave of the Court as required by Order III, rule 4 (2), Civil Procedure Code, was given determining the engagement of the pleader. He relied on *Patinhare Tarkatt Rama Mannadi v. Vellur Krishnan Menon*(1) and distinguished *Gopala Row v. Maria Susaya Pillai*(2), *Ramanuja Reddiar v. Rangaswami Aiyangar*(3), *Shankar Dat Dube v. Radha Krishna*(4). He drew the attention of the Court to *Radha Kishan v. The Collector of Jampur*(5).

A. Swaminatha Ayyar and *K. R. Rangaswami Ayyangar* for respondents were not called upon.

OPINION.

COUTTS TROTTER, C.J.—In this case the plaintiff's vakil appeared in Court on the day fixed for the hearing of the suit, asked for an adjournment and stated that, if that adjournment were not granted, he had no further instructions to go on with the case. He had previously filed a vakalat in the ordinary form. He did something more than the mere asking for an adjournment. He took the plaint which he had drawn and signed, and endorsed it as follows:—

"I have no instructions except to apply for an adjournment.

(Signed) A. V. KRISHNASWAMI AYYAR,

Vakil for the Plaintiff (with the date)."

The relevant provision of the Code is Order III, rule 4. Sub-rule (1) of that rule is

(1) (1903) I.L.R., 26 Mad., 267.

(2) (1907) I.L.R., 38 Mad., 274.

(3) (1908) 18 M.L.J., 51.

(4) (1898) I.L.R., 20 All., 195.

(5) (1901) I.L.R., 23 All., 220 (P.C.).

MANICKAM
PILLAI
v.
BATHUMMAL.

COUTTS
TROTTER,
C.J.

MANICKAM
PILLAI
v.
BATHUMMAL.
—
COUTTS
TROTTER,
C.J.

"The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorized by the power-of-attorney to act in this behalf."

Sub-rule (2) is,

"Every such appointment, when accepted by a pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the pleader, as the case may be, and filed in Court."

It is sought to be said here that, although this vakil wrote what I have read on the back of the plaint after having filed a vakalatnama, the vakalatnama must be considered to continue in force until something further was done, and it is also argued that the effect of the vakalatnama being considered to be in force is to make the pleader constructively appear in a proceeding in which he has explicitly stated that he does not appear. In our opinion, the statute does not require the writing containing the withdrawal by the pleader of his vakalat to be in any specified form, and it appears to us that that which he endorsed on the back of the plaint was a perfectly good written withdrawal from his duties and obligations under the vakalat. That is really sufficient to dispose of this case, and Mr. Krishnaswami Ayyar very frankly said that, if we take that view as to the proper construction of the writing, the case, so far as he is concerned, is unarguable. But, while basing our decision on that short ground, we think, in view of some decisions of this Court,—one recently reported decision and another which is unreported—that we ought to point out that when this matter was discussed in those cases, attention does not seem to have been drawn to the decision of the Privy Council in *Radha Kishan v.*

The Collector of Jaunpur(1). The facts of that case are set out in a quotation from the judgment of the Subordinate Judge, which runs as follows :—

"That day (i.e., the day fixed for hearing) the pleader for the applicant stated that he could not conduct the case, and he had received no instructions from his client. Thereupon the Court proceeded to try the case and tried and decided the issues on the evidence adduced on the plaintiff's behalf and decreed the suit against the applicant."

Their Lordships held in that case that the applicant could not be held in the circumstances to have appeared. We trust that if this matter comes before the Courts again, notice will be taken of that decision, because, so far as appears, a wider question is determined there, as there is no statement—a feature that exists in this case—to the effect that the pleader has filed an instrument in writing taking himself out of his vakalat, a withdrawal on his part which Order III, rule 4, contemplates.

The exact question put to us is, if when a pleader reports no instructions, whether after he has asked for an adjournment and been refused, or not, the Court is correct in holding that the party for whom the pleader was appearing has not appeared. We think that the only answer can be that, at any rate in the circumstances of this case, the pleader cannot be deemed to have appeared.

I should add one other word. The section says that the withdrawal of the pleader must be with the leave of the Court. It does not say, nor do I think we are to import into it, that any formality is necessary in the manner of the granting of the leave of the Court, and in the circumstances, we must presume that, in a case like the present, the Court in assenting to the conduct

MANICKAM
PILLAI
v.
BATHUMMAL.
—
COUTTS
TROTTER,
C.J.

(1) (1901) I.L.R., 28 All., 220 (P.C.).

MANICKAM
PILLAI
v.
BATHUMMAL.
—
COUTTS
TROTTER,
C.J.

of the vakil and in raising no question about his withdrawal, must be taken within the meaning of the section to have given its consent.

The case will go back to the single Judge for disposal on any point not determined by this Full Bench.

RAMESAM, J. RAMESAM, J.—I agree.

WALLACE, J. WALLACE, J.—I agree.

N.R.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Victor Murray Coutts Trotter, Chief Justice,
Mr. Justice Ramesam and Mr. Justice Wallace.*

1924,
April 11.

KRISHNAMACHARIAR (COUNTER-PETITIONER), PETITIONER,

v.

SRIRANGAMMAL AND TWO OTHERS (PETITIONERS),
RESPONDENTS.*

Rule applying sec. 5, Limitation Act (IX of 1908), to applications under O. IX, r. 13, Civil Procedure Code, whether ultra vires.

Held by the Full Bench:—The rule framed by the High Court applying section 5 of the Limitation Act to applications under Order IX, rule 13 of Civil Procedure Code, is *intra vires*. *Sennimalai Goundan v. Palani Goundan*, (1916) 32 I.C., 975, followed.

PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of M. N. KRISHNA AYYAR, District Munsif of Kovilpatti, in Interlocutory Application No. 15 of 1922, in Original Suit No. 296 of 1921.

The facts are given by KRISHNAN, J., in his Order of Reference to a Full Bench.

This petition coming on for hearing on the 4th and 5th days of December 1923, the Court made the following

* Civil Revision Petition No. 633 of 1922.

ORDER OF REFERENCE TO A FULL BENCH.

KRISHNAMA-
CHARIAR
v.
SRIRANG-
AMMAL.

KRISHNAN, J.—The chief question argued in this case is whether the rule framed by this High Court as an addition to rule 13, Order IX of the Civil Procedure Code, by which the provisions of section 5 of the Limitation Act were made applicable to applications to set aside *ex parte* decrees is *ultra vires* or not. The petitioner contends that it is and that the lower Court had no jurisdiction to excuse the delay in this case and should have dismissed the application as barred by limitation. The defendants who applied to set aside the *ex parte* decree against them had all of them been duly served and under article 164 of the Limitation Act the period of limitation for setting aside the decree is 30 days from the date of the decree. The application in this case was made beyond time and if delay cannot be excused the petition should have been dismissed. The Limitation Act does not by itself make section 5 thereof applicable to applications of this sort, and, but for the rule framed by the High Court, the Court would have no power to set aside the decree. The question whether the rule is *ultra vires* or not, thus necessarily arises. If the rule is *intra vires* there is no ground for interfering with the lower Court's order on the merits under this Court's revisional jurisdiction. I am not prepared to say that the lower Court exercised its discretion in excusing delay and setting aside the *ex parte* decree in any illegal or improper manner if it had jurisdiction to do so.

The question of the validity of the rule has, therefore, to be considered in this case. It was framed by this Court under the power given to it by sections 122 and 128, Civil Procedure Code. The rule necessarily alters the period of limitation for applications under Order IX, rule 13, Civil Procedure Code, fixed by the Limitation Act. Do our rule-making powers

KRISHNAMA-
CHARIAR
v.
SRIKANG-
AMMAL.

extend far enough to enable us to frame a rule which has that effect? I am inclined to think they do not. Section 122 gives us power to frame rules,

“regulating our own procedure and the procedure of the Civil Courts subject to our superintendence”

and no more. If the rule framed falls within that category, we can no doubt annul, alter or add to any rule in the first schedule of the Civil Procedure Code. Section 128 reiterates that the rule should refer to the procedure of Civil Courts and adds one further restriction that the rule framed should not be inconsistent with the provisions in the body of the Code. It then gives examples of the sort of rules that may be framed. But there is no indication here that we could frame a rule to alter the limitation fixed for any application by the Limitation Act.

The question whether the rule in dispute is *ultra vires* or not was once raised before COUTTS TROTTER, J., sitting as a single Judge and he held that it was not (see *Sennimalai Goundan v. Palani Goundan*(1)). He held the view that

“the articles in the Limitation Act limiting applications of this nature which are almost entirely interlocutory deal clearly with matters of procedure.”

With all respect to the learned Judge, I feel considerable difficulty in accepting his view. I do not see how we can distinguish between the limitation for suits and the limitation for applications. If one is procedure the other must equally be procedure. I think neither of them can properly be brought under the term “procedure.” The first schedule of the Civil Procedure Code deals with numerous kinds of applications. If we can alter the limitation for one it will follow that we have the power to alter the limitation with regard to every one of them. Can we then, for example, pass a

(1) (1916) 32 I.O., 975.

rule to alter the limitation for execution applications? It seems going too far to answer the question in the affirmative.

A Full Bench of the Allahabad High Court unanimously held the view that limitation could not be so affected; the learned Judges say in *Narsingh Sahai v. Sheo Prasad* (1):

“We are unanimous in holding that this Court has no power by any rule that it may make to alter the period of limitation prescribed by the Indian Limitation Act.”

This view has been followed in the Lahore High Court by Mr. Justice RAOOF in *Madan Gopal v. Malawa Ram*(2). He observes:

“The Court has power to alter, amend and add to rules of procedure laid down in the Code of Civil Procedure according to section 122 of the Code; but it has no power to alter the period of limitation provided by the Limitation Act”

see page 778. It was held by the Bombay High Court under the corresponding section 652 of the old Civil Procedure Code which gave power to the High Court, like the present section 122, to make rules to regulate matters connected with its own procedure and the procedure of Civil Courts subject to its superintendence, that the High Court had no power to frame a rule modifying expressly or by necessary implication any rule of limitation prescribed by the Limitation Act [see *Chunilal Jethabhai v. Dahyabhai Amulakh*(3)].

Our attention was drawn by the respondents' *vakil* to Order XXII, rule 9, clause (3) of the Civil Procedure Code, where there is an express provision made by the legislature itself that section 5 of the Limitation Act shall apply to applications under sub-rule (2) of that rule and it was argued that this was an indication that the legislature considered the application of section 5 to any

(1) (1918) I.L.R., 40 All., 1 (F.B.). (2) (1922) 68 I.O., 777.
(3) (1908) I.L.R., 32 Bom., 14 (F.B.).

KRISHNAMA-
CHARIAR
v.
SRIKANG-
AMMAL.

KRISHNAMA-
CHARIAR
v.
SRIRANG-
AMMAL.

of the applications dealt with in the first schedule as merely a matter of procedure and that the High Court has therefore power to frame similar rules under section 122, Civil Procedure Code. On the other hand it was urged that the legislature itself added the provision as it could not be done by any rule framed by the High Court. Neither argument seems to me to be sound and I think no inference can be drawn from it one way or the other.

Our attention was also drawn to the words of section 5 of the Limitation Act as they stood at the time the rule in question here was framed. It contemplated the section being made applicable "by any enactment or rule for the time being in force." But in my opinion this has no bearing on the question whether the rule making it so applicable is a valid rule or not. That has to be decided with reference to the scope of the rule-making power. It may be observed that section 5 has been recently amended by Act X of 1922 whereby the words "by any enactment or rule" have been changed into "*by or under any enactment*," the word "rule" being taken away. There was some discussion about the effect of this alteration and the reason for it, but I think it has no bearing on the present case.

For the above reasons I am inclined to think that the rule in question is *ultra vires*. But as my learned brother takes a different view and as the question is of some importance as it refers to the scope of our rule-making powers and as he desires that the question should be referred to a Full Bench, I agree to that course.

We refer to the Full Bench the following question:—

"Is the rule framed by the High Court applying section 5 of the Limitation Act to applications under Order IX, rule 13 of the Civil Procedure Code, *intra vires* or not?"

WALLER, J.—I regret that I cannot agree. Section 5 of the Limitation Act may be made applicable by rule to any application. Such a rule has been passed under section 122, Civil Procedure Code. I am not prepared to dissent from COUTTS TROTTER, J.'s view that this is a matter of procedure and that the High Court had power to frame such a rule under section 122, Civil Procedure Code. I agree with him that the articles in the Limitation Act limiting applications of this kind deal with matters of procedure. The rulings quoted seem to me to be not precisely in point. All that they decided was that the time requisite for getting certain copies, excluded by section 12 of the Limitation Act, could not be enlarged by implication in consequence of a rule having been passed insisting on a further copy being produced. What one Court held was that the rule was valid enough, but had no effect on section 12. That is not the point here. There is no question here of altering expressly or by implication a period of limitation. It is a question of applying by rule a section of the Limitation Act which itself provides for such application. Rule 9 (3) of Order XXII, Civil Procedure Code, indicates, to my mind, that the legislature regarded the matter as being one of procedure. I am not prepared to infer from the fact that the legislature itself inserted sub-rule (3), that the High Court has no power to insert a similar rule elsewhere in Schedule I. I would therefore hold that the rule in question is *intra vires*. In any case, it has been in force and followed for a number of years. Its validity seems to have been unchallenged since 1915 [vide *Sudalaimuthu Kudumban v. Andi Reddiar*(1)] and I think that the best course, now that the question has been raised and we are differing on it, is to refer it for the decision of a Full Bench. I therefore

KRISHNAMA-
CHARIAR
v.
SRIRANG-
AMMAL.

KRISHNAMA-
CHARIAR
v.
SRIKANG-
AMMAL.

agree that the question framed by my learned brother be so referred.

ON THIS REFERENCE

K. S. Ramabhadra Ayyar for petitioner.—The new rule is *ultra vires*. Sections 122 and 128, Civil Procedure Code, enable the High Court to make rules relating only to procedure and not to limitation also. The change in the language of section 5 of the Limitation Act into “by or under any enactment” shows that periods of limitation can be altered only by legislature and not by rules made by the High Court.

[CHIEF JUSTICE.—Do not the words mean “directly by an Act or indirectly by an Act (i.e.) by any rule made under the powers given by an Act”?]]

No. If so, the section must run as “by any enactment or under any rule framed under any enactment.” “By an enactment” means by a whole Act framed for the purpose. “Under an enactment” means under a portion of an Act. A rule of limitation is not a rule of procedure.—*Girish Chundra Basu v. Apurba Krishna Dass*(1), *Rajah of Pittapur v. Venkata Subba Row*(2), *Sree Krishna Doss v. Alumbi Ammal*(3). Some matters, though they are in the first schedule of the Civil Procedure Code, cannot be changed by rules framed by the High Court. Compare Order XXI, rules 32 and 33, which have been changed by Act XXIX of 1923. This new Act cannot be changed by any rule of the High Court.

[WALLACE, J.—Cannot the High Court change Order XXII, rule 9 (3) ?]

Not sub-clause (3) which is not a rule of procedure but a rule of limitation. See *Mungul Pershad Dicht v. Grija Kant Lahiri*(4). Once the time limited by law is

(1) (1894) I.L.R., 21 Cal., 940 (F.B.). (2) (1916) I.L.R., 39 Mad., 645.
(3) (1913) I.L.R., 36 Mad., 108. (4) (1882) I.L.R., 8 Cal., 51 (P.C.).

KRISHNAMA-
CHARIAR
v.
SRIKANG-
AMMAL.

passed the other side acquires a valuable right and that right cannot be interfered with by any rule of procedure. See *Alagappa Chettiar v. Chockalingam Chettiar*(1), *Colonial Sugar Refining Company v. Irving*(2), *Narsingh Sahai v. Sheo Prasad*(3). Right to apply to set aside an *ex parte* decree is a substantive right; *Mohumud Buhadoor Khan v. The Collector of Bareilly*(4). An application does not differ from an appeal in this respect. Compare *Madurai Pillai v. Muthu Chetty*(5), *Lingayya v. Chinna Narayana*(6), *Ramana v. Babu*(7), *Chunilal Jethabhai v. Dahyabhai Amulakh*(8).

A. Swaminatha Ayyar for respondent was not called upon.

OPINION.

COUTTS TROTTER, C.J.—By a rule framed by this Court in 1914 as an addition to rule 13, Order IX of the Civil Procedure Code, the provisions of section 5 of the Limitation Act were made applicable to applications to set aside *ex parte* decrees. It is suggested that that rule is *ultra vires* of the rule-making powers vested in this Court. I propose now to say very little about it, because I have already expressed my opinion on this matter in *Sennimalai Goundan v. Palani Gounden*(9) and nothing that I have heard in the course of an extended argument induces me to think that that opinion was wrong. I think that the strongest ground on which the rule can be supported is this : that section 5 of the Limitation Act obviously contemplates its extension by means of rules. In its old form it used the word “rule” and the section was to be made applicable “by any enactment or rule.” The words have been changed as follows : instead of “by

COUTTS
TROTTER,
C.J.

(1) (1918) I.L.R., 41 Mad., 904 (F.B.). (2) [1905] A.C., 369.
(3) (1918) I.L.R., 40 All., 1 (F.B.). (4) (1874) 21 W.R., 318.
(5) (1915) I.L.R., 38 Mad., 823 (F.B.). (6) (1918) I.L.R., 41 Mad., 169 (F.B.).
(7) (1914) I.L.R., 37 Mad., 186. (8) (1908) I.L.R., 32 Bom., 14 (F.B.).
(9) (1916) 32 I.C., 975.

KRISHNAMA-
CHARIAR
v.
SRIRANG-
AMMAL.
—
COUTTS
TROTTER,
C.J.

any enactment or rule," the section now runs "by or under any enactment." These words, though they mean the same thing, obviously express it better. In my opinion, it is perfectly clear that the High Court had power under the combined effect of section 5 of the Limitation Act and section 122 of the Civil Procedure Code to apply the provisions of section 5, which after all are a relaxation of the rigour of the law in a matter eminently suitable to such an extension, to the setting aside of *ex parte* decrees. I agree with my brother WALLER and the answer to the question referred to us is, that the rule framed by the High Court is *intra vires*.

RAMESAM, J. RAMESAM, J.—I agree with the judgment delivered by my Lord as to the construction of the words "by or under any enactment" in section 5 of the Limitation Act. So far as section 5 is concerned, the section itself contains an indication that it may be so extended by any other enactment or by any rule made under any other enactment. But even assuming that the contention of the learned vakil for the appellant as to the effect of the amendment is correct, namely, that the High Court cannot by any rule in the Civil Procedure Code extend section 5 of the Limitation Act, the effect of the amendment which was made in 1922 can be that only after 1922 the High Court cannot make such alterations or additions. It cannot be contended that an amendment of 1922 repealed the rule made in 1916. All that can be said is that no such rule can be made hereafter, but as I have said already I do not agree with the contention of the learned vakil as to the effect of the words "by or under any enactment."

WALLACE, J. WALLACE, J.—I agree with what both my learned brothers have said, but I would like to add one or two sentences. The appearance of a similar rule in Order XXII, rule 9, would indicate that such a provision of

limitation was deliberately placed by the legislature in the first schedule of the Civil Procedure Code and therefore alterable as a matter of procedure by force of section 122. Section 122, as I read it, gives power to annul this provision in Order XXII, rule 9, and therefore would, if that provision were not found in Order XXII, rule 9, give power to insert such a provision in that Order, if advisable. If such a power can be legally exercised in case of Order XXII, rule 9, I cannot see any possible reason why it should not be exercised in the case of Order IX, rule 13.

N.R.

APPELLATE CIVIL.

Before Mr. Victor Murray Coutts Trotter, Chief Justice,
Mr. Justice Ramesam and Mr. Justice Wallace.

BOLLA GURUVAYYA AND FOUR OTHERS (DEFENDANTS),
(APPELLANTS),

v.

CHERUKURI VENKATARATHNAM (PLAINTIFF),
RESPONDENT.*

Suit under sec. 77 of Indian Registration Act—Tender of tampered document for registration—Scope of Registrar's inquiry before registration—Scope of Court's inquiry under sec. 77 after Registrar's refusal to register.

The duty of a Registrar to whom a document which appears to have been tampered with after execution is presented for registration by the claimant, is to ascertain whether it is actually in the state in which it was executed by the parties and not to go into a roving inquiry whether the document tendered represents the substance of the agreement between the parties; and the duty of the Court in which a suit is filed under section 77 of the Registration Act to have it registered after refusal by Registrar is exactly the same.

* Letters Patent Appeal No. 6 of 1923.

KRISHNAMA-
CHARIAR
v.
SRIRANG-
AMMAL.
—
WALLACE, J.

1924,
April 10.

GURUVAYYA
v.
VENKATA-
BATHNAM.

APPEAL under clause 15 of the Letters Patent against the judgment of PHILLIPS, J., dated 19th February 1923, and passed in Appeal No. 300 of 1921 preferred against the decree of the District Court of Kistna at Masulipatam in Original Suit No. 17 of 1920.

In this case the plaintiffs as purchasers of certain lands from defendants presented for registration a sale-deed purporting to have been executed in their favour by defendants in June 1918. Upholding the defendants' objection that the sale-deed as presented was a forgery in that its date was altered from April to June and many portions of the contents and signatures therein were altered by erasure, additions and substitutions by the plaintiffs to whom it was given after execution, the Registrar declined to register it. On a suit being brought under section 77 of the Registration Act to have it registered, the District Court decreed the suit. On appeal to the High Court, PHILLIPS, J., concurred with the lower Court, while DEVADOSS, J., accepted the defendants' case and held that the suit should be dismissed. As the judgment of PHILLIPS, J., concurred with that of the lower Court, the appeal was dismissed and the defendants preferred this Appeal under clause 15 of the Letters Patent.

K. Krishnama Achariyar for appellant.

S. Varada Achariyar and *N. Rama Rao* for respondents.

JUDGMENT.

COUTTS
TROTTER,
C.J.

COUTTS TROTTER, C.J.—This was a suit brought under section 77 of the Indian Registration Act which enables a person who has tendered a document for registration to bring a suit in a Civil Court against the refusal of the Registrar to register it.

In this case the plaintiff tendered a document, which is before us, for registration. The document bears the

most apparent traces of having been tampered with. In one sheet all the glaze of the paper has been destroyed and there is very deep discoloration. Other sheets bear obvious signs of the surface of the paper having been chemically dealt with, but throughout, although the discoloration is extensive in the operative sheets of the document, the signature, which is admitted, and the stamp paper at the top, are practically intact. Expert evidence has shown that the discoloration and the destruction of the glaze on the surface of the paper are due to chemical action. The inference that those alterations were made after the execution of the document in its original state by the defendants is almost irresistible. Naturally enough the plaintiff was asked what explanation he proposed to offer. The one he gave was so childish that hardly any of the learned Judges who considered this matter have treated it seriously. That being so, what is the position? Is this Court to enter on a roving inquiry into the probabilities and the surrounding circumstances and put itself the question, Does this document, whatever its history, represent the substance of the agreement between the parties? In my opinion, that is a wholly otiose and irrelevant inquiry. The Registrar has to ask himself merely this: Is this document now tendered to me to be registered actually in the state in which it was executed by the parties to it? In my opinion, he would be exceeding his functions if he went into a roving inquiry as to whether the substance of the document truly represented the agreement actually concluded. He is concerned alone with the form, and not with the substance of the document. It appears that, in a suit under section 77, the same considerations should guide the Court which should guide the Registrar in considering his duty to register or to refuse registration. Indeed,

GURUVAYYA
v.
VENKATA-
BATHNAM.
—
COUTTS
TROTTER,
C.J.

GURUVAYYA
v.
VENKATA-
RATHNAM.
—
COUTTS
TROTTER,
C.J.

were it otherwise, the Court would be called upon to say, in effect, that the Registrar was perfectly justified in refusing registration, but that the Court will nevertheless order it to be registered; and the result might be that the Court would order registration of a document which had been altered behind the back of the person who executed it and after its execution and signature on the ground not that he had ever executed it in its present state, but that it represented what had actually been agreed between the parties. In my opinion, such a conclusion is so absurd as to refute itself.

The appeal must be allowed and the suit dismissed with costs throughout.

I may add that, if the facts were as the plaintiff contends, namely, that, although he has tampered with the document, the agreement was that which he contended it to be, he has a remedy other than by proceedings under this Act, or at any rate he had, though perhaps by now he may have lost it by limitation.

If the impugned document has been registered in pursuance of the order of the District Judge—and we are given to understand that it has—the registration stands cancelled. This order will be communicated to the Registrar of Kistna district.

RAMESAN, J. RAMESAN, J.—I agree.

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

N.B.

SPECIAL BENCH.

*Before Mr. Victor Murray Coutts Trotter, Chief Justice,
and Mr. Justice Ramesam.*

THE COMMISSIONER OF INCOME-TAX, MADRAS
(REFERRING OFFICER),

1924,
March 27.

v.

BINNY & CO. (MADRAS), LIMITED (ASSESSEE).*

Income-tax Act (XI of 1922)—Super-tax—Value of income—Company—Surplus accumulation of profits, not distributed among shareholders—Bonus shares issued to shareholders representing their share of profits—Liability of shareholders to income-tax or super-tax on such shares—Bonus shares, whether income.

Where the surplus accumulation of profits of a company, instead of being distributed among its shareholders, was capitalized under a special resolution of the company, and new shares were issued to the shareholders representing their share in the accumulated surplus,

Held, that the new shares were not taxable as income, and that the shareholders were not liable to super-tax on the value of the new shares issued to them.

