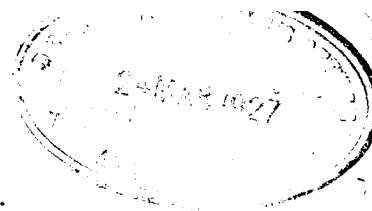


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THE INDIAN LAW REPORTS

MADRAS SERIES

CONTAINING

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

Editor

RAO BAHADUR M. A. TIRUNARAYANA CHARI (*Advocate*)

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 B. C. SANKARA NARAYANA (*King's Inns*)

VOL. XLIX—1926

JANUARY—DECEMBER

Published under the Authority of the Governor in Council
BY THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS
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JUDGES OF THE HIGH COURT.

1926.

1ST JANUARY TO 31ST DECEMBER.

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(1926) I.L.R., 49 Mad.

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ALIYASANTANA LAW OF SOUTH KANARA —Junior member of an Aliya-santana family—Right to recover marriage expenses from the ejman of the family and out of the family property—Maintenance—Similarity to Malabar Law—Maramakkathayam tarwad—Power of karnavan—Right of junior member to maintenance, based on co-proprietorship in family property—Maintenance, what it includes—Menchilavu, meaning of.] A junior member of an Aliyasantana family is entitled to claim his marriage expenses from the ejman of his family. The marriage expenses of a junior member of an Aliyasantana family form a part of his right to maintenance. The Aliyasantana system is similar in its incidents to the Maramakkathayam law of Malabar. Under both the systems, the junior members are co-owners with the Manager (ejman or karnavan) in the family property, and their right to maintenance is based on their ownership in the family property. The term "maintenance," though, in its limited sense, it means allowance for bare necessities of life, in its more comprehensive sense, includes what is usually called in Malayalam "Menchilavu" which is treated as part of maintenance, and under the latter head reasonable and legitimate expenses of the junior members such as expenses of their medical treatment, of defence in criminal cases, etc., have been allowed by the Courts out of the family property; similarly, marriage expenses of the junior members form part of their right to maintenance. <i>Parvathi v. Komaran</i> , (1883) I.L.R., 6 Mad., 341, and <i>Govindan Nair v. Kunjan Nair</i> , (1919) I.L.R., 42 Mad., 686, followed. Case law reviewed.	Page
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CHARTER-PARTY—*Freight paid in advance—Frustration of venture—Right to recover freight paid*:—See "CONTRACT ACT, ss. 32, 58 AND 65" ... 200

CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 21, 24 AND 39—*Mortgage decree for sale—Final decree passed—Mortgage property transferred from local jurisdiction of Sub-Court which passed the final decree to that of District Court—Withdrawal by District Court and re-transfer to same Court—Objections to execution, not on ground of jurisdiction—Subsequent order to sell—Objection to jurisdiction again not taken by judgment-debtor—Sale held—Application by latter to set aside sale, on grounds including want of jurisdiction—Objection, whether maintainable—Waiver of objection as to jurisdiction—Competency of Court passing mortgage decree to sell property outside its jurisdiction.* After the final decree in a suit for sale on a mortgage was passed by a Sub-Court and an application for execution was filed in that Court, the mortgage property was transferred from the territorial jurisdiction of that Court to that of the District Court. Notwithstanding the transfer, the Sub-Court passed orders on the objections raised by the judgment-debtor who did not however raise the objection to jurisdiction. Subsequently on the application of the decree-holder, the District Court withdrew the execution application to its own file and re-transferred it to the same Court, which subsequently held the sale of the property without objection to its jurisdiction. On the judgment-debtor filing an application in the Sub-Court to set aside the sale on the ground, *inter alia*, that the Court had no jurisdiction to sell the property; Held, that the objection to the territorial jurisdiction of the Court should be taken at the earliest possible opportunity, and if it was not so taken, it should be deemed to have been waived on the principles underlying section 21, Civil Procedure Code, and could not be taken at a later stage. *Ledgard v. Bull*, (1888) I.L.R., 9 All., 191 (P.C.). *Zamindar of Ettiyapuram v. Chidambaram Chetty*, (1920) I.L.R., 43 Mad., 675 (F.B.), applied; *Chokkalinga Pillay v. Velayudha Mudaliar*, (1924) 47 M.L.J., 443, referred to; and *Ramabhadra Riju Bahadur v. Maharaja of Jeypore*, (1919) I.L.R., 42 Mad., 813, distinguished; Held further by VENKATASUBBA RAO, J., that the objection to jurisdiction was not sustainable because—(a) the rule as to territorial jurisdiction does not apply to execution of mortgage decrees, and a Court can execute a mortgage decree passed by itself, although the property to be sold is wholly or partly outside its jurisdiction; *Kartick Nath Pandey v. Tilukdhari Lal*, (1888) I.L.R., 15 Calo., 867, followed, and (b) section 24, Civil Procedure Code, applies to execution proceedings; and the power given to the Court under that section is not limited to cases mentioned in section 39 of the Code.

Rajagopala Pandarathiar v. Tirupathia Pillai ... (1926) I.L.R., 49 Mad., 746

SEC. 47—*Decree—Execution—Pre-decree arrangement between the parties that the decree was not to be executed—Bar to execution—Pre-decree arrangement to postpone execution—Principle of decision to be applied in such cases, whether same—Stare decisis.* A pre-decree arrangement, by which a decree was not to be executed, can be pleaded in bar of execution of the decree. The principle of the Full Bench decision in *Chidambaram Chetty v. Krishna Vathiar*, (1917) I.L.R., 40 Mad., 233, is applicable to a case not merely of a pre-decree arrangement by which the execution of the decree was not to be postponed for a time, but also to a case where execution was absolutely prohibited. Case-law reviewed.

Venkatasubba Mucali v. Manikkammal ... (1926) I.L.R., 49 Mad., 513

- CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 64—Claims enforceable under attachment, meaning of:—See under "LAND ACQUISITION ACT" ...**
- SEC. 73 AND O. XXI, R. 71—**
Auction sale—Deposit of 25 per cent of price into Court by auction-purchaser—Default by him to pay balance of price—Re-sale—Deficiency in price—Application to recover deficiency from defaulter, by whom can be made—Attachment of deposit by decree-holder—Application by other decree-holders for rateable distribution of the deposit amount. Where an auction-purchaser in execution of a decree, who had paid the deposit of 25 per cent of the purchase money, defaulted to pay the balance and the property was re-sold and fetched a much lower price, only the decree-holder who brought the property to sale or the judgment-debtor, and not any other decree-holder, can apply, under Order XXI, rule 71, to recover from the defaulter the entire deficiency in price caused by the re-sale. Where such decree-holder had applied under rule 71 and attached the amount of the 25 per cent of the price in deposit in Court, other decree-holders, who had applied previously for execution of their decrees, are entitled to rateable distribution of the amount in deposit in Court as the amount became assets by reason of the attachment.
Sree Mahant Prayaga Doss v. Raja of Kalahasti ... (1926) I.L.R., 49 Mad., 570
- SEC. 92—Scheme settled by a decree in a scheme suit—Provision in the scheme for an application being made by worshippers to remove trustee and others and for alteration or modification of scheme—Provision whether ultra vires—Application to Court—Dismissal of panchayat and modification of scheme—Validity of order—Appeal, whether competent—Order, whether passed in execution proceedings—Jurisdiction of lower Court—Revision petition.** In a scheme for the management of a mosque, settled by a decree in a suit under section 92, Civil Procedure Code, there was a provision that an application might be made to the Court by worshippers for alteration or modification of the scheme, as if it were in execution of the decree, and for the exercise by the Court, of disciplinary jurisdiction over the trustee and panchayatdars. On application made to the Court by certain worshippers, the term of office of the panchayatdars was reduced and other modifications of the scheme were ordered by the Court. The panchayatdars appealed to the High Court; a preliminary objection was taken that no appeal lay: *Held* that the provision in the scheme for an application being made for the reliefs specified in section 92 of the Civil Procedure Code, was *ultra vires*, as it was opposed to the provisions of the section which prescribed a suit with the consent of the Advocate-General or District Collector to obtain such reliefs, and the order of the Court passed on the application was invalid and should be set aside; and that the order passed on such an application was not one passed in execution of the decree, and consequently no appeal lay against the order, but the High Court could treat the appeal as a revision petition and set aside the order, as the lower Court had exercised a jurisdiction not vested in it by law. *Sevak Jeranchoh Bhogilal v. The Dakore Temple Committee*, (1925) 49 M.L.J., 25 (P.C.), followed.
Abdul Hakim Baig v. Burramiddin ... (1926) I.L.R., 49 Mad., 580
- RR. 2, 3 AND 8—Probate and Administration Act (V of 1881), sec. 86—Applicability to the District Court for letters of administration with will annexed—Grant of—Appeal to the High Court—Order of High Court—Appeal to His Majesty in Council against order of High Court, whether competent—Letters Patent, cls. 39 and 44.** An appeal can be preferred to His Majesty in Council, under clause 39 of the Letters Patent, against an order of the High Court passed on an appeal under section 86 of the Probate and Administration Act, 1881, in an application for probate or letters of administration with the will annexed made in a District Court, if the case satisfies the provisions of sections 109 and 101 of the Civil Procedure Code. *Ramachandra Rao v. Ramachandra Rao*, (1922) I.L.R., 45 Mad., 320 (P.C.), and *Secretary of State for India v. Chelikani Rama Rao*, (1918) I.L.R., 89 Mad., 617 (P.C.), relied on; and *Rangoon Botatoung Co., Ltd. v. The Collector of Rangoon*, (1913) I.L.R., 40 Cal., 21 (P.C.), distinguished.
Paramaswami Ayyangar v. Alamelu Nachiyar ... (1926) I.L.R., 49 Mad., 954

- CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 145 AND O. XXI, R. 2, CL. 3—Surety for a judgment-debtor—Application by the decree-holder for execution of the decree against the surety—Plea by the surety of payment and discharge of decree—Satisfaction of decree, not certified to Court—Plea of discharge, whether open to surety, when it is not open to judgment-debtor.** Where a judgment-debtor, arrested and brought before a Court, was released on a person standing surety undertaking to produce him in Court whenever ordered by the Court and, in default of doing so, to pay the decree amount himself personally, and, on an application by the decree-holder against the surety to produce the judgment-debtor or in default to execute the decree personally against the surety, the latter pleaded that the decree could not be executed as it was wholly satisfied by payment, though satisfaction was not certified to the Court. *Held*, that a surety could not plead adjustment or discharge of a decree, when the judgment-debtor himself could not successfully put forward that plea under Order XXI, rule 2 (3) of the Civil Procedure Code, even though the surety was not a party to the decree. *Onkarmal Agarwala v. Nritya Gopal Chaki*, (1922) 67 I.C., 885, followed. No second decree is passed against the surety under section 145 of the Code, but the decree that is executed against him is the decree passed in the suit.
Thambi Reddi v. Devi Reddi ... (1926) I.L.R., 49 Mad., 325
- SEC. 153—Appeal presented against a deceased respondent—Power of Court to amend cause-title or return appeal memorandum for amendment—Power of Court to order refund of spoilt stamp—Discretion of Court to excuse delay in presentation of appeal against legal representative.** If an appeal is presented against a person, who is dead at the date of presentation, the Court may, under section 153, Civil Procedure Code, permit the cause-title to be amended, or may return the appeal memorandum for amendment and representation. If the appeal memorandum is not allowed to be amended, the party may apply for a refund of the spoilt stamp and may present a fresh appeal. In any case the Court will, if the appeal is out of time against the legal representative, have to excuse the delay in presentation before it can proceed to hear the appeal, but it is a matter for its discretion whether it would excuse the delay. *Govindu Kaviraj Purohita v. Gauranga Saw*, (1923) 45 M.L.J., 231, overruled; *Sankaran v. Savarimuttu Pillai*, C.M.P. No. 2807 of 1923, approved.
Gopala Kristnayya v. Lakshmana Rao ... (1926) I.L.R., 49 Mad. (F.B.), 18
- O. I, R. 3—Separate leases by a temple trustee to several tenants on different dates—One suit by succeeding trustee to set them aside and to recover possession, whether multifarious.** A trustee to set them aside and to recover possession, whether multifarious. A suit by a receiver of temple properties to set aside a number of leases granted by a previous trustee of the temple of various portions of one block of property to different tenants separately on different dates and to recover the portions thereof so demised from them respectively is not bad for misjoinder of parties and causes of action.
Govindaraja Mudaliyar v. Alagappa Thambiran. (1926) I.L.R., 49 Mad. (F.B.), 836
- O. II, R. 2—Two suits filed on same day, whether barred by—Option to Plaintiff to proceed with one.** If two suits are filed by the same person against the same defendant on the same day, each for a distinct relief arising out of one and the same claim, the plaintiff has the option, if Order II, rule 2, Civil Procedure Code, be applicable at all to the case, of electing to proceed with any one of the two suits he chooses. *Appasami v. Ramasami*, (1886) I.L.R., 9 Mad., 279, followed. *Per cur.*—Order II, rule 2, Civil Procedure Code, is not applicable to such a case as the suit which might happen to be numbered as the later suit cannot be said to have been filed "after" the other within the meaning of the rule; *Murti v. Bhola Ram*, (1894) I.L.R., 18 All., 165 (F.B.), dissented from.
Bayalu Ayyar v. Ramudu Ayyar ... (1926) I.L.R., 49 Mad., 869

CIVIL PROCEDURE CODE (ACT V OF 1908), O. IX:—See "PROVINCIAL INSOLVENCY ACT (V OF 1920), ss. 5, 10 (2) AND 43 (1)"	Page 935
by a tenant-in-common—Dismissal for default of plaintiff—Subsequent suit for partition, whether barred by Order IX, rule 9—Rule applicable to joint tenants, whether also applicable to tenants-in-common.] If a suit by a tenant-in-common for partition by metes and bounds is dismissed for default under Order IX, rule 8, Civil Procedure Code, another suit for the same purpose is not barred by Order IX, rule 9. On the dismissal of the previous suit, the plaintiff is relegated to his original position as co-sharer and the right to sue for separate possession is one which accrues from time to time.	
<i>Madhura Gramani v. Sessa Reddy</i> ... (1926) I.L.R., 49 Mad., 939	
ment—Rajinamah decree—"Money payable under a decree," meaning of—Certification of adjustment, when necessary—Decree for possession of lands on non-payment of a certain sum by defendants—Adjustment of decree, not certified—Adjustment, whether can be proved—Execution of decree—Bar.] Order XXI, rule 2 of the Civil Procedure Code, refers to a decree under which money is payable, whether there are other reliefs granted by the decree or not. The words "money payable under a decree" in rule 2 of Order XXI do not mean money which the party may, if he chooses, pay, but money which is recoverable by a party in execution against the party liable to pay it.	
<i>Narayanasami v. Rangasami</i> ... (1926) I.L.R., 49 Mad., 716	
gation-decree—Assignment—Application by assignee to execute decree—Assignee, alleged to be benamidar for a purchaser of hypotheca from some of the judgment-debtors—Assignee's right to execute the decree—Mortgage-decree, whether a decree for payment of money.] A mortgage-decree is not a decree for the payment of money within the meaning of the second proviso to rule 16 of Order XXI, Civil Procedure Code. Consequently, an assignee of a mortgage decree, though he is a benamidar for a purchaser of a portion of the mortgage property from some of the judgment-debtors in a mortgage suit, is not debarred from executing the decree by Order XXI, rule 16, proviso 2, Civil Procedure Code.	
<i>Chidambara Thera v. Subbarayar</i> ... (1926) I.L.R., 49 Mad., 508	
tion of a decree—Partition Act (IV of 1893)—Proclamation of sale—Appointment of a Commissioner—Duty of Court to settle proclamation of sale—No power in Court to delegate the duty to Commissioner—Settlement of proclamation by Commissioner—Sale thereunder—Validity of sale—Reserve price not fixed in proclamation—Party aware of contents of proclamation, effect of.] Under Order XXI, rule 66, of the Civil Procedure Code, it is for the Court to settle the proclamation of sale, and it cannot delegate that power to a Commissioner appointed by it; even if the party was aware of the contents of the sale proclamation prepared by the Commissioner, that would not relieve the Court of its duty of settling the proclamation; and if it was not settled by the Court, the sale held thereunder would be invalid.	
<i>Subramania Patter v. Achuta Menon</i> ... (1926) I.L.R., 49 Mad., 333	
See "ESTATES LAND ACT" ... O. XXI, RR. 89 AND 92 (1):—	
ing petition to be brought on record as legal representative—No right of appeal against order even when no rival claimant.] No appeal lies against an order under Order XXII, rule 5, Civil Procedure Code, dismissing, on the objection of the defendant, the application of a person to be brought on record as the legal representative of a deceased plaintiff, even when there is no rival claimant to be brought on the record as the legal representative.	
<i>Ayya Mudali Velan v. Veerayee</i> (1920) I.L.R., 43 Mad., 812, overruled.	
<i>Venkatakrishna Reddi v. Krishna Reddi</i> ... (1926) I.L.R., 49 Mad., (F.B.), 450	

CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII, R. 10, O. XXI, RR. 54 AND 69, AND SEC. 60 (2):—Suit in forma pauperis—Suit for future maintenance—Decree for plaintiff—Court-fee payable to Government from plaintiff—Application by Government for execution in respect of Court-fee—Application for attachment of the charge for future maintenance created by the decree—Attachment and sale of the charge, whether permissible—Proper method to recover Court-fee—Receiver to be appointed by Court—Payment by instalments.] The Government can recover the Court-fee decreed as payable to it by a pauper plaintiff, even when the plaintiff's property is confined to a right to future maintenance; and the proper method of recovering such Court-fee is by the Court appointing a Receiver to collect the maintenance amount and pay to Government (by instalments, if necessary, in order that plaintiff may have something to live upon) the Court-fee due by the plaintiff. <i>Rajindra Narain Singh v. Sundara Bibi</i>, (1923) I.L.R., 47 All., 385 (P.C.), followed. An application for execution by attachment and sale of the charge in respect of the maintenance created by the decree is not competent.	Page 54
<i>Secretary of State for India in Council v. Venkata Lakshamma</i> . (1926) I.L.R., 49 Mad., 567	
O. XXX(V, RR. 4, 5 AND SEC. 11:—See "TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 88 to 93" ...	691
O. XLI, R. 33, SEC. 107:—See "APPEAL TO PRIVY COUNCIL", ...	43
REG. 47.—Mortgage—Decree for sale—Person claiming mortgage property on a title paramount to that of the mortgagor, impleaded as a defendant—Exoneration in the final decree—His name, not struck off from record—Sale in execution—Claim to property by exonerated defendant—Petition, whether under sec. 47, Civil Procedure Code—Appeal from order on petition, whether competent.] Where, in a suit for sale on a mortgage, a person, who claimed the property by a title paramount to that of the mortgagor, was joined as a defendant, but the final decree merely stated that he was exonerated without removing his name from the record, he should be considered as continuing to be a party to the suit, and a petition, filed by him claiming the hypothecated property sold in execution of the decree and purchased by the decree-holder, falls under section 47 of the Civil Procedure Code, and an appeal from an order passed on the petition is competent. The ground on which a party is exonerated from the suit can never determine whether he continues or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record. <i>Venkataramayya v. Chitambaram</i> , (1918) 23 M.L.T., 206, followed.	
<i>Settur Konar v. Ramaswami Konar</i> ... (1926) I.L.R., 49 Mad., 494	
CONTRACT—Guarantee and indemnity, distinction between—Privity of contract between surety and principal debtor, necessary in guarantee—Implied or express contract—Rule of English Law—Indian Contract Act (IX of 1872), ss. 124, 126, 140, 141 AND 145, construction of—No right of suit for indemnifier against debtor in a contract of indemnity—Subrogation—Del credere agent—Right of suit—Ascertained pecuniary liability, necessary.] The plaintiffs, who were dubashes of the first defendant (a trading company) guaranteed the due performance of a contract for purchase of goods entered into by the second defendant with the latter, but the plaintiffs were not parties to this contract, nor the second defendant a party to the contract of guarantee. The second defendant refused to take the goods on the ground that the company did not comply with certain terms of the contract. The company debited the dubashes with the price in their deposit accounts with them. The dubashes sued the company to cancel the debit as the latter were in default, or to recover the amount debited from the second defendant, if they were in default: Held, that, under the Indian as under the English Law, a contract of guarantee, unlike one of indemnity, requires the concurrence of three parties, namely, the principal debtor, the creditor and the surety; the surety should undertake the obligation at the request, express or implied, of the principal debtor; the Indian Contract Act does	

not depart from the rule of English Law but reproduces the same in sections 126 and 145; and sections 140, 141 and 145 are applicable only to contracts of guarantee defined in section 126 and not to contracts of indemnity defined in section 124 of the Act. *Hodgson v. Shaw*, (1884) 3 M.Y. & K., 188; 40 E.R., 70, and *Nanak Ram v. Mehin Lal*, (1877) I.L.R., 1 All., 487, followed; *Muthu Raman v. Chinna Vellayan*, (1916) I.L.R., 39 Mad., 965, distinguished; that in this case, there was no contract of guarantee as there was no privity of contract between the principal debtor, creditor and the surety, but only a contract of indemnity between the latter two persons; that, in a contract of indemnity, the indemnifier cannot, on performance of the obligations of the debtor, in the absence of an assignment from the creditor, sue, in his own name, the debtor, as there is no privity of contract between them and there is in law no subrogation to him of the creditor's rights; that the plaintiffs were not *del credere* agents, as they did not introduce the customer to the company.

Perianna Marakkayar and Banians & Co. ... (1926) I.L.R., 49 Mad., 156

CONTRACT—Sale of goods—Repudiation by buyer on the ground that seller did not tender within the agreed time—Acceptance of repudiation by seller—Suit by seller for damages for breach of contract—Plea of non-liability raised by buyer on the ground that goods were not of agreed quality—Plea, whether permissible—Rule in *Braithwaite's case*, whether still good law and applicable to the case—Contract Act (IX of 1872), sec. 39.] Where a person who agreed to purchase certain goods repudiated the contract on the ground that the goods were not tendered by the seller within the time alleged to have been agreed, and thereupon the seller accepting the repudiation sued him for damages for breach of contract, and the buyer pleaded non-liability not only on the ground that the goods were not tendered within the agreed time but also on the ground that the goods tendered were not of the agreed quality, *Held*, that the buyer, having repudiated the contract on one ground, viz., that the goods were not tendered within the time agreed, could not plead non-liability on another ground, viz., that the goods were not of the agreed quality. The principle of *Braithwaite v. Foreign Hardwood Company*, [1905] 2 K.B., 543, is still good law and its authority has not been shaken by the decision of the House of Lords in *British and Beningtons, Ltd. v. N. W. Cachar Tea Co. and others*, [1923] A.C., 48.

Nannier v. Rayalu Iyer ... (1926) I.L.R., 49 Mad., 781

—Specific performance—Sale of lands—Counterpart agreement by vendee on the same date as sale deed—Agreement by vendee to convey the lands to vendor on his paying the same price in the month of Ani in the thirtieth year from date of agreement—Option to vendor—Death of vendor—Assignment of option by vendor's son to a stranger—Right of assignee to enforce specific performance of agreement—Agreement, whether a standing offer or an enforceable contract—Agreement, whether void for want of consideration—Rule of perpetuity—Specific Relief Act (I of 1877), sec. 23 (b).] On the same date on which a sale deed of certain lands was executed, the vendee agreed by a document to convey the same to the vendor on the latter wishing to have them and on his paying the same price as was paid for the sale, in the month of Ani of the thirtieth year from the date of the agreement. The vendor having died, his son assigned his rights under the document to a stranger who tendered the full amount to the vendee within the agreed time. On the latter refusing to execute a conveyance, the assignee sued the vendee for specific performance of the agreement; the latter pleaded that his undertaking was not a contract but only a standing offer and was not assignable, that even if it were a contract it was void for want of consideration and as offending the rule against perpetuities. *Held*, that the undertaking by the vendee was not a mere standing offer, but was an executory contract giving a right to the vendor to get a conveyance from the vendee and was assignable by the vendor; that the contract was part of the same transaction as the sale and was supported by consideration; that the right under the contract was not personal to the original vendor, but was assignable; that the contract was not void for perpetuity, as the period for the exercise of the option was definite and limited; and that, consequently, the assignee was entitled to specific performance of the agreement. *Helby v. Matthews*, [1895] A.C., 471; and *Papa Naidu v.*

Munisamy Aiyar, (1923) I.L.R., 46 Mad., 80, distinguished. *Fenkaeswara Ayyar v. Raman Nambudri*, (1916) 8 L.W., 435, and *Narasingerji Gyanagerji v. Panuganti Parthasardhi*, (1921) M.W.N., 519, referred to.

Munuswami Nayudu v. Sagalaguna Nayudu, ... (1926) I.L.R., 49 Mad., 387

CONTRACT ACT (INDIAN) (IX OF 1872), ss. 32, 56 AND 65—Charterparty—Impossibility of voyage—Advance freight paid, right to recover.] Advance freight paid by a shipper to a shipowner under a charterparty can under the Indian Contract Act be recovered back on the frustration of the venture, owing to circumstances which were beyond the control of the parties, and which they had not warranted not to exist. *Sivanandam Chettiar v. Surayya*, (1925) I.L.R., 48 Mad., 459, and *Boggiano & Co. v. The Arab Steamers Co., Ltd.*, (1916) I.L.R., 40 Bom., 529, followed. *Quære*: Whether a chartered ship is a common carrier?

Gandha Korliah v. Janoo Hassan ... (1926) I.L.R., 49 Mad., 200

SEC 39:—See "CONTRACT, SALE OF GOODS" ... 781

SEC. 233—Principal and agent—Liability, whether joint or alternative—Rule of English Law, alternative and not joint liability—Rule of Indian Law, whether different—Sec. 233, construction of—Option to creditor to sue either or both in the alternative—No right to judgment against both jointly.] Under the English Law, the liability of principal and agent is not joint but alternative: see *Morel Brothers & Co., Ltd. v. The Earl of Westmoreland*, (1904) A.C., 11. Section 233 of the Indian Contract Act does not lay down a rule different from the abovementioned rule of the English Law. What section 233 of the Act means is that the person dealing with the principal through the agent may, at his election, sue either, or he may sue both of them alternatively in a case where he is not sure against whom his exact remedy is; but he cannot get judgment against both of them jointly for the amount sued for.

Kutti Krishna Nair v. Appa Nair ... (1926) I.L.R., 49 Mad., 900

SEC. 249—Partner, admitted into an existing firm—Agreement by him to be liable for transactions prior to agreement—Agreement between partners inter se—Liability to creditors—(English) Partnership Act, 1890 (53 and 54 Vict., cap. 39), sec. 17—Rule of English and Indian Law.] Where a person was admitted as a partner into an existing firm under an agreement between him and the partners inter se whereby he agreed to be liable for transactions incurred prior to the agreement, he is not liable to the creditors of the firm in respect of such prior transactions, notwithstanding the agreement, by virtue of the provisions of section 249 of the Indian Contract Act, *Rolfe and the Bank of Australasia v. Flower Salting & Co.*, (1865) L.R., I.P.C., 27, followed; *Jagannath & Co. v. Cresswell and others*, (1913) I.L.R., 40 Cal., 814, dissented from.

Russa Engineering Works v. Kanaru Transport Co. (1926) I.L.R., 49 Mad., 980

CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 107 AND 161:—See "DEFAMATION" ... 315

SEC. 145—Magistrate directing parties to file statements of their claims—Magistrate subsequently dropping proceedings on being satisfied no likelihood of breach of peace—Legality of—Whether parties can insist upon evidence being taken—Disposal of sale-proceeds of crops attached.] It is open to a Magistrate who has passed a preliminary order under section 145 of the Code of Criminal Procedure, directing the parties to file written statements as regards their respective claims to possession of the subject-matter in dispute, to subsequently drop the proceedings if he is satisfied that there was no likelihood of a breach of the peace, and he is not bound to give the parties an opportunity to establish the contrary. *Manindra Chandra Nandi v. Barada Kanta Chowdhry*, (1903) I.L.R., 30 Cal., 112, followed. If he so drops the proceedings he cannot pass any orders in favour of either party as regards the disposal of the sale-proceeds of the crops raised on

- the land in dispute but should keep the same in deposit pending orders of a Civil Court. ... (1926) I.L.R., 49 Mad., 532
- Narasayya v. Venkiah* ... (1926) I.L.R., 49 Mad., 532
- CRIMINAL PROCEDURE CODE (ACT V OF 1898)**, ss. 190 (1) (b) AND 200 (aa) — *Police report in writing in non-cognizable cases — Jurisdiction of Magistrates to take cognizance of such cases.* By virtue of sections 190 (1) (b) and 200 (aa) of the Criminal Procedure Code, Magistrates mentioned in section 190 are entitled to take cognizance of even non-cognizable offences upon a report made in writing by a police officer without examining the officer upon oath. *Perumal Naick v. Emperor*, (1925) M.W.N., 317, overruled.
- Public Prosecutor v. Ratnavelu Chetty* ... (1926) I.L.R., 49 Mad., (F.B.), 525
- 203, 204 AND 436—*Practice of magistrates sending notice to accused on receipt of complaint—Dismissal under ss. 203 and 204 (3) of complaint after appearance of accused, not a discharge within sec. 436.* Unless and until a Magistrate is satisfied from an examination of the complainant and his witnesses that there is a *prima facie* case against the accused justifying the issue of a process under section 204 of the Criminal Procedure Code, the Magistrate is not entitled to call upon the accused to appear before him even optionally and to have his say against the complaint. Any such practice of sending a notice to the accused at the stage of enquiry contemplated by section 202 is improper and must be discontinued. *Held* further, that the fact that the accused appeared on such notice does not convert an eventual dismissal of the complaint under section 203 or 204 (3) into an order of "discharge," entitling the accused to notice before the dismissal is set aside and further enquiry ordered under section 436.
- Appa Rao Mudaliar v. Janaki Ammal* ... (1926) I.L.R., 49 Mad. (F.B.), 918
- Legality of charges and trial in respect of several offences:—See under "INDIAN PENAL CODE" ... ss. 234, 235 AND 239—See under ... 74
- SEC. 247—*Case posted to a certain date—Called up at 11 a.m.—Complainant absent—accused acquitted—If valid.* A Magistrate is entitled to call up a summons case at any time of the day to which it is posted and to acquit the accused under section 247 of the Criminal Procedure Code, if the complainant is not then present. He is not bound to wait for the complainant to appear at any time before the closing of the day in order to take up and dispose of a case. *Rangasami v. Narasimhalu*, (1884) I.L.R., 7 Mad., 213, *Kuttiyal v. Pari Makri*, (1884) I.L.R., 7 Mad., 356, followed. Criminal Revision Case No. 229 of 1925 dissented from.
- Tonkya v. Jaganna* ... (1926) I.L.R., 49 Mad., 883
- SEC. 252—*Warrant case—Evidence produced by prosecution taken—Application by complainant to summon other persons as being able to prove his case—Arbitrary refusal by Court, improper.* Though section 252 of the Criminal Procedure Code, unlike sections 203 (3) and 244 (2) of the Code, does not impose on a Magistrate trying a warrant case the duty of issuing summonses to witnesses named by the complainant, yet its effect is to throw a greater responsibility upon him than in a summons case, as he is empowered to arbitrarily refuse to summon such witnesses, but is bound to summon such as he thinks are likely to give useful evidence.
- Menon v. Krishnan Nayar* ... (1926) I.L.R., 49 Mad., 978
- SEC. 360 (1)—*Deposition must be read out to witness immediately after recording—Practice of examining a number of witnesses and afterwards reading out their depositions, illegal.* The requirements of section 360 (1) of the Code of Criminal Procedure (Act V of 1898) are not complied with unless the deposition of each witness is read out to him as soon as it is completed. To record the depositions of a number of witnesses and read them over to them at

the same time afterwards, is not a proper compliance with the section and is illegal, the direction contained therein being mandatory.

Kuppu Mudali, In re ... (1926) I.L.R., 49 Mad., 71

CRIMINAL PROCEDURE CODE (ACT V OF 1898) SEC. 488—*More than one person for whom petition presented—Maximum of Rs. 100 for all or for each —"In the whole," meaning of—Order of English Probate Court for alimony, if bar to application under sec. 488.* Under section 488 of the Criminal Procedure Code a Magistrate can order a person to pay a monthly maintenance not exceeding Rs. 100 to each of his dependants, viz., wife and children. The words "in the whole" in the section do not mean that Rs. 100 is the maximum limit for all the dependants together, but mean "for all the kinds of expenses of each dependant, such as boarding, lodging, medical expenses, school fees, etc." An order for alimony for the wife passed by the Probate Court in England which the wife is unable to execute against her husband is no bar to the passing of an order under section 488 of the Criminal Procedure Code. *Hill v. Hill*, [1902] Prob., 140, referred to. *Oraxton v. Oraxton*, () 71 J.P., 399, referred to. *In re Moideen*, (1918) M.L.J., 355, followed. *In re John Meiselbach*, (1972) 17 W.R. (Orl.), 49, approved.

Kent v. Kent ... (1926) I.L.R., 49 Mad., 891

CROWN GRANTS ACT (XV OF 1895):—See "GRANT OF UNSETTLED VILLAGE BY EAST INDIA COMPANY" ... 849

DECREE, amendment of, date of:—See "LIMITATION ACT, ART. 182 (4)" ... 807

DEFAMATION IN A COMPLAINT NOT IN GOOD FAITH—*Absolute privilege, if any—Sec. 499, Exception VIII, Indian Penal Code—English Common Law not applicable.* According to exception VIII to section 499, Indian Penal Code, defamatory statements in complaints to magistrates are not absolutely privileged. Unless they are made in good faith, the complainant is guilty of defamation. *In re Venkata Reddy*, (1918) I.L.R., 86 Mad., 216 (F.B.), overruled. *Held*, further that on matters specifically dealt with by the Penal Code, such as this, the English Common Law is not applicable. *Quere*.—Whether any absolute privilege attaches to advocates and witnesses when charged criminally?

Tiruvengata Mudali v. Tripurasundari Ammal, (1926) I.L.R., 49 Mad. (F.B.), 728

DEFAMATION, SUIT FOR—*Absolute privilege—Statement in complaint under sec. 107, Criminal Procedure Code (V of 1898)—Repetition of same statement in subsequent Police enquiry under sec. 161, Criminal Procedure Code.* Statements made in a complaint to a magistrate under section 107, Criminal Procedure Code, praying that security should be taken from a person for keeping the peace and a repetition of the same statements before a police officer to whom the Magistrate referred the complaint for enquiry and report are absolutely privileged and no action for damages for defamation in respect of such statement is maintainable. *Dr. Groenewelt v. Dr. Burwell*, (1700) 1 Ld. Raym., 454; 91 E.R., 1202 and *Watson v. M'Ewan* [1906] A.C., 480, followed.

Sanjivi Reddy v. Koneri Reddi ... (1926) I.L.R., 49 Mad., 315

DISTRICT MUNICIPALITIES ACT, MADRAS (IV OF 1920), SEC. 249, CL. (o) OF SCHEDULE V—*Commission agent selling wholesale grains of others, without licence—Liability to take licence.* Under section 249 of the Madras District Municipalities Act (IV of 1920) read with Schedule V, clause (o), any person who sells grain wholesale has to obtain licence and if he fails to do so he is liable to be punished under section 338 of the Act. *Held*, that a person who is not a mere orier or auctioneer who auctions the goods of others in their presence, but sells, for commission, on his own account, by auctioning wholesale in his premises the grain sent to him by others, comes within clause (o) of Schedule V of the Act.

Public Prosecutor v. Perumal Naicker ... (1926) I.L.R., 49 Mad., 432

- DISTRICT MUNICIPALITIES ACT, MADRAS (V OF 1920)**, ss. 146, 149, 313 AND 347—*Notice directing a certain act—Not complied with within time—Second notice issued prosecution within three months of second notice, but after more than three months from first notice—if barred.* If a notice is issued by a municipality on an occupier of a house to do certain acts enjoined by the District Municipalities Act is not complied with, the municipality is entitled to issue a second notice for the purpose. A prosecution instituted within three months of the second notice though beyond three months after the first for not complying with the second notice, is not barred under section 247 of the Act. Criminal Revision Case No. 164 of 1925, followed; *Ramanuja Chariar v. Kailasam Iyer*, (1925) I.L.R., 48 Mad., 870, dissented from.
- Ramachandra Chetty v. Chairman, Municipal Council, Salem* ... (1926) I.L.R., 49 Mad., 880
- 22 AND 40 AND RR. 37, 61, 62 OF SCH. 4—*Illegal expenditure by Chairman of a Municipality in carrying out Municipal Council's resolution—Liability to refund—Writ of certiorari, whether maintainable—Order of Local Self-Government, manner of issuing, under rule 37—Sec. 49 (1) of Government of India Act (9 and 10, Geo. V, ch. 101).* According to rule 37 of Schedule IV of Madras District Municipalities Act (V of 1920) the funds of a Municipality can be spent on education and other objects, subject to any rule that might be made by the Government; and if the Government has expressly or impliedly prohibited the expenditure of the funds on educational institutions not recognized by the Government, the expenditure in violation of such prohibition is illegal. Though a Chairman is by sections 13 (c), 22 and 40 (1) of the Act bound to carry out, on pain of removal, every resolution of the Municipal Council, such duty is under section 18 (e) of the Act subject to any restrictions or prohibitions imposed by the Act or the rules made thereunder by the Government. Rule 62 of the rules under the Act does not exempt the Chairman from liability to refund any sum spent in violation of such prohibition and if a former Chairman had made such illegal expenditure, rule 62 enables his successor to recover the same from him. An order of the Government issued under rule 37 of the District Municipalities Act, which requires such orders to be signed by the Secretary, "By order of the Government, Ministry of Local Self-Government" is, by virtue of section 49 (1) of the Government of India Act, a valid and unimpeachable order. Rule 61 of the rules of Schedule V of the Madras District Municipalities Act (V of 1920) is a substitute for the writ of *certiorari* for calling in question any illegal orders of surcharge made on the Chairman or other person and hence an application for a *certiorari* to quash such an order is not maintainable.
- Muhammad Raza Sahab v. Sadasiva Rao* (1926) I.L.R., 49 Mad., 49
- 249 AND 328—"Grain" meaning of—*Licence, for storing "grains" in godowns for wholesale trade—Notification, whether applicable to storing of rice and broken rice for wholesale—Rice and broken rice, whether, "grains" under the Act.* The word "grain" used in schedule V, clause (e) of the Madras District Municipalities Act (V of 1920), does not include rice and broken rice; consequently wholesale dealers are not liable to take out licences on payment of fees in respect of godowns in which rice and broken rice are stored for wholesale trade. "Grain" means a natural product of the earth, untreated except by gathering. *Cotton v. Fagan & Co.*, [1896] A.C., 457, followed.
- Municipal Council, Tuticorin v. Shanmuga Moopanar*, (1926) I.L.R., 49 Mad., 219
- EASEMENT BY PRESCRIPTION**—*Assertion of ownership during statutory period—Assertion of ownership during prior legal proceedings—Effect of both on prescriptive easement.* An easement by prescription is capable of being acquired only if the user during the statutory period had been with the *animus* of enjoying the easement as such in the land of another and not if the user had been in the consciousness of one's own ownership over the same, but a mere assertion of ownership in prior legal proceedings while the

- enjoyment was as an easement, is not conclusive against a right of easement. The question of *animus* is one of fact. *Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool), Limited*, [1915] A.C., 599 and *Lyell v. Hothfield*, [1914] 3 K.B., 911, followed. *Konda Reddi v. Ramaswami Reddi*, (1915) I.L.R., 38 Mad., 1 overruled.
- Subba Rao v. Lakshmana Rao* ... (1926) I.L.R., 49 Mad. (F.B.), 820
- ESTATES LAND ACT, MADRAS (I OF 1908)**, SEC. 8—*Exception to—"Acquired" meaning of.* The word "acquired" in exception to section 8 of the Madras Estates Land Act includes a case of "surrender" of his right of the Madras Estates Land Act to the inamdar; hence after such surrender the land by the occupancy ryot to the inamdar; hence after such surrender the land ceases to be part of the estate and a suit for rent thereof in a Civil Court is competent. The words "or otherwise" in section 8 (1) of the Act are not competent. The words "transfer" and "succession." *Per Cur.*—A case of *ejusdem generis* with "transfer" and "succession." *Per Cur.*—A case of "abandonment" stands on the same footing as "surrender."
- Subbarayudu v. Ramaswami* ... (1926) I.L.R., 49 Mad. (F.B.), 620
- SEC. 12—*Tree patta—Right to cut trees—Measure of damages.* Where an agreement is to be construed as one to pay *tirva* for the enjoyment of the produce of trees (e.g., palmyra trees), by a person not having any right in the land upon which the trees grow, section 12 of the Madras Act I of 1908 does not apply so as to entitle the licensee to cut down the trees. If he cuts down trees illegally he is liable for their full value. *Quære*, whether section 12 applies where the trees are on land held by an occupancy ryot, but they have been treated in his patta and *muchiika* as a separate entity.
- Raja of Ramnad v. Kamid Rowthen* ... (1926) I.L.R., 49 Mad. (P.C.), 335
- SS. 131, 189 AND 192, CL. 2—*Civil Procedure Code (Act V of 1908), O. XXI. rr. 89 and 92 (1)—Sale under Chapter VI of the Estates Land Act—Application to set aside sale, preferred under sec. 131 of the Act, dismissed—Subsequent suit in a Civil Court to set aside the sale on the ground of irregularity whether maintainable—Jurisdiction of Civil Court.* A Civil Court has jurisdiction to entertain a suit to set aside a sale, held under Chapter VI of the Madras Estates Land Act, on the ground of want of notice, of absence of proclamation and of inadequacy of price, even though an application to set aside the sale under section 131 of the Act had been made and dismissed. *Raja of Ramnad v. Venkataramaier*, (1922) I.L.R., 45 Mad., 890 (F.B.), applied. Order XXI, rule 89, Civil Procedure Code, does not apply to proceedings under the Estates Land Act, as it is excluded by section 192, clause 2 of the Act; and even though section 131 of the Act enacts a similar provision, still the provisions of Order XXI, rule 92 (1), do not apply to a dismissal of an application under section 131 of the Act, so as to make the sale absolute.
- Mahalinga Naiker v. Vellayya Naicker* ... (1926) I.L.R., 49 Mad., 490
- SEC. 30, CHAP. XI, SS. 168, 171, 172, 192 AND 215—*Record of rights and settlement of rent—Fair and equitable rent, settlement of—Orders of Revenue Officer as to record of rights and settlement of rent—Appeal to Board of Revenue against orders of Revenue Officer—Dismissal—Revision petition to High Court, whether competent—Revisional jurisdiction of High Court over orders of Board of Revenue and Revenue Officer, whether exists and when to be exercised—Suit—Settlement of fair and equitable rent under sec. 168 of the Act, whether controlled by limitations of sec. 30 relating to enhancement of rent—Failure to exercise jurisdiction.* In proceedings under Chapter XI of the Madras Estates Land Act for making a survey, record of rights and settlement of the Board of Revenue passed has revisional jurisdiction over the orders of the Board of Revenue on appeal under section 171 of the Act from the orders of the Revenue Officer in such proceedings. *Ramaswami Goundan v. Kali Goundan*, (1919) I.L.R., 42 Mad., 310, followed. In settling a fair and equitable rent under Chapter XI, section 168 of the Act, the Revenue Officer is not bound by the limitations of section 30 of the Act relating to enhancement of rent. Consequently, where the Revenue Officer, in settling a fair and equitable rent under section 168, considered himself bound by the limitations under section 30 and the Board of Revenue on appeal confirmed the order, their

orders should be set aside by the High Court on revision; and as section 173 of the Act, providing a remedy by suit in certain cases under Chapter XI, does not cover this case, the High Court would be justified in exercising its revisional jurisdiction.

Valluri Narasimha Rao v. Ryots of Peddamamdiipalli, (1926) I.L.R., 49 Mad., 499

EVIDENCE ACT (INDIAN), ACT I OF 1872, SEC. 112—Legitimacy—Presumption
 —Hindu woman—First marriage—Divorce—Marriage to another—Birth of a son within four months of divorce and during continuance of second marriage
 —Son, whether legitimate son of the first or second husband—No proof of want of access of second husband at a time when the son could have been begotten—English and Indian Law.] Where a Hindu woman was married to S in October 1903, was divorced by him in June 1904 married T in July 1904 and gave birth to a son in September 1904 and there was no proof that T could not have had access to her at any time when the son could have been begotten, *Held*, that, under section 112 of the Indian Evidence Act, which applied to the case, the son should be held to be the legitimate son of T, who was the husband of his mother at the time of his birth, even though the intercourse between her and T was during the continuance of her marriage with S and was adulterous. *Collector of Trichinopoly v. Lakshmanani*, (1874) 1 I.A., 282 (292), and *Ingestre v. Attorney-General* commented on in 30 Law Quarterly, page 153, relied on.

Sethu v. Palani ... (1926) I.L.R., 49 Mad., 553

EXECUTION—Court fee decreed as payable by pauper plaintiff—Mode of recovery by Government—Receiver to be appointed by Court—Attachment and sale of the charge in respect of maintenance not competent—See "CIVIL PROCEDURE CODE, O. XXXIII, n. 10" ... 567.

—Pre-decree arrangement between the parties that decree was not to be executed—*See* "CIVIL PROCEDURE CODE, SEC. 47" ... 513

FOREST ACT (V OF 1882), SEC. 21 (d)—Bare finding of cattle within forest reserve—Liability of owner—"permits his cattle to trespass," construction of.] If the cattle of a person left under the care of some servants strayed into a reserved forest, the owner not being present at the time and place, the owner is not guilty of "the offence of" pasturing or permitting his cattle to trespass "in or into a reserved forest within the meaning of section 21 (d) of the Madras Forest Act. An owner is not guilty unless he by some act or wilful omission of his allows his cattle to trespass. Mere proof that his cattle trespassed, without more, does not make out the offence. Criminal Revision Case No. 253 of 1886, 1 Weir, 762 and *Queen-Empress v. Krishnayya*, (1892) I.L.R., 15 Mad., 156, followed.

Ramadas v. King-Emperor ... (1926) I.L.R., 49 Mad., 875

GRANT OF UNSETTLED VILLAGE BY EAST INDIA COMPANY, with restraint on alienation—Validity of restraint—Crown Grants Act (XV of 1896) applicability of, to the grant—Sec. 8 of the Madras Regulation XXV of 1802.] A village not permanently assessed was granted by the East India Company in 1843 to the predecessor of the plaintiff with a condition restraining its alienation without the previous sanction of the Government. In a suit by the plaintiff in 1918, whose request to the Government for permission to alienate was refused, praying *inter alia* for a declaration that the condition restraining alienation was void, *Held* (1) that the grant was in effect one made by the Crown and therefore the restraint was valid and not void; and (2) that as the village was not permanently assessed under Madras Regulation XXV of 1802, section 8 of that Regulation which gives the holders of sanads under that Regulation absolute powers of alienation was inapplicable. *Held* further that the Crown Grants Act (XV of 1896) which enacts that grants by the Crown of estates unknown to the law are not invalid is not *ultra vires* of the Indian Legislature. *Held* also that though the formal assumption of sovereignty in India by the Crown was only in 1858, yet the possessions were, as provided by the previous Charter Acts, held by the East India Company, only as the delegate and in trust for the Crown. *Held* accordingly by *VENKATASUBBA RAO, J.*, that

the Crown Grants Act which is retrospective in operation and which is applicable to all grants made by the Crown was applicable to this grant also. *Held* by *SRINIVASA AYYANGAR, J.*, that the imposition of the clause was within the powers of the Crown even before the Crown Grants Act which is only declaratory and not retrospective.

Secretary of State for India v. Raja Parthasarathy Appa Rao ... (1926) I.L.R., 49 Mad., 349

GUARANTEE AND INDEMNITY;—See "CONTRACT" ... 156

GUARDIAN AND WARDS ACT (VIII OF 1890), ss. 7 (2) AND 34—See "MAJORITY ACT (INDIAN) (IX OF 1875), SEC. 3" ... 809

HINDU LAW—Adoption—Adoption by a person after the death of his only wife—Right of adopted son to inherit to the relations of the deceased wife—whether adopted son can claim as son of the wife, though she did not take part in ceremony of adoption—Pratigrahiyamatha, meaning of—Dattaka Mimamsa—Opinion of Sarkar Sastri, disapproval of.] The adopted son of a Hindu whose only wife had died before the adoption becomes the son of that wife so as to inherit as such to the relations in her father's family. There is no authority for the view that to be an adoptive mother, she should have actively participated in the adoption by actually receiving the boy in adoption. *Dattaka Mimamsa*, section I, verse 22, and section VI, verse 50, referred to; opinion of Sarkar Sastri, disapproved.

Sundaramma v. Venkatasubba Ayyar ... (1926) I.L.R., 49 Mad., 941

—Adoption—Husband's consent or authority to adoption by his widow—Consent or authority, whether can be implied—Express consent, meaning of—Positive consent—Essentials of adoption—Giving and taking—Datta homam—Giving and taking during husband's lifetime—Datta homam performed after husband's death—Completion of adoption—Validity of adoption.] Under the Hindu Law prevalent in Southern India, a husband's consent or authority to an adoption by his widow can be implied from his conduct and the circumstances. The expression "express consent," used in this connexion in some of the decisions of the Privy Council, means nothing more than "positive consent"; and the true rule deducible from them is this:—If from the circumstances you can infer that the husband did not prohibit and nothing more, that is not sufficient consent; but if you can infer that he assented to or authorized the adoption, that is clearly sufficient: *The Collector of Madura v. Mootoo Ramalinga Sathu-pathy*, (1886) 12 M.L.A. 397, explained; *Held* also, that giving and taking of the boy is of the essence of the adoption, and if it took place in the lifetime of the adoptive father the religious part, such as datta homam where necessary, can be deferred to a subsequent period and can be performed after his death. *Venkata v. Subhadra* (1884) I.L.R., 7 Mad., 548; *Subbarayar v. Subbammal*, (1893) I.L.R., 21 Mad., 497, followed.

Seetharamamma v. Suryanarayana ... (1921) I.L.R., 49 Mad., 989

—Adoption by widow with the consent of the nearest cognate heir, validity of—Succession—Bandhu—Father's sister's son's daughter's son, heritable bandhu.] In the absence of agnate heirs, a Hindu widow can, in Southern India, adopt with the consent of the nearest cognate reversioner. Father's sister's son's daughter's son is a heritable bandhu.

Kesar Singh v. Secretary of State for India ... (1926) I.L.R., 49 Mad., 652

—Adoption by widow—Consent of nearest sapindas—Death of consenting sapinda—Adoption, made by widow after consenting sapinda's death and long after consent was given—Consent, whether operative—Nearest sapindas at the time of adoption—Right to object—Their consent, if necessary—No objection made by them—Acquiescence, effect of—Rights of husband sary—Passing by survivorship to his father who gave consent—Gift by latter to the son's widow of his properties to be enjoyed by her for her life and to be handed over to the adopted son during her life or at her death—Adoption to last male holder—Rule as to divesting of estate, whether applicable to

the case—*Persona designata*.] The consent of the nearest sapinda to an adoption to be made by a widow can be acted upon by her after his death and long after the consent was given, if the nearest sapindas at the time of the adoption do not object to it. *Mami v. Subbarayar*, (1913) I.L.R., 36 Mad., 145, explained; *Case Law*, reviewed. Where the estate of the person, to whom the adoption was made, had survived to his father, who gave his properties to his son's widow under a registered deed and authorized her to adopt and provided in the deed that the widow should enjoy the properties for her life and hand them over to the adopted son at any time during her life or at her death. *Held*, that the adoption was not invalid on the ground that it was not made to the last male holder, nor on the ground that it divested an estate other than that of the widow adopting, that the estate in this case had become vested in the widow under the deed and that the adopted son divested only the widow or took the estate as *persona designata* under the deed.

Ammanna v. Satyanarayana ... (1926) I.L.R., 49 Mad. 633

HINDU LAW—Alienation by a co-parcener of a joint Hindu family of specific items of family property—Suit by non-alienating co-parcener for partition of his share in the alienated property—Unconditional decree for partition—Subsequent suit by alienee for general partition—*Res Judicata*—Allotment of properties—Items decreed to co-parceners in former suit, whether liable to be allotted to the alienee—Right of alienee to other items of family property to be allotted to alienor and be awarded to alienee in substitution.] Where a co-parcener in a joint Hindu family alienated certain specific items of the joint family property, and the non-alienating co-parcener sued the alienee and others and obtained an unconditional decree for partition and delivery of his share in the alienated properties alone, and subsequent to the decree the alienee instituted a suit for a general partition of all the family properties including the items awarded to the co-parcener in the previous suit and prayed that the whole of the items sold to him might be allotted to his vendor's share and awarded to him in respect of his purchase, and, if that could not be done, such other properties as might be allotted to his vendor's share might be awarded to him in substitution for the items sold to him. *Held*, that the decision in the former suit was *res judicata*, that the properties decreed to the co-parcener in the previous suit became the separate property of the co-parcener and were not liable to be allotted to the alienee in respect of his purchase, and that consequently the first prayer in the present suit could not be granted; *Subba Goundan v. Krishnamachari*, (1922) I.L.R., 45 Mad., 429, distinguished. *David Bevi Ammal v. Radhakrishna Aiyar*, (1923) 44 M.L.J., 309, dissented from; that the alienee was entitled to recover the properties that might be allotted to his alienor's share in the other properties of the family in substitution for the properties purchased by him. *Ramakishore Kedarnath v. Jainarain Ramrachhpal*, (1913) I.L.R., 40 Cal., 968 (P.O.), explained; *Hanmandas Ramdayal v. Valabhdas*, (1919) I.L.R., 43 Bom., 17, distinguished.

Souri Muthu v. Pachia Pillai ... (1926) I.L.R., 49 Mad., 483

Joint family—Debts—Commercial debts of father newly starting a trade—Liability of sons.] The text of Gautama, Chapter XII, 41, to the effect that the undivided sons of a Hindu are not liable for their father's commercial debts has long become obsolete; and ever since *Girdharee Lal v. Kantoo Lal*, (1874) 1 I.A., 321, sons are liable for all debts of their father which are neither illegal nor immoral. A trade is none the less ancestral because it was started only by the father.

Achutaramayya v. Ratanjee Bhootaji ... (1926) I.L.R., 49 Mad., 211

Joint family—Possession of joint property, whether necessary to constitute a joint family—Bequest to divided brother and his sons who were members of undivided family—Nature of estate taken by donees, whether as joint tenants or tenants-in-common—Will, not express as to nature of estate given—Presumption—Gift to donor's son and grandsons—Gift to strangers or persons who might inherit the property as obstructed heritage on intestacy—

Distinction as to presumption in such cases.] Under the Hindu Law, possession of joint family property is not a necessary requisite for the constitution of a joint family. Where a bequest was made by a Hindu to his divided brother and his sons, who were at the time members of a joint undivided family, but the will did not expressly indicate that the donees were to take the property as joint tenants, the donees should be deemed to take the property as tenants-in-common, *Lal Ram Singh v. Deputy Commissioner of Pratabgarh*, (1923) I.L.R., 45 All., 593 (P.O.), referred to; *Nagalingam Pillai v. Ramachandra Tevar*, (1901) I.L.R., 24 Mad., 429, distinguished, *Rewun Persad v. Mussumat Radha Beeby*, (1946) 4 M.I.A., 137, and *Jogender Narain Deo v. Ram Chandra Dutt*, (1896) I.L.R., 23 Cal., 670 (P.O.); 23 I.A., 37, applied. *Per KUMARASWAMI SASTRI, J.*—Where the donees are the sons and grandsons of the testator and would succeed to the property of the latter in the absence of any testamentary disposition and take the property as ancestral property, the presumption may be drawn, where the will is silent as to the nature of the estate conferred, that the donees took it as unobstructed heritage with the same incidents as would follow if there was no will. But where the donees, though members of a joint family, are not related to the testator, or though related to him would, in the absence of any will, either immediately or at a later stage, take the property as obstructed heritage and only as tenants-in-common, there is no reason for applying the presumption that the testator intended that the donees should take it as joint-tenants. *Per KRISHNAN, J.*—If property is given in terms expressly to a joint Hindu family, the family would take it with all the incidents of ancestral or joint family property, and it would not matter who made the gift; if the gift was to the members of it individually, they would take it in severalty.

Janakiram Chetty v. Nagamony Mudaliar ... (1926) I.L.R., 49 Mad., 98

HINDU LAW—Minor—De facto guardian—Alienation by de facto guardian for minor's necessity, whether valid—Alienation by de facto guardian, not for necessity, whether voidable or void—Ratification by minor on attaining majority, validity of.] An alienation by a de facto guardian of a Hindu minor, for a necessity of the minor, is valid under the Hindu Law. *Hanoomanpersaud Panday v. Mussumat Baboo Munraj Koonwaree*, (1858) 8 M.I.A., 393, relied on. An alienation by a de facto guardian, not for a necessity of the minor, is only voidable and therefore can be ratified by the minor on attaining his age of majority: *Chetty Culum Comara Venkatachella Reddyar v. Raja Rungasawmy Streemunth Iyengar Bahadur*, (1861) 8 M.I.A., 319, relied on.

Seetharamanna v. Appiah ... (1926) I.L.R., 49 Mad., 768

Religious endowments—Trusteeship—Hereditary trusteeship, whether partible or impartible—Tanjore Palace devasthanams—Succession to trusteeship—Trusteeship, whether devolves on a single heir or on co-heirs—Seizure by Government—Regrant to Senior Rani, effect of—Usage—Right of illegitimate sons of late Raja to trusteeship of Palace devasthanams—Acquisition by Rani—Accretion—Presumption as to accretion—Corpus in possession of Receiver and not with the widows—Effect on presumption as to accretion—Illegitimate sons of Raja, whether heirs to stridhanam properties.] After the death of of Rani—Collateral succession of illegitimate sons.] After the death of Sivaji, the last Raja of Tanjore, in 1855, the Government took possession, not only of the Raj and the private property of the Raja, but also of the devasthanams and their endowments which were in the possession and management of the late Raja. The Senior Rani, after obtaining possession of the private properties on a petition to the Government in 1862, sent up a memorial to the Government praying that the devasthanams and their endowments might be restored to her possession and management as the head of the family of the Raja for the time being. The Government restored them to her by an order in 1863, but did not indicate therein the course of succession to the management subsequent to her death. On her death in 1892, the Government again took possession of the devasthanams and their endowments, but had to restore them to the next senior Rani under a decree in a suit filed by her for the purpose; thereafter each of surviving Rani was in management as sole trustee until the last of them died in 1914. After her death, the illegitimate sons of the late Raja

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INCOME-TAX (INDIAN) ACT (XI OF 1922), SEC. 11 —Profession tax paid to municipality under section 111 of the Madras City Municipal Act (IV of 1919), not a proper deduction under section 11 of Income-tax Act.] Profession tax paid by a person under section 111 of the Madras City Municipal Act (IV of 1919) is not a proper deduction from his taxable income "as an expenditure incurred solely for the purposes of the profession" within section 11 of the Income-tax Act (XI of 1922). <i>Commissioner of Income-tax v. King and Partridge</i> ... (1926) I.L.R., 49 Mad. (S.B.), 296	
... ss. 22, 23 (3) AND (4), 28 AND 30— Filing statement of income—Order thereon—Appeal to and fine by appellate authority—Competency of appeal.] If in answer to a requisition by the Income-tax authorities, a person submits a statement of his income, the further enquiry and order thereon fall under section 23 (3) and not 23 (4) of the Indian Income-tax Act (XI of 1922); hence an appeal lies under section 30 from the eventual order of assessment. An appeal by the assessee being competent, he cannot, when fined by the appellate authority for gross under statement of income, plead that the appeal was incompetent. <i>Ramaswamiah v. Commissioner of Income-tax</i> (1926) I.L.R., 49 Mad., 831	
SEC. 66 (1)—Obligation of Commissioner to state a case even in cases under sec. 33 of the Act, section 45, Specific Relief Act (I of 1877).] Even in cases coming under section 33 of the Indian Income-tax Act, the Commissioner of Income-tax is bound to state a case to the High Court if in the course of enquiry under that section any question of law arises in the case and if he improperly declines to do so, the High Court may under the discretionary power vested in it by section 45 of the Specific Relief Act compel him to do so in proper cases. <i>Sheik Abdul Kadir Marakayar & Co., In re.</i> (1926) I.L.R., 49 Mad. (S.B.), 725	
JURISDICTION —Execution of mortgage decree ... 746	
LACCADIVE ISLANDS —British India—Cession of territory—Sovereignty—Laccadive Islands, when became part of British India—Law applicable to the Islands—Regulation I of 1912, sec. 3—Scheduled Districts Act (XIV of 1874)—Laws Local Extent Act (XV of 1874)—Appeal to High Court from order of Inspecting Officer of Laccadives—Delay in presentation of appeal—Power to excuse delay—Indian Limitation Act (IX of 1908), sec. 5, whether applicable.] The Laccadive Islands became part of British India only in 1909 when they were ceded by the Bibi of Cannanore to the British Government, until which time the sovereignty was vested in the Bibi. By Regulation I of 1912, section 3, the ordinary law of British India is not applicable to the Laccadive Islands, but only certain enactments specified therein, including the Scheduled Districts Act (XIV of 1874) but not the Laws Local Extent Act (XV of 1874) are made applicable to the islands; and no notification has been issued under section 3 of the Scheduled Districts Act, 1874, by which the Indian Limitation Act has been extended to the Islands. Consequently, the High Court has no power, under section 5 of the Indian Limitation Act, to excuse the delay in the presentation of an appeal preferred to it against an order of the Inspecting Officer of the Laccadive Islands. The decision in <i>Queen-Empress v. Cheria Koya</i> , (1890) I.L.R., 13 Mad., 353, is erroneous as it is based on a misapprehension that the Laccadive Islands were part of British India ever since 1792. <i>Ahmed Koya v. Aisamma</i> ... (1926) I.L.R., 49 Mad., 419	
LAND ACQUISITION ACT (I OF 1894), ss. 3 (b), 9 AND 53 —Attaching decree-holders—Attachment of lands—Mortgage of same by judgment-debtor subsequent to attachment—Further attachments by decree-holders subsequent to mortgage—Land acquired under the Act—Compensation money paid into Court subsequent to attachments—Decree-holders, whether interested in the lands under the Act—Rateable distribution—Money paid, whether assets—"Claims enforceable under attachment," in sec. 84, Civil Procedure Code,	

meaning of—Priority as between attaching creditors and mortgagee—Civil Procedure Code (Act V of 1908), ss. 84 and 73.] A decree-holder attached lands of his judgment-debtor in execution of his decree in the District Court. The latter subsequently mortgaged the lands to the District Court. The mortgage, two other decree-holders appellant; subsequent to the mortgage, the lands were acquired by Government under the Land Acquisition Act, and the compensation money was paid into the District Court by the Collector who referred the dispute between the mortgagee and the decree-holders for decision by the Court. The payment into Court was subsequent to all the attachments. On the mortgagee claiming priority over the decree-holders in respect of the compensation money and contending that the decree-holders who attached subsequent to and his mortgage were, in any event, not entitled to the money as against him; Held, that the attaching decree-holders were persons interested within the meaning of section 3 (b) of the Land Acquisition Act; *In re: The Land Acquisition Act, in the matter of Pestonji Jehangir Modi*, (1913) I.L.R., 37 Bom., 76, followed; that the compensation money paid into Court was assets held by the Court for distribution among the decree-holders; that the decree-holders, who attached subsequently to the mortgage, were entitled to rateable distribution of the amount in Court along with the decree-holder who attached previous to the mortgage under sections 64 and 73, Civil Procedure Code; *Thiraviyam Pillai v. Lakshmana Pillai*, (1918) I.L.R., 41 Mad., 616; *Ghisulal Agarwalla v. Todarmull Agarwalla*, (1921) 26 O.W.N., 169, followed, and that the decree-holders were entitled to rateable distribution even though their decrees were not actually being enforced; *Kali Kumar Saha v. Kali Prasanna Majumdar*, (1916) 33 I.C., 492; *Chunilal Devaji v. Karamchand Shrichand* (1922) 69 I.C., 181; and *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*, (1892) I.L.R., 16 Bom., 91, followed.
Pratapa Bhattadu v. A.E.L. Mission ... (1926) I.L.R., 49 Mad., 38

LAND ACQUISITION ACT (I OF 1894), SEC. 3 (f) AND SEC. 6 (3)—Declaration of acquisition of village sites—Conclusive evidence of public purpose—Right of suit not taken away—Sec. 6 (3) not ultra vires—"Village sites," meaning of.] In accordance with section 3, clause (f) of the Land Acquisition Act (I of 1894) the Government of Madras declared, by a notification in 1895, in favour of acquisition of village sites in the Tanjore district. Held, (1) that acquisition of house sites for Panchamas is a public purpose within the meaning of section 3 (f) of the Act, (2) that a declaration under section 6, clause (3) of the Act is only conclusive evidence that the land is needed for a public purpose, and it does not deprive the subject of his right of suit; *Eera v. Secretary of State for India*, (1905) I.L.R., 32 Cal., 605 (P.C.) and *Secretary of State for India v. Moment*, (1913) I.L.R., 40 Cal., 891 (P.C.), distinguished, (3) that section 6, clause (3) is therefore not ultra vires of the Indian legislature, and (4) that it is not open to Municipal Courts to question the correctness of a declaration by Government that a particular land is needed for a public purpose; *Hamabai Framjee v. Secretary of State for India*, distinguished.
Veeraraghavachariar v. Secretary of State for India. (1926) I.L.R., 49 Mad., 287

SEC. 81 (2), PRO. 3—Award of compensation by Deputy Collector—Apportionment—Payment by Deputy Collector to claimants according to his award—Apportionment, objected to by claimants, who were zamindar and his tenants—Reference to District Court—Apportionment altered—Zamindar awarded increased share of the compensation in the District Court—Right of zamindar to apply for execution against Government in the District Court.] Where a Deputy Collector, acquiring lands for the Government under the Land Acquisition Act, determined the amount of compensation payable, apportioned it among the claimants and paid their shares under his award, but on a reference made to the District Court at the instance of a claimant objecting to the apportionment, the District Court increased the share of compensation in favour of the objecting claimant, Held, that the award of the District Court was a direction that the Government should pay each claimant the amount

awarded to him under its award, and that the claimant, who obtained an increased share under its award, is entitled to recover the amount from the Government by filing an application in the District Court for execution against the Government. The Government is bound to deposit in the District Court the amount of compensation awarded by the Referring officer for distribution according to the award of the District Court, and increased amount, if any, awarded by the Court; the Government should not throw on the claimant the risk and burden of recovering the compensation from some other party to whom the Government has wrongfully paid it. The third proviso to section 31 (2) of the Act does not apply to a case of wrongful payment by the Deputy Collector to a claimant, as the proviso only comes into operation when section 31 (2) has been obeyed. *Raja Nilmoni Singh Deo Bahadur v. Ram Bandhu Rai*, (1881) I.L.R., 7 Cal., 388 (P.C.), relied on.

Deputy Collector, Cocanada v. Maharaja of Pittapur. (1926) I.L.R., 47 Mad., 519

LAND ENCROACHMENT ACT, MADRAS (II OF 1905), ss. 2, 3, 16—*Penal assessment—Government land—Inferential relinquishment of patta—Claim by resumption or reversion—Estoppel by conduct—New contention on appeal—Inconsistency with previous contention.* Ryots were in occupation of a lanka under pattas from Government whose property it was. The lanka was gradually diluviated, and between 1880 and 1885 became totally submerged, but after some years a new lanka was formed on the site. The appellant's tenant of a neighbouring lanka took possession of the re-formed land as an accretion to the lanka let to him, and paid to the appellant additional rent for it. The ryots had not formally relinquished their land as the land became diluviated they had ceased to pay rent to Government; the submerged land had been omitted from the gudikat or rent-roll, and had been struck out of the pattas. The Government imposed upon the appellant a penal assessment under the Madras Land Encroachment Act, 1905, in respect of the land. That Act by section 2 declares all land to be the property of Government, subject to exceptions which include lands which are the property of any person "holding under ryotwari tenure . . . or in any way subject to the payment of land revenue direct to Government." By section 3 any person who unauthorizedly occupies Government land is liable to an assessment of the penal character thereby provided. By section 16 the Act is not to apply to any lands claimed by escheat, resumption or reversion until such lands have been reduced into possession by Government. *Held*, that the assessment has been rightly imposed upon the appellant for the years after the Act came into force, since (a) it was to be inferred that the patta had been relinquished, and (b) the claim of Government was not by escheat, resumption or reversion. *Held*, further, that the appellant was estopped from raising a new contention, namely, that an assessment under the Act could be imposed only upon persons in physical occupation of the land, since that contention was inconsistent with the appellant's plaint and with the position which he had taken up throughout the controversy, and the Government was put at a disadvantage by the contention not being raised earlier.

Maharaja of Vizianagram v. Secretary of State for India ... (1926) I.L.R., 49 Mad. (P.C.), 249

LAWS LOCAL EXTENT ACT (XV OF 1874)—*Appeal to High Court from order of Inspecting Officer of Laccadives*:—See "LACCADIVE ISLANDS" ... 419

LEGITIMACY—*Presumption*:—See "EVIDENCE ACT" ... 419

LETTERS PATENT (MADRAS HIGH COURT), CLAUSE 15—*Order transposing some defendants as plaintiffs, whether a "judgment"*—*Appeal, maintainability of.* An order of a Judge on the Original Side of the High Court transposing certain defendants as plaintiffs and allowing the suit to proceed is not a "judgment" within clause (15) of the Letters Patent and is not appealable. *Tuljaram Row v. Alagappa Chettiar*, (1912) I.L.R., 35 Mad., 1 (F.B.), applied.

Official Assignee of Madras v. Ramalingappa ... (1926) I.L.R., 49 Mad., 539

LIMITATION ACT (IX OF 1908), ART. 11 (A)—*Hindu Law—Auction purchaser of a share of a co-parcener of a joint Hindu family—Right of purchaser—Purchaser gets only an equity to partition and is not a tenant-in common—Application by purchaser for delivery of possession in execution proceedings, ordered—Subsequent order for redelivery—Suit by purchaser for exclusive or joint possession within one year of the order, dismissed as incompetent—Subsequent suit for partition and delivery of possession, instituted more than one year after order for redelivery—Bar of limitation—Res judicata*—*Civil Procedure Code (Act V of 1908)*, sec. 11 and O. 11, rule 2.] In execution of a money decree against one of the members of a joint Hindu family, a house belonging to the joint family was sold in auction and the purchaser applied for and obtained possession in execution proceedings; but the house was redelivered to the other members in execution proceedings by order of Court; the purchaser instituted a suit within one year of the last order to recover possession, but it was finally dismissed on the ground that the plaintiff was not entitled to exclusive possession or joint possession along with the other members of the family. Thereupon the purchaser instituted the present suit for partition of a block of houses belonging to the family and delivery to him of his vendor's share therein, more than one year from the date of the order for redelivery in the execution proceedings; the defendants pleaded that the suit was barred by limitation under article 11 (A) of the Limitation Act, by the rule of *res judicata* and by Order II, rule 2 of the Civil Procedure Code. *Held*, that an auction purchaser of the undivided share of a co-parcener of a joint Hindu family in the Madras Presidency got by his purchase of a mere equity to a partition of the joint family property, and did not become a tenant-in-common with the other members of the family; that the purchaser was not entitled to get exclusive possession or joint possession of the property along with the other members either in execution proceedings or by a suit; that a suit instituted by the purchaser for partition and delivery to him of his vendor's share in the family property, more than one year from the order in execution proceedings, was not barred under article 11 (A) of the Limitation Act, 1908; that, as the relief the plaintiff now prayed for in the present suit for partition, based on the cause of action of his purchase of the undivided share of a member of a joint Hindu family, would be inconsistent with what he prayed for in the prior suit, in which the cause of action was the order on the claim petition, there was no bar of *res judicata* under section 11 or by order II, rule 2, of the Civil Procedure Code. *Baldeo v. Kanhaiyalal*, (1920) 24 C.W.N., 1001 (P.C.), and *Bhimappa v. Irrappa*, (1902) I.L.R., 28 Bom., 148, distinguished; *Munjaya v. Shanmuga*, (1915) I.L.R., 38 Mad., 684; and *Yelumalai Chetti v. Srinivasa Chetti*, (1906) I.L.R., 29 Mad., 294, followed.

Shanmugam Pillai v. Panchali Ammal ... (1926) I.L.R., 49 Mad., 593

ARTS. 62, 115 AND 120—*Suit for dividend declared by a registered company—Art. 120, applicable.* A suit by a shareholder against a company for recovery of a dividend is governed by article 120 of the Indian Limitation Act and not by article 62 or 115 or 116 of the Act. *Ripon Press and Sugar Mill Co., Ltd. v. Yama Venkatarama Chetty*, (1919) I.L.R., 42 Mad., 33, overruled.

Rama Seshayya v. Sri Tripurasundari Cotton Press, Bezwada ... (1926) I.L.R., 49 Mad., 468

ART. 132—*Starting point*:—See "MORTGAGE-DEED" ... 408

ART. 134—*Mortgagee—Sale by mortgagee to another for value—Vendee put in possession on sale—Suit by mortgagor for redemption, more than 12 years after sale—Suit, whether barred, under art. 134—"Good faith" in purchaser, whether necessary for application of art. 134—Limitation Acts of 1859, 1871, 1877 and 1908 compared.* Where a mortgagee in possession transfers the property under a sale-deed for consideration to another and puts him in possession, and what was bargained for by the transferee was an absolute sale, though he knew that

- MORTGAGE-DEED**—Principal amount payable on a certain date—Interest payable each year—On default in payment of interest, both principal and interest becoming payable—Option of mortgagee on default—Suit for both more than twelve years after default but within twelve years of date of payment of principal—Bar—Limitation Act (IX of 1908, Art. 132—Starting point.) Where a mortgage deed, dated 20th September 1890, which provided for the payment of the principal in 1904 and of the interest at the end of each year, contained a further clause that, in default of payment of interest in any year, the mortgagee "shall be at liberty to recover the whole amount of principal and interest due up to date," and after default in payment of interest the mortgagee sued for principal and interest in 1916, more than twelve years from the date of default but within twelve years from the date fixed for payment of the principal in the main contract, Held that, on a proper construction of the deed, the option was reserved with the mortgagee to enforce the default clause at his pleasure; that the period of limitation under article 132 of the Limitation Act started to run, not from the date of default fixed for payment of interest but from that of payment of principal under the main contract, and that consequently the suit was not barred by limitation. *Narna v. Ammani Amma*, (1916) I.L.R., 39 Mad., 581 followed; *Gaya Din v. Jhumman Lal*, (1915) I.L.R., 37 All., 400 (F.B.), dissented from.
Vellappa Chettiar v. Venkatasubbarayulu Naidu ... (1926) I.L.R., 49 Mad., 403
- MUNICIPAL CHAIRMAN** MAKING UNAUTHORIZED EXPENDITURE—Liability to refund:—See under "MADRAS DISTRICT MUNICIPALITIES ACT" ... 49
- MUNICIPAL COUNCIL'S RESOLUTION**—Chairman not bound to "carry out illegal resolution:—See under "MADRAS DISTRICT MUNICIPALITIES ACT" ... 49
- ORIGINAL SIDE RULES**, Order VI-A., R. 62—Suit on Negotiable Instrument by or against legal representatives of the original parties to the instrument—Summary procedure alone allowed by the rule.] Rule 62 of Order VI-A of the Original Side Rules (Madras) is mandatory; hence all suits on the Original Side of the High Court on bills of exchange, hundis and promissory notes whether by or against the original parties thereto or by or against their legal representatives must be laid only according to the summary procedure therein prescribed.
Venkataramayya v. Nurse ... (1926) I.L.R., 49 Mad. (F.B.), 815
- PARTITION ACT (IV OF 1893)**—Proclamation of sale:—See "CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 66" ... 333
- PARTNERSHIP ACT (ENGLISH), 1890** (53 AND 54 VICT., CAP. 39), SEC. 17—Rule of English and Indian Law:—See "CONTRACT ACT (INDIAN) ACT (IX OF 1872), SEC. 249" ... 930
- PENAL CODE (ACT XLV OF 1860)**, SEC. 121—Waging war—Continuing offence—Criminal Procedure Code, ss. 234, 235 and 239—Legality of charges and trial in respect of several offences—Same transaction, meaning of.] The waging of war is a continuing offence and a charge against the accused under section 121, Indian Penal Code, specifying more than three offences committed in the course of the war, and spread over a period of more than one year, does not contravene the provisions of section 134 of the Code of Criminal Procedure, and is not illegal. *Per KRISHNAN, J.* (agreeing with SPENCER, Offg. C.J.)—A rebellion is said to continue until it is suppressed by capture or destruction of the rebel forces, or by the rebels laying down their arms and making their submission as subjects to their sovereign and receiving his pardon. When a series of acts are so connected by community of purpose and continuity of action as to form not only one transaction but a single offence, proximity of time between the performance of the various acts composing that offence not being the sole test of the unity of the transaction, all persons accused of doing those acts may be charged and tried at one trial under section 235 of the Code of Criminal Procedure, although some of the accused took part only after some of the others had been arrested. *Per KRISHNAN, J.*—The various incidents in a

war may be so disconnected as to form different transactions and the question whether they form parts of the same transaction or not must be judged on the facts of each case. In this case they formed parts of the same transaction.
Mallayya v. King Emperor ... (1926) I.L.R., 49 Mad., 74

PENAL CODE, SEC. 499—Defamation—Exception VIII ... 728

PRACTICE—Memorandum of objections in Original Side appeals—Competency of.] Under the provisions of the Civil Procedure Code and the rules made by the High Court thereunder, it is competent for a respondent in an appeal from the Original Side of the High Court to file a memorandum of objections against the decrees appealed from. *Sabitri Thakurain v. Savi*, (1921) I.L.R., 48 Calc., 481 (P.O.), applied. *Bhimasena Rao v. Venugopaul Mudali*, (1925) I.L.R., 48 Mad., 631, overruled.
Venkatasam Chetty v. Gulabchand ... (1926) I.L.R., 49 Mad. (F.B.), 291

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SEC. 8 (2)—Sale of insolvent's estate by Official Assignee—Insolvent's objection to sale before Judge—Confirmation of sale by Judge—Right of appeal to insolvent as "aggrieved person." An insolvent whose estate has vested in the Official Assignee is not entitled to appeal as an "aggrieved person" within section 8 (2) of the Presidency Towns Insolvency Act (III of 1909) against an order of a Judge rejecting his opposition to a sale of his estate by the Official Assignee. *Ex parte Sheffield*; *In re Austin*, (1879) 10 Ch. D., 434, followed. *Ex parte Leadbitter*, (1878) 10 Ch. D., 388, and *Sakhawat Ali v. Radha Mohan*, (1919) I.L.R., 41 All., 243, followed. Observations in *Sivasubramania v. Theethiappa*, (1924) I.L.R., 47 Mad., 120, to the contrary, disapproved.
Hari Rao v. Official Assignee, Madras ... (1926) I.L.R., 49 Mad. (F.B.), 461

—SEC. 9, EXPLANATION
 —Closing of business by one partner—Right to get another partner adjudicated insolvent—Question of fact.] It is a question of fact in each case whether the act of one partner in closing the business of the firm and thus committing an act of insolvency so far as he is concerned is imputable to another partner so as to entitle the creditors of the firm to get the firm also adjudicated an insolvent. Held, that the mere fact of closing the firm by one partner without more (e.g.) evidence to show that the other either expressly or impliedly authorized the same was insufficient to lead to such imputation.
Gopal Naidu v. Mohanlal Kanyalal ... (1926) I.L.R., 49 Mad., 189

PRINCIPAL AND AGENT—Liability, Joint or alternative—Rule of Indian Law if different from rule of English Law—See CONTRACT ACT, SEC. 233 ... 900

PROBATE AND ADMINISTRATION ACT (V OF 1881), SS. 1, 4, 12, 59, 90, ETC.:—See "HINDU LAW" ... 281

—SEC. 69—Probate, grant of—"Persons claiming to have an interest in the estate of deceased," meaning of—"Persons who can object to grant of probate—Widow claiming a right of maintenance out of the estate of deceased, whether can object—Court of Probate Act, 20 and 21 Vict., Ch. 77, sec. 61.] A person, who is entitled to any portion of the estate left by a deceased or to a right to claim maintenance from such estate, has an interest within the meaning of section 69 of the Probate and Administration Act (V of 1881), and is entitled to object to the grant of probate of the will of the testator. It is not necessary that he should claim through the testator in order to enable him to oppose the grant of probate: consequently the widow of an undivided brother of the husband of a testatrix is entitled to object to the grant of probate of her will. *Keshan Dai v. Satyendra Nath Dutt*, (1901) I.L.R., 23 Calc., 441, followed.

Hanumantha Rao v. Letchamma ... (1926) I.L.R., 49 Mad., 930

PROBATE AND ADMINISTRATION ACT (V OF 1881), SEC. 86:—See "CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 109 and 110 AND O. XLV, RR. 2, 3 AND 8" ... 954

PROFESSIONAL MISCONDUCT—*None where mere negligence and no moral delinquency—Clause 10 of Letters Patent.* Mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct. In re G.M.C., (1889) 33 Sol. J., 397, followed.

Vakil, In re A ... (1926) I.L.R., 49 Mad. (S.B.), 523

PROVINCIAL INSOLVENCY ACT (V OF 1920), ss. 2 (d), 17 AND 28—*Insolvency of a Hindu father—Power of father to sell his sons' shares for his just debts, vesting of, as "Property" in Official Receiver—Death of father before exercise of power of Official Receiver, effect of.* Under the Provincial Insolvency Act (V of 1920), on the insolvency of a Hindu governed by the Mitakshara law, his power to sell his sons' shares also for paying his just and proper debts vests in the Official Receiver; the sons' shares themselves do not vest in the Receiver; *Sat Narain v. Behari Lal*, (1925) I.L.R., 8 Lah., 1 (P.C.), explained and applied; *Kuppuswami Goundan v. Marimuthu Goundan*, (1924) 47 M.L.J., 487, overruled. By reason of section 17 of the Act, the death of the insolvent before the Official Receiver exercised the power does not put an end to the Receiver's power to sell. Per KAISHNAN and RAMESAM, JJ.—Such power vests in the Receiver under section 28 of the Act as the insolvent's property, and not as "property" under section 2 (d) of the Act. Per VENKATASUBBA RAO, J.—Such power vests as "property" within section 2 (d) of the Act.

Seetharama Chettiar v. Official Receiver, Tanjore ... (1926) I.L.R., 49 Mad. (F.B.), 849

... ss. 4 AND 56—*Application under sec. 56 (3) to remove a person from possession of property—Person in possession setting up title—Delivery of possession, whether can be directed under sec. 56 (3)—Application under sec. 4—Question of title—Effect of order under sec. 56. (3) and sec. 4, difference between—Nature of applications under the section—Parties to application.* Acting under section 56 of the Provincial Insolvency Act (V of 1920), the Court cannot direct any person to deliver up any property in his possession to the Official Receiver, unless the insolvent is entitled, on the date of the application under the section, to the immediate possession of the property; if a title, however flimsy, is set up by the person in possession, the Court cannot act under section 56. But it is open to the Court, if a proper application being made under section 4 of the Act, to try the issue whether the insolvent is entitled to the property or not.

Chittammal v. Ponnuswami Naicker ... (1926) I.L.R., 49 Mad., 762

... ss. 5, 10 (2) AND 43 (1)—*Civil Procedure Code (Act V of 1908), O. IX—Annulment of adjudication for default of appearance of insolvent—Application under O. IX, Civil Procedure Code, to set aside order, whether competent—Definite remedy prescribed under sec. 10 (2) of the Act to be followed and not procedure under O. IX of the Code.* When an order annulling an adjudication has been passed under section 43 (1) of the Provincial Insolvency Act (V of 1920), it is not open to the Insolvency Court to set aside the order under the provisions of Order IX of the Civil Procedure Code. The insolvent should resort to the definite remedy prescribed by section 10 (2) of the Act and cannot apply under Order IX of the Code, by virtue of the provisions of section 5 of the Act. *Arunagiri Mudaliar v. Kandaswami Mudaliar*, (1924) 19 L.W., 418, followed.

Venugopalachariar v. Chunnilal ... (1926) I.L.R., 49 Mad., 935

... ss. 9, 13, 20 AND 28—*Joint Hindu family—Debt incurred by the father for the benefit of the family—Death of father, leaving major and minor sons—Major sons whether can be*

adjudicated insolvents. There is nothing in the Provincial Insolvency Act which prevents the undivided members of a joint Hindu family from being adjudicated insolvents in respect of debts due by the family; each case depends on its circumstances; the relation of creditor and debtor exists between the lender and the members of a joint family in respect of debts incurred by the family. *Chokkalingam Chettiar v. Thiruvenkataswami Naidu*, C.M.A., 47 of 1916 (unreported), followed.

Muthu Veerappa Chettiar v. Sivagurunatha Pillai, (1926) I.L.R., 49 Mad., 217

PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 28, CL. (5)—*Civil Procedure Code (V of 1908), sec. 60, cl. (c)—Agriculturist, meaning of—Properties, when exempt from attachment under sec. 60, cl. (c)—Properties, when not vested in Official Receiver—Properties of large landed proprietor, whether exempt.* Under section 28, clause (5) of the Provincial Insolvency Act (V of 1920), properties which are exempt from attachment under section 60 of the Civil Procedure Code, do not vest in the Official Receiver and are therefore not liable to be sold by him. The term "agriculturist" is used in section 60, clause (c), of the Code to denote a person making his living by tilling the soil, in other words, one whose sole means of livelihood is gained by cultivating land and does not necessarily mean a person who works with his hands; it includes a small holder of land who tills the soil, but not a large landed proprietor, even though his sole income is derived from land. *Jivan Bhaga v. Hira Bhaija*, (1888) I.L.R., 12 Bom., 363, referred to. The property of an agriculturist, to be exempt under clause (c) of section 60 of the Code, must be shown to have been occupied by him as such for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate the land. *Radhakisan Hakumji v. Balwant Ramji*, (1883) I.L.R., 7 Bom., 580, followed.

Muthuvenkatarama Reddiar v. Official Receiver, South Arcot ... (1926) I.L.R., 49 Mad., 227

... SEC. 64—*Succession Certificate Act (VII of 1889), Sec. 4—Dividend payable to creditors entered in the schedule—Payment of dividend by Official Receiver—Succession certificate, whether necessary to be produced before getting dividend—Applicability of Succession Certificate Act, sec. 4, to payment of dividend.* A certificate under section 4 of the Succession Certificate Act is not required to enable a person whose claim as legal representative of a deceased creditor has been entered in the schedule prepared under section 33 of the Provincial Insolvency Act (V of 1920) to obtain payment of the dividend due to him.

Omayaichi v. Ramachandra Ayyar ... (1926) I.L.R., 49 Mad., 952

... ss. 75 (2), 53 AND 54—*Appeal—Application to District Court by Official Receiver to set aside an alienation by insolvent—Dismissal—Right of a creditor to appeal against the order—Creditor, not actually party to the original application—Official Receiver, not moved to appeal—Person aggrieved by the order, meaning of—Practice—Amendment of appeal petition.* Under section 75 (2) of the Provincial Insolvency Act (V of 1920), a creditor of an insolvent can appeal against an order of a District Court dismissing an application of the Official Receiver to set aside, under sections 53 and 54 of the Act, an alienation by the insolvent, even though the creditor was not an actual party to the application and had not previously moved the Official Receiver to file an appeal and the latter had not refused to do so; but the creditor must prefer the appeal on behalf of all the creditors. *Ananthanarayana Ayyar v. Sankaranarayana Ayyar*, (1924) I.L.R., 47 Mad., 673, distinguished; *Shikri Prasad v. Aziz Ali*, (1922) I.L.R., 44 All., 71, followed.

Chowdappa Goundan v. Kathaperumal Pillai ... (1926) I.L.R., 49 Mad., 794

REGISTRATION ACT (INDIAN) (XVI OF 1908), ss. 17 AND 49—*Partnership—Release by a partner—Deed of release—Whether registration necessary—Partnership assets including immovable property—Unregistered release—dead, whether admissible in evidence—Nature of partner's right to the partnership property—Indian Contract Act (IX of 1872), sec. 253.* An unregistered deed of release by a partner of his share in the partnership business is

admissible in evidence, even though the partnership owns immovable property. Though a partner may be a co-owner in the partnership property, he has no right to ask for a share in that property, but only that the partnership business should be wound up, including therein the sale of the immovable property, and to ask for his share in the resulting assets. *Sudarsanam Maistri v. Narasimhulu Maistri*, (1902) I.L.R., 25 Mad., 149; *Gopala Chetty v. Vijayaraghavachariar*, (1922) I.L.R., 45 Mad., 378 (P.C.); and *Joharmal v. Tejram Jagrup*, (1893) I.L.R., 17 Bom., 235, relied on. Even if the document required registration under section 17 of the Registration Act, still it is admissible in evidence notwithstanding sections 49 or the Act, as it is not received as evidence of any transaction affecting immovable property, inasmuch as the release has the effect of leaving the immovable property in the same state as before the release, namely, as the property belonging to the partnership.

Venkataramnam v. Subba Rao ... (1926) I.L.R., 49 Mad., 738

REGISTRATION ACT (INDIAN) (XVI OF 1908), SEC. 77—Plaintiff (purchaser) tendering sale-deed for registration—Denial of execution—Refusal to register—Plaintiff's only remedy, suit under section 77 of the Registration Act and not suit for specific performance. If, on denial of execution by the vendor, a Registrar refuses to register a sale-deed presented by the purchaser for registration, the sole remedy of the purchaser is to file a suit as provided by section 77 of the Registration Act for registration of the deed within 30 days of the refusal and not a suit for specific performance of the contract, such as the execution of a new sale-deed, and delivery of lands sold, etc., *Venkataram v. Kristayya*, (1893) I.L.R., 18 Mad., 341, followed. *Amer Chand v. Nathu*, (1910) 7 A.L.J., 887; *Surendra Nath Nag Chowdhury v. Gopal Chunder Ghosh*, (1910), 12 C.L.J., 461 and *Nasiruddin Mulla v. Sidhoo Mia*, (1918) 44 I.C., 361, not followed.

Satyanarayana v. Chinna Venkata Rao ... (1926) I.L.R., 49 Mad., 302

REGULATION (MADRAS) (XXV OF 1892), SEC. 8—Crown Grant Act (XV of 1895):—See "GRANT OF UNSETTLED VILLAGE BY EAST INDIA COMPANY" ... 349

REGULATION (I OF 1912), SEC. 3.—Scheduled Districts Act (XIV of 1874)—Laws Local Extent Act (XV of 1874):—See "LACCADIVE ISLANDS" ... 419

RELIGIOUS ENDOWMENT—Trusteeship:—See under "HINDU LAW" ... 116

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Seller's agent or buyer—Construction—Undisclosed profit—Alleged ratification of buyer. The appellants, merchants at Madras, wrote to the respondents, merchants at Marseilles, confirming a "sale" to them of 300 tons of groundnuts. The letter was upon a printed form which was filled up as follows (*inter alia*): Price, 59 fcs., less 1 per cent per 100 kilos, c.f.i. Marseilles; Buyer (left blank); Terms, as usual; Commission, as arranged. There had been previous transaction and correspondence between the parties. The respondents sold the nuts to merchants in France for 61 fcs. per 100 kilos, without disclosing the transaction to the appellants. The appellants failed to deliver, and the respondents were held liable to damages to the French purchaser. In a suit by the appellants against the respondents to recover the price of other goods sold, the respondents counter-claimed to recover from them the damages. Held, upon the true construction of the documents in the case, that the appellants had not held that the respondents were not principals but merely agents, and (reversing the decree of the Appellate Court) that the appellants had not at any material time such knowledge of the sale by the respondents as to

entitle that Court to hold that there had been a ratification; and consequently that the respondents were not entitled to recover as principals, nor were they entitled to be indemnified as agents since they had failed to disclose the sale by them at a profit. Observations as to the extension which modern business has given to the terms "agent" and "agency."

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SUCCESSION CERTIFICATE ACT (VII OF 1889), SEC. 4:—See "PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 64" ... 952

TARIFF ACT (INDIAN) (VIII OF 1894), SEC. 10, amended by Act IV of 1916—Sale of imported sugar—Subsequent decrease of tariff value—"Duty of customs." The notification under Act IV of 1916, section 3, sub-section (2) of a decrease in the "tariff value" of an article is not a decrease in the "duty of customs" within the meaning of section 10 of Act VIII of 1894 so as to entitle the buyer under that section to a reduction of an equivalent part from the price which he has contracted to pay. *Prohudas v. Ganidada*, (1925) I.L.R., 52 Calc., 644 (P.C.); 52 I.A., 196, followed. Judgment of the High Court (I.L.R., 47 Mad., 222) reversed.

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TRANSFER OF PROPERTY ACT (IV OF 1882) SS. 83 AND 84—Deposit by mortgagor—Refusal of mortgagee to take the deposit—Withdrawal of deposit by the mortgagor—Uncontroverted plea of continued readiness to pay—Effect of, on subsequent interest—Onus. A deposit under sections 83 and 84 of the Transfer of Property Act is only a special kind of tender. If after a reasonable time after a proper deposit, the mortgagee, who has notice of such deposit, refuses to take the deposit, and the mortgagor thereafter withdraws the deposit, there is still a presumption that the mortgagor continued ready and willing to pay, which casts the onus on the mortgagee to prove the contrary. Held, in a suit by the mortgagee for the mortgage money after such withdrawal, that an uncontroverted plea by the mortgagor that he continued ready and willing to pay, disentitled the mortgagee to claim any interest subsequent to the deposit.

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TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 88 to 88—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5, and sec. 11—Suit for sale by mortgagee—Preliminary decree—Final decree—Non-execution by mortgagee—Suit by mortgagor for redemption—Bar—Res judicata. Where, after a preliminary decree for sale on a mortgage had been passed, the mortgagor failed within the time fixed in the decree to pay up the amount due under the decree and a final decree for sale was obtained, but the mortgagee did not execute the final decree and continued in possession the mortgagor cannot institute a suit for redemption against the mortgagee. The rule of *res judicata* laid down by the Full Bench in *Vedapuratti v. Vallabha Valiya Raja* (1902) I.L.R., 25 Mad., 300 (F.B.), is applicable to a suit for redemption such a suit, as much under Order XXXIV of the Civil Procedure Code, 1908, as under the repealed provisions of the Transfer of Property Act, even though the mortgagor was only a defendant in a prior suit for sale on the mortgage instituted by the mortgagee. Case law, reviewed.

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TRUSTEESHIP—Hereditary trusteeship, whether partible or impartible:—See under "HINDU LAW" 116

WATER, FLOW OF—Adjacent lands of lower and higher levels—Natural right of owner of latter to let off his water to land of lower level—No distinction between rural and urban areas. An owner of land in a lower level to which surface water from adjacent land on a higher level naturally flows is not entitled to deal with his lands so as to obstruct the flow of water from the higher land. This rule is applicable to all lands, whether situate in the country or in towns; *Gibbons v. Lenfestey*, (1915) 113 Law Times (N.S.), 55 (P.C.), followed; *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*, (1906) I.L.R., 29 Mad., 539, and *Sangana Reddiar v. Perumal Reddiar*, (1910) M.W.N., 545, overruled.

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PRIVY COUNCIL.*

HOPE PRUDHOMME & Co. (PLAINTIFFS), APPELLANTS

1925,
MARCH 24.

v.

HAMEL AND HORLEY, LIMITED (DEFENDANTS),
RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
MADRAS.]

Sale of goods—Seller's agent or buyer—Construction—Undisclosed profit—Alleged ratification of buyer.

The appellants, merchants at Madras, wrote to the respondents, merchants at Marseilles, confirming a "sale" to them of 300 tons of groundnuts. The letter was upon a printed form which was filled up as follows (*inter alia*): *Price*, 59 fcs., less 1 per cent. per 100 kilos., c.f.i. Marseilles; *Buyer* (left blank); *Terms*, as usual; *Commission*, as arranged. There had been previous transactions and correspondence between the parties. The respondents sold the nuts to merchants in France for 61 fcs. per 100 kilos, without disclosing the transaction to the appellants. The appellants failed to deliver, and the respondents were held liable to damages to the French purchaser. In a suit by the appellants against the respondents to recover the price of other goods sold, the respondents counter-claimed to recover from them the damages.

Held, upon the true construction of the documents in the case, that the appellate Court rightly held that the respondents were not principals but merely agents, and (reversing the decree

* Present: Lord WRENCH, Lord PHILLIMORE and Lord CARSON.

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of the Appellate Court) that the appellants had not at any material time such knowledge of the sale by the respondents as to entitle that Court to hold that there had been a ratification; and consequently that the respondents were not entitled to recover as principals, nor were they entitled to be indemnified as agents since they had failed to disclose the sale by them at a profit.

Observations as to the extension which modern business has given to the terms "agent" and "agency."

APPEAL (No. 76 of 1924) from a decree of the High Court in its Appellate Jurisdiction (March 12, 1923) reversing a decree of the Court in its Original Civil Jurisdiction (May 29, 1918).

The suit was instituted by the appellants to recover from the respondents the price of a cargo of castor seeds and the respondents counter-claimed to recover the amount of damages which they had been held liable to pay in respect of a transaction as to 300 tons of groundnuts. The substantial question in the appeal was whether the appellants were liable upon the counter-claim as had been held by the appellate Court (SCHWABE, C.J., and COUTTS TROTTER, J.), reversing the decree of the trial Judge, KUMARASWAMI SASTRI, J.

The facts of the case are fully stated in the judgment of the Judicial Committee.

E. B. Raikes for the appellants.

Neilson, K.C., and *O'Hagon* for the respondents.

The JUDGMENT of their Lordships was delivered by Lord PHILLIMORE.—The appellants, who are the plaintiffs, constitute a French firm of merchants carrying on business at Madras as exporters of groundnuts, castor seeds and other country produce.

The respondents, the defendant Company, are merchants in London who, from August, 1913, down to the date of the present suit, were intermediaries for the placing of the appellants' merchandise at European Continental ports, especially Marseilles.

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The suit was brought for the price of a cargo of castor seeds sold by the appellants to the respondents. The respondents set up certain defences to some of the items in the appellants' claim, but there was no answer to the bulk of it, and their real ground for refusing to pay was that they had a counter-claim against the appellants for a larger amount in respect of the non-delivery of a cargo of groundnuts, which should have been despatched in December, 1916, or January, 1917, to Marseilles.

It was this counter-claim that formed and forms the real matter in dispute. The trial Judge decided against the counter-claim, but the High Court at Madras in its appellate jurisdiction reversed this decision and gave judgment for the counter-claim—hence the present appeal.

The particular transaction over which the dispute arose began by a telegram of the 12th October, 1916, despatched by the respondents to the following effect:—

"Immediate reply bid ordinary three hundred
December January 59. Hamel."

The expansion of this telegram is to be found in a paragraph of a letter of the same date, which reads as follows:—

"We are much obliged for your offer of 100 tons of ordinary at F. 59.50, for December/January shipment, c.i.f. Marseilles, which offer we put before our friends, but regret to say that we have not been able to place at your price. On the other hand, we have succeeded in getting a counter-offer (but for 300 tons, instead of 100) at F. 59, which we are cabling you to-night and hope you will be able to accept. If you can do so and can offer us further quantities at the same price, we think we could place them or machine-decorticated kernels at Fs. 2 more."

The telegram in response was not produced at the trial, but there is no doubt that it was an acceptance

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dated the 14th, and on the same day the appellants wrote to the respondents as follows :—

"In accordance with the cables exchanged between us, we beg to confirm the following sale :—

Quantity.—300 tons (three hundred tons only).

Quality.—Groundnut kernels ordinary, usual quality.

Brand.—H.P.

Price.—at Frs. 59 per 100 kilos. (francs fifty-nine only).

C.F.I. per steamer from Kernels Ports to Marseilles.

Shipment.—December and/or January, 1916, and 17.

Buyer.—

Payment.—As usual.

Terms.—As usual.

Commission.—As arranged."

This letter was upon a printed form with such words as "quantity, quality, etc.," printed with spaces to be filled up in writing. What is especially to be noticed is that as against the word "buyer," there is a blank and against the word "Commission," the words "as arranged." The respondents on the 18th despatched the following note :—

"Contract (Purchase) Note No. 028.

Article.—Coromandel kernels new crop.

Quantity.—300 (three hundred) tons, packed in bags.

Quality.—As stipulated in Ref. 031.

Price.—Fcs. 59 (francs fifty-nine), less 1 per cent per 100 kilos., cost, freight and insurance, including war risk, Marseilles.

Shipment.—From Coromandel Coast during December, 1916, and/or January, 1917.

Payment.—As arranged.

Terms.—Marseilles C. Contract, 1909.

Your telegram of 14th October 1916.

Our telegram of 12th October 1916."

In compliance with this arrangement, the appellants took up space on the S.S. "Seapool"; and if they could have kept this they would have been able to ship to Marseilles in accordance with the contract. But, it being in the middle of the war, the Government

requisitioned the "Seapool," and the appellants did not succeed in procuring any other ship and failed to send the cargo forward.

The goods were the subject of a sale made on the 16th October by the respondents through a firm of Sydney Harvey & Co. of London at 61 francs per 100 kilos to the ultimate buyer, one Gravier of Marseilles. Gravier took proceedings before the tribunal of commerce at Marseilles to recover damages from Sydney Harvey & Co. for non-delivery.

The appellants were informed of these proceedings by the respondents, but in general terms only, and supposed that they were proceedings either against themselves or against the respondents as their agents, and believing that they had a good defence under French law, namely, that they had been prevented from fulfilling this contract by *force majeure*, gave instructions for this defence to be raised; and, when it failed before the tribunal of first instance, they furnished papers and documents for the appeal which the respondents had already started to the Cour d'Appel at Aix. The defence of *force majeure* failed also in that Court, and the appellants were required by the respondents to pay the amount which Gravier had recovered from Sydney Harvey & Co., and for which the respondents were liable.

This is the outline of the action which was taken with regard to the proceedings in France, but it will be necessary for their Lordships to go into rather more detail later on in this judgment.

Till a late date the appellants were under the impression that the respondents had acted as their agents in the transaction and would make no profit out of it except a commission of 1 per cent, which would be deducted from the price of 59 francs per 100 kilos.

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But in fact the respondents had acted as principals, reselling the stuff at a price of 61 francs per 100 kilos to Gravier through Sydney Harvey & Co. who were in form the sellers to him, but were to have 1 per cent commission; the result being that the respondents passed on their 1 per cent commission which the appellants were going to allow them to Sydney Harvey & Co., and took for themselves a profit of 2 francs per 100 kilos by their bargain with Gravier.

When the appellants found this out, they repudiated all liability; and, if the respondents were really agents, this repudiation was no doubt right, for, if they were agents, they were making an undisclosed profit and had no authority to sell as principals and therefore could not claim indemnity as agents from the appellants their principals; neither could they claim as a link in a chain of buyers and sellers for the damages recovered by the ultimate buyer, because there was no contract of sale between the appellants and themselves.

Hence the main contest in the case has been upon the question whether the respondents were entitled to treat themselves as buyers and sell for whatever profit they could get, or whether they were agents.

Both Courts in India have held that they were agents; but the appellate Court has considered that the appellants nevertheless fail, because they ratified and accepted the transaction. A consideration of this point will come later in their Lordships' judgment.

Notwithstanding the view taken by both the Courts in India, the respondents have insisted, as they had a right to do, in an elaborate and useful argument, that in the legal sense of the word they were not agents but principals.

There is great force in the observations which were made to their Lordships upon the extension which

modern business has given to the terms "agent" and "agency." In many trades—particularly, for instance, in the motor-car trade—the so-called agent is merely a favoured and favouring buyer, one who under an over-riding contract undertakes to do his best to find a market for the manufacturer's stock, who is given some special advantages, such as a special discount or preference in complying with his orders; but who in each particular contract acts as a buyer from the manufacturer and sells at whatever price he can get, unless—as is sometimes the case—he is by a special provision in the over-riding contract forbidden to sell too cheaply or required not to spoil the market by asking too much.

It would be quite possible that, in the present case, the position of the respondents, though frequently described by both parties as that of agents, was, notwithstanding, merely that of agents according to the modern business extension of the phrase, so that they would be entitled to treat themselves as buyers from the appellants and to sell at the best price they could get, in which case any damages which they would have to pay to the buyers from themselves on account of the non-delivery of the cargo would be damages which they in their turn could recover as damages from the appellants.

By virtue of a clause in one of the earlier documents, which will be mentioned shortly and which is in conformity with the usual practice in produce markets where there is a chain of sellers and buyers, the damages as ascertained between the last buyer and seller would probably without further litigation form the measure of the damages to be recovered all along the chain.

Accepting these submissions from the respondents, their Lordships must now proceed to analyse the documents which constitute this contract, and for this

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purpose they are prepared to accept the respondents' submission that attention must not be limited to the four or five documents which constitute the contract No. 626, but that the initial letters by which the business between the appellants and respondents was originally started must also be considered.

In the first letter, August 29th, 1913, the respondents, after mentioning the source of their introduction, write as follows:—

"We understand you are largely interested in the export of groundnuts, both undecorticated, and decorticated, and, further, that you are not represented in our market.

"We are desirous of taking up the business as selling agents, and would be pleased to hear whether you feel inclined to negotiate sales through us.

"We are selling fair quantities of Chinese and Bombay groundnut kernels, and we are, therefore, in touch with the best buyers.

"We would be interested in other articles exported from Madras, as seeds, ricemeal, tanned skins (sheep and goat) and cow hides.

"*Terms.*—We would open the usual D/P credit, through a first-class Bank, you drawing on us at 90 d/s 95 per cent against c.i.f. sales, and 80 per cent against value of consignments, less freight, and, in the latter case, our selling commission of 1½ per cent.

"We are agreeable to providing our own remuneration on c.i.f. transactions, or, if preferred, we would do the selling for a commission of 1½ per cent, each side paying their own cable and incidental expenses. Balances *pro* or *con* to be settled by 3 d/s drafts.

The appellants replied on September 18th as follows:—

"We thank you for your offer to be our agents for groundnuts, both decorticated and undecorticated, oil cakes, castor seeds and other Indian produce and seed, and accept your proposals on the terms given below against each respective article. * * * We shall now go to details of the principal terms and conditions for different articles we can offer you.

"*Groundnuts.*—This is always done on the fair average quality, and we accept your drawing terms of bill at 90 d/s for 95 per cent against c.i.f. or c.f. sales with usual D/P credits, as it is customary to pay freight on delivered weight we shall deduct the same in our invoice also.

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Then oil cakes and castor seeds are mentioned, and the letter proceeds:—

"For all these articles we would prefer to deal with you as principal to principal on c.i.f. or c.f. basis, as the case may be, and you fix your own remunerations, each party paying their own cable and incidental expenses. Balance of account to be adjusted *pro* and *con* by 3 d/s draft. As we accept to do business with you, and to meet your wishes, we cable you as per copy enclosed, and trust we shall soon hear from you with a view to business."

There appears to be a letter of the 5th September which has not been produced, and then the respondents wrote again on the 9th September, the material parts of this letter being as follows:—

"We were pleased to receive your yesterday's cable notifying that you had written us full particulars respecting the business proposed in our letter of the 5th instant.

"We now await same with interest, and trust it will not be long before some mutually satisfactory business results between us. * * *

Conditions of sale:—

"For groundnuts in shell and groundnut kernels would be the usual Marseilles terms, which are doubtless familiar to you.

Other articles would usually be sold.

"If desired, we will send you *pro forma* contracts.

"It is, of course, understood that, in the event of allowances for inferiority of quality, damages, late shipment or non-fulfilment of contract, same would be refunded by you on receipt of official award, should an amicable settlement be impossible. Kindly confirm.

"Prices mentioned are nett.

"*Consignments.*—We shall be interested to hear whether you can secure any parcels of tanned skins (goat and sheep) and tanned hides (buffalo and cow), wool, aloe fibre, etc., etc., to send to our care for sale.

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"The outlets are quite familiar to us. . . ."

Then comes a letter from the respondents to the appellants of the 10th October:—

"We thank you for your favour of the 18th ultimo, contents of which we have perused with interest.

"*Terms.*—Those enumerated appear to be in order."

Then terms as to castor seeds are mentioned—

"*Prices.*—Your proposal that these should be c.i.f. ore, and f. nett is acceptable to us. * * * We would like to draw your attention to the fact that very often buyers will not bid full prices for cabling, they reserving a margin to protect themselves in the event of values weakening pending receipt of reply. We hope, therefore, that, should orders prove to be at impracticable prices, you will not ignore same, but respond, wherever possible, with best counter-offer.

"We would also ask you to support us with as many offers as possible. When you find it impossible to offer, we would advise quotations. These will enable us to keep buyers posted and help us to secure orders for cabling. . . ."

There is also a letter from the appellants to the respondents of the 16th October containing the words—

"We of course agree that allowances, if any, imposed for inferiority of quality, damages, late shipment, or other causes, will be refunded by us on receipt of award, should an amicable settlement be impossible."

It is not necessary to mention any other documents at this stage.

Business began to be done, but it appears from a letter from the respondents of the 12th December that as a rule the prices asked were too high; and when the documents in respect of another contract, No. 424, came to the knowledge of the respondents, they discovered the reason why the prices had ruled so high, and in their letter of 12th December they expressed themselves as follows:—

"*Contract No. 424.*—For the 200 groundnut kernels, c. and f. Marseilles, at 15, February/March shipment, we notice you provide 1 per cent commission for us. We had been under the

impression, until receipt of the contract note referred to above, that prices were nett, as proposed in your letter of 18th September and confirmed in ours of 10th October last.

"We have doubtless lost a good deal of business, as the difference in your and our price has, on several occasions, represented the 1 per cent commission. In order to avoid any misunderstanding in future, we have asked you to reserve us 1 per cent commission on all transactions, and no doubt our request will have your attention.

"Subject to your approval, we propose the 1 per cent commission on contract No. 424 shall be divided between us, in view of the fact that we both had to cut our margin of profit in order to put the business through."

On the 12th December, the day that this letter was written, there is a telegram which is significant as to the general business relations of the parties:—
"25 tons Please offer Groundnuts in shell, Marseilles
100 tons January/February Read price midway 12/3 $\frac{3}{4}$ d. c. and f. Groundnuts in shell, Marseilles
100 tons February/March Read price midway 12/3 $\frac{3}{4}$ d. c. and f. Groundnuts in shell, Marseilles 100 tons
March/April Read price midway 12/3 $\frac{3}{4}$ d. c. and f.
The whole order to be executed or not at all. Please look after our commission 1 per cent In future."

During all this time, letters, owing to the war, were much delayed in transit. That of December 12th was answered on the 31st December 1913:—"Contract No. 424.—We note your remarks and are sorry to learn of the misunderstanding, which doubtless stood in the way of business. We note you are agreeable to forego half of the commission on the first transaction, and in future it is agreed that all our offers will include a commission for your goodselves of 1 per cent."

Now, turning to the first letter, that of August 29th, 1913, it may be observed that c.i.f. sales are to be cases where the respondents had already found a purchaser,

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and consignment sales where they are to take their chance of finding one.

The paragraph beginning "We are agreeable" may be open to two constructions; but their Lordships are of opinion that it refers to c.i.f. transactions only and offers two alternatives in the case of c.i.f. transactions, viz.:—We will provide our own remuneration—which means we will buy from you and get what profit we can from our buyers; or, we will treat ourselves as agents and sell for you on a commission of $1\frac{1}{2}$ per cent. It does not refer to consignment sales. The answer of the 18th September is to the effect that the appellants would prefer to deal as principal to principal, and let the respondents fix their own remuneration.

So far the documents, it is contended, appear to point to a relation of seller and buyer. But, notwithstanding, for some reason which is not explained, it is clear that the appellants were providing for a 1 per cent commission, which would be an agency commission for the respondents, and that, when the discovery was made, the respondents accepted the arrangement, so that the appellants would naturally believe that the respondents were selling at the price quoted by the appellants, taking their 1 per cent out of the purchase money and remitting the rest.

Why the appellants had allowed them 1 per cent only, instead of $1\frac{1}{2}$ per cent, and why the respondents were agreeable to accept this in future, is not explained. It may be that, as sales were hanging fire, the respondents were content with the smaller commission, just as they proposed to divide the 1 per cent commission on contract No. 424.

As a result, however, in their Lordships' opinion, the documents antecedent to the particular contract in

question support the general relation as being one of agency in the legal sense of the term and not one of sale and purchase.

It was suggested on behalf of the respondents that the one per cent was to be considered as in the nature of a discount or special favour to the respondents as agents in the modern commercial sense only, leaving them still to make a profit as sellers. But, admitting that this would be a possible theory, their Lordships can find no trace of anything in the correspondence which would give it a foundation in fact.

Their Lordships now come to the consideration of the particular contract. The letter of the 14th October, 1916, from the appellants, gives the price as francs 59, and under the head of the term "commission" the words "as arranged." The document of the 18th October, 1916, called "contract (purchase) note" gives the price as francs 59, less 1 per cent per 100 kilos. That 1 per cent is unquestionably the respondents' commission. The printed word "buyer" in the appellants' letter of the 14th October, 1916, is followed by a blank. It is common ground that the appellants did not at that time know to whom the respondents had sold, though, in fact, the respondents' contract with Sydney Harvey and Co. had been made on the 16th. These facts all point to "agency."

Counsel for the respondents drew their Lordships' attention to the contract for the sale of castor seeds, in which a similar form was filled up with the name of the respondents as buyers and a blank after the word commission; and he suggested that this was the real nature of the business, and that, if other contract notes had been printed in the record, they would be found to take the same shape; but if words mean anything, the distinction between the contract note in the case now

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under discussion and the castor seeds case and possibly others, shows that some business was done on one set of terms and other upon others. It is to be noticed that, in the castor seeds case, the price was not c.i.f., but f.o.b.

In the correspondence in this case as it was up to the last moment, the respondents spoke of themselves as agents. Even after the appellants had seen a copy of the award of the tribunal of commerce and noticed that Gravier had bought at an increased price, the respondents still wrote that they had acted as agents for the appellants. They did so as late as the 2nd December, 1918, and it was not till the appellants on the 7th December took the point that, as agents, the respondents were not entitled to make secret profits, that they set up the case that they had always dealt as principals and not agents.

Their Lordships agree with both the Courts below that the respondents were in the strict sense agents, and that, unless they can show that the appellants, with knowledge of what they had done, adopted and ratified it, they have no case.

The appellate Court thought they had so ratified it. Their Lordships find this very difficult to understand. What motive could the appellants possibly have for adopting a contract which, at the time they are supposed to have so done, meant a certain loss.

First of all it is necessary to ascertain when the appellants got to know the facts. The Chief Justice relies on a letter of the respondents of the 22nd March, 1917, which, it is said, if carefully looked into, would show that there was a chain of buyers and sellers, and that there were buyers in London who in their turn were sellers at Marseilles, from which the appellants should have learnt that they were not and could not be directly

parties to the proceedings before the tribunal of commerce.

It may be that they should have understood this and should have remembered it when they wrote the later letters. But this knowledge would not inform them that the respondents had acted as principals and were making a profit. This information only came out bit by bit; the sequence is as follows:—

On the 13th February, 1918, the respondents wrote to the appellants and sent them a copy of the award of the tribunal of commerce, which was dated the 22nd January. When this was received by the appellants does not precisely appear, but the first comment upon it is in a letter of the 16th April, in which they write as follows:—

“ S.S. ‘ Seapool.’ ”

“ We thank you for your remarks and for the copy of the arbitration award in this connection.

“ On perusing the award, we are in the first place struck with the fact that we are no party to the proceedings, which are held in connection with Mr. Jules Gravier and Sydney Harvey & Co., who, we presume, were buyers from you of the 300 tons relating to our contract No. 626. We may say that this is the first and only information we have received to the effect that the arbitration proceedings were not between Mr. Jules Gravier and your goodselves, for we were all along under the impression that Mr. Gravier had brought his claim against you; in fact, it was with this idea that we addressed him with a request that matters be settled out of Court. As the parcel was sold by you to Messrs. Sydney Harvey & Co., and as they resold the lot at a profit of Frs. 2, theirs is merely a contingent liability with which we have really no concern . . .

“ We therefore take it that, had the arbitration proceedings been held as between Mr. Gravier and ourselves or you as our agents, the arbitrators would have been in duty bound to give due consideration to the facts which precluded the shipment of the lot sold, and that under such circumstances we would have been fully exonerated from all blame and responsibility in the matter.

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"We are, however, quite ready and willing to give Messrs. Sydney Harvey & Co., every assistance we can to enable them to fight their case successfully, and with this end in view we beg to enclose certified documents connected with the case, as per details below, but, as we have already stated, Messrs. Sydney Harvey & Co.'s dispute with Mr. Jules Gravier is a contingent liability and we are no party to the same."

The respondents wrote back on the 29th May:—

"S.S. 'Seapool.'"

"We are much obliged for your favour of the 16th April and for the enclosures regarding the appeal on the above, which we have put forward to Messrs. Sydney Harvey & Co., asking them to post them down to the lawyer in Marseilles."

"Regarding what you write about the proceedings taken between Mr. Jules Gravier and Messrs. Sydney Harvey & Co., we were under the impression that, right away at the commencement, we told you that we had sold to Mr. Gravier through our brokers, Messrs. Sydney Harvey & Co., and are sorry if we omitted this."

"In any case, the trouble would have reverted back to you through ourselves as your agents, because, had Mr. Gravier taken proceedings against Messrs. Sydney Harvey & Co., they in their turn would have claimed their loss back from you, and it is usual in cases of this sort for there to be one case for the whole transaction."

"Regarding what you write about the profit of 2 francs, this is not a profit made by Messrs. Sydney Harvey & Co., who merely acted as brokers."

"We added the 2 francs to your figure in order to cover our expenses for Finance, Commission, etc., and to leave a small profit for ourselves as the 1 per cent which you allow us we had to pay Messrs. Sydney Harvey & Co. as their brokerage."

"We hope that, with the documents in hand, the lawyer in Marseilles will be successful in the appeal, and we will advise you in due course of the result."

The critical letter in answer is that from the appellants of the 18th July:—

"S.S. 'Seapool.'"

"We note carefully your remarks on the position. Regarding the difference of Frs. 2, this had nothing to do

with us, for we are dealing with you as agents, and we do not think it fair to ourselves that you yourselves should have appointed another medium to handle this business. However, we await results of the appeal, when we shall revert to this subject."

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The CHIEF JUSTICE thinks that this is a letter "urging" the respondents "to go on with the appeal" and accepting the position. Their Lordships do not find anything in it about urging an appeal. They consider that it is a reasonable letter, meaning this:

"You have done something that you ought not to have done; it may be, however, that on this particular occasion it will do us no harm, for we trust that the French Court of Appeal will accept the defence of *force majeure*; so we will wait till that appeal is heard, and then we will take up the whole matter with you."

This they subsequently did by desiring to know whether the respondents had not on other occasions taken a secret profit to which they were not entitled.

It is said that they urged an appeal. That was in their letter of the 31st May, written before disclosure, when they approved of the measures which, as they were informed, had been taken to institute an appeal. As the respondents kept writing to them that they were liable, what is more natural than that the appellants should get every ground of defence against Gravier's claim put forward?

COUTTS TROTTER, J., thinks that their letter of December 7th showed that they elected to abide by the contract; but their Lordships take an opposite view. The appellants were protesting against the decision of the French Court of Appeal, refusing to agree to the respondents' offer to accept a rather smaller sum in settlement, taking the point that the respondents must have mismanaged the case to bring about such a result, and further plainly saying that the respondents as their

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agents were not entitled to make secret profits; and there the matter ends.

Their Lordships can find nothing to lead them to suppose that the appellants did such an absurd and purposeless thing as to ratify this action of their agents when they already knew of its disastrous results.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and the judgment of the Court of first instance be restored with costs here and below.

Solicitors for appellant: *Sanderson, Lee, & Co.*

Solicitors for respondents: *Donald, McMillan, and Mott.*

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Charles Gordon Spencer, Offg. Chief Justice,
Mr. Justice Kumaraswami Sastri and
Mr. Justice Krishnan.*

1924,
October 13.

ADUSUMILLI GOPALA KRISTNAYYA AND ANOTHER
(APPELLANTS IN S.A. No. 883 OF 1923), PETITIONERS,

v.

ADIVI LAKSHMANA RAO, RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec 153—Appeal presented against a deceased respondent—Power of Court to amend cause-title or return appeal memorandum for amendment—Power of Court to order refund of spoilt stamp—Discretion of Court to excuse delay in presentation of appeal against legal representative.

If an appeal is presented against a person, who is dead at the date of presentation, the Court may, under section 153, Civil

* Civil Miscellaneous Petition No. 2880 of 1923.

Procedure Code, permit the cause-title to be amended, or may return the appeal memorandum for amendment and re-presentation. If the appeal memorandum is not allowed to be amended, the party may apply for a refund of the spoilt stamp and may present a fresh appeal. In any case the Court will, if the appeal is out of time against the legal representative, have to excuse the delay in presentation before it can proceed to hear the appeal, but it is a matter for its discretion whether it would excuse the delay.

Govindu Kaviraj Purohita v. Gauranga Saw, (1923) 45 M.L.J., 231, overruled; Sankaran v. Savarimuttu Pillai, C.M.P. No. 2807 of 1923, approved.

PETITION to amend the cause-title in Second Appeal No. 883 of 1923 by substituting the name of the legal representative in the place of the respondent, deceased at the time of the presentation of the Second Appeal.

The petitioners are the appellants in Second Appeal No. 883 of 1923. The sole respondent in the Second Appeal was dead when it was presented. The appellants were apparently unaware of his death when they presented the Second Appeal, but on becoming aware of it subsequently, they applied by a petition to substitute the name of his son as legal representative in the appeal memorandum, subject to the delay in presentation of the Second Appeal against the legal representative, being excused by the Court, if good cause was shown. The petition came on for disposal before Mr. Justice BEASLEY in the Admission Court, who referred the matter to a Full Bench.

K. N. Rajagopala Sastri for B. Satyanarayana for petitioners.—The Court has power under section 153, Civil Procedure Code, to amend the cause-title by substituting the name of the legal representative. The appellants do not want thereby to save limitation; the delay will still have to be excused by the Court, if good cause is shown. Section 153, Civil Procedure Code, is not confined to trial Courts, but applies also to appellate

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Courts. The decision in *Govindu Kaviraj Purohita v. Gauranga Saw*(1) is erroneous. Appeal is a continuation of the suit. The term "proceeding" in section 153 is used in the sense of a document other than evidence. See "proceedings" used in rule 4 (12) of Original Side Rules of the High Court. The decision of a Bench (RAMESAM and WALLACE, JJ.) in *Sankaran v. Savarimuthu Pillai*(2), is in favour of the petitioners and should be followed.

P. Bapiraju for respondent:—There is no jurisdiction in the Court to direct an amendment, as there is no appeal before the Court, as it was filed against a dead man. It has been so held in the case of a suit against a dead man: See *Veerappa Chetty v. Tindal Pennen*(3), *Arunachalam Chettiar, In re* (4), *Rasa Goundan v. Pichamuthu Pillai*(5), *Bejoy Chand Mahatap Bahadur v. Amulya Charan Mitra*(6). Any proceeding against a dead man is nugatory and the Court has no jurisdiction in the appeal.

OPINION.

If an appeal is presented against a person who is dead at the date of presentation, the Court may, under section 153, Civil Procedure Code, permit the cause-title to be amended or may return the appeal memorandum for amendment and re-presentation. We think that the Bench which decided *Govindu Kaviraj Purohita v. Gauranga Saw*(1) went too far in dismissing the Second Appeal as incompetent and in declining to exercise its power of correcting errors under section 153, Civil Procedure Code. If the appeal memorandum is not allowed to be amended, the party may apply for a refund of the spoilt stamp and may present a fresh appeal. In

(1) (1923) 45 M.L.J., 231.

(3) (1908) I.L.R., 31 Mad., 83.

(5) (1917) 42 I.C., 539.

(2) C.M.P. No. 2307 of 1923.

(4) (1915) 2 L.W., 828.

(6) (1914) 24 I.C., 112.

any case, the Court will, if the appeal is out of time against the legal representative, have to excuse the delay in presentation before it can proceed to hear the appeal.

Although the appeal may be incompetent owing to the wrong person being named as respondent, the Court which deals with it is acting in a suit and as such has full power under section 153 to direct an amendment of the appeal memorandum.

As observed by RAMESAM and WALLACE, JJ., in *Sankaran v. Savarimuthu Pillai*(1), the question resolves itself into one of Court fees only, and if the party has only made an unintentional error in inserting the name of the wrong respondent in his appeal memorandum, there is no reason to make him pay Court fees twice over, and it is simpler for the Court to direct an amendment of the cause-title.

The case will go back to the Admission Court with an expression of our opinion that the Court has power to amend the cause-title, but that it is a matter for its discretion whether it should excuse the delay in presentation.

Costs of this reference will be costs in the Second Appeal.

K.B.

(1) C.M.P. No. 2807 of 1923.

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APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
and Mr. Justice Beasley.*

1925,
August 17.

THE COMMISSIONER OF INCOME-TAX,
MADRAS (REFERRING OFFICER),

v.

SRI KRISHNA CHANDRA GAJAPATHI NARAYANA
DEO, RAJA OF PARLAKIMEDI (ASSESSEE).*

*Indian Income-tax Act (XI of 1922), sec. 9, sub-sec. (1) (vii),
sec. 34 and sec. 66 (2)—Vacant house under sec. 9,
meaning of—Occupation, whenever owner chooses to do so, and
not actual occupation, necessary—Exemption from tax in
previous year on an erroneous decision by income-tax officer—
Owner's liability to tax for the same income, in the succeeding
year—"Escaped assessment" under sec. 34, meaning of.*

A house is not *vacant* within the meaning of section 9, sub-section (1), clause (vii), of the Indian Income-tax Act (XI of 1922), while it is ready for occupation by the owner, i.e., ready for him to live in when he chooses to do so, and especially when servants of the owner were actually kept on the premises in order to get it ready for occupation whenever he wanted to go there; and the owner is not entitled to exemption from assessment to income-tax in respect of such house under the section.

The Queen v. St. Pancras Assessment Committee, (1877) 2 Q.B.D., 581, followed.

Under section 34 of the Act, a person is liable to be assessed to income-tax in a succeeding year for an income in respect of which he was exempted by the income-tax officer in the previous year, not inadvertently but deliberately on a consideration by the officer of the question of the liability.

The expression "Escaped assessment" in section 34 of the Act applies to cases where the income-tax officer has deliberately

adopted an erroneous construction of the Act, just as much as to a case where the officer has not considered the matter at all, but simply omitted the assessable property from his view and his assessment.

CASES stated under section 66 (2) of the Income-tax Act by D. N. STRATHIE, Commissioner of Income-tax, Madras, referring for the decision of the High Court.

The petitioner, who is the Zamindar of Parlākimedi, was assessed to income-tax in 1923-24 in respect of his income including the rental value of certain houses and bungalows owned by him, in respect of which however the income-tax officer had exempted him from liability to assessment in the previous year 1922-23, on the ground that the houses were vacant within section 9 (1) (vii) of the Income-tax Act (XI of 1922). In the succeeding year, however, the owner was assessed for the same on the ground that the assessee had "escaped assessment" in respect of the houses, etc., under section 34 of the Act. On appeal to the Commissioner of Income-tax, the latter confirmed the order of the income-tax officer. He was asked to make a reference and state a case to the High Court under section 66 (1) of the Act, and he accordingly stated a case on the three following points:—

(1) Whether the interest on arrears of rent charged by a landholder to his tenants is "agricultural income" within the meaning of section 2 (1) (a) of the Income-tax Act?

(2) Whether income which the assessing officer in 1922-23 deliberately refrained from taxing can be taxed in 1923-24 under section 34 of the Income-tax Act? and

(3) Whether under section 9, clause (1), sub-clause (vii) of the Income-tax Act (XI of 1922), the buildings mentioned in the schedule to his letter No. 102 of 1924, dated 16th March 1925, are exempt from income-tax for the period found vacant?

It appeared that the Government Pleader had withdrawn his contention upon the first question. The description of the houses in respect of the uses for which

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* Referred Cases 3 of 1924 and 8 of 1925.

they were intended and put, appears from the case stated by the Commissioner and is set out in the Judgment.

T. R. Ramachandra Ayyar for *L. A. Govindaraghava Ayyar* (with *L. S. Viraraghava Ayyar*) for assessee.—Section 34 of the Indian Income-tax Act does not apply to cases where the income-tax officer considered the question and deliberately gave up the income as not assessable to tax. It cannot be said that the item escaped assessment under section 34. The section contemplates only cases of inadvertent omission. If an officer deliberately allows exemption, there is no escape but the assessee is deliberately let off from assessment by the act of the officer. The houses were “vacant” during the assessable period as there was no actual occupation by the owner, or guests or officers for whom some of the houses were intended for residence. There was a vacancy within section 9, sub-section (1), clause (vii) of the Act XI of 1922. Fiscal enactments should not be construed by implication.

M. Patanjali Sastri for Income-tax Commissioner.—The petitioner is not entitled to exemption under section 9, sub-section (1) (vii) of the Income-tax Act (XI of 1922). The owner must be deemed to be in occupation of the house, if it was ready for occupation: see *Lord Walsingham v. Styles*(1), *Smith v. Dauney*(2).

Section 34 of the Indian Income-tax Act (XI of 1922) corresponds to the English Income-tax Act, 1918, section 125, which is perfectly express on this question and provides for the case where the income-tax surveyor has wrongly exempted an item from assessment. The Indian Act purports to reproduce the same provision. The latter portion of section 34 says,

(1) (1894) 3 Tax Cases, 247.

(2) (1904) 5 Tax Cases, 25.

“if assessee has been under-assessed at a lower amount, he can be re-assessed for the balance.”

This shows that even in cases of deliberate decision by the officer at a lower amount the matter can be gone into and assessment corrected. Similarly also, where a decision has been wrongly given exempting the assessee from liability altogether in the previous year, the same item can be brought into assessment in the next year.

JUDGMENT.

COUTTS TROTTER, C.J.—The short point here is whether certain bungalows which belong to the Raja of Parlākimedi are, or are not, assessable under section 9 of the Indian Income-tax Act, XI of 1922. The sub-section material to this question is sub-section 1 (7):

“in respect of vacancies such sum as the income-tax officer may determine, having regard to the circumstances of the case, is to be the tax payable by the assessee.”

The question we have to determine is, what the section means by “vacancies.” The executive authorities have issued for the guidance of their officers a manual, and this case has been put forward in the form of asking us to say whether section 32 of the manual is in consonance with the words of the Act. Ordinarily we should not view the matter from that point of view because the manual which is called notes of instructions is obviously merely a document for the guidance of officials. All we have to determine is two short questions—first, whether these bungalows in the circumstances of the case can be described within the meaning of the section as being vacant, the second question, which I shall deal with separately in a moment, is whether the assessment in this case can be made retrospective for one year under the provisions of section 34. To take the first question, the manual says outright that the sub-section

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only applies to property which is usually let to a tenant. Without deciding whether that is correct or not and whether a man who had a house that he never let, but who dismantled it and locked it up for the year would or would not be assessable, it is clear that these houses are in fact never let. The description in the case stated by Mr. Strathie is quite clear.

"Bungalow No. 1 is kept by the Raja as a guest house for Government officers and others visiting Parlākimedi. Bungalow No. 2 is only used when the Raja or his officers visit Berhampur. Bungalow No. 3 is occupied only about two months in the year when the Raja visits Madras during the season. Bungalow No. 4 is occupied during the hot weather,"

obviously by the Raja. It is clear from the way in which the case is framed that the contention put forward was that although, these bungalows were ready for occupation and therefore must necessarily have been occupied with the furniture necessary for the occupation of the Raja, they are not assessable if in fact it so happened in any one year that they were not lived in by the Raja or the other persons in question, guests or officers of the Raja's staff. In my opinion there is nothing in the section to warrant that construction and if a man owns a house ready for his own occupation, ready for him to live in when he chooses to do so and there is a statement here that not only was that the case but that servants of the Raja were actually kept on the premises in order to get it ready for occupation whenever he wanted to go there—he is assessable. In these circumstances I think that the case falls within the exact words of LUSH, J., in *The Queen v. St. Pancras Assessment Committee*(1). The words are to be found at page 588 where the learned Judge says this:—

"If, however, he (that is, the owner) furnishes it (that is, the vacant house) and keeps it ready for habitation whenever

(1) (1877) 2 Q.B.D., 581.

he pleases to go to it, he is an occupier though he may not reside in it one day in a year."

That seems to me to be conclusive and I respectfully agree with that view and think that that is the proper construction of the statute. In my opinion, therefore, the assessee is liable for assessment in respect of all the bungalows referred to in the case.

The next point is whether the assessment can be retrospective. It appears that in the previous year the income-tax officer had to consider the question and came to the conclusion that the Raja was not assessable in respect of these bungalows. The section of the English Act of 1918, section 125, is quite clear, because it provides expressly for the case where an allowance or exemption or abatement unauthorized by the Act has been deliberately made by the predecessor of the surveyor with whom the section is concerned. The Indian Act (section 34) is not quite so explicit. What it says is this:—

"If for any reason income chargeable with income-tax has escaped assessment in any year or has been assessed at too low a rate, the income-tax officer may, within a year, serve a notice."

It is said that "escaped assessment" must mean not that the question has been considered and decided in favour of the assessee, but that the income-tax officer has omitted to consider the question at all or was unaware of the existence of the property now sought to be taxed and therefore passed it over and that it does not apply to cases where the income-tax officer on consideration came to the conclusion, *ex hypothesi* an erroneous conclusion, that the property in question was not assessable. It seems to me that that construction is forbidden by the alternative case put in the section:

"Where the income . . . has been assessed at too low a rate,"

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that cannot be a matter of mere inadvertence, that must refer to a deliberate assessment made by the income-tax officer in the preceding year with knowledge of the facts and circumstances. It appears to me that a similar view must be taken of the previous words "escaped assessment" and that it applies to cases where the income-tax officer has deliberately adopted an erroneous construction of the Act just as much as to a case where the officer has not considered the matter at all, but simply omitted the assessable property from his view and from his assessment. In my opinion the questions referred to us must both be answered adversely to the assessee and it must be held that the property referred to us is not property describable as vacant during the year of assessment and that there is nothing in the statute to prevent the assessing officer from recovering income-tax for the previous year as allowed by section 34.

BEASLEY, J.

BEASLEY, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

RUKKU SHETTI AND OTHERS (PLAINTIFFS), APPELLANTS,

1925,
March 24.

v.

T. RAMACHANDRAYA AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Limitation Act (IX of 1908), art. 134—Mortgagee—Sale by mortgagee to another for value—Vendee put in possession on sale—Suit by mortgagor for redemption, more than 12 years after sale—Suit, whether barred under article 134—"good faith" in purchaser, whether necessary for application of article 134—Limitation Acts of 1859, 1871, 1877 and 1908 compared.

Where a mortgagee in possession transfers the property under a sale-deed for consideration to another and puts him in possession, and what was bargained for by the transferee was an absolute sale, though he knew that the transferor had only a mortgagee's interest, on a suit instituted by the mortgagor for redemption more than 12 years from the date of sale,

Held, that article 134 of the Limitation Act (IX of 1908), applied to the case, even though the vendee was not a transferee in good faith but knew that the vendor had only a mortgagee's interest; and that the suit was barred by limitation.

The decision of the Privy Council in *Subbaiya Pandaram v. Mahammad Mustapha Marcaray*, (1923) I.L.R., 46 Mad., 751 (P.C.), applying article 134 to transferees from trustees, is also applicable to transferees from mortgagees mentioned in the same article.

Kannuswami Thanjirayan v. Muthusami Pillai, (1917) M.W.N., 5, and *Muthaya Shetti v. Kanthappa Shetti*, (1918) 34 M.L.J., 431, followed.

APPEAL against the decree of K. GOPALAN NAYAR, the Subordinate Judge of South Kanara, in Original Suit No. 21 of 1919.

* Appeal Suit No. 182 of 1921.

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The material facts appear from the judgment of
RAMESAM, J.

C. V. Anantakrishna Ayyar for appellants.
B. Sitarama Rao for respondents.

JUDGMENT.

SPENCER, J.—I agree with RAMESAM, J. I am unable to regard the omission of the words “in good faith,” which appeared in the corresponding articles of the Limitation Acts of 1859 and 1871, as being without any significance, so as to throw the onus on a purchaser of the full interest from a mortgagee to prove that he acted in good faith before he can plead limitation. The same article 134 governs both properties conveyed in trust and properties mortgaged, when they have been transferred afterwards for valuable consideration. In the case of trust property the Privy Council has decided in *Subbaiya Pandaram v. Mahammad Mustapha Marcayar*(1) that a purchaser for valuable consideration with notice of the trust can under article 134 plead 12 years’ adverse possession as a defence to a suit brought by the trustee. I see no reason to suppose that trusts were intended to be put in a worse position than mortgages as regards recovery of alienated property. The only distinction between the positions of a purchaser from a mortgagee and a purchaser from a trustee, is that a mortgagee as such has the mortgage interest, which is assignable, in the property, whereas a trustee as such has no transferable interest. This distinction is pointed out in *Subbaiya Pandaram v. Mahammad Mustapha Marcayar*(2), but nevertheless it was held in that case that a transferee of trust property need not prove good faith before taking advantage of article 134, and the

(1) (1923) I.L.R., 46 Mad., 751 (P.C.).

(2) (1917) 32 M.L.J., 85.

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decision was confirmed by the Privy Council in *Subbaiya Pandaram v. Mahammad Mustapha Marcayar*(1). My judgment in *Kannuswami Thanjirayan v. Muthusami Pillai*(2) was quoted with approval in *Muthaya Shetti v. Kanthappa Shetti*(3) and we have not been shown any reason for doubting its correctness beyond a foot-note at page 516 of Rustomji’s Commentary on the Law of Limitation (Third Edition). The view of the majority of the Full Bench, which decided *Seeti Kutti v. Kunhi Pathumma*(4), that article 134 does not apply to cases where the transferee from a mortgagee does not get possession of the property will not help the appellants before us who are out of possession and ask for delivery of possession. In every case where article 134 is set up as a defence by a transferee from a mortgagee it is material to see what interest the mortgagee purported to transfer to him [vide *Rego v. Abbu Beari*(5), *Muthaya Shetti v. Kanthappa Shetti*(3), *Veerabhadra Tevan v. Veerappa Tevan*(6) and *Babuswamy Iyer v. Venkataswamy Naicken*(7)]. Exhibit II, dated July 16th, 1878, purports to be an absolute sale of the properties in A schedule and not a mere assignment of a mortgage interest in them. I think that both seller and purchaser must have honestly believed that the entire interest of the owner was being transferred by this document, seeing that if Exhibit I, dated January 12th, 1872, were to be treated as a sale with an option for re-purchase after four years and before six years, the date for repurchase had passed and the property had become vested entirely in the purchaser on January 12th, 1878. The present suit was rightly found by the Subordinate

(1) (1923) I.L.R., 46 Mad., 751 (P.C.).

(2) (1917) M.W.N., 5.

(3) (1918) 34 M.L.J., 421.

(4) (1917) I.L.R., 40 Mad., 1040 (F.B.).

(5) (1898) I.L.R., 21 Mad., 151.

(6) (1912) 16 I.C., 609.

(7) (1917) 32 M.L.J., 24.

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Judge to be time-barred and the appeal must be dismissed with costs.

RAMESAM, J.—This appeal arises out of a suit for redemption of a mortgage. The plaintiffs' predecessors in title, namely, one Parameshwari Hengsu and others, mortgaged such of the properties as are comprised in Schedule A and the properties in Schedule A-1 to one Manjunatha Naika by Exhibit I, dated the 12th January 1872, for Rs. 14,000. The mortgagee conveyed the properties in Schedule A by Exhibit II, dated the 16th July 1878, to one Venkappa the ancestor of the defendants and the defendants obtained them for their share at a family partition. The mortgagors assigned the equity of redemption in the mortgaged properties by Exhibit B, dated the 12th September 1906, to one Booba Shetti from whom it devolved on the plaintiffs under the Aliyasantana Law. We are not now concerned with the properties in Schedule A-1 as to which the interest of the mortgagee also has come to the plaintiff's hands by various transactions. The Subordinate Judge dismissed the suit. In appeal the claim for the properties in Schedule A-2 has not been pressed and no reference need be made to them and we are only concerned with the properties in Schedule A. Two points have been argued by the learned vakil for the appellants.

(1) Whether Exhibit I is a mortgage by conditional sale or a sale with an agreement for re-purchase?

(2) Assuming it is a mortgage, whether the suit is barred by limitation under article 134 of the Limitation Act?

In the view I take of the second question, I think it is unnecessary to discuss the first. For the purposes of discussion I will assume in favour of the appellant that

Exhibit I ought to be construed only as a mortgage by conditional sale. The question now is whether, the properties having been sold by Exhibit II, article 134 of the Limitation Act does not apply.

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Mr. Anantakrishna Ayyar, the learned vakil for the appellants, contends that article 134 of the Limitation Act can only apply where the transferee from the mortgagee took the properties in the belief that the transferor was absolutely entitled to them. That this was the law under the corresponding articles of the Acts of 1859 and 1871 admits of no doubt. See *Radanath Doss v. Gisborne*(1). But the words "in good faith" which appeared in that article have been omitted in the Acts of 1877 and of 1908. The question is, whether it can be contended that under the Acts of 1877 and of 1908 the knowledge on the part of the purchaser of the true nature of the interest of the transferor prevents the application of article 134. Mr. Anantakrishna Ayyar relied on *Singaram Chettiar v. Kalyanasundaram Pillai*(2). Though the remarks at page 738 of that decision are somewhat in favour of the appellant, the point was not actually decided in that case. The next decision relied on by him is *Tholasinga Mudali v. Nagalinga Chetty*(3) where the *obiter dictum* in *Singaram Chettiar v. Kalyanasundaram Pillai*(2) was followed by SADASIVA AYYAR and NAPIER, JJ. The next case relied on by him is the decision in *Muthaya Shetti v. Kanthappa Shetti*(4). In that case, it is observed,

"If the transferee bargained for, and believed he is bargaining only for, the interest of the mortgagee, he cannot acquire title as the absolute owner of the property. After all, article 134 is only a branch of the law of prescription, and the question to be determined would be what it is that the purchaser prescribed

(1) (1871) 14 M.I.A., 1.
(3) (1916) 1 M.W.N., 28.

(2) (1914) M.W.N., 735.
(4) (1918) 34 M.L.J., 431.

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for. The fact that he knew that his vendor had only a mortgage right would not be conclusive on this question. The real test would be, did he ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it? In *Pandu v. Vithu*(1), that is the test that was suggested."

I do not see how these remarks of SESHAGIRI AYYAR, J., help the appellants. If the transferee purported to purchase the absolute interest even though he knew that the transferor had only the interest of a mortgagee, the article would still apply according to this view. BAKEWELL, J., added that

"If the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention."

He made no reference to the case of *Singaram Chettiar v. Kalyanasundaram Pillai*(2) unlike SESHAGIRI AYYAR, J. The finding shows that the deed of mortgage in that case was styled a sale deed though construed by the High Court as a mortgage by conditional sale. The period for redemption fixed in it had expired when the deed of transfer was executed and it was said that the vendee would naturally suppose that he was purchasing an absolute title. The finding accordingly was that the transferor intended to transfer an absolute interest and that the intention of the parties was that there should be an absolute transfer of title of the property. This finding was accepted by the High Court and the Second Appeal was dismissed. I do not think that this case really supports the appellants.

Mr. Sitarama Rao, for the respondent, relied on the case *Kannuswami Thanjirayan v. Muthusami Pillai*(3)

(1) (1895) I.L.R., 19 Bom., 140.

(2) (1914) M.W.N., 735.
(3) (1917) M.W.N., 5.

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in which my learned brother took part. He pointed out that the decision in *Veerabadra Tevan v. Veerappa Tevan*(1) was really a case of an assignment of the mortgagee's interest. He also referred to 38 Madras, 1064, which was a case of a transferee from a trustee. He agreed with the decision in *Pandu v. Vithu*(2) and differed from CHAMIER, J.'s opinion in *Ghasi Ram v. Kishna*(3) and held that the purchaser need not prove that he purchased in good faith, that is, without constructive notice of the restricted nature of the vendor's title. In *Baluswamy Iyer v. Venkataswami Naicken*(4) it was held, in the case of a transferee from a trustee, that knowledge of the limited nature of the transferor's title will not disentitle the transferee from taking advantage of article 134 of the Limitation Act. In the case of trusts this is the view also adopted in *Subbaiya Pandaram v. Mahamad Mustapha Maracayar*(5) which was afterwards affirmed by the Privy Council in *Subbaiya Pandaram v. Mahammad Mustapha Maracayar*(6). These decisions were referred to by the learned Judges who decided *Muthaya Shetti v. Kanthappa Shetti*(7) as consistent with their view. To sum up, the possible cases that may arise in a matter of this sort are four—

(1) Where the transfer on its face purports to be an assignment of the mortgagee's interest only: In such a case article 134 can never apply.

(2) Where the transfer purported to be a sale deed but as a matter of fact only an assignment of the mortgagee's interest was all that was bargained for: It may be conceded that in such a case also article 134 does not apply. And this is all that was decided in *Muthaya Shetti v. Kanthappa Shetti*(7).

(1) (1912) 15 I.C., 609.

(3) (1913) 30 I.C., 564.

(5) (1917) 32 M.L.J., 85.

(2) (1895) I.L.R., 19 Bom., 140.

(4) (1917) 32 M.L.J., 24.

(6) (1923) I.L.R., 46 Mad., 751 (P.O.).

(7) (1918) 31 M.L.J., 431.

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(3) Where the deed of transfer is a sale-deed and what was bargained for by the transferee is also an absolute sale though he knew that the transferor has only a mortgagee's interest. In such a case, though under the Acts of 1859 and 1871, article 134 may not apply, I think under the Acts of 1877 and 1908 it applies. This is also the view taken by the Calcutta High Court in *Ram Kanai Ghosh v. Rai Sri Sri Hari Narayana Singh Deo Bahadur*(1), which was also a case of a trustee. Seeing that the Privy Council have come to the same conclusion in *Subbaiya Pandaram v. Mahammad Mustapha Marcaray*(2), I do not think any value can be attached to the dissent from the decision in *Ram Kanai Ghosh v. Raj Sri Sri Hari Narayana Singh Deo Bahadur*(1) in *Singaram Chettiar v. Kalyanasundarama Pillai* (3).

(4) Where the transfer is in the form of a sale deed and the transferee bargained for an absolute interest and acted *bona fide* throughout. To such a case there is no doubt that article 134 will always apply. Only the third case is the one in respect of which there seems to be some difference of opinion. But it seems to me that the preponderance of opinion in this High Court, in Bombay, in Calcutta and in the Privy Council is in favour of the view that article 134 applies. In the present case, though we may now construe Exhibit I to be a deed of mortgage, it is impossible to say that the purchaser under Exhibit II acted otherwise than *bona fide*. According to the terms of Exhibit I, the debt was to be paid off after the 12th of January 1876, and before the 12th of January 1878, and in default of payment on the latter date, it was to operate as an absolute sale. Under the law as it then stood, the mortgagee might have honestly thought that he obtained an absolute title

(1) (1905) 2 O.L.J., 546.

(2) (1923) I.L.R., 46 Mad., 751 (P.C.).

(3) (1914) M.W.N., 735.

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by the default of payment within the stipulated date and the transferee might have also similarly thought that the transferor had an absolute title. That both were acting perfectly *bona fide* is clear from the recitals in Exhibit II. It must be remembered that the Transfer of Property Act had not been enacted in 1878. The Privy Council held in *Pattabhiramier v. Vencatarow Naicken*(1) that the principle that a mortgage is for ever redeemable was not known to the ancient law of India. It is true that in a later case, *Thumbusawmy Moodelly v. Hoosain Rowthen*(2), Their Lordships indicated a different rule in the case of mortgages after the year 1858. But the parties to Exhibit II might well have thought that in the case of mortgage documents between 1871 and 1875 the decision in *Pattabhiramier v. Vencatarow Naicken*(1) applied. It is true that the Madras High Court repelled such a contention, but this was long after 1878. In the above remarks I assumed that the parties to Exhibit II knew that the proper construction of Exhibit I is that it was a mortgage by conditional sale. But even this is extremely doubtful. Whatever view we may now take of Exhibit I, there is nothing to show that the parties to Exhibit II did not honestly suppose it to be a deed of absolute sale which is what it purported to be. I think the present case is a case where the transferee acted *bona fide* according to the strictest meaning of the term, and article 134 applies. There is nothing to show that he did not pay the full value, according to the prices that ruled in 1878. I think the appeal fails on this ground and ought to be dismissed with costs.

K.B.

(1) (1870) 13 M.I.A., 560.

(2) (1875) I.L.R., 1 Mad., 1 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Odgers.

1924,
December 19.

SAIT SIVA PRATAPA BHATTADU (5TH CLAIMANT),
APPELLANT

v.

A.E.L. MISSION AND OTHERS (CLAIMANTS 4, 7 AND 8),
RESPONDENTS.*

Land Acquisition Act (I of 1894), ss. 3 (b), 9 and 53—Attaching decree-holders—Attachment of lands—Mortgage of same by judgment-debtor subsequent to attachment—Further attachments by decree-holders subsequent to mortgage—Land acquired under the Act—Compensation money paid into Court subsequent to attachments—Decree-holders, whether interested in the lands under the Act—Rateable distribution—Money paid, whether assets—‘Claims enforceable under attachment,’ in sec. 64, Civil Procedure Code, meaning of—Priority as between attaching creditors and mortgagee—Civil Procedure Code (Act V of 1908), ss. 64 and 73.

A decree-holder attached lands of his judgment-debtor in execution of his decree in the District Court. The latter subsequently mortgaged the lands to the appellant; subsequent to the mortgage, two other decree-holders attached the same lands. The lands were acquired by Government under the Land Acquisition Act, and the compensation money was paid into the District Court by the Collector who referred the dispute between the mortgagee and the decree-holders for decision by the Court. The payment into Court was subsequent to all the attachments. On the mortgagee claiming priority over the decree-holders in respect of the compensation money and contending that the decree-holders who attached subsequent to his mortgage were, in any event, not entitled to the money as against him;

Held, that the attaching decree-holders were persons interested within the meaning of section 3 (b) of the Land Acquisition Act; *In re The Land Acquisition Act, in the matter of Pestonji Jehangir Modi*, (1913) I.L.R., 37 Bom., 76, followed;

* Appeal No. 382 of 1923.

that the compensation money paid into Court was assets held by the Court for distribution among decree-holders;

that the decree-holders, who attached subsequently to the mortgage, were entitled to rateable distribution of the amount in Court along with the decree-holder who attached previous to the mortgage under sections 64 and 73, Civil Procedure Code; *Thiraviyam Pillai v. Lakshmana Pillai*, (1918) I.L.R., 41 Mad., 616; *Ghisulal Agarwalla v. Todarmull Agarwalla*, (1921) 26 C.W.N., 169, followed,

and that the decree-holders were entitled to rateable distribution, even though their decrees were not actually being enforced; *Kali Kumar Saha v. Kali Prasanna Majumdar*, (1916) 33 I.C., 492; *Chunilal Devaji v. Karamchand Shrichand* (1922) 69 I.C., 161; and *Sorabji Edulji Warden v. Govind Ramji, F.N. Wadia and another*, (1892) I.L.R., 16 Bom., 91, followed.

APPEAL against the decree of L. H. ARNDT, the Acting District Judge of Gōdāvari at Rajahmundry, in Original Petition No. 116 of 1922.

The material facts appear from the judgment.

G. Lakshmanan for appellant.

P. Chenchiah, C. Rama Rao and K. Ramamurthi for respondents.

JUDGMENT.

PHILLIPS, J.—This appeal relates to the conflicting claims of the parties to money awarded as compensation for land acquired. The appellants are the fourth mortgagees of the owner of the land and the respondents are the attaching creditors of the owner and have attached the land in execution of their decrees. The fourth claimant (the first respondent) attached the land in execution of his decree on 9th October 1920. The mortgage in favour of the appellants was executed on 12th November 1921 and the attachment by the seventh and eighth claimants (respondents 2 and 3) was in October 1922. The award of the Collector is dated 31st July 1922, but that does not decide the respective right of the several claimants, but referred the question to the

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District Court for decision. The compensation money was not received in the District Court until after October 1922 as distinctly stated by the District Judge, although an attempt has been made to show that he was wrong.

The first question raised for the appellants is that the attaching decree-holders are not persons "interested in the land" within the meaning of section 9 of the Land Acquisition Act, and it is contended that, in order to come within the definition, it is necessary that the party should have some legal interest in the land. The definition in the Act, however, is as follows:—

"The expression, 'persons interested' includes all persons claiming an interest in compensation to be made on account of the acquisition of the land under this Act"

This definition does not seem to contemplate that a person interested need have a legal interest in the land, because it specifically alludes to interest in the compensation to be made, and it has frequently been held that a person may be interested within the meaning of the Act without holding any legal estate in the land, and in two cases, *Chhuttan Lal v. Mul Chand*(1) and *J. C. Galstaun v. Secretary of State for India in Council*(2), it was held that a person who held an agreement for sale from the owner was a person interested within the meaning of the Act, although such agreement creates no legal estate; and *In re The Land Acquisition Act, In the matter of Pestonji Jehangir Modi*(3), it was held that a person may be interested in the compensation money without having any interest in the land in the legal sense of the term. Here it is clear that an attaching decree-holder who seeks to satisfy his claim out of the land is certainly interested in the compensation that has

(1) (1917) 37 I.C., 822.

(2) (1905) 10 C.W.N., 195.

(3) (1913) 1 L.R., 37 Bom., 76.

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to be paid for that land, as it is a matter of considerable importance to him that a sufficient amount of compensation should be paid in order that he may be able to satisfy his decree, and I think there can be no doubt that an attaching decree-holder is a person interested in the land within the meaning of the Act.

The next objection relates to the enforceability of the claims of the decree-holders. The District Judge has held that the alienation in favour of the appellants pending attachment by the fourth claimant was void against him, and that claimants 7 and 8 are entitled to come in before the alienee as persons entitled to rateable distribution. It is quite clear that an alienation made during attachment is void under section 64 of the Civil Procedure Code as against all claims enforceable under the attachment, and, in the explanation to that section we find that claims enforceable under an attachment include claims to rateable distribution of assets. Under section 73, where assets are held by a Court and more persons than one have, before the receipt of such assets made applications to the Court for execution of decree against the same judgment-debtor, the assets shall be rateably distributed among all such persons. Claimants 7 and 8 undoubtedly come within the meaning of this section and they would be entitled to share in the distribution of the assets along with the fourth claimant who made the first attachment.

The difficulty, however, arises as to whether this compensation money can be deemed to be assets held by the Court within the meaning of section 73. Under section 295 of the Civil Procedure Code of 1882 it was necessary that the assets should be realized by sale or otherwise in execution of a decree, but under section 73 of the new Code, there is no definite provision that the assets must be realized by sale or otherwise in execution

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of a decree. In the present case, it cannot be said that the money paid as compensation has, in the strict sense of the terms been realized in execution of a decree, and it has been held in *Sorabji Coovurji v. Kala Raghunath*(1) that assets within the meaning of section 73 must be assets held in the process of execution. This view has been dissented from in this Court in *Thiraviyam Pillai v. Lakshmana Pillai*(2) and this latter case has been followed in *Ghisulal Agarwalla v. Todarmull Agarwalla*(3). If it were necessary that the assets should be realized in the process of execution, it is difficult to understand why these words have been deliberately omitted from the new section 73. It appears to me that it will be sufficient if the assets are held by a Court and are assets which may be allotted towards the satisfaction of the decree by the Court and that the manner in which they may have been realized is immaterial. This interpretation gives some force to the change of language in section 73, which omits all reference to the method of realization. In the present case, the compensation money in the District Court when originally received may be said to be money belonging to the owner in the hands of the Court in its capacity as a Court of custody, and not as Court of execution, but when the decree-holder's claim to partake in the compensation money was decided then at least the money held must be deemed to be assets of the judgment-debtor held by the Court, for they were held from the date of the Court's award subject to the claim of the decree-holder. I am therefore of opinion that this compensation money comes within the meaning of "assets held by the Court" either from the date of receipt or at least from the date of the final award. Claimants 7 and

(1) (1912) I.L.R., 36 Bom., 156.

(2) (1918) I.L.R., 41 Mad., 616.
(3) (1921) 26 C.W.N., 169.

8 are entitled to come in under section 73, if the provisions of section 64 are also fulfilled.

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It is however argued that, under section 64, an alienation made pending attachment is not void against the decree-holders claiming rateable distribution unless, at the time of the alienation, *the claims were actually being enforced*. This view has been taken in *Barendra Nath Mitter v. Martin & Co.*(1) where MOOKERJEE, Ag. C.J., holds that the word "Enforceable" in the explanation to section 64 must be treated as meaning "in process of enforcement." With all respect it seems to me to be adding something to the Code which is not there and there is a prior authority in the Calcutta High Court in *Kali Kumar Saha v. Kali Prasanna Majumdar*(2) that the decree in respect of which rateable distribution is sought need not have been in process of execution at the time of the alienation. The same view has been held in Bombay in *Chunilal Devaji v. Karamchand Shrichand*(3); and in this latter case it was further held that it is unnecessary that the decree should have even been in existence at the date of the alienation. These cases follow the view taken in *Sorabji Udulji Warden v. Govind Ramji, F. N. Wadia and another*(4). In accordance with this view which I accept claimants 7 and 8 are entitled to rateable distribution along with the fourth claimant, whose claim must be preferred to that of appellant.

The appeal must therefore be dismissed with costs; (separate vakil's fee for each respondent).

ODGERS, J.—This appeal raises questions under the Land Acquisition Act. The Government acquired for the Imperial Bank certain lands and houses in

(1) (1921) 62 I.C., 167.
(3) (1922) 69 I.C., 161.

(2) (1916) 33 I.C., 492.
(4) (1892) I.L.R., 16 Bom., 91.

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Rajahmundry, and the question arises as to who is entitled to participate in the money paid as compensation for the acquisition. The appellants before us represent the fourth mortgagee. The first question is whether the attaching creditors represented by claimants 4, 7 and 8 take precedence over the fourth mortgagee. The fourth claimant as attaching creditor was prior in time to the fourth mortgagee, but the attachments of the seventh and eighth claimants are subsequent, and the question arises whether by section 73 of the Civil Procedure Code they are entitled to priority over the fourth mortgagee so as to give them a right to rateable distribution. It should be noted that the claims of the seventh and eighth claimants were made prior to the receipt of the assets in the lower Court, as the acquisition officer by his order of the 31st July 1922 left the question of the apportionment of the compensation to the decision of the District Court and also the amount of compensation to be deposited therein. Some attempt was made to argue that claimants 7 and 8 were not entitled to be heard as they had not appeared before the Land Acquisition Officer. In his letter, dated 25th September 1922, the Land Acquisition Officer refers the case to the District Judge for adjudication and the District Judge in his award, dated 27th January 1923, states that "the various claimants have been referred to this Court." He also states it is admitted as a fact that the attachments by claimants 7 and 8 were prior to the date when the assets came into the custody of the District Court. There is therefore nothing in that point.

The first serious point urged for the appellants is that an attaching creditor is not a person interested under section 3 (b) of the Land Acquisition Act. The definition of "a person interested" includes all persons claiming an interest in compensation to be made on

account of the acquisition of land under the Act and in section 9, sub-section 2, notice is to be given and the notice shall require "all persons interested in the land to appear personally, etc., . . . to state the nature of their respective interests in the land." In section 10 (1) the Collector may require, etc., "a statement containing as far as may be practicable the name of every other person possessing any interest in the land." On the strength of these quotations it is argued that as an attachment of land gives no interest in the land or what in the English Law is called real interest, the attaching creditor is not a person interested in the land within the meaning of the sections quoted of the Land Acquisition Act. It is to be observed that in the definition a person interested includes a person claiming an interest in the compensation and it is to my mind perfectly clear that an attaching creditor does this, for it is obviously to his advantage that his debt should be paid out of the sum deposited in Court as compensation for the acquisition of his debtor's land. By section 91 (f) of the Transfer of Property Act, a judgment creditor of the mortgagor who has obtained execution by attachment of the mortgagor's interest is allowed to redeem. That is to say, he stands in the position of the mortgagor with regard to an equitable interest in the property, i. e., the right of redemption. It is urged by the appellants here that this is an exceptional right and does not thereby confer on a judgment creditor an interest in the land. That an attaching creditor acquires no charge by his attachment, scarcely needs authority. See *Chamiyappa Tharagan v. Rama Ayyar* (1), and *Nachiappa Chettiar v. Subbier* (2). In *Chhuttan Lal v. Mul Chand* (3) it was held that a person

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(1) (1921) I.L.R., 44 Mad., 232.

(2) (1923) I.L.R., 46 Mad., 506.

(3) (1917) 87 I.C., 822.

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who entered into a valid agreement for the purchase of land which under the Transfer of Property Act gives no interest in the land itself is a person interested within the meaning of section 3 (b). In *In re The Land Acquisition Act, In the matter of Pestonji Jehangir Modi*(1), MACLEOD, J., as he then was, observed that it is quite possible that a person may be interested in the compensation money without having an interest in the land in the legal sense of the term. I therefore think that the objection that an attaching creditor is not a person interested under section 3 (b) of the Land Acquisition Act cannot be maintained.

By section 53 of the Land Acquisition Act the provisions of the Civil Procedure Code are to apply to proceedings under the Act save in so far as they may be inconsistent.

The next point is that section 73 of the Civil Procedure Code does not apply, because the compensation money has not come into Court as the result of an attachment, so that there are no assets held by the Court within the meaning of the section. The words of the Code of 1882, section 295, ran :

"Where the assets realized by sale or otherwise in execution of a decree."

These words have been omitted in the present Code and the section begins : "Where assets are held by a Court." It appears to me that if meaning is to be given to the amendment it must be taken that the legislature meant to extend the meaning of the word "assets" in the section and they are not therefore now to be regarded as confined to assets realized by sale or otherwise in execution of the decree. If the word "assets" is still to be read in its narrow sense, there is no doubt that this

(1) (1913) I.L.R., 37 Bom., 76.

compensation money is not "assets." If, on the other hand, assets may mean any fund held by a Court to the credit of a person, then assets may include compensation money as here. In *Sorabji Coovarji v. Kala Raghunath*(1), it was held that the assets referred to in section 73 are assets held in the process of execution. In this case money was paid into Court under Order XXI, rule 55, and it was held that when money was paid into Court for this particular purpose it could not fall under the words of the section. This has been dissented from in *Thiraviyam Pillai v. Lakshmana Pillai*(2), where the facts were these :—The judgment-debtor obtained permission of the Court under Order XXI, rule 83, to raise money by private alienation of the property and thus pay the amount due on one of the decrees. The money was accordingly paid into Court by the alienee. It was held that the money having been paid into Court pending the execution application was assets under section 73 of the Code and liable to rateable distribution. The Bombay decision is expressly dissented from. In *Ghisulal Agarwalla v. Todarmull Agarwalla*(3), a single Judge of the Calcutta High Court held that the natural interpretation of the wide language of section 73 would allow assets to be applied to any assets in the possession and at the disposal of the Court for the purpose of satisfying a decree obtained against the judgment-debtor. The case in *Sorabji Coovarji v. Kala Raghunath*(1) was referred to and the judgment in *Thiraviyam Pillai v. Lakshmana Pillai*(2) adopted where it says the intention of the legislature is to afford a creditor equal opportunities of obtaining a rateable advantage in the available assets of the judgment-debtor. It therefore appears to me having regard to the change in the language of the section and

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(1) (1912) I.L.R., 36 Bom., 156. (2) (1918) I.L.R., 41 Mad., 616.
(3) (1921) 28 O.W.N., 169.

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to the authority of the Madras ruling quoted that this compensation money may be regarded as assets within the meaning of section 73.

The third point is one raised under section 64 of the Civil Procedure Code, namely, that the claims must be good and valid claims at the time when the alienation was made. The argument derives force from the judgment of the Calcutta High Court reported in *Barendra Nath Mitter v. Martin & Co.*(1), where it was held that a claim for rateable distribution cannot be recognized under section 64 of the Civil Procedure Code unless it is in actual existence at the time of the alienation and it cannot ripen into such a claim unless the necessary conditions formulated in section 73 have been fulfilled. One of the conditions laid down in the judgment is the presentation of an application for execution before the receipt of the assets. The meaning given in the same judgment to the words "enforceable claim" in section 64, Civil Procedure Code, therefore, is that there is no claim till there is an application. Now as against this view, there is a decision in *Kali Kumar Saha v. Kali Prasanna Majumdar*(2), also of the Calcutta High Court, where it is held that it is immaterial for the application of section 64 whether the decree of the plaintiff had or had not been passed before the time when the transfer was effected. And in *Chunilal Devaji v. Karamchand Srichand*(3), the Bombay High Court held following a prior decision of the same Court in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(4), that under section 64 when an attachment has been laid on property in execution that attachment includes not only the claims of creditors attaching before a transfer but also includes the claims

(1) (1921) 62 I.C., 167.
(3) (1922) 69 I.C., 181.

(2) (1916) 33 I.C., 492.
(4) (1892) I.L.R., 16 Bom., 91.

of any other execution creditors who may apply for attachment before the assets are realized. The case referred to in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(1), is the judgment of a single Judge, Mr. Justice TELANG, but the judgment and the reasoning are extremely elaborate. There seems no reason to differ from this body of opinion on the strength of the opinion expressed in *Barendra Nath Mitter v. Martin & Co.*(2), and until that decision has been adopted either by the Privy Council or by this High Court, I prefer to rest my judgment on this part of the case on the other cases I have cited. I therefore think that the appeal fails on all points. I agree as to costs.

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APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice
Madhavan Nayar.

MAHAMMAD RAZA SAHAB BELGAMI (PETITIONER),
PETITIONER IN BOTH

1925,
April 27.

v.

SADASIVA RAO AND 2 OTHERS (RESPONDENTS),
RESPONDENTS.*

Madras District Municipalities Act (V of 1920), ss. 13 (c), (e), 22 and 40 and rules 37, 61, 62 of Sch. IV—Illegal expenditure by Chairman of Municipality in carrying out Municipal Council's resolution—Liability to refund—Writ of certiorari, whether maintainable—Order of Local Self-Government, manner of issuing, under rule 37—Sec. 49 (1) of Government of India Act (9 and 10 Geo. V, ch. 101).

According to rule 37 of Schedule IV of Madras District Municipalities Act (V of 1920) the funds of a municipality can

(1) (1892) I.L.R., 16 Bom., 91. (2) (1921) 62 I.C., 167.
* Civil Revision Petition No. 165 of 1923 and Civil Miscellaneous
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be spent on education and other objects, subject to any rule that might be made by the Government; and if the Government has expressly or impliedly prohibited the expenditure of the funds on educational institutions not recognized by the Government, the expenditure in violation of such prohibition is illegal. Though a chairman is by sections 13 (c), 22 and 40 (1) of the Act bound to carry out, on pain of removal, every resolution of the Municipal Council, such duty is under section 13 (c) of the Act subject to any restrictions or prohibitions imposed by the Act or the rules made thereunder by the Government.

Rule 62 of the rules under the Act does not exempt the Chairman from liability to refund any sum spent in violation of such prohibition and if a former Chairman had made such illegal expenditure, rule 62 enables his successor to recover the same from him.

An order of the Government issued under rule 37 of the District Municipalities Act, which requires such orders to be issued by Governor-in-Council, prohibiting certain expenditure, though signed by the Secretary, "By order of the Government, Ministry of Local Self-Government" is, by virtue of section 49 (1) of the Government of India Act, a valid and unimpeachable order.

Rule 61 of the rules of Schedule IV of the Madras District Municipalities Act (V of 1920) is a substitute for the writ of *certiorari* for calling in question any illegal orders of surcharge made on the Chairman or other person and hence an application for a *certiorari* to quash such an order is not maintainable.

PETITION under section 107 of the Government of India Act, 1915, praying the High Court to revise the order of the District Court of Guntūr in O.P. No. 131 of 1921.

The facts are given in the Judgment of MADHAVAN NAYAR, J.

Section 13 (c) and (e) of the Madras District Municipalities Act (V of 1920) is quoted in the Judgment at page 56.

Section 22 is quoted in the Judgment at page 65.

Section 40 (1) is quoted in the Judgment at pages 65 and 66.

Rule 37 of Schedule IV of the above Act is quoted in the Judgment at page 52.

Rule 61 is quoted in the Judgment at page 59.

Rule 62 is quoted in the Judgment at page 66.

Rule 60 of Schedule IV of the above Act is as follows:—

"(1) The auditors shall disallow every item contrary to law and surcharge the same on the person making, or authorizing the making of, the illegal payment; and shall charge against any person responsible therefor, the amount of any deficiency or loss incurred by the negligence or misconduct of that person or of any sum which ought to have been but is not brought into account by that person and shall, in every such case, certify the amount due from such person.

(2) The auditors shall state in writing the reasons for their decision in respect of every disallowance, surcharge or allowance and furnish a copy thereof to the person against whom it is made."

A. Krishnaswami Ayyar for petitioner.

The Government Pleader (C. V. Ananthakrishna Ayyar) for respondents.

JUDGMENT.

ODGERS, J. — *Civil Revision Petition No. 165 of 1923.* — ODGERS, J.

This is a petition to revise the order of the District Judge of Guntūr confirming a surcharge order made by the Examiner of Local Fund Accounts (Exhibit A) on the petitioner as Chairman of the Guntūr Municipal Council. The ground for the surcharge is that the petitioner illegally issued cheques against the municipal funds under the powers given him by rule 55 (1), part II of Schedule IV of the Madras District Municipalities Act (V of 1920) for the maintenance of 25 elementary schools managed by the Guntūr Municipal Council, such objects not being authorized objects under Act V of 1920. On 13th July 1921, the Guntūr Municipal Council passed a resolution (Exhibit I), (a) to introduce the national system of education in all the institutions under the management of the council, (b) to dispense with the annual grant by Government, (c) to conduct

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municipal primary schools independently of Government control.

On 19th August 1921 (Exhibit II), a committee of the Guntūr Municipal Council was appointed to formulate the methods of working the national system of education. The 25 elementary schools had been up to this date recognized by Government under the Educational Rules and Government had made a grant towards their maintenance. On 15th August 1921, the Government issued two Government Orders. No. 1583 (Exhibit IV) was issued under rule 37, Schedule IV of the Madras District Municipalities Act (V of 1920) as a special order. This Government Order ran as follows :—

"No portion of a municipal fund shall be applicable to the purpose of maintaining or aiding any educational institution which is not recognized or approved by the Government, the District Educational Council or any other authority duly authorized by the Government in this behalf to grant such recognition or approval."

(By order of the Government, Ministry of Local Self-Government.)

It may be here stated that rule 37, Schedule IV of the Madras District Municipalities Act, 1920, reads as follows :—

"The purposes to which the municipal fund may be applied include all objects expressly declared obligatory or discretionary by laws or rules, and in general everything necessary for, or conducive to, the safety, health, convenience or education of the inhabitants or to the amenities of the municipality and everything incidental to the administration; and the fund shall be applicable thereto within the municipality subject to these rules and such further rules or special orders as the Governor in Council may prescribe or issue; and shall be applicable thereto without the municipality if the expenditure is authorized by this Act, or specially sanctioned by the Governor-in-Council."

So the Municipal fund is applicable to these objects within the municipality "subject to these rules and such further rules, etc." The other G.O. No. 1584 (Exhibit P) was an order on the resolution of the Guntūr Municipal Council set out above and reads as follows :—

"Recorded. 2. The Government presume that the Municipal Council does not require any financial help from the Government for any purpose.

(By order of the Government, Ministry of Local Self-Government)."

The Guntūr Municipal Council considered on 14th October 1921 these Government Orders and on No. 1584 passed the following resolution :—

"This Council decided to dispense with Government grants only in regard to the national schools, but it is inexpedient that the Government should put a wrong interpretation upon it and presume that the Council does not require financial help from them for any purpose. The Council is of opinion that under these circumstances it is worthy only not to ask for financial help from the Government."

G.O. No. 1583, they considered and merely recorded. They also considered a letter from the Inspector of Schools (Exhibit IX), enquiring whether the Council intended to apply for recognition for the newly nationalized elementary schools and resolved that such recognition was unnecessary. On 22nd October 1921, the District Educational Council of Guntūr met and adjourned a resolution (Exhibit B) to withdraw recognition from the newly nationalized elementary schools "in accordance with G.O. No. . . . , dated" Previously on 8th October 1921 the Sub-Assistant Inspector of Schools informed the petitioner that he intended to inspect the schools of the municipality "as per my annual programme of work" (Exhibit C) and on 27th October 1921 the Chairman issued a Memo. (Exhibit C-1)

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to headmasters and headmistresses to that effect. The Inspector attended and extracts from his inspection book are Exhibit E, dated 31st October 1921. On 9th November 1921 (Exhibit VII) the Government drew the attention of the Guntūr Municipal Council to G.O. No. 1583 (Exhibit IV) and added :—

“ Since the Council has decided not to seek recognition for its schools, expenditure of municipal funds on such schools is illegal.”

That is the evidence on which the District Judge has come to the conclusion that as from the passing of Exhibit I on 13th July 1921, the Municipal schools ceased to be recognized by Government. The first contention addressed to us for the petitioner is that as these schools never ceased to be recognized, they did not fall within the mischief of G.Os. 1583 (Exhibit IV) or 2208 (Exhibit VII). The facts that the District Educational Council adjourned consideration of the resolution to withdraw recognition and that the schools were inspected as usual by the Government Inspector in October 1921 are cited to support this construction. It is to be observed as regards the first of these that the District Educational Council proposed to act in accordance with a certain G.O. (probably No. 1583 is referred to). If so, it is quite possible that the Council thought that any action on its part was unnecessary as Government had already treated these schools as unrecognized. That this latter is true there can be no doubt. It is perfectly clear from Exhibit IV that Government rightly or wrongly purported not to recognize or approve the schools after the proceedings of the Guntūr Municipal Council on 13th July 1921; see also Exhibit IX. Exhibit IV clearly shows that Government assumed equal or superior powers to the District Educational Council

to recognize or approve. Section 41 of Act VIII of 1920 (Elementary Education) is relied on to show that recognition of elementary schools is to be applied for through the Inspector to the District Educational Council, which is the recognizing authority subject to an appeal to the Director of Public Instruction. Section 124, District Municipalities Act, makes the rules, etc., in schedule IV, part of the Act. Section 304 gives the Governor-in-Council, power to amend or cancel the schedule. Rule 37, schedule IV, has been set out above and appears to me to give the Government a final control over the expenditure of the Municipality. It is said for the petitioner that so long as the aims of the latter are educative, Government has no control over the kind of education which is provided. The objects of expenditure of Municipal funds are set out in rule 40. The ways in which the Council may provide instruction are set out in rule 48. This and rule 47 (as to the duty of providing education generally), are part of part II of the Schedule of which rule 37 (above) is the first rule and which sets out the authorized objects of expenditure. Reading these rules and section 304 together I feel no doubt that the clause “subject to these rules, etc.” in rule 37 would also apply to control rule 48. Therefore Government can not only refuse its own grant to schools of which it does not approve but can control the expenditure of the Municipality on such schools. I do not think the fact that a Government inspection of these schools took place in accordance with the Sub-Assistant Inspector's programme, no doubt arranged long beforehand, as indeed he states, has any bearing on the question. The Government did not wish to proceed to the extreme and it was not till 9th November 1921 (Exhibit VII) that they definitely pointed out that

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expenditure on the schools was illegal. It appears to me that recognition is a matter of assent on both sides. Government must accept recognition and the Educational authority must desire it. As soon as either side withdraws, recognition is at an end. This is not an appeal. It is not necessary for me to say whether on the evidence I should have come to the same conclusion as the District Judge, but it appears to me there is evidence on which the District Judge could come to the conclusion he did with regard to this matter, viz., that the schools were unrecognized at any rate at the date from which the surcharge begins, viz, 10th August 1921.

The next point is as to the liability of the Chairman petitioner. It is said that under section 22 of the District Municipalities Act the Chairman was bound to give effect to the resolution of the Council of 13th July 1921. Section 13 lays down the general duties of the Chairman; by section 13 (c) he is to carry into effect the resolutions of the Council and by section 13 (e)

"The Chairman of the Municipal Council shall perform all the duties and exercise all the powers specifically imposed or conferred on the Chairman by this Act, and subject, whenever it is hereinafter expressly so provided, to the sanction of the Council, and subject to all other restrictions, limitations and conditions, hereinafter imposed, exercise the executive power for the purpose of carrying out the provisions of this Act, and be directly responsible for the due fulfilment of the purposes of this Act."

The power of signing cheques on Municipal funds is given to the Chairman by rule 55 (1) of Schedule IV.

By rules 56 to 62, the audit of accounts is controlled. By rule 60 the auditors are to charge against any person making or authorizing the making of an illegal payment. Rule 62 provides that the Chairman shall apply to the Court for payment of any sum certified as

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surcharged and it is said that this cannot apply to a case where the Chairman is surcharged himself. It no doubt applies where the Chairman recovers from other members or from a former Chairman as might be done in this case. Section 353 of the Act renders the Chairman as well as the other members liable for loss, waste or misapplication of municipal money. On the other hand, it is said that section 22 is opposed to section 13(e) where the words "subject to all other restrictions, limitations and conditions hereinafter imposed" occur. This would bring in the restrictions already referred to in rule 37, Schedule IV. It is perfectly clear to my mind that the Chairman is as liable as any member for misapplication of moneys. It may be hard that he be rendered so liable because he was merely carrying out a resolution of the Council though I think it is on record that he voted for that resolution himself. I think section 13 (e) and rules 37 and 55 (1) apply to this case. The Chairman cannot be obliged to carry out illegal resolutions and section 22 provides that he is relieved from carrying out a resolution modified, suspended or cancelled by a controlling authority. If the resolution of 13th July 1921 is to be construed as authorizing him to spend municipal money on the schools after the council had dispensed with Government aid and control, it may be said that resolution was afterwards cancelled by a controlling authority; there are however no specific words to this effect in the resolution and there does not appear to be any subsequent resolution to that effect. The Chairman signed the cheques and as I have already found he did so for an illegal purpose. He is therefore in my opinion liable; whether he has any remedy over against the other members is of course not open to discussion here.

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A third point is raised for the petitioner. It has not been taken below. That is, that the G.Os. were signed thus by the Secretary to Government, "By order of the Government, Ministry of Local Self-Government." It is of course well-known that education is a transferred subject under section 45-A, clause (1), sub-clause (d) of the Government of India Act which came into force on 17th December 1920. The date of the District Municipalities Act is 29th June 1920. It is said that rule 37 of Schedule IV of the District Municipalities Act provides that the "Special orders" must be prescribed or issued by the "Governor-in-Council" and that as these G.Os. were signed as set out above they are invalid as they do not conform to this express statutory provision. Section 49 of the Government of India Act provides as follows:—

"All orders and other proceedings of the Government of a Governor's province shall be expressed to be made by the Government of the province and shall be authenticated as the Governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings.

Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceedings on the ground that they were not duly made by the Government of the province."

In my opinion this provision was made expressly to meet a case like this and must be taken to override the provision in rule 37. There is thus no substance in this objection. These are the points raised in the Civil Revision Petition and in my opinion they all fail and the Civil Revision Petition must be dismissed with costs.

Civil Miscellaneous Petition No. 3407 of 1922.

This relates to the same subject-matter and is a petition for the issue of a writ of *certiorari* to bring in

and quash the auditor's order of surcharge referred to in my judgment in Civil Revision Petition No. 165 of 1923.

That this remedy is open under the English procedure is undoubted. The Public Health Act, 1875, section 247 (8), provides that

"Any person aggrieved by disallowance made (under (7) surcharges) may apply to the Court of Queen's Bench, for a writ of *certiorari* to remove the disallowance into the said Court, etc."

Cf. *Rea v. Roberts*(1), *Rea v. Roberts, Ex parte Scurr*(2). The question is: Is such a remedy open under the District Municipalities Act? Schedule IV, rule 60, corresponds to the Public Health Act, 1875, section 247 (7) but sub-section (8) of the Statute runs as already set out above, whereas rule 61 runs thus:—

"Any person aggrieved by disallowance, surcharge or charge made, may, within fourteen days after he has received or been served with the decision of the auditor, apply to the Principal Civil Court of original jurisdiction to set aside such disallowance, surcharge, or charge, and the Court, after taking such evidence as is necessary, may confirm, modify or remit such disallowance, surcharge or charge with such orders as to costs as it may think proper in the circumstances or in lieu of such application any person so aggrieved may appeal to the Governor-in-Council, who shall pass such orders as he thinks fit."

Rule 62 corresponds generally with section 247 (9). It seems to me therefore that the remedy by *certiorari* in this particular matter is not open under the District Municipalities Act and that a substituted remedy has been provided in that Act for the remedy by *certiorari* given by the Statute. Therefore whatever may be or may not be the general powers of the Court to issue this writ, it seems to me that that power, if it ever existed in the present case has been by implication

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(1) [1908] 1 K.B., 407.

(2) [1924] 2 K.B., 695.

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removed by the Act, which provides another and specified remedy. Further, even if the power exists in the present case, no *prima facie* case has in my opinion been made out for its exercise by us. The petition must be dismissed with costs.

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MADHAVAN NAYAR, J.—*Civil Revision Petition No. 165 of 1923.*—The facts necessary for the decision of this Civil Revision Petition and the Civil Miscellaneous Petition are fully set out in my learned brother's judgment with which I agree.

The Civil Revision Petition is against the order of the District Judge of Guntūr refusing to set aside the order made by the Examiner of Local Fund Accounts, Madras, surcharging the petitioner, the Chairman of the Guntūr Municipality, with Rs. 1,771-6-0. The surcharge certificate was issued by the first respondent under rule 60 (1) of Schedule IV of the Madras District Municipalities Act (V of 1920) which empowers every auditor to

“disallow every item contrary to law and surcharge the same on the person making, or authorizing the making of, the illegal payment.”

The case against the petitioner as mentioned in the surcharge certificate is that he issued cheques against the Municipal funds on different dates between the 10th of August 1921 and the 31st of October 1921 for amounts aggregating to Rs. 1,771-6-0 towards the salaries of teachers and for expenses in connection with the maintenance of 25 educational institutions within the Municipality contrary to special orders issued by the Government under rule 37 of part II of Schedule IV of the District Municipalities Act, which made such payments illegal. The Guntūr Municipal Council, by its resolution, dated the 13th of July 1921, Exhibit I, decided to introduce (1) the national system of education in all

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the institutions under management of the Council, (2) to dispense with the annual grant by the Government and (3) to conduct the municipal primary schools independently of Government control. On the 10th of August 1921 the Government passed the following G.O. No. 1583 (Exhibit IV) under rule 37, Schedule IV of the District Municipalities Act (V of 1920) as a special order and communicated it to all Chairmen of Municipal Councils including the Chairman of the Guntūr Municipal Council.

“No portion of a Municipal fund shall be applicable to the purpose of maintaining or aiding any educational institution which is not recognized or approved by the Government, the District Educational Council or any other authority duly authorized by the Government in this behalf to grant such recognition or approval.

(By Order of the Government, Ministry of Local
Self-Government.)

(Sd.) F. J. RICHARDS,
Secretary to Government.”

On the same date, reading the resolution of the Municipal Council. Exhibit I, the Government communicated to the Chairman, G.O. No. 1584 (Exhibit P) in which it was stated that

“The Government presume that the Municipal Council does not require any financial help from the Government for any purpose.”

On the 9th of November 1921 the Government passed and communicated to the Guntūr Municipal Council G.O. No. 2208 (Exhibit VII) in which, after drawing its attention to Exhibit IV, the Government stated that

“since the Council has decided not to seek recognition for its schools, expenditure of Municipal funds on such schools is illegal.”

The question for our decision is whether the expenditure of Municipal fund by the Chairman on

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the educational institutions mentioned in the surcharge certificate subsequent to Exhibit IV is illegal.

Three arguments have been advanced before us by Mr. Krishnaswami Ayyar on behalf of the petitioner: (1) since the schools in question, which were already recognized schools (i.e., prior to Exhibit I), never ceased to be recognized, they did not fall within the ban of G.O. No. 1583, or of any other Government order passed in connection with this matter and, therefore, the expenditure of Municipal funds on such schools is not illegal; (2) according to law, the Chairman of a Municipality is not liable to be surcharged for making illegal payments; and (3) G.O. No. 1583 and the other G.Os. issued by the Government are not valid orders as they were not issued by the Governor-in-Council as required under rule 37, Part II, Schedule IV of the District Municipalities Act. I shall examine these arguments, separately.

(1) The 25 Educational institutions under the control of the Guntūr Municipality were "recognized institutions" prior to the passing of the Madras Elementary Education Act (VIII of 1920). After the Elementary Education Act came into force, these continued to remain as recognized institutions (see section 41, clause IV of the Act), and the power to withdraw recognition or to confer it afresh was vested by the Act in the District Educational Council. It is argued by the learned vakil for the petitioner that the Government had, therefore, no power to withdraw the recognition already conferred upon the schools and, since the District Educational Council did not specifically withdraw the recognition consequent upon the passing of the resolution, Exhibit I, the expenditure of the Municipal fund on these institutions is not illegal.

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The various resolutions of the Council and the G.Os. passed by the Government are referred to in detail in my learned brother's judgment. I have no doubt that by Exhibit IV the Government purported not to recognize or approve of the Municipal schools after the Council had passed the resolution dated the 13th of July 1921, Exhibit I. In pursuance of it the Government on the same date communicated to the Municipality the order Exhibit V in which they presumed that the Municipality did not require any financial help. The proceedings set out in my learned brother's judgment show clearly that the order of the Government passed on the 10th of August 1921 was understood as an order withdrawing recognition and prohibiting the expenditure of the Municipal fund on the schools in question which ceased to be recognized on that date. The intention of the Government was, however, made absolutely clear by Exhibit VII which clearly declared that expenditure of Municipal fund on the said schools was illegal. In my opinion, it is not necessary, for the purpose of this case, to consider whether, after the passing of the Madras Elementary Education Act (VIII of 1920), the Government still had the power of granting recognition to the Elementary schools or withdrawing it from them; that the Government thought that it still had the power to grant recognition for the Municipal Secondary schools is clear from its order Exhibit VI, G.O. No. 1942, dated the 5th of October 1921, which is to the following effect:— in G.O. No. 1583, L. & M., dated 10th August 1921, the Government issued a special order under rule 37, schedule IV of the Madras District Municipalities Act, 1920, prohibiting the expenditure of Municipal funds on educational institutions which are not recognized or approved by the Government, the District Educational Council or any other authority duly authorized by the

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Government in this behalf to grant such recognition or approval. Under section 41 of the Madras Elementary Education Act, 1920

"District Educational Councils are empowered to grant recognition to Municipal Elementary schools. The Government are now pleased to authorize the Director of Public Instruction to grant recognition for Municipal Secondary schools for the purpose of this order."

Rightly or wrongly, the Government purported to withdraw the recognition of the Elementary schools in question and consequently passed orders prohibiting expenditure on those schools. The real question to be considered is whether the Government have the power to control the expenditure of Municipal fund by passing special orders prohibiting the expenditure. If such power is vested in the Government, whether the exercise of it in any particular case is justifiable or not, it is clear that expenditure contrary to such orders will be contrary to law and illegal, and the auditor will, therefore, be entitled to surcharge the same on the person making, or authorizing the making of, such expenditure, under rule 60 (1) of part II, Schedule IV. Rule 37 of part II, Schedule IV of the Madras District Municipalities Act provides that,

"The purposes to which the Municipal fund may be applied include all objects expressly declared obligatory or discretionary by laws or rules, and in general everything necessary for, or conducive to the safety, health, convenience or education of the inhabitants or to the amenities of the Municipality and everything incidental to the administration; and the fund shall be applicable thereto within the Municipality subject to these rules and such further rules or special orders as the Governor-in-Council may prescribe or issue."

Section 124 of the Act makes the rules and tables embodied in Schedule IV as part of Chapter VI which relates to Taxation and Finance. Under section 304,

"The Governor-in-Council may make rules altering, adding to, or cancelling Schedule II, Schedule V, Schedule VI or *Part II of Schedule IV.*"

According to the District Municipalities Act, the expenditure of the municipal fund is limited to purposes including "education" specified in rule 37 and referred to in detail in the subsequent rules and

"the fund is to be applied thereto within the Municipality, subject to these rules and such further rules or special orders as the Governor in Council may prescribe or issue."

This makes it clear that the Government can prohibit by passing special orders the expenditure of the Municipal fund on schools of which it does not approve; it, therefore, follows that the payments made by the Municipal Chairman for defraying the expenses of these schools subsequent to the 10th of August 1921 are illegal, inasmuch as they were made contrary to Government Orders prohibiting such expenditure. The Auditor was, therefore, rightly entitled, under rule 60 (1) of Part II, Schedule IV of the District Municipalities Act, to surcharge the amount on the person making, or authorizing the making of, such illegal payments.

The second question for consideration is as regards the liability of the Chairman of the Municipality. Mr. Krishnaswami Ayyar's arguments to show that the Chairman is not liable to be surcharged are based on sections 13 (c), 22, 40 (1) and Rule 62 of Schedule IV of the District Municipalities Act. According to section 13, clause (c)

"The Chairman of the Municipal Council shall carry into effect the resolutions of the council."

Section 22 states that

"The Chairman shall be bound to give effect to every resolution of the Council unless such resolution is modified, suspended or cancelled by a controlling authority."

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Section 40 (1) lays down that

"The Governor in Council may, by notification, remove any Chairman, if he, without an excuse sufficient in the opinion of the Governor in Council, omits or refuses to carry out any resolution of the Municipal Council."

These sections show that the Chairman of a Municipality is bound to carry out the resolutions of the Municipal Council and, if he refuses to do so, he is liable to be removed by the Governor-in-Council. If so, it is argued that he is not liable to be surcharged for giving effect to the resolution, dated the 13th of July 1921. This argument is sought to be supported by an inference drawn from rule 62. This rule provides that—

"Every sum certified to be due from any person by auditors under this Act shall be paid by such person to the Chairman within 14 days after the intimation to him of the decision of the auditors unless within that time such person has appealed to the Court or to the Governor-in-Council against the decision; and such sum if not so paid, or such sum as the Court or the Governor-in-Council shall declare to be due, shall be recoverable on an application made by the Chairman to the Court in the same way as an amount decreed by the Court."

It is pointed out that since this rule makes provision for the Chairman to recover from persons sums certified to be due from them by the auditor, it is to be understood that the Act does not contemplate that the Chairman is liable to be surcharged by the auditor. In reply to this argument the learned Government Pleader relies on section 13, clause (e) and points out that the suggested inference of the non-liability of the Chairman does not follow from rule 62. Section 13, clause (e), states that—

"The Chairman of the Municipal Council shall perform all the duties and exercise all the powers specifically imposed or conferred on the Chairman by this Act, and subject, whenever it is hereinafter expressly so provided, to the sanction of the Council, and subject to all other restrictions, limitations and conditions hereinafter imposed, exercise the executive power for the purpose of carrying out the provisions of this Act, and be

directly responsible for the due fulfilment of the purposes of this Act."

The words "subject to all other restrictions, limitations and conditions hereinafter imposed," introduce the restrictions referred to in rule 37 and thus impose limitations on the Chairman's duty to carry out the resolutions of the Council. I think sections 22 and 13 of the Act should be read together and subject to the limitation imposed by rule 37; and, if so read, it would follow that the payments made by the Chairman in this case in carrying out the resolution of the Council, dated the 13th of July 1921, in view of the special orders of the Government prohibiting the expenditure of the Municipal fund would be illegal payments, and as he was the person who made such illegal payments by issuing cheques under rule 55 (1), Schedule IV of the Act, the auditor would be entitled to surcharge him for making such illegal payments. Rule 62, Schedule IV of the Madras District Municipalities Act, does not warrant the inference that the Chairman is not liable to be surcharged. The rule only points out how the Chairman may recover the surcharged amount. Under that rule a Chairman may recover, in the way indicated therein, the surcharged amount from any person from whom the sum is certified to be due by the auditor under the Act including a former Chairman as in this case. I am, therefore, of opinion that the Chairman of a Municipality is liable to be surcharged under the Act for making illegal payments.

The third and the last argument addressed on behalf of the petitioner relates to the form of the Government order. The Government orders in question were issued "By order of the Government, Ministry of Local Self-Government" and signed by the "Secretary to Government." Under rule 37, Schedule IV of the District Municipalities Act, "further rules or special orders

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referred to therein should be prescribed or issued by the "Governor-in-Council."

It is argued that, since the Government orders in this case were issued "By order of the Government, Ministry of Local Self-Government" and not by the "Governor-in-Council," the Government orders are invalid as they do not conform to the express statutory provision contained in the District Municipalities Act. There is no force in this contention. The District Municipalities Act was passed on the 29th of June 1920 and the Government of India Act came into force in Madras by notification on the 17th of December 1920. Under section 45-A, clause (i), sub-clauses (d) of the Government of India Act, education has been made a "transferred subject." Section 46 (1) provides that the presidency of Fort St. George shall be governed, in relation to reserved subjects, by a Governor in Council, and in relation to transferred subjects, by the Governor acting with Ministers appointed under the Act. Section 49 (1) of the Government of India Act lays down that

"All orders and other proceedings of the Government of a Governor's province shall be expressed to be made by the Government of the province, and shall be authenticated as the Governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings."

The Government orders in question have been authenticated as mentioned in this section. It is stated in the same section that

"Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the Government of the province."

In view of this provision, the objection that the Government orders in this case are invalid as they do

not conform to the statutory provision of the District Municipalities Act cannot any longer be entertained in any legal proceeding and must be overruled.

In the result, I agree that this Civil Revision Petition should be dismissed with costs.

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C.M.P. No. 3407 of 1922.

This Civil Miscellaneous Petition has been filed for the issue of a writ of *certiorari* to bring in and quash the certificate of surcharge made by the auditor. Reliance has been placed by the learned vakil for the petitioner on the decisions in *Rex v. Roberts*(1), and *Rex v. Roberts. Ex parte Scurr*(2), to show that in England such writs are issued for quashing surcharge orders. These decisions are under the English Public Health Act, 1875, which contain provisions relating to surcharge and also provides for applications by aggrieved persons to the Court of King's Bench for writs of *certiorari* to remove their disallowance in the said Court (see section 247, clauses (7), (8) and (9). The rules in the District Municipalities Act relating to surcharge seems to be framed on the analogy of the provisions of the English Public Health Act with this important difference that for the statutory remedy by way of *certiorari* provided for in section 247, clause (8) of the English Act, the Indian Act by rule 61 substitutes application to the principal Civil Court of Original Jurisdiction, or in lieu of such application, appeal to the Governor in Council as remedies of persons aggrieved by surcharge orders (see rule 61). The English decisions, being based upon a specific provision of the English Public Health Act which provides for the making of applications for writs of *certiorari*, are not of much use in considering the

(1) [1908] 1 K.B., 407.

(2) [1924] 2 K.B., 695.

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question arising under the Indian Act which does not provide for any such applications. On the other hand, the absence of such a provision in our Act coupled with the substitution of another provision in its place rather suggests that the legislature thereby intended that this remedy should not be open to aggrieved persons under the District Municipalities Act. Writs of *certiorari* are not generally granted when other equally efficacious remedies exist under the law for the satisfactory redress of the grievances complained of.

Such being the case, the petitioner is not entitled to ask for the issue of a writ. I have already shown in my judgment in the Civil Revision Petition that he has not succeeded in showing that the order of the learned District Judge is wrong. I do not say anything about the general powers of this Court to issue writs of *certiorari* in relation to such matters as we are now considering; nor do I express any opinion on the question whether the general power of this Court to issue the writ, if it ever existed in the present case, could be taken away by implication by the District Municipalities Act. I may also state that it has not been argued with reference to authorities whether this very ancient remedy, which is the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction and which is frequently spoken of as being applicable only to "Judicial acts" and not to purely ministerial acts (See *Rex v. Woodhouse*(1), does exist in respect to certificates of surcharge made by auditors.

I agree that this petition also should be dismissed with costs.

N.R.

(1) [1906] 2 K.B., 501.

APPELLATE CRIMINAL

Before Mr. Justice Devadoss.

KUPPU MUDALI AND SIX OTHERS (ACCUSED) PETITIONERS.*

1925,
April 17.

Criminal Procedure Code (Act V of 1898)—Sec. 360 (1)—Deposition must be read out to witness immediately after recording—Practice of examining a number of witnesses and afterwards reading out their depositions, illegal.

The requirements of section 360(1) of the Code of Criminal Procedure (Act V of 1898) are not complied with unless the deposition of each witness is read out to him as soon as it is completed. To record the depositions of a number of witnesses and read them over to them at the same time afterwards, is not a proper compliance with the section and is illegal, the direction contained therein being mandatory.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1893, praying the High Court to revise the Judgment of R. H. COURTENAY, Sessions Judge of Salem in Criminal Appeals Nos. 68 and 69 of 1924, preferred against the Judgment of K. C. MANAVEDAN RAJA, Subdivisional First-class Magistrate of Sankari, in C.C. No. 28 of 1924.

The facts of the case are set out in the Judgment.

Dr. S. Swaminathan and A. V. K. Krishna Menon for Petitioners.

Public Prosecutor for the Crown.

JUDGMENT.

This is an application to revise the order of the Sessions Judge of Salem. The point urged on behalf of the petitioners is that the depositions of witnesses were not read over to them as soon as their examination was over. In other words, the terms of section 360 of

* Criminal Revision Case No. 739 of 1924.