Inland Revenue Commissioners v. Blott—Inland Revenue Commissioners v. Greenwood [1921] 2 A.C., 171 (view of the majority of the House of Lords, followed); and *Swan Brewery Company, Limited, v. Rex* [1914] A.C., 231, distinguished.

CASE stated under section 66 (2) of the Indian Income-tax Act for decision of the question whether the Assessee, Messrs. Binny & Co. (Madras), Limited, as a shareholder in the Deccan Sugar and Abkari Co., Limited, was liable to pay super-tax on the value of bonus shares newly issued by the latter in the year 1921.

The material facts appear from the judgment of the learned Chief Justice.

* Referred Case No. 1 of 1924.

GURUVAYYA
v.
VENKATA-
RATHNAM.
—
COUTTS
TROTTER,
C.J.

were it otherwise, the Court would be called upon to say, in effect, that the Registrar was perfectly justified in refusing registration, but that the Court will nevertheless order it to be registered; and the result might be that the Court would order registration of a document which had been altered behind the back of the person who executed it and after its execution and signature on the ground not that he had ever executed it in its present state, but that it represented what had actually been agreed between the parties. In my opinion, such a conclusion is so absurd as to refute itself.

The appeal must be allowed and the suit dismissed with costs throughout.

I may add that, if the facts were as the plaintiff contends, namely, that, although he has tampered with the document, the agreement was that which he contended it to be, he has a remedy other than by proceedings under this Act, or at any rate he had, though perhaps by now he may have lost it by limitation.

If the impugned document has been registered in pursuance of the order of the District Judge—and we are given to understand that it has—the registration stands cancelled. This order will be communicated to the Registrar of Kistna district.

RAMESAN, J. RAMESAM, J.—I agree.

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

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The material facts appear from the judgment of the learned Chief Justice.

* Referred Case No. 1 of 1924.

THE COMMISSIONER OF
INCOME-TAX
v.
BINNY & Co.

Nugent Grant for the Assessee.—The surplus accumulations of profits of the company were never paid to the shareholders as dividend. They were converted into capital of the company under a special resolution of the company. They were distributed as new shares to the shareholders in addition to their original shares. The case falls within the decision of the majority of the Law Lords in *Inland Revenue Commissioners v. Blott—Inland Revenue Commissioners v. Greenwood*(1). The decision in *Swan Brewery Company, Limited, v. Rex*(2) does not govern this case. It was a decision on the language of a special statute, Dividend Duties Act (1902) of Western Australia, in which the term “dividend” is defined in section 2 as including “any profit or advantage,” etc. Reference was also made to *Bouch v. Sproule*(3).

Government Pleader (C. V. Anantakrishna Ayyar) for the Government.—This case is concluded by the decision of the Privy Council in the *Swan Brewery Company, Limited, v. Rex*(2). The decision was delivered by Lord SUMNER and has been explained by himself in *Blott's* case(1). His Lordship says in the latter case, that the decision in the former case was not based on the particular language of the Statute of Western Australia (Dividend Duties Act, 1902), but on principle and on the general scheme of the Company's Act. Whether right or wrong, the decision of the Privy Council in *Swan Brewery Company, Limited, v. Rex*(2), accepted by the dissenting minority of the House of Lords in *Blott's* case(1), is binding on this Court.

JUDGMENT.

COUTTS
TROTTER,
C.J.

COUTTS TROTTER, C.J.—This is a reference by the Commissioner of Income-tax which raises a very simple

(1) [1921] 2 A.C., 171.

(2) [1914] A.C., 231.

(3) (1887) 12 App. Cas., 385.

point in the sense that it can be put within a narrow compass on a very few undisputed facts; in another sense it raises a subtle question of law, for it has given rise to a great variety of judicial opinion in very high quarters.

The facts are these. A company called the Deccan Sugar and Abkari Co., Limited, was incorporated in 1897 with a share capital of ten lakhs in shares of Rs. 500 face value each. In May 1908 the capital was increased to 22 lakhs by adding 7,000 preference shares of the A class of Rs. 100 face value each and 5,000 preference shares of the B class also of Rs. 100 face value each. In 1908, in pursuance of a resolution passed in June, the ordinary share capital was reduced to Rs. 1,66,672, thus making the total capital of the company something over 13 lakhs. Messrs. Binny & Co., Limited, held 200 ordinary shares of Rs. 125 each in this company. In 1921 the Deccan Company had on its books a surplus accumulation of profits undistributed of practically 5 lakhs of rupees. In July 1921, by a special resolution which was confirmed in the following month, the articles of the company were amended, and the two important amendments were these. The first was a preliminary one enabling the company by a special resolution to subdivide or consolidate its shares or any of them. The other was a new article 133-A by which the company by a special resolution might at any time take to itself the power to capitalize undivided profits or reserve fund; and that is what purported to take place in this case. Each holder of a share of Rs. 125 became the holder of three additional shares. The capital of the company was increased by 1,328 shares of Rs. 375 each; and therefore the result was that Messrs. Binny & Co. for 200 shares of Rs. 125 each got 200 shares of Rs. 500 each,

THE COMMISSIONER OF
INCOME-TAX
v.
BINNY & Co.
COUTTS
TROTTER,
C.J.

THE COMMISSIONER OF
INCOME-TAX
v.
BINNY & Co.
COUTTS
TROTTER,
C.J.

and in 1921 scrip carrying out that change of position was issued.

The question we have to decide is whether this issue of new shares to the shareholders representing their share in the accumulated surplus is taxable as income. I propose to say very little about this matter, because, to my mind, it crystallizes for our purposes into two questions. The first is, are we concluded by the decision of the Privy Council in the *Swan Brewery Company, Limited*, v. *Rea*(1)? The next is, is it desirable, if we are not covered by the Privy Council decision, to decide contrary to the majority of the House of Lords in *Inland Revenue Commissioners v. Blott—Inland Revenue Commissioners v. Greenwood* (2)?

It is best that I should deal with the first contention at the outset. It is suggested that the *Swan Brewery Company, Limited*, v. *Rea*(1) directly covers the present point but with great respect to certain observations of Lord SUMNER in *Blott's* case, I am unable to see that it does cover it. If it does, of course, we as an Indian Court are not at liberty to say, as some of the members of the House of Lords did in *Blott's* case, that it was erroneously decided. If it does not decide the point finally for the House of Lords, it decides it finally and conclusively for this Court. That was a decision on an Act known as the Dividend Duties Act of Western Australia, which, to put it shortly, taxed dividends, and contained a definition of "dividends" which covered "every profit, advantage or gain intended to be paid or credited to or distributed among any members of any company." It is quite obvious that a distribution of what was conveniently called bonus shares is an advantage to the shareholder; and, therefore,

(1) [1914] A.C., 231.

(2) [1921] 2 A.C., 171.

one may conclude that, on the words of the Act, their Lordships of the Privy Council had no option but to hold that this was a dividend within the meaning of the Act. Lord SUMNER, in delivering the judgment of the Board, said this:

"In ordinary language the new shares would not be called a dividend, nor would the allotment of them be a distribution of a dividend."

(it has to be observed that what is made taxable by the Act is a dividend and nothing more).

"The question in issue here," his Lordship goes on, "is whether or not the new shares were a dividend under the Act abovementioned."

If that judgment stood alone unexplained by any subsequent utterance of his Lordship, I should infer that not merely was it a decision on the words of the Australian statute but that it was carefully confined to be a decision on the words of that Statute with an intimation that, but for that statute, the word could not be capable of bearing the meaning required to be put upon it before the Crown could succeed. But in *Blott's* case (1), Lord SUMNER undoubtedly said that he had intended to lay down a wider principle, and that principle so far as I can see is this. Ever since the decision in *Trevor v. Whitworth*(2) in 1887 it has been accepted law that a company cannot buy its own shares. That is used, as I follow the reasoning of Lord SUMNER and Lord DUNEDIN, to found this contention: that, as a company cannot buy its own shares, that is to say, cannot pay its funds into its own coffers and issue scrip to itself, what must be supposed to have taken place, as Lord SUMNER says notionally, is that, although no such thing in fact happened, the company paid its profits over to the shareholder and that the shareholder

THE COMMISSIONER OF
INCOME-TAX
v.
BINNY & Co.
COUTTS
TROTTER,
C.J.

(1) [1921] 2 A.C., 171.

(2) (1887) 12 App. Cas., 409.

THE COMMISSIONER OF INCOME-TAX v. BINNY & Co.
COUTTS TROTTER, C.J.

repaid them and in return got scrip handed to him, which of course would give him a share in the capital of the company. That reasoning is thus answered by the reasoning of Viscount HALDANE and Viscount FINLAY. I will refer very briefly to one or two passages in Lord FINLAY's judgment at page 192 of the report. He says this :

"The general scope and effect of these transactions is beyond dispute. There was an increase in the capital of the company by the retention of the amounts available for dividends. Though the number of shares was increased by the issue of the new preference shares to the ordinary shareholders, this did not affect the proportions to which they were entitled in the undertaking and in any profits. All the shareholders received these new preference shares, so that the proportion in which they were to share in any profits remained the same.

The use of the sums which had been available for dividend to increase capital would enable the company to carry on a larger and more profitable business, which might be expected to yield larger dividends. These dividends, however, were to be in the future. So far as the present was concerned, there was no dividend out of the accumulated profits; these were devoted to increasing the capital of the company."

Then again at page 194,

"The effect of this operation" (that is the one which he described) "was that the amount of the bonus was retained by the company as additional capital, and that the shareholders got the new preference shares. No option was left to any particular shareholder. He was compelled by the action of the company to take the preference shares. He could not have sued for the bonus in money, as the resolution which gave the bonus *uno flatu* declared that it was to be satisfied by the distribution of preference shares. Under these circumstances it seems to be impossible to treat the shareholders for the purpose of super-tax as having received the bonus and paid it back to the company to be retained as capital. They never received it at all. The case appears to stand exactly as ROWLATT, J., put it—*Inland Revenue Commissioners v. Blott—Inland Revenue Commissioners v. Greenwood*(1)."

(1) [1920] 1 K.B., 114, 133.

"Now I do not think that there is a payment of a dividend to a shareholder unless a part of the profits of the company is thereby liberated to him in the sense that the company parts with it and he takes it."

If I may humbly add a word in such distinguished company, I think it might be put in this way. That you cannot say that there is a notional payment of a dividend to a shareholder when the position is that, if he sued for it, his action must be dismissed, that is to say, when the whole conception that he is entitled to the dividend is one that the law refuses to countenance. That being so, it is enough for me to say that I think that this Court, having regard to the fact that the words of the Indian Statute are, for all practical purposes, identical with those of the English Statute, should respectfully follow the opinion of the majority of the highest Court in the Empire, especially when that opinion was one confirming the unanimous decision of a very strong Court of Appeal of three very eminent Lords Justices. I should also like to add this, that I think it extremely improbable that this arrangement about the distribution of these profits and the manner in which the transaction should be carried through was drafted, here, without reference to the English cases. I do not know whether, at the time the resolution was drafted the decision of the House of Lords was published but, at any rate, the decision of the Court of appeal in *Inland Revenue Commissioners v. Blott—Inland Revenue Commissioners v. Greenwood*(1), was available. I have looked at that decision and it expresses the opinion that the case was concluded by the decision in *Bouch v. Sproule* (2), itself a House of Lords decision, and that opinion of the Court of Appeal must have been available to the learned gentleman who drafted these articles and

(1) [1920] 2 K.B., 657.

(2) (1887) 12 App. Cas., 385.

THE COMMISSIONER OF
INCOME-TAX
v.

BINNY & Co.

COURT
TROTTER,
C.J.

amendments to articles. I also observe that both Viscount HALDANE and Viscount CAVE agreed with the Court of Appeal in thinking that the matter before them in *Blott's* case was concluded by the previous decision of the House of Lords. In these circumstances, although I have treated the matter as one of law, I think that it would be an undesirable and inequitable result if we had to come to any other conclusion than that which we have arrived at.

Our answer to the reference is that the company, Messrs. Binny & Co., is not liable to pay super-tax on the value of shares newly issued by the Deccan Sugar and Abkari Company, Limited, in the year 1921. The company will have its costs on the Original Side scale.

RAMESAM, J.

RAMESAM, J.—I agree. There are three features in this case as in *Blott's* case which make it difficult for a Court to say that the additional shares issued amount to income. The first is that there was no option to the shareholders, and it was not open to them, to sue for the additional dividend in the shape of cash or in the shape of other chattels or goods. The resolution of the company compelled them to take it only in the form of additional shares and in no other. This feature was emphasized by all the Law Lords who formed the majority in *Blott's* case(1).

The next feature which perhaps is a corollary from the first is this: The relative situation of each shareholder to the other shareholders in the company remains unaltered. His proportion out of the total earnings that may be set apart for distribution as dividends among the shareholders remains the same after this operation of the company. To explain it further—If, for instance, in any year, the amount of profits that is set apart available for distribution among the shareholders is one lakh,

(1) [1921] A.O., 171.

the proportion which a particular shareholder gets, remains the same after the increase in shares as before. If formerly a shareholder got 32 per cent on shares of Rs. 125 each, now he will be getting Rs. 40 for each share of Rs. 500, i.e., 8 per cent on shares of Rs. 500; the total income would be the same amount.

The third feature which again may be regarded as a corollary from the other two is that the effect is the same as if the company passed a resolution expanding its operations and for increasing its machinery. This has been pointed out by Viscount FINLAY in *Blott's* case(1). It is true that, as Lord SUMNER points out, there was a payment in *Bouch v. Sproule*(2), a dividend warrant was sent out in the form of a negotiable instrument, which, had it been presented, payment must have been made. But this fact only served to distinguish *Bouch v. Sproule*(2), from the case before the House of Lords, *Blott's* case(1). If that distinction is emphasized, it follows that we ought to agree with the decision of the majority in *Blott's* case. It may be that the effect of the operations in question by the company is to increase the value of a share and if a particular shareholder sells his enhanced share, he may realize more in the market as pointed out by Viscount CAVE. This amounts to only realizing his assets in the shape of capital and not in the shape of income.

I agree with the answer proposed by my Lord.

L. M. Taylor, Attorney for Assessee.

K.R.

(1) [1921] 2 A.O., 171 at 196.

(2) (1887) 12 App. Cas., 385.

APPELLATE CRIMINAL.

Before Mr. Justice Venkatasubba Rao.

KUPPA REDDIAR AND TWO OTHERS (ACCUSED),
PETITIONERS

v.

KING-EMPEROR.*

1924,
March 20.

Criminal Procedure Code (Act V of 1898), sec. 106—Accused convicted of assault—No breach of peace involved—Accused convicted and directed to execute bonds for keeping the peace—Validity of the order—Meaning of “other offences” occurring in the section.

Section 106 of the Criminal Procedure Code implies that offences against public tranquillity and the offence of assault involve a breach of the peace, and proof of mere commission of one of these offences is enough to make the provisions of the section applicable.

The offences intended by the expression “other offences” occurring in the section, are those *ejusdem generis* with the offences against public tranquillity and of assault which are mentioned in the section. *Ramaswami Thevan v. King-Emperor* CrI. A. 1600 of 1922, unreported, followed; *In re Thirumal Reddy* (1922) 30 M.L.T., 348, dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the judgment of F. R. BRISLEE, Assistant First-class Magistrate of Tinnevely, in Calendar Case No. 5 of 1923.

The complainant, a village *talayari*, while going on *jamabandy* business, noticed accused 1—the village munsif—drinking toddy along with the other accused and he remonstrated with them for doing so. Thereupon he was assaulted by the accused and his hands were tied up. The accused were convicted by the

Magistrate under sections 342 and 112 of the Indian Penal Code and were sentenced to pay a fine of Rs. 20 each. They were further ordered under section 106 of the Code of Criminal Procedure to execute bonds to keep the peace for a period of 12 months. It was contended before the High Court that the order under section 106 was erroneous as the offence for which they were convicted did not involve a breach of the peace.

O. Narasimha Achary for the petitioners.

Public Prosecutor on behalf of the Crown.

JUDGMENT.

The petitioners were convicted of an offence under section 342 of the Indian Penal Code, namely, that of wrongful confinement. What the accused actually did is described in the following words by the lower Court:—

“Accused 2 and accused 4 . . . dragged him (the . . . complainant) towards accused 1, his hands were tied . . .”

Again

“He . . . testifies that accused 2 and accused 4 . . . beat P.W. 1 at the instance of accused 1 and then tied his hands and pushed him westwards. D.W. 3 testifies to the use of violence.”

The Magistrate made an order under section 106 of the Criminal Procedure Code directing each of the accused to execute a bond with sureties for keeping the peace during a period of 12 months.

On behalf of the petitioners it has been contended that the order directing the accused to keep the peace was improperly made as the offence in respect of which the accused were convicted does not involve a breach of the peace.

Section 106 so far as it is material for the present purpose runs thus:—

“Whenever any person accused of any offence punishable under Chapter VIII of the Indian Penal Code (Chapter VIII

KUPPA
REDDIAR
v.
KING-
EMPEROR.

* Criminal Revision Case No. 573 of 1923.

KUPPA
REDDIAR
v.
KING-
EMPEROR.

deals with offences against public tranquillity) . . . or of assault or other offence involving a breach of the peace . . . is convicted of such offence before a High Court . . . and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace, such Court may, at the time of passing sentence on such person, order him to execute a bond."

This section, in my opinion, implies that offences against public tranquillity and the offence of assault involve a breach of the peace. If nothing more is proved than that one of these offences has been committed, the section applies. Then the next question is what do the words "other offence" mean? In my opinion the offences intended are those *ejusdem generis* with the offences against public tranquillity and of assault which are mentioned in the section. Under the section the offence must involve a breach of the peace. These words must receive their ordinary and natural meaning. A thing is involved in another when it is necessarily included in or implied in it. In "assault" breach of the peace enters as a necessary element. It is an ingredient of the offence. In my opinion the section applies when the offence amounts to or constitutes a breach of the peace, in other words, when breach of the peace is a component part or an ingredient of the offence. The very fact that a man commits rioting or assault constitutes a disorder, a disturbance of the king's peace, general peace of the realm. The words "breach of the peace" in the section are the antithesis of the other set of words also occurring in the section "keeping the peace." The words "keeping the peace" connote preservation of the public peace and are the direct opposite of the words "breaking the peace."

In my view therefore the question to be answered in each case is, does the offence, brought home to the individual, necessarily include or imply a breach of the

peace, or does it constitute or amount to a breach of the peace? If it does the section applies.

I am not prepared to accept the construction placed upon the words in some of the cases cited at the bar, namely, that apart from the offence there must ensue a breach of the peace. If the legislature had intended to lay down a rule of that kind, entirely different words would have been used. It would then have said "any person accused of any offence punishable under Chapter VIII or of assault or other offence when the commission of such offence leads to a breach of the peace." In my opinion it is of the essence of the offence that a breach of the peace is committed. In committing the offence of which the offender is found guilty, he necessarily has also broken the peace.

Then the next question is—

Is it intended by the section that each of the offences described in the Indian Penal Code should fall under the category of either "offences involving a breach of the peace" or offences of the opposite description? I do not think this is either desirable or possible. The facts constituting an offence must be looked at for determining whether the offence comes within the section or not. The present case is in point and strikingly illustrates what I mean. Wrongful confinement *per se* is not an offence involving a breach of the peace. If for example a person happens to be in a room in his own house and another, by locking the room on the outside, confines the person within the room and makes egress impossible, all the elements necessary for constituting the offence of wrongful confinement are present. But this involves no breach of the peace but on the contrary if, as has happened in the present case, the offender in a coconut garden using violence seizes another

KUPPA
REDDIAR
v.
KING-
EMPEROR.

850 THE INDIAN LAW REPORTS [VOL. XLVII

KUPPA
REDDIAR
v.
KING-
EMPEROR.

and ties his hand, I am clearly of the opinion that the offence as proved does involve a breach of the peace.

Several authorities were cited, but I do not think that any useful purpose will be served by my discussing the various conflicting rulings bearing on the subject and opposite and different interpretations placed upon the words in the section but however I would add that I follow *Ramaswami Thevan v. King-Emperor*(1), a decision of SPENCE, J., and that I respectfully dissent from *In re Thirumal Reddy*(2) decided by KUMARASWAMI SASTRI, J.

The order therefore directing the accused to execute a bond for keeping the peace was rightly made.

As regards the merits of the case some points were urged before me, but I am not prepared to uphold any of the contentions and in the result the Criminal Revision Case fails and is dismissed.

D.A.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

AMMAKANNU AYI (PLAINTIFF), APPELLANT,

v.

A MALE CHILD NOT NAMED, BY GUARDIAN MURUGAYYA ODAYAR (2ND DEFENDANT), (SON AND LEGAL REPRESENTATIVE OF DECEASED 1ST DEFENDANT, PALANI), RESPONDENT.*

Suit and decree on a cause of action against a wrong person—Subsequent suit against the right person—No estoppel—Suit on a mortgage executed by a Hindu widow in her own capacity and not as guardian of her adopted son, but for purposes binding on estate—Adopted son's liability.

(1) Cri. A. No 1600 of 1922 (Unreported). (2) (1922) 30 M.L.T., 348.

* Appeal No. 160 of 1921.

A judgment obtained against a person in the belief that he executed a document in his own right does not bar a subsequent suit against the rightful owner, when it is subsequently learnt that he executed it on the latter's behalf.

AMMAKANNU
v.
MURUGAYYA
ODAYAR.

A Hindu widow who was consistently denying an adoption alleged to have been made by her executed a mortgage of her husband's estate in her own capacity and not as guardian of the adopted son but chiefly for purposes alleged to be binding on the estate. The mortgagee and his assignee knew of the denial and the assignee alleging that there was no adoption first sued the widow on the mortgage and got a mortgage decree against her. Then he sued the alleged adopted son on the mortgage and the decree, and prayed for a decree against him alleging that the debt was binding on the estate.

Held, (1) that the plaintiff was not by reason of the previous suit against the widow estopped from filing this suit against the adopted son who claimed to be the owner of the estate; *Scarf v. Jardine* (1882) 7 App. Cas., 345, distinguished, and (2) that even if there be consideration and bona fides, the suit should be dismissed as the widow executed the mortgage only in her own capacity and not as guardian of the defendant.

APPEAL against the decree of A. NARAYANA PANTULU, Subordinate Judge of Mayavaram, in Original Suit No. 46 of 1917.

The facts are given in the Judgment of JACKSON, J.

C. Krishnaswami Rao (with K. S. Jayarama Ayyar) for appellant.

A. Krishnaswami Ayyar (with V. Sundaram Ayyar) for respondent.

RAMESAM, J.—The facts have been stated by my learned brother whose judgment I have had the advantage of reading and need not be repeated.

A preliminary question of law raised by the defendant in the Court below and repeated here has first to be dealt with. He contends that, as the plaintiff filed her suit against Rathnathayi in 1914 and obtained a decree, she has elected her remedy and the present suit is not

AMMAKANNU
v.
MURUGAYYA
ODAYAR.
—
RAMESAM, J.

maintainable. He relies on *Scarf v. Jardine*(1), *Morel Brothers & Co., Limited v. Westmoreland (Earl of)*(2) (per COLLINS, M.R.), on appeal *Morel Brothers & Co., Limited v. Westmoreland (Earl of)*(3), *Moore v. Flanagan and wife*(4), and on *Kendall v. Hamilton*(5). *Scarf v. Jardine*(1) is a case of a customer of an old firm of partners selling goods to a new firm consisting of an old partner and a new partner and carrying on business under the old style without notice of the change. In that case the old firm was liable only on the ground of estoppel and after the plaintiff sued the new firm, it was held that he disavowed the estoppel and could not set it up again (see Lord SELBOURNE, L.C., at page 350). It was a case where either firm (but not both) could have been held to be legally liable. The present case is not a case where either Rathnathayi, or the present first defendant can be legally held to be liable on the mortgage. If Rathnathayi is the owner of the mortgage properties only Rathnathayi is liable on the mortgage and not the first defendant. If, however, the first defendant is the owner of the suit properties, and if it is held that Rathnathayi did not represent him in executing the mortgage bond, she is personally liable and on the mortgage neither is liable. If it is held that Rathnathayi represented him in executing Exhibit A, the first defendant is liable on the mortgage and Rathnathayi is not liable. Thus, on no version of the facts, do we get a case where plaintiff, at his option, can hold one or other of two persons (but not both) liable. The alternation of the liabilities of Rathnathayi and first defendant arises on different views of the facts. I am, therefore, of opinion that the case in *Scarf v. Jardine*(1) does not

(1) (1882) 7 App. Cas., 345.

(3) [1904] A.C., 11.

(2) [1903] 1 K.B., 64.

(4) [1920] 1 K.B., 919.

(5) (1879) 4 App. Cas., 504.

apply. The cases of *Morel Brothers & Co., Limited v. Westmoreland (Earl of)*(1) and *Moore v. Flanagan and wife*(2) are similar. It was held in each of those cases that it was not a case of joint liability but only of alternative liabilities and *Scarf v. Jardine*(3) applied.

The other case relied on by the appellant, *Kendall v. Hamilton*(4), was a case of agent and principal. Under section 233 of the Contract Act, the liability of the principal and agent is joint and several. The question how far the principle of *Kendall v. Hamilton*(4) will apply in India has been the subject of difference between the Indian High Courts and cannot be regarded as quite settled, [see *Shivlal Motilal v. Birdichand Jivraj*(5) following *Priestly v. Fernie*(6) and *Kendall v. Hamilton*(4) and *Muhammad Askari v. Radhe Ram Singh*(7)] unless the decision in *Bhagwati Prasad v. Radha Kishen Sewak Pande*(8) can be regarded as settling it. That was a case of an agent and undisclosed principal and the Privy Council reversing the decision in *Bir Bhaddar Sewak v. Sarju Prasad*(9) [in which the High Court dismissed the suit against the principal following *Priestly v. Fernie*(6) and referring to the notes to *Thomson v. Davenport*(10)] gave an equitable charge against the principal. The fact that *Bir Bhaddar Sewak v. Sarju Prasad*(9) was reversed by the Privy Council in *Bhagwati Prasad v. Radha Kishen Sewak Pande*(8) was evidently not noticed by that High Court in *Muhammad Askari v. Radhe Ram Singh*(7).

The point need not be pursued in this case as it does not arise.

(1) [1903] 1 K.B., 64, on appeal, [1904] A.C., 11.

(2) [1920] 1 K.B., 919.

(4) (1879) 4 App. Cas., 504.

(6) (1885) 3 H.C., 977.

(8) (1893) I.L.R., 15 All., 304 (P.C.).

(3) (1882) 7 App. Cas., 345.

(5) (1917) 19 Bom. L.R., 370.

(7) (1900) I.L.R., 22 All., 307.

(9) (1887) I.L.R., 9 All., 681.

(10) (1829) 9 B. & C., 78; 109 E.R., 30.

AMMAKANNU
v.
MURUGAYYA
ODAYAR.
—
RAMESAM, J.

AMMAKANNU
v.
MURUGAYYA
ODAYAR.
—
RAMESAM, J.

It has been never held that a wrong suit followed by a wrong decree bars a correct suit and we therefore hold the suit is maintainable.

It now remains to find on the facts, whether Rathnathayi in executing Exhibit A, intended to act on behalf of the minor or not. The cases cited by the appellant [viz., *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(1), *Judoonath Chuckerbutty v. Mr. James Tweedie*(2), *Makundi v. Sarabsukh*(3), *Watson & Company v. Sham Lal Mitter*(4), *Murari v. Tayana*(5), *Venkataramanachari v. Thirunaranachari*(6), *Velayudham Pillai v. Perumal Naicker*(7)], can help her only if, on the facts of this case, we can find that Rathnathayi did not act in her own right and intended to act on behalf of the minor [see *Ammani Ammal v. Ramasawmi Naidu*(8), and *Balwant Singh v. R. Clancy*(9)].

I may observe that the personal covenant in Exhibit A by itself, has, in my opinion, no bearing on the matter as that is the form of the document whatever the intention of the document might have been. If the plaintiff was an entire stranger to the family I would not attach any importance to the allegations in paragraph 11 of the plaint where she denies the adoption. But, seeing that plaintiff, though an assignee from the original mortgagee, is not a stranger to the family, her attitude in the said paragraph throws a good deal of light on that of Rathnathayi and Dorasami Odayar at the time of the execution of Exhibit A. Now not only the plaintiff, the mother of Rathnathayi, but her husband (who was also her maternal uncle) was a cousin of Dorasami Odayar, and she was also a sister of Dorasami's wife.

(1) (1856) 6 M.L.A., 893.

(2) (1869) 11 W.R., 20.

(4) (1888) I.L.R., 15 Cal., 8 (P.C.).

(6) (1915) 2 L.W., 212.

(8) (1919) 87 M.L.J., 113.

(3) (1884) I.L.R., 6 All., 417.

(5) (1896) I.L.R., 20 Bom., 286.

(7) (1915) 2 L.W., 1210.

(9) (1912) I.L.R., 34 All., 296 (P.C.).

AMMAKANNU
v.
MURUGAYYA
ODAYAR.
—
RAMESAM, J.

She must have known the transactions of her daughter from the time of the latter's husband's death. On an examination of the prior transactions mentioned in Exhibit A it strikes one that, while the first three represented by Exhibits B, C, D are genuine (this is conceded and admitted by defendant whose witnesses D.W. 1, 2, 3 prove them), the rest are all spurious items intended to swell up the consideration of the document to Rs. 3,000 (see D.W. 7) for some motive of their own (see D.W. 6). What these motives are, it is difficult to determine now. The consideration and motive of Exhibit A are shrouded in mystery. Seeing that the deed of adoption, Exhibit I, makes the first defendant continue to be the son of Dorasami (see also Exhibit CC, the deed of partition in Dorasami Odayar's family and Exhibit EE), it is possible that Rathnathayi entered into Exhibit I on the understanding that the adoption of the first defendant was to be regarded as sham or bogus. It may be that she was allowed to deal with properties for some time in her own right. But Exhibit II and the events that have since happened make it too late so far as she is concerned to question the adoption though it may still be open to the reversioners of her husband, if any, to question it within twelve years after Rathnathayi's death. In 1908 Rathnathayi dealt with the properties thinking they were her own (Exhibit W). In 1909, misunderstandings seem to have arisen between Dorasami Odayar and Rathnathayi (see D.W. 6) and possession of the properties of Thambusami was obtained by the minor in 1910 (Exhibit X, etc.). In 1914, the plaintiff filed her suit on Exhibit A (O.S. No. 37 of 1914) (Exhibit XV). It is obvious this suit was a friendly suit so far as she and Rathnathayi were concerned, but their attitude was adverse to the minor and Dorasami contested the suit. That plaintiff and Rathnathayi continue to be on friendly terms is clear

AMMAKANNU
v.
MURUGAYYA
ODAYAR.
—
RAMESAN, J.

from the fact that the latter has been examined as P.W. 3. In this case Rathnathayi admits that she, her brother P.W. 1, and plaintiff are living together. In her examination, she was not asked a single question to show that she executed the document on behalf of the first defendant, nor was Dorasami (D.W. 6) cross-examined on the matter. It is clear that the adverse attitude of Rathnathayi continues to this day and this explains why plaintiff made the allegations in paragraph 11 of the plaint. I therefore agree with my learned brother that Rathnathayi never intended to execute Exhibit A on the minor's behalf, nor can any decree be given against the minor on any other ground in the circumstances of the case.

The appeal fails and is dismissed with costs. There is no reason why the respondent should be deprived of his costs in the Court below. The memorandum of objections is therefore allowed, but there will be no order as to costs here.

JACKSON, J.

JACKSON, J.—Suit for a declaration that defendant is bound to pay plaintiff Rs. 7,237-9-9 both under the decree obtained by plaintiff in O.S. No. 37 of 1914 on the file of the Court of the Subordinate Judge of Māyavaram against one Rathnathayi and also as being due under a hypothecation bond executed on defendant's behalf. The lower Court dismissed the suit and plaintiff appeals.

2. The facts are as follows: Thambusami Odayar (vide genealogy, Exhibit M) died on 2nd August 1905 leaving a widow Rathnathayi. On 23rd August 1905 (Exhibit I) she adopted Palaniya Odayar, a son of her husband's uncle Doraisami Odayar. On 5th August 1906 she hypothecated property belonging to her late husband to this same Dorasami (Exhibit A). On 3rd January 1907 he transferred this deed of hypothecation

to his wife's sister Ammakannu Ayi, who is also the mother of the mortgagor, Rathnathayi. In 1914 Ammakannu Ayi sued Rathnathayi and Dorasami on this deed. In the plaint (Exhibit XV) she recites that Thambusami died leaving no heir whatsoever. For discharging his debts and necessary expenses Rathnathayi hypothecated certain property of his. If she should fail to recover the amount claimed from Rathnathayi, Doraisami should be made responsible. She obtained preliminary and final decrees against Rathnathayi alone (Exhibits G and G-1) on 15th September 1914 and 15th November 1916. The plaint in the present suit is dated 13th August 1917. It sets forth how Rathnathayi hypothecated her husband's property and how plaintiff obtained a decree. Execution was pending and plaintiff, when about to bring the property to sale, learnt that for some time past it had been in the possession of Palani, the present defendant, who was adopted as son of Thambusami by registered deed in August 1905. This deed was executed without Thambusami's permission, and the adoption was not really made (paragraph 11 of plaint). Palani, however, is bound to satisfy the decree obtained against Rathnathayi, since she bona fide executed the hypothecation in order to pay off her husband's debts, and Palani has enjoyed the benefit of her action.

3. On these pleadings the Subordinate Judge framed among other issues, Issue V, whether the suit mortgage bond is supported by consideration, and is true, valid and binding on the defendants. He found (paragraph 16) that the suit document was genuine and supported by consideration, and was not binding on the defendants. Accordingly he dismissed the suit.

4. Plaintiff urges that although the suit hypothecation deed contains no recital that Rathnathayi was

AMMAKANNU
v.
MURUGAYYA
ODAYAR.
—
JACKSON, J.

AMMAKANNU
v.
MURUGAYYA
ODAYAR.
—
JACKSON, J.

acting as guardian of her adopted son, she must nevertheless be presumed to have so acted. The question for determination is whether there is any ground for making such a presumption. Rathnathayi has consistently ignored the adoption. It is evidenced by the registered deed Exhibit I, dated 23rd August 1905, and Palani was admittedly in enjoyment of Thambusami's estate. Yet on 26th November 1905, Rathnathayi executed a promote, Exhibit F, for discharging a debt of her husband's with no mention that she was acting as guardian of her adopted son. In the present suit document Exhibit A, dated 5th August 1906, there is not the smallest indication of the existence of an adopted son and Rathnathayi acts entirely in her own right. It cannot even be said that the husband's debts exhaust the consideration, for Rs. 301-1-0 is received for Rathnathayi's domestic expenses and Rs. 283-6-9 for her prospective journey to Benares. Moreover, she makes a personal covenant to pay interest.

In June 1908 Rathnathayi leased out property as belonging to herself alone, Exhibit W. In June 1914 when she was sued on Exhibit A her obvious defence would have been that she acted merely as guardian of her adopted son, but so far from raising this plea, she remained ex parte and admitted the mortgage sued upon—vide Exhibit G-2. She has been examined as plaintiff's witness 3 in the present suit, and if plaintiff wished to establish that she acted on behalf of her adopted son, something might have been elicited about this adoption. No such question was put and at this stage of the case plaintiff seems to have been relying solely on the alternative plea that irrespective of the adoption the bond is binding on the defendant inasmuch as it was executed bona fide and for proper consideration (paragraph 13 of plaint). If some stranger to the family had bona fide

advanced money to discharge the father's debts under a misapprehension of Rathnathayi's title and in ignorance of the adoption, a Court might be justified perhaps in not demanding very rigid proof that the bond was actually executed on the adopted son's behalf. But in this case the parties were alive to all the facts. The original mortgagee is the adopted son's natural father and his transferee, the present plaintiff, is mother of the mortgagor and sister of the mortgagee's wife. Nobody could have been deceived as to the facts. Besides, however much a Court may feel constrained to help a bona fide mortgagee for consideration, there must be some ground upon which to base the presumption that a document executed in the sole name of the mortgagor is really executed in a fiduciary capacity. In *Watson & Company v. Sham Lal Mitter*(1) it was urged that a widow had not professed to act as guardian of her son, but it was found that after her name in the document there were these words "mother of Sham Lal Mitter minor" which were held to justify the view that she was acting as the guardian of her son. *Murari v. Tayana*(2) affords stronger support to the plaintiff because the document in question contained no mention of the minor and was an outright sale by the widow in order to discharge her husband's debts. But there it was found that the widow had the intention to sell *qua* guardian and a case was cited where it was held that a manager may sell with necessity and be accounted manager even though he has not described himself as such; *Judoonath Chuckerbutty v. Mr. James Tweedie*(3). In the present case such intention can hardly be presumed because as set forth above Rathnathayi has consistently exhibited the

AMMAKANNU
v.
MURUGAYYA
ODAYAR.
—
JACKSON, J.

(1) (1858) I.L.R., 15 Calo., 8 (P.C.). (2) (1896) I.L.R., 20 Bom., 283.

(3) (1869) 11 W.R., 20.

AMMAKANNU
v.
MURUGAYYA
ODAYAR.
—
JACKSON, J.

contrary intention to deal with the property in her own right and to ignore the adoption, which intention both plaintiff and Doraisami assumed as a fact in Original Suit No. 37 of 1914 when the hypothecation deed was first brought to court. And even if it were established that the husband's debts were discharged from pressing necessity, there still remains that part of the consideration which was entirely personal to Rathnathayi herself.

"In each case the language of the deed and the circumstances in which it was executed have to be considered" *Murari v. Tayana*(1).

Here neither the language nor the circumstances warrant any presumption that Rathnathayi acted as guardian. Therefore, the latter part of Issue V has been correctly decided by the lower Court, and there is no necessity to go into the question in Issue IV whether if plaintiff had established that Rathnathayi executed Exhibit A as guardian of Palani he would be estopped from suing Palani by the judgment obtained in Original Suit No. 37 of 1914 against Rathnathayi in her individual capacity.

When a plaintiff has the choice of suing two persons on the same cause of action it may happen that if he elect to sue one and obtain a decree he is estopped from suing the other. If the present plaintiff had sued Rathnathayi as agent of Palani and had obtained a judgment it might be argued that he was estopped from suing Palani. But when in the belief that Rathnathayi had executed the hypothecation in her own right, plaintiff has obtained a judgment against her, and has then learnt that Rathnathayi could only have executed it as guardian of Palani, there is no question of estoppel. It is simply as if she first sued the wrong person and subsequently sued the right person.

(1) (1896) I.L.R., 20 Bom., 286.

The bare facts that there was full consideration and bona fides cannot make the defendant liable.

The appeal accordingly fails and is dismissed with costs.

I agree with my learned brother as regards the memorandum of objections.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Wallace.

1924,
January 22.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
REPRESENTED BY THE COLLECTOR OF SALEM (DEFENDANT),
APPELLANT

v.

T. V. RAGHAVACHARIAR (PLAINTIFF), RESPONDENT.*

Madras Act (VII of 1865), sec. 1, and Madras Act (III of 1905), sec. 2—Water-cess—Ryotwari lands—Natural stream or channel passing through patta lands of a ryotwari pattadar—Channel, not separately demarcated as poramboke—Water taken by the ryot for irrigating dry lands—Right of Government to levy water-cess—Ryotwari patta, nature of.

A natural stream or channel, which passes through the patta lands of a ryotwari pattadar, although it is not demarcated as poramboke, is the property of the Government; and if the ryot takes water from the channel to irrigate dry lands in his patta, the Government is entitled to levy water-cess therefor.

Kalianna Mudali v. Secretary of State (1915) 31 I.C., 982; distinguished;

A ryotwari patta is not a document of title or a deed of grant but is only a record of demand by Government that a certain amount is due as land revenue on a certain area. *The Secretary of State for India in Council v. Kasturi Reddi*, (1903) I.L.R., 26 Mad., 268; *Muthu Veera Vandayan v. The Secretary of State for India in Council*, (1906) I.L.R., 29 Mad., 461, referred to.

* Second Appeal No. 334 of 1921.

*Pattamul
record of
demand
for
land
revenue*

SECOND APPEAL against the decree of K. S. LAKSHMI-NARASA AYYAR, Temporary Subordinate Judge of Salem, in Appeal Suit No. 118 of 1920 preferred against the decree of K. R. RAMAKRISHNA AYYAR, the District Munsif of Dharmapuri, in Original Suit No. 34 of 1917.

This is a suit instituted by the respondent to recover from the Government a sum of Rs. 12—7—10, alleged to have been illegally levied from him as water-cess for water said to have been taken by him from a Government source for irrigating his dry lands included in his ryotwari patta for raising wet crops thereon. It appeared that the water was taken from a natural stream, or channel, which passed through the plaintiff's patta lands in survey Nos. 13 and 17 in Nagalpatti village of Uttankarai taluk, Salem district. The stream was a "*Kattodai*" (a jungle stream) and began in survey No. 1 and flowed through survey Nos. 1, 4, 6, 13 and 17 and was discharging its waters into the Government irrigation source called Manalpallam; the survey Nos. 4 and 6 were demarcated as poramboke and the stream was described in the re-settlement register as channel poramboke in respect of the portion passing through the said survey Nos. 4 and 6; but as it passed through survey Nos. 13 and 17, it was not separately demarcated as poramboke. The lands in survey Nos. 13 and 17 were included in the ryotwari patta granted to the plaintiff's vendor. It was admitted by the plaintiff that the stream in question within survey Nos. 13, 14 and 17 was Government property prior to the grant of patta after darkhast to the plaintiff's vendor. The plaintiff contended that as the stream passed through his patta lands and was not demarcated as poramboke, he was the owner of the channel and was entitled to use the water for irrigating his dry lands and raising wet crop thereon. Both the lower

Courts decided in his favour and relied on the decision in *Kalianna Mudali v. Secretary of State*(1). The Defendant preferred a Second Appeal, which originally came on for hearing before AYLING and ODGERS, JJ., who called for revised findings on all the issues in the case in the light of the observations in their Judgment which was as follows:—

JUDGMENT.

AYLING, J.—This Second Appeal arises out of a suit for recovery of water-cess alleged to have been illegally levied by Government. It appears that the plaintiff took the water on account of which the cess was levied from a channel, which passed through his patta land, but was not separately demarcated as poramboke. This fact has been treated by both the lower Courts as conclusive against Government as to the legality of the levy; reliance being placed on a passage in a judgment reported in *Kalianna Mudali v. Secretary of State*(1), which runs as follows:—

"As to the claim to levy water-cess, these rills run through plaintiff's patta land, and their beds have not been separately demarcated as poramboke; they are part of the patta land and not the property of the Government, and therefore the water course cannot be said to belong to Government as decided day before yesterday in Appeal Suit No. 113 of 1910 (on the file of the High Court)."

The learned Government Pleader in Second Appeal argues that this Judgment (which is not reported in the regular series) needs re-consideration.

I was a party to it, though it is hardly necessary to say that after the lapse of nearly eight years, my memory of the case is of no assistance. I think, however, that in any attempt to apply it to other cases, strict regard must be had to the fact that we were there dealing with

"rills" feeding a pond, and not artificial irrigation channels. "Rill" is defined in the Oxford Dictionary as a small stream, brook, runnel or rivulet implying a natural, and not artificial origin, and a reference to the Judgment in Appeal Suit No. 113 of 1910 which is quoted, shows that the latter dealt with the ownership of the beds of rivers, and the water flowing over them. In so far as natural streams are concerned, I do not at present see any reason to doubt the correctness of our decision. Artificial irrigation channels stand on a totally different footing. When these are small, they are frequently not separately demarcated as poramboke; but their character as poramboke, is not affected by the omission to do so. The learned Government Pleader refers us to the following passage in the Settlement Register of the suit village. (Exhibit IV):

"It must be distinctly borne in mind that at the Original Settlement, a deduction of 25 per cent has been made from the gross produce on account of unfavourable seasons and on account of any roads, channels, banks, paths, etc., that may have been measured in with the cultivated area. The fact of the inclusion, therefore, of any Government poramboke in any re-survey field does not confer on the cultivator of that field, the right of entering on such poramboke or of in any way interfering with it and any unauthorized encroachment on such poramboke will be severely dealt with."

It will be apparent from this that the fact that the channel forms part of a survey number held in patta without separate demarcation does not, by itself, show that the said channel is not a poramboke channel.

The ruling in *Kalianna Mudali v. Secretary of State*(1), does not, therefore, conclude the case; and I would call upon the Subordinate Judge to submit findings on the issues on the evidence on record in the light of the above

(1) (1915) 31 I.C., 982.

remarks. Findings should be submitted by July 16th; seven days will be allowed for objections.

ODGERS, J.—I agree.

In accordance with the above order, the Subordinate Judge submitted findings to the effect—that the odai was a natural stream or channel, and not an artificial irrigation channel, that it must be considered as part of the survey Nos. 13, 14, 17, etc., in respect of which a patta had been granted to the plaintiff's vendor, that the decision in *Kalianna Mudali v. Secretary of State*(1) consequently applied to the case, that the plaintiff took water from the channel to irrigate his dry lands for raising wet crops thereon, and that the Government was not entitled to levy water-cess thereon.

On receipt of the findings, the case was posted for disposal before ODGERS and WALLACE, JJ.

The Government Pleader (*C. V. Anantakrishna Ayyar*) for appellant.

T. R. Vijayaraghava Achariyar for respondent.

JUDGMENT.

ODGERS, J.—This suit was brought by the plaintiff against the Secretary of State for India in Council to recover the amount of water-cess charged on the plaintiff because the plaintiff took Government water to irrigate his dry lands. The District Munsif found that the water-course could not be said to belong to Government and this was upheld by the Subordinate Judge, both the lower Courts relying on the decision in *Kalianna Mudali v. Secretary of State*(1), to which further reference will be made. The appeal was heard originally before AYLING, J., and myself and the case was remitted to the lower

(1) (1915) 31 I. C., 982.

THE
SECRETARY
OF STATE
v.
RAGHAVA-
CHARIAR.
—
ODGERS, J.

Appellate Court for fresh findings on all the issues. It was then submitted by the learned Government Pleader that the decision in *Kalianna Mudali v. Secretary of State*(1), required reconsideration and we pointed out in our Judgment that the case relied on was concerned with rills feeding a pond. We pointed out, however, that small *natural streams* are frequently not separately demarcated as poramboke but their character as poramboke is not affected by the omission to do so; and we also pointed out that it was apparent from the passage in the settlement register of the suit village, Exhibit IV, that the fact that the channel formed part of a survey number held in patta without separate demarcation, did not by itself show that the said channel was not a poramboke channel. We held that the ruling in *Kalianna Mudali v. Secretary of State*(1), did not conclude the case and, as stated, called upon the lower Appellate Court to return further findings on all the issues. This the lower Appellate Court has now done, and the finding still is that the plaintiff did not take water to his survey number from any Government source. The learned Subordinate Judge, relying on the fact that it was not an artificial irrigation channel and that therefore, in his opinion, the decision in *Kalianna Mudali v. Secretary of State*(1), supported the plaintiff, was apparently of opinion that, if the lands on either side of the channel were the patta lands of the plaintiff, it must be held that the channel and its water were included in the patta. This, in fact, is the point relied on for the plaintiff before us. It was urged, as a preliminary point, that this question is purely one of fact and cannot be raised in Second Appeal. But in my opinion, the grounds of the reasoning of the

(1) (1915) 31, I.C., 982.

THE
SECRETARY
OF STATE
v.
RAGHAVA-
CHARIAR.
—
ODGERS, J.

learned Subordinate Judge must be examined to see if they are supportable in law; and if they are not, it follows that his inference of fact from them can also not be supported. The plaintiff began by denying that there was any odai (stream) running through his land at all. This has been found to be absolutely false and I have no hesitation in concurring. As a matter of fact, the stream or channel runs through survey Nos. 13 and 17, the plaintiff's patta lands, to the south and falls into a tank in the railway poramboke, which there is reason to think is a Government irrigation source. The passage in the settlement register has been already referred to and it occurs also in the preamble to the patta. It is perfectly clear that a patta is merely a bill for rent and is in no sense a grant or conveyance of the land referred to therein. See *The Secretary of State for India in Council v. Kasturi Reddi*(1) and *Muthu Veera Vandayan v. The Secretary of State for India in Council*(2). It is also clear that the land and admittedly the water channel were poramboke before the grant of patta. The provisions of the Madras Act III of 1905, section 2, which have been discussed in a variety of cases in this Court, lay down that

"all rivers, streams, etc., and water courses . . . are and are hereby declared to be the property of Government except as may be otherwise provided by any law for the time being in force subject to the natural and easement rights of other landowners and to all customary rights legally subsisting with regard thereto."

If the pattadar has not prescribed against Government for use of the water in this channel or for the ownership of the bed thereon, it is clear that he has no grant of such rights contained in his patta. Such streams as the

(1) (1903) I.L.R., 26 Mad., 263.

(2) (1906) I.L.R., 29 Mad., 461.

THE
SECRETARY
OF STATE
V.
RAGHAVA-
CHARIAR.
—
ODGERS, J.

one under consideration have, in my opinion, been expressly excepted from the grant. It has been said by the Privy Council in *Prasad Row v. The Secretary of State for India*(1) that with regard to the true meaning and construction of the Act, various difficulties arise and those difficulties are evident from the conflict of opinion that has arisen in this High Court with regard to it. For instance in the Judgment of ABDUR RAHIM, J., in *Chinnappan Chetty v. The Secretary of State for India*(2), he points out

“that the rights of the Government in water are in connexion with its position as a landowner may be deduced from the use of the words ‘other landowners’ in the saving clause.”

So it appears to me that, if the ownership of the banks of the stream is still vested in Government, it cannot be said that the pattadar has any rights of ownership in the water thereon. This is pointed out by SADASIVA AYYAR, J., in *Secretary of State for India v. Janakiramayya*(3), wherein he says,

“Ryotwari lands stand on an entirely different footing from the zamindari and inam lands as Government has not lost proprietary rights over ryotwari lands. That ryotwari land continues to be Government land Thus the Government treats itself as owner of its ryotwari tenants’ lands while it treats the zamindar and inamdar as owner of the lands in permanently settled estates.”

In *Kandukuri Mahalakshmmamma Garu v. The Secretary of State for India*(4), MILLER and MUNRO, JJ., held that under section 2 of Act III of 1905, where the channel or river, which is the flowing body of water, is not shown to belong to a private person, it belongs to Government although private persons may be proprietors of the bed. The riparian proprietors have easement rights, but they are not on that account

(1) (1917) I.L.R., 40 Mad., 886. (P.C.) (2) (1919) I.L.R., 42 Mad., 239 (F.B.).
(3) (1915) 29 M.L.J., 389. (4) (1911) I.L.R., 34 Mad., 295.