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the Criminal Procedure Code were not complied with. Report was called for from the Magistrate who tried the case, and in his report he says:

"In cases where the depositions are long and would take a considerable time of the Court if they were then and there read over and interpreted to the witnesses, what is done is to keep all the witnesses aside as soon as each of them is examined so as not to give them an opportunity to mingle with those that are not examined and the place so allotted is within the view of the accused and their pleader. The depositions of these witnesses are read over and interpreted to them after the work in connection with the case for the day is over."

This practice, though it may facilitate the work of the Court, is not one which is sanctioned by section 360 (1) of the Criminal Procedure Code. Clause 1 of section 360 reads thus:

"As the evidence of each witness taken under section 356 or 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader if he appears by pleader, and shall if necessary be corrected."

The direction here is mandatory and not directory. As each witness' evidence is completed, it should be read over to him in the presence of the accused or his pleader. It is not proper for the Magistrate to examine a number of witnesses and ask them to be in a room and then have the depositions read over to them. The learned Public Prosecutor contends that this is only an irregularity and not an illegality and that it is not shown that the accused have been prejudiced by such a procedure being adopted. This is not merely an irregularity. I hold it as an illegality for, the terms of the section being mandatory, any violation or departure from the practice or procedure enjoined upon the Court is not merely an irregularity but an illegality. By having recourse to this practice, the witness whose evidence was taken, say at 11 o'clock, or who closed his evidence at 12 o'clock, and whose

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evidence is being read over to him at 5 o'clock after the day's work is over, might be able to improve upon his evidence and try to get his evidence altered. It is not also fair to an honest witness not to have his deposition read over soon after he made it, for, if the Magistrate has incorrectly recorded the deposition and if it is read over to the witness some hours after, the question would arise whether the witness is correct in his statement that he did not make such a statement but some other statement and whether the correction should be accepted or not. It is, I think, fair both to the witness, as well as to the Magistrate who takes down the deposition as well as to the accused to have the deposition read over as soon as the examination of the witness is over. It would avoid any conflict between the recollection of the accused's pleader, the recollection of the prosecuting counsel and the recollection of the Court as well as the recollection of the witness. Seeing there are four different persons to be considered in this connection, I think the provision of section 360 (1) is not only a salutary provision but is a provision intended for furtherance of justice. That being so, the procedure adopted by the Magistrate is an illegal procedure and I have no other course but that of setting aside the conviction, and directing the Magistrate to retry the case.

D.A.B.

APPELLATE CRIMINAL.

*Before Mr. Justice Krishnan**(On a difference of opinion between Spencer,
Officiating Chief Justice, and Reilly, J.)*1924,
October 23.GAM MALLU DORA ALIAS MALLAYYA (ACCUSED),
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APPELLANTS,

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KING-EMPEROR (COMPLAINANT), RESPONDENT.*

*Indian Penal Code (Act XLV of 1860), sec. 121—Waging
war—Continuing offence—Criminal Procedure Code,
ss. 234, 235 and 239—Legality of charges and trial in
respect of several offences—Same transaction, meaning of.*

The waging of war is a continuing offence and a charge against the accused under section 121, Indian Penal Code, specifying more than three offences committed in the course of the war, and spread over a period of more than one year, does not contravene the provisions of section 134 of the Code of Criminal Procedure, and is not illegal.

*Per KRISHNAN, J. (agreeing with SPENCER, Offg. C.J.).—*A rebellion is said to continue until it is suppressed by capture or destruction of the rebel forces, or by the rebels laying down their arms and making their submission as subjects to their sovereign and receiving his pardon.

When a series of acts are so connected by community of purpose and continuity of action as to form not only one transaction but a single offence, proximity of time between the performance of the various acts composing that offence not being the sole test of the unity of the transaction, all persons accused of doing those acts may be charged and tried at one

* Referred Trial No. 47 of 1924 and Criminal Appeals Nos. 297 and 337 of 1924.

trial under section 235 of the Code of Criminal Procedure, although some of the accused took part only after some of the others had been arrested.

Per KRISHNAN, J.—The various incidents in a war may be so disconnected as to form different transactions and the question whether they form parts of the same transaction or not must be judged on the facts of each case. In this case they formed parts of the same transaction.

TRIAL referred by L. H. ARNDT, Agency Additional Sessions Judge, Waltair, for confirmation of the sentence of death passed upon the said first accused in Case No. 10 of the Calendar for 1924, and appeals by accused 2 to 6 against the said order.

One Srirama Raju entered the Agency Tracts of Vizagapatam district in the guise of a sanyasi and formed a conspiracy to overthrow the Government. The rebels armed with guns, swords, etc., started their operations and between August 1922 and December 1923 attacked and plundered nine police stations, carried away a lot of ammunition, killed some police officers and destroyed telephone wires, etc. During the intervals between the various attacks the rebels camped in villages and made forced levies of supplies from the villagers. The accused, who were some of the rebels, were prosecuted before the Additional Sessions Judge, Agency Tracts, Waltair, and they were charged as follows, with having committed the offences between 22nd August 1922 and 18th December 1923 :—

1. That you, the above accused, did with others, at Chintapalli, Krishnadevipet, Rajavommangi, Addatigala, Rampa Chodavaram, Malkanagiri, Kondakamveru, and Paderu attack and loot or attempt to loot the police stations there and did, at Onjeri, Damanapalli, Rampa Chodavaram, Pedda Gadabapalem, Lingapuram, Kathiriloddi, Gudem, Darakonda, Kindalgundi, attack forces of the Crown, and did thereby wage war against the King-Emperor, committing offences punishable under section 121, Indian Penal Code, and within the cognizance of this Court of Session ;

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2. That you, the above accused, did, at the above places and within the above dates, with others, attempt to wage war against the King-Emperor, committing offences punishable under section 121, Indian Penal Code, and within the cognizance of this Court of Session ;

3. That you, among yourselves and with others, did conspire to wage war against the King-Emperor, committing an offence punishable under section 121-A, Indian Penal Code, and within the cognizance of this Court of Session ;

4. That you, with others, did, within the aforesaid dates, collect men, arms and ammunition, and thereby prepared to wage war against the King-Emperor, committing an offence punishable under section 122, Indian Penal Code, and within the cognizance of this Court of Session ;

5. That you, with others, did, in pursuance of your object of waging war or attempting to wage war on the King-Emperor, cause, in your attacks on the force of the Crown, the deaths of eight police officers including two British Officers and thereby committed an offence punishable under section 302, Indian Penal Code, and within the cognizance of this Court of Session ;

6. That you and others in your attacks on the police stations abovementioned did loot the stations of arms, ammunition, accoutrements and other property and did extract supplies of food and other articles by force or threats from villagers of various villages and that, as you used deadly weapons for the commission of those offences of dacoity, you committed offences punishable under section 397, Indian Penal Code, and within the cognizance of this Court of Session ;

7. That you, with others, formed yourselves into unlawful assemblies at various times and places with the common object, by force or show of criminal force, of overawing the Government of the Madras Presidency and public servants, that is, the officers of Government in those areas, in the exercise of their lawful power and to take possession of property, that is, the property public and private in the police stations and at other places where you and others attacked the forces of the Crown, and thereby committed offences punishable under sections 143, 147, and 148, Indian Penal Code, and within the cognizance of this Court of Session ;

8. That you, with others, did commit mischief by fire in that you burnt down on 31st May 1923 the Government rest-house at Koyyur and on 8th June 1923 Government sheds at Gudem, both

of which are ordinarily used as human dwellings, and thereby committed an offence punishable under section 436, Indian Penal Code, and within the cognizance of this Court of Session ;

And I hereby direct that you be tried by me on the said charges.

The accused were convicted by the Sessions Court and they preferred appeals to the High Court. The appeals were heard in the first instance by SPENCER, Offg. Chief Justice, and REILLY, J., and they differed on the question whether the various offences with which the accused were charged formed parts of the same transaction so as to make their joint trial legal—the OFFG. CHIEF JUSTICE holding that the trial was legal and REILLY, J., taking the contrary view. The appeal was posted before KRISHNAN, J., under section 429 of the Code of Criminal Procedure.

P. Markandayulu for the first appellant.

Public Prosecutor for the Crown.

JUDGMENT.

SPENCER, Offg. C.J.—The six appellants before us form the third batch of persons tried for complicity in the Vizagapatam-Godavari rebellion which broke out in August 1922. The Agency Additional Sessions Judge has convicted them all of offences punishable under sections 121, 121-A, 122, 143, 147, and 148, I.P.C., and he has convicted only the first and third appellants of an offence under section 397, and the rest of offences under section 395, Indian Penal Code, and has sentenced the first accused to death and the other five to transportation for life.

The first thing to be considered is whether the charge is in order both as regards the unrepresented appellants, accused 2 to 6, and as regards the first appellant, although his vakil has not raised the defence that the conviction of his client is bad for misjoinder; nor does it appear that misjoinder of charges was made the ground of any objection when the appeals of the batches already disposed of were heard. There are eight counts in the charge. Of the first two counts one consists of a charge for waging war and another of a charge for

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attempting to wage war, which all form parts of section 121 by the definition in the Code. It was unnecessary to have two counts for the same offence seeing that the dates and places are the same. Then the third count is that the accused conspired to wage war—an offence under section 121-A—and the fourth is that they collected arms and ammunition—an offence under section 122. It was unnecessary to have these counts in the charge as there was clear evidence that these men did much more than merely conspire and make preparations for war. The fifth charge relates to the murder of eight police officers. The accused have all been acquitted of this charge and it is unnecessary to consider it further. The sixth count that “you and others did loot the police stations abovementioned”—(of which there are eight) on dates not specified—and that you “did extract supplies of food and other articles by force or threats from the villagers of various villages,” on dates not specified, is too vague. Each looting of a village or police station should have been treated as a separate offence if it was intended to try any or all of the accused for dacoity apart from waging war. The convictions of the first and third accused under section 397—dacoity armed with a dangerous weapon—and of accused 2, 4, 5 and 6 under section 395 of dacoity, must be quashed, as the charges did not give them sufficient notice and particulars of what they had to meet: but the validity of the conviction under section 121 is not affected by the striking off of the convictions for other offences forming component parts of the offence of waging war, and the accused cannot be said to have been prejudiced in their defence on the charge for waging war, as the acts of dacoity were all merely some of a series of incidents which went to make up the continuing offence of waging war within the meaning of section 235 (3), Criminal Procedure Code.

The Judge has not passed separate sentences for each offence. The combined sentence of transportation for life imposed for the offence under section 121 cannot be reduced in the case of those accused against whom there is evidence of participation in that crime, as that sentence is the minimum prescribed by law under section 121.

It was decided by OLDFIELD and RAMESAM, JJ., in one of the appeals arising out of the Malabar rebellion, R.T. No. 80 of 1922, that the waging of war (or “adhering to the King’s enemies” as treason is sometimes described in England) is

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essentially a continuing offence, in which several incidents, which may in themselves be separate offences, may be comprised. I see no reason to think it is otherwise. Rebellion implies a state of being rather than the doing of any act, although for a conviction it is necessary to prove that some overt act was committed by the offender. Rebellions and wars continue until they are suppressed by capture or destruction of the rebel forces or by rebels laying down their arms and making their submission as subjects to their sovereign and receiving his pardon. What was held by the Privy Council in *Subrahmanya Ayyar v. King-Emperor*(1), to vitiate a trial was the joinder of more than three offences of bribery and extortion extending over 2½ years at one trial without separate charges for each offence as that was a direct contravention of sections 233 and 234, Criminal Procedure Code. When a series of acts are so connected by community of purpose and continuity of action as to form not only one transaction but a single offence, proximity of time between the performance of the various acts composing that offence not being the sole test of the unity of the transaction, section 235 authorizes persons accused of doing those acts to be charged and tried at one trial for them all—vide *Emperor v. Sherufalli*(2), *Emperor v. Datto Hunmant Shahapurkar*(3), which lay down the principle that intervals of time between the commission of a series of acts do not necessarily import want of continuity when the aims of those jointly tried have throughout been directed to one and the same objective, and *Choragudi Venkatadri v. Emperor*(4). *Subrahmanya Ayyar v. King-Emperor*(1) was not a case of misjoinder of persons. Section 232, Criminal Procedure Code (as amended), clause (d), authorizes the trial of more persons than one on one charge and at one trial if they are accused of different offences committed in the course of the same transaction. If an offence is a continuing one, I do not find any real difficulty in regarding it as a continuous transaction. In the course of committing a continuing offence like waging war there may be many minor incidents which of themselves constitute different offences. To take the example of another offence of a continuing nature, the offence of being a member of an unlawful assembly (section 143, I.P.C.), the members of it may commit several acts which amount

(1) (1902) I.L.R., 25 Mad., 61 (P.C.).

(2) (1903) I.L.R., 27 Bom., 135.

(3) (1906) I.L.R., 30 Bom., 49.

(4) (1910) I.L.R., 33 Mad., 502.

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of themselves to separate offences, and while section 149 provides that they are not responsible for offences committed by the general body before those individual persons join or after they leave the body, I have never heard it suggested that all the members cannot be tried at one trial for the main offence under section 143 as well as for those other offences which have been committed by any member in pursuance of the common object during the time when they were present in the assembly. To take another instance of a continuing offence—culpable homicide by starving a child to death by persons legally bound to maintain it illegally omitting to feed it—the acts or rather omissions might extend over a long period with occasional interruptions during which food might be given, closed by the culminating event of the child's death, and yet the whole would be one transaction with a single objective. It would be absurd to charge the guardians for withholding food from the child only on the day of its death when the cause of death was continuous and systematic starving. In the present case the matter is simplified by the fact that the accused are charged not merely for committing several offences in one transaction, but for the *same* offence, in which several other offences are combined, thus bringing the case within the scope of section 235 (3). Accused 4 and 6, according to the evidence, only took part in the second campaign; the first incident of which was the looting of Anantagiri village on 10th March 1923 and the last the attack on Paderu police station on 22nd September 1923. There is no evidence that accused 4 and 6 took part in the first campaign which lasted from August 1922 to November 1922. There was an interval between November 1922 and March 1923 during which no overt acts on the part of the rebels were reported. These two accused were only seen in the company of other rebels after the 1st May 1923. The fifth accused was first seen by P.Ws. 61 and 62 at Chintalapooddy on the 30th October 1922 upon which occasion constables were captured by the gang and Government rations looted. As the rebel gang led by Srirama Raju did not cease their operations or make their submission during the period in which these accused are charged with committing acts of waging war, I do not think that it was illegal to charge and try them simultaneously for the same offence of waging war under section 121, Indian Penal Code, with other members of the gang who were inspired by a common object of subverting the Government

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and destroying its forces, "offence" being defined in section 4 (1) (o), Criminal Procedure Code, as an act made punishable by law, and, "act" being defined in section 3 (2) of the General Clauses Act, as including a series of acts, so that an offence is really an act or series of acts made punishable by law. The charging of accused 1 and 2 with the attack on the police station at Paderu, which took place after these two accused had been arrested and kept in custody, and the charging of accused 4 to 6 with attacking Chintapalli and other police stations, which were looted before these men joined the rebel gang, were pieces of carelessness which should have been avoided; but I cannot hold that it vitiated their trial for waging war so long as there was evidence to prove that they took part in attacking other police stations and villages which were properly mentioned in the charges as acts of waging war. I think however that accused 4 and 5, who looted no police stations and fought in no engagements with the forces of the Crown, must have been prejudiced by not being informed in the charge what acts of theirs constituted waging war specifically, and what charges they had to meet, and I consider that the conviction of these two accused should be quashed and that they should be re-tried by the Additional Sessions Judge upon properly drawn up charges, having reference to the part they took in specified incidents within the dates mentioned in the charge under section 121.

The accused were all acquitted on the eighth count in the charge of mischief by fire by burning the Government rest-house at Koyyur and the sheds at Gudem. It is unnecessary to say more about that offence.

As regards the sixth accused the earliest incident about which there is any evidence of his participation in the rebellion is the attack on Paderu police station on the 22nd of September 1923, which occurred after the arrest of the first accused on the 18th September and the second accused on the 14th of September. As the continuance of the offence of waging war does not depend on the presence of particular rebels in the rebel band and as there is evidence that the gang continued under the leadership of Srirama Raju even after some of his adherents were killed and captured, I do not find the charge and trial of this accused along with other participators in the offence under section 121 to be illegal—vide section 239, clauses (a) and (d). If the leader, Srirama Raju, who was present throughout both

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the campaigns, had been on his trial along with these accused, could it be said that any of those who joined his following at a later stage of the rebellion, could not be tried along with those who deserted him at an earlier stage, seeing that all were charged with having committed the same main offence of waging war under his leadership at one time or another? I think not. Then on what principle, it may be asked, does Srirama Raju's absence from the dock alter the position of those who are present? I do not understand clause (a) of section 239 as applying only to offences of a continuing nature. Supposing two murders were committed in the course of one transaction and that A took part in both but B in the first only, A and B could be tried jointly for the same offence, viz., murder, but the charge would contain two counts against A and only one against B.

As regards the merits of the conviction, there is overwhelming evidence against the first accused that he took part in the attacks on the police stations of Chintapalli, Krishnadevipeta, Rajavommangi, Addatigala, Chodavaram, Annavaram and Malkanagiri, in the depositions of P.Ws. 6, 7, 9, 11, 36, 13, 43, 44, 49, 53, 54, 56, 71, 86 and of other acts of violence which are spoken to by prosecution witnesses 90, 91, 39, 41, 40, 48, 117, 59, 60, 72, 64, 82, 96, 100 and 65 and other witnesses. His name is mentioned in Exhibits S, XX, ZZ, GGG, UUU (2), TT (1), BBB (1), T (12), VVV, XXX, but not in Exhibits T, VV (1), SS (2), CCC and AAA. Of these witnesses some speak to the same occasion, but most of them to different occasions. The cumulative effect of this evidence is very great and leaves no room for doubt that the first accused committed the offence of waging war. P.Ws. 6, 7, 9, 36, 49, 56, 62, 63, 39 and others say that the first accused was a leader or *sirdar* under Srirama Raju and carried a gun (some say a '303 rifle) and posted guards. P.Ws. 23 and 24 say that he was among those who fired at the police at Onjeri ghat where a constable was killed. The schoolmaster of Gudem, P.W. 8, says that he was one of the leaders who persuaded people to join the rebels. There is not much evidence that he organized the rebellion, but there is a large amount of evidence that he took a leading part in it including the cutting of P.W. 90's ear. In his appeal petition and his statement to the Lower Court he pleaded that he remained with Srirama Raju under compulsion and that guards were sent to prevent him from running away. Several of the

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accused in this case have excused themselves on the plea that they were made to help the rebels. If all these pleas were true the band could not have held together for one day. As observed in the judgments disposing of the appeals of those previously convicted, the nature of the country made escape easy. It is impossible to believe that the leader of the rebellion had enough staunch followers to spare to guard those in his band who were unwilling to remain with him if so many wished to desert.

There can be no doubt of the guilt of the first accused. His conviction should in my opinion be confirmed and seeing that he was a ringleader among the rebels and probably was one of those who took life at Onjeri, if not at other places, the sentence of death imposed on him, I think, should also stand.

As regards accused 2, 3 and 6, we have been referred to the evidence connecting them with the offence which is tabulated at the end of the judgment of the lower Court. The second accused was seen by P.W. 9 and another witness carrying an ammunition box but he was also seen by P.W. 11 patrolling with a gun and a sword; so it appears that he was found competent and willing and so was promoted to a post of greater trust under the leader of the band. I find that there is ample evidence to convict all these accused of the offence of waging war. The sentence imposed on them is the minimum allowed by the Code. Their appeal should, in my opinion, be dismissed, but as my learned brother is of opinion that the conviction of accused 1, 2, 3, 4, 5 and 6 is bad, the case will be laid before a third Judge under section 429, Criminal Procedure Code.

REILLY, J.—With great respect I find myself unable to agree with my Lord in this matter. I regret this extremely, not only because I recognize that my Lord's opinion is likely to be of much more value than my own, but also because, if my view is adopted, it will involve throwing away the time and labour spent on this case in the Sessions Court for reasons not directly connected with the guilt or innocence of the accused.

2. Eight charges were framed against the six accused who are the appellants before us. On two of these charges all of them were acquitted. On the remaining six charges all of them were convicted, on charge 6 accused 1 and 3 being convicted of using deadly weapons in dacoity, punishable under section 397, Indian Penal Code, and the rest being convicted of dacoity punishable under section 395, Indian Penal Code.

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3. Charge 1 is that all the six accused waged war against the King-Emperor, an offence punishable under section 121, Indian Penal Code. Seventeen separate incidents, said to have occurred within dates more than 15 months apart, are mentioned in the charge, and at first sight it might appear that the Sessions Judge intended to charge the accused with that number of successive offences of waging war, which would offend against the rule that no one can be tried at one trial for more than three separate offences of the same kind nor even for three such offences if not committed within a year. But it was decided in Referred Trial No. 80 of 1922 that the offence of waging war, punishable under section 121, Indian Penal Code, is a continuing offence, and I am content to follow that decision. I agree that charge 1 is not illegal by reason of contravening section 234, Code of Criminal Procedure, by mentioning more than three offences spread over a period longer than a year.

4. But in my opinion there are other fatal defects in charge 1. The charge is to the effect that all the six accused between 22nd August 1922 and 18th December 1923 attacked and looted and attempted to loot eight specified police stations and attacked the forces of the Crown at nine specified places "and *did thereby wage war against the King-Emperor*, committing offences punishable under section 121, Indian Penal Code." No date is given for any of the 17 incidents mentioned. It is clear from the wording of the charge that the waging of war with which the accused are charged is in respect of the 17 incidents specified. Mr. Adam urges that, as waging war is a continuing offence, it would have been quite legal to charge the accused with waging war within certain dates and in a certain area without mentioning any particular incident. That may be so. But in this case particular incidents have been specified, and the accused have been informed by the charge that it is the accusation that they took part in those incidents which they have to meet. The incidents have not been mentioned in the charge as instances of their waging war or as illustrations of the way they did it: it is alleged against them that they took part in those incidents and thereby waged war. The prosecution have therefore to prove that the accused took part in those particular incidents or in some of them. If they fail to prove against any particular accused that he took part in any of those incidents, that accused must be acquitted on this charge. Evidence that he took part in other incidents of the rebellion might be used

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to corroborate evidence that he took part in these incidents or some of them but by itself cannot prove him guilty on the charge as framed. No evidence has been produced that accused 4 or accused 5 had anything to do with any of the 17 incidents mentioned in this charge. In my opinion accused 4 and 5 must therefore be acquitted on this charge. It may be possible to try them again for waging war by taking part in other incidents of which evidence has been given but which are not included in this charge; but with that we are not now concerned.

5. A less simple question is whether it was legal to try accused 6 with accused 1, 2 and 3 on charge 1. The evidence against accused 1 on this charge is that he took part in attacks on six police stations, the earliest being the attack on the Chintapalli station on 22nd August 1922 and the latest that on the Malkanagiri station on the 11th June 1923, and that he also took part in the attacks on the forces of the Crown at Onjeri and Damanapalli on 3rd September 1922 and 24th September 1922, respectively. The evidence against accused 2 is that he took part in the attacks on two police stations on 23rd August 1922 and 19th October 1922, respectively, and in the two attacks on the forces of the Crown at Onjeri and Damanapalli in September 1922. The evidence against accused 3 is that he took part in the attacks on three police stations between 23rd August 1922 and 11th June 1923 and in the attacks at Onjeri and Damanapalli in September 1923. There is also evidence that accused 1 was arrested on 18th September 1923 and accused 2 on 14th September 1923. The earliest and only incident mentioned in charge 1 in respect of which there is any evidence against accused 6 is the attack on Paderu police station on 22nd September 1923. That attack was more than three months after the latest of the 17 incidents mentioned in the charge in which according to the evidence accused 1 or accused 3 took part and 11 months after the latest of the incidents in which accused 2 took part. It was also after the dates on which accused 1 and 2 had been arrested and had disappeared from the scene. The finding of the Sessions Judge is that accused 6 only joined the rebels about 29th August 1923. One witness, P.W. 112, mentions that accused 6 was present when rice was extorted by some rebels at Bodatharampalem in April 1923. But apparently neither the prosecution nor the Judge relies on that evidence. There is no suggestion that the prosecution at any stage had evidence, which failed for any reason, that accused 1, 2, 3 or 6

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took part in any of the 17 incidents other than those I have mentioned in respect of them. We must take it that the prosecution case was that they took part only in those of the 17 incidents respectively. The question is, could accused 6 be tried legally for waging war at Paderu on 22nd September 1923 with accused 1 and 2, who by that date had been arrested and had disappeared from the scene, with accused 1 and 3, who were charged with committing other acts of war but none later than June 1923, and with accused 2, who was charged with none later than October 1922? I speak of accused 1 and 3 not being charged with any act later than June 1923, and accused 2 with none later than October 1922, because the mere inclusion in the charge framed by the Sessions Judge of allegations that accused 1, 2 and 3 took part in the attacks on Paderu and other stations, etc., which the prosecution had no intention of proving and knew in respect of Paderu station to be untrue so far as accused 1 and 2 are concerned, or of allegations that accused 6 took part in incidents earlier than the date when according to their case he joined the rebels, cannot help the prosecution. If the prosecution has evidence and sets out to prove that A, B and C has each committed a separate murder, their joint trial cannot be made legal by framing a charge that all of them committed all the three murders. The charge in a Sessions trial must be based on evidence given before the committing Magistrate. A misjoinder of persons cannot be escaped by deliberately making the charge wider than the evidence produced to support it in order to represent all the persons tried as accused of all the offences or incidents included, though there is no prospect nor intention of proving more than that each is guilty of some of them. It may be noticed in passing that apart from any legal defect in its charge 1 has been framed with so little care that it includes one attack on a police station and seven attacks on the forces of the Crown with which there is no evidence to connect any of the accused in this case. Remembering that waging war has been held to be a continuing offence, the utmost that charge 1 can be taken legally and effectively to allege against accused 1, 2, 3 and 6 is that accused 1 waged war from 22nd August 1922 to 11th June 1923, that accused 2 waged war from 23rd August 1922 to 19th October 1922, accused 3 from 23rd August 1922 to 11th June 1923, and accused 6 only on 22nd September 1923. When the dates are set out like that, it is certainly a very surprising charge.

6. I think it is clear—and I understand that to be also my Lord's view—that the trial of accused 6 on charge 1 with accused 1, 2 and 3 can be legal only if the attack on the police station at Paderu on 22nd September 1923 can be treated as part of the same transaction as that in which accused 1 and 3 were engaged in June 1923 and earlier and accused 2 on and before 19th October 1922, the date of the attack on the Rampa Chodavaram station, the last of the 17 incidents in which accused 2 is shown to have taken part—an incident which occurred ten months before accused 6 is shown to have joined the rebellion. These widely separated incidents can only be treated as parts of one transaction within the meaning of section 239, Code of Criminal Procedure, if the whole insurrection can be treated as one transaction in that sense. Is that a fair or reasonable interpretation of the word "transaction" as used in that section? If that interpretation is to be adopted, then 10 rebels might be tried together for 10 separate acts committed by them respectively at separate times and places over a period of many years if only they were all committed in furtherance of the same rebellion. In my opinion "transaction" as used in section 239, Code of Criminal Procedure, must mean something less wide than that. It has been suggested that, if waging war is a continuing offence and that offence may continue for a long period, then, so long as it continues and however many incidents it embraces, it must be one transaction within the meaning of the section. I must admit that at first sight that argument attracted me. But, with respect, an examination of the section, I think, shows that it is unsound. The first class of persons whom the section allows to be charged and tried together are "persons accused of the same offence committed in the course of the same transaction." There is something rather curious about those words. What is the meaning there of the words "in the course of the same transaction"? The provision relates, not to persons accused of the same kind of offence, but to persons accused of the same offence. Would it not have been enough to provide that persons accused of the same offence may be charged and tried together? What is the meaning of adding the qualification "committed in the course of the same transaction"? We cannot treat those words as meaningless or redundant—at least we are not at liberty to do so until we are satisfied that it is impossible to attach any significance to them. Now, if we apply this provision to

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non-continuing offences, that is, offences embracing only one incident, such as murder, we cannot reasonably speak of two persons being accused of the same murder committed in the course of the same transaction. If we do so, the words "committed in the course of the same transaction" are clearly redundant and add nothing to the meaning. But, if we apply the provision to a continuing offence, it is possible to give a meaning to those words. Applied to a continuing offence they will have a meaning if we read "committed in the course of the same transaction" as having a restrictive effect. A non-continuing offence is necessarily one transaction: a continuing offence may or may not be so: persons accused of the same continuing offence may be tried together so far as their offence is confined to one transaction. If the provision is interpreted in that way, it has an intelligible and practicable meaning. In my opinion it must be so interpreted. If that interpretation is correct, an offence cannot be treated as necessarily one transaction—merely because it is a continuing offence. On the contrary the section implies that a continuing offence may embrace more than one transaction, but, only so far as it is concerned with one transaction, can more persons than one be tried together for it. If we apply this to waging war, the section allows us to try several persons together for the same continuing offence of waging war within the limits of one transaction but not if the offence alleged covers more than one transaction. Under section 239 (d) several persons may be charged and tried together when accused of different offences committed in the course of the same transaction; but "transaction" there must have the same meaning as in section 239 (a).

7. We must return to the question whether an insurrection including many different incidents and extending over a long period can be regarded as one transaction within the meaning of section 239, Code of Criminal Procedure. I can find no reported case in which "transaction" has been given so wide a meaning. It can hardly be denied that in ordinary parlance no one would think of speaking of a long-continued insurrection as a transaction. Is there anything in the section or the connected sections of the Code to justify us in giving the word so extended a meaning? The general rule is laid down in section 233 of the Code—for every distinct offence there shall be a separate charge separately tried. The principle obviously is that the accused person shall have a simple allegation to meet

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and the Court a clear issue to try. But to the general rule certain exceptions are made. One person may be tried at one trial for three offences of the same kind committed within a year (section 234); one person may be tried at one trial for several offences forming parts of the same transaction (section 235); one person may be tried at one trial for several offences or for alternative offences if it is doubtful which of these offences the facts which can be proved will constitute (section 236); and lastly more persons than one may be tried together at the same trial for the same offence committed in the course of the same transaction, for three offences of the same kind committed by them jointly within a year, for different offences committed in the course of the same transaction, etc. (section 239). The object of introducing these exceptions to the general rule is to prevent unnecessary duplication of proceedings. On examination it will be seen that all these exceptions can be interpreted so as not to conflict with the general principle that the accused person should not be perplexed and the Court should not be confused by complicated or numerous or disconnected allegations. In interpreting these exceptions it must never be forgotten that they are exceptions to the general rule and therefore to be interpreted with strictness and, so far as they affect the defence of accused persons, with the utmost strictness. To my mind it is entirely wrong to approach the interpretation of the word "transaction" in section 235 or 239 with the idea of ascertaining how far etymologically it will extend, how far the thread of continuity implied in it can be stretched, how far we can strain its meaning without an obvious breakdown. In *Choragudi Venkatadri v. Emperor* (1), BENSON, J., remarked that the provisions of the Code regarding charges "are designed to simplify and define within reasonable limits the charges that may be tried at one and the same time and so avoid the embarrassment of the accused.* * * It is very desirable that Public Prosecutors and the Courts should give full effect to the spirit of the provisions of the Code, instead of straining them to cover doubtful cases." With those observations I respectfully agree. Can we consistently with the spirit of the Code stretch the ordinary meaning of the word "transaction" so as to make it embrace all the incidents of a long-continued rebellion spread over a wide area and extending

(1) (1910) I.L.R., 33 Mad., 502.

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over many months? This case itself I think illustrates the mischief of such an interpretation. At the trial, accused 6, an ignorant hillman, had to stand in the dock for more than a fortnight and listen to the examination of 96 witnesses before a word of evidence was given against him. Is it unlikely that at the end of that time he was bewildered and befogged about the case? It is clear that the Sessions Judge himself was confused by the complexity of the proceedings, as he fell into the remarkable error of convicting accused 4 and accused 5 on charge 1, though there is no evidence at all that they had anything to do with any of the incidents included in that charge. I am now concerned, however, not directly with any prejudice which the form of the charge may have caused to the accused, but with its legality. In my opinion the word "transaction" in sections 235 and 239 of the Code must not be interpreted in any special or artificial or conventional or technical way but as it is ordinarily used by men of education and common-sense. If you cannot speak of a series of events as a transaction in the ordinary sense in which that word is used, you cannot try a number of persons together in respect of those events by attributing a special and unusual meaning to the word in section 239 of the Code. Can we in any ordinary sense of the word say that accused 2, when he attacked the Rampa Chodavaram police station in October 1922, was engaged in the same transaction as accused 6 when he attacked the Paderu police station in September of the following year? To my mind it is impossible to do so. If that view is correct, the joint trial of accused 2 and accused 6 was illegal and void. Similarly the trial of accused 1 and accused 3 with accused 6 was illegal. There are somewhat similar difficulties about the trial of accused 1, 2 and 3 together; but it is unnecessary to discuss them. If the trial of accused 1, 2 and 3 with accused 6 was illegal, we cannot exclude accused 6 from consideration and leave the trial of accused 1, 2 and 3 to stand good.

8. In my opinion the convictions of accused 1, 2, 3 and 6 on charge 1 of waging war must be set aside and an order should be made for them to be retried for that offence either separately or, so far as there is evidence that they or any of them were jointly concerned in the incidents of waging war which were parts of one transaction, together.

9. Of the other charges on which the appellants have been convicted, charge 2 falls with charge 1. Charges 3, 4, 6 and

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7 without any specification of times and places are too vague to stand. In my opinion the convictions of all the accused on charges 2, 3, 4, 6 and 7 should be set aside and they should be acquitted on those charges, as it does not appear to be necessary to try them again for those offences.

These cases coming on for final hearing under section 429 of the Code of Criminal Procedure, the Court delivered the following :—

JUDGMENT.

This case has been referred to me under section 429, Criminal Procedure Code, because of a difference of opinion between the learned Judges who heard the appeals in the first instance. The learned OFFICIATING CHIEF JUSTICE was of opinion that the convictions and sentences of accused 1, 2, 3 and 6 should be confirmed and that the case against accused 4 and 5 should be retried; whereas my learned brother REILLY, J., who sat with him, was of opinion that the whole trial was vitiated as illegal and should be set aside; he directed that the 4th and 5th accused should be acquitted, and that accused 1, 2, 3 and 6 should be retried separately.

Both the learned Judges were agreed about certain minor charges framed against the accused. The main point on which they differed is on the question of the legality of the joint trial of all the accused chiefly on the first count in the charge. Under that count the accused were charged with the offence of waging war against the King-Emperor under section 121, I.P.C. The charge says,

"That you, the above accused (naming all six of them), did, with others, at eight places (named) attack and loot or attempt to loot the police stations there and did at other places (named) attack the forces of the Crown and did thereby wage war against the King-Emperor."

The learned vakil for the first appellant (first accused) urges that as it has been shown by the evidence in the case

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that the sixth accused joined the party waging war only long after the first and second accused had ceased to be members of that party as they had already been arrested, the trial of the sixth accused with the 1st and 2nd accused and others jointly was not justifiable by anything in the Criminal Procedure Code. This argument was rejected by the OFFICIATING CHIEF JUSTICE but has been accepted by my learned brother REILLY, J.

No doubt, as REILLY, J., points out, the fundamental rule under the Criminal Procedure Code is what is stated in section 233 that "for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately;" but the section itself mentions the exceptions to it and refers to sections 234, 235, 236 and 239. The learned Public Prosecutor contends that the joint trial of the six persons under section 121, I.P.C., is justified by section 239 (a).

There can be no doubt that there was a war being waged in the Rampa district and this case has arisen with reference to that war: it was started by one Srirama Raju who was the ring-leader of the rebels from August 1922 when the first attack on the Chintalapudi police station was made and continued for a long time thereafter. The question I have to decide is whether the six persons who have been tried together under the first count are not persons accused of the same offence committed in the course of the same transaction within the meaning of section 239 (a). There can be no doubt whatsoever that they are persons accused of the same offence because they were all charged under section 121, I.P.C., with waging the same war. Then the question is whether we can say that the offence was committed in the course of the same transaction so as to fall under section 239 (a).

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The question of the legality of a joint trial, in my opinion, really depends upon the accusation made and not upon the result of the trial; provided, of course, that the accusation is a real one and not a mere excuse for a joinder of charges which cannot be otherwise charged. It was so held in *Abdul Salim v. Emperor*(1), and I am prepared to follow it. It is not pretended here that there was any conscious attempt to join charges which could not otherwise be joined or that the charge as framed under count 1 was so framed for that purpose. The legality of the joint trial in this case has to be judged on the accusation and not on what was subsequently proved. The charge certainly as worded in count 1 puts all the six accused on the same footing as having committed all the various crimes mentioned in it in the course of the rebellion. The fact that it was afterwards shown that some two people among the six had by reason of their arrest ceased to be members of the party before a third man joined it, I do not think, will really affect the question at all.

The only question we have really to decide in the case is whether the various incidents mentioned in the charge were or were not parts of the same transaction. That the offence under section 121 of waging war is a continuing offence has been laid down in this Court in Referred Trial No. 80 of 1922. It was followed by another Bench of this Court in Criminal Appeal No. 1891 of 1922 and I am prepared to follow that view. The waging of a war is clearly a continuing offence, it begins with the first act of war and goes on till the war is ended in some manner as pointed out by the learned OFFICIATING CHIEF JUSTICE. It may be, as REILLY, J., remarks, that the various incidents in a war may be so disconnected as to

(1) (1922) I.L.R., 49 Cal., 573.

form different transactions. The question whether they form parts of the same transaction or must necessarily be held to be different transactions has to be judged, in my view, on the facts of each case.

In the present case there is no reason to suppose that the rebellion which was started by Srirama Raju and continuously carried on by him and his followers for a considerable time was anything but a single transaction. It was carried on throughout under his leadership and he and his followers were animated throughout with the same motive of overthrowing the British Government. There was both continuity of action and unity of purpose regarding the various acts charged against the accused. No doubt several places were attacked and looted and more than one engagement were fought in which some deaths took place; but I consider that we are justified in holding on the facts that the whole thing was one and the same transaction. The point was not taken in the lower Court and has therefore not been fully thrashed out. But I agree with the learned OFFICIATING CHIEF JUSTICE that the joint trial of the accused for the offence under section 121, I.P.C., is not illegal.

The expression "the same transaction" has been tried to be explained in several cases which have been brought to my notice. After all it cannot be said that any very satisfactory definition of the words has been given. Each case must be judged in my opinion on the facts of that particular case. Generally speaking I am prepared to follow the observations of the learned Judges in *Choragudi Venkatadri v. Emperor*(1), in which the effect of the previous decisions has also been considered, as to the meaning of the expression. ABDUR RAHIM, J., says that the usual tests applied to decide whether

(1) (1910) I.L.R., 33 Mad., 502.

different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. It is not necessary that all of them should be present to make the several incidents parts of the same transaction. Unity of place and proximity of time are not important tests at all; but the main test, so far as I can see, is the unity of purpose. Continuity of action goes with unity of purpose. If the various acts are done in pursuance of a particular end in view and as accessory thereto, they may, as ABDUR RAHIM, J., observes, be treated as parts of the same transaction. In this case there was clearly unity of purpose and continuity of action in starting and carrying on the war. All the accused were throughout acting with the same purpose of subverting the Government in joining the rebellion. In this connexion it was urged that as there was a lull in the operations for three months, as stated by the learned Sessions Judge in paragraph 8 of his judgment, it broke up the war into two campaigns and there were therefore at least two transactions. I do not think the argument is right as in this case it cannot be said that at the time of the lull the rebels had abandoned their idea of fighting against the Government. They were only waiting for a more favourable opportunity of attacking the Government forces. I am, therefore, of opinion that as a question of fact, various incidents mentioned in count 1 of the charge were parts of the same transaction and that the trial of these accused together was justified under section 239 (a).

It was next contended that a single trial under the 6th count of the charge also rendered it illegal even if the trial under the 1st count was proper. It was urged by the learned vakil for the 1st appellant that the charge included more than three offences of the same kind

committed in the course of a year as it charges the accused with eight separate dacoities ; and therefore the trial was bad as section 234, Criminal Procedure Code, justifies only a joinder of three such charges at one trial. If there were eight separate and independent charges of dacoity against the six accused, no doubt the objection would be a strong one ; but the learned Public Prosecutor points out that these charges are not separate but are made for offences which had been committed in the course of one and the same transaction, namely, the waging of the war. That seems to be so as the various dacoities were only incidents in the course of the war ; if the count of waging war failed, count 6 also would fail. Count 6 begins by saying " That you and others in your attacks on the police stations abovementioned did loot the stations of arms," etc., the words abovementioned referring to the first count. I think it is not straining its language too much to hold that the charge meant to accuse six persons of dacoity as having been committed in the course of the war and therefore the joinder of more than three charges would be justified under section 239 (d). It may be mentioned that the accused admitted that they did take part in the *fituri* rebellion and merely pleaded compulsion as their excuse. They were represented by a vakil, and no objection was taken to the frame of any of the charges or to the joint trial in the lower Court. There is really no foundation for the suggestion that the accused were embarrassed or in any way prejudiced in their defence. They themselves never said so. However, if the trial was illegal, no doubt, the question of prejudice will not arise. I, however, agree with the learned OFFICIATING CHIEF JUSTICE, for the reasons above given, in holding that the conviction cannot be set aside on the ground that the trial was illegal.

On the merits the case of accused 1, 2, 3 and 6 has been hardly argued before me, for it is clearly proved against them on the evidence. In fact, as I have stated already, it is not denied that these accused took part in the war. I confirm the conviction of accused 1, 2, 3 and 6 under section 121, I.P.C. As regards the sentence on the first accused, I shall deal with it presently. In the view I take it is unnecessary to consider their convictions under the other sections charged.

As regards the fourth and fifth accused, they are not shown to have looted any of the police stations mentioned in count 1 or committed any of the dacoities charged or to have fought in any engagement with the forces of the Crown. It is on this ground that REILLY, J., has directed their acquittal. It is, however, shown by the learned Public Prosecutor that there is a considerable body of evidence against them as set out by the learned Sessions Judge in the schedule to his judgment to show that they did take part in waging war though not exactly in the manner set out in count 1. In these circumstances, the proper order is, in my opinion, to quash the conviction of these two accused, because they would certainly have been prejudiced by the way in which the charge was framed under count 1, and to direct them to be retried by the Agency Additional Sessions Judge upon properly drawn up charges under section 121, I.P.C.

As regards the sentence on the first accused, I am not satisfied that a differentiation should be made between him and the other accused who took part in the rebellion, who are before me. The learned CHIEF JUSTICE confirms the sentence of death passed on him on the ground that he was probably one of those " who took

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life at Onjeri," but there does not seem to be clear evidence of it; he was acquitted of the charge of murder of the police officers. I would, therefore, alter his sentence and impose upon him the same sentence as the other accused have received, viz., transportation for life. With the alterations above mentioned, the appeals are dismissed.

D.A.B.

APPELLATE CIVIL.

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

1925,
April 8.

JANAKIRAM CHETTY (FIFTH DEFENDANT), APPELLANT,

v.

NAGAMONY MUDALIAR (PLAINTIFF), RESPONDENT.*

Hindu Law—Joint family—Possession of joint property, whether necessary to constitute a joint family—Bequest to divided brother and his sons who were members of undivided family—Nature of estate taken by donees, whether as joint tenants or tenants-in-common—Will, not express as to nature of estate given—Presumption—Gift to donor's son and grandsons—Gift to strangers or persons who might inherit the property as obstructed heritage on intestacy—Distinction as to presumption in such cases.

Under the Hindu Law, possession of joint family property is not a necessary requisite for the constitution of a joint family.

Where a bequest was made by a Hindu to his divided brother and his sons, who were at the time members of a joint undivided family, but the will did not expressly indicate that the donees were to take the property as joint tenants, the donees should be deemed to take the property as tenants-in-common.

* Original Side Appeal No. 38 of 1924.

Lal Ram Singh v. Deputy Commissioner of Pertabgarh, (1923) I.L.R., 45 All., 596 (P.C.), referred to; *Nagalingam Pillai v. Ramachandra Tevar*, (1901) I.L.R., 24 Mad., 429, distinguished; *Rewan Persad v. Mussumat Radha Beebi*, (1846) 4 M.I.A., 137, and *Jogeswar Narain Deo v. Ram Chandra Dutt*, (1896) I.L.R., 23 Calc., 670 (P.C.); 23 I.A., 37, applied.

Per KUMARASWAMI SASTRI, J.—Where the donees are the sons and grandsons of the testator and would succeed to the property of the latter in the absence of any testamentary disposition and take the property as ancestral property, the presumption may be drawn, where the will is silent as to the nature of the estate conferred, that the donees took it as unobstructed heritage with the same incidents as would follow if there was no will. But where the donees, though members of a joint family, are not related to the testator, or though related to him would, in the absence of any will, either immediately or at a later stage, take the property as obstructed heritage and only as tenants-in-common, there is no reason for applying the presumption that the testator intended that the donees should take it as joint-tenants.

Per KRISHNAN, J.—If property is given in terms expressly to a joint Hindu family, the family would take it with all the incidents of ancestral or joint family property, and it would not matter who made the gift; if the gift was to the members of it individually, they would take it in severalty.

APPEAL from the judgment of Mr. Justice DEVADOSS in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 166 of 1922.

One Kandasami Mudali, who was the divided paternal uncle of the plaintiff, left a will, dated 25th October 1905, bequeathing some property to the plaintiff's father, Kadirvelu, and his five sons including the plaintiff. The plaintiff's father and his sons were members of an undivided family. The plaintiff's father and his major sons sold the properties obtained under the will to several persons to discharge certain debts due by the plaintiff's father and his major sons. The plaintiff and another son were minors at the time of the alienations, and their father acted as their guardian in effecting the sales. Subsequently the

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plaintiff's father and his major sons became insolvents in 1918 and 1919, and the Official Assignee sold some of the properties in insolvency proceedings. The plaintiff, within three years of his attaining majority, brought this suit to recover his one-sixth share in the properties obtained under the will of his paternal uncle, some of which had been sold by his father and major brothers and others sold by the Official Assignee as already stated. The plaintiff contended that he was a tenant-in-common with his father and brothers, of the bequeathed properties, that the sales and the debts for which they were sold were not binding on his share of the properties. The learned trial Judge (DEVADOSS, J.) held that the plaintiff was a tenant-in-common in respect of the bequeathed properties, that the plaintiff's father was a guardian of the plaintiff, that there was no proof that the alienations were for such necessary purposes as would bind the minors, and accordingly decreed partition and recovery of an one-sixth share in favour of the plaintiff, and also directed that the plaintiff should pay his share of the value of improvements made by some of the alienees who were held to be *bona fide* transferees. With regard to another contention of the plaintiff that there was no joint family property in the possession of his father and his sons when the bequest was made to them, and that there could be no joint family unless there was joint family property, the learned Judge found that there was no joint family property owned by plaintiff's father and his sons and that consequently they could not form a joint family. The fifth defendant preferred this appeal.

A. Krishnaswami Ayyar (with him *K. Raja Ayyar* and *K. G. Srinivasa Ayyar*) for appellant.

K. Krishnama Achariyar and *K. M. Bhashyam Ayyangar* for respondent.

JUDGMENT.

KUMARASWAMI SASTRI, J.—The only question raised in these appeals is whether the respondent who is a legatee under the will of one O. Kandasami Mudaliar took the property bequeathed under the will as a tenant-in-common with his father and brothers or as a joint-tenant.

The will which has been probated is filed as Exhibit F. The testator Kandasami Mudaliar died leaving a widow, three sons and two daughters. He also left two brothers one of whom was Kadirvelu Mudaliar (father of the respondent) who was appointed executor. There was another brother Krishnaswami Mudaliar who had two sons. So far as the respondent is concerned, the terms of the will concerning him are very short. Paragraph 4 of the will says

"Items 4, 5, 6, 7, 8 and 9 under assets in paragraph 1 above, I bequeath and leave to my brother G. Kadirvelu Mudaliar and his sons."

Paragraph 5 goes on to state that in consideration of the help given by Kadirvelu Mudaliar as regards the business carried on by the testator, he bequeaths to Kadirvelu Mudaliar and his two sons a half share in the stationery business carried on in the Minerva Press and Thompson and Company, that the stationery business should be conducted by Thompson and Company, that the profits arising from the same, as per accounts separately and correctly maintained, should be divided equally every year before the end of March between his sons on the one part and his brother and his sons on the other. In case his sons do not agree with his brother and his sons, the stationery and stock in trade were to be valued and the testator's sons were to give Kadirvelu and his sons one-half of the estimated value.

It appears from the evidence, and it is not disputed before us, that the testator and his brothers were

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members of a divided family and that the brothers and their children were living together as members of an undivided family, though it is contended by the respondent's vakil that there was no joint family property owned by Kadirvelu and his sons who were the legatees aforesaid. It is also clear from the evidence that Kadirvelu and his sons would not in the ordinary course succeed to the properties of the testator as the testator left a widow, sons and daughters and that Kadirvelu and his sons were at best only remote heirs.

So far as the terms of the will go, there is very little to indicate that Kadirvelu and his sons were to take the property as members of a joint family with rights of survivorship. It is argued by the vakil for the appellant that the fact that the testator gives the property to Kadirvelu and his sons without naming his sons and the fact that in paragraph 10 of the will the gift to the daughters provides for a sale of the house and the division of the sale-proceeds equally among the daughters, if necessary, indicate that the gift to Kadirvelu and his sons was a gift to them as members of a joint family. It is argued by the respondent's vakil that the fact that paragraph 3 of the will which gives certain items to the sons of the testator expressly states that the property shall be the common property of his sons whereas the next paragraph which contains a gift to Kadirvelu and his sons does not make any such statement as to the property being common property shows that the testator's intention was the other way. It is also stated that the clause as regards the daughters in paragraph 10 of the will was so worded because one of the daughters was omitted and so it was necessary to mention the names and that as the property was a house which could not be divided equally, provision had to be made for the distribution of the sale-proceeds. If we had to depend

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solely on the will and look to its terms for a construction of the estate which Kadirvelu and his sons took, I do not think it can be said that there was an intention displayed by the testator in express language to indicate that Kadirvelu and his sons took the property as members of a joint family with all the rights and obligations arising therefrom. Some reliance was placed by the vakil for the respondent on the fact that Kadirvelu, who was executor and trustee under the will, shortly after the will, executed conveyances to the various legatees including himself and his sons and that the terms of these conveyances indicate that the donees took the property as tenants-in-common and not as joint-tenants.

It was argued that even assuming that the intention of the testator was that the gift was to be taken by them as members of a joint family, the act of the executor in conveying the estate to the various legatees as tenants-in-common was sufficient to impress the legacy with that character whatever may have been the intention of the testator. This question was not raised in the pleadings nor was it put in issue and as pointed out by the vakil for the appellants there are subsequent documents which show the dealings with the property by the adult members of the joint family and I do not think this aspect of the question can be raised for the first time in appeal as it is a mixed question of law and fact as to how the property was treated after the death of the testator.

Another question which was raised before the learned trial Judge was whether, if Kadirvelu and his sons had no joint family properties at the date of the gift, it can be said that they are members of a joint undivided Hindu family so as to call in aid the presumption that the gift to them was as joint-tenants. The argument that found favour with the trial Judge was that if there was no joint family property in existence there could be

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no joint family. In cases where persons live together and are joint in food and worship, it is difficult to conceive of their possessing no property not even the ordinary household articles which they would enjoy in common. There is nothing in Hindu Law which states that the properties should be immovable properties or that there should be any minimum value which is required to constitute a joint family. It is therefore very difficult to say of any persons that live together, unless they are a number of ascetics owning no properties at all in the world, that there is no property in common of any sort or kind. Nor is there anything in Hindu Law which says that possession of property is a necessary requisite for the constitution of a joint family. It is no doubt true that so far as Courts are concerned, the affairs of a joint family can come before a court only where property is involved, but that is due to Civil Courts not taking cognizance of disputes unless they are of a civil nature and such disputes can hardly arise where there is no property worth the name which the joint family possesses. Supposing that a family is joint and possesses joint property, all of which is either destroyed by fire or flood or is stolen or alienated, can it be said that the moment this happens the family becomes a divided family, and does it become joint family again if properties are again acquired by the members? I think it will lead to strange consequences if such a doctrine was upheld. I am not prepared to assent to the broad view that the possession of property is a necessary element in determining whether persons are joint or separate. A joint family is composed of persons who live together and who are joint in food and worship and the possession of property is not a condition precedent to the establishment of their status.

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I do not think that the question whether the donees had or had not joint or joint family properties has any bearing on the construction of the will.

In this state of things we have to fall back upon the presumption that arises in cases of gifts of this kind, viz., gifts to persons who constitute a joint family.

In dealing with this class of cases I think that a difference should be made between cases where gifts to persons who form a joint family are made by persons to whom they would succeed according to the law of intestate succession if no will was made, for example, gifts by a father to his children and by a husband who dies without issue to his wife or daughter and cases where gifts are made by will by persons to whom the donees would not inherit and who could have no interest in the properties on the death of the testator but for the will. In the former class of cases the authorities in Madras show that a presumption may be drawn that the donees were intended to take the estate as joint-tenants but I do not think that in the latter class of cases there is any ground or necessity for drawing such a presumption. There is a conflict of opinion between the various High Courts even as regards cases where a father bequeaths property to his sons who are members of an undivided family. It is unnecessary to refer to the various decisions of the various High Courts as their Lordships of the Privy Council in *Lal Ram Singh v. Deputy Commissioner of Partabgarh*(1) have summarized the authorities. Their Lordships observe as follows:—

“It appears that there has been great diversity of opinion in the High Courts in India as to the effect in a Mitakshara family of a bequest, made by a father of property which in the father's hands was self-acquired, to his son. In Calcutta, in 1863, the point first arose in the case of *Muddun Gopal v. Ram Buksh*(2)

(1) (1923) I.L.R., 45 All., 596 (P.C.).

(2) (1866) 6 W.R., 71.

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when it was held that such property would be ancestral, and this has been followed in the later case of *Hazari Mall Babu v. Abaninath Adhurjya*(1), decided in 1912. In Madras, upon the whole, the view seems to be that the father can determine whether the property, which he has so bequeathed, shall be ancestral or self-acquired on the principle of *cujus est dare ejus est disponere*, but that unless he expresses his wish that it should be deemed self-acquired it is ancestral. See *Tara Chand v. Reeb Ram*(2), and compare it with *Nagalingam Pillai v. Ramachandra Tevar*(3), and other cases. In Bombay, on the other hand, the principle of intention seems to have been accepted if it makes the property ancestral, but if there be no expression of intention it is deemed self-acquired. See *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy*(4) and *Nanabhai Ganpatrav Dhairyavan v. Achratbai*(5). At Allahabad the decision was that such property is self-acquired. See *Parsotam Rao Tantia v. Janki Bai*(6), decided in 1907. Finally in Oudh, in the case of *Rameshar v. Musammatt Rukmin*(7), decided in 1909, after a review of all the cases, it was held that, where self-acquired property is bequeathed to sons, in the absence of language clearly indicating the testator's intention that the property should be held by the sons subject to the incident of survivorship, it should be presumed that each son takes an interest which passes to his heirs at his death. *

* But their Lordships deem it unnecessary to pronounce upon these points. It may be that some day this Board will have to decide between the conflicting decisions of the Indian High Courts, and it may be that when this time comes, this Board will prefer to go back to the original text of the Mitakshara and put its own construction upon that text. It is not necessary to do so in this case."

In *Nagalingam Pillai v. Ramachandra Tevar*(3), which is the leading case on the subject in Madras, the will was by a Hindu father who was possessed of self-acquired property and the disposition was in favour of his sons. SHEPARD, J., after stating that the father might have bequeathed the property to a stranger and that his sons

(1) (1912) 17 C.W.N., 280.

(3) (1901) I.L.R., 24 Mad., 429.

(6) (1888) I.L.R., 12 Bom., 122.

(7) (1911) 14 Oudh Cases, 244.

(2) (1866) 3 M.H.C.R., 50.

(4) (1886) I.L.R., 10 Bom., 528.

(6) (1907) I.L.R., 29 All., 354.

could not have called the dispositions in question observed,

"As the father is at liberty to make any disposition he pleases or to leave his self-acquired property to descend as ancestral property, so when making any disposition in favour of his son, he is at liberty to preserve for the property the quality of ancestral property. Whether in any given case the property was intended to pass to the son as ancestral property, or as self-acquired property, must be a question of intention turning on the construction of the instrument of gift. Following the principle laid down in *Mahomed Shumsool v. Shewukram*(1), I think that if there are no words indicating a contrary intention, the natural inference should be that the father intended his sons to take his property as their ancestral estate."

Yethirajulu Naidu v. Mukunthu Naidu(2) is also a case where a father bequeathed property to his sons. SUBRAMANIA AYYAR, J., at page 373 observes as follows:—

"The remaining point for consideration in connexion with this house is whether the sons took it as tenants-in-common as contended on behalf of the 4th defendant. The decision of the Judicial Committee in *Jogeswar Narain Deo v. Ram Chandra Dutt*(3) points out that the principle of joint tenancy as obtaining in England is quite foreign to the Hindu Law and that, when property is gifted to more than one, in the absence of anything in the grant to the contrary, the presumption is that the donees take as tenants-in-common. But as implied in that decision itself joint ownership of another description is of course not only not foreign to the Hindu system, but quite familiar to it, viz., that special kind of which the joint holding by the members of an undivided Hindu family is the type. And in cases like the present, the question for determination is but one of intention to be ascertained with reference to the terms of the particular will. If the grant is to persons who are incapable of forming a Hindu joint family, they can of course take only as tenants-in-common. If, on the contrary, the grant is to persons who constitute such a family, even then it may be that the *prima facie* view is that they take in severalty and that those who argue in favour of the opposite construction have to

(1) (1874) 2 I.A., 7.

(2) (1905) I.L.R., 28 Mad., 363.

(3) (1896) I.L.R., 23 Oudh., 670 (P.C.); 23 I.A., 37.

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show some clear foundation for it in the terms of the will. Of course, the donees here, the sons, were persons who could be, and were, members of a joint family."

Venkatramiah Pantulu v. Subramaniam Pillai(1) was a case where the will was by a father giving property to his sons. *Indoji Githaji v. Kothapalli Rama Charlu*(2) was also a case of a Hindu father bequeathing his self-acquired property to his sons by will and ABDUR RAHIM and SPENCER, J.J., referred to *Nagalingam Pillai v. Ramachandra Tevar*(3) with approval. In *Rajah of Ramnad v. Sundara Pandiaswami Thever*(4) SESHAGIRI AYYAR, J., considered the case where property was given to a son by a father and observed :

"In my view the fact that the defendant took the estate as a gift from his father will not take away the liability which would have devolved on him if he had succeeded to the property as son and heir. As pointed out in *Nagalingam Pillai v. Ramachandra Tevar*(3), where property is given by will to a person who would otherwise be entitled to it as heir, the character of the property is not changed. The same principle should be extended to transfer *inter vivos*."

In fact it was conceded in the course of the arguments that all the Madras cases with the exception of the case *Mahalakshmi Amma v. Nagappaya*(5) are cases where the gifts are by a father to his sons. *Mahalakshmi Amma v. Nagappaya*(5) was no doubt a case where the gift was by a person to whom the donees would not be heirs in the ordinary course of events; but the judgment proceeds on the ground that the terms of the will indicate that the donees were intended to take the gift as members of a joint family, the circumstance being that the adult member was to manage the properties.

As regards cases where the donees, though forming members of a joint family, would not succeed in the

(1) (1914) 16 M.L.T., 489.

(3) (1901) I.L.R., 24 Mad., 429.

(2) (1919) 10 L.W., 498.

(4) (1914) 27 M.L.J., 694.

(5) (1921) 62 I.C., 814.

ordinary course, I see no reason to extend the same principle. I can find nothing in the authorities which state that the mere fact that a gift was to persons who formed the members of an undivided family by a person to whom they would not succeed on intestacy or by a stranger, without more, necessarily implies that the donees were intended to take the gift with all the incidents of joint family property, because they are members of a joint family—especially as members of a joint family can and often do own separate or self-acquired property. It is a well-settled rule of Hindu Law that in cases of obstructed inheritance a male succeeding takes the property as a tenant-in-common and not as a joint-tenant. If, as I take it in *Nagalingam Pillai v. Ramachandra Tevar*(1) the *ratio decidendi* is that because but for the will the donee would have taken it as ancestral property, it is therefore a reasonable presumption to draw that where a testator gives property to such a person without in terms indicating his intention he intended it to be taken in the same character as he would have taken but for the disposition, this would not apply to cases where the donees would succeed, if there was an intestacy, as tenants-in-common, or in cases where they would not be even reversioners to the estate but strangers. There is no reason for it. In *Mahomed Shumsool v. Shewkuram*(2), their Lordships of the Privy Council remark that it may be assumed that a Hindu knows as a general rule at all events women do not take absolute estate of inheritance which they are entitled to alienate, and that, in construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the disposal of property. In cases of

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(1) (1901) I.L.R., 24 Mad., 429.

(2) (1874) 2 I.A., 7.

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persons who, like the respondent, his father and brothers in the present case, would, if they succeed eventually, take as tenants-in-common under Hindu Law, there is no reason to suppose that the testator, knowing this fact, intended them to take as joint-tenants, it is more reasonable to presume that he wanted them to take the ordinary estate they would have taken if they succeeded on intestacy, and to require express words if the contrary was intended by the testator. There is, in my opinion, little reason to apply the observations of the Privy Council to cases of bequest to persons who would not take the estate as joint-tenants if they succeeded on intestacy—and much less to persons who would not be heirs in any event. In *Rewun Persad v. Mussumat Radha Beebi*(1) the testator gave his widow a life estate in all his property and after her decease he gave one-half to his brother and his sons. It was held that the sons took a vested interest in the property as tenants-in-common and not as joint-tenants. The facts of this case show that at the date of the death of the testator the brother and his sons to whom one-half was given were members of an undivided family and that the division was only afterwards, and their Lordships of the Privy Council observed :

“The testator after the death of his widow, gives the property to his brother Beekhary Das. After his death it becomes divisible into two parts. We apprehend that they would take as tenants-in-common ; in fact, that they had each of them a vested interest in one-fourth share not to come into actual enjoyment till the death of the widow.”

It is difficult to distinguish the facts of that case from those of the present one with the exception that the sons were named by the testator in *Rewun Persad v. Mussumat Radha Beebi*(1), but in the present case the gift was

(1) (1846) 4 M.L.A., 137.

to the father and his sons, the sons not being named ; but I do not think that makes any difference. In *Karuppai Nachiar v. Sankaranarayanan Chetty, etc.*(1), Sir ARNOLD WHITE, C.J., and SUBRAHMANYA AYYAR and BHASHYAM AYYANGAR, JJ., who constituted the Full Bench observed at page 305 :

“It would be revolutionary to hold that all property which comes to two or more persons who happen to be members of an undivided family is taken by them with benefit of survivorship, and there is no warrant whatever in the Mitakshara for such a general proposition. It has been held in more cases than one that the property which comes to members of an undivided family by devise or gift is not taken by them with benefit of survivorship.”

and after referring to the decision of their Lordships of the Privy Council in *Venkayamma Garu v. Venkataramanayamma Bahadur Garu*(2) they observed :

“But their Lordships have abstained from laying down that, as a universal rule, a heritage which devolves upon co-heirs who happen to be all or some of the members of an undivided family under the Mitakshara, is taken by them with benefit of survivorship.”

Reference has been made by Mr. Alladi Krishnaswami Ayyar to *Chakkra Kannan v. Kunhi Pokker*(3), which was a case of gift by a person to his wife and children following the Marumakkatayam Law and it was held that the donees took the property with the incidents of tarwad property. Here again it is a case where the gift is by a father to his wife and children and even though there was no marriage in the strict sense of the term in Malabar the same intention can be assumed where a father gives property to his wife and children as was assumed in *Nagalingam Pillai v. Ramachandra Tevar*(4). Moreover, it would be unsafe to apply to a joint family under the Mitakshara the same principle as would apply to

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(1) (1904) I.L.R., 27 Mad., 300 (F.B.).

(2) (1902) I.L.R., 25 Mad., 673 (P.C.). (3) (1916) I.L.R., 39 Mad., 317 (F.B.).

(4) (1901) I.L.R., 24 Mad., 429.

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tarwads in Malabar where partition is, except by consent of all parties, impossible.

The view I take is that in cases where the donees are the sons and grandsons and would succeed to the property of the testator in the absence of any testamentary disposition and take the property as ancestral property, the presumption may be drawn, where the will is silent as to the nature of the estate conferred, that they would take it as unobstructed heritage with the same incidents as would follow if there was no will. But where the donees, though members of a joint undivided family, are not related to the testator or, though related to him, would in the absence of any will either immediately or at a later stage take the property as obstructed heritage and only as tenants-in-common, there is no reason for applying the presumption that the testator by devising the property to them intended that there should be a joint tenancy. As pointed out by their Lordships of the Privy Council in *Jogeswar Narain Deo v. Ram Chandra Dutt*(1), which overrules the decision in *Vyadinada v. Nagammal*(2), the principle of joint tenancy is quite foreign to Hindu Law and that the ordinary rule is that where property is given to two or more persons they take it as tenants-in-common. It is no doubt true, as pointed by SUBRAHMANYA AYYAR, J., in *Yethirajulu Naidu v. Mukunthu Naidu*(3), gifts may be made to a joint family but I think that unless the gifts are made in such terms as would clearly indicate that the donees should take them as joint family members with the rights of survivorship, the mere fact that the donees are members of a joint family ought not to determine that they take it with benefits of survivorship and with all the liabilities of properties which are joint family properties.

(1) (1896) I.L.R., 23 Cal., 670 (P.C.); 23 I.A., 37.
(2) (1888) I.L.R., 11 Mad., 258. (3) (1905) I.L.R., 23 Mad., 363.

I think the decision of the learned trial Judge is correct and would dismiss the appeals with costs.

KRISHNAN, J.—The point for decision in these appeals is what estate did plaintiff and his brothers and his father Kathirvelu Mudaliar take in the suit properties under the will of his father's divided brother Kandasami Mudaliar, Exhibit F,—was it a joint estate with incidents of joint family property attached to it or did they take each an one-sixth share separately as tenants-in-common?

The decision turns on the words of the will. The will says in paragraph 4 “Items Nos. 4, 5, 6, 7, 8 and 9 under assets in paragraph 1 above, I bequeath and leave to my brother O. Kathirvelu Mudaliar and his sons.” It is not denied that under this clause the five sons and their father are joint legatees of the properties mentioned, some of which are the suit properties; it is not argued that the words “and his sons” are mere words of purchase. As the testator was dealing with his self-acquisition it is clear that it was open to him to give the properties to Kathirvelu and his sons as joint family property just as it was open to him to give them separate shares in the property. The question is what did he do in this case.

A good deal of argument was addressed to us as to what the proper presumption to be drawn is in such a case. It has been held in Madras that where a father gives his self-acquisitions to his sons by a will the proper presumption is that he gave them a joint estate with the incidents of joint family property unless the contrary is clear from the words of the will or otherwise. This was so laid down in Nagalingam Pillai's case in I.L.R., 24 Mad., 429, and that view has since been followed in this Court. The same view is taken in Calcutta but in Bombay and Allahabad the presumption is held to be in favour of the view that the sons take such property as

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self-acquired property. This conflict of opinion was brought to the notice of the Privy Council in the recent case of *Lal Ram Singh v. Deputy Commissioner of Partabgarh*(1) but while their Lordships set out what they considered the views of the different High Courts to be on page 604, they decided it unnecessary to pronounce on the point. We must therefore follow the Madras view on the point. The present case however is not on all fours with the 24 Mad. case as here we have a bequest by a Hindu to his divided brother and his sons and not one by a Hindu father to his sons. The Privy Council point out in page 605 that

"the principle upon which it is contended that such property (that is property bequeathed by the father to his sons) should be deemed ancestral is that the son is only getting by his father's will that which, but for the will, he would have received by descent according to the Mitakshara Law."

Now this principle obviously cannot apply to the bequest by the divided brother as the legatees will not get the properties by inheritance except for the bequest. The remote contingency of their taking as reversioners does not affect the question.

On the other hand it is argued that in all cases where property is given to more than one person the donees take separately as tenants-in-common and not as joint tenants and reliance is placed on the ruling of the Privy Council in *Jogeswar Narain Deo v. Ram Chandra Dutt*(2). No doubt that case lays down that the principle of joint tenancy is quite foreign to Hindu Law and that where property is given to two or more donees they take as tenants-in-common. But as pointed out by SUBRAHMANYA AYYAR, J., in the case of *Yethirajulu Naidu v. Mukunthu Naidu*(3), the Hindu Law is quite

familiar with one kind of joint tenancy, namely, the joint holding by members of an undivided Hindu family. If property is therefore given in terms expressly to a joint Hindu family, in my opinion the family would take it with all the incidents of ancestral or joint family property. There is nothing in the Privy Council decision or in the principles laid down by their Lordships contrary to the above view. If the gift is to the family, the family will take the property and hold it as other family property and it would not matter who made the gift. The question therefore has to be decided on the words of the will whether the bequest was to the joint family or to the members of it individually in which case they would no doubt take in severalty.

I do not agree with the learned Judge that Kathirvelu and his sons did not constitute a joint family on the ground that they had no property at all. The learned trial Judge has accepted the argument that the existence of joint property is an essential requisite to constitute a joint family. With respect I am unable to accept this position. Hindus get a joint family status by birth and the joint property is only an adjunct of the joint family. So long as the status continues the family constitutes a joint family. The plaintiff's vakil concedes that even according to his argument the existence of a chembu or a pot common to all the members is sufficient to constitute a joint family. That shows to my mind the unreal character of the contention. When asked what the position of the family is before it gets joint property, whether it is a divided family or joint family, the plaintiff's vakil could not say. According to him the joint family ceases every time when joint property is wholly lost and revives again when any joint property is again acquired. We cannot accept a contention leading to such a position. The possession of joint property is no doubt a normal

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(1) (1923) I.L.R., 45 All., 598 (P.C.).

(2) (1896) I.L.R., 23 Calc., 670 (P.C.) ; 23 I.A., 37.

(3) (1905) I.L.R., 23 Mad., 368.

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incident of a joint Hindu family but it is not in my opinion a pre-requisite for its constitution. In the passage in Sir BHASHYAM AYYANGAR's judgment in *Sudarsanam Maistri* KRISHNAN, J. v. *Narasimhulu Maistri*(1) quoted by the learned trial Judge, he was discussing the Mitakshara doctrine of joint family property and not the requisites of a joint family. I have no doubt that Kathirvelu and his sons constituted a joint Hindu family when the will took the effect. But it cannot be said that there is anything in the will to show definitely and clearly that the bequest was to the family and not to the individual members thereof separately. The ordinary presumption that when there are several joint donees they take as tenants-in-common must therefore prevail. I agree with my learned brother that these appeals fail and must be dismissed with costs.

K.B.

APPELLATE CIVIL.

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

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APPELLANTS,

v.

SIVAJI RAJA SAHEB AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Religious endowments—Trusteeship—Hereditary trusteeship, whether partible or impartible—Tanjore Palace devastanams—Succession to trusteeship—Trusteeship, whether devolves on a single heir or on coheirs—Seizure by

(1) (1902) I.L.R., 25 Mad., 149.

* Appeal No. 64 of 1920.

Government—Regrant to Senior Rani, effect of—Usage—Right of illegitimate sons of late Raja to trusteeship of Palace devastanams—Acquisitions by Ranis—Accretion—Presumption as to accretion—Corpus in possession of Receiver and not with the widows—Effect on presumption as to accretion—Illegitimate sons of Raja, whether heirs to stridhanam properties of Ranis—Collateral succession of illegitimate sons.

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After the death of Sivaji, the last Raja of Tanjore, in 1855, the Government took possession, not only of the Raj and the private property of the Raja, but also of the devastanams and their endowments which were in the possession and management of the late Raja. The Senior Rani, after obtaining possession of the private properties on a petition to the Government in 1862, sent up a memorial to the Government praying that the devastanams and their endowments might be restored to her possession and management as the head of the family of the Raja for the time being. The Government restored them to her by an order in 1863, but did not indicate therein the course of succession to the management subsequent to her death. On her death in 1892, the Government again took possession of the devastanams and their endowments, but had to restore them to the next senior Rani under a decree in a suit filed by her for the purpose; thereafter each of the surviving Ranis was in management as sole trustee until the last of them died in 1912. After her death, the illegitimate sons of the late Raja sued the sons of the adopted son of the Raja for joint management as trustees of the devastanams and endowments along with the latter, and for recovery of their shares in certain properties left by the Ranis, claiming them either as accretions to the Raja's estate or as stridhanam properties of the Ranis. It appeared that the Rajas had founded the devastanams and endowed them, that each Raja was the sole trustee on his accession to the Raj, that a Receiver was in possession of the Raja's private properties after their restoration to the Ranis during their lifetime, and that the devastanams and endowments were not in the possession and management of the Receiver but with the Ranis:

Held, that the devolution of the trusteeship of a religious endowment depends upon the terms of the trust deed, if any, by which it was founded, or on the usage of each particular institution where no express trust deed exists;

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that in this case according to the usage existing prior to the death of the late Raja, the trusteeship of the devastanams was held by the Raja for the time being as sole trustee, i.e., as impartible property held by a single individual;

that the character of the trusteeship and the rule of devolution were not altered by the grant of the Government in 1863 to the Senior Rani, who claimed it as head of the family of the Raja for the time being, held it as sole trustee, and was followed by the surviving Ranis, each of whom held it as a sole trustee; *Muttu Vaduganadha Tevar v. Dora Singha Tevar*, (1881) I.L.R., 3 Mad., 290 (P.C.), followed;

and that, consequently, the trusteeship in this case was impartible property devolving on a single heir as sole trustee, and therefore devolved on the eldest son of the adopted son of the late Raja as sole trustee;

Question, whether the office of dharmakarthā or trustee of a religious or charitable endowment descends to a single heir or is to be treated as joint property on partition, discussed. *Ramanathan Chetti v. Murugappa Chetty*, (1906) I.L.R., 29 Mad., 283 (P.C.); and *Meenakshi Achi v. Somasundaram Pillai*, (1921) I.L.R., 44 Mad., 205, distinguished. *Sethuramaswamiar v. Meruswamiar*, (1918) I.L.R., 41 Mad., 296 (P.C.), referred to.

Held also, that the properties acquired by the Ranis did not form accretions to the Raja's estate, as the Ranis were not in possession of the corpus of the estate, and consequently there was no room to presume the widows' intention to make them accretions to their husband's estate; *Saodamini Dasi v. The Administrator-General of Bengal* (1893), I.L.R., 20 Cal., 433 (P.C.), and *Rajah Parthasarathy Appa Rao v. Rajah Venkatadri Appa Rao*, (1923) I.L.R., 46 Mad., 190, followed;

that, viewing the acquisitions as stridhanam, the illegitimate sons of the Raja, though they might be his sapindas, were not entitled to succeed as heirs to the collaterals of the Raja, and consequently they were not entitled to succeed to the stridhanam properties of the Ranis.

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

APPEAL against the decree of S. RANGANATHA MUDALIYAR, the Subordinate Judge of Tanjore, in Original Suit No. 43 of 1913.

The plaintiffs are some of the illegitimate sons of the last Raja of Tanjore. The suit relates to the trusteeship of the Fort or Palace devastanams and their endowments and also to the plaintiffs' right to a share in the acquisitions made by the late Ranis as well as to certain jewels and movables belonging to the late Ranis. After the death in 1855 of Sivaji, the last Raja of Tanjore, the Government took possession of three sets of properties, (1) the Raj, (2) the private property of the Raja, (3) the pagodas, devastanams and their endowments as well as chatrams and their endowments. On 21st August 1862, on a petition filed by the then Senior Rani, Kamatchi Bayi Sahiba, the Government restored the private properties to her as Senior Rani and enjoined on her that she should arrange for the participative enjoyment in the estate of her co-widows or co-heirs, and also provided

"that on the death of the last surviving widow, the daughter of the late Raja or failing her, the next heirs of the late Raja will inherit the property."

In December 1862, Rani Kamatchi Bayi Saheba sent a memorial to the Government praying that

"the devastanams and their endowments which have been founded from time to time by members of her family may now be made over to her as the head of the family for the time being."

The Government passed an order on 19th March 1863, in these words:—

"It is desirable that the connection of the Government with the pagodas should cease, and they will accordingly be made over to Her Highness Kamatchi Bayi Saheba."

The Rani was in sole management of the devastanams and their endowments till her death in 1892. On her death the Government again took possession of the devastanams and their endowments. A suit was instituted by the next senior Rani against the Government and

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the Temple Committees, to recover the properties. The plaintiff succeeded in the first Court, and the decree was affirmed by the High Court on appeal by the judgment in *Kalianasundaram Ayyar v. Umamba Bayi Saheba*(1). The surviving Ranis were successively sole trustees of these institutions until the last of them died in 1912. With regard to the private properties of the late Raja, which were restored by the Government to the Senior Rani under an order of 1862, August 21, there were disputes as to the enjoyment by the co-widows and a suit was instituted by a junior Rani against the senior and others, and a Receiver was appointed by the decree in the suit in respect of the private properties and the Receiver was in possession of the same during the lives of all the Ranis. The Ranis were in receipt of pensions to the extent of Rs. 9,600 per annum. The Ranis had purchased certain lands out of their income and had also jewels and movables of large value. The illegitimate sons of the late Raja, known as Mangalavilas people, claimed in this suit to be entitled to be joint trustees of the devastanams and endowments along with the two sons of the adopted son of the late Raja, viz., defendants 1 and 2, and also claimed a share in the acquisitions made by the Ranis as well as in the jewels and movables purchased and left by them. The first and second defendants denied the plaintiffs' right to joint trusteeship with them, as well as to a share in the acquisitions and other properties. The first defendant claimed that he was the sole trustee of the devastanams. The Subordinate Judge held that the plaintiffs were not entitled to be joint trustees, that the first defendant was in law the sole trustee, that the plaintiffs were not entitled to a share in the properties forming the

(1) (1897) I.L.R., 20 Mad., 421.

acquisitions of the Ranis or their jewels, and dismissed the suit. The plaintiffs preferred this appeal.

A. *Krishnaswami Ayyar* for appellants.—The plaintiffs and some of the defendants (namely, defendants 3 and 4) are Mangalavilas people who have been held to be the illegitimate sons of Sivaji, the late Raja of Tanjore, and they have been held to be entitled to their shares in the private properties of the late Raja in a recent litigation—*Maharaja of Kolhapur v. Sundaram Ayyar*(1). The present suit is instituted by the illegitimate sons to establish their right to joint trusteeship of certain devastanams and their endowments along with the first and second defendants who were held to be the sons of an adopted son of the late Raja. Two questions arise, viz., (1) whether the illegitimacy is a bar to trusteeship, (2) what is the quantum of their interest in the trusteeship and how it is to be exercised. The lower Court held that illegitimate sons are postponed to legitimate sons and that it was by primogeniture that succession to trusteeship devolved and that the elder son of the adopted son was entitled to be sole trustee. The devastanams, etc., were taken over by the Government in 1855 on the Raja's death, but restored in 1863 to the Senior Rani, as the then senior among the seven Ranis of the late Raja. In a previous litigation between the senior widow against the Secretary of State and others, it was held that the senior widow to whom the devastanams and endowments were restored took a widow's estate; see judgment of the High Court in *Kalianasundaram Ayyar v. Umamba Bayi Saheba*(2). So long as a Hindu family is joint, only the senior member is entitled to manage. Both trusteeship and secular property of the Raja follow

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(1) (1925) I.L.R., 48 Mad., 1.

(2) (1897) I.L.R., 20 Mad., 421.

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the same line of inheritance. Both the trusteeship and secular property of the Raja were granted in the same way to the widows in the name of the then senior widow.

KUMARASWAMI SASTRI, J.—For 200 years, the Raja alone was trustee and not the junior members of the family—how can the restitution in 1863 make the trusteeship partible, if it was originally impartible and devolved by primogeniture?

In the Nuzvid case, *Raja Venkata Rao v. Court of Wards*(1) property was held to be divisible after re-grant. The ordinary rule of Hindu Law is, as to trusteeship, that there ought to be enjoyment by co-sharers by turns. See per BHASHYAM AYYANGAR, J., in *Ramanathan Chetty v. Murugappa Chetty*(2). This view is approved by the Privy Council on appeal in *Ramanathan Chetty v. Murugappa Chetty*(3); see also *Sethuramaswamiar v. Meruswamiar*(4), *Sethuramaswamiar v. Meruswamiar*(5) and *Meenakshi Achi v. Somasundaram Pillai*(6).

Primogeniture and exclusion of females should be proved as a custom, the ordinary rule of Hindu Law being that trusteeship is partible property. The very first trustee recognized by the Government by the re-grant in 1863 was a woman who was the senior widow of the family. When the family is joint, only the senior male member of the family is entitled to manage. See *Thandavaroya Pillai v. Shunmugam Pillai*(7).

After the last widow's death, the management vested in all the co-heirs to the estate. There is coparcenery between co-widows. See the judgment in A.S. 101 and 299 of 1919 of WALLIS, C.J., and SADASIVA AYYAR, J.; and *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(8).

- (1) (1879) I.L.R., 2 Mad., 128 (P.C.).
(3) (1906) I.L.R., 29 Mad., 283 (P.C.).
(5) (1918) I.L.R., 41 Mad., 296 (P.C.).
(7) (1909) I.L.R., 32 Mad., 167.

- (2) (1904) I.L.R., 27 Mad., 192.
(4) (1911) I.L.R., 34 Mad., 470.
(6) (1921) I.L.R., 44 Mad., 205.
(8) (1868) 3 M.H.C.R., 424.

The case in *Kaliana Sundaram Ayyar v. Umamba Boyi Saheba* (1) is direct authority that the grant in 1863 was a grant to a joint family.

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The next question is as to the illegitimate son's right to the acquisitions made by the late Ranis. The Receiver was in management of the Raja's private properties on behalf of the widows. The position is the same as if a widow was in possession of the estate on behalf of all of them. The presumption is that the acquisitions take the character of the parent estate, and the line of succession is the same as in the case of the parent estate. See the observations of the Privy Council in *Nabakishore Mandal v. Upendrakishore Mandal*(2). The onus is on the party who alleges the acquisitions to be stridhanam of the widow to prove it. See also *Mussumat Bhagbutti Dase v. Chowdry Bholanath Thakoor*(3); *Gonda Kooer v. Kooer Oody Singh*(4); *Isri Dutt Koer v. Hansbutti Koerain*(5) and *Sheolochun Singh v. Sahib Singh*(6).

The case *Saodamini Dasi v. The Administrator-General of Bengal* (7) is clearly distinguishable; the estate there vested in an executor who was to pay some income to the widow until she adopted; hence no income of the husband's estate vested in the widow, or was used by the widow in making the acquisitions; in the present appeal, the Receiver held for the rightful owners and no property vested in the Receiver unlike the case of an executor. The observation in *Akkanna v. Venkayya*(8) is opposed to the observations of the Privy Council in *Nabakishore Mandal v. Upendrakishore Mandal*(2). The question of presumption, left open by Privy Council

- (1) (1897) I.L.R., 20 Mad., 421.
(3) (1875) 2 I.A., 256.
(5) (1884) I.L.R., 10 Calc., 324 (P.C.).
(7) (1892) I.L.R., 20 Calc., 433 (P.C.).
- (2) (1922) 42 M.L.J., 253 (P.C.).
(4) (1874) 14 Beng. L.R. 159 (P.C.).
(6) (1887) I.L.R., 14 Calc., 387 (P.C.).
(8) (1902) I.L.R., 25 Mad., 351.

in *Rajah of Ramnad v. Sundara Pandiyasami Tevar*(1) is finally decided in *Nabakishore Mandal v. Upendrakishore Mandal*(2).

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The next point is, even assuming that the acquisitions were the stridhanam properties of the Ranis, the illegitimate sons are heirs, because they are the husband's heirs under the special text of Brihaspathi. The adopted son was adopted by Kamakshi Boyi Saheba only and not in association with the other Ranis. The other Ranis who subsequently inherited the property were only step-mothers of the adopted son. See Uttumalai case—*Annapurni Nachiar v. Forbes*(3). The latter could inherit only as a sapinda of their husband. All the sons, including the adopted son's son, take as husband's heirs. No son can be excluded. See *Bai Kesserbai v. Hunsraj Morarji*(4).

In *Nanja Pillai v. Sivabagyathachi*(5) a co-wife's daughter succeeded to the step-mother. If a woman has no issue, you must trace the inheritance as if the property was the husband's property. See also *Kanakammal v. Ananthamathi Ammal*(6).

KUMARASWAMI SASTRI, J.—In the case of collateral succession, illegitimate sons have no right?

The inheritance to stridhanam is under a special text of Brihaspathi. In *Subramania Ayyar v. Rathnavelu Chetty*(7) it has been held that a putative father succeeds to his illegitimate son. An illegitimate son is a sapinda of the putative father. If the property is stridhanam of the Ranis, the plaintiffs and other illegitimate sons inherit jointly with the adopted son's sons.

(1) (1919) I.L.R., 42 Mad., 581 (P.C.). (2) (1922) 42 M.L.J., 253 (P.C.).
(3) (1900) I.L.R., 23 Mad., 1 (P.C.). (4) (1906) I.L.R., 30 Bom., 431 (P.C.).
(5) (1913) I.L.R., 36 Mad., 116. (6) (1914) I.L.R., 37 Mad., 293.
(7) (1918) I.L.R., 41 Mad., 44 (F.B.)

A. V. Viswanatha Sastri for first respondent.—There were three sets of properties confiscated by the Government in 1855. There has been a distinction in the mode in which they were regranted or otherwise disposed of. The three kinds of properties are (i) raj, (ii) private properties, (iii) devastanams, chatrams and other charitable endowments. See *The Secretary of State in Council of India v. Kamachee Boye Saheba*(1) With regard to the re-grant of devastanams and their endowments, the terms of the re-grant are in sharp contrast to those of the re-grant of the private properties under Exhibit A-46 (in 1862, August 21). In the grant of devastanams, there are no words showing a widow's estate as granted, or mention of daughter or next heirs of Raja, or words importing the participation of the other co-widows in the trusteeship. The grant to Kamakshi Boyi Saheba is a grant in fee simple as absolute trustee. The Rajas were sole trustees all along. The Senior Rani was sole trustee from 1863 to 1892, and so also were the succeeding Ranis. In *Baboo Beer Pertab Sahee v. Maharajah Rajendra Partab Sahee*(2) it was held that a re-grant to a junior member after confiscation for rebellion, though a new grant, continues the old impartible nature of the tenure. By the grant in 1863, the old rule of primogeniture as to trusteeship was not taken away. The case *Muttu Vaduganadha Tevar v. Dora Singha Tevar*(3) distinguishes the case in *Raja Venkata Row v. Court of Wards*(4). See also *Ram Nundun Singh v. Janki Koer*(5). Under the Hindu Law, the eldest heir of a trustee succeeds to him. See *Purappavanalingam Chetti v. Nullasivan Chetti*(6), *Trimbak v. Lakshman* (7), *Sethuramaswamiar v. Meruswamiar*(8), *Sri Raman*

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(1) (1859) 7 M.I.A., 476. (2) (1867) 12 M.I.A., 1.
(3) (1881) I.L.R., 3 Mad., 290 (P.C.). (4) (1879) I.L.R., 2 Mad., 128 (P.C.).
(5) (1902) I.L.R., 29 Calc., 828 (P.C.). (6) (1868) 1 M. H.C.R., 415.
(7) (1896) I.L.R., 20 Bom., 495. (8) (1918) I.L.R., 41 Mad., 296 (P.C.).

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Lalji Maharaj v. Sri Gopal Lalji Maharaj(1) and Mayne's Hindu Law, paragraph 430. The decision in *Meenakshi Achi v. Somasundaram Pillai*(2) is distinguishable, as that was a grant in favour of two members of the family.

As to the claim for the acquisitions made by the Rani, there are three points to be remembered in this connexion, (1) the Receiver was in possession of the corpus from 1866, and none of the widows was in possession; (2) each Rani had a pension of Rs. 9,600 per annum, and Kamakshi Boyi Saheba had Rs. 1,000 more; and (3) this is a Government grant. The widows had under the grant only a life estate, and there can be no accretion in the case of life estates. It is a question of intention of the widow whether there was accretion to the corpus or not. The onus is on the person who alleges that there was accretion to prove it; the decision in *Akkanna v. Venkayya*(3) is approved by the Privy Council in *Rajah of Ramnad v. Sundara Pandiyasami Tevar*(4) and in *Rani Jagadamba Kumari v. Wazir Narain Singh*(5).

Illegitimate sons cannot succeed to collaterals. See *Karuppa Goundan v. Kumarasami Goundan*(6), *Ramalingu Muppan v. Pavadar Goundan*(7). Illegitimate daughter does not inherit to her mother's stridhanam, *Meenakshi v. Muniandi Panikkan*(8), *Subramania Ayyar v. Rathnavelu Chetty*(9), *Dharma Lakshman v. Sakharam Ramjirao*(10), *Zipru v. Bonitya*(11). *Bai Kesserbai v. Hunsraj Morarji*(12) approves of *Gojabai v. Shrimant Shahajirao Maloji Raji Bhosle*(13). Illegitimate sons of a man cannot claim as sapindas of his widow.

(1) (1897) I.L.R., 19 All., 428.

(3) (1902) I.L.R., 25 Mad., 351.

(5) (1923) I.L.R., 2 Pat., 319 (P.C.).

(7) (1902) I.L.R., 25 Mad., 519.

(9) (1918) I.L.R., 41 Mad., 44 (F.B.).

(11) (1922) I.L.R., 46 Bom., 424.

(13) (1893) I.L.R., 17 Bom., 114.

(2) (1921) I.L.R., 44 Mad., 205.

(4) (1919) I.L.R., 42 Mad., 581 (P.C.).

(6) (1902) I.L.R., 25 Mad., 429.

(8) (1915) I.L.R., 38 Mad., 1144.

(10) (1920) I.L.R., 44 Bom., 185.

(12) (1906) I.L.R., 30 Bom., 431 (P.C.).

O.S. Venkata Achariyar for the second respondent (adopted son's second son).—Illegitimate sons are outside the pale of Hindu Law except where texts expressly give rights to them. In *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik*(1) (Saptur Zamindari case), a senior son by a wife of an inferior caste was held to have no right as against a younger son of a wife of a superior caste. *A fortiori* an illegitimate son (who is son of no-wife) should be postponed to a legitimate son. The grant of 1863 gives an absolute right to Kamakshi Boyi Saheba. It is her stridhanam. The construction put on the grant in *Kalhanasundaram Ayyar v. Umamba Bayi Saheba*(2) is erroneous. It is not *res judicata* in this suit. The second defendant is entitled to be a joint trustee with the first defendant.

A. Krishnaswami Ayyar for appellants in reply.—Management by turns is division of trusteeship. Unless special usage is alleged and proved, ordinary rule of partibility applies.

The root of the title of Kamakshi Boyi Saheba is the grant of 1863. When the grantee put forward a certain title in a certain character and the grant is made to her as such, the grant should be so construed. See *Vengamma v. Chelumayya*(3).

There being no proof of special usage as regards this institution after 1863, the ordinary rule of partibility of trusteeship should be followed. In the case of stridhanam, in default of issue of the woman, the cases lay down that succession is traced as if the property belonged to the husband. In *Bai Kesserbai v. Hunsraj Morarji*(4) the Privy Council held that one co-widow succeeds to another co-widow. In *Tukaram v.*

(1) (1894) I.L.R., 17 Mad., 422.

(3) (1918) I.L.R., 36 Mad., 484.

(2) (1897) I.L.R., 20 Mad., 421.

(4) (1906) I.L.R., 30 Bom., 431 (P.C.).

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Narayana Ramchandra(1) it was held that propinquity is identical for woman's sapindas and for her husband's sapindas. In *Nanja Pillai v. Sivabagyathachi*(2) it was held the stridhanam heir is (her husband's) nearest sapinda. In *Subramania Ayyar v. Rathnavelu Chetty* (3), SADASIVA AYYAR, J., says that an illegitimate son is a sapinda of his father. See also *Kanakammal v. Ananthamathi Ammal*(4) and *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing*(5).

JUDGMENT.

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SPENCER, J.—Sivaji, the last Raja of Tanjore, died in 1855. After his death the East India Company took possession not only of the Raj of Tanjore and the private properties of the late Raja, but also certain pagodas and devastanams which had been in his possession and management up to the date of his death. It was held by the Privy Council that the East India Company's usurpation of this property amounted to an act of State of which the ordinary Civil Courts could not take cognizance. Subsequently the Senior Rani Kamakshi Bai Saheba petitioned Government for a restoration of the estate and also of the devastanams. The estate was restored by proceedings of the Madras Government, dated 21st August 1862, which we have dealt with in another place. The order restoring the devastanams was dated the 19th March 1863.

In her memorial, dated the 24th December 1862, Kamakshi Bai Saheba prayed that the pagodas and charitable institutions which had been founded from time to time by members of her family might be made over to her as the head of the family for the time being.

(1) (1912) I.L.R., 36 Bom., 339 (F.B.). (2) (1913) I.L.R., 36 Mad., 116.
(3) (1918) I.L.R., 41 Mad., 44 (F.B.). (4) (1914) I.L.R., 37 Mad., 293.
(5) (1891) I.L.R., 18 Cal., 151 (P.O.).

She mentioned in her memorial that Mr. Phillips, the Commissioner of Tanjore, had in 1858 recommended the Government to make over these endowments to Sakharam Saheb, husband of the Princess, and that the Government refused to accept that recommendation. The Government Agent, in forwarding Kamakshi Bai's memorial, recommended her prayer to be granted on the ground that it was highly desirable that all connection with these religious institutions on the part of Government should cease. The Governor in Council concurred with the Agent's recommendation and ordered the pagodas to be made over to the Rani. In doing so, the Government did not indicate the course of succession to be followed in the management of these endowments after Kamakshi Bai's death. Accordingly she managed the institutions till 1892, when she died.

Upon her death Government again took possession of the devastanams and put them under the management of the Temple Committee of Tanjore. The next Senior Rani Umamba Bai brought a suit (Original Suit No. 3 of 1894) for the recovery of these devastanams and their endowments, basing her title on the fact that she was the Senior Rani and head of the family. She impleaded the Secretary of State for India, the members of the Tanjore and Kumbakonam Devasthanam Committees and the other Ranis as defendants in her suit. In a careful judgment, in which he set out the history of these institutions, Mr. Venkobachariyar, then Subordinate Judge of Tanjore, came to the conclusion that the Government had no right to resume, or in any way interfere with, the management of the temples after granting them in favour of Kamakshi Bai, that they devolved as impartible property and that, by the State grant restoring them, Kamakshi Bai acquired an heritable interest in the properties. He decreed the suit in

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plaintiff's favour. There was an appeal to the High Court, which was heard by SHEPHARD and DAVIES, JJ. Those learned Judges dismissed the appeal holding that the estate taken by the Senior Rani was in the nature of self-acquired property in her hands in the sense that her rights were derivative from Government and had no relation to inheritance on the death of the Raja. They inferred from the fact that the plaintiff was chosen as the person to whom the trust should be made over in her capacity of widow of the late Raja, that the intention of the Government was to grant her a widow's estate, that is, to put her in the position which she would have enjoyed had there been no confiscation on the death of her husband the Raja.

After the death of Umamba Bai, the devastanam estate was managed by each of the widows who in turn became senior widow, until the last widow Jijamba Bai died in 1912. Disputes then arose between the children of the Raja's sword wives, who are known as Mangala Vilas people, and the sons of the adopted son, who are defendants 1 and 2. The former brought Original Suit No. 43 of 1913 in which they claimed the right to be declared entitled to the possession and management of the devastanams and their endowments and also to share in the immovable and movable properties purchased by the widows of the late Raja, which became accumulations and accretions to the private estate of the Raja, to which they claimed to succeed either as his heirs or as heirs to the widows who acquired these properties as *stridhanam*.

The learned Subordinate Judge, in dealing with these and other properties in dispute, held that the acquisitions of the various Ranis having been purchased in their own names, became their separate estates; and as regards the devastanam properties, he held that the

Government grant was to Kamakshi Bai by name as a single individual or sole trustee and that the endowments were therefore not capable of being made the subject of partition, but would pass to the head of the family for the time being, that individual at the time of suit being the 1st defendant, and he accordingly dismissed the suit.

In appeal, Mr. Alladi Krishnaswami Ayyar argued that the trusteeship of the devastanams should follow the same line of inheritance as the private estate of the Raja and that the Mangala Vilas people, having been held entitled to share in the private estate, should also be given a share in the management of the temples, the Government having by their grant destroyed the incident of impartibility which once attached to the estate. In support of his arguments he relied on *Raja Venkata Rao v. Court of Wards*(1), *Ramanathan Chetty v. Murugappa Chetty*(2), the principles upon which this case was decided having been approved by the Privy Council in *Ramanathan Chetty v. Murugappa Chetty*(3), on *Sethuramaswamiar v. Meruswamiar*(4), from which there was an appeal to the Privy Council in *Sethuramaswamiar v. Meruswamiar*(5), which reversed the decision of this Court, on *Meenakshi Achi v. Somasundaram Pillai*(6), and *Thandavaroya Pillai v. Shunmugam Pillai*(7).

For the respondent our attention was called to the fact that in the written statement of the third defendant, who was one of the Mangala Vilas people, it was asserted that these properties were impartible and should descend to the senior member of the senior line according to the custom obtaining in the family of the late Raja. In the Saptur case, *Ramasami Kamaya Naik v.*

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(1) (1879) I.L.R., 2 Mad., 128 (P.C.).

(3) (1906) I.L.R., 29 Mad., 288 (P.C.).

(5) (1918) I.L.R., 41 Mad., 296 (P.C.).

(2) (1904) I.L.R., 27 Mad., 192.

(4) (1911) I.L.R., 34 Mad., 470.

(6) (1921) I.L.R., 44 Mad., 205.

(7) (1909) I.L.R., 32 Mad., 167.

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Sundaralingasami Kamaya Naik(1), it was made clear that the son of a legally married wife is a preferable heir to impartible property over the son of a sword wife or concubine. The decisions in *Trimbak v. Lakshman*(2), where it was observed that religious offices were naturally indivisible, and in *Sri Raman Lalji Maharaj v. Sri Gopal Lalji Maharaj*(3), where it was observed that, if there are no emoluments attached to an office of trustee, there was no reason to partition the property amongst junior members, were also cited.

Ramanathan Chetty v. Murugappa Chetty(4), where BHASHYAM AYYANGAR, J., observed that the usage and custom in respect of religious trusteeships which were hereditary in a family, was generally that the office could be divided by getting the duties discharged in rotation by each member of the family and that the exceptions to that rule would only be a few cases in which the hereditary office may be descendible only to a single heir, was a case of family partition among Chetties of Sivaganga. It was not alleged in that case that there had been any trace of impartibility existing in the family prior to partition. In appeal in *Ramanathan Chetty v. Murugappa Chetty*(5), the Judicial Committee confirmed the decree of this High Court which provided for each member of the family taking one turn of management in succession, the grounds of their Lordships' decision being that there was an unbroken usage evidencing a family arrangement in this particular family and that that arrangement should hold good until altered by the Court or superseded by a new scheme. In *Meenakshi Achi v. Somasundaram Pillai*(6), the CHIEF JUSTICE and SESHAGIRI AYYAR, J., observed that the course of decisions in

this Presidency, which had the approval of the Judicial Committee, was opposed to the proposition that the office of a trustee in a public institution was indivisible and regulated by the same rules as the succession to impartible estates. The suit related to certain *kattalais* attached to a temple in the Tanjore district, and the learned Judges held that a claim by the seniormost male member to manage alone among the heirs should be proved as a special custom. From the history of the case it appears that these *kattalais* were managed for some years by the Board of Revenue and that they restored the management and the enjoyment of the lands to two members of the family representing the senior and the junior branches. In such a case, the usage of the institution was obviously opposed to the principle of management by a sole trustee. In Mayne's Hindu Law, paragraph 439, it is stated that the devolution of the trust upon the death or default of each trustee depends upon the terms upon which it was created, or the usage of each particular institution where no express trust deed exists.

In 1863, when Government restored the management of these temples to Kamakshi Bai, it was thought that it was the universal custom of the country that the eldest male heir of a deceased trustee should succeed as trustee to the person from whom he inherited. See *Purappavanalingam Chetti v. Nullasivan Chetti*(1). And in the Sivaganga case, *Muttu Vaduganadha Tevar v. Dora Singha Tevar*(2), the Privy Council recognized the principle that in regranteeing an impartible zamindari and issuing a sanad, the Government could retain the quality of impartibility in respect of any of the property thereby restored. From the history of these institutions described

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(1) (1894) I.L.R., 17 Mad., 422.

(3) (1897) I.L.R., 19 All., 428.

(5) (1906) I.L.R., 29 Mad., 283 (P.C.).

(2) (1896) I.L.R., 20 Bom., 495.

(4) (1904) I.L.R., 27 Mad., 152.

(6) (1921) I.L.R., 44 Mad., 205.

(1) (1863) I.M.H.C.R., 415.

(2) (1881) I.L.R., 3 Mad., 290 (P.C.).

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in Mr. VENKOBACHARIYAR's judgment in Original Suit No. 3 of 1894, Exhibit A-197, it appears that the Raja of Tanjore founded several religious institutions and acquired lands and gave them as endowments to temples, that the pagodas were managed by Serfoji as hereditary trustee and that on his death his son Sivaji succeeded to all the rights and privileges of his father including the management of the pagodas. I am of opinion, therefore, that the founders of these institutions intended that their successors who occupied the Raj should continue to have the sole management of the temples and pagodas and the endowments attached to them. It follows therefore that to divide these properties among the many claimants to the estate of the late Sivaji would be a policy inconsistent with the intentions of the founder of the institution when he endowed the temples with lands. I am further of opinion that when Government restored these properties to Kamakshi Bai as "head of the family for the time being," they indicated their intention that they should continue to be managed by a sole trustee. If it were necessary for the first defendant to prove that sole trusteeship is an incident of this hereditary trust, I should be prepared to find it proved.

In this view, the Subordinate Judge was right in recognizing the first defendant as being the lawful trustee who should manage these properties for his lifetime in his capacity of head of the family, and I consider that the appeal should be dismissed so far as these properties are concerned.

Next as regards the purchases of immovable and movable properties made by the widows out of their savings, and as regards their jewels, it must be remembered that the Ranis were only receiving a small income from the Mokhasa estate and pensions of Rs. 800 a

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month sanctioned by Government, and that from 1867 till the date of suit a Receiver was in charge of the estate. Thus the present is not an instance of a widow in possession of her husband's estate making acquisitions out of income, in which case the Privy Council declared in *Nabakishore Mandal v. Upendrakishore Mandal*(1), that the acquisitions would become accretions to the husband's estate unless it were shown that she dealt with it in such a manner that it would remain her own (vide also *Mussumat Bhagbutti Dae v. Chowdry Bholanath Thakoor*(2)).

Whether the after-purchases form accretions to the corpus of a deceased husband's estate or *stridhanam* of the widow depends upon her intention, which has to be gathered in every case from her manner of her dealing with the property [vide *Isri Dutt Koer v. Hansbutti Koerain*(3), where the authorities are reviewed, and later cases in *Akkanna v. Venkayya*(4), and *Subramanian Chetti v. Arunachelam Chetti*(5), and *Babu Sheo Lochun Singh v. Babu Saheb Singh*(6)].

In every case it is a question of fact whether a widow has dealt with the income of her husband's property in such a manner as to make it an accretion to the corpus (vide *Rajah of Ramnad v. Sundara Pandiyasami Tevar*(7)).

As for presumptions, when it is shown that the corpus of the estate has been all along in the possession of a Receiver or of the Court of Wards, as was the case in *Saodamini Dasi v. The Administrator-General of Bengal* (8), *Rajah Parthasarathy Appa Rao v. Rajah Venkatadri Appa Rao*(9), and here, there is no room for presuming

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| (1) (1922) 42 M.L.J., 253 (P.C.). | (2) (1875) 21 A., 256 (P.C.). |
| (3) (1884) I.L.R., 10 Cal., 324 (P.C.). | (4) (1902) I.L.R., 25 Mad., 351. |
| (5) (1905) I.L.R., 28 Mad., 1. | (6) (1887) 14 I. A., 63. |
| (7) (1919) I.L.R., 42 Mad., 531 (P.C.). | (8) (1893) I.L.R., 20 Cal., 433 (P.C.). |
| | (9) (1923) I.L.R., 46 Mad., 190. |

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that the widow intended to make the investments of the funds received by her, part of her husband's estate, when she did not get her husband's estate into her possession.

As for item 3 in schedule D-1 which is an acquisition of Anusamba Bai Saheba who died in 1895, she wrote a letter A-186 to the Collector announcing her intention to create a trust in favour of the adopted son's son and received a reply A-187 acknowledging her letter.

As regards jewels of Jijamba Bai, it is stated in the written statement of defendants 1 and 2 that they were purchased out of the savings from her own income, and there being no evidence *contra*, the Subordinate Judge was right in treating them as her absolute property.

Lastly, assuming that these properties were the self-acquisitions of the widows, the appellants claim to be *sapindas* and to have a right to succeed to the *stridhanam* of widows who were married in an approved form, on the ground that it goes on their deaths without issue to the heirs of their husband.

In *Subramania Ayyar v. Rathnavelu Chetty*(1) it was held by a Full Bench that the illegitimate son of a Sudra ranked as a *sapinda* of his putative father, and that the latter was entitled to succeed to his property if he died without issue.

But the Full Bench recognized the fact that an illegitimate son had never been regarded by any of the Courts in India as an heir to his putative father's collateral relations, and that the authorities against such a proposition were very strong (see page 72). I am not satisfied that there are sufficient grounds to reconsider that statement of the law as it now stands. The reason for giving an illegitimate son a half share of what a

(1) (1918) I.L.R., 41 Mad., 44 (F.B.).

legitimate son of a Sudra gets is morally justifiable on the ground that he has a legal right to be maintained by his putative father, but there is no legal obligation to maintain illegitimate children of collaterals.

The result is that the appeal of the Mangala Vilas parties in this suit is dismissed.

The costs of appellants and respondents 1 and 2, so far as the appeal relates to the devastanam estate, will be payable out of the income of the devastanam estate, as it was necessary to have the question of devolution of the trust finally settled; but the appeal, so far as accretions and accumulations are concerned, is dismissed with costs of respondents 1 and 2.

The memorandum of objections is also dismissed with costs of respondent 1.

KUMARASWAMI SASTRI, J.—This appeal relates to the devastanam known as the fort or palace devasthanam and the endowments founded by the Rajas of Tanjore and to the share of the plaintiffs in the immovable properties described in the plaint, which were purchased and enjoyed by the widows of Sivaji Maharaja who was the last Raja of Tanjore. Claim is also made to the jewels and movables left by the Ranis.

The plaintiffs and the 3rd and 4th defendants represent the illegitimate branch and the 1st and 2nd defendants are the grandsons of the late Sivaji Maharaja, the last ruler of Tanjore, being the sons of Serfoji who was adopted by Kamakshi Bai Saheba. The other defendants are alienees from one or other of the Ranis.

The plaintiffs sued for the trusteeship and possession of the devastanam properties and for the recovery of possession of the *stridhanam* properties left by the widows on the ground that they and the 3rd and 4th defendants are the sons of the sword wives of the late Raja and for a declaration that the 1st and 2nd

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defendants have no rights as the adoption of their father is invalid, that the alienations by the widows in favour of the other defendants are invalid beyond the life-time of the widows and that the plaintiffs as heirs are entitled to succeed. The contesting defendants denied that the plaintiffs and the 3rd and 4th defendants have any right as the sons of sword wives to the devastanam and other properties and stated that the alienations by the widows could not be questioned or set aside by the plaintiffs. The Subordinate Judge dismissed the plaintiffs' suit. As regards the devastanam properties he held that the grant by the Government was to a single individual or sole trustee and there can be no claim for participation. It would therefore pass to the head of the family for the time being and that the 1st defendant as the senior representative was entitled to be the sole trustee. As regards the other properties he held that the properties claimed were *stridhanam* properties of the Ranis and not accretions to the private estate of the Raja and that the plaintiffs and the 3rd and 4th defendants were not the heirs to the *stridhanam* properties. He dismissed the plaintiffs' suit and hence the appeal.

The 2nd defendant filed a memorandum of objections against that portion of the decree which declared that the 1st defendant was entitled to be the sole trustee. His case is that he is entitled along with the 1st defendant to be the trustee of the devastanam properties.

We have held in the appeals which relate to the private properties of Sivaji Maharaja that the plaintiffs and the 3rd and 4th defendants formed the illegitimate branch, that the Tanjore Rajas were Sudras by caste and that the illegitimate sons and their branch of the family who are known as the Mangala Vilas branch were only entitled to the shares which the illegitimate sons of a Sudra would take in their father's properties. We

also held that the adoption of the father of the 1st and 2nd defendants was valid and that the 1st and 2nd defendants as the adopted son's sons of the late Raja were entitled to inherit his properties and we ordered a partition of the private properties between the legitimate and the illegitimate branches. In disposing of this appeal it is clear that the claim of the plaintiffs in the plaint must be viewed from the standpoint of the above findings, and they can only get such rights as the law confers on the illegitimate sons of a Sudra.

The questions which arise for determination in this appeal are—

(1) Whether under the terms of the grant by the Government the trusteeship of the devastanam properties vests in all the heirs of Sivaji Maharaja, the last Ruler of Tanjore, like ordinary partible property and has to be managed by turns by each of such branches or whether it vests in the senior male member of the eldest branch of the family for the time being?

(2) Whether the properties acquired by the widows of the late Sivaji Maharaja were accretions to the estate and consequently divisible between such persons as would be entitled to a partition of the estate or whether they were the *stridhanam* properties of the widows who made the acquisitions and are descendible to the *stridhanam* heirs? and

(3) if the properties are *stridhanam* properties, whether the plaintiffs and the 3rd and 4th defendants would be entitled to a share?

As regards the trusteeship of the devastanam and other trust properties, I am of opinion that the Subordinate Judge is right. The devastanam and other endowments were taken charge of by the Government along with the Raj and the private estate of the last Raja on his death. We have in our judgment in the appeals from the main case traced the course of events from the confiscation of the Raj to the death of his last Rani. Kamakshi Bai Saheba, the senior widow and Rani, got possession of the private properties

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of the Raja under the terms of the grant (Exhibit A-46), dated the 21st August 1862. She petitioned the Government for the restoration to her of the devastanam and other trust properties, and the Government by their order, dated the 19th of March 1863, put her in possession of such properties. From 1863 to 1892 Kamakshi Bai Saheba was managing the properties as the sole trustee, and although a Receiver was appointed in 1865 in the litigation between Kamakshi Bai Saheba and her co-widows, the Receiver did not take possession of the devastanam properties and Kamakshi Bai Saheba was managing them as the sole trustee. On the death of Kamakshi Bai Saheba the Government took possession of the trust properties, and Umamba Bai Saheba, who was then the senior Rani, filed Original Suit No. 3 of 1894 against the Secretary of State and the members of the Devastanam Committees of Tanjore and Kumbakonam and the other surviving Ranis for a declaration of her right to succeed to the office and for possession of the properties. The Subordinate Judge in an exhaustive judgment decreed in favour of the plaintiff and the judgment has been filed as Exhibit A-197 in the suit. He held that on a construction of the Government grant of 1863 the restoration of the management of the pagoda to Kamakshi Bai Saheba carried with it heritable right and that the right was transmissible to her heirs, the Government having no right to resume or interfere with the management of the temple after the death of Kamakshi Bai Saheba. He was also of opinion that succession to the management should be traced in the same way as succession to the impartible Raj; that on the death of Kamakshi Bai Saheba the right did not vest jointly in the surviving widows and that the plaintiff as the senior widow was entitled to succeed. Against this judgment there was an appeal filed to the

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High Court which is reported in *Kalianasundaram Ayyar v. Umamba Bai Saheba*(1). The decision of the Subordinate Judge was confirmed and it was held by SHEPHARD and DAVIES, JJ., that the estate taken by Kamakshi Bai Saheba under the grant was in the nature of self-acquired property in the Rani's hands in the sense that her rights were derived from Government and had no relation back to inheritance on the death of the Raja and that as she asked that the management should be put in her hands in the capacity as the head of the family for the time being, the inference was that the intention was to grant a widow's estate, that is, to put Kamakshi Bai Saheba in the position which she would have enjoyed had there been no confiscation on the death of her husband the Raja. This decision does not, however, conclude the question as to whether on the death of the last of the Ranis the trusteeship and management was to be in the senior member of the family or whether it was to be treated as a right which should be enjoyed by all the members who were to divide the private properties of the Raja. So far as the terms of the grant go, the Government order putting Kamakshi Bai Saheba in management of the devastanam properties differs in several respects from the grant of 1862, and the order of the 19th of March 1863 simply says that it is desirable that the connection of Government with the pagodas should cease and they will accordingly be made over to Her Highness Kamakshi Bai Saheba.

In dealing with the question of management of the trust property, I think the first question to be considered is the usage as regards the management prior to the death of Sivaji Maharaja, the last ruler of Tanjore. There can be little doubt, and it is not seriously

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contended before us by the appellants, that this temple and the charities which were founded by the successive Rajas of Tanjore were in the possession and management of the Raja for the time being and that till the death of Sivaji the office was always held by a single individual. When the Raj was seized by the Government as an act of State, the pagodas and the devasthanams were also taken possession of and managed by the Government; but they were not desirous of taking upon themselves the responsibility of managing the temple and the devastanam properties. The Government at one time wanted that the devastanam should be made over to Sakharam Saheb, the son-in-law of Sivaji Maharaja, as sole trustee. Sakharam Saheb had married the elder daughter of the late Maharaja and on her death he married the younger daughter. As, however, there were disputes between Sakharam Saheb on the one side and Kamakshi Bai Saheba on the other, this proposal was not given effect to. In 1860 there was an idea of transferring the management to Avu Bai Saheba, the late Raja's mother, but she was not willing to assume management. After Kamakshi Bai Saheba got possession of the private properties of the Raja, she claimed the restoration of the devastanams and the endowments on the ground that they were vested in her husband and that she was the then head of the family. Her request was supported by the Government Agent and the outcome of it was the order of 1863 transferring the management to her. From 1863 till her death in 1892 she was the sole trustee and it was till then nobody's contention that the office of trustee could partake of the nature of private property and that each of the surviving Ranis was to have the management by turns and although the Receiver took possession of all the private properties, the trust

properties were left in the possession and management of Kamakshi Bai Saheba. On her death the next senior Rani was, as the result of the suit which I have already referred to, put in possession and management and on the death of each senior Rani the junior succeeded. I am unable to find anything either in the Government order or in the surrounding circumstances which changed the usage prevailing as regards these institutions, namely, the management by a single individual who was the head of the family for the time being and which rendered it subject to all the incidents of partible property.

In cases of religious institutions the main question to be considered is what was the usage of the institutions; and where from the date of the foundation of these charities up to the date of the present suit the trust was managed by a single individual who was the head of the family not in possession of any partible property, I think it would require very strong evidence to show that there is anything in the grant by the Government of 1863 which introduced a new course of devolution and would make it subject to all the incidents of a trusteeship held by a member of a joint and undivided family. As I said before, there is nothing in the grant of 1863 which either expressly or by implication changed the usage of these institutions. They formed part of the Tanjore Raj and the Raja for the time being was the trustee. As regards the private properties which were restored by the order of 1862 there are express words which make the grant subject to the ordinary Hindu Law applicable to partible properties and the properties were to descend according to Hindu Law. There are no such words in the grant of the devastanam properties to Kamakshi Bai Saheba. The devastanams having been part of the Tanjore Raj and the trusteeship having devolved on

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the Raja for the time being, the right of management till the confiscation by the East India Company must be treated as impartible property and the office as one which was held only by a single individual.

It was of course open to the Government to destroy that character and to grant the office on such terms as to succession as it thought fit. The confiscation having destroyed all antecedent rights there can be no question of any vested rights as to succession to the office. I am unable to infer from the mere fact that Kamakshi Bai Saheba applied for possession of the devastanam properties as senior widow and was put in possession, the course of succession to the office changed. Even if there was no confiscation, the office vested in the senior member of the Raja's family. In cases of confiscation and regrant of property which is impartible, the law is that in the absence of anything in the regrant, the property which is regranted is subject to the old incident of impartibility. In *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*(1), the zamindari of Hunsapore which was an impartible Raj and which descended to the eldest male heir according to the rule of primogeniture was confiscated by the East India Company and was in the possession of the Government for some years. It was then granted to the younger member of the family of the deposed Raja. It was held that, although the zamindari was to be treated as the self-acquired property of the grantee, the grant being from the Ruling Power, in the absence of evidence of the intention of the grantors to the contrary, carried the incidents of the family tenure as a Raj. In *Muttu Vaduganadha Tevar v. Dora Singha Tevar*(2), the Sivaganga Zamindari which was originally impartible was

(1) (1867) 12 M.I.A., 1.

(2) (1881) I.L.R., 3 Mad., 290 (P.C.).

confiscated by the Government and regranted and it was held by their Lordships of the Privy Council that the regrant did not make the estate partible. A similar view was also taken by their Lordships in *Ram Nundun Singh v. Janki Koer*(1), where it was held that the confiscation and regrant of an impartible Raj to the various members of the family did not make the property regranted partible. The mere fact that there was a regrant would not, in my opinion, destroy the course of devolution followed till that date.

Great reliance was placed by Mr. Krishnaswami Ayyar for the appellants on the decision reported in *Ramanathan Chetty v. Murugappa Chetty*(2), which was affirmed by their Lordships of the Privy Council in *Ramanathan Chetti v. Murugappa Chetti*(3). In that case the question was as to the validity of an arrangement come to by the members of an undivided family regarding the management by turns of a devastanam which was hereditary in the family. The question turned upon the usage as regards the management, and BENSON and BHASHYAM AYYANGAR, JJ., in the course of their judgment, observe :

"Except in the few cases in which the hereditary office may be descendible only to a single heir, the usage and custom generally is that along with other properties the office also is divided in the sense that the office is agreed to be held and the duties thereof discharged in rotation by each member or branch of the family, the duration of their turns being in proportion to their shares in the family property."

Their Lordships of the Privy Council rest their decision on the usage as regards the trusteeship. Lord MACNAGHTEN in delivering judgment of their Lordships observes as follows :—

"In their Lordships' opinion the case is a very simple one. They think the unbroken usage for a period of nineteen years

(1) (1902) I.L.R., 29 Cal., 828 (P.C.). (2) (1904) I.L.R., 27 Mad., 192.
(3) (1906) I.L.R., 29 Mad., 283 (P.C.).

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is as against the appellant conclusive evidence of a family arrangement to which the Court is bound to give effect."

It is on this sole ground that they held that there was nothing improper in the arrangement.

There can be little doubt that the Hindu text-writers treated a trusteeship or a right to the management of religious or charitable endowments as impartible property. In *Mancharam v. Pranshankar*(1), it was pointed out that the management of religious endowments is indivisible though modern custom has sanctioned a departure by allowing the parties entitled to officiate by turns. This decision was followed in *Trimbak v. Lakshman*(2). The inconvenience of such a custom was also pointed out. CANDY and RANADE, JJ., observed :

"It is clear that if the present claim of the appellant were recognized, each of the sons of the parties—and they have many—might claim a share not only in the family share but in the devasthan share and office also, and this process might go on with each generation, frittering away the income, and making the service wholly ineffective. The lower Court appears to have assumed, without any such evidence as is suggested in *Mohunt Rumun Dass v. Mohunt Ashbul Dass* (3), that the office is partible with the income. The practice of many generations of the parties must be considered in settling the question of impartibility, and that practice is in this case against partition with the one single exception of what took place in 1838."

This case was cited with approval by their Lordships of the Privy Council in *Sethuramaswamiar v. Meruswamiar*(4).

Where impartibility and management by a single individual who was the eldest member of the eldest branch of the family has been the rule from the foundation of the trust till the date of the present suit, I find nothing either in *Ramanathan Chetty v. Murugappa*

(1) (1882) I.L.R., 6 Bom., 298.

(3) (1864) 1 W.R. 160.

(2) (1896) I.L.R., 20 Bom., 495.

(4) (1918) I.L.R., 41 Mad., 296 (P.C.).

Chetty(1), or *Ramanathan Chetty v. Murugappa Chetty*(2), which compels us to hold that the office should be treated as partible property and that on partition of the other properties of the family, this office should be held by turns. I may also point out that, having regard to the numerous descendants of the late Raja who would, if the office is held to be partible, be entitled to turns of management, and having regard also to the future growth of the family, it would be against the interests of the trust to give the numerous parties turns of management and I am not prepared to do so unless compelled either by the established usage of the institution or the terms of the regrant by the Government. I think the proper rule in such cases is to see whether there is any deed constituting the trust and regulating the course of devolution of the trust. If there is such a document, then the devolution will, of course, be regulated by the terms of the document constituting the trust. If there is no such document, the Court has to see what was the usage of the institution and to give effect to such usage. Where there is no uniform course of conduct, the interests of the institution should be the first consideration. If the management can, without detriment to the trust, be held by turns, it is open to the Court to decree management by turns. I have not been referred to any *texts* which state that the office of dharmakartha or trustee of a religious or charitable endowment is to be treated as joint property on partition and that turns have to be given to each member of the undivided family who gets a share in the partition irrespective of the interests of the charities. I do not find anything in the decision of their Lordships of the Privy Council in *Ramanathan Chetty v. Murugappa*

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(1) (1904) I.L.R., 27 Mad., 192. (2) (1906) I.L.R., 29 Mad., 283 (P.C.)

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Chetty (1), to warrant the rule that even in the case of public charities and trusts the claims of the dividing co-parceners should override the interests of the institution and the observations of their Lordships in *Sethuramaswamiar v. Meruswamiar* (2), rather suggest that the rule laid down as to turns of management on partition applies only to private charities.

I find it difficult to accept the argument of Mr. Venkata Achariyar for the second defendant that the management should be confined to the first and second defendants by turns to the exclusion of the illegitimate sons. Either the office is impartible and descends on the eldest member of the senior line or it should be treated as partible and turns given to all those who are entitled to share in the family properties. There is no principle on which the office can be confined to the first and second defendants to the exclusion of the Mangala Vilas branch.

As regards the properties left by the last Rani in respect of which partition is claimed, I do not think the plaintiffs are entitled to any share. I do not think that the properties acquired by the Ranis can be said to be accretions to their husband's estate and to devolve upon the persons who would be entitled as reversioners to their property. From the year 1866 up till the date of this suit there was a Receiver in charge of the estate and none of the widows were in possession or management. I have in my judgment in the suit relating to the private properties of the late Raja given my reasons for holding that the estate was not strictly a Hindu widow's estate but that the grant by the Government was on terms which were analogous to it. It was held in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*, (3)

(1) (1906) I.L.R., 29 Mad., 283 (P.C.). (2) (1918) I.L.R., 41 Mad., 296 (P.C.).
(3) (1868) 3 M.H.C.R., 424.

that whatever rights the widows would have enjoyed had they succeeded to the estate of the late Raja under Hindu Law were destroyed by the grant of 1862 which was to be regarded as the root of title. Each Rani got about Rs. 9,500 a year as pension from the Government. The widows had their own properties and had also jewels and there is nothing to show that the properties now claimed were acquired with the income of the estate left by their husband and not with the savings from their pensions or dealings with their own *stridhanam* properties. Before the plaintiffs can claim the properties as accretions to the husband's estate, they must show that the properties were purchased out of the income of the estate or out of the savings therefrom. There is no evidence that the acquisitions by the Ranis were treated as part of their husband's estate or mixed up with it, but on the contrary we find that the Ranis were anxious to dispose of the properties which they had acquired. It is difficult to see how there can be said to be any accretions to the estate left by their husband.

So far as this Presidency is concerned, the authorities are to the effect that there is no presumption that property acquired by a Hindu widow out of funds which were at her absolute disposal would form part of her husband's estate. I have dealt with this question in *Rajah Parthasarathy Appa Rao v. Rajah Venkatadri Appa Rao* (1). In *Rajah of Ramnad v. Sundara Pandiyasami Tevar* (2), their Lordships of the Privy Council observe :

"Their Lordships think the answer to this is that a widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It may be that the presumption is the other way. A case has been cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property."

(1) (1923) I.L.R., 46 Mad., 190 at p. 220. (2) (1919) I.L.R., 42 Mad., 581 (P.C.).

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The case referred to seems to be *Akkanna v. Venkayya*(1), which was referred to in the course of the argument by Mr. De Gruyther.

It is argued by Mr. Krishnaswami Ayyar that the decision of the Privy Council in *Nabakishore Mandal v. Upendrakishore Mandal*(2), has settled the question which was left in doubt in *Rajah of Ramnad v. Sundara Pandiyasami Tevar*(3). There is an observation of their Lordships at page 256 to the following effect:—

“Now there can, their Lordships think, be no doubt that whatever stridhan she possessed was due to the accumulated savings from the income of the property which she received from her husband's estate, and though it is true that when that property had been received it would be possible for her so to deal with it that it would remain her own, yet it must be traced and shown to have been so dealt with, and in this case there is no sufficient evidence of this having been done.”

It is argued that the effect of this observation is that the onus is on the other side to show that she did something which would indicate an intention of treating the accretions as her own and not as part of her husband's estate. The previous decisions of the Privy Council are not referred to by their Lordships and I do not think this case can be said to overrule all the previous decisions of their Lordships on the subject.

I am of opinion that the decision in *Saodamini Dasi v. The Administrator-General of Bengal* (4), is clear authority for the view that where a widow is not in possession of her husband's estate, there can be no question of any purchase made by her being an accretion to her husband's estate. Their Lordships of the Privy Council observe: “The appellant's counsel contended that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate.

(1) (1902) I.L.R., 25 Mad., 351.

(2) (1922) 42 M.L.J., 253 (P.C.).

(3) (1919) I.L.R., 42 Mad., 581 (P.C.). (4) (1893) I.L.R., 20 Cal., 433 (P.C.).

Without examining the precise result of the decisions, it is sufficient to say that in this case there is no room for any such presumption, for the corpus of the estate never came to the widow, but was taken by Shamcharan Mullick under the will, and the income to which the widow succeeded was separated from it, and became and was dealt with as an entirely separate fund.”

I think the result of the authorities may be summed up as follows:—A Hindu widow has an absolute right of disposal over the income of the property which she inherits from her husband. She can either spend the same or accumulate it for her own benefit. In cases where she purchases properties or invests her savings and indicates by her conduct an intention that the properties purchased out of her savings should form part of her husband's estate, such savings should follow the same rules as govern the devolution of her husband's estate and should be treated as accretions to the estate. Where she does not do so, she has absolute powers of disposal over such property and can sell or give the same to anybody she pleases without any right of the reversioners to question her alienations. Where the question is one of intention to be deduced or inferred from her conduct, the presumption is she intends to keep the property for her own absolute benefit and to have absolute powers of disposal over it. Where, however, a widow is not in possession of her husband's estate, there is no presumption that any of the properties which she gets are to be treated as accretions to her husband's estate nor can an intention be inferred that she wants to treat them as part of her husband's estate. On her death such properties would follow the same course of succession as her *stridhanam* properties.

The claim in this appeal relates to the properties left by (1) Umamba Bai Saheba who died on the 4th of

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July 1900 possessed of items 1 and 2 in schedule D-1 to the plaint, (2) Anusamba Bai Saheba who died on the 30th September 1895 leaving item 3 in schedule D-1 and (3) Jijamba Bai Saheba, the last surviving widow. It is alleged that the properties in schedule E to the plaint were left by Jijamba Bai Saheba.

As regards item 3 in schedule D-1 which is the acquisition of Anusamba Bai Saheba, the evidence is that on her death Serfoji got possession of the property and after him his son, the 1st defendant, got possession. She also wrote to the Government Agent that she wanted to give the property to the adopted son and she made a settlement. The evidence, oral and documentary, shows that on her death in 1895 Serfoji got into possession in accordance with the settlement made by Anusamba Bai Saheba. The claim to item 3 by the present plaintiffs is therefore clearly barred by limitation, even assuming that the plaintiffs are her heirs.

As regards the properties of Jijamba Bai Saheba, the last Rani, she has left a will disposing of her properties and it follows that the plaintiffs can have no claim, she, in my opinion, having had full disposing power over the savings from her husband's estate, her pension, and her own *stridhanam* jewels.

As regards properties left by Umamba Bai Saheba, she died in 1900 and Jijamba Bai Saheba took possession of her properties. She claimed to be the heir of Umamba Bai Saheba and it does not appear that she claimed anything more than a co-widow's right to succeed. It is now settled law that there is no distinction as to the nature of the estate taken between property inherited by a woman from a male and property inherited from a female. In both the cases she takes not an absolute estate but only a qualified one. I need only refer to *Venkatarama Krishna Rau v. Bhujanga*

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Rau (1), *Virasangappa Shetti v. Rudrappa Shetti* (2), and to the decision of their Lordships of the Privy Council in *Sheo Shankar Lal v. Debi Sahai* (3), and *Sheo Partab Bahadur Singh v. The Allahabad Bank* (4). This being so, it follows from the decision of their Lordships of the Privy Council in *Lajwanti v. Safa Chand* (5), that a suit which is filed within twelve years of Jijamba Bai Saheba's death would not be barred. As Umamba Bai Saheba did not make any disposition of the properties, the question is who are the heirs to the properties left by her at the time of her death which were in the possession of her co-widow Jijamba Bai Saheba. The plaintiffs belonging to the illegitimate branch and being the descendants of the last Raja in existence, the question is whether under Hindu Law they can succeed to the estate of the Rani, and this turns on the question whether in the case of Sudras the illegitimate sons have got any right to collateral succession.

It is argued by Mr. Krishnaswami Ayyar that, in the absence of son, daughter and daughter's son, the *stridhanam* property goes to the husband and his heirs, and that if you come to the point where there are no such heirs as abovenamed, you have to make no difference between the husband's property and the *stridhanam* property of the wife and all her husband's heirs will be entitled to succeed. He therefore argues that, even if the property left by Umamba Bai Saheba who died issueless was her *stridhanam* property, succession must be traced as if it was the property of her husband, and, as the illegitimate sons would succeed along with the legitimate sons to the properties of their father, they would also succeed to the *stridhanam* properties in the

(1) (1896) I.L.R., 19 Mad., 107.

(2) (1896) I.L.R., 19 Mad., 110.

(3) (1908) I.L.R., 25 All., 468 (P.C.).

(4) (1903) I.L.R., 25 All., 476 (P.C.).

(5) (1924) 51 I.A., 171.

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same proportion. Reference has been made to the decision of their Lordships of the Privy Council in *Bai Kesserbai v. Hunsraj Morarji*(1), where their Lordships refer to the Mitakshara, the Mayukha and the texts of Brihaspathi as regards succession to *stridhanam* properties and hold that in the case of approved forms of marriage the heirs enumerated by Brihaspathi who are blood relations of the husband would succeed to the woman's property. Reference is also made to *Nanja Pillai v. Sivabagyathachi*(2), where it was held that the *stridhanam* property of a woman married according to the approved form who has left no issue will devolve on her husband and on failure of the husband the property will go to his *sapindas* in the order laid down in the Mitakshara with reference to the succession to the property of a male, and to *Kanakammal v. Ananthamathi Ammal*(3), where a similar rule has been laid down. Were the matter *res integra*, I am disposed to hold that in the case of Sudras an illegitimate son is in the same position as a legitimate son except that he gets a lesser share. The fact that an illegitimate son gets a lesser share would not by itself create a bar to collateral succession any more than the fact that an adopted son who exists along with a natural son born subsequently and who gets a lesser share would be barred. But there is a long catena of cases beginning with *Nissar Murtojah v. Kwar Dhunwunt Roy*(4), which decide that an illegitimate son has no right to collateral succession. I have in *Subramania Ayyar v. Rathnavelu Chetty*(5), referred to all the authorities and dealt fully with the illegitimate son's rights and the position of an illegitimate son with

(1) (1906) I.L.R., 30 Bom., 431 (P.C.).
(2) (1913) I. L.R., 36 Mad., 116. (3) (1914) I.L.R., 37 Mad., 298.
(4) (1863) Marshall's Reports, 609. (5) (1918) I.L.R., 41 Mad., 44 (F.B.).

regard to collateral succession. The right was negatived in *Krishnayyan v. Muttusami*(1), *Ranoji v. Kandoji*(2), *Parvathi v. Thirumalai*(3), *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*(4), *Ramalinga Muppan v. Pavadai Goundan*(5), *Meenakshi v. Muniandi Panikkan*(6), *Dharma Lakshman v. Sakharam Ramjirao*(7), and *Zipru v. Bomtya*(8). The plaintiffs are not entitled to Umamba Bai Saheba's property as heirs under Hindu Law.

The appeal fails and is dismissed. The memorandum of objections is also dismissed. I agree to the order as to costs proposed by my learned brother.

This appeal having been posted to be spoken to on the question of costs allowed to the first respondent on the memorandum of objections filed by the second respondent, the Court made the following :—

ORDER.

In modification of our original order we direct that the first respondent do get his costs of the memorandum of objections out of the devastanam estate and the second respondent will bear his own costs in his memorandum of objections.

K.R.

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| (1) (1884) I.L.R., 7 Mad., 407. | (2) (1885) I.L.R., 8 Mad., 557. |
| (3) (1887) I.L.R., 10 Mad., 334. | (4) (1899) I.L.R., 21 All., 99. |
| (5) (1902) I.L.R., 25 Mad., 519. | (6) (1915) I.L.R., 38 Mad., 1144. |
| (7) (1920) I.L.R., 44 Bom., 185. | (8) (1922) I.L.R., 46 Bom., 424. |

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri
and Mr. Justice Krishnan.

1925,
April 22.

K. V. PERIAMANNA MARAKKAYAR & SONS (SECOND
DEFENDANT), APPELLANT,

v.

BANIANS & CO. (PLAINTIFFS), RESPONDENTS.*

Contract—Guarantee and indemnity, distinction between—Privity of contract between surety and principal debtor, necessary in guarantee—Implied or express contract—Rule of English Law—Indian Contract Act (IX of 1872), ss. 124, 126, 140, 141 and 145, construction of—No right of suit for indemnifier against debtor in a contract of indemnity—Subrogation—Del credere agent—Right of suit—Ascertained pecuniary liability, necessary.

The plaintiffs, who were dubashes of the first defendant (a trading company), guaranteed the due performance of a contract for purchase of goods entered into by the second defendant with the latter, but the plaintiffs were not parties to this contract, nor the second defendant a party to the contract of guarantee. The second defendant refused to take the goods on the ground that the company did not comply with certain terms of the contract. The company debited the dubashes with the price in their deposit accounts with them. The dubashes sued the company to cancel the debit as the latter were in default, or to recover the amount debited from the second defendant, if they were in default:

Held, that, under the Indian as under the English Law, a contract of guarantee, unlike one of indemnity, requires the concurrence of three parties, namely, the principal debtor, the creditor and the surety; the surety should undertake the obligation at the request, express or implied, of the principal debtor; the Indian Contract Act does not depart from the rule

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of English Law but reproduces the same in sections 126 and 145; and sections 140, 141 and 145 are applicable only to contracts of guarantee defined in section 126 and not to contracts of indemnity defined in section 124 of the Act. PERIAMANNA
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Hodgson v. Shaw, (1834) 3 My. & K., 183, and *Nanak Ram v. Mehin Lal*, (1877) I.L.R., 1 All., 487, followed; *Muthu Raman v. Chinna Vellayan*, (1916) I.L.R., 39 Mad., 965, distinguished;

that, in this case, there was no contract of guarantee as there was no privity of contract between the principal debtor, creditor and the surety, but only a contract of indemnity between the latter two persons;

that, in a contract of indemnity, the indemnifier cannot, on performance of the obligations of the debtor, in the absence of an assignment from the creditor, sue, in his own name, the debtor, as there is no privity of contract between them and there is in law no subrogation to him of the creditor's rights;

that the plaintiffs were not *del credere* agents, as they did not introduce the customer to the company.

APPEAL from the judgment of Mr. Justice COUTTS TROTTER, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 467 of 1921.

The respondents, who were plaintiffs, were banians or dubashes of the first defendant company under a dubash agreement (Exhibit A), dated 21st November 1912. Under that agreement they guaranteed the due performance by the customers of the first defendant of their contracts with the latter, in consideration of a commission payable to them, and they also deposited a large sum of money with the first defendant under their contract. The second defendant (appellant) entered into a contract with the first defendant (Exhibit B) on 13th February 1920, to purchase 25 tons of yellow metal sheets from the first defendant; the contract was countersigned by the banians in token of their accepting their liability to the first defendant, but it was found that there was no privity of contract between the plaintiffs and the second

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defendant. Under Exhibit B, the second defendant was to pay the price against documents within sixty days of the arrival of ship with the goods, but had the option to pay earlier at a rebate, and for this purpose they could under the contract call upon the first defendant to fix the rate of exchange in advance with the banks in Madras, "subject to the banks operating for this period." The second defendant on 14th February 1920 wrote to the first defendant to fix the rate of exchange, but the latter failed to do so. The former again wrote to them on 5th May 1920 to fix the same, but the latter again failed to do so; thereupon the former wrote to cancel the contract. On arrival of the ship with the goods in 1921, the second defendant refused to take the goods at the rate of exchange in March 1921, as desired by the company, but offered to take it at the rate of exchange in May 1920. The first defendant thereupon debited their dubashes in their deposit account with them with the full amount of the price, Rs. 73,117-5-7 at the higher rate of exchange prevailing in March 1921. The dubashes (plaintiffs) instituted this suit against their principals as first defendant, and the purchaser as second defendant; they alleged that the first defendant was in default in not fixing the rate of exchange on the requisition of the second defendant, and that they were not entitled to debit the amount of the price to their deposit account with them, and they also prayed in the alternative, that, in case it should be found that the purchasers (second defendant) and not the vendors (first defendant) were in default, the second defendant should be directed to pay the amount to themselves or to the first defendant. The learned trial Judge held that the first defendant was not in default in not fixing the rate of exchange in May 1920, that the second defendant was not justified in breaking the

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contract by refusing to take the goods at the higher rate of exchange as offered by the first defendant, and passed a decree directing the second defendant to pay the plaintiffs a sum of Rs. 30,000 which was the difference between price realized by sale of the goods by order of the Court and the price debited to the plaintiffs. The second defendant preferred this appeal, impleading the plaintiffs as the sole respondents, and did not join the first defendant as a respondent to the appeal. The other material facts and the terms of the material documents (Exhibits A, B and I) appear from the judgments.

K. S. Sankara Ayyar for respondent.—There is a preliminary objection to the maintainability of the appeal. The appellant has omitted to join the first defendant as a respondent to the appeal. The plaintiff claims to be entitled to the rights of the first defendant. The decision of the trial Judge as between the first and second defendant is final. It cannot be reopened against the plaintiffs without making first defendant a party. The plaintiffs stepped into the place of the first defendant.

Nugent Grant (with *B. C. Sankaranarayana* and *K. S. Krishnaswami Ayyangar*) for appellant.—The first defendant is not a necessary party; the second defendant wants to get rid of the decree against him. No decree has been passed in favour of the first defendant. Moreover the plaintiff and the first defendant have compromised.

(On the merits).—There was no privity of contract between the plaintiff (respondent) and the appellant (second defendant). The plaintiffs were banians or dubashes of the first defendant. The contract of the appellant was only with the first defendant. The plaintiffs were not parties to that contract. By reason of the agreement between the plaintiffs and first

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defendant, the former may be bound to make good any loss to the latter, but there was no privity of contract between plaintiffs and the second defendant. This is not a contract of guarantee for which there must be three parties. See section 126 of the Indian Contract Act. The second defendant was not guilty of breach of the contract between himself and the first defendant, as the latter was in default in not fixing the rate of exchange on requisition by the second defendant under the contract. The second defendant is not liable in damages either to the first defendant or the plaintiffs.

Advocate-General (T. R. Venkatarama Sastri), with him *G. Krishnaswami Ayyar*, *K. S. Sankara Ayyar* and *K. Subrahmanyam* for respondent.—The second defendant was in default in repudiating the contract. The first defendant was not in default in not fixing the rate of exchange under the circumstances disclosed in the evidence. Fixing the rate of exchange was not so vital a term in the contract as to entitle the second defendant to repudiate the contract. The plaintiffs were guarantee brokers. The second defendant knew that they were such. The plaintiffs were bound to indemnify and did indemnify their principals. They were subrogated to the rights of the first defendant against the second defendant; see *The South Indian Industrials, Ltd. v. Mindi Rama Jogi*(1). The second defendant must have known that plaintiff undertook liability in the contract between the two defendants. The plaintiffs signed the proposal (Exhibit I) and the final contract (Exhibit B). In a contract of guarantee, under the English Law, the party for whom the guarantee is given should be a party to the contract. There is a

(1) (1914) 27 M.L.J., 501.

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difference in this respect between the English and the Indian Law. See sections 126, 140 and 141 of the Indian Contract Act. The definition of guarantee under section 126 does not require that the principal debtor should be a party to the contract. Section 140 gives a statutory right to sue the principal debtor in his own name: See *Muthu Raman v. Chinna Vellayan*(1); *Tirumalai Savuri Naiker v. Royar alias Kachiraya Thevar*(2); *Barkat-un-nissa v. Mahboob Ali*(3). An equitable lien is created in favour of a person who discharges the obligations of another, which is made a statutory right by the Contract Act.

Plaintiffs are *del credere* agents and are competent to sue in their own names.

K. S. Krishnaswami Ayyangar for appellants, in reply.—The Indian Contract Act only embodies the principle of English Law as to contracts of suretyship. A contract of guarantee or suretyship requires a tripartite agreement. No volunteer can get any rights by his performing the obligations of another. Reference was made to 15 Halsbury, page 975; Smith's Mercantile Law, page 553; *Hodgson v. Shaw*(4). The Indian Law is to the same effect. There must be three parties under section 126, and an implied contract as shown by section 145. The observations in *Muthu Raman v. Chinna Vellayan*(1) are not correct. The contract in this case can at best be viewed as a contract of insurance. In a contract of insurance, the suits can be brought only in the name of the creditor or the assured: *Simpson v. Thomson*(5), *King v. Victoria Insurance Company*(6), *Ex parte Bishop, In re Walker & Co.* (7).

(1) (1914) I.L.R., 39 Mad., 965.
(3) (1919) 17 All. L.J., 1068.
(5) [1877] 3 A.C., 279.

(2) (1921) 40 M.L.J., 529.
(4) (1834) 3 My. & K., 183.
(6) [1896] A.C., 250.

(7) (1880) 15 Ch. D., 400.

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The defendants are not *del credere* agents because they did not introduce the second defendant into the contract with first defendant ; nor is their liability an ascertained pecuniary liability. *Thomas Gabriel & Sons v. Churchill & Sim* (1).

JUDGMENT.

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KUMARASWAMI SASTRI, J.—This appeal arises out of a suit filed by the respondents who were the dubashes of the first defendant company for the recovery of Rs. 73,117-5-7 from the first defendant or in the alternative to direct the second defendant to pay either the plaintiffs or the first defendant the amount due by them.

The case for the plaintiffs is that by a dubash agreement, dated the 21st of November 1912, entered into between them and the first defendant they were appointed banians or dubashes of the first defendant to push certain branches of the business of the first defendant, that the said agreement *inter alia* provided that the plaintiffs were to guarantee the due completion of all contracts entered into by merchants with the first defendant and covered by the agreement, in consideration of the plaintiffs receiving certain rates of commission, that the plaintiffs deposited a sum of Rs. 3,00,000 for the due performance by them of the terms of their agreement with the first defendant, that a sum of Rs. 1,25,000 is now in the hands of the first defendant, that during the subsistence of the said agreement the second defendant entered into a contract in writing with the first defendant, agreeing to purchase from the first defendant 25 tons of yellow metal sheets at the rate mentioned in the contract, that the plaintiffs as the dubashes of the first defendant guaranteed the due performance of the said contract by the second defendant according to its terms, that under

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the contract between the first and second defendants it was provided that cash must be paid against documents within 60 days of the arrival of the steamer and the second defendant was to be entitled to a rebate of interest at 6 per cent for moneys paid before maturity, that the rate of exchange for payment at Madras was to be fixed on the second defendant's account on or before the date when payment by the first defendant company to the shippers fell due subject to the banks in Madras operating for the period, that on the 14th of February 1920, the second defendant asked the first defendant in writing to fix the exchange at once and the first defendant agreed to do so, that the first defendant failed to fix the exchange and the second defendant again asked the first defendant on the 3rd of May 1920 to fix the exchange immediately without any reference to him which also the first defendant agreed to do, that the first defendant company, however, failed to fix the exchange, that the second defendant by his letter of the 20th of October 1920 cancelled the contract owing to the first defendant's breach but agreed to accept the goods by paying at the rate of exchange current during the first week of May 1920 if delivery was offered on those terms, and that on the 29th of March 1921 the first defendant told the second defendant that they had fixed the exchange at 1s. 3½d., which was alleged to be the current rate on that date, and required the second defendant to pay a sum of Rs. 73,117-5-7. The plaintiffs state that, under the circumstances mentioned above, the first defendant was bound to fix the rate of exchange at least in May 1920 as required by the second defendant and that the first defendant not having done so, the second defendant was not bound to pay at a higher rate of exchange than what was current on the 4th May of 1920 or accept the goods. They state the first defendant was under an obligation to

(1) [1914] 1 K.B., 449 ; affd. on appeal [1914] 3 K.B., 1272.

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communicate to them the second defendant's application and fix the rate of exchange and that, if the first defendant had done so and told the plaintiffs of their inability, the plaintiff would have taken steps to settle the exchange, and that the first defendant wrongly debited to the deposit account of the plaintiffs with the first defendant and deducted therefrom a sum of Rs. 73,117-5-7 alleged to be due by the second defendant to the first defendant in respect of the contract made by the second defendant and that the first defendant is bound to pay the plaintiffs that sum with interest at 12 per cent till the date of payment. The alternative case of the plaintiffs is that, if for any reason the Court should hold that there was no breach or default on the part of the first defendant and that they were entitled to debit the said sum, the second defendant should be directed to pay the plaintiffs or the first defendant a sum of Rs. 73,117-5-7 which was the amount which, according to the first defendant, the second defendant was liable to pay in respect of the contract for the purchase of yellow metal sheets.

The first defendant admitted the dubash agreement and its terms and also the contract by the second defendant with them for the purchase of yellow metal sheets, but they stated that they were under no absolute obligation to fix the rate of exchange in advance as it involved a contract with the banks, that between the date of contract and the 20th of October 1920 the banks were not willing to enter into forward contracts fixing the rate of exchange for remittances to London, that the failure to fix the rate of exchange would not entitle the second defendant to cancel the contract but that he can only claim damages and that, in any event, such failure would not relieve the plaintiffs from their obligations as surety under the dubash agreement. They admit that they called upon the second

defendant to pay Rs. 73,117-5-7 according to the rate of exchange on the 29th of March 1921 and that they were within their rights in doing so. They also admit having debited the plaintiffs' deposit account with the sum of Rs. 73,117-5-7 and deny their liability to pay to the plaintiffs the said sum or to restore the item of plaintiffs' account. So far as the second defendant is concerned the first defendant firm state that they have no objection to any decree being passed against him.

The second defendant filed a written statement admitting the contract, but denying that the plaintiffs guaranteed the due performance of the contract by him. He states that the plaintiffs did not undertake any liability at his instance or for his benefit, that he is not concerned with any agreement between the plaintiffs and the first defendant firm, that there was no privity of contract between himself and the plaintiffs and that any transaction between the plaintiffs and the first defendant firm would not affect him. As regards the fixing of rate of exchange he says that the first defendant firm wrongfully failed to fix the rate of exchange, that by reason thereof he was relieved from liability under the contract, that in any event the first defendant's remedy against him is not to claim the price of the goods, but the difference between the market rate and the contract rate and that, if the Court should be of opinion that the failure to fix the rate of exchange does not relieve him of his obligation under the contract and that his only right is to claim damages from the first defendant firm for breach of covenant, he claims Rs. 30,500 as damages being the difference in the rate of exchange between May 1920 and the 29th of March 1921. He states that, if the plaintiffs have acquired the rights of the first defendant's firm under the contract, he is entitled to set off the above sum of Rs. 30,500 against the plaintiffs' demand, that the first

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defendant's firm refused to accept payment for the price of the goods at the rate of exchange prevailing in May 1920 and thereby committed a breach of contract and that the plaintiffs have no cause of action against him.

The case was tried before COUTTS TROTTER, J., who held that the plaintiffs had a cause of action against the second defendant on the ground that they affixed their signature to the offer made by the second defendant on the 13th of February 1920 and that therefore they must be taken to have guaranteed the contract which was subsequently made. As regards the fixing of the rate of exchange, the learned Judge was of opinion that, though it was possible to fix the exchange between February and May and difficult thereafter, the first defendant having employed a competent agent they were absolved from liability as the agent failed to get exchanges fixed between February and May. After the trial Judge gave these findings, the parties said that, if the 5th of March was to be taken as the date when the exchange was to be fixed, Rs. 30,000 would be the sum payable after giving credit to the price realized by the goods on re-sale under order of Court and he passed a decree for that amount in favour of the plaintiffs.

The second defendant appeals, and the main grounds taken by Mr. Grant are that there was no privity of contract between the plaintiffs and the second defendant entitling the plaintiffs to sue the second defendant on the contract, that the evidence shows that there was no agreement between the plaintiffs, the first defendant's firm and the second defendant whereby the plaintiffs entered into a contract of guarantee so as to give them any right of action under the provisions of the Contract Act, that at best the transaction was merely a transaction of indemnity between the plaintiffs and the first defendant's firm without any consultation with the second

defendant, that the frame of the suit which is primarily against the first defendant's firm shows that the suit was not instituted by the plaintiffs as the agents of the first defendant's firm, nor was there an assignment of any cause of action by the first defendant's firm even if such an assignment were permitted in law, that the first defendant's firm was bound to fix the rate of exchange at the request of the second defendant, that the onus is on them to show that they could not fix the rate of exchange and that they have not proved it.

An objection is taken by the Advocate-General for respondent that the appeal is bad for non-joinder of Messrs. Shaw Wallace & Co. No application was made either by the respondent or Shaw Wallace & Co. to be added as parties to the appeal. The appellant, who was directed to pay the plaintiffs the amount claimed, is not concerned with the first defendant's company as he has to pay first defendant nothing. As Mr. Menzies says that there has been an agreement between plaintiffs and first defendant's firm that the plaintiffs, if unsuccessful against second defendant, should get Rs. 6,000 from the first defendant, there is no necessity to join the first defendant's firm without any application made by the first defendant.

I am of opinion that on the evidence and the documents filed there was no privity of contract between the plaintiffs and the second defendant and that the plaintiffs were not guarantors within the meaning of the Contract Act.

The dubash agreement between the plaintiffs and the first defendant has been filed as Exhibit A in the case. It is dated the 21st November 1912. Paragraph 3 of the agreement states the nature of the business which is covered by it and it refers to three kinds of business, (a) business undertaken by the firm either on their own

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account or as agents for any constituent on guarantee of the banians, (b) business undertaken by the firm on joint account of themselves and the banians, and (c) business undertaken by the firm on their own account. Clause (e) of paragraph 5 which refers to the duties of the banians states that their duty shall be to guarantee due completion of contracting parties of all the terms of their contracts. Clause (g) states that in the event of the failure of any contracting party or parties to pay for or take delivery of his or their goods at the dates stipulated it shall be the duty of the banians to pay the firm in cash all sums so payable in the manner provided in the agreement. Clause (h) runs as follows:—

“Generally in respect of any business covered by this agreement to guarantee the due fulfilment by all dealers and traders of their several contracts, liabilities and obligations and to indemnify the firm against any loss in respect thereof and the liability of the banians shall in no way be affected by the firm giving time or otherwise affording facilities to any dealer or constituent.”

Paragraph 6 of the agreement runs as follows:—

“The liability of the banians shall commence

(1) In the case of transactions coming under clauses (a) and (b) of paragraph 3 hereof:—

As soon as the business is entertained.

(2) In all other cases, as soon as contracts are made between the firm and any dealer and shall continue until the contracts shall have been duly completed or all claims, losses, cost and damages in respect thereof shall have been fully discharged.”

Paragraph 11 refers to the right of the company to deduct out of the security deposited by the banians any amount that may be due by the banians. Paragraph 13 refers to the duty of the firm to institute suits at the cost of the banians for the realization of any moneys due in respect of contracts, on the firm being sufficiently

indemnified. Paragraph 14 refers to the commission payable. It states that as remuneration for their services under the agreement the banians should be entitled to a commission of a half per cent in respect of yarns, metals other than iron, paint, cement, sugar, timber and produce imported from other Indian ports.

The agreement gives the plaintiffs the option of refusing to be liable for any particular contract.

The contract between the first and second defendants for the purchase of yellow metal sheets has been filed as Exhibit B and it is dated the 13th of February 1920. It is for 25 tons of yellow metal sheets, English quality, to be shipped in November 1920 at £182-10-0 per ton, C.I.F. and C.I. Madras. The clause relating to exchange runs as follows:—

“Exchange to be fixed on dealers’ account on or before the date when payment by the merchants to shippers falls due subject to the banks in Madras operating for this period.”

Should no instructions in writing be received from dealers prior to the above-mentioned date the merchants have the option of their fixing exchange at rates then current. At the foot of the contract is a note signed by the banians which runs as follows:—

“Responsibility acknowledged by Banians & Co.”

The offer for these goods made by the second defendant is Exhibit I, dated the 9th of January 1920, and at the foot of it the Banians & Co. have signed. There is nothing more than “for Banians & Co. (Signed) Manager.”

None of the members connected with the firm of Banians & Co. have given evidence. Mr Browning, an Assistant in first defendant’s firm, was called as the plaintiffs’ first witness. When asked about the contract Exhibit B, which I have already referred to, he states that in the course of business, documents are

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signed by the dealers, that those documents are sent down to Banian & Co. for counter-signature and that, so far as the second defendant was concerned, he had no other document given to him which evidences the contract but that he could always have access to the contract in the firm's office. This is all the evidence as regards what took place when the contract was entered into and there is no evidence that the plaintiffs introduced the second defendant to the first defendant's firm or that there was any agreement between the plaintiffs, the first and second defendants that the banians should guarantee the performance of this particular contract. All that appears from the evidence is that, after the contract was signed, it was sent down to the banians and they accepted liability under the terms of the dubash agreement between the plaintiffs and first defendant and without any request by or reference to the second defendant. There is nothing to show when the banians affixed their signature to the proposal—Exhibit I—nor is there any evidence to show that the banians introduced the second defendant to the first defendant and that the contract was brought about on their intervention and guarantee. On the contrary the evidence of Mr. Menzies, one of the principals of the first defendant firm, shows that the second defendant was doing business with Gibson & Co., the first defendant's agents at Tuticorin, and that Mr. Menzies asked the second defendant to do business with his firm. He states that he could not say whether the banians were present when the contract was fixed up nor could he say when the banians put their signature to the contract. He says it was customary in their firm after the contract was entered into to send that particular form of contract and get the banians' signature. This was, I think, to show that the banians did not exclude the contract from the scope of

the dubash agreement—Exhibit A. I think that on the evidence on record there is no privity shown between the plaintiffs and the second defendant. So far as the plaintiffs and the first defendant are concerned, the dubash agreement creates an obligation on the part of the plaintiffs to indemnify the first defendant against any loss they may sustain by the non-performance and the question is whether such an indemnity would give a right of action against the second defendant on the contract between the first and second defendants.

Chapter VIII of the Contract Act deals both with contracts of indemnity and guarantee. A contract of indemnity is defined by section 124 as a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person. A contract of guarantee is defined by section 126 as a contract to perform the promise or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the surety: the person in respect of whose default the guarantee is given is called the principal debtor and the person to whom the guarantee is given is called the creditor. Section 140 states that where a guaranteed debt has become due or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor has against the principal debtor. Section 141 states that a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the

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extent of the value of the security. Section 145 states that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

I think that the Contract Act draws a distinction between contracts of indemnity and contracts of suretyship and that contracts of suretyship, unlike contracts of indemnity, require the concurrence of three persons, namely, the principal debtor, the creditor and the surety. The surety undertakes his obligation at the request express or implied of the principal debtor. Reading sections 126 and 145 together it seems to me that there can be no contract of guarantee, as distinguished from a contract of indemnity, unless there is privity between the principal debtor and the surety as it is difficult to speak of an implied promise between persons between whom there is no privity of contract. Section 126 refers to contract of guarantee and speaks of three persons with reference to that contract, namely, the person who gives the guarantee, the person in respect of whose default the guarantee is given and the person to whom the guarantee is given. Section 127 refers to consideration for the guarantee which is sufficient to support the guarantee. *Nanak Ram v. Mehin Lal*(1) is authority for the view that privity is necessary in all cases of suretyship between the three parties. Sections 140 and 141 only prescribe the methods by which the rights of the surety can be worked out and I find it difficult to see how a person, who agrees to perform the obligation of another without reference to him, can clothe himself with the right of action against him on the contract or

(1) (1877) I.L.R., 1 All., 487.

how a person can become a surety without the knowledge and consent of the principal debtor and clothe himself with the rights mentioned in sections 140 and 141 or section 145.

The English law is clear that no person who is not a party or privy to a contract can sue upon it and it has been laid down as early as *Hodgson v. Shaw*(1) that a person cannot make himself the creditor of another by volunteering to discharge the obligations of the other and that the rights of the surety against the principal debtor can only arise where the suretyship has been undertaken at the request, actual or constructive, of the principal debtor. The law is thus stated in Halsbury's Laws of England, Vol. XV, at page 517:

"The implied rights possessed by the surety against the principal debtor are not identical with those which the creditor has against the latter, but are somewhat similar to those possessed by one surety against another. They are available wherever the suretyship has been undertaken at the request, actual or constructive, of the principal debtor, but not otherwise, since no man can make himself the creditor of another by volunteering to discharge the latter's obligations. Once, however, such request has been obtained, an equity of indemnification becomes attendant upon the suretyship, and the principal debtor will be liable without the necessity of any further request for all sums subsequently paid by the surety under the guarantee as money paid to the use of the principal debtor."

I do not think that any difference was intended to be made in the Contract Act between the Indian and the English law on the subject, and I see no reason to depart from the English law as to the necessity of a request, actual or constructive, of the principal debtor to the surety in order that there may be an effective contract of suretyship.

(1) (1834) 3 My. & K., 188.

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So far as the contract of indemnity is concerned, by which a person agrees to indemnify another against loss caused by the conduct of a third person and which does not require the consent of, or privity with, the third person, the person who indemnifies can, on payment or discharge of the obligation, sue, but the suit in the absence of any assignment can only be in the name of the promisee. There is no subrogation in law as in the case of a surety who undertakes the obligation at the request of the promisor. I have not been referred to any English case where, in a case of a mere indemnity as distinguished from a contract of guarantee, a direct right of action on the original contract is given to the person who indemnifies against the person whose conduct has caused loss. In *Simson v. Thomson*(1) which was a case of certain underwriters against the insurer of a ship it was held that there was no independent right in the underwriters to maintain in their own name, and without reference to the person insured, an action for damages to the thing insured. Lord CAIRNS, after referring to the foundation for the right of underwriters, namely, the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss, observes,

"But this right of action for damages they must assert, not in their own name but in the name of the person insured."

Lord BLACKBURN observes:

"In England the action must be in the name of the shipowner, not of the underwriters. I think this material, as showing that it is the personal right of action of the shipowner, the benefit of which is transferred to the underwriters."

(1) (1877) 3 A.C., 279.

In *King v. Victoria Insurance Company*(1) their Lordships of the Privy Council observe at page 256:

"It is true that subrogation by act of law would not give the insurer a right to sue in a Court of law in his own name. But that difficulty is got over by force of the express assignment of the Bank's claim."

So far as the Indian law is concerned, there is nothing either in the Contract Act or the Civil Procedure Code which give any higher rights to a person under a contract of indemnity as distinguished from a contract of guarantee. In the present case as I am of opinion that the evidence only shows that there was a contract of indemnity evidenced by Exhibit A, I find it difficult to see how it is open to the Banians to sue the second defendant, between whom and the Banians there is no privity, for damages for breach of contract. It is clear in the present case, and it is not disputed before us, that no property in the goods passed to the second defendant and that the claim so far as the first and second defendants were concerned was a claim for damages for breach of contract.

It is contended by the Advocate-General that a contract of suretyship can be entered into without reference to the debtor and that even in such cases the person who indemnifies can avail himself of the provisions of sections 140 and 141, though he cannot under section 145, and reference has been made to *Muthu Raman v. Chinna Vellayan*(2) where it was held by OLDFIELD and NAPIER, JJ., that a person who becomes a surety without the concurrence thereto of the principal debtor gets as against the latter only the rights given by sections 140 and 141 and not those given by section 145. The main question in that case was whether a suit would lie on a hundi which is a negotiable

(1) [1896] A.C., 250.

(2) (1916) I.L.R., 39 Mad., 965.

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instrument under the circumstances mentioned therein and both the learned Judges differed from the lower Court and held that an action would lie if the hundi was presented for payment within a reasonable time and notice of dishonour was given, and they sent the case back to the lower Court for findings on the above points. The case was also argued on the footing of guarantee and also of sections 69 and 70 of the Contract Act and it was held that sections 69 and 70 would not apply. The learned Judges in dealing with the argument as to guarantee expressed the opinion abovementioned. With all respect it seems to me that there is nothing in the Contract Act which makes it necessary for us to depart from the well-known rule of English law that no action can be brought on a contract except by the parties or privies to it and that in cases of a mere indemnity no action can be maintained except in the name of the party to the original contract or on an assignment from him. OLDFIELD, J., observes :

"There is then in defendant's favour the English law, stated in *Hodgson v. Shaw*(1) already referred to and other cases, that the implied rights possessed by the surety are available, when the suretyship has been undertaken at the request, actual or constructive, of the principal debtor, but not otherwise, since no one can make himself the creditor of another by volunteering to discharge his obligations. In these circumstances, the opposite view must be supported unambiguously by section 145, if it is to be sustained."

I find it difficult to see what there is in section 145 that departs from the well-known rule of English law. NAPIER, J., while stating that the Indian Legislature has not used the clear and unambiguous language to be found in the Mercantile Law Amendment Act, 19 and 20 Vict., Cap. 97, section 5, thinks that the legislature intended to embody the law to be found in the Mercantile

(1) (1834) 3 My. & K., 183.

Law Amendment Act and to make no distinction between sureties in a bilateral contract and those in a trilateral contract. He, however, is not prepared to hold that section 145 can be construed as giving effect to that intention. He thinks that the plaintiff must fall back on section 140. I find it difficult to follow the view taken by the learned Judges. It seems to me that Sections 140, 141 and 145 refer not to contracts of indemnity but to contracts of suretyship which has been defined in section 126.

Treating the position of the Banians as that of persons who under the contract of indemnity (Exhibit A) have discharged the obligations, which the second defendant was bound to perform, their right, was either to get an assignment from the first defendant or to sue in the first defendant's name for their own benefit. In the present case it is difficult to see how on the plaint as framed the plaintiffs can say that they represent the interests of the first defendant. Almost the whole of the plaint is taken up with charging the first defendant with wrongfully debiting their deposit account with the loss claimed in respect of second defendant's contract. Paragraphs 14, 15, 16, 17 and 18 charge the first defendant with wrongful conduct so far as this contract is concerned and repudiate the plaintiff's liability as guarantors. The subsequent paragraph refers to other contracts and states that the plaintiffs have been discharged from all liability under the dubash agreement. The only paragraph containing the alternative claim is paragraph 24 where they state :

"Plaintiffs charge that if for any reason this Honourable Court should hold that there was no breach or default on the part of the first defendant, then, and in such event, the second defendant should be directed to pay to the plaintiffs or to the first defendant the said sum of Rs. 73,117-5-7 with further interest thereon at 12 per cent per annum and all other charges

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incurred by the first defendant in storing and keeping the goods up to date of payment: and that, in default of payment by the second defendant, the goods in question any be sold under the orders of this Honourable Court; that the sale-proceeds thereof be paid to the plaintiffs and that the second defendant be directed to pay the plaintiffs the balance due by the second defendant, in case there is deficiency in the amount due to them from the second defendant."

It cannot be said that in a suit as framed like the present the plaintiffs are suing as persons who have indemnified the first defendant against losses which they may incur and it is difficult to see how in this suit they can in any sense be taken to represent the first defendant merely because they added an alternative claim against the second defendant.

It was suggested in the course of the argument that the plaintiffs by virtue of the dubash agreement can be treated as *del credere* agents, but there is no evidence which would justify me in holding that any such agency exists. A *del credere* agent is defined as one who, in consideration of extra remuneration, called a *del credere* commission, undertakes that persons with whom he enters into contracts on the principals' behalf will be in a position to perform their duties. It is necessary that before a person can claim to be a *del credere* agent he must have brought about the contract in question. Reference was made to the observations of Sir JOHN WALLIS, C.J., in *The South Indian Industrials, Ltd. v. Mindi Rama Jogi*(1):—

"The position of dubashes in this part of India is much the same as that of Banians in Northern India which was considered in *Peacock v. Baijnath*(2) by WILSON and CUNNINGHAM, JJ., in a

(1) (1914) 27 M.L.J., 501 at 509.

(2) (1891) I.L.R., 18 Cal., 573.

passage of their judgment at page 586 which was subsequently approved by the Privy Council on appeal."

But in *Peacock v. Baijnath*(1) all that was held was that the Banian in that case, by the course of dealing between him and his principals, became liable as a *del credere* agent and that he could be called upon to pay, though he had been guilty of no fault or neglect. I can find no authority for holding that a dubash who gets a commission thereby becomes a *del credere* agent in respect of contracts entered into without his intervention. Assuming that the plaintiffs are *del credere* agents, it is difficult to see how they can sue the second defendant for breach of contract. The position of *del credere* agents was considered by PICKFORD, J. in *Thomas Gabriel & Sons v. Churchill & Sim*(2). This was a case where a vendor sued the *del credere* agent to recover the amount claimed by him under a contract as to which there were disputes between the vendor and the purchaser who refused payment on the ground that the seller did not duly perform his part of the contract. It was held by PICKFORD, J., after a review of the authorities, that the liability of a *del credere* agent does not extend to make him the person with whom the seller is entitled, if he wishes, to litigate any disputes that arise out of the contract and ascertain what is due upon it. The learned Judge, after a review of the authorities, observed:

"I do not think that any of these cases affords any ground for the contention set up by the plaintiffs in this case, that where there is a contract effected through a *del credere* broker, if disputes arise between the seller and the buyer, the seller is entitled to call on the *del credere* broker to litigate those disputes, taking upon himself all the obligations of the buyer and taking to himself all the defences of the buyer."

(1) (1891) I.L.R., 18 Cal., 573.

(2) [1914] 1 K.B., 449.

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This decision was affirmed by the Court of Appeal and is reported in *Thomas Gabriel & Sons v. Churchill & Sim*(1). BUCKLEY, L.J., after approving of the observations of PICKFORD, J., as to the extent of the obligation, observed :

"The liability of the *del credere* agent is a contingent pecuniary liability, not a liability to perform the contract; it is a pecuniary liability to make good in an event the default of the buyer in respect of a pecuniary liability. It does not extend to other obligations of the contract. It does not expose the *del credere* agent to an action to ascertain the sum due. It is limited to a contingent pecuniary liability in respect of a sum which, as between the seller and the buyer, is an ascertained sum."

If the first defendant could not under the law sue the plaintiffs as *del credere* agents to recover the sum claimed from the second defendant under the contract as to which there was a *bona fide* dispute, it seems to me difficult to see how, by the mere withholding of the deposit of the plaintiffs and debiting the amount claimed in the deposit account, the plaintiffs, assuming they are *del credere* agents, can litigate the disputes as between the first and second defendants in respect of the contract.

The next question is whether the first defendant committed breach of contract in not fixing the rate of exchange. Under the contract Exhibit B the first defendant was bound to fix the exchange on the dealer's account in advance subject to the banks operating for the period.

[His Lordship discussed the evidence and concluded as follows:—]

I am therefore of opinion that the second defendant is entitled to claim that he would only pay according to

(1) [1914] 3 K.B., 1272.

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the rate of exchange current between February and May when according to the finding of the learned trial Judge, with which I agree, it was possible to fix the exchange. If that is so, the amount which the second defendant would be entitled to owing to the difference in exchange would cover the sum decreed against him after the resale of the goods.

I am of opinion that the appeal should be allowed and the suit dismissed against the second defendant with costs in this and the Court below.

KRISHNAN, J. — This is an appeal by the second defendant company against a decree passed against them by Mr. Justice COUTTS TROTTER, now Chief Justice, sitting on the Original Side, for a sum of Rs. 30,000 and interest and costs. The suit was brought by the plaintiffs, Banians & Co., against Messrs. Shaw, Wallace & Co. as the first defendant and in the alternative against the second defendant. Between the plaintiffs and the first defendant there was an arrangement evidenced by Exhibit A, called the dubash agreement, by which the former undertook to guarantee the latter against all loss in certain specified branches of their business in consideration of the payment of a commission at 1 per cent on piece-goods and iron and at $\frac{1}{2}$ per cent on other goods. Among other things the Banians were "to guarantee due completion by contracting parties of all the terms of their contracts." See paragraph 5, clause (e) of Exhibit A. They were, however, to have an option to accept or decline to accept responsibility as regards any particular contract. It was the usual practice of the Banians to countersign the contract if they had accepted responsibility with regard to it.

The first defendant entered into a contract with the second defendant on 13th February 1920 for the sale of 25 tons of yellow metal sheets at £182-10-0

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per ton c.i.f., shipment in November 1920; cash against documents, delivery to be taken at once on arrival of the documents or before the 60th day after such arrival, that being the due date. The price was fixed in English currency, as the exchange was then fluctuating very much; to minimise loss on exchange the parties entered into a covenant that the exchange was to be fixed (in advance) on dealer's account on or before the date when payment fell due subject to the Banks in Madras operating; but if no instructions were received from the dealers prior to that date, the first defendant company was to have the option of fixing exchange at the current rate at the time of payment. These terms are embodied in Exhibit B, Exhibits I and II evidencing the prior negotiations.

The contract fell within the class of contracts guaranteeable by the plaintiffs and they accepted liability for it and in token thereof they countersigned the contract. When the goods arrived in January 1921 the second defendant refused to pay the price calculated at the then current exchange and to take delivery as they contended that the first defendant had wrongfully failed to fix the exchange when asked to do so in February 1920, when the exchange was very much more favourable to them. In fact it was then about $2\frac{3}{4}$ d. or $2\frac{1}{4}$ d. a rupee whereas in 1921 the exchange had fallen to about $1\frac{1}{3}$ d. or so. The contract being broken, the first defendant company had the goods sold in auction and that caused a loss of Rs. 30,000. They deducted this amount under the dubash agreement, Exhibit A, from the security which the plaintiffs had given to them.

The plaintiffs thereupon brought this suit alleging in the first instance that the first defendant company had itself committed the breach by wrongfully failing to fix

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the exchange in time and that they were therefore not entitled to any damages or to deduct any money from plaintiff's money in their hands and they claimed therefore that first defendant company should refund to them the money so deducted. In the alternative they asked that if the Court found that the second defendant had committed the breach and was liable in damages the amount payable by that company as damages should be decreed to be paid over to them. The trial Judge has exonerated the first defendant company from all liability and, holding that the second defendant company committed the breach of contract, has decreed damages, to be paid to the plaintiffs. The second defendant company has appealed to us making the plaintiff company the sole respondent to the appeal.

It was contended for the plaintiff company (respondents) that the first defendant company was a necessary party to the appeal and that the appeal should be dismissed for their non-joinder. Plaintiffs urge that they are entitled to a decree against one or the other of the defendants and therefore both the defendants should be before us so that if the second defendant is to be exonerated the first defendant may be made liable. That no doubt is the plaintiffs' point of view, but so far as the second defendant is concerned he only desires that the decree against him in favour of the plaintiffs should be set aside. His appeal against the plaintiffs alone is therefore properly constituted and it was for the plaintiffs to take the necessary steps to safeguard their interests. I should have been prepared to direct the first defendant company to be added as a party to the appeal but it appears from the evidence of Mr. Menzies, P.W. 3, that the matter of the suit has been compromised between that company and the plaintiff company. I am not prepared to hold that the first

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defendant company is a necessary party to this appeal and the objection on that score must be over-ruled.

The next point we have to consider is the objection of the second defendant company that the plaintiff company is not entitled to maintain any suit against them for damages for breach of the suit contract as that company was not a party to the contract at all. This objection is raised in Issues 7 and 8 in the case which run thus :

" 7. Did the plaintiffs guarantee the due performance of the contract at the instance of the second defendant and was there any privity of contract between the plaintiffs and the second defendant ?

" 8. If not, are the plaintiffs entitled to maintain the suit against the second defendant ? "

The learned trial Judge treated the question as if it was one of want of consideration for the contract of guarantee, because the guarantor had not been proved to have affixed his signature until the contract between the principals had been concluded. He over-ruled the objection by saying that the plaintiffs had signed the letter of the 13th February before the contract was concluded. With respect to the learned Judge, I think the point was misappreciated by him. The plea was that the second defendant had nothing whatever to do with the plaintiff's guarantee to the first defendant as that was a matter of arrangement purely between the plaintiffs and the first defendant and the fact that under such guarantee the plaintiffs had to pay the first defendant the damages claimed to be payable by the second defendant on the contract gave them no cause of action for damages against them. The first question for decision in this connexion is, had the second defendant company anything to do with the giving of the guarantee by the plaintiffs ? There is no evidence to show that they had. The arrangement was made

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in the usual course of business between the first defendant company and their dubashes, the plaintiffs, under Exhibit A. As I read Exhibit A the plaintiffs are in the position of insurers and they insure against any loss occurring to the 1st defendant company from their contracts, on the payment of a premium or commission on each contract. They indemnify the First defendant company against loss, but they do not do so at the instance of or at the request of the dealers with whom 1st defendant company was entering into contracts. The finding on issue 7 must therefore be that the plaintiffs did not guarantee at the instance of the Second defendant company and there was no privity of contract between them.

We have then to decide whether plaintiffs have any right to maintain his suit against the Second defendant company. We have here thus a position like this : *A* enters into a contract with *B* ; *C* without any connexion with *B* undertakes to indemnify *A* against any loss on that contract for a consideration moving from *A*. Loss occurs by *B* breaking the contract and *C* is obliged to make good that loss under his agreement with *A*. Can *C* sue *B* for such damages in his own name ? It seems to me he cannot. The general principle is that a person who is not a party or privy to the contract cannot enforce it. An insurer who pays is no doubt subrogated to the rights of the insured against third parties, *see* Smiths Mercantile Law, page 583 (Insurance against Fire) and the cases cited, but it is clear law that the insurer can only sue third parties in the name of the insured and not in his own name, *Simpson v. Thomson*(1) and *King v. Victoria Insurance Company*(2) and Halsbury's Laws of England, Vol. 15, page 519,

(1) (1877) 3 A.C., 279.

(2) [1896] A.C., 250.

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paragraph 1024. My learned brother having referred to all the English authorities quoted, I have not thought it necessary to refer to them myself again. Under the Indian Contract Act, the agreement between the plaintiffs and the 1st defendant is, it seems to me, a contract of indemnity falling under section 124, and under such a contract no right is given to the promisor to sue third parties. Feeling this difficulty the parties have expressly stipulated in paragraph 13 of Exhibit A that the defendant company should, after the plaintiff company had paid off their liability, sue in their own name on being properly indemnified, the third parties who are liable, for the benefit of the plaintiffs. This method has not been adopted here.

It is clear that, under the English law, such a suit as the present one will not lie against the 2nd defendant company. But it is argued that the Indian law is different and that the Indian Contract Act does give a right of suit in such circumstances and reliance is placed on section 140 of the Contract Act for this contention. It seems to me that the section does not apply to this case, as it lays down the rights of a surety in a contract of guarantee as defined in the Act. Such a contract is a tripartite contract to which the surety, the principal debtor and the creditor are all parties. Such contract results only when at the instance of the debtor the surety guarantees payment to the creditor. Section 126 of the Act which defines a contract of guarantee, though it does not say expressly that the debtor should be a party to the contract, clearly implies, in my opinion, that there should be three parties to it, namely, the surety, the principal debtor and the creditor; otherwise it will only be a contract of indemnity. Section 145 which enacts that in every contract of guarantee there is an implied promise by the principal debtor to indemnify

the surety clearly shows that the debtor and the surety are both parties to such a contract, for it will be strange to imply in a contract a promise between persons who are not parties to it. As that section deals with every contract of guarantee it would seem to follow that in every such contract the debtor must be a party. I can see no reason to suppose that the Indian Legislature intended to lay down a law different from the English Law on this point. I would have had no doubt on the matter but for the ruling in *Muthu Raman v. Chinna Vellayan*(1) where section 140 is construed as applying to a case of a bilateral contract to which the debtor is not a party, though it is held in it that section 145 implies the existence of three parties. With all respect, I am unable to follow the reasoning of that ruling; I think it is unsound. Section 140 refers to a tripartite contract of guarantee just as section 145 does, the former stating what rights pass to the surety from the creditor and the latter dealing with the rights of the surety against the principal debtor. Section 141 which immediately follows section 140 throws light on how section 140 is to be construed, for section 141 explains that the surety's right includes a right to the benefit of securities and provides that if the creditor loses the securities, as between him and the surety his claim is restricted to that extent. The case in *Muthu Raman v. Chinna Vellayan*(1) was a case of a negotiable instrument and the decision seems to have been based mainly on the sections of the Negotiable Instruments Act. It is thus entirely distinguishable from the present case. The observations on the meaning of section 140 by the two learned Judges who took part in that decision do not seem to be quite

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(1) (1916) I.L.R., 39 Mad., 965.

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concurrent and the decision finally turned on the findings under the Negotiable Instruments Act. I do not therefore think it necessary to refer the question as to the correctness of its interpretation of section 140 to a Full Bench. I would hold that plaintiffs are not entitled to maintain the suit as brought against the second defendant company. As regards the argument based on the plaintiff company being *del credere* agents, it is sufficient to say that such a point does not arise as plaintiffs had nothing to do with the making of the suit contract, they did not arrange it as agents at all. This is sufficient to dispose of the appeal but I think it proper to express my opinion on the question raised on the merits as well.

It is second defendant's case that first defendant company committed breach by wrongfully failing to fix the exchange in proper time and thus causing a loss of more than Rs. 30,000 claimed in suit. It is true that the covenant to fix the exchange is not a part of the main contract Exhibit B but is only a collateral covenant and the breach of it will not justify a breach of the main contract. But it was open to the second defendant company, if the first defendant company committed breach of that covenant, to set off the damages resulting from it against the damages for the breach of the main contract and as the former is admittedly larger than the latter it furnishes a full defence to the suit. The question then is whether the first defendant company wrongfully failed to fix the exchange. [His Lordship discussed the evidence and concluded as follows :—]

At any rate I am not satisfied on the evidence on record that it has been proved that it was impossible to have got the exchange fixed up in spite of the best endeavours of the first defendant company. No evidence has been called from any of the exchange Banks in

Madras to show that the exchange could not have been fixed up in time for the suit contract. Whether the fault be the first defendant company's or Mr. Tod's, in either case the second defendant company is entitled to be reimbursed the loss caused by the failure to fix up the exchange in time. In this view neither the first defendant company nor the plaintiffs will be entitled to any amount as damages from the second defendant company. On this ground also the suit would fail.

For the above reasons I agree that the appeal should be allowed and the decree of the trial Judge against the 2nd defendant company should be set aside and the suit dismissed against them with costs in the trial Court and of the appeal.

A. P. Sundarajan, Attorney for appellants.

K.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice
and Mr. Justice Viswanatha Sastri.*

GOPAL NAIDU (RESPONDENT) APPELLANT

v.

MOHANLAL KANYALAL (PETITIONER) AND TWO OTHERS
(CREDITORS), RESPONDENTS.*

Section 9, Explanation, Presidency Towns Insolvency Act (III of 1909)—Closing of business by one partner—Right to get another partner adjudicated insolvent—Question of fact.

It is a question of fact in each case whether the act of one partner in closing the business of the firm and thus committing an act of insolvency so far as he is concerned is imputable to another partner so as to entitle the creditors of the firm to get the other also adjudicated an insolvent.

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Held that the mere fact of closing the firm by one partner without more (e.g.) evidence to show that the other either expressly or impliedly authorized the same was insufficient to lead to such imputation.

ON APPEAL from the judgment and order of Mr. JUSTICE RAMESAM, dated 23rd September 1924 and passed in the exercise of the Insolvency Jurisdiction of the High Court in I.P. No. 7 of 1923.

The appellant who was adjudicated an insolvent at the instance of his creditors preferred this appeal.

The facts are given in the judgment.

K. S. Krishnaswami Ayyangar for appellant.—The order adjudicating my client is illegal. The only evidence upon which the order was made is that my client's partner closed the business when in difficulties and went away. This evidence is insufficient. There is no evidence that my client either expressly or impliedly authorized the closing of the business. That is the test laid down by decisions on the point. On the other hand there is evidence in this case that though my client resided in the mufassal he was always available there for any one who wanted to see him and that he was from time to time coming to Madras, looking into the accounts of the firm and seeing how the business was progressing. It is a question of fact in each case depending on various circumstances whether the act of one partner in closing the business is imputable to another. He referred to section 9 (3) (d) and Explanation to section 9 of the Presidency Towns Insolvency Act, Williams on Bankruptcy 13th Edition, page 186 and *Mills v. Bennet*(1), *Ex parte Mavor*(2), *Ex parte Blain*, *In re Sawers*(3), *Cooke v. Charles A. Vogeler Company*(4), *In re: Dhunput Singh*(5), *Kastur Chand Rai Bahadur v. Dhanpat Singh Bahadur*(6). He relied on *Harish Chandra Mukherjee v. The East India Coal Company, Ltd.*(7) and commented on *Kalianji v. The Bank of Madras*(8), *Abu Haji v. Haji Jan*(9) and *In the matter of Brij Mohun Dobay*(10).

(1) (1814) 2 M. & S. 556 = 105 E.R. 488.

(2) (1815) 19 Ves. 539 = 34 E.R. 616.

(3) (1879) 12 Ch. D., 522.

(5) (1893) I.L.R., 20 Cal., 771.

(7) (1912) 16 C.W.N., 733.

(9) (1906) 8 Bom. L.R., 648.

(4) [1901] A.C., 102.

(6) (1906) I.L.R., 23 Cal., 26 (P.C.)

(8) (1916) I.L.R., 39 Mad., 693.

(10) (1897) 2 C.W.N., 306.

O. Thanikachalam, for respondent did not contest the legal proposition of the appellant's counsel.

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JUDGMENT.

COUTTS TROTTER, C.J.—This case raises a point of some interest. Two persons traded together in partnership. A man called Anantha Mudali, about whom no question arises in these proceedings, and the Appellant Gopal Naidu had carried on a produce business in Madras and the facts seem to be that Anantha Mudali was managing the business in Madras, whereas Gopal Naidu resided ordinarily at Wallajabad, but the evidence which is given in the case—and that is the evidence that was relied upon by the adjudicating creditors themselves—establishes two things. The first is that when anybody—after the difficulties arose and in this concern they did arise—wanted to see Gopal Naidu when he went to Wallajabad, he found Gopal Naidu without difficulty and was able to put whatever he wanted to put before him. The other fact that emerges is that, although Gopal Naidu ordinarily resided at Walajabad, he did from time to time come to Madras and look into the accounts and see how the business was progressing. What is before us is an appeal by Gopal Naidu against his adjudication. The circumstances which led to it are these. The business got into difficulties when the debts due to the petitioning creditors amounted to something over Rs. 10,000 and the difficulties came to a head,—we will take it as proved, for it is not disputed—when Anantha Mudali closed the business and went away in order to get out of the clutches of his creditors, thereby committing an act of insolvency, so far as he is concerned, under section 9 (d) (iii) of the Presidency Towns Insolvency Act. That is a perfectly good foundation for the insolvency petition and the adjudication

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consequent upon it as against Anantha Mudali but it has been sought in this case to use that act of Anantha Mudali in order to lay the foundation not merely of the petition against Anantha Mudali himself, but of the petition against the appellant Gopal Naidu.

We had a very interesting argument practically giving us the whole of the history of the law on this matter both in England and in India. There is no doubt that the English cases (of which I may take as instances *Mills v. Bennett*(1) as one of the earlier and *Ex parte Blain*; *In re Sawers*(2) and *Cooke v. Charles A. Vogeler Company*(3) as some of the later), clearly lay down the principle that, in order that a man may be made a bankrupt, the act of bankruptcy relied upon must in English law be some act which can be definitely brought home to him, and the learned Judges point out that the act of an agent cannot ordinarily found a petition in bankruptcy. The chief pronouncement, which has been approved of in many subsequent cases, is contained in the judgment of BRETT, L.J., in *Ex parte Blain*; *In re Sawers*(2) at page 529. He says :

“ It was said that a person may commit an act of bankruptcy by his agent, and that the partner in England was the agent of these foreign partners, and therefore they committed an act of bankruptcy by their agent in England, that is, by allowing the execution to go without satisfying the judgment, and that, this having been done by their agent in England, they ought to be adjudged bankrupts. That assumes that a man can commit an act of bankruptcy by his agent, whether he has authorized the particular act or not, and that assumption seems to me to be equally wrong. I think that a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorized, and of which act he has had no cognizance.”

(1) (1814) 2 M. and S. 556.

(2) (1879) 12 Ch. D., 522.

(3) [1901] A.C., 102.

That is what BRETT, L.J., said in *Ex parte Blain*; *In re Sawers*(1) and, in my opinion, that is good law to-day in England and with a certain modification is probably good law in India. Meanwhile, the matter had arisen on several occasions in Calcutta as to whether a man could be adjudicated a bankrupt, because of the act of some person whom he left in charge of his business, namely, a munim gumastha or a quasi partner with the authority of an agent to act for his fellow partners; and, so far as the High Court of Calcutta is concerned, the matter came to a head in the case of *In re Dhunput Singh*(2) which was decided in the year 1893 by a Bench consisting of SIR COMER PETHERAM, C.J., PRINSEP and PIGOT, JJ. In that case there was a pronouncement of Mr. Justice TREVELYAN, which lends colour to the suggestion that the act of an agent in departing with intent to defeat creditors was always, as a matter of course, to be treated as a departure by the principal on the ordinary principles of agency, and that view was definitely rejected by the Court very largely on the authority of the English cases. The learned Judge who deals most clearly with the matter is PIGOT, J. At page 795 of the Calcutta Reports, he says :

“ I think the general proposition laid down by BRETT, L.J., in *Ex parte Blain*; *In re Sawers*(1) only affirms, and is intended to affirm, the rule stated before by Lord TENTERDEN :—‘ I think a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorized, and of which act he had no cognizance.’ This general rule is, I apprehend, applicable in cases outside those of the class with which we are here concerned and it seems to me absolutely to govern this case. There are, therefore, two reasons why the acts of Panna Lal in this case, assuming them to amount, so far as he personally was

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(1) (1879) 12 Ch. D., 522.

(2) (1893) I.L.R., 20 Calo., 771.

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concerned, to a departure, etc., with intent, etc., cannot be acts of insolvency committed by his master, Dhunput Singh. The first is that the nature of the acts themselves, as described in the section, is incompatible with the possibility of their being committed by any one but the debtor himself, the departure must be his departure and the intent proved must be his intent. The second is that a man cannot commit any act of bankruptcy by an act of his agent which he has not authorized, and of which act he had no cognizance."

He then goes on to say that, in accordance with the principles stated above which he accepts as correct, he thinks he must pronounce that the earlier case in the Calcutta High Court of *In re Hurruck Chand Golicha*(1) decided by BROUGHTON, J., sitting in insolvency was wrongly decided. This very case of Dhunput Singh came up before the Privy Council and was dealt with in *Kastur Chand Rai Bahadur v. Dhanpat Singh Bahadur*(2) in a judgment which was delivered by Lord HOBHOUSE. Their Lordships adopted what I may call a middle course. They thought that PIGOT, J., had put the supposed rule much too broadly and they thought that it was impossible to say that there can be no case in which the act of an agent in closing down the business and absconding from the creditors could be treated as an act of the principal and they proceeded to say that there might be cases, of which that before them they clearly considered not to be one, in which a Court would be justified in certain circumstances in holding that the act of the agent in violation of the section of the Bankruptcy Act might and should be treated as the act of the principal and in the light of that, the expression of opinion by PIGOT, J., required modification and a much more flexible rule should be laid down. I am reading from page 35 in which, after setting out the view taken by

(1) (1880) I.L.R., 5 Calc., 605.

(2) (1896) I.L.R., 23 Calc., 26 (P.C.).

PIGOT, J., and the High Court, their Lordships go on to observe as follows:—

"So understood, their Lordships cannot assent to the principle laid down by the High Court in *In re Dhanpat Singh*(1). The position of a gumastha differs in different cases. In some cases he may be little more, or no more, than an ordinary manager. In others he may represent the business so entirely that the beneficial owners have no practical control over it and are quite unknown to the customers. Mr. Justice PIGOT states the possible position of a gumastha with even more force than does Mr. Justice BROUGHTON [I think in *In re Hurruck Chand Golicha*(2).] He says: 'It often happens that a large business is carried on for years by a munim gumastha or by a succession of them, in the name of principals, who never are seen, or personally known, in connection with the business at all; sometimes in the name of family firms the members of which are constantly fluctuating from generation to generation, and of which firms it is or may be difficult to determine who are, at any given time, actually members.'"

Then their Lordships go on as follows:—

"Their Lordships think otherwise. They cannot hold that the creditors of firms exclusively managed by gumasthas have no remedy by way of insolvency, whatever the gumastha may do; though he may make fraudulent conveyances, promote fraudulent executions, or as in *In re Hurruck Chand Golicha*(2) levant 'leaving the creditors to find him or his master if they could.' And yet that consequence must follow if the principle laid down by the High Court in this case be the true one."

And then they go on to say:—

"It is a question in each case whether the gumastha occupies such a position that the owner must stand or fall by his acts, so that his fraud or his flight shall by imputation be the fraud or flight of the owner or multitude of owners, for the purpose of bringing their case within the Statute of Insolvency. Their Lordships agree with the Judges who have held that the statute admits of application to such cases, and that to exclude it may lead to injustice and confusion in many cases. They are

(1) (1893) I.L.R., 20 Calc., 671.

(2) (1880) I.L.R., 5 Calc., 605.

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by no means prepared to say that Hurruck's case was wrongly decided; though the position of the gumasta there is not stated so fully as they would think desirable if the case were before them for decision. On the other hand they have no hesitation in agreeing with the High Court that Punna did not occupy such a position as to make the respondent liable to be declared insolvent on the ground of his conduct. The respondent appears to have been an active and responsible owner. His residence and head koti at Azimgunge were well known. He occasionally came to Calcutta and to the koti. When difficulties arose, Punna applied to him to meet them; and when payment was suspended, Punna openly, by himself or by his servants, told the creditors that his principal was coming, and that they must wait for his action. Under such circumstances, even if Punna himself had committed the acts alleged by the appellant, it would, in their Lordship's opinion, be wrong to hold that his acts were those of the respondent."

In that case a hint had been thrown out by Mr. Justice PIGOT in the High Court and then by way of encouragement of the suggestion by Lord Hobhouse in the Judicial Committee that the case was one which might aptly be met by further legislation, and I suppose that it was that suggestion which brought about finally the Presidency Towns Insolvency Act of 1909 long after. We have the desired legislative machinery in the explanation to section 9. That explanation runs as follows:—

"For the purpose of this section, the act of an agent may be the act of the principal, even though the agent may have no specific authority to commit the act."

I take that section to be an attempt by the draftsman to carry out broadly and in spirit the effect of the observations of their Lordships of the Judicial Committee in *Kastur Chand Rai Bahadur v. Dhanpat Singh Bahadur*(1), and I am content to deal with it on that footing.

(1) (1896) I.L.R., 23 Calc., 26 (P.O.)

Unfortunately in this country a misinterpretation, as we feel constrained to regard it, has been put upon that section, and, for this purpose, I wish to refer to two cases. One is the case *In the matter of Brijmohun Dobay*(1), a decision of Mr. Justice SALE sitting alone in insolvency. What Mr. Justice SALE says on this point is very brief and I will read his exact words. He deals first with a different point with which we are not concerned and then he goes on to say this:

"If I had taken another view of this point, the question would still remain as to whether the departure of the gumastha under the circumstances and under the instructions of the debtor did not constitute an act of insolvency."

Why indeed should it not? For, as is clearly expressed in the learned Judge's words, the departure of the gumastha was under the express instructions of the master. We are here concerned with a case where the departure of the agent is *ex hypothesi* an act done by himself without express authority of the principal. Then he goes on to say,

"The difficulties which arose in *Dhanpat Singh's* case are absent from this. (We do not know what those difficulties are, but one of them was clearly the absence of express instructions of the principal) and I am inclined to think that the departure of the gumasta did, under the circumstances, amount to an act of insolvency on the part of the debtor."

This is really a decision on the facts of that case, and we entirely agree with the learned Judge that the facts of that particular case were such that certainly under the section of the Presidency Towns Insolvency Act and also previously to it under the guidance of the judgment of the Privy Council in *Kastur Chand Rai Bahadur v. Dhanpat Singh Bahadur*(2), his was a perfectly correct determination of the matter before him.

(1) (1897) 2 C.W.N., 308.

(2) (1896) I.L.R., 23 Calc., 26 (P.O.).

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The judgment of SALE, J., was brought to the notice of a Division Bench of this Court consisting of SPENCER, J., and PHILLIPS, J. There is no doubt, looking at the report *Kalianji v. The Bank of Madras*(1)—that those learned Judges regarded this decision of Mr. Justice SALE as laying down the sweeping principle that in all circumstances the act of an agent in closing down the principal's place of business must be treated to be the act of the principal and they treated that as being the existing law. They refer to English cases and they go on in these words:—

“In India it has been expressly enacted as an explanation to section 4 of the Provincial Insolvency Act (that is the same in words as section 9 of the Presidency Towns Insolvency Act) that for the purpose of that section, which deals with acts of insolvency committed by a debtor, the act of an agent might be the act of the principal. It was accordingly held in *In the matter of Brijmohun Dobay*(2) that the departure of an agent from the place of business did constitute an act of insolvency on the part of the principal.”

It did on the particular facts of that case, but unfortunately the learned Judges of the Madras High Court have taken to be a hard and fast rule of law what in truth and in fact was a decision on the particular facts of that particular case and the same fallacy undoubtedly vitiates the reasoning of Mr. Justice RAMESAM when he tried this case. He took the decision of the Calcutta Weekly Notes case and he took the decision of the Madras High Court as laying down a hard and fast rule which he was bound to respect, and without reference to the particular circumstances of the case, he thought he was in law bound to treat the act of the agent as inevitably the act of the principal, which is clearly incorrect.

(1) (1916) I.L.R., 39 Mad., 693.

(2) (1897) 2 C.W.N., 306.

In the light of these principles, Mr. Thanikachalam Chetti very wisely does not seek to uphold the decision of the learned Judge on this point. When we look at the affidavits it is clear that the facts of the case which are put by the creditors themselves before the Court constitute just the kind of facts which would enable the Court in its discretion to say in a particular case,

“this is not the sort of case where we will do what the Act allows us to do, namely, treat the unauthorized act of the agent in closing down the business as in law being the act of the principal.”

Mr. Thanikachalam Chetti does not therefore press us to remit the case back. On a further consideration in the light of these principles, he is content that the adjudication of Gopal Naidu should be quashed on the ground that circumstances exist here which do not permit of the Court saying that the act of Anantha Mudali in closing down the business could be treated on the materials before the Court as being necessarily in law the act also of Gopal Naidu. That is the sole ground on which we decide this case.

It was argued before the learned Judge on behalf of Gopal Naidu that he was in no circumstances accountable for the debts of the business which were relied upon by the petitioning creditors because it was said that he had before these debts were incurred executed a deed of dissolution of partnership and ceased to be a partner. That question has not been gone into before us. The learned Judge found against Gopal Naidu on that and Mr. Krishnaswami Ayyangar has not, in view of the other point on which he felt he was likely to succeed, touched that question. If, therefore, the matter ever comes before the Court in any other form, the whole subject is open and it is competent to Mr. Krishnaswami Ayyangar to contend that the learned Judge was wrong

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in forming the conclusion that the supposed deed of dissolution of partnership was a sham. It is open to Mr. Thanikachalam Chetti, on a proper view of the documents and the circumstances which were not put forward before, to say that the learned Judge is right and it was a sham. In the view we have taken it is not necessary for us to deal with that point at all and we are content to decide on the ground that has been argued before us.

The result will be that the appeal is allowed. Costs of the appeal of both sides on the Original Side scale will come out of the estate.

V. Varadaraja Mudaliar, Attorney for appellant.
Short Bewes & Co., Attorney for respondent.

N.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice
and Mr. Justice Viswanatha Sastri.*

GANDHA KORLIAH (PLAINTIFF), APPELLANT

v.

JANOO HASSAN (DEFENDANT), RESPONDENT.*

*Sections 32, 56 and 65, Contract Act (IX of 1872), Charterparty
—Impossibility of voyage—Advance freight paid, right to
recover.*

Advance freight paid by a shipper to a shipowner under a charterparty can under the Indian Contract Act be recovered back on the frustration of the venture, owing to circumstances which were beyond the control of the parties, and which they had not warranted not to exist. *Sivanandam Chettiar v. Surayya*, (1925) I.L.R., 48 Mad. 459 and *Boggiano & Co. v. The Arab Steamers Co., Ltd.*, (1916), I.L.R., 40 Bom. 529, followed.

Quære: Whether a chartered ship is a common carrier?

ON APPEAL from the judgment of the Honourable Mr Justice WALLER passed in the exercise of the Ordinary.

* Original Side Appeal No. 83 of 1924.