THE
SECRETARY
OF STATE
V.
RAGHAVA-
CHARIAR.
—
ODGERS, J.

owners of the channel, and they cannot use water which belongs to Government, free of cess, in the absence of an engagement with Government to that effect. It laid down that section 2 declared that, subject to the natural rights of other landowners, all standing and flowing waters which are not the property of anybody else are the property of Government. This case came on appeal to the Privy Council in *Prasad Row v. The Secretary of State for India* (1), where their Lordships recognize the difference in the law of this Presidency as to the rivers and streams from the English law and say that

“it is quite possible that it recognizes some proprietary rights on the part of Government in the water flowing in rivers and streams.”

Again, in *The Secretary of State for India v. Ambalavana Pandara Sannadhi* (2), ABDUR RAHIM, J., held that

“in order to justify the imposition of cess under this Act, it must be made out that the irrigation is caused by water supplied or obtained from a stream or river belonging to the Government”

and he did not understand the provisions of Act III of 1905 as laying down that

“even in those streams and rivers in which the riparian rights of zamindars or other owners of adjacent lands exist, a separate and independent proprietary right in the water subsists in the Government entitling it to demand from the owners of the land on the banks any price it chooses for the use of the water.”

This was concurred in by SRINIVASA AYYANGAR, J., but on the ground that the plaintiff had been drawing off the same quantity of water from time immemorial; but he refused to consider the effect of Act III of 1905. I am therefore of opinion that the patta of the plaintiff does not include this undemarcated poramboke stream.

(1) (1917) I.L.R., 40 Mad., 886 (P.C.)

(2) (1917) 33 M.L.J., 415.

THE
SECRETARY
OF STATE
v.
RAGHAVA-
CHARIAR.
—
ODGERS, J.

The second contention is that, if Government intended it not to be included in the patta, they ought to have excepted the channel from the patta. Reference has been made to the Survey Manual and to the Board's Standing Orders; but it seems to me that this cannot in any way have the force of law, being merely directions of the authorities to their officers, either survey or revenue, as to the way in which their duties should be carried out.

The third question raised is that no presumption in favour of Government arises from the provisions of Act III of 1905. This I have already dealt with in considering the first question. But I may add this, in *Secretary of State for India v. Janakiramayya*(1), it was held by a majority of the Full Bench as against the observations in *The Secretary of State for India v. Ambalavana Pandara Sannadhi*(2), that a special presumption is raised in favour of Government by Madras Act III of 1905. See per OLDFIELD, J., at page 398 and per BAKEWELL, J., at page 433.

The fourth contention of the plaintiff is that he has riparian rights. This is a question of at least mixed law and fact which he has not raised in either of the lower Courts and which, in my opinion, he is debarred from raising in Second Appeal. That is sufficient to dispose of this point. But I may add that whatever riparian rights, if any, the plaintiff might have in the water of this stream, it is more than doubtful if he was at liberty to erect two dams or diversions by which a considerable portion at least of the waters of the stream was diverted in order to irrigate his own dry patta lands. That would raise a question as to whether the rights of lower riparian owners, if any, have been

(1) (1915) 29 M.L.J., 389.

(2) (1917) 33 M.L.J., 415.

THE
SECRETARY
OF STATE
v.
RAGHAVA-
CHARIAR.
—
ODGERS, J.

infringed and whether the flow through this odai to the tank of Manalpallam has been interfered with. This is of course a question of evidence which cannot be allowed to be raised here. Reference may be made to S.A. No. 1639 of 1918 to which I was a party, in which it was said that the District Munsif thought that ryotwari landholders were entitled to all the rights of riparian owners under the English law. They may be said to own some such rights, such as the right of access to the river for using the water for bathing and for domestic purposes and so on; but so far as irrigation rights are concerned, it has been pointed out in *Lakshmiah v. Narayanappa*(1), that the only direct rights which the ryotwari landholders have are either derived (through express or implied contract) from the Government or are acquired against Government by prescription.

To refer to the case in *Kalianna Mudali v. Secretary of State*(2), the judgment is extremely short. The land in question seems to have been patta land. The first part of the judgment deals with the plaintiff having acquired an easement as against Government to interrupt the flow. The second part of it deals with the claim to levy water-cess and sets out that the

"rills run through the plaintiff's patta land and their beds have not been separately demarcated as poramboke. They are part of the patta land not the property of Government, and therefore the water course cannot be said to belong to Government as decided day before yesterday in Appeal Suit No. 113 of 1910."

I have perused the judgment in this Appeal No. 1639 of 1918 which was a case of zamindari lands where under section 2 of Act III of 1905 the zamindar is

(1) (1918) 23 M.L.T., 337.

(2) (1915) 31 I.C., 982.

THE
SECRETARY
OF STATE
v.
RAGHAVA-
CHARIAR.
—
ODGERS, J.

clearly "another landowner" within the meaning of the section. It is further difficult to discover from the very short statement in *Kalianna Mudali v. Secretary of State*(1), what were the exact facts of the case. It may be that the rills began and ended on the plaintiff's own patta land without flowing into or through any other land which is not the case in the appeal before us. I cannot see that this case is any real authority for the position advanced by the appellant. The learned Judges relied on a case they had already decided as to zamindari lands which, as pointed out, stood on a wholly different footing. For these reasons, I am of opinion that the appeal must be allowed with costs throughout.

WALLACE, J. WALLACE, J.—Plaintiff sued to recover with costs a sum paid by him as penal water-rate levied by the Tahsildar of Uttankarai taluk, Salem district, for unauthorizedly taking Government water to his registered dry lands. It appears from the evidence in the case that plaintiff is the pattadar of survey Nos. 13, 14 and 17 registered dry land, through which a jungle stream flows, which originally, according to the survey plan of 1897, ended in survey No. 17, but so far as appears from the evidence has, since the grant on darkhast of survey Nos. 13, 14 and 17, been discharging its waters into the Government irrigation source called Manalpallam, that plaintiff by mud dams at points A and B in the stream, diverted a portion of the water of that stream to his dry fields and raised wet crop, and that for his interference with the water of the stream penal water-rate was imposed on him.

2. Both the lower Courts have decided that the jungle stream within the limits of survey Nos. 13, 14 and 17 is the property of plaintiff and that the imposition

(1) (1915) 81 I.C., 982.

THE
SECRETARY
OF STATE
v.
RAGHAVA-
CHARIAR.
—
WALLACE, J.

of any water-rate for the diversion and use by him of its waters, at any point within these survey numbers, is illegal. Both Courts have based their decision on the ground that the patta for these fields granted apparently to plaintiff's vendor carried with it a grant of stream bed and the water on it where it flowed through these survey numbers. In so holding, it is perfectly clear that in the present state of the law, both Courts made a fundamental mistake in law as to the legal effect of a patta, and this mistake, we are, in Second Appeal, bound to consider and rectify.

3. I should have thought that it was well known law that a patta is not a document of title, or a deed of grant; (see *The Secretary of State for India in Council v. Kasturi Reddi*(1), and *Muthu Veera Vandayan v. The Secretary of State for India in Council*(2)). It is a record of demand by Government that such and such an amount is due as land revenue on such and such an area. Plaintiff admitted before us, when pressed, that the stream in question within survey Nos. 13, 14 and 17 was Government property prior to the grant of patta to his vendor. It follows that neither his vendor nor himself has succeeded to the ownership of that portion of the stream unless the grant of patta or the grant of these survey numbers on darkhast somehow carried with it also the transfer of ownership of that portion of the stream. As noted, the patta implies no such grant, and plaintiff has not chosen to produce or call for the darkhast records. I wholly fail, then, to find any proof that the ownership of Government admitted prior to the darkhast has been lost by Government.

4. The mere entry of a particular area in a patta cannot be any evidence that the whole extent of the

(1) (1908) I.L.R., 26 Mad., 268.

(2) (1906) I.L.R., 29 Mad., 461.

THE
SECRETARY
OF STATE
V.
RAGHAVA-
CHARIAR.
—
WALLACE, J.

area, without any reservations, was granted on darkhast to a darkhastdar, in the face of the customary proviso in all village A registers, viz., that at the original settlement a deduction of 25 per cent has been made from the gross produce on account of unfavourable seasons, and on account of any roads, channels, tanks, paths, etc., that may have been measured in with the cultivated area. The fact of the inclusion, therefore, of any Government poramboke in any re-survey field does not confer on the cultivator of that field the right of entering on such poramboke or of in any way interfering with it (Exhibit IV). The mere grant of a patta for a field does not then automatically carry with it the grant of any Government poramboke already existing within that field. Plaintiff's claim, which amounts to saying that there cannot be any Government channels in existence within lands granted on patta, unless these channels have been separately demarcated, is directly opposed to this general provision of the settlement. It is for plaintiff to prove that this usual reservation did not form part of the contract between his vendor and Government at the time of the grant of patta. He has not even produced his patta or examined his vendor to prove this, or to prove that his vendor was ever in possession of, or owner of, any portion of the stream. It seems to me almost absurd to contend that in granting a darkhast for dry lands—lands *ex hypothesi* not entitled to Government water—Government deliberately intended to confer on the darkhastdar not merely the user of water flowing through a channel in that land to a Government source of irrigation but also the ownership of part of that channel, so that every grant of patta would confer ownership of every channel within the land granted, and the right to dam up and stop the flow of water altogether. It is certain that Government in

THE
SECRETARY
OF STATE
V.
RAGHAVA-
CHARIAR.
—
WALLACE, J.

granting pattas never had any such intention or contemplated that such a transfer of ownership as would involve the wholesale breach of its covenant with the lower wet landholders was included in the contract. The practical inconveniences of upholding such a contention are obvious, as plaintiff himself would be the first to discover, if a pattadar further up the stream—say pattadar of field No. 1—claimed the rights which plaintiff now claims, and diverted all the water to his field so that none at all came as far as plaintiff's lands. Plaintiff's claim based on the patta appears to me therefore wholly untenable and the lower Court's acceptance of it is based on a material misconception of the law. The case cited by plaintiff in *Kalianna Mudali v. Secretary of State*(1), besides being a case not published in the authorized reports, does not seem to me of any assistance to plaintiff, since from the facts of that case it appears that the "rills" feeding the pond were wholly in the plaintiff's lands and had presumably never belonged, at any time, to Government.

5. Plaintiff has attempted before us to support the decree appealed against, on two grounds not taken before, (a) that under the Board's Standing Orders, Government does not charge water-rate for water taken from jungle streams provided no irrigation lower down is interfered with, (b) that plaintiff as owner of both banks of the stream in survey Nos. 13, 14 and 17 possesses the natural rights of a riparian owner to usufruct of the water as it flows between his banks. As to (a), the foundation for such a case has not been laid, and Government was never called upon to meet such a case, while it appears in evidence (defendant's fourth witness) that the jungle stream *does* feed an irrigation

(1) (1915) 31 I. C., 282.

THE
SECRETARY
OF STATE
v.
RAGHAVA-
CHARIAR.
WALLACE, J.

source, so that the Board's Standing Orders quoted has no application. As to (b), again, such a claim was never agitated in the lower Courts. Had it been, it would have been open to Government to contend

(1) that a mere darkhast ryotwari pattadar of dry lands has no riparian rights to water for irrigation purposes; see Second Appeal No. 1639 of 1918 (unreported);

(2) that even if he has, such rights do not permit the diversion by mud dams of water which would otherwise flow into a Government irrigation source. I am of opinion that such mixed questions of fact and law cannot be agitated for the first time here in Second Appeal.

6. It is clear then that as, between plaintiff and Government the ownership of this channel, and the water in it within fields Nos. 13, 14 and 17, belongs to Government and that the charge of water-rate, ordinary or penal, for water taken therefrom to dry lands is in accordance with law (Act VII of 1865 and III of 1905). This Second Appeal must therefore be allowed and plaintiff's suit dismissed with costs here and below.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Madhavan Nayar.

A. JANOO HASSAN SAIT, BY HIS AUTHORIZED AGENT
DADA BEG MUHAMMAD (PLAINTIFF), APPELLANT,

1924,
April 16.

v.

M. S. N. MAHAMAD OHUTHU (FIRST DEFENDANT),
RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 13 (d)—Foreign judgment—Suit on, in British Indian Court—Ex-parte decree against defendant in a Ceylon Court—Agent appointed by defendant under a power-of-attorney, empowering latter to sue and defend suits on his behalf in all Courts in Ceylon—Submission to jurisdiction—Notice of suit served on agent—Agent putting in no appearance at all in Court—Ex-parte decree, whether on the merits—Sufficiency of notice, whether can be raised in the suit in British Indian Court.

In a suit in a British Indian Court, on a foreign judgment of a Court in Ceylon, it appeared that the notice of suit to the defendant in the Ceylon Court was served on a person who was conducting business on the defendant's behalf in Ceylon and had been given by him a power-of-attorney under which the agent was empowered to sue in the Courts of Ceylon and to appear in any Court of Justice in Ceylon either as plaintiff or defendant; the agent did not put in any appearance at all in the suit in the Ceylon Court and the case was allowed to proceed *ex-parte* and judgment was passed *ex-parte* against the defendant.

Held, that the defendant must be deemed to have submitted himself to the jurisdiction of the foreign Court by reason of the execution of the power-of-attorney;

Ramanathan Chettiar v. Kalimuthu Pillai, (1914) I.L.R., 37 Mad., 163, referred to;

that ordinarily a judgment delivered *ex-parte* is deemed to be on the merits, and it is only when a defence has been raised and for some reason or another has not been adjudicated upon,

* Second Appeal No. 1146 of 1921.

JANOO
HASSAN
v.
MAHAMAD
OHUTHU.

that the decision can be said to be not upon the merits; and that the *ex-parte* judgment in this case must be deemed to be one passed on the merits, as the defendant did not at all appear in the case. *Keymer v. Visvanatham Reddi*, (1917) I.L.R., 40 Mad., 112 (P.C.), followed;

that where a foreign Court had held service of notice of a suit sufficient, it must be taken to be correct in the absence of any evidence to the contrary;

that if there was any irregularity in the service of notice, that point cannot be raised in the Courts in British India as a ground for questioning the validity of the foreign decree; *Pemberton v. Hughes*, [1899] 1 Ch., 781, followed;

but if it was distinctly proved that the person who was served was in no sense the defendant's agent at the time of the service and that consequently the defendant was unaware of the proceedings in the foreign Court, it might be an answer to the validity of the foreign judgment.

SECOND APPEAL against the decree of R. NARAYANA AYYAR, District Judge of Tanjore, in A.S. No. 579 of 1920, preferred against the decree of V. KRISHNA AYYAR, Second Additional Subordinate Judge of Tanjore, in O.S. No. 9 of 1919 (O.S. No. 25 of 1918 on the file of the Court of the Subordinate Judge of Tanjore).

The material facts appear from the judgment.

B. Sitarama Rao (with *K. Sundara Rao*) for appellant.—The service on the sub-agent is sufficient, as the power-of-attorney had given authority to the agent to appoint a sub-agent. The sub-agent could act only when the agent was absent from Ceylon. In the absence of any evidence whether the agent was present or absent, it must be presumed that he was absent at the time of service of summons on the sub-agent. The burden of proving the presence of the agent is on the respondent. The Ceylon Court had declared service sufficient. The point cannot be raised in the British Indian Court to impeach the foreign judgment, *Pemberton v. Hughes*(1).

(1) [1899] 1 Ch., 781.

JANOO
HASSAN
v.
MAHAMAD
OHUTHU.

T. L. Venkatarama Ayyar for respondent.—This is not a case of irregular service but of non-service of summons on the defendant. The rule in *Pemberton v. Hughes*(1) does not apply to such a case. The agent had returned and no summons could validly be served on the sub-agent when the agent was present in Ceylon. See *Dan by v. Coutts & Co.*(2); Halsbury, Vol. I, page 232. One of the two principals who had given the power-of-attorney had died before suit; the power was at an end: see *Tasker v. Shepherd*(3) and *Friend v. Young*(4). The foreign judgment was passed *ex-parte* and was obtained under the summary procedure for default of appearance and so it was not passed on the merits: see *Keymer v. Visvanatham Reddi*(5), *Oppenheim & Co. v. Mahommed Haneef*(6), *The Delta*(7), *The Challenge*(8), *Nouvion v. Freeman*(9). No submission to jurisdiction can be inferred from the execution of the power-of-attorney, because submission must be express and not implied: *Ramanathan Chetty v. Kalimuthu*(10) is not rightly decided.

JUDGMENT.

PHILLIPS, J.—This is a suit upon a foreign judgment of the Colombo Court against the first defendant. The first defendant and his brother who were trading in partnership executed a power-of-attorney to one Sheik Abdul Rahiman under which he was empowered to sue in the Courts of Ceylon and to appear before any Court or Courts of Justice either as plaintiff or defendant, etc. The power is a very wide one and gives the agent very full powers to represent the principals. Under the

(1) [1899] 1 Ch., 781.

(3) (1861) 6 H. & N., 575.

(5) (1917) I.L.R., 40 Mad., 112 (P.C.).

(7) (1876) 1 P.D., 393.

(9) (1890) 15 App. Cas., 1.

(2) (1895) 29 Ch. D., 500.

(4) [1897] 2 Ch., 421.

(6) (1922) I.L.R., 45 Mad., 496.

(8) [1904] P. 41.

(10) (1914) I.L.R., 37 Mad., 163.

JANOO
HASSAN
v.
MAHAMAD
OHUTHU

PHILLIPS, J.

provisions of that power, Abdul Rahiman appointed one Abdul Guddus as his sub-agent during his absence from Ceylon. A suit was filed in 1915 on four promissory-notes against Abdul Rahiman and Abdul Guddus, but upon their pleading that they were merely agents of first defendant's firm, another suit was brought against the first defendant. Notice of the suit was served on Abdul Guddus as first defendant's agent and the judgment on which the present suit is based was passed in his absence.

The first question for consideration is whether the first defendant had submitted to the jurisdiction of the foreign Court, and on this point I must agree with the learned District Judge that he did so by executing the power-of-attorney in favour of Abdul Rahiman empowering the latter to conduct litigation in the Ceylon Courts, namely, in a place where the agent was conducting business for his principals, and it is clearly a contract binding him to appear in those Courts and amounts to submission to the jurisdiction of those Courts. In this connexion I would refer to the case reported in *Ramanathan Chettiar v. Kalimuthu Pillai*(1).

The next question raised for the respondent is that the foreign judgment sued on was not one obtained on the merits. Ordinarily, a judgment delivered *ex-parte* is deemed to be one on the merits, but it is contended here that in summary suits similar to those provided for by Order XXXVII of the Civil Procedure Code, an *ex-parte* judgment cannot be deemed to be one passed on the merits. Reliance is placed on the case reported in *Viswanatham Reddi v. Keymer*(2) the decision in which was confirmed by the Privy Council in *Keymer v. Viswanatham Reddi*(3). In that case a defence had been put in, but it

(1) (1914) I.L.R., 37 Mad., 163. (2) (1916) I.L.R., 39 Mad., 95.
(3) (1917) I.L.R., 40 Mad., 112 (P.C.).

JANOO
HASSAN
v.
MAHAMAD
OHUTHU.

PHILLIPS, J.

was ordered to be struck out because of defendant's failure to answer interrogatories. The decision given in these circumstances was held to be one not on the merits. There are no doubt some observations in the judgment of this Court which would go to show that a foreign judgment passed in default of appearance is not a decree on the merits, and two cases are therein referred to as supporting this proposition. One of these is *The Delta*(1) and the other is *The Challenge and Duc D'Aumale*(2). In the first of these cases, the foreign judgments had not been delivered when the suit was filed in England and also it was held that the evidence of the French and Italian advocates examined left it doubtful whether the foreign judgment in that case would have, even in France or Italy, the force of *res judicata*. In the second case it appears that the defendants had not submitted to the jurisdiction. In the judgment of the Privy Council which is reported in *Keymer v. Viswanatham Reddi*(3) their Lordships in referring to the question under section 13 (b), Civil Procedure Code state that that section refers to "those cases where for one reason or another the controversy raised in the action has not in fact been the subject of direct adjudication by the Court." From this it would appear that it is necessary in the first place that some controversy should be raised in the action and in the second place that after it has been raised it should not have been finally decided. This principle is the same as that enunciated by Lord HERSCHELL in *Nounion v. Freeman*(4),

"in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of

(1) (1878) 1 P.D., 393. (2) [1904] P.D., 41.
(3) (1917) I.L.R., 40 Mad., 112 (P.C.) (4) (1890) 15 App. Cas., 1.

JANOO,
HASSAN
v.
MAHAMAD
ORUTHU.
—
PHILLIPS, J.

their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed; and can only be questioned in an appeal to a higher tribunal."

It will be seen that in accordance with this principle, *ex parte* decrees are by no means necessarily decrees not passed upon the merits. It is only when a defence has been raised and for some reason or another has not been adjudicated upon that the decision can be said to be not upon the merits. In other instances of *ex parte* decrees, they must be deemed to be decrees passed upon the merits. In the present case no appearance at all was put in on behalf of the first defendant, and the case was allowed to proceed *ex parte* and consequently it must be deemed to have been passed upon the merits.

A further question is raised, namely, that the first defendant had no notice at all of the suit and that consequently the whole decree is a nullity as coming under section 13 (d), namely, "where the proceedings in which the judgment was obtained are opposed to natural justice." A good deal of argument has been addressed to the question as to whether at the time that the notice was served upon him Abdul Guddus was the agent of the first defendant. It appears that he was appointed as first defendant's agent and had acted as such and there is no evidence to show that that agency had ceased at the time when the notice was served upon him. The foreign Court held that the notice was sufficient, and that decision must be taken to be correct in the absence of any evidence to the contrary. If there was any irregularity in the service of the notice, that point cannot be raised in the Courts of this country as a ground for questioning the validity of

all—

the foreign decree, as was held in *Pemberton v. Hughes*(1) where it was remarked by LINDLEY, M.R., at page 790:

"If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice."

If first defendant had definitely proved that Abdul Guddus was in no sense his agent at the time of the service of the notice and that consequently he was totally unaware of the proceedings in the Colombo Court, this might be an answer to the validity of the judgment; but this has not been shown and consequently I must hold that the judgment is valid.

In this view, I think it is unnecessary to discuss the further questions raised as to whether the death of first defendant's brother terminated Abdul Rahiman's agency and consequently the sub-agency of Abdul Guddus. They were at one time admittedly first defendant's agents and it is not shown that they had ceased to be so at the time the notice was served on the latter.

The appeal is accordingly allowed and the decree of the Court of first instance restored with costs both here and in the lower Appellate Court.

MADHAVAN NAYAR, J.—I agree.

K.R.

JANOO
HASSAN
v.
MAHAMAD
ORUTHU.
—
PHILLIPS, J.

MADHAVAN
NAYAR, J.

(1) [1899] 1 Ch., 781.

PRIVY COUNCIL.*

1924,
June 19.VAIDYANATHA AYYAR AND ANOTHER (DEFENDANTS),
APPELLANTS,

v.

SWAMINATHA AYYAR AND ANOTHER (PLAINTIFFS),
RESPONDENTS.

[On Appeal from the High Court of Judicature at Madras.]

Hindu Law—Religious endowment—Public charity—Suit to remove trustees—"Persons having an interest in the trust," Founder's descendants—Code of Civil Procedure (Act V of 1908), sec. 92.

The respondents were descendants in female lines of a Hindu who was the founder of a *chattram*; the evidence showed that the *chattram* was a public charity. With the consent of the Advocate-General, the respondents sued under section 92 of the Code of Civil Procedure to remove the trustees:—

Held, that the respondents were "persons having an interest in the trust" within the meaning of section 92, and consequently were entitled to maintain the suit, even though they might never themselves make use of the *chattram*.

Held, further, that the appointment of the first appellant as trustee was invalid since his appointer was professing to appoint a manager of property which he was falsely claiming to be his own, and was attempting to divert the income of the trust.

T. R. Ramachandra Aiyar v. Parameswaran Unni, (1919) I.L.R., 42 Mad., 360, discussed.

CONSOLIDATED APPEAL (No. 63 of 1922) from a judgment and two decrees of the High Court (November 13, 1919) affirming, with a variation, a judgment and two decrees of the Subordinate Judge of Kumbakonam.

The suit was brought by the respondents under section 92 of the Civil Procedure Code, 1908, with the consent of the Advocate-General, for a declaration that the appellants were not rightly appointed trustees of a

* PRESENT: Lord SHAW, Lord BLANESBURGH and Sir JOHN EDGE.

chattram and that in any case they should be removed from being trustees. They further prayed for a declaration that the *chattram* constituted a public charity with the properties, set out in schedules to the plaint, endowed to it.

The facts sufficiently appear from the judgment of the Judicial Committee.

The Subordinate Judge, upon an issue whether the plaintiffs were so interested as to be entitled under section 92 to maintain the suit, held that they were so interested; he was of opinion that the *chattram* was a public charity. He held that the appointment of the appellants was invalid, and that certain of the properties only were endowed to the charity under the will of Swaminatha. In the result he directed that a scheme should be framed for the management of the charity, and subsequently made a decree approving the scheme settled.

Upon appeal to the High Court the decrees were affirmed subject to modification. The learned Judges (ABDUR RAHIM and BURN, JJ.) in affirming the decision that the plaintiffs were entitled to maintain the suit under section 92, said:

"It has been ruled by a Full Bench of this Court in *Gauranga Sahu v. Sudevi Mata*(1), that the heirs of the founder have considerable interest in the maintenance of the charity, and the Hindu Law gives them the right to nominate trustees in the case of a vacancy, and in the absence of any provision in the deed of endowment for the appointment of trustees. In our opinion therefore the Full Bench decision of this Court in *T. R. Ramachandra Aiyar v. Parameswaran Unni*(2) does not preclude us from holding that the plaintiffs, having regard to the facts proved in the case, have an interest within the meaning of section 92 of the Civil Procedure Code sufficient to enable them to maintain the suit."

(1) (1917) I.L.R., 40 Mad., 612 (F.B.) (2) (1919) I.L.R., 42 Mad., 360.

VAIDYA-
NATHA
AIYAR
v.
SWAMI-
NATHA
AIYAR.

It was held further that Suri Ayyar was not competent to appoint trustees under this will, and that in any case the appointment was invalid as not one made bona fide in the interests of the trust. The decree of the Subordinate Judge was modified so far as it excluded certain properties from the endowment.

Upjohn, K.C., and *Abdul Majid* for the appellants.—The respondents were not “persons interested in the trust” within the meaning of section 92; their interest was remote and contingent, and not such a substantial interest as entitled them to sue under section 92; *T. R. Ramachandra Aiyar v. Parameswaran Unni*(1) and cases there mentioned. The judgment of the High Court was based upon *Gauranga Sahu v. Sudevi Mata*(2), but that case is not consistent with the abovementioned decision of the Full Bench. There was no evidence that the respondents ever used the *chattram*. Further, as regards two-thirds of the income the gift was to charity generally, not to the *chattram*, and consequently was too vague to be valid: *Runchordas v. Parvatibhai*(3). The appointment of the respondents as trustees was valid, and there was no ground for their removal.

De Gruyther, K.C., *Dube* and *Narasimham* for respondent No. 2 were not called upon.

The JUDGMENT of their Lordships was delivered by

Sir
JOHN EDGE.

Sir JOHN EDGE.—These are consolidated appeals by defendants in a suit, No. 1 of 1916, from two decrees, dated November 13, 1919, of the High Court at Madras, which affirmed, with a trifling variation as to some property claimed, a preliminary decree, dated April 15,

1918, and a final decree, dated September 30, 1918, of the Subordinate Judge of Kumbakonam.

The suit relates to a *chattram* (also called a choultry) at Kumbakonam, and property alleged to be endowed property of the *chattram*. The *chattram* is now known as Kalyanarama Ayyar's *chattram*. Formerly it was known as Rajappa Ayyar's *chattram*. Two Brahmans were the plaintiffs. Since the suit was in appeal in the High Court one of the plaintiffs died; his legal representative is now on the record and is one of the respondents.

The plaintiffs on November 13, 1916, brought this suit and claimed a declaration that the *chattram* was a public charitable institution having the properties mentioned in schedule B of the plaint and seven-ninths of the properties mentioned in schedules C to F as endowments; a declaration that the defendants are not lawfully appointed trustees and are not entitled to any right to the management and administration of the institution or in the properties belonging to it; that the defendants be removed from the office; that fit and proper persons be appointed trustees for the administration of the trust and that the *chattram* and the properties belonging to it be vested in them; that a scheme for the administration of the trust be settled; and other reliefs. The case of the plaintiffs was that the *chattram* was a public charity which had been founded and dedicated to the public more than sixty years before suit as a charitable institution for the convenience of travellers as a halting place and for the feeding of poor Brahmans resorting to it. The plaintiffs had obtained under section 92 of the Code of Civil Procedure, 1908, the consent in writing of the Advocate-General to their institution of the suit.

The defendants denied that the plaintiffs were persons who had an interest in the trust within the meaning

VAIDYA-
NATHA
AIYAR
v.
SWAMI-
NATHA
AIYAR.
—
Sir
JOHN EDGE.

(1) (1919) I.L.R., 42 Mad., 360. (2) (1917) I.L.R., 40 Mad., 612 (F.B.).

(3) (1899) I.L.R., 28 Bom., 725 (P.C.).

VAIDYA-
NATHA
Ayyar
v.
SWAMI-
NATHA
Ayyar.

Sir
JOHN EDGE.

of section 92 of the Code of Civil Procedure, 1908. They alleged that the *chattram* was a private *chattram* and they denied that it had ever been dedicated to the public, and that it had ever been endowed with any of the properties claimed as endowments; they pleaded that they had been duly appointed trustees, and other matters which are immaterial if they had not been duly appointed as trustees.

The learned Subordinate Judge who tried the suit recorded oral and documentary evidence, and he found that the plaintiffs, having obtained the consent in writing of the Advocate-General, were persons who were entitled to institute the suit; that the *chattram* had been dedicated to the public and had been endowed as alleged in the plaint; that the defendants were not duly appointed trustees; and decided that a scheme for the management of the trust should be framed; and he framed a scheme for the management of the trust. The learned Judges of the High Court on appeal concurred with the findings of the Subordinate Judge except that they found that a small portion of the property claimed as endowment was not endowed property and, with that variation as to the endowed property, affirmed by their decrees the decrees of the Subordinate Judge, and dismissed the appeals to their Court.

From those decrees of the High Court these consolidated appeals have been brought.

Mr. Upjohn, who appeared for the appellants, in his very able and exhaustive argument in support of these consolidated appeals, took and relied upon four points only. They were (1) that the plaintiffs were not persons who had an interest in the charitable trust within the meaning of section 92 of the Code of Civil Procedure, 1908, and consequently had no *locus standi* to institute this suit; (2) that the *chattram* was not proved to be a public

trust; (3) that the Courts below had misconstrued the will of Swaminatha Ayyar of November 7, 1881; and (4) that the first defendant had been properly appointed a trustee and there was no ground for removing him from his office as trustee of the charity. Their Lordships will deal with these points in the order in which they were argued by Mr. Upjohn.

Mr. Upjohn's first point was that, assuming for the purpose only of his argument that the *chattram* had been dedicated to the public with a trust created for public purposes of a charitable nature, the suit would not lie if the plaintiffs had not, within the meaning of section 92 of the Code of Civil Procedure, 1908, an interest in the trust. That is a perfectly sound argument. The consent in writing of the Advocate-General to the institution of the suit by the plaintiffs would not bring the suit within the meaning of section 92 of the Code of Civil Procedure, 1908, unless the plaintiffs had an interest in the trust. Mr. Upjohn contended that the plaintiffs had no interest in the trust within the meaning of section 92. The question is, had the plaintiffs an interest in the trust within the meaning of the section? They were descendants in female lines of Rajappa Ayyar and his son Kalyanarama Ayyar, one of whom, probably the former, founded and dedicated to the public the *chattram* as a charitable institution, and are of the founder's kin. The *chattram* was at first known as Rajappa Ayyar's *chattram* and was subsequently known as Kalyanarama Ayyar's *chattram*.

On August 22, 1894, the five sons of Kalyanarama Ayyar executed a partition-deed in which the *chattram* and the lands then belonging to it, from which the income of the *chattram* was derived, were mentioned. The lands belonging to the *chattram* were excepted from the partition, but it was agreed that the five brothers should

VAIDYA-
NATHA
Ayyar
v.
SWAMI-
NATHA
Ayyar.

Sir
JOHN EDGE.

VAIDYA-
NATHA
AIYAR
v.
SWAMI-
NATHA
AIYAR.
—
Sir
JOHN EDGE.

manage the *chattram* lands according to the order of seniority. It is obvious that the *chattram* must have been endowed with these lands before the date of that deed of partition. Mr. Upjohn contended that "an interest in the trust" to be within section 92 of the Code of Civil Procedure, 1908, must be some special interest and not merely a sentimental interest, and he referred to the dictum of Lord ELDON, L.C., *In re Bedford Charity (Masters, etc., of)* (1) in which in a reference to Sir Samuel Romilly's Act (52 Geo. 3, c. 101), which authorized persons other than the law officers to present petitions to the Court in certain matters of public charities, Lord ELDON said :

"The Act, indeed, authorizes 'any two or more persons' to present a petition; but I conceive that those words must be understood to mean persons having an interest"

which earlier at page 518 Lord ELDON interpreted as meaning a direct interest in the charity.

Mr. Upjohn also referred to the observations of Lord ELDON, L.C., in *Corporation of Ludlow v. Greenhouse and another* (2). It may be that the dictum of Lord ELDON in *In re Bedford Charity (Masters, etc., of)* (1) caused those who were responsible for the drafting of section 539 of the Code of Civil Procedure of 1877 (Act X of 1877) to draft that section as giving a right, in case of a breach of a trust created for public charitable purposes, to "two or more persons having a direct interest in the trust," and who had obtained the consent of the Advocate-General, to institute a suit under that section. It must, however, have subsequently appeared to the Governor-General of India in Council that the limitation of a "direct" interest was not expedient in India, and it was enacted by section 44 of the Civil Procedure Amendment Act, 1888, which amended the procedure then in force, "that in section

(1) (1819) 2 Swans, 471; 36 E.R., 696.

(2) (1827) Bligh's N.S., 17.

539, for the words 'having a direct interest' the words "having an interest" shall be substituted."

It may be that COURTS TROTTER, J., was correct in stating in *T. R. Ramachandra Aiyar v. Parameswaran Unni* (1) that it was in consequence of the decision in *Jan Ali v. Ram Nath Mundul* (2) that the change in the law was made by omitting the word "direct." In that case the High Court at Calcutta had held that the plaintiffs there, two Muhammadans who lived in a village and worshipped regularly at the village mosque, had no direct interest in the mosque. Their Lordships would have considered that Muhammadans who worshiped regularly in the mosque of the village had a direct interest in the trust relating to the mosque. But, so that they may not be misunderstood as to the meaning of "interest" in section 92 of the Code of Civil Procedure, 1908, they think it advisable to say that public Hindu temples are *prima facie* to be taken, as Sir JOHN WALLIS, C.J., said in *T. R. Ramachandra Aiyar v. Parameswaran Unni* (1), to be dedicated for the use of all Hindus resorting to them. They agree with Sir JOHN WALLIS that to hold that the bare possibility, however remote, that a Hindu might desire to resort to a particular temple, gives him an interest in the trust, appears to defeat the object with which the legislature inserted these words in the section.

"That object was to prevent people interfering by virtue of the section (section 92) in the administration of charitable trusts merely in the interests of others and without any real interests of their own."

In the present case their Lordships are of opinion that the fact that the plaintiffs are descendants, although only in female lines of the founder of the *chattram*, gave them an interest in the proper administration of the trust sufficient to enable them to maintain this suit,

(1) (1919) I.L.R., 42 Mad., 360.

(2) (1882) I.L.R., 8 Cal., 32.

VAIDYA-
NATHA
AIYAR
v.
SWAMI-
NATHA
AIYAR.
—
Sir
JOHN EDGE.

VAIDYA-
NATHA
Ayyar
v.
SWAMI-
NATHA
Ayyar.

Sir
JOHN EDGE.

although they themselves may never find it necessary to use the *chattram* as a rest-house or to obtain food there.

As to the second point argued by Mr. Upjohn, it is sufficient to say that there are concurrent findings that the *chattram* was a public trust, and their Lordships may add they also find that the *chattram* is a public trust.

As to the third point argued by Mr. Upjohn, that the Courts below misconstrued the will of Swaminatha Ayyar of November 7, 1881, that contention, if well founded, would show that the gift of some of the property to the *chattram* which each Court has found to belong to the *chattram* was a void gift within the decision of the Board in *Runchordas v. Parvatibhai*(1). The testator was one of the five sons of Kalyanarama Ayyar. It is not necessary to set out the translation of the whole of his will; the contention turns on the meaning of a part of the will.

After referring to the partition of August 22, 1894, between him and his brothers, and some other matters, the testator's will as translated continues, so far as is material, as follows :—

"The arrangement which I make regarding the aforesaid properties is this :—After my decease my properties and my estate shall be managed with all rights by my divided brothers K. Venkataranga Ayyar and K. Suryanarayana Ayyar as executors. The incomes from the villages and gardens shall be divided into three portions and two portions thereof shall be given to my wife, and the said house and the ethiradi manai (manai in front of it) be given to her for her occupation; and with the remaining one portion, the debts due by me and the debts contracted by me and K. Venkataranga Ayyar on the security of our family properties shall be discharged. After the said two kinds of debts are discharged, the said executors shall, with the said one-third portion of the said income, make annadhanam (feed poor people) in our family choultry in Perumbandi now under the management of K. Venkataranga Ayyar. My wife shall take all the aforesaid movable properties and enjoy them according to her pleasure, and if she dies leaving any movable properties, they

(1) (1892) I.L.R., 23 Bom., 725 (P.C.).

VAIDYA-
NATHA
Ayyar
v.
SWAMI-
NATHA
Ayyar.

Sir
JOHN EDGE.

shall be used by the said executors themselves for the said feeding charity. After my wife's decease, two out of three portions of the income enjoyed by her shall be utilized for the charity and the remaining one out of the three shares, and the dwelling-house and manai in front, shall be taken by K. Venkataranga Ayyar and K. Suryanarayana Ayyar and their posterity. The other dayadis have no right whatever."

Their Lordships assume the words "the charity" in the translation are the correct rendering of the vernacular, which they are informed is in Tamil. If these words are the correct rendering of the vernacular, they plainly refer to the *chattram* charity which had immediately before been indicated and the gift was not void for uncertainty. The original will was before the learned Subordinate Judge who tried the suit and who understood Tamil. This is what he said as to that part of the will :—

"14. It is next contended that this gift of a two-third share in the two-third share to a 'dharma' was invalid, and the decision in *Parthasarathy Pillai v. Thiruvengada Pillai*(1) was relied upon. A perusal of Swaminatha Ayyar's will indicates to my mind that the 'dharma' he intended to create in respect of the two-third share in the two-third share was the dharma to which he gave a one-third share in the income: and that the gift of two-third share of a two-third share is not void for uncertainty.

15. It was lastly contended that it was not open to this Court to construe the terms of Swaminatha Ayyar's will, in so far as they relate to the charity: but it appears to me that it is open to this Court to see what interest the charity has in Swaminatha Ayyar's properties. I therefore find that the *chattram* has a seven-ninth share in the income from the C to F schedule properties under Swaminatha Ayyar's will."

This is what the learned Judges of the High Court said on that subject :—

"As regards two-thirds of the income of the properties given to the wife which the will directs to be utilized for dharma on her death, it is argued that the reference there is not to this choultry but to charity generally. The learned Subordinate

(1) (1907) I.L.R., 30 Mad., 840.

VAIDYA-
NATHA
AIYAR
v.
SWAMI-
NATHA
AIYAR.

Sir
JOHN EDGE.

Judge has held that the word 'dharma' refers to this choultry and we think he is right in that construction. In that view of the will, the choultry becomes entitled under exhibit C to seven-ninths of the income of the properties."

Their Lordships hold that the will was not misunderstood by either of the Courts.

As to the fourth and last point argued by Mr. Upjohn, that the first defendant, Vaidyanatha Ayyar, had been properly appointed a trustee of the *chattram* and ought not to have been removed, it is necessary to see what the appointment in fact was. His appointment was made by paragraphs 10 and 11 of the will of Suri Ayyar, probate of which was granted on July 17, 1915. Suri Ayyar was the last survivor of the five brothers who were the sons of Kalyanarama Ayyar. Paragraphs 10 and 11 of the will, as translated, were as follows:—

"10. The choultry mentioned in paragraph 3 aforesaid and the entire properties attached thereto shall be in the management of the aforementioned R. Vaidyanatha Ayyar. The Brahman feeding and the Dwadasi kattalai of the said choultry shall be conducted on a scale not inferior to what is being conducted now.

11. After the abovementioned Vaidyanatha Ayyar, his younger brother, the said R. Narayanasami Ayyar, and after him, my friend Jayakrishnachariar, residing in Melakkaveri Achari Agraharam, shall look after the management of the said choultry and of the entire properties attached thereto."

Turning to paragraph 3 of the will, it will be seen what were the properties for the management of which Vaidyanatha Ayyar was appointed. Paragraph 3 is, as translated, as follows:—

"3. Besides the abovesaid properties there are in Kumbakonam town to the northern side of the Cauveri, my family choultry, the buildings attached thereto, lands, grounds, bandy pettai, etc., properties. These belong to me and are in my possession and enjoyment."

Suri Ayyar was appointing Vaidyanatha Ayyar manager of properties which he falsely alleged belonged to himself as proprietor, and was not appointing him as

VAIDYA-
NATHA
AIYAR
v.
SWAMI-
NATHA
AIYAR.

Sir
JOHN EDGE.

a trustee of properties which were already trust properties. Suri Ayyar as the last survivor of the descendants in the male line of the founder of the *chattram* possibly had a right to appoint a trustee of the charity: see *Gauranga Sahu v. Sudevi Mata*(1). But that was not what he was professing to do. He was professing to appoint a manager of property which he falsely alleged to be his own private property, and in the opinion of the Subordinate Judge his object was to afford a monthly income for the daughter of his late concubine and her children.

After Mr. Upjohn had concluded his arguments in support of the appeals, his junior counsel addressed the Board on a subject which Mr. Upjohn had not referred to and contended that some small portions of the properties which had been concurrently dealt with in the decrees of the trial Judge and the High Court as the properties of the charitable trust did not belong to the trust. When asked, however, to refer the Board to the evidence on which his contention was founded, counsel failed to point to any evidence in support of his contention.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitor for appellant: *Douglas Grant*.

Solicitor for respondents: *H. S. L. Polak*.

A.M.T.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Victor Murray Coutts Trotter, Chief Justice,
Mr. Justice Ramesam and Mr. Justice Wallace.

1924,
April 24.

GOVINDA NAIDU AND 2 OTHERS (PLAINTIFFS), APPELLANTS

v.

CHENGALROYA MUDALI AND 2 OTHERS (DEFENDANTS),
RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 153—Suit before Civil Courts to eject non-occupancy ryots on grounds not mentioned in the section, maintainability of.

*Held by the Full Bench:—*Section 153 of the Madras Estates Land Act is exhaustive of the grounds on which a non-occupancy ryot can be ejected by a suit before the Collector, but it does not oust the jurisdiction of the Civil Courts to entertain suits for ejecting such tenants on other legal grounds, e.g., (as in the present case) the expiry of the term of one year for which the tenant was let into possession under section 8 (4) of the Madras Estates Land Act by the landholder owning the kudiwaram interest also. *Yelikepalli Venkaya v. Venkatramayya Apparao* (1917) 33 M.L.J., 757, and the decision of *Oldfield, J., in Sankara Venkataratnam v. Sri Rajah Varadarajah Appa Rao* (1915) 29 M.L.J., 184, overruled.

Held by the Division Bench (Phillips and Venkatasubba Rao, JJ.) that not only benamidars in whose names immovable property is bought by others but also those to whom such property is nominally transferred by real owners, can maintain suits against strangers in respect of such property; *Gur Narayan v. Sheolal Singh* (1919) I.L.R., 46 Calc., 566 (P.C.), followed.

APPEAL against the decree of R. A. JENKINS, District Judge of Chingleput, in Original Suit No. 71 of 1918.

The facts are given in the Order of Reference of PHILLIPS, J. The plaintiff, the landholder, preferred this appeal.

* Appeal No. 7 of 1921.

This appeal coming on for hearing on the 16th and 17th days of October 1923, the Court (PHILLIPS and VENKATASUBBA RAO, JJ.) made the following

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

ORDER OF REFERENCE TO A FULL BENCH.

PHILLIPS, J.—One Chengama Naidu, Zamindar, was the original owner of the plaint lands. In 1870 he purchased also the kudiwaram right. The plaintiffs purchased from his successor-in-title in 1917. The suit is brought to eject the defendants from the suit lands, the defendants having executed muchilikas for periods of one year only, undertaking to give up the lands at the expiry of the period.

The District Judge held that the plaintiffs were mere benamidars and that the sale to them was a sham transaction and consequently they were not entitled to maintain the suit. The recent decision of the Privy Council in *Gur Narayan v. Sheolal Singh*(1) appears to be against this view, for it was there held that a benamidar could bring a suit although he was not the real owner. The respondents' vakil contends that that decision applies only to cases where a transaction is supported by consideration and that it does not apply to the transfer of property by the owner to a benamidar which was not really intended to effect a transfer. From the judgment, however, it would appear that the Privy Council made no distinction between the two classes of benamidars, for they start the discussion with the following words:—

"On the question whether a person who has no beneficial interest in the property which stands in his name or is acquired in his name can maintain an action in respect thereof, there is considerable diversity of judicial opinion in India,"

and further on in the judgment they refer to a passage in *Bilas Kunwar v. Desraj Ranjit Singh*(2)

(1) (1919) I.L.R., 46 Calc., 566 (P.C.). (2) (1915) I.L.R., 37 All., 557 (P.C.).

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

and from these two sentences I think it is clear that both classes of benamidars are included in that decision, and the plaintiffs are, therefore, entitled to sue in their own name, whether or not they are mere benamidars. The cases relied on by respondents were decided prior to this ruling of the Privy Council [*Vyricherla Veerabhadraraju Bahadur v. Dasiraju Venkatachelapati*(1), *Rajammal v. Mahadeva Yogi*(2) and *The Secretary of State for India v. Dadi Reddi Nagiah*(3).]

The case as regards the lands is not quite the same in respect of all of them, for the District Judge has found that in respect of $3\frac{1}{2}$ cawnies the defendants had occupancy rights. Admittedly they have been in possession of these lands for a very long period and are still in possession, and the only evidence that they have been out of possession for any time is the evidence afforded by a muchilika, Exhibit D, which was executed by other persons in respect of these lands. This is the only muchilika that has been issued and as admittedly the plaintiffs' vendors were in possession of annual muchilikas it is very significant that they have not been produced. There seems, therefore, to be no reason to disturb the finding of the District Judge that in respect of these $3\frac{1}{2}$ cawnies the defendants have acquired occupancy rights, and consequently the suit must fail as regards those lands.

As regards the other portion of the plaint lands, there has been no such occupation by the defendants and the plaintiffs rely on the provisions of section 8, clause (4) of the Estates Land Act as justifying their suit. That section reads as follows:—

"In cases where the interest of the ryot in the holding has passed to the landholder by transfer for valuable consideration

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

before the passing of this Act otherwise than at a sale for arrears of rent, or has passed by inheritance, the landholder shall have the right for a period of twelve years from the passing of this Act of admitting any person to the possession of such land on such terms as may be agreed upon between them and the person so admitted shall not be entitled during such period to the benefit of the provisions of section 46."

The District Judge has, however, held that the defendants are non-occupancy ryots and that consequently the provisions of section 153 must be applied, and there being no provision for the ejectment of ryots holding on a lease for one year, the plaintiffs have no cause of action. Section 153 has been the subject of considerable judicial discussion in this Court, but in no reported case does it appear to have been considered in connexion with section 8, clause (4) of the Act, the prior cases dealing with occupancy of "old waste" as defined in the Act. There is, therefore, no direct authority so far as the facts of this case are concerned, and I will now proceed to deal with it in that view.

In the first place, there is considerable doubt as to whether the defendants are really non-occupancy ryots, for although in the lower Court the plaintiffs' pleader admitted that they were such, that admission, if not supported by law, cannot bind the parties, and the question has to be determined. The definition of "ryot" in section 3 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."

Undoubtedly, during the period of the first defendant's lease he was such a ryot and it is contended that by mere holding over, he continues to be such. Admittedly no rent has been received from him for his occupation and, therefore, it is difficult to understand how he can be said to hold the land on condition of paying to the landholder the rent. He is holding the land in

(1) (1920) 57 L.C., 689.

(2) (1914) M.W.N., 717.

(3) (1919) 9 L.W., 22.

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

contravention of the terms of his lease and his agreement to pay rent has already expired. In the lease, there is no condition that he shall pay rent after the expiry of the period, and there is nothing in the Act which lays down that a man holding ryotiland without an agreement to pay rent holds it on condition of paying the rent. No doubt there is an observation in *Yelikepalli Venkaya v. Venkatramayya Apparao*(1), that

"the mere fact that a lease under which a man occupies ryoti land has expired, does not, as we read that section, viz., section 163, make him a trespasser within the meaning of that section."

Under section 163

"any person who otherwise than by inheritance or legal transfer occupies ryoti land in an estate and has not been admitted as a ryot by the landholder shall be liable to ejectment as a trespasser."

The defendants were certainly admitted as ryots by the grant of the lease, but they were so admitted for a definite term and I do not think it can be held that if they continued to occupy the land, that occupation can be deemed to be a consequence of their admission as ryots, for it is rather the result of the breach of the terms upon which they were so admitted. The occupation is certainly not by legal transfer, for that transfer was only operative until the end of the lease. If defendants are not ryots within the meaning of the Act, they cannot be non-occupancy ryots, a term which is nowhere specifically defined, and section 153 need not be applied at all and the suit would be brought under section 163 in a Civil Court as therein provided or under the ordinary provisions of law. This view is in effect supported by TYABJI, J., in his judgment in *Sankara Venkataratnam v. Sri Rajah Varadarajah Appa Rao*(2), but as I have pointed out above, it is opposed to the

(1) (1917) 33 M.L.J., 757.

(2) (1915) 29 M.L.J., 184.

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

decision of the Bench in *Yelikepalli Venkaya v. Venkatramayya Apparao*(1), and also to the opinion of OLDFIELD, J., in the former case.