Original Civil Jurisdiction of the High Court in C. S. No. 9 of 1923.

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The facts are given in the following Judgment of WALLER, J. :—

“ This is a suit to recover Rs. 7,700 by way of liquidated damages. On December 30th, 1919, defendant chartered from plaintiff two schooners to carry bags of rice or paddy from Akyab to certain ports in the Madras Presidency. Two trips were to be made, one after 15th January and the other in March 1920, the cargo on each trip to consist of 2,200 bags. In the event of a breach of the contract, the damages were fixed at a sum of Rs. 7,700 and defendant paid Rs. 1,050 in advance. The schooners were ready at Akyab at the required times but defendant failed to provide the necessary cargoes. Plaintiff therefore sues to recover Rs. 7,700 minus the amount paid in advance. Defendant denies liability and counter-claims for the Rs. 1,050 paid in advance.

II. *The following issues have been framed—*

1. Whether the defendant is exempted from the performance of the suit contract for reasons alleged in paragraphs 5, 6 and 7 to 12 of the written statement ;
2. Whether the plaintiff was aware of the said terms and conditions mentioned in paragraph 7 of the written statement at the time of entering into the suit contract ?
3. Whether the allegations in paragraphs 9 and 10 of the written statement are true ?
4. Whether it was an implied condition for the performance of the contract, that native craft licences should be obtained and whether the plaintiff was informed and aware of the same ?
5. Whether the defendant committed breach of contract ?
6. To what damages is the plaintiff entitled ?
7. Whether the defendant is entitled to the amount of the counter-claim ?
8. To what relief is the plaintiff entitled ?

III. At the time when the charterparties were executed, a Government order was in force prohibiting the export of rice without a licence. Plaintiff contends and has gone into the box to swear that he was, at the time, unaware of this order and that it was not in the contemplation of the contracting parties when

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the contracts were made. I may say at once that I do not believe him. The transaction was arranged by a broker called Janardhanam who lives at Akyab. Admittedly this man was aware of the order in question. Plaintiff was staying with him on 30th November 1919 and had been staying with him for some time before that. I find it quite impossible to believe that any party to the transaction was ignorant of the fact that the procuring of a licence was necessary before the contracts could be performed.

My conclusions on the facts are these—

(a) That the parties were aware that a licence was required before rice could be exported ;

(b) that defendant had the cargoes ready ; this is admitted by Janardhanam ;

(c) that he endeavoured on each occasion to get a licence, but failed.

IV. The main question in the suit is whether it was an implied condition of the contracts that licences should be obtained. I have no difficulty in finding that it was. Defendant would not, I think, have bound himself absolutely to pay a large sum by way of damages on the uncertain contingency of securing a licence. There is nothing in the charterparties which justifies the conclusion that he warranted himself to get licences.

On the finding that the contracts were made on the implied condition that licences should be obtained, the contracts, in my opinion, became void when defendant applied for but failed to get the licences. In an English case, where the facts were very similar to those now under consideration, *In re Anglo-Russian Merchant Traders and John Batt & Co.*(1), Lord READING, C.J., remarked that, in his opinion, the implied obligation was not an absolute obligation to ship, but an obligation that the sellers should use their best endeavours to obtain a permit. He added that he was unable to see why the law should imply an absolute obligation to do that which the law forbids. The same view was taken by SCRUTTON, L.J. Where an event assumed as the foundation of a contract does not happen, the promisor so long as the fault is not his, is discharged ; vide *Krell v. Henry* (2).

It is not necessary to consider the other English decisions cited, for it seems to me clear that on the facts found either

(1) [1917] 2 K.B., 679.

(2) [1903] 2 K.B., 740.

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section 32 or section 56 of the Contract Act applies. The implied condition was that cargo should be supplied on the obtaining of licence, which was an uncertain future event. The event became impossible owing to the refusal of the controller to issue licences and as a result the contracts became void (section 32 of the Contract Act). The terms of paragraph ii of section 56 appear to be equally applicable.

Plaintiff's suit must therefore be dismissed with costs. Defendant's counter-claim is resisted on the strength of several English decisions, e.g., *Civil Service Co-operative Society v. General Steam Navigation Co.*(1) and *Chandler v. Webster*(2). The law of England no doubt is that under the circumstances of a case like this, the contract is good up till the point at which performance becomes impossible and that payments made before that point has been reached cannot be recovered. Sir Frederick Pollock points out that this statement of the law does not commend universal approval in the legal profession. In any event it is not a correct statement of the law in this country, which is to be found in section 65 of the Contract Act—vide *Boggiano & Co. v. the Arab Steamers Co., Ltd.*(3). On the counter-claim I find for defendant. He will recover the advance of Rs. 1,050 with interest at 12 per cent from the date of the contract till the date of decree. Subsequent interest at 6 per cent. Plaintiff will pay his costs on the counter-claim."

The plaintiff preferred this appeal only as against the allowance of defendant's counter-claim.

S. Srinivasa Ayyar for appellant.

K. Sundara Rao for respondent.

JUDGMENT.

This case raises a point of some interest that has been much discussed in the English Courts and has very recently been the subject of a decision by Mr. Justice MACLEOD as he then was, sitting in the High Court of Bombay. (*Boggiano & Co. v. The Arab Steamers Co., Ltd.*(3). It is not disputed by the appellant that if

(1) [1903] 2 K.B., 756.

(2) [1904] 1 K.B., 493.

(3) (1916) I.L.R., 40 Bom., 529.

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Mr. Justice MACLEOD's judgment is correct he is out of Court. The plaintiff was the owner of two steamers which were chartered by the defendant for the carriage of rice from Akyab to the Coromandel Coast. The importation of rice was only permitted—and Mr. Justice WALLER, the trial Judge, has very rightly found that this was a fact perfectly within the knowledge of the parties—if and when a certificate could be obtained from the Food Comptroller. The learned Judge has also rightly found, and this part of his judgment is not challenged, that neither party to the contract committed himself to a guarantee that such a certificate would be forthcoming. As to that no question arises and the learned Judge therefore thinks that the execution of the contract became impossible owing to an act which is neither under the control of the parties nor which they had put themselves in the position of having warranted to be in existence, namely, the certificate. In these circumstances the shipper says that he is entitled to be paid back certain moneys which he had paid to the shipowner and these moneys are described in the contract as being paid for freight at the rate provided for in the charterparty:

"1. Rs. 450 only advance on acceptance of charterparty and to be deducted from the freight of second trip.

"2. Half of the freight to be paid as the vessel reaches Akyab and takes the cargo.

"3. The balance freight to be paid as the vessel reaches the port of destination."

It is sought to be said by the appellant in this case that this contract between the parties is not to be regarded as being governed by the general law of India laid down in the Contract Act but by the English common law. The appellant's vakil has very properly accepted the position that in circumstances such as the present the money that passed from one hand to the other

is recoverable by Indian law but irrecoverable by the English common law. If that were all that was to be said about it, it is quite plain that we should have to be guided by the statute law that obtains in this country and should not be justified in going past the Indian statute to the English common law, but a very ingenious argument is put forward, the same argument that was really put forward in the Bombay case. It is said that a ship in this position is a common carrier and that in accordance with the decision of the Privy Council in *The Irrawaddy Flotilla Company v. Bugwandas*(1) the contract between the parties is not to be supposed to be governed by the Indian Contract Act but by the English common law regarding the liabilities and rights of common carriers. It is said that the moment you show that a person is a common carrier you have proved the existence of a certain type of contract of a special kind which, according to the Privy Council decision, is not governed by the provisions of the Indian Contract Act. There appear to me to be two objections and the first is this: that it is more than doubtful whether a ship under charter as distinct from a general ship taking the goods of several shippers under separate bills of lading on the same voyage is properly described as a common carrier at all. It is not necessary to decide that point fortunately in this case but it is one that has been frequently discussed in commercial circles and amongst commercial lawyers for the past 70 years and there are a very considerable number of expressions of opinion by eminent commercial lawyers on the bench that a chartered ship is not a common carrier. If that be right, the appellant's case is ended at once. It appears to me that we can put the case on an even more solid footing

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(1) (1891) I.L.R., 18 Cal., 620 (P.C.).

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than that in the following way. Let us assume that in a contract of carriage by sea all those features which are peculiar to the contract of affreightment are governed by the English common law and therefore would not be touched even in this country by the provisions of the Indian Contract Act. But there are other incidents in the relation of ship-owner and shipper in a contract of affreightment which are in no way peculiarly confined to a contract of affreightment and which are independent of the special provisions of maritime law. That that is so, I think, is clear from many of the cases which were cited before us, so that the question narrows itself down to this, is money paid in the present circumstances by way of an advance freight, a special feature of a contract of affreightment deriving all its validity and force from the law maritime or does it derive its validity and force from the general English common law? The answer is to be found in the decision of the divisional Court in *Blakeley v. Muller*(1), which is reported as a footnote to *Civil Service Co-operative Society v. General Steam Navigation Company*(2). There CHANNELL, J., dealing with one of the Coronation cases as they are commonly called expressly says that it is an incident of the English common law and says that it is the same principle of the common law which prevents the refunding of advance freight on a charterparty where "the voyage is not completed and the freight therefore not earned." That way of putting it was assented to in the judgment of the EARL OF HALSBURY, L.C., Lord ALVERSTONE, C.J., and COZENS HARDY, L.J., where after citing the passage which I have read, the EARL OF HALSBURY, L.C., says he concurs with every word of that. If that be the right

(1) (1903) 88 L.T., 90.

(2) (1903) 2 K.B., 756 at 760.

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principle that was laid down by CHANNELL, J., it follows that the inability in England to recover advance freight on the frustration of the venture is derived from the general principles of the common law and not from any supposed peculiar incident attaching to maritime contracts of affreightment. That being so, even if a chartered ship is a common carrier, the answer would be that matters relating to the recoverability of freight paid in advance although they happen to occur in a charterparty which is a maritime document of affreightment are nevertheless to be regarded as being regulated by the ordinary common law or statute law, whether English or Indian. Then you get back to this position: that being the common law of the land or the statute law of the land—and the general principle is different in India from what it is in England—therefore, just as we should apply the common law in England, so we should apply the express statute that obtains in India. It therefore seems to me that we should take the view that, whether a chartered ship is a common carrier or not, nevertheless the general principle of the Indian Contract Act applies and advance freight when paid can be recovered back by the shipper on the frustration of the venture. That appears to be in accordance with the view expressed by PHILLIPS and ODGERS, J.J., in *Sivandam Chettiar v. Surayya*(1). Our decision is also in accordance with that in the *Boggiano & Co. v. The Arab Steamers Co., Ltd.*(2) with which we respectfully agree. The appeal will be dismissed with costs.

N.R.

(1) (1925) I.L.R., 48 Mad., 459.

(2) (1916) I.L.R., 40 Bom., 529.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
and Mr. Justice Viswanatha Sastri.*

1925,
August 28

PALANIAPPA CHETTIAR (SECOND LEGAL REPRESENTATIVE
OF THE PLAINTIFF), APPELLANT,

v.

RAJAH OF RAMNAD AND 4 OTHERS (DEFENDANTS
1 TO 3 AND 1ST AND 3RD LEGAL REPRESENTATIVES OF THE
PLAINTIFF), RESPONDENTS.*

*Malicious prosecution of plaintiff, suit for—Death of plaintiff—
Abatement of suit—No right for legal representatives to
continue suit even for costs of defence in the criminal
prosecution—Act XII of 1855.*

A suit for damages for malicious prosecution of the plaintiff abates on his death. Act XII of 1855 (Legal Representatives Act) does not enable his legal representatives to continue the suit to recover at least the costs incurred by him in defending the prosecution as loss caused to his estate, the loss on the ground of costs being incidental to, and inseparable from other losses sustained on account of the main injury, viz., the prosecution; *Pulling v. Great Eastern Railway* (1882) 9 Q.B.D., 110, followed.

APPEAL against the decree of K. S. VENKATACHALA AYYAR, Subordinate Judge of Madura, in O.S. No. 20 of 1923.

The facts are given in the Judgment.

V. Rajagopala Ayyar for appellant.—The legal representatives are entitled to recover at least the costs of defending the criminal case as there has been wrongful loss to the estate. *Rustomji Dorabji v. Nurse*(1) does not deal with the right to recover costs. Section 1 of Legal Representatives Act (XII of 1855) is applicable to this case.

[CHIEF JUSTICE: *Krishna Behary Sen v. The Corporation of Calcutta*(2), *Josiam Tiruvengadachariar v. Sawmi Iyengar*(3) are against you.]

* Appeal No. 131 of 1924

(1) (1921) I.L.R., 44 Mad., 357 (F.B.). (2) (1904) I.L.R., 31 Calc., 406.
(3) (1911) I.L.R., 34 Mad., 76.

C. V. Anantakrishna Ayyar with S. Soundararaja Ayyangar for respondents.—This suit abates and cannot be continued by legal representatives. The loss on the ground of costs is not separable from other losses which are not recoverable on account of abatement. *Pulling v. Great Eastern Railway*(1) and *London v. London Road Car Co.*(2)

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The JUDGMENT of the Court was delivered by

COUTTS TROTTER, C.J.—This is a point of some little interest. A man called Subrahmanya Chetti started a suit for damages for malicious prosecution and in his plaint he claimed a sum of money by way of general damages and he also claimed special damage under two heads. The first was vakils' fees and the second was travelling and other incidental expenses for securing the attendance of witnesses for the purpose of defending the prosecution which was launched against him. We will take it that that prosecution failed and had this unfortunate man lived, he would have got substantial damages against the defendant which would have included the special damage alleged to have been incurred by him. As a matter of fact he died while the suit was pending and when the suit actually came on for trial before the learned Subordinate Judge it was proposed to continue the action with his executor or legal representative substituted as the plaintiff. The learned Judge held that that could not be done and we agree with him.

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The thing can be put in two ways (1) on a narrower and (2) on a broader ground. The narrower ground is this; that his cause of action throughout is the tortious act of which he was the victim, and not the fact that he incurred out-of-pocket expenses, e.g., for getting himself cured by a doctor in case of personal injuries or getting himself defended by a barrister or a vakil in case of

(1) (1882) 9 Q.B.D., 110.

(2) (1888) 4 Times L.R., 448.

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malicious prosecution. That goes to swell the bill against the defendant but it is not a cause of action. The cause of action is that which was done to him by running him over or by prosecuting him maliciously as the case may be. When we come to the case of an executor or legal representative his cause of action on behalf of the estate is quite different. He can only sue for a tangible, measurable, pecuniary loss caused to the estate by reason of the tortious act so that it would follow on the narrower ground that although both the plaintiff if living and his legal representative after his death had a cause of action for the recovery of these out-of-pocket expenses caused by the wrong of the defendant nevertheless they would recover them in different rights and for different reasons. The living plaintiff will recover them as part of the damages for his general cause of action, i.e., malicious prosecution; while to the executor or administrator the expenditure would be the sole cause of action because to that alone would he be entitled to a judgment. It may be put as it was put in the English case of *Pulling v. Great Eastern Railway Co.*(1) on the broader ground that these expenses are not losses to the estate of the deceased within the meaning of the Act of Parliament (the wording of which is practically identical with that of the Indian Statute, Act XII of 1855), because they are so submerged and overtopped by the real cause of action which was the tortious injury (here malicious prosecution) that they must be treated as a mere incident of that cause of action and not as giving rise to a separate head of liability enuring after death to the legal representative. On that view the legal representative could not start an independent

(1) (1882) 9 Q.B.D., 110.

action for the expenses of the malicious prosecution as in the present case. We respectfully agree but in any event we think that the learned Judge was quite correct in holding in accordance with the authorities in Calcutta and Madras that the cause of action of the deceased man himself and that, if any, of his executors are so different that it would be impossible to permit his legal representatives to carry on a suit instituted by him to recover damages. That being so, there is no cause of action and this appeal will be dismissed. One set of costs to be divided.

N.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice, and
Mr. Justice Viswanatha Sastri.*

ACHUTARAMAYYA AND 2 OTHERS (DEFENDANTS 3 TO 5),
APPELLANTS,

1925,
October 22.

v.

RATNAJEE BHOOTAJI AND 2 OTHERS (PLAINTIFF AND
DEFENDANTS 1 AND 2), RESPONDENTS.*

*Hindu Law—Joint family—Debts—Commercial debts of father
newly starting a trade—Liability of sons.*

The text of Gautama, Chapter XII, 41, to the effect that the undivided sons of a Hindu are not liable for their father's commercial debts has long become obsolete; and ever since *Girdharee Lall v. Kantoo Lall* (1874) 1 I.A., 321, sons are liable for all debts of their father which are neither illegal nor immoral.

A trade is none the less ancestral because it was started only by the father.

APPEAL against the decree of S. SUBBAYYA SASTRI, Additional Subordinate Judge of Rajahmundry, in Original Suit No. 25 of 1920.

* Appeal No. 436 of 1922.

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The facts are given in the judgment of VISWANATHA SASTRI, J.

A. *Satyanarayana* for appellants.

G. *Lakshman* and V. *Viyyanna* for respondents.

JUDGMENT.

COUTTS
TROTTER,
C.J.

COUTTS TROTTER, C.J.—In this case the father of the appellants embarked on the hardware trade in 1914 and was sued with them in respect of debts contracted by him in the conduct of that venture. The appellants' vakil relied on a text of Gautama, XII, 41, which runs as follows:—

"Money due by a surety for a commercial debt, a fee due to the parents of a bride, debts contracted for spirituous liquor or in gambling and a fine shall not involve the sons of the debtor" and the bold contention is put forward that the pious obligation does not extend therefore to commercial debts. I have discussed this subject at length in paragraph 303 of the 9th Edition of Mayne on Hindu Law and I have very little to add to what I said there. This Court has held in *Thangathammal v. Arunachalam Chettiar*(1) that sons are liable in the case of a surety bond executed by the father for payment as distinct from obligations as a surety for appearance and for honesty; and there are other decisions of the Calcutta and Patna Courts to the same effect. This appears to me to be based upon the view that the governing provision in the texts is that which excludes from the rule debts that are not *Vyavaharika*, an expression taken from Usanas (*apud* Mitakshara ii, 48) and Vyasa (*apud* Jagannatha I, 5, 203). From 1874 onwards the decisions of the Privy Council have adopted this view and have crystallized the translation as "illegal or immoral." It

(1) (1918) I.L.R., 41 Mad., 1071.

appears in *Girdharee Lall v. Kantoo Lall* (1) and has been repeated in many subsequent cases. If this be correct, it will follow, as I have said, that the particular instances given in the Smritis must be treated as a mere expression of opinion on the part of the authors as to what classes of debts would fall under the general words. A modern Court would therefore be free in interpreting the general term to consider the particular instances given as obsolete under the conditions of to-day. I am clearly of opinion that commercial debts fall into this category and that we ought to say that the pious obligation extends to them. It may well be that in the time of Gautama it was thought that to engage in trade was degrading, at any rate in the case of the higher castes. No one could pretend that that view would be entertained to-day. For these reasons I am of opinion that the sons are liable in this case and that the appeals must be dismissed with costs.

Of course the whole doctrine of the pious obligation is itself a relic of antiquity based originally on a religious and not a legal conception but it has been controlled and moulded into shape by a series of decisions which, in my opinion, make it a working rule which in its actual application is neither inconvenient nor unjust.

VISWANATHA SASTRI, J.—Appeal No. 436 of 1922. Appeal by defendants 3 to 5 against the decree of the Court of the Additional Subordinate Judge, Rajahmundry, in Original Suit No. 25 of 1920.

Appellants are the sons of the first defendant, and the second defendant is their maternal uncle. The suit was laid for the recovery of a sum of money (Rs. 6,898-11-6) due in respect of money dealings between defendants 1 and 2 and plaintiff. Defendants 1

(1) (1874) 1 I.A., 321.

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and 2 are said to have carried on in partnership a trade in hardware, for the purpose of which trade money was being borrowed from time to time from plaintiff. It was also alleged that the first defendant and defendants 3 to 5 were undivided, and that the trade was being carried on by the first defendant for the benefit of the family. Defendants 3 to 5 contended that as they had become divided from their father (first defendant) they had nothing to do with the trade; that the trade was never an ancestral trade or a joint family trade, and that they were not liable. They also contended that the settlements of account alleged in the plaint, between plaintiff and defendants 1 and 2, were false. The Subordinate Judge held that the settlements of account were true, that the partition set up was brought about to defraud creditors; and he passed a decree against defendants 1 and 2, and against the joint family properties in the hands of defendants 3 to 5.

The contentions urged in appeal are:—(1) that the trade not being an ancestral trade, and the first defendant having started it only in 1914, appellants could not be held liable for sums said to have been borrowed for the purposes of the trade; and (2) that as Rs. 1,926-6-3 and Rs. 695-3-0 were due from third persons, and as the partnership took them over, they (defendants 3 to 5) were in any event not liable for the sums. The contention that defendants 3 to 5 had separated themselves from their father was not pressed before us.

Taking the second contention first, the allegation in paragraph 6 of the plaint is that on January 5, 1918, defendants 1 and 2 "made themselves liable in the sum of Rs. 1,926-6-3 for the share of E. Venkatasubbarayudu in the *katha* debt due by him and another K. Venkatanarayana Row, and the pro-note debt of the said E. Venkatasubbarayudu in the sum of Rs. 695-3-0."

In the case of a suretyship for payment, it may be taken as well settled that a Hindu son is liable. See *Sitaramayya v. Venkatramanna*(1), *Thangathammal v. Arunachalam Chettiar*(2), *Tukarambhat v. Gangaram*(3), *Rasik Lal Mandal v. Singheswar Rai*(4). The decision in *Narayan v. Venkatacharya*(5) relates to the liability of a grandson and has no application to the case before us. The text of Gautama (section 41) was referred to by the vakil for the appellants, but it appears to me that Gautama simply repeats Manu (section 159) and that he refers only to a suretyship for appearance. In the case of a suretyship for payment, the text of Yajnavalkya recognizes the liability of a son. This contention therefore cannot prevail.

Coming to the first contention, it was urged that the father was not continuing any ancestral trade but was starting a new trade and that for debts contracted for a new trade, the sons were not liable. That under ancient texts a son was under a legal obligation to pay his father's debts was the opinion held by that eminent Judge (MUTTUSWAMI AYYAR, J.) in *Ponnappa Pillai v. Pappuvayyanganar*(6). According to Yajnavalkya, if a father be long absent in a distant country or be dead the debt must be repaid by the son. It is equally well settled that the son was not under any such liability in the case of debts contracted for illegal or immoral purposes. According to Yajnavalkya, a son was not bound to pay a debt, even though ancestral, if it was contracted for the purpose of drinking, debauchery or gambling. According to Gautama, a son was not bound to discharge a debt incurred by his deceased father if due by him to a wine shop or a gambling saloon.

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(1) (1888) I.L.R., 11 Mad., 373.

(3) (1899) I.L.R., 23 Bom., 454.

(5) (1904) I.L.R., 28 Bom., 408.

(2) (1918) I.L.R., 41 Mad., 1071.

(4) (1912) I.L.R., 39 Calc., 843.

(6) (1882) I.L.R., 4 Mad., 1 (F.B.), at 18.

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"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."

See *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(1). In *Suraj Bansi Koer v. Sheo Persad Singh*(2), their Lordships of the Privy Council refer to the following dictum of WESTROPP, C.J., in the case of *Udaram v. Ranu*(3):—

"subject to certain limited exceptions (as for instance, debts contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather."

In the case before us the trade the father carried on was a trade in hardware, and there was nothing illegal or immoral about it. There is not even any suggestion to this effect in the written statement; and all that is alleged is that the business was neither an ancestral nor family business; that the sons had become divided from their father; and that the business was carried on by the father for his sole benefit. The finding is that the business was carried on for the benefit of the family and that the partition was fraudulent. In *Ramkishna Trimbak v. Narayan*(4) it was held that a son cannot escape liability for payment of the debts of his father contracted in fish trade. The decision in *The Official Assignee of Madras v. Palaniappa Chetty*(5) is no authority for the proposition that where a Hindu father starts for the first time a new trade, and for the purpose of the trade contracts debts his sons cannot be held liable for the debts so contracted. In that case the question arose in bankruptcy proceedings whether a Hindu son can be adjudicated insolvent in respect of debts incurred

(1) (1856) 6 M.I.A., 393 at 421.

(2) (1889) I.L.R., 5 Calc., 148 (P.C.) at 167. (3) (1874) 11 Bom. H.C.R., 83.

(4) (1916) I.L.R., 40 Bom., 126.

(5) (1918) I.L.R., 41 Mad., 824.

in a business newly started by his father during his minority, and in which he actively participated after attaining majority, and there was no question as to the liability of joint family properties for such debts.

I would therefore dismiss the appeal with costs.

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APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

M. A. R. R. M. P. MUTHU VEERAPPA CHETTIAR,
PETITIONING CREDITOR (APPELLANT),

1925,
September 3.

v.

U. K. SIVAGURUNATHA PILLAI, RESPONDENT
(RESPONDENT). *

*Provincial Insolvency Act (V of 1920), secs. 9, 13, 20 and 28—
Joint Hindu family—Debt incurred by the father for the
benefit of the family—Death of father, leaving major and
minor sons—Major sons whether can be adjudicated
insolvents.*

There is nothing in the Provincial Insolvency Act which prevents the undivided members of a joint Hindu family from being adjudicated insolvents in respect of debts due by the family; each case depends on its circumstances; the relation of creditor and debtor exists between the lender and the members of a joint family in respect of debts incurred by the family.

Chokkalingam Chettiar v. Thiruvengatasami Naidu, C M.A. No. 47 of 1916 (unreported), followed.

APPEAL against the order of R. A. JENKINS, District Judge of Coimbatore, in Insolvency Petition No. 43 of 1924.

The appellant, a creditor of the father of the respondent, filed a petition in the District Court to adjudicate the respondent an insolvent. The petitioner alleged that the father

* Appeal against Order No. 369 of 1924.

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incurred large debts for acquiring properties for the family, that the debts were incurred for the benefit of the family, that the respondent as the managing member of the family, after his father's death, had been enjoying the family properties, that when the appellant pressed him for payment, the latter requested the former to give him some time to collect his outstandings and pay him, that the respondent, taking advantage of the time given, fraudulently sold off the properties to a few creditors of the family with a view to give them a fraudulent preference; and he consequently applied to declare him an insolvent. The learned District Judge held that, as there was no personal liability as against the respondent for the debts of the father, and as it was not a debt of a joint trading family, the respondent could not be adjudicated insolvent, and dismissed the petition. The petitioning creditor preferred this appeal:

M. Patanjali Sastri for appellants.

S. Srinivasa Ayyar for respondent.

JUDGMENT.

This is an appeal against the order of the District Judge of Coimbatore dismissing the appellant's application to adjudicate the respondent an insolvent. The learned Judge dismissed the application on the ground that the respondent should not be adjudicated in respect of his father's debt, as there was no personal liability on the part of the respondent in respect of such debt. The petitioner in his petition alleged that the respondent was pressed to pay the debt due to him and he requested the petitioner to give him time to collect the outstandings and pay him. Taking advantage of the time given him he made certain alienations in favour of certain creditors, which the petitioner alleges to be fraudulent preferences. There is nothing in the Insolvency Act which prevents the undivided members of a joint Hindu family from being adjudicated insolvents in respect of debts due by the family. Each case would depend upon its circumstances. If the

petitioner makes the necessary allegations and proves them, then the Court would be justified in adjudging the members of a joint family insolvents. In the case of a joint Hindu family, if the father incurs debt and dies, the other members of the family do not stand in the relation of heirs; they only succeed to him and the debts are binding upon them. It was laid down by a Bench of this Court in *Chockalingam Chettiar v. Thiruvengkatasami Naidu*, C.M.A. No. 47 of 1916 (unreported), that the relation of creditor and debtor existed between the lender and the members of a joint family in respect of debts incurred by the family. That being so, there was no reason why the lower Court should not have enquired into the matter and disposed of the petition on the merits.

We, therefore, set aside the order and direct the District Judge to restore the petition to file and dispose of it according to the provisions of section 24 of the Provincial Insolvency Act. Costs will abide the result

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Madhavan Nayar.

THE MUNICIPAL COUNCIL, TUTICORIN, DEFENDANT
(PETITIONER),

v.

T. SHANMUGA MOOPANAR, PLAINTIFF (RESPONDENT).*

Madras District Municipalities Act (V of 1920), sch. V (o), ss. 249 and 328—"Grain," meaning of—Licence for storing "grains" in godowns for wholesale trade—Notification, whether applicable to storing of rice and broken rice for

* Civil Revision Petition No. 553 of 1923.

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wholesale trade—Rice and broken rice, whether "grains" under the Act.

The word "grain" used in schedule V, clause (o) of the Madras District Municipalities Act (V of 1920), does not include rice and broken rice; consequently wholesale dealers are not liable to take out licences on payment of fees in respect of godowns in which rice and broken rice are stored for wholesale trade.

"Grain" means a natural product of the earth, untreated except by gathering. *Cotton v. Vogan & Co.*, [1896] A. C., 457, followed.

PETITION praying the High Court to revise the decree of C. C. ANDREWS, the District Munsif of Tuticorin in Small Cause Suit No. 858 of 1922.

The Tuticorin Municipal Council resolved to require wholesale dealers in grain to take out licences under section 248 of the Madras District Municipalities Act (V of 1920) and published a notification under section 328 of the Act. The Municipality levied a fee and recovered it from the plaintiff in respect of certain godowns in which he had stored rice and broken rice for wholesale trade; the plaintiff paid the amount under protest, and sued to recover the amount by instituting this suit against the Municipal Council. The District Munsif held that rice and broken rice were not "grains" within the meaning of the Act, on the ground "grain" implied the capacity to germinate, and paddy after it was husked, became rice or broken rice, which could not germinate and was no longer grain. He accordingly decreed refund of the licence-fee paid in respect of the godowns in which rice and broken rice were stored. The Municipal Council preferred this Civil Revision Petition. The plaintiff preferred a memorandum of objections and contended, inter alia, that there was no due publication of the notification full sixty days before it was enforced.

B. Sitarama Rao (with him *Marthandam Pillai and Chithambaram Pillai*) for petitioner.—Schedule V (o) relates to jaggery, grain, etc., which are stored for wholesale trade. Rice is still grain, though the paddy has been husked. In its altered condition, it does not cease to be grain. See Stroud's Judicial Dictionary, Merchant Shipping Act, section 456, Chambers' Twentieth Century Dictionary.

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M. S. Vythinatha Aiyar, for respondent:—Until husking, paddy is grain; by husking paddy is made into rice and it is no longer grain; it ceases to be seed or germinating seed. "Grain" is derived from granum, which means "seed". See Century Dictionary page 2592, defining "grain." The House of Lords has defined grain as corn untreated except by gathering. See *Cotton v. Vogan & Co.*(1) and *Scott v. Bourdillion*(2).

Grain is "dhanyam" in the Government translation of the District Municipalities Act; Maclean's Glossary enumerates Navadhanyams but does not include rice. See Apte's Dictionary. Rice is "thandula" and is "nis-thusha" (without husk); Paddy is "sas-tusha" and is "dhanya." In Winslow's Dictionary "dhanya" is grain, corn in general, and rice is not included.

B. Sitarama Rao in reply.—Some kind of treatment such as beating of the grains is necessary in almost all grains, such as black gram Bengal gram, etc.; outer coating has got to be removed in almost all grains. They are not treated otherwise than that in all cases. They are still considered grains. So also is paddy when made into rice.

JUDGMENT.

SPENCER, J.—The Tuticorin Municipal Council, which SPENCER, J. through its Chairman preferred this Revision Petition, resolved to require wholesale dealers in grain to take out licences under section 248 of the Madras District Municipalities Act (V of 1920) and accordingly published a notification under section 328 in the *Tinnevely District Gazette*. The respondent, who was one of such wholesale dealers paid the fees, demanded of him under protest and brought a suit in the Small Cause Court to recover what was illegally collected from him. He succeeded in obtaining a decree for a portion of his claim. The District Munsif held that he was not liable to take out licences for godowns in which rice and broken rice, etc., were stored for wholesale trade but only for grain stores. It is contended for the petitioner that the word

(1) [1896] A.C., 457.

(2) (1806) 2 Bos. and Pul. (N.R.), 213; 127 E.R., 606.

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"grain" in Schedule V (o) to the Act includes rice and broken rice.

The District Munsif observed,

"Paddy without husk is rice. Rice is not a seed and does not sprout out. Hence rice or broken rice cannot be called a grain."

If the District Munsif meant by this that the distinction between grain and rice depended on the existence or absence of the power of germination, I think he went near the mark without hitting it. The germ or seed is in the rice. The outer husk merely serves as a protection from water and other external agencies which would penetrate and destroy the germ.

In the English language "corn" which is derived from the same Latin word "granum" as "grain" is, is commonly used to mean the grain of certain cereals, specially wheat in England, and maize in America, while growing. Thus an Englishman would speak of a field of growing wheat as a field of corn, but he would never include other plants grown from seed such as turnips, clover, mustard, etc., under the head of "corn". After the wheat is harvested and threshed, it is still corn and it is sold in a corn market, but after it has gone through a mill and become flour or meal, the individual corns or grains cannot be distinguished, and a substance is produced which is not corn or grain but something else. This meaning of the word "Grain" was brought out in a case that went up to the House of Lords and is reported in *Cotton v. Vogan & Co*(1), Lord HERSCHELL in interpreting the meaning of the words which occur in the Metage on Grain (Port of London) Act of 1872 "in respect of all grains brought into the port of London for sale", observed,

(1) [1896] A.C., 457.

"If the Legislature had intended to include what had always been regarded and treated as manufactured articles such as flour and meal, as distinguished from the natural products of the earth untreated except by gathering, the language would have been altogether different."

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Using similar language, I would say that if the Madras Legislature intended to include in Schedule V (o) rice and broken rice, which have gone through a certain process, as distinguished from the natural products of the earth untreated except by gathering, the storing of which without a licence may be prohibited by any Municipal Council, they would have used more explicit language to denote their meaning. In clauses (b) and (q) (proviso) the word "paddy" occurs and in clause (1) the word "flour" is used. There is therefore no reason to regard the word "grain" in clause (o) as being used in the comprehensive sense of all articles of commerce into which grain can be turned by some process or other. The use of the Tamil word "Danyam" (தானியம்) in the translation of the notification as the equivalent of "grain" strengthens the respondent's case. A trader who sells rice may be called a grain merchant and his merchandise may in a loose sense be called grain, when it includes both grain and rice; but rice is strictly not grain, and the separate entity of the grains by a process of disintegration disappears when they are converted into broken rice. For these reasons, I consider that there is no occasion to interfere with the District Munsif's decree. The Civil Revision Petition is dismissed with costs.

There is no substance in the objection taken in the memorandum of cross objections, that the notification was not published full sixty days before it was enforced as required by section 249 of the Act. There was evidence before the Court that the Gazette notice must have been published on January 30th to come into force

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on April 1st, and the District Munsif accepted the evidence. The memo. of objections is dismissed with costs.

MADHAVAN NAYAR, J.—I agree. The main question for decision in this Civil Revision Petition is whether “rice”, i.e., paddy without husk, and “broken rice” come within the meaning of the term “grain” found in Clause (o) of Schedule V of the District Municipalities Act. In the course of the argument we have been referred to well-known English Dictionaries, such as Murray’s Oxford Dictionary, Chambers’ Twentieth Century Dictionary, Webster’s Dictionary, etc., wherein the word “grain” has been explained. According to Murray’s Dictionary the word “grain” is derived from the root *Grannum* which means “seed”. From this, the inference is sought to be drawn that an article to be called “grain” should have the power to germinate or sprout and since this power is absent in rice which is husked paddy, it is argued that rice cannot be called “grain.” But I am not quite sure whether this distinction can be accepted as a safe test, because it involves the assumption that the presence or absence of “husk” is the main determining factor in the matter of germination, whereas, it is well known, that rice contains the seed which germinates or sprouts while the husk present in paddy merely serves to protect it from destruction during germination.

In a case under the Metage on Grain (Port of London) Act, 1872 (c.c.) section 4), *Cotton v. Vogan & Co.*(1), the House of Lords had to consider whether maize and oats imported with a view of their being first subjected to a process of grinding or crushing before sale would be “grain brought into the Port of London for sale” within the meaning of section 4 of the Act. By section 2 of that Act “Grain” is defined to mean

(1) [1896] A.C., 457.

“Corn, pulse and seeds, except the following seeds when brought into the Port of London in sacks or bags, that is to say linseed, rapeseed, millet seed, etc.”

With reference to the argument of Mr. Dankwerts that maize and oats sold after being subjected to the process of grinding and crushing might come within the definition of “grain” contained in the Statute, Lord HERSCHELL pointed out in his judgment that

“If it (Legislature) had intended to include what had been always regarded and treated as manufactured articles, such as flour and meal, as distinguished from the natural products of the earth untreated except by gathering, the language would have been altogether different to that which is to be found in this Statute”.

From this it may be inferred that the meaning of the term “grain” should be confined to *natural products of the earth untreated except by gathering*. Lord WATSON stated that

“The result of that process was that substances operated upon ceased to answer the statutory description of a dutiable article.”

Though the decision was given with reference to the definition of the word “grain” contained in a special statute, I think the description of the term “grain” in Lord HERSCHELL’s judgment is sufficiently general and may well be used for the purposes of the present case also. Judged by this test rice which is paddy subjected to the process involving the removal of husk and broken rice cannot strictly be called “grain”. Mr. Sitarama Rao for the petitioner invited our attention to the definition of the word “grain” contained in section 456 of the Merchant Shipping Act, 57 and 58 Vict., Chapter 60. That section defines “grain” to mean any corn, rice, paddy, pulse, seed, etc. But the section itself makes it clear that this is a special definition applicable to provisions of the part of the Act specially dealing with the

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“carriage of Grain Cargo”. Obviously this definition cannot be of much help in deciding the present case.

Under section 249 of the District Municipalities Act, Act V of 1920,

“The Council may publish a notification in the District Gazette and by beat of drum that no place within the Municipal limits or at a distance within three miles of such limits shall be used for any one or more of the purposes specified in Schedule V without the Chairman’s licence and except in accordance with the condition specified therein.”

Section 328 states that

“Every notification under this Act shall be published in the Official Gazette of the District in which the Municipality is situated both in English and in a vernacular language of the District”.

That the Legislature never intended to include “rice” and “broken rice” within the meaning of the term “grain” appears to be clear from the fact that in the notification in Tamil published by the Municipality in pursuance of the above provisions of the Act, the word “தானியம்” (dhanyam) is used as the Tamil equivalent of the English word “grain”; “dhanyam” as generally understood in the Tamil language does not mean “rice” (see Winslow’s Dictionary).

For the above reasons, I am inclined to hold that “rice” and “broken rice” do not come within the meaning of the term “grain” in clause (o) to Schedule V of the District Municipalities Act. The decision of the District Munsif is right and the Civil Revision Petition should be dismissed with costs.

I agree that the Memorandum of objections should also be dismissed with costs.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

MUTHUVENKATARAMA REDDIAR AND OTHERS
(PETITIONERS), APPELLANTS

1925,
Sep., 24.

THE OFFICIAL RECEIVER OF SOUTH ARCOT
AND OTHERS (RESPONDENTS), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 28, cl. (5)—Civil Procedure Code (V of 1908), sec. 60, cl. (c)—Agriculturist, meaning of—Properties, occupied by agriculturist, meaning of—Properties, from attachment when exempt under sec. 60, cl. (c)—Properties when not vested in Official Receiver—Properties of large landed proprietor, whether exempt.

Under section 28, clause (5) of the Provincial Insolvency Act (V of 1920), properties which are exempt from attachment under section 60 of the Civil Procedure Code, do not vest in the Official Receiver and are therefore not liable to be sold by him.

The term “agriculturist” is used in section 60, clause (c), of the Code to denote a person making his living by tilling the soil, in other words, one whose sole means of livelihood is gained by cultivating land and does not necessarily mean a person who works with his hands; it includes a small holder of land who tills the soil, but not a large landed proprietor, even though his sole income is derived from land.

Jivan Bhaga v. Hira Bhaija, (1888) I.L.R., 12 Bom., 363, referred to;

The property of an agriculturist, to be exempt under clause (c) of section 60 of the Code, must be shown to have been occupied by him as such for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate the land.

Radhakisan Hakumji v. Balvant Ramji (1883) I.L.R., 7 Bom., 530, followed.

APPEAL against the order of C. V. VISWANATHA SASTRI, the District Judge of South Arcot at Cuddalore, in I.A. No. 399 of 1924 in I.P. No. 14 of 1922.

The material facts appear from the judgment.

* Appeal against Order No. I of 1925.

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S. T. Srinivasagopala Achariyar for appellants.
C. Padmanabha Ayyangar and *T. D. Srinivasachari*
for respondents.

JUDGMENT.

DEVADOSS, J.

DEVADOSS, J.—The appellants were adjudicated insolvents on their own petition in 1922. They applied to the District Court on 24th July 1924 for a declaration that the two items of property, a terraced house and a cattle-shed, did not vest in the Official Receiver. The District Judge dismissed their petition, and they have preferred this appeal.

The contention of the appellants is that they are agriculturists and the two items which are buildings which they occupied are exempt from the operation of the Insolvency Law by reason of section 28, clause (5), of the Provincial Insolvency Act. The appellants are large landed proprietors owning about 300 acres of land worth nearly a lakh of rupees and their debts amounted to Rs. 1,35,000 and odd. The two items are valued by the appellants themselves at Rs. 6,000 and Rs. 1,000, respectively. Under section 28, clause (5), all properties which are exempt by reason of section 60 of the Code of Civil Procedure or by any other law from liability to attachment and sale in execution of a decree do not vest in the Official Receiver and are therefore not liable to be sold to satisfy the claims of the creditors. The question for determination is whether the two buildings come within section 60, clause (c), of the Code of Civil Procedure. Clause (c) is in these terms:—

“Houses and other buildings with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment belonging to an agriculturist and occupied by him.”

In order to claim exemption under section 60, clause (c), two points should be found in favour of the appellants,

(1) the appellants are agriculturists within the meaning of clause (c), and (2) the house and cattle-shed are such as are mentioned in clause (c).

The term, agriculturist, means etymologically one versed in agriculture and is not used in clause (c) in its etymological sense, but it is used to denote a person making his living by tilling the soil, in other words one whose sole means of livelihood is gained by cultivating land and does not necessarily mean only a person who works with his hands. But it means and includes a small holder of land who tills the soil and cultivates it. Clause (c) has to be read in the light of clauses (a) and (b). What is exempt from attachment is what is absolutely necessary to enable a person to live, such as wearing apparel, cooking vessels, bedding, etc., tools of artisans, implements of husbandry, etc. A large landed proprietor, even though his sole income is from land, is not an agriculturist within the meaning of clause (c).

Mr. Srinivasagopala Achariyar's contention is that a man whose sole income is from land, whatever its extent may be, whether he cultivates the land himself or leases it, is an agriculturist. If this is the correct meaning of the word “agriculturist” a man owning say, 1,000 acres of wet land is an agriculturist provided he has no other source of income. It could not have been the intention of the legislature to give protection to such people. The protection is given to small owners of land as well as actual tillers of the soil. The word “agriculturist” must be interpreted in a strict sense. In *Jivan Bhaga v. Hira Bai*(1), WEST, J., observes:—

“It was for agriculturists in the strictest sense and for an agriculturist in that sole character that the protection of section 266 (c) of the Civil Procedure Code was intended.”

(1) (188) I.L.R., 12 Bom., 383.

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We hold that the appellants are not agriculturists within the meaning of clause (c), of section 60.

Even if the contention of the appellants that they are agriculturists is upheld, they would not succeed in the appeal unless they make out that the house and cattle-shed are houses and buildings within the meaning of clause (c). In order to make out that the house and cattle-shed come within the meaning of clause (c), they must be shown to have been occupied for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate land. The expression "and occupied by him" gives the clue to the meaning of clause (c), i.e., that they are occupied by the agriculturists as such, such as houses or buildings necessary for pursuing the occupation of agriculturists—a shed in a field or a house in the midst of fields which is occupied so that the agricultural occupation may be carried on effectively and without loss of time, or in other words without such buildings and houses the agricultural operations would suffer. A mansion in a large village in which the owner lives, even though he has no other source of income except that from land, is not such a house as is contemplated by clause (c), nor is the house of an ordinary agriculturist situated at a considerable distance from the land which he cultivates and which is not necessary for effective or convenient cultivation of the land. A man may have a house in a town and a small holding at a considerable distance, from the income of which he maintains himself. As the house in the town is not occupied by him for purpose of agriculture, it is not exempt from attachment and sale under clause (c).

We are glad to find that the view that we hold is in accordance with the view expressed by WEST and

NANABHAI HABIDAS, JJ., in *Radhakisan Hakumji v. Balvant Ramji*(1). The learned Judges observe at page 531 :—

"The exemption is of a house or building occupied by an agriculturist, and this, we think, means a house dwelt in by an agriculturist as such, and the farm buildings appended to such dwelling. It does not include other houses, which in one sense may be occupied; what is meant is a physical occupation by an owner, of his house as a dwelling appropriate or convenient for his calling."

The house and cattle-shed are in the midst of a village containing it is said, about 300 houses and cannot be said that they were occupied by the appellants for purposes of agriculture and they do not come within the meaning of "houses and other buildings belonging to an agriculturist and occupied by him" within the meaning of section 60, clause (c), of the Code of Civil Procedure.

The decision in *Devare Hegde v. Vaikunt Subaya*(2), does not help the appellants. The learned Judges cite with approval the passage in *Radhakisan Hakumji v. Balvant Ramji*(1), extracted above and hold that if the building came within the exemption given by section 60, clause (c), at the time of the attachment, the benefit thereof would not be lost by the death of the judgment-debtor.

That the present contention is an after-thought is clear from the fact that the appellants mention the two items in their schedule as assets available for distribution among the creditors and delivered possession thereof to the Official Receiver two years before they made the application to the lower Court.

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

WALLER, J. :—I do not consider that appellants can any longer be described as agriculturists. Their land

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(1) (1883) I.L.R., 7 Bom., 530.

(2) (1917) I.L.R., 41 Bom., 475.

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has vested in the Official Receiver and there is nothing to show that they cultivate any other land as labourers or tenants. A house, to be exempt from attachment under section 60 of the Code of Civil Procedure, must belong to or be occupied by an agriculturist as such, i.e., for the purpose of agriculture. Apart from that, appellants placed the Official Receiver in possession of the lands before the adjudication and I do not think that they should now be allowed to plead exemption. I agree that the appeal should be dismissed with costs.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan.

1925,
April 22.

DONAPUDI NARASAYYA AND ANOTHER (PETITIONERS),
PETITIONERS,

v.

CHINGULURI VENKIAH AND OTHERS (COUNTER PETITIONERS)
RESPONDENTS.*

*Criminal Procedure Code (Act V of 1908)—Sec. 145—
Magistrate directing parties to file statements of their claims
—Magistrate subsequently dropping proceedings on being
satisfied no likelihood of breach of peace—Legality of—
Whether parties can insist upon evidence being taken—
Disposal of sale proceeds of crops attached.*

It is open to a Magistrate who has passed a preliminary order under section 145 of the Code of Criminal Procedure, directing the parties to file written statements as regards their respective claims to possession of the subject matter in dispute, to subsequently drop the proceedings if he is satisfied that there was no likelihood of a breach of the peace, and he is not bound to give the parties an opportunity to establish the contrary.

Manindra Chandra Nandi v. Barada Kanta Chowdhry.
(1903) I.L.R., 30 Cal., 112, followed.

* Criminal Revision Case No. 881 of 1924.

If he so drops the proceedings he cannot pass any orders in favour of either party, as regards the disposal of the sale-proceeds of the crops raised on the land in dispute but should keep the same in deposit pending orders of a Civil Court.

PETITION under sections 436 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order dated 7th June 1924, passed by V. ACHUTHAM PANTULU, Subdivisional Magistrate of Masulipatam, in Miscellaneous Case No. 16 of 1923.

The facts necessary for this report are set out in the judgment.

V. L. Ethiraj and K. Venkatarama Raju for the petitioner.

V. Ramadoss for the respondents.

Public Prosecutor for the Crown.

JUDGMENT.

This is an application to revise certain proceedings passed by the Subdivisional Magistrate, Masulipatam, in connection with an application filed by the petitioner asking the Magistrate to take action under section 145 of the Criminal Procedure Code. The Magistrate stating that he was satisfied that there was a dispute likely to cause a breach of the peace passed a preliminary order under section 145 and directed the parties to attend his Court and to file written statements of their respective claims as regards the possession of the subject matter in dispute. At a subsequent stage, the Magistrate became satisfied that there was no likelihood of a breach of the peace and he, therefore, dropped the proceedings, and passed no orders under section 145 regarding possession of the property.

The first point taken before me in revision is that the Magistrate was not entitled to drop the proceedings without giving an opportunity to the petitioner to show by evidence that there was a likelihood of a breach of

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the peace and that the Magistrate's conclusion that there was no likelihood of a breach of the peace from information received was incorrect. It is contended that, without an opportunity being given to the parties to show the existence of the likelihood of a breach of the peace, a Magistrate who has started proceedings under section 145, Criminal Procedure Code, cannot cancel or drop them. This does not seem to me to be the law at all, for, as pointed out in *Manindra Chandra Nandi v. Barada Kanta Chowdry*(1), where this very question was raised and considered,

"A party to a proceeding under section 145 is not in the position of a plaintiff in a civil suit who has set the Court in motion and has a right to require a decision upon the question raised by him. If a Magistrate either refuses to make an order under sub-section (1) of section 145 or, having made such an order, subsequently cancels it on the ground that a dispute does not exist likely to cause a breach of the peace, no private person has any *status* to contest the propriety of his refusal to make an enquiry into the question of possession."

It must be borne in mind that proceedings under section 145 are not taken in the interests of private parties but for the preservation of the public peace and if the Magistrate is satisfied that the likelihood of a breach of the peace either did not exist or that it has ceased to exist, it is the proper duty of the Magistrate to drop proceedings under section 145 and withdraw from interfering with the rights of parties in the property. The case in 30 Calo., 112 in which this very question was raised and decided by a Bench of the Calcutta High Court, is against the contention now raised by the petitioner. That ruling has been followed in this Court by SPENCER, J., in *Suryanarayana v. Rajah Ankineed Prasad*(2), and I am prepared to take the same view. I do not think it is open to a party to come up here and

(1) (1903) I.L.R., 30 Cal., 112.

(2) (1924) 20 L.W., 58.

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say that the Magistrate had no business to drop proceedings on the ground that there was no likelihood of a breach of the peace without giving him an opportunity to show that there was such a likelihood. It is the Magistrate's duty to be satisfied that there is no breach of the peace in his district. If he is so satisfied, it is not for a private party to object. Clause (5) of section 145 provides for a special case where as the Magistrate is proceeding with the trial of the question of possession, the parties to the proceedings or even other persons who are interested are given the right to show that no dispute likely to cause a breach of the peace exists or has existed. The existence of this clause does not take away the power of the Magistrate himself to drop the proceedings, if he is satisfied that there is no further likelihood of a breach of a peace. The first objection therefore fails.

The main point in the case however is as regards the order passed by the Magistrate about the deposit in Court. While the proceedings were going on in his court, the property seems to have been put under attachment and the crops seem to have been sold and certain moneys realised were deposited in Court. The Magistrate has passed an order directing the deposit to be given over in the main to the counter-petitioner excepting a small sum of Rs. 5-8-0 to be paid to the petitioner before me on proving his title. On this point it has been contended before me that, having dropped the proceedings under section 145, the Magistrate is *functus officio* and has no jurisdiction to pass any further orders in the case. That contention is supported by two decided cases in this Court, *Chenga Reddi v. Ramaswami Goundan*(1) *Natesa Naicken v.*

(1) (1914) 1 L.W., 1032.

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Raghavachari(1). On the contrary, there is a case, *Mahalakshmi v. Subbarayadu*(2), which has been followed in *Suryanarayana v. Rajah Ankineed Prasad*(3), which says that a Magistrate may pass orders directing that the income or profits obtained by sale of the crops on the land should be given over to the person who raised the crops or from whose possession the property was taken. As pointed out in 1 L.W., 1032 and 20 L.W., 924, it is this very point that is in dispute in a proceeding under section 145, as to who was in possession of the land, and, if the Magistrate is not going to make an enquiry to find out who was in such possession on the ground that there is no further likelihood of the breach of the peace and drops proceedings, it seems to me to be hardly correct for him to say that the sale-proceeds of the crops should be handed over to the person who raised the crops. That means that the Magistrate has to come to a conclusion as regards the very question that he is not going to consider.

I am inclined to follow the rulings in 1 L.W., 1032 and 20 L.W., 924 in preference to that in 17 L.W., 429. I notice that in the 17 L.W. case the counter-petitioners were not represented and the order was in favour of the petitioner who apparently made out that the crops had been taken from him. The Magistrate had directed that the money should be kept in deposit to enable the party entitled to it to get a decree of a civil court to show his title. It seems to me that that was the proper order in the case. I think it is not right for the Magistrate after having dropped the proceedings to make any further orders. He must leave the parties to settle their rights in the manner they think best to do, in the meanwhile holding his hands. In this case,

(1) (1924) 20 L.W., 924.

(2) (1923) 17 L.W., 429.

(3) (1924) 20 L.W., 58.

therefore, I set aside the order of the Magistrate directing payment of the money deposited to the counter-petitioner. The money will be kept in deposit in Court till one or other of the parties produces a decree of a civil Court to show his right to that money, and, on the production of such a decree, the money will be paid to the party entitled to it.

With this variation the petition must be dismissed.

D.A.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss.

VEERARAGHAVACHARIAR (PLAINTIFF), APPELLANT,

1924,
October 8.

v.

THE SECRETARY OF STATE FOR INDIA (DEFENDANT),
RESPONDENT.*

Sec. 3 (f) and sec. 6 (3) of the Land Acquisition Act (I of 1894)—Declaration of acquisition of village-sites—Conclusive evidence of public purpose—Right of suit not taken away—Sec. 6 (3) not ultra vires—"Village sites," meaning of.

In accordance with section 3, clause (f) of the Land Acquisition Act (I of 1894) the Government of Madras declared, by a notification in 1895, in favour of acquisition of village-sites in the Tanjore district.

Held, (1) that acquisition of house sites for Panchamas is a public purpose within the meaning of section 3 (f) of the Act,

(2) that a declaration under section 6, clause (3) of the Act is only conclusive evidence that the land is needed for a public purpose, and it does not deprive the subject of his right of suit; *Ezra v. Secretary of State for India* (1905) I.L.R., 32 Calc., 605 (P.C.) and *Secretary of State for India v. Momen* (1913) I.L.R., 40 Calc., 391 (P.C.), distinguished,

(3) that section 6, clause (3) is therefore not *ultra vires* of the Indian legislature, and

* Second Appcal No. 688 of 1921.

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(4) that it is not open to Municipal Courts to question the correctness of a declaration by Government that a particular land is needed for a public purpose; *Hamabai Framjee v. Secretary of State for India* (1915) I.L.R., 39 Bom., 279 (P.C.), distinguished.

SECOND APPEAL against the decree of R. NARAYANA AYYAR, District Judge of Tanjore, in Appeal Suit No. 398 of 1919 preferred against the decree of R. V. Krishna Ayyar, District Munsif of Negapatam, in Original Suit No. 389 of 1919.

The facts and arguments appear sufficiently from the judgment.

S. Muthiah Mudaliyar (with *K. Subrahmanyam*) for appellant.

Government Pleader (*C. V. Anantakrishna Ayyar*) for respondent.

JUDGMENT.

The first point raised in this second appeal is that the acquisition of house-sites for Panchamas is not a public purpose and the Court can go into the question whether it is a public purpose or not notwithstanding the notification by the Government that the acquisition was for a public purpose. The second point raised is that section 6, clause (3) of the Land Acquisition Act of 1894 is *ultra vires* of Indian legislature inasmuch as the clause states that the said declaration, meaning the declaration by the Government, shall be conclusive evidence that the land is needed for public purposes or for a company as the case may be. It is convenient to consider the first two points together.

The argument of Mr. Muthiah Mudaliyar, for the appellant, is that by enacting the provision in clause (3) of section 6, that the declaration shall be conclusive evidence that the land is needed for public purposes or for a company, the Indian legislature has taken away the right of suit by the party and that Courts are not

precluded from considering whether the purpose for which the lands are acquired under the Land Acquisition Act is a public purpose or not and if it is not a public purpose the mere declaration by the Government that it is a public purpose would not make the acquisition legal. It is not contended on behalf of the respondent that the right of suit has been taken away by clause (3) of section 6. All that section 6, clause (3) declares is that if the Government declares that a certain purpose for which it wants to acquire the lands is a public purpose, it shall be conclusive evidence of the fact.

The provision in section 6, clause (3) that the declaration shall be conclusive evidence is not a new provision enacted in 1894. In Act XX of 1852, section 1, there is a provision similar to this. Section 1 is in these terms:

"Whenever it shall appear to the Governor of Fort Saint George in Council that any land is needed for a public purpose, he shall make a declaration to that effect in a Minute of Council and such a declaration shall be conclusive evidence that the purpose for which the land is needed is a public purpose."

A similar provision was enacted in Act VI of 1857, section 2,

"The Government may take any land on a simple declaration under the signature of a Secretary that it is required for public purposes."

This power the Legislature had before the Government of India Act of 1858 and it cannot be said that the Indian Legislature enacted a provision it had no power to enact before the Government of India Act of 1858. The Government of India Act conferred upon the Indian Legislature the powers which it had when the Government was under the East India Company. That being so, it cannot be said, that the provision in section 6, clause 3, is *ultra vires* of the Indian Legislature.

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Before discussing the cases quoted on either side, it is best to consider what has been done by the Government. The Panchamas, the farm labourers of the Tanjore District have been living on lands belonging to the Mirasidars or owners of the lands. They had no rights to the sites on which they built their houses and they were liable to be evicted or turned out at the will and pleasure of the landlord. In order to improve the condition of the Panchamas, the Government proposed to acquire the sites and parcel them out to those, who were willing to build houses on the sites. With this object the Government appointed a Deputy Collector to acquire sites in the Tanjore District. He acquired land under the provisions of the Land Acquisition Act and the plaintiff is one of those persons whose land has been acquired for house-sites for the Panchamas. He has brought this suit for a declaration that the acquisition is illegal. Clause (f) of section 3 of the Land Acquisition Act defines "a public purpose" as

"including the provision of village-sites in districts in which the Local Government shall have declared by notification in the Official Gazette that it is customary for the Government to make such provision."

Under this clause the Government published a notification No. 317, dated 22nd May 1895 and the District of Tanjore is one of the Districts covered by the notification. I may remark in passing, that the appellant contended that there was no such notification and such a notification, if it existed, should have been filed. I thought it best to have the notification on record and I directed the Government Pleader to produce the notification. He has filed a copy of the original notification (marked as Exhibit III)*. From this notification, it is clear, that it is customary in certain

* Proceedings, dated 17th June 1895, No. 196.

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districts for the Government to provide house-sites. Under that notification the acquisition of land now in dispute was made, as is clear from Exhibit II. The acquisition having been made for a purpose, which the Legislature declared to be a public purpose, it is not open to the Court to go into the question whether it is public purpose or not. Where the Legislature has acted within its powers, it is not open to a Municipal Court to question the legality of the provisions of the enactment passed by the Legislature. If an enactment or any provision thereof is *ultra vires* of the Legislature, it would be open to the Court to question the legality of the enactment or the provision.

The Indian Legislature is a subordinate Legislature, subordinate to the Imperial Legislature composed of the Crown, the House of Lords and the House of Commons. The Indian Legislature is governed by the provisions of the Acts of Parliament. The Government of India Act of 1858, 21 & 22 Vict., Chapter VI, gives power to the Indian Legislature to frame laws. Under the Act of 1833 (III and IV William IV), section 43, the Governor-General in Council was given power to make laws and regulations and to repeal, amend or alter any laws or regulations whether then in force or thereafter to be enacted. The Government is entitled to acquire lands for public purposes, for every sovereign authority has power to acquire private land for public purposes and has the power to frame laws for the acquisition of land. When it acts within such powers, as are given to it by the Legislature, a Municipal Court cannot question the validity of the provisions of any law which regulates the acquisition of land. In *Empress v. Burah*(1) their Lordships of the Privy Council observed at page 180,

(1) (1879) I.L.R., 4 Calc., 172 (P.O.).

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"The Indian Legislature has powers expressly limited by the Act of Imperial Parliament which created it, and it can, of course do nothing beyond the limits which circumscribe these powers; but, when acting within these limits, it is not in any sense as an agent or delegate of Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as that of Parliament itself."

If it is granted that the Indian Legislature has power to frame laws for the acquisition of private lands, it must be conceded that it has power to frame provisions in the Act for the purpose of carrying out the object of the enactment. One of such provisions is that contained in clause (f) of section 3. According to that provision the doing of a certain act is declared to be a public purpose. It is not open to a Court to go behind it and say that it is not a public purpose.

Mr. Muthiah Mudaliyar laid stress upon a decision in *Damodar Gordhan v. Deoram Kanji*(1). In that case, the Privy Council held that section 113 of the Evidence Act was *ultra vires* of the Indian Legislature. Lord SELBOURNE at page 461 in delivering the judgment of their Lordships said with regard to section 113 of the Evidence Act,

"The Governor-General in Council being precluded by the Act, 24 & 25 Vict., chapter 67, section XXI from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not, by any Legislative Act purporting to make a notification in a Government Gazette conclusive evidence of a cession of territory, exclude enquiry as to the nature and lawfulness of that occasion."

In that case, their Lordships held that under the Act of Parliament the Indian Government could not by a notification hold that a portion of the territory was ceded to the native princes. There is nothing in the Government of India Act or in any other Act of Parliament

which in any way limits the power of the Indian Legislature to frame laws for the acquisition of land and so the enactment called the Land Acquisition Act is *intra vires* of the Indian Legislature.

It is argued that the right of suit of party has been taken away by section 6, clause (3). That clause does not take away the right of suit of any subject. What it declares is that when the Government declares a purpose to be a public purpose it shall be conclusive evidence of that. In *Secretary of State for India v. Moment*(1) the Privy Council held that a certain enactment, which took away the right of a subject to file a suit to question the act of the Government was *ultra vires*. The Burma Government passed Act IV of 1898 and section 41 provided that no civil court is to have jurisdiction to determine any claim or any right over land as against Government. This provision was held to be *ultra vires* of the Burma Legislature. Their Lordships held that the right of suit of a subject against the Government was preserved to him by the Act of 1858 and it was not open to the Legislature to take away that right. In this case, the right of suit is not taken away by the Legislature but clause (3) of section 6 provides that a declaration that the acquisition is intended for public purposes shall be conclusive evidence of that fact. No doubt in *Hamabai Framjee v. Secretary of State for India*(2) their Lordships of the Privy Council held that it is open to the Court to consider whether a purpose which was declared to be a public purpose by the Government was a public purpose or not. In that case, the Government proposed to acquire certain lands for building houses for Government servants and wanted to resume

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(1) (1913) I.L.R., 40 Cal., 391 (P.C.).

(2) (1915) I.L.R., 39 Bom., 279 (P.C.).

(1) (1876) I.L.R., 1 Bom., 367 (P.C.).

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the land which was granted under the Sanad to the plaintiff's predecessor in title. The question turned upon the provisions of the Sanad and in the course of the judgment Lord DUNEDIN observes at page 295,

"*prima facie* the Government are good judges of that. They are not absolute Judges; they cannot say *sic volo sic jubeo* but at least a Court would not easily hold them to be wrong."

That observation cannot apply to the present case for the Legislature has declared that the acquisition of lands for village sites in certain districts is a public purpose if the Government by notification in the Official Gazette declares that it is customary for the Government to make such provision. The case in *Ezra v. The Secretary of State*(1) which went on appeal to the Privy Council in *Ezra v. Secretary of State for India*(2) has no application to the present case. In that case, the acquisition was under Part VII of the Land Acquisition Act. Under section 40 the Government before giving consent shall be satisfied by an enquiry held under that section, of the need and public utility of the proposed work. The question there was whether the provisions of section 40 were satisfied. It was held that the provisions of section 40 were satisfied and that the plaintiff could not complain of the act of the Government. Here the acquisition is not under Part VII but under sections 6, 7, 8 and 9 of the Land Acquisition Act.

It is next urged that the purpose for which the acquisition is made is not a public purpose. Reliance is placed upon *Attorney General v. Terry*(3) and *Mersey Docks v. Cameron, Jones v. Mersey Docks*(4). Granting for arguments' sake that it is open to consider whether the purpose for which the acquisition is made is a public purpose or not, I do not think that these cases help the appellant much.

(1) (1903) I.L.R., 30 Calc., 36.

(3) (1874) 9 Ch. App., 423.

(2) (1905) I.L.R., 32 Calc., 605 (P.C.).

(4) (1905) 11 H.L.C., 443.

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In both cases it was held that the mere fact that the public was likely to be remotely benefited would not make the purpose a public purpose. Where the primary object is personal gain whether that be of a private individual or of a company, the public benefit resulting from the action of such a person or company is too remote and the purpose cannot be said to be a public purpose. Every merchant and every dealer can say that he benefits the public because he is catering or providing to the wants of the public. The merchant's first object is to make a gain for himself. The benefit that he may confer upon his constituents or patrons is very remote. Such purposes are not public purposes. In *Liskeard Union v. Liskeard Waterworks Co.*(1), the decision turned upon the wording of the enactment. A workhouse although a charitable institution was held to be a dwelling house within the meaning of the special enactment. It is not possible to define what a public purpose is. There can be no doubt that provision of house sites for poor people is a public purpose for it benefits a large class of people and not one or two individuals. In *Hamabai v. Secretary of State*(2), CHANDAVARKAR, J., observed

"There is no definition of public purpose in any of our legislative enactments to afford us a clue to the meaning of the term save that in the Land Acquisition Act but that it is a partially inclusive and not an exhaustive definition."

The definition given indicates what a public purpose is and the provision of house sites for people is a public purpose. The Government is the proper authority for deciding what a public purpose is. When the Government declare that a certain purpose is a public purpose, it must be presumed that the Government is in possession

(1) (1881) 7 Q.B.D., 505.

(2) (1911) 13 Bom., L.R., 1097.

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of facts which induce the Government to declare that the purpose is a public purpose. The Government are the best judges in the circumstances, of what a public purpose is. In *Wijeyesekera v. Festing* (1) their Lordships of the Privy Council observed that the decision of the Governor of Ceylon on the question whether land is needed or not for public purpose was final. Though the case was from Ceylon and in the Land Acquisition Ordinance there was no section corresponding to section 6, clause 3 of the Land Acquisition Act of 1894 yet the Privy Council held that the decision of the Governor was final. This shows that the Government are the proper judges of what a public purpose is. If the Government acts within the powers conferred on it by the Legislature, it is not open to a Municipal Court to question the act. I hold that the purpose for which the acquisition was made was for public purposes within the meaning of section 6 of the Land Acquisition Act and that the provision in clause 3 of section 6 that the declaration shall be conclusive evidence if the land is needed for public purposes is *intra vires* of the Indian Legislature.

It was next argued that under section 6 of the Land Acquisition Act the cost of acquisition should come out of the public revenues or some fund controlled or managed by a local authority, otherwise the acquisition is not for a public purpose. In this case, there is no evidence that the cost of acquisition was met from the funds collected by the Land Acquisition Officer from the panchamas. The Land Acquisition Officer P.W. 1 stated that he collected some money from some of the panchamas and that he deposited it with various banks and that his intention was to form co-operative societies to convey the lands to the persons who would pay for the

(1) [1919] A.C., 646.

sites. The cost of acquisition was met by the Government out of public revenue and therefore there is no substance in this contention.

It is feebly urged that there has been a contravention of the instructions of Government by the Land Acquisition Officer and therefore the acquisition of the land of the plaintiff is bad. I have not been shown any act or illegal omission which would constitute a contravention of the instruction of Government on this point.

It is argued on behalf of the appellant that what was contemplated by the notification of 1895 was village sites. Mr. Muthiah Mudaliyar contends that village sites mean lands reserved for communal purposes. He has referred to no authority for this position nor has he referred me to any Government Order or Standing Order of the Board of Revenue for the position that village sites mean communal lands. A village site ordinarily means the site on which the houses in a village are built. The word used in the Standing Order is Gramanattam. The Government reserve a portion of the land fit for building purposes as Gramanattam or village sites for the purpose of enabling people to settle on such sites and build houses, and grants a portion of that site to people on application (vide Standing Order 21 of the Board of Revenue). There is a reference to Gramanattam or village site in *Madathapu Ramaya v. The Secretary of State for India* (1). There is also reference in *Mahammad Meeru Mohiden v. The Secretary of State for India* (2). From the reference it is quite clear that what is spoken of as village site is not land reserved in a village for communal purposes but land which is reserved for being parcelled out as house-sites and also all the lands on which houses have been built.

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(1) (1904) 1 L.R., 27 Mad., 386 at 393.

(2) (1903) 13 M.L.J., 269 at 270.

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It is further contended that granting that the Government have power to acquire lands for village sites, it is not competent for the Government to acquire particular sites of houses for the benefit of individuals. The Government instructed the Land Acquisition Officer to acquire the sites on which the houses of the panchamas stand. It is not to benefit any particular individual that the Government have chosen to acquire sites and therefore the contention that the sites were acquired only for the benefit of individuals is not tenable.

In the result the appeal fails and is dismissed with costs. This judgment will govern the connected Second Appeals.

N.R.

PRIVY COUNCIL.*

MAHARAJA OF VIZIANAGRAM (PLAINTIFF),

1926,
January 18.

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT).

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT MADRAS.]

Madras Land Encroachment Act (III of 1905), ss. 2, 3, 16
—Penal assessment—Government land—Inferential relinquishment of pattas—Claim by resumption or reversion—Estoppel by conduct—New contention on appeal—Inconsistency with previous contentions.

Ryots were in occupation of a lanka under pattas from Government whose property it was. The lanka was gradually diluviated, and between 1880 and 1885 became totally submerged, but after some years a new lanka was formed on the site. The appellant's tenant of a neighbouring lanka took possession of the re-formed land as an accretion to the lanka let to him, and paid to the appellant additional rent for it. The ryots had not formally relinquished their pattas, but as the land became diluviated they had ceased to pay rent to Government; the submerged land had been omitted from the gudikat or rent-roll, and had been struck out of the pattas. The Government imposed upon the appellant a penal assessment under the Madras Land Encroachment Act, 1905, in respect of the land. That Act by section 2 declares all land to be the property of Government, subject to exceptions which include lands which are the property of any person "holding under ryotwari tenure . . . or in any way subject to the payment of land revenue direct to Government." By section 3 any person who unauthorisedly occupies Government land is liable to an assessment of the penal character thereby provided. By section 16 the Act is not to apply to any lands claimed by escheat, resumption or reversion until such lands have been reduced into possession by Government.

* Present: LORD SHAW, LORD PHILLIMORE, Sir JOHN EDGE, Mr. AMERR ALI and LORD SALVESEN.

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Held, that the assessment has been rightly imposed upon the appellant for the years after the Act came into force, since (a) it was to be inferred that the pattas had been relinquished, and (b) the claim of Government was not by escheat, resumption or reversion.

Held, further, that the appellant was estopped from raising a new contention, namely, that an assessment under the Act could be imposed only upon persons in physical occupation of the land, since that contention was inconsistent with the appellant's plaint and with the position which he had taken up throughout the controversy, and the Government was put at a disadvantage by the contention not being raised earlier.

APPEAL (No. 55 of 1924) from a decree of the High Court (March 18, 1920), which affirmed a decree of the Subordinate Judge of Cocanada, subject to a variation.

The suit was brought against the respondent by the trustee of the Vizianagram estate, in whose place the appellant had been brought on the record. The plaintiff prayed for a declaration of his title to a lanka of 247 acres, and for an injunction restraining the defendant from levying upon him a penal assessment under Madras Act III of 1905 in respect of the land.

The facts appear from the judgment of the Judicial Committee.

The Subordinate Judge made a decree dismissing the suit, and that decree was affirmed by the High Court (AYLING and SESHAGIRI AYYAR, JJ.), save that it was declared that the assessment could not be levied upon the land for a period prior to the Act coming into force; from that variation the respondent did not appeal.

Upjohn, K.C., *Narasimham* and *P. K. Subba Rao* for the appellant.—The imposition of the assessment under Madras Act III of 1905 was illegal. First, because section 3 applies only to a person who is in physical occupation of the land, and that was not the case here. Secondly, the land was excluded from being Government property for

the purpose of the Act by section 2, sub-section (1) (c) and (e). It had been granted under pattas to ryots, and the ryots had not relinquished the pattas according to the procedure laid down by the standing orders; a relinquishment cannot be inferred: *Mazhar Rai v. Ramgat Singh*(1), *Arun Chandra Singh v. Kamini Kumar*(2). Thirdly, the claim of the Government was by resumption or reversion, and consequently by section 16 the Act does not apply in the absence of a reduction into possession by the Government. The Act being of a penal nature must be construed strictly: *Dyke v. Elliott*(3), *Dickenson v. Fletcher*(4).

DeGruyther, K.C., and *Kenworthy Brown* for the respondent.—The contention that the plaintiff was not an occupier was not raised in India, and is inconsistent with his plaint and his position throughout. But the plaintiff was an occupier for the purpose of the Act: *Madathapu Ramaya v. The Secretary of State for India*(5). The Courts in India rightly inferred that the pattas had been relinquished. The Government thereupon got a title; when land is under water, possession is presumed to be in the owner: *Secretary of State for India v. Krishnamoni Gupta*(6), *Basanta Kumar Roy v. Secretary of State for India*(7).

Upjohn, K.C., replied.

The JUDGMENT of their Lordships was delivered by

LORD SALVESEN.—This is an appeal from the High Court of Judicature at Madras, dated 18th March,

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(1) (1896) I.L.R., 18 All., 290.

(2) (1914) I.L.R., 41 Calc., 683 (P.C.); 41 I.A., 32.

(3) (1872) 4 P.C., 184, 191. (4) (1873) 2 C.P., 1.

(5) (1904) I.L.R., 27 Mad., 386.

(6) (1902) I.L.R., 29 Calc., 518 (P.C.); 19 I.A., 104.

(7) (1917) I.L.R., 44 Calc., 858 (P.C.); 44 I.A., 104.

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1920, which substantially affirmed a decree and judgment, dated 31st December, 1915, of the Subordinate Judge at Cocanada in a suit at the instance of the appellant against the respondent. This suit arose out of a dispute as to the ownership of a lanka in the river Gōdāvari in the province of Madras, the extent of which was estimated, at the commencement of the suit, at 247 acres. The appellant is the owner of large estates, including the village of Kotipalli, situated on the banks of that river. The respondent is the Secretary of State for India, represented by the Collector of Gōdāvari. It is common ground that in 1862 there existed a lanka which was Government property, and for the cultivation of which pattas were issued by the Government of the day to ryots connected with the village of Sanapalli, which lies in the neighbourhood of Kotipalli. This lanka was cultivated under these pattas for a number of years thereafter, and the Government assessment was duly paid by the cultivators. An example of such a patta has been produced in the present suit. It is dated in 1869, and indicates that erosion on a somewhat minute scale had already commenced to affect the area of the lands in question. Gradually the river encroached more and more upon these lands until, some time between 1880 and 1885, the whole of the lands had been totally submerged. After some years of total submergence a new lanka appeared in the river which, by 1894, was of an area substantially the same as the lands in suit. At that time one, Mudragada Nagayya, was a lessee of the Kotipalli Lanka, under a lease granted by the owner of the estate now represented by the appellant, the duration of which was 10 years from 1892. Nagayya took possession of the re-formed lands as forming an accretion to the Kotipalli lankas and paid rent to the appellant for these lands as

well as for those originally embraced in his lease, and cultivated through sub-lessees of his own. He did not however, do so without objection and, from 1897 onwards, petitions were presented by the ryots of the Government village of Sanapalli complaining to the Government that the suit lands formed part of the old Sanapalli village, and requesting the Government to recover them from the appellant and grant them back to the ryots. The Government directed a survey of the lands and, after a lengthy correspondence between the appellant and the Government, the latter claimed the suit lands as Government property. In 1911 the Government sent notices to the appellant under section 7 of the Madras Act III of 1905. These were followed by a notice, dated 3rd February, 1912, demanding payment of Rs. 74,971-8-6, representing the penalty and block rates for the years 1900 to 1911, during which the appellant was alleged to be in unauthorized occupation of the suit lands.

On the 30th July, 1912, the appellant's predecessor in title instituted the present suit. In this he prayed for a judgment declaring his right to the 247 acres already referred to and to all accretions that might be made thereto, and for a permanent injunction against the Government restraining them from interfering with him in his ownership and enjoyment of the same by levying a penal assessment or by other steps. An immense amount of evidence was tendered at the trial, which it was stated occupied over 50 days of judicial time. The issue of fact which was responsible for most of the time occupied was whether the re-formed lands in question were an accretion to the appellant's lands of Kotipalli or constituted a re-formation *in situ* of the lands which had been formerly cultivated by the ryots of the Government. This issue of fact has been decided

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by both Courts against the appellant and is no longer in controversy.

The issues which still fall to be dealt with concern the legality of the penal assessment imposed on the appellant in 1911, and, as the case was presented to the Board, this assessment was challenged upon three grounds:—

(1) That an assessment, whether penal or otherwise, can only be imposed under the terms of this Act on "any person who shall unauthorizedly occupy any land which is the property of the Government." The appellant conceded that it must be now taken to be a fact that the land in suit is the property of Government and that it had been unauthorizedly occupied, but he maintained that the only persons upon whom the assessment could be levied were those in physical occupation of the land and not upon the owner of the estates of Kotipalli, who had merely granted leases of these lands under a *bona fide* belief that they formed accretions to his property. He founded this particularly upon section 6 (1), which makes the crops or other produce of the lands liable to forfeiture, which provision, he contended, could only be applicable to the actual cultivator and not to the landlord who, by the very fact of granting a lease of the lands, had excluded himself from occupation. Whatever force there may be in this contention, their Lordships do not propose to express any opinion upon it. Their Lordships hold that this contention is not open to the appellant in view of his actings before and throughout the litigation. The plaint contains the following passages:—

"The land in dispute has been in possession and enjoyment of the plaintiff's predecessors and plaintiff for several years."

and in paragraph 8 the plaintiff also submits that:—

"Madras Act III of 1905 is not retrospective in its operation and does not entitle the Government to recover assessment from the plaintiff, as he was in possession and occupation long prior to the coming into force of Madras Act III of 1905."

Not merely is there no reference to the construction which is now proposed to be put upon the Act in the plaint (which, indeed, in terms directly negatives the view now presented), but there is no trace of the contention being tabled throughout the voluminous proceedings in the Courts below. Even the appellant's case, although it is directed entirely to the legality of the penal assessment, does not contain a challenge of it upon this ground. There may have been occasions when the Board have entertained an argument on a pure question of law, although it has not been presented in the lower Court, where all the facts on which the contention depended had been definitely ascertained, but the objection to doing so in the present case goes very deep. The whole controversy between the appellant's predecessor and the Government which preceded the actual imposition of the penal assessment proceeded upon the admission or the tacit assertion of the appellant, that he was in occupation of the lands, or at all events, that he took upon himself the burden of vindicating the action of his own lessees or sub-lessees in cultivating it. Had this point been, at any time, mooted, the Government would have had an opportunity of considering upon whom the notice of assessment which they ultimately sent to the appellant should have been given, and upon whom the penal assessment should have been levied. After a period of nearly 25 years has elapsed between the date when the Government first definitely intimated their claim to the lands in suit, their Lordships are clearly of opinion that it is too late for the Board to entertain this contention.

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A litigant who has all along maintained a position in support of one, and in this case the more important, branch of his suit cannot be permitted, when he fails upon this branch, to withdraw from the position and assert the contrary, more especially when he thereby places his opponent at a great disadvantage. There could be no clearer case for the application of the doctrine of estoppel owing to the conduct of the litigant.

(2) The second ground of attack by the appellant is based upon section 2 of the Madras Act III of 1905. By that section all lands, wherever situated, are thereby declared to be the property of the Government, subject to the large exceptions enumerated under five heads which expressly preserve private rights. The exception founded on is contained in sub-section (c), which exempts from the operation of the clause all lands which are the property "of any person holding under ryotwari tenure . . . or in any way subject to the payment of land revenue direct to Government." The respondent conceded that, before the submergence of the lands in suit, they came within this exception. He also conceded that, after a darkhast is made and a patta granted by Government, the interest of the ryot holding under this form of tenure is permanent, hereditary and transferable, that no ejectment at the instance of the Government is competent for arrears of rent, and that such arrears can only be recovered, as in the case of all Government revenue, by sale of the property held under this tenure. On the other hand, it is common ground that the holder of land under ryotwari tenure is entitled, at any time, to relinquish it, and the standing orders of the Board of Revenue applicable to Madras contain elaborate provisions dealing with this particular kind of tenure, and also with questions relating to the form of relinquishment, remission of rent and the like.

The High Court have dealt very exhaustively with the numerous points which have been argued on the question whether the relinquishment by the ryots of Sanapalli village who held the pattas before their respective lands became submerged can be inferred from the whole circumstances of the case, including a vast amount of documentary evidence. They drew the inference that it must be held as a fact that the ryots did relinquish their holdings (and thereby secured immunity from further assessment in respect of them) as and when the lands became submerged and no longer capable of cultivation, and that, when the lands were re-formed *in situ*, they were the property of the Government and at their absolute disposal. Their Lordships agree with the reasoning of the High Court, and they will only summarize some of the considerations to which they attach most weight.

Mere submergence of land held under ryotwari tenure does not infer a relinquishment by the holder. On the other hand, if he wishes to retain his right to the submerged lands on the offchance of their being re-formed *in situ* at some future date, he must continue to pay year by year the assessment or rent which is due to Government. There are instances referred to in the documentary evidence in which some of these ryots, whose lands were only partially eroded, continued to do so and so kept alive their rights, but, in the ordinary case, the poor cultivator's interest is to relinquish the lands so as to escape paying the annual rent in the hope that, at a future date, should the lands be re-formed *in situ*, he may obtain a new tenure from the Government. On the other hand, according to the standing orders, all land for which a stipulated rent continues to be paid must be entered in the registers which these orders prescribe. The registers contain not merely an

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enumeration of all the lands in the district to which they apply in individual numbers, but they specify the acreage of the individual plots and also contain a record of the amount of rent leviable from each ryot in respect of the plot or plots he holds. In the case of Sanapalli village it has been found by concurrent findings of the Courts below that, when the land in question became submerged, it was not merely omitted from the ayacut or acreage of the village, but also from the gudikat or rental roll. The submerged land was likewise struck out of the pattas which constitute the evidence of title given to the holders under ryotwari tenure. These pattas are subject to revision from time to time when changes of circumstances occur; thus, if part of the land to which a ryot has right is eroded and relinquished by him, the rent corresponding to the part relinquished is deducted from the rent previously payable. In the case of the submerged lands the pattas appear to have been surrendered and, at all events, not one of them has been produced. It is common ground that none of the ryots who held pattas of the lands prior to submersion has paid any rent to the Government on these lands. These circumstances support the inference that the ryots concerned relinquished their holdings, which had indeed, in the then existing circumstances, become valueless. The only possible alternative is that we are to infer that the Government, from humanitarian motives, had remitted the rent due by the ryots. Such remissions are competent under the standing orders, but they can only be made by the authority of the Board of Revenue, and the inferior officials, including the Collector, have no power at their own instance to make them. No evidence is adduced of any such remission having been asked for or having been granted spontaneously. Further, in the petitions presented to the

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Government in 1897 and onwards, although in one or two of them there are statements to the effect that the former ryots had not relinquished their holdings, there was no claim ever made by any individual ryot to the effect that an identifiable portion of the re-formed lands was his property. On the contrary, the petitions proceeded on the footing that it was the duty of the Government to recover the lands in the illegal occupation of the appellant and to re-settle them upon the ryots of the village of Sanapalli without reference to the particular ryots who held the lands before the submergence. One suggested method of the Government so settling them was that the lands should be exposed to auction so that those ryots of Sanapalli who were prepared to pay most for the lands would obtain pattas from Government at the rents which they offered. The evidence to be derived from the petitions points to the ryots of Sanapalli village accepting the position that the Government was entitled to re-settle the lands, but urging that a preference should be given to the ryots of the village by whose inhabitants the lands had formerly been cultivated. A review of the whole facts disclosed by the evidence leads irresistibly to the conclusion that the lands in suit on their re-emergence from the river became once more the absolute property of the Government both under Madras Act III of 1905 and at common law, exactly as they had been in 1862 when the ryotwari tenures were first instituted.

(3) Lastly, it was maintained by the appellant that section 16 of the Madras Land Encroachment Act III of 1905 exempted the lands in question from its operation. The section is in these terms:—

“Nothing in this Act shall apply to any lands claimed by right of escheat, resumption or reversion, until such lands have been reduced into possession by Government.”

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It was argued for the appellant that, as the lands had been throughout occupied by himself or his tenants, they had never been reduced into possession by the Government, and that they were lands claimed by Government within the meaning of the clause. Their Lordships are unable to take this view. They are clearly of opinion that these lands were not claimed by Government within the meaning of the section. Before submersion these lands were the property of the Government, subject only to the rights of the ryotwari tenures which they had created. The moment these rights were relinquished by the ryots the Government were free to deal with them as they pleased. The effect of the relinquishment was to restore to the Government full freedom to dispose of what was originally their own. The appeal on this ground also fails. It is right to note that the apparent hardship of the appellant being subjected to a penal assessment in respect of the unauthorized occupation of lands of which, on plausible grounds, he believed himself to be the owner, has in this case been largely, if not entirely, obviated by the judgment of the High Court declaring the levy illegal for the years prior to the coming into force of the Madras Act III of 1905. This part of the judgment has not been challenged by either party.

Their Lordships will therefore humbly advise His Majesty that the decision of the High Court of Judicature at Madras should be affirmed and the appeal dismissed with costs to the respondent.

Solicitor for appellant—*H. S. L. Polak.*

Solicitor for respondent—*Solicitor, India Office.*

A.M.T.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Phillips and Mr. Justice
Kumaraswami Sastri.*

KATREDDI RAMIAH AND ANOTHER (DEFENDANTS 2 AND 15),
APPELLANTS,

1925,
March 21.

v.

KADIYALA VENKATASUBBAMMA AND OTHERS (PLAINTIFFS
AND DEFENDANTS 1, 3 TO 14 AND 16)—RESPONDENTS.*

*Hindu Law—Will—Mufassal will—Executors—Probate and
Administration Act (V of 1881), ss. 1, 4, 12, 59, 90, etc.—
Hindu Wills Act, 1870—Probate, not obtained—Vesting of
property—Whether property vests in executor, though probate
was not taken out—Whether the Probate and Administration
Act applies to executors not taking out probate—Powers of
executor without probate, whether absolute or only those of
manager.*

*Held by the Full Bench, that in cases of wills to which the
Hindu Wills Act does not apply, the estate of the testator vests
in the executor (who accepts office) from the date of the testa-
tor's death, and the provisions of the Probate and Adminis-
tration Act are applicable, even though probate has not been
obtained.*

*Ganapathi Aiyar v. Sivamalai Goundan, (1918) I.L.R., 36
Mad., 575, approved.*

APPEAL against the decree of the Additional Subordinate
Judge of Ellore in Original Suit No. 35 of 1920 (O.S.
No. 100 of 1919, Sub-Court, Ellore).

One Venkatasubbanna executed a will on 22nd Sep-
tember 1914 in the mufassal of the Presidency of
Madras and died on 5th January 1917 leaving no son
but a daughter, a daughter's son and a widow. Under
the will he divided the properties into three shares,
giving certain immovable and other properties to his

* Appeal No. 70 of 1921.

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daughter's son, another portion to his widow and a third portion to a person to be adopted to him by the widow. He also authorized his widow to adopt a son, to enjoy the properties given to her for her life, and provided that on her death her share was to be divided between his daughter's son and the adopted son. He also directed under the will that the widow should sell some of the properties and utilize the proceeds for certain charities mentioned by him, pay his debts out of 1,000 bags of paddy stored by him, collect his outstandings and discharge his debts, execute deeds of gift of the properties as specified in the will, and manage the adopted son's one-third share till he attained majority; there was a general clause in the will :—"I authorize my wife to conduct all my remaining affairs in my stead." As the testator had lived for nearly two years after the will was executed and was put to considerable expense on account of litigations in his lifetime, the paddy mentioned in the will as fund for payment of his debts was not available to the widow to pay his debts. She consequently sold some of the lands to the second defendant for payment of his debts and mortgaged, during the pendency of the present suit, other lands to the fifteenth defendant for the same purpose. The testator's daughter and her son instituted this suit against the widow, alienees, and the adopted son to obtain possession of the properties allotted to them under a family settlement alleged to have been entered into 13 days after the testator's death or in the alternative to recover their legacies under the will unencumbered by the alienations of the widow, the first defendant. The Subordinate Judge held that the first defendant was not an executor under the will, and that her alienations were not binding on the legatees, and he decreed to them possession of a third of the lands given to them under the will free from the claims of the alienees. The

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vendee and the mortgagee preferred this appeal. The appeal came on for hearing before SPENCER and SRINIVASA AYYANGAR, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH:—

SPENCER, J.—M. Subbanna executed a will on September 22, 1914, and died more than two years afterwards on January 5, 1917, leaving no sons but a daughter, a daughter's son and a widow.

He appointed his wife executrix of his will authorizing her to pay his debts out of the proceeds of 1,000 bags of paddy that he had in store in 1914, to recover sums owed to him by others, to sell a certain house and site, to carry out certain charitable and religious dispositions, to adopt a son and to manage the adopted son's one-third share of immovable property till he attained majority, etc., and then follows a general clause:—"I authorize my wife to conduct all the remaining affairs in my stead." Respondent's vakil attempted to argue that first defendant was only an executrix for a limited purpose (compare section 35 of Probate and Administration Act), and that the intention of the testator was to empower her to transact only those affairs which he specifically mentioned in the will. The use of the Telugu words యవత్తు (yavattu) and తతిమ్మ (tatimma) in this passage is to my mind consistent only with one meaning and that is that the testator intended his wife to be his general executrix. He provided in his will that his entire immovable property (excluding certain purchases of land which he had dedicated to temple worship) should be divided into three shares, and one share given to his daughter's son (second plaintiff), one to his adopted son (sixteenth defendant), and one to his widow (first defendant) for life, and that after her death her share should be divided between his daughter's son and the son adopted by his widow. The genuineness of the will is not disputed. Owing to the lapse of time between the making of the will and the testator's death, and the expense of law suits which he engaged in during his life, the paddy mentioned in the will as a fund for discharging debts was not available to the executrix, and she consequently had to sell 23 acres 68 cents of wet land under Exhibit I to the second defendant for the purpose of paying certain promissory notes and decree debts left owing by her husband when he died in 1917, and she further entered into a mortgage in favour of the fifteenth defendant for a similar purpose during the pendency of the present suit, which was

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instituted by deceased's daughter and daughter's son to obtain possession of the properties allotted to them under a family settlement alleged to have been arranged 13 days after the testator's death, or in the alternative to recover their legacies under the will, unencumbered by the sale, leases and mortgage to second, third, sixth and fifteenth defendants, respectively, and mesne profits for two years. The Subordinate Judge found for the plaintiffs and accordingly granted them a preliminary decree subject to the condition of their paying to first defendant Rs. 1,946 as their share of the debts amounting to Rs. 5,000 for which the testator was liable at the date of his death. The purchaser and the mortgagee from the widow (defendants 2 and 15) appeal. The argument put forward on their behalf was that, as the estate vested in the executrix from the date of the testator's death by virtue of the will, she could sell or mortgage his property to pay off his debts and could give the purchaser or mortgagee a good title.

As the will, with which we are concerned, was not executed by a Hindu within the City of Madras and does not relate to immovable property situate within this Court's Original Side jurisdiction, the Hindu Wills Act has no application to it, and consequently it was not made imperative by section 187 of the Succession Act that the executrix should take out probate in order to establish her right to deal with the deceased's estate. Section 179, which speaks of vesting, does not apply to the will of a Hindu, but section 4, which is the corresponding provision of the Probate and Administration Act, applies. Section 12 of that Act states that probate of a will, when granted, establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such, thus implying that they are not valid until probate is granted. I take this to mean that the executor of a Hindu will may do all acts which the will enjoins or permits him to do without any risk of having his authority to act *qua* executor questioned, but that if he exceeds his authority and does acts which the will does not expressly authorize him to do, such as the disposal of immovable property requiring the permission of Court which can only be given under section 90 (2), such acts are voidable at the instance of any person interested, unless and until the executor obtains probate or letters of administration and gets an order of Court to validate what he has done in the interval between the testator's death and the issue of probate or letters of administration. What acts an executor can under English Law do before obtaining probate are set out in Williams on Executors, Vol. I,

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at pages 213 to 215. They include the payment of debts owing by the deceased and the disposal of the testator's goods and chattels and real estate. An executor could always sell personally in order to pay debts, and since 1897 he can sell, lease, or mortgage realty for that purpose (vide pages 693 to 704). His power of disposal is absolute, but as he cannot maintain an action before probate though he can be sued if he has intermeddled with the estate, it becomes necessary for probate or letters of administration (if he dies first) to be obtained in order to justify his actions as executor.

There appears to be some divergence of opinion between the Calcutta and Bombay High Courts in the view taken by them as to the position of the executor of a Hindu or Muhammadan will who does not take out probate, Mr. Justice PUGH in Calcutta regarding him as a mere manager for the purpose of paying the debts and distributing the estate [*Sakina Bibee v. Mahomed Ishak*(1)], and Mr. Justice RUSSELL and Mr. Justice MARTEN in Bombay treating him as an executor in whom the estate vests by virtue of section 4 of the Probate and Administration Act [*Narrondas v. Narrondas*(2) and *Sir Mahomed Yusuf v. Hargovanias Jivan*(3)].

So far back as 1878 MARKBY, J., in *Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal*(4) and *Kherodemoney Dossee v. Doorgamoney Dossee*(5) held that the executor of a Hindu will did not represent the deceased by virtue of the will until he had obtained probate and the property did not vest in him by his mere appointment as executor in the will, and MACLEAN, C.J., in *Sarat Chandra Banerjee v. Bhupendra Nath Bosu*(6) expressed an opinion that the inclusion of the vesting section under the chapter relating to the grant of probate and letters of administration was an indication that the vesting followed from the grant of probate and that till then the executor held the property only as manager. There is also an observation of the Judicial Committee in *The Administrator-General of Bengal v. Premlal Mullick*(7) that prior to the Hindu Wills Act (the case before them being one of a will made in 1889 by a Hindu resident of Calcutta City) the powers and functions of the executor of a Hindu estate were those of a manager rather than those of an executor of an English will, that he did not require probate and that probate if obtained would not have

(1) (1910) I.L.R., 37 Cal., 839. (2) (1907) I.L.R., 31 Bom., 418.
(3) (1923) I.L.R., 47 Bom., 231. (4) (1879) I.L.R., 4 Cal., 342.
(5) (1879) I.L.R., 4 Cal., 455 at 468. (6) (1898) I.L.R., 25 Cal., 103.
(7) (1895) I.L.R., 22 Cal., 788 (P.C.).

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vested him with any title to the estate, either real or personal, which he administered. The decision of the same tribunal in *Kurrutulain Bahadur v. Nuzbat-ud-dowla Abbas Hossein Khan*(1) which by referring to sections 4, 59 and 90 of the Probate and Administration Act draws a distinction between executors under the Act and other executors who fail to take out probate throws light on this debated question. The Courts of Madras, Bombay and Calcutta seem to be all agreed that the executor of a Hindu will made in the mufassal derives his title from the will and that he can perform any of the duties cast on him by the will without taking out probate (vide *Ganapathi Aiyar v. Sivamalai Goundan*(2), *Balakrishnudu v. Narayanasawmy Chetty*(3), *Rajah Parthasarathy Appa Rao v. Rajah Venkataadri Appa Rao*(4). Even the learned Judges who decided *Sir Mahomed Yusuf v. Hargovandas Jivan*(5) were agreed in thinking that an executor who did not take out probate would be subject to any restriction in the will as to the disposal of immovable property. Such a disposal as would interfere with the literal performance of the trusts imposed by the will on the executor in respect of the specific bequests of immovable property would not be valid unless the executor obtained probate and obtained the directions of the Court under section 90 (2). The executor of a Hindu will has not in my opinion the general powers of an executor of an English will, as there is no section in the Probate and Administration Act giving an executor the wide powers conferred by section 269 of the Succession Act. In *Ganapathi Aiyar v. Sivamalai Goundan*(2), SUNDARA AYYAR and SADASIVA AYYAR, JJ., observed, "We can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining probate." My learned brother, whose judgment I have had the advantage of reading, apparently thinks that this observation goes too far and that an executor of a Hindu will in the mufassal has none of the powers of an executor under the Probate and Administration Act, unless he first takes out probate. This is in effect the Calcutta view. I would not go so far as to say that an executor appointed by will who does not take out probate is not an executor within the Act, as I think that section 90, clause (2), recognizes the existence of two classes of executors (1) those executors who get probate and obtain orders of Court for disposing of immovable property and (2) those

(1) (1906) I.L.R., 33 Cal., 116 (P.C.).

(2) (1913) I.L.R., 36 Mad., 575.

(3) (1914) I.L.R., 37 Mad., 175.

(4) (1923) I.L.R., 46 Mad., 190.

(5) (1923) I.L.R., 47 Bom., 231.

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executors who do not do so and are restricted to the terms of the will. The section speaks of even the former class as having the property vested in them, although probate has not been granted to them.

As the first defendant by disposing of 23 acres 68 cents of wet land under Exhibit I in favour of the second defendant for a price of Rs. 4,500 disabled herself from carrying out the testator's wishes in their entirety as to the division of his immovable property among his heirs in the manner set out in the will, and as she did not either before or after the sale validate her act by taking out probate and obtaining permission of the Court to dispose of the testator's immovable property for discharging his debts, the learned Subordinate Judge was right in my opinion in declaring the sale-deed in favour of the second defendant to be not valid and binding on the heirs under the will. Similarly the mortgage must also have been invalid so far as it interfered with their obtaining a distribution of their shares, but being executed *pendente lite* the plaintiffs were entitled to ignore it.

I am inclined to treat the first defendant as an executrix who has exceeded the limited authority given to her under the will as regards the disposal of immovable property and has failed to invest herself with the power that she might have got by taking out probate and applying to the Court to permit her to dispose of that property in a manner not authorized by the will.

Whether when the assets set apart under the will were not available for discharging the testator's debt, the first defendant, either as executrix without probate or as the manager or person in actual possession of the estate, would have power to sell any portion of it for the necessary purpose of discharging the deceased's debts and could give a good title to the purchaser is a question that has not been argued before us. As the determination of this question will largely depend on the answer to be given to the question of law formulated by my learned brother, I agree to the reference to a Full Bench in the terms proposed in his judgment.

SEENIVASA AYYANGAR, J.—The main question that arises in this appeal is one of considerable difficulty and at the same time of great general importance. The difficulty of the question has been immensely increased by the wide divergence in the views, with regard to the question, of the various High Courts in this country.

The daughter and the daughter's son of one Venkata-subbanna, the testator, instituted the suit from which this appeal

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has arisen. The first defendant is the widow of the testator and the sixteenth defendant is the son adopted by the first defendant to her deceased husband, the testator, under a power given to her by his will. Defendants 2 to 15 may all be regarded as alienees claiming through the first defendant.

The plaintiff's claim was for having these alienations set aside and delivery over to the plaintiffs of certain lands alleged to have been agreed to be given to them under a family arrangement entered into by the first defendant, subsequent to the death of the testator, or, in the alternative, for a partition and delivery over to them of their shares in the estate of the deceased according to the terms of the will. On behalf of the contesting defendants, namely, defendants 1 to 15, it was *inter alia* pleaded that the first defendant was the executrix appointed by the testator and that as such she was entitled to sell and dispose of the property of the deceased testator and that therefore the alienations could not be set aside. The learned Subordinate Judge in the Court below found on a construction of the will that there was no appointment of the first defendant in the will as general executrix either expressly or by necessary implication. On this finding the lower Court set aside the alienations and holding that the family arrangement set up by the plaintiffs was not proved, gave a decree in their favour for their shares of the properties bequeathed to them under the will subject, however, to a direction that the plaintiffs should pay to the first defendant a fifth share of the total amount of the debts of the testator discharged by the first defendant.

The first question, therefore, that arises is whether there is in the will an appointment of the first defendant as executrix by necessary implication. The learned vakil for the appellants has addressed to us a lengthy argument to show that the lower Court was wrong in holding that there was no such appointment. It seems to me that on a perusal of the entire will and all its various clauses there can be no doubt whatever of the appointment of the first defendant as executrix by the necessary implication. There is no other person to whom the execution of the will is confided. Wherever the testator thought there was anything to be done by way of carrying out his intentions, he has directed that the same should be done or carried out by the first defendant. Thus the debts due to him are directed to be recovered by her. It is she that is authorized to obtain proper documents in respect of lands purchased by him, but the sale-deeds for which had not been obtained by him during his lifetime, and she it is also that is directed to execute deeds of

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gifts and other documents in respect of certain grants made by him. She is also directed to sell certain properties and utilize the sale-proceeds for the purpose of certain charities. She is also the person that is directed to get the will registered within three months of his death. Over and above all these, there is about the end of the will the following sentence: "I authorize my wife to conduct all other affairs in my stead." The other affairs referred to there should necessarily signify and include affairs other than those in respect of which he has given particular directions. It is impossible to regard this sentence as not amounting to a constitution of the first defendant as his legal representative and the authority to conduct all other affairs undoubtedly amounts to confiding the execution of the will to her within the meaning of the definition of "executor." It almost seems to me that even apart from this sentence, the intention may be clearly gathered that she was the person to whom it was the intention of the testator that the execution of the will should be confided. But this sentence amounts almost to an express appointment. The lower Court was, therefore, clearly wrong in coming to the conclusion that the first defendant was not the general executrix appointed by the will. There was no reason whatever to suppose, as the subordinate Court seems to have done, that the first defendant was appointed an executrix only for certain limited purposes.

The lower Court having arrived at the conclusion that the first defendant was not the executrix at all, it became unnecessary for that Court to discuss the question whether if she were executrix what her powers were as such executrix to make the alienations sought to be set aside. This leads me to the consideration of the main question in this appeal, namely, whether an executor appointed by a will made in the mufassal of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain probate of the will or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act. It was unnecessary for the learned Subordinate Judge in the Court below to consider this question because on his finding that the first defendant was not appointed as executrix at all, no such question arises for decision by him. As we have however found that there is an appointment of the first defendant as executrix if only by necessary implication, it has become necessary to determine the nature and extent of her powers over the estate of

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the deceased. If it should be found that even though no probate may be obtained by the executor the estate becomes vested in him from the moment of the death of the testator as indicated in section 4 of the Probate and Administration Act and that he has all the powers of an executor as set out in that Act, then the test to be applied for the purpose of determining whether or not the alienations made by him would be valid and binding would be entirely different to the tests applicable if the correct view should be that unless and until an executor obtains probate his powers are only those of a mere manager. The present appeal, it seems to me, cannot be properly determined without coming to a decision with regard to this main question. If ultimately the view should prevail that the Probate and Administration Act is merely an enabling Act laying down the procedure for applications for probate and letters of administration and their grant and setting out the consequences that would follow on such grant being made or obtained and that therefore an executor of a will made in the mufassal of the Presidency, has, till he obtains the probate, the powers only of a mere manager as though the Probate and Administration Act had not been passed, then in the view we have taken that the first defendant is the properly appointed executrix of the will the case will have to be remanded to the lower Court for the purpose of determining the question what the powers are of such a mere manager with regard to the disposal of the property of the testator and whether having regard to the nature and extent of such power the particular alienations in this case were within or beyond such powers. If, however, the true view should be held to be that in the case of wills made in the mufassal the executors have, whether they obtain probate or not, all the powers of the executors as set out in the Act, then the question of the validity of the alienations might require to be determined with reference to the various sections of that Act and the provisions of the will in question. I may at once state that the case of *Ganapathi Aiyar v. Sivamalai Goundan*(1) is a direct authority for the position contended for by the appellants with regard to the main question of the powers of an executor under the Probate and Administration Act. The learned Judges, SUNDARA AYYAR and SADASIYA AYYAR, say at page 578 as follows: "But we can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without

(1) (1913) I.L.R., 36 Mad., 575.

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obtaining probate." The reasoning on which the learned Judges proceeded to arrive at that conclusion may be summed up as follows:—(1) There is no provision in the Probate and Administration Act which compels a person appointed as executor under a will to take out probate or letters of administration, whereas there is such a provision in the Indian Succession Act as incorporated in the Hindu Wills Act. (2) Under section 4 of the Act, all the property of the deceased vests in the executor as such. (3) Neither the preamble nor the heading of Chapter II in the Act nor section 12 requires that a different construction should be placed on section 4. (4) Probate is not necessary to make a person an executor as his title as executor is derived under the will. (5) Probate is merely the authentic evidence of the will and not the source of the title of the executor. The learned Judges in coming to that conclusion followed the decisions of the Bombay High Court in the case of *Shrik Moosa v. Shaik Essa*(1) and the case of *Mathuradas Lowji v. Goculdas Madhowji*(2). The case of *Sarat Chandra Banerjee v. Bhupendra Nath Bosu*(3) was also cited to their Lordships but has been attempted to be distinguished on a ground which I shall advert to later. It may be convenient here to observe that the view of the Bombay High Court in the said two Bombay cases has been maintained in several recent decisions of that Court. In *Narrondas v. Narrondas*(4), Mr. Justice RUSSELL merely follows the earlier Bombay view citing the earlier decisions. In the case of *Sir Mahomed Yusuf v. Hargovandas Jivan*(5) two Judges of the Bombay High Court after considering a great deal of the case-law on the point reiterate the Bombay view and follow it. In the case of *Narrondas v. Narrondas*(4) Mr. Justice RUSSELL referred to certain observations of Mr. Justice MARKBY in the case of *Komollochun Dutt v. Nilruttun Mundle*(6). Those observations are as follows: "The property vests in the executor by virtue of the will, not of the probate. The will gives the property to the executor; the grant of probate is the method which the law specially provides for establishing the will." That same learned Judge, Mr. Justice MARKBY, in the case of *Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal*(7) states as follows at page 345: "The executor does not represent the deceased by virtue of the will until he has obtained probate." In the case of *The*

(1) (1884) I.L.R., 8 Bom., 241.

(3) (1898) I.L.R., 25 Cal., 103.

(5) (1923) I.L.R., 47 Bom., 231.

(2) (1886) I.L.R., 10 Bom., 468.

(4) (1907) I.L.R., 31 Bom., 418.

(6) (1879) I.L.R., 4 Cal., 300.

(7) (1879) I.L.R., 4 Cal., 342.

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Administrator-General of Bengal v. Premlal Mullick(1) their Lordships of the Judicial Committee state as follows: "It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate and the vesting in him of the estate of the deceased. The will of the late Nundo Lal Mullick was executed in August 1889, and his executors, therefore, on their obtaining probate, became immediately vested, by force of statute, with the whole estates which belonged to him at the time of his decease." Though in that case their Lordships were not referring to the Probate and Administration Act, they were considering the terms of section 179 of the Succession Act, which is identical with section 4 of the Probate and Administration Act. In the case of *Sarat Chandra Banerjee v. Bhupendra Nath Bosu*(2), Chief Justice MACLEAN and Justice BANERJEE while holding that an executor under a Hindu will, before the Hindu Wills Act came into force, is not in the same position as an English executor under an English will, decide that the property does not vest in him, and that he holds it only as manager. The learned Judges referring to the preamble of the Act and the heading of Chapter II of the Act state as follows: "Where the estate is unadministered, if any one desire to come in and prove the will and get the benefit of the Act in that sense, he may have the opportunity of doing so, and the effect would be that the estate from that time would vest in such executor under section 4." Again in the case of *Sakina Bibee v. Mahomed Ishak*(3) Mr. Justice PUGH concludes his discussion of the subject as follows: "It appears to me that in the case of a non-probated will, if I may use the expression, the position must be as it was before the legislation, that is, the will is a gift from the testator to the legatees, and the executor is merely a manager to carry out the intentions of his testator. . . . In my judgment, therefore, the position of an executor who does not take probate is the same as that of a Hindu or Muhammadan executor before the Succession Act."

In this conflict of view between the various Courts, I am personally inclined to consider that the view taken by the learned Judges in the Calcutta High Court is the correct view. That view is, to my mind, really in accordance with the view

(1) (1885) I.L.R., 22 Calc., 788 (P.C.). (2) (1898) I.L.R., 25 Calc., 103.
(3) (1910) I.L.R., 37 Calc., 839.

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of their Lordships of the Judicial Committee in the case of *The Administrator-General of Bengal v. Premlal Mullick*(1). Considering the question, however, not on the authorities but with reference to the Probate and Administration Act, it has to be noticed that the Act is called "An Act to provide for the grant of Probates of Wills and Letters of Administration to the estates of certain deceased persons." And the preamble runs as follows: "Whereas it is expedient to provide for the grant of Probate of Wills and Letters of Administration to the estates of deceased persons in cases to which the Indian Succession Act of 1865 does not apply, etc." It is significant that the object of the Act is not stated to be to legislate about wills or to codify or modify the law relating to wills. Section 4 of the Act is as follows: "The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such." It is true that, reading the section by itself, it would rather seem to indicate that on the death of the testator the executor becomes his legal representative for all purposes and that the property of the deceased person vests in him as such. But it must be remembered that this section refers also to an administrator, and it cannot possibly be pretended that there can be any administrator till letters of administration are obtained, though the letters when obtained relate back to the date of the death of the intestate deceased. There is, therefore, no reason to suppose why, in the case of an executor, a similar result should not have been intended. It is, however, significant that section 4 appears in Chapter II entitled "Of Grant of Probate and Letters of Administration." This heading of the chapter, therefore, further strengthens the view that both the representative character and the vesting accrue only on probate being taken. Then, we have section 12 which is as follows: "Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such." This makes the meaning of the legislature, it seems to me, quite clear. It is only the probate of a will when granted that is said to establish the will from the death of the testator and renders valid all intermediate acts. The clear implication is that if the probate is not granted or obtained, the will is not established from the death of the testator and all intermediate acts of the testator will not be rendered valid. In section 59, it is provided that

(1) (1895) I.L.R., 22 Calc., 788 (P.C.).

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probate or letters of administration shall have effect over all the property, movable or immovable, of the deceased throughout the Province in which the same is (or are) granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him. The legislature after providing in Chapter V regarding the practice in granting and revoking probates and letters of administration proceeds in Chapter VI to enumerate the powers of an executor or administrator. Section 90 of the Act runs as follows: "(1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4. (2) The power of an executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order." There is no doubt that the clause in sub-section (2) "unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order" would seem to suggest that even in the absence of probate, the property vests in the executor and that he has power to dispose of immovable property subject only to any restrictions which may be imposed in that behalf by the will. There is real difficulty in construing this clause consistently with the other parts of the Act, and for my part, I am inclined to think that it was a case of mere confused expression and that what the legislature meant to lay down was that if a person appointed executor by a will should wish to dispose of property contrary to the directions contained in the will, he should first obtain probate and then apply to the Court and obtain an order from it authorizing him to do so.

I am therefore of the opinion that the Probate and Administration Act is a mere enabling Act and that persons desirous of obtaining the rights created by that Act should first proceed under the Act and clothe themselves with the right by obtaining either probate or letters of administration.

I am confirmed in this view all the more because I cannot possibly imagine that the legislature virtually altered the law of wills in the mufassal without expressly saying so or that the

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legislature meant to place an executor in the mufassal without probate practically for all purposes in the same position as an executor with probate in Presidency towns.

None of the learned Judges either of this Court or of the Bombay Court who have decided to the contrary have really given any satisfactory explanation either with regard to the preamble of the Act or the heading of Chapter II or the very clear terms of section 12.

In view, therefore, of the decision in the case of *Ganapathi Aiyar v. Sivamalai Goundan* (1) and the conflict of judicial opinion between the Bombay and the Calcutta High Courts in the same matter, I deem it necessary to refer to a Full Bench the question already propounded, namely, the main question in this appeal, "whether an executor appointed by a will made in the mufassal of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain probate of the will, or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act."

ON THIS REFERENCE

A. Krishnaswami Ayyar for appellant.—This is a mufassal will, to which the Probate and Administration Act (V of 1881) applies. It is not obligatory on executors in such cases to take out probate, as in cases to which the Hindu Wills Act, 1870, applies; in mufassal wills, to which Hindu Wills Act does not apply, the testator's estate vests in the executor by virtue of the will, and not by reason of the probate. If the estate vests in the executor, he has absolute powers to dispose of the estate as an executor. Prior to the Probate and Administration Act, 1881, a Hindu executor was only a manager. See executor defined in section 3 of the Probate and Administration Act, 1881; section 4 of the Act vests the estate in the executor as such; the estate vests, in such cases, whether probate is obtained or not. The vesting in the testator is from the date of the death of the testator, as under the English Law. See *Meyappa Chetty v. Subramanian Chetty* (2); Williams on Executors (11th Edn.), pages 206, 207, 213 and 214.

(1) (1913) I.L.R., 36 Mad., 575.

(2) (1916) 43 I.A., 118; [1916] A.C., 603.

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Section 90 of the Probate and Administration Act, 1881, shows that an executor has power to dispose of property vested in him even prior to obtaining probate. Reference was made to the following cases: *Ganapathi Aiyar v. Sivamalai Goundan*(1); *Balakrishnudu v. Narayanasawmy Chetty*(2); *Raja Parthasarathy Appa Rao v. Raj h Venkatadri Appa Rao*(3); *Shaik Moosa v. Shaik Essa*(4); *Sir Mahomed Yusuf v. Hargovandas Jivan*(5); *Administrator-General of Bengal v. Premlal Mullick*(6) is distinguishable as a case under the Probate and Administration Act and Administrator-General's Act, 1874; and the dictum in it was obiter on this question; *Kurrutulain Bahadur v. Nuzbat-ud-dowla Abbas Hossein Khan*(7). Once the Act is applicable, sections 3 and 4 of the Act will confer the rights on the executor.

G. Lakshmanma for respondent.—The Probate and Administration Act is only an enabling statute. The rights and obligations flow only on taking out probate under the Act. See section 1 (preamble). Without probate, an executor has only the powers of a manager. See *Administrator-General of Bengal v. Premlal Mullick*(6). The preamble furnishes the key to the construction of the statute, *Nga Hoong v. The Queen*(8); *Uda Begam v. Imam-ud-din*(9). Chapter VI of the Probate and Administration Act assumes that probate had been taken out and refers only to executors who have taken out probate in accordance with Chapters 2 to 5 of the Act. In the absence of probate, as before the Probate and Administration Act, the executor has only the powers of a manager. See *Srimati Jaykali Debi v. Shibnath Chatterjee*(10); *Administrator-General of Bengal v. Premlal Mullick*(6) is conclusive on this question. The decision in *Ganapathi Aiyar v. Sivamalai Goundan*(1) is erroneous. The decisions of the Calcutta High Court are uniformly in favour of the respondent's contention.

OPINION.

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KUMARASWAMI SASTRI, J.—The question raised in this reference is

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| (1) (1913) I.L.R., 36 Mad., 575. | (2) (1914) I.L.R., 37 Mad., 175. |
| (3) (1923) I.L.R., 46 Mad., 190 (224). | (4) (1884) I.L.R., 8 Bom., 241. |
| (5) (1923) I.L.R., 47 Bom., 231. | (6) (1895) I.L.R., 22 Cal., 738 (P.C.). |
| (7) (1903) I.L.R., 33 Cal., 116 (P.C.). | (8) (1857) 7 M.I.A., 72. |
| (9) (1880) I.L.R., 2 All., 74 (90). | (10) (1869) 2 B.L.R. (O.C.J.), 1 at 4. |

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“Whether an executor appointed by a Hindu will made in the mufassal of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain probate of the will or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act.”

Before the passing of the Hindu Wills Act of 1870, the estate of a deceased Hindu did not vest in the executor even though he obtained probate, and in cases not governed by the Act the right of the executor or legatee could be established either by production of probate or by other proof of the will, probate being only treated as one of the modes by which a will can be proved in Court, and District Courts had no power to grant probate or letters of administration to Hindu wills which were not governed by the Hindu Wills Act. Supreme Courts, however, reserved to themselves the power to grant probate but it was recognized that the grant of probate did not of itself confer any additional powers on executors not governed by the Hindu Wills Act. The position of such an executor was merely that of a manager so far as regards the powers which were not expressly conferred on him. In *The Administrator-General of Bengal v. Premlal Mullick*(1), their Lordships of the Privy Council in dealing with the rights of Hindu executors prior to the passing of the Administrator-General's Act of 1867 observe

“His powers and functions were not those of an English executor but rather those of a manager, but he did not require probate, and probate if obtained would not have vested him with any title to the estate either real or personal which he administered.”

In view of these observations it is unnecessary to refer in detail to the decisions of the High Courts on the

(1) (1895) I.L.R., 22 Cal., 738 (P.C.).

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subject. I need only refer to *Kherodemoney Dossee v. Doorgamoney Dossee*(1), *Sarat Chandra Banerjee v. Bhupendra Nath Bosu*(2), *Amulya Charan Seal v. Kali Das Sen*(3), *Maniklal Atmaram v. Manchershhi Dinsha Coachman*(4).

As regards grants of probate and the proof required of a will not governed by the Hindu Wills Act, it was held in *Bharti v. Bharti*(5), that before the passing of the Probate and Administration Act, it was not competent to District Courts to grant probate or letters of administration but as pointed out in *Krishna Kinkur Roy v. Rai Mohun Roy*(6), the passing of the Probate and Administration Act has altered this. It has, however, been held that there is no obligation cast on a Hindu or Muhammadan executor of wills not coming under the Hindu Wills Act to take out probate and that he can prove the will during the course of the suit just as if he was proving any other document requiring proof. Probate was regarded only as one mode of proving a will. I need only refer to *Krishna Kinkur Roy v. Rai Mohun Roy*(6), *Krishna Kinkur Roy v. Panchuram Mundul*(7), *Bhagvansang Bharaji v. Becharadas Harjivandas*(8), *Shaik Moosa v. Shaik Essa*(9), *Sakina Bibee v. Muhomed Ishak*(10). The Probate and Administration Bill as originally drafted and introduced in the Council proposed to make the production of probate or letters of administration necessary in all cases where the property exceeded Rs. 1,000 ; but when the Bill was in the Select Committee this provision was deleted. The result is that the Probate and Administration Act is, as it stands,

(1) (1879) I.L.R., 4 Calc., 455.
(3) (1905) I.L.R., 32 Calc., 861.
(5) (1880) 6 C.L.R., 138.
(7) (1880) I.L.R., 17 Calc., 272.
(9) (1884) I.L.R., 8 Bom., 241.

(2) (1898) I.L.R., 25 Calc., 103.
(4) (1876) I.L.R., 1 Bom., 269.
(6) (1887) I.L.R., 14 Calc., 37.
(8) (1882) I.L.R., 6 Bom., 73.
(10) (1910) I.L.R., 37 Calc., 839.

a measure purely permissive so far as the necessity for taking out probate is concerned.

The question is whether the Probate and Administration Act is only confined to cases where such permission is availed of and a person applies for probate or letters of administration or whether it applies to all cases. So far as the decided cases are concerned, there is a difference of opinion between the view taken by the Madras and Bombay High Courts on one side and the Calcutta High Court on the other. In *Fatma v. Shaik Essa*(1), WEST, J., held that the executor of a will of a deceased Muhammadan execut'd after the Probate and Administration Act had come into force could not claim to represent the estate of his testator until he had taken out probate. His view was that all classes of executors with regard to the necessity of taking out probate were on the same footing, that section 12 of the Act showed clearly that the idea at the bottom of the scheme of the Act was that a will was not to be considered established until probate had been taken out and that till probate there was no will "established," that is, there was no "will" at all exacting recognition of the dispositions made and the authority conferred by it. He held that the Act read as a whole established that probate was necessary in all cases. This view of WEST, J., was however overruled by Sir CHARLES SARGENT, C.J., and BAYLEY, in *Shaik Moosa v. Shaik Essa*(2), and it was held that by reason of the omission from the Probate and Administration Act which applies to Hindus and Muhammadans, of any section corresponding to section 187 of the Succession Act which requires the production of probate or letters of administration, a right of suit may be established by a Hindu or Muhammadan without taking

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(1) (1883) I.L.R., 7 Bom., 266.

(2) (1884) I.L.R., 8 Bom., 241.

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out probate. Sir CHARLES SARGENT, C.J., was of opinion that section 12 of the Probate and Administration Act was merely intended to be a condensed statement of the English Law which regards probate as the authenticated evidence of the will itself from which the executor derives his title and by virtue of which the property of the testator vests in him from the death of the testator and not as a condition precedent to establishing his claim. In *Mathuradas Lowji v. Goculdas Madhowji*(1), it was held following the decision in *Shaik Moosa v. Shaik Essa*(2), that an executor who has not taken out probate has the powers of alienation which the English Law confers on executors. In *Narrondas v. Narrondas*(3), it was held that the estate of a deceased vested in the executor appointed under the will even though he did not obtain probate. RUSSELL, J., observed as follows:—

“The plaintiffs were his executors and by section 4 of the Probate and Administration Act all his estate vested in the plaintiffs as such. This Court has held section 4 applicable before probate. See *Shaik Moosa v. Shaik Essa*(2), approved in *Mathuradas Lowji v. Goculdas Madhowji*(1). And in *Bai Harkor v. Maneklal Rasikdas*(4), it seems to have been assumed that the effect of section 4 would have been to vest the property in the executor of a will made before the passing of the Act, and not governed by the Hindu Law, although probate had not been granted.”

In *Sir Muhomed Yusuf v. Hargovandas Jivan*(5), MARTEN and FAWCETT, JJ., after reviewing the case law on the subject held that the estate vests in the executor under section 4 of the Probate and Administration Act and that he can convey the property by virtue of the power conferred upon him by section 90 of the Act even though he has not obtained probate. All the authorities are reviewed by the learned Judges in their judgment.

(1) (1886) I.L.R., 10 Bom., 468.

(3) (1907) I.L.R., 31 Bom., 418.

(2) (1884) I.L.R., 8 Bom., 241.

(4) (1888) I.L.R., 12 Bom., 621.

(5) (1923) I.L.R., 47 Bom., 231.

So far as Madras is concerned the view of the Bombay High Court has been accepted as correct. In *Ganapathi Aiyar v. Sivamalai Goundan*(1), SUNDARA AYYAR and SADASIYA AYYAR, JJ., held that an executor under the will of a Hindu who has not obtained probate is governed by the provisions of the Probate and Administration Act and can clothe a vendee with full title. Dealing with the argument that the property of the testator would vest in the executor only if he took out probate or letters of administration, the learned Judges observe: “We are unable to uphold this contention. There is no provision in the Probate and Administration Act which requires a person appointed as executor under a will to take out probate or letters of administration. Section 187 of the Indian Succession Act which provides that no right as legatee or executor under a will can be enforced unless probate or letters of administration have been taken out has not been enacted in the Probate and Administration Act. It was imported into the Hindu Wills Act, but it was apparently for very good reasons considered undesirable to embody it in the Probate and Administration Act. Under section 4 of the Act all the property of the deceased vests in the executor as such. Probate is not necessary to make a person an executor. His title is derived under the will. If section 187 of the Succession Act had been imported into the Probate and Administration Act, then neither the executor nor any person claiming as alienees under him would be entitled to enforce any right as executor or alienee. But we can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining probate. This was the view taken in *Shaik Moosa v. Shaik Essa*(2), and *Mathuradas Lowji v. Goculdas Madhowji*(3).” The learned Judges distinguish *Sarat*

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(1) (1913) I.L.R., 36 Mad., 575.

(2) (1884) I.L.R., 8 Bom., 241.

(3) (1886) I.L.R., 10 Bom., 468.

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Chandra Banerjee v. Bhupendra Nath Bosu(1), on the ground that it related to the validity of a sale made by an executor under a Hindu will in the year 1864 long before the Probate and Administration Act was passed and they observed that they could not assume that the learned Judges would have taken the same view in respect to wills made by a person who died after 1881. In *Balakrishnudu v. Narayanasawmi Chetti*(2), WALLIS, C.J., held that the estate of a deceased vests in the executor even though probate has not been taken out, and observed as follows :—

“The will is not governed by the Hindu Wills Act and section 187 of the Indian Succession Act is therefore not applicable. Under section 4 of the Probate and Administration Act the estate of the deceased vested in the plaintiff as her executor on her death in January 1904 and there is nothing in that Act to prevent him suing the defendant at once. No doubt if he had omitted to take out probate he could not have obtained a decree without producing a succession certificate, but there is nothing in that Act to prevent his instituting the suit and afterwards obtaining the certificate before decree.”

In *Rajah Parthasarathy Appa Rao v. Rajah Venkatadri Appa Rao*(3), it was assumed both by SADASIVA AYYAR and PHILLIPS, JJ., who originally heard the appeal, and by the Full Bench, that the Probate and Administration Act applied to unprobated wills in the mufassal to which the Hindu Wills Act did not apply.

A different view has been taken by the Calcutta High Court. In *Sarat Chandra Banerjee v. Bhupendra Nath Bosu*(1), it was held that an executor under a Hindu will executed before the Hindu Wills Act came into force is not in the same position as an English executor under an English will and that the property does not vest in him but that he holds it only as manager. As pointed out by SUNDARA

(1) (1898) I.L.R., 25 Cal., 103.

(2) (1914) I.L.R., 37 Mad., 175.

(3) (1923) I.L.R., 46 Mad., 190.

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AYYAR and SADASIVA AYYAR, JJ., in *Ganapathi Aiyar v. Sivamalai Goundan*(1), the will in question was executed before the passing of the Hindu Wills Act and the Probate and Administration Act; but I have little doubt that there are observations in the judgment which support the view taken that the Probate and Administration Act does not apply to cases where probate has not been granted to the executor. Sir WILLIAM MACLEAN, C.J., refers to the preamble of the Act and the fact that section 4 comes in under Chapter II of the Act headed “Of grant of probate and letters of administration” and observes that this indicates that the vesting was only to follow upon the grant of probate of the will in the one case, or grant of letters of administration in the other and that the section applies not only to executors but to administrators who obtain letters of administration under the Act. BANERJEE, J., thinks that the provisions of the Act must be taken to be controlled by the preamble of the Act and states that where probate has not been obtained the provisions of the Act would not apply. In *Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal*(2) a decree was obtained against a person who was not the proper legal representative. Subsequent to the decree, under the will of the deceased he took out probate and he filed a claim to the property attached in execution of the decree against the defendant in that suit who was only the concubine of the deceased. MARKBY, J., held that a person who took possession of the estate of a deceased Hindu who had left a will which was not probated must be treated for some purpose as his legal representative until some other claimant comes forward. In the course of his judgment the learned Judge observes that the executor does not represent the deceased by virtue

(1) (1913) I.L.R., 36 Mad., 575.

(2) (1879) I.L.R., 4 Cal., 342.

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of the will until he has obtained probate, that somebody must have represented the deceased and must represent the deceased and that the person who was in possession of the estate and managed it till probate was obtained might be treated as the person who was representing the estate. The same learned Judge, however, in *Komolothun Dutt v. Nilrutun Mundle*(1), observed :—

“ When the probate is granted it operates upon the whole estate, and (by section 188) it establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such. The property vests in the executor by virtue of the will, not of the probate. The will gives the property to the executor ; the grant of probate is the method which the law specially provides for establishing the will. So long as the probate exists it is effectual for that purpose.”

The question for determination there, however, was whether, when once probate was granted, it can be set aside by a separate suit and it was held that the only way to set it aside was to apply to the Court which granted the probate to revoke the grant. In *Sakina Bibee v. Mahomed Ishak*(2) it was held by PUGH, J., following *Sarat Chandra Banerjee v. Bhupendra Nath Bosu*(3), that the powers conferred by the Probate and Administration Act do not apply to an executor who has not taken out probate and that the powers of the executor under such a will must be the same as it was before the passing of the Act. The observations of the learned Judge were, however, *obiter*, as the question did not arise for determination.

I may refer to two Calcutta cases decided by their Lordships of the Privy Council which were referred to in the course of the argument. The first is *Administrator-General of Bengal v. Premal Mullick*(4). The question in that case was whether a Hindu executor who had

(1) (1879) I.L.R., 4 Cal., 360.

(3) (1898) I.L.R., 25 Cal., 103.

(2) (1910) I.L.R., 37 Cal., 839.

(4) (1895) I.L.R., 22 Cal., 788 (P.C.).

obtained probate of a will can transfer the administration to the Administrator-General by virtue of the provisions of the Administrator-General's Act, II of 1874. The will was executed in 1889 after the passing of the Probate and Administration Act. Their Lordships of the Privy Council were of opinion that the right conferred by section 31 of the Administrator-General's Act was not confined to any particular class of executors and that the executor under a Hindu will can take advantage of the provisions of the Act. In the course of their judgment their Lordships of the Privy Council, after pointing out that section 31 of the Administrator-General's Act of 1874 is a re-enactment, without verbal alterations of section 30 of the Administrator-General's Act, 1867 (Act No. XXIV of 1867), make the following observation at page 796 :—

“ It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose, to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate and the vesting in him of the estate of the deceased. The will of the late Nundo Lal Mullick was executed in August 1889, and his executors therefore, on their obtaining probate, became immediately vested, by force of statute, with the whole estate which belonged to him at the time of his decease.”

The words “ the executors, therefore, on their obtaining probate became immediately vested by force of statute ” are relied upon as supporting the view that the powers of an executor only arise on probate being taken. I do not think that we can hold that these observations which were *obiter* can be taken as an authoritative interpretation of section 4 of the Probate and Administration Act. The only question for decision was whether a Hindu who obtains probate of a will executed after the passing of the Probate and Administration Act was a person who came within the

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class of persons empowered to transfer the estate to the Administrator-General under section 31 of the Administrator-General's Act. There is great force in the following observations of Sir E. J. Trevelyan in his book "The Law relating to Hindu Wills," page 70:—

"Although it was unnecessary to decide this question, these observations would show that an estate does not vest in an executor until probate. It is submitted that their Lordships have omitted to consider the words "unless probate has been granted to him," in section 90 (2), the omission from section 4 of any reference to probate, and the expression of the effects of probate in sections 12 and 59, which, it is submitted, suggest that the powers of an executor are not dependent upon probate."

I may also point out that Sir Rowland Wilson in his work on Muhammadan Law is also of opinion that the powers of an executor of a Muhammadan under a will which is not probated are subject to the provisions of the Act and that without probate he is an executor within the meaning of the Probate and Administration Act except where the contrary appears from the context, see page 232, 5th edition

Reference has also been made to *Kurrutulain Bahadur v. Nuzbat-ul-dowla Abbas Hossein Khan*(1). That was a case where a Muhammadan left a will which under the Muhammadan Law would be invalid to the extent of two-thirds of the estate. The will was executed in 1893 after the passing of the Probate and Administration Act and the question was what the effect of the probate was as regards two-thirds of the estate which the testator under Muhammadan Law had no power to dispose of. It was held that the grant of probate did not estop the plaintiff from pleading that the will did not operate on two-thirds of the estate. Their Lordships of the Privy Council at page 130 state

(1) (1906) I.L.R., 33 Cal., 118.

that, although the supreme Courts granted probates of Hindu and Muhammadan wills, these Courts never applied the English rule as to the necessity for probate to such wills, nor did they attribute to such probates, when granted, the English doctrines as to the operation of probate, and observe as follows:—

"Under that system a Hindu or Muhammadan executor took no title to property merely as such by virtue of the probate."

I do not think this decision throws much light on the question before us.

So far as legislation in Madras is concerned there are two regulations which deal with this matter. One is Regulation III of 1802 and section 16 gave power to executors of Muhammadans and others to take charge of assets and to execute the trusts mentioned in the will and forbade Courts from interfering except on complaints. This section, however, was repealed so far as Hindus were concerned by Regulation V of 1829 and the preamble states that the provisions of section 16 of Regulation III of 1802 were contrary to the provisions of Hindu Law and the authorities prevalent. Section 4 of Regulation V of 1829 says that wills left by Hindus shall have no legal force whatever except so far as their contents may be in conformity with the provisions of the Hindu Law, according to the authorities prevalent in the respective provinces under this Presidency.

I am of opinion that the view taken by the Bombay High Court and by our own Court in *Ganapathi Aiyar v. Sivamalai Goundan*(1) is correct. As regards the vesting of the estate in the executor before probate is obtained, I think the observations of their Lordships of the Privy Council in *Meyappa Chetty v. Subramanian Chetty*(2) are clear. They observe:

(1) (1913) I.L.R., 36 Mad., 575.

(2) (1916) A.C. 803; 43 I.A., 118.

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"It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death."

I think there are many practical difficulties in coming to the opposite conclusion. Section 12 of the Probate and Administration Act says that probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such; so that it will be open to the executor to defer taking out probate and after administering the estate with the limited powers of a manager to apply for probate and clothe himself with rights which are far more extensive and which would have retrospective effect. For example, if he sells property before obtaining probate, the sale would not be binding unless there was an express provision in the will or unless it were necessary and beneficial to the estate within the meaning of *Hunooman Persaud Panday v. Mussumat Babooee Munraj Koonweree*(1), but if he takes out probate the alienation would be valid from the date of death of the testator because under section 90, unless there is an express prohibition, there is no question of necessity. It is not in every case that a purchaser can apply for letters of administration with will annexed. As the view taken by the Madras High Court has always been that the provisions of the Probate and Administration Act apply to cases where probate has not been obtained and as it would unsettle many titles if a contrary view were held we should not do so unless we are satisfied that the view taken till now is clearly erroneous.

Turning to the Probate and Administration Act, I do not think there is anything in the Act which clearly indicates that it is only applicable to executors who

(1) (1856) 6 M.I.A., 393.

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take out probate. "Executor" is defined generally in section 3 as a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided. Section 4 enacts that the executor or administrator, as the case may be, of a deceased person, is the legal representative for all purposes and all the property of the deceased person vests in him as such. No doubt this section comes under Chapter II which is headed "Of grant of probate and letters of administration," but I do not think that this fact has much bearing on the general words of the section nor do I think that the fact that an administrator gets title only from the date of the grant of letters of administration throws much light on the question. I think the meaning of the section is that property will vest in both of them but that in the case of an executor it vests from the date of the death of the testator, but by virtue of sections 14 and 15, an administrator being merely a person to whom the Court confides the management of the estate, the property vests in him from the date of the grant of letters of administration and not before. I do not think there is much point in the contention that because executors and administrators are both referred to in section 4 and because an administrator's rights commence from the date of the grant, a similar restriction should be placed upon the executor who derives title from the will of the testator. Section 90, I think, makes the point clear. It distinctly applies to both executors who have taken out probate and those who have not. Clause (1) gives the executor or administrator power to dispose of all or any of the property for the time being vested in him under section 4 and clause (2) says that if the will contains a restriction and the executor wants to sell property, he should obtain probate and get the leave of the Court. It is difficult to read section 90 as not applying to unprobated wills. It clearly contemplates

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the vesting of property in the executor who has not obtained probate. It is no doubt true that in the preamble it is stated that it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act does not apply, but I do not think that this fact alone should be taken as conclusive on the question. It seems to me that if the legislature intended that only wills which are probated should be governed by this Act, it would have said so in unequivocal terms and in the absence of any such statement I do not think I will be justified in holding that the Act is not applicable to cases where probate has not been obtained. There are several sections in the Act which have nothing to do with probate and which are general in their character and there is no reason why such provisions should not be applied to Hindu wills of which probate has not been obtained. I think there is great force in the observations of Sir CHARLES SARGENT, C.J., in *Shaik Moosa v. Shaik Essa*(1), where the learned Judge observes that the object of the legislature in enacting the Probate and Administration Act seems to have been to frame an act which would be applicable to all natives of this country whilst leaving the existing law as to those Hindus to whom the Hindu Wills Act applies, untouched.

I would answer the reference by stating that in cases of Hindu wills to which the Hindu Wills Act does not apply the estate vests in the executor (who accepts office) from the date of the testator's death and that the provisions of the Probate and Administration Act are applicable even though probate has not been obtained.

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PHILLIPS, J.

COUTTS TROTTER, C.J.—I agree.

PHILLIPS, J.—I agree.

K.R.

(1) (1884) I.L.R., 8 Bom., 241.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.*

M. D. VENKATASAM CHETTY AND ANOTHER, APPELLANTS,

1925,
October 27.

v.

MOTHICHAND GULABCHAND, RESPONDENTS.*

*Practice—Memorandum of objections in Original Side appeals—
Competency of.*

Under the provisions of the Civil Procedure Code and the rules made by the High Court thereunder, it is competent for a respondent in an appeal from the Original Side of the High Court to file a memorandum of objections against the decree appealed from. *Sabitri Thakurain v. Savi*, (1921) I.L.R., 48 Calc., 481 (P.C.), applied. *Bhimasena Rao v. Venugopal Mudali*, (1925) I.L.R., 48 Mad., 631, overruled.

MEMORANDA of cross-objections sought to be preferred by the respondents against the decree of DEVADOSS, J., passed in the exercise of the ordinary Original Civil Jurisdiction of the High Court in O.S. No. 376 of 1918 and against the order of WALLER, J., passed in the exercise of Insolvency Jurisdiction in I.P. No. 112 of 1917.

ORDER OF REFERENCE TO A FULL BENCH.

KUMARASWAMI SASTRI, J.—In this case the question raised is whether a memorandum of objections can be filed in an appeal from the Original Side. The petitioner before us filed a memorandum of objections but it was returned by the office on the ground that no memorandum of objections could be filed, relying on a decision of the CHIEF JUSTICE and SRINIVASA

* S.R. Nos. 5438 and 7519 of 1925 in O.S. Appeal Nos. 88 of 1924 and 22 of 1925, respectively.

VENKATASAM CHETTY v. GULABCHAND. AYYANGAR, J., in *Bhimasena Rao v. Venugopal Mudali*(1). We find it difficult to see why a memorandum of objections should not be filed in a Original Side appeal. Their Lordships of the Privy Council have in *Sabitri Thakurain v. Savi*(2) (to which the attention of the learned Judge does not seem to have been drawn, and which overruled the view in *Sesha Ayyar v. Nagarathna Lala*(3)) held that the fact that Letters Patent appeals from judgments on the Original Side are not from one Court to another but from one Judge of the High Court to two or more Judges does not prevent the sections of the Code as to security for costs from being applicable and the main ground given by SRINIVASA AYYANGAR, J., does not therefore hold. Turning to the rules of our Court and the Code, rule 1 of Order XLI-A of the Civil Procedure Code which refers to appeals to the High Court from the original decrees of subordinate courts, says that "the rules contained in Order XLI shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this Order." So, except for the modifications there, the whole of the Code applies, and under this Order, there is provision made for memorandum of objections being filed. Then rule 1 of Order XLI-B says that "the rules of Order XLI-A shall apply so far as may be to appeals to the High Court of Madras under clause (15) of the Letters Patent of the said Court; provided that it shall not be necessary to file copies of the judgment and decree appealed from." Then rule 2 of that order says that "notice of the appeal shall be given in the manner prescribed by Order XLI-A, rule 6." So that Order XLI-B distinctly applies to appeals under clause (15) of the Letters Patent. So far as the Civil Procedure Code is concerned, section 117 says that "Save as provided in this part or in part X or in rules, the provisions of this Code shall apply to such High Courts . . ." Section 120 of the Code refers to the provisions which will not apply to the High Court in the exercise of its Original Jurisdiction. Then section 121 refers to the rules in the body of the Code and says that those rules shall be in force until they are annulled or modified in accordance with the rule-making powers given in the Code. Section 129 gives the High Court power to make rules not inconsistent with the Letters Patent to regulate its own procedure. Order XLIX, rule 3, gives the rules which will not apply to the Original Side of the High Court and, so far as

(1) (1925) I.L.R., 48 Mad., 631. (2) (1921) I.L.R., 48 Cal., 481 (P.C.).
(3) (1904) I.L.R., 27 Mad., 121.

Order XLI is concerned, the only rule which is not applicable is rule 35 about the signing of the decrees. VENKATASAM CHETTY v. GULABCHAND.

Turning to the Original Side rules, we find that specific provision is made for filing memorandum of objections. Rule 351 expressly refers to the respondents' case being printed and refers to the memorandum of objections specifically. So that the rules contemplate the filing of a memorandum of objections. Article 37 of the Fee Rules provides a fee for the filing of a memorandum of objections—Rs. 75.

The only objection that can be taken is that an appeal from the Original Side to the Appellate Side is not an appeal from one Court to another but an appeal from one Judge of the High Court to one or more Judges of that Court, but this objection has been considered by the Privy Council and has been overruled, so far as it relates to security for costs, in *Sabitri Thakurain v. Savi*(1). Their Lordships of the Privy Council dealt with the various sections of the Code and said that the fact that the appeal was from one Judge of the Court to another under the Letters Patent is no ground for not applying the provisions of the Code.

This decision overrules the judgment of BHASHYAM AYYANGAR, J., in *Sesha Ayyar v. Nagarathna Lala*(2). Evidently SRINIVASA AYYANGAR, J., who delivered the judgment in *Bhimasena Rao v. Venugopal Mudali*(3), had in mind the decision of BHASHYAM AYYANGAR, J., in *Sesha Ayyar v. Nagarathna Lala*(2). When he speaks of an appeal under the Letters Patent as not being an appeal from one Subordinate Court to another his attention evidently does not seem to have been drawn to the decision of their Lordships of the Privy Council in *Sabitri Thakurain v. Savi*(1), and to the various rules referred to above both in the Civil Procedure Code and in the Original and Appellate Side Rules of the High Court. It seems to me that the argument that an appeal under the Letters Patent from the Original Side is not governed by the Code could not be entertained after the decision in *Sabitri Thakurain v. Savi*(1). With all respect I do not agree with the decision in *Bhimasena Rao v. Venugopal Mudali*(3). But in view of the fact that a Bench of this Court has held otherwise, and that the question is one of procedure which is likely to arise very frequently, I think the case should be referred to a Full Bench so that there

(1) (1921) I.L.R., 48 Cal., 481 (P.C.). (2) (1904) I.L.R., 27 Mad., 121.
(3) (1925) I.L.R., 48 Mad., 631.

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may be an adjudication once and for all on the matter. I would therefore refer for the decision of a Full Bench the following question :—" Whether it is competent for the respondent in an appeal from the Original Side to file a memorandum of objections against the decree appealed from ? "

KRISHNAN, J.—I agree with my learned brother that the question whether a memorandum of objections could be filed in an appeal from the Original Side should be decided by a Full Bench. The practice has always been to allow such memoranda of objections. Till recently there was nothing contrary to it; but our attention has been drawn to the decision of the CHIEF JUSTICE and SRINIVASA AYYANGAR, J., in *Bhimasena Rao v. Venugopal Mudali*(1), where it was held that such a memorandum of objections was not competent in the case of Original Side appeals. It seems to me that this matter requires further consideration. Order XLI-A of the Civil Procedure Code deals with appeals to the High Court from original decrees of subordinate courts. Rule 12 of that Order refers to memorandum of objections. Order XLI-B says that " the rules of Order XLI-A shall apply, so far as may be, to appeals to the High Court of Madras under clause (15) of the Letters Patent of the said Court, provided that it shall not be necessary to file copies of the judgment and decree appealed from." This Order seems to contemplate that a memorandum of objections can be filed in Original Side appeals in the same manner as in mufassal appeals, for there is nothing in Order XLI-B to prevent it being considered to be wide enough to include memorandum of objections. This view is supported by the practice that has been hitherto followed. The sections of the Code giving power to the High Court to make rules for regulating its own procedure have been referred to by my learned brother and I do not want to cover the same ground again. It is clear that the rules of practice referred to by my learned brother contemplate the filing of memorandum of objections, and one of them fixes the Court fee payable. They are rules made with authority and it would therefore seem that a memorandum of objections is competent in the case of Original Side appeals as well.

The question regarding the taking of security for costs in an Original Side appeal was considered by the Privy Council and the attention of their Lordships was drawn to the case reported in *Sesha Ayyar v. Nagarathna Lala*(2), in which BHASHYAM

(1) (1925) I.L.R., 48 Mad., 631.

(2) (1904) I.L.R., 27 Mad., 121.

AYYANGAR, J., had held that the Civil Procedure Code did not apply to appeals from the Original Side and that security could not be taken in an Original Side appeal. Their Lordships dissented from that view and held that the Code applied in such a case. There are observations in that case which make it clear that the Code will apply not only to security proceedings which was the matter which was being dealt with by their Lordships but also to other matters arising in appeals under the Letters Patent. After that decision it is difficult to say that there is anything wrong in allowing a memorandum of objections to be filed in an Original Side appeal. I, therefore, with all respect, think that the decision of the CHIEF JUSTICE and SRINIVASA AYYANGAR, J., requires reconsideration and I agree to the question proposed by my learned brother being submitted to the Full Bench.

ON THIS REFERENCE

V. Radhakrishna Ayya for respondent.—Order XLI, rule 22, Civil Procedure Code, allows memorandum of objections in mufassal appeals. On the view that this rule does not apply to Original Side appeals, *Bhimasena Rao v. Venugopal Mudali*(1) forbids a memorandum of objections in Original Side appeals. Rule 351 of Original Side Rules allows impliedly a memorandum of objections in Original Side appeals. Section 117, Civil Procedure Code, allows the application of Order XLI to Original Side appeals. Moreover Order XLI-A and Order XLI-B of the Appellate Side Rules framed under section 122 make Order XLI applicable to Original Side appeals. Article 37 of Appendix II of Original Side Rules provides for fees in memorandum of objections in Original Side appeals. Order XLIX, Civil Procedure Code, rule 3, permits Order XLI being made applicable to Original Side appeals except rule 35. See also *Sabitri Thakurain v. Savi*(2), applying Order XLI, rule 10, to Original Side appeals, in cases of security for costs overruling *Sesha Ayyar v. Nagarathna Lala*(3). See also *A. M. K. Goulding, In re*(4).

K. S. Narayana Ayyangar in the insolvency appeal submitted that his arguments were the same and referred to *Virupaksha Rao v. Ranganayaki Ammal*(5).

The appellants were not represented.

(1) (1925) I.L.R., 48 Mad., 631. (2) (1921) I.L.R., 48 Calc., 481 (P.C.).
(3) (1904) I.L.R., 27 Mad., 121. (4) (1924) I.L.R., 51 Calc., 695.

(5) (1925) 21 L.W., 662.

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OPINION.

The judgment of the Privy Council in *Sabitri Thakurain v. Savi*(1) makes it clear that the provisions of Order XLI will apply to Original Side appeals under the Letters Patent. Rule 22 of that Order expressly provides for cross-objections being raised by respondents. If there were any doubt about it, it would be resolved by the provisions of our own Orders XLI-A and XLI-B. See also Order XLIX, rule 3. Had the Privy Council case been cited before the Court in the case of *Bhimasena Rao v. Venugopal Mudali*(2) it would no doubt have come to a different conclusion. We decide accordingly that the memorandum of objections in this case is competent.

Costs will be costs in the cause.

Grant and Greatorax, Attorneys for the respondents in Original Side Appeal No. 22 of 1925.

N.R.

APPELLATE CIVIL—SPECIAL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.

1925,
October 29.

THE COMMISSIONER OF INCOME-TAX, MADRAS
(REFERRING OFFICER),

v.

KING AND PARTRIDGE (RESPONDENTS).*

Income-tax Act (XI of 1922), sec. 11.—Profession tax paid to Municipality under sec. 111 of the Madras City Municipal Act (IV of 1919), not a proper deduction under sec. 11 of Income-tax Act.

Profession tax paid by a person under section 111 of the Madras City Municipal Act (IV of 1919) is not a proper

(1) (1921) I.L.R., 48 Cal., 481 (P.C.). (2) (1925) I.L.R., 48 Mad., 631.
* Referred Case No. 3 of 1925.

deduction from his taxable income "as an expenditure incurred solely for the purposes of the profession" within section 11 of the Income-tax Act (XI of 1922).

CASE stated under section 66 (2) of the Indian Income-tax Act XI of 1922 by the Commissioner of Income-tax, Madras, referring for the decision of the High Court the following question, viz.—

"whether the profession tax levied under section 111 of the Madras City Municipal Act must be allowed as a deduction from the taxable income as an expenditure incurred solely for the purpose of the profession within the meaning of section 11 of the Indian Income-tax Act XI of 1922."

The facts appear from the judgment.

R. N. Aingar for the Assessee.—On the wording of section 111 it is clear that the professional tax is to be paid "by way of licence fee" for carrying on a profession. Rule 9 of Part II of Schedule IV to the Act shows that the tax is not based on income. So it is incurred for the purpose of profession within the meaning of section 11 (2) of the Income-tax Act. Even if it is based on income, an expenditure incurred for the purpose of the profession, whether statutory or voluntary is a proper deduction; See *Smith v. Lion Brewery Company, Limited*(1), *Usher's Wiltshire Brewery, Limited v. Bruce*(2), *Scottish Union and National Insurance Company v. New Zealand and Australian Land Company*(3), *Vulcan Motor and Engineering Co. v. Hampson*(4), *Patent Castings Syndicate, Limited v. Etherington*(5) and *Commissioner of Income-tax v. Nedungadi Bank*(6), which allowed a deduction of Companies' tax. Profession tax differs in many respects from income-tax. Income-tax is based on last year's income; whereas profession tax is based on future income.

M. Patanjali Sastri for Commissioner of Income-tax.—Professional tax is like income-tax based only on income and just like income-tax it is not a proper deduction. It is not a licence fee. Profession tax is payable under section 111 also by Government servants and pensioners and by all upon aggregate income. See section 111 (1) and (2). "By way of licence fee" in section 111 means "on the analogy of a licence fee" and distress is the mode of enforcing profession tax as in the case of income-tax. It is only in certain professions such as keeping

(1) [1911] A.C., 150.

(3) [1921] 1 A.C., 172.

(5) [1919] 2 Ch., 254 at 267.

(2) [1915] A.C., 433 at 443.

(4) [1921] 3 K.B., 597 at 606.

(6) (1924) I.L.R., 47 Mad., 687.

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slaughter-houses, under section 297, that a licence must be taken beforehand. In other cases such as in the case of vakils, etc., no licence is taken or issued; yet all have to pay profession tax. All compulsory payments are not proper deductions unless they are incurred solely for the purpose of the profession within section 11 (2) of the Income-tax Act. It is not sufficient if they are merely incurred in the course of or in connexion with the trade. The meaning of the words "for the purpose of trade" is given by Lord DAVEY in *Strong & Co., Limited v. Woodfield*(1); they mean "for the purpose of enabling a person to carry on and earn profits in the trade." See also *Smith v. Lion Brewery Company, Limited*(2) and *Usher's Wiltshire Brewery, Limited v. Bruce*(3). Income-tax paid is not a proper deduction; see *Aston Gas Company v. Attorney-General*(4). Even income-tax is paid only on future income, though the estimate is made on last year's income. See *Brown v. National Provident Institution*(5).

R. N. Aingar replied.

OPINION.

This is a reference under section 66 (2) of the Indian Income-tax Act XI of 1922 and the question submitted for our opinion is whether profession tax paid under section 111 of the Madras City Municipal Act should be allowed as a proper deduction from the taxable income "as an expenditure incurred solely for the purposes of the profession" of the assessee within the meaning of section 11 of the Income-tax Act.

The assessee is a firm of attorneys practising in Madras and they claim that they are entitled to the deduction above-mentioned. The Commissioner of Income-tax was of opinion that the deduction claimed was not an allowable item.

The answer to the question put to us depends in our opinion upon the nature of the profession tax levied by the Municipality. If the profession tax is a contribution from the income of the assessee to the Municipality, it will stand on the same footing as income-tax itself which

(1) [1906] A.C., 448.

(3) [1915] A.C., 433 at 443.

(2) [1911] A.C., 150

(4) [1906] A.C., 19,

(5) [1921] 2 A.C., 222.

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is such a payment to the Government. It is clear in assessing the income of a person the income-tax he pays could not be deducted, for what is paid is a part of the income itself and not as expenditure for earning that income or profit. It was so ruled in *Ashton Gas Company v. Attorney General*(1) and the proposition is conceded before us. What then is the profession-tax? Is it a payment made out of the income of the taxpayer or is it an expenditure which he has to incur to enable him to earn his income? We are of opinion that it is the former and not the latter.

Under the City Municipal Act (Act IV of 1919), section 111, every person not liable for the companies' tax who within the city and for a period of 60 days in the half year exercises "a profession, art, trade or calling or holds any appointment public or private" bringing him within the taxation rules of schedule IV is liable to pay the profession tax. Now schedule IV makes it clear that the amount of tax payable is dependent on the income of the person taxed, the minimum being an income of Rs. 100 a month, except in the cases of hotel-keepers, etc., dealt with under class IX. Professional men are taxed not because they carry on their profession but because they do so and earn an income. The amount of tax varies with the income and if a person is overtaxed he has a right of appeal.

Now the nature of the tax cannot vary with the individual taxed. In the case of persons holding appointments under the Government it seems to us impossible to predicate that they pay profession tax to enable them to earn their salary. Section 111, Explanation 2, makes even pensioners liable for profession tax as if they were holders of appointments carrying a salary equal to the pension. In their cases it is still more difficult to treat the profession tax as a payment by them to earn their

(1) [1906] A.C., 10.

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income. It is clear in those cases the Municipality claiming a part of their income as a tax. A different rule it seems to us cannot be applied in the case of men who make their income by professional services. It is argued that because section 111 uses the words "by way of licence fee," we must hold that the payment of the profession tax is for the purpose of obtaining a licence to carry on one's profession in the city. We are unable to accept this argument. The Act deals with several matters in which the obtaining of a licence is a pre-requisite to the carrying on of a business or profession within the municipal limits. We find examples of it in Chapter XII of the Act. There is no provision in the Act which makes the carrying on of one's profession without paying the profession tax illegal; and no formal licence is issued on payment. The tax if unpaid can no doubt be collected by coercive processes of distraint, etc., but the carrying on of the profession is not interfered with. It is clear therefore that the Act does not treat the profession tax as a payment for a licence. The words "by way of a licence fee" seem to us to show that the payment is to be made in the manner of a licence fee but do not imply that in itself the tax is a licence fee. It is true that under Part II, schedule 4, rule 9, the tax is estimated on general considerations and not on the exact amount of ascertained income of the person taxed. This merely provides a method of estimating one's income to avoid the trouble of having accounts produced and examined in every case. The fact that when an over-estimate is made liberty is given to the person taxed to produce his accounts and prove his income and get his tax reduced indicates that the proper basis of the tax is the income earned. In this view payment of the profession tax cannot be held to be "an expenditure for the purpose of such profession," though it is incurred in connection with it. The words "for the purpose of"

were construed by Lord DAVEY in the case of *Strong & Co., Limited v. Woodfield*(1) where the expression was "for purposes of the trade." His Lordship observed—

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"These words appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

Following that view we consider that the payment of profession tax does not fall within section 11.

The cases of *Smith v. Lion Brewery Company*(1) and of *Usher's Wiltshire Brewery, Limited v. Bruce*(2) were cited by the learned Counsel for the assesseees. But instead of helping him they show what may properly be treated as money spent for purposes of trade. The expenses referred to in those cases were directly incurred for the purpose of increasing the income of the trade and were therefore allowed to be deducted. These cases do not apply here in the view we take of the nature of the profession tax. Along with these cases should be considered the case of money spent for an anti-prohibition campaign by a brewer which was disallowed as a deduction, as it was held that it was not money directly spent for increasing the brewer's income, though it may have indirectly had that effect. *Ward & Company v. Commissioner of Taxes*(3). The case of *Commissioner of Income-tax v. Nedungadi Bank*(4) referred to the companies tax and not to the profession tax. The observation in it regarding profession tax that it stands on the same footing as income-tax supports the contention of the Government, but we do not look upon it as any authority on the point before us as the

(1) [1906] A.C. 448, 453.

(2) [1911] A.C., 150.

(4) [1923] A.C., 145.

(3) [1915] A.C., 438.

(5) (1924) I.L.R., 47 Mad., 667.

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observation is only an *obiter dictum*. The case is not otherwise applicable. *Patent Castings Syndicate, Limited v. Etherington*(1) referred to excess profits duty which stands on a different footing altogether; as pointed out by the learned Judge there, it was declared by statute to be an admissible deduction. Furthermore, the case was one of net profits of the company on which dividend was payable to the manager and not an income-tax case.

For the above-mentioned reasons we have come to the conclusion that the amount of profession tax paid is not a proper deduction for assessment of income-tax and we answer the question submitted in the negative. The assesses will pay the Commissioner's costs and Vakil's fee Rs. 200.

T. D. Narasayya, Attorney for assesses.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice,
and Mr. Justice Reilly.

1925,
September
16.

K. SATYANARAYANA (SECOND DEFENDANT), APPELLANT,

v.

Y. CHINNA VENKATARAO AND FIVE OTHERS (PLAINTIFFS
AND DEFENDANTS 3, 8, 7 AND 9), RESPONDENTS.*

Sec. 77¹ of Indian Registration Act (XVI of 1908)—Plaintiff (purchaser) tendering sale-deed for registration—Denial of execution—Refusal to register—Plaintiff's only remedy, suit under sec. 77 of the Registration Act and not suit for specific performance.

If, on denial of execution by the vendor, a Registrar refuses to register a sale-deed presented by the purchaser for registration, the sole remedy of the purchaser is to file a suit as provided by section 77 of the Registration Act for registration

of the deed within 30 days of the refusal and not a suit for specific performance of the contract, such as the execution of a new sale-deed, and delivery of lands sold, etc., *Venkatasami v. Kristayya*, (1893) I.L.R., 16 Mad., 341, followed. *Amer Chand v. Nathu*, (1910) 7 A.L.J., 887; *Surendra Nath Nag Chowdhury v. Gopal Chunder Ghosh*, (1910) 12 C.L.J., 464 and *Nasiruddin Mida v. Sidhoo Mia*, (1918) 44 I.C., 361 not followed.

APPEAL against the decree of C. RANGANAYAKALU NAYUDU, Additional Subordinate Judge of Cocanada, in O.S. No. 10 of 1920.

The contesting defendants in this suit, viz., defendants 1 to 3 formed members of a joint Hindu family, the second and third defendants being respectively the son and widow of two deceased brothers of the first defendant. The fourth and fifth defendants were relatives of this family claiming some interest in some of the suit lands. The plaintiff alleged that, defendants 1, 3, 4 and 5 and the mother and guardian of the second defendant executed in his (plaintiff's) favour on 20th January 1917 an agreement promising to execute in his favour within a month, a sale-deed of certain family lands for Rs. 6,000 for the purpose of discharging debts binding on defendants 1 to 3 and that they accordingly executed a sale-deed on 31st January 1917 and handed over the same to the plaintiff. The plaintiff further alleged that when he presented it for registration the third defendant denied execution and the Sub-Registrar registered it only as regards others and refused registration as regards the third defendant and that his appeal to the Registrar for enquiry and registration as regards the third defendant was unsuccessful. Without filing a suit under section 77 of the Registration Act within 30 days of the Registrar's refusal, the plaintiff later on filed this suit for specific performance of the contract, viz., for the execution of a sale-deed by all the defendants as agreed and for possession of the lands sold, alleging that he had fully discharged the whole of the consideration of Rs. 6,000 as agreed. The first defendant was *ex-parte*. The second defendant pleaded that the 1st defendant was not a joint owner at all of the suit properties having been adopted in another family, that he himself was solely entitled to them, that at the time of the agreement and execution of the sale-deed he was a major, that the debts were not binding on him, that his mother's execution of the agreement and sale-deed were not true and binding on him and that the third defendant was entitled only to maintenance. The third defendant pleaded that she did not execute the sale-deed.

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(1) [1919] 2 Ch., 254.

* Appeal No. 68 of 1922.

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The following were the first four issues framed in the suit by the Subordinate Judge:—

- (1) Whether the suit agreement is genuine?
- (2) Whether the second defendant was a major on the date of the agreement and the agreement is not valid for that reason?
- (3) If the second defendant was a minor, whether the agreement was for his benefit and is binding on him?
- (4) Whether by reason of execution of a sale-deed, which the third defendant has refused to register, the plaintiff lost his rights to ask for specific performance by a suit, and his only remedy lay by suing for registration under section 77 of the Indian Registration Act.

On the first issue the Subordinate Judge held that the suit agreement was genuine. On the second issue he held that on the date of the suit agreement the second defendant was a minor. On the third issue he held that the agreement was for the 2nd defendant's benefit and was binding on him. On the fourth issue he held that as the defendants failed to execute and give a duly registered document binding on all the parties to the agreement, the plaintiff was entitled to sue for specific performance and that a suit under section 77 of the Registration Act was not his only remedy. He relied on *Arumalu v. Meenakshi*(1) and *Nasiruddin Midda v. Sidhoo Mia*(2). He accordingly allowed the suit. Thereupon the second defendant filed this appeal in which he urged all his contentions as before including the one based on section 77 of the Indian Registration Act.

A. Krishnaswami Ayyar with *P. C. Venkataramayya* for appellant.—The sale-deed was in this case with the plaintiff and was presented by him for registration. On the Registrar's refusal to register, his only right was to file a suit under section 77 of the Registration Act. The agreement to sell having merged in the sale-deed, plaintiff cannot sue for specific performance of the contract and again ask for a new sale-deed, as if the agreement is still unexecuted and in force; an agreement to sell cannot be read into an executed conveyance. Not having filed a suit within 30 days as required by section 77, the plaintiff has lost his remedy and this suit is incompetent. This is the view consistently taken by our High Court; See *Venkatasami v. Kristayya*(3), *Thayarammal v. Lakshmiammal*(4)

(1) (1912) 12 M.L.T., 301.
(3) (1893) I.L.R., 16 Mad., 341.

(2) (1918) 44 I.C., 361.
(4) (1920) I.L.R., 43 Mad., 822.

Subbaraya Pillay v. Devasahayam Pillai(1). He referred to *Chinna Krishna Reddi v. Dorasami Reddi*(2), *Subba Reddiar v. Visvanatha Reddiar*(3). The Allahabad and Calcutta High Courts take a different view and this High Court refused to follow them in the two latest of the above cases.

G. Lakshmanan (with *A. Satyanarayana* and *C. Rama Rao*), for respondents.—The plaintiff (i. e., the purchaser), has done everything he was bound to do and hence, the sellers are ordinarily and also by the terms of the contract in this case, bound to give the buyer a proper registered conveyance by all the parties to the contract and to put him in possession; that they have not done. Hence a suit for specific performance for all such reliefs lies. The remedy under section 77 of the Registration Act is nowhere specified as the only remedy. It is only an optional and summary remedy and the section gives only one of the several reliefs to which the plaintiff is entitled, viz. that relief of getting the document registered. That is the view taken in *Tripura Soonduree v. Russick Chunder Kanoongoe*(4), *Amer Chand v. Nathu*(5), *Surendra Nath Nag Chowdhury v. Gopal Chunder Ghosh*(6), *Nasiruddin Midda v. Sidhoo Mia*(7). A joint sale-deed by all the executants was intended and sale-deed by some alone will not do; *Arumalu v. Meenakshi*(8). In some of the Madras cases quoted by the appellant the plaintiff was at fault and his suit was therefore dismissed. In others where the Courts held that it was through the fault of the defendant that the documents were not registered, the Courts directed specific performance.

A. Krishnaswami Ayyar replied.

JUDGMENT.

COUTTS TROTTER, C.J.—This is an appeal from a decree of the Subordinate Judge of Cocanada wherein he gave certain remedies by way of specific relief to the plaintiffs. The plaintiffs' case was that sums of money were due to them as debts from various people. It is not material for the purposes of our decision to know

(1) (1922) M.W.N., 70.
(3) (1914) 22 I.C., 941.
(5) (1910) 7 A.L.J., 887.
(7) (1918) 44 I.C., 361.

(2) (1897) I.L.R., 20 Mad., 19.
(4) (1871) 15 W.R., 189.
(6) (1910) 12 C.L.J., 464.
(8) (1912) 12 M.L.T., 301.

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how those debts were alleged to have come into existence, what was their nature or what were the relations to the plaintiffs of the various parties to the transactions in question. The transaction was that an agreement was entered into for the sale of certain property in extinguishment of the plaintiffs' claims. The agreement that was entered into by the contracting parties was this: "We shall execute the sale-deed for this as per your draft and give it to you registered within three months from this date"; so that undoubtedly under that document it was part of the obligation of the defendants to get the deed that was in contemplation by this agreement drawn up, executed, and registered. A deed was drawn up and in due course it came to the stage of registration. One of the persons who executed the agreement, the third defendant in this case, when the time came for registration, objected to the registration of the document and the registration authorities after an enquiry into the matter refused to order registration of the document as against the recalcitrant third defendant, plaintiffs' case of course being throughout that she was a person against whom the deed ought to have been registered (and that is their case here to-day) and that the registration authorities were in error in giving effect to her refusal. In these circumstances they brought this suit for specific performance of the agreement against all the parties to it. We are not really called upon to decide in this case whether this is a matter in which the contemplation of the parties was that all should sign or that the signatures of what I may call the operative persons should be regarded as sufficient, it apparently being the fact that the signatures of others including the recalcitrant third defendant were added *ex majori cautela* in case they should raise objections and claims thereafter. Speaking for myself, I think that even in such a

case it must most probably be held that it was the intention that they should execute for the very purposes that I have mentioned. However, in the view that we take, it is unnecessary to decide the matter. And if the other view were to prevail that the signature of this person was otiose and unnecessary, then of course the plaintiffs' case would fail equally because the whole agreement would be completed sufficiently to satisfy the contract and there would be nothing for the suit to operate upon. But taking it that the signature of the third defendant was necessary, what is the position in law?

By section 77 (1) of the Registration Act it is enacted as follows:—

"Where the Registrar refuses to order the document to be registered, any person claiming under such document may within 30 days after the making of the order of refusal, institute in the Civil Court within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office."

That is a statutory remedy given to a person who stands in the position that he is entitled to have a document registered by somebody else, that that somebody else has refused and the Registrar has upheld the refusal and he wants to have that compulsorily registered as against the other person. It should be observed, and I think this is a most important thing to notice about the section, that it provides a limitation of a short period of 30 days, the object no doubt being to ensure that matters of this kind should be gone into when the evidence is fresh in everybody's mind and in all human probability all of it available, whereas if left to an ordinary suit some people might be dead who could throw light on the matter and others might have let it fade from their recollection. I should have thought that looking at the

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statute alone it is clear that the object of the legislature was to provide a remedy of a very short period of limitation for putting right a wrongful refusal to register, and that must be held to be the remedy and the only remedy given by law. But unfortunately the matter is covered with conflicting authority. The authorities in Madras appear to differ from the authorities in other parts of India. In a matter which is open to divergence of view, my opinion is that this Court should follow its own *cursus curiæ* unless it is of opinion that the former decisions of the Court are clearly wrong. I do not think, if it agrees with those decisions, that it ought to harass the parties with any argument before a Full Bench merely because of different views in other Courts.

An authority which is directly in favour of the respondents is *Amer Chand v. Nathu*(1) a decision to which that very distinguished Judge STANLEY, C.J., was a party. A sale-deed was executed, a lady refused to register it, but no suit was brought for compulsory registration; nevertheless it was held that the plaintiff was entitled to a remedy by way of specific performance; and the learned Judge says this:—

“His (plaintiff's) grounds of appeal are that the substantial relief sought by him was the specific performance of the contract for sale and for possession of the property. We see no answer to this appeal. No defence to the action was disclosed by the defendants and in view of all the facts the Court of first instance as well as the lower appellate Court ought, in our opinion, to have granted a decree for specific performance. The Court of first instance was wrong in passing an order (that is no doubt true) for registration of the sale-deed which was executed by the guardian of the defendants in view of the provisions of the Registration Act. But it appears to us that the Court has jurisdiction to direct performance of the contract and to require that the defendants should do all necessary acts for the purpose of fulfilling the obligation into which through their guardian

(1) (1910) 7 A.L.J., 887.

they had entered, and that the plaintiff is entitled to have a fresh sale-deed executed by all necessary parties and to have the document so executed registered.”

And then they quote *Ohinna Krishna Reddi v. Dorasami Reddi*(1), a case which I shall show presently is really no authority for the proposition laid down by the Allahabad High Court at all. The next direct authority in Mr. Lakshman's favour is a case in *Surendra Nath Nag Chowdhury v. Gopal Chunder Ghosh*(2), a decision of MUKERJEE and CARNDUFF, JJ. There the decision was that

“although a document, which has been executed, is inoperative in law and wholly ineffectual to create title in the intended lessee, it is nevertheless evidence of a valid agreement to execute a lease and may consequently form the foundation of an action for specific performance.”

That really entails another doctrine as well as the one we are directly concerned with here, namely, that though a lease has for some reason or other become, or was from the first, legally inoperative, yet for the purpose of bringing a suit for specific performance it is open to the Court to treat it as a mere agreement of lease. I should have thought it a very vicious method of construction to say that a document, which purports to be one thing, is to be allowed to be treated when it is found imperfectly to contain what it purports to be as a valid document of a different order altogether. The reasoning of the learned Judges of the Calcutta High Court appears to be this. The undertaking of a person who enters into a contract for the sale of real property is to do everything whereby an operative agreement in law can be effected. He has not done everything if he failed in an instrument where the obligation is cast upon him to obtain its registration and, therefore, a step in the creation of the legal

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(1) (1897) I.L.R., 20 Mad., 19.

(2) (1910) 12 C.L.J., 464.

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relation of purchaser and vendor being wanting, you can compel the person who has not taken that step to take it. The answer appears to me to be very simple. Section 77 of the Registration Act not only tells you how you are to do that, but says that if you want to effect that purpose of having registration forcibly carried out by a decree of the Court, you must do it within 30 days. It seems to me that these decisions in Calcutta and Allahabad in effect take upon themselves by a side wind to get rid of the period of limitation strictly imposed by the express words of the statute. To my mind no judicial decision has any right to tamper with a thing directly enforced and enjoined by a statute whose construction is free from possible doubt. The most that can be said is that the remedy given by the statute is not intended to be the only one. It is almost impossible to believe that the legislature can have intended that there should be a direct and an indirect way of effecting the same thing and that the period of limitation applicable to them should be entirely different. That is the view that has been taken in more than one case in this Court. But before I deal with them I want to refer to one other case of the Calcutta High Court, *Nasiruddin Midda v. Sidhoo Mia*(1), because that is an instructive case. What appears to me to be the policy underlying the Calcutta trend of decisions is, I think, well illustrated by that case decided by MUKERJEE and BEACHCROFT, JJ., in 1917. In that case the plaintiff claimed two things in the alternative. He first put in a claim asking in terms to have the registration of a document enforced and an alternative claim along with it for specific performance. The document was in the same stage as the document here. It had been executed

(1) (1918) 44 I.C., 361.

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but one of the parties had refused to acknowledge the right to have it registered. The learned Judges say this :

“As regards the claim to enforce registration of the document executed in his favour by his vendors he was, no doubt, bound to follow strictly the procedure prescribed by the Indian Registration Act before he could institute a suit under section 77 to compel registration. But as regards the alternative claim to enforce specific performance of the agreement to sell there was really no answer to the suit. Although the vendors had executed the document, they could not be deemed to have completely performed their part of the agreement. The agreement in essence was not merely to execute a conveyance which until registered would be inoperative in law but to transfer the full title from themselves to the plaintiff as purchaser. Such title could be transferred only by means of a registered instrument; consequently the execution of the conveyance not followed by registration could not be regarded as fulfilment of the contract.”

So that what is taken away by the right hand is immediately replaced by the left and where the statute has forbidden a special means, another means is promptly devised in order to get round the words of the Act.

In Madras the decisions have been different and having considered them all, I am of opinion that they are quite consistent. The leading case and the most direct authority is *Venkatasami v. Kristayya*(1). There the plaintiff sued for specific performance and a decree had been passed in the lower Court directing the defendant to execute and register a deed of transfer. That judgment was upset by MUTTUSWAMI AYYAR and HANDLEY, JJ., and the reasoning that is directly in point is to be found on the second page of the judgment. It is an interesting case because the judgment contemplates the case not merely of failure by the defendant to procure registration but the case where the plaintiff

(1) (1893) I.L.R., 16 Mad., 341.

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does not pursue the remedy given him under section 72 or 76. The learned Judges say this :

"If defendant had appeared and admitted execution, the document would have been registered. If he had appeared and denied execution, registration would have been refused and plaintiff would have been entitled to an enquiry before the Registrar under sections 73 to 76. If defendant did not appear, plaintiff might have proved execution of the document, and on such proof would have been entitled to registration. If the registering officer was not satisfied with the evidence of execution and refused to register, an appeal would have lain to the Registrar under section 72. If the decision under section 72 or 76 had been adverse to plaintiff, he would have a remedy by suit under section 77 of the Act. Plaintiff had therefore a complete remedy under the Act, and not having chosen to follow it, has only himself to blame that the efficacy of the document has not been completed by registration."

Then they go on to dispose of the other doctrine that you can treat an incomplete conveyance as a complete agreement for a conveyance and negative that. The learned vakil who appeared for the respondents in this case said,

"There is a distinction. The plaintiff was disentitled there, because it was through his own negligence that he failed to get the document registered."

I may point out in passing that in terms part of that negligence was considered by the learned Judges to be his failure to adopt the remedy given him under the Registration Act including the remedy by suit under section 77. But says Mr. Lakshmanna,

"If you look at some of the later cases you will find that a distinction is drawn and you find that in cases where it has been proved that the defendant was the person to blame, the remedy by the Specific Relief Act has been allowed."

When examined, those cases appear to me not in the least to support his contention. In *Chinna Krishna Reddi v. Dorasami Reddi*(1), there had been a document of conveyance executed, but before registration the

(1) (1897) I.L.R., 20 Mad., 19.

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defendant in the suit got hold of the document fraudulently, stole it from the plaintiff and concealed it for the purpose of preventing registration from taking place, because obviously the Registrar cannot register a document which for his purpose is non-existent, and therefore the learned Judges say that the plaintiff was clearly entitled to have a fresh document executed and registered just as he would be so entitled if after execution the document had been accidentally lost or destroyed. That no doubt is quite true. And it follows a much older decision of this High Court in *Nynakka Routhen v. Vavana Mahomed Naina Routhen*(1). In that case, soon after execution, the document in question was destroyed by fire before it had been registered. It was held that the plaintiff was entitled to ask the Court to compel the defendant to execute a fresh document. The principle of the decisions in the last two cases is perfectly intelligible but it does not appear to me to touch the present case. Mr. Lakshmanna says,

"All those were cases where it had been shown that the defendant was at fault. No doubt on his own showing the Court ought to give specific performance as a remedy for the plaintiff."

It is not in my opinion the true line of reasoning at all. The plaintiff there was entitled to have a decree which no doubt included a direction that he should be given an executed and registered instrument, because as things stood at the time of the suit he had nothing whatever to register. In the one case the document had been destroyed and in the other case it had been abstracted and he could not go to the Registrar and say, "Compel my conveyor to register a document in my favour," because the document to be registered was non-existing. The cases appear to have no bearing on

(1) (1869) 5 M.H.O.R., 123.

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this case. And it must be remembered that although in this country the remedy of specific performance is a statutory remedy, it nevertheless is simply a crystallization into statutory form of an equitable remedy to which laches was, as it is to all equitable claims, an answer. How it can be said that a man who is given an express statutory remedy by an Act of Legislature under section 77 of the Registration Act and has failed to take advantage of it, has not been guilty of laches and is entirely free from blame, passes my comprehension. It appears to me that a man who has failed to adopt the remedy expressly provided by the statute cannot come to this Court and ask for an exercise in his favour of a discretionary and equitable remedy. I ought to add that the decision in *Venkatasami v. Kristayya*(1) has been followed in several later decisions of this Court of which I need only instance two, *Thayarammal v. Lakshmiammal*(2) and *Subbaraya Pillai v. Devasahayam Pillai*(3). This is sufficient to dispose of this appeal because it is not pretended that unless the respondent can get over this stile there is anything arguable in the appeal. That being so, the appeal must be allowed with costs of second defendant throughout and the suit dismissed.

Memorandum of objections is dismissed. No costs.

REILLY, J.

REILLY, J.—I entirely agree.

N.R.

(1) (1893) I.L.R., 18 Mad., 341.

(2) (1920) I.L.R., 43 Mad., 822.

(3) (1922) M.W.N., 70.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice
and Mr. Justice Viswanatha Sastri.*

P. SANJIVI REDDY AND ANOTHER (PLAINTIFFS), APPELLANTS *

1925,
October 6.

v.

K. KONERI REDDI (DEFENDANT) RESPONDENT.

*Defamation, suit for—Absolute privilege—Statement in complaint under sec. 107, Criminal Procedure Code (V of 1898)
—Repetition of same statement in subsequent Police enquiry under sec. 161, Criminal Procedure Code.*

Statements made in a complaint to a Magistrate under section 107, Criminal Procedure Code, praying that security should be taken from a person for keeping the peace and a repetition of the same statements before a police officer to whom the Magistrate referred the complaint for enquiry and report, are absolutely privileged and no action for defamation in respect of such statement is maintainable. *Dr. Groenvelt v. Dr. Burwell*, (1700) 1 Ld. Raym., 454; 91 E.R.; 1202 and *Watson v. M'Ewan* [1905] A.C. 480, followed.

APPEAL against the decree of R. A. JENKINS, the District Judge of Bellary, in Original Suit No. 53 of 1923.

The facts and arguments are given in the judgment.

The plaintiff whose suit for damages for malicious prosecution and defamation was dismissed preferred this appeal.

Sir K. V. Reddi and P. V. Rangaram for appellants.

S. Ranganatha Ayyar for respondent.

COUTTS TROTTER, C.J.—The plaintiffs in this case brought a suit claiming damages for malicious prosecution and for defamation. The defendant presented a petition to the Deputy Magistrate of Adōni praying that the plaintiffs and some others should be bound over under section 107 of the Criminal Procedure Code. The Magistrate on receipt of the petition sent it to the police

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for enquiry and report. The police reported, after enquiry and after hearing what the petitioner had to say that there was no foundation for the allegations in the petition. Thereupon the Magistrate dismissed it and refused to take any action under section 107, Criminal Procedure Code. This civil suit is the outcome of those proceedings.

No difficulty arises with regard to the claim for malicious prosecution. The short and sufficient answer to such a claim is that the plaintiffs were not in fact prosecuted. But the claim for defamation raises a question of some little importance.

A code like the Criminal Procedure Code which purports to provide for every conceivable situation labours under at least one disadvantage and that is that it is difficult, if not impossible, to argue by analogy and to extend the principle to be found in one class of cases with which it deals to another. I make no question but that it is against the general principles of the Code that action should lie for statements made in circumstances such as the present. But unfortunately while the Code contains definite provisions as to certain statements the effect of which is to make them absolutely privileged it can hardly be said to have provided for statements such as these. Indeed the contention for the plaintiffs is that the present occasion cannot be brought within the words of the Code at all. The difficulty in the present case is created by the wording of section 202, Criminal Procedure Code, the section which authorizes a Magistrate to refer a matter for investigation to a police officer taken in conjunction with the definition of 'complaint' contained in section 4 (1-h). In the latter section 'Complaint' is defined as

"the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence"

and section 202 which gives the Magistrate the power to refer a matter for investigation by a police officer is in terms restricted by defining the occasion on which he may so act by the words

"on receipt of a complaint of an offence of which he is authorized to take cognizance."

It is argued that as a petition under section 107 does not allege the commission of an offence but merely the apprehension that an offence may be committed, the Magistrate has no jurisdiction to order a police investigation. From this it would follow that the investigation is one not authorized by the Code and it is said to follow that the statement made on such an occasion cannot be supposed to be absolutely privileged. It is further pointed out that, on the principle of *expressum facit cessare tacitum*, where the Code indicates that absolute privilege should attach to statements, it has done so by implication under section 161. That section makes a person interrogated by a police officer making an investigation bound to answer all questions relating to the case put to him by the police officer. Unfortunately the investigation dealt with by section 161 is limited to an investigation made under Chapter XIV of the Code which relates to information as to the commission of a cognizable offence. I have already stated that this was not a case of an offence at all but merely a threatened or contemplated offence. The argument is thus two-fold, first that the Magistrate has no jurisdiction to refer the case for investigation at all, and secondly, that even if he had, as the information did not relate to the commission of an offence, the witness was under no necessity to answer questions put to him and therefore absolute privilege cannot attach to such answers. It was not disputed at the bar that, if the witness were compellable to answer questions, absolute privilege would

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attach to his answers, nor was it disputed that qualified privilege might be held to attach to the statements made in this case. That however would not help the respondent here, as there were allegations of malice which were not gone into by the learned Judge which would have invalidated any claim to qualified privilege. With regard to the statements alleged to have been made to the police officer, I do not feel any great difficulty. It is, I think, possible to argue that the words of section 154 at the opening of Chapter XIV, "Every information relating to the commission of a cognizable offence" may be held to cover "information relating to the threatened commission of a cognizable offence" which, of course, would cover the present case where the suggestion was that the petitioner's life was in danger. But I prefer to put it on another and a wider ground. In *Watson v. M'Ewan*(1) the House of Lords decided that the absolute privilege which attaches to a witness in the box also attaches to statements made by him for the purpose of his being examined in the box. In that case one of the statements on which it was sought to found the action was made to the solicitor for the purpose of taking the witness's proof and might have been held to be covered by the professional privilege of the solicitor. But another of the statements was made not to a professional lawyer but to a layman, the husband of the plaintiff, in reference to proceedings for a separation which were pending between them. But the House of Lords did not proceed on the ground of professional privilege at all but on the ground of the privilege of a witness. Lord HALSBURY says at page 487,

"It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a

step towards and is part of the administration of justice, namely, the preliminary examination of witnesses to find out what they can prove."

I take that as clearly implying that all statements made by a potential witness as a preliminary to going into the witness-box are equally privileged with the statements made when actually in the box in Court. And the compiler of the head-note took the same view because he states—

"The privilege which protects a witness from an action of slander in respect of his evidence in the box also protects him against the consequence of statements made to the client and solicitor in preparing the proof for trial."

I am therefore of opinion that the statements made to the police officer which could only be made with a view to their being repeated on oath before the Magistrate were absolutely privileged. It would in my opinion have been much better if the Code had contained a general power to Magistrates to refer any matter brought to their notice for investigation to a police officer without confining it to Chapter XIV. Petitions under section 107 are habitually referred for investigation by Magistrates. This is a great safeguard to the subject, and no class of cases requires more security from the very nature of the allegations made. An allegation not that a man has committed an offence but that he contemplates committing one can obviously be made much more recklessly than an allegation that he has in fact committed an offence which is a much more tangible subject of investigation. I think it will be well that the Code should be revised and that express provision should be made conferring power in terms upon magistrates to refer petitions under section 107 for investigation. It is quite true that there is a ruling recorded in *Weir's Criminal Rulings*, Vol. II, page 51 (Criminal R.C. No. 132 of 1891) that there is no irregularity in a

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(1) [1905] A.C., 480.

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Magistrate calling for a report from a magistrate (and a police officer must be in the same position) before taking action under section 107. But I think it would be well if the matter were finally settled by an express statutory direction.

With regard to the statements in the petition presented to the magistrate, it is clear that such a document is contemplated by section 107(1) as part of the regular machinery of the section. Its wording is—

“Whenever a magistrate of the class described in the section is informed that any person is likely to commit any breach of the peace”

and it is clear that the petition would fall within the information contemplated by the section. If so, it would clearly be invested by the common law of England with absolute privilege which attaches not merely to the actual proceedings of any tribunal exercising judicial functions, but to all preliminary steps which are in accordance with the recognized and reasonable procedure of such a tribunal. This was laid down by Lord HOLT, C.J., in 1700 in the case of *Dr. Groennelt v. Dr. Burwell*(1). I am of opinion that that principle which is absolutely necessary for the administration of justice must be held to obtain in India also. The learned Judge was therefore right in non-suiting the plaintiffs, and this appeal must be dismissed with costs.

VISWANATHA
SASTRI, J.

VISWANATHA SASTRI, J.—The suit was for the recovery of Rs. 5,000 being the damages sustained by plaintiffs by reason of certain “false and malicious accusations and imputations” made by defendant in a “criminal complaint filed” by him in the Court of the Deputy Magistrate, Adōni, on 28th June 1923. These “accusations and imputations” were repeated in a statement made by the defendant to the Sub-Inspector of

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Police, Aspari, on 21st July 1923, to whom the Deputy Magistrate had referred the complaint for investigation. Defendant admitted the filing of the “petition” and contended that “it cannot be deemed to be a complaint”; that the filing of it did not amount to a prosecution; that consequently plaintiffs had “no cause of action to sue for damages for malicious prosecution”; that no such suit lay in respect of statements made to the police officer in the course of the inquiry and that the statements were not made “maliciously and without reasonable and probable cause;” but “in good faith, *bona fide*, for good reasons and for the protection of this defendant’s own interest.” On these pleadings the trial Judge joined the following issues:—

I. Were the allegations absolutely privileged?

II. Was there any prosecution such as would entitle the plaintiff to damages, if it were proved to be malicious and based on false allegations?

No evidence was received, and the learned trial Judge after considering the law came to the conclusion that

“no action can be taken by the plaintiffs for damages for defamation in respect of allegations made by the defendant in his complaint to the magistrate or in his statement to the police.”

He also held that as “there was no prosecution, but only an attempt at prosecution, no suit for damages for malicious prosecution can lie.”

These findings are impeached in appeal.

The petition of 28th June 1923 presented to the Deputy Magistrate, Adōni, is not printed, but the allegations said to have been made in it are detailed in paragraph 5 of the plaint. The petition was one praying for action under section 107 of the Criminal Procedure Code, and as it was dismissed without issuing any

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notice to plaintiff, there was no prosecution of plaintiffs and consequently no action for damages for malicious prosecution would lie.

On the question whether an action for damages for defamation would lie on the basis of the petition, the contention of the defendant was one of absolute privilege. In *re Muthusami Naidu*(1) a bench of this Court following *Golap Jan v. Bholanath Khettry*(2) held that a defamatory statement in a complaint to a magistrate was absolutely privileged. But it was contended on behalf of the appellants that a petition to a magistrate to take action under section 107 of the Criminal Procedure Code was not a "complaint" within the meaning of the term as defined in section 4(1), clause (h) of the said Code; and that subsequently no claim to absolute privilege can be made, with respect to accusations and imputations made therein. A "complaint" is defined in the Code as an

"allegation made orally or in writing to a magistrate with a view to his taking action under the Code that some person . . . has . . . committed an offence."

It is argued that no offence was committed by the defendant, and that consequently the petition should not be deemed to be a "complaint." It is open to a person whose personal safety is threatened, to apply to a magistrate for protection and one of the ways of affording protection is by taking security under section 107 of the Criminal Procedure Code. The petition put in by defendant initiated a proceeding; and in *re Muthusami Naidu*(1), the case above cited, the learned Judges observe:

"We do not think that a statement in a complaint which initiates a proceeding should be held to be entitled to less privilege than other statements made by parties in the subsequent stages of the proceedings."

(1) (1914) I.L.R., 37 Mad., 110.

(2) (1911) I.L.R., 38 Cal., 880.

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I may here state that the words used in the plaint are "The defendant filed a criminal complaint in the court of etc." In my opinion, therefore, the plea of absolute privilege will prevail with respect to the petition presented to the Deputy Magistrate.

The question whether there is any such privilege in the case of the statement made to the Sub-Inspector of Police on 21st July 1923 is not free from difficulty in the face of the ruling of SESHAGIRI AYYAR, J., in *re Kakumara Anjaneyalu*(1) to the effect that

"the rule of law that parties before the Court are absolutely privileged cannot be extended to the case of complaints to a police constable."

In that case the question of privilege arose in a prosecution under section 499, Indian Penal Code, and not as here in a civil action for defamation, and in *Chunni Lal v. Narsingh Das*(2) a bench of five Judges held that "the civil and the criminal law and procedure . . . are . . . independent of each other"

and that as "there was no statue in India dealing with civil liability for defamation, the rule of equity, justice and good conscience" had to be applied. The same view has been taken by a special bench of five Judges of the Calcutta High Court in *Satish Chandra Chakravarti v. Ram Doyal De*(3). At page 426 it is stated that

"the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the common law of England."

In the case before us, the petition presented to the Deputy Magistrate was sent by him to the police for investigation and so far as my experience goes, this is usually done. Such a course is authorized under section 202 of the Criminal Procedure Code, when a magistrate receives "a complaint of an offence of which he is

(1) (1916) 35 I.C., 813.

(2) (1918) I.L.R., 40 All., 341 (F.B).

(3) (1921) I.L.R., 48 Cal., 888.

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authorized to take cognizance." But a contention is raised to the effect that as there was no complaint of an offence of which the magistrate was authorized to take cognizance, he had no authority to order police investigation and that the statement to the sub-inspector of police was therefore made to an officer who had no authority to hold any investigation. Section 107 of the Criminal Procedure Code appears in part IV which is headed "prevention of offences." The prevention of offences is a part of the administrative machinery for maintaining "law and order," and this task is laid on magistrates. These magistrates have control over the police, whose assistance they can seek in the discharge of their duties. Such being the case, it appears to me that it is perfectly open to a magistrate who is asked to set in motion section 107 of the Criminal Procedure Code, to avail himself of the help which is available to him under section 202, Criminal Procedure Code, when complaint of an offence of which he is authorized to take cognizance is made to him. In this view I am fortified by the ruling reported in Weir's Criminal Rulings, Vol. II, page 51. In that case the report was no doubt called for from a subordinate magistrate, but this can make no difference. In Halsbury's Laws of England (Edition of 1911), Vol. XVIII, section 1254 it is stated that "the privilege attaches not merely to proceedings at the trial, but to proceedings which are essentially steps in judicial proceedings." In the footnote reference is made to *Waston v. M'Ewan*(1) where it was held

"that the public policy which renders the protection of witnesses necessary for the administration of justice necessarily involves that which is a step towards, and is part of the administration of justice, namely, the preliminary examination of witnesses to find out what they can prove,"

(1) [1905] A.C., 480.

and that consequently statements made by a witness to a litigant or his solicitor in preparing proof are absolutely privileged. I am therefore of opinion that apart from section 202 of the Criminal Procedure Code, it was competent to the Deputy Magistrate, Adōni, to have referred the matter to the police for investigation, and that the Sub-Inspector of Police, Aspari, was entitled to hold the investigation and having presented the petition, it was the duty of the defendant to assist in the investigation. It was said that such wide privileges would have disastrous consequences on innocent citizens, who would be left without redress. But it will always be open to such persons to put sections 182 and 211, Indian Penal Code, in motion by an application under section 195, Criminal Procedure Code.

I would therefore dismiss the appeal with costs.

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APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Wallace.

TAMBI REDDY VIRAREDDY (SECOND COUNTER-PETITIONER,
SURETY), APPELLANT,

1925,
November 24

v.

DEVI REDDY PATTABHIRAMI REDDY & Co.
AND OTHERS (PETITIONERS AND FIRST COUNTER-PETITIONER),
RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), sec. 145 and O. XXI,
r. II, cl. 3—Surety for a judgment-debtor—Application*

* Civil Miscellaneous Appeal No. 106 of 1923.

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by the decree-holder for execution of the decree against the surety—Plea by the surety of payment and discharge of decree—Satisfaction of decree, not certified to Court—Plea of discharge, whether open to surety, when it is not open to judgment-debtor.

Where a judgment-debtor, arrested and brought before a Court, was released on a person standing surety undertaking to produce him in Court whenever ordered by the Court and, in default of doing so, to pay the decree amount himself personally, and, on an application by the decree-holder against the surety to produce the judgment-debtor or in default to execute the decree personally against the surety, the latter pleaded that the decree could not be executed as it was wholly satisfied by payment, though satisfaction was not certified to the Court.

Held, that a surety could not plead adjustment or discharge of a decree, when the judgment-debtor himself could not successfully put forward that plea under Order XXI, rule 2 (3) of the Civil Procedure Code, even though the surety was not a party to the decree.

Onkarmal Agarwala v. Nritya Gopal Chaki, (1922) 67 I.C., 885, followed.

No second decree is passed against the surety under section 145 of the Code, but the decree that is executed against him is the decree passed in the suit.

APPEAL against the order of A. S. BALASUBRAHMANYA AYYAR, District Judge of Nellore, in E.P. No. 44 of 1924 in O.S. No. 2 of 1923.

The material facts appear from the judgment.

B. Somayya for appellant.

T. V. Venkatarama Ayyar for respondents 1 and 2.

JUDGMENT.

The plaintiffs who are respondents 1 and 2 herein arrested the second defendant, the third respondent herein, in execution of a money-decree. The appellant executed a security-bond on 11th December 1923 undertaking to produce and hand over the second defendant whenever the Court passed an order to produce him. The bond also provided that in default of the surety

producing the second defendant and handing him over to the Court, the amount of decree, interest, and costs shall be recovered by the plaintiffs from the surety personally. On the execution of the bond, the second defendant was released from arrest. The plaintiffs applied to the lower Court for an order that the surety be directed to produce the second defendant and in default of producing him, the decree-amount be realized from him. The appellant contended that the decree of the plaintiffs against the second defendant had been satisfied and that no execution could issue against him in execution of a decree already satisfied. The District Judge overruled the objection of the appellant and directed him to produce the second defendant on or before a certain date and on his failure to do so that execution should issue against him. The appellant has preferred this Civil Miscellaneous Appeal.

Two points arise for consideration in this case, one of fact and the other of law.

The first point is whether the decree has been satisfied. Mr. Somayya for the appellant relies very strongly upon Exhibit II which is the defendant's ledger in the account book of the plaintiffs. From the entries in the ledger it is found that a nil balance is struck. And Mr. Somayya's contention is that the decree-debt has been wiped off by payment. There are entries on both sides of the ledger and the balance is zero. In Exhibit III, the ledger of the third defendant, there is a debit entry of Rs. 5,000. It is argued for the appellant that the third defendant paid Rs. 5,000 in discharge of the decree-debt and thereby the decree-debt has been fully satisfied.

Exhibit I is the day-book and in it there is an entry that the decree in O.S. No. 2 of 1925 has been transferred to Adapala Varada Reddi for Rs. 5,000 and a promissory

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DEVI REDDY. note for the sum of Rs. 5,000 has been obtained this day from him.

Mr. T. V. Venkatarama Ayyar for the respondents 1 and 2 contends that there was no transfer of the decree in favour of Adapala Varada Reddi, the third defendant in the case, but there was only an agreement to transfer the decree to him. Exhibit A, pro-note executed by Varada Reddi in favour of the plaintiffs, on 10th January 1924, contains a recital that Varada Reddi had arranged to take a transfer of the decree-debt from the plaintiffs. The entry in the day-book is of the same date as that of the pro-note. The third defendant was only a surety for defendants 1 and 2, and in the razinama decree, he is made liable only for 2/5ths of the decree amount in case the plaintiffs were unable to realize the decree amount from defendants 1 and 2. It is unlikely that when he was made liable only for 2/5ths of the amount in case the plaintiffs were unable to obtain satisfaction from defendants 1 and 2 that he would discharge the whole of the decree amount by undertaking to pay Rs. 5,000. There is no evidence that the decree has been transferred to the third defendant. The appellant's contention is, that the entry that the decree has been transferred should be taken to mean that the decree was transferred on the 10th January 1924. Taking the entry alone, in Exhibit A, it cannot be said that the decree has been transferred to the third defendant. The onus is upon the appellant to show that the plaintiffs have transferred the decree and that they could not apply for execution. On a consideration of the evidence we have no hesitation in holding that the decree was not transferred to nor was any amount paid towards the decree by the third defendant. The appellant has not shown that the decree has been satisfied by any amount being paid by the third defendant Varada Reddi.

The next question is, granting for arguments sake, TAMBI REDDY v. DEVI REDDY. that the decree amount was paid by the third defendant, can the appellant take advantage of the payment, when the payment has not been certified by the Court as required by Order XXI, rule 2. The appellant's argument is that the surety is not a party to the decree and he could not apply to the Court to enter up satisfaction of a decree which has been satisfied by payment by the third defendant. The surety is not a party to the decree but becomes a party only for a limited purpose, that is, for the purpose of appeal when an order is made against him under section 145, Civil Procedure Code—vide *Ramanathan Pillai v. Doraiswami Aiyangar*(1). The fact that he is not a party to the decree is no ground for getting round a definite provision of law under Order XXI, rule 2, clause (3).

Mr. Somayya strongly urges that the said provision is contained in processual law and should not be held to override substantive law and under the Law of Contract a surety is not bound to pay, when the debt which he undertook to pay in case of default of the principal debtor has been paid off or adjusted.

Whatever may be the policy of the legislature in enacting clause (3), the Court is bound to give effect to it. Where the decree is adjusted wholly or in part the judgment-debtor should apply within three months to the Court and that such adjustment or payment should be recorded as certified and if he fails to do so, he cannot plead adjustment or payment in answer to the execution of the decree against him. Considerable reliance is placed by Mr. Somayya on the interpretation of Order XXI, rule 16, by the Madras High Court that the executing Court has a discretion to refuse execution at the instance of a transferee of a decree.

(1) (1920) I.L.R., 43 Mad., 325.

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In *Rama Ayyan v. Sreenivasa Pattar*(1), the judgment-debtor transferred some of his immovable properties to a person in consideration of his paying the judgment-debt to the original decree-holder. The vendee without paying the decree-holder the amount of the decree, got a transfer of the decree to himself and, as assignee, applied for execution. It was held that he was not entitled to execute the decree when he himself in spite of his undertaking to discharge the decree had fraudulently obtained a transfer of the decree from the decree-holder. Mr. Justice SUBRAHMANYA AYYAR observed at page 232, with regard to section 258 of the old Code corresponding to Order XXI, rule 2 of the present Code :

"The last paragraph prohibits judgment-debtors, who omit to apply under the second paragraph or having applied fail to establish their case, from relying in execution proceedings upon any payment, satisfaction or adjustment not duly certified. Manifestly therefore the enquiry under the said second paragraph can take place only between a person standing in the relation of a judgment-debtor and a judgment-creditor."