If the defendants are not trespassers and are treated as non-occupancy ryots, then section 153 has to be considered. Section 189 and Schedule A of the Act take away from the cognizance of Civil Courts all suits filed under section 153 and that section is the one dealing with eviction of non-occupancy ryots. It would appear from the judgment in *Yelikepalli Venkaya v. Venkatramayya Apparao*(1) that the Bench in that case treated section 153 as exhaustive and held that all suits to eject non-occupancy ryots must be brought in the Revenue Court. However, in the earliest reported case to which we have been referred, *Ponnusamy Padayachi v. Karuppudayan*(2), SPENCER, J., held that the section was not exhaustive, but MILLER, J., who was the other member of the Bench did not deal with this question. In the other case *Sankara Venkataratnam v. Sri Rajah Varadarajah Appa Rao*(3), TYABJI, J., also held that some suits in ejectment could be brought in a Civil Court, although he had expressed a different opinion in an earlier case, *Ardajeri Rama Reddi v. Karpi Sivaga*(4). It is, however, significant that OLDFIELD, J., in a subsequent case *President, District Board, Tanjore v. Kannuswami Thondaman*(5), agreed with the view taken by SPENCER, J., that the section was not exhaustive. We thus have two Judges who, after due consideration, have come to the ultimate conclusion that the section is not exhaustive and also the opinion of SPENCER, J., to the same effect. The cases referred to, as I have mentioned above, all deal with the occupation of old waste under section 6 of the Act and made no reference

(1) (1917) 33 M.L.J., 757.

(3) (1915) 29 M.L.J., 184.

(2) (1915) I.L.B., 38 Mad., 843.

(4) (1918) M.W.N., 971.

(5) (1916) 35 I.O., 121.

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

to section 8 (4) with which we are now concerned, and it is this fact which differentiates the present case.

Under section 8 (4) the landholder is empowered within twelve years of the passing of the Act to lease out the ryoti land in which the interest of the ryot has passed to him on such terms as may be agreed upon between them and there is a further proviso that the person so admitted shall not be entitled during such period to the benefit of the provisions of section 46. Section 46 is a section dealing with the right of a non-occupancy ryot to acquire a permanent right of occupancy under certain conditions. That right is expressly taken away from persons to whom land has been leased under section 8 (4). If this section stood alone it would be quite clear that the landholder would have the right to evict his tenant in accordance with the terms of the lease to that effect; but it is contended that this right has been taken away by section 153 and if section 153 is exhaustive that possibly would be the case. But it must be remembered that section 153 is expressly stated to be subject to the other provisions of this Act and consequently it is subject to the provisions of section 8 (4). Unless, therefore, section 153 expressly takes away the rights conferred by section 8 (4), it would not be right, I think, to read into it any such provision; for when a right has been expressly conferred by a statute, there can be no implication that it is taken away by another portion of the statute unless it is expressly so done. The reason for treating section 153 as exhaustive appears to be based on the language of the proviso to the section which was added in an amending Act, namely,

"nothing in this shall affect the liability of any person who is a non-occupancy ryot, etc., to be ejected."

This provision has been construed in one way by SPENCER and TYABJI, JJ., and in another way by

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

OLDFIELD, J., in *Sankara Venkataratnam v. Sri Rajah Varadarajah Appa Rao*(1), and the Bench in *Yelikepalli Venkaya v. Venkatramayya Apparao*(2), and it is for consideration, which is the right interpretation. The section begins

"A non-occupancy ryot shall, subject to the provisions of this Act, be liable to ejectment by suit before the Collector on one or more of the following grounds, and not otherwise."

The real question is the meaning of the words "not otherwise." Does it refer back merely to the words "one or more of the following grounds," or does it also include the words "by suit before the Collector"? If it refers to the latter, then undoubtedly a non-occupancy ryot would not be liable to ejectment except by suit before the Collector unless there is some provision in the Act which allows of it. The anomaly of this interpretation is clearly set out both in the judgments of SPENCER and TYABJI, JJ., and it certainly is somewhat strange that the legislature should favour those tenants who hold on a short lease rather than those who hold on a lease for a period exceeding five years, which is referred to in clause (e) of the section. The proviso according to the respondents merely adds another class of cases to clauses (a) to (e) and the words "the liability of any person to be ejected" do not touch the question of the *forum* in which the liability is to be enforced. If the legislature had intended to merely enact a sixth class of case in which ejectment could be had, it is difficult to understand why the proviso was framed in its present form when it would have been simpler to have merely added a clause (f)—

"on the ground of expiry of the lease granted before the commencement of this Act."

The form in which the amendment has been made leads me to accept the appellant's contention that the

(1) (1915) 29 M.L.J., 184.

(2) (1917) 33 M.L.J., 757.

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

liability referred to is the liability of a tenant under the ordinary law apart from the provisions of the Estates Land Act. A tenant, who has accepted a lease for one year, is bound under the Transfer of Property Act to deliver possession to his landlord at the expiry of the term and he is then liable to ejectment in default. It is possible that, because the proviso is confined to leases granted before the commencement of the Act, this may have been the intention of the legislature and that his liability is only the liability under the Act. It is certainly a question of great difficulty and the section has been interpreted in different ways. If "otherwise" is read as referring only to the grounds mentioned in the section, then there would be no difficulty in holding that any person liable to ejectment under the ordinary law would not be saved therefrom unless it is expressly so stated in the Estates Land Act and I think that probably this interpretation of the section would lead to less difficulty in dealing with all these cases. I certainly think that the words in section 153 "subject to the provisions of this Act" must be interpreted as subject to section 8 (4) and that the rights and liabilities under section 8 (4) are not touched by section 153. Another ground for this view is that it is well established that the jurisdiction of Civil Courts continues in all cases unless it is expressly taken away by the statute. As, however, there is a conflict of opinion in this Court both on the interpretation of section 163 and also section 153 and as my learned brother does not at present wish to express an opinion as to whether section 163 should be applied to this case, I think it is necessary to have section 153 interpreted by a Full Bench of this Court and would therefore refer the following question for determination.

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

Is section 153 of the Estates Land Act exhaustive, and does it oust the jurisdiction of Civil Courts in all cases where it is sought to eject a non-occupancy ryot?

VENKATASUBBA RAO, J.—The facts have been set out and the authorities referred to in the judgment of my learned brother, and I do not propose to cover the same ground. But, I desire to say a few words on the interpretation of section 153 of the Madras Estates Land Act.

It is admitted that the case falls within section 8 (4) of the Act and under the terms of the lease which is for a period of one year, the landholder is entitled to take possession of the land on the expiry of that period. Section 8 (4) provides that the landholder shall have the right of admitting any person to the possession of the land described in that sub-section on such terms as may be agreed upon between them. It is argued on behalf of the defendants that the plaintiff is not entitled to eject them, because it is said that section 153 applies and the liability to be ejected is limited to the grounds specified in it. It is further argued that the suit is cognizable under the terms of that section only by the Collector, and that Civil Courts have no jurisdiction to try suits instituted for the purpose of ejecting non-occupancy ryots. Section 153 runs:—

"153. A non-occupancy ryot shall, subject to the provisions of this Act, be liable to ejectment by suit before the Collector on one or more of the following grounds and not otherwise, namely:—

(a) On the ground that he has used the land in a manner which renders it unfit for the purposes of the tenancy;

(b) On the ground that a decree for arrears of rent in respect of the holding passed against him or any person whose legal representative he is remains unsatisfied at the expiry of the revenue year following the one in which the decree was passed;

(c) On the ground that he has refused to agree to pay a fair and equitable rent determined under section 49;

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

(d) On the ground that without the permission of the landholder the ryot has mined or quarried or excavated gravel or clay for profit within his holding; and

(e) Where he has been admitted to occupation of the land under a registered lease for a term exceeding five years, on the ground that the term of the lease has expired.

(Nothing in this section shall affect the liability of any person who is a non-occupancy ryot according to the provisions of this Act to be ejected on the ground of expiry of the term of a lease granted before the commencement of this Act.)"

In my opinion the section deals with the grounds on which a non-occupancy ryot may be ejected by means of a suit before the Collector. In that sense, the enumeration of the grounds appears to be exhaustive. If the lease is for a term exceeding five years and is in writing and registered, the lessee may be ejected on the ground that the term of the lease has expired. This is what clause (e) provides. In the case of a lease not coming within clause (e), the lessee can be ejected only on one of the grounds mentioned in clauses (a) to (d); that is to say, in the case of a lease, say for two or three years, the lessee can be ejected only on the ground that he has misused the land or that he has failed to pay the rent or that he has refused to pay a fair and equitable rent. It is only on these grounds in respect of a short term lease, to use a compendious expression, that a lessee can be ejected by a suit before the Collector. The object of the section seems to be to provide a summary remedy in certain cases. The legislature has thought it fit to give the Collector jurisdiction to eject tenants under leases coming within clause (e) on any one of the five grounds specified in that section. But if the tenant does not hold the land under a lease coming under clause (e) it seems to be the intention of the legislature to vest the Collector with jurisdiction to eject him only if one of the four grounds mentioned in clauses (a) to (d) exists. To take a concrete instance, if the

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

tenant holds the land under a lease for a term of one year, he cannot be ejected under section 153 on the ground that the term of the lease has expired. It is contended on behalf of the defendants that a tenant admitted under a lease, say, for a term of one year, cannot be ejected notwithstanding that the lease has become determined by efflux of the time limited under it. I agree that such a tenant cannot be ejected under section 153 of the Act. But I do not think that the rights possessed by the lessor under the general law are intended to be restricted by section 153. The law confers certain rights upon the lessor and imposes certain liabilities on the lessee. For instance, one of the rights possessed by the lessor is that on the determination of the lease, the lessee shall put him into possession of the property leased. A lease of property may also be determined by forfeiture either because the lease contains an express provision for re-entry on breach of a particular condition or because the lessee has denied the lessor's title to the property. If the legislature intended to abrogate the whole body of the law on the subject, I should certainly expect to find very clear words, and I do not think it is permissible to hold that sweeping changes in the law have been effected merely by drawing inferences from the language used. The results are of a far-reaching character and I am not prepared to assume that substantive rights have been taken away by the terms of section 153. The contention on behalf of the defendants is practically this: A non-occupancy ryot under a short-term lease cannot be ejected at all unless he misuses the land or fails to pay rent or refuses to pay a fair rent. According to this argument, if a non-occupancy ryot is once admitted to the occupation of the land under a lease for a short term, the lessor is practically without a remedy;

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

section 8 (4) gives the lessor the right to admit the lessee on such terms as may be agreed upon; but yet the lessee, provided he is careful enough to pay the rent and not to misuse the land, acquires what may be roughly described as a permanent right to occupy the land. This position leads to many anomalies, one of them being that a tenant under a short-term lease enjoys an advantage over a tenant under a lease falling within clause (e), the former can never be ejected on the ground that the term of the lease has expired; whereas the latter is liable to be so ejected. It has been said that the object of the legislature was to favour long leases and to discourage short leases. But to understand the principle underlying the section seems to me to be an impossible task. What therefore has to be done is to interpret the section reasonably and in a manner that absurd results do not follow. I would construe the section thus: "A non-occupancy ryot shall be liable to be sued before the Collector only in certain cases and in no other cases; only when the grounds specified in the section exist can the lessor eject his tenant by means of a suit before the Collector." The landlord, it is intended, may enforce the statutory right given by section 153 by means of a suit before the Collector. But the existing rights under the general law are not intended to be taken away and the Civil Courts are not deprived of their jurisdiction.

The defendants rely upon the proviso to the section as supporting their contention. The proviso just like the body of the section is unhappily worded. But I think that the proviso adds a new ground of ejectment, namely, in case of leases granted before the commencement of the Act, the ryot may be ejected on the expiry of the term whether the lease is of the description mentioned in clause (e) or whether it is not. But here

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.

again, the lessor gets a statutory right to institute a summary suit before the Collector, and it is not intended that the proviso should affect the ordinary jurisdiction of the Civil Courts or take away the rights possessed under the general law. I place this construction because any inconsistency will be then avoided between the body of the section and the proviso.

The section is by no means easy to interpret. Whichever view may be adopted, it is difficult to justify it with reference to an intelligible principle underlying the section. But I think the construction that I have ventured to place upon the section is least open to objection. In my opinion when the term under a short-term lease expires, the lessee may be ejected under the general law whether he holds over, that is, continues in possession with the consent of the landlord, or becomes a mere trespasser by continuing to be in possession without such consent. Clauses (a) to (e) of section 153 do not apply at all and the rights and the liabilities of the parties are to be regulated entirely irrespective of the provisions of the Madras Estates Land Act.

In view of the conflict of opinions that have been expressed on this subject in the cases to which my learned brother has referred, I agree that the matter should be referred to a Full Bench; and I also agree in the Order of Reference proposed.

I may add that the argument on behalf of the defendants that the plaintiff is not entitled to sue, because he is a benamidar for the true owner, is untenable and that I have nothing to add to the observations of my learned brother on this point with which I entirely agree.

ON THIS REFERENCE

A. Krishnaswami Ayyar with A. N. Krishna Ayyangar for appellants.—Section 9, Civil Procedure Code, gives

GOVINDA
NAIDU
v.
CHENGAL-
BOYA
MUDALI.

Civil Courts jurisdiction to try all civil suits unless otherwise provided. The defendant is not a "ryot" as defined in section 3 (15) of the Estates Land Act but is a trespasser. Section 8 (4), which is an exception to section 6 and under which the defendant was let into possession, makes the defendant liable to be ejected under section 163 by a suit before a Civil Court; and this right of the landholder has not been taken away by section 189 and section 153, the latter of which is expressly made subject to section 8 (4) and is expressly confined to suits filed before the Collector.

V. C. Gopalaratnam for V. V. Srinivasa Ayyangar for respondent.—This is not a question of jurisdiction. The defendant cannot be ejected at all in any Court; see sections 9 and 187 (g) of the Act. He is a non-occupancy tenant within section 8 (4). He cannot be treated as a trespasser simply because his term has expired. Section 6 gives him occupancy right. "On terms" in section 8 (4) means "on terms other than as to occupancy right." Section 46 is the only restriction mentioned in section 8 (4) and not section 153 also. All rights under contracts, e.g., those under section 8 (4) have been taken away by section 187 and section 153 and the latter provides all grounds for ejectment; expiry of one year's term is not one of them nor does the defendant come under section 163; *Yelikepalli Venkaya v. Venkatramayya Apparao*(1). The omission to deal with a case of a lease of less than five years after the Act is advised. Section 153 does not deal with the forum or with rights under the general law. *Sankara Venkataratnam v. Sri Rajah Varadarajah Appa Rao*(2) holds that the Act is comprehensive as to grounds of ejectment and forum.

(1) (1917) 33 M.L.J., 757.

(2) (1915) 29 M.L.J., 184.

OPINION.

RAMESAM, J.—The facts are simple. The suit lands are ryoti lands in an estate as defined by the Madras Estates Land Act. Chengama Naidu, the landholder in 1870, purchased the kudivaram interest. In fasli 1318, the lands were let to the first defendant for cultivation for a year. Thereafter, the first defendant continued in possession under yearly leases also agreeing to relinquish possession of the lands at the end of the year. On 17th June 1917 the plaintiffs purchased the lands and now seek to eject the first defendant.

The question referred to us is—Is section 153 of the Estates Land Act exhaustive, and does it oust the jurisdiction of Civil Courts in all cases where it is sought to eject a non-occupancy ryot?

For the purpose of discussing section 153, I will at once assume (without deciding) that the defendant is a non-occupancy ryot. PHILLIPS, J., gave some reasons for holding that he is not a ryot at all. There is considerable force in his observations. Assuming, however, that he is a non-occupancy ryot, we have the following classes of non-occupancy ryots under the Act:—

- (1) A ryot of old waste [section 6 (3)].
- (2) A ryot of waste land reclaimed by the landlord for a period of thirty years from the reclamation [section 6 (5)].
- (3) A person admitted under section 8 (4), the case before us.

There may be others.

Section 153 of the Act applies to all these cases. When the case is one of old waste, its effect has to be considered along with section 157. A tenant of old waste can be ejected only on the grounds mentioned in section 153, even if there is a contract to the contrary. But, in the other two cases of non-occupancy ryots, there is no section similar to section 157. In these cases, a

GOVINDA
NAIDU
v.
CHENGAL-
BOYA
MUDALI.
RAMESAM, J.

GOVINDA
NAIDU
v.
CHENGAL-
ROYA
MUDALI.
—
RAMESAM, J.

contract to the contrary will have full operation and the ryot is *prima facie* liable to be ejected on the expiry of the term. The words "not otherwise" in section 153 are used in contrast to the words "on one or more of the following grounds," and have no reference to the words "before the Collector." The effect of the opening words of the section is—A suit before the Collector will lie only on certain grounds and on no other grounds. The section does not prohibit a suit before the Civil Court on other grounds if it lies. The only section in the Act cutting down the jurisdiction of Civil Courts is section 189 and I do not think another prohibition of the jurisdiction of Civil Courts is intended in section 153. If the words "not otherwise" mean not only "on no other grounds" but also "in no other Court" section 157 is unnecessary as to old waste.

Of the decisions referred to by PHILLIPS, J., *Ardajeri Rama Reddi v. Karpi Sivaga*(1), *Ponnusamy Padayachi v. Karuppudayan*(2), *Sankara Venkataratnam v. Sri Rajah Varadarajah Appa Rao*(3), *Yelikepalli Venkaya v. Venkatramayya Apparao*(4), and *President, District Board, Tanjore v. Kannuswami Thondaman*(5), the decision of TYABJI, J., in *Ardajeri Rama Reddi v. Karpi Sivaga*(1) has no bearing. In that case it was found that the land was neither private land nor old waste nor was there any suggestion that the ryot was a non-occupancy ryot. The defendant in it was a ryot to whom section 6 (1) applied. The rest of the observations in that judgment are *obiter dicta*. No question arose about section 153 and the case can throw no light on it. The other cases dealt with old waste. The observations of SPENCER, J., in *Ponnusamy Padayachi v. Karuppudayan*(2), about section 153 support my view.

(1) (1913) M.W.N., 971.

(2) (1915) I.L.R., 38 Mad., 843.

(3) (1915) 29 M.L.J., 184.

(4) (1917) 33 M.L.J., 757.

(5) (1916) 35 I.C., 121.

The actual decision relates to the application of the proviso to the section. As to *Sankara Venkataratnam v. Sri Rajah Varadarajah Appa Rao*(1) I do not agree with the view of OLDFIELD, J., that

"it prescribes the Collector's Court as the tribunal for all ejectment suits against them, whatever the ground of liability to ejectment."

It follows I dissent from the decision in *Yelikepalli Venkaya v. Venkatramayya Apparao*(2), which is based on the view adopted by OLDFIELD, J., in *Sankara Venkataratnam v. Sri Rajah Varadarajah Appa Rao*(1). The decision in *President, District Board, Tanjore v. Kannuswami Thondaman*(3) turned on the application of sections 153 and 157 to old waste and cannot help in cases where the land held by the non-occupancy ryot is not old waste.

My answer to the question referred to is—Section 153 is exhaustive of the grounds of suit before the Collector but not exhaustive in the sense that the suits for ejectment of non-occupancy ryots lie only before the Collector. It may be that, as to old waste, the effect of section 157 is to prohibit a suit for ejectment on grounds other than those in section 153 (which can be only before a Civil Court) though, even then, the proviso to section 153 prevails over both the sections 153 and 157. But as to other non-occupancy ryots, there is no such section and suits lie before Civil Court if based on grounds other than those mentioned in section 153. I agree with VENKATASUBBA RAO, J.'s observation that this is the only construction which reconciles and gives effect to section 153, its proviso and section 157. My view is the view indicated by both the learned Judges who referred the case.

COUTTS TROTTER, C.J.—I agree.

WALLACE, J.—I agree.

COUTTS
TROTTER, C.J.
WALLACE, J.

N.B.

(1) (1915) 29 M.L.J., 184.

(2) (1917) 33 M.L.J., 757.

(3) (1916) 35 I.C., 121.

APPELLATE CRIMINAL.

*Before Mr. Justice Spencer.*1924,
April 10.

EDIGA THIMIAH AND SIX OTHERS (ACCUSED), PETITIONERS,

v.

KING-EMPEROR.*

Criminal Procedure Code (Act V of 1898), sec. 423 (d)—Appellate Court's power to order accused to repay complainant, court-fee—Court Fees Act (Act VII of 1870), sec. 31—Order not an enhancement of sentence.

An order passed by an Appellate Court directing the accused under section 31 of the Court Fees Act (Act VII of 1870) to repay the complainant the court-fee paid on the complaint petition does not amount to an enhancement of the sentence but is only an incidental order which an Appellate Court can make, under section 423 (d) of the Code of Criminal Procedure (Act V of 1898), to bring the judgment into conformity with the law.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the judgment of E. R. WOOD, Joint Magistrate of Penukonda, in Criminal Appeal No. 26 of 1923, preferred against the judgment of R. RANGANATHA CHAR, Sarishtadar-third-class Magistrate of Madakasira, in Calendar Case No. 24 of 1923.

The accused were convicted under sections 323 and 504 of the Indian Penal Code and were sentenced to various fines, by the third-class Magistrate. On appeal by the accused the Joint Magistrate confirmed the conviction and sentence and also ordered the accused to pay, under section 31 of the Court Fees Act, the court-fee paid by the complainant. It was contended in revision that the order for the payment of the court-fee was not valid.

* Criminal Revision Case No. 890 of 1923.

D. Audinarayanayya for V. S. Narasimha Ohar, for the petitioners.

Public Prosecutor for the Crown.

THIMIAH
v.
KING-
EMPEROR.

JUDGMENT.

This Criminal Revision Case has been admitted on the question of the validity of the Appellate Court's order to pay the complainant's court-fees under section 31 of the Court Fees Act.

At the hearing an objection has been raised that the Appellate Court's judgment is defective under section 367 of the Code of Criminal Procedure because the Joint Magistrate did not discuss the bearing of the evidence of each prosecution witness on the guilt of each accused. This is not one of the grounds stated in the revision petition and I do not find any substance in it.

The order to collect court-fees from the accused passed by the Appellate Court is not an enhancement of the sentence under the authority of *In re Vemuri Seshanna*(1). The case in *Queen-Empress v. Tangavelu Ohetti*(2) was decided by a single Judge in September 1898. The head-note to the report indicates that it was a decision under the Code of 1882, which had not the same provision under section 423 (d) for passing incidental or consequential orders in appeal, that was introduced by Act V of 1898. I hold that the making of an order under section 31 of the Court Fees Act does not ordinarily amount to an enhancement of sentence but may be made as an incidental order to bring the judgment into conformity with the law. Section 31 of the Court Fees Act provides that all fees ordered to be repaid under this section shall be recoverable "as if they were fines," but does not thereby make them part

(1) (1903) I.L.R., 26 Mad., 421.

(2) (1899) I.L.R., 22 Mad., 153.

TRIMIAH
v.
KING-
EMPEROR.

of the sentence. In *Queen-Empress v. Tangavelu Chetti*(1) the Assistant Magistrate who tried the case made an order for a part of the court-fees claimed by the complainant to be repaid out of the fine collected as sentence, and it was for this reason that Justice MOORE was impelled to treat the Assistant Magistrate's order to pay the fee as an integral part of the sentence, and to regard the Deputy Magistrate's order to pay an increased amount as an enhancement of the sentence. I do not find any such objection to exist in the present case to the Joint Magistrate's order.

The Criminal Revision Petition is therefore dismissed.

D.A.B.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

VENKATANARAYANA CHETTY (PETITIONER),

APPELLANT,

v.

U. R. M. M. S. SEVUGAN CHETTY AND OTHERS

(COUNTER-PETITIONERS), RESPONDENTS.*

Provincial Insolvency Act (III of 1907), sec. 39 (4)—Provincial Insolvency Rules, r. 21 (b)—Final dividend—Reopening of declaration of final dividend and of order as to distribution—Right of creditor, whose claim was notified but not proved—Notice to such creditor—Nature of notice—Express notice—Notice by separate registered letter to each creditor—Absence of such notice, effect of.

Under section 39, clause (4) of the Provincial Insolvency Act (III of 1907), whenever a final dividend is to be declared, a creditor, whose claim has been notified but not proved, must have express notice that the Receiver is proceeding to declare a final dividend and that he would do so without regard to the

claim of such creditor if he does not take care to prove in time; and under rule 21 (b) of the rules framed by the High Court under the Act, the notice under section 39 (4) of the Act should be in the form of a separate registered letter addressed to each creditor.

As a particular form of notice is prescribed by the rules made under the statute, a strict compliance with the rule is necessary before the creditor's claim to share in the final dividend can be disallowed.

Where therefore the notice required by the section and the rule was not given to such a creditor before a final dividend was declared and distribution ordered, he should, on application to the Court, be allowed to reopen the matter and should be given an opportunity of proving his debt within a time to be allowed by the Court.

APPEAL against the Order of A. FOTHERINGHAM, District Judge of Salem, in I.A. No. 71 of 1919 in I.P. No. 3 of 1912.

This appeal arises out of an application filed by one of the creditors of an insolvent in the District Court of Salem, to reopen an order passed as to declaration of final dividend and distribution of the fund without including the petitioner's claim for a share. The petitioner, who was a creditor of the insolvent, had obtained a sale of certain properties from the insolvent in discharge of his debt, but this sale was set aside on the application of the Receiver under section 37 of the Provincial Insolvency Act as being a fraudulent preference. The Receiver realized the assets of the insolvent including the properties sold to the petitioner; and after realization the Receiver prepared a list showing the dividend due to the creditors, including the name of the petitioner in the list prepared by him; but the petitioner alleged that subsequently his name was excluded by the Court, as his debt was not proved by him and the Court declared a final dividend and ordered its distribution among other creditors. The petitioner thereupon filed the present application to fix the dividend after including him as a creditor entitled to share in the assets along with other

VENKATA-
NARAYANA
CHETTY
v.
SEVUGAN
CHETTY.