The surety not being a party to the decree could not apply under Order XXI, rule 2. I am unable to accept the argument that a surety though he is not a party to the decree could not ask the Court to hold an enquiry as to the decree being satisfied by payment or adjustment provided the application is made within the time allowed by the law.

Though he has no *locus standi* to insist upon an enquiry he could apply to the Court to hold an enquiry inasmuch as he has an interest in showing that the decree has been satisfied. In *Ponnuswami Nadar v. Letchmanan Chettiar*(2), there was a difference of opinion between Mr. Justice ABDUR RAHIM and Mr. Justice SUNDARA AYYAR, as regards the question

whether the prohibition regarding uncertified adjustment will or will not apply while the adjustment is made by a third party.

In *Ramayya v. Krishnamurti*(1), it was held that

"Order XXI, rule 2, did not disentitle a judgment-debtor from proving facts that a transferee of a decree applying for execution was merely a benamidar for another judgment-debtor."

These cases have no application to the present question and they do not throw any light upon the points raised in this case. The real question is whether a surety can plead adjustment or the discharge of a decree when the judgment-debtor himself could not successfully put forward that plea. In this case the payment or adjustment was not certified by the Court as required by Order XXI, rule 2, and therefore execution could proceed against the second defendant.

When there is an executable decree against the second defendant, can it be reasonably contended that so far as the surety is concerned there is no executable decree? The Court cannot recognize any adjustment or payment out of Court unless certified as is required by law and in the absence of such certificate, a decree-holder, however fraudulent his conduct may be, is entitled in law to execute his decree against the judgment-debtor, and so long as he is entitled to execute the decree against the judgment-debtor, a surety, who undertakes to pay the decree-amount, cannot plead that there is no decree against the judgment-debtor and therefore he is released from liability under the bond. Section 145 says :—

"When any person has become liable as a surety, a decree or an order may be executed against him to the extent to which he has rendered himself personally liable."

(1) (1896) I.L.R., 19 Mad., 230.

(2) (1912) I.L.R., 35 Mad., 659.

(1) (1917) I.L.R., 40 Mad., 296.

TAMBI REDDY On the failure of the surety to carry out the terms
DEVI REDDY. of the bond, he makes himself liable for the amount of
the decree or such amount as he has undertaken to pay.

It is next suggested that the original decree is not executed against the surety but a second decree passed on his failure to carry out his undertaking and therefore that decree is different from the original decree. No second decree is passed against the surety. The order under section 145 is passed when he makes himself liable by failing to carry out the terms of the bond to the extent to which he has rendered himself liable. The decree that is executed against him is the decree passed in the suit and therefore it cannot be said that a second decree is passed against him.

The contention of Mr. Somayya for the appellant that uncertified adjustment or payment could be pleaded by the surety, was specifically negatived in a recent case decided by a Bench of the Calcutta High Court in *Onkarnal Agarwala v. Nritya Gopal Chaki*(1). The learned Judges observed at page 886 :

"The surety is bound so long as the judgment-debtor is bound. The judgment-debtor is bound so long as any payments which he may have made are not certified by the Court."

In the result we have no hesitation in holding that so long as there is an executable decree against the judgment-debtor the surety is not relieved from his liability to pay the decree amount under the terms of the security bond executed by him.

The appeal fails and is dismissed with costs.

K.R.

(1) (1922) 87 I.C., 885.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

APPU alias SUBRAMANIA PATTAR (PETITIONER),
APPELLANT,

1925,
November 20.

v.

O. ACHUTA MENON, RECEIVER (DEAD) AND OTHERS
(COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 66—Sale in execution of a decree—Partition Act (IV of 1893)—Proclamation of sale—Appointment of a Commissioner—Duty of Court to settle proclamation of sale—No power in Court to delegate that duty to Commissioner—Settlement of proclamation by Commissioner—Sale thereunder—Validity of sale—Reserve price not fixed in proclamation—Party aware of contents of proclamation, effect of.

Under Order XXI, rule 66, of the Civil Procedure Code, it is for the Court to settle the proclamation of sale, and it cannot delegate that power to a Commissioner appointed by it; even if the party was aware of the contents of the sale proclamation prepared by the Commissioner, that would not relieve the Court of its duty of settling the proclamation; and if it was not settled by the Court, the sale held thereunder would be invalid.

APPEAL against the order of G. H. B. JACKSON, District Judge of South Malabar, in Miscellaneous Petition No. 51 of 1921 in Original Suit No. 4 of 1917.

This appeal arises out of an application to set aside a sale held under the Partition Act (IV of 1893) in a suit for partition. A preliminary decree for partition was passed, and a Commissioner was appointed to effect a partition under the Partition Act. The proclamation of sale was settled, not by the Court, but by the Commissioner, who held the sale under the said proclamation in public auction. The petitioner, who was one of the defendants in the suit, filed this petition to set aside the

* Civil Miscellaneous Appeal No. 335 of 1922.

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sale on the ground that the proclamation was not settled by the Court, as required by Order XXI, rule 66, and the Partition Act (IV of 1893), and also alleged that no reserve price was mentioned in it, and that the petitioner was not allowed to bid, and other objections. The District Judge overruled these objections and dismissed the petition and confirmed the sale. The petitioner preferred this appeal.

K. Kuttikrishna Menon for appellant.

Respondents were not represented.

JUDGMENT.

The first point raised in this appeal is that the proclamation of sale was not settled by the Court but that the Commissioner appointed by the Court after the preliminary decree prepared the proclamation of sale and sold the property. It is for the Court to settle the proclamation of sale and it could not delegate that power to the Commissioner appointed by it. Order XXI, rule 66, directs that when any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court and that such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale and specify as fairly and accurately as possible the property to be sold and a number of other things. It is also contended that no reserve price was mentioned in the proclamation of sale. It is also urged that the appellant was not allowed to bid at the auction. The learned Judge relying upon the report of the Receiver has dismissed the appellant's application to set aside the sale. Even if the appellant was aware of the contents of the proclamation prepared by the Receiver, that would not relieve the Court of its duty of settling the

proclamation. As the records stand at present, we are unable to say whether the allegation of the appellant is true or false. If the proclamation was not settled by the Court the sale would be invalid. As the learned District Judge has not taken evidence in support of the allegations in the petition and as the auction purchasers are not represented here, we think the proper course would be to set aside the order of the District Judge and direct him to restore the application of the appellant to file and dispose of it after taking such evidence as may be adduced by him and other parties to the suit. Costs of this appeal will abide the result and be provided for in the order that will be passed by the District Court.

K.R.

SUBRAMANIA
PATTER
v.
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PRIVY COUNCIL.

RAJA OF RAMNAD (PLAINTIFF)

v.

KAMID ROWTHEN AND OTHERS (DEFENDANTS).*

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT MADRAS.]

*Estates Land Act (I of 1908, Madras), sec. 12—Tree patta—
Right to cut trees—Measure of damages.*

Where an agreement is to be construed as one to pay tirva for the enjoyment of the produce of trees (e.g., palmyra trees), by a person not having any right in the land upon which the trees grow, section 12 of the Madras Act I of 1908 does not apply so as to entitle the licensee to cut down the trees. If he cuts down trees illegally he is liable for their full value.

Quaere, whether section 12 applies where the trees are on land held by an occupancy ryot, but they have been treated in his patta and muchilka as a separate entity.

* Present:—LORD DUNEDIN, LORD SHAW, LORD BLANESBURGH and Sir JOHN EDGAR.

1926,
January 21.

RAJA OF
RAMNAD
v.
KAMID
ROWTHEN.

CONSOLIDATED APPEALS (No. 29 of 1924) from orders of the High Court (February 24, 1920) reversing decrees of the Court of the District Munsif of Manamadura.

The appellant brought suits in the District Munsif's Court claiming from the respective respondents, who held pattas from him, damages in respect of their having cut and removed certain palmyra trees.

The facts, and the terms of section 12 of the Madras Estates Land Act, 1908, which were material to the suits, appear fully from the judgment of the Judicial Committee.

The Munsif decreed the suits, but upon cross-petitions for revision, the High Court (SADASIVA AYYAR and SPENCER, JJ.), after a remand for further findings, dismissed the suits. The views of the learned Judges appear from the judgment here reported.

De Gruyther, K.C., and *Kenworthy Brown* for the appellant.

Narasimham for the respondents.

The JUDGMENT of their Lordships was delivered by

LORD
DUNEDIN.

LORD DUNEDIN.—The plaintiff in the present set of cases is the Zamindar of Ramnad, an estate situated in the Presidency of Madras. The defendants are ryots who are tenants of the plaintiff in virtue of certain pattas. The plaintiff complained that the defendants had cut down trees belonging to him. The trees were palmyra trees, which yield a juice which is tapped from the trees, and, as it makes an intoxicating liquor, has a commercial value. The plaintiff raised separate actions against each alleged wrongdoer in the Court of the District Munsif of Manamadura. The pleading in the case was in the highest degree unsatisfactory and was, as will appear hereafter, the real cause of the unsatisfactory

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—
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DUNEDIN.

condition of the case on the appeal before this Board. It may be here parenthetically explained that the ordinary position of a ryot is that he is in possession of the land for agricultural uses, but that he is not entitled to cut down trees. But in Madras there is special legislation dealing with the subject, namely, the Madras Estates Land Act, being Act I of 1908. Section 12 of that Act is in the following terms :

"Subject to any rights which by custom or by contract in writing executed by the ryot before the passing of this Act are reserved to the landholder, every occupancy ryot shall have the right to use, enjoy and cut down all trees now in his holding, and in the case of trees which after the passing of this Act may be planted by the ryot or which may naturally grow upon the holding he shall have the right to use, enjoy and cut them down, notwithstanding any contract or custom to the contrary."

In the definition clause, section 3, sub-section 6, "occupancy ryot" is defined :

"'Occupancy ryot' means a ryot having a permanent right of occupancy in his holding."

The sub-section 15 defines "ryot" :

"'Ryot' means 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."

Sub-section 3 defines "holding" :

"'Holding' means a parcel or parcels of land held under a single patta or engagement in a single village."

Now, what the plaintiff ought to have said in each case was in plain terms that the defendants were not persons to whom section 12 applied, because they were lessees of the trees in terms which made them usufructuaries of the trees, but did not give them the trees as a mere appanage of land let to them, and then to have averred that they had wrongfully cut down the trees. Instead of this, what he did was this (the averments in one case may be taken as a sample of the whole as they

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are all in terms practically identical). After averring the cutting down of the trees, he said :

"The defendant, who is bound according to the custom of the village and zamin and according to law to pay compensation to plaintiff for the said trees, has not done so."

To this the defendant (again taking one case as a sample) replied first, by denying that the trees had been cut and, second, by denying the custom alleged. It is thus evident that, so far, the real question as to whether the Act of 1908 applied had not been properly raised. It is true that it had been alleged that the patta was a tree patta. But that allegation had not been pressed home by the appropriate plea, that the result was that the Act did not apply. On the contrary a custom of payment had been set up, which exactly fits the exception mentioned in the opening words of section 12. The parties then went to trial in the Court of the District Munsif of Manamadura. He delivered a judgment. In this judgment he found as a fact that the trees had been cut. He then found in law that, as a *tirva* or rent was paid for the trees, the trees belonged to the Zamindar and that, therefore, at common law, apart from custom, if the tenants cut the trees, they must pay damages. He then went on to deal with the averment of custom as if it had been an averment of custom, not as to right of payment, which it obviously was, but as to scale of payment, which it obviously was not. He then found that there was no universal custom proved as to scale, and thus it being left to himself to determine the figure of damages, he determined them as 25 years' purchase of the annual rent value of a tree. He did not in his judgment make any mention of the Act of 1908. He granted decrees in all cases for a sum representing the 25 years' purchase of the rental value of the trees cut,

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From this judgment an appeal in the form appropriate to such a case from the Munsif's Court, i.e., civil revision petition, was preferred to the High Court of Madras. This was disposed of by MOORE, J. He, in his judgment, after stating the claim, says this :

"These Civil Revision Petitions arise out of a number of small cause suits which were brought by the petitioner the Raja of Ramnad to recover from his tenants the value of palmyra trees on their holdings which had been wrongfully cut and appropriated by the tenants. The value of the trees was claimed at the rate of Rs. 3 per tree in one village and Rs. 6 per tree in the other two villages. In C.R.P. No. 1252 of 1918, the petitioner is the defendant in one of the small cause suits. It was alleged in the plaint that the defendants, who were bound according to the custom of the village and zamin and according to law to pay compensation to the plaintiff for the trees cut, had not done so. The defendants denied having cut the trees and the custom alleged in the plaint and claimed the ownership of the trees. They further contended that the value claimed was excessive. The District Munsif found that the alleged cutting was true and that the value claimed was proper for the trees, viz., Rs. 3 and Rs. 6, and that the holding consisted of trees which were assessed to *tirva*. On the third point, viz., 'Whether the alleged usage was true and what relief was plaintiff entitled to?' the District Munsif held that the proper amount of compensation would 'ordinarily' be the capitalized value of the annual *tirva*, or twenty-five times the annual *tirva*. The findings on the first two points being in plaintiff's favour, the only question for decision in these petitions is whether the method of calculating compensation adopted by the lower Court is correct."

He then mentions the contention of the defendants under section 12 of the Act, but he says no more about it. In other words, he seems to stick to his view that the only question left was the valuation question. He criticises unfavourably the Munsif's view of the 25 years' purchase of the rental value of the trees as the proper measure of damages, a result which, he says, he cannot extract from the proof as to custom, and he then remits

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the case to the inferior Court for findings on the following points :

" 1. Whether there is a valid custom entitling the landholder to claim compensation for palmyra trees cut by the defendants, without the permission of the landholder ? 2. If so, what is the compensation payable by the defendants ? "

The case then went back to the lower Court. This time there was a different Munsif. He pronounced a very clear judgment. He said :

" I have to give findings on the following two issues :—

I. Whether there is a valid custom entitling the landholder to claim compensation for palmyra trees cut by the defendants without the permission of the landholder ?

II. If so, what is the compensation payable to the defendants ?

2. Issue No. I :

I have heard Mr. T. C. Srinivasa Ayyangar, pleader for the plaintiff, the Raja, at great length. I have approached the question in the light of the observations contained in the judgment of the High Court. I would find the issue in the negative.

Issue No. II requires no finding in view of my finding on issue No. I."

He also takes no notice of the Act, but assumes that he had been told that the Zamindar's only right to compensation rests on a custom to receive it.

On the return to the High Court of the findings, the Zamindar presented a note of objections. In these objections he, for the first time, raised definitely the true case as to the application of the Act :

" 4. The District Munsif erred in throwing the onus of proof on the plaintiff.

5. The District Munsif erred in assuming that the Estates Land Act had any application to the present case."

The case was then resumed by the High Court with the returned findings and the objections thereto. They, in all the cases, set aside the decree of the lower Court and dismissed the suits. They granted the respondents their costs in the High Court ; in one case they directed

that there should be no costs in the lower Court, but in all the other cases they were silent as to the costs in the lower Court. The opinion of the learned Judge who delivered the leading judgment begins with the statement that " the counter-petitioners are the tenants of land on which trees were and are standing." He then goes on to say :

" The remaining questions for consideration are :

(1) Whether the District Munsif was right in allowing as damages not the value of the trees cut, but only 25 times the *tirva* payable and

(2) Whether plaintiff (petitioner) is legally entitled to claim damages at all, in other words, whether the tenants have got absolute right to deal with the trees in any manner without being liable for any damages for so dealing. So far as the first question is concerned, I might at once say that if the tenants are legally liable for damages, they ought to have been made to pay the market value of the trees and not 25 times the *tirva*. But, on the second point, I am of opinion that the defendants are not liable for any damages at all."

After dealing with an argument which seems to have been presented that the right to cut down trees does not include the right to appropriate them, which he negatives, he then comes to the true question of the case. This portion of his judgment must be quoted in full and is as follows :

" Lastly it was argued that the defendants are not ryots holding lands for agricultural purposes, but that they are merely persons who have been allowed to enjoy the produce of the trees on payment of some remuneration to the landholder which remuneration does not fall within the definition of rent in the Estates Land Act, and that therefore section 12 has no application at all. The muchilkas, Exhibit E series, executed by the tenants do not, in my opinion, support this contention. They are all ordinary muchilkas of the kind usually executed by ryots holding land under the Zamindar. The only special feature of these muchilkas is that the fixed rent payable by the ryot who holds the land, calculated on the area of the land, which is described as *Regui punja*, is increased by an amount varying

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with the number and size of the trees in the holding. Under the definition in clause 1 of section 3 of the Act, agriculture includes horticulture, and the fact that the rent for the land varies with the number of trees standing thereon does not make the ryot a mere licensee enjoying the produce of the trees under the landlord. He is the occupancy ryot of the land itself with the trees thereon, though paying varying rents according to the number of trees existing on the land. (We were told in the course of the argument that the assessment was varied once in six years, according to the number of trees at the time of the periodical settlement.) Reliance was, however, placed on the decision in *Murugappa Chettiar v. Ramanathan Chettiar*(1) for the contention that these were not muchilkas for the land held by an occupancy ryot, but that these are agreements for payment of vari or tax payable in respect of the trees held on tree pattas. We have not before us the muchilka executed in that case and if, on a consideration of the terms of that muchilka, it was held that it was an agreement by a licensee to pay *tirva* for enjoying the produce of trees without any *kudiwaram* right in him in the land on which the trees stood, I accept (if I may say so with respect) the correctness of that decision. But, as I said, I am satisfied in this case that the land itself on which the trees stand is held on patta, though the rent payable for that land varied with the number of trees standing on it, owing to a certain amount (varying according to the number of trees) being added to the invariable rent based on the extent of the land. Therefore, the Estates Land Act does apply to the relationship of landlord and tenant in this case."

SPENCER, J., concurs and says as follows:

"The suggestion that section 12 of the Madras Estates Land Act does not apply in this case was put forward on the assumption that the pattas in the suits were purely tree pattas and not pattas for land. But a reference to the muchilkas on the record shows that this is not the case. I agree with my learned brother both on the general question as to the effect of section 12 of the Madras Estates Land Act, and as to the order to be passed in particular cases."

It is therefore quite clear that the case has been decided upon the ground that the ryots were holders

(1) (1914) 1 L.W., 881.

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of land on which trees stood, that they had cut trees standing on their own holdings, and that they had the right so to cut them in respect of section 12 of the Madras Act. It is clear also that, had the tenants' right to the trees not depended on the fact that the trees stood on their holdings, but had depended on a separate lease of the trees as trees, whether the trees stood on their holdings or on the holdings of other persons, the learned Judges would have come to the opposite conclusion and would have held that the damages for illegal cutting were to be measured by the value of the trees so cut and, lastly, it is clear that the reason that they held that the trees in question were held as part of the land holdings and not in respect of a separate title was not in respect of any local knowledge as evidenced by proof led, but because they determined the fact as a matter of construction of the leases in question of which the muchilkas or tenants' counterpart were produced. Their Lordships are in entire concurrence with the learned Judges as to the result in law if the trees are held on what may be called separate title. In such a case section 12 of the Madras Act does not apply, and they think that the case cited, *Murugappa Chettiar v. Ramanathan Chettiar*(1) was rightly decided. They think also that the result that follows was rightly affirmed by the learned Judges, i.e., that the full value of the trees which had been illegally cut must be paid for.

But their Lordships are quite unable to concur with the reasons of the judgment on the further point. From the reference made to the Exhibit E series of the muchilkas it would seem as if the learned Judges had exclusively directed their attention to a case where there is both land and trees which are included in the lease.

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In one case at least, by a comparison and reference, perhaps it is possible to infer that some at least of the trees are on the land let, but that is not the case with all. Moreover there are a large number of muchilkas which deal with trees and trees alone. How can it be possible to deduce from this, as a matter of construction, that these trees are on a land holding of the person to whom the tree right is granted? How can it be told that he holds any land at all? It is matter of common knowledge—and the case already mentioned is an instance—that, in view of the known use of the palmyra tree, leases of what are only the usufruct of the trees as such are granted. Many of the muchilkas produced point to such a lease. But in the judgment they have all been compelled to suffer the fate of the muchilka, which is above mentioned. If the judgment stands, it would be very far reaching and, in granting leave to appeal to the King in Council, the learned Judges seem fully to appreciate that fact. In their Lordships' view, the facts on which the case depends have not been properly found one way or the other.

There are just three situations in which palmyra trees may be held:

(1) They may simply be growing on land which is held by a ryot, though no mention of trees be made in any lease.

(2) They may be growing on land held by a ryot, but they may be let as a separate entity in his lease.

(3) They may be let to a person on whose land they do not grow.

Assuming trees to be cut without the leave of the landholder, the position in law as regards 1 and 3 seems simple.

As regards (1) section 12 of the Act of 1908 applies and the landholder has no claim.

As regards (3) section 12 of the Act of 1908 does not apply and the landholder has a claim for the full value of the trees so cut.

As regards (2) their Lordships will not express an opinion because, as yet, there is no determination of the question, so far as they know, by the Courts in India, and they would wish such a determination before coming themselves to a conclusion.

But as regards the cases in this appeal, there are no materials for ascertaining positively in regard to the 30 separate cases, in which of the three categories each case falls. They cannot be taken in a block. Each case stands on its own facts. Their Lordships have, therefore, come to the conclusion that these cases must go back to the Courts in India to determine on evidence of fact in each particular case into which category it falls and, in accordance with that determination, to pronounce or refuse decrees in each particular case. As regards costs, for the reasons stated in this judgment, their Lordships consider that the confusion into which the cases have fallen is largely due to the inadequate pleading of the plaintiff. At the same time the defendants ought not to have denied the cutting—a fact which has been determined against them. Their Lordships, therefore, think that the case should be remitted as aforesaid, that the respondents should have the costs of the appeal before this Board, and in each of the Courts below, except the costs of the original inquiry before the first Munsif; that, in that inquiry in the case of all defendants who denied cutting of trees, there should be no costs to either party; and that the costs of the future progress of the case should be determined by the Courts

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in India. They will humbly advise His Majesty to issue an order in accordance with these views.

Solicitors for appellant: *Chapman-Walker and Shephard.*

Solicitor for respondent: *H. S. L. Polak.*

A.M.T.

PRIVY COUNCIL.*

1908,
January 28.

HAJEE SHAKOOR GANI, SINCE DECEASED (DEFENDANT)

v.

T. S. SABAPATHI PILLAI (PLAINTIFF).

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT MADRAS.]

Indian Tariff Act (VIII of 1894), sec. 10, amended by Act IV of 1916—Sale of imported sugar—Subsequent decrease of tariff value—"Duty of customs."

The notification under Act IV of 1916, section 3, subsection (2) of a decrease in the "tariff value" of an article is not a decrease in the "duty of customs" within the meaning of section 10 of Act VIII of 1894 so as to entitle the buyer under that section to a reduction of an equivalent part from the price which he has contracted to pay. *Probhudas v. Ganidada*, (1925) I.L.R., 52 Calc., 644 (P.C.); 52 I.A., 196, followed.

Judgment of the High Court (I.L.R., 47 Mad., 222) reversed.

APPEAL (No. 118 of 1924) from a decree of the High Court in its Appellate Jurisdiction (September 12, 1923) affirming a decree of that Court in its Original Jurisdiction (August 14, 1923). Between December 14 and 19, 1922, the respondent under five written contracts bought from the appellant, since deceased, a large

* Present: VISCOUNT DUNEDIN, MR. AMERU ALI and SIR ARTHUR CHANNELL.

quantity of Java sugar out of a consignment then shortly expected to arrive in Madras, at certain rates for delivery in Madras "ex-godown." On December 22, 1922, a notification was issued by the Governor-General in Council under Act IV of 1916 whereby the tariff value of sugar was reduced from Rs. 26-4-0 to Rs. 16-4-0 per cwt. The ship did not arrive at Madras until December 31, 1922. The effect of the notification was that the appellant paid for duty upon the sugar sold to the respondent Rs. 10,625 less than he would have had to pay if the delivery had taken place before the alteration of tariff value. The respondent claimed to deduct that amount from the contract price, as being a reduction in the "duty of customs" within the meaning of section 10 of the Indian Tariff Act (VIII of 1894). Having to pay the full price in order to obtain delivery he brought a suit in the High Court to recover Rs. 10,625.

The trial Judge (COUTTS TROTTER, J.) made a decree in favour of the plaintiff, and that decree was affirmed on appeal by SCHWABE, C.J., and KRISHNAN, J. The appeal is reported in I.L.R., 47 Mad., 222.

Sir G. Lowndes, K.C., and *E. B. Raikes* for the appellant.—The decision of the Judicial Committee in *Probhudas v. Ganidada*(1) is conclusive in the appellant's favour. Upon the argument of that appeal, the decision now under appeal was cited to the Board.

E. L. Thornton for the respondent.—The decision in *Probhudas v. Ganidada*(1) is distinguishable. The judgment there was based upon the fact that both parties to the contract knew that there would be a decrease of tariff which would affect the sum payable for duty. In the present case it was anticipated that

(1) (1925) I.L.R., 52 Calc., 644 (P.C.); 52 I.A., 196.

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the ship would arrive before the notification was made, and the parties contracted on that basis.

Sir G. Lowndes, K.C., in reply.—In *Probhudas's* case (1) it was held in terms that a change in tariff value was not a change in the duty within section 10 of Act VIII of 1894. In the absence therefore of an express provision in the contract the respondent was entitled to no deduction.

VISCOUNT
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The JUDGMENT of their Lordships was delivered by VISCOUNT DUNEDIN.—Their Lordships are of opinion that this case is clearly governed by the judgment of their Lordships' Board in *Probhudas v. Ganidada*(1).

They will, therefore, humbly advise His Majesty that the appeal should be allowed, the decrees of both Courts below set aside, and judgment entered for the appellant with costs here and in the Courts below.

Solicitors for appellant: *T. U. Wilson & Co.*

Solicitors for respondent: *R. A. Newton.*

A.M.T.

(1) (1925) I.L.R., 52 Calo., 644 (P.C.); 52 I.A., 196.

APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao and
Mr. Justice Srinivasa Ayyangar.*

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL (DEFENDANT), APPELLANT,

1926,
January 28.

v.

SRI RAJA PARTHASARATHY APPA RAO SAVAI
ASWARAO BAHADUR ZAMINDAR GARU
AND 3 OTHERS (PLAINTIFFS), RESPONDENTS.*

Grant of unsettled village by East India Company, with restraint on alienation—Validity of restraint—Crown Grants Act (XV of 1895) applicability of, to the grant—Sec. 8 of the Madras Regulation XXV of 1802.

A village not permanently assessed was granted by the East India Company in 1843 to the predecessor of the plaintiff with a condition restraining its alienation without the previous sanction of the Government.

In a suit by the plaintiff whose request to the Government for permission to alienate was refused, praying *inter alia* for a declaration that the condition restraining alienation was void,

Held (1) that the grant was in effect one made by the Crown and therefore the restraint was valid and not void; and

(2) that as the village was not permanently assessed under Madras Regulation XXV of 1802, section 8 of that Regulation which gives the holders of sanads under that Regulation absolute powers of alienation was inapplicable.

Held further that the Crown Grants Act (XV of 1895) which enacts that grants by the Crown of estates unknown to the law are not invalid is not *ultra vires* of the Indian Legislature.

Held also that though the formal assumption of sovereignty in India by the Crown was only in 1858, yet the possessions were, as provided by the previous Charter

* Appeal No. 142 of 1921.

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Acts, held by the East India Company only as the delegates of and in trust for the Crown.

Held accordingly by VENKATASUBBA RAO, J., that the Crown Grants Act which is retrospective in operation and which is applicable to all grants made by the Crown was applicable to this grant also.

Held by SRINIVASA AYYANGAR, J., that the imposition of the clause was within the powers of the Crown even before the Crown Grants Act which is only declaratory and not retrospective.

APPEAL against the decree of K. SAMBASIVA RAO NAYUDU, Subordinate Judge of Bezwada, in O.S. No. 51 of 1918.

The facts are given in the judgment.

Government Pleader (*C. V. Anantakrishna Ayyar*) for appellant.

P. Venkataramana Rao for respondent.

JUDGMENT.

VENKATA-
SUBBA RAO, J.

VENKATASUBBA RAO, J.—The suit which has led to this appeal relates to a village known as Ravicherla. It was granted to the ancestors of the plaintiffs by a sanad issued by the Government, dated the 2nd of May 1843. The grant contains two restrictive clauses one relating to the right of succession which provides that Ravicherla shall be held in perpetuity by the grantees and only such of their heirs could take as the Government might recognize for this purpose from time to time. The second clause, the one with which we are concerned in this appeal, imposes a restriction on the right of alienation, no transfer of the village being valid unless the previous consent of the Government has been obtained authorizing such transfer.

The plaintiffs agreed to sell the property and the proposed vendee having regard to the second provision referred to above desired them to obtain the consent of the Government to the sale. The plaintiffs accordingly requested the Government to give consent but the

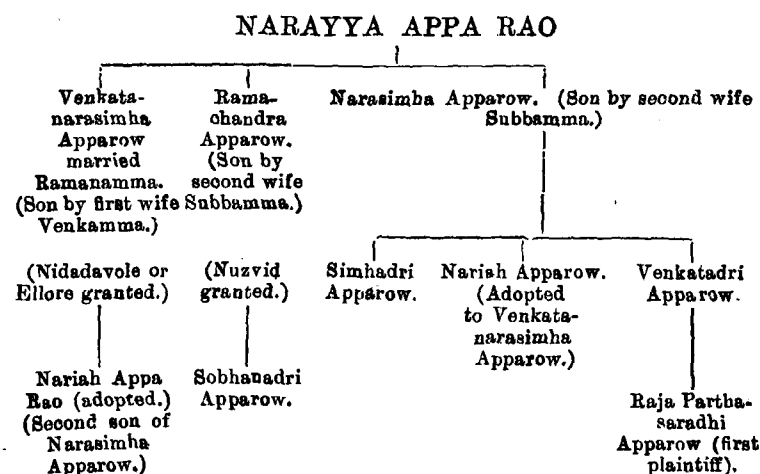
Government declined to do so. The suit was then laid against the Secretary of State and the plaintiffs allege that the village though it was nominally granted by the Government, was really acquired as a result of a family settlement, the Government merely acting as mediators in the matter. The plaintiffs urge that in any event the clause in question imposing a restraint on alienation is void.

The Subordinate Judge agreeing with the plaintiffs gave them a decree and the Secretary of State has filed this appeal.

The first point to be considered is, was the village granted to the plaintiffs' ancestors by the Government or did they acquire it as a result of a family arrangement?

The facts that have to be considered in connexion with this point mark an important epoch in the history of Nuzvid Zamindari.

The following genealogy will serve to explain the facts of the case :—



Prior to 1800 A.D. the estate had been transferred to Government management and in that year the Government determined to restore the zamindari and

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sanads were issued in 1802 to Venkatanarasimha Appa Rao for the parganas in the Ellore Sirkar now constituting the Zamindari of Ellore or Nidadavole and to Ramachandra Appa Rao for the parganas in the Kondapalli Sirkar now constituting the Zamindari of Nuzvid. Narasimha Appa Rao, the youngest of the three brothers, was then a minor and for some reasons which it is unnecessary to go into, his rights were completely overlooked.

This, as might be expected, led to litigation which finally ended in the decree of the Sudder Court in 1819 which upheld the division of the zamindari in 1802 as an act of State with which the Courts of Law would not be justified in interfering. Narasimha then attempted to carry the matter to the Privy Council but his circumstances did not permit him to do so and he at that juncture appealed to the Government.

The Collector Mr. G. E. Russell on the 16th of March 1820 wrote to the Board of Revenue pointing out that it would have been more proper if at the division of the zamindari a pension had been secured to the claimant and suggesting that the Government might give him some allowance for his maintenance. The Collector also referred to the fact that Narasimha was head and ears in debt and thus observed:

"That the good intentions of the Government will therefore be frustrated unless anything which they may give him shall be protected from the fangs of his creditors."

The Board of Revenue were averse to adopting the suggestion made by the Collector and the matter had to be finally settled by the Government. Sir Thomas Munro, the Governor of Madras, strongly felt that the claim of Narasimha was substantially just and that he was deprived of his lawful rights by the action of the subordinate officers of the Government and that he

failed to get adequate relief from the established Courts of Law.

"The Governor in Council" so runs the Government Order, dated the 13th February 1821, "cannot entertain the idea that it is befitting for the Government to look on with passive indifference at a claim like this or at the fate which attends it in Courts of Law."

The Government recognized that though they were under no legal liability they had in the matter a moral responsibility. I feel tempted to quote the very words:

"The Government are answerable for the injury which he has sustained. They are answerable also for the ruin in which, owing to the ambiguity in which they left his claims to the course which their judicial institutions led him to adopt, he has been involved. They are answerable for these wrongs not before a Court of Justice, any more than they would have been if, in consequence of similar oversights, the country had been thrown into disorder and the lives and property of its inhabitants exposed to hazard. But their responsibility is a matter of reason and of conscience and should induce them to do all that is practicable to compensate for the wrongs which have been committed."

The Government having issued this order advised the Collector to prevail upon the Zamindars of Nidadavole and Nuzvid to make a settlement with the claimant and intimated that if they failed to take a reasonable view the Government might be constrained to adopt measures to give effect to what must be presumed to have been their intention at the time of the grant of the sanads.

These events bring us up to 1821 and the material before us is silent as to what transpired between 1821 and 1829.

It would appear that by this time both the estates of Nidadavole and Nuzvid came under the Court of Wards, both Venkatanarasimha and Ramachandra having died. Venkatanarasimha died having adopted Narayya and

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Ramachandra died leaving an only son Sobhanadri. No settlement was effected and the Government resolved to adopt drastic measures and on the 10th of April 1829 requested the Sudder Court to draft a Regulation revoking the sanads of 1802. Accordingly Regulation IV of 1829 was passed on the 23rd of June declaring the sanads of 1802 to be void and empowering the Government to issue fresh sanads granting Narasimha a third of the whole estate. The Board of Directors did not approve of the Regulation and its operation was therefore suspended. This takes us to the year 1829.

From 1829 to 1835 there is again a gap, but the crucial events are those that happened subsequent to this period. The facts that have been so far narrated are important only as leading up to the events which I shall now set forth.

The contention of the plaintiff is that Ravicherla fell to his ancestors in a family settlement between the representatives of the three branches, that though the village was acquired ostensibly under a grant from the Government, the source of title was in fact not the grant but the family settlement and that therefore the restrictive covenants in the grant are void and of no effect. I shall show that this contention is utterly unfounded. There is not the slightest doubt that Ravicherla was settled upon the plaintiff's ancestors by the Government and that the grant took the final shape of the sanad, dated 2nd May 1843.

Narasimha died and his minor sons Simhadri and Venkatadri had come of age. Narayya and Sobhanadri had also taken possession of their estates of Nidadavole and Nuzvid, respectively. In 1835 the then Governor Sir Frederic Adam brought his personal influence to bear upon the Zamindars Narayya and Sobhanadri and got

them to consent to pay Narasimha's sons Rs. 600 a month for their maintenance. On the 4th February 1835 two agreements were entered into, one relating to the debt due by Nidadavole to Nuzvid which is for the present irrelevant and the other agreement related to three matters :

(1) There was a debt due by Ramanamma the widow of Venkata Narasimham to the Nuzvid Estate. Sobhanadri agreed to give this up.

(2) Narayya similarly waived his right against Sobhanadri in respect of properties that belonged to Venkamma the mother of the late Venkata Narasimha.

(3) Narayya and Sobhanadri agreed to pay the sons of Narasimha Rs. 600 a month, Rs. 400 to be paid by Narayya and Rs. 200 by Sobhanadri.

To these agreements the two Zamindars alone were parties and though a provision was made in favour of the sons of Narasimha they did not execute the agreements. The documents filed in the case make it very clear that this arrangement was brought about by the direct intervention of His Excellency the Governor (in Exhibit F both Narasimha's sons and the Zamindars say that these agreements were entered into "in the presence of the Right Honourable the Governor").

So far it will be seen that there was no reference to Ravicherla. Under orders of the Governor, these agreements were on the 6th of February 1835 sent on to the Collector. In the letter of that date, Exhibit D, there is a reference to the fact that the Governor personally expressed to Simhadri Appa Rao his approbation of the provisions made for the benefit of Narasimha Appa Rao's sons. In the reply of the Collector that followed, dated the 4th March 1835, we find for the first time a reference to Ravicherla. The matter was raised in this way. Narayya by the agreements referred to waived his rights to the properties of Venkamma in favour of Sobhanadri.

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Ravicherla was one of the properties that belonged to Venkamma. The Collector asked—would not the surrender in favour of Sobhanadri enure also for the benefit of the sons of Narasimha? The question was raised and it was left open. Mr. Venkataramana Rao the learned vakil for the plaintiff with great resourcefulness and ability argued that this showed that Ravicherla fell as a result of the agreement to Simhadri. But a perusal of the documents will show, as I have said, that this contention is quite unsound. The Collector merely stated what he believed to be the fact and did not speak from personal knowledge. The question regarding Ravicherla was finally settled by the Government Order, dated the 10th of November 1836.

It says :

“ The Right Honourable the Governor in Council observes that at the time arrangements were made for adjusting the disputes between the Zamindars of Nidadavole and Nuzvid, it was distinctly understood and repeatedly explained to them that the Mokhasa village of Ravicherla had lapsed to Government.”

I have already pointed out that His Excellency the Governor was personally present and took part in the arrangements and this minute clearly records that it was distinctly understood that Ravicherla was the property of the Government. If this be so Ravicherla could not have passed to Sobhanadri under the arrangements referred to.

The matter is made even clearer by the subsequent proceedings. The sons of Narasimha were sent for by the Collector and they refused to accept the terms offered by Nidadavole and Nuzvid. Some months were thus wasted. They again appeared and expressed their willingness to agree to the terms, provided the Government granted to them for their support three small villages. This was before the minutes of consultation,

dated the 10th November 1836. After the Government had decided that Ravicherla had lapsed to them, the Collector conceived the idea of recommending to the Government the desirability of conferring upon the sons of Narasimha the villages of Ravicherla, Madaca and Rudravaram. Then after a short interval the Collector suggested Sriramavaram in lieu of the villages of Madaca and Rudravaram. These events must be carefully followed in their chronological order. Exhibit E the letter of the Collector, dated the 23rd of May 1837, sets forth very clearly the facts which I have referred to. I will quote three passages from it :

(1) “ The terms on which he grounded his acquiescence were that three small villages might be bestowed upon him for his support on the part of the Government independent of the pension to be granted by his brothers of Nuzvid and Nidadavole.

(2) Shortly after this occurred, the right to the village of Ravicherla became a subject of enquiry and was ultimately assumed and appropriated by Government under their orders, dated 10th November 1836, and the idea was then awakened of recommending to Government the propriety of conferring it together with the villages of Madaca and Rudravaram upon him.

(3) In making this recommendation I am perfectly aware that Simhadri Appa Rao will be indebted to the beneficence of Government solely for it not to any personal or private claim but to the operation of those feelings of sympathy which influences Government in all its acts.”

Can there be any doubt after this, that before even the idea of settling Ravicherla came to be conceived, it had been unequivocally declared that the village was the property of the Government?

The matter, however, does not stop here. The two zamindars as well as the two sons of Narasimha appeared before the Collector in September 1837, that is about four months after the letter of the Collector referred to above. Simhadri gives a writing, dated the

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15th September, and Venkatadri, the other son of Narasimha, a writing, dated the 23rd September. Simhadri says :

"It is necessary that I should give my unconditional and unreserved agreement in accepting the said allowances, when your (Collector's) recommendation in my favour would be taken into consideration."

What is the recommendation that is referred to? It is obviously the grant of Ravicherla and Sriramavaram by the Government. Again Simhadri says :

"I fearlessly accept the terms proposed by the Board, submitting in every respect to such terms alone as Government in their justice may be pleased to extend to me."

Venkatadri in the writing signed by him, agreed to the terms contained in his brother's letter.

The four letters signed by the zamindars and the sons of Narasimha formed enclosures to the communication of the Collector, dated the 5th October 1837, to the Board of Revenue. The Collector says :

"I have pledged myself (without which I could not have effected the present arrangement) that Government, to mark their satisfaction at the good understanding which has taken place between the brothers, will make over to Simhadri Appa Rao the villages of Ravicherla and Sriramavaram, alluded to in my former letter under date the 23rd of May last."

It is impossible to contend in the face of this very clear evidence that Ravicherla was not the property of the Government at the time of the grant.

I may, however, trace the subsequent history of these negotiations. On the 17th of November 1837 the Government decided finally to grant these villages to Narasimha's son (see Exhibit G). The Board directed the Collector to insert in the sanads conferring on them these two villages, a proviso that the lands should not be liable for any of their debts. The Governor in

Council approved of this suggestion of the Board of Revenue. Simhadri and Venkatadri desired that the exemption should extend also to the allowance agreed to be paid by Nidadavole and Nuzvid. The officers of the Government could not accede to their wishes because in the words of Exhibit IV, dated the 20th September 1838, the allowances "do not immediately emanate from the Government." In the enclosure to Exhibit IV Simhadri referred to Ravicherla and Sriramavaram as villages conferred by the Government and requested that the clauses should be inserted in the sanad. The contrast is very marked when he referred to the allowance as payable by Nidadavole and Nuzvid in regard to which also he desired that restrictive clauses should be inserted. It is unnecessary to refer to the further correspondence in the matter. Exhibit J is the sanad, dated 2nd May 1843. This refers to the Government Order, dated the 10th November 1836, by which Ravicherla reverted to the Government. There is further a reference to the arrangement, dated the 4th February 1835, and it is clearly stated that at that time there was "a distinct understanding and repeated explanations," in pursuance of which Ravicherla lapsed to the Government. This sanad clearly states also that it was the Government that settled the village upon Simhadri and Venkatadri.

There can therefore be no doubt that it was by reason of the grant that the ancestors of the plaintiff acquired Ravicherla and that the source of their title is not a family settlement between the representatives of the three branches. The question does not admit of doubt, but owing to the very strenuous argument addressed to us on this subject I have dwelt on this point at this length.

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This disposes of the question of fact raised in the case. I have come to the conclusion that the Subordinate Judge's finding is wrong and must be reversed.

Then remain the points of law that have been raised and I shall now deal with them.

It is first contended that the restrictive covenant in question is void. This would be so under the general law, but grants from the Crown are governed by the Crown Grants Act (XV of 1895). Doubts having arisen as to the power of the Crown to impose restrictions upon grants made by it, the Act was passed to remove such doubts.

Section 2 makes the Act have a retrospective effect. It says :

"Nothing in the Transfer of Property Act shall . . .
be deemed ever to have applied to any grant . . .
heretofore made . . . by or on behalf of Her Majesty
the Queen-Empress or Her heirs or successors . . . but
every such grant shall be construed . . . as if the said
Act had not been passed."

Section 3 enacts :

"All . . . restrictions . . . contained in
any such grant shall . . . take effect according to their
tenor, any rule of law . . . to the contrary notwith-
standing."

I am here quoting only the material portions of the sections.

The contention advanced is, that the grant was not made on behalf of the Crown and that the Act will not therefore apply to it. The argument is put in this way. In 1858 the Sovereignty of India was for the first time assumed by Her Majesty; it had previously vested in the East India Company. The grant having been made in 1843, it could not be deemed to have been made on

behalf of the Crown. If it had not been made on behalf of the Crown, the Crown Grants Act is inapplicable.

Let me examine if this contention is sound. At the time of the grant, the Charter Act that was in force is that of 1833 (3 & 4 Will. IV, Chap. 85). I shall first take the preamble. It recites that the East India Company have consented that all their rights in the territories and territorial and commercial assets and property shall be placed at the disposal of parliament. It further recites that it is expedient that the territories now under the Government of the said Company be continued under such Government, *but in trust* for the Crown, discharged of all claims of the Company to any profit therefrom to their own use. The first section of the Act gives effect to the intention expressed in the preamble.

If the Government by the East India Company was thus in trust for the Crown of the United Kingdom, does it not follow that the grant made by the Company should be deemed to be on behalf of the Crown? But the plaintiff's learned vakil objects that a trustee does not act "on behalf of" his beneficiary and the act of the East India Company cannot therefore be deemed to be an act on behalf of the Crown. The answer is that the word "trust" is not used in the Charter Act in its strict technical sense and it will be far-fetched to hold that because the word used is "trust", therefore the law of trusts as strictly understood should govern the relations of the Company and the Crown. This could not be the intention of the legislature and I am unable to accept the argument.

In this connexion, I may notice another argument advanced by the plaintiff's learned vakil. He contends that under section 1 of the Charter Act of 1833, what is vested in the Company in trust for His Majesty are

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"the lands and hereditaments, revenue, rents and profits of the said Company" and not "the territorial acquisitions and revenues." This objection is not in my opinion sound; even granting it is, it does not avail the plaintiff; for, what was granted is, in any event, the land of the Company.

Is the objection then sound? I may now glance at the provisions of the earlier and later Charter Acts. In the Act of 1853 (16 & 17 Vict., Ch. 95) the first section provides that all the territories in the possession and under the Government of the East India Company shall continue under such Government in trust for Her Majesty. The word "continue" is in this connexion significant.

The Act of 1853 (21 and 22 Vict., Ch. 106) refers in similar terms to the Government of the territories being vested in the Company in trust for Her Majesty. It is by this Act that the Government is transferred to Her Majesty. The statute makes it clear that the rights previously vested in and exercised by the Company in trust for the Crown, shall thenceforth become vested in and be exercised *in the name of Her Majesty*. This shows beyond all possibility of doubt that it was the Crown that was previously the sovereign and that the rights were exercised by the Company for the Crown but that subsequent to the passing of the Act the Crown directly exercised these rights and not through the medium of the Company.

The Royal Titles Act of 1876 (39 Vict., Ch. 10) has been relied on by the plaintiff. It is urged that it refers to a transfer of Government and the word transfer implies that the Crown did not previously possess sovereign rights. It is impossible to uphold this contention, for the very section referred to by the plaintiff's learned vakil re-affirms the position that previous to 1853

the Government of India had vested in the East India Company in trust for Her Majesty.

Now turning to the earlier Charter Act of 1813 (53 Geo. III, Ch. 155) we find that the sovereignty of the Crown was clearly emphasized and it is affirmed that the territorial acquisitions are under the Government of the Company "without prejudice to the undoubted sovereignty of the Crown."

The view I have taken derives support from the observations of the Judicial Committee in *The Secretary of State in Council of India v. Kamachee Boye Sahaba*(1); their Lordships refer to the powers of the East India Company as delegated powers of sovereignty and at page 540 they refer to the Company as the delegate of the British Government.

In *Haji Mahamad Nasurudin Khan Bahadur v. Eagambara Mudaly*(2), SUBRAHMANYA AYYAR and BENSON, JJ., assumed (the question was not raised) that the Crown Grants Act applied to a grant of 1848. In *Sheo Singh v. Raghubans Kunwar*(3) there is no discussion but the Act was held to apply to a grant of 1861.

The contention raised is in my opinion unsound and must be rejected.

The next contention of the plaintiff is, that the reference to Her Majesty the Queen, in the Crown Grants Act, as "The Queen Empress" indicates that the Legislature intended that the Act should apply only to grants subsequent to 1876 when that title was assumed by Her Majesty. This distinction is too refined and unsubstantial and I cannot possibly accept it. Long previous to the Crown Grants Act, the title of the Queen Empress had become firmly established and it seems unsafe to found an argument on the mere fact that in

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(1) (1859) 7 M.I.A., 478.

(2) (1907) 2 M.L.T., 55.

(3) (1906) I.L.R., 27 All., 684 (P.C.).

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referring to Her Majesty the words "Queen Empress" are added. It would be both usual and natural to speak of Her Majesty as the Queen Empress and much stronger ground, I should imagine, must be shown, for limiting the scope of the Act in the way suggested.

The next contention advanced by the plaintiff's learned vakil is, that the Crown Grants Act is *ultra vires* of the Indian Legislature.

It is urged that the Crown cannot create an estate unknown to the law and that the estate created by the grant is of this description. Mr. Anantakrishna Ayyar, the learned Government Pleader, answers that this is not an estate unknown to the ordinary Law, and relies upon the passage at 487 of Vol. VI, Halsbury's Laws of England :

"A grant by the Crown may contain a condition against alienation."

His second answer is, that this estate is in any event not unknown to the Indian Law and in support of this he cites *Gulabdas Juggivandas v. The Collector of Surat* (1). In the view I have taken it is unnecessary to deal with these points. Granting that the Crown cannot create an estate of this kind, the Crown Grants Act expressly confers this power upon the Crown and this leads to the consideration of the question whether the Crown Grants Act is *ultra vires* of the Indian Legislature.

Section 22 of the *Indian Council's Act*, 1861, enacts that the Governor-General in Council shall have power to make laws for all persons and for all places and things in the Indian territories. But the plaintiff relies upon the proviso that the Governor-General in Council shall not have the power of making any laws which may affect

(1) (1879) I.L.R., 3 Bom., 186 (P.C.).

the authority of Parliament. How does the Crown Grants Act affect the authority of Parliament? The prerogative of the Parliament remains unaffected and notwithstanding the Act, it can create estates unknown to the law. Further, if the Parliament itself could have passed the Statute, why should not the Indian Legislature created by an Act of the Imperial Parliament, have the same power? As observed by their Lordships of the Judicial Committee in *Empress v. Burah*(1), the Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it and when acting within the limits prescribed, it has plenary powers of legislation, as large, and of the same nature as, those of Parliament itself.

See also *Hodge v. The Queen*(2) and *Powell v. Apollo Candle Co.*(3).

The contention therefore that the Act is *ultra vires* fails.

It is lastly urged that the sanad contravenes the provisions of section 8 of Madras Regulation XXV of 1802, which provides that proprietors of land shall be at free liberty to transfer their rights without previous consent of the Government. But this Regulation does not apply, because, in the first place, there was no permanent assessment of the land revenue, no revenue having been imposed at all in regard to this grant; secondly the Government did not purport to act under the Regulation nor was the intention of the parties that the sanad should be issued under it. The fact that the sanad was granted after the date of the regulation does not necessarily make it a sanad issued under the regulation. And the mere use of the words "Sanad-i-milkiyat-i-istimrar" does not show that the regulation governs

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(1) (1879) I.L.R., 4 Calc., 172 (P.C.).

(2) (1884) 9 App. Cas., 117. (3) (1885) 10 App. Cas., 282.

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the sanad; See *Secretary of State v. Raja of Venkata-giri*(1); thirdly the form of the grant is not that prescribed for sanads under the regulation. Why should a grant then not made under the regulation, be by a fiction treated as made under it and why should it be assumed by so treating it, that provisions of the regulation were deliberately infringed?

I therefore hold that this contention also is untenable.

As I have said in an early part of this judgment, the question that has been raised is in regard to the validity of the covenant imposing a restriction on alienation. No argument has been addressed to us in regard to the other restrictive covenant as no question bearing on it arises in the case and I do not desire (and indeed it is unnecessary to do so) to say anything at present regarding that covenant.

I have now dealt with all the points urged on behalf of the plaintiff. As I have rejected all his contentions, the appeal must be allowed and the suit dismissed with costs throughout.

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SRINIVASA AYYANGAR, J.—My learned brother and myself have practically heard this appeal twice over and after giving the case my very careful consideration, I have also come to the conclusion that the appeal should be allowed.

The appellant is the Secretary of State for India in Council. He was the defendant in the Original suit from which this appeal arises instituted by the present Raja of Bhadrachalam and his sons as plaintiffs as the owners of a village called Ravicherla and situate in Kistna district. The action was a curious one. The reliefs prayed for were that it should be declared that the plaintiffs were

absolutely entitled to the village of Ravicherla and to dispose of the same, that the sanad issued in respect of the said village should be construed and it be declared that clause 3 of the same is void, illegal and invalid and not binding on the plaintiffs, that even if it were held that the consent of the Government is necessary (for the plaintiffs disposing of the said village), the Government have no right to withhold their consent arbitrarily.

It may be convenient to dispose of the claim put forward in the last of the prayers above referred to. On the face of it, it is merely an alternative prayer and it is to the effect that if the Court should find that clause 3 is not invalid or illegal and that the same was binding on the plaintiffs, still it should be declared that the Government had no right arbitrarily to refuse to consent to any alienation that may be attempted to be made by the plaintiffs. The suggestion of the plaintiffs with regard to this matter must obviously be that the Government was under some sort of obligation to exercise a proper discretion in according or refusing the permission that might be applied for by the plaintiffs to alienate the property and that in declining to accord such permission as stated in paragraph 8 of the plaint without assigning any reasons the Government acted arbitrarily and therefore illegally. No arguments were addressed to us and no grounds advanced or referred on behalf of the plaintiffs-respondents for establishing that the Government was under any such obligation not to exercise its discretion arbitrarily or that they were bound to give any reasons for declining to accord the permission applied for. The third issue in the case was:

“Whether the Government acted arbitrarily in not stating the reasons in refusing sanction for the alienation and if so what is the effect thereof.”

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This issue was found against the plaintiffs by the lower Court, and that finding was not attacked in the argument before us. The Subordinate Judge, however, found the other issues in the case in favour of the plaintiffs and granted a decree declaring the right of the plaintiffs to alienate the property without any previous permission of the Government. It is against this decree that the appeal has been filed on behalf of the defendant, the Secretary of State for India.

I have found some difficulty in understanding the judgment of the learned Subordinate Judge in the Court below. In paragraph 12 of his judgment he states thus :

“ If the grant is to be considered as having been made by the Government, there is nothing illegal or invalid or void and inoperative in the conditions imposed by the Government.”

This view would seem to be qualified by him in the next paragraph of his judgment where he states thus :

“ The village of Ravicherla was held under sarva mukhasa tenure by Venkamma. The mere resumption of that village by Government cannot alter its nature. In the hands of the Government it was an absolute estate, one on an absolute and permanent tenure. It was made over to the plaintiffs' ancestors under Exhibit “ J ” and the restrictions imposed were intended as a cloak to shield the properties from the fangs of the creditors at the time but not to limit the nature of the estate given over. The plaintiffs hold the village on an absolute permanent tenure.”

Two arguments would seem to be indicated in the above extract from the learned Subordinate Judge's judgment and these are (1) because the village had been granted on sarva mukhasa tenure, even in the hands of the Government the village was only sarva mukhasa and the Government had no right to regrant it to any other person except as a sarva mukhasa, that is to say, according to the Subordinate Judge, on an absolute and permanent tenure, and (2) that the condition in respect

of alienation was not really intended to be operative as between the grantors and the grantees but was intended to be merely a cloak to shield the properties from the fangs of the creditors. There are obvious difficulties in the way of accepting either of these views. In fact I did not understand the learned vakil for the respondents to argue for either of these two positions. There is absolutely no warrant for supposing that even after resumption any conditions or characteristics of the tenure on which it had been previously granted continue attached to any property. And I further fail to see on what grounds the learned Subordinate Judge supposes that even after resumption, the absolute owner of property, as he recognized the Government of the day to be, had no right to make a fresh grant of the property to some other person on a different tenure or on terms and conditions different to the previous grant. Sarva mukhasa tenure is supposed by the learned Subordinate Judge to be absolute property, but apparently it was of a resumable nature. I can see no principle or reason for any of the suppositions made by the learned Subordinate Judge with regard to this aspect of the case. As to the second point above referred to, the view that the learned Subordinate Judge took would appear to be that clause 3 in the sanad restraining alienation by the grantee except with the permission previously obtained from the Government was not really intended to be operative as between the parties to the grant and was to be in the grant merely as a cloak to save the property from the fangs of the creditors. It is one thing to say that a particular clause in a document was put in with the object or purpose of saving the property from the fangs of creditors and another altogether to say that it was never intended to be operative or binding between the parties. Assuming that a condition was inserted in

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a grant with a particular object it does not follow that the condition is valid or operative only to the extent of securing or subserving the particular object had in view. It cannot be open to parties to a document to contend that in spite of the clear terms of a particular clause in a document such clear terms should be allowed to be controlled or modified by the avowed object with which the clause was inserted. It is no doubt true that the clause appears to have been inserted in the sanad with the primary object of saving the property from the creditors of the grantees; but the restriction imposed was not that it was incapable of being taken, sold or otherwise dealt with in execution of a decree or at the instance of creditors but that the grantees should have no power to alienate the property. It is therefore clear that what was done was to secure the intended object only by restraining the power of voluntary alienation by the grantees and obviously therefore to protect the property not only from the creditors but to protect the grantees against themselves. In these circumstances I cannot agree with the learned Subordinate Judge that the clause was not intended to be operative as between the grantors and the grantees.

As regards the theory of the clause being a mere cloak, I must take it that what the learned Subordinate Judge means is that the clause being void and inoperative was intended merely as a cloak, that is, as something calculated and designed to conceal the truth, namely, the real alienability of the subject matter of the grant. It is only therefore, if, as a matter of fact, the clause restraining alienation was invalid and the subject of the grant was really alienable that the explanation of the clause as a cloak would be of any value. The main question therefore for determination in this appeal is whether the condition against alienation contained in

clause 3 of the sanad is valid and binding on the grantees and this indeed was the question with regard to which the learned vakil for the respondents addressed all his argument. It was put in two ways. The first contention might not inaccurately be described as an argument on the facts. It was said that though there was a formal sanad given by the United East India Company, the Government for the time being, to the grantees the ancestors of the plaintiffs, still, the plaintiffs' ancestors did not obtain the property under or by virtue of the grant but the property was either their own, and if not, was obtained by them as the result of a family agreement made by and between their branch and the other branches of their family. Very able and ingenious was the argument advanced by the learned vakil for the respondents on this aspect of the case. The contention itself is formulated by the plaintiffs in paragraphs 4 and 5 of their plaint in the following terms:

"Sree Raja Venkatadri Appa Rao Bahadur and Sree Raja Simhadri Appa Rao Bahadur, the father and uncle, respectively, of the first plaintiff herein were entitled to a share in the Nuzvid Zamindari. At the original partition of the said estate which took place in or about 1770 they were excluded by mistake. The 1st plaintiff's father and uncle pressed their claims to the said zamindari. The then Government of Madras interceded and in or about 1835 a settlement was arrived at and in and by which it was *inter alia* agreed that the village of Ravicherla should be granted to the plaintiffs' father and uncle on an absolute and permanent tenure. In pursuance of the said settlement in or about 1840 the said village was granted to the 1st plaintiff's father and uncle on an absolute and permanent tenure and put in their possession. Three years thereafter on or about 2nd May 1843 a Sanad-i-milkiyat-i-istimrar was granted in respect of the said property."

The real import of this contention is, I take it to be, that the plaintiffs' family obtained the property not from the Government, that the Government had not the

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property in them to give it away, that it was property which was at any rate in the order and disposal of the other branch of the plaintiffs' family and that the plaintiffs' branch of the family obtained it not as the result of any grant by the Government but as the result of a family arrangement between the different branches of their family and that therefore the sanad which was granted in respect of the village of Ravicherla subsequently by the Government and accepted by the plaintiffs' branch of the family was not the real source of the plaintiffs' title to the property, was a mere sham deed and should not be looked to for the purpose of determining the plaintiffs' rights. If on the facts I should have been disposed to agree with the contention, it might become necessary to consider whether assuming that the plaintiffs' predecessors obtained the property as the result of a family arrangement between them and the other branches of their family, still the acceptance by them of the sanad in question from the Government could affect their rights to the village and if so in what manner and to what extent, and whether in that view the clause in question would or would not be binding on them. But in my view, it is unnecessary to consider that question, because after a careful consideration of all the documentary evidence in the case, that is to say, the only evidence before us, it is clear that even on the facts the contention put forward on behalf of the plaintiffs-respondents could not be accepted. For some reason into which for the purpose of this appeal it is unnecessary to enquire, the Nuzvid Zamindari was at the time of the permanent settlement early in the last century settled by the then Government not on all the branches of the family but on two of its branches alone, excluding the branch to which the plaintiffs belonged. In consequence of this, the plaintiffs' branch of the family launched on a protracted but

unsuccessful litigation for the purpose of recovering from the other branches of their family their share or alleged share in the zamindari. After, however, all this litigation was over, it appears to have been realized by some of the authorities of the Government at the time that the original settlement of the zamindari to the exclusion of the plaintiffs' branch of the family was due to some mistake and that something should be done to repair the injustice, if only in consideration of the helpless condition in which the plaintiffs' branch of the family then was. We thus find in Exhibit III that Mr. Russell, Collector of Masulipatam at the time, addresses the Board of Revenue in the following terms :

"Throughout the whole of the correspondence which passed on this subject there does not appear to be the slightest trace of it ever having been proposed or intended, to grant a part of the lands to the petitioner ; and I confess it seems to me that the only possible blame which the Government can take to themselves for the manner in which they disposed of the country is, the omission to secure the petitioner a pension similar to those assigned to some others who were in like situations. That this omission has involved him in great distress is certain and it is no less true that the now established denial of his having had any hereditary right to the lands must for ever preclude him from obtaining relief from his brothers by declaring the zamindari to have been acquired by them. Under these circumstances therefore and more particularly as my official situation rendered it my duty to oppose his claim in its progress through the Courts, I shall feel happy if my present address should be the means of inducing the Government to give him some allowance for his maintenance. But I should not omit to mention that the facility with which the unfortunate decree of the Provincial Court enabled him to borrow money has plunged him over head and ears in debt to persons who hoped to profit by his obtaining a share of the country and that the good intentions of the Government will therefore be frustrated unless anything which they may give him shall be protected from the fangs of his creditors."

The Board of Revenue, however, as will be seen in Exhibit II, did not take a favourable view of the

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recommendations of the Collector, because they still believed that though not in the zamindari yet in the other properties of the joint family the plaintiffs' branch might have a right and that in any case to seek to make a provision for the plaintiffs' branch of the family might constitute a dangerous precedent with respect to the members of the zamindari all over the country. But the Governor in Council at the time would appear to have taken a refreshingly humane view of the situation, as will be seen at the concluding portion of Exhibit "A," where the following passage appears :

"The Governor in Council cannot entertain the idea that it is befitting for the Government to look on with passive indifference at a claim like this or at the fate which attends it in courts of law. It is not sufficient for the Government that, in the manner of restoring the zamindari they exercised a discretion which nobody had power to question, that no law has been infringed in the treatment which Narasimha Appa Rao has met with and that, if he had received better legal advice, the ruin in which he has been involved might have been less complete. The Government must not merely let the law take its course, but must exercise a paternal care over the people. It has to preserve their affections as well as its own authority. In reviewing the circumstances of the case under consideration, it appears clearly that Narasimha Appa Rao has been cut off from the provision to which he had an equitable claim. The Government are answerable for the injury which he has sustained. They are answerable also for the ruin in which, owing to the ambiguity in which they left his claims and to the course which their judicial institution led him to adopt, he has been involved. They are answerable for these wrongs not before a Court of Justice any more than they would have been if, in consequence of similar oversights, the country had been thrown into disorder and the lives and property of its inhabitants exposed to hazard. But their responsibility is matter of reason and of conscience and should induce them to do all that is practicable to compensate for the wrongs which have been committed. Whether fresh legal proceedings should be instituted is a question of prudence to be determined according to their probable result. But the Governor in Council trusts that the necessity of legal proceedings may be

suspended by the influence of the Collector. If out of the revenues of the zamindari an adequate provision is made for the future support of Narasimha Appa Rao, and a composition effected with his creditors, the further interference of the Government will not be required. But if the Zamindar be advised to rest secure in the terms of the Government grant, it will then remain to be considered what measures will be most advisable with the view of giving effect to what must be presumed to have been the intentions of the Government when that grant was made."

In Exhibit "A-1" the Government asked the Collector of Masulipatam to point out that both in honesty and in law at least a proper maintenance should be settled on the plaintiffs' branch of the family and asked the Collector to explain these sentiments of the Government to the Zamindar and express "the anxious hope of the Government that he should lose no time in proposing such effectual relief as may remove from the plaintiffs' branch of the family the distress they were in." This was in February 1821. But apparently the Collector was not able to achieve anything by persuasion and we find from Exhibit B that the Government finding themselves unable to bring the Zamindars to any reasonable settlement required the Judges to suggest ways and means of setting right the injustice perpetrated at the time of the permanent settlement, and thereupon steps were taken for making and approving of a draft regulation respecting the Nuzvid Zamindari to set aside the inequitable division at the time of the permanent settlement and to bring about another settlement giving a share to the plaintiffs' branch of the family. This draft regulation is Exhibit "C-1." Though this was got ready about June 1821, in September following, other counsel would appear to have prevailed and the Government asked the Board of Revenue in Exhibit "C-3" that no measures be taken for carrying into effect the proposed regulation.

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It was after this as may safely be surmised from Exhibits VII and D that the Governor of Madras sometime early in the year 1835 personally settled all the disputes and differences between the various branches of the family and persuaded the other two branches of the family to confer a pension for maintenance of Rs. 600 per mensem on the plaintiffs' branch of the family (see Exhibit D-1). The point in this discussion with regard to this pension is that it was refused to be accepted by the plaintiffs' branch of the family at first and as a condition for accepting the same they stipulated for a grant to them of three small villages from the Government independent of the pension to be granted by their brothers of Nuzvid and Nidadavole (see Exhibit E). In Exhibit F bearing date the 16th day of October 1837, the Collector of Masulipatam addressing the Board of Revenue states that he could not have persuaded the plaintiffs' branch of the family to accept the arrangement regarding the pension without pledging himself that the Government, to mark their satisfaction at the good understanding which has taken place between the brothers, will make over to Simhadri Appa Rao the two villages of Ravicherla and Sriramavaram. It is also significant that in the documents obtained by the Collector from the other two branches of the family with regard to their final undertaking of the obligation to pay the pension agreed to there is not the slightest reference to the village of Ravicherla or the settlement of the same on the plaintiffs' branch of the family. From the terms of Exhibit VII it is abundantly clear that even at the time of the original settlement of the disputes and differences between the various branches of the family it was distinctly understood and repeatedly explained to the Zamindars of Nidadavole and Nuzvid that the mukhasa

village of Ravicherla had lapsed to the Government, and that it had been even prior to that date attached by the Collector, as being the property of the Government.

Exhibit "G" speaks of the sanads to be granted by the Government with respect to the villages of Ravicherla and Sriramavaram as conferring the villages on Simhadri Appa Rao. Again in the Arzee, dated 17th August 1838, submitted by Raja Simhadri Appa Rao Bahadur to the Collector of Masulipatam he speaks of the cowle to be granted to him for the villages of Ravicherla and Sriramavaram conferred on him by the Government. Again later on in the same document he states as follows, with reference to the contemplated provision regarding the preventing of alienation of property :—

"The provision which the Honourable Government have thought proper to make in the cowle that the above villages are not to be liable for sale on account of the debts contracted by my father Raja Narasimha Appa Rao and myself prior to the date of the grant, will secure to me the villages benevolently conferred by Government for my permanent subsistence in consideration of the distressed condition of my family."

It is also significant that one of the provisions finally agreed to be inserted in the sanad as the result of the negotiations between the plaintiffs' family and the Government was that the succession to the village should devolve upon such of the heirs of the present grantees as the Government may determine after their death (see Exhibits V and H).

Again in Exhibit "J" the sanad in respect of the suit village, the recitals contained in clear terms a reference to the village of Ravicherla having reverted to the Government.

All this mass of documentary evidence makes it abundantly clear that the village of Ravicherla was dealt with at the time of the sanad as property which had

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reverted to the Government and become vested in it, so as to be capable of being disposed of by the Government at their pleasure. When the question arises as regards the ownership of property in some ancient period the evidence afforded by some unimpeachable ancient documents should, it seems to me, be accepted beyond question. I may indeed go further and state that the language of most of these documents is absolutely inconsistent with the contention put forward on behalf of the respondents that the village of Ravicherla did not belong to the Government but was property which still at the time of the grant vested in the other branches of the family and that all the documents including the sanad were elaborate devices for the purpose of effecting curious camouflage and making it appear that the property belonged to the Government in order that they may insert in the sanad restrictive provisions regarding the inheritance to and the disposal of the village. I am further satisfied that if what was intended was such an elaborate device, the language used would have been entirely different to that employed in the documents. I feel therefore bound to reject the contention that the village of Ravicherla was not a grant to the plaintiffs' family by the Government and that the plaintiffs' family acquired the property not as the result of any such grant from the Government but as the result of a family arrangement with the other members of the family. I also fail to see how, if indeed all the parties at the time agreed to the village of Ravicherla being treated as the property of the Government for the purpose of its being granted on the terms set out in the sanad to the plaintiffs' family, it could now be contended that there was no such title in the Government to impose any conditions. However, as I have already observed, it is unnecessary, in view of the

decision I have arrived at, that the grant was by the Government itself, which had the property vested in it at the time so as to enable it to make the grant, that there should be any further consideration of the legal effect of the plaintiffs' family having accepted a sanad in respect of the village from the Government and having purported to continue to hold it under the terms of the sanad till the other day when they applied to the Government for permission to alienate the property, a permission which was refused.

But this conclusion does not dispose of the case, because it is only a conclusion with regard to what may be said to be the argument based on facts. But assuming that the sanad should be deemed or regarded as the source of the plaintiffs' title to the village in question and that therefore the nature and extent of the rights with regard to the prayers in the plaint should be determined by the sanad itself and the terms therein set out, the contentions were even more ingenious and strenuous which were put forward by the learned vakil for the plaintiffs to establish that the plaintiffs' right to the village should be adjudged to be absolute and untrammelled by any conditions.

The first argument had reference to the Crown Grants Act, Act XV of 1895. It was not in its true nature so much an argument as an answer by way of anticipation. The learned vakil for the plaintiffs assumed that for the defendant the Crown Grants Act will be referred to and relied upon as enabling or justifying the alienation and began by assailing it *in limine*. But looking at the preamble and considering the purpose of the Act it cannot be doubted that the Act was rather declaratory in its nature than enabling or enacting. It had to be enacted, so says the preamble, because doubts had arisen as to the extent and operation of the

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Transfer of Property Act of 1882. Prior to the Transfer of Property Act, there was no statutory enactment of the Indian Legislature regulating transfers of property. But after that Act was passed apparently doubts came to be expressed or entertained whether that was an Act governing transfer of property by act of parties who were subjects of the Crown or whether the provisions of the Act applied also to transfers of property by the Crown. Taking the terms of the Crown Grants Act, the inference seems to be irresistible that prior to the Transfer of Property Act there was no doubt whatever as to the power of the Crown to make a transfer of property in any terms, or under any of the conditions whatsoever. Apart from one argument which shall be referred to hereafter, the learned vakil for the plaintiffs did not refer to any limitations on the power of the Crown to create or transfer estates previous to the passing of the Transfer of Property Act. The personal law of the Hindus or Muhammadans or other communities in India could not possibly affect the rights of the Christian sovereign power. If all Acts of legislature owe their origin to the sovereign power whatever that may be, in the absence of clear indication to the contrary, the provisions of statutory law should be regarded as governing transactions only of the subjects of the sovereign power and not of the sovereign power itself. Further the rules of law whether statutory or otherwise, governing and regulating transfers of property as between subject and subject of the sovereign power, are based or should be deemed to be based on principles which cannot in any wise be regarded as applicable to a transfer by the sovereign power itself.

As I read the Crown Grants Act, it became necessary for the legislature to pass such an Act altogether declaratory in its nature, merely because of the doubts which

came to be entertained after the passing of the Transfer of Property Act. The meaning and significance of Crown Grants Act of 1895 is merely a restatement of the principle underlying section 3 thereof, namely, that the Crown is entitled to impose any restrictions, conditions or limitations over, whatsoever, in any grant or transfer it may make whether such restrictions, conditions or limitations over, would be legal or valid or not in any grant or transfer made by one subject to another, and it became necessary for the legislature to restate and reaffirm the principle only because of the doubts that arose subsequent to the passing of the Transfer of Property Act. I cannot therefore regard the Crown Grants Act as an enacting or enabling measure of the legislature or even as a ratifying Act with retrospective effect making legal that which was not so. An explanatory and declaratory Act cannot be regarded or construed as if it were an enactment creative or regulative of rights or obligations. It seems to me therefore unnecessary to deal in detail with the very long and learned argument addressed to us for the plaintiffs with special reference to the Crown Grants Act. I am satisfied that the sanad in this case which was a grant by the State or sovereign authority would be binding according to its tenor. I shall therefore merely refer briefly to the other contentions of the learned vakil for the plaintiffs. His first contention was that section 3 providing for Crown Grants taking effect according to their tenor refers merely to such grant or transfer as aforesaid, and therefore refers back to section 2 and is confined in its operation to a grant or transfer heretofore made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, her heirs or successors or on behalf of the Secretary of State for India in Council. The Secretary of State for India in Council

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came into being only on the assumption, by Her Majesty Queen Victoria, of the Government of India in 1858 and the title of Empress of India was conferred on Her Majesty only in 1876 and the argument founded thereon was that therefore the grants and transfer of property to which the Act is applicable are only grants and transfers made subsequent to 1858 or 1876. But I have already come to the conclusion that the Act, as such, is intended to be limited only to grants and transfers subsequent to the passing of the Transfer of Property Act. When section 2 lays down that nothing in the Transfer of Property Act shall apply or be deemed to have applied to any grant or transfer made before 1895 or to be made after 1895 I cannot regard the Act as intended to apply to the construction of any grant made previous to the year 1882. But at the same time I cannot accept the argument of the learned vakil for the plaintiffs that merely because the expression used is "Queen Empress" and that title was conferred on Her Majesty only in 1876 the Act must on that ground be confined in its operation only to grants or transfers made subsequent to 1876. The mere fact that a person is referred to in a document, albeit a statute of the legislature, by his or her present title seems to me to be no reason, apart from the context, to hold that a limitation or definition of the time is thereby introduced impliedly, by referring only to the period of time subsequent to the adoption or conferring of the title and there seems also no reason for supposing that the expression was not used merely to indicate the sovereign bearing the title.

The next contention for the plaintiffs was that previous to the assumption of the sovereignty of India by the Crown in 1858 the sovereignty was in the United East India Company and that therefore the grant

which was made in the year 1843 under the sanad issued by the Company, could not be regarded as a grant by or even on behalf of the Crown. This contention has been to my mind conclusively answered by the learned Government Pleader who appeared for the Secretary of State. The Parliamentary Act 3 and 4 Will. IV, c. 85 both in the preamble and in section I provides and declares that the territories, revenues, etc., of India in the possession and under the Government of the Company shall remain and be vested in the Company in trust for His Majesty and even in the Government of India Act, 1853, similar words were used. In *Gibson v. The East India Company*(1) the general principle of law is referred to that all conquests made by subjects necessarily belong to the Crown and in the case of *The Advocate-General v. Richmond*(2) it is pointed out that the vesting of the territories and revenues in the United East India Company is in trust for His Majesty for the service of the Government of India. See also *The Secretary of State in Council of India v. Kamachee Boye Sahaba*(3). It seems to me unnecessary to refer to all the cases that have been cited at the bar in connexion with this question, because the terms of the statute are to my mind perfectly clear.

It was also argued by the learned vakil for the plaintiffs that even assuming that the Government of the country was carried on by the Company in trust for Her Majesty it does not follow that the grant was a grant made on behalf of Her Majesty. The contention was that the expression "on behalf of" imports some sort of agency and that it cannot be said that a grant by a trustee is on behalf of the beneficiary. I cannot possibly agree with such a contention, and having regard to the

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(1) (1889) 5 Bing. (N.P.), 262; s.c. 132 E.R., 1105.
(2) (1845) Perry's O.O., 566. (3) (1859) 7 M.I.A., 476.

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context in which the terms have been used, I feel no difficulty whatever in holding that when a grant is made by an agency exercising delegated sovereign power the grant is properly described as made on behalf of the supreme sovereign power.

The next argument advanced on behalf of the plaintiffs was not on the construction of the Crown Grants Act but with regard to the entire Act on the footing that the Act itself was *ultra vires* of the Indian Legislature. It was said that under the English Common Law the Crown cannot create an estate unknown to law. It may well be asked, unknown to which law? Is it the Common Law of England or India or the Statute Law of England or this country, and what is the meaning of the expression "estate unknown to law"? An estate inalienable in its nature is not an estate unknown to law. But after all I fail to see, how, assuming for the purpose of the argument that the contention is well founded that the Crown cannot create an estate unknown to law, that makes the Crown Grants Act *ultra vires*. The Indian Legislature is, while legislating within the limits imposed by Parliament, in the same position as an independent and absolute legislature. Under section 22 of the Indian Councils Act, 24 and 25 Vict., Ch. 67, the Governor-General in Council is empowered to make laws for all persons and for all things whatever. There is however in that section a proviso, that the Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of that Act and certain other Acts therein referred or which may affect the authority of Parliament, or the constitution and rights of the East India Company or any part of the unwritten laws or constitution of the United Kingdom of Great

Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories.

Mr. Venkataramana Rao's argument, if I understand him rightly, was to the effect that it was part of the common law of the United Kingdom of Great Britain and Ireland that the Crown cannot create an estate unknown to law and the said proviso forbids the Governor-General in Council from making any law which will affect any part of the unwritten laws or the constitution of the United Kingdom of Great Britain. But he omitted from consideration altogether the qualifying clause beginning with the words "whereon may depend in any degree the allegiance of any person, etc." I am unable therefore to accept the argument that the Crown Grants Act should be regarded as *ultra vires* for the reason that it enables the Crown to create an estate unknown to the law.

A further contention was also advanced to the effect that the Crown Grants Act was *ultra vires* also because it was calculated to affect the authority of the Parliament. I must confess I was unable to understand the argument of the learned vakil with regard to this contention. I cannot even imagine how assuming that the Act enables the Crown to create an estate unknown to the law the authority of the Parliament is thereby affected.

For all these reasons I have no hesitation in rejecting the contention of the learned vakil for the plaintiffs-respondents that the Crown Grants Act is *ultra vires* of the Indian Legislature. But after all in the view I have taken, that the Crown Grants Act is not an enacting or enabling measure but for which the Crown could not make a particular kind of grant but is only an

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explanatory and declaratory Act and in terms refers only to grants made subsequent to 1882, it seems to me futile to examine more minutely the contention that it is *ultra vires*.

The learned vakil for the plaintiffs has not shown how otherwise the grant in this case should be regarded as void or illegal or not binding on the plaintiffs.

There is only one other contention on behalf of the plaintiffs which remains to be noticed, and that is the argument based on section VIII of Regulation XXV of the Madras Regulations. Under that section it is provided as follows :

" Proprietors of land shall be at free liberty to transfer, without the previous consent of the Government, or of any other authority, to whomsoever they may think proper, by sale, gift, or otherwise, their proprietary right in the whole, or in any part of their zamindaries."

But this section and the Act itself apply only to lands for the revenue payable to the Government in respect of which an assessment is permanently fixed. In the case before us no such permanent assessment is fixed or made payable to the Government under the sanad. This argument also therefore fails.

In the result I agree with my learned brother in the conclusion that the judgment of the lower Court cannot be sustained and that therefore the appeal should be allowed and the plaintiffs' suit dismissed with costs both in this Court and in the Court below.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

CHINNA MUNUSWAMI NAYUDU (PLAINTIFF), APPELLANT,

1925,
March 5

v.

SAGALAGUNA NAYUDU AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Contract—Specific performance—Sale of lands—Counterpart agreement by vendee on the same date as sale deed—Agreement by vendee to convey the lands to vendor on his paying the same price in the month of Ani in the thirtieth year from date of agreement—Option to vendor—Death of vendor—Assignment of option by vendor's son to a stranger—Right of assignee to enforce specific performance of agreement—Agreement, whether a standing offer or an enforceable contract—Agreement, whether void for want of consideration—Rule of perpetuity—Specific Relief Act, sec. 23 (b).

On the same date on which a sale-deed of certain lands was executed, the vendee agreed by a document to convey the same to the vendor on the latter wishing to have them and on his paying the same price as was paid for the sale, in the month of Ani of the thirtieth year from the date of the agreement. The vendor having died, his son assigned his rights under the document to a stranger who tendered the full amount to the vendee within the agreed time. On the latter refusing to execute a conveyance, the assignee sued the vendee for specific performance of the agreement; the latter pleaded that his undertaking was not a contract but only a standing offer and was not assignable, that even if it were a contract it was void for want of consideration and as offending the rule against perpetuities.

Held, that the undertaking by the vendee was not a mere standing offer, but was an executory contract, giving a right to the vendor to get a conveyance from the vendee, and was assignable by the vendor;

that the contract was part of the same transaction as the sale and was supported by consideration;

* Appeal No. 431 of 1925.

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that the right under the contract was not personal to the original vendor, but was assignable;
that the contract was not void for perpetuity, as the period for the exercise of the option was definite and limited;
and that, consequently, the assignee was entitled to specific performance of the agreement.

Helby v. Matthews, [1895] A.C., 471; and *Papa Naidu v. Munisamy Aiyar*, (1928) I.L.R., 46 Mad., 30, distinguished. *Venkateswara Aiyar v. Raman Nambudri*, (1916) 3 L.W., 435, and *Narasingerji Gyanagerji v. Panaganti Parthasardhi*, (1921) M.W.N., 519, referred to.

APPEAL against the decree of R. GOPALA RAO, the Subordinate Judge of Chingleput, in Original Suit No. 46 of 1920.

One Venkatasubrahmanya Ayyar, on behalf of himself and his minor son Krishnaswami Ayyar, executed a sale deed, dated 28th January 1891, of the village of Siyatti for a consideration of Rs. 10,000 to one Venkatapathi Nayudu, the father of the defendants. On the same day the vendee executed what was called a counterpart document in favour of the vendor; the material portions of the document were as follows:

"Counterpart document executed on 27th January 1891, to Sikrala Venkatasubrahmanya Ayyar, . . . by K. Venkatapathi Nayudu, etc. As I have this day purchased absolutely for Rupees ten thousand the entire village of Siyatti, etc. . . . I shall again convey to you only (tungalukkae) absolutely the said village of Siyatti after a period of 30 years from this date (i.e.) in the Ani cultivation season of the 30th year in case you wish to have the village again, and on your paying the said sum of Rupees ten thousand to me. To this effect have I consented and executed the counterpart document."

The vendor died in 1899. His son Krishnaswami Ayyar assigned his rights under the above document in favour of one Chinna Munusami Naicker, the plaintiff herein under Exhibit E, dated 12th May 1910. Exhibit E was in the form of a sale-deed for Rs. 19,200, out of which Rs. 10,000 was payable to the previous vendee Kamusetti Venkatasami Nayudu as per his counterpart

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document. The assignee (plaintiff) tendered the full amount in June 1920 within the time agreed under the counterpart agreement. The vendee refused to execute a conveyance as agreed. The assignee thereupon instituted this suit for specific performance of the agreement against the sons and legal representatives of the deceased vendee. The plaintiff also prayed in the alternative for redemption in case the Court should hold the transaction to be a mortgage and also for damages in case the Court should hold that the plaintiff was not entitled either to specific performance or redemption. The defendants pleaded that the counterpart document did not amount to a completed contract which can be assigned but was only an offer which was not, and could not be, accepted before the time limited in the document, that the right to accept was personal to the original vendor and could not be assigned to anyone else, and that the alleged agreement was void for want of consideration and invalid as infringing the rule against perpetuities. The Subordinate Judge held that there was no completed agreement which could be assigned, but that there was only a standing offer to Venkatasubrahmanya Ayyar, which ceased to have operation after his death; he accordingly dismissed the suit. The plaintiff preferred this appeal.

C. V. Anantakrishna Ayyar for appellant.

S. Varada Achariyar for respondents.

JUDGMENT.

SPENCER, J.—On 28th January 1891 Venkatasubrahmanya Ayyar, on behalf of himself and his minor son Krishnaswami Ayyar, sold the village of Siyatti to Venkatapathi Nayudu for a consideration of Rs. 10,000. On the same day the parties executed what is termed a

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counterpart document, by which the purchaser Venkatapathi Nayudu agreed to reconvey the village for the same consideration of Rs. 10,000 if the vendor made an application for that purpose in the month of Ani 30 years later. Venkatasubrahmanya Ayyar died in 1899, leaving Krishnaswami Ayyar, his only son, surviving him. Krishnaswami Ayyar assigned his interest under the counterpart agreement, Exhibit B (1), to the plaintiff in this suit for a consideration of Rs. 19,200 out of which Rs. 10,000 were to be paid to get a reconveyance according to the terms of that document.

The plaintiff's suit was dismissed in the Court of the Subordinate Judge of Chingleput on the ground that there was no completed agreement, but only a standing offer, the benefit of which could not be assigned to a stranger. I am unable to agree with the learned Subordinate Judge upon this point. In my view Exhibit B (1) was a contract containing an undertaking on the part of the purchaser to accept an offer of repurchase if made by the vendor for a certain amount at a certain future time. In other words what Krishnaswami Ayyar assigned to the plaintiff was the right under an executory contract to exercise an option at a certain future date to obtain a conveyance of immovable property at a certain price. An offer or proposal cannot of course be enforced till it is accepted; but here the parties had gone beyond the stage of proposal and had entered into a contract which was supported by consideration, as was found in the trial Court. As the learned Subordinate Judge observed:

"Siyatti village was sold by Venkatasubrahmanya Ayyar for Rs. 10,000 plus the benefit of getting back the village under the conditions mentioned in Exhibit B (1)."

The fact that Venkatasubrahmanya Ayyar had sold the village to Venkatapathi Nayudu was the consideration for executing this agreement for a reconveyance.

The terms of the agreement between the parties were as follows:

"As I have this day purchased absolutely for Rs. 10,000 the entire village of Siyatti which belongs to you in the Conjeeveram taluk, Chingleput district, and in which you hold ekabhoga mirasi right and the right to cultivate, I shall again convey to you the said village after a period of 30 years from this date, i.e., in the Ani cultivation season of the 30th year in case you wish to have the village again, and on your paying the said sum of Rs. 10,000 to me."

The translation does not exactly reproduce the Tamil. There is an emphasis on the word "you" where it occurs after the words "I shall convey to," but there is no condition to the effect that the purchaser would reconvey the village only to the vendor and no proviso that both of them should be alive on the date fixed for tendering Rs. 10,000 and writing a deed of reconveyance. In the normal expectation of human life in this Presidency it was improbable that both seller and purchaser should be alive 30 years after the date of contracting. The Subordinate Judge, who knows Tamil, was of opinion that the word *தங்களுக்கு* should not, in the contest where it occurs, be interpreted to mean that Venkatapathi Nayudu undertook to reconvey the property to Venkatasubrahmanya Ayyar personally and not to his heirs or assigns.

I agree with him. I think that there was no personal element in this transaction which would make the contract incapable of being specifically enforced under section 21 (b) of the Specific Relief Act.

In this Court the main contest has raged over the question whether the Exhibit B (1) was assignable before the sum of Rs. 10,000 was tendered. Under section 23 (b) of the Specific Relief Act the representative in interest of a party to a contract may ordinarily obtain specific performance of it, provided that no

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personal quality of any party to the contract is a material ingredient. The Subordinate Judge has been led into some confusion of thought by a consideration of the case of *Helby v. Matthews*(1). He has also allowed himself to be led into a discussion of "option contracts," whatever they may be, and his judgment is vitiated by a reference to American authorities, a practice which has been condemned by the Privy Council. The case of *Helby v. Matthews*(1) was peculiar in that it dealt with what is known as a hire purchase contract. Brewster obtained on hire a piano and, after paying a certain number of monthly instalments, he pawned the piano with the respondents who refused to give it up to the owners (the plaintiffs). It was held by the House of Lords that there was no agreement between Brewster and the appellants that he should buy the piano. Before he paid the 36th and last instalment there should be no right by purchase in the hirer, and he was not bound to keep the piano till he had paid every one of the 36 monthly instalments; and as the owners could not compel him to buy, it was neither a purchase nor an agreement to buy within the words of section 9 of the Factor's Act of 1889, until the hirer completed the conditions necessary for a sale by making the last payment and exercising his option to purchase the piano. There is no complete analogy between that case and the present one.

The case of *Papa Naidu v. Munisamy Aiyar*(2), to the decision of which my learned brother was a party, has been cited before us, as it was held that what was agreed upon in that case constituted not a complete agreement but a mere standing offer. The purchaser of certain lands agreed to execute a reconveyance on

(1) [1895] A.C., 471.

(2) (1928) I.L.R., 46 Mad., 30.

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payment of Rs. 800 within the 30th day of Vikasi in any year whatsoever. It appears to me that that agreement was not enforceable, for the simple reason that there was no mutuality and no time fixed for performance. Apparently the promisor in that case agreed to sell upon demand before a certain date in any year, but as there was no time limit and no consideration for keeping the offer open for an indefinite time, the promisor was entitled to withdraw at any time before the promisee applied for performance.

At the end of paragraph 14 of his judgment the Subordinate Judge has confounded the tender, which was to be made in future, with the proposal or offer which must form the basis of every completed agreement. The real offer and acceptance were made on the same date as the sale. The date upon which the purchaser agreed to accept a tender of Rs. 10,000 for the purpose of reconveying the village of Siyatti to the seller is quite certain, namely, the month of Ani in the 30th year after 1891, and there is no vagueness upon the point of time for performance. It is as if Venkatapathi had said to Venkatasubrahmanya Ayyar:

"In consideration of your having sold me the village of Siyatti this day for Rs. 8,000, I undertake if you come to me in the month of June, 30 years hence and tender me a similar amount of Rs. 8,000 I will accept it and will execute to you a reconveyance of that property."

Upon Subramanya Ayyar's acceptance of this offer the contract was put in writing and the contract was then registered. Whether the suit document and the sale-deed executed on the same day should be treated as a mortgage by conditional sale or a sale with a simultaneous but independent agreement for reconveyance is not of material consequence, except upon the point of assignability. The plaintiff says he tendered Rs. 10,000 on 19th June 1920 and upon the defendant

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hiding himself, he gave him a registered notice of his willingness to pay the amount, to which the defendant replied refusing to receive it. The Subordinate Judge has found that there was a valid tender as alleged in the plaint, and there is no question of limitation, as sometimes arises when it is doubtful whether a particular transaction is a mortgage or an independent agreement for reconveyance.

The decisions in *Venkateswara Aiyar v. Raman Nambudri*(1), and *Narasingerji Gyanagerji v. Panaganti Parthasaradhi*(2), support the appellant's contention that contracts of this nature are capable of assignment. The last-named decision has recently been reversed by the Privy Council (vide I.L.R. 47 Mad., 729) but not on the question of the contract being assignable, as their Lordships found the transaction concerned to be of the nature of a mortgage rather than a sale, and there is no difficulty in treating a mortgage interest as being assignable.

The English cases of *Buckland v. Papillon*(3) and *Manchester Brewery Company v. Coombs*(4), which were quoted as good law by McCARDIE, J., in *County Hotel and Wine Company v. London and North Western Railway*(5), are authorities for the proposition that in England options to purchase as well as contracts to sell are capable of assignment.

If the suit contract was a mortgage, the mortgagor's interest was unquestionably transferable.

We have therefore allowed the question to be argued whether Exhibit B-1, constituted a mortgage by conditional sale or an executory contract. A Bench of this Court has already expressed its opinion that this was a

(1) (1916) 3 L.W. 435.

(3) (1866) 1 Eq., 477.

(2) (1921) M.W.N., 519.

(4) [1901] 2 Ch., 808.

(5) (1918) 2 K.B., 251.

sale rather than a mortgage [see the judgment in Second Appeal No. 2180 of 1915 exhibited as Exhibit I (b)] but this opinion was given prior to the Privy Council decision in *Narasingerji v. Parthasaradhi Rayanam Garu*(1), which reversed the judgment of WALLIS, C.J., and OLDFIELD, J., in *Narasingerji Gyanagerji v. Panaganti Parthasaradhi*(2), upon which the Subordinate Judge relied for excluding the evidence of surrounding circumstances and deciding that Exhibit B-1 was not a mortgage. There is much to be said in favour of either view, but it is unnecessary to pronounce in favour of the view that we have here a transaction in the form of a mortgage by conditional sale.

Again the insolvency of Venkatasubrahmanya Ayyar did not affect the right of the plaintiff, seeing that the Official Assignee under an indenture of 22nd February 1916, Exhibit BB, conveyed the father's interest to Krishnaswami, the insolvent's son, and that Krishnaswami's widow under Exhibit BB released her right on 16th February 1921 in favour of the plaintiff after both the father's interest and the son's interest had become combined in the son.

The appeal must, for the above reasons, be allowed with costs throughout and the suit must be remanded. A preliminary decree will be passed directing the defendants to execute a conveyance in proper form on stamp paper and to register the same within one week from the re-opening of the lower Court after the summer vacation and providing that on their failure to do so the Court will execute a conveyance of the suit properties to the plaintiff on their behalf.

The lower Court will take evidence as to the claim for mesne profits due from date of plaint and will pass a

(1) (1924) I.L.R., 47 Mad., 729 (P.C.).

(2) (1921) M.W.N., 519.

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final decree after ascertaining what is due to plaintiff on that account. The plaintiff gives up his claim for damages for cutting of trees and depreciation of buildings, etc., covered by the seventh issue. The defendant will be at liberty to draw out the purchase amount deposited in Court.

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RAMESAM, J.—This appeal arises out of a suit to compel the defendants to execute a conveyance to the plaintiff. The Subordinate Judge dismissed the suit and the plaintiff appeals.

One Venkatasubrahmanya Ayyar and his son Krishnaswami Ayyar sold the suit village to Venkatapathi Nayudu, the father of the defendants, by Exhibit B (dated 27th January 1891) for Rs. 10,000. On the same day Venkatapathi executed the counterpart, Exhibit B-1, to his vendors agreeing to reconvey the village for the same amount in the Ani month of the thirtieth year from the date of the agreement, if they wish to have it. The month of Ani in the thirtieth year corresponds to 14th June to 14th July 1920. Venkatasubrahmanya Ayyar became insolvent in 1897 and died in 1899. His properties vested in the Official Assignee of Madras. In 1910 his son Krishnaswami Ayyar executed Exhibit E to the plaintiff conveying his rights in the suit village. Krishnaswami Ayyar also obtained a deed from the Official Assignee (Exhibit BB-1, dated 22nd February 1916) by which the latter conveyed all rights to the suit village vested in him by reason of the insolvency of Venkatasubrahmanya Ayyar. Krishnaswami Ayyar died in 1919. His widow executed Exhibit BB-1 (dated 16th February 1921) releasing her rights in favour of the plaintiff. The Subordinate Judge has found (and the finding has not been questioned before us) that the plaintiff tendered the amount of Rs. 10,000 in the month of June 1920. The present suit was filed on 12th July 1920. The

Subordinate Judge found on issue 2 (b) that the effect of Exhibit B-1 was that there was a standing offer to Venkatasubrahmanya Ayyar which ceased to have operation after his death and dismissed the suit.

The plaintiff appeals.

The main points argued at great length before us relate to the effect of Exhibit B-1. Exhibits B and B-1 formed part of a single transaction and Exhibit B-1 is certainly supported by consideration. The respondent contended that the right created under it in favour of Venkatasubrahmanya Ayyar and Krishnaswami Ayyar was purely personal and could not be assigned (Issue 2-b). He also contended that it was an option to accept or refuse in June 1920 and could be assigned only after the offer was accepted by the tender of the amount and thus ripened into a contract to sell and buy. He argues that before 14th June 1920 there was no agreement for sale and purchase and therefore there was nothing to assign; neither Subrahmanya Ayyar nor Krishnaswami Ayyar lived up to that date, and no one else can accept an offer made to them. In other words, the option which an offeree has to refuse or accept an offer made to him, even if it can be called a right, is not such a right as can be assigned, so as to enable the assignee to accept the offer. The two aspects of the questions are to a certain extent connected.

It is true that, in cases of sale and an agreement to resell and other similar cases such as a lease with covenant for sale or a hire with an agreement for purchase, the second part of the transaction, where the vendee has an option, does not amount to an agreement for sale and purchase (vide *Lord Ranelagh v. Melton*(1), which was a case of lease with an option to purchase;

(1) (1864) 2 Dr. & Sm., 278; 62 E.R., 627.

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Helby v. Matthews(1), which was followed and applied by AYLING, J., and myself in *Papa Naidu v. Muniswami Ayyar*(2), where there was no time fixed for the exercise of the option). In all these cases, such a pre-contract [see per Lord WATSON in *Helby v. Matthews*(1)] is, if not supported by consideration, a *nudum pactum*, but if it is supported by consideration (as in this case) it amounts to an undertaking on the part of the offerer not to withdraw the offer, i.e., it is a contract, not a contract for sale and purchase, but one not to withdraw an offer. It is a contract precedent to the agreement for sale and purchase. If the time fixed for the exercise of the option is any time within a certain date, the option may be exercised at any time within that date and will mature into a contract to buy and sell. But if the option is to be exercised at a certain stated time, i.e., after the expiration of a certain period [as in *Lord Ranelagh v. Melton*(3)], or between certain points of time as in this case, it would seem that the option cannot be irrevocably exercised earlier than the stated time. This seems to be the opinion of KINDERSLEY, V.C., in *Lord Ranelagh v. Melton*(3). But the question of assignability of the right of the optionee did not arise in any of these cases. They do not throw any light on that question.

Prima facie, the rights of the parties to a contract are assignable—*Tolhurst v. Associated Portland Cement Manufacturers* (1900) (4); *Tolhurst v. Associated Portland Cement Manufacturers* (1900) (5). The same principle is embodied in section 23 (b) of the Specific Relief Act unless “the personal quality of such a party is a material ingredient in the contract.” These words of the Indian Act seem to me exactly the same

(1) [1895] A.C., 471.

(3) (1864) 2 Dr. & Sm. 278, 62 E.R., 627.

(2) (1923) I.L.R., 46 Mad., 30.

(4) [1901] 2 K.B., 811.

(5) [1902] 2 K.B., 660 at 668.

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as the words used by FRY, L.J., in his Specific Performance, section 225. See also *Tolhurst v. Associated Portland Cement Manufacturers* (1900) (1) where Lord MAONAGHTEN uses the words “personal elements.” But he proceeds to state in section 229:

“Where though the relation established by the contract may have in it nothing personal, some previous personal relation of favour or otherwise, between the contracting parties, has been a material motive to the contract, it can be enforced by that person only.”

Mr. Varadachari relies on this statement of FRY, L.J., and on the previous relation between the parties to attract its application. But I do not find anything in section 23 (b) of the Specific Relief Act (which corresponds to section 225 of FRY, L.J., only) justifying an extension of it, so as to cover a case to which section 229 of FRY, L.J., could apply. The learned *vakil* referred to *Vithoba Madhav v. Madhav Damodar*(2), *Mohendra Nath Mookerjee v. Kali Proshad Johuri*(3) and *Toomey v. Rama Shai*(4) as examples of the application of this principle. There is no resemblance between this case and the cases *Toomey v. Rama Shai*(4) and *Mohendra Nath Mookerjee v. Kali Proshad Johuri*(3). Even the case *Vithoba Madhav v. Madhav Damodar*(2) is distinguishable. The term of 30 years, in my opinion, makes it clear that the option was not intended to be personal. The parties could not have been so certain of the life of Subrahmanya Ayyar and Krishnaswami Ayyar up to the end of this time and could only have meant that the option might be exercised by them or their heirs. I may observe that the translation of Exhibit B at page 15 is not quite correct. The vernacular word “Thangalukkai” is a merely emphatic form of saying “you,” and though, if it occurs

(1) [1903] A.C., 414 at 417.

(3) (1903) I.L.R., 30 Cal., 265.

(2) (1918) I.L.R., 42 Bom., 344.

(4) (1890) I.L.R., 17 Cal., 115.

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by itself, it may be translated as "you only"; in this case it represents the vernacular idiom, the emphatic form being sometimes used when the word is repeated in the same sentence. There is no word for "only." Mr. Varadachari also contended that even if there is nothing personal in the contract still the offeree only can accept an offer. This proposition is true of mere offers. But, in this case, we have an offer which is irrevocable under a contract and only the offeree has an option to accept or refuse. This does not stand in the same footing as a bare offer. To say that the rights of an offeree in a case of this kind do not descend to his heirs seems to me a repetition of the argument about personal element in another guise and the term of 30 years seems to afford an answer to this argument as well. Mr. Varadachari has conceded that the family of Subrahmanya Ayyar was the object of Venkatapathi Nayudu's bounty and the option may be exercised by the heirs, but argued that it is not assignable. But this seems to be a distinction without any principle to support it. If a right can be transmitted to heirs, it is equally assignable. I therefore think that the option can be assigned even before it matures into an agreement to sell and purchase. In England it was so held in *Buckland v. Papillon*(1). ROMILLY, M.R., held that it was an interest under an agreement and vested in the assigns in bankruptcy (at page 483). On appeal Lord CHELMSFORD, L.C., in *Buckland v. Papillon*(2) said at page 71 :

"I see no reason why an option to take a lease should not be an interest in land"

and lower down

"it cannot be contended successfully that a person who may call for a lease at his own will and pleasure may not be looked upon as entitled to an agreement for a lease."

(1) (1886) 1 Eq., 477.

(2) (1886) 2 Ch. App., 67 at 71.

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Under section 54 of the Transfer of Property Act an agreement to sell, by itself, cannot create an interest in land—much less can an option even if it is made irrevocable by reason of a contract. But I do not see why the interest under the contract is not assignable as a right *ex contractu* if not as a right *in rem*. The case in *Buckland v. Papillon*(1) was referred to with approval by Lord LINDLEY in *Tolhurst v. The Associated Portland Cement Manufacturers* (1900) (2) and in *County Hotel and Wine Co., Ltd. v. London and North-Western Railway Co.* (3) by McCARDIE, J. (see also Fry on Specific Performance section 1105, and Redman's Landlord and Tenant, page 28, and Leake on Contracts, page 919) (1901) 2 Ch., 608). In this Court the assignability of an option was recognized in *Venkateswara Aiyar v. Raman Nambudri*(4) and *Narasingerji Gyanagerji v. Panagant Parthasaradhi*(5) modified by the Privy Council on another ground in *Narasingerji v. Parthasaradhi Rayanam Garu*(6).

The learned vakil for the respondent also contended that the option is void as offending the rule against perpetuities. If it created an interest in land, this contention is correct. But in India it cannot create an interest in land, whatever the rule in England may be. As a right *ex contractu* intended to be exercised at a stated time (ranging within one month) by the optionees or their representative and assigns, it does not tie up the land and cannot offend the rule against perpetuities [see *Charamudi v. Raghavulu*(7) followed in *Raja of Karvennagar v. Velayuda Reddy*(8)].

The assignment to the plaintiff is therefore valid. The further question argued by the appellant's vakil that

(1) (1886) 1 Eq., 477.

(3) (1918) 2 K.B., 251 at 256.

(5) (1921) M.W.N., 519.

(7) (1916) I.L.R., 39 Mad., 462.

(2) [1903] A.C., 414 at 423.

(4) (1916) 3 L.W., 435.

(6) (1924) I.L.R., 47 Mad., 729 (P.C.).

(8) (1915) 18 M.L.T., 83.

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Exhibits B and B-1, on their true construction, amount to a mortgage does not arise. The fact of a long term is in favour of the appellant [see *Swaminatha Aiyar v. Appasami Aiyar*(1), *Madhab Charan Das v. Rajani Mohan Das*(2) and *Modhu Sudan Das v. Rhidoy Moni Baistabi* (3)]. The oral evidence as to the produce of the lands also seems to be in his favour, but there is no evidence as to the prices of grains in 1890. On the other hand Exhibits II, III, III(a) and IV suggest that the lands are of poor quality and, on a former occasion, this High Court held that the documents do not amount to a mortgage [Exhibit I (b)]. This judgment does not constitute *res judicata*. It is not necessary to pursue this point further.

In the result I agree with my learned brother that the appeal should be allowed and with the order proposed by him.

K.R.

(1) (1915) 27 I.C., 305.

(2) (1921) 64 I.C., 583.

(3) (1901) 6 C.W.N., 192.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Krishnan.

P. M. A. VELLIAPPA CHETTIAR (LEGAL REPRESENTATIVE
OF THE 6TH DEFENDANT), APPELLANT

1925,
January 8.

v.

VENKATASUBBARAYULU NAIDU AND OTHERS (PLAINTIFF
AND DEFENDANTS), RESPONDENTS.*

*Mortgage-deed—Principal amount payable on a certain date—
Interest payable each year—On default in payment of interest,
both principal and interest becoming payable—Option of
mortgagee on default—suit for both more than twelve years
after default but within twelve years of date for payment of
principal—Bar—Limitation Act (IX of 1908), art. 132—
Starting point.*

Where a mortgage-deed, dated 20th September 1890, which provided for the payment of the principal in 1904 and of the interest at the end of each year, contained a further clause that, in default of payment of interest in any year, the mortgagee "shall be at liberty to recover the whole amount of principal and interest due up to date," and after default in payment of interest the mortgagee sued for principal and interest in 1916, more than twelve years from the date of default but within twelve years from the date fixed for payment of the principal in the main contract, *Held* that, on a proper construction of the deed, the option was reserved with the mortgagee to enforce the default clause at his pleasure; that the period of limitation under article 132 of the Limitation Act started to run, not from the date of default of payment of interest but from that fixed for payment of principal under the main contract, and that consequently the suit was not barred by limitation. *Aarna v. Ammani Amma*, (1916) I.L.R., 39 Mad., 981, followed; *Gaya Din v. Ghumman Lal*, (1915) I.L.R., 37 All., 400, (F), dissented from.

* Appeal No. 389 of 1919.

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APPEAL against the decree of T. M. FRENCH, Temporary Subordinate Judge of Vellore, in Original Suit No. 18 of 1918.

This is a suit to recover a sum of money on a mortgage-deed executed on the 20th September 1890, by the first defendant in favour of the assignor of the plaintiff. The deed provided for the payment of interest by the 30th Ani of each year and for payment of the principal on 30th Ani, Krodhi (13th July 1904); and it also provided that, if the interest was not paid in any year, the principal and interest should be recoverable at once. There was default of payment of interest in some years previous to this suit which was instituted on 13th July 1916. The principal defendants contended *inter alia* that the suit was barred by limitation, as more than twelve years had elapsed after the date of default in payment of interest. The Subordinate Judge over-ruled this contention and decreed the suit. The sixth defendant preferred this appeal. The material portions of the mortgage bond were as follows:

"I shall pay you the annual interest, all at once, every year on 30th Ani and obtain receipts from you. I shall pay you the principal Rs. 16,000 on 30th Ani, Krodhi year (13th July 1904). . . . If I should fail to pay you the annual interest as aforesaid, in any year, you, your heirs and persons authorized by you in this respect shall be at liberty to recover all at once, from the hypotheca hereof and from me, my heirs and successors, the amount of principal and interest due thereunder till such date of default, quite irrespective of the subsequent instalments. . . ."

K. Rajah Ayyar for Appellant.—The suit is barred by limitation as the cause of action for principal and interest accrued on default of payment of interest. There is no option to the mortgagee. Money had become due on default of payment of interest in any year under the deed. Article 132, Limitation Act, applies and the starting point is the date of first default. All

the High Courts, except the Madras High Court, have taken this view.

See *Gaya Din v. Ghumman Lal*(1), *Nathi v. Tursi*(2), *Shrinivas v. Chanbasapa Gowda*(3) but Contra *Narna v. Ammani Amma*(4).

A. Krishnaswami Ayyar for respondent referred to later cases in Madras following *Narna v. Ammani Amma*(4), viz., *Lachakkammal v. Sokkayya Naick*(5), *Kaliappa Nadar v. Sami Iyer*(6), *Ramadh Bibi Ammal v. Kandasami Pillai*(7) and dictum in *Juneswar Dass v. Mahabeer Singh*(8).

JUDGMENT.

The only question that arises in this appeal is one of limitation. The suit is brought on a mortgage-deed, dated 20th September 1890, in 1916, the mortgage money not being payable under the deed until 1904. There is also a clause in the deed that in default of payment of interest the whole amount of principal and interest up to that date, should become due. It is argued before us in the first place that this default clause leaves no option to the mortgagee as to whether he shall or shall not enforce it; but on a consideration of the language of the document which is translated in this Court as follows: "If I should fail to pay . . . you shall be at liberty to recover," it is clear that the option is reserved with the mortgagee to enforce this clause at his pleasure. That being so, the question is whether the period of limitation started to run on the date of default, or when the money became due under the terms of the main contract, namely, 1904, under Article 132 of the Limitation Act. The view that the money becomes due within the meaning

(1) (1915) I.L.R., 37 All., 400 (F.B.). (2) (1921) I.L.R., 43 All., 671.

(3) (1923) 25 Bom. L.R., 103.

(4) (1916) 1 L.R., 39 Mad., 981.

(5) (1918) M.W.N., 586.

(6) (1921) M.W.N., 384.

(7) (1919) 9 L.W., 479.

(8) (1876) I.L.R., 1 Cal., 163 (P.C.).

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of this article at the date of the first default has been adopted by the Allahabad High Court in *Gaya Din v. Ghumman Lal*(1), and that decision has been followed in two subsequent cases in *Nathi v. Tursi*(2), and *The Collector of Jaunpur v. Jamna Prasad*(3). The case in *Gaya Din v. Ghumman Lal*(1), has been considered by this Court in *Narna v. Ammani Ammal*(4), in which a Division Bench took a view different from that of the Allahabad High Court and that view has subsequently been followed in *Ramadh Bibi Ammal v. Kandasami Pillai*(5) *Lachakkammul v. Sokkayya Naick*(6), *Kaliappa Nadar v. Sami Iyer*(7), and to one or other of these cases we both have been parties. There is no definite pronouncement of the Privy Council on this point, although there is a dictum in support of the view taken in this Court in *Juneswar Dass v. Mahabeer Singh*(8), the other cases of the Privy Council cited before us, namely, *Kishan Narain v. Pala Mal*(9), and *Muhammad Hafiz v. Muhammad Takariya*(10), are decisions under Order XI, rule 2, of the Code of Civil Procedure, and are not authorities on this point. In this state of affairs we prefer to follow the course of decisions in this Court in preference to the view of the Allahabad High Court; and consequently this appeal must fail and is dismissed with costs of plaintiff, and seventy-third respondent.

In this view it is unnecessary to decide the further point upon which the lower Court relies, namely, that the limitation was saved by reason of the acknowledgment of the debt.

The balance of Rs. 50 due to the Court guardian will be paid by the appellant.

K.R.

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| (1) (1915) I.L.R., 37 All., 400 (F.B.). | (2) (1921) I.L.R., 48 All., 671. |
| (3) (1922) I.L.R., 44 All., 360. | (4) (1916) I.L.R., 39 Mad., 981. |
| (5) (1919) 9 L.W., 479. | (6) (1918) M.W.N., 586. |
| (7) (921) M.W.N., 384. | (8) (1876) I.L.R., 1 Cal., 163 (P.C.). |
| (9) (1923) 44 M.L.J., 123 (P.C.). | (10) (1922) I.L.R., 44 All., 121 (P.C.). |

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Madhavan Nair.

KIJANAR SHESHAPPA SHETTY (DEFENDANT), APPELLANT

1925
November 2.

v.

KIJANAR DEVARAJA SHETTY (PLAINTIFF), RESPONDENT.*

Aliyasantana Law of South Kanara—Junior member of an Aliyasantana family—Right to recover marriage expenses from the ejman of the family and out of the family property—Maintenance—Similarity to Malabar Law—Marumakkathayam tarwad—Power of karnavan—Right of junior member to maintenance, based on co-proprietorship in family property—Maintenance, what it includes—Menchilavu, meaning of.

A junior member of an Aliyasantana family is entitled to claim his marriage expenses from the ejman of his family.

The marriage expenses of a junior member of an Aliyasantana family form a part of his right to maintenance.

The Aliyasantana system is similar in its incidents to the Marumakkathayam law of Malabar. Under both the systems, the junior members are co-owners with the manager (ejman or karnavan) in the family property, and their right to maintenance is based on their ownership in the family property.

The term "maintenance," though, in its limited sense, it means allowance for bare necessities of life, in its more comprehensive sense, includes what is usually called in Malayalam "Menchilavu" which is treated as part of maintenance, and under the latter head reasonable and legitimate expenses of the junior members such as expenses of their medical treatment, of defence in criminal cases, etc., have been allowed by the Courts out of the family property; similarly, marriage expenses of the junior members form part of their right to maintenance.

Parvati v. Kamaran, (1883) I.L.R., 6 Mad., 341; and *Govindan Nair v. Kunjan Nair*, (1919) I.L.R., 42 Mad., 686, followed. Case law reviewed.

* Second Appeal No. 787 of 1923.

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SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, the District Judge of South Kanara, in A.S. No. 27 of 1922 preferred against the decree of D. S. RAJA RAO, the District Munsif of Puttur, in O.S. No. 679 of 1920.

This is a Second Appeal in a suit instituted by a junior member of an Aliasantana family to recover the expenses incurred by him, for his marriage from the ejman of his family personally and out of the immovable properties of the family specified in the schedule to the plaint. The defendant pleaded that he was not the ejman, that the plaint property was not family property, that the marriage was not arranged or performed with his consent, and that the ejman of an Aliasantana family was not bound to contribute to the marriage expenses of a junior member of the family. It was found that the ejman withheld his consent for the marriage perversely and on no justifiable grounds. The District Munsif gave a decree in favour of the plaintiff directing the defendant to pay a portion of the amount claimed in the plaint, personally and as manager of the family on the responsibility of the immovable properties of the family specified in the plaint. The District Court on Appeal confirmed the decree. The ejman (defendant) preferred this Second Appeal.

B. Sitarama Rao for appellant.

K. Y. Adiga for respondent.

JUDGMENT.

We are invited in this Second Appeal to set aside a decree by which the Court of appeal below in concurrence with the Court of first instance gave the plaintiff a sum of Rs. 181-9-3 on account of expenses incurred by him for performing his marriage. The plaintiff is a junior

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member of a family of which the "ejman" is the defendant. The parties are Jains of South Kanara governed by the Aliasantana Law. In reply to the plaintiff's claim, the defendant pleaded that he was not the ejman, that the plaint property was not family property, that the marriage was not arranged or performed with his consent and that, in any event, the ejman of an Aliasantana family was not bound in law to contribute for the marriage expenses of a junior member. The lower Courts overruled all these pleas. As regards the want of consent alleged by the ejman, it is conceded for the appellant that the lower Courts should be deemed to have found that the ejman withheld his consent for the marriage perversely and on no justifiable grounds. In these circumstances, Mr. Sitarama Rao argues that the lower Court's decree is contrary to law, because (1) the law does not recognize the union between a man and woman following the Aliasantana Law as a valid and binding marriage and (2) this item of expense should not on any account be included within the rule making maintenance a proper charge on the revenues of the family. The important question for our decision is whether the plaintiff, a junior member of an Aliasantana family, is entitled to claim his marriage expenses from the ejman of the family.

The Aliasantana system is very similar in its incidents to the Marumakkathayam Law (see *Subbu Hegadi v. Tongu* (1) and *Muthu Amma v. Gopalan* (2)). A karnavan in Malabar is the senior male member of a group of persons, all of them tracing their descent in the female line from a common female ancestor owning joint property under the absolute control and management of the karnavan. This group forms a Marumakkathayam

(1) (1869) 4 M.H.C.R., 196.

(2) (1918) I.L.R., 36 Mad., 593.

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tarwad (see *Kenath Puthen Vittil Tavazhi v. Narayanan*(1)). The powers and rights of the karnavan, who corresponds to the ejman of the Aliyasantana family, have been laid down in various decisions of this Court. Large and absolute though his powers be over the administration of the tarwad property and its funds, the regulation of the tarwad's internal economy, and the protection, control and supervision of the junior members, it should never be forgotten that the tarwad property in his possession is not exclusively his own, but he owns it along with the other members only as a co-proprietor. As observed in *Narayani v. Govinda*(2), "although as a senior member he enjoys special consideration, he has no higher claim in the enjoyment of the income than any other member of the family." The right of ownership is of overwhelming importance to the junior members, as it clothes them with very valuable rights which they can enforce against the karnavan. The status of a member of a Malabar tarwad carries with it four distinct rights, viz., (1) a right to be maintained by the karnavan, (2) a right to see that the tarwad property is not alienated otherwise than in accordance with law, (3) a right to become the tarwad karnavan, when he becomes the senior male member, and (4) a right to a share if a partition were made and the tarwad broken up by common consent. (*Moidin Kutti v. Krishnan*(3) *Ibrayan Kunhi v. Komamutti Koya*(4) and *Muthu Amma v. Gopalan*(5)). To these might be added another right, viz., a right to bar an adoption, *Chandu v. Subba* (6).

Of these rights obviously the most substantial one is the right to "maintenance" as such a right is the mode in which the right of ownership in the tarwad property

(1) (1905) I.L.R., 28 Mad., 182 at 183. (2) (1884) I.L.R., Mad., 352.
(3) (1887) I.L.R., 10 Mad., 322. (4) (1892) I.L.R., 15 Mad., 501.
(5) (1913) I.L.R., 36 Mad., 593. (6) (1890) I.L.R., 13 Mad., 209.

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is most effectively enforced by the junior members. The value of such a right in the case of persons living under a system of law which does not sanction compulsory partition, nor recognizes son's claims against the father, cannot be over-estimated. The nature of this right has been thus described by SESHAGIRI AYYAR and BAKEWELL, JJ., in *Ammani Amma v. Padmanaba Menon* (1):

"The allowance claimed by an anandravan of a Malabar tarwad or by a junior member of a joint Hindu family is not as a dependent upon the owner of the property, but as one who, in his own right, is entitled to participate in the income. The common law in both cases having vested the management in the senior member, the claim for separate maintenance is an index of proprietorship . . . in the property of the tarwad and consequently that right cannot be denied unless circumstances show that the tarwad is not in a position to give a separate allowance."

[See *Achutan Nair v. Kunjunni Nair*(2), *Maradevi v. Pammakka*(3), *Kunhikrishna Menon Karnavan v. Kunhikavamma*(4) and *Govindan Nair v. Kunju Nair*(5).]

The term "maintenance," as has been pointed out, is often loosely applied. In its limited sense, as understood in Malabar, it means the expenses required for food, raiment and oil; in its more comprehensive sense, it includes what is usually called in Malayalam "Menchilavu," which is treated as a part of maintenance. [See *Govindan Nair v. Kunju Nair*(5).] According to SUNDARA AYYAR, J., the word "Menchilavu" is used to designate a part of what is required for the support of a person and is distinguished from what is strictly necessary for food and raiment. Legally it may be taken to mean part of what would be included in the terms "maintenance" and "necessaries." SADASIVA AYYAR, J., states that "the

(1) (1918) I.L.R., 41 Mad., 1075. (2) (1903) 13 M.L.J., 499.
(3) (1913) I.L.R., 36 Mad., 203. (4) (1918) 35 M.L.J., 565.
(5) (1919) I.L.R., 42 Mad., 686.

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literal meaning (of the term "Menchilavu") seems to be excess expenditure." We take it that it means what is usually allowed beyond what is strictly required for food and clothing alone. Under the expression, therefore, come the sums which are required for keeping up a respectable appearance consistent with the position and dignity of the family to which a person belongs, sums required for a reasonable amount of travelling to holy places in the case of a member of an aristocratic family, etc., for slight conveniences and comforts, which though they might be called luxuries when indulged in by a low class individual, would come under the head of "necessaries" in the case of persons belonging to families which cannot be classed with the lower sections of the community. [See *Valia Konikkal Edom Kelu v. Lakshmi Nettyar Ammal*(1).] In *Ravanni Achan v. Thankunni*(2) PHILLIPS, J., described "Menchilavu" as "a luxurious form of maintenance as distinguished from bare maintenance" and stated that "the claim to both must be treated as based on the same footing." COUTTS TROTTER, J., as he then was, and KUMARASWAMI SASTRI, J., observed that "Menchilavu" which has been translated as "maintenance" is said to be indistinguishable from maintenance of the members of a Hindu family. (S.A. Nos. 2556 and 2557 of 1912.) The loose application of the word, as pointed out above, is due to the fact that the English word "maintenance" is not, strictly speaking, a correct equivalent of the Malayalam word "chilavu" of which it is generally understood to be a translation. The term means "expenses" and is comprehensive in its significance. The right to maintenance is the right to claim one's "expenses" which obviously must be of various kinds.

(1) (1913) M.W.N., 379.

(2) (1919) I.L.R., 42 Mad., 749.

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By the enforcement of this right which, as already mentioned, is given to a member of a Malabar tarwad or an Aliyasanthana family by reason of the proprietary interest possessed by the member in the family property, the junior members have been able to secure legal recognition of their claims not only for the cost of the "bare necessities of life," but also for the expenses legitimately incurred for "medical treatment" [*Kelu Achan v. Umala Achan*(1)], and also for arrears of "Menchilavu" (for instance, expenses "for clothes, oil, soup, tea, coffee and confectionery") *Ravanni Achan v. Thankunni*(2), see also *Valia Konikkal Edom Kelu v. Lakshmi Nettyar Ammal*(3), assuming that there are adequate funds at the disposal of the family. The decision in *Krishnan v. Govinda Menon*(4), recognizing the obligation of the karnavan to educate the junior member, declared that it was not incumbent on him as part of his duties to

"give the junior members education through the medium of the English language or on western lines."

Such a claim if made now would for its decision, as suggested in the judgment itself, depend upon the question whether such education "has not become essential." In *Neelakanta Thuruwambu v. Ananthanarayana Aiyar*(5), it was held that, having regard to the circumstances of the family which was a well-to-do one,

"a contract by a karnavan engaging a tutor for the purpose of teaching the English language on reasonable terms as to remuneration for the members of the family is binding upon the succeeding karnavans and that the debt thus due is payable out of the assets of the family."

If all these claims can be recognized as legal, whether they come under the strict designation of "maintenance" or not, the claim for the allowance being

(1) (1912) 17 I.C., 704.

(2) (1919) I.L.R., 42 Mad., 789.

(3) (1913) M.W.N., 379.

(4) (1898) 8 M.L.J., 294.

(5) (1909) 19 M.L.J., 590.

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based on the junior members' co-proprietorship of the joint family property, we fail to see why the marriage expenses of a junior member of a tarwad or Aliyasanthana family should not also be defrayed by the karnavan or ejman, provided that the family had adequate funds, and the karnavan or ejman has no valid and proper objections to the marriage.

The junior members of an Aliyasanthana family or a Malabar tarwad are not expected to live in a perpetual state of celibacy, and it is not denied that marriage is a necessary incident in the normal life of individuals in Kanara and Malabar as in other parts of the country. It has been held in *Srinivasa Iyengar v. Thiruvengadathaiyengar*(1) and *Gopalam v. Venkataraghavulu*(2) that the marriage of a male governed by Mitakshara law is a necessary burden upon the family. We have been pressed with the argument that as under the Aliyasanthana law union of man and woman is

"in truth, not a marriage but a state of concubinage into which the woman enters of her choice and is at liberty to change when and as often as she pleases."

[See *Subbu Hegadi v. Tongu* (3)]. There can be no legal obligation on an ejman or a karnavan to defray the expenses of the so-called marriage. In our opinion this argument has absolutely no bearing on the decision of this question. The prevailing system of marriage is a well recognized and time-honoured social institution sanctified by the long usages of the society to which the parties belong. The fact that the Courts have refused to consider it as valid marriage in law is no reason why the family, if it can afford the means, should refuse to defray the expenses for the marriage of a junior member. In our opinion, the marriage expenses of a

(1) (1915) I.L.R., 38 Mad., 556.

(2) (1917) I.L.R., 40 Mad., 632.

(3) (1869) 4 M.H.C.R., 186.

junior member of a Malabar tarwad or Aliyasanthana family form a part of his "right to maintenance."

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The cases referred to above do not by any means exhaust the variety of expenses for meeting which an anandravan can make a valid claim against the karnavan of the tarwad. It has been held in *Subbu Shettethi v. Krishnacharya*(1), though guardedly, that in certain circumstances a karnavan is entitled to raise money on the security of the family property for the defence of the members of the family charged with "rioting" if the money could not otherwise be procured. The exact legal basis for the liability of the tarwad property is not stated in the judgment; but the observations of MILLER and KRISHNASWAMI AYYAR, JJ., in Second Appeal No. 359 of 1906—an earlier case—that

"there is some evidence that some money was borrowed for expenses of the defence of a member of the family who was prosecuted in a criminal case but the nature of the criminal case does not enable us to say that the defence was for a family purpose,"

would suggest that the question to be decided would be whether the expenditure is for a family purpose, though the judgment does not show the exact bearing of the nature of the criminal case on the question of family purpose. In a still earlier case, i.e., Second Appeal No. 28 of 1888, without referring to the nature of the criminal charge and its connection with the question of family purpose (the available papers do not show what the charge was), Sir ARTHUR COLLINS, C.J., and PARKER, J., held that

"the Lower Court rightly decided that the money borrowed for the purpose of defraying the expenses incurred in a criminal charge against the karnavan and two senior anandravans was a debt incurred for the tarwad purpose and binds the tarwad. In our opinion, the cases discussed above are but

(1) (1911) 21 M.L.J., 159.

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illustrations of the rule that the junior member of a Malabar tarwad or Aliyasanthana family is entitled to claim from the karnavan or ejaman for his maintenance all his "necessary expenses,"

the justification for such a demand being his undoubted co-ownership of the tarwad property. Such expenses when defrayed by him would be expenses incurred by the karnavan for tarwad purposes and would bind the tarwad. What expenses are necessary may, in disputed cases, be safely left to the decision of the Courts. The principle is thus stated by SUNDARA AYYAR, J., in his book on Malabar Law :

"The rule of law is that the anandravan should be allowed for his maintenance what is reasonable and proper having regard to his needs and having regard to the position, affluence and status of the family. What is reasonable and proper will depend upon the circumstances and the times and would be a pure question of fact."

There is nothing in the conclusion we have reached, contrary to the principle of the Malabar or Aliyasanthana law.

We are fortified in our conclusion that the junior member is entitled to claim his marriage expenses by the decision in *Parvathi v. Kamaran*(1). It was said in that case that in North Malabar the male members of a Nayar tarwad are by custom entitled to receive from the karnavan an allowance for the maintenance of their consorts and children while living in the tarwad house. In the present case the junior member does not pitch his demand so high. He claims only the expenses incurred for the performance of his marriage. It is well known that the Aliyasanthana people in South Kanara have advanced further towards the paternal family than have the Marumakkathayam people in Malabar. It is the recognized practice in South Kanara for the woman and

her minor children to live with her husband (see *Subbu Hegadi v. Tongu*(1): It is a common practice in North Malabar and a growing practice in South Malabar (see *Parvathi v. Kamaran*(2) and *Muthu Amma v. Gopalan*(3). As this decision is based upon the custom in North Malabar which exists in an intensified form in Kanara, it follows that a junior member under the Aliyasanthana system also would be entitled to claim such expenses. If so, his right to claim *the expenses of his marriage* should be undoubted and, as we have shown, there is nothing in the principle of Aliyasanthana law against the recognition of such a right.

We are asked not to place much reliance on the decision in *Parvathi v. Kamaran*(2) as its authority is alleged to be somewhat shaken by the observation of the learned Judges who decided the case *Ravanni Achan v. Thankunni*(4). In that case PHILLIPS and NAPIER, JJ., held that an anandravan of a Malabar tarwad is not entitled to claim maintenance from his tarwad for his wife, who belongs to another tarwad, and much less is he entitled to claim for her any "menchilavu." The learned Judges think that to allow such a claim put forward by the anandravan would be to uphold the claim of the wife for maintenance from her husband's tarwad and then they refer to *Parvathi v. Kamaran*(2) and point out that even in that case the proposition contended for was described as inconsistent with the principles of Marumakkathayam Law. With due deference, it seems to us that the true significance of the claim advanced on the anandravan's behalf has not been correctly appreciated by the learned Judges. By asking for an allowance for the maintenance of his wife, the junior male member of a Malabar tarwad is not

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(1) (1889) 4 M.H.C.R., 196.

(3) (1913) I.L.R., 36 Mad., 593.

(2) (1883) I.L.R., 6 Mad., 341.

(4) (1919) I.L.R., 42 Mad., 789.

(1) (1883) I.L.R., 6 Mad., 341.

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asking the Court to hold that his wife has a right to recover maintenance from his tarwad. In so doing, he is only asking the Court to give effect to his right to recover from the karnavan expenses for his own maintenance of which "bharyachilavu" (wife's expenses) as it is called in Malabar is a necessary part. As observed in *Muthu Amma v. Gopalan*(1), by SUNDARA AYYAR and SADASIYA AYYAR, JJ., *Parvathi v. Kamaran*(2) held that a male member of a Marumakkathayam tarwad is entitled to an allowance for his consort and children living with him, that is, in computing the amount to which he is entitled for his own maintenance, the fact that he has to maintain a wife and children should be taken into account. (The italics are ours.) The claim of a junior member of a Malabar tarwad to receive from the karnavan an allowance for the maintenance of his wife and children, though described as inconsistent with the principle of Marumakkathayam law, was still allowed in that case as the custom was found to support such a claim. In our opinion, the effect of the decision in *Parvathi v. Kamaran*(2), cannot be minimized by the observation

"that the finding in the case (as regards custom) based on the evidence of two witnesses was not objected to."

This case has been referred to apparently with approval in *Maradevi v. Pammakka*(3) and explained as shown above in *Muthu Amma v. Gopalan*(1) and has always been looked upon by the community following these systems of law as enunciating a well known and correct principle of customary law. In this connection it may be interesting to note the following observations occurring in the Malabar Marriage Commission Report as regards this custom.

(1) (1913) I.L.R., 36 Mad., 593.

(2) (1883) I.L.R., 6 Mad., 341.

(3) (1913) I.L.R., 36 Mad., 203.

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"But so well established is the custom that the High Court has held that the maintenance of the "wives" and children of the junior members (residing with their "husbands" in the husband's tarwad) is a charge which the karnavan of the junior members is bound to meet. The High Court allows that the ruling would seem inconsistent with the principles of Marumakkathayam law, but the answers to the interrogatories and the evidence taken by the Commission show that the ruling is really and truly in accordance with existing usage." (The italics are ours.)

For the above reasons, we hold that the lower Court's decree awarding the plaintiff the expenses for his marriage is correct. It has not been argued before us that the amount is excessive. This Second Appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

PONTHINODA AHMED KOYA AND OTHERS (PETITIONERS)

v.

ILLIKKAKKAD AISAMMA AND OTHERS (RESPONDENTS).*

1925,
September
21.

Laccadive Islands—British India—Cession of territory—Sovereignty—Laccadive Islands, when became part of British India—Law applicable to the Islands—Regulation I of 1912, sec. 3—Scheduled Districts Act (XIV of 1874)—Laws Local Extent Act (XV of 1874)—Appeal to High Court from order of Inspecting Officer of Laccadives—Delay in presentation of appeal—Power to excuse delay—Indian Limitation Act (IX of 1908), sec. 5, whether applicable.

The Laccadive Islands became part of British India only in 1909 when they were ceded by the Bibi of Cannanore to the British Government, until which time the sovereignty was vested in the Bibi.

* Civil Miscellaneous Petition No. 1832 of 1924.

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By Regulation I of 1912, section 3, the ordinary law of British India is not applicable to the Laccadive Islands, but only certain enactments specified therein, including the Scheduled Districts Act (XIV of 1874) but not the Laws Local Extent Act (XV of 1874), are made applicable to the islands; and no notification has been issued under section 3 of the Scheduled Districts Act, 1874, by which the Indian Limitation Act has been extended to the islands.

Consequently, the High Court has no power, under section 5 of the Indian Limitation Act, to excuse the delay in the presentation of an appeal preferred to it against an order of the Inspecting Officer of the Laccadive Islands.

The decision in *Queen Empress v. Cheria Koya*, (1890) I.L.R., 13 Mad., 353, is erroneous as it is based on a misapprehension that the Laccadive Islands were part of British India ever since 1792.

PETITION presented to the High Court to excuse the delay in presentation of an appeal against order (S.R. No. 1604 of 1924) against the order of the Inspecting Officer of the Laccadives in Case No. 6 of 1923 of Agathi Island, Laccadives.

This is an application presented to excuse the delay in an appeal preferred to the High Court against the order of the Inspecting Officer of the Laccadive Islands. Under Regulation I of 1912, section 17, the period prescribed therein for presentation of an appeal to the High Court is six months excluding the monsoon months, June to September both inclusive. The petitioners applied that the delay may be excused for reasons stated in the affidavit, namely, that there were severe storms for three months which prevented the parties from leaving their places, and they relied on the provisions of section 5 of the Indian Limitation Act.

K. P. Padmanabha Pillai for petitioners.

B. Pocker for respondents.

Government Pleader (C. V. Ananthakrishna Ayyar),
amicus curiae.

JUDGMENT.

DEVADOSS, J.—This is an application by the appellant ARMED KOYA v. AISAMMA. to excuse the delay of 182 days in presenting S.R. No. 1604 of 1924 (Civil Miscellaneous Appeal) against the order of the Inspecting Officer of the Laccadives in Case No. 6 of 1923 of Agathi Island.

Mr. Padmanabha Pillai for the appellant contends that section 5 of the Limitation Act applies to the case and the Court is entitled to consider the application on the merits. Mr. Pocker for the respondents contends that the Limitation Act has not been extended to the Laccadives and therefore the Court has no power to act under section 5 of the Limitation Act. In order to determine this question it is necessary to see whether the law of limitation has been extended to the Laccadive Islands.

The history of the Laccadive Islands is an interesting one. We are at present concerned with the four islands which are known as the southern group of islands and the Island of Minicoy which are administered by the Collector of Malabar. It is unnecessary to consider the history previous to the year 1792. A few passages from "A short account of the Laccadive Islands and Minicoy" by R. H. Ellis, I.C.S., would be quite sufficient for the purpose of this case:

"In 1791 the southern islands passed, by the conquest of Cannanore, to the East India Company along with other possessions of the Bibi; and were further ceded, with Tipu's entire possession in Malabar, by the peace of Seringapatam, in 1792." "It was determined however 'as a matter of policy and conciliatory of Mappillas in general' to permit her to retain her possessions, provided she paid a tribute to the Honourable Company."

The East India Company was in possession of the islands from 1792. Owing to the non-payment of the

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DEVADOSS, J. tribute payable by the Bibi the islands were attached in 1875. This attachment remained in force until 1908. In 1909 the Bibi ceded the islands to the British and she was given a pension. By the cession of the islands to the British Government in 1909 the islands became British possession and part of India. The following proclamation was issued in 1912:

"In exercise of the power conferred by the Indian Councils Act, 1861 (24 and 25 Vict., C. 67) section 47, the Governor-General in Council is pleased to declare that for the purpose of the said Act, the Laccadive Islands and Minicoy, which by the Proclamation No. 292-I.A., dated the 5th February 1909, have been declared to be subject to the Government of Madras, shall be included within the limits of the Madras Presidency."

By virtue of this proclamation the southern group of the Laccadive Islands and Minicoy became part of the Madras Presidency, and the High Court of Madras was invested with jurisdiction over the southern group by a notification, dated the 1st February 1912:

"In exercise of the power conferred by the Indian High Courts Act, 1865 (28 and 29 Vict., Cap. 15), section 3, the Governor-General in Council is pleased to authorize and empower the High Court of Judicature at Madras to exercise within the Laccadive Islands and Minicoy, which are not included within the limits of the places for which the said High Court was established, all such jurisdiction and powers as the said High Court may, from time to time, exercise in the scheduled districts of the Presidency of Madras."

Though the southern group of the Laccadive Islands and Minicoy have become parts of the Madras Presidency and though the High Court has jurisdiction over them, yet, all the Acts of the Governor-General of India have not been extended to them. Regulation 1 of 1912, section 3, makes the Madras State Prisoners Regulation of 1819, the State Prisoners Act of 1858 and the

Scheduled Districts Act of 1874, the only enactments in force in the islands. Section 21 is as follows:

"All questions relating to any rights claimed or set up in the Civil Courts of the islands shall be determined in accordance with any custom not manifestly unjust or immoral governing the parties or property concerned, and, in the absence of any such custom, according to justice, equity and good conscience."

Under section 26 an appeal lies to the High Court from any decision of the Collector in the exercise of his original jurisdiction. Under section 17 the time for appeal is six months from the date of the judgment or order appealed against provided that the months of June, July, August and September shall be excluded in reckoning such period. It is clear from the Regulation that the ordinary law of British India is not applicable to the islands, but only such enactments or such portions of such enactments as are specifically mentioned in the Regulation and the Scheduled Districts Act of 1874 are applicable to the islands. Under section 3 of the Scheduled Districts Act of 1874:

"The Local Government, with the previous sanction of the Governor-General in Council may, from time to time, by notification in the *Gazette of India*, and also in the local *gazette* declare what enactments are actually in force in any of the scheduled districts, or in any part of any such districts, and (b) declare of any enactment that it is not actually in force in any of the said districts or in any part of any such district."

Under the notification issued by the Government the Limitation Act has not been extended to the islands.

Mr. Padmanabha Pillai relies upon the decision in *Queen Empress v. Cheria Koya*(1) as supporting his contention. In that case it was held that the Criminal Procedure Code was applicable to the southern group of the Laccadive Islands. The learned Judges were of opinion that inasmuch as the Scheduled Districts Act did not expressly exclude the operation of the Criminal

(1) (1890) I.L.R., 13 Mad., 353.

Procedure Code and as the Laws Local Extent Act makes all the enactments of the Indian Legislature applicable throughout British India, it should be taken that the Criminal Procedure Code was in force in the islands. It was not brought to the notice of the learned Judges that the Laccadive Islands were not part of British India. The sovereignty of the islands before 1909 was vested in the Bibi of Cannanore. Though the islands were in the possession of the British Government they did not become part of British India, for they were taken possession of for arrears of tribute according to the agreement between the Government and the Bibi. In the light of the facts placed before the learned Judges they held that the Criminal Procedure Code was in force in these islands. The matter has now been placed beyond doubt by the cession of the islands to the British Government in 1909 and by the proclamation of the Secretary of State above referred to.

It is urged that if the law of limitation is not extended to the Laccadive Islands there will be no limitation for suits and there will be no security of title and no title can be created by prescription and a suit may be brought at any time against any person. We are not concerned with the policy of the Government with regard to the administration of these islands. It may be that practical difficulties will arise in deciding questions of title and claims for money. We are only concerned in this petition to see whether the petitioner can claim the benefit of section 5 of the Limitation Act. As the Limitation Act has not been extended to the Laccadive Islands we have no power to consider the application on the merits. We, therefore, dismiss the Civil Miscellaneous Petition with costs.

As the matter is of importance we gave notice to the Government Pleader to help us in deciding this question.

We are very much indebted to him for the able way in which he summarised the history of the islands and brought to our notice the various proclamations and regulations with reference to the islands.

WALLER, J.—This is an application under section 5 of the Limitation Act for excusing delay in the presentation of an appeal. The appeal comes from one of the group of Laccadive Islands which is administered by the Collector of Malabar. It raises a very interesting question as to the applicability of the Limitation Act to that area. Mr. Padmanabha Pillai's argument was based entirely on an old ruling of this Court (*Queen-Empress v. Cheria Koya*(1)). As the position did not seem to us to be entirely clear, we asked Mr. C. V. Ananthakrishna Ayyar, the Government Pleader, to assist us. He has now placed before us the history of these islands in relation to the Government of India and we are very much indebted to him for his assistance. In the ruling above referred to, the High Court found that the Laccadive Islands had become an integral part of Her Majesty's territories so far back as the year 1792 and, relying on Acts XIV and XV of 1874, decided that the Criminal Procedure Code was in force in them. It is clear that the Judges were misinformed as to the true position, which was that the Secretary of State had repeatedly refused to assume the sovereignty of the islands and that Impichi Bibi did not surrender it till the year 1909. The agreement with her was ratified by the Governor-General in that year and the islands became part of His Majesty's Indian dominions with effect from 1st July 1909. They were incorporated in the Madras Presidency on 1st February 1912 and on the same date were placed under the jurisdiction of the Madras High Court.

(1) (1890) I.L.R., 13 Mad., 353.

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WALLER, J. Minicoy Regulation). Section 3 provides that:

"This Regulation, the Madras State Prisoners Regulation, 1819, the State Prisoners Act, 1858, and the Scheduled Districts Act, 1874, shall be the only enactments in force in the islands."

The Laws Local Extent Act (XV of 1874) is not referred to and therefore is not in force. Nor has any notification been issued under Act XIV of 1874 applying the Limitation Act to the islands. This being so, the whole basis of Mr. Padmanabha Pillai's argument disappears. It follows that the Limitation Act does not apply to Laccadive Islands and that the law of limitation applicable to them must be looked for in Regulation 1 of 1912. Section 17 read with section 27 provides that appeals shall ordinarily be filed within six months, from which the period of the south-west monsoon (June to September inclusive) is to be excluded. That period we have no power to extend. The application fails and is dismissed with costs.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1925,
December 17.

THE PUBLIC PROSECUTOR (APPELLANT)

v.

THANIYA (ACCUSED).*

*Madras Planters' Labour Act (I of 1903) ss. 4, 7, 30 and 42—
Breach of rules framed under Act—Contract of labour not
containing descriptive marks of labourer, invalidity of—
Illegality of conviction for desertion.*

The conviction of a labourer under section 30 of the Madras Planters' Labour Act (I of 1903) for desertion is illegal if the

* Criminal Appeals Nos. 339 and 340 of 1925.

contract of labour does not contain the particulars required by the rules framed under the Act (e.g.) descriptive marks of the labourer.

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APPEALS under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the accused by the Subdivisional Magistrate of Tellicherry in Criminal Appeals Nos. 13 and 12 of 1925 on his file preferred against the judgments of the Court of the Second-class Magistrate of Vayitri in Calendar Case Nos. 836 and 830 of 1924.

The facts are given in the judgment.

Public Prosecutor (J. C. Adam) for appellant.

T. A. Ananta Ayyar for respondent.

Section 4 (1) of the Madras Planters' Labour Act is as follows:—

"Every contract between a planter and a maistri, and every labour contract shall be in writing and shall be in such form and shall contain such particulars as the Local Government may by rules made under this Act direct, and every labour contract shall be signed in the presence of a magistrate or of some other person expressly authorized by the Local Government by name or in virtue of his office."

Section 7—"No contract made otherwise than in accordance with the provisions of section 4 shall be enforceable under this Act as a labour contract against the labourer entering into it."

Section 30 (1)—"Every labourer who deserts from an estate upon which he has contracted to work, or without reasonable cause fails to present himself on the estate at the time specified in his contract, shall be punishable with imprisonment for a term which may extend to one month or with fine not exceeding fifty rupees, or with both."

Rule 2 (4) framed under the Act required that the contract with the labourer should contain "the labourer's native place (village, taluk and district), caste, age, and descriptive marks."

The JUDGMENT of the lower appellate Court was as follows:—

1. "The appellant Guruva, son of Babbu, was convicted of an offence punishable under section 30 of the Madras Planters' Labour Act.

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2. Rule 2 of the rules framed under section 4 of the Act says that every labour contract should contain the labourer's descriptive marks. In the contract executed by the appellant no such marks have been noted. The contract is thus one made otherwise than in accordance with the provisions of section 4 and section 7 therefore makes it 'not enforceable.' The conviction based as it is on this invalid contract, cannot stand. I allow the appeal and acquit the appellant."

JUDGMENT.

DEVADOSS, J. — This is an appeal by the Public Prosecutor against the decision of the Subdivisional Magistrate of Tellicherry who quashed the conviction of the accused by the Second-class Magistrate of Vayitri under section 30 of the Madras Planters' Labour Act, I of 1903, on the ground that the contract executed by the appellant did not contain his descriptive marks as required by law. The contention of the Public Prosecutor is that the omission to mention the descriptive marks of the accused was not a wilful omission but an oversight and that omission should not be held to invalidate the contract. The question is whether the omission to enter any particulars required by the rules vitiates the contract or makes it unenforceable under the Act. The argument of the Public Prosecutor is that the omission to give the descriptive marks of a labourer is such a negligible thing that it cannot be held to invalidate a contract. He argues "could it be said that a person, who has no descriptive marks or is unable to give his father's name as required by the rules cannot enter into a contract of this kind." The Governor in Council has framed rules under sections 4, 13 and 42 of the Planters' Labour Act of 1903. Rule 2 (4) is in these terms—

"Labourer's native place (village, taluk and district) caste, age, and descriptive marks,"

and section 4 says :

"Every contract between a planter and a maistri and every labour contract shall be in writing and shall be in such form and shall contain such particulars as the local Government may by rules made under this Act direct."

The question is whether the non-compliance with any of these rules as to particulars vitiates the contract? In the contract form there is a column for descriptive marks. That column has not been filled in. It is unnecessary to enquire, for the purpose of this case, whether the accused has any descriptive marks or not. What we are concerned with is to see whether the rules have been complied with. The argument that it is not necessary to fill up one of the columns required to be filled up under the rules, either because the column cannot be filled up or it is not necessary to fill it up because of its minor importance does not commend itself to me. The Madras Planters' Labour Act of 1903 is an exceptional piece of legislation. It converts the civil liability into the criminal liability of a labourer and subjects him to imprisonment for one month with or without fine. When the legislature enacts that in order to give validity to a contract certain formalities should be complied with, it is not for the Court to say whether any of the formalities is necessary or not. It may be as the Public Prosecutor argues that if a person has no descriptive marks, or if he is not able to give his father's name, the contract cannot be executed. But where, owing to wilful omission or carelessness, the columns are not filled up, it cannot be said that one of the particulars required by the rules is not of such importance as to make the contract invalid. The rules require that the labourer's native place, village, taluk and district, caste, age and descriptive marks should be given. If a labour contract does not contain the name, caste, or age of the labourer,

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can we hold that the contract is a valid one? Whatever may be the reason for the legislature requiring such particulars, it is not for the Court to enquire into the reasonableness of it. When the legislature, for reasons best known to itself, requires certain formalities to be gone through, or certain formalities to be observed, in order to make a contract valid, or when it requires certain descriptive marks or particulars to be given in a contract to make it valid, the Court cannot consider any one of the terms or requisites as of no importance. I think the descriptive marks of a labourer are as important as his name and caste and therefore the omission to give descriptive marks makes the contract unenforceable. It is not suggested that these rules have not got the force of law. Such a contention would be on the face of it untenable, for the rules are framed under sections 4, 13 and 12 of the Act. In the Assam Labour Act, Act VI 1901, the form to be filled in is made part of the Act itself, and the Madras Act is evidently based upon the Assam Labour Act and it cannot be said that the Madras Legislature has required certain particulars to be given in the form without due consideration. When a similar enactment in another province requires the descriptive marks to be given in the contract, we may take it that it is for good reasons that the legislature required them.

The legislature does require certain formalities for the validity of certain contracts. For instance in the case of statutory bodies no contract which is not under seal is valid. Even if a statutory body has acted on such a contract, yet, when that contract is sought to be enforced in a Court of law, it cannot be enforced if it is not under seal. The law requires certain documents to be attested and such documents may be proved only by proving attestation. The Courts are bound to give effect to the law as they find it and not to consider whether

a certain formality is essential or non-essential. It is urged that a good many contracts might be declared invalid if such a literal construction of the rules is to prevail; but it is not the function of the Court to consider what effect the decision will have. The duty of a Court is to interpret and apply a statute as it finds it, and no provision of law should be considered unnecessary or immaterial. The labourer is as much entitled to protection as the planter. Labourers are mostly ignorant people and the protection given under the Act should not be lightly taken away. The legislature evidently in order to prevent unscrupulous maistris and others inducing labourers to enter into contracts which might afterwards be found irksome to them, requires that certain formalities should be gone through and certain particulars should be entered in the contract to safeguard them and to prevent them from escaping the consequences of the non-fulfilment of the contract by pleading that they are not the persons who signed the contract. The Act takes the precaution to see that everything is done above board and to the knowledge of the labourer. For instance, it lays upon the Magistrates or other persons before whom such labour contracts are signed, a duty to see that the terms are fully explained to and are understood by the parties. In the face of the considered policy of the Act and the clear terms of sections 4 and 7 it cannot be said that the Subdivisional Magistrate was wrong in setting aside the conviction of the accused on the ground that the descriptive marks were not given in the contract.

I therefore decline to interfere with the order of the Magistrate and dismiss this appeal.

WALLER, J.—I agree that the appeals must be dismissed. The rule framed under section 4 of the Act requires that, among other particulars, the descriptive

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marks of the labourer shall be entered in the contract. In these cases, no such marks have been entered. In fact, no attempt has been made to comply with the rule. It is not asserted that respondents have no descriptive marks and I infer from Mr. Adam's admission that a large number of similar contracts may be affected by our decision, and that the rule has been habitually ignored. There is, of course, in neither case any dispute as to the identity of the labourer, but that is not to the point. In order that the contract may be enforceable under the Act the law requires that certain things shall be entered into it. If they are omitted the contract cannot be enforced.

N.B.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan.

1925,
November 18

THE PUBLIC PROSECUTOR, (APPELLANT)

v.

KALIA PERUMAL NAICKER, (ACCUSED).*

Sec. 249 and clause (o) of Schedule V of Madras District Municipalities Act (IV of 1920)—Commission agent selling wholesale grains of others, without licence—Liability to take licence.

Under section 249 of the Madras District Municipalities Act (IV of 1920) read with Schedule V, clause (o), any person who sells grain wholesale has to obtain licence and if he fails to do so he is liable to be punished under section 338 of the Act.

Held that a person who is not a mere crier or auctioneer who auctions the goods of others in their presence, but sells, for commission, on his own account, by auctioning wholesale in his premises the grain sent to him by others, comes within clause (o) of Schedule V of the Act.

* Criminal Appeal No. 886 of 1925.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the order of acquittal passed by the Second-class Bench Magistrates of Shevvapet in S.T. No. 1126 of 1923.

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NAICKER.

The facts are given in the judgment.

Public Prosecutor (J. C. Adam) for appellant.

A. K. Balakrishnan amicus curiae.

Section 249 of the Madras District Municipalities Act (IV of 1920) is as follows:—

(1) The council may publish a notification in the district gazette and by beat of drum that no place within municipal limits or at a distance within three miles of such limits shall be used for any one or more of the purposes specified in Schedule V without the chairman's licence and except in accordance with the conditions specified therein.

Clause (o) of Schedule V of the Act is as follows:—

“Selling grain or jaggery wholesale or storing grain or jaggery for the wholesale trade.”

JUDGMENT.

This is an appeal by the Government against the acquittal by the Bench Magistrates, Shevvapet, of the counter-petitioner against whom a charge had been brought of failure to take out licence for selling grain wholesale. Under section 249 of the District Municipalities Act (V of 1920) read with Schedule V, clause (o) of the same Act, any person who sells grain wholesale has to obtain licence. If he fails to do so, he is liable to be punished under section 338. The Bench Magistrates acquitted the accused on the ground that he was only getting commission for auctioning the grain. The question for decision is whether he is not even as a commission agent a person who sells grain. What he

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actually did was to sell by auction bandy-loads of grain wholesale. The grain belonged to his customers who sent it to him for sale and he effected the sale by auction and obtained a remuneration by way of commission. He is nevertheless the person who actually sold the grain. It is clear therefore that he is a person who comes within clause (o) of Schedule V and must take out a licence. It is not a case of a mere crier or auctioneer who auctions the goods of another person in the latter's presence and acts as a mere agent for the purpose. The accused is, as I understand from the records, a commission agent who sells other people's goods and receives remuneration by a commission, he being treated as the actual seller of the goods.

In these circumstances the acquittal must be set aside and the accused convicted under section 338 of the District Municipalities Act. He is fined Rs. 5 and will undergo simple imprisonment for two days in default of payment of the fine.

N.R.

PRIVY COUNCIL.*

MAHOMED KHALEEL SHIRAZI AND SONS
(PLAINTIFFS), APPELLANTS,

1926,
February 4.

v.

LES TANNERIES LYONNAISES AND ANOTHER
(DEFENDANTS), RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Appeal to Privy Council—Competence—Suit in Original Jurisdiction—Absence of appeal to Appellate Jurisdiction—Additional Evidence on appeal—Code of Civil Procedure (Act V of 1908), Order XLI, r. 33 and s. 107.

A suit was brought against *A* and *B* in the Original Civil Jurisdiction of the Madras High Court. The trial Judge made a decree against *A* for a large sum with costs, and dismissed the suit as against *B*, but decreed that *B* should pay the plaintiffs' costs. *A* and *B* jointly appealed; the plaintiffs did not appeal. The Appellate Court made a decree reducing the sum payable by *A* and dismissing the suit as against *B*. The plaintiffs appealed to the Privy Council.

By Order XLI, rule 33, an Appellate Court may pass any such decree or order as the case may require including one in favour of a respondent or party who has not filed any appeal or objection.

Held that the present appeal, so far as *B* was concerned, being in effect an appeal direct from the trial Judge was not competent under the Code of Civil Procedure, 1908, or under the Letters Patent of the High Court; Order XLI, rule 33, was not intended to apply to such an appeal.

The power of an Appellate Court under section 107 of the Code of Civil Procedure, 1908, to admit additional evidence should be exercised with much caution, and only where the Court is satisfied that in the interests of justice the power should be exercised, and that the evidence would have been admissible at the trial.

* Present: VISCOUNT FINLAY, LORD BLANESBURGH, SIR JOHN EDGE and Mr. AMERU ALL.

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LYONNAISES.

APPEAL (No. 30 of 1924) from a decree of the High Court in its Appellate Civil Jurisdiction (March 14, 1922) varying a decree of that Court in its Original Civil Jurisdiction (October 20, 1920). The suit was brought by the appellants in the High Court against the respondents and another defendant to recover money alleged to be due under two contracts for the sale of skins.

The facts relevant to this report are stated in that part of the judgment of the Judicial Committee here reported. The appeal as against the first respondent depended entirely upon the evidence and involved no question of law.

Sir George Lowndes, K.C., Kenworthy Brown and D. Chamier for the appellants.

Dunne, K.C., and Blanco White for respondent No. 1.
E. B. Raikes for respondent No. 2.

The JUDGMENT of their Lordships was delivered by Sir JOHN EDGE.—This is an appeal by the plaintiffs from a decree, dated 14th March 1922, of the High Court at Madras, which was made in its Appellate Civil Jurisdiction and varied a decree, dated 20th October 1920, of a Judge of the same Court, which was made in the Ordinary Original Civil Jurisdiction of the High Court.

The appeal arises in a suit which was instituted with the leave of the High Court on 3rd February 1919, in the Ordinary Original Civil Jurisdiction of the High Court by the plaintiffs, who live in the city of Madras, to obtain a decree against Les Tanneries Lyonnaises and their agent Monsieur J. Marret for money alleged to be due to the plaintiffs under a contract for the sale and delivery of goat skins under a contract of 25th May 1917, and under a contract of 26th January 1918, for the sale and delivery of sheep skins. There was another defendant to the suit named, C. Sowrimuthoorya

Oodayar, against whom no relief was claimed. The suit was tried and the decree of the trial Judge was made in the Ordinary Original Civil Jurisdiction of the High Court.

The French company carries on business at Oullins, near Lyons, in France. Marret and Oodayar live at Pondicherry. The contract of 25th May 1917 was made by Marret as the agent of the French company with the plaintiffs in the city of Madras, and the money which might become due under it was payable at a bank in the city of Madras. The contract of 26th January 1918 was made by Marret at Pondicherry, and the money which might become due under it was payable to the plaintiffs at the bank in the city of Madras.

The trial Judge made, on 20th October 1920, a decree for Rs. 1,76,242-0-5, with interest thereon and for costs against the French company, and by his decree dismissed the suit against Marret and Oodayar, but decreed that Marret should pay to the plaintiffs taxed costs and interest thereon. The plaintiffs did not appeal to the High Court against the decree of the trial Judge dismissing the suit against Marret. They had obtained a decree against the French company for their entire claim, and with that they were then content. As appears by the record, the French company and Marret jointly appealed to the High Court against the decrees which had been made against them. On that appeal the High Court found that the French company was not liable to pay anything in respect of the claim under the contract of 26th January 1918, and by its decree modified the decree against them made in respect of their liability under the contract of 25th May 1917, with certain costs, and dismissed the suit against Marret and Oodayar. Against that decree of the High Court this appeal by the plaintiffs has been brought.

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In the High Court Marret on behalf of the French company and himself had filed a joint written statement. In this appeal for the first time the French company and Marret are represented by different counsel instructed by separate firms of solicitors. Those learned counsel raised preliminary objections to the appeal, the consideration of which their Lordships decided should stand over until the arguments on the appeal had been heard. Their Lordships will now state what those preliminary objections were and what is their decision on them. Each of the learned counsel contended that the suit was not within the cognizance of the High Court in its Original Civil Jurisdiction. The learned counsel for Marret further contended that this appeal to His Majesty in Council is, in effect, an appeal against the decree of the trial Judge dismissing the suit as against Marret, from which decree the plaintiffs had not appealed, and that such an appeal was not allowed by the Code of Civil Procedure, 1908, or by the Letters Patent of the High Court.

As to the objection that the suit was not within the cognizance of the High Court in its Original Civil Jurisdiction, their Lordships find that the contract of 25th May 1917 was made in the city of Madras, and it was agreed that the money payable under that contract should be paid in the city of Madras, and that it was agreed that the money payable under the contract of 26th January 1918 should be paid in the city of Madras, and further find that the High Court, under its Letters Patent, gave leave to the plaintiffs to bring the suit in the Ordinary Original Civil Jurisdiction of the High Court, and consequently hold that the suit was within the cognizance of the High Court in its Ordinary Original Civil Jurisdiction, and disallow that objection. As to the objection especially raised by the

learned counsel for Marret, that as the plaintiffs had not appealed against the decree of the trial Judge dismissing the suit, excepting as to costs, against Marret, no appeal lay against him, their Lordships have been referred to the Code of Civil Procedure, Order XLI, rule 33, *Gangadhar Muradi v. Banabashi Padihari*(1), and *Bhaidas Shivdas v. Bai Gulab*(2). Their Lordships think that this appeal to His Majesty in Council, in so far as Marret is concerned, is, in effect, an appeal direct to His Majesty in Council from the decree of the trial Judge, which is not allowable under the Code of Civil Procedure, 1908, or under the Letters Patent of the High Court, and they hold that the Code of Civil Procedure, 1908, Order XLI, rule 33, was not intended to apply to such an appeal, and they accordingly decide that the appeal, so far as Marret is concerned, should be dismissed, but without costs.

[The judgment then dealt with the appeal so far as it related to Les Tanneries Lyonnaises, and after considering the documentary and verbal evidence at length, held that the decree of the trial Judge should be restored. It was proved that Marret had not acted honestly. The judgment concluded as follows:—]

There is one other question raised by the appellants in this appeal. It relates to the admission in evidence by the Court of Appeal of documents which were not in evidence before the trial Judge. The High Court as a Court of Appeal in this suit had, under section 107 of the Code of Civil Procedure, 1908, power to take additional evidence. In their Lordships' opinion it is a power which should be exercised by a Court of Appeal with much caution and only in suits where it is satisfied

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(1) (1914) 22 Calo. L.J., 390.

(2) (1921) I.L.R., 45 Bom., 718 (P.C.); 48 I.A., 181.

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that in the interests of justice it should be exercised, and that such additional evidence when admitted will be evidence which, if produced at the trial, would have been admissible. The additional evidence, admission of which is complained of on behalf of the appellants, however much it may have affected the judgments in the Court of Appeal, has not affected the judgment of their Lordships in the slightest degree.

Their Lordships will humbly advise His Majesty that the appeal, so far as it relates to Les Tanneries Lyonnaises, should be allowed, and the decree of the High Court in appeal should be set aside against both respondents, with costs payable by Les Tanneries Lyonnaises, and the decree of PHILLIPS, J., should be restored and affirmed, and that the appeal, so far as it relates to Monsieur J. Marret, should, save as aforesaid, be dismissed without costs. The respondents, Les Tanneries Lyonnaises, should pay to the appellants their costs in the High Court and in this appeal.

Solicitor for appellants—*Douglas Grant*.

Solicitors for respondent No. 1—*Thompson, Quarrel, and Allencave*.

Solicitors for respondent No. 2—*Josselyn and Elwse*.

A.M.T

APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.*

SHEIK HUSSAIN SAHIB (PLAINTIFF), APPELLANT,

1925,
November 10.

v.

PACHIPULUSU SUBBAYYA AND ANOTHER
(DEFENDANTS), RESPONDENTS.*

*Water, flow of—Adjacent lands of lower and higher levels—
Natural right of owner of latter to let off his water to land
of lower level—No distinction between rural and urban
areas.*

An owner of land on a lower level to which surface water from adjacent land on a higher level naturally flows is not entitled to deal with his lands so as to obstruct the flow of water from the higher land. This rule is applicable to all lands whether situate in the country or in towns; *Gibbons v. Lenfestey*, (1915) 113 Law Times (N.S.), 55 (P.C.), followed; *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*, (1906) I.L.R., 29 Mad., 539, and *Sangana Reddiar v. Perumal Reddiar*, (1910) M.W.N., 545, overruled.

SECOND APPEAL against the decree of A. NABAYANA PANTULU GARU, Subordinate Judge of Kistna at Ellore, in A.S. No. 380 of 1921 preferred against the decree of C. BHASKARA REDDI GARU, District Munsif of Kovvur, in O.S. No. 911 of 1919.

The plaintiff owned some lands in a village, the rain water falling on which was naturally flowing on the defendants' neighbouring land which was on a lower level. The defendant erected a bund on his land the effect of which was to pen back the plaintiff's water. Plaintiff sued (a) for a declaration of his right to allow

* Second Appeal No. 1076 of 1922.

his water to flow on the defendants' land in its natural course, (b) for the removal of the bund and (c) for a permanent injunction restraining the defendant from obstructing such flow. The defendant pleaded that the plaintiff purchased his lands knowing that the bund had already been raised before his purchase, that the plaintiff had no natural right in law and that there was no actual damage caused to the plaintiff. The District Munsif held that the plaintiff had the natural right, that he sustained damage to the extent of Rs. 50 owing to the obstruction to the flow of his water and ordered the defendants to open three sluices in the bund so as to allow the flow of the water. On appeal by the defendants, the Subordinate Judge, without finding whether any damage was caused to the plaintiff, dismissed the suit holding that the plaintiff had no natural right. He relied on *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(1) and *Sangana Reddiar v. Perumal Reddiar*(2). The plaintiff then preferred this Second Appeal.

This Second Appeal coming on for hearing the Court (PHILLIPS and RAMESAM, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The plaintiff (appellant) is the owner of a piece of land which lies on a higher level than the land of the defendant and he seeks to prevent the defendant from erecting a bund on his land, which has the effect of preventing the flow of surface water over the plaintiff's land on to the defendant's land which is its natural outlet. The lower Appellate Court following the ruling in *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(1) has held that the defendant is entitled to prevent water flowing over his land by erecting a bund. It is now argued for the appellant that this decision in *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(1) is only applicable to cases where the lands

(1) (1906) I.L.R., 29 Mad., 539.

(2) (1910) M.W.N., 545.

are situated within a town and he relies on subsequent cases of this Court, *Ramasawmy v. Rasi*(1) and *Maharajah of Venkatagiri v. Secretary of State for India*(2). In *Ramasawmy v. Rasi*(1) the prior decision in *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(3) was distinguished on the ground that it referred to land in a town and was therefore not applicable to agricultural land outside a town. The decision in *Maharajah of Venkatagiri v. Secretary of State for India*(2) was with reference to the right to bund a natural stream and SESHAGIRI AYYAR, J., prefers to base his decision on illustration (h) of section 7 of the Easements Act (Madras Act V of 1882) rather than illustration (i) which deals with surface water, illustration (h) dealing with natural streams. He, however, adds that if the learned Judges in *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(3) intended to lay down that the principle regarding the conflict of rights should be extended to agricultural areas in rural parts he dissents from the proposition and WALLIS, Offg. C.J., takes the same view. SUBRAHMANYA AYYAR, J., in *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(3) laid down the proposition that the natural right mentioned in illustration (i), namely, "the right of every owner of upper land that water naturally rising in, or falling on, such land and not passing in defined channels, shall be allowed by the owner of adjacent lower land, to run naturally thereto," was not an absolute right but was the right to pass such water without incurring any liability for damages caused thereby and held that when that right came in conflict with the right mentioned in illustration (a), namely, "the exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force" the latter must prevail. If this proposition is correct, it would be illogical to hold that the natural right to pass water over a lower land cannot prevail in a town, whereas it must prevail in the country.

In section 7 we have the definition of what an "easement" is, namely, "restriction of one or other of the following rights" which are mentioned. Because illustration (a) mentions the right of an owner of land "in a town" to build on such land, it does not necessarily exclude the right of an owner of land in the country to build on such land. In fact section 7 itself deals with the exclusive right of every owner of immovable property,

(1) (1915) I.L.R., 38 Mad., 149.

(2) (1915) 28 M.L.J., 98.

(3) (1906) I.L.R., 29 Mad., 539.

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subject to any law for the time being in force, to enjoy and dispose of the same, and also the right of every owner of immovable property, subject to any law for the time being in force, to enjoy without disturbance by another the natural advantages arising from its situation. *Prima facie*, the owner of immovable property is entitled to do what he pleases with his land and can only be restrained by law or by the superior right of some other person. There can be no distinction between such a right in a town and the same right in the country, unless it is subject to any law for the time being in force. We find it difficult to realize the distinction drawn between such rights in *Ramasawmy v. Rasi*(1) and *Maharajah of Venkatagiri v. Secretary of State for India*(2) unless there is some law or custom having the force of law which restricts the right in rural areas, but not in urban areas. The difficulties of cultivating land are referred to and it is suggested that owing to these difficulties the natural right of an owner of land to do on it what he pleases is subject to restrictions but this can only be if the restrictions are imposed by law or custom having the force of law. If the right of an owner to pass his surface water on to the lower land is an absolute right which the owner of the lower tenement cannot resist, it is undoubtedly an easement right enjoyed by him over the lower tenement, but we find in the Act that the right is given as an illustration of a right against which an easement may be acquired and is not described as being in itself an easement right. It is doubtful whether the legislature would have given a right which is in itself an easement right as an illustration of a natural right in restriction of which an easement right can be acquired. We may mention that the observations, in *Maharajah of Venkatagiri v. Secretary of State for India*(2) with reference to illustration (i) of section 7 are *obiter* inasmuch as it was found in that case that the water which was interfered with was the water of a natural stream. The decision, however, in *Ramasawmy v. Rasi*(1) distinctly limits the proposition put forward in *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(3) to urban areas although in the earlier judgment there is no language to lead one to suppose that the learned Judges meant to confine the decision to urban areas. They no doubt refer to illustration (a) which deals with land in a town, but the right mentioned is only an illustration of the rights referred to in section 7 and does not exclude other rights

(1) (1915) I.L.R., 38 Mad., 149. (2) (1915) 28 M.L.J., 98.
(3) (1906) I.L.R., 29 Mad., 539.

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ex jure nature appertaining to an owner of land. An owner of agricultural land is undoubtedly entitled to raise the level of his land if he so wishes, provided there exists no legal restriction of such act. It might thus happen that a lower land when raised would become higher in level than the adjacent land which had formerly been on a higher level. The right to pass water would thereby be reversed and the owner of the originally lower land would be entitled to pass water on to what was originally the higher land. If the owner of the lower land has such a right to raise his land over the whole of it, it is strange that he cannot raise the level over only a part, such raising having the effect of stopping the flow of water through the adjacent land but whether he has such right must depend on the extent of the right of the owner of the land which was originally higher. Three other authorities have been cited before us from other parts of India, the first being *Ambica Saran Singh v. Debi Saran Singh*(1) in which it was decided that the owner of a higher land had the right to pass his surface water over the lower land so long as it continued to be on a lower level, apparently dissenting from the decision in *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(2) although in terms it does not purport to do so. In the other two cases, of Calcutta and Patna respectively, the Easement Act does not apply, *Ramadhin Singh v. Jadunandan Singh*(3) and *Sarban v. Prudo Sahu*(4). The former case is of no assistance here, for it merely deals with the right of a party to abstain from passing water falling on his land to the lower land and to collect it on his own land. The Patna case does not refer to any authorities and the Court came to a conclusion differing from that taken in *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(2).

Inasmuch as the authority of *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(2) which was followed in *Sangana Reddiar v. Perumal Reddiar*(5), has been questioned in *Ramasawmy v. Rasi*(6) and *Maharajah of Venkatagiri v. The Secretary of State for India*(7), we think that it is advisable that the whole question should be considered by a Full Bench of this Court, and accordingly we refer the case to a Full Bench for decision.

(1) (1914) 24 I.C., 91. (2) (1906) I.L.R., 29 Mad., 539.
(3) (1915) 27 I.C., 268. (4) (1922) 69 I.C., 948.
(5) (1910) M.W.N., 545. (6) (1915) I.L.R., 38 Mad., 149.
(7) (1915) 28 M.L.J., 98.

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ON THIS REFERENCE

V. Suryanarayana for appellant.—I am entitled to this right which is a natural right; *Gibbons v. Lenfestey*(1), *John Young & Co. v. Bankier Distillery Company*(2) and section 7 (b), illustration (i) of Easement Act. *Maung Bya v. Maung Kyi Nyo*(3) incidentally deals with this point and approves *Ramasawmy v. Rasi*(4) and *Abdul Hakim v. Gonesh Dutt*(5) which are in my favour. In law there can be no distinction between natural rights in towns and in country. *Mahamahopadhyaya Ranga Charar v. The Municipal Council of Kumbakonam*(6) is wrong.

B. Satyanarayana for respondents.—Plaintiff's right can exist only so long as my land is on a lower level. I have also a natural right to raise the level of my land or to put up a bund; and when I do so the other's natural right will be at an end; *Mahamahopadhyaya Ranga Charar v. The Municipal Council of Kumbakonam*(6). Illustration (a) of section 7 is not controlled by illustration (i); *Maung Bya v. Maung Kyi Nyo*(3) does not deal with this point and does not really approve of *Ramasawmy v. Rasi*(4) which is wrong. Damage is the test. It has not been found in this case that putting up the bund has caused any damage to the plaintiff.

The OPINION of the Court was delivered by

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COUTTS TROTTER, C.J.—This appeal raises certain questions of fact with which we are not concerned. The question of law to which our attention has been directed is whether the owner of a plot of land on a lower level on to which water flows in the ordinary course of nature from adjacent land on a higher level is entitled in law so to deal with his land as to obstruct the escape of water from the higher land. It is said that any right which the owner of the higher land has is not in the nature of an easement and that terms such as dominant and servient tenements are inapplicable. That may be true in the abstract but it seems to me that the Privy Council and

(1) (1915) 113 L.T. (N.S.), 55 (P.C.).

(3) (1925) 49 M.L.J., 222 (P.C.).

(5) (1886) I.L.R., 12 Cal., 323.

(2) [1893] A.C., 691.

(4) (1915) I.L.R., 38 Mad., 149.

(6) (1906) I.L.R., 29 Mad., 539.

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the House of Lords have clearly recognized a very close analogy between the two classes of cases and that if the owner of the land at the lower level raises an obstruction to the natural flow of the water he will be restrained if it causes or tends to cause damage to the owner of that on the higher. *Gibbons v. Lenfestey*(1) is a direct authority of the Privy Council binding upon us. In the judgment of the Committee which was delivered by Lord DUNEDIN we have at page 57 :

"The right of the superior proprietor to throw natural water on the lower land is not an ordinary servitude to which this rule can apply. It is a natural right inherent in property; it is a question of nomenclature whether it is or is not called a servitude."

Later on we have

"where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher ground insensibly without hurting the inferior tenement should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property."

In *John Young & Co. v. Bankier Distillery Company*(2) Lord WATSON says at page 696 :

"The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation, unless it has been unduly and unreasonably increased by operations which are in *emulationem vicini*. But he is under no

(1) (1915) 113 L.T. (N.S.), 55 (P.C.).

(2) [1893] A.C., 691.

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legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case here, and water artificially conveyed from a distant stream."

And then His Lordship quotes Lord GIFFORD in *Blair v. Hunter Finlay and Company*(1):

"Although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible."

The same principle clearly underlies the decision in *Smith v. Kenrick*(2) and in that case Mr. Justice CRESSWELL in delivering the judgment of the Court said (page 565):

"There are many cases in which the principle has been recognized, that one landowner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus, he cannot, by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house, nor from building on his own land, although it may obstruct windows, unless indeed by lapse of time the adjoining land has become subject to a right analogous to what in the Roman Law was called a servitude. So also in *Acton v. Blundell*(3) where the subject was very much discussed, the Court held that one land-owner having dug a well on his own land could not maintain an action against a party who afterwards sunk a coal-pit in the neighbourhood which had the effect of drawing the water away from his well; the act not being done by the defendant negligently or maliciously, but in a proper manner for the purpose of winning his own coal. We think that the same principle is applicable to the present case. The water is a sort of common enemy,—as was said by Lord TENDEBEN, in *Rex v. The Commissioners of Sewers for Pagham Level*(4)—against which each man must defend himself. And this is in accordance with the

(1) 9 Court Sess. Cases, 3rd Series, Macpherson, at page 207.

(2) (1849) 7 C.B., 515; 137 E.R., 205.

(3) (1843) 12 M. & W., 324; 152 E.R., 1223.

(4) (1828) 8 B. & C., 355; 108 E.R., 1075.

Civil Law, by which it was considered that land on a lower level owed a natural servitude to that on a higher, in respect of receiving without claim to compensation, the water naturally flowing down to it."

This last case also touched on the distinction between natural and artificial accumulations of water which was later in 1868 made the basis of the celebrated decision in *Rylands v. Fletcher*(1). The reference seems to have been made on account of the conflict of views expressed in *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(2) and *Sangana Reddiar v. Perumal Reddiar*(3) on the one hand and *Ramasawmy v. Rasi*(4) on the other. The referring Bench in accepting the distinction drawn in *Ramasawmy v. Rasi*(4) held that *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(2) only referred to urban areas and we agree that no such distinction arises. It doubtless came from the accident that illustration (a) to section 7 of the Easements Act instances a case of land in an urban area because it wishes to safeguard the statutory rights of urban authorities to restrict unapproved methods of dealing with land and buildings. In our opinion *Mahamahopadhyaya Ranga Chariar v. The Municipal Council of Kumbakonam*(2) was wrongly decided and the reasoning on which it is based is clearly at variance with the decisions of the Privy Council and the House of Lords to which we have referred; and the same observations apply to *Sangana Reddiar v. Perumal Reddiar*(3). It cannot be that the law recognizes two inconsistent rights in adjacent owners, the exercise of one of which would necessarily destroy the other.

It was contended by the respondent that, if the argument of the appellant should be correct, the

(1) (1868) 3 H.L.C., 330.
(3) (1910) M.W.N., 545.

(2) (1906) I.L.R., 29 Mad., 539.
(4) (1915) I.L.R., 38 Mad., 149.

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owners of the adjoining lands at a lower level would be prevented from improving their lands; but this is clearly not so as the adjoining owner can improve his lands to any extent he pleases, even to the extent of raising the level of his lands provided that he makes suitable arrangements for carrying off the water from his neighbour's land. We are confirmed in our view by the fact that the decision in *Ramasawmy v. Rasi*(1) was referred to by the Privy Council in *Maung Bya v. Maung Kyi Nyo*(2) with approval as being consistent with the authorities.

We refer the case back to the Division Bench for final disposal with this expression of opinion.

N.R.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.*

1925,
October 29.

VENKATAKRISHNA REDDI AND TWO OTHERS
(DEFENDANTS—RESPONDENTS), APPELLANTS,

v.

KRISHNA REDDI (PETITIONER—PLAINTIFF), RESPONDENT.*

O. XXII, r. 5, *Civil Procedure Code* (V of 1908)—*Order rejecting petition to be brought on record as legal representative—No right of appeal against order even when no rival claimant.*

No appeal lies against an order under Order XXII, rule 5, *Civil Procedure Code*, dismissing, on the objection of the defendant, the application of a person to be brought on record as the legal representative of a deceased plaintiff, even when

(1) (1915) I.L.R., 38 Mad., 149.

(2) (1925) 49 M.L.J., 282 (P.C.).

* Appeal against Order No. 346 of 1924.

there is no rival claimant to be brought on the record as the legal representative. *Ayya Mudali Velan v. Veerayee* (1920) I.L.R., 43 Mad., 812, overruled.

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APPEAL against the order of G. G. SOMAYAJULU SASTRI, District Judge of South Arcot, in Appeal Suit No. 325 of 1923, presented against the order of S. RANGASWAMI AYYANGAR, District Munsif of Villupuram, in I.A. No. 357 of 1923 in O.S. No. 451 of 1922.

The facts are given in the Order of Reference.

This appeal coming on for hearing, the Court (DEVADOSS and WALLER, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

DEVADOSS, J.—The plaintiff, in O.S. No. 451 of 1922, on the file of the District Munsif's Court of Villupuram died pending the suit and the respondent herein applied to be brought on record as the legal representative of the plaintiff. The District Munsif held that the will under which the respondent claimed the property of the deceased plaintiff was not genuine and dismissed his petition. The respondent preferred an appeal to the District Court of South Arcot. A preliminary objection was raised by the appellants herein to the appeal on the ground that no appeal lay against the order of the District Munsif. The District Judge overruled the preliminary objection and held that the will under which the respondent herein claimed was a genuine will, set aside the order of the District Munsif dismissing his application for being added as the second plaintiff and remanded the suit for disposal according to law. Against that order the defendants have preferred this appeal.

It is contended by Mr. Bashyam Ayyangar for the appellants that no appeal lay to the District Court from the order of the District Munsif passed under rule 5 of Order XXII of the Civil Procedure Code. Under Order XXII, rule 3, clause (1) "Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit." Clause (2) is as follows: "Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned . . ." Rule 5 provides, "Where a

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question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court." Section 367 of the old Code was "If any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit, or decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit." The present rule 5 does not allow a separate suit to be brought for the purpose of determining who the legal representative is, nor does it require that the question should be decided at or before the hearing of the suit as to who shall be admitted to be the legal representative for the purpose of prosecuting the suit. It is therefore the duty of the Court to determine the question whether the person claiming to be the legal representative is the legal representative or not. Where there is a conflict between two or more persons as to who the legal representative is, the Court should determine the question and the person who is found by the Court to be the legal representative should be made a party to the suit.

The question is, does Order XXII contemplate the case of the Court dismissing the application of a person to be brought on record as the legal representative of the deceased plaintiff when there is no conflict between rival claimants. I think, considering the changes made in the new Code, the evident intention of the legislature was to allow the sole applicant to be brought on record as the legal representative. It did not contemplate the dismissal of a petition to be brought on record on the objection of the defendant, for it did not provide for the abatement of the suit in case such an application was dismissed. It has specifically provided for the abatement of the suit when no application is made within the time limited by law. It is open to the defendant to prove in the course of the suit that the right of the deceased plaintiff did not survive to the person brought on record. As that is the course contemplated by Order XXII there is no appeal provided against an order made under rule 5. Under the old Code, section 588 (18), appeals were provided against an order refusing to bring the legal representative on record as well as against an order bringing the legal representative on record. The present Code advisedly has not mentioned orders under rule 5, Order XXII, among the appealable orders in Order XLIII. The question therefore is whether an order refusing to bring a person as the legal representative of the deceased plaintiff, when

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he is the only applicant for the purpose, is a decree or only an order. If the Court refuses to bring the sole applicant on record as the legal representative of the deceased plaintiff, the Court has to dismiss the suit as it abates so far as the deceased plaintiff is concerned. The abatement of the suit is a necessary consequence of the refusal of the Court to bring the sole applicant on record. Under rule 9, when a suit abates or is dismissed under Order XXII no fresh suit would lie on the same cause of action. The result is, the applicant, even though he is the real legal representative, has neither an appeal against the order refusing to make him a party nor has the right to bring a separate suit on the same cause of action. He cannot bring a suit for declaration that he is the legal representative of the deceased plaintiff, for such a suit, for obvious reasons, would not lie. Did the legislature intend to lay down in Order XXII that a person who is the real legal representative of deceased plaintiff but who, on the objection of the defendant, is not made a party to the suit in the place of the deceased plaintiff should go without any remedy and lose his right to the property in the suit? I think from the wording of rule 3 it is clear that an order refusing to bring the applicant on record as the legal representative of the deceased plaintiff, when there is no rival claimant to dispute his right is a decree, for it determines final rights between the parties.

It is contended by Mr. Bashyam Ayyangar that the decision of the Court that the applicant was not the legal representative of the deceased plaintiff would not operate as *res judicata* in subsequent proceedings as the order was not made in a suit. Granting, for argument's sake, that such an order is not one which is made in the suit, the principle of *res judicata* would apply, for it determines finally the question whether the applicant is the legal representative of the deceased plaintiff entitled to continue the suit on the cause of action alleged in the plaint or not. It was laid down by their Lordships of the Privy Council in *Ramachandra Rao v. Ramachandra Rao* (1) that the principle of *res judicata* would apply to a decision which finally determines the rights of the parties even though the decision was not in a suit. In that case an order made in land acquisition proceedings as regards the title of the parties barred a subsequent suit in respect of the matter which was in dispute in the land acquisition proceedings. It was contended in that case that the order in the land acquisition proceedings was not a decision

(1) (1922) 1 L.R., 45 Mad., 320 (P.C.).

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in a former suit. Lord BUCKMASTER, who delivered the judgment of their Lordships, observes at page 331 :

"It has been suggested that the decision was not in a former suit, but whether this were so or not makes no difference, for it has been recently pointed out by this Board in *Hook v. Administrator-General of Bengal*(1), that the principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of the Code in this respect."

In the light of this decision it is not possible to hold that a decision under Order XXII, rule 5, would not operate as *res judicata* in a subsequent suit.

As there is a conflict of authorities, I proceed to consider the most important cases on the point. In *Rama Rao v. The Rajah of Pittapur*(2), it was held by Sir JOHN WALLIS, C.J. and SESHAGIRI AYYAR, J., that an order striking out from the array of parties the defendant as an unnecessary party and dismissing the suit against him was in effect a decree and was appealable as such. In *Ayya Mudali Velan v. Veerayee*(3), OLDFIELD and SESHAGIRI AYYAR, JJ., held that an order rejecting the claim of a person to be the legal representative of the deceased plaintiff and to continue the suit amounted to a decree dismissing the suit and gave him the right of appeal from that order. The District Court relied upon these two decisions for overruling the preliminary objection. I am inclined to hold that the decisions in *Rama Rao v. The Rajah of Pittapur*(2) and in *Ayya Mudali Velan v. Veerayee*(3) are correct.

In *Pakkai v. Pathumma*(4), it was held by BENSON and SUNDARA AYYAR, JJ., that an order that a person is not the legal representative of a deceased plaintiff did not bar a separate suit. In that case the question whether an appeal lay against the order refusing to make a person the legal representative of the deceased plaintiff was neither raised nor considered; what the learned Judges held was that the decision of the Court refusing to make a person the legal representative of the deceased plaintiff was not a question arising for decision in the suit and therefore the principle of *res judicata* did not apply. But in view of the decision of the Privy Council in *Ramachandra Rao v. Ramachandra Rao*(5) this decision cannot be said to be good law. Further there is a specific provision in rule 9 against a separate suit on the same cause of action.

(1) (1921) I.L.R., 48 Cal., 499 (P.C.).
(2) (1919) I.L.R., 42 Mad., 219.
(3) (1920) I.L.R., 43 Mad., 812.
(4) (1913) M.W.N., 673.
(5) (1922) I.L.R., 45 Mad., 320 (P.C.).

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Reliance is placed by Mr. Bhashyam Ayyangar on *Subramania Iyer v. Vaithilinga Mudaliar*(1) for the position that no appeal lies from an order refusing to make a person the legal representative of a deceased plaintiff. The facts of the case are distinguishable from the facts of the present case. There the Court did make one of the rival claimants a party in the place of the deceased plaintiff, and the suit did not abate in consequence. The Court held that the rival claimants who were not made parties to the action had no right of appeal. The case is different when the sole applicant is not made a party on the ground that he is not the legal representative for the order amounts to a final determination of one of the questions in issue between him and the defendant and that decision finally determines the result of the suit. The case *Venkata Seshamma v. Gunneswara Rao*(2) is also distinguishable from the present case. In that case also the suit did not abate as one of the applicants was not made a party to the suit. SPENCER and KUMARASWAMI SASTRI, JJ., held that no appeal lay against an order refusing to make some of the claimants parties to the action and they distinctly say that there was no abatement of the suit. In *Subbayya v. Saminadayar*(3), it was held that an appeal lay against an order dismissing the application of a person to be brought on record as the legal representative of the deceased party. The learned Judges observe at page 497 :

"The title to represent being denied, there is in the present case a dispute between the claimant and the defendant. We therefore think the District Judge ought to have entertained the appeal. We also think that the appeal lay against the decree dismissing the suit." This was followed by a Bench of the Allahabad High Court in *Hanwant Singh v. Ram Gopal Singh*(4).

In *Ram Sarup v. Moti Ram*(5), it was held that no appeal lay from an order dismissing the application of a person to be brought on record as the legal representative of a deceased plaintiff and that such an order was not a decree. In *Sital Prosad v. Bajrani Sahai*(6), it was held that such an order did not come within the definition of the word "decree" as the question was not in controversy in a suit and as the person seeking to be added as a party was not a party to the suit.

(1) (1918) M.W.N., 198.
(2) (1924) 48 M.L.J., 129.
(3) (1895) I.L.R., 18 Mad., 496.
(4) (1903) I.L.R., 30 All., 348.
(5) (1920) I.L.R., 1 Lah., 493.
(6) (1912) 18 I.C., 70.

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In a recent case, *Ruckmani Ammal v. Veerasami Aiyangar*(1), JACKSON, J., held that no appeal lay against an order under rule 5 of Order XXII.

It is unnecessary to deal with the other cases quoted by Mr. Bhashyam Ayyangar. I think the proper course in such cases would be to make the sole applicant a party to the suit and then raise an issue as to whether he is the legal representative or not as a preliminary issue and try the other issues if the preliminary issue is found in favour of the person brought on record. Such a decision would amount to a decree and the person who is brought on record as the legal representative would have a right of appeal against the decree.

As, however, there is a conflict of authorities on this point I would refer for the decision of a Full Bench the question whether an appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant when there is no rival claimant for being brought on record as his legal representative.

WALLER, J.—I agree that there being a conflict of authority on the question, it should be referred for the decision of a Full Bench. My own view is that no appeal lies. An order of this kind could be appealed against as an order under the old Civil Procedure Code. Under the present Code no appeal lies against it under order XLIII and I do not think that it can be appealed against as a decree. The decision on an application under Order XXII, rule 3 is not a matter that is in controversy in the suit itself. If there is a dispute whether the applicant is or is not the legal representative, it has to be determined under rule 5 before the suit can be proceeded with.

ON THIS REFERENCE—

V. C. Viraraghavan for K. Bashayam for appellant.—The order as an order is not appealable; see section 104 and Order XLIII, Civil Procedure Code. The remedy of the only legal representative is to file a suit against defendant for a declaration that he is the legal representative and if he succeeds in the suit he may revive the suit. He referred to Order XXII, rules 3 and 5, corresponding to sections 365 to 367 of old Civil Procedure Code. Against such an order there was an appeal under old Civil Procedure Code under clause (18) of section 588. The order does not amount to a decree; see definition of decree and section 2 (2) of Civil Procedure Code. This legal

(1) (1924) 47 M.L.J., 370.

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representative petition does not concern 'parties to' or 'matters in' the suit. Hence it is not appealable as a decree, see *Lakshmi Achi v. Subarama Ayyar*(1), *Ram Sarup v. Moti Ram*(2) *Sital Prosad v. Bajrangi Sahai*(3).

[KRISHNAN, J.—It is curious that there is an appeal against abatement and no appeal against dismissal of legal representative petition. The petitioner has only to wait till the Court orders the suit to have abated to have a right of appeal.]

Ayya Mudali Velan v. Veerayee(4), is distinguishable; if not, it is incorrect. It was distinguished in *Venkata Shesamma v. Gunneswara Rao*(5), and *Ruckmani Ammal v. Veerasami Aiyangar*(6). The two proceedings are different; see *Balabai v. Ganesh*(7) per CHANDAVARKAR, J. and *Ram Sarup v. Moti Ram*(2).

S. Nagaraja Ayyar (with K. S. Jayarama Ayyar) for respondent.—In terms, there is no right of appeal against the order under the new Code. But the effect of the order is to make it equivalent to a decree. Hence there is an appeal; *Ayya Mudali Velan v. Veerayee*(4). A question as to who is the legal representative is a question in the suit; *Venkata Reddy v. Venkata Reddy*(8), and *G.I.P. Railway Co. v. Ramachandra Jagannath*(9). Order XXII deals only with cases of rival claimants. Section 146, Civil Procedure Code, gives the right to continue the suit if there is no rival claimant, even if there be no order of the Court bringing the claimant on record. It is only on account of the enactment of section 146 no appeal is provided from the order.

OPINION.

The question referred to us is in the following terms:—

"Whether an appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant when there is no rival claimant for being brought on the record as his legal representative."

The facts of the case are that on the 14th April 1923 the plaintiff on record died. On the 20th June within the period demarcated by law the petitioner (respondent herein) petitioned to be brought on the record as

(1) (1916) I.L.R., 39 Mad., 438. (2) (1920) I.L.R., 1 Lah., 493.
(3) (1912) 13 I.C., 70. (4) (1920) I.L.R., 43 Mad., 812.
(5) (1924) 46 M.L.J., 129. (6) (1924) 47 M.L.J., 370.
(7) (1903) I.L.R., 27 Bom., 162 at 181. (8) [1915] 2 L.W., 519.
(9) (1919) I.L.R., 43 Bom., 286.

the legal representative of the deceased plaintiff. The ground on which he sought to be brought on record was that he was the legatee of the deceased plaintiff and took under her will the properties in suit. The learned District Munsif made an order on the 30th June in the following terms:—

“Subject to the proof of the genuineness of the will, the petitioner may be brought on record as the operation and validity of the will turns upon the finding of the first issue.”

That of course was purely a conditional order. On the 14th August the District Munsif proceeded to inquire into the question outlined in the provisional order, viz., the genuineness of the will and passed the order of that date. He found the will was not genuine and as a consequence, of course, the provisional order as to the appellant being brought on the record fell to the ground.

The material provisions of the Code are parts of Orders XXII and XLIII. By Order XXII, rule 5, where a question arises as to whether any person is or is not the legal representative of the deceased plaintiff or a deceased defendant, the said question shall be determined by the Court. By rule 9 (2) the plaintiff or the person claiming to be the legal representative of the deceased plaintiff . . . may apply for an order to set aside the abatement or dismissal; and, in certain circumstances which are set out in the rule, the Court shall set aside the abatement. The question is whether an appeal lies from an order made in pursuance of Order XXII, rule 5, if the determination, to call it by an unequivocal term for a moment, was an order within the meaning of the Code.

If it is, then under Order XLIII, rule 1, such an order does not fall within the list of orders there given from which appeals lie to a higher tribunal. We may notice in passing that the Order does provide for an appeal against an order made under Order XXII, rules 9 and 10 but not

against orders made under any other rules in that Order. It appears to us therefore that, assuming this to be an order, the Code expressly excludes its being appealed against as an order. Whether the respondent in this case would or would not have a remedy by way of appeal against the abatement which follows as a consequence of this order is another matter. But we are not concerned with that, there is nothing about it in this order which was simply one refusing to make him legal representative and was entirely silent as to any question of abatement or dismissal of the suit. But it is sought to say that it is appealable for the reason that it is not in truth an order but a decree. The definition of “decree” is contained in section 2 (2) of the Code and runs as follows:—

“A decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.”

The line of argument appears to be this—and that is the reason for the appearance of the words in the reference “when there is no rival claimant for being brought on the record as legal representative”—that where there is only one claiming to be the legal representative, the effect of rejecting that person’s claim is *ipso facto* to bring the suit to a close and that therefore the order dismissing the claim is a final adjudication as between the only possible parties. It was held in *Ayya Mudali Velan v. Veerayee* (1) by OLDFIELD and SESHAGIRI AYYAR, JJ., that an order rejecting the claim of a person to be the legal representative of a deceased plaintiff and continue the suit amounted to a dismissal of the suit and was therefore appealable as a decree.

(1) (1920) I.L.R., 43 Mad., 812.

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The extreme inconvenience of that view would be this: that an order rejecting the claim of a person to be legal representative would be a decree if he were the only available legal representative but would only be an order if there were rivals, any one of whom might have applied to be declared to be the legal representative; for example, on the 20th June it might quite well have been that other claimants would have come forward before the date when the time for applying expired, namely, the 14th July; so that at the time the plaintiff was petitioning there was nothing to show that, even if his petition was rejected, other persons might not come forward to represent the interests of the deceased plaintiff. On that ground we think it impossible to say that a mere refusal *per se* to appoint a person the legal representative of a deceased plaintiff or a deceased defendant can be regarded as a final decree, partly because the Court would have to go into all sorts of inquiries to ascertain what were the surrounding circumstances before it could decide whether such refusal was a decree or an order. It seems to us that the Code cannot have contemplated the institution of such an inquiry as that. For these reasons we are of opinion that we should answer this reference by saying that no appeal lies against the order in this case; but we give no expression of opinion as to what would be the consequence if the petitioner appeals against the actual order of abatement or dismissal.

It follows that in our opinion *Ayya Mudali Velan v. Veerayee*(1) was wrongly decided.

N.B.

(1) (1920) I.L.R., 43 Mad., 812.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.*

S. HARI RAO (INSOLVENT), APPELLANT,

v.

1926,
January 18.

THE OFFICIAL ASSIGNEE OF MADRAS AND THREE OTHERS
(RESPONDENTS). *

*Sec. 8 (2) of Presidency Town Insolvency Act (III of 1909)—
Sale of insolvent's estate by Official Assignee—Insolvent's
objection to sale before Judge—Confirmation of sale by
Judge—Right of appeal to insolvent as "aggrieved person."*

An insolvent whose estate has vested in the Official Assignee is not entitled to appeal as an "aggrieved person" within section 8 (2) of the Presidency Towns Insolvency Act (III of 1909) against an order of a Judge rejecting his opposition to a sale of his estate by the Official Assignee.

Ex-parte Sheffield, In re Austin (1879) 10 Ch. D., 434, *In re Leadbitter* (1878) 10 Ch. D., 388, and *Sakhawat Ali v. Radha Mahan*, (1919) I.L.R., 41 All., 243, followed. Observations in *Sivasubramania v. Theethiappa*, (1924) I.L.R., 47 Mad., 120, to the contrary, disapproved.

APPEAL from the order of the Hon'ble Mr. Justice WALLER, dated 4th March 1924, passed in the exercise of the Insolvency Jurisdiction of the High Court in Insolvency Petition No. 218 of 1922 rejecting the objection of the insolvent to a sale of a part of his estate by the Official Assignee on the ground that the sale was prejudicial to the insolvent. The insolvent filed this appeal. The other facts are given in the judgment.

This appeal coming on for hearing, the Court (the CHIEF JUSTICE and VISWANATHA SASTRI, J.) made the following

* Original Side Appeal No. 47 of 1924.

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ORDER OF REFERENCE TO A FULL BENCH.

"We refer the following question to a Full Bench whether the decision in *Sivasubramania v. Theethiappa*(1) is correct or whether the decision in *Sakhawat Ali v. Radha Mohan*(2) should be followed."

ON THIS REFERENCE—

P. R. Srinivasa Ayyangar (with A. Rajagopal Ayyar) for appellant (insolvent).—I have a *locus standi* to appeal under section 8 (2) of the Presidency Towns Insolvency Act as an aggrieved person. I applied in the lower Court under section 86 of the Act as an "aggrieved person" to set aside the sale. The very inclusion of the insolvent as an "aggrieved person" in section 86 shows that he is likely to be aggrieved under certain circumstances. He is entitled to all surplus under section 76 of the Act. Section 33 (3) enjoins the insolvent to aid in the realization of his property. It is a duty coupled with a penalty for non-compliance. Section 39 (2) shows that the insolvent is entitled to an unconditional discharge if the assets realized are equal to four annas in the rupee. Hence he is interested in seeing that as much as possible is realized out of his estate. *Sivasubramania v. Theethiappa*(1), *Ketokey Churan Banerjee v. Sreemuthy Sarat Kumari Dabee*(3), *Anandji Damodar v. James Finlay & Co.*(4). The observations in *Ex-parte Sidebotham* *In re Sidebotham*(5) are in my favour. *Ex-parte Sheffield In re Austin*(6) is not against my contention and *Sakhawat Ali v. Radha Mohan*(2) is wrong. My *locus standi* was not questioned in the lower Court and there is a decision against me hence I am an "aggrieved person" and entitled to appeal. See also *In re Lamb Ex-parte Board of Trade*(7), *Shuttleworth v. Murray*(8). The Official Assignee is a trustee for the creditors only to a limited extent.

M. S. Venkatarama Ayyar for respondents.—The insolvent has no *locus standi*. The hope of getting a surplus eventually will not give him a right of interference in the administration of the estate by the Official Assignee in whom the estate is legally vested for all who are interested in it. During administration the Official Assignee is a trustee only for

(1) (1924) I.L.R., 47 Mad., 120.

(3) (1916) 20 C.W.N., 995.

(5) (1890) 14 Ch. D., 458, 464, 466.

(7) [1894] 2 Q.B., 805, 812.

(2) (1919) I.L.R., 41 All., 243.

(4) (1921) 82 I.C., 441.

(6) (1879) 10 Ch. D., 434.

(8) [1901] 1 Ch., 819, 823, 828.

creditors. It is only after a surplus results, he is a trustee for the insolvent. Till then he is not; and the insolvent has no legal interest to intervene simply on account of some probable or possible surplus. *Ex-parte Sheffield, In re Austin*(1), *Holdsworth v. M'Crea*(2).

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OPINION.

COURTIS TROTTER, C.J.—The question raised here is whether the insolvent has a right of appeal against an order confirming a sale of a part of the estate which was originally his and subsequently vested in the Official Assignee, an order which he sought to oppose. The matter was referred to a Full Bench in view of what were represented to be the directly conflicting decisions of this Court in *Sivasubramania v. Theethiappa*(3) and of the Allahabad High Court in *Sakhawat Ali v. Radha Mohan*(4). We observe that the English decisions on the subject were not cited to the Madras Court, so far as appears from the report. We have examined those decisions and come to the conclusion that they ought to be followed.

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The only ground on which the insolvent's right to appeal can be based is that he is a "person aggrieved," because, his estate having vested in the Official Assignee, he is nevertheless entitled to say that, if all the claims of the creditors who had proved were set aside or discharged by payment, he would have an interest in the surplus which might be left over. The leading English cases, *Ex parte Sheffield, In re Austin*(1) and *In re Leadbitter*(5) have disposed of this contention on grounds which, we think, are unanswerable. The insolvent has no legal interest but has merely a hope or expectation and as JAMES, L.J., pointed out, the mischief

(1) (1879) 10 Ch. D., 434.

(3) (1924) I.L.R., 47 Mad., 120.

(2) (1867) 2 H.L.R., 387.

(4) (1919) I.L.R., 41 All., 243.

(5) (1878) 10 Ch. D., 388.

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of allowing a bankrupt on the contingent chance of his ultimately acquiring title to some surplus which might never be realized, to interfere with and embarrass the administration of the estate, would be immeasurable. We are therefore of opinion that the insolvent has no right of appeal, which will therefore stand dismissed. The question referred to us was perhaps not rightly framed, and I say so with the more freedom because I drafted it myself. I have had the advantage of perusing the judgment about to be delivered by KRISHNAN, J., and I agree that we can follow the ruling in *Sakhawat Ali v. Radha Mohan*(1) without the necessity of saying that *Sivasubramania v. Theethiappa*(2) was wrongly decided. The right claimed by the insolvent in the latter case was to object to a creditor's proof and that is not directly before us.

(This judgment is that of myself and BEASLEY, J.)

BEASLEY, J.

BEASLEY, J.—I concur.

KRISHNAN, J.

KRISHNAN, J.—I agree with the learned Chief Justice that we should follow the view expressed in *Sakhawat Ali v. Radha Mohan*(1) which is in accordance with the view taken in the English cases cited to us, *Ex-parte Sheffield*, *In re Austin*(3) and *In re Leadbitter*(4). As pointed out in those rulings the insolvent has after adjudication no legal interest in his estate which has vested in the Official Assignee; and he has therefore no legal right to interfere in the realization of that estate and he cannot be treated as "aggrieved" by any order passed in the course of such realization. It is true that if any surplus remains after the creditors are paid in full such amount will be paid over to the insolvent and it is also true that if a certain proportion of his debt is paid from his assets he will be entitled to

(1) (1919) I.L.R., 41 All., 243.

(3) (1879) 10 Ch. D., 484.

(2) (1924) I.L.R., 47 Mad., 120.

(4) (1878) 10 Ch. D., 888.

a discharge. But these are merely expectations as pointed out in the English cases which may or may not be realized. They do not give any legal right to the insolvent to interfere in the realization of his property which is entirely left to the Official Assignee. The reasoning to the contrary in the judgment of OLDFIELD, J., in *Sivasubrahmania v. Theethiappa*(1) cannot be supported. That case itself was however one of an appeal by the insolvent against an order admitting proof of a creditor to which he had objected. The question whether the insolvent is a person aggrieved in such circumstances does not arise in the present case and I express no opinion on the point. I would answer the reference by saying that the ruling in *Sakhawat Ali v. Radha Mohan*(2) should be followed and that no appeal lies in the present case, and I agree in dismissing the appeal.

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ORIGINAL CIVIL.

Before Sir Murray Coutts Trotter, Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.

In re A. V. P. M. R. M. MURUGAPPA CHETTIAR.

Income-tax—Sec. 10 of Indian Income-tax Act (XI of 1922)—
Profits—Money remitted to headquarters in British India
by foreign branch—Presumption.

1925,
28
September

Money remitted to the headquarters of a firm in British India from a branch situated in a foreign country is presumed to be profits and not capital and is assessable to income-tax as profits unless the assessee proves the contrary; *Scottish Provident Institution v. Allan*, [1903] A.C., 129, followed.

(1) (1924) I.L.R., 47 Mad., 120.

(2) (1919) I.L.R., 41 All., 243.

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Application under section 45 of the Specific Relief Act I of 1877 and section 66 of the Income-tax Act XI of 1922 for an order requiring the Commissioner of Income-tax to refer to the High Court the question of law arising in the matter of assessing the petitioner to income-tax.

The facts are given in the judgment.

M. Subbaraya Ayyar for assessee.—The foreign remittance is not taxable; for it was not profits, but was appropriated by the assessee to capital. The Commissioner is wrong in holding that there is a conclusive presumption that a remittance from a branch in a foreign country to the headquarters can represent only profits. Accounts between the branch and the headquarters for the year in question were not settled and the profits were not ascertained. These facts are borne out by the accounts themselves.

M. Patanjali Sastri for the Commissioner.—It is a question of fact whether this sum represents capital or profits in the circumstances of this case. The Commissioner did not hold that any conclusive presumption arose but only held that as the assessee did not tender any proof, but had mixed up his accounts of capital and profits, a presumption arose that the remittance represented only profits. The onus of proving the contrary is on the assessee and a wrong appropriation to evade tax is not binding on the Crown; *Scottish Provident Institution v. Allan*(1), *C. W. Schulze v. S. W. Bensted*(2).

M. Subbaraya Ayyar in reply.—The former of the cases quoted related to a case unquestionably of profits.

JUDGMENT.

The difficulty in this case has entirely arisen owing to the ambiguity in the language used by the Commissioner in passing his order on the petition. The second paragraph of his order was on the face of it capable of the construction that he had held in the circumstances of this case that where any sum of money passed from a foreign business to the headquarters of the firm in British India it must be regarded as profits and that no

(1) [1903] A.C., 129.

(2) (1922) 8 Tax Cases, 259.

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evidence was admissible to show that in fact it was something else. We are satisfied that the Commissioner did not mean to say that, but merely meant to say that he thought that where money was remitted from abroad to the headquarters in British India, the natural inference would be that such remittances came out of profits rather than capital until the contrary was shown by the assessee. The claim here was that a large portion of the amount remitted from Seranda to Karaikudi was a re-payment of capital lent long years before or at any rate was profits outside the three years' limit which would not under the law be assessable in British India. The Commissioner heard this contention and was not satisfied that the assessee had made out his case and he was entitled to take that view. That the *onus* of proof rested upon the assessee appears to be amply borne out by the case of *Scottish Provident Institution v. Allan*(1). That was a case of a Scottish Insurance Company, with branches in Australia, and in dealing with the question whether remittances from Australia to the head office in Scotland were assessable to income-tax, Lord HALSBURY uses the following language:—

"The next question is whether or not, though earned abroad, the profits have been brought to this country. Here is a large sum sent back. Putting these two items together, they must include and obviously do include a large amount of profits. It is for the company to show, if the fact be so, that that remittance ought to be subject to a certain amount of deduction, because a good deal of it was repayment of that which was, in truth, capital and not profit at all."

The presumption that the Commissioner made in this case, viz., that *prima facie* all remittances were to be regarded as profits and that the burden of proof was cast upon the assessee to show the contrary, seems to be amply warranted by the authority of that case. As the

(1) [1903] A.C., 129.

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Commissioner did not misdirect himself the only questions in the case that remain are purely questions of fact and so long as he has approached them without any misconception in his mind as to how they should be dealt with, his findings are conclusive.

The application will be dismissed with costs, Rs. 150.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.

1925,
October 28.

A. VENKATA GURUNATHA RAMA SESHAYYA
(PLAINTIFF), APPELLANT,

v.

SRI TRIPURASUNDARI COTTON PRESS, BEZWADA
(2nd DEFENDANT), RESPONDENT. *

Indian Limitation Act (IX of 1908), arts. 62, 115, 116 and 120—Suit for dividend declared by a registered company—Art. 120, applicable.

A suit by a share-holder against a company for recovery of a dividend is governed by article 120 of the Indian Limitation Act and not by article 62 or 115 or 116 of the Act. *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*, (1919) I.L.R., 42 Mad., 33 overruled.

APPEAL under clause 15 of the Letters Patent against the judgment of Mr. Justice WALLACE in S. A. No. 593 of 1921 preferred against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 22 of 1920 preferred against the decree of the Court of the District Munsif of Bezwada in O.S. No. 112 of 1917.

* Letters Patent Appeal No. 35 of 1924.

The facts appear from the following judgment of WALLACE, J., in the Second Appeal:—

“The only question argued in this appeal is one of limitation. The plaintiff had purchased in Court auction some shares which the judgment-debtor held in the second defendant company, and some dividends on those shares which had fallen due before the date of his purchase. The company refused to pay him the dividends and he has filed a suit for these. His suit was in 1917. One of the dividends, namely, that for 1912, fell due on 11th April 1913 and the lower Courts have held that the plaintiff's suit was barred as regards this dividend, since he had not sued within three years of the dividend falling due. The plaintiff appeals.

The plaintiff relies chiefly on a ruling reported in *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty* (1) which lays down that a suit by a share-holder to recover dividend is covered by article 116 of the Indian Limitation Act, that is, a share-holder gets six years within which to sue for payment of dividend which has been due. The rejoinder to this contention is that the plaintiff is not a share-holder, since the company has refused to register him as such. The plaintiff appeals to the ruling in *Nagabushanam v. Ramachandra Rao* (2), but though that ruling no doubt lays down that a Court-auction purchaser, such as he is, is entitled to be registered as the owner of the shares purchased, the company still retains full discretion to refuse such registry. The plaintiff then is not a share-holder and cannot therefore take his stand on the registered contractual relation which is the foundation for any claim to call in aid article 116 of the Indian Limitation Act . . .

The plaintiff, however argues that the defendant company holds dividends for share-holders in trust for them and that therefore there is no period of limitation at all, but the case he himself relies on, viz., *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty* (1) clearly negatives this view. .

The plaintiff's cause of action for the receipt of the dividend arises, in the absence of any acknowledgment, on the date on which it fell due for payment. He cannot add to that any extended period of limitation which is applicable only to persons of a special class such as share-holders to which his judgment-debtor belonged. The plaintiff takes his assignment subject to all the laws of limitation. I agree therefore that the

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(1) (1919) I.L.R., 42 Mad., 33.

(2) (1922) I.L.R., 45 Mad., 587.

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decision of the lower Court is correct and dismiss the appeal with costs."

The plaintiff then preferred this appeal.

This Letters Patent Appeal coming on for hearing, the Court [VENKATASUBBA RAO and MADHAVAN NAYAR, JJ.] made the following

ORDER OF REFERENCE TO A FULL BENCH:—

VENKATASUBBA RAO, J.—This is a Letters Patent Appeal from the judgment of WALLACE, J. One Subba Rao was a share-holder of the 2nd defendant company. A money decree was passed against him and in execution of it certain shares belonging to him together with the dividends that had accrued were attached and sold. The plaintiff who became the purchaser at the Court-sale has instituted the present suit for the recovery of the dividends. The short question to be decided is: What is the article of the Limitation Act that is applicable to the case? The defendant company contends that the period of limitation is three years, whereas the plaintiff urges that the period is six years. WALLACE, J., was of the opinion that the suit would have been in time had the plaintiff been a share-holder but that the plaintiff would not fall under that article. The ground of his decision is that *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(1), which lays down that a suit for return of deposit is governed by article 116 is inapplicable, if the suit is brought not by a share-holder between whom and the company there is a contractual relation but by a transferee from such a share-holder. With great respect, I am unable to agree. Article 116 applies to a suit "for compensation for the breach of a contract in writing registered." The article does not say that the suit must necessarily be by the promisee against the promisor; if, for instance, the claim is founded upon a registered bond, can it be said that a suit by a transferee from the payee under the bond does not come under this article? The suit, being for a dividend that has accrued, is in the nature of a claim for money due and the position of the transferee for this purpose cannot be different from that of the share-holder himself.

The case cannot therefore be distinguished as has been done by WALLACE, J., from *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(1).

(1) (1919) I.L.R., 42 Mad., 33.

In my opinion the real question that arises is: Does article 116 apply at all? In other words, does *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(1) correctly state the law?

SIR JOHN WALLIS, C.J., and SESHAGIRI AYYAR, J., held in it that a suit by a share-holder against a company is governed by article 116. With the utmost respect for the learned Judges I feel bound to say that this decision is based on a fallacy. Article 116 applies to contracts in writing registered. Is the contract between the share-holder and the company a contract of this description? The learned Judges having held that the memorandum and the articles of association constitute the contract between the share-holder and the company, took the view that these two documents must be deemed to be registered within the meaning of article 116. Is this construction correct? The word "registered" has not been defined in the Limitation Act but its definition is to be found in the General Clauses Act of 1897. Section 3, clause 45, of that Act says:—"Registered" used with reference to a document shall mean registered in British India under the law for the time being in force for the registration of documents." Can it be said that the Indian Companies Act embodies any portion of "the law for the time being in force for the registration of documents?" The Act deals with registration of companies and not registration of documents. Section after section refers to the registering of a company. Section 2, clause 2, defines a company as one registered under the Act. Section 2, clause 15, defines the "Registrar" as a Registrar performing under the Act the duty of registration of companies. Section 4 prohibits certain partnerships unless they are registered as companies. Section 11 aims against the registration of companies by names identical with those of companies already in existence. Section 248 provides for the establishment of registration offices and deals with the offices where companies shall be registered. It is unnecessary to refer to further sections, but it is clear beyond doubt that it is the registration of companies and not of documents that is within the purview of the Indian Companies Act.

It is no doubt true that in a few sections the word "registered" is used with reference to the memorandum and the articles of association. After dealing with the registration of these documents (sections 17, 18, 22 and 23), the Act proceeds to enact in section 24 that a certificate of incorporation

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shall be conclusive evidence that the Association is a company registered under the Act. But registration of the articles and memorandum is merely incidental and the object to be achieved is the registration of the company. It is not sufficient to say that in the Indian Companies Act there are some stray provisions that deal with the registration of certain documents. The real question is, does the Indian Companies Act contain any portion of "the law" as contemplated by the General Clauses Act "for the time being in force for the registration of documents?"

I have so far applied a negative test. Where is this law then contained? If we now turn to the Registration Act of 1908 we find the preamble running thus:—

"Whereas it is expedient to consolidate the enactments relating to the registration of documents, it is hereby enacted as follows."

It is the Indian Registration Act therefore that contains "the law for the time being in force for the registration of documents." It is needless to point out that this Act does not deal with the registration of memoranda or articles of association.

The view I have taken derives some support from article 112 of the Limitation Act which gives the period of limitation as three years for a suit to enforce a call by a registered company. If in the opinion of the legislature, enforcing a call is enforcing an obligation arising under a registered contract, a period of three years would not have been prescribed; for, under article 116 when any contract (whatever its nature may be) is in writing registered, the period of limitation is six years. See *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*(1). The general policy of the Act is to prescribe the longer period in the case of obligations arising under a registered contract. If, therefore, article 112 in truth refers to such an obligation, the position will be this: article 112 will stand apart and be inconsistent with the general scheme and policy of the Act. From this it is a fair inference that the idea underlying article 112 is that the obligation in respect of a call does not arise under a registered contract. This article also incidentally shows by its wording that what is registered is the company and not the articles or memoranda.

Article 116, therefore, of the Limitation Act cannot apply to a suit by a share-holder against a registered company. The

(1) (1917) I.L.R., 44 Cal., 759 (P.O.).

learned Judges who decided *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(1) came to the opposite conclusion as they felt that a narrow interpretation should not be put upon the words in the General Clauses Act. When two interpretations are possible, one narrow and the other a liberal one, I should certainly not have the slightest hesitation in adopting that interpretation which accords with justice. But I cannot help feeling in the present case that the construction suggested on behalf of the plaintiff is utterly unsound. It is with the greatest reluctance that I feel compelled, departing from the authority cited, to adopt a view which gives the shorter period of limitation.

The plaintiff's learned vakil suggests that if article 116 does not apply, article 120, the residuary article, governs the case. I cannot accept this contention. Article 115 applies to suits for compensation for the breach of a contract not in writing registered. It is contended that the memoranda and articles do not constitute a contract between the company and its members. In *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(1) it was held that the obligation to pay a dividend arises from the contract evidenced by these documents. I am prepared to follow this decision in this respect. Section 21 of the Indian Companies Act runs thus:—

"The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs and legal representatives to observe all the provisions of the memorandum and of the articles subject to the provisions of this Act."

This section is almost identical with section 14 of the English Act, The Companies (Consolidation) Act, 1908. The contention is that, although the section says that there shall be deemed to be a covenant on the part of each member, it does not say that the company is bound by reason of a contract entered into by it.

There has been a good deal of conflict of opinion in England on this point and Palmer in his "Company Law" deals in Chapter IV with this subject.

In *Welton v. Saffery*(2), Lord HERSCHELL observed:

"It is quite true that the articles constitute a contract between each member and the company."

(1) (1919) I.L.R., 42 Mad., 33.

(2) [1897] A.C., 299.

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STERLING, J., in *Wood v. Odessa Water-works Company*(1) said:

"The articles of association constitute a contract not merely between the share-holders and the company but between each individual share-holder and every other."

JAMES, L.J., in *Johnson v. Lyttle's Iron Agency*(2), referred to the articles as a contract between the company and the share-holders. It is unnecessary to multiply references and it is sufficient to refer to the following passage in Buckley's Companies Acts, 1924 edition, page 28:—

"All the authorities as to whether the articles constitute a contract as between the company and its members were reviewed by ASTBURY, J., in the recent case of *Hickman v. Kent or Romney Marsh Sheep Breeders' Association*(3), who decided that the result of the apparently conflicting decisions and dicta referred to above was that, though the articles can neither constitute a contract between the company and an outsider nor give any individual member of the company special contractual rights beyond those of the members (or, *quære*, any particular class of members) generally, they do in fact constitute a contract between a company and its members in respect of their ordinary rights as members."

If the articles and memoranda constitute therefore a contract binding on the company as well as on each member, article 115 clearly applies to the case and a suit for the recovery of the dividend must be brought in three years from the date when payment becomes due.

As the view I am taking is opposed to that adopted by a Bench of this Court in *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(4), and as the point, I understand, is likely to frequently arise in connexion with a company which is now under liquidation, I would refer the following question to a Full Bench:—

Is a suit by a shareholder against a company for recovery of a dividend governed by article 115 or 116 of the Limitation Act?

If neither article applies, which is the article applicable?

(1) (1889) 42 C.D., 636.

(3) [1915] 1 Ch., 881.

(2) (1877) 5 Ch.D., 687.

(4) (1919) I.L.R., 42 Mad., 33.

MADHAVAN NAYAR, J.—For deciding this Letters Patent Appeal, it has become necessary to consider the question, what article of the Limitation Act governs a suit by a share-holder against a company. In *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(1), it was held by SIR JOHN WALLIS, C.J., and SESHAGIRI AYYAR, J., that article 116 applies to such a case. Under this article a period of six years is fixed for suits "for compensation for the breach of a contract in writing registered." The learned Judges in *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(1) took the view (1) that the memorandum and articles of association constituted the contract between the share-holders and the company and (2) that these two documents must be deemed to be registered within the meaning of article 116. Accepting the soundness of the view that the two documents constitute the contract, the learned vakil for the respondent has argued that these two documents cannot be considered to be registered within the meaning of article 116. "Registered" according to the General Clauses Act, section 3, clause 45, when used with reference to a document, means "registered in British India according to the law for the time being in force for the registration of documents. According to its preamble the Indian Registration Act contains the law for the time being in force for the registration of documents. That Act does not contain any special provision for the registration of "Memorandum and Articles of Association." Sections 17 and 18 of the Indian Companies Act refer to the registration of these documents and section 22 says that the Registrar of the province in which the registered office of the company is situate shall retain and register them. The Registrar means a Registrar or Assistant Registrar performing under the Indian Companies Act the duty of registration of companies (see section 2, clause 15). Section 23 refers to the effect of registration and section 24 says that a certificate of incorporation given by the Registrar should be conclusive evidence that the Association is a company registered under the Act. As pointed out by my learned brother, sections 2, clauses (2) and (15) and 4, 5, 11 and 248 indicate that the Indian Companies Act embodies only the law for the "registration of companies" and not any portion of the law for the "registration of documents," for which provision is made in the Indian Registration Act. The wording of article 112 of the Indian Limitation Act suggests

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that what is registered is the "company" and not the "memorandum" or "articles of association." No doubt, there are sections, as already mentioned, in the Indian Companies Act relating to the registration of these two documents, but on the strength of those sections which deal only with what may be described as matters incidental to the registration of companies, I do not think it can be said that any portion of the law for the registration of documents for the time being in force is contained in the Indian Companies Act.

If this view is accepted, then article 115 of the Indian Limitation Act would be the article applicable to a suit by a share-holder against a company, but the learned vakil for the appellant argues that that article is inapplicable because the memoranda and the articles of association do not constitute a contract between the company and its members and that, therefore, the proper article which would govern the case is article 120. As regards the question whether the memoranda and the articles of association constitute a contract, there has been some conflict of opinion in England, but the weight of authority is *decidedly* against the view put forward on behalf of the appellant. I think it has been rightly held in *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(1), that the right to receive a dividend arises out of the contract evidenced by the memorandum and the articles of association.

In the circumstances pointed out by my learned brother, I agree that the opinion of the Full Bench may be invited on the questions proposed by him.

ON THIS REFERENCE—

K. N. Rajagopala Sastri for appellant.—Article 120 of the Limitation Act applies to the suit. Neither article 62 nor 115 nor 116 will apply. Article 62 cannot apply; for neither when the dividend originally came into the hands of the plaintiff, i.e., at the time of the declaration of the dividend nor at the time when the dividend was allotted to the plaintiff can the dividend be said to have been "received" by the defendant for the plaintiff, as it was already with the defendant. "Received", in that article means received from a third party. See *Subba Rao v. Rama Rao*(2), *Yerukola v. Yerukola*(3). Neither article 115 nor article 116 is applicable; for (a) this is not a suit for damages; (b) there is no contract

(1) (1919) I.L.R., 42 Mad., 38.

(2) (1917) I.L.R., 40 Mad., 291.

(3) [1922] I.L.R., 45 Mad., 648 (F.B.).

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expressed or implied between the plaintiff and the company constituted by its articles and the memorandum of association. While the company itself comes into being only on incorporation by the issue of the articles and the memorandum of association, there cannot be *eo instanti* a contract also between the company and the share-holders. *Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate*(1). *Hickman v. Kent or Romney Marsh Sheep Breeders' Association*(2) is wrong. Likewise the statement of Buckley on Companies, 1924 Edn., page 27. It may be that there may be special contracts embodied in the articles; for example, those that relate to the payment of remuneration to each director for his work; and a suit may lie on such contracts. But there is none between a share-holder and the company. The proper view is that on a declaration of dividend a debt is created by the statute (The Companies Act) and it is not a debt arising out of a contract. If I am wrong as regards the non-existence of a contract under article 115, then I rely on article 116 and *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(3).

P. Satyanarayana Rao for respondent.—Article 62 is applicable; for on a declaration of dividend by the directors it becomes the money of the share-holders. Then it is "received" for plaintiff's use as "money had and received." Even an implied promise to pay money comes within the purview of "money had and received" and a notional receipt is also a receipt. See *Sinclair v. Brougham*(4), *Lightwood on Time Limit of Actions*, page 239, *LORD HERSCHELL's* dictum in *Welton v. Saffery*(5), *Buckley on Companies*, 1924 Edn., page 658, *Hickman v. Kent or Romney Marsh Sheep Breeders' Association*(2). Article 115 applies if article 62 does not apply. The articles, the memorandum of association and the share certificate together constitute a contract. See *Buckley on Companies*, 1924 Edn., page 27, *Hickman v. Kent or Romney Marsh Sheep Breeders' Association*(2), *Maxwell Tipping*(6), *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(3), *In re Artisans' Land and Mortgage Corporation*(7). Debts due under contracts have been held by the Privy Council to fall under article 116 if the contracts are registered. See *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*(8). *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(3) is wrong on the

(1) [1899] 2 Ch., 80 at 88.

(3) (1915) I.L.R., 42 Mad., 33.

(5) [1897] A.C., 299.

(7) [1904] 1 Ch., 796.

(2) [1915] Ch., 881.

(4) (1914) A.C., 398.

(6) [1903] 1 Ch., 512.

(8) (1917) I.L.R., 44 Cal., 759 (P.C.).

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question of registration, for it is the company that is registered and not the contract. But the dividend is a debt due under an unregistered contract and arises from an implied promise to pay. Hence the residuary article 115 applicable to contracts applies.

OPINION.

COUTTS
TROTTER, C.J.

COUTTS TROTTER, C.J.—In this case the appellant bought up at a Court-auction sale the rights of the judgment-debtor to receive dividends accrued in a limited company of which he was a share-holder. The question that we have to determine, now that the auction-purchaser is seeking to enforce his right against the company, is, what period of limitation is applicable to such a claim?

The Indian Limitation Act is one of those unfortunate pieces of Indian legislation which by trying to provide for everything conceivable very often ends by leaving out cases of the most glaring description. I might take this as a very good instance, for there is no article which provides *simpliciter* for a debt due, such a debt as would have been the subject of the old common law action in debt, although, oddly enough, provision is made by article 63

“for money payable for interest upon money due from the defendant to the plaintiffs”;
so that a special article is enacted for the interest and nothing is said whatever about the principal debt. It was suggested that to such cases as this, article 62 might apply, which is,

“for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.”

The fact is that the money out of which the dividend has to come is received by the company for its own use and put into its own coffers. Then at a later stage in accordance with the articles a dividend is declared by the company in a general meeting on the advice and

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recommendation of the directors. The very ingenious argument put forward was that as soon as the declaration was made there must be taken to be a notional second receipt by the company as it were from its right hand to its left, the second receipt to be deemed to be for the use of the share-holders who will be entitled to the dividend. It is sufficient to say that that is a line of argument which seems quite in conflict with the enactment of the statute as to when the time begins to run and that is when the money is received, the clear implication being—and it is not inconsistent with the frame of the English cause of action for money had and received—that the money must at the time it came into the hands of the defendant have been there and then put into his hands for the use of the plaintiff. It is quite true that in cases where the party aggrieved is ignorant of the facts the time will only begin to run, not when the money was in fact received by the defendant, but when the plaintiff first became aware of it; but that is a matter of procedure which really does not, except for a special purpose, fix the time when the money is to be deemed to be received. I think we are constrained to hold that the original receipt by the company is the only receipt upon which article 62 would operate and that as that receipt is not for the use of the plaintiff he cannot be brought within article 62.

I now pass to the next suggested alternative which is article 115, and that is worded as follows:—

“For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for”

And if the defendant company can bring itself within the four walls of that article, that carries them home in this case and this action is statute-barred. Were the matter *res integra*, I should myself be strongly inclined to

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say that an action such as this was not an action for compensation for the breach of any contract. The English and the Irish Courts have quite clearly laid it down that upon the declaration of a dividend a debt immediately becomes payable by the company to each share-holder in respect of the amount of dividend represented by the amount of his holding in shares, and I should have thought therefore that it was not correct to describe the obligation to pay a debt as being compensation for the breach of a contract. But that matter is not *res integra* because it has been dealt with in a decision under the following article 116 of the Limitation Act, by the Privy Council. That is the case of *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*(1) and the judgment of the Board was delivered by Lord SUMNER. Now the words of article 116 are as follows:—

“For compensation for the breach of a contract in writing registered.”

In *Tricomdas's* case the sum of money in issue was arrears of rent due under a registered lease, and the argument that was put forward and which the Board refused to accept was that article 110 of the Act specifically provided a period of limitation for arrears of rent, and, that being so, it was immaterial whether the rent was due under a registered or an unregistered lease. The Board rejected that argument on the ground that the words of article 116 were not incapable of covering a case of rent due and that a long *cursus curiae* of Indian decisions and the decisions of the Board had construed every possible section that they could with a view to giving favour to registered instruments and prolonging the period of limitation. That appears to us to be a method of approaching the case which is binding on us and I think we have to say in the case of

(1) [1919] I.L.R., 44 Cal., 759 (P.C.).

a debt such as the debt created between company and share-holder on the declaration of a dividend that, if it is a contract at all, the remedy sought is aptly described as compensation for the breach of a contract, express or implied.

The matter does not rest there, however, because a very learned argument has been put forward before us the effect of which is to show that although the declaration of a dividend creates a debt, yet the relation between share-holder and company is not a relation which could be described as a contractual one. On that point there has been a very great conflict of opinion and divergent views in the English and Irish Courts. I am not a company lawyer and I do not propose to do more than refer very briefly to the main views that have been expressed. The whole matter is summed up in the judgment of ASTBURY, J., in the case of *Hickman v. Kent or Romney Marsh Sheep Breeders' Association*(1) where he comes to the conclusion that although the articles cannot be held to constitute a contract between the company of the one part and an outsider in his capacity of outsider of the other part, yet as between share-holder and share-holder and the company a contract is in fact constituted. There were many weighty expressions of opinion to the contrary. We have come to the conclusion that the safest course to adopt here is to take the view that the declaration creates a debt. BYRNE, J., in *In re Artisan's Land and Mortgage Corporation*(2) after reviewing the very weighty pronouncements in Irish cases which he refers to, holds that it not merely creates a debt but by virtue of the share-certificates and the memorandum of articles it creates a specialty debt. Although the Irish Courts (not, I think, BYRNE, J.) do

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(2) [1904] 1 Ch., 706.

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use language which seems to imply that it is not merely a specialty debt but it is a debt arising out of a specialty contract, we are not really bound to go so far as that. We think that this debt created by the declaration, whether in certain circumstances and for certain purposes it might be regarded as a contract, is not a contract such as was contemplated and envisaged by article 115 of the Limitation Act. It is difficult enough to regard that form of words as applicable to a claim for rent. It seems to me clumsy beyond anything that is legitimate to allow the claim of a share-holder for his dividend to be regarded as aptly described by "compensation for breach of contract, express or implied." In our opinion it is merely a claim for debt and as, unfortunately the Limitation Act does not contain an article applicable to debts, all we can do is to fall back on the omnibus article 120 and treat this case as one for which no article specifically applicable is prescribed under the schedule.

There is only one other matter that we have to deal with, which, in essence, was the start of this whole business. We were referred to a decision of this Court in *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(1) a decision of WALLIS, C.J. and SESHAGIRI AYYAR, J. That was a suit for a dividend and it was decided that the suit fell within article 116. Article 116 of course speaks of registered contracts and there is no doubt that the learned Judges held not merely that registration of a contract, in the ordinary sense, was covered by the article, but the deposit of the memorandum and articles of association of a limited company with the Registrar of Joint Stock Companies under the direction of the Act. That seems to us to be

(1) (1919) I.L.R., 42 Mad., 33.

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putting an intolerable strain upon the word "registered" and one which the draftsman of this statute could not possibly be thought to have contemplated. Of course the decision amounts to this, and we find ourselves unfortunately in disagreement with it even on the minor point, that the relation constituted between the shareholder and the company is a contractual relation—we do not even go so far as that as we wish to limit ourselves carefully—if "contractual" is taken to mean, contractual in the sense contemplated by articles 115 and 116 of the Limitation Act. We therefore are of opinion that *Ripon Press and Sugar Mill Co., Ltd. v. Nama Venkatarama Chetty*(1) is incorrectly decided and we think we ought to say so.

The reply to the question submitted to us is that in our opinion article 120 is the article that applies.

KRISHNAN, J.—I agree.

KRISHNAN, J.

BEASLEY, J.—I agree.

BEASLEY, J.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Ramasam.

SOURI MUTHU AND OTHERS (PLAINTIFFS AND DEFENDANTS
3 AND 4), APPELLANTS,

1925,
July 26.

v.

PAVADAI PACHIA PILLAI AND ANOTHER (1ST AND
2ND DEFENDANTS), RESPONDENTS.*

Hindu Law—Alienation by a co-parcener of a joint Hindu family of specific items of family property—Suit by non-alienating co-parcener for partition of his share in the alienated property—Unconditional decree for partition—

(1) (1919) I.L.R., 42 Mad., 33. * Second Appeal No. 1704 of 1923.

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PILLAI.

Subsequent suit by alienee for general partition—Res judicata—Allotment of properties—Items decreed to co-parceners in former suit, whether liable to be allotted to the alienee—Right of alienee to other items of family property to be allotted to alienor and be awarded to alienee in substitution.

Where a co-parcener in a joint Hindu family alienated certain specific items of the joint family property, and the non-alienating co-parcener sued the alienee and others and obtained an unconditional decree for partition and delivery of his share in the alienated properties alone, and subsequent to the decree the alienee instituted a suit for a general partition of all the family properties including the items awarded to the co-parcener in the previous suit and prayed that the whole of the items sold to him might be allotted to his vendor's share and awarded to him in respect of his purchase, and, if that could not be done, such other properties as might be allotted to his vendor's share might be awarded to him in substitution for the items sold to him,

Held, that the decision in the former suit was *res judicata*, that the properties decreed to the co-parcener in the previous suit became the separate property of the co-parcener and were not liable to be allotted to the alienee in respect of his purchase, and that consequently the first prayer in the present suit could not be granted; *Subba Goundan v. Krishnamachari* (1922) I.L.R., 45 Mad., 449, distinguished; *Davud Beevi Ammal v. Radhakrishna Aiyar* (1923) 44 M.L.J., 309, dissented from;

that the alienee was entitled to recover the properties that might be allotted to his alienor's share in the other properties of the family in substitution for the properties purchased by him. *Ramakishore Kedarnath v. Jainarain Ramrachhpal*, (1913) I.L.R., 40 Cal., 966 (P.C.), explained; *Hanmandas Ramdayal v. Valabhdas*, (1919) I.L.R., 43 Bom., 17, distinguished.

SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, District Judge of North Arcot, in A.S. No. 316 of 1921, preferred against the decree of A. SUNDARESA SASTRI, the District Munsif of Tiruvannāmalai, in O.S. No. 388 of 1920.

The material facts appear from the judgment. The plaintiffs, who were sons of an alienee from the father of the first defendant, sued for a general partition of the family properties, after a previous suit for partial partition, instituted by the son of

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his alienor, had been brought and an unconditional decree for partial partition of the alienated properties had been passed in favour of the co-parcener-plaintiff. The District Munsif decreed in favour of the plaintiffs awarding the items sold to their father. The District Judge reversed the decree and dismissed the suit. The plaintiffs preferred this second appeal.

K. Sankara Sastri for appellants.—The suit is not barred as *res judicata*. The suit is maintainable, as the former suit was only for partial partition of the items sold, which was maintainable. See *Iburamsa Rowthan v. Theruvenkatasami Naick*(1), *Venkatachella Pillay v. Chinmaiya Mudaliar*(2).

The non-alienating co-parcener, who recovers his share in the alienated property, should submit his share recovered to the claim of the alienee in his general suit for partition; see *Subba Goundan v. Krishnamachari*(3), *Davud Beevi Ammal v. Radhakrishna Aiyar*(4), *Hanmandas Ramdayal v. Valabhdas* (5). In any event the entire suit ought not to have been dismissed. The alienee is entitled to have the items in the unalienated properties that might fall to his alienor's share, to be allotted to the alienee in substitution of the items bought by him.

N. Chandrasekhara Ayyar, for respondent, was not called upon the first point as to items decreed in the previous suit; and on the second point as to partition of unalienated properties, he had no objection.

The JUDGMENT of the Court was delivered by

RAMESAM, J.—The facts out of which this second appeal arises are not in dispute. One Subbaraya Pillai, father of first defendant, died in 1918. He sold the properties mentioned in the plaint Schedule No. I to the first plaintiff's father Roger, on the 27th February 1905, the properties mentioned in Schedule No. II to 4th defendant on 22nd May 1902 and the properties in Schedule No. III to the predecessors-in-title of the present third defendant on 21st May 1901. The properties

(1) (1911) I.L.R., 34 Mad., 269 (F.B.). (2) (1870) 5 M.H.C.R., 166.
(3) (1922) I.L.R., 45 Mad., 449. (4) (1923) 44 M.L.J., 309.
(5) (1919) I.L.R., 43 Bom., 17.

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mentioned in Schedule No. IV were not disposed of by him. The present first defendant alleging that the sales mentioned above, made by his father, were not binding on him, sued for partition and recovery of his share in O.S. No. 416 of 1916. He obtained a decree. That suit came up to the High Court in Second Appeal, and the decree in favour of the plaintiff was confirmed with some variations which are not now material. After the termination of the said litigation the present plaintiffs, the sons of the alienee of the properties in Schedule I, have now sued for a general partition of the properties of Subbaraya. They allege that the properties left undisposed of by him were enough to be allotted to the share which the present first defendant is entitled to. They pray in the first instance that the whole of the properties sold to them may be allotted to the father's share and through the father to themselves, and in the alternative they pray for the allotment of other properties as substitute, if the Court holds that the properties sold to them and mentioned in Schedule I cannot be allotted to them. The District Munsif agreeing with the plaintiffs' contention gave a decree for the properties sold to them. On appeal the District Judge reversed the decree and dismissed the plaintiffs' suit, on the ground that the suit as framed is not maintainable. He was of opinion that a suit for general partition by a stranger purchasing specific items of property from one of the members of a joint family should be filed before a suit by a non-alienating co-parcener for partition of the alienated item is filed, and decreed, and would not be maintainable after the partial partition was decreed. In the result he dismissed the plaintiffs' suit. The plaintiffs appeal.

In second appeal the plaintiffs have urged their right to both the alternative prayers. The right of a

purchaser to file a suit for general partition, and to work out his rights and equities either by having the properties sold to him allotted to the share of the alienor, or by getting other properties in substitution is not in dispute before us, and has been conceded on both sides. Vide *Aiyyagiri Venkataramayya v. Aiyyagiri Ramayya*(1). The right of a non-alienating co-parcener to file a suit for partial partition and get a decree for his share is equally settled, and must now be taken as established law. Vide *Venkatachella Pillay v. Ohinnayya Mudaliar*(2), *Subramanya Chettiyar v. Padmanabha Chettiyar*(3), and *Iburamsa Rowthan v. Thiruvencatasami Naick*(4). We must start from the basis that these decisions were correctly decided. If in a suit for partial partition the purchaser does not defend the suit on the ground of his equity, or if his plea is disallowed, the decree must be regarded as final. It is true as pointed out in *Ramakishore Kedarnath v. Jainarayan Ramrachhpal*(5) that it is competent for the Court to make the whole or any part of the relief granted in such a suit to the non-alienating co-parcener conditional on his assenting to the results of a suit for general partition. In the present case no such equities were urged in the former second appeal. What was argued was that the purchaser was entitled to insist on the son suing for a general partition, not that he himself was entitled to sue for a general partition, and get the property allotted to his share, and that the decree in that suit should be made conditional on the result of such a suit. Thus we have got the fact in this case that in the former suit no condition was added to the decree. In *Hanmandas Ramdayal v. Valabhdas*(6) **BATCHELOR and KEMP, JJ.**,

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(1) (1902) I.L.R., 25 Mad., 880 (F.B.). (2) (1870) 5 M.H.C.R., 168.
(3) (1896) I.L.R., 19 Mad., 287. (4) (1911) I.L.R., 34 Mad., 269 (F.B.).
(5) (1913) I.L.R., 40 Calc., 938 (P.C.). (6) (1919) I.L.R., 43 Bom., 17.

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added a reservation staying execution of the decree and giving three months to the defendant to file a suit for general partition. It practically amounted to making the decree conditional. The question that now arises is, what is the effect of the unconditional decree in the former suit? We think that so far as the particular property is concerned the former suit is final and makes the matter *res judicata* and the plaintiffs are not entitled to their first prayer. The result of the decree in the former suit is that the plaintiff in that suit gets his share as his separate property, and does not hold it as joint family property. The learned vakil for the appellants relies on two decisions. The first decision he relies on is *Subba Goundan v. Krishnamachari*(1). In that case a non-alienating co-parcener sued not for partial partition but for possession of the property alienated, on the ground that the sale was void. His suit was decreed. It was held that a suit for general partition by the purchaser was afterwards maintainable. It was pointed out by the learned Judges that it was not in the power of the defendant in the prior suit to convert the suit for possession into a suit for general partition. In so far as the suit for general partition beyond the specific properties sold is concerned, these observations are undoubtedly in favour of the appellants. But this case cannot be regarded as authority in their favour so far as the first prayer is concerned. The first suit in that case was a suit for possession and when the non-alienating co-parcener got a decree for the properties, it must be taken that he obtained possession of the properties on behalf of the joint family; it cannot be said that he obtained it as his separate property. In the appeal before us the first suit was a suit for partial

(1) (1922) I.L.R., 45 Mad., 449.

partition and as we already observed the first defendant obtained the property as his separate property. The second case relied on by the learned vakil for the appellants is *Davud Beevi Ammal v. Radhakrishna Aiyar*(1). The observations of WALLACE, J., particularly are in their favour. These observations seem to be *obiter dicta*; for on the facts of that case the observations were not necessary. The suit for partial partition by the son was pending at the time when the suit for general partition was taken for consideration and decreed. WALLACE, J., seems to have been of opinion that, where a non-alienating co-parcener obtained a decree in a suit for partial partition, he obtains the property as joint family property. This is indirectly to say that the decision in *Venkatachella Pillay v. Ohinaiya Mudaliar*(2) and other cases allowing a suit for partial partition are erroneously decided. There is no purpose in a decree for partition if the only object of it is merely to get rid of the sale and not to divide the property by metes and bounds. So long as such a suit is permissible and the decree directs division of the property by metes and bounds, the result of the decree must be that the co-parcener gets his share as separate property. And as there is no condition or reservation attached to the former decree as was pointed out in *Ramakishore Kedarnath v. Jainarayan Ramrachhapal*(3) or as was done in *Hanmandas Ramdayal v. Valabhadas*(4), that decree is final and cannot be re-opened in another suit. It seems to us therefore the matter is *res judicata* so far as the property sold is concerned and the first part of the appellants' contention must therefore be disallowed.

(1) (1923) 44 M.L.J., 309.

(3) (1918) I.L.R., 40 Cal., 966 (P.C.).

(2) (1870) 5 M.H.C.R., 166.

(4) (1919) I.L.R., 43 Bom., 17.

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Coming to the second prayer, it is obvious that all the authorities and the trend of the previous discussion go to show that the suit is maintainable. It was not in the plaintiff's power to ask for a general partition in the former suit as was pointed out in *Subba Goundan v. Krishnamachari*(1). The learned vakil for the respondents does not support the District Judge's judgment on this point. The result is that the second appeal must be allowed and the case remanded for disposal according to law in the light of the above observations. Appellants will have refund of their court fee on the appeal memorandum. We may say that we agree with the District Judge in thinking that the position of third and fourth defendants is the same as that of the plaintiffs and they will be given a similar decree in this case. In the second appeal each party will bear his own costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice
Visvanatha Sastri.

MAHALINGA NAIKER (PLAINTIFF), APPELLANT,

v.

VELLAYYA NAIKER AND ANOTHER (DEFENDENTS),
RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 131, 189 and 192, cl. 2
—*Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 92 (1)*
—*Sale under Chapter VI of the Estates Land Act—Application to set aside sale, preferred under sec. 131 of the Act, dismissed—Subsequent suit in a Civil Court to set aside the sale*

(1) (1922) I.L.R., 45 Mad., 449.

* Second Appeal No. 73 of 1923.

on the ground of irregularity, whether maintainable—Jurisdiction of Civil Court.

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A Civil Court has jurisdiction to entertain a suit to set aside a sale held under Chapter VI of the Madras Estates Land Act, on the grounds of want of notice, of absence of proclamation and of inadequacy of price, even though an application to set aside the sale under section 131 of the Act had been made and dismissed.

Rajah of Ramnad v. Venkataramaiyer, (1922) I.L.R., 45 Mad., 890 (F.B.), applied.

Order XXI, rule 89, Civil Procedure Code, does not apply to proceedings under the Estates Land Act, as it is excluded by section 192, clause 2 of the Act; and even though section 131 of the Act enacts a similar provision, still the provisions of Order XXI, rule 92 (1) do not apply to a dismissal of an application under section 131 of the Act, so as to make the sale absolute.

SECOND APPEAL against the decree of the Subordinate Judge of Rāmnād, in Appeal Suit No. 74 of 1921, preferred against the decree of the District Munsif of Srivilliputtur in Original Suit No. 430 of 1917.

The material facts appear from the judgment.

B. Sitarama Rao and S. R. Muttuswami Ayyar for appellant.

A. Venkatarayalayya and L. Venkatanarasayya for respondents.

JUDGMENT.

VISVANATHA SASTRI, J.—Plaintiff is the appellant. He sued to set aside a sale held under the provisions of Chapter VI of the Estates Land Act, and for a permanent injunction restraining defendants from interfering with his enjoyment, on the following grounds: (1) that the sale was held without due notice to him, (2) that there was no publication, and (3) that the price was grossly inadequate. The first Court held on all these points in favour of plaintiff, and passed a decree as prayed for. Defendants appealed, and the Appellate Court held that a Civil Court had no jurisdiction to entertain such a

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suit and allowed the appeal. That such a suit would lie has been held by a Full Bench of this Court in *Rajah of Ramnad v. Venkataramaiyer*(1). The Vakil for the respondents contended that this ruling would not apply because there was an application to set aside the sale under section 131 of the Act, and that Order XXI, rule 92 (1) of the Code of Civil Procedure barred the suit. This rule runs as follows :—

“ Where no application is made under rule 89, rule 90 or rule 91 ; or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute ”.

I may here state that rule 89 is similar to section 131 of the Estates Land Act, and it was represented that the applications put in by plaintiff under this section were dismissed because the proper sum was not deposited. Section 192 of the Estates Land Act relates to the application of the Code of Civil Procedure to “ suits, appeals and other proceedings under the Act ” and it lays down that

“ Subject to the other provisions of this Act and subject to the following modifications and additions, the provisions of the Code of Civil Procedure shall apply to all suits, appeals and other proceedings under this Act so far as they are not inconsistent therewith.”

And in clause (2) it is stated that section 310-A (corresponding to rule 89 of Order XXI) shall not apply. Now if rule 89 of Order XXI of the Code of Civil Procedure does not apply to proceedings under the Estates Land Act, I fail to see how rule 92 (1) of Order XXI can be made applicable simply on the ground that section 131 of the Estates Land Act is similar to rule 89 of Order XXI. As observed in the Full Bench case above referred to, the jurisdiction of Civil Courts is taken away only in

(1) (1922) I.L.R., 45 Mad., 890 (F.B.).

cases referred to in section 189 of the Estates Land Act, and it was not even suggested that there is anything in this section to bar the suit out of which this Second Appeal arises.

I would therefore allow the appeal and setting aside the decree of the Lower Appellate Court direct that that Court do rehear the appeal. Appellant will get his costs in this Court, and costs in the Lower Appellate Court will abide and follow the result. Appellant will get a refund of the Court-fee paid on the Memorandum of Appeal.

ODGERS, J.—I agree. It was stated in the referring judgment in *Rajah of Ramnad v. Venkataramaiyer*(1) as well settled that the Civil Courts have jurisdiction in all cases in which they would have had jurisdiction prior to the Act except in so far as such jurisdiction is expressly or by necessary implication taken away by the provisions of section 189 of the Estates Land Act. The question put before the Full Bench was quite general in its terms. It is admitted that the only distinction between this case and that dealt with by the Full Bench is that two unsuccessful applications were made by the ryot under section 131. I cannot see that this makes the slightest difference in principle and a suit by a ryot who says his property has been improperly sold is expressly said by the Full Bench to be outside the restrictive provisions of the Madras Estates Land Act. I agree as to the order proposed by my learned brother.

K.R.

(1) (1922) I.L.R., 45 Mad., 890 (F.B.).

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APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice
Madhavan Nayar.

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September 7.

SETHU KONAR (2ND DEFENDANT), APPELLANT,

v.

RAMASWAMI KONAR (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 47—Mortgage—Decree for sale—Person claiming mortgage property on a title paramount to that of the mortgagor, impleaded as a defendant—Exoneration in the final decree—His name, not struck off from record—Sale in execution—Claim to property by exonerated defendant—Petition, whether under sec. 47, Civil Procedure Code—Appeal from order on petition, whether competent.

Where, in a suit for sale on a mortgage, a person, who claimed the property by a title paramount to that of the mortgagor, was joined as a defendant, but the final decree merely stated that he was exonerated without removing his name from the record, he should be considered as continuing to be a party to the suit, and a petition, filed by him claiming the hypothecated property sold in execution of the decree and purchased by the decree-holder, falls under section 47 of the Civil Procedure Code, and an appeal from an order passed on the petition is competent.

The ground on which a party is exonerated from the suit can never determine whether he continues or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record.

Venkatasawmy v. Chitambaram, (1918) 23 M.L.T., 206, followed.

APPEAL against the order of K. S. RAMASWAMI SASTRI, Subordinate Judge of Negapatam, in A.S. No. 117 of 1923 preferred against the order of S. VARADA ACHARIYAR,

* Appeal against Appellate Order No. 43 of 1924.

District Munsif of Tiruturaippundi in E.A. No. 230 of 1922 in O.S. No. 320 of 1918.

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The material facts appear from the judgment.

R. Ganapathi Ayyar and N. Panchapagesa Ayyar for appellant.

K. S. Jayarama Ayyar for respondent.

JUDGMENT.

SPENCER, J.—O.S. No. 320 of 1918 was a suit brought by the first respondent upon a mortgage. The suit was decreed and the plaintiff purchased some of the suit property in Court auction. Second defendant in the suit thereupon filed an application to set aside delivery of the items purchased on the ground that he had a paramount title which prevailed over the title of the mortgagor in consequence of more than 16 years' possession after the property had been surrendered to him by the owner. The District Munsif found in favour of the petitioner and directed release of the property. On appeal to the Subordinate Judge by the decree-holder purchaser, the District Munsif's order was set aside and the petition was dismissed. It is now contended that no appeal lay to the Subordinate Judge, on the ground that the appellant, though made a party to the suit, was exonerated as he set up a title paramount to that of the mortgagor, and consequently the decree-holders' remedy, if any, against the District Munsif's judgment was to bring a suit to set aside the order. The Subordinate Judge held that he could dispose of the appeal against the order under section 47 as a claim petition was preferred by a party to the suit and he thought that the latest decision in *Venkatasawmy v. Chitambaram*(1), was in favour of this view. Reliance is now placed upon *Krishnappa v. Periaswamy*(2). The

(1) (1918) 23 M.L.T., 206.

(2) (1917) I.L.B., 40 Mad., 964.

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learned Judges who decided that case were inclined to the view that if a party was exonerated from a suit on the ground of mis-joinder he would not remain a party to the suit for the purpose of section 47 and that it was immaterial whether his name was actually removed from the record in pursuance of the order exonerating him. In *Venkatasawmy v. Chitambaram*(1), SADASIVA AYYAR and PHILLIPS, JJ., took the view that the plain words of the Code were intended to give legal effect to the decision of the Full Bench in *Ramaswami Sastrulu v. Kameswaramma*(2), and to overrule the previous decisions which had decided that a defendant whose name appears in the decree without being struck off was not a party to the suit, if he had been exonerated by the decree passed in the suit. In *Sannamma v. Radhabayi*(3), this case is quoted in the footnote and ABDUR RAHIM, J., who was one of the referring Judges, expressed a doubt as to the correctness of *Krishnappa v. Periaswamy*(4), and thought it required to be overruled as it did not give sufficient effect to the plain language of the section. The decision of the Full Bench did not actually overrule I.L.R., 40 Mad., 964, as it was not necessary to do so in order to answer the questions referred to the Full Bench. The opinion of the Full Bench was that if a person had been properly impleaded as a defendant in a suit and if the plaintiff abandoned his claim against him and the suit was dismissed as against him, such a person would still be "a defendant against whom a suit has been dismissed" within the explanation to section 47 of the Civil Procedure Code. In *Krishnappa v. Periaswamy*(4), the previous decision in *Venkatapathi Naidu v. Subraya Mudali*(5), was quoted with approval. This is a

(1) (1918) 23 M.L.J., 206.

(2) (1900) I.L.R., 23 Mad., 381 (F.B.).

(3) (1918) I.L.R., 41 Mad., 418 (F.B.). (4) (1917) I.L.R., 40 Mad., 964.

(5) (1908) 17 M.L.J., 416.

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judgment of a single Judge given before the amendment of the Code. With due respect I am unable to follow the learned Judge when he says that a party against whom a claim has been abandoned is clearly not a party to the suit. The mere exoneration of a party does not have the result of making him cease to be a party. It may mean only that the plaintiff does not want a decree against him, as was the case in *Venkatataswamy v. Chitambaram*(1). In my opinion the ground upon which a party is exonerated can never determine whether he continues to be a party to the suit or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record. In *Krishnappa v. Periaswamy*(2), the learned Judges were evidently impressed with the anomaly that might arise out of the Court having to decide in execution proceedings questions which it had refused to determine in the suit. That might be the consequence of exonerating a person who had a title superior to that of the principal defendant; but the obvious remedy would be for the Court to adopt the procedure provided in section 47 of treating the petition in execution as a suit and trying it in the regular manner, if it had not already taken the simpler course of removing the party from the record under Order I, rule 10 (2) at an earlier stage. As the appellant in the present case was a party to the suit and the final decree merely states that he is exonerated without removing his name from the record, I think that his remedy lay only by a petition under section 47, which was the course he adopted, and as the Subordinate Judge has decided against his claim on a question of fact, no second appeal will lie. The appeal is dismissed with costs of the respondent. We direct each party to bear his own costs in the Courts below.

(1) (1918) 23 M.L.J., 206.

(2) (1917) I.L.R., 40 Mad., 964.

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MADHAVAN NAYAR, J.—I agree. In *Ramaswami Sastrulu v. Kameswaramma*(1), it was decided that the defendant, in whose favour a suit is dismissed he being exonerated from the suit, must be regarded as a party to the suit within the meaning of section 244 of the old Code. The explanation to section 47 of the present Code, viz.—

“For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit,”

gives effect to this decision; an appeal, therefore, clearly lies in the present case. The question raised before us was, no doubt, left open in the Full Bench decision in *Sanmamma v. Radhabayi*(2). But it appears to me that the opinion of the learned Chief Justice is to the effect that, in cases of this description, unless a party's name has been struck out and removed from the records, he would remain “a party to the suit.” That has not been done in this case and, therefore, though the second defendant (appellant) has been exonerated in the judgment, in my opinion, he must still be regarded as a party to the suit within the meaning of section 47, Civil Procedure Code.

As the other question raised is one of fact, I agree that this Civil Miscellaneous Second Appeal should be dismissed with costs.

K.R.

(1) (1900) I.L.R., 23 Mad., 361 (F.B.). (2) (1918) I.L.R., 41 Mad., 418 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

VALLURI NARASIMHA RAO, PROPRIETOR OF
PEDDAMAMIDIPALLI (PETITIONER), PETITIONER,

1925,
October 28.

v.

THE RYOTS OF PEDDAMAMIDIPALLI (RESPONDENTS),
RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 30, Chap. XI, ss. 168, 171, 172, 192 and 215—Record of rights and settlement of rent—Fair and equitable rent, settlement of—Orders of Revenue Officer as to record of rights and settlement of rent—Appeal to Board of Revenue against order of Revenue Officer—Dismissal—Revision petition to High Court, whether competent—Revisional jurisdiction of High Court over orders of Board of Revenue and Revenue Officer, whether exists and when to be exercised—Suit—Settlement of fair and equitable rent under sec. 168 of the Act, whether controlled by limitations of sec. 30 relating to enhancement of rent—Failure to exercise jurisdiction.

In proceedings under Chapter XI of the Madras Estates Land Act for making a survey, record of rights and settlement of rents, the High Court has revisional jurisdiction over the orders of the Board of Revenue passed on appeals under section 171 of the Act from the orders of the Revenue Officer in such proceedings.

Ramaswami Goundan v. Kali Goundan, (1919) I.L.R., 42 Mad., 310, followed.

In settling a fair and equitable rent under Chapter XI, section 168 of the Act, the Revenue Officer is not bound by the limitations of section 30 of the Act relating to enhancement of rent.

Consequently, where the Revenue Officer, in settling a fair and equitable rent under section 168, considered himself bound by the limitations under section 30 and the Board of Revenue on appeal confirmed the order, their orders should be set aside

* Civil Revision Petition No. 262 of 1924.

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by the High Court on revision; and as section 173 of the Act, providing a remedy by suit in certain cases under Chapter XI, does not cover this case, the High Court would be justified in exercising its revisional jurisdiction.

CIVIL REVISION PETITIONS to the High Court under section 115, Civil Procedure Code, and section 107 of the Government of India Act, to revise the proceedings of the Board of Revenue, Land Revenue and Settlement, in Settlement of Rent Appeal 2 of 1923 preferred against the order of the Revenue Officer in Original Petition No. 1 of 1922 of Peddamamidipalli.

The material facts appear from the judgment.

V. Ramadoss for petitioner.

A. Venkatarayalu Ayya for respondent.

Government Pleader (C. V. Anantakrishna Ayyar) for the Board of Revenue.

JUDGMENT.

DEVADOSS, J.

DEVADOSS, J.—The Revenue Officer for the settlement of rents in the villages of Kalagampudi and Peddamamidipalli, Narasapur taluk, Kistna district, made a record of rights under Chapter XI of the Estates Land Act. The appeal of the proprietor of Peddamamidipalli to the Board of Revenue against the record of rights made by the Revenue Officer has been dismissed. He now moves the High Court to revise the order of the Board of Revenue.

Two points arise for decision in this case: (1) Has the High Court revisional jurisdiction over the orders of the Board of Revenue passed under sections 171 and 172 of the Estates Land Act? and (2) If the question of jurisdiction is answered in the affirmative, should the High Court exercise its revisional jurisdiction in this case?

The first point has been fully argued by Mr. Ramadoss for the petitioner and M. Venkatarayalu Ayya for the

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respondents. We have also heard the Government Pleader to whom we gave notice to appear for the Board of Revenue as it was represented to us that a number of Civil Revision Petitions were pending in the High Court in which the question of jurisdiction was involved. After a careful consideration of the arguments in the case, I see no reason to change my view expressed in *Appanna v. Latchayya*(1). I do not wish to repeat here the reasons which I gave in that case but will deal briefly with the arguments of the learned Government Pleader.

His contention is that the Board of Revenue is not a Civil Court and jurisdiction is given to it under the Estates Land Act to hear appeals from, and to revise, the orders of the Collector and the Settlement Officer and the High Court cannot revise the orders of the Board of Revenue either under section 115, Civil Procedure Code, or under section 107 of the Government of India Act of 1915. His argument is based upon the observations made by the learned Chief Justice in *Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam Harbour Acquisition*(2). In that case it was held that the High Court could not interfere in revision with the order of a land acquisition officer who refused to refer a case to the District Court under section 18 of the Land Acquisition Act. As the decision is that of a Full Bench I am bound by it, but I may be permitted to remark why could not the High Court interfere with the order of a land acquisition officer if he refuses to refer a case to the District Court when the High Court has jurisdiction to determine any question that may arise on a reference being made: In other words if the land acquisition officer makes a reference to the District

(1) (1924) I.L.R., 47 Mad., 250.

(2) (1924) I.L.R., 47 Mad., 357 (F.B.).

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Court, an appeal lies from the District Court to the High Court; but if he does not refer the case to the District Court the High Court is said to have no power to direct him to refer the case to the District Court. If a Collector refuses to refer a case to the Civil Court, he does something which he ought not to do, and the High Court which has the power to hear and determine matters on a reference being made to the District Court cannot be said to have no power to direct the Collector to do what he is bound to do. However, as that case has no application to the present, I refrain from making any further comment. The decision in *Parthasaradhi Nayudu v. Koteswara Rao* (1), has no application to the present case. According to that decision, where the legislature erects a tribunal for the purpose of determining any question which arises under a particular enactment, the High Court cannot interfere with the decision of that tribunal unless the High Court is empowered under the enactment which erects the tribunal to hear appeals from such tribunal or unless the enactment erecting the tribunal makes it a Civil Court within the meaning of clause 16 of the Letters Patent of the Madras High Court.

When a Settlement Officer makes a record of rights under Chapter XI of the Estates Land Act, he determines the rights and liabilities of both the landholder and the ryot. His proceedings are governed by the Civil Procedure Code. Vide section 192. Part B of the schedule of the Estates Land Act, No. 21, provides an appeal to the District Court against an order under section 137 for the repair of an irrigation work, and Nos. 22 and 23 provide for an appeal to the District Court in the case of applications by ryots to execute

(1) (1924) I.L.R., 47 Mad., 369 (F.B.).

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works in default of the landholder and for the recovery of the costs of the repair of an irrigation work. From a perusal of Parts A and B of the schedule it is apparent that, wherever civil rights of the parties, i.e., landholder and ryot, are determined, an appeal is provided to the District Court. In the case of matters which are entirely within the cognizance of the Revenue Officer an appeal is provided to the Collector and against his decision a second appeal is provided under section 190 to the Board of Revenue. A record of rights is as important as, if not more important than, the terms of a patta, and section 173 gives liberty to a party to sue to set aside an order of the Settlement Officer in certain cases. Under section 172, the Board of Revenue may on application, or of its own motion, direct the revision of any record of rights or any portion thereof. The mere fact that an appeal lies to the Board of Revenue is no argument for saying that the High Court has no power under the Act to revise the orders of a Collector or Settlement Officer acting under Chapter XI. The Calcutta High Court has consistently held that, in the case of orders of Collectors or Revenue Officers determining the rights of the landlords and tenant, the High Court has power to interfere in revision with them. In *Kartik Chendra Ojha v. Gora Chand Mahto* (1), it was held that

"Proceedings on applications for enhancement of rent under section 27 of the Chota Nagpur Tenancy Act are judicial proceedings. The High Court has jurisdiction to interfere in cases where the Courts of Collectors have either exceeded the jurisdiction or failed or refused to exercise the jurisdiction vested in them by the Chota Nagpur Tenancy Act."

The learned Judges observe at page 522:—

"From the very nature of the proceedings themselves, and also from the provisions of the Act as contained, for

(1) (1913) I.L.R., 40 Cal., 518.

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instance, in Chapter XVI, it is clear that proceedings on application for enhancement of rent are judicial proceedings, and in view of the express provisions of section 224 (2) which allows in certain cases a second appeal to this Court, it cannot, in our opinion, be contended that Deputy Commissioners in the performance of their judicial duties under the Chota Nagpur Tenancy Act are not Courts subject to the appellate jurisdiction of this Court."

The learned Judges held that, notwithstanding that the Board of Revenue had revisional jurisdiction over the orders of Collectors, the High Court had revisional jurisdiction over such orders. In *Ram Dayal v. Ramadhin*(2), a bench of the Allahabad High Court held that the High Court had no power under section 622 to revise an order of a Collector under section 183 of the North-West Provinces Rent Act, Act XII of 1881, on appeal from an Assistant Collector of the second class. The arguments of STRAIGHT, J., who delivered the judgment of the Court, is that if it were held that the High Court had jurisdiction to revise such orders, it might create a dilemma inasmuch as the Board of Revenue also had revisional jurisdiction. The question is whether the High Court *could* and not whether it *should* interfere with an order of a Collector after the Board of Revenue has interfered with it. The question does not depend upon any dilemma arising in the exercise of revisional jurisdiction by the High Court as well as by the Board of Revenue. It would be a matter for consideration in each case whether the High Court should exercise its powers or not. If it considers that the case is not a proper case for the exercise of its revisional powers, it would refrain from doing so, but if it is, the High Court would interfere with such orders.

In one portion of the argument the learned Government Pleader almost suggested that if the Board of

(1) (1890) I.L.R., 12 All., 198.

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Revenue declined to interfere with an order of a Collector, then the High Court might interfere, but if the Board of Revenue did interfere with such order, the High Court had no power to interfere. Such an argument, though not put forward in so many words by the Government Pleader, is on the face of it untenable. It is not seriously contended that *Ramaswami Goundan v. Kali Goundan*(1), was not correctly decided. The same learned Judges who decided *Ramaswami Goundan v. Kali Goundan*(1) decided *Paramaswamy Iyengar v. Alamelu Natchiar Ammal*(2).

In considering this question, the aim and the scope of the Estates Land Act should be considered. Under the old Rent Recovery Act, Act VIII of 1865, the High Court had no revisional jurisdiction over orders of revenue courts. Under the Estates Land Act, Act I of 1908, appeals are provided to the District Court against the orders of revenue courts and the Civil Procedure Code is made expressly applicable to the proceedings of the revenue officers and revenue courts by section 192. Under section 202 the High Court is empowered to make rules consistent with the Estates Land Act declaring that any portions of the Code of Civil Procedure shall not apply to suits between landholder and ryot as such or to any specified classes of such suits or shall apply to them subject to modifications specified in the rules. These are innovations which are made in the present enactment and the object of the legislation was to determine the respective rights and liabilities both of the landholder and the ryot. In all cases where the rights of the landholder or the ryot are affected, an appeal is given to the District Court. It would be against the scope of the Act and the specific provisions

(1) (1919) I.L.R., 42 Mad., 310.

(2) (1919) I.L.R., 42 Mad., 76.

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of section 192 to hold that the High Court has no revisional jurisdiction over the orders of the Board of Revenue. It is unnecessary in this connexion to consider whether the Board of Revenue is a court subordinate to the High Court. All Courts which are governed by the Civil Procedure Code are Civil Courts and therefore the High Court as having the right of superintendence over all the Civil Courts in the Presidency has power over such Civil Courts as are erected by any enactment. The Board of Revenue is authorized under rule 21 framed by the Governor in Council under section 215 of the Estates Land Act to hear appeals from the decision of the Collector under Chapter XI. The mere fact that appeals lie to the Board of Revenue would not take away the power of the High Court to revise the orders of the Collector or of the Board of Revenue. It is nowhere said, and there is no provision in the Act or in the rules framed under the Act, that the orders of the Board of Revenue are final. The argument advanced in *Ram Dayal v. Ramadhin*(1), cannot apply to this case, for the Board of Revenue in this case is only an appellate authority and not a revisional authority. For the above reasons and for the reasons given by me in *Appanna v. Latchayya*(2), I answer the question in the affirmative.

Second point.—The Revenue Officer had to determine what was a fair and equitable rent. He thought he was bound by the provisions of section 30 of the Estates Land Act in determining under Chapter XI what was fair and equitable rent. The provisions of section 30 apply to enhancement of rent at the instance of the landholder. Under Chapter XI either the landholder or the ryot may apply to the Government for an order

(1) (1890) I.L.R., 12 All., 198.

(2) (1924) I.L.R., 47 Mad., 250.

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directing that a survey be made and a record of rights be prepared by the Revenue Officer in respect of an estate or a portion of the estate. In making a record of rights the Revenue Officer has to be guided by considerations which are not necessarily the same as those arising under section 30. A Revenue Officer acting under Chapter XI should take into consideration the existing rate of rent, the rise in prices, the time when the rate was last settled and the present state of things as regards the facilities of irrigation and other circumstances which would enable him to settle what is a fair and equitable rent. Whatever may be the rate of rent, if he considers that it is not fair and equitable, he is entitled to alter it, and in doing so he is not bound by the rule in section 30 under which the increase cannot be more than As. 2 in the rupee. Under Chapter XI the Revenue Officer may reduce the rent and may settle different rates of rent for land of different value and different fertility. The Revenue Officer therefore has not exercised the jurisdiction which he had in determining what is fair and equitable in the circumstances of the case. The High Court does not interfere as a rule with the orders of Courts subordinate to it, or over which it has revisional jurisdiction in cases where there is another remedy open for the party than by revision. Section 173 provides for a suit by a party who feels aggrieved by the record of rights but none of the clauses (a) to (f) of sub-section 3 applies to the present case. The parties have no right of suit in this case and therefore this is a case in which the High Court would be justified in exercising revisional jurisdiction.

I therefore set aside the order of the Board of Revenue and the order of the Revenue Officer for the Settlement of Rents and direct him to make a proper

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record of the rent in the light of the remarks made above. Petitioner will have the costs of this application. The costs of further proceedings will abide the result.

WALLER, J.—On the first point I think that the matter is concluded by *Ramaswami Goundan v. Kali Goundan*(1), a decision from which I see no reason to dissent. On the second, I agree that the Revenue Officer in settling a fair and equitable rent is not bound by the provisions of section 30 of the Act. It is obvious that there is no right of suit in regard to the questions raised. If there were, we should not be justified in interfering in revision.

I concur in the order proposed.

K. R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1925,
November 13.

CHIDAMBARA THEVAR, SIXTH DEFENDANT,
(RESPONDENT), APPELLANT,

v.

SUBBARAYAR (PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 16, proviso 2—Mortgage-decree—Assignment—Application by assignee to execute decree—Assignee, alleged to be benamidar for a purchaser of hypotheca from some of the judgment-debtors—Assignee's right to execute the decree—Mortgage-decree, whether a decree for payment of money.

A mortgage-decree is not a decree for the payment of money within the meaning of the second proviso to rule 16 of Order XXI, Civil Procedure Code.

(1) (1919) I.L.R., 42 Mad., 310.

* Civil Miscellaneous Second Appeal No. 91 of 1924.

Consequently, an assignee of a mortgage decree, though he is a benamidar for a purchaser of a portion of the mortgage property from some of the judgment-debtors in a mortgage suit, is not debarred from executing the decree by Order XXI, rule 16, proviso 2, Civil Procedure Code.

APPEAL against the appellate order of A. S. BALASUBRAHMANYA AYYAR, District Judge of East Tanjore, in Appeal Suit No. 396 of 1923 preferred against the order of the District Munsif of Tirutturaippundi in Miscellaneous Application No. 300 of 1923 in Original Suit No. 248 of 1917.

The material facts appear from the judgment.

A. V. Visvanatha Sastri for appellant.

C. Padmanabha Ayyangar for respondent.

JUDGMENT.

DEVADOSS, J.—The only question in this appeal is whether a mortgage-decree is a decree for payment of money within the meaning of the expression in Order XXI, rule 16, Civil Procedure Code. The appellant is the sixth defendant in Original Suit No. 248 of 1917, a suit brought on a mortgage. The sixth defendant bought a portion of the hypotheca and the rest of the property was purchased by one Arunachalam Chetti. One Subbarayar obtained a transfer of the mortgage decree and applied to the Court to be recognized as a transferee decree-holder and for execution of the decree.

The sixth defendant opposed the application on the ground that Subbarayar was a benamidar for Arunachalam Chetti and that under the second proviso to Order XXI, rule 16, he was not entitled to execute the decree. The District Munsif held that it was not proved that Subbarayar was benamidar for Arunachalam Chetti. The appeal of the sixth defendant was dismissed by the District Judge. He has preferred this appeal and the contention of Mr. Visvanatha Sastri for the appellant

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is that inasmuch as Arunachalam Chetti purchased a portion of the hypotheca subject to the mortgage, he is a judgment-debtor and the assignment in favour of Subbarayar being benami for him, he is not entitled to execute the decree against a co-defendant.

Granting for argument's sake that Subbarayar is benamidar for Arunachalam Chetti the question is, is Arunachalam Chetti prevented from executing the decree against the sixth defendant? The question is a simple one. Is a mortgage-decree a decree for payment of money within the meaning of the second proviso to Order XXI, rule 16? According to the proviso—

“Where a decree for payment of money against two or more persons has been transferred to one of them it should not be executed against the others.”

We are unable to uphold the contention that a mortgage decree is a decree for the payment of money within the meaning of the proviso. A good deal of argument of Mr. Visvanatha Sastri was based upon *Abdulla Sahib v. Doctor Oosman Sahib*(1), and other cases which were decided before the passing of the present Civil Procedure Code. Under the present Procedure Code a preliminary decree is drawn up and time is given for redemption and if within the given time, money is not paid, a final decree, or a decree absolute is passed and the mortgaged property is brought to sale and, if the proceeds of the sale are not sufficient to pay up the amount of the decree and if the personal remedy is outstanding, a decree is given personally against the mortgagor. Till a personal decree is given, it cannot be said that the decree is one for the payment of money.

Under the old Civil Procedure Code a mortgage decree directed the payment of money and in default of

(1) (1905) I.L.R., 28 Mad., 224.

payment that the property was to be sold. According to form No. 129 time was given to the defendant to pay the principal and interest and costs within six months and in default of the defendant paying into Court such principal, etc., by the time given it was ordered that the mortgaged premises should be sold and it was further provided that, in case the sale-proceeds of the mortgaged property did not cover the decree amount, the judgment-creditor could recover the amount personally or from other property of the mortgagor. Under the old Code, therefore, a mortgage decree could be considered as a decree primarily for the payment of money. *Abdulla Sahib v. Doctor Oosman Sahib*(1), and the other cases which were decided under the old Code have no application to a mortgage decree passed under the present Code. Even when the old Code was in force, the Calcutta High Court consistently held the view that a mortgage decree was not a decree for money. In *Laldhari Singh v. Manager, Court of Wards, Bhapatpura Estate*(2), Mr. Justice MOOKERJEE after an exhaustive examination of the cases on the point held that—

“a decree for sale of the mortgaged property could not be deemed as a decree for money within the meaning of section 232 of the Code of 1882.”

A decree for redemption though it contains a provision for payment of money cannot be said to be a decree for money nor can a foreclosure decree in which a provision is made for the payment of money within the time fixed, be a decree for payment of money. Where a decree is passed for the delivery of a specific movable property, and in default, to pay a certain sum of money it is not primarily a decree for money.

In a mortgage decree the property is to be proceeded against in the first instance and the decree is, therefore, primarily against the property mortgaged.

(1) (1905) I.L.R., 28 Mad., 224.

(2) (1911) 14 C.L.J., 688.

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If a personal remedy is not outstanding, the only remedy of the mortgagee decree-holder is to proceed against the property and the mere fact that a personal remedy is outstanding will not convert the mortgage-decree into a decree for payment of money within the meaning of the proviso to rule 16 of Order XXI. The case *Sadagopa Ayyangar v. Sellammal*(1), does not help the appellant. In that case Mr. Justice SPENCER and Mr. Justice VENKATASUBBA RAO held

“the expression decree for money against several persons in Order XXI, rule 16, is not restricted to a personal decree for money against two or more defendants.”

The decree directed the defendant to pay the amount out of his family properties, and the learned Judges held—

“that the fact that the defendant was directed by the decree to pay the amount out of his family properties does not make the decree any the less, a decree for payment of money against him.”

If a trustee is directed to pay money or an executor is directed to pay money, though he is not personally liable to pay the amount, it is still a decree for the payment of money. But that is quite a different thing from a mortgage-decree which directs that the mortgaged properties should be sold to discharge the debt.

In section 232 of the Code of 1882 the expression was “decree for money.” In the present Order XXI, rule 16, the expression is “decree for the payment of money.” The words “the payment of” were evidently introduced to make the meaning clear.

We have no hesitation in holding that a mortgage-decree is not a decree for the payment of money within the meaning of the second proviso to rule 16 of Order XXI.

The appeal, therefore, fails and is dismissed with costs.

K.R.

(1) (1922), 43 M.L.J., 761.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice
Madhavan Nayar.

VENKATASUBBA MUDALI AND ANOTHER (DEFENDANTS
1 AND 2), APPELLANTS

1925,
Decem ber 7.

v.

MANICKAMMAL AND ANOTHER (2ND AND 3RD PLAINTIFFS),
RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 47—Decree—Execution—Pre-decree arrangement between the parties that the decree was not to be executed—Bar to execution—Pre-decree arrangement to postpone execution—Principle of decision to be applied in such cases, whether same—Stare decisis.

A pre-decree arrangement, by which a decree was not to be executed, can be pleaded in bar of execution of the decree.

The principle of the Full Bench decision in *Chidambara Chettiar v. Krishna Vathiar*, (1917) I.L.R., 40 Mad., 233, is applicable to a case not merely of a pre-decree arrangement by which the execution of the decree was to be postponed for a time, but also to a case where execution was absolutely prohibited.

Case law reviewed.

APPEAL against the decree of L. C. HORWILL, District Judge of Chingleput, in E.P. No. 45 of 1924, in O.S. No. 21 of 1920.

The decree-holders, who had obtained a final decree in a suit for sale on a mortgage, applied under Order XXI, rules 66 and 72, Civil Procedure Code, that the mortgage property might be sold to recover the decree amount. The judgment-debtor set up an arrangement prior to the preliminary decree as an adjustment of the decree in bar of execution. The learned District Judge held that the adjustment not being embodied in the

* Appeal against Order No. 270 of 1925.

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decree could not be recognized, relying on the decisions in *Mallayya v. China Kotayya*(1), *Ramanathan Uthettiar v. Venkatachalam*(2) and *Singa Raja v. Pethu Raja*(3), and directed the sale. The judgment-debtor appealed.

K. Bashyam Ayyangar for appellant.

T. R. Ramachandra Ayyar for respondent.

JUDGMENT.

WALLACE, J.

WALLACE, J.—The point for decision is whether it is open to a judgment-debtor to plead in bar of execution of a decree against him a pre-decree arrangement that the decree was not to be executed. The Lower Court has held that it was not so open to him, relying on three decisions of this Court, which in my view, so far as they may be used to support this view, run counter to the general trend of decisions in this Court. The most important decision on this point is the Full Bench case in *Chidambaram Chettiar v. Krishna Vathiyar*(4). The question referred to the Full Bench there was whether a pre-decree arrangement to postpone the execution of a decree for a certain time can be pleaded as a bar to immediate execution. Two learned Judges of the Full Bench held that it could, and another learned Judge differed. The former based their decisions on the principle of *stare decisis*, the previous cases relied on by them and on which they elected to stand, being *Rama Ayyan v. Sreenivasa Pattar*(5), *Rukmani Ammal v. Krishnamachari*(6), *Krishnamachariar v. Rukmani Ammal*(7), and *Subramanya Pillai v. Kumaravelu Ambalam*(8). Now, curiously enough, it was not noticed and has been overlooked also in other judgments on this

(1) (1921) 14 L.W., 817.

(3) (1918) 35 M.L.J., 579.

(5) (1896) I.L.R., 19 Mad., 230.

(7) (1905) 15 M.L.J., 370.

(2) (1923) 17 L.W., 635.

(4) (1917) I.L.R., 40 Mad., 233 (F.B.).

(6) (1905) 9 M.L.T., 464.

(8) (1916) I.L.R., 39 Mad., 541.

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matter that *Rama Ayyar v. Sreenivasa Pattar*(1) is not really in point. The agreement in that case was post-decree and not pre-decree. The other three cases lay down in general terms the principle that a pre-decree arrangement that a decree, when obtained, should not be executed, can be pleaded in bar of execution. *Rukmani Ammal v. Krishnamachari*(2) and *Subramanya Pillai v. Kumaravelu Ambalam*(3) follow the Full Bench ruling in *Laldas v. Krishdas*(4). No previous authority was quoted in *Krishnamachariar v. Rukmani Ammal*(5). It is clear that these cases lay down a principle wider than the principle raised in the question referred to the Full Bench. In the Full Bench case, the question was whether a pre-decree arrangement for a temporary postponement of execution can be pleaded; while, in the three cases above quoted, the general principle was that a pre-decree arrangement not to execute at all can be pleaded. The concurring judgment in the Full Bench proceeded however on the footing that this general principle adopted furnishes the answer to the question raised, although it was not necessary for the decision to go so far as the three cases above quoted. I have no doubt that the concurring Judges did intend to take their stand on the wider principle enunciated in these cases and that they meant to uphold and confirm that principle and lay down that this Court in doing so was proceeding on the principle of *stare decisis*.

Subsequently to the 40 Madras case, there have been two divergent lines of decisions. One follows the general principle already stated, for example, *Sambasiva Ayyar v. Thirumalai Ramanuja Thathachariar*(6) in which it is adopted in clear terms as inherent in and

(1) (1896) I.L.R., 19 Mad., 230.

(3) (1916) I.L.R., 39 Mad., 541.

(5) (1905) 15 M.L.J., 370.

(2) (1905) 9 M.L.T., 464.

(4) (1898) I.L.R., 22 Bom., 463 (F.B.).

(6) (1919) 37 M.L.J., 356.

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flowing from the Full Bench decision; and *Velu Thevan v. Krishnaswami Reddi*(1) to which one of us was a party. The other set of cases springs from the ruling in *Arumugam Pillai v. Krishnaswami Naidu*(2) but, before that is considered, reference may be made to the case in *Singa Raja v. Pethu Raja*(3). That case turned on a rather strict interpretation of Order XXXIV and not on this general principle, and no reference was made either to the 40 Madras or 43 Madras case. In 43 Mad., 725, which was decided in 1920, one learned Judge held that 40 Madras "does not oblige us to extend the principle to the extent required by the appellants' contention." I would point out that the one case referred to by the learned Judge, OLDFIELD, J., as the only case appearing in the authorized reports supporting the appellants' contentions before him is the 19 Madras case, which, as I have observed, has no application to a pre-decree arrangement; while the learned Judge has overlooked the 39 Madras case.

Next comes the case in *Mallappa v. China Kotayya*(4) which really seems to me hardly in point. It was a case of pre-suit, and not of a pre-decree, arrangement, which the learned Judges held could and should have been pleaded as an absolute defence to the suit. This was sufficient for the disposal of the case but the learned Judges went on to consider the general question of the right of a party to plead a pre-decree arrangement in bar of execution, and referred to the cases already quoted. The Full Bench case is put aside on the ground set out in the 43 Madras case, but it is quoted at the end of the judgment as supporting the plea that the agreement in that suit could not be pleaded in bar of execution. It is clearly a case distinguishable

(1) (1925) 48 M.L.J., 277.
(3) (1918) 35 M.L.J., 579.

(2) (1920) I.L.R., 43 Mad., 725.
(4) (1921) 14 L.W., 317.

from the 40 Madras case. The next case is *Ramanatham Chettiar v. Venkatachalam*(1) passed in 1923 which was decided on the ground that the agreement there pleaded was more similar to the one in 43 Madras than to that in 40 Madras. In this divergence of authority I think we are bound to follow the Full Bench ruling, which does undoubtedly adopt and follow the general principle laid down in *Rukmani Ammal v. Krishnamachari*(2), *Krishnamachariar v. Rukmani Ammal*(3) and *Subramania Pillai v. Kumaravelu Ambalam*(4) and hold to the principle which has been followed since 1903 until it was doubted in the 43 Madras case. It is essential that, in such matters, there should be uniformity of procedure, and I see no reason to refer the case again to a Full Bench as we have been requested to do.

We must therefore reverse the decision of the District Judge and direct him to re-hear the case. Costs up to date will abide the result.

MADHAVAN NAYAR, J.—I concur with my learned brother throughout in his judgment. I have not been convinced by the arguments of Mr. T. R. Ramachandra Ayyar that the decision in *Velu Thevan v. Krishnaswami Reddi*(5) to which I was a party does not lay down the correct law. It was held in that case that a judgment-debtor could plead in bar of an execution a pre-decree arrangement between him and the decree-holder that the decree should not be executed. That decision was based upon the Full Bench ruling in *Ohidambaram Chettiar v. Krishna Vathiyar*(6). The decisions in *Krishnamachariar v. Rukmani Ammal*(3), *Rukmani Ammal v. Krishnamachari*(2) and *Subramania Pillai v. Kumaravelu Ambalam*(4) which lay down the general principle that an arrangement prior to a decree not to execute the decree at all

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(1) (1923) 17 L.W., 635.
(3) (1905) 15 M.L.J., 370.
(5) (1925) 48 M.L.J., 277.

(2) (1905) 9 M.L.T., 464.
(4) (1916) I.L.R., 39 Mad., 541.
(6) (1917) I.L.R., 40 Mad., 233 (F.B.).

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can be pleaded in bar of an execution furnished the ground for the decision in the Full Bench case. These cases laid down a principle wider than the one raised in the question referred to the Full Bench. There can be no doubt that the learned Judges who decided the case in *Chidambaram Chettiar v. Krishna Vathiyar*(1) accepted the principle of these three cases as correct law. The decision mainly relied upon by Mr. Ramachandra Ayyar, *Arumugam Pillai v. Krishnaswami Naidu*(2), as pointed out by my learned brother, refers to *Rama Ayyar v. Sreenivasa Pattar*(3) which has no application to a pre-decree arrangement and overlooks the decision in *Subramania Pillai v. Kumaravelu Ambalam*(4) and apparently brushes aside the decisions mainly relied upon in the Full Bench case on the ground that they do not appear in the authorized reports. The other decisions quoted for the respondent, namely, *Singa Raja v. Pethu Raja*(5), *Mallayya v. Chinna Kotayya*(6), and *Ramanathan Chettiar v. Venkatachalam*(7) do not advance his contentions in any appreciable degree.

In this state of the authorities, I agree with my learned brother that we are bound to follow the Full Bench ruling and reverse the decision of the District Judge and request him to re-hear the case. The costs up to date will abide the result.

K.R.

- (1) (1917) 1 L.R., 40 Mad., 233 (F.B.). (2) (1920) 1 L.R., 43 Mad., 725.
(3) (1869) 1 L.R., 19 Mad., 230. (4) (1918) 1 L.R., 39 Mad., 541.
(5) (1918) 35 M.L.J., 579. (6) (1921) 14 L.W., 317.
(7) (1923) 17 L.W., 635.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice
Madhavan Nayar.

THE DEPUTY COLLECTOR, COCANADA (REFERRING
OFFICER), APPELLANT,

1925,
December 10.

v.

THE MAHARAJA OF PITTAPUR (FIRST CLAIMANT),
RESPONDENT.*

Land Acquisition Act (I of 1894), sec. 31 (2), proviso 3—Award of compensation by Deputy Collector—Apportionment—Payment by Deputy Collector to claimants according to his award—Apportionment, objected to by claimants, who were Zamindar and his tenants—Reference to District Court—Apportionment altered—Zamindar awarded increased share of the compensation in the District Court—Right of Zamindar to apply for execution against Government in the District Court.

Where a Deputy Collector, acquiring lands for the Government under the Land Acquisition Act, determined the amount of compensation payable, apportioned it among the claimants and paid their shares under his award, but, on a reference made to the District Court at the instance of a claimant objecting to the apportionment, the District Court increased the share of compensation in favour of the objecting claimant,

Held, that the award of the District Court was a direction that the Government should pay each claimant the amount awarded to him under its award, and that the claimant, who obtained an increased share under its award, is entitled to recover the amount from the Government by filing an application in the District Court for execution against the Government.

The Government is bound to deposit in the District Court the amount of compensation awarded by the Referring officer for distribution according to the award of the District Court,

* Appeal against Order No. 391 of 1923.

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and the increased amount, if any, awarded by the Court; the Government should not throw on the claimant the risk and burden of recovering the compensation from some other party to whom the Government has wrongfully paid it.

The third proviso to section 31 (2) of the Act does not apply to a case of wrongful payment by the Deputy Collector to a claimant, as the proviso only comes into operation when section 31 (2) has been obeyed.

Raja Nilmoni Singh Deo Bahadur v. Ram Bandhu Rai, (1881) I.L.R., 7 Calc., 388 (P.C.), relied on.

APPEAL against the order of T. V. NARAYANAN NAYAR, Acting District Judge of Gōdāvari, in E.P. No. 64 of 1923 in Original Petition No. 164 of 1920.

The Government acquired an extent of seven and odd acres of land in Tenangi village, and the Deputy Collector estimated the market value at Rs. 250 per acre. The Maharaja of Pittapur, who had melwaram rights in the land, was awarded by the Deputy Collector Rs. 104-4-4 as compensation for his melwaram interest and the balance was awarded to the tenants, who were the other claimants before him. The awarding officer paid the tenants the amount due to them according to his award. The Zamindar, who had objected to the share allowed to him, asked for a reference to be made to the District Court within the time allowed by the Land Acquisition Act. The reference was made, and the District Court upheld the Zamindar's contention and awarded to him Rs. 930 for the value of his melwaram right, in modification of the award of the Deputy Collector. As the Government did not pay the Zamindar the additional amount awarded to him by the District Court, he applied, by an execution petition in the District Court, to recover from the Government the additional amount awarded to him. The Government pleaded that the Zamindar should recover the amount from the tenants, to whom the Deputy Collector had

paid under his award, and that the award of the District Court should not be taken as an executable decree. The District Judge overruled both the contentions, and passed an order fixing one month's time for payment by the Government of the excess amount awarded to the Zamindar, under section 82 of the Civil Procedure Code. The Referring officer (Deputy Collector) preferred this appeal.

The Government Pleader (C. V. Anantakrishna Ayyar) for appellant.

S. Srinivasa Ayyangar and *S. Venkatesa Ayyangar* for respondents.

JUDGMENT.

The award of the District Court directed that the amount awarded by it should be paid to each party. We think this is a clear direction that Government shall pay to each party the amount awarded to him. That is the essential motive and meaning of an award and Government is bound, *prima facie*, to supply the money required to pay each party the amount of compensation due to him.

In the present case, unfortunately, the Deputy Collector had not obeyed section 31 of the Land Acquisition Act, and instead of depositing in Court the amount to be apportioned, paid over to the tenants the amount awarded by him to them. Consequently when the District Court increased the Zamindar's share to the total compensation, the balance due to him was not available in Court for payment over to him. The Government's view is that the Zamindar must recover it from the tenants to whom it was paid in excess. The Government Pleader calls in aid the third proviso to section 31 (2). We do not think this proviso has any application. It only comes into operation when

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section 31 (2) itself has been obeyed, and does not apply to a case of excess payment wrongfully made [see *Raja Nilmoni Singh Deo Bahadur v. Ram Bandhu Rai*(1)].

We think that Government was bound, under the provisions of the Land Acquisition Act, to have ready in the District Court the amount awarded by the Referring officer, for distribution according to the decision of the District Court. If the District Court had in a proper reference increased the amount of compensation, Government is bound to pay into Court the amount of increased compensation. The principle is not altered when an apportionment of the compensation amount is increased, and if the Referring officer had obeyed section 31, the necessary money would have been there. It is not right that Government should throw on a party, whose property it has compulsorily acquired, the risk and burden of recovering the compensation from some one else to whom Government has wrongfully paid it. Whether Government can by appropriate proceedings recover the excess from those to whom it was paid is for Government to consider. We are not prepared at this stage to grant time to Government, as requested by the Government Pleader, to appeal against the award of the District Court. It seems to us a proper award and the appeal time has long ago expired.

We see no reason to interfere with the order of the lower Court and dismiss the appeal with costs.

K.R.

(1) (1881) I.L.R., 7 Calc., 388 (P.C.).

SPECIAL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.*

In re A VAKIL.

1925,
October 6.

Professional misconduct—None where mere negligence and no moral delinquency—Clause 10 of Letters Patent.

Mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct. *In re G.M.C.* (1889), 33 S.J., 397, followed.

The facts appear from the following notice issued by the High Court:—

“A complaint having been made to the High Court by S. Ponnusami Pillai, Contractor, and agent of C. Thayarammal, appellant in A.S. No. 267 of 1921 on the file of the Court of the Subordinate Judge of Chittoor (A.S. No. 119 of 1921 on the file of the District Court of Chittoor) and dharmakarthha of Appukutti Pillai Choultry of Renigunta, residing at No. 29, Perumal Mudali Street, Puddupakkam, Madras, against Mr. M., B.A., B.L., High Court Vakil, practising at Chittoor,

(1) that the said Mr. M. having been engaged as vakil of the said C. Thayarammal in the said Appeal Suit No. 267 of 1921 on the file of the Court of the Subordinate Judge of Chittoor preferred against the decree of the Court of the District Munsif of Madanapalle in Original Suit No. 309 of 1920, and having been put in possession of enough funds, failed to take the necessary steps to get in time certified copies of the judgment and decree in the said Appeal Suit No. 267 of 1921, for enabling the said C. Thayaramma to prefer a second appeal to the High Court and thereby deprived her of the right of second appeal, and (2) that therefore the said Mr. M. neglected his duty towards his client the said C. Thayarammal who, in consequence, suffered serious loss and damage and that thereby the said Mr. M. rendered himself liable to be dealt with under the disciplinary jurisdiction of the High Court for unprofessional conduct, the High Court, under section 10 of the Letters Patent, directed that the said vakil, Mr. M., be called upon to show cause why he should not in the circumstances

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stated be removed from the roll of vakils of the High Court, or be otherwise dealt with for his unprofessional conduct mentioned above."

Advocate-General for the Crown.—In this case what is proved is only negligence of a clerk who later on manipulated the accounts in order to deceive his master (the vakil). No professional misconduct on the part of the vakil is proved, nor any moral turpitude. The vakil offered from the beginning to make sufficient amends to the client; but the client's demand seems to have been excessive.

T. R. Ramachandra Ayyar for the Vakils' Association.—Mere negligence like this is not professional misconduct.

P. Venkataramana Rao for the vakil, was not called upon.

The JUDGMENT of the Court was delivered by The CHIEF JUSTICE.—The charges framed, if they were substantiated, would prove no more than negligence on the part of the vakil's clerk. It is only fair to the vakil to say that he has throughout accepted civil responsibility for his clerk's negligence to the extent of any proved loss in consequence of it by the client. But it has been laid down clearly in England in the case of *G.M.C.* (in the proceedings against *MAYOR COOKE*, a solicitor)(1) and also by a Bench of this Court in a judgment delivered on the 7th December 1923 in the matter of *T. C. K. Kurup*, Bar.-at-Law, Advocate, High Court, Madras, the Court consisting of the then CHIEF JUSTICE, PHILLIPS and RAMESAM, JJ., that negligence by itself is not professional misconduct; into that offence there must enter the element of moral delinquency. Of that there is no suggestion here, and we are therefore able to say that there is no case to investigate, and that no reflexion adverse to his professional honour rests upon Mr. M.

N.R.

(1) (1889) 33 S.J., 397.

APPELLATE CRIMINAL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief
Justice, Mr. Justice Spencer and
Mr. Justice Krishnan.*

THE PUBLIC PROSECUTOR, APPELLANT,

v.

RATNAVELU CHETTY, ACCUSED.*

Ss. 190 (1) (b) and 200 (aa), Criminal Procedure Code (V of 1908)—Police report in writing in non-cognizable cases—Jurisdiction of Magistrates to take cognizance of such cases.

By virtue of sections 190 (1) (b) and 200 (aa) of the Criminal Procedure Code, Magistrates mentioned in section 190 are entitled to take cognizance of even non-cognizable offences upon a report made in writing by a police officer without examining the officer upon oath. *Perumal Naick v. Emperor* (1925) M.W.N., 317, overruled.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the accused by the Assistant Sessions Judge of Salem in Sessions Case No. 16 of 1925 on the file of the Court of Session of the Salem division.

The facts are given in the following Order of Reference of DEVADOSS and WALLER, JJ. :—

DEVADOSS, J.—This is an appeal by the Public Prosecutor against the order of acquittal of the Assistant Sessions Judge of Salem. The accused was committed to the Court of Session under section 211, Indian Penal Code. The Assistant Sessions Judge held that the proceedings were started on a police report before the Magistrate and the proceedings were void and therefore the committal to the Sessions Court was illegal and

* Criminal Appeal No. 551 of 1925.

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acquitted the accused. The contention of the Public Prosecutor is that the initiation of the proceedings was not illegal and the committal therefore was right.

The simple question for decision is whether the charge sheet in a non-cognizable case is a report or not. Section 190 of the Criminal Procedure Code empowers a Magistrate to take cognizance of a case "(a) upon receiving a complaint of facts which constitute such offence, (b) upon a report *in writing* of such facts *made by any police officer*, (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed." Does the report of a police officer come within clause (b) of section 190 of the Criminal Procedure Code? The police are empowered to investigate the commission of a cognizable offence. When information is given of the commission of a non-cognizable offence, the police should refer the informant to the Magistrate. Under section 155, clause (2), no police officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class, or a Presidency Magistrate. A police officer therefore is incompetent to investigate a non-cognizable case unless he is ordered to do so by a Magistrate of the first or second class, or a Presidency Magistrate. When a police officer does anything which he is not empowered to do, he cannot be said to act under the colour of his office. The investigation by a police officer of a non-cognizable case is no better than an investigation by a private individual. When a police officer investigates the commission of a cognizable offence, he has to send a report under section 173, which lays down what particulars it should contain. The police are also ordered to report under section 174 in cases of suicide, etc. A report under clause (b), therefore, is a report which a police officer is authorized to make. Any information given to a Magistrate by a police officer in a case which is not cognizable by the police cannot be said to be a report. The contention of the Public Prosecutor is that when any police officer reports about a non-cognizable case, he reports as a police officer and therefore it must be considered to be a report. Such an argument, if upheld, would mean that a police officer can report about any offence, cognizable or otherwise. Supposing a police officer reports about the commission of adultery or enticing away a married woman, though under section 199, the husband alone is competent to complain of such an offence, could it be said that the report is a proper report simply because the police officer

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came to know of the commission of the offence in his official capacity? The law requires that certain formalities should be gone through before criminal proceedings could be initiated. It would be doing violence to section 190 to hold that a Magistrate is entitled to initiate proceedings upon the report of a police officer as regards a non-cognizable offence.

A Magistrate has power to initiate proceedings upon receiving a complaint, but when a person presents a complaint, certain formalities have to be gone through. A sworn statement has to be taken and if the Magistrate thinks that the police should be asked to enquire into it, he may act, under section 202, and he may dismiss the complaint after examining the complainant on oath under section 203 if in his opinion no offence has been committed. But in the case of a police report no such formality need be gone through. Though it is open to a Magistrate not to take any action upon a report of the police, I am yet to see a Magistrate who has the temerity to do so. When the police send a charge sheet, there is a presumption that the police have investigated the matter and that there is a case to be enquired into by the Court and no Magistrate would think of dismissing a charge sheet after perusal on the ground that no offence has been made out. In fact there is no provision in the Act for dismissing a charge sheet without enquiry, whereas a Magistrate can dismiss a complaint after examining the complainant and after satisfying himself that the complaint does not disclose a criminal offence, or that he does not believe the complainant. The charge sheet in a non-cognizable case does not come within the meaning of section 190, clause (b) of the Procedure Code.

The next question is whether a Magistrate can take action upon such a report. He can take action provided he treats it as a complaint under clause (1) (a) or clause (1) (c). If he treats it as a complaint then he must require the police officer who sends in the charge sheet to give a sworn statement before him, for he has to be satisfied that an offence has been committed and that there is a case to be enquired into. If he treats it as information under clause (c) then he must transfer the case to some other Magistrate under section 201. It is not competent to any Magistrate on receiving a charge sheet, or the report of a police officer, in a non-cognizable case, to proceed to enquiry without complying with the provisions of law with regard to a complaint under clause (a) or information under clause (c). This point was specifically decided by me and my

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brother WALLACE, J., in *Perumal Naick v. Emperor*(1). I held the same view in another case, Crl.R.O. No. 823 of 1924. Notwithstanding the able argument of the learned Public Prosecutor I do not see any ground for changing my opinion expressed in the two cases mentioned above.

I shall briefly deal with the cases referred to by him. In *Bhairab Chandra Barua v. Emperor*(2) it was held that a police report in a non-cognizable case is either a complaint under section 4, clause (h) or a police report under section 190, clause (1) (b) of the Criminal Procedure Code and the Magistrate had jurisdiction to take cognizance of an offence under section 211 of the Indian Penal Code disclosed therein. The learned Judges followed the decision in a previous case of their own and held that a police report in a non-cognizable case was either a complaint as defined in the Criminal Procedure Code or a report within the meaning of section 190, clause (1) (b). With great respect I am unable to see how the report in a non-cognizable case can be a complaint. A complaint is defined as "An allegation made orally or in writing to a Magistrate, with a view to his taking action, under the Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a police officer." The argument is that the report of a police officer is a report which he is authorized to send in a cognizable case and that a report in a non-cognizable case being not a report in its strict sense, must be taken to be a complaint. If this argument is pushed to its logical conclusion, it would mean that whatever is not a report which a police officer is authorized to send is a complaint. A complaint as defined in the Criminal Procedure Code means an allegation made orally or in writing to a Magistrate of the commission of an offence. It takes the place of an indictment under the English Law. To treat any letter or any report by any officer as a complaint is doing violence to the plain meaning of the word "complaint" as defined in the Criminal Procedure Code. No Magistrate is entitled to take notice of a letter unless the person complaining of the commission of an offence appears before him and is prepared to support his statement on oath. If a police officer sends a report and is prepared to make a statement on oath, then it might be treated as a complaint, but not if he simply sends a letter to the Magistrate and asks him to take cognizance of a case and initiate proceedings. I have already discussed at some length the question whether a police

(1) (1925) M.W.N., 317.

(2) (1919) I.L.R., 46 Cal., 807.

report in a non-cognizable case comes within section 190, clause (1) (b) or not. In *Bhairab Chandra Barua v. Emperor*(1) the complaint was not made to the village officer but at the police station to the police officer. In the present case information was given to the village munsif. In *Sarfaraz Khan v. King-Emperor*(2) similar argument was advanced and accepted. In *King-Emperor v. Sada*(3) it was held that "there is no section in the Criminal Procedure Code, 1898, which empowers a police officer to make, of his own motion, any report to a Magistrate in a non-cognizable case; hence, where he files a formal complaint in such a case, he cannot be said to "make a report" and his complaint falls within the definition of "complaint" in section 4 (h) of the Criminal Procedure Code, 1898. It was further held in that case that the Magistrate could direct such police officer to pay compensation to the accused. The principle of this decision is that it is competent for police officer to make a complaint of a non-cognizable offence and if he does make a complaint, he becomes an ordinary complainant and if his complaint is false or frivolous, he can be ordered to pay compensation to the accused. If the report of a police officer of a non-cognizable case is to be treated as a complaint without the formality of the officer swearing to its truth, can such officer be made to pay compensation and can the accused, if the case is false, have a civil remedy? In the case of a police charge sheet, i.e., a report in a cognizable case, the police officer is protected, whereas a complainant is not. Therefore it is against the policy of the law to hold that a police officer who acts without jurisdiction should have the benefit of a police officer who acts within the limits allowed him by law. The case in *Chidambaram Pillai v. Emperor*(4) does not help either side. There it was held that it was competent for a police officer to file a complaint. In that case a complaint was filed by a police officer and he gave a sworn statement. When a police officer complains of the commission of a non-cognizable offence, he complains like any other private individual and if he wants to set the criminal law in motion, he must comply with the formalities for the purpose. A Magistrate is empowered to act under section 476. Can a Magistrate who loses his watch send a servant of his whom he suspects of theft under section 476 to the nearest Magistrate? The mere fact that a person is empowered in his official capacity to act in a particular way does not

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(1) (1919) I.L.R., 46 Cal., 807.
(3) (1902) I.L.R., 26 Bom., 150 (F.B.).

(2) (1913) 11 A.L.J., 331.
(4) (1909) I.L.R., 32 Mad., 3.

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enable him to act in the same way in his private capacity. To treat the report of a police officer in a non-cognizable case as a complaint without the formalities required for the initiation of proceedings would lead to gross irregularity, if not injustice. Supposing a police officer sends a letter to a Magistrate about the commission of a non-cognizable offence, would the Magistrate be entitled to refer it to the police for enquiry under section 202 of the Criminal Procedure Code? Could he act without the security of a definite information being given him against the accused? These are some of the consequences that will ensue if an ordinary police report is treated as a complaint and the Magistrate is asked to take cognizance without the further formalities being gone through. Any person may complain of the commission of an offence, and it is open to a police officer as to any private individual to complain of the commission of an offence; and if he does so, he comes under section 190, clause (1) (a).

I therefore hold that a Magistrate is not competent to initiate proceedings against any person on a police charge sheet in a non-cognizable case. If he wants to take action he must treat it as a complaint and take a sworn statement from the police officer.

In this case information was given to the Village Magistrate and was forwarded by him to the police. The police considered the information to be false and sent in a charge sheet and asked the Magistrate to take action under section 211. The Magistrate enquired into the matter and committed the accused to the Court of Session. The proceedings before the Magistrate and the commitment were illegal. But the Sessions Judge was not justified in acquitting the accused. What he should have done was to have sent up the papers to the High Court for quashing the commitment.

I would therefore set aside the order of acquittal and remit the case to him for such action as he may think necessary in view of the observations above made.

WALLER, J.—This is an appeal by the Public Prosecutor. The accused in the case brought a charge of dacoity against a number of persons. It was investigated by the police, who reported it to be false and had it struck off the file. They then chargesheeted the accused under section 211, Indian Penal Code. The Magistrate committed him to the Sessions. The

Assistant Sessions Judge, following the decision in *Perumal Naick v. Emperor*(1) held that the commitment was illegal and acquitted the accused.

The facts are almost exactly parallel to those of the case above cited. If the decision in it is right, the Public Prosecutor's appeal fails. What my brothers, DEVADOSS and WALLACE, JJ., held was that the police charge sheet was not a complaint within the meaning of section 190, Criminal Procedure Code, and that the offence under section 211, Indian Penal Code, being non-cognizable, the police had no power to investigate it and charge the accused of their own accord. There has, of course, been no investigation of the charge under section 211, Indian Penal Code, in this case nor was there in the other. What was investigated was the original charge of dacoity, which the police had the fullest power to investigate.

Mr. Adam relies on *Bhairab Chandra Barua v. Emperor*(2) where it was held that a police report in a non-cognizable case is either a complaint under section 4 (h) or a police report within section 190 (1) (b) of the Criminal Procedure Code. The Calcutta Bench refused to follow *King-Emperor v. Sada*(3) and *Chidambaram Pillai v. Emperor*(4). In the latter case it was decided that "where a police officer files a complaint in a non-cognizable case or regarding an offence which it was not his duty to report, such a complaint is a complaint within section 4 (h) of the Criminal Procedure Code and not a police report." In the former the decision was to the same effect. What, it seems to me, those cases decided was that a complaint is none the less a complaint because it is made by a police officer.

The real question to my mind is whether the "police report" referred to in section 190 (1) (b) of the Criminal Procedure Code is limited to reports made in cognizable cases. In an Allahabad case *Sarfaraz Khan v. King-Emperor*(5), KNOX, J., held that it was not. As he pointed out "the object of the Code appears to be that, before proceedings are taken against an accused person, such as would bring him to a Court of justice, a Magistrate must have before him knowledge, independent of his own knowledge, based either upon a complaint or upon a police report. If he chooses to take action without such independent report he is bound to inform an accused that he is entitled to have the case tried by some Court other than the

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(1) (1925) M.W.N., 317.

(2) (1919) I.L.R., 46 Cal., 807.

(3) (1902) I.L.R., 26 Bom., 150 (F.B.).

(4) (1909) I.L.R., 32 Mad., 3.

(5) (1913) 11 A.L.J., 331.

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Court of such Magistrate." That is a perfectly correct statement of the law contained in sections 190 and 191 of the Criminal Procedure Code. Section 190 says that a Magistrate may take cognizance of an offence on a complaint, on a police report, on information from any person other than a police officer or on his own knowledge or suspicion. But if he acts on information from a person other than a police officer or on his own knowledge or suspicion, he must proceed under section 191 of the Criminal Procedure Code. It seems to me that sufficient attention has not been paid to the words I have above underlined. The Criminal Procedure Code obviously contemplates the possibility of information other than a formal report under section 173 being received by a Magistrate from the police. I cannot believe that the Legislature intended that a Magistrate, though empowered to take cognizance on information from any other person, must, when he receives information from a police officer of a non-cognizable offence, hold his hand and decline to take cognizance. In the case we are now considering, the police investigated a complaint of dacoity and found that it was false—that is, that an offence under section 211 of the Indian Penal Code had been committed. There was no informant whom under section 155 (1) of the Criminal Procedure Code they could refer to a Magistrate. There was nothing to investigate and they required no order to investigate. I can see nothing in the Code which would prohibit them from giving information direct to the Magistrate themselves or prevent the Magistrate from taking cognizance on that information.

I think that the correct view is laid down in *Sarfaraz Khan v. King Emperor*(1), by KNOX, J., and also in *In re Asadulla Hussain Khan*(2). *Chidambaram Pillai v. Emperor*(3) was one in which a formal complaint had been preferred by a police officer and the decision was that a complaint presented by a police officer was not a police report but a complaint. If it be held that the police report referred to in section 190 (1) (b) of the Criminal Procedure Code is confined to reports in cognizable cases, I can see no reason why the report in this particular case should not be treated as a complaint. The fact that it was sent in a form designed for police reports under section 173 of the Criminal Procedure Code can make

(1) (1913) 11 A.L.J., 331.

(2) (1913) 6 M.L.T., 259.

(3) (1906) I.L.R., 32 Mad., 3.

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no real difference. The definition of complaint in the Criminal Procedure Code excludes reports of police officers. If by that is intended the exclusion merely of reports under section 173 of the Criminal Procedure Code, there seems to be no reason why other information furnished by the police should not be treated as a complaint.

Whatever view is right, I think that the Appeal should be allowed. If section 190 (1) (b) does not exclude reports in non-cognizable cases, the Magistrate could take cognizance on the report in this case. If it does exclude such reports he could take cognizance on the report as a complaint. The non-examination of the complainant on oath is provided for by section 200 (a) of the Criminal Procedure Code.

This Appeal having been set down for final orders on Monday, the 11th day of January 1926, the Court (DEVADOSS and WALLER, JJ.) made the following

ORDER OF REFERENCE TO A THIRD JUDGE :—

"Though we are agreed as to setting aside the order of acquittal, there is a difference of opinion as to any further proceedings that are to follow, viz., whether there should be a retrial on merits or not, and we direct that the case be placed before a third Judge under section 429 of the Criminal Procedure Code."

This Criminal Appeal coming on for hearing, the Honourable the CHIEF JUSTICE referred the case to a Full Bench.

ON THIS REFERENCE

The *Public Prosecutor* (J. C. Adam) for the Crown.—Section 190, Criminal Procedure Code, uses the words "any offence" which includes non-cognizable offences also. That section draws a distinction between a "complaint" which must be on oath and a "police report" which need not be on oath. Though a police officer cannot of his own accord investigate a non-cognizable offence yet there is nothing in section 190 (b) or in any other section which lays down that a police officer can report only in cognizable cases. If he is put on false scent, he is an aggrieved party and he can therefore himself be an informant. It is only if an information is given to him by a private person of a non-cognizable offence he must refer him to a Magistrate. Whether the report of a police officer is called a complaint or report, the Code as now amended provides by section 200 (a) that the

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officer need not be examined on oath. *Perumal Naick v. Emperor*(1) is wrong. I rely on *Bhairab Chandra Barua v. Emperor*(2), *Sarafaraz Khan v. King-Emperor*(3). He referred to section 173 of the Criminal Procedure Code.

C. S. Venkatachari (with *D. Ramaswami Ayyangar*) for the accused.—The word “report” in section 190 does not include a police report of a non-cognizable offence. Neither section 155 nor any other section empowers a police officer to make a report in non-cognizable cases. So, when the Code uses the word “police report” it is in cases where he is bound to “report,” i.e., in “cognizable offences” only. We must give the same meaning to the words “police report” wherever it occurs in the Code. See *King-Emperor v. Sada*(4), *Chidambaram Pillai v. Emperor*(5).

SPENCER, J.—The JUDGMENT of the Court was delivered by SPENCER, J.—This is an appeal against an acquittal. Upon a charge sheet charging the accused with an offence of making a false charge of dacoity (section 211, Indian Penal Code) the Stationary Sub-Magistrate of Krishnagiri held a preliminary enquiry and committed the accused to the Sessions. The Assistant Sessions Judge of Salem being of opinion that the commitment on a charge of a non-cognizable offence upon a police report was illegal, acquitted the accused, instead of making a reference to the High Court, as he should have done if he held that opinion, to quash the commitment under section 215, Criminal Procedure Code. The learned Judges (DEVADOSS and WALLER, JJ.) who heard the appeal were agreed on the point that the Assistant Sessions Judge’s procedure in acquitting the accused without a trial was wrong, but they differed on the question whether a retrial should be ordered; there followed a reference under section 429, Criminal Procedure Code, to a third Judge, and he being the CHIEF

(1) (1925) M.W.N., 317.

(2) (1919) I.L.R., 46 Cal., 807.

(3) (1913) 11 A.L.J., 331.

(4) (1902) I.L.R., 26 Bom., 150 (F.B.).

(5) (1909) I.L.R., 32 Mad., 3.

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JUSTICE, ordered the matter to be placed before a Full Bench.

From Schedule 2, column 3 to the Code of Criminal Procedure, it is apparent that the offence of making a false charge with intent to injure a person is one for which the police may not arrest without a warrant, in other words, it is not a “cognizable offence” within the definition in section 4 (1) (f) of the Criminal Procedure Code.

Mr. Justice DEVADOSS agreed with the Assistant Sessions Judge that the proceedings in the committing Magistrate’s Court were illegal because the Magistrate took cognizance of the offence under section 211, Indian Penal Code, upon a police report of a non-cognizable offence without taking a sworn statement from any one. He followed a reported case decided by himself and Mr. Justice WALLACE, *Perumal Naick v. Emperor*(1) and the case of *King-Emperor v. Sada*(2). Mr. Justice WALLER was averse to putting a narrow construction on the word “report” in section 190 (1) (b) as including only reports of cognizable offences. We consider the latter view to be the more correct. While the section itself speaks of “any offence,” we think that an attempt to limit its application to one particular class of offences is not warranted by the language used. In *King-Emperor v. Sada*(2), the learned Judges were inclined to confine the expression “police report” to reports which the police were required by the Code of 1882 to make in the matter of cognizable offences and by certain other sections. CANDY, J., noticed that though under the Code of 1872 police reports of non-cognizable offences were to be regarded as complaints, the Code of 1882 did

(1) (1925) M.W.N., 317.

(2) (1902) I.L.R., 26 Bom., 150 (F.B.).

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not empower a police officer to report at all about such offences without the order of a Magistrate. CHANDAVAR-KAR, J., observed that the expression "police report" did not occur in any section outside the chapter which deals with the investigation of cognizable offences, except sections 62 and 114. The first of these sections provides for reports being sent to District Magistrates and Subdivisional Magistrates whenever persons within their jurisdictions are arrested by the police without a warrant. The second provides for reports being sent in the case of threatened breaches of the peace when an immediate arrest is the only means by which peace may be preserved. The learned Judge might well have added to his list section 145 which provides for the police reporting disputes as to immovable property. It would be easy to conceive of other circumstances where police officers may find occasion to convey information to the magistracy or obtain their orders as to the course of action to be taken by them for the preservation of the peace and the prevention and detection of crime besides those specifically mentioned in the sections of the Code of Criminal Procedure. It should not be assumed that on all those occasions for which the Code does not specifically provide, a police officer is not acting in the discharge of his duty if he sends a report. It was held by this Court in *In re Asadulla Hussain Khan*(1), that a police officer's action was not *ultra vires* if instead of referring a person, who gave the police information of the commission of a non-cognizable offence, to the Magistrate as provided by section 155 (1) he reported the case to the Magistrate and asked for his orders under section 155 (2) to investigate it. In *Sarfaraz Khan v. King Emperor*(2), KNOX J., held that reports of

(1) (1909) 6 M.L.T., 259.

(2) (1913) 11 A.L.J., 331.

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investigations made by the police into non-cognizable offences under orders of a Magistrate passed under section 155 (2) fell under section 173 and that Magistrates could take cognizance of the case upon receiving such a police report. The Bombay Full Bench which decided the case in *King-Emperor v. Sada*(1) were quite ready to take the view that information furnished by a police officer to a Magistrate, which did not come within the purview of a police report prescribed by some section of the Code, fell anyhow within the definition of a complaint in section 4 (1) (h) which is defined as an "allegation orally or in writing to a Magistrate with a view to his taking action, under this Code, that some person, whether known or unknown, has committed an offence but it does not include the report of a police officer."

In Calcutta also it was held that it must be either a report or a complaint [vide *Bhairab Chandra Barua v. Emperor*(2)]. The learned Judges of the Calcutta Court went on to say that if a Magistrate upon receiving a report from the police recommending the prosecution of a person who had lodged false information with the police as to the commission (as here) of a dacoity omitted to examine the complainant under section 200 before issuing a summons to the accused, the omission was a mere irregularity which did not affect his jurisdiction. Upon this point they probably had in their minds the provision of section 529 (e), Criminal Procedure Code, as that section is quoted in *Harihar Roy v. Emperor*(3) printed as a foot-note to their judgment. DEVADOSS, J., does not in his judgment consider the effect of this provision. His comment upon this point is "to treat the report of a police officer in a non-cognizable case as

(1) (1902) I.L.R., 26 Bom., 150 (F.R.). (2) (1910) I.L.R., 46 Calc. 807.
(3) (1918) I.L.R., 46 Calc., 810.

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a complaint without the formalities required for the initiation of proceedings would lead to gross irregularity, if not injustice." The law only requires that the Magistrate, who takes cognizance of an offence under section 190, sub-section (1), clause (a) or (b) without having jurisdiction, should act in good faith though erroneously, to make his proceedings valid. The learned Judge proceeds to consider the case of *Chidambaram Pillai v. Emperor*(1), and the effect of some other sections in the same Chapter XV in which section 190 occurs, notably sections 196 and 196-A and 198, and he puts the questions (1) whether a Magistrate could take cognizance of an offence of adultery or enticing away a married woman upon a police report and (2) whether if a police officer sent a letter to a Magistrate about the commission of a non-cognizable offence, could the Magistrate refer it to the police for investigation under section 202. The answers to these questions are contained in the Code itself; sections 196, 196-A, 198 and 199 clearly contain mandatory provisions as they declare "No Court shall take cognizance of" (here follow the description of certain definite offences) "except" or "unless," etc. The amended Criminal Procedure Code of 1923, which was in force when the Sub-Magistrate took cognizance of the offence under section 211, Indian Penal Code, as well as when DEVADOSS, J., delivered his judgment in this case and that reported in *Perumal Naick v. Emperor*(1) has made the question of the jurisdiction of Magistrates to take cognizance of non-cognizable offences upon a report made in writing made by any police officer without examining the police officer upon oath perfectly clear and free from all possible ambiguity. For section 190 (1) (b) authorizes certain Magistrates to take cognizance of

(1) (1925) M.W.N., 317.

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any offence upon a report in writing of facts which constitute such offence made by any police officer, and section 200 (aa) provides that where a public servant acting or purporting to act in the discharge of his official duties makes a complaint of an offence, nothing shall require the Magistrate to examine him before taking cognizance of the offence. It is unfortunate that this change in the law was not brought to the notice of the learned Judges comprising the Bench, as the present reference might have thus been avoided. We overrule *Perumal Naick v. Emperor*(1) and we set aside the acquittal of the accused in this case, and direct him to be tried according to law for the offence under section 211, Indian Penal Code, at the Sessions of the Salem Division on the first available date.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice,
and Mr. Justice Ramésam.

THE OFFICIAL AS-SIGNEE OF MADRAS (RESPONDENT—
1ST DEFENDANT), APPELLANT,

1925,
December 16.

v.

A. RAMALINGAPPA AND ANOTHER (APPLICANTS—5TH AND 6TH
DEFENDANTS), RESPONDENTS.*

Letters Patent (Madras High Court), clause 15—Order transposing some defendants as plaintiffs, whether a "judgment"—Appeal, maintainability of.

An order of a Judge on the Original Side of the High Court transposing certain defendants as plaintiffs and allowing the

(1) (1925) M.W.N., 317.

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suit to proceed is not a "judgment" within clause 15 of the Letters Patent and is not appealable. *Tuljaram Row v. Alagappa Chettiar*, (1912) I.L.R., 35 Mad., 1 (F.B.), applied.

APPEAL against the interlocutory order made by Mr. Justice SRINIVASA AYYANGAR in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, on an application in C.S. No. 395 of 1922.

The facts are given in the Judgment.

K. S. Narayana Ayyangar for appellant.

K. Raja Ayyar and *V. Ramaswami Ayyar* for respondents.

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COUTTS TROTTER, C.J.—The preliminary point is taken in this case that no appeal lies because the pronouncement appealed against was not a "judgment" but an "order." The words have been the subject of great controversy in these Courts and I certainly do not propose to attempt to go through the welter of conflicting decisions, with many of which I may say I do not in the least agree. It seems to me that the matter is left in a state in which all this Court can do is to take the principle underlying the Full Bench decision in *Tuljaram Row v. Alagappa Chettiar*(1) and apply it as best it can to the actual matter before it. In this case the learned Judge directed that certain persons who appeared in the first instance on the record as defendants should be added as plaintiffs, the second plaintiff having given up his cause of action and thereby adversely, no doubt, affected the position of the defendants who were transposed, because, if he obtained a decree, in the working out of that decree, they might have their rights affected. However, that is a question on the merits which really does not arise. The learned Chief Justice, Sir ARNOLD WHITE, laid down the following test in the case cited

(1) (1912) I.L.R., 35 Mad., 1 (F.B.).

above, *Tuljaram Row v. Alagappa Chettiar*(1). If I may respectfully say so, I think he very wisely guarded himself from setting up a too procrustean bed in the language that he adopted, laying down the principle for courts to work out on the facts of each case :—

"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. 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."

Then, later on, he says this, and I respectfully agree with it,

"I think the decision may be a judgment for the purposes of the section though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding."

Applying that and endeavouring as best as I can to see what is its true application, I think it is this, that a determination, call it what you will, which has the effect, whether on a technical ground or on the merits, of putting an end to the proceedings as regards the particular people or *in toto* is a judgment and is appealable; but, if the pronouncement leaves the suit free to go on, then it is not a judgment within the meaning of the clause. In my opinion a distinction may be drawn which unfortunately has not been between the grant and the refusal of leave to sue. It seems to me that it may

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well be said that refusing leave to sue is a final determination of the matter against the proposed plaintiff. Similarly, in a case where a Court held that it had no jurisdiction to entertain the suit, I make no doubt that these Courts would accept that in accordance with the decision in *Tuljaram Row v. Alagappa Chettiar*(1) as being a final determination. But it seems to me that, if the effect of the order is to allow the proceedings to go on, it is impossible to say that it satisfies the test laid down by Sir ARNOLD WHITE in *Tuljaram Row v. Alagappa Chettiar*(1). I do not desire to multiply illustrations, because it is much better to leave these things to be dealt with as they arise. I have therefore contented myself with what appears to me to be a reasonably clear illustration one way or the other. Looking at this order, its effect was to allow the suit to go on for determination on the merits and I am utterly unable to see that the order of transference of these persons from the position of defendants to that of plaintiffs was in any way a decision the effect of which was to put an end to the suit or proceeding. In my opinion, therefore, without attempting to lay down any different test to that laid down by my learned predecessor in *Tuljaram Row v. Alagappa Chettiar*(1) I think it is not a case which is on the line. It is a case where any person applying ordinary language would without hesitation say that this was an order and not a judgment. I am therefore of opinion that no appeal lies and that this appeal must be dismissed with costs.

RAMESAM, J. RAMESAM, J.—I agree. The state of the case law has been aptly described by my Lord and, having

(1) (1912) I.L.R., 35 Mad., 1 (F.B.).

regard to it, I will not attempt any definition of the word "judgment." I will only say this, that I am not prepared to say that every order on a contested petition is a judgment. The line dividing judgments from orders must be drawn somewhere short of this. Having regard to the fact that in the case before us no substantial right of the defendants has been adversely affected by the order under appeal, I would say that it does not fall on the judgment side of the line. Beyond this I make no further attempt.

Grant and Greateorex, solicitors for appellant.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

RAMA REDDY (3RD DEFENDANT), APPELLANT,

v.

RANGADASAN AND OTHERS (PLAINTIFFS AND 4TH AND 5TH DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), arts. 134 and 144—Hindu Law—Religious endowment—Temple—Trustee—Alienation by trustee, not for a valid purpose—Suit against alienee to recover temple property, more than twelve years after alienation—Bar of limitation—Temple property, whether vested in idol or trustee—Trustee, mere Manager—Adverse possession.

Where a trustee of a Hindu temple improperly alienated temple property and a suit was instituted by a succeeding trustee to recover the property from the alienee more than twelve years from the date of the alienation,

Held, that, in the case of a Hindu temple, its property vested in the idol and the trustee was only a manager for the time being; that the trustee could not convey a valid title to the transferee, and therefore article 134 of the Limitation Act, 1908, did not apply to a suit for recovery of the temple property improperly

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alienated by the trustee; *Sri Vidya Varuthi Thirthaswami v. Baluswami Ayyar* (1921) I.L.R., 44 Mad., 831 (P.C.), applied;

that article 144 of the Act did not apply to a case of alienation by a trustee, where the alienee derived possession from the trustee, and that consequently the suit was not barred by limitation.

Semble.—Where a person takes possession of temple property, not derivatively from the trustee but hostilely against the trustee, article 144 will apply as against the trustee and the idol.

APPEAL under clause 15 of the Letters Patent against the judgment of MADHAVAN NAYAR, J., in Second Appeal No. 1230 of 1921 preferred against the decree of J. J. COTTON, District Judge of Coimbatore, in Appeal Suit No. 33 of 1921 preferred against the decree of P. G. RAMA AYYAR, Principal District Munsif of Erode, in Original Suit No. 713 of 1918.

The plaintiff sues as the present pujari and trustee of the suit temple to recover possession of certain lands, which were granted to an ancestor of the plaintiff as the manager for the time being of the suit temple. The lands had been sold by the first and second defendants (who were the father and uncle of the plaintiff and defendants 6, 7 and 8, respectively) to the third defendant in 1893. The plaintiff alleged that the lands had been granted as service inam to their family for doing pujari service; that the alienation by his father and the uncle were not valid and he instituted this suit in 1918. The District Munsif dismissed the suit as barred by limitation. On appeal, the Subordinate Judge reversed and remanded the suit, holding that if the plaintiff's family were entitled to a beneficial interest in the inam, the suit would not be barred by limitation on the authority of the decisions in 13 Mad., 277, and 10 M.L.T., 781. After remand the District Munsif again dismissed the suit and on appeal the District Judge confirmed the decree and dismissed the appeal. The lower Appellate Court found that the plaintiff was the pujari or trustee of the suit

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temple and that the suit property was attached to the temple. The plaintiff preferred a second appeal, which was heard by MADHAVAN NAYAR, J., who held that the suit was not barred under article 134, Limitation Act, and relied on the decision of the Privy Council in 44 Madras, 831, reversed the decrees of the lower Courts and gave a decree to the plaintiff as prayed, subject to his paying Rs. 1,700 to the third, fourth and fifth defendants for value of improvements. The third defendant preferred this Letters Patent Appeal.

T. R. Ramachandra Ayyar and N. P. Narasimha Ayyar for appellant.

T. M. Krishnaswami Ayyar for respondents.

JUDGMENT.

DEVADOSS, J.—This is an appeal against the judgment of MADHAVAN NAYAR, J., giving a decree to the plaintiff. The third defendant has preferred this Letters Patent Appeal. The question for determination is whether the suit is barred by article 134 of the Limitation Act. The plaintiff is the trustee of a temple. The finding is that the property is the property of the temple. The contention of Mr. Ramachandra Ayyar is that the suit is barred under article 134 inasmuch as the suit was brought more than twelve years after the date of the alienation. Article 134 gives a period of twelve years for the recovery of possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration. The argument advanced is that the suit is barred by article 134, if the transferor is held to be a trustee, and if he is not a trustee, then the suit is barred by reason of article 144 of the Limitation Act. The finding that the transferor is a trustee cannot be challenged now. The simple

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question is therefore whether article 134 applies to the case. It was decided in *Sri Vidya Varuthi v. Baluswami Ayyar*(1) that a permanent lease of mutt property granted by the head of the mutt could not create any interest in the property to enure beyond the life of the grantor and consequently article 134 of Schedule I of the Limitation Act of 1908, did not apply to a suit brought by the successor of the grantor for the recovery of the property. Mr. Ramachandra Ayyar tries to get over this decision by contending that the transferee was only a lessee and that he did not deny the title of the mutt but only contended that he was entitled to be in perpetual possession of the property being a permanent lessee. Mr. AMEER ALI in delivering the judgment of their Lordships observed—

“It is also to be remembered that a ‘trustee’ in the sense in which the expression is used in the English law is unknown in the Hindu system, pure and simple.”

With reference to the head of a mutt or Shebait he observed,

“In no case was the property conveyed to or vested in him, nor is he a ‘trustee’ in the English sense of the term, although in view of the obligations and duties resting on him he is answerable as a trustee, in the general sense, for maladministration.”

In the case of a religious institution the property is vested in the idol and the trustee is only a manager for the time being. In the case of a mutt the head of the mutt for the time being is entitled to use the income of the mutt property subject to the maintenance of the Thambirans and the ascetics attached to the mutt. In the case of a trustee of a temple he is not entitled to use any portion of the income for himself. In the case of a wakf if the deed of trust makes provision for the maintenance of the Muthavalli or the trustee for the time being, he may use the income for

(1) (1921) I.L.R., 44 Mad., 831 (P.O.).

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himself as allowed by the deed of trust, but in the case of Hindu religious institutions no trustee of any institution is entitled to use any portion of the income for himself if the property is vested in the idol. The decision in 44 Madras cannot be said to apply only to cases of leases. The remarks of their Lordships apply to cases of all alienations of property. A permanent lease is as much an alienation as a sale. The mere fact that rent is payable by the permanent lessee does not make a permanent lease any the less an alienation than a sale. Has the trustee of a religious institution the right to alienate the kudivaram interest in the temple property? Can it be said, if he lets into possession tenants so as to enable them to acquire occupancy rights, that he does not alienate the kudivaram interest? The mere fact that the tenants pay the melvaram to the temple cannot convert the transfer of the kudivaram into anything less than an alienation of it. A trustee therefore cannot convey a valid title to the transferee and therefore article 134 does not apply to a suit for the recovery of the temple property improperly alienated by the trustee. The case in *Subbayya Pandaram v. Mahammad Musthapha Maracayar*(1) has no application to the present case. In that case the property was vested in the trustees and it was sold in execution of a decree. It was held that the suit was barred by article 144. In that case it was distinctly found that the property was vested in the person against whom the decree was obtained and the property being vested in him he could by transfer give a title to the vendee and if the transaction is not set aside within 12 years the vendee gets a good title. The case in *Kuppuswami Mudaliar v. Samia Pillai*(2) does not touch the point under discussion. There the holder of a religious office

(1) (1917) I.L.R., 40 Mad., 751.

(2) (1922) 42 M.L.J., 1.

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was dismissed from the office, but he continued to be in possession of the property for more than 12 years after his dismissal and a suit by the successor was held to be barred. The property was vested in the person and he held the office for the time being and when he was dismissed from the office his possession became adverse to his successor and the successor not having sued within 12 years his suit was barred.

There were a few cases which may be said to support the contention of Mr. Ramachandra Ayyar that an invalid alienation of trust property should be set aside within 12 years, and, if not so set aside, the vendee under the invalid sale gets a good title. The decision in *Gnana Sambanda Pandara Sannadhi v. Velu Pandaram*(1) and *Damodar Das v. Lakhan Das*(2) supports this view. In *Gnana Sambanda Pandara Sannadhi v. Velu Pandaram*(1), the hereditary managers of the property with which a religious foundation was endowed had purported to sell and assign the management and lands of the endowment to the representative of another institution. It was held that the possession delivered to the purchaser was adverse to the vendors, and after 12 years, the successor of the vendor could not recover possession of the property conveyed.

Their Lordships observed at page 279,

"There is no proof of any custom in this case, and consequently these deeds of sale are void and did not give any title to the purchasers. The title remained in Chockalinga and Nataraja and the possession which was taken by the purchaser was adverse to them. . . ."

"Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other, but if there is, article 144 of the same schedule is applicable to the property. That bars the suit after 12 years' adverse possession."

(1) (1910) I.L.R., 23 Mad., 271.

(2) (1919) I.L.R., 37 Cal., 885.

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In *Damodar Das v. Lekhan Das*(1), the Privy Council held that where two chelas divided two institutions and the property among themselves one chela could not recover the property on the death of the other. Sir ARTHUR WILSON, who delivered the judgment of their Lordships, observed at page 894,

"It follows from this that the learned Judges were further right in holding that from the date of the *ekrarnama* the possession of the junior *chela*, by virtue of the terms of that *ekrarnama* was adverse, to the right of the idol and of the senior *chela*, as representing that idol, and that therefore the previous suit was barred by limitation."

There is no discussion in *Vidya Varuthi Thirthaswami v. Baluswami Ayyar*(2) of the decisions in *Gnana Sambanda Pandara Sannadhi v. Velu Pandaram*(3) and in *Damodara Das v. Lekhan Das*(1). In view of their Lordships' decision in *Sri Vidya Varuthi Thirthuswami v. Baluswami Ayyar*(2), the decisions in the former cases cannot be considered to be good law. The principle underlying these decisions seems to be this: that where the trustee of a religious institution who is only a manager for the time being, alienates any property belonging to the trust, he cannot give a valid title to the alienee, for he himself has no interest in the property and the alienee can only get what the manager himself possesses, namely, of being in possession of the property. The principle of adverse possession would apply to cases where a person who could assert his title does not assert his title within the period fixed by article 144 of the Limitation Act. In the case of a minor whose property has been improperly alienated by the guardian he has the right of suit within three years after his attaining majority. The legal fiction is that an idol is a minor for all time and it has to be under

(1) (1910) I.L.R., 37 Cal., 885.

(2) (1921) I.L.R., 44 Mad., 831 (P.C.).

(3) (1900) I.L.R., 23 Mad., 277.

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perpetual tutelage and that being so, it cannot be said that the idol can ever acquire majority, and a person who acquires title from a trustee of a temple cannot acquire any title adverse to the idol, for the idol is an infant for all time and the succeeding trustee could recover the property for the idol at any time. Though the language has been loosely used as if the trustee occupies a position similar to that of the karnavan of a Malabar tarwad, or the managing member of a joint Hindu family, or the guardian of a minor, yet his position is different from that of any of these. It is contended by Mr. Ramachandra Ayyar that a trustee can alienate the property for certain purposes. In order to preserve the trust or with the sanction of the Court he could alienate the property, but such alienation is under exceptional circumstances. But where he purports to convey the title to the property which is vested in him the vendee cannot be said to derive title from a man who could never give a good title to him. If the vendee buys knowing that the trustee has no right to convey title to the property which is vested in the idol, he cannot set up article 144 in answer to a suit by the trustee for the recovery of the property. His possession is that of the trustee and a trustee's possession can never be adverse to the idol. No doubt if a person takes possession of the immovable property belonging to a temple and keeps the trustee and the persons connected with the temple out of possession and is able to assert such possession adversely to the trust for over 12 years, he could acquire a valid title under section 28 of the Limitation Act. But where such person acquires possession from the manager, his possession can only be with the consent of the trustee for the time being and therefore his possession can never become adverse to the temple. The observation

of one of us in *Jagga Rao Bahadur Garu v. Gohar Bibi*(1), apply to the present case ;

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"If the properties are trust properties, any person claiming from a trustee cannot acquire a prescriptive title against the trust. Whether the document is valid or invalid, it would not give a right to anybody claiming under that document to prescribe for a title against the trust."

MADHAVAN NAYAR, J., held similarly in *Lakshminarayana Kulluraya v. Rajamma*(2). In a recent case in *Govinda Row v. Chinnathambi Pillai*(3). PHILLIPS, J., held that a permanent lessee could not set up the bar of limitation in a suit for recovery of possession of the property by the trustee. He held that article 134 did not apply to that case. As regards the contention that article 144 applied, the learned Judge observed :—

"This contention was negatived by their Lordships on the ground that the idol has no power to bring a suit except through the trustee and consequently there can be no question of the suit being barred unless it could not have been brought at an earlier date."

Reliance is placed upon *Ramrup Gir v. Lal Chand Marwari*(4). In that case the Patna High Court held that the alienation by the Mahant did not give a good title to the alienee, unless it is proved that the alienation was one which could bind the institution. In the course of the judgment, DAS, J., observed :—

"In my opinion the true rule is this ; where the property is vested in the juridical person as it was in Damodar Das's case (37 Calcutta, 885) and the Mahant is only the representative and manager of the idol, the act of alienation is a direct challenge upon the title of the idol ; and the idol, or the manager of the idol on behalf of the idol, must bring the suit within 12 years from the date of the alienation. But where the title is in the Mahant or the Shebait, as it was in the two other cases to which I have referred, the act of alienation is not a challenge upon the title of the idol, though the property may be endowed property in the sense that its income has to be appropriated to

(1) (1923) 17 L.W., 521 (529).
(3) (1925) 49 M.L.J., 640.

(2) (1925) 21 L.W., 256.
(4) (1922) 67 I.C., 401.

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the purposes of the endowment, and there is no adverse possession so long as the person making the alienation is alive; and the possession of the defendant becomes adverse to the plaintiffs only when a new title has come into existence capable of maintaining the suit and which has not approved of or acquiesced in the alienation."

With due respect to the learned Judge, I am unable to follow his reasoning as regards the property vesting in an idol. Where a manager alienates property belonging to an idol, his act cannot be said to be a challenge on the title of the idol. When the idol is incapable of asserting its will except through its manager, how can it be said that the manager's act is a challenge on its title? An idol, as I have already observed, being under perpetual tutelage can never assert its will and therefore the manager or the trustee who alienates its property cannot by his act be said to challenge the title of the idol. He might as well set up his own title against the idol. Can any express trustee or manager of a temple set up his own title against the trust or the temple? If the manager cannot set up an adverse title to the property vested in the idol, can he by his act allow a person who derives title from him to assert a title which he himself could not assert against the idol. The case of *Ramrup Gir v. Lalchand Marwari*(1), is against the principle of the decision in *Sri Vidya Varuthi Thirthaswami v. Baluswami Ayyar*(2), and therefore it cannot be relied upon in support of the argument for the appellant.

In the result the appeal fails and is dismissed with costs of first respondent.

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WALLER, J.—I agree.

K.R.

(1) (1922) 67 I.C., 401.

(2) (1921) I.L.R., 44 Mad., 831 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

SETHU AND OTHERS (DEFENDANTS), APPELLANTS,

v.

PALANI alias THIRUMENI THEVAN (PLAINTIFF),
RESPONDENT.*

1925,
October 20.

Evidence Act (Indian), Act I of 1872, sec. 112—Legitimacy—Presumption—Hindu woman—First marriage—Divorce—Marriage to another—Birth of a son within four months of divorce and during continuance of second marriage—Son, whether legitimate son of the first or second husband—No proof of want of access of second husband at a time when the son could have been begotten—English and Indian Law.

Where a Hindu woman was married to S in October 1903, was divorced by him in June 1904, married T in July 1904 and gave birth to a son in September 1904 and there was no proof that T could not have had access to her at any time when the son could have been begotten,

Held, that, under section 112 of the Indian Evidence Act, which applied to the case, the son should be held to be the legitimate son of T, who was the husband of his mother at the time of his birth, even though the intercourse between her and T was during the continuance of her marriage with S and was adulterous.

Collector of Trichinopoly v. Lakkammani and others (1874) 1 I.A., 282 (292), and *Ingestre v. Attorney-General* commented on in 30 Law Quarterly, page 153, relied on.

APPEAL under clause 15 of the Letters Patent against the Judgment of KRISHNAN, J., in Second Appeal No. 1115 of 1921.

The material facts appear from the Judgment. The first Court decided in favour of the plaintiff. The lower Appellate Court reversed the decree, and on second

* Letters Patent Appeal No. 27 of 1924.

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appeal, KRISHNAN, J., reversed the decree and restored that of the District Munsif. The defendants preferred this appeal. The judgment of KRISHNAN, J., is reported in 47 Mad., 706.

L. A. Govindaraghava Ayyar (with *P. S. Narayana-swami Ayyar*) for appellants.—Under the Hindu Law there are only two kinds of sons now recognized, viz., (1) aurasa son and (2) adopted son; a son begotten in adultery cannot be recognized under the Hindu Law; such a son cannot be legitimized in effect under the provisions of section 112 of the Indian Evidence Act. The plaintiff was begotten by *T* in adultery with the woman during the continuance of her marriage with her first husband. Section 112 is only a rule of presumption and cannot affect the substantive law of the parties. Under the English Law, a child of adulterous connexion does not become legitimate by subsequent acknowledgment. See *Birtwhistle v. Vardill*(1). See *Ingestre v. Attorney-General*, reported in the "Times," dated 14th October 1913, and commented on in 30 Law Quarterly, at pages 153 to 157. In English Law, though conception may be prior to marriage, if the birth is subsequent to marriage, the issue will be legitimate, but in Scotland both conception and birth may be prior to marriage, which will legitimize the issue. But both in Scotland and in England, prior conception should not be adulterous: See *The King v. Luffe*(2), *Rahi and others v. Govind Valad Taja*(3), *Nicholas v. Asphar*(4), Bannerjee in his book on Stridhanam (6th Edn., 1913, pp. 164-166) criticises the decision in 1 I.A., 282; Hunter's Roman Law, p. 201. The French Law is to the same effect. Hindu Law is even stricter, requiring both conception and birth

(1) (1835) 2 Cl. & Fin., 571; s.c., 6 E.R., 1270.

(2) (1807) 8 East., 198; s.c., 103 E.R., 316.

(3) (1876) I.L.R., 1 Bom., 97 at 116, 117.

(4) (1897) I.L.R., 24 Cal., 216.

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to be after lawful marriage, if issue is to be legitimate. Section 112, Indian Evidence Act, does not override the substantive Law. See *Bajinath Singh v. Mahomed Hajee Abba*(1), *Muhammad Allahverd Khan v. Muhammad Ismail Khan*(2).

K. V. Krishnaswami Ayyar for respondent.—The Hindu Law is not different from the English Law on this question. Even under the Hindu Law there were sons called *Kanina* and *Gudaja*: see also Manu, Chapter 9, verse 173. The Evidence Act can and does enact substantive law. Conclusive proof is defined in Evidence Act, section 4. The case in *Nicholas v. Asphar*(3) is distinguishable, because there the remarriage had not taken place, before the child was born.

JUDGMENT.

DEVADOSS, J.—This appeal raises a novel question. DEVADOSS, J. The plaintiff's mother Pechiammal was first married to one Subramania Thevan in September or October 1903, who divorced her in May or June 1904. She married again one Thirumeni Thevan in June or July 1904. The plaintiff was born to her in September 1904. The plaintiff sues for partition of his one-third share in the property of Thirumeni Thevan. The District Munsif held that the plaintiff was the son of Thirumeni Thevan and passed a preliminary decree in his favour. The Subordinate Judge reversed the decree of the District Munsif holding that the plaintiff was not the legitimate son of Thirumeni Thevan. Mr. Justice KRISHNAN set aside the decree of the Subordinate Judge and restored that of the District Munsif holding that the plaintiff was the son of Thirumeni Thevan. There is evidence in the case to show that Pechiammal did not live with her first husband for any length of time but carried on

(1) (1925) 48 M.L.J., 339 (P.C.).

(2) (1888) I.L.R., 10 All., 289.

(3) (1897) I.L.R., 24 Cal., 216.

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an intrigue with Thirumeni Thevan in consequence of which there were criminal proceedings and Subramania Thevan divorced her on account of her conduct. There is also evidence that Thirumeni Thevan treated the plaintiff as his son and that at the time the plaintiff could have been conceived his mother was having criminal intimacy with Thirumeni Thevan.

The question in this case turns upon the construction of section 112 of the Indian Evidence Act. Under section 112, if a person is born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution, the mother remaining unmarried, he shall be considered to be the son of his mother's husband unless it could be shown that the husband had no access to his mother at any time when he could have been begotten. If a person is born during wedlock, the law says it is conclusive proof that he is the legitimate son of the husband of his mother, and the onus of proving that the husband had no access to the mother at any time he could have been begotten is upon the husband. In this case, complication is introduced by the mother marrying again. If the plaintiff's mother had not married Thirumeni Thevan, the plaintiff would be considered to be the son of Subramania Thevan, and the onus would be upon Subramania Thevan or any other who challenges his paternity to prove that he was not begotten by Subramania Thevan. But the plaintiff's mother married Thirumeni Thevan when she was *enceinte* and the plaintiff was born during the subsistence of a valid marriage between his mother and Thirumeni Thevan. According to section 112, plaintiff is the son of Thirumeni Thevan, and unless and until it is proved that Thirumeni Thevan had no access to Pechiammal, the plaintiff's mother, at any time he could have been

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begotten, the onus is on those who challenge his paternity. There is no proof in this case that Thirumeni Thevan had not access to the plaintiff's mother at the time he could have been begotten. On the other hand, the evidence shows that Thirumeni Thevan was carrying on an intrigue with Pechiammal at the time when the plaintiff could have been begotten.

The argument of Mr. Govindaraghava Ayyar is that, according to Hindu Law, there are only two classes of sons, Aurasa and Dattaka sons, and to import section 112 of the Evidence Act into the region of Hindu Law would be giving section 112 the force of substantive law overriding the principles of Hindu Law. The Evidence Act was enacted for the purpose of enabling the Courts to act upon relevant evidence and to come to a conclusion on such evidence. In order to enable the Court to decide matters satisfactorily, the law of evidence requires the Court to raise certain presumptions and section 112 raises one of those presumptions, and the presumption is a rebuttable one, and until it is rebutted it should be considered conclusive proof. Before considering whether section 112 has made an inroad into the Hindu Law or not, it is necessary to consider whether the parties to this case are persons who are governed by the Code of Manu. No doubt the Courts have acted upon the general presumption that the Hindu Law applies to all persons who are not Christians, Muhammadans or persons professing any distinctive faith. Hindu Law, strictly so-called, cannot be applied to some of the castes in this Presidency. According to Hindu Law there can be no divorce and there can be no remarriage of widows. But according to the custom prevailing among the Maravars in Southern India a man can divorce his wife at any time he likes and a divorced woman as well as a widow could validly remarry; and

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DEVADOSS, J. the children of such remarriage are legitimate and inherit to their parents. It is, therefore, difficult to see how section 112 can be said to militate against or override any of the principles of the Hindu Law. Even according to Manu's Code, the plaintiff would be considered the legitimate son of Thirumeni Thevan. Section 173 of Chapter 9 is in these terms :

"if one marries a pregnant young woman, whether pregnancy be known or unknown, the male child in her womb belongs to the bridegroom and is called the son received with the bride."

It might be said that this rule applies only to virgins. But whether it applies to virgin or divorced woman or to widow, Manu did recognize the fact that pregnant women could be validly married and the child who was *en ventre sa mere* at the time of the marriage was the child of the husband. In Manu's time, the levirate was prevalent—vide Chapter 9, section 167. In Manu's time remarriage of widows was prevalent, though Manu condemned it. When the remarriage of a widow or a divorced woman is valid according to the law of the parties, it cannot be said that the rule which says that a person born during the subsistence of a valid marriage shall be considered to be the son of the husband is opposed to the Hindu Law. Mr. Govindaraghava Ayyar for the appellant relied upon several English cases, *Birtwhistle v. Vardill*(1), *The King v. Luffe*(2). These cases have no application to the question to be decided in this case. According to the law of Scotland, the marriage between a man and a woman legitimizes their issue born before marriage. But the law of England does not recognize any person as legitimate who is not born during lawful wedlock or within 280 days

of the dissolution of marriage either by death or by a decree of Court. The Hindu Law is the same in this respect as the English Law. [*Collector of Trichinopoly v. Lekkammani and others*(1)]. On grounds of public policy, under the English Law, a person born during the lawful wedlock is held to be legitimate, and the onus of proving that he is illegitimate is on the person who asserts it. The question as it has arisen in this case has not arisen in any English case. Sir James Stephen in his *Book on Evidence* says that he is not aware of any decided case on the point. Thayer in his *Treatise on Evidence*, page 349, refers to an American case. Mr. Govindaraghava Ayyar relied upon the rule in French Code and also upon the Roman Law on the point. I think it is unnecessary to consider what the rule is in other systems of law about the legitimacy of a person. According to the Indian Evidence Act all that is necessary to show that a person is legitimate is that he was born either during wedlock or within 280 days of the dissolution of the marriage. In this case there is no question of illegitimacy at all. If Thirumeni Thevan had not married Pechiammal the plaintiff would be the legitimate son of Subramania Thevan. Thirumeni Thevan having married her he becomes the legitimate son of Thirumeni Thevan. The law no doubt leaves it to Thirumeni Thevan or any other person who challenges his paternity to prove that Thirumeni Thevan had not access to the plaintiff's mother at any time he could have been begotten. In the case of *Ingestre v. Attorney-General* reported in the Times of October 14, 1913, this question arose.

In that case the petitioner's mother was twice married. She had left her first husband in 1881, and on May 16, 1881, he presented a petition for divorce; a

(1) (1835) 2 Cl. & Fin., 571; s.c. 6 E.R., 1270.

(2) (1807) 8 East., 193; s.c. 103 E.R., 316.

(1) (1874) I.I.A., 282 at pp. 292 and 293.

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DEVADOSS, J. decree nisi was pronounced on December 10, 1881, and was made absolute on June 20, 1882. A day or two afterwards she married her second husband, with whom she had cohabited since she left her first husband, and the petitioner was born on September 8, 1882. The evidence satisfied the Court that he was the son of the second husband, and the question of law then arose whether he was the legitimate son of his father, for although he was born in wedlock he was conceived at a time when his parents could not lawfully have been married.

Sir Samuel Evans, President of the Probate Division, answered the question in the affirmative. We have not been able to get at the report of this case, but the case is discussed in 30 Law Quarterly at pages 153 to 157. The facts in that case are very similar to the present and though the judgment in the case is not before us the conclusion arrived at by the learned President of the Probate Division is in conformity with section 112 of the Indian Evidence Act.

The decision in *Rahi and others v. Govind Valad Teja*(1) has no application to the present case. In that case, the question was whether a person was the illegitimate son of his father when his mother was not kept continuously by the father. As I have already observed, there is no question of illegitimacy in this case. Either the plaintiff is the legitimate son of Subramania Thevan or the legitimate son of Thirumeni Thevan. If his mother had not married Thirumeni Thevan the plaintiff would be considered the legitimate son of Subramania Thevan. The words of the section have to be given their proper meaning. The legislature intended that if the mother married again, the child born during the subsistence of a second marriage would

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DEVADOSS, J. be considered to be the child of the man whom the mother married again. Without going into the public policy of the law enacted in section 112 it is sufficient to say that, if a person is born during lawful wedlock, he is the son of the husband of his mother. It is open to those who say that the plaintiff is not the son of Thirumeni Thevan to prove that Thirumeni Thevan could not have had access to Pechiammal at any time when the plaintiff could have been begotten. If a man marries a woman not knowing that she is pregnant, he could, by showing that he could not have had access to the woman when the pregnancy commenced, make out that the child is not his. But if a person knowing that a woman is pregnant marries her, the child of the woman though born immediately after the marriage becomes in law his child unless the man proves that he had no access to the woman, when he could have been begotten. The plaintiff therefore is the son of Thirumeni Thevan and is entitled to a share of his properties.

In the result the appeal is dismissed with costs.

WALLER, J.—This appeal raises a question under section 112 of the Indian Evidence Act. The facts found are these. Plaintiff's mother was married to one Subramania Thevan in October 1903. She was divorced in June 1904 and married Thirumeni Thevan a month later. In September, Plaintiff was born to her. The question is whether, on these facts, plaintiff is to be regarded as the legitimate son of Thirumeni Thevan. The District Munsif thought that he should be so regarded. The Subordinate Judge held that he was the legitimate son of the first husband. KRISHNAN, J., agreed with the District Munsif.

On the language of section 112, I think that KRISHNAN, J., is right. Plaintiff was born during the

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continuance of a valid marriage between the mother and Thirumeni Thevan and there is no proof of non-access during the material period. The argument contra is that a child conceived during adulterous intercourse can never become legitimate even though the parents have been validly married before its birth. That was at one time the view of English lawyers and it appears to be still the law in France. In English Law, where, as a concession, a child conceived before marriage as the result of a non-adulterous connexion was regarded as legitimate if born after the marriage of its parents, the concession was based on a fiction which dated back the marriage to the conception. The fiction was, of course, not applicable to the fruit of an adulterous connexion, for the parents could not lawfully have married at the time of conception. That, however, is not the law of India as stated in section 112 of the Indian Evidence Act. Nor is it the present law of England, vide *Ingestre v. The Attorney General*, a case of which we have got no report, but which is commented on in an article in 30 Law Quarterly, p. 153. Mr. Govindaraghava Ayyar argues that it is opposed to Hindu Law but the Privy Council in *Collector of Trichinopoly v. Lekkamani and others*(1), decided that the English and Hindu Law do not differ in such matters. An Indian case has been referred to, *Nicholas v. Asphar*(2). There the first husband died in November 1841. The widow married again in December 1841 and gave birth to a daughter in April 1842. The learned Judge found that the daughter was the legitimate daughter of the first husband. No doubt, she was born within 280 days after the first husband's death but the section requires that the widow *should not have re-married*. If she does, the presumption is that the child is the legitimate child of the second

(1) (1874) 1 I.A., 282.

(2) (1897) I.L.R., 24 Cal., 216.

husband. No doubt, that presumption can be rebutted by proof of his non-access during the material period. If such proof be forthcoming another presumption would arise that the child was the legitimate offspring of the first husband. But with great respect, I do not think that the learned Judge stated the law correctly when he said that "presumption of legitimacy arising from conception during a valid subsisting marriage is conclusive." The date of birth and not that of conception is the test. In the case of a dissolution not only must the birth be within 280 days but the widow should further not have re-married. I agree that the appeal should be dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and
Mr. Justice Reilly.

S. K. MARIYA PILLAI AND ANOTHER (RESPONDENTS),
PETITIONERS,

1925,
July 18.

v.

MUTHUVELU PANDARAM (PETITIONER), RESPONDENT.*

Local Boards Act (XIV of 1920) ss. 56 and 57—Taluk Board—Meetings—Failure of member to attend meetings—Discontinuance of membership, when caused—Non-attendance for three consecutive months, not three meetings, necessary—Computation of period of three months—From date of first default—Erroneous ruling of President that there was no discontinuance—No opportunity to Board to restore member—Decision as to discontinuance, whether affected.

Under section 56 (1) (h) of the Local Boards Act, 1920, it is the failure of a member of a Taluk Board to attend meetings of the Board for three consecutive months, and not three consecutive meetings, that entails discontinuance of his membership.

* Civil Revision Petition No. 311 of 1924.

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The period of absence for three consecutive months is to be computed from the date of his first default in attending a meeting: *Kershaw v. Mayor etc., of Shoreditch* (1906) 22 T.L.R., 302, followed.

The fact that, owing to an erroneous ruling of the President of the Board that there was no discontinuance of membership caused by his absence, the Board had no opportunity to exercise its power to restore the member to his office, cannot affect the decision of the Court as to the discontinuance of the membership.

PETITION under section 107 of the Government of India Act to revise the order of A. S. BALASUBRAHMANYA AYYAR, District Judge of East Tanjore at Negapatam, in Original Petition No. 6 of 1924.

The material facts appear from the Judgment. The material portion of section 56 of the Local Boards Act, 1920, is cited in the Judgment.

T. R. Ramachandra Ayyar and K. S. Champakesa Ayyangar for petitioners.

S. Panchanadha Mudaliyar for respondent.

JUDGMENT.

VENKATA-
SUBBA RAO, J.

VENKATASUBBA RAO, J.—This Civil Revision Petition raises an interesting question. The petitioners before us are two members of the Taluk Board of Tirutturaippundi. There was a meeting of the Board on the 6th September 1923 and they attended it. On the 19th September there was another meeting. They failed to attend it. On the 17th October there was a meeting and the petitioners were again absent. In November no meeting was convened. On the 19th December there was a meeting at which they failed to be present. On the 17th January 1924, a meeting was convened and the petitioners attended it. The question that we have to decide is, did the petitioners cease to hold office by reason of the fact that they failed for three consecutive months to attend the meetings of the Local Board?

Section 56 (1) (h), so far as it is relevant to the present point, reads thus:

“Subject to the provisions of section 57, a member of a Local Board shall cease to hold his office, if he

(h) fails for three consecutive months to attend the meetings of the Local Board.”

The words are “three consecutive months,” not “three consecutive meetings.” The first default occurred on the 19th September 1923. Computing three months from that date, it is obvious that the petitioners failed for three consecutive months to attend the meetings of the Board. That the period is to be computed from the date of the first default is settled by *Kershaw v. Mayor, etc., of Shoreditch* (1).

Schedule 2, rule 1, enacts:

“Every Local Board shall meet for the transaction of business at least once in two months.”

This fixes merely the minimum and there is nothing to prevent the Local Board from meeting more often, say twice a month, if it chooses to do so. In this case, it met twice in September. The default having occurred on the 19th September, three months must be reckoned from that date.

A difficulty was suggested and it may be put in the form of an illustration. Supposing the Local Board does not meet in January, meets in February, does not meet in March; there is only one meeting held during the three months and it is asked, in such a case, does the subsection apply? The answer is perfectly clear. The subsection uses the word “meetings” and not “meeting.” There must therefore be at least two meetings which a member has failed to attend and section 56 (h) will not otherwise apply.

If, on the other hand, the three months should be computed not from the date of the default, but the construction is that the month should be excluded when the petitioners attended a meeting (in this case the month of

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September); even then they committed default, because they failed for three consecutive months, October, November and December, to attend the meetings of the Board.

Another contention has been urged on behalf of the petitioners and it has reference to sub-section (4) of section 56 which runs thus:—

“In the case of a person who has ceased to be a member in consequence of failure to attend meetings, the matter shall be reported by the President at the next meeting of the Local Board, which may at that meeting restore such person to office.”

It has been contended that this provision has not been complied with. The President reported to the meeting that the petitioners had failed to attend meetings for three consecutive months. But he gave a ruling at that meeting that they did not forfeit their seats on that account. It is argued that the petitioners were thus deprived of an opportunity of having the question of their reinstatement considered. I cannot accept this contention. The result has been unfortunate, but as I hold that they did commit default, the fact that the petitioners easily acquiesced in the wrong ruling of the President, which happened to be in their favour, does not absolve them.

In the result, I am of the opinion that the decision of the District Judge is correct and the Civil Revision Petition is accordingly dismissed. We desire to make no order as to costs because the question raised is novel and of some difficulty and the petitioners have not acted improperly in taking the matter to this Court.

REILLY, J.—I agree that the petitioners ceased to hold office as members of the Taluk Board of Tirutturaipūndi because they failed to attend the meetings of that Board for three consecutive months from the 19th September 1923. I understand the expression “three consecutive months” in section 56 (1) (h) of the Act to

be equivalent to a period of three months. I do not think that the question whether the President of the Board reported the failure of the petitioners to attend the meetings of the Board—as he should have done under section 56 (4) of the Act—can affect the question whether they had or had not ceased to be members of the Board. I agree that the petition must be dismissed.

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APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice
Madhavan Nayar.*

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL (PETITIONER), APPELLANT,

1926,
January 4.

v.

SARVEPALLI VENKATA LEKSHMAMMA, RESPONDENT
(PLAINTIFF), RESPONDENT.*

*Civil Procedure Code (Act V of 1908), O. XXXIII, r. 10, O. XXI,
rr. 54 and 66, and sec. 60 (n)—Suit in forma pauperis—
Suit for future maintenance—Decree for plaintiff—Court-
fee payable to Government from plaintiff—Application by
Government for execution in respect of Court-fee—Applica-
tion for attachment of the charge for future maintenance—
created by the decree—Attachment and sale of the charge,
whether permissible—Proper method to recover Court-fee—
Receiver to be appointed by Court—Payment by instalments.*

The Government can recover the Court-fee decreed as payable to it by a pauper plaintiff, even when the plaintiff's property is confined to a right to future maintenance; and the proper method of recovering such Court-fee is by the Court appointing a Receiver to collect the maintenance amount and pay to Government (by instalments, if necessary, in order that plaintiff may have something to live upon) the Court-fee due by the plaintiff.

* Appeal against Order No. 186 of 1924.

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Rajindra Narain Singh v. Sundara Bibi, (1923) I.L.R., 47 All., 385 (P.C.), followed.

An application for execution by attachment and sale of the charge in respect of the maintenance created by the decree is not competent.

APPEAL against the order of V. VENUGOPAL CHETTI, the District Judge of Nellore, in E.P. No. 124 of 1922 in Original Suit No. 51 of 1921, of the Subordinate Judge's Court, Nellore.

The plaintiff sued for enhancement of her maintenance which had been awarded to her under a previous decree. By a compromise entered into between the parties, the plaintiff was to be paid Rs. 120 per annum in two instalments and a charge was also given on some immovable properties specified in the plaint and a decree was passed in terms of the compromise. The decree directed that the plaintiff should pay half the Court-fee, i.e., a half of Rs. 225. The Secretary of State for India applied in execution to realize this amount from the plaintiff, and filed an application in execution and prayed for attachment and sale of "the charge for maintenance of the plaintiff on the properties referred to in the decree," under Order XXI, rules 11, 54 and 66, Civil Procedure Code. The plaintiff objected that the property was not liable to attachment and sale under section 60 (n), Civil Procedure Code. The District Judge held that the property was not liable to attachment and sale, and dismissed the petition. The Secretary of State preferred this appeal.

The Government Pleader (C. V. Anantakrishna Ayyar) for appellant.—The Government is entitled to a first charge on the charge for maintenance given to the plaintiff under the decree, by virtue of the provisions of Order XXXIII, rule 10, Civil Procedure Code. Though attachment and sale are not possible under section 60 (n) of the Civil Procedure Code, still a Receiver should be appointed to collect and pay the maintenance amount, after giving some amount for maintenance to the plaintiff. The

decision of the Privy Council in *Rajindra Narain Singh v. Sundara Bibi*(1) is conclusive on the point.

B. Somayya and Arunachala Ayyar for respondent.—Section 60 (n) prohibits the attachment and sale of right to maintenance. The decree in favour of the Government, though included in the compromise, is inexecutable. The Privy Council decision in *Rajindra Narain Singh v. Sundara Bibi*(1) does not apply, as it was a case of transfer of an interest in land. Here there is no transfer of an interest in land, but only a charge was created to which recourse could be had in default of payment. It is not an interest in land. See *Padmanund v. Rama Prasad*(2); *Lucas v. Harris*(3); and *Subraya v. Krishna*(4).

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JUDGMENT.

We cannot subscribe to respondent's contention that Government cannot under a decree recover the Court-fee decreed as payable to Government from a pauper plaintiff, whenever plaintiff's property is confined to a right to future maintenance. That contention is negatived by the Privy Council ruling in *Rajindra Narain Singh v. Sundara Bibi*(1) which also indicates the proper method of recovering such Court-fee. That method is by the Court appointing a Receiver to collect the maintenance amount and pay to Government (by instalments, if necessary, in order that plaintiff may have something to live upon) the fee due by plaintiff. The appellant's execution petition as it stands does not ask for relief in that form, and it should be amended. We grant leave to amend it accordingly. The amended petition is forwarded to the lower Court for disposal in the light of the Privy Council decision quoted above. Each party will bear his own costs in this appeal.

K.R.

(1) (1925) I.L.R., 47 All., 385. (2) (1912) 16 C.L.J., 374.
(3) (1887) 18 Q.B.D., 127 at 137 (C.A.).
(4) (1928) I.L.R., 46 Mad., 650 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1925,
September
14.

SREE MAHANT PRAYAGA DOSS JEE VARU
(PETITIONER), APPELLANT,

v.

UMADE RAJA RAJAI RAJA DAMARA KUMARA
THIMMA NAYANIM BAHADUR VARU, RAJA OF
KALAHASTI AND OTHERS (RESPONDENTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 73, and O. XXI, r. 71
—Auction sale—Deposit of 25 per cent of price into
Court by auction-purchaser—Default by him to pay balance
of price—Re-sale—Deficiency in price—Application to
recover deficiency from defaulter, by whom can be made—
Attachment of deposit by decree-holder—Application by other
decree-holders for rateable distribution of the deposit amount.

Where an auction-purchaser in execution of a decree, who had paid the deposit of 25 per cent of the purchase money, defaulted to pay the balance and the property was resold and fetched a much lower price, only the decree-holder who brought the property to sale or the judgment-debtor, and not any other decree-holder, can apply, under Order XXI, rule 71, to recover from the defaulter the entire deficiency in price caused by the re-sale.

Where such decree-holder had applied under rule 71 and attached the amount of the 25 per cent of the price in deposit in Court, other decree-holders, who had applied previously for execution of their decrees, are entitled to rateable distribution of the amount in deposit in Court as the amount became assets by reason of the attachment.

APPEAL against the order of W. L. VENKATARAMAYYA, District Judge of Nellore, in E.P. No. 121 of 1917 in O.S. No. 40 of 1910 on the file of the District Court of North Arcot.

* Civil Miscellaneous Appeal No. 31 of 1919.

The material facts appear from the Judgment.
T. V. Venkatarama Ayyar for appellant.
S. Varadachari for respondent.

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JUDGMENT.

DEVADOSS, J.—The taluk of Pamur in Kalahasti zamin was sold by the District Court of Nellore on 25th August 1914 in execution of the decree in C.S. No. 187 of 1912 and was knocked down for Rs. 6,90,000 to one Ramagarji Neelakanthagarji who made a deposit of 25 per cent of the amount of his bid and subsequently defaulted to pay the balance. The property was again put up to sale but did not fetch more than Rs. 1,01,000. The decree-holder in C.S. No. 187 of 1912 thereupon applied to the Court under Order XXI, rule 71 for the recovery of the difference between Rs. 6,90,000 and Rs. 1,01,000 from the defaulting purchaser. The District Judge dismissed his application, but the High Court in L.P.A. No. 42 of 1917 set aside the order of the District Judge and directed him to dispose of the petition according to law.

Several persons who had obtained decrees against the Raja of Kalahasti applied to the District Court for attachment of the deposit made on 25th August 1914 and prayed in the alternative for a rateable distribution of the amount under section 73, Civil Procedure Code. The District Judge held that the only person entitled to proceed against the defaulting purchaser was the decree-holder in C.S. No. 187 of 1912 and the other decree-holders were neither entitled to attach the amount in Court under Order XXI, rule 52 nor to claim rateable distribution of the same under section 73 and dismissed their applications. Decree-holders other than decree-holder in C.S. No. 187 of 1912 preferred these appeals against the orders of the District Judge.

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The facts are not disputed. The only question for determination is, are the appellants entitled to any relief, and if so, what? It is admitted by both the appellants and the respondents that the deposit of 25 per cent in Court belonged to the defaulting purchaser and that the decree-holder in C.S. No. 187 of 1912 made an application under Order XXI, rule 71 for the recovery of the deficiency from the defaulting purchaser. It is common ground that the defaulting purchaser is a man of straw and there is no likelihood of any amount being recovered from him. Under Order XIX, rule 86 if the auction purchaser makes any default in payment within the time mentioned the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government and the property shall be resold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. Mr. HUGHES, the then District Judge of Nellore, held that it was not a proper case for forfeiting the amount of the deposit to the Government and directed that the amount should be in Court pending the disposal of certain petitions.

Re-sale of the property was held under Order XXI, rule 87, and, as the property fetched a considerably lower sum than that for which it was first sold, a certificate was given as to the amount of deficiency by the officer conducting the sale. Order XXI, rule 71, is in these terms:

"Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money."

Under this rule the decree-holder became entitled to proceed against the defaulting purchaser for the difference between 6,90,000 and 1,01,000. From the terms of this rule it is quite clear that the decree-holder who brings the property to sale gets a decree against the defaulting purchaser for the deficiency and may recover the amount from him under the provisions relating to execution of decrees. If he does not choose to execute the decree, the judgment-debtor is entitled to execute the decree against the defaulting purchaser for the deficiency. A good deal of confusion has arisen from overlooking the distinction between the capacity of the decree-holder who brings the property to sale and his capacity as a decree-holder by reason of the provisions of Order XXI, rule 71. In his capacity as decree-holder he is entitled to be paid only the amount of his decree. As a decree-holder by reason of the provisions of Order XXI, rule 71 he is entitled to execute the decree against the defaulting purchaser for the whole amount of the deficiency. He cannot partially execute the decree only to the extent of the amount due to him. When he executes the decree for the deficiency he executes it for the whole amount of the deficiency. When the decree-holder in C.S. No. 187 of 1912 applied to the Court to proceed under Order XXI, rule 71, he did not ask for the execution of the decree in C.S. No. 187 of 1912 but he asked for the execution of the decree for the deficiency from the defaulting purchaser. In execution of what I may call the decree for the deficiency, the judgment-debtor is not the original judgment-debtor, but the defaulting purchaser. The position would be clear if the judgment-debtor himself applied to proceed under rule 71 against the defaulting purchaser. The defaulting purchaser is a judgment-debtor to the extent of the deficiency by virtue of the certificate of the officer holding the sale,

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If the defaulting purchaser paid the amount of the deficiency into Court, what would be, the character of the amount so paid? Would it or would it not be assets within the meaning of section 73, Civil Procedure Code? The defaulting auction purchaser is to make good the deficiency caused by reason of his default in paying the balance of the purchase money. If he pays the balance without execution being taken against him, that would be assets in the same way as it would be if he had made no default at all. The mere fact that the defaulting purchaser is made to pay the amount of the deficiency by a coercive process or by proceeding under the provisions relating to the execution of a decree for payment of money, would not change the character of the amount paid by him into Court.

In this case the defaulting purchaser is said to be a man of straw and nothing could be recovered from him. He had to his credit Rs. 1,72,500 being the amount of 25 per cent on the amount of his bid. When the decree-holder who brought the property to sale asked the Court to attach the money in Court under Order XXI, rule 71, the money was attached as the money of the defaulting purchaser. Under Order XXI, rule 52,

"Where the property to be attached is in the custody of any Court or Public Officer, the attachment shall be made by a notice to such Court or Officer, requesting that such property and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued."

Here the money was in the Court which effected the attachment. The effect of the attachment for an amount much larger than that in Court was to convert what belonged to the defaulting purchaser into assets within the meaning of section 73. If a debt due to the defaulting purchaser was attached under Order XXI in execution of the decree for the deficiency and if the debtor of the defaulting purchaser pays the amount into Court would

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that amount not be assets in Court? Whether the amount of the deficiency is paid by the defaulting purchaser or whether a debt of his is attached and the debtor pays the amount into Court or whether the money of the defaulting purchaser in Court is attached the result is the same. The money paid into Court or in Court becomes the proceeds realized in execution of the decree for the deficiency and such amount is not only for the benefit of the decree-holder who brought the property to sale but of all the other decree-holders who are entitled to rateable distribution under section 73, Civil Procedure Code. It is difficult to see any difference between the proceeds of auction sale held at the instance of a decree-holder and the amount paid by a defaulting purchaser by reason of his not being able to pay the whole of the sale amount within the time fixed, so far as the rights of the other decree-holders are concerned. It is not disputed that if the defaulting purchaser had not made any default and paid the whole amount of Rs. 6,90,000 into Court, the decree-holder who brought the property to sale as well as the other decree-holders entitled to rateable distribution under section 73 would be entitled to be paid rateably, and the defaulting auction purchaser being forced to make good the deficiency by an execution against him cannot change the character of the amount which he either voluntarily pays into Court or is recoverable from him or from his property or funds belonging to him. In this view of the case, it is unnecessary to consider in detail the arguments advanced on both sides.

The contention of Mr. T. V. Venkatarama Ayyar for the appellants is that the expression "decree-holder" in Order XXI, rule 71 should be held to mean all the decree-holders who are entitled to share rateably under section 73, Civil Procedure Code. His argument is that

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under the old Code the expression "decree-holder" was held to include all decree-holders entitled to share rateably under section 73. He relies upon *Chakrapani Chetty v. Dhanji Settu*(1) and *Bajoy Singh Dudhuna v. Hukumchand*(2). Such a construction would no doubt be a beneficial one so far as the decreeholders are concerned. But reading Order XXI, rule 71, it cannot be said that the legislature intended by the expression "decree-holder" any decree-holder or all the decree-holders against the judgment-debtor. It cannot be that each decree-holder who was entitled to share rateably has the right to proceed under rule 71. From the juxtaposition of the expression "at the instance of either the decree-holder or the judgment-debtor", it is clear that the legislature intended by the term "decree-holder" the decree-holder who brings the property to sale, for, the right to proceed against the defaulting purchaser for the deficiency is given to the judgment-debtor as well as to the decree-holder. If it was intended that any other decree-holder should have the benefit, the legislature would have made the matter clear by adding an explanation as in section 64 or by using the expression "at the instance of any decree-holder" instead of the expression "the decree-holder."

It has been urged on the side of the respondent by Mr. Varadachari that the decree-holder in C.S. No. 187 of 1912 did not act for the other decree-holders and was not a trustee for the other decree-holders. No doubt he does not act for the other decree-holders nor is he a trustee for them, but he is entitled as a decree-holder to proceed against the defaulting purchaser for the whole amount of the deficiency and when he does so the whole amount of the deficiency is recoverable and not only a

(1) (1901) I.L.R., 24 Mad., 311.

(2) (1902) I.L.R., 29 Cal., 548.

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portion thereof. As I have already remarked, when the decree-holder in C.S. No. 187 of 1912 applied under rule 71 for an order against the defaulting purchaser for the recovery of the deficiency he did not execute his decree but the decree for the deficiency under rule 71. He, having been given a specific decree against a specific individual, is entitled to have that decree executed, and all that rule 71 says is that at the instance of either the decree-holder or the judgment-debtor any deficiency shall be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

It has been urged that an application under Order XXI, rule 71, was made by the judgment-debtor and that application was dismissed, and no appeal was preferred against that order, and therefore the amount in Court cannot become the assets within the meaning of section 73. The District Judge of Nellore dismissed both the applications of the decree-holder and the judgment-debtor under rule 71, and the decree-holder preferred an appeal to the High Court, and the High Court in L.P.A. No. 42 of 1917 set aside the order of the District Judge and remanded the petition for disposal according to law. It is contended by Mr. Venkatrama Ayyar that this order enures for the benefit of the judgment-debtor as well under Order XLI, rule 33. It is not necessary to consider this aspect of the question as I have already held that the amount in Court became assets by reason of the attachment at the instance of the decree-holder.

The argument is advanced on behalf of the respondents that an attachment could be raised by paying the attaching creditor the amount of his decree and the other decree-holders entitled to claim under section 73 would have no remedy and even if the property is sold and the amount of the decree due to the decree-holder who brings the property to sale is paid with the costs of the

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sale, etc., the sale could be set aside under rule 89. But these arguments do not meet the real question in the case. No doubt if the decree-holder in C.S. No. 187 of 1912 was paid the amount of his decree before the sale was effected, the attachment could have been raised, but if after the sale was effected and the sale-proceeds were put into Court, the decree-holder who brings the property to sale can only share rateably with the other decree-holders under section 73. We are not concerned at present to consider what might have happened if he was paid off before the sale under rule 55 or after the sale under rule 89. Here the defaulting auction purchaser had funds in Court which have by reason of execution of the decree under Order XXI, rule 71, become assets. Section 73 of the Civil Procedure Code runs thus :

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets after deducting the costs of realization shall be rateably distributed among all such persons."

The legislature has considerably amended the old section 295. The assets were to have been realized by sale or otherwise in execution of a decree. Under the present section if the assets are held by a Court, i.e., the assets of the judgment-debtor are held by a Court, persons who have applied for execution before the receipt of such assets are entitled to share rateably. In this case the appellants did apply for execution against the Raja of Kalahasti before the decree-holder in C.S. No. 187 of 1912 brought the property to sale and the amount now in Court had been realized by means of the provisions of Order XXI, rule 71. The money in Court therefore is assets held by the Court and all the appellants are entitled to share rateably along with the

decree-holder in C.S. No. 187 of 1912. The learned District Judge has directed that the whole amount of his decree should be paid to him. In the view we have taken he is only entitled to share rateably along with the other creditors.

In the result the appeals are allowed and the petitions remanded to the lower Court for rateable distribution under section 73, Civil Procedure Code. As the question involved in these appeals is not one free from difficulty, the appellants and respondent (1), i.e., the decree-holder in C.S. No. 187 of 1912 are entitled to their costs out of the amount in Court.

WALLER, J.—I agree. The position seems to me to be this. It is clear that, if there had been no default, if, in fact, the whole of the purchase money had been paid, appellants would have been entitled to rateable distribution. I can see no reason for holding that the auction purchaser's default alters the situation entirely to their detriment, so that they are not entitled to share in the percentage of the purchase price which he deposited.

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APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Wallace.

1925,
December 11.

ABDUL HAKIM BAIG AND OTHERS—(RESPONDENTS 1 TO 5),
APPELLANTS,

v.

MAHOMED BURRAMIDDIN AND OTHERS (PETITIONERS AND
SIXTH RESPONDENT), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), s. 92—Scheme settled by a decree in a scheme suit—Provision in the scheme for an application being made by worshippers to remove trustee and others and for alteration or modification of scheme—Provision, whether ultra vires—Application to Court—Dismissal of panchayat and modification of scheme—Validity of order—Appeal, whether competent—Order, whether passed in execution proceedings—Jurisdiction of lower Court—Revision petition.

In a scheme for the management of a mosque, settled by a decree in a suit under section 92, Civil Procedure Code, there was a provision that an application might be made to the Court by worshippers for alteration or modification of the scheme, as if it were in execution of the decree, and for the exercise by the Court of disciplinary jurisdiction over the trustee and panchayatdars. On application made to the Court by certain worshippers, the term of office of the panchayatdars was reduced and other modifications of the scheme were ordered by the Court. The panchayatdars appealed to the High Court; a preliminary objection was taken that no appeal lay:

Held that the provision in the scheme for an application being made for the reliefs specified in section 92 of the Civil Procedure Code, was *ultra vires*, as it was opposed to the provisions of the section which prescribed a suit with the consent of the Advocate-General or District Collector to obtain such reliefs, and the order of the Court passed on the application was invalid and should be set aside;

* Appeal against Order No. 50 of 1925.

and that the order passed on such an application was not one passed in execution of the decree, and consequently no appeal lay against the order, but the High Court could treat the appeal as a revision petition and set aside the order, as the lower Court had exercised a jurisdiction not vested in it by law.

Sevak Jeranchod Bhogilal v. The Dakore Temple Committee, (1925) 49, M.L.J., 25 (P.C.), followed.

APPEAL against the order of S. VENKATASUBBA RAO, the Subordinate Judge of Bezwada, in Civil Miscellaneous Petition No. 2259 of 1921 in Original Suit No. 113 of 1913.

The material facts appear from the Judgment.

V. Ramadas for appellants.

S. Varadachari for respondents.

JUDGMENT.

DEVADOSS, J.—A scheme was framed for a mosque at Bezwada in Original Suit No. 113 of 1913. Five worshippers at the mosque applied to the Subordinate Court at Bezwada to have the scheme amended. The Subordinate Judge after taking evidence has amended the scheme to a considerable extent. This appeal is by the members of the Panchayat, who were appointed to hold office for life. The question raised in the appeal is whether the following clause in the scheme is *ultra vires* or *intra vires* :—

“The provisions of this scheme may be altered or modified as if it were in execution of the decree in this suit on the application of not less than three worshippers resident in Bezwada to the Sub-Court exercising original jurisdiction over the town of Bezwada, or in the absence of such Court, the District Court of Kistna.”

The contention of Mr. Ramados for the appellant is that this provision is *ultra vires*. Before considering the question whether such a clause is *ultra vires* or not, we have to see what the clause means. Under the clause

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an application can be made as if in execution of the decree. It has been held by the Privy Council in *Sevak Jeranchod Bhogilal v. The Dakore Temple Committee*(1), that an order on an application of this kind is not an order on an execution application. In that case, under the decree, the District Court was empowered to frame rules for the working of a scheme. Certain rules were framed and an appeal was preferred to the High Court against the order of the District Judge. The Privy Council held that no appeal lay against the order of the District Judge. In *Ranganatha Thathachariar v. Krishnaswami Thathachariar*(2), it was held that no appeal lay against the order of appointment of a trustee by the Subordinate Judge in exercise of the powers given him under the scheme. In that case some worshippers interested in the temple presented a petition to the Sub-Court for directions to fill up a vacancy caused by the resignation of a trustee. The Subordinate Judge directed the Board of Supervision to fill up the vacancy. The trustee who is said to have resigned appealed to the High Court. The High Court held that, though the order of the Subordinate Judge was a judicial one, it was not passed in execution and therefore no appeal lay. The application of the respondents cannot be considered to be an application in execution. Parties cannot by consent give power to a Court to treat the matter in a particular way. This contention necessarily involves an objection to the maintainability of this appeal. The order passed by the lower Court not being one in execution, no appeal lies. It cannot be treated as a decree within the meaning of section 47. Though in many cases appeals were allowed, yet after the ruling of the Privy Council in *Sevak Jeranchod Bhogilal v. The*

(1) (1925) 49 M.L.J., 25 (P.C.).

(2) (1924) I.L.R., 47 Mad., 139.

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Dakore Temple Committee(1), Courts are incompetent to entertain appeals against orders passed by subordinate courts with regard to the alteration of a scheme once settled by the Court. I, therefore, treat this as a revision petition as I consider that the lower Court acted without jurisdiction in altering the scheme.

The contention of the respondent is that a scheme once framed is always liable to alteration and that the Courts in India have the same power as the Courts of Chancery in England and that Courts can always alter schemes for proper reasons. That the Court has power to alter a scheme cannot be denied. Any scheme framed for the management of a public, charitable, or religious institution or trust can always be altered for proper grounds. The question is whether it should be done as provided by section 92, or by an application to the Court which framed the scheme. In several schemes, provision is made for alteration by an application to the Court by the parties or by persons interested in their working. In the well-known Tirupathi case such a provision was made in the scheme (*vide Prayag Doss Ji Varu v. Tirumala Srirangacharla Varu*(2)). The question is whether such a provision gives the Court jurisdiction to alter the scheme on an application made to it. When a scheme is settled, the suit comes to an end. To say that any person could apply to alter the scheme once framed would necessarily mean that the suit is pending. It cannot be said that the suit is pending for all time from the mere fact that the scheme framed contains a provision that an application can be made for altering the scheme. Section 92 of the Civil Procedure Code requires the sanction of the Advocate-General or the Collector of the district to enable

(1) (1925) 49 M.L.J., 25 (P.C.).

(2) (1937) I.L.R., 30 Mad., 138 (P.C.).

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persons to bring a suit for obtaining directions of the Court for the administration of a trust or for settling a scheme. If it is held that, by virtue of a clause in a scheme providing for its alteration on application, the Court can alter the scheme, the provisions of section 92 would be practically abrogated. When section 92, Civil Procedure Code, directs that for the settlement of a scheme and for other reliefs the sanction of the Advocate-General should be obtained, it would be *ultra vires* of any Court to obtain jurisdiction by inserting a clause in the scheme whereby persons interested in the scheme or others are enabled to apply to the Court for the alteration of the scheme. Before a scheme is actually put in working order, it is open to the parties to the suit in which the scheme is framed to apply to have the scheme modified. But where a scheme has to be modified after the suit comes to an end, though the Court has power to alter the scheme, it could do so only after the formalities required by law are complied with. The analogy of the English practice cannot be relied upon in support of the contention that such provision is *intra vires*. In England, the Attorney-General or the Relators can apply for the framing of a scheme and for its modification. The Court of Chancery is in London and the Attorney-General is practically, if not actually, in charge of the conduct of the proceedings. But in this Presidency, where there are so many District Courts and Subordinate Courts entitled to act under section 92, it is impossible for the Advocate-General to have control over persons who obtain permission and act independently of the Advocate-General and he very seldom interferes in the conduct of the suit. When Courts find some difficulty, or when they think that the help of the Advocate-General should be obtained, they no doubt call upon the Advocate-General to help them.

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But in the absence of such request from the Court the Advocate-General does not trouble himself about the conduct of a suit under section 92. That being so, the analogy of the English practice cannot be held to apply to the practice obtaining here. Where a clause in the scheme is opposed to, or contravenes, a specific provision of law, it cannot be said that that clause is *intra vires* from the mere fact that the Court gives sanction for its inclusion in the scheme. In *Narayanamurthi v. Achayya Sastrulu*(1), SPENCER, Officiating Chief Justice, and SRINIVASA AYYANGAR, J., were of opinion that such a clause was *ultra vires* having regard to the express provisions of section 92, Civil Procedure Code. In two cases to which I was a party, Civil Miscellaneous Appeals Nos. 45 of 1923 and 20 of 1923, it was held that such a wide clause as the one in this case was *ultra vires* of the Court. SPENCER and MADHAVAN NAYAR, JJ., held the same view in Civil Miscellaneous Appeal No. 70 of 1925, and in Civil Revision Petition No. 152 of 1924, the learned CHIEF JUSTICE was of the same opinion. In Civil Suit No. 430 of 1875, BAKEWELL, J., held that any relief which was covered by section 92 could not be dealt with by the Court on an application in the suit in which the scheme was framed.

The argument of Mr. Varadachari for the respondents is that such a clause is *intra vires*, for in order to effect proper working of the scheme, or owing to the changed conditions, the scheme can be modified, and for doing so an application can be made in the suit itself, whatever may be the distance of time from the actual framing of the scheme to the date on which the application is made; and he relies upon *Sadupadhya Omeshanand Oja v. Rameswar Prasad Singh*(2), *Govinda-*

(1) (1924) 20 L.W., 687.

(2) (1918) 43 I.C., 772.

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swamy Naidu v. Uchappa Goundan(1) and *Muhammad Waheb Hussian v. Abbas Hussain*(2). In *Govindaswami Nayudu v. Uchappa Goundan*(1) KRISHNAN, J., doubted the competency of an application to alter a scheme, though SPENCER, J., was of a different opinion. In *Sadupadhya Omeshanand Oja v. Ravaneswar Prasad Singh*(3), reference was made to *Damodarbhat v. Bhogilas*(4). These cases do not really touch the question. If a clause provides for the removal of a trustee on an application, that clause is invalid, for it goes right across the provisions of section 92. In order to remove a trustee a suit has to be filed with the sanction of the Advocate-General. Obtaining the sanction of the Advocate-General is not merely a matter of form. The Advocate-General, as a responsible officer, is bound to see whether the applicant has made out a proper case and to satisfy himself that the grounds are not frivolous before he grants sanction. To apply for the removal of a trustee, without obtaining the sanction of the Advocate-General because there is a provision in the scheme for such removal, is not merely overlooking the provisions of section 92, but it is setting at naught the distinct provisions of law intended to prevent frivolous applications to Court and consequent waste of time. The case *Ramadas v. Hanumantha Rao*(5) does not help the respondent.

The contention for the respondent is that a suit under section 92 must be considered to be a suit on behalf of all the worshippers and therefore it is not only the parties to the suit but any one interested in the institution that can apply for the alteration of the scheme. As I have already observed the Court's power to alter a scheme at any time for proper grounds is not denied by the appellant. But in order to give jurisdiction to the

(1) (1922), 70 I.C., 579.

(2) (1923) 71 I.C., 280.

(3) (1918) 43 I.C., 772.

(4) (1900) I.L.R., 24 Bom., 45.

(5) (1913) I.L.R., 38 Mad., 364.

Court, the proper procedure for the purpose should be adopted with the necessary preliminaries, and a scheme cannot be altered by a mere application to the Court simply by reason of the existence of a clause in the scheme to that effect. Even if such a provision is valid, the proper course would be to apply to the Advocate-General for permission to obtain a specific relief, and if the Advocate-General gives permission, an application may be made. But without it an application cannot be made by any one, at his will and pleasure, to alter a scheme. I am prepared to hold that such a general provision in a scheme that any one interested in the institution can apply for the modification of the scheme, or can apply for the removal of a trustee, or for any such relief, is *ultra vires*. But in this case it is unnecessary to go that length as the provision here is that the application should be made as if it were in execution of the decree in the suit. There is no decree to be executed and therefore no application could be made as if it were in execution of the decree.

There is another clause which is clearly invalid and that is

"The Court may act, on the application of not less than three worshippers resident in Bezvada, in the matter of its disciplinary jurisdiction over the trustee and the panchayatdars."

Such a clause makes the Court practically the superintendent of the religious institution. The Courts in India are not empowered to interfere in matters religious, but they can only act in civil matters. To empower the Court to exercise disciplinary jurisdiction over the trustee and panchayatdars of a religious institution is practically investing the Court with power of management of the institution. Such a provision cannot empower the Court to interfere in matters of internal arrangement, and parties cannot

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invest the Court with jurisdiction which it does not possess, for under the Civil Procedure Code it is only suits of a civil nature that can be entertained. A clause of this kind, if held valid, would empower the Court to interfere in matters purely religious. For example, suppose the trustee of a temple introduces some new ritual or changes the ritual, can the Court hold an enquiry whether the ritual is approved by the shastras and whether it should be introduced in the temple or not? Surely, the Court is incompetent to go into such matters, and parties cannot invest the Court with jurisdiction which it is incompetent to exercise. As I hold that the clause in paragraph 9 of the scheme is *ultra vires*, the order of the lower Court altering the scheme was made without jurisdiction. In this view it is unnecessary to go into the merits of the case.

In the suit the order of the lower Court is set aside and the appeal is allowed with costs. Both parties will have the costs out of the trust estate.

Memorandum of objection is dismissed.

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WALLACE, J.—This appeal raises questions of great importance for religious trusts and a satisfactory answer is by no means easy. In O.S. No. 113 of 1913 on the file of the Subordinate Judge, Bezwada, the final decree settled a scheme in respect of a jumma masjid in Bezwada. In that scheme a committee of one trustee and five panchayatdars was appointed for life. The scheme contained a clause that the trustee or a member of the panchayat shall be liable for removal or suspension by the Court for proved misconduct or neglect of duty and that the Court may act in such matters on the application of not less than three worshippers resident in Bezwada. Under this clause five worshippers presented an application asking for the removal of the present committee and for certain modifications of the scheme.

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The lower Court heard the application and modified the scheme, providing *inter alia* that the panchayat should be appointed for five years only instead of for life and directing further that, as five years had already elapsed since the present panchayat took charge, they must vacate their office. This was accordingly done, and a fresh committee has been appointed under rules framed by the lower Court. Against their removal in this fashion, the five panchayatdars have appealed.

Their contention is twofold, first that the clause in the original scheme permitting, if it does permit, such radical alterations in the scheme was *ultra vires* of the Court which drew it up, and secondly even if the clause is *intra vires* the present circumstances do not call for such measure. The other parties to the appeal raise a preliminary objection that no appeal lies. As to that, if the lower Court's proceedings are wholly *ultra vires* I would, if necessary, allow the appeal to be converted into a Civil Revision Petition and decide the case on the question of jurisdiction. The discussion as to the maintainability of the appeal may be dealt with incidentally in considering the wider question which has been opened up by this case, namely whether, where a scheme has been sanctioned for the administration of a trust, Courts are at liberty on a mere application to grant a relief of the nature which section 92 of the Civil Procedure Code says shall be obtained by a suit.

Where the scheme does not purport to confer on the Court power to remove a trustee or to grant any of the other reliefs of the kind set out in section 92, the answer is easy. The Court has no authority to grant such reliefs on an application. The only method by which they can be obtained is by way of a suit under section 92. But where a scheme purports to confer on the Court power to grant such relief, the question is

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whether such authority in the scheme is not beyond the jurisdiction of any Court to grant, because in effect it abrogates section 92 of the Code of Civil Procedure.

The principle underlying section 92, I take it, is that no trustee shall be removed or new trustees appointed, or any other reliefs of the nature specified therein granted except by way of a suit filed under the sanction of the Advocate-General, so that trustees may be afforded some protection against frivolous and vexatious attempts to remove them. I do not think the legislature intended this principle to be any the less applicable when a scheme for the administration of a public trust has once been framed, or intended to countenance any procedure by which, when once a scheme has been framed, section 92 will no longer have any application to the trust and that in future if a scheme has been framed the interesting game of attacking, harassing and removing trustees may go on merely on an application under the scheme without any guarantee, such as the necessity of obtaining the sanction of the Advocate-General affords, that the proceedings are either in the interests of the public or in the interests of the institution. I am of opinion that section 92 was intended to be enforced whenever any of the reliefs mentioned in it are asked for, whether or no a scheme has already been framed under it. When therefore, for example, a scheme has been already settled and it is sought to be altered so that a trustee may be removed and a new trustee appointed, that cannot be done by an application under the scheme even if the scheme purports to allow it to be so done. It can only be done by a suit after obtaining the sanction of the Advocate-General. The true test as to the legal propriety of a clause in a scheme is whether the relief granted by that clause is such a relief that, if it was being sought before the

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scheme was sanctioned, it would have to be sought by a suit under section 92. If it was, it cannot be granted by any sort of application under the scheme notwithstanding that the scheme itself purports to provide such a means of obtaining that relief.

Any other conclusion would lead to fantastic results. If it be held, for example, that under such a clause as that which exists in the scheme under consideration, the life membership of a trustee may be reduced to five years, there is nothing to prevent the Court extending the five years' period again to a life period, or reducing the number of trustees, or in effect altering the original scheme out of all recognition, while at the same time it removes the wholesome check to frivolous and vexatious applications which section 92 imposes and which is no less necessary after the scheme is framed than before it is framed.

It is argued, and I appreciate the force of the contention, that this conclusion will compel worshippers to bring suits even for the most petty alterations in the original scheme, but that will only be so for such alterations as are within the mischief of section 92. If the relief is such as does not really alter the lines of the original scheme so as to make it to all intents and purposes a new scheme, or does not otherwise run counter to section 92, then section 92 is no bar. But even so I would suggest that in future schemes such alterations should only be made after obtaining the sanction of the Advocate-General. Alterations which go to the root of the scheme, particularly alterations which limit or affect any right conferred on individuals by the original scheme, are on a different footing and cannot be introduced under the guise of petty modifications of the scheme.

The present case affords an illustration of both forms of relief. The alteration of the term of membership

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from life to five years, whereby, under the guise of modification of the scheme, five members appointed for life are removed, is obviously a radical alteration of the original scheme. Such a proposal is really a new scheme and therefore within the mischief of section 92. The other alteration, namely directing publication of annual balance sheets, is a matter of purely administrative detail which the trustees are perfectly competent to carry out without reference to the Court.

The view which I have put forward above is, I think, the view to which this High Court has been gradually moving. In *Prayag Dossji Varu v. Tirumala Srirangacharla Varu* (1), under section 539 of the old Civil Procedure Code, this court held that power should be reserved, in a trust scheme, for an application to the court by persons interested for directions, which might be enforced by way of execution. On appeal from this decision the Privy Council in *Prayag Dossji Varu v. Tirumala Srirangacharla Varu* (2), modified the scheme and *inter alia* provided for liberty for persons interested to apply to the District Court with reference to the carrying out of the scheme and to the High Court for modification of the scheme. The legal propriety of these directions was not raised before the Board. The scheme coming back to the District Court for framing rules and rules having been framed, the High Court held in *Prayag Dossji Varu v. Tirumala Purisa Srirangacharyulu* (3), that the District Court acted, when it framed these rules, by way of execution of the decree and that an appeal lay from such directions to the High Court. This was in 1908. In *Ramados v. Hanumantha Rao* (4), which is also a case under section 539 of the old Code, it was held by a bench in 1911 that a scheme framed under section

(1) (1905) I.L.R., 28 Mad., 319.
(3) (1908) I.L.R., 31 Mad., 406.

(2) (1907) I.L.R., 30 Mad., 138 (P.C.).
(4) (1913) I.L.R., 36 Mad., 364.

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539 can be altered by the Court and that the section confers the same powers that the Court in England possesses and previous cases cited above were relied upon. In *Govindaswami Naidu v. Uchappa Goundan* (1), in 1921, SPENCER, J., on the authority of 24 Bombay, 45, was inclined to hold that modifications of an original scheme should be moved before the Court by way of an application by persons interested and not by a suit. But the same learned Judge in *Narayanamurti v. Achayya Sastrulu* (2), in 1924, objected to a clause in a scheme permitting general liberty to apply for modification, being of opinion that such liberty in respect of matters relating to the reliefs mentioned in section 92 was *ultra vires*. The same view has been taken by another bench to which one of us was a party in *Bramyya v. Dronamraju* (3). The learned Judges there relied on the Privy Council case *Sevak Jeranchod Bhogilal v. The Dakore Temple Committee* (4), which certainly is not reconcilable with 31 Madras, 106 or 24 Bombay, 45 and pointed out that if this view is not taken it would practically throw on the Court the burden of administering such trusts up and down the whole country whenever a scheme has been framed. I am in full agreement with this view.

The difficulty of holding any other view is enhanced when I consider what remedy a trustee removed under such a removal clause in such a scheme has. If he had been removed by a suit under section 92 he has the right of appeal, but if he is removed under a clause in the scheme it is very doubtful if he has any right of appeal, even though the scheme confers it. From the decision of the Privy Council in *Sevak Jeranchod Bhogilal v. The Dakore Temple Committee* (4), it would appear that alterations in a scheme are not matters in execution as if made

(1) (1922) 70 I.C., 579.
(3) C.M.A. 20 of 1923.

(2) (1924) 20 L.W., 687.
(4) (1925) 49 M.L.J., 25 (P.C.).

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under section 47 of the Civil Procedure Code which would permit of an appeal. The Patna High Court seems to view such a provision for alterations as an amendment of the decree. See *Muhammad Waheb Hussain v. Abbas Hussain*(1) where they remark—

“It is to prevent a multiplicity of suits that the Courts in administrative actions reserve a liberty to the parties to apply from time to time and so often as may be necessary.”

But if that view is adopted an appeal would lie as if from a decree and there are difficulties in the way of that view. It implies that a suit is, in a sense, never finished, and that the sanction of the Advocate-General given at the commencement of the suit continues *ad infinitum* and may be used to cover all sorts of motions and prayers never contemplated by the Advocate-General when he gave his sanction and may in fact be reliefs which, if they had been mooted at the time when the suit was first presented, might have been refused altogether

It has been held latterly in several cases by this Court that no appeal will lie against any action taken by the Court under a sanctioned scheme. In *Sivan Pillai v. Venkatachela Aiyar*(2), SPENCER and MADHAVAN NAIR, JJ., held that 31 Madras, 406, is no longer good law in view of the Privy Council decision in *Sevak Jeranchod Bhogilal v. The Dakore Temple Committee*(3). The cases reported in *Lokasikhamani Mudaliar v. Thiagaraja Chettiar*(4) and *Ranganatha v. Krishnaswami*(5) were also relied on. In C.M.A. No. 45 of 1923, DEVADOSS and WALLER, JJ., also held that no appeal lay. If the lower Court acts outside the scheme or acts under a clause in the scheme which is itself *ultra vires* of the Court which framed the scheme, then the Court acts without jurisdiction and its order may be set aside by a civil revision

(1) (1923) 71 I.C., 289.