1924,
March 25.

(1) (1889) I.L.R., 22 Mad., 153.

* Civil Miscellaneous Appeal No. 46 of 1921.

VENKATA-
NARAYANA
CHETTY
v.
SEVUGAN
CHETTY.

creditors and to order refund from the other creditors if they had been paid. It appeared that neither the Receiver nor the Court had given him express notice by a registered letter as required by rule 21 (b) of Insolvency Rules and section 39 (4) of Act III of 1907. The District Judge held that the petitioner had no *locus standi*, that he had himself notice of the proceedings in Court by reason of the proceedings to annul his sale. He observed as follows :—

“Petitioner was thus apprised of the insolvency proceedings and he was therefore responsible to know of the Gazette notification requiring proof of claims. He cannot therefore plead failure of personal notice.”

He accordingly dismissed the petition. The petitioner preferred this appeal.

S. T. Srinivasagopala Achariyar for appellant.

K. Bhashyam Ayyangar for respondent.

The JUDGMENT of the Court was delivered by

KRISHNAN, J. — This is an appeal in an insolvency proceeding which began in 1912. The appeal is by one of the creditors. He claimed to be entitled to a dividend from the assets realized from the insolvent's estate. His application was dismissed by the learned District Judge on the ground that the *final dividend* had been declared before his application was filed and that the distribution of the dividends so ordered could not be revised so as to include his share, as he knew that such dividend was going to be declared and took no steps in time. The learned Judge points out that he appeared in Court in person when it was claimed by the Official Receiver that a property transferred to him by the insolvent was not validly transferred. It was a case of a fraudulent preference and the Receiver applied to have the alienation set aside and it was set aside. The learned Judge holds that he should have kept in touch with the proceedings in Court; and as he had tendered

no proof of his claim in time he was rightly refused his share in the dividend. Now the difficulty in adopting this view is that, under section 39, clause 4 (a) of the Provincial Insolvency Act of 1907, a particular form of notice to creditors whose claims have been notified but not proved is prescribed whenever a final dividend is to be declared. It appears that in this case such a notice had not been given to the creditor. Under rule 21 (b) of the rules framed by this Court under the Insolvency Act, it is prescribed that the notice under section 39 (4) should be in the form of a separate registered letter addressed to each creditor. Section 39 (4) says also that the creditor should have express notice that the Receiver is proceeding to make a final dividend and that he would do so without regard to the claims of the creditor if he does not take care to prove his debt in time. When a notice of that sort is prescribed by the rules made under the statute, a strict compliance with the rule is necessary before the creditor's claim to share in the final dividend can be disallowed.

We have not been referred to anything to show that the appellant has proved his claim up to date or that his proof has been accepted. But as the Court did not send the necessary notice as required by the section, we think that the creditor should be allowed to re-open the matter and that he should be given an opportunity of proving his debt within a time to be fixed by the lower Court. We are saying all this on the footing that the final dividend has been declared in this case. The learned Judge says that there was only one dividend and that was the final dividend in the case. If, however, the dividend that has been declared is not the final dividend, of course, the creditor will have no ground to share in it for none of these remarks made above will apply to the case. That is a matter that should be considered and decided by the lower Court. It must see

VENKATA-
NARAYANA
CHETTY
v.
SEVUGAN
CHETTY.
KRISHNAN, J.

VENKATA-
NARAYANA
CHETTY
v.
SEVUGAN
CHETTY.
—
KRISHNAN, J.

whether the dividend declared was the final dividend or whether any further assets are available for payment of another dividend. The order of the lower Court is set aside and the case will go back to the lower Court for disposal in the light of the observations made by us. As regards the costs of this appeal we think we would not be justified in giving any costs to the appellants as all the delay and difficulty has arisen from the fact that he delayed the tendering of proof of his debt. We direct each party to bear his costs in this appeal.

K.R.

APPELLATE CIVIL.

*Before Mr. Victor Murray Coutts Trotter, Chief Justice,
and Mr. Justice Ramesam.*

1924,
March 26.

LETCHMANA CHETTY AND TWO OTHERS (PETITIONERS),
APPELLANTS,

v.

SUBBIAH CHETTY AND OTHERS (RESPONDENTS), RESPONDENTS.*

Limitation Act (IX of 1908), sec. 7—Joint decree-holders—Minority of some of them—Father of minors acting as their next friend—Decree in favour of father and sons, with their father as next friend—Death of father after decree—No application for execution by father in his lifetime—First application by eldest son within three years of his attaining majority but more than three years after decree—Bar of limitation—Father, whether competent to give valid discharge under sec. 7—Civil Procedure Code (V of 1908), O. XXXII, r. 6—Time for filing application, when begins to run against joint decree-holders.

A Hindu father and his three minor sons represented by him as their next friend, obtained a joint decree on the 16th October 1913; the former died two months after decree without filing an application to execute it; the eldest son, who attained majority at the end of December 1914, applied for execution on the 3rd December 1917 within three years of his majority but

* Appeal against Order No. 222 of 1921.

more than three years after the decree. It was contended that this application was barred by limitation.

Held, that as the father was the next friend of his minor sons in the suit and in the decree, he was not, during his lifetime, in a position to give a legal and valid discharge of the decree without leave of the Court obtained under Order XXXII, rule 6 of the Civil Procedure Code; *Ganesha Row v. Tuljaram Row*, (1913) I.L.R., 36 Mad., 295 (P.C.), applied;

that as the father was not competent to give a valid discharge during his lifetime, the time for making an application for execution of the decree did not begin to run as against any of the joint decree-holders until their respective disabilities had ceased; and the application was not barred by limitation.

APPEAL against the order of P. S. SITARAMA AYYAR, Additional Subordinate Judge of Rāmnād at Madura, in Execution Application No. 48 of 1920 in Original Suit No. 224 of 1911.

This appeal arises out of an application for execution of the decree in Original Suit No. 224 of 1921, passed on the 16th October 1913 in favour of the father of the present appellants and the appellants who were all of them minors represented by their father as next friend. The father died in December 1913. He had filed no application for execution before his death. The first appellant attained majority about the end of December 1914. The first appellant presented the first application for execution of the decree on the 3rd December 1917 within three years of his attaining majority. The second and third applications for execution were made on 1st December 1918 and 13th November 1919, respectively, and the present application was filed by the first appellant for himself and as next friend of his brothers (who were still minors) on the 30th March 1920. In the second and third applications, the question of limitation was left open by the Court. The defendants contended that the present application was barred by limitation as the first application of the 3rd December 1917 was

LETCHMANA
CHETTY
v.
SUBBIAH
CHETTY.

LETCHMANA
CHETTY
v.
SUBBIAH
CHETTY.

barred by limitation, as the father did not file any application for execution during his lifetime after the decree was passed. The appellants contended that the father could not have given a valid discharge and that therefore the application of 3rd December 1917 was within time. The Subordinate Judge held that the father as manager of the joint Hindu family could have given a valid discharge during his lifetime and that section 7 of the Limitation Act did not save limitation against any of the decree-holders. He dismissed the application as barred by limitation. The appellants preferred this appeal.

K. V. Krishnaswami Ayyar and *V. Rajagopala Ayyar* for appellant.

A. Swaminatha Ayyar for respondents.

JUDGMENT.

COUTTS
TROTTER, C.J.

COUTTS TROTTER, C.J.—This case furnishes a signal instance of the mischievous tendency of the Courts in this country to evade, or endeavour to evade, plain statutory mandates, and in no sphere of the law, so far as I have observed, has that tendency been more freely exercised than in that branch of the law we are concerned with in the present case, namely, the law of limitation. The way in which this matter stands is as follows:—In October 1913, a decree was obtained in a suit in which the plaintiffs were a father and his three sons, and the three sons were described on the face of the proceedings as suing through their next friend and guardian the first plaintiff (that is, the father). Two months after that decree the father died and it was not until December of the following year 1914 that the eldest of the three sons attained his majority. On the 3rd December 1917, well within three years of the attainment of majority, an execution application was taken out. It is said that application was barred because time must be taken to have run not from

LETCHMANA
CHETTY
v.
SUBBIAH
CHETTY.
COUTTS
TROTTER, C.J.

the attainment of majority of the eldest son but from the date of the decree itself, i.e., October 1913. The reason for it is said to be this and it depends upon the construction of two sections of two statutes. One the learned Judge has referred to, and the other he has not. Before I approach the consideration of the case law I will look at the sections of the statutes themselves. The relevant section of the Limitation Act is section 7. It says this: "where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability (that means for our present purpose minority) and a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased."

Therefore a good discharge, which could be given without the concurrence of the others, is necessary before limitation can be invoked. Now it is said that the father in this case became entitled to give a good discharge as soon as the decree was passed, and to give a good discharge not only on behalf of himself but on behalf of his minor sons. This Court held in a number of cases culminating in the case of *Ganesha Row v. Tuljaram Row*(1) that a Hindu father could, as managing member of a family, give a good discharge of a decree debt notwithstanding the fact that he might appear in the suit in the capacity of guardian *ad litem* or next friend. They based that decision upon the express provisions of Hindu Law and they said that his position as a father was independent of his position as guardian *ad litem* or next friend and that no disability which could attach to him can be

(1) (1913) I.L.R., 36 Mad., 295 (P.C.).

LETOHMANA
CHETTY
v.
SUBBIAH
CHETTY.
—
COUTTS
TROTTER, C.J.

supposed to attach to him by reasons to which I am coming presently and could in any way affect his position under the general Hindu law as father. That is the decision of this Court in several cases culminating in *Ganesha Row v. Tulja Ram Row*(1). What the learned Judges were dealing there with was an argument based upon a section of the Civil Procedure Code. That section is the present rule 6 in Order XXXII and it reads as follows:—

“A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor, either (a) by way of compromise before the decree or order, or (b) under a decree or order in favour of the minors.”

As I said, the basis of the decision in *Tuljaram Row's* case was that the father occupied two entirely separate positions, that he was clothed with a double personality, and that inhibition of his acting in a certain manner in one of those capacities was no inhibition of his doing it under the other, the general powers of a Hindu father. Thereupon *Tuljaram Row's* case went to the Privy Council with this pronouncement of the Madras High Court to deal with and to say whether it was right or whether it was erroneous, and the words of the Privy Council are absolutely explicit in their application of the principle laid down by the Madras High Court and which, so far as I can see, is the necessary substratum of the whole of the argument that has been addressed to us. What their Lordships say is this:

“They (their Lordships of the Privy Council) consider it to be clear that when he (that is the father) himself is the next friend or the guardian of the minor, his powers are controlled by the provisions of the law and he cannot do any act in his capacity as father or managing member which he is debarred from doing as a next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment.”

(1) (1911) 21 M.L.J., 1093.

LETOHMANA
CHETTY
v.
SUBBIAH
CHETTY.
—
COUTTS
TROTTER, C.J.

In other words their Lordships say in the plainest language, the inhibition imposed upon him in one character must be extended to the other suggested character or else the Act becomes waste paper. It is said that there are decisions of this Court subsequent to that pronouncement of the Judicial Committee which nevertheless go on saying that a father can give a good discharge without the consent of the Court where the decree has been obtained. I am not at all sure that those cases—most of them are very inadequately reported—do purport to go counter to the principle laid down in *Tuljaram Row's* case, because it is not quite plain, so far as I can see, that, in those cases, the father was the guardian *ad litem* of the minors. All I can say is that, if he was the guardian, the Privy Council decision compels me to say that those cases were wrongly decided; if he was not, they merely say that where the father is not the guardian *ad litem* he can take the money and give a good discharge and though I do not disagree with that, I would like to reconsider that position hereafter. I am not saying that if this was what those cases had decided, those cases are incorrect; but I am quite clear about this, that if in those cases the father was the guardian *ad litem*, they are clearly wrongly decided in the teeth of the express mandate of the Privy Council case. No one, I think, could plausibly contend that a man in such a double position could give a good discharge. He can only give a discharge after obtaining the permission of the Court. It therefore follows that at the time when the father died, he had never been in a position to give a good and legal discharge for this debt and that therefore the time must be calculated as beginning to run from the date when the respective disabilities cease. Seeing that one of the decree-holders is still a minor, there is really no question of limitation arising in the case. The case will go back for further proceedings in execution. The appellants will have their costs throughout.

LETCHMANA
CHETTY
v.
SUBBIAH
CHETTY.
—
RAMESAM, J.

RAMESAM, J.—I agree.

Several decisions of this Court have been referred to by the learned vakil for the respondent. The first of these is the decision in *Duraiswami Sastrial v. Venkatarama Iyer*(1). It expressly purports to be based on the decision in *Ganesha Row v. Tulja Ram Row*(2) which was a decision of this court on Order XXXII, rule 7. It was reversed afterwards by the Privy Council in *Ganesha Row v. Tuljaram Row*(3). This was followed by a single Judge in *Ramanadham Sivayya v. Udatah Atchayya*(4). The next case is *Palaniandi Pillai v. Papathi Ammal*(5). It is true that this was after the decision of the Privy Council, but no reference was made in the argument to Order XXXII, rule 6, or to the fact that the decision in *Ganesha Row v. Tulja Ram Row*(2) on which the decision in *Duraiswami Sastrial v. Venkatarama Iyer*(1) was based, had been reversed by the Privy Council. This was again followed in *Venkatasubbiah v. Venkateswaralu*(6) and the same remarks apply to this case also. In *Rati Ram v. Niadar*(7) the decree was obtained by a single decree-holder. There was no minor among the original plaintiffs. The original decree-holder died leaving two sons, one a major and the other a minor. The major son on behalf of himself and acting as the next friend for his younger brother applied that they should be made legal representatives in the place of their deceased father. Before the order was made on the application, the applicant died, and on the day the application came on for hearing, nobody appeared and the petition was dismissed. The result was they were not made parties, so that it is not a case where we have two decree-holders one of whom

(1) (1911) 21 M.L.J., 1088.

(3) (1918) I.L.R., 38 Mad., 295 (P.C.).

(5) (1914) M.W.N., 159.

(2) (1911) 21 M.L.J., 1093.

(4) (1913) M.W.N., 288.

(6) (1917) M.W.N., 816.

(7) (1919) I.L.R., 41 All., 435.

is a major and the other a minor represented by the major as next friend. Order XXXII, rule 6, cannot apply to the facts of that case. That case is therefore correctly decided and cannot therefore help us in this case.

LETCHMANA
CHETTY
v.
SUBBIAH
CHETTY.
—
RAMESAM, J.

K.R.

APPELLATE CIVIL.

Before Mr. Victor Murray Coutts Trotter, Chief Justice,
and Mr. Justice Ramesam.

KOYASAN KOYA HAJI AND OTHERS (LEGAL REPRESENTATIVES
OF PLAINTIFF IN S.A. No. 949 OF 1921), APPELLANTS,

1924,
March 26.

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL,
REPRESENTED BY THE COLLECTOR OF MALABAR, AND TWO OTHERS
(DEFENDANTS), RESPONDENTS.*

*Madras Land Encroachment Act (III of 1905), ss. 6 and 14,
Explanation—Notices to quit—Encroachment on poramboke
lands—Plaintiffs' possession, not disturbed after notice—
Review—Dismissal—Order to vacate—Suit for declaration
and injunction—Cause of action for suit—Limitation of six
months—Plaintiff, deeming himself aggrieved—Plaintiff's
right to elect by which proceedings he is aggrieved—Starting
point of limitation.*

Where a Deputy Collector on behalf of the Government issued to the plaintiff, under section 6 of the Land Encroachment Act (III of 1905), a notice to quit certain lands in his occupation but nothing further happened to oust him from possession, and the plaintiff filed a review petition before the Deputy Collector who dismissed it and issued an order to the plaintiff to vacate the lands, on a suit for declaration and injunction being instituted by the plaintiff against the Secretary of State, more than six months from the issue of the first notice to quit but within six months of the last order to vacate the lands,

* Second Appeals Nos. 949 and 1341 of 1921.

KOTASAN
KOYA HAJI
v.
SECRETARY
OF STATE
FOR INDIA.

Held, that, assuming that the cases specified in the explanations to section 14 of the Land Encroachment Act are not exhaustive of the causes of action under the Act, the plaintiff was entitled to elect by which of the proceedings under the Act, he deems himself aggrieved so as to base it as a cause of action for a suit for declaration and injunction under the section; and that the plaintiff was entitled to found his cause of action for this suit, as he did, on the later order of the Deputy Collector to vacate the lands, and the suit was not barred by limitation. *The Secretary of State for India v. Assan*, (1916) I.L.R., 39 Mad., 725 (F.B.), distinguished.

SECOND APPEALS against the decrees of J. H. B. JACKSON, District Judge of South Malabar, in Appeal Suits Nos. 3 of 1921 and 103 of 1920, preferred against the decrees of S. NARAYANASWAMI AYYAR, Principal District Munsif of Calicut, in Original Suits Nos. 691 and 605 of 1919.

These Second Appeals arose out of two suits in which the plaintiffs sued for a declaration and for an injunction against the Secretary of State for India in Council. The plaintiff in the first case (S.A. No. 949 of 1921) claimed the suit lands as the jenm land of the second defendant in which he (the plaintiff) had acquired a kanom right and that his predecessors-in-title had been, and he was still, in possession, when the Deputy Collector issued a notice to quit under section 6 of the Madras Land Encroachment Act (III of 1905), on the ground that the land was poramboke land of the Government, encroached upon by the plaintiff. The notice was issued on the 17th April 1919 to the third defendant who was the tenant of the plaintiff. Nothing happened in consequence of the notice and the plaintiff continued in possession. On 10th May 1919, the plaintiff put in a petition for review of this order issuing notice to the third defendant before the Deputy Collector, who dismissed the petition on the 18th September 1919, and on the 2nd October 1919 he passed an order received by the plaintiff on the same date, to the effect that the plaintiff should vacate the lands. On the 22nd December 1919 the plaintiff instituted the present

KOTASAN
KOYA HAJI
v.
SECRETARY
OF STATE
FOR INDIA.

suit for a declaration that the plaintiff was entitled to the land on the strength of title and possession, and for an injunction against the Secretary of State from ousting him from possession or interfering in any way with his right. The first defendant (the Secretary of State) pleaded, *inter alia*, the bar of limitation under section 14 of the Act, as more than six months had expired from the date of the first notice to quit. The plaintiff stated in her plaint that "the cause of action arose on the 2nd October 1919, when the plaintiff received the order of the Deputy Collector" to vacate the lands. Both the lower Courts held that the suit was barred by limitation under the provisions of section 14 of the Act and dismissed the suit. The plaintiff preferred this Second Appeal. The facts and contentions in the connected Second Appeal were similar.

T. S. Viswanatha Ayyar for appellants } in S.A. 949
The Government Pleader for respondents } of 1921.
A. Krishnaswami Ayyar for appellant } in S.A. 1341
The Government Pleader for respondent } of 1921.

JUDGMENT.

COUTTS TROTTER, C.J.—In this case the plaintiff was in occupation of some land, cultivating it by a tenant. Government claimed that it was their land, and on the 17th of April 1919 they sent her a notice to quit under section 6 of the Land Encroachment Act, III of 1905. Nothing happened for a time. In May 1919 the plaintiff put in a petition for a review of this notice to the Deputy Collector. On the 18th of September 1919 the Deputy Collector dismissed the review petition. On the 2nd of October 1919 an order which amounted practically to a notice to quit went to the plaintiff. On the 22nd of December 1919 the plaintiff filed the present suit for vindicating her alleged rights of ownership in the Civil Court.

COUTTS
TROTTER, C.J.

KOTASAN
KOYA HAJI
v.
SECRETARY
OF STATE
FOR INDIA.
—
RAMESAM, J.

The Courts below have declared the suit to be barred by limitation by reason of section 14 of the Act which says :

" Nothing contained in this Act shall be held to prevent persons deeming themselves aggrieved by any proceedings under this Act except as herein provided from applying to the Civil Courts for redress."

(That is what this woman has done.)

" Provided that the Civil Court shall not take cognizance of any suit instituted by such persons for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose."

Then follow two explanations :

" The cause of action shall be deemed to have arisen (a) in respect of any assessment or penalty."

(that is a provision under another section which I have not dealt with)

" on the date on which such assessment or penalty was levied ; (b) in respect of eviction or forfeiture, on the date of eviction or forfeiture."

Section 6 contains the machinery for eviction and it is provided that a notice shall be served on the person in occupation requiring him to vacate the land and, if such notice is not obeyed, by removing or deputing a subordinate to remove any person who may refuse to vacate the same. How in the teeth of that provision anybody can venture to argue that a person who has had notice under section 6 and in spite of it remains in undisturbed possession has been evicted from the land, I cannot understand, and I do not think it can fairly be said that any judgment of this Court has gone that length. But the case is put in another and a slightly, I will not say, more plausible, but a slightly less inarguable, way. It is said that the illustrations contained in the explanation to section 14 of the Act are not exhaustive and that a person may be aggrieved by proceedings under this Act when those proceedings do not amount to an assessment, penalty,

KOTASAN
KOYA HAJI
v.
SECRETARY
OF STATE
FOR INDIA.
—
COURTS
TROTTER, C.J.

eviction or forfeiture. Assuming that argument to be sound, the plaintiff in this case put forward as the thing which she deemed herself to be aggrieved by, not the notice at all which might have been a mere *brutum fulmen* which might have resulted in nothing whatever in the future, but a tangible definite order of the Deputy Collector received by her on the 2nd of October 1919 ordering her to quit. How it can be said that the plaintiff must be deemed to be aggrieved by the earliest stage of the proceedings when she did not choose to be aggrieved by it, I cannot appreciate. It is argued that though she says she was not aggrieved by the notice, she obviously was aggrieved by it, because she petitioned the Deputy Collector to withdraw it or to review it. It seems to me that, assuming that to be so, it does not in the least preclude her from saying, " Well, if I was aggrieved by the notice, in the sense that I put in a petition against it, that is not what I am questioning in this suit here. I am aggrieved and for the purpose of this suit I am solely aggrieved by the order of the Deputy Collector of the 2nd of October 1919." How anybody can deny her the right to elect as to which stage of the proceedings she should complain of, passes my comprehension. In my judgment, the Full Bench decision in *The Secretary of State for India v. Assan* (1) has no bearing on this point whatever ; because there was no question as to when there had been an infringement of the plaintiff's right ; and the plaintiff had a continuous chain of proceedings which began by his actually paying money out of his pocket in answer to a demand. To my mind, the Full Bench decision has no bearing on this point whatever.

The appeal must be allowed and the suit remanded for re-trial. The appellants will have their costs of this

(1) (1916) 1 L.R., 89 Mad., 725 F.B.)

KOYASAN
KOYA HAJI
v.
SECRETARY
OF STATE
FOR INDIA.

COUTTS
TROTTER, C.J.

appeal and in the lower Appellate Court in any event. The court-fee will be refunded to the appellants.

In S.A. No. 1341 of 1921.

COUTTS TROTTER, C.J.—Same judgment as in the connected S.A. No. 949 of 1921. There will be a similar order as to costs and refund of court-fee.

RAMESAM, J.—I entirely agree. Assuming that all the causes of action that may arise under the Act are not exhausted by the explanation to section 14 and assuming that a declaratory suit filed on account of proceedings taken under the Act also falls under section 14, it is open to the plaintiff to deem herself aggrieved by whichever one of several proceedings taken against her she may choose. In the case of *The Secretary of State for India v. Assan*(1) the plaintiff actually made a payment. In a case where a penal assessment has been paid it may be that it is not open to a plaintiff to say that he does not deem himself aggrieved by that payment, that he can ignore that payment and that he deems himself aggrieved by a later proceeding, because payment of money to another person in token of his proprietorship is practically a loss to himself and a recognition by him of the adverse title of the other. But in a case where there are a series of proceedings, being mere notices without any further attack against the title and enjoyment of the plaintiff it is open to the plaintiff to choose the last of these things and say that he deems himself aggrieved by this and not by the earlier proceedings. I am aware there are some cases which though they may not arise under the Act, imply that it is not open to a person seeking a declaration to so choose, but I do not agree with them.

KOYASAN
KOYA HAJI
v.
SECRETARY
OF STATE
FOR INDIA.
RAMESAM, J.

In this case in paragraph 9 of the plaint the plaintiff has clearly stated that the dismissal of her petition by the Deputy Collector and the communication of the 2nd of October 1919 is the proceeding on which the cause of action arose, which means that she felt herself aggrieved only by this and not by any earlier proceeding, for a declaratory suit. That being so, this second appeal must be allowed and I agree to the order proposed by my lord the Chief Justice.

In S.A. No. 1341 of 1921.

RAMESAM, J.—I agree. It is contended by the learned Government Pleader in this case that there is an admission in paragraph 4 of the plaint that the plaintiff deemed himself aggrieved on the 19th of March 1919; but seeing that a declaratory suit is an optional one and not compulsory, the view I take in such matters is that a person who wishes to file a declaratory suit has the right to say which of several proceedings taken against him (not amounting to adverse possession or enjoyment) is the particular proceeding by which he deems himself aggrieved for the purpose of filing a declaratory suit. In this case it may be that the plaintiff was aggrieved by several proceedings, but of these he chooses only the proceeding of the 26th of May 1919 as the one by which he felt himself aggrieved for the purpose of filing the declaratory suit and not the earlier proceeding of the 19th of March 1919. That being so, this Second Appeal is governed by the judgment in Second Appeal No. 949 of 1921.