(2) (1925) 22 L.W., 796.

(3) (1925) 49 M.L.J., 25 (P.C.)

(4) (1917) 5 L.W., 586.

(5) (1924) I.L.R., 47 Mad., 139.

petition (see C.M.A. 45 of 1923 to which one of us was a party).

I think that the view laid down by the Privy Council in *Sevak Jeranchod's Case*(1), is that orders in such matters are orders passed neither in execution nor in pending suit, but under jurisdiction conferred by the scheme itself which will give the Court jurisdiction in a matter which the scheme permits provided it is otherwise not *ultra vires* because in conflict with some other jurisdiction conferred by Statute or rule having the force of law. If therefore a clause permitting the Court to remove a trustee is *intra vires*, the trustee removed under it has no remedy by way of appeal such as he would have had if he had been removed by a suit under section 92. To my mind this is another indication that any clause which conflicts with section 92, Civil Procedure Code, is *ultra vires*.

I must hold therefore that no appeal lies, but if the alteration in the scheme is *ultra vires* or had been obtained by a method, *e.g.*, by way of execution which is not legal, it is necessary to treat this appeal as a civil revision petition and cancel the order of the lower Court.

It is clear from what I have already said that I regard clauses 8 and 9 of the present scheme as *ultra vires* if and in so far as the Court has utilized them to grant reliefs of the nature provided for in section 92 of the Civil Procedure Code, and clause 9 also further because modifications of the scheme are not matters in execution. The modification by the lower Court which changes the period of membership of the panchayat from life to five years, thus *ipso facto* putting an end to the membership of respondents 2 to 6 is a form of relief which the

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worshippers could obtain only by way of a suit under section 92 and is therefore *ultra vires*. The other alteration is one for the trustees themselves under the scheme.

I therefore agree that the alterations must be and are hereby cancelled.

Costs of both parties in this appeal will come out of the trust estate.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Odgers.

SHANMUGAM PILLAI (FIRST DEFENDANT), APPELLANT,

v.

PANCHALI AMMAL AND OTHERS (SECOND PLAINTIFF AND DEFENDANTS 2 AND 6), RESPONDENTS.*

Limitation Act (IX of 1908), art. 11 (A)—Hindu Law—Auction purchaser of a share of a co-parcener of a joint Hindu family—Right of the purchaser—Purchaser gets only an equity to partition and is not a tenant-in-common—Application by purchaser for delivery of possession in execution proceedings, ordered—Subsequent order for redelivery—Suit by purchaser for exclusive or joint possession within one year of the order, dismissed as incompetent—Subsequent suit for partition, and delivery of possession, instituted more than one year after order for redelivery—Bar of limitation—Res Judicata—Civil Procedure Code (Act V of 1908), sec. 11 and O. II, rule 2.

In execution of a money decree against one of the members of a joint Hindu family, a house belonging to the joint family was sold in auction and the purchaser applied for and obtained possession in execution proceedings; but the house was redelivered to the other members in execution proceedings by

* Second Appeal No. 751 of 1924.

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order of Court; the purchaser instituted a suit within one year of the last order to recover possession but it was finally dismissed on the ground that the plaintiff was not entitled to exclusive possession or joint possession along with the other members of the family. Thereupon the purchaser instituted the present suit for partition of a block of houses belonging to the family and delivery to him of his vendor's share therein, more than one year from the date of the order for redelivery in the execution proceedings; the defendants pleaded that the suit was barred by limitation under article 11 (A) of the Limitation Act, by the rule of *res judicata* and by Order II, rule 2 of the Civil Procedure Code.

Held, that an auction purchaser of the undivided share of a co-parcener of a joint Hindu family in the Madras Presidency got by his purchase a mere equity to a partition of the joint family property, and did not become a tenant-in-common with the other members of the family;

that the purchaser was not entitled to get exclusive possession or joint possession of the property along with the other members either in execution proceedings or by a suit;

that a suit instituted by the purchaser for partition and delivery to him of his vendor's share in the family property, more than one year from the order in execution proceedings, was not barred under article 11 (A) of the Limitation Act, 1908;

that, as the relief the plaintiff now prayed for in the present suit for partition, based on the cause of action of his purchase of the undivided share of a member of a joint Hindu family, would be inconsistent with what he prayed for in the prior suit, in which the cause of action was the order on the claim petition, there was no bar of *res judicata* under section 11 or by order II, rule 2, of the Civil Procedure Code.

Baldeo v. Kanhaiyalal, (1920) 24 C.W.N., 1001 (P.C.), and *Bhemappa v. Irappa*, (1902) I.L.R., 26 Bom., 146, distinguished; *Munjaya v. Shanmuga*, (1915) I.L.R., 38 Mad., 684, and *Yelumalai Chetti v. Srinivasa Chetti*, (1906) I.L.R., 29 Mad., 294, followed.

SECOND APPEAL against the decree of L. R. ANANTHANARAYANA AYYAR, the Second Additional Subordinate Judge of Madura, in A. S. No. 2 of 1924, preferred against the decree of V. DANIEL CHELIAPPA, the District

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Munsif of Madura town, in Original Suit No. 551 of 1920.

The material facts appear from the Judgment of SPENCER, J.

P. R. Srinivasan for appellant—The present suit is barred under article 11 (A) of the Limitation Act, as it was instituted more than one year after the date of the previous order for re-delivery: the suit is instituted under Order XXI, rule 103 and is barred by article 11 (A), Limitation Act. A suit for partition is a suit for present possession. Though his title is the purchase, the special article 11 (A) applies, as he failed in the execution proceedings. The point is concluded by the decision of the Privy Council in *Baldeo v. Kanhaiyalal* (1), see also *Ganpat Rai v. Husaini Begam* (2), *Bhimappa v. Irappa* (3), *Tilokchand v. Sadaram* (4), See also the decision of PHILLIPS, J., in S.A. No. 1708 of 1922, which distinguishes the case in *Yelumalai Chetti v. Sreenivasa Chetti* (5). The last case is a decision on rule 95 of Order XXI, etc., to which rule 103 or article 11 (A), does not apply. In the Privy Council Case also (24 C.W.N., 1001), the plaintiff was not entitled to present possession; he asked for partition there also. It does not matter whether the petitioner is entitled to present possession or not, the prayer in the petition in execution proceedings is what matters. If he asks for present possession in the petition and in the suit, the article 11 (A) applies. The suit is also barred by the rule of *res judicata* (section 11, clause 4) and Order II, rule 2, Civil Procedure Code.

C. A. Seshagiri Sastri for respondent (plaintiff).—The appellant applied under rule 100 of Order XXI and an order was passed under rule 101, as the purchaser was not entitled to present possession; both rule 103 of Order XXI, Civil Procedure Code and article 11 (A), Limitation Act, mention present possession. A purchaser of a share of a co-parcener is entitled only to an equity to get a partition, and is not a tenant-in-common. He is not entitled to joint possession with the other members of the family under the well established law of this Presidency. See *Kota Balabadra Patro v. Khetra Doss*, (6).

(1) (1920) 24 C.W.N., 1001 (P.C.); s.c.; 12 L.W., 408.

(2) (1921) 19 A.L.J., 53.

(3) (1902) I.L.R., 26 Bom., 146.

(4) (1875) 7 N.W. P.H.C.R. 113.

(5) (1906) I.L.R., 29 Mad., 294.

(6) (1916) 31 M.L.J., 275.

Manjaya v. Shanmuga (1), *Maharaja of Bobbili v. Venkataramanjulu Naidu* (2), *Subba Goundan v. Krishnamachari* (3).

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The Privy Council Case in *Baldeo v. Kanhaiyalal* (4) was one apparently of a divided family, because (1) the family property was entered in the names of both the brothers, and not in the name of one as manager, (2) symbolical possession had been given showing that they were tenants-in-common; see Order XXI, rule 35 (2) as to delivery of joint possession.

In Bombay the position of a purchaser from a coparcener is that of a tenant-in-common, unlike the view that prevails in Madras; the Bombay cases are not applicable; so also cases of Muhammadan joint families, the members of which and the purchasers from a sharer of a Muhammadan family are tenants-in-common; hence those cases are not relevant.

JUDGMENT.

SPENCER, J.—The second plaintiff in the suit, who is the first respondent in this appeal, is the second wife of one Ganapathia Pillai (deceased), who was the assignee of the rights of one Sankararama Ayyar, auction-purchaser of a house, which belonged to the joint family of one Ramalingam Pillai and the first and second defendants, and which was attached in execution of a money decree obtained by one Narayanaswami Ayyar against Ramalingam Pillai. The present suit is for partition by metes and bounds of a block of houses belonging to the joint family and for delivery to the plaintiff of the share of the minor son of Ramalingam Pillai, who is now dead. The question to be decided in second appeal is whether the suit is barred by reason of its having been instituted more than one year after an order which was passed on 7th September 1915 under Order XXI, rule 101 of the Civil Procedure Code, redelivering the property to the possession of defendants 1 and 2 after the plaintiff's husband had got

(1) (1915) I.L.R., 38 Mad., 684.

(2) (1916) I.L.R., 39 Mad., 267.

(3) (1922) I.L.R., 45 Mad., 449.

(4) (1920) 24 C.W.N., 1001 (P.C.).

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possession in spite of their obstruction. Within a year of the order under rule 101 the plaintiff's husband brought a suit (Original Suit No. 40 of 1916) for setting it aside and for a declaration that the defendants had no manner of right in these properties. That suit was finally dismissed by this Court in Second Appeal No. 707 of 1919 on the ground that the plaintiff was not entitled to joint possession along with the other members of the joint family of the defendants.

Additional arguments against the maintainability of this suit are based on defences arising out of section 11 and Order II, rule 2, Civil Procedure Code, in consequence of the prior suit of 1916 having been dismissed.

For establishing his contention that this suit is barred by limitation under article 11 (A) the appellant's vakil relies on *Ganpat Rai v. Husaini Begam*(1), *Bhimappa v. Irappa*(2), and *Baldeo v. Kanhaiyalal*(3), the same case being also reported in Calcutta Weekly Notes(4) and on *Tilokchand v. Sada Ram* (5).

In *Ganpat Rai v. Husaini Begam* (1) the plaintiff's father was resisted in attempting in execution to get present possession of a house that he had purchased in Court auction and an order was passed against him. Eleven years later the plaintiff sued for separation and present possession of a two-fifths share of the same property by virtue of his purchase. PIGOTT, J., observed,

"On the principle that the greater includes the less, it seems reasonable to hold that the right now claimed to present possession, over portion of the house, is included in the right claimed in the year 1906 to present possession over the entire house so as to bring into operation the provisions of article 11 (A) of the Limitation Act Schedule."

(1) (1921) 19 A. L.J., 53.

(2) (1906) I.L.R., 26 Bom., 146.

(3) (1920) 12 L.W., 408 (P.C.).

(4) (1920) 24 Calo. W.N., 1001 (P.C.).

(5) (1875) 7 N.W.P. H.O.R., 118.

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He also observed that the order itself had very definitely referred the auction purchaser to his remedy by way of a regular suit, yet he had put off availing himself of this remedy to rectify the adverse order passed against him for nearly 12 years.

This case can be distinguished from the one before us on the ground that the property there belonged to Muhammadans and the plaintiff in the suit asserted that the judgment-debtor whose share he had purchased was the owner of a two-fifths share while the claim order negatived his right to any portion of the house. A purchaser of the share of a sharer under Muhammadan Law is entitled to something more than a mere equity to partition of the joint family property, which is what the purchaser of the undivided share of a co-parcener in a Hindu family in Madras gets by his purchase. I do not see any occasion to regard this decision as directly opposed to *Yelumalai Chetti v. Srinivasa Chetti*(1) as PHILLIPS, J., did recently in Second Appeal No. 1708 of 1922, a second appeal in which, as in this case, a question arose as to the right of a Court auction purchaser to enforce his right to an order for partition of joint family property more than one year after the dismissal of an application for delivery of possession. The principle established by *Yelumalai Chetti v. Srinivasa Chetti* (1), as I understand the decision, is that an order for partition of joint family property cannot be passed in execution proceedings and, therefore, a subsequent suit for that relief is not barred either by section 47 (old section 244) of the Civil Procedure Code or by failure to appeal against an order made under Order XXI, rule 93 (old section 318). The case does not deal with the application of any article of the Limitation Act.

(1) (1906) I.L.R., 29 Mad., 294.

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In *Bhimappa v. Irappa*(1) a purchaser at a Court sale, having been obstructed, applied for removal of the obstruction and for possession, and his application was rejected. More than a year after the order passed against him he filed a suit praying that the order in the miscellaneous proceedings might be set aside and that a partition might be directed and that the whole of the plot of land which he purchased might be allotted to the share of his judgment-debtor and that he might be placed in present possession of it. CHANDAVARKAR, J., remarked that his suit, though in name a suit for partition, was in substance a suit for possession of that very property under the self same right put forward without avail in the miscellaneous proceedings, and so it was a suit to establish his right to the same property covered by the order, and having been brought more than a year after the date of the order in the miscellaneous proceedings, which he asked to have set aside, it was barred. In considering how far we should be influenced by the ruling of the Bombay Court in such a matter we must remember that, as noticed by Mr. Mayne in paragraph 355 of his Hindu Law,

"In Bombay it is held that even before partition the purchaser of the interest of one co-parcener is a tenant-in-common with the others; but, in Madras, this view is not accepted, and it is held that the purchaser is not a tenant-in-common but has only an equity to enforce his rights by partition."

To make this clear, it will be sufficient to refer to *Patil Hari Premji v. Hukam Chand*(2), and *Naro Gopal v. Paragauda*(3), where it was laid down that an alienation by a joint tenant effects a severance, as a result of which the alienee before division by metes and bounds becomes a tenant-in-common. But in *Kota*

(1) (1902) I.L.R., 26 Bom., 146.

(2) (1886) I.L.R., 10 Bom., 363 at page 366.

(3) (1917) I.L.R., 41 Bom., 347 at pages 354 and 356.

Balabadra Patro v. Khetra Doss(1), *Manjaya v. Shanmuga*(2), and *Maharaja of Bobbili v. Venkataramanjulu Naidu*(3), it was held that a purchaser of a co-parcener's interest in the joint family property has not a common right to joint possession with the rest of the family nor is he a tenant-in-common; but he has only an equity to compel a partition and to work out his rights against the share that falls to him (See also *Subba Goundan v. Krishnamachari*(4). Here, as in other cases where the application of article 11 (A) of the Limitation Act is in question, the important thing is to see, as the Judicial Committee did in *Baldeo v. Kanhaiyalal* (5), what was asked for in the claim proceedings and what is asked for in the present suit. The law provides *ut sit finis litium* that a person defeated in claim proceedings shall not ask for the same relief that was denied him in those proceedings, which are summary, except in a suit filed within a year of the order. Under Order XXI, rule 103, Civil Procedure Code, a party against whom an order for possession is made under rule 101 may institute a suit to establish his right to present possession of the property, but on his failing to do so the order becomes final.

From the fuller report of the Privy Council case of *Baldeo v. Kanhaiyalal*(6), which appears in 24 Calcutta Weekly Notes, 1001, it appears that the village which belonged to a joint family was on the death of the head of the family registered in the names of his two sons, and that the appellant both in his application for possession under rule 97 and in his suit asked for actual possession of the eight annas share of one of the sons whose interest he purchased. Their Lordships observed

(1) (1916) 31 M.L.J., 275. (2) (1915) I.L.R., 38 Mad., 684 at page 692.

(3) (1916) I.L.R., 39 Mad., 265. (4) (1922) I.L.R., 45 Mad., 449.

(5) (1920) 12 L.W., 408 (P.C.). (6) (1920) 24 C.W.N., 1001 (P.C.).

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that it was too clear for argument that on both occasions he asked for exactly the same relief, and his suit brought more than one year after the disposal of his claim was thus time barred.

In *Tilokchand v. Sada Ram*(1), which was a decision under the Civil Procedure Code of 1859, the plaintiff asserted in execution proceedings that there had been a partition and he claimed to recover one-fourth of certain immovable property which had fallen by the partition to his lot. Both at the time of the claim and at the time of the suit a right to present possession was asserted, and the suit being more than one year after his failure in the claim proceedings, was thus barred. The facts of the case before us are different. Both in the claim proceedings and in the prior suit (Original Suit No. 407 of 1915) the plaintiff asserted his right to have his title to actual possession of the house declared; but in the present suit, he asks for partition, after allowing for good and bad qualities, of the family properties, and for delivery of a moiety to him. In making such a partition it is not necessary to go behind or re-open the decisions in the prior proceedings. The plaintiff is only exercising the equitable right of the co-parcener whose share he has purchased to demand a partition at any time. Article 11 (A) is thus not a bar to this suit, and as the relief the plaintiff now asks for in a suit based on the cause of action of his purchase of the undivided share of a member of a joint family would be inconsistent with what he asked for in the prior suit, in which the cause of action was the order on the claim petition, there is equally no bar of *res judicata* under section 11, Civil Procedure Code or by Order II, rule (2).

The decrees of the lower Courts are confirmed and the Second Appeal is dismissed with costs.

(1) (1875) 7 N.W.P. H.C.R., 113.

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ODGERS, J.—The facts are fully set out in the judgment of my learned brother and the only question of importance to be decided in the Second Appeal is whether the present suit is barred under the provisions of article 11 (A) of the Limitation Act by reason of the order made against the plaintiff's husband (and son) on 7th September 1915 (Exhibit C), whereby possession of the suit house was re-delivered to the defendants 1 and 2 under Order XXI, rules 100 and 101, Civil Procedure Code. The plaintiff's husband then brought a suit on 8th September 1915 (Original Suit No. 407 of 1915) for a declaration that all the suit properties belonged to him and that defendants 1 and 2 had no right to the same and for cancellation of the order of 7th September 1915. The Munsif dismissed the suit but the Subordinate Judge held that plaintiff was entitled to retain possession of item 2 till the otti was redeemed and for joint possession of all other items with defendants 1 and 2. On Second Appeal (S.A. 707/19) to this Court, ABDUR RAHIM and OLDFIELD, JJ., held that plaintiff was not entitled to get possession along with members of the family as being the purchaser of joint family property. They restored the decree of the Munsif. Now in the present suit the plaintiff asks for possession after partition. The simple question is, is this a different thing from what was asked for in the suit of 1915 as appears on the face of it or is it in fact the same thing so as to attract the limitation of one year under article 11 (A) of the Limitation Act?

Now a person who acquires the rights of a co-parcener of joint family property is not a person entitled to present possession; in other words he does not become a tenant-in-common with the joint family. His only right is to be obtained by partition the share to which his

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alienor is entitled; cf., *Kota Balabadra Patro v. Khetra Doss*(1) where the Court thought it unnecessary to discuss the rulings of the Bombay High Court, and SESHAGIRI AYYAR, J., remarked in the course of the argument that the law in Bombay is different. To the same effect is the decision in *Maharaja of Bobbili v. Venkataramanjulu Naidu*(2). See also *Subba Goundan v. Krishnamachari*(3) and the cases therein cited. The case relied on by the appellant may be shortly referred to. In *Baldeo v. Kanhaiyalal*(4) there are indications that the property had become divided though this is not clear and the plea was raised that the appellant was not entitled to actual possession as purchaser in Court auction of the 8 annas share of one of the sons. Their Lordships say this does not matter, the question being not what appellant might or ought to have asked but what he did ask. Viewed by this standard, the present case seems to be outside the purview of the Privy Council decision. There the appellant twice asked for exactly the same relief. Here the plaintiff first asked for a declaration of his title and possession as against defendants 1 and 2, but in the present suit, after setting out in paragraph 12 of the plaint that plaintiff and defendants 1 and 2 are each entitled to half the suit properties, he asks for partition and delivery of his share. In my opinion these facts have only to be stated to put the present case outside the Privy Council decision. In *Ganpat Rai v. Husaini Begam*(5) the case was one between Muhammadans as to whom of course the doctrine of the Hindu Law set out above has no application. The purchaser of a share of a Muhammadan heir no doubt has a right to present possession after partition. In 1906 the plaintiff's father claimed the

(1) (1916) 31 M.L.J., 275.

(2) (1916) I.L.R., 39 Mad., 265.
(3) (1922) I.L.R., 45 Mad., 449 at 462. (4) (1920) 24 C.W.N., 1001 (P.O.).
(5) (1921) 19 A.L.J., 58.

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entire house. He then discovered that his vendor was only entitled to two-fifths of the house and asked to be put in possession. It was held that he had in effect asked for this before, when he was definitely referred to a suit and did not bring one till the last possible day. I do not think this case helps us. In *Bhimappa v. Irappa*(1) the suit was "both in form and in substance one for establishing plaintiff's right to and for the present, possession of Survey No. 78" in which he had purchased the right, title and interest of defendant 1 at a Court sale and as to which when he went to take possession he was obstructed. If the law in Bombay is that a purchaser of an undivided co-parcener's share is entitled to possession [as to which see *Patil Hari Premji v. Hakam Chand*(2), *Naro Gopal v. Paragauda*(3)] there is no doubt that the plaintiff here was asking for exactly the same thing in the suit as he asked for in the summary proceedings. I very much doubt if the case is useful as a guide.

Tilokchand v. Sada Ram(4) was a case under section 245 of Act VIII of 1859 which corresponds to present Order XXI, rule 58, the claim section. There was no question of present possession and I think this case affords no help.

In *Yelumalai Chetti v. Srinivasa Chetti*(5) it was held that as the only right acquired by Court sale against the second defendant, whose undivided half share had been purchased by plaintiffs, was to effectuate the sale by a suit for partition of the joint property of the co-parceners, it was not competent to the Court, on a mere application for execution by the purchaser to enforce the purchaser's right by an order for partition.

(1) (1902) I.L.R., 26 Bom., 146.

(2) (1886) I.L.R., 10 Bom., 363.

(3) (1917) I.L.R., 41 Bom., 347.

(4) (1875) 7 N.W.P.H.C.R., 113.

(5) (1906) I.L.R., 29 Mad., 294.

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So that present section 47 could not be a bar to plaintiff's suit for partition. The question of article 11 (A) did not arise in this case.

A recent ruling of PHILLIPS, J., in S.A. No. 1708 of 1922 has been cited to us in which he held that *Yelumalai Chetti v. Srinivasa Chetti*(1) is directly opposed to *Ganpat Rai v. Husaini Begam*(2). With respect, I think if we bear in mind that the latter case had to do with Muhammadans who are tenants-in-common whereas *Yelumalai Chetti v. Srinivasa Chetti*(1) had to do with the alienation of an undivided share of a Hindu co-parcener the opposition disappears as the cases do not really relate to the same doctrine at all. The authority of *Yelumalai Chetti v. Srinivasa Chetti*(1) can be accepted without in the least diminishing the weight of the argument adduced for the respondent in this case.

I have examined the authorities adduced for the appellant on this point at some length as the issue is of importance. I agree with my learned brother that they do not enable or compel us to say that the view of the lower Appellate Court is wrong. I agree with my learned brother as to the other points raised and that this appeal must be dismissed with costs.

K.R.

(1) (1906) I.L.R., 29 Mad., 294.

(2) (1921) 19 A.L.J., 53.

APPELLATE CIVIL—FULL BENCH

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.*

RAMABHADRA THEVAR AND TWO OTHERS (DEPENDANTS
1 TO 3), APPELLANTS,

1926,
January 15.

v.

ARUNACHALAM PILLAI AND ANOTHER (PLAINTIFFS 1 AND 2),
RESPONDENTS.*

Transfer of Property Act (IV of 1882), ss. 83 and 84—Deposit by mortgagor—Refusal of mortgagee to take the deposit—Withdrawal of deposit by the mortgagor—Uncontroverted plea of continued readiness to pay—Effect of, on subsequent interest—Onus.

A deposit under sections 83 and 84 of the Transfer of Property Act is only a special kind of tender. If after a reasonable time after a proper deposit, the mortgagee, who has notice of such deposit, refuses to take the deposit, and the mortgagor thereafter withdraws the deposit, there is still a *presumption* that the mortgagor continued ready and willing to pay, which casts the onus on the mortgagee to prove the contrary.

Held, in a suit by the mortgagee for the mortgage money after such withdrawal, that an uncontroverted plea by the mortgagor that he continued ready and willing to pay, disentitled the mortgagee to claim any interest subsequent to the deposit.

APPEAL against the decree of ANANTANARYANA AYYANGAR, Subordinate Judge of Tanjore, in O. S. No. 183 of 1922.

The facts are given in the Referring Order of ODGERS, J.

This Appeal and the Memorandum of Cross-Objections filed by the respondents coming on for hearing, the Court (PHILLIPS and ODGERS, JJ.) made the following

* Appeal No. 226 of 1924.

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ORDER OF REFERENCE TO A FULL BENCH:—

PHILLIPS, J.—The first point for consideration is the construction of the mortgage deed executed by the father of defendants Nos. 1 to 3 in favour of the first plaintiff's manager, fourth defendant. The first plaintiff on his own behalf and on behalf of his minor son, second plaintiff, sold certain property to the father of first defendant under Exhibit I on 11th September 1909. There was a prior mortgage on this property, dated 9th February 1908. As there was this prior mortgage and also because one of the vendors was a minor, the first defendant's father did not pay the whole of the purchase money, but retained a sum of Rs. 4,625. On the 15th September 1909 the first defendant's father hypothecated the property he bought, for this amount and stipulated that the first plaintiff should execute a security bond for Rs. 6,000 on or before the 14th September 1910. The relevant provisions in this mortgage deed which we have to construe are as follows:—

"I shall pay the aforesaid amount of principal together with the interest . . . as soon as you execute and get registered before the 14th September 1910 a security bond in respect of immovable properties estimated by the mediators at rupees six thousand . . . If security is not given before the said stipulated date, I shall, up to the date on which the security is given, add interest on principal and interest on interest at the said rate with twelve months' rests and pay you the amount of principal and interest accruing due . . ."

The lower Court has held, and I think rightly held, that the execution of this security bond was a condition precedent to the demand for the mortgage money and that therefore this suit for the money is not maintainable because the security bond had not been executed, but as the parties came to an agreement during the suit that the mortgage should be adjusted by means of this suit and that the suit should not be dismissed, the lower Court proceeded with the trial and held that there was no obligation on the first plaintiff to execute a security bond on any particular date and that therefore the mortgagor must pay compound interest on the amount of the mortgage from September 1910, because the deposit made in Court was not a valid deposit, being conditional. This conclusion is somewhat inconsistent with the finding that the execution of the security bond was a condition

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precedent to the enforcement of the mortgagee's right, and it is now contended for the appellant that the first plaintiff was bound to execute the security bond after the date fixed therefor, namely, 14th September 1910, and that therefore when the mortgagor deposited the mortgage amount coupled with a request for the execution of the security bond it was a valid tender under section 83 of the Transfer of Property Act, although it was coupled with this condition. The question therefore for determination is whether the mortgagee was under an obligation to execute the security bond, an obligation which can be enforced by the first defendant. To adopt the interpretation put upon the document by the lower Court is to hold that the mortgage is irredeemable except at the option of the mortgagee, and this would constitute a clog on the equity of redemption which cannot be enforced. Consequently, if the language is ambiguous, I think that we must adopt an interpretation which would remove that clog. The document itself is an extraordinary document because it provides that on default by the mortgagee the mortgagor is to be penalized, and similarly if the mortgagee fulfils his bargain and the mortgagor commits default, the mortgagee is to be penalized by the compound interest being reduced to simple interest. However this may be, I think it is undoubted that there was an obligation on the mortgagee to execute this security bond, and consequently that obligation could be enforced by the other party to the contract. He was therefore entitled to demand a security bond before paying the money, and the execution of the security bond was not left to the will of the mortgagee to perform at any time he chose. If that is the correct view, the deposit of the mortgage money coupled with a request for the security bond is not a deposit coupled with a condition outside the contract, for the condition was one enforceable under the contract. The deposit was therefore a valid deposit under section 83.

There remains then the question whether the mortgage money ceases to bear interest from the date of deposit under the terms of section 84 of the Transfer of Property Act. Notice of the deposit was sent to the plaintiff, but he refused to accept the money and subsequently the first defendant withdrew the amount from Court. On similar facts it was held in *Krishnasami Chettiar v. Ramasami Chettiar*(1) that interest did not cease to

(1) (1912) I.L.R., 35 Mad., 44.

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run, the ground for the decision being that the deposit must be left in Court in case the mortgagee changes his mind. This decision is somewhat at variance with the decision in *Velayuda Naicker v. Hyder Hussan Khan Sahib*(1), where it was held that once a tender had been made and refused, interest ceases to run, although in that case the money had been taken back from the mortgagor by the lender after refusal by the mortgagee. The decision in *Krishnasami Chettiar v. Ramasami Chettiar*(2) was considered in *Thevaraya Reddy v. Venkatachela Pandithan*(3), where AYLING and TYABJI, JJ., differed. The case went up in appeal and was decided in *Thevaraya Reddy v. Venkatachalam Pandithan*(4). I was one of the members of that Bench and dissented from the decision in *Krishnasami Chettiar v. Ramasami Chettiar*(2), and apparently ABDUR RAHIM, Offg. C.J., was inclined to the same view, although he held that it was not necessary to decide the point. On the other hand SESHAGIRI AYYAR, J., was of opinion that *Krishnasami Chettiar v. Ramasami Chettiar*(2) was rightly decided. The questions have been considered in *Hukam Singh v. Babu Lal*(5), and there a Bench of that Court followed my judgment in *Thevaraya Reddy v. Venkatachalam Pandithan*(4), and accepted the reasoning therein. I have very little to add to my judgment in that case, but I will add a few words regarding the decision in *Krishnasami Chettiar v. Ramasami Chettiar*(2), from which I venture to differ. In the judgment in that case the question was asked whether when the mortgagor had deposited the money and issued a notice to the mortgagee he had not done all that has to be done by him to enable the mortgagee to take the amount out of Court; and can he then withdraw the money even before the mortgagee appears to claim it? The answer was given in the negative; and a further question was asked why should he be at liberty to do so because the mortgagee appears and refuses to take it? The answer I would give to that question is that the mortgagee is under a duty to take the money when tendered and the cessation of interest on his refusal is a penalty for not performing his duty of submitting to redemption. A mortgagor might be able to collect the mortgage money and interest accrued to date of deposit, but unable to raise any more to meet further interest. Is he to be compelled either to forego his undoubted

(1) (1910) I.L.R., 33 Mad., 100.

(3) (1914) 1 L.W., 595.

(2) (1912) I.L.R., 35 Mad., 44.

(4) (1917) I.L.R., 40 Mad., 804.

(5) (1922) I.L.R., 44 All., 198.

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right to redeem, or else to leave his money lying idle, until the mortgagor chooses or is compelled to accept it? In the case of an usufructuary mortgage the injustice to the mortgagor is obvious as he is deprived of the benefit of his property and of his money. One consideration which appears to have escaped the notice of the learned Judges in that case is that if the mortgagor leaves his money in Court deposit after refusal by the mortgagee it might lapse to Government before the amount is withdrawn; who, in that case, is to bear the loss, the mortgagor or the mortgagee? In the present case the deposit was made in 1913 and this suit was not brought until 1922. If, therefore, the first defendant had left the money in deposit, the money would long ago have lapsed to Government. Section 84 is very clear and says that interest shall cease when once the mortgagor has done all that he can to enable the mortgagee to draw the money. When a mortgagee has received notice that the money is actually in Court and that he can draw it at that time, what more can be done by the mortgagor to enable him to draw it? Proceeding strictly on the interpretation of the section I still adhere to my opinion that *Krishnasami Chettiar v. Ramasami Chettiar*(1) is wrong and I am inclined to think that the legislature did not intend to make the law in India identical with the law in England. In England when a tender has been made it is also necessary that the mortgagor should always be ready to pay the amount, but the burden of proving that he is not so ready is on the mortgagee. I take it therefore that, when there has been a tender and there is no evidence of any subsequent refusal to pay, the provisions of the English law would be complied with, and the tender would be valid, except perhaps in cases where it was shown that the tenderer had subsequently derived profit from the money tendered.

As the question is one of some importance and there is a divergence of views in this Court, I think that the question should be referred for decision to a Full Bench. Accordingly the appeal is submitted to a Full Bench for decision.

The Memorandum of Objections is dismissed with costs.

ORDER, J.—This was a suit for an amount due on a mortgage or, in default of payment, for sale. The first plaintiff and fourth defendant were brothers. The second plaintiff was son of first plaintiff and a minor at the date of suit. Defendants 1 to 3

(1) (1912) I.L.R., 35 Mad., 44.

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were brothers and undivided. In 1909 first plaintiff and fourth defendant sold some of their family properties to the father of defendants 1 to 3, and for the protection of the minor (second plaintiff) a mortgage bond Exhibit A was executed by the father of defendants 1 to 3 to the fourth defendant as head of his family. On a partition between fourth defendant and first plaintiff, the amount of the bond fell to share of plaintiffs 1 and 2. Two questions are raised in appeal to us (a) that the Subordinate Judge's construction of Exhibit A was wrong, (b) that interest on Exhibit A ceased by reason of a deposit by defendants 1 to 3 in Court under the terms of section 83, Transfer of Property Act. By Exhibit A the mortgagor undertook to repay "as soon as you execute and get registered before 14th September 1910 a security bond in respect of immovable properties estimated by the mediators at rupees six thousand in order that no disputes might arise in the matter of the said sale properties since there are included therein the properties given as security under a deed executed for rupees four hundred by you and your younger brother Arunachalam Pillai for and on behalf of the said minor Govindaswami also on 9th February 1908 to Peruvalandan Papavinasam Ayyangar, and get this back with endorsement of payment made thereon." The document proceeds "If security is not given before the said stipulated date, I shall, up to the date on which the security is given, add interest on principal and interest on interest at the said rate with twelve months' rests and pay you the amount of principal and interest accruing due in that manner, and take this back with endorsement of payment made hereon." Security was not furnished by the date named. The Subordinate Judge found that the delivery of the security bond to defendants was a condition precedent to the plaintiff's claim to the mortgage money and was prepared to hold that the suit was not maintainable owing to the failure of the plaintiffs to execute and deliver security bond according to the covenant in Exhibit A. The minor, however, having attained majority offered at the trial to recognize the mortgage as binding on him and to receive the amount due thereon and the Subordinate Judge "owing to the good sense displayed by both parties" proceeded to settle all questions arising on Exhibit A and decided that the deposit made by the defendant being conditional was invalid and that interest consequently did not cease to run. He gave a decree for plaintiffs for amount claimed subject to the deduction of the amount paid by defendants

1 to 3 to satisfy Papavinasam Ayyangar's decree (which had been obtained since the date of Exhibit A) which has now been agreed at Rs. 865 plus costs and 6 per cent interest. Under the circumstances it is perhaps unfortunate that the Subordinate Judge did not act on his first inclination and dismiss the suit. The clause as to the furnishing of the security bond seems to be clearly a clog on the equity of redemption as the mortgage money cannot be claimed without such bond and no time is provided within which (after 14th September 1910) such security bond is to be furnished and compound interest is to run "up to the date on which the security is given." Therefore interest is to run on for any length of time until the mortgagee thinks fit to render himself competent to accept it by executing the security bond. This appears to render the clause invalid. The minor has, however, become a major and has offered to accept the mortgage money. The real question is, therefore, the second, the question as to the deposit. On 6th August 1913 the father of defendants 1 to 3 deposited the necessary amount in Court and tendered it to fourth defendant who however refused to take it out, whereupon the Court referred the father of defendants 1 to 3 to a regular suit by its order, dated 15th November 1913. The Subordinate Judge held that the tender was not unconditional because defendants 1 to 3 requested that fourth defendant should first furnish security as provided for in Exhibit A before he drew the money. The Subordinate Judge holds that the condition is against the terms of Exhibit A. This I am unable to understand as the money can clearly not be taken by the mortgagee unless and until a security bond is provided as stated in Exhibit A. I do not see how under the circumstances this can be regarded as a conditional deposit so as to render the deposit invalid. The main question argued before us however was as to the consequent cessation of interest for another reason, viz., that although defendants made a deposit and kept the money in Court for about a year, they subsequently withdrew it. This is a pure question of law on which there is some apparent conflict of opinion.

Section 84, Transfer of Property Act, reads as follows:—
"When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the

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mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be," the relevant words to the present case being in the last clause.

In *Velayuda Naicker v. Hyder Hussan Khan Sahib*(1), a case of tender, the Court held that "tender" does not imply that the tenderer must always be ready to pay and that the cases to the contrary in the English law and in Calcutta did not apply. There does not appear to be any distinction drawn in the section between tender and deposit. In *Krishnasami Chettiar v. Ramasami Chettiar*(2), a case of deposit, it was held that a continuance of the deposit was necessary to obtain the benefit of the section. The English cases as to the necessity for continued readiness to pay in the case of tender were relied on and the case in *Velayuda Naicker v. Hyder Hussan Khan Sahib*(1) distinguished on the ground that there was there no allegation of a subsequent demand by the mortgagee for the amount and that mortgagor failed to pay and also because the matter was clearer as regards deposit as distinguished from tender. "We cannot speak of a person having deposited in Court if he has withdrawn his deposit."

In *Thevaraya Reddy v. Venkatachala Pandithan*(3), a case heard by AYLING and TYABJI, JJ., there were disputes among the mortgagee's representatives, and the money deposited was not taken out for a year after which the mortgagors withdrew it. AYLING, J., thought that *Krishnasami Chettiar v. Ramasami Chettiar*(2) governed the case and that the ruling should be sustained in the absence of a reference to a Full Bench. TYABJI, J., on the other hand, thought the ruling in *Krishnasami Chettiar v. Ramasami Chettiar*(2) was wrong and that *Velayuda Naicker v. Hyder Hussan Khan Sahib*(1) was the correct view on the ground that it was not shown that the English law differed from the Indian law and that the English law makes a tender perfect and complete unless the party impeaching its completeness shows an absence of readiness to pay. He examined the English law and added that the facts in *Krishnasami Chettiar v. Ramasami Chettiar*(2) and in the case before him were different. On this difference of opinion a Letters Patent Appeal was taken and the decision is

(1) (1910) I.L.R., 33 Mad., 100.

(2) (1912) I.L.R., 35 Mad., 44.

(3) (1914) 1 L.W., 595.

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reported in *Thevaraya Reddy v. Venkatachalam Pandithan*(1). It was heard by a Bench of three Judges of whom my learned brother was one. ABDUR RAHIM, Offg. C.J., held that the interpretation of section 84 in *Krishnasami Chettiar v. Ramasami Chettiar*(2) was that "The deposit in order to be effective under section 84 must remain in Court until the mortgagee or his successor in interest has been enabled or is in a position to withdraw it." SESHAGIRI AYYAR, J., held that *Krishnasami Chettiar v. Ramasami Chettiar*(2) was rightly decided. PHILLIPS, J., on the other hand thought that this decision was wrong. He said "the cessation of interest is the penalty imposed upon the mortgagee for refusal to accept the money when offered and this penalty is not remitted because he changes his mind when it is too late." The learned Judges, however, held that, in the case before them, the circumstances were different and as the mortgagors failed to have the deposit in Court sufficiently long to enable the mortgagees to draw the amount they failed to do all they had to do under the section.

This opinion of PHILLIPS, J., in *Thevaraya Reddy v. Venkatachalam Pandithan*(1) has recently been approved by the Allahabad High Court in *Hukam Singh v. Babu Lal*(3). The English law is set forth *inter alia* in *Bank of New South Wales v. O'Connor*(4).

In Fisher on Mortgages (Sixth Edition), section 1851, it is stated that "interest will cease to run upon the mortgage debt from the time at which a proper tender of the whole amount is shown to have been made. But it ought to appear, that from the time of the tender the money was kept ready by the mortgagor, and that no profit was afterwards made of it; upon proof of the contrary whereof the interest will still run." The principle in English law being apparently that if the mortgagor was to have the benefit of cessation of interest on the mortgage, he must not have earned interest on the money elsewhere in the meantime.

In this state of the authorities, I think it is desirable that the point should be settled. The point is essential to the appeal which therefore should be referred to a Full Bench as proposed by my learned brother.

(1) (1917) I.L.R., 40 Mad., 804.

(2) (1912) I.L.R., 35 Mad., 44.

(3) (1922) I.L.R., 44 All., 199.

(4) (1889) 14 App. Cas., 273.

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ON THIS REFERENCE

K. S. Krishnaswami Ayyangar for appellants.—On the facts of the case my insistence on the giving of security at the time of deposit was proper. As the mortgagee was at fault in not taking the deposit he is not entitled to subsequent interest though I withdraw the same. After such a deposit there is a presumption that I continued ready and willing to pay; see *Kinnaird v. Trollope*(1). The English law and the Indian law are alike. Moreover I specifically pleaded in this case my continued readiness and willingness to pay and that has not been denied by the mortgagee.

K. Rajah Ayyar for *N. S. Srinivasa Ayyar* and *S. V. Narayana Ayyar* for respondents.—Deposit and tender have the same effect and both must be continuous if the interest is to cease.

[CHIEF JUSTICE.—If both are alike, then why cannot the mortgagor withdraw the deposit and revert to tender and say that he was ever ready to tender and pay?]

The deposit in Court must continue and withdrawal takes away the effect of tender; *Krishnasami Chettiar v. Ramasami Chettiar*(2). In the case of tender the onus of proof of continued readiness and willingness is on the mortgagor; see *Harris on Tender*, page 92; 21 *Halsbury*, 149. Withdrawal of deposit shows an intention to utilize the money and is proof of un readiness to pay; *Edmondson v. Copland* (3). He explained *Kinnaird v. Trollope*(1). Interest will cease only during the time the deposit was actually in Court and not after it was withdrawn. There is no power to withdraw the deposit from Court; nor have I any power to ask him to redeposit the amount. A valid tender before suit must be followed by payment in Court. *Haji Abdul Rahman v. Haji Noor Mahomed*(4). Neither the question of onus nor the question of continued readiness to pay has been dealt with by the lower Courts in this case.

JUDGMENT.

In our opinion a deposit in Court under section 84 is only a special kind of tender, designed to make available a sure mode of proof to the mortgagor of the fact

(1) (1889) 42 Ch. D., 610.

(3) [1911] 2 Ch., 301.

(2) (1912) I.L.R., 35 Mad., 44.

(4) (1892) I.L.R., 16 Bom., 141.

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that he has made a tender. If he tenders in the ordinary way and that tender is denied, he may be defeated by false evidence; if he tenders by deposit in Court, the matter is proved for him by the record.

We do not agree with the view of *PHILLIPS, J.*, that once the money is deposited and a reasonable time given to the mortgagee to take it out, interest thereafter cannot be allowed in any circumstances. Nor do we agree with the view apparently adopted in *Krishnasami Chettiar v. Ramasami Chettiar*(1) that if after depositing the money in Court, the mortgagor withdraws it, his original deposit is to be treated as a nullity; in other words, that he is to be regarded as never having tendered at all.

In our opinion the deposit operated as a tender, and the only question properly arising was whether the mortgagor, notwithstanding his withdrawal, remained ready and willing to pay, throughout. The better opinion seems to be that the fact of the tender raises the presumption that the debtor continued ready and willing to pay, and that the burden is cast upon the creditor to show that he was either not willing or not able to pay because he had utilized the moneys for other purposes. And it may be that the fact of withdrawal might, in certain circumstances, in itself be some evidence of unwillingness to pay. But however that may be, here there was an allegation in paragraph 6 of the written statement that the defendants had always been ready and willing to pay.

On that no issue was raised and in our view that is sufficient to conclude the matter in the defendants' favour, and to preclude the plaintiffs (who have no

(1) (1912) I.L.R., 35 Mad., 44.

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merits) from claiming interest after the date of the deposit in Court.

The decree will be drawn up accordingly and must give credit for the sum of Rs. 865 with costs and interest referred to by ODGERS, J.

Defendants will have the costs of the appeal.

N.B.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Phillips, Mr. Justice Krishnan
and Mr. Justice Ramesam.*

SUBBARAYADU (DEFENDANT), PETITIONER,

v.

RAMASWAMI AND TWO OTHERS (PLAINTIFFS)
RESPONDENTS.*

*Sec. 8, exception to, of Madras Estates Land Act (I of
1908)—“Acquired,” meaning of—.*

The word “acquired” in exception to section 8 of the Madras Estates Land Act includes a case of “surrender” of his right by the occupancy ryot to the inamdar; hence after such surrender the land ceases to be part of the estate and a suit for rent thereof in a Civil Court is competent. The words “or otherwise” in section 8 (1) of the Act are not *ejusdem generis* with “transfer” and “succession.”

Per Cur. A case of “abandonment” stands on the same footing as “surrender.”

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 decree of K. SUNDARAM CHETTI, Subordinate Judge of Guntūr, in A.S. No. 44 of

* Civil Revision Petition No. 771 of 1923.

1922 preferred against the decree of P. M. SRINIVASA
AYYANGAR, District Munsif of Tenali, in O. S. No. 1229
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The plaintiffs as permanent lessees, under an inamdar, sued in 1919 in the District Munsif's Court of Tenali, the defendant, the tenant under the inamdar for arrears of rent for faslis 1327 and 1328. The defendants pleaded *inter alia* that the land was part of an estate and that a suit for rent therefor was cognizable only by a Revenue Court. The plaintiffs answered that there was a surrender of the occupancy right to the landholder in 1888 and that hence the land ceased to be part of the estate owing to exception to section 8 of the Madras Estates Land Act. Both the fact of the surrender and its legal effect were denied by the defendant. Both the District Munsif and the Subordinate Judge on appeal upheld the above contentions of the plaintiffs and gave a decree to the plaintiffs.

The defendant preferred this Revision Petition.

This petition coming on for hearing the Court (WALLACE and MADHAVAN NAYAR, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

WALLACE, J.—The point for decision in this case is whether the exception to section 8 of the Madras Estates Land Act applies to the surrender of the *kudivaram* right by a tenant to his landlord, leading to the result that the land ceases to be part of the estate. The unhappy wording of sections 8 and 6 of the Act makes the question a very difficult one to settle, and Benches of this Court have in consequence taken varying views on the meaning of the exception.

The wording of the section as it stands barely makes sense. A captious critic might contend that “shall cease to be part of the estate” means “shall cease to be an inam or the inamdar's property at all” which is absurd. It also seems absurd to speak of the acquisition by an inamdar of the *kudivaram* interest “before . . . the commencement of this Act”

SUBBARAYADU v. RAMASWAMI. resulting in the land ceasing to be part of the estate, when *ex hypothesi* the Act and therefore the definition of "estate" under it were non-existent at the time of the acquisition. And this anomaly applies to the land in this case since the surrender was in 1888. I presume the language is meant to imply in a case of this kind that the land does not form part of the estate and therefore never was, and never can be, within the operation of the Act.

The real point, however, is whether such a surrender falls within the term "acquired" in the exception. It is argued on one side that "acquired" is confined to the modes of passing of the *kudivaram* right from the ryot to the landholder mentioned in the section (section 8), to which the exception is appended, that is, "transfer, succession or otherwise." It is contended on the other side that the phrase "or otherwise" will include a case of "surrender," and that, even if it does not, the language used in section 6 (2) implies that such a surrender is a method by which the landholder acquires an occupancy right with such effect that he can pass it on to a ryot. To this it is answered that "or otherwise" can only import a species of passing of the *kudivaram* right *ejusdem generis* with transfer or succession, and that the position of the phrase "surrendered or abandoned" in section 6 (2), in juxtaposition to "comes into the possession of the landholder," seems to imply that by surrender or abandonment, the *kudivaram* right does not come into the possession of a landholder but remains suspended in the air, until another ryot is admitted to the land, and that therefore these terms cannot be methods of acquisition of that right by an inamdar.

It must be admitted that the loose language employed in these sections gives plausibility to either view, and one has to decide the case rather on the broad principles of the sections than on their actual wording. Section 8 as a whole is obviously intended to cover cases in which the occupancy right is transferred to or comes into the possession of the landholder, and to prevent him in such cases from using that merger to destroy the character of the land as ryoti land. That is, a landlord is forbidden to become his own occupancy tenant. It was evidently considered that in normal cases the landholder would be bound to admit, and would admit, another ryot to the land, and that ryot would by the very fact of admission step into the occupancy right left, which the landholder is forbidden to

hold as such. But, there are certain exceptions to the rule. One is set out in sub-section (4) by way of giving the landholder some compensation for value spent before the passing of the Act on acquiring the *kudivaram* right, and by way of giving some effect to cases of succession both before and after the Act. The exception to the Act was, I think, intended to exempt inamdars alone among landholders from the application of this principle that the landholder cannot be his own occupancy tenant, and to permit him to be so when the rights of third parties were not adversely affected. The effect of the exception, whatever its language is to take what was ryoti land, in which the inamdar had not, *ex hypothesi*, the *kudivaram* right, out of the operation of the Act altogether, when the occupancy right had passed to the inamdar so that it ceased to be ryoti land and the inamdar could henceforth deal with it unhampered by any of the provisions of the Act.

That being so, there seems no obvious distinction in principle between the passing of the occupancy right from the ryot to the inamdar by sale, gift or succession and its passing by a deed of surrender. The test is obviously not the passing of consideration, because in a case of succession there is no consideration. Nor is it a deed of transfer or a voluntary act, because in the case of succession there may be no deed and in the case of an intestacy there is no voluntary act; I would hold then *prima facie* that when a ryot has, by a voluntary act, transferred his right to the inamdar or when the passing of that right is the result of the legal right of inheritance, the inamdar has "acquired" that right within the meaning of the phrase used in this exception. To put it in a different form, the phrase "or otherwise" in section 8 (1) will include the case of a surrender.

The case of an abandonment is different and more difficult and fortunately we are not concerned with it here. In such a case it is open to argument whether the occupancy right automatically reverts to the landholder at all. That a right of occupancy can remain in suspense vested in no one, but ready to descend on the next comer is apparent from section 10 (2) and may also be deduced from a consideration of the conception of ordinary unoccupied ryoti waste, the right of occupancy to which comes into being on the admission by the landholder of a ryot thereto. I would leave that question open here.

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Against the views thus derived from the general scope of section 8 that the term "acquired" includes all cases whereby the right passes by operation of a legal form of transfer from the ryot to the inamdar we are referred to the language of section 6 (2). It is argued that having regard to that language, cases falling within section 8 (4) and the exception to section 8 are species of methods whereby the right of occupancy "comes into the possession of the landholder" and are categorically distinguished from cases of surrender and abandonment. There is much to be said for the view that abandonment is not a method by which that right "comes into the possession of the landholder." But it is difficult to see why surrender, especially a surrender by deed as in this case, is not, and I must simply record my opinion that the language of section 6 (2) was not intended to convey the contrary. It is moreover doubtful if that language does draw the categorical distinction pleaded for, while the essence of the rule laid down in section 8 (4) is the method of transfer, the essence of the exception is not the method of transfer but the party in whose favour the transfer is made. One cannot reasonably contrast a mode of transfer with a transferee. Again as pointed out by Mr. Varadachari, it was unnecessary to include the exception to section 8 in section 6 (2), because by that exception the land is taken out of the operation of the Act altogether and therefore section 6 or any other section in the Act will not apply to it.

Again, if one gives section 8 (1) its full meaning and "otherwise" does not include "surrender," then any and every landholder acquiring by surrender by which certainly whatever right the occupancy ryot had is passed on to him can hold the land as a ryot. This is, I feel sure, contrary to the principles of the Act.

The rulings of this Court have not been uniform on the interpretation of this exception. In *Suryanarayana v. Patanna* (1), two learned Judges, SADASIVA AYYAR and SPENCER, JJ., differed as to whether "surrender" is included in the word "acquired." In *Ponnusamy Padayachi v. Karuppudayan* (2), a third Judge, MILLER, J., agreed with SPENCER, J., and agreed that "surrender" is so included. In *Venkata Sastrulu v. Sitarumudu* (3), SESHAGIRI AYYAR, J., agreed mainly with SADASIVA

AYYAR, J., and in *Zamindar of Nuzvid v. Lakshminarayana* (1), SUBBARAYADU v. NAPIER, J., expressed agreement in this view. That, however, was a case not of surrender but of abandonment, into which, in my view, different considerations will enter. In an unreported case, Second Appeal No. 1244 of 1919, OLDFIELD, J., adopted the view held by SPENCER, J. There is thus a clear conflict of authority; and that being so, I think it is necessary to refer to a Full Bench the question whether the word "acquired" in the exception to section 8 covers a case of "surrender."

MADHAVAN NAYAR, J.—The defendant is the petitioner. The question for decision in this case is whether the suit land is part of an "estate," within the purview of the Madras Estates Land Act and the suit is not triable in a Civil Court. The lower Courts have found that the suit village is an estate under section 3, sub-section (2), clause (d) of the Estates Land Act, and this finding has not been attacked before us. It has also been found that the *kudivaram* interest of the tenant has been surrendered by deed to the landlord in 1888. The learned vakil for the plaintiffs (respondents) argues that, though ordinarily the jurisdiction of the Civil Court should be held to have been ousted because the suit village is an estate under section 3, sub-section (2), clause (d), still the Civil Court has jurisdiction, because, by reason of the surrender, the *kudivaram* interest in the village has been acquired by the inamdar within the meaning of the exception to section 8 of the Act and the land has, therefore, ceased to be part of an estate. It is argued on behalf of the petitioner that surrender is not a mode of acquisition of the *kudivaram* interest within the meaning of the exception.

The short question for consideration is whether the inamdar in this case has acquired the *kudivaram* interest in the suit land within the meaning of the exception to section 8 of the Estates Land Act. If he did so acquire, the land has ceased to be part of an estate and the Civil Courts have jurisdiction to try the suit. The exception to section 8 runs as follows: "Notwithstanding anything contained in this section where, before or after the commencement of this Act, the *kudivaram* interest in any land comprised in an estate falling within clause (d) of sub-section (2) of section 3 has been or is acquired by the inamdar, such land shall cease to be part of the estate." Mr. Krishnaswami Ayyar argues that this provision being an exception to section 8, the word

(1) (1915) I.L.R., 38 Mad., 608. (2) (1915) I.L.R., 38 Mad., 848.
(3) (1915) I.L.R., 38 Mad., 891.

(1) (1922) I.L.R., 45 Mad., 39 at 59.

SUBBARAYADU "acquired" referred to in it must obviously refer to one of the modes of the acquisition of *kudivaram* interest contemplated by sub-sections (1) to (4) of section 8 which do not refer to acquisition by surrender as a mode of acquiring the *kudivaram* interest. Reference has also been made to sub-section (2) of section 6 of the Act to support the above argument.

Section 8 of the Estates Land Act deals with the merger of occupancy right. Generally stated, sub-section (1) deals with the merger of the entire interests of the landholder and the occupancy right by transfer, succession or otherwise. Sub-section (2) deals with the transfer of the occupancy right in any land to a co-sharer. Sub-section (4) deals with the acquisition by the landholder of the *kudivaram* interest by transfer for valuable consideration or by inheritance. "Surrender" is not specifically mentioned as a mode of acquisition in the section. The *kudivaram* interest of the tenant acquired in any of the aforesaid ways does not give the landholder any private rights of ownership, unless the landholder happens to be an inamdar and acquires the *kudivaram* interest in the way indicated in the various sub-sections referred to above. This is the interpretation put upon the exception by the learned Vakil for petitioner. Sub-section (2) of section 6 of the Act relied on in support of this interpretation is in these terms: "where land held by a ryot with a permanent right of occupancy is *surrendered* or abandoned or, save in the cases falling within sub-section (4) of section 8, and the exception to section 8, comes into the possession of the landholder . . ." It is pointed out that in this sub-section acquisition by surrender is put in a different category from the acquisition under the exception to section 8.

The question is not free from difficulty, but I am inclined to hold that the arguments of the learned vakil for the petitioner should not be accepted. The object of section 8 is to preclude the landholder, who acquires by transfer, succession or otherwise the occupancy right in a holding, from treating it as his private land and preventing the tenant from acquiring a right of occupancy in it. But an exception has been deliberately made by the legislature in the case of an inamdar whose village is an estate falling within clause (d) of sub-section (2) of section 3, when he acquires the *kudivaram* interest in any land comprised in the estate. When the intention of the legislature was to show this exceptional favour to inamdars departing from its general policy, I do not see any reason why giving effect to

this intention in all its fullness should be defeated by placing a narrow interpretation on the word "acquired" so as to exclude acquisition by surrender. No reason is suggested for thus excluding "acquisition by surrender" from the scope of the exception. No doubt, the clause appears as an exception to section 8; but in giving effect to the intention of the legislature to its fullest extent, it is not right to uphold the narrow construction suggested by the learned vakil for the petitioner. Even if the exception is to be confined in its operation to the modes of acquisition mentioned in section 8, it seems to me that the word "otherwise" in the expression "by transfer, succession or otherwise" would include within it, acquisition by "surrender." In interpreting the word "otherwise" it is difficult to apply the *ejusdem generis* principle, for the mere reason that there is no similarity in the two modes of acquisition mentioned, namely, transfer and succession, except that, in the result, the landholder obtains a *kudivaram* interest. The one method denotes a voluntary act and consideration; the other method is purely involuntary and has nothing to do with consideration. In such circumstances, it is difficult to apply the *ejusdem generis* principle of construction in finding out what is meant by "otherwise."

The contrast between the right obtained by the landlord through "surrender" and the right to *kudivaram* obtained under the exception to section 8 indicated in sub-section (2) of section 6 of the Act supports to some extent the argument advanced on behalf of the petitioner. Sub-section (2) of section 6 states that in land surrendered or abandoned by a ryot, a landlord cannot obtain rights of occupancy before the expiry of ten years. It may be, as pointed out by MILLER, J., that by referring to the exception to section 8 in sub-section (2) of section 6, the legislature intended that, in construing the sub-section (2) of section 6, we should exclude surrender and abandonment from the methods of acquisition by which a landholder may acquire indefeasibly an occupancy right. However that may be, I do not think that it is permissible to adopt a construction of the exception to section 8 which would, by restricting the meaning of the word "acquired," stultify the intention of the legislature in enacting that exception. The difficulty felt in construing section 6, sub-section (2) and the exception to section 8 together is due to the loose language employed in sub-section (2) of section 6. As pointed out by

SUBBARAYADU v. RAMASWAMI. the respondents' learned vakil, reference to the exception to section 8 in sub-section (2) of section 6 is unnecessary because by that exception land ceases to be part of an estate and is thus taken out of the Act altogether and no section of the Act will, therefore, apply to such land.

The view advanced on behalf of the petitioner finds support in the opinion of SADASIVA AYYAR, J., in *Suryanarayana v. Patanna*(1) but SPENCER, J., in the same case dissented from this view. MILLER, J., in *Ponnusamy Padayachi v. Karupudayan*(2) accepted the view of SPENCER, J., while in *Zamindar of Chellapalli v. Somaya*(3) SESHAGIRI AYYAR, J., was inclined to follow the views of SADASIVA AYYAR, J., in *Suryanarayana v. Patanna*(1). NAPIER, J., sitting with SADASIVA AYYAR, J., held that surrender is not a mode of acquiring *kudivaram* interest within the meaning of the exception. It may be pointed out that this decision deals with lands in a zamindari. In the latest decision in S.A. No. 1244 of 1919, OLDFIELD and SPENCER, JJ., upheld the view which found favour with SPENCER, J., in *Suryanarayana v. Patanna*(1). As the judicial opinion is thus divided, I agree with my learned brother that it is necessary to refer to a Full Bench the question whether the word "acquired" in the exception to section 8 covers a case of "surrender."

I may state that the question whether abandonment is a mode of acquiring *kudivaram* interest by the inamdar within the meaning of the exception to section 8 does not arise in this case though Mr. Varadachari for the respondent was willing to concede in the course of his arguments that acquisition by abandonment does not come within the scope of the exception.

ON THIS REFERENCE

A. Krishnaswami Ayyar (with Ch. Raghava Rao) for petitioner.—This land has not ceased to be an estate; hence Civil Court has no jurisdiction. Section 6 of the Estates Land Act generally confers occupancy right upon tenants in all estates, except in certain cases specifically mentioned in the Act. Exception to section 8 says that the effect of "acquisition" of occupancy right by an inamdar is to destroy occupancy right; the question now is whether "surrender" by the tenant is a mode of acquisition; and though this exception is put as an exception only to section 8 (1), it must be read with section 6

(2) which specifically deals with the effect of surrender or abandonment. Section 6 (2) by its language puts cases of surrender in antithesis to and except cases coming under exception to section 8; hence acquisition of occupancy right by an inamdar which is dealt with in exception to section 8 does not include acquisition by surrender. Otherwise the language of section 6 (2) must begin with the clause "save in the cases falling within 8 (4) and exception to section 8." Moreover the exception to section 8, which is an exception to clause (1) of section 8, uses language "by transfer, succession or otherwise." The words "or otherwise" are *ejusdem generis* with transfer, and succession which are positive ways of acquisition by landholder while surrender or abandonment are not so but only indicate a negative act of the tenant and an extinction of his right. See Justice SADASIVA AYYAR's view in *Suryanarayana v. Patanna*(1) and similar language in section 22 (1) by the Bengal Tenancy Act which has been construed in favour of my contention in *Bidan Chandra Das v. Rajeswari Debya*(2), *Muktakeshi Dasi v. Pulin Behary Singh*(3).

S. Varadachari (with V. Govindarajachari) for respondent.—The exception to section 8 is really an exception to section 2 (d) by which the legislature sought to favour the inamdars specially and to take such surrendered lands out of the Estates Land Act altogether. The previous case law in this Presidency shows this. Even otherwise, the exception to section 8 is an exception only to section 8 (1) and it cannot be controlled by section 6 (2). The word "acquired" in the exception is wide enough to include cases of acquisition by surrender. "Acquire" in the exception means only "comes into possession" which are the words used in section 6 (2). See also Murray's Dictionary for the meaning of the word "acquire." The words "or otherwise" in section 8 (1) are not *ejusdem generis* with transfer or succession. There is no common method acquisition between "transfer" and "succession." The words "save in cases falling within section 8 (4) and in exception to section 8" occurring in section 6 (2) are put in *ex majore cautela*.

Ch. Raghava Rao in reply.—When the meaning of the word "acquire" in the exception to section 8 is not clear we may legitimately refer to section 6 (2).

(1) (1915) I.L.R., 38 Mad., 808.

(2) (1915) I.L.R., 38 Mad., 843.

(3) (1916) I.L.R., 39 Mad., 341.

(1) (1915) I.L.R., 38 Mad., 808.

(2) (1905) 2 C.L.J., 570.

(3) (1908) 8 C.L.J., 324, 328.

OPINION.

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PHILLIPS, J.—The question that has been referred for our opinion is whether the word “acquired” in the exception to section 8 of the Madras Estates Land Act covers a case of “surrender.” That exception reads as follows:—

“Notwithstanding anything contained in this section where, before or after the commencement of this Act, the kudivaram interest in any land comprised in an estate falling within clause (d) of sub-section (2) of section 3 has been or is acquired by the inamdar, such land shall cease to be part of the estate.”

It is not seriously disputed that the word “acquired” in its ordinary sense is wide enough to cover a case of acquisition by surrender or abandonment as well as any other form of acquisition. It is, however, contended that in this exception the word must be construed in a limited sense so as to exclude surrender and abandonment, and two grounds are put forward in support of this contention. The first is that, inasmuch as the exception is an exception to section 8, the modes of acquisition must be limited to those mentioned in section 8, clause (1), namely, “transfer, succession or otherwise,” and it is argued that these words specifically exclude “surrender” and “abandonment.” This was the view taken by SADASIYA AYYAR, J., in *Suryanarayana v. Patanna*(1) but SPENCER, J., did not agree with him. Since then there has been a conflict of opinion in this Court. SADASIYA AYYAR, J., relied on the decisions of the Calcutta High Court in *Badan Chandra Das v. Rajeswari Debya*(2) and *Muktakeshi Dasi v. Pulin Behari Singh*(3). The latter purports to follow the decision in the former and contains the remark—

(1) (1915) I.L.R., 38 Mad., 608.

(2) (1905) 2 C.L.J., 570.

(3) (1908) 8 C.L.J., 324.

“In construing words like ‘or otherwise’ it has always been held that the matters reserved must be ‘*ejusdem generis*’ and that is very clearly brought out in the case of *Badan Chandra Das v. Rajeswari Debya*(1).”

From a perusal of the judgment in *Badan Chandra Das v. Rajeswari Debya*(1) it would appear that the head note, which runs “the terms ‘transfer, succession or otherwise’ in section 22” (equivalent to section 8 (1), Estates Land Act) “do not mean and include a ‘surrender’; the expression ‘or otherwise’ as used in the section means ‘or in a similar way’” is worded in a considerably wider manner than the language of the judgment. As however one of the Judges in *Muktakeshi Dasi v. Pulin Behari Singh*(2) was a party to the prior decision, we must take it that that was the meaning of the latter judgment, but it must be observed that the judgment does not expressly lay down the proposition, which can only be inferred from its general tenor, and there is no argument in the judgment to support such a proposition; similarly the judgment in the *Muktakeshi Dasi v. Pulin Behari Singh*(2), which purports to follow the former decision, does not contain any argument. One difficulty in the way of construing “or otherwise” as limited to matters *ejusdem generis* is that it is very difficult to imagine what other means of acquisition can be referred to which are of the same nature as “transfer” and “succession,” terms which in themselves are extremely wide. Even supposing that the exception to the section must be governed by the first clause thereof, it does not appear that the word “acquired” must be interpreted in a limited sense, so as to exclude surrender and abandonment. However this may be, I am of opinion that the exception, so called, is in effect a substantive provision

(1) (1905) 2 C.L.J., 570.

(2) (1908) 8 C.L.J., 324.

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PHILLIPS, J. and there is no necessity to qualify its meaning by the preceding clauses.

The second argument put forward is that the language of section 6, clause (2) shows that the legislature intended to exclude "surrender" or "abandonment" from the provisions of the exception to clause 8. That runs as follows :—

"Where land held by ryot with a permanent right of occupancy is surrendered or abandoned or save in the cases falling within sub-section (4) of section 8, and the exception to section 8 comes into the possession of the landholder. . . ."

This would seem to draw a distinction between cases of the surrender and abandonment and other cases in which the right of occupancy comes into the possession of the landholder. The whole of this provision seems somewhat unnecessary in view of section 6, clause (1) which in effect deals with the same subject, but it has possibly been provided *ex-abundanti cautela*. Whatever the reason for the provision, the language of the succeeding section, when it is clear in its terms, must be read as it stands, and should not be interpreted in a strained manner merely in order to bring it into consonance with a previous section. There is no ambiguity in the language of the exception to clause (8) and there is therefore no reason why in interpreting it reference should be made to section 6 (2). The word "acquired" has a very general meaning and would ordinarily include acquisition by surrender, and the only argument that has been advanced against this proposition is that when a tenancy is surrendered the tenants' rights under the lease are not acquired by the landlord, but they merely cease to exist. Here, however, it is not a question of acquiring the tenancy right, but it is a question of acquiring the kudivaram interest, and that, I take it, means the right of occupancy in the land and not merely rights under a particular lease. If this

argument is rejected, as it must be, we have the word "acquired" in its ordinary sense and that is wide enough to include acquisition by surrender. In this reference, acquisition by abandonment has not been dealt with, but, so far as the case has been argued before us, it would appear that the two modes of obtaining the kudivaram right, namely, by surrender or abandonment, stand on the same footing.

The question referred must therefore be answered in the affirmative and the civil revision petition will be remitted to the Division Bench for disposal accordingly.

KRISHNAN, J.—The question raised in this reference is whether exception to section 8 of the Madras Estates Land Act covers a case of "surrender" or not. It has been answered in the affirmative by MILLER, OLDFIELD and SPENCER, JJ., in *Ponnusamy Padayachi v. Karuppu-dayan*(1), *Suryanarayana v. Patanna*(2), and S.A. No. 1244 of 1919, respectively, but in the negative by SADASIVA AYYAR, SESHAGIRI AYYAR and NAPIER, JJ., in *Suryanarayana v. Patanna*(2), *Venkata Sastrulu v. Sitaramudu*(3), and *Zamindar of Nuzvid v. Lakshminarayana*(4), respectively. It is on account of this direct conflict of opinion that the matter is referred to the Full Bench and we have to decide it on the section of the Act.

The word "acquired" in the exception, which is the word to be construed, it cannot be denied, is of wide enough import to include all cases of acquisition, by surrender, abandonment or otherwise. The word is defined in Murray's Oxford Dictionary as meaning "to gain, to obtain, to get as one's own, to gain the ownership of, to come into possession of." Is there any reason then why it should be restricted or cut down in its meaning in the exception? The object of the exception is

(1) (1915) I.L.R., 38 Mad., 843.
(3) (1915) I.L.R., 33 Mad., 891.

(2) (1915) I.L.R., 38 Mad., 608.
(4) (1922) I.L.R., 45 Mad., 89.

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KRISHNAN, J. clearly to exempt inamdars as distinguished from zamindars from the applicability of clauses (1) and (3) of section 8. There is nothing in the policy of the Act so far as I can see, nor in the language of the exception to restrict the exemption to cases other than those of surrender and abandonment.

It is, however, contended that there are words in section 8 (1) and in section 6 (2) which necessitate that we should construe the word "acquired" in the exception as not including cases of surrender and abandonment. It is first argued that the word "otherwise" in clause (1) of section 8 must be read "*ejusdem generis*" with the preceding words "transfer or succession" and that so read it will not include cases of surrender or abandonment. It is then argued that as the exception in section 8 is an exception to clause (1) it should also be read as not including such cases when the clause itself does not include them. The whole of this argument turns upon reading "otherwise" as governed by the rule of "*ejusdem generis*." The word is wide enough to include all cases of the interest of the landholder and of the occupancy ryot becoming united in the same person. To read it as "*ejusdem generis*" with transfer and succession thus excluding cases of surrender and abandonment will lead to the result that the prohibition in it against a landholder holding the land as a ryot will not be applicable to cases where he obtains the ryoti interest by surrender or abandonment even when the landholder is a zamindar. This is clearly incorrect, for clause (4) shows in what case alone an exception is allowed in the case of zamindars.

As my learned brother PHILLIPS, J., observes in his judgment, which I have had the advantage of reading, if the word "otherwise" is limited to matters "*ejusdem generis*" with transfer and succession, it is difficult to

see to what case it can possibly refer. The learned SUBBARAYADU vakil for the appellant suggested that it might refer to RAMASWAMI. cases of acquisition of title by prescription, but they are KRISHNAN, J. no more *ejusdem generis* with transfer and succession than surrender can be said to be. I think the argument based on the language of section 8 (1) is erroneous.

The more difficult point is the one raised on the language of section (6), clause (2). That language, it is argued, suggests that the exception to section 8 does not apply to cases of surrender or abandonment but only to cases where the landholder comes into possession of the land in some other manner as the saving clause which refers to the exception is not applied to cases of surrender or abandonment in the clause. If we read the exception to apply to cases of surrender or abandonment as well, it is argued that there will be a conflict between it and clause (2). On the other hand if we are to restrict the exception as contended for we will have to read into it the words "otherwise than by surrender or abandonment" after the word "acquired"; there is no warrant for doing this. The words "and the exception to section 8" in clause 2 seem to be quite superfluous as by the exception to section 8 itself such cases are taken entirely out of the Act. It seems to me that 6 (2) is not intended in any way to govern the exception to section 8 or to control its general language and that if there is any conflict, the exception which refers to inamdars only must be taken to override the general provision in section 6, clause (2) which refers to landholders generally and not *vice versa*.

In the view I take, I see no difference between cases of surrender and of abandonment. I agree that our answer to the reference should be that the case of "surrender" is within the exception to section 8.

RAMESAM, J.—I agree.

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APPELLATE CIVIL.

*Before Mr. Justice Odgers and Mr. Justice
Viswanatha Sastri.*

1925,
October 6.

CHAVAKULA AMMANNA (PLAINTIFF), APPELLANT,

v.

CHAVAKULA SATYANARAYANA AND OTHERS
(DEPENDANTS), RESPONDENTS.*

*Hindu Law—Adoption by widow—Consent of nearest sapindas—
Death of consenting sapinda—Adoption, made by widow
after consenting sapinda's death and long after consent was
given—Consent, whether operative—Nearest sapindas at the
time of adoption—Right to object—Their consent, if neces-
sary—No objection made by them—Acquiescence, effect of—
Rights of husband in the estate passing by survivorship to his
father who gave consent—Gift by latter to the son's widow of
his properties to be enjoyed by her for her life and to be
handed over to the adopted son during her life or at her
death—Adoption to last male holder—Rule as to divesting of
estate, whether applicable to the case—Persona designata.*

The consent of the nearest sapinda to an adoption to be made by a widow can be acted upon by her after his death and long after the consent was given, if the nearest sapindas at the time of the adoption do not object to it.

Mami v. Subbarayar (1913) I.L.R., 36 Mad., 145, explained; Case Law, reviewed.

Where the estate of the person, to whom the adoption was made, had survived to his father, who gave his properties to his son's widow under a registered deed and authorized her to adopt and provided in the deed that the widow should enjoy the properties for her life and hand them over to the adopted son at any time during her life or at her death.

Held, that the adoption was not invalid on the ground that it was not made to the last male holder, nor on the ground that it divested an estate other than that of the widow

adopting, that the estate in this case had become vested in the widow under the deed and that the adopted son divested only the widow or took the estate as *persona designata* under the deed.

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SECOND APPEAL against the decree of NARAYANA PANTULU Garu, Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 460 of 1921 preferred against the decree of C. RAJAGOPALA AYYANGAR, Additional District Munsif of Narasapur, in Original Suit No. 14 of 1919.

The plaintiff, as one of the nearest reversioners, sued for a declaration that the adoption of the first defendant by the third defendant was not valid. The third defendant made the adoption under the authority or consent given to her by her father-in-law, one Somanna, under a registered deed executed by him (Exhibit I), dated 26th April 1891. Under the deed, Somanna, after giving a portion of his properties to his daughter, gave the rest to his daughter-in-law (the widow of his predeceased son Ramayya), and put her in possession and authorized her to adopt a son to her husband. The material portions of the document were as follows:—

Exhibit I (26th April 1891).

Document, executed on 26th April 1891, in favour of Chevakula Dhanalakshmi, who is the widow of the late Chevakula Ramayya and my daughter-in-law, etc. . . .

The property is delivered possession of to you this very day. In order to get these lands, etc., registered in your name, I shall file the necessary relinquishment applications, etc. As you asked me for my consent in order to adopt a boy for the prospering of our family, I have given my consent for the same. I have given my consent, so that you may adopt at your pleasure, whomsoever you may like, whenever it is necessary, from among the sons of your brother or the sons of my brothers or their daughters' sons or their sons' sons. You are therefore hereby authorized to keep the whole of the property mentioned herein under your management through your lifetime, and to pass the said property to the adopted son either after your death or at any time at your pleasure, meanwhile maintaining the adopted son at your own cost . . . You shall enjoy the said lands at your pleasure, yourself paying the Government taxes thereon.

(Signed) Chevakula Somanna.

* Second Appeal No. 186 of 1923.

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Somanna died on 28th August 1891, without revoking his authority, and on the 10th June 1910, the third defendant adopted, in pursuance of the authority of Somanna, the first defendant, who was the son of Sooriah, the brother of the plaintiff and was one of the five nearest sapindas living at the time of the adoption. Besides Sooriah, two other nearest sapindas of the same rank took part in the adoption, while the plaintiff and his elder brother Venkataramayya, who knew that the adoption was taking place at the time, did not raise any objection to adoption. The plaintiff instituted this suit on 19th June 1916 for a declaration that the adoption was not valid in law. Both the lower Courts held that the adoption was valid and dismissed the suit. The plaintiff preferred this second appeal.

P. R. Ganapati Ayyar and *K. Venkatarama Raju* for appellant.—The adoption is invalid. The authority of the father-in-law was at an end on his death; unlike the case of an authority from a husband, the authority or consent of a sapinda is at an end on his death and is inoperative as an authority or consent. See *Mami v. Subbarayar*(1). The mere fact that certain sapindas (though nearest sapindas) took part in the ceremonies or were present is not sufficient consent, as they were not asked by the widow for their consent nor did they give their independent consent. Consent of sapindas who are alive at the time of adoption is necessary; the consent of a sapinda several years before adoption is insufficient. During the father-in-law's lifetime, the adoption might be made with his consent already obtained, as there is then a joint family but not after his death. In *Suryanarayana v. Ramadoss*(2), the father-in-law was alive, giving consent is different from authorization. Consent of sapindas must be of such sapindas as were alive at the date of adoption. See *Narsimham v. Rukmaniamma*(3), *Lakshmibai v. Vishnu Vasudev* (4), *Nagarampalli Kamesan v. Nagarampalli Batchamma*(5). The analogy of consent of reversioners to an alienation by a widow is not complete. There can be subsequent ratification in regard to alienation, but no subsequent ratification can validate an adoption without previous consent. See *Doraisawmi Pillai v. Chinnia Goundan*(6). Next, there is no power to adopt except to the last male holder.

(1) (1918) I.L.R., 36 Mad., 145

(2) (1918) I.L.R., 41 Mad., 604.

(3) (1928) All-India Reporter (Mad.), 225.

(4) (1905) I.L.R., 29 Bom., 410.

(5) (1914) M.W.N., 620.

(6) (1918) 34 M.L.J., 258.

Here the property had become vested in the father-in-law, and adoption to his son was invalid. *Annammah v. Mabbu Bali Reddy*(1), *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry*(2). Here even under the deed a life estate only vested in the daughter-in-law. The exception to the rule that the adoption should be made to the last male owner, recognized in *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(3), should not be extended. See *Madana Mohana Deo v. Purushottama Deo*(4), *Sivagnanam Servaigar v. Ramasawmy Chettiar*(5). Consent is by custom, and as such cannot be extended by analogy.

S. Varada Achari (with him *P. Bapi Raju*) for respondent.—A father-in-law's consent is different from that of an ordinary sapinda; like the husband's authority, it can be acted upon at any time during his lifetime, or even after his death. The power is not similar to that of a principal to his agent, lapsing on the former's death. There is no time limit for the exercise of the power. Death of consenting sapinda or delay does not by itself affect the efficacy of the power. There must be change of circumstances by lapse of time. The case in 36 M., 145, itself shows that if the adoption is *not disapproved* by sapindas at the time of the adoption, it is valid. There is no need for the widow to apply again to the sapindas at the time. If the sapindas do not object or disapprove, but take part in the adoption and sign the adoption deed (as here), the adoption is valid. Only change of circumstances and not mere lapse of time or death of the assenting sapinda will make the consent inoperative. See *Suryanarayana v. Ramadoss*(6), *Anne Brahmamayya v. Chelasami Rattayya*(7). There is *prima facie* authority under the original consent and if sapindas do not object but take part in the adoption, that is enough.

Secondly, the estate no longer vested in the father-in-law but in the adopting widow under the deed of the former. Under the deed, the daughter-in-law took a woman's estate, and the adopted son took as *persona designata*. In this case, there is no divesting by inheritance, but the adopted son takes as *persona designata* under the document. The rule as to divesting is not

(1) (1875) 8 M.H.C.R., 108.

(2) (1865) 10 M.I.A., 279.

(3) (1876) I.L.R., 1 Mad., 69 (P.C.). (4) (1818) I.L.R., 41 Mad., 855 (P.C.).

(5) (1912) 22 M.L.J., 85 (98).

(6) (1918) I.L.R., 41 Mad., 604 (608).

(7) (1924) 20 L.W., 508 (516-517).

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applicable here. See *Maharaja of Kolhapur v. Sundaram Ayyar*(1), *Ananga Bhima Deo v. Kunja Bihari Deo*(2) and *Mussu-mat Bhoobun Moyee Debia v. Ram Kishore Acharj Choudhry*(3).

JUDGMENT.

ODGERS, J.

ODGERS, J.—This was a suit by a reversioner during the lifetime of a widow for a declaration that an adoption alleged to have been made by the latter is not valid and binding on the reversioners. The District Munsif held that the objection raised by the plaintiff to the validity of the adoption failed which view was upheld by the Subordinate Judge. A certain person called Somanna executed on the 26th April 1891 Exhibit 1 which is a document in favour of one Dhanalakshmi, his daughter-in-law, whereby he gave her certain property—the effect of which will be discussed later—and a power or consent to her to adopt. The words are :—

“As you asked me for my consent in order to adopt a boy for the prospering of our family, I have given my consent, so that you may adopt at your pleasure, whomsoever you may like, whenever it is necessary, from among the sons of your brother, or the sons of my brothers or their daughters' sons or their sons' sons.”

Somanna died on the 28th August 1891 without having revoked this authority and, on the 10th June 1910 or nearly 19 years after, the adoption in question was made by Dhanalakshmi.

The first point taken by Mr. P. R. Ganapati Ayyar is that, as the father-in-law is merely a sapinda, his consent must come to an end with his death. It is only, says the learned vakil, in the case of the husband's authority that it extends beyond his death. Somanna had three brothers, Subbanna, Lingappa and Thirapayappa. The son of Lingappa called Ammanna is the plaintiff and

(1) (1925) I.L.R., 48 Mad., 1 at 214. (2) (1919) 25 M.L.T., 204.
(3) (1865) 10 M.I.A., 279 at 311.

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another of his sons called Surayya is the second defendant. One of the sons of Thirapayappa is Mulaya alias Mulaswami of whom we shall hear more and the other son is Chinna Venkataramayya. Somanna had a son Ramayya, who had pre-deceased him and who married Dhana-lakshmi, the adoptive mother in the present case.

It is of course well settled in this Presidency since its recognition in the Ramnad case *The Collector of Madura v. Moottoo Ramalinga Satupathy*(1) (see also the case in *Sri Virada Pratapa Raghunada I'eo v. Sri Brozo Kishoro Patta Deo*(2) which approved it) that a widow may adopt if duly authorized by her husband's kindred. This has been amplified and explained in various later cases. See *Kristnanya v. Lakshmipathi*(3) where it is said that the adoption must be made not from capricious or corrupt motives but on a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband. This case has been referred to a Bench by a learned Judge of this Court on account of the opinions expressed in *Mami v. Subbarayar*(4) and *Suryanarayana v. Ramadoss*(5). Referring to *Subrahmanyam v. Venkamma*(6), which held that the principle of the decisions of the Privy Council would be satisfied if the consent of the nearest sapinda was obtained, the learned Judges in *Mami v. Subbarayar*(4) proceed :

“It cannot be said to have been in the contemplation of the learned Judges who held so, that the consent of the nearest sapinda would be sufficient, even if at the time of adoption that sapinda is no longer living and the person who is the nearest sapinda at the time does not consent to the adoption. It must, we think, be conceded that, if a sapinda who has given his consent withdraws it, afterwards the widow would not be

(1) (1868) 12 M.I.A., 397. (2) (1876) I.L.R., 1 Mad., 69 (P.C.).
(3) (1920) I.L.R., 43 Mad., 650 (P.C.).
(4) (1913) I.L.R., 36 Mad., 145. (5) (1918) I.L.R., 41 Mad., 604.
(6) (1903) I.L.R., 26 Mad., 627.

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entitled to act upon such consent and it seems to us to be unreasonable to hold that consent once given should become irrevocable by the death of the sapinda giving the consent so as to override the opinion of the sapinda who subsequently became entitled to be heard. But it is contended that, if the authority is acted upon within a reasonable time, that ought to be sufficient to obviate the necessity of obtaining the consent of the sapindas living at the date of adoption. No doubt it may not be necessary that the consent should be given actually at the time the adoption is made, but it seems to us that at any rate a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made."

Whereas in *Suryanarayana v. Ramadoss*(1) a judgment of SESHAGIRI AYYAR, J., the learned Judge says:

"this train of thought, i.e. (that the assent of the sapindas is presumptive evidence of the goodness of the act) precludes me from acceding to the proposition that mere lapse of time without more, or the death of the consenting sapinda, would put an end to the authorization freely and *bona fide* granted. It is settled that the fact that a consent to an alienation was given by a reversioner who is dead would not by itself be sufficient to enable the reversioner entitled to succeed to the property to impeach that consent. In my opinion, the same reasoning should govern the assent to an adoption."

Mr. Ganapathi Ayyar insists that an adoption must be invalid if made without the consent of the nearest or near sapinda at the time; whereas on the other hand, Mr. S. Varadachari maintains that, in the case of a consent once obtained by the widow, it is sufficient if the sapindas have the right of veto when the adoption is made a long time after the consent was originally given and if the circumstances have materially changed. On this we have no evidence here. In *Anne Brahmanna v. Chelasami Rattayya*(2) RAMESAM, J., says:—

"In my opinion, there is an essential difference between the authority of the husband and the assent of a sapinda. The

former is intended to be exercised only after the death of the husband. The latter is intended to be used at a reasonable time after the consent is given. When the interval is short, the death of the sapinda may not matter; but a sapinda's assent is not to be pocketed by the widow and used long after it was given when entirely different considerations as to the expediency of the adoption may apply."

Mr. Varadachari, on the other hand, lays stress on the words quoted above from *Mami v. Subbarayar*(1)

"which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made."

He says that these words import that, once a widow has the consent of a near or the nearest sapinda and does not adopt within a reasonable time, the sapindas who are nearest at the time when the adoption is actually made and when the circumstances which originally prevailed when the consent was given may no longer exist must be deemed to have the power of veto. The case in *Suryanarayana v. Venkataramana*(2) which was a general power given to the widow to adopt any boy at any time and was not acted upon for nine years was construed and explained in *Nagarampalli Kamesam v. Nagarampalli Batchamma*(3) as meaning that an authority given in such general terms cannot be relied on as validating an adoption made several years afterwards, when several of the sapindas who gave the authority had died and when other sapindas interested in the estate and affairs of the widow had come into existence and when other similar circumstances had intervened before the adoption took place. They also refer to *Mami v. Subbarayar*(1). In the present case the facts are somewhat important because it is found that the reversioners of equal degree with the plaintiff Ammanas, namely, Surayya and Mulaya, actively participated

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(1) (1918) I.L.R., 41 Mad., 604.

(2) (1924) 20 L.W., 508 at 517.

(1) (1913) I.L.R., 36 Mad., 145.

(2) (1903) I.L.R., 26 Mad., 681.

(3) (1914) M.W.N., 620.

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in the adoption and the other two Venkataramayya and Ammanna, the plaintiff, were in their houses at the time of the adoption and did not object. In this connexion reliance is placed on the case reported in *Venkammal v. Namasivaya Chettiar*(1) where it was held that there must be a conscious exercise of discretion on the part of the sapinda as to whether assent shall or shall not be given. There was no evidence or allegation that the widow asked for the boy in consequence of any authority given by her husband. But the sapinda had allowed his boy to be brought up by the widow, had been frequently urged to give the boy in formal adoption and allowed him to be so adopted. The learned Judges held that the natural father's conduct showed that he gave a deliberate assent to the action of the widow in making the adoption. That case is possibly stronger than the present. But I think the facts must be taken strongly against the plaintiff on this point.

The second point taken by Mr. P. R. Ganapathi Ayyar is that, even if this adoption had taken place and even if it must be held to have taken place with the consent of the nearest sapinda, the person to whom the adoption was made, namely, the son of Somanna, never had any estate and that the adoption was therefore not made to the last male holder who is Somanna, but to Dhanalakshmi's husband Ramayya. It is further said that it is a principle of the Hindu Law that, where an estate has vested in the heirs of the deceased person, it cannot be afterwards divested by any adoption made by the widow in pursuance of a power, the only exception being that, if a widow has succeeded by inheritance to the estate of her husband and makes an adoption, she obviously divests herself *ipso facto* of her estate in

(1) (1896) 6 M.L.J., 35.

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favour of the adopted son. Many cases were quoted for this proposition. It is probably not necessary to go through all of them. Reference may be had to *Annammah v. Mabbu Bali Reddy*(1) where it was held that the estate of the deceased son having become vested in his heir cannot be defeated and divested by an adoption, and to *Ratna Mudaliar v. Raghunadha Bhattar*(2) where it is clearly laid down that an adoption not made to the last male holder, which would have the effect of divesting the estate taken on inheritance by the deceased's brothers, would be invalid. The answer to this is said to be, to begin with, that the rule as to the last male holder does not apply to joint families and further that there is no scope for the rule as to divesting where there is, as in this case, a document, there being no question of inheritance and the adopted son clearly takes as devisee under the document Exhibit I. The rule as to divesting has been quite lately explained by KUMARASWAMI SASTRI, J., in the Tanjore Palace case *Maharaja of Kolhapur v. Sundaram Ayyar*(3) where he says :

"The whole principle underlying the rule as to divesting estates is that a superior title as heir cannot be created by a widow, while the property has already vested in a person who in law has taken the estate from the deceased heir of the last male holder."

In *Ananga Bhima Deo v. Kunja Bihari Deo*(4) which was referred to by the learned vakil for the respondents, a case of an impartible zamindari, it was held the power to adopt was not limited in point of time by the fact that a line of the husband's heirs had in succession come into possession of the estate. The limit to such power is when the husband's adopted son attains full age and so full capacity to continue the line by natural born

(1) (1875) 8 M.H.C.R., 108.

(3) (1925) I.L.R., 48 Mad., 1 at 214.

(2) (1898) 8 M.L.J., 173.

(4) (1919) 25 M.L.T., 204

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sons or adoption. All the cases speak as to the divesting of an estate which has devolved by inheritance. In this case by this settlement or whatever it may be called, Exhibit I, the father-in-law of Dhanalakshmi purported to give her for some estate or other all his property with the exception of certain property given to his daughter under these words :

"You are therefore hereby authorized to keep the whole of the property mentioned herein under your management throughout your lifetime and to pass the said property to the adopted son either after your death or at any time at your pleasure, meanwhile maintaining the adopted son at your own cost."

There can therefore in this case, it seems to me, be no question of inheritance where the mode of natural devolution has been artificially controlled by a document of this character and it is not contended that the settler had no power to make such a disposition of his property. It has been argued at length on one side or the other that the donee took either a woman's estate or a mere life estate. If she took a woman's estate she would have the power of course to pass the corpus of the estate in accordance with the terms of the document. If it is a life estate solely as known to the English law she either has a power of appointment within a certain class to the whole property after her death or the adopted son is a *persona designata* although he is to be selected from a certain class of persons. Which-ever view is taken of this document, I do not think it makes any difference to the decision of the present point. If the rule of Hindu Law as to adoption to the last male holder is a corollary to the rule as to the divesting of already vested estates, it seems to me that these doctrines have no application to a case like the present, where the settler after the transfer can clearly not be regarded as the last male holder.

I therefore think the appeal fails on both grounds and I would dismiss it with costs.

VISWANATHA SASTRI, J.—Plaintiff is the appellant. He sued for a declaration that the adoption of the first defendant by the third defendant was not valid and binding on the reversioners. The adoption was made on 10th June 1910 as recited in the adoption deed Exhibit II, and the deed recites that it was made in pursuance of an authority to adopt given to third defendant, by her deceased father-in-law on 26th April 1891 under a deed Exhibit I. It was alleged in the plaint that the authority could not have been acted upon after the father-in-law's death; that no adoption in fact took place and that even if it took place it was not done "with the consent of the then surviving heirs." Both the lower Courts found that the first defendant was adopted by the third defendant; and that the authority given in Exhibit I was sufficient. It was contended before us that the adoption was not valid because, (1) the authority given by the father-in-law was useless after his death; and (2) the adoption was made to third defendant's husband and not to the last male holder, and at a time when the reversion had vested in others. The Second Appeal first came before me sitting as a single Judge, and as there was an apparent conflict between *Mami v. Subbarayar*(1) and *Suryanarayana v. Ramados*(2) I ordered that it be posted before a Bench.

In *Mami v. Subbarayar*(1) the adoption was made by the adoptive mother on the authority given to her by her deceased adopted son in a will left by him. The sapindas living on the date of the adoption did not give their consent; and it will appear from the Judgment (at page 146) that the adoption was made in disregard

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(1) (1913) I.L.R., 36 Mad., 145.

(2) (1918) I.L.R., 41 Mad., 604.

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of the opinion of the nearest sapindas then living. The learned Judges observe at page 148:

“It seems to us that a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made.”

This case was examined in *Suryanarayana v. Ramadoss*(1) and it was held that mere lapse of time without more, or the death of the consenting sapinda, will not put an end to a consent freely and *bona fide* granted. I may here state that although the adoption in the present case was made 19 years after the date of authority, it was admitted in the plaint (para 6) and conceded before us that, had the donor of the authority been alive on the date of adoption, the adoption would have been perfectly valid. The question therefore is whether his death *ipso facto* put an end to his authority. In the 41 Madras case it was held that such would not be the case, and in 20 Law Weekly, 503, RAMESAM, J., observes at page 517 that

“when the interval is short the death of the sapinda may not matter, but a sapinda's assent is not to be pocketed by the widow and used long after it was given, when entirely different considerations as to the expediency of the adoption may apply.”

In *Suryanarayana v. Venkataramana*(2) the question arose whether the assent of sapindas to adopt “any boy at any time” would entitle a widow to adopt nine years after the date the consent was given; and it was held that the assent was not valid, (1) because it was too general in its nature and (2) because during the nine years circumstances had materially changed, one of them being that two out of the three assenting sapindas and two dissenting sapindas had died. This dictum has been explained in *Nagarampalli Kamesam v. Nagarampalli Batchamma*(3). I may here state that the

(1) (1918) I.L.R., 41 Mad., 604.

(2) (1903) I.L.R., 26 Mad., 681.

(3) (1914) M.W.N., 620 at 621.

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authority in the present case was not to adopt any boy, but to adopt a boy “from among the sons of your brother, or the sons of my brothers, or their daughters' sons or their sons”; and that the boy adopted satisfied this description. There was no doubt the liberty to adopt “whenever it was necessary.” In my opinion the trend of these decisions is that when the consent is given by the father-in-law, who happens to be the nearest sapinda then living, his death before the adoption is made would not *ipso facto* revoke the consent; and that such a consent will come to an end only if circumstances had materially changed after his death. In the present case it was not alleged that there has been any change in the circumstances on the date the adoption was made, caused either by the coming into existence of other nearer sapindas, or by the death of sapindas then alive; or by reason of the estate having vested in third persons. The evidence shows that five sapindas were alive on the date of adoption. The boy adopted is the son of one of them and his natural father was present at the adoption. Another sapinda assisted the widow during the ceremony, and a third was present. Plaintiff and the fifth sapinda were on that date in their houses in the village, and did not in any way indicate to the widow that they objected to the adoption. Soon after the adoption, steps were taken to transfer the patta in the name of the adopted boy and notices were sent to plaintiff. From what the District Munsif says in paragraph 49, the plaintiff made no serious attempt to oppose the transfer, and Venkataramiah alleged that his son had been adopted and not the first defendant. And what is more the suit was instituted on the last day of limitation although plaintiff was aware of the adoption at any rate when he got the notices from the Tahsildar.

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It was said that the third defendant had to seek out plaintiff and Venkataramiah and obtain their consent and that she did not do so. She was not adopting under any consent given by sapindas then alive; and she preferred to adopt under an authority given to her by her deceased father-in-law. This authority had the approval of three out of five sapindas alive on the date of the adoption; and in the case in *Mami v. Subbarayar*(1) the consent was held not to

"be efficacious to validate an adoption which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made" (see at page 148).

That presence at an adoption ceremony would imply acquiescence, though such acquiescence may not be equivalent to consent, is the view taken in *Ramchandra v. Mulji Nanabhai*(2). In the present case all that was needed was acquiescence in a consent already given, and not fresh consent.

I therefore come to the conclusion that in the circumstances of the present case, the authority under which the third defendant acted was not at an end on the date the adoption was made.

It was next contended by appellant's vakil that the adoption was invalid because it was not made to the last male holder, who in this case was said to be the father-in-law. The father-in-law had given the properties to the third defendant under Exhibit I, and possession was delivered over to her on the date of the deed (26th April 1891). The deed goes on to say:

"You are therefore hereby authorized to keep the whole of the property mentioned herein under your management through your lifetime, and to pass the said property to the adopted son either after your death or at any time at your pleasure."

(1) (1913) I.L.R., 36 Mad., 145. (2) (1898) I.L.R., 22 Bom., 558 (F.B.).

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And it concludes by saying: "You shall enjoy the said lands at your pleasure, yourself paying the Government taxes thereon." I fail to see how after this transfer the father-in-law could be deemed to be the last male holder. The terms of Exhibit I above stated appear to me to be similar to the terms of the will which was construed in *Srinivasa v. Dandayudapani*(1). The adopted son (first defendant) would not succeed by inheritance but only as devisee under Exhibit I; and the rule that the adoption will be invalid unless made to the last male holder applies only to cases where the adopted son would take by inheritance. See *Venkataramier v. Gopalan*(2). As observed by KUMARASWAMI SASTRI, J., in *Maharaja of Kolhapur v. Sundaram Ayyar*(3),

"the whole principle underlying the rule as to divesting estates is that a superior title as heir cannot be created by a widow, while the property has already vested in a person who in law has taken the estate from the deceased heir of the last male holder."

In this view, it is not necessary to consider the cases relied upon by appellant's vakil, *Chandra v. Gojara-bai*(4), *Shri Dharanidhar v. Chinto*(5), *Lakshmibai v. Vishnu Vasudev*(6) and *Dattatraya Bhimrao v. Gangabai*(7) as in all of them the adoption was after the estate had vested by inheritance in a third person.

I would therefore dismiss the Second Appeal with costs.

K.R.

(1) (1889) I.L.R., 12 Mad., 411. (2) (1919) 9 L.W., 43.
(3) (1925) I.L.R., 48 Mad., 1. (4) (1890) I.L.R., 14 Bom., 463.
(5) (1896) I.L.R., 20 Bom., 250. (6) (1905) I.L.R., 29 Bom., 410.
(7) (1922) I.L.R., 46 Bom., 541.

APPELLATE CIVIL.

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

1926,
January 6.

KESAR SINGH (SECOND DEFENDANT), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
REPRESENTED BY THE COLLECTOR OF KURNOOL
(PLAINTIFF) RESPONDENT.*

*Hindu Law—Adoption by widow with the consent of the
nearest cognate heir, validity of—Succession—Bandhu—
Father's sister's son's daughter's son, heritable bandhu.*

In the absence of agnate reversioners, a Hindu widow can, in Southern India, adopt with the consent of the nearest cognate reversioner.

Father's sister's son's daughter's son is a heritable bandhu.

APPEAL against the decree of S. VENKATASUBBA RAO,
Subordinate Judge of Kurnool, in O.S. No. 11 of 1920.

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

A. Krishnaswami Ayyar (with W. Kothandaramayya, and K. Balasubrahmanya Ayyar) for appellants.—In the absence of agnates, consent of the cognate presumptive reversioner (the deceased's father's sister's son in this case) will validate a widow's adoption; see *The Collector of Madura v. Moottoo Ramalinga Sathupathy*(1), which holds that the consent of the nearest sapinda is sufficient. The term "sapinda" includes both agnates and cognates; see *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(2). The view that the consent of the nearest male agnate alone will validate an adoption is wrong; see *The Collector of Madura v. Moottoo Ramalinga Sathupathy*(1), to the effect that the consent of Muthuveerayi and of Muthusami Thevar, who were respectively the mother and a

* Appeal No. 334 of 1922.

(1) (1868) 12 M.I.A., 397.

(2) (1915) I.L.R., 42 Cal., 384 (P.C.).

Samanodaka relation of the deceased husband of the widow was sufficient. In *Rajah Venkatappa Nayanim Bahadur v. Renga Rao*(1), the consent of the senior widow, and in *Maharaja of Kolhapur v. Sundaram Ayyar*(2) the consent of the mother-in-law was considered necessary and sufficient. *Anne Brahmaya v. Chelasami Rattayya*(3), the latest decision in my favour, summarizes all the prior decisions. *Viswasundara Row v. Somasundara Rao*(4) is wrong owing to three misconceptions, (a) that the word *gnathi* means only agnates, whereas it includes both agnates and cognates according to its meaning in Monnier William's Dictionary and Apte's Sanskrit Dictionary and *Maharaja of Kolhapur v. Sundaram Ayyar*(2), (b) that *The Collector of Madura v. Moottoo Ramalinga Sathupathy*(5) held that the consent of male agnates is necessary and (c) that a daughter's son cannot confer any spiritual benefit. Adoption is a secular act; see Sarkar on Adoption, page 26. Reversioners whether the agnates or cognates who would be prejudiced by the adoption must be consulted. Stray sentences occurring in *Veerabasavaraju v. Balasurya Prasada Rao*(6) and *Kristnayya v. Lakshmipathi*(7), to the effect that the consent of "male agnates" or "agnates" is necessary ought not to be twisted into a principle, for in those two cases such agnates were in existence who were entitled to be consulted before cognates. Reference was made to *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(8), *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(9), *Ramasami Aiyar v. Venkataramaiyan*(10), *Suryanarayana v. Venkataramana*(11), *Venamma v. Subramaniam*(12) and *Lakhipriya Dasi v. Raikishori Dasi*(13). The next question is whether Kaser Singh who is related to the propositus as the latter's father's sister's son's daughter's son is a heritable bandhu. The lower Court holds that there is no mutuality of sapindaship between the two as propounded in *Umaid Bahadur v. Udoi Chand*(14), and that the claimant is therefore not a heritable bandhu. This is wrong. The above view which is to be found in the last paragraph of the decision in *Umaid Bahadur v. Udoi Chand*(14) and which is to the effect

(1) (1916) I.L.R., 39 Mad., 772.

(3) (1924) 20 L.W., 503.

(5) (1868) 12 M.I.A., 397.

(7) (1920) I.L.R., 43 Mad., 650 (P.C.).

(9) (1876) I.L.R., 1 Mad., 174 (P.C.).

(11) (1906) I.L.R., 29 Mad., 382 (P.C.).

(13) (1916) I.L.R., 43 Cal., 243.

(2) (1925) I.L.R., 48 Mad., 1 at 68.

(4) (1920) I.L.R., 43 Mad., 876.

(6) (1918) I.L.R., 41 Mad., 998 (P.C.).

(8) (1876) I.L.R., 1 Mad., 69 (P.C.).

(10) (1879) I.L.R., 2 Mad., 91 (P.C.).

(12) (1907) I.L.R., 30 Mad., 50 (P.C.).

(14) (1881) I.L.R., 6 Cal., 119 (F.R.).

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that if X is not a descendant of the line of the maternal grandfather of Y or Y's father or mother, then X and Y are not sapindas of each other, is *obiter* and is not supported either by the two Sanskrit texts which alone govern bandhu succession or by text writers such as Sircar or Ghose or by subsequent decisions. According to the first text "the property of a near sapinda shall be that of a near sapinda" which has been interpreted as laying down the rule that there must be mutuality of sapindaship between them. "Sapinda" means "connected by particles of the same body." The second text lays down that "on mother's side in the mother's line after the 5th, on the father's side in the father's line after the 7th (ancestor) the sapinda relationship ceases." This means that if A claims B's property as a relation through B's father A must be either directly an ancestor of B within seven degrees or be within seven degrees from the common ancestor. But if A claims relationship through B's mother, the number of degrees allowed either directly or from the common ancestor is only five. Since sapindaship must be mutual, i.e., since both must be sapindas of each other, the above rule must be applied *vice versa*. There is no third rule like the one contained in the above *obiter dictum*. Tested according to the above rules the claimant is the heir. The *obiter* in *Umaid Bahadur v. Udoi Chand*(1) is supported, only by Dr. Sarvadhikari and by no others. Likewise his elaborate and misconceived views on the question of who alone are *Atma Bhandhus*, *Pitru Bhandhus* and *Matru Bhandhus* and the relative priority amongst them and his evolution of five families out of these three kinds of bandhus, who alone are said to be entitled to succeed are opposed to the Mitakshara and are not accepted by other text writers and by the Privy Council; see *E. O. Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar*(2) and *Vedachala Mudaliar v. Subramania Mudaliar*(3). He relied on *Ramachandra Martand Waikar v. Vinayek Venkatesh Kothekar*(4), *Adit Narayan Singh v. Mahabir Prasad Tiwari*(5), *Umashankar Prasad Parasair v. Mt. Nageswari Kobi*(6), *Rami Reddi v. Gangi Reddi*(7) and Mr. Justice SADASIVA AYYAR's view in *Chinna Pichu Iyengar v.*

- (1) (1881) I.L.R., 6 Cal., 119 (F.R.). (2) (1896) I.L.R., 19 Mad. 405 (P.C.).
(3) (1921) I.L.R., 44 Mad., 753 at 767 (P.C.).
(4) (1915) I.L.R., 42 Cal., 384 (P.C.).
(5) (1921) 40 M.L.J., 270 (P.C.), 48 I.A., 86.
(6) (1918) 8 Pat. L.J., 663 (F.B.) (7) (1925) I.L.R., 48 Mad., 722.

Padmanabha Iyengar(1), *Tirath Ram v. Mst. Kahan Devi*(2), *Bishun Prasad v. Binaik Prasad*(3), *Ratnasubbu v. Ponnappa*(4), *Sethurama v. Ponnammal*(5) and Sarkar's Hindu Law, 1924 Edition, page 97, and the article in 9 Madras Law Journal, pages 60 and 59. These show that the intervention of two females is no bar. He referred to and commentated on *Babu Lal v. Nanku Ram*(6), *Lowji v. Mithabai*(7) and Mr. Justice NAPIER's view in *Chinna Pichu Iyengar v. Padmanabha Iyengar*(1).

Government Pleader (C. V. Anantakrishna Ayyar) for respondents.—The consent of the nearest male agnate alone will validate an adoption and not that of a cognate. See *Veerabasavaraju v. Balasurya Prasad Rao*(8), *Kristnayya v. Lakshmipathi*(9) which are express on the point. Expressions in other cases as to the consent of female agnates and also of cognates are only casual and *obiter*. The consent of the cognate even if true is bad as it was got by the widow on representing that her husband also had authorized her to adopt.

The claimant is not a bandhu. In counting degrees, more than one woman cannot intervene except as mother and daughter. This is the view of Sarvadhikari. *Vide* Banerjee on Marriage and Sridhana, page 68. Also in the commentary on the Yagnavalkya, the commentator in illustrating how the degrees are to be reckoned, has taken only one female as intervening. There cannot be a line where males and females occur indiscriminately. Sapindaship must be mutual. *Umaid Bahadur v. Udoi Chand*(10) has been followed in *Babu Lal v. Nanku Ram*(6), *Lowji v. Mithabai*(7) and in *Chinna Pichu Iyengar v. Padmanabha Iyengar*(1). "Mutuality" "Sapindaship" require also that both the propositus and claimant must both be within the five families enumerated by Dr. Sarvadhikari. The Privy Council decision in *Ramachandra Martand Waikar v. Vinayek Venkatesh Kothekar*(11) approved of Dr. Sarvadhikari's rules on the subject.

W. Kothandaramayya in reply.—The theory that a line cannot have more than one woman intervening is unsound.

- (1) (1921) I.L.R., 44 Mad., 121. (2) (1920) I.L.R., 1 Lah., 588.
(3) (1905) 2 A.L.J., 458. (4) (1882) I.L.R., 5 Mad., 69.
(5) (1889) I.L.R., 12 Mad., 155. (6) (1895) I.L.R., 22 Cal., 339.
(7) (1900) 2 Bom. L.R., 842. (8) (1918) I.L.R., 41 Mad., 998 (P.C.).
(9) (1920) I.L.R., 43 Mad., 650 (P.C.). (10) (1881) I.L.R., 6 Cal., 119 (F.B.).
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Even Dr. Banerjee states that a line in *descent* can have more than one woman, but states that a line in *ascent* should not have more than one woman. This is illogical. Learned text writers like Sarkar Sastry and Mandlik do not approve of this restriction. They state that a line may consist of males and females indiscriminately. Again such a restriction of a line would lead to the exclusion of the recognized and enumerated bandhus, (*eq*) mother's mother's brother's son and mother's mother's sister's son, where certainly two women intervene.

JUDGMENT.

SPENCER, J.

SPENCER, J.—I have had the advantage of seeing the judgment which my learned brother is about to deliver. On the questions of fact I have nothing to add to what he will state beyond expressing my entire agreement with his conclusions. On the two questions of law arising out of the 5th and 6th points I wish to express my concurrence with his opinion. His opinion on the 5th point agrees also with that of RAMESAM, J., in *Anne Brahmayya v. Ohelasami Rattayya*(1). I agree with them in respectfully dissenting from the view expressed by OLDFIELD, J., in *Viswasundara Row v. Somasundara Rao*(2) to the effect that the class of sapindas, whose consent should be obtained by a widow in order to supply the authority lacking in consequence of her husband having died without authorizing her to adopt a son, is limited to agnates. In the judgment of SESHAGIRI AYYAR, J., in *Krishnayya v. Lakshmipathy*(3) the *smrithi* of Yagnavalkya which is the basis for the theory that a woman, who has no husband, father or sons, needs the advice of those who are her natural protectors is quoted:—

रक्षेत् कन्यां पिता विन्नां पतिः पुत्रास्तु वार्षके ।
अभावे ज्ञातयस्तेषां न स्वातन्त्र्यं क्वचित् स्त्रियः ।

(1) (1924) 20 L.W., 503.

(2) (1920) I.L.R., 43 Mad., 876.

(3) (1916) 30 M.L.J., 265.

“Let her father protect a maiden, her lord a married woman, sons in old age; if none of these, other gnatis; she is not fit for independence.”

Here the word used is “gnatis.”

But temporal considerations cannot be left out of account. Proximity to the deceased with respect to rights of property is also an important factor in considering who should be consulted, for the reason that those persons who would succeed to the property, if no adoption were made, are most interested in the protection of the inheritance and in restraining the widow concerned from acting capriciously. (*Vide Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(1), *Veerabasavaraju v. Balasurya Prasada Rao*(2). As regards the devolution of property the original text of Manu is:—

अनन्तरः सपिण्डात् यस्तस्य तस्य धनं भवेत् ।

which may be translated literally:—

“Whoever is unremote from the sapinda, to him let his wealth belong.”

The word used here is “sapinda.”

Now neither the word “gnati” nor the word “sapinda” is synonymous with the English word “agnate,” whatever may be the suggestion conveyed by the common root “gna.” For sapindas undoubtedly include Bhinnagotra sapindas who are cognates, and in Professor Monier William's Sanskrit Dictionary “gnati” is defined as a “paternal relation, a kinsman in general, a father, a brother, a distant kinsman, one who does not participate in the oblations offered to deceased ancestors. According to the Schol. “gnati” is a paternal and “sam-bhandhin,” a maternal relation; the original meaning of gnati may be “intimately acquainted” Cf. Greek $\gamma\upsilon\omega\tau\omicron\varsigma$, $\gamma\upsilon\omega\tau\eta$ ” (gnotos gnotee).

(1) (1876) I.L.R., 1 Mad., 69 (P.O.). (2) (1918) I.L.R., 41 Mad., 998 (P.O.).

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SPENCER, J. "The Ramnad case established the proposition that in the Dravida country under the Dravidian branch of the Mitakshara Law—there in force—in the absence of authority from her deceased husband, a widow may adopt a son with the assent of his male agnates"

and in the other passage in *Kristnayya v. Lakshmi-pathi*(2), where Viscount CAVE observed at p. 654

"The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter,"

their Lordships had no intention of laying down the propositions (1) that in the absence of agnates available for being consulted no adoption could be made by a widow who had failed to obtain the authority of her husband, and (2) that in no circumstances should cognates be consulted. No doubt agnates should as a rule be consulted first, if there are agnates, because the principal agnates are the nearest kinsmen but there appears to be no authority for limiting the class of gnatis and sapindas, whose assent may be taken by a widow about to adopt a son, to agnates, except the judgments of my learned brothers OLDFIELD and PHILLIPS, JJ., in *Vistwasundara Row v. Somasundara Rao*(3) and of JACKSON, J., in *Anne Brahmayya v. Chelasami Rattayya*(4), and I am unable to regard the reasons given by them for excluding a daughter's son as convincing and well founded.

Now leaving the 5th point and turning to the 6th point, I find from the pedigree that Kesar Singh is the

(1) (1918) I.L.R., 41 Mad., 998 (P.C.).

(2) (1920) I.L.R., 43 Mad., 650 (P.C.).

(3) (1920) I.L.R., 43 Mad., 876.

(4) (1924) 20 L.W., 508.

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Parot Bapalal Sevakram v. Mehta Harilal Surajram(1), purports to follow the Full Bench Case of *Umaid Bahadur v. Udvi Chand*(2) which was also followed by a Bench of the same Court in *Babu Lal v. Nanku Ram*(3), and is quoted with approval in the Privy Council decision in *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(4), but is stated by SADASIVA

(1) (1895) I.L.R., 19 Bom., 631.

(2) (1891) I.L.R., 6 Cal., 119 (F.B.).

(3) (1895) I.L.R., 22 Cal., 339.

(4) (1915) I.L.R., 42 Cal., 334 (P.C.).

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AYYAR, J., in *Chinna Pichu Iyengar v. Padmanabha Iyengar*(1), to contain a fallacious conclusion. The defendant in *Umaid Bahadur v. Udoi Chand*(2), was in the same degree of relationship to the propositus as E was to B in the table at p. 128. It was unnecessary for the purpose of that case to decide whether E's son F was a sapinda of B. The learned Judges observed that F was within six degrees from the common ancestor. He was actually 5th in descent from A, and the Acharakanda declares that sapinda relationship ceases only after the 5th ancestor on the mother's side in the mother's line and after the 7th ancestor on the father's side in the father's line, calculating from whence the direction of the line changes. So the statement as to B and F not being sapindas to each other was an obiter dictum and the reference to six degrees is not intelligible. The Sanskrit word for "line" in verse 53 of the Acharakanda quoted in West and Buhler at pp. 174-175 (pp. 125-6 Calc.) is "*santana*" "सन्तान" which means "extending, spreading, lineage, race, family, progeny, offspring, a son or daughter." It does not appear to denote male ancestors and male descendants exclusively. In Golap Chandra Sarkar's Hindu Law, 5th Edition, p. 98, the learned author observes that each link is called a purusha "पुरुष" which means "a generation, a person, a man" but that is not the word used in this text. He also observes that recent commentators confine the upward lines to male ancestors only, although the downward lines according to them may pass through males or females, or either, and that no reason is assigned by them for this distinction. He comments on the fact that the Mitakshara does not say anything about the lines passing

(1) (1921) I.L.R., 44 Mad., 121. (2) (1881) I.L.R., 6 Calc., 119 (F.B.).

through males only, or through both males and females without any distinction, and he thinks that the novel views which were propounded for the first time by the Tagore Law Lecturer of 1880 were embodied in the judgment of the Full Bench in *Umaid Bahadur v. Udoi Chand*(1) and that they are peculiar to Professor Sarvadhikari and unsupported by authority.

The Tagore Law Lecturer for 1833, Dr. Jolly, criticised Professor Sarvadhikari's theory in these words at p. 216 :—

"An essentially new system of bandhu relationship under Mitakshara Law has been recently proposed by Rajkumar Sarvadhikari. He takes the three bandhus each as indicative of the three principal classes of bandhus and not as embracing the nine bandhus specially named only. This theory has the advantage of giving a clue to the order of precedence among the bandhus. However, though it is developed with rigorous logic from the data put forth by its author, there is no sufficient foundation for these data in the Mitakshara to commend its ready acceptance."

Some general remarks on the subject of female succession follow.

Professor Sarvadhikari enunciates the proposition that in the case of bandhus on the paternal side there cannot be more than two females between the claimant and the propositus and that if there are two females, these two must be related as mother and daughter to each other. But the text of the writings of the ancient expounders of Hindu Law does not warrant the restriction of heritable cognates to those in the father's agnate line and the mother's agnate line. Supposing that is the correct interpretation to be placed on the passage from the Acharakanda to which I have referred above, the logical result would be to allow the intervention of no more than one female, and two females should

(1) (1881) I.L.R., 6 Calc., 119 (F.B.).

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SPENCER, J. *Adit Narayan Singh v. Mahabir Prasad Tiwari*(1) is a case in point. The suit of the purchasers of the estate of one Hanuman, who was a matri bandhu (mother's paternal aunt's son) of the propositus, failed in the Privy Council because of the existence of a mother's sister's grandson (an atma bhandu) named Rajendra. It was not considered by the Judicial Committee to be an objection to Rajendra's title that two females intervened between Rajendra and the propositus Dhanukdari even though those two females were not related as mother and daughter but as sisters. In the case before us two females intervene between Kesar Singh and Ananta Ram Singh, viz., Ganga Bai and Ammi Bai, who are related to the claimant as mother and maternal great grandmother, respectively, and a male, viz., Jagannatha Singh, who is Kesar Singh's maternal grandfather, intervenes between them. In *Adit Narayan Singh v. Mahabir Prasad Tiwari*(1) the principle is once more recognized that the enumeration of bandhus as heirs in the Mitakshara is illustrative and not exhaustive. This is sufficiently evident from the fact that such obvious heirs as a sister's son and a maternal uncle are not specifically mentioned, although the maternal uncle's sons are among the cognate kindred enumerated in the text of Chapter II, Section VI, *placitum* ii. This principle was established in *E. O. Muthusami Mudaliyar v. Simambedu Mutiukumaraswami Mudaliyar* (2). In *Krishna Ayyangar v. Venkatarama Ayyangar* (3) quoted by the Judicial Committee in *Adit Narayan Singh v. Mahabir Prasad Tiwari*(1) the suggestion

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I have mentioned that among modern writers Sarkar does not adopt the views enunciated by Professor Sarvadhikari; Ghose also considers that the mode of computation from the propositus up to the common ancestor and then down to the claimant advocated by Professor Sarvadhikari is opposed to all the Hindu lawyers and to the express words of the Mitakshara and he says at p. 146 of his *Principles of Hindu Law* (3rd Edition) that the rule laid down in *Umaid Bahadur v. Udoi Chand*(2) has not been followed in later cases in the same Court and in the High Courts of Madras, Allahabad and Patna and he cites several instances of bandhus whose claims as heirs have been recognized even though more than one female intervened in the line between them and the propositus including the case of *Babu Lal v. Nanke Ram*(3). On the other hand Banerjee appears to range himself on the side of Sarvadhikari (see p. 68 of Banerjee's *Hindu Law of Marriage and Stridhanam* where the learned author says that a line of female ancestors is not regarded as a line in Hindu Law). RAMESAM, J., in *Rami Reddi v. Ganga*

(1) (1921) 40 M.L.J., 270 (P.C.); 48 I.A., 86.
(2) (1890) I.L.R., 19 Mad., 405 (P.C.). (3) (1908) I.L.R., 29 Mad., 115.

(1) (1907) I.L.R., 30 Mad., 406.
(2) (1881) I.L.R., 8 Cal., 119 (F.B.). (3) (1895) I.L.R., 22 Cal., 239.

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SPENCER, J. Reddi(1) notices that some of Professor Sarvadhikari's views on priority of succession based on separation into four families have not been accepted by the Judicial Committee.

It has been long settled that succession under the Mitakshara law depends upon propinquity and not upon religious efficacy, which is one reason for not excluding cognates who trace their relationship through one or more females.

But there are two known tests of capacity for inheriting among bandhus which must be satisfied, and these are (1) that sapinda relationship ceases, in the case of *Bhinnagotra* sapindas or bandhus, after the 5th degree from the common ancestor when the descent is through a female and after the 7th degree from the common ancestor when the descent is through a male; (2) there must be an element of mutuality between the claimant and the propositus, in other words they must be so related that they are sapindas of each other.

Both these tests have been referred to in the most instructive case of *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(2). There the plaintiffs were Laxman Rao's paternal grand father's son's son's daughter's daughter's sons. As they claimed through a female and as the common ancestor Timaji was more than five degrees removed from the plaintiffs, Timaji was not a sapinda of Plaintiffs. It followed therefore that Timaji's descendants among whom was the propositus Laxman Rao were not sapindas of plaintiffs and thus plaintiffs' claim failed, although the plaintiffs were sapindas of Laxman Rao, whose descent from the common ancestor Timaji was through males, as Laxman Rao could count seven degrees from the common ancestor in

enumerating his sapindas. The principle is that when a man computes his relations (sapindas) through his father he has a wider range (seven degrees) than when he computes his relations through his mother, and those relations of his who are connected with him through their mothers have a smaller range (five degrees) and will only include him among their sapindas if he comes within that limit. Applying this test to the pedigree in the present case we find that Dhan Singh alias Kem Singh the common ancestor is within five degrees of Kesar Singh, who claims relationship to Anantaram Singh through his mother, and that Anantaram Singh who was related to Kesar Singh through his father, Mohan Singh, is easily within seven degrees of the common ancestor Dhan Singh. The plaint pedigree unnecessarily shows Bagirath Singh, the father of Dhan Singh, but he need not be reckoned in the counting which starts from the common ancestor. For these reasons I agree with my learned brother that the appeal must be allowed with costs of the appellant here and in the lower Court and the plaintiff's suit is dismissed.

In view of the special difficulty and importance of this case we allow a vakil's fee of Rs. 2,500 in this Court.

Under Order XXXIII, Rule 10, Civil Procedure Code, the Court-fees payable on the appeal may be recovered from the pauper appellant, either by deducting the same from the costs awarded to him and paying him the balance, or otherwise from his properties.

VENKATASUBBA RAO, J.—The Government claim the suit properties on the ground of escheat. They originally belonged to Kurnool Anantaram Singh who died about 1864 or 1865 and on his death his inheritance devolved on his widow Ramabai. Kesar Singh who is referred to as the second defendant resists

(1) (1925) I.L.R., 48 Mad., 722 at 724. (2) (1915) I.L.R., 42 Calo., 884 (P.O.).

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the suit of the Government on the ground *inter alia* that he was adopted by Ramabai in the year 1900 and that his adoption was recognized and acted upon till her death in September 1915. The estate was also claimed by one Nuzvid Anantaram Singh who alleged that he was the heir entitled to the property after the widow's death. He also filed a suit and Kesar Singh was the principal defendant. There was thus a three-cornered contest, the claimants being the Government, Nuzvid Anantaram Singh and Kesar Singh. It is necessary to mention in this connexion that in 1895 a suit (Original Suit No. 2 of 1895) was filed against Ramabai by certain persons who claimed to be the nearest reversioners of Anantaram Singh. Four plaintiffs instituted that suit, the object of which was to have certain alienations made by Ramabai declared invalid. Lakshmana Singh, P.W. 1, and Umrao Singh, P.W. 2, are two out of the said four plaintiffs. That suit was dismissed as it was found that the claimants were not the reversioners. Nuzvid Anantaram Singh now put forward in the lower Court the same pedigree as the plaintiffs in the suit of 1895 relied on and he claimed to be related to the last male owner in precisely the same manner as those plaintiffs claimed they were related. He availed himself of the fact that he was not made a party to the previous suit and sought to rely upon the pedigree which was held to be false in that litigation. The two suits, that of the Government and that of Nuzvid Anantaram Singh, were tried together by the lower Court and the claim of Nuzvid Anantaram Singh was rejected and that of the Government allowed. There is no appeal by Nuzvid Anantaram Singh and therefore the decree passed against him has become final. Kesar Singh has filed the present appeal and the contest in this Court is therefore confined to Kesar Singh and the Government.

Kesar Singh pleaded that Ramabai adopted him and he therefore became entitled to the estate. The Government denied the factum of adoption as well as its validity. For the defence it was alleged that Ramabai had the authority of her husband to adopt and in any event the adoption was made with the consent of her husband's nearest kinsman Jagannath Singh. The lower Court found in favour of the factum of adoption but held that the consent neither of the husband nor of the kinsman was proved. Another ground taken by Kesar Singh was, that the suit of the Government was bound to fail as there was in any event an heir of Anantaram Singh in existence. The Subordinate Judge has found on this point in favour of the Government. The third ground of defence was, that Kesar Singh apart from this adoption was entitled to the property being a heritable bandhu of the late Anantaram Singh. On this point again the finding of the Subordinate Judge is against the defendant.

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Six points arose for decision:—

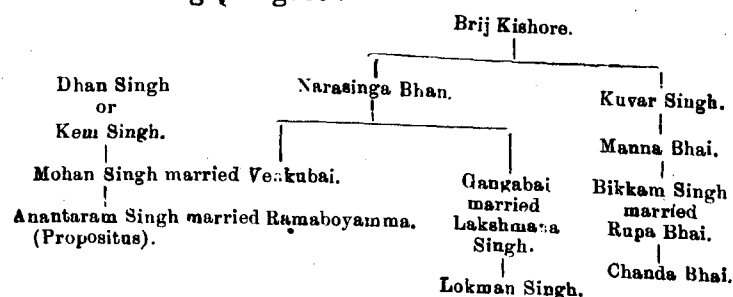
1. Did Anantaram Singh leave no heirs and did the property therefore escheat to the Government?
2. Was the adoption in fact made?
3. Did the widow have her husband's authority or consent to make the adoption?
4. Did Jagannatha consent to the adoption?
5. Is his consent sufficient in law to validate the adoption?
6. Is the 2nd defendant a heritable bandhu of Anantaram Singh?

Point No. 1.

The first point I proceed to consider is, whether it has been made out that there was an entire absence of heirs, which alone would render the property escheat to the Government. The second defendant Kesar Singh

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claims that he is the nearest heir. But for the present I shall assume that he has not made out his title. The question still remains, was there an heir to Anantaram Singh in existence and does the claim of the Government on that account fail? On behalf of the defence one Beecum Singh has been put forward as the heir of the deceased—barring the second defendant. If the relationship alleged between Beecum Singh and Anantaram Singh is true, it is not disputed that Beecum Singh would be a heritable bandhu and would thus exclude the Government. The relationship of Beecum Singh as gathered from the evidence may be set forth in the following pedigree:—



Beecum Singh himself was examined and he completely proves this pedigree. [Then His Lordship discussed the oral evidence on this point and concluded as follows.]

The evidence points irresistibly to the conclusion that there was in existence an heir of Anantaram Singh, namely Beecum Singh, whose existence puts the Government out of Court. It is unfortunate that in this long and important trial such an obvious point was overlooked. I cannot also help noticing the strange course the Government took for establishing the absence of heirs. They chose to examine, in order to prove that there was no heir, two persons who had themselves claimed to be the heirs and who in the witness box reiterated that claim.

On my finding on this point, the suit of the Government fails. I shall however proceed to consider the other points involved in the case.

Point No. 2.

Was the adoption in fact made? The learned Subordinate Judge has found in favour of the factum of adoption. [Then His Lordship discussed the evidence on this point and concluded as follows.]

I am not therefore prepared to disturb the finding of the lower Court that the adoption did in fact take place.

Point No. 3.

Did Anantaram Singh authorize his wife to make an adoption? [His Lordship discussed the evidence on this point and concluded as follows.]

My conclusion on this point is that it has not been proved that Anantaram Singh authorized the adoption.

Point No. 4.

Did Jagannath Singh consent to the adoption? I may preface my remarks on this subject by saying that Kesar Singh, the second defendant, was related to Ramabai through her husband, being the latter's paternal aunt's son's grandson. He is also her blood relation being her brother's son. Jagannath Singh whilst being the maternal grandfather of Kesar Singh, also happened to be the nearest *bhinnagotra* sapinda living, of Anantaram Singh. Jagannath Singh was in fact Anantaram Singh's father's sister's son. The case put forward for the second defendant is, that Jagannath Singh consented to the adoption. It is suggested, that as it was considered desirable to have the requisite assent of the nearest sapinda in order to supply the husband's authority, should it be found wanting, Ramabai applied for the consent of Jagannath Singh.

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I shall briefly advert to the evidence on this point. [Then His Lordship discussed the evidence on this point and continued.]

An attempt is made to show by the learned Government Pleader that Jagannatha Singh's consent is bad, because it was given on Ramabai representing to him that she had her husband's authority. I do not think that this contention is sustainable. This suggestion was not made in the cross-examination of any of the witnesses, and reliance is placed upon a stray statement made by Chittar Singh, who says in cross-examination, that Ramabai told Jagannatha Singh that her husband had given her authority. Advantage cannot be taken of an isolated statement of this nature when the attention of not a single witness was called to this point.

The learned Judge's reasons for finding against the defence are the following:—

1. There is no writing.
2. Consent is referred to for the first time in this suit.

3. In Exhibit XVIII, dated 7th August 1923, written by Ramabai to the President, District Board, Kurnool, while she says that her husband gave the authority, she does not say that Jagannatha gave consent.

Each of these reasons is insufficient and unconvincing. If the consent was taken in writing, no question would now arise and we must therefore determine the truth of the case with reference to oral evidence and probabilities. There was no occasion to refer to this consent previous to the suit and the omission to mention it in Exhibit XVIII is immaterial. To refer to consent would be not only unnecessary but superfluous.

The learned Judge has not referred to the evidence of Lakshmana Singh at all and the Judge has necessarily failed to notice that he has not been even

cross-examined on the point. It is also worthy of notice that the learned Judge does not advert to the evidence in regard to the part which Jagannatha is said to have taken in the adoption and as I have said there is no indication that this point was even disputed. I am quite aware that from the mere fact that Jagannatha took part in the adoption, it cannot be inferred either that he supposed that he was giving the consent or that there was on his part such exercise of discretion as would render the consent effectual. See *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(1). But what I desire to say is, that the Judge entirely overlooked the point that the evidence left no room for doubt, that if Jagannatha's consent had been asked, it would not have been withheld. The Judge did not have an opportunity of watching the demeanour of some of the witnesses, notably, Lakshmana Singh. I am not for these reasons disposed to attach much weight to the finding of the learned Judge on this point. In my opinion, the consent of Jagannatha Singh has been proved.

Point No. 5.

The next point that has to be considered is, whether consent of Jagannatha Singh is sufficient. He was a bandhu, a bhinnagotra sapinda of the deceased, being his father's sister's son. It has been contended for the Government that as Jagannatha Singh was not an agnate of the last male owner, his consent would not be sufficient. It is urged that the consenting relation must be a male agnate of the deceased. In this case the question whether the consenting relation must be a male or a female does not arise. But it is said that it is only the consent of an agnate that will avail and that although

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cognates, that *bhinnagotra sapindas* are recognized for purposes of inheritance, they must be disregarded for the purpose of giving consent to an adoption. The law on the subject of kinsmen's consent has gradually been developed in the decisions of the Judicial Committee and though there might have been some indefiniteness in the law at one time, the question is, in my opinion, now free from doubt. The consent that is referred to in the rulings is that of "sapindas" which term includes both agnates and cognates and not that of agnates alone. To elucidate this point I shall refer to certain rulings of the Privy Council and from them the right principle can be deduced and they incidentally also show how the law on the point has been gradually developed.

The first case where the point was fully considered is the Ramnad case, *The Collector of Madura v. Mootoo Ramalinga Sathupathy*(1). In that it was decided that in the case of an undivided family the consent of the adopting widow's father-in-law is both requisite and sufficient. If the father-in-law be dead, the consent of the husband's brothers must be obtained. Where the husband was divided from his co-parceners, the consent of the father-in-law would be similarly sufficient. Where no father-in-law is in existence, the case must depend upon the circumstances of the family. There should be such evidence of the assent of the kinsmen as suffices to show that the act of the widow was done neither capriciously nor from a corrupt motive. In the particular case, the family was a divided one and to examine the soundness of the argument now advanced, it is important to bear in mind that the relations whose consent was held to be sufficient were:—

(1) Mootoo Veroyee, the adopting widow's mother-in-law :

(1) (1833) 12 M.I.A., 397.

(2) Muttuswami, the natural brother of Annaswami, the widow's father-in-law, and the nearest male relation alive.

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Their Lordships after observing that Muttuswami was not a sapinda but only a samanodhaka, added that he was the natural brother of Annaswami and that circumstances might strengthen his title to be considered the natural male protector of Ramaswami's widow.

I refer to this case for the purpose of showing that the contention urged by the Government, that it is the consent of a male agnate that is required, is utterly wrong. Mootoo Veroyee was an agnate but was clearly not a male. Muttuswami while being a male was clearly not an agnate in so far as his position was referable to that of the natural brother of Annaswami.

In tracing the development of the law, it is also useful to notice that their Lordships in this judgment advert to two considerations:—

- (1) Observance of religious duty, and
- (2) Heirship to property.

I shall presently show the later development of this branch of the subject. Before passing on from this case I need only observe, that the view was expressed in it, that the consent of every kinsmen however remote is not essential. The expression used in the judgment throughout is "kinsmen" excepting in the last paragraph where the word "sapinda" is used.

The next case is *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(1). In this case the principle was reaffirmed that where the family is undivided the requisite authority is to be sought within the family itself. The relations whose consent is necessary are again described as the husband's kinsmen. While their

(1) (1876) I.L.R., 1 Mad., 69 (P.O.).

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Lordships recognize the importance of an adoption being a religious act, they again indicate that considerations regarding devolution of property cannot altogether be lost sight of (page 83). One of the propositions of Mr. Justice HOLLOWAY from which the Privy Council expresses dissent is, that proximity to the deceased with respect to rights of property is not an element to be considered. (See page 82.)

The next case is *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(1). The point actually decided was, that if the adopting widow has not acted capriciously or from a corrupt motive, the court ought not to minutely examine the motives operating on her mind. There should be proof of assent on the part of the sapindas, their Lordships observed, as should be sufficient to support the inference that the adoption was made upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband. The reference to "expediency" shows that an adoption is not considered wholly in the nature of the spiritual act and that temporal considerations cannot be disregarded. The relations indicated in this case are the deceased husband's "sapindas."

In the next case, *Venkanema v. Subramaniam*(2), the facts that arose necessitated a more definite statement of the law. Besides deciding that the quality of the assent in question was bad, it further decided that the consent of one of the two cousins of the deceased was insufficient, the other of the same degree not having been consulted at all. The deceased's relations are again referred to in this judgment as his kinsmen.

(1) (1876) I.L.R., 1, Mad., 174 (P.C.).

(2) (1907) I.L.R., 30 Mad., 50 (P.C.).

We then come to the case of *Virabasavaraju v. Balasurya Prasada Rao*(1), where the doctrine of the kinsmen's consent is fully developed and takes a well-defined and definite form. This case after affirming the rule laid down in the *Ramnad Case* when the family happens to be undivided, lays down the following rules:—

(1) Where the husband was at his death in a state of separation, the father-in-law's consent is essentially requisite to the validity of the adoption.

(2) If there is no father-in-law, the assent of the divided brothers is equally requisite.

(3) If a majority assent and one refuses, his objection may be discounted. (The rule must on principle be extended to where the minority consists of more than one).

(4) The absence of the consent of the divided brothers or in case there is only one, want of his consent, cannot be made good by the authorization of distant relative.

(5) The reasons which make the assent of the divided brothers a requisite condition apply *mutatis mutandis* to the case of the nearest sapindas other than brothers.

This case places the law beyond doubt. Where there are relations of various degrees, the consent of the nearest must be obtained. The consent of the majority will be sufficient and if there is only one, his consent will be requisite. The reason for insisting upon the consent of the nearest sapindas is stated to be that they are interested in the well-being of the widow (in other words) that they are her natural guardians and that they are interested in the spiritual welfare of the deceased or in the protection of his estate. I may, in passing, remark that if the nearest sapinda happens to be sufficiently

(1) (1918) I.L.R., 41 Mad., 998 (P.C.).

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remote, the first two elements exist only in theory. The consideration that uniformly holds good is the third consideration, namely, that pertaining to the devolution of property. In this connection it is useful to note, as indicating the development of the doctrine, the emphasis their Lordships lay upon the temporal aspect of adoption. They point out that although some expressions in *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (1) might imply that the question of reversionary interest forms only a secondary consideration there are other remarks in the same case coupled with the observations in the *Vellanki Venkata Krishna Rao v. Venkatarama Lakshmi* (2) which show that rights to property cannot be left out of consideration. In this connection, they cite, doubtless with approval, the words of *Sarkar Shastri* to the effect that an adoption is more a temporal than a spiritual institution.

The last case of the Privy Council on this point is *Krishnayya v. Lakshmipathi* (3). The principles laid down in the previous cases are affirmed and the case is again a distinct authority for the proposition that the consent required is that of a majority of the nearest sapindas.

None of these cases gives support to the theory that the consent must be that of *agnates*. Dealing with particular facts, their Lordships have sometimes no doubt used the expression "agnates" but it is scarcely right to attach importance to the casual use of a word and lose sight of clearly stated principles. As an instance I may point out that for the respondent a passage was strongly relied on in the judgment in *Veerabasavaraju v. Balasurya Prasada Rao* (4), where the effect of the *Ramnad Case* is stated to be, that in the

(1) (1868) 12 M.I.A., 397.

(2) (1876) I.L.R., 1 Mad., 174 (P.O.).

(3) (1920) I.L.R., 43 Mad., 650 (P.O.).

(4) (1918) I.L.R., 41 Mad., 998 (P.O.).

absence of authority from her husband a widow may adopt a son "with the assent of his male agnates." Can it be said that these words were intended to control the actual decision in the *Ramnad Case*, which, it is clear beyond doubt, as I have shown, is not that the assent of the male agnates is requisite? Far from *Veerabasavaraju v. Balasurya Prasada Rao* (1), being an authority for any such position, it clearly shows that the consent that is deemed requisite is that of the husband's *sapindas*. Are we to ignore the repeated use of the word "sapindas" and kinsmen" on the ground that the word "agnate" is in some places used? The reasons given and considerations adverted to apply equally to cognates, i.e., *bhinna-gotra sapindas*, as to agnates or *sagotra sapindas*. In the later cases most distinct emphasis is laid upon the reversionary interest of the consenting kinsmen.

If the view urged for the Government is correct, it would follow that in the absence of authority from her husband when there are no agnates living the widow cannot make an adoption at all. A most distant agnate can by giving consent validate an adoption, whereas a very near kinsmen if he happens to be a cognate, cannot give consent. Is this distinction based on any principle? Though under the law cognates are postponed to agnates, several of the former class are more closely related to the deceased than many of the latter class. If the consenting cognates are the immediate reversioners I fail to see why their assent should not be sufficient. They are interested in the protection of the estate and it is their reversionary interest that is affected. Some relations who are cognates are more directly interested in the well-being of the widow and the spiritual welfare of the deceased than many remote agnate relations.

(1) (1818) I.L.R., 41 Mad., 998 (P.O.).

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There is nothing in these decisions which expressly or impliedly, gives countenance to the theory that in regard to consent, cognates stand on a footing different from that of agnates. In the scheme of the Mitakshra succession, cognates are, with the exception of the daughter's son, as a body postponed to agnates. As the consent of the nearer agnates is requisite and sufficient, so the consent, on failure of agnates, of the nearer cognates, would similarly validate an adoption. The rules laid down in the case of agnates, such as the view of the majority prevailing, must *mutatis mutandis* apply also to cognates. Judged from the standpoint of the particular relation being required to fill the position of the widow's natural guardian or to possess an interest in the spiritual welfare of her husband, several cognate relations, as several agnate kinsmen, may be found to lack the necessary qualifications; but the test of propinquity from the point of view of property will be found an unfailing test and a sure guide.

So far, I find no difficulty as this conclusion is fairly deducible from the rulings of the Judicial Committee. The Privy Council, however, has had no occasion to make a pronouncement as regards the rank to be assigned to the deceased's mother, his brothers, and his daughter's son if a conflict arises amongst them. Although for purposes of succession the order is, the daughter's son, the mother, the father, the brothers, it has now been decided that for the purpose of giving consent the father comes first. The mother according to the *Ramnad Case* has a place but the question remains where does she come? If the mother consents but the brothers refuse or the brothers consent and the mother refuses, what will be the result? In this scheme, what is the place of the daughter's son? When the contest has reference to this limited group, the point may

present some difficulty, and for an obvious reason. Each one of these relations, on account of close affinity to the widow's husband, holds an important position both from the spiritual and temporal standpoints; but in the case of remoter kinsmen, this element of difficulty does not exist. When the point I have indicated has to be decided, the observations of the Judicial Committee in regard to a family council may probably furnish a solution.

One aspect of this question actually presented itself in *Viswasundara Row v. Somasundara Rao*(1), and it was there decided that when the deceased's brothers assented to the adoption, the consent of the daughter's son was unnecessary. I refrain from expressing any opinion on the actual point decided in it, although I must confess with the greatest respect to the learned Judges, that I am unable to agree with much of the reasoning which supports their judgment. To take only one of the reasons, to say that the daughter's son owes no spiritual duty to the deceased is against the spirit and the letter of the Hindu Law and is opposed to Hindu sentiment. I do not, however, wish to enter into a detailed consideration of the reasons as I am generally in agreement with the criticism of this judgment by RAMESAM, J., in *Anne Brahmayya v. Chelasami Rattayya*(2).

The point that has to be decided in the present case however is, there being no agnate relation and the nearest cognate relation who under the law would be the presumptive reversioner having assented to the adoption, does his consent validate it? In my opinion, it clearly does.

The Sixth Point.

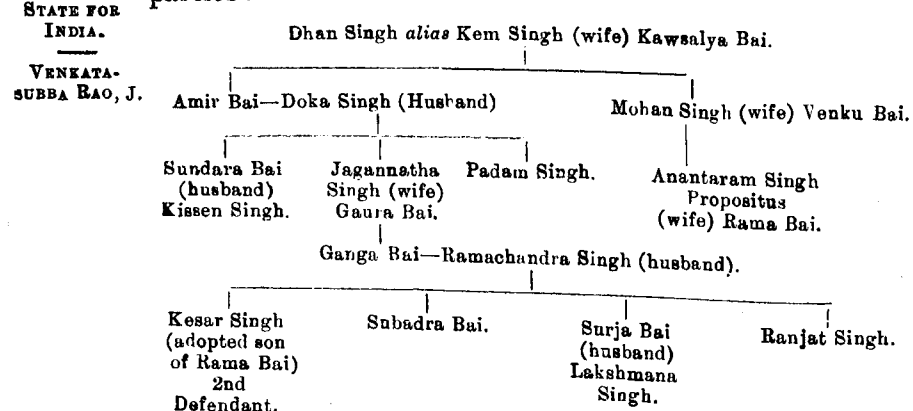
I shall now deal with the sixth and the last point, is Kesar Singh a heritable bandhu of Anantaram Singh?

(1) (1920) I.L.R., 43 Mad., 878.

(2) (1924) 20 L.W., 503.

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KESAR SINGH v. SECRETARY OF STATE FOR INDIA. The following pedigree explains the relationship of the parties :—



It is contended on behalf of the Crown that Kesar Singh is not a heritable bandhu of the propositus. The contention is based on what is known as the "line theory" of Professor Rajkumar Sarvadhikari. It is urged on the other side that judged by the tests accepted in the rulings of the highest authority the appellant is entitled to succeed and the doctrine formulated by Sarvadhikari does not find support in the works of the ancient expounders of law.

To deal with these contentions, it is necessary to glance briefly at a few of the leading principles in regard to the law of bandhu succession. The right of bandhus, or kinsmen related to the deceased through females, to succeed, is primarily based upon the text of Yagnavalkya which runs thus :—

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

Let us now turn to Vignaneswara's commentary, the Mitakshara. The subject is dealt with in Chapter II, sections 5 and 6 of Mr. Colebrooke's translation of

that work. On failure of brother's sons, says the Mitakshara (section 5) gotrajas or agnates share the estate. Paternal grandmother is said to take the inheritance first. Then the order of succession is given to gotraja sapindas. By way of parenthesis, Vignaneswara says that he is dealing in this section with the succession of samana-gotra sapindas only, as bhinna-gotra sapindas are indicated by the term bandhu. The sanskrit words are—

Bhinna-gotra Sapindanam bandhu sabdana grahanat.—

Here then do we find the definition of the word bandhu. That word is used to indicate bhinna-gotra sapindas, the opposite of the terms gotraja-sapindas or samana-gotra sapindas.

Section V, as I have said, deals with the succession of gotrajas. In section VI, the bandhu succession is dealt with. According to the text of Yagnavalkya cited above, bandhus take the estate after the gotrajas and the order of succession among the bandhus is described in section VI. In this connexion it is unnecessary to refer in more detail to this section to which I shall return later.

We have thus seen that the term bandhu is synonymous with bhinna-gotra sapindas or sapindas belonging to a different family (gotra). Who then are sapindas? To understand this term, we must first turn to clause 6 of section V. It is there indicated that "the relation of the sapindas ceases with the seventh person." But we must bear in mind that section V is confined, as I have said, to the laying down of the order of succession of gotraja-sapindas. The limit of the seventh degree is thus expressly stated with reference to gotraja-sapindas of the same family. In the Chapter of the Mitakshara dealing with inheritance (Vyvaharadhyaya) the word "sapinda" as it occurs in the expression

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bhinnagotra sapinda has not been defined. In Achara-dhyaya (chapter on the rules of conduct) to which I must now advert Vignaneswara lays down the rules in regard to marriage.

The Author says:—

“He should marry a girl who is non-sapinda with himself. Non-sapinda means, not his sapinda. Sapinda relationship arises between people through their being connected by particles of one body.”

Vignaneswara here recognizes that the word sapinda understood in this its etymological sense, may be applied almost to all men and it is necessary to limit it, in its signification, to certain definite individuals.

Vignaneswara proceeds to say that with the object of so limiting it, Yagnavalkya has laid down “After the fifth ancestor on the mother’s and after the seventh on the father’s side” the relationship of sapinda ceases.

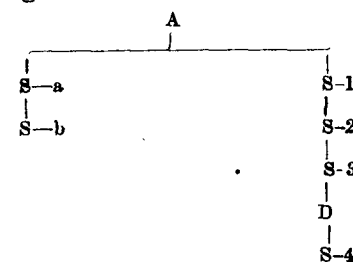
Panchamat Saptamat Urdhvam Mutrutha Pitruta-statha.—This text means, says the Commentator—

“On the mother’s side in the mother’s line after the fifth, on the father’s side in the father’s line after the seventh (ancestor) the sapinda relationship ceases.”

By this process we arrive at the meaning of the word bandhu. In Vyvaharadhyaya we find that bandhus are described to be bhinna-gotra sapindas. This is the first stage. We then find it stated in the Acharadhyaya that the sapinda relationship ceases beyond the fifth in the mother’s line and beyond the seventh in the father’s line. This is the second stage. Putting these two parts of the definition together we arrive at the result that a bandhu is a relation belonging to a different family not removed beyond the fifth degree in the mother’s line or beyond the seventh in the father’s line. I have so far dealt with the test of Vignaneswara’s commentary upon it.

I shall now pass on to another text, the text of Manu which reads thus:—

Anantarah Sapindathyah tasyatasyadhanam bhavet which has been understood as meaning “the property of a near sapinda shall be that of a near sapinda.” This is the foundation of the doctrine that the relation of sapindaship must be mutual. I shall illustrate this by the following diagram:—



In this diagram *S* represents a male and *D* a female. Are *S-b* and *S-4* sapindas of each other? *S-b* is connected through his father and is within the prescribed seven degrees from the common ancestor *A*, but *S-4* who traces descent through his mother is beyond the limit of five degrees from *A*. There is therefore no mutuality of sapinda relationship between *S-b* and *S-4*. This element of mutuality being absent, they cannot inherit to each other.

Let me now apply the rules I have so far deduced, to the present case. Dhan Singh is the common ancestor of Kesar Singh the claimant and Anantaram Singh the propositus. Kesar Singh claims relationship through his mother Gangabai and is fifth in descent from Dhan Singh. Anantaram Singh traces relationship through his father Mohan Singh and is third in descent from the common ancestor. The test of degree as well as the test of mutuality are thus satisfied. If these are the only two tests that are to be applied, Kesar Singh’s claim to be a heritable bandhu must be upheld.

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This leads me on to a discussion of what I have described as the line theory of Professor Sarvadhikari.

Chapter II, section 6 of Mr. Colebrooke's translation of the Mitakshara must in this connexion be referred to.

After having dealt with agnates in section 5, Yagnavalkya deals with bandhus in section 6.

He says:—

"On failure of agnates the cognates are heirs. Cognates are of three kinds, related to the person himself, to his father or to his mother as is declared by the following text."

The text of Vridhasatatapa is then cited which groups bandhus under three headings.

(1) *Atma Bandhus*.—Sons of his own paternal aunt, sons of his own maternal aunt and sons of his own maternal uncle.

(2) *Pitri Bandhus*.—Sons of his father's paternal aunt, sons of his father's maternal aunt and sons of his father's maternal uncle.

(3) *Matri Bandhus*.—Sons of his mother's paternal aunt, sons of his mother's maternal aunt and sons of his mother's maternal uncle.

Vignaneswara then proceeds:—

"Here by reason of near affinity atma bandhus are his successors in the first instance, on failure of them Pitri bandhus or if there be none Matri Bandhus. This must be understood to be the order of succession here intended."

Professor Sarvadhikari evolves a theory out of this. He proceeds in this way—The bandhus specifically mentioned, will, on an examination, be found to belong to certain families and he infers therefrom that heritable bandhus must be restricted to those families. The families are the following:—

(1) The family of the propositus.

(2) The family of the mother's father of the propositus.

(3) The family of the father's mother's father of the propositus.

(4) The family of the mother's mother's father of the propositus.

To this Professor Sarvadhikari feels obliged to add the cognate descendants of the propositus.

I shall now state the five groups of bandhus prepared on this basis:—

(1) His (propositus's) cognate descendants, family No. 1.

(2) Cognate descendants of his agnate ascendants, family No. 2.

(3) Descendants of his mother's agnate ascendants, family No. 3.

(4) The descendants of his father's mother's agnate ascendants, family No. 4.

(5) The descendants of his mother's mother's agnate ascendants, family No. 5.

In the present edition of Sarvadhikari's work the bandhus belonging to the first three families are termed atma bandhus, the bandhus belonging to the fourth family, Pitru bandhus, the bandhus, belonging to the fifth family, Matri bandhus. As I have already said, according to this doctrine, a person who does not belong to these five families cannot be a heritable bandhu. First then, we have to ascertain whether applying this rule the claimant is a heritable bandhu of the propositus. Then we have to apply the test of mutuality, that is, we have to determine, whether applying the same rule the propositus is a heritable bandhu of the claimant.

Now taking the facts of the present case, the claimant, from the point of view of the propositus, falls within the five families. Kesar Singh is a cognate descendant of Anantaram's agnate ascendant. But

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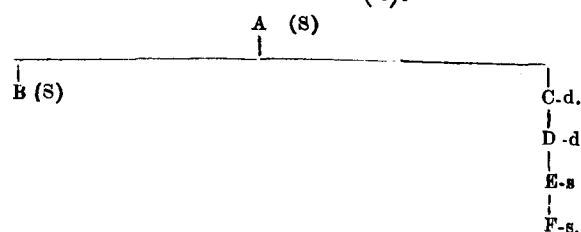
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Anantaram, from the point of view of Kesar Singh, does not belong to one of the five prescribed families. Thus the test of mutuality is wanting. Kesar Singh's claim cannot therefore be upheld if this theory is adopted.

The question is, does this doctrine find support either in any ancient text or recognized commentary. No authority is relied on by the learned author. The result of applying the rule laid down by him is to further narrow the class of heritable bandhus. My remarks are not intended to be a criticism of his theory as such. It may be both logical and rational, but it is the duty of the court to interpret and apply the law as it stands and I find no justification for accepting the view of Prof. Sarvadhikari. This rule has not received the approval of the Judicial Committee.

The learned Government Pleader invites our attention to three cases. The first case he relies upon, is *Umaid Bahadur v. Udoi Chand* (1).



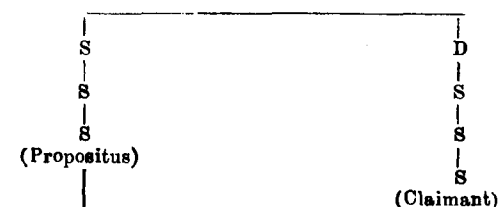
E in the diagram above given was the claimant in the case, and the learned Judges held that he could succeed to the estate of *B* the propositus. This was the point decided and so far there is nothing in the case to support the respondent's contention. Having held that *E* can inherit, the learned Judges went on to add, at the close of their judgment, that *F* would not be a bandhu and no reasons are given. This is clearly an *obiter dictum*. It is suggested and this seems to be the case, that this decision having been given at the time

(1) (1881) I.L.R., 6 Cal., 119 (F.B.).

Sarvadhikari delivered his lectures, the learned Judges adopted his view and in the illustration gave expression to it.

Nor did the present question arise in *Babu Lal v. Nanku Ram*(1), which is relied on merely because certain observations in the previous case *Umaid Bahadur v. Udoi Chand*(2) were cited in the judgment. To remove any misapprehension I must state that at page 345 certain relations are found grouped in five classes, and beyond the mere accident that the families mentioned by Sarvadhikari are also five in number, there is nothing in common between the five groups in this judgment and the five families of Sarvadhikari.

The third and the last case relied on for the respondent is *Chinna Pichu Iyengar v. Padmanabha Iyengar*(3). The claimant in that case is indicated in the following diagram:—



The claim was disallowed on the authority of *Umaid Bahadur v. Udoi Chand*(2). NAPIER, J., expressly said that he would adopt the view of Sarvadhikari for the reason that *Umaid Bahadur v. Udoi Chand*(2) had never been doubted. This view however, did not commend itself to the other learned Judge, SADASIVA AYYAR, J., but he agreed with NAPIER, J., in disallowing claim on the somewhat curious ground that he is generally against claims by remote relations and that only by legislation the anomalies of the present law could be removed.

(1) (1895) I.L.R., 22 Cal., 339. (2) (1881) I.L.R., 6 Cal., 119 (F.B.).
(3) (1921) I.L.R., 44 Mad., 121.

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I do not think there is such authority as will compel us to accept the view of Professor Sarvadhikari which finds no support in the texts or ancient commentaries and which has the effect of unduly limiting the bandhus who can inherit. Several commentators have refused to recognize the dictum of this learned writer as correct. I need only mention Ghose and Sircar Shastri.

In the table given in Sir Sankaran Nayar's edition of Mayne, a person is indicated as the heritable bandhu who occupies the position of Kesar Singh although in the table given in the present edition which is apparently modelled upon Sarvadhikari, that relation is omitted.

The subject of bandhu succession was considered at some length in *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(1). Among the tests laid down, in the very instructive judgment, is not to be found the test now under discussion. Although their Lordships refer to passages in *Umaid Bahadur v. Udoi Chand*(2) and *Babu Lal v. Nanku Ram*(3), as also to the work of Sarvadhikari, there was no necessity to consider the present point.

It has been suggested that as the authority of Sarvadhikari as an eminent lawyer has been recognized by the Judicial Committee we must adopt the rule formulated by him on this head. I do not think that this is a safe guide. Now turning to the five families as classified by Sarvadhikari, father's father's sister's son is described as atma bandhu, whereas according to the text he is a pitru bandhu. And again, mother's father's brother's son and mother's father's sister's son are, according to Sarvadhikari, atma bandhus, whereas they are, according to the text, matri bandhus. According to Sarvadhikari again, the bandhus in the first two

(1) (1915) I.L.R., 42 Cal., 384 (P.C.) (2) (1881) I.L.R., 6 Cal., 119 (F.B.).
(3) (1895) I.L.R., 22 Cal., 339.

families must be exhausted before a bandhu in the third family can come in. This view has been dissented from by the Privy Council in *E. O. Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar*(1). In that case mother's brother was preferred to father's sister's son, that is a relation in family No. 3 (Sarvadhikari) was preferred to a relation in family No. 2 (Sarvadhikari). At page 409 their Lordships describe a father's father's sister's son as a pitru bandhu which is in consonance with the text, but is against the view of Sarvadhikari. It is noteworthy that in *Muttusami v. Muttukumarasami*(2), which is the decision of the Madras High Court affirmed by the Privy Council in the *E. O. Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar*(1), the grouping of Sarvadhikari was not accepted.

In *Vedachela Mudaliar v. Subramania Mudaliar*(3) the dicta of MUTTUSWAMI AYYAR, J., in *Muttusami v. Muttukumarasami*(2) were approved by the Judicial Committee. I have arrived at the conclusion that the view of Professor Sarvadhikari on this point cannot be accepted.

I cannot conclude the discussion of this point without adverting to one matter which I think is of some importance. I have said in the course of this judgment that in the case of bandhus, sapinda relationship ceases beyond the fifth from the mother and the seventh from the father. This is repeatedly referred to in the judgment of the Judicial Committee in *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(4). The question in that case was whether the plaintiffs who claimed through their mother but who were bhinnagotra sapindas beyond the fifth degree could inherit. It was held that they could not. I refer to this point,

(1) (1896) I.L.R., 19 Mad., 405 (P.C.) (2) (1893) I.L.R., 16 Mad., 28.
(3) (1921) I.L.R., 44 Mad., 753 (P.C.) (4) (1915) I.L.R., 42 Cal., 384 (P.C.).

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because there are some observations in the judgment which may at first sight seem to imply that the limit of sapinda relationship in the case of bandhu ceases with the fifth degree irrespective of whether the claim is traced through the father or the mother. The District Judge had held "that the appellants claiming through their mother and being sixth in descent from their common ancestor Timaji Pant were outside the limits of heritable bandhus recognized by the Mitakshara law and had no claims" (see page 291). This was the view that was affirmed by the Privy Council. There is nothing in the judgment to suggest that their Lordships intended to do away in the case of bhinnu-gotra sapindas the well recognized distinction dependent upon whether the claim is traced through the father or the mother. The view which their Lordships refused to accept is that of Golapchandra Sarkar Shastri—the view which was pressed before the Judicial Committee by Mr. De Gruyther to the effect that the word "bandhu" includes either all cognate relations without any restriction or at any rate all cognates within seven degrees on both the father's as well as on the mother's side. The distinction to which I have referred is recognized in all works of Hindu law whether the writer belongs to the school of Sarvadhikari or not. It was not suggested in the course of the arguments before us, that such a distinction does not exist, but I have considered it necessary to make these remarks as in what I have stated I have recognized this distinction.

My conclusion, therefore, is that Kesar Singh is a heritable bandhu of Anantaram Singh and the claim of the Government must fail on this ground also.

In the result, the appeal succeeds and it is allowed and the suit is dismissed. I agree in the order as to costs made by my learned brother.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice
Madhavan Nayar.

THIRUKONA ELLARAYYAN (DEFENDANT), APPELLANT,
v.

1926,
January 7.

NAKONDA NAGASWAMI AYYAR (PLAINTIFF), RESPONDENT.*
Transfer of Property Act (IV of 1882), ss. 88 to 93—Civil Procedure Code (Act V. of 1908), O. XXXIV, rr. 4, 5 and sec. 11—Suit for sale by mortgagee—Preliminary decree—Final decree—Non-execution by mortgagee—Suit by mortgagor for redemption—Bar—Res judicata.

Where, after a preliminary decree for sale on a mortgage had been passed, the mortgagor failed within the time fixed in the decree to pay up the amount due under the decree and a final decree for sale was obtained, but the mortgagee did not execute the final decree and continued in possession, the mortgagor cannot institute a suit for redemption against the mortgagee.

The rule of *res judicata* laid down by the Full Bench in *Vedapuratti v. Vallabha Valiya Raja* (1902) I.L.R., 25 Mad., 300 (F.B.), is applicable to a suit for redemption, as much under Order XXXIV of the Civil Procedure Code, 1908, as under the repealed provisions of the Transfer of Property Act, even though the mortgagor was only a defendant in a prior suit for sale on the mortgage instituted by the mortgagee.

Case law, reviewed.

APPEAL under clause 15 of the Letters Patent against the Judgment of DEVADOSS, J., in Second appeal No. 1139 of 1922 against the decree of H. R. BARDSWELL, District Judge of Madura, in A.S. No. 289 of 1921, against the decree of the District Munsif of Madura in Original Suit No. 300 of 1920.

The defendant was a usufructuary mortgagee under a deed executed on 29th August 1904, which contained a covenant to pay the amount. He brought a suit in 1912

* Letters Patent Appeal No. 32 of 1925.

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for sale on his mortgage, obtained a preliminary and a final decree on 14th October 1913 and 25th February 1914, respectively. The mortgagee did not take any action in execution of the final decree. The plaintiff, who had obtained a subsequent mortgage during the pendency of the former suit and brought a suit thereon against his mortgagor, obtained a final decree therein and purchased the property himself in execution, instituted the present suit to redeem the prior mortgagee in possession. Both the lower Courts dismissed the suit as barred by the rule of *res judicata*. The plaintiff preferred a second appeal which came on for hearing before DEVADOSS, J. His Lordship held that the suit was not barred, and reversed the decrees of the lower Courts and remanded the suit for disposal on the merits. Against this judgment, the defendant preferred this appeal under the Letters Patent.

T. L. Venkatarama Ayyar for appellant.—The present suit is barred by the rule of *res judicata*. See *Ranga Ayyangar v. Narayana Chariar*(1). That decision has been distinguished by DEVADOSS, J., on the ground that it was inapplicable to a case governed by the present Civil Procedure Code. The doctrine of *res judicata* is one of substance and is not affected by the change in the procedure governing mortgage suits. The decision in *Ranga Ayyangar v. Narayana Chariar*(1) is reached with reference to the provisions of both the Transfer of Property Act and the Civil Procedure Code. It is true that the clause in section 89 of the Transfer of Property Act providing for the extinction of the right to redeem has not been re-enacted in Order XXXIV, Rule 5. But the omission is immaterial. Even assuming that the right to redeem is alive it cannot be enforced by suit. The decision in *Vedapuratti v. Vallabha Valiya Raja* (2) is that of a Full Bench and is applicable to this case. The provisions of Order XXXIV of the Civil Procedure Code and the forms of mortgage decrees given in the Appendix clearly show that the matters in issue in a mortgage suit are identical, whatever the form of the suit. The preliminary decree in every

(1) (1916) I.L.R., 39 Mad., 896. (2) (1902) I.L.R., 25 Mad., 300 (F.B.).

case has to declare the right to redeem and give some time to the mortgagor to redeem. It is only in default of such redemption that the consequential rights vary in accordance with the form of the suit.

The Bombay High Court has in XLIII, Bom. 335, taken the view that a second suit for redemption will lie and has dissented from the decision in *Vedapuratti v. Vallabha Valiya Raja*(1). DEVADOSS, J., has in effect followed this decision in preference to the Madras view.

C. S. Venkata Achariar for the respondent.—*Vedapuratti v. Vallabha Valiya Raja*(1) is a decision under the Transfer of Property Act and inapplicable to a case arising under the present Civil Procedure Code. *Mallikarjunadu Setti v. Lingamurti Pantulu, &c.*(2), a Full Bench case, held that preliminary decrees under the Transfer of Property Act were executable and so it was held that there being an executable preliminary decree a second suit will be barred as *res judicata*. Under the present Code preliminary decrees are declaratory; and as the final decree for sale does not provide for redemption there is no executable decree and hence there is no *res judicata*. *Ranga Ayyangar v. Narayana Chariar*(3) was also a case of an executable decree. In *Adipuram Pillai v. Gopalasami Mudali*(4) it was held that the mortgagor could pay the decree amount even after the time specified in the decree and at any time before sale and on such payment recover possession through court; and that is because, the preliminary decree being executable, possession can be recovered through court. Under the present Code that right is taken away.

The omission of the clause in section 89, of the Transfer of Property Act providing for the extinction of the right to redeem on the passing of an order under that section shows that the right to redeem is kept alive under the present Code, even after the final decree. See also *Abdul Shaker Sahib v. Abdul Rahiman Sahib*(5).

Moreover, *Vedapuratti v. Vallabha Valiya Raja*(1) relates to a second suit for redemption and the decision is right because the same man cannot come to the court as plaintiff once again. But in a mortgagee's suit for sale the mortgagor is a

(1) (1902) I.L.R., 25 Mad., 300 (F.B.). (2) (1902) I.L.R., 25 Mad., 244 (F.B.).
(3) (1916) I.L.R., 39 Mad., 896. (4) (1908) I.L.R., 31 Mad., 354.
(5) (1923) I.L.R., 46 Mad., 148.

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AYYAR. defendant and if he is a decree-holder he is a decree-holder in spite of himself, *Adipuranam Pillai v. Gopalasami Mudali*(1). There is no reason why he should be precluded from enforcing his right to redeem as a plaintiff. *Ranga Ayyangar v. Narayana Chariar*(2), is an unwarranted extension of the principle in *Vedapuratti v. Vallabha Valiya Raja*(3) and the contrary view in *Rama v. Bhagchand*(4) is the correct view.

The decision in *Vedapuratti v. Vallabha Valiya Raja*(3) is itself opposed to several decisions of the Privy Council. See *Gokuldoss v. Kriparam*(5); *Hari Ravji Chiplunkar v. Shapurji Hormusji Shet*(6); and *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*(7). Reference was also made to *Senhouse v. Earl*(8), *Quarrel v. Beckford*(9) and *Marshall v. Shrewsbury*(10).

T. L. Venkatarama Ayyar in reply.—The Privy Council cases in (5), (6) and (7) have been considered and construed by the Full Bench in *Vedapuratti v. Vallabha Valiya Raja*(3) and that construction is binding on this court. In *Gokuldoss v. Kriparam*(5) the decree did not provide for the mortgagor redeeming at all and is even a weaker case than *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*(7). There being no subsequent decision of the Privy Council disapproving *Vedapuratti v. Vallabha Valiya Raja*(3), it is good law in Madras. It is no valid distinction to say that the mortgagor was a defendant in the prior suit and a plaintiff in the present one. In proper cases even a defendant's right to redeem might be extinguished. See *Sri Gopal v. Pirthi Singh*(11) and *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*(12).

There is no change in substance under the Civil Procedure Code. The question of the executability or otherwise of the preliminary decree is immaterial. Though there was a difference of opinion among the Judges, in *Mallikarjunadu Setti v. Lingamurti Pantulu &c.*(13), as to executability of the decree the same learned Judges unanimously held in their judgment, delivered on the same day, in *Vedapuratti v. Vallabha Valiya Raja*(3), that a second suit for redemption was barred as *res judicata*.

(1) (1908) I.L.R., 31 Mad., 354.

(3) (1902) I.L.R., 25 Mad., 300 (F.B.).

(5) (1973) 13 Ben.-L.R., 205 (P.C.).

(7) (1898) I.L.R., 19 Mad., 249.

(9) (1816) 1 Madd., 209.

(11) (1902) I.L.R., 24 All., 429 (P.C.).

(13) (1902) I.L.R., 25 Mad., 244 (F.B.).

(2) (1916) I.L.R., 39 Mad., 898.

(4) (1915) I.L.R., 39 Bom., 41.

(6) (1886) I.L.R., 10 Bom., 461 (P.C.).

(8) (1752) 2 Ves. Sen., 449.

(10) (1875) 10 Ch., App. 250.

(12) (1912) I.L.R., 39 Calc., 527 (P.C.).

The plea of bar under section 11 is not affected by any theory of executability or otherwise of a preliminary decree. *Adipuranam Pillai v. Gopalasami Mudali*(1) decided that the mortgagor could deposit the decree amount after the time given in the decree only in his character as a judgment-debtor and not as a mortgagor. That right even now the mortgagor has under the Civil Procedure Code.

The omission of the clause in section 89 of the Transfer of Property Act providing for the extinction of the right to redeem does not affect the substance, because the same result is arrived at in the present Code even without that clause. A second suit on the original cause of action for redemption is clearly extinguished by the decree in the previous suit.

JUDGMENT.

WALLACE, J.—The original suit in this case was a suit for redemption of a mortgage. The suit property was mortgaged usufructually to the defendant on 29th August 1904. In the mortgage was also a personal covenant to pay. The defendant sued on 2nd August 1912 in Original Suit No. 430 of 1912 and got a preliminary decree for sale on 14th October 1913 and a final decree on 25th February 1914. No action was taken by him under the final decree. On 2nd September 1912 *pendente lite* the same mortgagor mortgaged the property to the plaintiff's father. The plaintiff sued in Original Suit No. 239 of 1918 and got a decree for sale in 1918, brought the property to sale and bought it in Court-auction. He now sues to redeem the mortgage. The plaintiff was not a party to the suit of 1912, but the defendant contends that, as his mortgage was *pendente lite* and the plaintiff, therefore, has no higher rights than his mortgagor, and as the mortgagor did not choose to redeem under the decree of 1913, the mortgagor and therefore the plaintiff is barred by *res judicata* from redeeming. Both the trial Court and the lower Appellate

(1) (1908) I.L.R., 31 Mad., 354.

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Court held that the suit was barred by *res judicata*. In second appeal DEVADOSS, J., has held that it is not, and against this judgment this Letters Patent appeal is filed. It has been ably argued at length before us by Mr. C. S. Venkatachariar for the plaintiff and Mr. T. L. Venkatarama Ayyar for the defendant.

The real question at issue may be shortly stated, but cannot be as shortly answered. It is, when a mortgagor has failed within the time fixed in the preliminary mortgage decree for sale to pay up the amount due under the decree and a final decree for sale has been obtained, does a suit for redemption by him lie or is his cause of action barred by *res judicata*? There is a long series of decisions, some taking one view and some the other, passed before and under the provisions of the Transfer of Property Act; but there is no direct decision under the present Civil Procedure Code after the repeal of sections 86 to 89, 92 and 93 of the Transfer of Property Act and their re-birth in other form under Order XXXIV of the Civil Procedure Code. The most important case in this Court is the Full Bench decision in *Vedapuratti v. Vallabha Valiya Raja*(1), passed under the old provisions of the Transfer of Property Act and the Civil Procedure Code, and, if the principles of that decision have not been reversed by the Privy Council and are still applicable in spite of the changes in the law, that decision is binding on this Bench. Otherwise, the matter is *res integra*.

The case with which the Full Bench had to deal was based on a usufructuary mortgage of 1858. There had been a suit and a decree for redemption, the decree being passed under section 92 of the unamended Transfer of Property Act containing a provision for sale of the

(1) (1902) I.L.R., 25 Mad., 300 (F.B.).

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mortgaged property, if the mortgage amount was not paid, but containing no foreclosure clause. The decree was not executed and the decree amount was not paid, but no order absolute for sale under section 93 was obtained by the mortgagee. A second suit for redemption was then filed and the Full Bench was called on to decide whether in these circumstances the second suit was maintainable. It was held by all the five Judges that, whether or not the relationship of mortgagor and mortgagee subsisted, because of the fact that no order absolute under section 93 had been obtained, and the property, therefore, had not been sold, the cause of action, namely, the right to redeem, had become merged in the decree, and was, therefore, *res judicata* and no second suit for redemption would lie. We are not pointed to any subsequent decision of the Privy Council which has controverted that decision, and so far as it goes, therefore, it is binding on us. Mr. Venkatachari, however, contends that, even accepting that position, the present case differs from the Full Bench case in two vital particulars which will take it out of the purview of that decision. These differences are, first, that the first suit here on which the decree for sale was obtained was not a suit by the mortgagor for redemption but by the mortgagee for sale, and secondly, that the changes in the law since the Full Bench case render its principles no longer applicable. These two points may be dealt with together as they are intimately connected.

It is essential to recall the terms of the Transfer of Property Act under which that decision was passed. Under section 88 of that Act, in the event of the plaintiff mortgagee's success in a suit for sale the decree is, first, to take an account and declare the amount due, and secondly, to order that, if the mortgagor pays the amount into Court within the time fixed, he shall be put

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in possession of the property, and thirdly, to declare that, if the amount is not so paid, the property shall be sold. Section 89 provided that, if the mortgagor pays the amount within the time fixed, he shall get possession, and that, if payment is not so made, the mortgagee shall apply for an order absolute for sale and obtain it and thereupon the mortgagor's right to redeem and the security shall both be extinguished. A decree in a foreclosure suit sections 86 and 87 followed similar lines, and, in default of payment by the mortgagor, the plaintiff was entitled to obtain an order absolute declaring that the mortgagor is absolutely debarred from all right to redeem, and on the passing of such an order the mortgage debt is deemed to be discharged. A decree for redemption under sections 92 and 93 also followed similar lines, and the result of non-payment was that the defendant-mortgagee may apply for an order absolute that the mortgagor is absolutely debarred from all right to redeem, or that the property be sold and on the passing of such order the right to redeem and the security were extinguished. In this Court it was held by the majority of the Full Bench in *Mallikarjunadu Setti v. Lingamurti Pantulu, &c.*(1), that such orders absolute are not decrees but proceedings in execution. The decree to be executed was what is now styled the preliminary decree, and in such a decree in a suit for sale or redemption the decree, *inter alia*, directed payment of the money by the mortgagor and delivery thereon of the property by the mortgagee.

Now, Mr. Venkatachari's first point is this :—

When the decree for sale was under section 89 and not under section 93 it was open to the mortgagor even after the order absolute for sale to execute that decree

(1) (1902) I.L.R., 25 Mad., 244 (F.B.).

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so far as it was executable by him and to pay up the mortgage amount, in fact up to the time when the property was actually sold; and he deduces therefrom that the right to redeem was not put an end to by an order absolute for sale under section 89. This has, no doubt, been held in several cases, but it is essential to note that, after the order absolute, payment was open to the mortgagor not *qua* mortgagor under the provisions of the Transfer of Property Act, but *qua* judgment-debtor under the mortgage decree under the provisions of the Civil Procedure Code, which permit a judgment-debtor whose property is being sold in execution of a decree to pay up the decree amount at any time before the actual sale, even under certain circumstances after the sale itself. It is true that some of these decisions, for example *Ramunni v. Brahma Dattan*(1), *Bibijan Bibi v. Sachi Bewah*(2) and *Misri Lal v. Mitthu Lal*(3) seem to favour the view that such payment after the order absolute is made by the mortgagor *qua* mortgagor in the exercise of the right to redeem, that is, that the right to redeem was still open after the passing of the order absolute for sale. But such a view must be held to have been erroneous since the Privy Council has definitely laid down in *Het Ram v. Shadi Ram*(4) what the proper interpretation of section 89 of the Transfer of Property Act is. The language does not admit of doubt. Their Lordships say :—

“The construction which their Lordships put on the language so used is that on the making of an order absolute the security as well as the defendant's right to redeem are both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.”

(1) (1892) I.L.R., 15 Mad., 386.

(3) (1908) I.L.R., 23 All., 28.

(2) (1904) I.L.R., 31 Cal., 383.

(4) (1918) I.L.R., 40-All., 407 (P.C.).

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This brings section 89 into line with the clearer wording of section 93 on this point. Therefore any payment made by the mortgagor after the passing of the order absolute for sale is not a payment *qua* mortgagor in the exercise of the right to redeem, but a payment by a judgment-debtor to avert the sale, in the exercise of a right given him *qua* judgment-debtor, springing from and dependent on the execution of the decree by the mortgagee. Whether on such payment the Court could in execution restore the property to the mortgagor on the ground that the decree implied that the mortgagee could not have payment except on the condition of restoring the property is an open question which *Adipuranam Pillai v. Gopalasami Mudali*(1) is inclined to answer in the affirmative. In any case it is quite clear from the Privy Council dictum that under the old procedure both the security and the right to redeem were extinguished by the passing of the order absolute for sale and that the security, so far at least as the parties to the suit were concerned, was absorbed into the decree and had no further existence outside it.

It follows, therefore, that the opportunity to redeem, given to the mortgagor under the old decree for sale, just as under the old decree for foreclosure or redemption, might be lost for ever if the mortgagee obtained an order absolute under section 87, 89 or 93. When under the decree or in execution of it the opportunity to redeem might in a certain contingency be lost for ever, it is difficult, almost impossible, to say that the right to redeem was not a matter in issue in the suit. It would not, of course, be lost unless the conditions which entailed its loss were fulfilled, but it was certainly a matter in issue; it was so vitally in issue that

(1) (1908) I.L.R., 81 Mad., 854.

proceedings in the suit might result in its being lost for ever. This is the sum and substance of the Full Bench decision.

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Now all these sections of the Transfer of Property Act are gone and it is to be decided whether their disappearance involves the disappearance of the ground on which the former decision was based. Rules 2 and 3 of Order XXXIV of the Civil Procedure Code correspond to the old sections 86 and 87 of the Transfer of Property Act, Rules 4 and 5 to sections 88 and 89 and Rules 7 and 8 sections 92 and 93; but the clause under section 39 relating to the extinguishment of the security and the right to redeem has disappeared, and does not appear in Rule 5, though similar clauses are retained in rules 3 and 8. I think, however, it is clear that it does not appear in rule 5, because it is not necessary. Under the old procedure the preliminary decree which allowed redemption remained the executable decree, and, therefore the right to redeem was not extinguished automatically by the order absolute itself. So it was necessary to enact that on the passing of the order absolute it should disappear. Now the right to redeem embodied in the preliminary decree simply does not appear in the final decree which is now the executable decree. Therefore it disappears when the final decree is passed just as before it disappeared when the order absolute was passed. What was previously effected by direct statutory provision is now effected by procedure. But the contingency abovenoted still remains, namely, that when certain proceedings are taken in the suit after the preliminary decree for sale, the right to redeem is extinguished. In my view, therefore, the right to redeem is still vitally a matter in issue in the mortgage suit for sale. There is no essential change in the law which necessitates any inference that the principles laid down in the Full Bench case

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will not still apply. The final decree in its own terms makes it clear that the right to redeem is no longer enforceable under it, for it makes no provision for redemption. It cannot be that the adjudication on the right to redeem which was in issue in the suit and present in the preliminary decree somehow vanishes out of the suit upon the passing of the final decree. Before the final decree was passed, the mortgagor could not file a fresh suit for redemption, because a suit is still pending in which the relief he seeks for is given by the preliminary decree. He cannot by his own neglect attain a better position. I say "a better position," because obviously if he can in such circumstances file a fresh suit for redemption, he can choose his own time to redeem and is not bound to redeem within the time fixed by the preliminary decree. It seems to me an irrational contention that says in effect that the passing of a final decree resuscitates a right—the right to file a fresh suit for redemption—which expired on the passing of the preliminary decree. The effect no doubt is to enable the mortgagee to force redemption on the mortgagor and to convert his decree for sale into one for foreclosure, but that again is no new factor introduced by the new procedure.

The only case in which any feature of novelty arises, is when a mortgagee is in possession and has obtained a final decree for sale, which has put an end to the mortgagor's right to redeem, and will not proceed further to bring the property to sale. This is the case now before us and Mr. Venkatachari strongly urges that it puts the mortgagor in an unfair position, since he has under the final decree no power to compel the mortgagee to bring the property to sale. He urges that under the old procedure, where the executable decree was executable by the mortgagor as well as by the mortgagee, the mortgagor could pay up the decree amount at any

time, until the property was actually sold. But in practice I see no real innovation. Under the old procedure, the mortgagor could pay up (a) within the time fixed in the decree, then he paid as mortgagor, (b) when the decree was being executed then he paid *qua* judgment-debtor. He could not, *qua* mortgagor, have the time fixed in the decree extended (see *Vallabha Valiya Rajah v. Vedaquratti*(1), *Adipuram Pillai v. Gopalsami Mudali*(2)). Therefore any payment after the time fixed could only be in execution, after the passing of the order absolute when the right to redeem was gone, and he paid only *qua* judgment-debtor. Such right was then equally as now, dormant unless and until the mortgagee took proceedings in execution. Thus the former right of paying up after the time fixed in the decree is the same and no other than the present right of paying up after the final decree, viz., the right, *qua* judgment-debtor, to pay up which right is in both cases contingent on the mortgagee proceeding to bring the property to sale, and was not at any time exercisable independently of that contingency. There is no new hardship here, though there is no doubt some hardship, or at least some undue partiality by the law in favour of the mortgagee, who is in possession and elects to be content with having destroyed by a final decree his mortgagor's right to redeem and refuses to bring the property to sale under the final decree.

It may be that, in view of this, Courts may be open to reconsider the position that the time granted for redemption in the preliminary decree for sale cannot be extended before the final decree (or order absolute) is passed. It is true that Rule 5 of Order XXXIV does not contain a provision similar to that in rules III and IV

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(1) (1896) I.L.R., 19 Mad., 40 (F.B.). (2) (1903) I.L.R., 31 Mad., 354.

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allowing the Court to extend the time for payment; but it is a power which may well be within the inherent powers of the Court, as in the case of preliminary decrees for specific performance (see *Abdul Shaker Sahib v. Abdul Rahiman Sahib*(1) or it may be that a suit may lie on the decree to compel the mortgagee to bring the property to sale, in view of the fact that a mortgagee, who delays to bring the property to sale, is frustrating the fundamental principle of the mortgage contract, and of the right to redeem as defined in section 60 of the Transfer of Property Act both now merged in the final decree, that his ultimate claim is not to the property but to his money and to the recovery of that money by sale of the mortgaged property. However that may be, I am clear that the new procedure neither affects nor requires any change whatever from the old position, laid down in the Full Bench Case, that the right to redeem was in issue in the mortgage suit for sale and is therefore *res judicata* when a decree in that suit was obtained. It may be noted incidentally that two of the learned Judges in the Full Bench Case were of opinion (vide their judgments in the Full Bench Case, 25 Mad., 244) that the order absolute for sale was a decree, in fact a final decree, and yet that view did not dissuade them from holding that the second suit for redemption did not lie, even though in their view the first suit had only reached to the stage of a preliminary decree, since no order absolute had been obtained. In the Full Bench case, the right to redeem had not been extinguished by any order absolute, and therefore subsisted. Nevertheless the Full Bench were unanimous that the right to redeem was merged in the decree and was *res judicata*. My conclusion on this part of the case, therefore, is that to follow the Full Bench ruling

(1) (1928) I.L.R., 46 Mad., 148.

even under the new procedure will inflict no new hardship on the mortgagor.

I shall notice very briefly a few of the cases cited before us, dealing first with High Court cases and then with the Privy Council cases. The greater number are suits in which the first suit was for redemption and the second suit also for redemption, and either the decree in the first suit did not provide for foreclosure of the right to redeem, or, if it did, neither party had taken any steps to foreclose. Such decisions in Madras, prior to the Full Bench case, must be held to have been overruled, so far as they are inconsistent therewith, for example, *Periandi v. Angappa*(1), which was, however, not under the Transfer of Property Act, *Vallabha Valiya Rajah v. Vedapuratti*(2) and *Ramunni v. Brahma Dattan*(3) which rejected the then Bombay doctrine of constructive foreclosure by *res judicata* [see *Gan Savant Bal Savant v. Narayan Dhond Savant*(4)] even when the decree in the first suit did not provide for foreclosure. The case *Maloji v. Sagaji*(5), though there the second suit was not for redemption but by a mortgagee for sale, also followed the *res judicata* principle, holding that the mortgage was merged in and could not be separated from the redemption decree obtained in the first suit. The Allahabad Court followed suit in *David Hay v. Razi-ud-din*(6) and so did Bombay in *Bapuji Ramchandra v. Guja Malu*(7) which, however, must be taken to have been overruled by the Full Bench of Bombay in *Ramji v. Pundharnath*(8) which has altered the previous view in Bombay. The Full Bench case in *Vedapuratti v. Vallabha Valiya Raja*(9) already mentioned is also a case in

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(1) (1884) I.L.R., 7 Mad., 423. (2) (1896) I.L.R., 19 Mad., 40 (F.B.).
(3) (1892) I.L.R., 15 Mad., 366. (4) (1883) I.L.R., 7 Bom., 467.
(5) (1889) I.L.R., 13 Bom., 567. (6) (1897) I.L.R., 19 All., 202.
(7) (1918) I.L.R., 42 Bom., 246. (8) (1919) I.L.R., 43 Bom., 384 (F.B.).
(9) (1902) I.L.R., 25 Mad., 300 (F.B.).

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which both suits were for redemption. To come to cases in which the first suit was, as in the present case, a suit for sale and an order absolute for sale had been obtained but no further action had been taken, this High Court in *Ranga Ayyangar v. Narayana Chariar*(1) where the first decree was obtained in 1872 prior to the passing of the Transfer of Property Act, held that the second suit for redemption was barred. In *Rama v. Bagchand*(2) the later Bombay view prevailed that the suit was not barred by *res judicata*. No previous case in India is discussed in that judgment and only one English case is cited. *Shah Mehdi Hasan v. Ismail Hasan*(3) a case under the present Civil Procedure Code adopted the Bombay view that the suit was not barred. An earlier Allahabad case reported in *Shiam Sunder Lal v. Har Narayan*(4) takes the same view. So far as this Court goes then, the general principle of *res judicata* has been applied to the case where the first suit was a suit for sale.

Coming now to the Privy Council cases, the earliest is one of 1873, *Gokuldoss v. Kriparam*(5). The first suit was by the mortgagee for sale. The decree in that case was a curious one which did not provide any opportunity to the mortgagor to come in and redeem, and in execution of which the mortgagee somehow got into possession. It was held that the mortgagor had never had his legal opportunity of redeeming and, therefore, a suit for redemption lay in the circumstances of the case. That is no authority in favour of the respondent. In *Hari Ravji Chiplunkar v. Shapurji Mormusji Shet*(6), the question whether the mortgagor could, instead of suing for redemption on a decree for redemption, fall

(1) (1916) I.L.R., 39 Mad., 896.

(3) (1920) I.L.R., 42 All., 517.

(5) (1873) 12 B.L.R., 205 (P.C.).

(2) (1915) I.L.R., 39 Bom., 41.

(4) (1911) 9 I.C., 158.

(6) (1886) I.L.R., 10 Bom., 461 (P.C.).

back on the original mortgage and claim to redeem it was not decided. In *Mahabir Pershad Singh v. Macnaghten*(1) where the mortgagee had got a decree for sale and the mortgagor sued to have the sale set aside and certain set-offs allowed, it was held that the second suit was barred by *res judicata*. The case is not much to the point here. In *Sri Raja Papama Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*(2), the decree passed on a simple mortgage did not suggest foreclosure or necessarily anything more than an usufructuary mortgage. The case is explained at page 335 of the Full Bench case in *Vedapuratti v. Vallabha Valiya Raja*(3). It again is no authority in favour of the respondent. In *Faiyaz Husain Khan v. Prag Narain*(4) the first decree was in favour of the mortgagee for sale, and he had also got an order absolute for sale and the plaintiff had in execution become the auction purchaser. The second suit was by the auction-purchaser (defendant) in a suit on a second mortgage to redeem, the plaintiff's purchase being subsequent to the defendant's. It was held that the defendant could not resist the plaintiff's claim to possession. Incidentally it was laid down that an auction-purchaser on foot of a second mortgage could have and ought to have redeemed before the sale under the first mortgage decree was confirmed and that his subsequent application to redeem was properly refused. There is nothing in any of these cases which runs counter to the general principles laid down in *Vedapuratti v. Vallabha Valiya Raja*(3). In *Sukhi v. Ghulam Safdar Khan*(5) a prior mortgagee had obtained a decree for sale without joining a puisne mortgagee and the latter sued, and it was argued that

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(1) (1889) I.L.R., 16 Cal., 682 (P.C.).

(2) (1896) I.L.R., 19 Mad., 249.

(3) (1902) I.L.R., 25 Mad., 300 (F.B.).

(4) (1907) I.L.R., 29 All., 339 (P.C.).

(5) (1921) I.L.R., 43 All., 469 (P.C.).

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the prior mortgagee could not use his mortgage as a shield, because the mortgage was merged in the decree for sale and was, therefore, extinguished. The Privy Council held that under the altered wording of the Transfer of Property Act and the Civil Procedure Code the mortgage was not extinguished and could be held up as a shield. I do not consider that this ruling is authority for the proposition that, when a mortgagee has obtained a decree for sale, the mortgage as between himself and his mortgagor and all parties to the suit is not merged in the decree in the suit. The decision merely declares that by the decree the security is not extinguished so far as to prevent the agitation of rights under it which were not decided by the decree. It does not touch the question of agitating afresh rights already concluded by the decree.

The plaintiff's mortgage in the present case is *pendente lite* and his rights are, therefore, no higher than the rights of the mortgagor, and, as I have already said, the rights of redemption as between the mortgagor and the mortgagee have been once for all merged in the decree in the suit for sale. The principle involved is that in all suits on mortgage which are successful the mortgage, so far as parties to the suit are concerned, is merged in the decree and the mortgagor's rights are only exercisable under the decree and do not exist any longer outside the decree. The right to redeem, therefore, can be exercised only as provided under the decree and not outside the decree. It follows then that, after a decree in a mortgage suit, whatever the form of that decree, whether for foreclosure, sale or redemption, the parties to the mortgage and to the suit and their legal representatives or assignees cannot maintain in future any separate suit or any claim arising out of the

mortgage [see *Ameenammal v. Meenakshi*(1)]. The proper test, I think, is, "Does the decree provide for every relief obtainable by the parties under the mortgage and leave none unprovided for?" It appears to me that it does. It may be noted that the form of final decree, Form 10-A of Schedule I-D, is the same in a suit for sale as in a suit for redemption, in the case of a simple or usufructuary mortgage when payment has not been made, and that sub-clause (3) in Order XXXIV, rule 8, does not apply to sub-clause (4). In the case of a final decree for redemption under a simple or usufructuary mortgage it cannot be doubted that the right to redeem ceases with the passing of the decree. Why should it be deemed otherwise in the case of a final decree of exactly the same wording in a suit for sale?

The learned Judge from whose judgment this appeal is preferred has distinguished the case of *Ranga Ayyangar v. Narayana Charariar*(2) by saying that, if the Judges there had been dealing with a decree unexecutable by a mortgagor, the decision would have been different. I do not think it follows. Under a preliminary decree it is as open to the mortgagor as to the mortgagee to obtain the final decree, and the fact that the former's neglect results in a final decree which is not executable by him cannot resuscitate the right to redeem which is gone. When the learned Judge holds that the right of the mortgagor to redeem property has not been taken away upon the passing of the final decree for sale, I must, for reasons I have already given, with respect differ from him. The learned Judge relies mainly on *Ramji v. Pandharinath*(3) which lays down that the right to redeem is not a matter in issue in a suit for sale. I have already given my opinion that, if the right

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(1) (1920) 12 L.W., 173.

(2) (1916) I.L.R., 39 Mad., 896.

(3) (1919) I.L.R., 48 Bom., 384 (F.B.).

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to redeem can be foreclosed, as it can, in such a suit, it is very difficult to hold that it is not a matter in issue in the suit. I must, for reasons given above, hold that the learned Judge's decree should be reversed. I would reverse it and restore the decree of the lower Appellate Court with costs to the defendant throughout.

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MADHAVAN NAYAR, J.—The defendant-appellant as usufructuary mortgagee with a personal covenant to pay sued in O.S. No. 430 of 1912 for the sale of the suit properties. A preliminary decree was passed in his favour on the 14th of October 1913, in which time was fixed for payment till the 14th of November 1914. A final decree was passed on the 25th of February 1914. While this suit was pending, the mortgagor gave another mortgage of these properties to the plaintiff's father. In O.S. No. 289 of 1918 the plaintiff-respondent obtained a decree for sale without making the defendant a party to the suit and purchased the property himself. He then instituted the present suit for the redemption of the mortgage in favour of the defendant.

The question for decision is whether the decree in O.S. No. 430 of 1912 operates as *res judicata* in the plaintiff-respondent's suit for redemption. DEVADOSS, J., reversing the concurrent judgments of the lower Courts, rejected the plea of *res judicata* and remanded the suit for disposal. This decision is the subject matter of the Letters Patent Appeal.

In my opinion, this case must be decided by applying the principle of the decision in *Vedapuratti v. Vallabha Valiya Raja*(1). In that case a Full Bench of this Court held that, where a suit for redemption had been instituted and a decree for redemption had been passed therein but not executed, a subsequent suit is not

maintainable for the redemption of the same mortgage. It is no doubt true that in the present case the decree in the prior suit was one for the sale of the properties and not for redemption; but if we have regard to the real nature of the decree for sale passed under sections 88 and 89 of the Transfer of Property Act, it will be found that this difference does not really make the decision inapplicable. It is not denied that the decree in O.S. No. 430 of 1912 gave the mortgagor who was the defendant in that suit a right to obtain possession of the suit property by paying the decree amount within the time fixed by the Court. In *Vedapuratti v. Vallabha Valiya Raja*(1) Sir BASHYAM AYYANGAR, J., states thus:

"Whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption, there is in each a conditional decree for redemption in favour of the mortgagor, the condition being the payment by the mortgagor of the amount decreed on or before the day fixed." . . . "Decrees for specific performance, decrees respecting rights of easements and similar decrees are often made conditional, but they are none the less 'final judgments' having the force of *res judicata*."

The learned CHIEF JUSTICE said:

"The Legislature has laid down what is the 'matter in issue' in a redemption suit. In order to succeed the mortgagor has to show that he is entitled to a decree ordering that if he pays off the mortgage debt in pursuance of the order of the Court, the mortgagee shall retransfer the property and if necessary put him in possession. The matter in issue is aye or no—is the mortgagor entitled to the decree which, if he succeeds, the Court is required by section 92 to make?"

The same matter is in issue in a mortgagee's suit for sale. The form of the decree shows that it contains a conditional decree for redemption. The right to redeem having been thus once adjudicated, the decision in which it was so done must operate as *res judicata* in a

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(1) (1902) I.L.R., 25 Mad., 300 (F.B.).

(1) (1902) I.L.R., 25 Mad., 300 (F.B.) at 32A.

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subsequent suit for redemption. It is true that even after the order absolute for sale under section 89, it is open to the mortgagor to pay up the mortgage amount and thus avert the sale [see *Adipuranam Pillai v. Gopulasami Mudali*(1)] but this does not mean that the right to redeem still survives. The payment is made by the mortgagor not under the Transfer of Property Act but in the capacity of a judgment-debtor under the provisions of the Code of Civil Procedure. The substantial right involved in the suit, viz., the right to redemption being thus merged in the decree, though the decree is one for sale, the same right cannot again be put in issue in another suit. Applying the principle of the decision in *Vedapuratti v. Vallabha Valiya Raja*(2) it was held by SADASIVA AYYAR and NAPIER, JJ., in *Ranga Ayyangar v. Narayana Chariar*(3), that a subsequent suit instituted by the mortgagor for redemption of the mortgage was barred by *res judicata* by the decision in a prior suit for sale instituted by the mortgagee in which a decree had been passed containing a direction in favour of the mortgagor who was a defendant therein for recovery of possession of the property and which decree was not executed by either party.

The learned vakil for the respondent argues that the decision in *Vedapuratti v. Vallabha Valiya Raja*(2) is inapplicable to the present case, also because of the alteration in the law regarding the nature of the decree to be passed in mortgage suits for sale of properties introduced by Order XXXIV, rules 4 and 5 of the Civil Procedure Code, which repealed sections 88 and 89 of the Transfer of Property Act. By the repeal of the old sections of the Transfer of Property Act there are now two decrees in all mortgage suits—the preliminary decree

(1) (1908) I.L.R., 31 Mad., 354. (2) (1902) I.L.R., 25 Mad., 300 (F.B.).
(3) (1916) I.L.R., 39 Mad., 895.

and the final decree. The preliminary decree cannot be executed, the executable decree being the final one. It is argued by Mr. Venkatachariar that, since under the Code of 1908 the preliminary decree is now inexecutable, all that is stated in *Vedapuratti v. Vallabha Valiya Raja*(1) with reference to the operative character of such decrees become inapplicable to cases arising under the present Code. He also argues that since by the omission in Order XXXIV, rule 5, of the words “and thereupon the defendant’s rights to redeem and the security shall both be extinguished” which occurred at the end of the old section 89, the relationship of the mortgagor and the mortgagee still subsists in spite of the final decree, it is open to the mortgagor to institute a second suit for redemption.

In my view, the non-executability of the decree and the alleged continuance of the relationship of the mortgagor and the mortgagee even after the passing of the final decree do not affect the application of the principle of the decision in *Vedapuratti v. Vallabha Valiya Raja*(1) to the facts of the present case. The question that we have to decide is purely one of *res judicata*. A properly framed preliminary decree contains a direction enabling the mortgagor-defendant to pay the money declared to be due on the mortgage to the mortgagee within the prescribed period in which event the mortgagee shall deliver the property to the mortgagor. By paying the amount prescribed in the preliminary decree it is open to the mortgagor to obtain a final decree. Since he did not do so in the present case, the right of redemption which has become merged in the decree cannot be re-opened again in a subsequent suit. It may be observed that the learned CHIEF JUSTICE in *Vedapuratti v. Vallabha Valiya Raja*(1) did not rest his judgment on the executability of the

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decree for he had on the same day delivered judgment in another Full Bench Case [see *Mallikarjunadu Setti v. Lingamurthi Pantulu, etc.*(1)], in which he held that an order passed upon an application made under section 89 of the Transfer of Property Act corresponding to Order XXXIV, rule 5 of Act V of 1908 was not an order made in execution proceedings. Sir BASHYAM AYYANGAR also bases his judgment on principles of *res judicata* embodied in section 11 of the Code of Civil Procedure though as a supplemental ground the learned Judge states that the second suit is barred by the provisions of section 244 also inasmuch as the applications under sections 89 and 93 were applications in execution. As regards the continuance of the relationship of the mortgagor and the mortgagee, it cannot be said, as has already been pointed out, that the payment which the mortgagor-defendant is entitled to make to avert the sale is made by him as a mortgagor; he pays only in the capacity of a judgment-debtor under the provisions of the Code of Civil Procedure. Whether on making such payment he is entitled to be put in possession of the property is a doubtful question which it is not necessary to decide in this case though the case in *Adipuranam Pillai v. Gopalasami Mudali*(2) decides that he is so entitled.

In the course of his arguments, Mr. Venkatachariar referred particularly to three decisions, namely, *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet*(3), *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*(4), and *Gokuldoss v. Kriparam*(5) in support of his contention that the second suit for redemption would lie. The first two cases have been explained by Sir

(1) (1902) I.L.R., 25 Mad., 244 (F.B.). (2) (1908) I.L.R., 31 Mad., 354.
(3) (1886) I.L.R., 10 Bom., 461 (P.C.). (4) (1896) I.L.R., 19 Mad., 249.
(5) (1873) 13 B.L.R., 205 (P.C.).

BASHYAM AYYANGAR, J., in *Vedapuratti v. Vallabha Valiya Raja*(1). In *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet*(2), their Lordships of the Privy Council, though they cite the decision in *Periandi v. Angappa*(3) do not express any opinion on the question whether the plaintiff could fall back upon the original mortgage and the case therefore does not afford any help in answering the question whether a subsequent suit on the same mortgage is barred by section 11 of the Code. The decision in *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*(4) really depended on the construction of the prior decree passed on the mortgage which contained the condition that

“if the debt is not discharged according to the instalments, you should recover the same by means of the mortgaged property, the crops of our cultivation and our other property and from our person according to your wish.”

The learned Judges held that the prior decree in effect put the mortgagee in the position of the usufructuary mortgagee and therefore the mortgage could be redeemed by a fresh suit. The decision in *Gokuldoss v. Kriparam*(5) is also based on the construction of the prior decree passed in the case under which the mortgagee got into possession. It was held that as that decree did not extinguish the mortgagor's right of redemption, a suit by him for that purpose was not barred.

The decision in *Ramji v. Pandharinath*(6) took the view that a second suit for redemption would lie. Mr. Justice DEVADOSS has in effect followed that decision. The view of our own High Court in *Vedapuratti v. Vallabha Valiya Raja*(1) is different from that of the Bombay High Court. Mr. Venkatachariar has not been

(1) (1902) I.L.R., 25 Mad., 300 (F.B.). (2) (1886) I.L.R., 10 Bom., 461 (P.O.).
(3) (1884) I.L.R., 7 Mad., 423. (4) (1896) I.L.R., 19 Mad., 249.
(5) (1873) 13 B.L.R., 205 (P.C.). (6) (1919) I.L.R., 43 Bom., 334 (F.B.).

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able to persuade me that the decision in *Vedapuratti v. Vallabha Valiya Raja*(1) does not lay down the correct law. I do not think it is necessary to discuss the various other decisions referred to by him in the course of the argument, as they do not in my view directly bear on the question under consideration. In my opinion, the plaintiff's suit is barred by the operation of the doctrine of *res judicata*. I would therefore set aside the decision of the learned Judge and dismiss the plaintiff's suit with costs throughout.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1926,
February 5.

NARAYANASAMI NAIDU AND OTHERS (PLAINTIFFS
2 TO 4), APPELLANTS,

v.

RANGASAMI NAIDU AND OTHERS (DEFENDANTS
2 TO 5), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Decree—Adjustment—Razinamah decree—“Money payable under a decree,” meaning of—Certification of adjustment, when necessary—Decree for possession of lands on non-payment of a certain sum by defendants—Adjustment of decree, not certified—Adjustment, whether can be proved—Execution of decree—Bar.

Order XXI, rule 2 of the Civil Procedure Code, refers to a decree under which money is payable, whether there are other reliefs granted by the decree or not.

The words “money payable under a decree” in rule 2 of Order XXI do not mean money which the party may, if he chooses, pay, but money which is recoverable by a party in execution against the party liable to pay it.

(1) (1902) I.L.R., 25 Mad., 300 (F.B.).
* Civil Miscellaneous Appeal No. 272 of 1924.

APPEAL against the order of T. S. TYAGARAYA AYYAR, District Judge of Trichinopoly, in E.P.R. No. 34 of 1922 in Original Suit No. 11 of 1913.

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The material facts appear from the judgment. The learned District Judge held that the adjustment of the decree could be proved, even though it was not certified to the Court. He observed that the razinamah decree was not one under which any money was payable but it was one for delivery of immovable property alone, that it was an option given to the defendants to pay the amount mentioned in the decree, that the decree-holders were not entitled to recover the amount in execution, and that therefore the decree did not fall under Order XXI, rule 2, Civil Procedure Code. Finding the adjustment proved, he dismissed the petition for execution. The petitioners preferred this appeal.

S. T. Srinivasagopala Chari for appellants.—An uncertified adjustment of any decree is not a bar to execution. It cannot be recognized in execution under the new Code (Act V of 1908), Order XXI, rule 2, clause (3), which is different from section 258 of the former Code (Act XIV of 1882). See *Ramakrishna v. Balakrishna Rao*(1) and *Gharry v. Gowrya*(2). Here the decree is also one under which money is payable.

L. A. Govindaraghava Ayyar for respondent.—The decision in *Ramakrishna v. Balakrishna Rao*(1) is not against the respondent. The decree here is not for payment of money. It is for possession of lands in the event of non-payment of money. The plaintiff cannot recover money by execution against the defendant. “Money payable under a decree” in Order XXI, rule 1 refer to a decree for payment of money; in clause 2, the expression “the decree” must refer to a decree for payment of money referred to in clause 1. The decision in *Abdul Latif Sahib v. Bathula Bibi Ammal*(3) refers to a decree where money is directed to be paid under the decree. In *Ramakrishna v. Balakrishna Rao*(1) money was payable under the decree, though there were also other reliefs

(1) (1920) I.L.R., 43 Mad., 476.

(2) (1921) 23 Bom. L.R., 961.

(3) (1914) 15 M.L.T., 338.

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granted by the decree. The decision in *Gharry v. Gowrya*(1) goes too far.

Reference was made to the following cases:—*Sethurama Sahib v. Chotta Raja Sahib*(2) and *Vaidhinadasamy Ayyar v. Somasundram Pillai*(3).

S. T. Srinivasagopala Chari for appellant, in reply.—The Calcutta High Court in *Baba Mohamed v. Webb*(4) construed section 258 of the Code of 1877 as applicable to all decrees, as under the old Code of 1859 (section 206). The language of the present Code is even wider. It applies to “any decree.” Reference was made to the terms of article 174 of Limitation Act, 1908, and article 171 of the Limitation Act of 1877.

JUDGMENT.

A razinamah decree was passed on 22nd October 1914 in O.S. No. 11 of 1913 in which it was provided that in case the first defendant or the fourth defendant were to pay to the decree-holders Rs. 17,000 within two years the property should be reconveyed to the first defendant, but if default be made in such payments the decree-holders themselves should enjoy the properties with absolute rights. The plaintiffs, decree-holders, entered into an agreement on 19th April 1916 with the second defendant whereby they relinquished their interest in the property for Rs. 7,000. The second plaintiff applied to the lower Court for execution of the decree. The learned District Judge held that the decree had been adjusted by the arrangement of 19th April 1916 evidenced by Exhibits A and B and that the plaintiff was not entitled to execute the decree. He also held that the second plaintiff released his right to the property by another document Exhibit E, dated 15th July 1922. Against his order plaintiffs 2 to 4 have preferred this appeal.

The contention of Mr. Srinivasagopala Chari for the appellants is that the decree was a money decree

(1) (1921) 23 Bom. L.R., 981.

(2) (1917) M.W.N., 327, 330.

(3) (1905) I.L.R. 28 Mad., 473 (F.B.).

(4) (1881) I.L.R., 6 Calc., 786.

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and any adjustment out of Court not certified to the Court should not be recognized. The sole question in this case is whether the decree is a decree coming within Order XXI, rule 2, Civil Procedure Code. The terms of the razi-decree are such that the plaintiffs could not recover Rs. 17,000 from the defendants if the latter did not choose to pay the amount. There is no decree in favour of the plaintiffs for Rs. 17,000. What is stated in the decree is that if the first defendant or the fourth defendant were to pay Rs. 17,000 to the decree-holders they should reconvey the property to the first defendant. It is open to the defendants 1 and 4 not to pay the amount in which case the decree-holders will not be bound to reconvey the property. If the first defendant or the fourth defendant did not choose to pay the amount to the plaintiffs, the decree did not empower them to realize the amount by execution. The decree is not one “where any money is payable under a decree” and therefore does not come within the provisions of Order XXI, rule 2.

The next contention is that rule 2 applies to all kinds of decrees whatever may be the nature of the relief granted and reliance is placed upon *Gharry v. Gowrya*(1). In that case the learned CHIEF JUSTICE and Mr. Justice SHAH held that rule 2 applied to all kinds of decrees. With very great respect to the learned Judges we are unable to accept this view. There is no discussion in the case of the decisions bearing on the question. The learned Judges contented themselves by merely saying the words, “Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted” as justifying their view, that the words did

(1) (1921) 23 Bom. L.R., 981.

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not confine the provisions of the rule to money decrees and that any decree was provided for. The rule says "where any money payable under a decree of any kind is paid out of Court," i.e., where any money payable under a decree, whatever may be its nature, is paid out of Court, it has to be certified, or if the decree is otherwise adjusted either in whole or in part that also has to be certified. The words "the decree" can only mean the decree under which any money is payable. The use of the definite article clearly indicates that the decree can only mean a decree where any money is payable, and the rule means any decree under which money is payable, whether there be other reliefs or not, if adjusted out of Court, should be certified to the Court within the time allowed by law. But where no money is payable under a decree as, for instance, in the case of recovery of immovable property or grant of injunction or any other relief in which the plaintiff is not entitled to enforce by execution payment of money, that decree does not come within the purview of rule 2.

In *Ramakrishna Rao v. Balakrishna Rao*(1), it was held by OLDFIELD, J., and SESHAGIRI AYYAR, J., that Order XXI, rule 2, applied to partition decrees which provided for payment of money as well as other reliefs, such as partition of immovable property and adjustments with regard to such property, and that such adjustment could not be recognized unless certified or recorded as required by the rule. The learned Judges considered the previous cases on the point and came to the conclusion that if money was payable under a decree, and if there were other reliefs, any adjustment of that decree out of Court should be certified within the time prescribed and, if not certified to the Court, then such an adjustment could not be recognized.

(1) (1920) I.L.R., 43 Mad., 476.

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We may briefly refer to the history of the rule in order to understand what it really means. Under section 206 of Act VIII of 1859 all adjustments, whatever may be the nature of the decree, had to be certified to the Court and any adjustment not certified could not be recognized. The latter portion of the section 206 was in these terms: "No adjustment of decree in part or in whole shall be recognized by the Court unless, etc." In the Act of 1877, the chapter on execution of decrees was greatly expanded and in some respects altered and section 258 of the Code of 1882 was practically the same as that contained in the Code of 1877. Under the Code of 1877 it was not necessary that all the adjustments of decrees, whatever may be the nature, should be certified to the Court. In *Baba Mohamed v. Webb*(1), a Bench of the Calcutta High Court held that the rule contained in section 258 was applicable to all decrees. The learned Judges observe at page 788 referring to section 258 of the Code of 1877—

"that section corresponds in all material respects, and carries with it the same meaning as section 206 of the former Procedure Code (Act VIII of 1859) which manifestly deals with the adjustment of any decree."

Under section 258 of the Code of 1882 which is a verbatim copy of the corresponding section of the Code of 1877 it was held that it applied only to money decrees. That was the view of the Madras High Court in *Sankaran Nambiar v. Kanara Kurup*(2). The learned CHIEF JUSTICE and Mr. Justice BENSON held that section 258, Civil Procedure Code, referred only to the execution of decrees under which money was payable and was not applicable to decrees for possession of immovable properties. The section was further amended in the present Code by the addition of the

(1) (1881) I.L.R., 6 Calc., 786.

(2) (1899) I.L.R., 22 Mad., 182.

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words "of any kind" in order to reconcile the conflicting views of the different High Courts. In *Abdul Latif Saheb v. Bathula Bibi Ammal*(1), it was held by WALLIS and AYLING, JJ., that where there was a decree for the delivery of certain immovable property and for the payment of money it was not open to the Court to recognize any uncertified adjustment under Order XXI, rule 2, clause 3, Civil Procedure Code. This was followed in *Sethurama Sahib v. Chotta Raja Sahib*(2), where Mr. Justice SADASIVA AYYAR who held in *Kelu Nair v. Meenakshi*(3), that Order XXI, rule 2 of the Civil Procedure Code did not apply to the relief of possession of immovable properties given by a decree, altered his view, and following the decision in *Abdul Latif Saheb v. Bathula Bibi Ammal*(1), held that where the decree provided for payment of money as well as other reliefs the adjustment of such a decree could not be recognized unless certified to the Court within the time allowed by law and observed that the words "the decree" in the second sentence of that rule meant a decree of any kind under which money is payable including a complex decree under which possession is also marked, and that as regards execution of that portion also of the decree which relates to possession of immovables an uncertified adjustment cannot be recognized.

From the position of rule 2 in the present Code and from the heading and the marginal note, the intention of the legislature can be clearly gathered. Though the headings and marginal notes should not be held to govern the clear text of a section, yet they can be taken as an indication of what the legislature meant. Under the Code of 1859 section 206 was in the chapter relating

(1) (1914) 15 M.L.T., 338.

(2) (1917) M.W.N., 327.

(3) (1918) 25 M.L.J., 586.

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to execution generally. In the Code of 1877 and in the Code of 1882 section 258 was in the chapter relating to execution under the heading mode of execution and in the present Code, Order XXI, rule 2 relates to execution of decrees and orders and the heading over rule 1 is "payment under decree." If the contention of Mr. Srinivasagopala Chari is correct, the legislature should have said in plain terms that the adjustment of any decree out of Court should not be recognized unless certified to the Court within the time allowed by law. That was the clear expression in the Code of 1859 and if the legislature intended to re-enact that provision it would have done so in very simple language. The addition of the words "of any kind" after the words "decree" in the second line of Order XXI, rule 2 were intended to set at rest the difference of view between the Madras High Court and the Calcutta High Court and the conflicting views as regards the meaning of section 258 of the Code of 1882. By the addition of the words "of any kind," it cannot be said that the legislature intended that the adjustment of any decree, whatever may be the relief claimed, should be certified to the Court. We are clearly of opinion that Order XXI, rule 2 refers to a decree under which money is payable whether there are other reliefs or not and if no money is payable under a decree then rule 2 cannot be held to apply to such a decree. The words "payable under a decree" do not mean any money which the party may, if he chooses, pay, but money which is recoverable by a party in execution against the party liable to pay it. In this case, as already observed, the plaintiffs could not execute the decree against first and fourth defendants.

First plaintiff died before the date of the razi-decree and plaintiffs 2 to 4 entered into the agreement evidenced by Exhibit A. The recital in the document is :

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"As we have on this date got from you a note of bond executed in our favour for this Rs. 7,000 stipulating interest at As. 6 per cent per mensem, you yourself shall take the karar and all other properties and also you yourself shall take from the said properties the income including the old arrears and the new income."

A pro-note was executed on the same day by the second defendant in favour of the plaintiffs which is Exhibit B. A suit was filed in the Pudukkottai Court for the amount due under the pro-note and was realized by the plaintiffs. The arrangement evidenced by Exhibits A and B are therefore an adjustment of the decree passed in plaintiffs' favour, and such an adjustment could be pleaded as the decree does not come within the purview of rule 2 of Order XXI. The learned Judge has correctly held that the decree was adjusted by the arrangement evidenced by Exhibits A and B and the plaintiffs therefore could not ask for execution of the decree which had already been adjusted. It is not necessary to consider in this view whether Exhibit E amounts to a release of the plaintiffs' right in the property in favour of the sons of the second defendant.

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

K.B.

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ORIGINAL CIVIL—SPECIAL BENCH.

*Before Sir Murray Coultts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan, and Mr. Justice Beasley.*

In re SHEIK ABDUL KADIR MARAKAYAR & Co.

*Indian Income-tax Act (XI of 1922), sec. 33, cls. (1), (2) and (3)
and sec. 66 (1)—Obligation of Commissioner to state a case
even in cases under sec. 33 of the Act—Sec. 45, Specific
Relief Act (I of 1877).*

1925,
November 11.

Even in cases coming under section 33 of the Indian Income-tax Act, the Commissioner of Income-tax is bound to state a case to the High Court if in the course of enquiry under that section any question of law arises in the case and if he improperly declines to do so, the High Court may under the discretionary power vested in it by section 45 of the Specific Relief Act compel him to do so in proper cases.

APPLICATION under section 45 of the Specific Relief Act and section 66 of the Indian Income-tax Act.

In a case disposed of by the Commissioner of Income-tax on review under section 33 of the Income-tax Act, he was requested by the assessee to refer to the High Court a substantial question of law arising in the case. He refused to do so. Thereupon the assessee filed this application under section 45 of the Specific Relief Act and under section 66 of the Income-tax Act for an order to compel the Commissioner to refer the case to the High Court.

K. S. Krishnaswami Ayyangar (with N. Srinivasa Ayyangar) for assessee.—The Commissioner of Income-tax who disposed of this case under section 33 of the Income-tax Act was requested to refer the substantial question of law arising in the case for the opinion of the High Court; and he declined to do so. He is bound to refer under section 66 of the Act and section 45 (b) of the Specific Relief Act. "May" in section 66 (1) has been interpreted as "shall" in *Alcock Ashdown and Co., Ltd. v. Chief Revenue Authority of Bombay*(1).

(1) (1923) I.L.R., 47 Bom., 742 (P.C.).

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M. Patanjali Sastri for the Commissioner.—The Income-tax Act is a complete Code and section 66 must be deemed to have exhausted all cases where the Commissioner can be compelled to refer. That section compels him to refer only in cases falling under sections 31 and 32. As this case was disposed of by him under section 33, he cannot be compelled to refer. He may refer if he chooses. Hence this application does not lie.

JUDGMENT.

By section 66 (1) of the Indian Income-tax Act, 1922, it is enacted,

"If, in the course of any assessment under this Act, . . . a question of law arises, the Commissioner may, either on his own motion or on reference from any income-tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court" and by sub-section (2)

"Within one month of the passing of an order under section 31 or section 32, the assessee, in respect of whom the order was passed, may, by application accompanied by a fee of Rs. 100 or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order, and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court."

There is a proviso with which we are not concerned enabling the assessee, if the final determination of the Commissioner under section 33 is favourable to him, to withdraw his application and get a refund of the fees that he paid. By sub-section (3),

"If, on any application being made under sub-section (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply to the High Court and the High Court, if it is not satisfied of the correctness of Commissioner's decision, may require the Commissioner to state the case and refer to it and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly."

It is clear that sub-sections (2) and (3) of section 66 are in terms limited to orders passed under sections 31 and 32. As to orders in review passed by the Commissioner under section 33 as in the present case there is nothing to operate upon except 66 (1) and the assessee has no remedy unless we hold that the Court has power to order the Commissioner to state a case embodying any point of law that may arise in the course of proceedings under section 33. The Privy Council has held in *Alcock Ashdown and Co., Ltd. v. Chief Revenue Authority of Bombay*(1) that the words of the older Act of 1918 import a mandate to the Commissioner to state a case where a real point of law arises, and has further held that if he improperly declines to do so the Court may compel him under the general powers of the Specific Relief Act. It is conceded by Mr. Patanjali Sastri that sub-sections (2) and (3) of section 66 of the present Act only apply to orders under sections 31 and 32; but he asks us to draw the inference that the power of the High Court was meant to be confined to cases under those sections and was by implication taken away in the case of orders under section 33. The result would be that the Commissioner by calling up the records under section 33 would be in a position to burke any further enquiry whatever. We do not think that that can have been intended and we accordingly hold that the principle of *Alcock Ashdown and Co., Ltd. v. Chief Revenue Authority of Bombay*(1) must be applied to orders under section 33. It follows that the statute has set a period of limitation on applications which relate to orders passed under sections 31 and 32 and not on those which relate to orders passed under section 33. The answer appears to be that the jurisdiction conferred by section

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45 of the Specific Relief Act is discretionary and that in the case of unreasonable and unexcused delay the Court would refuse to exercise it.

The Court therefore directs the Commissioner to state a case it not being seriously contended that there is not a substantial point of law involved. Costs of this application reserved.

N.B.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Phillips, Mr. Justice Krishnan, Mr. Justice Beasley and Mr. Justice Madhavan Nayar.

TIRUVENGADA MUDALI (ACCUSED)

1926,
February 15.

TRIPURASUNDARI AMMAL (COMPLAINANT)*

Defamation in a complaint not in good faith—Absolute privilege, if any—Sec. 499, exception VIII, Indian Penal Code—English Common Law not applicable.

According to exception VIII to section 499, Indian Penal Code, defamatory statements in complaints to Magistrates are not absolutely privileged. Unless they are made in good faith, the complainant is guilty of defamation. *In re Venkata Reddy*, (1913) I.L.R., 36 Mad., 216 (F.B.), overruled.

Held, further, that on matters specifically dealt with by the Penal Code, such as this, the English Common Law is not applicable.

Quære.—Whether any absolute privilege attaches to advocates and witnesses when charged criminally?

CASE referred to High Court under section 438, Criminal Procedure Code by the Sessions Judge of North Arcot in Calendar Cases Nos. 3 and 10 of 1925 before Sub-divisional Magistrate, Vellore.

* Case Referred No. 66 of 1925.

The facts are given in the judgment.

This case coming on for hearing, the Court (WALLER and MADHAVAN NAYAR, JJ.) made the following:—

ORDER OF REFERENCE TO A FULL BENCH.

WALLER, J.—This is a reference by the Sessions Judge, North Arcot. Petitioner filed a complaint against three persons charging them with offences under sections 448 and 323, Indian Penal Code. In that complaint he described the first of them as being the paramour of the second, the description being quite unnecessary for the purpose of the complaint, which had itself been preferred as a counterblast to a prior complaint presented against the complainant by one of the persons defamed. Respondent thereupon charged petitioner with defamation. The Subdivisional Magistrate convicted him. The Sessions Judge has made a reference to this Court, pointing out that the conviction is illegal in view of the decision in *Re Muthusami Naidu*(1). That decision follows the well-known case in *In re Venkata Reddy*(2) in which it was ruled that neither party, witness, counsel nor Judge could be held liable for defamation on account of words written or spoken in any proceeding before a Court recognized by law. The Judges remarked:

“We do not think that a statement in a complaint which initiates a proceeding should be held to be entitled to less privilege than other statements made by parties in the subsequent stages of the proceeding. If the complaint is false, then the defendant would be entitled to prosecute the complainant for preferring a false charge.”

I must confess that I am unable to see the force of the last argument in a case like this. This is not a case in which the charge is that the substance of the complaint itself is defamatory. What is charged is that, into a complaint of house trespass and hurt, a malicious and irrelevant libel has been introduced. To suggest that the defamed person's sole and sufficient remedy is to prosecute the complainant for bringing a false complaint of house trespass and hurt is to deprive him of any remedy whatever against the defamatory statement. The other argument is based on *In re Venkata Reddy*(2). I have elsewhere (in Criminal Appeal

(1) (1914) I.L.R., 37 Mad., 110. (2) (1913) I.L.R., 36 Mad., 216 (F.B.).

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No. 218 of 1925) expressed the view that it must now be held that the authority of that case has been severely shaken by a later ruling of this Court—*Gopal Naidu v. King-Emperor*(1). The earlier case was based on the Common Law of England; but it was pointed out in the later that the Criminal Law of India must be looked for in the Penal Code and that the Common Law of England should not be imported into it. The 8th exception to section 499, Indian Penal Code, refers to what are described as “accusations.” The illustration appended to the exception shows that in that term are included complaints to Magistrates, which are therefore entitled to no more than the limited privilege granted by the exception. “It is the duty of a Court to accept, if that can be done, the illustrations given as being both of relevance and of value in the construction of the text.” *Mahomed Syedol Ariffin v. Yeoh Ooi Gark*(2). Reading together exception VIII and its illustration, there can, I think, be no doubt as to the construction of the text that the privilege accorded to persons who make complaints to Magistrates is of a limited character. If the privilege accorded to the complaint itself is not absolute, libellous statements made in the course of it are entitled to no greater protection. The law has, in my opinion, been correctly laid down in *Satish Chandra Chakravarti v. Ram Doyal De*(3), which expressly differs from the view hitherto taken in this Court. It is not for us to overrule the decision of another Bench of this Court, but it seems to me that, in the light of *Gopal Naidu v. King-Emperor*(1), the decision relied on by the Sessions Judge requires reconsideration. I would therefore refer to a Full Bench the question whether a defamatory statement made in a complaint to a Magistrate is absolutely privileged.

MADHAVAN NAYAR, J.—I am also of the opinion that in view of the decision in *Gopal Naidu v. King-Emperor*(1), the case in *Re Muthusami Naidu*(4) requires reconsideration. I agree to the reference proposed by my learned brother.

ON THIS REFERENCE—

Public Prosecutor (J. C. Adam) for the Crown.—The accused cannot claim absolute privilege. The statement being *prima facie* defamatory, is an offence unless it comes within the

(1) (1923) I.L.R., 48 Mad., 605 (F.B.). (2) (1916) 43 I.A., 256.
(3) (1921) I.L.R., 48 Cal., 388. (4) (1914) I.L.R., 37 Mad., 110

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8th exception to section 499, Indian Penal Code. What is given in that exception is only a qualified privilege. Since it has been found in this case that the accused did not act in good faith in making the defamatory statement that exception does not apply. It is not correct to say that the Penal Code has not dealt with cases of absolute privilege; see section 77 onwards.

As the Indian Penal Code has codified the law of offences including defamation, we must look only to the Penal Code for the law on such offences as it specifically deals with and cannot invoke the English Common Law under which Judges, advocates, parties and witnesses can claim absolute privilege from civil as well as criminal liability. See *Gopal Naidu v. King-Emperor*(1), which in effect overrules *In re Venkata Reddy*(2). See also *Satish Chandra Chakravarti v. Ram Doyal De*(3), the opinion of MOORE, J., in Weir's Criminal Rulings, Volume I, page 589, and *Isuri Prasad Singh v. Umrao Singh*(4). English or Indian cases holding that as regards civil liability there is absolute privilege in such matters are not to the point.

A. Sivakaminathan, *amicus curiæ*.—There is absolute privilege as laid down in *In re Venkata Reddy*(2). English Common Law (Criminal) was prevalent in India ever since the first Charter of 1726; see also the Charter of 1800 which established the Supreme Court in Madras for Madras and for the factories. As regards the mufassal, the Magistrates and Judges administered Muhammadan Criminal Law in so far as it was not inconsistent with English Common Law. Then we had the Penal Code in 1861. Article 30 of the Letters Patent of the Madras High Court and section 2 of Indian Penal Code deal only with punishments but not with offences. Indian Penal Code is not exhaustive of all offences and privileges. Under the English Common Law there is absolute privilege, in matters like this, given to Judges, advocates, parties and witnesses. *Barendra Kumar Ghosh v. Emperor*(5) holds that the Indian Penal Code must not be assumed to have abrogated the prior Criminal Law unless there is an express abrogation, or in cases where it is silent; see also *Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court*(6), where it was held that the Indian Penal Code is silent as to contempts on Courts and that by the Common Law of England the High Court can

(1) (1923) I.L.R., 46 Mad., 605 (F.B.). (2) (1913) I.L.R., 36 Mad., 216 (F.B.).
(3) (1921) I.L.R., 48 Cal., 388. (4) (1900) I.L.R., 21 All., 234.
(5) (1925) I.L.R., 52 Cal., 197 (P.C.). (6) (1884) I.L.R., 10 Cal., 109 (P.C.).

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punish for contempt. See also *In re Ramaswami Ayyar*(1). Cases of qualified privilege alone are dealt with in section 499. Cases of absolute privilege such as this are not dealt with by the Penal Code. Public policy requires the existence of absolute privilege in such cases as the present. Even section 77 does not give absolute privilege as regards criminal liability to Judges acting beyond their jurisdiction. That cannot be the law. Hence we must conclude that the English Common Law applies to cases like this.

OPINION.

In this case the petitioner filed a complaint against three persons charging them with offences of simple hurt and house trespass under sections 323 and 448 of the Indian Penal Code. In that complaint he described two of them as being paramours. Thereupon he was charged with the defamation and was convicted. The Sessions Judge referred the case to the High Court on the view that the decision in *Re Muthusami Naidu*(2) following *In re Venkata Reddy*(3), established the position that statements such as that on which the conviction was founded were absolutely privileged. The correctness of the ruling in *In re Venkata Reddy*(3) has undoubtedly been questioned in the Full Bench case, *Gopal Naidu v. King-Emperor*(4). The learned referring Judges therefore very rightly took the view that the matter should be settled and that a Full Bench should reconsider the question and decide whether *In re Venkata Reddy*(3) was rightly decided.

We do not think that any useful purpose would be served by an exhaustive examination of the authorities such as was made by MOOKERJEE, Offg. C.J., in *Satish Chandra Chakravarti v. Ram Doyal De*(5). It is not

(1) (1921) I.L.R., 44 Mad., 913. (2) (1914) I.L.R., 37 Mad., 110.
(3) (1913) I.L.R., 36 Mad., 216 (F.B.). (4) (1923) I.L.R., 46 Mad., 605 (F.B.).
(5) (1921) I.L.R., 48 Cal., 388.

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contested that the general trend of the Madras and Bombay authorities is to regard such statements as absolutely privileged and that the Calcutta and Allahabad Courts have taken the opposite view that the privilege is qualified only and should be taken as confined to the exceptions appended to section 499 of the Indian Penal Code. The Rangoon Court also has recently in *McDonnell v. King-Emperor*(1) adopted the Calcutta view. Our task is to consider the words of the statute and to say whether it leaves it open to the accused to contend that it is not exhaustive of all the cases of privilege which can be put forward. The suggestion is that the statute only concerned itself with cases of qualified privilege and legislated for them, leaving intact the absolute privilege conferred by the English Common Law on Judges, advocates, parties and witnesses.

Two propositions appear to us to be indisputable on the facts of the case as stated. The first is that the petitioner cannot bring himself within any of the exceptions to section 499 for the simple reason that there is a finding against him that the statement that he made was not made in good faith. The only exception to the Indian section under which he could bring himself is the 8th and that expressly lays down that the privilege conferred by it on persons who prefer accusations against others extends only to those who make them in good faith. The second proposition (and the Crown does not contest it) is that, if the Common Law of England is to be held to apply to this case, the action of the petitioner would be absolutely privileged.

The words of the section itself as distinct from the explanations and exceptions are quite clear in their

(1) (1925) I.L.R., 3 Rang., 524.

definition of what is *prima facie* to be regarded as defamatory :—

“Whoever . . . makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person is said, except in the cases hereinafter excepted, to defame that person.”

We have next to consider the decision in *In re Venkata Reddy*(1) which was a considered pronouncement of the then Chief Justice Sir ARNOLD WHITE, and two other Judges and it lies upon us closely to scrutinize the grounds on which that decision was based before we venture to dissent from it. As we follow that reasoning it is based mainly on two considerations. The first is that it was not to be inferred that the framers of the Indian Penal Code intended to depart from the English Law which is substantially reproduced in the statute unless they did so expressly or by necessary implication; the second, that, as the Code confined itself to dealing with cases of qualified privilege, it might be supposed that its authors intended to leave the provisions of the English Common Law regarding absolute privilege intact. The first line of reasoning is summarized in the observations of the learned CHIEF JUSTICE at page 222 of the report:

“It is not to be supposed that the framers of the Penal Code had not before their minds the doctrine of the English Law with regard to the question of absolute privilege; and it seems to me that, in dealing with a matter of such importance, if they had intended to exclude its application, they would have made their intention clear and would not have left it to be a matter of negative inference.”

The second line of reasoning is of course closely allied to the first but, as it seems to us, it is based on a misapprehension. Although section 499 is silent as to

(1) (1913) I.L.R., 36 Mad., 216 (F.B.).

absolute privilege, the Code as a whole is not; for it confers absolute privilege by section 77 on a Judge

“in the exercise of any power which is, or which in good faith he believes to be, given to him by law.”

That perhaps is a wider privilege than is given to an English Judge, because there are expressions in the English cases which lend colour to the view that the existence in fact of jurisdiction and not merely the honest belief in the possession of jurisdiction is a condition precedent to the privilege.

But the first line of reasoning is not obnoxious to this objection and raises a question of gravity and importance. It is undoubtedly remarkable that the draftsman of the statute who must have been familiar with the English Common Law made no reference to the position of witnesses or advocates *nominatim* but confined himself to the perfectly general language of the 8th and 9th exceptions. The inference drawn in *In re Venkata Reddy*(1) was that it was inconceivable that the statute should have been silent on such obvious topics unless it meant to leave the English Common Law relating to them intact. That is a line of reasoning which seems to us to be wholly inapplicable to a codifying statute and the Indian Penal Code is obviously meant to be a codifying statute, an expression which may sufficiently for our present purposes be defined as a statute intended to be complete in itself with regard to the subject matter with which it deals. Indeed the very title “Indian Penal Code” involves the conception of a codifying statute. As we understand the principles of construction applicable to such matters, a codifying statute does not exclude reference to earlier case law on the subjects covered by the statute for the purpose

(1) (1913) I.L.R., 36 Mad., 216 (F.B.).

of throwing light on the true interpretation of the words of the statute where they are, or can be contended to be, open to rival constructions. We are unaware of any instance other than the present where it has been argued that matter outside of the statute can be invoked not by way of construing its provisions but of adding something to it which is admittedly not to be found within it. We agree with Sir ARNOLD WHITE, Chief Justice, that these matters must have been present to the mind of the draftsman. We differ from him in the inference to be drawn from the silence of the statute regarding them. It seems to us inconceivable that that silence can be interpreted otherwise than as a deliberate refusal to incorporate that part of the Common Law of England into the law of India.

In re Ramaswami Ayyar(1), a decision to which one member of this Court was a party, was cited as authority for the proposition that the Common Law of England could be imported into the Indian Penal Code and render acts that would *prima facie* be offences under the Code into acts not criminal or punishable. That was a case of a conviction under section 341 of the Indian Penal Code for wrongful restraint and the restraint was held not to be wrongful within the meaning of the section because the restraint exercised in that case would not be civilly wrongful by the Common Law of England. The Court therefore thought itself entitled to treat the word "wrongfully" as meaning "tortiously" and it is not disputed that the law of this country with regard to torts must in the main be guided by principles derived from English Law and English cases. The English authorities relied upon in that case were relied upon merely for the proposition that a restraint in such

(1) (1921) I.L.R., 44 Mad., 913.

circumstances as there appeared would not be tortious in English Law. It may very well be that a consideration of English Law was excluded by the definition of "wrongful restraint" contained in section 339 of the Indian Penal Code, which was not brought to the notice of the Court and that therefore the case was decided on a wrong footing. Be that as it may, the case is not an authority for the proposition that the English Common Law can be imported into an Indian statute unless words are used which necessarily refer the Court for their interpretation to the English cases defining what is to be considered as a civil wrong.

We are therefore of opinion that the privilege defined by the exceptions to section 499 of the Indian Penal Code must be regarded as exhaustive as to the cases which they purport to cover and that recourse cannot be had to the English Common Law to add new grounds of exception to those contained in the statute. At the same time we desire to guard ourselves against laying down any principle wider than that necessitated by this reference. The reference relates to the position of a complainant and the 8th exception and the illustration to it show clearly that the exception was meant to apply to complainants. The question of privilege that may attach to an advocate or a witness is not before us and we express no opinion as to whether it might or might not be possible to distinguish their positions. In the next place the question referred relates solely to criminal proceedings against a complainant and we say nothing as to how far he may be protected from civil proceedings. It no doubt seems anomalous that it should be a possible view that a man should be protected against civil proceedings but still exposed to a criminal prosecution; but we do not exclude the possibility, should the question arise hereafter, of that being

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the necessary conclusion from the fact that the criminal law of India is codified and the law of civil wrongs is not. We refer this case back to the Divisional Bench with the expression of opinion that no absolute privilege attaches to the statement made in this case. It will be open to that bench, before whom the matter comes on revision, to consider whether the Subdivisional Magistrate was right, on the footing of qualified privilege alone attaching to the statement made in this complaint.

Finally we desire to say this, that the divergence of judicial opinion on the subject referred to us and the allied subjects discussed in the argument is so great that we venture to suggest that further legislation defining for this country the limits of privilege, whether absolute or qualified, is eminently desirable.

N.R.

APPELLATE CIVIL.

*Before Mr. Justice Phillips and Mr. Justice
Madhavan Nayar.*

1926,
February 24.

CHITTURI VENKATARATNAM AND OTHERS (DEFENDANTS),
APPELLANTS,

v.

SIRAM SUBBA RAO (PLAINTIFF), RESPONDENT.*

*Indian Registration Act (XVI of 1908), ss. 17 and 49—
Partnership—Release by a partner—Deed of release—
Whether registration necessary—Partnership assets includ-
ing immovable property—Unregistered release deed, whether*

* Letters Patent Appeal No. 42 of 1925.

*admissible in evidence—Nature of partner's right to the
partnership property—Indian Contract Act (IX of 1872),
sec. 253.*

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An unregistered deed of release by a partner of his share in the partnership business is admissible in evidence, even though the partnership owns immovable property.

Though a partner may be a co-owner in the partnership property, he has no right to ask for a share in that property, but only that the partnership business should be wound up, including therein the sale of the immovable property, and to ask for his share in the resulting assets. *Sudarsanam Maistri v. Narasimhulu Maistri*, (1902) I.L.R., 25 Mad., 149; *Gopala Chetty v. Vijayaragavachariar*, (1922) I.L.R., 45 Mad., 378 (P.C.), and *Joharmal v. Tejram Jagrup*, (1893) I.L.R., 17 Bom., 235, relied on.

Even if the document required registration under section 17 of the Registration Act, still it is admissible in evidence notwithstanding section 49 of the Act, as it is not received as evidence of any transaction affecting immovable property, inasmuch as the release has the effect of leaving the immovable property in the same state as before the release, namely, as the property belonging to the partnership.

APPEAL under clause 15 of the Letters Patent preferred against the judgment of DEVADOSS, J., in Second Appeal No. 848 of 1922, preferred against the decree of P. RAMA RAO PANTULU, the Subordinate Judge of Masulipatam, in Appeal Suit No. 00 of 1921, against the decree of C. VARADARAJULU PANTOLU, the District Munsif of Masulipatam, in Original Suit No. 206 of 1917.

This is a suit by the plaintiff, who was originally a partner along with two others, to recover the suit property as his own. The defendant, who had purchased the same under a sale deed from one T. V. Subba Rao, who was one of the other partners, pleaded that the suit property belonged to the partnership, that, though it was purchased in the name of the plaintiff, it was benami for the partnership, that the plaintiff had released his share in the partnership under a document,

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and that he had, consequently, no right or interest in the suit property. The release deed was not registered and the plaintiff contended that it was not admissible in evidence. Both the lower Courts held that the release deed, though unregistered, was admissible in evidence and dismissed the suit. On Second Appeal by the plaintiff, DEVADOSS, J., held that the document was inadmissible for want of registration, and decreed joint possession in favour of the plaintiff. The defendants preferred this Letters Patent Appeal.

A. Krishnaswami Ayyar for appellant.—The release deed does not require registration. The right of a partner is different from the interest of a co-owner. A partner does not release his interest in immovable property which belongs to the partnership but only his right to an account. Next point is estoppel. He retired from the partnership, after taking some consideration, and is therefore estopped and his creditor is equally estopped from attaching his interest in the partnership. See the judgment of JARDINE, J., in *Joharmal v. Tejram Jagrup*(1). The right of a partner in a dissolved partnership is a right to an account. See article 106 of the Limitation Act. The distinction between a partnership and joint ownership like that of a joint family is shown in such cases as *Gopala Chetty v. Vijayaraghavachariar*(2), *Sudarsanam Maistri v. Narasimhulu Maistri*(3). See Lindley on Partnership (New Edition), pp. 108 and 434. Reference was made to *Gray v. Smith*(4); *In re De Nicols. De Nicols v. Curlier*(5). Share in a joint stock company is not land within the Statute of Frauds: *Watson v. Spartley*(6). The plaintiff is estopped and is barred by the rule of part-performance.

B. Sitarama Rao for respondent.—If the release of partnership includes lands, it requires registration; if it does not, the interest in land does not lapse. The partner's interest is an interest in land. See Lindley on Partnership, page 433 :

- (1) (1893) I.L.R., 17 Bom., 235. (2) (1922) I.L.R., 45 Mad., 378 (P.C.).
(3) (1902) I.L.R., 25 Mad., 149. (4) (1890) 43 Ch. D., 208.
(5) [1900] 2 Ch., 410. (6) (1854) 10 Ex., 222.

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see per TELANG, J., in *Joharmal v. Tejram Jagrup*(1), *Maung Po Hti v. Mahomed Cassim*(2), *Gray v. Smith*(3). There is no specific performance, if there is sale deed, which was not compulsorily registered. See *Venkatasami v. Kristayya*(4). The plea of part-performance was not put forward. A partnership is on the same footing as a joint family. If a member of a joint family releases by a deed, it must be registered, else, release is inoperative.

JUDGMENT.

PHILLIPS, J.—The only question for consideration PHILLIPS, J. in this Appeal is whether the document, Exhibit III, is admissible in evidence. It purports to be a kararnamah or release of partnership share and it recites that in consideration of a sum of Rs. 2,100 settled by the mediators the executant relinquishes his share, title and interest in the partnership business. Admittedly the partnership was possessed of immovable property and the learned Judge in Second Appeal has held that as the document is one creating or extinguishing an interest in immovable property within the meaning of section 17 of the Registration Act, it requires registration and is therefore inadmissible in evidence as not having been registered. The learned Judge finds that this document is a relinquishment of the executant's share in the partnership and that "instead of Subba Rao being paid his share of the assets of the partnership, the partner entered into an arrangement by which he purported to release his right in the partnership." Inasmuch as he received a consideration of Rs. 2,100 for this release, that amount is clearly the amount settled by the mediators as being the share in the assets of the partnership to which he was at that time entitled. The real question

- (1) (1893) I.L.R., 17 Bom., 235. (2) (1903) I.L.R., 30 Ca. c., 1016 (P.C.).
(3) (1890) 43 Ch.D., 208. (4) (1893) I.L.R., 16 Mad., 341.

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at issue is whether this is a document surrendering an interest in immovable property. Under section 253 of the Contract Act all partners are joint owners of the partnership property, but the share of each partner in the partnership property is the value of his original contribution increased or diminished by his share of profit or loss, i.e., he can only claim to receive his share of the assets of the partnership after all accounts have been taken. This is clearly shown in *Sudarsanam Maistri v. Narasimhulu Maistri*(1). In that case the plaintiff sued for a share in the partnership which admittedly was possessed of immovable property and it was held that his suit was barred by limitation. It was argued that in respect of the immovable property the suit would be in time, although as a suit for dissolution of partnership it was barred by limitation. It was, however, held that the only suit which he could bring would be for winding up the business of the partnership for distribution of the surplus and not a suit for partition of the partnership properties. Similarly, in *Gopala Chetty v. Vijayaraghavachariar*(2), it was held by the Judicial Committee that a suit to recover a share in property which fell in after the dissolution of the partnership could not be maintained when the right to sue for an account was barred by limitation. These two cases are certainly authority for holding that a partner as such cannot sue for a specific share in the partnership property, but his only remedy is to sue for taking accounts and ascertainment of his share. A question similar to the present one arose in *Joharmal v. Tejram Jagrup*(3), where it was held by JARDINE, J., that a certain document transferring a share in the assets of a firm which was possessed of immovable property did not require

(1) (1902) I.L.R., 25 Mad., 149. (2) (1922) I.L.R., 45 Mad., 378 (P.C.)
(3) (1893) I.L.R., 17 Bom., 235.

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registration. TELANG, J., however, held the contrary view. JARDINE, J.'s judgment is based on the English law which he discusses at great length. Under the English law the share of a partner in the assets of the partnership is undoubtedly personalty and not realty, but it is contended here that that does not conclude the case and that where a document relinquishing a share is executed that document must be registered. The question is not free from doubt in England. There is a case, *Gray v. Smith*(1) where an agreement to withdraw from a firm was under consideration and it was held by KEKEWICH, J., that such an agreement required a document under section 4 of the Statute of Frauds inasmuch as it conveyed an interest in land. In appeal the point was not determined, but COTTON, L.J., expressed his concurrence with KEKEWICH, J.'s view. On the other hand in *Forster v. Hale*(2) it was held that the lease of colliery was a mere incident in the partnership and no signed writing was necessary. The same principle was adopted in *Dale v. Hamilton*(3). In *Watson v. Spratley*(4), it was held that a contract to sell a share in a joint stock company did not come within the Statute of Frauds. At page 236 MARTIN, B., observed :

“Indeed land or real property is the main substratum of their joint stock or partnership property, and their profits are directly obtained from its use. It is true, the legal interest in such real property is generally vested in the corporation and not in the individual partner or partners as in the cost book mine; but the interest of the shareholder in the great incorporated joint stock companies and in the smallest mine conducted upon the cost book principle, is in its essential nature and quality, identical. In both, the shareholder has only the right to receive

(1) (1890) 43 Ch.D., 208.
(2) (1846) 5 Hare, 369.

(2) (1798) 3 Ves., 696.
(4) (1854) 10 Ex., 222.

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the dividends payable on his share, that is, a right to his just proportion of the profits arising from the employment of the joint stock, consisting indeed partly of land; but, whilst he holds his share, he has no interest or separate right to the land or any part of it. He is, indeed, interested in the employment of it, but he cannot proceed against it directly for anything which is due to him, or make any part of it his own, for the purpose of satisfying any demand which he may have as shareholder. He is not in the situation of a mortgagee who has a direct interest in the land; or of a joint tenant, or tenant in common, who may make a part of it his own in severalty."

Again in *In re De Nicols*. *De Nicols v. Ourlier*(1), KEKEWICH, J., observed:

"It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land, and that to an action to enforce such agreement the plea of the Statute of Frauds will not avail."

He quotes for his authority *Forster v. Hale*(2) and *Dale v. Hamilton*(3), but he still adheres to the view expressed by him in *Gray v. Smith*(4). There seems to be some conflict therefore between the decisions of English Courts, and I think the question must be examined to see whether this deed of release is really a document which extinguishes an interest in immovable property.

It is well-settled law that a contract for the sale of shares in companies owning immovable property is not affected by the Statute of Frauds, and it is somewhat difficult to see what distinction can be drawn between the interest of a shareholder in immovable property belonging to the company and that of a partner in immovable property belonging to the partnership

(1) [1900] 2 Ch., 410.
(3) (1846) 5 Hare, 369.

(2) (1798) 3 Ves., 898.
(4) (1890) 43 Ch. D., 208.

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business. A shareholder, although he may not have any power to dispose of the property of the company, yet has an interest in it as it is out of such property that he derives his share in the profits of the company. Similarly in a partnership business a partner may be a co-owner in the property, but he has no right to ask for a share in that property but only that the partnership business should be wound up, including therein the sale of the immovable property, and to ask for his share in the resulting assets. Before a partner released his right in the partnership property that property belongs to the partnership and incidentally to him as a member of the partnership but not in his individual capacity. When, therefore, he retires from the partnership by releasing his rights therein, the property still remains the property of the partnership and the action in releasing his rights does not actually extinguish his right in the immovable property, for he receives his share of the assets on going out of the partnership, and the immovable property still remains the property of the partnership as it was before. I would therefore hold that Exhibit III does not require registration.

Even if this view is not correct, I think there is another ground for holding that Exhibit III is admissible in evidence based on section 49 of the Registration Act, which says that no document required by section 17 to be registered shall be received as evidence of any transaction affecting such property. Although, therefore, this release deed may require registration under section 17, yet it may be received in evidence if it is not received as evidence of any transaction affecting such property. Here, the transaction has the effect of leaving the immovable property in the same state as it was before, namely, as property belonging to the partnership. The fact that that partnership consists of one less partner

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than before, does not affect the immovable property. This seems to me to be clear from the decisions regarding shares in joint stock companies, whether incorporated or unincorporated. The property remains the partnership property and is not affected by the change in the body of persons owning it. In this view then Exhibit III is admissible in evidence, even if it requires registration as a document extinguishing an interest in immovable property. I must, therefore, come to the conclusion that the judgment of the learned Judge is wrong and that the decree of the Subordinate Judge must be restored with costs both here and in Second Appeal. Appeal No. 43 of 1925 follows this and there will be a similar order in that appeal.

MADHAVAN
NAYAR, J.

MADHAVAN NAYAR, J.—I agree and have nothing to add.

K.R.

APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao and Mr. Justice
Madhavan Nayar.*

1925,
August 28.

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1ST DEFENDANT (PETITIONER AND TWO OTHERS),
APPELLANTS,

v.

TIRUPATHIA PILLAI AND ANOTHER (RESPONDENTS—
ASSIGNEE DECREE-HOLDERS) RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), ss. 21, 24 and 39—
Mortgage decree for sale—Final decree passed—Mortgage
property transferred from local jurisdiction of Sub-Court
which passed the final decree to that of District Court—
Withdrawal by District Court and re-transfer to same Court
—Objections to execution, not on ground of jurisdiction—*

* Civil Miscellaneous Appeal No 450 of 1924.

*Subsequent order to sell—Objection to jurisdiction again not
taken by judgment-debtor—Sale held—Application by latter
to set aside sale, on grounds including want of jurisdiction—
Objection, whether maintainable—Waiver of objection as to
jurisdiction—Competency of Court passing mortgage decree
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After the final decree in a suit for sale on a mortgage was passed by a Sub-Court and an application for execution was filed in that Court, the mortgage property was transferred from the territorial jurisdiction of that Court to that of the District Court. Notwithstanding the transfer, the Sub-Court passed orders on the objections raised by the judgment-debtor who did not however raise the objection to jurisdiction. Subsequently on the application of the decree-holder, the District Court withdrew the execution application to its own file and re-transferred it to the same Court, which subsequently held the sale of the property without objection to its jurisdiction. On the judgment-debtor filing an application in the Sub-Court to set aside the sale on the ground *inter alia*, that the Court had no jurisdiction to sell the property ;

Held, that the objection to the territorial jurisdiction of the Court should be taken at the earliest possible opportunity, and if it was not so taken, it should be deemed to have been waived on the principles underlying section 21, Civil Procedure Code, and could not be taken at a later stage.

Ledgard v. Bull, (1887) I.L.R., 9 All., 191 (P.C.) ; *Zamindar of Ettiyapuram v. Chidambaram Chetty*, (1920) I.L.R., 43 Mad., 675 (F.B.) applied ; *Chokkalinga Pillay v. Velayudha Mudaliar*, (1924) 47 M.L.J., 448, referred to ; and *Ramabhadra Raju Bahadur v. Maharaja of Jeypore*, (1919) I.L.R., 42 Mad., 813 (P.C.), distinguished ;

Held further by VENKATASUBBA RAO, J., that the objection to jurisdiction was not sustainable because—

(a) the rule as to territorial jurisdiction does not apply to execution of mortgage decrees, and a Court can execute a mortgage decree passed by itself, although the property to be sold is wholly or partly outside its jurisdiction ;

* *Kartick Nath Pandey v. Tilukdhari Lall*, (1888) I.L.R., 15 Calc., 667, followed ; and

(b) section 24, Civil Procedure Code, applies to execution proceedings ; and the power given to the Court under that

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section is not limited to cases mentioned in section 39 of the Code.

APPEAL against the order of the Court of the Subordinate Judge of Tanjore in E.A. No. 564 of 1923 in E.P. No. 212 of 1923 in Original Suit No. 43 of 1911.

The material facts appear from the Judgment.

S. Varadachariyar for appellant.

Advocate-General (T. R. Venkatarama Sastri) for respondent.

JUDGMENT.

VENKATASUBBA RAO, J.—The question argued in this case is one of jurisdiction, and it has been argued ably by Mr. Varadachariyar for the appellant and the Advocate-General for the respondent.

The suit is upon a mortgage and the final decree was passed by the Sub-Court of Tanjore on 23rd March 1917. The execution application with which we are concerned was filed in that Court on 2nd August 1922. On 1st April 1923 the taluk where the property is situate was, by a Government notification, transferred as and from 1st July 1923 from the local limits of the Sub-Court of Tanjore to the jurisdiction of the District Court of West Tanjore. Notwithstanding this notification, the Sub-Court proceeded with the hearing of the execution application. On 6th July 1923, objections were taken to the sale proclamation, but no objection on the ground of want of jurisdiction was raised. On 14th July 1923 the Sub-Court made an order in regard to the objections raised. The decree-holder by this time having realized that the District Court of West Tanjore was the proper Court, applied to that Court to withdraw to its own file the execution application. The District

Court in its turn formally withdrew the application to its file and re-transferred it to the Sub-Court believing that by this process it conferred jurisdiction on the Sub-Court. After this order of re-transfer, without any objection being taken to jurisdiction, the Sub-Court made an order directing the sale of the property. On 22nd October 1923, the decreeholder himself purchased the property for Rs. 41,000, the amount due to him being over Rs. 52,000, and thereupon the defendant under O. XIX, rule 90, Code of Civil Procedure, applied to the Sub-Court for the setting aside of the sale and one of the main objections taken was in regard to the jurisdiction of the Court to sell the property. The learned Subordinate Judge disallowed this application, and in the present appeal the correctness of his order is attacked.

I may at the outset observe that, though the sale is impeached before us on several grounds, the only point seriously urged is the one relating to jurisdiction.

On three grounds the order of the lower Court may be supported.

First, the defendant did not object to the jurisdiction of the Court, and on the principle underlying section 21, the objection must be deemed to have been waived. It is a settled principle that where a Court has no inherent jurisdiction over the subject-matter of a suit, no waiver on the part of the defendant can confer jurisdiction upon it. But where the Court has jurisdiction over the subject-matter but there are irregularities in the initial procedure, the defendant who without objection goes to trial upon the merits, cannot subsequently dispute the jurisdiction of the Court. See *Ledgard v. Bull*(1). Here then is the rule as well as the

(1) (1887) I.L.R., 9 All., 191 (P.C.)

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exception. Turning to the Indian Statute Law, section 99, Civil Procedure Code, embodies the rule. The exceptions to the rule are contained *inter alia* in section 11 of the Suits Valuation Act and section 21 of the Civil Procedure Code. By virtue of these sections, certain defects of jurisdiction are put on a par with "irregularities in the initial procedure." In regard to the pecuniary jurisdiction of a Court, section 11 of the Suits Valuation Act and in regard to its territorial jurisdiction section 21, Civil Procedure Code, recognize that there may be a waiver on the part of the defendant and that the absence of jurisdiction does not render the decree a nullity. As Mr. Varadachariyar contends, section 21 does not in terms apply; but the rule has been held to be of general application and the principle underlying section 21 has been applied to cases which do not strictly fall within its terms. *Zamindar of Ettiyapuram v. Chidambaram Chetty*(1) is an authoritative ruling on the point. In that case the Court had jurisdiction to try the mortgage suit at the time it was instituted. It had jurisdiction at the time the preliminary decree was passed but lost jurisdiction when it passed the final decree. Objection was taken to the validity of the decree in execution, but it was overruled on the ground that the objection must be deemed to have been waived. Section 21 runs thus:—

"No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice."

No objection could have been taken to the place of suing, because the suit was instituted in the proper Court; nor was it the appellate or revisional Court that

(1) (1920) I.L.R., 43 Mad., 675 (F.B.).

disallowed the plea of want of jurisdiction. *Zamindar of Ettiyapuram v. Chidambaram Chetty*(1) is therefore a clear authority for the position that, although section 21 does not in terms apply, the principle underlying it holds good.

In *Chokkalinga Pillay v. Velayudha Mudaliar*(2), a final decree was passed without objection in a mortgage suit by a Court which had by then lost territorial jurisdiction by reason of Government notification. In a subsequent suit brought to set aside the decree on the ground that the decree was void for want of jurisdiction, it was held that the defendant having waived the plea of want of jurisdiction, it was no longer open to him to raise it. I observed in my judgment in that case (p. 459)—

"The section in terms no doubt does not apply, because it refers to the disallowing of the objection by an appellate or revisional Court. But the principle is of general application and if in appeal or revision the decree cannot be impeached it is equally reasonable that in a collateral proceeding it should not be allowed to be attacked. I respectfully adopt the statement of the law contained in *Zamindar of Ettiyapuram v. Chidambaram Chetty*(1), to the effect that the principle underlying section 21 is that the objection to territorial jurisdiction is cured not merely for the purpose of the appellate or revisional Court but cured entirely and for all purposes. In my opinion again, this section applies when there is want of jurisdiction not merely at the institution of the suit but at any stage during the progress of it. It is difficult to believe that a more stringent rule was intended to be applied to cases where there has occurred a cessation of jurisdiction, than to those where there has been initial absence of jurisdiction."

In the Letters Patent appeal from this decision No. 57 of 1924 this view was confirmed.

Mr. Varadachariyar strongly contends that although the rule has been extended to a certain extent in these

(1) (1920) I.L.R., 43 Mad., 675 (F.B.).

(2) (1924) 47 M.L.J., 443.

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cases still they only deal with objections that could have been taken prior to the passing of the decree, or compendiously put, objections to the place of suing. In the present case, it is urged that any plea of want of jurisdiction could have been taken for the first time only in execution proceedings and the learned vakil on this ground asks us not to further extend the principle. I cannot accept the contention. If it is conceded that apart from section 21 there is a principle of general application, I fail to see why we must limit it in the manner suggested. I agree with Sir JOHN WALLIS's observation in 43 Mad., 675 at 686, that the decision of the Privy Council in *Ramabhadra Raju Bahadur v. Maharaja of Jeypore* (1), is not opposed to this view. The Judicial Committee were dealing with the case of a decree which ordered sale of land situate in a scheduled district, and their Lordships held that as the sections of the Code did not apply to a scheduled district, the principle of section 21 could not be invoked. All that has been decided by the Privy Council is, that if the Code itself does not apply the principle recognized by it similarly does not apply. I am therefore clearly of the opinion that it is now no longer open to the defendant to object to jurisdiction.

The order may next be supported on the ground that the rule of territorial jurisdiction does not apply to execution of mortgage decrees. In *Maseyk v. Steel & Co.* (2), a mortgage suit was instituted under section 19 of the Code of Civil Procedure of 1882 which gives jurisdiction to a Court to entertain a suit in respect of properties partly situated within its jurisdiction and partly out of it. Some of the properties were situated in the district of *N* and some in the district of *R*. One property known as Mehal No. 20 was situated

(1) (1919) I.L.R., 42 Mad., 813 (P.C.). (2) (1887) I.L.R., 14 Cal., 661

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partly within the district of *N* and partly within the district of *R*. The suit was brought in the Court at *R* and the decree was also passed by that Court. In pursuance of that decree, the mortgage properties including Mehal No. 20 were sold by the *R* Court. The question that had to be decided was, was the sale of this Mehal not wholly situated in the *R* district valid?

PETHERAM, C.J., observing that execution of money decree stood on a different footing from execution of mortgage decrees, held that the power of the Court in executing mortgage decrees was not limited by the territorial jurisdiction of that Court. In the case of a money decree, the Court cannot attach property outside its jurisdiction, for the decree merely awards a sum of money and does not prescribe the method by which that sum shall be recovered. In the case of a mortgage decree, however, the decree itself directs the sale of the property by the Court and it is practically in the nature of a decree for specific performance. On these grounds, the learned CHIEF JUSTICE held that the rule of territorial competency does not apply to execution of mortgage decrees. The other learned Judge, Mr. Justice GHOSH, was also of the same opinion.

Section 19 referred to in the judgment, it will be seen, corresponds to section 17 of the present Code. If immovable property is situate within the jurisdiction of different Courts, a suit in respect of it may be instituted in any Court within the local limits of whose jurisdiction any portion of that property is situate.

With reference to 14 Cal., 661, I must make two observations, first, some passages in the judgment may give the impression that the reason for the decision was that as section 19 authorized the institution of the suit, the authority extended also to execution proceedings. But the decision is not based on this narrow ground, nor

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is there any warrant for the position that the section which in terms refers only to the institution of the suit applies also to execution proceedings.

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The second observation I have to make is, that the judgment deals only with the actual case that arose, that is to say, the sale of property partly within the Court's jurisdiction and partly outside, and although there are some expressions of doubtful import, there is no definite pronouncement in regard to the law if the property sold is wholly outside the jurisdiction.

In *Kartick Nath Pandey v. Tilukdhari Lall*(1), this principle was recognized and 14 Calc., 661, was cited with approval. I may incidentally say that this case is on all fours with the present. At the time of the passing of the mortgage decree the property was wholly situate within the local limits of the Court, and after the decree, the district within which the property was situate was transferred to the local jurisdiction of another Court. It was held that the Court which passed the decree had authority to execute its decree and bring the property to sale. I am not now concerned with the wider point whether the Court can in all cases execute its own decree. I am referring to this case only for the more limited position that a Court can execute a mortgage decree passed by itself although the property to be sold is wholly or partly outside its jurisdiction.

Gopi Mohan Roy v. Doybaki Nundun Sen(2), is an instructive case. It was decided by a bench of which GHOSH, J., who took part in 14 Calc., 661, was a member. The suit was on a mortgage and related to two properties each within the jurisdiction of a separate Court. The Court within whose jurisdiction one of the

(1) (1888) I.L.B., 15 Calc., 667.

(2) (1892) I.L.R., 19 Calc., 18.

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properties was situate passed the decree and it was held that it could sell the other property also although it was outside its jurisdiction. GHOSH, J., observed that he did not intend to lay down a contrary rule in the earlier case, 14 Calc., 661. The fact that one item was wholly outside the Court's jurisdiction was held not to make any difference.

In *Tincovri Debya v. Shib Chandra Pal Chowdhury*(1), PRINSEP and AMIR ALI, JJ., affirmed 19 Calc., 13, on the broad ground that it would be impossible to give effect to the provisions of the Transfer of Property Act relating to sales if it were held necessary to apply to different Courts to obtain realization of the mortgage debt.

In *Begg Dunlop & Co. v. Jagannatha Marwari*(2), it was held that a Court is not competent in execution of a decree for money to attach a debt payable to the judgment debtor outside the jurisdiction by a person not resident within the jurisdiction of the Court. Mr. Justice MUKHERJEA in the course of his judgment observes that an exception is recognized in the case of mortgage decrees to the general rule that no Court can in execution assume jurisdiction over property outside its territorial limits.

In some of the cases mentioned above (see 14 Calc., 661 and 19 Calc., 13) the learned Judges tried to overcome the difficulty presented by section 223 corresponding to section 39 of the present Code. Under that section, the Court which passed a decree, may, on the application of the decree-holder, send it for execution to another Court and the section contains four clauses (a), (b), (c) and (d) showing when this procedure is to be adopted. The view that found favour with the

(1) (1894) I.L.R., 21 Calc., 639.

(2) (1912) I.L.R., 39 Calc., 104.

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Judges was that "may" in the section means "may when necessary." In the case of a mortgage decree, the Court which passes it directs the sale by itself of the property mortgaged and in such a case sending of the decree to another Court is optional and not compulsory. In the case of attachment in pursuance of a decree there is assumption of jurisdiction for the first time after the decree and the section then operates compulsorily.

The Calcutta High Court has thus uniformly held (and there is quite a string of decisions on the point) that in the case of a mortgage decree, a Court which passed it may notwithstanding the fact that the property is outside its jurisdiction, bring it to sale. We have not been referred to any case of the Madras High Court which has refused to follow this rule. In matters of procedure it is more important that the law should be certain than that it should be logical, and whatever my own view may be, if the question has to be decided on principle, I am content to follow the Calcutta decisions not only for the reason that some very eminent Judges have taken part in them but also because, what with the defective provisions of the Code relating to jurisdiction and what with the constantly occurring territorial redistribution, there is scarcely a question free from doubt and the view of the Calcutta High Court, in the circumstances, affords some measure of protection to decree holders.

I shall now deal with the last of the three grounds I have mentioned. Section 24 gives the High Court or the District Court power to transfer suits and other proceedings. The material part of the section reads thus:—

"The High Court or the District Court may transfer any suit, appeal or other proceeding—pending before it for trial or

disposal to any Court subordinate to it and competent to try or dispose of the same."

Mr. Varadachariar's contention is that this does not apply to execution proceedings. He puts his argument thus: The test of competency in the case of execution proceedings is territorial jurisdiction. How can then an execution petition be transferred to a Court which has no such jurisdiction? It can be transferred only under the section to a Court competent to dispose of it. A Court without local jurisdiction is not competent to dispose of the execution application. He thus contends that the words of the section by *implication* show that the section is not intended to deal with execution applications. I am not prepared to accept this argument. Under the section a suit pending in any Court may be transferred to any other Court competent to try it. To take a concrete instance, the High Court may transfer a suit pending in the District Court of Tinnevely to the District Court of Rajahmundry. The District Court of Rajahmundry is not strictly competent to try the case as it is wanting in territorial jurisdiction. Does it then mean that a suit cannot be transferred to a Court not having local jurisdiction? If this view be adopted, the very object of the section will be defeated, and possibly very few suits, if any at all, can be transferred. This consideration makes it clear that in regard to suits competency is not referred to in the section in the sense of territorial or local competency.

Now, coming to execution applications, the scheme of the Code seems to indicate that pecuniary competency in a Court need not exist. Mr. Varadachariar asks, if in the case of execution applications pecuniary competency is always out of the question and section 24 is to be held as authorizing transfer to a Court not possessing territorial competency, what possible meaning can

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reasonably be given to the words "competent to dispose of the same"? It seems to me that this objection does not take count of the fact that there may be other kinds of incompetency so far as an executing Court is concerned. To take an instance, under Order II, rule 4, a decree directing delivery of possession of immovable property cannot be transmitted to any Presidency Court of Small Causes for execution. I am, therefore, of opinion that section 24 applies to execution proceedings. See *Velliappa v. Subramaniam*(1), *Nassarvanji v. Khar-sedgi*(2) and *Muhammad Habib-ullah v. Tikam Chand*(3).

Mr. Varadachariar next contends in the alternative that should section 24 be held to apply to execution proceedings, they can be transferred only to Courts competent under section 39, Civil Procedure Code, to dispose of them. In other words, he urges that the only Courts to which decrees can be transferred are those mentioned in section 39, because they are the only Courts possessing jurisdiction. In effect, his contention is that section 39 gives to the Court that passed the decree a power to transfer, whereas section 24 gives similar power, and no higher power to a superior Court. This construction is far fetched and if adopted will render section 24 so far as execution proceedings are concerned almost useless.

A fourth point is raised by the learned Advocate-General who appears for the respondent that on a right construction of sections 37, 38 and 39 the Court which passed the decree as well as the Court which has jurisdiction owing to territorial redistribution both these Courts have jurisdiction to execute the decree. This argument extends to all decrees, money decrees as

(1) (1916) I.L.E., 39 Mad., 485. (2) (1898) I.L.R., 22 Bom., 778.
(3) (1925) I.L.R., 47 All., 57.

well as mortgage decrees. It is very difficult to reconcile the decisions that have been cited on the point and *Seeni Nadan v. Muthusami Pillai*(1), a judgment of three Judges, illustrates the range of conflict of opinion on this subject. As my decision on the previous points disposes of this appeal, I would prefer to express no opinion on this question. I may repeat what I said on a cognate matter in *Chokkalinga Pillay v. Velayudha Mudaliar*(2) that in view of the great uncertainty that prevails on this subject, the legislature should in clear and unequivocal terms lay down as to which Courts possess jurisdiction in such cases. The appeal fails and I would dismiss it with costs.

MADHAVAN NAYAR, J.—I have had the advantage of reading the judgment of my learned brother; I agree with him in holding that this appeal should be dismissed with costs, but I prefer to rest my judgment on the short ground that since the appellant did not object to the jurisdiction of the Court at the earliest opportunity, he is now precluded from raising that question on the principle underlying section 21 of the Code of Civil Procedure. Under that section, unless objection is taken to the place of suing at the earliest possible opportunity, no objection can be taken in appeal or in revision. As contended for by Mr. Varadachariar in his able argument, the section in terms does not apply; but the decisions of this Court have on different occasions applied the general principle underlying section 21 to cases which do not fall strictly within its scope. The most recent decision on the question is the one reported in *Chokkalinga Pillay v. Velayudha Mudaliar*(2) by PHILLIPS, J., and my learned brother. In that case a suit upon a mortgage was instituted in Kumbakonam

(1) (1919) I.L.E., 42 Mad., 821 (F.B.). (2) (1924) 47 M.L.J., 449 at 459.

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Court when that Court had jurisdiction over the place where the mortgaged property was situated. Owing to the transfer of jurisdiction from that Court to the Mayavaram Court, the former Court lost the jurisdiction over the place where the mortgaged properties lay at the time of the passing of the final decree. No objection was raised as to the competency of the Court to pass the final decree. In a suit brought to set aside the decree on the ground that it was void for want of jurisdiction, it was held that since the objection was not taken at the earliest possible opportunity, it must be deemed to have been waived. Both the learned Judges expressed the opinion that, though the section in terms does not apply because it refers to the disallowing of the objections by an appellate Court or revisional Court, still the principle is of general application and that the validity of the decree then under consideration could not be impeached in a suit brought to set aside the decree. It is stated by PHILLIPS, J., that

“the principle underlying the section is that waiver of territorial jurisdiction is recognized by law, whereas it has been consistently held that other forms of jurisdiction such as jurisdiction of the subject matter or pecuniary jurisdiction cannot be waived by consent of parties.”

For holding that the principle underlying the section is of general application, reliance was placed on the Full Bench ruling reported in *Zamindar of Ettiyapuram Chidambaram Chetty*(1). In that case, the Court which passed the final decree in a mortgage suit had no jurisdiction to pass the decree and objection was taken in execution to the validity of the decree. In overruling the objection, it was pointed out by the Full Bench:—

“The effect of the section is that objections which the appellate or revisional Court is thereby precluded from allowing must be considered cured for all purposes unless taken before

(1) (1920) I.L.R., 43 Mad., 675 (F.B.).

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the passing of the decree in the original Court. That the ordinary way of questioning a decree passed without jurisdiction is on appeal or in revision and, if this is forbidden, a Court of first instance cannot in execution do that which the appellate or revisional Court is precluded from doing.”

Mr. Varadachariar's contention that, since his plea as regards the want of jurisdiction could have been taken for the first time only in execution proceedings in this case, section 21 of the Code of Civil Procedure, which deals only with the objection as to the place of suing should not be applied, cannot be accepted. As pointed out by my learned brother, no reason is suggested for placing this limitation upon the general principle underlying section 21. The decision of the Privy Council in *Ramabhadra Raju Bahadur v. Maharaja of Jeypore*(1) does not support the contention of the learned vakil for the appellant. In that case, an order for sale of the mortgaged property situated in a scheduled district to which the Civil Procedure Code did not apply was made by the Subordinate Judge's Court of Vizagapatam. It was held by their Lordships of the Privy Council that the order for sale was bad as made under a section of the Code which did not apply to the scheduled district and that section 21 of the Code of Civil Procedure did not apply to the case. As pointed out by WALLIS, C.J., they had not to consider the application of section 21 where all the mortgaged properties were within the jurisdiction of the Courts governed by the Code of Civil Procedure. I am, therefore, of opinion that the appellant in this case is not now entitled to take the objection that the Court had no jurisdiction to sell the property.

I do not express any opinion on the other points dealt with by my learned brother in his judgment.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

CHITTAMMAL AND ANOTHER (2ND AND 3RD RESPONDENTS),
APPELLANTS,

v.

1. PONNUSWAMI NAICKER
2. A. SUBRAMANIA AYYAR, } PETITIONERS),
OFFICIAL RECEIVER OF TINNEVELLY } RESPONDENTS.*

*Provincial Insolvency Act (V of 1920), ss. 4 and 56—
Application under sec. 56 (3) to remove a person from possession of property—Person in possession setting up title—
Delivery of possession, whether can be directed under sec. 56 (3)—Application under sec. 4—Question of title—Effect of order under sec. 56 (3) and sec. 4, difference between—Nature of applications under the section—Parties to application.*

Acting under section 56 of the Provincial Insolvency Act (V of 1920), the Court cannot direct any person to deliver up any property in his possession to the Official Receiver, unless the insolvent is entitled, on the date of the application under the section, to the immediate possession of the property; if a title, however flimsy, is set up by the person in possession, the Court cannot act under section 56.

But it is open to the Court, on a proper application being made under section 4 of the Act, to try the issue whether the insolvent is entitled to the property or not.

APPEAL against the order of J. K. LANCASHIRE, the District Judge of Tinnevely, in Insolvency Application No. 265 of 1923, in Insolvency Petition No. 17 of 1923.

The first petitioner in the lower Court, a lessee of the properties in question from the second petitioner, the Official Receiver of Tinnevely, filed a petition under section 56 (3) of the Provincial Insolvency Act in the District Court to remove the respondents 2 and 3 therein, from the properties in their possession on the ground

that the properties belonged to the insolvent adjudicated in I.P. No. 17 of 1921. The persons in possession claimed to be in possession of the properties ever since 1897 under a family arrangement; and they contended that their names as well as the name of the insolvent were included in a joint patta, that the second respondent was the widow of the insolvent's paternal uncle, that the third was her daughter, that they had been paying the Government revenue ever since, that they were given the lands in absolute right and that their possession could not be disturbed. They adduced evidence to prove their case. The learned District Judge held that there was no valid absolute gift, but that they were probably entitled only to maintenance; that the properties were vested in the insolvent, and directed, under section 56 (3), that the Official Receiver be placed in possession of the properties, removing the second and third respondents from their possession. The latter preferred this appeal.

K. Bhashyam Ayyangar and S. Rajagopalachariar for appellants.

K. R. Rangaswami Ayyangar and R. Krishnaswami for respondents.

JUDGMENT.

DEVADOSS, J.—This appeal is against the order of DEVADOSS, J. the District Judge of Tinnevely directing the appellants to hand over possession of the property in their possession to the Official Receiver and his lessee. The first respondent herein is the lessee of the property from the second respondent who is the Official Receiver of Tinnevely. The appellants were in occupation of the property in dispute from the year 1897. The respondents applied to the District Judge for an order under section 56 of the Provincial Insolvency Act directing

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the appellants to hand over possession of the property in dispute to the respondents on the ground that the property was the property of the insolvent. The learned Judge has passed an order under section 56 (3) in favour of the respondents. The question for consideration is whether such an order can be passed against persons who claim adversely to the insolvent. Section 56, clause (3), second paragraph is in these terms:—

“ Provided that nothing in this section shall be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.”

An application under section 56 is made for the purpose of realization of the property of the insolvent. If a person is in possession of the property on behalf of the insolvent, or claims under the insolvent, possession of such property may be taken under the orders of the Court by the Official Receiver. But where the person in possession claims adversely to the insolvent, or where he is able to show that the insolvent is not entitled to present possession, the Court has no power to proceed under section 56, for the second paragraph of clause (3) specifically says that

“ nothing in this section shall be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.”

The corresponding provision in the Presidency Towns Insolvency Act is section 58; and clause (2) of that section puts the matter beyond doubt. It is as follows:—

“ The Official Assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a receiver of the property appointed under the Code of Civil Procedure, 1908,

and the Court may, on his application, enforce such acquisition or retention accordingly.”

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The position of the Official Assignee is therefore the same as that of a receiver appointed under the Code of Civil Procedure. Order XI, rule 1 (2), is as follows:—

“ Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.”

The power of the Court under the Provincial Insolvency Act, section 56, is not any higher than the power of the High Court under the Presidency Towns Insolvency Act, section 58. The Court therefore cannot, acting under section 56, direct any person to deliver up property in his possession to the Official Receiver unless the insolvent is entitled on the date of such application to the possession of such property. If a title, however flimsy, is set up by the person in possession, the Court should not act under section 56. It is open to the Court on a proper application being made under section 4 of the Provincial Insolvency Act to try the issue whether the insolvent is entitled to the property or not. But in order to enable the Court to do that a proper application ought to be made under section 4 of the Provincial Insolvency Act, and the other side should be asked to plead thereto.

In this case it is suggested for the respondents that, though the application was made under section 56, it must be deemed that the enquiry was held under section 4 and the order was made under that section. But it is clear from the sixth paragraph of the District Judge's order that he passed the order only under section 56 (3) and we cannot import into it something which is not there. If the application was one under section 4 the first respondent should not have been made a party. Nobody other than the Official Receiver can move under

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section 4 unless the Official Receiver is unwilling to act and the Court authorizes a creditor or any other person interested in preserving the insolvent's estate to act under that section in the name of the Official Receiver.

It is again urged that the question of the title of the appellant has been gone into and has been found against, and therefore it is unnecessary that there should be a fresh proceeding under section 4. When an order is passed under section 56 (3) it does not determine the rights of the parties and though the Judge may incidentally determine the question, yet it cannot be said that the question is finally determined. It would not be right to allow a loose procedure to obtain in insolvency proceedings. The law of insolvency is not properly understood in the mufassal and it would not be right on the part of the Court to adopt a loose procedure for the purpose of realizing the estate of the insolvent. Such a procedure would lead inevitably to hardship and to an unsettled state of the law.

In regard to the merits it is unnecessary to say much. The appellants were in possession of the property from 1897. They claim to have been in possession of the property by virtue of an arrangement in the family. It is urged by Mr. Bhashyam Ayyangar that no registered document is necessary for a family arrangement. If the appellant could show that there was a proper arrangement, they would be entitled to retain possession of the property against the insolvent and against the Official Receiver.

On behalf of the respondents it is urged that the first appellant is dead and therefore the second appellant, daughter of the first appellant, has no right to be in possession of the property. This question again will have to be gone into fully, and in the absence of an investigation into the title of the second appellant it

would not be right to deprive her of the possession of the property and drive her to a suit. If the order is to be construed as an order under section 4 a suit would be barred; if it is construed as an order under section 56 (3) the order is illegal inasmuch as the insolvent is not entitled to present possession of the property.

In a recent case, *Official Receiver of South Arcot v. Perumal Pillai*(1), it was decided by SPENCER, J., and myself that the power given by section 4 of the Provincial Insolvency Act, is subject to the provisions of the Act one of which is the proviso to section 56 (3) which is in the way of the Court removing any person from the possession of property whom the insolvent has no present right to remove.

The appeal is allowed and the order of the lower Court is set aside with costs throughout.

WALLER, J.—I agree that, where there is a dispute as to the insolvent's title, section 56 cannot be invoked. For, in order that that section may be resorted to, the insolvent must have an immediate right to remove from possession. Proceedings therefore should have been taken under section 4.

K.R.

(1) (1923) 18 L.W., 884.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice
Viswanatha Sastriyar.

1925,
October 6.

VEMULPALLAI SEETHARAMANNA AND OTHERS
(DEFENDANTS 1 TO 5), APPELLANTS,

v.

MAGANTI APPIAH AND ANOTHER (PLAINTIFF AND
SIXTH DEFENDANT), RESPONDENTS.*

Hindu Law—Minor—De facto guardian—Alienation by de facto guardian for minor's necessity, whether valid—Alienation by de facto guardian, not for necessity, whether voidable or void—Ratification by minor on attaining majority, validity of.

An alienation by a *de facto* guardian of a Hindu minor, for a necessity of the minor, is valid under the Hindu Law. *Hanoomanpersaud Panday v. Mussumat Babooee Munraj Kooweree* (1858) 6 M.I.A., 393, relied on.

An alienation by a *de facto* guardian, not for a necessity of the minor, is only voidable and therefore can be ratified by the minor on attaining his age of majority :

Chetty Colum Comara Venkatachella Reddyer v. Raja Rungasawmy Streemunth Iyengar Bahadur, (1861) 8 M.I.A., 319, relied on.

SECOND APPEAL against the decree of K. SOWRIRAJULU NAYUDU, Subordinate Judge of Masulipatam, in Appeal Suit No. 7 of 1922, preferred against the decree of P. RANGASWAMI AYYANGAR, Principal District Munsif of Gudivāda, in Original Suit No. 151 of 1919.

V. Ramadoss for appellants.—Acts of a *de facto* guardian are binding on the minor, if the alienation is for a necessity, as in the case of an alienation by a *de jure* guardian : see *Hanoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(1), *Nathuram v. Shoma Chhagan*(2), *Arunachala Mudali v. Chidambara Reddi*(3). Secondly, acts of a *de facto* guardian can

be ratified by the minor on his becoming a major, just as a *de jure* guardian's acts can be validly ratified by him. The alienations in both cases are voidable and not void and therefore can be ratified. See *Chetty Colum Comara Venkatachella eddyer v. Raja Rungasawmy Streemunth Iyengar Bahadur*(1).

P. Satyanarayana Rao for respondents.—All acts of a *de facto* guardian are void. An intermeddler by calling himself a *de facto* guardian, cannot cease to be an intermeddler. An intermeddler's acts cannot bind the minor. In the absence of the parents, the Court must appoint a person as guardian. See *Thayammal v. Kuppanna Koundan*(2). The Hindu Law does not differ from the Muhammadan Law in this respect. Unauthorized alienations are a nullity : *Kristo Kissor Neoghy v. Kad-rmojee Dossee*(3) and *Musst. Bhikuo Koer v. Musst. Chamela Koer*(4). There is no text of Hindu Law which recognizes a *de facto* guardian's powers. It is like the Muhammadan Law in this respect : see *Mata Din v. Ahmal Ali*(5), *Imambandi v. Mutsuddi*(6).

JUDGMENT.

ODGERS, J.—The question in this case is whether an alienation by a *de facto* guardian is valid under the Hindu Law. The person in question is the maternal uncle of the plaintiff and of course is neither the natural nor the legal guardian. The District Munsif dismissed the suit which was a claim for a declaration that the alienation made during the minority of the plaintiff did not bind him. The Subordinate Judge reversed this decision holding that the alienation made by the maternal uncle was a void transaction.

It has been argued at length for the respondents that a *de facto* guardian is unrecognized in the Hindu Law. It may be at once said that, if there is such a recognition, I am satisfied that the recognition is more or less modern and possibly, to some extent, the recognition, if it is legally recognized at all, has come about

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* Second Appeal No. 444 of 1923.

(1) (1856) 6 M.I.A., 393. (2) (1890) I.L.R., 14 Bom., 562.

(3) (1903) 13 M.L.J., 223.

(1) (1861) 8 M.I.A., 319.

(2) (1915) I.L.R., 38 Mad., 1125.

(3) (1878) 2 C.L.R., 583.

(4) (1898) 2 C.W.N., 191.

(5) (1912) I.L.R., 34 All., 213 (P.C.).

(6) (1918) I.L.R., 45 Cal., 878 (P.C.).

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by necessity. The earliest case, as far as I know, is the well-known case in *Hanoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(1) where their Lordships of the Privy Council say :

"Upon the third point it is to be observed that under the Hindu Law the right of a *bona fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly for the purpose of saving the estate or for the benefit of an estate is not (provided the circumstance would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure*."

It has been said that this dictum is obiter as the Rani in the case under discussion was undoubtedly the natural guardian. It might perhaps also be said that the third point was not absolutely essential to the decision. However that may be, any dicta that may fall from the Privy Council are naturally entitled to great weight and, if the powers of a *de facto* guardian under the Hindu Law have been recognized in other decisions, it must, I think, be taken that a *de facto* guardian is known to that law. Much stress has been laid for the respondents on the Privy Council case in *Imambandi v. Mutsaddi*(2), where it is clearly laid down that a *de facto* guardian is unknown in the Muhammadan Law. The decisions of the Courts on this point of Muhammadan Law are fully examined and, in their Lordships' judgment delivered by Mr. AMEER ALI, a person who may be conveniently called a *de facto* guardian has no power under the Muhammadan Law to convey to another any right or interest in immovable property which the transferee can enforce against the infant. Nothing can be clearer than that. But it has to be observed that not only there but all through the judgment only the question as arising under the Muhammadan Law is dealt with.

(1) (1856) 6 M.J.A., 393.

(2) (1918) I.L.R., 45 Cal., 878 (P.C.).

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On the other hand, in Gour's Hindu Code, section 906, it is asserted that the powers of a natural and *de jure* guardian are the same as those of a legal guardian. Any act done by the *de facto* guardian would be equally binding on the minor if it is supported by necessity or benefit to the minor. See also section 913 where the learned author expressly states that the Muhammadan Law is different.

In *Mohanund Mondul v. Nafur Mondul*(1), a grandmother purported to sell a minor's estate. The Court found that she was a *de facto* guardian, and, relying on *Hanoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(2), it held that not only might a *de facto* guardian mortgage but also sell. BANNERJI, J., points out that there may be cases where the sale of a part of the minor's estate might be more beneficial to him than a mortgage. In *Adhar Chandra Dutta v. Kirtibash Bairagee*(3), it is said in the judgment :

"It is conceded by the learned Doctor who appeared for the appellants that the powers of a *de facto* guardian are the same as those of a legal guardian."

It appears that the Court adopted that admission which was that of Dr. Rash Behari Ghose. In *Bai Amrit v. Bai Manik*(4), which is a case of a transaction by the mother as guardian of her son and of her minor daughter-in-law, she would of course be the natural guardian of the son, but the case is treated as if she was the manager *de facto* of the family, any sales for valuable consideration, the proceeds of which were applied to meet the family necessities, were held to be unquestionable. *Nathuram v. Shoma Ohhagan*(5) was a case of the father's cousin taking charge of a minor and borrowing money to meet the funeral expenses of the

(1) (1819) I.L.R., 26 Cal., 820.

(2) (1856) 6 M.J.A., 393.

(3) (1910) 12 C.L.J., 586.

(4) (1875) 12 Bom. H.C.R., 79 at 81.

(5) (1890) I.L.R., 14 Bom., 562.

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deceased father. It was held that he had sufficient authority to bind the minor by a loan if it were necessary. SADASIVA AYYAR, J., in *Vembu Aiyar v. Srinivasa Aiyangar*(1), citing 6 M.I.A., 412, says that, when the act is done by the person who is not the guardian but who is the manager of the estate in which the minor is interested, the latter will equally be bound if under the circumstances the step taken was necessary, proper or prudent.

On the other hand, no case has been cited, except possibly one, which lays down that a *de facto* guardian has no power to deal with the property of a minor for necessity. On the other hand in *Arunachela Reddi v. Chidambara Reddi*(2), it is said:

“It is well settled that an alienation may be validly made by a *de facto* guardian (assuming of course the necessity).”

It is true that there the guardian in question was a natural guardian. But, in my view, having regard to the authorities I have cited, that can make no difference.

Arumugam Chetti v. Duraisinga Tevar(3), which was referred to by the learned vakil for the respondents, merely lays down that, once a guardian has been appointed by the Court, the rights of the natural guardian are extinguished. It will be noticed at page 41 the learned Judges say that there is no proof that the first defendant's mother was the *de facto* guardian. In *Gopi Ram v. Jeot Ram*(4), the mother did not mortgage the property on behalf of her son and no question of necessity arose. *Mata Din v. Ahmad Ali*(5) is again, like *Imambandi v. Mutsaddi*(6), a case under the Muhammadan Law. The family were Muhammadans and were governed by the Muhammadan Law relating to guardianship.

(1) (1912) 23 M.L.J., 638 at 646.

(2) (1903) 13 M.L.J., 223.

(3) (1914) I.L.R., 37 Mad., 38.

(4) (1923) I.L.R., 45 All., 478.

(5) (1912) I.L.R., 34 All., 213 (P.C.).

(6) (1918) I.L.R., 45 Cal., 878 (P.C.).

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It is pointed out by their Lordships that the question was whether, according to Muhammadan Law, a sale by a *de facto* guardian, if made for necessity and if beneficial to the minor, is altogether void or merely voidable: but it was unnecessary to decide the question, as the appellant had not shown that the sale was for necessity or was beneficial to the minor. Reliance is also placed for the respondent on a remark of SADASIVA AYYAR, J., in *Thayammal v. Kuppanna Koundan*(1), that nobody else than the father and the mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right, to be and to act as a guardian of a minor's person and property. Recourse must be had to the Court (representing the rights of the king which are paramount to even the rights of the parents) where there is no natural guardian alive. I am unable to see how this helps the respondent in the present case as the relation in question was the maternal uncle, who is therefore a direct male ancestor of the minor. The decision was that the paternal aunt was not a natural guardian. A decision much relied on is *Narayanan Nambudri v. Ravunni Nair*(2) by a single Judge of this Court where, in the case of a Nambudri illom, the step-mother of the minors, who was managing the household and looking after them, borrowed money, for necessity. On the assumption that the parties were *prima facie* governed by Hindu Law and that no special custom had been set up in the pleadings it was held that the step-mother had no legal authority. The learned Judge said:

“It is not contended that the *de facto* guardianship gave her, i.e., the step-mother, any right to mortgage the estate.”

(1) (1915) I.L.R., 38 Mad., 1125.

(2) (1924) 47 M.L.J., 686.

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With great deference I am unable to see first how the dictum applies to the facts of this case and secondly, if necessary, I would take leave to say that if the parties were governed by the Hindu Law, I should have thought it might have been well contended that the mortgage, if for necessity, could be upheld.

The Court below has found that, as to one of the sales evidenced by Exhibit IV, which is the only one in question before us, there was necessity to the extent of Rs. 275 out of a total consideration for Rs. 400. It is said by the appellants that there has been a ratification by Exhibit III by the minor on attaining his age of this alienation by his *de facto* guardian. On the other hand, it is said that any alienation not for necessity is void and not voidable and as there can be no ratification of a void transaction it is of no effect in this case. It is, I think, clear that an alienation by a *de jure* guardian or a natural guardian is voidable and, as I am inclined to hold the powers of these guardians are similar, I think a transaction entered into by a *de facto* guardian not for necessity is only voidable and therefore can be ratified by the minor on attaining his age. In *Chetty Culum Comara Venkatachella Reddiyar v. Raja Rungasami Streemunth Aiengar Bahadur*(1), the minor recognized a transaction made during his minority by his adoptive mother and guardian. This was upheld without determining the question as to the power of a Hindu widow as guardian to create a charge during the minority of the minor son.

Further, it is said that this suit is barred by limitation. The sale is dated 28th February 1907. The suit was brought on the 1st March 1919 which is admittedly the last day of the twelve years allowed. But it is said

(1) (1861) 8 M.L.A., 319.

in the letter, Exhibit III, that the transferee had had possession delivered to him some time before the date of the sale deed. The words which have been retranslated are,

“Whether before the delivery of possession to you in pursuance of the sale *before now or after.*”

The words “before now” are indefinite, but they might refer to possession being given on the same day. There is further some contention on the other side that these persons were already in possession as tenants. However that may be, the matter is much too indefinite for us to attach the slightest weight to those words. I therefore think that this point fails. This question of limitation, though dealt with by the District Munsif and found in favour of the defendants, was not considered by the learned Subordinate Judge. In my view, there is nothing in the point.

I think the learned Subordinate Judge is wrong in holding that the alienation made by the *de facto* guardian is a void transaction. In my view, the appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

VISWANATHA SASTRI, J.—Defendants 1 to 5 are the appellants. The suit was for a declaration that the alienations made by plaintiff's maternal uncle during his minority were not binding on him, and for recovery of the items alienated.

The alienations were made under two sale-deeds of the dates 28th February 1907 (Exhibit IV) and 7th October 1913, and the suit was instituted (it was said on the last day of limitation) in 1919. The District Munsif dismissed the suit; and on appeal the Subordinate Judge gave plaintiff a decree for possession. The contentions urged in second appeal are—

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(1) That the alienations by way of sale, by the maternal uncle who was not the *de jure* guardian of plaintiff, were void, and

(2) that the suit was barred by limitation with respect to the items covered by Exhibit IV, as defendants were placed in possession prior to the date of Exhibit IV. The second appeal first came on for hearing before RAMESAM, J., who referred it to a Bench

“as the matter (which forms the subject-matter of the first contention) was not concluded by authority so far as the Hindu Law is concerned.”

It was argued before us that under the Hindu Law, the father, the mother, and, failing them, the king, were the guardians of an infant; that no other relation was the guardian; that *de facto* guardians were no better than intermeddlers; and that alienations by *de facto* guardians were void as was laid down by the Privy Council in *Imambandi v. Mutsaddi*(1). That case related to a Muhammadan minor; their Lordships based their decision on Muhammadan Law Texts; and so far as I am able to see, I do not find reference in the judgment to any decided cases concerning Hindu minor. Alienations by *de facto* guardians of Hindu minors have come up very frequently before Courts, and our attention has not been directed to any decided case in which it has been held that such an alienation was *per se* void, apart from any question as to whether it was for legal necessity or not. It was said that this may be due to the fact that the point was not raised in those cases, but, as observed by MAOLEAN, C.J., in *Mohanund Mondul v. Nafur Mondul*(2),

“the absence of judicial authority suggests that the point has not been regarded as open to serious argument.”

(1) (1918) I.L.R., 45 Cal., 878 (P.C.). (2) (1899) I.L.R., 26 Cal., 820, at p. 822.

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So far as Hindu Law goes, it appears to me that there is nothing in it which limits guardianship only to the father, the mother, and, failing them, the king. Macnaghten, in his Principles and Precedents of Hindu Law, says that in default of the father and mother,

“An elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and, failing such relations, the office devolves on the maternal kinsman, according to their degree of proximity, but the appointment of guardian universally rests with the ruling power.”

(See Volume I, pages 103, 104.) And in Volume II (Precedents), case III at page 204 gives the opinion of Pandits based on the authority of the Dayabhaga Dayatatwa, Dayakrama Sangraha that the husband's sister's son is the guardian of a childless widow who is a minor. It was said that in the absence of the father and mother,

“recourse must be had to the Court (representing the rights of the king which are paramount to even the rights of the parents) where there is no natural guardian alive;” as observed by SADASIVA AYYAR, J., in *Thayammal v. Kuppanna Koundan*(1). But it must be remembered that the learned Judge in the previous sentence includes among natural guardians the elder brother and the direct male and female ancestors of the minor, although according to respondent's vakil, they would not be the natural guardians under Hindu Law. Applications to Courts can only be made under the Guardian and Wards Act, and it has been held by a Full Bench of the Calcutta High Court in *Ram Ohunder Chuckerbutty v. Brojonath Mozumdar*(2) that this Act would not affect or alter any provision of Hindu Law as to guardians who do not avail themselves of the Act. It is true that in

(1) (1915) I.L.R., 38 Mad., 1125, at p. 1126.

(2) (1879) I.L.R., 4 Cal., 929 (F.B.).

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that case the person who acted as guardian of the minor was the mother; but this circumstance would not in my opinion make any difference.

Coming to decided cases, it was held in *Mohanund Mondul v. Nafur Mondul*(1) on the authority of the Privy Council Case in *Hunooman-persaud Panday v. Mussamut Babooee Munraj Koonweree*(2) that a sale by a *de facto* guardian (it was the grandmother), in case of necessity, was valid. And in *Arunachela Beddi v. Chidambara Reddi*(3), WHITE, C.J., and BENSON, J., held that

"it is well settled that an alienation may be validly made by a *de facto* guardian (assuming of course necessity)."

In *Ganjayya v. Ramaswami*(4), it was held that the natural mother was a "lawful guardian" for the purpose of section 21 of the Limitation Act, even though there was a testamentary guardian named in the will of the adoptive father who was unwilling to act. In *Nathuram v. Shoma Chhagan*(5) a debt contracted by the father's cousin for necessary purposes was held to bind the minor. Although it is no authority in the sense of its being a judicial decision, I may state that in *Adhar Chandra Dutta v. Kirtibash Bairagee*(6) such an eminent lawyer as Dr. Rash Behari Ghosh conceded that the powers of a *de facto* guardian (of a Hindu) were the same as those of a *de jure* guardian. Our attention was drawn to the observations of SADASIVA AYYAR, J., in *Thayammal v. Kuppanna Koundan*(7) wherein the learned Judge holds that

"Under the Hindu Law, nobody else than the father and mother of a minor (with probable exception in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to act as guardian of his person and property."

(1) (1899) I.L.R., 26 Cal., 820.

(3) (1903) 13 M.L.J., 223.

(5) (1899) I.L.R., 14 Bom., 562.

(2) (1915) I.L.R., 38 Mad., 1125, at p. 1126.

(2) (1856) 6 M.I.A., 398.

(4) (1913) 24 M.L.J., 428.

(6) (1910) 12 C.L.J., 586.

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In that case the alienation by the paternal aunt was found to be "for no necessity" and the second appeal could have been decided only on this finding without considering the question whether she was a natural guardian under Hindu Law. I may also state that the probable exceptions which the learned Judge recognizes, supports the view that guardianship under the Hindu Law is not confined only to the father, mother, and the king, as contended for by respondent's vakil. The learned Judge relies on the decisions of the Calcutta High Court, *Kristo Kissor Neoghy v. Kadermaye Dossee*(1) and *Musst. Bhiknokoer v. Musst. Chamela Koer*(2) in support of his view. They were both cases in which the Court was moved to appoint a guardian, and there was no question as to the binding nature of an alienation made by *de facto* guardian. It may here be stated that the case in *Mohanund Mondul v. Nafur Mondul*(3) is referred to with approval by SADASIVA AYYAR, J., in *Vembu Iyer v. Srinivasa Iyengar*(4). Reference was made to *Narayanan Nambudri v. Ravunni Nair*(5) where a single Judge of this Court held that a *de facto* guardian of a Hindu Nambudri minor (a step-mother) was no better than an intermeddler, and had no right to represent a minor. It does not appear that any of the cases referred to were brought to the notice of the learned Judge. Decisions under Muhammadan Law have no bearing on the present question; and I am clearly of opinion that the right of a *de facto* guardian to deal with the property of a Hindu minor has been recognized by our Courts ever since the decision of the Privy Council in *Hunooman-persaud Panday v. Mussamut Babooee Munraj Koonweree*(6), provided the alienation was for necessity.

(1) (1878) 2 C.L.R., 583.

(3) (1899) I.L.R., 26 Cal., 820.

(5) (1924) 47 M.L.J., 686.

(2) (1898) 2 C.W.N., 191.

(4) (1912) 23 M.L.J., 688, at p. 646.

(6) (1856) 6 M.I.A., 398, at p. 412.

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I may here state that in the present case the *de facto* guardian was the maternal uncle who took charge of the minor after his mother's death; and the evidence of D.W. 1 is to the effect that the paternal aunt with whom the minor was for a time was not in a position to maintain herself. So far as Hindu Society in South India goes, the maternal uncle is treated as the closest relation of a person, next to his father and mother, and at all ceremonies at which presents are given, it is his that is first handed over.

Appellants' vakil next contended that the alienations now sought to be set aside were ratified by plaintiff; and that they were therefore valid, apart from any question of the maternal uncle being only the *de facto* guardian. Exhibits II and III are two letters passed on by plaintiff to the vendees on 9th November 1918, wherein he approved of the sale-deeds of the dates 7th October 1913 and 1st March 1907. That such a ratification would make the alienation binding will be clear from the decision in *Chetty Oolum Comara Venkatachella Heddiyar v. Rajah Rungasami Streemunth Aiengar Bahadur*(1).

It was also urged before us that, so far as the alienation under Exhibit IV went, the suit was barred by limitation, as possession was, as stated in it, given before its date (28th February 1907); that the evidence was that it was given during the previous cultivation season (August 1906); and that time ran from August 1906. The question under article 144 of the Limitation Act would be when the possession became adverse to the plaintiff. The District Munsif held that it became adverse when possession was given, but the Subordinate Judge did not consider this question. Since possession

(1) (1861) 8 M.I.A., 319.

was given in view of a contemplated sale it cannot be said that it became adverse to the vendor from the date it was given in case the sale was held not binding on the minor.

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The sale to the father of defendants 1 to 3 has been found by both Courts to be binding to the extent of Rs. 275, and the sale to the 5th defendant has been held to be wholly binding. In my view the effect of the ratification evidenced by Exhibit III is to make the sale to the father of Defendants 1 to 3 wholly binding on plaintiff.

I would therefore allow the appeal, and, reversing the decree of the Court below, dismiss the suit with costs throughout.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Odgers.

.NANNIER alias RAMIER AND ANOTHER (DEFENDANTS
2 AND 3), APPELLANTS

1926,
October 28.

v.

N. M. RAYALU IYER, NAGASAMY IYER & Co.
(PLAINTIFFS), RESPONDENTS.*

Contract—Sale of goods—Repudiation by buyer on the ground that seller did not tender within the agreed time—Acceptance of repudiation by seller—Suit by seller for damages for breach of contract—Plea of non-liability raised by buyer on the ground that goods were not of agreed quality—Plea, whether permissible—Rule in Braithwaite's case, whether still good law and applicable to the case—Contract Act (IX of 1872), sec. 39.

Where a person who agreed to purchase certain goods repudiated the contract on the ground that the goods were not tendered by the seller within the time alleged to have been

* Second Appeal No. 572 of 1928.

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agreed, and thereupon the seller accepting the repudiation sued him for damages for breach of contract, and the buyer pleaded non-liability not only on the ground that the goods were not tendered within the agreed time but also on the ground that the goods tendered were not of the agreed quality,

Held, that the buyer, having repudiated the contract on one ground, viz., that the goods were not tendered within the time agreed, could not plead non-liability on another ground, viz., that the goods were not of the agreed quality.

The principle of *Braithwaite v. Foreign Hardwood Co., Ltd.*, [1905] 2 K.B., 543, is still good law and its authority has not been shaken by the decision of the House of Lords in *British and Beningtons, Ltd. v. N. W. Cachar Tea Company and others* [1923] A.C., 48.

SECOND APPEAL against the decree of H. R. BARDSWELL, District Judge of Madura, in Appeal Suit No. 10 of 1921, preferred against the decree of U. GOVINDAN NAYAR, Additional Subordinate Judge of Madura, in O.S. No. 57 of 1920.

The defendants agreed under Exhibit A, dated 27th August 1918, to purchase 25 bales of yarn from the plaintiffs. The plaintiffs offered and defendants took delivery of five bales in September 1918. The subsequent tenders of plaintiffs on two occasions in October and November 1918 were not accepted by the defendants. The plaintiffs sent a notice (Exhibit E) on 6th January 1919 demanding performance by the defendants and stating that on default the goods would be sold at defendants' risk. The latter replied finally under Exhibit F, dated 13th January 1919, repudiating the contract on the ground that the plaintiffs did not tender the goods within one month from the date of the contract as agreed. The plaintiffs finally accepted the repudiation under Exhibit L, dated 16th January 1919, denying that there was any agreement as to time, and intimating that unless the defendants performed the contract within 24 hours, a suit would be instituted against

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them. The sellers thereupon filed this suit for damages. The defendants (purchasers) pleaded originally that they were not liable at all for breach of contract, on the ground that the plaintiffs did not tender goods within one month as agreed. Subsequently they filed an additional written statement alleging that they were not liable, as the goods tendered were not of the contract quality, as they came to know of this on examination of the five bales of goods already accepted by them. The Subordinate Judge gave effect to this latter plea, dismissed the plaintiffs' claim for damages and decreed to the defendants on their counter claim, the refund of the deposit made by them. On appeal the District Judge held that the defendants having repudiated the contract on another ground were not entitled to raise the plea as to the quality of goods in bar of their liability for breach of contract, that there was no stipulation of one month's time for performance of the contract and that the plaintiffs were not guilty of any breach; and he reversed the decree and decreed the plaintiffs' claim for damages. The defendants preferred this Second Appeal.

C. V. Ananthakrishna Ayyar and *C. V. Harihara Ayyar* for appellants.—There are two questions:—(1) Goods were not tendered within one month, (2) goods tendered were not up to the contract description and quality. The defendants did not repudiate the contract. Even if they did, the plaintiffs did not accept the repudiation; hence the defendants' repudiation is not effective—see section 39, Contract Act, Pollock and Mulla, page 289. As the plaintiffs did not accept the defendants' repudiation, the latter are entitled to rely on the objection that the goods were not according to contract. The rule in *Braithwaite's Case*(1) does not apply to this case, as the repudiation was not accepted by the plaintiffs. If *Braithwaite's Case*(1) does apply to this case, then it is submitted that that case was wrongly decided; that case is overruled in effect or disapproved by the House of Lords in *British and Beningtons, Ltd. v.*

(1) [1905] 2 K.B., 543.

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N. W. Cachar Tea Company and others(1). See observations of Lord SUMNER in that case : see also *Abdul Rahiman Sahib and Co. v. Shaw Wallace and Co.*(2) per DEVADOSS, J. *Parthasarathy Chetty & Co. v. Gajapathi Naidu & Co.*(3) per COURTS TROTTER, C.J.—A breach does not put an end to a contract until it is accepted as such by the other party, see *Subhadra-yamma v. Venkatapati Raju*(4).

M. Patanjali Sastri for *Mr. A. Krishnaswami Ayyar* for respondents.—This case is concluded by the decision in *Rayalu Aiyar v. Kuppu Aiyar and Sons*(5). The rule in *Braithwaite's Case* is approved and followed in later cases : *Taylor v. Oakes*, *Roncoroni and Co.*(6).

JUDGMENT.

ODGERS, J.

ODGERS, J.—This is a suit for damages for breach of contract. The defendants contracted with the plaintiffs for the purchase of 25 bales of yarn of certain quality, orders for which had already been placed by the plaintiffs' Bombay agents with the agent of the Pedlad Factory at Bombay. The price was Rs. 21-8-0 per box and each bale was to contain 20 boxes of 10 lb. each. The varthamanam letter, Exhibit A, is dated 27th August, 1918. The plaintiffs allege that the defendants accepted delivery of five bales in accordance with the plaintiffs' arrival advice on the 2nd September 1918, but they afterwards did not pay for or take delivery of the remainder of the goods. The plaintiffs claim Rs. 3,485-15-8, or the difference between the contract and the market prices prevailing at the dates of the breaches. The defendants in their written statement rely on time as being of the essence of the contract, and they say also that the plaintiffs were not justified in selling the unaccepted goods against the defendants which they did on the 27th January 1919, there having been a breach

(1) [1923] A.C., 48.

(2) (1924) 20 L.W., 725.

(3) (1925) 49 M.L.J., 215 (218). (4) (1925) I.L.R., 48 Mad., 280 (247) (P.C.).

(5) (1925) 49 M.L.J., 1.

(6) (1922) 127 L.T., 267.

on 13th October 1918. This written statement was filed on 12th April 1919. On the 11th October 1919 an additional written statement was put in in consequence, it is said, of an examination caused to be made by the defendants of a small quantity of the yarn contained in the five bales accepted by them. In the additional written statement they plead that the goods offered by the plaintiffs weighed only 8½ lb. as against 10, that the yarn was not No. 20 and that the dye was not fast. For these reasons they were not bound to receive the said bales.

The only issue that we are really concerned with in the case is issue 5, "Whether all or any of the plaintiffs' offers to perform the contract were made within a reasonable time in accordance with the terms of the contract and valid?" This issue *inter alia* was settled on the 3rd September 1919 and no additional or amended issue seems to have been thought necessary in consequence of the additional written statement of the defendants. This, as far as I can see, seems to have been completely neglected throughout. The Additional Subordinate Judge in fact notices that no supplementary written statement was filed by the defendants with reference to the alternative claim to damages which the plaintiffs were allowed to add to paragraph 10 of the plaint on 9th October 1920. The case on which the defendants went throughout was that the plaintiffs should have delivered the 25 bales within a month. This has been found against by both the Courts and is of course binding on us in Second Appeal. The Additional Subordinate Judge, however, held that the plaintiffs were bound to prove that the goods tendered and refused were in accordance with the contract in respect of quality and that, therefore, this not having been proved, all that the defendants could recover in consequence of the

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breach committed by the plaintiffs was the amount of their advance.

The learned District Judge, on the other hand, held that, on the authority of *Braithwaite v. Foreign Hardwood Co.*(1) the Subordinate Judge was not justified in allowing the fifth issue to be taken and in giving judgment for the defendants upon it. The District Judge found that the defendants absolutely repudiated the contract by Exhibit F and that by that repudiation they absolved the plaintiffs from proving any of the conditions precedent, e.g., as to quality of the goods.

The first question, therefore, to be determined is whether there was a repudiation of the contract. The first tender under the contract was on 2nd September 1918 under Exhibit B. These goods were accepted. There was no question as to them. The second tender of five bales was on 12th October 1918 by Exhibit C to which there was no reply by the defendants. The plaintiffs again on 25th November 1918 by Exhibit D tendered further goods and on 9th January 1919 again tendered goods and received the answer Exhibit F, dated 13th January 1919. A registered notice had been sent on 6th January 1919, Exhibit E, to which Exhibit F was the answer. In Exhibit F the defendants insisted that delivery was to be within a month, and that after the delivery on 2nd September 1918 the plaintiffs were often requested by the defendants to deliver the remaining bales. "But as you said that you were not able to deliver them, our clients said that they did not want them, that the contract terminated, and that the advance of Rs. 500 paid for the said 20 bales should be brought and refunded to them, etc." But in spite of this, intimations of arrival were sent by the plaintiffs on 12th

(1) [1905] 2 K.B., 543.

October 1918 and 26th November 1918. They further add that, as these latter deliveries were not taken, the contract should have been cancelled and reasonable damages claimed. The answer to this is Exhibit L, dated 16th January 1919, by which the plaintiffs combat an allegation that the time for delivery was one month and gave the defendants a final opportunity of taking delivery and paying for the remainder of the goods within 24 hours after the receipt of Exhibit L; otherwise proceedings would be started against them. The question is whether the clear repudiation of the contract in Exhibit F was accepted by the plaintiffs in Exhibit L. I am of opinion that it was, and all that Exhibit L did was to give the defendants a *locus penitentiae* for performing the contract within 24 hours, but at the end of the latter period the plaintiffs would treat the contract as repudiated and would institute legal proceedings thereon. I think, therefore, the learned District Judge was right in holding that there was a repudiation of the contract by Exhibit F. Now the question is, was he right in refusing to permit the defendants to take advantage of any defects such as non-performance of the conditions precedent to the contract?

A long argument has been addressed to us on the principle of *Braithwaite's case* (supra) and as to the exact principle which was laid down in that case. The principle enunciated there appears to be that, if the defendants repudiate the contract, they are not entitled to allege thereafter that the plaintiffs were not in a position to tender the goods according to the contract. It was urged in argument in the Court of Appeal in that case for the plaintiffs that the defendants were really endeavouring to contend that a continuing repudiation of a contract has the effect of reviving conditions precedent, the performance of which they had already

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waived by their original repudiation. *Braithwaite's case* was perhaps complicated by the fact that the original repudiation was not accepted by the plaintiffs. This took place while the goods were still on the sea and in spite of it the plaintiffs tendered the goods after they arrived. COLLINS, M.R., said :

"In my opinion that act (namely, the repudiation) of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which I am assuming he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not ready and willing to perform the conditions precedent devolving upon him, and that if they had known the facts they might have rejected the instalment when they tendered to them. One answer to such a contention on the part of the defendants is that, tested by the old form of pleadings, it would have been a good replication by the plaintiff to aver that the defendants had waived performance by him of the conditions precedent by adhering to their original repudiation of the whole contract, and would not accept any instalment if tendered to them. The defendants are not in a position now, by reason of their after-acquired knowledge, to set up a defence which they previously elected not to make."

In so far as the additional written statement in this case is concerned, those words apply to the present case. We have heard a great deal of the effect of *British and Beningtons, Limited v. N. W. Cachar Tea Company, and others*(1) on the decision in *Braithwaite's case*. It is even said that this decision has displaced the authority of *Braithwaite's case*. Lord ATKINSON who delivered the leading opinion of the House of Lords in that case was, I think, of opinion that *Braithwaite's case* was perfectly good law. He cited *in extenso* and apparently with approval the quotation which I have

(1) [1923] A.O., 48.

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given above from the judgment of COLLINS, M.R. Lord SUMNER, who was counsel for the defendants in *Braithwaite's case*, said discussing the case that

"it was dealt with as one in which the buyers had explicitly waived all conditions precedent, while retaining a right to rely on them as terms, the breach of which would sound in damages that could be given in evidence in reduction of the claim."

Hence I take it the consideration that a certain percentage of the cargo in *Braithwaite's case* was inferior to the contract quality. Further remarks Lord SUMNER :

"It does not anywhere appear that, even if the first cargo might rightly have been rejected, the seller could not have found another exactly conforming with the contract which he might have duly tendered and so have put himself right . . . I do not think that the case, as reported, lays it down that a buyer, who has repudiated a contract for a given reason which fails him, has therefore no other opportunity of defence either as to the whole or as to part, but must fail utterly . . . What he says, i.e. (on the alleged repudiation) is of course very material upon the question whether he means to repudiate at all, and if so, how far, and how much, and on the question in what respects he waives the performance of conditions still performable *in futuro* or dispenses the opposite party from performing his own obligations any further; but I do not see how the fact, that the buyers have wrongly said "We treat this contract as being at an end, owing to your unreasonable delay in the performance of it" obliges them, when that reason fails, to pay in full, if, at the very time of this repudiation, the sellers had become wholly and finally disabled from performing essential terms of the contract altogether. *Braithwaite's case* says nothing, which affects the regular consequences, when it appears that at the time of breach the plaintiff is already completely disabled from doing his part at all."

Braithwaite's case was further considered in *Taylor v. Oakes, Roncoroni and Co.*(1) where GREER, J., in the Original Court said :

(1) (1923) 127 L.T., 267.

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"If I have rightly interpreted the judgment of COLLINS, M. R., the decision merely means that a buyer cannot justify his refusal of an offer to deliver goods under the contract, by proving that if he had not refused, the goods when delivered, would not have been in accordance with the contract. It does not decide that if wrong goods or wrong documents of title are actually presented for acceptance to the buyer, and refused by him without the knowledge of their defects for an untenable reason, he, the buyer is liable for its damages for his justifiable refusal because he gave a wrong reason for it."

In the Court of appeal BANKES, L.J., said:

"It seems to me, after the decision in *Braithwaite's case* which binds this Court, that where there has been a repudiation by way of anticipatory breach, the contract is at an end, if the repudiation is accepted, and it is immaterial afterwards to consider what would have happened if there had been no repudiation, and the contract had continued and the plaintiff had been obliged to perform it."

SCRUTTON, L.J., was of opinion that by reason of *Braithwaite's case*, the Court was precluded from considering the argument of the defendant to the effect that if he had not repudiated, the plaintiff would not have been able to deliver the goods according to the contract. The case has been elaborately examined by a Bench of this Court (RAMESAM and REILLY, J.J.), in a case which bears a strong similarity to this. In fact we are told that one of the parties is the same. The case is reported as *Rayulu Aiyar v. Kuppu Aiyar and Sons*(1). There the contract was for 50 bales of yarn. The defendants took delivery of two consignments of 5 bales each and afterwards did nothing. They relied on the defence that the boxes were not of 10 lb. weight but only 8½ lb. apparently on an examination by an expert of a small portion of the bales accepted. The Subordinate Judge in that case held, as in this, that the plaintiffs had not proved that the 40 bales answered to the description in

(1) (1925) 49 M.L.J., 1.

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the contract and found the issue against the plaintiffs. *Braithwaite's case* was there carefully examined in the judgment of RAMESAM, J., and I agree with the learned Judge that the present case is an *a fortiori* case and the difficulties in understanding *Braithwaite's case*, if any, need not affect it. But I should like to express my concurrence with him that Lord SUMNER in *British and Beningtons, Ltd. v. N. W. Oachar Tea & Co. and others* (1) applied the principle of *Braithwaite's case* and did not dissent from it. I think the present case is very like the case in *Rayulu Aiyar v. Kuppu Aiyar and Sons* (2) and we are told that the contracts are entirely similar but the contract in *Rayulu Aiyar v. Kuppu Aiyar and Sons*(2) was of a higher value and consequently it took the form of a first appeal to this Court whereas this is a second appeal. REILLY, J., also delivered a judgment in that case and was of opinion that as it had not been proved that the 40 bales in question were not of the contract description, and as, even if they were not of that description, plaintiffs had still time to supply others in their stead, had the quality been duly objected to by the defendants, the exact interpretation of *Braithwaite's case* was not of immediate importance. I therefore think on the consideration of this case that the learned District Judge was right in debarring the defendants from setting up any defence from their after-acquired knowledge other than that as to time which they raised in the first instance and which they did not succeed in establishing.

The matter is really governed by section 59 of the Contract Act. In the note to section 120 of the Act the learned authors of Pollock and Mulla's Contract Act point out that two courses are open to the promisee

(1) [1923] A.C., 48.
59-A

(2) (1925) 49 M.L.J., 1.

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when the promisor repudiates. He may either treat the repudiation of the other party as a wrongful putting an end to the contract and may at once bring his action as on a breach of it, or "he may treat the notice of intention as inoperative and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance," but in the latter case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

In the case in hand, in my construction of Exhibits F and L the repudiation contained in Exhibit F was accepted in Exhibit L subject to 24 hours' grace. It is not suggested that during the 24 hours the defendants did anything in compliance with the contract.

The only other point raised is as to damages. It is not suggested that if the District Judge is right the basis of damages is wrong. The appellants say, however, that the District Judge was in error in taking the date of Exhibit F, 13th January 1919, as the date when the contract was finally put an end to and that 12th October 1918, the date of the first refusal to accept further bales, should be the date at which the market price is to be ascertained. In *Rayulu Aiyar v. Kuppu Aiyar and Sons*(1) the dates of breach were taken as at the dates on which the plaintiffs gave notice that certain bales were ready for delivery. There, as has already been pointed out, after the acceptance of the

(1) (1935) 49 M.L.J., 1.

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first consignment the defendants did nothing. But here we have the letter Exhibit F in which they absolutely repudiate the rest of the contract. The only question raised here is as to the market rate of the first consignment refused. I think, however, the learned Judge was justified in taking the date of Exhibit F as the time when the contract was finally put an end to by the defendants and that he was right in assessing the damages as he did. The second appeal is therefore dismissed with costs.

SPENCER, J.—I entirely agree. I am of opinion that the principle of *Braithwaite's case* is still good law, and that its authority has not been shaken by the decision of the House of Lords in *British and Beningtons, Ltd. v. N. W. Cachar Tea Co. and others* (1) and others as conceived by DEVADOSS, J., in *Abdul Rahiman Sahib & Co. v. Shaw Wallace & Co.*(2). Later decisions of English Courts must be taken to have discussed and explained *Braithwaite's case* rather than dissented from what was therein propounded as the legal consequences of a repudiation of a contract.

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(1) [1928] A.C., 48.

(2) (1924) 20 L.W., 725.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice
Madhavan Nayar.

1926
January 26.

CHOWDAPPA GOUNDER (A CREDITOR OF THE INSOLVENT,
FOR HIMSELF AND ON BEHALF OF ALL THE CREDITORS),
APPELLANT,

v.

KATHAPERUMAL PILLAI AND 2 OTHERS (RESPONDENTS
1 AND 2, AND PETITIONER—OFFICIAL RECEIVER),
RESPONDENTS.*

*Provincial Insolvency Act (V of 1920), ss. 75 (2), 53 and 54—
Appeal—Application to District Court by Official Receiver
to set aside an alienation by insolvent—Dismissal—Right
of a creditor to appeal against the order—Creditor, not
actually party to the original application—Official Receiver,
not moved to appeal—Person aggrieved by the order,
meaning of—Practice—Amendment of appeal petition.*

Under section 75 (2) of the Provincial Insolvency Act (V of 1920), a creditor of an insolvent can appeal against an order of a District Court dismissing an application of the Official Receiver to set aside, under sections 53 and 54 of the Act, an alienation by the insolvent, even though the creditor was not an actual party to the application and had not previously moved the Official Receiver to file an appeal and the latter had not refused to do so; but the creditor must prefer the appeal on behalf of all the creditors.

Ananthanarayana Ayyar v. Sankaranarayana Ayyar, (1924) I.L.R., 47 Mad., 673, distinguished; *Shikri Prasad v. Aziz Ali*, (1922) I.L.R., 44 All., 71, followed.

APPEAL against the order of J. J. COTTON, District Judge of Coimbatore, in Insolvency Application No. 558 of 1922 in Insolvency Petition No. 47 of 1922.

The material facts appear from the judgment of MADHAVAN NAYAR, J. The District Judge dismissed the

* Civil Miscellaneous Appeal No. 364 of 1923.

application of the Official Receiver to set aside the alienation of the insolvent. One of the creditors appealed against the order. The creditor was not actually a party to the original application and did not move the Official Receiver to appeal.

T. R. Ramachandra Ayyar, for respondent took a preliminary objection that the creditor cannot appeal.

L. A. Govindaraghava Ayyar for appellant.—A creditor can appeal as he is a person aggrieved by the order under section 75 of the Provincial Insolvency Act (V of 1920), though there is an Official Receiver. The creditor need not be a party individually to the original application by the Official Receiver; nor need the Official Receiver have been moved by the creditor to appeal, before he (creditor) can himself appeal.

Reference was made to the following cases:—

Shikri Prasad v. Aziz Ali (1), *Niadar v. Ramji Lal* (2), *Anantanarayana Ayyar v. Sankaranarayana Ayyar* (3), and other cases referred to in the judgment.

T. R. Ramachandra Ayyar for respondent.—The view of the Madras High Court is that a creditor can appeal only (1) if he was a party to the order appealed against, and (2) if the Official Receiver refuses to appeal on request by the creditor. In 47 Mad., 763, the creditor was a party. If the Official Receiver refuses to do his duty, then only a creditor has a grievance under section 75 (2) of the Act.

JUDGMENT.

WALLACE, J.—The first question in this appeal is whether an appeal lies. The Official Receiver of Coimbatore in proceedings in insolvency applied to the lower Court under section 53 of the Provincial Insolvency Act to declare void against him an assignment or sub-lease in favour of the second respondent before it. The lower Court dismissed the petition. The appellant before us is not the Official Receiver but one of the

(1) (1922) I.L.R., 44 All., 71.

(2) (1925) 23 All., L.J., 503.

(3) (1924) I.L.R., 47 Mad., 673.

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creditors; and a preliminary objection is taken that such an appeal by a single creditor is not competent. It does not appear that the appellant before appealing moved the Official Receiver to appeal. For the purposes of this argument I assume that the Official Receiver was not moved to appeal.

The appellant relies very strongly on the general wording of section 75, sub-clauses (1) and (2), which undoubtedly lays down that any creditor aggrieved by the decision of the District Court may appeal to the High Court in a matter of this kind. The short question then is, is the appellant a creditor aggrieved by this order and does the fact that he did not first move the Official Receiver to appeal make him any the less an aggrieved creditor?

Now, the general scheme of the Act is that in insolvency proceedings creditors cannot act individually and independently but are represented by the Official Receiver who alone may ordinarily take action. Clearly however the Official Receiver can act for the whole body of the creditors only when the interests of the whole body are homogeneous; if the interests of individual creditors conflict, then the Official Receiver cannot represent the interest of the creditor who is standing on his individual right as opposed to those of the general body, so far as that right is concerned. Such a case would occur, for example, when the Official Receiver or some creditor wishes to have the debt of another creditor struck out as fictitious, or when one creditor wishes to be ranked as a secured creditor, or when an alienation in favour of one creditor is sought to be declared void under section 53 or 54 of the Act. In such cases it seems to me clear that no one but the individual creditor can represent his individual interest, as distinguished from the interest he possesses homogeneous

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with those of the general body of creditors. The general principle thus would seem to be that where the insolvency proceeding under consideration concerns only an individual creditor and his interests, he alone can agitate the matter both in the Original Court and in the Appeal Court.

Reference may be made in this connexion to the reported ruling in *Khushhali Ram v. Bholar Mal*(1). In such cases however there would ordinarily be an order by the Receiver as representing the general body of creditors, and *a fortiori*, the homogeneous interest of all individual creditors including the creditor opposed to him in the matter of that creditor's individual claims, unfavourable to the individual creditor's individual claims and the latter would apply first of all to the Court under section 68 for redress. [See *Thiruvengkatachariar v. Thangayiammal*(2)]. But where the proceeding concerns the general interests of the general body of creditors, then individual creditors are not in the first instance permitted ordinarily to act individually, but must be represented by and must act through the Official Receiver. What then is the principle to be invoked if the Official Receiver being moved on behalf of the general body of creditors, refuses to act? The proper principle, as I conceive, has been laid down by CAVE, J., in *Ex parte Kearsley. In re Genese*(3). It is quoted *in extenso* in *Ananthanarayana Ayyar v. Sankaranarayana Ayyar*(4).

That principle would, *prima facie*, apply equally to proceedings in the Original Insolvency Court and to proceedings in appeal from it. But, having regard to the generally adopted interpretation of the phrase "any person aggrieved" set out in the well-known case of

(1) (1915) I.L.R., 37 All., 252.
(3) (1888) 17 Q.B.D., 1.

(2) (1916) I.L.R. 39 Mad., 479.
(4) (1924) I.L.R., 47 Mad., 378 at 382.

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In re Sidebotham(1) and adopted therefrom in various decisions in this country [see *Ananthanarayana Ayyar v. Sankaranayana Ayyar*(2) and *Kumarappa Chettiar v. Murugappa Uthettiar*(3)] it must be admitted that section 75 does give an individual creditor a wider right, viz., a right to appeal in any case in which his interests are adversely affected whether it is his individual interests or his interests as one of the general body of creditors which are so affected, so that it is open to the individual creditor to appeal in a case where his interests are homogeneous with, and not opposed to those of the whole body of creditors, even though he has not first moved the Official Receiver to appeal and had a refusal.

At the same time it is essential that the general principle that the individual creditor cannot without leave or order of the Court represent the whole body of the creditors, must not be lost sight of, and in cases where he does so it must be made clear that the appeal is on behalf of the general body of creditors. Following therefore the analogy of a suit by an individual creditor under section 53 of the Transfer of Property Act [*cf. Pokker v. Kunhammad*(4) and *Ishwar Timappa v. Devar Venkappa*(5)], I would direct that before this petition of appeal be entertained and heard, the petition be amended so as to make it clear that the appellant is appealing on behalf of the general body of creditors, so that any order he may obtain will enure on their behalf and be worked out, if necessary, by the Official Receiver.

The general principles on which such insolvency proceedings ought to be conducted would then be these. In original proceedings in the Insolvency Court, in which an individual creditor's individual interests are concerned and are opposed to the interests of the other

(1) (1880) 14 Ch. D., 458.

(3) (1918) 38 I.C., 771.

(2) (1924) I.L.R., 47 Mad., 673.

(4) (1919) I.L.R., 42 Mad., 143.

(5) (1908) I.L.R., 27 Bom., 146.

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creditors so that the Official Receiver cannot represent the individual creditor's individual claims, a motion may be made by the individual creditor and an appeal may be made by him also; but when in the original proceedings the individual creditor's interests are homogeneous with those of the rest so that the Official Receiver can represent all, the proper person to move is the Official Receiver and the individual creditor cannot move unless there is a decision of the Official Receiver against him under which he can come up under section 68. But in the matter of appeals an individual creditor can always appeal whether or not the Official Receiver does; but if in the matter of appeal his interests are homogeneous with those of the rest of the creditors, then in such a case he must make his petition a representative petition on behalf of all the creditors.

I do not think that the fact that the appellant was not in his individual capacity a party to the original petition precludes him from appealing. This individual creditor was in matters in which his interests are homogeneous with those of the general body of creditors sufficiently represented in the Original Court by the Official Receiver who was a party to the original proceedings.

Various decisions have been quoted at the bar. I shall refer only to a few of them. *Iyappa Nainar v. Manicka Asari*(1) is no authority against a right of appeal in this case. There the creditors' interests were not affected in any way and it was held therefore that he had no right of appeal at all. *Appireddi v. Appireddi*(2) is not a case of an appeal, and section 75 did not come under consideration. Ordinarily, as I have said, where the interests of all creditors are involved, the individual creditor cannot move in the Original Court

(1) (1917) I.L.R., 40 Mad., 630.

(2) (1922) I.L.R., 45 Mad., 189.

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unless and until the Official Receiver has refused to move. The same rule is laid down in 47 Mad., 673 and *Hemraj Champa Lal v. Ramkishen Ram*(1). The respondent relied strongly on 47 Mad., 673. That, however, was a case in which the Court did not deny the right of a creditor to come up on appeal, but only held that he had been premature and should have applied himself to the Original Court in place of the Official Receiver who refused to act under sections 53 and 54 of the Act to have the alienation set aside, and it was laid down generally that the principle must be safeguarded, that a creditor should ordinarily act on behalf of the whole body of creditors, and if necessary for that purpose should apply for and obtain permission to use the Official Receiver's name. The same principle was safeguarded in another way in *Jaganatha Ayyangar v. Narayana Ayyangar*(2) by the Court directing that the proceedings after remand ordered on appeal by an individual creditor should be conducted by the Official Receiver. The respondent relies on the wording in the 47 Madras case with reference to the right of appeal under section 75 :

"We see no reason why we should not . . . hold that a creditor can appeal when he is a party to the decision appealed against,"

and it is sought to deduce the inference that he cannot appeal when he is not a party to the decision appealed from. As to this, I think, as I have said, that, as his interests in that case are homogeneous with those of the general body of creditors he need not have been represented in the original proceedings in his individual capacity; it is sufficient that he was represented by the Official Receiver. In *The East India Cigarette*

(1) (1917) 2 P.L.J., 101.

(2) (1919) 52 I.O., 761.

Manufacturing Co., Ltd. v. Ananda Mohan Basak(1), an individual creditor whose individual interests were at stake was allowed to appeal and make the Official Receiver a party in order to have on record the general body of creditors. The previous view in the Allahabad High Court set out in *Jhabba Lal v. Shib Charan Das*(2), that the provisions of Act III of 1907 did not allow an individual creditor to appeal has been altered in deference to the wording of the present section 75. See *Shikri Prasad v. Aziz Ali*(3) and *Niadar v. Ramji Lal*(4).

I would therefore allow the appeal to be argued provided the appellant amends his appeal petition to make it clear that his appeal is presented by him as representative of the general body of creditors, and then he may be heard on the merits.

MADHAVAN NAYAR, J.—The facts of this case are very simple. One Kathaperumal Pillai was adjudicated as an insolvent. He had assigned a lease in his favour to the second respondent. The Official Receiver at the instance of the present appellant, one of the creditors, filed an application before the District Judge to set aside this alienation under sections 53 and 54 of the Provincial Insolvency Act, V of 1920. The appellant himself was not an actual party to the proceedings. The District Judge declined to set aside the alienation. The present appeal is against this order of the District Judge. The appellant, before filing the appeal, did not move the Official Receiver to file an appeal, but he has made him the third respondent before us.

Mr. Ramachandra Ayyar on behalf of the second respondent, the alienee, takes the preliminary objection that the appellant, inasmuch as he did not request the

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(1) (1919) 24 C.W.N., 401.
(3) (1922) I.L.R., 44 All., 71.

(2) (1916) I.L.R., 39 All., 152.
(4) (1925) 23 A.L.J., 503.

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Official Receiver to file an appeal beforehand, is not himself entitled to file it. The appeal has been preferred under section 75, sub-section (2) of the Provincial Insolvency Act. Section 46 of Act III of 1907 gave a right of appeal to any person aggrieved by an order made in the exercise of insolvency jurisdiction. The Madras High Court in *Thirumenkata Chariar v. Thangayiammal* (1) held that an individual creditor was a person aggrieved and was entitled to appeal. In that view, as pointed out in *Niadar v. Ramji Lal* (2) the terms of section 46 have been altered in the new Act in section 75, sub-section (1) to

“The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction * * .”

Sub-section (2) of section 75 provides that

“Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a Subordinate Court, may appeal to the High Court.”

There can be no doubt that the decision of the District Judge is clearly adverse to the interests of the appellant; for it reduces the amount of property out of which he will be entitled to claim a dividend. It is conceded by Mr. Ramachandra Ayyar that the language of the section is certainly wide enough to include, within its terms—

“Any such person aggrieved by any such decision or order of a District Court,”

a creditor like the present appellant who was not an actual party to the original proceedings or who has not asked the Official Receiver to file an appeal. But he argues that, according to the decisions of this Court, an appeal by a creditor under this section is to be deemed

(1) (1916) I.L.R., 39 Mad., 479.

(2) (1925) 23 A.L.J., 503.

incompetent if he is not an actual party to the proceedings, or if he has not moved the Official Receiver to file the appeal beforehand.

In my opinion, the position contended for is not warranted by the decisions of this Court. In *Kumarappa Chettiyar v. Murugappa Chettiyar* (1), when an objection was raised as regards the maintainability of an appeal filed by a contesting creditor in insolvency proceedings under section 36 of the old Act, III of 1907, KRISHNAN, J., after a consideration of the English authorities as to who is a person aggrieved stated as one of his conclusions that a person is “aggrieved by an order where he is party to an order, or, even if he is not, he is bound by the order and the order affects his interests, i.e., his person or his property, injuriously.” If so, the appellant, though not a party, as “an aggrieved person,” is certainly entitled to prefer the appeal. OLDFIELD, J., while agreeing with the conclusion of KRISHNAN, J., made the following observations:—

“The Official Receiver, from the moment at which the insolvent's estate vests in him, represents the body of creditors and ought to protect their interests. If in the exercise of his discretion he thinks it unnecessary to appear to do so, but finds that a particular creditor thinks an appearance necessary, the proper practice is for him to obtain an indemnity from such creditor and to carry on the contest, recovering his costs from him in case of failure.”

These remarks, in my opinion, do not lay down that an aggrieved creditor can prefer an appeal only in cases where the Official Receiver has refused to do so; they only indicate the usual practice and are meant to point out that the order passed in insolvency cases after the vesting of the estate in the Official Receiver will enure only to the advantage of the whole body of creditors.

(1) (1916) 36 I. C., 771.

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This decision was followed by OLDFIELD and SESHAGIRI AYYAR, JJ., in 52 Ind. Cas., 761, with this remark:

"This, however, we may observe, will not entitle appellant (a creditor) to the conduct of the petition in the lower Court, when it is dealt with there in pursuance of this order."

In *Ananthanarayana Ayyar v. Sankaranarayana Ayyar* (1) the case most relied on by Mr. Ramachandra Ayyar, it was held that a creditor could move the Court to set aside a voluntary transfer or to avoid a fraudulent preference and that he could file an appeal against the order of the lower Court. In the course of their judgment the learned Judges observed:

"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 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."

These remarks, while laying down a very salutary rule of practice, do not, in my opinion, support the contention that an aggrieved creditor cannot prefer an appeal under section 75 (2) without first obtaining a refusal from the Official Receiver. The observation in the judgment

"We see no reason why we should not * * * hold that a creditor can appeal when he is a party to the decision appealed from,"

does not necessarily lead to the conclusion that an aggrieved creditor can prefer an appeal only if he actually figures in his own person as a party to the original proceeding. In the present case, the appellant

(1) (1924) I.L.R., 47 Mad., 678.

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was sufficiently represented by the Official Receiver in the lower Court as his interests did not conflict with those of the other creditors and, in this sense, he may be deemed to have been a party to the original proceeding. It is true that in all the rulings of the Madras High Court that we have examined the creditor was an actual party to the proceedings and that in some of them there are remarks that a creditor, before he moves the Court, should apply to the Official Receiver to take the necessary proceedings; but it seems to me that none of the decisions goes the length of holding that a creditor can prefer an appeal against an adverse order passed by the District Judge only if he is an actual party to the proceeding or only if the Official Receiver on being moved refuses to appeal. To import this limitation would be to cut down the general right conferred upon an aggrieved creditor by section 75 (2).

The contention that has been advanced on behalf of the appellant is supported by the decision in *Shikri Prasad v. Aziz Ali* (1). In that case the original application was by the insolvent complaining under the old Act against an act of the Official Receiver and from the order passed by the District Judge a creditor preferred an appeal. In reply to the objection that no appeal lay, the learned Judges observed that section 75 (2) of Act V of 1920 gives a right of appeal to any creditor against the decision of a District Court of the nature specified in Schedule 1 of the Act. In *Niadar v. Ramji Lal* (2) the crops in suit were attached by a Receiver in insolvency at the instance of the appellant who was a creditor of the estate. The District Judge held that the crops were sold to the respondent and belonged to him and directed their release from attachment. The creditor preferred an appeal to the High

(1) (1922) I.L.R., 44 All., 71.

(2) (1925) 23 A.L.J., 503.

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Court under section 75(2). As regards the preliminary objection taken that no appeal lay, the learned Judges pointed out that the decision being adverse to the interests of the creditor, he was a person aggrieved and had, therefore, a right of appeal under section 75 of the Act. It is not clear from the report whether the creditor was actually a party to the original proceedings.

In my opinion, the preliminary objection in this case should be overruled. The right conferred by section 75 (2) is not to be fettered by considerations such as whether he was an actual party to the proceedings, or whether before he filed his appeal he moved the Official Receiver to appeal. It is the policy of the insolvency law to administer an insolvent's estate in the interests of all the creditors. Any order that may be passed in favour of the appellant-creditor will enure only to the benefit of the entire body of creditors represented by the Official Receiver and not merely for his own benefit. Since the Official Receiver is a party to this appeal, there can be no difficulty, in the event of the creditor's success, in passing an order in favour of the Official Receiver, so that the advantages resulting from it may enure for the benefit of all the creditors. The same result may be achieved, as suggested by my learned brother, by directing that, before this petition of appeal be entertained and heard, the petition be amended so as to make it clear that the appellant is appealing on behalf of the general body of creditors, so that any order he may obtain will enure on their behalf and be worked out, by the Official Receiver.

For these reasons, I would overrule the preliminary objection and proceed with the case. I agree with the order proposed by my learned brother.

This appeal and the Memorandum of Objections put in by the second respondent coming on for further

hearing this day after the amendment of the appeal petition in compliance with the order of Court contained in the above judgment, dated 7th January 1926, the Court delivered the following

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JUDGMENT.

The appeal petition has been amended and is now in proper form. The District Judge cannot decline to go into the matter of the nominal or fraudulent nature of the alienation. The "Separate suit" he speaks of is not between the present parties and will not settle the matter at issue between them. We set aside his order and direct that the petition be re-heard and decided in the insolvency proceedings. Appellant will get his costs here up-to-date.

The Memorandum of Objections is dismissed.

K.R.

APPELLATE CIVIL.

*Before Mr. Justice Phillips and Mr. Justice
Madhavan Nayar.*

VENKATASAMI NAIDU (FIFTH DEFENDANT), APPELLANT,

1926,
January 27.

v.

VENKATASUBBA NAIDU AND OTHERS (PLAINTIFF
AND DEFENDANTS 1 TO 4), RESPONDENTS.*

*Limitation Act (IX of 1908), art. 182 (4)—Date of amendment,
meaning of—Order directing amendment, whether a judg-
ment—Amended decree, whether should bear same date as
order to amend.*

The words "date of amendment" in article 182 (4) of the Limitation Act (IX of 1908) mean the date of the Court's order

* Appeal against Order No. 150 of 1924.

VENKATASAMI NAIDU v. VENKATA-SUBBA NAIDU. directing the amendment and not the date on which the decree is actually altered or corrected.

An order of amendment is itself a judgment, and the date of the amended decree must be the same as that of the judgment.

Nirit Lal Jha v. Kalanand Singh, (1916) 36 I.C., 533, followed.

APPEAL against the order of G. J. QURAISHI SAHIB, Subordinate Judge of Ellore, in C.M.P. No. 536 of 1923 in O.S. No. 94 of 1915 on the file of Sub-Court of Chittoor.

This appeal arises out of an application by the defendants for transfer of the decree to the District Munsif's Court of Tindivanam for execution. The application was made more than three years after an order for amendment of the decree had been passed by the Court, but within three years after the decree was actually amended. The order directing the amendment was passed on 13th August 1920, the order was carried out and the amendment of the decree was actually made on 8th September 1920, and the petition for transfer was made on 6th September 1923. The lower Court rejected the petition, holding that the execution application was barred by limitation. One of the petitioners preferred this appeal.

K. R. Narayanaswami Ayyar for appellant.

C. Padmanabha Ayyangar and *L. Venkatanarasiah* for respondent.

JUDGMENT.

The only question for determination is the meaning of the words "date of amendment" in article 182 (4) of the first schedule to the Limitation Act. It is contended for the appellant that the "date of amendment" must mean the date on which the decree is actually altered or corrected and not the date of the Court's order directing the amendment, and argument

is advanced that an amendment does not bear the same relation to the order as a decree bears to the judgment and that therefore the provision in the Civil Procedure Code which says that the decree shall bear the date of the judgment is not applicable here. As a matter of fact, an order of amendment is itself a judgment and, in accordance therewith, the original decree is altered, and becomes a new and amended decree in accordance with the judgment pronounced. It seems therefore, clear that the date of the amended decree must be the same as that of the judgment. To hold otherwise would be to put in the hands of the ministerial officers of the Court the power to fix any date for the amendment of the decree quite regardless of the date on which the order was passed. The same view was taken in *Nirit Lal Jha v. Kalanand Singh*(1) and we see no reason to hold otherwise.

The appeal is accordingly dismissed with costs.

K.R.

ORIGINAL SIDE—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.*

IN THE MATTER OF NATHA VENKATESA PERUMAL alias YELCHURI SRI RAMULU CHETTY, a minor.

1925,
October 19.

Sec. 3, Indian Majority Act (IX of 1875), ss. 7 (ii) and 34 of Guardians and Wards Act (VIII of 1890)—Order appointing guardian conditional on giving security, validity of—Effect of such order on age of majority.

If a person is appointed under the Guardian and Wards Act as guardian of the person or property of a minor,

(1) (1916) 36 I.C., 533.

* O.P. No. 212 of 1924.

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conditional on his furnishing security, and fails to furnish the security, then there is no appointment of a guardian within the meaning of section 3 of the Indian Majority Act and such minor attains majority when he completes 18. Such a conditional order under the Act is invalid. Judgment of SADASIVA AYYAR, J., in *Gopammal v. Srinivasa Ayyangar*, (1916) 30 M.L.J., 508, followed. *Subba Naik v. Rama Ayyar*, (1917) I.L.R., 40 Mad., 775, overruled.

CASE referred to a Full Bench in O.P. No. 212 of 1924, on the file of the High Court, at the instance of SRINIVASA AYYANGAR, J.

The facts are given in the judgment.

V. Radhakrishnayya for the plaintiff.—As the order appointing the guardian was expressly conditional on his giving security, the guardian cannot be deemed to have been appointed within the meaning of section 3 of the Indian Majority Act unless and until security is given.

[CHIEF JUSTICE.—Under section 34 of the Guardians and Wards Act, no security can be ordered until a guardian has actually been appointed; and outside section 34 there is no power to order security.]

Under section 50 of the Guardians and Wards Act under which the High Court has framed rules, the appointment may be conditional; see rules 240 and 241 and Forms 92, 93 and 94 of the Civil Rules of Practice.

[CHIEF JUSTICE.—These rules and forms presuppose the existence of an already appointed guardian.]

Though in *Gopammal v. Srinivasa Ayyangar*(1) SADASIVA AYYAR, J., held that security can be demanded only from a guardian already appointed, MOORE, J., held otherwise. Justice SADASIVA AYYAR's view is dissented from in *Subba Naik v. Rama Ayyar*(2). *Gopal Chunder Bose v. Gonesh Chunder Srimani*(3) is against me. Even if a conditional order is not valid under the Guardians and Wards Act such an order may be valid under the Letters Patent of the High Court. In the analogous case of Receivers conditional orders have been held to be good: see *Edwards v. Edwards*(4).

None appeared for the respondent.

(1) (1916) 30 M.L.J., 508.

(3) (1908) 4 C.L.J., 112.

(2) (1917) I.L.R., 40 Mad., 775.

(4) (1876) 2 Ch. D., 291.

The JUDGMENT of the Court was delivered by

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COUTTS TROTTER, C.J.—This is a matter which has been put before a Bench on the suggestion of the learned trial Judge, SRINIVASA AYYANGAR, J., because it raises a question of some difficulty and some conflict of authorities. The facts are these. There was a minor called Natha Venkatesa Perumal Chetty. On the 20th November 1924 an order was made by WALLER, J., in Chambers conditionally appointing the natural father of the boy as his guardian under the Guardians and Wards Act. Part of the order was that the father was to furnish certain security. He did not do so and he died in the following July without having furnished any security at all in compliance with the condition contained in the order. On the 15th of August 1925 the minor became 18 years old. The question we have to determine is whether, having regard to the events that happened and to the terms of the order of WALLER, J., the minor is to be regarded as subject to the longer term of minority ending at 21 provided by the Indian Majority Act or is to be regarded as having in August attained his majority, when he completed his 18th year. We will first refer to the relevant statutory provisions. Section 3 of the Indian Majority Act (IX of 1875) runs as follows:—

“Every minor of whose person or property or both a guardian . . . has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of 18 years . . . shall, notwithstanding anything contained in the Indian Succession Act (X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before.”

The question, therefore, raised by that Act is whether there has been appointed or declared by a Court of Justice such a guardian in which case his majority

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automatically on the making of the order is prolonged to the age of 21. We therefore turn to the Guardians and Wards Act (VIII of 1890) to see what its provisions are with regard to the appointment of guardians. By section 7 (1)

"Where the Court is satisfied that it is for the welfare of a minor that an order should be made (a) appointing a guardian of his person or property, or both, or (b) declaring a person to be such a guardian, the Court may make an order accordingly."

Then finally by section 34, it is provided as follows:—

"Where a guardian of the property of a ward has been appointed or declared by the Court . . . he shall (a) if so required by the Court, give a bond as nearly as may be in the prescribed form, to the Judge of the Court to ensure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed, engaging duly to account for what he may receive in respect of the property of the ward."

The short point here is this: Was the conditional order which was made in this case *intra vires* of the statute under which the appointment is made. A suggestion is made that the only power given under section 34 is to impose the duty of finding security and executing a bond on the person who is before the Court in the capacity of an appointed guardian. If that be so, there would be no power to impose such a condition upon a person who is merely an aspirant to the office of guardian before the Court actually appoints him. There are two different opinions in this Court on the subject; one is the opinion of SADASIVA AYYAR, J., contained in *Gopammal v. Srinivasa Ayyangar*(1) in which he expressed the opinion that these suspensory conditions are not warranted by the words of the section, and that the mufassal rules, the Civil Rules of Practice, which appear to validate them are thus *ultra vires* under the Act. In

(1) (1916) 30 M.L.J., 508.

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our opinion, that view is the correct one and the later opinion expressed by a Bench of this Court consisting of AYLING and SESHAGIRI AYYAR, JJ., reported in *Subba Naik v. Rama Ayyar*(1) to the contrary is incorrect. If this be so, the sole question that arises is this: Was this order wholly bad or can we sever the valid from the invalid? On that it seems to us that, if the learned Judge had as it were definitely made an appointment but merely hampered it with a condition warranted by the Act, that would be one thing and this Court might be able to say that the part creating the guardian was positive and effectual and reject the rest demanding the security. That seems to have been the view adopted by STEPHEN, J., in *Gopal Chunder Bose v. Gonesh Chunder Srimani*(2). Apparently that view has not been accepted in later cases by other Judges in Calcutta. The matter, we think, turns upon the actual wording of the order: and that wording is this:

"That upon Lakshminarasimhulu Chetty, the petitioner herein, furnishing security to the satisfaction of the Registrar of this Court for a sum of Rs. 5,000 only, he be, and hereby is, appointed guardian of the property of the said minor during his minority or until the further order of this Court."

It seems to us impossible to say that the learned Judge who passed that order could have meant to do otherwise than make the actual appointment of the guardian coming into force, dependent upon a prior furnishing of the security. Therefore, if this order is bad, we think it is bad *in toto*. No practical difficulty will, as we conceive it, arise, as we think it can very easily be met by adopting a different form of procedure. The mischief of these suspensory orders, apart altogether from the question as to whether they are legal or invalid,

(1) (1917) I.L.R., 40 Mad., 775.

(2) (1908) 4 C.L.J., 112.

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is that the matter goes before the Judge who makes these suspensory orders and then the papers go into the office where it is nobody's business to see what is being done about it. The order is not complied with, and then somebody finds out that the minor, whom it was desired to protect, has attained his majority, and the Court is powerless because the guardian has failed to carry out its directions and the Court has kept no control over the matter by reason of the nature of the order so as to summon the guardian and ask him "Why have you not furnished the security?". The remedy seems to us to be quite simple. Let the learned Judge, before he makes the appointment of a guardian, if he is satisfied that it is a proper case for the minor to have a guardian in charge of his property and of his affairs, make enquiries about the proposed guardian and satisfy himself fully whether, if appointed, he will be in a position and will be willing to execute a bond to the amount that the learned Judge thinks that the use and the value of the estate demand: and, if after that, he makes an order, which the guardian disobeys, as to the furnishing of security, then there are remedies against the guardian without the consequence of the minor being left in this position, with no valid order appointing a guardian made at all and his ceasing, or rather being never taken, to be a ward of the Court. It is only right to say that we gather that in this case there is no question of any dangerous consequences to the minor owing to this misfortune that happened, but there are cases readily conceivable, and probably within the experience of many, where young men in this city are surrounded by circumstances which would make it imperative for the Court in their own interests to provide them with guardians. We think, therefore, that there being a doubt as to the validity of suspensory orders, it will be

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well if the practice of this Court in future were not to make orders in this form, but to adopt the procedure which we have suggested.

We are therefore of opinion that this boy, Natha Venkatesa Perumal Chetty, is now a major.

N.R.

ORIGINAL SIDE—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.*

RAJAH INUGANTI VENKATARAYANIM VARU *alias*
VENKATARAMAYYA GARU (PLAINTIFF),

1925,
October 20.

v.

W. H. NURSE (DEFENDANT).*

Order VI-A, rule 62 of Original Side Rules—Suit on negotiable instrument by or against legal representatives of the original parties to the instrument—Summary procedure alone allowed by the rule.

Rule 62 of Order VI-A of the Original Side Rules (Madras) is mandatory; hence all suits on the Original Side of the High Court on bills of exchange, hundis and promissory notes whether by or against the original parties thereto or by or against their legal representatives must be laid only according to the summary procedure therein prescribed.

CASE referred to a Full Bench in C.S. No. 720 of 1925, Original Side, at the instance of SRINIVASA AYYANGAR, J.

Rule 62 of Order VI-A is given in the judgment.

The facts are given in the judgment.

N. Chandrasekara Ayyar for the plaintiff.—Rule 62 of Order VI-A of the Original Side Rules is mandatory and unlike

* C.S. No. 720 of 1925.

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Order XXXVII of Civil Procedure Code gives no option to the plaintiff to bring a suit on a negotiable instrument in the ordinary form. The object of the rule being to expedite suits on all negotiable instruments, summary procedure alone is allowed whether the suits be by or against original parties to the instrument or by or against their legal representatives. Article 5 of the Limitation Act applies only to suits under Order XXXVII, Civil Procedure Code, and not to suits under Order VI-A of Original Side Rules. If there is any hardship, then leave to defend should ordinarily be given to the legal representatives. The English practice conforms to Order VI-A. See Bullen and Leake, Eighth Edition, pp. 7 and 126. *Millar and Co. v. Keane*(1), *Cockle v. Treacy*(2).

K. S. Narayana Ayyangar with G. Ramakrishna Ayyar, *amicus curiae*.—Rule 62 refers to Order XXXVII, Civil Procedure Code. Hence the rule must be interpreted as giving an option to the plaintiff to file a suit on a negotiable instrument either under the ordinary form or under the summary procedure. Though a form of summons as for summary procedure is given, no form of plaint as for a summary suit as required by rule 63-A is given. Till such a form is given the suit may be in ordinary form. Order VI-A of Original Side Rules is *ultra vires* in that it takes away the ordinary right of suit. If the object of the rule is expedition, it has not been achieved in that there is no enactment compelling summary suits on the Original Side to be brought within six months. Expediency and convenience point to inapplicability of Order VI-A to suits against guardians, managers, etc., especially in cases where evidence is required to prove the liability of such defendants on the note or bill; *The Chartered Mercantile Bank v. Seconde*(3), *Remfry v. Shillingford*(4), *Bhupati Ram v. Sourendra Mohun Tagore*(5). These cases go to show that the summary procedure can be availed of only as against original parties and not against legal representatives. The English practice is different. See 1925 Annual Practice, p. 137; Byles on Bylls, 1923 Edition, p. 332.

N. Chandrasekara Ayyar in reply, relied on C.R.P. No. 868 of 1921 by AYLING, J. (unreported).

(1) (1889) 24 Ir.R., 49.

(3) (1869) 3 Beng. L.R. (O.C.J.), 146.

(2) (1896) 2 Ir.R., 267.

(4) (1876) I.L.R., 1 Cal., 130.

(5) (1903) I.L.R., 30 Cal., 446.

JUDGMENT.

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This reference has been necessitated, by the judgment of DEVADOSS, J., in C.S. No. 877 of 1923 sitting on the Original Side of the High Court wherein the learned Judge held that under Order VI (a) of the High Court Rules of Practice a person suing on a negotiable instrument had an option to bring his suit in the ordinary form or under the summary procedure as he liked, the rules in the Order, though in form peremptory, being in reality only directory and not mandatory; and that a suit by or against the legal representative of a party to a negotiable instrument and not by or against a party himself should be brought as an ordinary suit and not as a summary suit.

On both the above points it seems to us with all respect that the learned Judge's views cannot be supported. Rule 62 of Order VI (a) says that the

"procedure prescribed by Order XXXVII of the First Schedule of the Code of Civil Procedure, 1908, shall be followed in all suits on negotiable instruments with the modifications mentioned in this Order."

Order XXXVII, Civil Procedure Code, no doubt gives an option to bring such a suit either in the summary form or in the ordinary form; for rule 2 (1) thereof says:

"all suits upon bills of exchange, hundis or promissory notes may in case the plaintiff desires to proceed hereunder, be instituted, etc."

Now it is in this very rule that Order VI (a) has introduced a modification; for rule 63 (a) thereof which corresponds to it has deleted the words "may, in case the plaintiff desires to proceed hereunder," which are the words giving the option and has substituted for them the word "shall." There can be no clearer indication than that of the object of the framers of the

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rules to take away the option and substitute for it a rigid rule requiring all suits on negotiable instruments to be brought in a summary manner. The form prescribed for the plaint under the rule, namely, Form No. 4 in Appendix B, Civil Procedure Code, is a form adapted only for summary suits and not for ordinary suits. The intention underlying the High Court's Rule was to expedite the disposal of all suits on negotiable instruments and the rule has had a salutary effect in that direction. The very object of the rule will be defeated if we are to hold that in spite of its language there is still an option left to a plaintiff suing on a negotiable instrument to bring his suit in the ordinary form. We hold there is no such option.

In this connexion it may be mentioned that it was feebly suggested that on the view we are taking, the rule would have to be treated as *ultra vires* because it is said that it takes away the ordinary right of suit from a litigant suing upon a negotiable instrument. That may be the effect of the rule but the High Court which framed the rule has full powers to frame rules for regulating its procedure under clause 37 of the Letters Patent under which this rule was framed; and the rule is purely one of procedure and does not affect any substantive rights of parties. This objection is therefore groundless.

The last question is whether suits on negotiable instruments brought not by or against parties to it but by or against their legal representatives are excluded from the scope of Order VI (a). On this point there is no difference between the rule under the Civil Procedure Code and the one in Order VI (a). They both refer to all suits on bills of exchange, hundis or promissory notes; there is no limitation that the suit should be by or against parties to the instrument. So long as the suit

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can be properly described as a suit on a bill of exchange, hundi or promissory note, it can be, and in the High Court it must be, brought in the summary form. A suit on a negotiable instrument by or against a legal representative is still a suit on the instrument and will fall under Order VI (a). It is only if any other cause of action is added not based on the instrument that the suit may fall outside the scope of the Order; if the liability sought to be enforced is solely under the instrument it would not matter whether it is sought to be enforced against a party to the instrument or a legal representative of such a party such as an executor, or administrator, or heir of his. The English practice is in accordance with this view; there does not seem to be any proper reason to adopt a different rule here. Undoubtedly where summary suits are brought against executors, administrators, or other legal representatives who were not parties to the instrument, the rule as to granting leave to defendants will be liberally interpreted as the learned Judge observes. In such an action unconditional leave to defend will generally be given if the defendant has any reasonable ground for asking that the claim should be strictly proved. That removes any hardship that a legal representative defendant may be put to by the adoption of the summary procedure.

It is argued that summary procedure is not available where apart from the note sued on, other facts have to be proved to make the defendant liable as no evidence is taken in such suits, and *Remfry v. Shillingford*(1) and *Bhupati Ram v. Sourendra Mohun Tagore*(2) are cited in support of the contention. To meet the objection raised in these cases the law has been changed under the new Code of 1908 by adding to rule 2 (2) of

1 (1876) I.L.R., 1 Cal., 130.

2 (1903) I.L.R., 30 Cal., 446.

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Order XXXVII a provision which says that if leave to defend is not obtained "the allegations in the plaint shall be deemed to be admitted" making it unnecessary to prove them by evidence. The same rule applies under Order VI (a), for it adopts the rules of Order XXXVII unless modified by itself. These decisions are therefore of no force now.

We hold that suits on bills of exchange, hundis and promissory notes by or against legal representatives of parties can and must be brought in the High Court in the summary form.

The case will go back to the learned Judge on the Original Side for disposal. The costs of the reference will be costs in the cause.

N.R.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.*

SUBBA RAO (DEFENDANT), APPELLANT,

v.

LAKSHMANA RAO AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

Easement by prescription—Assertion of ownership during statutory period—Assertion of ownership during prior legal proceedings—Effect of both on prescriptive easement.

An easement by prescription is capable of being acquired only if the user during the statutory period had been with the *animus* of enjoying the easement as such in the land of another and not if the user had been in the consciousness of one's own ownership over the same.

* City Civil Court Appeal No. 67 of 1922.

But a mere assertion of ownership in prior legal proceedings while the enjoyment was really as an easement, is not conclusive against a right of easement. The question of *animus* is one of fact. *Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool), Limited*, [1915] A.C., 599, and *Lyell v. Hothfield*, [1914] 3 K.B., 911, followed. *Konda Reddi v. Ramasami Reddi*, (1915) I.L.R., 38 Mad., 1, overruled.

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APPEAL against the decree of PAUL APPASWAMI, City Civil Judge, Madras, in O S. No. 487 of 1921.

The facts are given in the Order of Reference.

This appeal coming on for hearing, the Court (PHILLIPS and ODGEES, JJ.) made the following:—

ORDER OF REFERENCE TO A FULL BENCH.

PHILLIPS, J.—In this case, there are two houses, Nos. 19 and 20, adjoining one another and apparently they both originally belonged to the same family. For many years past, and certainly for 20 years, the inhabitants of No. 20 have been using a privy situated in No. 19 and for that purpose have been enjoying the right of way over portions of No. 19. The plaintiff in this case originally brought a suit in 1917 for recovery of house No. 19, but that suit was dismissed. He has now brought the present suit for a declaration that he is absolutely entitled to the latrine marked C in the plan and to the use thereof and in the alternative, as a right of easement. Although the plaintiff's suit to recover house No. 19 has been dismissed, yet, in his plaint, he persists in asserting his right to it, inclusive of the latrine marked C, and he pleads in the alternative that he is entitled to the use of the latter as an easement. The learned City Civil Judge has found that this right has been established and has given a decree accordingly, and this decision is in accordance with a decision of this Court in *Konda Reddi v. Ramasami Reddi* (1). There it was held that the mere claim of the higher right of ownership would not prevent a person from acquiring a lesser right of easement, provided he can show that he asserted certain right of enjoyment over the land in question for the benefit of another land belonging to him. This case purported

(1) (1915) I L.R., 38 Mad., 1.

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to follow a Full Bench decision in *Narendra Nath Bahari v. Abhoy Charan Chattopadhyaya*(1). A similar view was taken in this Court in *Venkata Varaha Dikshitar v. Subbaroya Pillai*(2). It is now urged for the appellants that this view is opposed to the decision of the Judicial Committee in *Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool), Limited*(3) and also to decisions in *Jalaluddin v. Asad Ali*(4) and *Chunilal Fulchand v. Mangaldas Govardhandas*(5), the two latter decisions being under section 26 of the Limitation Act, the Easements Act not being applicable in those provinces. I think it must be conceded that the contention that the decision in *Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool), Limited*(3) is opposed to the decisions of this Court is correct. There their Lordships say: "In substance the owner of the dominant tenement throughout admits that the property is in another and that the right being built up or asserted, is the right over the property of that other. In the present case this was not so. For these reasons their Lordships are of opinion that the grounds upon which the judgment appealed from are put cannot be maintained." The question is not discussed at any length and the case being one from South Nigeria, it is obviously not based upon the provisions of the Indian Easements Act and it is upon the language of section 15 of that Act that this Court based its conclusion. In addition to the decision of the Judicial Committee, we have been referred to a case in *Lyell v. Hothfield*(6) which distinguishes two earlier cases, *Earl De La Warr v. Miles*(7) and *Dawson v. Mc. Groggan*(8). In the former case it was held by BRETT, L.J., that the user having been established, the fact that the user was based upon a right which was found not to exist was not material. CORROX, L.J., came to the same conclusion. Nor do I think that the leading judgment of JAMES, L.J., takes any different view. This case and the Irish case were considered in *Lyell v. Hothfield*(6) by a single Judge and were distinguished on the ground that in those cases the acts of user were done in pursuance of an alleged right in *alieno solo* although the claim was made under a mistaken belief, but where the acts were acts

(1) (1907) I.L.R., 34 Cal., 51 (F.B.).

(3) [1915] A.C., 599.

(5) (1892) I.L.R., 16 Bom., 592.

(7) (1881) 17 Ch. D., 585.

(2) (1911) 1 M.W.N., 95.

(4) (1883) 3 A.W.N., 66.

(6) [1914] 3 K.B., 911.

(8) (1908) 1 Ir.R., 92.

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attributable to a claim of the ownership of the soil itself there can be no question of obtaining an easement. This is the view taken in *Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool), Limited*(1). The question appears to be one of some difficulty, for it is not quite clear to me, why a person using a right of way on another's land as of right uninterruptedly for over 20 years should be allowed to establish a permanent right to the easement, whereas if that same person says that he used this right of way, because he was the owner of the land, he should by that mere assertion be deprived of the right which would otherwise be held to have accrued to him. It must also be observed that if the acts are done in pursuance of a mistaken belief of ownership, and such belief is known to the real owner, an absolute title by prescription would be acquired in 12 years, whereas a lesser right of easement is not acquired even after 20 years of the very same enjoyment. Such a conclusion hardly seems to be logical. As the decision of the question must depend upon the interpretation of section 15 of the Easements Act, I think that possibly the judgment of this Court may have to be modified in view of the decision of the Judicial Committee which was based not on the Indian Easements Act but on the English Law on the point which is very similar. I think therefore that it is desirable to refer to a Full Bench the question whether the decision in *Konda Reddi v. Ramasami Reddi*(2) is correct.

ODGERS, J.—In this case the plaintiffs sued as owners of house and ground No. 20, Singarachari Street, Triplicane, and they also alleged that they were the owners of No. 19 in the same street by right of inheritance as reversioners to the last male holder. As to this latter house they had brought a suit C.S. No. 222 of 1917 which was tried on the Original Side of this Court and Mr. Justice COURTS TROTTER (as he then was) decided that No. 19 was not the property of the plaintiffs but of the defendants and this judgment was confirmed in appeal, O.S. Appeal No. 52 of 1919. The right in dispute in the present case is the right of using a latrine which is in the compound of No. 19 and plaintiff's suit was for a declaration that they are absolutely entitled to "their latrine" marked C in the plan and to the use thereof as hithertofore. They claim user for more than 70 years. The prayer in the plaint was amended on the

(1) [1915] A.C., 599.

(2) (1915) I.L.R., 38 Mad., 1.

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25th September 1922, the suit having been begun on the 17th August 1921, by an alternative prayer that they are entitled to the use of the said privy C as hitherto as a right of easement. The learned City Civil Judge found that the plaintiffs were entitled to an easement, and on appeal to this Court it is contended that no right of easement can be acquired on or over the land which the acquirer believes to be his own. It is perfectly clear from the definition of an easement in section 4 of the Easements Act that no man can acquire an easement in land which is his own. The question is whether the belief or allegation that the land is his own, when it is not really so makes any difference. In other words, has a man under section 15 of the Easements Act to prescribe for an easement with a certain animus or not? The part of the Easements Act which will have to be considered is section 15, paragraph (3): "And where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years." Section 2 of the English Prescription Act, 2 and 3 Will. IV, Ch. 71, which corresponds to section 15 (3) of the Indian Easements Act runs "The right of way must have been actually enjoyed by any person claiming right thereto without interruption." The provisions of this Act have been the subject of many decisions. For instance in *Bright v. Walker*(1) the words "as of right"—which section 15 reproduces in the Indian Easements Act have been considered, and it was laid down that under the Prescription Act the claimant must prove enjoyment for statutory period as of right. This would be impossible for instance if there were unity of possession of both the tenements during all or part of the time; compare the remarks of the same Judge (MARTIN, B.) in *Onley v. Gardiner*(2). In *Gale on Easements*, p. 238, it is laid down that one of the essentials for an acquisition of easement is that the enjoyment must have been an enjoyment of the easement in the character of an easement distinct from the enjoyment of the land itself, and in *Goddard on Easements*, p. 16, the author says that "where a man exercises his right in his capacity as owner of the soil the right he exercises is not an easement but a proprietary right incident to the ownership of the land." In *Gardner v. Hodgson's*

(1) (1834) 1 C. M. & R., 211; 149 E.R., 1057.
(2) (1838) 4 M. & W., 496; 150 E.R., 1525.

Kingston Brewery Company(1), Lord LINDLEY says: "I understand the words 'claiming right thereto' and the equivalent words 'as of right' which occur in section 5 (of the Prescription Act) to have the same meaning as the older expression *nec vi, nec clam, nec precario*" and adds "A title by prescription can be established by long peaceable open enjoyment only; but in order that it may be so established the enjoyment must be inconsistent with any other reasonable inference than that it has been as of right in the sense above explained . . . If the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established." In *Attorney-General of Southern Nigeria v. John Holt & Company*(2) the respondents had built stores and sheds upon certain land reclaimed from the sea and for a long period had used it for purposes of their business and had had exclusive possession. The Crown appealed to the Privy Council against the colonial judgment in so far as it declared that the respondents were entitled to an easement to place stores, etc., on the reclaimed land; and it argued that as the respondents were in exclusive possession of the servient land they could not acquire an easement over it by prescription. Their Lordships held that the respondents thought they were making proper use of their rights as owners of property abutting upon the sea and say "an easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another and that the right being built up or asserted is the right over the property of that other." They refer to *Lyell v. Hothfield*(3). In this case, the learned Judge found that for sixty years there have been disputes between certain bodies of shepherds, each asserting their own rights on the ground that the land belonged to the lord of their own manor and not to the lord of the other manor. The Judge points out that "the feeding of sheep on the part of the manor in question was not done with the consent or acquiescence of Lord HOTHFIELD and it is the consent or acquiescence which lies at the root of a claim for prescription . . . Here the acts were acts attributable to a claim to the ownership of the soil itself." And again at the end of the judgment he says: "Here the enjoyment, such as it was, was attributable to a mistaken

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(1) [1903] A.C., 229 at 239. (2) [1915] A.C., 599.
(3) [1914] 3 K.B., 911.

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claim to a right to the soil." As against this body of authority the respondents quote *Konda Reddi v. Ramasami Reddi*(1) the decision of SUNDARA AYYAR and SADASIYA AYYAR, JJ., where it is held that "there is no reason why a person who walks along a certain land without the permission of the true owner and in the assertion of a right to walk should not create in favour of the enjoyer a prescriptive right of easement simply because he mistakenly supposes that he is the owner of the land or asserts that his act of enjoyment is sufficient to give him the ownership by prescription. It is pointed out that in the third paragraph of section 15 of the Easements Acts title need not be claimed as an easement and that the enjoyment is required to possess two properties, viz., (1) that it must be as of right without interruption, and (2) that it must be as an easement. The first quality is intended to show that enjoyment by licence or under a contract which would not amount to a grant of an easement would be ineffectual to create a right by prescription. Then the other quality is that the enjoyment should be as an easement and they quote illustration (b) to the section to explain what is meant by the words "as an easement," and they go on to say "that the words mean that unity of title or possession during the period of the twenty years or a portion thereof, makes the possession useless to create a right of easement." The learned Judges in a previous part of their judgment consider what is meant by adverse enjoyment and they say "the *animus possidendi* of the adverse enjoyer would determine the title which he would acquire by prescription. It might be open to the real owner to say that only an easement right was so asserted by the person in adverse enjoyment. . . . It is the adverse enjoyment or enjoyment without a lawful right that gives right to a title by prescription." In considering the case *Narendra Nath Bahari v. Abhoy Charn Chattopadhyaya*(2) the learned Judges say: "It is of course impossible to prove an *animus* to hold the land as owner and at the same time in virtue of a right of easement." It appears to me therefore that the learned Judges in *Konda Reddi v. Ramasami Reddi*(1) must be taken to hold that the *animus* by or under which a person exercises his right in the case of a prescriptive right must be taken into consideration. The same observation may be made with reference to another case quoted by the respondents, namely, *Venkata Varaha Dikshitar v.*

(1) (1915) I.L.R., 38 Mad., 1.

(2) (1907) I.L.R., 34 Cal., 51 (F.B.).

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Subbaroya Pillai(1) where it was held that a false belief of ownership does not necessarily preclude the acquisition of a right of easement. The learned Judges in sending down the case for a finding on the question whether the plaintiff has enjoyed the way as an easement as of right for the prescriptive period with reference to the circumstances they adverted to, say: "They are material for determining *quo animo* did the plaintiff enjoy the way." The facts of the case are not reported, but it would appear probable that the right of easement had been established previously and that this right was used to support a claim to ownership.

Another case cited by the respondents was *Earl De La Warr v. Miles*(2), and a passage was relied on to the effect that if enjoyment is proved for the time requisite under the Prescription Act as of right and not by permission it does not matter on what ground the claimant rests his alleged title. A careful perusal of the judgment will, I think, show, however, that it is confined to one of the three grounds, custom, grant or prescription. There was, I think, no claim to a right of ownership in the case and it may further be said that this was not a case of easement at all but of a *profit a prendre*, as in the case of *Dawson v. Mc. Groggan*(3) where it was held that the defendants were entitled to presume a legal origin for an absolutely uninterrupted assertion of rights to *profits a prendre* extending over seventy years. Reference was made to *Narendra Nath Bahari v. Abhoy Charn Chattopadhyaya*(4) where a Full Bench of the Court held that a suit was not liable to be dismissed *in limine* because it contained alternative claims of ownership and easement. This is a matter of pure pleading and all that the Court held was that they are alternative claims and not so necessarily inconsistent that the plaintiff ran the risk of having his pleading struck out. In this state of the authorities, speaking for myself, I am of opinion that the ruling in *Konda Reddi v. Ramasami Reddi*(5), with great deference to the opinion of the two eminent Judges who decided it, is wrong and that if a man exercises a right with the *animus* or consciousness that he is exercising a proprietary right in his own land and not a right over another's land he cannot acquire a right of easement by prescription. The question in this case is, if that premise is sound, with what *animus* did the

(1) (1911) 1 M.W.N., 95.

(2) (1881) 17 Ch. D., 535.

(3) (1903) 1 Ir.R., 92.

(4) (1907) I.L.R., 34 Cal., 51 (F.B.).

(5) (1915) I.L.R., 38 Mad., 1.

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plaintiff here assert his right to use the privy (C)? As already pointed out he asserted his ownership to No. 19 in a previous suit which went to appeal. That was in 1917. That was found against in 1920. In 1921 he presented the plaint in the present case insisting on his absolute title to the privy marked C and continued to assert it for 13 months thereafter until he amended his plaint, and even then the claim to an easement is only inserted in the alternative. The state of a man's mind can only be judged by his outward acts and it is certainly a question of fact. If one has to judge the state of the plaintiff's mind in this case, I do not see how the conclusion can be avoided that he persisted in his claim to this latrine as owner. I agree in the order proposed by my learned brother.

ON THIS REFERENCE—

S. Duraiswami Ayyar with *A. Raghunatha Rao* for appellants.—A right to an easement by prescription can be acquired only if the enjoyment during the statutory period had been as such, i.e., as an easement, and not in assertion of any claim of ownership in the enjoyer. A person can acquire a right of easement only on another's property and not on his own; see the definition of 'easement' in the Indian Easement Act, sections 15 of the Easement Act and 26 of the Limitation Act and sections 1, 2 and 5 of the English Prescription Act, which are all alike. The words 'claiming right thereto' in section 15 govern 'easement.' It is the character of the *animus* during the time of enjoyment that determines whether enjoyment was as an easement or in virtue of a claim of ownership. He referred to *Attorney-General of Southern Nigeria v. John Holt and Co.*(1), *Lyell v. Hothfield*(2), *Bright v. Walker*(3), *Jalal-ud-din v. Asad Ali*(4), *Chunilal Fulchand v. Manjoldas Govardhandas*(5). In this view most of the observations in *Konda Reddi v. Ramasami Reddi*(6) are wrong. What was asserted both during the statutory period and also during the previous litigation was only a right of ownership and not easement. He distinguished the other cases quoted in the Order of Reference. He referred to *Goddard on Easements*, page 243 and *Gale*, 10th Edition, page 226.

P. Satyanarayana for respondents—Section 15 of the Easement Act and not section 26 of the Limitation Act governs

(1) [1915] A.C., 599.

(3) (1884) 1 C.M. & R., 211; 149 E.R., 1067.

(5) (1892) I.L.R., 16 Bom., 592.

(2) [1914] 3 K.B., 911.

(4) (1883) 3 A.W.N., 66.

(6) (1915) I.L.R., 38 Mad., 1.

the matter. It has been held that the above Indian decisions under the latter section do not govern the former section. The two sections are differently worded. *Konda Reddi v. Ramasami Reddi*(1) is right and it is followed in *Surendra Nath Singh v. Girdhari Singh*(2). These cases and *Onley v. Gardiner*(3) imply that the words 'as an easement' in section 15 are useful only to exclude the period during which there is unity of possession of the dominant and servient tenements and not to destroy the acquisition of easement altogether. 'Claiming title thereto' in section 15 do not govern 'easement.' There is a comma, after 'thereto'; see *Peacock on Easements*, page 432. I rely also in *Narendra Nath Bahari v. Abhoy Charn Chatteropadhyaya*(4), *Venkata Varaha Dikshitar v. Subbaroya Pillai*(5) and *Sri Ram v. Mani Ram*(6). Supposing I had falsely claimed in the prior litigation the higher right as owner, that does not prevent me from asserting now the true character of my enjoyment, i.e., as an easement. I really asserted only a right of easement throughout. *Jalal-ud-din v. Asad Ali*(7) is dissented from in *Chadammi Lal v. Sahib Charan*(8).

The OPINION of the Court was delivered by

COUTTS TROTTER, C.J.—We think that some of the expressions of opinion in *Konda Reddi v. Ramasami Reddi*(1) cannot be supported. They are clearly in conflict with the English cases of *Lyell v. Hothfield*(9), and the *Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool), Limited*(10). There is nothing inconsistent with these two decisions to be found in *Earl De La Warr v. Miles*(11), because in that case the right was exercised as a right of a dominant over a servient tenement, even though the owner of the dominant tenement was in error as to the exact origin of the right he possessed and exercised. Though the English cases are of course decisions either under the English

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(1) (1915) I.L.R., 33 Mad., 1.

(3) (1888) 4 M & W, 496; 150 E.R., 1525.

(5) (1911) 1 M.W.N., 95.

(7) (1883) 3 A.W.N., 66.

(9) [1914] 3 K.B., 911.

(2) (1921) 62 I.C., 633 (Calo.).

(4) (1907) I.L.R., 34 Calo., 51.

(6) (1923) 74 I.C., 922 (All.).

(8) (1905) A.W.N., 18.

(10) [1915] A.C., 599.

(11) (1881) 17 Ch. D., 535.

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Prescription Act or the common law, we are satisfied that their principles apply to section 15 of the Indian Easements Act. It is clear that a man is not finally precluded from claiming the benefit of an easement merely because in the course of legal proceedings he made an unfounded claim to be owner, however strongly the making of such a claim might weigh against him. The learned Judges in *Konda Reddi v. Ramasami Reddi*(1) seem to imply that the assertion of ownership during the period of user is not fatal to the success of a claim to an easement. To this proposition we cannot assent. Our opinion is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against a right of easement, yet the question *quo animo egerit*, to what purported character are the acts of user to be ascribed, is one which the Court must answer, and if *Konda Reddi v. Ramasami Reddi*(1) implies the contrary we think it is wrongly decided. We agree with the conclusion of SHREARMAN, J., in *Lyell v. Hothfield*(2) that acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. The question of animus in this case is one of fact which must be determined in the light of these observations by the Division Bench to which the case will be sent back.

N.B.

(1) (1915) I.L.R., 38 Mad., 1.

(2) [1914] 3 K.B., 911.

ORIGINAL SIDE.

Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.

PITTA RAMASWAMIAH (PETITIONER)

v.

1925,
September,
28.

THE COMMISSIONER OF INCOME-TAX, MADRAS
(RESPONDENT).*

Ss. 22, 23 (3) and (4), 28 and 30, Indian Income-tax Act (XI of 1922)—Filing statement of income—Order thereon—Appeal to and fine by appellate authority—Competency of appeal.

If in answer to a requisition by the Income-tax authorities, a person submits a statement of his income, the further enquiry and order thereon fall under section 23 (3) and not 23 (4) of the Indian Income-tax Act (XI of 1922); hence an appeal lies under section 30 from the eventual order of assessment. An appeal by the assessee being competent, he cannot when fined by the appellate authority for gross under statement of income, plead that the appeal was incompetent.

APPLICATION under section 45 of the Specific Relief Act (I of 1877), and under section 66 of the Indian Income-tax Act (XI of 1922), by Pitta Ramaswamiah, assessed to income-tax.

The facts are given in the judgment.

K. Sankara Sastri for assessee. The inquiry and order in this case were under section 23 (4) and not under section 23 (3) of the Indian Income-tax Act of 1922. See the original officer using the words "to the best of my judgment" in his order. Hence I have no right of appeal; see section 30 (1) of the Act. Hence the order of the appellate authority fining me under section 28 of the Act is without jurisdiction.

M. Patanjali Sastri for the Crown.—As an estimate of the income was put in by the assessee, the original order was only under section 23 (3) and not under section 23 (4) in spite of the words "to the best of my judgment" in the order. Hence an

* In the matter of Pitta Ramaswamiah.

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appeal was competent and the appellate authority had jurisdiction to fine the assessee.

JUDGMENT.

The assessee in this case put in a statement of his income amounting to Rs. 420. At a later stage when he was called upon to produce his accounts and so forth to substantiate that statement, he did not do so and said that the officer could assess him on the materials he could find. Thereupon the officer proceeded to estimate the income which turned out in his judgment to be much larger than what the assessee stated and it being in his opinion a gross case of misstatement of income assessed him and from that assessment the assessee appealed. In appeal he did not succeed in persuading the Court that he had been wrongly assessed but he did persuade the appellate authority that it was a very gross case of misstatement of his income. Thereupon he was fined Rs. 250 under section 28 of the Act. Now he appeals against that and the chief ground he takes is that the proceedings before the appellate income-tax authority were *coram non judice* because he says he acted under section 23 (4) and not under section 23 (3); and that under section 30 (1) (the proviso to that sub-section) there was no appeal available to him in this case, for the proviso says that no appeal shall lie in respect of an assessment made under section 23 (4). The answer to that is that this man having put in an estimate of his income obviously fell within section 23 (3) and not section 23 (4) and that the Income-tax officer's use of the words "to the best of his judgment", which he should not have used, has led to the contention that it was a case falling within sub-section (3) though it is not. There is no question to discuss here and this petition must be dismissed with costs (Rs. 150).

N.B.

APPELLATE CIVIL—SPECIAL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.*

THE COMMISSIONER OF INCOME-TAX, MADRAS
(REFERRING OFFICER)*

1925,
January 11.

v.

THEVARA PATASALA, BY MANAGER ARUNACHALAM
CHETTIAR (ASSESSEE).

*Sec. 4 (3) (1) and section 10 of the Indian Income-tax Act
(XI of 1922)—Trustees of charity running a business—
Profits liable to income-tax.*

If persons entrusted with funds and enjoined by the trust deed to invest them in lands and to maintain a religious or charitable institution with the income therefrom, choose to invest the funds in business (e.g., the running of a rice mill), the profits derived from the business are not exempt under section 4 (3) (1) of the Income-tax Act as charitable income, but are liable to income-tax as business profits under section 10 of the Act, recoverable from the manager of the business. *Coman v. Governors of the Rotunda Hospital, Dublin* [1921] 1 A.C., 1 and *In the matter of Lakshman Das Narain Das* (1925) I.L.R., 47 All., 68, followed.

CASE referred under section 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, in his letter No. 524, dated 22nd April 1925, for the decision of the High Court of the following question:—

"Whether the income derived by the Thevara Patasala from its rice mill business is income derived from "property held under trust" within the meaning of section 4 (3) (1) of the Indian Income-tax Act XI of 1922."

The facts are given in the judgment.

* Referred Case No. 11 of 1925.

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V. Ramaswami Ayyar for assessee.—I claim exemption under section 4 (3) (1) of the Act. A breach of trust does not divest the fund from its character of trust.

M. Fatanjali Sastri for the Crown.—There has been no trust on the facts of this case. Even if there is one, if a trustee makes an investment of its funds in business, then the business profits are taxable. See *Royal Agricultural Society of England v. Wilson*(1), *Brighton College v. Marriott*(2), *In the matter of Lakshman Das Narain Das* (3), *The Religious Tract and Book Society of Scotland v. Forbes*(4). This is not 'property' contemplated by section 4 (3) (1); for property in that section means 'property' as mentioned in section 9 of the Act.

V. Ramaswami Ayyar, in reply, distinguished the cases quoted by the respondent on the ground that here no business was started, but what was dedicated was a business concern (i.e.), a rice mill which is property exempted from taxation under section 4 (3) (1). There is no definition of 'property' in the Act. The exemption under the English Act is restricted to annual payments, unlike the Indian exemption in section 4 (3) (1).

The JUDGMENT of the Court was delivered by

COUTTS
TROTTER,
C. J.

COUTTS TROTTER, C.J.—The facts in this case are sufficiently set out in the case stated by the Commissioner, and they are shortly these—that a Hindu joint family entered into a partition and agreed among themselves that Rs. 15,000 of the family property should be set aside for a trust purpose, which purpose was to establish a Thevara Patasala, that is a school for teaching Hindu Tamil hymns, and that the income from the balance of the amount after erecting a building was to be used for the upkeep and carrying on of the school. The direction was that that balance was to be invested in the purchase of lands and that it was on the income arising from those lands the Patasala should be

(1) (1924) 9 Tax. Cases, 62.
(3) (1925) I.L.R., 47 All., 68.

(2) [1925] 1 K.B., 312, 317.
(4) (1896) 3 Tax. C., 415.

run. Now in these circumstances we entertain no doubt that there was a creation of a valid trust and one from which none of the parties or its members could possibly have resiled without committing a breach of trust. The question now arises in consequence of what the trustees did. Instead of investing the balance after building the school in lands, they in some shape or form invested them in a rice mill; apparently they purchased it and they carried on there the business of milling rice and derived income from it. The point taken by the Crown is that on that income they are liable to be taxed as being the profits of the business. It is quite clear to our minds that if they are the profits of a business they cannot at the same time be income derived from property held under trust wholly for religious or charitable purposes. The question was at first sight a little complicated by the fact which appears on the face of the document that this was a forbidden investment and that to put the money into this rice mill was a clear breach of trust on the part of the trustees. But on reflection the answer of the Crown appears to be that even assuming it to be a breach of trust, that is a matter which raises questions no doubt as between the *cesti qui trust* and the trustees and it may be that the trustees will not be able to charge the institution with any part of the profits that is taken from them by the Crown in the form of taxes. On that we express no opinion. But it does not in the least affect the position. The English authorities are quite clear that if an institution which primarily exists for charitable purposes chooses to raise funds for those purposes by carrying on a business in competition with other persons who have to pay income-tax, they like them will have to pay income-tax notwithstanding the fact that the ultimate surplus of the profits is all going to the charitable object. In our opinion,

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that is clearly laid down in *Coman v. Governors of the Rotunda Hospital, Dublin*(1), which has been followed in the subsequent cases, and only the other day in *In the matter of Lakshman Das Narain Das*(2). We think that that principle applies quite clearly to the Indian Act as the Allahabad High Court holds and that the answer to this reference must be that the proceeds derived from the carrying on of this rice mill are assessable to income-tax. The person whom we declare to be assessable and whom we make to pay the costs of this reference including a pleader's fees of Rs. 150 is the manager Arunachalam Chetti.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Krishnan, Mr. Justice Ramesam and
Mr. Justice Beasley.

1926,
March 24.

C. S. GOVINDARAJA MUDALIAR (PLAINTIFF), APPELLANT,

v.

ALAGAPPA THAMBIRAN AND 11 OTHERS (DEFENDANTS),
RESPONDENTS.*

Order I, rule 3, Civil Procedure Code—Separate leases by a temple trustee to several tenants on different dates—One suit by succeeding trustee to set them aside and to recover possession, whether multifarious.

A suit by a receiver of temple properties to set aside a number of leases granted by a previous trustee of the temple of various portions of one block of property to different tenants separately on different dates and to recover the portions thereof so demised from them respectively is not bad for misjoinder of parties and causes of action.

* Original Side Appeal No. 5 of 1921.

(1) [1921] 1 A.C., 1.

(2) (1925) I.L.R., 47 All., 68.

ON APPEAL from the Order of Mr. Justice DEVADOSS, dated 27th September 1923, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 539 of 1921.

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THAMBIRAN.

The facts are given in the judgment.

This Original Side Appeal coming on for hearing, the Court (COUTTS TROTTER, C.J., and RAMESAM, J.) referred the case to a Full Bench, stating the following question of law, viz. :—

“ Is a suit brought by a receiver of the temple properties to set aside a number of leases granted by a previous trustee of the temple of various portions of one block of property to different tenants separately on different dates and to recover the portions thereof so demised from them respectively, bad for misjoinder of parties and causes of action? ”

ON THIS REFERENCE—

K. S. Krishnaswami Ayyangar for appellant.—The suit is not bad for misjoinder of parties and causes of action. Order I, rule 3, Civil Procedure Code, exactly applies to this case. As I am the present trustee succeeding to all the lands of the temple, there is a unity of title just as in the case of an heir succeeding to a Hindu widow. There is only one cause of action and not several. It is only a question of joinder of parties. The various alienations are only violations of my sole right and I attack all the alienations on some common questions of law and fact. There is no necessity to pray for the avoidance of the leases. A prior limited owner's alienations can be set aside by a full owner in one suit whether the prior owner was a widow, a father, a karnavan or a guardian. See *Nundo Kumar Nasker v. Banomali Gayan*(1), *Vasudeva Shanbhaga v. Kuleadi Narnapai*(2), *Mahomed v. Krishnan*(3), *Abdul v. Ayaga*(4), *Byathamma v. Avulla*(5), *Dorusami Pillai v. Angammal*(6), *Umabai v. Vithal*(7), *Parbati Kunwar v. Mahmud Fatima*(8), *Kubra Jan v. Ram Bali*(9).

(1) (1902) I.L.R., 29 Cal., 871.

(2) (1873) 7 M.H.C.R., 290.

(3) (1888) I.L.R., 11 Mad., 106.

(4) (1889) I.L.R., 12 Mad., 234.

(5) (1892) I.L.R., 15 Mad., 19.

(6) (1908) 18 M.L.J., 484.

(7) (1909) I.L.R., 33 Bom., 203.

(8) (1907) I.L.R., 29 All., 267.

(9) (1908) I.L.R., 30 All., 560 (F.B.).

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K. Krishnamachari (with *V. Narasimha Ayyangar*) for respondents.—The cause of action is not the unity of title, but the illegal alienations as stated in the plaint, which the plaintiff has to avoid before recovering the properties. These are independent causes of action. There is no question common to all these alienations. Some may be good and binding on the trust and others may not. There is no analogy between the cases quoted and the present case. In them the alienor was a limited owner and the plaintiff sued in his independent full right. In this case, the present trustee has no higher rights than the previous one. He is only an agent of the idol. If the previous trustee could not have brought a single suit to set aside the various independent alienations which were made on different dates and under different circumstances the present trustee too cannot. *Afzal Shah v. Lachmi Narain* (1) holds that a single suit like this is bad for multifariousness. Even if a single suit could be brought to eject various people in possession of various plots, a declaratory suit against several cannot be brought. He distinguished the cases quoted by the appellant.

OPINION.

KRISHNAN, J.

KRISHNAN, J.—The question referred to the Full Bench is whether “a suit brought by a receiver of temple properties to set aside a number of leases granted by a previous trustee of the temple of various portions of one block of property to different tenants separately on different dates and to recover the portions so demised from them respectively, is bad for misjoinder of parties and causes of action.”

In a suit brought under section 92 of the Code of Civil Procedure to remove the trustee and to frame a scheme, etc., plaintiff was appointed receiver and was directed to recover the temple properties. The suit properties are held by the various defendants under several leases, all for 99 years granted by the trustee. Plaintiff claims that it was beyond the powers of the

(1) (1918) I.L.R., 40 All., 7.

trustee to grant leases for such a long period and seeks to invalidate them on that ground and to recover the properties ejecting the defendants. Defendants urge, among other pleas, that the alienations are valid in the circumstances alleged by them in their written statements and that in any case, the plaintiff cannot recover possession but only get the term reduced to 21 years or such other period as the trustee was competent to grant. These are two of the questions that arise in the case which are common to all the defendants.

The question referred for our opinion has obviously to be decided on the allegations in the plaint and on the provisions of the Code of Civil Procedure, as it now stands.

The principal rule we are concerned with is Order I, rule 3, which allows the joinder in one suit of a number of defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise. There is a considerable difference between the language of this rule and that of section 28 of the Code of 1882 which was the previous law on the point. The rule is now in accordance with the English Rule R.S.C. Order XVI, rule 4. The older authorities are therefore not of much more force now though they are still useful guides, as Justice DAVAR observes in *Umabai v. Bhai Balwant*(1). Though rule 3 in terms applies only to joinder of defendants, it impliedly refers to joinder of causes of action also as held by the learned Judges of the Calcutta High Court in *Ramendra Nath Roy v. Brajendra Nath Dass*(2).

(1) (1910) I.L.R., 34 Bom., 358 at 367.

(2) (1918) I.L.R., 45 Cal., 111.

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They have referred to the English authorities on the point and as I entirely agree with them it is unnecessary to refer to such authorities again.

Two conditions are necessary to be fulfilled for the application of Order I, rule 3, namely, that the relief claimed should arise from a series of acts or transactions, the word "series" implying that there should be some connexion between them, and that there must be some common question of law or fact arising in the suit. There is nothing in the rule that confines it to a single cause of action. Now it seems to me that both the conditions above stated are fulfilled in the present case. I have already mentioned above the two common questions that arise for decision. There is unity of title in the plaintiff as he claims as the proper present representative of the temple estate to set aside the alleged improper alienations of the previous trustee. The series of transactions impugned are the various 99 year leases granted by the previous trustee. They are all similar and depend for their validity on the powers of that trustee. They form in my opinion a series of transactions within the meaning of rule 3. I think the rule applies to this case and that the suit is not bad for multifariousness. While on the one hand we should not allow the Court to be embarrassed by the joinder of a number of totally unconnected controversies in one suit, we should not unduly restrict the scope of the rules regarding the joinder of parties and causes of action, so as to lead to unnecessary multiplicity of suits. If any inconvenience is felt by the joinder of a number of causes of action it is always open to the Court to take action under Order II, rule 6. It may be that the plaintiff can bring a separate suit against each lessee but that is no reason why he should be driven to do so. Order I, rule 3, itself contemplates the possibility of

separate suits. It is desirable where there are common questions of law or fact to decide, that they should be decided in one suit rather than in many to avoid possible conflict of decisions. In the case of several alienations by a single individual which are all alleged to be improper it is better that they should all be before the Court at once to secure a proper decision as to all of them. These are the observations made by the Full Bench in *Vasudeva Shanbhaga v. Kuleadi Narnapai*(1), and they are still of value as guiding principles.

The next Madras case referred to is the case *Mahomed v. Krishnan*(2). In that case the learned Judges pointed out that in a suit by the junior members of a tarwad to recover a number of tarwad properties improperly alienated by the karnavan, the primary ground of action was the interest vested in the plaintiffs to the whole of the property in suit and that there was unity of title and the claim arose from the same cause of action though there were numerous alienees unconnected with one another holding the various items in suit. This principle has consistently been followed in this Court, and in suits by reversioners, by adopted sons, and by co-parceners for partition, the joinder of any number of alienees is permitted without any objection on the ground of misjoinder.

The same view is taken in Calcutta. In *Nundo Kumar Nasker v. Banomali Gayan*(3), following the ruling in *Ishan Chunder Hazra v. Rameswar Mondol*(4), it was held that a lessee could bring a single action against his lessor and a number of subsequent lessees from him for ejectment and that it was not bad for misjoinder. The point was again elaborately considered

(1) (1874) 7 M.H.C.R., 290.

(3) (1902) I.L.R., 29 Cal., 871.

(2) (1888) I.L.R., 11 Mad., 106.

(4) (1897) I.L.R., 24 Cal., 831.

GOVINDARAJA in *Ramendra Nath Roy v. Brajendra Nath Dass*(1),
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v. where the corresponding rules of the Supreme Court
ALAGAPPA and the English authorities on them are referred to at
THAMBIRAN. length. I entirely agree with the view expressed by
KRISHNAN, J. the learned judges in that case regarding the principle
of the applicability of Order I, rule 3.

The case in *Afsal Shah v. Lachmi Narain*(2), was cited on the other side. But it seems to me that the scope and effect of Order I, rule 3, has not been properly considered in it. If the case was one of an owner of property suing to eject a number of wholly unconnected trespassers on different portions of his property, as their Lordships say it is on page 11, it would be bad for misjoinder, for it is difficult to bring it under Order I, rule 3. It is in that view quite different from the present case as the defendants here are all lessees holding under similar leases given by the trustee and the plaintiff is seeking to set aside all of them on the same ground.

For the reasons stated above, I would hold that the suit is not bad for misjoinder of parties and causes of action and answer the question referred in the negative. As no other point has been decided by the trial Judge and as, I think, he is wrong in the view he has taken, and, as the parties agree to such a course, I would set aside his order and direct him to proceed with the further trial of the case. The costs of this appeal will be disposed off by the trial Judge in his final decree.

RAMESAM, J. — This is an appeal from the order of our brother DEVADOSS, J., sitting on the original side. The appellant before us is the plaintiff. He is the Receiver of Sri Komaleswaram temple properties appointed by order of Court, dated the 27th July 1920,

passed in Civil Suit No. 429 of 1916 on the file of the High Court. In that capacity he sues for recovery of certain properties belonging to the temple on the ground that the various leases under which the respective defendants are in possession and which were executed by or in favour of the former trustees are voidable at the instance of the present plaintiff. Defendants 1 and 2 are interested in plot 18. Five other defendants are interested in two plots and defendants 8 and 9 in another plot. A preliminary issue was framed "Is the suit bad for misjoinder of parties and cause of action?" This was first argued. The learned Judge held that the frame of the suit was bad for multifariousness and he passed an order giving leave to the Plaintiff to proceed with the suit against such one of the Defendants as he may choose and withdraw it against the others. The plaintiff appeals.

In *Vasudeva Shanbhaga v. Kuleadi Narnapai*(1), it was held that a suit brought against a number of alienees of a deceased member of an undivided family for the recovery of family property illegally alienated by him is not bad for multifariousness. In *Mahomed v. Krishnan*(2), the suit was brought by the junior members of a tarwad against the karnavan and his alienees. The plaintiff prayed for the removal of the karnavan, for a declaration that his alienations are invalid against the tarwad and for possession of the property alienated among other reliefs. It was held that the suit was not bad for multifariousness and the earlier case was followed. There were 48 alienations; MUTTUSWAMI AYYAR, J., observed—

"In our judgment, it makes no difference whether the right enforced is that of a co-parcener or a reversioner, for the object in both is to reduce to possession a vested interest as well

(1) (1918) I.L.R., 45 Calo., 111

(2) (1918) I.L.R., 40 All., 7.

(1) (1874) 7 M.H.O.R., 290.

(2) (1888) I.L.R., 11 Mad., 106.

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in property illegally alienated as in the property held by the managing member or by the tenant for life. In the view that the primary ground of action is the interest vested in possession as regards the whole of the property in suit, there is a unity of title, and the claim made is one in respect of the same cause of action."

In *Abdul v. Ayaga*(1), the same view was again taken, the suit being for a declaration that alienations by the karnavan were not binding on the tarwad. It was said there is no reason why a declaratory suit should be treated differently from a suit for possession inasmuch as the titles to be adjudicated upon were the same in both. In *Byathamma v. Avulla*(2), it was held that the suit by a karnavan to recover properties given away by a former karnavan was not bad for multifariousness. So much is this doctrine established in this Court that in Appeal Suit No. 182 of 1896 (unreported) it was held that a reversioner was bound to include all the alienations made by a widow and questioned by him, in one suit so that a second suit would be barred under section 43 of the Civil Procedure Code. This case was considered in *Dampanaboyina Gangi v. Addala Rumaswami*(3). BHASHYAM AYYANGAR, J., observed:

"It purports to be based upon a course of decisions in this Presidency in which it was held that a suit relating to various properties in the possession of different defendants who claimed under different alienations made by a widow or by a karnavan or the managing member of a tarwad or a joint Hindu family, is not open to the objection of misjoinder of defendants and of causes of action, when the plaintiff's ground of title to all the properties included in the suit is the same * * * * *

A person suing for partition of an estate or for an estate which has devolved upon him by inheritance may so shape his plaint as to base it upon a single cause of action, the various defendants being joined as parties in possession of the estate. Further

(1) (1889) I.L.R., 12 Mad., 281.

(2) (1892) I.L.R., 15 Mad., 19.

(3) (1902) I.L.R., 25 Mad., 788 at 745.