K. B.

APPELLATE CIVIL.

*Before Mr. Justice Wallace.*1924,
April 4.

K. V. RAMACHARI (FIRST DEFENDANT) PETITIONER,

v.

K. V. KRISHNAMACHARI AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XI, r. 14—Inspection of documents—Right of party—Discretion of Court—Caution to be exercised by Court in ordering inspection—No legal right as of course—Public policy—Necessary proof of plaintiff's title—Who can be allowed inspection on behalf of party—Dismissed employee of defendant's firm, siding with plaintiff—Suit for partnership accounts—Partnership denied—Trade accounts when can be inspected—Employee, if and when can be allowed to inspect for plaintiff.

Where the plaintiff, alleging in the plaint that he was a partner in the defendant's firm and trade, sued for the taking of partnership accounts, and defendant denied the partnership in the written statement, specified therein several documents on which he intended to rely, and produced a large number of them into Court with a memorandum praying that the Court should not allow the plaintiff inspection of them without specific orders passed after hearing his objections, but the Court ordered that several of the documents might be inspected on behalf of the plaintiff by a dismissed employee of the defendant's firm on the plaintiff giving him a power-of-attorney and on his undertaking not to examine him as a witness in the case. On revision petitions being preferred by both sides against the orders,

Held, that, under Order XI, rule 14, Civil Procedure Code, the mere production of documents by one party does not give an immediate and indefeasible right of inspection to the other party;

that the plaintiff cannot, unless and until he has established his partnership, be allowed to inspect any documents which do not bear on the question of partnership, and that, as regards those which do bear on it, the Court must hear the defendant's objections before it passes its order; if and when the plaintiff has established his partnership, the

* Civil Revision Petitions Nos. 86, 87 and 116 of 1924.

Court must consider if the plaintiff is entitled to inspect the trade accounts of the firm;

Held further, that the Court is not justified in law in permitting a dismissed employee of the defendant's firm, who was siding with the plaintiff in this dispute and ill-disposed towards the defendant, to be the person to inspect the trade accounts on behalf of the plaintiff, before the latter had established his partnership, although the person might have a power-of-attorney from the plaintiff; but after the latter had established that he was a partner, the employee can be permitted to inspect on his behalf, as the employee would then have been as much the servant of the plaintiff as of the defendant; *Enamul Huq v. Ekramul Huq*, (1898) I.L.R., 25 Cal., 294, followed.

Caution to be exercised by the Court in permitting inspection of documents, pointed out.

PETITIONS under section 115, Civil Procedure Code, and section 107 of the Government of India Act, to revise the orders of L. R. ANANTANABAYANA AYYAR, Second Additional Subordinate Judge of Madura, in Interlocutory Application No. 238 of 1923 in Original Suit No. 8 of 1923.

The plaintiff instituted the suit, on the footing that he was a partner in the firm and trade carried on by the defendants, for dissolution of partnership and for taking of accounts of the partnership and for other reliefs. The defendants filed their written statement denying the alleged partnership and mentioned therein several documents on which they intended to rely in the suit, and later on produced about 1,400 documents into Court with a memorandum in which the first defendant prayed that the Court might not allow inspection of them to the plaintiff except on specific orders passed after hearing his objections thereto. The issues in the suit were framed, but the trial had not commenced. The plaintiff filed an application for inspection of all

RAMACHARI
v.
KRISHNAMACHARI.

RAMACHARI
v.
KRISHNAMA-
CHARI.

the documents, and later on applied that the documents might be inspected by one Mannar Aiyar, who was an employee of the suit firm for 20 years but had been dismissed by the first defendant and had joined the side of the plaintiff in this dispute. On that petition the lower Court first ordered inspection of 212 documents, but observed that Mannar Aiyar could be allowed to inspect only if he had a power-of-attorney from the plaintiff; after giving a power-of-attorney to the former, the latter again applied to allow the former to inspect; the lower Court ordered Mannar Aiyar to inspect the documents. The defendant thereupon filed a petition to set aside the order allowing inspection by Mannar Aiyar, and on that petition the Court passed an order to the effect that if the plaintiff would give an undertaking that the plaintiff would not examine Mannar Aiyar as a witness, he would be allowed to inspect, that if he would not give such an undertaking, this petition of the defendant must be considered to have been allowed, and inspection by Mannar Aiyar disallowed. Against these orders, both sides preferred Civil Revision Petitions, namely, Civil Revision Petitions Nos. 86 and 87 of 1924 being by the first defendant, and Civil Revision Petition No. 116 of 1924 being by the plaintiff.

A. Krishnaswami Ayyar and T. M. Ramaswami Ayyar for petitioner.

K. Raja Ayyar and S. V. Ramaswami Ayyar for respondents.

JUDGMENT.

First defendant in Original Suit No. 8 of 1923 on file of Second Additional Subordinate Judge's Court, Madura, has put in two Revision Petitions Nos. 86 and 87 of 1924 asking for revision of two interlocutory orders of

RAMACHARI
v.
KRISHNAMA-
CHARI.

Subordinate Judge with reference to inspection of his documents by plaintiff. Interference by this Court with the proceedings of a lower Court during the pendency of a suit is to be deprecated unless strong reasons are made good, but in the present case I think that the revisional powers of this Court must be exercised, partly on the ground that the lower Court has not properly understood the provisions of Order XI, rule 14 of the Civil Procedure Code, and partly on the ground that the result of its orders may be wholly unnecessary and irreparable damage to first defendant's business interests.

2. There are two main contentions in the suit, (a) that plaintiff is really a partner in first defendant's firm and trade, (b) that plaintiff is therefore entitled to a taking of the partnership accounts. In his written statement first defendant referred, without giving particulars, to a number of documents on which he proposed to rely. Later on he filed various lists of them at various times and produced about 1,400 documents and put in a final affidavit of documents on 20th September 1923 in which he prayed the Court that it should not allow inspection of any document by plaintiff without specific orders and without notice to him. On 24th October 1923 plaintiff, without filing any affidavit, put in a memorandum asking for inspection of all documents filed in Court by defendants and followed that up on 1st November 1923 by an affidavit in which he requested that one Mannar Aiyar be permitted to inspect on his behalf. On that the lower Court on 2nd November 1923 passed the first order now under revision, permitting plaintiff to inspect 212 documents, but refusing to allow Mannar Aiyar to inspect as he was not a power-of-attorney agent for plaintiff.

3. I cannot assent to the proposition that, when a party has produced in Court under Order XI, rule 14,

RAMACHARI
v.
KRISHNAMA-
CHARI.

documents in his possession but has urged that inspection should not be allowed before hearing his objections, the Court has a right to ignore that protest and the other party has a legal right to inspect all documents relating to all issues and at all stages of the trial of the suit, i.e., that the mere production by one party gives an immediate and indefeasible right of inspection to the other. I do not read Order XI, rule 14, as justifying any such conclusion. As the Court was proceeding according to the usual practice in the mufassal, to allow inspection in Court under Order XI, rule 14, and not under rule 15, I hold it was bound to consider first defendant's objections to inspection and especially bound to consider whether plaintiff was entitled to inspect all these documents *at that stage of the case*, viz., before trial had begun. As pointed out above, the first point to be decided in the case is whether plaintiff is or was a partner in first defendant's trade. Until that is decided in plaintiff's favour, obviously plaintiff has no right whatever to be allowed to inspect the trade accounts, apart from those which bear on the question of partnership. The Court has no right to assume that plaintiff is a partner, and, if it must hold that he is not, unless and until he proves that he is, clearly it is unjustified in law in allowing a stranger, merely on the allegation that he is a partner, permission to inspect all the trade accounts of first defendant. The conduct of business would be impossible under such conditions and the Court has clearly lent itself to a course which is wholly opposed to public policy, and it is therefore necessary for this Court to interfere.

4. On this part of the case then, viz., on Civil Revision Petition No. 87 of 1924, the proper order is that plaintiff cannot be allowed, unless and until he has

RAMACHARI
v.
KRISHNAMA-
CHARI.

established that he is a partner, to inspect any documents which do not bear on this question of partnership, and that, as regards documents which do bear on it, the lower Court must hear first defendant's objections before it passed its order. If and when plaintiff has established his partnership, then the lower Court will similarly consider if plaintiff is entitled to inspect the remaining documents. I reverse the order under revision in Civil Revision Petition No. 87 of 1924 and order accordingly.

5. In Civil Revision Petition No. 86 of 1924 the lower Court has still further wandered from what I regard as the first principles of public policy. Following on its order of 2nd November 1923, it passed a further order on 1st December 1923 permitting Mannar Aiyar to inspect all first defendant's documents (Mannar Aiyar having by then obtained a power-of-attorney from plaintiff), provided plaintiff undertook not to examine Mannar Aiyar as a witness. Plaintiff in his turn has filed Civil Revision Petition No. 116 of 1924 against the imposition of this condition. Now, without going into the details of affidavits on the relations of first defendant and Mannar Aiyar, the following points are clear :—(a) this Mannar Aiyar was employed in first defendant's firm for at least twenty years from 1898 to 1918, writing up and keeping the firm's accounts; (b) he left first defendant's service in 1918 and reverted to plaintiff's side in the dispute between plaintiff and first defendant and is now actively supporting plaintiff under circumstances which indicate that he personally is ill-disposed towards first defendant and (c) that plaintiff wants Mannar Aiyar to inspect the accounts and Mannar Aiyar himself wants to inspect them, because he already knows the firm's business so thoroughly that he will be able to detect if there has been any tampering with the accounts.

RAMACHARI
v.
KRISHNAMA-
CHARI.

6. As supra, the Court is for the present to assume that plaintiff is an outsider to the firm, who has been able to gain over to his side a disgruntled former employee of first defendant and has given him a power-of-attorney for the express purpose of setting him to a roving inspection of first defendant's accounts and this is what the lower Court is permitting him to do. Such a course seems to me in the highest degree objectionable and contrary to public policy. That any outsider by mere allegations in a plaint should be able to obtain from a Court the power of inspection of all firm's books by a former employee of the firm who knows the firm's business for over twenty years and who is employed by the plaintiff for the purpose of that inspection, not because of his skill as accountant and auditor, but because of his exclusive and intimate acquaintance with all the firm's business, is a position that cannot be defended, and to permit it would be to put an end altogether to any privacy and confidential dealings in business.

7. The various rulings of English Courts which have been cited to me clearly establish the proposition that a Court can and must exercise discretion as to whom it is going to permit to conduct such an inspection and the case in *Enamul Huq v. Ekramul Huq*(1) is to the same effect. The absence of a power-of-attorney (as in that case) does not alter the personality of the proposed inspecting agent. I am strongly of opinion that, until and unless plaintiff establishes that he is a partner of the firm, Mannar Aiyar is, from his previous connexion with the firm, a wholly undesirable person to allow to inspect the accounts for plaintiff. If, however, plaintiff establishes that he is and was a partner, then as such partner he is entitled to the fullest scrutiny and

knowledge of the firm's accounts and affairs, and the objection to an inspection of all the firm's books on his behalf by Mannar Aiyar, who would then in his connexion with the firm have been servant of plaintiff as much as of first defendant, would disappear.

8. I must therefore reverse the order under revision in Civil Revision Petition No. 86 of 1924 also and order that unless and until plaintiff establishes his plea of partnership, inspection on his behalf by Mannar Aiyar cannot be permitted and such inspection as the lower Court permits must be by some one else.

9. First defendant will get his costs on both these petitions. Civil Revision Petition No. 116 of 1924 is dismissed with costs, Rs. 50 being allowed for printing.

10. I must impress on the lower Court that such a privilege as inspection by a party of his adversary's documents is not a matter of routine, but is to be permitted or refused only after a judicial decision not only as to the right to inspection itself, but with reference also to the stage of the case at which such right is to be permitted, and that it is to be exercised so as to result in as little harm as possible to parties who are entitled to have the protection of the Court in carrying on their lawful pursuits.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

1924,
April 23.

GANJAM MANIKYAMBA AND OTHERS (PLAINTIFFS),
APPELLANTS,

v.

PASALA MALAYYA AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 6, 8 and 189—Suit in a Civil Court by holder of a dharimella inam to eject a tenant—Plaintiff claiming to be owner of kudivaram before grant of melvaram to him—Plaintiff, whether landholder—Defendant, whether an occupancy tenant—Suit, whether maintainable in a Civil or Revenue Court—Jurisdiction, how determined.

Where the plaintiff, the holder of a dharimella inam, alleging that his predecessor-in-title was the owner of the kudivaram in the lands before the melvaram was granted to him by the zamindar, sued in a Civil Court to recover possession of the lands from the defendants who were alleged to be in possession after the termination of an oral lease from him, but the latter pleaded that they were tenants with occupancy rights and that the Civil Court had no jurisdiction to entertain this suit,

Held, that, if the plaintiff proved that his predecessor-in-title was already owner of the kudivaram before the melvaram interest was transferred to him by the zamindar, the plaintiff was not a landholder holding an estate or part thereof, and the Civil Court would have jurisdiction to entertain this suit: but if the plaintiff had no kudivaram interest at all and he became an inamdar solely by virtue of the grant of melvaram by the zamindar, then this suit would not be maintainable in a Civil Court but would lie only in a Revenue Court; *Marina Veeraswamy v. Boyinapalli Venkatrayudu*, (1920) 39 M.L.J. 225 (F.B.), applied and *Brahmayya v. Achiraju*, (1922) I.L.R., 45 Mad., 716 (F.B.), distinguished.

APPEAL against the order of C. RANGANAYAKULU, Additional Subordinate Judge of Cocanada, in Appeal

* Appeal against Order No. 438 of 1922.

Suit No. 20 of 1921 preferred against the order of M. MANJUNATHA RAO, the District Munsif of Rāmachandrapuram, in Original Suit No. 692 of 1917.

The suit was for the recovery of possession of the suit lands together with mesne profits from 1914 on the allegations that the land was leased by the first plaintiff to the second plaintiff who orally leased the same to the first defendant for a period of three years (1913 to 1915), and that the defendants have been keeping the same in their possession without any subsequent engagement with plaintiffs. The plaintiff's case was that the lands were dharimella inam lands but that the first plaintiff's predecessor-in-title was already owner of the kudivaram interest in the lands and that the melvaram was subsequently granted to the predecessor-in-title by the zamindar after the permanent settlement. The defendants pleaded that they did not take the land on lease from the plaintiffs, that it belonged to them and had been in their possession for about forty years prior to suit, that they purchased them from its original owner, that, in any event, the suit land being dharimella inam land, these defendants had occupancy rights therein and could not be ejected, and that the Civil Court had no jurisdiction to entertain the suit. The District Munsif held that the first plaintiff's predecessor-in-title was originally owner of the kudivaram and acquired, by grant subsequent to the permanent settlement, the melvaram interest from the zamindar, that the defendants had taken the lands on lease from the plaintiffs, and that they were unlawfully in possession after expiry of the lease, and that the Civil Court had consequently jurisdiction to entertain this suit and he accordingly passed a decree for possession with mesne profits in favour of the plaintiffs. On appeal by the defendants, the Subordinate Judge held that the suit land was a dharimella

MANIKYAMBA
v.
MALAYYA.

MANIKYAMBA
v.
MALAYYA.

inam granted subsequent to the permanent settlement, and that in the case of dharimella inam, Civil Courts have no jurisdiction to entertain a suit for ejectment and mesne profits or rent, and he relied on the decision of the Full Bench in *Brahmayya v. Achiraju*(1). He accordingly reversed the decree of the District Munsif and directed the plaint to be returned to the plaintiffs for presentation to the proper Revenue Court. The plaintiffs preferred this Miscellaneous Appeal against this order of the Subordinate Judge.

Ch. Raghava Rao for the appellants.

K. Srinivasa Rao for the respondents.

JUDGMENT.

. This appeal is against an order of the Subordinate Judge of Cocanada returning a plaint to be presented to the proper Court; and the Subordinate Judge held that the Civil Court had no jurisdiction to try the suit but only the Revenue Court had. The suit was for the recovery of possession of certain properties on the strength of a lease alleged to have been given orally to the first defendant by the second plaintiff. The defendant denied the lease and claimed occupancy rights in the lands. He also pleaded that the plaintiff as inamdar was a landholder within the meaning of the Madras Estates Land Act and therefore this suit could not be tried by the Civil Court. The Subordinate Judge decided on the first part of issue 3 that the suit land is a dharimella inam; and that finding we must accept. He then considered himself bound by the ruling of the Full Bench reported in *Brahmayya v. Achiraju*(1) to hold that the plaintiff as a dharimella inamdar was a landholder within the meaning of the Act, and therefore the Civil Court had no

(1) (1922) I.L.R., 45 Mad., 716 (F.B.).

MANIKYAMBA
v.
MALAYYA.

jurisdiction to try this suit, and he directed the plaint to be returned to the proper court. It is pointed out to us that the plaintiffs' case was that they owned the kudivaram interest to start with in this land and that it was only subsequently that they obtained by grant the melvaram interest from the zamindar. It was argued that, when a kudivaramdar gets by transfer or otherwise the melvaram interest in the land, the kudivaramdar does not lose his kudivaram interest thereby, and the persons who were in occupation of the lands as tenants under him as kudivaramdar do not become ryots and do not get kudivaram rights automatically transferred to them by the transfer of melvaram rights to the original kudivaramdar. The Full Bench case referred to is sought to be distinguished from the present case on this ground. In the Full Bench case the transfer was of both the varams simultaneously to the grantee and the question arose whether under those circumstances the suit by the grantee for rent should be tried by the Revenue Court or the Civil Court. The question depended upon whether he was a landholder within the meaning of the Act or not. The majority of the Judges held that in the circumstances he was a landholder.

Here we have a different case put forward by the plaintiffs, namely, a case of the transfer of melvaram to a person who already owned the kudivaram right. If the plaintiff was a kudivaramdar to start with before the melvaram right was transferred to him, his position is different from the position of the parties in the Full Bench case. The Subordinate Judge has not considered the question whether the plaintiffs' allegation that he was a kudivaramdar to start with, is true or not. The District Munsif discussed the question and came to the conclusion that the plaintiffs' allegation was true. That finding of the District Munsif has not been displaced by the

MANIKYAMBA
v.
MALAYYA.

Subordinate Judge. We must, therefore, for the purpose of deciding this appeal, assume that the plaintiff was a kudivaramdar before he got the melvaram interest. In such circumstances we are of opinion that the ruling in the Full Bench case above cited will not apply. The Estates Land Act itself in the explanation to section 6 recognizes that a person owning a right of occupancy already in the land does not lose it subsequently by getting the interest of the landholder in the lands. No doubt, as pointed out by Mr. Justice OLDFIELD in the Full Bench case, there is some difficulty in reconciling this explanation with section 8. We must take it that section 8 must be read subject to the explanation in section 6. A question similar to the one before us arose before another Full Bench in this Court on a former occasion, *Marina Veeraswamy v. Boyinapalli Venkatrayudu*(1). It was held by that Full Bench of five Judges, that a person who was already the owner of a kudivaram right and to whom the zamindar granted the melvaram subsequently is not a person holding an estate or part thereof, and is also not a person entitled to collect the rent by virtue of a transfer from the owner or his predecessor-in-title within the meaning of section 3 (5) of the Estates Land Act, and therefore he did not acquire the status of a landholder in consequence of the grant by the zamindar and his suit was maintainable in the ordinary Civil Court against his tenants for recovery of rent. The authority of that Full Bench is still subsisting and it has not been overruled by any subsequent Full Bench of this High Court. We must, therefore, hold that the Subordinate Judge was not right in disposing of this case without going into the question whether the plaintiff owned the kudivaram

(1) (1920) 39 M.L.J., 225 (F.B.).

MANIKYAMBA
v.
MALAYYA.

interest before the melvaram was granted to him. If he finds that the plaintiff had no kudivaram interest at all, that he became an inamdar solely by virtue of the grant made by the zamindar of melvaram rights, his view that the plaintiff could not maintain the suit in the Civil Court would be right; but if, on the other hand, he comes to the conclusion, as the Munsif has done, that the plaintiffs owned the kudivaram interest before they became entitled to the melvaram by the grant by the zamindar, the Full Bench case in *Marina Veeraswamy v. Boyinapalli Venkatrayudu*(1), already referred to, will apply, and the present case will have to be tried by the Civil Court. In the latter case the Subordinate Judge will consider the other issues in the case and dispose of the appeal himself. In the former case the order returning the plaint would be re-affirmed. We, therefore, set aside the order of the Subordinate Judge and remand the appeal to him to be disposed of in the light of the observations made above. Costs will abide and follow the result of the appeal. The court-fee paid for the appeal in this Court will be refunded to the appellant.

K.B.

(1) (1920) 39 M.L.J., 225 (F.B.).

APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice Jackson.*1924,
July 10.

RAJARATHNA NAIDU (EIGHTH RESPONDENT), APPELLANT,

v.

RAMACHANDRA NAIDU AND OTHERS (PETITIONER AND
RESPONDENTS NOS. 1 TO 3 AND 5 TO 7), RESPONDENTS.**Civil Procedure Code (Act V of 1908), O. XXI, r. 16, proviso
2—Transfer of decree—Mortgage-decree for sale against two
or more persons—Transfer to one of them—Decree, whether
executable by transferee against others—Decree for payment
of money, meaning of.*

The second proviso to Order XXI, rule 16 of the Civil Procedure Code (which enacts that where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others) does not apply to mortgage decrees for sale, which are in essence decrees, not for the payment of money, but for the sale of property.

Laldhari Singh v. Manager, Court of Wards, Bhabatpura Estate, (1911) 14 C.L.J., 639, followed; *Vaidhinadasamy Ayyar v. Somasundram Pillai*, (1905) I.L.R., 28 Mad., 473 (F.B.), *Ramayya v. Krishnamurti*, (1917) I.L.R., 40 Mad., 296, and *Sadogopa Ayyangar v. Sellammal*, (1922) 43 M.L.J., 761, distinguished.

APPEAL against the order of R. A. JENKINS, District Judge of Chingleput, in Execution Petition No. 51 of 1920 in Original Suit No. 32 of 1916 on the file of the District Court.

A final decree in a mortgage suit for sale of the hypothecated property was transferred by the original decree-holder in favour of one Ramachandra Naidu who applied to have the assignment in his favour recognized by the Court. The first defendant and his son, the second defendant, as well as the widow of the third defendant were joined as parties to the petition. The

* Appeal against Order No. 436 of 1922.

mortgage had been executed by defendants Nos. 1 and 3 and the final decree in the suit was to the effect that, as the balance of the decree amount had not been paid, "it is hereby decreed as follows:—(1) that the mortgaged property or a sufficient part thereof be sold, etc." . . . The third defendant had made a will bequeathing his properties to respondents Nos. 4 to 8 in the lower Court, who applied that they should be made parties to the petition, and, on being made parties, they contended that the transfer of the decree to the petitioner Ramachandra Naidu was only benami for the first defendant who paid the decree amount to the original decree-holder, that the first defendant was the real debtor liable for the decree and that the third defendant was only a surety, and that the transferee of the decree could not be recognized as competent to execute the decree as it was transferred benami for the first defendant. The District Judge held that the provisions of Order XXI, rule 16, did not apply to mortgage decrees and that petitioner was entitled to be recognized as transferee and to bring the land to sale. The eighth respondent preferred this Civil Miscellaneous Appeal against the order of the District Judge.

S. E. Sankara Ayyar for appellant.

T. R. Ramachandra Ayyar for respondent.

JUDGMENT.

The question for decision is whether the second proviso to Order XXI, rule 16 of the Code of Civil Procedure, applies to a mortgage decree for sale. It applies in terms only to a decree "for the payment of money." The phrase in the old Code, section 232, was "a decree for money." The alteration indicates that emphasis is to be laid on the word "payment" and that unless the decree directs payment of money, the rule will not

RAJARATHNA
NAIDU
v.
RAMA-
CHANDRA
NAIDU.

RAJABATHNA
NAIDU
v.
RAMA-
CHANDRA
NAIDU.

apply. This is the view taken in the judgment of the Calcutta High Court in *Laldhari Singh v. Manager, Court of Wards, Bhabatpura Estate*(1). The Calcutta High Court has consistently held the view that this proviso will not apply to mortgage decrees for sale [vide the above ruling and also *Lalla Bhagun Pershad v. Holloway*(2) and *Jagubandhu v. Haladhar*(3)].

2. Appellant relies on three cases of this High Court. Two of these, *Vaidhinadasamy Ayyar v. Somasundram Pillai*(4) and *Ramayya v. Krishnamurthi*(5) are not of much assistance as they do not deal with the language of Order XXI, rule 16, or the corresponding section under the old Civil Procedure Code. In *Sadogopa Ayyangar v. Sellammal*(6) language somewhat favourable to appellant's contention has been used, but even in that case it is clear that the decree was a "decree for the payment of money," although in the case of the first defendant the decree directed the money to be paid out of his family property. None of these cases affects the general principle laid down in the Calcutta cases, and inherent, in our opinion, in the rule itself, that the proviso does not apply to decrees which are in essence decrees not for the payment of money but for the sale of property. We are of opinion that the order appealed against is correct and we dismiss this appeal with costs.

K.R.

(1) (1911) 14 C.L.J., 639 at 642.

(3) (1918) 27 C.L.J., 110.

(5) (1917) I.L.R., 40 Mad., 296.

(2) (1885) I.L.R., 11 Calc., 393.

(4) (1905) I.L.R., 28 Mad., 473 (F.B.)

(6) (1922) 43 M.L.J., 761.