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under section 28, Civil Procedure Code, relating to the joinder of different persons as defendants, it is open to a plaintiff to join as defendants various persons against whom the right to relief is alleged to exist, whether jointly, severally or in the alternative in respect of the same matter. * * * *

It would be noted that the phrase "in respect of the same matter" occurring in this section, is wider than the phrase "in respect of the same cause of action" occurring in section 26, Civil Procedure Code, relating to the joinder of different persons as plaintiffs in the same suit. . . . In *Ishan Chunder Hazra v. Rameswar Mondol*(1) it was held, following the decision of this Court in *Vasudeva Shanbhaga v. Kuleadi Narnapai*(2) and *Mahomed v. Krishnan*(3) that "in a suit for ejectment against several defendants who set up different titles to various parts of the land claimed, there was only one cause of action" and it was observed that "in England in an action in ejectment all the parties in possession are joined." Under the English Law, the persons to be made defendants in an action in ejectment, i.e., to be named in the writ, are all the persons in possession of the land sought to be recovered; and the persons who have a right to defend an action of ejectment are not only the persons named in the writ, but also any person who is in possession by himself or his tenant (Rules 112 and 113; pp. 494-98; Dicey's "Parties to an Action," Edition of 1870). As to cases in which different persons are in possession of different portions of the property, the rule laid down in Cole on 'Ejectment' (p. 76) is as follows:—

'When the tenements claimed and the tenants thereof are numerous, it is frequently advisable to bring two or more distinct ejectments rather than one action against all of them for the whole of the property. The exercise of a sound discretion and judgment on this point may sometimes save much trouble' * * * *

Whether the action is based only upon one cause of action or not will depend upon the frame of the plaint in a suit for ejectment and not upon the answers to the suit, which may be set up by the different defendants. Even if the plaint is not based upon one and the same cause of action, yet if the relief that is claimed severally against the different defendants be in respect of the same matter, section 28, Civil Procedure Code, will save it from the objection of multifariousness."

(1) (1897) I.L.R., 24 Calc., 881.

(2) (1874) 7 M.H.C.R., 260.

(3) (1888) I.L.R., 11 Mad., 106.

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In my opinion, the above sentences quoted from *Dampanaboyina Gangi v. Addala Ramaswami*(1) though strictly *obiter dicta*, as the point in that case was the applicability of section 43 (now Order II, rule 2), lay down the correct principle on the question of multifariousness. *Inlar Knar v. Gur Prasud*(2), *Mazhar Ali Khan v. Sajjad Hussain Khan*(3), *Ishan Chunder Hazra v. Ramaswar Mondol*(4) and *Nando Kumar Nasker v. Banomali Gayan*(5) are other decisions laying down the same principle. In *Ishan Chunder Hazra v. Ramaswar Mondol*(4), the Court observed—

“The cause of action namely, what the plaintiffs were bound to prove in order to succeed was that they were the reversioners of Brahmayi in regard to this property and that the claim was not barred by limitation. The defendants then could raise any answer they thought fit to get rid of the claim; but the cause of action was one.”

Whatever difficulty one may feel as to whether the cause of action in such cases is the same, certainly it ought to be held that they relate to the same matter as pointed out in *Dampanaboyina Gangi v. Addala Ramaswami*(1). The same remarks apply to *Nando Kumar Nasker v. Banomali Gayan*(5). All these cases were followed in *Parbati Kunwar v. Mahmud Fatima*(6). Now it may be said and there is some force in the contention that a mere unity of title is not enough to save a suit from the mischief of multifariousness. For instance, if several properties belonging to A, the owner of a land, have been trespassed upon by different persons at different times, can it be said that A may bring one suit in ejectment against all the trespassers. I find some difficulty in saying that a single suit will lie (vide

(1) (1902) I.L.R., 25 Mad., 736.

(2) (1889) I.L.R., 11 All., 33.

(3) (1902) I.L.R., 24 All., 858.

(4) (1897) I.L.R., 24 Cal., 831.

(5) (1902) I.L.R., 29 Cal., 871.

(6) (1907) I.L.R., 29 All., 267.

Afzal Shah v. Lachmi Narain(1) cited by DEVADOSS, J.). But where the unity of the title in the plaintiff is coupled with the fact that his predecessor was a limited owner or a person under a disability, such as a minor or the idol of a temple, and the alienations were made by a guardian or the trustee of the temple, such a fact makes the plaintiff's suit one in respect of the same matter. It may be that in the trial of such a suit the total income of the property vested in the widow, the minor, the idol or the manager of a joint family or a tarwad has to be considered and all the circumstances of the owner or the institution have to be taken into account in judging the question of the justifying necessity in considering the various alienations sought to be impeached. The possibility of the necessity of such an enquiry is probably the unifying element which makes the suit relate to the same matter. The case of the trustee of a temple was always regarded in several respects similar to that of a guardian of an infant heir or manager of a joint family (see for instance *Konwar Doorganath Roy v. Ram Chunder Sen*(2). Mr. Krishnama Achariyar appearing for the respondents contended that, though this principle is correct in a suit for possession by a reversioner, it will not apply in a suit for declaration. I do not see any reason why there should be a distinction made between a suit for declaration and a suit for possession. The case in *Abdul v. Ayaga*(3) already cited is a case where the plaintiff sued for declaration only. The present Civil Procedure Code though it does not use the words “the same matter” as in the Code of 1882, refers to a transaction or a series of transactions, the object being to widen the scope of the cases permitting joinder. In A.S. No. 78 of 1911 (unreported) a suit by the trustee

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(1) (1918) I.L.R., 40 All., 7.

(2) (1877) I.L.R., 2 Cal., 341 (P.C.).

(3) (1889) I.L.R., 12 Mad., 234.

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of a temple to set aside two alienations of the former trustee was held not to be bad for multifariousness and the decree was reversed and the suit remanded by SANKARAN NAYAR and SPENCER, JJ.).

None of the above authorities have been cited before the learned Judge. He relied upon a passage in *Seturatnam Aiyar v. Venkatachela Goundan*(1). No question of multifariousness was raised in the case. Before the Privy Council the plaintiff himself complained that evidence relating to one item should not have been used against him for other items. The Privy Council observed that he himself was responsible for the joinder and ought not to complain. I therefore hold that the suit is not bad for multifariousness. The order will therefore be reversed and the suit sent back for disposal according to law and I agree with my learned brother KRISHNAN, J.'s order as to costs.

BEASLEY, J. BEASLEY, J.—I have read the judgments of my learned brothers and am in entire agreement with them, and have nothing further to add.

A. Kandaswami Mudaliyar, attorney for appellant.

N.R.

(1) (1920) I.L.R., 48 Mad., 567 (P.C.).

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Krishnan, Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

T. S. BALAVENKATA SEETHARAMA CHETTIAR
AND ANOTHER (PETITIONERS), APPELLANTS,

1926,
April 26.

v.

THE OFFICIAL RECEIVER, TANJORE, AND 24 OTHERS
(RESPONDENT AND PERSONS ADDED AS PARTIES), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 2 (d), 17 and 28—

Insolvency of a Hindu father—Power of father to sell his sons' shares for his just debts, vesting of, as "Property" in Official Receiver—Death of father before exercise of power by Official Receiver, effect of.

Under the Provincial Insolvency Act (V of 1920), on the insolvency of a Hindu governed by the Mitakshara law, his power to sell his sons' shares also for paying his just and proper debts vests in the Official Receiver; the sons' shares themselves do not vest in the Receiver; *Sat Narain v. Behari Lal*, (1925) I.L.R., 6 Lah., 1. explained and applied; *Kuppuswami Goundan v. Marimuthu Goundan*, (1924) 47 M.L.J., 487, overruled.

By reason of section 17 of the Act, the death of the insolvent before the Official Receiver exercised the power does not put an end to the Receiver's power to sell.

Per KRISHNAN and RAMESAM, JJ.—Such power vests in the Receiver under section 28 of the Act as the insolvent's property, and not as "property" under section 2 (d) of the Act.

Per VENKATASUBBA RAO, J.—Such power vests as "property" within section 2 (d) of the Act.

APPEAL by the sons of the insolvent against the Order of J. C. STODART, District Judge of West Tanjore at Tanjore, in I.A. No. 455 of 1924 in I.P. No. 5 of 1922.

The facts are given in the judgment.

T. Rangachariyar (with K. Rajah Ayyar and K. Narasimha Ayyangar) for appellants.—The Privy Council has decided in

* Appeal against Order No. 39 of 1925.

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Sat Narain v. Behari Lal(1) that neither the shares as such of the sons nor the father's power to sell their shares for his just debts vests in the Official Assignee. Section 2 (e) of the Presidency Towns Insolvency Act corresponds to section 2 (d) of the Provincial Insolvency Act. Even if it be taken that the Privy Council has decided that the power vests, that was because the decision was under the Presidency Towns Insolvency Act in which there is section 52 which seems to provide for the vesting of such power. There is no section in the Provincial Insolvency Act, which governs this case, corresponding to section 52. The Privy Council in effect holds that the sons' shares can be got at only in execution or after an enquiry under section 4 of the Act. The Official Receiver cannot be in a better position than the creditors of the father in the matter of realization. There will be practical difficulties in selling the son's shares if some portion of a particular debt is not binding on the sons. The Privy Council holds that *Fakirchand Motichand v. Motichand* and *Hurruckchand*(2), *Rangayya Chetti v. Thanikuchalla Mudali*(3), *Nunnu Setti v. Chidaraboyina* (4) do not apply. Hence *Official Assignee of Madras v. Ramachandra Ayyar*(5), *Sellamuthu Servai, In re*(6) which follow the above earlier rulings do not apply. *Kuppuswami Goundan v. Marimuthu Goundan*(7) and *Narasimudu v. Basuva Sankaram*(8), must be deemed to have been overruled by the Privy Council decision. If the power vests there is no provision in the Act for refund of any surplus to the sons; see section 67 of the Act. If the power vests as "property" then the power can only be sold and cannot be exercised; see section 59 of the Act. "Power" is not "property," *Ex parte Gilchrist, In re Armstrong*(9), *Tremayne v. Rashleigh*(10) and *Nunnu Setti v. Chidaraboyina*(4). See also definition of "power" in Stroud's Judicial Dictionary. *Shripad v. Basappa*(11), *The Allahabad Bank Ltd., Bareilly v. Bhagwan Das Johari*(12) which were after *Sat Narain v. Behari Lal*(1) hold that the sons' shares do not vest. He commented on *Khenchand v. Narain Das*(13), and *Subramania Aiyar v.*

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| (1) (1925) I.L.R., 6 Lah., 1. | (2) (1883) I.L.R., 7 Bom., 438. |
| (3) (1896) I.L.R., 19 Mad., 74. | (4) (1908) I.L.R., 26 Mad., 214. |
| (5) (1923) I.L.R., 46 Mad., 54. | (6) (1924) I.L.R., 47 Mad., 87 (F.B.). |
| (7) (1924) 47 M.L.J., 487. | (8) (1924) 47 M.L.J., 749. |
| (9) (1886) 17 Q.B.D., 521. | (10) [1908] 1 Ch., 681. |
| (11) (1925) I.L.R., 49 Bom., 785. | (12) (1925) 24 A.L.J., 323. |
| (13) (1925) I.L.R., 6 Lah., 493. | |

Krishna Aiyar(1). At any rate as the father died before the Official Receiver exercised the power, the power cannot be exercised afterwards; for the Official Receiver represents the father; sale thereafter is *ultra vires*; *Nichols v. Nixey*(2). There is no section in the Provincial Insolvency Act corresponding to section 93 of the Presidency Insolvency Act to cover such a case. There is also no provision in the Provincial Insolvency Act for the son to intervene.

S. Varada Acharya (with *N. Rama Rao*) for the respondent.— This power is property within the definition in section 2 (d). Section 2(d) is verbatim, the same as section 266 of old Civil Procedure Code, section 60 of new Civil Procedure Code and section 2 (e) and section 52 of the Presidency Towns Insolvency Act. If for purposes of section 60 of Civil Procedure Code this power is property of the insolvent, equally for the Insolvency Act this power is property. *Sat Narain v. Behari Lal* (3) did not hold eventually that this power is a conditional power. Section 2 (d) does not deal with unconditional power alone. To the extent the father's debts are neither illegal nor immoral the father's power to sell is absolute. If the power mentioned in section 52 vests in Official Assignee as property as held by the Privy Council, then the power under section 2 (d) equally vests in Official Receiver. In the Provincial Insolvency Act, section 28 corresponds to section 52 of Presidency Act. The whole family property vested in the father before the son's birth and the son's birth has not altered the father's right in this respect; see *Girdharee Lall v. Kantoo Lall* (4). Compare Section 53 of new Civil Procedure Code which also takes the same view. If this "power" is "property" of the father that vests in Official Receiver, then any surplus will revert to the father who will hold it for himself and his sons, under the substantive law. If sons' interest does not vest in the Official Receiver it is difficult to invoke the aid of section 4 of the Act. There cannot be any declaration of rights as between the father and son. Decisions under old Civil Procedure Code and under 11 and 12 Victoria, Chapter 21, which have the same wording have held that this power vested in Official Assignee or Official Receiver. The Privy Council holds that these decisions are not inconsistent with this view.

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| (1) C.M.A., 115 of 1925 (unreported). | (2) (1885) 29 Ch. D., 1005. |
| (3) (1925) I.L.R., 6 Lah., 1. | |
| (4) (1875) 14 B.L.R., 187 (P.O.); I.L.A., 321. | |

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T. Rangachariyar in reply.—*Subraya v. Nagappa*(1) holds that if the father sells the sons' shares, he does so on their behalf for his just debts. As the English law prevailed in the Presidency Towns, mention is made of "powers" in the Presidency Towns Insolvency Act. Section 52 of that Act deals only with powers known to English law.

JUDGMENT.

KRISHNAN, J.—The point for decision in this appeal is whether the Official Receiver in whom the property of an insolvent Hindu governed by the law of Mitakshara is vested under the Provincial Insolvency Act, V of 1920, is entitled to sell the joint family property of the insolvent and his sons for his debts, they being neither illegal nor immoral. The lower Court has held that he could, and has upheld the sale by him. The appellants contend that he has no such power.

The rulings of this Court have been in favour of recognizing such power and holding such sales to be valid both in the Presidency town and in the mufassal; see *Official Assignee of Madras v. Ramachandra Ayyar*(2), *Sellamuthu Servai*, In re(3), *Sankaranarayana Pillai v. Rajamani*(4) and *Kuppuswami Goundan v. Marimuthu Goundan*(5). There was a difference of opinion as to whether the power to sell the joint property alone vested in the Official Assignee or Receiver or whether the undivided share itself of the sons vested in him. In the first three cases quoted above it was ruled that the power alone vested but in *Kuppuswami Goundan v. Marimuthu Goundan*(5), the opinion was expressed that the share itself vested. But all the cases were agreed that the Official Assignee or Receiver was entitled to sell the whole joint property and give a good title to

(1) (1909) I.L.R., 33 Bom, 264.

(2) (1923) I.L.R., 46 Mad., 54.

(3) (1924) I.L.R., 47 Mad., 87 (F.B.).

(4) (1924) I.L.R., 47 Mad., 462.

(5) (1924) 47 M.L.J., 487.

the purchaser provided that the debts were such as the sons were, on account of their pious obligation, bound to pay from their joint property.

The question has again been raised now on account of the recent ruling of the Privy Council in *Sat Narain v. Behari Lal*(1) and it is contended that the result of that decision is to compel us to hold that neither the shares of the sons nor the power to sell such shares vests in the Official Receiver and that he can proceed against the sons' share if at all only by way of suit. The Privy Council has no doubt clearly laid down that the shares of the sons do not vest in the Official Assignee. That decision was under the Presidency Towns Insolvency Act and one of the arguments used by their Lordships to arrive at their conclusion is based on the existence and the language of section 52 of that Act, a section which finds no counterpart in the Provincial Insolvency Act. Nevertheless as the other arguments apply equally to the latter Act, it seems to me that we must hold that the same principle governs cases under it in the mufassal. As a result we must overrule the decision in *Kuppuswami Goundan v. Marimuthu Goundan*(2), in so far as it holds that the undivided share of the son itself vests in the Official Receiver.

That does not, however, carry the appellants far enough to enable them to succeed in their appeal, for if the Official Receiver has got the father's power to sell the joint property vested in him he will be entitled to sell the whole joint property himself. It is therefore argued for the appellant that though under the Presidency Towns Insolvency Act such a power may be vested in the assignee by virtue of section 52 there is no provision in the Provincial Insolvency Act to so vest it.

(1) (1925) I.L.R., 6 Lah., 1.

(2) (1924) 47 M.L.J., 487.

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I do not think the Legislature intended to make any such distinction between the Madras and the mufassal insolvencies as suggested by this argument. It cannot be said that their Lordships of the Privy Council laid down that such a power will not pass to the Official Assignee; it was not necessary for them to do so for the purpose of the case before them which was one of a right of preemption claimed by the insolvent's son as owner of his share of the family property. The vesting of a power to sell it in the Official Assignee would not interfere with that right till he actually exercises that power and sells; a thing which had not been done in that case. In fact their Lordships expressly say—

"It may be that under the provisions of section 52 or in some other way that property (i.e., the joint property) may in a proper case be made available for the payment of the father's just debts."

The contention, however, is that the effect of their Lordships' judgment is to prevent any vesting of such a power in mufassal cases at any rate as there is no express provision for it in the mufassal Act. It seems to me however, that the provisions we have in the Act are sufficient to vest such a power. Section 28 which is the vesting section vests the whole of the property of the insolvent in the Official Receiver. In the joint family property the insolvent father is not only entitled to his own share but has also got a power to sell the whole property including the son's share for payment of his just debts. It seems to me that under section 28 itself his share as well as the power will vest in the Receiver as the insolvent's property. It is not necessary to pray in aid the definition of "property" in section 2 (d) for this purpose. There may be a difficulty in doing so as their Lordships seem to have been of opinion that section 2 (e) of the Presidency Insolvency Act, the wording of which

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is the same as that of section 2 (d) of the Provincial Insolvency Act, contemplates only an "absolute and unconditional power of disposal," which a father's power is not, as it depends upon the existence of debts liable to be satisfied out of the son's share. Section 28, however, by itself is enough, it seems to me, to vest that power in the Receiver as a species of property belonging to the father.

Now it is argued that a power can never be treated as property and reliance is placed upon the case of *Ex parte Gilchrist, In re Armstrong*(1), especially on the judgment of FRY, L.J., on page 531. In that case the learned judges were dealing with what is called a general power of appointment under the English law which is a very different thing in law from the power of the Hindu father under the Hindu law which we are dealing with. Section 52 of the Presidency Towns Insolvency Act itself speaks of such a power or capacity of the father to sell as a species of property. I hold, therefore, that the Receiver had in this case the power to sell the whole joint property to pay the father's debts as they were neither immoral nor illegal debts and his sale must be upheld.

I am fortified in my view as the same view was taken by a Bench of this Court in C.M.A. No. 115 of 1925 (unreported) and also by the Lahore High Court in *Khemchand v. Narain Das*(2). There is an expression of opinion to the contrary by MACLEOD, C.J., in *Shripad v. Basappa*(3) who says on page 787—

"Speaking for myself, I do not think when the manager of a joint Hindu family is adjudicated insolvent, the power which he had before his insolvency to dispose of family estate for proper purposes, must be considered as vesting in the Receiver or Official Assignee."

(1) (1883) 17 Q.B.D., 521.

(2) (1925) I.L.R., 6 Lah., 438.

(3) (1926) I.L.R., 49 Bom., 785.

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It does not seem to be a considered opinion nor is it shared by COYAGEE, J., who sat with him. The Chief Justice makes no reference to section 52 of the Presidency Towns Act. With all respect I am unable to accept the Chief Justice's dictum.

In this case one further argument has to be considered and that is that because the insolvent's father died before the Receiver effected his sale, the sale was without authority and void. It is argued that the power came to an end with the death of the father and that the Receiver was no longer entitled to exercise it. For this argument, reliance is placed on the case of *Nichols v. Niwey*(1). The answer to this contention is provided for by section 17 of the Act which deals with cases where the insolvent debtor dies pending proceedings in insolvency. That section enacts that unless the Court otherwise orders, the proceedings shall be continued so far as may be necessary for the realization and distribution of the property of the debtor. The power of sale can thus be exercised for the realization of the assets of the insolvent even though he is dead. The English case cited is thus not applicable.

The appeal fails and is dismissed with costs, to be paid out of the estate, of the Official Receiver and the alienees, each one set.

RAMESAM, J. RAMESAM, J.—As I agree with the judgments of my learned brothers, I will briefly give my reasons for doing so.

Having regard to the reference to section 52 of the Act at page 24 of the judgment in *Sat Narain v. Behari Lal*(2) I think there is very little doubt that the Privy Council intended to hold that the right of alienation of a Hindu father in respect of joint family property passes

(1) (1895) 29 Ch. D., 1005.

(2) (1925) I.L.R., 6 Lah., 1.

to the Official Assignee under the Presidency Towns Insolvency Act. I think the point is not capable of much argument. The more difficult question that arises before us is, whether in the case of the Provincial Insolvency Act the absence of a provision like section 52 makes any difference, and, if so, what? The question turns upon what construction one may place on the definition of "property" in section 2 (d) of the Act. This definition is identical with the definition in 2 (e) in the Presidency Act and has been repeated from the definition in 2 (e) of the older Provincial Act III of 1907 which has been repealed by the present Act. On the one hand Mr. Varada Achari contends that, seeing that, under the Civil Procedure Code of 1882 which contained provisions relating to Provincial Insolvency, section 354 was understood, though it did not say in so many words, as if it enacted that all the property of the insolvent described as attachable in section 266 should vest in the Receiver and that the Provincial Insolvency Act is only intended to consolidate the preceding state of the law, the definition of the word "property" in the Provincial Insolvency Acts ought to be construed so as to include the property itself and not merely the father's rights over it. To this argument, however, there are three replies. First, the Privy Council have pointed out that decisions under the Civil Procedure Code ought not to be used for construing the Insolvency Acts. The Code had a history of its own culminating in section 53 of the present Code of 1908. Secondly, the House of Lords in *Bank of England v. Vagliano Bros.*(1) condemned this mode of construing an Act, that is, we ought to look at the Insolvency Act by itself and not to be influenced by the fact that it was a continuation of the

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(1) [1891] A.C., 107.

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previous Civil Procedure Code of 1882. Thirdly, the identical words in the Presidency Towns Insolvency Act have been construed by the Privy Council in *Satnarain v. Behari Lal*(1), as applying only to property over which the insolvent had absolute power of disposal and until we see a reason to the contrary in the Act we are now considering, I think, if possible, the words in this Act ought to receive the same construction. I must therefore reject Mr. Varada Achari's contention that the property (including the son's share) itself vests in the Official Assignee. On the other hand it is contended by Mr. Ranga Achari that not even the father's rights over the property passed to the Official Assignee. Now, there is no doubt that the word "property" may include without doing any violence to the term the rights of a Hindu father over joint family property under the Mitakshara Law. This is shown by section 52 in the Presidency Towns Insolvency Act. The only question is, whether we should construe the word "property" in the Provincial Insolvency Act so as to exclude such rights. I am not able to see any reason why we should—the absence of a section like section 52 of the Presidency Towns Insolvency Act throwing no light on the matter. I therefore agree with the conclusion of my learned brothers.

On the third point, namely, whether the death of the insolvent makes any difference, I agree that it does not.

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VENKATASUBBA RAO, J.—This appeal raises a very important question, namely, what is the effect of the decision of the Judicial Committee in *Satnarain v. Behari Lal*(1). The Hindu Law recognizes the power of a father, subject to certain conditions and restrictions, to deal with his son's undivided interest in joint family

(1) (1925) I.L.R., 6 Lah., 1.

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property. On a father being adjudicated an insolvent, what is the nature of the right, if any, that passes to the Official Assignee or the Official Receiver as the case may be? This is the question that this appeal raises. The appellants before us are the sons of an insolvent and they challenge the act of the Official Receiver, who, for paying off the father's debts, exercised the power to sell the sons' interest also in the family properties. The learned District Judge has held that the Receiver could validly exercise such a power in respect of debts not shown to be either illegal or immoral.

Mr. Ranga Achari, the appellants' learned vakil, contends before us that the judgment of the Judicial Committee must be taken to amount to a pronouncement, that on a father being adjudicated an insolvent, neither the son's undivided share nor the father's conditional power to dispose of that share vests in the Official Assignee. The case decides unmistakably, so far as the Presidency Towns Insolvency Act is concerned, that the son's share as such does not vest in the Official Assignee. Does it further decide that the insolvent's conditional power to dispose of his son's interest does not also pass to the Official Assignee? The case having been decided with reference to the Presidency Towns Insolvency Act, a further question arises, what is the bearing of that decision on the scope, in this respect, of the Provincial Insolvency Act—the Act under which the present appeal has to be decided?

The points raised being of considerable importance, this Bench, consisting of three Judges, has been specially constituted to hear this appeal.

In order to understand properly the decision of the Judicial Committee, it is necessary to have regard first to the facts with reference to which the judgment was given, and, secondly, to bear in mind the divergent

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views on the subject taken by the Courts in India. In the case before the Privy Council, the question arose in regard to the right of pre-emption, which a son, as a member of a joint family, claimed to exercise, after adjudication of his father as an insolvent; and against the son the contention was put forward that the entire property having previously vested in the Official Assignee, the son ceased to have any proprietary interest in the property which would entitle him to exercise the right of pre-emption. A Full Bench of the Lahore High Court decided that on adjudication of the father which was before the suit, the son's undivided interest also passed to the Official Assignee and that consequently there was no right left in the son outstanding which could be enforced in the suit. Did the undivided share of the son vest or not vest in the Official Assignee? This was the question that the Judicial Committee had to decide, and disagreeing with the Full Bench of the Lahore High Court their Lordships held that it did not vest. If the High Court had held that what passed to the Official Assignee was not the son's undivided interest but the father's conditional power of disposal, the plaintiff's suit would not have been dismissed. In the light of these facts, is there anything to show that the Judicial Committee intended to lay down that even the disposing power of the father did not pass? That the Judicial Committee has not said so in express terms, is not disputed. The decreeing of the plaintiff's claim is not inconsistent, as I have said, with the recognition of the father's disposing power having passed to the Official Assignee.

Then, in regard to the views held by the Indian Courts, there was a sharp divergence of opinion as to what vested in the Official Assignee, on the adjudication of a Hindu father belonging to a joint undivided Hindu

family. To bring out the real point at issue, I shall refer to a few recent cases decided by the High Courts in India. In *Official Assignee of Madras v. Ramachandra Ayyar*(1), the Official Assignee contended that on the adjudication of the father the interest of the minor sons of the insolvent in the family property, vested in him. Sir WALTER SCHWABE, C.J., who delivered the judgment of the Court consisting of himself and COURTS TROTTER, J., observes that it may be taken as established law, that the Official Assignee is not entitled to have vested in him the shares of the other members, although he can deal with them if the insolvent could lawfully have done so had there been no insolvency. In *Sellamuthu Sarvai, In re*(2) the question had to be considered whether the Privy Council decisions in *Sahu Rama Chandra v. Bhup Singh*(3) and *Chet Ram v. Ram Singh*(4) affected the law as understood, in regard to the Official Assignee's power to deal with the son's interest during the insolvent's lifetime. In each of the three separate judgments that were delivered, the point is emphasized that the accepted law is, that it is the father's power that vests in the Official Assignee and not the undivided share of the son. COURTS TROTTER, J., says, thus :—

“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 for the 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.”

(1) (1923) I.L.R., 43 Mad., 54.

(2) (1924) I.L.R., 47 Mad., 87 (F.B.).

(3) (1917) I.L.R., 33 All., 137 (P.C.).

(4) (1922) I.L.R., 44 All., 388 (P.C.).

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KRISHNAN, J. refers to it as settled law, 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. In *Sankaranarayana Pillai v. Rajamoni*(1) the law was again stated in similar terms. PHILLIPS, J., observes :

"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 also it vested in him the power of these insolvents as fathers to sell their sons' interest in the property for the payment of antecedent debts."

In my own judgment in that case, I expressed myself thus :

"The learned Subordinate Judge has found that the debts of the 1st and 2nd 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 son's interest in ancestral immovable estate for the payment of the father's debts not tainted with illegality or immorality."

The first two cases arose under the Presidency Towns Insolvency Act and the third under the Provincial Insolvency Act and in each of these cases it was assumed that what vested in the Official Assignee was not the undivided share of the son but the conditional power of disposal possessed by the Hindu father.

The point again came up before a Bench of the Madras High Court in *Kuppusawmi Goundan v. Marimuthu Goundan*(2). That was a case under the Provincial Insolvency Act. It was there decided, contrary to the trend of the authority of this Court, that the entire undivided interest of the son vested in the Official Receiver as distinguished from the mere disposing power of the father. SPENCER, Offg. C.J., thought that *Official Assignee of Madras v. Ramachandra Ayyar*(3)

(1) (1924) I.L.R., 47 Mad., 462.

(2) (1924) 47 M.L.J., 487.

(3) (1923) I.L.R., 46 Mad., 54.

was wrongly decided owing to a concession erroneously made by the Advocate-General who argued that case and preferred to follow the judgment of the Lahore High Court in *Bihari Lal v. Satnarain*(1), the very same decision which was later upset by the Privy Council in the case cited at the opening of this judgment, *Satnarain v. Behari Lal*(2). SRINIVASA AYYANGAR, J., who concurred with SPENCER, Offg. C.J., felt bound to follow the Lahore decision and held that the share itself vested. He observed, however, that if the matter had been *res integra* he would have taken the view that it was the bare power that vested and not the corporeal undivided interest.

It was after these cases were decided by the Madras High Court, that the question was raised before the Judicial Committee in the appeal from the Lahore case. The Madras cases to which I have made reference illustrate the conflict that prevailed in the Indian Courts on this question. Sir SHADI LAL, C.J., as one of the members of the Full Bench of the Lahore High Court, clearly indicated that if he had not been bound by authority he would have held that what vested was only the father's conditional power and not the son's undivided share. The Privy Council directed the whole of their judgment to show that the Lahore High Court's view, namely, that the share itself vested in the Official Assignee, was wrong. When their Lordships say that they disapprove of one of these aforesaid two views, it seems to me that it would be most improper to read into their judgment, an intention to overrule by implication, the other and the exactly opposite view which had been repeatedly taken on this subject. These considerations seem to me to point strongly to the fact

(1) (1922) I.L.R., 3 Lah., 323.

(2) (1925) I.L.R., 6 Lah., 1.

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that the Judicial Committee could not have intended to lay down the very wide proposition for which Mr. Ranga Achari contends.

A careful examination of the judgment itself leads me, on the contrary, to the conclusion, that their Lordships recognize that although the son's undivided share does not pass, the father's conditional power of disposal does pass. Reference is made to section 2 (e) where the word "property" is said to include any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. They then refer to section 52 (2) (b) which enacts that the property of the insolvent shall comprise the capacity to exercise all such powers in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency. Under the first of these sections, it is the property that vests; under the second, it is the power that vests, and their Lordships point out that it is difficult to reconcile section 52 with the proposition that the property itself vests in the Assignee. While thus they reject the doctrine that the property vests, they impliedly accept the theory that the power vests. They again refer to section 52 as containing a provision which enables the Official Assignee to have recourse to the son's share for the payment of the father's just debts. Section 52 can be invoked only by reason of the fact that, under the section, the property that vests in the Official Assignee includes the capacity to exercise a power of disposal. The following sentence in their Lordships' judgment makes their meaning even more clear:—

"It is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interests

in the joint property and from the female members their right to maintenance and transfer the whole estate to an Assignee of the insolvent for the benefit of his creditors."

It admits of no doubt, that what their Lordships were combating in the whole of their judgment, was the view that the physical, corporeal, undivided share of the son immediately vests in the Assignee as contrasted with and distinguished from the bare right of conditional disposal possessed by the Hindu father. It is also significant that it is stated towards the close of their judgment that the cases cited by their Lordships, are not inconsistent with the conclusion at which they have arrived.

I am therefore satisfied that *Satnarain v. Behari Lal* (1) is not an authority for the proposition that under the Presidency Towns Insolvency Act the conditional power of disposal of the father does not vest in the Official Assignee.

I shall now proceed to deal with the second part of the question, viz., what bearing has this ruling on the scope of the Provincial Insolvency Act in this respect? The argument for the appellant may be shortly put thus. Section 2 (e) of the Presidency Towns Insolvency Act is identical in language with section 2 (d) of the Provincial Insolvency Act. The interpretation put by the Judicial Committee on section 2 (e) must therefore hold good in respect of 2 (d).

It is next urged that section 2 (e) has been construed as referring only to property over which the insolvent has an absolute and unconditional power of disposal, whereas a Hindu father's right is only a conditional right. The answer is twofold. Their Lordships were concerned with pointing out that section

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52 which vests merely the power, is irreconcilable with section 2 (e) which vests the property. In regard to section 2 (e) at the top of page 22, after saying that "property" is defined as including any property over which any person has a disposing power which he may exercise for his own benefit, they go on to say :

"And it may be said that a Hindu father's power to sell the joint property and apply the proceeds to the payment of his debts, is such a power."

Later on at the same page, they observe :

"And section 2 seems to contemplate an absolute and unconditional power of disposal."

Their Lordships were clearly pointing out that the definition in section 2 applies "unless, there is something repugnant in the subject or context" and that section 52 renders it repugnant to hold that in contravention of its express terms the property itself vests. However this may be, it seems to me to be somewhat far-fetched to suggest that such construction as might be deemed to have been placed upon the words in section 2 (e), was intended to be absolute and final irrespective of the context or the enactment where those words may occur. In the Provincial Insolvency Act there is no provision corresponding to section 52 (2) (b) which refers to the exercise of power over property. In the construing therefore of section 2 (d) in the Provincial Insolvency Act, we are not hampered by the fact of co-existence in the same enactment, of another provision in apparent or real conflict with that section. These very words have been used by the Indian legislature in enactment after enactment in *pari materia* with the Provincial Insolvency Act, to signify the conditional and restricted power possessed by a Hindu father. These identical words are used in section 266 of the Civil Procedure Codes of 1877 and

1882 and are reproduced in section 60 of the present Code of 1908. In all these enactments, as in the Provincial Insolvency Act with which we are at present concerned, these words stand alone and are not controlled by a different set of words such as those that occur in section 52 of the Presidency Towns Insolvency Act. It must be borne in mind that their Lordships throughout in their judgment repeatedly point out that their decision is given in respect of the Presidency Towns Insolvency Act alone. When the Law of Insolvency for the mufassal was a part of the Civil Procedure Code itself, section 266 was referred to in section 354 of the two earlier Codes, under which section the property of the insolvent vested in the Receiver. I am therefore of the opinion that whatever be the meaning of the words in section 2 (e) of the Presidency Towns Insolvency Act, the expression in section 2 (d) of the Provincial Insolvency Act includes the qualified and restricted power of a Hindu father.

The only difficulty that still remains is, under this section, is it the property or the power that vests in the Official Receiver? The Privy Council have in very emphatic terms shown the unsoundness of the position that the property itself vests and although the Presidency Towns Insolvency Act alone was under discussion, their observations are of general application. In the face of those remarks, it is impossible to hold that the property itself vests. Sir SHAHI LAL, C.J., in the Lahore case, after adverting to cases under the Civil Procedure Code, felt bound to hold that it is the undivided share and not the qualified power that vests. It seems to me that there is nothing in the cases decided under the various Codes that compels one to take the view that the property itself as distinguished from the power vests in the Official Receiver. The legislature in

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using the phraseology it did in section 2 (d) of the Provincial Insolvency Act, did no more than intend to enact that the insolvent's property includes also, in the case of a Hindu father, his disposing power over his son's undivided interest. This construction seems to me to be equally applicable whether the words are used in the Civil Procedure Code or in the Provincial Insolvency Act. Till a contrary opinion was expressed in *Kuppuswami Goundan v. Marimuthu Goundan*(1) (which must now be regarded as overruled) this is the view that was taken by the Madras High Court in regard to the Presidency as well as the Provincial Insolvency Acts. In my opinion, the authority of the Madras cases that have held that a Hindu father's qualified and restricted power to dispose of his son's undivided interest, vests on his adjudication, in the Official Receiver, has not been shaken by the recent pronouncement of the Privy Council in *Satnarain v. Behari Lal*(2).

I may add that my view receives support from two cases decided since the Privy Council ruling, one, a decision of a Bench of this Court (PHILLIPS and MADHAVAN NAYAR, J.) in C.M.A. No. 115 of 1925, and the other, a decision of the Lahore High Court, *Khemchand v. Naraindas*(3).

In the present case, after adjudication, the insolvent died. Does this fact make any difference? As the learned District Judge points out, section 17 provides for this contingency, which runs thus:—

"If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued so far as may be necessary, for the realization and distribution of the property of the debtor."

(1) (1924) 47 M.L.J., 487.

(2) (1925) I.L.R., 6 Lah., 1.

(3) (1925) I.L.R., 6 Lah., 43.

Nichols v. Nixey(1) has been cited for the proposition, that the trustee cannot exercise a power of appointment after the death of the bankrupt, the donee of the power. The obvious answer to this is, that a decision which applies to powers in the ordinary legal sense of that term, cannot be treated as an authority in regard to what is an entirely different thing, namely, the right, which has come to be described as power, under the Hindu Law of the father to dispose of his son's interest in the joint family property.

The appeal fails and is dismissed with costs as provided for in the judgment of my learned brother KRISHNAN, J.

N.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice
and Mr. Justice Ramasam.*

N. M. RAYALU AYYAR AND 2 OTHERS (PLAINTIFFS),
APPELLANTS IN APPEAL No. 334 OF 1924 AND
RESPONDENTS IN APPEAL No. 219 OF 1922

1925,
March 17.

v.

S. S. RAMUDU AYYAR AND ANOTHER (DEFENDANTS),
RESPONDENTS IN APPEAL No. 334 OF 1924 AND APPELLANTS
IN APPEAL No. 219 OF 1922.*

*Order II, rule 2, Civil Procedure Code (V of 1908)—Two suits
filed on same day, whether barred by—Option to Plaintiff to
proceed with one.*

If two suits are filed by the same person against the same defendant on the same day, each for a distinct relief arising out of one and the same claim, the plaintiff has the option, if

(1) (1885) 29 Ch. D., 1005.

* Appeals Nos. 334 of 1924 and 219 of 1922.

Order II, rule 2, Civil Procedure Code, be applicable at all to the case, of electing to proceed with any one of the two suits he chooses. *Appasami, v. Ramasami* (1886) I.L.R., 9 Mad., 279, followed.

Per cur. Order II, rule 2, Civil Procedure Code, is not applicable to such a case as the suit which might happen to be numbered as the later suit cannot be said to have been filed "after" the other within the meaning of the rule; *Murti v. Bhola Ram*, (1894) I.L.R., 16 All., 165 (F.B.), dissented from. APPEALS 334 of 1924 and 219 of 1922, against the decrees of P. G. RAMA AYYAR, First Additional Subordinate Judge, Madura, in Original Suits No. 29 and 11 of 1921 of his Court, which were originally Original Suits Nos. 72 and 73 of 1921, respectively, of the Madura Subordinate Judge's Court.

The plaintiffs agreed to sell to the defendants sixty bales of yarn at certain prices and delivered to the defendants twenty-eight bales on various dates. They offered to deliver nine more bales on condition of the entire price of the twenty-eight bales being paid at once, promising to deliver the remaining twenty-three bales at an early date. As the defendants did not pay the price of the twenty-eight bales, the plaintiffs refused to deliver the nine bales or the remaining twenty-three and cancelled the contract. The defendants pleaded that the plaintiffs committed breach of contract both as regards the due dates on which the bales were agreed to be delivered and as to their right to couple their further delivery with a condition. They also alleged that they sustained damages on account of the plaintiff's neglect and refused to pay the balance of price for the twenty-eight bales received.

The plaintiffs filed two suits on the same day against the defendants, one (viz., O.S. 73 of 1921) for balance of price due for the twenty-eight bales and the other (viz., O.S. 72 of 1921) for damages for non-acceptance of the

remaining thirty-two bales. The Subordinate Judge gave a decree for the balance of price but dismissed the suit for damages. Both parties preferred appeals against the decrees.

Arguments in Appeal 219 of 1922 (O.S. No. 73 of 1921) by defendants.

A. Krishnaswami Ayyar with P. V. Krishnaswami Ayyar.—

The two suits arise out of one and the same cause of action and the filing of two suits is barred by Order II, rule 2, Civil Procedure Code; see *Duncan Brothers & Co., v. Jeetmull Gredharee Lall*(1) and the opinion of Wilson, J, in *Anderson, Wright & Co. v. Kalagarla Surjinarain*(2).

[*Courts Trotter, C.J.*—Of two suits filed on the same day and perhaps simultaneously, which is earlier?]

That which is numbered earlier; see Order IV, rule 2, and *Murti v. Bhola Ram*(3).

C. V. Anantakrishna Ayyar with S. Doraiswami Ayyar, V. Thiagaraja Ayyar and P. S. Chandrasekhara Ayyar.—The causes of action are different. The decisions quoted are incorrect. Order II, rule 2, does not apply to suits filed on the same day as owing to the mere chance of the office numbering them consecutively one cannot be said to have been filed "after" the other. Anyhow *Appasami v. Ramaswami*(4) holds that I have an option of prosecuting any one of them as I choose and giving up the other. In this case, I choose to prosecute the suit for the price which is numbered later.

JUDGMENT.

It will be convenient first to deal with Appeal No. 334. The plaintiffs and appellants before us were the sellers and they had entered into a contract to deliver to the buyers sixty bales of yarn of various counts. They delivered twenty-eight bales before 15th

(1) (1892) I.L.R., 19 Cal., 872.
(3) (1894) I.L.R., 16 All., 165.

(2) (1886) I.L.R., 13 Cal., 329.
(4) (1883) I.L.R., 9 Mad., 279.

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November 1918 when the controversy between the parties arose. The offer is to be found in a letter of the 27th July, Exhibit A, accepted by an answer of the 5th August, Exhibit II. The terms of the contract are very simple. The bales were to be delivered by the sellers as soon as they got them from the mills which manufactured them and what is called *Tavanai* credit was extended to the buyer. That is explained in this way. The mill month runs from the 21st of one month to the 20th of the next, and the period of credit is to the end of the calendar month following that in which the mill month expired; that is to say, for goods delivered by the mill from the 21st September to the 20th October payment will be due on the 30th of the following November. On the 15th of November the sellers wrote announcing that 9 bales had arrived at the mills and were in stock there and the letter says:

"If you therefore pay us Rs. 2,660 being the balance due for the October tavanai and Rs. 21,120 being the balance due for the November tavanai, Rs. 23,780 in all, we shall also pay the amount to the mills, take out the bales and deliver them to you."

We see no answer to the contention that that was a bad tender, because it did not offer to deliver the goods which were due for delivery unless a condition was complied with, which was not in accordance with the original contract. It is clear therefore that there never was at this date any valid tender of the 9 bales. With regard to the remaining 23, they were never tendered at all, but the seller's contention is that they were entitled to cancel the balance of the contract in the events which happened and that they did so by their letter of the 22nd January 1919, Exhibit B. It is quite true that in Exhibit II we find the position that if payments

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were not duly made in accordance with the contract, there was a provision for cancellation of all the outstanding part of the contract at the seller's option. Assuming that Exhibit B is not merely a threat to cancel but does actually purport to effect a cancellation, we are clearly of opinion that it was not a cancellation which the sellers were entitled to bring about as matters then stood. The demand was to pay first a sum of Rs. 23,780 as to which we will assume for this purpose the money was due, but it was coupled with the further demand that 9 bales should be paid for, of which up to date, as we have found, there had been no valid tender. In these circumstances, we agree with the learned Judge that the sellers were never in a position to claim damages for non-acceptance of any one of these 32 bales.

The other appeal, No. 219 of 1922, relates to the price of the 28 bales which the buyers have had and not paid for. They seek to evade payment by invoking the provisions of Order II, rule 2 of the Code of Civil Procedure. What happened was that the sellers brought two suits, one in respect of the 28 bales as goods sold and delivered and the other in respect of the balance of 32 for damages for non-acceptance. A full Bench of the Calcutta High Court, *Duncan Brothers & Co. v. Jeetmull Greedaree Lall*(1), giving effect to a prior expression of opinion by WILSON, J., has held that, though the two causes of action may be legally different, if the goods are all deliverable under one contract you cannot validly split them into two and bring separate suits in respect of them. Assuming this to be correct, the words of Order II, rule 2 (2), are—

(1) (1892) I.L.R., 19 Cal., 372 (F.B.).

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"Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

It is said that the doctrine of the Calcutta High Court can be applied to this case by invoking the authority of the decision in *Murti v. Bhola Ram*(1). In this case, the facts appear to be that the suits were presented together on the same day and an officer of the Court numbered them respectively as 72 and 73, 72 being the suit for damages for non-delivery of the 32 bales and 73 the suit for the price of the 28 bales sold and delivered. The Allahabad case is invoked as laying down the proposition that the numbering affixed by the Court shall *prima facie* be conclusive as to the order of time in which the suits were respectively instituted. We are not prepared to assent to that doctrine, but would rather hold that the plaintiffs here can confine themselves to suit No. 73 and have suit No. 72 dismissed under Order II, rule 2. It may very well happen that of two suits presented simultaneously one was held for some technical cause for a week or ten days and then would be numbered several numbers behind the one which was admitted without question. Even if it be that the numbering is *prima facie* evidence of the respective dates of admission, it does not seem to us that it determines that the suit bearing the later number was "afterwards" launched within the meaning of the rule which, in our opinion, contemplates a later proceeding in the real sense. In any case we prefer to follow the ruling in *Appasami v. Ramasami*(2), which clearly contemplates that in a case like the present the plaintiff may elect as to which of two suits instituted by him together

(1) (1894) I.L.R., 16 All., 165 (F.B.). (2) (1886) I.L.R., 9 Mad., 279.

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on the same day shall be held to be barred by the operation of Order II, rule 2. This being so, we think the sellers here are entitled to ask that the doctrine, if applied, should be applied to the suit for damages in respect of the non-acceptance of 32 bales so as to leave their remedy unaffected as to the 28 bales sold and delivered. The result is that both appeals fail and are dismissed with costs.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

KAMMABOYINA RAMADAS (ACCUSED), PETITIONER,*

v.

1926,
 February 1.

KING-EMPEROR (COMPLAINANT), RESPONDENT.

Forest Act (V of 1882), sec. 21 (d)—Bare finding of cattle within forest reserve—Liability of owner—"permits his cattle to trespass"; construction of.

If the cattle of a person left under the care of some servants strayed into a reserved forest, the owner not being present at the time and place, the owner is not guilty of the offence of "pasturing or permitting his cattle to trespass" in or into a reserved forest within the meaning of section 21 (d) of the Madras Forest Act. An owner is not guilty unless he by some act or wilful omission of his allows his cattle to trespass. Mere proof that his cattle trespassed, without more, does not make out the offence.

Criminal Revision Case No. 253 of 1886, I Weir, 762 and, *Queen Empress v. Krishnayya*, (1892) I.L.R., 15 Mad., 156, followed.

* Criminal Revision Case No. 536 of 1925.

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 Sub-divisional Magistrate of Narasaraopet in C.C. No. 12 of 1925 (C.A. No. 14 of 1925, Court of Sessions, Guntūr Division).

B. Jagannadha Das for the petitioner.

Public Prosecutor for the Crown.

JUDGMENT.

The petitioner was convicted under section 21 (d) of the Forest Act (V of 1882) and sentenced to pay a fine of Rs. 200. His appeal to the Sessions Judge of Guntūr was rejected on the ground that no appeal lay against the conviction in a summary trial, when the fine did not exceed Rs. 200. The petitioner has preferred this Revision Petition.

The contention on behalf of the petitioner is, that the Deputy Magistrate has not correctly applied the law to the facts of the case and that the mere finding of the petitioner's flock of goats grazing within the forest reserve would not by itself make the owner of the goats punishable under section 21 (d). Under that section "any person who pastures cattle or permits cattle to trespass" is punishable with imprisonment for 6 months or with fine which may extend to Rs. 500, or with both.

The statement of the law in paragraph 4 of the Deputy Magistrate's judgment

"I hold that as the rightful owner of the flock, the accused is responsible for its actions and that his paid servants or agents cannot be solely taken to task. The word 'permit' used in the section has to be interpreted in its broadest sense and includes all the acts which, though done without his explicit orders, are such as to be guarded against."

is not correct. The expression "permits his cattle to trespass" means something more than the cattle

trespassing within the forest reserve. In order to make the owner liable, there must be something more than the mere finding of his cattle within the forest reserve. If the owner, knowing that the cattle would trespass into the forest reserve, neglects to take proper care of his cattle, or knowing that his servants would take the cattle to the reserved forest, does not forbid them from doing it, or knowing that his servants might take his cattle to the reserve forest connives at it, then he might be said to permit the cattle to trespass; but, where without his knowledge or against his orders his servants allow cattle to trespass into the forest reserve, he cannot be held to be guilty. In this case it is a question of fact whether from the circumstances the Magistrate, as a judge of fact, can come to the conclusion that the accused by his act or by his negligence permitted or allowed his cattle to trespass into the forest reserve. If the law is as stated by the Magistrate, then the owner of cattle would be liable even if his enemy without his knowledge, or his servant, in spite of his orders, drives his cattle into the forest reserve. The law has been correctly stated by MUTTUSWAMI AYYAR and BRANDT, JJ., in Criminal Revision Case No. 253 of 1886 reported in Weir's Criminal Rulings, Vol. I, at page 762, as follows:—

"A person certainly cannot be said to permit cattle to trespass into a reserve forest, unless he knows that such trespass is likely to be committed and neglects with such knowledge to take measures to prevent it. The essence of the offence consists either in a misfeasance, as in the case of one wilfully pasturing cattle, or in a nonfeasance as in his neglecting to take proper measures to prevent the cattle trespassing in circumstances from which it may reasonably be inferred that such trespass might have been foreseen or known as the probable consequence of his negligence."

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In *Queen Empress v. Krishnayya*(1), all that the prosecution proved was that the defendant's cattle were found in a reserve. It was held that the accused was not liable. The decision therefore is correct, but, with great respect, we are unable to agree with the observation of the learned Judges that "the owner cannot be held liable unless some overt act of his be proved." It is not necessary that there should be any overt act. Omission to take reasonable precaution against trespass knowing or having reason to believe that cattle would trespass into the forest reserve, would amount to permitting cattle to trespass within the meaning of section 21 (d).

The learned Public Prosecutor relies upon *Rea v. Almon*(2), and contends that it is for the accused to show that there was no negligence on his part or that his servants acted contrary to his orders and that in the absence of such evidence the master is liable criminally for the acts of his servants. In that case the defendant was convicted for publishing a libel (Junius's letters) in one of the magazines called "The London Museum" which was bought at his shop and even professed to be printed for him. Lord MANSFIELD stated the law thus:

"That proof of a public exposing to sale and selling at his shop by his servant was *prima facie* sufficient, and must stand till contradicted, or explained or exculpated by some other evidence, and, if not contradicted, explained or exculpated, would be in point of evidence sufficient or tantamount to conclusive. Mr. Mackworth's doubt seemed to be 'whether the evidence was sufficient to convict the defendant, in case he believed it to be true.' And in this sense I answered it. *Prima facie* it is good; and remains so till answered. If it is believed and remains unanswered, it becomes conclusive. If it

(1) (1892) I.L.R., 15 Mad., 156. (2) (1770) 5 Burr., 2687; 98 E.R., 411.

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be sufficient in point of law and the juryman believes it, he is bound in conscience to give his verdict according to it."

This case has no application to the present. There the libellous publication was sold in the defendant's shop and purported to have been printed for him. It was open to him to prove that the sale was without his knowledge and that the printing was done either contrary to his orders or without his knowledge. The Libel Act of 1843, 6 and 7, Victoria, Chapter 96, section 7, has made it clear that

"it should be competent to such a defendant to prove that such a publication was made without his authority or knowledge and that the said publication did not arise from want of due care or caution on his part."

In the case of cattle trespassing within the forest reserve, the owner may be miles away from the reserve, and it cannot be said that the onus is upon him to prove that it was done without his authority or knowledge. In every case it is for the Magistrate who tries the case to find on the evidence whether the accused by some act or omission or by negligence allowed or permitted the trespass. If from the evidence on the side of the prosecution the Court could presume that the defendant by his omission to take such reasonable care as the owner of cattle should have, allowed his cattle to trespass, or knowing that the cattle would trespass, failed to take such care as every prudent owner of cattle is expected to take, a *prima facie* case would be made out. Then, the onus of proof that he took all reasonable care to prevent cattle trespassing, or that the trespass was in spite of his care or against his orders, would be upon him. If he fails to make out that, he should be held to be guilty. But the prosecution cannot succeed, by merely showing that a man's cattle was found within the forest reserve.

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In this case, inasmuch as the Magistrate erred with regard to the statement of the law and convicted the accused without recording a finding that he either wilfully or negligently permitted the trespass or failed to take such care as would be necessary to prevent cattle trespassing into the forest reserve, the conviction cannot stand. We therefore set aside the conviction and direct that the accused be retried and the case disposed of according to law. The fine, if paid, will be refunded to the petitioner.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

RAMACHANDRA CHETTI (ACCUSED), PETITIONER,

v.

CHAIRMAN, MUNICIPAL COUNCIL, SALEM
(COMPLAINANT), RESPONDENT.*

Madras District Municipalities Act (V of 1920), ss. 146, 149, 313 and 347—Notice directing a certain act—Not complied with within time—Second notice issued—Prosecution within three months of second notice, but after more than three months from first notice—if barred.

If a notice issued by a Municipality on an occupier of a house to do certain acts enjoined by the District Municipalities Act is not complied with, the Municipality is entitled to issue a second notice for the purpose. A prosecution instituted within three months of the second notice though beyond three months after the first, for not complying with the second notice, is not barred under section 247 of the Act.

Criminal Revision Case No. 164 of 1925 followed; *Ramanujachariar v. Kailasam Ayyar*, (1925) I.L.R., 48 Mad., 870, dissented from.

* Criminal Revision Case No. 707 of 1925.

RAMA-
CHANDRA
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v.
CHAIRMAN,
MUNICIPAL
COUNCIL,
SALEM.

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 Subdivisional First-class Magistrate of Salem in Criminal Appeal No. 49 of 1925 preferred against the judgment of the Court of the Third-class Magistrate of Salem Town in Calendar Case No. 579 of 1925.

V. L. Ethiraj with *A. Rangaswami Ayyangar* for the petitioner.

Public Prosecutor for the Crown.

JUDGMENT.

WALLER, J.—The question raised in this case is whether the prosecution is barred by limitation under section 347 of the Madras District Municipalities Act. A notice was served on petitioner under sections 146, 149 and 313 of the Act in June 1924. On July 4th he put in a petition to the Chairman asking him to inspect the latrine. In reply an endorsement was sent on 11th August informing him that he would be prosecuted if he did not obey the notice in one week. At the same time the Chairman directed the Health Officer to report further. That officer's report was unfavourable to petitioner. On 22nd October a fresh notice was sent to petitioner, which was served on 6th November.

He failed to comply with it and a prosecution was launched. It was launched within three months after the second notice, but more than three months after the first. Mr. Ethiraj contends that the offence was committed on the expiry of the first notice and that the prosecution is barred by limitation. His contention is supported by a decision of SRINIVASA AYYANGAR, J., in *Ramanujachariar v. Kailasam Ayyar*(1). JACKSON, J., in

(1) (1925) I.L.R., 48 Mad., 870.

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COUNCIL,
SALEM.
—
WALLER, J.

Criminal Revision Case No. 164 of 1925 took a different view. The same point was raised before MADHAVAN NAYAR, J., and myself in Criminal Revision Case No. 122 of 1925, but was not considered by us. We held that the prosecution was within time, as the first notice had been kept in abeyance while the parties were negotiating. It is possible that, in this case also, petitioner's representation of 4th July might be regarded as an attempt at negotiation, but Mr. Adam does not press the point. The question, then for consideration is whether there is anything in the Act that prohibits the issue of a second notice, when no action has, for some reason or other, been taken on the first. I can myself see nothing that does so. The offence consists in the failure to obey a requisition issued by the competent authority. If a particular requisition is not enforced, I can find nothing in the Act that prevents the Chairman from issuing another. If a prosecution is then launched, the prosecution is for failure to comply with the second requisition and not for failure to comply with the first. If a prosecution had been instituted on the first requisition and had failed or not been pressed, other consideration might come in, but that question does not arise here.

I agree in the view taken by JACKSON, J., that where, as here, no steps have been taken to enforce the first requisition, a Chairman is entitled to make a second and to institute a prosecution for failure to comply with it. The Criminal Revision Case is therefore dismissed.

DEVADOSS, J.

DEVADOSS, J.—I agree.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

NAGARAMBILLE TONKYA (COMPLAINANT), PETITIONER,

1926,
March 9

v.

MATTA JAGANNA AND TWO OTHERS (ACCUSED),
RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), sec. 247—Case posted to a certain date—Called up at 11 a.m.—Complainant absent—accused acquitted—if valid.

A Magistrate is entitled to call up a summons case at any time of the day to which it is posted and to acquit the accused under section 247 of the Criminal Procedure Code, if the complainant is not then present. He is not bound to wait for the complainant to appear at any time before the closing of the day in order to take up and dispose of a case.

Rangaswami v. Narasimhulu, (1884) I.L.R., 7 Mad., 213,
Kuttiyah v. Pari Makri, (1884) I.L.R., 7 Mad., 356, followed.

Criminal Revision Case No. 229 of 1925 dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Second-class Magistrate of Sompeta in Calendar Case No. 200 of 1925.

The order of the Second-class Magistrate of Sompeta was in these terms:—

“The case was called on for hearing to-day to which it had been posted. The complainant not being present either in person or by pleader, the accused are acquitted under section 247, Criminal Procedure Code.”

The facts necessary for this report appear from the judgments on revision.

K. Bhashyam Ayyangar for the petitioner.

* Criminal Revision Case No. 772 of 1925.

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K. N. Ganapati for the Public Prosecutor, for the Crown.

The respondents were not represented.

JUDGMENT.

DEVADOSS, J.

DEVADOSS, J.—This is a petition to revise the order of acquittal passed by the Second-class Magistrate of Sompeta under section 247 of the Code of Criminal Procedure. It is contended by Mr. Bhashyam Ayyangar for the petitioner that the complainant and his witnesses appeared at 11–30 a.m. on the date fixed for the trial of the case and the Magistrate acted illegally in acquitting the accused on the ground that the complainant was absent and that the appearance of the complainant on the date is a sufficient compliance with section 247.

The question is whether the absence of the complainant at the time when the case was taken up for hearing was sufficient to justify the Magistrate in dealing with the case under section 247. That section is in these terms:

“If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day.”

The section makes it obligatory upon the Magistrate to acquit the accused if the complainant does not appear, unless he thinks proper to adjourn the hearing of the case to some other day. The contention is that it is sufficient if the complainant appears at any time during the day, and that “the day” means the ordinary working hours of the Court, i.e., from 11 a.m. to 5 p.m. If the contention is to hold good it would mean that the Magistrate has to wait till 5 p.m. before dealing with a

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DEVADOSS, J.

case under section 247. There is nothing in the section which would justify the construction that the words “upon the day appointed for the appearance of the accused,” etc., mean any time before the close of the working day. In Order IX, rule 8 of the Civil Procedure Code, the wording is, “where . . . the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed,” etc. From this it is clear that the plaintiff should be present when the case is called on for hearing. In the case of a complainant, the complainant should appear when the case is called on for hearing. The object of section 247 is to prevent the complainant from being dilatory in the prosecution of the case, and if he does not care to be present when the case is called on, the accused is entitled to an acquittal unless the Magistrate chooses for reasons he thinks proper to adjourn the case. It may, no doubt, appear to be a hardship that a complainant who was present from 11 a.m. to 4–30 p.m. should have his case dismissed if he happens to be away for a few minutes when the case is taken up; but the question is not whether there is hardship or not but what is the meaning of the section. The complainant is bound to be present on the day to which the case is posted, and if he wants to be absent during any portion of the day he should take the Court's permission for doing so. But, if he does not do so, he does so at his risk. It is suggested that such a construction would entitle the Magistrate to dismiss a complaint under section 247 even after the prosecution case is closed and before he delivers judgment. No doubt, it would be so; but that is not a ground for giving a construction to a section different from what the clear words would justify.

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JAGANNA.
DEVADOSS, J.,

The presence of the complainant's vakil alone is not sufficient compliance with the requirements of section 247. In civil cases the presence of a party's vakil is considered as the appearance of the party. But in criminal cases, except where the Court dispenses with the personal attendance of the accused and allows him to appear by a pleader or agent, his presence is essential. A complainant cannot be represented by a pleader in order to take away the jurisdiction of the Magistrate to proceed under section 247. Where a vakil appears for the complainant, it is not likely that the Magistrate would dismiss the complaint under section 247, for the vakil would represent to the Court that his client was unavoidably absent or that he had just gone out of the Court house for a very proper purpose.

This case has been referred to a Bench by WALLACE, J., by reason of the view taken by JACKSON, J., in Criminal Revision Case No. 229 of 1925. In that case JACKSON, J., held that section 247 must be strictly interpreted and the appearance of the complainant during any portion of the day was sufficient compliance with section 247. With great respect, I am unable to agree with that view. We should not consider the hardship that may be caused to the complainant in construing the section. Instructions may be given to Magistrates not to dismiss cases under section 247 unless they are satisfied that the complainant is keeping out of the way and to wait for a reasonable time to enable the complainant to appear; but the absence of such instructions would not be a ground for giving a forced construction to the very clear words of the section.

The view of JACKSON, J., is opposed to the view taken by HUTCHINS, J., in *Kuttiyali v. Pari Makri*(1). There the

(1) (1884) I.L.R., 7 Mad., 356.

learned Judge overruled the contention that the Magistrate should wait till the close of the day before he could act under section 247.

It is next contended that on the merits the petitioner is entitled to have the order of the Magistrate set aside. The petitioner appeared with his witnesses at 11-30 a.m. and it is alleged that the case was taken up and dismissed five minutes before the appearance of the complainant. Though the Magistrate could very well have waited for a short time, it cannot be said that the order of the Magistrate is illegal. He acted within his powers and when the order is not illegal it would not be right for this Court to interfere with it. Though the conduct of the accused was not all that could be desired, yet I do not think it would be right to set aside the order of the Magistrate in a case of this kind. The petition is dismissed.

WALLER, J.—This petition raises a question as to the construction of section 247, Criminal Procedure Code. A summons case was called on for hearing. The complainant not appearing, the Magistrate acquitted the accused under section 247. Later in the day the complainant put in an appearance. It is now argued on his behalf that as he appeared on the day to which the case had been adjourned, the Magistrate had no jurisdiction to acquit the accused—in other words, that a Magistrate cannot act under the section before the Court day has closed.

There is direct authority to the contrary—vide *Rangaswami v. Narasimhulu* (1) and *Kuttiyali v. Pari Makri*(2). The earlier of these two rulings, which dates back over 40 years, follows a still older decision of the year 1874. So far as I am aware the view that has prevailed for

(1) (1884) I.L.R., 7 Mad., 213.

(2) (1884) I.L.R., 7 Mad., 356.

over 50 years was not questioned till it was dissented from by JACKSON, J., last year in Criminal Revision Case No. 229 of 1925. With great respect, I am unable to follow his line of reasoning. He appears to think that there is something in the section that prevents a Magistrate from taking up a particular case twice on the same day, that, in fact, a Magistrate cannot if a complainant does not appear in the morning, adjourn the case till the afternoon. I can myself see nothing in the section that prevents a Magistrate from so doing. Indeed, I think that, as a rule, he would be well advised to give a complainant whose case is called on early in the day, some latitude before he decides to apply section 247. If, however, he decides to act at once, when a complainant fails to appear on his case being called on, I am clearly of opinion that he has jurisdiction to do so and that he is not obliged to wait till the close of the Court day before doing so. I agree therefore in dismissing the petition.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss and Mr. Justice Wallace.

RAMACHANDRAN SERVAI (PETITIONER),

v.

PRESIDENT, UNION BOARD, KARAIKUDI
(RESPONDENT).*

Madras Local Boards Act (XIV of 1920), ss. 164 and 221—Proceedings taken by a Local Board under sec. 221 to recover penalty for encroachment—If defaulting party can raise a contention regarding the factum of encroachment.

Where a Local Board has instituted proceedings before a Magistrate under section 221 of the Madras Local Boards Act

* Criminal Revision Case No. 614 of 1924.

for the recovery of a penalty imposed on a person for encroachment, he cannot plead the non-existence of the encroachment, as section 221 only prescribes the manner of recovery and does not permit the reopening of the question of liability.

In re Smith, (1923) 45 M.L.J., 731, *In re Krishnaswami*, 21 L.W., 254, *Municipal Council, Chicacole v. Seetharamayya Naidu*, 21 L.W., 280, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order, dated 30th June 1924, in M.C.No. 13 of 1924, on the file of the Court of the Subdivisional First-class Magistrate of Devakottai.

S. Swaminathan for *K. K. Ranganatha Ayyar* for the petitioner.

S. Ranganatha Ayyar for the respondent.

Public Prosecutor for the Crown.

JUDGMENT.

The question for decision in this case is whether, when a Local Board moves a Magistrate under section 221 of the Madras Local Boards Act XIV of 1920 to recover a penalty imposed for encroachment, the defaulting party can ventilate before the Magistrate his claim that there was no encroachment at all, and plead such a defence to the case.

It is obvious that, if petitioner's contention that he is allowed to plead such a defence be sound, the Magistrate is constituted a sort of appellate authority over the Local Board in the matter of deciding whether or not there has been in fact an encroachment; and a wholesale application of such a principle would mean that in all cases of demand by the Local Board for fees, tolls, costs, compensation, damages, penalties, charges, expenses or other sums due to it, the Magistrate, a Judge appointed for the trial of criminal matters, is set up as

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the final Judge over the Local Board, except in so far as either party may take the matter before a Civil Court.

This is to our minds a startling proposition, and, unless the wording of the section clearly imports it, we do not accept it. Clause (1) of the section clearly lays down that what has to be ascertained by the Magistrate is the "amount or apportionment of the sum," if that is disputed, and that, we take it, is the "question" that has to be determined under clause (3). Here petitioner is not disputing as to the amount due or its apportionment. He contends that the penalty is not leviable at all. We therefore see no support for petitioner in the wording of the section.

Under section 164, petitioner is "bound" to pay such sum as may be demanded by the Local Board by way of penalty, which sum "may be recovered in the manner hereinafter provided," i.e., as in section 221. This makes it quite clear that section 221 only applies to the manner of recovery and does not re-open the question whether petitioner is "bound to pay." Petitioner is not able to refer us to any reported case directly in support of his view. The case *In re Smith*(1) was a case of prosecution of a person who had erected some machinery without permission of the Commissioner of the Madras City Municipality, and thus was said to have contravened section 288 of the Madras City Municipal Act IV of 1919. There, this High Court went into the question of whether such permission was required in the case and decided that it was not. We do not think this can throw any light on the proper interpretation of sections 164 and 221 of the Local Boards Act. The same learned Judge has held in a case *In re Krishna-swami*(2) that, in a prosecution for contravention of

(1) (1923) 45 M.L.J., 731.

(2) 21 L.W., 254.

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section 166 (1) of the Local Boards Act, it was not open to the accused to plead that the motor-bus licence ought not to have been refused by the President of the Local Board. Another learned Judge of this Court has taken a similar view in a case *Municipal Council, Chicacole v. Seetharamayya Naidu*(1), a case of disobedience to a notice under section 219 (1) of the Madras District Municipalities Act V of 1920.

We find no support for petitioner's contention in these cases or any others cited before us. We dismiss this petition.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss.

E. C. KENT (COUNTER, PETITIONER), PETITIONER,

1925,
March 27.

v.

MRS. E. E. L. KENT (PETITIONER), RESPONDENT.

Criminal Procedure Code (Act V of 1898), sec. 488—More than one person for whom petition presented—Maximum of Rs. 100 for all or for each—"In the whole," meaning of—Order of English Probate Court for alimony, if bar to application under sec. 488.

Under section 488 of the Criminal Procedure Code a Magistrate can order a person to pay a monthly maintenance not exceeding Rs. 100 to each of his dependants, viz., wife and children.

The words "in the whole" in the section do not mean that Rs. 100 is the maximum limit for all the dependants together, but mean "for all the kinds of expenses of each dependant, such as boarding, lodging, medical expenses, school fees, etc."

(1) 21 L.W., 280.

* Criminal Revision Case No. 98 of 1925.

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An order for alimony for the wife passed by the Probate Court in England which the wife is unable to execute against her husband is no bar to the passing of an order under section 488 of the Criminal Procedure Code.

Hill v. Hill, [1902] P. 140, referred to. *Crazton v. Crazton*, 71 J.P., 399, referred to. *In re Moideen*, (1913) 25 M.L.J., 355, followed. *In re John Meiselback*, (1872) 17 W.R. (Crl.), 49, approved.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate, Civil and Military Station, Bangalore, in Mis. C.C. No. 18 of 1924.

The facts were:

Edward Cavendish Kent married Eleanor Kent in 1909 and there were three children of the marriage. In December 1923 Eleanor Kent obtained a decree nisi for divorce in England and she was given custody of two children and the husband was directed to pay her alimony. The decree nisi had not been made absolute at the time of the hearing of the present petition. The wife was not able to enforce the order for alimony as the husband lived in the Mysore State and legal difficulties prevented her from obtaining execution. In these circumstances, she claimed from her husband maintenance for herself and her two children.

Vere Mockett with Short, Bewes & Co. for the petitioner.

E. L. Thornton with T. S. Krishnaswami for the respondent.

Public Prosecutor for the Crown.

JUDGMENT.

This is an application to revise the order of the District Magistrate, Civil and Military Station, Bangalore,

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directing the petitioner to pay Rs. 300 a month under section 488 of the Code of Criminal Procedure. The petitioner is a well-to-do planter who neglected to maintain his wife and two children. The wife made an application to the District Magistrate and he has passed the order which is sought to be revised.

The first contention on behalf of the petitioner is that under section 488 the Magistrate has jurisdiction to award only Rs. 100 in all for the support of the wife and the children. Mr. Mockett, who appears for the petitioner, relies upon the words "Rs. 100 in the whole" and argues that the Magistrate cannot award more than Rs. 100 in all for the support of the wife and the children and that the award by the Magistrate of Rs. 300, Rs. 100 for the wife and Rs. 100 for each of the children, is *ultra vires*. Clause (1) of section 488 reads as follows:—

"If any person having sufficient means, neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, . . . may, on proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate not exceeding one hundred rupees in the whole, as such Magistrate thinks fit."

To contend that when a woman makes an application for herself and for her children she could only be given Rs. 100 for the maintenance of herself and of her children whatever be the number, is opposed to the clear wording of the section. If the petitioner's construction of the section is correct it would amount to this; if a person has an illegitimate child and an application is made under this section and Rs. 100 is awarded to that child and if that person afterwards refuses to maintain his wife and the legitimate children, the wife and the legitimate children would have no remedy against him, for the sum of Rs. 100 has already

been awarded for the support of the illegitimate child, and no further order can be made on behalf of the wife and legitimate children as no Magistrate can award more than Rs. 100 for all the persons whom he is bound to maintain.

This section was enacted to suit Indian conditions. A Muhammadan can legally marry four wives at the same time. Supposing he neglects or refuses to maintain one wife and her children and supposing she obtains an order under this section and gets Rs. 100 and if he afterwards refuses or neglects to maintain any of the other wives and children, they would be helpless, and if he refuses to maintain all the four wives at the same time, is it to be said that the section requires that all the four wives should apply by a joint petition for payment of maintenance to them and their children? Supposing a European has legitimate children by a deceased wife, and children by a living wife and also illegitimate children, supposing the illegitimate children obtain an order for their maintenance and the Magistrate directs the payment of Rs. 100 for their maintenance and if the man after some time refuses to maintain his legitimate children by the deceased wife, are they to be without any remedy? And still further, if he refuses to maintain his wife and legitimate children, are they to be without any remedy? I think the contention that a person can only be ordered to pay Rs. 100 for the support of his illegitimate children, for the support of his family by the deceased first wife and for the support of the living wife and her children is, on the face of it, an untenable one.

Mr. Mockett relied upon the Summary Jurisdiction of Magistrates Act, 58 and 59 Victoria, Chapter 39, section 5, clause (c), and contended that the sum awardable

under that section was for the maintenance of the wife and the children with her, and a Magistrate had no power to award more than £ 2 a week. Section 5, clause (c) gives the Court of summary jurisdiction power to make an order, among other things, for the legal custody of the children under 16 years of age, and an order for maintenance under clause (c) which is as follows:—

“a provision that the husband shall pay to the applicant personally or for her use to any officer of the Court, or a third person on her behalf, such weekly sum not exceeding £ 2 as the Court shall, having regard to the means both of the husband and the wife, consider reasonable.”

There is no provision in this section for the payment of any amount for the maintenance of any child unable to maintain itself. But the Justices in considering what amount should be awarded to the wife, may take into consideration what would be required for the maintenance of the child or children in the custody of the wife. The maximum is fixed at £ 2 a week as the object of the Act is to give relief to the wife. There are other enactments like the Bastardy Act and the Poor Law Act under which a father could be made to pay maintenance for his illegitimate and legitimate children.

The case of *Hill v. Hill*(1) does not help the petitioner. Sir FRANCIS JEUNE, President of the Probate Division, observes as follows at page 142:—

“Therefore the whole sum ordered is to be paid to the applicant personally. There is in the Act no express power to order that sums shall be paid for children, even the children of his (the husband's) own marriage. But in considering what amount should be ordered to be paid by the husband, if the Justices were right in taking into account the expenses of maintaining any child or children of the marriage, they would be equally justified in taking into account the expenses in respect

(1) [1902] P., 140.

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of children whom the husband under the Poor Law at any rate was legally liable to maintain, and they were right in ordering such amount to be paid—as only it could be paid—to the wife.”

58 and 59 Victoria, Chapter 39, was specially enacted for giving speedy relief to married women who, on account of desertion or neglect on the part of their husbands to maintain them, have to seek speedy remedy for provision for maintaining themselves. That Act is not similar to section 488 which specially provides for the maintenance of “wife and child, legitimate or illegitimate, which is unable to maintain itself.”

In considering what amount should be paid for the wife it need not be taken into consideration whether she has children to be maintained or not. The position of the husband and his means and the position of the wife alone should be considered. In the case of each child the needs of the child should be considered. The words “in the whole” mean that only a sum of money not exceeding Rs. 100 should be ordered to be paid and no other payment, either in the shape of fees or medical expenses, etc., should be ordered to be paid; nor can the Magistrate order the husband to provide a house for the wife. It is to prevent the Magistrate making an order that the husband should pay so much for the schooling of the children, or so much for clothing, or so much for medical expenses and so on, that the words “in the whole” have been put into the section. The Magistrate can only order one sum not exceeding Rs. 100 to be paid for the wife and for each of the children unable to maintain itself.

The section speaks of “wife or his legitimate or illegitimate child” and does not speak of “wife and child.” The words have to be given their plain meaning. To construe the words as meaning wife and children is opposed to all rules of construction. If a man has the

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luxury of more wives than one, his liability to maintain them is not lessened thereby. Every wife and every legitimate child and every illegitimate child could be awarded up to Rs. 100 provided the husband or the father has the means to pay the amounts.

The contention that section 488 is modelled on the lines of 58 and 59 Victoria, Chapter 39, section 5, cannot hold water. Section 488 of the Code of 1893 is not a new provision enacted in 1898. The same provision was found in the Code of 1882 and the Codes of 1875 and 1872 and in Act XXV of 1861, section 316 contained a provision corresponding to section 488, clause (1). All that has to be proved in order to give jurisdiction to a Magistrate under section 488 is that the child is unable to maintain itself and that the father neglected or refused to maintain it, and in the case of the wife that the husband refused or neglected to maintain her. Even a grown-up child, if unable to maintain itself, is entitled to get maintenance from the father if he has the means. Vide *In re Moideen*(1) and *In the matter of W.B. Todd*(2).

The next contention urged by Mr. Mockett is that there has been no neglect to pay for the maintenance of the wife and the children. This is a question of fact and the learned Magistrate has found that the petitioner herein has neglected to maintain his wife and children. A mere offer to maintain them is not sufficient, and Mr. Mockett has admitted that nothing has been paid for the maintenance of the wife and children for at least some years. There is nothing in this contention.

The third contention raised by Mr. Mockett is that there is an order of the Probate, Divorce and Admiralty Division of the High Court in England whereby the

(1) (1913) 25 M.L.J., 355.

(2) (1873) 5 N.-W.P.H.C.R., 237.

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petitioner is directed to pay his wife so much alimony per month, and it is seriously urged before me that this order is a bar to an application under section 488 of the Criminal Procedure Code. It is admitted that the wife finds it impossible to execute the order for alimony against the petitioner who is a planter in the Mysore State. Whether the order is executable or not is immaterial for the present purpose. The section gives jurisdiction to the Magistrate to award maintenance if he is satisfied that a person has neglected or refused to maintain his wife or child. The existence of the order is not sufficient to oust the jurisdiction of the Magistrate, for a mere order for maintenance is not equivalent to maintaining the wife; and the order, whatever may be its force, or nature, cannot take away the Magistrate's jurisdiction so long as the husband neglects or refuses to maintain the wife.

Reliance was placed upon *Craxton v. Craxton*(1). BARGRAVE DEANE, J., observed:—

"There can be no desertion in law when a suit is pending. Once the Divorce Court was seized with the matrimonial suit, Justices have no right to interfere in the matter . . . Here the President had actually made an order, how then can the Justices claim to overrule it."

In that case an order for alimony had been made by the President of the Probate Division and the Justices could not therefore pass an order under the Summary Jurisdiction Act. That case has no application to the present, for the proceedings in the Probate Division do not control the jurisdiction of a Magistrate in India.

As I have already observed, if it is proved to the satisfaction of the Magistrate under section 488 that the husband has neglected to maintain his wife, the

(1) 71 J.P., 399.

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Magistrate has jurisdiction to order the husband to pay for the maintenance of his wife. In this case the order for alimony is unexecutable. Even if held to be executable, I am of opinion that so long as the husband does not maintain the wife either by payment of alimony or otherwise, the Magistrate's jurisdiction to order him to pay maintenance is not taken away.

The case *In re Subbaramakamma*(1) does not help the petitioner. In that case a decree for a monthly allowance for maintenance had been obtained in the High Court and that decree was in force and the wife could not get a further and separate order for maintenance from the Magistrate. The case would be different if the execution of the decree for maintenance had become barred or the decree had become unexecutable. This was distinctly held so far back as 1872. In a case *John Meiselback*(2), a bench consisting of Sir RICHARD COUCH, C.J., and AINSLIE, J., held that a decision of the Civil Court refusing to enforce a contract or agreement against a man for the maintenance of a woman cannot conclude either the woman from applying, or a Magistrate from making an order, under section 316 of the Criminal Procedure Code, for the maintenance of their illegitimate daughter. The learned CHIEF JUSTICE observed:

"The proceeding in the Civil Court was of a different nature. It was founded on an alleged contract, and the decision of the Civil Court, even if it had not proceeded as it appears to have done on the law of limitation, would not have concluded the woman from applying under section 316 of the Criminal Procedure Code for the maintenance of the illegitimate daughter

. . . The only question in this case is whether the matter was so put before the Magistrate that he had jurisdiction to

(1) (1902) 2 Weir, 615.

(2) (1872) 17 W.R. (Criml.), 49.

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make the order under section 316 for the maintenance of the illegitimate daughter. She stated in her petition that both she and the daughter were starving and required maintenance, and she asked for a sum to be paid for maintenance. The Magistrate had power to make an order for the maintenance of the daughters,"

under section 316 of Act XXV of 1861 (now section 488). The only questions were whether the child was a child of the man and whether he had neglected to maintain the child; and on these facts being found the Magistrate had jurisdiction to pass an order even though there was a previous contract between the man and woman for payment for maintenance.

Considering the position of the parties, the order for payment of Rs. 100 to each of the persons (wife and two children) is eminently a just order. I dismiss the petition with costs of the counter-petitioner.

Counsel's fee Rs. 100.

B.C.S.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice.

KUTTIKRISHNAN NAIR (1ST DEFENDANT),
PETITIONER,

v.

APPA NAIR AND ANOTHER (PLAINTIFF AND
SECOND DEFENDANT), RESPONDENTS.*

Indian Contract Act (IX of 1872), sec. 233—Principal and agent—Liability, whether joint or alternative—Rule of English Law, alternative and not joint liability—Rule of Indian Law, whether different—Sec. 233, construction of—

* Civil Revision Petition No. 820 of 1924.

Option to creditor to sue either or both in the alternative—No right to judgment against both jointly.

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Under the English Law, the liability of principal and agent is not joint but alternative: See *Morel Brothers & Co., Ltd. v. The Earl of Westmoreland*, [1904] A.C., 11.

Section 233 of the Indian Contract Act does not lay down a rule different from the abovementioned rule of the English Law.

What section 233 of the Act means is that the person dealing with the principal through the agent may, at his election, sue either, or he may sue both of them alternatively in a case where he is not sure against whom his exact remedy is; but he cannot get judgment against both of them jointly for the amount sued for.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887) to revise the decree of the Additional District Munsif of Calicut in S.C.S. No. 435 of 1923.

The material facts appear from the judgment.

K. Krishna Menon for petitioner.

O. T. Govindan Nambiyar for respondent.

JUDGMENT.

In this case a point of some little interest arises because the plaintiff on a contract for supply of timber sued two defendants, the first of whom he alleged to be the principal and the second, he alleged, carried the transaction through. What the learned Judge has done is to give judgment against both of them. In my opinion that cannot be done. The liability of principal and agent is not joint but alternative—see *Morel Brothers & Co., Ltd. v. The Earl of Westmoreland*(1), which really confirms the very careful examination of the subject in the judgment of the Master of the Rolls in the Court

(1) [1904] A.C., 11.

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below. Now it is said that the English Law has been altered by section 233 of the Indian Contract Act together with its illustration. The section runs :

"In cases where the agent is personally liable, a person dealing with him may hold either him or his principal or both of them, liable"

and then the illustration is,

"A enters into a contract with B to sell him 100 bales of cotton and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton."

In my opinion the wording of that section is very unfortunate because it gives rise to the argument and doubt as to whether it was not intended in cases of principal and agent to create by this section a joint liability in the action and that the section must be construed as meaning that he may get judgment against both of them on one and the same transaction. In my opinion that is so utterly contrary to all accepted principles of law that it cannot be right and I have come to the conclusion that what the section means is that the person dealing with the principal through the agent may at his election sue either or he may sue both of them alternatively in a case where he is not sure whom his exact remedy is against; but I am quite clear on this point that the section can only be construed as meaning that he may sue both principal and agent in the alternative and that he cannot get judgment against both of them jointly for the amount sued for. That would be to turn a liability which is clearly mutually exclusive into a joint liability, and, as pointed out by the House of Lords, the liability of an agent and principal cannot be joint. The whole conception of the law of principal and agent excludes all idea of joint liability. The plaintiff in this case has elected, if he is forced to

his alternative, to keep his judgment against the principal and let that against the agent go. There was evidence on which the learned Judge could find that the principal was liable in this case and the result will be that the decree will be modified by striking out that part which inflicts liability upon the agent and retaining that part of it which inflicts liability on the principal. It is quite true that the person who complains is the principal and the principal only and that he has failed; but I shall not give any costs in this Court, because I think that the creditor invited this appeal by taking judgment against both principal and agent. So this Civil Revision Petition is dismissed without costs.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Spencer, Mr. Justice Krishnan
and Mr. Justice Beusley.

THE BOARD OF REVENUE, MADRAS, REFERRING
AUTHORITY,

1926,
April 21.

v.

MOOPANNA SOMARAZU AND ANOTHER (PERSONS INTERESTED
IN THE DECISION IN THIS REFERENCE), RESPONDENTS.*

Indian Stamp Act (II of 1899), Schedule I, clause 40 (a) and (b), corresponding to Madras Stamp (Amendment) Act (VI of 1922), Schedule I-A, clause 33 (a) and (b)—Mortgage deed neither giving possession nor agreeing to give—Right of mortgagee to take possession in default of payment of any instalment due under the mortgage—Stamp duty payable.

If, under the terms of a mortgage, possession is neither given nor agreed to be given to the mortgagee, but the mortgagee is to take possession on default of payment of any instalment due under the mortgage, the mortgage does not fall under clause 40 (a) of Schedule I of the Indian Stamp Act (II of 1899),

* Referred Case No. 19 of 1925.

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corresponding to Schedule I-A, clause 33 (a) of the Madras Stamp (Amendment) Act (VI of 1922) but falls under clause (40) (b) of Schedule I of Act II of 1899 corresponding to clause 33 (b) of the Madras Act VI of 1922.

CASE stated under section 57 of Act II of 1899 (Indian Stamp Act) by the Board of Revenue in letter C.R. No. 564, Miscellaneous, of 1925, dated 22nd September 1925, for the decision of the High Court on the question of the stamp duty chargeable on the document in question.

The material portions of the document are given in the judgment.

Advocate-General (T. R. Venkatarama Sastri) for the Government.—This is an English mortgage; and higher stamp duty has to be paid. It falls under clause 40 (a) of Schedule I of Stamp Act (II of 1899) which corresponds to clause 33 (a) of the Madras Stamp (Amendment) Act (VI of 1922); for, an English mortgage involves an absolute transfer of title and possession. Under clause 40 (a) it is immaterial whether possession is given at the time of a mortgage or agreed to be given at a later time. Corresponding clause 16 in Act XVIII of 1869 levied higher stamp duty only if possession was given at the time of the mortgage. Clause 41 of the Stamp Act (I of 1879) levied higher duty not only in such a case but also when at the time of the execution of the mortgage possession was agreed to be given. Since the words “at the time of the execution” have been omitted in the present Act, it is clear that a higher stamp duty is payable for all documents under which possession is agreed to be given at any time.

[KRISHNAN, J.—Only if the right to possession is in fulfilment of the terms of the contract and not on any contingency which will be a breach thereof.]

That will be adding words to the clause, which is not proper. Possession taken under any contingency is also one under, and by virtue of, the deed. Owing to the abovementioned changes in the wording in the new Act, *Anonymous Case*(1), *Hinganghat Mill Company, Ltd. v. Rekchand Bhikamchand*(2) which were on the wording of the older Acts are not now applicable.

P. V. Rangaram for respondent.—This is not an English mortgage. As the Stamp Act itself gives a definition of a

(1) (1884) I.L.R., 10 Cal., 274.

(2) (1884) I.L.R., 8 Bom., 310 (F.B.).

mortgage deed in section 2 (17) we cannot resort to the definition of a mortgage as given by the Transfer of Property Act and construe this as an English mortgage and infer that possession must be deemed to have been given. The deed does not expressly give possession, nor does it contain a covenant to give possession. The condition as to possession is not one of the important conditions of the deed, because a power of sale is given to which the right to possession is only subsidiary. This is like a mortgage by conditional sale without any possession being given. Right to get possession only on a contingency, i.e., on a breach of the terms of the deed, is not the sort of possession contemplated by the Act. The omission of the words “at the time of execution” does not matter. Hence the observations of FIELD, J., and MITTER, J., in *Anonymous Case*(1) are still good law. Where there is a doubt in a fiscal enactment, its construction must be in favour of the subject. The practice hitherto in regard to such deeds has been to levy only the smaller duty.

JUDGMENT.

SPENCER, J.—The question before us is whether documents, of which we have a specimen form here, are mortgage deeds of the description defined in Article 33 (a), Schedule I-A of the Madras Stamp Act VI of 1922, in these words,

“Mortgage deed . . . when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given.”

In the Stamp Act XVIII of 1869 the description ran differently. It was a mortgage deed of this class only when possession of property comprised therein was given by the mortgagor at the time of execution. Then in Act I of 1879, the words “at the time of execution” were transposed from the end to the beginning of the sentence and the description ran thus:—

“when at the time of execution possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given.”

(1) (1881) I.L.R., 10 Cal., 274.

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—
SPENCER, J.

In the present Act, the words "at the time of execution" have been altogether dropped. Therefore we have only to consider whether possession of the property is either given by the mortgagor or agreed to be given under the document that is before us. The decisions in *Anonymous Case*(1) and *Hinganghat Mill Company, Ltd. v. Rekchand Bhikamchand*(2), being decisions upon Acts which are not now in force, serve rather as guides for the interpretation of the present Act than as authorities. The mortgage deed before us is in the form of an English mortgage. The mortgagor gives a certain parcel or piece of land to the mortgagee "to have and to hold" "subject to the proviso for redemption" therein contained. Then there is a covenant that the mortgagee shall permit the mortgagor to retain possession of the premises, so long as he shall make the annual payments as stipulated, the net result of which is that the mortgagor remains in possession and thus possession is not immediately given by the mortgagor of the property comprised in the deed. But there is a provision at the end of the document providing that, if default is made in payment of certain annual instalments, the mortgagee may at any time thereafter enter into and upon the said piece of land and premises and shall thenceforth quietly possess and enjoy the same. The question is whether this covenant amounts to an agreement to give possession. I think that the main agreement between the parties is that possession should not be given to the mortgagee in the first instance as the result of the execution of the mortgage deed and that this covenant for the mortgagee entering on the property in case of the mortgagor making default in payment is a subsidiary

(1) (1884) I.L.R., 10 Cal., 274.

(2) (1884) I.L.R., 8 Bom., 310 (F.B.).

agreement which is only to take effect upon a certain contingent event happening which may never happen. Under these circumstances, I am of opinion that this document is one in which possession is not given or agreed to be given and that it falls under article 33 (b) of the Act.

KRISHNAN, J.—This is a reference by the Board of Revenue for the decision of the High Court on the question of the proper stamp duty payable on the document submitted to us. That document is in the form of an English mortgage. The question we are called upon to decide is whether this mortgage falls under article 33 (a) or 33 (b) of the present Madras Stamp Act, Schedule I-A. To make it fall under clause (a) it is necessary that

"the possession of the property or any part of the property comprised in the deed should be given or agreed to be given."

If it does not fall under clause (a) it must fall under clause (b). This question was considered on a reference with regard to a similar document in *Anonymous Case*(1) but under the previous Stamp Act of 1879, article 44, Schedule I.. There is a difference in the wording of that Act and the present Act with which we are now dealing. The words "at the time of execution" have been omitted in the present Act. It was held by the learned Judges that the document before them did not fall under clause (a) but only under clause (b). As the Act has been changed, it is no doubt true, as my learned brother says, that the case cannot be treated as an authority; nevertheless, it is a useful guide, as to the construction to be placed upon the article, as it is now worded. The question of what stamp duty is payable on a document, must necessarily be decided on the words of

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the document and the terms it embodies. There can be no doubt that, under the document before us, possession is not given by the mortgagor to the mortgagee, for by express stipulation the mortgagor is to continue in possession. The covenant with reference to possession is that on a certain event happening, namely, on the mortgagor's default to pay in time the instalments fixed in the document, the mortgagee has the power to sell the property if he so chooses, or to take possession of the property in case he thinks fit to do so. The question then is whether this document can be treated as a document by which the mortgagor has agreed that possession of the property should be given to the mortgagee within the meaning of clause (a). I am inclined to think that the words "agreed to be given" in clause (a) should not be construed in too wide a sense as the Advocate-General argues but that these words should be restricted in the manner the Judges of the Calcutta High Court did. MITTAR, J., says with reference to these words in clause (a):

"I am of opinion that clause (a) of article 44 covers only those mortgage deeds in which as security for the money advanced on mortgage, possession of the property or any part of the property mortgaged is actually given or agreed to be given. But it does not include mortgage deeds in which it is stipulated that the mortgagee would be entitled to take possession of the property, or any portion of the property mortgaged in case there should be any breach of the covenants of the deed. The word 'given' in the clause in question seems to me to point out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the agreement on the part of the mortgagor to deliver over possession as part of the security of the mortgage money. But, where by virtue of a stipulation in the mortgage deed, the mortgagee becomes entitled to enter upon possession quite irrespective of the consent of the mortgagor to make over possession, the clause in question does not apply."

I am inclined to think that that is the proper connotation of the words "agreed to be given." These words

do not really cover a case where on a breach of covenant power is reserved for the mortgagee to take possession if he thinks fit. That will be putting too large an interpretation upon the words "agreed to be given." The principle is that in cases where a taxing Act like the Stamp Act imposes a pecuniary burden upon the subject, the construction most beneficial to the subject should be adopted in cases of doubt. I am therefore of opinion that the words "agreed to be given" should not be construed as covering cases of agreement to give possession on the breach of a certain covenant, or on the happening of a future event which may or may not happen but only cases where by the words of the document possession is directly agreed to be given. This view is also supported by the judgment of FIELD, J., in the same Calcutta case. GARTH, C.J., takes a slightly different view based upon the words "at the time of execution." But these words are not now in the Act and therefore his judgment is not of much use to us. There is however one sentence in it to which I shall draw attention. It expresses forcibly that too large a construction should not be placed upon the words. He says, at page 278,

"again if the Advocate-General's view were correct, clause (a) would be applicable in all cases where possession of the property is agreed to be given at any distance of time, or under any conditions, even temporarily, for non-payment of interest. I cannot think that the Legislature meant to extend so largely or so unreasonably, the class of mortgages which are to be chargeable with the higher duty."

There is a further point here, and that is, that even if we construe the words "agreed to be given" as covering cases where on the breach of a covenant possession is to be given to the mortgagee, such an agreement does not exist here, for here the agreement is not for the mortgagor to give possession but for the mortgagee to take possession if he thinks fit. Such a

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case does not seem to come under clause (a). This is what FIELD, J., says on the point:

"Now, although there is an authority to the mortgagees and trustees, to take possession upon the happening of certain events, I think it impossible to say that there is any agreement by the mortgagor to give possession."

The mortgagor, on the breach of a covenant, may refuse to give possession and drive the mortgagee to a suit to enable him to enforce the covenant as regards possession. A document that contains such a provision is, I think, not contemplated by clause (a) of article 33.

I therefore agree with my learned brother that this document is not a document which falls under clause (a), but under clause (b), and should be stamped accordingly.

BEASLEY, J.

BEASLEY, J.—I agree.

N R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Spencer, Mr. Justice Krishnan and
Mr. Justice Beasley.

1926,
April 21.

THE COMMISSIONER OF INCOME-TAX, MADRAS
(REFERRING OFFICER),

v.

THE NEDUNGADI BANK, LTD., CALICUT
(ASSEESSEE).*

Section 4, Explanation and sec. 10 (2) (ix) of Indian Income-tax Act (XI of 1922)—Profits of branch offices situated outside British India—Head office situate in British India—Profits of branches utilized by head office—Income-tax on such profits—Fund set apart by the firm with itself for provident fund of employees—No deduction allowable under sec. 10 (2) (ix) of the Act.

Where in addition to taking into account in the balance sheet the profits or gains of a branch situated outside British

India, the head office of a firm situated in British India credited them in the accounts of the head office and utilized such profits in various ways in British India, e.g., (a) for payment of dividends, (b) for remuneration of directors, (c) for reserve fund, etc., held that such profits must be deemed to have been received in British India and were assessable to income-tax under section (4) (1) and (2) of the Income-tax Act.

Amounts contributed by a firm towards the provident fund of its employees cannot be deducted under section 10 (2) (ix) of the Act, if they have not been actually paid to the employees but retained by the firm itself for future payment.

CASE stated under section 66 (2) of the Income-tax Act, 1922, by the Commissioner of Income-tax in his letter No. 1301 of 1925, dated 20th October 1925, on the following questions:—

1. "Whether that portion of the Bank's profits Rs. 56,567, which can be conventionally held to have been cashed in Cochin and Travancore, can be said to have been brought into British India within the meaning of section 4 (2) of the Indian Income-tax Act."

2. "Whether the moneys set aside by the Bank as contributions to its employees' provident fund can be regarded as expenditure incurred for the purpose of the business within the meaning of section 10 (2) (ix)."

The facts appear from the judgments.

T. V. Muthukrishna Ayyar for the assessee.—The assessee (bank) is not chargeable with income-tax on the profits made by the branches situated outside British India, simply because those profits were taken into account in the balance sheet prepared by the head office situated in British India; see explanation to section 4 of the Act. The profits were not sent over to British India, but were retained by the branches. In order to be so chargeable those profits must have been actually or notionally received or adjusted in British India. Right to send for profits from such branches is not enough. *Gresham Life Assurance Society v. Bishop* (1), *Forbes v. Scottish Provident Institution* (2), *Standard Life Company v. Allan* (3). Simply because some of the dividend warrants which were all payable by the head office were paid by the branches it cannot be deemed that the profits were received in British India and the dividends were repaid by

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(1) [1902] A.C., 287.

(2) (1895) 3 Tax Cases, 443.

(3) (1901) 4 Tax Cases, 446, 454.

* Referred Case No. 22 of 1925.

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the head office out of them, especially when there were sufficient funds in the head office to pay them. *Aurangabad Mills, Limited, In re*(1). The change made in 1922 in the wording of section 4 does not make any difference. Under section 10 (2) (ix) of Act the assessee is entitled to a deduction of assessment in respect of money set apart for payment of provident fund to the employees; see *Smyth v. Stretton*(2) and page 105 of the rules appended to the Income-tax Manual.

[*Court.*—The amount so set apart was not only not expended but was not even invested in any outside bank but was only separately kept by this very bank. Hence how can it be deducted?]

M. Patanjali Sastri for the Crown.—Much more than what is contained in explanation to section 4 has taken place in this case. Not only dividends have been paid by the branches but all their profits have been appropriated by the head office for various purposes, such as reserve fund, provident fund, dividends, remuneration of directors, etc. The branches are not independent firms dealing on their own account. The deposits made there and the profits earned there are all sent over to the head office and the accounts of both are also inseparably mixed. Hence *Gresham Life Assurance Society v. Bishop*(3) has no application to this case. When money is sent from a foreign branch to the head office, the presumption is that it is out of profits and not out of capital. *Scottish Provident Institution v. Allan*(4). He was stopped.

T. V. Muthukrishna Ayyar replied.

JUDGMENT.

SPENCER, J.

SPENCER, J.—The first question referred to us relates to the liability to income-tax of the profits of the Nedungadi Bank at Calicut which are asserted to have been earned in Cochin and Travancore. This Bank has these two branches outside the limits of British India. Under section 4 (2) of the Income-tax Act, the profits and gains of a business accruing or arising outside British India may be deemed to have accrued or arisen in British India, provided that they are received or brought into British

(1) (1921) I.L.R., 45 Bom., 1286.
(3) [1902] A.C., 287.

(2) (1904) 5 Tax Cases, 36.
(4) [1903] A.C., 129.

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India within three years of the end of the year in which they accrued. The balance sheet of this Bank for the year ending 31st December 1923 shows Rs. 1,38,460 as net profits of the Bank. No separate account has been drawn up to show what the profits in its branches amounted to. There is only one account and no separate profit and loss account of the branches. This sum of Rs. 1,38,460 is shown in the appropriation account on the credit side, and the unappropriated balance of the previous year is added to it, and on the debit side figures are given which show how these profits were distributed, e.g., Rs. 71,000 were paid out in dividends; Rs. 20,000 as Managing Director's remuneration; Rs. 2,869 towards Provident fund; and certain amounts were allotted to the special reserve funds which included bad debts, pensions and gratuities; and the balance of Rs. 24,000 is transferred to the balance sheet. There is no reserve fund representing the profits of the branches kept apart from this general fund. The Assistant Commissioner in his order concluded that the entire profits of these branches had been actually remitted to the office in British India by book transfer, because, as he finds, the profits and expenses have been transferred by a regular book transaction from the foreign branch offices to the head office, and there are no materials left at the branch offices for drawing up a separate profit and loss statement. Thereafter the profits which may be held to have remained with the branch offices so as to be available for the branches for employment for their own business are not ascertainable, and no balance is left at the end of the year in the revenue and expenditure account of the branch offices from which a profit and loss account could have been drawn up, all income received by the branches having been transferred to the head office account and all expenditure directly chargeable against revenue

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having been similarly transferred to the head office account. The explanation to section 4 merely states that profits or gains arising outside British India are not necessarily to be deemed to be brought into British India by reason that they are taken into account in the balance sheet. It seems to me that in this case there has been a good deal more done to the profits arising out of the transactions in the branch banks than merely taking them into account in the balance sheet for the information of the shareholders. These sums have been amalgamated with the net profits of the head office and out of the amalgamated sum dividends have been paid and directors have been remunerated, and otherwise the branch banks' profits have been appropriated. Under such circumstances I am prepared to hold that the sums which were appropriated for payments made at the head office must be deemed to have been "received or brought into" the Calicut office, which is in British India, and therefore that the whole of the amount shown as net profits of the Bank is liable to income-tax.

The second question is whether the Bank can exclude the amount paid as contribution to the employees' Provident fund under the heading of "expenditure incurred for the purpose of the business" within the meaning of section 10, clause (2) (ix). It appears that the Bank makes itself liable for paying a certain proportion of the sums which are invested with itself for the benefit of its employees. Until the employee withdraws the amount standing to his credit in the Provident fund, it is no "expenditure" for the purpose of the business but only a liability. The case quoted on behalf of the assessee, *Smyth v. Stretton* (1) can be distinguished on the ground that in that case the

(1) (1904) 5 Tax Cases, 86.

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college invested £35 annually for the benefit of its assistant masters in an Insurance fund. The money was actually paid out to the Insurance company and was claimed as an expenditure. Upon these facts the High Court held that each master had obtained an addition to his salary on which he was liable to pay tax. The liability of Dulwich College which made those contributions was not considered at all. Even supposing that the college treated those sums as expenditure, it does not follow that the Bank in the present case can so treat these amounts which have not been actually expended. I therefore consider that the second question should be answered in the negative.

KRISHNAN, J.—This is a reference under section 66 (2) of the Income-tax Act of 1922 by the Commissioner of Income-tax with reference to the assessment of income-tax of the Nedungadi Bank at Calicut. That Bank has branches both in British India and Travancore and Cochin. The first question submitted for our opinion is:—

"Whether that portion of the Bank's profits Rs. 56,567 which can be conventionally held to have been earned in Cochin and Travancore can be said to have been brought into British India within the meaning of section 4 (2) of the Indian Income-tax Act."

Section 4 (2) refers to profits and gains of business arising outside British India of a person resident in British India. The Nedungadi Bank has its head office in British India, namely, at Calicut. The question is whether the profits and gains of its business carried on in Travancore and Cochin can be said to have been brought into British India so as to be liable to income-tax. The question really turns upon the way in which these profits and gains have been treated by the Bank. The Assistant Commissioner of Income-tax in his order has gone into the facts very fully and has come to the

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conclusion that the profits and gains made in Cochin and Travancore must be treated as having been brought into British India and the Commissioner of Income-tax has supported that conclusion. The reasons are fully set out in the Assistant Commissioner's order where he points out the way in which the accounts were kept. All the income received by the foreign branches was transferred to the head office account and all expenditure directly chargeable against revenue was similarly transferred to the head office account in the accounts of both the head office and the branch offices in Cochin and Travancore. The result was that at the end of the year after these transfers took place there was really no balance left in the revenue and expenditure account of the branch offices, the amount being treated as having been transferred to the head office account. As pointed out by him, there was a frequent flow of remittances to and from the head office and the branch office. Flow of money by book entries can also amount to remittances. There seems to be ample evidence which justifies the Assistant Commissioner's conclusion that the balances with the branches in Travancore and Cochin were really remitted to or brought into the head office at Calicut. The way in which the profit and loss appropriation account is made out certainly seems to show that the whole income of the branches and the head office was treated as one lump sum for the purpose of ascertaining and payment of dividends. The balance is dealt with partly as special reserve funds and partly as a general reserve fund; so that the whole profits including the profits of the branches in Cochin and Travancore are dealt with in Calicut. When moneys are remitted without any special allocation to profit or capital accounts, between the branches and the head office of the Bank, the contention that the profits were kept back

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in the branch offices and only other moneys were remitted to the head office cannot possibly be accepted. It is quite true that for the payment of dividends there was enough money obtained as profits and gains by the branches in British India alone. But the payment of the dividends were not restricted to those profits as shown by the way in which these accounts were kept by the Bank and its branches. This is not a case merely of reliance being placed upon the balance sheet for the purpose of holding that the profits and gains were brought into British India, which is a matter dealt with by the explanation to section 4. Here there is very much more evidence to make it quite clear that the amounts earned as profits in the foreign branches were transmitted to the head office and treated as so transmitted for the Bank's purpose and for payment of dividends. We are not bound to go into questions of fact in a reference under section 66 (2). We must take the facts as stated by the Commissioner, and, unless it can be established by the assessee that there is no evidence to support the finding of the Commissioner that the profits were brought into the British India, we cannot decide the question in his favour. I am of opinion that there is sufficient evidence to justify the finding of the Income-tax authorities, and on that ground I answer the first question in the affirmative.

The second question referred to us is with regard to the employees' provident fund which the Bank has maintained. For every rupee paid by the employee which represents a certain proportion of his pay every month the Bank contributes the same amount and the two amounts are entered in the Bank's books to the credit of the employee in question. It is claimed that the Bank is entitled to deduct the sums contributed by the Bank towards this Provident fund under section 10 (2) (ix) as

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expenditure incurred solely for the purpose of earning profits or gains. If the money had been spent by the Bank, no doubt section 10 (2) (ix) would apply. But in the case before us it is clear that the Bank has not yet spent the money; all that it has done is that it has made entries in its books admitting liability on its part to pay a certain sum of money to the employee when he retires or goes out of office. That cannot be treated as an expenditure by the Bank. The expenditure will take place only when it pays, and it will be time enough to claim deduction then. The deduction cannot be allowed now. I would therefore answer the second question in the negative.

Costs payable by the assessee will be Rs. 250.

BRASLEY, J.

BRASLEY, J.—I agree.

N.R.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Devadoss and Mr. Justice Wallace.

APPA RAO MUDALIAR (ACCUSED), PETITIONER,

v.

JANAKI AMMAL (COMPLAINANT), RESPONDENT.*

Sections 202, 203, 204 and 436, Criminal Procedure Code (V of 1898, as amended)—Practice of Magistrates sending notice to accused on receipt of complaint—Dismissal under ss. 203 and 204 (3) of complaint after appearance of accused, not a discharge within sec. 436.

Unless and until a Magistrate is satisfied from an examination of the complainant and his witnesses that there is a *prima*

* Criminal Revision Case No. 790 of 1925 and Criminal Revision Petition No. 649 of 1925.

facie case against the accused justifying the issue of a process under section 204 of the Criminal Procedure Code, the Magistrate is not entitled to call upon the accused to appear before him even optionally and to have his say against the complaint. Any such practice of sending a notice to the accused at the stage of enquiry contemplated by section 202 is improper and must be discontinued.

Held further, that the fact that the accused appeared on such notice does not convert an eventual dismissal of the complaint under section 203 or 204 (3) into an order of "discharge," entitling the accused to notice before the dismissal is set aside and further enquiry ordered under section 436.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (V of 1898, as amended) praying the High Court to revise the Order, dated 1st December 1925, of the District Magistrate of Chingleput in Criminal R.C. No. 45 of 1925 (C.C. No. 443 of 1925, on the file of the Court of the Stationary Second-class Magistrate of Ponneri).

The accused preferred this Revision Petition which was posted before a full Bench at the request of the Public Prosecutor. The necessary facts appear from the Judgment of DEVADOSS, J.

K. Narasimha Ayyar for the petitioner.—The Magistrate is entitled to issue a notice to the accused even at the stage contemplated by section 202, to show cause why any process should not issue against him under section 204. Compare section 252 which enables the accused to appear before a Magistrate before any summons or warrant is issued to him. The notice under section 202 is virtually a summons under section 204 and as the accused appeared in response to it, the dismissal of the complaint thereafter, though styled as one under section 203, is in effect a "discharge" of the accused under section 253. Hence he is entitled to notice before the order of dismissal is set aside and further enquiry is ordered under section 436.

Public Prosecutor (J. C. Adam) for the Crown, with *N. A. Krishna Ayyar* and *R. Viswanatha Ayyar* for the respondent (complainant).—There is no warrant under the Criminal Procedure Code for the issue of a notice to the accused at the stage of

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enquiry under section 202; see *Chandi Charun Mitra v. Manindra Chandra Roy Chowdhury*(1).

[CHIEF JUSTICE and WALLACE, J., referred to the Judgment of WALLACE, J., in Criminal Revision Case No. 578 of 1925 * condemning the issue of such notice.]

Emperor v. Gajraj Singh(2) holds that no notice to the accused is necessary before ordering further enquiry in such a case.

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TROTTER, C.J.

COUTTS TROTTER, C.J.—I have had the advantage of perusing the judgment about to be delivered by my brother DEVADOSS and I entirely agree in the conclusion that he has arrived at, a conclusion which was also arrived at by WALLACE, J., in Criminal Revision Case No. 578 of 1925. As I also find myself in complete accord with the reasoning of those learned Judges, it is unnecessary for me to add more than a few words. It may no doubt happen from time to time that to allow a proposed accused person to appear and to hear what he has to say while the proceedings are at the stage contemplated by section 202 of the Criminal Procedure Code might turn the scale and satisfy the Magistrate that there was no case for issuing process under section 204. I make no doubt that it is in this view that Magistrates have been in the habit of giving a person against whom a charge is formulated at least an option to come before them if he so desires at the earliest stage. It seems to me that such a procedure is entirely unwarranted by the Code. The object of the chapter of the Code in which section 202 appears is to prevent accused persons being harassed at all or asked to appear if in the opinion of the Magistrate no *prima facie* case is made out: and in my opinion the Code never contemplated that at that stage they should be either asked or permitted to state their cases. That is really enough to dispose of this

(1) (1922) 27 C.W.N., 198.

(2) (1925) I.L.R., 47 All., 722.

* Printed at the end of this case.

matter but I am also of opinion that the practice of summoning an accused person at the stage marked by section 202 has much greater dangers than safeguards to the accused. He is obviously not bound to appear even if invited or given an opportunity of doing so. If he does not appear, it is likely to weigh against him with the Magistrate; if he does, he runs the danger of being committed to a statement of his case before he knows with any definiteness what exactly is laid to his charge. The argument that because Mr. Narasimha Ayyar's client, in fact, appeared before the Magistrate when the proceedings were at the stage of preliminary inquiry under section 202, he is therefore entitled to be heard when that proceeding is questioned in a higher Court is to my mind quite untenable. This appellant has never been discharged because he had never been charged.

I should like to say in conclusion that I entirely endorse the strictures passed by DEVADOSS, J., on the remarks contained in the Order of the District Magistrate which in effect really prejudice the case. I agree with the order proposed by DEVADOSS, J.

DEVADOSS, J.—This is an application to revise the Order of the District Magistrate of Chingleput directing further enquiry into a complaint dismissed under section 203 of the Criminal Procedure Code by the Stationary Second-class Magistrate of Ponneri. At the request of the Public Prosecutor, the learned Chief Justice has directed that this Criminal Revision Petition be heard by a Full Bench as one of the questions involved affects the practice prevailing in the Magistrates' Courts. Two questions arise for consideration: (1) Has a Magistrate jurisdiction to require the presence of the accused when he holds an enquiry or investigation under section 202 of the Criminal Procedure Code

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into a complaint of which he is empowered to take cognizance or which has been transferred to him under section 192? and (2) Is an order under section 436 of the Criminal Procedure Code for further enquiry into a complaint dismissed under section 203 bad for want of a notice to the accused?

First point.—When a complaint is presented or transferred to a Magistrate he may, after examining the complainant on oath, dismiss the complaint under section 203 if there is in his judgment no sufficient ground for proceeding, and if there is sufficient ground for proceeding he shall issue a summons or warrant under section 204 for the attendance of the accused. Section 202 authorizes a Magistrate for reasons to be recorded in writing to postpone the issue of process for compelling the attendance of the person complained against, and either enquire into the case himself, or direct an enquiry or investigation to be made by a Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint. The object of section 202 is to prevent the harassing of innocent persons by an indiscriminate issue of processes in cases where there is no sufficient ground for proceeding against them. Unless and until a Magistrate is satisfied that there is in his judgment sufficient ground for proceeding, he should not compel the appearance of the accused before him. It is to enable him to see that there is sufficient ground for proceeding that he is authorized to hold an enquiry by himself or by a subordinate Magistrate or by a police officer or by any other fit person. The object of the section would be defeated if the accused is made to appear in an enquiry under section 202. It is argued that the notice issued under section 202 to the accused gives him an option to appear or not, and

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therefore it cannot be said that the Court compels his appearance when it issues notice to him under section 202; but the option is rendered useless as his non-appearance might be construed into a disinclination on his part to be present at the enquiry and might create a prejudice in the mind of the Magistrate against him, and if he appears the object of the postponement of the process is practically nullified. Should the Magistrate after such enquiry think that there is in his judgment sufficient ground for proceeding, any statement made by the accused might prejudice him in the trial of the case, and if he declines to answer any question that may be put to him by the Magistrate, that might prejudice the Magistrate against him. The question has been exhaustively considered by my brother WALLACE, J., in a recent case, Criminal Revision Case No. 578 of 1925, and as I entirely agree with his conclusion and the reasons therefor, it is unnecessary to discuss the cases noticed by him. I hold that the practice of issuing notice to the accused under section 202 is not illegal but is highly undesirable as it defeats the specific object of section 202 and might prejudice the accused if the complaint is not dismissed under section 202 and should therefore be put a stop to without delay.

Second point.—The proviso to section 436 of the Criminal Procedure Code makes it clear that a person is entitled to notice before an order is made under that section if he has been discharged. When an accused person has not been discharged according to the provisions of the Criminal Procedure Code, he is not entitled to notice when the District Magistrate or the Sessions Court or the High Court orders further enquiry into a complaint which has been dismissed under section 203, or sub-section (3) of section 204. Mr. Narasimha Ayyar's contention is that in this case his client appeared before

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the Magistrate on a notice under section 202 and as the complaint was dismissed, he must be considered to have been discharged. The dismissal of a complaint under section 203 of sub-section (3) of 204 is before the appearance of the accused, and no accused person can be said to be discharged when no process has been issued for his appearance. It is only where a Magistrate taking cognizance of an offence is of opinion that there is sufficient ground for proceeding, he issues a summons or warrant for the attendance of the accused. If the case is a summons case the trial is according to Chapter XX and when a complaint in a summons case is thrown out the accused is acquitted. In warrant cases the enquiry and trial are under Chapter XXX, and under section 253, if the Magistrate finds that no case has been made out against the accused which, if unrebutted, would warrant his conviction, he shall discharge him. An accused person is said to be discharged when the case against him is thrown out under sections 209, 253 or 259, or when the Advocate-General enters a *nolle prosequi* under section 333. The expression "person who has been discharged" in section 436 refers to a person who has been discharged under sections 209, 253 or 259. A person against whom no process has been issued under section 204 is not a discharged person and therefore no notice is necessary to him when the District Magistrate or the Sessions Court or the High Court directs further enquiry into a complaint dismissed under section 203 or sub-section (3) of section 204. The same view was held in *Emperor v. Gajraj Singh*(1). The answer to the second question is in the negative.

(1) (1925) I.L.R., 47 All., 722.

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Mr. Narasimha Ayyar very properly contends that his client would be prejudiced by certain remarks of the District Magistrate in his Order. He calls a letter produced by the accused as a spurious letter. The evidence on record does not warrant such an opinion of the letter. Again, the observation 'Accused was certainly liable for trespass, insult and assault as complained by the complainant' is tantamount to a finding that the accused is guilty. Without the evidence of both sides it is not proper for any court to come to a definite conclusion that an accused person is guilty of an offence. The Stationary Sub-Magistrate followed the practice which, though condemned by *Sheik Meeran Sahib v. Ratnavelu Mudali*(1) seems to be in vogue throughout the Presidency and there is no reason for transferring the case for further enquiry to another Magistrate. Any Magistrate who enquires into this case will ignore the observations of the District Magistrate as regards the merits of the case and come to a conclusion on the evidence that might be adduced before him as to the guilt or the innocence of the accused. There is no reason to interfere with the order of the District Magistrate except setting aside that portion of the order by which the case is transferred to the Taluk Magistrate of Ponneri.

The case will be enquired into by the Stationary Sub-Magistrate of Ponneri who, if he thinks proper, may hold an enquiry under section 202 before issuing process to the accused in order to satisfy himself that there is sufficient ground for proceeding. If he is not satisfied he may dismiss the complaint under section 203; if he is satisfied that there is sufficient ground for proceeding he shall issue process under section 204.

(1) (1914) I.L.R., 37 Mad., 181.

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WALLACE, J.

WALLACE, J.—I entirely agree. On the first point I have already said all that I wish to say in my judgment in Criminal Revision Case No. 578 of 1925.

On the second point I agree that an accused to whom a process has not issued under section 204 (1) has not “appeared” at the proceedings contemplated by Chapters XVIII and XXI and therefore cannot claim that a dismissal of the complaint under section 203 of the Code of Criminal Procedure amounts to a discharge.

N.B.

The following is the Judgment in Criminal Revision Case No. 578 of 1925 referred to in the Judgment of the Full Bench:—

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

1926,
March 11.

P. VARADARAJULU NAYUDU (PETITIONER), COMPLAINANT,

v.

P. KUPPUSWAMY NAYUDU (RESPONDENT), ACCUSED.*

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Third Presidency Magistrate, Georgetown, Madras, dated 4th May 1925, in Application No. 3172 of 1925.

V. L. Ethiraj for the petitioner.

K. P. Krishna Menon for Crown Prosecutor.

O. Thanikachalam Chetti for the accused.

* Criminal Revision Case No. 578 of 1925 (Criminal Revision Petition No. 487 of 1925).

JUDGMENT.

This is a Criminal Revision Case against the Order of the Presidency Magistrate dismissing a complaint under section 203, Criminal Procedure Code. The chief ground of attack is that the Magistrate has ignored the proper procedure under sections 202 and 203 and adopted a procedure for which there is no warrant and which is in many ways open to objection.

It appears that the procedure is one which has been for many years in practice in that Court. It is that when a complaint is put in and sworn to, the Magistrate without hearing the complainant's case or his witnesses issues notice to the accused to appear and show cause against the issue of process, hears what the accused has to say, examines any witness he wishes to have examined and then decides whether the complaint shall be received or not.

It is argued that this procedure is justified by section 202. It may be said that it is not prohibited by the letter of that section but it is clearly contrary to the spirit of that section and to the general principles of the Code. Section 202 clearly implies that an accused is not to be troubled unless the Magistrate is first satisfied that the complaint is *prima facie* true, and therefore the case is made out which the accused must rebut. To call upon an accused to appear and disclose his defence before the Magistrate has satisfied himself that the complaint is *prima facie* true, is contrary to the spirit of the whole procedure of criminal trials. It is no justification to say that the accused is willing to adopt that procedure, because if he refused to adopt it, he will do so at his peril and the Magistrate would at once conclude that there was a good case against him. It is a procedure most unfair to the accused. He is in effect compelled not only to state, but to substantiate his

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defence, before the prosecution has substantiated any case against him, and this is the exact opposite of the principle underlying the prescribed procedure. It is not until the prosecution case has been fully and thoroughly put forward and tested by cross-examination that the accused is to be called upon to put forward his defence. Under the procedure now adopted if the Magistrate rejects the defence and considers that there is a case to go on with, then the accused has to put his case forward before a Magistrate who has already rejected his defence. From this point of view alone the procedure is indefensible.

It is no less unfair to the prosecution. The result, I suppose, in a majority of cases is that the complaints are thrown out without the complainant having been allowed to put forward his full case at all. The Magistrate accepts the defence before he knows what the full prosecution is.

The meaning of section 202 is perfectly clear. It is that the accused is not to be called upon to appear unless and until the Magistrate has satisfied himself from the complainant and his witnesses that there is a *prima facie* case against him.

This procedure has been condemned by this Court so far back as *Sheik Meeran Sahib v. Ratnavelu Mudali*(1) where BAKEWELL, J., remarks:

"It appears to me that the object of the procedure prescribed by Chapter XVI, which is entitled 'Of complaints to Magistrates,' is the separation of unfounded from substantial cases at the outset and to prevent innocent persons from being brought into the police courts and subjected to the annoyance of frivolous charges."

See also Criminal Revision Case No. 123 of 1925, which is also a case from the Presidency Magistrate's Court.

(1) (1914) I.L.R., 37 Mad., 181.

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Such a practice has frequently been condemned by the Calcutta High Court. See *Baidyanath Singh v. Muspratt*(1), *Bhim Lal Sah v. Emperor*(2), *Balai Lal Mukerjee v. Pasupathi Chatterjee*(3), *Chandi Charan Mitra v. Manindra Chandra Roy Chowdhury*(4) and *Bechu Mia v. Anwar Nabi*(5). I note that the decision in *Baidya Nath Singh v. Muspratt*(1) has been dissented from by a single Judge in *In the matter of the Petition of Dukhi Kewat*(6). This latter case and *In re Tukuram*(7) are the only cases that the respondent has been able to put before me in his favour. In the 6 Bom. L.R. case the point was whether the issue of process to the accused for the purpose of enquiry under section 202 meant that the trial had begun and the propriety of the issue of that process was not discussed.

The ruling of this Court in *Sheik Meeran Sahib v. Ratnavelu Mudali*(8) so far back as 1912, referring to the procedure in the Presidency Magistrate's Court, does not seem to have had any effect in putting a stop to this practice. It is time therefore that this undesirable practice should cease and it will not cease until the Magistrates are in each case compelled to do over again what they have done improperly.

I am of opinion that the complainant has not had a fair hearing of his case, that he is entitled under section 202 to have that case reconsidered and I remand the case for that purpose. I reverse the Magistrate's order and direct him to rehear the complaint. It is hardly necessary to add that the statement of the accused and his witnesses which have been now taken cannot be treated as evidence at the rehearing.

N.B.

(1) (1887) I.L.R., 14 Calc., 141.

(3) (1916) 21 C.W.N., 127.

(5) (1924) 30 C.W.N., 312.

(7) (1904) 6 Bom. L.R., 91.

(2) (1913) I.L.R., 40 Calc., 414.

(4) (1922) 27 C.W.N., 196.

(6) (1906) I.L.R., 28 All., 421.

(8) (1914) I.L.R., 37 Mad., 181.

APPELLATE CIVIL.

Before Sir C. V. Kumaraswami Sastri, Offg. Chief
Justice, and Mr. Justice Curgenvven.

1926,
July 20.

THE RUSSA ENGINEERING WORKS, LTD.
(PLAINTIFFS), APPELLANTS,

v.

THE KANARA TRANSPORT CO. AND OTHERS
(DEFENDANTS), RESPONDENTS.*

Indian Contract Act (IX of 1872), sec. 249—Partner, admitted into an existing firm—Agreement by him to be liable for transactions prior to agreement—Agreement between partners inter se—Liability to creditors—(English) Partnership Act, 1890 (53 and 54 Vict., cap. 39), sec. 17—Rule of English and Indian Law.

Where a person was admitted as a partner into an existing firm under an agreement between him and the partners *inter se* whereby he agreed to be liable for transactions incurred prior to the agreement, he is not liable to the creditors of the firm in respect of such prior transactions, notwithstanding the agreement, by virtue of the provisions of section 249 of the Indian Contract Act.

Rolfe and the Bank of Australasia v. Flower, Salting & Co., (1866) L.R., 1 P.C., 27, followed; *Jagarnath and Co. v. Cresswell and others* (1913) I.L.R., 40 Calc., 814, dissented from.

APPEAL from the Order of WALLER, J., in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 576 of 1923.

The material facts appear from the Judgment.

O. Thanikachalam Chetti for appellant.

V. Radhakrishnayya for respondent.

* Original Side Appeal No. 26 of 1925.

The JUDGMENT of the Court was delivered by KUMARASWAMI SASTRI, Offg. C.J.—This is an appeal that arises out of an application to execute a decree which was passed against two defendants, the Kanara Transport Co. and Captain Bhandarkar. The decree, as is usual with decrees against firms, was obtained in the firm's name, there being at that time no question as to who were the partners of that firm. Under the rules on the Original Side that question has to be raised, in cases where each of the alleged partners is not served personally, in execution of the decree. Where it is sought to execute the decree against persons who are not named and not simply as against a firm, notice has to go to those persons to show cause why execution should not go against them as partners of the firm. In this case such notices went and we are concerned with two persons, Sanjiva Rao and Panduranga Bhat. Sanjiva Rao did not appear and contest the motion and an *ex parte* order for execution was passed as a matter of course. Panduranga Bhat appeared and denied that he was a partner. His case was that he was asked to become a partner in this firm by Captain Bhandarkar who is his brother-in-law, that he agreed to become a partner on condition that the accounts were looked into, and Sanjiva Rao ceased to be a partner and he took his place as partner, and that as none of these conditions was fulfilled he has not become a partner of the firm and therefore is not liable on any claim against the firm.

The partnership was started under an oral agreement; at any rate, we do not find any document evidencing the partnership when it was started. According to the evidence it was started on the 1st October 1922. It is clear from the evidence and Exhibits III, IV and VI that Panduranga Bhat was not a partner when the partnership was started or for some

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time afterwards. Exhibit II, as to the genuineness of which there is no dispute, is dated the 17th April 1923 and is signed by Panduranga Bhat, Bhandarkar, Sundar Rao and Shiva Rao. The document runs as follows :

" We, viz., (1) Uppinangady Panduranga Bhat, (2) P. R. Bhandarkar, (3) Kalle Sundar Rao and (4) Kalle Shiva Rao, are the only partners of the concern named Kanara Transport Company, Mangalore, S.K. and there are no other partners. Mr. Kalle Sanjiva Rao is no longer a partner of the firm. All the four partners are entitled to share in the profits and losses equally. All the four of us are jointly and severally liable for the debts of the concern hitherto incurred. A regular deed of partnership will be entered into within a fortnight from date."

It is clear from this document that there is a specific statement made that Sanjiva Rao was no longer a partner of the firm, so that, even assuming the respondent's case to be true, one of the conditions, that were necessary, namely, the retirement of Sanjiva Rao, is specifically stated in Exhibit II. As regards other conditions, they are not set out in Exhibit II and we agree with the learned Judge in thinking that we cannot import into Exhibit II other conditions alleged.

The learned Judge has disposed of the case on the ground that as the appellants have claimed against Sanjiva Rao also as a partner and as it is not shown that he has left the firm, they cannot have it both ways and that therefore the fact that they claimed against Sanjiva Rao is evidence to show that Panduranga Bhat could not be a partner. We think the proper way to appreciate the evidence in this case is first of all to see whether there is anything in the evidence to show that the statement which has been made in Exhibit II that Sanjiva Rao was no longer a partner of the firm is not correct. The onus, we think, clearly lies upon Panduranga Bhat who now wants to show that the recitals in Exhibit II are not correct. There is no evidence that

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Sanjiva Rao after the date of Exhibit II did any act or made any assertion which could lead one to a reasonable supposition that he continued to be a partner of the firm. On the contrary Sanjiva Rao went further than the statement in Exhibit II. He denied that he ever was a partner of the firm and on the evidence there is nothing to show that Sanjiva Rao either by reason of his own acts or by reason of any acts of the partnership can be treated as continuing as a partner of the firm after the date of Exhibit II.

The next question is whether the plaintiffs, by claiming against both Sanjiva Rao and Panduranga Bhat, have done anything which would support the case of Panduranga Bhat that he is not liable. The claim is in respect of dealings between the plaintiff firm and the firm of the Kanara Transport Company. The account which appears on page 39 of the printed book, as to which there is no dispute, shows that dealings began on the 31st August 1922 and went on till the 14th August 1923 and Exhibit II is, dated the 17th April 1923, so that Sanjiva Rao has gone out and Panduranga Bhat has come in under Exhibit II after that date. Being a continuous transaction Panduranga Bhat would be liable for transactions from the 30th April 1923 to the date when they close. Being one continuous transaction the plaintiffs would have to make both of them parties and claim against both of them in any event, and the fact that they chose to claim against Sanjiva Rao in respect of the transactions subsequent to his withdrawal and against Panduranga Bhat for transactions antecedent to his coming in, would not by itself be a ground for denying the plaintiffs such rights as they might have against each of the partners. We think that on the evidence it is difficult to hold that Sanjiva Rao continued to be a partner after the date of Exhibit II and, the

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onus being on the respondent to show that he ceased to be a partner, we do not think that we can hold that he has no liability under this decree.

As regards the liability of the respondent we agree with the contention of Mr. Radhakrishnayya that we cannot make him liable in respect of antecedent transactions on the strength of an agreement contained in Exhibit II between the partners *inter se* that he would be liable for transactions hitherto incurred and for future transactions. The law on this subject is, we think, clearly contained in section 249 of the Indian Contract Act which expressly excludes such liability as regards the creditors of the firm. Section 249 of the Indian Contract Act is really the same as section 17 of the English Partnership Act, 1890, and the law has been set out in Lindley on Partnership (third edition), pages 273 and 275. This view is also supported by the decision of the Privy Council in *Rolfe and the Bank of Australasia v. Flower, Salting & Co.*(1). The learned Trial Judge has referred to *Jagannath & Co. v. Cresswell and others*(2), a decision of IMAM, J., on a question of trade mark, but if that decision held that apart from privity of contract a creditor of the firm is entitled to rely on an agreement between the partners, we respectfully dissent from it. It is however possible to distinguish that case from the present one that all the parties were aware of the agreement and entered into it on that footing. It seems to us to be clear that the respondent cannot be made liable for any transaction before the 30th April 1923. Sanjiva Rao has not appealed against the order which makes him liable for subsequent transactions but we have got power under the Code, even though he has not appealed, to adjust the rights so as to do justice between the

(1) (1886) L.R., 1 P.C., 27.

(2) (1913) I.L.R., 40 Cal., 814.

present appellant and respondent. We think the proper order to make is to direct execution to go against Sanjiva Rao for Rs. 5,334-3-3. As regards Panduranga Bhat, execution will issue against him for Rs. 3,621-6-0 with interest at 12 per cent from the various dates in the account till decree and 6 per cent thereafter. As regards costs the respondent will pay the appellant half his taxed costs.

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APPELLATE CIVIL.

*Before Mr. Justice Phillips and Mr. Justice
Madhavan Nayar.*

C. VENUGOPALACHARIAR (PETITIONER), APPELLANT,

1926
February 10.

v.

CHUNNILAL SOWCAR AND OTHERS (RESPONDENTS),
RESPONDENTS.*

*Provincial Insolvency Act (V of 1920), ss. 5, 10 (2) and 43
(1)—Civil Procedure Code (Act V of 1908), O. IX—
Annulment of adjudication for default of appearance of
insolvent—Application under O. IX, Civil Procedure Code,
to set aside order, whether competent—Definite remedy pre-
scribed under sec. 10 (2) of the Act to be followed and not
procedure under O. IX of the Code.*

When an order annulling an adjudication has been passed under section 43 (1) of the Provincial Insolvency Act (V of 1920), it is not open to the Insolvency Court to set aside the order under the provisions of Order IX of the Civil Procedure Code.

The insolvent should resort to the definite remedy prescribed by section 10 (2) of the Act and cannot apply under Order IX of the Code, by virtue of the provisions of section 5 of the Act.

* Appeal against Order No. 201 of 1925.

VENUGOPALA-
CHARIAR
v.
CHUNNILAL.

Arunagiri Mudaliar v. Kandaswami Mudaliar (1924) 19 L.W., 418, followed.

APPEAL against the order of L. C. HORWILL, District Judge of Chingleput, in Miscellaneous Petition No. 129 of 1924 in O.P. No. 63 of 1923.

The material facts appear from the judgment.

S. V. Venugopalachariar for appellant.

None appeared for the respondent.

JUDGMENT.

PHILLIPS, J.—The question for decision in this case is whether, when an order of annulment has been passed under section 43 (1) of the Provincial Insolvency Act, it is open to the Insolvency Court to set aside its order by virtue of the provisions of Order IX of the Code of Civil Procedure. The wording of the section is

“ If the debtor does not appear on the day fixed for hearing his application for discharge . . . the order of adjudication shall be annulled . . . ”

This certainly seems to be a mandatory provision, but it is contended for the appellant that the word “ shall ” does not necessarily make the order mandatory and that it may be treated as merely directory. A similar question was considered in C.R.P. No. 554 of 1925 a case in which the debtor had not applied for discharge at all and on that ground his insolvency was annulled and it was there held that the Court had power to review its order of annulment. It only differs slightly from the present case and cannot really be distinguished on principle. On the other hand, in *Arunagiri Mudaliar v. Kandaswami Mudaliar* (1), WALLER, J., was of opinion that section 43 was absolutely peremptory in its terms and that therefore time could not be granted for applying

(1) (1924) 19 L.W., 418.

for discharge. KRISHNAN, J., did not take this view, but he apparently held that, if an order for annulment had been made, the provisions of section 10 (2) should be applied. I am inclined to agree that section 10, clause (2), governs this case. Under section 5 of the Act the provisions of the Civil Procedure Code are to be applied subject to the provisions of the Act. Section 10 (2) provides a definite remedy for a debtor in respect of whom an order of adjudication has been annulled, and it gives him permission to present another petition on the same facts, provided that he satisfies the Court that he was prevented from prosecuting his application by any reasonable cause. Such a remedy is certainly distinct from any remedy granted by the Civil Procedure Code and appears to prescribe definitely the procedure to be adopted. If that is so, then, I think that the words “ subject to the provisions of this Act ” in section 5 must have their full force ; when the Act prescribes a definite method by which the debtor can obtain his remedy it is not open to him to adopt other methods which would be open under the Civil Procedure Code. No provision similar to section 43 was contained in the old Provincial Insolvency Act and it is obviously one of the provisions of the new Act that the debtor shall be obliged to apply for discharge if he wishes to retain the benefit of insolvency so as to put an end to the proceedings in insolvency. Provisions have been enacted in section 43 (1) that, if he does not apply for discharge, his adjudication shall be annulled, but it allows him in certain cases a further remedy of presenting another petition in insolvency which is the method of giving relief to persons who have been prevented by *bona fide* causes from prosecuting their applications. In this view with all respect, I am not prepared to accept the views expressed in C.R.P. No. 554 of 1925 but would rather adopt the opinion

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expressed in *Arunagiri Mudaliar v. Kandaswami Mudaliar*(1). Although the insolvent has a remedy prescribed by the Act, he has chosen to apply under Order IX. His petition was rightly dismissed.

The appeal is accordingly dismissed.

MADHAVAN
NAYAR, J.

MADHAVAN NAYAR, J.—I entirely agree. The question is whether by virtue of the provisions contained in section 5 of the Provincial Insolvency Act the appellant is entitled to ask the Court to consider his application to restore and rehear the petition for discharge dismissed on account of his default under section 43. In my opinion, section 43 is clearly mandatory; section 5 states that subject to the provisions of the Insolvency Act the Insolvency Court, in regard to proceedings under the Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction. But the Provincial Insolvency Act itself has provided in section 10 (2) a special procedure by means of which the appellant can have his remedy.

According to that section, after obtaining leave of the Court he can file an application for adjudicating him an insolvent. The intention of the legislature therefore seems to be that in this class of cases arising under section 43, the special procedure referred to in section 10 (2) should be followed and not the provisions of the Civil Procedure Code. It is therefore clear that the appellant cannot rely on the provisions of the Civil Procedure Code by virtue of section 5 of the Insolvency Act.

As regards the authorities it was decided in C.R.P. No. 554 of 1925 that it is open to apply for review in a case where the debtor failed to apply for discharge under section 43 within the specified time; but the learned

(1) (1924) 19 L.W., 418.

Judges do not make any reference to the provisions of section 10 (2) of the Insolvency Act. KRISHNAN, J.'s view in *Arunagiri Mudaliar v. Kandaswami Mudaliar*(1), as regards section 10 (2) supports our conclusion, though his decision sitting as a single Judge in C.R.P. No. 554 of 1925 is in favour of the appellant's contention. No reference is made in that judgment to section 10 (2) of the Provincial Insolvency Act.

I agree with my learned brother that it is not open to the appellant to rely on the provisions of the Civil Procedure Code in this case. I would also dismiss the appeal.

K.R.

APPELLATE CIVIL.

*Before Mr. Justice Phillips and Mr. Justice
Madhavan Nayar.*

MADHURA GRAMANI (THIRD DEFENDANT), APPELLANT,

v.

THUMALA SESA REDDY AND OTHERS (PLAINTIFF AND
1ST AND 2ND DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. IX, r. 9—Suit for partition by a tenant-in-common—Dismissal for default of plaintiff—Subsequent suit for partition, whether barred by O. IX, r. 9—Rule applicable to joint tenants, whether also applicable to tenants-in-common.

If a suit by a tenant-in-common for partition by metes and bounds is dismissed for default under Order IX, rule 8, Civil Procedure Code, another suit for the same purpose is not barred by Order IX, rule 9.

On the dismissal of the previous suit, the plaintiff is relegated to his original position as co-sharer and the right to sue for separate possession is one which accrues from time to time.

(1) (1924) 19 L.W., 418.

* Appeal against Order No. 380 of 1925.

1926,
March 1.

MADHURA
GRAMANI
v.
SSEHA
REDDY.

APPEAL against the order of A. S. KRISHNASWAMI AYYAR, Subordinate Judge of Nellore, in A.S. No. 11 of 1925, preferred against the decree of S. RAJAGOPALA AYYANGAR, Principal District Munsif of Nellore, in O.S. No. 851 of 1922.

The material facts appear from the judgment.

V. C. Viraraghava Chari for appellant.

B. Somayya for respondents.

JUDGMENT.

This is an appeal against an order of remand by the Subordinate Judge of Nellore. The District Munsif had held that the suit was barred under the provisions of Order IX, rule 9, and had dismissed it. The suit was one for the partition of certain property in which the plaintiff claimed a three-fourths share. In the year 1911 the plaintiff's assignor had brought a suit for obtaining joint possession of this three-fourths share and it had been decreed. In 1917 she filed a suit for partition of her share and separate enjoyment and that suit was dismissed under Order IX, rule 8. It is now contended for the appellant that the present suit, which is also one for partition, is barred under Order IX, rule 9. The Subordinate Judge has relied on several cases of the Allahabad High Court and on *Madon Mohan Mondul v. Baikanta Nath Mondul*(1), cases which dealt with suits for partition in families which were originally joint Hindu families, and the contention now raised is that these decisions must be deemed to be solely applicable to the case of joint Hindu families and cannot be applied in the case of joint owners or tenants-in-common.

In the first place, it must be observed that in most of these cases, although the family was a joint Hindu

(1) (1908) 10 C.W.N., 839.

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family, yet it had become divided in status prior to the suit. On principle it is difficult to see how any distinction can be drawn between joint tenants and tenants-in-common, for the right to partition belongs equally to each of them. In the present case, when the suit of the plaintiff's assignor was dismissed in 1917 she was relegated to her right of possession as joint owner and consequently to her right to partition, a right which accrues from time to time, for this right had not been taken away by the prior litigation. It is not contended for the appellant that the question is *res judicata* and consequently, the present suit, which is based on the plaintiff's assignor's right of partition, is not barred by Order IX, rule 9.

The appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice
Madhavan Nayar.

SUNDARAMMA (FIRST DEFENDANT), APPELLANT,

v.

VENKATASUBBA AYYAR AND THREE OTHERS (PLAINTIFF
AND DEFENDANTS NOS. 2, 3 AND 4), RESPONDENTS.*

1926,
March 12.

Hindu Law—Adoption—Adoption by a person after the death of his only wife—Right of adopted son to inherit to the relations of the deceased wife—whether adopted son can claim as son of the wife, though she did not take part in ceremony of adoption—Pratigrahiyamatha, meaning of—Dattaka Mimamsa—Opinion of Sarkar Sastri, disapproval of.

The adopted son of a Hindu whose only wife had died before the adoption becomes the son of that wife so as to inherit as such to the relations in her father's family.

* Letters Patent Appeal No. 129 of 1925.

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There is no authority for the view that to be an adoptive mother, she should have actively participated in the adoption by actually receiving the boy in adoption.

Dattaka Mimamsa, section I, verse 22, and section VI, verse 50, referred to; Opinion of Sarkar Sastri, disapproved.

APPEAL under clause 15 of the Letters Patent against the judgment of DEVADOSS, J., in Second Appeal No. 318 of 1922, preferred against the decree of E. H. WALLACE, District Judge of Salem in A.S. No. 207 of 1920, preferred against the decree of C. GOMAJI RAO, District Munsif of Krishnagiri, in O.S. No. 122 of 1919.

The plaintiff is the son of a step-sister of one Narasimha Ayyar, and claimed to be reversioner to his estate along with the third and fourth defendants, who were sons of another step-sister of the same person. The plaintiff sued for a declaration that the alienations made by the first defendant, who was the widow of Narasimha Ayyar, to the second defendant was not valid and binding on the plaintiff and others as the reversioners to the estate. The first and second defendants pleaded that the plaintiff and third and fourth defendants were not the nearest reversioners, but that one Subbu Narayana Ayyar, the adopted son of the husband of one Venkachi Ammal, the uterine sister of Narasimha Ayyar, was the nearest reversioner to him and that consequently the plaintiff was not competent to maintain the suit. It appeared that Venkachi Ammal had died prior to the adoption made by her husband. It was contended for the plaintiff that as the woman had died before the adoption and did not consequently take part in the ceremony of adoption and receive the boy in adoption in association with her husband, the adopted son was not her son and could not inherit to her paternal relations. The lower Courts overruled the plaintiff's contention and dismissed the suit. The plaintiff

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preferred a second appeal, which came on for disposal before DEVADOSS, J., who held that the adopted son did not become the son of the woman who had predeceased the adoption by her husband. His Lordship reversed the decrees of the lower Courts, and remanded the appeal for disposal on all the issues in the case. Against this judgment, the first defendant preferred this Letters Patent appeal.

C. V. Anantakrishna Ayyar for appellant.

A. Krishnaswami Ayyar for respondents.

JUDGMENT.

PHILLIPS, J.—The question in this appeal is whether the adopted son of a man whose only wife had died before the adoption becomes the son of that wife so as to be her legal heir. This question does not seem to have been directly decided in any case and therefore it will be necessary to see how far the authorities support the proposition. In the first place it is necessary to consider the principles which govern adoption under the Hindu Law. In *Uma Sunker Moitro v. Kali Komul Mozumdar*(1), ROMESH CHANDER MITTER, J., observes :

“The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born both in respect to the paternal and maternal line, and his complete substitution into the adopter's family as if he were born in it.”

This theory has been upheld by the Privy Council in *Nagindas Bhagwandas v. Bachoo Hurkissondas*(2). The theory then appears to be that the adopted boy by a legal fiction becomes the natural son of the adoptive father and presumably also of his wife. The question here is not complicated by the existence of two or more

(1) (1881) I.L.R., 6 Cal., 256 (F.B.).

(2) (1916) I.L.R., 40 Bom., 270 at 288 (P.C.).

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wives. In *Narasimha v. Parthasarathy*(1) their Lordships of the Judicial Committee observe

"Only one wife can receive the child in adoption so as to step into the position of being its adoptive mother" and again

"to hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law."

This conclusion appears to be based on the theory of adoption, namely, that the adopted son becomes the natural son of the father, and the only way in which he can be deemed to be the natural and legitimate son of his father is by a fiction that he is the son of that father's wife also. A Hindu son has to offer oblations not only to his father's ancestors but also to his mother's ancestors. When therefore, he is adopted into a new family, he becomes the son of that family and presumably he would offer oblations not only to his adoptive father's ancestors but to his father's wife's ancestors as well. It would be straining the legal fiction of adoption too far to hold that the boy need have no mother at all although this may possibly be necessary in the case of an adoption by a bachelor, but that is an exceptional case with which we are not concerned now. In a family in which there were two wives it was held that the wife who joined with the father in making the adoption, although the junior wife, was the mother of the boy in preference to her senior co-wife *Annapurni Nachiar v. Collector of Tinnevely*(2). This was upheld by the Privy Council in *Annapurni Nachiar v. Forbes*(3). Wherever possible, therefore, a mother should be found for the boy and the fact that such a mother died before the adoption can be no obstacle in view of the fictitious character of the whole principle of adoption.

(1) (1914) I.L.R., 37 Mad., 199 at 220 (P.C.).
(2) (1895) I.L.R., 18 Mad., 277. (3) (1900) I.L.R., 23 Mad., 1.

It is contended for the respondent that even when the adoptive father's wife is alive she does not become the adoptive mother unless she actively participates in the adoption by receiving the adopted boy. This contention is apparently based on the literal meaning of the word "Prathigrahiya" which is ordinarily translated as adoptive. Its literal meaning is "receiving" and it is contended that unless the boy is actually received by the woman she does not become his adoptive mother. It is well settled that a man can adopt without the consent of his wife and even against her consent and in either case the adoption is valid. If the adoption is valid and the principle is recognized that the adopted boy ought in theory to have a mother it is difficult to accept the proposition that he is not to have any mother at all unless she actually receives him in adoption. The argument that the wife becomes the adoptive mother is based on the text of Nanda Pandita in Dattaka Mimamsa, part I, verse 22

"In consequence of the superiority of the husband by his mere act of adoption, the affiliation of the adopted, as son of the wife, is complete in the same manner as her property in any other thing accepted by the husband".

In this text there is no qualification of the words "son of the wife" such as is sought to be put upon it by the respondent. He contends that it only means son in a tertiary sense, as laid down by Sarkar Sastri in his commentary on adoption (p. 227). When pressed for an interpretation of this tertiary sense, the learned vakil had to adopt the conclusion in Sarkar Sastri's book, namely, that he was not really a son for any purpose. This seems to be a quite unnecessary deduction, for it destroys the apparent meaning of the text. If he is not really the son of the wife in any sense, why should the text declare that his affiliation as

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such is complete. No doubt Sarkar Sastri in his commentary supports the proposition put forward for the respondent, but there are very many contradictory statements to be found in his commentary. For instance, his observations at page 200 are altogether contradicted by those at page 419 E. Apart therefore from this commentary, there appears to be no authority for the proposition that the wife does not become the adoptive mother unless she actually received the boy. It may also be observed that it is only in very rare cases that the wife receives the boy as well as the father and consequently in most cases, if this contention were to be upheld the result would be that an adopted son who was adopted by the father would have no mother at all, for admittedly he is no longer considered to be the son of his natural mother and consequently he would be in the anomalous position of a man who has no mother at all. If this anomalous position of a man without a mother can be avoided, I think it should be as being opposed to law of nature to which the theory of adoption is assimilated. The text of Dattaka Mimamsa is undoubtedly an authority to the contrary. I may observe that the late Sir BHASHYAM AIYANGAR, J., accepted this proposition in an article in 9 Madras Law Journal, 231, and there appears to be no reason why it should not be adopted. If, therefore, the wife becomes the adoptive mother whether she takes part in the ceremony or not, then there can be little difficulty in pressing the fiction a little further so as to include the deceased wife of the adoptive father. The whole theory being a fiction, the impossibility of a woman becoming the mother after her death must be explained away by the fictitious nature of adoption. As her consent is not necessary, the fact that the consent cannot be obtained after her death is immaterial. I would, therefore, hold

that the deceased wife of the adoptive father can become the adoptive mother and the adopted son becomes her heir.

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The learned Judge from whose decision this appeal is preferred has adopted the arguments of Sarkar Sastri in favour of his view, but as I have observed above, these arguments seem to be based on incorrect principles and an incorrect reading of the text. The appeal must, therefore, be allowed and the plaintiff's (respondent's) suit dismissed with costs throughout.

MADHAVAN NAYAR, J.—The question for decision is whether an adopted son can inherit to the relations of the wife of his adoptive father when that wife was dead at the time of his adoption. DEVADOSS, J., answered the question in the negative basing his judgment on the ground that “adoption being after the death (of his wife) it cannot be said by any fiction that she took part in the adoption.” According to this view an adopted son can be heir only to the wife of the adoptive father who joins in the ceremony of adoption and who is termed “the receiving mother.” The correctness of this view is challenged in this Letters Patent Appeal.

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There is no direct authority on the point, but two texts in Dattaka Mimamsa have a bearing on the question. These are Dattaka Mimamsa, section 1, verse 22, and section 6, verse 50, and are thus translated by Stokes.

“In consequence of the superiority of the husband, by his mere act of adoption, the affiliation of the adopted, as son of the wife, is complete in the same manner as her property in any other thing accepted by the husband.

“The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest for the rule regarding the paternal, is equally applicable to the maternal grandsires (of adoptive sons).”

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Respondent relies strongly on the latter of the above-mentioned texts in support of his contention. This text shows that the relations of the adoptive mother only are the maternal relations of the adopted son. It is pointed out that the Sanskrit word "Prathigrahiyamatha" corresponding to the term "adoptive mother" means "mother who accepts in adoption" and, therefore, only the relations of a "receiving mother" are the maternal relations of the adopted son. It is difficult to accede to the argument that effect should be given to the literal meaning of the word "Prathigrahiyamatha" and that it should be understood in the sense of physical acceptance by the mother; for it is well known that the wife of the adopter is regarded as the adoptive mother even if she is not present at the adoption. The wife becomes the adoptive mother, not because she receives the boy in adoption, but because she is the wife of the adopter—her husband—who takes the boy in adoption. The context in which the passage occurs does not seem to require that the word should receive its primary meaning. The author mentions that the ancestors of the adoptive father are the paternal ancestors of the adopted son and then points out in the same way that the "forefathers of the adoptive mother only are also the maternal grandsires of the sons given" as distinguished from the ancestors of the natural mother. To illustrate this position there is no need to emphasise "acceptance" by the adoptive mother as a necessary feature in the ceremony of adoption. Sarkar Sastri in his "Tagore Law Lectures on adoption" interprets the term "Prathigrahiyamatha" literally. He says at page 419 E

"But it should be observed that although the husband's son is deemed by courtesy to be the wife's son, yet acceptance by the wife is absolutely necessary to constitute the husband's adoptee her legal son."

See also page 237. These passages support the contention of the respondent. But the same learned author at page 200, paragraph 4, of the same volume expresses the following contrary view relied on by the appellant:—

"When the adopter is a widower, it might be said that his deceased wife's ancestors will be the maternal ancestors of the adopted son."

The opinion of Sarkar Sastri is, therefore, not very helpful in deciding this question.

In support of the theory that there should be a "receiving mother" to enable the husband to make a valid adoption, the learned Judge refers to *Annapurni Nachiar v. Collector of Tinnevely*(1), but that was a case where a conflict arose between the two married wives of the holder of an impartible zamindari as regards the right to succeed to the impartible estate, the property of the infant adoptive son of their late husband. It was held that the junior wife having taken part in the adoption was entitled to preference over her co-wife who was not associated by the husband in the act of adoption. In the course of his judgment Mr. Justice SHEPHERD points out that

"Where, however, there are several wives it is said that the husband is at liberty to designate the one who shall take the place of mother, and that by this means the anomaly of assigning several mothers to the adopted son may be avoided."

As regards the association by the husband of one of the wives in the act of adoption, the Privy Council in affirming the decision of the High Court observed thus—

"It certainly is a reasonable law that the head of a family should be able to take action likely to prevent disputes between his widows relative to adoption and the consequences of it. To unite one wife with himself in adopting is one way; and it is satisfactory to find that besides the one direct judicial decision there is so much reason and opinion in its favour and so little against it."

(1) (1895) I.L.R., 18 Mad., 277.

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See *Annapurni Nachiar v. Forbes*(1). What has thus been said as regards the "acceptance" by one mother when there are several wives to the adopter does not lead to the conclusion that the "receiving mother" is necessary to validate the adoption by the husband. It is conceded that if the husband had only one wife the act of adoption inasmuch as it concerns him alone may be performed independently of her.

The first of the two texts referred to above does not in any way support the suggestion that the adoptive mother to have the same relation as the natural mother should be one who actually receives the boy in adoption. On the other hand, inference drawn from it strongly supports the appellant. It is undisputed that adoption can be made by the husband without the consent of his wife. It may be made even against her wishes; for association with the husband in the act of adoption is a religious formality which does not show any legal significance. The ceremonial of adoption utterly ignores the wife, who need not be present and to whom no part is assigned if she is present (Mayne's Hindu Law, page 229). When the adoption is made whether with or without her consent the wife becomes the adoptive mother of the child by the mere fact of adoption. Adoption is but a fiction in law. As observed by MAHAMOOD, J., in *Ganga Sahai v. Lekhraj Singh*(2).

"Adoption is itself 'second birth' proceeding upon the fiction of law that the adopted son is 'born again' into the adoptive family by the rites of initiation."

According to Hindu Law, an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter as the legitimate son.

The theory of adoption depends upon the principle of a complete severance of the child adopted from the

(1) (1900) I.L.R., 23 Mad., 1 at 9. (2) (1887) I.L.R., 9 All., 253.

family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family, as if he were born in it. See *Uma Sunker Moitro v. Kalikomul Mozumdar*(1), quoted with approval in *Nagin Das Bhagwan Das v. Bachoo Hurkisson Das*(2). As his adoption puts the adopted son in the place of legitimate son as regards the rites of inheritance in the family of the adopter, he must be considered to be heir to any rights arising after the adoption from his father's wife's position in his adoptive family, though she was not alive at the time of the adoption. To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature the adopted boy should have a mother. I do not think it is impossible to conceive the deceased wife as the fictional mother of the adopted child. The theory of a "receiving mother" being discarded, I cannot find any difficulty in holding that the wife of the adoptive father though she was dead at the time of adoption can be considered as the adoptive mother.

It is true that when a bachelor adopts, the adopted boy can have no adoptive mother. Fiction cannot be made to assimilate to nature in that case. But there is no reason why we should extend that analogy to cases like the present when it is possible to give full effect to the fiction by ascribing the deceased wife of the husband as the adoptive mother of the child.

For these reasons, I hold that the Letters Patent Appeal should be allowed and the plaintiff's suit be dismissed with costs throughout.

K.R.

(1) (1881) I.L.R., 6 Cal., 256 at 259, 260.
(2) (1916) I.L.R., 40 Bom., 270, 288.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice
Madhavan Nayar.

1926,
March 18.

OMAYACHI (PETITIONER), APPELLANT,

v.

O. S. RAMACHANDRA AYYAR (OFFICIAL RECEIVER OF
TANJORE, RESPONDENT), RESPONDENT.*

Provincial Insolvency Act (V of 1920), sec. 64—Succession Certificate Act (VII of 1889), sec. 4—Dividend payable to creditors entered in the schedule—Payment of dividend by Official Receiver—Succession certificate, whether necessary to be produced before getting dividend—Applicability of Succession Certificate Act, sec. 4, to payment of dividend.

A certificate under section 4 of the Succession Certificate Act is not required to enable a person whose claim as legal representative of a deceased creditor has been entered in the schedule prepared under section 33 of the Provincial Insolvency Act (V of 1920) to obtain payment of the dividend due to him.

APPEAL against the order of J. C. STODART, District Judge of West Tanjore, in I.A. No. 391 of 1924 in I.P. No. 12 of 1922.

The appellant, as legal representative of her deceased son, proved a debt due to him from an insolvent debtor, and was entered as a creditor in the schedule prepared by the Court under section 33 of the Provincial Insolvency Act. Subsequently she applied to the Official Receiver for payment of the dividend due to her. The Receiver required her to produce a succession certificate before payment out could be made to her. The petitioner then applied to the District Judge for payment and prayed that the Official Receiver may be ordered to make the payment without production of a

succession certificate. The learned Judge held that the Official Receiver's order as to production of succession certificate was right and dismissed the petition. Against this order, this appeal was preferred.

T. M. Krishnaswami Ayyar and V. Ganapati for appellant.

M. S. Ramachandra Ayyar for respondents.

JUDGMENT.

This is an appeal against an order of the District Judge confirming an order of the Official Receiver requiring a succession certificate from the appellant before payment of her claim. Under section 64 of the Provincial Insolvency Act, a creditor entered in the schedule is entitled to be paid his dividend out of the assets of the insolvent, and section 4 of the Succession Certificate Act does not appear to be applicable to such payments because it is only applicable to decrees or orders for the payment of debts. In the Civil Procedure Code of 1882, the framing of the schedule under section 352 was deemed to be a decree in favour of the creditors as held in *Arunachala v. Ayyaru*(1), but in the Insolvency Act of 1907 and in the later Act of 1920 there is no such provision. Consequently, it would appear that section 4 of the Succession Certificate Act is not applicable to the payment of dividends by the Receiver. This is only natural, for in paying out the debts due by the insolvent the Receiver has always to investigate the claims and adjudicate upon them. The claim has been proved and no other person has come forward to claim the same debt.

The adjudication of the Receiver is sufficient protection to the estate of the insolvent, for no further creditor

* Appeal against Order No. 394 of 1924.

(1) (1884) I.L.R., 7 Mad., 318.

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can come in to prove against the insolvent's estate. We must therefore set aside the order of the Official Receiver and allow this appeal with costs.

The Official Receiver will pay the dividend to the appellant and also interest at 6 per cent for the period it has been withheld.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1926,
March 18.

PARAMASWAMI AYYANGAR AND ANOTHER, PETITIONERS,

v.

ALAMELU NACHIYAR, RESPONDENT.*

Civil Procedure Code (Act V of 1908), ss. 109 and 110 and O. XLV, rr. 2, 3 and 8—Probate and Administration Act (V of 1881), s. 86—Application to the District Court for letters of administration with will annexed—Grant of—Appeal to the High Court—Order of High Court—Appeal to His Majesty in Council against order of High Court, whether competent—Letters Patent, clauses 39 and 44.

An appeal can be preferred to His Majesty in Council, under clause 39 of the Letters Patent, against an order of the High Court passed on an appeal under section 86 of the Probate and Administration Act, 1881, against an order of the District Court in proceedings under the said Act, if the case satisfies the provisions of sections 109 and 110 of the Civil Procedure Code.

Ramachandra Rao v. Ramachandra Rao, (1922) I.L.R., 45 Mad., 320 (P.C.), and *Secretary of State for India v. Chellikani Rama Rao*, (1916) I.L.R., 39 Mad., 617 (P.C.), relied on; *Rangoon Botatoung Co., Ltd. v. The Collector of Rangoon*, (1913) I.L.R., 40 Cal., 21 (P.C.), distinguished.

PETITION under sections 109, 119 and Order XLV, rules 2, 3 and 8 of the Civil Procedure Code, praying that the High Court may be pleased to grant a

* Civil Miscellaneous Petition No. 379 of 1926.

certificate enabling the petitioners to appeal to His Majesty in Council against the decision of the High Court in A.A.O. No. 437 of 1923 and A.A.O. No. 15 of 1924 preferred to the High Court against the decree of H. R. BARDSWELL, District Judge of Madura, in O.S. No. 14 of 1919.

The material facts appear from the judgment.

S. Varadachari, N. S. Rangaswami Ayyangar and P. V. Martandam Pillai for petitioners.

M. Patanjali Sastri for respondent.

JUDGMENT.

This is an application for the grant of leave to appeal to His Majesty in Council against the decree of the High Court in C.M.A. Nos. 437 of 1923 and 15 of 1924. A preliminary objection is taken by Mr. Patanjali Sastri for the respondent that no appeal lies to the Privy Council against the decree of the High Court in testamentary matters and it is incompetent for the High Court to grant leave to appeal to His Majesty in Council. The argument of Mr. Patanjali Sastri is that under the Probate and Administration Act, section 86, only one appeal is provided from an order of District Judge or District Delegate to the High Court and no further appeal is allowed by the Act, and that an appeal being a creature of statute there is no statute granting the right of appeal to the Privy Council in testamentary matters. Section 86 no doubt provides for an appeal to the High Court against an order made by a District Judge or a District Delegate. The question is, is the decree of the High Court in a testamentary matter appealable to His Majesty in Council, if the case is one which, if it were an ordinary civil case, would be appealable under section 109 of the Code of Civil Procedure. Reliance is placed

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upon the well-known case in *Rangoon Botatoung Co., Ltd. v. The Collector of Rangoon*(1) for the contention that no appeal lies to the Privy Council. In that case it was held that no appeal lay to the Privy Council in land acquisition cases. Their Lordships observed:

"A special and limited appeal is given by the Land Acquisition Act from the award of 'the Court' to the High Court. No further right of appeal is given. Nor can any such right be implied."

In that case the award was considered to be an award by an arbitrator and the Land Acquisition Act having provided for only one appeal it was held that no second appeal lay to the Privy Council. Their Lordships treated the decision of the Court on reference by the Collector to be an award by arbitrators. The question is whether to a civil case wherein the rights of parties are determined the Civil Procedure Code does not apply. The case in *Rangoon Botatoung Co., Ltd. v. The Collector of Rangoon*(1) has been explained by their Lordships of the Privy Council in *Ramachandra Rao v. Ramachandra Rao*(2). Lord BUCKMASTER in delivering the judgment of their Lordships observed at page 329:

"The argument which succeeded in that case emphasizes the distinction between an award and a decree, and the judgment mentions this in terms by stating that the appellants, although admitted to the High Court, could not have the right to carry an award made under an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its original jurisdiction When once the award as to the amount has become final, all questions as to fixing of compensation are then at an end; the duty of the Collector in case of dispute as to relative rights of the persons together entitled to the money is to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be."

(1) (1913) I.L.R., 40 Cal., 21 (P.C.). (2) (1922) I.L.R., 45 Mad., 320 (P.C.).

In *Ramachandra Rao v. Ramachandra Rao*(1) it was held that a decision with regard to title in land acquisition proceedings was *res judicata* between the parties in subsequent proceedings. The explanation is this, so long as the amount of compensation is in question no right or title of the parties is involved; but where the amount awarded as compensation is paid into Court, and two or more persons claim the right to receive the money, there is a civil contest as to the right to the money between the persons before the Court, and any determination by the Court as to the rights of the parties is a determination in a civil case, and the ordinary incidents applicable to a decree in a civil suit concerning property apply to such decision and therefore, in land acquisition proceedings, if two persons contest the right to the amount deposited in Court, their title to such money is determined by the Court and that decision is a decision on the merits of the contest as to the title, and such a decision operates as *res judicata* in a subsequent suit, where the same title is in question. In *Secretary of State for India v. Chellikani Rama Rao*(2) the objection that no appeal lay to the Privy Council in a case under the Forest Act was raised. Reliance was placed upon *Rangoon Botatoung Co., Ltd. v. The Collector of Rangoon*(3) in support of the contention. The Privy Council overruled the objection on the ground that there was no civil right in dispute in *Rangoon Botatoung Co., Ltd. v. The Collector of Rangoon*(3). Lord SHAW in delivering the judgment of the Privy Council observed:

"The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings. In view of the nature of the question to be tried, and the provisions of the particular statute, it was held that there was no right 'to carry an award made in an arbitration as to the value of land' further

(1) (1922) I.L.R., 45 Mad., 320 (P.C.). (2) (1916) I.L.R., 39 Mad., 617 (P.C.).
(3) (1913) I.L.R., 40 Cal., 21 (P.C.).

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than to the Courts specifically set up by the statute for the determination of that value."

With reference to the case before them they observed :

"The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land ; and if the ordinary Courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation."

The order passed by this Court is a decree in a contested civil matter and under clause 39 of the Letters Patent an appeal lies to the Privy Council from any judgment, decree or order of the High Court made on appeal. Clause 44 empowers the Indian Legislature to alter or modify the Letters Patent. By the Civil Procedure Code an appeal to the Privy Council against an order or decree of the High Court is provided if it fulfils certain conditions. Sections 109 and 110 of the Civil Procedure Code lay down in what cases an appeal shall lie to the Privy Council. If a decree or a final order of the High Court satisfies the provisions of sections 109 and 110, it is difficult to see how an appeal is not competent to His Majesty in Council. The only authority in point is a decision of the Lower Burma Chief Court reported in *Po Kin v. Ma Sein Tin*(1). There, the learned Judges, following *Rangoon Botatoung Co., Ltd. v. The Collector of Rangoon*(2), held that no appeal lay against an order made under the Probate and Administration Act. Such an objection does not seem to have been taken in any other case, though in several cases against orders under the Probate and Administration Act appeals were presented to the Privy Council. It is urged by Mr. Patanjali Sastri that, though this objection is a novel one, yet it is one which, though not taken in other cases, he is entitled to take here.

(1) (1919) 51 I.C., 593.

(2) (1913) I.L.R., 40 Cal., 21 (P.C.).

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If the contention of the respondent is to prevail, no appeal to the Privy Council could lie against the orders of the High Court in insolvency matters or orders under the Guardians and Wards Act. In the Provincial Insolvency Act an appeal is provided to the High Court but not an appeal to the Privy Council. It cannot be said that no appeal lies to His Majesty in Council against the order of the High Court made in insolvency proceedings provided sections 109 and 110 are satisfied. This point was specifically raised and decided in *Chatrapat Singh Dugar v. Kharag Singh Lachmiram*(1). In that case JENKINS, C.J., observed :

"It is urged that sections 46 and 47 of that Act (meaning the Provincial Insolvency Act), if anything, negative this right of appeal. But I do not so read the Insolvency Act. In my opinion, by that Act there was no intention to interfere with any right of appeal to the Privy Council that might otherwise exist, and this is a case which comes clearly within the provisions of the Letters Patent and of section 109 of the Code. The only question is whether this is a case which can properly be certified to be a fit one for appeal to His Majesty in Council."

We have, therefore, no hesitation in holding that the objection of the respondent as to the competency of an appeal to the Privy Council is wholly untenable.

On the merits, we hold the case satisfies the provisions of sections 109 and 110. We therefore certify that this is a fit case for appeal to His Majesty in Council under section 109 (a), and we grant the leave prayed for.

K.B.

(1) (1913) I.L.R., 40 Cal., 685.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1926,
March 23.

JAMMI HANUMANTHA RAO (PLAINTIFF), APPELLANT,

v.

ARATLA LETCHAMMA (DEFENDANT), RESPONDENT.*

Probate and Administration Act (V of 1881), sec. 69—
Probate, grant of—“Persons claiming to have an interest
in the estate of deceased,” meaning of—Persons who can
object to grant of probate—Widow claiming a right of
maintenance out of the estate of deceased, whether can object
—Court of Probate Act, 20 and 21 Vict., Ch. 77, sec. 61.

A person, who is entitled to any portion of the estate left by a deceased or to a right to claim maintenance from such estate, has an interest within the meaning of section 69 of the Probate and Administration Act (V of 1881), and is entitled to object to the grant of probate of the will of the testator. It is not necessary that he should claim through the testator in order to enable him to oppose the grant of probate: consequently the widow of an undivided brother of the husband of a testatrix is entitled to object to the grant of probate of her will.

Keshan Dai v. Satyendra Nath Dutt, (1901) I.L.R., 28 Cal., 441, followed.

APPEAL against the decree of H. D. C. REILLY, District Judge of Ganjām, in Original Suit No. 35 of 1923.

The material facts appear from the judgment.

B. Jagannada Das for appellant.

T. A. Anantha Ayyar *amicus curiae* for respondent.

JUDGMENT.

The appellant applied for the probate of the will of one Narasamma, dated 4th June 1920, the grant of probate was opposed by the respondent who is the

widow of the brother of Narasamma's husband, and the District Judge held that it was not proved that Narasamma executed the will and dismissed the application.

Mr. Jagannada Das for the appellant raises the contention that the respondent was not entitled to oppose the grant of probate as she had no interest in the estate of the deceased so as to be entitled to enter caveat under section 69 of the Probate and Administration Act (V of 1881). As there is a conflict of authority on this point and as the respondent has not appeared to oppose the appeal, we asked Mr. Anantha Ayyar to appear as *amicus curiae*, and we are thankful to him for bringing to our notice the cases opposed to the contention of the appellant. Under section 69

“In all cases it shall be lawful for the District Judge, if he thinks fit, to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.”

What is the nature of the interest which a person should have in order to entitle him to enter a caveat? The contention of the appellant is that the person who enters a caveat should claim a right to the property under the testator, and if he claims the property adversely to the testator he is not entitled to oppose the grant of probate, for his right would not be affected by the grant of probate or letters of administration with the will annexed. The respondent claims the right to maintenance out of the income of the property devised under the will as she is the widow of the undivided brother of the testatrix's husband. The relationship is not denied, and the only question is whether the claim to maintenance against the property devised by the will, granting that the allegation of the respondent is true, would entitle her to oppose the grant of probate. In

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Garabini Dassi v. Pratap Chandra Shaha(1) it was held that the right to maintenance was not such an interest as would entitle a person to oppose the grant of probate. This is a direct authority in favour of the appellant. In *Abhiram Dass v. Gopal Dass*(2) it was held by a Bench of the Calcutta High Court that

"a person not claiming any of the property of the testator but disputing the right of the testator to deal with certain property as his own has not such an interest in the estate of the testator as entitles him to come in and oppose the grant of probate."

The learned Judges observe at page 52:

"The term (meaning interest in section 69) does not necessarily refer to any particular property, but to the claim of any person to succeed by inheritance or otherwise to any portion of the estate of the deceased by reason of an interest, not on an adverse title to the testator to any particular property, but in the estate itself, whatever that may consist of. The form of the caveat too would seem to show that the person who enters a caveat admits that the particular property forms a portion of the estate of the testator, but objects either to the execution of the will or to the proposed manner of dealing with any portion of the estate."

The learned Judges declined to follow the two previous decisions of the same Court in *In the matter of the petition of Bhobosoonduri Dabee*(3) and *In the matter of the petition of Hurrolal Shaha*(4). The case in *Abhiram Dass v. Gopal Dass*(2) has been followed by other High Courts. In *Pirojshah Bikhaji v. Pestonji Merwanji*(5) it was held, following *Abhiram Dass v. Gopal Dass*(2), that a person who wishes to come in as the caveator must show some interest in the estate derived from the deceased by inheritance or otherwise. The Patna High Court takes the view in *Kalajit Singh v. Permeshar Singh*(6).

(1) (1900) 4 C. W.N., 602

(3) (1881) I.L.R., 6 Calc., 463.

(5) (1910) I.L.R., 34 Bom., 459.

(2) (1890) I.L.R., 17 Calc., 48.

(4) (1882) I.L.R., 8 Calc., 570.

(6) (1917) 1 Pat. L.W., 308.

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The words of section 99 are "claiming to have any interest in the estate of the deceased." There is nothing in the wording of the section to show that the caveator should claim interest through the testator. All that is necessary to entitle a person to enter caveat is to claim interest in the estate of the deceased. The words "interest in the estate" do not necessarily convey the idea that the interest should be claimed through the testator. If that was the intention of the legislature, the clause could have been differently worded so as to make the meaning clear. In India under the Hindu law, the widow of a co-parcener is entitled to maintenance and if a person disposes of the property as his self-acquisition in favour of the legatees, the widow of a co-parcener will be driven to the necessity of filing a suit against the executor or legatee and proving that it is joint family property. A person claiming to be the undivided brother of the testator claims an interest not through the deceased, but independently of him. Can he enter a caveat on the ground that the property devised is the joint property of himself and the testator? It has been consistently held that a reversioner is entitled to oppose the grant of probate. In *Syama Charan Bavsya v. Prafulla Sundari Gupta*(1) it was held by MOOKERJI, J., and CHAPMAN, J., after an examination of the authorities, "that although a reversioner under the Hindu law has no present alienable interest in the property left by the deceased he has substantial interest in the protection or devolution of the estate and as such is entitled to appear and be heard in a probate proceeding." See also *Akhileswari Dasi v. Hari Charan*(2). Can it be said that a reversioner claims through the testator? If the principle of law enunciated in *Pirojshah Bikhaji v. Pestonji Merwanji*(3) and *Abhiram Dass v. Gopal Dass*(4)

(1) (1915) 19 C.W.N., 882.

(3) (1910) I.L.R., 34 Bom., 459.

(2) (1924) 40 C.L.J., 297.

(4) (1890) I.L.R., 17 Calc., 48.

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is correct, a reversioner who does not claim through the testator cannot oppose the grant of probate. A Hindu will may contain a power to adopt. A reversioner who has interest in preventing the estate from going to a third person by reason of a forged will containing a power to adopt is entitled to protect the estate from going to strangers. If a reversioner who has no present interest in the estate is entitled to come in and oppose the grant of probate, it is difficult to see how a person who claims right to maintenance from the estate devised by the testator is not entitled to oppose the grant of probate. Under the English law the personal estate is his absolute property and nobody has any right to it till he dies. But under the Hindu law a widow has the right to claim maintenance and the widow of an undivided co-parcener is entitled to maintenance. If the property devised is joint family property the reversioner is entitled to see that the reversion is not endangered. In *In the matter of the Petition of Bhobosoonduri Dabee*(1) FIELD, J., after a very exhaustive examination of the authorities, held that, under section 242 of the Succession Act, any person who can show that he is entitled to maintain a suit in respect of property over which probate would have effect, possesses a sufficient interest to entitle him to enter a caveat and oppose the grant. In that case the testator left his widow and two sons and purported to give the entire property to his widow for her life and after her death to his two sons. A mortgagee of the son's share and a decree-holder against the other son opposed the grant of probate. Both the Judges who heard the case (WHITE and FIELD, JJ.) held that the mortgagee of the son's share was entitled to oppose the grant of probate as by the will they would be left without a remedy.

In the Court of Probate Act, 20 & 21 Vict., C. 77, section 61, the wording is

(1) (1881) I.L.R., 6 Cal., 460.

"others having or pretending interest in the personal estate affected by a will should be cited or summoned and may be permitted to become parties or intervene for their respective interest."

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A portion of that section is practically copied in section 69 of the Probate and Administration Act (V of 1881) and section 242 of the Indian Succession Act (X of 1886) with slight modification. Instead of the words "having or pretending interest in the personal estate" the wording in the Indian enactment is "claiming to have an interest." FIELD, J., observed at page 471:

"As to the test of what constitutes a sufficient interest to entitle any particular person to be made a party, according to the view which I have already stated, I think it comes to this, that any person has a sufficient interest who can show that he is entitled to maintain a suit in respect of the property over which the probate would have effect under the provisions of section 242 of the Indian Succession Act."

The learned Judges who decided *Abhiram Dass v. Gopal Dass*(1), differed from *In the matter of the Petition of Bhobosoonduri Dabee*(2), on the ground that the rule laid down by FIELD, J., was not adopted by WHITE, J. Though WHITE, J., did not lay down the rule in such broad terms as FIELD, J., yet he held that the mortgagee of the son's share was entitled to oppose the grant of probate of the father's will. In *In the matter of the Petition of Hurrolal Shaha*(3), it was held that a presumptive reversioner to property with which a will deals has a sufficient interest in such property to entitle him to maintain a suit in respect of such property and that he is entitled to maintain a case for the revocation of probate. The learned Judges followed the decision in *In the matter of the Petition of Bhobosoonduri Dabee*(2). In *Kishen Dai v. Satyendranath Dutt*(4), a Bench of the Calcutta High Court held that

(1) (1890) I.L.R., 17 Cal., 48.

(2) (1881) I.L.R., 6 Cal., 460.

(3) (1882) I.L.R., 8 Cal., 570.

(4) (1901) I.L.R., 28 Cal., 441.

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"The words 'interest in the estate of the deceased' in section 69 of the Probate and Administration Act mean 'interest in the estate left by the deceased' and that a judgment-creditor who but for the will would in execution of his decree have a right to seize the property or that share of it which should descend to his debtor and who alleges that the will has been set up for the purpose of defrauding the creditors, is a person claiming an interest in the estate of the deceased and as such has a *locus standi* in opposing the grant of the probate of the will."

It cannot be said that a Hindu son claims through his undivided father. If the father devises his property as his self-acquisition, is not the son entitled to oppose the grant of probate on the ground that it is a forgery? And it cannot be said in such a case that he claims through the father. In *Arakal Bastian Ansap v. Narayana Ayyar*(1), it was held that the judgment-creditors of the son of the deceased, who had attached the son's interest in his deceased father's estate before the application for probate, were entitled to oppose the grant of probate. It is contended that the Privy Council in *Nilmoni Singh Deo v. Umanath Mookerjee*(2) disallowed the contention that an attaching creditor of a son's share was entitled to oppose the grant of the probate of the father's will. Their Lordships did not decide the point, but only expressed a doubt. They observe at page 28:

"They entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors."

They give no final opinion upon it. If a testator purports to devise his property as his self-acquisition in order to defeat his undivided brother or to defeat the claim for maintenance of the widow of his co-parcener, does he not commit fraud? and is not the brother or the widow entitled to question the genuineness of the will?

(1) (1911) I.L.R., 34 Mad., 405.

(2) (1884) I.L.R., 10 Cal., 19.

In *Rahamtullah Sahib v. Rama Rau*(1) it was held that a legatee under a will or a creditor of the testator had not such interest as to entitle him to oppose the grant of probate. In the case of a creditor the estate is liable, whether the will is genuine or not. The executor, and if there is no executor the administrator, is bound to pay the debts of the testator out of the estate and the creditor will not ordinarily suffer in any way by a false will being propounded and probate thereof being obtained. There may be cases where it may be to the interest of the creditor to oppose the grant of probate if by obtaining probate an unscrupulous person or a person of no means is enabled to make away with the property of the deceased and thereby defeat the creditor. If the probate proceedings are fraudulent, any person who would suffer thereby is entitled to object to such proceedings. In *Crispin v. Dogliani*(2) the natural son of the testator objected to the grant of probate on the ground that by the law of Portugal he was entitled to the whole of the deceased's property and that he had instituted a suit in Portugal against the executor in which he obtained a decree that he should be put in possession of the property. The declaration did not state the nature of the suit, nor the questions involved in it, nor did the judgment show that the plaintiff was in the same position as a legitimate son. The learned Judges held that the foreign judgment alone did not show such an interest in the party in whose favour it was made as to entitle him to dispute the will. If the judgment of the foreign Court had given the property to him the learned Judges might probably have allowed him to contest the grant of probate. In *Brinda Chowdhurani v. Radhica Chowdhurani*(3) it was held that the widow of a Hindu testator who had died leaving sons had sufficient interest

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(1) (1894) I.L.R., 17 Mad., 373.

(2) (1860) 2 Sw. & Tr., 17.

(3) (1885) I.L.R., 11 Cal., 492.

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to call upon the executor to prove the will in solemn form *per testes*. At page 494 they observe:

"She is entitled to maintenance and, if she pleases, to institute a suit, to have her maintenance made a charge upon the estate of her deceased husband."

The true principle deducible from the cases is that a person who is entitled to any portion of the estate left by the deceased or a right to claim maintenance from the estate of the deceased has an interest within the meaning of section 69 of the Probate and Administration Act. It is not necessary that he should claim through the testator in order to enable him to oppose the grant of probate of the will of the testator. If a person is likely to suffer by the grant of the probate of a forged will or an invalid will he has sufficient interest to enter a caveat.

The next contention is that the judgment of the learned Judge is opposed to the evidence in the case.

His Lordship dealt with the evidence and proceeded as follows:—We see no reason to differ from the finding of the learned Judge that it has not been satisfactorily proved that the will was executed by Narasamma or that at the time of the alleged execution of the will she was in a sound disposing state of mind.

WALLER, J.

WALLER, J.—On both points I agree. I think that the words in section 69 of the Probate and Administration Act "claiming to have any interest in the estate of the deceased" are intended to bear the same meaning as the words in the English Act "having or pretending interest in the (personal) estate affected by the will." That is the view taken in *Kishen Dai v. Satyendranath Datt*(1), which I would follow. On the merits, I see no reason to dissent from the conclusion of the District Judge. The appeal must be dismissed.

K.R.

(1) (1901) I.L.R., 28 Cal., 441.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

MANDAVILLI SEETHARAMAMMA AND ANOTHER
(DEFENDANTS), APPELLANTS,

1926,
April 26.

v.

ATTIVILLI SURYANARAYANA (PLAINTIFF),
RESPONDENT.*

Hindu Law—Adoption—Husband's consent or authority to adoption by his widow—Consent or authority, whether can be implied—Express consent, meaning of—Positive consent—Essentials of adoption—Giving and taking—Datta homam—Giving and taking during husband's lifetime—Datta homam performed after husband's death—Completion of adoption—Validity of adoption.

Under the Hindu Law prevalent in Southern India, a husband's consent or authority to an adoption by his widow can be implied from his conduct and the circumstances.

The expression "*express consent*," used in this connexion in some of the decisions of the Privy Council, means nothing more than "*positive consent*"; and the true rule deducible from them is this:—If from the circumstances you can infer that the husband did not prohibit and nothing more, that is not sufficient consent; but if you can infer that he assented to or authorized the adoption, that is clearly sufficient:

The Collector of Madura v. Muthuramalinga Sathupathy (1868) I.L.R., 12 M.I.A., 397, explained;

Held also, that giving and taking of the boy is of the essence of the adoption, and if it took place in the lifetime of the adoptive father the religious part, such as datta homam where necessary, can be deferred to a subsequent period and can be performed after his death.

Venkata v. Subhadra (1884) I.L.R., 7 Mad., 548; *Subbarayar v. Subbammal* (1898) I.L.R., 21 Mad., 497, followed.

* Second Appeal No. 708 of 1923.

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SECOND APPEAL against the decree of C. G. MACKAY, District Judge of Vizagapatam, in A.S. No. 408 of 1920, preferred against the decree of P. NARAYANA RAO, Subordinate Judge of Vizagapatam, in O.S. No. 25 of 1919.

The plaintiff, as the daughter's son of one Kurmanadhan (deceased), sued for a declaration that the adoption of the second defendant by the first defendant, the widow of Kurmanadhan, was invalid as the widow had no authority from her deceased husband to make the adoption. The boy was brought over from Cocanada, where he lived with his natural father, to Anakapalle, where the deceased lived, on the 1st June 1916; the auspicious date for adoption had been fixed for the 16th June 1916, and in the meantime all the terms in contemplation of the adoption had been settled. But on the 10th June 1916 Kurmanadhan died. The ceremony of adoption was performed on the 24th June 1916, the boy was *formally* given and taken and there was also the performance of datta homam. The defendants relied in the lower Courts upon an oral authority said to have been given by Kurmanadhan some four hours previous to his death. Both the lower Courts disbelieved the oral authority and held that the adoption was invalid for want of authority and gave a declaration in favour of the plaintiff. The defendants preferred this Second Appeal.

G. Lakshmanan for appellants.—There was implied authority for the adoption. Authority need not be express. It may be implied. It should not be prohibited; it is enough if the husband had expressed a wish and did not prohibit. In Bombay express prohibition is necessary. In Madras, an implied authority is sufficient and not merely express authority. If the husband expresses his unequivocal wish or intention, it is enough. Assent or authority may be inferred as a fact, though it is not express: Reference was made to *Collector of Ramnad*

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v. *Muthuramalinga Sathupathy*(1), *Subbarayar v. Subbammal*(2), *Vaithlingam v. Natesa*(3) to West and Buhler's Hindu Law, page 867 (4th Edn.), Book III, section 7, and to *Maharaja of Kolhapur v. Sundaram Ayyar*(4).

Further, the giving and taking had taken place in Kurmanadhan's lifetime; the datta homam can be deferred; it is only a completion of what had begun; the giving and taking was the essential act in adoption; the completion can be made after the adoptive father's death. The widow had certainly implied authority to complete the adoption. See *Venkata v. Subhadra*(5) and *Subbarayar v. Subbammal* (2).

B. Satyanarayana for respondent.—In the pleadings, the defendants rely only on a specific oral authority, which both the lower Courts have found to be false; no other authority or completion by the widow of an adoption begun by the deceased had been set up in the written statement or raised in the issues.

The authority must be express and not implied in such cases: See, *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(6). There was no giving and taking even in the husband's lifetime, since the natural father wanted a deed of adoption, which was not executed. There was also giving and taking prior to the datta homam, which shows that all the essential elements were performed only after the husband's death.

JUDGMENT.

RAMESAM, J.—I have had the advantage of perusing RAMESAM, J. the judgment of my brother VENKATASUBBA RAO, J. I will add a few reasons for agreeing with it.

In the first place I agree with him in thinking that the phrase "express authority of the husband" so often used in decisions means nothing more than an affirmative indication enabling the widow to adopt, which can be traced to the mind of the husband. The word "express" is used in opposition to the state of the law in Bombay where non-forbidding of adoption by the

(1) (1888) 12 M.I.A., 397.

(2) (1898) I.L.R., 21 Mad., 497.

(3) (1914) I.L.R., 37 Mad., 529 (531).

(4) (1925) I.L.R., 48 Mad., 1 at (202).

(5) (1884) I.L.R., 7 Mad., 548.

(6) (1876) I.L.R., 1 Mad., 69 at 78 (P.O.).

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widow is taken as equivalent to authorization. In *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(1), we have got the words "express authority" in two places at page 77, and at page 78 "express permission." The Judicial Committee then referred to Justice HOLLOWAY's opinion in the Ramnad case and to the manner in which it was dealt with by the Judicial Committee. They said—

"It pointed out that on the question who are the kinsmen whose assent will supply the want of a positive permission from the husband, etc."

Thus it is clear that the word "express" is not used in opposition to the word "implied" and an authority can be implied from the facts of a particular case. In *Subbarayar v. Subbammal*(2), their Lordships say:—

"In the circumstances of this case, the direction in the will most clearly implied that datta homam should precede the Upanayana."

Secondly, there are two essentials requisite for the validity of an adoption;

(1) Giving and taking.

(2) Datta homam (only in certain cases).

Where only the giving and taking is complete but the case is one which requires datta homam, it may be said that the process of adoption has begun but is not completed, until datta homam is performed. In such cases it has been held that the datta homam may be performed later on even if both the natural parents of the boy are dead, *Venkata v. Subhadra*(3). It is true that in the ceremony of datta homam there is always a formal giving and taking even if previously there had been an informal giving and taking, and because of this

(1) (1878) I.L.R., 1 Mad., 69 at 78 (P.C.).

(2) (1898) I.L.R., 21 Mad., 497 at 502.

(3) (1884) I.L.R., 7 Mad., 548.

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Mr. Satyanarayana contends for the respondent that the first giving and taking is nothing and the second giving and taking is everything and it cannot be said that the process of adoption has begun, for, he asks, if the first giving and taking has any significance, why should it be repeated in the datta homam ceremony? The reply to this argument is that the repetition is a purely formal matter and if the giving and taking in the course of datta homam is the only real giving and taking, it could not be held that the datta homam can be performed by a relation after the death of both the parents as has been held in *Venkata v. Subhadra*(1), for an orphan cannot be given away. It follows therefore in all cases where the process of adoption has begun by a giving and taking in the lifetime of the adopting father there is a clear indication of his desire and no further authority is needed to enable the widow to adopt. It should be necessarily implied in such taking by the adoptive father. In the practical application of this rule no doubt some caution will have to be observed. There may be cases where a boy is brought merely for trial, that is, kept on probation. It cannot be said in such cases there is a complete giving and taking on account of the temporary parting of the parent's custody. But where it has been settled that the boy should be adopted and his custody has been parted with by the parents finally and a date is fixed for the datta homam ceremony and a few days before that the adopting father dies by a sudden attack of colic or other disease and nothing has happened after the bringing of the boy to show that the adoptive father has changed his attitude towards the boy, such facts constitute a cogent indication of the husband's wishes which enable the widow to

(1) (1884) I.L.R., 7 Mad., 548

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adopt. It is said that this point was not raised* in the Courts below. In the similar case of *Subbarayar v. Subbammal* (1), also there was no issue but on the ground that all the facts were known and there was no prejudice their Lordships affirmed the decree on the ground of a taking and acceptance at a different date from that found by the lower Court. In the present case, the facts were pleaded in the written statement and found by the Courts below.

I agree with the order proposed by my learned brother. The memorandum of objections is dismissed. No order as to costs.

VENKATA-
SUBBA RAO, J.

VENKATASUBBA RAO, J.—The Plaintiff is the daughter's son of one Kurmanadhan deceased, and he files the suit for a declaration that the second defendant has not been validly adopted by the first defendant, the widow of Kurmanadhan.

The defendants relied upon oral authority said to have been given by Kurmanadhan some four hours previous to his death on the 10th of June 1916. Both the lower Courts have disbelieved the specific case set up and have allowed the plaintiff's claim. This is a finding of fact and we cannot interfere with it in Second Appeal. On behalf of the defendants, however, the case has been presented to us from a somewhat different standpoint. In regard to the facts, upon which depends the question of law raised, there is no dispute. The second defendant was living with his natural father at Cocanada and Kurmanadhan was a resident of Anakapalle. On the 1st of June 1916 the boy was taken from Cocanada to Anakapalle with a view to his being adopted. Three letters passed between Kurmanadhan and the father of the boy between the 2nd and the 7th of

(1) (1898) I.L.R., 21 Mad., 497.

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June 1916, which show that in respect of the contemplated adoption all the terms were settled. An auspicious day was chosen and the adoption was fixed for the 16th of June 1916. Unfortunately, in the meantime, on the 10th of June Kurmanadhan died. The ceremony of adoption was performed on the 24th of June, the boy was formally given and taken and there was also the performance of *datta homam*.

These facts are clearly set forth in the written statement of the defendants and are found to be true by the learned District Judge. We are not therefore called on to deal with the evidence in the case, the only question to be decided being, what is the legal effect of the facts found. Mr. Lakshmanan, the learned vakil for the defendants, puts his case in two ways. He says first, from the facts found, the husband's consent to his wife making the adoption may be implied; secondly, that the secular act of giving and taking the boy having been completed in the lifetime of the husband, the religious act of *datta homam* essential to complete the adoption, may be performed subsequent to his death.

If either of these contentions is accepted, the appeal must be allowed and in my opinion both these propositions are sound.

In regard to the first contention, the question resolves itself into this, can a husband's consent or authority be implied from his conduct? If in law it can be implied, the facts of the present case lead almost to an irresistible conclusion that the wife did have the necessary authority. While the law says that the widow must have her husband's consent, it does not restrict the manner in which that consent may be given. Whether consent was given is a question of fact and I fail to see why it cannot be implied from conduct. The plaintiff's learned vakil points out that what is recognized in the

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decisions is the husband's "express consent." It is undoubtedly true that in the decisions of the highest authority, the expression used is "express consent." But what does that expression mean? In the leading case on the subject, *The Collector of Madura v. Muthuramalinga Sathupathy*(1), the Privy Council point out how the various schools in India accepting the same text as their authority have developed different rules of law in regard to the widow's power of adoption. Their Lordships observe:—

"All the schools accept as authoritative the text of Vasistha, which says, 'Nor let a woman give or accept a son unless with the assent of her lord.' But the Mithila school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and therefore that a widow cannot receive a son in adoption, according to the dattaka form at all. The Bengal school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; while the Mayukha, Kaustubha, and other treatises which govern the Mahratta school, explain the text away by saying, 'that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul.'"

It is now settled that in Southern India as in Bengal, the husband's assent is required and in the passage quoted above that assent is described as "express permission." These words are used to mark the contrast between the law as accepted by the Bengal school and the Mahratta school. The Mahratta doctrine proceeds upon the view that the adoption being beneficial to the husband's soul, where he has not intimated his prohibition, assent may be assumed. In Bengal and Southern India, on the other hand, assent cannot be inferred from the mere absence of prohibition; something more is required; there must be positive or affirmative consent

(1) (1868) 12 M.I.A., 397.

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given by the husband. Putting it in other words, according to the Mahratta school, if there is no dissent, assent may be assumed. In Bengal and Southern India, the absence of dissent or prohibition is not sufficient but positive assent must be proved. If the judgment of the Privy Council in the *Collector of Madura v. Muthuramalinga Sathupathy*(1) is carefully read, it will be seen, that it is to bring out this distinction their Lordships use the expression "express consent." This distinction is of great importance and cannot be ignored when the law obtaining in different provinces is under discussion. Now it will be observed that in the same judgment besides the word "express," two other words are used in this connection, namely, "formal" and "positive." The expression "express consent" means nothing more than "positive consent." What then is the true rule deducible? If from the circumstances you can infer that the husband did not prohibit the adoption and nothing more, that is not sufficient; but if you can infer that he assented to or authorized the adoption, that is clearly sufficient. The following passage in West and Buhler, 3rd Edition, at page 957, supports my view:—

"Any unequivocal indication of his assent would probably be taken as equivalent to an express command."

In this case the only reasonable inference from the proved facts is, that the husband gave his consent to his widow making the adoption and on this ground I would hold the adoption to be valid.

In regard to the second contention of Mr. Lakshmananna, it is clearly borne out by authority. *Venkata v. Subhadra*(2) is the converse of the present case. It was the natural father of the boy that died after the gift and the acceptance. At the datta homam which

(1) (1868) 12 M.I.A., 397.

(2) (1884) I.L.R., 7 Mad. 548

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was performed subsequent to his death the elder brother of the boy made the formal gift. The learned Judges holding that there was giving and taking in the lifetime of the natural father, upheld the adoption on the ground that the religious rite was essential only to complete the adoption. *Subbarayar v. Subbammal*(1) is, however, a parallel case. The boy was given and taken and subsequently the adoptive father died. The ceremony of datta homam was performed by his widow and the adoption was held valid. The principle underlying these cases is, that giving and taking is of the essence of the adoption and the religious part of it can be deferred to a subsequent period. I am prepared to follow these cases and on this ground also I confirm the adoption.

The result is, the appeal is allowed and the plaintiff's suit is dismissed. The defendants will have their costs of this appeal, but the parties will bear their own costs in the lower Courts.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

K. C. MENON (COMPLAINANT), PETITIONER,

v.

P. KRISHNAN NAYAR (ACCUSED), RESPONDENT.*

Criminal Procedure Code, 1898, sec. 252—Warrant case—Evidence produced by prosecution taken—Application by complainant to summon other persons as being able to prove his case—Arbitrary refusal by Court, improper.

Though section 252 of the Criminal Procedure Code, unlike sections 208 (3) and 244 (2) of the Code, does not impose on a Magistrate trying a warrant case the duty of issuing summonses

(1) (1898) I.L.R., 21 Mad., 497.
* Criminal Revision Case No. 153 of 1926.

to witnesses named by the complainant, yet its effect is to throw a greater responsibility upon him than in a summons case, as he is not empowered to arbitrarily refuse to summon such witnesses, but is bound to summon such as he thinks are likely to give useful evidence.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying, the High Court to revise the order of the Court of the Subdivisional Magistrate of Calicut, dated 19th December 1925, in Calendar Case No. 136 of 1925.

The facts necessary for this report appear from the judgment.

K. S. Jayarama Ayyar for the petitioner.

V. L. Ethiraj for *M. C. Sridharan* for the respondent.

A. S. Sivakaminathan for the Public Prosecutor for the Crown.

JUDGMENT.

This is a petition to revise the order of the Subdivisional Magistrate of Calicut refusing the petitioner's petition to summon certain witnesses for the prosecution. The petitioner is prosecuting the accused for offences under section 477-A of the Indian Penal Code and section 282 of the Indian Companies Act for concocting false balance sheets, when he was the Managing Director of the Manorama Printing Works in 1921 and 1922, in particular for showing an inflated and false value of the stock in hand and including in the company's stock the full value of books only sent to them for sale on commission. The petitioner filed his complaint on 8rd November 1925 naming three witnesses. At that time the books of the company had been impounded and were in the Lower Court.

His witnesses were examined on 23rd and 24th November 1925 and cross-examined on 5th and 6th December 1925. The petitioner put in a further list of

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four witnesses styled "Experts in valuation," and the Magistrate examined these on 12th December 1925 and 19th December 1925. On 17th December 1925 the petitioner put a further list of witnesses stating that he had got further information about the inclusion in the stock list of books which never belonged to the company and were not in its possession, some of which the petitioner had secured. The lower Court refused to summon these on the ground that it was new matter, and the petitioner has put in this revision petition.

His chief point is that at the stage which the case has reached, the Magistrate has no option to refuse to examine witnesses cited by him, and he relies on section 252 of the Criminal Procedure Code. That section lays down that not only shall the Magistrate take all the evidence which may be produced in support of the prosecution but shall himself ascertain the names of other persons able to give evidence for the prosecution and summon such of the latter as he thinks necessary. In the present case, the new list of witnesses is one offered by the complainant himself, just as his previous list of expert witnesses was offered, some time after the complaint was filed and after the trial had begun. What then is the proper attitude for the Court to take up regarding such a list? The section does not appear to me to be very clear on the point; but, as I read it, it means first that the complainant should himself produce what evidence he can in support of the prosecution and the Magistrate shall proceed to hear it. The Court is apparently not bound to issue process for such witnesses, or to grant time for the production of such witnesses, but if produced it must record their evidence. There is no section here corresponding to section 208(3) in the case of committal proceedings or section 244(2) in the case of trial in summons cases. This is a

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remarkable omission, as otherwise the language "shall take all such evidence, as may be produced in support of the prosecution" is the same in all the three sections; and section 257 gives the *accused* the power of asking the Magistrate to issue compulsory process, while section 252 itself gives the Magistrate power to summon persons whom he has himself ascertained to be acquainted with the facts of the case. Next when the complainant has done all he can without the assistance of the process of the Court, it is then for the Magistrate to ascertain *from the complainant* or otherwise the names of other persons likely or able to give evidence, and he must summon such of those as he thinks necessary, i.e., such of those he thinks will be of value in assisting the prosecution case. He cannot, I take it, arbitrarily refuse to summon such witnesses.

It is his duty to assist, and not to hamper, the prosecution, and for that purpose he must issue summons to persons, of whom the complainant has informed him, who, he considers, are likely to give useful evidence. Obviously, I take it that the Magistrate is not bound to, or expected to, exercise this duty of "ascertaining" more than once, and the proper time is when the evidence "produced" in support of the prosecution has been taken, and that ordinarily includes the cross-examination, if any, and re-examination, if any, before the charge (see *Varisai Rowther v. King Emperor*) (1).

Now, I find from the Magistrate's order that, though he asked the complainant after the examination-in-chief of his original witnesses, whether he had any more witnesses to examine, he did not and has not yet asked him that question after the examination of the original witnesses was over, nor was the question in the

(1) (1923) I.L.R., 48 Mad., 449 (F.B.).

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proper form. The question to be asked is not whether complainant has any more witnesses whom he can produce without summons, but whether he can inform the Court of any witnesses who will have to be brought by process. The Magistrate has therefore, in my view, not complied with the law. The stage of examining the original witnesses produced by the complainant is over. But still the Court has to ascertain from the complainant whether there are any other persons able to give evidence in support of the prosecution. The Court must remedy this defect and must do so now.

As to whether the petitioner has traversed new grounds, the consideration of that matter seems to me not at all a matter of procedure on which I can at this stage be properly called upon to give a decision. The discretion to summon or not to summon lies with the Magistrate. But he is not to interpret that discretion in a narrow or purely technical sense. He must look at the prosecution case broadly, decide what are the broad allegations of facts on which the complaint is founded and then determine whether the evidence offered is not necessary to assist in the establishment of that case. A useful test will be whether if the accused were acquitted in this case, it would be open to the complainant to put in a fresh complaint on the facts now put forward.

I set aside the order and direct that the petition be reheard in the light of the above remarks.

B.C.S.

